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THE  
ENGLISH AND EMPIRE DIGEST  
WITH  
COMPLETE AND EXHAUSTIVE  
ANNOTATIONS.

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VOLUME XLIII.



# THE ENGLISH AND EMPIRE DIGEST

COMPLETE AND EXHAUSTIVE  
ANNOTATIONS

BEING

A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED  
FROM EARLY TIMES TO THE PRESENT DAY, WITH ADDITIONAL  
CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE  
OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING

COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE  
SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN  
GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

## VOLUME XLIII.

*TRADE AND TRADE UNIONS.  
TRADE MARKS, TRADE NAMES,  
AND DESIGNS.  
TRAMWAYS AND LIGHT RAIL-  
WAYS.*

*TRESPASS.  
TROVER AND DETINUE.  
TRUSTS AND TRUSTEES.  
VALUERS AND APPRAISERS.  
WATER SUPPLY.*

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# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS

A. C. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 ( <i>e.g.</i> , [1891] A. C.)	Eng.
A. Jur. Rep.	Australian Jurist Reports	Aus.
A. L. T.	Australian Law Times	Aus.
A. R.	Ontario Appeal Reports, 27 vols., 1876-1900	Can.
Act.	Acton's Reports, Prize Causes, 2 vols., 1809-1841	Eng.
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1831-1842	Eng.
Adam	Adam's Justiciary Reports (Scotland), 1893- (current)	Scot.
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822-1826	Eng.
Agra	Agra High Court	Ind.
Agra F. B.	Agra High Court, Full Bench	Ind.
Ale. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813-1833	Ir.
Ale. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832-1841	Ir.
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1616-1619	Eng.
All.	New Brunswick Reports (Allen)	Can.
Alta. L. R.	Alberta Law Reports	Can.
Amb.	Ambler's Reports, Chancery, 1 vol., 1716-1783	Eng.
And.	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535-1605	Eng.
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737-1740	Eng.
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792-1797	Eng.
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875-1890	Eng.
App. Ct. Rep.	Appeal Court Reports	N.Z.
App. D.	South African Law Reports, Appellate Division	S. Af.
Architects' L. R.	Architects' Law Reports, 4 vols., 1904-1909	Eng.
Argus L. R.	Argus Law Reports	Aus.
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1816-1818	Scot.
Arm. M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1810-1842	Ir.
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838-1839	Eng.
Arn. & Hl.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1810-1811	Eng.
Ashb.	Ashburner's Principles of Equity, 1902	Eng.
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870- (current)	Eng.
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736-1754	Eng.
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law	Eng.
Ayl. Par.	Ayliffe's Paterson Juris Canonici Anglicani	Eng.
B.	Barber's Gold Law	S. Af.
B. & Ad.	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830-1834	Eng.
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817-1822	Eng.
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822-1830	Eng.
P. & C. R. (preceded by date)	Reports of Bankruptcy and Companies Winding up Cases, 1918- (current) ( <i>e.g.</i> , [1918-19] P. & C. R.)	Eng.
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861-1870	Eng.
B. C. R.	British Columbia Reports	Can.
B. Dig.	Bosc's Digest	Ind.
B. L. R.	Bengal Law Reports	Ind.
B. L. R. A. C.	Bengal Law Reports, Appeal Cases	Ind.
B. L. R. P. C.	Bengal Law Reports, Privy Council	Ind.
B. L. R. Sup. Vol.	Bengal Law Reports, Supp. Vol.	Ind.
B. R. A.	Butterworths' Rating Appeals, 2 vols., 1913-1925	Eng.
B. W. C. C.	Butterworths' Workmen's Compensation Cases, 1907- (current)	Eng.
Bac. Abr.	Bacon's Abridgment	Eng.
Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852-1854	Eng.

Baild. ... ..	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)	Eng.
Ball & B. ... ..	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814	Ir.
Bankr. & Ins. R. ... ..	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855	Eng.
Bar. & Arn. ... ..	Barron and Arnold's Election Cases, 1 vol., 1843—1846	Eng.
Bar. & Aust. ... ..	Barron and Austin's Election Cases, 1 vol., 1842	Eng.
Barn. Ch. ... ..	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741	Eng.
Barn. K. B. ... ..	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1731	Eng.
Barnes ... ..	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760	Eng.
Batt. ... ..	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826	Ir.
Beat. ... ..	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830	Ir.
Beav. ... ..	Beavan's Reports, Rolls Court, 36 vols., 1838—1866	Eng.
Beav. & Wal. ... ..	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1816	Eng.
Beaw. ... ..	Beawes's Lex Mercatoria	Eng.
Bell, C. C. ... ..	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860	Eng.
Bell, Ct. of Sess. ... ..	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792	Scot.
Bell, Ct. of Sess. fol. ... ..	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1791—1795	Scot.
Bell, Dict. Dec. ... ..	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833	Scot.
Bell, Sc. App. ... ..	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1812—1850	Scot.
Bellewe ... ..	Bellewe's Cases <i>temp.</i> Richard II., King's Bench, 1 vol.	Eng.
Belt's Sup. ... ..	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1750	Eng.
Ben. ... ..	Benloe's Reports, Common Pleas, fol., 1 vol., 1357—1579	Eng.
Benl. ... ..	Benloe's (or Bendloe's) Reports, King's Bench, fol., 1 vol., 1410—1627	Eng.
Ber. ... ..	New Brunswick Reports (Berton)	Can.
Bing. ... ..	Bingham's Reports, Common Pleas, 10 vols., 1822—1834	Eng.
Bing. N. C. ... ..	Bingham's New Cases, Common Pleas, 6 vols., 1831—1840	Eng.
Biss. & Sm. ... ..	Bisset and Smith's Digest	S. Af.
Bitt. Prac. Cas. ... ..	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876	Eng.
Bitt. Rep. in Ch. ... ..	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884	Eng.
Bl. Com. ... ..	Blackstone's Commentaries	Eng.
Bl. D. & Osb. ... ..	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848	Ir.
Bli. ... ..	Bligh's Reports, House of Lords, 4 vols., 1819—1821	Eng.
Bli. N. S. ... ..	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837	Eng.
Bluett ... ..	Bluett's Isle of Man Cases	1. of M.
Bom. ... ..	Bombay High Court Reports	Ind.
Bom. A. C. ... ..	Bombay Reports, Appellate Jurisdiction	Ind.
Bom. Cr. Ca. ... ..	Bombay Reports, Crown Cases	Ind.
Bom. O. C. ... ..	Bombay Reports, Original Civil Jurisdiction	Ind.
Bos. & P. ... ..	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804	Eng.
Bos. & P. N. R. ... ..	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807	Eng.
Bott. ... ..	Bott's Laws Relating to the Poor, 2 vols., 6th ed., 1827	Eng.
Bourke ... ..	Bourke's Reports	Ind.
Br. & Col. Pr. Cas. ... ..	British and Colonial Prize Cases, 3 vols., 1914—1919	Eng.
Bract. ... ..	Bracton De Legibus et Consuetudinibus Angliæ	Eng.
Bro. Abr. ... ..	Sir R. Brooke's Abridgement	Eng.
Bro. C. C. ... ..	W. Brown's Chancery Reports, 4 vols., 1778—1794	Eng.
Bro. Ecc. Rep. ... ..	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872	Eng.
Bro. N. C. ... ..	Sir R. Brooke's New Cases, 1 vol., 1515—1558	Eng.
Bro. Parl. Cas. ... ..	J. Brown's Cases in Parliament, 8 vols., 1702—1800	Eng.
Bro. Supp. to Mor. ... ..	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.	Scot.
Bro. Synop. ... ..	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827	Scot.
Brod. & Bing. ... ..	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822	Eng.
Brod. & F. ... ..	Broderick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864	Eng.
Broun ... ..	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845	Scot.
Brown. & Lush. ... ..	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866	Eng.
Brownl. ... ..	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624	Eng.
Bruce ... ..	Bruce's Decisions, Court of Session (Scotland), 1714—1715	Scot.

<b>Buch.</b> ... ..	<b>Buchanan's Reports of the Supreme Court of the Cape of Good Hope, 1868—1879</b> ... ..	S. Af.
<b>Buch. A. C.</b> ... ..	<b>Buchanan's Reports of Appeal Court (Cape)</b> ... ..	S. Af.
<b>Buchan.</b> ... ..	<b>Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813</b> ... ..	Scot.
<b>Buck</b> ... ..	<b>Buck's Cases in Bankruptcy, 1 vol., 1816—1820</b> ... ..	Eng.
<b>Bull. N. P.</b> ... ..	<b>Buller's Nisi Prius (published, London, 1772)</b> ... ..	Eng.
<b>Bulst.</b> ... ..	<b>Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626</b> ... ..	Eng.
<b>Bunb.</b> ... ..	<b>Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1711</b> ... ..	Eng.
<b>Burr.</b> ... ..	<b>Burrow's Reports, King's Bench, 5 vols., 1756—1772</b> ... ..	Eng.
<b>Burr. S. C.</b> ... ..	<b>Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776</b> ... ..	Eng.
<b>Burrell</b> ... ..	<b>Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1810</b> ... ..	Eng.
<b>C. A.</b> ... ..	<b>Court of Appeal Reports, 3 vols., 1867—1877</b> ... ..	N.Z.
<b>C. &amp; P.</b> ... ..	<b>Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841</b> ... ..	Eng.
<b>C. B.</b> ... ..	<b>Common Bench Reports, 18 vols., 1845—1856</b> ... ..	Eng.
<b>C. B. N. S.</b> ... ..	<b>Common Bench Reports, New Series, 20 vols., 1856—1865</b> ... ..	Eng.
<b>C. B. R.</b> ... ..	<b>Canadian Bankruptcy Reports Annotated, 1920—(current)</b> ... ..	Can.
<b>C. C. Ct. Cas.</b> ... ..	<b>Central Criminal Court Cases (Sessions Papers), 1834—1913</b> ... ..	Eng.
<b>C. L. Ch.</b> ... ..	<b>Common Law Chambers</b> ... ..	Can.
<b>C. L. J.</b> ... ..	<b>Cape Law Journal</b> ... ..	S. Af.
<b>C. L. J. N. S.</b> ... ..	<b>Canada Law Journal, New Series, 1865—(current)</b> ... ..	Can.
<b>C. L. J. O. S.</b> ... ..	<b>Canada Law Journal, Old Series, 10 vols., 1855—1864</b> ... ..	Can.
<b>C. L. R.</b> ... ..	<b>Common Law Reports, 3 vols., 1853—1855</b> ... ..	Eng.
<b>C. L. R.</b> ... ..	<b>Commonwealth Law Reports</b> ... ..	Aus.
<b>C. L. R.</b> ... ..	<b>Calcutta Law Reporter</b> ... ..	Ind.
<b>C. L. T.</b> ... ..	<b>Canadian Law Times</b> ... ..	Can.
<b>C. L. T. Occ. N.</b> ... ..	<b>Canadian Law Times, Occasional Notes</b> ... ..	Can.
<b>C. P.</b> ... ..	<b>Upper Canada Common Pleas</b> ... ..	Can.
<b>C. P. D.</b> ... ..	<b>Law Reports, Common Pleas Division, 5 vols., 1875—1880</b> ... ..	Eng.
<b>C. P. D.</b> ... ..	<b>Cape Provincial Division Reports</b> ... ..	S. Af.
<b>C. R. [date] A. G.</b> ... ..	<b>Canadian Reports, Appeal Cases</b> ... ..	Can.
<b>C. T. R.</b> ... ..	<b>Cape Times Reports of the Supreme Court of the Cape of Good Hope</b> ... ..	S. Af.
<b>C. W. N.</b> ... ..	<b>Calcutta Weekly Notes</b> ... ..	Ind.
<b>Cal. &amp; El.</b> ... ..	<b>Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885</b> ... ..	Eng.
<b>Cald. Mag. Cas.</b> ... ..	<b>Caldecott's Magistrates' Cases, 1 vol., 1776—1785</b> ... ..	Eng.
<b>Calth.</b> ... ..	<b>Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618</b> ... ..	Eng.
<b>Cam. Cas.</b> ... ..	<b>Cameron's Supreme Court Cases</b> ... ..	Can.
<b>Cam. Prac.</b> ... ..	<b>Cameron's Supreme Court Practice</b> ... ..	Can.
<b>Camp.</b> ... ..	<b>Campbell's Reports, Nisi Prius, 4 vols., 1807—1816</b> ... ..	Eng.
<b>Can. Com. Cas.</b> ... ..	<b>Commercial Law Reports of Canada, 4 vols., 1901—1905</b> ... ..	Can.
<b>Can. Crim. Cas.</b> ... ..	<b>Canadian Criminal Cases, Annotated, 1898—(current)</b> ... ..	Can.
<b>Can. Gaz.</b> ... ..	<b>Canadian Gazette</b> ... ..	Can.
<b>Can. Ry. Cas.</b> ... ..	<b>Canadian Railway Cases</b> ... ..	Can.
<b>Car. &amp; Kir.</b> ... ..	<b>Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853</b> ... ..	Eng.
<b>Car. &amp; M.</b> ... ..	<b>Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1842</b> ... ..	Eng.
<b>Car. C. L.</b> ... ..	<b>Carrington's Treatise on Criminal Law</b> ... ..	Can.
<b>Card. Doc. Ann.</b> ... ..	<b>Cardwell's Documentary Annals of the Reformed Church of England, 2 vols., 1546—1716</b> ... ..	Eng.
<b>Carl.</b> ... ..	<b>New Brunswick Reports (Carleton)</b> ... ..	Can.
<b>Carp. Pat. Cas.</b> ... ..	<b>Carpmael's Patent Cases, 2 vols., 1602—1812</b> ... ..	Eng.
<b>Carl.</b> ... ..	<b>Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673</b> ... ..	Eng.
<b>Cart.</b> ... ..	<b>Cases on British North America Act (Cartwright)</b> ... ..	Can.
<b>Carth.</b> ... ..	<b>Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700</b> ... ..	Eng.
<b>Cary</b> ... ..	<b>Cary's Reports, Chancery, 1 vol.</b> ... ..	Eng.
<b>Cas. in Ch.</b> ... ..	<b>Cases in Chancery, fol., 3 parts, 1660—1697</b> ... ..	Eng.
<b>Cas. Pract. K. B.</b> ... ..	<b>Cases of Practice, King's Bench, 1 vol., 1655—1775</b> ... ..	Eng.
<b>Cas. Sett.</b> ... ..	<b>Cases of Settlements and Removals, 1 vol., 1685—1727</b> ... ..	Eng.
<b>Cas. temp. Finch</b> ... ..	<b>Cases temp. Finch, Chancery, fol., 1 vol., 1673—1680</b> ... ..	Eng.
<b>Cas. temp. King</b> ... ..	<b>Select Cases temp. King, Chancery, fol., 1 vol., 1724—1733</b> ... ..	Eng.
<b>Cas. temp. Talb.</b> ... ..	<b>Cases in Equity temp. Talbot, fol., 1 vol., 1730—1737</b> ... ..	Eng.
<b>Cass. Dig.</b> ... ..	<b>Cassell's Digest</b> ... ..	Can.
<b>Ch. (preceded by date)</b> ... ..	<b>Law Reports, Chancery Division, since 1890 (e.g., [1891] 1 Ch.)</b> ... ..	Eng.
<b>Ch. App.</b> ... ..	<b>Law Reports, Chancery Appeals, 10 vols., 1865—1875</b> ... ..	Eng.
<b>Ch. Cas. in Ch.</b> ... ..	<b>Choyce Cases in Chancery, 1557—1606</b> ... ..	Eng.
<b>Ch. Ch.</b> ... ..	<b>Upper Canada Chancery Chambers Reports</b> ... ..	Can.
<b>Ch. D.</b> ... ..	<b>Law Reports, Chancery Division, 45 vols., 1875—1890</b> ... ..	Eng.
<b>Ch. Rob.</b> ... ..	<b>Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808</b> ... ..	Eng.
<b>Char. Cham. Cas.</b> ... ..	<b>Charley's Chamber Cases, 2 vols., 1875—1876</b> ... ..	Eng.
<b>Char. Pr. Cas.</b> ... ..	<b>Charley's New Practice Reports, 3 vols., 1875—1876</b> ... ..	Eng.
<b>Chip.</b> ... ..	<b>New Brunswick Reports (Chipman)</b> ... ..	Can.

xxvi      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Chit. ... ..	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822...	Eng.
Cl. & Fin. ... ..	Clark and Finnely's Reports, House of Lords, 12 vols., 1831—1846 ... ..	Eng.
Cl. & Sc. Dr. Cas. ... ..	Clark and Scully's Drainage Cases ... ..	Can
Clay. ... ..	Clayton's Reports and Pleas of Assizes at Yorke, 1 vol., 1631—1650 ... ..	Eng.
Clif. & Rick. ... ..	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884 ... ..	Eng.
Clif. & Steph. ... ..	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872 ... ..	Eng.
Co. A. ... ..	Cook's Lower Canada Admiralty Court Cases ... ..	Can.
Co. Ent. ... ..	Coke's Entries ... ..	Eng.
Co. Inst. ... ..	Coke's Institutes ... ..	Eng.
Co. L. J. ... ..	Colonial Law Journal ... ..	N.Z.
Co. Litt. ... ..	Coke on Littleton (1 Inst.) ... ..	Eng.
Co. Rep. ... ..	Coke's Reports, 13 parts, 1572—1618 ... ..	Eng.
Coch. ... ..	Nova Scotia Reports (Cochran) ... ..	Can.
Cockb. & Rowe ... ..	Cockburn and Rowe's Election Cases, 1 vol., 1833 ... ..	Eng.
Coll. ... ..	Collyer's Reports, Chancery, 2 vols., 1844—1846 ... ..	Eng.
Coll. Jurid. ... ..	Collectanea Juridica, 2 vols. ... ..	Eng.
Colles ... ..	Colles' Cases in Parliament, 1 vol., 1697—1713 ... ..	Eng.
Coll. ... ..	Coltman's Registration Cases, 1 vol., 1879—1885 ... ..	Eng.
Com. ... ..	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1710 ... ..	Eng.
Com. Cas. ... ..	Commercial Cases, 1895—(current) ... ..	Eng.
Com. Dig. ... ..	Comyns' Digest ... ..	Eng.
Comb. ... ..	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698 ... ..	Eng.
Con. & Law. ... ..	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843 ... ..	Ir.
Cong. Dig. ... ..	Congdon's Digest ... ..	Can.
Const ... ..	Const's edition of Bott's Poor Laws, 3 vols., 1807 ... ..	Eng.
Cooke & Al. ... ..	Cooke and Alecock's Reports, King's Bench (Ireland), 1 vol., 1833—1834 ... ..	Ir
Cooke, Pr. Cas. ... ..	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747 ... ..	Eng
Cooke, Pr. Reg. ... ..	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1712 ... ..	Eng.
Coop. G. ... ..	G. Cooper's Reports, Chancery, 1 vol., 1792—1815 ... ..	Eng.
Coop. Pr. Cas. ... ..	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838 ... ..	Eng.
Coop. temp. Brough. ... ..	C. P. Cooper's Cases temp. Brougham, Chancery, 1 vol., 1833—1834 ... ..	Eng.
Coop. temp. Cott. ... ..	C. P. Cooper's Cases temp. Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases) ... ..	Eng.
Cor. ... ..	Coryton's Reports ... ..	Ind.
Corb. & D. ... ..	Corbett and Daniell's Election Cases, 1 vol., 1819 ... ..	Eng.
Correspondances Jud. ... ..	Correspondances Judiciaires ... ..	Can.
Couper ... ..	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885 ... ..	Scot.
Cout. ... ..	Coutlees' Unreported Cases ... ..	Can.
Cout. Dig. ... ..	Coutlees' Digest ... ..	Can.
Cowp. ... ..	Cowper's Reports, King's Bench, 2 vols., 1774—1778 ... ..	Eng.
Cox & Atk. ... ..	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846 ... ..	Eng.
Cox, C. C. ... ..	E. W. Cox's Criminal Law Cases, 1843—(current) ... ..	Eng.
Cox, Eq. Cas. ... ..	S. C. Cox's Equity Cases, 2 vols., 1745—1797 ... ..	Eng.
Cox, M. & H. ... ..	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, 1 vol., 1846—1852 ... ..	Eng.
Cr. & J. ... ..	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832 ... ..	Eng.
Cr. & M. ... ..	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834 ... ..	Eng.
Cr. & Ph. ... ..	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841 ... ..	Eng.
Cr. App. Rep. ... ..	Cohen's Criminal Appeal Reports, 1908—(current) ... ..	Eng.
Cr. M. & R. ... ..	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835 ... ..	Eng.
Craw. & D. ... ..	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846 ... ..	Ir.
Craw. & D. Abr. C. ... ..	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838 ... ..	Ir.
Cress. Insolv. Cas. ... ..	Cresswell's Insolvency Cases, 1 vol., 1827—1829 ... ..	Eng.
Cripps' Church Cas. ... ..	Cripps' Church and Clergy Cases, 2 parts, 1847—1850 ... ..	Eng.
Cro. Car. ... ..	Croke's Reports temp. Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641 ... ..	Eng.
Cro. Eliz. ... ..	Croke's Reports temp. Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603 ... ..	Eng.
Cro. Jac. ... ..	Croke's Reports temp. James I., King's Bench and Common Pleas, 1 vol., 1603—1625 ... ..	Eng.
Cru. Dig. ... ..	Cruise's Digest of the Law of Real Property, 7 vols. ... ..	Fug.
Cunn. ... ..	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735 ... ..	Eng.
Curt. ... ..	Curtis' Ecclesiastical Reports, 3 vols., 1834—1844 ... ..	Eng.
D. ... ..	Duxbury's Reports of the High Court of the South African Republic ... ..	S. Af.
D. C. A. ... ..	Dorion's Queen's Bench Reports ... ..	Can.
D. L. R. ... ..	Dominion Law Reports ... ..	Can.

Dal. ... ..	Dalison's Reports, Common Pleas, fol., 1 vol., 1546—1574 ...	Eng.
Dalr. ... ..	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720 ...	Scot.
Dan. ... ..	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823 ...	Eng.
Dan. & Ll. ... ..	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829 ...	Eng.
Dav. & Mer. ... ..	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843 1844 ...	Eng.
Dav. Ir. ... ..	Davy's (or Davis' or Davy's) Reports (Ireland), 1 vol., 1604—1611 ...	Ir.
Dav. Pat. Cas. ... ..	Davies' Patent Cases, 1 vol., 1785—1816 ...	Eng.
Day ... ..	Day's Election Cases, 1 vol., 1892—1893 ...	Eng.
Dea. & Sw. ... ..	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857 ...	Eng.
Deac. ... ..	Deacon's Reports, Bankruptcy, 4 vols., 1834 1840 ...	Eng.
Deac. & Ch. ... ..	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835 ...	Eng.
Dears. & B. ... ..	Dearsly and Bell's Crown Cases Reserved, 1 vol., 1856—1858 ...	Eng.
Dears. C. C. ... ..	Dearsly's Crown Cases Reserved, 1 vol., 1852—1856 ...	Eng.
Deas & And. ... ..	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832 ...	Scot.
De G. ... ..	De Gex's Reports, Bankruptcy, 2 vols., 1844—1848 ...	Eng.
De G. & J. ... ..	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859 ...	Eng.
De G. & Sm. ... ..	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852 ...	Eng.
De G. F. & J. ... ..	De Gex, Fisher and Jones's Reports, Chancery, 4 vols., 1859—1862 ...	Eng.
De G. J. & Sm. ... ..	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—1865 ...	Eng.
De G. M. & G. ... ..	De Gex, Macnaghten and Gordon's Reports, Chancery, 8 vols., 1851—1857 ...	Eng.
Delane ... ..	Delane's Decisions, Revision Courts, 1 vol., 1832—1835 ...	Eng.
Den. ... ..	Denison's Crown Cases Reserved, 2 vols., 1844 1852 ...	Eng.
Dick. ... ..	Dickens' Reports, Chancery, 2 vols., 1559—1798 ...	Eng.
Dirl. ... ..	Dirlton's Decisions, Court of Session (Scotland), fol., 1 vol., 1665—1677 ...	Scot.
Dods. ... ..	Dodson's Reports, Admiralty, 2 vols., 1811—1822 ...	Eng.
Donnelly ... ..	Donnelly's Reports, Chancery, 1 vol., 1836—1837 ...	Eng.
Doug. El. Cas. ... ..	Douglas' Election Cases, 4 vols., 1774—1776 ...	Eng.
Doug. K. B. ... ..	Douglas' Reports, King's Bench, 4 vols., 1778—1785 ...	Eng.
Dow ... ..	Dow's Reports, House of Lords, 6 vols., 1812—1818 ...	Eng.
Dow & Cl. ... ..	Dow and Clark's Reports, House of Lords, 2 vols., 1827 1832 ...	Eng.
Dow. & L. ... ..	Dowling and Lowndes' Practice Reports, 7 vols., 1813—1819 ...	Eng.
Dow. & Ry. K. B. ... ..	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—1827 ...	Eng.
Dow. & Ry. M. C. ... ..	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822 1827 ...	Eng.
Dow. & Ry. N. P. ... ..	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822 1823 ...	Eng.
Dowl. ... ..	Dowling's Practice Reports, 9 vols., 1830—1841 ...	Eng.
Dowl. N. S. ... ..	Dowling's Practice Reports, New Series, 2 vols., 1841—1843 ...	Eng.
Dr. & Wal. ... ..	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841 ...	Ir.
Dr. & War. ... ..	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—1843 ...	Ir.
Dra. ... ..	Draper's King's Bench Reports ...	Can.
Drew. ... ..	Drewry's Reports, Chancery, 4 vols., 1852—1859 ...	Eng.
Drew. & Sm. ... ..	Drewry and Smale's Reports, Chancery, 2 vols., 1859 1865 ...	Eng.
Drinkwater ... ..	Drinkwater's Reports, Common Pleas, 1 vol., 1840—1841 ...	Eng.
Drury temp. Nap. ... ..	Drury's Reports temp. Napier, Chancery (Ireland), 1 vol., 1858—1859 ...	Ir.
Drury temp. Sug. ... ..	Drury's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1841—1844 ...	Ir.
Dugd. Orig. ... ..	Dugdale's Origines Juridicales ...	Eng.
Dunl. (Ct. of Sess.) ... ..	Dunlop, Court of Session Cases (Scotland), 2nd Series, 24 vols., 1838—1862 ...	Scot.
Dunning ... ..	Dunning's Reports, King's Bench, 1 vol., 1753—1754 ...	Eng.
Durie ... ..	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621—1642 ...	Scot.
Dyer ... ..	Dyer's Reports, King's Bench, 3 vols., 1513—1581 ...	Eng.
E. & A. ... ..	Upper Canada Error and Appeal ...	Can.
E. & B. ... ..	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—1858 ...	Eng.
E. & E. ... ..	Ellis and Ellis's Reports, Queen's Bench, 3 vols., 1858—1861 ...	Eng.
E. B. & E. ... ..	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol., 1858—1860 ...	Eng.
E. D. C. ... ..	Reports of the Eastern Districts Court (Cape) from 1880 ...	S. Af.
E. D. L. ... ..	South African Law Reports, Eastern Districts Local Division ...	S. Af.
E. L. R. ... ..	Eastern Law Reporter ...	Can.
E. R. (or Eng. Rep.) ... ..	English Reports ...	Eng.
E. R. ... ..	Ontario Election Reports ...	Can.
Eag. & Y. ... ..	Eagle and Younge's Tithe Cases, 4 vols., 1204—1825 ...	Eng.

## xxviii      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

East	...	...	East's Reports, King's Bench, 16 vols., 1800—1812	...	...	Eng.
East, P. C.	...	...	East's Pleas of the Crown	...	...	Eng.
Ecc. & Ad.	...	...	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855	...	...	Eng.
Eden	...	...	Eden's Reports, Chancery, 2 vols., 1757—1766	...	...	Eng.
Edgar	...	...	Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725	...	...	Scot.
Edw.	...	...	Edwards' Reports, Admiralty, 1 vol., 1808—1812	...	...	Eng.
Elchies	...	...	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—1754	...	...	Scot.
Emden's B. C.	...	...	Emden's Building Contracts, Building Leases and Building Statutes	...	...	Eng.
Eng. Pr. Cas.	...	...	Roscoe's English Prize Cases, 2 vols., 1745—1858	...	...	Eng.
Eq. Cas. Abr.	...	...	Abridgment of Cases in Equity, fol., 1667—1744	...	...	Eng.
Eq. Rep.	...	...	Equity Reports, 3 vols., 1853—1855	...	...	Eng.
Esp.	...	...	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810	...	...	Eng.
Ex. D.	...	...	Law Reports, Exchequer Division, 5 vols., 1875—1880	...	...	Eng.
Exch.	...	...	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856	...	...	Eng.
Exch. C. R.	...	...	Exchequer Court Reports	...	...	Can.
F. (Ct. of Sess.)	...	...	Fraser, Court of Session Cases (Scotland), 5th series, 8 vols., 1898—1906	...	...	Scot.
F.	...	...	Foord's Reports of the Supreme Court of the Cape of Good Hope, 1879—1880	...	...	S. Af.
F. & F.	...	...	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867	...	...	Eng.
F. N. D.	...	...	Finnemore's Notes and Digest of Natal Cases, 1863—1867	...	...	S. Af.
Fac. Coll.	...	...	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), 38 vols., 1752—1841	...	...	Scot.
Falc.	...	...	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751	...	...	Scot.
Falc. & Fitz.	...	...	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838	...	...	Eng.
Fenton	...	...	Fenton, Important Judgments	...	...	N.Z.
Ferg.	...	...	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817	...	...	Scot.
Fitz. Nat. Brev.	...	...	Fitzherbert's Natura Brevium	...	...	Eng.
Fitz-G.	...	...	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1727—1731	...	...	Eng.
Fl. & K.	...	...	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol., 1810—1812	...	...	Ir.
Fonbl.	...	...	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852	...	...	Eng.
For.	...	...	Forrest's Reports, Exchequer, 1 vol., 1800—1801	...	...	Eng.
Forb.	...	...	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713	...	...	Scot.
Fort. De Laud.	...	...	Fortesque, De Laudibus Legum Angliæ	...	...	Eng.
Fortes. Rep.	...	...	Fortesque's Reports, fol., 1 vol., 1692—1736	...	...	Eng.
Fost.	...	...	Foster's Crown Cases, 1 vol., 1708—1760	...	...	Eng.
Fount.	...	...	Fountainhall's Decisions, Court of Session (Scotland), fol., 2 vols., 1678—1712	...	...	Scot.
Fox & S. Ir.	...	...	M. C. Fox and T. B. C. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825	...	...	Ir.
Fox & S. Reg.	...	...	J. S. Fox and C. L. Smith's Registration Cases, 1 vol., 1886—1895	...	...	Eng.
Fras.	...	...	Fraser (Simon), Election Cases, 2 vols., 1793	...	...	Eng.
Freem. Ch.	...	...	Freeman's Reports, Chancery, 1 vol., 1660—1706	...	...	Eng.
Freem. K. B.	...	...	Freeman's Reports, King's Bench and Common Pleas, 1 vol., 1670—1704	...	...	Eng.
G.	...	...	Gregorowski's Reports of the High Court of the Orange Free State from 1883	...	...	S. Af.
G. & R.	...	...	Nova Scotia Reports (Geldert & Russell)	...	...	Can.
G. I. Dig.	...	...	General Index Digest	...	...	Can.
G. W. D.	...	...	South African Law Reports, Griqualand West Local Division	...	...	S. Af.
G. W. L.	...	...	South African Law Reports, Griqualand West Local Division	...	...	S. Af.
Gal. & Dav.	...	...	Gale and Davison's Reports, Queen's Bench, 3 vols., 1841—1843	...	...	Eng.
Gale	...	...	Gale's Reports, Exchequer, 2 vols., 1835—1836	...	...	Eng.
Gaz. L. R.	...	...	New Zealand Gazette Law Reports	...	...	N.Z.
Geld. Dig.	...	...	Geldert's Digest	...	...	Can.
Gib. Cod.	...	...	Gibson's Codex Juris Ecclesiastici Anglicani	...	...	Eng.
Giff.	...	...	Giffard's Reports, Chancery, 5 vols., 1857—1865	...	...	Eng.
Gilb.	...	...	Gilbert's Cases in Law and Equity, 1 vol., 1713—1714	...	...	Eng.
Gilb. C. P.	...	...	Gilbert's History and Practice of the Court of Common Pleas	...	...	Eng.
Gilb. Ch.	...	...	Gilbert's Reports, Chancery and Exchequer, fol., 1 vol., 1706—1726	...	...	Eng.
Gilm. & F.	...	...	Gilmour and Falconer's Decisions, Court of Session (Scotland), 2 parts, Part I. (Gilmour) 1661—1666, Part II. (Falconer) 1681—1686	...	...	Scot.
Gl. & J.	...	...	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1819—1828	...	...	Eng.
Glanv.	...	...	Glanville, De Legibus et Consuetudinibus Regni Angliæ	...	...	Eng.
Glanv. El. Cas.	...	...	Glanville's Election Cases, 1 vol., 1623—1624	...	...	Eng.
Glascokk	...	...	Glascokk's Reports (Ireland), 1 vol., 1831—1832	...	...	Ir.

Godb. ... ..	Godbolt's Reports, King's Bench, Common Pleas, and Exchequer, 1 vol., 1574—1637	Eng.
Gouldsb. ... ..	Gouldsbrough's Reports, Queen's Bench and King's Bench, 1 vol., 1586—1601	Eng.
Gow ... ..	Gow's Reports, Nisi Prius, 1 vol., 1818—1820	Eng.
Gr. ... ..	Upper Canada Chancery (Grant)	Can.
Griffin's Patent Cases	Griffin's Patent Cases, 1884—1887	Eng.
Gwilll. ... ..	Gwillim's Tithe Cases, 4 vols., 1224—1824	Eng.
H. ... ..	Hertzog's Reports of the High Court of the South African Republic, 1893	S. Af.
H. & C. ... ..	Hurlstone and Coltman's Reports, Exchequer, 4 vols., 1862—1866	Eng.
H. & N. ... ..	Hurlstone and Norman's Reports, Exchequer, 7 vols., 1856—1862	Eng.
H. & Tw. ... ..	Hall and Twells' Reports, Chancery, 2 vols., 1848—1850	Eng.
H. & W. ... ..	Hurlstone and Walmsley's Reports, Exchequer, 1 vol., 1840—1841	Eng.
H B. It. (preceded by date)	Hansell's Reports of Bankruptcy and Companies' Winding up Cases, 3 vols., 1915—1917 ( <i>e.g.</i> , [1915] H. B. R.)	Eng.
H. C. ... ..	Reports of the High Court of Griqualand West	S. Af.
H. E. G. ... ..	Hodgin's Election Reports	Can.
H. L. Cas. ... ..	Clark's Reports, House of Lords, 11 vols., 1847—1866	Eng.
Hag. Adm. ... ..	Haggard's Reports, Admiralty, 3 vols., 1822—1838	Eng.
Hag. Con. ... ..	Haggard's Consistorial Reports, 2 vols., 1789—1821	Eng.
Hag. Ecc. ... ..	Haggard's Ecclesiastical Reports, 4 vols., 1827—1833	Eng.
Hailes ... ..	Hailes's Decisions, Court of Session (Scotland), 2 vols., 1766—1791	Scot.
Hale, C. L. ... ..	Hale's Common Law	Eng.
Hale, P. C. ... ..	Hale's Pleas of the Crown, 2 vols.	Eng.
Han. ... ..	New Brunswick Reports (Hannay)	Can.
Har. & Ruth. ... ..	Harrison and Rutherford's Reports, Common Pleas, 1 vol., 1865—1866	Eng.
Har. & W. ... ..	Harrison and Wollaston's Reports, King's Bench and Bail Court, 2 vols., 1835—1836	Eng.
Harc. ... ..	Harcarse's Decisions, Court of Session (Scotland), fol., 1 vol., 1681—1691	Scot.
Hard. ... ..	Hardres' Reports, Exchequer, fol., 1 vol., 1655—1669	Eng.
Hare ... ..	Hare's Reports, Chancery, 11 vols., 1811—1853	Eng.
Hawk. P. C. ... ..	Hawkins's Pleas of the Crown, 2 vols.	Eng.
Hay ... ..	Hay's Reports	Ind.
Hay & Marr. ... ..	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	Eng.
Hayes ... ..	Hayes's Reports, Exchequer (Ireland), 1 vol., 1830—1832	Ir.
Hayes & Jo. ... ..	Hayes and Jones's Reports, Exchequer (Ireland), 1 vol., 1832—1834	Ir.
Hem. & M. ... ..	Hemming and Miller's Reports, Chancery, 2 vols., 1862—1865	Eng.
Het. ... ..	Hetley's Reports, Common Pleas, fol., 1 vol., 1627—1631	Eng.
Hob. ... ..	Hobart's Reports, Common Pleas, fol., 1 vol., 1613—1625	Eng.
Hodg. ... ..	Hodges' Reports, Common Pleas, 3 vols., 1835—1837	Eng.
Hog. ... ..	Hogan's Reports, Rolls Court (Ireland), 2 vols., 1816—1834	Ir.
Hog. Adm. ... ..	W. Holt's Rule of the Road Cases, Admiralty, 1 vol., 1865—1867	Eng.
Holt, Eq. ... ..	W. Holt's Equity Reports, 2 vols., 1815...	Eng.
Holt, K. B. ... ..	Sir John Holt's Reports, King's Bench, fol., 1 vol., 1688—1710	Eng.
Holt, N. P. ... ..	F. Holt's Reports, Nisi Prius, 1 vol., 1815—1817	Eng.
Home, Ct. of Sess.	Home's Decisions, Court of Session (Scotland), fol., 1 vol., 1735—1744	Scot.
Hong Kong L. R.	Hong Kong Reports	Hong Kong
Hop. & Colt. ... ..	Hopwood and Coltman's Registration Cases, 2 vols., 1868—1878	Eng.
Hop. & Ph. ... ..	Hopwood and Philbrick's Registration Cases, 1 vol., 1863—1867	Eng.
Horn & H. ... ..	Horn and Hurlstone's Reports, Exchequer, 2 vols., 1838—1839	Eng.
Hov. Supp. ... ..	Hovenden's Supplement to Vesey Jun.'s Reports, Chancery, 2 vols., 1753—1817	Eng.
How. C. ... ..	Howard's Chancery Practice	Ir.
How. C. S. ... ..	Howard's Supplement to Rules, etc., of the High Court of Chancery in Ireland	Ir.
How. E. E. ... ..	Howard's Equity Exchequer	Ir.
How. P. L. ... ..	Howard on the Popery Laws	Ir.
Hud. & B. ... ..	Hudson and Brooke's Reports, King's Bench and Exchequer (Ireland), 2 vols., 1827—1831	Ir.
Hudson's B. C. ... ..	Hudson on Building Contracts, 2 vols.	Eng.
Hume ... ..	Hume's Decisions, Court of Session (Scotland), 1 vol., 1781—1822	Scot.
Hut. ... ..	Hutton's Reports, Common Pleas, fol., 1 vol., 1617—1638	Eng.
Hy. Bl. ... ..	Henry Blackstone's Reports, Common Pleas, 2 vols., 1788—1796	Eng.
Hyde ... ..	Hyde's Reports	Ind.
I. C. L. R. ... ..	Irish Common Law Reports, 17 vols., 1819—1866	Ir.
I. Ch. It. ... ..	Irish Chancery Reports, 17 vols., 1850—1867	Ir.
I. Eq. It. ... ..	Irish Equity Reports, 13 vols., 1838—1851	Ir.

I. L. R. ...	...	Irish Law Reports, 13 vols., 1838—1851	...	...	Ir.
I. L. R. (Vol.) All.	...	Indian Law Reports, Allahabad	...	...	Ind.
I. L. R. (Vol.) Bom.	...	Indian Law Reports, Bombay	...	...	Ind.
I. L. R. (Vol.) Cal.	...	Indian Law Reports, Calcutta	...	...	Ind.
I. L. R. (Vol.) Lah.	...	Indian Law Reports, Lahore	...	...	Ind.
I. L. R. (Vol.) Mad.	...	Indian Law Reports, Madras	...	...	Ind.
I. L. R. (Vol.) Pat.	...	Indian Law Reports, Patna	...	...	Ind.
I. L. R. (Vol.) Ran.	...	Indian Law Reports, Rangoon	...	...	Ind.
I. L. T. ...	...	Irish Law Times, 1867—(current)	...	...	Ir.
I. L. T. Jo. ...	...	Irish Law Times Journal, 1867,—(current)	...	...	Ir.
I. R. (preceded by date)	...	Irish Reports, since 1893 ( <i>e.g.</i> , [1891] 1 I. R.)	...	...	Ir.
I. R. (Vol.) C. L.	...	Irish Reports, Common Law, 11 vols., 1866—1877	...	...	Ir.
I. R. Eq. ...	...	Irish Reports, Equity, 11 vols., 1866—1877	...	...	Ir.
I. R., R. & L. ...	...	Irish Reports, Registry Appeals in the Court of Exchequer Chamber and Appeals in the Court for Land Cases Reserved, 1 vol., 1868—1876	...	...	Ir.
Ind. Awards ...	...	Industrial Awards Recommendations	...	...	N.Z.
Ind. Jur. N. S. ...	...	Indian Jurist, New Series	...	...	Ind.
Ind. Jur. O. S. ...	...	Indian Jurist, Old Series	...	...	Ind.
Ir. Cir. Rep. ...	...	Reports of Irish Circuit Cases, 1 vol., 1841—1843	...	...	Ir.
Ir. Jur. ...	...	Irish Jurist, 18 vols., 1819—1866	...	...	Ir.
Ir. L. Rec. 1st ser.	...	Law Recorder (Ireland), 1st series, 4 vols., 1827—1831	...	...	Ir.
Ir. L. Rec. N. S.	...	Law Recorder (Ireland), New Series, 6 vols., 1833—1838	...	...	Ir.
Irv. ...	...	Irvine's Justiciary Reports (Scotland), 5 vols., 1852—1867	...	...	Scot.
J. Bridg.	...	Sir John Bridgman's Reports, Common Pleas, fol., 1 vol., 1613—1621	...	...	Eng.
J. D. R. ...	...	Juta's Daily Reporter, reporting Cases in the Cape Provincial Division	...	...	S. Af.
J. P. ...	...	Justice of the Peace, 1837—(current)	...	...	Eng.
J. P. Jo. ...	...	Justice of the Peace (Weekly Notes of Cases)	...	...	Eng.
J. R. ...	...	Jurist Reports	...	...	N.Z.
J. R. N. S. ...	...	Jurist Reports, New Series	...	...	N.Z.
J. Shaw, Just.	...	J. Shaw's Justiciary Reports (Scotland), 1 vol., 1848—1852	...	...	Scot.
Jac. ...	...	Jacob's Reports, Chancery, 1 vol., 1821—1823	...	...	Eng.
Jac. & W. ...	...	Jacob and Walker's Reports, Chancery, 2 vols., 1819—1821	...	...	Eng.
James ...	...	Nova Scotia Reports (James)	...	...	Can.
Jebb & B. ...	...	Jebb and Bourke's Reports, Queen's Bench (Ireland), 1 vol., 1841—1842	...	...	Ir.
Jebb & S. ...	...	Jebb and Symes' Reports, Queen's Bench (Ireland), 2 vols., 1838—1841	...	...	Ir.
Jebb, C. C. ...	...	Jebb's Crown Cases Reserved (Ireland), 1 vol., 1822—1840	...	...	Ir.
Jebb, Cr. & Pr. Cas.	...	Jebb's Crown and Presentment Cases	...	...	Ir.
Jenk. ...	...	Jenkins' Reports, 1 vol., 1220—1623	...	...	Eng.
Jo. & Car. ...	...	Jones and Carey's Reports, Exchequer (Ireland), 1 vol., 1838—1839	...	...	Ir.
Jo. & Lat. ...	...	Jones and La Touche's Reports, Chancery (Ireland), 3 vols., 1814—1846	...	...	Ir.
Jo. Ex. Ir. ...	...	T. Jones' Reports, Exchequer (Ireland), 2 vols., 1834—1835	...	...	Ir.
John. ...	...	Johnson's Reports, Chancery, 1 vol., 1858—1860	...	...	Eng.
John. & H. ...	...	Johnson and Hemming's Reports, Chancery, 2 vols., 1859—1862	...	...	Eng.
Jur. ...	...	Jurist Reports, 18 vols., 1837—1854	...	...	Eng.
Jur. N. S. ...	...	Jurist Reports, New Series, 12 vols., 1855—1867	...	...	Eng.
K. ...	...	Kotze's Reports of the High Court of the Transvaal Province 1877—1881	...	...	S. Af.
K. & G. ...	...	Keane and Grant's Registration Cases, 1 vol., 1854—1862	...	...	Eng.
K. & J. ...	...	Kay and Johnson's Reports, Chancery, 4 vols., 1854—1858	...	...	Eng.
K. B. (preceded by date)	...	Law Reports, King's Bench Division, since 1900 ( <i>e.g.</i> , [1901] 2 K. B.)	...	...	Eng.
Kames, Dict. Dec.	...	Kames, Dictionary of Decisions, Court of Session (Scotland), fol., 2 vols., 1540—1741	...	...	Scot.
Kames, Rem. Dec.	...	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752	...	...	Scot.
Kames, Sel. Dec.	...	Kames, Select Decisions, Court of Session (Scotland), 1 vol., 1752—1768	...	...	Scot.
Kay ...	...	Kay's Reports, Chancery, 1 vol., 1853—1854	...	...	Eng.
Kebl. ...	...	Keble's Reports, fol., 3 vols., 1661—1677	...	...	Eng.
Keen ...	...	Keen's Reports, Rolls Court, 2 vols., 1836—1838	...	...	Eng.
Keil. ...	...	Keilwey's Reports, King's Bench, fol., 1 vol., 1327—1578	...	...	Eng.
Kel. ...	...	Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707	...	...	Eng.
Kel. W. ...	...	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1734	...	...	Eng.
Keny. ...	...	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1759	...	...	Eng.
Keny. Ch. ...	...	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—1754	...	...	Eng.
Kerr ...	...	New Brunswick Reports (Kerr)	...	...	Can.



Kilkerran	...	Kilkerran's Decisions, Court of Session (Scotland), fol., 1 vol., 1738—1752	Scot.
Kn. & Omb.	...	Knapp and Ombler's Election Cases, 1 vol., 1834—1835	Eng.
Knapp	...	Knapp's Reports, Privy Council, 3 vols., 1829—1836	Eng.
Knox	...	Knox's Reports	Aus.
Konst. & W. Rat. App.	...	Konstam and Ward's Reports of Rating Appeals, 1 vol., 1909—1912	Eng.
Konst. Rat. App.	...	Konstam's Reports of Rating Appeals, 2 vols., 1904—1908	Eng.
L. & G. temp. Plunk.	...	Lloyd and Goold's Reports temp. Plunkett, Chancery (Ireland), 1 vol., 1834—1839	Ir.
L. & G. temp. Sugd.	...	Lloyd and Goold's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1835	Ir.
L. & Welsb.	...	Lloyd and Welsby's Commercial and Mercantile Cases, 1 vol., 1829—1830	Eng.
L. C. & M. Gaz.	...	Local Courts and Municipal Gazette	Can.
L. C. J.	...	Lower Canada Jurist	Can.
L. C. L. J.	...	Lower Canada Law Journal	Can.
L. C. R.	...	Lower Canada Reports	Can.
L. G. R.	...	Local Government Reports, 1902—(current)	Eng.
L. J. Adm.	...	Law Journal, Admiralty, 1865—1875	Eng.
L. J. Bey.	...	Law Journal, Bankruptcy, 1832—1880	Eng.
L. J. C. C.	...	Law Journal (County Courts Reporter), 1912—(current)	Eng.
L. J. C. P.	...	Law Journal, Common Pleas, 1831—1875	Eng.
L. J. Ch.	...	Law Journal, Chancery, 1831—(current)	Eng.
L. J. Eccl.	...	Law Journal, Ecclesiastical Cases, 1866—1875	Eng.
L. J. Ex.	...	Law Journal, Exchequer, 1831—1875	Eng.
L. J. Ex. Eq.	...	Law Journal, Exchequer in Equity, 1835—1841	Eng.
L. J. K. B. or Q. B.	...	Law Journal, King's Bench or Queen's Bench, 1831—(current)	Eng.
L. J. M. C.	...	Law Journal, Magistrates' Cases, 1831—1896	Eng.
L. J. N. C.	...	Law Journal, Notes of Cases, 1866—1892 (from 1893, see Law Journal)	Eng.
L. J. O. S.	...	Law Journal, Old Series, 10 vols., 1822—1831	Eng.
L. J. P.	...	Law Journal, Probate, Divorce and Admiralty, 1875—(current)	Eng.
L. J. P. & M.	...	Law Journal, Probate and Matrimonial Cases, 1858—1859, 1866—1875	Eng.
L. J. P. C.	...	Law Journal, Privy Council, 1865—(current)	Eng.
L. J. P. M. & A.	...	Law Journal, Probate, Matrimonial and Admiralty, 1860—1865	Eng.
L. Jo.	...	Law Journal Newspaper, 1866—(current)	Eng.
L. L. R.	...	Leader Law Reports	S. Af.
L. M. & P.	...	Lowndes, Maxwell, and Pollock's Reports, Bail Court and Practice, 2 vols., 1850—1851	Eng.
L. N.	...	Legal News	Can.
L. R. A. & E.	...	Law Reports, Admiralty and Ecclesiastical Cases, 4 vols., 1865—1875	Eng.
L. R. C. C. R.	...	Law Reports, Crown Cases Reserved, 2 vols., 1865—1875	Eng.
L. R. C. P.	...	Law Reports, Common Pleas, 10 vols., 1865—1875	Eng.
L. R. Eq.	...	Law Reports, Equity Cases, 20 vols., 1865—1875	Eng.
L. R. Exch.	...	Law Reports, Exchequer, 10 vols., 1865—1875	Eng.
L. R. H. L.	...	Law Reports, English and Irish Appeals and Peerage Claims, House of Lords, 7 vols., 1866—1875	Eng.
L. R. Ind. App.	...	Law Reports, Indian Appeals, Privy Council, 1873—(current)	Eng.
L. R. Ind. App. Supp. Vol.	...	Law Reports, India Appeals Privy Council, Supplementary Volume, 1872—1873	Eng.
L. R. Ir.	...	Law Reports (Ireland), Chancery and Common Law, 32 vols., 1877—1893	Ir.
L. R. P. & D.	...	Law Reports, Probate and Divorce, 3 vols., 1865—1875	Eng.
L. R. P. C.	...	Law Reports, Privy Council, 6 vols., 1865—1875	Eng.
L. R. Q. B.	...	Law Reports, Queen's Bench, 10 vols., 1865—1875	Eng.
L. R. Q. B.	...	Quebec Reports, Queen's Bench	Can.
L. R. Sc. & Div.	...	Law Reports, Scotch and Divorce Appeals, House of Lords 2 vols., 1860—1875	Eng.
L. T.	...	Law Times Reports, 1859—(current)	Eng.
L. T. Jo.	...	Law Times Newspaper, 1813—(current)	Eng.
L. T. O. S.	...	Law Times Reports, Old Series, 34 vols., 1813—1860	Eng.
L. Th.	...	La Themis	Can.
Lane	...	Lane's Reports, Exchequer, fol., 1 vol., 1605—1611	Eng.
Lat.	...	Latch's Reports, King's Bench, fol., 1 vol., 1625—1628	Eng.
Laws. Reg. Cas.	...	Lawson's Registration Cases, 1895—(current)	Eng.
Ld. Raym.	...	Lord Raymond's Reports, King's Bench and Common Pleas, 3 vols., 1694—1732	Eng.
Le. & Ca.	...	Leigh and Cave's Crown Cases Reserved, 1 vol., 1861—1865	Eng.
Leach	...	Leach's Crown Cases, 2 vols., 1730—1814	Eng.
Lee	...	Sir G. Lee's Ecclesiastical Judgments, 2 vols., 1752—1758	Eng.
Lee temp. Hard.	...	T. Lee's Cases temp. Hardwicke, King's Bench, 1 vol., 1733—1738	Eng.

Ieg. Rep.	...	...	Legal Reporter	...	...	...	...	...	Ir.
Legge	...	...	Legge's Reports	...	...	...	...	...	Aus.
Leon.	...	...	Leonard's Reports, King's Bench, Common Pleas and Exchequer, fol., 4 parts, 1552—1615	...	...	...	...	...	Eng.
Lev.	...	...	Levinz's Reports, King's Bench and Common Pleas, fol., 3 vols., 1660—1696	...	...	...	...	...	Eng.
Lew. C. C.	...	...	Lewin's Crown Cases on the Northern Circuit, 2 vols., 1822—1838	...	...	...	...	...	Eng.
Ley	...	...	Ley's Reports, King's Bench, fol., 1 vol., 1608—1629	...	...	...	...	...	Eng.
Lib. Ass.	...	...	Liber Assisarum, Year Books, 1—51 Edw. III.	...	...	...	...	...	Eng.
Lilly	...	...	Lilly's Reports and Pleadings of Cases in Assize, fol., 1 vol.	...	...	...	...	...	Eng.
Litt.	...	...	Littleton's Reports, Common Pleas, fol., 1 vol., 1627—1631	...	...	...	...	...	Eng.
Lloyd, L. R.	...	...	Lloyd's List Law Reports, 1919—(current)	...	...	...	...	...	Eng.
Lloyd, Pr. Cas.	...	...	Lloyd's Reports of Prize Cases, 10 vols., 1914—1924	...	...	...	...	...	Eng.
Lofft	...	...	Lofft's Reports, King's Bench, fol., 1 vol., 1772—1774	...	...	...	...	...	Eng.
Long. & T.	...	...	Longfield and Townsend's Reports, Exchequer (Ireland), 1 vol., 1811—1842	...	...	...	...	...	Ir.
Lords Journals	...	...	Journals of the House of Lords	...	...	...	...	...	Eng.
Lud. E. C.	...	...	Luder's Election Cases, 3 vols., 1784—1787	...	...	...	...	...	Eng.
Lumley, P. L. C.	...	...	Lumley's Poor Law Cases, 2 vols., 1834—1842	...	...	...	...	...	Eng.
Lush.	...	...	Lushington's Reports, Admiralty, 1 vol., 1859—1862	...	...	...	...	...	Eng.
Lut.	...	...	Sir E. Lutwyche's Entries and Reports, Common Pleas, 2 vols., 1682—1704	...	...	...	...	...	Eng.
Lut. Reg. Cas.	...	...	A. J. Lutwyche's Registration Cases, 2 vols., 1813—1853	...	...	...	...	...	Eng.
Lynd.	...	...	Lyndwood, Provinciale, fol., 1 vol.	...	...	...	...	...	Eng.
M.	...	...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	...	...	...	...	...	S. Af.
M. & S.	...	...	Maule and Selwyn's Reports, King's Bench, 6 vols., 1813—1817	...	...	...	...	...	Eng.
M. & W.	...	...	Meeson and Welsby's Reports, Exchequer, 16 vols., 1836—1847	...	...	...	...	...	Eng.
M. C. C.	...	...	Mining Commissioner's Cases	...	...	...	...	...	Can.
M. C. R.	...	...	Montreal Condensed Reports	...	...	...	...	...	Can.
M. H. C. R.	...	...	Madras High Court Reports	...	...	...	...	...	Ind.
M. L. R. (Vol.) K. B. or Q. B.	...	...	Montreal Law Reports, King's Bench or Queen's Bench	...	...	...	...	...	Can.
M. L. R. (Vol.) S. C.	...	...	Montreal Law Reports, Superior Court	...	...	...	...	...	Can.
M. M. Cas.	...	...	Martin's Reports of Mining Cases	...	...	...	...	...	Can.
Mac.	...	...	Macassey's New Zealand Reports	...	...	...	...	...	N.Z.
Mac. & G.	...	...	Macnaghten and Gordon's Reports, Chancery, 3 vols., 1819—1852	...	...	...	...	...	Eng.
Mac. & H.	...	...	Macrae and Hertslet's Insolvency Cases, 1 vol., 1847—1852	...	...	...	...	...	Eng.
McCle.	...	...	McClelland's Reports, Exchequer, 1 vol., 1821	...	...	...	...	...	Eng.
McCle. & Yo.	...	...	McClelland and Younge's Reports, Exchequer, 1 vol., 1821—1825	...	...	...	...	...	Eng.
Macfarlane	...	...	Macfarlane's Jury Trials, Court of Session (Scotland), 3 parts, 1838—1839	...	...	...	...	...	Scot.
Macl. & Rob.	...	...	Maclean and Robinson's Scotch Appeals (House of Lords), 1 vol., 1839	...	...	...	...	...	Scot.
Macph. (Ct. of Sess.)	...	...	Macpherson, Court of Session (Scotland), 3rd series, 11 vols., 1862—1873	...	...	...	...	...	Scot.
Macq.	...	...	Macqueen's Scotch Appeals, House of Lords, 4 vols., 1819—1865	...	...	...	...	...	Scot.
Macr.	...	...	Macrory's Patent Cases, 2 parts, 1847—1856	...	...	...	...	...	Eng.
Mad.	...	...	Madras High Court Reports	...	...	...	...	...	Ind.
Madd.	...	...	Maddock's Reports, Chancery, 6 vols., 1815—1822	...	...	...	...	...	Eng.
Madd. & G.	...	...	Maddock and Geldart's Reports, Chancery, 1 vol., 1819—1822 (Vol. VI. of Madd.)	...	...	...	...	...	Eng.
Madox	...	...	Madox's Formulæ Anglicanum	...	...	...	...	...	Eng.
Madox, Exch.	...	...	Madox's History and Antiquities of the Exchequer, 2 vols.	...	...	...	...	...	Eng.
Mag.	...	...	Magistrate and Municipal and Parochial Lawyer, London, 5 vols., 1848—1852	...	...	...	...	...	Eng.
Man. & G.	...	...	Manning and Granger's Reports, Common Pleas, 7 vols., 1840—1845	...	...	...	...	...	Eng.
Man. & Ry. K. B.	...	...	Manning and Ryland's Reports, King's Bench, 5 vols., 1827—1830	...	...	...	...	...	Eng.
Man. & Ry. M. C.	...	...	Manning and Ryland's Magistrates' Cases, 3 vols., 1827—1830	...	...	...	...	...	Eng.
Man. L. J.	...	...	Manitoba Law Journal	...	...	...	...	...	Can.
Man. L. R.	...	...	Manitoba Law Reports	...	...	...	...	...	Can.
Man. R. temp. Wood	...	...	Manitoba Reports temp. Wood	...	...	...	...	...	Can.
Mans.	...	...	Manson's Bankruptcy and Company Cases, 21 vols., 1893—1914	...	...	...	...	...	Eng.
Mar. L. C.	...	...	Maritime Law Reports (Crockford), 3 vols., 1860—1871	...	...	...	...	...	Eng.
March	...	...	March's Reports, King's Bench and Common Pleas, 1 vol., 1639—1642	...	...	...	...	...	Eng.
Marr.	...	...	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	...	...	...	...	...	Eng.
Marsh.	...	...	Marshall's Reports, Common Pleas, 2 vols., 1813—1816	...	...	...	...	...	Eng.
Marsh.	...	...	Marshall's Reports	...	...	...	...	...	Ind.
Mayn.	...	...	Maynard's Reports, Exchequer Memoranda of Edw. I. and Year Books of Edw. II., Year Books, Part I., 1273—1326	...	...	...	...	...	Eng.
Meg.	...	...	Megone's Companies Acts Cases, 2 vols., 1889—1891	...	...	...	...	...	Eng.

Men. ... ..	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850 ... ..	S. Af.
Mer. ... ..	Merivale's Reports, Chancery, 3 vols., 1815—1817 ... ..	Eng.
Milw. ... ..	Milward's Ecclesiastical Reports (Ireland), 1 vol., 1819—1843 ... ..	Ir.
Mod. Rep. ... ..	Modern Reports, 12 vols., 1669—1755 ... ..	Eng.
Mol. ... ..	Molloy's Reports, Chancery (Ireland), 3 vols., 1808—1831 ... ..	Ir.
Mont. ... ..	Montagu's Reports, Bankruptcy, 1 vol., 1829—1832 ... ..	Eng.
Mont. & A. ... ..	Montagu and Ayrton's Reports, Bankruptcy, 3 vols., 1832—1838 ... ..	Eng.
Mont. & B. ... ..	Montagu and Bligh's Reports, Bankruptcy, 1 vol., 1832—1833 ... ..	Eng.
Mont. & Ch. ... ..	Montagu and Chitty's Reports, Bankruptcy, 1 vol., 1838—1840 ... ..	Eng.
Mont. & M. ... ..	Montagu and Macarthur's Reports, Bankruptcy, 1 vol., 1826—1830 ... ..	Eng.
Mont. D. & De G. ... ..	Montagu, Deacon, and De Gex's Reports, Bankruptcy, 3 vols., 1840—1844 ... ..	Eng.
Moo. & P. ... ..	Moore and Payne's Reports, Common Pleas, 5 vols., 1827—1831 ... ..	Eng.
Moo. & S. ... ..	Moore and Scott's Reports, Common Pleas, 4 vols., 1831—1831 ... ..	Eng.
Moo. Ind. App. ... ..	Moore's Indian Appeal Cases, Privy Council, 14 vols., 1836—1872 ... ..	Eng.
Moo. P. C. C. ... ..	Moore's Privy Council Cases, 15 vols., 1836—1863 ... ..	Eng.
Moo. P. C. C. N. S. ... ..	Moore's Privy Council Cases, New Series, 9 vols., 1862—1873 ... ..	Eng.
Mood. & M. ... ..	Moody and Malkin's Reports, Nisi Prius, 1 vol., 1826—1830 ... ..	Eng.
Mood. & R. ... ..	Moody and Robinson's Reports, Nisi Prius, 2 vols., 1830—1841 ... ..	Eng.
Mood. C. C. ... ..	Moody's Crown Cases Reserved, 2 vols., 1824—1844 ... ..	Eng.
Moore, C. P. ... ..	J. B. Moore's Reports, Common Pleas, 12 vols., 1817—1827 ... ..	Eng.
Moore, K. B. ... ..	Sir F. Moore's Reports, King's Bench, fol., 1 vol., 1485—1620 ... ..	Eng.
Mor. Dict. ... ..	Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808 ... ..	Scot.
Morr. ... ..	Morrell's Reports, Bankruptcy, 10 vols., 1884—1893 ... ..	Eng.
Mos. ... ..	Moseley's Reports, Chancery, fol., 1 vol., 1726—1730 ... ..	Eng.
Mun. Rep. ... ..	Municipal Reports ... ..	Can.
Murd. Epit. ... ..	Murdoch's Epitome ... ..	Can.
Murp. & H. ... ..	Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837 ... ..	Eng.
Murr. ... ..	Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830 ... ..	Scot.
My. & Cr. ... ..	Mylne and Craig's Reports, Chancery, 5 vols., 1835—1841 ... ..	Eng.
My. & K. ... ..	Mylne and Keen's Reports, Chancery, 3 vols., 1832—1835 ... ..	Eng.
N. A. C. ... ..	Native Appeal Cases ... ..	S. Af.
N. & S. ... ..	Nichols and Stop's Reports (Tasmania) ... ..	Tasmania
N. B. Dig. ... ..	New Brunswick Digest (Stevens) ... ..	Can.
N. B. Eq. Rep. ... ..	New Brunswick Equity Reports ... ..	Can.
N. B. R. ... ..	New Brunswick Reports ... ..	Can.
N. B. R. (All.) ... ..	New Brunswick Reports (Allen) ... ..	Can.
N. B. R. (Ber.) ... ..	New Brunswick Reports (Berton) ... ..	Can.
N. B. R. (Carl.) ... ..	New Brunswick Reports (Carlton) ... ..	Can.
N. B. R. (Chip.) ... ..	New Brunswick Reports (Chipman) ... ..	Can.
N. B. R. (Han.) ... ..	New Brunswick Reports (Hannay) ... ..	Can.
N. B. R. (Kerr) ... ..	New Brunswick Reports (Kerr) ... ..	Can.
N. B. R. (P. & B.) ... ..	New Brunswick Reports (Pugsley and Burbidge) ... ..	Can.
N. B. R. (P. & T.) ... ..	New Brunswick Reports (Pugsley and Trueman) ... ..	Can.
N. B. R. (Pug.) ... ..	New Brunswick Reports (Pugsley) ... ..	Can.
N. B. R. (Tru.) ... ..	New Brunswick Reports (Trueman) ... ..	Can.
N. I. (preceded by date)	Northern Ireland Law Reports, 1925—(current) ( <i>c.q.</i> , [1925] N. I.) ... ..	Ir.
N. L. R. ... ..	Natal Law Reports ... ..	S. Af.
N. P. D. ... ..	South African Law Reports, Natal Provincial Division ... ..	S. Af.
N. S. R. ... ..	Nova Scotia Reports ... ..	Can.
N. S. R. (Coch.) ... ..	Nova Scotia Reports (Cochran) ... ..	Can.
N. S. R. (G. & O.) ... ..	Nova Scotia Reports (Geldert and Oxley) ... ..	Can.
N. S. R. (G. & R.) ... ..	Nova Scotia Reports (Geldert and Russell) ... ..	Can.
N. S. R. (James) ... ..	Nova Scotia Reports (James) ... ..	Can.
N. S. R. (Old.) ... ..	Nova Scotia Reports (Oldrights) ... ..	Can.
N. S. R. (R. & C.) ... ..	Nova Scotia Reports (Russell and Chesley) ... ..	Can.
N. S. R. (R. & G.) ... ..	Nova Scotia Reports (Russell and Geldert) ... ..	Can.
N. S. R. (Thom.) ... ..	Nova Scotia Reports (Thomson) ... ..	Can.
N. S. W. Adm. or Ad. ... ..	New South Wales Reports, Admiralty ... ..	Aus.
N. S. W. B. ... ..	New South Wales Reports, Bankruptcy ... ..	Aus.
N. S. W. Bkpty. Cas. ... ..	New South Wales Bankruptcy Cases ... ..	Aus.
N. S. W. Eq. ... ..	New South Wales Reports, Equity ... ..	Aus.
N. S. W. Ind. Arbtrn. Cas. ... ..	New South Wales Industrial Arbitration Cases ... ..	Aus.
N. S. W. L. R. ... ..	New South Wales Law Reports ... ..	Aus.
N. S. W. Land App. Cts. ... ..	New South Wales Land Appeal Courts ... ..	Aus.
N. S. W. S. C. R. (Eq.) ... ..	New South Wales Supreme Court Reports (Equity) ... ..	Aus.
N. S. W. S. C. R. (L.) ... ..	New South Wales Supreme Court Reports (Law) ... ..	Aus.
N. S. W. S. C. R. N. S. ... ..	New South Wales Supreme Court Reports, New Series ... ..	Aus.
N. S. W. W. N. ... ..	New South Wales Weekly Notes ... ..	Aus.
N. W. ... ..	North-Western Provinces High Court Reports ... ..	Ind.
N. W. T. R. ... ..	North-West Territories Reports ... ..	Can.
N. Z. Jur. ... ..	New Zealand Jurist ... ..	N.Z.
N. Z. Jur. Mining Law ... ..	New Zealand Jurist Mining Law ... ..	N.Z.

## xxxiv REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

N. Z. Jur. N. S. ...	... New Zealand Jurist, New Series ...	N.Z.
N. Z. L. R. ...	... New Zealand Law Reports, 1883—(current) ...	N.Z.
N. Z. L. R. C. A. ...	... New Zealand Law Reports, Court of Appeal, 5 vols., 1883—1887 ...	N.Z.
Nels. ...	... Nelson's Reports, Chancery, 1 vol., 1625—1693 ...	Eng.
Nev. & M. K. B. ...	... Nevile and Manning's Reports, King's Bench, 6 vols., 1832—1836 ...	Eng.
Nev. & M. M. C. ...	... Nevile and Manning's Magistrates' Cases, 3 vols., 1832—1836 ...	Eng.
Nev. & P. K. B. ...	... Nevile and Perry's Reports, King's Bench, 3 vols., 1836—1838 ...	Eng.
Nev. & P. M. C. ...	... Nevile and Perry's Magistrates' Cases, 1 vol., 1836—1837 ...	Eng.
New Mag. Cas. ...	... New Magistrates' Cases (Bittleston, Wise and Parnell), 5 vols., 1844—1850 ...	Eng.
New Pract. Cas. ...	... New Practice Cases (Bittleston and others), 3 vols., 1844—1848 ...	Eng.
New Rep. ...	... New Reports, 6 vols., 1862—1865 ...	Eng.
New Sess. Cas. ...	... New Sessions Magistrates' Cases (Carrow, Hamerton, Allen, etc.), 4 vols., 1844—1851 ...	Eng.
Nfld. L. R. ...	... Newfoundland Reports ...	Nfld.
Nolan ...	... Nolan's Magistrates' Cases, 1 vol., 1791—1793 ...	Eng.
Notes of Cases ...	... Notes of Cases in the Ecclesiastical and Maritime Courts, 7 vols., 1841—1850 ...	Eng.
Noy ...	... Noy's Reports, King's Bench, fol., 1 vol., 1558—1649 ...	Eng.
O. B. & F. ...	... Ollivier Bell and Fitzgerald's Reports ...	N.Z.
O. B. S. P. ...	... Old Bailey Session Papers ...	Eng.
O. Bridg. ...	... Sir Orlando Bridgman's Reports, Common Pleas, 1 vol., 1660—1666 ...	Eng.
O. F. S. ...	... Reports of the High Court of the Orange Free State, 1879—1883 ...	S. Af.
O. L. R. ...	... Ontario Law Reports ...	Can.
O'M. & H. ...	... O'Malley and Hardcastle's Election Cases, 1869—(current) ...	Eng.
O. P. D. ...	... South African Law Reports, Orange Free State Provincial Division ...	S. Af.
O. R. ...	... Ontario Reports ...	Can.
O. R. ...	... Official Reports of the South African Republic, 1894—1899 ...	S. Af.
O. R. C. ...	... Reports of the High Court of the Orange River Colony ...	S. Af.
O. S. ...	... Upper Canada Queen's Bench, Old Series ...	Can.
O. W. N. ...	... Ontario Weekly Notes ...	Can.
O. W. R. ...	... Ontario Weekly Reporter ...	Can.
Old. ...	... Nova Scotia Reports (Oldrights) ...	Can.
Ont. Dig. ...	... Digest of Ontario Case Law, 4 vols., 1823—1900 ...	Can.
Owen ...	... Owen's Reports, King's Bench and Common Pleas, fol., 1 vol., 1557—1614 ...	Eng.
P. (preceded by date) ...	... Law Reports, Probate, Divorce, and Admiralty Division, since 1890 ( <i>e.g.</i> , [1891] P.) ...	Eng.
P. & B. ...	... New Brunswick Reports (Pugsley and Burbidge) ...	Can.
P. & T. ...	... New Brunswick Law Reports (Pugsley and Trueman) ...	Can.
P. Cas. ...	... Prize Cases Heard and Decided in the Prize Court During the Great War, 3 vols., 1914—1922 ...	Eng. & Col.
P. D. ...	... Law Reports, Probate, Divorce, and Admiralty Division, 15 vols., 1875—1890 ...	Eng.
P. E. I. ...	... Prince Edward Island Reports ...	Can.
P. H. ...	... Ontario Practice ...	Can.
P. Wms. ...	... Peere Williams' Reports, Chancery and King's Bench, 3 vols., 1605—1735 ...	Eng.
Palm. ...	... Palmer's Reports, King's Bench, fol., 1 vol., 1619—1629 ...	Eng.
Park. ...	... Parker's Reports, Exchequer, fol., 1 vol., 1743—1767; App. 1678—1717 ...	Eng.
Pat. App. ...	... Paton's Scotch Appeals, House of Lords, 6 vols., 1726—1822 ...	Scot.
Pater. App. ...	... Paterson's Scotch Appeals, House of Lords, 2 vols., 1851—1873 ...	Scot.
Peake ...	... Peake's Reports, Nisi Prius, 1 vol., 1790—1794 ...	Eng.
Peake, Add. Cas. ...	... Peake's Additional Cases, Nisi Prius, 1 vol., 1795—1812 ...	Eng.
Peck. ...	... Peckwell's Election Cases, 2 vols., 1803—1806 ...	Eng.
Pelham ...	... Pelham (S. A.) Reports ...	Aus.
Per. & Dav. ...	... Perry and Davison's Reports, Queen's Bench, 4 vols., 1838—1841 ...	Eng.
Per. & Kn. ...	... Perry and Knapp's Election Cases, 1 vol., 1833 ...	Eng.
Per. C. S. ...	... Perrault's Conseil Supérieur ...	Can.
Per. P. ...	... Perrault's Prévosté de Quebec, 1726—1756 ...	Can.
Ph. ...	... Phillips' Reports, Chancery, 2 vols., 1841—1849 ...	Eng.
Phil. El. Cas. ...	... Phillips' Election Cases, 1 vol., 1780 ...	Eng.
Phillim. ...	... J. Phillimore's Ecclesiastical Reports, 3 vols., 1809—1821 ...	Eng.
Phillim. Eccl. Jud. ...	... Sir R. Phillimore's Ecclesiastical Judgments, 1 vol., 1867—1875 ...	Eng.
Phip. ...	... Phipson's Digest of Natal Reports, 1858—1859 ...	S. Af.
Pig. & R. ...	... Pigott and Rodwell's Registration Cases, 1 vol., 1843—1845 ...	Eng.
Pite. ...	... Pitcairn's Criminal Trials (Scotland), 3 vols., 1488—1624 ...	Scot.
Plowd. ...	... Plowden's Reports, fol., 2 vols., 1550—1580, and Plowden's Queries, Vol. I. ...	Eng.
Poll. ...	... Pollexfen's Reports, King's Bench, fol., 1 vol., 1670—1682 ...	Eng.
Poph. ...	... Popham's Reports, King's Bench, fol., 1 vol., 1591—1627 ...	Eng.
Pow. R. & D. ...	... Power, Rodwell, and Dew's Election Cases, 2 vols., 1848—1856 ...	Eng.

Pratt ... ..	Pratt's Supplement to Bott's Poor Laws, 1833 ... ..	Eng.
Prece. Ch. ... ..	Precedents in Chancery, fol., 1 vol., 1689--1722 ... ..	Eng.
Price ... ..	Price's Reports, Exchequer, 13 vols., 1814--1821 ... ..	Eng.
Price ... ..	Price's Mining Commissioners' Cases ... ..	Can.
Pug. ... ..	New Brunswick Reports (Pugsley) ... ..	Can.
Py. R. ... ..	Pykes' Lower Canada Reports ... ..	Can.
Q. B. ... ..	Queen's Bench Reports (Adolphus and Ellis, New Series), 18 vols., 1841--1852 ... ..	Eng.
Q. B. (preceded by date)	Law Reports, Queen's Bench Division, 1891--1901 ( <i>e.g.</i> , [1891] 1 Q. B.) ... ..	Eng.
Q. B. D. ... ..	Law Reports, Queen's Bench Division, 25 vols., 1875--1890 ... ..	Eng.
Q. J. P. ... ..	Queensland Justice of Peace Reports ... ..	Aus.
Q. L. J. ... ..	Queensland Law Journal and Reports, 11 vols., 1879--1901 ... ..	Aus.
Q. L. R. ... ..	Quebec Law Reports ... ..	Can.
Q. L. R. (Beor) ... ..	Queensland Law Reports by Beor, 1876--1878 ... ..	Aus.
Q. P. R. ... ..	Quebec Practice Reports ... ..	Can.
Q. R. (Vol.) K. B. or Q. B.	Rapports Judiciaires de Québec, Cour du Banc du Roi, 1892--(current) ... ..	Can.
Q. R. (Vol.) S. C. ... ..	Rapports Judiciaires de Québec, Cour Supérieure, 1892--(current) ... ..	Can.
Q. S. C. R. ... ..	Queensland Supreme Court Reports, 5 vols., 1860--1881 ... ..	Aus.
Q. S. R. ... ..	Queensland State Reports, 6 vols., 1902--1906 ... ..	Aus.
Q. W. N. ... ..	Weekly Notes, Queensland ... ..	Aus.
R. ... ..	The Reports, 15 vols., 1893--1895 ... ..	Eng.
R. ... ..	Roscoe's Reports of the Supreme Court of the Cape of Good Hope, 1861--1867, 1871--1872, 1877--1878 ... ..	S. Af.
R. (Cl. of Sess.) ... ..	Rettie, Court of Session Cases (Scotland), 4th series, 25 vols., 1873--1898 ... ..	Scot.
R. A. C. ... ..	Ramsay, Appeal Cases ... ..	Can.
R. & C. ... ..	Nova Scotia Reports (Russell & Chesley) ... ..	Can.
R. & G. ... ..	Nova Scotia Reports (Russell and Geldert) ... ..	Can.
R. C. ... ..	La Revue Critique de Législation et de Jurisprudence de Canada ... ..	Can.
R. de J. ... ..	Revue de Jurisprudence ... ..	Can.
R. de L. ... ..	Revue de Législation et de Jurisprudence, 3 vols., 1845--1848 ... ..	Can.
R. E. D. ... ..	New South Wales, Reserved and Equity Decisions ... ..	Aus.
R. E. D. ... ..	Ritchie's Equity Decisions (Russell) ... ..	Can.
R. J. R. Q. ... ..	Quebec Revised Reports ... ..	Can.
R. L. N. S. ... ..	Revue Légale, New Series, 1895--(current) ... ..	Can.
R. L. O. S. ... ..	Revue Legale, Old Series, 21 vols., 1869--1892 ... ..	Can.
R. P. C. ... ..	Reports of Patent Cases, 1881--(current) ... ..	Eng.
R. R. ... ..	Revised Reports ... ..	Eng.
Rast. ... ..	Rastell's Entries ... ..	Eng.
Rayn. ... ..	Rayner's Title Cases, 3 vols., 1575--1782 ... ..	Eng.
Real Prop. Cas. ... ..	Real Property Cases, 2 vols., 1813--1847 ... ..	Eng.
Rep. Ch. ... ..	Reports in Chancery, fol., 3 vols., 1615--1710 ... ..	Eng.
Rep. in C. of A. ... ..	Reports in Courts of Appeal ... ..	N.Z.
Res. & Eq. Jud. ... ..	New South Wales Reserved and Equity Judgments ... ..	Aus.
Reserv. Cas. ... ..	Reserved Cases ... ..	Ir.
Rick. & M. ... ..	Rickards and Michael's Locus Standi Reports, 1 vol., 1885--1889 ... ..	Eng.
Rick. & S. ... ..	Rickards and Saunders' Locus Standi Reports, 1 vol., 1890--1894 ... ..	Eng.
Ridg. L. & S. ... ..	Ridgeway, Lapp, and Schoales' Reports (Ireland), 1 vol., 1793--1795 ... ..	Ir.
Ridg. Parl. Rep. ... ..	Ridgeway's Parliamentary Reports (Ireland), 3 vols., 1781--1796 ... ..	Ir.
Ridg. temp. H. ... ..	Ridgeway's Reports temp. Hardwicke, 1 vol., King's Bench, 1733--1736; Chancery, 1744--1746 ... ..	Eng.
Ritch. Eq. Rep. ... ..	Ritchie's Equity Reports ... ..	Can.
Rob. Eccl. ... ..	Robertson's Ecclesiastical Reports, 2 vols., 1844--1853 ... ..	Eng.
Rob. L. & W. ... ..	Roberts, Leeming, and Wallis' New County Court Cases, 1 vol., 1849--1851 ... ..	Eng.
Robert. App. ... ..	Robertson's Scotch Appeals, House of Lords, 1 vol., 1707--1727 ... ..	Scot.
Robin. App. ... ..	Robinson's Scotch Appeals, House of Lords, 2 vols., 1840--1841 ... ..	Scot.
Roll. Abr. ... ..	Rolle's Abridgment of the Common Law, fol., 2 vols. ... ..	Eng.
Roll. Rep. ... ..	Rolle's Reports, King's Bench, fol., 2 vols., 1614--1625 ... ..	Eng.
Rom. ... ..	Romilly's Notes of Cases, 1 part, 1767--1787 ... ..	Eng.
Roscoe's B. C. ... ..	Roscoe, Digest of Building Cases ... ..	Eng.
Rose ... ..	Rose's Reports, Bankruptcy, 2 vols., 1810--1816 ... ..	Eng.
Ross, L. C. ... ..	Ross's Leading Cases in Commercial Law (England and Scotland), 3 vols. ... ..	Eng.
Rowe ... ..	Rowe's Reports (England and Ireland), 1 vol., 1798--1823 ... ..	Eng.
Rul. Cas. ... ..	Campbell's Ruling Cases, 25 vols. ... ..	Eng.
Russ. ... ..	Russell's Reports, Chancery, 5 vols., 1821--1829 ... ..	Eng.
Russ. & M. ... ..	Russell and Mylne's Reports, Chancery, 2 vols., 1829--1833 ... ..	Eng.

# xxxvi      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Russ. & Ry.	...	Russell and Ryan's Crown Cases Reserved, 1 vol., 1800—1823	Eng.
Rus. E. R.	...	Russell's Election Reports...	Can.
Ry. & Can. Cas.	...	Railway and Canal Cases, 7 vols., 1835—1854	Eng.
Ry. & Can. Tr. Cas.	...	Railway and Canal Traffic Cases, 1855—(current)	Eng.
Ry. & M.	...	Ryan and Moody's Reports, Nisi Prius, 1 vol., 1823—1826	Eng.
Ryde & K. Rat. App.	...	Ryde and Konstam's Reports of Rating Appeals, 1 vol., 1894—1904	Eng.
Ryde, Rat. App.	...	Ryde's Rating Appeals, 3 vols., 1871—1893	Eng.
S.	...	Searle's Reports of the Supreme Court of the Cape of Good Hope	S. Af.
S. A. L. J.	...	South African Law Journal	S. Af.
S. A. L. R.	...	South Australian Law Reports	Aus.
S. A. L. R.	...	South African Law Reports	S. Af.
S. A. R.	...	Reports of the High Court of the South African Republic, 1881—1892	S. Af.
S. A. S. R.	...	South Australian State Reports, since 1921 ( <i>e.g.</i> , [1921] S. A. S. R.)	Aus.
S. C.	...	Reports of the Supreme Court of the Cape of Good Hope from 1880	S. Af.
S. C. (preceded by date)	...	Court of Session Cases (Scotland), since 1906 ( <i>e.g.</i> , [1906] S. C.)	Scot.
S. C. (H. L.) (preceded by date)	...	Court of Session Cases (Scotland) (House of Lords), since 1906 ( <i>e.g.</i> , [1906] S. C. (H. L.))	Scot.
S. C. (J.) (preceded by date)	...	Court of Justiciary Cases (Scotland), since 1906 ( <i>e.g.</i> , [1906] S. C. (J.))	Scot.
S. C. R.	...	Canada, Supreme Court Reports	Can.
S. L. T.	...	Scots Law Times, 1893 (current)	Scot.
S. Q. R.	...	Queensland State Reports	Aus.
S. R.	...	Reports of the High Court of Southern Rhodesia	S. Af.
S. R. C.	...	Stuart's Lower Canada Reports	Can.
S. R. N. S. W.	...	New South Wales, State Reports	Aus.
S. R. Q.	...	Queensland Reports, Supreme Court	Aus.
S. V. A. R.	...	Stuart's Vice-Admiralty Reports	Can.
S. W. A.	...	South-West Africa Law Reports	S.-W. Af.
Saint	...	Saint's Digest of Registration Cases, 1813—1906, 1 vol.	Eng.
Salk.	...	Salkeld's Reports, King's Bench, 3 vols., 1689—1712	Eng.
Sask. L. R.	...	Saskatchewan Law Reports	Can.
Sau. & Sc.	...	Sausee and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—1840	Ir.
Saund.	...	Saunders's Reports, King's Bench, 2 vols., 1666—1672	Eng.
Saund. & A.	...	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904	Eng.
Saund. & B.	...	Saunders and Bidder's Locus Standi Reports, 1905—(current)	Eng.
Saund. & C.	...	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1848	Eng.
Saund. & M.	...	Saunders and Macrae's County Courts and Insolvency Cases (County Courts Cases and Appeals, Vols. II. and III.), 2 vols., 1852—1858	Eng.
Sav.	...	Savile's Reports, Common Pleas, fol., 1 vol., 1580—1591	Eng.
Say.	...	Sayer's Reports, King's Bench, fol., 1 vol., 1751—1756	Eng.
Sc. Jur.	...	Scottish Jurist, 16 vols., 1829—1873	Scot.
Sc. L. R.	...	Scottish Law Reporter, 61 vols., 1865—1921	Scot.
Sc. R. R.	...	Scots Revised Reports	Scot.
Sch. & Lef.	...	Schoales and Lefroy's Reports, Chancery (Ireland), 2 vols., 1802—1806	Ir.
Scott	...	Scott's Reports, Common Pleas, 8 vols., 1834—1840	Eng.
Scott, N. R.	...	Scott's New Reports, Common Pleas, 8 vols., 1840—1845	Eng.
Sea. & Sm.	...	Searle and Smith's Reports, Probate and Divorce, 1 vol., 1859—1860	Eng.
Sel. Cas. Ch.	...	Select Cases in Chancery, fol., 1 vol., 1685—1698 (Pt. III. of Cas. in Ch.)	Eng.
Selwyn's N. P.	...	Selwyn's Abridgement of the Law of Nisi Prius	Eng.
Sess. Cas. K. B.	...	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1717	Eng.
Sett. & Rem.	...	Cases adjudged in K. B. concerning Settlements & Removals, 1 vol., 1685—1727	Eng.
Sh. (Ct. of Sess.)	...	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols., 1821—1838	Scot.
Sh. & Macd.	...	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols., 1835—1838	Scot.
Sh. Dig.	...	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1808	Scot.
Sh. Just.	...	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831	Scot.
Sh. Sc. App.	...	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824	Scot.
Sh. Teind Ct.	...	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831	Scot.
Shep. Touch.	...	Sheppard's Touchstone of Common Assurances	Eng.
Show.	...	Shower's Reports, King's Bench, 2 vols., 1678—1695	Eng.
Show. Parl. Cas.	...	Shower's Cases in Parliament, fol., 1 vol., 1694—1699	Eng.
Sid.	...	Siderfin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670	Eng.

Sim. ... ..	Simons' Reports, Chancery, 17 vols., 1826—1852 ... ..	Eng.
Sim. & St. ... ..	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826 ... ..	Eng.
Sim. N. S. ... ..	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852 ... ..	Eng.
Skin. ... ..	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697 ... ..	Eng.
Sm. & Bat. ... ..	Smith and Batty's Reports, King's Bench (Ireland), 1 vol., 1824—1825 ... ..	Ir.
Sm. & G. ... ..	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857 ... ..	Eng.
Smith, K. B. ... ..	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806 ... ..	Eng.
Smith, L. C. ... ..	Smith's Leading Cases, 2 vols. ... ..	Eng.
Smith, Reg. Cas. ... ..	C. L. Smith's Registration Cases, 1895—(current) ... ..	Eng.
Smythe ... ..	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1830—1840 ... ..	Ir.
Sol. Jo. ... ..	Solicitors' Journal, 1856—(current) ... ..	Eng.
Spence ... ..	Spence's Equitable Jurisdiction of the Court of Chancery ... ..	Eng.
Spinks ... ..	Spinks' Prize Court Cases, 2 parts, 1854—1856 ... ..	Eng.
St. R. Qd. (preceded by date) ... ..	Queensland State Reports, since 1902 ( <i>e.g.</i> , [1902] St. R. Qd.) ... ..	Aus.
Stair Rep. ... ..	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1661—1681 ... ..	Scot.
Stark. ... ..	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823 ... ..	Eng.
State Tr. ... ..	State Trials, 34 vols., 1163—1820 ... ..	Eng.
State Tr. N. S. ... ..	State Trials, New Series, 8 vols., 1820—1858 ... ..	Eng.
Stewart ... ..	Stewart's Nova Scotia Admiralty Reports, 1803—1813 ... ..	Can.
Stockton ... ..	Stockton's Vice-Admiralty Report and Digest ... ..	Can.
Story ... ..	Story's Commentaries on Equity Jurisprudence ... ..	Eng.
Stra. ... ..	Strange's Reports, 2 vols., 1710—1717 ... ..	Eng.
Stu. M. & P. ... ..	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—1853 ... ..	Scot.
Stuart ... ..	Sessions Cases (Stuart) ... ..	Scot.
Stuart, Adm. ... ..	Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856 ... ..	Can.
Stuart, Adm. N. S. ... ..	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859—1874 ... ..	Can.
Stuart, K. B. ... ..	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835 ... ..	Can.
Sty. ... ..	Style's Reports, King's Bench, fol., 1 vol., 1646—1655 ... ..	Eng.
Sw. ... ..	Swabe's Report, Admiralty, 1 vol., 1855—1859 ... ..	Eng.
Sw. & Tr. ... ..	Swabe and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865 ... ..	Eng.
Swan. ... ..	Swanston's Reports, Chancery, 3 vols., 1818—1821 ... ..	Eng.
Swin. ... ..	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841 ... ..	Scot.
Syme ... ..	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829 ... ..	Scot.
T. & M. ... ..	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851 ... ..	Eng.
T. H. ... ..	Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909 ... ..	S. Af.
T. Jo. ... ..	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685 ... ..	Eng.
T. L. ... ..	Reports of the Witwatersrand High Court (Transvaal Colony), 1910—(current) ... ..	S. Af.
T. L. R. ... ..	The Times Law Reports, 1884—(current) ... ..	Eng.
T. P. ... ..	Reports of the Supreme Court of the Transvaal, 1910—(current) ... ..	S. Af.
T. P. D. ... ..	South African Law Reports, Transvaal Provincial Division ... ..	S. Af.
T. Raym. ... ..	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—1683 ... ..	Eng.
T. S. ... ..	Reports of the Supreme Court of the Transvaal, 1902—1909 ... ..	S. Af.
Taml. ... ..	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830 ... ..	Eng.
Tas. L. R. ... ..	Tasmanian Law Reports ... ..	Aus.
Taunt. ... ..	Taunton's Reports, Common Pleas, 8 vols., 1807—1819 ... ..	Eng.
Tax Cas. ... ..	Tax Cases, 1875—(current) ... ..	Eng.
Tay. ... ..	Taylor's King's Bench Reports ... ..	Can.
Temp. Wood ... ..	Manitoba Reports <i>temp.</i> Wood ... ..	Can.
Term Rep. ... ..	Term Reports (Durnford and East), fol., 8 vols., 1785—1800 ... ..	Eng.
Terr. L. R. ... ..	Territories Law Reports ... ..	Can.
Thom. ... ..	Nova Scotia Reports (Thomson) ... ..	Can.
Toth. ... ..	Tothill's Transactions in Chancery, 1 vol., 1559—1616 ... ..	Eng.
Town St. Tr. ... ..	Townsend, Modern State Trials ... ..	Eng.
Trem. P. C. ... ..	Tremaine Pleas of the Crown, 1 vol., 1667 ... ..	Eng.
Trist. ... ..	Tristram's Consistory Judgments, 1 vol., 1872—1890 ... ..	Eng.
Tru. ... ..	New Brunswick Reports (Trueman) ... ..	Can.
Tudor, L. C. Merc. Law. ... ..	Tudor's Leading Cases on Mercantile and Maritime Law ... ..	Eng.
Tudor, L. C. Real Prop. ... ..	Tudor's Leading Cases on Real Property ... ..	Eng.
Turn. & R. ... ..	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825 ... ..	Eng.
Tyr. ... ..	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835 ... ..	Eng.
Tyr. & Gr. ... ..	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836 ... ..	Eng.
U. C. Jur. ... ..	Upper Canada Jurist ... ..	Can.
U. C. L. J. N. S. ... ..	Canada Law Journal, New Series, 1865—(current) ... ..	Can.

# xxxviii    REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

U. C. I. J. O. S. ...	Canada Law Journal, Old Series, 10 vols., 1855—1864 ...	Can.
U. C. R. ...	Upper Canada Reports, Queen's Bench ...	Can.
Udal ...	Fiji Law Reports (Udal) ...	Fiji.
V. L. R. ...	Victorian Law Reports ...	Aus.
V. R. ...	Victorian Reports ...	Aus.
V. R. (Adm.) ...	Victorian Reports (Admiralty) ...	Aus.
V. R. (Eq.) ...	Victorian Reports (Equity) ...	Aus.
V. R. (Law) ...	Victorian Reports (Law) ...	Aus.
Vaugh. ...	Vaughan's Reports, Common Pleas, fol. 1 vol., 1666—1673 ...	Eng.
Vent. ...	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol. 2 vols., 1668—1691 ...	Eng.
Vern. ...	Vernon's Reports, Chancery, 2 vols., 1680—1719 ...	Eng.
Vern. & Scr. ...	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788 ...	Ir.
Ves. ...	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817 ...	Eng.
Ves. & B. ...	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1811 ...	Eng.
Ves. Sen. ...	Vesey Sen.'s Reports, 2 vols., 1747—1756 ...	Eng.
Vin. Abr. ...	Viner's Abridgment of Law and Equity, fol., 22 vols. ...	Eng.
Vin. Supp. ...	Supplement to Viner's Abridgment of Law and Equity, 6 vols. ...	Eng.
W. ...	Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857 ...	S. Af.
W. A. L. R. ...	West Australian Law Reports ...	Aus.
W. A'B. & W. ...	Webb, A'Beckett and Williams' Victorian Reports ...	Aus.
W. & W. ...	Wyatt and Webb ...	Aus.
W. C. C. ...	Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—1907 ...	Eng.
W. H. C. ...	South African Law Reports, Witwatersrand High Court ...	S. Af.
W. Jo. ...	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640 ...	Eng.
W. L. D. ...	South African Law Reports, Witwatersrand Local Division ...	S. Af.
W. L. R. ...	Western Law Reporter ...	Can.
W. L. T. ...	Western Law Times ...	Can.
W. N. (preceded by date) ...	Law Reports, Weekly Notes, 1866— (current) (e.g., [1866] W. N.) ...	Eng.
W. N. ...	Calcutta Weekly Notes ...	Ind.
W. R. ...	Weekly Reporter, 51 vols., 1852—1906 ...	Eng.
W. R. ...	Sutherland's Weekly Reporter ...	Ind.
W. R. ...	Weekly Reporter, reporting cases in the Cape Provincial Division ...	S. Af.
W. W. & A'B. ...	Wyatt, Webb and A'Beckett ...	Aus.
W. W. R. ...	Western Weekly Reports ...	Can.
Wallis by Lyne ...	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791 ...	Ir.
Web. Pat. Cas. ...	Webster's Patent Cases, 2 vols., 1602—1855 ...	Eng.
Welsh, Reg. Cas. ...	Welsh's Registry Cases (Ireland), 1 vol., 1832—1840 ...	Ir.
Went. Off. Ex. ...	Wentworth's Office and Duty of Executors ...	Eng.
West ...	West's Reports, House of Lords, 1 vol., 1839—1841 ...	Eng.
West temp. Hard. ...	West's Reports temp. Hardwicke, Chancery, 1 vol., 1736—1740 ...	Eng.
West. Tithe Cas. ...	Western's London Tithe Cases, 1 vol., 1592—1822 ...	Eng.
White ...	White's Justiciary Reports (Scotland), 3 vols., 1886—1893 ...	Scot.
White & Tud. L. C. ...	White and Tudor's Leading Cases in Equity, 2 vols. ...	Eng.
Wight ...	Wightwick's Reports, Exchequer, 1 vol., 1810—1811 ...	Eng.
Will. Woll. & Dav. ...	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837 ...	Eng.
Will. Woll. & H. ...	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839 ...	Eng.
Willes ...	Willes' Reports, Common Pleas, 1 vol., 1737—1758 ...	Eng.
Wilm. ...	Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770 ...	Eng.
Wils. ...	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1712—1771 ...	Eng.
Wils. & S. ...	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835 ...	Scot.
Wils. Ch. ...	J. Wilson's Reports, Chancery, 2 vols., 1818—1819 ...	Eng.
Wils. Ex. ...	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817 ...	Eng.
Win. ...	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625 ...	Eng.
Wm. Bl. ...	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1746—1779 ...	Eng.
Wm. Rob. ...	William Robinson's Reports, Admiralty, 3 vols., 1838—1850 ...	Eng.
Wms. Saund. ...	Williams' Notes to Saunders' Reports, 2 vols. ...	Eng.
Wolf. & B. ...	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1861 ...	Eng.
Wolf. & D. ...	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858 ...	Eng.
Woll. ...	Wollaston's Reports, Bail Court and Practice, 1 vol., 1810—1811 ...	Eng.
Wood ...	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1798 ...	Eng.
Y. A. D. ...	Young's Vice-Admiralty Reports ...	Can.



Y. & C. Ch. Cas.	...	...	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841--1843	...	...	...	...	...	Eng.
Y. & C. Ex.	...	...	Younge and Collyer's Reports, Exchequer in Equity, 4 vols., 1833--1841	...	...	...	...	...	Eng.
Y. & J.	...	...	Younge and Jervis' Reports, Exchequer, 3 vols., 1826--1830	...	...	...	...	...	Eng.
Y. B.	...	...	Year Books	...	...	...	...	...	Eng.
Y. B. (Rolls Series)	...	...	Year Books (Rolls Series)	...	...	...	...	...	Eng.
Y. B. (Sel. Soc.)	...	...	Year Books (Selden Society)	...	...	...	...	...	Eng.
Yelv.	...	...	Yelverton's Reports, King's Bench, fol., 1 vol., 1602--1613	...	...	...	...	...	Eng.
You.	...	...	Younge's Reports, Exchequer in Equity, 1 vol., 1830--1832	...	...	...	...	...	Eng.



# ABBREVIATIONS

## USED IN THIS WORK.

(For Abbreviations used in citing Reports, *see* pp. xxiii—xxxix, *ante*.)

A.-G.	.	.	.	.	.	for Attorney-General.
Act.	.	.	.	.	.	„ Actiengesellschaft.
Admlty.	.	.	.	.	.	„ Admiralty.
Affd.	.	.	.	.	.	„ Affirmed.
Affg.	.	.	.	.	.	„ Affirming.
Akt.	.	.	.	.	.	„ Aktiengesellschaft ; Aktiebolaget ; Aktieselskabet.
Alta.	.	.	.	.	.	„ Alberta.
Anon.	.	.	.	.	.	„ Anonymous.
Apld.	.	.	.	.	.	„ Applied.
Appet.	.	.	.	.	.	„ Applicant.
Appln.	.	.	.	.	.	„ Application.
Appln.	.	.	.	.	.	„ Application to Register a Trade Mark.
Applt.	.	.	.	.	.	„ Appellant.
Apprvd.	.	.	.	.	.	„ Approved.
Arbn.	.	.	.	.	.	„ Arbitration.
Archbp.	.	.	.	.	.	„ Archbishop.
Art.	.	.	.	.	.	„ Article.
Ass. Tax Case	.	.	.	.	.	„ Assessed Tax Case.
Assce.	.	.	.	.	.	„ Assurance.
Asscn.	.	.	.	.	.	„ Association.
B. C.	.	.	.	.	.	„ Borough Council.
B. C.	.	.	.	.	.	„ British Columbia.
Bkpcy.	.	.	.	.	.	„ Bankruptcy.
Bkpt.	.	.	.	.	.	„ Bankrupt.
Bldg. Soc.	.	.	.	.	.	„ Building Society.
Bp.	.	.	.	.	.	„ Bishop.
C. A.	.	.	.	.	.	„ Court of Appeal.
C. & S. L. Ry. Co.	.	.	.	.	.	„ City & South London Railway Co.
C. C. A.	.	.	.	.	.	„ Court of Criminal Appeal
C. C. R.	.	.	.	.	.	„ County Court Rules.
C. C. R.	.	.	.	.	.	„ Court of Crown Cases Reserved.
C. L. P. Act.	.	.	.	.	.	„ Common Law Procedure Act.
C. L. Ry. Co.	.	.	.	.	.	„ Central London Railway Co.
C. O. R.	.	.	.	.	.	„ Crown Office Rules.
C. S. U. C.	.	.	.	.	.	„ Consolidated Statutes of Upper Canada.
Ca. sa.	.	.	.	.	.	„ <i>Capias ad satisfaciendum</i> .
Cale. Ry. Co.	.	.	.	.	.	„ Caledonian Railway Co.
Ch.	.	.	.	.	.	„ Chancery.
Ch. Div.	.	.	.	.	.	„ Chancery Division.
Co.	.	.	.	.	.	„ Company
Co-op. Asscn.	.	.	.	.	.	„ Co-operative Supply Association.
Comrs.	.	.	.	.	.	„ Commissioners.
Consd.	.	.	.	.	.	„ Considered.
Corpn.	.	.	.	.	.	„ Corporation.
Ct.	.	.	.	.	.	„ Court.
Ct. of Ch.	.	.	.	.	.	„ Court of Chancery.
Ct. of Eq.	.	.	.	.	.	„ Court of Equity.
Ct. of R.	.	.	.	.	.	„ Court of Review.
D. C.	.	.	.	.	.	„ Divisional Court.
Dbtd.	.	.	.	.	.	„ Doubted.

Deft. . . . .	for Defendant.
Distd. . . . .	„ Distinguished.
Div. Ct. . . . .	„ Divisional Court.
Eccl. Comrs. . . . .	„ Ecclesiastical Commissioners.
Eccl. Ct. . . . .	„ Ecclesiastical Court.
Ex. Ch. . . . .	„ Exchequer Chamber.
<i>Ex p.</i> . . . . .	„ <i>Ex parte</i> .
Exch. . . . .	„ Exchequer.
Exor. . . . .	„ Executor.
Exorship. . . . .	„ Executorship.
Expld. . . . .	„ Explained.
Ext'd. . . . .	„ Extended.
Extrix. . . . .	„ Executrix.
<i>Fi. fa.</i> . . . . .	„ <i>Fieri facias</i> .
Foll'd. . . . .	„ Followed.
G. & S. W. Ry. Co. . . . .	„ Glasgow & South Western Railway Co.
G. C. Ry. Co. . . . .	„ Great Central Railway Co.
G. E. Ry. Co. . . . .	„ Great Eastern Railway Co.
G. N. of Scotland Ry. Co. . . . .	„ Great North of Scotland Railway Co.
G. N. Picc. & Brompton Ry. Co. . . . .	„ Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co. . . . .	„ Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland . . . . .	„ Great Southern & Western Railway Co. of Ireland.
G. W. Ry. Co. . . . .	„ Great Western Railway Co.
Govt. . . . .	„ Government.
Grdns. . . . .	„ Guardians or Guardians of the Poor.
H. C. of A. . . . .	„ High Court of Australia.
H. L. . . . .	„ House of Lords.
I. R. Comrs . . . . .	„ Inland Revenue Commissioners.
Insee. . . . .	„ Insurance.
JJ. . . . .	„ Justices.
Jud. Act . . . . .	„ Judicature Act.
K. B. Div. . . . .	„ King's Bench Division.
L. & B. Ry. Co. . . . .	„ London & Brighton Railway Co.
L. & N. E. Ry. Co. . . . .	„ London & North Eastern Railway Co.
L. & N. W. Ry. Co. . . . .	„ London & North Western Railway Co.
L. & S. W. Ry. Co. . . . .	„ London & South Western Railway Co.
L. & Y. Ry. Co. . . . .	„ Lancashire & Yorkshire Railway Co.
L. B. . . . .	„ Local Board.
L. B. & S. C. Ry. Co. . . . .	„ London, Brighton & South Coast Railway Co.
L. C. . . . .	„ Lord Chancellor.
L. C. & D. Ry. Co. . . . .	„ London, Chatham & Dover Railway Co.
L. C. C. . . . .	„ London County Council.
L. Elec. Ry. Co. . . . .	„ London Electric Railway Co.
L. G. Board . . . . .	„ Local Government Board.
L.J. . . . .	„ Lord Justice.
L.JJ. . . . .	„ Lords Justices.
L. M. & S. Ry. Co. . . . .	„ London, Midland & Scottish Railway Co.
L. T. & S. Ry. Co. . . . .	„ London, Tilbury & Southend Railway Co.
M. S. Act . . . . .	„ Merchant Shipping Act.
M. S. & L. Ry. Co. . . . .	„ Manchester, Sheffield & Lincolnshire Railway Co.
Mags. . . . .	„ Magistrates.
Man. . . . .	„ Manitoba.
Mentd. . . . .	„ Mentioned.
Met. Dist. Ry. Co. . . . .	„ Metropolitan District Railway Co.
Met. Ry. Co. . . . .	„ Metropolitan Railway Co.
Mid. G. W. Ry. Co. . . . .	„ Midland Great Western Railway Co.
Mid. Ry. Co. . . . .	„ Midland Railway Co.
Mtge. . . . .	„ Mortgage.
Mtgee. . . . .	„ Mortgagee.
Mtgor. . . . .	„ Mortgagor.
N. B. . . . .	„ New Brunswick.
N. B. Ry. Co. . . . .	„ North British Railway Co.
N. E. Ry. Co. . . . .	„ North Eastern Railway Co.
N. F. . . . .	„ Not Followed.
N. P. . . . .	„ Nisi Prius.

N. S.	.	.	.	.	for Nova Scotia.
N. W. P.	.	.	.	.	„ North-West Provinces.
N. W. T.	.	.	.	.	„ North-West Territories.
Ont.	.	.	.	.	„ Ontario.
Ord.	.	.	.	.	„ Order.
Overd.	.	.	.	.	„ Overruled.
P. C.	.	.	.	.	„ Privy Council.
P. E. I.	.	.	.	.	„ Prince Edward Island.
Petn.	.	.	.	.	„ Petition or Election Petition.
Pltf.	.	.	.	.	„ Plaintiff.
Q. B. Div.	.	.	.	.	„ Queen's Bench Division.
Qu.	.	.	.	.	„ <i>Quarre</i> .
Que.	.	.	.	.	„ Quebec.
R. C.	.	.	.	.	„ Rural Council.
R. D. C.	.	.	.	.	„ Rural District Council
R. S. A.	.	.	.	.	„ Rural Sanitary Authority.
R. S. C.	.	.	.	.	„ Revised Statutes of Canada.
R. S. C.	.	.	.	.	„ Rules of the Supreme Court, 1883.
Refd.	.	.	.	.	„ Referred.
Regn. of Trade Mk.	.	.	.	.	„ Registration of Trade Mark.
Regr. of Trade Mks.	.	.	.	.	„ Registrar of Trade Marks.
Resp.	.	.	.	.	„ Respondent.
Restg.	.	.	.	.	„ Restoring.
Revsd.	.	.	.	.	„ Reversed.
Revsg.	.	.	.	.	„ Reversing.
Ry. Co.	.	.	.	.	„ Rail. Co. or Railway Co.
.	.	.	.	.	„ Same Case.
S. C. (name of colony following)	.	.	.	.	„ Supreme Court of a Colony.
S. E.	.	.	.	.	„ Settled Estates.
S. E. & C. Ry. Co.	.	.	.	.	„ South Eastern & Chatham Railway Co.
S. E. Ry. Co.	.	.	.	.	„ South Eastern Railway Co.
S. P.	.	.	.	.	„ Same Point.
S.S.	.	.	.	.	„ Steamship.
Sask.	.	.	.	.	„ Saskatchewan.
Sched.	.	.	.	.	„ Schedule.
<i>Sci. fa.</i>	.	.	.	.	„ <i>Scire facius</i> .
Sect.	.	.	.	.	„ Section.
Set. Land Act	.	.	.	.	„ Settled Land Act.
Settlmt.	.	.	.	.	„ Settlement.
Soc.	.	.	.	.	„ Society
Soc. Anon.	.	.	.	.	„ Société Anonyme, etc.
Solr.	.	.	.	.	„ Solicitor.
Trade Mk.	.	.	.	.	„ Trade Mark.
Tram. Co.	.	.	.	.	„ Tramways Company.
U. C.	.	.	.	.	„ Urban Council.
U. D. C.	.	.	.	.	„ Urban District Council.
U. S. A.	.	.	.	.	„ United States of America.
Union Assmt. Com.	.	.	.	.	„ Union Assessment Committee.
Urban S. A.	.	.	.	.	„ Urban Sanitary Authority.
V.-C.	.	.	.	.	„ Vice-Chancellor.
Workmen's Comp. Act	.	.	.	.	„ Workmen's Compensation Act.
Y. T.	.	.	.	.	„ Yukon Territory.



## MEANING OF TERMS

### USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases, except such as are classified as "Mentioned," are grouped according to the points in the case which they annotate: within these groups they are listed chronologically, except such as are classified as "Referred to," which come at the end of the group and are arranged *inter se* in chronological order. Cases which annotate the annotated case generally are grouped together after cases which annotate specific points, similarly arranged, and are followed by cases classified as "Mentioned" arranged chronologically *inter se*. The terms used in classifying the annotating cases are as follows:—

- "APPLIED" (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.
- "APPROVED" (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.
- "CONSIDERED" (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.
- "DISTINGUISHED" (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.
- "DOUBTED" (Dbtd.).—This expression is used where the court in the annotating case without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.
- "EXPLAINED" (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.
- "EXTENDED" (Extld.).—Compare "APPLIED," *supra*.
- "FOLLOWED" (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.
- "NOT FOLLOWED" (N.F.).—Compare "FOLLOWED," *supra*, to which it is the adverse.
- "OVERRULED" (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.
- "REFERRED" (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.
- "MENTIONED" (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.





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<i>Passing Off</i> . . . . .	.. TRADE MARKS, TRADE NAMES, AND DESIGNS.		

## Part I.—Definitions.

### SECT. 1.—"TRADE."

1. **Operations of a commercial character.**—We may reasonably say that it [the word "trade"] was intended to embrace a great variety of different operations, though all of a commercial character, something therefore like a warehouse, like a shop, like a counting house (KELLY, C.B.).

It was never the intention of the legislature so to limit the meaning of the word "trade" [to the business of buying & selling] (KELLY, C.B.).

No doubt the word "trade" was originally there [in the Bkpey. Acts] intended as applying only to persons who either bought or sold, or whose business was immediately cognate to the buying or selling of goods, but even then we find from time to time the words used in a much wider sense (POLLOCK, B.).—CHARTERED MERCANTILE BANK OF INDIA, LONDON & CHINA v. WILSON (1877),

3 Ex. D. 108 ; 17 L. J. Q. B. 153 ; 38 L. T. 254 ; 1 Tax Cas. 179.

*Annotation* :—**Mentd.** Chapman v. Royal Bank of Scotland (1881), 1 Tax Cas. 363.

2. **Whether limited to buying & selling.**—DOE d. WETHERELL v. BIRD, No. 12, *post*.

3. —.—]—HARRIS v. AMERY, No. 23, *post*.

4. —.—]—CHARTERED MERCANTILE BANK OF INDIA, LONDON & CHINA v. WILSON, No. 1, *ante*.

5. —.—]—[A tradesman denotes] "a person carrying on a trade, buying & selling, & a barber does not come within that description (CHANNELL, J.).—PALMER v. SNOW, [1900] 1 Q. B. 725 ; 69 L. J. Q. B. 356 ; 82 L. T. 199 ; 64 J. P. 342 ; 48 W. R. 351 ; 16 T. L. R. 168 ; 44 Sol. Jo. 211 ; 19 Cox, C. C. 475, D. C.

6. —.—]—A trading business is one which

Sect. 1.—“Trade.” Sects. 2 & 3: Sub-sects. 1 & 2.]

involves the purchase & the sale of goods (LUSH, J.).—HIGGINS v. BEAUCHAMP, [1914] 3 K. B. 1192; 84 L. J. K. B. 631; 111 L. T. 1103; 30 T. L. R. 687, D. C.

7. — With view to profit.]—The definition of the mere word “trade” does not necessarily mean something by which a profit is made (LORD COLERIDGE, C.J.).—*Re DUTY ON ESTATE OF INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND & WALES* (1888), 22 Q. B. D. 279; 58 L. J. Q. B. 90; 60 L. T. 505; *sub nom.* INLAND REVENUE COMRS. v. INCORPORATED COUNCIL OF LAW REPORTING, 3 Tax Cas. 105, D. C.

Annotations:—*Reid*, British Institute of Preventive Medicine v. Styles (1895), 11 T. L. R. 432; Brighton College v. Marriott (No. 1), [1926] A. C. 192; Skinner v. Breach, [1927] 2 K. B. 220.

8. — — — — — There can be no definition of the words “exercising a trade.” It is only another mode of expressing “carrying on a business”; but it certainly carries with it the meaning that the business or trade must be habitually or systematically exercised, & that it cannot apply to isolated transactions (LORD MORRIS).

How does a wine merchant exercise his trade? I take it, by making or buying wine & selling it again, with a view to profit (LORD HERSHELL).—GRAINGER & SON v. GOUGH, [1896] A. C. 325; 65 L. J. Q. B. 410; 71 L. T. 435; 60 J. P. 692; 44 W. R. 561; 12 T. L. R. 361; 3 Tax Cas. 162, H. L.

Annotations:—*Consol.* Crookston v. Furtado (1910), 5 Tax Cas. 602; Smith v. Greenwood, [1921] 3 K. B. 583. *Reid*, La Bourgogne (1898), 68 L. J. P. 9; Taxation Comrs. v. Kirk, [1900] A. C. 588; Badische Anilin und Soda Fabrik v. Thompson (1902), 88 L. T. 192, n.; Scott v. Solomon, [1905] 1 K. B. 577; Kirkwood v. Gadd, [1910] A. C. 122; Egyptian Hotels v. Mitchell, [1914] 3 K. B. 418; Greenwood v. Smith, [1922] 1 A. C. 417; Wilcock v. Pinto, [1925] 1 K. B. 30; Belfour v. Mace (1927), 138 L. T. 338. *Mentd.* *Re* Watson & Sandie & Hull (1897), 14 T. L. R. 124; Turner (Leicester) (for Revere Rubber Co.) v. Rickman (1898), 4 Tax Cas. 25; Stephenson v. Rogers (1899), 80 L. T. 193; Lovell & Christmas v. Taxation Comrs., [1908] A. C. 46; Weiss, Biheller & Brooks v. Farmer, [1923] 1 K. B. 226; Sales v. Atlanta S.S. Co. of Copenhagen (1925), 134 L. T. 411; MacLaine v. Ecoffit, [1926] A. C. 424; Tarn v. Seoulen, Nielsen, Andersen v. Collins, Muller (London) v. Lethem, Same v. I. R. Comrs., [1928] A. C. 34.

— — — — — Compare No. 29, *post*.

9. — May include manufacturing.] The word “trade” no doubt primarily means traffic by way of sale or exchange or commercial dealing, but may have a larger meaning so as to include manufactures (*per Cur.*).—TAXATION COMRS. v. KIRK, [1900] A. C. 588; 69 L. J. P. C. 87; 83 L. T. 4, P. C.

For purposes of income tax.]—*See* INCOME TAX, Vol. XXXVIII., pp. 22–24, Nos. 108–127.

For purpose of National Health Insurance Act.]—*See* WORK & LABOUR.

Who are traders.]—*See* Sect. 3, sub-sect. 2, *post*.

## SECT. 2.—“BUSINESS.”

10. Occupation as distinguished from pleasure.]—(1) It is not essential that there should be payment in order to constitute a business; nor does payment necessarily make that a business which without payment would not be a business.

(2) The word [“business”] means almost anything which is an occupation, as distinguished from a pleasure—anything which is an occupation or duty which requires attention is a business (LINDLEY, L.J.).—ROLLS v. MILLER (1884), 27

Ch. D. 71; 53 L. J. Ch. 682; 50 L. T. 597; 32 W. R. 806, C. A.

Annotations:—*As to* (1) *Apld.* Barnard Castle U. C. v. Wilson, [1901] 2 Ch. 813. *Consol.* South-West Suburban Water Co. v. St. Marylebone Union, [1904] 2 K. B. 174; *Re* A Debtor, [1927] 1 Ch. 97. *Reid*, Tod-Healdy v. Benham (1888), 59 L. T. 25; Withington District L. B. of Health v. Manchester Corpn. (1893), 68 L. T. 330; Tompkins v. Rogers, [1887] 2 K. B. 94. *Generally*, *Mentd.* Tritton v. Bankart (1887), 56 L. T. 306; Wiltshire v. Cosslett (1889), 6 T. L. R. 410.

11. Whether payment essential.]—ROLLS v. MILLER, No. 10, *ante*.

12. Not synonymous with trade—Unless conducted by buying & selling.]—Every trade is a business, but every business is not a trade; to answer that description it must be conducted by buying & selling (LORD DENMAN, C.J.).—*Doe* d. WETHERELL v. BIRD (1834), 2 Ad. & El. 161; 4 Nev. & M. K. B. 285; 4 L. J. K. B. 52; 111 E. R. 63.

13. — — — Wider application than trade.]—HARRIS v. AMERY, No. 23, *post*. Compare Sect. 1, *ante*.

Exercise of trade or business.]—*See* Sect. 3, *post*.

## SECT. 3.—EXERCISE OF TRADE OR BUSINESS.

### SUB-SECT. 1.—IN GENERAL.

14. What amounts to—Whether isolated act sufficient.]—It is true that if a person carrying on a particular business does a single isolated preliminary first act in that business he is carrying it on (BUCKLEY, L.J.).—A-G. v. PLYMOUTH CORPN. (1909), 100 L. T. 712; 73 J. P. 271; 7 L. G. R. 710, C. A.

15. — — — — — GRAINGER & SON v. GOUGH, No. 8, *ante*.

— — — — — Compare BANKRUPTCY, Vol. IV., p. 17, Nos. 78, 79; FOOD & DRUGS, Vol. XXV., p. 126, Nos. 471, 475; MONEY & MONEY-LENDING, Vol. XXXV., pp. 202, 203, 207, Nos. 282, 291, 321, 327.

16. — — — — — Exercise for public.]—It is not properly said that one uses a manual occupation when he makes no more than for himself, as he who brews or bakes for his own use (*per Cur.*).—CITY OF LONDON CASE (1610), 8 Co. Rep. 121 b; 77 E. R. 658.

Annotations:—*Reid*, Fernor v. Brooke (1591), Cro. Eliz. 203; Hutchins v. Player (1663), O. Bridg. 272; R. v. Kilditch (1669), 1 Saund. 311; Thomas v. Sorrel (1673), 3 Keb. 223; Merchants Adventurers v. Ichow (1686), Comb. 34; R. v. Prew (1708), 11 Mod. Rep. 189; Mitchell v. Reynolds (1711), 1 P. Wms. 181; Pary v. Berry (1717), 1 Com. 269; Chamberlain of London v. Compton (1825), 4 L. J. O. S. K. B. 49. *Mentd.* Dublin Corpn. Case (1620), Palm. 1; Langham's Case (1642), March. 179; Greenwell v. Burwell (1699), 1 Ld. Raym. 151; London City v. Vanaecker (1699), 1 Ld. Raym. 496; London City v. Wood (1701), 12 Mod. Rep. 669; Winton v. Wilks (1705), 2 Ld. Raym. 1129; Cotton v. Davies (1717), 1 Stra. 53; Broadbent v. Wilks (1712), Willes, 360; Clark v. Denton (1830), 1 B. & Ad. 92; Reynolds v. Burford (1814), 2 Dow. & L. 327; Cox v. Hakes (1890), 15 App. Cas. 506; Kruse v. Johnson, [1898] 2 Q. B. 91; Secretary of State for Home Affairs v. O'Brien, [1923] A. C. 603.

17. — — — — — The law . . . forbids no man to use any trade privately, as to be a tailor in my house or the like, for that is not a trade, but a service (*per Cur.*).—NORRIS v. STAPS (1616), as reported in Hob. 210; 80 E. R. 357.

Annotations:—*Reid*, Winton Corpn. v. Wilks (1705), 2 Ld. Raym. 1129; Mitchell v. Reynolds (1711), 1 P. Wms. 181; Pary v. Berry (1717), 1 Com. 269. *Mentd.* London City v. Vanaecker (1699), 1 Ld. Raym. 496; R. v. Westwood (1830), 7 Bing. 1; R. v. Darlington School (1816), 6 Q. B. 682; Gosling v. Voley (1847), 7 Q. B. 406.

18. — — — — — Exercise as master.]—If a man employ workmen in his own house . . . it is an exercising of the trade.—HOBBS v. YOUNG (1691), 3 Mod. Rep. 313; Carth. 102; Comb. 179; Holt,

K. B. 66; 2 Salk. 610; 1 Show. 241, 206; 87 E. R. 206.

*Annotations: Refd.* Raynard v. Chase (1756), 1 Burr. 2; Keot v. Dormy (1812), 15 East, 161; Shaw v. Poynter (1834), 3 L. J. K. B. 110.

— **For purpose of restraint of trade.**—*See* Part IV., *post*.

— **For purpose of restrictive covenants in leases.**—*See* LANDLORD & TENANT, Vol. XXXI., pp. 159-161, Nos. 2918-2906.

— **For purpose of restrictive covenants on conveyance.**—*See* SALE OF LAND, Vol. XL., pp. 321-326, Nos. 2722-2752.

**19. Where trade or business is carried on.—Meaning of—Question of fact.**—“Where the trade is carried on” may mean where the goods in respect of which trading is carried on are conveyed, made, bought or sold; or, speaking of land, where it is cultivated or used for any other purpose of profit. That makes the locality of the goods or the land which are the subjects of the trade to be in a certain sense the place where the trade is carried on, because it is the place where the things corporeally exist or are dealt with. But there is another sense, in which the conduct & management, the head & brain of the trading adventure, are situated in a place different from that in which the corporeal subjects of trading are to be found. It becomes therefore a question of fact (*LORD HALSBURY, C.*)—*SAN PAULO (BRAZILIAN) RY. Co. v. CARTER*, [1896] A. C. 31; 65 L. J. Q. B. 161; 73 L. T. 538; 60 J. P. 81, 452; 14 W. R. 336; 12 T. L. R. 107; 3 Tax Cas. 407, H. L.

*Annotations: Apd.* Adphorpe v. Peter Schoenhofen Brewing Co. (1899), 80 L. T. 395. *Consd.* R. v. Clarksell General Taxes Commr., [1901] 2 K. B. 879; De Beers Consolidated Mines v. Howe, [1905] 2 K. B. 612; Mitchell v. Egyptian Hotels, [1915] A. C. 1922. *Refd.* Grove v. Elliotts & Parkinson, Elliotts & Parkinson v. Grove (1896), 3 Tax Cas. 481; Taxation Commr. v. Kirk, [1900] A. C. 588; Kodak v. Clark, [1902] 2 K. B. 450; Goetz v. Bell, [1901] 2 K. B. 136; Ogilvie v. Kitton (1908), 5 Tax Cas. 338; American Thread Co. v. Joyce (1912), 106 L. T. 171; Liverpool & London & Globe Insco. v. Bennett, Blyce v. Northern Assoc., Blyce v. Ocean Accident & Guarantee Corp., [1912] 2 K. B. 11; Hood v. Magee (1918), 7 Tax Cas. 327; Bradbury v. English Sewing Cotton Co., [1922] 2 K. B. 569; Swedish Central Ry. v. Thompson, [1925] A. C. 495; Egyptian Delta Land & Investment Co. v. Todd (1928), 14 T. L. R. 747. *Mentd.* Gresham Life Assoc. Soc. v. Bishop (1902), 71 L. J. K. B. 618; Allianz Co. v. Bell, [1902] 1 K. B. 184; The Polzeath, [1916] P. 117; L. R. Commr. v. Sansom, [1921] 2 K. B. 492.

#### SUB-SECT. 2.—WHO ARE TRADERS.

**20. Actor.**—(1) The business of a travelling circus is not a trade.

(2) It is certain that no actor nor any person exhibiting like resp., gymnastic feats in public nor even the proprietor of a theatre would be a trader within the meaning of the Bkpey. Act now in force in any earlier Bkpey. Act (*KELLY, C.B.*)—*SPEAK v. POWELL* (1873), L. R. 9 Exch. 25; 43 L. J. M. C. 19; 29 L. T. 434; 38 J. P. 8.

**21. Auctioneer.**—Auctioneers do not carry on a “trade” so as to make one partner liable upon a bill of exchange accepted in the firm name by his co-partner without the knowledge or authority of the former.—*WHEATLEY v. SMITHIES*, [1906] 2 K. B. 321; 75 L. J. K. B. 627; 95 L. T. 96; 54 W. R. 537; 22 T. L. R. 591; 50 Sol. Jo. 513, D. C.; *reverd.* on other grounds, [1907] 2 K. B. 681, C. A.

*Annotation: Refd.* Higgins v. Beauchamp, [1911] 3 K. B. 1192.

**22. Banker.**—To an action of *assumpsit* by the indorsees against the indorser of a bill of exchange,

deft. pleaded that the bill was made & indorsed after the passing of 57 Geo. 3, c. 99, which restrains spiritual persons from being occupied in any trade or dealing that pfts. were a banking co., of which certain spiritual persons holding benefices were partners & members; that the trade or business of a banker was carried on by the said co-partnership for gains & profits as well of those spiritual persons as others, contrary to the form of the statute; whereby the indorsement & the promise in the declaration mentioned were void in law: *Held*: the plea was good, & the trade of a banker was within the meaning of the statute.—*HALL v. FRANKLIN* (1838), 3 M. & W. 259; 1 Horn & H. 8; 7 L. J. Ex. 110; 2 Jur. 97; 150 E. R. 1141.

*Annotation: Mentd.* Re London & Eastern Banking Corp., *Ex p. Longworth's Exors.* (1859), John. 465.

**23.** — (1) Banking is not strictly a trade (*WILLES, J.*).

(2) Farming & grazing . . . are businesses which have for their object the acquisition of gain (*ERLE, C.J.*).

(3) “Business” has a more extensive significance than “trade” . . . It was never doubted that farming was a “business” though not a “trade” (*WILLES, J.*).

(4) Trade has the technical meaning of buying & selling (*WILLES, J.*). *HARRIS v. AMERY* (1865), L. R. 1 C. P. 148; Hop. & Ph. 294; Har. & Ruth. 357; 35 L. J. C. P. 89; 13 L. T. 504; 30 J. P. 56; 12 Jur. N. S. 165; 14 W. R. 199.

*Annotations: As to (3) Consd.* Scott v. Solomon, [1905] 1 K. B. 477; Whalley v. Smithies, [1906] 2 K. B. 421.

*Refd.* Smith v. Anderson (1880), 13 Ch. D. 247; Kensington & Knightsbridge Electric Lighting Co. v. Notting Hill Electric Lighting Co. (1918), 87 L. J. K. B. 666; *As to (4) Refd.* Thorpe v. Parnall (1906), 60 J. P. 821. *Generally, Refd.* Womersley v. Merritt (1867), L. R. 4 Eq. 695; Dennis v. Hutchinson, Trafford v. Sams, [1922] 1 K. B. 693.

**24. Civil servant—Sub-postmaster.**—A sub-post office carried on with a chemist’s shop on premises is outside a covenant “Trading to be restricted to chemistry & druggists’ business & dentist or doctor” as the office of a sub-postmaster is a branch of the public service, in the nature of a monopoly, at a fixed remuneration, & cannot be said to be “trading.”—*FRAMPTON v. GILLISON*, [1927] 1 Ch. 196; 95 L. J. Ch. 555; 136 L. T. 600; 42 T. L. R. 749; 70 Sol. Jo. 965, C. A.

**25. Dancer.**—Dancing is no trade, but it may be called a profession (*per CUR.*).—*ROBINSON v. GROCOURT* (1695), 5 Mod. Rep. 104; 87 E. R. 547.

*Annotation: Refd.* R. v. Ludlam (1724), 8 Mod. Rep. 267.

**26. Farmer.**—*HARRIS v. AMERY*, No. 23, *ante*.

**27.** — “Farming is not a trade.”—*NASH v. HOLLINSHEAD*, [1901] 1 K. B. 700; 70 L. J. K. B. 571; 81 L. T. 483; 65 J. P. 357; 49 W. R. 421; 17 T. L. R. 352; 3 W. V. C. 125, C. A.

*Annotations: Consd.* Curtis v. Skinner (1906), 95 L. T. 31. *Refd.* Skinner v. Brach, [1927] 2 K. B. 220.

**28. Gymnast—Performer in public.**—*SPEAK v. POWELL*, No. 20, *ante*.

**29. Insurer—Fire insurance.**—[A point was raised] whether the business of insuring buildings against fire was a trade. This business, when carried on for the sake of profit, may, no doubt, in some sense of the word, be called a trade (*per CUR.*).—*CITIZENS INSURANCE CO. OF CANADA v. PARSONS*, *QUEEN INSURANCE CO. v. PARSONS* (1881), 7 App. Cas. 96; 51 L. J. P. C. 11; 45 L. T. 721, P. C.

*Annotations: Refd.* A.-G. for Ontario v. A.-G. for the Dominion, [1896] A. C. 318. *Mentd.* Dobie v. Temporality Board (1882), 7 App. Cas. 136; Russell v. R. (1882), 7 App. Cas. 829; Colonial Building & Investment Assoc.

#### PART I. SECT. 3, SUB-SECT. 2.

*Transient traders.*—*See* MARKETS & FAIRS, Vol. XXXIII., pp. 568, 569.

**SECT. 3.—Exercise of trade or business: Sub-sect. 2.**  
**Parts II. & III. Sect. 1.]**

*v. A.-G. of Quebec* (1883), 9 App. Cas. 157; *Hodge v. R.* (1883), 9 App. Cas. 117; *Bank of Toronto v. Lambe*, *Merchants' Bank of Canada v. Lambe*, *Canadian Bank of Commerce v. Lambe*, *North British Mercantile Insce. v. Lambe* (1887), 12 App. Cas. 575; *A.-G. for Manitoba v. Manitoba License-Holders' Assoc.* (1901), 71 L. J. P. C. 28; *Re Coleman's Depositories & Life & Health Assoc. Assoc.* (1907), 76 L. J. K. B. 865; *John Deere Plow Co. v. Wharton*, [1915] A. C. 330; *Great West Saddlery Co. v. R.*, [1921] 2 A. C. 91; *A.-G. for Ontario v. Reciprocal Insurers*, [1921] A. C. 328; *Yarmon v. R.*, [1924] A. C. 999; *Toronto Electric Comrs. v. Sulder*, [1925] A. C. 396.

**30. Landowner decoying wild fowl.]**—Every man that has a property may employ it for his pleasure & profit, as for alluring & procuring decoy ducks to come to his pond. To learn the trade of seducing other ducks to come there in order to be taken is not prohibited either by the law of the land or the moral law: but it is as lawful to use art to seduce them, to catch them, & destroy them for the use of mankind, as to kill & destroy wild fowl or tame cattle. Then when a man uses his art or his skill to take them to sell & dispose of for his profit, this is his trade (*Holtz, C.J.*).—*KREBLE v. HICKERINGILL* (1706), 11 East, 574, n.; *Holtz, K. B.* 14; 3 Salk. 9; 11 Mod. Rep. 73, 130; 103 E. R. 1127.

**Annotations.]**—*Reid, Carrington v. Taylor* (1809), 11 East, 571; *Hannam v. Mockett* (1824), 2 B. & C. 934; *Ilbottson v. Peat* (1865), 34 L. J. Ex. 118; *Higgins v. O'Donnell* (1870), 18 W. R. 378; *Mogul S.S. Co. v. McGregor, Gow,*

[1892] A. C. 25; *Trollope v. London Building Trades Federation* (1895), 11 T. L. R. 228; *Allen v. Flood*, [1898] A. C. 1. **Mentid.** *Pannell v. Mill* (1846), 3 C. B. 625; *Lumley v. Gye* (1853), 22 L. J. Q. B. 463; *Togers v. Rajendro Dutt* (1860), 8 Moo. Ind. App. 103; *Quinn v. Leatham* (1904), 70 L. J. P. C. 76; *Pratt v. British Medical Assoc.*, [1919] 1 K. B. 211; *The Tubantia*, [1921] P. 78.

**31. Merchant.]**—A merchant includes all sorts of traders as well & as properly as merchant adventurers.—*LONDON CORPN. v. WILKS* (1704), 2 Salk. 415; 91 E. R. 386.

**32. Musician.]**—*MUSICIANS' CO. IN LONDON* (OR *CHAMBERLAIN OF LONDON*) *v. GREEN* (1724), 8 Mod. Rep. 211; 88 E. R. 152.

**33. Proprietor of travelling circus.]**—*SPEAK v. POWELL*, No. 20, *ante*.

**34. Renter of tolls.]**—*Scemle*: the renting of tolls is not a profession or trade.—*BELLAMY v. BURCH* (1817), 16 M. & W. 590; 8 L. T. O. S. 413; 153 E. R. 1325.

**Who are traders within bankruptcy laws.]**—*See BANKRUPTCY*, Vol. IV., pp. 17-24, Nos. 70-192.

—**Infants.]**—*See BANKRUPTCY*, Vol. IV., pp. 29, 30, Nos. 234-236.

—**Married women.]**—*See BANKRUPTCY*, Vol. IV., pp. 31-33, Nos. 251-255, 259-271.

**Who are traders within Sunday Observance Acts.]**—*See TIME*, Vol. XLII., pp. 938, 939, 941, 945.

**Married women as traders.]**—*See HUSBAND & WIFE*, Vol. XXVII., pp. 89-91, Nos. 693-707; *BANKRUPTCY* Vol. IV., pp. 31-33, Nos. 251-255, 259-274.

## Part II.—Control and Supervision of Trade.

**Board of Trade—Decisions not binding on courts.]**—*See CONSTITUTIONAL LAW*, Vol. XI., p. 514, Nos. 154.

**Census of production.]**—*See Census of Production Act*, 1906 (c. 49), *Census of Production Act*, 1917 (c. 2).

**Conciliation Boards.]**—*See Conciliation Act*,

1896 (c. 30); *New Ministries & Secretaries Act*, 1916 (c. 68), s. 2; *Industrial Courts Act*, 1919 (c. 69).

**Trade boards.]**—*See WORK & LABOUR*.

**Statutory regulation of wages.]**—*See MINES*, Vol. XXXIV., pp. 730-737, Nos. 1104-1146; *WORK & LABOUR*.

## Part III.—Freedom of Trade and Monopoly.

### SECT. 1. IN GENERAL.

**35. Right to exercise any lawful trade.]**—All trades lawful & not to be restrained but by Parliament.—*CASE OF MONOPOLIES, DARY v. ALLEN* (1602), *Moore, K. B.* 671; 1 Web. Pat. Cas. 1; 11 Co. Rep. 84 b; *Noy*, 173; 72 E. R. 830.

**Annotations.]**—*Reid, City of London Case* (1610), 8 Co. Rep. 121 b; *Norris v. Staps* (1616), *Hob.* 210; *Dublin Corp'n. Case* (1620), *Palm.* 1; *R. v. Maldenhead Corp'n.* (1620), *Palm.* 76; *R. v. Hampden* (1637), 3 Stat. Tr. 826; *Thomas v. Sorrell* (1673), *Freem. K. B.* 85; *Yarmon v. R.* (1686), 3 Mod. Rep. 75; *Boulton v. Bull* (1795), 2 Hy. Bl. 463; *Crane v. Pulee* (1812), 4 Man. & G. 580; *Beard v. Egerton* (1846), 3 C. B. 97; *Caldwell v. Vanvliessen*, *Caldwell v. Verbeek*, *Caldwell v. Rolfe* (1851), 9 Hare, 415; *Togers v. Rajendro Dutt* (1860), 13 Moo. P. C. C. 209; *Young v. Pernie* (1861), 4 Giff. 577; *Murray v. Clayton* (1872), 7 Ch. App. 573; *Marsden v. Saville Street Co.* (1878), 3 Ex. D. 202; *G. R. Ry. v. Goldsmid* (1881), 9 App. Cas. 927; *R. v. Halifax County Court Judge*, [1891] 1 Q. B. 793; *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 1 Ch. 354; *North Western Salt Co. v. Electrolytic Alkali Co.* (1912), 107 L. T. 439; *A.-G. of Commonwealth of Australia v. Adelaide S.S. Co.*, [1913] A. C. 781. **Mentid.** *Precedence of the Judges* (1693), *Fortes, Rep.* 382; *Jenks v. Turpin* (1881), 13 Q. B. D. 505.

**36. —[**(1) At common law no man could be prohibited from working at any lawful trade.

(2) The common law abhors all monopolies which prohibit any from working in any lawful

trade.—*IPSWICH TAILORS' CASE* (1614), 11 Co. Rep. 53 a; 77 E. R. 1218; *sub nom. IPSWICH TAILORS v. SHERRING*, 1 Roll. Rep. 4; *sub nom. IPSWICH CLOTHWORKERS CASE*, *Godb.* 252.

**Annotations.]**—*Consol. Davies v. Davies* (1887), 36 Ch. D. 359. **Reid.** *Norris v. Staps* (1616), *Hob.* 210; *Jolliffe v. Brode* (1621), *W. Jo.* 13; *Thomas v. Sorrell* (1673), 3 Keb. 223; *R. v. Durham Corp'n.* (1756), 1 Keny. 512; *French v. Adams* (1763), 2 Wils. 168; *Boulton v. Bull* (1795), 2 Hy. Bl. 463; *Beard v. Egerton* (1846), 3 C. B. 97; *Jefferys v. Boosey* (1851), 4 H. L. Cas. 819; *Togers v. Rajendro Dutt* (1860), 13 Moo. P. C. C. 209; *Marsden v. Saville Street Co.* (1878), 3 Ex. D. 203; *Kyuse v. Johnson*, [1898] 2 Q. B. 91. **Mentid.** *Hackett v. Tilly* (1706), 11 Mod. Rep. 93.

**37. —[**At common law every man may set up . . . any . . . trade that he pleased (*WYLDE, J.*).—*THOMAS v. SALTMARSH* (1673), as reported in *Freem. K. B.* 115; 89 E. R. 85; *sub nom. THOMAS v. SORRELL*, 3 Keb. 181, *Ex. Ch.*

**Annotations.]**—**Mentid.** *Jeverson v. Moor* (1699), 12 Mod. Rep. 262; *Shaw v. Bull* (1701), 12 Mod. Rep. 592; *R. v. Papinian* (1725), 2 Sess. Cas. K. B. 134; *Ex p. Armitage* (1756), *Amb.* 294; *Muskett v. Hill* (1839), 5 Bing. N. C. 694; *Wood v. Leadbitter* (1845), 13 M. & W. 838; *Washbourne v. Burrows* (1847), 16 L. J. Ex. 266; *Taplin v. Florence* (1851), 10 C. B. 741; *Congreve v. Everett* (1854), 10 Exch. 298; *Holley v. Stephens* (1862), 12 C. B. N. S. 91; *Nuttall v. Bracewell* (1866), 36 L. J. Ex. 1; *L. C. v. Dundas*, [1904] P. 1; *Warr v. L. C. C.*, [1904] 1 K. B. 713; *Smith v. Colbourne*, [1914] 2 Ch. 533; *British Actors Film Co. v. Glover*, [1918] 1 K. B. 299.



38. —.—.]—*KEEBLE v. HICKINGHILL*, No. 30, *ante*.

39. —.—.]—An action lies against the master of a vessel for purposely firing a cannon at negroes, & thereby preventing them from trading with pltf., & it is no answer to such action that pltf. had not conformed to the law of the country in paying the duty due to the King for his licence to trade.

It has been said that a person engaged in a trade violating the law of the country cannot support an action against another for hindering him in that illegal traffic. That I entirely accede to, but it does not apply to this case. This is a foreign law; the act of trading is not itself immoral, & a *jus positivum* is not binding on foreigners (LORD KENYON).—*PARLETON v. MCGAWLEY* (1791), Peake, 270; 170 E. R. 153, N. P.

*Annotations:—*Consid. Allen *v. Flood*, [1898] A. C. 1; *Pratt v. British Medical Assoc.*, [1919] 1 K. B. 244. *Refd.* *Lundey v. Gye* (1853), 2 E. & B. 216; *Mogul S.S. Co. v. McGregor*, Gow 1889, 23 Q. B. D. 598; *Quinn v. Leatham* (1901), 70 L. J. P. C. 76.

40. —.—.]—*HOMER v. ASHFORD*, No. 250, *post*.

41. —.—.]—The presumption in favour of unrestrained trade among the King's subjects is so strong, that even the Lord Mayor's Ct. of London cannot support proceedings upon bye-laws in restraint of trade among the citizens, without first showing the immemorial custom that none but freemen of the city shall carry on trade within it.—*CHAMBERLAIN OF LONDON v. COMPTON* (1825), 4 L. J. O. S. K. B. 49; 7 Dow. & Ry. K. B. 597; 3 Dow. & Ry. M. C. 503.

*Annotation:—**Apld.* *Clark v. Le Cren* (1829), 9 B. & C. 52.

42. —.—.]—A bye-law, that no person shall exercise the art of a painter within the City of London, not being free of the Company of Painters, is a bye-law in restraint of trade, & void, unless there be a special custom to warrant it.

By common law, any person may carry on any trade in any place, unless there be a custom to the contrary (BAYLEY, J.).—*CLARK v. LE CREN* (1829), 9 B. & C. 52; 7 L. J. O. S. K. B. 186; 109 E. R. 20.

43. —.—.]—*NORDENFELT v. MAXIM NORDENFELT GUNS & AMMUNITION CO.*, No. 139, *post*.

44. —.—.]—(1) Where the goodwill of a business is sold, without further provision, the vendor may set up a rival business, but he is not entitled to canvass the customers of the old firm, & may be restrained by injunction from soliciting any person who was a customer of the old firm prior to the sale to continue to deal with the vendor, or not to deal with the purchaser.

The same principle is applicable to the case where a person has been taken into partnership on the terms that on the expiration of the partnership the goodwill of the business shall belong solely to the other partner.

(2) It is said, indeed, that he may not represent himself as a successor of the old firm, or as carrying on a continuation of their business (LORD HERSHELL).

(3) They (*i.e.* the Ct. of Appeal in the case of *Leggott v. Barrett*, No. 903, *post*) thought they could not on any just principle prevent deft. from supplying a man with goods if he applied for them; that there was no implied obligation upon him, either legal or moral, to shut his door against a customer who came to him of his own free will; that a sale of goodwill did not involve an implied contract not to deal with any customers of the old business the goodwill of which was sold (LORD HERSHELL).

(4) An express covenant not to carry on business would be incapable of being enforced as a restraint of trade if it was larger than the necessity of the

case, having regard to the particular character of the business demanded, or, perhaps, unless it was restricted in some way either in time or space (LORD DAVEY).

(5) Generally speaking, it means much more than what LORD ELDON took it to mean in *Crutwell v. Lye*, No. 880, *post*. . . . Often it happens that the good will is the very sap & life of the business without which the business would yield little or no fruit. It is the whole advantage whatever it may be of the reputation & connection of the firm which may have been built up by years of honest work or gained by lavish expenditure of money (LORD MACNAGHTEN).

(6) He may advertise himself as having been a partner in or the founder or manager of the business which he has sold provided he does not represent that the business which he is carrying on is the same business as or identical with that which he has sold. It is well settled that he may do all this (LORD DAVEY).

(7) The common law has always been jealous of any interference with trade (LORD MACNAGHTEN).—*THEGO v. HUNT*, [1896] A. C. 7; 65 L. J. Ch. 1; 73 L. T. 511; 41 W. R. 225; 12 T. L. R. 80, H. L.; *revers.*, [1895] 1 Ch. 462, C. A.

*Annotations:—*As to (1) *Apld.* *Jennings v. Jennings*, [1898] 1 Ch. 378; *Gillingham v. Boddow*, [1900] 2 Ch. 242; *Curl v. Webster*, [1904] 1 Ch. 685. *Distd.* *Green (Northampton) v. Morris*, [1914] 1 Ch. 562. *Apld.* *Boorne v. Wicker*, [1927] 1 Ch. 667. *Consd.* *Farley v. Cooper*, [1927] 2 K. B. 384. *Refd.* *West London Syndicate v. I. R. Coms.*, [1898] 2 Q. B. 507; *Re David & Matthews*, [1899] 1 Ch. 378; *Morris v. Saxelby*, [1915] 2 Ch. 57. As to (3) *Refd.* *McEllistrim v. Ballymacelligott Coop. Agricultural & Dairy Soc.*, [1919] A. C. 518. As to (6) *Refd.* *Hill v. Leavis*, [1900] 1 Ch. 466. *Generally, Refd.* *Valentine M. at Junc. Co. v. Valentine Extract Co.*, [1900] 83 L. T. 259; *Byan v. Webb*, [1901] 2 Ch. 59; *Livock v. Pearson* (1928), 33 Com. Cas. 188.

45. —.—.]—*UNDERWOOD (E.) & SON, LTD. v. BARKER*, No. 777, *post*.

46. —.—.]—*QUINN v. LEATHAM*, No. 1179, *post*.

47. —.—.]—An importer may acquire a valuable reputation for himself & his wares by his care in selection, or his precautions in transit & storage or because his local character is such that the article acquires a value by his testimony to its genuineness. But apart from contract or misrepresentation there is nothing to prevent a person from acquiring goods from a manufacturer & selling them in competition with him, even in a country into which the manufacturer, or his agent has been the sole importer.

*Applts.* sought to restrain *resps.* from selling in India a well known brand of cigarettes which for some years they alone had been importing into & selling in India: they were assignees of the trade mark & goodwill in India. *Resps.* having bought over 21 millions of the cigarettes cheaply from purchasers from the manufacturers, who had granted *applts.* the sole rights for India, were able to undersell *applts.* The sales by *resps.* involved no breach of contract, misrepresentation or infringement; further it was not shown that *applts.* had acquired any independent reputation as importers.—*Held*: the suit was not maintainable.—*IMPERIAL TOBACCO CO. OF INDIA, LTD. v. BONNAN*, [1924] A. C. 755; 1 L. R. 51 Ind. App. 269; 93 L. J. P. C. 216; 131 L. T. 642; 40 T. L. R. 613; 41 R. P. C. 111, P. C.

48. —.—.]—*Or several trades.*—*NORRIS v. STAPS* (1616), Hob. 210; Hut. 5; 80 E. R. 357.

*Annotations:—**Apld.* *Parry v. Berry* (1717), 1 Com. 269. *Refd.* *Whiton v. Wilks* (1765), 2 Ld. Raym. 1129; *Michell v. Reynolds* (1711), 1 P. Wms. 181. *Mentd.* *Louden City v. Vanhook* (1639), 1 Ld. Raym. 496; *R. v. Westwood* (1830), 7 Bing. 1; *R. v. Darlington School* (1814), 6 Q. B. 682; *Gosling v. Velej* (1817), 7 Q. B. 106.

*Sec. 1.—In general. Sec. 2: Sub-sect. 1.]*

**49. — For any remuneration desired.]** — Every man has a right to work for the best price he can get; but, if others choose to work for less than the usual price, the law will not permit that violence should be committed towards them, or towards those by whom they are employed, or those with whom they are connected.—*R. v. BATT* (1834), 6 C. & P. 329; 172 E. R. 1263.

*Annotations:—Mendil, R. v. Howell* (1839), 9 C. & P. 137; *Drake v. Footitt, Drake v. Hankin* (1881), 7 Q. B. D. 201.

**50. — By any method desired.]** This was an action by which *pltf.* sought to enforce a bond against *def.* The condition of the bond recited that *def.* & seventeen other obligors, being respectively, owners & occupiers of mills & other premises in Wigan & the neighbourhood, carried on their business of spinners & weavers of cotton yarn & cloth, & employed many workpeople & servants; & that certain societies or combinations subsisted in the neighbourhood amongst divers persons, whereby persons willing to be employed were deterred by a reasonable fear of social persecution & other injuries from hiring themselves to work at the said establishments; & that thereby the legal control of the obligors over their property & establishments was injuriously interfered with; & that these combinations were sustained by funds arbitrarily levied & extracted from the workmen employed by the obligors & receiving wages from them. . . . The question is, whether this is a bond in restraint of trade, & we think it is so. *Prima facie* it is the privilege of a trader in a free country, in all matters not contrary to law, to regulate his own mode of carrying it on according to his own discretion & choice. If the law has in any matter regulated or restrained his mode of doing this, the law must be obeyed. But no power short of the general law ought to restrain his free discretion. Now here the obligors to this bond have clearly put themselves into a situation of restraint. . . . We see no way of avoiding the conclusion that, if a bond of this sort between masters is capable of being enforced at law, an agreement to the same effect amongst workmen must be equally legal & enforceable, & so we shall be giving a legal effect to combinations of workmen for the purpose of raising wages, & make their strikes capable of being enforced at law. We think that the legislature have been contented to make such strikes not punishable, & certainly they never contemplated them as being the subject of enforcement by a suit at law, on the part of the body of delegates, against any workmen who might have been seduced by some designing person to sign an engagement with penalty to continue in the strike as long as a majority were for holding out (*per CUR.*). *HILTON v. ECKERSLEY* (1856), 6 E. & B. 47; 25 L. J. Q. B. 199; 26 L. T. O. S. 314; 20 J. P. 196; 2 Jur. N. S. 587; 4 W. R. 326; 119 E. R. 789, Ex. Ch.

*Annotations:—Apld.* Hornby v. Close (1867), L. R. 2 Q. B. 153; *Mogul S.S. Co. v. McGregor, Gow*, [1892] A. C. 25. *Refd.* Walsby v. Anley (1861), 3 E. & E. 516; Wood v. Bowron (1866), L. R. 2 Q. B. 21; Farrer v. Close (1869), L. R. 4 Q. B. 602; R. v. Stainer (1870), L. R. 1 C. C. R. 230; Collins v. Locke (1879), 4 App. Cas. 674; Duke v. Littleboy (1880), 43 L. T. 216; Mineral Water Bottle Exchange & Trade Protection Soc. v. Booth (1887), 36 Ch. D. 465; Swaine v. Wilson (1889), 24 Q. B. D. 252; Connor v. Kent, Gibson v. Lawson, Curran v. Treleven (1891) 2 Q. B. 545; Lyons v. Wilkins, [1896] 1 Ch. 811; Allen v. Flood, [1898] A. C. 1; Elliman v. Camington (1901), 81 L. T. 858; Quinn v. Leathem, [1901] A. C. 495; United Shoe Machinery Co. of Canada v. Brunet, [1909] A. C. 330; Russell v. Carpenters & Joiners Amalgamated Soc. (1912) A. C. 421; A.-G. of Commonwealth of Australia v. Adelaide S.S. Co., [1913] A. C. 781; Pratt v. British Medical Assocn., [1919] 1 K. B. 244; Valentine v. Hyde, [1919] 2 Ch. 129.

**51. — — — — —.]** — Owners of ships, in order to secure a carrying trade exclusively for themselves & at profitable rates, formed an association & agreed that the number of ships to be sent by members of the assocn. to the loading port, the division of cargoes & the freights to be demanded, should be the subject of regulation; that a rebate of 5 per cent. on the freights should be allowed to all shippers who shipped only with members; & that agents of members should be prohibited on pain of dismissal from acting in the interest of competing shipowners; any member to be at liberty to withdraw on giving certain notices.

*Pltfs.*, who were shipowners excluded from the assocn., sent ships to the loading port to endeavour to obtain cargoes. The associated owners thereupon sent more ships to the port, underbid *pltf.*s, & reduced freights so low that *pltf.*s were obliged to carry at unremunerative rates. They also threatened to dismiss certain agents if they loaded *pltf.*s' ships, & circulated a notice that the rebate of 5 per cent. would not be allowed to any person who shipped cargoes on *pltf.*s' vessels. *Pltfs.* having brought an action for damages against the associated owners alleging a conspiracy to injure *pltf.*s. :—*Held*: (1) since the acts of *def.*s. were done with the lawful object of protecting & extending their trade & increasing their profits, & since they had not employed any unlawful means, *pltf.*s. had no cause of action.

Now it is not denied & cannot be even argued that *prima facie* a trader in a free country in all matters "not contrary to law may regulate his own mode of carrying on his trade according to his own discretion & choice." This is the language of *ALDERSON, B.* [in *Hilton v. Eckersley*, No. 50, *ante*], & no authority, indeed no argument, has been directed to qualify that leading proposition (*LORD HALSBURY, C.*).

(2) Intimidation, violence, molestation, or the procuring of people to break their contracts, are all of them unlawful acts; & I entertain no doubt that a combination to procure people to do such acts is a conspiracy & unlawful (*LORD HALSBURY, C.*).

(3) Acts done by a trader in the lawful way of his business, although by the necessary results of effective competition interfering injuriously with the trade of another, are not the subject of any action. Of course it is otherwise, as pointed out by *LORD HOLT*, if the acts complained of, although done in the way & under the guise of competition or other lawful right, are in themselves violent or purely malicious, or have for their ultimate object injury to another from ill-will to him, & not the pursuit of lawful rights (*LORD FIELD*).

(4) It was contended that the agreement between *def.*s. to act in combination which was proved to exist, was illegal as being in restraint of trade. I think that it was so, in the sense that it was void, & could not have been enforced against any of *def.*s. who might have violated it. But it does not follow that the entering into such an agreement would, as contended, subject the persons doing so to an indictment for conspiracy (*LORD HANNEN*).—*MOGUL S.S. Co. v. MCGREGOR, GOW & Co.*, [1892] A. C. 25; 61 L. J. Q. B. 295; 66 L. T. 1; 56 J. P. 101; 40 W. R. 337; 8 T. L. R. 182; 7 Asp. M. L. C. 120, H. L.

*Annotations:—As to* (1) *Apld.* *Jenkinson v. Nield* (1892), 8 T. L. R. 540; *Temperton v. Russell*, [1893] 1 Q. B. 715. *Consd.* *North Western Salt Co. v. Electrolytic Alkali Co.* (1912), 107 L. T. 439; *Ware & De Freville v. Motor Trade Assocn.*, [1921] 3 K. B. 40. *Apld.* *Reynolds v. Shipping Federation*, [1921] 1 Ch. 28; *Thompson v. British Medical Assocn. (N. S. W. Branch)*, [1924] A. C. 764. *Consd.* *Sorrel v. Smith*, [1926] A. C. 700. *Refd.* *Connor v. Kent*,

Gibson v. Lawson, Curran v. Treleaven, [1891] 2 Q. B. 545; Lyons v. Wilkins, [1896] 1 Ch. 811; Newton v. Amalgamated Musicians' Union (1896), 10 Sol. Jo. 716; Boots v. Grundy (1900), 82 L. T. 769; South Wales Miners' Federation v. Glamorgan Coal Co., [1905] A. C. 239; Denaby & Cuddey Main Collieries v. Yorkshire Miners' Assoc., [1906] A. C. 384; Conway v. Wade, [1908] 2 K. B. 844; Hyams v. Stuart King, [1908] 2 K. B. 696; A.-G. of Commonwealth of Australia v. Adelaide S.S. Co., [1913] A. C. 781; Larkin v. Long, [1915] A. C. 811; Thomas v. Moore, [1918] 1 K. B. 555; Pratt v. British Medical Assoc., [1919] 1 K. B. 244; Davies v. Thomas, [1920] 2 Ch. 189; Rawlings v. General Trading Co., [1921] 1 K. B. 633; Brimelow v. Casson, [1924] 1 Ch. 302; British Oxygen Co. v. Liquid Air, [1925] Ch. 383; *As to* (2) **Consd.** Allen v. Flood, [1898] A. C. 1. **Refd.** Ajello v. Worsley, [1898] 1 Ch. 274; Quinn v. Leathorn, [1901] A. C. 445; National Phonograph Co. v. Edison Bell Consolidated Phonograph Co., [1908] 1 Ch. 335. *As to* (3) **Consd.** Trollope v. London Building Trades Federation (1895), 72 L. T. 312; Allen v. Flood, [1898] A. C. 1. **Refd.** Huttley v. Simmons, [1898] 1 Q. B. 181; Gibson National Amalgamated Labourers' Union of Great Britain & Ireland, [1903] 2 K. B. 600. *As to* (4) **Refd.** Evans v. Heathcote, [1918] 1 K. B. 418. *Generally, Refd.* *Re* Apollinaris Co.'s Trade Marks, Quinquinaris v. Friedrichshall & "Humayd Janso" (1890), 63 L. T. 162; Maxlin-Nordenfelft Guns & Ammunition Co. v. Nordenfelft (1892), 2 L. R. 298; Wright v. Hennessy (1891), 11 T. L. R. 14; Elliman v. Currington (1901), 84 L. T. 858; United Shoe Machinery Co. of Canada v. Brunet, [1909] A. C. 330; Montefiore v. Menday Motor Components Co., [1918] 2 K. B. 211; Valentine v. Hyde, [1919] 2 Ch. 129; *Re* Wallace, Champion v. Wallace, [1920] 2 Ch. 274. **Mentd.** *Re* Whitechurch (1890), 21 Q. B. D. 420; *Re* Bowman, Secular Soc. v. Bowman, [1915] 2 Ch. 417.

52. ———. —[The individual trader may be as selfish as he pleases; to hold otherwise would be (to use BOWEN, L.J.'s words in the case of *Mogul S.S. Co. v. McGregor, Gow & Co.*, No. 51, *ante*) "to convert into an illegal motive the instinct of self-advancement & self-protection, which is the very incentive to all trade" (FARWELL, L.J.).

(2) Of all forms of restraint of trade, the creation of a monopoly in a necessary of life is probably the most objectionable (FARWELL, L.J.).—NORTH-WESTERN SALT CO., LTD. v. ELECTROLYTIC ALKALI CO., LTD. (1912), as reported in 107 L. T. 439, C. A.; *on appeal*, [1914] A. C. 461, H. L.

**Annotations: Generally, Refd.** A.-G. of Commonwealth of Australia v. Adelaide S.S. Co., [1913] A. C. 781; Evans v. Heathcote, [1918] 1 K. B. 418; Rawlings v. General Trading Co., [1921] 1 K. B. 635; Crown Milling Co. v. R., [1927] A. C. 391; English Hop Growers v. Derling, [1928] 2 K. B. 174; Palmolive Co. (of England) v. Freedman, [1928] 1 Ch. 261. **Mentd.** Kregor v. Hollins (1913), 109 L. T. 225; Montefiore v. Menday Motor Components Co., [1918] 2 K. B. 241; Naylor, Benzon v. Krahnische Industrie-Gesellschaft (1918), 87 L. J. K. B. 1066; Lipton v. Powell, [1921] 2 K. B. 51.

53. ———. —[Trade, profession or calling].—HEPWORTH MANUFACTURING CO. v. RYOTT, No. 589, *post*.

—[Although resulting in damage to others.]—*See* ACTION, Vol. I., pp. 31, 32, Nos. 243, 252.

54. ———. —[Applicability of rule to foreigner trading in England.]—ROUSILLON v. ROUSILLON, No. 138, *post*.

55. Right of employer to prevent employee using skill & knowledge—[Gained during employment.]—*See* W. C. LENG & CO., LTD. v. ANDREWS, No. 104, *post*.

56. ———. —[ATTWOOD v. LAMONT, No. 131, *post*.

Restraint of trade by custom & statute.]—*See* Part IV., *post*.

Restraint of trade by agreement.]—*See* Part V., *post*.

Trading with alien enemy.]—*See* ALIENS, Vol. II., pp. 102–188.

Trade unions.]—*See* Part VII., *post*.

Trade Protection Societies.]—*See* Part VIII., *post*.

## SECT. 2.—MONOPOLY.

### SUB-SECT. 1.—IN GENERAL.

*See, generally*, PATENTS, Vol. XXXVI., pp. 525 *et seq.*

57. Nature of—[Sole right to exercise trade.]—IPSWICH TAILORS' CASE, No. 36, *ante*.

58. ———. —[—]—EAST INDIA CO. v. SANDYS (1685), Skin. 132, 165, 197, 223; 90 E. R. 62, 76, 91, 103; *sub nom.* CASE OF MONOPOLIES, EAST INDIA CO. v. SANDYS, 10 State Tr. 371.

**Annotations:—Refd.** Merchants Adventurers v. Rehov (1687), Comb. 52. **Mentd.** Onichund v. Barker (1715), Willes, 538; Rogers v. Rajendro Dutt (1860), 13 Moo. P. C. C. 209.

59. ———. —[Without limitation as to persons or place].—(1) A bond or promise to restrain oneself from trading in a particular place, if made upon a reasonable consideration, is good. *Scius*, if it be on no reasonable consideration, or to restrain a man from trading at all.

The general question upon this record is, whether this bond, being made in restraint of trade, be good? . . . A special consideration being set forth in the condition, which shows that it was reasonable for the parties to enter into it, the same is good . . . but with this constant diversity, viz. where the restraint is general not to exercise a trade throughout the kingdom, & where it is limited to a particular place (*per CUR.*).

(2) To obtain the sole exercise of any known trade throughout England, is a complete monopoly, & against the policy of the law. . . . When restrained to particular places or persons, if lawfully & fairly obtained, the same is not a monopoly (*per CUR.*).

(3) It is to be tried whether upon consideration of the circumstances the contract be good or not & that is matter of law, not fit for a jury to determine (*per CUR.*).—MITCHEL v. REYNOLDS (1711), 1 P. Wms. 181; Fortes. Rep. 296; 10 Mod. Rep. 130; 24 E. R. 347.

**Annotations:—As to (1) **Appld.** Gummakers Soc. v. Fell (1742), Willes, 381; Davis v. Mason (1793), 5 Term Rep. 118; Hayward v. Young (1818), 2 Chit. 407; Horner v. Graves (1831), 7 Jing. 735; Young v. Timmins (1831), 1 Cr. & J. 334; Wallis v. Day (1837), 2 M. & W. 273; Ward v. Byrne (1839), 5 M. & W. 518; Catt v. Tourle (1869), 1 Ch. App. 634; Gravelly v. Barnard (1871), L. R. 18 Eq. 518. **Consd.** Davies v. Davies (1887), 36 Ch. D. 359; Nordenfelft v. Maxlin Nordenfelft Guns & Ammunition Co., [1891] A. C. 535; Haynes v. Doman, [1899] 2 Ch. 13; *Re* Hollis' Hospital Trustees & Hague's Contract (1899), 47 W. R. 691. **Apprvd.** Morris v. Saxelby, [1916] 1 A. C. 688. **Consd.** Palmolive Co. (of England) v. Freedman, [1928] 1 Ch. 264. **Refd.** Chesman v. Nambly (1727), 2 Stra. 739; Low v. Peers (1770), Willes, 351; Gale v. Reed (1806), 8 East. 80; Homer v. Ashford (1825), 3 Bing. 322; Wickens v. Evans (1829), 3 Y. & J. 318; Keppell v. Bailey (1834), 2 My. & K. 517; Hitechock v. Coker (1837), 6 Ad. & El. 438; Mallan v. May (1843), 11 M. & W. 633; Tallis v. Tallis (1853), 1 E. & B. 391; Ronsillon v. Ronsillon (1880), 14 Ch. D. 351; Clegg v. Hands (1889), 44 Ch. D. 506, n.; Mogul S.S. Co. v. McGregor, Gow (1889), 23 Q. B. D. 598; Badische Anilin und Soda Fabrik v. Schott, Seamer, [1892] 3 Ch. 417; Mouchel v. Cubitt (1907), 24 L. R. C. 194; North-Western Salt Co. v. Electrolytic Alkali Co. (1912), 107 L. T. 439; Horwood v. Millar's Timber & Trading Co., [1917] 1 K. B. 305; Rodriguez v. Speyer, [1919] A. C. 59; Hepworth Manufacturing Co. v. Ryott, [1920] 1 Ch. 1; English Hop Growers v. Derling, [1928] 2 K. B. 174. *As to* (3) **Appld.** Dowden & Pook v. Pook, [1901] 1 K. B. 45. **Refd.** Dundy v. Henderson (1855), 11 Exch. 394. *Generally, Mentd.* Shelton v. Sire (1719), 11 Mod. Rep. 310; Wilkinson v. Wilkinson (1871), L. R. 12 Eq. 601; *Re* Morgan, Dowson v. Davey (1910), 26 T. L. R. 398.**

60. ———. —[Distinguished from patent.]—EAST INDIA CO. v. SANDYS (1682), 1 Vern. 127; 23 E. R. 362; *subsequent proceedings* (1685), Skin. 132, 165, 197, 223.

**Annotation:—Mentd.** Lingood v. Croucher (1742), 2 Atk. 395.

61. ———. —[Distinguished from exclusive right of user by landowner.]—Appl. co. advanced money to resp. co., & agreed to accept debentures in



delivers goods to either of those persons must be taken to have assented to those terms, & consequently cannot demand goods so delivered to any such dyer, etc., without paying the balance of his general account.—**KIRKMAN v. SHAWCROSS** (1794), 6 Term Rep. 14; 101 E. R. 410.

*Annotation*.—**Consd.** *Oppenheum v. Russell* (1802), 3 Bos. & P. 42.

71. ———.]—(1) An agreement between three persons carrying on the trade of trunk & box makers, & travelling, by themselves & their servants, into various parts of England, to vend trunks & boxes, to divide, & not interfere with certain districts of the several cities, boroughs, towns, & villages, as set forth by them on Bowles's Post Map of England; & that each, during his life, by himself & his agents duly authorised, shall travel into, to sell trunks & boxes in his way of business, without any interruption whatsoever, by either of the other two, during their joint lives, in certain cities, boroughs, towns, & villages, & not to suffer any goods in the said trade to be manufactured at their respective shops or warehouses, or to be sent from their respective shops, houses, or warehouses, or from any other place, for the purpose of being sold or disposed of on the ground to be travelled by the other parties thereto; & not to aid or assist any person to oppose all, or any, & either of the parties; & not to purchase any tea chest or chests, black or green, at a higher price than 6d. or 8d. each in Oxford; & in case, at any time, during their joint lives, any person or persons shall set up & oppose any or either of the parties, to meet together, & enter into such mutual agreement, to the intent therein agreed to, as shall be beneficial to the mutual interests of the parties, it being declared to be their intentions not to do any act prejudicial to the interests of each other, but to aid & assist each other in their said trade & business, to the utmost of their power, does not operate in general restraint of trade, & as an agreement contemplating a partial restraint only, is founded on a sufficient & valid consideration. Therefore, counts setting forth the same, & averring, by way of breaches, that deft. travelled into the districts of pltf., & sold boxes therein:—**Held**: good, on general demurrer.

(2) It is said that the effect of this agreement is to create a monopoly; & that, by upholding its validity, we shall lead to other combinations for monopolising trades. If the brewers or distillers of London were to come to the agreement suggested, many other persons would soon be found to prevent the result anticipated: & the consequence would, perhaps, be that the public would obtain the

articles they deal in at a cheaper rate (**HULLOCK, B.**).—**WICKENS v. EVANS** (1829), 3 Y. & J. 318.

*Annotations*.—**As to** (1) **Distd.** *Urmon v. Whitelegg* (1890), 63 L. T. 455. **Refd.** *Hitchcock v. Coker* (1837), 6 Ad. & El. 438; *Wallis v. Day* (1837), Murr. & H. 22; *Mumford v. Gething* (1859), 7 C. B. N. S. 305. **As to** (2) **Refd.** *Mogul S.S. Co. v. McGregor*, Gow (1859), 23 Q. B. D. 598.

72. ———.]—**Defts.** counsel contended that it is injurious to the public by giving in effect a monopoly to pltf., & thereby depriving the public of the benefit that might be derived from competition. If this were so, & the parties proposed by their agreement to endeavour to prevent competition generally, there might be weight in the objection; but the effect of the agreement is only that the one co. shall not compete or interfere with the other upon the particular line mentioned in the agreement (**LORD CAMPBELL, C.J.**).—**SHREWBURY & BIRMINGHAM RY. CO. v. LONDON & NORTH WESTERN RY. CO.** (1851), 17 Q. B. 652; 21 L. J. Q. B. 89; 18 L. T. O. S. 119; 16 Jur. 311; 117 E. R. 1431.

73. ———.]—In 1911 D. & co., who were motor accessory factors, agreed with pltf., who were motor tyre manufacturers, in consideration of pltf.' allowing them certain discounts off their list prices, to buy a given quantity of pltf.' goods within a specified time; also not to sell or offer pltf.' goods to any person at less than pltf.' list prices, except that D. & co. were to be at liberty to allow to genuine trade customers a limited discount off such list prices, & in case of any such sale they agreed, as pltf.' agents, to obtain from the trader a similar undertaking that he would observe pltf.' list prices & to forward such undertaking to pltf. Pltf. exacted similar agreements from all their trade purchasers, & this was known to **defts.**, who were large storekeepers & sold tyres by retail to the public.

In Jan. 1912, **defts.** ordered tyres of pltf.' make from D. & co., & by an agreement purporting to be made between **defts.** & D. & co. in consideration of D. & co.'s allowing them certain discounts off pltf.' list prices, they agreed (*inter alia*), not to sell or offer any motor tyres of pltf.' make to any private customer at less than the list prices. Pltf. sued **defts.** for breach of this contract:—**Held**: assuming that pltf. were undisclosed principals, no consideration moved from them to **defts.**, & the contract was unenforceable by them.—**DUNLOP PNEUMATIC TYRE CO., LTD. v. SELFLEDGE & CO., LTD.**, [1915] A. C. 817; 84 L. J. K. B. 1680; 113 L. T. 386; 31 T. L. R. 399; 59 Sol. Jo. 439, 11 L.

*Annotations*.—**Refd.** *Palmitive Co. (of England) v. Freedman*, [1928] 1 Ch. 261. **Mentd.** *Barker v. Stockley*, [1919] 1 K. B. 121; *The Lord Strathcona*, [1925] P. 113.

Co., LTD. (1917), 39 O. L. R. 195; 31 D. L. R. 710; 12 O. W. N. 187. **CAN.**

d. ———.]—**CROWN MILLING CO., LTD. v. R.**, [1927] A. C. 394, **N.Z.**

e. ———.]—**R. v. ELLIOTT** (1905), 5 O. W. R. 163; 9 O. L. R. 618. **CAN.**

f. ———.]—**WAMPOLE & CO. v. KAIN (F. E.) & CO., LTD.** (1906), 11 O. L. R. 619; 7 O. W. R. 810. **CAN.**

g. ———.]—A contract between dealers, fixing prices to be paid by them for specified articles or commodities which may be the subject of trade & commerce, with the object of restricting competition & establishing a monopoly therein, constitutes an agreement unduly to prevent or lessen competition, within Criminal Code, R. S. C. 1906, c. 116, s. 498, & is not enforceable against the parties.—**WEDDMAN v. STRAUGH (Man.)** (1912), 21 W. L. R. 717; 46 S. C. R. 1; 2 D. L. R. 731; 20 Can. Crim. Cas. 117. **CAN.**

h. ———.]—An injunction to

restrain deft. from serving goods of pltf.'s manufacture except at prices mentioned in an agreement between them was refused, where the stipulations imposed by vendor-pltf. were such as unreasonably to enhance the price to the purchasing public: the element of crime came in & affected the freedom of contract.—**STEARNS v. AVERY** (1915), 8 O. W. N. 70; 33 O. L. R. 251. **CAN.**

k. ———.]—**CROWN TAILORING CO. v. BLACKFORD (Ont.)**, [1923] 1 D. L. R. 116. **CAN.**

l. ———.]—An agreement between a number of traders not to sell certain specified goods below certain specified prices is not necessarily unenforceable, as being in restraint of trade.—**CADG v. DALY**, [1910] 1 L. R. 306. **IR.**

m. *What must be established.*—To show that an agreement is one "to unduly prevent or lessen competition in the production, manufacture, pur-

chase, barter, sale, transportation, or supply of coal, an agreement to try what, if successful, would be the unduly preventing or lessening of competition, must be established.—**STEWART v. THOMAS (Alta.)**, [1917] 1 W. W. R. 896; 27 Can. Crim. Cas. 409; 49 D. L. R. 691. **CAN.**

n. *Combination to regulate sale.*—*Whether agreement void as contrary to public policy.*—Several incorporated cos. & individuals, engaged in the manufacture & sale of salt, entered into an agreement stipulating that the several parties agreed to combine & amalgamate under the name of "The Canadian Salt Assn." for the purpose of successfully working the business of salt manufacturing & to develop & extend the same, & which provided that all the parties to it should sell all salt manufactured by them through the trustees of the assn., & should sell none except through the trustees.—**Held**: this agreement was not void as contrary to public policy, or as tending

*Sect. 2.—Monopoly: Sub-sect. 2. Part IV. Sects. 1 & 2: Sub-sects. 1 & 2, A.]*

**74. ———— Restraint for purpose of maintaining prices.]**—An agreement between two coachmasters not to oppose each other, or charge higher prices is legal.

This agreement does not preclude a third or more persons from starting an opposition to plff. & defts. (ELLENBOROUGH, C.J.).—*HEARN v. GRIFFIN* (1815), 2 Chit. 407.

**75. ————** ————]—Tenders for the supply of stone having been invited by a corpn., it was agreed between A., B., C. & D., quarry owners, that B. should not tender, that C. & D. should tender above A.'s price, that A. should purchase certain quantities of stone from B., C., D., at a fixed price, & that B., C., & D. should not supply the corpn. with stone during 1875. The stone was purchased, as agreed, by A., but B., in breach of the agreement, sent in a tender, which was accepted:—*Held*: on demurrer, the agreement was not void, & a bill would lie by A. to restrain B. from supplying the corpn. directly or indirectly during 1875 with stone, without making the corpn. parties.

There is nothing illegal in the owners of commodities agreeing that they will sell as between themselves at a certain price, leaving one of them to make any other profit that he can (BACON, V.-C.).—*JONES v. NORTH* (1875), L. R. 19 Eq. 426; 44 L. J. Ch. 388; 32 L. T. 149; 39 J. P. 392; 23 W. R. 468.

**76. ————** ————]—*COLLINS v. LOCKE*, No. 137, post.

**77. ————** ————]—**Whether amounting to intention to injure public.]**—A.-G. OF COMMONWEALTH OF AUSTRALIA v. ADELAIDE S.S. CO., LTD., No. 68, ante.

**Pooling agreements between railway companies.]**—See RAILWAYS, Vol. XXXVIII., pp. 327, 328, Nos. 423-132.

**78. ———— Agreement "cornering" market.]**—Demurrer allowed to a bill for a discovery & injunction against an action; the effect being a contract for participation in an illegal transaction; the result of a combination of wholesale grocers, by the title of "The Fruit Club" acting by a select committee, of which defts. were members, to purchase all imported fruit; though not strictly forestalling, regrating or monopoly. Persons contracting on behalf of a legal society, of which they are members, as a committee are not liable to non-suit, & cannot defend an action, upon an objection of parties.—*Cousins v. Smith* (1807), 13 Ves. 512; 33 E. R. 397, L. C.

*Annotations:—Reid, Mogul S.S. Co. v. McGregor, Gow* (1889), 23 Q. B. D. 598. *Mentid. Meux v. Malby* (1818), 2 Swan. 277.

**79. Restrictions as to user—Lease of machinery.]**—Plffs. in Nov. 1900, leased to defts., a firm of boot manufacturers, certain machines called the Consolidated Lasting Machines for a term of twenty years unless sooner determined by the lessors. This agreement for the hire of the machinery con-

tained a condition that the lessee should use the machinery to its full capacity so far as the number & kind of boots & shoes made in the factory would permit. There was a provision that a sum of 3d. for each 1,000 revolutions of the main shaft of the Consolidated Lasting Machine should be paid by defts. Defts. after using this machinery for three years refused to use it any more, giving as their reason that it could not be used by them so as to enable them to compete with any commercial success with rival firms & now used other machinery in its place.

On an action for damages for breach of contract:—*Held*: defts. might have been foolish in entering into such a contract, but it could not be said it was a contract contrary to public policy. Upon the construction of the contract the machines could not be said to be worked to their full capacity unless they were worked continuously during working hours. It was immaterial whether there was now a better machine for the same purpose. Plffs.' machines, on the evidence, were quite satisfactory at least for some of the work in defts.' factory, & defts. were bound to use them for all work which they were capable of doing without regard to the fact that another machine could do it better & cheaper. Plffs. to be entitled to an inquiry as to damages.—*BRITISH UNITED SHOE MACHINERY CO., LTD. v. SOMERVELL BROTHERS* (1906), 95 L. T. 711.

**80. ————** ————]—By various leases in 1903 & 1901 applts. leased to resps. for twenty years machines made & used for certain processes in the manufacture of shoes, containing in each case a "tying clause," the effect of which was to prohibit the use by resps. in the said manufacture of any machines not leased by applts. Some additional leases were granted of other & allied machines to be used for certain ancillary processes in the same manufacture. These latter resps. called upon applts. to remove, but continued to work the former in conjunction with machines not leased to them by applts.

To an action for an injunction & damages resps. pleaded that applts. by false representations that they were patentees in respect of their machines, had induced them to take the said leases; & that the covenants therein, by reason of their unjust & oppressive nature & of the practical monopoly which applts. had acquired in Canada in the manufacture & supply of shoemaking machinery were in restraint of trade & void:—*Held*: (1) as resps. had not repudiated the leases after discovery of the alleged false representations, but had continued to work the demised machines & paid the royalties reserved, they had elected to treat the leases as subsisting, & could not afterwards avoid them; (2) as the tying clauses merely prescribed the mode of user, & were not severable from the rest of the contracts, they could not be separately repudiated; (3) the covenants were not in restraint of trade. The shoe manufacturers of Canada were at liberty to hire or not to hire applts.' machines on applts.'

to a monopoly or being in undue restraint of trade; & it was not *ultra vires* such of the contracting parties as were incorporated cos., but was such in its nature as the ct. would enforce.—*ONTARIO SALT CO. v. MERCHANTS' SALT CO.* (1871), 18 Gr. 540.—**CAN.**

**a. ———— Agreement as to discounts.]**—*CHANDLER & MASSLY, LTD. v. KNY-SCHERRER CO.* (Ont.) (1905), 36 S. C. R. 130; 25 C. L. T. 106.—**CAN.**

**p. Covenant not to "handle" certain class of goods.]**—A covenant not to "handle" a certain class of goods during a specified term of years is void,

as being in undue restraint of trade, there being no limitation of territory.—*BENTLEY v. BENTLEY* (1898), 12 Man. L. R. 136. **CAN.**

**q. Contract to buy goods only from plaintiff.]**—Whether injunction granted to restrain breach.—A ct. will by injunction restrain a deft. from buying material (such as ready-prints for local newspapers) from other persons in breach of his contract for a certain period to buy only from plff., where it is important in plff.'s interests that such contract be carried out.—*TORONTO TYPE FOUNDRY CO., LTD. v. LEACH* (Ont.), [1920] 2 W. W. R. 18.—**CAN.**

**r. ————]—TORONTO TYPE FOUNDRY CO., LTD. v. JUCKES (Ont.), [1920], 2 W. W. R. 22.—**CAN.****

**1. Covenant not to sell cream to any creamery other than defendant's creamery.]**—Whether rules of society in undue restraint of trade.—*M'ELLISTIRM v. BALLYMACCELLIGOTT CO-OPERATIVE AGRICULTURE & DAIRY SOCIETY, LTD.*, [1918] 1 I. R. 313; *reversd.* [1919] A. C. 584, H. L.—**IR.**

**a. Construction of monopoly under Commercial Trusts Act, 1910, s. 5.]**—A monopoly or control under sect. 5 of the above Act is contrary to the public

terms as they pleased. Applts. were at liberty to prescribe the terms so long as they were not illegal, & were under no obligation to produce & dispose of their manufacture on terms similar to those imposed on patentees by the Canadian Patent Act.

(4) The question whether or not a contract is in restraint of trade & therefore void in law is a ques-

tion of law (LORD ATKINSON).—UNITED SHOE MACHINERY CO. OF CANADA v. BRUNET, [1909] A. C. 330; 78 L. J. P. C. 101; 100 L. T. 579; 25 T. L. R. 442; 53 Sol. Jo. 396, P. C.

—See, also, PATENTS, Vol. XXXVI., pp. 746, 747, Nos. 2336, 2337, 2341-2344; SALE OF GOODS, Vol. XXXIX., pp. 525 527, Nos. 1400-1409.

## Part IV.—Restraint of Trade by Custom, Bye-Law and Statute.

### SECT. 1.—BY CUSTOM AND BYE-LAW.

See Municipal Corporation Acts, 1835 (c. 76), s. 14; 1882 (c. 50), s. 247; CORPORATIONS, Vol. XIII., pp. 331-333, 336, 337, 437, Nos. 688-708, 743, 745, 750, 761, 1005; PUBLIC HEALTH, Vol. XXXVIII., pp. 157-167, Nos. 52 124.

### SECT. 2.—BY STATUTE.

#### SUB-SECT. 1.—IN GENERAL.

**81. Construction of statutes restraining trade.**—THOMAS v. SALTMAIR (1873), as reported in FREEM. K. B. 115; 89 E. R. 85; *sub nom.* THOMAS v. SORREL, 3 Keb. 184, Ex. Ch.

*Annotations:* Ment. Jenson v. Moor (1699), 12 Mod. Rep. 202; Shaw v. Bull (1701), 12 Mod. Rep. 392; R. v. Papinian (1725), 2 Sess. Cas. K. B. 31; *Ex p.* Amtage (1756), Amb. 291; Muskett v. Hill (1839), 5 Bing. N. C. 694; Wood v. Leadbitter (1845), 13 M. & W. 838; Washbourne v. Burrows (1847), 16 L. J. Ex. 266; Taplin v. Florence (1851), 10 C. B. 744; Congreve v. Evelis (1854), 10 Exch. 298; Bailey v. Stephens (1862), 12 C. B. N. S. 91; Nuttall v. Busewell (1866), 36 L. J. Ex. 1; L. C. C. v. Dundas, [1904] P. 1; Warr v. L. C. C. [1904] 1 K. B. 713; Smith v. Colbourne, [1914] 2 Ch. 533; British Actors Film Co. v. Glover, [1918] 1 K. B. 299.

**82. Preliminary service as apprentice—Before carrying on trade—Person carrying on trade as trustee.**—A person carrying on a trade as a trustee only for children only, is not liable to the penalty of the statute, for carrying on a trade without serving an apprenticeship.—MEAZIAN v. PEARSALL (1806), 6 Esp. 1; 170 E. R. 811, N. P.

#### SUB-SECT. 2.—THE SLAVE TRADE.

##### A. In General.

**83. Status of slavery—Local existence.**—(1) Where certain persons, who have been slaves in a foreign country where slavery was tolerated by law, escaped thence & got on board a British ship of war on the high seas: *Held:* A British subject resident in that country, who claimed the slaves as his property, could not maintain an action

against the commander of the ship for harbouring the slaves after notice.

(2) [The Ct. of Admty.] cannot lend its assistance in the condemnation of a vessel, on the ground that it is engaged in a traffic which, according to the municipal laws of the country to which claimant belongs, is no wrong (BAYLEY, J.).

(3) The moment they put their feet on board of a British man of war, not lying within the waters of East Florida, where, undoubtedly, the laws of that country would prevail, those persons who before had been slaves, were free. . . . If any injury had been done to them they would have had a remedy by applying to the laws of this country for redress. . . . If any force had been used by the master or any person in his assistance, can it be doubted that the slaves might have brought an action of trespass? . . . Nay, if the slave . . . had resisted the force & his death had ensued in the course of such resistance, can there be any doubt that every one who had contributed to that death would, according to our laws, be guilty of murder? (BEST, J.).

(4) A slave has no country, he is not reared by or for his parents, or for his own benefit, but for that of his master, he is incapable of compact (BEST, J.).

(5) Plff. had no right in these persons, except in their character of slaves. . . . & according to the principles of the English law, such a right cannot be considered as warranted by the general law of nature. I do not mean to say that particular circumstances may not introduce a legal relation to that extent; but assuming that there may be such a relation, it can only have a local existence, where it is tolerated by the particular law of the place (HOLKROYD, J.).

(6) The law of slavery is a law *in invitum*; & when a party gets out of the territory where it prevails & out of the power of his master & gets under the protection of another power, without any wrongful act done by the party giving that protection, the right of the master, which is

interest if it is obtained by breaches of the law, even although it could have been obtained without breaches of the law it might not have been contrary to the public interest, but might have operated to the public advantage. MERCHANTS' ASSOCN. OF NEW ZEALAND (INCORPORATED) v. R. [1912], 32 N. Z. L. R. 1233. —N.Z.

### PART IV. SECT. 2, SUB-SECT. 1.

**b. Validity of bye-law—Limiting number of shop licences.**—A bye-law of a town passed under 39 Vict. c. 26, s. 2, s. 3 (O), limiting the number of shop licences to be issued in the town to one, & directing the holder of such licence to confine the business of his

shop exclusively to the keeping & selling of liquor.—*Held:* bad, as being in effect prohibitory & creating a monopoly. —*Re BROMBY & TOWN OF BOWMANVILLE CORPN.* (1876), 38 U. C. R. 580.—CAN.

**c. — Authorising mayor to grant trading licences.**—38 Vict. c. 88, authorising the mayor of Fredericton to grant to any person wishing to engage in any trade, profession, occupation or calling in the city, a licence to engage therein, is not *ultra vires* as being an interference with "trade or commerce."—*Ex p. FAIRBAIRN* (1878), 81 N. B. R. (2 P. & B.) 4.—CAN.

**d. — Prohibiting junk & second-hand stores dealing with minors.**—R. v.

LIVY (1899), 30 O. R. 403.—CAN.

**e. — Agent soliciting orders for stationery without licence.**—R. v. BREWSTER (1924), 43 Can. Crim. Cas. 366; 34 B. C. R. 494.—CAN.

**f. R. S. O. 1877 (c. 158), s. 15—Whether preventing co-operative associations to enter into credit transactions.**—ONTARIO CO-OPERATIVE STORECUTTERS' ASSOCN. v. CLARKE (1880), 31 C. P. 280.—CAN.

**g. What is a sale by wholesale within Municipal Act, 1891, s. 166.**—A sale to a person in British Columbia by an agent of a firm doing business outside the province of 1,100 business cards to be supplied by them, is a sale by wholesale & not a sale by retail







*B. The Trade in Slaves.**(a) In General.*

See Slave Trade Acts, 1824 (c. 113); 1833 (c. 73); 1843 (c. 98); 1873 (c. 88); 1876 (c. 46); Pacific Islanders Protection Acts, 1872 (c. 19); 1875 (c. 51); Forgery Act, 1913 (c. 27), s. 14 (1).

See, also, CRIMINAL LAW, Vol. XIV., p. 47, No. 159; Vol. XV., pp. 726-728, Nos. 7865-7884.

**98. Whether contrary to law of nations.**—Any trade contrary to the general law of nations, although not tending to or accompanied with any infraction of the belligerent rights of that country whose tribunals are called upon to consider it, may subject the vessel employed in that trade to confiscation. The slave trade is now deemed by this country contrary to the law of nations, unless tolerated by the municipal regulations of the state to which the owners of the vessel engaged in the trade may belong.—THE FORTUNA (1811), 1 Dods. 81; 1 Eng. Pr. Cas. 193, n.; 165 E. R. 1240.

*Annotations:*—**Apld.** Madrazo v. Willes (1820), 3 B. & Ald. 353. **Mentd.** R. v. Botsen (1865), L.C. & Ca. 515; The Hanaborn, [1919] A. C. 993.

**99.** —.—]—LE LOUIS (1817), 2 Dods. 210; 165 E. R. 1464.

*Annotations:*—**Apld.** The San Juan Nepomuceno (1821), 1 Hag. Adm. 265. **Consd.** R. v. Serva (1815), 1 Cox, C. C. 292. **Apld.** Buron v. Donnan (1848), 2 Exch. 167. **Consd.** R. v. Keyn (1876), 2 Ex. D. 63. **Refd.** Santos v. Illidge (1859), 5 Jur. N. S. 1358.

**Distinguished from piracy.**—See CRIMINAL LAW, Vol. XV., p. 726, Nos. 7865, 7866.

*(b) Seizure of Vessels Engaged in Slave Trade.*

See Slave Trade Act, 1873 (c. 88), ss. 3, 4.

**100. Foreign vessel—Trade permitted by foreign country.**—Where a claim is given for a ship engaged in the slave trade on the ground that the property belongs to the subjects of a country which still permits that trade, the ct. has a right to inquire into the title of the ship, & the *onus probandi* lies upon the parties setting up the claim.

THE DONNA MARIANNA (1812), 1 Dods. 91.

*Annotation:*—**Apld.** Madrazo v. Willes (1820), 3 B. & Ald. 353.

**101.** —.—]—The cts. of this country will respect the property of foreigners engaged in the slave trade, under the sanction of the laws of their own country. THE DIANA (1813), 1 Dods. 95; 165 E. R. 1244.

*Annotation:*—**Apld.** Madrazo v. Willes (1820), 3 B. & Ald. 353.

**102.** —.—]—FORBES v. COCHRANE, No. 83, ante.

—.—]—See, also, CRIMINAL LAW, Vol. XV., p. 727, Nos. 7870, 7871.

**103. Seizure in British port.**—The owner of a vessel, though a subject of the Queen of Spain, & resident at Cadiz, is liable to the forfeitures & penalties incurred under Slave Abolition Act, 1833 (c. 73), if his vessel came within a British port.—DEL CAMPO & MARTINEZ v. R. (1837), 2 Moo. P. C. C. 15; 12 E. R. 907.

*Annotation:*—**Refd.** Hocquard v. R., The Newport (1857), 11 Moo. P. C. C. 156.

—.—]—See, also, CRIMINAL LAW, Vol. XV., p. 727, Nos. 7873, 7874.

*(c) Payment of Bounties to Seizors.*

See Slave Trade Act, 1873 (c. 88), ss. 11-16, 19, 21; & generally, PRIZE LAW, Vol. XXXVII., pp. 678-686, Nos. 1463-1515.

**104. Right to bounty—Flag officer.**—Flag officer entitled to share of bounty given for seizure of slaves.—THE DOLORES (1819), 2 Dods. 413; 165 E. R. 1531.

**105.** —.— Governor of colony—Absent at time of seizure.—The governor of a colony being the person to whom the general management of such J.—VOL. XLIII.

colony is entrusted is the person entitled to the bounties payable in respect of a seizure of slaves, even though he is absent from the colony at the time the seizure is made.—*Re BOUNTIES PAYABLE IN RESPECT OF SEIZURE OF CERTAIN SLAVES AT SIERRA LEONE* (1863), Brown, & Lush, 148; 32 L. J. P. M. & A. 189; 9 Jur. N. S. 1254; 167 E. R. 322.

**106.** —.— Application of prize principles—Joint capture.—The principles of joint capture in prize cases apply to vessels associated in the capture of ships engaged in the slave trade; therefore, where the actual capture was made by one of two vessels associated for such purpose, the other, which had joined in the chase & rendered subsequent assistance, held entitled to share in the bounty for the slaves & in the proceeds of the ship, stores, & cargo.—THE AVISO (1826), 2 Hag. Adm. 31; 166 E. R. 155.

*Annotations:*—**Distd.** The Zepherina (1830), 2 Hag. Adm. 317. **Apld.** The Sociedade Febr (1843), 2 Wm. Rob. 155. The Felicidade (1848), 12 Jur. 411.

**107.** —.—]—In joint captures, only the actual force present shares in the prize: therefore when a tender of one ship was joint captor with another ship, the prize was shared proportionably between the capturing ship & the tender; but the tender's share, under the Order in Council, June 30, 1827, is distributable among the whole of the ship's company.—THE ZEPHERINA (1830), 2 Hag. Adm. 317; 166 E. R. 259.

*Annotation:*—**Mentd.** R. v. Serva (1815), 1 Den. 194.

**108.** —.—]—THE EAGLE (1811), 1 Wm. Rob. 236; 1 Notes of Cases, 61; 166 E. R. 560. *Annotation:*—**Distd.** The Felicidade (1848), 12 Jur. 411.

**109.** —.—]—Cases of claims to joint capture of slave vessels are to be governed by the principles established in the Prize Ct. of Admty. with respect to claims to joint capture in time of war; subject, however, to such exceptions as the distinction between the respective cases may create; e.g. where, in the former instance, a claim to joint capture is supported solely by the evidence of releasing witnesses.

Principles as to what will constitute association between ships of war. An order was given by a superior to an inferior officer, by which the latter was prevented joining with his vessel in the chase of a slave ship, which was afterwards captured by the vessel of the former:—*Held:* a claim to joint capture was sustainable.—THE SOCIÉADÉ FELIZ (1843), 2 Wm. Rob. 155; 2 Notes of Cases, 430; 4 L. T. 528; 7 Jur. 956; 166 E. R. 713; *previous proceedings* (1842), 1 Wm. Rob. 303.

*Annotation:*—**Apld.** The Brazil (1856), Sw. 75.

**110.** —.—]—In questions of joint capture, the *onus probandi* is on the claimant, & in favour of the actual captor. The rule, that no claim for joint capture can be established on the sole evidence of the crew claiming, is not so strict in slave cases as in prize of war. It appearing in the evidence that the surrender of the slave took place before she was seen by the vessel claiming; such claim of joint capture held not to be established.—THE BRAZIL (1856), Sw. 75; 1 L. T. 528; 4 W. R. 375; 166 E. R. 1027.

**111.** —.—]—A Queen's ship, which is authorised to capture slave ships, being in sight during the chase & capture by another ship of war of a vessel equipped for the slave trade, is entitled to share as joint captor in the tonnage bounties awarded under 1 & 2 Vict. c. 47, unless the *animus capiendi* is clearly rebutted.

In establishing a claim to joint capture of a vessel equipped for the slave trade, proof that the alleged joint captor was seen by those on board

*Sect. 2. —By statute: Sub-sect. 2, B. (c); sub-sects. 3 & 4. Part V. Sect. 1.]*

the prize before capture is important, but is not absolutely required as in cases of prize of war.

At daylight on a morning nearly calm, her Majesty's steamships *Falcon* & *Dart* were in company, each under canvas only; each had authority to capture vessels engaged in the slave trade; but the *Falcon* was on her voyage home. A vessel, which afterwards proved to be equipped for the slave trade, appeared in sight of both ships: the *Dart* got up steam & went in chase. The captain of the *Falcon*, deeming the *Dart* sufficient for the purpose, did not get up steam, but continued his course. The chase lasted a few hours only; & the capture by the *Dart* took place in daylight, in sight of those on deck of the *Falcon*, at the distance of about seven miles. The prize was destroyed as unseaworthy. Proceedings of adjudication subsequently took place, & bounties were awarded under 2 & 3 Vict. c. 73, 1 & 2 Vict. c. 47, s. 2:—*Held*: the *Falcon* was entitled to share as joint captor.—**BRIG (NAME UNKNOWN)** (1864), *Brown*, & *Lush*, 370; 167 E. R. 404.

**112.** —[The principles of law which are applied to prize captures in time of war are applicable to questions of bounty for the capture of vessels engaged in the slave trade.—**THE FELICIDADE (OTHERWISE VIRGINIA)** (1818), 3 Wm. Rob. 45; 6 Notes of Cases, 174; 12 Jur. 441; 166 E. R. 880.

—[Compare, generally, **PRIZE LAW**, Vol. XXXVII., pp. 598–603, Nos. 352–438.

**113. Capture on inland expedition.**—**THE RIO PONGAS** (1824), cited in 2 Hag. Adm. at p. 370; 166 E. R. 278.

*Annotation*.—**Consd.** **THE DONNA BARBARA** (1831), 2 Hag. Adm. 366.

**114.** — **Nature of ship making capture.**]

The instructions annexed to the convention with Portugal, embodied in Slave Trade Act, 1824 (c. 113), imply that the seizures of Portuguese slave ships are to be made under the personal direction of the commander of a ship of war:—*Held*: therefore, a seizure by an open boat, the crew of which was borne on the books of a king's ship, commanded by an officer of the rank required to make the search, but actually putting off from an unauthorised tender, & at a distance of 1,500 miles from the king's ship, did not entitle the ship to the moiety of the proceeds or to the bounties under Slave Trade Act, 1824 (c. 113), ss. 67, 68, the slave ship having been condemned by the competent et. as prize to a tender to a king's ship. — **THE DONNA BARBARA** (1831), 2 Hag. Adm. 366; 166 E. R. 277; *on appeal* (1831), 3 Hag. Adm. App. C. 446.

*Annotations*.—**Consd.** **THE EAGLE** (1841), 1 Wm. Rob. 236. **Mentd.** **R. v. SERVA** (1845), 1 Den. 104.

#### SUB-SECT. 3.—TRADE IN FIREARMS.

*See Firearms Act, 1920 (c. 43).*

**115. Air gun.**—Pistols Act, 1903 (c. 18), does not apply to a mere toy, but it does apply to an air gun if it is a weapon from which a shot, bullet, or other missile can be discharged, although it is not a firearm.—**BRYSON & GAMAGE, LTD.**, [1907] 2 K. B. 630; 76 L. J. K. B. 936; 97 L. T. 399; 71 J. P. 439; 21 Cox, C. C. 515, D. C.

**116. Pistol.**—On the sale of a pistol to a person who being a householder purposes to use such pistol only in his own house or the curtilage thereof

it is necessary under Pistols Act, 1903 (c. 18), s. 3, not only that reasonable proof of these facts shall be given to the vendor, but also that the intending purchaser shall produce to the vendor a statement to that effect signed by himself & either by a police officer or a justice of the peace.—**MATTHEWS v. GRAY**, [1909] 2 K. B. 89; 78 L. J. K. B. 545; 100 L. T. 907; 73 J. P. 303; 25 T. L. R. 476, D. C.

**117.** — **Air pistol.**—An air pistol is not *per se* a firearm within the definition of "firearm" in Firearms Act, 1920 (c. 43), s. 12 (1), but it is an "air gun or air rifle" within the proviso which empowers a Secretary of State to make rules declaring certain types of air guns & air rifles to be specially dangerous, & if it is so declared, it is to be deemed to be a firearm.—**SAINT v. HOCKLEY** (1925), 41 T. L. R. 555; 69 Sol. Jo. 575, D. C.

**118. Prohibition of importation.—Of arms, ammunition, gunpowder or "any other goods"—"Any other goods" must be ejusdem generis.**—(Customs Consolidation Act, 1876 (c. 36), s. 43, provides that: "The importation of arms, ammunition, gunpowder, or any other goods may be prohibited by Proclamation or Order in Council":—*Held*: in that sect. the meaning of the words "any other goods" is restricted to things of the same class as those previously specified, & therefore, a Proclamation purporting to prohibit the importation of an article which was not of that class was illegal & invalid.—**A.-G. v. BROWN**, [1920] 1 K. B. 773; 89 L. J. K. B. 1178; 122 L. T. 558; 84 J. P. 113; 36 T. L. R. 165; *on appeal*, [1921] 3 K. B. 29, C. A.

**Necessity for licence.**—*See* **REVENUE**, Vol. XXXIX., p. 247, Nos. 301–304.

#### SUB-SECT. 4.—OTHER PARTICULAR TRADES.

**119. Dye stuffs.**—Dyestuffs (Import Regulation) Act, 1920 (c. 77), s. 1 (1), prohibits certain imports "with a view to the safeguarding of the dye-making industry."

These forbidden imports are (a) "all synthetic organic dyestuffs, colours & colouring matters," & (b) "all organic intermediate products used in the manufacture of" the same:—*Held*: manufactured articles containing a minute & commercially, non-separable ingredient of the prohibited matter fell within the prohibition, though the articles themselves, artists' colours & materials & copying ink pencils, would be of no direct use in the dye making industry.—**WHYTE, RIDSDALE & CO. v. A.-G.**, [1927] 1 Ch. 548; 96 L. J. Ch. 351; 137 L. T. 181; 43 T. L. R. 142; 71 Sol. Jo. 143.

**Hosiery manufacturers.**—*See* Hosiery Act, 1845 (c. 77), ss. 1–4.

**Silk weavers.**—*See* Silk Weavers Act, 1845 (c. 128), ss. 1–3.

**Tobacco manufacturers & dealers.**—*See* Finance Act, (1909–1910) Act, 1910 (c. 8), s. 83; **REVENUE**, Vol. XXXIX., pp. 233, 237, Nos. 95, 114.

**Old metal dealers.**—*See* Old Metal Dealers Act, 1861 (c. 110); Prevention of Crime Act, 1871 (c. 112), s. 13; Public Health Acts (Amendment) Act, 1907 (c. 53), s. 86.

**Marine store dealers.**—*See* Merchant Shipping Act, 1894 (c. 60), ss. 538–542; Public Health Acts (Amendment) Act, 1907 (c. 53), s. 86.

**Anchor & chain cables.**—*See* Merchant Shipping Act, 1894 (c. 60), s. 543; **Anchor & Chain Cables Act, 1899 (c. 23)**; **SALE OF GOODS**, Vol. XXXIX., p. 464, No. 899.

#### PART IV. SECT. 2, SUB-SECT. 4.

**1. Marine store dealers.—Necessary ingredient of offence against Prevention of Crime Act, 1871—Accused must be "dealer in old metals."**—**ADAMS v. M'KENNA** (1906), 8 F. (Cl. of Sess.), 79.—**SCOT.**

## Part V.—Restraint of Trade by Agreement.

### SECT. 1.—IN GENERAL.

**120. Former rules.**—*CLERK v. TAYLORS OF EXETER* (GOVERNOR & CO.), No. 176, *post*.

**121. —**—[*CLAYGATE v. BATCHELOR* (1602), *Owen*, 143; 74 E. R. 961; *sub nom.* *COLGATE v. BATCHELOR*, Cro. Eliz. 872.]

*Annotations*.—**Expld.** *Green v. Price* (1845), 13 M. & W. 695; *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A. C. 535. **Refd.** *Thompson v. Harvey* (1688), Comb. 121; *Mitchel v. Reynolds* (1711), 1 P. Wins. 181; *Mallan v. May* (1843), 11 M. & W. 653; *Maxim Nordenfelt Guns & Ammunition Co. v. Nordenfelt*, [1893] 1 Ch. 630; *Re Hollis' Hospital Trustees & Hague's Contract* (1899), 47 W. R. 691.

**122. —**—[The old cases of *Claygate v. Batchelor*, No. 121, *ante*, & *Clerk v. Taylors of Exeter*, No. 176, *post*, cannot now be considered law. They undoubtedly proceeded on the ground that all covenants & agreements in restraint of trade however limited are altogether void, but in modern times the *cts.* have held that partial restraints of trade may be allowed when they are reasonable in extent on the ground that such restraints are rather beneficial to general commerce than injurious to it (*POLLOCK, C.B.*).—*GREEN v. PRICE* (1845), as reported in 13 M. & W. 695; 9 Jur. 857; 153 E. R. 291; *affd. sub nom.* *PRICE v. GREEN* (1847), 16 M. & W. 346, Ex. Ch.]

*Annotations*.—**Refd.** *Galsworthy v. Straut* (1848), 1 Exch. 659; *Denny v. Henderson*, (1855), 24 L. J. Ex. 324; *Mercer v. Irving* (1858), P. B. & E. 563; *Mogul S.S. Co. v. McGregor*, Gow (1889), 23 Q. B. D. 598. **Mentd.** *Nicholls v. Stretton* (1817), 10 Q. B. 346; *Bishop v. Kitchen* (1868), 38 L. J. Q. B. 20; *Farrer v. Close* (1869), L. R. 1 Q. B. 602; *Collins v. Locke* (1879), 4 App. Cas. 674; *Walls v. Smith* (1882), 21 Ch. D. 243; *M. S. & L. Ry. v. Brown* (1883), 8 App. Cas. 703; *Baines v. Geary* (1887), 35 Ch. D. 151; *Baker v. Hedgecock* (1888), 39 Ch. D. 520; *Swaine v. Wilson* (1889), 21 Q. B. D. 252; *Davies, Turner v. Lowen* (1891), 61 L. T. 655; *Branton v. Dixon* (1892), 36 Sol. Jo. 556; *Maxim Nordenfelt Guns & Ammunition Co. v. Nordenfelt*, [1893] 1 Ch. 630; *Nevanas v. Walker & Foreman*, [1914] 1 Ch. 413.

**123. —**—[*CONTINENTAL TYRE & RUBBER (GREAT BRITAIN) CO., LTD. v. HEATH*, No. 188, *post*.]

**124. —**—[*A-G. OF COMMONWEALTH OF AUSTRALIA v. ADELAIDE S.S. CO., LTD.*, No. 68, *ante*.]

**Relaxation by modern rules.** See Sect. 2, sub-sect. 1, *post*.

**General & partial restraints.** See Sect. 2, sub-sect. 3, *post*.

**125. Must conform to recognised principles.**—By an agreement in writing deft. agreed to serve plff., who was a tailor, at Weybridge, as a cutter, & he further agreed "not to enter into any business arrangement in competition with or that would in any way interfere with the business carried on by" plff., "at his establishments in Weybridge or the City of London, or at any of his addresses of the future":—*Held*: the agreement was unreasonable as being too wide.

All these agreements in restraint of trade are *prima facie* bad unless coming within well recognised principles (*LORD ALVERSTONE, C.J.*).—*BERTHAM v. FRASER* (1904), 21 T. L. R. 8; 19 Sol. Jo. 14, D. C.

**126. Contract containing servile incidents — Invalid.**—*DAVIES v. DAVIES*, No. 406, *post*.

**127. —**—[By an indenture made between the mtgor., a clerk in the employment of deft., & plff., a money-lender, the mtgor., who was indebted in various sums to creditors whom the money-lender agreed to pay on having the repayment secured to him in manner thereafter appearing, assigned to plff. (*inter alia*) all the

salary, wages, or other moneys then or thereafter during the continuance of the security to become due to him under his employment with defts. or with any other employers to hold to plff. absolutely, but subject to a proviso for redemption. The mtgor. then covenanted that he would repay plff. by certain instalments; that during the continuance of the security he would not, without the express sanction in writing of plff. determine his engagement with defts. or other his employers for the time being; that he would not borrow or attempt to borrow any money or part with, sell or pledge his furniture, chattels, or effects, or obtain or endeavour to obtain credit or permit any one to pledge his credit, save his wife in the case of ordinary tradesmen's books for weekly settlement, or make himself or his property answerable for any sum of money whether legally or morally; & that he would not, without plff.'s consent in writing, remove from his then dwelling-house or take any other. Plff. alleging that the mtgor. had committed breaches of the covenants contained in the indenture, gave notice of the assignment to defts. & brought an action to recover salary due from them to the mtgor.:—*Held*: the contract was entire & indivisible, & was bad as being contrary to public policy inasmuch as it unduly & improperly fettered the mtgor.'s liberty of action & the free disposal of his property.

It appears to me that it is not using overstrained or poetical language to say it made this unfortunate man the slave of the money-lender (*SCRUTTON, L.J.*).—*HORWOOD v. MILLAR'S TIMBER & TRADING CO., LTD.*, [1917] 1 K. B. 305; 86 L. J. K. B. 190; 115 L. T. 805; 33 T. L. R. 86; 61 Sol. Jo. 114, C. A.]

*Annotations*.—**Consd.** *Naylor, Benzon v. Krainische Industrie Gesellschaft* (1918), 87 L. J. K. B. 1066. **Distd.** *Denny's Trustee v. Denny & Warr*, [1919] 1 K. B. 583. **Refd.** *Mellish v. Ballymacelligott Co-op. Agricultural & Dairy Soc.*, [1919] A. C. 748; *Pratt v. British Medical Assocn.*, [1919] 1 K. B. 241; *Hepworth Manufacturing Co. v. Ryott*, [1920] 1 Ch. 1.

**128. No offence at common law.**—*A-G. OF COMMONWEALTH OF AUSTRALIA v. ADELAIDE S.S. CO., LTD.*, No. 68, *ante*.

**129. How far court will consider illegality—Agreement ex facie illegal.**—Where an action is brought on a contract which is *ex facie* illegal as being in unreasonable restraint of trade, the *ct.* will decline to enforce the contract, irrespective of whether illegality is pleaded or not; but, where the question of illegality depends upon the surrounding circumstances, as a general rule, the *ct.* will not entertain the question unless it is raised by the pleadings.

Plff. co. was a combination of salt manufacturers formed for the purpose of regulating supply & keeping up prices, & it had the practical control of the inland sale market. The members of the co. were entitled to be appointed as its distributors, *i.e.* agents to sell on behalf of the co. the salt which it had purchased from them. Defts., who had not joined the combination agreed to sell to the co. for four years 18,000 tons of salt *per annum*, of which a certain proportion was to be table salt, at a fixed uniform price per ton, & undertook not to make any other salt for sale. They were to have the option of buying back the whole or a part of their table salt in each year at plff. co.'s current selling price & were to be appointed distributors on the same terms as the co.'s other distributors. Defts. having sold salt in violation

*Sect. 1.—In general. Sect. 2: Sub-sect. 1, A. (a).]*

of this agreement, pltf. co. sued them for breach of contract. Defts. did not by their defence raise the issue of illegality, but they sought to rely on certain facts & documents admitted in evidence at the trial upon other issues as showing that the agreement was illegal as against public policy:—*Held*: having regard to the form of the pleadings, the surrounding circumstances could not be looked at for the purpose of determining the illegality of the agreement, & the agreement was not *ex facie* illegal.—*NORTH WESTERN SALT CO., LTD. v. ELECTROLYTIC ALKALI CO., LTD.*, [1914] A. C. 461; 83 L. J. K. B. 530; 110 L. T. 852; 30 T. L. R. 313; 58 Sol. Jo. 338, H. L.; *reversg.*, [1913] 3 K. B. 422.

*Annotations*:—*Consd.* *Montefiore v. Menday Motor Components Co.*, [1918] 2 K. B. 211; *Lipton v. Powell*, [1921] 2 K. B. 51; *Ratclings v. General Trading Co.*, [1921] 1 K. B. 635; *Palmolive Co. (of England) v. Freedman*, [1928] Ch. 261. *Refd.* A.-G. of Commonwealth of Australia v. Adelaide S.S. Co., [1913] A. C. 781; *Kregor v. Hollins* (1913), 109 L. T. 225; *Evans v. Heathcote*, [1918] 1 K. B. 418; *Naylor, Benzon v. Krahnische Industrie Gesellschaft*, [1918] 1 K. B. 331; *Crown Milling Co. v. R.*, [1927] A. C. 391; *English Hop Growers v. Dering*, [1928] 2 K. B. 174.

**130. — Illegality deducible only from surrounding circumstances—Not raised in pleadings.**—*NORTH WESTERN SALT CO., LTD. v. ELECTROLYTIC ALKALI CO., LTD.*, No. 129, *ante*.

**131. Who may enter into agreement—Employer & employee.**—Pltf. carried on business at Kidderminster as a draper, tailor, & general outfitter. By a contract of employment of deft. by pltf., after reciting that deft. had requested pltf. to employ him as an assistant in his business at an annual salary & commission on turnover above a certain amount in the tailoring department & that pltf. was willing to do so only upon his entering into the agreement not to trade in opposition to him thereafter expressed, deft. agreed that he would not at any time thereafter "either on his own account or on that of any wife of his or in partnership with or as assistant, servant, or agent to any other person, persons or co. carry on or be in any way directly or indirectly concerned in any of the following trades or businesses; that is to say, the trade or business of a tailor, dressmaker, general draper, milliner, hatter, haberdasher, gentlemen's, ladies' or children's outfitter at any place within a radius of ten miles of" Kidderminster. Dft. subsequently set up business as a tailor at Worcester, outside the ten miles' limit, but obtained & executed tailoring orders in Kidderminster. The Div. Ct. held that the covenant was wider than was reasonably necessary for the protection of pltf.'s business, but that it was severable by striking out the enumerated trades except that of a tailor & limiting its operation to the trade or business of a tailor, & granted an injunction restricted to the tailoring trade:—*Held*: (1) the covenant being a single covenant for the protection of pltf.'s entire business & not several covenants for the protection of his several businesses could not be severed; (2) even if the covenant could be severed by confining it to the tailoring business it would still be void as being in restraint of competition.

(3) It is the covenantee, resp. here, who has to show that the restriction sought to be imposed upon the covenantor goes no further than is reasonable for the protection of his business (*ATKIN & YOUNGER, L.J.J.*).

(4) The restraint must be reasonable not only in the interests of the covenantee, but in the interests of both the contracting parties (*ATKIN & YOUNGER, L.J.J.*).

(5) An employer is not entitled by a covenant taken from his employee to protect himself after the employment has ceased against his former servant's competition *per se*, although a purchaser of goodwill is entitled to protect himself against such competition on the part of his vendor (*ATKIN & YOUNGER, L.J.J.*).

(6) Previously accepted rules as to the doctrine of severance require careful application if not entire reconsideration (*ATKIN & YOUNGER, L.J.J.*).

(7) I think . . . it is still the law that a contract can be severed if the severed parts are independent of one another & can be severed without the severance affecting the meaning of the part remaining (*LORD STERNDAL, M.R.*).

(8) It must now I think be recognised in all cts. that there is every difference in the matter of validity between such a covenant as we find here embodied in a contract of service & the same covenant when found in an agreement for the sale of goodwill (*ATKIN & YOUNGER, L.J.J.*).

(9) An employer may not, after his servant has left his employment, prevent that servant from using his own skill & knowledge in his trade or profession, even if acquired when in the employers service. That skill & knowledge are only placed at the employer's disposal during the employment (*YOUNGER, L.J.*).—*ATTWOOD v. LAMONT*, [1920] 3 K. B. 571; 90 L. J. K. B. 121; 124 L. T. 108; 36 T. L. R. 895; 65 Sol. Jo. 25, C. A.

*Annotations*:—*As to (1) Apld.* *Clarke, Sharp v. Solomon* (1920), 37 T. L. R. 176; *British Concrete Co. v. Schell*, [1921] 2 Ch. 563. *As to (2) Apld.* *Spence v. Mercantile Bank of India* (1921), 37 T. L. R. 390. *As to (5) Apld.* *Bowler v. Lovegrove*, [1921] 1 Ch. 612. *Consd.* *English Hop Growers v. Dering*, [1928] 2 K. B. 174. *As to (7) Apld.* *Putsman v. Taylor*, [1927] 1 K. B. 637.

**132. — Vendor & purchaser of goodwill.**—*ATTWOOD v. LAMONT*, No. 131, *ante*.

**133. Question of agreement one of fact.**—A. having printed a work, sold 300 copies to B., a bookseller, at 40s. a copy, binding himself not to sell to others, in quires, under 48s., & in single copies under 50s. a copy, until B.'s 300 were sold, or his consent was obtained. In his letter, which constituted the agreement, he said to B., "I do not expect you to sell under 48s. & 50s., but do as you like." When B. had sold a part of the 300 copies, he went into partnership with C., & transferred all his stock at the cost price. He also sold some copies at 45s. & 46s. A., in contravention of his agreement, sold under the stipulated prices; but, on being threatened with proceedings by B., persuaded D., who had purchased the principal part, to consent to give them back, if it would satisfy B. D. had an interview with B., & told him this. D. said, that he understood the arrangement was a settlement of the difference, & that B. went away from the interview perfectly satisfied. In an action by B. against A. for a breach of the agreement:—*Held*: neither the underselling by B. nor the transfer of the stock to the partnership, were grounds of non-suit; but the arrangement with D. was an answer to the action, if the jury thought it made an end of the dispute between the parties.—*BENNING v. DOVE* (1833), 5 C. & P. 427; 172 E. R. 1038, N. P.

*Annotation*:—*Mentd.* *Re Curry, Ex p. Lever* (1850), 15 L. T. O. S. 476.

**134. Agreements between equal contracting parties & between master & servant contrasted.**—*ENGLISH HOP GROWERS v. DERING*, No. 377, *post*.

**Covenants in restraint of trade—In lease.**—*See, generally, LANDLORD & TENANT*, Vol. XXXI., pp. 159-164, Nos. 2918-2966.

— **Whether usual covenant.**—*See*

## PART V.—RESTRAINT OF TRADE BY AGREEMENT.

LANDLORD & TENANT, Vol. XXXI., p. 153, Nos. 2872-2876.

**Sale of land.]—See SALE OF LAND, Vol. XI., pp. 321-326, Nos. 2722-2753.**

**Contract to be performed abroad—Governed by lex loci solutions.]—See CONFLICT OF LAWS, Vol. XI., p. 392, No. 663.**

**Stamp—Written agreement stipulating amount of penalty on breach.]—See REVENUE, Vol. XXXIX., pp. 272, 275, Nos. 570, 601.**

**Preliminary agreement for sale of business—Insertion of restrictive covenant in final agreement—By purchaser without knowledge of vendor.]—See SALE OF LAND, Vol. XI., p. 15, No. 29.**

### SECT. 2.—VALIDITY OF AGREEMENTS

#### SUB-SECT. 1.—ESSENTIALS.

##### A. Reasonableness.

##### (a) In General.

**135. Contract must be reasonable.]—HOMER v. ASHFORD, No. 250, post.**

**136. ———.]—A. agreed to serve B. & C., partners, for six years at a fixed salary, & not to be employed for any other person during that time; at the expiration of which he was to be admitted into the partnership, but no terms were settled. A. left the service of B. & C. during the term, & commenced business in the same trade: *Held*: both parts of the agreement must be taken together, & as one part could not, on account of its vagueness, be enforced, the *et.* would not interfere to restrain A. from carrying on his business.**

[The agreement] would afford a strong reason against the interference of the *et.* for it would be what is commonly termed a hard bargain (SHADWELL, V.-C.).—*KIMBERLEY v. JENNINGS* (1836), 6 Sim. 340; 5 L. J. Ch. 115; 58 E. R. 621; *sub nom.* *KIMBERLEY v. YEO, KIMBERLEY v. JENNINGS, Donnelly, 1.*

*Annotations: Distd.* Cornwall v. Hawkins (1872), 41 L. J. Ch. 435. *Refd.* Pickering v. Ely (Bp.) (1843), 12 L. J. Ch. 271; Dietrichsen v. Cabburn (1846), 2 Ph. 52; Lumley v. Wagner (1852), 1 De G. M. & G. 604; Daggett v. Ryman (1858), 16 W. R. 302.

**137. ———.]—(1) Agreements in restraint of trade are against public policy & void, unless the restraint they impose is partial only, & reasonable in relation to the objects of the contract; & also unless they are made upon a real & *bond fide* consideration. Where the object of an agreement is to parcel out the stevedoring business of a particular port amongst the parties to it, & so to prevent competition, at least amongst themselves, & also, it may be, to keep up the price to be paid for the work:—*Held*: such agreement is not invalid if carried into effect by provisions reasonably necessary for the purpose, though the effect of them might be to create a partial restraint upon the power of the parties to exercise their trade.**

(2) A provision that if a particular merchant named in the agreement should refuse to allow the stevedoring of any ship to be done by the party entitled to it under the agreement, & should require one of the other parties to do it, such

party so required should give an equivalent to the party who lost the stevedoring, is not unreasonable either as regards the party entitled or as regards the merchant.

(3) A provision that in the case of ships passing out of the hands of merchants named in the contract into the hands of other merchants, who should not choose to employ the party entitled under the agreement, all the parties thereto are deprived of the work, cannot be justified. It is obviously detrimental to the public, is entirely beyond anything the legitimate interests of the parties required, & is utterly unprofitable & unnecessary, at least for any purpose which can be avowed.

(4) Cts. are not disposed to measure the adequacy of the consideration, if a real & *bond fide* consideration exists (*per Cur.*).—*COLLINS v. LOCKE* (1879), 1 App. Cas. 674; 48 L. J. P. C. 68; 41 L. T. 292; 28 W. R. 189, P. C.

*Annotations:—As to (1) Apld.* Davies v. Davies (1887), 36 Ch. D. 359. *Refd.* Maxim Nordenfellt Guns & Ammunition Co. v. Nordenfellt (1893) 1 Ch. 639; Allen v. Flood, [1898] A. C. 1; North Western Salt Co. v. Electrolytic Alkali Co. (1912), 107 L. T. 439. *Generally, Refd.* Swaine v. Wilson (1859), 21 Q. B. D. 252; Gozney v. Bistol, *etc.*, Trade & Provident Soc., [1909] 1 K. B. 901. *Mentd.* Vimey v. Bignold (1887), 20 Q. B. D. 172.

**138. ———.]—(1) There is no absolute rule that a covenant in restraint of trade is void if it is unlimited in regard to space. The question in each case is whether the restraint extends further than is necessary for the reasonable protection of the covenantee. If it does not do that, the performance of the covenant will be enforced, even though the restriction be unlimited as to space. Pltfs. were champagne merchants doing business throughout England & the continent. Deft., who was in their employment, agreed that he would not for ten years after leaving their service engage in the champagne trade. Deft. subsequently commenced business as a retail wine merchant in London, selling champagne & other wines:—*Held*: although the agreement extended to the whole of England, & was, in fact, unlimited as to space, pltfs. were entitled to an injunction to restrain a breach of that agreement.**

(2) The policy of the English law in favour of trade applies to foreigners trading in England equally with English subjects.—*ROUSILLON v. ROUSILLON* (1880), 11 Ch. D. 351; 49 L. J. Ch. 338; 42 L. T. 679; 11 J. P. 663; 28 W. R. 623.

*Annotations:—As to (1) Apld.* Radische Anilin und Soda Fabrik v. Schott, Seem, [1892] 3 Ch. 147; Thorsten Nordenfellt v. Maxim Nordenfellt Guns & Ammunition Co., [1891] A. C. 535. *Consd.* Goldsoll v. Goldman, [1914] 2 Ch. 603. *Refd.* Mills v. Dunham, [1891] 1 Ch. 576; Moenich v. Feenestre (1892), 67 L. T. 602; Mounis v. Saxelby, [1915] 2 Ch. 57. *As to (2) Apld.* Fevenek v. Hubbard (1902), 71 L. J. K. B. 509. *Refd.* Emanuel v. Symon, [1908] 1 K. B. 302; Gavin Gibson v. Gibson, [1913] 3 K. B. 379; Guindar v. De Garmont & Donnet, [1914] 3 K. B. 145. *Dynamit Actien-Gesellschaft v. Rio Tinto Co.* [1918] A. C. 292. *Generally, Refd.* Davies v. Davies (1887), 36 Ch. D. 359; Haynes v. Doman, [1899] 2 Ch. 13; North Western Salt Co. v. Electrolytic Alkali Co. (1912), 107 L. T. 439; Easton v. Russ, [1914] 1 Ch. 468; Millers v. Steedman (1915), 84 L. J. K. B. 2057. *Mentd.* Sirdar Gurdial Singh v. Faridkot, [1894] A. C. 670; Pemberton v. Hughes, [1899] 1 Ch. 781; Kaufman v. Gerson, [1904] 1 K. B. 391; Mounis v. Owen, [1907] 1 K. B. 746; Saxelby v. Fulton, [1909] 2 K. B. 208. *Re*

### PART V. SECT. 2, SUB-SECT. 1.—A. (a).

**135 i. Contract must be reasonable.]—PARKER & CO., LTD. v. WOOLLANDS (1921), 26 W. L. R. 172.—AUS.**

**135 ii. ———.] SASKATCHEWAN CO-OPERATIVE WHEAT PRODUCERS, LTD. v. ZUROWSKI (Sask.), [1926] 3 D. L. R. 810; [1926] 2 W. W. R. 604.—CAN.**

**135 iii. ———.] OAKES & CO. v. JACKSON (1876), 1 L. R. 1 Mad. 134.—IND.**

**135 iv. ———.] HARLEY v. STRIKE (1876), 2 N. Z. Jur. N. S. 114.—N.Z.**

**135 v. ———.]—Where the limitations of a covenant in restraint of trade are reasonable, having regard to the nature of the business, it will be enforced.—HARRIS v. BLUETT (1886), 5 N. Z. L. R. 175 (S. C.).—N.Z.**

**135 vi. ———.]—Appet. & resp. entered into an agreement in London whereby appet. engaged resp. for performance**

in South Africa as a variety artiste for a certain period & resp. agreed not to appear professionally without the written permission of appet. in any towns in South Africa within twelve months after the termination of her engagement with appet.—*Held*: the agreement by resp. was not unreasonable & was enforceable at the instance of appet. by interdict.—AFRICAN THEATRES TRUST, LTD. v. JOHNSON, [1921] C. P. D. 25.—S. AF.

*Sect. 2.—Validity of agreements: Sub-sect. 1, A. (a).]*

*Macartney v. Macfarlane v. Macartney*, [1921] 1 Ch. 522; *Employers' Liability Assoc. Corp'n. v. Sedgwick, Collins*, [1927] A. C. 95.

139. —. (1) A patentee & manufacturer of guns & ammunition for purposes of war covenanted with a co. to which his patents & business had been transferred that he would not for twenty-five years engage except on behalf of the co. either directly or indirectly in the business of a manufacturer of guns or ammunition:—*Held*: the covenant though unrestricted as to space was not, having regard to the nature of the business & the limited number of the customers, namely the Governments of this & other countries, wider than was necessary for the protection of the co., nor injurious to the public interests of this country; it was therefore valid & might be enforced by injunction.

(2) To a certain extent different considerations must apply in cases of apprenticeship & cases of that sort, on the one hand, & cases of the sale of a business or dissolution of partnership on the other. A man is bound to apprentice because he wishes to learn a trade & to practise it. A man may sell because he is getting too old for the strain & worry of business, or because he wishes for some other reason to retire from business altogether. Then there is obviously more freedom of contract between buyer & seller than between master & servant or between an employer & a person seeking employment (LORD MACNAGHTEN).

(3) I would answer the argument in the words of TINDAL, C.J., in *Rennie v. Irvine*, No. 321, *post*. "If the contract is a reasonable one at the time it is entered into we are not bound to look out for improbable & extravagant contingencies in order to make it void" (LORD MACNAGHTEN).

(4) When once it is admitted that whether the covenant be general or particular the question of its validity is alike determined by the consideration whether it exceeds what is necessary for the protection of the covenantor, the distinction between general & particular restraints ceases to be a distinction in point of law (LORD HERSHELL, C.).

(5) The general policy of the law is opposed to all restraints upon liberty of individual action which are injurious to the interests of the state or community (LORD WATSON).

All restraints of trade of themselves, if there is nothing more, are contrary to public policy, & therefore void. That is the general rule. But there are exceptions. . . . It is a sufficient justification & indeed it is the only justification, if the restriction is reasonable, reasonable, that is, in reference to the interests of the parties concerned & reasonable in reference to the interests of the public (LORD MACNAGHTEN).—NORDENFELT v. MAXIM NORDENFELT GUNS & AMMUNITION CO., [1891] A. C. 535; 63 L. J. Ch. 908; 71 L. T. 489; 10 T. L. R. 636; 11 R. 1, H. L.; *affy.* S. C. *sub nom.* MAXIM NORDENFELT GUNS & AMMUNITION CO. v. NORDENFELT, [1893] 1 Ch. 630, C. A.

*Annotations:—As to (1) Consd.* *Millers v. Steedman* (1915), 84 L. J. K. B. 2057; *Rodriguez v. Speyer*, [1919] A. C. 50. *Reid.* *Underwood v. Barker*, [1899] 1 Ch. 300; *Bromley v. Smith* (1909), 78 L. J. K. B. 745; *Ropeway v. Hoyle* (1919), 120 L. T. 538; *Dewes v. Fitch*, [1920] 2 Ch. 159. *As to (2) Consd.* *Underwood v. Barker*, [1899] 1 Ch. 300. *Reid.* *Mouchell v. Cubitt* (1907), 24 R. P. C. 194; *Mason v. Provident Clothing & Supply Co.*, [1913] A. C. 724; *Morris v. Saxby*, [1916] 1 A. C. 688; *Altwood v. Lamont*, [1920] 3 K. B. 571. *As to (3) Reid.* *Palmolive Co. (of England) v. Freedman*, [1928] Ch. 264. *As to (4) Consd.* *Eastes v. Russ*, [1914] 1 Ch. 468. *As to (5) Consd.* *Haynes v. Doman*, [1899] 2 Ch. 13; *Underwood v. Barker*, [1899] 1 Ch. 300; *Lansom Pneumatic Tube Co. v. Phillips* (1904), 91 L. T. 363. *Apld.* *Tivoli Manchester v. Colley* (1901), 52 W. R. 632. *Consd.* *Leng v.*

*Andrews*, [1909] 1 Ch. 763; *Russell v. Carpenters & Joiners' Amalgamated Soc.*, [1910] 1 K. B. 506. *Apld.* *Morris v. Iyle* (1910), 103 L. T. 545; *A.-G. of Commonwealth of Australia v. Adelaide S.S. Co.*, [1913] A. C. 781. *Consd.* *Mason v. Provident Clothing & Supply Co.*, [1913] A. C. 724; *North Western Salt Co. v. Electrolytic Alkali Co.*, [1914] A. C. 461; *Morris v. Saxby*, [1916] 1 A. C. 688; *Hepworth Manufacturing Co. v. Ryott*, [1920] 1 Ch. 1; *British Concrete Co. v. Schell*, [1921] 2 Ch. 563; *Palmolive Co. (of England) v. Freedman*, [1928] Ch. 264. *Reid.* *Dubowski v. Goldstein*, [1896] 1 Q. B. 478; *Re Hollis' Hospital Trustees & Hagues Contract*, [1899] 2 Ch. 540; *Hooper & Ashby v. Willis* (1906), 91 L. T. 624; *Re Beard, Reversionary & General Securities Co. v. Hall*, *Re Beard*, *Beard v. Hall*, [1908] 1 Ch. 383; *Continental Tyre & Rubber (Great Britain) Co. v. Heath* (1913), 29 T. L. R. 308; *Goldson v. Goldman*, [1914] 2 Ch. 603; *Jevans v. Heathcote*, [1917] 2 K. B. 336; *Horwood v. Millar's Timber & Trading Co.*, [1917] 1 K. B. 305; *Wiltmore v. King* (1918), 87 L. J. Ch. 646; *Denny v. Denny & Warr*, [1919] 1 K. B. 583; *McElstrim v. Ballymacolligott Co-op. Agricultural & Dairy Soc.*, [1919] A. C. 518; *Pratt v. British Medical Assoc.*, [1919] 1 K. B. 211. *Generally, Reid.* *Robinson v. Heuer* (1898), 67 L. J. Ch. 614; *Elliman v. Carlington* (1901), 84 L. T. 858; *United Shoe Machinery Co. of Canada v. Brunet*, [1909] A. C. 330; *Stuart & Simpson v. Haebeled* (1917), 55 Sol. Jo. 598; *Naylor, Benson v. Krahnische Industrie Gesellschaft* (1918), 87 L. J. K. B. 1066; *Rawlings v. General Trading Co.*, [1921] 1 K. B. 635; *English Hop Growers v. Dering*, [1928] 2 K. B. 171. *Mentd.* *Wilson v. Carney*, [1908] 1 K. B. 729; *Woodbridge v. Bellamy*, [1911] 1 Ch. 326; *Pullen v. Pullen & Holding* (1920), 123 L. T. 203.

140. . . . It is settled that the ct. will not enforce a covenant which it considers unreasonable (KEKEWICH, J.). *MORSE v. FOWLER* (1899), 41 Sol. Jo. 89.

141. . . . —DOWDEN & POOK, LTD. v. POOK, No. 217, *post*.

142. . . . —By an agreement in writing deft. agreed to appear at plffs.' theatre at Manchester at a salary of £60 per week. The agreement contained the following clause: "Prior to the commencement of this engagement & during its continuance or within six months afterwards, no artist shall perform at any place of entertainment within twenty miles of Manchester . . . without the written consent of the director. . . ." Deft. having been billed to appear at a theatre at Salford, in violation of this agreement & after leave to appear there had been refused her, plffs. brought this action, claiming an injunction:—*Held*: on the evidence, the restraint was reasonable, & therefore that the injunction claimed should be granted.

There are two questions to consider first, whether the restraint was reasonable in reference to the interests of the parties concerned; & secondly, even though reasonable in their interest, whether it was injurious to the public. If the restraint was not reasonable in the interest, or as it is sometimes expressed, for the protection of the interests of the parties concerned, it is against public policy & void. . . . There may be cases . . . in which even though the restraint is not unreasonable in the interest of the parties concerned, it may of itself be of such a character as to be injurious to the public, & in such cases, again, the restraint is void (WALTON, J.).—*TIVOLI, MANCHESTER, LTD. v. COLLEY* (1901), 52 W. R. 632; 20 T. L. R. 437; 48 Sol. Jo. 417.

143. . . . —(1) By a contract for the employment of deft. as canvasser by plffs., a clothing & supply co. having branches all over England, described in the contract as carrying on business on the check & credit system "at London in the county of Middlesex, amongst other places," deft. agreed that he would not within three years after the termination of the employment be in the employ of any person, firm, or co. carrying on or engaged in a business the same as or similar to that of plff. co., or assist any person employed or assisting in any such business, "within twenty-five miles of London aforesaid where the co. carry on business":—*Held*: assuming, without deciding,

that the agreement was not too vague as regards the area of restriction to be enforced by injunction, the restriction was wider than was reasonably necessary for plffs.' protection.

(2) Questions of this kind [validity] have always been reserved by the cts. as being for the ct. itself. . . . Evidence cannot be given on the question of validity or of reasonableness, although evidence can be given as to the nature of the business & of the employment & I think, also as to any practice which is usual among business men as regards the terms of the employment, not because this can determine the legal question of what is reasonable, but because what is usual is to some extent a guide in the consideration of the requirements of the particular business. . . .

The test is now settled. The law is summed up in LORD MACNAGHTEN's judgment in *Nordenfellt v. Maxim Nordenfellt Guns & Ammunition Co.*, No. 139, *ante*. After pointing out, as LORD WATSON had already done, that the standard of public policy must be the standard of the day, & that what was laid down as to public policy a long time ago may be of little use in settling what the actual standard is, he says: "The true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, & all restraints of trade of themselves, if there is nothing more, are contrary to public policy, & therefore void. That is the general rule. But there are exceptions: restraints of trade & interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, & indeed, it is the only justification, if the restriction is reasonable, reasonable, that is, in reference to the interests of the parties concerned & reasonable in reference to the interests of the public, so framed & so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public." . . . Resps. have to show that the restriction they have sought to impose goes no further than was reasonable for the protection of their business (LORD HALL-DANE, C.).

(3) The ct. may, & in some cases will, enforce a part of a covenant in restraint of trade, even though taken as a whole the covenant exceeds what is reasonable. But, in my opinion, that ought only to be done in cases where the part so enforceable is clearly severable, & even so only in cases where the excess is of trivial importance, or merely technical, & not a part of the main purport & substance of the clause (LORD MOULTON).—*MASON v. PROVIDENT CLOTHING & SUPPLY CO., LTD.*, [1913] A. C. 724; 82 L. J. K. B. 1153; 109 L. T. 449; 29 T. L. R. 727; 57 Sol. Jo. 739, H. L.; *revers. S. C. sub nom. PROVIDENT CLOTHING & SUPPLY CO., LTD. v. MASON*, [1913] 1 K. B. 65, C. A. *Annotations*.—As to (1) *Appl. Millers v. Steadman* (1915) 84 L. J. K. B. 2057. *Fold. Morris v. Saxelby*, [1916] 1 A. C. 688. *Appl. Whitmore v. King* (1918), 87 L. J. Ch. 617. *Distd. Dawes v. Fitch*, [1920] 2 Ch. 159. *Refd. Spence v. Mercantile Bank of India* (1921), 37 T. L. R. 390. As to (2) *Appl. Rastores v. Russ*, [1914] 1 Ch. 168; Atwood v. Lamont, [1920] 3 K. B. 571; Hepworth Manufacturing Co. v. Ryott, [1920] 1 Ch. 1. As to (3) *Consd. Nevanas v. Walker & Foreman*, [1914] 1 Ch. 413. *Appl. Horwood v. Millar's Timbers & Trading Co.*, [1917] 1 K. B. 305; Atwood v. Lamont, [1920] 3 K. B. 571. *Consd. British Concrete Co. v. Schellf.*, [1921] 2 Ch. 563; Putman v. Taylor, [1927] 1 K. B. 637. *Refd. Goldsoll v. Goldman*, [1915] 1 Ch. 292. *Generally, Refd. Kinski v. Peet* (1915), 112 L. T. 1107; *Great Western & Metropolitan Dairies v. Gibbs* (1918), 34 T. L. R. 341; *McEllistram v. Ballymacelligott Co-op. Agricultural & Dairy Soc.*, [1919] A. C. 548; *Hopeways v. Hoyle* (1919), 120 L. T. 538. *Mentd. Denny's Trustee v. Denny & Warr*, [1919] 1 K. B. 583.

144. —. —.] — A.-G. OF COMMONWEALTH OF AUSTRALIA v. ADELAIDE S.S. CO., LTD., No. 68, *ante*.

145. —. —.]—A man validly contracts as he will because he is a free man; he validly disposes of his property as he will because it is his own. The cts., on grounds of policy, declare contracts in restraint of trade to be unenforceable & dispositions in perpetuity or which fetter the prerogative to be invalid. I never heard of a legal disability from which a party or a transaction could be relieved, because it would be good policy to do so. When it had been established that the reasonableness of restrictive covenants upon a trader's prosecution of his calling was a factor in their permissibility, it followed naturally enough that in judging what is reasonable the relevant conditions of trade must be looked at as at the time when the question arises. The principle itself is that one party may impose reasonable restrictions upon the other. Where reasonableness is not an element in a principle the case is otherwise (LORD SUMNER).—*RODRIGUEZ v. SPEYER BROTHERS*, [1919] A. C. 59; 88 L. J. K. B. 147; 119 L. T. 409, H. L.

*Annotation*: *Refd. Valentine v. Hyde*, [1919] 2 Ch. 129.

146. —. —.]—*RAWLINGS v. GENERAL TRADING CO.*, No. 266, *post*.

147. **How reasonableness determined—From subject-matter of contract.**—Although public policy requires that every man shall be at liberty to work for himself, & shall not deprive himself or the state of his labour, skill, or talent, it is equally a principle of public policy that a man shall be enabled to sell to the best advantage anything that he has acquired by his labour, skill or talent, & when that advantage requires him to enter into stipulations he may do so, provided such stipulations, however restrictive upon himself, are not unreasonable, having regard to the subject-matter of the contract.

Upon the formation of a co. for the purchase & working of a certain process of manufacture introduced into this country from America, the agreement for the purchase contained a provision that the vendors "will not directly or indirectly carry on, nor will they, to the best of their power, allow to be carried on by others, in any part of Europe, any co. or manufactory having for its object the manufacture or sale of productions now manufactured in the business or manufactory," of the vendors, " & will not communicate to any person or persons the means or processes of such manufacture, so as in any way to interfere with the exclusive enjoyment by the purchasing co. of the benefits hereby agreed to be purchased " :—*Held*: the restriction contained in this clause was not greater having regard to the subject-matter of the contract, than was necessary for the protection of the purchasers, & was capable of being enforced against the vendors.

This case, as it seems to me, much more resembles the sale of a secret, which has been held to be perfectly good, with a stipulation unlimited as to time & place as to communicating the secret or dealing with it so as to interfere with the purchaser (JAMES, V.-C.).—*LEATHER CLOTH CO. v. LORSONT* (1869), L. R. 9 Eq. 345; 39 L. J. Ch. 86; 21 L. T. 661; 34 J. P. 328; 18 W. R. 572.

*Annotations*.—*Consd. Allsepp v. Wheatcroft* (1872), L. R. 15 Eq. 59. *Appl. Hagg v. Darley* (1878), 47 L. J. Ch. 567. *Fold. Roussillon v. Roussillon* (1880), 14 Ch. D. 351. *Consd. Davies v. Davies* (1887), 36 Ch. D. 339; *Mill v. Dunham*, [1891] 1 Ch. 576; *Nordenfellt v. Maxim Nordenfellt Guns & Ammunition Co.*, [1894] A. C. 535; *Morris v. Saxelby*, [1916] 1 A. C. 688; Atwood v. Lamont, [1920] 3 K. B. 571. *Distd. British Concrete Co. v. Schellf.*, [1921] 2 Ch. 563. *Refd. Badische Anilin und Soda Fabrik v. Schott, Segner*, [1892] 3 Ch. 447; *Mouch v. Fenestre*



*Sect. 2.—Validity of agreements: Sub-sect. 1, A. (a) & (b) i. & ii.]*

(1892), 67 L. T. 602; North Western Salt Co. v. Electrolytic Alkali Co. (1912), 107 L. T. 439; McEllistirm v. Ballymacelligott Co-op Agricultural & Dairy Soc., [1919] A. C. 518; Ropeways v. Hoyle (1919), 120 L. T. 538; Smedley's, Ltd. v. Smedley, [1921] 2 Ch. 580, n.

— **Factors for consideration.**—*See, generally, Sub-sects. 2 & 3, post.*

(b) *Proof of Reasonableness.*

i. *In General.*

148. Onus on covenantor—To prove unreasonableness.]—MILLS v. DUNDHAM, No. 641, *post*.

149. — — — — — BADISCHE ANILIN UND SODA  
FABRIK v. SCHOTT, SEGNER & Co., No. 269, *post.*

150. - -. HAYNES v. DOMAN, No. 158,  
*post.*

151. — — — — — CARIBONUM Co., LTD. v.  
THE COUCH, No. 382, *post*.

152. Onus on covenantee.—To prove reasonable-  
ness.]—SIR W. C. LING & Co., LTD. v. ANDREWS,  
No. 164, *post*.

153. — — — — —.] — MASON v. PROVIDENT CLOTHING & SUPPLY CO., LTD., No. 143, *ante*.

154. - ———.—(1) In determining whether a covenant in restraint of trade is enforceable, a covenant exacted by the purchaser from the vendor on a sale of the goodwill of a business stands on a different footing from a covenant exacted by an employer against his employee; & *semble* in the latter case a covenant against competition *per se* will not be enforced.

(2) Pltf. co. were the leading manufacturers of hoisting machinery in the United Kingdom, & deft. had been in the co.'s employment as draughtsman & otherwise from the time he left school. After several years' service deft. was engaged by the co. as engineer for two years certain & thereafter, subject to four months' notice on either side, upon the terms of an agreement which contained a covenant by deft. with the co. that he would not during a period of seven years from his ceasing to be employed by the co., either in the United Kingdom of Great Britain or Ireland, carry on either as principal, agent, servant, or otherwise, alone or jointly or in connection with any other person, firm, or co., or be concerned or assist, directly or indirectly, whether for reward or otherwise, in the sale or manufacture of pulley blocks, hand overhead runways, electric overhead runways, or hand overhead travelling cranes: *Held*: the covenant was wider than was required for the protection of pltf. co., & was not enforceable.

(3) It is not that such restraints must of themselves necessarily operate to the public injury but that it is against the policy of the common law to enforce them except in cases where there are special circumstances to justify them (LORD PARKER OF WADDINGTON).

(4) The *onus* of proving such special circumstances must, of course, rest on the party alleging them. When once they are proved, it is a question of law for the decision of the judge whether they do or do not justify the restraint (LORD PARKER OF WADDINGTON).

(5) The ct. no longer considers the adequacy of the consideration in any particular case (LORD PARKER OF WADDINGTON).— *PERBERT MORRIS, LTD. v. SAXELBY*, [1916] 1 A. C. 688; 85 L. J. Ch. 210; 114 L. T. 618; 32 T. L. R. 297; 60 Sol. Jo. 305, H. L.; *aff'd*, [1915] 2 Ch. 57, C. A.

**Annotations:** As to (1) **Consd.** Great Western & Metropolitan Dairies v. Gibbs (1918), 31 T. L. R. 314. **Appl.** Hopeways v. Hoyle (1919), 88 L. J. Ch. 446. **Consd.** Attwood v. Lamont, [1920] 3 K. B. 571; British Reinforced Concrete Engineering Co. v. Schelft, [1921] 2 Ch. 563. As to (2) **Appl.** Attwood v. Lamont, [1920] 3 K. B. 571;

Hepworth Manufacturing Co., Wernham (1961), [1920] 1 Ch. 1. **Consd.** Palmolive Co. (of England) v. Greenman, [1928] Ch. 261. **Refd.** Porster v. Suggett (1918), 35 T. L. R. 87; Whitmore v. King (1918), 87 L. J. Ch. 446. *As to* (3) **Consd.** Horwood v. Miller's, Timber & Trading Co., [1917] K. B. 305; Evans v. Heathcote, [1918] 1 K. B. 1. **As to** (4) **Refd.** *supra* at Ch. 612. **Consd.** Smedley v. Smedley (1918), [1921] Ch. 580. **Consd.** Millers v. Steedman (1915), 84 L. J. K. K. 2057; McElistrim v. Ballymacrellott Co.-op. Agricultural & Dairy Soc., [1919] A. C. 518; Dewes v. Fitch, [1920] 2 Ch. 159; Prince v. Mercantile Bank of India (1921), 37 T. L. R. 390. **Refd.** Hawlings v. General Trading Co., [1921] 1 K. B. 653.

155. — -- .] — ATTWOOD v. LAMONT, No. 131, *ante*.

ii. *Evidence.*

**156. Of what matters evidence admissible—**  
**General rule.]—**DOWDEN & POOK, LTD. v. POOK,  
No. 247. *post*.

157. — Nature of trade.}—MUMFORD v. GETHING, No. 448, *post*.

158. — (1) An agreement made in 1894 between pltf., a hardware manufacturer at Dudley, & deft., a young man of twenty-four, on deft., entering pltf.'s service, contained a restrictive clause that deft. would not, during his service or after the determination thereof, divulge to any person the secrets of pltf. or the mode of conducting his business, or any part thereof, or any information with regard to the same, or after the determination of such service work for or serve any other person or firm carrying on the same kind of business, or any part thereof, within a radius of twenty-five miles from pltf.'s words at Dudley, without his consent. In 1897 deft. left pltf.'s service, & in 1899, without his consent, entered the service of a firm carrying on a business similar to that of pltf. about three miles from his works. In an action by pltf. against deft. to restrain him from continuing in the service of the firm, & from any further breach of the agreement:—*Held*: pltf. was entitled to an injunction, since the restrictive clause was not void either as being unreasonable for pltf.'s protection, or as being unlimited in point of time & so binding deft. during his whole life.

(2) Evidence from persons in the trade is admissible to inform the ct. of its nature, & of what is customary in it, & of anything requiring attention in the mode of conducting it, & of any particular dangers requiring precautions, & what precautions are required in order to protect a person carrying on the business from injury by a person leaving his service. But the reasonableness of a contract depends on its true construction & legal effect, & is consequently a question for the ct., & on such a question the opinion of witnesses is out of place (JANDLEY, M.R.).

(3) Where a man of sufficient age & business capacity knowingly enters into a contract of service which is only in partial restraint of trade, I think the *onus* lies on him to prove that it goes beyond what is reasonably necessary (ROMER, L.J.).

(1) A covenant in restraint of trade will not be held to be wholly void merely because its language is wide enough to cover possible cases which would be unreasonable, but which were not within the contemplation of the parties. Where the restriction is so worded as to be divisible, the restraint will be held to be good so far as it is free from objection, & bad only as to those parts which are objectionable.—*HAYNES v. DOMAN*, [1899] 2 Ch. 13; 68 L. J. Ch. 419; 80 L. T. 569; 15 T. L. R. 354; 43 Sol. Jo. 553, C. A.

**Annotations :—***As to (1)* **Distd.** *Mason v. Provident Clothing & Supply Co.*, [1913] A. C. 721. **Consd.** *McEllistrin v. Ballymacellkott Co-op. Agricultural & Dairy Soc.*, [1919] A. C. 548. **Refd.** *Hepworth Manufacturing Co. v. Ryott*, [1920] 1 Ch. 1. *As to (2)* **Consd.** *North Western Salt Co.*



*v. Electrolytic Alkali Co.* (1912), 107 L. T. 439. *Reid*, Hood & Moore's Stores & Jones (1899), 81 L. T. 109; Lamson Pneumatic Tube Co. *v.* Phillips (1904), 91 L. T. 363. *As to* (3) *Consd.* North Western Salt Co. *v.* Electrolytic Alkali Co. (1912), 107 L. T. 439; *Eastes v. Russ*, [1914] 1 Ch. 468; *Attwood v. Lamont*, [1920] 3 K. B. 571; *Dowes v. Fitch*, [1920] 2 Ch. 159. *As to* (4) *Expld.* Morris *v.* Ryle (1910), 103 L. T. 545. *Consd.* *Millers v. Steedman* (1915), 81 L. J. K. B. 2057. *Generally, Reid, Morris v. Saxelby*, [1915] 2 Ch. 57; *Forster v. Suggett* (1918), 35 T. L. R. 87; *Spence v. Mercantile Bank of India* (1921), 37 T. L. R. 390.

159. —. —. *MASON v. PROVIDENT CLOTHING & SUPPLY CO., LTD.*, No. 143, *ante*.

160. —. —. *Usual course of business.*—*BADISCHE ANILIN UND SODA FABRIK v. SCHOTT, SEGNER & Co.*, No. 269, *post*.

161. —. —. *Custom of employment.*—*SIR W. C. LENG & CO., LTD. v. ANDREWS*, No. 164, *post*.

162. —. —. *Extent of area.*—*MUMFORD v. GETHING*, No. 448, *post*.

163. —. —. *HAYNES v. DOMAN*, No. 158, *ante*.

164. —. —. (1) *Deft.*, while under age, entered the service of *pltf.*s, proprietors of a newspaper in a provincial town where a rival newspaper was established, as junior reporter under a written agreement which provided that he would not, after leaving *pltf.*s' service, "either on his own account or in partnership with any other person, be connected, as proprietor, employee, or otherwise, with any other newspaper business carried on" in the town or within a radius of twenty miles. There was evidence that such a clause was most unusual, almost unique, in agreements of this class. *Deft.* having entered the service of the rival newspaper: *Held*: the restriction was wider than was reasonably necessary for the protection of *pltf.*s' interest & therefore could not be enforced; even had it been enforceable against an adult, it would not have been valid as against *deft.*, who was an infant when he executed the agreement.

(2) It is for the *ct.* to consider whether, on the ground of public policy, such a covenant is or is not reasonable, whether it is or is not valid; & its validity depends upon whether it is more than is reasonably required for the protection of the covenantee (*COZENS-HARDY, M.R.*).

(3) It is also open to both parties to put before the *ct.* evidence of what is customary in such employment, because if a thing is customary it is in favour of its being considered on the one hand as reasonably necessary (*FLETCHER MOULTON, L.J.*).

(4) The fact that the restriction is not limited in point of time has had a very great effect upon my mind. I do not think that any of the previous decisions of the *ct.* throw any doubt on the principle that the limitation with regard to time is a factor, & may be a most important factor, in deciding the question before the *ct.* whether the restriction is reasonably necessary or not (*FLETCHER MOULTON, L.J.*).

(5) The question of reasonableness & public policy is a question of law for the judge; the evidence of *pltf.*s, that they required the restriction for their protection was no evidence at all on the point; so much so, indeed, that the question could not properly be put to them, because it is the very question that the judge had to determine: the admissible evidence is evidence of facts from which the judge could draw the conclusion whether the clause is reasonably necessary or not; evidence that *pltf.*s, or any other persons think it reasonably necessary is not admissible (*FARWELL, L.J.*).

(6) It is for *pltf.*s, to prove the sufficiency of their reasons, & that there were in fact weighty reasons; it is not enough for them to say that they think it reasonable & for the judge to say that it

seems not unreasonable without any facts being proved to show the reasonable necessity for the clause (*FARWELL, L.J.*).

(7) I desire to read a passage from the speech of LORD MACNAGHTEN in *Nordenfellt v. Maxim Nordenfellt Guns & Ammunition Co.*, No. 139, *ante*, where he says: "Restraints of trade & interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification & indeed it is the only justification, if the restriction is reasonable, reasonable, that is, in reference to the interests of the parties concerned & reasonable in reference to the interests of the public, so framed & so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public." The argument which has been addressed to us on behalf of *resps.* does not bring the case within that doctrine. That doctrine does not mean that an employer can prevent his employee from using the skill & knowledge in his trade or profession which he has learnt in the course of his employment by means of directions or instructions from the employer. That information & that additional skill he is entitled to use for the benefit of himself & the benefit of the public who gain the advantage of his having had such admirable instruction (*FARWELL, L.J.*).—*SIR W. C. LENG & CO., LTD. v. ANDREWS*, [1909] 1 Ch. 763; 78 L. J. Ch. 80; 100 L. T. 7; 25 T. L. R. 93. C. A. *Annotations*:—*As to* (1) *Consd.* *Eastes v. Russ*, [1914] 1 Ch. 468; *Millers v. Steedman* (1915), 81 L. J. K. B. 2057. *As to* (3) *Apprvd.* *Mason v. Provident Clothing & Supply Co.*, [1913] A. C. 721. *Reid, Russell v. Carpenters & Joiners Amalgamated Soc.*, [1910] 1 K. B. 506. *As to* (7) *Apprvd.* *Mason v. Provident Clothing & Supply Co.*, [1913] A. C. 721. *Consd.* *Eastes v. Russ*, [1914] 1 Ch. 468. *Expld.* *Millers v. Steedman* (1915), 81 L. J. K. B. 2057. *Apprvd.* *Morris v. Saxelby*, [1916] 1 A. C. 688. *Consd.* *Roneways v. Hoylo* (1919), 120 L. T. 538. *Appld.* *Hopworth Manufacturing Co. v. Ryoff*, [1920] 1 Ch. 1. *Reid, Bowler v. Lovegrove*, [1921] 1 Ch. 612. *Generally, Reid, Attwood v. Lamont*, [1920] 3 K. B. 571.

165. —. —. *MASON v. PROVIDENT CLOTHING & SUPPLY CO., LTD.*, No. 143, *ante*.

166. —. —. *Reasonableness.*—*HAYNES v. DOMAN*, No. 158, *ante*.

167. —. —. *SIR W. C. LENG & CO., LTD. v. ANDREWS*, No. 164, *ante*.

168. —. —. *MASON v. PROVIDENT CLOTHING & SUPPLY CO., LTD.*, No. 143, *ante*.

169. —. —. *Dangers requiring precaution.*—*HAYNES v. DOMAN*, No. 158, *ante*.

170. —. —. *Precautions necessary for protection.*—*HAYNES v. DOMAN*, No. 158, *ante*.

171. —. —. *Unusualness of covenant.*—*PEARKS, LTD. v. CULLEN*, No. 772, *post*.

172. *Of what matters judicial notice taken*—*Nature of trade.*—By agreement between *pltf.* & *deft.*, *pltf.*, a milkman, agreed to keep *deft.* in his service, & *deft.* agreed to enter such service, for one month certain from the date of the agreement, & until the expiration a month's notice, to be given by either party to the other of them, of his or their intention of determining the said contract at the end of such month; in consideration whereof, *deft.* agreed that he would not, within the space of twenty-four months after quitting or being discharged from the same, carry on the business of a milkman within five miles from Northampton Square; & for further security, *deft.* agreed, that if within twenty-four calendar months after the determination of the service he should within such distance, etc., carry on the business of a milkman, he should be liable to certain penalties. The declaration, after stating mutual promises, averred, that *deft.* entered the service as agreed on, & remained until, etc., when he quitted & was

**Sec. 2.—Validity of agreements: Sub-sect. 1, A. (b) ii., & B. (a) & (b) i. & ii.]**

discharged from the same. It then stated general performance by pltf. of his part of the agreement, & assigned for breach, that within twenty-four months after deft.'s quitting & being discharged from the said service, he did carry on the business of a milkman within five miles from Northampton Square.—*Held*: (1) the agreement it disclosed was not illegal; (2) under this agreement there might be other modes of determining the service than by a month's notice from either party; (3) at all events, it sufficiently appeared on the face of the declaration that the service of deft. was determined, according to the terms of the agreement; (4) if deft. had been improperly discharged by pltf. such wrongful discharge was no answer to the action, but would be merely the subject of a cross-action.

(5) Can we judiciously take notice of the nature of the occupation of the parties, or of the extent of the population in the area to which the restriction extends (MAULE, J.).

(6) When you are doubting as to the reasonableness of a restriction upon trade, the time during which it is to be enforced is to be taken into consideration. It appears to me, that it may be for the just interest of the party imposing the restraint, to have a certain time after the discharge of his servant, during which he may go round among his customers, & give them warning that that servant is no longer employed in his behalf (TINDAL, C.J.).—PROCTOR v. SARGENT (1810), 2 Man. & G. 20; Drinkwater, 56; 2 Scott, N. R. 289; 10 L. J. C. P. 31; 133 E. R. 647.

*Annotations*.—As to (1) *Refd.* Mallan v. May (1843), 11 M. & W. 653; Sauter v. Ferguson (1819), 7 C. B. 716. As to (4) *Dtd.* General Billposting Co. v. Atkinson, [1908] 1 Ch. 537. As to (6) *Apd.* Eastes v. Russ, [1914] 1 Ch. 468. *Refd.* Maxim Nordenfelt Guns & Ammunition Co. v. Nordenfelt, [1893] 1 Ch. 630. *Generally, Refd.* Dowden & Pook v. Pook, [1904] 1 K. B. 45.

**173. — Populousness of district.**—PROCTOR v. SARGENT, No. 172, *ante*.

**B. Consideration.**

**(a) In General.**

**174. General rule.—Consideration necessary.**—BROAD v. JOLLYFFE, No. 366, *post*.

**175. — — — — —**—PRAGNELL v. GOFF (1648), Sty. 111; 82 E. R. 570.

**176. — — — — —**—(1) Bond that one shall not use his trade in a certain place is void; (2) so is a promise or covenant without good consideration.—CLERK v. TAYLORS OF EXETER (GOVERNOR & Co.) (1685), 3 Lev. 241; 83 E. R. 670. Ex. Ch.

*Annotations*.—As to (1) *Overd.* Green v. Price (1816), 9 Jur. 857. *Refd.* Mitchell v. Reynold (1716), Fortes. Rep. 296.

**177. — — — — —**—MITCHEL v. REYNOLDS, No. 59, *ante*.

**178. — — — — —**—COLMER v. CLARK, No. 277, *post*.

**179. — — — — —**—GUNMAKERS, ETC. (MASTER, ETC.) v. FELL, No. 338, *post*.

**180. — — — — —**—DAVIS v. MASON, No. 661, *post*.

**181. — — — — —**—Covenants in general restraint of trade are void. Particular restraints are good, if not unreasonable, & made with consideration; but where the restraint is larger than is necessary for the protection of the party for whose security it is made, it is void.

An agreement that deft., a moderately skilled dentist would abstain from practising over a district 200 miles in diameter, in consideration of receiving instructions & a salary from pltf., determinable at three months' notice.—*Held*: unreasonable & void.

Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive; & if oppressive it is in the eye of the law unreasonable. Whatever is injurious to the interests of the public is void on the grounds of public policy (TINDAL, C.J.).—HORNER v. GRAVES (1831), 7 Bing. 735; 5 Moo. & P. 768; 9 L. J. O. S. C. P. 192; 131 E. R. 284.

*Annotations*.—N.F. Archer v. Marsh (1837), 6 Ad. & El. 959. *Dtd.* Proctor v. Sargent (1810), 2 Man. & G. 20. *Consd.* Mallan v. May (1843), 11 M. & W. 653; Rogers v. Maddocks, [1892] 3 Ch. 316; Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co., [1894] A. C. 535; Underwood v. Barker, [1899] 1 Ch. 300; Tivoll, Manchester v. Colley (1901), 52 W. R. 632. *Refd.* Hitchcock v. Coker (1887), 6 Ad. & El. 438; Whitaker v. Howe (1811), 3 Beav. 383; Price v. Green (1844), 16 L. J. Ex. 108; Talbot v. Talbot (1853), 1 E. & B. 391; Collins v. Locke (1879) 1 App. Cas. 674; Davies v. Davies (1887), 36 Ch. D. 359; Haynes v. Doman, [1899] 2 Ch. 13; Townsend v. Juiman, [1900] 2 Ch. 698; Dowden & Pook v. Pook, [1904] 1 K. B. 45; Leatham v. Johnstone-White, [1907] 1 Ch. 322; Russell v. Carpenters & Joiners Amalgamated Soc., [1910] 1 K. B. 506; North-Western Salt Co. v. Electrolytic Alkali Co. (1912), 107 L. T. 439; A.-G. of Australia v. Adelaide S.S. Co., [1913] A. C. 781; Eastes v. Russ, [1914] 1 Ch. 468; Millers v. Steedman (1915), 81 L. J. K. B. 207; Horwood v. Millar's Timber & Trading Co., [1916] 2 K. B. 44; Navlor Benzoni v. Kramische Industrie Gesellschaft, [1918] 1 K. B. 331; Whitmore v. King (1918), 87 L. J. Ch. 647; Rodriguez v. Speyer, [1919] A. C. 59; Hopeways v. Hoyle (1919), 35 T. L. R. 285; British Concrete Co. v. Scholff, [1921] 2 Ch. 563; English Hop Growers v. Dering, [1928] 2 K. B. 174. *Mentd.* Boys v. Ancell (1839), 5 Bing. N. C. 390.

**182. — — — — —**—YOUNG v. TIMMINS, No. 186, *post*.

**183. — — — — —**—All contracts in restraint of trade, whereby a party is restricted generally, & without reference to place, from exercising his trade for a specified time, are void by the general policy of the law.

A., a coal merchant, on taking B. into his service as a clerk & traveller, entered into a bond, wherein B. bound himself not to follow or be employed directly or indirectly in the trade of a coal merchant for nine months after he shall have been discharged from his service. An action being brought thereon by A. & a verdict recovered, the judgment was arrested, on the ground that such a contract was void as being in restraint of trade, unreasonable & unnecessary to the protection of pltf.

Wherever a party enters into a contract for which he receives a good consideration, & the contract does not bind him to go farther than to do justice to another, a limited restraint of trade may be supported. If there be nothing in the contract to repeal the idea that no consideration existed, every restraint of the kind would be void as being *nudum pactum*, in the same way as, if a party were to enter into the service of another without any consideration, it would be void. So, if the stipulations were that he would never trade at all, it would be bad. Then, if he receive a consideration, the object of which is to compensate him for the injury he may do to another if he were to enter the trade without restriction, & to secure that other from any disadvantage resulting therefrom, the restraint would be good, provided it be limited by the proper

**PART V. SECT. 2, SUB-SECT. 1.—B. (a).**

**174 i. General rule.—Consideration necessary.**—DAWES v. WILKINSON (1860), 19 U. C. R. 604.—CAN.

**174 ii. — — — — —**—COPELAND-

CHATTERSON Co. v. HICKOK (1907), 5 W. L. R. 353; 16 Man. L. R. 610.—CAN.

**174 iii. — — — — —**—In the case of covenants in restraint of trade, the deed of covenant must show a good consideration.—AUCHTERLONIE v. BILL

(1868), 4 Mad. 77.—IND.

**174 iv. — — — — —**—HARBHAI MANEKJI v. SHARAFALI ISRAJI (1897), 1 L. R. 22 Bom. 861.—IND.

**m. Implied consideration.**—MILLER v. THOMPSON, 20 C. L. T. 77.—CAN.

object of the contract (LORD ABINGER, C.B.).—WARD v. BYRNE (1839), 5 M. & W. 548; 9 L. J. Ex. 14; 3 J. P. 724; 3 Jur. 1175; 151 E. R. 232.

**Annotations.**—*Distd.* Proctor v. Sargent (1840), 2 Man. & G. 20. *Consd.* Rennie v. Irvine (1844), 7 Man. & G. 969; Nordenfolt v. Maxin Nordenfolt Guns & Ammunition Co., [1891] A. C. 535. *Distd.* Underwood v. Barker, [1899] 1 Ch. 300. *Reid.* Hinder v. Gray (1840), 1 Man. & G. 195; Nicholls v. Stretton (1847), 10 Q. B. 346; Salner v. Ferguson (1849), 7 C. B. 716; Allsepp v. Wheatcroft (1872), L. R. 15 Eq. 59; Jousillon v. Roudillon (1880), 14 Ch. D. 351; Hill v. Hill (1886), 55 L. T. 769; Davies v. Davies (1887), 38 Ch. D. 359; Badische Anilin und Soda Fabrik v. Schott, Segner, [1892] 3 Ch. 447; Lamson Pneumatic Tube Co. v. Phillips (1904), 91 L. T. 363; Mason v. Provident Clothing & Supply Co., [1913] A. C. 724; Nevanas v. Walker & Foreman, [1914] 1 Ch. 413; Morris v. Saxelby, [1915] 2 Ch. 57.

**184. Restraint by deed—Consideration not expressed.**—HOMER v. ASHFORD, No. 250, *post*.

**185.** — *J.*—MALLAN v. MAY, No. 258, *post*.

**186. Validity of promissory note founded on agreement.—Agreement void for want of consideration.**—By an agreement, reciting that A. & C. had for some time past employed, & then did employ E. in executing the orders which they from time to time received; & also reciting that A. & C. had requested E. to enter into an agreement to work in his trade or business, to execute the orders of A. & C. in manufacturing & making goods in the way of his trade for the said A. & C. alone, to which he had consented, in consideration of his past employment, & also, of the undertaking of A. & C. to continue to employ him as theretofore. A. & C. agreed with E., that they would, during the joint lives of themselves & E., continue to employ him in executing their order as theretofore, & upon the like or other usual terms, subject nevertheless, to the provisos & agreements thereafter mentioned; & E. agreed with A. & C. that he would, during the joint lives of A. & C. work for & execute their orders for them as he had been accustomed in his trade or business in a good & workmanlike manner, & at general & proper prices & terms; & that he would not at any time work for, or execute or cause to be executed, the orders for any person or persons whomsoever, in his trade or business, without the consent in writing of A. & C., which consent should be necessary on every distinct occasion, & should contain the address of the person or persons for whom he might thereby be permitted to be employed, & also the specific work which he was thereby permitted to perform; but it was provided & agreed, that in case A. & C. should at any time be desirous to put an end to that agreement, & should give, or cause to be given, at least three months' notice in writing to E., the agreement should be considered as at an end & determined, provided also that in case A. & C. should at any time have occasion or be under the necessity, by reason of the urgency or extent of orders, or should otherwise think fit, they should be at liberty to employ any other person or persons to execute orders for them in the trade or business of E.; & that, without thereby releasing E. from his agreement therein contained of exclusively working for A. & C.; & it was provided that nothing therein contained should be taken to restrain or prevent E. from executing the orders of any person or persons residing in the city of London, or within six miles thereof: *Held*: (1) this agreement, being a partial restraint of trade, & not having an adequate consideration to support it, was void; (2) a promissory note given by E. to A. & C. in consideration of breaches of the agreement, in working for other persons, was also void, & could not be set off by A. & C. in an action against them, at the suit of the assignees

of E. for work done.—YOUNG v. TIMMINS (1831), 1 Cr. & J. 331; 1 Tyr. 226; 9 L. J. O. S. Ex. 68; 148 E. R. 1446.

**Annotations.**—*As to* (1) *Dbtd.* Maxim Nordenfolt Guns & Ammunition Co. v. Nordenfolt, [1893] 1 Ch. 630. *Reid.* Keppell v. Bailey (1834), 2 My. & K. 517; Hitchcock v. Coker (1836), 2 Har. & W. 461; Hare v. Waring (1837), 3 M. & W. 362; R. v. Welsh, etc. (1853), 1 C. L. R. 319. *Gravely v. Barnard* (1874), L. R. 18 Eq. 518.

#### (b) What Constitutes Good Consideration.

##### i. In General.

**187. Must be reasonable.**—MITCHEL v. REYNOLDS, No. 59, *ante*.

**188.** — *J.*—CHEESMAN v. RAMBY (1728), Fortes. Rep. 297; 92 E. R. 860.

**189. Must be sufficient in law to support a contract.**—By a written agreement, *plff.* & *deft.* agreed to become partners in the business of stage coach proprietors, for the purpose of running a coach daily, at certain hours, between London & Croydon. The agreement contained the following article, 12th, that in the event of dissolution of partnership, & so long as *plff.* should continue to carry on the trade of a coach proprietor at Croydon, *deft.* should not, either on his own account or that of any other person or persons, or jointly with any other, run or use for hire any stage coach, omnibus, or other carriage, or otherwise ply for hire on any part of the road over which the coach was appointed to run, at any time within one hour before or after certain specified hours of the day:—*Held*: the agreement of *plff.* to enter into the partnership was of itself a sufficient consideration for the partial restraint of trade imposed on *deft.* by the 12th article.

The agreement is good if there be a sufficient consideration in law to support a contract; & the entering into a partnership, from which the party desires a benefit, is of itself a sufficient consideration to support any promise of this nature. . . . The partnership must last at least a month; & it is clear . . . that the *ct.* cannot inquire into the extent or adequacy of the consideration (PARKE, B.).—LEIGHTON v. WALES (1838), 3 M. & W. 545; 7 L. J. Ex. 145; 150 E. R. 1262.

**Annotations.**—*Reid.* Atkyns v. Kinnier (1850), 4 Exch. 776; Maxim Nordenfolt Guns & Ammunition Co. v. Nordenfolt, [1893] 1 Ch. 630.

**190. Must be legal consideration of value.**—HITCHCOCK v. COKER, No. 326, *post*.

**191.** — *J.*—TALLIS v. TALLIS, No. 240, *post*.

**192.** — *J.*—GRAVELY v. BARNARD, No. 226, *post*.

**193. Must be real & bonâ fide.**—COLLINS v. LOCKE, No. 137, *ante*.

##### ii. Adequacy.

**194. Court will not inquire into adequacy.**—ARCHER v. MARSH, No. 617, *post*.

**195.** — *J.*—HITCHCOCK v. COKER, No. 326, *post*.

**196.** — *J.*—LEIGHTON v. WALES, No. 189, *ante*.

**197.** — *J.*—(1) *Plffs.* agreed in writing with L., that he should serve them for seven years as a crown glass maker; that he should not during that term work for any other person without their licence; that they might deduct from his wages any fine he might incur for breach of their rules; that during any depression of trade he should be paid a moiety of his wages; that if he should be sick or lame, *plffs.* should be at liberty to employ any other person in his stead, without paying him any wages; that *plffs.* should pay him, so long as he should be employed & work as a crown glass maker, certain wages by the piece, & £8 a year, in lieu of house rent & firing; & that *plffs.* should

*Sect. 2.—Validity of agreements: Sub-sect. 1, B. (b) ii. & iii., (c), & C.]*

have the option of dismissing him from their service on giving him a month's notice or a month's wages:—*Held*: this agreement bound plffs. to employ L. during the seven years, subject to the above power of dismissal; there was, therefore, a good consideration for L.'s contract to serve for the seven years, & the agreement was not in unlawful restraint of trade.

(2) The adequacy of the consideration the ct. will not inquire into (ALDERSON, B.).—PILKINGTON v. SCOTT (1816), 15 M. & W. 657; 15 L. J. Ex. 329; 7 L. T. O. S. 340; 153 E. R. 1014.

*Annotations*.—As to (1) *Apld.* Hartley v. Cummings (1817), 5 C. B. 217. *Consd.* Cummings v. Elderton (1853), 4 H. L. Cas. 621. *Apld.* R. v. Welch (1853), 2 E. & B. 357; Boston Deep Sea Fishing & Ice Co. v. Ansell (1888), 59 L. T. 345. (See 59 L. T. at p. 350). Robinson v. Heuer, [1898] 2 Ch. 451. *Consd.* Devoauld v. Rosser, [1906] 2 K. B. 728. *Refd.* Re Bailey, Re Collier (1854), 3 E. & B. 607; Whittle v. Frankland (1862), 2 B. & S. 49; Worthington v. Sudlow (1862), 31 L. J. Q. B. 131; Eyre & Spottiswoode v. R. (1866), 3 T. L. R. 5; Maxim Nordenfellt Guns & Ammunition Co. v. Nordenfellt, [1893] 1 Ch. 630. *Generally, Mentd.* G. N. Ry. v. Harrison (1852), 12 C. B. 570; Lumley v. Gye (1853), 2 E. & B. 216.

198. — [J.—] SAINTER v. FERGUSON, No. 600, *post*.

199. — [J.—] GRAVELY v. BARNARD, No. 226, *post*.

200. — [J.—] HERBERT MORRIS, LTD. v. SAXELBY, No. 154, *ante*.

201. — [J.—] If legal consideration of value.]-TALLIS v. TALLIS, No. 240, *post*.

202. — [J.—] If consideration real & bona fide.]-AUSTEN v. BOYS, No. 822, *post*.

203. — [J.—] COLLINS v. LOCKE, No. 137, *ante*.

204. — [J.—] DAVIES v. DAVIES, No. 406, *post*.

205. — [J.—] HOWARD v. DANNER, No. 219, *post*.  
— [J.—] See, generally, CONTRACT, Vol. XII., pp. 201, 205, Nos. 1610-1652.

iii. *Particular Instances.*

206. **Contract of apprenticeship.**—A bond to C. conditioned, in consideration of her teaching B. a trade, [of linen-draper] that B. after leaving her shall not, either by herself or any other person for her use, carry on the trade or instruct any person to carry it on within half a mile of B.'s now dwelling house, or of any other house she, her exors. or administrators shall remove to, is good where the breach is assigned for instructing B.'s husband in that trade within half a mile of A.'s then house.

The agreement is a very reasonable one; for it is to give her the benefit of the trade, whenever she will pay what should have been given with her as an apprentice (*per* C.R.).—CHESMAN v. NAINBY (1727), 2 Stra. 739; 2 Ld. Raym. 1456; 93 E. R. 819; *affd.*, 1 Bro. Parl. Cas. 231, H. L.

*Annotations*.—*Apld.* Clarke v. Comer (1733), Lee temp. Hard. 53. *Consd.* Young v. Timmins (1831), 1 Cr. & J. 331. *Apld.* Hitchcock v. Coker (1837), 6 Ad. & El. 138; Mallan v. May (1813), 11 M. & W. 653. *Consd.* Nicholls v. Stretton (1817), 11 Jur. 1008; Price v. Green (1817), 16 M. & W. 316; Maxim Nordenfellt Guns & Ammunition Co. v. Nordenfellt, [1893] 1 Ch. 630; Eastes v. Russ, [1911] 1 Ch. 468. *Apld.* Putman v. Taylor, [1927] 1 K. B. 637. *Refd.* Low v. Peers (1770), Wilms. 361; Dowden & Pook v. Pook, [1904] 1 K. B. 45.

207. **Agreement for mutual assistance in trade.**]-WICKENS v. EVANS, No. 71, *ante*.

208. **Grant of sum of money.**]-ANON. (prior to 1836), cited in 6 Sim. at p. 351; 58 E. R. 626. *Annotation*.—*Refd.* Kimberley v. Jennings (1836), 6 Sim. 340.

209. **Contract of employment.**]-WALLIS v. DAY, No. 618, *post*.

210. — [J.—] PILKINGTON v. SCOTT, No. 197, *ante*.

211. — [J.—] SAINTER v. FERGUSON, No. 600, *post*.

212. — [J.—] BENWELL v. INNS, No. 395, *post*.

213. — [J.—] MUMFORD v. GETHING, No. 448, *post*.

214. — [J.—] (1) In determining whether a contract is a "hard bargain" the ct. will not, if there be valuable consideration, consider whether the consideration is sufficient, but whether one party has taken an unfair advantage of the position of the other party.

In consideration of A. employing B. at a weekly salary of 21s. to go about London & sell oil for him, B. agreed that he would not for twelve calendar months after the determination of the agreement, which was determinable on a week's notice on either side, sell oil within a radius of eight miles from the General Post Office. After a year's employment B. determined the agreement, & then commenced selling oil on his own account within the prohibited area:—*Held*: the agreement not being a "hard bargain," & being for valuable consideration, A. was entitled to an injunction.

(2) As regards the order to commit, deft. now says he will obey the injunction. I am always reluctant to send people to prison, if it can possibly be avoided, & as he says that, & as plff. does not press for an immediate order of committal, the course we propose to take is to let the motion to commit stand over generally with liberty to apply (JESSEL, M.R.). MIDDLETON v. BROWN (1878), 47 L. J. Ch. 411; 38 L. T. 331, C. A.

215. — **Continuance of previous engagement.**]-GRAVELY v. BARNARD, No. 226, *post*.

216. — [J.—] WOODBRIDGE & SONS v. BELLAMY, No. 735, *post*.

217. — **Infant.**]-Deft., an infant, in consideration of being employed by plffs., as a milk carrier, at a salary of 21s. per week, agreed not to carry on or serve in the business of a seller of milk, within five miles of plffs.' place of business for two years after leaving plffs.' service. The agreement was terminable at a week's notice on either side. Deft. left plffs.' service a few days after he came of age:—*Held*: the agreement as a whole, was an agreement for the benefit of deft., & an injunction granted to restrain a breach of it.

Such a contract is very beneficial. The reason is that if he is able to make such a bargain, he obtains the means of earning or continuing to earn his livelihood, he gets the employment which he would not otherwise obtain or continue to have without having subject to the restriction (NORTH, J.).—EVANS v. WARE, [1892] 3 Ch. 502; 62 L. J. Ch. 256; 67 L. T. 285; 36 Sol. Jo. 731; 3 R. 32.

*Annotations*.—*Apld.* Merriott v. Martin (1899), 43 Sol. Jo. 717. *Consd.* Green v. Thompson (1899), 80 L. T. 691; Morrison, Fleet v. Fletcher (1900), 17 T. L. R. 95. *Refd.* Farmers & Cleveland Dairies Co. v. Riley (1893), 9 T. L. R. 260.

218. — [J.—] MERRIOTT v. MARTIN (1899), 43 Sol. Jo. 717.

219. — **Payment for retention of services.**]-The receiver & manager of a restaurant business, appointed by the ct. in certain Chancery proceedings, required each of the waiters, at the restaurant to sign an agreement that in consideration of the employer retaining the waiter's services at 4s. per week, the latter agreed not to enter into

PART V. SECT. 2, SUB-SECT. 1.—B. (b) iii.

n. *Mutual agreement between two neighbouring land-owners not to hold cattle markets on the same day.*]-POTHU RAM v. ISLAM FATIMA (1915), 1 L. R. 37 All. 212.—IND.

the service of a new restaurant about to be opened in the vicinity, during the current year, & in case of breach to pay £1 a day for every day he might remain in the service of the new restaurant as liquidated damages:—*Held*: the receiver & manager had authority to enter into the agreement, & it was a reasonable agreement necessary for the protection of the business.

I think there was good consideration for the agreement, though I cannot go into the adequacy of it (BYRNE, J.).—HOWARD v. DANNER (1901), 17 T. L. R. 548.

**220. Agreement for partnership.]** LEIGHTON v. WALES, No. 189, *ante*.

**221. — With son of bankrupt covenantor.]**—A., a trader, became bkpt., whereupon B. agreed to purchase the business from the assignees, & to enter into partnership with A.'s son, if A. would enter into a bond not to carry on the same business within twenty miles. A. gave the bond:—*Held*: there was a sufficient consideration for the bond to entitle B. to an injunction to restrain A. from carrying on the business within the limits prescribed.—CLARKSON v. EDGE (1863), 33 Beav. 227; 3 New Rep. 283; 33 L. J. Ch. 413; 10 L. T. 120; 10 Jur. N. S. 871; 12 W. R. 518; 55 E. R. 351.

**222. Sale of business.—By assignees of bankrupt.]** CLARKSON v. EDGE, No. 221, *ante*.

**223. — Bankrupt joining with trustee.]**—If a bkpt. join with his trustee in selling the goodwill & business previously carried on by the bkpt., & agrees with the purchaser not to carry on a similar business within a prescribed district, such agreement is binding on him, & he can be restrained from so doing. BUXTON & HIGH PEAK PUBLISHING & GENERAL PRINTING CO. v. MITCHELL (1885), 1 Cab. & El. 527.

**224. Contract for articulated clerkship - Covenant by brother-in-law of articulated clerk.]**—Deft., who practised at R., had for some time acted as solr. to pltf., & it was arranged that he should take pltf.'s brother-in-law G., who was under twenty-one years of age, as his articulated clerk. The usual articles were accordingly prepared, to which pltf. was a party, whereby G., with the consent of his guardian, bound himself clerk to deft. for five years. There was no covenant in any way restricting G. from practising as a solr. at the expiration of the articles.

Simultaneously a bond was executed by pltf. binding himself to pay £1,000 to deft. in case G. should within ten years of the expiration of the articles carry on his profession as a solr. in R., or within ten miles thereof, without the written consent of deft. Shortly after the expiration of the articles G. was admitted a solr. Deft. then insisted that G. should not practise in R., or within ten miles thereof, & threatened to enforce the bond in case G. should commence to practise within that radius. Pltf. thereupon brought an action against deft. claiming a declaration that the bond was obtained by misrepresentation & undue influence & without consideration, & was void, & that he was entitled to have the same set aside; also an injunction to restrain deft. from taking any proceedings to enforce the bond. Alternatively he claimed a declaration that the restriction imposed by the bond was not necessary for the protection of deft., & that the same was void; & he asked that it should be delivered up to be cancelled:—*Held*: there had been no undue influence or misrepresentation, but pltf. was perfectly well aware what the object of the bond was when he executed it; he had secured in full by the bond the advantage which he sought, viz., the articulated clerkship for his brother-in-law, &

therefore had had the consideration for which he executed the bond; & further that, inasmuch as pltf. had delayed for over five years in taking proceedings to dispute his liability under the bond, or to get it set aside, he could not now come to a ct. of equity & obtain such relief.—RICHARDS v. WHITHAM (1892), 66 L. T. 695, C. A.

**Consideration for contracts of service.]** See, generally, MASTER & SERVANT, Vol. XXXIV., pp. 48, 49.

(c) *Proof of Consideration.*

**225. Consideration not presumed.]**—In an action of debt on a bond to H., not to enter into the service of another person, within 10 miles of S., during two years after leaving H.'s service, some good consideration ought to be shown on the face of the declaration, as the ct. will not presume one.—HUTTON v. PARKER (1839), 7 Dowl. 739.

**226. Consideration may be inferred.]**—A legal consideration of any value is sufficient to support a contract in partial restraint of trade; & the ct. will not inquire as to its adequacy.

Pltf., a surgeon, engaged deft., who was not qualified to practise, but was studying with a view to pass the necessary examination, to assist him in his practice, the engagement being terminable at the will of either party. Subsequently deft., previously to going up to pass his examination, executed, at the request of pltf., a bond, which was conditioned to be void if deft. should not practise within certain limits, but which contained no express agreement on the part of pltf. to continue deft.'s employment. Deft. remained in pltf.'s employment for about three months afterwards, & was then dismissed. He subsequently commenced practising within the prescribed limits, & a suit was instituted to restrain him from so doing:—*Held*: an agreement by pltf. to continue deft.'s employment on the old terms could be inferred; there was consideration to support the bond, & pltf. was entitled to an injunction.—GRAVELLY v. BARNARD (1874), L. R. 18 Eq. 518; 43 L. J. Ch. 659; 30 L. T. 863; 39 J. P. 20; 22 W. R. 891.

*Annotations.*—*Apld.* Hood & Moore's Stores v. Jones (1899), 81 L. T. 169. *Reid.* DAVIS v. DAVIES (1887), 36 Ch. D. 359; London & Yorkshire Bank v. PRITT (1887), 56 L. J. Ch. 987; *Re* Weston, DAVIS v. Taggart, [1900] 2 Ch. 164.

**227. Admissibility of parol evidence.]**—Parol evidence of the consideration is admissible in regard to contracts in restraint of trade just as it is in regard to all other simple contracts. COOPER v. SOUTHGATE (1891), 63 L. J. Q. B. 670; 10 L. R. 552, D. C.

**228. Presumption of legality Consideration in deed.]**—HOMER v. ASHFORD, No. 250, *post*.

**Restraint by deed.]**—See Sub-sect. 3, A., *ante*.

C. *Certainty.*

**229. What amounts to uncertainty—Tied house covenant.]**—Pltf., a brewer, sold a piece of land to the trustees of a freehold land society, who covenanted with him that he, his heirs & assigns, should have the exclusive right of supplying beer to any public-house erected on the land, but pltf. did not enter into any covenant to supply it. Deft., a member of the society, who was also a brewer, acquired a portion of the land with notice of the covenant, & erected on it a public-house which he supplied with his own beer. Pltf. filed his bill to restrain deft. from supplying beer, alleging that pltf. had always been ready to furnish a sufficient supply of good beer at a fair price:—*Held*: the covenant was not void either for uncertainty or want of mutuality, or as being an unreasonable restraint of trade. CATT v.

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**TOURLE** (1869), 4 Ch. App. 654; 38 L. J. Ch. 665; 21 L. T. 188; 33 J. P. 659; 17 W. R. 939, L. J.

**Annotations:—***Consd. Clegg v. Hands* (1890), 44 Ch. D. 506, n. *Mentd. Luker v. Dennis* (1877), 7 Ch. D. 227; *Zetland v. Hislop* (1882), 7 App. Cas. 427; *Donnell v. Bennett* (1883), 22 Ch. D. 835; *Metropolitan Electric Supply Co. v. Ginder*, [1901] 2 Ch. 799; *Courage v. Carpenter*, [1910] 1 Ch. 262; L. C. E. v. Allen, [1914] 3 K. B. 612; L., C. & D. Ry. & S. E. & C. Ry. Cos.' Managing Committee v. Spiers & Pond (1916), 32 T. L. R. 493; *Lord Stratheona S.S. Co. v. Dominion Coal Co.*, [1926] A. C. 108.

**230. —** Covenant to retire from business "so far as the law allows."—*DAVIES v. DAVIES*, No. 406, *post*.

**231. —** Covenant not to enter into business competition.]—*MARSHALLS, LTD. v. LEEK*, No. 621, *post*.

**232. —** — At any future addresses.]—*BEETHAM v. FRASER*, No. 125, *ante*.

**233. —** — Within twenty-five miles of London.]—*MASON v. PROVIDENT CLOTHING & SUPPLY CO., LTD.*, No. 143, *ante*.

**234. —** — [Pltf. B. & his co-pltf., C., carried on in partnership the business of auctioneers & estate agents at Portsmouth & Gosport, & in May, 1920, deft. entered their employment as an outside canvassing & negotiating clerk under a written agreement of service with provided (*inter alia*) that either party could terminate the employment on giving seven days' notice in writing & clause 5, "after the termination from any cause of the employment aforesaid the clerk shall not for the term of one year carry on or be interested in carrying on the business of auctioneers & estate agents after such termination directly or indirectly assist as clerk manager or in any other capacity in the carrying on of such business within the borough of Portsmouth or in the town of Gosport." The duties of deft. were to interview people & to obtain for pltf.s. intending buyers or sellers, or intending lessors or lessees, of house property. In Sept. 1920, pltf.s. duly terminated deft.'s employment, & on leaving their service he at once commenced business on his own account as an estate agent within the prohibited area, describing himself as "C. Lovegrove, A.A.I., Estate Agent," the initials A.A.I. meaning Associate of the Auctioneers' Institute, but he did not take out an auctioneer's licence nor do any business as an auctioneer: *Held*: (1) clause 5 on its true construction was not void for uncertainty, the intention of the parties being that deft. should not after the termination of his employment carry on or be interested in carrying on the business of an auctioneer & estate agent within the prohibited area for one year; but (2) deft., in carrying on the business of an estate agent only, had not committed a breach of the clause, nor had he by the use of the initials A.A.I. held himself out to be an auctioneer; (3) the clause being intended to prevent competition *per se*, was wider than was reasonably necessary for the protection of pltf.s.' business & was therefore against public policy & not enforceable.—*BOWLER v. LOVEGROVE*, [1921] 1 Ch. 642; 90 L. J. Ch. 356; 124 L. T. 695; 37 T. L. R. 424; 65 Sol. Jo. 397.

*D. Fairness.*

*See Nos. 554, 555, post.*

**SUB-SECT. 2.—HOW DETERMINED.**

*A. Function of Judge.*

**235. To decide validity of contract.]—MITCHEL v. REYNOLDS**, No. 59, *ante*.

**236. —**—[*DOWDEN & POOK, LTD. v. POOK*, No. 247, *post*.

**237. —**—[*UNITED SHOE MACHINERY CO. OF CANADA v. BRUNET*, No. 80, *ante*.

**238. —**—[*MASON v. PROVIDENT CLOTHING & SUPPLY CO., LTD.*, No. 143, *ante*.

**239. To decide reasonableness of restraint.]—MALLAN v. MAY**, No. 258, *post*.

**240. —**—[A declaration in covenant recited that pltf. & deft. had been partners as publishers of books, & that part of their trade, called the canvassing trade, consisted in publishing books in numbers, & employing travellers to sell such books by canvassing for purchasers. By indenture, dissolving the partnership, it was agreed that pltf. should retain the whole of the partnership stock, & should indemnify deft. against all liabilities, & pay him a large sum of money. Dft. (*inter alia*) covenanted not directly nor indirectly to be concerned in the canvassing trade in London or within 150 miles of the General Post Office, nor in Dublin or Edinburgh or within 50 miles of either, nor in any town in Great Britain or Ireland in which pltf. or his successors might at the time have an establishment, or might have had one within the six months preceding. Breaches: that deft. was engaged in the trade within 150 miles of the General Post Office, & also in Manchester & Liverpool, in which towns pltf., at the time of the breaches, had establishments. Pleas, to both sets of breaches; that there were numerous works which pltf. did not publish, & had no intention of publishing, & that many such might be published with advantage to the public, by deft., & without injury to pltf.; that the canvassing trade applied to all such books; & that the restraint, as to the canvassing trade as applicable to such works, was unreasonable: verification. Demurrer, amongst other grounds, because the plea referred matter of law to the jury:—*Held*: (1) the declaration was good, it not appearing that the restraint was unreasonable, the pleas were bad in substance, as the facts disclosed did not show that the restraint was unreasonable. *Qu.*: whether, if the facts had so shown, the pleas would have been bad in form.

(2) The authorities treat . . . the reasonableness of the restraint . . . as questions of law for the ct. (*BIRLE, J.*).

(3) If there was a legal consideration of value the contract ought to be enforced without reference to the quantum of that value (*LORD CAMPBELL, C.J.*).

(4) The contract is valid unless some restriction is imposed beyond what the interest of pltf. requires, & his interest has been considered to extend very widely (*LORD CAMPBELL, C.J.*).

(5) In respect of time the restriction may be unlimited . . . & though in respect of space there must be some limit, yet contracts have been supported where the area of exclusion was apparently greater than the area of pltf.'s practice (*LORD CAMPBELL, C.J.*).—*TALLIS v. TALLIS* (1853), 1 E. & B. 391; 22 L. J. Q. B. 185; 21 L. T. O. S. 43; 17 Jur. 1149; 1 W. R. 114; 118 E. R. 482.

**Annotations:—***As to* (1) *Appl. Rensillon v. Rensillon* (1880), 14 Ch. D. 351. *Refd. Dendy v. Henderson* (1855), 24 L. J. Ex. 324; *Swaine v. Wilson* (1889), 21 Q. B. D. 252; *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A. C. 535; *Mason v. Provident Clothing & Supply Co.*, [1913] A. C. 724; *Horwood v. Miller's Timber & Trading Co.*, [1916] 2 K. B. 44; *Attwood v. Lamont*, [1920] 3 K. B. 571. *As to* (2) *Appl. Dowden & Pook v. Pook*, [1904] 1 K. B. 45. *As to* (4) *Refd. Morris v. Saxelby*, [1915] 2 Ch. 57. *As to* (5) *Refd. Parsons v. Cotterill* (1887), 56 L. T. 839; *Maxim Nordenfelt Guns & Ammunition Co. v. Nordenfelt*, [1893] 1 Ch. 630.

**241. —**—[*HAYNES v. DOMAN*, No. 158, *ante*.

**242. —**—[*DOWDEN & POOK, LTD. v. POOK*, No. 247, *post*.

**243.** —[Where by an agreement by which deft. was appointed manager of pltf's. business he had contracted that, if he left pltf's. service, he should not engage or be employed during the following five years in any business similar to that of pltf's. "within the limit of the Eastern Hemisphere":—*Held*: the agreement, whether regarded as applying to the United Kingdom only or as extending throughout the whole world, was not so wide as to go beyond what was reasonably necessary for the protection of pltf's. in their business, having regard to the peculiar nature of that business, & to the position occupied by deft. therein.

I have to examine into the facts of the case as they existed at the date when this contract was made, & to judge from those facts whether or not this contract is so wide that it cannot be said to be reasonably necessary for the protection of pltf. co. in their business.

The judge must say . . . whether or not the restrictive contract was reasonably necessary for the protection of the contractee. As to the facts, if there is a judge & jury, the judge will have to get those facts found by the jury, & then, when those facts have been ascertained, he will have to look at the contract & to take into consideration the circumstances under which it was entered into as found by the jury, & then say whether it is reasonable (VAUGHAN WILLIAMS, L.J.).—*LAMSON PNEUMATIC TUBE CO. v. PHILLIPS* (1904), 91 L. T. 363; 48 Sol. Jo. 604, C. A.

*Annotation*: *Reid*. *Ropeways v. Hoyle* (1919), 120 L. T. 538.

**244.** [ *SIR W. C. LENG & CO., LTD. v. ANDREWS*, No. 164, *ante*.

**245.** [ *A-G. of COMMONWEALTH of AUSTRALIA v. ADELAIDE S.S. CO., LTD.*, No. 68, *ante*.

**246.** [ *HERBERT MORRIS, LTD. v. SAXELBY*, No. 154, *ante*.

### B. Function of Jury.

**247. To find issues of fact.**—(1) A limited co. carrying on business as cider merchants, aerated-water manufacturers, & cordial compounders, & having about 1,200 customers chiefly in the south of England, with a small number over the rest of England, Scotland, Ireland, & abroad, employed a manager for the cider department, who, by agreement under seal, covenanted with the co. that he would not, either solely or jointly with or as manager or agent for any other person or persons directly or indirectly carry on or be engaged or concerned in the business of a cider merchant, manufacturing chemist, or cordial compounder for the term of five years after leaving the service of the co.:—*Held*: upon its true construction the covenant extended to every part of the world, & it was wider than was necessary for the protection of the business of the company, & therefore unreasonable, & void as being in restraint of trade.

On the construction of the covenant in this case I cannot doubt that it imposes a world-wide restraint. I can see no ground for limiting its operation to the United Kingdom. I think it must stand or fall as being a covenant prohibiting deft. from carrying on the businesses in question in any part of the world. The question whether such a covenant is valid depends upon the question whether it could really be necessary for

the protection of the particular business carried on by pltf's. There may be some businesses of such a character that a covenant of this kind might not be unreasonable with regard to them; but the question is whether it can be said to be reasonable with regard to pltf's. business (COZENS-HARDY, L.J.).

(2) With reference to the question whether it is within the province of the judge, or that of the jury, to decide as to the reasonableness of the covenant, we start with the clear rule of law that, in general, a contract in restraint of trade is illegal; & therefore, in the case of an action upon such a contract, it would be the duty of the judge, upon ascertaining the nature of the contract, to withdraw the question from the jury. Upon the general rule there is engrafted a qualification depending upon the character of the restriction in relation to the circumstances of the particular case. Such a contract may be valid, if, having regard to those circumstances, it is reasonable. The question is, within whose province it falls to say whether the restriction in a particular case comes within the general rule or the qualification of that rule. Clearly, I should say, within the province of the tribunal whose duty it would be, in the absence of any special circumstances, upon the construction of the contract to declare it to be illegal. The authorities support that view (MATHEW, L.J.).

(3) The critical period at which to look is the time when the covenant was entered into (COZENS-HARDY, L.J.).

(4) In deciding the question [of reasonableness] all the surrounding circumstances ought to be taken into consideration & are admissible in evidence.

*DOWDEN & POOK, LTD. v. POOK*, [1904] 1 K. B. 15; 73 L. J. K. B. 38; 89 L. T. 688; 52 W. R. 97; 20 T. L. R. 39; 48 Sol. Jo. 50, C. A.

*Annotations*: As to (1) *Appl. Lamson Pneumatic Tube Co. v. Phillips* (1904), 91 L. T. 363. *Consol. White, Tompkins & Co. v. Wilson* (1907), 23 T. L. R. 459. *Reid*. *North Western Salt Co. v. Electrolytic Alkali Co.* (1912), 107 L. T. 439; *Ropeways v. Hoyle* (1919), 120 L. T. 538. As to (2) *Reid*. *Leng v. Andrews*, [1909] 1 Ch. 763; *North Western Salt Co. v. Electrolytic Alkali Co.* (1912), 107 L. T. 439.

**248. What issues left to jury Whether new business opened—& whether business carried on substantially by defendant.**—On a contract by deft., on a sale by him of the goodwill of a business, that he would not, within a certain time, open any "new business" of the kind; a business having in fact been opened by a servant of deft., it was left to the jury whether there had been a new business opened, & whether, if so, it was really & substantially the business of deft., & carried on on his behalf & for his benefit. —*CLARK v. HOWARD* (1860), 2 F. & F. 125, N. P.

**249.** [ *Circumstances under which agreement entered into.* ] *LAMSON PNEUMATIC TUBE CO. v. PHILLIPS*, No. 243, *ante*.

### C. Matters for Consideration.

#### (a) Consistency with Public Policy.

**250. General rule.**—(1) A covenant to restrain a person from exercising a trade is not illegal, if it be not to the general prejudice of the public, & the consideration be reasonable.

In covenant, pltf. in his declaration, after *proferet*, averred, that defts., for the considerations in the deed contained, covenanted that they would

### PART V. SECT. 2, SUB-SECT. 2.—C. (a).

**250 i. General rule.**—An agreement under seal by several butchers not to transact business in the Melbourne

Meat Market, is a combination in restraint of trade, contrary to public policy, & cannot be enforced, though there was ample consideration for the mutual covenant.—*BIRTHWISTLE v.*

*HARR* (1878), 4 V. L. R. (L.) 153. **AUS.**

**250 ii.** —[An agreement between steamship cos. fixing rates for freight & passengers for one season



*Sect. 2.—Validity of agreements : Sub-sect. 2, C. (a) & (b).]*

not do certain acts. Defts. pleaded, that, as the performance of the covenants in the indenture mentioned, would, for a term, prevent them from carrying on their trade, they were in restraint of trade, & illegal :- *Held* :- as defts. had not cravedoyer of the deed, nor demurred to the declaration on account of any supposed consideration in the deed, as set out therein, the ct. would, the covenants being reasonable, presume that the deed disclosed a sufficient legal consideration.

(2) If a sufficient consideration is admitted by the pleading, the deed may be supported, although the deed itself does not express a sufficient consideration. None of the cases on deeds restraining trade have decided that the consideration must appear on the deeds (BEST, C.J.).

(3) The first object of the law is to promote the public interest; the second to preserve the rights of individuals. The law will not permit any one to restrain a person from doing what the public welfare & his own interest require that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry or his capital in any useful undertaking in the kingdom, would be void (BEST, C.J.).—HOMER v. ASHFORD (1825), 3 Bing. 322; 11 Moore, C. P. 91; 4 L. J. O. S. C. P. 62; 130 E. R. 537.

*Annotations.* 1. *Is to* (1) *Reid*, Mallon p. May, 1843; 41 M. & W., 653; Cooper p. Southgate, 1843; 35 L. R., 670. (2) Attwood v. Lamont, [1920] 3 K. B. 571. *Is to* (3) *Apl.* Vernon v. Hallam (1886), 31 Ch. D. 748. *Consd.* Morris v. Saxelby, [1915] 2 Ch. 97. *Reid*, Munford p. Gething (1859), 7 C. B. N. S. 304; Nordensfeldt p. Maxim-Nordensfeldt (1891), 14 Q. B. 421. *Is to* (4) Hospital Trustees v. Hughes' Contract (1899), 17 W. R. 691.

251. — . — MAY v. O'NEILL, No. 723, *post.*

252. - -, NORDENFELT v. MAXIM NORDENFELT GUNS & AMMUNITION CO., No. 139, *ante*.

253. — — — TIVOLI, MANCHESTER, LTD. v.  
COLLEY, No. 142, *ante*.

254. - (1) It is not every restraint of trade which will render the provisions of an agreement unlawful, in the sense that it cannot be enforced by action at common law. To have that effect a restraint of trade must be such as in some way to prejudice the interests of the community (VAUGHAN WILLIAMS, 1.J.).

(2) Every contract in general restraint of trade without limit is bad, but a partial restraint limited so as to afford reasonable protection only to either or both of the contracting parties, & so as not to be injurious to the public (FARWELL, L.J.).

(3) I fail to see myself how any evidence with regard to the mode in which the rules have in practice been applied would be relevant to the question of their construction (*FARWELL, J.J.L.*).—*RUSSELL v. AMALGAMATED SOCIETY OF CARPENTERS & JOINERS*, [1910] 1 K. B. 506; 79 L. J. K. B. 507; 102 L. T. 119; 26 T. L. R. 228; 51 Sol. Jo. 213, C. A.; *affd.*, [1912] A. C. 421, H. L.

*Annotations:—Generally, Reifd. Mudd v. Operative Carpenters & Joiners General Union (1910), 103 L. T. 45;*

is not void as against public policy if the rates are proper & reasonable & the contract in fact beneficial to the public.—*ST. JOHN RIVER S.S. CO. v. STAR LINES S.S. CO.* (1911), 10 E. L. R. 97; 40 N. B. R. 405.—**CAN.**

**c.** *Price fixing agreement — Prices not excessive — Agreement not against public policy.*— PALMOLIVE CO. (AUSTRALIA) v. McCABKIE (1925), 26 S. R. N. S. W. 212; 43 N. S. W. W. N. 18. — **AUS.**

**d.** — *For ginning & baling cotton & to share profits Agreement neither in restraint of trade nor against*

q. Agreement for towage—Each tug to take proper turns at towing.] - PRATT v. TAPLEY (1875), 16 N. B. R. (3 Pug.) 163.—CAN.

**r. Agreement to confine business dealings to members of same caste.**—In a suit upon an agreement blinding defendants to remain subject to the orders of plaintiff, the head of their caste, not to carry on their trade with the assistance of any other persons than their own caste, & imposing penalties for non-performance.

Baker v. Ingall, [1912] 3 K. B. 106; Thomas v. Ship Constructive, etc. Assocn., Portsmouth A. Branch (1912), 28 T. L. R. 372; Kelly v. National Soc. of Operative Printers' Assistants (1915), 84 L. J. K. B. 2236; McEllistrim v. Ballymacelligott Co-op. Agricultural & Dairy Soc., [1919] A. C. 518; Pratt v. British Medical Assocn., [1919] 1 K. B. 211.

**255. - - .]** MASON v. PROVIDENT CLOTHING & SUPPLY CO., LTD., No. 143, *ante*.

256. — —.]—HORWOOD *v.* MILLAR'S TIMBER & TRADING CO., LTD., No. 127, *ante*.

257. — — Injurious to interests of community.] —  
NEVILLE v. DOMINION OF CANADA NEWS CO., LTD.,  
No. 306, *post*.

**258. — Larger than necessary for cove-**  
**nantee's protection.]—** (1) Every restraint of trade  
 which is larger than what is required for the  
 necessary protection of the party with whom the  
 contract is made, is unreasonable & void, as  
 injurious to the interests of the public, on the  
 ground of public policy.

By articles of agreement under seal, it was agreed that deft. should become assistant to plffs. in their business of surgeon dentist, for four year; that plffs. should instruct him in the business of a surgeon dentist, & that after the expiration of the term, deft. should not carry on that business in London or in any of the towns or places in England or Scotland where plffs. might have been practicing before the expiration of the service. The declaration alleged as breaches: first, that after the term, deft. carried on business in London, secondly, that plffs. had during the term carried on business in Great Russell Street, Bloomsbury, yet deft., after the term, carried on business in the same place. Plea to the first breach, that London was a large & populous district, containing 1,500,000 inhabitants, & that the stipulation in the agreement was an undue, unreasonable, & unlawful restriction of trade. Plea to the second breach, that, before the expiration of the service, plffs. had practiced in very many towns in England, & amongst others, London, Preston, Oswestry, etc. & that divers of the towns were distant from each other 150 miles; wherefore the stipulation was an unreasonable restriction of trade, & the agreement, as to so much, was wholly void:—*Held*: (2) the first plea was bad, as the covenant not to practice in London was valid, the limit of London not being too large for the profession in question; & the latter part of it was also bad, for attempting to put in issue matter of law, viz. the reasonableness of the restriction.

*Semble :* (3) in considering the question of restriction, the populousness of particular districts ought not to be taken into consideration ; (1) the stipulation as to not practicing in towns where pliffs. might have been practicing during the service, was an unreasonable restriction, & therefore illegal & void ; but the stipulation as to not practicing in London was not affected by the illegality of the other part.

(5) If there be simply a stipulation, though in an instrument under seal that a trade or pro-

ance:—*Held*: it would be contrary to public policy to give effect to such an agreement. -**VAITHELINGA v. SAMINADA** (1878), L. L. R. 2 Mad. 44.—**IND.**

1. *Creamery company rules*—Member bound to supply all the milk of all his cows.]—TIPPERARY CO-OPERATIVE CREAMERY CO. v. HANLY, [1912] 2 I. R. 586; 46 I. L. T. 219.—IR.

a. — — — —.] — **ATHLACCA CO-  
OPERATIVE CREAMERY, LTD. v. LYNCH**  
(1915), 49 J. L. T. 233. —IR.

b. — — —.] — Rules of a co-operative creamery society registered under Industrial & Provident Societies



fession shall not be carried on in a particular place, without any recital in the deed, & without any averments showing circumstances which rendered such a contract reasonable, the contract is void (PARKE, B.).—*MALLAN v. MAY* (1843), 11 M. & W. 653; 12 L. J. 15x. 376; 1 L. T. O. S. 110, 258; 7 Jur. 536; 152 E. R. 907.

*Annotations:—As to (1) Consd.* Tallis v. Tallis (1853), 1 E. & B. 391. *Refd.* Elves v. Crofts (1850), 10 C. B. 241; Rousillon v. Rousillon (1880), 14 Ch. D. 351; Millers v. Steedman (1915), 84 L. J. K. B. 2057. *As to (2) Apd.* Price v. Green (1817), 16 M. & W. 346; Atkyns v. Kinnler (1850), 4 Exch. 776; Putnam v. Taylor, [1927] 1 K. B. 637. *Refd.* Sahner v. Ferguson (1819), 7 C. B. 716; Collins v. Locke (1879), 4 App. Cas. 674; Eastes v. Russ, [1914] 1 Ch. 468. *As to (1) Refd.* Collins v. Locke (1879), 4 App. Cas. 674. *Generally Refd.* Nicholls v. Strutton (1847), 11 Jur. 1008; Hastings v. Whitley (1848), 2 Exch. 611; Dendy v. Henderson (1855), 24 L. J. Ex. 324; Hilton v. Eckersley (1855), 6 E. & B. 47; Mumford v. Gehung (1859), 7 C. B. N. S. 305; Davies v. Davies (1887), 36 Ch. D. 359; Parsons v. Cotterill (1887), 56 L. T. 839; Davies, Turner v. Lowen (1891), 61 L. T. 655; Maxim Nordenflett Guns & Ammunition Co. v. Nordenflett, [1893] 1 Ch. 630; Haynes v. Doman, [1899] 2 Ch. 13; Leff & Jenks v. Ganson (1899), 43 Sol. Jo. 744; Dowden & Pook v. Pook, [1904] 1 K. B. 45; North Western Salt Co. v. Electrolytic Alkali Co. (1912), 107 L. T. 439; Morris v. Savelby, [1916] 1 A. C. 688; Attwood v. Lamont, [1920] 3 K. B. 571. *Mentd.* Horwood v. Griffith (1853), 2 W. R. 71.

259. ———. ———.]—*BOWLER v. LOVEGROVE*, No. 234, *ante*.

260. ——— **Unreasonable restraint.**]—*COLLINS v. LOCKE*, No. 137, *ante*.

261. ———. ———.]—*TIVOLI, MANCHESTER, LTD. v. COLLEY*, No. 142, *ante*.

262. ———. ———.]—*CONTINENTAL TYRE & RUBBER (GREAT BRITAIN) CO., LTD. v. HEATH*, No. 488, *post*.

263. ——— **General restraint.**]—*COLLINS v. LOCKE*, No. 137, *ante*.

264. ———. ———.]—*BADISCHE ANILIN UND SODA FABRIK v. SCHOTT, SEGNER & CO.*, No. 269, *post*.

265. ——— **Restraint without consideration.**]—*COLLINS v. LOCKE*, No. 137, *ante*.

266. ——— **Restraint of competition in bidding—Disposal of public stores.**]—(1) At a sale by public auction of surplus property belonging to the Ministry of Munitions plff. & deft. agreed, in order to avoid competition, that deft. alone should bid for certain goods, & that the goods, if purchased, should be divided equally between them. In pursuance of that agreement plff. abstained from bidding & the goods were knocked down to deft. Deft. subsequently repudiated the agreement. In an action by plff. to recover one moiety of the goods purchased or the value thereof over & above the price paid at the auction, the judge held that, at any rate where the goods sold were the property of the public, it was against public policy that persons should combine at an auction to procure the goods to be sold at a price considerably below the fair value with the necessary result that the public were defrauded. He accordingly held that the agreement was unenforceable:—*Held*: the agreement was not illegal, & judgment should be entered for plff.

(2) As to the question whether the agreement was void as being in restraint of trade, the agreement was not *ex facie* illegal; as between the parties it appeared to be plainly reasonable.—*RAWINGS v. GENERAL TRADING CO.*, [1921] 1 K. B. 635; 90 L. J. K. B. 404; 124 L. T. 562;

37 T. L. R. 252; 65 Sol. Jo. 220; 26 Com. Cas. 171, C. A.

*Annotation:—Generally, Mentd.* Cohen v. Roche, [1927] 1 K. B. 169.

267. ——— **Agreement restricting customer to one manufacturer.**]—A letter written by manufacturers to a trade customer, offering their goods at a low price if the customer agrees to take such goods exclusively from them, is an "original literary work" within Copyright Act, 1911 (c. 46), s. 1 (1), & the writers are entitled to copyright therein. Such a letter is not contrary to public policy as being in restraint of trade.—*BRITISH OXYGEN CO. v. LIQUID AIR, LTD.*, [1925] 1 Ch. 383; 95 L. J. Ch. 81; 133 L. T. 282.

268. **Ground of inconsistency must be clearly established.**]—*UNDERWOOD (E.) & SON, LTD. v. BARKER*, No. 777, *post*.

**Agreements contrary to public policy, generally.**]—*See CONTRACT*, Vol. XII., pp. 240–256, Nos. 1970–2089.

#### (b) Limits of Time or Space.

269. **General rule—Limits of time & space must be considered.**]—Plffs., a foreign corpn., carried on business as manufacturers of aniline dyes & other chemical products, their principal place of business being on the Rhine, but they traded with most parts of the world, partly by means of branch establishments, partly by agents, & partly direct. Defts., who had their place of business at Manchester, had been plffs.' agents in England under an agreement, by clause 7 of which they bound themselves for three consecutive years after the termination of the agreement not to start a business of the same kind nor to give any information about the business. The agreement was terminated on June 30, 1892, & defts. then commenced business on their own account in Manchester as dealers in chemical colours, & solicited the custom of plffs.' customers. On a motion for an injunction to restrain defts. from carrying on business in breach of clause 7 of the agreement:—*Held*: the clause was not unreasonable for the protection of plffs.' trade, & *interim* injunction granted.

(1) Where a covenant in restraint of trade is general, that is, without qualification, it is bad as being unreasonable & contrary to public policy; but where it is partial, that is, subject to some qualification either as to time or space, then the question is whether it is reasonable, & if it is reasonable, then it is good in law. In considering the question of reasonableness, the points to which the attention of the ct. is specially directed are the limits of time & space, & the protection required for the trade of the covenantee, the latter point involving the examination of the nature & extent of the trade. The reasonableness depends on all the circumstances, which must be duly weighed in each case, & if the restraint is greater than the protection that the business of the covenantee can possibly require, the covenant is unreasonable & void.

(2) When the covenant is qualified as to time, the burden lies on the covenantor of showing that the restraint is unreasonable.

(3) Although not conclusive on the subject, the opinion of mercantile men, manifested by their

[1917] 2 L. R. 107.—*IR.*

#### PART V. SECT. 2. SUB-SECT. 2.—C. (b).

*c. General rule.*]—A contract for the sale of the goodwill of a business, a restriction upon the vendor from

Act, 1893, the shares being transferable only with the consent of the committee of the society, bound the members not to sell the milk of their cows, produced within a certain defined area, "to any creamery other than a creamery of the society, or to any co.

society, person, or persons who sell milk or manufacture butter for sale":—*Held*: not to amount to an illegal restraint of trade, nor to create such a monopoly as to offend against public policy.—*COOLMOYNE & FETTERHOLM CO-OPERATIVE CREAMERY LTD. v. BULFIN*,

*Sect. 2.—Validity of agreements: Sub-sect. 2, C. (b) & (c).]*

acts, is not to be disregarded on the question of reasonableness (CHITTY, J.).—*BADISCHE ANILIN UND SODA FABRIK v. SCHOTT, SEGNER & CO.*, [1892] 3 Ch. 447; 61 L. J. Ch. 698; 67 L. T. 281; 8 T. L. R. 742.

*Annotations:—As to (1) Consd. Moe nich v. Fenestre* (1892), 67 L. T. 602; *Lamson Pneumatic Tube Co. v. Phillips* (1904), 91 L. T. 363. *Apld. Hooper & Ashby v. Willis* (1905), 93 L. T. 236. *Consd. Millers v. Steedman* (1915), 84 L. J. K. R. 2057. *Refd. Maxim Nordenfolt Guns & Ammunition Co. v. Nordenfolt*, [1893] 1 Ch. 630; *Haynes v. Doman*, [1899] 2 Ch. 13. *As to (2) Apld. Carbonado Co. v. Le Couch* (1913), 109 L. T. 385. *Consd. Millers v. Steedman* (1915), 84 L. J. K. R. 2057.

**270. Limit of time.**—*PROCTOR v. SARGENT*, No. 172, *ante*.

**271. —**—*TALLIS v. TALLIS*, No. 240, *ante*.

**272. —**—*AUSTEN v. BOYS*, No. 822, *post*.

**273. —**—*DAVIES v. DAVIES*, No. 406, *post*.

**274. —**—*TREGO v. HUNT*, No. 44, *ante*.

**275. —**—*SIR W. C. LENG & CO., LTD. v. ANDREWS*, No. 161, *ante*.

**276. — Agreement of service relating to profession.**—By an agreement dated Aug. 17, 1912, made between pltf., a solr. practising at Tamworth, & deft., who was employed by pltf. from 1890 to 1914 successively as junior clerk, articulated clerk, & managing clerk, deft. undertook to serve pltf. as managing clerk for three years, & expressly agreed with pltf. that he would not, on the expiration or sooner determination of that term, either alone, or jointly with any other person or persons, directly or indirectly, "be engaged or manage or concerned in the office, profession, or business of a solr., within a radius of seven miles of the Town Hall of Tamworth," except in respect to a particular business therein mentioned. After the termination of deft.'s employment under the agreement deft. in 1919 intentionally committed a breach of the restrictive covenant in order to test the validity of the restriction:—*Held*: the covenant, though unlimited in point of time, did not in the circumstances exceed what was reasonably required for the protection of the covenantee & was not against the public interest.—*FITCH v. DEWES*, [1921] 2 A. C. 158; 90 L. J. Ch. 436; 125 L. T. 744; 37 T. L. R. 784; 65 Sol. Jo. 626, H. L.; *affy*. S. C. *sub nom.* *DEWES v. FITCH*, [1920] 2 Ch. 159, C. A.

*Annotations:—Consd. Attwood v. Lamont*, [1920] 2 K. B. 146. *Distd. Bowler v. Lovegrove*, [1921] 1 Ch. 642. *Apld. Spence v. Mercantile Bank of India* (1921), 37 T. L. R. 390.

**277. Limit of space.**—Bond restraining the obligor from carrying on his trade in a particular place & for a limited time & upon valuable consideration is good.—*COLMER v. CLARK* (1734), 7 Mod. Rep. 230; *Ridg. temp. H.* 135; 87 E. R. 1209; *sub nom.* *CLERKE v. COMER*, Cunn. 51; *Lee temp. Hard.* 53; *sub nom.* *CLERK v. CROW*, 2 Barn. K. B. 463.

*Annotation:—Refd. Maxim Nordenfolt Guns & Ammunition Co. v. Nordenfolt*, [1893] 1 Ch. 630.

**278. —**—*WARD v. BYRNE*, No. 183, *ante*.

**279. —**—*TALLIS v. TALLIS*, No. 240, *ante*.

**280. —**—*AUSTEN v. BOYS*, No. 822, *post*.

**281. —**—*DAVIES v. DAVIES*, No. 406, *post*.

**282. —**—A covenant by a clerk & traveller with a firm of brewers that he would not, during his service, or within two years afterwards, either directly or indirectly, sell, procure orders for, or recommend, or be in anywise concerned or engaged in the sale or recommendation, either on his own account or for any other person, public co. or

corp., of any Burton ale or porter brewed at Burton, or offered for sale as such, other than the ale, beer, or porter brewed by pltf.s:—*Held*: (1) void as unnecessarily extensive.

There has been a natural inclination of the cts. to bring within reasonable limits the doctrine as to these covenants laid down in the earlier cases, but it has generally been considered in the later as well as in the earlier cases that a covenant not to carry on a lawful trade, unlimited as to space, is on the face of it void (*WICKENS, V.-C.*).

(2) Pltf.s' case fails, but as deft. has, according to my view, deliberately done the express thing he bound himself not to do, & escapes the consequences on technical grounds, I shall dismiss the bill, including the motion without costs (*WICKENS, V.-C.*).—*ALLSOP v. WHEATCROFT* (1872), L. R. 15 Eq. 59; 42 L. J. Ch. 12; 27 L. T. 372; 37 J. P. 180; 21 W. R. 102.

*Annotations:—As to (1) Consd. Hagg v. Darley* (1878), 47 L. J. Ch. 567. *Dbid. Rousillon v. Rousillon* (1880), 11 Ch. D. 351. *Consd. Davies v. Davies* (1887), 36 Ch. D. 359; *Maxim Nordenfolt Guns & Ammunition Co. v. Nordenfolt*, [1893] 1 Ch. 630. *Refd. Mills v. Dunham* (1891), 64 L. T. 712.

**283. —**—*TREGO v. HUNT*, No. 44, *ante*.

**284. —**—*ROBINSON (WILLIAM) & CO., LTD. v. HEUER*, No. 560, *post*.

**285. —**—*UNDERWOOD (E.) & SON, LTD. v. BARKER*, No. 777, *post*.

**286. —**—Where employer's business worldwide.—*ROPEWAYS, LTD. v. HOYLE*, No. 802, *post*. *General & partial restraints.*—*See Sub-sect. 3, post*.

*(c) Interests of Parties.*

**287. Restraint limited to protection of covenantee.**—*HORNER v. GRAVES*, No. 181, *ante*.

**288. —**—*MALLAN v. MAY*, No. 258, *ante*.

**289. —**—*TALLIS v. TALLIS*, No. 240, *ante*.

**290. —**—*WOLMERSHAUSEN v. O'CONNOR*, No. 520, *post*.

**291. —**—*ROUSILLON v. ROUSILLON*, No. 138, *ante*.

**292. —**—*MILLS v. DUNHAM*, No. 641, *post*.

**293. —**—*BADISCHE ANILIN UND SODA FABRIK v. SCHOTT, SEGNER & CO.*, No. 269, *ante*.

**294. —**—*TREGO v. HUNT*, No. 41, *ante*.

**295. —**—*DUBOWSKI & SONS v. GOLDSTEIN*, No. 438, *post*.

**296. —**—*STRIDE v. MARTIN*, No. 695, *post*.

**297. —**—A covenant, negative in its terms, prohibiting a servant during the term of his employment from being concerned in any business other than that of his employer, is not enforceable by way of injunction, at any rate where the prohibition is not restricted to a competing business.

A traveller for pltf.s, a firm of wine merchants, agreed to denote the whole of his attention & time to the business of pltf.s, & not directly or indirectly to engage or employ himself in any other business, or transact any business with any person or persons than pltf. for a term of ten years. The traveller having left pltf.s' employ & entered that of another firm, pltf.s moved for an injunction to restrain him from engaging in any other business, & from acting as a traveller for any other firm of wine merchants during the term of ten years:—*Held*: the negative stipulations in this contract were unreasonable & ought not to be enforced, & the application must therefore be refused.

(2) To enforce such a general negative stipulation as I find here would be in my opinion a dangerous extension, for here the stipulation extends to business of any kind, while the negative stipula-

dealing with his former customers & others, within a reasonable area, for

an unlimited time, is not an unreasonable restraint of

trade.—*Goss v. Richardson* (1877), 3 V. L. R. (L.) 267.—*AUS.*

tions enforced in the prior cases . . . were confined to special services. For these reasons I refuse the motion, but looking at the conduct of deft., I do so without costs (ROMER, J.). *EHLMAN v. BARTHOLOMEW*, [1898] 1 Ch. 671; 67 L. J. Ch. 319; 78 L. T. 646; 46 W. R. 509; 14 T. L. R. 364; Sol. Jo. 449.

*Annotations*.—As to (1) *Folld. Robinson v. Heuer* (1898), 67 L. J. Ch. 644. (See 67 L. J. Ch. p. 615.) *Apld.* Chapman v. Westberry (1913), 58 Sol. Jo. 56; Rely-a-Bell Burglar & Fire Alarm Co. v. Eisler, [1926] Ch. 609.

298. — — — *UNDERWOOD (E.) & SON, LTD. v. BARKER, No. 777, post.*

299. — — — *DOWDEN & POOK, LTD. v. POOK, No. 247, ante.*

300. — — — *LAMSON PNEUMATIC TUBE Co. v. PHILLIPS, No. 243, ante.*

301. — — — So long as the restraint is not more than is necessary for the protection of the covenantee the covenant is not unreasonable & must be enforced (NEVILLE, J.).—*DOTTIRIDGE BROTHERS, LTD. v. CROOK* (1907), 23 T. L. R. 644.

302. — — — *LEITHAM (HENRY) & SONS, LTD. v. JOHNSTONE-WHITE, No. 634, post.*

303. — — — *BROMLEY v. SMITH, No. 477, post.*

304. — — — *SIR W. C. LENG & CO., LTD. v. ANDREWS, No. 161, ante.*

305. — — — A skipper contracted to devote the whole of his time, attention, ability & energies to the performance of his duties as skipper in a trawler, the property of his employers & not to give his time to any other business or occupation :—*Held*: an injunction could not be granted to restrain him from obtaining other employment, as that would practically amount to enforcing a specific performance of the contract.—*CHAPMAN v. WESTBERRY* (1913), 58 Sol. Jo. 50.

*Annotation*.—*Apld.* Rely a Bell Burglar & Fire Alarm Co. v. Eisler, [1926] Ch. 609.

306. — — — *Ptff.* was a director of a co. which was engaged in selling land in Canada. Defts. were the proprietors of a weekly newspaper in which they held themselves out as giving honest advice to intending purchasers of Canadian land. *Ptff.* agreed with defts., who owed him £1,490, that if they paid him £750 by certain instalments & observed the terms of the agreement in all respect he would accept £750 in full satisfaction of their debt, but that on breach of any of the terms the whole £1,490, less any sums paid on account, should immediately become due & payable. One of the terms was that defts. should not publish in any periodical published by them any comment upon *ptff.*'s land co., its directors, business or land, or upon any co. with which defts. had notice that the land co. was connected or concerned. Upon a subsequent breach of this term by defts., *ptff.* brought this action under the agreement to recover the balance of the whole £1,490 :—*Held*: the agreement was unenforceable, being vitiated by the term in question upon two grounds, namely (a) that the term was in restraint of trade & was wider than was reasonably necessary for the protection of *ptff.*, & (b) the term was void as being against public policy, inasmuch as it was not consistent with the proper conduct of the newspaper in the public interest.—*NEVILLE v. DOMINION OF CANADA NEWS CO., LTD.*, [1915] 3 K. B. 556; 84 L. J. K. B. 2105; 113 L. T. 979; 31 T. L. R. 542, C. A.

*Annotations*.—*Reid.* Naylor, Benzon v. Kralnische Industrie Gesellschaft, [1918] 1 K. B. 331; Pratt v. British Medical Assoc., [1919] 1 K. B. 244; Kemp v. Glasgow Corp., [1920] A. C. 836.

307. — — — *HERBERT MORRIS, LTD. v. SAXELBY, No. 154, ante.*

308. — — — *HOLWOOD v. MILLAR'S TIMBER & TRADING CO., LTD., No. 127, ante.*

309. — — — *A co-operative society, registered under the Industrial & Provident Societies Act, 1893 (c. 39), carried on the business of manufacturing for sale cheese & butter from milk supplied by certain of its members. By its amended rules the society bound itself to take all milk produced by members' cows kept on any lands within a defined area, comprising some eighty townships, at the current price fixed by the committee, & rule 6 (2) provided that no member having milk to sell, the produce of cows kept within the defined area, should, without the previous consent of the committee, sell any such milk to any creamery other than the creamery of the society, or to any co., society or person who sold milk or manufactured butter for sale. Under rule 16 a member whose shares had been transferred or cancelled thereupon ceased to be a member, but a member was not otherwise entitled to withdraw from the society. Rule 21 required the consent of the committee to any transfer of shares, but the committee were not bound to assign any reason for their refusal. The rules contained an arbm. clause providing for the reference of all disputes between the society & its members to the Irish Agricultural Organisation Society, whose award was to be final. In an action by a member impeaching the validity of the rules :—*Held*: rule 6 (2) read in combination with rules 16 & 21, imposed upon members a greater restraint than was reasonably required for the protection of the society, & was illegal as in restraint of trade & ultra vires the society.—*McELLISTRIM v. BALLYMACCELLIGOTT CO-OPERATIVE AGRICULTURAL & DAIRY SOCIETY*, [1919] A. C. 518; 88 L. J. P. C. 59; 120 L. T. 613; 35 T. L. R. 351, H. L.*

*Annotations*.—*Reid.* R. Quinn & National Catholic Benefit & Thrift Society's Arbitration, [1921] 2 Ch. 318; Biddulp & District Agricultural Soc. v. Agricultural Wholesale Soc., [1927] A. C. 76.

310. — — — *Ptffs.* carried on a large business, extending over the whole of the United Kingdom, in the manufacture & sale of B. R. C. road reinforcements. In 1918 deft. S. & his partners, who carried on a small business for the sale, not manufacture, of loop road reinforcements over a limited area of the United Kingdom, sold their business to *ptffs.*, & jointly & severally covenanted for a certain period neither directly nor indirectly to carry on or manage or be concerned or interested in "or act as servant of any person concerned or interested in" the business of the "manufacture or" sale of road reinforcements in any part of the United Kingdom. Deft. S. having recently entered the employment of a road reinforcement co., *ptffs.* sued on the covenant :—*Held*: the servant clause was too wide in scope; e.g., it would have prevented S. from becoming the servant of any trust co. that held shares in any road reinforcement co.; the servant clause being part of the main purport & substance of the one entire covenant could not be severed, though the words "manufacture or" being merely subject-matter might be severed; assuming severance was allowed, & assuming that S. had broken the rest of the covenant, which on its construction was extremely doubtful, & as to which no breach was assigned in the pleadings, the covenant was still too wide in area for the protection of the goodwill of the small business sold. In considering the reasonableness of a covenant in restraint of trade entered into by a vendor on the sale of a business, the ct. must merely consider whether it was reasonably necessary for the protection of the purchaser in respect of the particular business sold. The purchaser's existing businesses are not the legitimate subject of this protection, & their nature & extent must be disregarded.—*BRITISH REIN-*

*Sect. 2.—Validity of agreements: Sub-sect. 2, C. (c), (d) & (e), & D.; sub-sect. 3, A.]*

**FORCED CONCRETE ENGINEERING CO., LTD. v. SCHIEFF,** [1921] 2 Ch. 563; 91 L. J. Ch. 114; 126 L. T. 230.

*Annotation:—Distd. Putman v. Taylor, [1927] 1 K. B. 637.*

**311. — Effect on distinction between general & partial restraints.]—NORDENFELT v. MAXIM NORDENFELT GUNS & AMMUNITION CO., No. 139, *ante*.**

**312. — Business consisting of several departments.]—CONTINENTAL TYRE & RUBBER (GREAT BRITAIN) CO., LTD. v. HEATH, No. 188, *post*.**

**313. — Agreement against soliciting any customers—Past or future.]—KONSKI v. PEET, No. 497, *post*.**

**314. Interests of both parties to be considered.]—TIVOLI, MANCHESTER, LTD. v. COLLEY, No. 142, *ante*.**

**315. —.]—MASON v. PROVIDENT CLOTHING & SUPPLY CO., LTD., No. 143, *ante*.**

**316. —.]—ATTWOOD v. LAMONT, No. 131, *ante*.**

**Unreasonable protection of covenantee contrary to public policy.]—See Nos. 258, 259, *ante*.**

*(d) Circumstances at Time of Covenant.*

**317. General rule.]—BADISCHE ANILIN UND SODA FABRIK v. SCHOTT, SEGNER & CO., No. 269, *ante*.**

**318. —.]—DOWDEN & POOK, LTD. v. POOK, No. 247, *ante*.**

**319. —.]—LAMSON PNEUMATIC TUBE CO. v. PHILLIPS, No. 243, *ante*.**

**320. —.]—RODRIGUEZ v. SPEYER BROTHERS, No. 145, *ante*.**

**321. Covenant valid when made—Whether validity affected by subsequent events.]—(1) Upon a contract for the sale of a lease & the goodwill of the business of a banker, the assignor agreed that he would not, during the term assigned, solicit the custom of or knowingly supply bread or flour to any of the customers then dealing of the said premises, without the consent of plff., under a certain penalty:—*Held*: not void as an unreasonable restraint of trade.**

The first part of the agreement—that deft. would not directly or indirectly set up or carry on during the term the business of a baker, within one mile of the premises disposed of—is admitted to be good (TINDAL, C.J.).

(2) If the contract is a reasonable one at the time it is entered into, we are not bound to look out for improbable & extravagant contingencies in order to make it void (TINDAL, C.J.). **RANNIE v. IRVINE** (1814), 7 Man. & G. 969; 8 Scott, N. R. 674; 14 L. J. C. P. 10; 4 L. T. O. S. 133 a; 8 Jur. 1051; 135 E. R. 393.

*Annotations:—As to (1) Consd. Baines v. Geary (1887), 35 Ch. D. 151. Refd. Elves v. Crofts (1850), 10 C. B. 241. As to (2) Apld. Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co., [1891] A. C. 535; Haynes v. Doman, [1899] 2 Ch. 13. Generally, Mentd. Mills v. Dunham, [1891] 1 Ch. 576.*

**322. —.]—If the covenant is binding to its full extent when made, its significance cannot be varied by any subsequent occurrence (TALFOURD, J.).—ELVES v. CROFTS (1850), 10 C. B. 241; 19 L. J. C. P. 385; 14 Jur. 855; 138 E. R. 98; *sub nom.* CROFTS v. ELVES, 15 L. T. O. S. 393.**

*Annotations:—Apld. Jacoby v. Whitmore (1883), 49 L. T. 335. Consd. Townsend v. Jarmen, [1900] 2 Ch. 698. Refd. Wright v. Chappell (1869), 20 L. T. 369; Davies v. Davies (1887), 36 W. R. 86; Fernby v. Barker, [1903] 2 Ch. 539.*

**323. —.]—A covenant, by a licensee for the residue of a term of fourteen years, of patent improvements in machinery for slubbing fibrous substances, not to make or vend any slubbing**

frames whatever without the invention applied to them, is not void as a covenant in restraint of trade. To an action for breach of such covenant, deft. pleaded that he was at all times ready & willing, & offered to use, exercise, & put the invention in practice, both in the making & vending slubbing frames with the invention attached, & used his best endeavours to induce manufacturers & others to employ him to make & to purchase & apply the same from him; nevertheless, the invention & frames to which the invention was applied, was & were of so little value & utility, & were so defective & worthless, that without deft.'s default he was at all times during the continuance of the licence unable to induce any person so to employ him, & was by reason thereof prevented from using, exercising or putting in practice the licence, & the invention & licence became & were useless to deft., & the licence was of no use, benefit or effect, wherefore deft. made & vended slubbing frames without the invention applied to them:—*Held*: the plea was no answer to the action.

It would be a very mischievous decision if we were to hold that a contract, which it may be presumed was reasonable at the time it was entered into, might be construed as a contract in restraint of trade because something more useful than the subject matter of it has been invented, or the habits of society have changed (POLLOCK, C.B.).—**JONES v. LEES** (1856), 1 H. & N. 189; 26 L. J. Ex. 9; 2 Jur. N. S. 645.

*Annotations:—Consd. Maxim Nordenfelt Guns & Ammunition Co. v. Nordenfelt, [1893] 1 Ch. 630. Refd. Rousillon v. Rousillon (1889), 14 Ch. D. 351; Davies v. Davies (1887), 36 Ch. D. 359; Mouchel v. Culbitt (1907), 24 R. P. C. 191.*

**324. —.]—NORDENFELT v. MAXIM NORDENFELT GUNS & AMMUNITION CO., No. 139, *ante*.**

**325. —.]—(1) The benefit of a partner's covenant not to carry on a similar business to that of the partnership during a fixed period from the commencement thereof passes by an assignment of the goodwill of the partnership.**

(2) If one man, apart from any business, takes a covenant in gross from another man that he will not trade at all, that is simply oppressive. He does not require it to protect his own interest, because he has no interest to protect. It is therefore only as incident to the business that the covenant can in its origin have legal validity, although . . . it may very well continue to have validity after the original business has ceased, because *ex post facto* occurrences do not necessarily invalidate a covenant good in its inception (FARWELL, J.).

(3) The et. no doubt qualifies the right which is given under an assignment of goodwill when the actual use of the name is not specified by limiting the user of the name to which the goodwill is annexed so as not to impose a personal liability upon the assignors (FARWELL, J.).—**TOWNSEND v. JARMAN**, [1900] 2 Ch. 698; 69 L. J. Ch. 823; 83 L. T. 366; 49 W. R. 158; 17 R. P. C. 649.

*Annotations:—As to (1) Refd. Leatham v. Johnstone-White, [1907] 1 Ch. 322; Dewes v. Fitch, [1920] 2 Ch. 159. Generally, Mentd. Pomeroy v. Seale (1906), 23 T. L. R. 179; Boussod, Valadon v. Marchant (1907), 21 T. L. R. 111.*

*(c) Populousness of District.*

**326. General rule.]—Declaration, in assumption, that, before & at the time of the promise, plff. was a druggist, & had taken deft. into his service as assistant, at an annual salary, on condition, among other things, that deft. should enter into & perform the agreement after-mentioned; that deft., in consideration of the premises, & in performance of the condition, by an agreement, reciting as above, agreed with plff. that, if deft. should at any**

time thereafter exercise the trade or business of a chemist & druggist in the town of T., or within three miles thereof, deft. should pay pltf. £500 as liquidated damages. Allegation of mutual promises to perform the agreement; & that deft. exercised the trade within T. Breach, non-payment of £500. Verdict for pltf., on *non-assumpsit*.—*Held*: (1) that there was a legal consideration for the contract; (2) the ct. could not enter into the question, whether the consideration was equal in value to the restraint agreed to by deft.; (3) the restraint was not shown to be unreasonable or oppressive by the circumstance that its duration was not limited to the life of pltf., or to the time during which he should carry on the business. Judgment for pltf.

If it is not unreasonable, as undoubtedly it is not, to prevent a servant from entering into the same trade in the same town in which his master lives, so long as the master carries on the trade there, we cannot think it unreasonable that the restraint should be carried further & should be allowed to continue, if the master sells the trade or bequeaths it or it becomes the property of his personal representative; that is . . . it does not appear to us unreasonable that the restriction should go so far as to . . . secure the enjoyment of the same trade to his purchaser or legatee or exor. (TINDAL, C.J.).

(1) Where the question turns upon the reasonableness or unreasonableness of the restriction . . . the answer may depend upon various circumstances . . . such as . . . the populousness of the neighbourhood (TINDAL, C.J.).—*HITCHCOCK v. COKER* (1837), 6 Ad. & El. 438; 1 Nev. & P. K. B. 796; 2 Har. & W. 464; 6 L. J. Ex. 266; 1 J. P. 215; 112 E. R. 167, Ex. Ch.

*Annotations*:—*As to* (2) *Apld.*, *Lighton v. Wales* (1838), 3 M. & W. 515; *Pilkington v. Scott* (1846), 1 M. & W. 677; *Sahner v. Ferguson* (1849), 7 C. B. 716; *Gravely v. Barnard* (1871), L. R. 18 Eq. 518. *Consd.*, *Cooper v. Southgate* (1891), 63 L. J. Q. P. 679. *Refd.*, *Proctor v. Sargent* (1849), 2 Man. & G. 20; *Green v. Price* (1815), 13 M. & W. 695; *R. v. Welch & Wills* (1853), 17 Jur. 1007. *As to* (3) *Consd.*, *Mumford v. Gething* (1849), 7 C. B. N. S. 305; *East v. Jones* (1841), 1 Ch. 408. *Refd.*, *Archer v. Marsh* (1857), 6 Ad. & El. 959; *Pemberton v. Vaughan* (1847), 11 Jur. 411; *Hastings v. Whitley* (1845), 2 Exch. 611; *Elves v. Crofts* (1850), 10 C. B. 211; *Ronsillon v. Ronsillon* (1880), 11 Ch. D. 341; *Badische Anilin und Soda Fabrik v. Schott, Segner*, [1892] 3 Ch. 417; *Moenich v. Fenestre* (1892), 61 L. J. Ch. 737; *Rogers v. Maddocks*, [1892] 3 Ch. 316; *Haynes v. Doman*, [1899] 2 Ch. 13; *Phillips v. Stevens* (1899), 15 T. L. R. 325; *Underwood v. Barker*, [1899] 1 Ch. 300; *Townsend v. Jarman* (1900), 69 L. J. Ch. 823; *McEllistrich v. Bullymacelligott Co-op. Agricultural & Dairy Soc.*, [1919] A. C. 518; *Fitch v. Dewes*, [1921] 2 A. C. 158. *As to* (4) *Refd.*, *Ward v. Byrne* (1839), 5 M. & W. 518; *Avery v. Langford* (1844), Kay, 663; *Dendy v. Henderson* (1855), 11 Exch. 191; *Nordenfellt v. Maxim Nordenfellt Guns & Ammunition Co.*, [1894] A. C. 355. *Generally*, *Refd.*, *Mallan v. May* (1843), 12 L. J. Ex. 376; *Tallis v. Tallis* (1853), 1 E. & B. 391; *Hilton v. Ekersley* (1855), 6 E. & B. 47; *Meier v. Irving* (1858), E. B. & E. 663; *George v. Whitmore* (1883), 49 L. T. 335; *Davies v. Davies* (1887), 36 Ch. D. 359; *Mason v. Provident Clothing & Supply Co.*, [1913] A. C. 724; *Morris v. Saxelby*, [1915] 2 Ch. 57; *Rodriguez v. Speyer*, [1919] A. C. 59.

327. —.]—*MALLAN v. MAY*, No. 258, *ante*.

#### D. Sale of Goodwill.

328. Distinguished from covenants between employer & employee.]—*NORDENFELT v. MAXIM NORDENFELT GUNS & AMMUNITION CO.*, No. 139, *ante*.

#### PART V. SECT. 2, SUB-SECT. 3.—A.

d. Effect of Contract Act, s. 27.—The above sect. does away with the distinction observed in the English cases between partial & total restraint of trade, & makes all contracts falling within its terms void unless they fall

within its exceptions. The sect. was intended to prevent a partial as well as a total restraint of trade.—*NIRALA DUBASHI v. ABDUL ALI* (1892), L. L. R. 19 Calc. 765.—*IND.*

e. Exclusive film renting.—Whether general restraint.—Appet. & resp. entered into an agreement whereby

329. —.]—*UNDERWOOD (E.) & SON, LTD. v. BARKER*, No. 777, *post*.

330. —.]—*HERBERT MORRIS, LTD. v. SAXELBY*, No. 154, *ante*.

331. —.]—*ATTWOOD v. LAMONT*, No. 131, *ante*.

332. Plaintiff & defendant having same names.—*SMEDLEY'S LTD. v. SMEDLEY* (1918), [1921] 2 Ch. 580, n.

*Annotation*:—*Refd.*, *British Concrete Co. v. Schellif*, [1921] 2 Ch. 563.

#### SUB-SECT. 3.—GENERAL AND PARTIAL RESTRAINTS.

##### A. General Restraints.

333. General rule—Not valid.]—*COLGATE v. BACHELER*, No. 677, *post*.

334. —.]—*ROGERS v. PARREY* (1613), as reported in 2 Bulst. 136; 80 E. R. 1012.

*Annotations*:—*Refd.*, *Mitchel v. Reynolds* (1711), 1 P. Wms. 181; *Maxim Nordenfellt Guns & Ammunition Co. v. Nordenfellt*, [1893] 1 Ch. 630.

335. —.]—*BROAD v. JOLLYTE*, No. 366, *post*.

336. —.]—*PRUGNELL v. GOSSE* (1618), Ayleyn. 67; 82 E. R. 919.

*Annotations*:—*Refd.*, *Mitchel v. Reynolds* (1711), 1 P. Wms. 181; *Mallan v. May* (1843), 11 M. & W. 653.

337. —.]—*MITCHEL v. REYNOLDS*, No. 59, *ante*.

338. —.]—General restraints of trade are bad: particular restraints, either as to time or place, are good, if for a sufficient consideration. If . . . there be a good consideration given to the person restrained, a contract or agreement upon such consideration so restraining a particular person may be good & valid in law, notwithstanding the general rule (WILLES, C.J.).—(*GUNMAKERS, ETC. (MASTER, ETC.) v. FELL* (1712), Willes, 381; 125 E. R. 1227.

*Annotations*:—*Consd.*, *Ward v. Byrne* (1839), 5 M. & W. 518. *Apld.*, *Mallan v. May* (1843), 11 M. & W. 653. *Consd.*, *Nordenfellt v. Maxim Nordenfellt Guns & Ammunition Co.*, [1894] A. C. 355. *Refd.*, *Ronsillon v. Ronsillon* (1880), 11 Ch. D. 351; *Mineral Water Bottle Exchange & Trade Protection Soc. v. Booth* (1887), 36 W. R. 271.

339. —.]—*MORRIS v. COLMAN*, No. 586, *post*.

340. —.]—*HOMER v. ASHFORD*, No. 250, *ante*.

341. —.]—*MALLEN v. CHURCHILL*, No. 707, *post*.

342. —.]—*WICKENS v. EVANS*, No. 71, *ante*.

343. —.]—*HORNER v. GRAVES*, No. 181, *ante*.

344. —.]—*WALLIS v. DAY*, No. 618, *post*.

345. —.]—*BRYSON v. WHITEHEAD*, No. 380, *post*.

346. —.]—*HINDE v. GRAY*, No. 610, *post*.

347. —.]—*ROUSILLON v. ROUSILLON*, No. 138, *ante*.

348. —.]—*VERNON v. HALLAM*, No. 771, *post*.

349. —.]—*BADISCHE ANILIN UND SODA FABRIK v. SCHOTT SEGNER & CO.*, No. 269, *ante*.

350. —.]—*UNDERWOOD (E.) & SON, LTD. v. BARKER*, No. 777, *post*.

appet. agreed to let to resp.'s such bioscope films as appet. would supply from time to time, the selection of films in appet.'s discretion. Resp. agreed that he would only exhibit the films at a certain place & would not lend or sub-hire them, & that he would not during the continuance of the



**382.** ————[Deft. entered the employment of plffs., who employed secret processes, under an agreement by which he was to acquire knowledge of their manufactures in accordance with their secret processes & to hold as confidential their secrets or secret processes & not at any time to communicate any of plffs.' formulae, processes, or machinery to any person, & not "within the British Empire or the Continent of Europe for five years" after leaving their employment directly or indirectly enter into or be engaged in the business of manufacturing or selling carbon papers & ribbons or in any business which for the time being might be carried on by plffs.]

After leaving plffs.' employment deft., who had obtained particulars of a secret machine of plffs.' & formulae & of materials used by them, became manager to a co. which manufactured goods similar to those of plffs. :—*Held* : on a motion for an interlocutory injunction in an action to enforce the agreement, deft. had made an improper use of plffs.' secret formulae or processes of manufacture within the first branch of the agreement which did not extend to processes in common use & to which considerations of time & space did not apply, & his breach of that part of the covenant ought to be restrained. The covenant restraining deft. from engaging for five years in any business which plffs. might carry on would be too wide, but was severable from the rest of the second part of the agreement. The covenant in that part being qualified both as to time & space, the *onus* of proving that it was unreasonable lay upon deft., & the evidence showing that the covenant was necessary for the proper protection of trade, this part of the covenant was held not to be unreasonable, & an interlocutory injunction granted in the terms of the covenant down to the words "carbon papers & ribbons."—*CARBONUM CO., LTD. v. LE COUCH* (1913), 109 L. T. 385; *on appeal*, 109 L. T. 587, C. A.

**383.** ————[Fourteen years.]—Deft. sold to plff. a business of manufacturing & selling the "Government Carbolic Disinfectants," the process of manufacturing which was a secret in his possession, & covenanted not to carry on the business of a manufacturer or seller of the "Government Carbolic Disinfectants" or of any other article or thing of a disinfectant nature for fourteen years, & not to disclose the secret for the same period. Plff. brought this action, alleging that deft. was infringing those covenants & seeking to restrain him. Deft. delivered a statement of defence, whereby he specifically denied that he was infringing the covenants, & further demurred on the ground that the covenant not to carry on such business was in restraint of trade, & too general in its provisions :—*Held* : having regard to the subject-matter the covenant was not too general, & the demurrer must be overruled.—*HAGG v. DARLEY* (1878), 47 L. J. Ch. 567; 38 L. T. 312.

———[Duty not to disclose confidential information.]—*See, generally*, MASTER & SERVANT, Vol. XXXIV., pp. 121, 122, Nos. 923-934.

**384.** ————[Payment of shipping dues—Goods shipped at particular docks.]—If the directors of a railway co. become, for the purpose of the co., lessees of land, with a privilege to use docks, & agree to pay rent & royalties to the owner of the docks, & enter into other conditions which, by a state of circumstances subsequently created, appear to be unreasonable & impolitic, such stipulations & conditions cannot on that account be treated as *ultra vires* of the directors. Nor can a condition to pay shipping dues, not only for goods actually

brought along the railway & shipped at those docks, but for goods brought along the railway to be shipped at other docks, be treated as a covenant in restraint of trade.—*TAFF VALE RY. CO. (DIRECTORS, ETC.) v. MACNAIB* (1873), L. R. 6 H. L. 169; 42 L. J. Q. B. 153; 22 W. R. 65, H. L.

**385.** ————[Covenant in gross.]—*TOWNSEND v. JARMAN*, No. 325, *ante*.

**386.** ————[Leatham (Henry) & Sons, Ltd. v. Johnstone-White, No. 634, *post*.]

Restrictions on buyer of goods.—*See* SALE OF GOODS, Vol. XXXIX., pp. 525-527, Nos. 1401-1409.

———[To prevent competition.]—*See* Part III., Sect. 2, sub-sect. 2, *ante*.

———[Agreements in general & partial restraint of trade.]—*See* Sub-sect. 3, A. & B., *ante*.

———[Particular trades, businesses & professions.]—*See* Sect. 9, *post*.

### SECT. 3.—PARTIES TO AGREEMENT.

#### SUB-SECT. 1. IN GENERAL.

**387.** Agent acting under power of attorney—Right to bind principal.]—By a power of attorney, B., who was one of the four partners in a firm of dyers carrying on business at D. under the style of B. O. & Co., appointed his brother E. his attorney, to sell or concur in selling any of his real, leasehold, or personal property to any person or persons, "upon such terms, subject to such special or other conditions, & in such manner" as the attorney should approve, & also to sign any deeds that ought to be executed " & generally to do, negotiate, transact, & perfect all & any other act, deed, matter or thing whatsoever . . . for the transacting, settling, & adjusting all other my estate, affairs, tradings, & concerns whatsoever" ; & with full power & authority to act as fully & effectually as if he were personally present & did the same himself. E., acting for himself as a partner, & also under his power of attorney on behalf of B., joined with the other partners of the firm in executing a contract for the sale of the business to H.

Amongst other things, it was agreed that H. should pay the debts of the business, which were estimated at £15,000; if they did not exceed that amount the vendors were to be entitled to a share of profits calculated on £5,000 "deferred capital"; if the debts exceeded £15,000, £5 for every £2 of the excess was to be deducted from the £5,000 deferred capital; the vendors might require H. to take over their deferred capital, paying in cash two-fifths of its nominal amount; if the concern was converted into a limited co., the vendors were to receive shares for their deferred capital; & if the debts were less than £15,000, H. was to pay the difference in cash at the end of two years. It was agreed that H. might carry on the business under the style of B. O. & co., & that the vendors should not carry on any like business within fifty miles of D. H. brought an action for specific performance :—*Held* : (1) the provisions as to deferred capital were only a way of ascertaining the purchase-money, & did not constitute a partnership; & therefore the agreement was not void against B., on the ground that the power of attorney did not authorise an agreement for a partnership; (2) if the power of attorney did not authorise E. to give the purchaser power to trade under the name of B. O. & co., nor to agree not to trade within fifty miles of D., they were stipulations for the benefit of H., which he could waive, & he having done so,



*Sect. 3.—Parties to agreement: Sub-sects. 1, 2 & 3, A. & B.]*

that a decree for specific performance ought to be made.

(3) *Seemle*: E., was authorised by the power of attorney to enter into the agreement not to carry on business of a similar character, within fifty miles of D., as a general concern could not be sold advantageously without such a provision. *Qu.*: whether he was authorised by the power to give authority to H. to trade in the name of B. O. & Co. — *HAWKSLEY v. OUTRAM*, [1892] 3 Ch. 359; 62 L. J. Ch. 215; 67 L. T. 804; 2 R. 60, C. A.

*Annotations*:—*As to* (2) *Consd.* Lloyd v. Nowell, [1895] 2 Ch. 744. *Refd.* Monrell v. Studd & Millington, [1913] 2 Ch. 648. *Generally, Refd.* *Re* Johnston Foreign Patents Co., *Re* Johnston Die Press Co., *Re* Johnston Engraving Co., J. P. Trust v. Above Cos., [1904] 2 Ch. 231; North v. Loomes, [1919] 1 Ch. 378.

**388. Receiver & manager appointed by court.]**  
—*HOWARD v. DANNER*, No. 219, *ante*.

#### SUB-SECT. 2.—INFANTS.

*See MASTER & SERVANT*, Vol. XXXIV., pp. 42-44, 506, Nos. 184-189, 191, 195-199, 202, 203, 205, 206, 4200; & *generally*, INFANTS, Vol. XXVIII., pp. 152 *et seq.*

#### SUB-SECT. 3.—RIGHTS AND LIABILITIES OF REPRESENTATIVES AND ASSIGNEES.

##### A. Personal Representatives.

**389. Whether bound by agreement Executors of covenantor.]**—*COOKE v. CALCROFT* (1773), 2 Wm. Bl. 856; 3 Wils. 380; 95 E. R. 1111.

**390. Right to benefit of agreement—Administatrix of covenantee.]**—*MARTIN v. BRUNSDEN* (1894), 98 L. T. Jo. 237, D. C.

**391. — Executors of covenantee.]**—*ARCHER v. MARSH*, No. 617, *post*.

**392. —**—*HASTINGS v. WHITLEY*, No. 665, *post*.

**393. —**—*HINKINS v. ALDER* (1906), 50 Sol. Jo. 258, D. C.

##### B. Assignees.

**394. Right to benefit of agreement—General rule.]**—(1) In an agreement for employment as a milk carrier, the servant undertook not to serve or interfere with any customer served or belonging at any time to the master, his successors or assigns:—*Held*: if on the construction of the undertaking it was not limited to interference with persons who were customers during the employment of the servant, the undertaking was severable, & capable of enforcement in respect of persons who were customers during the employment.

(2) The benefit of such a covenant is assignable. —*BAINES v. GEARY* (1887), 35 Ch. D. 154; 56 L. J. Ch. 935; 56 L. T. 567; 51 J. P. 628; 36 W. R. 98; 3 T. L. R. 523.

*Annotations*:—*As to* (1) *Consd.* Baker v. Hodgcock (1888), 39 Ch. D. 520. *Distd.* Perls v. Saalfeld, [1892] 2 Ch. 149. *Dbtd.* Dubowski v. Goldstein, [1896] 1 Q. B. 478. *N.F.* Continental Tyre & Rubber (Great Britain) Co. v. Heath (1913), 29 T. L. R. 308. *Refd.* Mills v. Dunham, [1891] 1 Ch. 576; Maxim Nordenfolt Guns & Ammunition Co. v. Nordenfolt, [1893] 1 Ch. 630; Haynes v. Dorman (1899), 80 L. T. 569; Underwood v. Barker, [1899] 1 Ch. 300; Chard v. Hammond (1901), 48 Sol. Jo. 773; Hooper & Ashby v. Willis (1906), 91 L. T. 624; Leng v. Andrews, [1909] 1 Ch. 763; Russell v. Amalgamated Soc. of Carpenters & Joiners (1910), 102 L. T. 119; Millers v. Steedman (1915), 84 L. J. K. B. 2057.

**395. — Purchaser of part of business—Covenant with employer, assignees & successors.]**—(1) The servant of a milkman, in C. street, London,

agreed not to carry on the like business within three miles therefrom:—*Held*: this was not an undue restraint of trade, & the servant was restrained, by injunction, from violating his agreement.

(2) A. agreed to take B. as his servant, "at such wages as might from time to time be agreed on," & B., on his part, agreed to serve A., & not to set up trade for himself within certain limits. B. accordingly entered into & continued in A.'s service, at wages agreed on:—*Held*: there was a good & valuable consideration to support the agreement as against B., & the c. enforced it.

(3) A milkman, carrying on business in three places, took debt. into his service. Debt. engaged, as regarded the milkman, his assignees & successors, not to carry on a similar trade within certain limits. A. sold his branch business at one of the three places to pltf., who retained debt. in his service:—*Held*: pltf. as assignee & successor of part of the business, was entitled to the benefit of debt.'s contract. —*BENWELL v. INNS* (1857), 24 Beav. 307; 26 L. J. Ch. 663; 30 L. T. O. S. 70; 21 J. P. 708; 53 E. R. 376.

*Annotations*:—*As to* (1) *Refd.* Harris v. Parsons (1862), 32 Beav. 328. *As to* (3) *Consd.* Baines v. Geary (1887), 35 Ch. D. 154. *Refd.* Batho v. Tunks, [1892] W. N. 101.

**396. — Purchaser of goodwill of business—Covenant of original vendor not to compete.]**—*ELVES v. CROFTS*, No. 614, *post*.

**397. —**—*Defts.* assigned to pltf. a business they carried on in partnership on certain premises. In the deed of assignment they covenanted not to carry on the business within a certain area, nor to do any act, matter, or thing, whereby or by reason whereof pltf., his exors., administrators, or assigns, or any other person or persons, claiming or to claim under him or them, should or might be injured or damaged in the trade or business. Subsequently pltf. assigned to A. & B. "the business in its entirety & the goodwill thereof as carried on by pltf. upon the aforesaid premises." & engaged that he would not, after the transfer of the said business, carry on a similar business within a certain area. There was not, however, any express assignment of the benefit of debt.'s covenant to A. & B., but the memorandum containing the terms of the assignment stipulated that all proper dues & documents should be prepared & signed by the necessary parties. After the assignment to A. & B. debt. committed a breach of their covenant with pltf. by carrying on business within the specified area:—*Held*: pltf. was entitled to recover substantial, & not merely nominal damages, as a trustee for A. & B., his assignees. —*WRIGHT v. CHAPPELL* (1869), 20 L. T. 369; 17 W. R. 655.

**398. —**—*An agreement by a person employed by another not to carry on a similar business at any time thereafter within a certain area is, in the absence of express stipulation to the contrary, construed to continue during the whole of the contractor's lifetime, notwithstanding the employer has (a) removed his business to another place; or (b) assigned it to a third person; or (c) retired from the business without assigning it. The benefit of such an agreement, since it adds value to the goodwill of the business, passes on an assignment either of the "goodwill" or of the "beneficial interest" in the business; & the agreement may be enforced by the assign, although assigns are not expressly mentioned in the agreement.*

On being employed as a shopman to C., an Italian warehouseman, W. entered into a written agreement with C., in which the assigns were not



mentioned, not to carry on a similar business within a mile of C.'s shop. C. afterwards removed his business to other premises 450 yards away, taking W. with him as shopman. W. afterwards left his employment & C. sold the beneficial interest & goodwill in his business to J. W. having set up a similar business at premises not a mile distant from either of C.'s premises:—*Held*: in an action by J. against W. the benefit of W.'s covenant with C. passed by the assignment to J., & J. was entitled to an injunction restraining W. from carrying on business within the one mile limit.

No evidence as to the intention of the parties can be admitted (BRETT, M.R.).—*JACOBY v. WHITMORE* (1883), 49 L. T. 335; 48 J. P. 325; 32 W. R. 18, C. A.

*Annotations*:—*Conad. Davies v. Davies* (1887), 36 Ch. D. 359. *Apld. Smith v. Hawthorn* (1897), 76 L. T. 716; *Townsend v. Jarman*, [1900] 2 Ch. 698. *Reid, Showell v. Winkup* (1889), 60 L. T. 389; *Batho v. Tunks*, [1892] W. N. 101; *Leatham v. Johnstone-White*, [1907] 1 Ch. 322; *Woodbridge v. Bellamy* (1911), 80 L. J. Ch. 265.

399. — — —.]—Pltfs. in Mar. 1886, employed deft. as a brewer's traveller, under an agreement restraining deft. from becoming employed in the sale of beer, spirits, tobacco, or cigars within a limited area for two years after leaving pltf.'s service, without pltf.'s written consent. Pltfs. in Mar. 1887, assigned their business of brewers, with the goodwill, to a co., agreeing verbally with the co. that they should employ pltfs.' travellers. Deft. entered the co.'s service, & left them in Sept. 1887, & became employed in a similar business. Pltfs. brought an action against deft. for injunction: *Held*: (1) the benefit of the restrictive agreement passed to the co. with the goodwill, & pltfs. were merely trustees thereof for the co.; (2) pltfs.' consent to deft.'s entering the service of the co., independently of its not having been in writing, was not a release of the restrictive agreement for the future. *SHOWELL v. WINKUP* (1889), 60 L. T. 389.

400. — — —.]—*BATHO v. TUNKS*, [1892] W. N. 101.

401. — — —.]—*Purchaser from administratrix.*—*MARTIN v. BRUNSDEN* (1894), 98 L. T. Jo. 237, D. C.

402. — — —.]—*TOWNSEND v. JARMAN*, No. 325, *ante*.

403. — — —.]—*Purchaser from receiver.*—Deft. & his partner, who were publishers & proprietors of a magazine, sold their business to a limited co., & agreed to become managing directors of the co. for three years. The agreement further provided that the vendors would not during the three years, if they continued to be managing directors either solely or jointly, carry on or engage directly or indirectly in any other trade or business, or if they, or either of them, for any reason ceased to be managing directors or director, they or he would not, during the period of ten years from the date of their or his so ceasing, carry on or assist or take part, directly or indirectly, in the same or a similar business in the City of London or within 20 miles thereof. A receiver, who was appointed on behalf of the debenture holders in the co., sold the business to pltf., & informed deft. that his services as managing director would no longer be required:—*Held*: the covenant was not too wide; the covenant was not put an end to by the receiver informing deft. that his services would no longer be required; & the covenant passed to the assignee upon the assignment of the goodwill of the business. — *WELSTEAD v. HADLEY* (1904), 21 T. L. R. 165, C. A.

404. — — —.]—A partnership agreement was

entered into by A., B., & C. on Dec. 1, 1905. By an agreement made between A., B., & C. of the one part & S. of the other part, made on Dec. 2, 1905, S. agreed to serve as general manager for ten years from Jan. 1, 1906, if the partnership should so long exist, & if that engagement should during such term be terminated in consequence of any breach on the part of S. of any of the terms of engagement towards the firm, S. bound himself not at any time within ten years thereafter & within a radius of 20 miles from Nelson's Column to carry on or be engaged in any business similar to or including the business for which the firm was about to be constituted. S. was dismissed on Oct. 3, 1907, for breach of the terms of engagement. The goodwill of the business was assigned to pltf. co. on Nov. 12, 1907. Pltf. co. asked for an injunction restraining S. from carrying on business within 20 miles of Nelson's Column. S. alleged that he was not carrying on a similar business as he did not manufacture, but merely bought from manufacturers. He also said the covenant was a personal one & could not be assigned. On S.'s note-paper he described himself as "Automobile carriage builder. High class work at moderate price," & he also advertised:—*Held*: (1) S. was carrying on a business similar to & directly competing with plaintiff co.; (2) the object of the agreement was to protect the goodwill of the business, & the benefit passed to the assignee of the goodwill.—*AUTOMOBILE CARRIAGE BUILDERS, LTD. v. SAYERS* (1909), 101 L. T. 419.

405. — — —.]—In 1906 deft. entered into an agreement in writing with a partnership firm consisting of two members who were carrying on the business of importing & selling wood & slate, that he should be employed by them as clerk, traveller, & representative for the sale of their commodities. By clause 8 of the agreement it was provided that deft. should not at any time during the period of five years after he should cease to be in the service of the firm be "engaged or concerned, either alone or with or on behalf of any other person or persons, in any business whatsoever connected with the wood & slate business" in the four specified adjoining counties without the consent in writing of the firm. After the death of both of the partners deft. entered the employment of another firm of timber merchants, who eventually established a branch of their business at a town which was in one of the counties referred to in the agreement, & they appointed deft. as manager of it. Pltfs., the exors. of the last surviving partner, complained that deft. had been soliciting orders from their customers in breach of the agreement, & they brought an action against him claiming an injunction to restrain further breaches & damages:—*Held*: the restrictive agreement was one the benefit of which was capable of being assigned & was assigned with the goodwill of the business, but the restriction imposed by the agreement went further than was necessary for the reasonable protection of the employers, & would not be enforced by the ets., the words "connected with" being an exceedingly vague & general expression, & what it meant to include was something which was not the wood business itself.—*WHITMORE v. KING* (1918), 87 L. J. Ch. 617; 119 L. T. 533, C. A.

406. — — —.]—*Continuing partner.*—(1) On a dissolution of partnership the retiring partner, who received a large sum of money, covenanted "to retire from the partnership; & so far as the law allows, from the business, & not to trade, act, or deal in any way so as directly or indirectly to affect the continuing partners." The business

**SECT. 3.—Parties to agreement : Sub-sect. 3, B. Sects. 4 & 5 : Sub-sects. 1 & 2, A., B. & C.]**

[of galvanised iron manufacturers] had been carried on at Wolverhampton & in London. In an action by the survivor of the continuing partners & his assignees to restrain the retiring partner from carrying on a similar business in Middlesex :—*Held* : the covenant to retire from the business so far as the law allows was too vague for the ct. to enforce.

(2) If there is valuable consideration then the ct. will not consider, but will leave the parties to consider whether that consideration is or is not sufficient (COTTON, L.J.).

(3) A limit in time is not indispensable in order to enable the covenant to be enforced where there is some other limit to be found which makes the contract reasonable & necessary for the protection of the party who seeks to protect himself (BOWEN, L.J.).

(4) The law of England allows a man to contract for his labour or allows him to place himself in the service of a master, but it does not allow him to attach to his contract of service any servile incidents, any elements of servitude as distinguished from service (BOWEN, L.J.).

(5) If a covenant is in any way limited, either sufficiently as regards space, or sufficiently as regards time, then it will not be considered as an absolute restraint of trade, but only a limited restraint (COTTON, L.J.).

(6) It is not necessary in the present case to consider or to decide whether what I have called the old doctrine of the common law, that covenants absolutely unlimited both in space & in time ought to be modified, having regard to the altered character of the commercial intercourse of the world (BOWEN, L.J.).—*DAVIES v. DAVIES* (1887), 36 Ch. D. 359 ; 56 L. J. (Ch. 962 ; 58 L. T. 209 ; 36 W. L. R. 86 ; 3 T. L. R. 839, C. A.

*Annotations* :—*As to* (1) *Refd.* Tinsley v. Tinsley (1888), 4 T. L. R. 376 ; Welstead v. Hadley (1904), 21 T. L. R. 165 ; Reeve v. Marsh (1906), 23 T. L. R. 24. *As to* (3) *Refd.* Mills v. Dunham, [1891] 1 Ch. 576. *As to* (4) *Apld.* Horwood v. Miller's Timber & Trading Co., [1917] 1 K. B. 305. *As to* (5) *Refd.* Davies, Turner v. Lowen (1891), 64 L. T. 555 ; Badische Anilin und Soda Fabrik v. Schott, Segner, [1892] 3 Ch. 447 ; North-Western Salt Co. v. Electrolytic Alkali Co. (1912), 107 L. T. 439. *As to* (6) *Consd.* Maxim Nordenfekt Guns & Ammunition Co. v. Nordenfekt, [1893] 1 Ch. 630. *Generally, Meutd.* Rivington v. Garden, [1901] 1 Ch. 561.

407. ————]—SMITH v. HAWTHORN, No. 719, *post*.

408. ————]—New trustees.]—CHARD v. HAMMOND (1904), 48 Sol. Jo. 773.

**Restrictions on use of premises.]—See LANDLORD & TENANT, Vol. XXXI., pp. 153–156, Nos. 2877–2898.**

**Tied house covenants.]—See LANDLORD & TENANT, Vol. XXXI., pp. 109–112, Nos. 2448–2462.**

**SECT. 4.—FORMALITIES OF CONTRACT.**

*See, generally, CONTRACT, Vol. XII., pp. 51 et seq.*

409. Whether express covenant necessary.]—SHACKLE v. BAKER, No. 550, *post*.

410. ————]—CRUTWELL v. LYE, No. 880, *post*.

411. ————]—Admissibility of parol evidence of understanding.]—HARRISON v. GARDNER, No. 869, *post*.

412. Sufficiency of memorandum—Name of employer not appearing.]—NORMAN v. WILLETTTS (1897), 13 T. L. R. 264.

*Annotation* :—*Meutd.* General Billposting Co. v. Atkinson, [1908] 1 Ch. 537.

**SECT. 5.—CONSTRUCTION OF AGREEMENTS.**

**SUB-SECT. 1.—IN GENERAL.**

*See, generally, DEEDS, Vol. XVII., pp. 242 et seq.*

413. Construed in same manner as other agreements.]—MALLAN v. MAY, No. 458, *post*.

414. ————]—MILLS v. DUNHAM, No. 641, *post*.

415. Whole agreement must be taken together.]—GALE v. REED, No. 801, *post*.

416. ————]—KIMBERLEY v. JENNINGS, No. 136, *ante*.

417. ————]—R., a brewer, engaged M. as a traveller for procuring orders for & selling malt liquors, & also, if required by R., aerated waters, to the class known as wholesale purchasing agents in a certain district. M. agreed that for two years after the determination of his employment he would not be concerned in selling malt liquors or aerated waters within a certain district [100 miles]. R. never dealt in aerated waters, nor required M. to obtain orders for them. M., after leaving R.'s employment, became traveller to rival brewers within the prescribed district. R. brought an action, & applied for an injunction. M. insisted that the restriction was too wide, & therefore void. The judge construed the restriction as only prohibiting M. from selling wholesale, & held that the stipulation as to aerated waters was severable, & granted an injunction limited to selling malt liquors wholesale :—*Held* : (1) the agreement must be construed as prohibiting M. from selling wholesale or retail within the limit, & the restraint was not greater than was necessary for the reasonable protection of R., for that selling wholesale & retail were not two distinct businesses, but only different modes of carrying on the one business of selling malt liquors, the selling malt liquors either wholesale or retail within the district might affect R.'s business, & R. was entitled to restrain M. from selling malt liquors in any way within the district ; (2) the stipulation as to aerated waters was severable.

(3) In cases of this kind, where a document contains a covenant in restraint of trade, as in all other questions of a similar kind, the first thing is to look at the agreement, not only at part of it, but at the whole of it. The business of the employer must be regarded & the duties of the employed ; more especially the object of the covenant must be considered (LOPES, L.J.).—ROGERS v. MADDOCKS, [1892] 3 Ch. 346 ; 62 L. J. (Ch. 219 ; 67 L. T. 329 ; 36 Sol. Jo. 695 ; 2 R. 53, C. A.

*Annotations* :—*As to* (2) *Apld.* Attwood v. Lamont, [1920] 2 K. B. 146. *Refd.* Underwood v. Barker, [1899] 1 Ch. 309.

418. ————]—MASON v. PROVIDENT CLOTHING & SUPPLY CO., LTD., No. 143, *ante*.

**Severability.]—See Sect. 6, *post*.**

419. No presumption against validity.]—MILLS v. DUNHAM, No. 641, *post*.

420. What should be taken into consideration—Intent of parties.]—GALE v. REED, No. 801, *post*.

421. ————]—MILLS v. DUNHAM, No. 641, *post*.

422. ————]—Prior to agreement.]—LOVELL & CHRISTMAS, LTD. v. WALL, No. 798, *post*.

423. ————]—Business of employer.]—ROGERS v. MADDOCKS, No. 417, *ante*.

424. ————]—UNDERWOOD (E.) & SON, LTD. v. BARKER, No. 777, *post*.

425. ————]—Duties of employee.]—ROGERS v. MADDOCKS, No. 417, *ante*.

426. Object of restraint.]—ROGERS v. MADDOCKS, No. 417, *ante*.

427. ————]—Business meaning of words.]—In construing a covenant in restraint of trade the

circumstances & the business meaning of the words used must be regarded, & where the covenantor, the manager of the business sold, covenanted not to "be concerned or interested" in a similar business, held, a breach of such covenant to become the manager of a rival business in the same street. — *CAVENDISH v. TARRY* (1908), 52 Sol. Jo. 726.

**428. Contract with wholesale dealer not to retail at less than specified price—Wholesale dealer commencing sale direct to public—Right of retail dealer to notice of charge.**—Defts., manufacturers, sold goods to plffs., who were retailers, upon condition that plffs. should not resell the goods to the public at less than a specified price. After business had been carried on between plffs. & defts. upon this condition for three years defts., without giving plffs. notice of their intention to change their method of business, began to sell goods direct to the public without the intervention of middlemen, at a price very much lower than that which plffs. were obliged to charge under their contract with defts. As a result of this action by defts. plffs. were left with goods which they had bought from defts. & had in stock, & could not dispose of the goods except at a loss. They now claimed damages on the ground that a term must be implied in the contract of defts. that they would not themselves sell the goods to the public below that which plffs. were bound by the contract to charge, or at least that before beginning to sell goods to the public they would give plffs. sufficient notice to enable them to dispose of their stock of goods at a profit: *Held*: no such term as plffs. required could be implied in the contract. — *LIVOCK v. PEARSON BROTHERS* (1928), 33 Com. Cas. 188.

**429. — Whether entitled so to do.** — *LIVOCK v. PEARSON BROTHERS*, No. 428, *ante*.

#### SUB-SECT. 2.—LIMITATION OF GENERAL TERMS.

##### A. In General.

**430. Whether contract will insert words.**—*CONTINENTAL TYRE & RUBBER (GREAT BRITAIN) CO., LTD. v. HEATH*, No. 488, *post*.

— *See, generally*, *DEEDS*, Vol. XVII., pp. 353–355, Nos. 1640–1664.

**Restriction of general words by recitals.** *See, generally*, *DEEDS*, Vol. XVII., pp. 367–369, Nos. 1782–1796.

##### B. As to Time.

**431. Covenant by employee No limit of time expressed Whether restricted to time of service.**—Deft., on being appointed agent for the sale of wine & spirits of plffs. gave to them a bond, with condition that deft. should diligently, honestly, & faithfully serve plffs., as such agent, & should not engage in, undertake, transact, or do any business in the same trade, within ten miles of the town of T., for himself, or any other person or firm, & should use his best endeavours to promote the interest & increase the business & connection of plffs.; & should faithfully & punctually collect, account for & pay over all debts of plffs.: — *Held*: the restriction, as to deft. doing business for other persons in the same trade within the particular district, was limited to the time he remained in plffs.' service. — *KING v. HANSELL* (1860), 5 H. & N. 106; 1 L. T. 376; 157 E. R. 1119.

**432. — — — — —**—Plff. in this action carried on the business of a pathological laboratory. He had commenced the business in 1901. It consisted of making chemical, microscopical, &

bacteriological examinations of samples of material sent to him & making reports thereon. It was in 1901 a new method of medical research; there were only two or three similar institutions in London, & plff.'s clients were almost wholly consultant physicians residing in the Harley Street district. In 1905 plff. engaged deft. as assistant microscopist in his laboratory upon terms which made the engagement terminable on a month's notice, & included an agreement that deft. would not engage in any similar work within ten miles of plff.'s laboratory; no limit of time was expressed. The period of notice was afterwards lengthened. Plff. gave deft. six months' notice on July 15, 1912, but by consent the engagement was determined on Oct. 25. Dft. shortly afterwards opened a pathological laboratory at 25, Beaumont Street, within half a mile of plff.'s laboratory. Plff. brought this action to restrain him. The judge held on the construction of the agreement that the restriction was confined to the time during which the engagement continued & dismissed the action: — *Held*: (1) on the construction the restriction lasted during the whole of deft.'s life; (2) the restriction was wider than was reasonably necessary for plff.'s protection & was therefore void. — *EASTES v. RUSSELL*, [1914] 1 Ch. 168; 83 L. J. Ch. 329; 110 L. T. 296; 30 T. L. R. 237; 58 Sol. Jo. 234, C. A.

*Annotations: As to* (1) *N.F. Dewar v. Fitch*, [1920] 2 Ch. 159. *As to* (2) *Apld. Millers v. Stoddman* (1915), 84 L. J. K. R. 2057. *Distd.* *Dewar v. Fitch*, [1920] 2 Ch. 159. *Reid. Goldsoll v. Goldman*, [1915] 1 Ch. 292. *Horwood v. Miller's Timber & Trading Co.*, [1917] 1 K. R. 303; *Attwood v. Lamont*, [1920] 3 K. R. 571. *Generally, Reid. Morris, Herbert v. Saxelby*, [1915] 2 Ch. 57; *Sevill v. Dominion of Canada News Co.* (1915), 113 L. T. 979.

**433. — Not to interfere with customers—Whether restricted to customers during time of employment.** — *BAINTS v. GEARY*, No. 391, *ante*.

**434. — — — — —** — *KONSKI v. PEET*, No. 497, *post*.

**435. — — — — —** — A service agreement which shows that it is intended to apply to the soliciting of future customers who deal in the goods dealt in by the society entering into the agreement at the time when the employee of the society ceases to be in their service is too wide. — *EAST ESSEX FARMERS, LTD. v. HOLDER* (1926), 70 Sol. Jo. 1001.

**436. — Not to act for clients of employer—Refers to time of termination of service.** — *LEWIS & LEWIS v. DURNFORD*, No. 726, *post*.

**437. Covenant by articulated clerk—Not to take away or do business with clients—Habitual clients.** — *HAYNE v. BURCHELL* (1890), 7 T. L. R. 116; 35 Sol. Jo. 88, C. A.

##### C. As to Space.

**438. Whether restricted to particular locality.** — By an agreement for the employment of deft. by plffs. in their business of dairymen, deft. agreed that he would not, during the continuance of his service, or at any time thereafter, serve or solicit, or in any way interfere with any of the customers who should at any time be served by or then belong to plffs. in the said business: — *Held*: (1) deft.'s agreement must be construed as referring only to the business of dairymen as then carried on by defts. in a particular locality, & not to any other such business started by them elsewhere; (2) (*LORD ESHER, M.R., & LOPES, L.J.*) the agreement was severable & was good with regard to customers of plffs. who were such while deft. was in their service.

(3) (*RIGBY, L.J., & scilicet, ESHER, M.R.*) The agreement was good both with regard to the above-mentioned customers & with regard to

*Seet. 5.—Construction of agreements: Sub-sect. 2, C. & D.; sub-sects. 3, 4 & 5.]*

customers who became such after the termination of deft.'s service with plffs.

(4) The only test of the validity of an agreement in restraint of trade now is whether or not such an agreement is reasonably necessary for the protection of the person with whom it is made (RIGBY, L.J.).—*DUBOWSKI & SONS v. GOLDSTEIN*, [1896] 1 Q. B. 478; 65 L. J. Q. B. 397; 74 L. T. 180; 44 W. R. 436; 12 T. L. R. 250; 40 Sol. Jo. 331, C. A.

*Annotations:—As to (1) Apld.* Underwood v. Barker, [1899] 1 Ch. 300. *Distd.* Kensington & Knightsbridge Electric Lighting Co. v. Notting Hill Electric Lighting Co. (1918), 87 L. J. K. B. 1076. *Refd.* North Western Salt Co. v. Electrolytic Alkali Co. (1912), 107 L. T. 439. *As to (2) Consd.* Attwood v. Lamont, [1920] 2 K. B. 146. *Refd.* Chard v. Hammond (1901), 48 Sol. Jo. 773; Horwood v. Millar's Timber & Trading Co., [1916] 2 K. B. 44. *As to (3) N.F.* East Essex Farmers v. Holder (1926), 70 Sol. Jo. 1001. *As to (4) Apld.* Underwood v. Barker, [1899] 1 Ch. 300. *Generally, Refd.* Hood & Moore's Stores v. Jones (1899), 81 L. T. 169.

**439.** —[—]—*BARR v. CRAVEN* (1903), 89 L. T. 574; 20 T. L. R. 51, C. A.

**440. Whether restricted to particular place of business—Change of place of business.**—Deft. was engaged as a servant by B., a dairyman, of Evelyn's Dairy, 160, Edward street, New Cross, & deft. agreed with B., his assigns & successors, that after quitting the service he would not "interfere with the trade & the customers served by & from the dairy aforesaid." Plffs. purchased B.'s business, it being part of the agreement that B. should introduce plffs. to his customers. The premises at 160, Edward street being found unsuitable, plffs. moved the business to 95, High street, Deptford, which was about the same distance from B.'s customers' houses as was 160, Edward street. After being in plffs.' service for some time, deft. left them & thereafter served customers of plffs. who had been introduced by B. Plffs. claimed to restrain deft. from committing a breach of his covenant by interfering with plffs.' trade or the customers served by & from plffs.' dairy at 95, High street, Deptford:—*Held*: the action failed as the covenant by deft. only related to customers served by & from the premises at 160, Edward street, & none of those who had been served by deft. after leaving plffs.' service could be so described.—*MARSHALL & MURRAY, LTD. v. JONES* (1913), 29 T. L. R. 351.

*D. As to Nature of Business.*

**441. Whether restricted to particular trade.**—*EVERY v. LANGEFORD*, No. 789, *post*.

**442.** —[—]—Agreement by B., on entering for a term of three years the service of A., a tailor, not to enter the service or employ of any other person or enter into any engagement or be concerned or interested in carrying on either on his own account or otherwise, "any business whatsoever within the distance of one mile from — during the continuance of the said term or afterwards during the further period of two years," without A.'s consent in writing. On motion by A. to restrain B. from setting up as a tailor within the prescribed limit in breach of the agreement:—*Held*: the agreement was void, & effect could not be given it by rejecting the general restraint, & limiting the

agreement for the purposes of the action to carrying on the business of a tailor thereby sought to be restrained.—*BAKER v. HEDGECOCK* (1888), 39 Ch. D. 520; 57 L. J. Ch. 889; 59 L. T. 361; 36 W. R. 840; 4 T. L. R. 569.

*Annotations:—Foll'd.* Continental Tyre & Rubber (Great Britain) Co. v. Heath (1913), 29 T. L. R. 308. *Refd.* Mills v. Dunham, [1891] 1 Ch. 576; Morris v. Iyle (1910), 103 L. T. 545.

**443.** —[—]—*MILLS v. DUNHAM*, No. 611, *post*.

**444.** —[—]—*MOENICH v. FENESTRE*, No. 646, *post*.

**445.** —[—]—*EHIRMAN v. BARTHOLOMEW*, No. 207, *ante*.

**446.** —[—]—*HOOD & MOORE'S STORES, LTD. v. JONES*, No. 776, *post*.

**447.** —[—]—*Ambiguous covenant.* — *NEVANAS (S. V.) & CO. v. WALKER & FOREMAN*, No. 506, *post*.

**SUB-SECT. 3.—ADMISSIBILITY OF EXTRINSIC EVIDENCE.**

*See, generally, DEEDS*, Vol. XVII., pp. 302–358.

**448. Whether admissible—To identify subject-matter of contract—Nature of employment.**—A mercantile house in London, dealing in lace, employed travellers to obtain orders, & sell for them in England, each in a particular district or journey. A vacancy having occurred in the travellership of the M. journey, plffs. acquainted deft. with the fact, he being then in their employ in another occupation, & it was verbally agreed with him that he should fill the place, the understanding being, that a contract in writing should be afterwards drawn up & signed. Deft. started on the M. journey, & sometime afterwards the following form of contract was sent down to him & he signed it:—"In consideration of my entering upon your employ, at a salary of, etc., I herewith agree to do so with the understanding, that in the event of my wishing to travel, & doing so, for any other house in the same trade, on any part of the same ground, to pay you the sum of £50." Deft., after having travelled for plffs. on the M. journey for about a year, quitted their service, & commenced travelling, for a rival house of business, over the M. journey. In an action by plffs. for the penalty:—*Held*: (1) plffs. were entitled to recover, for a good consideration for deft.'s undertaking appeared on the face of the writing; the circumstances under which deft. became traveller to plffs. showed a good consideration in fact; the contract meant to engage the entire services of deft. so long as he was in plffs.' employ, & it would have been a breach of it to travel for any one else in the absence of the prohibitory part; & therefore, the contract intended the penalty to attach in case deft. travelled, over the same ground, for any other house in the same trade after he left plffs.' employ; (2) the extrinsic evidence was properly admitted to identify the particular service in which deft. was to be employed, viz. that of traveller, & the ground over which he was to travel, viz. the M. journey; the subject-matter of the contract being thus ascertained, the contract was not unlimited in point of space, & so void as in restraint of trade.—*MUMFORD v. GETTING* (1859), 7 C. B.

**PART V. SECT. 5, SUB-SECT. 2.—D.**

**441 i. Whether restricted to particular trade.**—Deft. obtained a license to sell salt in the salt factory at Krishnapatnam, & he executed an agreement by which he was to manufacture salt in the said factory as long as the excise

system should be in force, & deliver same to plffs. for sale, & plffs. were to give him a fixed price for it:—*Held*: the agreement, so far as it restrained the sale of salt to others than plffs., was bad.—*RAGAVAYYA v. SUBHAYYA* (1889), 1 L. R. 13 Mad. 475.—*IND.*  
g. Contract to pay higher price.]—

A contract under which goods were purchased at a certain rate for the Cutch market, containing a stipulation that, if the goods went to Madras, a higher rate should be paid for them, but not one in restraint of trade.—*THIRAK SOOK v. DHURUM CHAND* (1890) 1 L. R. 17 Cal. 320.—*IND.*

N. S. 305; 29 L. J. C. P. 105; 1 L. T. 64; 6 Jur. N. S. 428; 8 W. R. 187; 141 E. R. 831.

*Annotations:—As to (1) Consd. Estates v. Russ*, [1914] 1 Ch. 408. *Reid. Mills v. Dunham*, [1891] 1 Ch. 576; *Rogers v. Maddocks* (1892), 62 L. J. Ch. 219; *Maxim Nordenfellt Guns & Ammunition Co. v. Nordenfellt*, [1893] 1 Ch. 630; *Haynes v. Doman*, [1899] 2 Ch. 13; *Phillips v. Stevens* (1899), 15 T. L. R. 325; *Attwood v. Lamont*, [1920] 3 K. B. 571. *As to (2) Reid. Krell v. Henry*, [1903] 2 K. B. 710. *Generally, Reid. Mason v. Provident Clothing & Supply Co.* (1913), 82 L. J. K. B. 1153.

**449. — To show intention of parties.]—**JACOBY v. WHITMORE, No. 398, *ante*.

**450. — —.]** (1) Deft. entered into an agreement with plff. as his employer, that he would not accept another situation, or establish himself in any business, within 15 miles of London, without the written consent of plff. for a period of three years after leaving plff.'s service; but such permission was not to be withheld if it could be proved to the satisfaction of plff. that the situation sought, or the business established, was not for the sale of the same class of goods as those sold by plff. :—*Held*: on a motion for an injunction to restrain deft. from breaking the agreement, the clause providing that plff.'s permission was not to be withheld unless the business in which deft. engaged was in the same class of goods as plffs. showed that the restrictive clause was intended to apply to all kinds of business whatsoever, & was therefore wider than was necessary for the protection of plff. & void.

(2) We cannot receive such evidence [evidence to show how the clause was understood by the parties] (LINDLEY, L.J.).

We are not entitled to make surmises; we have to construe documents according to the language deliberately used (BOWEN, L.J.). *PERIN v. SAALFELD*, [1892] 2 Ch. 149; 61 L. J. Ch. 409; 66 L. T. 666; 40 W. R. 518, C. A.

*Annotations:—As to (1) Consd. Morris v. Ityle* (1910), 103 L. T. 515. *Reid. Haynes v. Doman*, [1899] 2 Ch. 13; *Underwood v. Barker*, [1899] 1 Ch. 300; *Hoope & Ashby v. Willis* (1906), 91 L. T. 624; *Cattermoul v. Jared* (1909), 33 Sol. Jo. 241; *Long v. Andrews*, [1909] 1 Ch. 763; *Russell v. Amalgamated Soc. of Carpenters & Joiners* (1910), 102 L. T. 119; *Millers v. Steedman* (1915), 81 L. J. K. B. 2057.

**451. — —.]** To show effect of restraint.]—*MOUCHEL v. CURTIS & Co.*, No. 703, *post*.

**452. — —.]** To show past application of rules of trade union.]—*RUSSELL v. AMALGAMATED SOCIETY OF CARPENTERS & JOINERS*, No. 251, *ante*.

#### SUB-SECT. 4. — MEASUREMENT OF DISTANCES.

**453. Nearest means of access.]**—A. in London engages not to open a shop for business within 1 mile of B.'s shop, he estimating the distance: the shortest way of access by the footpath is to be taken. *WOODS v. DENNETT* (1817), 2 Stark. 89; 171 E. R. 582, N. P.

*Annotations:—Consd. Leigh v. Hind* (1829), 9 B. & C. 774. *Reid. Moullet v. Cole* (1872), L. R. 8 Exch. 32.

**454. — —.]** (1) The assignor of a lease of a public-house in London, covenanted that he would not keep a public-house within the distance of half a mile from the premises assigned: *Held*: the half mile, as mentioned in the covenant, imported half a mile measured by the nearest way of access between the premises assigned & any public-house afterwards kept by the assignor.

(2) The proper mode of measuring the distance would be to take a straight line from house to house, in common parlance, as the crow flies

(*PARKE, J.*).—*LEIGH v. HIND* (1829), 9 B. & C. 774; 4 Man. & Ry. K. B. 579; 7 L. J. O. S. K. B. 313; 109 E. R. 288.

*Annotations:—As to (1) Fould. Atkins v. Kinnier* (1850), 4 Exch. 776. *As to (2) Apd. R. v. Saffron Walden* (1846), 9 Q. B. 76; *Stokes v. Grissell* (1854), 14 C. B. 678; *Lake v. Butler* (1855), 5 E. & B. 92. *Fould. Moullet v. Cole* (1872), L. R. 8 Exch. 32.

**455. A straight line or as the crow flies.]** *LEIGH v. HIND*, No. 451, *ante*.

**456. — —.]**—Under a contract not to carry on business within a given distance, the distance is to be measured in a straight line upon a horizontal plane, & not by the nearest practicable mode of access.—*DUGNAN v. WALKER* (1859), John. 416; 28 L. J. Ch. 867; 33 L. T. O. S. 256; 5 Jur. N. S. 976; 7 W. R. 562; 70 E. R. 496.

*Annotation:—Apd. Moullet v. Cole* (1872), L. R. 8 Exch. 32.

**457. — —.]**—Deft. covenanted with plff. not to carry on the business of a publican within half a mile of plff.'s premises. He afterwards carried on business within half a mile if the distance were measured in a straight line, "as the crow flies," but not within half a mile if the distance were measured by the nearest mode of practicable access: *Held*: there had been a breach of the covenant.—*MOUFLET v. COLE* (1872), L. R. 8 Exch. 32; 42 L. J. Ex. 8; 27 L. T. 678; 21 W. R. 175, Exch.

#### SUB-SECT. 5. — PARTICULAR WORDS AND PHRASES.

**458. "London."—Whether confined to City of London.]**—In construing instruments the words are to be construed according to their strict & primary acceptance, unless from the context of the instrument, & the intention of the parties to be collected from it, they appear to be used in a different sense, or unless in their strict sense they are incapable of being carried into effect; subject, however, to this, that the meaning of a particular word may be shown by parol evidence, to be different in some particular place, trade or business, from its proper and ordinary signification.

By articles of agreement between A., described as "of Great Russell street, Bloomsbury Square, in the county of Middlesex," of the one part, & B., etc., of the second part, the former agreed to instruct the latter in the business of a surgeon dentist for a term of four years, & it was stipulated that B. should not, without the consent of A., carry on the business of a dentist surgeon "in London, or any of the towns or places in England or Scotland," where A. may have been practising before the expiration of the term: *Held*: in its strict & proper meaning, the word London meant the City of London, in which sense it ought to be understood as there was nothing in the context to prevent its being construed in its proper sense; & that a statement in the case, that "London" had a popular or colloquial sense, in which Great Russell Street would be understood to be within its limits, was not sufficient for the purpose of causing a different construction to be put upon that word in the instrument. *MALAN v. MAY* (1814), 13 M. & W. 511; 14 L. J. Ex. 48; 4 L. T. O. S. 174; 9 Jur. 19; 153 E. R. 213.

*Annotations:—Reid. Wallace v. A.-G.* (1861), 33 Beav. 381. *Mentd. Simpson v. Markison* (1847), 11 Q. B. 23; *Davies, Turner v. Lowen* (1891), 61 L. T. 635; *Brunner v. Moore*, [1901] 1 Ch. 305; *Cave v. Horsell*, [1912] 3 K. B. 533.

**459. — —.]** Whether confined to Metropolitan

**PART V. SECT. 5, SUB-SECT. 5.**  
h. "Carry on business of acrated water manufacturing or appertaining thereto." *SHARP v. CAIN*, [1924]

S. A. S. R. 203.—**AUS.**

k. "Concerned or interested"—Con duct interfering with business or profits of plaintiffs.]—*SOUTHLAND FROZEN*

MEAT & PRODUCE EXPORT CO., LTD. v. NELSON BROTHERS, LTD. (1896), 15 N. Z. L. R. 1; *affd.* [1898] A. C. 442; P. C.—**N.Z.**

*Sect. 5.—Construction of agreements: Sub-sect. 5. Sect. 6: Sub-sects. 1 & 2, A. & B.]*

**district.]** STUTCLIFFE & BINGHAM, LTD. v. HOLWILL (1912), 131 L. T. Jo. 156.

**460.** — “In county of Middlesex.”]—MASON v. PROVIDENT CLOTHING & SUPPLY CO., LTD., No. 143, *ante*.

**461.** “Any matter or thing whatsoever in anywise relating to specified trade—Lending money not included.]—A covenant not to be engaged in a specified trade, “or in any matter or thing whatsoever in anywise relating thereto” within a given district, does not prevent the covenantor from lending money to a person engaged in such trade within the said limits upon mtge. of his trade premises, although he may know that the mtgor. has no means of paying the debt except out of the profits of the business. *BIRD v. LAKE, BIRD v. TURNER* (1863), 1 Hcm. & M. 338; 71 E. R. 147. *Annotations:—Folld. Smith v. Hancock*, [1891] 2 Ch. 377; *Cory v. Harrison* (1901), 18 Sol. Jo. 340.

**462.** “Interested”—Means entitled to profits.]—HILL (GEO.) & CO. v. HILL, No. 537, *post*.

**463.** — Means proprietary or pecuniary interest.]—SMITH v. HANCOCK, No. 549, *post*.

**464.** — — — — — The manager of a jewellery business entered into a covenant with the proprietors of the business that he would not become interested in, either directly or indirectly, a similar trade or business to that carried on by the said proprietors. Subsequently he entered the employment of a firm in a similar business as an assistant at a fixed salary:—*Held*: there was no breach of the covenant, as he had no “proprietary or pecuniary” interest in his new employment. *GOPHUR DIAMOND CO. v. WOOD*, [1902] 1 Ch. 950; 71 L. J. Ch. 550; 86 L. T. 801; 50 W. R. 603; 18 T. L. R. 492.

*Annotation:—Refd. British Concrete Co. v. Schellf*, [1921] 2 Ch. 563.

**465.** “Concerned”—Means “having something to do with.”]—HILL (GEO.) & CO. v. HILL, No. 537, *ante*.

**466.** “Concerned or interested”—Whether includes creditor of competing business. Resp., a coal merchant carrying on both a home & an export business, sold the home business to applts. & covenanted with them that he would not “solely or jointly with any other person either directly or indirectly carry on or be concerned or interested in the coal trade in any part of Great Britain or the Isle of Man.” He afterwards sold the export business to a co. & took the purchase-money in shares. The co. afterwards sold the business to a firm, the purchase-money being payable to the co. by instalments lasting over several years. The firm having begun to carry on both a home & an export business, applts. brought an action against respnt. for breach of covenant:—*Held*: resp. was not “concerned or interested in” the home business in the business sense which must be attributed to those words, & there was no breach of covenant. *CORY (WILLIAM) & SON, LTD. v. HARRISON*, [1906] A. C. 274; 75 L. J. Ch. 714; 93 L. T. 818, H. L.

*Annotation:—Apld. Cavendish v. Tarry* (1908), 52 Sol. Jo. 726.

**467.** — Whether includes acting as manager of similar business.]—CAVENDISH v. TARRY, No. 427, *ante*.

**468.** Neighbourhood—Immediate neighbour-hood.]—STRIDE v. MARTIN, No. 695, *post*.

**469.** “Use” of works—Means manufacturing use.]—Resps. contracted with applts. not to “erect or assist, or be in any way concerned or interested in the erection of or use of freezing works

at Bluff,” & thereafter contracted with W. first to purchase all frozen meat produced at his works at Bluff, & secondly to purchase his works at the expiration of their contract with applts., together with additional works to be completed by that date:—*Held*: (1) neither of those contracts with W. was a breach of the contract with applts., by the true construction whereof use means the manufacturing use, & does not include the uses contemplated by resps. in either of their purchases. (2) nor is it a breach to lend money to that third person where such loan is independent of the contract with him. — *SOUTHLAND FROZEN MEAT & PRODUCE EXPORT CO. v. NELSON BROTHERS* [1898] A. C. 442; 67 L. J. P. C. 82; 78 L. T. 363 P. C.

**470.** “Interfere with, prejudice or in any manner affect”—Whether includes setting up rival business.]—Deft. was engaged as traveller to pltf., & he agreed that he would not “on the termination of this engagement or within two years thereafter without the consent in writing of” pltf., “either in his own name or in the name or names of any other person or persons, directly or indirectly, interfere with prejudice, or in any manner affect the trade or business or reputation of said” pltf., & would not solicit the latter’s customers:—*Held*: the agreement did not prevent deft. from setting up a rival business provided that he did not solicit pltf.’s customers. — *REEVE v. MARSH* (1906), 23 T. L. R. 24.

**471.** “House” for sale of exciseable liquors. Construed to mean public-house.]—Upon the sale by deft. to pltf. of deft.’s interest in a public-house & premises licensed for the sale of liquors, together with the goodwill, deft. agreed that she would not “exercise, carry on, or be in any manner, directly or indirectly, concerned in any house for the sale of exciseable liquors within an agreed distance during the occupancy of the premises by pltf.”:—*Held*: the words “house” should be construed according to the subject-matter of the agreement as public or licensed house, & not as any premises upon which the sale of liquors might be carried on & the agreement was not too wide. — *CATTERMOL v. JARED* (1909), 53 Sol. Jo. 244.

**472.** “Connected with.”]—WHITMORE v. KING No. 405, *ante*.

## SECT. 6. SEVERABILITY.

### SUB-SECT. 1.—IN GENERAL.

*See, generally, CONTRACT, Vol. XII., pp. 413-417, Nos. 3331-3353.*

**473.** How far contract enforceable—Where void part severable.]—WALLIS v. DAY, No. 618, *post*.

**474.** — — — — —]—NICHOLLS v. STRETTON, No. 725, *post*.

**475.** — — — — —]—By agreement made June 6, 1885, by D. & co. of London, foreign carriers, thereafter referred to as “employers,” of the one part & L., of the other part, the employers agreed to engage L. as their clerk on certain conditions, which L. agreed to observe & perform, & the agreement contained the following covenant: “L. agrees that he will not within twelve calendar months after the termination of this agreement, from whatever cause, carry on or be engaged in, or interested, directly or indirectly, in the cities of London, Birmingham, Liverpool, England, & New York, United States, or within fifty miles thereof of each of the above-named places, either as principal, clerk, agent, or otherwise, in any business similar to the business now or hereafter to be carried on by employers.” On Feb. 21

1891, deft. gave plffs. a month's notice to terminate the engagement, & on leaving plffs. he entered into the service of a rival firm in London, & as plffs. alleged solicited the custom of the customers of plffs. Plffs. had not any trade with Birmingham, but a considerable business with the other places mentioned in the agreement. This was a motion on the part of plffs. asking, in the terms of the covenant, omitting the words "or hereafter" near the end, that deft. might be restrained by injunction from committing a breach of the agreement: *Held*: the limit of time was reasonable, also that of space, with the exception of Birmingham, with which place plffs. appeared to have no connection; the words "principal, clerk, agent, or otherwise," in the agreement were not too wide; the words "now or hereafter" in the agreement were not reasonable; & the ct. could separate the different parts of the covenant, holding part good and part bad. *DAVIES, TURNER & CO. v. LOWEN* (1891), 61 L. T. 655; 7 T. L. R. 476.

*Annotations*:—*Consd.* Hooper & Ashby v. Willis (1905), 93 L. T. 236. *Apld.* Attwood v. Lamont, [1920] 2 K. B. 116.

476. —. *HAYNES v. DOMAN*, No. 158, *ante*.

477. —. —. Where an infant enters into a contract restricting himself as to his future business & the agreement contains some stipulations which are for the infant's benefit & are operative, & also some stipulations which are not for his benefit & are inoperative, if the inoperative parts can be severed, the agreement can be enforced as to its operative parts, as in the case of a contract made by an adult.

Deft., an infant, entered into an agreement with plff. to act as an assistant in plff.'s retail bakery business, & his duty was to take the bread out & sell it to customers & others on the round. He agreed that he would not within three years after leaving the service & within a distance of ten miles be engaged in the business of miller, baker, & in some other employments which the master did not then carry on. He would not have obtained the employment if he had not accepted this agreement. After several years' service he left the employment & set up a bakery business in the same place: *Held*: the agreement was operative as to the restriction relating to the retail bakery business but was inoperative with regard to the other restrictions, & as the operative part could be severed, plff. was entitled to an injunction to restrain deft. from being engaged in the bakery business.

The restriction must coincide with what is necessary for the protection of the master's business (CHANNELL, J.).—*BROMLEY v. SMITH*, [1909] 2 K. B. 235; 78 L. J. K. B. 715; 100 L. T. 731.

*Annotations*:—*Apld.* Attwood v. Lamont, [1920] 2 K. B. 116. *Reid*, Gadd v. Thompson, [1911] 1 K. B. 304.

478. —. —. **Must be clearly severable.**—*MASON v. PROVIDENT CLOTHING & SUPPLY CO., LTD.*, No. 143, *ante*.

479. —. —. *NEVANAS (S. V.) & CO. v. WALKER & FOREMAN*, No. 506, *post*.

480. —. —. **Severed parts must be independent.**—A promise may be enforceable notwithstanding that the promisor has in the same document made promises supported by the same consideration, which are void, provided that the severed parts are independent & that not

the kind but only the extent of the promisor's obligations will be changed by the partial enforcement. Agreements in restraint of trade form no exception to this rule.

Deft. was employed by the plff., a tailor carrying on businesses at three places A. B. & C. in Birmingham, as manager & cutter. Deft. in consideration of the employment promised that on the determination of his agreement he would not for five years (a) set up as a tailor himself, (b) enter into the employment of a named neighbouring trade rival, (c) be employed in any capacity with any tailor carrying on business in A. or B. or C.:—*Held*: the promise not to take service with any tailor in A. could be severed from the other promises & enforced, in that it did not affect the original effect & meaning of the agreement—namely to protect the plff. against the improper use by deft. of the knowledge which he had acquired in plff.'s service—but only limited the scope of its operation. *PUTSMAN v. TAYLOR*, [1927] 1 K. B. 741; 96 L. J. K. B. 726; 137 L. T. 201; 43 T. L. R. 392, C. A.

#### SUB-SECT. 2.—WHAT CONTRACTS ARE SEVERABLE.

##### A. In General.

481. **Contract containing independent covenants.**—

—*WALLIS v. DAY*, No. 618, *post*.

482. —. —. *ATTWOOD v. LAMONT*, No. 131, *ante*.

483. **Covenant covering possible unreasonable cases—Possibility not within contemplation of parties.**—*HAYNES v. DOMAN*, No. 158, *ante*.

484. —. **Excess of trivial nature.**—*MASON v. PROVIDENT CLOTHING & SUPPLY CO., LTD.*, No. 143, *ante*.

485. —. **Assignment of wages coupled with unreasonable restrictions.**—*HORWOOD v. MILLAR'S TIMBER & TRADING CO., LTD.*, No. 127, *ante*.

##### B. In respect of Area of Restraint.

486. **Contract not to trade within Cities of London & Westminster—Or within six hundred miles thereof.**—By deed, reciting that A. & B. carried on business as perfumers in partnership, & that it had been agreed between them that B., in consideration of £2,100, should assign to A. his moiety of the goodwill, stock in trade, etc., of the co-partnership, B., in consideration thereof covenanted that he would not, during his life, carry on the trade of a perfumer within the cities of London & Westminster, or within the distance of 600 miles from the same respectively; & for the observance of this covenant, he bound himself to A., his exors., etc., in the sum of £5,000, by way of liquidated damages, & not of penalty:—*Held*: this covenant was divisible, & was good so far as it related to the cities of London & Westminster, though void as to the 600 miles, a breach, that B. carried on the trade in the city of London, was good, & A. was entitled to recover in respect of such breach, the whole sum of £5,000.—*PRICE v. GREEN* (1847), 16 M. & W. 316; 16 L. J. Ex. 108; 153 E. R. 1222; *sub nom.* *GREEN v. PRICE*, 9 L. T. O. S. 296, Ex. Ch.

*Annotations*:—*Apld.* Nicholls v. Stretton (1847), 10 Q. B. 346; Bishop v. Kitchin (1868), 38 L. J. Q. B. 20. *Consd.*

#### PART V. SECT. 6, SUB-SECT. 2.—A.

481 i. **Contract containing independent covenants.**—*McLHERSON v. MOILER* (1920), 20 S. R. N. S. W. 535;

#### 37 N. S. W. N. 162.—AUS.

481 ii. —. —. *MACKENZIE v. STRICKMIAH* (1890), 1 L. R. 13 Mad. 472.—*IND.*

#### PART V. SECT. 6, SUB-SECT. 2.—B.

1. **Contract not to trade within town of Stratheona for five years.**—*LATIMER v. FONTAINE* (1903), 7 Terr. L. R. 110, 2 W. L. R. 110. *CAN.*



*Sect. 6. Severability: Sub-sect. 2, B., C. & D.]*

*Baines v. Gandy* (1887), 35 Ch. D. 154; *Baker v. Hodgecock* (1888), 39 Ch. D. 329. *Apld.* *Davies, Turner v. Lowen* (1891), 64 L. T. 656. *Reid Galsworthy v. Strutt* (1898), 1 Exch. 639; *Dundy v. Henderson* (1899), 21 L. J. Ex. 321; *Morley v. Irving* (1898), F. B. & F. 963; *Turner v. Close* (1899), L. R. 1 Q. B. 602; *Collins v. Locke* (1899), 4 App. Cas. 674; *McS. & L. Ry. v. Brown* (1899), 8 App. Cas. 763; *Mogul S. S. Co. v. McGregor*, *Gow* (1899), 23 Q. B. D. 595; *Brinton v. Dixon* (1892), 36 Sol. Jo. 356; *Maxim Nordenflicht Guns & Ammunition Co. v. Nordenflicht* (1893), 1 Ch. 630; *Seyanas v. Walker & Foreman* (1914), 1 Ch. 415. *Mentid. Wallis v. Smith* (1882), 21 Ch. D. 243; *Swaine v. Wilson* (1899), 21 Q. B. D. 252.

**487. Contract not to trade within United Kingdom Or in foreign countries.**—*UNDERWOOD (E.) & SON, LTD. v. BARKER*, No. 777, *post*.

**488.** — — — (1) Deft. was employed by plffs. as a traveller in their solid tyre department under an agreement which contained the following clause: "On the termination by any means of this agreement [deft.] shall not for a period of one year from the date of such termination either alone or jointly or in partnership, or in the service of any other person or persons, firm, or co. whatsoever directly or indirectly, either by himself or as agent, or otherwise carry on or manager or be concerned, employed, or interested in the sale, purchase, manufacture or other dealings in india-rubber goods, whether wholesale or retail, in any part of the United Kingdom, Germany, or France." Deft. within one year after leaving plffs.' employment entered the service of another co. which was engaged in the sale of india-rubber goods in the United Kingdom, whereupon plffs. claimed an injunction:—*Held*: the covenant, considering the duration of the restriction, was not too wide or unreasonable for the protection of plffs.' business, except that part of it which related to Germany & France, in which countries plffs. sold no india-rubber goods, but that that part of the covenant could be severed from the other part; & therefore plffs. were entitled to an injunction on that footing.

The views of the *cts.* as to restraint of trade have altered from time to time. The *cts.* in early times approached the subject with a prejudice against restraint of trade; they thought that all restraints of trade were contrary to public policy & therefore void. Later *cts.* had relaxed that rule & held that, while general restraints were bad, partial restraints might be good. . . . There is considerable force in the argument that a person employed in one particular department of a business would be in a position to pick up a certain amount of information as to the other departments of the business & that therefore it is not unreasonable for his employers to protect themselves as to those other departments. I take the view that *deft.* has not made it clear that plffs.' interest did not require *deft.*'s exclusion or that the public interest would be sacrificed if the proposed restraint were upheld. . . . As the decisions stood at present there seems to be no difficulty as to severing a covenant when there were other words in the covenant to which the restriction can apply, but I feel great difficulty when there is only one word in the covenant to which the restriction can apply in saying that the *ct.* can insert other words in the covenant in order to cut down the meaning of the words used in the covenant (*SCRUTTON, J.*).

(2) It is not to the public interest that persons should be allowed to lightly break contracts which they had entered into (*SCRUTTON, J.*). *CONTINENTAL TYRE & RUBBER (GREAT BRITAIN) CO., LTD. v. HEATH* (1913), 29 T. L. R. 308.

**489.**

1. A covenant not to carry on or be interested in the business of vendor or dealer in real or imitation jewellery for the period of two years in the County of London, England, Scotland, Ireland, Wales, or any part of the United Kingdom of Great Britain & Ireland & the Isle of Man, or in France, the United States of America, Russia, or Spain, or within twenty five miles of the Potsdammerstrasse, Berlin, or St. Stefan's Kirche, Vienna, is severable both in respect of the nature of the business & the area covered by it.

Where therefore the *ct.* was of opinion that it was reasonably necessary for the protection of the covenantee's business it granted an injunction against the covenantor's carrying on during the period mentioned the business of a vendor or dealer in imitation jewellery in the County of London, England, Scotland, Ireland, Wales, or any part of the United Kingdom of Great Britain & Ireland & the Isle of Man. *GOLDSOLL v. GOLDMAN*, [1915] 1 Ch. 292; 84 L. J. Ch. 228; 112 L. T. 494; 59 Sol. Jo. 188, C. A.

*Annotations*:—*Reid. Morris v. Saxelby*, [1915] 2 Ch. 57; *Attwood v. Lantant*, [1920] 3 K. B. 571; *Putsman v. Taylor*, [1927] 1 K. B. 637.

**490. Contract not to trade within thirty miles of Bournemouth.—Or within thirty miles of Southampton.]—Deft., on entering the employment of plffs., who were builders' merchants carrying on business at Southampton with branch offices at Bournemouth, Poole, Branksome, Portsmouth, & Guildford, covenanted that he would not for the period of fourteen years after the termination of his employment, at any place within a radius of 30 miles either from the town hall at Bournemouth or from the Bargate at Southampton, carry on or be concerned or interested in any capacity in carrying on the business of a builders' merchant or manufacturer of or dealer in cement, lime, bricks, plaster, laths, whitening, & any other building materials which at any time during his employment should be manufactured by or dealt in or sold on commission by plffs., or any other business, trade, or manufacture not within the foregoing of the same or a like nature or character as the business then carried on or which during his employment might be carried on by plffs. Deft. after leaving plffs.' employment, carried on business as a builders' merchant within 7 miles of the town hall at Bournemouth:—*Held*: the area was larger than was reasonably required for the protection of plffs.' trade, & on that ground the covenant was unreasonable.—*HOOPER & ASHBY v. WILLIS* (1906), 94 L. T. 621; 22 T. L. R. 451, C. A.**

**491. Contract not to trade within any district where employers trading.]—By a contract dated Jan. 22, 1906, plffs. engaged *deft.* as a traveller for a certain assigned district. The contract contained a provision that *deft.* should not within a period of five years from the termination of his engagement with plffs., either by himself or in connection with any other person or persons, carry on the trade or business of a coal & coke factor or merchant or colliery agent or any of them, or any department thereof, within a radius of 5 miles from any railway station or port serving a district in which the employers were trading by themselves, their agents or travellers or otherwise during the engagement of *deft.*:—*Held*: (1) this was one covenant, it was not severable, & (2) it was far too wide for the reasonable protection of the employers & therefore could not be enforced.—*CLARKE, SHARP & CO., LTD. v. SOLOMON* (1920), 37 T. L. R. 176, C. A.**



*C. In respect of Interference with Clients or Customers.*

**492. Contract not to interfere with present or future clients.]** NICHOLLS v. STRETTON, No. 725, *post*.

**493. — — —]** BAINES v. GEARY, No. 394, *ante*.

**494. — — —]** DUBOWSKI & SONS v. GOLDSTEIN, No. 438, *ante*.

**495. — — —]** CHARD v. HAMMOND (1901), 48 Sol. Jo. 773.

**496. Contract not to "solicit orders or in any way deal with" customers.]** It is not necessary for me to consider further whether some part of the agreement can be severed as good, from the rest which is bad, because I think the whole is good; but I may add that, in my opinion, I could sever the earlier part of the clause in question, viz., the words "call upon or directly or indirectly solicit orders," from the latter portion, viz., the words "or in any way deal or transact business with" the old customers, if it were necessary (CHITTY, J.).—MILLS v. DUNHAM, [1891] 1 Ch. 576; 60 L. J. Ch. 362; 64 L. T. 712; 39 W. R. 289; 7 T. L. R. 238, C. A.

*Annotations:—***Reld.** Moonich v. Fenestre (1892), 61 L. J. Ch. 737; Rogers v. Maddocks, [1892] 3 Ch. 346; Maxim Nordenfellt Guns & Ammunition Co. v. Nordenfellt, [1893] 1 Ch. 639; Haynes v. Doman, [1899] 2 Ch. 13; Hood & Moore's Stores v. Jones (1899), 81 L. T. 169; Morris v. Iyle (1910), 103 L. T. 545; North Western Salt Co. v. Electrolytic Alkali Co. (1912), 107 L. T. 439; Eastes v. Russ, [1914] 1 Ch. 468; Millers v. Steedman (1915), 84 L. J. K. B. 2057; Whitmore v. King (1918), 87 L. J. Ch. 646; Attwood v. Lamont, [1920] 3 K. B. 571.

**497. Contract not to "interfere with any customer or any person in habit of dealing with master."]**—Pltf. K. had employed deft. under a written agreement at a weekly salary determinable by a week's notice as a saleswoman, & deft. had covenanted "not at any time during or after the determination of the employment directly or indirectly, either on her own account or for any other person, or firm, or co., to solicit, interfere with, or endeavour to entice away from the master any customer of or any person or persons in the habit of dealing with the master;" & she had also covenanted "not at any time after the determination of the employment to advertise that she was late with K." Subsequently pltf. discharged deft. with a week's wages in lieu of notice, refusing to allow her to work out the week's notice, & shortly afterwards deft. had entered the employment of R. who at one time had been with K. While in the employment of R. she had addressed a circular to S. who had been a customer of pltf. for ten years, but during the last two years had dealt elsewhere. The firm had also advertised as "R. late of K." Pltf. alleged that deft. was in fact in partnership with R. & that these acts were breaches of her covenants. Dft. alleged that by dismissal with a week's wages in lieu of notice, pltf. had abandoned his right to sue on the covenant.—**Held:** (1) there was no partnership & no breach of the covenant against advertising; the master had by paying a week's wages discharged all his obligation under the contract, which was not therefore abandoned; & the covenant as to soliciting, etc., was too wide to be reasonable & was not severable; (2) the agreement not to solicit customers could not be confined by construction to persons who were customers during the employment, but extended to all persons who were customers at the date of the agreement or at any time after that date.—KONSKI v. PEET

[1915] 1 Ch. 530; 84 L. J. Ch. 513; 112 L. T. 1107; *sub nom.* KASKI v. PLATT, 59 Sol. Jo. 383. *Annotations:—*As to (2) **Fold.** East Essex Farmers' Holders (1926), 70 Sol. Jo. 1001. *Generally, Reld.* Turpin v. Victoria Palace (1918), 88 L. J. K. B. 569.

**498. Contract "not to solicit any customers in respect of goods supplied in course of employers' business."]**—EAST ESSEX FARMERS, LTD. v. HOLDER, No. 435, *ante*.

*D. In respect of Nature of Business.*

**499. Contract not to be concerned in any other business.]**—BAKER v. HEDGELOCK, No. 442, *ante*.

**500. — — —]**—WOODS v. THORNBURN (1897), 41 Sol. Jo. 756.

**501. Contract not to be concerned in employer's business—"Now or hereafter to be carried on."]**—DAVIES, TURNER & CO. v. LOWEN, No. 475, *ante*.

**502. — — —]** "Or any other business."—ROBINSON (WILLIAM) & CO., LTD. v. HEUER, No. 560, *post*.

**503. — — —]** "Or other specified businesses."—BROMLEY v. SMITH, No. 477, *ante*.

**504. — — —]**—ATTWOOD v. LAMONT, No. 131, *ante*.

**505. — — —]** "Or any business which might be carried on" by employers.]—CARIBONUM CO., LTD. v. LE COUCH, No. 382, *ante*.

**506. — — —]** "Or any business "similar to any business carried on during period of employment."]

—In 1908 pltf. co. agreed to employ deft. F. as manager of the co. at Liverpool for five years from Jan., 1909, & by clause 7 it was provided that the manager should not for a period of one year after the determination of the agreement, whether by effluxion of time or in any other way whatsoever, either solely or jointly with or as agent for any other person, firm or co., directly or indirectly carry on or be engaged, concerned or interested in carrying on, within the United Kingdom the trade or business of an importer of meat or an agent for importers of meat, or any other trade or business similar to any trade or business carried on during the period of his employment by the co., except with the consent in writing of the directors for the time being.

At the date of agreement pltf. co.'s business as importers or agents for importers was confined to the Australasian trade as distinguished from the American trade, though they did some business as wholesale dealers in meat, including American meat. The business was conducted almost entirely in the north of England & the Midlands, but it had since undergone considerable expansion. In proceedings to enforce clause 7 of the agreement it was admitted that the concluding part of the clause was too wide, but it was contended that the clause was severable & that the first part was not too wide & was enforceable by injunction:—**Held:** clause 7 of the agreement was severable but the restraint against carrying on within the United Kingdom the business of a meat importer or agent for meat importers was wider than was reasonably required for the protection of pltf. co. because it embraced the American trade as well as the Australasian trade & could not be fairly construed as referring to the latter trade alone, & because it extended to the whole of the United Kingdom, & the clause was therefore void as being in undue restraint of trade notwithstanding the time limit of one year.

To preclude a former servant from carrying on

PART V. SECT. 6, SUB-SECT. 2.—C.

**m. Covenant not to interfere with any person who was during the continuance of employee's employment a customer of the firm.]**—STEPHEN v. KUHNELLE (1920), 26 S. R. N. S. W. 327; 43 N. S. W. W. N. 67.—AUS.

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**Sect. 6.—Severability: Sub-sect. 2, D. Sects. 7 & 8: Sub-sect. 1, A. (a) & (b).]**

his natural business in any part whatever of the United Kingdom is a very strong step & requires exceptional justification.

I may clear the ground at once from a suggestion that, in view of certain remarks of LORD MOUTON in the recent case of *Mason v. Provident Clothing & Supply Co.*, No. 143, *ante*, this part of the covenant is invalidated, because the succeeding part of the covenant, namely, that prohibiting the carrying on by the manager of any trade or business similar to any trade or business carried on during the period of his employment by the co., is, admittedly, too wide. I do not think that those remarks were intended to be applicable to cases where the two parts of a covenant are expressed in such a way as to amount to a clear severance by the parties themselves, & as to be substantially equivalent to two separate covenants (*SARGANT, J.A. NEVILLAS (S.A.) & CO. v. WALKER & FOREMAN*, [1911] 1 Ch. 413; 83 L. J. Ch. 380; 110 L. T. 416; 30 T. L. R. 184; 58 Sol. Jo. 235. *Annotations:—Consd. Atty. and v. Lamont*, [1920] 3 K. B. 371. *Reid. Putnam v. Taylor*, [1927] 1 K. B. 637.

**507. — "Real or imitation jewellery."**

*GOLDSOLL v. GOLDMAN*, No. 489, *ante*.

**508. Contract not to deal in particular goods.—Goods in which employer might have but did not actually deal.**—*ROGERS v. MADDOCKS*, No. 417, *ante*.

—Nor solicit any customers.]—*See* No. 435, *ante*.

**509. Contract not to be concerned in vendors' business.—Or act as servant of any person concerned in similar business.**—*BRITISH REINFORCED CONCRETE ENGINEERING CO., LTD. v. SCHEFF*, No. 310, *ante*.

**SECT. 7.—EXTINGUISHMENT OF COVENANT.**

**510. Covenant by employee—Whether extinguished by dismissal—Wrongful dismissal.**—*PROCTOR v. SARGENT*, No. 172, *ante*.

**511. — — — — — j.—Employers agreed with their manager that he should hold office subject to termination at twelve months' notice by either party & with a restriction on his right to trade after its termination. The employers having wrongfully dismissed him without notice:—Held:** he was entitled to treat the dismissal as a repudiation of the contract & to sue them for damages for breach of contract, & was no longer bound by the restriction on trade. *GENERAL BILLPOSTING CO., LTD. v. ATKINSON*, [1909] A. C. 118; 78 L. J. Ch. 77; 99 L. T. 943; 25 T. L. R. 178, II. J.

*Annotations:—Consd. Measures v. Measures*, [1910] 2 Ch. 218. *Dista. Kanski v. Peet*, [1915] 1 Ch. 539. *Reid. Dennis v. Tunard & Moot*, [1911] 56 Sol. Jo. 162. *Newsum v. Bradley*, [1918] 1 K. B. 271. *Re Rubel Bronze & Metal Co. & Vos*, [1918] 1 K. B. 315; *British Concrete Co. v. Scheff*, [1921] 2 Ch. 563; *Martin v. Stout*, [1925] A. C. 359.

**512. — — — — — Winding up of company.**—Deft., in July, 1903, entered into an agreement with plff. co. of which he was a director (a) to hold office for seven years at a fixed salary, & (b) that so long as he should continue to hold office, & for seven years after ceasing to hold such office, he would not, either solely or jointly with, or as manager or agent for, any other person or

persons or co. directly or indirectly carry on or be engaged or interested in any business that would compete with that carried on by the co. In Apr., 1909, a receiver & manager was appointed in a debenture-holder's action, & a compulsory winding-up order was made against the co. The receiver & manager having given notice to deft. that his services would no longer be required, & having ceased to pay his salary, deft. commenced to carry on business on his own account. In an action to restrain deft. from carrying on business in competition with the co. in breach of his covenant:—*Held:* plff. co. could not have specific performance of clause (b) without performing, & they could not now perform, clause (a) in favour of deft., & consequently he was no longer bound by his restrictive covenant & the co. were not entitled to an injunction. *MEASURES BROTHERS, LTD. v. MEASURES*, [1910] 2 Ch. 218; 79 L. J. Ch. 707; 102 L. T. 791; 26 T. L. R. 188; 51 Sol. Jo. 521; 18 Mans. 40, C. A.

*Annotations:—Reid. Alpertion Rubber Co. v. Manning*, [1917] 86 L. J. Ch. 377; *Rigaker Union Manufacturing Co. (Ramsbottom)*, [1918] 1 K. B. 392.

**513. Dismissal by receiver.**—*WILSTEAD v. HADLEY*, No. 403, *ante*.

**514. Dismissal with wages in lieu of notice.**—*KONSKI v. PEIT*, No. 497, *ante*.

**SECT. 8.—BREACH.**

**SUB-SECT. 1.—WHAT CONSTITUTES BREACH.**

**A. Covenant Not to be Interested, Concerned or Engaged in Similar Trade, Business or Profession.**

(a) In General.

**515. Test of similarity—Sufficiently similar to compete.**—Plffs. granted a lease to the A. B. Co. containing a covenant that the tenants would not carry on the business of a restaurant similar to that carried on by R., another tenant of plffs. R. was an hotel keeper who had a restaurant on licensed premises connected with his hotel. The A. B. Co. carried on a restaurant at which they sold tea, coffee, cocoa, pastry, & cold meat, but not any hot meat except beef pies, & this was not objected to. The A. B. Co. having assigned their lease to deft., he proceeded in his restaurant to sell hot meat & other things not sold by the A. B. Co. Deft. had not a license for the sale of intoxicants, nor a victualler's license; his establishment was on a much smaller scale than that of R., his premises were of an inferior class to those of R., & his prices were much lower:—*Held:* the test whether deft.'s business was similar to that of R. was whether it was sufficiently like it to compete with it, & judging by this rule, although there were considerable differences between R.'s business & that of deft., deft.'s business was similar to that of R., & an injunction must be granted in the terms of the covenant, with a proviso that it was not to prevent deft. from selling any of the articles in which the A. B. Co. had dealt.—*DREW v. GUY*, [1891] 3 Ch. 25; 63 L. J. Ch. 547; 71 L. T. 220; 58 J. P. 803; 7 R. 220, C. A.

**516. — — — — — j.—Deft. sold to plff. his business of an annatto & food preservatives manufacturer & dealer in condensed milk, & covenanted that**

**PART V. SECT. 7.**

**n. Covenant by employee Whether extinguished by dismissal.**—In an agreement in which an employee undertook that in case he "left" the

employment of his master "for any cause whatever," he would not for a period of seven years start a similar business within fifteen miles of the town where his employer carried on business. He was dismissed by his employer &

immediately started in business in the same town:—*Held:* the word "leave" did not connote dismissal, & therefore there was no breach of the agreement.—*COLEBORNE v. KEARNS*, [1912] 46 T. L. T. 305.—*JR.*

E 2



from acting as such :—*Held* : (1) as the agreement recited in the bond was for the protection of the business carried on by H. & P., & they had in the business a joint interest during their partnership, & several interests in the event of a dissolution, the agreement must be taken to be several as well as joint, & that P. could sue alone for a breach of it ; (2) there had been a breach of it, for that a person acting as a surgeon was carrying on the profession of a surgeon, although he only acted as salaried assistant to a surgeon who carried it on for his own benefit.

It is true that in *Allen v. Taylor*, No. 524, *ante*, where there was a contract not to carry on the trade of a rag dealer, it was held that merely acting as clerk or assistant to a person carrying on that trade, was not a breach of the covenant. But an agreement not to carry on a trade is a very different thing from an agreement not to carry on a business or profession. "Carrying on a trade" implies to my mind that the person engaged in it is engaged in it *qua* trade, that is to say, as a trade producing profit or loss which is to be shared by him, & that is not the case if he is merely a salaried assistant. I cannot come to the conclusion that a man is less carrying on the profession of a surgeon because he is doing so as assistant to some one else. "Profession" is different from trade, & it is much more emphatic to my mind than if "business" alone were here. When, as here, the words "carry on the business or profession of a surgeon" are merely used to denote what is done by a man acting as a surgeon, a man, in my opinion, acts as surgeon & carries on the business of a surgeon none the less because he is not the principal or engaged in the business as a partner, but is merely carrying it on as assistant to somebody else (*COTTON, L.J.*).

*PALMER v. MATLET* (1887), 36 Ch. D. 411 ; 57 L. J. Ch. 226 ; 58 L. T. 61 ; 36 W. R. 460 ; 3 T. L. R. 760, C. A.

*Annotations* :—As to (2) *Apld.* *Robertson v. Willmott* (1909), 25 T. L. R. 681. *Generally, Rejd.* *Way v. Bishop*, [1928] Ch. 617.

**543. Professional manager.**—Deft. covenanted not to practise as an architect or surveyor within a defined area for a certain number of years :—*Held* : he committed a breach of that covenant by acting as manager at a fixed salary to another architect.—*ROBERTSON v. WILLMOTT* (1909), 25 T. L. R. 681 ; 53 Sol. Jo. 631.

*Annotations* :—*Consd.* *Way v. Bishop*, [1928] Ch. 617. *Rejd.* *Ramoneur v. Brixey* (1911), 55 Sol. Jo. 40.

**544. Company servants & agents—Voluntary liquidation of company—New company formed with same name.**—An injunction was obtained by pltf. against a co., restraining them, their servants & agents, from soliciting the custom of persons who before the sale of a certain part of their business to pltf. were their customers. Thereafter the co. went into voluntary liquidation, & a new co. was formed under the same name, to which were transferred the assets & business of the old co. :—*Held* : as the reconstruction of the old co. had been regularly carried out for the sake of obtaining new capital & not colourably for the sake of evading the order, the new co. became an

independent co. & was in no sense the servant or agent of the old, & therefore in soliciting a customer of pltf. the new co. committed no breach of the injunction which has been obtained.—*BOSCH v. SIMMS MANUFACTURING CO., LTD.* (1909), 25 T. L. R. 419.

**545. Creditor of similar business.**—*BIRD v. LAKE, BIRD v. TURNER*, No. 461, *ante*.

**546.**—*SOUTHLAND FROZEN MEAT & PRODUCE EXPORT CO. v. NELSON BROTHERS*, No. 469, *ante*.

**547.**—*CORY (WILLIAM) & SON, LTD. v. HARRISON*, No. 466, *ante*.

(c) *Husband and Wife.*

**548. Covenant by wife—Before marriage—Business carried on by husband.**—A. agreed under a penalty that she would not take, keep, be interested or concerned in any licensed house within one mile of pltf.'s premises. A. afterwards married a publican having a licensed house within one mile of pltf.'s premises & assisted him in his business :—*Held* : there was no breach of the agreement.—*LOE v. LANDER* (1856), 27 L. T. O. S. 160 ; 4 W. R. 597.

**549. Covenant by husband—Business established by wife—For benefit of nephew.**—Deft., who had been carrying on the business of a grocer under the style of "T. P. Hancock," sold the business to pltf., & entered into an agreement not to "carry on or be in anywise interested in" any similar business within a specified area. About seven years later the wife of deft., desiring, against his wishes, to start her nephew in business, opened a grocer's shop within the specified area, & carried on business there under the style of "Mrs. T. P. Hancock." The business was managed by the nephew, & deft.'s wife took some part in carrying it on ; but deft. took no part. The money necessary for starting the business was found by the wife out of her separate estate, & no money whatever was contributed by deft., either towards starting the business or carrying it on, nor did he share in the profits in any way. He, however, introduced his wife to his bankers, where she opened an account in her own name, assisted her in obtaining the lease of the shop in her own name, introduced the nephew to the wholesale merchants who had supplied the old business, & as his wife was disabled by rheumatism from writing, wrote for her a circular inviting "old friends" to come to the shop. He also handed copies of the circular to some few persons, including a tenant of his own :—*Held* : there had been no breach of the agreement by deft.

When a person sells a business & agrees not to carry on, or be in any way interested in any similar business, the word "interested" is used to prevent him, not only from carrying it on, but also from having any proprietary or pecuniary interest in it (*LINDLEY, L.J.*).—*SMITH v. HANCOCK*, [1891] 2 Ch. 377 ; 63 L. J. Ch. 477 ; 70 L. T. 578 ; 58 J. P. 638 ; 42 W. R. 165 ; 10 T. L. R. 133 ; 38 Sol. Jo. 116 ; 7 R. 200, C. A.

*Annotations* :—*Apld.* *Gophir Diamond Co. v. Wood*, [1902] 1 Ch. 950 ; *Cory v. Harrison* (1905), 75 L. J. Ch. 714.

covenanted "not to enter into any retail business in the town of A. in competition with" pltf. Deft. R., purporting to act as manager for his father, began to carry on the business of a general storekeeper in the town of A., admittedly in competition with pltf. :—*Held* : the words "enter into" should receive a wide construction ; & deft. R., whether really acting for his father, or whether operating on his own behalf, was guilty of a breach of his covenant,

& should be restrained from directly or indirectly conducting the business in A.—*MARKSON v. ROSENBERG & MARKSON*, [1927] 4 D. L. R. 164 ; 61 O. L. R. 1.—*CAN.*

**a. Covenant assigned—Whether assignee can sue for breach of covenant.**—Deft. sold his business & goodwill to B. & bound himself never, during his lifetime or the lifetime of any of his children, to open any business of a like nature to that carried on by B.

at H. B. afterwards sold his business & goodwill to pltf. & ceded to him his right under the agreement with deft. to whom notice of the cession was given :—*Held* : deft. had by his contract undertaken not to carry on a business of the nature of the one he had sold, which undertaking was not of so personal a nature as to be incapable of being ceded, & consequently pltf. could enforce the agreement.—*DUMAS v. TRAUTMAN* (1891), 9 S. C. 14.—*S. AF.*

## Sect. 8.—Breach: Sub-sect. 1, B.; sub-sect. 2, A.]

## B. In Particular Trades, Businesses or Professions.

See Sect. 9, post.

## SUB-SECT. 2.—REMEDIES FOR BREACH.

## A. Injunction.

See, generally, INJUNCTION, Vol. XXVIII., pp. 355 *et seq.*

**550. Whether injunction granted.**—(1) Undertaking, upon sale of the goodwill of a trade, not to carry on the same business, & to use the best endeavours to assist the purchaser, etc. The remedy for a breach is an action, or issue *quantum damnificatus*; & an injunction against proceeding under a judgment for the consideration upon affidavits before answer was refused.

(2) Purchaser has choice of several securities. He may rest upon assurance of vendor, he may require a covenant (LORD ELDON, C.).

(3) If it had been nothing more than a purchase of the goodwill of this trade the vendor would be at liberty to set up the same trade in another situation (LORD ELDON, C.).—SHACKLE v. BAKER (1808), 14 Ves. 468; 33 E. R. 600, L. C.

*Annotations* —As to (1) *Consd.* Harrison v. Gardner (1817), 2 Madd. 198. *Refd.* Churton v. Douglas (1858), John. 174; Ghiesi v. Cooper (1880), 11 Ch. D. 596.

**551. — Interim injunction.** — BATHO v. TUNES, [1892] W. N. 101.

**552. — — — — —** DIETZ, DAVIS & CO., LTD. v. SYMMONS (1894), 38 Sol. Jo. 712.

**553. — — — — —** The ct. ought not to grant an *interim* injunction to restrain a person from following his trade or profession if it is satisfied that to do so may prevent such person from earning his livelihood.—PALACE THEATRE, LTD. v. CLENSY & HACKNEY & SHEPHERD'S BUSH EMPIRE PALACES, LTD. (1909), 26 T. L. R. 28, C. A.

**554. — Covenant with partnership—Of harsh description—Action for dissolution of partnership pending.**—Where an agreement had been entered into between A. & B., who were partners without any written articles, & persons in their employ, containing terms & provisions of a harsh description, & where one of the partners had filed a bill against the other for a dissolution of the partnership, the ct. refused to interfere at the suit of the other partner, to restrain the breach of the negative terms of the agreement.—CROFT v. HAWK (1836), Donnelly, 82; 5 L. J. Ch. 305; 47 E. R. 241.

**555. — Agreement for valuable consideration—Not being a "hard bargain."**—MIDDLETON v. BROWN, No. 214, *ante*.

**556. — Covenant not to engage in any other business.**—EHRMAN v. BARTHOLOMEW, No. 297, *ante*.

**557. — Covenant not to engage in competing business.**—Deft., an admitted solr., having accepted the situation of clerk to pltf., a solr. practising at N., entered into a bond with pltf. which recited that deft. had been recently appointed agent to O., & was conditioned to be void if deft. should abstain from practising as a solr. in N., or within thirty miles from thence, without the consent of pltf.; & should not act as O.'s legal adviser, except as pltf.'s clerk; & should not accept or undertake any other agency or

appointment, except such as he then held, without pltf.'s consent, & in case the engagement should be put an end to or determined, should not continue to act as agent for O.

Shortly afterwards deft. was a candidate for the office of clerk to the board of guardians; whereupon pltf. gave him three months' notice of putting an end to his engagement. After the expiration of the three months, deft. resigned his appointment as agent to O., but afterwards resumed the same. Deft. also obtained the situation & was performing the duties of clerk to the board of guardians, & since the filing of the bill, obtained the situation of clerk to the Commissioners of Land Tax. Perpetual injunction granted to restrain deft. from acting as agent to O., or as clerk to the magistrates, or from otherwise violating the stipulations of the bond.—EDMONDS v. LEWIS (1860), 3 L. T. 115; 6 Jur. N. S. 1091.

**558. — — — — —** EHRMAN v. BARTHOLOMEW, No. 297, *ante*.

**559. — — — — —** During continuance of contract of service—Agreement providing for dismissal on breach.]—Pltf. & deft. formerly carried on the business of house agents in partnership under articles which provided that an outgoing partner should not for a period of ten years from the dissolution of the partnership carry on, or engage or be interested directly or indirectly in, any similar business with a radius of one mile from the partnership premises. Deft. withdrew from the partnership business & started a similar business on his own account at an office outside the prohibited radius. In the course of such business he endeavoured to let two houses within the prohibited radius, & he put up notice boards at three houses directing intending tenants to apply to him at his office & inserted advertisements of these intended lettings in a newspaper:—*Held*: these acts were a breach of the covenant, & an injunction granted.—HADSLEY v. DAYER-SMITH, [1914] A. C. 979; 83 L. J. Ch. 770; 111 L. T. 479; 30 T. L. R. 524; 58 Sol. Jo. 551, H. L.; *affy.* S. C. *sub nom.* DAYER-SMITH v. HADSLEY, 108 L. T. 897, C. A.

**560. — Operation of injunction limited to specific period.**—By an agreement in writing H. agreed to serve the W. R. co. as confidential clerk for five years from Jan. 1, 1895, the co. having the option to renew the engagement for five years more. The co. could dismiss H. at any time by three months' notice. H. agreed that during the term he would devote his whole time & attention to the business of the co., & that he would not during the engagement, without the consent of the co., engage as principal or servant in any business relating to goods of any description made or sold by the co., or in any other business whatever, upon pain of instant dismissal. H. covenanted that if he should be so dismissed he would not at any time within three years from his dismissal be engaged directly or indirectly as principal, agent, or servant in the business of dealer in wares of the description made by the co., within 150 miles of W. In 1898 H. left the service of the co. without leave & became traveller to another firm carrying on the same business. The co. applied for an injunction to restrain H. during the term of service from carrying on as principal, agent, servant, or otherwise, any business relating to goods of the description made by the co., & from soliciting orders for other firms:—*Held*: during

## PART V. SECT. 8, SUB-SECT. 2.—A.

**557 i. Whether injunction granted—Covenant not to engage in competing business.**—GILL v. OSTERSTOCK, [1926] S. A. S. R. 318.—AUS.

**557 ii. — — — — —** PEACE (WILLIAM CO. v. PEACE (1912), 23 O. W. R. 22; 4 O. W. N. 63; 5 D. L. R. 891.—CAN.

b. — Deprivation of employee's

means of livelihood would result].—LOVELL v. PEARSON (1914), 26 O. W. R. 357; 6 O. W. N. 357; 17 D. L. R. 856.—CAN.

c. — — — — — BEGG (CHARLES

the continuance of the engagement, the agreement made by H, with the co. that he would not engage in any business relating to goods sold by the co. was valid though not restricted in point of space, & it was severable from the agreement not to engage in any other business, & ought to be enforced by injunction. An injunction was therefore granted as asked, but limited to the first term of five years, the co. waiving their option to retain H, in their service for another five years, & the ct. doubting whether the agreement ought to be enforced for that further term.—*ROBINSON (WILLIAM) & CO., LTD. v. HEUER*, [1898] 2 Ch. 451; 67 L. J. Ch. 614; 79 L. T. 281; 47 W. R. 31; 42 Sol. Jo. 756, C. A.

*Annotations:—* *Consd.* Chapman v. Westerby (1913), 58 Sol. Jo. 50. *Apld.* Attwood v. Lamont, [1929] 2 K. B. 146. *Refd.* Rely-a-Bell Burglar & Fire Alarm Co. v. Elser, [1926] Ch. 609.

**561.** — — — **Effect of winding up of employing company.** Deft. agreed to serve a banking co., which was registered under Cos. Act, 1862 (c. 89), as manager of a branch, & he agreed that he would not within a year of the termination of the agreement either by notice or as thereafter provided, enter into the service of or in any way act for any bank carrying on business within a radius of five miles of any branch of the bank to which he might be appointed manager. The banking co. were empowered to put an end to the agreement in the event of deft. being guilty of misconduct. The banking co. afterwards passed resolutions for voluntary winding up, & liquidators were appointed for the purpose of selling their business & goodwill to another banking co. Deft. thereupon left the co.'s branch bank & entered the service of another bank at the same place. The co. thereupon gave him a month's notice to terminate the agreement, & brought an action to restrain him from entering the service of the other bank in breach of the agreement: *Held*: the voluntary winding up did not operate as a dismissal of the co.'s servants, & therefore the co. were entitled to the injunction claimed. *MIDLAND COUNTIES DISTRICT BANK, LTD. v. ATTWOOD*, [1905] 1 Ch. 357; 74 L. J. Ch. 286; 92 L. T. 369; 21 T. L. R. 175; 12 Mans. 20.

*Annotations:—* *Expld.* Reigate v. Union Manufacturing Co. (Ramsbottom), [1918] 1 K. B. 592. *Refd.* *Re* Havana Exploration Co. (1915), 85 L. J. Ch. 174; Thomas v. Todd, [1926] 2 K. B. 311. *Mentd.* Robinson Printing Co. v. Chic, [1905] 2 Ch. 123.

**562.** — — — **Covenant to serve plaintiff Effect of dismissal by plaintiff.** A. purchased from B. certain premises, fixtures, & the goodwill of a business. As part of the consideration for the purchase of the goodwill B. covenanted not to carry on business at a particular place. A. covenanted to employ B. B. having been dismissed, set up business in breach of his covenant: *Held*: although there was not sufficient evidence to show that B. had been properly dismissed, yet A. was entitled to an injunction to restrain B. from committing a breach of his covenant. — *DAGGETT v. RYMAN* (1868), 17 L. T. 486; 16 W. R. 302.

**563.** — — — **No negative covenant against engaging in trade.** Where in breach of an agreement by the deft. to serve plff. for fourteen years as manager of his business, which agreement contained no express negative covenants, deft. left plff., & engaged in similar business a few doors off: *Held*: the ct. had power to grant an injunction, but the power was discretionary, & the

case was not one for its exercise.—*JACKSON v. ASTLEY* (1883), Cab. & El. 181.

**564.** — — — **Deft. agreed to become manager of plff. co.'s works for a certain period, & during that period "to give the whole of his time to the co.'s business."**

The agreement was wholly affirmative, & contained no express stipulation that deft. should not do any particular thing. He being about to set up & become a director of a rival co., the judge granted an injunction to restrain him from giving less than the whole of his time to the co.'s business: *Held*: there being no negative stipulation in the agreement restraining deft. from so doing, the ct. could not grant such an injunction.—*WHITWOOD CHEMICAL CO. v. HARDMAN*, [1891] 2 Ch. 416; 60 L. J. Ch. 428; 64 L. T. 716; 39 W. R. 433; 7 T. L. R. 325, C. A.

*Annotations:—* *Consd.* Silver v. Gatti (1893), 37 Sol. Jo. 776. *Apld.* Star Newspaper v. O'Connor & Wetton (1893), 9 T. L. R. 526; Davis v. Foreman, [1894] 3 Ch. 654; Mutual Reserve Fund Life Assocn. v. New York Life Insce. & Harvey (1896), 75 L. T. 528. *Consd.* Ehrman v. Bartholomew, [1898] 1 Ch. 671; Metropolitan Electric Supply Co. v. Glider, [1900] 2 Ch. 799; Kuehner v. Graham, [1909] 1 Ch. 413; Chapman v. Westerby (1913), 58 Sol. Jo. 50. *Apld.* Mortimer v. Bockett, [1929] 1 Ch. 571. *Distd.* Rely-a-Bell Burglar & Fire Alarm Co. v. Elser, [1926] Ch. 609. *Refd.* Ryan v. Mutual Tontine Westminster Chambers Assocn., [1893] 1 Ch. 116; Alexander v. Mensons Proprietary (1900), 16 T. L. R. 131; Prosperity v. Lloyds Bank (1923), 39 T. L. R. 372.

**565.** — — — **In a contract of personal service a stipulation by the employed to "act exclusively for" his employers does not, in the absence of a negative covenant, express or implied, which is sufficiently clear & definite, confer upon the employers a right to obtain an injunction against the employed to restrain him from entering into the employment of other persons.** *MUTUAL RESERVE FUND LIFE ASSOCN. v. NEW YORK LIFE INSURANCE CO. & HARVEY* (1896), 75 L. T. 528; 13 T. L. R. 32; 41 Sol. Jo. 47, C. A.

*Annotation:—* *Consd.* Chapman v. Westerby (1913), 58 Sol. Jo. 50.

**566.** — — — **Covenant restraining area—Not vague or indefinite.** — *MASON v. PROVIDENT CLOTHING & SUPPLY CO., LTD.*, No. 143, *ante*.

**567.** — — — **Covenant not to manufacture under specified name Injunction to restrain use of name only.** — *VERNON v. HALLAM*, No. 774, *post*.

**568.** — — — **Covenant not to undercut price.** — Deft., who was a wholesale & retail dealer, purchased from plffs. 12 gross of Palmolive soap tablets & signed an agreement that he would not sell plffs.' soap at less than 6d. a tablet. Deft. then sold the soap at 5d. a tablet, & in an action to restrain him from breaking the agreement, he contended that it would be robbing the public to sell at 6d. a tablet & that the agreement was in restraint of trade & illegal: *Held*: the agreement was valid & enforceable & plffs. were entitled to the injunction claimed. *PALMOLIVE CO. (OF ENGLAND) v. FREEDMAN*, [1928] Ch. 264; 97 L. J. Ch. 40; 138 L. T. 274; 44 T. L. R. 86; 71 Sol. Jo. 927, C. A.

**569.** — — — **Limitation of operation To cases of injury.** — *CUBA SUBMARINE TELEGRAPH CO. v. WEST INDIA & PANAMA TELEGRAPH CO.* (1901), 45 Sol. Jo. 360, C. A.

— — — **Consideration of comparative injury.** — *See INJUNCTION*, Vol. XXVIII., p. 383, No. 145.

— — — **Theatrical contracts.** — *See THEATRICALS*, Vol. XLII., pp. 915, 916.

& Co., LTD. v. NAUJOES (1903), 23 N. Z. L. R. 194.—*N.Z.*  
d. — — — *Damages proper remedy in absence of evidence that covenant neces-*

*sary for plaintiff's protection.* — *GRISON v. KINSMAN* (1921), 42 N. L. R. 172.  
— *S. A.F.*

• *Covenant providing for damages*

*on breach—Whether damages may be waived & injunction claimed.* — *TORONTO DAIRY CO. v. GOWANS* (1879), 26 Gr. 290.—*CAN.*



*Sect. 8.—Breach: Sub-sect. 2, A. & B.; sub-sects. 3, 4 & 5. Sect. 9: Sub-sects. 1 & 2.]*

**Restraint disclosure of confidential information.]—***See INJUNCTION, Vol. XXVIII., pp. 476-479, Nos. 820-844.*

**Covenant providing for damages on breach—Whether injunction & damages granted.]—***See BONDS, Vol. VII., p. 253, Nos. 951-953; DEEDS, Vol. XVII., pp. 402, 404, Nos. 2116, 2118-2121, 2124 2131.*

**570. — Duty to elect remedy.]—**By an agreement made in 1890, plff. agreed to employ, & deft. to work for & serve plff. as tailor, hosier, or outfitter, & it was agreed: that deft. should not for the space of three years act as tailor, hosier, or outfitter, or take service or act as agent in such business within a radius of twenty-five miles of plff.'s shop, under a penalty of £500 as liquidated damages. On June 10, 1893, deft. left plff.'s service, & committed a breach of the agreement. Plff. brought this action claiming an injunction & £500 liquidated damages for breach of the agreement, & on motion obtained an *interim* injunction. The action was then set down for the point of law to be argued as to whether deft. was not, on payment of £500, absolved from any obligation under the agreement. Plff. now asked for an injunction, but withdrew the claim for damages: *Held*: (1) deft. ought, when the motion came on, to have called on plff. to elect whether he asked for an injunction or liquidated damages, as he could not have both, & the pleadings were therefore embarrassing to deft.; (2) deft. having gone on, was too late in taking the point, & there must be an injunction for three years after July 10, 1893.—*GENT v. HARRISON* (1893), 69 L. T. 307.

**571. — Damages & injunction claimed in writ—Election of remedy in statement of claim.]**  
*LEWIS & LEWIS v. BURNFORD* (1907), 21 T. L. R. 61.

**Defendant offering damages on breach—Whether remedy by injunction precluded.]—***See BONDS, Vol. VII., p. 253, Nos. 951, 953.*

**Contracts containing both positive & negative covenants—Restraint of breach of negative covenants.]—***See INJUNCTION, Vol. XXVIII., pp. 451-454, Nos. 700-716.*

**Breach of covenant by plaintiff.]—***See INJUNCTION, Vol. XXVIII., p. 434, Nos. 574, 575.*

**572. Enforcement of injunction—By attachment & committal.]** *MIDDLETON v. BROWN*, No. 211, *ante*.

**573. — J. OWEN, HARRIES & Co. v. LOCK** (1896), 50 Sol. Jo. 800.

**574. — DOTTRIDGE BROTHERS, LTD. v. CROOK** (1907), 23 T. L. R. 641.

#### B. Damages.

*See, generally, DAMAGES, Vol. XVII., pp. 76 et seq.*

**Covenant providing for payment of agreed sum—Whether penalty or liquidated damages.]—***See DAMAGES, Vol. XVII., pp. 136, 138, 140-148, 151, Nos. 422, 426, 427, 436, 448, 453, 462, 471, 472, 476, 477, 498, 499, 504, 505, 507-509, 528, 532.*

**Whether additional remedy by injunction.]—***See BONDS, Vol. VII., p. 253, Nos. 951-953; DEEDS, Vol. XVII., pp. 403, 404, Nos. 2118-2121.*

**575. — Sum excessive.]—***BLAKE v. EAST INDIA CO.* (1674), 2 Cas. in Ch. 198; 22 E. R. 909.

**576. — Payment into court of sum in satisfaction—Whether further sum recoverable.]—**

Where under agreement not to carry on the business of a smith within a certain distance of plff., under a penalty of £30 & to an action upon the agreement, deft. paid into ct. the sum of £30 in satisfaction; plff. replied that he had suffered more damages; the cause was tried, & at trial plff. recovered £30 in addition to the sum paid into ct.:—*Held*: the verdict was right, as the only issue was whether or not plff. had sustained more damages, & deft. ought to have demurred, or to have moved in arrest of judgment.—*BALLINGER v. SHEPPARD* (1848), 11 L. T. O. S. 204.

#### SUB-SECT. 3.—PRACTICE.

**Covenant for payment of penalty on breach—Discovery of documents exposing party to penalty.]**

*See DISCOVERY, Vol. XVIII., p. 165, No. 1180.*

**577. Allegation of breach—Necessity for.]—***MOSELEY v. JONES* (1859), 33 L. T. O. S. 111.

**578. — Particulars.]—**An inquiry as to damages sustained by plffs. by reason of deft.'s breach of his covenant in restraint of trade having been directed, & an order for an affidavit of documents by deft. having been made, the judge held that plffs. must give a statement in writing of the heads under which they sought to recover damages from deft., & that the time for the affidavit of documents must be extended till fourteen days after plff.'s statement:—*Held*: as plffs. were ignorant of the particulars of breaches of covenant, the order would be useless, as they could only comply with it by stating every imaginable ground of damage, & the order was therefore discharged.—*MAXIM NORDENFELT GUNS & AMMUNITION CO. v. NORDENFELT*, [1893] 3 Ch. 122; 62 L. J. Ch. 719; 69 L. T. 471; 42 W. R. 38; 37 Sol. Jo. 600; 2 R. 538, C. A.

*Annotation:—Refd. Waynes Merthyr Co. v. Radford* (1895), 65 L. J. Ch. 140.

**Illegality of contract in restraint of trade—Whether necessary to plead illegality.]—***See No. 129, ante.*

#### SUB-SECT. 4. COSTS OF PROCEEDINGS.

**579. Costs refused to successful defendant.]—***ALLSOPP v. WHEATCROFT*, No. 282, *ante*.

**580. — EHRLMAN v. BARTHOLOMEW, No. 297, *ante*.**

#### SUB-SECT. 5. WAIVER AND RELEASE.

**581. Covenant on assignment of doctor's practice**

**—Not to attend patients within prohibited area—**

**Patients attended at assignee's request.]—**Deft., by deed, assigned to plff. his business as a surgeon & apothecary, carried on by deft. in Park Street, Camden Town: & deft. covenanted, that he should not nor would, directly or indirectly, by himself, or in co-partnership with any other person or persons, carry on or exercise his practice or profession of a surgeon & apothecary, or either of them, either by residing or visiting any patient, within the distance of three miles from the then place of business of deft., in Park Street aforesaid: & that, in case of any breach of this covenant, deft. should & would pay to plff. the full sum of £500, to be recovered against deft. as & for liquidated damages, & not as a penalty. After the execution of this deed, deft. attended several ladies in their confinements, within the three

#### PART V. SECT. 8, SUB-SECT. 5.

**1. Employing defendant after alleged malpractices.]—***DEACON v. CHERIAN* (OHL), [1925] 4 D. L. R. 661.—**CAN.**



miles, & on one occasion received a sum of £14 14s. for his services; but he attended these persons with the knowledge & consent of pltf., in consequence of a request by him that deft. should for a time continue to visit the patients, to keep the connection together; & the jury, in an action on the covenant, found that deft., in these instances, exercised the practice & profession of a surgeon, for the purpose of assisting pltf.:—*Held*: the above facts did not constitute a breach of the covenant.—*RAWLINSON v. CLARKE* (1845), 14 M. & W. 187; 14 L. J. Ex. 361; 5 L. T. O. S. 200; 153 E. R. 442; *subsequent proceedings* (1846), 15 M. & W. 292, Ex. Ch.

*Annotations*.—*Mentis*. Green v. Price (1845), 11 L. J. Ex. 225; Galsworthy v. Strutt (1818), 1 Exch. 659.

**582. Covenant not to enter employment of competitor—Employment by competitor with knowledge of former employer.**—Deft. was under covenant with pltf. not to enter the service of a coachbuilder within a certain area. In answer to a letter from a coachbuilder within the prescribed distance, inquiring after deft.'s character, pltf. replied, "Deft. will be of no use to you as foreman." Deft. entered into his service, & continued there, to the knowledge of pltf. for upwards of nine months. Bill for injunction dismissed.—*MAYTHORN v. PALMER* (1861), 11 L. T. 261; 28 J. P. 760; 11 Jur. N. S. 230; 13 W. R. 37.

**583. — Employment by assignees of business—With consent of employers.**—*SHOVELL v. WINKUP*, No. 399, *ante*.

**Covenant not to establish business within prohibited area—Licence after breach.**—*See BONDS*, Vol. VII., p. 230, No. 724.

## SECT. 9.—PARTICULAR TRADE, BUSINESSES AND PROFESSIONS.

### SUB-SECT. 1.—ACCOUNTANT.

**584. Validity or reasonableness of restraint Six years—Any place in England.**—*ISITT & JENKS v. GANSON* (1899), 43 Sol. Jo. 714.

### SUB-SECT. 2.—ACTORS AND THEATRICAL PERFORMERS.

*See, also*, THEATRES, Vol. XLII., Part I., Sect. 7, sub-sect. 9.

**585. Construction of contract—Agreement for exclusive performance.**—*GAUITY THEATRE CO. v. LOFTUS* (1893), *Times*, Aug. 11.

**586. Validity or reasonableness of restraint.**—Contract with the proprietors of a theatre not to write dramatic pieces for any other, legal; as a similar restraint of a performer would be; not resembling a covenant restraining trade generally.

Covenant, restraining trade within particular limits, or partners from carrying on the same trade for their private benefit, legal.—*MORRIS v. COLMAN* (1812), 18 Ves. 437; 34 E. R. 382, L. C.

*Annotations*.—*Distd.* Clarke v. Price (1819), 2 Wils. Ch. 157. *Expld. & Distd.* Kemble v. Kean (1829), 6 Sim. 333. *Appl.* Dietrichsen v. Cabburn (1816), 1 Coop. Temp. Cott 72. *Consd.* Lumley v. Wagner (1852), 1 De G. M. & G. 691. *Reftd.* Taylor v. Davis (1834), 4 L. J. Ch. 18; Kimberley v. Jennings (1836), 6 Sim. 340; Hills v. Croll (1845), 1 Coop. Temp. Cott. 83; Stevens v. Henning (1855), 6 De G. M. & G. 223; Merchants' Trading Co. v. Banner (1871), L. R. 12 Eq. 18; Donnell v. Bennett (1883), 31 W. R. 316; Whitwood Chemical Co. v. Hardman, (1891) 2 Ch. 416.

**587. —**—*LANNER v. PALACE THEATRE, LTD. ECCARIUS & ARMSTRONG* (1893), 9 T. L. R. 162, 165; 37 Sol. Jo. 175.

**588. — Agreement preventing earning of**

**livelihood.**—*CANTERBURY & PARAGON, LTD. v. LLOYD* (1898), 43 Sol. Jo. 63.

**589. — Agreement not to use pseudonym—Reputation established under pseudonym.**

(1) Pltfs., who were film producers, employed deft. as a film actor. His contract of employment required him to act under a pseudonym, which should be the sole property of pltfs. On the determination of the contract he was precluded from using the pseudonym for any purpose whatever & from film acting for new employers unless & until they agreed not to announce or advertise his performance under the pseudonym. Owing partly to his own ability & partly to pltfs.' advertisements deft. acquired a considerable reputation under the pseudonym in which his professional identity became so completely merged, that his market value without it would be diminished more than 50 per cent. until his identity & reputation were re-established *de novo*. Deft. having entered the service of rival film producers under the pseudonym, pltfs. sued for an injunction:—*Held*: in the circumstances the contract was in partial restraint of trade & not reasonably required for the protection of the employers, & for this reason would not be enforced.

(2) A restraint of trade is *prima facie* contrary to public policy. It is a misapprehension to suggest that this doctrine is confined merely to restraint of trade in any ordinary meaning of the word "trade"; it extends further than trade, it undoubtedly extends to the exercise of a man's profession or calling (*ATKIN, L.J.*).—*HEPWORTH MANUFACTURING CO. v. RYOTT*, [1920] 1 Ch. 1; 89 L. J. Ch. 69; 122 L. T. 135; 36 T. L. R. 10; 61 Sol. Jo. 19, C. A.

**590. — Twenty miles.**—*READ & BAILEY v. PONCHERY & CRYSTAL PALACE CO., LTD.* (1899), 43 Sol. Jo. 728.

**591. —**—*TIVOLI, MANCHESTER, LTD. v. COLLEY, No. 112, ante.*

**592. How far restraint of trade material.**—*HEPWORTH MANUFACTURING CO. v. RYOTT*, No. 589, *ante*.

**593. Breach of agreement—Injunction—Whether interlocutory injunction granted.**—An opera singer by agreement dated only as to the year 1870 agreed to sing at a certain theatre for the whole London season, & nowhere else in the kingdom of Great Britain. "*pendant l'annee*" 1871, without the written consent of the employer. The singer's salary did not extend beyond the season which ended on Aug. 5. On motion for injunction to restrain him singing elsewhere after the season was over but during the year 1871;—*Held*: the ct. would not under the circumstances of the case grant an injunction on an interlocutory application.—*MAPLESON v. BENTHAM* (1871), 20 W. R. 176.

**594. — Whether lying against performer & employer.**—*READ & BAILEY v. PONCHERY & CRYSTAL PALACE CO., LTD.* (1899), 43 Sol. Jo. 728.

**595. — Agreement for inclusive services—Representation of sketch on cinematograph.**—Pltfs., who were music hall proprietors, made an agreement with deft. by which it was provided that deft. should give pltfs. his exclusive services & that he should not permit any colourable imitation, representation, or version of his performance to be given within a certain radius. It was alleged by pltfs. that deft. permitted the representation of one of his sketches on a cinematograph at certain picture palaces within the prescribed area, & they brought an action against him to restrain him from this alleged breach of the agreement:—*Held*: on the evidence, deft. had taken no part

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in the alleged reproduction of his performance, & therefore he was entitled to judgment.—*LONDON THEATRE OF VARIETIES, LTD. v. PAANS* (1911), 31 T. L. R. 75, C. A.

#### SUB-SECT. 3.—AUCTIONEER AND ESTATE AGENT.

**596. Breach of agreement—Covenant restraining trade within certain area—Acting as agent outside prohibited area—For firm also carrying on business within.]—FAIRBROTHER v. ENGLAND** (1891), 40 W. R. 220; 36 Sol. Jo. 139.

**597. — Taking office outside prohibited area—Acting as agent within.]—HADSLEY v. DAYER-SMITH**, No. 559, *ante*.

#### SUB-SECT. 4.—AUTHOR.

**598. Validity or reasonableness of restraint—Agreement with proprietor of theatre—Not to write play for any other theatre.]—MORRIS v. COLMAN**, No. 586, *ante*.

**599. — Agreement with newspaper proprietor—Not to write for any other paper.]—S.**, proprietor of a weekly newspaper, by a letter to F., an author, agreed that F. should write two tales, extending over one year, at £10 per week for each number, to contain about the same quantity as was sent under a former similar engagement, & to receive the first number on Apr. 22, 1855, & to continue to receive one number weekly during one year, conditionally that F. should not write for any other newspaper published at less than 6d. F. accepted, received £20 deposit, & wrote regularly for some weeks; then went to Paris, sent an abrupt conclusion of the then current tale in a small quantity of manuscript, & refused to proceed with his engagement with S., & entered into another engagement with C. S. thereupon stopped his payments to F., & employed another author to conclude the half finished tale:—*Held*: the condition as to F. not engaging elsewhere was valid.—*STIFF v. CASS*, *ib.* (1856), 2 Jur. N. S. 318.

**600. — Option to publisher to publish subsequent works.]—Pltfs.** entered into a written agreement with deft., Mrs. E., an authoress, for the publication of a novel already written by her, & by the same agreement secured an option to publish her "next three books" upon certain royalty terms therein contained. The agreement provided that if they exercised their option in the case of any of her next three books, pltfs. were during the legal term of the copyright to have the exclusive right of producing & publishing the book within a defined area together with the entire control of the publication & terms of sale of the book, & also the right of suing in respect of infringe-

ment of copyright. The agreement also provided that Mrs. E. was not without the consent of pltfs. to publish, or allow to be published, any abridgment, translation or dramatised version of the books, & that on the determination of the agreement in certain events therein specified the right to print & publish the book was to revert to Mrs. E. who was then to be entitled to be registered as the proprietor thereof. In breach of this agreement Mrs. E. agreed with defts. C. & Co., a rival firm of publishers, who had notice of pltfs.' agreement, to print & publish her next novel. In an action by pltfs. to restrain both defts. from publishing the novel until it had been first submitted to pltfs. for their acceptance:—*Held*: the agreement was not a contract of personal service but was a contract by Mrs. E. to sell the products of her labour or industry, of which the ct. would grant specific performance by restraining her from disposing of the novel in breach of her agreement with pltfs.—*MACDONALD v. EYLES*, [1921] 1 Ch. 631; 90 L. J. Ch. 248; 124 L. T. 625; 37 T. L. R. 187; 65 Sol. Jo. 275.

*Annotation:—Ridd. Performing Right Soc. v. London Theatre of Varieties*, [1922] 2 K. B. 433.

#### SUB-SECT. 5.—BAKER.

**601. Validity or reasonableness of restraint—One mile.]—RANNIE v. IRVINE**, No. 321, *ante*.

**602. — Ten miles—Three years.]—BROMLEY v. SMITH**, No. 477, *ante*.

**603. — Agreement not to supply customers existing at time of agreement.]—RANNIE v. IRVINE**, No. 321, *ante*.

**604. — Agreement with association.]—TOBY v. MAJOR** (1899), 13 Sol. Jo. 778.

**605. — Agreement relating to business not carried on at time of agreement.]—BROMLEY v. SMITH**, No. 477, *ante*.

**606. Breach of agreement—Agreement not to open new business—Business opened by servant.]—CLARK v. HOWARD**, No. 248, *ante*.

**607. — Agreement not to carry on business similar to fully licensed restaurant.]—DREW v. GUY**, No. 515, *ante*.

#### SUB-SECT. 6.—BANK EMPLOYEE.

**608. Validity or reasonableness of restraint—Any other Eastern bank—Business carried on in some Eastern countries.]—Pltf.**, a bank clerk in the employment of defts., subscribed for many years to defts.' officers' pension fund. One of the rules under which the fund was administered provided that "no subscriber leaving the service of the bank . . . for the purpose of entering the service of any other Eastern Exchange bank shall be entitled to any return in respect of his contributions to the fund. . . ." In Dec. 1919, pltf. left defts. for the purpose of entering the service of

#### PART V. SECT. 9, SUB-SECT. 4.

*g. Validity or reasonableness of restraint—Agreement with publisher—Not to publish a similar work.]—Deft. G.* wrote a book for school use, the copyright in which he assigned to pltf., & agreed not to publish any similar work during the subsistence of the agreement. He subsequently wrote for defts. F. Bros. a book on the same lines, adopting the same system, repeating the same kind of lessons, intended practically for the same class of pupils, & F. Bros. published it at a like low price:—*Held*: the agreement was not an unreasonable restraint of trade; & defts.

1 Bros. should be restrained by injunction from publishing the second book.—*EDUCATIONAL CO. OF IRELAND, LTD. v. FALLON BROTHERS, LTD.*, & *OKZ.* [1919] 1 L. R. 62; 53 L. T. 41.—*IR.*

#### PART V. SECT. 9, SUB-SECT. 5.

*h. Validity or reasonableness of restraint—Ten years & eight miles.]—Deft.* by an agreement in writing sold the goodwill of his bakery business, together with the tools, plant, & stock-in-trade to pltf. The agreement contained (*inter alia*) the following clause: "The vendor shall not, during the period of ten years from the date hereof

within the radius of eight miles from the premises where the said business of baker is now carried on by the vendor carry on conduct or assist in carrying on or conducting or be concerned or interested directly or indirectly in the business of selling or in manufacturing bread or that class of goods known to the bakery trade as smallgoods." Deft. engaged himself as a journeyman baker to a baker carrying on business within the radius of eight miles:—*Held*: the restriction was not void as being in restraint of trade.—*GRANTHAM v. CAMPBELL*, (1910), 29 N. Z. L. R. 1019.—*N.Z.*

& obtained a situation with another bank which was admittedly an Eastern Exchange Bank within the meaning of the rule. He then claimed to be credited by defts. with the amount of his contributions to the pension fund, on the ground (*inter alia*) that the rule depriving him of the right to recover them was void as in restraint of trade:—*Held*: the rule was not wider than was reasonably necessary to protect defts., & therefore it was not void as being in restraint of trade, & the action failed.—*SPENCE v. MERCANTILE BANK OF INDIA, LTD.* (1921), 37 T. L. R. 745, C. A.

## SUB-SECT. 7.—BREWER.

**609. Breach of agreement—Agreement not to carry on business of common brewer—Carrying on business of retail brewer.**—Carrying on the business of a retail brewer, held, to be no breach of a covenant not to carry on the business of a common brewer, or retailer of beer.—*SIMONS v. FARREN* (1831), 1 Bing. N. C. 126; 4 Moo. & S. 672; 131 E. R. 1065; *subsequent proceedings*, 1 Bing. N. C. 272.

**610. Validity or reasonableness of restraint—Agreement not to carry on business—Agreement unlimited in area—Limited in time.**—A covenant by the lessor of a brewery, that he will not "during the continuance of the demise, carry on the business of a brewer or merchant, or agent for the sale of ale, etc., in S. or elsewhere, or in any other manner howsoever be concerned in the business," is void, as being a general restraint of trade.—*HINDE v. GRAY* (1840), 1 Man. & G. 195; 1 Scott, N. R. 123; 9 L. J. C. P. 253; 1 Jur. 392; 133 E. R. 302.

*Annotations*.—**Distd.** *Green v. Price* (1815), 13 M. & W. 695. **Appl.** *Allsopp v. Wheatcroft* (1872), L. R. 15 Eq. 59. **Expld.** *Bonhill v. Bonhill* (1880), 11 Ch. D. 351; *Nordenfelt v. Maxlin Nordenfelt Guns & Ammunition Co.* (1891) A. C. 535. **Mentd.** *Brace v. Hill* (1812), 10 M. & W. 735; *Wright v. Howe*, (1813) 1 L. T. O. S. 314; *Yates v. Tearle* (1814), 8 Jur. 774; *Slade v. Hawley* (1815), 13 M. & W. 757; *Dawson v. Wrench* (1819), 3 Lxch. 359; *South Eastern Ry. v. Ry. Comrs.* (1881), 6 Q. B. D. 586; *White v. Southland Hotel Co.* (1897), 45 W. R. 431.

**611.** ———— Deft. was employed as manager by plffs., who were the manufacturers of certain products used in brewing, & he covenanted with them that he would not, for a period of five years after leaving their employment, enter or be in the employment of any house carrying on a similar business, or carry on or be engaged in any such business, excepting any business not competing or calculated to compete with plffs.' business. Plffs. had a large business in England, & were extending their business to other countries in different parts of the world. Within five years after leaving plffs.' employment deft. entered into the employment of a person carrying on a similar business in England competing with plffs. —*Held*: the covenant was not unreasonable as being too wide, & was therefore valid.—*WHITE, TOMKINS & COURAGE v. WILSON* (1907), 23 T. L. R. 469.

## PART V. SECT. 9, SUB-SECT. 8.

**k. Construction of agreement—"Carrying on business"—Business carried on in name of another.**—*KERR v. BOWDEN* (N. W. T.), (1905), 1 W. L. R. 28.—*CAN.*

## PART V. SECT. 9, SUB-SECT. 9.

**l. Validity or reasonableness of restraint—Covenant not to trade within certain limits.**—Defts. sold his business to plff. & covenanted for ten years

not to carry on such business in Melbourn, Ballarat, Echuca & other places or in any place in Victoria or New South Wales in which plff. might be carrying it on. In an action for breach in carrying it on between Melbourn, Ballarat & Echuca, deft. demurred on the ground of the contract being in restraint of trade:—*Held*: the breach only should be looked to & as to the places named in the breach the restriction was not too large.—*ROBERTSON v. ENGLISH* (1867), 4 W. W. & A. R. 238

**612.** ——— Agreement not to solicit orders for all—No area specified.—*ALLSOPP v. WHEATCROFT*, No. 282, *ante*.

## SUB-SECT. 8.—BUTCHER.

**613. Validity of restraint—Restraint of person from whom purchases to be made.**—A bond with condition not to buy sheep's feet off any other but such & such, & not above such a quantity, is void; for it is in restraint of trade.—*THOMPSON v. HARVEY* (1688), 1 Show. 2; Comb. 121; Holt, K. B. 674; 89 E. R. 408.

*Annotations*.—**Refd.** *Michel v. Reynolds* (1711), 1 P. Wms. 181; *Edwards v. Brown* (1831), 1 Cr. & J. 307. **Mentd.** *Collins v. Blanton* (1767), 2 Wils. 311.

**614.** ——— Covenant not to carry on business within five miles.]—A butcher, on assigning, for the residue of a term, certain premises upon which he has carried on his business, together with the fixtures & the goodwill of the trade, covenanted with the purchaser, that he would not at any time thereafter, either by himself, or as agent or journeyman for another, set up, exercise, or carry on, or be employed in, the trade or business of a butcher, within five miles from the premises thereby assigned:—*Held*: (1) not an unreasonable restraint, either in respect of time or in respect of distance; (2) the covenant did not cease to be a binding covenant, on the expiration of the term, or on the covenantor's ceasing, by himself or his assigns, to carry on the business assigned.

If the covenant is binding to its full extent, when made, its signification cannot be varied by any subsequent occurrence: & to hold otherwise would be to render its import uncertain & to impair its efficiency for that protection which the law contemplates as just (*per Cur.*).—*ELYES v. CROFTS* (1850), 10 C. B. 241; 19 L. J. C. P. 385; 14 Jur. 855; 138 E. R. 98; *sub nom.* *CROFTS v. ELYES*, 15 L. T. O. S. 393.

*Annotations*.—**1st to (1) Apprvd.** *Jacoby v. Whitmore* (1883), 49 L. T. 335. **As to (2) Consd.** *Townsend v. Jarnan*, (1900) 2 Ch. 698. **Refd.** *Wright v. Chappell* (1869), 20 L. T. 369. **Contradictd.** *Reid, Davies v. Davies*, (1887), 36 W. R. 86; *Forinly v. Barker*, (1903) 2 Ch. 539.

**615.** ——— Covenant not to supply persons who may be customers.]—*CHARD v. HAMMOND* (1904), 18 Sol. Jo. 773.

**616. Construction of agreement—Duration of restraint—Assignment of goodwill.**—*ELYES v. CROFTS*, No. 614, *ante*.

## SUB-SECT. 9.—CARRIER.

**617. Validity or reasonableness of restraint—Covenant not to compete in business on same route—No time limit.**—M. executed a deed reciting that he had entered into treaty with A. for the disposal of the business of a carrier from London to certain places in Norfolk & Suffolk, & from those places to London, which M. carried on & intended relinquishing to A.; that it was thereupon stipulated that M., his heirs, exors., & admors.

—*AUS.*

**m.** ——— Five years.—*Construction of covenant—Not to run coaches in opposition to plaintiff in Victoria.*—*GRACE v. CARRICK* (1888), 14 V. L. R. 533.—*AUS.*

**n.** ———— *Woodville v. McCAUSILL* (1907), 26 N. Z. L. R. 1032.—*N.Z.*

**o.** ——— To ship by plaintiff's steamers.]—A contract by a corpora to ship all goods consigned to them at

t. *Validity or reasonableness of restraint*—One year—"Do certain things which might injure plaintiff's business."

627. — — — United Kingdom, Germany or France—Tyres.]—CONTINENTAL TYRE & RUBBER (GREAT BRITAIN) CO., LTD. v. HEATH, No. 488, *ante*.

628. — — — Two years—Agreement not to be concerned in sale of Burton beer—Other than that brewed by covenantee.]—ALLSOPP v. WHEATCROFT, No. 282, *ante*.

629. — — — — Hundred miles—Malt liquors.]—ROGERS v. MADDOCKS, No. 417, *ante*.

630. — — — Three years—Fifteen miles—Necessity for consent for acceptance of any situation.]—PERLS v. SAALFELD, No. 450, *ante*.

631. — — — — Agent for foreign anilin dye manufacturer.]—BADISCHE ANILIN UND SODA FABRIK v. SCHOTT, SEGNER & CO., No. 269, *ante*.

632. — — — — Twenty-five miles—Clothing.]—MASON v. PROVIDENT CLOTHING & SUPPLY CO., LTD., No. 143, *ante*.

633. — — — Five years—Twenty miles—Restraint on business other than those travelled in.]—MORSE v. FOWLER (1899), 44 Sol. Jo. 89.

634. — — — — United Kingdom—Business confined to certain English counties.]—Deft. entered into the service of several cos., whose combined businesses covered the area of the United Kingdom & Ireland, as traveller, being engaged by H. acting for & on behalf of one co. called the principal co., & also on behalf of the others, called the subsidiary cos. By an agreement deft. agreed to serve both the principal & subsidiary cos. in such capacity as should be from time to time appointed, & that he would not in the United Kingdom enter the service of any competing firms within five years from the termination of his employment with the principal & subsidiary cos. without the consent in writing of the principal co. It was also provided that all restrictions & conditions were to be as if made with each co., & could be enforced by that particular co. in whose service deft. happened to be. Deft. had been in the service of the principal co., but just before the agreement was signed he was transferred to one of the subsidiary cos., whose business was confined to the three northern counties of England. He was shortly afterwards dismissed, & then entered the service of a competing firm: *Held*: the agreement deft. had entered into was only a contract between deft. & the individual co. into whose service he entered; therefore it was a contract between him & the subsidiary co. alone & was too wide as to space & therefore void; & the fact that all the cos. had a common management & were interested in each other's business did not affect the case, as the contract must be for the protection of the particular business in which the man was employed.

A man who has no interest in the business at all cannot take a covenant from a man that he will not enter into that particular business; it does not concern him, and it is against public policy, because it restricts trading in the United Kingdom (FARWELL, L.J.).—LEETHAM (HENRY) & SONS, LTD. v. JOHNSTONE-WHITE, [1907] 1 Ch. 322; 76 L. J. Ch. 304; 96 L. T. 348; 11 Mans. 162; *sub nom.* LEETHAM & SONS, LTD. v. WHITE, 23 T. L. R. 251, C. A.

*Additions*: — *Consd.* Dottridge v. Crook (1907), 23 T. L. R. 644; Morris v. Saxelby, [1915] 2 Ch. 57. *Apld.* British Concrete Co. v. Scheff, [1921] 2 Ch. 563. *Refd.* Attwood v. Laumont, [1920] 3 K. B. 571.

—Deft., who was employed by plffs. as a travelling salesman, in his agreement with them covenanted that he would not, for one year after the termination of his employment, do certain things which might injure plffs.' business.

In an action for damages for breach of the covenants:—*Held*: the covenants contained in three of the clauses were illegal or too wide, & were unenforceable.—DOMINION ART CO., LTD. v. MURPHY (1923), 54 O. L. R. 332.—CAN.

635. — — — — Agreement not to deal with customers in any commodity.]—By an agreement between a firm of hop merchants & their traveller, the latter was bound to travel, solicit orders, & collect moneys for the firm from their customers who were mentioned in a book signed by the employers & the traveller, which book was to be the property of the firm & to be delivered up by the traveller on the determination of his employment & at such other times as might be required by his employers, who might at any time add to or withdraw from the book the name of any person; & in the case of such withdrawal the traveller was to have no interest in any business thereafter done with the person whose name might be so withdrawn. The traveller was prohibited without the written consent of his employers from calling upon, soliciting orders, or receiving money from any persons other than those whose names appeared in the book, & was also prohibited for a period of five years after the determination of the agreement directly or indirectly, either as principal, agent or servant, from soliciting orders for any goods or marketable commodity whatsoever from or calling upon any brewers, customers, or persons from whom he might have obtained or solicited orders, or upon whom he might have called whilst in the employ of the firm. The firm dealt with hops only, & the traveller whilst in their employ was concerned only with hops. The book mentioned in the agreement contained at the date of the determination of the traveller's engagement with the firm the names of about 100 customers of the firm. After the determination of such engagement the traveller proposed to enter the service of malsters & to solicit orders for malt from (*inter alia*) persons from whom he had solicited orders for hops when in the employment of the hop merchants. On a motion by the hop merchants to restrain him from so doing as being a breach of his agreement with them: *Held*: (1) the restrictive clause was one which in the interests of the public was not reasonable; (2) it was wider than was necessary for the protection of plffs.' business, & was therefore void.—MORRIS & CO. v. RYLE (1910), 103 L. T. 545; 26 T. L. R. 678; 51 Sol. Jo. 748, C. A.

— — — — Compare No. 641, *post*.

636. — — — — Fifty miles from trading station—Colonial agent.]—Deft. entered into an agreement with plffs. to serve them for five years as super-vising agent at certain of their stations in West Africa. Plffs. were export & import merchants engaged in the West African trade, bankers, & agents. The agreement contained the following restrictive clause: "The agent agrees that he will not, either in Africa or in Europe or elsewhere, at any time during the five years next following the termination for any reason of his employment under this agreement, directly or indirectly, either alone or in partnership with or as agent, manager, clerk, servant, or director, of any person or persons or co. or cos. or otherwise howsoever, & whether for his own benefit or for the benefit of any other person or persons, or co. or cos. (a) assist or engage in the business of a trader or merchant competing in any way with any business at any time during his employment carried on by the co. within the radius of 50 miles from a trading

a. — — — WILLIAMS v. MASTERS, WILLIAMS v. WEBB (1912), 31 N. Z. L. R. 1118.—N.Z.

b. — — — Twelve years—Agreement for ten years' employment.]—By agreement in writing, dated Apr. 24, 1889, deft. was employed as a commercial

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station in West Africa now or during his employment established, owned, or managed by the co., or (b) trade or deal in relation to or in connection with any such competing business with any person or persons, co. or cos. now or at any time hereafter during his employment a customer or customers of the co. otherwise dealing with the co., or solicit or endeavour to obtain the custom or connection of any such person or persons, co. or cos., so far as concerns goods, merchandise, or produce supplied, bought, or dealt within the course of the business of the co. Provided that this clause shall only be enforceable so long as the co. or its assigns enforcing the same shall continue to carry on or be carrying on such business or part thereof:—*Held*: the restriction imposed by the clause was necessary for the protection of plffs.' business, & was not void as being in restraint of trade.—*MILLERS, LTD. v. STEEDMAN* (1915), 81 L. J. K. B. 2057; 113 L. T. 538; 31 T. L. R. 413, C. A.

**637.** — Five miles of any station or port serving district supplied by covenantant.—*CLARKE, SHARP & CO., LTD. v. SOLOMON*, No. 491, *ante*.

**638.** — Ten years.—*EHKMAN v. BARTHOLOMEW*, No. 297, *ante*.

**639.** — Fourteen years—Thirty miles of two specified centres—Centres thirty miles apart.—*HOOPER & ASHBY v. WILLIS*, No. 490, *ante*.

**640.** — Life of covenantor—Fifty miles—Wines & spirits.—An agreement by a clerk & traveller to a wine & spirit merchant that he will not during his life engage in a business of a similar character within a distance of 50 miles from his employer's place of business is not invalid as being in unreasonable restraint of trade, or in excess of what was required for the reasonable protection of the employer in his business.—*PARSONS v. COTTERILL* (1887), 56 L. T. 839; 51 J. P. 679.

*Annotation*.—*Reid, Haynes v. Doman*, [1899] 2 Ch. 13.

**641.** — No time limit—Agreement not to carry on business with customers—Similar business as covenantant.—(1) An agreement for the employment of deft. as a traveller provided, that he was to "call upon & solicit orders" for all articles in the way of plffs.' business of antiseptic manufacturers, & in the event of the termination of the agreement, that he should not, either on his own account or for any employer, "call upon, or directly or indirectly solicit orders from, or in any way deal or transact business with," any one, who had, while the agreement was in force, been a customer of plffs. After the termination of the agreement, deft. entered the employment of rival antiseptic manufacturers, & as their traveller, called upon & solicited orders from some of plffs.' customers. On motion by plffs. to restrain deft. from committing any further breach of the agreement:—*Held*: the meaning of the agreement, according to its true construction, was to prevent deft., after leaving plffs.' employ, from transacting, with persons who had been customers of plffs. while the agreement was in force, business of a similar kind to that carried on by plffs.; this was not a greater restraint than was necessary for the protection of the employers; & the agreement was therefore valid & could be enforced to this extent.

Agreements in restraint of trade will be con-

strued by the ct. in the same manner as in any other agreements.

Stipulations of this kind are looked upon as advantageous to the public if so restricted as not to go beyond what is needed for the protection of the employer. They ought not then to be construed with or bias as being *prima facie* illegal, but construed fairly (*KAY, L.J.*).

The first thing we have to do is to ascertain the real meaning of the parties by construing the agreement without any leaning either way (*LINDLEY, L.J.*).

(2) The contention that you are to treat a restraint of trade as *prima facie* bad & throw upon the person supporting it the onus of showing that it is reasonable is introducing a wholly unsound principle into the construction of documents (*LINDLEY, L.J.*).—*MILLS v. DUNHAM*, [1891] 1 Ch. 576; 60 L. J. Ch. 362; 61 L. T. 712; 39 W. R. 289; 7 T. L. R. 238, C. A.

*Annotations*.—(1) to (1) *Apld. Moonie v. Fenestre* (1892), 61 L. J. Ch. 737. *Reid, Rogers v. Maddocks*, [1892] 3 Ch. 316; *Maxim Nordenfellt Guns & Ammunition Co. v. Nordenfellt*, [1893] 1 Ch. 630; *Hood & Moore's Stores v. Jones* (1899), 81 L. T. 169; *Millers v. Steedman* (1915), 81 L. J. K. B. 2057; *Whitmore v. King* (1918), 87 L. J. Ch. 617. As to (2) *Reid, Haynes v. Doman*, [1899] 2 Ch. 13; *Morris v. Rylo* (1910), 103 L. T. 545; *North Western Salt Co. v. Electrolytic Alkali Co.* (1912), 107 L. T. 439; *Eastes v. Russ*, [1911] 1 Ch. 468; *Attwood v. Lamont*, [1920] 3 K. B. 571.

—Compare No. 635, *ante*.

**642.** — United Kingdom—Advertising agent.—A covenant by an employee of an advertising agent that he would not carry on, or be engaged directly or indirectly in any similar business in any part of the United Kingdom, is too wide, & therefore void.—*STUART & SIMPSON v. HALLHEAD* (1911), 55 Sol. Jo. 598.

**643.** — Agreement to pay sum of money Before acting for rival firm.—*MUMFORD v. GETHING*, No. 418, *ante*.

**644.** — Agreement not to solicit customers—In specified district or "any district whatsoever"—Recovery of consideration for performance.—An action was brought to recover arrears of an annuity, the consideration for which was an agreement by the annuitant, a commercial traveller in the hop trade, "that he would not, at any time thereafter, either on his own account or on account of any other person or persons whomsoever, excepting defts., solicit orders for hops from any of the customers in the West of England, or in South Wales, or in any district whatsoever":—*Held*: without deciding whether the restraint of trade, so far as it regarded the West of England & South Wales, could be enforced; plff., who had performed his part of the contract, was entitled to recover the consideration due in respect of it.—*BISHOP v. KITCHIN* (1868), 38 L. J. Q. B. 20.

*Annotations*.—*Consd. Evans v. Heathcote*, [1918] 1 K. B. 414. *Dtd. Rawlings v. General Trading Co.*, [1921] 1 K. B. 635.

**645.** Construction of agreement—Agreement not to carry on business with customers—Business similar to that of covenantant.—*MILLS v. DUNHAM*, No. 611, *ante*.

**646.** — "Any trade or business"—Trade or business in competition with covenantor.—By an agreement, dated Aug. 1880, & made between plff., who was described as an agent of commission merchant carrying on business under the style of M. & co., of the one part, & deft. F. of the other part, deft. agreed to enter plff.'s service as clerk

traveller by plff. for ten years, from Apr. 1, 1889, upon the terms (*inter alia*) that deft. would not within twelve years from Apr. 1, 1889, or for two years after the termination of his

employment, if same should continue beyond ten years, engage in business similar to that carried on by plff., or act as commercial traveller for any person or body, carrying on similar

business, providing that such restriction should only extend to such counties in Ireland as deft. should travel in for plff. at any time during his employment: *Held*: a reasonable

at a certain salary. Clause 4 of the agreement provided as follows: "In case the employment of P. shall be determined by any cause whatever, he shall not during the period of five years thence next following carry on or engage in, either as principal, agent, clerk, or otherwise, any trade or business in the United Kingdom in connection with any kind of goods of Continental manufacture which the firm of M. & co. shall have dealt in at any time previously to such determination." In 1892 deft. left pltf.'s employment & embarked in a rival business, & pltf. applied for an injunction restraining him from carrying on any business in contravention of the above agreement. Deft. contended that the agreement was unreasonable & oppressive, & was void, as being in restraint of trade:—*Held*: the words "any trade or business" in the covenant did not refer to any retail trade in which such Continental goods might happen to be sold, but to trade or business of a commission merchant; having regard to pltf.'s business, the restriction that deft. should not carry on such business in the United Kingdom was not unreasonably wide; the words "at any time previously" meant during the time of deft.'s employment; & therefore that the restraint was not wider than was reasonably necessary for pltf.'s protection, & the covenant was not void.—*MOENICH v. FENESTRE* (1892), 61 L. J. Ch. 737; 67 L. T. 602; 8 T. L. R. 804; 2 R. 102, C. A.

*Annotation*:—*Reid. Hood & Moore's Stores v. Jones* (1899), 81 L. T. 169.

647. — Sale of beer & malt liquors.—Includes sale by retail.]—*ROGERS v. MADDOCK*, No. 417, *ante*.

648. — Agreement with association of companies.]—*LEETHAM (HENRY) & SONS, LTD. v. JOHNSTONE-WHITE*, No. 634, *ante*.

649. — "London."—*SUTCLIFFE & BINGHAM, LTD. v. HOLWILL* (1912), 131 L. T. Jo. 156.

650. Breach of agreement—Agreement not to travel for porter, ale, & spirit merchant—Employment by brewer.]—In an action on a bond, conditioned that deft. should not "travel for any porter, ale, or spirit merchant, as agent, collector, or otherwise" :—*Held*: the condition of the bond was not broken by deft.'s entering into the service, as traveller, of a brewer.—*JOSELYN v. PARSON* (1872), L. R. 7 Exch. 127; 41 L. J. Ex. 60; 25 L. T. 912; 36 J. P. 455; 20 W. R. 316.

*Annotation*:—*Fold. Lovell & Christmas v. Wall* (1910), 103 L. T. 588.

651. — Agreement not to interfere with trade or solicit customers—Setting up rival business without soliciting customers.]—*REEVE v. MARSH*, No. 470, *ante*.

#### SUB-SECT. 12.—DENTIST.

652. Validity or reasonableness of restraint—One mile—Covenantor having same surname as that acquired by covenantee.]—*SMEDLEY'S, LTD. v. SMEDLEY* (1918), [1921] 2 Ch. 580, n.

*Annotation*:—*N.F. British Concrete Co. v. Schell*, [1921] 2 Ch. 563.

653. — Two hundred miles.]—*HORNER v. GRAVES*, No. 181, *ante*.

654. — London or any place in England where

covenantor had practised.]—*MALLAN v. MAY*, No. 258, *ante*.

655. Breach of agreement—Agreement on dissolution of partnership—Not to see any patients of remaining partners—Attendance on former personal patients.]—Pltf. practised as a dentist in partnership with defts. By the articles of partnership in the event of the death or retirement of any of the partners the partnership should continue between the surviving or remaining partners. By a subsequent agreement pltf. agreed to retire from the firm, defts. taking over the management & control of the practice; & pltf. agreed not to, during the term of the late partnership, see any patients of defts. professionally without the latter's consent:—*Held*: this did not preclude pltf. from attending on those persons who had been his own patients exclusively while he was a partner.—*HARRIS v. MANSBRIDGE* (1900), 17 T. L. R. 21.

656. — Whether interim injunction granted—Defendant undertaking to keep account.—In an action by certain members of a partnership firm, which had been dissolved, to restrain another member of the late firm from (*inter alia*) attending the patients of the firm at his private house:—*Held*: upon the true construction of the restrictive clause in the partnership deed, the ct. would not grant an interim injunction, deft. undertaking to keep an account.—*CLIFFORD v. PHILLIPS* (1907), 51 Sol. Jo. 748.

#### SUB-SECT. 13.—DOCTOR AND SURGEON.

657. Validity or reasonableness of restraint—Two miles—Attendances within prohibited area—On invitation.]—*ROBERTSON v. BUCHANAN*, No. 671, *post*.

658. — Two miles & a half—Agreement not to reside & practice—Sale of goodwill.]—(Covenant on an indenture, whereby deft. & pltf. agreed to enter into partnership as surgeons for the term of three years; & deft. covenanted that after the determination of the partnership, he would not at any time practice as a surgeon at No. 28, Dorset Crescent, or within the distance of 2½ miles the roof, measuring by the usual streets or ways, of approach thereto, nor reside within the distance of 2½ miles of No. 28, Dorset Crescent, without pltf.'s consent, nor would attempt to prevail on any of the patients of deft., or of the partnership, to withdraw from pltf., or to employ any other medical attendant in prejudice of pltf., but would in all things endeavour to promote the business & advantage of pltf. as a surgeon, so far as it was in the power of deft., & as he could reasonably & properly be required to do; & that, if deft. should in any respect, break or infringe this stipulation, he should pay pltf. £1,000 as & for liquidated damages, & not by way of penalty. Breach, that after the expiration of the term, deft. did reside within the distance of 2½ miles of the premises, No. 28, Dorset Crescent. The plea traversed this allegation; & after verdict for pltf.:—*Held*: (1) the distance was to be measured, not by the most frequented public ways, but by any of the usual public ways; (2) the covenant not to reside at any time within the prescribed distance was not unreasonable or void.—*ATKYNs v. KINNIER* (1850),

agreement for the protection of the interests & trade of pltf. as employer, & therefore valid.—*CUSSEN v. O'CONNOR* (1893), 32 L. R. Ir. 330.—*IR.*

#### PART V. SECT. 9, SUB-SECT. 13.

a. Validity or reasonableness of re-

straint *New South Wales*.]—An agreement restricted a doctor of medicine from practising his profession in New South Wales:—*Held*: void as being against public policy.—*BURROD v. ALLOWAY* (1871), 10 N. S. W. S. C. R. (Eq.) 9.—*AUS.*

d. — Three years—*Sussex County*.]—*RYAN v. McNICHOL* (1898), 34 N. B. R. 391.—*CAN.*

e. — Eight miles.] Pltf. S. & W. — S. being a licensed medical practitioner, & W. an apothecary purchased the goodwill of deft.'s



*Sect. 9.—Particular trades, businesses and professions: Sub-sects. 13, 14 & 15.]*

4 Exch. 776; 19 L. J. Ex. 132; 154 E. R. 1429; sub nom. *ATKINS v. KINNEAR*, 14 L. T. O. S. 353.

*Annotations:—As to (1) Reifd. Dugman v. Walker (1859), John. 446. As to (2) Reifd. Maxim Nordenfellt Guns & Ammunition Co. v. Nordenfellt, [1893] 1 Ch. 630. Generally, Reifd. Elves v. Crofts (1850), 10 C. B. 241; Reynolds v. Bridge (1856), 6 E. & B. 528; Mercer v. Irving (1858), E. R. & E. 563; Moullet v. Cole (1872), L. R. 8 Exch. 32. **Mentd.** Lake v. Butler (1855), 24 L. J. Q. B. 273; Bonsall v. Byrne (1867), 16 W. R. 372; *Re Newman, Ex p. Capper* (1876), 4 Ch. D. 724; Wallis v. Smith (1882), 21 Ch. D. 243; Stegmann v. O'Connor (1899), 80 L. T. 231.*

**659. — Five miles—Three years.]—**EVERTON v. LONGMORE (1899), 15 T. L. R. 356, C. A.

**660. — Seven miles.]—**A. & B. entered into the following agreement: "In consideration that A., of Macclesfield, surgeon & apothecary, will engage me, the undersigned B., as assistant to him as a surgeon, etc., I, the said B., promise the said A., that I will not at any time practice as surgeon or apothecary at Macclesfield, or within seven miles thereof, under a penalty of £500: & I, the said A., do hereby agree with the said B. to engage the said B. as an assistant to me as a surgeon, etc., on the terms aforesaid." In *assumpsit* by A. against B. for a breach of this agreement, the declaration averred that A. did, in pursuance & performance of the agreement, engage B. as assistant to him A. as surgeon, etc., according to the terms, true intent, & meaning of the agreement:—*Held*: there was a sufficient consideration for the promise of B., & the contract was not void as an unreasonable restraint of trade.

It is now, however, settled that the ct. will not inquire into the adequacy of the consideration (*COLTMAN, J.*).—*SAINTER v. FERGUSON* (1849), 7 C. B. 716; 18 L. J. C. P. 217; 13 L. T. O. S. 72; 13 Jur. 828; 137 E. R. 383; *subsequent proceedings*, 1 Mac. & G. 286, L. C. *Annotation:—Reifd. Mercer v. Irving (1858), 27 L. J. Q. B. 291.*

**661. — Ten miles Fourteen years.]—**In consideration that A. would take B. as an assistant in his business as a surgeon, for so long time as it should please A., B. agreed not to practise on his own account for fourteen years within ten miles of the place where A. lived, & gave a bond for this purpose; this bond was held good in law.

A bond in restraint of trade cannot be arbitrarily taken & without consideration; some consideration must appear (*LORD KENYON, C.J.*).

It was objected that the limits within which deft. engaged not to practise are unreasonable; but I do not see that they are necessarily unreasonable, nor do I know how to draw the line. Neither are the public likely to be injured by an agreement of this kind, since every other person is at liberty to practise as a surgeon in this town (*LORD KENYON, C.J.*).—*DAVIS v. MASON* (1793), 5 Term Rep. 118; 101 E. R. 69.

*Annotations:—Apld. Gravelly v. Burnard (1871), L. R. 18 Eq. 518. Reifd. Wickens v. Evans (1829), 3 Y. & J. 318; Horner v. Graves (1831), 7 Bing. 735; Hiltcock v. Coker (1837), 6 Ad. & El. 438; Whitaker v. How (1841), 3 Beav. 383; Mallan v. May (1843), 11 M. & M. 653; Nordenfellt v. Maxim Nordenfellt Guns & Ammunition Co., [1894] A. C. 535; Dowden & Pook v. Pook, [1901] 1 K. B. 15.*

practice as a medical man at I., deft. agreeing not to practice within eight miles of that place. In an action on this agreement:—*Held*: there was nothing illegal in plffs. entering into partnership; & no intention could be inferred that W. should practice physio contrary to the statute; & that the fact of his not being licensed could therefore form no defence.—*SWAN & WALKER v. SCOTT* (1864), 23 U. C. R. 434.—**CAN.**

**l. — — — Whether counted from boundary of prohibited area.]—**ORFORD v. MOORE (1908), 27 N. Z. L. R. 222.—**N.Z.**

**g. — Five miles—Five years.]—**SNIDER v. MCKELVEY (1900), 27 A. R. 339; 20 C. L. T. 298.—**CAN.**

**h. — Covenant not to open an office.]—**KING v. WILSON (1904), 25 C. L. T. 51; 11 B. C. R. 109.—**CAN.**

**662. — — — Agreement not to set up or carry on business or profession—Acting as assistant.]—**PALMER v. MALLETT, No. 542, *ante*.

**663. — — — Agreement between Harley Street physicians—Agreement restraining practice for life.]**EASTES v. RUSS, No. 432, *ante*.

**664. — Twenty miles.]—**A bond by an apothecary not to set up business within 20 miles is not illegal as in restraint of trade.—*HAYWARD v. YOUNG* (1818), 2 Chit. 407.

*Annotations:—Reifd. Proctor v. Sargent (1840), 2 Man. & G. 20; Mallan v. May (1843), 11 M. & W. 653.*

**665. Construction of agreement—Duration of restraint—Restraint unlimited as to time—Period not confined to lifetime of covenantor.]—**To debt on bond, by the exors. of the obligee, deft., after setting out on over the condition, which was, that "if the obligor should practise as a surgeon or apothecary at S., at any time, without the consent in writing of the obligee, than, if the obligor should pay the obligee £1,000, the bond should be void, otherwise it should remain in force," pleaded, that he did not practise as a surgeon or apothecary at S. without the consent in writing of the obligee:—*Held*: (1) bad, in general demurrer, for not showing the performance of the condition which rendered the bond void; (2) the period of restraint, mentioned in the condition, was not confined to the lifetime of the obligee.—*HASTINGS v. WHITLEY* (1848), 2 Exch. 611; 154 E. R. 635.

*Annotation:—As to (2) Reifd. Elves v. Crofts (1850), 10 C. B. 241.*

**666. — — — Lifetime of covenantor.]—**EASTES v. RUSS, No. 432, *ante*.

**667. — Area—Measurement of distance—Measurement by shortest route.]—**ATKINS v. KINNEAR, No. 658, *ante*.

**668. — Proviso for determination on notice—Notice determining agreement & "covenants therein."]**—Deft. agreed to act as assistant to plff. in his business of surgeon & apothecary, & by deed covenanted with plff. that he would not at any time after he should cease to act as plff.'s assistant, & whether the said indenture should be in other respects determined or not, carry on, or exercise the profession & business of a surgeon & apothecary in the town of C., or within the compass of 5 miles therefrom. The deed contained a proviso that it should be lawful for deft., by giving one month's notice, to determine the indenture & the covenants & agreements therein contained, subject nevertheless & without prejudice to any rights of action which might have accrued, or which might accrue thereafter to plff., by virtue of those presents, & for the true performance of the covenants thereinbefore contained, on the part of deft., not to carry on the profession or business of a surgeon & apothecary at C.

Deft. by due notice determined the indenture, " & the covenants & agreements therein contained," & then proceeded to practise as a surgeon & apothecary at C.

Injunction to restrain deft. granted in the terms of the above covenant.—*GILES v. HAIR* (1859), 1 L. T. 154; 5 Jur. N. S. 1381; 8 W. R. 74.

**k. — Contract not to practise as physician.]—**A. agreed on certain terms to become assistant for three years to B., who was a physician & surgeon practising at Zanzibar. The letter which stated the terms "which B. offered & which (as the ct. found) A. accepted, contained the words "the ordinary clause against practising must be drawn up." At the end of a year a disagreement took place & A. ceased to act as B.'s assistant & began to practise



**669. Breach of agreement—Agreement not to set up or carry on business or profession—Attendances within prohibited area—With knowledge & consent of covenantee.]**—*RAWLINSON v. CLARKE*, No. 581, *ante*.

**670. ——— Agreement prohibiting direct or indirect competition.]**—An agreement for the sale of a medical practice provided that the vendor would not practise or reside within a given radius, or otherwise directly or indirectly enter into competition with the purchaser. The vendor was called in by patients resident within the radius, & visited them. He did not, however, solicit such patients, & they stated that they would in no event have called in the purchaser: *Held*: the competition contemplated by the agreement was not confined to active competition, & the acts of the vendor constituted an infringement of the covenant. — *ROGERS v. DUFFY* (1887), 57 L. J. Ch. 504; 36 W. R. 496; 4 T. L. R. 98.

**671. ——— On invitation.]**—Where on the sale of a medical practice the vendor covenants not to "set up in practice" within the distance of 2 miles from the house at which he carried on the practice sold, he does not commit a breach of that covenant by attending at their request for remuneration two or three of his former patients within that distance, though it is not essential to the breach of such a covenant that the vendor should reside within the prohibited area; he may reside beyond the distance & yet commit a breach of the covenant by acts done within it. — *ROBERTSON v. BUCHANAN* (1904), 73 L. J. Ch. 408; 90 L. T. 390, C. A.

**672. ——— ———.]**—*SEWELL v. WRIGHT* (1906), 50 Sol. Jo. 223.

**673. ——— Acting as assistant.]**—*PALMER v. MALLET*, No. 542, *ante*.

**674. ——— Agreement between partners & assistant—Engagement of assistant by one partner after dissolution.]**—*PALMER v. MALLET*, No. 542, *ante*.

**675. ——— Interlocutory injunction.]**—*HAIR v. EASBY* (1887), 4 T. L. R. 112, D. C.

#### SUB-SECT. 14.—DRAPER AND HOSIER.

**676. Validity or reasonableness of covenant—Covenant not to trade in particular place—For limited time.]**—*ANON.* (1577), Moore, K. B. 115; 72 E. R. 477.

*Annotations*: — *Refd.* *Mitchel v. Reynolds* (1711), 1 P. Wms. 181; *Hitchcock v. Coker* (1837), Nev. & P. K. B. 796.

**677. ——— ———.]**—A bond conditioned to pay £20 if A. use the trade of a haberdasher within a certain place & time, is void.

This condition is against law, to prohibit or restrain any to use a lawful trade at any time, or at any place (*per cur.*). — *COLGATE v. BACHELOR* (1602), Cro. Eliz. 872; 78 E. R. 1097; *sub nom.* *CLAYGATE v. BACHELOR*, Owen, 113.

*Annotations*: — *Consd.* *Green v. Price* (1845), 13 M. & W. 693. — *Refd.* *Thompson v. Harvey* (1689), Comb. 121; *Mitchel v. Reynolds* (1711), 1 P. Wms. 181; *Mallau v. May* (1843), 11 M. & W. 653; *Nordenfolt v. Maxson Nordenfolt Guns & Ammunition Co.*, [1894] A. C. 535; *Re Hollis' Hospital Trustees & Hague's Contract* (1899), 47 W. R. 691.

**678. ——— No time limit.]**—*BRAGGE v. STANNER* (1621), Palm. 172; 81 E. R. 1031.

*Annotation*: — *Refd.* *Mitchel v. Reynolds* (1711), 1 P. Wms. 181.

In *Zanzibar* on his own account, B. sued for an injunction to restrain him: *Held*: B. was entitled to an injunction restraining A. from practising in *Zanzibar* on his own account during the period of three years. — *CHARLESWORTH*

*v. MacDONALD* (1898), 1 L. R. 23 Bom. 103. **IND.**

1. — *Agreement to practise "only during tenure of appointment as medical officer."* — *BALLACHULSH SLEATE QUARRIES, LTD. v. GRANT* (1903), 5 F. (Cl.

**679. ——— Covenant not to carry on draper's or other specified business—Covenantee carrying on more than one business.]**—*MORSE v. FOWLER* (1899), 41 Sol. Jo. 89.

**680. ——— ———.]**—*ATTWOOD v. LAMONT*, No. 131, *ante*.

**681. What amounts to breach of agreement—Covenant not to instruct other persons—Instructing covenantor's husband.]**—*CHESMAN v. NAINBY*, No. 206, *ante*.

**682. ——— Covenant not to carry on business within prohibited area—Supplying goods from outside area.]**—Upon a sale of the goodwill of a drapery & hosiery business for £170, the vendor covenanted that he would not carry on or assist in the carrying on of a business such as that carried on upon the premises assigned, within 2 miles, under the forfeiture of £200, to be recovered as liquidated damages: *Held*: this covenant was broken by the vendor's supplying from a place beyond the prescribed limit, goods, to the amount of £150, to customers residing within the district, at their solicitation. — *BRAMPON v. BEDDOES* (1863), 13 C. B. N. S. 538; 1 New Rep. 279; 7 L. T. 679; 11 W. R. 268; 143 E. R. 213.

*Annotation*: — *Fold.* *Hatsley v. Dayer-Smith*, [1911] A. C. 979.

**683. ——— Covenant not to carry on business of ladies' outfitter—Sale by hosier of articles sold by ladies' outfitter.]** The sale by a hosier in the ordinary course of his business of certain articles sold by a ladies' outfitter is not a breach of a covenant not to carry on the business of a ladies' outfitter, even if the articles sold form a substantial part of the business of a ladies' outfitter. — *STUART v. DIPLOCK* (1889), 13 Ch. D. 343; 59 L. J. Ch. 112; 62 L. T. 333; 38 W. R. 223; 6 T. L. R. 101, C. A. *Annotations*: — *Distd.* *Bailey v. Skinner & Fleming*, *Refd.* (1898), 42 Sol. Jo. 780. — *Apld.* *Lorden v. Brooke-Hitching*, [1927] 2 K. B. 237. — *Refd.* *Fitz v. Hes*, [1893] 1 Ch. 77; *Wartski v. Meaker* (1914), 110 L. T. 473.

**684. ——— Covenant not to engage in similar business—Entering service of rival firm next door.]** — *WATTS v. SMITH*, No. 530, *ante*.

**685. ——— Carrying on part of business of hosier or draper.]** — *BAILEY v. SKINNER & FLEMING, REID & Co.* (1898), 12 Sol. Jo. 780.

**Covenants restricting user of premises.]**—*See LANDLORD & TENANT*, Vol. XXXI., pp. 157, 167, Nos. 2902, 2904, 3002, 3003.

#### SUB-SECT. 15.—GLASS WORKER.

**686. Validity or reasonableness of restraint—Seven years.]**—*PILKINGTON v. SCOTT*, No. 197, *ante*.

**687. ——— ———.]**—A. contracted to serve B. & his partner or partners for the time being, for seven years, in his business of a glass & alkali manufacturer, & at all times during the term to do his best endeavours, & use his utmost care & diligence in the works; & further, that he would not, at any time during the term, neglect or absent himself from the service, without the consent in writing of B. or his partner or partners for the time being, or either or such of them as should carry on the business; nor would work for or serve any other person or persons, without such consent; in consideration of which service, B. agreed to pay A. 24s. per week for a certain amount of work, & to

of *Sess.*, 1105; 40 Sol. Jo. 791; 11 S. L. T. 230. **SCOT.**

m. — *Effect of assignment by covenantor.* — *RODGER v. HERRINGTON*, [1909] S. C. 256; 40 Sol. Jo. 208; 16 S. L. T. 616. **SCOT.**

*Sect. 9.—Particular trades, businesses and professions: Sub-sects. 15, 16, 17, 18, 19 & 20.]*

find him some other description of work, provided he should not require that quantity of the specified work, so that A.'s wages should not be less than 24s. per week, except when a furnace should be out, when A. agreed to work for 21s. per week; & it was agreed, that, if A. should be sick or otherwise incapacitated from performing the service, or in case of misconduct, or if B., or his partner or partners for the time being, or either or such of them as should carry on the trade, should discontinue the trade during the term, in either of such cases, B. or his partners should be at liberty to retain or employ any other person in the room or stead of A. without being obliged to pay him any wages or satisfaction:—*Held*: this agreement was not void for want of mutuality, or as being in unreasonable restraint of trade.—*HARTLEY v. CUMMINGS* (1847), 5 C. B. 247; 17 L. J. C. P. 81; 10 L. T. O. S. 247; 12 Jur. 57; 136 E. R. 871.

*Annotations*:—*Apld.* *Robinson v. Heuer*, [1898] 2 Ch. 451. *Refd.* *Boston Deep Sea Fishing & Ice Co. v. Ansell* (1888), 59 L. T. 345. *Mentd.* *Wood v. Copper Miners' Co.* (1849), 7 C. B. 906; *Lumley v. Gye* (1853), 2 E. & B. 216; *Evans v. Walton* (1867), L. R. 2 C. P. 615.

**688.** — *Five years—United Kingdom.*—*Pltf. co.* & *deft.* entered into an agreement under which *deft.* was to be employed as works engineer at *pltf.*'s works & was not to divulge any trade secret during his employment or thereafter except in the proper course of business & on the determination of his employment he was not, for five years, to carry on in the United Kingdom or to be interested in glass bottle manufacture or any other business connected with glass making carried on by the *pltf.*:—*Held*: the agreement was not unreasonably in restraint of trade.—*FORSTER & SONS, LTD. v. SUGGETT* (1918), 35 T. L. R. 87.

**689.** — *Phillips v. Stevens* (1899), 15 F. L. R. 325, D. C.

SUB-SECT. 16.—INSURANCE AGENT.

**690.** *Construction of agreement—Agreement not to interfere with business—Limited to district in which agent has acted.*—*BARR v. CRAVEN* (1903), 89 L. T. 574; 20 T. L. R. 51, C. A.

SUB-SECT. 17.—MILKMAN.

**691.** *Validity or reasonableness of covenant—Covenant not to trade within five miles—For two years.*—*PROCTOR v. SARGENT*, No. 172, *ante*.

**692.** — *Covenant not to trade within same district—For two years.*—*BENWELL v. INNS*, No. 395, *ante*.

**693.** — *Covenant not to trade within two miles—For two years.*—An infant entered into the service of a milk seller, & covenanted not to carry on the same trade, & after he came of age he continued in the same service for 18 months without repudiating the contract:—*Held*: this conduct amounted to a ratification of the contract in equity, & an injunction to restrain a breach of the covenant was granted.

It was a kind of contract well known & not unusual, for the trade of a milkman was one where the servant was in constant communication with the customers, while they never saw the master; & the covenant in question was therefore not an improper one (*WICKENS, V.-C.*).—*CORNWALL v. HAWKINS* (1872), 41 L. J. Ch. 435; 26 L. T. 607; 20 W. R. 653.

*Annotations*:—*Apld.* *Walton v. Everington* (1885), 1 T. L. R. 396. *Fold.* *Evans v. Ware*, [1892] 3 Ch. 502. *Refd.* *Brown v. Harper* (1893), 68 L. T. 488.

**694.** — *Covenant by infant.*—An infant entered into a contract with his employers, milk sellers, not to carry on a milkman's business within a distance of 2 miles nor to solicit his employers' customers, "under a penalty of £200 to be recovered as & by way of liquidated damages & not by way of penalty." In an action for an injunction to restrain the infant from carrying on a milkman's business within the specified distance:—*Held*: the contract was binding on the infant, the clause as to the payment of the £200 only binding him to pay the damage actually caused by his breach of contract, & not being a penalty clause in the ordinary sense.—*MORRISON, FLEET & CO., LTD. v. FLETCHER* (1900), 17 T. L. R. 95.

**695.** — *Covenant not to trade in neighbourhood of specified towns.*—By an agreement dated Sept. 18, 1893, Martin sold his retail milk business & goodwill to *deft.* *Stride*, & covenanted "not to employ any one or retail milk on his own account in the neighbourhood of Southampton or Norham." On a breach of this covenant the county ct. judge granted an injunction in the terms of the covenant. *Deft.* appealed on the grounds that the covenant was wider than was necessary to protect *pltf.*, & therefore void, & that the injunction was bad, not being sufficiently definite in showing exactly where *deft.* could not trade:—*Held*: the covenant was not too wide to protect *pltf.*, & the injunction following the terms of the covenant was not too indefinite as the parties must know its meaning, & the word "neighbourhood" meant immediate neighbourhood.—*STRIDE v. MARTIN* (1897), 77 L. T. 800, D. C.

**696.** — *Covenant not to trade within twenty miles—For one year—Covenant by cashier employed by wholesale dairymen.*—*Pltf. co.*, whose business was to supply milk wholesale & to manufacture dairy products, entered a combine, which required all the employees to enter into service agreements, & *deft.*, who was employed as cashier, entered into such an agreement, which provided that for a year after the termination of his employment he would not assist in carrying on the business of wholesale dairymen or manufacturers of dairy products or dairy utensils within 20 miles of *pltf.*'s headquarters or interfere for 6 months with any person who had been a customer of *pltf.* or of the combine within 18 months of the termination of the agreement. After the date of the agreement *pltf.* commenced the manufacture of dairy utensils. Most of *pltf.*'s customers for milk were within 10 miles from their headquarters, but there were a few beyond that radius, & one or two beyond 20 miles. *Pltf.*'s customers for dairy products & utensils were all over England. *Deft.* left *pltf.*'s employment & entered the employment of a dairy co. in the vicinity. In an action to restrain a breach of the restrictive clause:—*Held*: *pltf.* had failed to prove that the restrictive clause was necessary for their protection, as there was no evidence justifying such a restriction as 20 miles & as the clause precluded *deft.*, who had been merely a cashier, from occupying any position, not only in a dairy business or that of a manufacturer of dairy products, but in that of a manufacturer of dairy utensils, which *pltf.* were not manufacturing at the date of the agreement, & the action failed.—*GREAT WESTERN & METROPOLITAN DAIRIES, LTD. v. GIBBS* (1918), 34 T. L. R. 344.

**697.** — *Covenant not to serve customers—Belonging at any time to employer or his successor.*—*BAINES v. GEARY*, No. 394, *ante*.

**698.** — *Dubowski & Sons v. Goldstein*, No. 438, *ante*.

**699.** *Construction of covenant—"Carrying on*

business"—Business carried on by receiver.]—**SHORT HORN DAIRY CO., LTD. v. HALL** (1887), 83 L. T. Jo. 45.

**700.** — "Neighbourhood"—Means immediate neighbourhood.]—**STRIDE v. MARTIN**, No. 695, *ante*.

**701.** Breach of covenant—Sum payable as liquidated damages—Whether damages or penalty.]—**MORRISON FLEET & CO., LTD. v. FLETCHER**, No. 694, *ante*.

#### SUB-SECT. 18.—PATENT AGENT AND PATENTEE.

**702.** Validity or reasonableness of covenant—Covenant by licensee—Not to make machines without applying invention.]—**JONES v. LEES**, No. 323, *ante*.

**703.** — — — Not to infringe or compete with patents—No time limit.]—In 1903 *pltf.* granted to *defts.* a licence by deed to use, within a certain district, the inventions protected by three patents granted to H. in 1897 & relating to the employment of ferro-concrete in the construction of buildings. The deed contained a covenant by *defts.* that they would not at any time, without the written consent of *pltf.*, carry out, or contract to carry out, the ferro-concrete or similar work which might be an infringement of the patents or be in competition with them. In an action to restrain breaches of the covenant, *defts.*, who were builders having a large business both in, & outside of, the district, alleged that the covenant, if valid, would prevent them using at all in the United Kingdom in their business the modes of building construction which they had used before the date of the licence; they contended that the covenant was wider than was necessary for the protection of the patentee & injurious to the public interest, & was in undue restraint of trade, & void. They tendered evidence to show the scope of the patents, the modes of building prior to, & subsequent to, the date of the patents, the extent & nature of *defts.*' business at the date of the licence, & the effect which the covenant would have upon their business, & what, having regard to the nature of the patents, was necessary for the protection of the patentee:—*Held*: (1) the restraint under the covenant continued only during the existence of the patents, which was coterminous with the duration of the licences, & did not extend beyond what was reasonably necessary for the protection of the trade of the covenantee, & was valid, & (2) the evidence tendered by *defts.* was inadmissible.

(3) It seems to me that when you are dealing with a patent a restraint which does not exceed the ambit of the patent itself is not open to objection on the ground that the area it covers is too wide (**NEVILLE, J.**).—**MOUCHEL v. CUBITT & CO.** (1907), 24 R. P. C. 191.

**704.** — — — Covenant by vendor—Not to establish factory in Europe—For goods the subject-matter of patent.]—**LEATHER CLOTH CO. v. LORSONT**, No. 147, *ante*.

**705.** — — — To assign all future patent rights—Of like nature.]—An agreement by the vendor of a patent to assign to the purchaser all future patent rights which the vendor may hereafter acquire of a like nature to the patent sold is not contrary to public policy.—**PRINTING & NUMERICAL REGISTERING CO. v. SAMPSON** (1875), L. R.

19 Eq. 462; 44 L. J. Ch. 705; 32 L. T. 354; 23 W. R. 463.

*Annotations*:—**Apld.** **Macdonald v. Eyles**, [1921] 1 Ch. 631. **Refd.** **Rousillon v. Rousillon** (1880), 14 Ch. D. 351; **Hadische Anilin und Soda Fabrik v. Schott, Segner**, [1892] 3 Ch. 447; **Maxim Nordenfelt Guns & Ammunition Co. v. Nordenfelt**, [1893] 1 Ch. 630; **Lamson Pneumatic Tube Co. v. Phillips** (1904), 91 L. T. 363; **Millers v. Steedman** (1915), 84 L. J. K. B. 2057; **Morris v. Saxelby**, [1915] 2 Ch. 57; **Horwood v. Millar's Timber & Trading Co.**, [1916] 2 K. B. 44; **Attwood v. Lamont**, [1920] 2 K. B. 146; **British Reinforced Concrete Engineering Co. v. Schelft**, [1921] 2 Ch. 563; **English Hop Growers v. Dering**, [1928] 2 K. B. 174. **Mentd.** **Tullis v. Jackson**, [1892] 3 Ch. 441; **Spies v. Hunt**, [1908] 1 K. B. 729; **Wilson v. Cumley**, [1908] 1 K. B. 729; **Weld-Blundell v. Stephens**, [1919] 1 K. B. 520.

**706.** What amounts to breach of covenant—Covenant not to carry on business of Patent Agent—Personal appearance at Patent Office.]—**LAKE v. HARRISON** (1897), 13 T. L. R. 568.

#### SUB-SECT. 19.—PUBLICAN.

**707.** Validity or reasonableness of restraint—Five years.]—In *assumpsit* for the breach of an agreement, by which *deft.* agreed to assign his interest in the lease of a public house to *pltf.*, & the jury found that he had no title or right to assign, & the agreement contained a clause that *deft.* should not carry on the business of a victualler within five years from the time of making the agreement, but which was omitted in the declaration:—*Held*: as it formed no part of the consideration on which the action for the breach of the agreement was founded, the declaration was sufficient; although it was insisted that the clause in question rendered the agreement void, as being in restraint of trade.—**McALLEN v. CHURCHILL** (1826), 11 Moore, C. P. 483; 4 L. J. O. S. C. P. 183.

**708.** — — — Agreement by vendor not to carry on trade during occupancy of premises by purchaser.]—**CATTERMOUL v. JARED**, No. 471, *ante*.

**709.** Construction of agreement—"House for the sale of exciseable liquors"—Public-house.]—**CATTERMOUL v. JARED**, No. 471, *ante*.

Tied house covenants.]—*See* **LANDLORD & TENANT**, Vol. XXXI., pp. 109-113, Nos. 2415-2487.

Covenants restricting user of premises.]—*See* **LANDLORD & TENANT**, Vol. XXXI., pp. 161, 162, Nos. 2912-2956.

#### SUB-SECT. 20.—PUBLISHER.

**710.** Validity or reasonableness of restraint—London or one hundred & fifty miles thereof.]—**TALLIS v. TALLIS**, No. 240, *ante*.

**711.** — — — Dublin or fifty miles thereof.]—**TALLIS v. TALLIS**, No. 240, *ante*.

**712.** — — — Edinburgh or fifty miles thereof.]—**TALLIS v. TALLIS**, No. 240, *ante*.

**713.** — — — Any town in Great Britain or Ireland—Where covenantee had establishment at time of agreement—Or within six months preceding agreement.]—**TALLIS v. TALLIS**, No. 240, *ante*.

**714.** — — — Agreement not to publish magazine of particular description.]—An agreement by a publisher not to publish in future a magazine of a particular description is analogous to an agreement by a tradesman not to deal in a particular

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n. Validity or reasonableness of restraint—Three years—Effect of assign-

ment of covenant.]—**SKERRY, WYNNE & SKERRY'S COLLEGE (IRELAND) LTD. v. MOLES** (1907), 42 I. L. T. 46.—**IR.**

o. — — — Two years.]—**BERTLITZ & SCHOOL OF LANGUAGES v. DUCHÈNE** (1903), 6 F. (Ct. of Sess.) 181.—**SCOT.**

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article, & like this latter agreement, is not void as a too general restraint on trade.—*AINSWORTH v. BENTLEY* (1866), 14 W. R. 630.

**715. — Agreement to give services to particular publication—Not to engage in other business.]**—Pltfs. had purchased the copyright of & the right to use the name of deft. in the publication of a work called "Beeton's Christmas Annual," & deft. agreed to give his whole time to the service of pltfs., & not to engage in any other business:—*Held*: deft. must be restrained from advertising a rival work.—*WARD v. BEETON* (1871), L. R. 19 Eq. 207; 23 W. R. 533.

**716. — City of London or twenty miles thereof—Ten years.]**—*WELSTEAD v. HADLEY*, No. 403, *ante*.

**717. Construction of agreement—Duration—Agreement by directors—Director discharged by receiver.]**—*WELSTEAD v. HADLEY*, No. 403, *ante*.

**SUB-SECT. 21.—SCHOOL TEACHER.**

**718. Validity or reasonableness of restraint—Ten miles—Five years.]**—*LIEVRE v. MAYONNET* (1913), 2 L. J. C. C. 4.

**719. Construction of agreement—Agreement not to carry on school within twelve years—Not limited to lifetime of covenantee.]**—Deft. entered into a written agreement with W. in consideration of being employed as assistant master, not to carry on the business of a school within 9 miles of the places where W.'s school was carried on for 12 years after leaving the school. Subsequently, & while deft. was in his service, W. entered into a partnership agreement with pltf. who was on his death to succeed to the business. W. died, & thereupon deft. commenced a school in the same place. On a motion on behalf of pltf. to restrain deft. from so doing:—*Held*: (1) deft.'s agreement was not limited to the life of W.; (2) though goodwill was not mentioned in the partnership agreement, the benefit thereof did pass so as on the death of W. to vest in pltf., & deft.'s agreement formed part of such goodwill; (3) pltf. was therefore entitled to the benefit thereof, & to the injunction asked for.—*SMITH v. HAWTHORN* (1897), 76 L. T. 716; 13 T. L. R. 477.

*Annotation*:—As to (1) *Apld.* *Hinkins v. Alder* (1906), 50 Sol. Jo. 238.

**SUB-SECT. 22.—SOLICITOR.**

**720. Validity or reasonableness of covenant—Covenant not to practise in particular place—For limited time.]**—Articles, under which A. had served his clerkship to an attorney, contained a proviso, that A. should not practise within a certain district; & also a covenant on the part of his father, that A. should, within a month after he came of age, execute a bond in a specified penalty to ensure his fulfilment of the proviso; A., who was an infant at the time of the execution of the articles, served under them for three years after he attained his full age, but was never called on to execute any bond, & with a knowledge of the purport of the articles, completed his clerkship, & afterwards

began to practise as an attorney within the district from which the articles purported to exclude him. A motion for an injunction to restrain him from practising within that district was refused with costs.—*CAPES v. HUTTON* (1826), 2 Russ. 357; 38 E. R. 370.

*Annotation*:—*Distd.* *Walton v. Everington* (1885), 1 T. L. R. 396.

**721. — Covenant not to practise within London & one hundred & fifty miles therefrom—For limited time.]**—A contract entered into by a practising attorney to relinquish his business & recommend his clients to two other attorneys for a valuable consideration, & that he would not himself practise in such business within certain limits, & would permit them to make use of his name in their firm for a certain time, but without his interference, etc., was held to be valid in law.—*BUNN v. GUY* (1803), 4 East, 190; 1 Smith, K. B. 1; 102 E. R. 803.

*Annotations*:—*Distd.* *Hornor v. Graves* (1831), 9 L. J. O. S. C. P. 192. *Consd.* *Thornbury v. Bovill* (1842), 1 Y. & C. Ch. Cas. 554. *Distd.* *Green v. Price* (1846), 9 Jur. 857. *Refd.* *Bozon v. Farlow* (1816), 1 Mer. 459; *Candler v. Candler* (1821), Jac. 225; *Hughes v. Statham* (1825), 6 Dow. & Ry. K. B. 219; *Hitchcock v. Coker* (1837), 6 Ad. & El. 438; *Proctor v. Sargent* (1840), 2 Scott, N. R. 289; *Whittaker v. Howe* (1841), 3 Beav. 383; *Mallan v. May* (1843), 11 M. & W. 653; *Aubin v. Holt* (1855), 2 K. & J. 66; *Mumford v. Gething* (1859), 7 C. B. N. S. 305. *Mentd.* *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A. C. 535.

**722. — Covenant not to practise in Great Britain—For twenty years.]**—An agreement by a solr., for valuable consideration, not to practise as solr. in any part of Great Britain for twenty years, held valid.

I cannot say that in my opinion the public interest will be in any way interfered with or affected by his not being allowed to practise (*LORD LANGDALE, M.R.*).—*WHITTAKER v. HOWE* (1841), 3 Beav. 383; 40 E. R. 150.

*Annotations*:—*Consd.* *Davies v. Davies* (1887), 36 Ch. D. 359. *Distd.* *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A. C. 535. *Refd.* *Nicholls v. Stretton* (1847), 10 Q. B. 346; *Elves v. Crofts* (1850), 10 C. B. 241; *Tallis v. Tallis* (1852), 16 Jur. 746, n.; *Harms v. Parsons* (1862), 1 New Rep. 175; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351; *Underwood v. Barker* (1899), 68 L. J. Ch. 201; *Kastes v. Russ* (1913), 83 L. J. Ch. 329. *Mentd.* *May v. Thomson* (1882), 47 L. T. 295.

**723. — Covenant not to practise within City of London or counties of Middlesex or Essex—Time unlimited.]**—Deft. bound himself to a London solr. by articles for a term & covenanted that he would not at the expiration of the term or at any time thereafter, either solely or jointly with, or as agent for, any other person or persons directly or indirectly practise the business of an attorney or solr. within the City of London or the counties of Middlesex or Essex, nor directly or indirectly act as such attorney or solr. for any client or clients of pltf. or any partner or partners of pltf. or for any person or persons who should have been a client or clients of pltf., or any partner or partners of pltf., at any time during the term. At the expiration of the term deft. having commenced business on his own account in Southwark:—*Held*: the restriction was not unreasonable, & deft.'s acting for a petitioner in the London Ct. of Bkpcy. was a breach of the covenant.

The rule is . . . that the restriction must not be so large as to prevent the covenantor from practising at all & not larger than is consistent with the public interest. I think this case quite

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**p. Validity or reasonableness of covenant—Covenant not to practise within fifty miles of specified area.]**—*HAMILTON v. LETHBRIDGE* (1912), 14 C. L. R. 236.—*AUS.*

**q. — Covenant not to practise within thirty miles of specified area.]**—*MULLIGAN v. CORR*, [1925] 1 I. R. 172; 59 I. T. L. 157.—*IR.*

**r. — Covenant by English barrister practising in Colony—Where professions**

**of barrister & solicitor fused.]**—*HOME v. DOUGLAS* (1912), *Times*, Nov. 15.—*CHINA.*

**t. — Agreement not to practise in certain districts for thirty years.]**—*CHAPMAN v. SWAN*, [1912] E. D. L. 150.—*S. AF.*

within both limits (JESSEL, M.R.).—*MAY v. O'NEILL* (1875), 44 L. J. Ch. 660.

*Annotations*:—*Consd. Fitch v. Dowes*, [1921] 2 A. C. 158. *Refd. Rousillon v. Rousillon* (1880), 14 Ch. D. 351.

**724. — Covenant not to reside in specified parish.**—(1) By agreement between pltf., a solr., & deft., after reciting that pltf., being manager of certain estates at T., & finding it expedient to establish an office there for the transaction of law & other business had proposed to appoint deft. as resident clerk there—it was agreed, that deft. should reside at T.; & that, in consideration of his services, pltf. should pay him a certain salary; & that either party might determine the agreement by a certain notice; & that deft. would not, for the space of twenty-one years, notwithstanding the decease of pltf., reside in the parish of T., or within twenty-one miles thereof, or carry on therein or within the distance aforesaid, during the period of twenty-one years, any business of the description of that carried on under the agreement:—*Held*: the restriction was not unreasonable & was good in law.

(2) A declaration on the above agreement alleged as a breach, that, after its determination, deft. resided in the parish of T., & during the said period of twenty-one years carried on business in the parish of the description of that carried on under the agreement. Plea to first breach: that, although deft. resided in the parish of T., yet he did not so reside for the purpose or with the intention of carrying on business of the description of that carried on under the agreement:—*Held*: whether the allegation in the declaration was to be read as one or two distinct breaches, the plea was bad.

Is it clear that the protection of pltf. does not require that deft. should not reside within the prescribed limits? Dft. must perform his agreement unless he can clearly establish that the restraint is unreasonable (ALDERSON, B.).—*DENDY v. HENDERSON* (1855), 11 Exch. 194; 24 L. J. Ex. 321; 25 L. T. O. S. 168; 156 E. R. 800.

**725. — Covenant not to interfere with clients—Limited to clients during period of service.**—A deed recited that pltf. had carried on the business of an attorney, that deft. had for four years been his salaried clerk, & had applied to him to accept deft. as his articulated clerk without premium, which pltf. consented to do on deft.'s entering into the covenants thereafter contained; & deft. bound himself clerk to pltf. for five years by articles; it was then, by the deed, witnessed that, in pursuance, of the agreement, & in consideration of 5s., etc., deft. did, for himself, his heirs, exors. & administrators, thereby covenant with pltf., his exors., administrators, partners & assigns: that deft. should not, during the term of five years mentioned in the articles, nor at any time after its expiration, directly or indirectly, interfere or intermeddle with, or be concerned as attorney, agent or otherwise, for, any person who had already been, or who should from time to time thereafter become or be, the client or correspondent in business of or with pltf., or any partner or partners he might admit to a share with him, or any person to whom he might sell or assign the whole or any part of his business of attorney; & that deft. should not act as partner, clerk or assistant with or to any person who should interfere or intermeddle as aforesaid: & in case deft. should commit any breach of his covenants, he should forfeit & pay, as liquidated damages £100 for every such breach; & each day's repetition or continuance of any interference, etc., as aforesaid should be deemed a fresh breach of covenant, &

incur a new & separate penalty & right of action. Pltf. declared in covenant, assigning breaches in respect of persons who had been his clients before & at the time of the making of the deed, & of persons who had been his clients while deft. continued under the articles:—*Held*: the part of the covenant in respect of which the breaches were assigned was good, as not operating unduly in restriction of trade, & might be separated from the rest; & therefore an action might be brought on such breaches.—*NICHOLLS v. STRETRON* (1847), 10 Q. B. 346; 11 Jur. 1008; 116 E. R. 134.

*Annotations*:—*Apld. Baines v. Geary* (1887), 35 Ch. D. 154. *Refd. Price v. Green* (1847), 16 M. & W. 346; *Giles v. Hart* (1859), 1 L. T. 154. *Mentd. Nordenfolt v. Maxim Nordenfolt Guns & Ammunition Co.*, [1894] A. C. 535.

**726. — Covenant not to act for clients—Clients at time of termination of service—Or within previous five years.**—A clerk to a firm of solrs. covenanted that, if his engagement should be terminated, he would not "act for any person who is or has within the previous five years been a client of the firm":—*Held*: the covenant referred to persons who should be clients of the firm at the time when the clerk's engagement terminated or within five years before that time, & was not wider than was reasonably necessary for the protection of the firm's practice.

As a matter of construction, the covenant . . . was not wider than necessary for the reasonable protection of pltf.'s very considerable practice by restricting one who had been in their confidential employment & had had frequent opportunities of becoming acquainted with their clients & with their clients' affairs, from acting contrary to their interests (SWINFEN EADY, J.).—*LEWIS & LEWIS v. DURNFORD* (1907), 24 T. L. R. 64.

**727. Construction of covenant — "Original clients"**—*Covenant by partners.*—In July, 1880, pltf. & deft. entered into partnership as solrs. Clause 7 of the partnership agreement provided: "Either party is to be at liberty to transact any business in his own name, if he wishes to do so, & also to transact any business for any private friends, or poor persons, without charge, he in such case paying all office out of pocket expenses." Clause 8 provided: "Either party is to be at liberty to terminate this agreement by three months' notice in writing at any time, & in such case neither is to transact any business for, or in any way to influence business with any clients who were original clients of the other. No notice was given to terminate the partnership, but it was dissolved by mutual consent on Aug. 10, 1899. Pltf. now moved for an injunction:—*Held*: (1) notwithstanding no notice was given, clause 8 of the agreement came into operation when the partnership was dissolved on Aug. 10; (2) "original clients" comprised those who were clients of either pltf. or deft. before they became partners, & also those for whom pltf. or deft. in pursuance of clause 7, transacted business as for private friends or poor persons.—*BADHAM v. WILLIAMS* (1900), 83 L. T. 141; 44 Sol. Jo. 575.

**728. — Covenant by clerk—To remain away from specified town—Not to give services to any except plaintiff in such town.**—In 1846, deft. entered into the service of pltf., a solr. at Amer-sham, as his clerk, & in Dec. 1849, pltf. put an end to the service, by a notice, to expire on Mar. 25, 1850. On Jan. 7, 1850, deft. wrote to pltf., asking to be paid his salary to Lady Day, & to be at once discharged, "in order that he might go to London & remain there until he could meet with another engagement." To this letter pltf. replied, assenting to deft.'s proposal saying, "of

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course, I should have expected your services, if you were in Amersham; but, as you request me at once to pay your salary to Lady Day, in order that you may go to town until you meet with another engagement, I consent to accord your request"; & on the following day, pltf. asked deft. whether, "if he paid him up to Mar. 25, he intended going to town & remaining there till he got another engagement," to which deft. answered that he did; whereupon pltf. said—"on these conditions, I am prepared to pay your salary, at once up to Lady Day; but, if you remain in Amersham, I shall expect your services,"—& accordingly paid him the full quarter's salary. Deft. went to London, but shortly afterwards, & before Lady Day, returned to Amersham at the request of a client of pltf.'s, in whose employ he remained, giving professional advice:—*Held*: there was no evidence of a contract on the part of deft. to go to London & remain there, or to forbear to give his services in Amersham to any person other than pltf., or to render service to pltf. if he should return to Amersham.—*DANIELS v. CHARLEY* (1851), 11 C. B. 739; (Ox, M. & H. 535; 21 L. J. C. P. 37; 18 L. T. O. S. 122; 16 J. P. 168; 138 E. R. 665.

729. — Any person who is or has within the previous five years been a client.]—*LEWIS & LEWIS v. DURNFORD*, No. 726, *ante*.

—.]—*See Sect. 5, sub-sect. 5, ante*.

730. What amounts to breach of covenant—Residing within prohibited area.]—*DENDY v. HENDERSON*, No. 724, *ante*.

731. — Covenant not to practise in City of London—Acting for petitioner in London Court of Bankruptcy.]—*MAY v. O'NEILL*, No. 723, *ante*.

732. — Practising in courts within prohibited area—Instructions received outside.]—*LEWELYN v. SIMPSON* (1891), 91 L. T. Jo. 9.

733. — Covenant not to act for clients after expiration of articles—Acting as agent for country solicitors—Firm agent during prescribed period.]—Country solrs. held to be "clients" of their London agent within the meaning of a covenant by an articulated clerk not to transact business with persons who should be clients of his master's firm during the period of the articles.—*REID v. BURROWS*, [1892] 2 Ch. 413; 61 L. J. Ch. 448; 67 L. T. 183; 40 W. R. 620; 8 T. L. R. 538; 36 Sol. Jo. 490.

734. — Communication with persons within prohibited area—Letter posted outside.]—By an agreement made between pltf. & deft. the latter covenanted that he would not within a certain district do for other persons any work or act usually done by solrs. He wrote & posted letters outside the prohibited area addressed to persons residing within the area. These letters were solr.'s letters written on behalf of clients, & contained demands for an apology & for payment of a debt, & other matters. The instructions for the letters were given outside the area:—*Held*: the acts were done at the places where the letters were received, & therefore they were breaches of the covenant. In that case [*Edmundson v. Render*] deft. had covenanted not to "do any work or act . . . usually done by solrs." within a certain area. He had written letters to persons at addresses within the prohibited area to demand an apology for a slander & to collect a debt with his (deft.'s) charges as a solr. & other similar letters. The point for decision was whether this amounted to doing those acts within the district.

I held that it did. . . . I seem to have used the words, "He has acted as a solr. within the district." I think that my meaning would have been more accurately expressed thus: "He has within the district done an act usually done by a solr." (*BUCKLEY, L.J.*).—*EDMUNDSON v. RENDER*, [1905] 2 Ch. 320; 74 L. J. Ch. 585; 93 L. T. 124; 53 W. R. 632; 49 Sol. Jo. 620.

*Annotations*:—*Distd. Freeman v. Fox* (1911), 55 Sol. Jo. 650. *Expld. Woodbridge v. Bellamy*, [1911] 1 Ch. 326. *Consd. Dayer-Smith v. Hadsley* (1913), 108 L. T. 897.

735. —.]—*Deft.*, an admitted solr., signed an agreement of service with pltf.s, a firm of solrs. carrying on business in London & at Brentford, whereby, in consideration of their employing him as their conveyancing clerk & representative advocate at Brentford at a stated salary, deft. undertook that he would not, at any time during his employment, or after the determination thereof, "carry on within a radius of five miles of the town hall, Brentford, the profession of a solr." After the termination of the engagement deft., who had started business as a solr. in London, wrote from his office in London, on behalf of a client residing within the prescribed radius, to a person also residing within the radius, demanding payment of a debt due to his client. The recipient of the letter, who was not in fact the debtor, as the result of the correspondence which ensued, bought up the debt, & deft., who acted as solr. for both parties, received a payment for his services. Upon motion for an interlocutory injunction to restrain deft. from infringing the restrictive condition:—*Held*: there had been no breach of the agreement & an injunction ought not to be granted.—*WOODBRIDGE & SONS v. BELLAMY*, [1911] 1 Ch. 326; 80 L. J. Ch. 265; 103 L. T. 852; 55 Sol. Jo. 204, C. A.

*Annotations*:—*Apld. Freeman v. Fox* (1911), 55 Sol. Jo. 650. *Repld. Dayer-Smith v. Hadsley* (1913), 108 L. T. 897.

736. —.]—*Deft.* had entered the employment of pltf., a solr., under an agreement which prohibited him from practising or acting as a solr., solr.'s clerk, or conveyancer within a certain area during, & for a certain time after leaving, the employment. Deft., after the employment was determined, did one act which was the act of a solr. within the area, & wrote several solr.'s letters to persons within the area:—*Held*: the covenant must be construed to mean substantially acting as a solr., & there had been no breach of the agreement, & an injunction ought not to be granted.—*FREEMAN v. FOX* (1911), 55 Sol. Jo. 650.

737. — Actual presence—Presence in prohibited area not necessary.]—*Deft.* had bound himself to a solr. practising at M. by articles for a term, & covenanted that he would not at any time do any work or act for or on behalf of any persons usually done by solrs. within a radius of fifteen miles from M. without written permission. Deft. took proceedings to obtain probate of the will of a person within the prohibited radius, & corresponded from H. with a witness within the prohibited radius with a view to obtaining his evidence in order to enable probate to be obtained. He signed the *præcipe* directing a plaint note to be issued for a county ct. summons at a ct. in the prohibited area on behalf of a pltf. residing therein, & conducted the proceedings until receipt of the amount paid into ct. He prepared the will of a testatrix residing within the area on instructions received outside the area, & received a small fee therefor, but was present when she executed it within the area; & lastly, he advertised in a paper circulating within but published outside the area a farm for letting within the prohibited dis-



strict. In an action to restrain deft. from practising within the prohibited limit:—*Held*: (1) the covenant might be broken although deft. or his clerks did not go professionally within such limit; therefore the proceedings in connection with the collection of the debt through the county ct. infringed the covenant; (2) also the acts done in relation to the execution of the will, which must be held to have been done by deft. in his character of a solr., constituted a breach of such covenant; (3) those as to advertising the farm did not break it.—*EDMUNDSON v. RENDER* (1904), 90 L. T. 814; 48 Sol. Jo. 560; *subsequent proceedings*, [1905] 2 Ch. 320.

738. — Collecting debts through County Court.]—*EDMUNDSON v. RENDER*, No. 737, *ante*.

739. — Advertising property.]—*EDMUNDSON v. RENDER*, No. 737, *ante*.

740. — Acts in relation to execution of will.]—*EDMUNDSON v. RENDER*, No. 737, *ante*.

741. — Isolated act within prohibited area.]—*FREEMAN v. FOX*, No. 736, *ante*.

742. — Covenant not to "practise"—Acting as managing clerk to another solicitor.]—A solr. who has covenanted after the expiration of a partnership not to "practise" within a given area does not break the covenant by acting as managing clerk to another solr. within the area indicated.—*WAY v. BISHOP*, [1928] Ch. 647; 97 L. J. Ch. 267; 130 L. T. 246; 44 T. L. R. 571; 72 Sol. Jo. 387, C. A.

#### SUB-SECT. 23.—STOCKBROKER.

743. Validity or reasonableness of restraint—Twenty years—Fifty miles.]—Deft., who was employed by a firm of stock & share brokers at Cardiff, covenanted that he would not, within twenty years after leaving his employers' service, carry on the business of a stock & share broker within 50 miles of Cardiff:—*Held*: a reasonable covenant.—*LYDDON v. THOMAS* (1901), 17 T. L. R. 450.

#### SUB-SECT. 24.—TAILOR.

744. Validity or reasonableness of covenant—Bond not to trade in Exeter—Penalty payable to guild of tailors.]—*EXETER CO. OF TAYLORS v. CLARKE* (1684), 2 Show. 345; 89 E. R. 978.

*Annotations*:—*Reld*. Thompson v. Harvey (1688), Comb. 121; Mallan v. May (1843), 11 M. & W. 653. *Mentd*. Low v. Peers (1770), Wilms. 364.

745. — Covenant not to trade within ten miles—For three years.]—Deft. was employed by pltf., a tailor in Regent street, as a cutter & fitter of wearing apparel. Deft. entered into an agreement with pltf., that, upon the termination of his employment for any cause, he would not carry on the business of a tailor within a circuit of 10 miles of Charing Cross for the period of three years from such termination of employment. Some time afterwards deft. left pltf.'s employment, & set up the business of a tailor & outfitter within about 200 yards of pltf.'s premises. An application for an injunction to restrain deft. having been made, the defence was raised that the restriction imposed by the agreement upon deft. was far in excess of what was required for the reasonable protection of pltf. in his business;

& that the agreement was therefore invalid on the ground that it was contrary to public policy, as being in unreasonable restraint of trade:—*Held*: the agreement was not unreasonable either in point of space or in point of time, for a tailor like pltf. to require deft. to enter into; therefore the agreement was not invalid; & pltf. was entitled to the injunction claimed.—*NICOLL v. BEERE* (1885), 53 L. T. 659; *sub nom.* *NICHOLL v. BEEBE*, 2 T. L. R. 11.

746. — Area of restraint measured from present or future addresses.]—*BAKER v. HEDGE-COCK*, No. 442, *ante*.

747. — —.]—*BEETHAM v. FRASER*, No. 125, *ante*.

748. — Covenant not to enter into any business arrangement—In competition with covenantee.]—*BEETHAM v. FRASER*, No. 125, *ante*.

749. What amounts to breach of agreement—Agreement not to carry on trade—Acting as foreman.]—In consideration of A. paying a certain sum to B., B. assigned all his interest in business to A., & covenanted that he would not at any time carry on, or practice, or engage in, alone with any other person, the trade or business of a tailor, within the space of twenty miles from London. In another part of the deed, A. covenanted that B. should be employed as a cutter in business so long as business should be carried on, or so long as B. should diligently & faithfully attend to the business. Upon a bill by A., praying an injunction to restrain B. from carrying on the business of a tailor:—*Held*: (1) although that part of the agreement with reference to the employment of B. could not be enforced in this ct., yet, there being a good consideration for B.'s negative covenant, the ct. would enforce that part of the agreement; (2) also, that acting as the foreman of the business of a tailor was a violation of the agreement by B.—*ROLFE v. ROLFE* (1816), 15 Sim. 88; 1 Coop. temp. Cott. 87; 6 L. T. O. S. 518; 10 Jur. 61; 60 E. R. 550.

*Annotations*:—*As to* (1) *Folld*. Daggett v. Ryman (1688), 17 L. T. 486. *Distd*. Smith v. Hancock, (1894) 1 Ch. 209. *Reld*. Catt v. Tourle (1889), 4 Ch. App. 654, *as to* (2) *Folld*. Newling v. Dobell (1868), 38 L. J. Ch. 111. *Reld*. Allen v. Taylor (1870), 19 W. R. 35; *Pearks v. Cullen* (1912), 28 T. L. R. 371. *Generally*, *Consd*. Lumley v. Wagner (1852), 1 De G. M. & G. 604.

750. — — Acting as journeyman.]—*NEWLING v. DOBELL*, No. 529, *ante*.

#### SUB-SECT. 25.—OTHER PARTICULAR TRADES.

751. Architect & surveyor—Construction of agreement—Covenant not to practise within specified place—Right to act when specially invited.]—*PORTSMOUTH v. SEWARD* (1901), 45 Sol. Jo. 594, C. A.

752. — Validity of restraint—Agreement by infant apprentice.]—By a deed of apprenticeship deft., an infant, bound himself apprentice to pltf. in his business as an architect & surveyor for the term of four years. The deed contained a covenant by deft. not to carry on within ten years after the expiration of the term the business of an architect or surveyor within 10 miles of the town where the master resided. There was evidence that no architect in the town would accept as an apprentice a person who refused to enter into a similar restrictive covenant:—*Held*: (1) having regard

#### PART V. SECT. 9. SUB-SECT. 24.

a. Validity or reasonableness of covenant—Whether injunction granted on breach.]—*CURTIS v. SANDISON* (1831), 10 Sh. (Ct. of Sess.) 72.—*SCOT*.

#### PART V. SECT. 9. SUB-SECT. 25.

b. Manufacturer—Validity of restraint—Ten years.]—Deft. upon being appointed general manager of pltf. co., which carried on business of manufac-

turing & selling certain goods in Australia & selling them in N. Zealand also agreed that he would not during the period of ten years after the termination of his employment be in any way

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to the impossibility of deft. obtaining instruction except upon the terms of his entering into the covenant, the covenant was reasonable; (2) as it did not come into operation until after the termination of the apprenticeship it was enforceable against deft. by injunction.—*GADD v. THOMPSON*, [1911] 1 K. B. 304; 80 L. J. K. B. 272; 103 L. T. 836; 27 T. L. R. 113; 55 Sol. Jo. 156, D. C.

*Annotation:—Generally, Mentd. Roberts v. Gray*, [1913] 1 K. B. 520.

**753. Billposter—Construction of agreement—Duration—Wrongful dismissal of servant.]—GENERAL BILLPOSTING CO., LTD. v. ATKINSON**, No. 511, *ante*.

**754. Blacksmith—Validity of restraint—Within same town or certain precincts.]—ANON.** (1587), 2 Leon. 210; Moore, K. B. 242; 74 E. R. 485.

*Annotations:—Refd. Mitchell v. Reynolds* (1711), 1 P. Wms. 181; *Hitchcock v. Coker* (1837), 1 Nev. & P. K. B. 798; *Maxim-Nordenfelt Guns & Ammunition Co. v. Nordenfelt* (1893), 41 W. R. 604.

**755. Boot & shoe maker—Validity of restraint—Two miles—Three years.]—KAVANAGH v. DAL- LASTON** (1894), 38 Sol. Jo. 216.

**756. Builders' merchants—Validity of restraint—Thirty miles—Fourteen years.]—HOOPER & ASHBY v. WILLIS**, No. 490, *ante*.

**757. Burglar & fire alarm maker—Validity of restraint—Agreement not to enter or be interested in competing business.]—Deft. E. entered the employment of plffs. under an agreement which provided that during the term of his employment with the co. he should not enter into any other employment nor be interested in the business of any other co., firm or individual installing or dealing with burglar or fire alarms. During the currency of the term E. entered the employment of a competing co. :—*Held*: the restriction was valid, but the ct. would not grant an injunction restraining E. from continuing in the employment of the competing co. nor an injunction restraining the competing co. from continuing to employ him, as plffs.' remedy was in damages.**

The ct. granted an injunction restraining E. during the currency of the term from being interested in the business of deft. co. or any business installing or dealing with burglar or fire alarms.—*RELY-A-BELL BURGLAR & FIRE ALARM CO., LTD. v. EISLER*, [1920] Ch. 609; 95 L. J. Ch. 345; 135 L. T. 286; 70 Sol. Jo. 669.

**758. Carriage builder—Breach of agreement—Agreement not to engage in similar business—Engagement as agent for purchase & sale.]—AUTOMOBILE CARRIAGE BUILDERS, LTD. v. SAYERS**, No. 404, *ante*.

**759. Caterer—Breach of agreement—Soliciting custom within area—Letters posted outside area.]—CULLARD v. TAYLOR** (1887), 3 T. L. R. 698.

concerned in any similar business in Australia or N. Zealand :—*Held*: the agreement was not unreasonable either as to area or duration.—*BRIGHTMAN v. LAMPSON PARAGON, LTD.* (1914), 18 C. L. R. 331.—*AUS.*

*c. Fruit marketing—Shareholders of association agreeing to deal with association.]—HERON v. PORT HUON FRUIT-GROWERS CO-OPERATIVE ASSOCN., LTD.* (1922), 30 C. L. R. 315.—*AUS.*

*d. — Failure of lessee to get land-lord's consent to sell to association.]—Deft. entered into a contract with plff. the Kermoo Growers Co-operative Asscn. on Feb. 23, 1923, whereby she was to market all her fruit & vegetables with the said asscn. which is a subsidiary organisation to plff. the Associated Growers of British Columbia, Ltd.*

In May, 1925, deft. obtained a lease of a ten acre lot adjoining her own from the Canada Permanent Trust Co. but the lessor expressly refused to give deft. leave to market the fruit & vegetables raised on the lot with the Co-operative Asscn. The two assocns. recovered judgment in an action for specific performance of the agreement & for an injunction :—*Held*: it was deft.'s duty to obtain, if she could, the lessor's consent to the sale of her produce to plffs.—*ASSOCIATED GROWERS OF BRITISH COLUMBIA, LTD. & KERMOOS GROWERS CO-OPERATIVE ASSOCN. v. RIDDICK* (1926), 36 B. C. R. 475.—*CAN.*

*e. Broker—Whether assignee of covenant entitled to injunction.]—Plff. purchased deft.'s business as an*

**760. Cider merchants—Validity of restraint—Five years—No limitation of area.]—DOWDEN & POOK, LTD. v. POOK**, No. 247, *ante*.

**761. Chimney sweep—Breach of agreement—Agreement not to undertake or carry on business within certain area—Employment as servant by competing company.]—RAMONEUR CO., LTD. v. BRIXEY**, No. 540, *ante*.

**762. Coachbuilder—Breach of agreement—Waiver.]—MAYTHORN v. PALMER**, No. 582, *ante*.

**763. Coal merchant—Breach of agreement—Amalgamation of companies—Agreement not to be interested in similar company.]—CORY (WILLIAM) & SON, LTD. v. HARRISON**, No. 466, *ante*.

**764. Concentrated meat business—Validity of restraint—Agreement not to carry on business in Europe—Agreement with army contractors.]—HARVEY v. CORPE** (1885), 79 L. T. Jo. 246.

**765. Dairy products manufacturer—Validity of restraint—Twenty miles—Restriction as to goods not dealt in by plaintiffs.]—GREAT WESTERN & METROPOLITAN DAIRIES, LTD. v. GIBBS**, No. 696, *ante*.

**766. Dyer—Validity of restraint—Agreement not to carry on trade within certain town—For half a year.]—DIER'S CASE** (1414), Y. B. 2 Hen. 5, fo. 5, pl. 26.

*Annotations:—Distd. Colgate v. Bachelier* (1602), Cro. Eliz. 872; *Broad v. Jollyfe* (1620), Cro. Jac. 598. *Refd. Ipswich Clothworkers Case* (1615), 11 Co. ltop. 53 a; *Ward v. Byrne* (1839), 5 M. & W. 548; *Mallan v. May* (1843), 12 L. J. Ex. 376; *Davies v. Davies* (1887), 36 Ch. D. 359; *Maxim Nordenfelt Guns & Ammunition Co. v. Nordenfelt*, [1893] 1 Ch. 630. *Mentd. Egerton v. Brownlow* (1853), 4 H. L. Cas. 1.

**767. Engineer—Validity of restraint—United Kingdom or Ireland—Seven years.]—HERBERT MORRIS, LTD. v. SAXELBY**, No. 154, *ante*.

**768. Fender maker—Validity of restraint—Agreement not to use patterns of other maker.]—*Qu.*: whether an agreement, by a fender maker, not to use the patterns of another fender maker, on any account whatever, until the patterns have been out a clear twelvemonth from the time the latter should have had any one pattern in the market, is an agreement in restraint of trade.—*STUART v. NICHOLSON* (1836), 3 Bing. N. C. 113; 2 Hodg. 191; 3 Scott, 536; 6 L. J. C. P. 66; 132 E. R. 352.**

**769. Fishmonger—Validity of restraint—Three miles—No restriction as to time.]—WOODS v. THORNBURN** (1897), 41 Sol. Jo. 756.

**770. Food preservatives manufacturer—Breach of agreement—Not to carry on or be interested in similar business—Covenantor becoming director of competing company.]—CASTELL v. MIDDLETON**, No. 516, *ante*.

**771. Galvanised iron manufacturers—Validity of restraint—Agreement to retire from business—"In so far as law allows."—*DAVIES v. DAVIES***, No. 406, *ante*.

exchange broker at Kingston, & the latter agreed not to go into business there again. Plff. afterwards sold out to C., & entered into a like agreement with him :—*Held*: plff. after this sale had not such an interest in the contract with deft. as entitled him to an injunction, & his remedy, if any, was at law.—*JONES v. WOOLEY* (1869), 16 Gr. 106.—*CAN.*

*f. Photographer.]—WILLIAMSON v. EWING* (1880), 27 Gr. 596.—*CAN.*

*g. —]—A., a photographer in Elgin, & B. his brother, who had at one time been his assistant, entered into an agreement whereby B. for a small loan, bound himself not to start or carry on the business of a photographer, or to enter into the employment of any photographer, in Elgin*



**772. Grocer—Validity of restraint—Two miles—One year.]**—Deft. was employed by pltf. co. as shop assistant in their branch shop at Southend under an agreement by which deft. agreed that he would not, for a period of two years subsequent to his leaving the employment, "establish, carry on, or be engaged in, or interested in . . . a business of a similar character to the business of the co. within the distance of two miles of any shop for the time being belonging to the co. at which he has been employed within the twelve months prior to his leaving their employ, nor solicit any of the customers of the co." Deft.'s duty was to serve at the grocery counter in pltf's. shop, although for a short time he canvassed for orders at the houses of pltf's. regular customers. Shortly after leaving pltf's. service, deft. entered the employment in the like capacity of another co., whose business was of a similar character to that carried on by pltf's., & whose shop was within two miles of pltf's. shop. In an action by pltf's. to restrain deft. from continuing in the service of this other firm in breach of the restrictive covenant entered into by him :—*Held* : deft. was "engaged" with the other firm within the meaning of that expression in the agreement, but, having regard to the nature of deft.'s employment, the restrictive covenant was not reasonably necessary for the protection of pltf's. business & therefore could not be enforced.

The nature of deft.'s employment . . . is described in the evidence as that of shop assistant . . . . It is clear that he had no confidential duty to perform. . . . Evidence has been called to show that such a term was unusual in the case of shop assistants although common in the case of managers. Upon that evidence I conclude that in such a case the clause was not regarded as necessary (HAMILTON, J.).—PEARKS, LTD. v. CULLEN (1912), 28 T. L. R. 371.

**773. Gun & ammunition manufacturer—Validity of restraint—Twenty-five years—No restriction as to space.]**—NORDENFELT v. MAXIM NORDENFELT GUNS & AMMUNITION CO., No. 578, *ante*.

**774. Hackle pin & wire manufacturer—Validity of restraint—Agreement not to carry on business under own name.]**—(1) A covenant by a person not to carry on the business of a manufacturer under his own name, though containing no limit as to space, is not void as being in restraint of trade.

(2) The assignor of the goodwill of a business cannot be restrained from soliciting the customers.—VERNON v. HALLAM (1886), 34 Ch. D. 748; 56 L. J. Ch. 115; 55 L. T. 676; 35 W. R. 156; 3 T. L. R. 154.

*Annotation* :—As to (1) *Distd.* Hepworth Manufacturing Co. v. Ryott, [1920] 1 Ch. 1.

**775. Hardware manufacturer—Validity of restraint—Twenty-five miles—No time limit.]**—HAYNES v. DOMAN, No. 158, *ante*.

**776. Hay & corn dealer—Validity of restraint—Two miles—No restriction as to time.]**—Deft. was

or within twenty miles thereof :—*Held* : the restraint, being limited to a particular district, & reasonably necessary for A.'s protection, & A. having given a legal consideration, therefore, was valid & binding on B.—STEWART v. STEWART (1899), 1 F. (Ct. of Sess.) 1158; 36 Sc. L. R. 787; 7 S. L. T. 52.—SCOT.

**h. Hardware—Validity of restraint—Five years.]**—S. & H., trading as partners, sold out their business to E. under a written agreement, as follows :—"S. & H. do hereby bind themselves to E. under a penalty of \$2,000, that they will not do business

in Chesley in hardware for the term of five years." Within the five years S. commenced a hardware business in Chesley, in connection with M. :—*Held* : this did not amount to a breach of the above agreement, though the matter was not free from doubt.—ELLIOTT v. STANLEY (1884), 7 O. R. 350.—CAN.

**i. Tea & coffee agent.]**—D., on entering the employment of W. as agent in the vending of teas & coffees, covenanted with W. not to engage in the sale or delivery of teas or coffees in the city of Toronto, either for himself or as agent for any other person,

in the employ of pltf's. predecessors in business, who were hay & corn dealers, as salesman & manager of one of their branches, at a salary of 24s. per week, with the use of four living rooms over the shop.

In consideration of a small increase by way of commission in his salary, he undertook in the event of ceasing to represent his employers "not to enter into business for myself, or with others, or with any other firm within a radius of two miles from the shop in which I have been engaged."

The agreement was written out on the firm's business paper, which stated the nature of the business :—*Held* : the agreement must be construed with reference to the scope of the business, & not in a wide sense so as to render it void; although unlimited as to time it was not in the circumstances unreasonable; & pltf's. were entitled to an injunction restraining a breach.—HOOD & MOORE'S STORES, LTD. v. JONES (1899), 81 L. T. 169.

**777. ——— United Kingdom & other countries—Valid as to United Kingdom.]**—Pltf's., hay & straw merchants, at Brentford, who carried on an extensive wholesale & retail trade, in the United Kingdom, France, Belgium, & Canada, & had permanent places of business in the United Kingdom & France, in Oct. 1897, agreed to employ deft. as their clerk & foreman, in Calais or elsewhere, at a weekly wage of 35s. Deft. entered into a covenant that he would not, for the space of twelve months next after his leaving or being dismissed, carry on the business of a hay & straw merchant, or enter into the service of, or act as agent for, any person or persons carrying on the business of a hay & straw merchant, in the United Kingdom, or in France, or in the kingdom of Belgium, or Holland, or in the Dominion of Canada. Deft. continued in pltf's. employment until Nov. 1898, when he voluntarily left them, & entered into the employment of a rival hay & straw merchant in London :—*Held* : (1) the restraint imposed on deft. was not unreasonable, at any rate so far as the United Kingdom was concerned; (2) the covenant was not void on any ground of public policy; & deft. must be restrained from violating his covenant.

(3) The modern doctrine as I understand it, is that if an agreement restraining a person from carrying on business is injurious to the public interests of this country such agreement is invalid to the extent to which it is injurious, but not further, if it is so framed as to permit of division into two portions, one of which is good & the other bad . . . an agreement in restraint of trade which is wider than is reasonably necessary for the protection of the person seeking to enforce it is invalid so far as it is wider than is so necessary (LANDLEY, M.R.).

(4) The old rule of law that all covenants in restraint of trade are *prima facie* contrary to public

for at least two years after leaving W.'s employ. W. moved for an injunction to restrain D., who had left her employ, from violating the above covenant :—*Held* : the covenant was binding upon D., notwithstanding that the consideration for it might have been inadequate.—WITCHER v. DARLING (1885), 9 O. R. 311.—CAN.

**k. Patent medicine—Assignment of right to manufacture & sell.]**—IRISH v. PUTTER (1886), 19 N. S. R. (7 R. & G.) 405.—CAN.

**l. ——— Construction of agreement—Unlimited as to time.]**—Pltf's. sued L. for breach of the following agree-

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policy, & therefore void, has not been rescinded by recent decisions.

(5) If the restraint is unreasonable as to the foreign countries named, which I do not think it is, still the agreement as to them is clearly severable from that part of it which relates to this country (LINDLEY, M.R.).

(6) What may be reasonable on the sale of a business may be unreasonable on the departure of a man from the service of his employer (LINDLEY, M.R.).

(7) The old rule that a covenant in restraint of trade without limit in space within the United Kingdom is unreasonable, or *prima facie* unreasonable . . . is still, I believe, a rule to be followed (VAUGHAN WILLIAMS, L.J.).

(8) The contract must be construed with reference to the business of ptfs., which it was the object of the parties to protect (LINDLEY, M.R.).

(9) A covenant in restraint of trade, which is no wider than is reasonably required for the protection of the covenantee, will not be held void on any ground of public policy, unless some specific ground for so holding it void can be clearly established. But such cases are exceptional—UNDERWOOD (E.) & SON, LTD. v. BARKER, [1899] 1 Ch. 300; 68 L. J. Ch. 201; 80 L. T. 306; 47 W. R. 347; 15 T. L. R. 177; 43 Sol. Jo. 261, C. A.

**Annotations:—**18 to (1) *Consd. Haynes v. Doman*, [1899] 2 Ch. 13. *Refd. Hopewell v. Hoyle* (1918), 120 L. T. 538. *As to* (2) *Apld. Hooper & Ashby v. Willis* (1906), 94 L. T. 624; 129 J. v. Andrews, [1909] 1 Ch. 763. *Consd. Russell v. Carpenters & Joiners Amalgamated Soc.*, [1910] 1 K. B. 506; *Stuart & Simpson v. Halstead* (1911), 55 Sol. Jo. 598; *Morris v. Saxelby*, [1915] 2 Ch. 57. *Refd. North-Western Salt Co. v. Electrolytic Alkali Co.* (1912), 107 L. T. 439; *A. G. of Australia v. Adelaide S.S. Co.*, [1913] A. C. 781; *Millets v. Steedman* (1915), 84 L. J. K. B. 2057. *As to* (7) *Apld. North-Western Salt Co. v. Electrolytic Alkali Co.* (1912), 107 L. T. 439.

**778. — Construction of agreement—Scope of business considered.]—HOOD & MOORE'S STORES, LTD. v. JONES**, No. 776, *ante*.

**779. Horse-hair manufacturer—Validity of restraint—Two hundred miles.]—**(1) A covenant not to carry on the trade of horse-hair manufacturer within two hundred miles of Birmingham, held valid.

(2) A covenant, on the purchase of the business of horse-hair manufacturers not to carry on the trade of horse-hair manufacturer, construed to prevent the covenantor from the buying & selling manufactured horse-hair.

(3) The cases lay down this principle: that if the nature of the trade require it, the extent excluded may be very great indeed, as in the case of solr. & attorney in which there are two cases which hold such a covenant is good, though it prohibits the business being carried on throughout all England (ROMILLY, M.R.).—**HARMS v. PARSONS** (1862), 32 Rom. 328; 1 New Rep. 175; 32 L. J.

Ch. 247; 7 L. T. 815; 27 J. P. 164; 9 Jur. N. S. 145; 11 W. R. 250; 55 E. R. 129.

**Annotations:—***As to* (1) *Refd. Maxim Nordenfolt Guns & Ammunition Co. v. Nordenfolt*, [1893] 1 Ch. 690. *Generally, Refd. Davies v. Davies* (1887), 36 Ch. D. 359.

**780. — Construction of agreement—Agreement not to carry on trade—Dealing in manufactured horsehair.]—HARMS v. PARSONS**, No. 779, *ante*.

**781. Joiner—Validity of restraint—Agreement not to carry on business in London—Twenty-one years.]—ROGERS v. PARREY** (1613), 2 Bulst. 136; Cro. Jac. 326; 80 E. R. 1012.

**Annotations:—***Refd. Mitchel v. Reynolds* (1711), 1 P. Wms. 181; *Maxim Nordenfolt Guns & Ammunition Co. v. Nordenfolt*, [1893] 1 Ch. 630.

**782. Law accountant—Validity of restraint—Contract by infant—New contract inferred after attaining age.]—**In Sept. 1886, deft. agreed to serve ptfs., a firm of law accountants, at a weekly salary of 30s., or such other sum as might be agreed upon, & at the expiration of the agreement not to seek employment from or do work for persons who might at any time up to the expiration of the agreement have employed ptfs. At the time of the execution of the agreement deft. was a minor. After attaining twenty-one he continued in ptfs.' service for over four years, & his wages were raised from time to time. He left in Apr. 1892, & sought & obtained employment from persons who prior to that date were customers of ptfs.:—*Held*: it ought to be inferred from the conduct of the parties that a new contract between them, containing a stipulation by deft. in the terms of the agreement of Sept. 1886, not to seek employment or do work for former customers of ptfs., had been entered into after deft. attained twenty-one, & an injunction ought to be granted to restrain the breach of such stipulation.—**BROWN v. HARPER** (1893), 68 L. T. 488; 9 T. L. R. 429; 37 Sol. Jo. 405; 3 R. 585.

**783. Linen draper—Validity of restraint—Half a mile from any house inhabited by covenantee—No restriction as to time.]—CHESMAN v. NAINBY**, No. 206, *ante*.

**784. Machinery manufacturer—Validity of restraint—Seven years—United Kingdom.]—HERBERT MORRIS, LTD. v. SAXELBY**, No. 154, *ante*.

**785. Meat importer—Validity of restraint—Agreement not to engage in business similar to any business carried on.]—NEVANAS (S. V.) & CO. v. WALKER & FOREMAN**, No. 506, *ante*.

**786. — United Kingdom—One year.]—NEVANAS (S. V.) & CO. v. WALKER & FOREMAN**, No. 506, *ante*.

**787. Mercers—Validity of restraint—Agreement not to set up in same town.]—ANON.** (1611), March, 77; 82 E. R. 419.

**Annotation:—***Consd. Mitchel v. Reynolds* (1711), 1 P. Wms. 181.

**100. — — — — —]—BARROW v. WALKER** (1643), Marsh. 191; 82 E. R. 470.

**Annotation:—***Consd. Mitchel v. Reynolds* (1711), 1 P. Wms. 181.

ment: "The said L. does further agree not to make compound or sell directly or indirectly any article in connection with sheep or cattle medicine in New Zealand or the States of the Australian Commonwealth." It was admitted he had compounded & sold sheep & cattle medicines.—*Held*: the agreement was void & unenforceable as being in restraint of trade, being unlimited as to time & practically as to space.—**HOBBS BROTHERS v. LANGSTONE & LARKY** (1911), 31 N. Z. L. R. 200.—N.Z.

**m. Confectioner—Agreement not to "interfere in any way"—With business sold to plaintiff.]—TURNER v. BURNS** (1893), 24 O. R. 28.—CAN.

**n. — Validity of restraint—Five years.]—**Defts. on selling their restaurant & confectionery business in a certain town covenanted that they would not for five years "engage" in that town "either directly or indirectly in the business of restaurant keepers or confectioners" unless ptfs. gave up possession of the premises sold.—*Held*: acting as a paid employee in another restaurant did not constitute a breach of the covenant.—**LEE HING v. GREEN**, [1927] 4 D. L. R. 279; [1927] 2 W. W. R. 729; 21 Sask. L. R. 505.—CAN.

**o. Furniture manufacturer—Validity of restraint—Ten years.]—COOK v. SHAW** (1894), 25 O. R. 124.—CAN.

**p. Advertisement expert.]—SHEP-PARD PUBLISHING CO. v. HARRIS** (1905), 5 O. W. R. 482; 9 O. L. R. 504.—CAN.

**q. Nurserymen & fruit sellers—Validity of restraint—Ten years.]—CARPENTER v. CARPENTER** (1907), 9 O. W. R. 862; 15 O. L. R. 9.—CAN.

**r. Wood business—No competition without consent of third party.]—NOVAK v. ABRAHAM (Y. T.)** (1908), 8 W. L. R. 922.—CAN.

**t. Motor engineers—Limitation as to time & space reasonable.]—**On Feb. 3, 1910, deft. in an agreement between him & ptfs., covenanted with ptfs. that he would not engage in or have money invested in any business

**789. — Merchant—Validity of restraint—Considerable part of county of Cornwall.]**

(1) Upon the sale of the business of a general merchant in a country place, the vendor agreed to give a bond for a sum of £1,000 as liquidated damages, if he should be thereafter concerned in any "trading establishment" within a neighbouring district, comprising a considerable section of the county of Cornwall:—*Held*: this was not too general a restraint of trade; & specific performance of the agreement was decreed at the suit of the vendor.

(2) In constructing the condition of such a bond, a ct. of law would take into consideration the surrounding circumstances at the time of executing the bond, & would consider the words "trading establishment" to mean an establishment for any trade likely to interfere with the goodwill, which was the subject of the sale.

(3) A trade is a thing saleable & . . . The restriction for the term of a life, though not the life of the original vendor, is not an unreasonable condition (PAGE WOOD, V.-C.).—*AVERY v. LANGFORD* (1854), Kay, 663; 2 Eq. Rep. 1097; 23 L. J. Ch. 837; 23 L. T. O. S. 227; 18 Jur. 905; 2 W. R. 615; 69 E. R. 281.

*Annotations*:—As to (2) *Consd. Perls v. Saalfeld*, [1892] 2 Ch. 149. *Apld. Woods v. Thornbury* (1897), 41 Sol. Jo. 756. *Consd. Cattemoul v. Jared* (1909), 53 Sol. Jo. 244. *Refd. Nevanus v. Walker & Foreman*, [1914] 1 Ch. 413. *Generally, Refd. Maxm Nordenfelt Guns & Ammunition Co. v. Nordenfelt* (1892), 62 L. J. Ch. 273. *Mentd. South Wales Ry. v. Wythes* (1854), 5 De G. M. & G. 889.

**790. — Construction of agreement—"Trading establishment."]**—*AVERY v. LANGFORD*, No. 789, *ante*.**791. Motor car salesman—Validity or reasonableness of restraint—Fifty miles.]**—*WILLETT (H. J.), LTD. v. BEASLEY* (1923), 58 L. Jo. 355, C. A.

**792. Music hall manager—Breach of agreement—Agreement not to be interested in any music hall, etc.—Financial interest in companies giving cinematograph exhibitions.]**—*Pltfs.* who were music hall proprietors, in 1914 made with *deft.* who had been their manager, an agreement whereby he undertook until Sept. 1917, not to be "interested in any music hall, theatre, circus, hippodrome, or other place of entertainment" within a certain area.

During the specified period *deft.* became financially interested in two cos. which gave cinematograph entertainments within the area in question, & *pltfs.* brought an action against him for an injunction to restrain him from being interested therein:—*Held*: as a cinematograph theatre was a place of entertainment of an entirely different kind from a music hall, the action failed.—*LONDON THEATRES OF VARIETIES, LTD. v. GIBBONS* (1916), 33 T. L. R. 26.

**793. Newspaper proprietor & reporter—Breach of agreement—Agreement not to print or publish sporting paper within certain area—Publication of**

paper containing amateur sports information.]—A newspaper is published when & where it is offered to the public by the proprietor; it may be published in more than one place, & where its proprietor has two offices in two different towns, at each of which he offers for sale or distribution copies of his paper, the paper is published at each office.

On the sale of *Bell's Life in London* the vendors agreed with the purchaser not to print or publish any sporting paper within 10 miles of a certain London street:—*Held*: the publication within this area of a paper containing no racing or betting odds, but merely recording such amateur sports as cricket, football, cycling, & running, was not a breach of the agreement.—*McFARLANE v. HULTON*, [1899] 1 Ch. 884; 68 L. J. Ch. 408; 80 L. T. 486; 47 W. R. 507.

**794. — Validity of restraint—Twenty miles—Agreement with infant.]**—*SIR W. C. LENG & CO., LTD. v. ANDREWS*, No. 164, *ante*.

**795. Optician—Breach of agreement—Agreement not to carry on business alone or with the assistance of any other person—Acting as manager to another person.]**—*DALES v. WEABER*, No. 523, *ante*.

**796. Perfumer—Validity of restraint—Within cities of London & Westminster.]**—*PRICE v. GREEN*, No. 486, *ante*.**797. Provision merchant—Validity of restraint—One mile—No time limit.]**—*WEBB v. LARK* (1884), 78 L. T. Jo. 96.

**798. — Breach of agreement—Manufacture & sale of margarine.]**—*Deft.* had been a director of a limited co. formed for carrying on the general business of provision merchants. A substantial part of the profits of that co. was derived from the manufacture & sale of margarine by two subsidiary cos. On the amalgamation of that co. with *pltf. co.*, who were carrying on the business of provision merchants, *deft.* entered into an agreement to become a director of *pltf. co.* for a period of five years, & that he would not at any time, solely or jointly, directly or indirectly carry on or be engaged or concerned or interested in the business of a "provision merchant" within a prohibited area, save on behalf of *pltf. co.* *Deft.*, having ceased to be a director of *pltf. co.*, threatened to carry on & be engaged, concerned & interested within the prohibited area in the exclusive business of manufacturing margarine & of selling the margarine so manufactured to wholesale or retail dealers therein. *Pltf. company* claimed an injunction to restrain *deft.* from so acting; & alternatively, to have the agreement rectified on certain grounds:—*Held*: (1) the manufacturing & selling by *deft.* of margarine would not be a breach of the agreement; & there was no ground for rectification thereof.

(2) It is irrelevant & improper to ask what the parties prior to this deed intended or understood

similar to or in competition with the business carried on by the Winnipeg Garage Ltd. in Manitoba, Saskatchewan or Alberta, for a period of five years from the above date. After the agreement, *deft.* acted as manager for another co. carrying on in automobiles:—*Held*: the limitations imposed as to time & space were not unreasonable.—*KELLY v. McLAUGHLIN (Man.)* (1911), 19 W. L. R. 633; 1 W. W. R. 309; 21 Man. L. R. 789.—*CAN.*

**a. Launderers—Validity of restraint—Three years.]**—*ALLEN MANUFACTURING CO. v. MURPHY* (1911), 18 O. W. R. 572; 2 O. W. N. 877; 23 O. L. R. 467.—*CAN.*

**b. Grocer—Agreement not "to open store" in Toronto.]**—*Deft.*, a Ruthenian grocer, sold to *pltf.*, a fellow countryman, the stock in trade & goodwill of a grocery business carried on in the city of Toronto. *Deft.* agreed not "to open store" in Toronto; but, very soon after the sale & receipt of the purchase-price, which included £300 for the goodwill, *deft.* opened a grocery store in the neighbourhood of the store which he had sold; & to the *deft.*'s new store customers of the old were attracted. It was conceded that Ruthenians prefer to deal with people of their own race & usually do so:—*Held*: the protection which the restraint was designed to afford was not greater than

was reasonably necessary for the protection of *pltf.* in the enjoyment of the goodwill; & the contract was, therefore, a valid & binding one.—*MIZON v. POHORETZKY* (1917), 40 O. L. R. 239; 38 D. L. R. 214.—*CAN.*

**c. Electric business—Validity of restraint—Agreement not to trade in own name or trade name.]**—*Deft.* sold his electric business to *pltf.* & agreed not to do business in the city of Saint John "either in his own name nor under the name of the Jones Electric Co. from the date of these presents to the end of time." After the sale *deft.* continued to carry on an electric business in the city of Saint John:—*Held*: this agreement was neither void as being

**Sect. 9.—Particular trades, businesses and professions: Sub-sect. 25. Part VI. Sect. 1.]**

(COZENS-HARDY, M.R.).—LOVELL & CHRISTMAS, LTD. v. WALL (1911), 104 L. T. 85; 27 T. L. R. 236, C. A.

**Annotation:—**As to (1) *Reid, Slack v. Hancock* (1912), 107 L. T. 14.

**799. Retail dealer—Validity of restraint—One mile.]—**An agreement to give up a house & goodwill of a business for £7, & not to open a shop in the same line of business within 1 mile of the said house under a forfeiture of £20, is not illegal on the ground that the restraint of trade is unlimited in point of time & may continue though the purchaser ceases to carry on the business. Nor does the agreement require a stamp as being for a subject-matter of the value of £20.—*PEMBERTON v. VAUGHAN* (1847), 10 Q. B. 87; 16 L. J. Q. B. 161; 11 Jur. 411; 110 E. R. 35.

**Annotations:—***Consd. Maxim Nordenfolt Guns & Ammunition Co. v. Nordenfolt*, [1893] 1 Ch. 630. *Reid, Elves v. Crofts* (1850), 10 C. B. 241.

**800. Road reinforcement manufacturers—Validity of restraint—Agreement not to be interested in any such business.—In United Kingdom.]—**BRITISH REINFORCED CONCRETE ENGINEERING CO., LTD. v. SCHELFF, No. 310, *ante*.

**801. Ropemaker—Validity of restraint—Agreement by retiring partner—To employ remaining partners.]—**By indenture between A. & B., & C., dissolving their partnership, as ropemakers, A. & B. covenanted to allow C. during his life, 2s. on every cwt. of cordage which they should make on the recommendation of C. for any of his friends & connections, & whose debts should turn out to be good; & that A. & B. should stand the risk of such debts incurred, but should not be compelled to furnish goods to any of C.'s connections whom they should be disinclined to trust; & C. covenanted not to carry on the business of a ropemaker during his life except on Govt. contracts; & that all debts contracted or to be contracted in his or their names, pursuant to the indenture, should be the exclusive property of A. & B.; & that C. should, during his life, exclusively employ A. & B., & no other person, to make all the cordage ordered of him, by or for his friends & connections, on the terms aforesaid, & should not employ any other person to make any cordage on any pretence whatsoever:—*Held*: (1) the covenant by C. to employ A. & B. exclusively to make cordage for his friends, & not to employ any other, etc. A. & B. not being obliged to work for any other than such as they chose to trust, was not illegal & void as being in restraint of trade without adequate consideration; for the whole indenture must be construed together, according to the apparent reasonable intent of the parties; & the general object being only to appropriate to A. & B. so much of C.'s private trade as they chose to give his friends credit for, so much only was covenanted to be transferred, & C. was

still at liberty to work for any of his friends who were refused to be trusted by A. & B.: by which construction the restraint on C. was only coextensive, as in reason it could only be intended to be, with the benefit to A. & B.; & therefore the restraint on C. could be no prejudice to public trade; (2) breaches assigned generally against C. for having made cordage for divers persons other than for Govt., & for employing other persons than A. & B. to make cordage for his friends, etc., were well assigned; though no particular persons were named, nor the quantities or kinds of cordage mentioned, etc.; such facts lying more particularly within C.'s knowledge.—*GALE v. REED* (1806), 8 East, 80; 103 E. R. 274.

**Annotations:—**As to (1) *Consd. Collins v. Locke* (1879), 4 App. Cas. 674; *Maxim Nordenfolt Guns & Ammunition Co. v. Nordenfolt*, [1893] 1 Ch. 630. *Reid, Hitchcock v. Coker* (1836), 2 Har. & W. 464; *Ward v. Byrne* (1839), 5 M. & W. 548.

**802. ——— Not to act as manager or agent—Five years.]—**Pltfs. carried on the business of designers & suppliers of aerial ropeways, but they did not manufacture any of the requisite parts, though they sometimes constructed the ropeways. Their business was substantially of a world wide character, & deft. entered their employment, as assistant in the drawing office, & signed an agreement by which he undertook that on leaving pltfs.' employment, & for five years thereafter, he would not "accept any employment or be concerned with any person, firm or co. carrying on business of designers, manufacturers or constructors of aerial ropeways of any kind, or engage in such business or act either solely or jointly with or as manager or agent for any person, firm or co. directly or indirectly carrying on or engaged, concerned or interested in such business." Deft., having left pltfs.' employment, became managing director of Aerial Ropeway Transporters, Ltd., a co. which he was largely concerned in forming. In an action to restrain a breach of agreement:—*Held*: the part of the agreement as to acting with or as manager or agent for any person or co. interested in such business was too wide, & though that part was severable, yet, as pltfs. had no trade secrets which deft. was in a position to use in a similar business, & as there was in the circumstances no danger of solicitation of pltfs.' customers by deft. the action failed.—*ROPEWAYS, LTD. v. HOYLE* (1919), 88 L. J. Ch. 446; 120 L. T. 538; 35 T. L. R. 285.

**803. Saleswoman—Validity of restraint—Agreement not to interfere with customers—No restriction as to time.]—**KONSKI v. PEET, No. 497, *ante*.

**804. Shoe manufacturers—Validity of restraint—Lease of machine with "tying clause."—**UNITED SHOE MACHINERY CO. OF CANADA v. BRUNET, No. 80, *ante*.

**805. Shipbuilder—Breach of agreement—Agreement not to carry on business of ship & boat builder—Making masts, etc., used in shipbuilding.]—**SCHNEIDER v. BOND (1887), 3 T. L. R. 577, C. A.

in restraint of trade nor inoperative because unlimited in point of time.—*BAIRD v. JONES* (1920), 47 N. B. R. 31. —C.A.

**d. Engravers & manufacturers of dies & stencils—Validity of restraint—Five years.]—**On the dissolution of a partnership which had carried on business as engravers, & manufacturers of dies & stencils, pltf., one of the partners, bought the business & deft., the other partner, covenanted, in the dissolution agreement, that he would not for five years carry on or be engaged in the "business of an engraver or manufacturer of dies, stencils,

seals, signs & rubber stamps, & any other articles of a similar kind":—*Held*: the covenant was not unreasonable or against public policy.—*HOUGHTON v. EVANS* (B. C.), [1925] 3 D. L. R. 109; [1925] 2 W. W. R. 248.—C.A.

**e. Slaughterers—Construction of agreement—"Keeping out of slaughtering business."—**DUNN v. CAMPBELL (circa 1868), Mac. 490.—N.Z.

**f. Ironfounder—What amounts to breach—Acting as manager for another person at weekly salary.]—**Resp., on selling his business of an ironfounder to applt., agreed "not to commence business again as ironfounder" within

certain limits:—*Held*: It was not a breach of this agreement to act as manager for another person, at a weekly salary, of an ironfoundry within the limits mentioned.—*DISPATCH FOUNDRY CO., LTD. v. KILGOUR* (1896), 14 N. Z. L. R. 652.—N.Z.

**g. Corn factor—Construction of agreement.]—**On the construction of a contract between a corn factor & his clerk a stipulation in these terms:—"neither while in my service nor after leaving it are you to accept any other situation; nor engage directly nor indirectly in any business on your own account in Leith or neighbourhood"—

**806. Stage coach proprietor—Breach of agreement—Agreement not to run coaches from particular place—Running coach through prohibited place.]—**A coach master having sold his share of the business to his partner, with an undertaking not to be concerned in any coach running from *R. to London*, or prejudicial to the business which he had sold, an injunction was granted restraining him from running a coach from *P. through R. to London*.—*WILLIAMS v. WILLIAMS* (1818), 1 *Coop. temp.* Cott. 95; 2 *Swan*. 253; 1 *Wils. Ch.* 473, n.; 36 *E. R.* 612, L. C.

*Annotation:—***Mentd.** *Smith v. Fromont* (1818), 2 *Swan*. 330.  
**807. Stevedore—Validity of restraint—Agreement to parcel out stevedoring business.]—***COLLINS v. LOCKE*, No. 137, *ante*.

**808. Tobaccoist—Breach of agreement—Not to carry on business—Covenantor becoming manager of rival business.]—***BAXTER v. LEWIS* (1886), 30 *Sol. Jo.* 705.

*Annotation:—***Refd.** *Hill v. Hill* (1886), 35 *W. R.* 137.

**809. Tube manufacturer—Validity of restraint—Three years—United Kingdom.]—***BRITISH MANNESMANN TUBE CO., LTD. v. PHILLIPS* (1903), 48 *Sol. Jo.* 117.

**810. ——— Within limit of Eastern Hemisphere.]—***LAMSON PNEUMATIC TUBE CO. v. PHILLIPS*, No. 243, *ante*.

**811. Walter—Validity of restraint—Authority of receiver to enter into agreement.]—***HOWARD v. DANNER*, No. 219, *ante*.

**812. Wine merchant—Validity of restraint—Ten years—No limit as to space.]—***ROUSILLON v. ROUSILLON*, No. 138, *ante*.

**813. ——— Covenant not to buy goods elsewhere—Provided supply maintained at required level.]—**It is a contract by which plffs. agreed to supply defts. with the wine of good quality in such quantities as defts. might require on reason-

able terms, & defts. agreed, so long as plffs. kept their part of the contract, not to take a supply of burgundy from any other merchant, & further, plffs. were to take 200 shares in deft. co. It was objected that this contract, being unlimited in point of time, was in restraint of trade. But the answer was that it was not unlimited in point of time, because the obligation on defts. to abstain from supplying themselves with wine from other merchants only lasted so long as plffs. continued to perform their obligation (*STERLING, L.J.*).—*BOUCHARD SERVAIS v. PRINCE'S HALL RESTAURANT, LTD.* (1904), 20 *T. L. R.* 574, C. A.

**814. ——— Breach of agreement—Establishment of business outside prohibited area—Soliciting & obtaining orders within area.]—**On a sale by a wine merchant of his stock-in-trade & business, he covenanted that he would not set up or carry on at C., or in any other place within the counties of C., A., or M. the business of a wine & spirit merchant. The vendor gave up his place of business at C. & had no place of business within the prescribed district, but he solicited, & obtained orders within it.—**Held:** the question, whether this was a breach of the covenant, was too doubtful to entitle plff. to an injunction without bringing an action. But it was a breach of the covenant.—*TURNER v. EVANS* (1852), 2 *De G. M. & G.* 740; 42 *E. R.* 1061, L. J.

*Annotations:—***Consd.** *Allen v. Taylor* (1870), 19 *W. R.* 35. **Refd.** *Clark v. Watkins* (1863), 8 *L. T.* 8; *Woodbridge v. Bellamy*, [1911] 1 *Ch.* 326.

**815. Wood importer—Validity of restraint—Agreement not to be concerned in wood business—Within specified area.]—***WHITMORE v. KING*, No. 405, *ante*.

**816. Wool merchant—Validity of restraint—Fifty miles—Ten years.]—***DELIUS v. MÜLLER* (1901), 45 *Sol. Jo.* 737.

## Part VI.—Goodwill.

### SECT. 1.—IN GENERAL.

**817. Defined.]—***CRUTWELL v. LYE*, No. 880, *post*.

**818. ———.]—**The goodwill of the business is nothing more than an advantage attached to the possession of the house (*LEACH, M.R.*).—*CHISSUM v. DEWEES* (1828), 5 *Russ.* 29; 38 *E. R.* 938.

*Annotations:—***Folld.** *King v. Mid. Ry.* (1868), 17 *W. R.* 113; *Pile v. Pile, Ex p. Lambton* (1876), 3 *Ch. D.* 36. **Mentd.** *Tipping v. Power* (1842), 1 *Hare*, 405; *Ward v. Mackinlay* (1884), 10 *Jur. N. S.* 1063; *Richmond v. White* (1879), 4 *L. J. Ch.* 798; *Re Rhoades, Ex p. Rhoades*, [1899] 1 *Q. B.* 905.

meant that the party so restrained was not to accept a situation, nor engage in business in Leth as a corn-factor in any branch of that trade.—*WATSON v. NEUFFREY* (1893), 1 *Macph.* (Cl. of Sess.) 1110; 35 *Sc. Jur.* 635.—**SCOT.**

**h. Boot & shoe factor—Validity of restraint—One year.]—***MULVEIN v. MURRAY*, [1908] *S. C.* 528; 45 *S. L. R.* 364; 15 *S. L. T.* 807.—**SCOT.**

**k. Wine farmer—Reasonability of articles of co-operative society.]—**A wine farmer became a member of a co-operative society, registered under Act No. 25, 1892, the articles of assocn. of which bound members for an indefinite period to sell only as much of their wine as authorised by the society to persons at prices fixed by the co. In an action by the co. for an interdict restraining a member from

selling wine to persons not designated by the co.—**Held:** the restraint of trade placed by the articles on its members was unreasonable & deft. therefore was not bound thereby.—*KO-OPERATIEVE WYNBOUWERS VERENIGING VAN Z. A. B. P. K. T. v. BOTHA*, [1923] *C. P. D.* 429.—**S. AF.**

### PART VI. SECT. 1.

**817i. Defined.]—**The goodwill of a professional business is an asset of the estate.—*CHRISTIE v. CLARKE* (1866), 16 *C. P.* 544; *affd.* (1867), 27 *U. C. R.* 21.—**CAN.**

**817ii. ———.]—***Re WOOD, VALLANCE & Co. (Ont.)* (1915), 7 *O. W. N.* 814; 8 *O. W. N.* 267, 583; 24 *D. L. R.* 831.—**CAN.**

**817iii. ———.]—**Goodwill, *Lord Macnaghten* has said, is the benefit &

**819. ———.]—***ENGLAND v. DOWNS*, No. 835, *post*.

**820. ———.]—***POTTER v. INLAND REVENUE COMRS.*, No. 832, *post*.

**821. ———.]—**The estate of a deceased partner is entitled to participate in the goodwill of a business which does not belong to the surviving partners except by express agreement.

The goodwill of a trade, although inseparable from the business, is an appreciable part of the assets of a concern, both in fact & in the estimation of a ct. of equity. . . . It seems to be that species of connection in trade which induces

advantage of the good name, reputation & connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old established business from a new business at its first start.—*HANNAH v. JUGGERNATH & Co.* (1914), 1 *L. R.* 42 *Calc.* 262.—**IND.**

**817iv. ———.]—**"Goodwill" includes book debts, but not the promises in which a business is carried on.—*Re CROCKETT* (1895), 29 *L. T.* 117.—**IR.**

**817v. ———.]—***DONALD v. HODGKIN'S TRUSTEES* (1893), 21 *H. (Cl. of Sess.)* 246; 31 *Sc. L. R.* 181; 1 *S. L. T.* 366.—**SCOT.**

**l. Value of dentist's goodwill—Small, or even nil.]—**The value of the goodwill of a professional business such as that of a dentist is from the nature of the business necessarily small, or

Sect. 1.—In general. Sect. 2: Sub-sect. 1.]

customers to deal with a particular firm. It varies almost in every case, but it is a matter distinctly appreciable (LORD ROMILLY, M.R.).—*WEDDERBURN v. WEDDERBURN* (No. 4) (1856), 22 Beav. 84; 25 L. J. Ch. 710; 28 L. T. O. S. 4; 2 Jur. N. S. 674; 52 E. R. 1039.

*Annotations*.—*Mentd.* Clements v. Hall (1857), 24 Beav. 333; Clark v. Leach (1863), 1 De G. J. & Sm. 409; Vyse v. Foster (1872), 8 Ch. App. 315, n.

**822.** —.—(1) F. H. & B. carried on the business of solrs. in partnership. A was afterwards admitted as a partner, & in 1838 F. retired; he reserved to himself the right of introducing T. as a partner in the firm. In 1846, H. B. & A. entered into new articles of partnership, the term of which was extended to 1853, & articles were inserted for the valuation & purchase of the share of any retiring or deceased partner during the term; these articles were made subject to the right reserved by F. of introducing T. In 1848 H. died, & his widow was paid the value of his share. In 1849 F. introduced T. as a partner. A memorandum was then drawn up, without reference to the articles of 1846, declaring that from Sept. 1850 T. should have one-fifth of the profits until Sept. 1853, from which date he was to take an equal share in the partnership profits; the partnership to continue for ten years from Sept. 1, 1850. A clause was afterwards, added, that in the event of the death or retirement of either of the senior partners before, Sept. 1, 1853, his two-fifths should be divided into thirds, two-thirds, to be taken by the surviving senior partner, & one-third by T. A., in connection with his signature to this memorandum, wrote that it was not to annul or prejudice the articles of 1846. In Aug. 1853, A. signified his intention of retiring from the business, & he claimed the value of his share of the partnership & of the goodwill. Upon a bill filed by A. to have the value of his share in the business & the goodwill thereof ascertained:—*Held*: A., by his notice, had dissolved the partnership; the two days intervening between the notice & the determination of the partnership under the articles of 1846, could give no marketable value to the goodwill in the business, & A. was only entitled to the profits during the continuance of the partnership.

(2) Where a trade is established in a particular place, the goodwill of that trade means nothing more than the sum of money which any person would be willing to give for the chance of being able to keep the trade connected with the place where it has been carried on. Goodwill is something distinct from the profits of a business, although in determining its value, the profits are necessarily taken into account, & it is usually estimated at so many years' purchase upon the amount of those profits. The term "goodwill" seems wholly inapplicable to the business of a solr., which has no local existence, but is entirely personal, depending upon the trust & confidence which persons may repose in his integrity & ability to conduct their legal affairs.

(3) No question arises in these cases on the adequacy of the consideration unless it is merely illusory, but solely whether the restraint is confined within reasonable limits of space or time (LORD CHELMSFORD, C.).—*AUSTEN v. BOYS* (1858), 2 De G. & J. 626; 27 L. J. Ch. 714; 31 L. T. O. S.

276; 4 Jur. N. S. 719; 6 W. R. 729; 44 E. R. 1133, L. C.

*Annotations*.—*As to* (1) *Reid*. Reynolds v. Bullock (1878), 47 L. J. Ch. 773; Corbin v. Stewart (1911), 28 T. L. R. 99. *Generally*, *Mentd.* Clark v. Leach (1863), 1 De G. J. & Sm. 409.

**823.** —.—(1) Upon a sale of the goodwill of a business, the vendor is at liberty to set up a precisely similar business, & that next door to the premises where the original business has been carried on. But he is not at liberty to do so under the old style or firm, although his name should be the only one appearing in that firm. Nor is he at liberty in any other manner to hold out that he is carrying on business in continuation of or in succession to the business carried on by the late firm.

(2) The term "Goodwill" defined. It means every advantage that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on or with the name of the late firm.—*CHURTON v. DOUGLAS* (1859), John. 174; 28 L. J. Ch. 841; 33 L. T. O. S. 57; 5 Jur. N. S. 887; 7 W. R. 365; 70 E. R. 385.

*Annotations*.—*As to* (1) *Apld.* Hudson v. Osborne (1869), 39 L. J. Ch. 79. *Consd.* Leggett v. Barrett (1880), 15 Ch. D. 306. *Reid.* Scott v. Rowland (1872), 26 L. T. 391; Levy v. Walker (1879), 10 Ch. D. 436; Mogford v. Courtenay (1881), 45 L. T. 303; Walker v. Mottram (1881), 19 Ch. D. 355; Pearson v. Pearson (1884), 27 Ch. D. 145; Trego v. Hunt, [1896] A. C. 7; Acreford v. Tollit (1902), 71 L. J. Ch. 727; Pomorov v. Scalé (1906), 22 T. L. R. 795. *As to* (2) *Reid.* Levy v. Walker (1879), 10 Ch. D. 436; Ghiesi v. Cooper (1880), 14 Ch. D. 596; Trego v. Hunt, [1896] A. C. 7; West London Syndicate v. J. R. Comrs., [1898] 2 Q. B. 507.

**824.** —.—[The goodwill is clearly incident to the course (GIFFARD, V.-C.).—*KING v. MIDLAND RY. Co.* (1868), 17 W. R. 113.

**825.** —.—[The owner of business premises mortgaged them with the machinery & fixtures. A railway co. gave notice to take part of the premises for their railway, but before the price was fixed the mtgor. died, & the mtgees. entered into possession of the property. A suit was instituted for the administration of the mtgor.'s estate, which proved to be insolvent, & a receiver was appointed, who, with the consent of the mtgees. carried on the business. Arbitrators & an umpire were appointed to fix the compensation money payable by the co. The umpire awarded a sum of £11,950 of which he certified that he had awarded £2,800 in respect of the loss of profits in carrying on the business. The exors. claimed the £2,800 as belonging to the mtgor.'s estate, to be divided among his general creditors:—*Held*: the £2,800 was in the nature of compensation for the value of the goodwill of the business, which passed with the premises.—*PILE v. PILE, Ex p. LAMPTON* (1870), 3 Ch. D. 36; 45 L. J. Ch. 841; 35 L. T. 18; 40 J. P. 742; 24 W. R. 1003, C. A.

**826.** —.—(1) A trader who has sold his business & goodwill to another for value must abstain not only from soliciting orders from but also from dealing with the old customers.

(2) "Goodwill." I apprehend, must mean every advantage—every possible advantage, if I may so express it, as contrasted with the negative advantage of the late partner not carrying on the business himself—that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of

even nil.—*OWEN v. RAYNER* (1905), 25 N. Z. L. R. 168.—N.Z.

*m. Doctor's goodwill.*—Regarding the practice of a deceased doctor there is no goodwill recognised by the law.—

*BAIN v. MUNRO* (1878), 5 R. (Ct. of Sess.) 416; 15 Sc. L. R. 280.—SCOT.

*n. Public-house goodwill.*—The question whether the goodwill of a public-house is heritable or movable

depends on the circumstances of each case.—*MUIRHEAD'S TRUSTEES v. MUIRHEAD* (1905), 7 F. (Ct. of Sess.) 496; 42 Sc. L. R. 367; 12 S. L. T. 749.—SCOT.



the late firm, or with any other matter carrying with it the benefit of the business (JESSEL, M.R.).—*GINESI v. COOPER & Co.* (1880), 14 Ch. D. 596; 49 L. J. Ch. 601; 42 L. T. 751.

*Annotations*.—As to (1) *Consd.* *Leggett v. Barrett* (1880), 43 L. T. 641. *Reid.* *Walker v. Mottram* (1881), 19 Ch. D. 355; *Pearson v. Pearson* (1884), 27 Ch. D. 145; *Trego v. Hunt*, [1896] A. C. 7. As to (2) *Reid.* *Trego v. Hunt*, [1896] A. C. 7.

827. —.]—The goodwill of a public-house is not a personal goodwill, but on sale of the house passes with it.

It is quite plain that the goodwill of a public-house passes with the public-house. In such a case the goodwill is the mere habit of the customers resorting to the house. It is not what is called a personal goodwill (JESSEL, M.R.).—*Re KITCHIN, Ex p. PUNNETT* (1880), 16 Ch. D. 226; 50 L. J. Ch. 212; 44 L. T. 226; 29 W. R. 129, C. A.

*Annotations*.—*Consd.* *West London Syndicate v. I. R. Comrs.*, [1898] 2 Q. B. 507. *Mentd.* *Re Knight, Ex p. Voisey* (1882), 21 Ch. D. 442; *Re Willis, Ex p. Kennedy* (1888), 21 Q. B. D. 384.

828. —.]—*TREGO v. HUNT*, No. 44, *ante*.

829. —.]—INLAND REVENUE COMRS. v. MULLER & CO.'S MARGARINE, LTD., No. 834, *post*.

830. —.]—H. & F. carried on business as stockbrokers in London under articles of partnership which contained no mention of goodwill. The term for which the partnership was constituted expired, & the business was carried on by them as partners at will upon the conditions of the articles as far as applicable. H. died, & F. continued to carry on the business. For this purpose he obtained the permission of the committee of the Stock Exchange to use the name of the firm. He accounted for H.'s capital, but declined to pay anything in respect of the goodwill:—*Held*: the nature of a stockbroker's business was not such that there could not be a saleable goodwill thereof; & in the absence of any provision to the contrary in the articles, the goodwill must be sold & the proceeds accounted for.

The goodwill of a business is the advantage, whatever it may be, which a person gets by continuing to carry on & being entitled to represent to the outside world that he is carrying on a business which has been carried on for some time previously (WARRINGTON, J.).—*HILL v. FEARIS*, [1905] 1 Ch. 466; 74 L. J. Ch. 237; 53 W. R. 457; 21 T. L. R. 187.

**Effect of bankruptcy of trader.**—*See* BANKRUPTCY, Vol. V., p. 650, Nos. 5810-5811.

—**Assignment of trade mark with goodwill.**—*See* BANKRUPTCY, Vol. V., p. 968, No. 7924.

## SECT. 2.—NATURE AND CHARACTERISTICS.

### SUB-SECT. 1.—PERSONAL AND LOCAL GOODWILL.

831. **Personal & local goodwill distinguished.**—There is no such abstract property as will bear the name of goodwill. In some cases there is a local goodwill, especially in the case of an inn; there is also a goodwill which is purely personal. It is said, that personal goodwill is not such a thing as could be considered the subject of sale. Then, suppose a goodwill was partly local & partly personal, that personal goodwill is in the individual bkpt., & not in the assignees; the personal goodwill is the power to recommend customers, but what would be the recommendation of the assignees? they could have no influence on the customers (SIR JOHN CROSS).—*Re THOMAS, Ex p. THOMAS* (1841), 2 Mont. D. & De G. 294; 5 Jur. 967, Ct. of R.; *on appeal* (1842), 1 Ph. 159, L. C.

*Annotation*.—*Mentd.* *Re Marshall, Re Marshall & Rodgers* (1846), De G. 273.

832. —.]—The trade or goodwill of a trade sometimes enhances the value of real property as a well accustomed tavern or shop will, on account of the habit of persons to frequent it, sell for much more & the duty on a conveyance of the place where the business is carried on ought *pro tanto* to be augmented; & very frequently the goodwill of a business or profession without any interest in land connected with it is made the subject of sale though there is nothing tangible in it; it is merely the advantage of the recommendation of the vendor to his connections & his agreeing to abstain from all competition with the vendor (POLLOCK, C.B.).—*POTTER v. INLAND REVENUE COMRS.* (1854), 10 Exch. 147; 23 L. J. Ex. 345; 18 Jur. 778; 2 W. R. 561; 156 E. R. 392; *sub nom.* *Re STAMP DUTY ON POTTERS' DEED*, 2 C. L. R. 1131; *sub nom.* *A-G. v. POTTER*, 23 L. T. O. S. 269.

*Annotations*.—*Consd.* *I. R. Comrs. v. Angus, Same v. Lewis* (1889), 23 Q. B. D. 579; *West London Syndicate v. I. R. Comrs.*, [1898] 2 Q. B. 507; *I. R. Comrs. v. Muller's Margarine*, [1901] A. C. 217. *Reid.* *Limmer Asphaltic Paving Co. v. I. R. Comrs.* (1872), L. R. 7 Exch. 211; *Smelting Co. of Australia v. I. R. Comrs.*, [1896] 2 Q. B. 179; *Danubian Sugar Factories v. I. R. Comrs.*, [1901] 1 K. B. 245.

833. —.]—It is obvious there are certain kinds of goodwill to which a mtgee. will be entitled. The goodwill which attaches to a particular house increases the value of that house & therefore the mtgee. is entitled to that. If for instance there is a well known public house & from its position being well known people frequent it the goodwill attaches to the house & adds to its value. But there may be other kinds of goodwill attaching to the personal reputation which a man has made for himself. Of course that does not go to the mtgee. of the house but is a thing personal to the man whose skill & name have acquired that goodwill (COTTON, L.J.).—*COOPER v. METROPOLITAN BOARD OF WORKS* (1883), 25 Ch. D. 472; 53 L. J. Ch. 109; 50 L. T. 602; 32 W. R. 709, C. A.

*Annotation*.—*Consd.* *West London Syndicate v. I. R. Comrs.*, [1898] 2 Q. B. 507.

834. **Locality of goodwill.**—(1) What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit & advantage of the good name, reputation, & connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old established business from a new business at its first start (LORD MACNAGHTEN).

The term goodwill is nothing more than a summary of the rights accruing to resps. from their purchase of the business & property employed in it (LORD DAVEY).

(2) If there is one attribute common to all cases of goodwill it is the attribute of locality. For goodwill has no independent existence. It cannot subsist by itself. It must be attached to a business. Destroy the business, & the goodwill perishes with it, though elements remain which may perhaps be gathered up & be revived again (LORD MACNAGHTEN).

I do not say there may not be such a thing as a goodwill of a business utterly unconnected with the premises in which the business has been previously carried on, for it is quite possible that a man retiring from business might wish to retain the premises for his own private use, & sell merely the goodwill. . . . The goodwill of a trade carried on in a shop is as essential to the tradesman as the shop itself, which is benefited by it. What is the trade of a shop but the business done in it, & how is that custom brought to the shop but by the goodwill attached to it. The combination of a suitable shop with the trade done in it, & the

*Sect. 2.—Nature and characteristics: Sub-sects. 1 & 2.*

*Sect. 3: Sub-sects. 1 & 2, A. & B.; sub-sect. 3.]*

goodwill inducing that trade, seem to me to be inseparable (LORD BRAMPTON).

That in some cases & to some extent goodwill can & must be considered as having a distinct locality, is obvious, & was not in fact disputed. The goodwill of a public-house or of a retail shop is an instance. The goodwill of a business usually adds value to the land or house in which it is carried on if sold with the business; & so far as the goodwill adds value to land or buildings, the goodwill can only be regarded as situate where they are. In such a case the goodwill is said to be annexed to them (LORD LINDLEY).

(3) It has not been contended that goods, wares, & merchandise cover goodwill (LORD LINDLEY).—INLAND REVENUE COMRS. v. MULLER & CO.'S MARGARINE, LTD., [1901] A. C. 217; 70 L. J. K. B. 677; 84 L. T. 729; 49 W. R. 603; 17 T. L. R. 530, H. L.; on appeal from S. C. sub nom. MULLER & CO.'S MARGARINE, LTD. v. INLAND REVENUE COMRS., [1900] 1 Q. B. 310, C. A.

*Annotations:—As to (2) Consd. Danubian Sugar Factories v. I. R. Comrs., [1901] 1 K. B. 245; Rickerby v. Reay (1903), 20 R. P. C. 330. Refd. Rey v. Lecouturier (1907), 98 L. T. 197; Velazquez v. I. R. Comrs., [1914] 3 K. B. 458. Generally, Mentd. Pink v. Sharwood (No. 2), Re Ord's Trade Mk. (1913), 109 L. T. 594; Urban v. I. R. Comrs. (1913), 29 T. L. R. 476.*

#### SUB-SECT. 2.—GOODWILL AS SEPARATE ENTITY.

**835. Whether separable from business.]**—(1) The goodwill of a victualler's business held, under the circumstances, to be incident to the stock & license, & not to the premises on which the business was carried on.

(2) A widow carried on the business of a licensed victualler on premises held by her from year to year. Prior to her second marriage, she assigned her household goods, furniture, stock-in-trade, brewing utensils, & all other her effects upon trusts excluding her husband. She married:—*Held*: the goodwill of the trade, which was afterwards sold, passed by the deed as incident to the stock & license, & not to the husband with the premises.

(3) It [goodwill] is the chance or probability that custom will be had at a certain place of business in consequence of the way in which that business had been previously carried on (LORD LONGDALE, M.R.).—ENGLAND v. DOWNS (1842), 6 Beav. 269; 12 L. J. Ch. 85; 6 Jur. 1075; 49 E. R. 829.

*Annotation:—Generally, Mentd. Groves v. Wright (1856), 2 K. & J. 317.*

**836. —.]**—The widow & one of the two exors. of a surgeon dentist, who alone proved his will very shortly after his decease, by the description of the widow & one of the exors. of the deceased, entered into an agreement with a person as his successor, who agreed to give to the widow, her exors., administrators & assigns £100 yearly for five years, for the goodwill of the business, & for the advantage of an introduction to the patients of the deceased, to pay £100 for the instruments, to take the furniture at a valuation, & to take the house which the deceased held as a yearly tenant, & in which he resided, for the residue of the term therein. The agreement contained stipulations for the personal exertions of the widow on behalf of the successor. Upon inquiries before the master in a creditors' suit against the widow for the administration of testator's estate, it appeared by the affidavit of the successor that he relied upon the widow's personal exertions; & that, if these

were not afforded, he should resist payment of the annuity. By the report the master did not charge her with the annuity of £100 as part of her testator's assets; but, on exceptions:—*Held*: the whole, or a part, of the annuity belonged to the estate; & the cause was referred back to the master to review his report.—*SMALE v. GRAYES* (1850), 3 De G. & Sm. 706; 19 L. J. Ch. 157; 15 L. T. O. S. 179; 14 Jur. 662; 64 E. R. 670.

*Annotation:—Consd. Corbin v. Stewart (1911), 28 T. L. R. 99.*

**837. —.]**—The goodwill of a business, carried on by a wife before marriage, & afterwards by the husband & wife, survives to her: she may dispose of it & receive the purchase-money for her own benefit, even though it is carried on upon leasehold premises forming a part of the estate of testator, which were disposed of by his will.—*MORRIS v. MOSS* (1855), 25 L. J. Ch. 194.

**838. —.]**—*WEDDERBURN v. WEDDERBURN* (No. 4), No. 821, ante.

**839. —.]**—*SMITH v. EVERETT*, No. 932, post.

**840. —.]**—*ROBERTSON v. QUIDDINGTON*, No. 920, post.

**841. —.]**—*HALL v. BARROWS*, No. 933, post.

**842. —.]**—*Re KITCHIN, Ex p. PUNNETT*, No. 827, ante.

**843. —.]**—(1) By an agreement under seal the vendor agreed to sell the goodwill of the business of an hotel proprietor & licensed victualler, & the lease of the hotel in which the business was carried on, together with the household furniture, stock-in-trade, cash & book debts; of the total consideration £4,085 was apportioned to "lease & goodwill" £1,462 to furniture, stock-in-trade, & cash & £37 to book debts. The vendor was to show a good title to the lease & to assign the lease & goodwill to the purchasers; in the event of the consent of the landlords to the assignment of the lease not being obtained, it was provided that the vendor should, at the option of the purchasers, execute a declaration of trust of the leasehold premises in their favour. The consent of the landlords not having been obtained, a declaration of trust was executed in favour of the purchasers, which was stamped with the fixed duty of 10s.:—*Held*: the goodwill was not merely an enhancement of the value of the leasehold premises but was capable of being sold independently thereof, & as it was property other than lands, the agreement was liable to *ad valorem* duty in respect of the value of the goodwill.

(2) If the lease alone had been dealt with the vendor might after the sale have solicited the customers who had been in the habit of staying at the hotel to transfer to him their custom at another hotel. The goodwill having been agreed to be transferred, the vendor could not do this (RIGBY, L.J.).—*WEST LONDON SYNDICATE v. INLAND REVENUE COMRS.*, [1898] 2 Q. B. 507; 67 L. J. Q. B. 956; 79 L. T. 289; 47 W. R. 125; 14 T. L. R. 569; 42 Sol. Jo. 714, C. A.

*Annotations:—As to (1) Apld. Baglioni v. Cavalli (1900), 83 L. T. 500. Expld. & Distd. Muller's Margarine v. I. R. Comrs., [1900] 1 Q. B. 310. Refd. Danubian Sugar Factories v. I. R. Comrs., [1901] 1 K. B. 245. Maples v. I. R. Comrs., [1914] 3 K. B. 303. Generally, Mentd. Chesterfield Brewery Co. v. I. R. Comrs., [1899] 2 Q. B. 7.*

**844. —.]**—The goodwill of a public house is something apart from & different from the house (COZENS-HARDY, J.).—*BAGLIONI v. CAVALLI* (1900), 83 L. T. 500; 49 W. R. 236; 45 Sol. Jo. 78.

**845. —.]**—*INLAND REVENUE COMRS. v. MULLER & CO.'S MARGARINE, LTD.*, No. 834, ante.

**846. Goodwill attached to premises—Purchase price part of real estate of vendor.]**—Suppose the dealing has been extensive & carried on in partnership & with the father's stock the son who is exor.



would be accountable. Suppose the house were a house of great trade he must account for the value of what is called the goodwill of it (LORD HARDWICKE, C.).—GIBBLETT v. READ (1744), 9 Mod. Rep. 459; 88 E. R. 573, L. C.

*Annotations:—*Reid, Abbott v. Parfitt (1871), L. R. 6 Q. B. 346; Moseley v. Rendell (1871), L. R. 6 Q. B. 338.

847. ———.]—Money received by an extrix. for the goodwill of a public-house is assets in her hands.—WORRAL v. HAND (1791), Peake, 105; 170 E. R. 95, N. P.

848. ———.]—A public-house belonging to an intestate in fee, & in which he had carried on business, was sold, on lease, in the administration of his estate:—*Held*: the goodwill could not be separated from the real estate.—BOOTH v. CURTIS (1869), 20 L. T. 152; 17 W. R. 393.

—Rights of mortgagee.]—See MORTGAGE, Vol. XXXV., pp. 312, 602, Nos. 580–588, 3416.

### SECT. 3.—TRANSFER OF GOODWILL.

#### SUB-SECT. 1.—WHAT WORDS TRANSFER GOODWILL.

849. *Whether implied—On sale of business.*]—Where a business is sold the entire goodwill & right to use trade marks pass to the purchaser without any express mention of them being made in the deed of assignment, & the ct. will restrain any attempt on the part of the vendor to retain either for his own benefit or use.—SHIPWRIGHT v. CLEMENTS (1871), 19 W. R. 599.

850. ———.]—ROSS v. SURSHAM (1894), 11 T. L. R. 66.

851. *Stock-in-trade.*]—ENGLAND v. DOWNS, No. 835, *ante*.

852. *Assets.*]—JENNINGS v. JENNINGS, No. 891, *post*.

853. *Trade interest.*]—“Trade interest” which expression we understand to refer to goodwill, expectation of profit & any other similar matters (*per* CUR.).—*Re* LONDON COUNTY COUNCIL & CITY OF LONDON BREWERY CO., [1898] 1 Q. B. 387; 67 L. J. Q. B. 382; 77 L. T. 463; 61 J. P. 808; 46 W. R. 172; 14 T. L. R. 69, D. C.

854. *Goods, wares & merchandise.*]—INLAND REVENUE COMRS. v. MULLER & CO.’S MARGARINE, LTD., No. 834, *ante*.

855. *Works & plant.*]—In Hamilton Gas Works Act, 1895, s. 46, the expression “gas works & plant” includes not only the works themselves in the material sense but the undertaking as a going concern.—HAMILTON GAS CO., LTD. v. HAMILTON CORPN., [1910] A. C. 300; 79 L. J. P. C. 76; 102 L. T. 372; 74 J. P. 185; 26 T. L. R. 377, P. C.

#### SUB-SECT. 2.—WHAT PASSES BY TRANSFER OF GOODWILL.

##### A. In General.

856. *Bequest of goodwill of business carried on on testator’s freehold—Includes limited right of occu-*

*pation of premises.*]—*Semble*, a bequest of the goodwill of a business carried on by testator on his own freehold, entitles the legatee to such limited occupation only of the premises as may be necessary to enable him to obtain the benefit of his bequest, but not necessarily to have a lease of the premises.—FRYER v. WARD (1862), 31 Beav. 602; 32 L. J. Ch. 433; 9 Jur. N. S. 164; 11 W. R. 104; 54 E. R. 1272.

857. *Assignment of solicitor’s business & goodwill—Right to deeds & papers of clients of assignor.*]—In the absence of specific & definite stipulations, an assignment of the “goodwill” of a solr.’s business does not carry with it the right to the custody of deeds & papers belonging to the clients of the assignor (DENMAN, J.).—JAMES v. JAMES & BENDALL (1889), 58 L. J. Q. B. 300; 60 L. T. 569; 37 W. R. 495; 5 T. L. R. 383, D. C.; *on appeal*, 23 Q. B. D. 12, C. A.

*Annotation:—*Mentd. *Re* Palmer & Hosken, [1898] 1 Q. B. 131.

858. *Secret formulas for manufacturing proprietary articles.*]—A debtor, against whom a receiving order had been made, had carried on business in the manufacture & sale in England, France & America of certain proprietary articles made according to secret formulas invented by him & his brother with whom he was in partnership. In his public examination he was required to disclose these formulas in writing to his trustee. The debtor & his brother had each of them agreed not to disclose the secret. Upon the dissolution of the partnership the bkpt. retained the assets & goodwill of the business in England & America, while his brother continued to carry it on in France. The formulas had never been committed to writing. The bkpt. refused to disclose them on the ground that they existed only in his brain as the result of his skill & capacity, & that to disclose them would be a breach of his agreement with his brother:—*Held*: the formulas were part of the goodwill & assets of his business, & he was bound to communicate them to his trustee.—*Re* KEENE, [1922] 2 Ch. 475; 91 L. J. Ch. 484; 127 L. T. 831; 38 T. L. R. 663; 66 Sol. Jo. 503; [1922] B. & C. R. 103, C. A.

##### B. Benefit of Restrictive Covenants.

See Part V., Sect. 3, sub-sect. 3, B., *ante*.

#### SUB-SECT. 3.—CARRYING ON BUSINESS AFTER TRANSFER.

859. *Right of assignor to carry on same business—in absence of express covenant.*]—SHACKLE v. BAKER, No. 550, *ante*.

860. ———.]—CRUTWEILL v. LYE, No. 880, *post*.

861. ———.]—BOZON v. FARLOW, No. 904, *ante*.

862. ———.]—It is the clearly established

### PART VI. SECT. 3, SUB-SECT. 2.—A.

*o. Whether special value to firm—Of premises of same special value to third person.*]—By a deed of dissolution of partnership the retiring partner agreed to sell to the continuing partners his share of the goodwill of the business, agencies, & premises of the firm for £2,000, & it was also agreed that all premises, plant, & stock to arrive should be taken over by the continuing partners at a fair value.—*Held*: the sale of the goodwill of the premises did not include the special value to the firm of premises which would have had the same special value in the hands

of any third person.—*Re* TOTHILL, WATSON & CO. (1903), 22 N. Z. L. R. 755.—N. Z.

*p. Right to business books.*]—When a retail business is sold without any express limitation or restriction, the right to the business books passes to the purchaser.—MORRISON v. MORRISON (1900), 2 F. (Ct. of Sess.) 382; 37 Sc. L. R. 283; 7 S. L. T. 326.—SCOT.

### PART VI. SECT. 3, SUB-SECT. 3.

859i. *Right of assignor to carry on same business—in absence of express covenant.*]—A. sold by a written agreement his plant & stock in trade as a

ginger beer manufacturer at Parramatta:—*Held*: there was no implied covenant by the vendor not to establish a similar business in Parramatta or elsewhere.—BROWN v. MILLER (1863), 2 N. S. W. S. C. R. (L.) 76.—AUS.

859ii. ———.]—ANDERSON v. MILL (1912), 14 W. A. L. R. 184.—AUS.

859iii. ———.]—Deft. sold to plif. the goodwill of the business of an innkeeper which he was carrying on in London, in this Province, under the name of “Mason’s Hotel” or “Western Hotel”:—*Held*: the sale of the goodwill implied an obligation enforceable in equity that deft. would not

Sect. 3.—Transfer of goodwill: Sub-sects. 3 & 4.]

doctrine that the ct. will carry into execution an agreement so constituted [contract by letter]. It is not necessary to be satisfied that the parties actually meant the same thing, provided a clear assent be given to a certain proposition arising *de facto* out of the terms of the correspondence.

Upon the whole my opinion is this—that the terms of the contract, & its subject-matter are sufficiently stated; but that *pltf.* has no right, according to the contract to claim any goodwill in the trade in addition to the partnership property which is the subject of it except what is the necessary effect of his acquiring the sole ownership in the property—certainly not such as to preclude *deft.* from carrying on the same trade where & when & with whom he pleases (LORD ELDON, C.).—KENNEDY v. LEE (1817), 3 Mer. 441; 36 E. R. 170, L. C.

*Annotations*.—*Consd.* Churton v. Douglas (1859), John. 174. *Refd.* Thornbury v. Bevil (1842), 1 Y. & C. Ch. Cas. 554; Reynolds v. Bullock (1878), 47 L. J. Ch. 773; Ginesi v. Cooper (1880), 14 Ch. D. 596; Pearson v. Pearson (1884), 27 Ch. D. 145; I. R. Comrs. v. Muller's Margarine (1901), 84 L. T. 729. *Mentd.* Thomas v. Blackman (1844), 1 Coll. 301; Chinnock v. Ely (1865), 4 De G. J. & Sm. 638; Baumann v. James (1867), 16 L. T. 165; Cayley v. Walpole (1870), 39 L. J. Ch. 609; Lewis v. Brass (1877), 37 L. T. 738; Rossiter v. Miller (1878), 3 App. Cas. 1124; Preston v. Luck (1884), 27 Ch. D. 497; Hawkins v. Chaffey (1886), 54 L. T. 72; Chillingworth v. Esche (1923), 129 L. T. 808.

863. ———.—[CHURTON v. DOUGLAS, No. 823, ante.

864. ———.—[SMITH v. EVERETT, No. 932, post.

865. ———.—[One of two partners in a firm of S. J. & Co. in a country town, having died, the survivor filed his bill against the exors. to have the partnership wound up; the decree for sale was made, & it was referred to chambers to settle the terms & conditions. A sale in one lot, of the goodwill & of the premises in which the business had been carried on was directed, & an advertisement was approved, which stated that the purchaser would have the "exclusive right" to hold himself out as successor of S. J. & Co.; but it was ordered that these words should be struck out, as calculated to mislead a purchaser & that a statement should be introduced that the sale would not prevent *pltf.* or his assigns from carrying on the same business in the same town.—JOHNSON v. HELLELEY (1864), 2 De G. J. & Sm. 446; 5 New Rep. 211; 34 L. J. Ch. 179; 11 L. T. 581; 13 W. R. 220; 46 E. R. 447, L. J.

*Annotations*.—*Consd.* Trego v. Hunt, [1896] A. C. 7; Jennings v. Jennings, [1898] 1 Ch. 378. *Refd.* Walker v. Mottram (1881), 19 Ch. D. 355; Pearson v. Pearson (1881), 27 Ch. D. 145; Page v. Ratcliffe (1896), 74 L. T. 343; *Re* David & Matthews, [1899] 1 Ch. 378; Gillingham v. Biddow, [1900] 2 Ch. 242.

866. ———.—[The vendor of a business & the goodwill thereof may, in the absence of express stipulation to the contrary, set up a business of the same kind either in the same neighbourhood or elsewhere, & may publicly advertise the fact of his having done so; but he must not solicit the customers of the old business to cease dealing with the purchaser, or to give their custom to himself.—LABOUCHERE v. DAWSON (1872), L. R. 13 Eq. 322;

41 L. J. Ch. 427; 25 L. T. 894; 36 J. P. 404; 20 W. R. 309.

*Annotations*.—*Consd.* Leggett v. Barrett (1880), 15 Ch. D. 308. *Apd.* Ginesi v. Cooper (1880), 14 Ch. D. 596; Mogford v. Courtenay (1881), 45 L. T. 303. *Refd.* Walker v. Mottram (1881), 19 Ch. D. 355. *Distd.* Pearson v. Pearson (1884), 27 Ch. D. 145. *Consd.* Vernon v. Hallam (1886), 34 Ch. D. 748. *Apprd.* Trego v. Hunt, [1896] A. C. 7. *Distd.* Livock v. Pearson (1928), 83 Com. Cas. 188. *Refd.* Allen v. Flood, [1898] A. C. 1; Jennings v. Jennings, [1898] 1 Ch. 378; Gillingham v. Biddow, [1900] 2 Ch. 242; Green (Northampton) v. Morris, [1914] 1 Ch. 562; Boorne v. Wicker, [1927] 1 Ch. 667; Farey v. Cooper, [1927] 2 K. B. 384.

867. ———.—[TREGO v. HUNT, No. 44, ante.

868. ———.—[False representation of intention not to carry on same business.]—CRUTWELL v. LYE, No. 880, post.

869. ———.—[On one of two partners retiring from trade, it was left to arbitrators to determine, amongst other things, what was to be paid to the retiring partner for the goodwill of the trade; & they, on an understanding that the retiring partner would not set up the trade in the same street or its vicinity, awarded £500 as the share of the retiring partner for the goodwill, which was paid; but no mention was made in the award as to the retiring partner not carrying on the trade in the same street or its vicinity. Afterwards, he having set up the trade in the same street, a decree made, on *parol* evidence of the understanding on which the award was made, enjoining him, on the ground of fraud, from carrying on the same trade in the same street, or its vicinity.—HARRISON v. GARDNER (1817), 2 Madd. 198; 56 E. R. 308.

*Annotation*.—*Consd.* Trego v. Hunt, [1896] A. C. 7.

870. Exclusive right of assignee to carry on actual business transferred.]—*Pltf.* declared in covenant, & set out first an indenture, whereby *deft.*, the original proprietor of a medicine, bargained, sold, & assigned all his right, interest, & property in it to a third person, subject to a covenant by the assignee to pay him one-third of the profits during his & his wife's lives; & also covenanted with the assignee that he would not thereafter, by himself or jointly with any other, prepare or sell, or engage with any other person in preparing or selling the said medicine, etc.; & then *pltf.* set out a second indenture, whereby the first assignee assigned all his right, interest, & property in the medicine to *pltf.*, subject to the covenant of reservation; & then *pltf.* set out a third indenture between him & *deft.*, reciting the two former, & that he had agreed with *deft.* for the absolute purchase of all his right, share, & interest, as well in the said medicine, as in the one-third share so reserved to *deft.*; by which indenture *deft.* bargained, sold, & assigned to *pltf.* all that third share, & all other share, or proportions, right, title, interest, claim or demand whatsoever of *deft.* to the said medicine, or to the profits, etc. *habendum* to *pltf.* in like manner as *deft.* might have done if those presents had not been made: with a covenant that *pltf.* might at all time thereafter prepare & sell the medicine in the name of *deft.*, & receive the profits thereof to his own use; & another covenant for further assur-

thereafter resume or carry on the business of an innkeeper in London, under the name of "Mason's Hotel," or "Western Hotel"; & would not resume or carry on the business of an innkeeper, under any name or in any manner, in the premises in question; & would not hold out in any way that he was carrying on the business formerly carried on by him under the said names, or either of them.—

MOSSOP v. MASON (1871), 18 Gr. 453.—CAN.

859iv. ———.—[Where a business carried on in leased premises is sold as a going concern the taking by the seller of a new lease of the premises with the idea of returning there after the expiration of the existing lease, amounts to a direct solicitation of the old customers & consequently tends to depreciate that which was sold. The seller will be

ordered to assign the new lease to the buyer, or if the lessor's consent to such assignment cannot be had, the seller will be restrained from carrying on business in the premises.—PULOS v. DEMARCO (Alta.), [1917] 2 W. W. R. 1000.—CAN.

859 v. ———.—[CHANDRA KANTA DAS v. PARASULLAH MULLICK (1921), I. L. R. 48 Calc. 1030.—IND.

ance, for the more perfect & absolute assigning & assuring to pltf. the said medicine, & all the profits arising from the sale thereof. Then pltf. proceeded to assign breaches in the words of the first indenture between deft. & the first assignee; that deft. prepared & sold the medicine, & also engaged with others in preparing & selling it for his own profit, etc.: & charged some of these breaches to be contrary to the first indenture, & to deft.'s covenants therein with the first assignee; but the second breach was charged to be contrary to the last indenture & to his covenant with pltf.:—*Held*: the last indenture alone, without the confirmation, which, however, the construction of it received from the two former, recited therein, showed an intention in deft., & the words of it were large enough, to assign to pltf. not only the one-third share of the profits reserved by the first indenture, but all deft.'s right, title, & interest in the medicine, & all the future profits arising from the sale thereof; & such assignment of all his interest & property in the medicine raised an implied covenant that he would not prepare or sell the medicine, or engage with others in so doing, for his own profit; such preparation & sale being a retention & exercise of the right of preparing & vending the medicine of which he was once the proprietor, in derogation of his deed, whereby he had conveyed such right to pltf., & the second breach was well assigned, which was charged to be against his covenant in the last deed with pltf.—*SEDDON v. SENATE* (1810), 13 East, 63; 104 E. R. 290.

871. —.]—*HUDSON v. OSBORNE*, No. 874, *post*.

872. —.]—The rule of *Labouchere v. Dawson*, No. 860, *ante*, by which in the case of a voluntary sale the vendor of the goodwill of a business is precluded from afterwards soliciting the former customers of that business cannot be extended to the case of a compulsory alienation. The obligation enforced by the rule is purely personal & is not a mere incident to the transfer of property. Therefore the purchaser of the goodwill of a business from a trustee in bkcy. or liquidation has no right to restrain the bkpt. or liquidating debtor from setting up *bona fide* a fresh business & soliciting the customers of his former business & it is immaterial whether bkpt. has or has not joined in the conveyance of the goodwill to the purchaser.

An assignment of a business & its goodwill, without more, . . . as against the assignor . . . confers on the assignee the exclusive right to carry on the business assigned & as incidental to this it also confers on him the exclusive right to represent himself as carrying on that business & consequently the right not only to sue the assignor for damages if he has infringed these rights but also to restrain him from infringing them if he manifests an intention to infringe them (*per CUR.*).—*WALKER v. MOTTRAM* (1881), 19 Ch. D. 355; 51 L. J. Ch. 108; 45 L. T. 659; 30 W. R. 165, C. A. *Annotations*:—*Apld.* *Dawson v. Beeson* (1882), 22 Ch. D. 504. *Consd.* *Pearson v. Pearson* (1884), 27 Ch. D. 145; *Trego v. Hunt*, (1898) A. C. 7; *Jennings v. Jennings*, (1898) 1 Ch. 378. *Apld.* *Green* (Northampton) *v. Morris*, (1914) 1 Ch. 562; *Farey v. Cooper*, (1927) 2 K. B. 384. *Consd.* *Boorne v. Wicker*, [1927] 1 Ch. 667.

#### PART VI. SECT. 3, SUB-SECT. 4.

873 i. *Right of assignee to exclusive use of trade name.*—*McDONALD v. MILLER* (1904), 37 N. S. R. 46; 23 C. L. T. 299.—*CAN.*

873 ii. —.]—*WILSON v. WILLIAMS* (1894), 29 L. R. Ir. 176.—*IR.*

873 iii. —.]—*S.*, one of the partners of S. & M., bought the business & good-

will, & carried the business on for three years in his own name. At the end of that time his former partner M. & a person also named S., who had entered into partnership with him, began to trade in the same business in the same town, under the name of S. & M.:—*Held*: S. was entitled to interdict against their using that name.—*SMITH v. M'BRIDE & SMITH* (1888), 16 R. (Cl.

#### SUB-SECT. 4.—USE OF NAME AFTER TRANSFER.

*See, generally, TRADE MARKS, TRADE NAMES, & DESIGNS.*

873. *Right of assignee to exclusive use of trade name.*—*CHURTON v. DOUGLAS*, No. 823, *ante*.

874. —.]—In substance there is no distinction between the sale of a business & goodwill by a trader himself & a sale by his assignees in bkcy. Therefore on sale of a business by a trader's assignee in bkcy. the trader has no right upon setting up a fresh business after his discharge to use the trade marks of his old business or in any other way to represent himself as carrying on the identical business which was sold, although he has a right to set up again in business of the same kind next door to his old place of business.

He has no right to call his house O. house. That I take to be a mode of representing his business as the same as was carried on there. It is the trade designation of the business—it is the O. house business. I think that a man who has sold the house which is known as O. house & the business which is known as the O. house business has no right to reassume that name which can only be reassumed for the purpose of deceiving the public into the belief that his present business is the same as his former one (*JONES, V.C.*).—*HUDSON v. OSBORNE* (1869), 39 L. J. Ch. 79; 21 L. T. 386.

*Annotations*:—*Apld.* *Hammond v. Malcolm Brunker & Collins* (1892), 8 T. L. R. 324. *Refd.* *Walker v. Mottram* (1881), 19 Ch. D. 355.

875. —.]—The assignment of the goodwill & business of C. & W. did convey the right to use the name of C. & W. & the exclusive right to use that name as between the vendor-purchaser of that business. . . . The sale of the goodwill & business conveyed the right to the use of the partnership name as a description of the articles sold in that trade & that right is an exclusive right as against the person who sold it & an exclusive right against all the world so that no other person could represent himself as carrying on the same business (*JAMES, L.J.*).—*LEVY v. WALKER* (1879), 10 Ch. D. 436; 48 L. J. Ch. 273; 39 L. T. 654; 27 W. R. 370, C. A.

*Annotations*:—*Apld.* *Chappell v. Griffith* (1885), 53 L. T. 459. *Distd.* *Chatters v. Isaacson* (1887), 57 L. T. 177; *Gray v. Smith* (1889), 43 Ch. D. 208. *Apld.* *Bodega Co. v. Owens* (1889), 7 It. P. C. 31. *Consd.* *Thynne v. Shove* (1890), 45 Ch. D. 577. *Apld.* *Burchell v. Wilde*, (1900) 1 Ch. 551. *Refd.* *Jennings v. Jennings*, (1898) 1 Ch. 378; *Re David & Matthews*, [1899] 1 Ch. 378; *Pomeroy v. Scalé* (1906), 23 T. L. R. 170. *Mentd.* *Waring & Gillow v. Gillow & Gillow* (1916), 32 T. L. R. 389.

876. —.]—Deft. who claimed to have been descended from an ancestor of the name of Pomeroy & who carried on business under the name of Mrs. Pomeroy assigned the business to a co. with the goodwill & exclusive right to use the name of Mrs. Pomeroy as part of the name of the co. & to represent the co. as carrying on the business in continuation of the firm of Mrs. Pomeroy:—*Held*: deft. must be restrained from carrying on a similar business under the name of Pomeroy or Mrs. Pomeroy or any other style of which the name Pomeroy formed part.—*MRS. POMEROY, LTD. v. SCALÉ* (1906), 23 T. L. R. 170; 24 R. P. C. 177.

877. — While not exposing vendor to

of Sess.) 36; 26 Sc. L. R. 22.—*SCOT.*

873 iv. —.]—Where the business & goodwill of an insolvent, carried on in his own name, has been sold in the insolvency the insolvent is entitled thereafter to set up a fresh business in his own name, but he cannot represent such business to be the old one.—*DOWSON v. HOBKIRK & WATSON*, [1912] W. L. D. 1.—*S. AF.*



**892.** —[—]—*TAYLOR v. CAMBRIDGE GAZETTE Co., LTD. & KILNER* (1898), 42 Sol. Jo. 832.

**893.** —[—]—*WEST LONDON SYNDICATE v. INLAND REVENUE COMRS., No. 843, ante.*

**894.** —[—]—(1) If the goodwill had been sold in the ordinary way on the death & had been assured to the purchaser it is clear since the case of *Trego v. Hunt*, No. 44, *ante*, that the surviving partner who would have been one of the vendors could not injure the goodwill sold by soliciting the customers of the old firm (*ROMER, J.*).

(2) The goodwill of the business would be an asset, & might well be the most valuable asset of the partnership. The exors., therefore, in the absence of special provisions in the partnership contract, would be entitled to require that the goodwill should be sold together with the other assets for the purposes of divisions between the exors. & the surviving partner (*ROMER, J.*).—*Re DAVID & MATTHEWS*, [1899] 1 Ch. 378; 68 L. J. Ch. 185; 80 L. T. 75; 47 W. R. 313.

*Annotations* :—*As to* (1) *Reid, Gillingham v. Beddow*, [1900] 2 Ch. 242; *Pomeroy v. Sealé* (1906), 22 T. L. R. 795. *As to* (2) *Reid, Re Leas Hotel Co., Salter v. Leas Hotel Co.*, [1902] 1 Ch. 332; *Hill v. Fearis*, [1905] 1 Ch. 466. *Generally, Reid, Burchell v. Wilde* (1900), 48 W. R. 491.

**895.** —[—]—*Involuntary alienation.*—*WALKER v. MOTTRAM*, No. 872, *ante*.

**896.** —[—]—The general principle affirmed by the House of Lords in *Trego v. Hunt*, No. 44, *ante*, that a vendor who sells the goodwill of his business & receives the purchase-money cannot afterwards destroy that which he has sold by soliciting his former customers, does not apply to the case of a sale of a debtor's business by the trustee of a deed of assignment executed by the debtor for the benefit of creditors. In such a case the alienation being involuntary as in the case of a *bkpcy.* the exception established in *Walker v. Mottram*, No. 872, *ante*, applies, & debtor is not precluded from soliciting the customers of his old firm.—*GREEN & SONS (NORTHAMPTON), LTD. v. MORRIS*, [1914] 1 Ch. 562; 83 L. J. Ch. 559; 110 L. T. 508; 30 T. L. R. 301; 58 Sol. Jo. 398.

*Annotations* :—*Fold, Farey v. Cooper*, [1927] 2 K. B. 384. *Reid, Boorne v. Wicker*, [1927] 1 Ch. 667.

**897.** —[—]—A debtor who has assigned his business & goodwill to a trustee for the benefit of creditors is not precluded, in the absence of express stipulation to the contrary, from soliciting the customers of the old business, notwithstanding that the deed of assignment contains a covenant by him to aid to the utmost of his power the realisation of the property assigned & the distribution of the proceeds thereof amongst creditors. In such a case, therefore, debtor cannot be restrained from canvassing the customers, nor can a third person be restrained from instigating debtor to do so.—*FAREY v. COOPER*, [1927] 2 K. B. 384; 96 L. J. K. B. 1046; 137 L. T. 720; 43 T. L. R. 803, C. A.

**898.** —[—]—*Express provision authorising vendor to set up business.*—T. P. as trustee of a will, carried on a business which had been carried on by testator under the name of James P. By an agreement made to compromise a suit, James P., a son of the testator & a beneficiary under his will, agreed to sell to T. P. all his interest in the business, & in the property on which it was carried on. It was provided that nothing in the agreement should prevent James P. from carrying on the like business where he should think fit, & under the name of James P. T. P. brought this action to enforce this agreement, & to restrain James P. from soliciting the customers of the old firm :—*Held* : the proviso in the agreement authorised

deft. to carry on business in the same way as any stranger might lawfully do.—*PEARSON v. PEARSON* (1884), 27 Ch. D. 145; 54 L. J. Ch. 32; 51 L. T. 311; 32 W. R. 1006, C. A.

*Annotations* :—*Fold, Vernon v. Hallam* (1886), 34 Ch. D. 748. *Overd, Trego v. Hunt*, [1896] A. C. 7. *Consd. Jennings v. Jennings*, [1898] 1 Ch. 378; *Re David & Matthews*, [1899] 1 Ch. 378; *Gillingham v. Beddow*, [1900] 2 Ch. 242. *Reid, Bristol, Cardiff & Swansea Aerated Bread Co. v. Maggs* (1890), 44 Ch. D. 616; *Robb v. Green* (1895), 64 L. J. Q. B. 593; *Boorne v. Wicker*, [1927] 1 Ch. 667.

**899.** —[—]—One of two partners bought out the other under their articles. The articles provided that the outgoing partner might set up a similar business in the neighbourhood :—*Held* : the proviso was merely declaratory, & did not authorise solicitation of old customers.—*GILLINGHAM v. BEDDOW*, [1900] 2 Ch. 242; 69 L. J. Ch. 527; 82 L. T. 791; 64 J. P. 617.

**900.** —[—]—*Old customers dealing with vendor—Subsequent solicitation.*—The goodwill of a business was sold to the C. Co. W., one of the vendors, who had been a partner in the business, subsequently formed the N. Co., which competed with the C. Co. W., on behalf of the N. Co., solicited custom from persons who had been customers of the original business :—*Held* : the rule which prohibits the vendor from soliciting customers applies when the customers, although remaining customers of the purchaser, have in fact become customers of the new firm started by the vendor. It is immaterial whether a particular individual who is solicited has also of his own accord done business with the vendor.—*CURL BROTHERS, LTD. v. WEBSTER*, [1904] 1 Ch. 685; 73 L. J. Ch. 540; 90 L. T. 479; *sub nom. CARL BROTHERS, LTD. v. WEBSTER*, 52 W. R. 413.

**901.** —[—]—*Application to vendor's executors.*—The rule laid down in *Trego v. Hunt*, No. 44, *ante*, that a vendor of the goodwill of a business is not entitled to solicit its customers extends to a vendor's exors. carrying out a contract for the sale of the goodwill, & the exor. will be restrained at the suit of purchaser from soliciting customers of the business.

Where therefore a deed of partnership provided that on the death of a partner the surviving partner should acquire deceased partner's share of the capital property & assets of the partnership business, or alternatively that the surviving partner might elect to have the whole of the assets of the partnership realised & divided, an injunction was granted at the instance of the surviving partner to restrain an exor. of deceased partner from soliciting customers of the firm.—*BOORNE v. WICKER*, [1927] 1 Ch. 667; 96 L. J. Ch. 361; 137 L. T. 409; *sub nom. BORNE v. WICKER*, 71 Sol. Jo. 310.

*Annotation* :—*Reid, Farey v. Cooper*, [1927] 2 K. B. 384.

*Dissolution of partnership.*—*See PARTNERSHIP, Vol. XXXVI., pp. 493, 494, Nos. 1604—1614.*

#### SUB-SECT. 6.—DEALING WITH FORMER CUSTOMERS AFTER TRANSFER.

**902. Whether restrained.**—*GINESI v. COOPER & Co.*, No. 826, *ante*.

**903.** —[—]—(1) If it had been a sale of a goodwill to a stranger . . . I think that there would be an implied contract on the part of a person who sells a goodwill that he will not immediately after solicit the customers who are really the people who form the goodwill (*BRETT, L.J.*).

(2) Is there anything which will justify the ct. in construing a sale of goodwill as an implied

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contract not to deal with any customers of the old business the goodwill of which was sold? In my opinion not. Here the parties were dealing with that upon which the law had put a definite & fixed interpretation. It was well known what a sale of good will implied &—although many cases have dealt with the effect of a sale of goodwill no case has ever laid down that a man who had sold his goodwill although he set up a shop next door was not justified in dealing with the customers of the old firm whom he did not solicit to come there (COTTON, L.J.).

(3) Undoubtedly the cases have established that the sale of a goodwill does prevent a man from representing that he is carrying on the old business, or that he is the successor of it & in that way trying to get the customers of the partnership (COTTON, L.J.).—LEGGOTT v. BARRETT (1880), 15 Ch. D. 306; 51 L. J. Ch. 90; 43 L. T. 641; 28 W. R. 962, C. A.

**Annotations:—**As to (1) *Consd.* Walker v. Mottram (1881), 19 Ch. D. 355. As to (2) *Consd.* Pearson v. Pearson (1888), 27 Ch. D. 145; Trego v. Hunt, (1896) A. C. 7. As to (3) *Refd.* Mogford v. Courtenay (1881), 45 L. T. 303. *Generally.* *Mentd.* Palmer v. Johnson (1884), 13 Q. B. D. 361; Mason v. Schuppisser (1899), 81 L. T. 147; Gros-wolde-Williams v. Barneby (1900), 83 L. T. 708; Monk v. Arnold (1902), 86 L. T. 580; Millbourn v. Lyons, [1914] 2 Ch. 231.

**SUB-SECT. 7.—ENFORCEMENT OF AGREEMENT TO TRANSFER.**

**Specific performance generally.]—See SPECIFIC PERFORMANCE, Vol. XLII., pp. 421 *et seq.***

**904. Whether purchase specifically enforced.]—**Specific performance of an agreement for selling the business of an attorney, refused, upon the bill of the vendor, there being no express stipulations by which the ct. might be enabled to carry it into effect on his part, in return for deft.'s purchase-money; & there being no conditions generally applicable to transactions of this nature so as to come within the description of "usual clauses" to be inserted in an instrument to be drawn up in pursuance of the agreement.

Unless restrained by positive contract a man may after selling the goodwill of a trade set up a business of the same kind at the same place whenever he pleases (GRANT, M.R.).—BOZON v. FARLOW (1816), 1 Mer. 459; 35 E. R. 742.

**Annotations:—***Refd.* Thornbury v. Bevil (1842), 6 Jur. 407. *Mentd.* Stocker v. Brockelbank (1851), 3 Mac. & G. 250.

**905. —.]—**The ct. will not execute a contract for the sale of a goodwill but will leave the parties to law.—BAXTER v. CONOLLY (1820), 1 Jac. & W. 576; 37 E. R. 487.

**Annotations:—***Consd.* Coslake v. Till (1826), 1 Russ. 376. *Refd.* Thornbury v. Bevil (1842), 1 Y. & C. Ch. Cas. 554.

**906. —.]—**BRYSON v. WHITEHEAD, No. 380, ante.

**907. —.]—**(1) Pltf. wishing to sell a medical practice with the lease of the house where it was carried on, placed it on the books of a medical agent. This led to negotiations with deft. The premiums asked for the practice & for the lease were stated in a letter from the agent to deft., but no time for completing the purchase was mentioned. Deft. replied in a letter to the agent accepting the terms offered, & adding that he should be ready to pay the deposit money "on receipt of corrected agreement." & at the same time he wrote to pltf. personally, also accepting the terms offered & adding, "I shall trust to you to give me the best introduction you can during three months & afterwards, if necessary." Pltf.

replied, thanking deft. for acceding to his terms & saying that "it would be his aim as well as his duty to give him an effectual introduction to his patients." A formal agreement was drawn up but never signed, & after some further correspondence deft. refused to complete the purchase:—*Held:* inasmuch as the time for the commencement of the purchase was left uncertain, & the stipulation as to the three months' introduction was not agreed to, & as the parties contemplated a formal agreement, there was no binding contract between the parties, & the action was dismissed.

**Qu.: whether the ct. can enforce specific performance of a contract to sell a medical practice.**—MAY v. THOMSON (1882), 20 Ch. D. 705; 51 L. J. Ch. 917; 47 L. T. 295, C. A.

**Annotations:—**As to (1) *Consd.* Gray v. Smith (1889), 43 Ch. D. 208. *Refd.* Bristol, Cardiff, & Swansea Aerated Bread Co. v. Maggo (1890), 44 Ch. D. 816. *Generally.* *Mentd.* Hawkesworth v. Chaffey (1886), 55 L. J. Ch. 335; Bellamy v. Debenham (1891), 39 W. R. 257.

**908. — Goodwill annexed to premises.]—**In an agreement by a tenant at will of a public-house for the sale of the possession, trade, & goodwill of the house at a fixed sum, & of the stock and furniture at a valuation, one of the terms being that possession should be taken, & the money paid on a given day, time is of the essence of the contract; & a purchaser, who was not in a condition to fulfil his part of the contract on that day, cannot compel a specific performance, though he was ready on the following day to have proceeded to complete the purchase. **Qu.: whether a ct. of equity will enforce the performance of a contract for the purchase of a subject-matter, of which the goodwill of a public-house, unconnected with any fixed interest in the premises, forms the principal part.**—COSTLAKE v. TILL (1826), 1 Russ. 376; 38 E. R. 146.

**Annotations:—***Consd.* Gray v. Smith (1889), 43 Ch. D. 208. *Refd.* Walker v. Jeffreys (1812), 1 Hare, 341; Macbryde v. Weekes (1856), 22 Beav. 533.

**909. —.]—**D. agrees with W. & another, in writing to sell to them a lease, trade, & goodwill, subject to the rent & ordinary covenants, but free from all other incumbrances; also, to sell the tenant's fixtures, furniture, & effects, at such sum as the same should be valued at by two persons named or their umpire, & all the stock of beer not exceeding a specified quantity at the valuation of two licenced gaugers or their umpire; & for the consideration aforesaid the purchasers agreed to accept an assignment without requiring evidence of title prior to the lease, & if either party neglected to perform the agreement he should pay to the other £150 as liquidated damages. Defts., alleging misrepresentation, refusal to produce the lease under which pltf. held, & the forfeiture of the lease by change of a policy, refused to complete:—*Held:* all these objections were untenable; but specific performance refused, on the ground that the clause as to fixtures and stock could not be enforced. *Semble:* the ct. will not declare payment of a valuation to be made, but will enforce a contract for purchase of a goodwill where it is annexed to the premises.—DARBEY v. WHITAKER (1857), 4 Drew. 134; 29 L. T. O. S. 351; 5 W. R. 772; 62 E. R. 52.

**Annotations:—***Refd.* Collins v. Collins (1858), 28 Beav. 306; Tillet v. Charing Cross Bridge Co. (1859), 26 Beav. 419; Baker v. Met. Ity. (1862), 31 Beav. 504; Richardson v. Smith (1870), 5 Ch. App. 648; Muller's Margarine v. I. R. Comrs (1899), 69 L. J. Q. B. 291. *Mentd.* Hart v. Hart (1881), 18 Ch. D. 670.

**910. Failure to pay purchase-money—Rights of vendor.]—**Where an agreement had been made to sell the goodwill of a trade, & in the meantime a partnership of three years took place between the parties, the original owner of the trade has no



right, at the end of the term of partnership, to hold possession of the stock & business as a mtgee. in possession, because a portion of the purchase-money had not been paid.—*ALLAWAY v. DAVIS* (1847), 9 L. T. O. S. 329, L. C.

**911. Sale of "goodwill, etc."—Uncertainty.]**—The terms "goodwill, etc." in a contract for the sale of a foundry, are not so uncertain as alone to prevent a decree for specific performance of it; for the words *et cetera* point to things necessarily connected with and belonging to the goodwill, & to be defined in the conveyance.

Specific performance of an agreement to purchase one-third of a foundry refused, on the ground of uncertainty; the contract not specifying what portion of the purchase-money was to be left in the business, but only a "large portion"; & not stating when it was to be paid, or how to be secured, & what interest was to be allowed in the meanwhile.—*COOPER v. HOOD* (1858), 26 Beav. 293; 28 L. J. Ch. 212; 32 L. T. O. S. 171; 4 Jur. N. S. 1266; 7 W. R. 83; 53 E. R. 911.

**912. Provision for reference of disputes to arbitration—Stay of action pending reference.]**—Defts. by an agreement in writing contracted with pltf. for the sale to him of their business of the manufacture & sale of certain electric batteries. The agreement, by clause 5, was expressed to be subject to the following condition, that "the tests which are now being carried out by or on behalf of the purchaser prove to his reasonable satisfaction that the Alkum electric batteries now being made by the vendors are capable of fulfilling the claims made by them." By clause 12 it was provided that, if any dispute should arise between the parties as to the agreement or any clause, matter or thing therein contained or the intention or construction thereof or in any wise relating thereto, the same should be referred to two persons therein named as arbitrators under the Arbitration Act, 1889. Part of the purchase-money was, in pursuance of the agreement, paid by pltf. by way of deposit. Pltf. however refused to complete the purchase, alleging that in consequence of the non-fulfilment of the condition he was no longer bound by the agreement. Defts. insisted that the condition was satisfied & gave notice of the pending dispute to the arbitrators & requested them to proceed with the reference; pltf. issued a writ claiming a declaration that the agreement was determined & no longer binding on the parties & repayment of the deposit. Defts. thereupon issued a summons asking for a stay of the proceedings in the action pursuant to s. 4 of the Arbitration Act, 1889 (c. 49):—*Held*: if the condition were in fact not fulfilled, pltf.'s obligation under the contract came to an end in accordance with the terms expressed in the contract itself & not by reason of the occurrence of an event dehors the consideration of the contracting parties, & therefore, the agreement to refer the dispute, which was one within the meaning of it, to arbn. was still binding between the parties & the action must be stayed.—*DE LA GARDE v. WORSNUP*, [1928] Ch. 17; 96 L. J. Ch. 446; 137 L. T. 475; 71 Sol. Jo. 604.

#### SECT. 4.—VALUATION.

##### SUB-SECT. 1.—PARTNERSHIP GOODWILL.

###### A. In General.

**913. Whether a subject of value.]—Qu.**: whether the goodwill of a professional business is saleable.—*JONES v. NOY* (1833), 2 My. & K. 125; 3 L. J. Ch. 14; 39 E. R. 892.

**914. —.]—HALL v. BARROWS**, No. 933, *post*.

**915. — Professional partnership—Solicitors.]**—*SPICER v. JAMES* (1830), Collyer's Law of Partnership, 2nd ed., p. 104; cited in 3 De G. & Sm. at p. 713; 64 E. R. 673.

**916. — — —.]—AUSTEN v. BOYS**, No. 822, *ante*.

**917. — — —.]**—In 1877 the three partners in a firm of solrs. agreed that the partnership should be dissolved, that two of them should continue to carry on the partnership business, & should employ the third as a clerk at a salary, & that all the books, papers & other property of the firm should vest in & be the property of the two continuing partners. The third partner died shortly afterwards, & in an action by his administratrix against the two continuing partners, an order was made directing the partnership accounts to be taken as from Jan. 1874. In taking the accounts, pltf. claimed that a sum should be allowed in respect of the interest of deceased partner in the "goodwill" of the partnership business, which was put at £10,000, being five years' purchase of the estimated annual profits of the business:—*Held*: under the circumstances no sum could be allowed in respect of the alleged "goodwill" of the business.

As a general rule, & in the absence of express contract, there is not, in a partnership between solrs., any partnership asset which is capable of being sold or valued as the "goodwill" of the partnership business.—*ARUNDELL v. BELL* (1883), 52 L. J. Ch. 537; 49 L. T. 345; 31 W. R. 477, C. A. *Annotation*:—*Reid. Re Barfield, Goodman v. Child* (1901), 84 L. T. 28.

**918. — — — Doctors.]—CORBIN v. STEWART** (1911), 28 T. L. R. 99.

**919. — — — Notaries.]—Re MANCHESTER NOTARIES, KNOTT v. BOUTFLOWER**, [1922] W. N. 199.

**920. — Legacy of share of goodwill.]**—The legatee of the share of the mere goodwill of a deceased partner cannot support a bill against the surviving partner to obtain the benefit of his legacy, even after assent by the exor.

A. & B. carried on business in partnership on premises belonging to the firm. A. died, having bequeathed his goodwill, not including the book debts or stock-in-trade, to pltf. The exors. assented to the bequest, but had assigned testator's interest in the trade premises to the surviving partner. To a bill by pltf. against the surviving partner to realise his share of the goodwill, a general demurrer was allowed.—*ROBERTSON v. QUIDDINGTON* (1860), 28 Beav. 529; 54 E. R. 469.

*Annotation*:—*Reid. Re David & Matthews*, [1899] 1 Ch. 378.

**921. — Brokers on Stock Exchange.]—HILL v. FEARIS**, No. 830, *ante*.

**922. Allowance for goodwill.—To retiring partner—No provision in articles.]**—Claim of retiring partner to a share in the value of the goodwill of the business disallowed.

Two persons entered into partnership for twenty-one years, but in consequence of disagreements & misconduct, disputes ensued. The partnership was dissolved by decree, one consenting to retire & the other to take the stock & effects at a valuation:—*Held*: the retiring partner was not entitled to any allowance for his share of the goodwill, no provision being made by the partnership articles for such an allowance on a dissolution by death or by the retirement of one partner by notice during the term.—*HALL v. HALL* (1855), 20 Beav. 139; 52 E. R. 555.

*Annotations*:—*W.F. Reynolds v. Bullock* (1878), 47 L. J. Ch. 773. *Dodd, Stewart v. Gladstone* (1879), 10 Ch. D. 626. (See 10 Ch. D. p. 656.)

## Sect. 4.—Valuation: Sub-sect. 1, A., B. &amp; C.]

**923.** ————].—A. & B. carried on the business of chemists upon leasehold premises belonging to A. By the partnership articles, upon A.'s retirement B. was to have the right of purchasing the premises at a valuation:—*Held*: the premises were to be valued irrespective of the advantages to be derived from the fact, that the business of chemist had been carried on there for thirty years.—*BURFIELD v. RITCH* (1862), 31 Beav. 241; 54 E. R. 1130.

*Annotation*:—*N.F. Reynolds v. Bullock* (1878), 47 L. J. Ch. 773.

**924.** ————].—*REYNOLDS v. BULLOCK*, No. 934, *post*.

**925.** ————].—On a dissolution of a partnership the expelled partner was entitled to be paid for his share in "the stock-in-trade, credits, property, & effects of the business." In the valuation made, nothing was awarded to him for the goodwill:—*Held*: as the terms of the partnership were silent as to the goodwill, it had been properly omitted in the valuation.—*CHAPMAN v. HAYMAN* (1885), 1 T. L. R. 397.

**926.** ————].—*Inconsistent provisions in articles*.—Articles of partnership executed in 1864 contained a provision that, as soon as possible after Apr. 30 in each year, a full & general account should be taken by the partners of the stock, etc., & other the estate & effects of the partnership, & that a fair valuation & appraisalment should be made of all the particulars which might be in their nature susceptible of valuation. It was also provided that the accounts of a partner ceasing to be a partner should be adjusted by payment to such partner of the sum which should appear to his credit, after the same should have been adjusted under the provisions thereinbefore contained.

On Apr. 30, 1875, *deft.*, who were co-partners with *pltf.*, being dissatisfied with his conduct, served on him a notice dated Apr. 28, that the partnership would, as regarded him, be dissolved as & from Oct. 31 then next. After this *pltf.* was treated as a stranger. The account up to Apr. 30, 1875, was made up without his being consulted, & in the valuation of the property the goodwill of the business was not included. It was held in the *ct.* below that, in determining what *pltf.* was entitled to receive on his exclusion from the partnership, the value of his share of the goodwill ought to be taken into account:—*Held*: *prima facie* the goodwill ought not to be included in the valuation, & the articles contained nothing to show that it was intended to include it.

The words "susceptible of valuation" in the articles, meant susceptible in the ordinary way adopted by commission merchants. Goodwill, in such cases, was never sold alone, & was not in its nature susceptible of valuation.—*STEUART v. GLADSTONE* (1879), 10 Ch. D. 626; 40 L. T. 145; 27 W. R. 512, C. A.

*Annotations*:—*Apld. Hunter v. Dowling*, [1895] 2 Ch. 223; *Scott v. Scott* (1903), 89 L. T. 682. *Distd. Hill v. Pearis*, [1905] 1 Ch. 466. *Consd. Smith v. Nelson* (1905), 92 L. T. 313. *Refd. Cox v. Willoughby* (1880), 13 Ch. D. 863. *Mentd. Green v. Howell*, [1910] 1 Ch. 495.

—On death of one partner.]—See Sub-sect. 1, C., *post*.

## B. Mode of Valuation.

**927. Price if sold most advantageously.]**—

(1) When, on a dissolution, one partner obtains exclusively the benefit of the goodwill, & is made accountable for it, the *ct.*, in ascertaining its value, considers what it would have produced, if sold in the most advantageous manner & at the proper period of time.

(2) The value of the goodwill of a banking business assessed at one year's average net profits.—*MELLERSH v. KEEN* (No. 2) (1860), 28 Beav. 453; 54 E. R. 440.

**928. So many years' purchase upon amount of profits.]**—*AUSTEN v. BOYS*, No. 822, *ante*.

**929. Banking business—One year's average net profits.]**—*MELLERSH v. KEEN* (No. 2), No. 927, *ante*.

**930. Valuation subject to surviving partner's right to carry on business.]**—*COOK v. COLLINGRIDGE* (1825), 27 Beav. 456; 54 E. R. 180; *previous proceedings* (1823), Jac. 607.

*Annotations*:—*Consd. Parsons v. Hayward* (1862), 31 Beav. 199. *Apld. McDonald v. Richardson*, *Richardson v. Marten* (1864), 10 L. T. 166. *Consd. Pearson v. Pearson* (1884), 27 Ch. D. 145. *Refd. Crawshaw v. Collins* (1826), 2 Russ. 325; *Cooper v. Hood* (1858), 26 Beav. 293; *Davies v. Hodgson* (1858), 25 Beav. 177; *Mellersh v. Keen* (1859), 27 Beav. 236; *Walker v. Mottram* (1881), 19 Ch. D. 355; *Trego v. Hunt*, [1896] A. C. 7.

**931.** ————].—There is no equity to prevent a surviving partner or clerk who is appointed exor. from continuing the same trade, & a purchaser of testator's goodwill must take subject to the chance of obtaining the customers of the old establishment.—*DAVIES v. HODGSON* (1858), 25 Beav. 177; 27 L. J. Ch. 449; 31 L. T. O. S. 49; 4 Jur. N. S. 252; 6 W. R. 355; 53 E. R. 604.

*Annotations*:—*Mentd. R. Hill, Hill v. Hill* (1881), 50 L. J. Ch. 551; *Slade v. Chaine*, [1908] 1 Ch. 322.

**932.** ————].—The goodwill in a partnership business does not, on the death of one partner, survive beneficially to the others; when it has any value, a due proportion belongs to the estate of the deceased partner, but the surviving partner has still the right to carry on the same business & at the same place.

After the decease of one of two partners in a bank, the survivor sold the business for £10,000:—*Held*: the estate of the deceased was entitled to a share of so much of the £10,000 as was attributable to the goodwill, & special inquiries were directed to ascertain the value, having regard to the fact, first, that the partnership premises belonged to the survivor, secondly, that he had still the right to carry on the same business in the same locality, & thirdly, that the sole right of issuing notes, under the 7 & 8 Vict. c. 32, belonged to him.

After a sale no one would have had any right to prevent E. from carrying on the very same business on the very same premises as before (*ROMILLY, M.R.*).—*SMITH v. EVERETT* (1859), 27 Beav. 446; 29 L. J. Ch. 236; 34 L. T. O. S. 58; 5 Jur. N. S. 1332; 7 W. R. 605; 54 E. R. 175.

*Annotations*:—*Refd. Mellersh v. Keen* (No. 2) (1860), 28 Beav. 453; *Robertson v. Quidington* (1860), 28 Beav. 529.

**933.** ————].—By partnership articles the exors. of a deceased partner were entitled to his share of the stock, property & effects belonging to the partnership, & the surviving partner had the option of taking the same at a valuation:—*Held*: the goodwill of the business ought to be taken into account in the valuation, but to be valued upon the principle that the surviving partner, if he were not the purchaser, would be at liberty to carry on the same description of business.—*HALL v. BARROWS* (1863), 4 De G. J. & Sm. 150; 3 New Rep. 259; 33 L. J. Ch. 204; 9 L. T. 561; 28 J. P. 148; 10 Jur. N. S. 55; 12 W. R. 322; 46 E. R. 873, L. C.

*Annotations*:—*Apld. Reynolds v. Bullock* (1878), 47 L. J. Ch. 773; *Page v. Ratcliffe* (1897), 76 L. T. 63. *Refd. Steuart v. Gladstone* (1879), 10 Ch. D. 626; *Trego v. Hunt*, [1896] A. C. 7. *Mentd. Leather Cloth Co. v. American Leather Cloth Co.* (1863), 1 Hem. & M. 271; *Bury v. Bedford* (1864), 4 De G. J. & Sm. 352; *McAndrews v. Bassett* (1864), 4 New Rep. 12; *Ainsworth v. Wainman* (1866),



L. R. 1 Eq. 518; *Maxwell v. Hogg*, *Hogg v. Maxwell* (1867), 2 Ch. App. 307; *Levy v. Walker* (1879), 10 Ch. D. 436; *Singer Manufacturing Co. v. Loog* (1882), 8 App. Cas. 15; *Goodfellow v. Prince* (1887), 35 Ch. D. 9; *Borthwick v. Evening Post* (1888), 37 Ch. D. 449; *Jennings v. Jennings* (1898), 77 L. T. 786.

**934.** —[It is now settled that goodwill is ordinarily a distinct part of the property of a trading partnership, & therefore under a provision in partnership articles for valuation of the partnership, property & effects at its close, the goodwill is a matter of valuation.

But having regard to the fact that each of the partners will hereafter be at liberty to set up & carry on the same business as that carried on by the firm. Such valuation will not include anything in respect of debts, being at liberty to carry on the business at the same place (*HALL, V.-C.*)—*REYNOLDS v. BULLOCK* (1878), 47 L. J. Ch. 773; 39 L. T. 443; 26 W. R. 678.

#### C. Death of One Partner.

**935. Whether goodwill survives.]—Qu.:** whether upon the death of a partner the goodwill survives.—*CRAWSHAY v. COLLINS* (1808), 15 Ves. 218; 33 E. R. 736, L. C.

*Annotations:—*Consd. *Willett v. Blanford* (1842), 1 Hare, 253. *Reid, Lewis v. Langdon* (1835), 7 Sim. 421; *Simpson v. Chapman* (1853), 4 De G. M. & G. 154; *Wedderburn v. Wedderburn* (1856), 25 L. J. Ch. 710; *Blyth v. Blyth* (1861), 4 L. T. 536. *Mentd.* *Featherstonhaugh v. Fenwick* (1810), 17 Ves. 298; *Heathcote v. Hulme* (1819), 1 Jac. & W. 122; *Brown v. De Tastet* (1821), Jac. 284; *Cook v. Collingridge* (1823), Jac. 607; *Wedderburn v. Wedderburn* (1838), 4 My. & Cr. 41; *Portlock v. Gardner* (1842), 11 L. J. Ch. 313; *Buckley v. Barber* (1851), 20 L. J. Ex. 114; *Darby v. Darby* (1856), 3 Drew. 495; *Davies v. Hodgson* (1858), 25 Beav. 177; *Stevenson v. Akt. Fur Cartonagen Industrie*, [1918] A. C. 239.

**936. — Apart from express provision.]—**The goodwill of a trade, carried on in partnership without articles, survives; & is not partnership stock.—*HAMMOND v. DOUGLAS* (1800), 5 Ves. 539; 31 E. R. 726, L. C.

*Annotations:—*Dtd. *Crawshay v. Collins* (1808), 15 Ves. 218. *Consd.* *Lewis v. Langdon* (1835), 7 Sim. 421. *N.F. & David & Matthews*, [1899] 1 Ch. 378.

**937. —**[—F., on entering into articles of partnership with B., paid a premium; F. died. After his death B. sold the goodwill of the trade:—*Held:* on the construction of the articles, that the representative of F. was not entitled to a share of the money for which such goodwill sold.

*Semble*, on a partnership between professional persons, the goodwill of a business, on the death of one, survives.—*FARR v. PEARCE* (1818), 3 Madd. 74; 56 E. R. 437.

**938. —**[—*WEDDERBURN v. WEDDERBURN* (No. 4), No. 821, *ante*.

**939. —**[—*ARUNDELL v. BELL*, No. 917, *ante*.

**940. —**[—*Re DAVID & MATTHEWS*, No. 894, *ante*.

**941. —**[—*HILL v. FEARIS*, No. 830, *ante*.

**942. — Express provision in articles.—**That goodwill should belong to partners.]—By articles of partnership between two persons, it was provided that "the goodwill of the business should belong to the partners in the same proportions as those in which they were respectively entitled to the capital of the partnership; but the value of the goodwill should not be taken into account in any of the accounts between the partners as between the partnership & either of the partners"; & that "on the determination of the partnership, at whatever time & by whatever means, a general account & valuation of all the property, effects & liabilities of the partnership should be made up & settled by & between, as the case might be, the partners, or the surviving partners, & the exors.

or administrators of the deceased partners, or the respective exors. or administrators of the deceased partners; & their respective claims or shares & interests in the partnership & the property & effects thereof should be ascertained." One of the partners died during the period of the partnership, whereupon the partnership determined:—*Held:* upon the construction of the articles, in the general account & valuation directed to be taken on the determination of the partnership the value of the goodwill was to be estimated.—*WADE v. JENKINS* (1860), 2 Giff. 509; 30 L. J. Ch. 633; 3 L. T. 464; 7 Jur. N. S. 39; 66 E. R. 214.

**943. — Share of deceased partner to be taken at value in last balance sheet.—**Goodwill not brought in to balance sheet.]—One partner died while negotiations were pending for the sale of business premises to a railway co. By the partnership deed the share of a deceased partner was to be taken at the value put upon it by the last balance sheet, & in the past balance sheets there was no mention of goodwill:—*Held:* in taking the accounts the deceased partner must be credited with a share of the premises, plant, etc., at the price subsequently paid for them by the railway co., but his estate was not entitled to any share of the sum paid for goodwill.—*HUNTER v. DOWLING*, [1895] 2 Ch. 223; 61 L. J. Ch. 713; 72 L. T. 653; 43 W. R. 619; 13 R. 474.

**944. —**Articles of partnership provided that a full & general annual account & valuation of all the capital, stock-in-trade, property, profits, moneys, credits, & effects whatsoever of the partnership should be made, & that if a partner should die before the expiration of the partnership his exors., administrators, & assigns should be entitled to such sum of money as his share of the capital & property of the partnership should upon the last general annual account amount to.

A partner died during the continuance of the partnership, & his exors. claimed that in ascertaining the amount of his share they were entitled to have a sum for the goodwill of the partnership business, which was of considerable value, included in the account & valuation.

The articles contained no express provision as to the goodwill.

On a summons taken out to determine whether they were entitled to have a sum for the goodwill included:—*Held:* there was no material difference between the present case & *Stewart v. Gladstone*, No. 926, *ante*, & the principle of that decision being that, where the accounts from which the sum to be paid is to be ascertained are accounts for the purpose of ascertaining profits, the goodwill is not to be included, a sum for the goodwill ought not to be included in the account.—*SCOTT v. SCOTT* (1903), 89 L. T. 582.

**945. — "Then employed or used in carrying on the said business."—**Two persons agreed to carry on the business of a brewery for twenty-one years under partnership articles, which provided that, on the death of a partner without nominating a son to succeed him, which event happened, "the property, stock, goods, & effects of the said partnership" were to be valued, & the surviving partner was to have the option to purchase at such valuation.

The articles further provided that immediately on the determination of the partnership by any of the contingencies mentioned in the articles the partners should join in making up a final account of all the property, joint stock, money, goods, & effects, belonging to the partnership, & that after such account should have been so

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made up "the property, stock, goods, & effects then employed or used in carrying on the said business" would be valued as therein mentioned.

The partnership was continued upon the same articles by a deed of covenant for a further period of seven years & afterwards without any written or verbal agreement. One partner died, & the surviving partner exercised his option to purchase the business at the valuation:—*Held*: although the articles said nothing about goodwill in terms, yet the words "then employed or used in carrying on the said business" could not be construed in so narrow a way as to exclude the goodwill in valuing the business; & therefore the goodwill must be valued separately, & the exors. of the deceased partner were entitled to a share of profits down to the date of the valuation.—*PAGE v. RATLIFF* (1897), 76 L. T. 63, C. A.

**946. —Express exclusion of goodwill.]**—By a clause in articles of partnership executed in 1878 between two brothers it was provided that on the death of either the survivor should pay to the exors. of the deceased the full share to which they should be entitled on the taking of a general account in writing of the partnership assets, "such stock & other assets as shall not consist of money to be valued either by mutual agreement or valuation in the usual way nothing being charged for goodwill."

One brother died in 1886, & the survivor as sole exor. under his will effected the valuation as directed, paid for the share as surviving partner, & thenceforth carried on the business on his own account.

In an action brought in 1908 by the residuary legatees under the said will against the surviving partner in effect for an account on the footing that there had been no operative sale & purchase in 1886 by reason of the valuation then made not being in manner authorised by the clause, & that the business must be deemed to have been carried on for the benefit of both parties to the suit:—*Held*: on the true construction of the clause there was a binding contract of sale & purchase, & the valuation was only an incident in carrying out the same. The evidence showed that a substantially accurate method had been adopted, but even if error has been shown either in the method or the results it could not destroy the contract, but would fall to be corrected by the ct. on being clearly & conclusively proved. The price of goodwill must in any event be excluded from the valuation, & applts. could not rely exclusively on the dual character of deft. which had been imposed upon him by their own testator.—*HORDERN v. HORDERN*, [1910] A. C. 465; 80 L. J. P. C. 15; 102 L. T. 867; 26 T. L. R. 524, P. C.

**947. Time of valuation—At date of death.]**—B., the surviving partner in a business, being also the exor. of the deceased partner, carried on for eight years the business, which was insolvent at the death of the deceased partner, & then sold the business for £1,700. In a suit for the administration of the deceased partner's estate against B., as exor.:—*Held*: the value of the goodwill ought to be ascertained at the time of the deceased

partner's death, & not at the time of sale.—*BROUGHTON v. BROUGHTON* (1875), 44 L. J. Ch. 526; 23 W. R. 770.

#### SUB-SECT. 2.—LICENSED PREMISES.

**948. Whether goodwill element in valuation.]**—*EDWARDS v. EDWARDS* (1837), 1 Jur. 654.

*Annotation*:—*Reld*, West London Syndicate v. I. R. Comrs., [1898] 2 Q. B. 507.

**949. Mode of valuation.]**—In Aug. 1845, deft.'s testatrix granted to pltf. a lease of a public-house in London Road, Liverpool, for fourteen years, at a rent of £70 *per annum*, the latter paying £300 for the goodwill; & before the expiration of that lease, viz. in Mar. 1858, she granted him a further lease for fourteen years at a rent of £80 *per annum*. Each of these leases contained the following proviso: "Provided also, & it is agreed & declared that, at the expiration or other sooner determination of the term hereby granted, all such sum & sums of money as shall or can be procured for the goodwill of the business of a licensed victualler in respect of the premises from an incoming tenant, shall be received by & belong to the lessee, his exors., etc."

The second lease being about to expire, negotiations took place between pltf. & deft. for a renewal, but they failed to come to terms; & deft., with notice of pltf.'s claim under the above proviso, granted a lease of the premises to a new tenant for a term of fourteen years, at a rent of £160 *per annum*, & a premium of £1,300.

Upon a case stated for the opinion of the ct. by an arbitrator, to whom it was to be referred to assess the amount of damages pltf. was entitled to recover for the breach, if any, of the above proviso, upon the principles to be laid down by the ct., it was found as a fact that "the rental of £160 *per annum* reserved in the lease granted to the new tenant was, without any premium, bonus, or other payment whatever, a full & sufficient rental for the premises under such a lease whether intended for a licensed victualler's business or not"; & further, that "the goodwill of the business carried on by pltf. would, if belonging to the owner of the house, have had a very considerable value, & if such owner had in that case been willing to grant a lease similar to that granted to the new tenant, a sum exceeding £1,300 would without difficulty have been obtained for the goodwill":—*Held*: the proviso was broken; & the arbitrator was to estimate the damages pltf. was entitled to recover for such breach, in the same manner as one accustomed to value "goodwill" as between outgoing & incoming tenant would estimate them, & in so doing was not to disregard the increased value of the property in the neighbourhood generally.—*LEWELLYN v. RUTHERFORD* (1875), L. R. 10 C. P. 456; 44 L. J. C. P. 281; 32 L. T. 610.

#### SECT. 5.—STAMPS AND OTHER DUTIES.

**Conveyance on sale—Liability to stamp duty.]**—*See REVENUE*, Vol. XXXIX., p. 278, Nos. 621–627.

**Property passing on death.]**—*See ESTATE & OTHER DEATH DUTIES*, Vol. XXI., p. 9, No. 35.

## Part VII.—Trade Unions.

NOTE.—In this Part Trade Union Act, 1871 (c. 31); Conspiracy & Protection of Property Act, 1875 (c. 86); Trade Union Act (Amendment) Act, 1876 (c. 22); Trade Disputes Act, 1906 (c. 47); Trade Union Act, 1913 (c. 30); & Trade Disputes & Trade Unions Act, 1927 (c. 22), are referred to as 1871 Act, 1875 Act, 1876 Act, 1906 Act, 1913 Act, & 1927 Act respectively.

## SECT. 1.—DEFINITIONS.

Statutory definition.]—See 1913 Act, ss. 1, 2.

**950. Combination for regulating relations—Between workmen & masters.]**—(1) Where the general objects of a society are legal, as in the case of a provident society the object of which is the relief of members when disabled by age or accident or when out of employment, the fact that some of its rules are illegal as being in restraint of trade does not constitute the society an illegal society, or prevent a member from recovering a sum of money payable to him under a rule of the society which is not illegal.

(2) Rules made for the *bonâ fide* purpose of protecting the funds of such a society from claims, which may be avoided, are not illegal because they are incidentally to some extent in restraint of trade, provided that their provisions go no further than is reasonable & necessary for that purpose.

(3) . . . "Trade union" means any combination for regulating the relations between workmen & masters, or between workmen & workmen, or between masters & masters, or for imposing restrictive conditions on the conduct of any trade or business . . . the society [a friendly society] is a trade union within the definition clause (LINDLEY, L.J.).

(4) The general proposition, that every society which has rules in restraint of trade is unlawful, i.e. criminal, & that its members are punishable at common law was denied by the ct. in *R. v. Stainer*, No. 1153, *post*, & cannot be supported (LINDLEY, L.J.).—SWAINE v. WILSON (1889). 24 Q. B. D. 252; 50 L. J. Q. B. 78; 62 L. T. 309; 54 J. P. 484; 38 W. R. 261; 6 T. L. R. 121, C. A.

*Annotations*.—As to (1) *Consd.* Chamberlain's Wharf v. Smith, [1900] 2 Ch. 605. *Distd.* Sayer v. Amalgamated Soc. of Carpenters & Joiners (1902), 19 T. L. R. 122; Cullen v. Elwin (1904), 90 L. T. 840. *Apld.* Burke v. Amalgamated Soc. of Dyers, [1906] 2 K. B. 583; Gozney v. Bristol Trade & Provident Soc., [1909] 1 K. B. 901. *Distd.* Russell v. Carpenters & Joiners Amalgamated Soc., [1910] 1 K. B. 506. *Consd.* Osborne v. Amalgamated Soc. of Ry. Servants, [1911] 1 Ch. 540; Kelly v. National Soc. of Operative Printers (1915), 113 L. T. 1055; Evans v. Heathcote, [1918] 1 K. B. 418. *Generally, Refd.* Howden v. Yorkshire Miners' Assocn., [1903] 1 K. B. 308.

**951. —Between workmen & workmen.]**—SWAINE v. WILSON, No. 950, *ante*.

**952. —Between masters & masters.]**—SWAINE v. WILSON, No. 950, *ante*.

**953. Combination for imposing restrictive conditions on trade or business.]**—SWAINE v. WILSON, No. 950, *ante*.

**954. —]**—Pltfs. were manufacturers of "cased tubes," & were members of a trade combination called the Cased Tube assocn., & depts., who were also manufacturers of cased tubes, consisted of all the other members of the assocn. The object of the assocn. was the regulation of

prices in the trade, & in furtherance of that object it was provided by the rules that each member should be restricted in his output of cased tubes to a certain fixed percentage of the total output of the members, the percentage being based on the member's actual output in preceding years. Each member whose output in any month exceeded his percentage was required to pay the profits of such excess into a "pool," while each member whose output in any month was less than his percentage was entitled to receive a certain sum out of the pool. The rules provided that the members should sell their cased tubes only upon the terms & at the prices which should from time to time be fixed by the assocn. No means was provided by which a person who had once joined the assocn. could terminate his membership. By an agreement made between pltfs., depts., & certain firms, pltfs., in consideration of depts. fixing their percentage at a certain figure, agreed not to sell their cased tubes to any persons other than the said firms, who on their part agreed not to purchase any cased tubes from manufacturers other than the members of the assocn. The agreement provided that it should continue in force as long as the assocn. & a certain other society, over whom pltfs. had no authority, continued to control prices. For several months pltfs.' output was less than their percentage, & they became entitled to receive from the assocn. sums of money out of the pool, & the secretary of the assocn. furnished them each month with an account showing how much they were entitled to for that month. In an action brought to recover the money so due:—*Held*: (1) the restraint of trade imposed by the agreement & the rules was unreasonable as between the parties, & therefore the agreement was invalid at common law, & pltfs. could not recover thereon; (2) the assocn. was a "trade union" within the definition in 1876 Act, s. 16, & therefore under 1871 Act, ss. 3 & 4, the agreement was not void; & though the agreement could not be directly enforced, the debts created under it could form the foundation for an account stated, & pltfs. were entitled to recover on the accounts stated.—EVANS (JOSEPH) & Co. v. HEATHCOTE, [1918] 1 K. B. 418; 87 L. J. K. B. 593; 118 L. T. 556; 34 T. L. R. 247, C. A.

*Annotations*.—As to (1) *Apld.* McEllistrim v. Ballymacalligott Co-op. Agricultural & Dairy Soc., [1919] A. C. 548. *Distd.* Palmolive Co. (of England) v. Freedman, [1928] Ch. 264. *Refd.* Hawlings v. General Trading Co., [1921] 1 K. B. 635. As to (2) *Consd.* Thompson v. British Medical Assocn. (N. S. W. Branch), [1924] A. C. 764. *Refd.* McEllistrim v. Ballymacalligott Co-op. Agricultural & Dairy Soc., [1919] A. C. 548.

**Whether trade protection association a trade union.]**—See Part VIII., *post*.

**955. Friendly society.]**—SWAINE v. WILSON, No. 950, *ante*.

**956. Whether trade union a corporation.]**—(1) A trade union registered under Trade Union Acts, can, by virtue of the provisions of 1871 Act, s. 7, but not otherwise, acquire & hold land.

(2) The word "purchase" in 1871 Act, s. 7, is used in its ordinary sense of "buy for money"; not in the technical legal sense of "acquire otherwise than by descent or escheat," & consequently a devise of land by will to such a society is invalid.

## PART VII. SECT. 1.

*q. Separate corporate entity.]*—A trade union has some kind of corporate entity distinct from the members

who compose it.—EGAN v. BARRIER BRANCH OF AMALGAMATED MINERS' ASSOCN. (1917), 17 S. R. N. S. W. 243; 34 N. S. W. W. N. 129.—AUS. *r. Society of master masons formed*

*to take over unincorporated society—Not a trade union.]*—ABERDEEN MASTER MASONS' INCORPORATION, LTD. v. SMITH, [1908] S. C. 689; 45 Sc. L. R. 484; 15 S. L. T. 953.—SCOT.

**Sect. 1.—Definitions. Sect. 2: Sub-sects. 1 & 2, A.]**

(3) That society is a trade union registered under 1871 Act, but it is not a corpn. (NORTH, J.).

(4) In my opinion the sect. [1871 Act, s. 7] has nothing to do with the acquisition of land as forming part of the substratum of the society itself (NORTH, J.).—*Re AMOS, CARRIER v. PRICE*, [1891] 3 Ch. 159; 60 L. J. Ch. 570; 65 L. T. 69; 39 W. R. 550; 7 T. L. R. 559.

*Annotation:—As to (2) Consd. Re Clarke, Clarke v. Clarke*, [1901] 2 Ch. 110.

957. —[.]—(1) A trade union is neither a corpn., nor an individual, nor a partnership between a number of individuals. . . . It is an assocn. of men which almost invariably owes its legal validity to 1871 & 1876 Acts (FARWELL, J.).

(2) The funds of the society are appropriated to the purposes of the society, & their misappropriation can be restrained by injunction (FARWELL, J.).

(3) The acts complained of are the acts of the assocn. They are acts done by their agents in the course of the management & direction of a strike; the undertaking such management & direction is one of the main objects of deft. society, & is perfectly lawful (FARWELL, J.).—*TAFF VALE RY. CO. v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS* (1900), [1901] A. C. 426; 70 L. J. K. B. 905, n.; 83 L. T. 474; 50 W. R. 44; 44 Sol. Jo. 714; *reversd.*, [1901] 1 K. B. 170, C. A.; *restored*, [1901] A. C. at p. 434, H. L.

*Annotations:—As to (1) Expld. Linaker v. Pilcher* (1901), 70 L. J. K. B. 396. *Consd. Yorkshire Miners' Assocn. v. Howden*, [1905] A. C. 256. *Refd. Bussy v. Amalgamated Soc. of Ry. Servants & Bell* (1908), 24 T. L. R. 437; *Parr v. Lancashire & Cheshire Miners' Federation*, [1913] 1 Ch. 366; *Kelly v. National Soc. of Operative Printers' Assistants* (1915), 84 L. J. K. B. 2236; *McLuskey v. Cole*, [1922] 1 Ch. 7; *Marshall Shipping Co. v. Board of Trade*, [1923] 2 K. B. 343. *As to (2) Refd. Amalgamated Soc. of Ry. Servants v. Osborne*, [1910] A. C. 87; *Ideal Films v. Richards*, [1927] 1 K. B. 374. *As to (3) Refd. Gblan v. National Amalgamated Labourers' Union of Great Britain & Ireland*, [1903] 2 K. B. 600; *Russell v. Amalgamated Soc. of Carpenters & Joiners*, [1912] A. C. 421. *Generally, Refd. Airey v. Weighill* (1905), 49 Sol. Jo. 279; *South Wales Miners' Federation v. Glamorgan Coal Co.* (1905), 74 L. J. K. B. 525; *Conway v. Wade*, [1908] 2 K. B. 844; *Vacher v. London Soc. of Compositors*, [1913] A. C. 107; *Walker v. Sur*, [1914] 2 K. B. 930; *Bloom v. National Federation of Discharged & Demobilised Sailors & Soldiers* (1918), 63 Sol. Jo. 54; *Hardie & Lane v. Chiltern*, [1928] 1 K. B. 663. *Mentd. Markt v. Knight S.S. Co. Sale & Frazar v. Knight S.S. Co.*, [1910] 2 K. B. 1021; *Mercantile Marine Service Assocn. v. Toms*, [1916] 2 K. B. 243.

958. **Not individual or partnership.]—TAFF VALE RY. CO. v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS**, No. 957, *ante*.

959. **Unincorporated statutory legal entity—Able to own property & act by agents.]—OSBORNE v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS**, No. 1089, *post*.

960. **Company—With power to regulate output & prices.]—Companies Act, 1900 (c. 48), s. 1, does not make the certificate of the Registrar of Cos. conclusive that the co. in respect of which he has granted a certificate is validly registered & is not in reality a trade union. The sect. only deals with ministerial acts. The mere fact that in its memorandum & arts. of assocn. a co. has power to enter into an arrangement for the regulation of the output of, & the price to be obtained for, goods, this not being one of the main objects of the co., does not constitute the co. a trade union, & as such incapable of registration under Companies Acts.—BRITISH ASSOCN. OF GLASS BOTTLE MANUFACTURERS, LTD. v. NETTLEFOLD (1911), 27 T. L. R. 527.**

*Annotation:—Apld. Performing Right Soc. v. London Theatre of Varieties*, [1922] 1 K. B. 539.

—[.]—*See, also, COMPANIES*, Vol. IX., p. 77, Nos. 281–282.

961. **Test to be applied—Preliminary statement of objects & rules—Read together.]—CHAMBERLAIN'S WHARF, LTD. v. SMITH**, No. 1036, *post*.

**SECT. 2.—LEGALITY.****SUB-SECT. 1.—IN GENERAL.**

962. **Common law legality.]—Pltf., being a member of & in receipt of sick pay from deft. society, was subjected to a deduction of 2s. 6d. from his sick pay for breach of the rules of the society. He thereupon brought an action in the county ct. for a declaration to the effect that he had not broken the rules & for the return of the 2s. 6d. as having been improperly deducted. It appeared that deft. society was registered under 1871 & 1876 Acts as a trade union, & that its rules provided for raising funds to secure to the members the benefits of a superannuation fund, a sick fund, a funeral fund, a travelling fund, & a trade fund. Rule 1 stated that the society was "a trade union." By r. 7, clause 2, s. 4, "Should work be offered at the current rate of wages to any member receiving travelling relief, unless it be to fill the place of those fighting for better conditions, & he refuses to accept it, his allowance shall be at once stopped, & his card given up."**

By r. 40, s. 1, members paying to the trade fund were to be entitled to dispute pay, travelling relief, & assistance to sue employers under Employers' Liability & Workmen's Compensation Acts. Sect. 2 was as follows: "Strike pay will only be paid in support of members endeavouring to secure an advance of wages or resisting a reduction of same, resisting an increase of the hours of labour, & when desirable, endeavouring to secure a reduction of same." By sect. 4, "Should a strike take place, all members who are entitled to trade benefit under this rule shall receive pay at the rate of 1s. 8d. per day for each working day, not to exceed six weeks. If the strike continue, the executive committee shall be empowered to continue pay for a longer period, if they, upon consideration, deem it necessary. . . ."

By sect. 6, "No officer or member of this society shall be authorised or permitted to take any active interest in, aid in any way, or otherwise assist [any trade movement except in his private capacity. . . ."

The judge held that the society was a trade union, that its objects were in restraint of trade & illegal at common law, & that therefore he was precluded by 1871 Act, s. 4, from entertaining the claim:—*Held*: there was jurisdiction to entertain the claim, for the objects of the society were not illegal, & the rules amounted to no more than an insurance of the members against the consequences of a strike.

It is a common mistake to suppose that every trade union is, apart from the Act of 1871, an unlawful combination (COZENS-HARDY, M.R.).—*GOZNEY v. BRISTOL TRADE & PROVIDENT SOCIETY*, [1909] 1 K. B. 901; 78 L. J. K. B. 616; *sub nom. GOSNEY v. BRISTOL, WEST OF ENGLAND & SOUTH WALES OPERATIVES' TRADE & PROVIDENT SOCIETY*, 100 L. T. 669; 25 T. L. R. 370; 53 Sol. Jo. 341, C. A.

*Annotations:—Distd. Russell v. Amalgamated Soc. of Carpenters & Joiners*, [1910] 1 K. B. 506. *Apld. Kelly v. National Soc. of Operative Printers' Assistants* (1914), 84 L. J. K. B. 557. *Refd. Mudd v. General Union of Operative Carpenters & Joiners* (1910), 103 L. T. 45; *Kelly v. National Soc. of Operative Printers* (1915), 113 L. T. 1055; *Evans v. Heathcote*, [1918] 1 K. B. 418.

**963.** —.]—Long before the statutes of 1871 & 1876 were enacted trade unions were things in being, the general features of which were familiar to the public mind. . . . Statutes did not set them up (LORD SHAW OF DUNFERMLINE).—AMALGAMATED SOCIETY OF RAILWAY SERVANTS v. OSBORNE, [1910] A. C. 87; 79 L. J. Ch. 87; 101 L. T. 787; 26 T. L. R. 177; 54 Sol. Jo. 215, H. L.; *affg.* S. C. *sub nom.* OSBORNE v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS, [1909] 1 Ch. 163, C. A.; *subsequent proceedings*, [1911] 1 Ch. 540, C. A.

*Annotations*.—*Reid*, Kelly v. National Soc. of Operative Printers' Assistants (1915), 84 L. J. K. B. 2236. *Mentd.* Russell v. Amalgamated Soc. of Carpenters & Joiners, [1910] 1 K. B. 506; Wilson v. Amalgamated Soc. of Engineers, [1911] 2 Ch. 324; Gaskell v. Lancashire & Cheshire Miners' Federation (1912), 28 T. L. R. 518; Vacher v. London Soc. of Compositors, [1912] 3 K. B. 547; Carter v. United Soc. of Boilermakers (1915), 85 L. J. Ch. 289; Kemp v. Glasgow Corp., [1920] A. C. 836; Jenkin v. Pharmaceutical Soc. of Great Britain, [1921] 1 Ch. 392; *Re* Quinn & National Catholic Benefit & Thrift Soc.'s Arbitration, [1921] 2 Ch. 318.

**964.** —.]—RUSSELL v. AMALGAMATED SOCIETY OF CARPENTERS & JOINERS, No. 987, *post*.

**965.** Statutory legality.]—TAFF VALE RY. CO. v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS, No. 1295, *post*.

**966.** —.]—Legal entity.]—OSBORNE v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS, No. 1089, *post*.

**967.** —.]—Overriding former statutory illegality.—Under Unlawful Societies Act, 1799 (c. 79), & Seditious Meeting Act, 1817 (c. 19).—LUBY v. WARWICKSHIRE MINERS' ASSOCN., No. 1034, *post*.

#### SUB-SECT. 2.—LEGAL AND ILLEGAL COMBINATIONS.

##### A. In General.

See 1913 Act, Sect. 2 (2), (3).

**968.** Evidence of legality.—By rules of union—Rules cloak to shield illegal objects.]—(1) If the printed rules are not the real rules of the assocn. & if the society under the pretence of being a benevolent institution is really a scheme in whole or in part designed for the encouragement & support of illegal strikes, the society must be deemed to be established for an illegal purpose (HANNEN, J.).

(2) A strike is properly defined as "a simultaneous cessation of work on the part of the workmen"; & its legality or illegality must depend on the means by which it is enforced & on its objects. It may be criminal, as if it be part of a combination for the purpose of injuring or molesting masters or men: or it may be simply illegal, as if it be the result of an agreement depriving those engaged in it of their liberty of action . . . or it may be perfectly innocent, as if it be the result of the voluntary combination of the men for the purpose only of benefiting themselves by raising their wages (HANNEN, J.).

(3) The question whether a society has been established for illegal purposes or not, ought, as I think with rare exceptions, to be decided by the rules themselves. . . . To explain & interpret

these rules by vague general evidence of what may be sometimes done is, I think, objectionable. . . . I admit that cases may arise where a society may intentionally be established for illegal purposes, but may studiously keep such purposes from sight while they carry them out in practice. In such cases parol evidence of the acts & practice of the society might be very important. . . . Such evidence would not however be given to explain or interpret the rules but to show that they were a fraud & a sham (HAYES, J.).—FARRER v. CLOSE (1869), L. R. 4 Q. B. 602; 10 B. & S. 553; 38 L. J. M. C. 132; 20 L. T. 802; 33 J. P. 517; 17 W. R. 1129.

*Annotations*.—As to (1) *Reid*, Swaine v. Wilson (1889), 24 Q. B. D. 252. As to (2) *Consd.*, Russell v. Amalgamated Soc. of Carpenters & Joiners, [1910] 1 K. B. 506. *Reid*, Mogul S.S. Co. v. McGregor, Gow (1889), 23 Q. B. D. 598. *Generally*, *Reid*, R. v. Stainer (1870), 39 L. J. M. C. 54; Old v. Robson (1890), 6 T. L. R. 151; Gozney v. Bristol Trade & Provident Soc., [1909] 1 K. B. 901.

**969.** —.]—Severability of legal & illegal rules.]—SWAINE v. WILSON, No. 950, *ante*.

**970.** —.]—CULLEN v. ELWIN, No. 1098, *post*.

**971.** —.]—RUSSELL v. AMALGAMATED SOCIETY OF CARPENTERS & JOINERS, No. 987, *post*.

**972.** —.]—Pltf., who was a member of deft. society, a trade union, & had been expelled therefrom by a resolution of the executive committee, brought an action to obtain reinstatement as a member on the ground that his expulsion was *ultra vires* & void. Defts. took the preliminary objection that the society was at common law an illegal assocn., & further that having regard to 1871 Act, s. 4, (3) (a), the action was not maintainable, being "instituted with the object of directly enforcing any agreement for the application of the funds of a trade union to provide benefits to members." The rules of the society provided that the executive committee could only sanction, as distinct from ordering, a strike, & any member striking without such sanction was not entitled to strike pay. Under certain circumstances the committee were empowered to issue notice papers to the men for signature &, if signed by two-thirds of the men, to fix a day for handing the same to the employers, & if a strike ensued the committee were to assist the men in the struggle. The committee had power to expel a member found guilty of attempting to injure the society or break it up otherwise than as allowed by the rules. Apart from this the rules did not provide that when a strike was sanctioned by the committee every member was bound to strike, nor did they prevent members who had struck from resuming work if they pleased:—*Held*: (1) the rules were not in restraint of trade, & the society was a lawful assocn. at common law.

It [the society] is possessed of considerable property which belongs to the members, & any member unjustly excluded may invoke the assistance of the ct. (COZENS-HARDY, M.L.).

(2) The action was not a proceeding instituted with the object of directly enforcing an agreement for the application of the funds of the union "to

#### PART VII. SECT. 2, SUB-SECT. 2.—A.

1. Association for political purposes.]—The Victorian Assocn. was established as stated by its prospectus for the purpose of seeking out & promoting by all lawful means in its power the return to Parliament of men of liberal & enlarged views who by experience, education & character were calculated to command the respect & enjoy the confidence of their fellow

colonists & who would in their political career be guided by a tenacious regard for the public welfare rather than by a desire to obtain the temporary approbation of any section of the community. On a case stated without pleadings between the joint-treasurers of the society & one of the members in an action on the undertaking of the latter to subscribe to the funds of the society:—*Held*: the assocn. was not illegal nor the members' undertaking a

void one.—RYAN v. STEPHENS (1864), 1 W. W. & A.T. 102.—AUS.

a. Association "unduly to lessen competition in sale of coal."—HATELY v. ELLIOTT (1905), 5 O. W. R. 261; 9 O. L. R. 185.—CAN.

b. Evidence of legality.—Conduct & practice of union.]—CHASE v. STARR (Man.), [1923] 4 D. L. R. 103; [1923] 3 W. W. R. 500; *affd.*, 55 S. C. R. 495.—CAN.

**Sec. 2.—Legality: Sub-sect. 2, A., B. & C.]**

provide benefits to members"; & consequently the action was maintainable.

(3) Illegality must not be presumed or inferred. It must be established, if at all, upon some plain provision in the rules (COZENS-HARDY, M.R.).

(4) I may add that the mere introduction of some objectionable rules will not necessarily taint the whole of the rules (COZENS-HARDY, M.R.).

(5) The right to have benefits from the funds is unenforceable. . . . There is nothing in 1871 Act, s. 4, to forbid a ct. to entertain legal proceedings to enforce the member's right to his vote or his right to his distributive share in winding up (BUCKLEY, L.J.).—OSBORNE v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS, [1911] 1 Ch. 540; 80 L. J. Ch. 315; 104 L. T. 267; 27 T. L. R. 289, C. A.

**Annotations:—**As to (1) *Distd. Thomas v. Portsmouth "A" Branch of Ship Constructive, etc. Assocn.* (1912), 28 T. L. R. 372. As to (2) *Reid, Donkin v. Pearson*, [1911] 2 K. B. 412. As to (5) *Fold, Kelly v. National Soc. of Operative Printers' Assistants* (1914), 84 L. J. K. B. 557. *Consd. R. v. Cheshire County Court Judge & United Soc. of Boilermakers, Etc p. Malone*, [1921] 2 K. B. 694; *Amalgamated Soc. of Carpenters, Cabinet Makers & Joiners v. Braithwaite, General Union of Operative Carpenters & Joiners v. Ashley*, [1922] 2 A. C. 440. *Reid, Parr v. Lancashire & Cheshire Miners' Federation* (1913), 108 L. T. 446.

**973. — Plain provision as to illegality.]**—OSBORNE v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS, No. 972, *ante*.

**974. — Conduct & practice of union.]**—FARRER v. CLOSE, No. 968, *ante*.

**975. Illegality not to be presumed or inferred.]**—OSBORNE v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS, No. 972, *ante*.

**976. Mutual insurance society.]**—GOZNEY v. BRISTOL TRADE & PROVIDENT SOCIETY, No. 962, *ante*.

**977. Enforcement of legal rules—Notwithstanding existence of illegal rules—General objects of union legal.]**—SWAINE v. WILSON, No. 950, *ante*.

**B. Provisions in Restraint of Trade.**

**978. Whether combination illegal.]**—HILTON v. ECKERSLEY, No. 50, *ante*.

**979. —.]**—RIGBY v. CONNOL, No. 1035, *post*.

**980. —.]**—A society established for the protection of a particular trade contained a rule that no member should employ any traveller, carman, or outdoor employee who had left the service of another member without the consent in writing of his late employer till after the expiration of two years:—*Held*: the rule was unreasonable, in restraint of trade, & void. *Qu.*: whether the society was to any & what extent within 1871 & 1876 Acts.

[The article] is not even limited in its application to any particular employee who, from their position, might have confidentially acquired any knowledge in their employment. . . . The great objection to this covenant is that it might be used most oppressively by preventing a man who had never been in any confidential position & never desired improperly to use the information he had then acquired from getting employment from another master in the trade which he knew most about (COTTON, L.J.).—MINERAL WATER BOTTLE EXCHANGE & TRADE PROTECTION SOCIETY v. BOOTH (1887), 36 Ch. D. 465; 57 L. T. 573; 36 W. R. 274, C. A.

**Annotations:—***Consd. Davies v. Thomas*, [1920] 2 Ch. 189. *Reid, Chamberlain's Wharf v. Smith* (1900), 83 L. T. 238.

**981. —.]**—A society was registered as a trade union under 1871 Act, & in addition to its rules laying down the duties of members with

reference to trade questions, & imposing fines, suspension & expulsion upon members violating the rules as to trade matters, it also contained rules giving to members certain allowances out of the funds in cases of sickness, accident, infirmity, or want of employment, & other allowances similar to those of a friendly society. A member sued in the petty session ct. for one week's sick benefit which was refused to him by the society; the magistrates made an order for the payment of the sum claimed, holding that the society was substantially a friendly society, & that they had jurisdiction in the matter:—*Held*: as some of the objects of the society were in restraint of trade, the society was at common law an illegal assocn., & although such society was made legal to a certain extent by 1871 Act, sect. 4 of that Act prevented any ct. from entertaining or enforcing any agreement between the members to provide benefits to members, & consequently the magistrates had no jurisdiction to make the order in question.—*OLD v. ROISSON* (1890), 59 L. J. M. C. 41; 62 L. T. 282; 51 J. P. 597; 38 W. R. 415; 6 T. L. R. 151, D. C.

**Annotations:—***Fold, Sayer v. Amalgamated Soc. of Carpenters & Joiners* (1902), 19 T. L. R. 122. *Consd. Culen v. Elwin* (1904), 90 L. T. 840. *Expld. Burke v. Amalgamated Soc. of Dyers*, [1906] 2 K. B. 583. *Consd. Gozney v. Bristol Trade & Provident Soc.*, [1909] 1 K. B. 901. *Reid, Russell v. Amalgamated Soc. of Carpenter & Joiners*, [1910] 1 K. B. 506; *Pratt v. British Medical Assocn.*, [1919] 1 K. B. 244.

**982. —.]**—URMSTON (TREASURER, ETC.) v. WHITELEGG, No. 1305, *post*.

**983. —.]**—ASPDEN v. STEAM ENGINE MAKERS' SOCIETY (1904), *Times*, Dec. 14.

**984. —.]**—MUDD v. GENERAL UNION OF OPERATIVE CARPENTERS & JOINERS, No. 1101, *post*.

**985. —.]**—OSBORNE v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS, No. 972, *ante*.

**986. —.]**—An action was brought by a member against deft. trade union to recover an amount in name of sick benefit:—*Held*: apart from the provisions of 1871 Act, the trade union was an illegal assocn., as its rules were in restraint of trade, & the action could not be maintained. —*THOMAS v. PORTSMOUTH "A" BRANCH OF SHIP CONSTRUCTIVE, ETC. ASSOCN.* (1912), 28 T. L. R. 372, D. C.

**987. —.]**—The rules of a society registered under Trade Union Acts, 1871 (c. 31) & 1876 (c. 22), combined provisions for the militant purposes of a trade union, which were admittedly in restraint of trade, with provisions for the provident purposes of a friendly society, & the subscriptions of the members were applicable to all the purposes of the society. One of the rules provided for the expulsion of members for non-compliance with the decisions of the managing or branch committees directing the militant operations of the society or for violating the recognised trade rules of the district:—*Held*: an action [by the personal representative] against the society & its trustees for payment of moneys alleged to be due to a member under the rules in respect of superannuation benefit was not maintainable under the Act of 1871 & was not maintainable apart from the Act; because (1) (LORDS LOVEBURN, C. & ATKINSON), the society, being a voluntary assocn., could not have been sued in such an action in its own name; (2) (LORDS MACNAGHTEN, SHAW OF DUNFERMLINE, MERSEY & ROBSON), the society was an illegal assocn. at common law, inasmuch as its main purposes were in unreasonable restraint of trade & the rules relating to those purposes were not severable from the rules relating to its provident purposes.



(3) There have been many & probably there may be still some trade unions lawful in every point of view & not depending for their legality on their immunity in the Act of 1871 (LORD MACNAGHTEN).

(4) Having regard to the constitution of the society, the powers vested in its executive officers, & the blending of its funds for all purposes, it is impossible to separate from what is legal from what is not legal (LORD MACNAGHTEN).

(5) The reference to the occurrence of strikes in the rules or the provision for the support of members during a strike does not *per se* make the association illegal (LORD SHAW OF DUNFERMLINE).—RUSSELL v. AMALGAMATED SOCIETY OF CARPENTERS & JOINERS, [1912] A. C. 421; 81 L. J. K. B. 619; 106 J. T. 433; 28 T. L. R. 276; 56 Sol. Jo. 342, H. L.; *affy.*, [1910] 1 K. B. 506, C. A.

*Annotations*.—As to (2) *Apld.* Mudd v. General Union of Operative Carpenters & Joiners (1910), 103 L. T. 45; Baker v. Ingall, [1912] 3 K. B. 106; Thomas v. Portsmouth "A" Branch of Ship Constructive, etc. Asscn. (1912), 28 T. L. R. 372. *Reid.* McEllistram v. Ballymacelligott Co-op. Agricultural & Dairy Soc., [1919] A. C. 548; Pratt v. British Medical Asscn., [1919] 1 K. B. 244. *Generally.* *Reid.* Kelly v. National Soc. of Operative Printers' Assistants (1915), 84 L. J. K. B. 2236.

988. —[A.-G. OF COMMONWEALTH OF AUSTRALIA v. ADELAIDE S.S. CO., LTD., No. 68, *ante.*

989. —[EVANS (JOSEPH) & CO. v. HEATHCOTE, No. 954, *ante.*

990. Rules only incidentally in restraint of trade—Bonâ fide intention to protect funds.—SWAINE v. WILSON, No. 950, *ante.*

Strikes.]—See Sub-sect. 2. C., *post.*

#### C. Strikes.

See 1927 Act, s. 1.

991. Whether strike definable.]—FARRER v. CLOSE, No. 968, *ante.*

992. —[—There is no authority which gives a legal definition of the word "strike" but I conceive the word means a refusal by the whole body of workmen to work for their employers in consequence of either a refusal by the employers of the workmen's demand for an increase, or of a refusal by the workmen to accept a diminution of wages when proposed by their employers (KELLY, C.B.).—KING v. PARKER (1876), 34 L. T. 887.

*Annotation*.—*Mentd.* De Oleaga v. West Cumberland Iron & Steel Co. (1879), 4 Q. B. D. 472.

993. —[—LYONS (J.) & SONS v. WILKINS, No. 1167, *post.*

994. —[—(1) Where workmen strike in breach of their contracts those who help to maintain the strike by money & counsel are not liable to pay damages to the employers merely because losses are thereby caused to the employers.

A trade union having been sued for damages on the ground that workmen had been induced to break their contracts with their employers by officials of the union, & that the union had ratified & adopted the acts of their officials:—*Held*: the union was not liable, those who procured the strike not having been authorised by the rules or by the action of the union.

(2) This word ["strike"] is of an artificial character, & does not represent any legal definition or description (LORD JAMES OF HEREFORD).

(3) I do not think that inducing or attempting to induce men not to work for a particular employer, or a combination for that purpose, is a cause of action, if it be done in furtherance of what the parties in good faith believe to be their trade interests, though it may injure the employer in his business (LORD DAVEY).

(4) A local strike will naturally be engineered by the local branch officials, but in my opinion the branch officials are not agents of the union with authority to bind the union by their acts in a local strike. Such agency must be founded on something outside the rules & its existence must be proved by those who rely on it (LORD JAMES OF HEREFORD).

(5) It is true that in certain conditions the asscn. is bound to furnish strike pay. Will that circumstance create the agency for which counsel contends? I will suppose that the employers are also members of an asscn. of coalowners, as we are told that they are, & that the coalowners' asscn. bind themselves to support each other with money in the event of any one member locking out his workmen after certain conditions had been observed. If such member locked out his men without giving the notice prescribed by contract it would seem very strange to suppose the other members were liable to damages for an act over which they had no control & which was contrary to the conditions. Yet the cases are precisely the same (LORD LOREBURN, C.).—DENABY & CADEBY MAIN COLLIERIES, LTD. v. YORKSHIRE MINERS' ASSCN., [1906] A. C. 384; 75 L. J. K. B. 961; 95 L. T. 561; 22 T. L. R. 513, H. L.

*Annotations*.—As to (1) *Consd.* Gozney v. Bristol, etc. Trade & Provident Soc., [1909] 1 K. B. 901. *Expld.* Smithies v. National Asscn. of Operative Plasterers, [1909] 1 K. B. 310. The head-note . . . does not I think accurately state the result of the decision (BUCKLEY, L.J.).

995. —[—A "strike" of workmen is not limited to disputes between employers & workmen with regard to increase or diminution of wages: it includes a general concerted refusal by workmen to work in consequence of an alleged grievance.—WILLIAMS BROTHERS (HULL), LTD. v. NAAMLOOZE VENNOOTSCHAP (W. H.) BERGHUYS KOLENHANDEL (1915), 86 L. J. K. B. 334; 21 Com. Cas. 253.

996. How far legal.]—FARRER v. CLOSE, No. 968, *ante.*

997. —[—LYONS (J.) & SONS v. WILKINS, No. 1167, *post.*

998. —[—TAFF VALE RY. CO. v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS, No. 957, *ante.*

999. —[—QUINN v. LEATHEM, No. 1179, *post.*

1000. —[—DENABY & CADEBY MAIN COLLIERIES, LTD. v. YORKSHIRE MINERS' ASSCN., No. 994, *ante.*

1001. —[—JOSE v. METALIC ROOFING CO. OF CANADA, LTD., No. 1187, *post.*

1002. —General strike.—Where no trade dispute existing.]—(1) A general strike called by the Trades Union Congress Council in a trade where no trade dispute can be shown to exist is illegal. Persons inciting or taking part in such a strike are not protected by 1906 Act, & trade unionists who refuse to obey the order to strike cannot be deprived of their trade union benefits.

(2) Trade union funds are held in a fiduciary capacity & cannot legally be used for or depleted by paying strike pay to any member of a union who illegally ceases to work.

(3) Branch officers of a Union, who called a strike on instructions from an outside body without the authority of their own central executive & without the ballot prescribed by the rules, restrained by injunction.—NATIONAL SAILORS' & FIREMEN'S UNION OF GREAT BRITAIN & IRELAND v. REED, [1926] Ch. 536; 95 L. J. Ch. 192; 135 L. T. 103; *sub nom.* NATIONAL SEAMEN'S & FIREMEN'S UNION OF GREAT BRITAIN & IRELAND v. McVEY, SAME v. REED, 42 T. L. R. 513.

*Sect. 2.—Legality: Sub-sect. 2, C. Sect. 3: Sub-sects. 1, 2 & 3, A. & B. (a), (b). Sect. 4: Sub-sect. 1.]*

**1003. Provision in rules relating to strikes—Whether per se illegalising union.]—RUSSELL v. AMALGAMATED SOCIETY OF CARPENTERS & JOINERS, No. 987, ante.**

**Strike pay.]—See Nos. 1078–1080, post.**

### SECT. 3.—TRADE UNION AGREEMENTS.

#### SUB SECT. 1.—IN GENERAL.

**1004. Foundation of jurisdiction of court to interfere—Invasion of right of property—Necessity for society to possess property.]—RIGBY v. CONNOL, No. 1035, post.**

#### SUB-SECT. 2.—TRADE UNIONS LEGAL AT COMMON LAW.

**Legality of combination.]—See Sect. 2, sub-sect. 2, ante.**

**1005. Agreement enforceable.]—GOZNEY v. BRISTOL TRADE & PROVIDENT SOCIETY, No. 962, ante.**

#### SUB-SECT. 3.—TRADE UNIONS ILLEGAL AT COMMON LAW.

##### A. Validity of Agreements.

*See 1871–1906 Acts.*

**Legality of combination.]—See Sect. 2, sub-sect. 2, ante.**

**1006. Agreement not void.]—STRICK v. SWANSEA TIN-PLATE CO., No. 1143, post.**

**1007. —.]—ASPDEN v. STEAM ENGINE MAKERS' SOCIETY (1904), Times, Dec. 14.**

**1008. —.]—OSBORNE v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS, No. 972, ante.**

**1009. —.]—EVANS (JOSEPH) & CO. v. HEATHCOTE, No. 954, ante.**

**1010. Agreements not confined to unenforceable agreements—Within 1871 Act, s. 4.]—LEES v. LANCASHIRE & CHESHIRE MINERS' FEDERATION (1906), Times, June 20.**

**1011. Valid foundation for declaration—For account stated.]—EVANS (JOSEPH) & CO. v. HEATHCOTE, No. 954, ante.**

##### B. Enforceability of Agreements.

##### (a) Agreements within 1871 Act, Sect. 4.

*See 1871 Act, s. 4.*

**1012. Agreement in restraint of trade.]—URMSTON (TREASURER, ETC.) v. WHITELEGG, No. 1305, post.**

**1013. —.]—CULLEN v. ELWIN, No. 1098, post.**

**1014. —.]—ASPDEN v. STEAM ENGINE MAKERS' SOCIETY (1904), Times, Dec. 14.**

**1015. —.]—RUSSELL v. AMALGAMATED SOCIETY OF CARPENTERS & JOINERS, No. 987 ante.**

**1016. —.]—EVANS (JOSEPH) & CO. v. HEATHCOTE, No. 954, ante.**

**1017. Agreements relating to levies or fines—Injunction to restrain levy.]—Where the executive committee of a registered trade union have passed a resolution inflicting fines upon members who have acted in a manner prejudicial to the welfare of the society by working in the same shop with a non-member the society will not be restrained at the instance of the members on whom such fines have been stated to have been imposed from levying them even on the assumption that the rules gave no direct power of fining. To prohibit the**

defendants from levying such fines at the instance of parties who still wish to retain the benefit of membership of the society with its attendant advantages would be entertaining legal proceedings instituted with a view to directly enforcing an agreement within 1871 Act, s. 4.—**MULLETT v. UNITED FRENCH POLISHERS' LONDON SOCIETY (1904), 91 L. T. 133; 20 T. L. R. 595.**

*Annotations:—Reid, Steele v. South Wales Miners' Federation (1907), 96 L. T. 260; Osborne v. Amalgamated Soc. of Ry. Servants (1911), 80 L. J. Ch. 315.*

**1018. — Action to restrain proceedings on invalid ballot.]—The Executive Council of a trade union called a general ballot on the question of a levy on members, & on the proposal being defeated, decided a fortnight later to hold a second general ballot on the question of a similar levy. The voting papers at the second ballot, in breach of the rules, were not, except in the London district, checked by the scrutineers appointed to check all general ballots. The second ballot resulted in favour of the levy. The council afterwards held a third ballot as to alterations in the rules, & the ballot papers were issued to the London branch with the card numbers of the members thereon, whereby the votes of the members could be identified. Pltfs., who were members of the trade union, thereupon brought actions against members of the council for a declaration that the second & third ballots were invalid & for an injunction restraining defts. from acting thereunder:—*Held*: (1) if the officials of the society were satisfied that it was of extreme importance to get a reversal of a decision on the first ballot they were entitled to hold a second ballot immediately afterwards, but the second ballot was invalid as the scrutiny of about half the votes was made by the wrong persons; (2) the third ballot was invalid as there had been no such secrecy as was provided for by the rules; & the ct. was not precluded by 1871 Act, s. 4, from entertaining the actions, & there would be a declaration that pltfs. were not liable to pay the levy & that the third ballot was not properly held.—**BRODIE v. BEVAN, DUNN v. BEVAN (1921), 38 T. L. R. 172.****

**1019. Agreements between one union & another.]—Pltfs. were the secretary & other officials of an unregistered trade union called the Glasgow & District Glass Bottle Makers' Trade Protection Society, & defts. were the secretary & trustees of the National Federation of Glass Bottle Workers, an unregistered trade union of which pltf. society was a constituent member. The Federation had passed a resolution purporting to expel pltf. society on the ground that pltf. society had by refusing to carry out a resolution of the Federation acted in contravention of the rules & thereby forfeited its membership. In a representative action for a declaration that the expulsive resolution was invalid, & that pltf. society was still a member of the Federation, & for an injunction to restrain the Federation from acting on the resolution:—*Held*: the action was brought for the purpose of directly enforcing an agreement between the two trade unions whereby the one was admitted as a member of the other, & under 1871 Act, s. 4 (4), could not be entertained by the ct. *Semble*: one trade union may be a member of another.—**McLUSKEY v. COLE, [1922] 1 Ch. 7; 91 L. J. Ch. 242; 126 L. T. 269, C.A.****

**1020. —.]—Pltf. was a member of a provincial trade union which made an agreement with a London trade union that a member of the former union should, if he came to London, be entitled to membership of the latter union. Pltf.**



was offered a job in London, but was refused membership in the London union, & he was therefore unable to accept the job. Pltf. thereupon brought an action against the London union & its secretary for a declaration that he was entitled to membership of the London union, & for an injunction & damages:—*Held*: as the agreement was made, not between pltf. & deft. trade union, but between the two trade unions & as pltf. was neither directly nor indirectly a party to it, the action failed.—*HOLLAND v. LONDON SOCIETY OF COMPOSITORS* (1924), 40 T. L. R. 440.

**Agreements providing for benefits.**—*See, generally*, Sect. 5, *post*.

**Enforcement by entertaining application by expelled member.**—*See* Nos. 1035–1040, *post*.

(b) *Agreements Not Within 1871 Act, Sect. 4.*

*See* 1871 Act, s. 4.

**1021. Restraint of amalgamation.**—*WOLFE v. MATTHEWS*, No. 1123, *post*.

**1022. Agreement to pay member costs of legal proceedings.**—*LEES v. LANCASHIRE & CHESHIRE MINERS' FEDERATION* (1906), *Times*, June 20.

## SECT. 4.—REGISTERED TRADE UNIONS

### SUB-SECT. 1.—REGISTRATION.

*See* 1871 Act, ss. 6, 13, 17; 1876 Act, s. 6; Regulations, 1876 & 1890, Governing Registered Trade Unions, ss. 11, 15A, 15B.

**1023. Conditions precedent—Trade union must be in existence.**—For a trade union to be capable of registration under the 1871–1913 Acts, it must have come into existence before the date of the application for registration & not be merely a proposed trade union at that date.

When therefore two applications were made for registration of trade unions under the same name & it appeared that the application made first in time related only to a proposed & not an existing union, an order was made for registration in respect

to the later application, which had reference to an existing union, the name being modified so as to prevent confusion with a union of the same name that had only ceased to exist some two years before.

—*Re NATIONAL UNION OF SHIPS' STEWARDS, COOKS, BUTCHERS & BAKERS*, [1925] Ch. 20; 94 L. J. Ch. 37; 132 L. T. 628; 40 T. L. R. 871.

**Objects must be statutory.**—*See* Nos. 450, 954, *ante*.

**1024. Discretion of registrar—Two applications to register in same name—Refusal to register until status of applicants determined by court.**—A trade union which had been some years in operation, became divided into two sections, each section claiming to have the governing body among them. Both sections applied to register the trade union by the name which the society had always gone by. The registrar heard evidence voluntarily given by each party, & finding there was a *bona fide* dispute, refused to register the trade union under either application until the decision of a competent ct. determined the legal status of the applts. On a rule for a *mandamus*, obtained by the parties first applying to compel the registrar to register the union on their application:—*Held*: (1) irrespective of the regulations, the registrar was right, under the Act, in refusing to register, so as not to alter the position of the parties; (2) the dispute between the members of this society was one which ought to be decided by the Ct. of Ch. & this ct. would not enter into the merits upon a rule for *mandamus*.—*R. v. FRIENDLY SOCIETIES REGISTRAR* (1872), L. R. 7 Q. B. 741; 41 L. J. Q. B. 366; 27 L. T. 229; 37 J. P. 262.

*Annotation*:—*As to* (2) *Consd. Rigby v. Council* (1880), 14 Ch. D. 482.

**1025. Certificate of registration—Not conclusive as to passing or alteration of rules.**—*OSBORNE v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS*, No. 1089, *post*.

**1026. Validity until cancellation—Objects of union illegal.**—*PARR v. LANCASHIRE & CHESHIRE MINERS' FEDERATION*, No. 1041, *post*.

**1027. Enforcement of right to registration—**

## PART VII. SECT. 3, SUB-SECT. 3.—

### B.

c. "Directly enforcing."—"*Benefits to members.*"—*AMALGAMATED SOCIETY OF ENGINEERS v. SMITH* (1913), 16 C. L. R. 637.—*AUS.*

d. ———.—"*GENERAL UNION*" SOCIETY OF OPERATIVE CARPENTERS & JOINERS v. O'DONNELL (1877), 1 L. T. J. 232.—*IR.*

e. ———.—In an action against a trade union at the instance of one of its members to recover benefit money alleged to be due to him in terms of its rules:—*Held*: prior to Trade Union Act, 1871 (c. 31), a trade union was an unlawful combination, whose contracts to confer benefits on members could not be enforced in cts. of law, & as the statute in removing the illegality of such assocns. expressly provided that nothing in it should have the effect of making such contracts enforceable in cts. of law, the ct. had no jurisdiction to entertain the action.—*SHANKS v. UNITED OPERATIVE MASONS' ASSOCN.* (1874), 1 L. (Ct. of Sess.) 823; 11 Sc. L. R. 356.—*SCOT.*

f. ———.—*AITKEN v. ASSOCIATED CARPENTERS & JOINERS OF SCOTLAND* (1885), 12 R. (Ct. of Sess.) 1206; 22 Sc. L. R. 796.—*SCOT.*

g. ———.—*WILKIE v. KING*, [1911] S. C. 1310.—*SCOT.*

h. ———.—*LOVE v. AMALGAMATED SOCIETY OF LITHOGRAPHIC PRINTERS*, [1912] S. C. 1078; 49 Sc. L. R. 788; [1912] 2 S. L. T. 50.—*SCOT.*

k. ———.—An action at the

instance of a member of an unregistered trade union for declarator that certain proposed alterations in the rules were *ultra vires*, & for interdict against misapplication of the funds of the union, was not a proceeding instituted with the object of directly enforcing an "agreement to provide benefits to members," & the ct. had jurisdiction to entertain the action.—*WILSON v. SCOTTISH TYPOGRAPHICAL ASSOCN.*, [1912] S. C. 534.—*SCOT.*

l. ———.—In an action against a trade union by the widow of a member of the union for payment of the burial allowance provided for by the rules of the union:—*Held*: this allowance was a "benefit to members" within the above sect. & accordingly the jurisdiction of the ct. was excluded.

—*McLAREN v. NATIONAL UNION OF DOCK LABOURERS*, [1918] S. C. 834; 55 Sc. L. R. 763; [1918] 2 S. L. T. 175.—*SCOT.*

m. ———.—*Enforcement of agreement for payment of penalty.*—A trade union imposed upon a firm, which was a member of the union, a fine for a breach of the rules of the union. Thereafter the firm brought an action against the union for declarator that at the date of the alleged breach it was not a member of the union, & for interdict against the enforcement of the fine. Admittedly the firm was a member at the date of the imposition of the fine:—*Held*: the action, in spite of its form, was in substance & effect a proceeding instituted with the object of enforcing an agreement for

the payment of a penalty to a trade union within Trade Union Act, 1871, s. 4, & was accordingly excluded by that section.—*RAE (G. & J.), LTD. v. PLATE GLASS MERCHANTS' ASSOCN.*, [1919] S. C. 426; 56 Sc. L. R. 315; [1919] 1 S. L. T. 228.—*SCOT.*

n. ———.—*Agreement for application of trade union funds.*—*SMITH v. SCOTTISH TYPOGRAPHICAL ASSOCN.*, [1919] S. C. 43; 56 Sc. L. R. 46; [1918] 2 S. L. T. 250.—*SCOT.*

o. ———.—*Agreement concerning conditions on which members shall transact business.*—*JOHNSTON v. ABERDEEN MASTER PLUMBERS' ASSOCN.*, [1921] S. C. 62; 58 Sc. L. R. 47; [1920] 2 S. L. T. 390.—*SCOT.*

p. ———.—*EDINBURGH MASTER PLUMBERS' ASSOCN. v. MUNRO*, [1928] S. C. 565; [1928] S. L. T. 402.—*SCOT.*

## PART VII. SECT. 4, SUB-SECT. 1.

q. *Union of employers or employees.*—A union of employers or employees may be registered as an organisation under Commonwealth Conciliation & Arbun. Act, 1904–1909, Part 5.—*HURDESS v. VIATZ* (1915), 11 Tas. L. R. 57.—*AUS.*

r. *Cancellation of registration.*—*AUSTRALIAN COMMONWEALTH SHIPPING BOARD v. FEDERATED SEAMEN'S UNION OF AUSTRALASIA* (1925), 36 C. L. R. 412.—*AUS.*

t. *Association of artisans for acquisition of gain.*—An assocn. of artisans for the purpose of enhancing the price of their work by bringing all

*Sect. 4.—Registered trade unions: Sub-sects. 1, 2 & 3.]*

**Determination of status of applicant—Matter for Chancery court—Not dealt with on rule for mandamus.]—R. v. FRIENDLY SOCIETIES REGISTRAR, No. 1024, ante.**

—*See* 1913 Act, s. 2 (4).

**1028. Effect—Trade union becomes legal entity.]—OSBORNE v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS, No. 1089, post.**

—**Right to sue & be sued in registered name.]—See** No. 1295, post.

**1029. Cancellation of registration—Rule providing for illegal purpose—Registration not thereby cancelled.]—PARR v. LANCASHIRE & CHESHIRE MINERS' FEDERATION, No. 1041, ante.**

—*See* 1876 Act, s. 8; Regulations, 1876 & 1890, Governing Registered Trade Unions, ss. 12-14.

#### SUB-SECT. 2.—NAME AND OFFICE.

*See* 1871 Act, ss. 13 (3), 15; Regulations (1876 & 1890) Governing Registered Trade Unions, r. 2.

**1030. Exclusive right to name.]—TAFF VALE RY. CO. v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS, No. 1295, post.**

**1031. Modification of name—On application for registration—Avoidance of confusion.]—Re NATIONAL UNION OF SHIPS' STEWARDS, COOKS, BUTCHERS & BAKERS, No. 1023, ante.**

**Change of name.]—See** 1871 Act, s. 13 (3); Regulations (1876 & 1890) Governing Registered Trade Unions, rr. 2, 16; 1876 Act, ss. 11, 13.

#### SUB-SECT. 3.—MEMBERSHIP.

*See* 1871-1913 Acts.

**1032. Membership between one union & another—Validity.]—McLUSKEY v. COLE, No. 1019, ante.**

**1033. Expulsion—Power of court to entertain application by expelled member.]—OSBORNE v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS, No. 972, ante.**

**1034. ———.]—(1)** Although modern trade unions having branches & appointing delegates come within the scope of Unlawful Societies Act, 1799 (c. 79), & Seditious Meeting Act, 1817 (c. 19), & are not expressly exempted from those Acts by any subsequent Act, their existence has been recognised by the legislature in the Acts relating to trade unions, & they must be deemed to be impliedly exempt from the provisions of the said Acts.

**(2)** Deft. assocn. was registered under 1871 & 1876 Acts, & consisted of numerous lodges or branches. Each lodge elected its own officials & managed its own affairs & appointed delegates to meet & confer with delegates of kindred societies.

Pltf. alleged that he was a member of the assocn., that a resolution of its council purporting to expel him was *ultra vires*, & claimed an injunction to restrain the assocn. & its officials from acting on the resolution. The assocn. denied that pltf. was a member, & alleged that it had power under its rules to pass the resolution, which was valid & also pleaded that it was an unlawful combination & confederacy within the meaning of the said Acts of George III: Unlawful Societies Act, 1799 (c. 79), & Seditious Meeting Act, 1817 (c. 19):—**Held:** pltf. was a member of the assocn., the resolution was *ultra vires*, & the assocn. was exempt from the provisions of the said Acts.—**LUBY v. WARWICKSHIRE MINERS' ASSOCN.,** [1912] 2 Ch. 371; 81 L. J. Ch. 741; 107 L. T. 452; 28 T. L. R. 509; 50 Sol. Jo. 670.

**1035. ——— Whether enforcement of agreements within 1871 Act, sect. 4.]—(1)** The foundation of the jurisdiction of the ct. to prevent a member of a voluntary assocn. from being improperly expelled is the right of property vested in such member of which he is deprived.

**(2)** The rules of a trade union provided that the money arising from the subscriptions of its members should be applicable in various ways for their benefit. They also purported to regulate the affairs of that trade, & provided that any journeyman binding his son in a "foul shop," being a shop in which non-union men were employed, should be fined, & not be entitled to any benefit until such fine had been paid. Pltf. a member of the union, who was alleged to have broken the rule as to apprenticeship, & who, having refused to pay the fine, had been expelled from the union, brought his action against the committee & trustees of the union claiming to be entitled to participate in its benefits, & that defts. might be restrained from excluding him from such participation:—**Held:** as the action was brought to enforce an agreement between members of a trade union "to provide benefits to members," within the meaning of 1871 Act, s. 4, which the ct. was not by that sect. enabled to enforce; & as, apart from the Act, the union was an illegal assocn., pltf. was not entitled to any relief.—**RIGBY v. CONNOL** (1880), 14 Ch. D. 482; 49 L. J. Ch. 328; 42 L. T. 139; 28 W. R. 650.

**Annotations:—As to (1)** *Consd.* **Baird v. Wells** (1890), 44 Ch. D. 661. *Refd.* **Milligan v. Sullivan** (1888), 4 T. L. R. 203; **Cassel v. Ingils**, [1916] 2 Ch. 211; **A.-G. v. Swan**, [1922] 1 K. B. 682; **Wing v. Burn** (1928), 44 T. L. R. 258. **As to (2)** *Apld.* **Duke v. Littleboy** (1880), 49 L. J. Ch. 802. *Distd.* **Wolfe v. Matthews** (1882), 21 Ch. D. 194. *Apld.* **Chamberlain's Wharf v. Smith**, [1900] 2 Ch. 605. *Consd.* **Taff Vale Rly. v. Amalgamated Soc. of Rly. Servants** (1900), [1901] A. C. 426; **Cullen v. Elwin** (1904), 90 L. T. 840. *Apld.* **Mullett v. United French Polishers' London Soc.** (1904), 91 L. T. 133. *Expld.* **Yorkshire Miners' Assocn. v. Howden**, [1905] A. C. 256. *Expld. & Distd.* **Osborne v. Amalgamated Soc. of Rly. Servants**, [1911] 1 Ch. 540. *Distd.* **Amalgamated Soc. of Carpenters, Cabinet Makers, & Joiners v. Brathwaite, General Union of Operative Carpenters & Joiners v. Ashley**, [1922] 2 A. C. 440,

the business of the trade into one shop & dividing the prices of the work done amongst the members according to their skill is an assocn. that has for its object the acquisition of gain, & if consisting of more than twenty persons must be registered.—**BHUKAJI SABAJI v. BAPU SAJU** (1877), 1 L. R. 1 Bom. 550.—**IND.**

**a. ——— Voluntary agreement made subsequently not filed—Right to enforce agreement.]—PUKEMIRO COLLIERIES, LTD. v. PUKEMIRO MINERS' UNION**, [1928] N. Z. L. R. 385.—**N.Z.**

#### PART VII. SECT. 4, SUB-SECT. 3.

**1033 i. Expulsion—Power of court to entertain action by expelled member.]—**

A voluntary assocn. was formed by millers & sellers of flour "to promote & establish uniformity in commercial usages, & for the exchange of information of advantage to the members." An annual subscription was paid by the members "to defray expenses." Pltf., who had been a member of the assocn., brought a suit for an injunction to restrain the committee from refusing to accept his subscription & from turning him out of the assocn. The only property possessed by the assocn. at the date of the suit was £35, being the balance of subscriptions over expenses:—**Held:** the ct. had no jurisdiction to entertain the suit, as the assocn. was a purely voluntary one, & no right to property was in

question.—**AMOS v. BRUNTON** (1897), 18 N. S. W. Eq. 184; 14 N. S. W. N. 69.—**AUS.**

**1033 ii. ———.]—MACHEPHERSON v. STUBBS** (1914), 16 W. A. L. R. 87.—**AUS.**

**1033 iii. ———.]—PARKER v. TORONTO MUSICAL PROTECTIVE ASSOCN.** (1900), 32 O. R. 305.—**CAN.**

**b. ——— Right of member to be heard.]—**A member of an organisation charged with misconduct has, in the absence of express provision in the rules to the contrary, a right to be heard before the matter is determined against him, & if he is not afforded a proper opportunity of being heard, then, irrespective of the merits, the

**Reid.** *Winder v. Kingston-upon-Hull Incorporation for the Poor* (1888), 58 L. T. 583; *Swaine v. Wilson* (1839), 24 Q. B. D. 252; *Old v. Robson* (1890), 59 L. J. M. C. 41; *Steele v. South Wales Miners' Federation* (1907) 1 K. B. 361; *Cope v. Crossingham*, [1908] 2 Ch. 624. *Generally*, **Reid.** *Amalgamated Soc. of Ry. Servants v. Osborne*, [1910] A. C. 87. **Mentd.** *Ryan v. Mutual Tontine Westminster Chambers Assn.* (1892), 62 L. J. Ch. 252.

**1036.** ————]—The rules of an assocn., called the Tea Clearing House, the members of which were dock cos. & tea warehouse keepers carrying on the business of warehousing tea in bond, provided, rule 11, that every member should charge on teas the respective rates & adhere to the terms & conditions specified in a schedule to the rules, & should not be at liberty to depart from them in any way, except that a discount not exceeding 10 per cent. might be allowed on the said rates. No other discount, no money gratuities & no advantages, direct or indirect, should be offered or allowed by any member to any merchant, broker, or other person in connection with any matter or thing in anywise relating to the Tea Clearing House agreement. By rule 14, no subscriber should be entitled to warehouse or deposit tea with, or employ in connection with tea, any dock co. or tea warehouse keeper who was not a member of the Clearing House, or to purchase or sample any tea from the warehouse of any non-member.

By rule 15, any member breaking or failing to observe any of the rules was to be liable to expulsion by resolution of the committee. The committee passed a resolution expelling plffs. for an alleged breach of the rules, & they brought an action against the members of the committee to restrain them from acting on the resolution, on the ground (*inter alia*) that plffs. had not had an opportunity of being heard in their defence:—**Held:** the assocn. was a "trade union" within 1876 Act, s. 10; its objects were illegal independently of the 1871 Act, & 1871 Act, s. 4, prevented the ct. from directly enforcing the agreement between the members.

I will consider what the nature of the assocn. is. We are not bound by either the preliminary statement of its objects or by the rules taken separately; we must look at the two together in order to see what the real object & scope of the assocn. is (LORD ALVERSTONE, M.R.).—**CHAMBERLAIN'S WHARF, LTD. v. SMITH**, [1900] 2 Ch. 605; 69 L. J. Ch. 783; 83 L. T. 238; 49 W. R. 91; 16 T. L. R. 514; 44 Sol. Jo. 643, C. A.

**Annotations:—Apld.** *Mullett v. United French Polishers' London Soc.* (1904), 91 L. T. 133. **Distd.** *Yorkshire Miners' Assn. v. Bowden*, [1905] A. C. 256. **Distd.** *Steele v. South Wales Miners' Federation*, [1907] 1 K. B. 361. **Distd.** *Osborne v. Amalgamated Soc. of Ry. Servants*, [1911] 1 Ch. 540. **Consd.** *Kelly v. National Soc. of Operative Printers* (1915), 113 L. T. 1055. **Expld. & Distd.** *Braithwaite v. Amalgamated Soc. of Carpenters, Cabinet Makers & Joiners, Ashley v. General Union of Operative Carpenters & Joiners*, [1921] 2 Ch. 399. **Reid.** *Cullen v. Elwin* (1903), 88 L. T. 886; *Amalgamated Soc. of Carpenters, Cabinet Makers & Joiners v. Braithwaite, General Union of Operative Carpenters & Joiners v. Ashley* [1922] 2 A. C. 440.

decision is contrary to natural justice & cannot stand.—**JEDGAR & WALKER v. MEADE** (1916), 23 C. L. L. 29.—**AUS.**

**e.** *Necessity for giving power in rules.*—A power of expulsion must be found in the rules & does not exist apart from them.—**CLARKE v. FERRIE**, [1926] N. I. 1.—**IR.**

**d.** ————]—A member of a trades union society cannot be expelled by the Executive Committee or by the society unless such power is given by its constitution either in express terms or by necessary implication therefrom. Such society has no inherent right to expel a member.—**GALLOWAY v.**

**BOILERMAKERS, ETC.**, [1921] W. L. D. 20.—**S. AF.**

**e.** *Whether condition precedent to membership—Payment of enhanced fee.*—**FEDERATED SEAMEN'S UNION OF AUSTRALASIA v. BELFAST & KOROIT STEAM NAVIGATION CO., LTD.** (1918), 24 C. L. R. 462.—**AUS.**

**f.** ————]—*Compliance with rules of organisation.*—**HUGHES v. ANTHONY** (1925), 27 W. A. L. R. 134.—**AUS.**

**g.** *Miners' Relief Society—Participation in fund—Construction of bye-law.*—The 12th rule or bye-law of the relief society established in connection with the mines of the Dominion

**1037.** ————]—**OSBORNE v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS**, No. 972, *ante*.

**1038.** ————]—Plff. was a member of deft. society, which would have been illegal but for 1871 Act, & he was expelled from the society, for conduct alleged to be detrimental to its interests, such conduct consisting in his being employed in the printing office of a newspaper during the night & by a firm of carriers during a portion of the day:—**Held:** (1) upon the construction of the society's rules plff.'s expulsion was *ultra vires*, there was no evidence of any misconduct on his part, & he was entitled to an injunction to restrain the society from enforcing the resolution for his expulsion as he was not seeking by his claim for an injunction to enforce directly any of the agreements specified in 1871 Act, s. 4; (2) as a member of an unincorporated voluntary assocn. could not recover general damages against the assocn. as such for a breach of the rules or of the contract contained in the rules, plff. was not entitled to damages.—**KELLY v. NATIONAL SOCIETY OF OPERATIVE PRINTERS' ASSISTANTS** (1915), 84 L. J. K. B. 2236; 113 L. T. 1055; 31 T. L. R. 632; 59 Sol. Jo. 716, C. A. **Annotations:—As to** (1) **Expld.** *R. v. Cheshire County Court Judge & United Soc. of Boilermakers, Ex p. Malone*, [1921] 2 K. B. 691. **Reid.** *Braithwaite v. Amalgamated Soc. of Carpenters, Cabinet Makers & Joiners, Ashley v. General Union of Operative Carpenters & Joiners*, [1921] 2 Ch. 399. **As to** (2) **Apld.** *R. v. Cheshire County Court Judge & United Soc. of Boilermakers, Ex p. Malone*, [1921] 2 K. B. 694.

**1039.** ————]—**AMALGAMATED SOCIETY OF CARPENTERS, CABINET MAKERS & JOINERS v. BRAITHWAITE, GENERAL UNION OF OPERATIVE CARPENTERS & JOINERS v. ASHLEY**, No. 1043, *post*.

**1040.** ————]—The reinstatement by the ct. of a member of a trade union who has been expelled for alleged non-compliance with a rule embodying an agreement as to the payment of subscriptions, but who has not in fact failed to comply with the rule, is not prohibited by 1871 Act, s. 4, as such reinstatement does not "directly" enforce the agreement.—**BLACKALL v. NATIONAL UNION OF FOUNDRY WORKERS OF GREAT BRITAIN & IRELAND** (1923), 39 T. L. R. 431.

**1041.** ————]—**Application of 1906 Act, s. 4.**—(1) 1871 Act, s. 6, which declares that if any one of the purposes of a registered trade union is unlawful, the registration shall be void, & sect. 13 which provides that the certificate of registration, unless withdrawn or cancelled, shall be conclusive evidence that the regulations of the Act have been complied with, must be read with the 1876 Act, s. 8, which empowers the Registrar of Friendly Societies to withdraw or cancel the certificate of registration of a trade union on proof "that the registration of the trade union has become void under 1871 Act, s. 6. Where, therefore, any of the purposes of a registered trade union are *ultra*

*Coal Co.*, provided that, "No member shall participate in the benefits of the society until two full months after the date of his first payment"—**Held:** a member was absolutely excluded from any participation in the benefits of the society in case of illness or accident happening within the period of two months, & the right to participate only arose in cases where the inability to work was due to causes arising after the lapse of the two months.—**MCDONALD v. DOMINION COAL CO. RELIEF FUND** (1903), 36 N. S. R. 15.—**CAN.**

**h.** *Refusal to admit to membership in local union.*—The wrongful refusal

*Sect. 4.—Registered trade unions: Sub-sects. 3, 4, 5 & 6, A. & B.; sub-sect. 7.]*

*vires*, it can properly be sued in its registered name, until its certificate of registration has been withdrawn or cancelled by the registrar.

The committee of a trade union passed a resolution purporting to expel one of its members from the union. To an action by the member to restrain the union & its officers from wrongfully expelling him from the union defts. pleaded that the action was not maintainable, because the expulsion was a tortious act done in furtherance of a trade dispute within 1906 Act, s. 4:—*Held*: 1906 Act, s. 4, did not apply to the case of a pltf. suing in respect of a breach of his contractual rights under the rules of the union.

(2) An unregistered assocn. consisted of numerous trade unions & their members. One of its objects, as defined by its rules, was illegal. Under its rules it had a president, vice-president, treasurer & secretary, & its affairs were managed by an executive committee & its funds were vested in trustees. In an action by a member to restrain the application of the funds of the assocn. to illegal purposes the president, vice-president, treasurer, & secretary were made defts. & objected that they did not represent the assocn., & that pltf. should have sued the executive committee & the trustees:—*Held*: deft. officials sufficiently represented the assocn. for the purposes of the action.

(3) Pltf. claimed a declaration that so much of a rule of deft. federation as provided for a parliamentary levy upon members was *ultra vires* & invalid; an injunction restraining deft. Federation & deft. branch union from making payments out of their funds to the Miners' Federation, & from expelling pltf. from membership of deft. federation & deft. branch union; a declaration that other defts. as trustees of the Miners' Federation were not entitled to make payments of the funds of the Federation for parliamentary purposes; & an injunction restraining last-named defts. accordingly:—*Held*: pltf. was entitled to the declarations & injunctions claimed; that there was nothing in 1906 Act, s. 4, precluding the making of those declarations & injunctions; that although deft. Federation had applied its funds for unlawful purposes it had not thereby ceased to be a registered trade union & therefore was rightly sued in its registered name & defts. as trustees of the Miners' Federation were rightly sued as fairly representing that body.—*PARR v. LANCASHIRE & CHESHIRE MINERS' FEDERATION*, [1913] 1 Ch. 366; 82 L. J. Ch. 193; 108 L. T. 446; 29 T. L. R. 235.  
*Annotations*:—As to (1) *Reid*. Kelly v. National Soc. of Operative Printers' Assistants (1915), 84 L. J. K. B. 2236. As to (2) *Consd. Hardie & Lane v. Chiltern*, Same v. Same, [1928] 1 K. B. 663.

**1042. — Grounds for expulsion.—Bringing union into discredit.**—On May 2, 1918, pltf., who was a member of the Cardiff branch of deft. registered trade union, wrote a letter to the general secretary of the head office saying that a large number of irregularities prevailed at the branch office, & making charges of serious misconduct against members of the committee, in that they were accepting engagements at prices smaller than those charged to their own employer. As a result of this letter the branch, after con-

siderable correspondence & meetings, ultimately passed a resolution on Jan. 5, 1919, expelling pltf. from the union, as he refused to withdraw in writing the charges so made after disclaiming any intention to make any reflections on the branch or its members, & promising to write to that effect.

Under rule 16 (3) of the rules of the union it was competent for any branch, at a special or quarterly meeting, to fine, suspend or expel any member from the union, upon satisfactory proof being given that he had by his conduct "brought the union into discredit."

In an action by pltf. against the union for a declaration that the resolution expelling him was *ultra vires* & void, & for a consequential injunction:—*Held*: rule 16 (3) must be read as an enabling one as well as one dealing with procedure, & "bringing the union into discredit" meant bringing the union, or any branch of it, into discredit with the public, or any section if it, or with the other component parts of the whole organisation; the conduct of pltf. afforded ample materials for the branch to come to the conclusion to expel him, & the action failed.—*WOLSTENHOLME v. AMALGAMATED MUSICIANS' UNION*, [1920] 2 Ch. 388; 89 L. J. Ch. 388; 123 L. T. 741; 64 Sol. Jo. 585; 84 J. P. Jo. 266.

**1043. — Participation in profit sharing scheme.**—Pltfs. in the two cases were respectively members of two different registered trade unions. In the first case the rules of the trade union provided that it should be competent for the branch committee or other authorities there mentioned to fine or expel any member "working on a co-partnership system when such system makes provision for the operatives holding only a minority of the shares." In the second case the rules contained a similar power to fine or expel any member proved to be "working against the interests of the society by working on the premium bonus system."

The trade unions threatened to expel pltfs. on the ground that they were participants in a profit sharing scheme, instituted by the co. by whom they were employed, under which meritorious employees might become entitled to a share of the profits & might invest the same in the purchase of shares in the ct. This was independent of their wages, which were paid by the co. at full trade union rates. In actions by pltfs. for injunction to restrain the threatened expulsion:—*Held*: (1) the jurisdiction of the ct. to entertain the actions was not ousted by 1871 Act, s. 4; & (2) on the construction of the rules, pltfs. were not liable to be expelled on the ground of their participation in the profit sharing scheme.—*AMALGAMATED SOCIETY OF CARPENTERS, CABINET MAKERS & JOINERS v. BRAITHWAITE, GENERAL UNION OF OPERATIVE CARPENTERS & JOINERS v. ASHLEY*, [1922] 2 A. C. 440 91 L. J. Ch. 688; 128 L. T. 65; 38 T. L. R. 879; 66 Sol. Jo. 707, H. L.; *affg. S. C. sub nom. BRAITHWAITE v. AMALGAMATED SOCIETY OF CARPENTERS, CABINET MAKERS & JOINERS, ASHLEY v. GENERAL UNION OF OPERATIVE CARPENTERS & JOINERS*, [1921] 2 Ch. 399, C. A.

**1044. — Jurisdiction of county court.**—A member of a trade union brought an action in the county ct. for a declaration that a resolution of the trade union purporting to expel him from the union was *ultra vires* & void, & an injunction

by the officers of a local union of the United Mine Workers of America to admit pltf. to membership therein as a result of which pltf. were unable to obtain employment:—*Held*: to render individual members of the local

union liable in damages.—*WILLIAMS & BRES v. LOCAL UNION No. 1562, UNITED MINE WORKERS OF AMERICA & YOUNG (Alta.)*, [1918] 2 W. W. R. 767; 41 D. L. R. 709; *affd.*, 14 Alta. L. R., 251.—*CAN.*

*k. Power of court to compel person to become member of union.*—The ct. has no power to compel any person to join a union.—*MAGNER v. GOHNS*, [1916] N. Z. L. R. 529.—*N.Z.*

to restrain the union from acting upon the resolution. The particulars of demand did not include any claim for damages, & having regard to the nature of the action, no damages could have been recovered:—*Held*: the county ct. judge had no jurisdiction to entertain the action. It is essential to the jurisdiction of the county ct. in such a case that there should be a money claim not exceeding £100, & when no such claim is made & established, the ct. cannot grant ancillary relief by way of declaration or injunction.—*R. v. CHESHIRE COUNTY COURT JUDGE & UNITED SOCIETY OF BOILERMAKERS, Ex p. MALONE*, [1921] 2 K. B. 694; 90 L. J. K. B. 772; 125 L. T. 588; 65 Sol. Jo. 552; *sub nom. R. v. PARSONS, Ex p. MALONE*, 37 T. L. R. 546, C. A.

*Annotations*:—*Consd. Simpson v. Crowle*, [1921] 3 K. B. 243; *Davey v. Robinson*, [1923] 1 K. B. 563. *Apld. Smith v. Smith*, [1925] 2 K. B. 144; *Do Vries v. Smallbridge*, [1928] 1 K. B. 482. *Reid. Humber Conservancy Board v. Federated Coal & Shipping Co.*, [1928] 1 K. B. 492.

**1045.** — **Wrongful expulsion—Right to damages.**—*KELLY v. NATIONAL SOCIETY OF OPERATIVE PRINTERS' ASSISTANTS*, No. 1038, *ante*.

**1046.** — **According to rules—Action of union unfair but done in good faith—Right of expelled member to redress.**—A person who has joined an assocn. governed by rules under which he may be expelled has no legal right of redress if he is expelled according to the rules, however unfair & unjust the action of the expelling tribunal may be, provided that it acted in good faith.—*MACLEAN v. WORKERS' UNION*, [1929] 1 Ch. 602; 45 T. L. R. 258.

**1047.** **Power of local authority to require employees to be members.**—*A.-G. v. BIRKENHEAD CORPN.* (1928), 92 J. P. Jo. 526.

#### SUB-SECT. 4.—RULES.

See 1871 Act, ss. 14, 18, sched. 1.

**1048.** **Right of court to interfere in internal affairs of union.**—*COX v. NATIONAL UNION OF FOUNDRY WORKERS OF GREAT BRITAIN & IRELAND* (1928), 44 T. L. R. 345.

**1049.** **Admissibility in evidence against member.**—*MINNS v. SMITH* (1858), 1 F. & F. 318; *subsequent proceedings*, 32 L. T. O. S. 89.

**1050.** **Alteration—Necessity for notice—What is sufficient notice.**—By the rules of a trade union it was provided that a delegate meeting should not have power to alter any rule unless notice of the proposed alteration had been given:—*Held*: this did not mean that a rule could not be altered unless notice of the identical alteration ultimately adopted had been given; it merely meant that notice of an intention to alter the rule must be given, & then the delegate meeting could by discussion alter it in the way they might there & then determine.—*AMALGAMATED SOCIETY OF ENGINEERS v. JONES* (1913), 29 T. L. R. 484.

**1051.** — **On whom binding—Insane member.**—(1) The alteration by a trade union, during the insanity of a member, of a rule as to sick benefits, to the prejudice of that member, is binding upon him if made in accordance with the rule authorising

& regulating the alteration of the rules of the union.

(2) *Semble*, an action is not maintainable by a member of his representatives against a registered trade union to recover sick pay under the rules relating to sick benefits for members.—*BURKE v. AMALGAMATED SOCIETY OF DYERS*, [1906] 2 K. B. 583; 75 L. J. K. B. 533, D. C.

— **Validity—Whether certificate of registration conclusive.**—See No. 972, *ante*.

**1052.** — **Effect of resolutions.**—*COX v. NATIONAL UNION OF FOUNDRY WORKERS OF GREAT BRITAIN & IRELAND* (1928), 44 T. L. R. 345.

#### SUB-SECT. 5.—BOOKS AND ACCOUNTS.

See Part VII., Sect. 5, sub-sect. 5.

#### SUB-SECT. 6.—PROPERTY.

##### A. In General.

See 1871 Act, ss. 7, 8; 1876 Act, ss. 3, 4.

**1053.** **Right to acquire real property—Statutory not common law right.**—*Re AMOS, CARRIER v. PRICE*, No. 956, *ante*.

**1054.** — **May not be acquired as part of sub-stratum of union.**—*Re AMOS, CARRIER v. PRICE*, No. 956, *ante*.

**1055.** — **Amount limited by statute—One acre.**—*Re AMOS, CARRIER v. PRICE*, No. 956, *ante*.

**1056.** — — — — — *OSBORNE v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS*, No. 1089, *post*.

**1057.** — — — — — *TAFF VALE RY. Co. v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS*, No. 1205, *post*.

**1058.** — **Meaning of "purchase"—Popular not technical meaning.**—*Re AMOS, CARRIER v. PRICE*, No. 956, *ante*.

**1059.** **Right to acquire personal property—Amount unlimited.**—*TAFF VALE RY. Co. v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS*, No. 1205, *post*.

**1060.** — — — — — *OSBORNE v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS*, No. 1089, *post*.

**Exemption from income tax.**—See Income Tax Act, 1918 (c. 40), s. 39 (2).

##### B. Funds.

See Sect. 5, *post*.

#### SUB-SECT. 7.—TRUSTEES AND OFFICERS.

See 1871 Act, ss. 8–11, sched. 1; 1876 Act, ss. 3, 4; Regulations, 1876 & 1890, Governing Registered Trade Unions, ss. 17–20.

**1061.** **Trustees—Not required to be members of union.**—*YORKSHIRE MINERS' ASSOCN. v. HOWDEN*, No. 1127, *post*.

**1062.** — — — — — *VACHER & SONS, LTD. v. LONDON SOCIETY OF COMPOSITORS*, No. 1259, *post*.

#### PART VII. SECT. 4, SUB-SECT. 4.

**1.** **Validity of—Power of executive of union to enter into contracts intra vires union.**—*WELLINGTON WHARF LABOURERS' INDUSTRIAL UNION OF WORKERS v. BANK OF NEW ZEALAND* (1914), 33 N. Z. L. R. 842.—N.Z.

**m.** — **Lump sum in excess of summons to members.**—*WOKLACK PLUMBERS & GASFITTERS' INDUSTRIAL UNION v. CORN* (1915), 34 N. Z. L. R. 633.—N.Z.

**n.** — — — **Whether registrar can refuse to register.**—*OHINEMURI MINES & BATTERIES EMPLOYEES' INDUSTRIAL UNION OF WORKERS v. INDUSTRIAL UNIONS REGISTRAR*, [1917] N. Z. L. R. 829.—N.Z.

**o.** **Rule stipulating resort to arbitration—Consent to arbitration to be made in writing.**—An arbn. clause in the rules of a trades union providing for determination by arbn. of a dispute between the executive council & a member "on condition that both

parties bind themselves in writing to agree to the decision:—*Held*: where one of the parties had not consented in writing, the condition was not purified & the arbitration clause did not apply.—*DRENNAN v. ASSOCIATED IRONMOULDERS OF SCOTLAND*, [1921] S. C. 151; 58 Sc. L. R. 116; [1921] 1 S. L. T. 18.—SCOT.

#### PART VII. SECT. 4, SUB-SECT. 7.

**p.** **Trustees—Liability on contracts for work done for union before**

**Sect. 4.—Registered trade unions: Sub-sects. 7, 8, 9, 10 & 11. Sect. 5: Sub-sect. 1, A. & B.]**

**Liability to replace funds misapplied.]—**  
See Nos. 1092, 1130, *post*.

**Actions by & against.]—**See 1871 Act, s. 9, & Nos. 1290–1293, *post*.

**1063. Officers—Suspension from office—Right of officer to be heard.]—**A registered trade union had numerous branches. The union had a chairman, a general secretary, treasurer, trustees & two auditors who were elected at the annual general meeting of the union. Each branch elected similar officials for itself. The annual general meeting consisted of delegates from the various branches. The supreme government of the union was in the annual general meeting, but the general management of the union was vested in an executive committee elected at the annual general meeting. A rule of the union empowered the executive committee (*inter alia*) to take every means to secure the observance of the union's rules, to remove any incompetent or insubordinate officer, & to suspend, expel & prosecute members acting contrary to the rules. For two years before Apr. 1916, B. was treasurer of his branch & was negligent in his duties, & the secretary of the branch without his knowledge misappropriated moneys. These matters were not discovered until the summer of 1918, & came before the executive committee in Nov. 1918, when the committee, disregarding B.'s application to appear before them in his defence, passed a resolution that B. "be removed from any office then held by him & not permitted to hold any delegation on behalf of the union for a period of five years." At the date of the resolution B. was chairman of his branch & one of the general auditors of the union & his competency in these offices had not been questioned. In an action by B. to restrain the union & the executive committee from acting on the resolution on the ground that it was *ultra vires*.—*Held*: (1) the rule must be construed strictly & did not justify the resolution; (2) if the resolution were within the rule, the executive committee ought, on the principles of natural justice, to have given B. an opportunity of appearing before them in his defence before they passed the resolution.—*BURN v. NATIONAL AMALGAMATED LABOURERS' UNION*, [1920] 2 Ch. 364; 89 L. J. Ch. 370; 123 L. T. 411; 64 Sol. Jo. 570; 18 L. G. R. 449.

**Liability to replace funds misapplied.]—**  
See No. 1130, *post*.

**Offences by trustees & officers.]—**See Sect. 5, sub-sect. 6, *post*.

#### SUB-SECT. 8.—AMALGAMATION.

See 1876 Act, ss. 12, 13; Trade Union (Amalgamation) Act, 1917 (c. 34).

**1064. Validity—Necessity for authority in rules.]—**  
—*WOLFE v. MATTHEWS*, No. 1123, *post*.

See, *now*, 1876 Act, s. 12.

**1065. Necessity for compliance with statutory requirements—Subsequent compliance not sufficient.]—**(1) No statutory power for two unions to amalgamate is conferred by 1876 Act, s. 12, as amended by Trade Union (Amalgamation) Act, 1917 (c. 24), s. 1, except subject to the condition precedent contained therein as to holding a ballot of each constituent union at which 50 per cent. at

the least of the members vote & the votes in favour of amalgamation exceed by at least 20 per cent. the votes against it.

(2) Although under 1876 Act, s. 13, notice in writing of an amalgamation must be sent to the registrar & registered, & until this is done the amalgamation does not take effect, yet an amalgamation which is rendered invalid by reason of a failure to comply with the above condition precedent is not invalidated by registration of the notice nor is the registration of such a notice conclusive of the validity of the amalgamation.

(3) When funds of a constituent union have been handed to what purports to be a union formed by the amalgamation of this union with another constituent union, but the amalgamation is invalid, the amalgamated union holds any part of those funds remaining in its hands as trustees for the members of the constituent union, & will on their application in a representative action be restrained from dealing with these funds; & 1906 Act, s. 4, affords no defence to a claim for this relief.—*BOOTH v. AMALGAMATED MARINE WORKERS' UNION*, [1926] Ch. 904; 96 L. J. Ch. 1; 136 L. T. 152; 42 T. L. R. 580.

**1066. Whether registration of notice conclusive as to validity.]—***BOOTH v. AMALGAMATED MARINE WORKERS' UNION*, No. 1065, *ante*.

**1067. Consent of 50 per cent. of members of each union.]—***SHEET IRON WORKERS' & LIGHT PLATERS' SOCIETY v. BOILERMAKERS' & IRON & STEEL SHIPBUILDERS' SOCIETY* (1924), 40 T. L. R. 294.

**1068. Registration of notice of amalgamation.]—***BOOTH v. AMALGAMATED MARINE WORKERS' UNION*, No. 1065, *ante*.

**1069. Time from which amalgamation takes effect—From registration of notice of amalgamation.]—***BOOTH v. AMALGAMATED MARINE WORKERS' UNION*, No. 1065, *ante*.

**1070. Failure to comply with statutory requirements—Funds to be paid into court.]—***SHEET IRON WORKERS' & LIGHT PLATERS' SOCIETY v. BOILERMAKERS' & IRON & STEEL SHIPBUILDERS' SOCIETY* (1924), 40 T. L. R. 294.

**1071. Funds held in trust for constituent unions.]—***BOOTH v. AMALGAMATED MARINE WORKERS' UNION*, No. 1065, *ante*.

**1072. What court has jurisdiction to determine status—Chancery Division.]—***SHEET IRON WORKERS' & LIGHT PLATERS' SOCIETY v. BOILERMAKERS' & IRON & STEEL SHIPBUILDERS' SOCIETY* (1924), 40 T. L. R. 294.

#### SUB-SECT. 9.—DISSOLUTION.

See 1871 Act, s. 1, sched. I; 1876 Act, s. 14, Regulations, 1876 & 1890, Governing Registered Trade Unions, r. 21.

**Application of funds on dissolution.]—**See Sect. 5, sub-sect. 4, *post*.

#### SUB-SECT. 10.—OFFENCES AND PENALTIES.

See 1871 Act, ss. 12, 19–22; & Sect. 5, sub-sect. 6, *post*.

#### SUB-SECT. 11.—LEGAL PROCEEDINGS.

See Sect. 10, *post*.

registration.]—*MCPHERSON v. HILBERG* (1912), 11 W. A. L. R. 48.—*AUS.*

**a. Removal—Necessity for appointing new trustee.]—***DODDS v.*

*INNES* (1891), 10 N. Z. L. R. 53.—*N.Z.*

**PART VII. SECT. 4, SUB-SECT. 8.**  
**r. Industrial, Conciliation & Arbi-**

*tration Act*, 1908, s. 20, governs amalgamations—*Of unions in same industry.]—**ROWLEY v. CANTERBURY SLAUGHTERMEN'S UNION OF WORKERS*, [1918] N. Z. L. R. 684.—*N.Z.*



## SECT. 5.—FUNDS.

## SUB-SECT. 1.—APPLICATION.

## A. In General.

See 1913 Act, s. 1 (1).

**1073. Purpose must be authorised by constitution—Validity of payments.]—OSBORNE v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS, No. 972, ante.**

**1074. — Running newspaper.]—LINAKE v. PILCHER, No. 1291, post.**

**1075. — — —.]—OSBORNE v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS, No. 1089, post.**

**1076. — — —.]—BENNETT v. NATIONAL AMALGAMATED SOCIETY OF OPERATIVE HOUSE & SHIP PAINTERS & DECORATORS, No. 1092, ante.**

**1077. — — —.]—CARTER v. UNITED SOCIETY OF BOILERMAKERS, No. 1130, post.**

**1078. — Strike pay—Strike declared without permission of union.]—The rules of a trade union, the management of which was vested in a council, under whom an executive committee acted, provided that no lodge was to give notice of a strike until its case had been laid before a council or committee meeting for their approval; & that any lodge, or number of men in a lodge, ceasing work without the approval of either the committee or council should forfeit all claims on the union. A number of men in a lodge ceased work on account of a dispute with their employer without having laid their case before the council or the committee for their approval. The executive committee refused to grant strike pay, but the council on appeal allowed it:—*Held*: the resolution of the council was *ultra vires*.—*Re DURHAM MINERS' ASSOCN., WATSON v. CANN* (1900), 17 T. L. R. 39, C. A.**

**1079. — — —.]—Permission given after commencement of strike.]—HOWDEN v. YORKSHIRE MINERS' ASSOCN., No. 1122, post.**

**1080. — — —.]—Illegal strike.]—NATIONAL SAILORS' & FIREMEN'S UNION OF GREAT BRITAIN & IRELAND v. REED, No. 1002, ante.**

**1081. — Lock out pay—Improper motive for desiring reinstatement—Intention to strike with permission of union.]—HOWDEN v. YORKSHIRE MINERS' ASSOCN., No. 1122, post.**

**1082. — Provision of legal aid—Necessity for common interest.]—ALFEN v. HEWLETT (1902), 18 T. L. R. 604.**

**1083. — — —.]—The objects of a trade union, as stated in the rules, were the raising of funds for mutual benefit by the contributions of the members, which were to be applied (*inter alia*) to giving legal aid to members when necessity arose in their relation with employers; & in cases of a dispute arising between members & their employers, or unlawful treatment of members by their employers, the executive committee were, if they considered the merits of the case justified such a course, to provide legal aid for the members. A member of the union was dismissed by his employer without a week's notice, & in answer to a letter written to him by the general secretary of the union the employer stated that the member was discharged for dishonesty. The union took proceedings on behalf of the member to recover a week's salary in lieu of notice, & the employer paid the amount. The executive committee of the union then obtained the member's consent to bring an action for libel against the employer, founded upon his letter to the general secretary, & brought an action & employed their own**

solrs., whose costs they paid. The action was dismissed with costs. The employer sued the union to recover his taxed costs of the action for libel:—*Held*: the union had instigated pltf. to bring the action, for which there was no reasonable or probable cause, that the union had wrongfully maintained pltf. in the action, having no common interest, & therefore the union were liable. *Semble*: there was nothing in the rules of the union to justify the action; but even if there was, the rules could not justify an act which would be wrongful if done by an individual.—*GREIG v. NATIONAL AMALGAMATED UNION OF SHOP ASSISTANTS, WAREHOUSEMEN & CLERKS* (1900), 22 T. L. R. 274.

*Annotation*:—*Beld. Oram v. Hutt*, [1914] 1 Ch. 98.

**1084. — — —.]—ORAM v. HUTT, No. 1139, post.**

**1085. — — —.]—Necessity for direct benefit to union.]—ORAM v. HUTT, No. 1139, post.**

**1086. — Promotion of non-political unions among miners—Trade union of seamen.]—The rules of the National Union of Seamen, a registered trade union, declared one of its objects as follows: "To promote & to provide funds to extend the adoption of trade union principles, & to affiliate with such other trade unions & federations of trade unions as, in the opinion of the executive council, may appear desirable":—*Held*: the union had power under its rules to provide funds to promote the establishment & growth of non-political trade unions among miners.—*Re NATIONAL UNION OF SEAMEN, WILSON v. NATIONAL UNION OF SEAMEN*, [1929] 1 Ch. 216; 45 T. L. R. 92.**

**1087. — — —.]—At a special general meeting of deft. trade union a resolution was passed authorising a loan to the Miners' Non-Political Movement, & pltf., who were members of the trade union, claimed (a) a declaration that the meeting was not legally constituted or held & that the proposed loan was *ultra vires*, & (b) an injunction to restrain defts. from acting on the resolution. Pltfs. contended that the resolution was void for uncertainty because the loan referred to in it would be to an undefined body. Defts. contended that the resolution referred to the miners' non-political unions which began to come into existence in Nov. 1926, & that the question of irregularity in the holding of the meeting was one of internal management & gave pltf. no cause of action:—*Held*: as it was within the power of defts. to make a loan to a non-political trade union, & as such a loan was what was contemplated by the resolution, pltf. could not base any claim upon the wording of the resolution, & pltf., suing on behalf of themselves & other members of the trade union, could not obtain the injunction claimed, however irregularly the meeting might have been summoned or conducted. Such proceedings could be brought only by the trade union itself.—*COTTER v. NATIONAL UNION OF SEAMEN* (1929), 45 T. L. R. 352, C. A.**

**Political purposes.]—See Sub-sect. 1, B., post.**  
**Legality of objects generally.]—See Sect. 2, sub-sect. 2, ante.**

## B. Political Purposes.

See 1913 Act, ss. 3–7; 1927 Act, s. 4.

**1088. What are political purposes—Parliamentary representation—Former law.]—One of the objects of a trade union as defined by its rules was "to provide funds wherewith to pay the expenses of**

**PART VII. SECT. 5, SUB-SECT. 1.—A.**  
**t. Purpose must be authorised by constitution.]—ANDERSON v. WRIGHTS**

**OF GLASGOW INCORPORATION (1865), 3 Macph. (Ct. of Sess.) (H. L.) 1; 37 So. Jur. 236.—SCOT.**

**PART VII. SECT. 5, SUB-SECT. 1.—B.**  
**a. Support of anti-conscription campaign.]—Pltf. sued on behalf of him-**

*Sect. 5.—Funds: Sub-sect. 1, B.: sub-sect. 2, A.]*

returning & maintaining representatives to Parliament." The rules, however, did not provide any machinery for making a levy upon the members of the union for the purposes of the said funds, nor did they indicate the persons by whom such levy was to be made. A resolution in favour of a general contribution by the members for that purpose having been passed by a large majority of the union, the officials of the union proceeded to levy the contribution. A member of the union who objected to the contribution sought to obtain an injunction restraining the union & its officials from making the levy, upon the ground that in the absence of provision in the rules for making it the levy was illegal:—*Held*: as the provision of a parliamentary representation fund was within the scope of the assocn., & as the majority of the members were in favour of it, the ct. would not interfere with the levy of contributions to that fund merely because the rules did not expressly provide the necessary machinery for making it.—*STEELE v. SOUTH WALES MINERS' FEDERATION*, [1907] 1 K. B. 361; 76 L. J. K. B. 333; 96 L. T. 260; 23 T. L. R. 228; 51 Sol. Jo. 190.

*Annotation*:—*Overd. Osborne v. Amalgamated Soc. of Rty. Servants*, [1909] 1 Ch. 163.

1089. ———.—[1] The definition of a trade union contained in 1871 Act, s. 23, or the amended definition in 1876 Act, s. 16, is a limiting & restrictive definition & it is not competent to a trade union either originally to insert in its objects or by amendment to add to its objects something so wholly distinct from the objects contemplated by the Trade Union Acts as a provision to secure or maintain parliamentary representation.

(2) The certificate of the registrar under 1871 Act, s. 13, & the regulations made by the Secretary of State pursuant to that sect. of the registry of any rules or alterations of rules is not conclusive as to the validity of the proceedings taken by the society for the passing of such rules or alterations.

(3) It is important to observe that a trade union was not the creation of the Act of 1871 (*COZENS-HARDY, M.R.*).

(4) Such union can buy & sell land not exceeding one acre, & personal estate without limit of amount (*FARWELL, L.J.*).

(5) A registered trade union is thus a statutory legal entity, anomalous in that, although consisting of a fluctuating body of individuals & not being incorporated it can own property & act by agents (*FARWELL, L.J.*).

(6) If a trade union as such can run a newspaper, the proprietors of *The Times*, for instance, can register themselves as a trade union & libel all & sundry with perfect impunity. It is said that *MATHER, J.*, decided that the union could do so in *Linaker v. Pilcher*, No. 1291, *post*, that case was decided under somewhat unfortunate circumstances & cannot be regarded as correct (*FARWELL, L.J.*).—*OSBORNE v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS*, [1909] 1 Ch. 163; 78 L. J. Ch. 204; 99 L. T. 945; 25 T. L. R. 107; 53 Sol. Jo. 98, C. A.; *on appeal*, *sub nom.* *AMALGAMATED SOCIETY OF RAILWAY SERVANTS v. OSBORNE*, [1910] A. C. 87, H. L.

*Annotations*:—As to (1) *Auld. Wilson v. Amalgamated Soc. of Engineers*, [1911] 2 Ch. 324. *Refd. Gaskell v. Lancashire & Cheshire Miners' Federation* (1912), 28 T. L. R. 518; *Parr v. Lancashire & Cheshire Miners' Federation*

(1913), 108 L. T. 446; *Carter v. United Soc. of Boiler-makers & Iron & Steel Shipbuilders* (1916), 85 L. J. Ch. 289; *Jenkin v. Pharmaceutical Soc. of Great Britain*, [1921] 1 Ch. 392. As to (5) *Refd. Kelly v. National Soc. of Operative Printers' Assistants* (1915), 84 L. J. K. B. 2236. *Generally, Refd. Russell v. Carpenters & Joiners Amalgamated Soc.*, [1910] 1 K. B. 500; *Osborne v. Amalgamated Soc. of Rty. Servants*, [1911] 1 Ch. 540; *Vacher v. London Soc. of Compositors*, [1912] 3 K. B. 547; *Re Quinn & National Catholic Benefit & Thrift Soc.'s Arbitration*, [1921] 2 Ch. 318; *Amalgamated Soc. of Carpenters, Cabinet Makers & Joiners v. Bralthwaite, General Union of Operative Carpenters & Joiners v. Ashley*, [1922] 2 A. C. 440.

1090. ———.—[1] A member of a trade union society who, with other members, had been compelled by its rules to contribute to a fund for an object which could not be carried into effect, acting on behalf of himself & all other members by whom contributions had been made to the fund, applied by originating summons against the trustees in whose name the fund was invested for a declaration that upon the true construction of the rules & in the events which had happened the fund ought to be distributed among the subscribers; on account of the investments representing the fund, an inquiry who in the events which had happened were entitled to the fund; distribution of the fund among those entitled; payment into ct. of the fund pending distribution; & if & so far as necessary execution of the trusts of the fund. It was objected on behalf of defts. that pltf. was not entitled to proceed by originating summons under R. S. C., Ord. 55, r. 3, since he was not a *cestui que trust* under the trust of any instrument, or under R. S. C., Ord. 54A, r. 1, since there was no question of construction to be determined:—*Held*: pltf. was not entitled to relief as a *cestui que trust* under the trust of any instrument with R. S. C., Ord. 55, r. 3, since his claim was in default of the trust of the rules of the society, not under that trust, there was no question of construction for determination under R. S. C., Ord. 54A, r. 1, & it would not be advisable to deal with the matter partly on the summons & leave the rest to be decided in an action & no order was made on the summons.

(2) The object of the fund is perfectly clear. It is the maintenance of Parliamentary representation, & that has been declared to be illegal (*SWINFEN EADY, J.*).—*Re AMALGAMATED SOCIETY OF RAILWAY SERVANTS, ADDISON v. PILCHER*, [1910] 2 Ch. 547; 80 L. J. Ch. 19; 103 L. T. 627; 27 T. L. R. 12; 54 Sol. Jo. 874.

1091. ———.—[The principle laid down in *Amalgamated Society of Railway Servants v. Osborne*, [1910] A. C. 87 that trade unions as defined by Parliament have no power to levy contributions from their members for the purpose of securing parliamentary representation, extends also to securing representation on municipal & other local bodies other than boards of guardians, at any rate where the levies on the members in aid of the funds are in effect compulsory.—*WILSON v. AMALGAMATED SOCIETY OF ENGINEERS*, [1911] 2 Ch. 324; 80 L. J. Ch. 409; 104 L. T. 715; 27 T. L. R. 418; 55 Sol. Jo. 498.

*See, now*, 1913 Act, s. 3 (3).

1092. ———.—*Purpose must be authorised by rules.*—The general trustees of a society established as a trade union under 1871 & 1876 Acts, acting in pursuance of a resolution of the general council, subscribed £100 of the moneys of the society for

self & all other members of deft. union, except the personal defts. & those members who voted in support of the resolution hereinafter mentioned, for a declaration that a payment of £100 out of the union funds to support

the anti-conscription campaign, which had been made in pursuance of a resolution passed by the majority of members of the union, was *ultra vires* & illegal, & for an order that the said sum should be repaid to the union:—

*Held*: the payment was *ultra vires* the union.—*ALLEN v. GORTON* (1918), 18 S. R. N. S. W. 202; 35 N. S. W. W. N. 69.—AUS.

b. *Right of executor of deceased member of union—To continue action*



shares in a limited co. which had been formed with the object of publishing a newspaper in the interests of a political party known as the "Labour Party" & whose profits, after payment of 4 per cent. on its shares, were to be used in the maintenance & extension of its business. The object of the resolution of the general council was not simply to invest the moneys of the society, but to contribute to the expenses of publishing the newspaper. The shares were applied for & allotted before the passing of 1913 Act. There was nothing in the rules of the society which authorised the application of its funds for political purposes:—*Held*: the above application of the funds of the society was unauthorised & *ultra vires*, & not the less so because of the provisions of 1913 Act as that Act gave the society no further powers with reference to political objects than those contained in the rules of the society, & that therefore the trustees were liable to make good the £100 with interest.

There must be a declaration that the payment by defts. out of the funds of deft. society in respect of the purchase by defts. of the 100 shares in Labour Newspapers, Ltd., was illegal & *ultra vires* the powers of the society, & that the trustees are liable to make good the £100 so wrongfully applied, together with interest on the sum at the rate of 5 per cent. per annum (WARRINGTON, J.).—*BENNETT v. NATIONAL AMALGAMATED SOCIETY OF OPERATIVE HOUSE & SHIP PAINTERS & DECORATORS* (1915), 85 L. J. Ch. 298; 113 L. T. 808; 31 T. L. R. 203.

*Annotation*:—*Follis, Carter v. United Soc. of Boilermakers* (1915), 85 L. J. Ch. 289.

**1093. Effect of compliance with statutory regulations.**—In 1925 pltf. applied to the Registrar of Friendly Societies alleging that some of the general funds of deft. union, of which he was a member, had been applied through the Trades Union Congress in furtherance of various political objects in breach of the rules of the union. The Registrar decided that there had been no breach & declined to make any order. In an action by pltf. for relief based on an alleged breach by deft. union of 1913 Act, s. 3, in respect of the same matters:—*Held*: (1) the conditions precedent stated in 1913 Act, s. 3 (1), having been duly complied with, the statutory restrictions thereby imposed had ceased to operate so that no breach of the statute had been established, & the action failed; (2) pltf.'s true cause of action in the circumstances was in respect of a breach of the rules of deft. union which was not directly raised upon the record; even assuming that it had been, the legislature did not contemplate that an aggrieved person who had complained to the registrar upon the footing of a breach of the rules & failed, could afterwards resort to the ct.—*FORSTER v. NATIONAL AMALGAMATED UNION OF SHOP ASSISTANTS, WAREHOUSEMEN & CLERKS*, [1927] 1 Ch. 539; 96 L. J. Ch. 141; 137 L. T. 86; 43 T. L. R. 199; 71 Sol. Jo. 105.

**1094. Effect of complaint to Registrar—Bar to legal action.**—*FORSTER v. NATIONAL AMALGAMATED UNION OF SHOP ASSISTANTS, WAREHOUSEMEN & CLERKS*, No. 1093, *ante*.

#### SUB-SECT. 2.—AGREEMENTS FOR APPLICATION OF FUNDS.

##### A. In General.

See 1871 Act, s. 4 (3); 1927 Act, s. 2.

**1095. Not enforceable—Action by member**

*commenced in deceased's name.*—*MARTIN'S EXECUTRIX v. M'GHEE*, [1914] S. C. 628; 51 S. L. T. R. 499; [1914] 1 S. L. T. 365.—*SCOT*.

**against society.**—A society in the nature of a benefit society comprised a head & branch establishments. The society was governed by rules of 1872, which, besides providing for the benefit of its members, contained rules in restraint of freedom of trade. A dispute arose between the head establishment & a branch, & the latter having threatened to secede, an action was brought by the head establishment against the branch for an injunction to restrain the latter from dividing the funds in their possession:—*Held*: such action was not maintainable (a) because, under general law, some of the societies' rules were in restraint of trade; & (b) because 1871 Act, s. 4 (3), expressly excluded the ct. from entertaining such proceedings.

These principles are equally applicable whether a central society sues a branch, a society sues an individual, or an individual a society.—*DUKE v. LITTLEBOY* (1880), 49 L. J. Ch. 802; 43 L. T. 216; 28 W. R. 977.

*Annotations*:—*Distd. Yorkshire Miners' Assocn. v. Howden*, [1905] A. C. 256. *N.F. Cope v. Crossingham*, [1908] 2 Ch. 621. *Refd. Winder v. Kingston-upon-Hull Corpn. for the Poor* (1888), 58 L. T. 583.

**1096.** ———. *J.*—*OLD v. ROBSON*, No. 981, *ante*.

**1097.** ———. *J.*—*Held*: as the objects of deft. society were mainly in restraint of trade & to maintain strikes, the ct. had no jurisdiction to entertain an action to enforce a rule of the society providing for benefits to members out of the funds.—*SAYER v. AMALGAMATED SOCIETY OF CARPENTERS & JOINERS* (1902), 19 T. L. R. 122.

*Annotation*:—*Refd. Russell v. Carpenters & Joiners' Amalgamated Soc.*, [1910] 1 K. B. 506.

**1098.** ———. *J.*—A society registered under the Trade Union Acts was governed by rules some of which made provision for benefits to members, & the others were illegal as being in restraint of trade.

A member brought an action against the officers of the society to enforce a rule of the society under which he claimed to be entitled to a superannuation allowance:—*Held*: upon the consideration of all the rules of the society, the main object of the society was illegal at common law as being in restraint of trade, & those rules which made provision for benefits to members were merely ancillary to that main object, & could not be separated from it, therefore, under 1871 Act, s. 4, the action must fail.—*CULLEN v. ELWIN* (1904), 90 L. T. 840; 20 T. L. R. 490; 48 Sol. Jo. 474, C. A.

*Annotations*:—*Follis, Russell v. Amalgamated Soc. of Carpenters & Joiners*, [1910] 1 K. B. 506. *Refd. Pratt v. British Medical Assocn.* (1918), 88 L. J. K. B. 625.

**1099.** ———. *J.*—*ASPDEN v. STEAM ENGINE MAKERS' SOCIETY* (1904), *Times*, Dec. 14.

**1100.** ———. *J.*—*BURKE v. AMALGAMATED SOCIETY OF DYERS*, No. 1051, *ante*.

**1101.** ———. *J.*—Where the rules of a trade union which have an illegal tendency as being in restraint of trade, are a main feature of the trade union, the trade union is an illegal assocn. at common law, & a member cannot maintain an action against the union to enforce benefits under those rules which have no illegal purpose.—*MUDD v. GENERAL UNION OF OPERATIVE CARPENTERS & JOINERS* (1910), 103 L. T. 45; 26 T. L. R. 518.

**1102.** ———. *J.*—*THOMAS v. PORTSMOUTH "A" BRANCH OF SHIP CONSTRUCTIVE, ETC. ASSOCN.*, No. 983, *ante*.

#### PART VII. SECT. 5, SUB-SECT. 2.—A. c. Whether enforceable—Action by personal representatives of member

*against society.*—*MORRISON v. EDINBURGH FLESHERS INCORPORATION* (1853), 16 Dunl. (Ct. of Sess.) 86; 26 Sc. Jur. 56.—*SCOT*.

**Sect. 5.—Funds: Sub-sect. 2, A. & B.; sub-sect. 3.]**

**1103. —**—[Cox v. NATIONAL UNION OF FOUNDRY WORKERS OF GREAT BRITAIN & IRELAND (1928), 44 T. L. R. 345.

**1104. —**—**Action by personal representatives of member against society.]**—BURKE v. AMALGAMATED SOCIETY OF DYERS, No. 1051, *ante*.

**1105. —**—[RUSSELL v. AMALGAMATED SOCIETY OF CARPENTERS & JOINERS, No. 987, *ante*.

**1106. —**—**Action by society against member.]**—DUKE v. LITTLEBOY, No. 1095, *ante*.

**1107. —**—[By 1871 Act, s. 4, it is enacted that nothing in the Act shall enable any ct. to entertain any legal proceeding instituted with the object of directly enforcing any agreement for the application of the funds of a trade union to provide benefits to members.

Deft. was a member of a friendly society registered under 1871 & 1876 Acts. By one of the rules of the society a member meeting with an accident & becoming totally incapacitated from following his employment for the remainder of his life was entitled to receive the sum of £100; & all members receiving such a benefit were obliged to sign an agreement that in the event of their returning to their trade they would refund to the society the amount of accident benefit received. If a member failed to refund, certain officers of the society were empowered to institute legal proceedings for the recovery of the amount received.

Deft., having met with an accident & being apparently incapacitated for life from following his employment of a moulder in an iron foundry, made a claim & received from the society a sum of £100. On receipt of that sum he signed an agreement that in case he should at any time thereafter resume work as an ironfounder, he would forthwith repay to the society the sum of £100, & that, in case that sum was not repaid within a named period, certain officers of the society should have power to sue & proceed against him in any ct. of competent jurisdiction of the said sum. Deft. was able to resume & did resume work as an ironfounder within the meaning of the agreement. In an action by the officers of the society against deft. to recover the sum of £100 under the agreement:—*Held*: the action was brought directly to enforce an agreement for the application of the funds of the trade union to provide a benefit to a member within 1871 Act, s. 4, & was therefore not maintainable.—BAKER v. INGALL, [1912] 3 K. B. 106; 81 L. J. K. B. 553; 105 L. T. 934; *sub nom.* FRIENDLY SOCIETY OF IRONFOUNDERS OF ENGLAND, IRELAND & WALES v. INGALL, 28 T. L. R. 104; 56 Sol. Jo. 122; 75 J. P. Jo. 580, C. A.

**1108. —**—**Action by central society against branch.]**—DUKE v. LITTLEBOY, No. 1095, *ante*.

**1109. —**—[COPE v. CROSSINGHAM, No. 1128, *post*.

**1110. —**—**Action by guardians of the poor—To recover expenses of maintaining pauper member of union.]**—A member of a trade union is not "a member of a benefit or friendly society, & as such entitled to receive any payment," within Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 23, inasmuch as 1871 Act expressly declines to enable any ct. to entertain proceedings to enforce an agreement to apply the funds of a trade union to provide benefits for members; & therefore, the guardians cannot under that sect. obtain from a trade union the repayment of expenses incurred in the relief of a pauper lunatic member.—WINDER v. KINGSTON-UPON-HULL

CORPN. (GOVERNORS & GUARDIANS) (1888), 20 Q. B. D. 412; 58 L. T. 583; 53 J. P. 535, D. C. *Annotation*.—*Held*, St. Mary, Islington, Grdnas. v. Amalgamated Soc. of Engineers (1903), 68 J. P. 665.

**1111. —**—**Action by nominee on death of member—Effect of 1876 Act, s. 10.]**—By 1871 Act, s. 4 (3), no ct. is to entertain any legal proceeding to enforce "any agreement for the application of the funds of a trade union to provide benefits for members." By 1876 Act, s. 10, which is to be construed as one act with 1871 Act, it is provided that a member of a trade union, not being under the age of sixteen years, may, by writing, nominate a person to whom any moneys payable on the death of such member, not exceeding £50, shall be paid; & that, on receiving proof of the death of a nominator, the trade union "shall pay to the nominee the amount due to deceased member," not exceeding the sum aforesaid:—*Held*: there was nothing in 1876 Act to show that it was intended to repeal the provisions in 1871 Act, s. 4, & consequently no action could be maintained against a trade union by the nominee of deceased member to recover a sum of money to which, under the rules of the trade union, the member of his nominee had become entitled to receive from the funds of the union.—CROCKER v. KNIGHT, [1892] 1 Q. B. 702; 61 L. J. Q. B. 466; 66 L. T. 596; 56 J. P. 420; 40 W. R. 353; 8 T. L. R. 412, C. A.

**1112. —**—**Unless society legal at common law.]**—SWAINE v. WILSON, No. 950, *ante*.

**Indirect enforcement—Action to restrain expulsion.]**—*See* Nos. 1033, 1035, *ante*.

**What are benefits.]**—*See* Sub-sect. 2, B., *post*.

**Restraint of misapplication of funds.]**—*See* Sub-sect. 3, *post*.

#### B. Meaning of Benefits.

*See* 1871 Act, s. 4 (3); 1927 Act, s. 2.

**1113. Sick benefit.]**—OLD v. ROBSON, No. 981, *ante*.

**1114. —**—[BURKE v. AMALGAMATED SOCIETY OF DYERS, No. 1051, *ante*.

**1115. —**—[THOMAS v. PORTSMOUTH "A" BRANCH OF SHIP CONSTRUCTIVE, ETC. ASSOCN., No. 986, *ante*.

**1116. Superannuation allowance.]**—CULLEN v. ELWIN, No. 1098, *ante*.

**1117. —**—[RUSSELL v. AMALGAMATED SOCIETY OF CARPENTERS & JOINERS, No. 987, *ante*.

**1118. Disablement benefit.]**—ASPEN v. STEAM ENGINE MAKERS' SOCIETY (1904), *Times*, Dec. 14.

**1119. —**—[SWAINE v. WILSON, No. 950, *ante*.

**1120. —**—**Agreement to repay on resumption of work.]**—BAKER v. INGALL, No. 1107, *ante*.

**1121. Undertaking to pay cost of legal proceedings.]**—LEES v. LANCASHIRE & CHESHIRE MINERS' FEDERATION (1906), *Times*, June 20.

#### SUB-SECT. 3.—MISAPPLICATION.

**1122. Who may take proceedings—Member of union—On refusal of trustees.]**—(1) Where the trustees of a union refused to take legal proceedings to restrain the union from a proposed misapplication of its funds, a single member of the union was held entitled to sue in his own name, the trustees being added as defendants.

(2) A rule of a trade union provided that members permitted to cease work by the sanction of the union, in accordance with the rules, should receive strike pay from the union:—*Held*: where members of a union had ceased work without the

permission of the union, the union had no power under the rule to give its permission subsequently so as to authorise strike pay being given to such members.

(3) Another rule of the trade union provided that members of a branch of the union which might be "locked out or otherwise thrown out of employment" should, on certain conditions, receive strike pay. The members of a branch struck work illegally & without the sanction of the union. Afterwards they expressed a desire to resume work, but, as their object in resuming work was only to put themselves into a position to strike with the sanction of the union, the masters refused to allow them to go back to work:—*Held*: these members were not "locked out or otherwise thrown out of employment" within the rule.—*HOWDEN v. YORKSHIRE MINERS' ASSOCN.*, [1903] 1 K. B. 308; 72 L. J. K. B. 176; 88 L. T. 134; 19 T. L. R. 193; 47 Sol. Jo. 237, C. A.; *affd. sub nom. YORKSHIRE MINERS' ASSOCN. v. HOWDEN*, [1905] A. C. 256, H. L.

*Annotations*:—*As to* (1) *Refd.* *Osborne v. Amalgamated Soc. of Ry. Servants*, [1911] 1 Ch. 540; *Kelly v. National Soc. of Operative Printers' Assistants* (1915), 113 L. T. 1055. *As to* (2) *Distd.* *Mullett v. United French Polishers' London Soc.* (1904), 91 L. T. 133. *Consd.* *Amalgamated Soc. of Carpenters, Cabinet Makers & Joiners v. Braithwaite, General Union of Operative Carpenters & Joiners v. Ashley*, [1922] 2 A. C. 440. *Refd.* *Denaby & Cadeby Main Collieries v. Yorkshire Miners' Asscn.*, [1906] A. C. 384. *Generally, Refd.* *Giblan v. National Amalgamated Labourers' Union of Great Britain & Ireland*, [1903] 2 K. B. 600; *Steele v. South Wales Miners' Federation*, [1907] 1 K. B. 361; *Cope v. Crossingham*, [1909] 2 Ch. 148; *Baker v. Ingall*, [1912] 3 K. B. 106; *Oram v. Hutt*, [1913] 1 Ch. 259; *Valentine v. Hyde*, [1919] 2 Ch. 129; *Sansom v. London & Provincial Union of Licensed Vehicle Workers* (1920), 36 T. L. R. 666. *Mentd.* *A.-G. v. De Winton*, [1906] 2 Ch. 106; *Fraser v. Fear* (1912), 107 L. T. 423.

**1123. Right to Injunction.**—By 1871 Act, s. 4, it is provided that nothing in the Act shall enable the ct. to entertain any legal proceeding instituted with the object of directly enforcing an agreement for the application of the funds of a trade union to provide benefits to its members. *Pltfs.*, members of a trade union within the Act, sought for an injunction to restrain other members from applying the funds in a manner contrary to an agreement to provide benefits to members:—*Held*: such an injunction would not be a direct enforcement of the alleged agreement & the ct. might entertain the proceeding.

*Pltfs.* are members of a combination associated together for purposes which are in restraint of trade, & this combination or assocn. would undoubtedly have been unlawful but for the provisions of 1871 Act, of which the sole or principal object seems to have been to place restrictions on the officers of the societies & to prevent their defalcations (*Fry, J.*).—*WOLFE v. MATTHEWS* (1882), 21 Ch. D. 194; 51 L. J. Ch. 833; 47 L. T. 158; 30 W. R. 838.

*Annotations*:—*Consd.* *Yorkshire Miners' Asscn. v. Howden*, [1905] A. C. 256; *Steele v. South Wales Miners' Federation* (1907), 96 L. T. 260; *Amalgamated Soc. of Carpenters, Cabinet Makers & Joiners v. Braithwaite, General Union of Operative Carpenters & Joiners v. Ashley*, [1922] 2 A. C. 440. *Refd.* *Swaine v. Wilson* (1889), 24 Q. B. D. 252; *Taff Vale Ry. v. Amalgamated Soc. of Ry. Servants*, [1901] A. C. 426; *Cope v. Crossingham*, [1909] 2 Ch. 148; *Osborne v. Amalgamated Soc. of Ry. Servants*, [1911] 1 Ch. 540.

#### PART VII. SECT. 5, SUB-SECT. 3.

**11231. Right to injunction.**—*Pltf.*, a member of a trade union within the Act, sought an injunction to restrain the trustees & executive of the union to which he belonged from paying strike-pay out of the funds of the union to certain members of the union on strike. *Pltf.* mainly, if not entirely, relied on the alleged fact that the strike had not been carried out in

accordance with the rules of the union:—*Held*: the ct. had no jurisdiction to grant an injunction, & even if it had, a very plain case would require to be made out before the ct. would look minutely into alleged infractions of the rules of such a society.—*RIDDELL v. DODDS* (1890), 9 N. Z. L. R. 210.—*N.Z.*

**11232.**—*M'LAREN v. MILLER* (OR AMALGAMATED SOCIETY OF RAIL-

**1124.** —.]—*BLOKHAM v. MEDICAL DEFENCE UNION, LTD.* (1894), 10 T. L. R. 384, C. A.

**1125.** —.]—*TAFF VALE RY. CO. v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS, NO. 957, ante.*

**1126.** —.]—*ALFIN v. HEWLETT* (1902), 18 T. L. R. 664.

**1127.** —.]—(1) A trade union was established for objects which included payment to members locked out or on strike. The whole of the funds were to be applied in carrying out the specified objects according to the rules. The union misapplied part of the funds by payments of strike money in cases not authorised by the rules. An individual member having brought an action against the union, its trustees & some of its officials, for an injunction restraining them from making the payments:—*Held*: the action was not instituted with the object of "directly enforcing" an agreement for the application of the funds to provide benefits to members within 1871 Act, s. 4, the object being not to apply but to prevent misapplication of the funds, & the action was maintainable.

The object of the litigation was to obtain an authoritative decision that the action of the union which was challenged by *pltf.* was not authorised by the rules of the union. The decision might take the form of a declaration or the form of an injunction, or both combined (*LORD MACNAGHTEN*).

(2) In this union the trustees must be members, but it is not necessary under 1871 Act that they should be so (*LORD DAVEY*).—*YORKSHIRE MINERS' ASSOCN. v. HOWDEN*, [1905] A. C. 256; 74 L. J. K. B. 511; 92 L. T. 701; 53 W. R. 667; 21 T. L. R. 431, H. L.; *affg. S. C. sub nom. HOWDEN v. YORKSHIRE MINERS' ASSOCN.*, [1903] 1 K. B. 308, C. A.

*Annotations*:—*As to* (1) *Apld.* *Osborne v. Amalgamated Soc. of Ry. Servants*, [1911] 1 Ch. 540; *Sansom v. London & Provincial Union of Licensed Vehicle Workers* (1920), 36 T. L. R. 666. *Consd.* *Amalgamated Soc. of Carpenters, Cabinet Makers & Joiners v. Braithwaite, General Union of Operative Carpenters & Joiners v. Ashley*, [1922] 2 A. C. 440. *Refd.* *Giblan v. National Amalgamated Labourers' Union of Great Britain & Ireland*, [1903] 2 K. B. 600; *Denaby & Cadeby Main Collieries v. Yorkshire Miners' Asscn.*, [1906] A. C. 384; *Steele v. South Wales Miners' Federation*, [1907] 1 K. B. 361; *Cope v. Crossingham*, [1909] 2 Ch. 148; *Oram v. Hutt*, [1913] 1 Ch. 259; *Kelly v. National Soc. of Operative Printers' Assistants* (1915), 113 L. T. 1055. *Generally, Refd.* *Mullett v. United French Polishers' London Soc.* (1904), 91 L. T. 133; *Baker v. Ingall*, [1912] 3 K. B. 106; *Valentine v. Hyde*, [1919] 2 Ch. 129. *Mentd.* *A.-G. v. De Winton*, [1906] 2 Ch. 106; *Fraser v. Fear* (1912), 107 L. T. 423.

**1128.** —.]—A resolution was passed by the members of a branch of a registered trade union that they would secede from the parent society & distribute the funds amongst the members of the branch. The rules of the society contained no provision as to the secession of branches. The trustees of the branch having declined to pay over the funds under their control to the head trustees, when required so to do, according to the rules, the head trustees brought an action against the trustees of the branch for a declaration that the resolution was *ultra vires*, an injunction, & payment to them of the funds of the branch:—*Held*: (1) the action,

WAY SERVANTS FOR SCOTLAND V. MOTHERWELL BRANCH OF THE SOCIETY) (1880), 7 R. (Ct. of Sess.) 867.—*SCOT.*

**11233.** —.]—*MARTIN'S EXECUTRIX v. M'GHEE*, [1914] S. C. 628; 51 Sc. L. R. 499; [1914] 1 S. L. T. 365.—*SCOT.*

*d. Trade Union Act, 1881, s. 13—Proceedings of criminal nature.*—*TRIVETT v. McDONALD* (1919), 26 C. L. R. 156.—*AUS.*

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apart from the claim for payment, was not instituted with the object of directly enforcing an agreement for the application of the funds to provide benefits to members within 1871 Act, s. 4, the object being to preserve the fund by preventing it from being misapplied without in any way administering it; & (2) upon the construction of the rules, the society had a sufficient interest in the property of the branch to maintain the action, but the ct. had no jurisdiction to make any order for payment.—*COPE v. CROSSINGHAM*, [1909] 2 Ch. 148; 78 L. J. Ch. 615; 100 L. T. 945; 25 T. L. R. 593; 53 Sol. Jo. 559, C. A.

**1129.** —.]—*PARR v. LANCASHIRE & CHESHIRE MINERS' FEDERATION*, No. 1041, *ante*.

**1130.** —.]—The society of B., a trade union registered under the Trade Union Acts with the usual trade union objects, i.e. assistance in sickness, & the protection & promotion of the interests of workmen in disputes with employers, but not including by its rules the circulation of political literature or the promotion of "political objects" within 1913 Act, responded to an appeal made by a body of labour & trade union representatives for assistance in establishing a daily newspaper devoted to the interests of labour, by contributing out of its funds the sum of £1,000 expended in the purchase of shares in a co. formed to carry on such a newspaper, & also, by making a levy on its members, of a further sum of £1,000, to be applied in the same way. Pltf., a member of deft. society, brought an action against the society, joining the members of the executive council as co-defts., (a) for an order to replace the sum of £1,000, being funds of the society wrongfully invested in shares of the said co., & to invest such sum in investments authorised by the rules of the society; & (b) for an injunction to restrain defts. from investing any of the funds of the society, or contributing any of such funds, in shares of the said co., & from making any levy upon any of the members of the society of any sum to be in any way applied for the purposes of the said co., & from deducting any such levy from any benefit to which the members of the said society may be entitled under the rules:—*Held*: the payments were not justified as within the objects of the society, & were *ultra vires* the powers of the society, nor could they be deemed to be an "investment" within the meaning of the rules. The members of the executive council of deft. society, who had authorised the investment, must be held personally liable to replace the money. The declaration, order, & injunction asked for must be granted.—*CARTER v. UNITED SOCIETY OF BOILERMAKERS* (1915), 85 L. J. Ch. 289; 113 L. T. 1152; 32 T. L. R. 40; 60 Sol. Jo. 44.

**1131.** —.]—The rules of a trade union provided (*inter alia*) that in the event of members being engaged in a strike or lock out officially recognised by the union, the union should pay "dispute pay" of 12s. a week & 2s. for each child under fourteen. A trade dispute having arisen, was officially recognised as from Feb. 16, 1918. The union authorised the members on strike to sell to those still at work tickets at 2s. each for the benefit of the strikers. The proceeds of these tickets, amounting to a very large sum, were paid into the general account of the union & applied partly in payment of the "dispute pay" prescribed by the rules & partly in extra payments.

In an action by three members of the union suing in a representative capacity on behalf of the members of their respective branches, claiming

(a) a declaration that the ticket moneys could not be applied in discharge of the liability to pay dispute pay, but were held by the union, subject to certain deductions for commission & expenses, for the sole benefit of members subject to the dispute, & (b) other relief:—*Held*: (1) the payments were purely voluntary payments made for a particular purpose & not applicable to any other purpose, such as the payment of dispute pay, which was a liability arising under the rules; & (2) pltf. were entitled to the declaration claimed as to the application of the proceeds & to an injunction to restrain the further misapplication thereof & if necessary to an account of the expenses properly to be deducted therefrom; (3) with regard to moneys already misapplied the ct. was precluded by 1871 Act, s. 4, from granting relief either by the appointment of a receiver or by ordering an account.—*SANSOM v. LONDON & PROVINCIAL UNION OF LICENSED VEHICLE WORKERS* (1920), 36 T. L. R. 666.

**1132.** —.]—*BOOTH v. AMALGAMATED MARINE WORKERS' UNION*, No. 1065, *ante*.

**1133. Right to declaration.]** — *YORKSHIRE MINERS' ASSOCN. v. HOWDEN*, No. 1127, *ante*.

**1134.** —.]—*BENNETT v. NATIONAL AMALGAMATED SOCIETY OF OPERATIVE HOUSE & SHIP PAINTERS & DECORATORS*, No. 1092, *ante*.

**1135.** —.]—*CARTER v. UNITED SOCIETY OF BOILERMAKERS*, No. 1130, *ante*.

**1136.** —.]—*SANSOM v. LONDON & PROVINCIAL UNION OF LICENSED VEHICLE WORKERS*, No. 1131, *ante*.

**1137. Right to account.]**—*SANSOM v. LONDON & PROVINCIAL UNION OF LICENSED VEHICLE WORKERS*, No. 1131, *ante*.

**1138. Funds already misapplied—Whether relief granted—Relief amounting to administration by court.]**—*SANSOM v. LONDON & PROVINCIAL UNION OF LICENSED VEHICLE WORKERS*, No. 1131, *ante*.

**1139. — Duty to repay—Liability of officer—Costs of personal action against officer paid by union.]**—(1) Action brought by a member of a trade union for a declaration that the payment of the costs incurred by the officials of the union in bringing actions for slander & libel & slander against another member of the union by the union out of its funds was *ultra vires* the union, & for repayment by one of the officials who had received moneys to pay his costs:—*Held*: it was not within the powers of the union so to apply its funds, & the official who had received the money must repay the amount so received.

(2) The fact that the slanders complained of injure the trade union as well as the officer does not create a common interest which would justify the trade union in maintaining the action. A common cause is not a common interest.

(3) A trade union is not justified in defraying the costs of legal proceedings by its members whenever an indirect benefit may be expected to result from the proceedings.—*ORAM v. TUTT*, [1914] 1 Ch. 98; 83 L. J. Ch. 161; 110 L. T. 187; 78 J. P. 51; 30 T. L. R. 55; 58 Sol. Jo. 80, C. A.

*Annotations:—As to* (1) *Consd. Neville v. London "Express" Newspaper*, [1919] A. C. 368. *Generally, Mentd. Wold-Blundell v. Stephens*, [1919] 1 K. B. 520; *Hickman v. Kent or Romney Marsh Sheepbreeders' Asscn.* (1920), 36 T. L. R. 528.

**1140. — Liability of trustees.]** — *BENNETT v. NATIONAL AMALGAMATED SOCIETY OF OPERATIVE HOUSE & SHIP PAINTERS & DECORATORS*, No. 1092, *ante*.

**1141. — — —.]**—*CARTER v. UNITED SOCIETY OF BOILERMAKERS*, No. 1130, *ante*.

## SUB-SECT. 4.—EFFECT OF DISSOLUTION OF UNION.

*Compare FRIENDLY SOCIETIES, Vol. XXV., pp. 342, 343, Nos. 422–431.*

**1142. Who entitled to surplus assets—Existing subscribers at the time of dissolution—Resulting trust.]—**A society was registered under 1871 & 1876 Acts, to raise funds by means of weekly contributions to defend & support its members in obtaining & maintaining reasonable remuneration for their labour. There were two classes of members, printers & transferrers, & by the rules of the society the printers subscribed twice as much as the transferrers, & were entitled to receive twice as much strike or lock out pay; the scale of payments also varied with the length of time a member had belonged to the society. No provision was made by the rules for the distribution of the funds of the society on a dissolution. At the time of its dissolution the society consisted of 201 members, & its unexpended funds amounted to £1,000, & the question now arose how this sum was to be distributed. The A.-G. having been served, & making no claim to the fund as *bonâ vacantia*:—*Held*: there was a resulting trust in favour of those who had subscribed to the fund, & the money was now divisible amongst the existing members at the time of the dissolution, in proportion to the amount contributed by each member to the funds of the society, irrespective of fines or payments made to members in accordance with the rules.—*Re PRINTERS & TRANSFERRERS AMALGAMATED TRADES PROTECTION SOCIETY*, [1899] 2 Ch. 184; 47 W. R. 619; 15 T. L. R. 394; 43 Sol. Jo. 550; *sub nom. Re PRINTERS & TRANSFERRERS SOCIETY, CHALLINOR v. MASKERY*, 68 L. J. Ch. 537.

*Annotations:—Apld. Re Lead Co.'s Workmen's Fund Soc., Lowes v. Smelling Down Lead with Pit & Sea Coal*, [1904] 2 Ch. 196; *Re Customs & Excise Officers' Mutual Guarantee Fund, Hobson v. A.-G.*, [1917] 2 Ch. 18. *Reid v. Brathwaite v. A.-G.*, [1909] 1 Ch. 510; *Re Amalgamated Soc. of Ry. Servants, Addison v. Pilcher*, [1910] 2 Ch. 547; *Osborne v. Amalgamated Soc. of Ry. Servants*, [1911] 1 Ch. 540.

**1143. — Not expelled members.]—**Members of a trade assocn. were expelled for breach of rules in restraint of trade. The assocn. passed a resolution to wind up, with a direction to their trustees to divide the surplus assets among the persons entitled under the rules. An inquiry was direct on summons as to who were the persons entitled, & in what proportions:—*Held*: the expelled members were properly excluded in the Chief Clerk's certificate made in answer to the inquiry.

That sect. [1871 Act, s. 3] I take to mean this, that for the present purposes the agreement is to be in force & is not to be considered void or voidable by reason that a rule or rules which are said to be illegal are merely in restraint of trade (NORTH, J.).—*STRICK v. SWANSEA TIN-PLATE CO.* (1887), 36 Ch. D. 558; 57 L. J. Ch. 438; 57 L. T. 392; 35 W. R. 831.

*Annotations:—Reid, Swaine v. Wilson* (1889), 24 Q. B. D. 252; *Taff Vale Ry. v. Amalgamated Soc. of Ry. Servants*, [1901] A. C. 426.

**1144. Amount payable to members—Sum proportional to amount contributed—Irrespective of fines or payments out.]—***Re PRINTERS & TRANSFERRERS AMALGAMATED TRADES PROTECTION SOCIETY*, No. 1142, *ante*.

**1145. Right to sue for distributive share.]—***OSBORNE v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS*, No. 972, *ante*.

**1146. Funds subscribed for illegal purpose—No right to proceed by originating summons under R.S.C., Ord. 55, r. 3.]—***Re AMALGAMATED SOCIETY OF RAILWAY SERVANTS, ADDISON v. PILCHER*, No. 1090, *ante*.

**Dissolution generally.]—***See Sect. 4, sub-sect. 9, ante.*

## SUB-SECT. 5.—BOOKS AND ACCOUNTS.

*See 1871 Act, ss. 14, 16, sched. I.*

**1147. Books—Right to inspect—Employment of accountant.]—**By 1871 Act, s. 14, sched. I, clause 6, the rules of a registered trade union must contain provisions in respect of "the inspection of the books & names of members of the trade union by every person having an interest in the funds of the trade union."

The rules of a registered trade union provided that its books & accounts & list of members should be "open to the inspection of all the members thereof, & of all the persons having an interest in the funds, in accordance with the Trade Union Acts":—*Held*: members of the society were entitled to inspect the books & accounts by means of an accountant employed by them for the purpose, the accountant undertaking that the information obtained would only be used for informing his clients of the result of his inspection.—*NORRY v. KEEP*, [1909] 1 Ch. 561; 78 L. J. Ch. 334; 100 L. T. 322; 25 T. L. R. 289.

*Annotations:—Expld. Dodd v. Amalgamated Marine Workers' Union* (1923), 129 L. T. 401. *Apld. Dodd v. Amalgamated Marine Workers' Union*, [1924] 1 Ch. 116.

**1148. — — — ]—**In the action plff. claimed (a) inspection of the accounts of deft. union; (b) production of the books & accounts to him & his accountant; (c) damages; (d) costs. The rules of the union provided that the books & accounts should be open to the inspection of any member at all reasonable times. The union had purported to expel plff. from his membership of the union, but the judge, on Feb. 23, 1923, made an order declaring that plff. was not validly expelled. On an interlocutory motion by plff. the same judge made an order that the union should produce to plff. or his accountant their books & accounts for inspection, the accountant to undertake not to make use of any information so acquired except for communicating to plff. the result of his inspection. On the interlocutory motion no agreement was come to to treat it as the trial of the action:—*Held*: the proposition that, whatever be the circumstances of a case, every individual member of a trade union has a right by law to inspect the books by an accountant was a proposition which was not established by the decision in *Norry v. Keep*, No. 1147, *ante*.—*DODD v. AMALGAMATED MARINE WORKERS' UNION* (1923), 93 L. J. Ch. 65; 129 L. T. 401; 39 T. L. R. 379; 67 Sol. Jo. 480, C. A.

**1149. — — — Onus of proof that employment not bonâ fide.]—**A member of a trade union who desires to exercise his statutory right of inspecting the books & accounts of the union under 1871 Act, s. 14, sched. I, clause 6, may "in proper cases" employ an accountant to assist him.

The onus of showing that in employing an accountant the member is not acting *bonâ fide* lies on the trade union resisting that inspection.—*DODD v. AMALGAMATED MARINE WORKERS' UNION*, [1924] 1 Ch. 116; 93 L. J. Ch. 100; 129 L. T. 819; 40 T. L. R. 44; 68 Sol. Jo. 117, C. A.

## SUB-SECT. 6.—OFFENCES.

*See 1871 Act, ss. 12, 19–22.*

**1150. Right to take summary proceedings—Under Friendly Societies Act, 1855 (c. 63).]**—A mutual society which, in addition to the rules for

Sect. 5.—Funds: Sub-sect. 6. Sect. 6.]

the *bond fide* mutual relief of sick members, & for other ordinary purposes of a friendly society, includes also rules for the encouragement, relief, & maintenance of men on strike, is not a friendly society within above Act, ss. 9, 44, first, because such last-mentioned purposes are not analogous to those of friendly societies properly so called; & secondly, because such purposes are those of a trade union, & are illegal as being in restraint of trade; consequently, the summary jurisdiction given to the justices by above Act, s. 24, does not apply to cases of fraud or misappropriation of the funds of such a society on the part of any of its members.—*HORNBY v. CLOSE* (1867), L. R. 2 Q. B. 153; 8 B. & S. 175; 36 L. J. M. C. 43; 15 L. T. 563; 31 J. P. 148; 15 W. R. 336; 10 Cox, C. C. 393.

*Annotations*.—*Expld. R. v. Dodd* (1868), 18 L. T. 89; *R. v. Friendly Soc.*, *Reg.* (1872), 41 L. J. Q. B. 366. *Refd.* *Farrer v. Close* (1869), L. R. 4 Q. B. 602; *R. v. Stainer* (1870), L. R. 1 C. C. R. 230; *Mogul S.S. Co. v. McGregor*, *Gow* (1889), 23 Q. B. D. 598; *Swaine v. Wilson* (1889), 24 Q. B. D. 252; *Russell v. Amalgamated Soc. of Carpenters & Joiners*, [1912] A. C. 421; *Pratt v. British Medical Assocn.*, [1919] 1 K. B. 244. *Mentd.* *Cowan v. Milbourn* (1867), 16 L. T. 290.

1151. ———.]—The decision in *Hornby v. Close*, No. 1150, *ante*, that a trades union, part of whose funds are applied to the maintenance of strikes, is an illegal society, & therefore, cannot maintain a complaint against an officer of such society for embezzlement of its funds, applies only to proceedings taken under Friendly Societies Act, 1855 (c. 63), & does not extend to an indictment.

Prisoner was indicted for forging a banker's pass book, with intent to defraud. He was treasurer to a trades union which was admitted to be within the decision in *Hornby v. Close*, No. 1150, *ante*. It was contended that such a society, having no legal existence, could possess no funds, & therefore, could not be defrauded:—*Held*: the objection of illegality was applicable only to the summary proceedings before magistrates provided by Friendly Societies Act, 1855 (c. 63); but did not extend to deprive the society of its remedy by indictment.—*R. v. DODD* (1868), 18 L. T. 89, N. P.

1152. ———.]—*Embezzlement*.—*R. v. DODD*, No. 1151, *ante*.

1153. ———.]—*S.*, an officer of a friendly society, some of whose rules were in restraint of trade, embezzled their money:—*Held*: rules in restraint of trade are not criminal, although they may be void as being against public policy, & societies having such rules are entitled to the protection of the criminal law for their funds, & consequently, *S.* might properly be convicted of embezzlement.—*R. v. STAINER* (1870), L. R. 1 C. C. R. 230; 39 L. J. M. C. 54; 21 L. T. 758; 34 J. P. 165; 18 W. R. 439; 11 Cox, C. C. 483, C. C. R.

*Annotations*.—*Appld.* *R. v. Tankard*, [1894] 1 Q. B. 548. *Refd.* *Swaine v. Wilson* (1889), 24 Q. B. D. 252.

1154. ———.]—*Forgery*.—*R. v. DODD*, No. 1151, *ante*.

1155. ———.]—*Larceny*.—A treasurer of a trades union convicted of stealing moneys belonging to himself & the other members of the society. *Larceny Act*, 1868 (c. 116), does not merely affect the procedure in cases of larceny, so as to include acts committed before the day of its passing, July 31, 1868, but creates a new offence, & any act to come within its provisions must have been committed after that date. It is for the jury to say when a larceny or embezzlement took place.—*R. v. BLACKBURN* (1868), 33 J. P. 55; 11 Cox, C. C. 157.

1156. ———.]—*Offences within 1871 Act, s. 12—Whether imprisonment ordered in default of pay-*

*ment—Order drawn up as for civil debt.*]—*Summonses* were issued against two officers of local branches of a certain trade union under the above sect., charging them with wilfully withholding certain sums of money belonging to the union. Both defts. admitted the charges against them, & orders, headed "Civil debt" were made upon them for payment of the amounts due, or in default distress & sale. Both defts. defaulted, & application was then made for their committal to prison under the section. The magistrate refused the application on the ground that the sect. was modified by Summary Jurisdiction Act, 1879 (c. 49), s. 6, & that, the proceedings being civil & not criminal, in order to obtain committal a judgment summons must be issued & the prosecution must prove possession of means by defts. An order nisi was then obtained, addressed to the magistrate & two defts., calling on them to show cause why the orders should not be removed & quashed on the ground that the moneys ordered to be paid were not civil debts:—*Held*: as the orders were regular on the face the rule must be discharged.—*R. v. TRUSCOTT* (1899), 81 L. T. 188; 15 T. L. R. 405; 19 Cox, C. C. 379, D. C.

1157. ———.]—*Absence of fraud*.—If an officer of a trade union wilfully withholds money of the trade union, he is not, in the absence of fraud, liable to the penalties imposed by above sect., but under above Act, s. 9, an action may be brought against him for the recovery of the money.

—*MADDEN v. RHODES*, [1906] 1 K. B. 534; 75 L. J. K. R. 329; 94 L. T. 741; 70 J. P. 230; 54 W. R. 373; 22 T. L. R. 356; 50 Sol. Jo. 326; 21 Cox, C. C. 180, D. C.

1158. *Whether civil action lies—After conviction—Prosecution under 1871 Act, s. 12.*]—The treasurer of a local branch of a trades union fraudulently misapplied certain moneys belonging to his society, & was summarily proceeded against & ordered to pay the amount claimed, & by way of penalty. He made default in payment of the two sums & was sentenced to two months' imprisonment with hard labour. He was afterwards proceeded against by the general secretary of the union in the county ct. for the amount originally claimed, but the county ct. judge nonsuited *ptf.* on the ground that he was not entitled to maintain the action. *Ptf.* moved to set aside the nonsuit:—*Held*: on the motion to set aside the nonsuit, as *ptf.* had had recourse to the remedy provided by above sect., & deft. had been punished, the punishment suffered by him operated as an extinguishment of the debt.—*KNIGHT v. WHITMORE* (1885), 53 L. T. 233; 33 W. R. 907; 1 T. L. R. 550, D. C.

*Annotations*.—*Appld.* *Vernon v. Watson*, [1891] 1 Q. B. 400. *Refd.* *Madden v. Rhodes* (1906), 54 W. R. 373.

1159. ———.]—*UNITED BUILDERS' LABOURERS UNION v. STEVENSON* (1906), *Times*, Feb. 7.

1160. ———.]—*Under 1871 Act, s. 9—Wilfully withholding money without fraud.*]—*MADDEN v. RHODES*, No. 1157, *ante*.

## SECT. 6.—CRIMINAL OFFENCES ARISING OUT OF TRADE UNION OPERATIONS.

See 1875 Act; 1906 Act, s. 2; 1927 Act.

1161. *Combination in restraint of trade—Not criminal.*]—*R. v. STAINER*, No. 1153, *ante*.

1162. ———.]—*SWAINE v. WILSON*, No. 950, *ante*.

1163. ———.]—*MOGUL S.S. Co. v. MCGREGOR, GOW & Co.*, No. 51, *ante*.



**1164.** ———.]—(1) An act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to a civil action.

Resps. were shipwrights employed "for the job" on the repairs to the woodwork of a ship, but were liable to be discharged at any time. Some ironworkers who were employed on the iron work of the ship objected to resps. being employed, on the ground that resps. had previously worked at iron work on a ship for another firm, the practice of shipwrights working on iron being resisted by the trade union of which the ironworkers were members. Applt., who was a delegate of the union, was sent for by the ironworkers & informed that they intended to leave off working. Applt. informed the employers that unless resps. were discharged all the ironworkers would be called out or knock off work, it was doubtful which expression was used; that the employers had no option; that the iron men were doing their best to put an end to the practice of shipwrights doing ironwork, & that wherever resps. were employed the iron men would cease work. There was evidence that this was done to punish resps. for what they had done in the past. The employers, in fear of this threat being carried out which, as they knew, would have stopped their business, discharged resps. & refused to employ them again. In the ordinary course resps. employment would have continued. Resps. having brought an action against applt., the jury found that he had maliciously induced the employers to discharge resps. & not to engage them, & gave resps. a verdict for damages:—*Held*: applt. had violated no legal right of resps., done no unlawful act, & used no unlawful means, in procuring resps.' dismissal; his conduct was therefore not actionable however malicious or bad his motive might be, & notwithstanding the verdict applt. was entitled to judgment.

(2) I do not doubt that every one has a right to pursue his trade or employment without "molestation" or "obstruction" if those terms are used to imply some act in itself wrongful. . . . If it be intended to assert that an act not otherwise wrongful always becomes so if it interferes with another's trade or employment, . . . I say that such a proposition in my opinion has no solid foundation in reason to rest upon (LORD HERSCHEL).

(3) Combination of different persons in pursuit of a legitimate trade object occurred in the case of *The Mogul Steamship Co. v. McGregor, Gow, & Co.*, No. 51, ante, & was there held to be lawful. Combination for no such object but in pursuit really of a malicious purpose to ruin or injure another would, I should say, be clearly unlawful (LORD SHAND).—ALLEN v. FLOOD, [1898] A. C. 1; 67 L. J. Q. B. 119; 77 L. T. 717; 62 J. P. 595; 46 W. R. 258; 14 T. L. R. 125; 42 Sol. Jo. 149, II. L.; *revers. S. C. sub nom. FLOOD v. JACKSON*, [1895] 2 Q. B. 21, C. A.

*Annotations*:—As to (1) *Consid. Lyons v. Wilkins*, [1896] 1 Ch. 811; *Ajello v. Worsley*, [1898] 1 Ch. 274; *Hutley v. Simmons*, [1898] 1 Q. B. 181. *Apld. Taylor v. Cambridge Gazette Co. & Kilner* (1898), 42 Sol. Jo. 832. *Distd. Lyons v. Wilkins*, [1899] 1 Ch. 255. *Apld. Boots v. Grundy* (1900), 82 L. T. 769. *Expld. & Distd. Quinn v. Leatham*, [1901] A. C. 495. *Distd. Read v. Friendly Soc. of Operative Stonemasons of England, Ireland & Wales*, [1902] 2 K. B. 732. *Consid. Giblan v. National Amalgamated Labourers' Union of Great Britain & Ireland*, [1903] 2 K. B. 600. *Distd. South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A. C. 239. *Consid. Conway v. Wade* (1908), 78 L. J. K. B. 14. *Apld. Santen v. Busnach* (1913), 29 T. L. R. 214. *Consid. Stott v. Gamble*, [1916] 2 K. B. 504. *Pratt v. British Medical Assocn.*, [1919] 1 K. B. 244. *Distd. Valentine v. Hyde*, [1919] 2 Ch. 129. *Apld. Davies v. Thomas*, [1920] 2 Ch. 189; *Hodges v. Webb*, [1920] 2 Ch. 70. *Consid. Wolstenholme v. Ariss*,

[1920] 2 Ch. 403. *Apld. Ware & De Freville v. Motor Trade Assocn.*, [1921] 3 K. B. 40; *White v. Riley*, [1921] 1 Ch. 1; *Sorrell v. Smith*, [1925] A. C. 700. *Refd. Charnock v. Court* (1899), 68 L. J. Ch. 550; *Hubbuck v. Wilkinson*, *Heywood & Clark*, [1899] 1 Q. B. 86; *Densby & Cadeby Main Collieries v. Yorkshire Miners' Assocn.*, [1906] A. C. 384; *National Phonograph Co. v. Edison Bell Consolidated Phonograph Co.*, [1908] 1 Ch. 335; *Hardie & Lane v. Chilton*, [1928] 2 K. B. 306. *As to (3) Consid. Hutley v. Simmons*, [1898] 1 Q. B. 181. *Generally, Refd. Linaker v. Pilcher* (1901), 70 L. J. K. B. 396. *Mentd. Briggs v. Thornton* (1903), 73 L. J. Ch. 301; *Wilford v. West Riding of Yorkshire County Council*, [1908] 1 K. B. 685; *Re Ainsworth, Finch v. Smith*, [1915] 2 Ch. 96.

**1165.** ———.]—A.-G. OF COMMONWEALTH OF AUSTRALIA v. ADELAIDE S.S. CO., LTD., No. 68, ante.

**1166.** Combination maliciously to ruin or injure another.]—ALLEN v. FLOOD, No. 1164, ante.

**1167.** 1875 Act—Application of sect. 3—Combination in furtherance of trade dispute—Whether indictable for conspiracy.]—(1) Above sect. rendered legal "an agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers & workmen," & provided that it should not be indictable as a conspiracy "if such act committed by one person would not be punishable as a crime." There it appears that strikes are legalised by Act of Parliament, & that one person would not be indictable for a crime by endeavouring to encourage or bring about that which in itself is not illegal, namely, a strike. Therefore a combination of two or more persons to do this would come exactly within the words of sect. 3 of the Act, & would not, since this Act of Parliament, be an offence against the law (KAY, L.J.).

(2) A strike is an agreement between persons who are working for a particular employer not to continue working for him (KAY, L.J.).

(3) Strikes & trade unions which were formerly considered illegal have now been legalised, at all events, so far as the doctrines as to restraint of trade are concerned, & a strike can be conducted up to a certain point with perfect legality (LYNDLEY, L.J.).—LYONS (J.) & SONS v. WILKINS, [1896] 1 Ch. 811; 65 L. J. Ch. 601; 74 L. T. 358; 60 J. P. 325; 45 W. R. 19; 12 T. L. R. 278; 40 Sol. Jo. 372, C. A.; *subsequent proceedings*, [1899] 1 Ch. 255, C. A.

*Annotations*:—As to (1) *Refd. Taff Vale Ry. v. Amalgamated Soc. of Ry. Servants*, [1901] 1 K. B. 170; *Gozney v. Bristol, etc. Trade & Provident Soc.*, [1909] 1 K. B. 901. *As to (3) Refd. Quinn v. Leatham*, [1901] A. C. 495. *Generally, Refd. Charnock v. Court*, [1899] 2 Ch. 35; *Ware & De Freville v. Motor Trade Assocn.*, [1921] 3 K. B. 40.

**1168.** ———.]—QUINN v. LEATHAM, No. 1179, post.

**1169.** ———.]—VACHER & SONS, LTD. v. LONDON SOCIETY OF COMPOSITORS, No. 1269, post.

**1170.** ———.]—Nothing to do with civil remedies.]—QUINN v. LEATHAM, No. 1179, post.

Intimidation or injury.]—See CRIMINAL LAW, Vol. XV., pp. 765, 766, Nos. 8210–8219.

Persistently following.]—See CRIMINAL LAW, Vol. XV., p. 767, Nos. 8220–8221.

Hiding or deprivation of property.]—See CRIMINAL LAW, Vol. XV., p. 767, No. 8222.

Watching & besetting.]—See CRIMINAL LAW, Vol. XV., pp. 767, 768, Nos. 8223–8232.

Form of indictment & conviction.]—See CRIMINAL LAW, Vol. XIV., p. 224, No. 2075; Vol. XV., p. 768, Nos. 8233–8236.

Application to seamen.]—See SHIPPING, Vol. XLI., pp. 251, 252, Nos. 930–933.

Jurisdiction of magistrates.]—See MAGISTRATES, Vol. XXXIII., p. 318, No. 332.

# SECT. 7.—TORTS ARISING OUT OF TRADE UNION OPERATIONS.

## SUB-SECT. 1.—COMBINATION IN PURSUIT OF TRADE INTEREST.

1171. Whether acts tortious.]—*MOGUL S.S. Co. v. MCGREGOR, GOW & Co.*, No. 51, *ante*.

1172. —.]—*ALLEN v. FLOOD*, No. 1164, *ante*.

1173. — Purpose effected without malice.]—One of the declared objects of resp. branch assocn. was "the maintenance of the honour & the interests of the medical profession." Its arts. of assocn. provided for the expulsion of a member by a resolution of its council if carried by three-quarters of those present, & confirmed by a general meeting. By a rule of the branch assocn. existing when applt. became a member, "when any member shall have been expelled he shall not be met in consultation or accorded professional recognition in any other form until it shall have been otherwise decided by the council." A further rule provided that if any member should be declared by the council to have omitted to comply with any of its rules, he was not to be met in consultation or recognised. A resolution expelling applt. from membership was duly carried by the council & confirmed by a general meeting, applt. being present, & heard in his defence, at both meetings; the resolution was communicated in writing by the secretary to the other members. Applt. brought an action against resps. for damages alleging (*inter alia*) that resps. had conspired to induce medical practitioners, members of the assocn., to refuse to meet him or to accord him professional recognition; & he contended that the rule set out above was in restraint of trade & void:—*Held*: (1) the rule was not in restraint of trade, since its object was not to penalise an expelled member, but to promote the interest & objects of resps.; (2) the council & the general meeting, when considering the resolution, were acting quasi-judicially, & the decisions arrived at, being supported by adequate evidence, could not be questioned without proof, of fundamental error in the procedure, or bias or malice in those present. —*THOMPSON v. BRITISH MEDICAL ASSOCN.* (N. S. W. BRANCH), [1924] A. C. 764; 93 L. J. P. C. 203; 131 L. T. 102; 40 T. L. R. 506; 68 Sol. Jo. 518, P. C.

1174. — Purpose not effected by illegal means.]—*SORRELL v. SMITH*, No. 1183, *post*.

Combination to procure termination or breach of contractual relationship.]—*See* Nos. 1190–1193, *post*.

Combination to prevent parties entering into contractual relationship.]—*See* Nos. 1221–1223, *post*.

Placing names on "black lists" or "stop lists."]—*See* Sub-sect. 5, *post*.

Effect of 1906 Act.]—*See* Sect. 8, *post*.

## SUB-SECT. 2.—COMBINATION TO INJURE ANOTHER IN TRADE.

1175. Whether acts tortious.]—By the common law, liberty of a man's mind & will how he should bestow himself & his means, his talents, & his industry, is as much the subject of the law's protection as is that of his body. Therefore, if two or more persons agreed to co-operate against that liberty of thought & freedom of will they would be guilty of a conspiracy.—*R. v. DRUITT, LAWRENCE & ADAMSON* (1867), 16 L. T. 855; 10 Cox, C. C. 592.

Annotations:—*Consd. Allen v. Flood*, [1898] A. C. 1; *Quinn v. Leatham*, [1901] A. C. 495; *Larkin v. Long*, [1915] A. C. 814. *Reid, Springhead Spinning Co. v. Riley* (1868),

L. R. 6 Eq. 551; *Gill v. Williamson* (1869), 20 L. T. 712; *R. v. Shepherd* (1869), 11 Cox, C. C. 325; *R. v. Parnell* (1881), 14 Cox, C. C. 508; *Connor v. Kent, Gibson v. Lawson, Curran v. Treleaven*, [1891] 2 Q. B. 545; *Mogul S.S. Co. v. McGregor Gow*, [1892] A. C. 25; *Valentine v. Hyde*, [1919] 2 Ch. 129; *Sorrell v. Smith*, [1923] A. C. 700. *Menfd. R. v. Orman & Barber* (1880), 14 Cox, C. C. 381.

1176. —.]—A number of persons engaged in running omnibuses from one part of London to the other, agreed among themselves to "nurse" the vehicles of a rival independent proprietor, *pltf.* They accordingly ran one omnibus before & one behind each omnibus of *pltf.*, & generally interfered with the carrying on of his business, thus driving him off the road:—*Held*: an action of conspiracy would lie.

It is enough that defts. conspire to encourage acts to be done by others by connivance or suggestion.—*GILL v. WILLIAMSON* (1869), 20 L. T. 712, N. P.

1177. — Malicious intent.]—*MOGUL S.S. Co. v. MCGREGOR, GOW & Co.*, No. 51, *ante*.

1178. —.]—*ALLEN v. FLOOD*, No. 1164, *ante*.

1179. — No justification or excuse.]—(1) A combination of two or more, without justification or excuse to injure a man in his trade by inducing his customers or servants to break their contracts with him or not to deal with him or continue in his employment is, if it results in damage to him, actionable.

(2) The words "trade dispute between employers & workmen" in Conspiracy & Protection of Property Act, 1875 (c. 86), s. 3, do not include a dispute on trade union matters between workmen who are members of a trade union, & an employer of non-union workmen who refuses to employ members of a trade union. *Semble*: the words are restricted to disputes between an employer & his own workmen.

(3) A threat to call men out given by a trade union official to an employer of men belonging to the union & willing to work with him is a form of coercion, intimidation, molestation, or annoyance to them & to him very difficult to resist, & to say the least, requiring justification (*LORD LINDLEY*).

(4) Conspiracy & Protection of Property Act, 1875 (c. 86), s. 3, has nothing to do with civil remedies.

Assuming that there was a trade dispute within the meaning of sect. 3 & that an indictment for conspiracy could not be sustained in a case like this, the difference between an indictment for a conspiracy & an action for damages occasioned by a conspiracy is very marked & is well known (*LORD LINDLEY*).

(5) As to *pltf.*'s rights. He had the ordinary rights of a British subject. He was at liberty to earn his own living in his own way, provided he did not violate some special law prohibiting him from so doing, & provided he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognised by law, its correlative is the general duty of every one not to prevent the free exercise of this liberty, except so far as his own liberty of action may justify him in so doing (*LORD LINDLEY*).—*QUINN v. LEATHEM*, [1901] A. C. 495; 70 L. J. P. C. 76; 85 L. T. 289; 65 J. P. 708; 50 W. R. 139; 17 T. L. R. 749, H. L.

Annotations:—As to (1) *Consd. Gliban v. National Amalgamated Labourers' Union of Great Britain & Ireland*, [1903] 2 K. B. 600; *National Phonograph Co. v. Edison Bell Consolidated Phonograph Co.*, [1908] 1 Ch. 335; *Larkin v. Long*, [1915] A. C. 814; *Long v. Smithson* (1918), 88 L. J. K. B. 223; *Valentine v. Hyde*, [1919] 2 Ch. 129. *Apld. Ware & De Freville v. Motor Trade Assocn.*, [1921]



3 K. B. 40; Jasperson v. Dominion Tobacco Co., [1923] A. C. 709. **Distd.** Reynolds v. Shipping Federation, [1924] 1 Ch. 28. **Expld.** Sorrell v. Smith, [1925] A. C. 700. **Reifd.** Read v. Friendly Soc. of Operative Stonemasons of England, Ireland & Wales, [1902] 2 K. B. 732; South Wales Miners' Federation v. Glamorgan Coal Co., [1905] A. C. 239; Denaby & Cadeby Main Collieries v. Yorkshire Miners' Assoc., [1906] A. C. 384; Conway v. Wade, [1908] 2 K. B. 844; Said v. Butt, [1920] 3 K. B. 497; Brimelow v. Casson, [1924] 1 Ch. 302; Hardie & Lane v. Chilton, [1928] 2 K. B. 306. *As to (2)* **Reifd.** White v. Riley, [1921] 1 Ch. 1. *As to (5)* **Consd.** Valentine v. Hyde, [1919] 2 Ch. 129. **Generally.** **Consd.** Pratt v. British Medical Assoc., [1919] 1 K. B. 244. **Reifd.** Bulcock v. St. Anne's Master Builders' Federation (1902), 19 T. L. R. 27; Gaskell v. Lancashire & Cheshire Miners' Federation (1912), 66 Sol. Jo. 719; Santen v. Busnach (1913), 29 T. L. R. 214; Vacher v. London Soc. of Compositors, [1913] A. C. 107; Davies v. Thomas, [1920] 3 Ch. 189; Hodges v. Webb, [1920] 2 Ch. 70; G. W. K. v. Dunlop Rubber Co. (1926), 42 T. L. R. 376. **Mentd.** West Ham Union v. L. C. C. (1902), 71 L. J. K. B. 299; R. v. Brailford, (1905) 2 K. B. 730; *In the Goods of Hall*, Hall v. Knight & Baxter (1913), 109 L. T. 587; *Re Ainsworth*, Finch v. Smith, [1915] 2 Ch. 96; Croft v. Blay, [1919] 1 Ch. 277; Welldon v. Butterley Co., [1920] 1 Ch. 130; Tinline v. White Cross Insee., [1921] 3 K. B. 327.

**1180. — Where damage resulting—Intentional employment of unlawful means—No actual malice proved.**—A single person or a body of persons commits an actionable wrong if he or they inflict actual pecuniary damage upon another by the intentional employment of unlawful means, such as threats of coercive action, to injure that person's business, even though the unlawful means may not comprise any specific act which is *per se* actionable & actual malice is not proved. The element of conspiracy in a case of this kind is of importance only in considering the weight of the acts alleged & the extent of the damage resulting therefrom.—**PRATT v. BRITISH MEDICAL ASSOC.**, [1919] 1 K. B. 244; 88 J. J. K. B. 628; 120 L. T. 41; 35 T. L. R. 14; 63 Sol. Jo. 84.

**Annotations.**—**Consd.** Ware & De Freville v. Motor Trade Assoc., [1921] 3 K. B. 40. **Reifd.** Valentine v. Hyde, [1919] 2 Ch. 129; Davies v. Thomas, [1920] 1 Ch. 214; Hodges v. Webb, [1920] 2 Ch. 70; Said v. Butt, [1920] 3 K. B. 497; Sorrell v. Smith, [1925] A. C. 700. **Mentd.** British Ry. Traffic & Electric Co. v. C. R. C. Co. & L. C. C., [1922] 2 K. B. 260.

**1181. — Unlawful means not comprising any specific act actionable per se.**—**PRATT v. BRITISH MEDICAL ASSOC.**, No 1180, *ante*.

**1182. —**—[In 1922 pltf's. fitted out an expedition to salvage cargo from the wreck of a Dutch steamship, which had sunk in 1916 in the North Sea in over 100 feet of water. Pltf's. worked at the scene of the wreck whenever the weather & tides permitted during the summer of 1922 & from Apr. to July, 1923. During that time they had succeeded in cutting a hole into No. 4 hold, had buoyed the wreck, & had extracted some portions of cargo of little value at a cost of over £40,000. In July, 1923, defts., British subjects & partners in a rival salvage co., arrived on the scene in a British registered ship, & by sending down their own divers & interfering with pltf's. diving operations, tried to secure possession of the wreck & cargo, & either prevent further work on the part of pltf's. or establish themselves with pltf's. in concurrent occupation:—**Held:** as defts.' interference was high-handed & deliberate they would be restrained until further order from doing any acts at or near the wreck whereby pltf's. might be prevented or hindered in the carrying on of their salvage operations.]

What follows from the findings I have stated is that defts. personally, or by their servants or agents, have trespassed upon pltf's. possession &

wilfully & wrongfully interrupted & molested them in their lawful undertaking. Molestation such as that of which pltf's. complain is, in my opinion, actionable where it causes damage (**DUKE, P.**).—**THE TUBANTIA**, [1924] P. 78; 93 L. J. P. 148; 131 L. T. 570; 40 T. L. R. 335; 16 Asp. M. L. C. 346; 18 Lloyd, L. R. 158.

**1183. —**—[**(1)** A combination of two or more persons for the purpose of injuring a man in his trade is unlawful & if it results in damage to him, is actionable. If the real purpose of the combination is not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed & no action will lie, although damage to another ensues provided that the purpose is not effected by illegal means.]

[**(2)** A threat to effect a purpose which is in itself lawful gives no right of action to the person thereby injured.]

A trade union of retail newsagents advocated the policy of limiting the number of retail newspaper shops in a given area, & enforced that policy by procuring its members to withdraw their custom from any wholesale newsagent who supplied newspapers to a retailer opening a new shop without its permission. Certain newcomers in a district having opened shops without the union's permission & obtained supplies of newspapers from a wholesale newsagent R., pltf., who was a customer of R., at the request of the union, of which he was a member, withdrew his custom from R. & transferred it to another wholesale newsagent W. Defts., a committee representing the proprietors of the newspapers, who took the view that the union's policy was injurious to the interests of their trade, intervened at the request of R., & in order to compel pltf. to return to R. as a customer, threatened to discontinue the supply of those newspapers which W. obtained directly from them, & also to discontinue the supply of newspapers to S., a wholesale newsagent who supplied W. with others of his newspapers, unless S. ceased to supply W. with newspapers so long as W. supplied pltf. Defts. acted as they did for the sole purpose of protecting their trade, & were not actuated by spite against pltf. or by any desire to injure him. In an action to restrain defts. from interfering with the right of pltf. to continue contractual relations with W.:—**Held:** defts. had not committed or threatened to commit any wrong against pltf. & the action failed.—**SORRELL v. SMITH**, [1925] A. C. 700; 94 L. J. Ch. 347; 133 L. T. 370; 41 T. L. R. 529; 69 Sol. Jo. 641, H. L.

**Annotation.**—*As to (1)* **Consd.** Hardie & Lane v. Chilton, [1928] 2 K. B. 306.

**Procuring termination or breach of contractual relationship.**—*See* Sub-sect. 3, *post*.

**Preventing parties entering into contractual relationship.**—*See* Sub-sect. 4, *post*.

**"Black lists" & "Stop lists."**—*See* Sub-sect. 5, *post*.

**Effect of 1906 Act.**—*See* Sect. 8, *post*.

#### SUB-SECT. 3.—COMBINATION PROCURING TERMINATION OR BREACH OF CONTRACTUAL RELATIONSHIP.

##### A. In General.

**1184. Whether acts tortious.**—At the hearing of a complaint under Employers & Workmen Act, 1875 (c. 90), by the proprietors of a coal mine

*Sect. 7.—Torts arising out of trade union operations: Sub-sect. 3, A.]*

against deft., one of their workmen, it appeared that the workmen were employed under contracts determinable on fourteen days' notice, & subject to certain regulations under which the employer might dismiss or suspend any workman for disobedience to orders, & the workmen, in descending or ascending the mine in "cages," were to obey the orders of the banksman. Part of the miners employed at the colliery, including deft., were members of a trade union. The unionists addressed a notice to complainants that, at the expiration of fourteen days, all non-unionists must descend & ascend the mine by themselves. On the morning of the day of which such notice expired, certain workmen, of whom deft. was one, were at the pit mouth for the purpose of going down by the "cage" then in readiness for them. The first to enter the cage was a non-unionist, whereupon the other men, who were unionists, refused to go down with him. The non-unionist then went down alone, & upon the next cage coming up a few seconds afterwards, the unionists offered to go down; but the under-manager in charge refused to allow them to do so. This occurred on three successive days. The justices ordered deft. to pay substantial damages for wrongfully "absenting" himself from complainants' service, & dismissed a counterclaim by him against them for having wrongfully refused to allow him to follow his lawful employment:—*Held*: under the circumstances, there had been such a breach of contract on the part of deft. as entitled complainants to substantial, & not merely to nominal, damages, & the counterclaim could not be maintained.—*BOWES & PARTNERS v. PRESS*, [1894] 1 Q. B. 202; 63 L. J. Q. B. 165; 70 L. T. 116; 58 J. P. 280; 42 W. R. 340; 10 T. L. R. 55; 9 R. 302, C. A.; *affg.* S. C. *sub nom.* *PRESS v. BOWES & PARTNERS, LTD.* (1893), 62 L. J. M. C. 145, D. C.

**1185. — Materiality of motive—Malice.]**—Defts. were members of a joint committee of three trade unions connected with the building trade in Hull. A firm of builders there having refused to obey certain rules laid down by the unions with regard to building operations, the unions sought to compel them to do so, by preventing the supply of building materials to them. In pursuance of this object, they requested pltf. a master mason & builder in Hull, who supplied building materials to the firm, to cease to supply them with such materials, but pltf. refused to do so. Thereupon, with the object of injuring pltf. in his business, in order to compel him to comply with such request, defts. induced persons who, to the knowledge of defts., had entered into contracts with pltf. for the supply of materials, to break their contracts, & not to enter into further contracts with pltf., by threatening that the workmen would be withdrawn from their employ. Pltf. sustained damage

in consequence of such breaches of contract, & of the refusal of such persons to enter into contracts with him:—*Held*: an action was maintainable by pltf. against defts. for maliciously procuring such breaches of contract, & also for maliciously conspiring together to injure him by preventing persons from entering into contracts with him.—*TEMPERTON v. RUSSELL*, [1893] 1 Q. B. 715; 62 L. J. Q. B. 412; 69 L. T. 78; 57 J. P. 676; 41 W. R. 585; 9 T. L. R. 393; 37 Sol. Jo. 423; 4 R. 376, C. A.

*Annotations:—Apld.* Lyons v. Wilkins, [1896] 1 Ch. 811. *Consd.* Allen v. Flood, [1898] A. C. 1. *Fold.* Quinn v. Leatham, [1901] A. C. 495. *Consd.* Taft Vale Ry. v. Amalgamated Soc. of Ry. Servants (1901), 50 W. R. 44; National Phonograph Co. v. Edison-Bell Consolidated Phonograph Co., [1908] 1 Ch. 335. *Distd.* Reynolds v. Shipping Federation, [1924] 1 Ch. 28. *Refd.* Wright v. Hennessey (1894), 11 T. L. R. 14; Charnock v. Court (1899), 68 L. J. Ch. 550; Read v. Friendly Soc. of Operative Stonemasons of England, Ireland & Wales, [1902] 2 K. B. 732; Valentine v. Hyde, [1919] 2 Ch. 129; Ware & De Freville v. Motor Trade Assoc., [1921] 3 K. B. 40; Sorrell v. Smith, [1925] A. C. 700.

**1186. —**—[—(1) Procuring a breach of contract is an actionable wrong unless there be justification for interfering with the legal right.

Miners employed in collieries without giving notice to their employers & in breach of their contracts abstained from working on certain days upon the direction or order of a federation of the miners given by their executive council. The federation & council acted honestly without malice or ill will towards the employers & with the object only of keeping up the price of coal by which the wages were regulated:—*Held*: an action for damages lay by the employers against the federation & its officers, no justification for their action being shown.

(2) Malice in the sense of spite or ill will is not the gist of such an action as that which pltf. have instituted (*LORD MACNAGHTON*).—*SOUTH WALES MINERS' FEDERATION v. GLAMORGAN COAL CO.*, [1905] A. C. 239; 74 L. J. K. B. 525; 92 L. T. 710; 53 W. R. 593; 21 T. L. R. 441, H. L.; *affg.* S. C. *sub nom.* *GLAMORGAN COAL CO. v. SOUTH WALES MINERS' FEDERATION*, [1903] 2 K. B. 545, C. A.

*Annotations:—Is to* (1) *Distd.* Stott v. Gamble, [1916] 2 K. B. 504. *Apld.* Valentine v. Hyde, [1919] 2 Ch. 129. *Refd.* Giblin v. National Amalgamated Labourers' Union of Great Britain & Ireland, [1903] 2 K. B. 600; Davies v. Thomas, [1920] 1 Ch. 217; Ware & De Freville v. Motor Trade Assoc., [1921] 3 K. B. 40; Brimelow v. Casson, [1924] 1 Ch. 302. *Is to* (2) *Refd.* Said v. Butt, [1920] 3 K. B. 497. *Generally, Refd.* National Phonograph Co. v. Edison-Bell Consolidated Phonograph Co., [1908] 1 Ch. 335; Larkin v. Long (1915), 84 L. J. P. C. 201; Pratt v. British Medical Assoc., [1919] 1 K. B. 241; Sorrell v. Smith, [1925] A. C. 700.

**1187. —**—[—In an action against applts. alleging that they had conspired to injure pltf. in the conduct of their business, & that in pursuance of the conspiracy the union whom they represented caused pltf.'s men to go out on strike, the judge in effect directed the jury that if the resolutions of the union calling out pltf.'s men were the cause of the strike they were an action-

trade union, represented to pltf.'s employer that the employment of pltf. as aforesaid was a breach of a contract made by the employer with the union represented by deft., & warned him against further employing pltf. The employer, in consequence of this warning, did not further employ pltf. It was found as a fact that deft. was not actuated by any malice or desire to injure pltf. but acted in the interests of his union & the employer:—*Held*: pltf. had no cause of action.—*BOND v. MORRIS*, [1912] V. L. R. 351. —*AUS.*

**1184 II. —**—[—*GRAHAM v. BRICK-*

*LAYERS & MASONS' UNION* (1908), 9 W. L. R. 475.—*CAN.*

**1184 III. —**—[—It is not an actionable wrong merely to induce or persuade a person to do something which he may lawfully do or to refrain from doing something which he may lawfully refrain from doing, even if the result is injury to another in his trade.—*HENRICKS v. WIENE (Sask.)* (1915), 30 W. L. R. 854; 5 W. W. R. 373; 21 D. L. R. 68.—*CAN.*

**1184 IV. —**—[—Neither an individual nor a corps. can be guilty of conspiring with third parties or with his or its agent or employee to induce himself

or itself to dismiss wrongfully another of his or its employees.—*PATTERSON v. CANADIAN PACIFIC RY. CO.*, [1918] 1 W. W. R. 40; 38 D. L. R. 183; 12 Alta. L. R. 474.—*CAN.*

**1184 V. —**—[—If A. informs B. that he will not deal with him unless he cease to deal with C., & C. thereby loses the custom of B., C. has no action against A. although he may, in fact, have suffered loss through his interference.—*SCOTTISH CO-OPERATIVE WHOLESALE SOCIETY v. GLASGOW FLESHERS' TRADE DEFENCE ASSOC.* (1898), 35 Sc. L. R. 645; 5 S. L. T. 263.—*SCOT.*

able wrong, without regard to the motive & without regard to the conspiracy alleged:—*Held*: this direction could not be supported & there must be a new trial.—*JOSE v. METALLIC ROOFING CO. OF CANADA, LTD.*, [1908] A. C. 514; 78 L. J. P. C. 36; 99 L. T. 742; 24 T. L. R. 878, P. C.

**1188.** ———— **Resulting damage.**—A combination between two or more persons to induce others not to employ a particular person nor to permit him to be employed, even if the acts are maliciously done & with an intention to injure such person, is not actionable if no civil injury results to him in consequence, for a conspiracy to do certain acts gives a right of action only where the acts agreed to be done, & in fact done, would, had they been done without preconcert, have involved a civil injury to the person against whom they were directed.—*HUTTLEY v. SIMMONS*, [1898] 1 Q. B. 181; 67 L. J. Q. B. 213; 14 T. L. R. 150.

*Annotations*.—*Consd.* *Quinn v. Leatham*, [1901] A. C. 495. *Refd.* *Pratt v. British Medical Assoc.*, [1919] 1 K. R. 214; *Valentine v. Hyde*, [1919] 2 Ch. 129; *Sorrell v. Smith*, [1925] A. C. 700.

**1189.** ———— **Act lawful.**—*ALLEN v. FLOOD*, No. 1164, *ante*.

**1190.** ———— **Protection of trade interest.**—*PETO v. APPERLEY* (1891), 35 Sol. Jo. 792.

**1191.** ———— **—**—*THOMAS v. AMALGAMATED SOCIETY OF CARPENTERS & JOINERS* (1902), *Times*, Apr. 28.

**1192.** ———— **—**—*BULCOCK v. ST. ANNE'S MASTER BUILDERS FEDERATION* (1902), 19 T. L. R. 27; 47 Sol. Jo. 32.

**1193.** ———— **—**—*READ v. FRIENDLY SOCIETY OF OPERATIVE STONEMASONS OF ENGLAND, IRELAND & WALES*, No. 1204, *post*.

**1194.** ———— **Act in fulfilment of duty.**—(1) Pltf. was a theatrical manager. Defts. were members of a committee called the Joint Protection Committee, which was composed of representatives of five assocns. namely, the Assocn. of Touring Managers, the Variety Artists' Federation, the Actors' Assocn., the Musicians' Union, & the National Assocn. of Theatrical Employees. The minimum wage for chorus girls was fixed by the Actors' Assocn. at £2 10s. per week. Pltf. paid his chorus girls £1 10s. per week. The contracts were from week to week, provided for a week's rehearsal without pay, & for "no play, no pay." No tour was booked for any fixed period, or for any appreciable time ahead. One member of pltf.'s co., a girl of eighteen, was living in immorality with another member of the co., who was a deformed dwarf. Pltf. knew that they were living together when he engaged them at a joint salary of £3 a week. The girl was induced to lead an immoral life because she did not earn enough money to live on. In the case of another member of the co., whose wages were £1 10s. a week, the evidence given showed that there were

reasons for believing that she was resorting to immorality. There was no doubt that the members of the co. were leading a hand to mouth existence. Defts. desired in the interests of the theatrical calling & its members to stop such under payment & its evil consequences, & as the only means of doing so, induced theatre proprietors not to allow pltf. the use of their theatres, either by breaking contracts already made or by refusing to enter into contracts:—*Held*: defts. were justified in their action, as they owed a duty to their calling & its members to take all necessary steps to compel pltf. to pay his chorus girls a living wage, so that they should not be driven to supplement their earnings by misconduct for the purpose of gain.

*Semle*: (2) the business of presenting histrionic performances to the public for profit is a trade or industry in which actors are employed within 1906 Act. (3) The Act would afford no defence to an action for damages for inducing a breach of a contract which was not a contract of employment.—*BRIMELOW v. CASSON*, [1924] 1 Ch. 302; 93 L. J. Ch. 256; 130 L. T. 725; 68 Sol. Jo. 275.

**1195.** ———— **Absence of justification.**—*QUINN v. LEATHAM*, No. 1179, *ante*.

**1196.** ———— **—**—*SOUTH WALES MINERS' FEDERATION v. GLAMORGAN COAL CO.*, No. 1180, *ante*.

**1197.** ———— **—**—(1) Two workmen, members of a trade union, who had respectively entered into contracts with an employer to serve him for a term of years, broke their contracts before the passing of 1906 Act by striking, together with others in the same employ, & continuing on strike, during the currency of the periods for which they had respectively contracted to serve. The trade union had originally sanctioned the strike in ignorance of the existence of the before-mentioned contracts, but subsequently gave the workmen strike pay, after they became aware of those contracts, in order to keep the workmen out on strike:—*Held*: the trade union, by procuring a continuing breach of contract by the workmen, had rendered themselves liable in damages to the employer.

(2) Where an agreement was made between a trade union & a federation of employers for the reference of disputes between employers & employed to arbn. & a dispute had arisen between a particular employer, a member of the employers' federation, & his workmen:—*Held*: a *bona fide* belief on the part of the union that the employers were intending to evade a settlement of the dispute in accordance with the agreement, or even an actual intention on the part of the employers so to do, did not constitute a cause or excuse which would justify the trade union in procuring the breach by workmen of their contracts of service with the before-mentioned employer.

**1190 i.** ———— **Materiality of motive—Protection of trade interest.**—*GIBBINS v. METCALFE* (1905), 15 Man. L. R. 580; 1 W. L. R. 139; 23 C. L. T. 308.—*CAN.*

**1190 ii.** ———— **—**—It is no defence to an action for persuading a servant to break his contract with his master, that the persuader acted in good faith in pursuance of the provisions of the constitution of a trade union of which the servant & the persuader were both members, & that he had no ill will towards the master.—*BRAUCH v. ROTH* (1904), 6 O. W. R. 345; 10 O. L. R. 284.—*CAN.*

**1190 iii.** ———— **—**—*R. v. BECKETT* (1910), 15 O. W. R. 449; 20 O. L. R. 401; 1 O. W. N. 167.—*CAN.*

**1190 iv.** ———— **—**—A combination of two or more persons without justification to injure any workman by inducing employers not to employ him is (apart from any question of malice), if it results in damage to him, actionable. This wrongful interference with the freedom of disposal of labour may be negatived by showing justification therefor arising from the right of due maintenance of the equal civil rights of the persons interfering.—*SLEUTER v. SCOTT* (1915), 8 W. W. R. 714; 81 B. C. R. 165.—*CAN.*

**1190 v.** ———— **—**—A retail milk dealer held entitled to a perpetual injunction restraining a co-operative assocn. of milk producers from interfering with contracts which pltf. had entered into for the supply of milk,

although at the time the action was begun such interference was merely threatened, with the object of forcing pltf. to contract with the association, & it was acting under the belief that the step it was seeking to compel pltf. to take would be beneficial to all milk dealers & milk producers contracting with it.—*STEEVES DAIRY, LTD. v. TWIN CITY CO-OPERATIVE MILK PRODUCERS ASSOCN.*, [1926] 1 D. L. R. 130; [1926] 1 W. W. R. 25; 36 B. C. R. 286.—*CAN.*

**1190 vi.** ———— **—**—*GOLD-FINCH & CO. v. HANGHTIFF SAWMILLERS CO-OPERATIVE ASSOCN., LTD.* (1914), 33 N. Z. L. R. 666.—*N.Z.*

**Whether act criminal.**—*YOUNG & REES v. QUAIN*, *THE REES v. QUAIN* (1910), 10 C. L. R. 110.—*AUS.*

*Sect. 7.—Torts arising out of trade union operations: Sub-sect. 3, A. & B.; sub-sect. 4.]*

(3) It was argued that, having regard to the constitution of the union as established by its rules, which appear in the rules of 1904, the union, the central body, stood to the branch in the relation of principal & agent, or that the branch was a constituent part of one central body, that is to say the union, that is deft. assocn., so that the action & knowledge of the branch would be the action & knowledge of the central body. I am of opinion that this contention cannot be justified.

... The House of Lords in *Denaby & Cadeby Main Collieries, Ltd. v. Yorkshire Miners' Assocn.*, No. 994, *ante*, held that the branch officials were not as such officers or agents of the central body, but in my judgment the decision in the House of Lords in no way exonerates the central body from responsibility, if a central body in fact orders or authorises the branch officials wrongfully to withdraw men from their employment. ...

But I have to consider in the present case whether the fact that the branch was asking the union to sanction the strike makes the union & the branch stand either in the relation of principal & agent, or in such relation that the duty to communicate would justify the imputation of the knowledge of the branch as the knowledge of deft. assocn. I have grave doubts as to this. It is quite clear that the relation is not that of principal & agent (*VAUGHAN WILLIAMS, L.J.*).

(4) The case against D. [the local trade union official] depends on his knowledge of the scagliola contracts. He says that he did not know of these contracts, & the Lord Chief Justice has found that until Jan. 17 he did not know (*VAUGHAN WILLIAMS, L.J.*).—*SMITHIES v. NATIONAL ASSOCN. OF OPERATIVE PLASTERERS*, [1909] 1 K. B. 310; 78 L. J. K. B. 259; 100 L. T. 172; 25 T. L. R. 205, C. A.

*Annotations:—As to (1) Rejd. Long v. Smithson* (1918), 88 L. J. K. B. 223. *Generally, Rejd. Gozney v. Bristol, etc. Trade & Provident Soc.*, [1909] 1 K. B. 901; *Pratt v. British Medical Assocn.*, [1919] 1 K. B. 214. *Mentd. Beadling v. Goll* (1922), 39 T. L. R. 128; *Bowling v. Camp* (1922), 128 L. T. 342; *Brookes v. Brown* (1922), 39 T. L. R. 3; *Henshall v. Porter*, [1923] 2 K. B. 193.

**1198. — Procuring continuing breach of contract.]—SMITHIES v. NATIONAL ASSOCN. OF OPERATIVE PLASTERERS, No. 1197, *ante*.**

**Effect of 1906 Act.]—See Sub-sect. 8, *post*.**

#### *B. Legality of Means Employed.*

**1199. Whether acts tortious — Intimidation, violence or molestation.]—MOGUL S.S. Co. v. MCGREGOR, GOW & Co., No. 51, *ante*.**

#### **PART VII, SECT. 7, SUB-SECT. 3.—B.**

**1199 i. Whether acts tortious — Intimidation, violence or molestation.]—R. v. MCCARTHY, [1903] 2 I. R. 146.—IR.**

**1199 ii. — — —.]—AGNEW v. MUNRO** (1891), 18 R. (Cl. of Sess.) (J.) 22.—SCOT.

**1199 iii. — — —.]—MACKINLAY v. HART** (1897), 25 R. (Cl. of Sess.) (J.) 7; 35 Sc. L. R. 32; 5 S. L. T. 152.—SCOT.

**1201 i. — Threat—To call strike.]—A combination of persons, with intent to coerce their employer, by means of a threat, into dismissing from his employment or refusing to employ, another person, is actionable at the suit of that person, where the threat used is that of an unlawful strike.—MARTELL v. VICTORIAN COAL MINERS' ASSOCN.** (1903), 29 V. L. R. 475.—AUS.

**1201 ii. — — —.]—BRISBANE SHIPWRIGHTS PROVIDENT UNION v. HEGGIE** (1906), 3 C. L. R. 686.—AUS.

**1201 iii. — — —.]—Pltf. had at one time been a member of deft. union. His subscriptions having fallen**

into arrears defts. B. & V. were instructed by the union to wait upon pltf. & endeavour to induce him to pay the arrears. They did so, but pltf. refused to pay. Thereupon B. & V. professing to act on behalf of the union, but without any express authority, threatened pltf.'s employers that those of pltf.'s fellow employees who were members of the union would strike unless pltf. was dismissed. The employer thereupon dismissed pltf.:—*Held*: the threat to cause a strike was within the class of acts which defts. B. & V., were authorised to do, & being made for the benefit of the union, the union was liable.—*NOLAN v. SOUTH AUSTRALIAN LABOURERS UNION*, [1910] S. A. L. R. 85.—AUS.

**1201 iv. — — —.]—BLACKMORE v. GAS EMPLOYEES' UNION** (1916), 16 S. R. N. S. W. 323; 33 N. S. W. N. 129.—AUS.

**1201 v. — — —.]—SOUTHAN v. GROUNDS** (1916), 16 S. R. N. S. W. 274; 33 N. S. W. N. 114.—AUS.

**1200. — — —.]—An assocn. of traders in a particular district were bound by a rule which provided that "on an employee leaving an employer, who is a member of the assocn., the employer shall, if so desirous, report same to the secretary, who shall advise all the members, & no other member of the assocn. shall employ or supply him for twelve months." Pltf., a traveller, left the employment of W., the secretary of the assocn., & entered the service of H., another member, to whom he transferred customers whom he had secured for W. W. called a meeting of the assocn. & reported the matter. At the meeting H. was persuaded by W. & other members to give pltf. notice to terminate his employment. His dismissal was not obtained by any illegal means, i.e., coercion, intimidation, threats or undue influence. In an action by pltf. against W. & the other officials of the assocn. for damages & an injunction to restrain them from interfering with him in his calling:—*Held*: pltf. had no cause of action against defts.—*DAVIES v. THOMAS*, [1920] 2 Ch. 189; 89 L. J. Ch. 338; 123 L. T. 450; 84 J. P. 201; 36 T. L. R. 571; 64 Sol. Jo. 529, C. A.**

*Annotations:—Rejd. Hodges v. Webb*, [1920] 2 Ch. 70. *Mentd. Said v. Butt*, [1920] 3 K. B. 497.

**1201. — Threat—To call strike.]—MOGUL S.S. Co. v. MCGREGOR, GOW & Co., No. 51, *ante*.**

**1202. — — —.]—ALLEN v. FLOOD, No. 1164, *ante*.**

**1203. — — —.]—QUINN v. LEATHEM, No. 1179, *ante*.**

**1204. — — —.]—By an indenture of apprenticeship a firm of stone masons contracted to teach pltf., who was twenty-five years of age, the trade of a mason. By becoming parties to the rules of deft. trade union the firm had contracted not to take apprentices over sixteen years of age. In order to compel the firm to comply with this latter contract defts. threatened to withdraw the workmen employed by the firm if pltf. was taught the trade of a mason; in consequence of this the firm broke their contract with pltf.:—*Held*: pltf. was entitled to maintain an action against defts., for defts. had knowingly & for their own ends procured the commission of an actionable wrong, & had procured it by the use of illegal means, & it was immaterial that they seemed to have acted in good faith & in the best interests of their society.—*READ v. FRIENDLY SOCIETY OF OPERATIVE STONEMASONS OF ENGLAND, IRELAND & WALES*, [1902] 2 K. B. 732; 71 L. J. K. B. 994;**

**1201 vi. — — —.]—AUSTRALIAN COMMONWEALTH SHIPPING BOARD v. FEDERATED SEAMEN'S UNION OF AUSTRALASIA** (1925), 35 C. L. R. 462; 31 Argus L. R. 97.—AUS.

**1201 vii. — — —.]—Damages are recoverable against a trade union & the members thereof in an action by employers of workmen when, by means of threats, abusive language, & a system of espionage, the workmen are induced to break their contracts of employment with the employers, & other workmen are prevented from entering into the employment in their stead.—*KRUG FURNITURE Co. v. BERLIN UNION OF AMALGAMATED WOODWORKERS* (1903), 23 C. L. T. 170; 5 O. L. R. 463; 2 O. W. R. 282.—CAN.**

**1201 viii. — — —.]—COOPER & SONS v. MACFARLANE** (1879), 6 R. (Cl. of Sess.) 683.—SCOT.

**1201 ix. — — —.]—RUSSELL & Co. v. IRON SOCIETY OF BOILERMAKERS & UNITED & STEEL SHIPBUILDERS** (1907), 15 S. L. T. 118.—SCOT.

87 L. T. 493; 51 W. R. 115; 19 T. L. R. 20; 47 Sol. Jo. 29, C. A.

*Annotations*.—*Apld.* South Wales Miners' Federation v. Glamorgan Coal Co., [1905] A. C. 239. *Consd.* Smithies v. National Asscn. of Operative Plasterers, [1909] 1 K. B. 310. *Apld.* Larkin v. Long, [1915] A. C. 814. *Refd.* Bulcock v. St. Anne's Master Builders' Federation (1902), 19 T. L. R. 27; Pratt v. British Medical Asscn., [1919] 1 K. B. 244.

1205. ————]—*WHEATLEY v. PADON* (1904), 48 Sol. Jo. 459, D. C.

1206. ————]—*GASKELL v. LAN-CASHIRE & CHESHIRE MINERS' FEDERATION*, No. 1248, *post*.

1207. ————]—*SCRUTTON, LTD. v. LEWIS* (1913), *Times*, Jan. 16, C. A.

1208. ————]—*Pltf.*, a cigar maker in the employment of a co., sued *defts.*, who were in the same employment, for damages & an injunction to restrain them from inducing her employers to cease to employ her. *Pltf.* was a member of the Independent Cigar Makers' Union. *Def't. B.* & the other employees were members of the Cigar Makers' Mutual Asscn. When *pltf.* entered into the employment B. asked her if she belonged to the asscn. She replied that she did not. B. said, "You'll have to join next week or we won't work with you." A week later *pltf.* was asked if she had joined, & on her answering in the negative B. said, "You can't work here." *Pltf.* replied, "You can't sack me. Mr. Phineas Phillips took me on; he alone can sack me." B. thereupon said, "Then we'll strike." *Defts.* then went to Mr. Phineas Phillips, who thereafter said to *pltf.*, "My workpeople refuse to work with you, & will go on strike if you don't join; you'll have to go." Mr. Phineas Phillips at the trial stated that B. said that *pltf.* had refused to join their union & that their union instructed them that if she stayed they would not stay there. He said that he felt compelled to discharge her, as he did not care to see his employees go out. The county ct. judge held that there was no evidence of a threat to go to the jury & non-suited *pltf.*:—*Held*: the county ct. judge was right in so holding.

It was not suggested that *defts.* had done anything illegal in giving the notice determining the contract. . . . It was simply a warning given by *defts.* to their employer without any violence or anger of their resolution to leave his employ (*VAUGHAN WILLIAMS, L.J.*).—*SANTEN v. BUSNACH* (1913), 29 T. L. R. 214; 57 Sol. Jo. 226, C. A.; *revg.* S. C. *sub nom.* *SANKEN v. BUSNACH* (1912), 28 T. L. R. 515, D. C.

*Annotations*.—*Distd.* Valentine v. Hyde, [1919] 2 Ch. 129. *Consd.* Hodges v. Webb, [1920] 2 Ch. 70. *Refd.* Pratt v. British Medical Asscn., [1919] 1 K. B. 244.

1209. ————]—*HODGES v. WEBB*, No. 1240, *post*.

1210. ————]—*WHITE v. RILEY*, No. 1242, *post*.

1211. ————]—*To do lawful act.*]—*HODGES v. WEBB*, No. 1240, *ante*.

1212. ————]—*Inducement not to continue an employment is illegal only if it is exercised by illegal means.*

A branch of a musicians' trade union having expelled *pltf.* from the union passed a resolution of Feb. 2, 1919, that as *pltf.* was now a non-member of the union the members of the branch would not, after Mar. 3, 1919, play with him, & any member so doing would be treated as a non-member. On Feb. 7, 1919, the passing of this

resolution was notified by the secretary of the branch to the manager & also to the musical director of the cinema where *pltf.* was employed. The enforcement of this resolution was suspended during correspondence & further meetings, & ultimately, on Apr. 21, 1919, the secretary of the branch wrote to inform *pltf.'s* employer that the resolution of Feb. 2 would be acted upon, whereupon *pltf.*, who had on Feb. 15, 1919, received from his employer a fortnight's notice of dismissal, was instantly dismissed. In an action by *pltf.* against the secretary & members of the branch committee alleging threats & coercion by them & asking for an injunction to restrain them from individually or collectively interfering with his right to dispose of his labour as he would:—*Held*: the simple notification to the employer of an intention to do a lawful act, or lawful acts, whether on behalf of an individual or of a number of persons, could not properly be described as the use of illegal means against the person employed, & the action failed.—*WOLSTENHOLME v. ARISS*, [1920] 2 Ch. 403; 89 L. J. Ch. 395; 123 L. T. 741; 64 Sol. Jo. 585; 84 J. P. Jo. 266.

1213. ————]—*DAVIES v. THOMAS*, No. 1200, *ante*.

1214. ————]—*Coercion or undue influence.*]—*DAVIES v. THOMAS*, No. 1200, *ante*.

*Effect of 1906 Act.*]—*See Sect. 8, post.*

SUB-SECT. 4.—COMBINATION TO PREVENT PARTIES ENTERING INTO CONTRACTUAL RELATIONSHIP.

1215. *Whether acts tortious—Tending to destruction or deterioration of property.*]—*Defts.* who were officers of a trades union, gave notice to workmen, by means of placards & advertisements, that they were not to hire themselves to *ptf's.* pending a dispute between the union & *ptf's.* The bill prayed an injunction to restrain the issuing of the placards & advertisements, alleging that by means thereof *defts.* had, in fact, intimidated & prevented workmen from hiring themselves to *ptf's.*, & that *ptf's.* were thereby prevented from continuing their business, & the value of their property was seriously injured & materially diminished:—*Held*: the acts of *defts.* as alleged by the bill, amounted to crime, & ct. would interfere by injunction to restrain such acts, inasmuch as they also tended to the destruction or deterioration of property.—*SPRINGHEAD SPINNING CO. v. RILEY* (1868), L. R. 6 Eq. 551; 37 L. J. Ch. 889; 19 L. T. 64; 32 J. P. 531; 16 W. R. 1138.

*Annotations*.—*Overd.* Prudential Asscn. v. Knott (1875), 10 Ch. App. 142. *Refd.* Thorley's Cattle Food Co. v. Massan (1877), 6 Ch. D. 582; Temperton v. Russell, [1893] 1 Q. B. 435. *Mentd.* Dixon v. Holden (1869), L. R. 7 Eq. 488; Mulken v. Ward (1872), L. R. 13 Eq. 619; Dockrell v. Dougall (1898), 78 L. T. 840.

*Jurisdiction of court as to injunction where acts tends to destruction of property.*]—*See INJUNCTION*, Vol. XXVIII., p. 475, Nos. 813–815.

1216. ————]—*Mere inducement not to serve another.*]—*MCLELLA v. UNITED SOCIETY OF DRILLERS* (1905), *Times*, Feb. 17, C. A.

1217. ————]—*Materiality of motive.*]—By their statement of claim *ptf's.* alleged that *defts.* combined with others to prevent them carrying on their trade, by inducing third persons not to deal with them:—*Held*: (1) this did not violate any right of *ptf's.*, & therefore the statement of claim disclosed no cause of action.

1213 I. ————]—*CHAPLIN v. YOUNG* (1911), 31 N. Z. L. R. 214.—*N.Z.*

1214 I. ————]—*Coercion or undue influence.*]—*GRAHAM v. KNOTT* (1908), 14 B. C. R. 97.—*CAN.*

1214 II. ————]—*BLANCHET. MC-GINLEY* (1912), 31 N. Z. L. R. 807.—

*N.Z.*

1214 III. ————]—*MILLER v. COLLETT, SMITH v. COLLETT* (1913), 32 N. Z. L. R. 994.—*N.Z.*

*Sect. 7.—Torts arising out of trade union operations: Sub-sects. 4 & 5.]*

(2) The intention is immaterial if the acts themselves are not wrongful & merely to say they are unlawful does not make them so (BIGHAM, J.).

(3) Given the confederacy, the motive & purpose make all the difference (PHILLIMORE, J.).—*BOOTS v. GRUNDY* (1900), 82 L. T. 769; 48 W. R. 638; 16 T. L. R. 457; 44 Sol. Jo. 552, D. C.

1218. — — — **Mallce.**] — **TEMPERTON** v.  
**RUSSELL**, No. 1185, *ante*.

**1219.** ——— ——— **Onus of proof.]—**  
**McELREA v. UNITED SOCIETY OF DRILLERS (1905),**  
*Times*, Feb. 17, C. A.

1220. — — — Promotion of trade interest.]—  
HAILE v. LILLINGSTONE (1891), 35 Sol. Jo. 792.

**1221.** — — — — —.]—WORKMAN & ARMY & NAVY AUXILIARY Co-OPERATIVE SUPPLY, LTD. v. LONDON & LANCASHIRE FIRE INSURANCE CO. (1903), 19 T. L. R. 360; 47 Sol. Jo. 405.

*Annotation* :—**Mentd.** Jordy v. Vanderpump (1920), 64 Sol. Jo. 324.

1222. ———.]—DENABY & CADEBY  
MAIN COLLIERIES, LTD. v. YORKSHIRE MINERS'  
ASSOC., No. 994. *ante*.

1223. [REYNOLDS v. SHIPPING FEDERATION, LTD., 1924]—A federation comprising nearly all the shipowners of this country entered into an agreement with N. trade union that the members of the federation should employ on their ships as seamen & firemen persons belonging to that union. In pursuance of this agreement the N. union issued a special card to each of its members, & the shipowners instructed their ships' officers to employ no one who did not possess this card. The object of the agreement was to secure a supply of men who submitted to the decisions of the National Maritime Board, a body formed to establish "a single source of supply of sailors & firemen controlled by employers & employed." The agreement was entered into by reason of the formation of a rival trade union called the A. union, which refused to join the National Maritime Board or be bound by its decisions as to rates of pay, terms of employment, etc. Pltf. belonged to the A. union & failed to obtain the employment on a ship as greaser because he had not the necessary card & refused to join the N. union so as to procure one:—*Held*: as the agreement was entered into not from a malicious desire to inflict loss on an individual or class of individuals, but from a desire to advance the business interests of employers & employed alike by maintaining the advantages of collective bargaining & control, it was not unlawful, & no action for conspiracy was maintainable by pltf.—REYNOLDS v. SHIPPING FEDERATION, LTD., [1924] 1 Ch. 28; 93 Ll. J. Ch. 70; 130 L. T. 341; 39 T. L. R. 710; 68 Sol. Jo. 61.

*Annotation* :—**Refd.** *Sorrell v. Smith*, [1925] A. C. 700.

1224. — — — — —.]—SORRELL v. SMITH, No.  
1183, *ante*.

1225. — Acts without justification—Resulting in damage.]—QUINN v. LEATHER, No. 1179, *ante*.

**1226.** — [—]—[—].—(1) Two or more persons, such as the officers of a trade union, who by virtue of their position, have special power to carry out their design, are not justified in combining to prevent, & in fact preventing, a workman who is or has been a member of the union from obtaining any employment in his trade or calling, to his injury, merely with the object of enforcing payment of a debt due from him to the union. Not

only are such persons themselves liable to the workman for the injury so caused by them, but the union is also itself liable for the wrongful acts committed by them as its agents.

(2) A combination of two or more persons, without justification, to injure any workman by inducing employers not to employ him or continue to employ him, is, if it results in damage to him, actionable. What is a justification must depend upon the circumstances of the particular case.

(3) Even if a single individual who, by virtue of his position or influence, has power to carry out his design, sets himself to the task of preventing, & succeeds in preventing, a man from obtaining or holding employment in his calling, to his injury, by reason of threats to or special influence upon the man's employers, or would be employers & the design was to carry out some spite against the man, or had for its object the compelling him to pay a debt, or any similar object not justifying the acts against the man, then that individual is liable to the man for the damage consequently suffered.—GIBLAN v. NATIONAL AMALGAMATED LABOURERS' UNION OF GREAT BRITAIN & IRELAND, [1903] 2 K. B. 600; 72 L. J. K. B. 907; 89 L. T. 386; 19 T. L. R. 708. (C. A.)

*Annotations* — As to (1) **Refd.** *Airey v. Weighill* (1905), 49 Ch. 270; *Malcolm, Brunner v. Waterhouse* (1908), 24 T. R. 554; *Valentine v. Hyde*, [1919] 2 Ch. 129. Sorrell *v. Smith*, [1925] A. C. 700. As to (2) **Distd.** *Davies v. Thomas*, [1920] 1 Ch. 217. As to (3) **Consd.** *Conway v. Wade*, [1908] 2 K. B. 814. **Distd.** *Warc & Previle v. Motor Trade Assocn.*, [1921] 3 K. B. 240. **Refd.** *Pratt v. British Medical Assocn.*, [1919] 1 K. B. 844; *Hodges v. Webb*, [1920] 2 Ch. 70. *Generally*, **Refd.** *White v. Riley*, [1921] 1 Ch. 1.

1227. — Acts to enforce recovery of debt to union—Liability of union & individual members thereof.]—GIBLIAN v. NATIONAL AMALGAMATED LABOURERS' UNION OF GREAT BRITAIN & IRELAND, No. 1226. *ante*.

**SUB-SECT. 5.—“STOP LISTS” AND “BLACK LISTS.”**

1228. Whether act tortious—Protection of trade interest.]—JENKINSON *v.* NIELD (1892), 8 T. L. R. 540. D. C.

**Annotations:—***Consd. Flood v. Jackson*, [1895] 2 Q. B. 21.  
*Distd. Trollope v. London Building Trades Federation*  
(1895), 72 L. T. 342.

**1229.** — [—]—In consequence of a dispute with reference to an alleged preferential employment of non-union men by a building firm, a trade union published a poster headed "Trollope's Black List," containing the names of non-union men employed by the firm. Upon motion for an interlocutory injunction to restrain the publication, it was decided by the judge that the publication was a purely malicious act within the lines laid down by LORD FIELD in *Mogul Steamship Co. v. MacGregor*, No. 51, *ante*, & that therefore an interlocutory injunction must be granted:—*Held*: a *prima facie* case had been established that defendants were doing more than was in fact necessary for their own protection; & therefore the order for an interlocutory injunction ought not to be interfered with.—TROLLOPE & SONS v. LONDON BUILDING TRADES FEDERATION (1895), 72 L. T. 342; 11 T. L. R. 280, C. A.; *subsequent proceedings* (1896), 12 T. L. R. 373.

**Annotations:**—**Apld.** *Newton v. Amalgamated Musician's Union* (1896), 40 Sol. Jo. 716. **Refd.** *Lyons v. Wilkins*, [1896] 1 Ch. 811; *Taff Vale Ry. v. Amalgamated Soc. of Ry. Servants*, [1901] A. C. 426; *Pratt v. British Medical Assocn.* (1918), 120 L. T. 41.

PART VII. SECT. 7. SUB-SECT. 5.

1228 l. *Whether act tortious—Protection of trade interest.*—MITCHELL v. WOODS (1906). 4 W. L. R. 371.—CAN.

1228 II. ———.]—BARR V. MUSSELBURGH MERCHANTS' ASSOCN., [1912] S. C. 174; 49 Sc. L. R. 102; [1912] 2 S. L. T. 204.—SCOT.

**204.—SCOT.**



**1230.** ———.]—**NEWTON v. AMALGAMATED MUSICIANS' UNION** (1896), 12 T. L. R. 623; 40 Sol. Jo. 716.

**1231.** ———.]—**WARE & DE FREVILLE, LTD. v. MOTOR TRADE ASSOCN.,** No. 1264, *post*.

**1232.** ———.]—Pltfs. had been members of the Motor Trade Asscn., of which the members were not permitted to sell certain motor cars except at certain prices. The asscn. sent a person to buy a car from pltfs., & on the ground that their price regulations had been infringed by the transaction, & that pltfs. refused to pay the sum in the nature of a fine to the association's indemnity fund, the asscn. caused the name of pltfs. to be published in their "stop" list so as to prevent pltfs. from obtaining supplies of goods from dealers or manufacturers. In an action against the officials of the association pltfs. applied for an *interim* injunction to restrain them from publishing the name of pltfs. in the "stop" list:—*Held*: there was no *prima facie* case for granting an injunction, & the action must go to trial.—**AUTO-MART (LONDON), LTD. v. CHILTON** (1927), 43 T. L. R. 463.

**1233.** ——— **No illegal means employed.**—Pltfs. sued defts. for damages for conspiracy, & alternatively, for money had & received by defts. to the use of pltfs., on the ground that the money had been obtained from them by duress. The action was tried by AVORY, J., & a jury, & at the conclusion of pltfs.' case defts. submitted that there was no case to go to the jury. The judge overruled that objection, whereupon defts. elected to call no evidence, & the jury returned a verdict for £132 & judgment was given for pltfs. for that sum. Pltfs. & defts. were all members or officials of the M. Trade Asscn., which was an asscn. composed of manufacturers, agents, & dealers in motor cars, formed with the object of encouraging & protecting the motor industry in the United Kingdom & of insuring that all members of the trade should deal fairly with each other. One of the matters it endeavoured to deal with was to prevent the agents who sold motor cars for manufacturers from selling motor cars at prices either above or below the manufacturers' list prices. The asscn. endeavoured to enforce the list price by putting those who contravened it on a "stop list," the effect of which would be that no member of the asscn. would supply goods to the named person, or to any one who supplied him with the protected goods. Pltfs. were a firm of motor agents & dealers who had been members of the M. Trade Asscn. for some years. In Jan. 1926, it came to the notice of the asscn. that pltfs. had transgressed one of the rules of the asscn. by selling a motor car at a price below the list price. In fact they had been induced to do so by an agent of the asscn., to whom they sold a motor car at the full list price, but included in that price a full year's tax, about £9, & some other minor matters. One of the partners in pltf. firm attended before the stop list committee of the asscn., with notice of the charge against him, & the committee informed him, by letter of Mar. 18, 1926, that if he would pay £200, buy back the car sold at its list price, & insert a signed undertaking in the journal of the asscn., he would not be put on the stop list. He assented on Mar. 22, but got the fine altered to payment in two instalments. On Mar. 24 he sent the asscn. a cheque for £332, being £225 for the re-purchase of the car; £7 the cost of the undertaking; & £100 for the first instalment, the balance to be paid in three months. Before the second instalment became payable the Ct. of Criminal Appeal decided in *R. v. Denyer*, No. 1234, *post*, that to obtain money

by a threat to put on the stop list was criminal. Pltfs. thereupon refused to pay the second instalment, & ultimately issued a writ against defts. The M. Trade Asscn. had no express power to demand an apology or an undertaking for future conduct from a member who undersold:—*Held*: the judge should have withdrawn the case from the jury because the evidence only showed an agreement to forbear from doing a legal act, putting pltfs. on the stop list, if pltfs. would do an act which was not unlawful, i.e. pay money which pltfs. might legally pay & the asscn. might receive; & such an agreement was not a conspiracy; there being neither unlawful end nor unlawful means.—**HARDIE & LANE, LTD. v. CHILTON**, [1928] 2 K. B. 306; 97 L. J. K. B. 539; 139 L. T. 275; 44 T. L. R. 470, C. A.

*Annotation*:—*Reid*. Lord Chief Justice's Note (1928), 20 Cr. App. Rep. 185.

**1234. Right to demand money**—In consideration of withholding name from "stop list."—An asscn., formed to watch over & protect the interests of manufacturers, wholesale retailers & users of motor goods, had by its bye-laws power to place upon a stop list published by the asscn. the name of any person who was proved to its satisfaction to have offered, advertised or sold any motor vehicle or motor goods at a price above or below the manufacturers' fixed price lists, & no member of the asscn. was allowed to supply any motor goods to any person whose name was on the stop list. The asscn. usually offered any person who had offended as an alternative to inclusion in the stop list an opportunity to give an undertaking not to offend again & to pay a sum of money to the asscn. Applt. was the servant of the asscn. & superintendent of its stop list. R., who was the proprietor of a garage but not a member of the asscn., & who had sold a tyre & offered to sell a motor car at a certain price, appeared before the asscn. on a charge of selling motor goods below list prices. Applt. in the performance of his duty as the superintendent of the asscn.'s stop list wrote to R. on Jan. 14, 1926, that at a meeting of the asscn. it was resolved "that you be offered an alternative of inclusion in the stop list of payment of £250 to the indemnity fund of this asscn. & publication of the enclosed form of undertaking in Motor Commerce. Please therefore let me have two cheques, one for £250 made payable to this asscn., & one for £7 made payable to Motor Commerce, together with the enclosed form of undertaking duly signed on or before Monday next, 18th inst., otherwise I shall have no option but to include your name in the stop list, which must be in the printer's hands by that date." R. did not sign the undertaking or pay the money demanded, & his name accordingly appeared in the stop list published in the issue of Motor Commerce of Jan. 23. Applt. was charged under Larceny Act, 1916 (c. 50), s. 29 (1), of uttering a letter knowing the contents thereof, demanding money with menaces without reasonable or probable cause, & convicted.

It did not follow that if the asscn. had the right to put the name of a person upon the stop list it had also the right to demand money from him as the price of not doing so.—*R. v. DENYER*, [1926] 2 K. B. 258; 95 L. J. K. B. 699; 134 L. T. 637; 42 T. L. R. 452; 28 Cox, C. C. 163; 19 Cr. App. Rep. 93, C. C. A.

*Annotations*:—*Consd.* **AUTO-MART (LONDON) v. CHILTON** (1927), 43 T. L. R. 463. *Obtd.* **HARDIE & LANE v. CHILTON**, [1928] 2 K. B. 306. *Reid*. Lord Chief Justice's Note (1928), 20 Cr. App. Rep. 185.

**1235.** ———.]—**HARDIE & LANE, LTD. v. CHILTON**, No. 1233, *ante*.

*See* Sect. 7.—*Torts arising out of trade union operations : Sub-sects. 5, 6 & 7. Sect. 8 : Sub-sect. 1.]*

**1236. Measure of damages.]**—TROLLOPE v. LONDON BUILDING TRADES FEDERATION (1890), 12 T. L. R. 373.

**SUB-SECT. 6.—OFFENCES UNDER CONSPIRACY AND PROTECTION OF PROPERTY ACT, 1875 (c. 86).**

*See* CRIMINAL LAW, Vol. XV., pp. 765-769, Nos. 8209-8238.

**SUB-SECT. 7.—IMMUNITY IN RESPECT OF TRADE DISPUTES.**

*See* Sect. 8, sub-sect. 3, *post*.

**SECT. 8.—THE TRADE DISPUTES ACTS, AND ANALOGOUS COMMON STATUTES.**

**SUB-SECT. 1.—IN GENERAL.**

*See* 1906 Act, ss. 3-5 ; 1927 Act.

**1237. What amounts to trade dispute.]**—(1) In an action for damages for inducing pltf.'s employers to dismiss him, by threats that otherwise the union men would cease working, the defence was that the acts, if any, of deft. were not actionable as provided by 1906 Act, s. 3. The jury found that there was no trade dispute existing or contemplated by the men, & that deft.'s threats were uttered in order to compel pltf. to pay a union fine & to punish him for not paying it, & to prevent him from getting or retaining employment, & they gave pltf. damages :—*Held* : there was as a matter of fact evidence to justify the findings of the jury.

(2) "Trade dispute" is a familiar phrase in earlier Acts of Parliament, & is defined in this Act

[1906 Act]. I do not know that the definition is of much assistance. If this sect. [1906 Act, s. 3] is to apply there must be a dispute, however the subject-matter of it be defined. A mere personal quarrel or a grumbling or an agitation will not suffice. It must be something fairly definite & of real substance. Let me see how this alters the pre-existing law. It is clear that, if there be threats or violence, this sect. gives no protection, for then there is some other ground of action besides the ground that "it induces some other person to break a contract" & so forth. So far there is no change. If the inducement be to break a contract without threat or violence, then this is no longer actionable, provided always that it was done "in contemplation or furtherance of a trade dispute." What is the meaning of these words I will consider presently. In this respect there is a change. If there be no threat or violence, & no breach of contract, & yet there is "an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills," there again there is perhaps a change. It is not to be actionable, provided that it was done "in contemplation or furtherance of a trade dispute."

(3) I come now to the meaning of the words "an act done in contemplation or furtherance of a trade dispute." These words are not new in an Act of Parliament ; they appear in 1875 Act. I think they mean that either a dispute is imminent & the act is done in expectation of & with a view to it, or that the dispute is already existing & the act is done in support of one side to it. In either case the act must be genuinely done as described, & the dispute must be a real thing imminent or existing. I agree that the sect. cannot fairly be confined to an act done by a party to the dispute. I do not believe that was intended. A dispute may have arisen, for example, a single colliery, of which the subject is so important to the whole industry that either employers or workmen

**PART VII. SECT. 8, SUB-SECT. 1.**

**1237i. What amounts to trade dispute.]**—The term "industrial dispute" in the Constitution, s. 51 (xxxv), connotes a real & substantive difference having some element of persistency, & likely, if not adjusted, to endanger the industrial peace of the community. Such a dispute is not created by a mere formal demand & a formal refusal.—*R. v. COMMONWEALTH COURT OF CONCILIATION & ARBITRATION & MERCHANT SERVICE GUILD OF AUSTRALASIA, Ex p. TAYLOR (ALLEN) & CO., LTD., Ex p. GULF S.S. CO., LTD., Ex p. HOLYMAN (WILLIAM) & SONS, LTD. (1912), 15 C. L. R. 586.—AUS.*

**1237 ii.** —.]—The question of permitting employees to wear & display when on duty a badge indicating that they are members of a trade assoc. is an "industrial matter" within the definition of that term in Commonwealth Conciliation & Arb. Act, 1904-1911, s. 4, & there may be an "industrial dispute" in respect of such a question within the definition, & within the Constitution, s. 51 (xxxv).—*AUSTRALIAN TRAMWAY EMPLOYEES ASSOC. v. PRAIRIAN & MALVERN TRAMWAY TRUST (1913), 17 C. L. R. 680.—AUS.*

**1237 iii.** —.]—*MERCHANT SERVICE GUILD OF AUSTRALASIA v. COMMONWEALTH S.S. ASSOC. (1913), 16 C. L. R. 661.—AUS.*

**1237 iv.** —.]—In the case of a demand made by or on behalf of employees on their employers & refused or not conceded, pre-existing dissatisfaction communicated to or known

by the employers before the demand is not always a necessary element to constitute an industrial dispute or to make the demand real & genuine.—*MERCHANT SERVICE GUILD OF AUSTRALASIA v. NEWCASTLE & HUNTER RIVER S.S. CO., LTD. (1913), 16 C. L. R. 591.—AUS.*

**1237 v.** —.]—As between an organisation of employees & an employer who employs persons doing the same kind of work as is done by members of the organisation, although no members of the organisation are employed by that employer, an "industrial dispute" may exist, or if members of the organisation will probably apply to the employer for employment may be probable.—*AUSTRALIAN TIMBER WORKERS' UNION v. SHARP (JOHN) & SONS, LTD. (1919), 26 C. L. R. 302.—AUS.*

**1237 vi.** —.]—*FEDERATED CLOTHING TRADERS OF AUSTRALIAN COMMONWEALTH v. ARCHER (1919), 27 C. L. R. 207.—AUS.*

**1237 vii.** —.]—*RILEY v. ORGAN, [1921] St. R. Qd. 28.—AUS.*

**1237 viii.** —.]—Where a demand as to wages, & conditions of labour is made on behalf of its members by an organisation, registered under Commonwealth Conciliation & Arb. Act, 1904-1921, of employees in a particular industry upon a number of employers engaged in that industry, the fact that certain of those employers do not employ any members of the organisation or that all the employees of certain of the employers are satisfied with their wages & conditions of labour, does not

prevent the dispute constituted by the non-compliance with the demand from being an "industrial dispute" within the Constitution, s. 51 (xxxv), & of the Commonwealth Conciliation & Arb. Act, to which those employers are parties in respect of whom a binding award may be made by the Commonwealth Ct. of Conciliation & Arb.—*BURWOOD CINEMA, LTD. v. AUSTRALIAN THEATRICAL & AMUSEMENT EMPLOYEES' ASSOC. (1925), 35 C. L. R. 528 ; 31 Argus L. R. 282.—AUS.*

**1237 ix.** —.]—Where it is shown that there is (1) dissatisfaction among the workers employed in a mine ; (2) adoption by an industrial union of proposed conditions of employment which a branch of the union of which the dissatisfied workers are members desire to see introduced ; (3) the forwarding by the union to the employer of the proposed conditions ; & (4) refusal by the employer to agree to them, there is a dispute or difference between the union & the employer which is an "industrial dispute" within the Industrial Conciliation & Arb. Act, 1905. *The Colliery Employees Federation v. Brown (3 C. L. R. 255) distinguished.*—*CHOMWELL & BARNOCKBURN COLLIERY CO., LTD. v. BOARD OF CONCILIATION FOR THE INDUSTRIAL DISTRICT OF OTAGO & SOUTHLAND & OTAGO COAL MINERS' INDUSTRIAL UNION OF WORKERS (1906), 25 N. Z. L. R. 986.—N.Z.*

**i.** — "Extending beyond limits of any one State."—An industrial dispute extending beyond the limits



may think a general lock out or a general strike is necessary to gain their point. Few are parties to, but all are interested in, the dispute. If, however, some meddler sought to use the trade dispute as a cloak beneath which to interfere with impunity in other people's work or business, a jury would be entirely justified in saying that what he did was done in contemplation or in furtherance, not of the trade dispute, but of his own designs, sectarian, political, or purely mischievous, as the case might be. These words do, in my opinion, in some sense import motive, & in the case I have put a quite different motive would be present. If the jury so found, the meddler would not be protected by 1906 Act, s. 3. But I have no doubt that an act done with a single eye to the dispute, "in contemplation or in furtherance" of it, would not be actionable on any of the grounds specified in the sect. (LORD LOREBURN, C.).—*CONWAY v. WADE*, [1909] A. C. 506; 78 L. J. K. B. 1025; 101 L. T. 248; 25 T. L. R. 779; 53 Sol. Jo. 754, II. L.

*Annotations*.—As to (1) *Consd.* *Dallimore v. Williams & Jesson* (1912), 29 T. L. R. 67. *Distd.* *Dallimore v. Williams & Jesson* (1914), 30 T. L. R. 432; *White v. Itley*, [1921] 1 Ch. 1; *Sorrell v. Smith*, [1925] A. C. 700. As to (2) *Consd.* *Hodges v. Webb*, [1920] 2 Ch. 70; *Ware & De Freville v. Motor Trade Assn.*, [1921] 3 K. B. 40. *Refd.* *Sanken v. Busnach* (1912), 28 T. L. R. 515; *Larkin v. Long*, [1915] A. C. 814; *Pratt v. British Medical Assn.*, [1919] 1 K. B. 244. As to (3) *Consd.* *Vacher v. London Soc. of Compositors*, [1912] 3 K. B. 547. *Appl.* *Scrutton v. Lewis* (1913), *Times*, Jan. 16. *Generally.* *Consd.* *Valentine v. Hyde*, [1919] 2 Ch. 129. *Refd.* *Davies v. Thomas*, [1920] 2 Ch. 189.

1238. — Not confined to dispute between employer & workmen—Or workmen & workmen.]—A "trade dispute" within the meaning of that expression in the 1906 Act is not confined to a dispute between an employer & his workmen or between the workmen themselves.—*DALLIMORE v. WILLIAMS & JESSON* (1912), 29 T. L. R. 67; 57 Sol. Jo. 77, C. A.; *subsequent proceedings* (1914), 30 T. L. R. 432, C. A.

1239. — Dispute between workmen & employer.]—*GASKELL v. LANCASHIRE & CHESHIRE MINERS' FEDERATION*, No. 1248, *post*.

1240. — —.]—In 1919 pltf. was employed as a "charge hand" by a firm of contractors on work on which most of the workmen belonged to deft's. trade union. The trade union to which pltf. belonged was not recognised by deft's. union, which regarded the members of pltf. union as non-unionists. This policy was being strongly opposed by the Masters' Asscn., & for some time past the question of the employment with unionists of non-unionist workmen in general & of pltf's. union in particular had been under discussion between defts. union & the masters, accompanied in one instance by a strike which was still unsettled. Deft., who was the London district secretary of his union, was sent to the place of

pltf.'s employment to investigate complaints about the employment of non-unionists, with power to call out the union men. Deft. asked pltf. to join his union, & on pltf.'s refusal deft. called out all the union men, thereby stopping the work, & subsequently informed pltf. that similar trouble would occur on any job on which pltf. was employed. Deft. told the manager of the co. for which the work was being done that no further work would be done until pltf. had been removed. When the Masters' Asscn. subsequently inquired whether the job would be allowed to proceed if pltf. were discharged, deft. replied that if pltf. were discharged & a member of deft's. union put in charge, the job could proceed at once. The contractors accordingly dismissed pltf., who then brought this action for damages, & an injunction on the ground that deft. had by threats to pltf. or his employers illegally induced, coerced & procured his dismissal.—*Held*: (1) there was an existing trade dispute between employers & workmen connected with the employment of pltf. & others within 1906 Act, s. 5 (3), & the members of deft's. union were called out by him in furtherance of such trade dispute; (2) there were no threats or coercion used by deft. against pltf. or his employers for which deft. could be sued either by him or them.

(3) In the absence of conspiracy or unlawful combination, a firm or even emphatic statement by one person that unless the person whom he is addressing consents to the adoption of a particular course which he can lawfully take, the speaker will do that which he is lawfully entitled to do, is not a threat for which the speaker can be held liable at law.—*HODGES v. WEBB*, [1920] 2 Ch. 70; 89 L. J. Ch. 273; 123 L. T. 80; 36 T. L. R. 311.

*Annotations*.—As to (1) *Apprvd.* *White v. Riley*, [1921] 1 Ch. 1. As to (2) *Refd.* *Hardie & Lane v. Chilton*, [1928] 2 K. B. 306. As to (3) *Apprvd.* *Ware & De Freville v. Motor Trade Assn.*, [1921] 3 K. B. 40. *Consd.* *Sorrell v. Smith*, [1925] A. C. 700.

1241. — Dispute between employer & association of employers.]—Resp., a stevedore, employed labourers who were members of a trade union. On his refusing to join an asscn., formed by the other stevedores of the port, some of the stevedores & appts., who were officials of the union, in order to force resp. to join the asscn., induced his labourers to cease working for him, & so caused him pecuniary loss.

In an action by resp. against appts. & certain others claiming damages on the ground that they had unlawfully combined to induce his labourers to break their contracts with him, appts. pleaded (*inter alia*) as a defence that the acts complained of were done by them in contemplation or furtherance of a trade dispute within 1906 Act, ss. 3 & 5 (3).—*Held*: as the dispute was one between an individual stevedore & an asscn. of stevedores,

of any one State is an industrial dispute which at a given moment exists in more than one State, that is, extends over an area which embraces territory of more than one State.—*BUILDERS LABOURERS' CASE* (1914), 18 C. L. R. 224.—AUS.

g. — —.]—*TRAMWAYS CASE* (No. 2) (1914), 19 C. L. R. 43.—AUS.

h. — —.]—Members of an organisation of employees who were employed by certain owners of coal mines in New South Wales & in Victoria struck work in sympathy with employees of the New South Wales Railway Comrs. who also had struck work. Except as stated there was no dispute between the mine owners & their employees.—*Held*: the strike of the members of the organisation was

not an offence against Commonwealth Conciliation & Arb'n. Act, s. 6, since it was not on account of an industrial dispute extending beyond one State.—*METROPOLITAN COAL CO. OF SYDNEY, LTD. v. AUSTRALIAN COAL & SHALE EMPLOYEES' FEDERATION* (1917), 24 C. L. R. 85.—AUS.

k. — —.]—*Time for application for decision thereon*.—*INCE BROTHERS v. FEDERATED CLOTHING & ALLIED TRADES UNION, CAMBRIDGE MANUFACTURING CO. PROPRIETARY, LTD. v. FEDERATED CLOTHING & ALLIED TRADES UNION* (1924), 34 C. L. R. 457.—AUS.

l. What amounts to "strike".—*MCPHERSON v. PERTH ELECTRIC TRAMWAYS, LTD.* (1910), 12 W. A. L. R. 192.—AUS.

m. — —.]—The cessation of work by employees in combination, & the refusal, under a common understanding to continue to work, would amount to a strike in the ordinary meaning of the word, but not in the special cases included in the definition of "strike" in Act No. 17, 1912, s. 5.—*CLYDE ENGINEERING CO., LTD. v. AMALGAMATED SOCIETY OF ENGINEERS*, [1925] N. S. W. Ind. Arb'n. Cas. 48.—AUS.

n. Commonwealth Court of Conciliation & Arbitration.—*Right of President to state case for opinion of High Court*.—*MERCHANT SERVICE GUILD OF AUSTRALASIA v. NEWCASTLE & HUNTER RIVER S.S. CO., LTD.* (1913), 16 C. L. R. 591.—AUS.

o. — —.]—*Right to amend plaint*.—A plaint before the Commonwealth

**Sect. 8.—The Trade Disputes Acts, and analogous colonial statutes: Sub-sects. 1, 2 & 3.]**

it was not a "trades dispute" which is defined by the Act to be a dispute between employers & workmen or workmen & workmen, & therefore the statutory defence failed.—**LARKIN v. LONG**, [1915] A. C. 814; 84 L. J. P. C. 201; 113 L. T. 337; 31 T. L. R. 405; 59 Sol. Jo. 455, H. L.

**Annotations:—***Consid.* **Valentine v. Hyde**, [1919] 2 Ch. 129. *Distd.* **Sorrell v. Smith**, [1925] A. C. 700. *Refd.* **Pratt v. British Medical Assocn.**, [1919] 1 K. B. 244; **Ware & De Freville v. Motor Trade Assocn.**, [1921] 3 K. B. 40.

**1242. — Dispute between workmen & workmen.]—**(1) The mere statement to an employer by a number of workmen that they will not work with another workman, & that if that workman is retained in the employers service they will strike, even where they have knowledge that he cannot dispense with their services, does not, of itself, constitute an unlawful threat, & is therefore not, of itself, actionable.

(2) A dispute between workmen & workmen concerning which trade union workmen shall belong to is connected with the employment or non-employment of a particular workman & is a trade dispute within 1906 Act, s. 5 (3), & is, in the absence of threats, protected by 1906 Act, s. 3.—**WHITE v. RILEY**, [1921] 1 Ch. 1; 89 L. J. Ch. 628; 124 L. T. 168; 36 T. L. R. 849; 64 Sol. Jo. 725, C. A. **Annotations:—***As to* (1) *Refd.* **Sorrell v. Smith**, [1925] A. C. 700; **Hardie & Lane v. Chilton** (1928), 97 L. J. K. B. 539. *As to* (2) *Distd.* **Royal London Mutual Inseo. Soc. v. Williamson** (1921), 37 T. L. R. 742.

**1243. — Connected with employment or conditions of labour.]—**(1) The immunity conferred 1906 Act, s. 3, on certain acts done in contemplation or furtherance of a trade dispute does not apply where those acts are coupled with coercion on the employer.

(2) Coercion may exist though no threat is used or warning given, e.g. a determined request by the representatives of a powerful trades union may amount to coercion.

(3) A dispute between workmen & workmen is not a trade dispute within the Act unless it is directly connected with the existing employment or non-employment, terms of employment or

conditions of labour of some person. For instance, a demand that a particular workman shall join a local trades union to which practically all his fellow workmen belong is not necessarily a trade dispute within the Act, though non-compliance with the demand will probably lead to his non-employment in the immediate future.—**VALENTINE v. HYDE**, [1919] 2 Ch. 129; 88 L. J. Ch. 326; 120 L. T. 653; 35 T. L. R. 301; 63 Sol. Jo. 890.

**Annotations:—***As to* (2) *Consid.* **Ware & De Freville v. Motor Trade Assocn.**, [1921] 3 K. B. 40. *Refd.* **Davies v. Thomas**, [1920] 1 Ch. 217. *As to* (3) *Expld.* **Hodges v. Webb**, [1920] 2 Ch. 70. *Distd.* **White v. Riley**, [1921] 1 Ch. 1. *Generally*, *Mentd.* **Sald v. Butt**, [1920] 3 K. B. 497.

**1244. — As to membership of trade union.]—****VALENTINE v. HYDE**, No. 1243, *ante*.

**1245. What amounts to trade—Presentations of histrionic performance to public—For profit.]—****BRIMFLOV v. CASSON**, No. 1194, *ante*.

**1246. Necessity for trade dispute—General strike.]—****NATIONAL SAILORS' & FIREMEN'S UNION OF GREAT BRITAIN & IRELAND v. REED**, No. 1002, *ante*.

**SUB-SECT. 2.—ACTS IN CONTEMPLATION OR FURTHERANCE OF TRADE DISPUTE.**

*See* 1906 Act, s. 3.

**1247. Inducement to break contract or interference with trade, business or employment—Whether actionable—Acts accompanied by threats or violence.]—****CONWAY v. WADE**, No. 1237, *ante*.

**1248. — — — — —.]—**Members of a trade union were agitating to compel all their fellow miners to join the union. An agent of the union informed the manager that, unless plf's. joined, the pit would stop. The judge held that this did not involve a threat to cause a strike, & dismissed an action by plf's. for wrongfully causing their employer to break their contracts:—*Held*: (1) there was no ground for upsetting this finding; (2) the acts, even if wrongful, were done during a trade dispute within 1906 Act, & the action was not maintainable; (3) a union is not excluded from the protection of the Act because some of the things which it does are not among the authorised objects of trade unions as defined by the Act.—(**GASKELL**

**INDUSTRIAL UNION** (1925), 35 C. L. R. 449; 31 Argus L. R. 117.—**AUS.**

**b. — — — — —.]—****WALSH v. SAINSBURY** (1925), 36 C. L. R. 464; 31 Argus L. R. 343.—**AUS.**

**c. — — — — —.]—***Reduction of output by employees.]—***MYHILL v. FEDERATED MOULDERS (METAL) UNION**, No. 1, [1925] N. S. W. Ind. Arbn. Cas. 5.—**AUS.**

**d. — — — — —.]—***Whether all strikes illegal before reference to arbitration.]—***McQUEIRIE** (1908), 16 O. L. R. 522; 11 O. W. R. 358.—**CAN.**

**e. — — — — —.]—***Liability for aiding strikers.]—***R. v. NELSON** (1910), 9 E. L. R. 210.—**CAN.**

**f. — — — — —.]—****VULCAN IRON WORKS CO. v. WINNIPER LODGE NO. 174 IRONMOULDERS' UNION** (1911), 16 W. L. R. 647; 21 Man. L. R. 473.—**CAN.**

**g. — — — — —.]—***General sympathetic strike.]—*The immunity provided by Code, s. 590, does not extend to a general "sympathetic" strike.—**R. v. RUSSELL (Man.)**, [1920] 1 W. W. R. 624; 51 D. L. R. 1.—**CAN.**

**h. Liability for "picketing & besetting."]—****COTTER v. OSBORNE (Man.)** C. R., [1911] 1 A. C. 137.—**CAN.**

**k. — — — — —.]—****DICK v. STEPHENSON (Alta.)**, [1923] 3 W. W. R. 761.—**CAN.**

**l. — — — — —.]—**The distribution of handbills on the street in front of & near

Ct. of Conciliation & Arbn. alleging the existence of a dispute between the parties might after the hearing of the plaint had begun be amended so as to allege in addition or as an alternative that there was a pending, threatened or probable dispute between the parties.—**FELT HATTERS' CASE** (1914), 18 C. L. R. 88.—**AUS.**

**p. — — — — —.]—***Words to be construed in their ordinary meaning.]—*The phrase "Industrial disputes extending beyond the limits of any one State" in the Constitution, s. 51 (xxv), is to be construed according to the natural & ordinary meaning of the words as understood at the time of the passing of Commonwealth of Australia Constitution Act.—**HOLMAN'S CASE** (1914), 18 C. L. R. 273.—**AUS.**

**q. Jurisdiction of Industrial Court.]—**The Industrial Ct. has jurisdiction over a dispute between a municipal corp'n. & its employees who are employed in such municipal work as sanitation, scavenging, road work, carters, etc.—*Re AN INDUSTRIAL DISPUTE, PORT PIRIE CORPN. v. ARNOLD*, [1916] S. A. L. R. 161.—**AUS.**

**PART VII. SECT. 8, SUB-SECT. 2.**

**r. Illegal strike—Liability of trade union for acts of agents.]—****WADDELL v. AUSTRALIAN WORKERS' UNION** (1922), 30 C. L. R. 570.—**AUS.**

**t. — — — — —.]—***Refusal to act on award.]*

—In an industry governed by a Federal award, decisions adverse to the employees were given upon various claims submitted by them to the Federal tribunal constituted for the purpose of determining disputes in the industry. Certain of the employees thereupon, at a meeting held for the purpose, determined not to resume work & did not, in fact, resume their work:—*Held*: the employees should be deemed guilty of a default of public duty in aiding an illegal strike.—**MOUNT KEMBLA COLLIERIES, LTD. v. CRAIG**, [1921] N. S. W. Ind. Arbn. Cas. 102.—**AUS.**

**a. — — — — —.]—**The effect of Commonwealth Conciliation & Arbn. Act, 1904–1921, s. 6a, is to prohibit the doing of anything in the nature of a lock-out or strike in relation to an industrial dispute, which has been settled by an award of the Commonwealth Ct. of Conciliation & Arbn. by any person or organisation bound by, or entitled to the benefit of, that award; & the sect. does not prohibit members of an organisation of employees which is bound by an award from striking by ceasing in concert to work while in the employment of an employer who is not bound by the award, such ceasing to work being in consequence of an industrial difference between the organisation & that employer only.—**METROPOLITAN GAS CO. v. FEDERATED GAS EMPLOYEES'**

v. LANCASHIRE & CHESHIRE MINERS' FEDERATION (1912), 28 T. L. R. 518; 56 Sol. Jo. 719, C. A.

*Annotations:—As to (1) Held.* Valentine v. Hyde, [1919] 2 Ch. 129; Hodges v. Webb, [1920] 2 Ch. 70.

1249. ————]—SCRUTTON, LTD. v. LEWIS (1913), *Times*, Jan. 16, C. A.

1250. ————]—WHITE v. RILEY, No. 1242, *ante*.

1251. ————]—Where there is an existing arrangement between a recognised trade union & an employers' assocn. that non-unionists shall not be employed in the mines of a district, & at one of those mines the officials of the recognised trade union in pursuance of the settled policy of their union advise or instruct & thereby procure a workman charged with giving out safety lamps not to let miners who are members of an unregistered union have their lamps, or when they obtain from some of those miners the lamps issued to them without employing violence or threats of violence, their action, if taken for the purpose of preserving peace in the mine by preventing non-unionists from working there, is done in contemplation of a trade dispute within 1906 Act, s. 3, & does not constitute a breach of 1875 Act, s. 7.—FOWLER v. KIBBLE, [1922] 1 Ch. 487; 91 L. J. Ch. 353; 126 L. T. 566; 38 T. L. R. 271; 66 Sol. Jo. 267, C. A.

1252. ————]—Acts accompanied by coercion.—What amounts to coercion.—VALENTINE v. HYDE, No. 1243, *ante*.

1253. ————]—Libel.—UNITED COUNTY THEATRES, LTD. v. DURRANT (1909), *Times*, July 6, C. A.

1254. ————]—Effect of existence of malice.—Employees who were on good terms with their employer & had contracted to serve him at a fixed wage, were ordered by the officials of their union to strike for higher wages.

In an action claiming damages for inducing the employees to break their contracts, defts. officials of the union, pleaded that the acts of which pltf. complained were acts done by them "in contemplation or furtherance" of a trade dispute within 1906 Act, s. 3, & therefore, the action was not maintainable against them:—*Held*: the defence was a good defence, notwithstanding that the motive prompting the acts was not altogether free from malice, since the existence of malice did not render the protection of the statute for acts done in contemplation or furtherance of a trade dispute void.—DALLMORE v. WILLIAMS & JESSON (1914), 30 T. L. R. 432; 58 Sol. Jo. 470, C. A.

1255. ————]—Inducement to misapply money.—1906 Act, s. 3, does not prohibit an action against the officers of a trade union for an injunction restraining them from inducing their members,

in furtherance of a trade dispute, to commit a breach of contract by handing over to the trade union money collected by them on behalf of their employers.—ROYAL LONDON MUTUAL INSURANCE SOCIETY, LTD. v. WILLIAMSON (1921), 37 T. L. R. 742.

1256. ————]—Contract must be contract of employment.—BRIMELOW v. CASSON, No. 1194, *ante*.

### SUB-SECT. 3.—IMMUNITY OF TRADE UNION FROM ACTION OF TORT.

*See* 1906 Act, s. 4.

1257. Whether limited to acts in contemplation or furtherance of trade dispute.—(1) 1906 Act, s. 4, is general in its application, & protects a trade union against any action of tort & is not limited to a tortious act arising out of a trade dispute. Therefore, an action for malicious prosecution will not lie against a trade union.

(2) An action will lie against a member or official of a trade union for a tort committed by him when acting on behalf of himself & all other members of the union 1906 Act, s. 4, only preventing him from being so sued as to render the trade union as such & its funds liable for the tortious act.—BUSSY v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS & BELL (1908), 24 T. L. R. 437.

*Annotation:—As to (1) Distd.* Rickards v. Bartram (1908), 25 T. L. R. 181.

1258. ————]—A trade union which published a newspaper was sued for damages in respect of an alleged libel published therein. There was no trade dispute going on or in contemplation at the time of the publication of the alleged libel:—*Held*: the action was maintainable & 1906 Act, s. 4, had no application.—RICKARDS v. BARTRAM (1908), 25 T. L. R. 181.

*Annotation:—Apprvd.* Vacher v. London Soc. of Compositors, [1912] 3 K. B. 547.

1259. ————]—(1) 1906 Act, s. 4 (1), which provides that "an action against a trade union . . . in respect of any tortious act alleged to have been committed by or on behalf of the trade union shall not be entertained by any ct.," is general in its application & is not limited to tortious acts committed in contemplation or furtherance of a trade dispute; & any such action will be summarily dismissed upon an application under R. S. C., Ord. 25, r. 4.

(2) 1875 Act, s. 3, provided that an agreement or combination of two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers &

a place of business with the object of lessening the number of persons patronising such business & because of the refusal of the proprietor to employ "union" men at certain wages:—*Held*: to be a violation of Criminal Code, s. 501 (f), even assuming that the proprietor's contract with the "union" obliged him as a matter of contract to employ only union men.—R. v. BLACKSAIL, R. v. HANOSJAA, [1925] 4 D. L. R. 247; [1925] 3 W. W. R. 314; 44 Can. Crim. Cas. 286.—CAN.

m. ————]—RENESS v. R., [1926] 3 D. L. R. 669; [1926] S. C. R. 499; 46 Can. Crim. Cas. 14.—CAN.

n. ————]—SCHUBERG v. LOCAL NO. 118 INTERNATIONAL ALLIANCE THEATRICAL STAGE EMPLOYEES, [1927] 2 D. L. R. 20; [1927] 1 W. W. R. 545; 47 Can. Crim. Cas. 213; 38 B. C. R. 130.—CAN.

o. ————]—Trade Disputes Act, 1906, in legalising "peaceful picketing," does not confer a right to enter upon private property against the will

of the owner.—LARKIN v. BELFAST HARBOUR COMRS., [1908] 2 I. R. 214.—IR.

p. ————]—TOPIN v. FERON (1909), 43 I. L. T. 190.—IR.

q. ————]—An unlawful entry on another's premises cannot be justified under Trades Disputes Act, s. 2 (1).—MCUSKER v. SMITH, [1918] 2 I. R. 432.—IR.

r. ————]—BARTON v. HARTEN, [1925] 2 I. R. 37.—IR.

t. ————]—CLARKSON v. STUART (1894), 22 R. (Ct. of Sess.) (J.) 5.—SCOT.

a. ————]—WILSON v. RENTON, [1909] S. C. (J.) 32; 47 Sc. L. R. 209; [1909] 1 S. L. T. 30; 6 Adam, 166.—SCOT.

b. Inducement to break contract or interference with trade, business or employment.—Whether actionable.—LONG v. LARKIN, [1914] 2 I. R. 329.—IR.

c. ————]—RUDDOCK v. SIN-

CLAIR, [1925] N. Z. L. R. 677.—N.Z.

d. ————]—When the old laws against combinations of workmen were abolished, their place was supplied by an Act which declares it to be a crime punishable by imprisonment for any workman to obstruct, disturb, or intimidate those who choose to remain in the service of their masters. We have here a combination of men agreeing to compel their masters to dismiss all workmen who refuse to join them, & link all the rest of the men in the union to refuse to work for that master. If this is not obstruction & intimidation I do not know what it is (LORD COCKBURN).—MENNIE v. BLAIR (1852), 14 Dunl. (Ct. of Sess.) 359; 1 Stuart, 297.—SCOT.

e. ————]—MILLIGAN (JOHN & CO., LTD. v. Ayr Harbour Trustees, [1915] S. C. 937; 52 Sc. L. R. 748; [1915] 2 S. L. T. 69.—SCOT.

f. ————]—SLOAN v. MACMILLAN, [1921] S. C. (J.) 1.—SCOT.

*Sect. 8.—The Trade Disputes Acts, and analogous colonial statutes: Sub-sect. 3. Sects. 9 & 10: Sub-sect. 1.]*

workmen should not be indictable as a criminal conspiracy, if the act when committed by one person would not be a crime. It thus struck, in the particular instance mentioned, at the principal of the criminal law of conspiracy to the effect that it is the "agreement or combination" which is the essence of the crime, & that therefore, or combination or agreement to do, or procure to be done, something not in its own nature criminal if done by one person, might still be a crime (LORD ATKINSON).

(3) The qualification common to 1906 Act, ss. 1, 2 & 3 is here introduced to qualify to that extent the statutory liability imposed upon the trustees, who may not be members of the union at all (LORD ATKINSON).—*VACHER & SONS, LTD. v. LONDON SOCIETY OF COMPOSITORS, [1913] A. C. 107; 82 L. J. K. B. 232; 107 L. T. 722; 29 T. L. R. 73; 57 Sol. Jo. 75, II. J.*

*Annotations:—As to (1) Consd. Hardie & Lane v. Chiltern, [1928] 1 K. B. 663. Reid. Gaskell v. Lancashire & Cheshire Miners' Federation (1912), 28 T. L. R. 518; Valentine v. Hyde, [1919] 2 Ch. 129. Generally, Mentd. National Telephone Co. v. Postmaster General, [1913] A. C. 546; Re Boaler, [1915] 1 K. B. 21; London Corp'n. v. Associated Newspapers, [1915] A. C. 674; Sage v. Elcholz, [1919] 2 K. B. 171; Bowling v. Camp (1923), 128 L. T. 342; Henshall v. Porter, [1923] 2 K. B. 193; The Ituaapehu (1926), 136 L. T. 146.*

**1260. Protection extends only to union as whole.—No shield to individual members.]—BUSSY v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS & BELL, No. 1257, ante.**

**1261. Libel.]—UNITED COUNTY THEATRES, LTD. v. DURRANT (1909), Times, July 6, C. A.**

**1262. Effect of some rules providing for illegal object.]—GASKELL v. LANCASHIRE & CHESHIRE MINERS' FEDERATION, No. 1248, ante.**

**1263. Action for breach of contractual rights—Under union rules.]—PARR v. LANCASHIRE & CHESHIRE MINERS' FEDERATION, No. 1041, ante.**

**1264. Action for injunction to restrain future tortious act.]—(1) Pltfs. were dealers in motor cars. Deft. assocn. was a trade union certified as such under 1913 Act, s. 2 (3), & other defts. were respectively the chairman & members of the council of the assocn. The assocn. consisted of manufacturers of motor vehicles & motor goods, & the manufacturers fixed certain prices for their goods, above or below which they deemed it undesirable that their goods should be sold. In order to enforce this object, the bye-laws of the assocn. provided that on proof to the satisfaction of the council that any person has offered or advertised or sold any proprietary price maintained article at a price above or below the price fixed in the protected list, the council might place the name of that person on a list called the "stop list," & give notice thereof to all members of the assocn., with an exception in the case of contracts existing at the date of admission of the proprietor to membership; & the council might also place on the stop list the name of any person who should supply proprietary price maintained articles to, or have any trade relations in regard to those**

articles with, any person whose name was on the stop list. The bye-laws further provided that no member of the assocn. should supply any proprietary price maintained article to, or have any trade relations in regard thereto with, any person whose name was on the stop list. Pltfs., who were not members of the assocn., on behalf of a customer advertised for sale a new motor car, which was being manufactured by a member of the assocn. & was to be delivered shortly, at a price exceeding the price fixed by the manufacturer. The council of the assocn., after hearing pltfs., decided to place their name on the stop list, & published the stop list with pltfs.' name, among others, on it in the trade journals. Pltfs. thereupon brought an action for an injunction to restrain defts. from publishing pltfs.' name in the stop list, or from publishing any libel of pltfs. injuriously affecting them in their business. The libel complained of was the publication of the stop list, which stated that "in pursuance of its policy of conserving the fixed retail prices scheduled in its protected lists, the Motor Trade Assocn. issues the subjoined stop list under power of its bye-laws. . . . Until further notice the following parties are not to be supplied directly or indirectly with any of the articles on the protected lists of this Assocn." Then followed the names & addresses:—*Held*: the publication of pltfs.' name in the stop list was done by defts. *bonâ fide* in the protection of trade interests of the members of the assocn., & therefore was not unlawful, & an injunction should not be granted.

(2) 1906 Act, s. 4, which provides that "an action against a trade union . . . in respect of any tortious act alleged to have been committed by or on behalf of the trade union shall not be entertained by any ct."—applies to an action for an injunction to restrain the future commission of a tortious act.—*WAKE & DE FREVILLE, LTD. v. MOTOR TRADE ASSOCN., [1921] 3 K. B. 40; 90 L. J. K. B. 949; 125 L. T. 265; 37 T. L. R. 213; sub nom. WAKE & DE FREVILLE, LTD. v. MOTOR TRADE ASSOCN., 65 Sol. Jo. 239, C. A.*

*Annotations:—As to (1) Föld. Sorrell v. Smith, [1925] A. C. 700. Consd. R. v. Denyer, [1926] 2 K. B. 258. Föld. Auto-Mart (London) v. Chilton (1927), 43 T. L. R. 463. Consd. Hardie & Lane v. Chilton, [1928] 2 K. B. 306. Reid. Hardie & Lane v. Chiltern, [1928] 1 K. B. 663.*

**1265. Immunity applicable to union of masters or workmen.]—HARDIE & LANE, LTD. v. CHILTERN (CHILTON), No. 1289, post.**

## SECT. 9.—AGENCY BETWEEN CENTRAL UNION AND BRANCHES.

**1266. Whether agency between central union & branches—Determination by rules.]—ALREY v. WEIGHILL (1905), 49 Sol. Jo. 279, C. A.**

**1267. ———.]—DENABY & CADEBY MAIN COLLIERIES, LTD. v. YORKSHIRE MINERS' ASSOCN., No. 994, ante.**

**1268. ———.]—SMITHIES v. NATIONAL ASSOCN. OF OPERATIVE PLASTERERS, No. 1197, ante.**

## PART VII. SECT. 9.

**1266 i. Whether agency between central union & branches—Determination by rules.]—WATERSIDE WORKERS FEDERATION OF AUSTRALIA v. BURGESS BROTHERS, LTD. (1916), 21 C. L. R. 129.—AUS.**

**g. Right of craft brotherhood—To revoke charter of local union.]—There is no inherent right in the executive board of an international craft brother-**

hood to revoke the charter of a local union thereof for violations of its constitution. Such right must be found in the constitution in order to be exercisable.—*MORRISON v. INGLES, INGLES v. WOODSIDE (B. C.), [1920] 2 W. W. R. 50.—CAN.*

**h. ———.]—A revocation of the charter of a local union of an international craft brotherhood:—*Held*: to be illegal because done with-**

out right or done under a right improperly exercised, as no opportunity had been given to the local union of defending itself.—*BRITISH COLUMBIA TELEPHONE CO. v. MORRISON, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION No. 213, & LOCAL UNION No. 310, OF SUCH BROTHERHOOD, [1921] 1 W. W. R. 694.—CAN.*

**k. Right of society registered in**

1269. — Authority to branch to act as agents.] — *AIREY v. WEIGHILL* (1905), 49 Sol. Jo. 279, C. A.

1270. — — — — —.] — *DENABY & CADEBY MAIN COLLIERIES, LTD. v. YORKSHIRE MINERS' ASSOCN., No. 994, ante.*

1271. — — — — —.] — *SMITHIES v. NATIONAL ASSOCN. OF OPERATIVE PLASTERERS, No. 1197, ante.*

1272. — Provision of strike pay by central union.] — *DENABY & CADEBY MAIN COLLIERIES, LTD. v. YORKSHIRE MINERS' ASSOCN., No. 994, ante.*

1273. — Request to central union to sanction strike.] — *SMITHIES v. NATIONAL ASSOCN. OF OPERATIVE PLASTERERS, No. 1197, ante.*

1274. Authority of officials—Limited to authority lawfully exercisable by union.] — *WALTERS v. GREEN, No. 1278, post.*

1275. Liability of official—Breach of contract—Necessity for knowledge of contract.] — *SMITHIES v. NATIONAL ASSOCN. OF OPERATIVE PLASTERERS, No. 1197, ante.*

1276. Position of district delegate—Whether union or officials bound by acts of delegate.] — *Pltfs. were shipwrights, employed by the day by a firm of ship repairers to execute repairs to the woodwork of a ship. Some ironworkers who were members of a trade union were employed on the ironwork of the ship, & they objected to working in the same yard with pltfs. upon the ground that the latter had previously worked at ironwork on ships in another yard. The district delegate of the union was called in by the ironworkers, & he informed the employers that the ironworkers would leave off work unless pltfs. were discharged that day. In consequence of that threat pltfs. were discharged at the end of the day. Pltfs. brought an action against the district delegate, the chairman, & the general secretary of the union, for maliciously, & with intent to injure pltfs., inducing the employers to discharge pltfs., & to refuse to engage them again. The jury found that the district delegate acted maliciously, & that pltfs. had been injured thereby, but that other two defts. did not authorise his acts:—*Held*: the district delegate was not the agent or servant of the members of the union, so as to render each member liable for his acts, & therefore, the chairman & general secretary were not, merely by reason of their being members of the union, liable in the action.—*FLOOD v. JACKSON, [1895] 2 Q. B. 21; 64 L. J. Q. B. 665; 73 L. T. 161; 59 J. P. 388; 43 W. R. 453; 11 T. L. R. 335; 39 Sol. Jo. 396; 14 R. 397, C. A.; reversed, without touching this point, sub nom. ALLEN v. FLOOD, [1898] A. C. 1, H. L.**

*Annotations*:—*Distd. Linaker v. Pilcher* (1901), 70 L. J. K. B. 396. *Reid, Wolstenholme v. Ariss, [1920] 2 Ch. 403. Mentd. Lyons v. Wilkins, [1896] 1 Ch. 811; Ajello v. Worley, [1898] 1 Ch. 274; Huttley v. Simmons, [1898] 1 Q. B. 181; Taylor v. Cambridge Gazette Co. & Kilner (1898), 42 Sol. Jo. 832; Charnock v. Court (1899), 68 L. J. Ch. 550;*

*England—To sue branch officers in Canada—For account & return of assets.*—*SELLOR'S v. WOODRUFF, [1925] 4 D. L. R. 646; 57 O. L. R. 582. —CAN.*

*J. Jurisdiction of Court of Session.*—The National Union of Dock Labourers consisted of combinations of dock labourers which were enrolled by the executive of the union as local branches. The Union had its registered office in England, but had a branch office in Glasgow. It was registered in England, but a copy of its rules was recorded in Scotland.—*Held*: the union was subject to the jurisdiction of the Ct. of Session.—*MACKENDRICK v. NATIONAL UNION OF*

*DOCK LABOURERS IN GREAT BRITAIN & IRELAND, [1911] S. C. 83; 48 Sc. L. R. 17; [1910] 2 S. L. T. 215.—SCOT.*

#### PART VII. SECT. 10, SUB-SECT. 1.

*1. General rule.*—A trade union has the same right to sue as any other organisation except as limited by statute.—*AMALGAMATED SOCIETY OF CARPENTERS & JOINERS v. SINCLAIR, [1925] 2 D. L. R. 774; 56 O. L. R. 559.—CAN.*

*m. Unable to sue in registered name—At common law.*—A trade union registered under 45 Vict. No. 19, not being a corporate body, cannot sue at common law in its registered name.—*RAILWAY WORKERS & GENERAL LA-*

*Hubbuck v. Wilkinson, Heywood & Clark, [1899] 1 Q. B. 86; Lyons v. Wilkins, [1899] 1 Ch. 255; Boots v. Grundy (1900), 82 L. T. 789; Quinn v. Leatham, [1901] A. C. 495; Read v. Friendly Soc. of Operative Stonemasons of England, Ireland & Wales, [1902] 2 K. B. 732; Briggs v. Thornton (1903), 73 L. J. Ch. 301; Gibian v. National Amalgamated Labourers' Union of Great Britain & Ireland, [1903] 2 K. B. 600; South Wales Miners Federation v. Glamorgan Coal Co., [1905] A. C. 239; Denaby & Cadeby Main Collieries v. Yorkshire Miners' Asscn., [1906] A. C. 384; Conway v. Wade (1908), 78 L. J. K. B. 14; National Phonograph Co. v. Edison Bell Consolidated Phonograph Co., [1908] 1 Ch. 335; Wilford v. West Riding of Yorkshire County Council, [1908] 1 K. B. 685; Santen v. Busnach (1913), 29 T. L. R. 214; Re Ainsworth, Finch v. Smith, [1915] 2 Ch. 96; Stott v. Gamble, [1916] 2 K. B. 504; Pratt v. British Medical Asscn., [1919] 1 K. B. 244; Valentine v. Hyde, [1919] 2 Ch. 129; Davies v. Thomas, [1920] 2 Ch. 189; Hodges v. Webb, [1920] 2 Ch. 70; Ware & De Freyville v. Trade Asscn., [1921] 3 K. B. 40; White v. Riley, [1921] 1 Ch. 1; Sorrell v. Smith, [1925] A. C. 700; Hardie & Lane v. Chilton, [1928] 2 K. B. 306.*

*Liability of union for tort of agent.*—*See 1906 Act, s. 4; & Sect. 8, ante.*

#### SECT. 10.—PROCEEDINGS BY AND AGAINST TRADE UNIONS.

##### SUB-SECT. 1.—RIGHT TO SUE.

1277. One or more members of masters' association—Right to sue on behalf of themselves & other members—Injunction to restrain commission of offence.]—*Qu.*: whether one or more members of a masters' asscn. can sue on behalf of themselves & all other the members of their union for an injunction to restrain the committing of an offence under 1875 Act, & from inducing persons to break their contracts.—*CHARNOCK v. COURT, [1899] 2 Ch. 35; 68 L. J. Ch. 550; 80 L. T. 564; 63 J. P. 456; 47 W. R. 633; 43 Sol. Jo. 416.*

*Annotation*:—*Apld. Walters v. Green, [1899] 2 Ch. 696.*

1278. Persons subject to compulsion by illegal means—Right to sue as co-plaintiffs.]—(1) Persons whom it is sought to compel by illegal means to act not in accordance with the views they would themselves adopt, but in accordance with the views of others, may join as co-pltfs. in an action against those seeking to coerce them.

(2) Trade unions are legal bodies, & *prima facie* their officers cannot be presumed to have authority to do or sanction anything other than that which trade unions may lawfully do (*STIRLING, J.*).—*WALTERS v. GREEN, [1899] 2 Ch. 696; 68 L. J. Ch. 730; 81 L. T. 151; 63 J. P. 742; 48 W. R. 23; 15 T. L. R. 532.*

1279. — — — — — Injunction to restrain inducement to break contracts.]—*CHARNOCK v. COURT, No. 1277, ante.*

1280. Right to sue in registered name.] —*TAFF VALE RY. CO. v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS, No. 1295, post.*

1281. Head trustees of union—Right to sue branch trustees—Threatened misapplication of funds.]—*COPE v. CROSSINGHAM, No. 1128, ante.*

*BOURERS ASSOCN. v. UNITED LA BOURERS PROTECTIVE SOCIETY (1914), 14 S. R. N. S. W. 1; 31 N. S. W. W. N. 12.—AUS.*

*n. Right to apply for writ of mandamus.*—*R. v. RATHMINES URBAN DISTRICT COUNCIL, [1928] 1 I. R. 260.—IR.*

*o. Refusal of secretary-treasurer to hand over funds—Trade union may sue for recovery.*—The secretary-treasurer of an unregistered trade union was removed from office but declined to hand over to his successor a fund which he held for payment of certain expenses & salaries. In an action on behalf of the union for the amount:—*Held*: though some of the purposes of

**Sect. 10.—Proceedings by and against trade unions:**  
**Sub-sects. 1, 2 & 3.]**

**1282. Proceedings under Workmen's Compensation Act, 1906 (c. 58).—Right of union to take proceedings in workman's name.]—**It is not right for a trade union to start proceedings [under above Act] in the workman's name without his authority, although the trade union may help the workman (*LORD COZENS-HARDY, M.R.*).—*BOBBEY v. CROSBIE (W. M.) & Co., LTD.* (1915), 84 L. J. K. B. 856; 8 B. W. C. C. 230, C. A.; *reversd.* without affecting this point, 85 L. J. K. B. 239, H. L.

**1283. —Right of union to assist workman.]—***BOBBEY v. CROSBIE (W. M.) & Co., LTD.*, No. 1282, *ante*.

**1284. Member of union or representative.—Right to sue for sick pay.]—***BURKE v. AMALGAMATED SOCIETY OF DYERS*, No. 1051, *ante*.

**Maintenance by trade union.]—***See ACTION*, Vol. I., p. 84, Nos. 682, 683.

**SUB-SECT. 2.—LIABILITY TO BE SUED.**

**1285. Members of trade protection society.—Members passing resolution authorising expenditure.]—**By the rules of a society "for the protection of trade" the professed object of which was to watch the progress of measures through Parliament affecting the trade interests, & to protect its members from the practices of the fraudulent & dishonest, the committee had the appointment of the printer & stationer, to be elected from among the members of the society; & to the committee was to be referred the defraying of the expenses, & the applying & disposing of the moneys of the society. It was also provided by the rules, that the sum of £10 should be left in the secretary's hands to meet the current expenses; but that all orders for the payment of money should be drawn by secretary upon the treasurer at a committee meeting. *Pltf.* was appointed printer & stationer to the society, & shortly afterwards paid his subscription. *Defts.*, who were members of the committee passed the resolutions for the orders for printing & stationery which were supplied by *pltf.*:—*Held*: *pltf.* was not precluded by the rules from suing *defts.*, as the rules did not create a partnership between the members of the society; & it was not to be inferred from the rules that *pltf.* looked to the fund, & not to the parties who gave the orders.—*CALDICOTT v. GRIFFITHS* (1853), 8 Exch. 898; 1 C. L. R. 715; 23 L. J. Ex. 54; 17 J. P. 601; 155 E. R. 1618.

**1286. Officials of union.—Liability to be sued in representative character.—R. S. C., Ord. 51, r. 9.]—**An order may be made under above rule authorising one or more persons to defend on behalf of all persons interested, against the will of the person or persons so authorised. *Pltf.*, a member of a labour protection league, sued to enforce his rights under a rule of the league, which provided that,

in case of a member being permanently disabled by an accident, a levy should be made on the members of the league for his benefit, & applied for an order authorising the president & secretary of the league to defend on behalf of all the members. The president & secretary opposed the application:—*Held*: an order could properly be made.—*WOOD v. MCCARTHY*, [1893] 1 Q. B. 775; 62 L. J. Q. B. 373; 69 L. T. 431; 41 W. R. 523; 9 T. L. R. 447; 37 Sol. Jo. 478; 5 R. 408, D. C.

**Annotations:—***Reid. Mercantile Marine Service Assn. v. Toms*, [1916] 2 K. B. 243; *Hardie & Lane v. Chiltern*, Same *v. Same*, [1928] 1 K. B. 663.

**1287. ———.]—***Pltf.*, who carried on business as a builder, sued the officers of three trade unions, & of the joint committee of such trade unions, "as well on their own behalf as on behalf of & as representing all the members of each of the said societies & joint committee to which they respectively belong," for damages & also for an injunction to restrain the trade unions & joint committee from molesting him in the conduct of his business:—*Held*: *pltf.* was not entitled, under R. S. C., Ord. 18, r. 9, to sue *defts.* in their representative character, inasmuch as the members of the trade unions assumed to be represented by the officers of the trade unions had no such interest in the cause or matter as was contemplated by the rule.—*TEMPERTON v. RUSSELL*, [1893] 1 Q. B. 435; 62 L. J. Q. B. 300; 68 L. T. 425; 57 J. P. 518; 41 W. R. 321; 9 T. L. R. 304; 37 Sol. Jo. 303; 4 R. 302, C. A.

**Annotations:—***Consd. Bedford v. Ellis*, [1901] A. C. 1. *Reid. Wood v. McCarthy*, [1893] 1 Q. B. 775; *Flood & Taylor v. Jackson, Knight & Allen* (1895), 59 J. P. 388; *Charnock v. Court* (1899), 80 L. T. 561; *Linaker v. Pilcher* (1901), 70 L. J. K. B. 396; *Taft Vale Ity. v. Amalgamated Soc. of Uly. Servants*, [1901] A. C. 426; *Mercantile Marine Service Assn. v. Toms*, [1916] 2 K. B. 243; *Hardie & Lane v. Chiltern*, [1928] 1 K. B. 663.

**1288. ———.]—***Pltfs.* brought an action for an alleged libel published in a journal owned & managed by the Imperial Merchant Service Guild. The guild was an unincorporated body having for its objects the protection of the interests & the legal defence of captains, officers & apprentices of the merchant service. It consisted of about 15,000 members, & its business & affairs were conducted under the control & supervision of a management committee, of which the chairman vice-chairman, & secretary were members, *Pltfs.* issued the writ in the action against the chairman, vice-chairman, & secretary of the guild "sued on their own behalf & on behalf of all other members of" the guild, & applied for an order under above rule, that *defts.* should be appointed to represent all other members of the guild:—*Held*: the order ought not to be made.—*MERCANTILE MARINE SERVICE ASSOCN. v. TOMS*, [1916] 2 K. B. 243; 85 L. J. K. B. 311; 114 L. T. 124, C. A.

**Annotation:—***Apld. Hardie & Lane v. Chiltern*, Same *v. Same*, [1928] 1 K. B. 663.

**1289. ———.]—**In an action against three joint *defts.* claiming damages for conspiracy & libel, & also money had & received to *pltf.*'

the union may be illegal as being in restraint of trade the union is not thereby deprived of its right to hold a beneficial interest in the fund & to invoke the aid of the courts for its protection.—*STARR v. CHASE*, [1924] 4 D. L. R. 55; [1924] S. C. R. 495.—*CAN.*

**p. Void registration under Companies Acts.—No right to sue.]—***EDINBURGH & DISTRICT AERATED WATERS MANUFACTURERS' DEFENCE ASSOCN. v. JENKINSON & Co.* (1903), 5 F. (Ct. of Sess.) 1159.—*SCOT.*

**q. Performing Right Society.—Whether trade union.]—***PERFORMING*

*RIGHT SOCIETY, LTD. v. EDINBURGH MAGISTRATES*, [1922] S. C. 165; 59 Sc. L. R. 194.—*SCOT.*

**r. Right to sue subject to Trade Union Acts, 1871–1906.]—**The contract between an English trades union & its members is governed by the law of England when there is nothing to show that the contract is to be performed outside England. Such a trades union can sue & be sued only subject to the Trade Union Acts, 1871–1906.—*ROGERS v. UNITED SOCIETY OF BOILERMAKERS & IRON & STEEL SHIPBUILDERS*, [1910] T. L. 195.—*S. AF.*

**PART VII. SECT. 10, SUB-SECT. 2. t. Trustees cannot be sued.—Proceedings of criminal nature.]—***Ex p. McDONALD* (1919), 26 C. L. R. 156; 19 S. R. N. S. W. 256; 36 N. S. W. W. N. 48.—*AUS.*

**a. Purchase of goods on credit.—Statutory inability to buy on credit.]—***Pltf.* sued the officers & directors of a co-operative assn. incorporated under R. S. O. 1887, c. 166, for the price of goods sold on credit, the assn. being by their Act of incorporation forbidden to buy in that way.—*Held*: *pltf.* could not recover, as no action could be maintained upon an implied



use, debts. were named twice in the writ & statement of claim, (a) without any qualification, & (b) in a representative capacity, as representing an unregistered trade union, the Motor Trade Assocn., & its members. The statement of claim alleged that debts. controlled the assocn. for all practical purposes & that its funds were vested in them:—*Held*: (1) there being no community of interest between debts. & the other members of the assocn., so far as regards the subject-matter of the action or the defence to it, the case would not be brought within the provisions of R. S. C., Ord. 16, r. 9, & the claim so far as it was made against debts. in a representative capacity must be struck out & dismissed; (2) the case came within 1906 Act, sect. 4, prohibiting any action in tort against any trade union, the sect. applying equally to union of masters or of workmen or of the two.—*HARDIE & LANE, LTD. v. CHILTERN (CHILTON)*, [1928] 1 K. B. 663; 96 L. J. K. B. 1040; 138 L. T. 14; 43 T. L. R. 709; 71 Sol. Jo. 664, C. A.

**1290. Trustees of union—Action for salary.**—In an action to recover salary the trustees of a trade union are properly made debts. under 1871 Act, s. 9.—*CURLE v. LESTER* (1893), 9 T. L. R. 480.

*Annotation*.—*Reid. Hardie & Lane v. Chiltern*, [1928] 1 K. B. 663.

**1291. — Liability to be sued so as to bind union funds.**—The trustees of a trade union, appointed as provided by 1871 Act, are entitled to be indemnified out of the funds of the union in respect of a liability incurred by them by reason of a libel contained in a newspaper, of which as such trustees they are registered proprietors & which is carried on in the interests of the members of the trade union. Therefore, in an action brought against them for a libel contained in the newspaper, the trustees can be sued in their capacity of trustees so as to bind the funds of the trade union.

Looking at the rules, & at the objects of the society there disclosed there can be no question that it was within the power & objects of the society to establish & carry on the newspaper (*MATHEW, J.*).—*LINAKER v. PILCHER* (1901), 70 L. J. K. B. 396; 84 L. T. 421; 49 W. R. 113; 17 T. L. R. 256, 45 Sol. Jo. 276.

*Annotations*.—*N.F. Osborne v. Amalgamated Soc. of It. Servants*, [1909] 1 Ch. 163. *Reid. Steel v. South Wales Miners' Federation* (1907), 96 L. T. 260; *Richards v. Bartram* (1908), 25 T. L. R. 181.

**1292. — Injunction against branch trustees—Threatening to misapply funds.** *COPE v. CROSSINGHAM*, No. 1128, *ante*.

**1293. — Action for declaration as to Parliamentary levy.**—*PARR v. LANCASHIRE & CHESHIRE MINERS' FEDERATION*, No. 1044, *ante*.

**1294. Union registered under Trade Union Acts—Claim under Friendly Societies Acts—Jurisdiction of justices.**—*WHELLAN v. RODGERS* (1887), 3 T. L. R. 450, D. C.

**1295. — Liability to be sued in registered name.**—(1) A trade union, registered under 1871 & 1876 Acts, may be sued in its registered name.

The very omission from the statute of any provision authorising & directing that it shall sue & be sued in any other name than that given to it by its registration appears to me to lead to no other reasonable conclusion than that in so creating it, it was intended by the Legislature that by that

name & by no other it should be known & that for all purposes that name should be used & applied to it in all legal proceedings unless there was any other provision which militated against such a construction (*LORD BRAMPTON*).

(2) Parliament has legalised trade unions, whether registered or not (*LORD MACNAGHTEN*).

(3) A registered trade union has an exclusive right to the name in which it is registered, a right to hold a limited amount of real estate & unlimited personal estate (*LORD SHAND*).

(4) I have no doubt whatever that a trade union whether registered or unregistered may be sued in representative actions if the persons selected as debts. be persons who, from their position, may be taken fairly to represent the body (*LORD MACNAGHTEN*).—*TAFF VALE RY. CO. v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS*, [1901] A. C. 426; 70 L. J. K. B. 905; 85 L. T. 147; 65 J. P. 596; 50 W. R. 44; 17 T. L. R. 698; 45 Sol. Jo. 690, H. L.

*Annotations*.—*As to* (1) *Consd. Bloom v. National Federation of Discharged & Demobilised Sailors & Soldiers* (1918), 35 T. L. R. 50. *Reid. Gliban v. National Amalgamated Labourers' Union of Great Britain & Ireland*, [1903] 2 K. B. 600; *Yorkshire Miners' Assocn. v. Howden*, [1905] A. C. 256; *McLuskey v. Cole*, [1922] 1 Ch. 7; *Marshall Shipping Co. v. Board of Trade*, [1923] 2 K. B. 343. *As to* (3) *Reid. Glamorgan Coal Co. v. South Wales Miners' Federation*, [1903] 2 K. B. 545. *As to* (4) *Consd. Russell v. Amalgamated Soc. of Carpenters & Joiners*, [1912] A. C. 421. *Apld. Parr v. Lancashire & Cheshire Miners' Federation*, [1913] 1 Ch. 366. *Reid. Linaker v. Pilcher* (1901), 70 L. J. K. B. 396; *Bussy v. Amalgamated Soc. of Ry. Servants & Bell* (1908), 24 T. L. R. 437; *Markt v. Knight S.S. Co., Sale & Frazar v. Knight S.S. Co.*, [1910] 2 K. B. 1021; *Vacher v. London Soc. of Compositors*, [1913] A. C. 107; *Kelly v. National Soc. of Operative Printers' Assistants* (1915), 84 L. J. K. B. 2236; *Ideal Films v. Richards*, [1927] 1 K. B. 374; *Hardie & Lane v. Chiltern*, *Same v. Same*, [1928] 1 K. B. 663. *Generally*. *Reid. Airey v. Welchill* (1905), 49 Sol. Jo. 279; *Conway v. Wade*, [1908] 2 K. B. 844; *Amalgamated Soc. of Ry. Servants v. Osborne*, [1910] A. C. 87. *Mentd. Walker v. Sur*, [1911] 2 K. B. 930; *Mercantile Marine Service Assocn. v. Toms*, [1916] 2 K. B. 243.

**1296. Proper representatives of union—Representative action.**—*TAFF VALE RY. CO. v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS*, No. 1295, *ante*.

**1297. Injunction—Enumeration of persons to be bound.**—*PINK v. FEDERATION OF TRADES & LABOUR UNIONS* (1892), 8 T. L. R. 216; 36 Sol. Jo. 201.

**Effect of 1906 Act.**—*See Sect. 8, sub-sect. 3, ante*.

#### SUB-SECT. 3.—PROCEDURE.

**1298. Joinder of causes of action—Action for slander—Action for conspiracy to slander.**—Eight plffs. were members of the National Union of Railwaymen, a trade union. One was president, another the general secretary, three were assistant secretaries, & the other three were members of the executive committee. All the secretaries received salaries, & other four plffs. were paid 12s. 6d. a day, when engaged in the work of the union. Six debts. were members of the Associated Society of Locomotive Engineers & Firemen. In Oct. 1915, several debts. made speeches at various meetings of railway men, & stated that but for the conduct of plffs. at a meeting in June, 1915, the railway men would have got a

representation or warranty of authority in law to do an act; & moreover, plff. must be taken to have known of the statutory inability.—*STRUTHERS v. MACKENZIE* (1897), 28 O. R. 381.—*CAN.*

*b. In own name.*—*WILLIAMS v. LOCAL UNION No. 1562, UNITED MINE*

*WORKERS OF AMERICA*, [1919] 1 W. W. R. 217; 45 D. L. R. 150; 14 Alta. L. R. 251.—*CAN.*

*c. Cannot be sued.*—An unincorporated body, a local branch of a trade union, was named as debt. in the writ of summons, & entered an appearance:—*Held*: it was improper to sue.

—*ROBINSON v. ADAMS* (1925), 56 O. L. R. 217; [1925] 1 D. L. R. 359.—*CAN.*

**PART VII. SECT. 10. SUB-SECT. 3. d. Contents of complaint.**—*AGNEW v. ADDISON* (1892), 20 R. (Cl. of Sess.) 19.—*SCOT.*

**Sect. 10.—Proceedings by and against trade unions :  
Sub-sect. 3. Parts VIII. & IX. Sects. 1 & 2.]**

war bonus in June, 1915, instead of Oct. The statement of claim alleged that defts. conspired to injure plffs. by publishing matter defamatory of plffs. & that in pursuance of such conspiracy they published of each of plffs. in their offices defamatory statements. No special damage was alleged or proved. The jury found that four of defts. had conspired to slander plffs., & that all defts. had slandered plffs.; they awarded damages for the separate slanders, but none in respect of conspiracy. Judgment was entered for each of plffs. for the amount awarded respectively, & for a declaration that four defts. had conspired to injure plffs. by publishing slanders of them :—*Held* : the causes of action for conspiracy to slander & for the separate slanders were not improperly joined in one action, subject to the judge's power to direct separate trials of the several causes of action, if he thought them embarrassing to the several defts.—*THOMAS v. MOORE*, [1918] 1 K. B. 555; 87 L. J. K. B. 577; 118 L. T. 298, C. A.

*Annotations*.—*Reid*, Pratt v. British Medical Assocn., [1919] 1 K. B. 244; Myroft v. Sleight (1921), 90 L. J. K. B. 883; Payne v. British Time Recorder Co., [1921] 2 K. B. 1; *Simmonds v. Newport Abercrom Black Vein Steam Coal Co.*, [1921] 1 K. B. 616; *The W. H. Randall*, [1928] P. 41.

**1299. Discovery—Action for damages for conspiracy—Documents tending to incriminate.]**—In an action for damages for a conspiracy to induce workmen to break their contracts with plff. deft. cannot refuse to discover the material documents on the ground that they may tend to incriminate him.—*NATIONAL ASSOCN. OF OPERATIVE PLASTERERS v. SMITHIES*, [1906] A. C. 434; 75 L. J. K. B. 861; 95 L. T. 71; 22 T. L. R. 678, H. L.

**1300. — Privilege between solicitor & client—Letters between member & union authorities—Union assisting member in legal proceedings.]**—

A member of a trade union who had been dismissed by his employers furnished the union authorities, as required by the rules, with information in writing to enable the authorities to decide whether he was entitled to bring an action for wrongful dismissal at the expense of the union & with the assistance of their solr. The information comprised the evidence available in support of the action & the names of the witnesses. The union authorities sanctioned an action brought by the member, with their solr. acting as solr. for plff. Upon a summons for discovery taken out by defts. :—*Held* : the letters containing the information did not fall within the established rule as to the privilege between solr. & client & must be produced.—*JONES v. GREAT CENTRAL RY. CO.*, [1910] A. C. 4; 79 L. J. K. B. 191; 100 L. T. 710; 53 Sol. Jo. 428, H. L.  
*Annotation* :—*Reid*, Adam S.S. Co. v. London Assee. Corpn., [1914] 3 K. B. 1256.

**1301. — Interrogatories as to contents of documents—Documents in possession of secretary of union.]**—Dft. in an action for libel being called upon to give discovery of documents made an affidavit in which he gave in a schedule a list of documents which he said were in the possession & custody of the trade union of which he was general secretary, & as to which he stated that he had no power to produce them as they belonged to the trade union. Plff. applied for an order that he might be at liberty to interrogate dft. as to the contents of the documents scheduled to his affidavit :—*Held* : the application must be refused inasmuch as a person in the position of a servant cannot be required to answer an interrogatory asking him to give the contents of documents in the possession of his master.—*BALFOUR v. TILLET* (1913), 29 T. L. R. 332; 57 Sol. Jo. 356, C. A.

*See, generally*, DISCOVERY, Vol. XVIII.

**1302. Further & better particulars.]**—*TEMPERSON v. RUSSELL* (1893), 9 T. L. R. 319, C. A.

## Part VIII.—Trade Protection Societies.

**1303. Validity of provisions in restraint of trade.]**—*WICKENS v. EVANS*, No. 71, ante.

**1304. — —.]**—*MINERAL WATER BOTTLE EXCHANGE & TRADE PROTECTION SOCIETY v. BOOTH*, No. 980, ante.

**1305. — —.]**—Where the members of an assocn. agreed not to sell certain goods at less than a particular price for ten years, & to forfeit a penalty of £10 for each contravention of this agreement, there being no restriction as to area :—*Held* : such agreement was unreasonable both as to time & area, & was a restraint upon trade which the ct. would not enforce.—*URMSTON (TREASURER, ETC.) v. WHITELEGG* (1891), 55 J. P. 453; 7 T. L. R. 295, C. A.

*Annotations*.—*Apld*, North Western Salt Co. v. Electrolytic Alkali Co. (1912), 107 L. T. 439. *Reid*, Elliman v. Carrington (1901), 84 L. T. 858.

**1306. — —.]**—*EVANS (JOSEPH) & CO. v. HEATHCOTE*, No. 954, ante.

**1307. — —.]**—(1) The rules of an assocn. comprising substantially all the retail dealers of yeast

in a large area stated the object of the assocn. to be (a) to enable the members to meet from time to time for mutual counsel; (b) to advise the meeting of all defaulting customers; & (c) to improve the tone of the trade generally & create a more amicable feeling amongst the members; & rule 20, "on an employee leaving an employer, who is a member of the assocn., the employer shall, if so desirous, report same to the secretary who shall advise all the members, & no other member of the assocn. shall employ or supply him for twelve months." The officials of the assocn. were W., the secretary, & three other persons. D., after serving two years with W. as his traveller to obtain orders for yeast from his customers in his district, which was within the area entered the service of H., also a member of the assocn. & carrying on business in the same district, subject to a month's notice on either side to be given at any time. W., finding that D. was obtaining from his customers orders for yeast for H., convened a meeting of the assocn.

### PART VIII.

**a. General rule.]**—An agency intended to give information to shop-

keepers with a view to protect them against parties who are not likely to pay their accounts, is a legitimate object, provided it is prosecuted in a

legal manner.—*ANDREWS v. DRUMMOND & GRAHAM* (1887), 14 R. (Ct. of Sess.) 568.—*SCOT*.



which H. attended. At this meeting the attention of H. was called to rule 20 & he was asked to dismiss D. which he refused to do. After the meeting further discussions took place between some of the members, including W., & H., & eventually H. consented to give & did give D. notice determining his employment. In an action by D. against the officials of the assocn. claiming damages & an injunction to restrain them from interfering with him in his calling on the ground that they had used their position & influence as officials to bring undue pressure to bear on H. to procure his dismissal:—*Held*: rule 20 was in unreasonable restraint of trade & void, but not on that account an offence at common law.

(2) *Semble*: that assocn. was a trade union as defined by 1876 Act, s. 16, & therefore came within the protection of 1871 Act, s. 4.—*DAVIES v. THOMAS*, [1920] 1 Ch. 217; 89 L. J. Ch. 1; 122 L. T. 340; 84 J. P. 9; 36 T. L. R. 39; 64 Sol. Jo. 115; 18 L. G. R. 57; *affd.*, [1920] 2 Ch. 189, C. A.

*Annotations*:—*Generally*, *Refd.* *Hodges v. Webb*, [1920] 2 Ch. 70. *Mentd.* *Said v. Butt*, [1920] 3 K. B. 497.

**1308. Validity of bye-laws regulating conduct.**—An assocn. formed to promote & protect the cotton trade in L. made a bye-law rendering a member liable to expulsion for disreputable conduct in dealings with members of associated societies. Pltfs. having sold cotton, the bills of lading of which were forged to a firm, members of a German assocn., with whom the L. Assocn. had agreed that refusal to arbitrate upon questions in dispute should constitute disreputable conduct, refused to submit the questions between themselves & such firm to arbn., & a foreign award was made against pltfs. for payment of a large sum of money. By German law an "enforcement order" is necessary before an award can be enforced. The L. Assocn. having threatened to expel pltfs. under their bye-law:—*Held*: the bye-law & agreement were within the powers of the assocn., & not being oppressive on the minority of its members, were *intra vires*; also the assocn. was not a trade union or illegally registered as a co.—*MERRIFIELD, ZIEGLER & Co. v. LIVERPOOL COTTON ASSOCN., LTD.* (1911), 105 L. T. 97; 55 Sol. Jo. 581.

*Annotation*:—*Mentd.* *Harrop v. Harrop*, [1920] 3 K. B. 386.

**1309. Membership—Resignation—Withdrawal of resignation—Re-election.**—The members of a

voluntary trade protection society became such by election & paid an annual subscription in return for which they were entitled to legal assistance for the purposes of their trade & to some other benefits. By the rules the members incurred no obligation beyond the payment of their subscriptions. The rules contained no provision as to the retirement or expulsion of members:—*Held*: a member was entitled to retire at any time without any consent of the other members that on the receipt by the society of a letter from a member stating his wish to retire he at once ceased to be a member without the necessity of the acceptance by the society of his resignation; that he could not before acceptance withdraw his resignation; & he could not become a member again without re-election.—*FINCH v. OAKE*, [1896] 1 Ch. 409; 65 L. J. Ch. 324; 73 L. T. 716; 60 J. P. 309; 12 T. L. R. 156; 40 Sol. Jo. 224, C. A.

**1310. Whether a trade union.**—MINERAL WATER BOTTLE EXCHANGE & TRADE PROTECTION SOCIETY v. BOOTH, No. 980, *ante*.

**1311.** —.—*CHAMBERLAIN'S WHARF, LTD. v. SMITH*, No. 1036, *ante*.

**1312.** —.—*MERRIFIELD, ZIEGLER & Co. v. LIVERPOOL COTTON ASSOCN., LTD.*, No. 1308, *ante*.

**1313.** —.—*EVANS (JOSEPH) & Co. v. HEATHCOTE*, No. 954, *ante*.

**1314.** —.—*DAVIES v. THOMAS*, No. 1307, *ante*.

**1315.** —.—A society consisting of authors, composers, publishers, & proprietors of musical, literary, & dramatic works, was formed with the object of enforcing on behalf of its members the rights & remedies of the owners of the copyright in such works as regards public performances of them. The society was registered as a co. & by the arts. of assocn. members of the society who were publishers undertook to assign to it their interest, present & future, in the performing rights of any works published by them, & the society thereby acquired the sole right to licence or forbid the public performance of any such works:—*Held*: such society was not a "trade union" within the Trade Union Acts.—*PERFORMING RIGHT SOCIETY, LTD. v. LONDON THEATRE OF VARIETIES, LTD.*, [1924] A. C. 1; 93 L. J. K. B. 33; 130 L. T. 450; 40 T. L. R. 52; 68 Sol. Jo. 99, H. L.

*Annotations*:—*Mentd.* *Imperial Tobacco Co. of India v. Bonnam*, [1924] A. C. 755; *Drabble v. Hycolite Manufacturing Co.* (1928), 44 T. L. R. 261.

## Part IX.—Slander of Title, Trade Libel, etc.

### SECT. 1.—SLANDER OF TITLE AND SLANDER OF GOODS.

See *LIBEL & SLANDER*, Vol. XXXII., pp. 203–211.

### SECT. 2.—STATEMENTS REFLECTING ON PLAIN-TIFF IN WAY OF TRADE, PROFESSION OR CALLING.

*NOTE.*—The following page & number references are to *LIBEL & SLANDER*, Vol. XXXII.

*Libellous statements.*—See pp. 20–27, Nos. 110–167.

*Statements actionable per se.*—See pp. 31–17, Nos. 233–527.

*Qualified privilege.*—Statements as to credit of traders.—See p. 120, Nos. 1516–1521.

—Statements by & to trade protection societies.—See pp. 126, 127, Nos. 1582–1589.

## TRADE BOARDS.

*See* WORK AND LABOUR.

## TRADE DESCRIPTIONS.

*See* TRADE MARKS, TRADE NAMES AND DESIGNS.

## TRADE DISPUTES.

*See* TRADE AND TRADE UNIONS.

## TRADE LIBEL.

*See* LIBEL AND SLANDER.

# TRADE MARKS, TRADE NAMES AND DESIGNS.

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## Part I.—Trade Marks.

### SECT. 1.—IN GENERAL.

**Definitions.]**—See Trade Marks Act, 1905 (c. 15), s. 3.

**Register of Trade Marks.]**—See Trade Marks Act, 1905 (c. 15), ss. 3-7.

—**Sheffield.]**—See Trade Marks Act, 1905 (c. 15), s. 63.

—**Manchester.]**—See Trade Marks Act, 1905 (c. 15), s. 64.

**1. As property.]**—*LEATHER CLOTH CO. v. AMERICAN LEATHER CLOTH CO.*, No. 570, *post*.

### SECT. 2.—WHAT TRADE MARKS REGISTRABLE.

#### SUB-SECT. 1.—IN GENERAL.

See Trade Marks Act, 1905 (c. 15), ss. 3, 8-11.

**2. Mark capable of registration as design.]**—The mere fact that a proposed trade mark is capable of being registered as a design is not a fatal objection to its registration as a trade mark.—*Re UNITED STATES PLAYING CARD CO.'S APPLICATION*, [1908] 1 Ch. 197; 77 L. J. Ch. 204; 98 L. T. 435; 24 T. L. R. 140.

*Annotation:—Reffid. Goodall v. Waddington* (1924), 41 R. P. C. 658.

**3. Mark to be used to indicate goods of applicant.]**—*PHILIPPART v. WILLIAM WHITELEY, LTD.*, *Re PHILIPPART'S TRADE MARK "DIABOLO"*, No. 30, *post*.

**4. —.]**—*Re CARL LINDSTROEM AKT.'S TRADE MARK*, No. 38, *post*.

#### PART I. SECT. 1.

**a. Interpretation of Canadian law—Reference to English decisions.]**—The Canadian law respecting trade marks being derived from English legislation reference for its interpretation should be had to English decisions, more especially as the law extends throughout the Dominion, & it is desirable that the jurisprudence should be uniform.—*R. v. AUMIER* (1897), Q. R. 6 Q. B. 146.—**CAN.**

**b. Definition.]**—A trade mark is a distinctive picture which would indicate to a purchaser of the article bearing it the means of getting the same article in future, by getting an article with the same mark on it.—*MITCHELL & CO. v. JOSHUA BROTHERS* (1891), 17 V. L. R. 736.—**AUS.**

**c. —.]**—Under the language of Trade Mark & Design Act, R. S. 1906 (c. 71), s. 3 (a), a general trade mark means a trade mark used in connection with the various articles in which the proprietor deals in his trade, & may cover several classes of merchandise if the proprietor is trading in such several classes. On the other hand, under sub-sect. (b) a specific trade mark is limited to a class of merchandise of a particular description, so if appet. deals in two different classes of merchandise he must apply for two specific trade marks, one applicable to each class.—*Re NOELLE'S TRADE MARK* (1913), 13 F. L. R. 366; 14 L. L. R. 385; 49 C. L. J. N. S. 753.—**CAN.**

**d. Interpretation of Indian law—Unaffected by English law.]**—In respect of rights in trade marks & trade names any rights acquired by the parties in England have no effect on the rights of the parties in India. The rights of industrial property in India are governed by the laws of India & are in no way affected by the laws of England or by the action of the

parties in England.—*VON WULFING v. JIVANDAS & CO.* (1924), 1. L. R. 50 Bom. 402.—**IND.**

**11. As property.]**—In India there being no Registration Act giving the right of property in trade marks by registration, the only right of action a trader or manufacturer has, is the common law right of action which entitles him to an injunction restraining the use of a trade mark belonging to him.—*VON WULFING v. JIVANDAS & CO.* (1921), 1. L. R. 50 Bom. 402.—**IND.**

#### PART I. SECT. 2, SUB-SECT. 1.

**31. Mark to be used to indicate goods of applicant.]**—*ASHTON & PARSONS v. GOULD* (1909), 7 C. L. R. 598.—**AUS.**

**31i. —.]**—Property cannot be acquired in marks, etc., known to a particular trade as designating quality merely, & not, in themselves, indicating that the goods to which they are affixed are the manufacture of a particular person.—*PARTLO v. TODD* (Ont.) (1888), 17 S. C. R. 196.—**CAN.**

**31ii. —.]**—*WILSON v. LYMAN* (1898), 25 A. R. 303.—**CAN.**

**31v. —.]**—*STANDARD IDEAL CO. v. STANDARD SANITARY CO., C.R.*, [1911] A. C. 78; [1911] A. C. 259; 80 L. J. P. C. 87; 103 L. T. 440; 27 T. L. R. 63; 27 R. P. C. 789.—**CAN.**

**e. Descriptive word—Whether registrable.]**—Such a word as "Bovax," being a mere term of description, is not capable of being appropriated as a trade mark under Trade Marks Statute 1864, or of being registered under Trade Marks Registration Act, 1876.—*LEWIS v. KLAPPROTH* (1885), 11 V. L. R. 214.—**AUS.**

**f. —.]**—A word or representation having reference to the character or quality of the goods, may form part of a distinctive label.—

**5. Mark to be used without delay.]**—The *bond fide* intention to use a trade mark, as indicated by Trade Marks Act, 1905 (c. 15), s. 37, means a definite intention of the proprietor to use the mark consistently & without delay. Registration with a doubtful intention of possibly using the mark should circumstances make it expedient or with the intention of assigning it to a limited co. for that co.'s user, does not satisfy the sect., & in such cases the mark may, upon application be removed from the register.—*Re DUCKER'S TRADE MARK* (1928), 97 L. J. Ch. 353; 139 L. T. 271; 72 Sol. Jo. 502; 45 R. P. C. 397, C. A.

**6. Mark capable of being applied to goods sold in United Kingdom.]**—This was an appeal under Trade Marks Act, 1905 (c. 15), from a refusal of the registrar of patents, designs & trade marks to register a trade mark. The mark applied for consisted in the centre of a cross & in the angles the letters "V. T." twice repeated, once upside down, & that was surrounded by the words "Val de Travers Etat." Appets. disclaimed practically all the letter press; therefore the only essential particular of the mark was the cross device. There was on the register a mark belonging to a co., with which appets. were already in litigation, which involved all these disclaimed matters without the word "Etat" & also what might be a cross—that is to say, it was clearly a cross device looked at from one direction, though it might be a dagger if looked at from the other. The registrar, therefore refused to register this

*LEVER BROTHERS, LTD. v. MOWLING & SON*, [1909] V. L. R. 59.—**AUS.**

**g. —.]**—The word "Sarilla" was sought to be registered as a trade mark in respect of mineral & aerated waters, natural & artificial, including ginger beer. The application was opposed on the ground that the word was not an invented word, but merely a variation of the word "Sarsaparilla," a well-known beverage, & that it had reference to the character or quality of the goods to which it applied.—*Held*: the word "Sarilla" was not an invented word, it had reference to the character or quality of some of the goods to which it was to be applied, & therefore application to register was refused.—*SCHWEPPES, LTD. v. ROWLANDS (E.) PROPRIETARY, LTD.* (1913), 16 C. L. R. 162.—**AUS.**

**h. —.]**—The words "Microbe Killer," regularly registered, constitute a valid trade mark.—*ADAM v. SHAW* (1897), 28 O. R. 612.—**CAN.**

**k. —.]**—A trade mark for a certain kind of yeast, consisting of a label bearing the representation of the head & bust of a woman, with the words "Day" & "Hop" on either side, & the words "Cream Yeast" below, was properly registrable & valid.—*GILLET v. LUMSDEN BROTHERS* (1904), 24 C. L. T. 345; 8 O. L. R. 168; 3 O. W. R. 851.—**CAN.**

**l. —.]**—The word "self-reducing" as applied to the manufacture & sale of women's corsets is descriptive, & does not constitute a good trade mark.—*KORS BROTHERS v. DOMINION CORSET CO.* (1913), 15 Exch. C. R. 18.—**CAN.**

**m. —.]**—"Sure-crop" or "Shur-crop," as applied to fertilizers, are ordinary words descriptive of the quality of the article, incapable of acquiring a secondary meaning, & not registrable as a valid trade mark, & should be expunged from the Register.



mark on the ground that it was calculated to deceive, because both marks would tend to cause the goods to be sold as "cross brand." From this decision appcts. appealed. On the hearing it was further urged against their appeal that by virtue of an agreement dated Dec. 24, 1907, appcts. had disposed of all their rights until the year 1925 to resps. to sell their goods in this country, & that, therefore they had no goods which could be sold or used in the United Kingdom to which the trade mark sought to be registered could be applied:—*Held*: the registrar's decision must be affirmed & the appeal dismissed. The fact that appcts. had never had any trade or business in this country with reference to these goods, or could have until 1925, made their application to register a trade mark now too remote.—*Re NEUCHATEL ASPHALTE Co.'s TRADE MARK*, [1913] 2 Ch. 291; 82 L. J. Ch. 414; 108 L. T. 966; 29 T. L. R. 505; 57 Sol. Jo. 611.

*Annotation*.—*Apld. Re Ducker's Trade Mk.* (1928), 97 L. J. Ch. 353.

#### SUB-SECT. 2.—NAME OF COMPANY, INDIVIDUAL, OR FIRM.

*See Trade Marks Act, 1905 (c. 15), s. 9 (1).*

**7. Name of company—Written as signature.—In ordinary handwriting.**—The name of a co. is not "represented in a special or particular manner" within Trade Marks Act, 1905 (c. 15), s. 9, by the fact that it is written, like a signature, in more or less ordinary handwriting, & is not, when so written, registrable as a trade mark.—*Re BRITISH MILK PRODUCTS Co.'s APPLICATION*, [1915] 2 Ch. 202; 84 L. J. Ch. 819; 113 L. T. 925.

**8. Name of individual—Fictitious person.**—*Re HOIT & Co.'s TRADE MARK*, No. 49, *post*.

**9. —Represented in particular or distinctive manner.**—*Re CARROLL'S APPLICATION* (1899), 16 R. P. C. 82.

**10. Name of firm—Set out in distinctive manner.—In combination with name in foreign characters.**—The name of the firm of applts. & the address "Levenbank" are added, & . . . the name of the firm . . . in Hindostanee. *Prima facie* these figures . . ., would appear to me, with the name

& address of the firm added, to constitute in each case a distinctive device, within the meaning of the Act, & thus to be a trade mark authorised to be registered under the Act (LORD CAIRNS, C.).—*ORR EWING v. TRADE MARKS REGISTRAR* (1879), 4 App. Cas. 479; 48 L. J. Ch. 707; 41 L. T. 239; 28 W. R. 17, H. L.; *revg.* S. C. *sub nom.* *Re ORR EWING'S TRADE MARKS* (1878), 8 Ch. D. 794, C. A.

*Annotations*.—*Consd. Baker v. Rawson* (1890), 45 Ch. D. 519. *Expld. Re Meeu's Appln.*, [1891] 1 Ch. 41. *Consd. Re Wright, Crossley's Appln. & Royal Baking Powder Co. of New York*, [1900] 2 Ch. 218. *Reid. Re Rotherham's Trade Mk.* (1880), 49 L. J. Ch. 511; *Hennessy v. Keating* (1908), 25 R. P. C. 361. *Mentd. Re Brook's Trade Mks.* (1878), 26 W. R. 791.

**11. —In common letters.**—*Re PRICE'S PATENT CANDLE Co.*, No. 181, *post*.

#### SUB-SECT. 3.—SIGNATURE OF APPLICANT OR PREDECESSOR.

*See Trade Marks Act, 1905 (c. 15), s. 9 (2).*

**12. In combination with descriptive words.**—Where M. applied to register as a trade mark his signature in combination with the descriptive words "Filtre Rapide" he was allowed to register his signature with the above words added.—*Re MAIGNEN'S APPLICATION* (1880), 28 W. R. 759.

**13. Signature of existing firm.**—A firm of Macfarlane & Co., sometimes with various initials, traded as whisky distillers & merchants at Paisley from 1740 to 1897; they had a good local reputation. The then continuing member of the firm, J. Macfarlane, assigned the goodwill of the business to Foulds & Co., Ltd. Pltfs. were four of the directors of Foulds & Co., Ltd. It was agreed that the business should be assigned by Foulds & Co., Ltd., to pltfs., but that assignment was not actually executed till after action brought. Foulds & Co., Ltd., remained the real owners of & carried on the business under the style of Macfarlane & Co. In the year 1897 Ehrmann Bros., the predecessors in business of defts., began to use the name "Macfarlane" or "Macfarlane & Co.," to denote a brand of whisky sold by them. They adopted the name at the suggestion of a gentleman named Macfarlane, who was associated with them

—*BOWKER FERTILIZER Co. v. GUNNS, LTD.* (Ont.), (1917), 16 Exch. C. R. 520; 27 D. L. R. 469.—**CAN.**

**n.** —.—.—*LAMONT, CORLISS & Co. v. STAR CONFECTIONERY Co.*, [1924] Exch. C. R. 147.—**CAN.**

**o.** —.—.—A person cannot obtain an exclusive right to use by registering it as a trade mark a word in common use as a descriptive word of the character & quality of the goods in connection with which it is used.—*CHANNELL, LTD. v. ROMBOUGH (B.C.)*, (1925) 1 D. L. R. 233; [1924] S. C. R. 600.—**CAN.**

**p.** —.—.—A word mark consisting of words that are merely descriptive of the goods to which it is to be applied cannot validly be registered as a trade mark; & that well settled rule is applicable also to a design mark that is merely descriptive.—*FROST STEEL & WIRE Co., LTD. v. LUNDY* (1925), 57 O. L. R. 494.—**CAN.**

**q.** —.—.—*WATT v. O'HANLON* (1886), 4 R. P. C. 1.—**IR.**

—.—.—*LEVER BROTHERS v. MCGILL*, [1917] N. Z. L. R. 595.—**N.Z.**

**r.** —.—.—The words "Café noir," applied to biscuits.—*Held*: to be words having reference to the character or quality of the goods, & therefore, not entitled to registration

as a trade mark under Act 12 of 1895.

—*PREK, FREAN & Co. v. CARR & Co.* (1898), 15 S. C. 172; 8 C. T. R. 207.—**S. AF.**

**t. Descriptive wrapper.**—A wrapper or pamphlet forming a cover to a bottle, & containing a dissertation on the chemical properties & qualities of the liquor in the bottle, cannot be registered.—*WOLFE v. LANG & Co.* (1887), 13 V. L. R. 752.—**AUS.**

**u. Workers' trade marks.**—*A-G. FOR NEW SOUTH WALES v. BREWERY EMPLOYEES UNION OF NEW SOUTH WALES* (1908), 6 C. L. R. 469.—**AUS.**

#### PART I. SECT. 2, SUB-SECT. 2.

**81. Name of individual—Fictitious person.**—*TEMPLETON v. WALLACE* (1900), 4 Torr. L. R. 340.—**CAN.**

**x.** —.—.—A name which one person is using or has the right to use as a trade name cannot be registered as part of a trade mark by another person; & therefore the latter, though registered as proprietor of such a trade mark, cannot restrain any person who is using such name merely as a trade name.—*FERNE v. WILSON* (1900), 26 V. L. R. 422.—**AUS.**

**y.** —.—.—Upon an application therefor by a limited co. or corp., the ct. ordered the name of an individual to be registered as a specific

trade mark, it being established that there had been such long user, in all the principal countries of the world, of the name as applied to the manufacture of certain goods as to give it a distinctive or secondary meaning.—*Re WEDGWOOD TRADE MARK* (1909), 12 Exch. C. R. 417.—**CAN.**

**y. Name of firm.—In common letters.**—The name of an individual or firm, without anything more & without being accompanied by any particular distinctive feature, may be considered & known as a trade mark, & is entitled to registration as such.—*Re ELKINGTON & Co.'s TRADE MARK* (1908), 11 Exch. C. R. 293.—**CAN.**

—.—.—*UNITED CIGAR STORES, LTD., PROVINCIAL & UNITED CIGAR STORES, LTD. (DOMINION) v. MILLER & UNITED CIGAR STORES OF WINNIPEG (Ont.)* (1920), 19 Exch. C. R. 449; 51 D. L. R. 433.—**CAN.**

**d.** —.—.—*Held*: That the name "Wampole's" having acquired a secondary meaning was properly registered as a trade mark, & could not be used as such by any other person or co., without the latter clearly distinguishing their goods from those of the owner of the trade mark.—*WAMPOLE (HENRY K.) & Co., LTD. v. WAMPOLE (HENRY S.) & Co. & HORNER*, [1925] Exch. C. R. 61.—**CAN.**

*Sect. 2.—What trade marks registrable: Sub-sects. 3 & 4, A., B. & C.]*

in their business of dealers in wines & spirits. They registered the signature of "Macfarlane & Co." as their trade mark, No. 204,384. During the year 1899 the trade, nominally carried on by pltf.s., was extended to England. Pltf.s., when the respective trades of the parties came into collision, brought this action to restrain defts. from using the name "Macfarlane & Co.," so as to represent their whisky as that of pltf.s. Order for particulars of defts.' advertising, etc., made.

Pltf.s. also moved to rectify the Register of Trade Marks by removing defts.' mark "Macfarlane & Co.," No. 204,384:—*Held*: pltf.s. had failed to prove that defts.' acts had intercepted or were calculated to intercept pltf.s.' trade. The action was dismissed with costs.

On the admission of defts.' counsel that the registration of "Macfarlane & Co." as a trade mark could not be supported as it was not the signature of an existing firm, an order to rectify was made on the motion by consent.—*MACMILLAN v. EHRMANN BROTHERS, LTD., Re TRADE MARK "MACFARLANE & Co."* (1904), 21 R. P. C. 357.

14. Signature of a company.]—*Re BRITISH MILK PRODUCTS Co.'s APPLICATION*, No. 7, *ante*.

SUB-SECT. 4.—INVENTED WORDS.

A. Words Already in Existence.

See Trade Marks Act, 1905 (c. 15), s. 9 (3).

15. Whether invented word—Ignorance of applicant.]—*Re SALT (SIR TITUS), SONS & Co.'s APPLICATION*, No. 74, *post*.

16. — Part of name of foreign company.]—To be registered as a trade mark, an "invented word" need not be absolutely new, or invented for the purpose.

The word "Tachytype" had been used as part of the name of a foreign co. who had advertised & made communications of patented inventions in their own name in England. An English co. were allowed to register the word "Tachytype" as a trade mark.—*Re LINOTYPE Co.'s TRADE MARK*, [1900] 2 Ch. 238; 69 L. J. Ch. 625; 82 L. T. 794; 16 T. L. R. 353; 17 R. P. C. 380.

*Annotations*:—*Distd.* Christy v. Tipper, [1904] 1 Ch. 696. *Foll.* *Re Soc. le Ferment's Appln.* (1912), 81 L. J. Ch. 724. *Reff.* Hommel v. Gebrüder, Bauer, *Re Trade Mk. "Hæmatogen"* (1904), 21 R. P. C. 576.

17. — Name of patented article.]—Previous to 1893, S., in Germany, had manufactured a solution of formaldehyde, which he called "Formalin." In 1893 letters patent were granted to P., on a communication from S., for the substance "Formalin," which was described as being a water-white liquid of pungent odour & containing 40 per cent. of pure formaldehyde combined with 60 per cent. of water. The F. co. subsequently became possessed of the patent, & were appointed sole agents in Great Britain for S. In 1898, the F. co. applied for registration of the word "Formalin" as a trade mark. The registrar of trade marks, acting for the Comptroller-General, refused the application, & applts. appealed:—*Held*: appcts. had no title to apply for the registration of the word "Formalin," & the name of a patented substance would not be registered as a

trade mark for such substance as manufactured & sold by appcts., & the word "formalin" did not connote the manufacture of appct.'s assignors.—*Re FORMALIN HYGIENIC Co., LTD.'s APPLICATION* (1900), 17 R. P. C. 486.

*Annotation*:—*Reff.* Edge v. Nicolls, [1911] 1 Ch. 5.

18. — Previous exclusive use by applicants.]—An "invented word" need not be absolutely new in order to be registrable as a trade mark under Trade Marks Act, 1905 (c. 15), s. 9.

The word "Lactobacilline" had been used by appcts. to describe their preparation of a lactic ferment for some years before they applied to register it as a trade mark. The ct., having come to the conclusion on the evidence that "lactobacilline" was an invented word, allowed appcts. to register it notwithstanding their prior user of it.—*Re SOCIÉTÉ LE FERMENT'S APPLICATION* (1912), 81 L. J. Ch. 724; 107 L. T. 515; 28 T. L. R. 490; 20 R. P. C. 497, C. A.

*Annotations*:—*Distd.* *Re Williams' Appln.* (1917), 86 L. J. Ch. 273. *Reff.* *Re Yalding Manufacturing Co.'s Appln.* (1916), 33 R. P. C. 285.

19. — Variation of existing word.]—The word "Absorbine" as applied to a veterinary preparation for absorbing & removing swellings:—*Held*: to be a mere variation of an existing English word, & therefore not an "invented word" capable of registration.—*CHRISTY v. TIPPER*, [1905] 1 Ch. 1; 74 L. J. Ch. 55; 91 L. T. 712; 53 W. R. 147; 21 T. L. R. 53; 49 Sol. Jo. 54; 21 R. P. C. 755, C. A.

*Annotation*:—*Reff.* *Re Yalding Manufacturing Co.'s Appln.* (1916), 33 R. P. C. 285.

20. — Acquisition of secondary meaning.]—(1) The word "Hæmatogen" as applied to a preparation of a drug called Hæmoglobin is not an "invented word" within the meaning of s. 64 (1) (d) of the Patents, Designs & Trade Marks Act, 1883 (c. 57), as amended by the Patents, Designs & Trade Marks Act, 1888 (c. 50), s. 10 (1), & was therefore not capable of registration as a trade mark.

(2) The word has not acquired a secondary meaning exclusively denoting pltf.'s goods.—*HOMMEL v. GEBRÜDER BAUER & Co.* (1904), 21 T. L. R. 80; 22 R. P. C. 43, C. A.

*Annotations*:—*As to (1) Consd.* *Re Ferment's Appln.* (1912), 29 R. P. C. 497. *As to (2) Consd.* *Re Davis' Trade Mks., Davis v. Sussex Rubber Co.*, [1927] 2 Ch. 345.

21. — —]—The W. T. co. was incorporated in May, 1898, & in Aug. of that year registered as a Trade Mark the word "Bioscope" in connection with their business, which was that of sellers, not manufacturers, of cinematographic apparatus. In Sept. 1903, they commenced an action against V. who had previously been in their service as managing director, in respect of similar apparatus bearing the name "Bioscope" & sold by him, & against a co. promoted by him. Pltf.s. claimed relief on the grounds of infringement of their Trade Mark & also of passing off at the trial of the action which came on with a motion by defts. to rectify the Register, evidence was given of the use of the term "Bioscope," both with & without reference to cinematographic apparatus, for many years prior to the commencement of pltf.s.' business: & it further appeared that a machine bearing that name had previously been patented in England:—*Held*: (1) the word "Bioscope" was not an invented word, within

PART I. SECT. 2, SUB-SECT. 4.—A.

191. Whether invented word—Variation of existing word.]—If an invented word is suggested as the essential particular of a trade mark it is a good

mark & must be accepted if it is really an invented one, & not merely colourably so. A mere variation of the orthography or termination of a word is not sufficient to constitute an "invented word" if to the eyes & ears the same

idea is conveyed as by the word in its ordinary form.—*CORN PRODUCTS REFINING Co. v. AFRICAN PRODUCTS MANUFACTURING Co.*, [1922] W. L. D. 163.—S. AF.

the meaning of Patents, Designs & Trade Marks Acts, s. 64 (1) (d), & the Trade Mark must therefore be struck off the register with costs; (2) deft. co. had not represented its business to be the business of pltf. co.; (3) defts.' goods had not in fact deceived & were not calculated to deceive the public into the belief that they were the goods sold by pltf. co.; but defts.' goods were sufficiently distinguished; (4) the word "Bioscope" did not denote pltf. co.'s goods exclusively & they had no monopoly in the word.—*WARWICK TRADING CO., LTD. v. URBAN, Re TRADE MARK NO. 216,821 (1904)*, 21 R. P. C. 240.

#### B. Compound Words.

See Trade Marks Act, 1905 (c. 15), s. 9 (3).

**22. Component parts in common use.**—A word cannot be registered as an "invented word" under Patents, Designs & Trade Marks Act, 1888 (c. 50), s. 10 (1) (d), the sect. substituted for Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 64, if it has any "reference to the character or quality of the goods" within (e).

The word "Somatose," derived from Greek "*sonna*," Angl. "body"; genitive "*somatos*," held not to be registrable, either as an "invented word" under (d) of above sect. 10, "*somal*" being the root of many English words having reference to the body, & "ose" being a common English suffix, or as a word "having no reference to the character or quality of the goods," within (e), appcts. having, when applying for registration, themselves described the article for which they proposed to use the word as applicable to the human body.—*Re FARBENFABRIKEN APPLICATION*, [1894] 1 Ch. 645; 63 L. J. Ch. 257; 70 L. T. 186; 42 W. R. 488; 10 T. L. R. 260; 38 Sol. Jo. 251; 7 R. 439, C. A.

*Annotations.*—*Distd. Re Densham's Trade Mk.*, [1895] 2 Ch. 176; *Re Trade Mk. No. 58,405 "Bovril"*, [1896] 2 Ch. 600. *Overd. Eastman Photographic Materials Co. v. Comptroller-General of Patents*, [1898] A. C. 571. *Re Holt's Trade Mk.*, [1896] 1 Ch. 711; *Re Verschure & Zoon's Trade Mk.* (1905), 74 L. J. Ch. 684; *Re Du Cros' Applns.*, [1912] 1 Ch. 644; *Re British Milk Products Co.'s Appln.*, [1915] 2 Ch. 202; *Re Garrett's Appln.*, [1916] 1 Ch. 436.

**23.** —[The B. E. corpn. applied in Feb. 1896, to register the word "Electrozone" as a trade mark in class 3. The comptroller refused registration on the ground that the mark did not consist of any of the essential particulars required as a condition for the registration of a new trade mark:—*Held*: "Electrozone" was not an invented word.—*Re BRITISH ELECTROZONE CO.'S APPLICATION* (1896), 13 R. P. C. 447.

**24.** —[*Re KYNOCH (G.) & Co.'s TRADE MARK, No. 31, post.*

**25.** —[The word "Uneeda," being a mere misspelt combination of the English words "You need a," is not an "invented word" within the meaning of Patents, Designs, & Trade Marks Act, 1888 (c. 50), s. 10. Moreover, it is descriptive of the character or quality of the goods; & on both these grounds it is not the proper subject of registration as a trade mark.—*Re "UNEEDA" TRADE MARK*, [1902] 1 Ch. 783; 86 L. T. 439; 50 W. R. 467; 18 T. L. R. 453; *sub nom. Re NATIONAL BISCUIT CO.'S APPLICATION*, 71 L. J. Ch. 353; 19 R. P. C. 281, C. A.

*Annotations.*—*Fold. Re Trade Marks Act, 1905 (1909)*, 25 T. L. R. 695. *Consd. Re Cording's Appln.*, [1916]

1 Ch. 422. *Reff. Wellcome v. Thompson & Capper, Re Burroughs, Wellcome's Trade-mks.*, [1904] 1 Ch. 736; *Re Elsmann (London), Ltd.'s Appln.* (1920), 37 R. P. C. 134; *Re Davis' Trade Mks.*, *Davis v. Sussex Rubber Co.*, [1927] 2 Ch. 345.

**26. Composed from different foreign languages.**—A tea dealer registered the word "Mazawatee" as trade mark for tea & other articles of food under the Patents, Designs & Trade Marks Acts, 1883 & 1888. The tea was mostly imported from Ceylon, & the word registered was compounded of "maza," which means relish in Hindustani, & "wattee," which means an estate in Cingalese; but the compound word had no meaning in either language. There was no estate in Ceylon named "Mazawatee":—*Held*: on an application to expunge the trade mark, the word "Mazawatee" was a good trade mark, being a fancy word under Patents, Designs & Trade Marks Act, 1883 (c. 37), & an invented word under the Act of 1888, having no reference to the quality of the goods, & not being a geographical name.—*Re DENSHAM'S TRADE MARK*, [1895] 2 Ch. 176; 64 L. J. Ch. 634; 72 L. T. 614; 43 W. R. 515; 11 T. L. R. 376; 39 Sol. Jo. 448; 12 R. 283, C. A.

*Annotations.*—*Consd. Thompson v. Miller, Re Thompson's Trade Mk.* (1895), 13 R. P. C. 35. *Appld. Re Eastman Photographic Materials Co.'s Appln.* (1897), 76 L. T. 730 (*see*, [1898] A. C. 571).

**27. Composed from geographical name & surname.**—Word similar to geographical name & surname.—An application was made for registration in class 40 of a trade mark consisting of the word "Stanwal." At the hearing the Registrar of trade marks held that the word resembled in pronunciation & appearance the word "Stanwell," a surname & the name of a place & that it also resembled in pronunciation & appearance the word "Standwell" often used in referring to goods. The application was refused on the grounds that the word was not an invented word & was not distinctive within the meaning of Trade Marks Act, 1905 (c. 15), s. 9, & also in the exercise of the Registrar's discretion. Appcts. appealed to the Ct. In an affidavit filed on their behalf it was stated that the word "Stanwal" had been invented by deponent by combining the first letters of the first word in appcts.' name & of the place, Walpole, in which their business premises were situated & that the word had no reference to, & was not connected with the name of any person or the place Stanwell or the words "Stand well":—*Held*: the word was an invented word within the meaning of Trade Marks Act, 1905 (c. 15), s. 9 (3), & was not a geographical name or a surname but was only like a geographical name or a surname & was not calculated to cause confusion.—*Re STANDARD WOVEN FABRIC CO.'S APPLICATION* (1918), 35 R. P. C. 53.

#### C. Words having No Direct Reference to Character or Quality.

See Trade Marks Act, 1905 (c. 15), s. 9 (3).

**28. Whether invented word.**—The word "Satinine," applicable to goods in Classes 47 & 48 in Schedule 3 to Trade Marks Rules, 1883 (c. 57), comprising starch, blue, & other preparations for laundry purposes & perfumery:—*Held*: to be a descriptive word, & therefore not registrable as "an invented word" or "a word having no

#### PART I. SECT. 2, SUB-SECT. 4.—B.

**22.1. Component parts in common use.**—Where there had been a *bona fide* use of the name "Auto-strop" as applied to razors, safety razors & blades, for a number of years by appot. & it had be-

come the custom of the trade to order appot.'s goods under that name:—*Held*: for the purpose of the application to the Registrar of trade marks the name was to be deemed a distinctive mark within Patents, Designs, & Trade Marks Act, 1911, s. 64 (1) (c).

—*Re AUTO-STROP SAFETY RAZOR CO.* (1912), 32 N. Z. L. R. 666.—N.Z.

#### PART I. SECT. 2, SUB-SECT. 4.—C.

**28.1. Whether invented word.**—CENTAUR CO. v. AMERICAN DRUGGISTS

**Sect. 2.—What trade marks registrable: Sub-sect. 4, C. & D.]**

reference to the character or quality of the goods," under Patents, Designs & Trade Marks Act, 1888 (c. 50), s. 10, which is substituted for sect. 64 of the 1883 Act.—*Re MEYERSTEIN'S TRADE MARK* (1890), 43 Ch. D. 604; 59 L. J. Ch. 401; 62 L. T. 526; 38 W. R. 440; 7 R. P. C. 114.

**Annotations:—***Fold. Re Talbot's Trade Mk.* (1894), 63 L. J. Ch. 264. *Consd. Eastman Photographic Materials Co. v. Comptroller-General of Patents*, [1898] A. C. 571. *Reid. Re Farbenfabriken Appln.*, [1894] 1 Ch. 646; *Re Cording's Appln.*, [1916] 1 Ch. 422; *Re Yalding Manufacturing Co.'s Appln.* (1916), 33 R. P. C. 285.

**29. —**—*Re FARBENFABRIKEN APPLICATION*, No. 22, ante.

**30. —**—*V. & P.* had for some years manufactured a preparation for softening, preserving, & waterproofing articles of leather, called "Molliscorium," & they in 1876 registered that word as their trade mark in respect of that preparation. T. in 1886 registered as a trade mark in respect of the same class of goods a label of which the distinctive part was the word "Emolliolorum," & he described his manufacture as a fluid preparation for rendering certain specified articles made of leather, & every description of leather, thoroughly waterproof & supple. V. & P. moved for the rectification of the register by expunging T.'s mark. The evidence did not satisfy the ct. that any one had been deceived by the similarity of the two marks:—*Held*: (1) the word "Emolliolorum" would convey to the mind of an ordinary Englishman that the substance designated by it would act by softening the articles to which it was to be applied, & was consequently descriptive. It was not, therefore, a "fancy word" within the meaning of Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 64 (1) (c), nor an invented word, or a word having no reference to the character or quality of the goods, within Patents, Designs & Trade Marks Act, 1888 (c. 50), s. 10 (1) (d) (e), & the registration of T.'s mark could not be justified; (2) inasmuch as V. & P. might in the future development of their trade wish to apply the name "Emolliolorum" to some substance made by them, in which the existence of T.'s mark on the register might interfere with them, they were "persons aggrieved," within the meaning of sect. 90 of the Act of 1883, by its entry on the register.—*Re TALBOT'S TRADE MARK* (1894), 63 L. J. Ch. 264; 70 L. T. 119; 42 W. R. 501; 38 Sol. Jo. 200; 8 R. 149; 11 R. P. C. 77.

**Annotations:—***Generally, Reid. Re Densham's Trade Mk.* (1895), 43 W. R. 515; *Bourne v. Swan & Edgar, Re Bourne's Trade Mks.*, [1903] 1 Ch. 211.

**31. —**—*An application was made by G. Kynoch & co., Ltd., to the Comptroller to register the word "Kynite" as a trade mark in class 20, which consists of explosive substances. The word was invented by taking the first syllable of Kynoch & adding the termination "ite," which is a common termination for explosives. The Comptroller refused registration on the ground that the word was capable of having reference to the character or quality of the goods. It appeared that there was in existence a word "Kainite," which was the name of a mineral substance, & also "Kinelite," the name of an explosive. It was also suggested that the word might be taken to have a reference to the root of "kinetic":—Held: "Kynite" was an invented word, & had no*

reference to the character or quality of the goods, & the Comptroller was directed to proceed with the registration.—*Re KYNOCH (G.) & Co.'s TRADE MARK* (1897), 14 R. P. C. 905.

**32. —**—*A word which is "an invented word" within the meaning of Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 64 (1) (d), as amended by Patents, Designs & Trade Marks Act, 1888 (c. 50), s. 10 (1), may be registered as a trade mark, although it "has reference to the character or quality of the goods" within clause (e). Clauses (d) & (e) are independent of each other.—EASTMAN PHOTOGRAPHIC MATERIALS Co. v. COMPTROLLER-GENERAL OF PATENTS, DESIGNS & TRADE MARKS, [1898] A. C. 571; 67 L. J. Ch. 628; 79 L. T. 195; 47 W. R. 152; 14 T. L. R. 527; *sub nom. Re EASTMAN PHOTOGRAPHIC MATERIALS Co., LTD.'s APPLICATION*, 15 R. P. C. 476, H. L.*

**Annotations:—***Appld. Re Trade Mk. No. 96,997, Field v. Wages Syndicate* (1900), 82 L. T. 231. *Consd. Re Linotype Co.'s Trade Mk.*, [1900] 2 Ch. 238; *Re National Biscuit Co.'s Appln.* (1901), 70 L. J. Ch. 318; *Re "Uneeda" Trade Mk.*, [1901] 1 Ch. 550; *Hommel v. Gebrüder, Bauer* (1904), 20 T. L. R. 585. *Distd. Christy v. Tipper*, [1905] 1 Ch. 1. *Consd. Re Gestetner's Trade Mk.*, [1908] 1 Ch. 513. *Appld. Re Appln. of Soc. to Ferment* (1911), 28 T. L. R. 175; *Re Carl Lindström Akt's Trade Mk.*, [1914] 2 Ch. 103. *Consd. Re Yalding Manufacturing Co.'s Appln.* (1916), 33 R. P. C. 285; *Re Salter's Appln.* (1923), 40 R. P. C. 402. *Reid. Kodak v. London Stereoscopic & Photographic Co., Kodak v. Houghton, Re Kodak's Trade Mks.* (1903), 19 T. L. R. 297; *Re Trade Marks Act, 1905* (1909), 25 T. L. R. 695; *Re Du Cros' Applns.*, [1912] 1 Ch. 64; *Re Cording's Appln.*, [1916] 1 Ch. 422; *Re Garrett's Trade Mk.* (1916), 85 L. J. Ch. 350; *Re Elsmann (London), Ltd.'s Appln.* (1920), 37 R. P. C. 135; *Re Diamond T. Motor Car Co.*, [1921] 2 Ch. 583; *Re Davis's Trade Mks.*, *Davis v. Sussex Rubber Co.*, [1927] 2 Ch. 345. *Mentd. A.-G. v. Metropolitan Electric Supply Co.*, [1905] 1 Ch. 24; *R. v. West Riding of Yorkshire County Council*, [1906] 2 K. B. 676; *O'Grady v. Wilmut*, [1916] 2 A. C. 231; *Banbury v. Bank of Montreal*, [1918] A. C. 626; *Dobb v. Dobb* (1918), 87 L. J. Ch. 321; *Re Wernher, Wernher & Beit*, [1918] 1 Ch. 339.

**33. —**—*The F. co. in 1890 registered, the word "Savonol" as a Trade Mark for soft soap, etc. Deft. co. began to use "Savoline" for soap. The F. co. brought an action for infringement of trade mark & passing off, & the W. co. gave notice of motion to expunge the trade mark from the Register. It was directed that the motion to rectify should come on with the trial of the action. At the trial defts. contended that "Savonol" was not an invented word & ought to be expunged from the Register, & that, even if it remained on the Register, defts., in what they were doing, were not infringing, & that their goods could not be passed off for pltf's.:—Held: "Savonol" was an invented word, & the motion to rectify must be dismissed with costs, & pltf's. were entitled to an injunction & other relief, & also to a certificate that the validity of the trade mark had come in question in the action. Where an action for infringement of a trade mark, which had been more than five years on the Register, & a motion to rectify the Register were heard together, a certificate that the validity of the trade mark had come in question was granted.—FIELD (J. C. & J.) & Co., LTD. v. WAGEL SYNDICATE, LTD., *Re TRADE MARK 96,997*, [1900] 1 Ch. 651; 69 L. J. Ch. 365; 82 L. T. 231; 48 W. R. 390; 44 Sol. Jo. 315; 17 R. P. C. 266.*

**Annotations:—***Reid. Bourne v. Swan & Edgar, Re Bourne's Trade Mks.*, [1903] 1 Ch. 211; *Christy v. Tipper*, [1904] 1 Ch. 696.

**34. —**—*Re "UNEEDA" TRADE MARK*, No. 25, ante.

**35. Word exclusively applicable to particular**

SYNDICATE (Que.) (1922), 68 D. L. R. 84.—CAN.

**28 ii. —**—*If a word is really an invented word the fact that it may*

contain a covert allusion to the character or quality of the goods is no objection to its registration, & the quantum of invention is immaterial.—

*Re LIEBIG'S EXTRACT OF MEAT CO. LTD.'s TRADE MARK, Re WAILES, DOVE & Co., LTD.* (1902), 22 N. Z. L. R. 165.—N.Z.

**article.]—**KODAK, LTD. v. LONDON STEREOGRAPHIC & PHOTOGRAPHIC CO., LTD., *KODAK, LTD. v. HOUGHTON (GEORGE) & SON, Re KODAK, LTD.'S TRADE MARKS*, No. 43, *post*.

36. —[.]—In May, 1905, P. registered, as a trade mark, under Patents, Designs & Trade Marks Acts, 1883 (c. 57), & 1888 (c. 50), the word "Diabolo" in respect of tops. The word was not then a word current in the English language, but was to be found in some Italian dictionaries as a variant for "diavolo." The top in respect of which the mark was registered & used was a double-coned one which was adopted to be rotated by a cord attached to two flexible rods, the top & the rotatory apparatus forming the means of playing a game which with some improvements was a revival of a game played about the beginning of the nineteenth century, in France called "*le diable*" or "*le jeu au diable*" & in England "the devil on two sticks":—*Held*: as the word "Diabolo" was such as to suggest to ordinary minds, & selected so to suggest, the devil or something in which the devil played a part, it was not an invented word or a word having no reference to the quality or character of the goods, & was not a registrable trade mark & must be removed from the register of trade marks.

*Qu.*: whether the word was not also open to objection because it was not at the date of registration used or proposed to be used to indicate that the goods to which it applied were the goods of the person asking for registration.—*PHILIPPAUT v. WILLIAM WHITELEY, LTD., Re PHILIPPAUT'S TRADE MARK "DIABOLO,"* [1908] 2 Ch. 274; 77 L. J. Ch. 650; 99 L. T. 291; 24 T. L. R. 707; 25 R. P. C. 565.

*Annotations:—*Consd. *Re Williams's Appln.* (1917), 86 L. J. Ch. 273; *Reid, Burberry's v. Cording* (1909), 100 L. T. 985; *Re Trade Marks Act, 1905* (1909), 25 T. L. R. 695.

37. —[.]—A word not being an invented word ought not to be put on the register if the spelling is phonetic & resembles in sound a word which in its proper spelling could not be put on the register.

An application was made to expunge from the register several trade marks consisting of the word "Orlwoola" registered under Patents, Designs, & Trade Marks Acts, 1883 & 1888, for, amongst other things, woollen goods, with a disclaimer in each case of the words "all wool." These marks had been extensively used for many years in connection with unshrinkable woollen goods:—*Held*: "Orlwoola" was merely a misspelling of "all wool"; if the goods to which the word was applied were entirely composed of wool the word was descriptive, & if not, was deceptive: & the trade marks were not registrable either under the Act of 1905 or under the previous Acts & ought to be expunged.—*Re Brock (H. N.) & Co., LTD.,* [1910] 1 Ch. 130; 79 L. J. Ch. 211; 101 L. T. 587; *sub nom. Re TRADE MARKS NOS. 224,722, 230,405 & 230,407*, 26 T. L. R. 100; 26 R. P. C. 850. C. A.; *revers. S. C. sub nom. Re TRADE MARKS ACT, 1905*, 25 T. L. R. 695.

*Annotation:—*Consd. *Re Davis's Trade Mks., Davis v. Sussex Rubber Co.,* [1927] 2 Ch. 345.

38. —[.]—(1) A word which is an "invented word" within Trade Marks Act, 1905 (c. 15), s. 9 (3), may be registered as a trade mark although it has "direct reference to the character or quality of the goods" within head (4) of that sect., the law in this respect being the same as that laid down in *Eastman Photographic Materials*

*Co. v. Comptroller-General of Patents, Designs & Trade Marks*, No. 32, *ante*, with reference to corresponding provisions of the Patents, Designs & Trade Marks Acts, 1883 & 1888.

(2) The word "Parlograph" is capable of registration as a trade mark under class 8 in respect of sound-recording & reproducing machines & parts & accessories thereof.

A German co., which had already registered the word "Parlograph" as its trade mark in several foreign countries, in connection with sound-recording & reproducing machines & the like, applied for registration of the word as its trade mark in England. A pamphlet was in evidence, issued by an English co., which was the sole agent in the United Kingdom for sale of the German co.'s goods, which described, under the name "Parlograph," a sound-recording machine thereby offered for sale in the United Kingdom:—*Held*: the word sufficiently indicated that it was to be used in connection with articles produced by appets. to come within the definition of "trade mark" in s. 3 of the Act of 1905.—*Re CARL LINDSTROM AKT.'S TRADE MARK, [1914] 2 Ch. 103; 83 L. J. Ch. 847; 111 L. T. 246; 30 T. L. R. 512; 58 Sol. Jo. 580.*

39. —[.]—An application was made to register the word "Arsenoid" as a trade mark in class 2 in respect of certain chemical substances. The Registrar refused the application on the ground that the word was not an invented word, & that, if it were, it had a direct reference to the character or quality of the goods, which might or might not be a true one, & that it should, in the exercise of his discretion, be refused:—*Held*: it was doubtful whether "Arsenoid" was an invented word, but the Registrar had exercised his discretion, & there was no reason to differ from him.—*Re YALDING MANUFACTURING CO., LTD.'S APPLICATION* (1916), 33 R. P. C. 285.

*Annotation:—*Appld. *Re Salter's Appln.* (1923), 40 R. P. C. 402.

40. —[.]—Application made to register the word "Aluminox" in class 1 in respect of paints, dry colours, distempers, enamels, varnishes, japans & anti-corrosive oils, opposed on the grounds that the mark was an abbreviated form of the words aluminium oxide, was not an invented word & was a word having direct reference to the character or quality of the goods:—*Held*: "Aluminox" was not an invented word, it would directly convey to any one the meaning of aluminium oxide, it would lead to confusion & deception within Trade Marks Acts, 1905 (c. 15), s. 11, & it was not adapted to distinguish any one's goods. The application was refused.

Even if a mark is an invented word, that does not preclude the considerations at the opposition stage of the question whether or not its use would be liable to lead to confusion or deception under sect. 11, & it is open to the registrar to refuse the mark under his discretion under sect. 12.—*Re SALTER'S APPLICATION* (1923), 40 R. P. C. 402.

41. —[.]—*Re BROWN, WILLS & NICHOLSON'S APPLICATION* (1923), 41 R. P. C. 171.

*See, also, Sub-sect. 5, post.*

#### D. Other Cases.

42. Word not invented for particular purpose.]—*Re LINOTYPE CO.'S TRADE MARK, No. 16, ante.*

43. —[.]—Pltffs. had registered the words "Kodak," "Brownie," "Bullseye," & "Pano-

#### PART I. SECT. 2, SUB-SECT. 4.—D.

a. Word exclusively applicable to particular article.]—The words "Cutine," "Diarrhol" & "Tusso"

are sufficiently invented words, within the meaning of Act 12 of 1895, to be registered as trade marks with reference to patent medicines, but not the words

"Dolorine Elixir" & "Digestine."—*RUFFEL v. REGISTRAR OF DEEDS* (1899), 16 S. C. 141; 9 C. T. R. 100.—S. AF.

**Sect. 2.—What trade marks registrable: Sub-sect. 4, D.; sub-sect. 5.]**

ram" in classes 8 & 1 for photographic cameras & films respectively, the relative dates of registration varying in the different cases. Under these names & certain abbreviations of the same they were selling cameras & rolls of appropriate films. Defts. were selling rolls of films not of pltfs.' manufacture which were catalogued & advertised in various ways as "Kodak film," "Brownie film," & so on, & it was proved that customers at their shops had been supplied with films not of pltfs.' manufacture in response to written & verbal orders for "Kodak film," "film for a Kodak," & so on. In actions brought for injunctions to restrain infringement & passing-off defts. contended that the expressions "Kodak film," "Brownie film," "No. 3 F.P.K. film," "No. 1 Brownie film," & the like, whatever their original signification might have been, had come to mean & were understood by the trade & the public as now meaning simply films of any kind or make so long only as they would fit the particular camera; & they moved to rectify the Register by the removal therefrom of the trade marks as registered for the accessories in class 1, mainly on the ground that the words were descriptive of the respective cameras for which the films were of the appropriate sizes. The word "Panoram" as registered in class 8 for cameras was also attacked as being descriptive & having reference to the character or quality of the goods, but pltfs. admitted that this word must be removed from the Register in each class:—*Held*: (1) pltfs. had clearly established that the descriptions & letters in question meant their films & no others; defts. had wholly failed to establish that the same descriptions & letters referred to sizes only, irrespective of origin, & defts. must therefore be restrained by injunction from making & selling films in such a way as to lead to the belief that their films were of pltfs.' manufacture; (2) "Kodak" was an invented word referring exclusively to pltfs.' goods, & was applied to their cameras & films substantially about the same time; "Brownie" & "Bullseye" were words having no real reference to the character or quality of the goods & were applied by pltfs. simultaneously to new patterns of cameras & to films; & the motion to rectify therefore failed except as regarded the word "Panoram," which must be removed from the Register in respect of both cameras & films.—*KODAK, LTD. v. LONDON STEREOSCOPIC & PHOTOGRAPHIC CO., LTD.,* *KODAK, LTD. v. HOUGHTON (GEORGE) & SON, Re* *KODAK, LTD.'S TRADE MARKS* (1903), 19 T. L. R. 297; 20 R. P. C. 337.

*Annotations.*—As to (2) *Re* *Gestetner's Trade Mk.,* [1907] 2 Ch. 478; *Re* *Soc. le Ferment's Appln.* (1912), 81 L. J. Ch. 724.

**44. Phonetic rendering of unregistrable word.]—**Where a particular word cannot be registered as a trade mark, another word sounding exactly like it, but spelt differently, cannot be registered.—*Re* *RIPLEY & SON'S TRADE MARK* (1898), 78 L. T. 367; 14 T. L. R. 299; 42 Sol. Jo. 363, C. A.

**45. — Old mark.]—**Appets. were owners of an old trade mark consisting of the letters "V Z." An application by them for the registration of the word "Vezet" was granted.

*Qu.*: whether a word which is merely a combination of the sounds of letters can be registered as a

new mark.—*Re* *VERSCHURE & ZOON'S TRADE MARK* (1905), 74 L. J. Ch. 684; 22 R. P. C. 568.

*Annotations.*—*Consd. Re* *Garrett's Appln.,* [1916] 1 Ch. 436. *Re* *Reddaway's Appln.,* [1914] 1 Ch. 856.

**46. —]—***Re* *BROCK (H. N.) & CO., LTD.,* No. 37, *ante.*

**47. —]—**Phonetic rendering of initials of company.]—*Re* *GARRETT'S APPLICATION*, No. 336, *post.*

**48. — — —.]—**An application was made for the registration of a trade mark consisting of the word "Eanco" in class 38. The application was refused on the ground that the word represented phonetically "E. & Co." & was therefore not distinctive:—*Held*: "Eanco" was not an invented word; & if it were, the Registrar had exercised his discretion rightly in refusing it.—*Re* *EISMAN & CO. (LONDON), LTD.'S APPLICATION* (1920), 37 R. P. C. 135.

*Annotation.*—*Distd. Re* *Reddaway's Appln.,* [1925] Ch. 693.

**SUB-SECT. 5.—WORDS HAVING NO DIRECT REFERENCE TO CHARACTER OR QUALITY.**

*See* *Trade Marks Act*, 1905 (c. 15), s. 9 (4).

**49. Whether registrable.]—**A fictitious name, such as the name of a character in fiction, is a "word" capable of being registered alone as a trade mark under Patents, Designs & Trade Marks Act, 1888 (c. 50), s. 10 (e).—*Re* *HOLT & CO.'S TRADE MARK*, [1896] 1 Ch. 711; 65 L. J. Ch. 410; 44 W. R. 369; *sub nom.* *HOLT & CO. v. SAUNDERS, GREEN & CO., Re* *HOLT & CO.'S TRADE MARK*, 74 L. T. 225; 12 T. L. R. 272; 40 Sol. Jo. 351, C. A. *Annotation.*—*Consd. Re* *Len's Trade Mk., Re* *McEwan's Trade Mk.,* [1912] 2 Ch. 32.

**50. — — —.]—**The Linotype co., applied for registration of the word "Typograph" as a trade mark in class 5, viz., unwrought & partly wrought metals used in manufacture, & in class 7, viz., agricultural & horticultural machinery, & parts of such machinery. The Comptroller refused registration, & on appeal to the Board of Trade, the appeal was referred to the ct. On the evidence, it appeared that "Typograph" was a dictionary word meaning a type-making & type-setting machine. Appets. were manufacturers of machines of this nature. The Appeal as to Class 7 was not opened:—*Held*: the word "Typograph" was not, under the circumstances, a word having no reference to the character or quality of the goods, & was not entitled to registration.—*Re* *LINOTYPE CO.'S APPLICATION* (1897), 42 Sol. Jo. 13; 14 R. P. C. 900.

**51. — — —.]—**An application having been made to the Comptroller for the registration of the word "Nectar" as a trade mark in class 42 for tea, coffee, & cocoa, the application was refused on (*inter alia*) the ground that the word was not one "having no reference to the character or quality of the goods." Appets. appealed, & the appeal was referred by the Board of Trade to the ct.:—*Held*: the word was not a word having no reference to the character or quality of the goods.—*Re* *HARRISONS & CROSFIELD'S APPLICATION* (1900), 18 R. P. C. 34.

**52. — — —.]—**An application was made to register the word "Century" as a trade mark for all goods in class 7, i.e. machinery of all kinds & parts of machinery, excepting agricultural & horticultural machines & their parts, included in class 7. The Comptroller refused the application, on the ground

**PART I. SECT. 2, SUB-SECT. 5.**

**491. Whether registrable.]—**Words

which are separately *publici juris*, such as "Red" & "Seal," when combined & applied to a specific manufacture,

may cease to be so, & may well be protected as trade marks.—*SMITH v. FAIR* (1887), 14 O. R. 729.—*CAN.*



that the word had reference to the quality or character of the goods. The Registrar of Trade Marks in an affidavit referred to the use of the word in a commendatory sense, & especially in certain registered trade marks, the right to the exclusive use of it in those applied for since 1888 having been disclaimed: he also stated that registration of the word had been frequently refused:—*Held*: having regard to the fact that the word had often been refused, the Comptroller's discretion should not be overruled.—*Re PRINTING MACHINERY Co.'s APPLICATION* (1905), 23 R. P. C. 88.

53. —.]—The Ct. has jurisdiction under Trade Marks Act, 1905 (c. 15), s. 9 (5), to permit registration of words having a direct reference to the character or quality of the goods, as well as geographical terms, but it is for appts. to prove that words *primâ facie* unsuitable for registration have acquired distinctiveness, & the extent to which the ct. will require the proof of this acquired distinctiveness to go will depend upon the character of the word. In determining whether a word *primâ facie* descriptive ought to be admitted to registration as a trade mark the ct. ought to consider whether the registration will cause substantial difficulty or confusion in view of the provision in s. 44 that no registration shall interfere with the use by any person of any *bonâ fide* description of the character or quality of his goods.

A special application to register the words "California Syrup of Figs" for an aperient medicine was referred by the Board of Trade to the ct. The evidence established a *primâ facie* case of the words having become identified by long user with the goods of appts.:—*Held*: the application ought to be allowed to proceed.—*Re CALIFORNIA FIG SYRUP Co.*, [1910] 1 Ch. 130; 79 L. J. Ch. 211; 101 L. T. 587; 26 T. L. R. 100; 26 R. P. C. 846, C. A.; *revisé*, [1909] 2 Ch. 99.

*Annotations*:—*Re* Trade Marks Act, 1905 (1909), 25 T. L. R. 695; *Re* Akt. B. A. F. Hirth's Trade Mk. "Primus," [1910] 2 Ch. 64; *Re* Lea's Appln., *Re* McEwan's Appln. (1912), 106 L. T. 410; *Teofani v. Teofani*, *Re* Teofani's Trade Mk., [1913] 2 Ch. 545.

54. —.]—(1) Upon a special application under Trade Marks Act, 1905 (c. 15), s. 9 (5), to register the word "diamine" for dyes, it was proved that the word, which had been used by appts. as a trade mark for twenty years, had become extensively known to the trade in the United Kingdom as indicating the goods of appts. The word was a known chemical term which indicated that the substance to which the word was applied contained two amine groups, but it was used by appts. for their dyes, whether they contained one, two, or more amine groups or no amine group at all:—*Held*: the word was not distinctive within the meaning of the sub-sect., because it was descriptive, & because it was used deceptively, & the application ought not to be allowed to proceed.

(2) *Semble*: "adapted to distinguish" contemplates that the word which it is sought to register is one which as a word is adapted to distinguish the goods & not a word which may by user acquire the capacity of distinguishing the goods.—*Re CASSELLA (LEOPOLD) & Co.*, [1910] 2 Ch. 240; 79 L. J. Ch. 529; 102 L. T. 792; 26 T. L. R. 472; 54 Sol. Jo. 505, 27 R. P. C. 453, C. A.

*Annotations*:—*As to* (1) *Consd.* *Re* National Cash Register Co. (1917), 34 R. P. C. 354. *Re* Imperial Tobacco Co. of Great Britain & Ireland v. Pasquali, *Re* Imperial Tobacco Co.'s Trade Mks., [1918] 2 Ch. 207. *As to* (2) *Apprd.* *Sharpe v. Solomon*, *Re* Sharpe's Trade Mk. (1914), 84 L. J. Ch. 290.

55. —.]—Pltf. was proprietor of the trade mark "Health" for cocoa & chocolate, registered

in pursuance of an order of the Board of Trade under Trade Marks Act, 1905 (c. 15), s. 9 (5). Pltf. had for some years sold & advertised his cocoa as "Health Cocoa." Defts. had recently put upon the market a cocoa called "Health & Strength Cocoa." In an action to restrain the infringement of pltf.'s trade mark & the passing off of defts.' goods as & for pltf.'s:—*Held*: "Health" as applied to cocoa was a commendatory epithet & was not *per se* distinctive of pltf.'s goods; the word had only become distinctive by user in certain parts of England, & was therefore not registrable under sect. 9 (5).

An order of the Board of Trade under Trade Marks Act, 1905 (c. 15), s. 9 (5), does not bind the ct. in a motion to rectify the Register.—*THORNE (HENRY) & Co., LTD. v. SANDOW, LTD.* (1912), 106 L. T. 928; *sub nom.* *THORNE (HENRY) & Co., LTD. v. SANDOW (EUGEN) & SANDOW, LTD.*, *Re* THORNE & Co., LTD.'s Trade Mark, 28 T. L. R. 416; *sub nom.* *THORNE (HENRY) & Co., LTD. v. SANDOW (EUGEN) & SANDOW, LTD.*, *Re* "HEALTH" TRADE MARK, 29 R. P. C. 440.

*Annotations*:—*Appld.* *Re* Massachusetts Saw Works (1918), 35 R. P. C. 137. *Re* Teofani v. Teofani, *Re* Teofani's Trade Mk., [1913] 2 Ch. 545.

56. —.]—The word "Ribbon" held not to be a registrable trade mark for a dentifrice, inasmuch as the word as used by appts. was descriptive of the form & character of the dentifrice in respect that it described the manner & form in which the dentifrice came out of the tube in which it was sold.—*Re COLGATE & Co.'s MARK* (1913), 29 T. L. R. 326; 30 R. P. C. 262.

57. —.]—Pltfs. were the publishers of Christmas & other greeting cards & stationery, & had registered the word "classic" as a trade mark for their goods. They brought an action against defts. for infringement of the trade mark & passing off, & defts. moved to expunge the trade mark from the register, & denied that their use of "classic" was calculated to pass off their cards as pltf.'s cards:—*Held*: (1) the word "classic" was a laudatory epithet, & not a word "having no direct reference to the character & quality of the goods" so as to be registrable under Trade Marks Act, 1905 (c. 15), s. 9 (4); (2) it was incapable of being treated as "adapted to distinguish" so as to be registrable under sect. 9 (5) of the Act, & even if it had been capable of becoming distinctive, it had not in fact become distinctive of pltf.'s goods by user. The claim for infringement therefore failed, & the word must be expunged from the Register of Trade Marks; (3) there was nothing in the get-up of defts.' boxes of cards apart from the use of the word "classic" to support pltf.'s claim for passing off, & in view of the finding that the word was not in fact distinctive of pltf.'s goods, the claim in respect of passing off must also be dismissed.—*SHARPE (W. N.), LTD. v. SOLOMON BROTHERS, LTD.*, *Re* SHARPE (W. N.), LTD.'s Trade Mark (1914), 84 L. J. Ch. 290; 112 L. T. 435; 31 T. L. R. 105; 32 R. P. C. 15, C. A.

*Annotations*:—*As to* (2) *Consd.* *Re* National Cash Register Co. (1917), 34 R. P. C. 354; *Imperial Tobacco Co. of Great Britain & Ireland v. Pasquali*, *Re* Imperial Tobacco Co.'s Trade Mks., [1918] 2 Ch. 207.

58. —.]—*Re* WOODWARD'S TRADE MARK, WOODWARD, LTD. v. BOULTON MACRO, LTD., No. 410, *post*.

59. —.]—When a name which is truly descriptive of the article sold has always been associated with the particular name of the manufacturer, a monopoly of the name of the article, apart from the name of the manufacturer, cannot be acquired under ordinary circumstances.

*Sect. 2.—What trade marks registrable: Sub-sects. 5 & 6, A.]*

Appls. had manufactured & sold milk prepared with malt or extract of malt as "Horlick's Malted Milk":—*Held*: they were not entitled to restrain resp. from selling a similar article manufactured by him as "Hedley's Malted Milk."—*HORLICK'S MALTED MILK CO. v. SUMMERSKILL* (1916), 86 L. J. Ch. 175; 115 L. T. 843; 33 T. L. R. 83; 61 Sol. Jo. 114; 34 R. P. C. 63, H. L.

60. —.]—*Re WILLIAMS & Co.'s, LTD.* APPLICATION, No. 129, *post*.

61. —.]—In considering whether a trade mark consisting of a word is infringed by a colourable imitation, regard must be had to the nature of the word said to be infringed; & an ordinary & common word, as "Regiment," ought not, apart from user, to be considered an infringement of the equally common & ordinary word "Regimental."

—*IMPERIAL TOBACCO CO. OF GREAT BRITAIN & IRELAND, LTD. v. DE PASQUALI & Co.* (1918), 87 L. J. Ch. 293; 34 T. L. R. 313; *sub nom.* *IMPERIAL TOBACCO CO. v. PASQUALI*, *Re* *IMPERIAL TOBACCO CO.'S TRADE MARKS*, 62 Sol. Jo. 422; 35 R. P. C. 185; *on appeal*, [1918] 2 Ch. 207, C. A.

*Annotation* :—*Re* *Wigfull's Trade Mks.*, [1919] 1 Ch. 52.

62. —.]—In 1904 the Pacific Heating Electric Co. was incorporated in America & in 1912 the name was changed to the Hotpoint Electric Heating co. The co. manufactured electrically heated irons & electric cooking & heating apparatus. Trade in these articles under the mark "Hotpoint" had commenced in the United Kingdom in about 1909, the trade was at first small but it increased from 1914 to 1916 when it was interfered with by the war. Roughly two-thirds of the value of the trade was in respect of heating irons. In Nov. 1908, Letters Patent for "Improvements in Electrically Heating Apparatus especially applicable to Flat Irons" were granted to William Eastman & Alan Warne who assigned their interest therein to Eastman & Sons (Dyers & Cleaners), Ltd., & thereafter this co. & Alan Warne carried on in co-partnership the business of the manufacture & sale of electric irons made in accordance with the patent. A characteristic of these irons was that they were heated at the point, & they were sold under the name "Hot-Point." The business was subsequently transferred to another co. which continued to describe the irons as "Hot-Point." The American co. had objected to the use of the mark by Eastman & Warne in 1910, but took no further action, & the English firm continued to use the description "Hotpoint" in connection with irons without interference. In Jan. 1917, the Hotpoint Electric Heating Co. made a special application under Trade Marks Act, 1905 (c. 15), s. 9 (5), to register the mark "Hotpoint" as a trade mark in Class 13 for "electric appliances for heating, cooking, washing & cleaning purposes, all being metal goods not included in other classes." In 1918 an amalgamation took place in America of the Hotpoint Electric Heating Co., & two other cos. under the name of the Edison Electric Appliance co., but the goodwill of the Hotpoint co. in Canada & the United Kingdom was not transferred. After the amalgamation the goods for which the trade mark was applied were manufactured by the Edison Electric Appliance co. The application to register was referred to the ct., the Eastman co. & Eastman & Warne being included as resps. At the hearing appts. agreed

to exclude from their application "Irons for Industrial, Domestic, & Laundry Use, & Soldering & Branding Irons":—*Held*: the word "Hotpoint" had reference to the character of the goods but it had become distinctive of appts.' electrical appliances, other than irons, in respect of which registration had been sought; the word was so descriptive of irons that, even if appts. had not abandoned their application for these goods, it would have been difficult to contend that it had become distinctive; the fact that there might be confusion in the minds of some people who buy irons was no ground for refusing to allow registration of a mark which had become distinctive of appts.' goods in respect of the other appliances; & under the circumstances the mark was not calculated to deceive by reason of the change of manufacture, the Hotpoint Electric Heating co. & the Edison Electric Appliance co. being in truth the same persons under a different name.—*Re* *HOTPOINT ELECTRIC HEATING CO.'S APPLICATION* (1921), 38 R. P. C. 63.

*Annotation* :—*Re* *Lacteosote v. Alberman*, [1927] 2 Ch. 117.

63. —.]—An application was made by persons interested in the perfumery trade to remove from the Register a trade mark consisting of the word "Rosette" registered in Class 48 for face powder, not medicated, on the ground that the registration conflicted with the principle which had generally been accepted for many years, namely that the name of a flower or plant should not be allowed registration as a trade mark by one member of the perfumery trade, in respect of perfume, that the word "Rosette" meant a little rose, & consequently came within the principle, & as the registration was calculated to injure & embarrass members of the perfumery trade, the mark should be removed from the Register:—*Held*: while the word "Rosette" in the strict sense means a little rose, so far as the English use is concerned, it is not primarily or even generally used in this sense, but in the sense of a little decoration of silk or paper somewhat resembling a rose in general shape. The application to remove the mark was consequently refused, but in view of the fact that registration was mainly justified by reason of the evidence of long user, & distinctiveness the mark was transferred to Part B of the Register.—*Re* *WERTHEIMER ET FILS TRADE MARK* (1924), 41 R. P. C. 454.

64. —.]—An application was made in the name of a corp'n. organised under the laws of the State of Minnesota, U.S.A., for the registration of a trade mark consisting of the word "Wetordry" in Class 50, in respect of abrasives. The application was refused on the ground that the word had direct reference to the character or quality of the goods, that it had not obtained any distinctiveness by use in Great Britain & that it did not satisfy the requirements of Trade Marks Act, 1905 (c. 15), s. 9, & that it contravened s. 11 of the Act:—*Held*: there was no evidence before the Registrar that the mark was distinctive; the word "Wetordry" had direct reference to the character or quality of the goods; & the Registrar was right in refusing the application.—*Re* *MINNESOTA MINING & MANUFACTURING CO.'S APPLICATION* (1924), 41 R. P. C. 237.

65. —.]—*Combination of letters.*—Combinations of letters may constitute valid & registrable trade marks, notwithstanding that they indicate the quality & pattern of the goods to which they are

65 i. —.]—*Combination of letters.*—*WOSTENHOLM v. WOOLHOUSE* (1888), 14 V. L. R. 963.—*AUS.*

65 ii. —.]—Single or more letters may form a trade mark, & more especially when combined, woven or

introduced into a monogram.—*SMITH v. FAIR* (1887), 14 O. R. 729.—*CAN.*

65 iii. —.]—A firm, having



applied, if, but not unless, they also indicate that the goods have been manufactured by a particular person or firm.

Pltfs. had for many years made & sold large numbers of ploughs & wearing parts of ploughs, &, in order to distinguish the various makes, patterns, & sizes, they stamped the different wearing parts with letters or combinations of letters, the effect of which, as they alleged, was that a purchaser of one of their ploughs requiring a new wearing part could, by buying the same stamped with the same letters as his original plough, be certain of obtaining, (a) an article of pltfs.' manufacture, & (b) one which would accurately fit his plough. Pltfs. registered seventeen of these combinations of letters as their trade marks. In an action to prevent the infringement of these registered trade marks:—*Held*: pltfs. had established their right to the exclusive use of these combinations of letters, which were valid trade marks, notwithstanding that they were also indicative of the pattern & quality of the goods to which they were applied.—*RANSOME v. GRAHAM* (1882), 51 L. J. Ch. 897; 47 L. T. 218.

#### SUB-SECT. 6.—ANY OTHER DISTINCTIVE MARK.

##### A. In General.

See Trade Marks Act, 1905 (c. 15), s. 9 (5); Trade Marks Act, 1919 (c. 79), s. 2 (2).

66. *Meaning of distinctive.*—*BANHAM* (GEORGE) & CO. v. REDDAWAY (F.) & CO., No. 337, *post*.

67. *Meaning of "capable of distinguishing."—Distinguished from "adapted to distinguish."*—(1) A fancy word capable of being distinctive is not disqualified for registration as a trade mark merely because it is also descriptive in the sense of suggesting some quality of the goods.

(2) The expression "capable of distinguishing" in Trade Marks Act, 1919 (c. 79), s. 2 (2), has a somewhat wider import than the expression "adapted to distinguish" in Trade Marks Act, 1905 (c. 15), s. 2, as interpreted by the authorities, in that it embraces marks which have not at the date of the application to register, but which, if used long enough, may thereafter, become distinctive of the goods of the proprietor of the mark.

(3) Upon an application under s. 2 of the Act of 1919 for registration in Part B of the register of trade marks of a mark which has been in actual use for two years it is not necessary for applicant to prove that the mark has actually become distinctive. It is sufficient for him to satisfy the registrar that it is not incapable of becoming distinctive.

The pltf. having for more than two years used the marks "Davis' Ustikon" & "Ustikon" to indicate that rubber soles for boots were of his manufacture, applied for & obtained registration of the two trade marks in Part B of the register under s. 2 of the Act of 1919. At a time when "Ustikon" applied to goods indicated both to the trade & to the public that the goods were manufactured by pltf. defts. used the word

"Justickon" to place on their rubber soles. In an action by pltf. for infringement & passing off & on a motion by defts. to rectify the register by removing pltf.'s marks:—*Held*: (1) the mark "Ustikon" was at the time of its registration capable of distinguishing, & did in fact distinguish, pltf.'s goods, & was therefore rightly placed on the register; (2) defts.' mark "Justickon" was an infringement of pltf.'s mark "Ustikon"; there was a likelihood of deception owing to the close resemblance of the two words, & pltf. was therefore entitled to an injunction to restrain defts. from using their mark "Justickon."—*RE DAVIS'S TRADE MARKS, DAVIS v. SUSSEX RUBBER CO.*, [1927] 2 Ch. 345; 97 L. J. Ch. 8; 137 L. T. 714; 44 R. P. C. 412, C. A.

68. *Claim for registration as distinctive mark.—Whether other essential particulars required.*—

(1) Trade Marks Act, 1905 (c. 15), s. 9 (1-5), are separate & distinct, & the expression "any other distinctive mark" in sub-sect. 5 means a distinctive mark other than the mark designated in sub-sects. 1 to 4. Therefore, when a mark is claimed to be registrable under sub-sect. 5, the only essential particular which sect. 9 requires is that it should be distinctive, & there is nothing in the sect. which requires that the mark should also contain one or more of the essential particulars designated in sub-sects. 1 to 4.

(2) *Qu.*: whether the fact that the user of a trade mark in a foreign country has rendered the mark in fact distinctive in that country ought to be taken into consideration.—*RE DIAMOND T MOTOR CAR CO.*, [1921] 2 Ch. 583; 90 L. J. Ch. 508; 120 L. T. 87; 66 Sol. Jo. (W. R.) 8; 38 R. P. C. 373.

*Annotation*:—As to (1) *Reff. Re Reddaway's Appln.*, [1925] Ch. 693.

69. — *What may be considered—Distinctiveness in United Kingdom—Not distinctiveness in foreign markets.*—For the purpose of determining whether a trade mark has the characteristic of distinctiveness requisite for registration under Trade Marks Acts the ct. will look to its distinctiveness in the United Kingdom & not to its distinctiveness in foreign markets.—*RE GALLAHER, LTD.'S APPLICATION* (1924), 41 T. L. R. 139; 42 R. P. C. 215.

70. — *Prospective distinctiveness.*—*RE DAVIS'S TRADE MARKS, DAVIS v. SUSSEX RUBBER CO.*, No. 67, *ante*.

71. *Loss of right to registration as distinctive.—Use of additional mark.—Additional mark indicating foreign source of goods.*—(1) A "special & distinctive word" used in the definition of a trade mark in Trade Marks Registration Act, 1875 (c. 91), s. 10, means a word which distinguishes the goods to which it is attached as goods made or sold by the owner of the mark; & by using some additional words so as to induce the general public, as distinguished from persons in the secrets of the particular trade who would not be deceived, to believe that goods so marked are of foreign brand & manufacture, the inventor of the original word is precluded from saying that such word is distinctive of his own manufacture so as to be capable of registration as his

adopted the letters "I.L." to denote a peculiar quality of whiskey sold by them, acquired an exclusive right to the use of those letters as a trade mark, though they were always preceded by the name of the firm upon the labels issued by it.—*KINAHAN v. BOLTON* (1863), 15 I. Ch. R. 75.—*IR.*

1. — *Term describing method of J.—VOL. XLIII.*

*selling.*—A term which has no reference to any particular kind of goods at all, but merely to a particular method of selling goods, that is, to a particular method of fixing the price, may not be appropriated & monopolised as a trade name by any one man.—*DOUGLAS v. LOCKE* (1915), 32 W. L. R. 254; 9 W. W. R. 42; 24 D. L. R. 238.—*CAN.*

PART I. SECT. 2, SUB-SECT. 6.—A. g. "*Royal*."—The word "Royal" is not such a special & distinctive word as would, if used as a trade mark before the enactment of Act 23 of 1877, be registrable under that Act.—*WRIGHT, CROSSLEY & CO. v. ROYAL BAKING POWDER CO.* (1898), 15 S. C. 9; 8 C. T. R. 11.—*S. AF.*

**Sect. 2.—What trade marks registrable: Sub-sect. 6, A., B. & C.]**

**trade mark.** In 1876, A. registered as his trade mark the word "Eton," which had been used since 1809 & become known in the trade as denoting cigarettes of his manufacture. He had also been in the habit of selling, & supplying for the purposes of sale, "Eton" cigarettes in boxes so labelled, in conformity with an alleged custom in the trade, as to imply that such cigarettes were manufactured at St. Petersburg by a Russian firm:—*Held: A., by so acting in connection with the word "Eton" as to suggest to persons not in the trade that the cigarettes were not of his making, had destroyed the value of the word as a "special & distinctive" within Trade Marks Act, 1875 (c. 91), s. 10, & accordingly that at the time of registration it had ceased to be his special & distinctive mark capable of registration; (2) as five years on the register does not (on the authorities) give an indefeasible title to a mark which, from not properly constituting a trade mark within the meaning of the Act, ought not to have been registered, A.'s action to restrain an infringement of the mark by B. was dismissed, & rectification of the register by removing the mark on B.'s application allowed.*

(3) The word or words must distinguish the product of the person claiming the trade mark from the product of all other persons; & it appears to me that it must have that distinctive character at the time of registration. Then there is a further requisite that such distinctive word or words must have been used as a trade mark before the passing of the Act (FRY, L.J.).—*Re WOOD'S TRADE-MARK, WOOD v. LAMBERT & BUTLER (1886), 32 Ch. D. 247; 55 L. J. Ch. 377; 54 L. T. 314; 2 T. L. R. 232; 3 R. P. C. 81, C. A.*

**Annotations:—***As to (1) Apld. Newman v. Pinto (1887), 57 L. T. 31. (See 57 L. T. at p. 35.) Distd. Re Dexter's Appln., Re Willis's Trade Mks., [1893] 2 Ch. 262; Sharpe v. Solomon, Re Sharpe's Trade Mks. (1914), 31 R. P. C. 441. Consd. Re Warschauer's Appln. (1925), 43 R. P. C. 46. Reid. Re Apollinaris Co.'s Trade Mks., [1891] 2 Ch. 186. As to (2) Consd. Baker v. Rawson (1890), 45 Ch. D. 519. As to (3) Apld. Bourne v. Swan & Edgar, Re Bourne's Trade Mks., [1903] 1 Ch. 211. Consd. Re Lea's Appln., [1913] 1 Ch. 446. Reid. Perry, Davis v. Harbord (1890), 63 L. T. 389. Generally, Reid. Thornelee v. Hill, [1891] 1 Ch. 569.*

**B. Geographical Name.**

*See Trade Marks Act, 1905 (c. 15), s. 9 (4) (5).*

**72. What is a geographical name.]—***Re MAGNOLIA METAL CO.'S TRADE MARKS, No. 583, post.*

**73. Whether registrable.]—**B. & co. in 1885 registered as a trade mark for unwrought & partly wrought metals "The Brymbo Special," & used the same on tin plates & other goods. The B. Steel co. carried on business at the Brymbo steel works at Brymbo & had used "Brymbo" as a brand for iron & steel for many years, & as they alleged before 1875. In 1889 they applied to register "Brymbo" as a trade mark but were refused on account of B. & co.'s mark. They then moved to expunge that mark. B. & co. offered to limit

their registration to tin plates:—*Held: the B. Steel co. were aggrieved by the registration of B. & co.'s mark, & such mark was not capable of being registered & must be expunged from the register.—Re BATT'S TRADE MARK (1889), 6 R. P. C. 493.*

**Annotation:—***Expld. Re Apollinaris Co.'s Trade Mks., "Apollinaris," "Friedrichshall," & "Hunyadi Janos" (1890), 63 L. T. 162.*

**74. — Adjectival form of name.]—**(1) A word already in existence cannot properly be said to be an "invented word" because the person claiming to have invented it was not aware of its existence.

(2) The word "Eboline" being a word compounded of the word "Eboli," the name of a town in Italy, with the English suffix "ne" is not an "invented word" within the meaning of the Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 64 (d), as amended by sect. 10 of the Act of 1888, & it is a "geographical name" within the meaning of sub-sect. (e) of the same sect.

(3) The prohibition contained in sub-sect. (e) is not confined to the use of the noun substantive, but it extends to the adjective & to the name of a place to which an ordinary English suffix has been added so as to impart to it an adjectival form.—*Re SALT (SIR TITUS), SONS & CO.'S APPLICATION, [1894] 3 Ch. 166; 63 L. J. Ch. 756; 71 L. T. 386; 42 W. R. 666; 10 T. L. R. 610; 38 Sol. Jo. 647; 8 R. 682; 11 R. P. C. 517.*

**Annotations:—***As to (2) Distd. Re Denham's Trade Mks., [1895] 2 Ch. 176; Re Magnolia Metal Co.'s Trade-mks., [1897] 2 Ch. 371.*

**75. — Mark distinctive by user.]—***Re "APOLLINARIS" TRADE MARK, No. 127, post.*

**76. — —.]—**Application under Trade Marks Act, 1905 (c. 15), s. 9 (5), for the registration of the word "Oswego" alone in class 42 in respect of corn flour. Appcts. were an American co. with factories at Oswego, in New York State. There was evidence to show that they had sold Oswego corn flour for many years in this country, that there was no other corn flour known by the name "Oswego," that their corn flour was known to the public as "Oswego" without the use of their name, & that the name "Oswego" was known in this country through its association with their goods rather than as a geographical name. There were on the register five other trade marks in class 42 containing the word "Oswego." Three of these belonged to appcts. & two to biscuit manufacturers who did not oppose the present application:—*Held: the only question now before the ct. was whether "Oswego" was adapted to distinguish the corn flour of appcts. from the corn flour of other persons; the ct. had not to consider whether registration of "Oswego" might lead to confusion between appcts.' corn flour & similar goods, such as oatmeal, of other persons; the ct. had power to take into consideration evidence of actual user of the trade mark, & on the evidence in the present case there must be a declaration that "Oswego" ought to be deemed a distinctive mark in respect of corn flour.—Re NATIONAL STARCH CO.'S APPLICATION, [1908] 2 Ch. 698;*

*Co. (1913), 47 S. C. R. 484.—CAN.*

**75 ii. — —.]—**A geographical name is not ordinarily the subject of a trade mark, & is not *per se* registrable; but when by long user thereof the name has acquired a secondary signification in derogation of its primary geographical meaning, & has become the trade designation of a manufactured article, such a name may be registered.—*Re PACIFIC LIME CO., LTD. (1920), 20 Exch. C. R. 207; 66 D. L. R. 367.—CAN.*

**PART I. SECT. 2, SUB-SECT. 6.—B.**

**73 i. Whether registrable.]—***Semble: a combination of words such as "The London & American Supply Stores" would not be a geographical name so as to render it incapable of registration as a trade mark.—FERNE v. WILSON (1900), 26 V. L. R. 422.—AUS.*

**73 ii. — —.]—**THOMSON v. SEPPLETT (B.) & SONS, LTD. (1925), 37 C. L. R. 305; 31 Argus, L. R. 438.—AUS.

**73 iii. — —.]—**The use of a geo-

graphical name in a secondary sense as part of the title identifying a mercantile journal, & not as merely descriptive of the place where the journal is published, will be protected.—*ROSE v. MOLEAN PUBLISHING CO. (1897), 24 A. R. 240.—CAN.*

**73 iv. — —.]—***Re BENGAL IRON & STEEL CO. (1914), 33 N. Z. L. R. 877.—N.Z.*

**75 i. — Mark distinctive by user.]—**CANADA FOUNDRY CO. v. BUCYRUS

78 L. J. Ch. 34; 99 L. T. 724; 25 T. L. R. 13; 53 Sol. Jo. 13; 21 Cox, C. C. 712; 25 R. P. C. 802.

**Annotations:**—*Distd. Re California Fig Syrup Co.'s Appln.*, [1909] 2 Ch. 99. (*See* [1910] 1 Ch. 130.) *Consd. Teofani v. Teofani, Re Teofani's Trade Mk.*, [1913] 2 Ch. 545. *Refd. Re Lea's Appln., Re McEwan's Appln.*, [1912] 2 Ch. 32.

77. ———.]—*Re CALIFORNIA FIG SYRUP Co.*, No. 53, *ante*.

78. ——— **Word similar to geographical name.**]—*Re STANDARD WOVEN FABRIC Co.'s APPLICATION*, No. 27, *ante*.

#### C. Surname.

*See* Trade Marks Act, 1905 (c. 15), s. 9 (4) (5); Trade Marks Act, 1919 (c. 79), s. 7.

79. **Whether registrable—Per se.**]—The mere surname of an individual, although it may be "adapted to distinguish" the goods of all the persons, taken collectively, who bear that surname from the goods of other persons bearing a different surname, is not "adapted to distinguish" the goods of a particular appt., even though his surname be an uncommon one, from those of other persons within the meaning of that expression in Trade Marks Act, 1905 (c. 15), & ought not therefore to be registered under Trade Marks Act, 1905 (c. 15), s. 9, para. 5.—*Re LEA (R. J.), LTD.'s APPLICATION*, [1912] 2 Ch. 32; 81 L. J. Ch. 489; 106 L. T. 410; 28 T. L. R. 258; 56 Sol. Jo. 308; 29 R. P. C. 165; *affd.* on other grounds, [1913] 1 Ch. 446, C. A.

**Annotations:**—*Consd. Re National Galvanizers' Appln.* (1920), 37 R. P. C. 202. *Refd. Teofani v. Teofani, Re Teofani's Trade Mk.*, [1913] 2 Ch. 545; *Re Crawford's Appln.*, [1917] 1 Ch. 550; *Re Avery's, Appln.* (1919), 36 L. P. C. 89; *Re Burford's Appln.*, [1919] 2 Ch. 28.

80. *S. P. Re McEwan (William) & Co. LTD.'s APPLICATION*, [1912] 2 Ch. 32; 81 L. J. Ch. 489; 106 L. T. 410; 28 T. L. R. 258; 56 Sol. Jo. 308; 29 R. P. C. 165.

81. ———.]—(1) A preliminary order of the Board of Trade or the ct. under Trade Marks Act, 1905 (c. 15), s. 9 (5), directing the Registrar of trade marks to proceed with an application to register a surname as a trade mark merely enables the application to proceed as if it were an ordinary & not a special application, & is in no way final or conclusive so as to prevent the Registrar from subsequently refusing the application for registration on its merits, or to preclude the ct. upon an application, after registration, by a person aggrieved under Trade Marks Act, 1905 (c. 15), s. 35, from expunging the entry on the ground that the trade mark is not in fact distinctive.

(2) A surname is not necessarily incapable of being a registrable trade mark. It may be registered, for instance, where it is an uncommon name & its user has been so extensive that it has in fact become distinctive, within Trade Marks Act, 1905 (c. 15), s. 9, for the goods with respect to which it is registered or proposed to be registered. Applications to register surnames ought, however, to be closely scrutinised, & registration only permitted where the distinctive character of the mark is clearly proved.

Teofani & Co., Ltd., & their predecessors in business had for more than twenty years traded in London as tobacco & cigarette manufacturers, & during that period had used the name "Teofani" as a trade mark to an extent which, in the opinion

of the ct., made it in fact "distinctive" for cigarettes. The name was uncommon, there being only one person, A. Teofani, in the United Kingdom who bore it besides the predecessors in business of the co. In 1909 the co. obtained an order of the Board of Trade under Trade Marks Act, 1905 (c. 15), s. 9, para. 5, for the registration of the name "Teofani" as a trade mark.

On appeal from the refusal of the judge on the application of A. Teofani, to order the removal of the mark from the Register:—*Held*: the mark was properly registered.

(3) *Ptfs.*, Teofani & Co., Ltd., & their predecessors in business had for many years manufactured & sold cigarettes as "Teofani's cigarettes," under which description they had become well known to the trade & the public. In 1909 *ptfs.* caused the name "Teofani" to be registered as their trade mark. In 1911 *def.*, Athanasius Teofani, commenced to make & sell cigarettes under the description of "A. Teofani's cigarettes."

In an action to restrain passing off & infringement of *ptfs.*' trade mark the judge granted an injunction restraining *def.* from selling or offering for sale cigarettes as "A. Teofani's cigarettes" or otherwise marking his goods with the name "Teofani," either with or without other names, without clearly distinguishing such cigarettes from those of *ptfs.*, & from infringing the trade mark:—*Held*: the injunction was rightly granted.

(4) Within the period of seven years limited by Trade Marks Act, 1905 (c. 15), s. 35, from the date of the original registration of a trade mark, it is open to any aggrieved person to apply to rectify the Register by the removal of a mark complained of, & the ct. has jurisdiction to hear the application, & reverse any order for registration made by the Board of Trade.—*TEOFANI & CO., LTD. v. TEOFANI, Re TEOFANI & CO.'s TRADE MARK*, [1913] 2 Ch. 545; 82 L. J. Ch. 490; 109 L. T. 114; 29 T. L. R. 674; 57 Sol. Jo. 686; 30 R. P. C. 446; *sub nom. Re TRADE MARK No. 312,065*, 29 T. L. R. 591, C. A.

**Annotations:**—*As to* (1) *Refd. Re Lea's Appln.*, [1913] 1 Ch. 446. *As to* (2) *Consd. Re Crawford's Appln.*, [1917] 1 Ch. 550; *Re Burford's Appln.*, [1919] 2 Ch. 28; *Re Eno's Appln.* (1919), 37 L. P. C. 1. *Refd. Sharpe v. Solomon, Re Sharpe's Trade Mk.* (1914), 81 L. J. Ch. 290; *Slazengers' Appln.* (1914), 31 R. P. C. 511.

82. ——— **Necessity for order of Board of Trade.**]—Benz et Cie. applied to register a trade mark consisting of the name "Benz" written in capital letters, which were distorted, within two concentric circles containing within them two wreaths:—*Held*: "Benz" was not shown to be the name of a co., individual, or firm within Trade Marks Act, 1905 (c. 15), s. 9 (1), & was not a distinctive mark within sub-sect. 5 of that sect.; but appts. could make a fresh application asking for registration with disclaimer or for an order that the word "Benz" should be deemed a distinctive mark.—*Re BENZ ET CIE. RHEINISCHE AUTOMOBILE UND MOTEREN FABRIK ACT.* (1913), 108 L. T. 589; 29 T. L. R. 295; 57 Sol. Jo. 301, C. A.

*See, now*, Trade Marks Act, 1919 (c. 79), s. 7.

83. ——— **Mark distinctive by user.**]—*TEOFANI & CO., LTD. v. TEOFANI, Re TEOFANI & CO.'s TRADE MARK*, No. 81, *ante*.

84. ———.]—B. Muratti, Sons & Co., Ltd., made a special application to register the name

TRADE MARKS (1914), 18 C. L. R. 446. —*AUS.*

85. ———.]—Petitioners were incorporated in Oct. 1915. Since then they have done a large business in motor cars, & have used a trade mark consisting of a round circle, in the centre of which are the words

#### PART I. SECT. 2, SUB-SECT. 6.—C.

86. **Whether registrable—Mark distinctive by user.**]—Where it is sought to register as a trade mark a word which is a surname, a declaration must be obtained from the Registrar of trade marks that the word shall be deemed to be a distinctive mark, & having

made such a declaration, the Registrar may then attach to the registration of the word as a trade mark such reasonable conditions as will protect the rights of any persons who before the application for registration have used the word with respect to their goods.—*DAIMLER Co., LTD. v. REGISTRAR OF*

*Secl. 2.—What trade marks registrable: Sub-sect. 6, C.]*

"Muratti" in class 45 in respect of cigarettes. The application was referred by the Board of Trade to the ct. Appets. filed a great number of affidavits in support of their application made by traders from all parts of the United Kingdom, showing extensive user of the name for a very long period. It appeared from the exhibits that the name "Muratti" had been used by appets. on the cigarettes, boxes, show cards, & advertisements, but in some cases the name appeared as "Muratti's." The application was opposed by the Comptroller-General, who contended that the name had not been used as a trade mark & was not distinctive.—*Held*: on the evidence, the name had been used as a trade mark; it was a very peculiar & uncommon name, & it should be deemed to be distinctive.—*Re MURATTI (B.), SONS & CO., LTD.'S APPLICATION (1915), 32 R. P. C. 77.*

*Annotation:—Refd. Re Burford's Appln., [1919] 2 Ch. 28.*

85. — — — — —.]—On an *ex parte* motion by Cadbury Bros., Ltd., to the ct., pursuant to rule 129 Trade Mark Rules, 1906, for an order on the Registrar of Trade Marks to proceed with their application under Trade Marks Act, 1905 (c. 15), s. 9 (5), for the registration of the word "Cadbury" as their trade mark in respect of certain goods, the ct., being of opinion on the evidence that the word by long user in connection with the goods in question indicated & was distinctive of the goods manufactured by appets. & by them only, & was adapted to distinguish such goods from those of any other person, ordered the application to be proceeded with.—*Re CADBURY BROTHERS, LTD.'S APPLICATION. [1915] 1 Ch. 331; 84 L. J. Ch. 242; 112 L. T. 235; 59 Sol. Jo. 161.*

*Annotation:—Distd. Re Crawford's Appln., [1917] 1 Ch. 530.*

86. — — — — —.]—The Daimler Co., Ltd., had for twenty years carried on business in this country as manufacturers & sellers of motor vehicles, which were universally known as "Daimler" cars. They applied under Trade Marks Act, 1905 (c. 15), s. 9 (5), to register that name as a Trade Mark in class 22 in respect of motor vehicles. Two other cos. had for some time past sold in this country cars manufactured abroad. These two cos. both used the name "Daimler" in their titles, but always in combination with other words & never separately or as the initial word. They did not oppose the application to register, & one of them was in course of being wound up under the war legislation. The Board of Trade required appets. to apply by motion to the High Ct. Registration in Australia had been ordered by the High Ct. of Australia:—*Held*: "Daimler" had become distinctive of appets.' cars, & there was no likelihood of confusion, & the application should be allowed to proceed.—*Re DAIMLER CO.'S APPLICATION (1916), 32 T. L. R. 672; 33 R. P. C. 337.*

*Annotation:—Refd. Re Burford's Appln., [1919] 2 Ch. 28.*

87. — — — — —.]—An application by William Crawford & Sons, Ltd., for leave to proceed under

Trade Marks Act, 1905 (c. 15), s. 9 (5), with the registration of the surname "Crawford" as a trade mark in class 42 for biscuits, cakes, & shortbread was refused, although the name was identified with their goods & they had for some seventy years used the word "Crawford's" on their labels & in their advertisements to distinguish their goods & had acquired a most extensive trade throughout Scotland & in England, it appearing that "Crawford" was a common surname in Scotland, in the sense of being shared by many persons, & not uncommon in England.

*Seemle*: the fact that a trader to identify his goods used for many years on the labels & in the advertisements of his goods a name, & also this registered trade mark not having any reference to the name, militates against the name being *per se* capable of registration as a trade mark.—*Re CRAWFORD (WILLIAM) & SONS' APPLICATION, [1917] 1 Ch. 550; 86 L. J. Ch. 325; 116 L. T. 440; 61 Sol. Jo. 315.*

88. — — — — —.]—The Lodge Sparking Plug Co., Ltd., who in 1913 had acquired the business of Lodge Bros. & Co., made a special application to register the word "Lodge" as a trade mark in class 13 in respect of sparking plugs. The application was referred to the ct., & appets. adduced evidence to show that from 1908 onwards they had used the word "Lodge" as a trade mark for sparking plugs. It was objected on behalf of the Registrar of Trade Marks that the word was a surname & was not one that should be registered; also that it denoted a patented article:—*Held*: appets. had established user of the word since 1908, as a trade mark, & not as the name of a patented article, & the name, although not particularly rare, was not a common one.—*Re LODGE SPARKING PLUG CO., LTD.'S APPLICATION (1918), 35 R. P. C. 222.*

89. — — — — —.]—J. C. Eno, Ltd., who had for many years carried on business as manufacturers of & dealers in a dry saline preparation known as "Eno's Fruit Salt," were the registered proprietors of the trade mark "Fruit Salt" in class 3 in respect of their said preparation. In July, 1919, they made two special applications for the registration of the surname "Eno" as a trade mark (a) in class 3 in respect of fruit salt being a medicinal preparation, & (b) in class 42 in respect of a dry preparation for making a non-intoxicating beverage. Appets. desired to be heard by the ct. & gave notice of motion accordingly. It appeared that "Eno" was a very rare surname, & the evidence showed that appets. had long used the name "Eno" as a trade mark, & that the public frequently asked for the preparation as "Eno." On the motions coming on for hearing by the ct.:—*Held*: "Eno" was a word adapted to distinguish the appets.' goods & was therefore distinctive.—*Re ENO'S APPLICATIONS (1919), 37 R. P. C. 1.*

90. — — — — —.]—In 1908 a co. was formed in this country under the name of "The (U.K.) Winget Concrete Machine Co., Ltd." the title

"Gray Dort," the border of the said trade mark bearing the words "own a" at the top, & the words "You will like it," at the bottom:—*Held*: had petitioners used as their trade mark the words "Gray Dort" alone, their five years user would have entitled them to have had the same registered as a trade mark, & in view of that, the fact of their using additional words as above mentioned, in connection therewith, should not have the effect of vitiating their right to register, & the trade mark as described & used should be registered.—*Re GRAY DORT*

MOTORS, LTD. TRADE MARK (1920), 20 Kech. C. R. 186.—*CAN.*

83 iii. — — — — —.] If it is clearly shown that by well established *de facto* use as a trade mark, a surname has become in fact distinctive, & that, having regard to the nature of the trade & the circumstances of the case, registration is not likely to interfere with the legitimate claims of other traders to use their own names in their own businesses, registration will be permitted, even though the surname is borne by an appreciable number of

other persons *Re LODGE SPORTING CLUB'S APPLICATION, [1921] N. Z. L. R. 463.—N.Z.*

83 iv. — — — — —.]—The only essential prerequisite for the registration of a surname as a trade mark in terms of Act 9, 1916, s. 99, is proof that it is distinctive. A surname may be proved to be distinctive, although it has not actually been used by itself as a trade mark, but only as the central and most prominent feature of some design or combination.—*Ex p. MARTELL, [1920] T. P. D. 53.—S. AF.*

being later changed to "Winget, Ltd." for the purpose of, among other things, carrying on business as manufacturers of concrete mixing & moulding machines. The business had become an extensive one. There had formerly been a co. in America called "The Winget Concrete Machine Co." but this co. had no business in the United Kingdom, & had in fact long ceased to exist. In Feb. 1918, Winget, Ltd., made a special application under Trade Marks Act, 1905 (c. 15), s. 9, para. 5, to register the name "Winget" as a trade mark in class 6, in respect of machinery & parts of machinery for mixing & moulding concrete & similar material, & asked to have the application heard by the ct. It appeared that Winget was a surname, though a very rare one. The motion coming on for hearing, it was ordered, appets. being willing & offering to file an affidavit as to the non-user of the name "Winget" in America in connection with the class of goods in question, that the Registrar proceed with the application.—*Re WINGET'S APPLICATION* (1919), 36 R. P. C. 75.

91. ————]—W. & T. Avery, Ltd., & their predecessors in business had carried on business as manufacturers of weighing apparatus of all kinds since 1730. In 1918, they made a special application to register the surname "Avery" as a trade mark in class 6, in respect of weighing machines, & applied to the ct. for an order under Trade Marks Act, 1905 (c. 15), s. 9, para. 5. Appets.' business was by far the largest of its kind in the United Kingdom, the annual turnover exceeding £1,000,000. It appeared from the evidence that the name "Avery" had for several years past been used alone on all the weights & on a substantial proportion of all the machines manufactured by appets.; & that the name "Avery," though not uncommon, was recognised throughout the trade & by the public as denoting appets.' goods:—*Held*: in the special circumstances & in view of the evidence, the name "Avery" was adapted to distinguish appets.' goods from those of all other persons. —*Re AVERY (W. & T.), LTD.'S APPLICATION* (1919), 36 R. P. C. 89.

92. ————]—H. G. Burford & Co., Ltd., were an English co. incorporated in 1915, & occupied since then in the sale in this country of commercial motor vehicles manufactured in the United States of America. In Feb. 1918, they made a special application to the Board of Trade under Trade Marks Act, 1905 (c. 15), s. 9 (5), for the registration of the word "Burford" in script type in class 22 in respect of commercial motor vehicles, the word "Burford" being both a surname & a geographical name.

The Board of Trade referred the matter to the ct. The word "Burford" had been selected & used by appets. as being the surname of the founder of the business in the United States, who was also largely interested in the co. Appets. adduced evidence to prove that the word "Burford" when used in connection with commercial motor vehicles, denoted vehicles of their manufacture. The user of the name had extended over about three & a half years, during which time between 400 & 500 of such vehicles had been sold in this country:—*Held*: (1) on the evidence the name "Burford" was distinctive in the United Kingdom of appets.' commercial motor vehicles, not only to persons connected with the motor trade, but also to buyers & users of, & to persons interested in such vehicles; (2) having regard to appets.' business & to the rapid growth of their trade, the high reputation which their goods had already acquired, & the wide area over which that reputation extended, the fact that the user of the name had only extended over the

short period of three & a half years was not a sufficient ground for refusing registration; (3) length of user was important only in considering the question of fact whether a name mark had become distinctive of appets.' goods; therefore the application to register ought to be directed to proceed.—*Re BURFORD (H. G.) & Co., LTD.'S APPLICATION*, [1919] 2 Ch. 28; 88 L. J. (Ch. 186; 120 L. T. 591; 35 T. L. R. 319; 63 Sol. Jo. 409; 36 R. P. C. 139, C. A.

*Annotations:—As to (3) Apud. Re Eno's Appals.* (1919), 37 R. P. C. 1; *Re Thornycroft's Appln.* (1920), 37 R. P. C. 25. *Generally, Reid. Re Avery's Appln.* (1919), 36 R. P. C. 89; *Re Winget's Appln.* (1919), 36 R. P. C. 75.

93. ————]—John I. Thornycroft & Co., Ltd., & their predecessors in business had, since the year 1896, carried on business in this country as manufacturers of commercial motor vehicles, which had throughout the whole of that period been sold as "Thornycroft" vehicles. They applied under Trade Marks Act, 1905 (c. 15), s. 9, para. 5, for registration of that name in class 22 in respect of commercial motor vehicles & applied to the ct. for an order under that paragraph:—*Held*: appets. had established that the name "Thornycroft" had acquired a distinctiveness entitling them to proceed with registration.—*Re THORNYCROFT'S APPLICATION* (1920), 37 R. P. C. 25.

94. ————]—Crossley Brothers, Ltd., who were the successors in business of Crossley Brothers, who commenced business in co-partnership in 1866 made two special applications to register the word "Crossley" as a trade mark in class 6 in respect of gas & oil engines & in class 18 in respect of gas generating plant. The applications were referred to the ct., & appets. adduced evidence to show that they or their predecessors had manufactured gas engines since 1870, oil engines since 1891, & a gas generating plant since 1901, & that the word Crossley had been used as their trade mark continuously from those dates respectively. Comment was made on behalf of the Registrar of Trade Marks as to the wording of some of the declarations, but subject to this the applications were not objected to. The applications for registration were ordered to be proceeded with.—*Re CROSSLEY BROTHERS, LTD.'S APPLICATION* (1921), 38 R. P. C. 81.

95. ————]—F. Reddaway & Co., Ltd., made four special applications to register the name "Reddaway" as a trade mark in respect of machine driving & carrying belts & bands included in class 25, hair-woven machine driving belting & other belting included in class 35, india-rubber goods for mechanical purposes included in class 40, & hose of all kinds included in class 50, & applied to the ct. for an order under Trade Marks Act, 1905 (c. 15), s. 9 (5). Evidence was adduced that appets. had carried on since 1892 the business previously carried on since 1873 by F. Reddaway & Co. as manufacturers of (*inter alia*) machine belting, hose-piping & rubber for mechanical purposes; that the name "Reddaway" had been used since 1880, either alone or in conjunction with words indicating the manufacture of appets., or their predecessors, & in combination with their registered trade marks, & had long been recognised as indicating goods of appets.' manufacture or selection. The applications were unopposed:—*Held*: the name had been used as an indication of the manufacturer, & not as the name of the article; & the Registrar of Trade Marks was directed to proceed with the applications.—*Re REDDAWAY (F.) & Co., LTD.'S APPLICATION* (1921), 38 R. P. C. 83.

96. ————]—Perry & Co., Ltd., the successors of a business established in 1824, made a

*Sect. 2.—What trade marks registrable: Sub-sect. 6, (C. & D.)*

special application to register the word "Perry" as a trade mark in class 13 in respect of free wheel clutches & driving chains for cycles. The application was referred to the ct. & appcts. who were the registered owners of many trade marks comprising the word "Perry" for pen nibs & other stationers' sundries, adduced evidence to show that, ever since 1888 & 1901 when they had commenced the manufacture of chains & free wheels respectively, they had consistently used the word "Perry" as their trade mark for those articles, & that the word was distinctive of their goods. No objection was taken on behalf of the Registrar of Trade Marks. The application was ordered to be proceeded with.—*Re PERRY & Co., LTD.'s APPLICATION* (1921), 38 R. P. C. 195.

97. —.] Application was made for registration in class 9 of a Trade Mark consisting of the word "Obermeier" in respect of grand & upright pianos. Appct. had previously registered the word, but the registration had lapsed in 1921. Application was by a German firm, the successor of a firm which had originally supplied appct. with the pianos to which the mark had been attached. The successor firm had registered the word "Obermeier" in Germany. The grounds of opposition were that the mark was not capable of distinguishing appcts.' goods by reason of its being a surname & being the name of the opponents firm which had used the name "Obermeier" on pianos sold & shipped by it to Great Britain since 1905, & was so using it.—*Held*: the word "Obermeier" had in the past been put forward by appct. as a surname & was according to its ordinary signification a surname; distinctiveness had not been established; having regard to advertisements by appct. & the marking on the pianos, the name must have meant to purchasers a piano manufactured at a particular factory in Germany & possibly that appct. was sole agent for the sale of them in this country, the user of the word "Obermeier" thereafter in connection with pianos not of the manufacture of the opponents would be calculated to deceive.—*Re WARSCHAUER'S APPLICATION* (1925), 43 R. P. C. 46.

*Annotation*:—*Refd. Lacteosote v. Alberman*, [1927] 2 Ch. 117.

98. — Name not adapted to distinguish.]—Special applications by Pope's Electric Lamp Co., Ltd., to register the word "Pope" as a trade mark for incandescent electric lamps were referred by the Board of Trade to the ct. The evidence established a *prima facie* case of the word having become identified by user with the goods of appct. co.:—*Held*: the word "Pope," being for all essential purposes the surname of the manufacturer of appct. co.'s goods, was not in its nature adapted to distinguish them from the goods of other persons of the name of Pope, & could not become so adapted by user so as to be capable of registration as a trade mark under Trade Marks Act, 1905 (c. 15), s. 9, para. 5.—*Re POPE'S ELECTRIC LAMP CO., LTD.'s APPLICATIONS*, [1911] 2 Ch. 382; 80 L. J. Ch. 682; 105 L. T. 580; 27 T. L. R. 567.

*Annotations*:—*Appl. Re Lea's Appln.*, [1913] 1 Ch. 446. *Consd. Teofani v. Teofani, Re Teofani's Trade Mk.*, [1913] 2 Ch. 515.

\* 99. — — —.]—Previous to 1868 R. J. Lea, a tobacconist, had supplied to one Boardman, a licensed victualler in Manchester, a tobacco mixture which became known & was asked for as "Boardman's" mixture. In 1868 R. J. Lea, with Boardman's sanction, began to sell this mixture to the public under a label bearing the

words "Boardman's Smoking Mixture" in addition to other matter, including the name, address, & a trade mark device of R. J. Lea. This label was registered in 1887 as a whole for "tobacco being a smoking mixture." In 1910 R. J. Lea, Ltd., the successors in business of R. J. Lea, applied to register the word "Boardman's" under Trade Marks Act, 1905 (c. 15), s. 9 (5), as a trade mark in respect of manufactured tobacco. There was evidence that, in a limited market among persons who knew & liked the mixture, it was known & spoken of as "Boardman's," & that the word had been used as a trade mark in connection with goods for the purpose of indicating that they were the goods of appcts. The application having been referred to the ct. by the Board of Trade, it was dismissed by the judge on the ground (*inter alia*) that a mere surname of an individual appct., though it might be adapted to distinguish the goods of all the persons, taken collectively, who bore that surname from the goods of other persons bearing a different surname, was not adapted to distinguish the goods of the appct. from those of other persons within the meaning of that expression in Trade Marks Act, 1905 (c. 15), & ought not, therefore, to be registered under Trade Marks Act, 1905 (c. 15), s. 9 (5):—*Held*: on the evidence the word "Boardman's" was not "adapted to distinguish" the goods of the appcts. from those of other dealers in tobacco, & was not therefore registrable as a "distinctive mark" within Trade Marks Act, 1905 (c. 15), s. 9 (5).—*Re LEA (R. J.), LTD.'s APPLICATION*, [1913] 1 Ch. 446; 82 L. J. Ch. 241; 108 L. T. 355; 29 T. L. R. 334; 57 Sol. Jo. 373; 30 R. P. C. 216, C. A.

*Annotations*:—*Consd. Teofani v. Teofani, Re Teofani's Trade Mk.*, [1913] 2 Ch. 515; *Re National Galvanizers' Appln.* (1920), 37 R. P. C. 202. *Refd. Re Crawford's Appln.* [1917] 1 Ch. 550; *Re Avery's Appln.* (1919), 36 R. P. C. 89; *Re Burford's Appln.*, [1919] 2 Ch. 28.

100. — — —.]—Slazengers, Ltd., made a special application to register the word "Slazengers" in class 49 for games of all kinds & sporting articles not included in other classes. Slazengers, Ltd., were the successors in business of a firm called Slazenger & Sons. The application was referred by the Board of Trade to the ct. when registration was asked for of "Slazenger." Appcts. filed evidence with a view to show the user of the name on their goods for many years, & that their goods had become identified with the name:—*Held*: there was no evidence of the actual use of "Slazenger" as a trade mark, & independently of actual use, there was not sufficient evidence to satisfy the ct. that the name was "adapted to distinguish" appcts.' goods.—*Re SLAZENGERS, LTD.'s APPLICATION* (1914), 31 R. P. C. 501.

101. — — —.]—In 1922, the Robert Bosch Akt., a German co. which had succeeded Robert Bosch in the business of manufacturing magnetos & other electrical units at S. Germany, applied to register the surname "Bosch" as a trade mark in classes 6 & 13 in respect of magnetos & certain other electrical units. The applications were opposed by the American Bosch Magneto corp. on the grounds that the name "Bosch" was not distinctive, & was calculated to deceive by reason of its having been used by the opponents both separately & as a part of their corporate title. The applications were allowed. The opponents appealed to the ct. & the motion was heard with witnesses. It was not contested by opponents that at the outbreak of war the name "Bosch" had been distinctive of appct.'s goods, but it was contended that, by reason of circumstances existing during & since the war, the meaning of the name had been changed, & that appcts. had by their



conduct acknowledged & contributed to that change. Some years prior to the war with the assent of Robert Bosch a co. had been formed in America for the purpose of distributing the German "Bosch" products; that co. had also manufactured magnetos, etc., & evidence was given that it had been the policy of the co. to lead the American public to believe that the products marketed by it were of American origin. In 1918, the American Custodian of Alien Property took possession of that co.'s assets, which were subsequently sold by the custodian to the opponent corp'n. which was entirely independent of Robert Bosch & his concerns. Prior to the war there had been an English co. dealing in German "Bosch" products which had been taken over by the English Custodian, who had sold its assets. On the outbreak of war appcts.' exports to this country had ceased. During & subsequent to the war period a very considerable quantity of magnetos & other electric units bearing the name "Bosch" either alone or in combination with other words have been imported into this country from America either as units or as parts of cars, lorries, etc. In 1920 appcts. recommenced to export their products to this country, & marked their products with the name Robert Bosch, & with a trade mark consisting of an armature in a circle; they also advertised widely that all genuine Stuttgart goods were so marked:—*Held*: in order to succeed appcts. must prove that at the date of the applications substantially all people dealing with the goods in question recognised the name "Bosch" as meaning, & meaning only, appcts.' goods; in the period 1914–1922 at least as many "Bosch" units had been imported into this country from America as there had been from Germany; in view of such importations & of appcts.' extensive warnings as to the manner in which their goods were marked, it was impossible to say that at the date of the applications the name "Bosch" was distinctive of appcts.' goods; the provisions of Trade Marks Act, 1905 (c. 15), ss. 22, 39, 41 & 44, did not assist appcts.; the facts were not such as to justify registration on the ground of concurrent user, the case was not one for allowing registration subject to limitations as to the mode or place of user; & the appeal should be allowed.—*Re BOSCH AKT.'S APPLICATIONS* (1925), 43 R. P. C. 18.

**102.** — *Necessity for close scrutiny.*—*TEOFANI & CO., LTD. v. TEOFANI, Re TEOFANI & Co.'s TRADE MARK*, No. 81, *ante*.

#### *D. Mark Distinctive by User.*

**103.** *Whether user sufficient.*—*Without inherent distinctiveness.*—*Re CASSELLA (LEOPOLD) & Co.*, No. 54, *ante*.

**104.** *Mark identified with goods of applicant.*—*B. & J.* early in 1879 began to sell a particular kind of Turkish towel & to use upon it a label containing

the name "Osman." These towels became known in the market as "Osman Towels." In 1880 they registered the label as a trade mark. In 1889 they brought an action against J. J. & co., who were selling similar towels under the name of Osman. J. J. & co. in defence alleged & proved that these towels had been manufactured & sold to them under the name of Osman by H. in 1881, & had been manufactured & sold by them from 1882 down to the present time as "Osman's" & that the towels so manufactured by H. & by them had been publicly sold by H. & other firms. Pltf.'s case was that they had arranged with H. to discontinue manufacturing these towels, & that they were not aware of any manufacture by defts. themselves, although they had procured "Osman" towels from defts., believing them to be part of H.'s stock. Defts. had also from time to time purchased Osman towels from pltf's. Defts. moved to rectify the Register of Trade Marks by expunging the word "Osman" from the registered Trade Mark:—*Held*: "Osman" denoted a particular towel of pltf.'s manufacture & not the name of the towel by whomsoever manufactured; the word was not common to the trade & it was not proved that pltf.'s knew of defts.' user of the word Osman on towels of defts.' manufacture & therefore pltf.'s were entitled to register as they did in 1880. The motion to rectify must be refused & an injunction to restrain defts.' from infringing the registered trade mark granted.—*BARLOW & JONES v. JOHNSON, JABEZ & Co.* (1890), 7 R. P. C. 395, C. A.

*Annotations.*—*Reid, Re Magnolia Metal Co.'s Trade Mks.*, 26 J. P. Atlas (Ct.) (1897), 66 L. J. Ch. 598; *Sen Sen Co. v. Britten* [1899] 1 Ch. 692. *Mentl. Field v. Wagon Syndicate*, [1900] 1 Ch. 651.

**105.** ] By a written agreement made in 1898 between the predecessors of appcts. & L., it was agreed that L. should permit them to manufacture & sell a certain pattern of bedstead under the name of the L. bedstead, on payment of a royalty. The pattern of bedstead referred to was a bedstead constructed in three parts, & had been approved by L. in 1881, when he gave verbal permission for the use of his name upon these bedsteads. There was evidence that since 1881 the name of L. had been continuously applied to bedsteads constructed on the above principle by appcts. & their predecessors, & to nothing else, & that the bedsteads had become well known to the trade generally as the L. bedsteads. Upon an application referred to the ct. by the Board of Trade for the registration of the words "Lawson Tait" as a trade mark in class 41 for bedsteads:—*Held*: the name "Lawson Tait" must be deemed to be a distinctive mark in respect of bedsteads of the pattern referred to in the agreement of 1898, within the meaning of Trade Marks Act, 1905 (c. 15), s. 9 (5), & the registrar must be directed to proceed with the registration of it

#### **PART I. SECT. 2, SUB-SECT. 6.—D.**

**104i.** *Mark identified with goods of applicant.*—The letter D. was originally used to denote a particular shape of ploughshare, but in process of time came to be associated solely with shares of pltf.'s manufacture. Pltf's. then registered D. as a trade mark:—*Held*: the registration was valid.—*HORNSEY v. HUNSON* (1890), 11 N. S. W. Eq. 148.—**AUS.**

**104ii.** —.]—*UNITED STATES PLAYING CARD Co. v. HURST* (1917), 39 O. L. R. 249; 34 D. L. R. 715; *reversd*, 58 S. C. R. 603.—**CAN.**

**104iii.** —.]—Potlions had manufactured biscuits, cake, puddings &

infants' food for a great number of years, & had adopted & used the word or name "Christie" as a trade mark on labels & in advertising to denote & distinguish their goods. The word "Christie" had been used alone, not associated with the word "biscuits" or other words, & had acquired a distinctive meaning:—*Held*: the word "Christie" should be registered as a specific trade mark to be used in connection with the manufacture & sale of biscuits, cake, puddings and infants' food.—*Re CHRISTIE BROWN CO., LTD.* (Ont.) (1920), 20 Exch. C. R. 119; 56 D. L. R. 256.—**CAN.**

**104iv.** —.]—*BODEGA CO., LTD. & RIVIERE v. OWENS* (1889), 23 L. R.

Ir. 371; 7 R. P. C. 31.—**IR.**

**104v.** —.]—Where there was evidence that the words "Mile End" had been identified with appct.'s crocheted cotton by user for the preceding ten years, & where the ct. was satisfied that the term "brilliant" as applied to the said crocheted cotton was not a mere laudatory epithet & had also been identified with the said cotton for the period mentioned:—*Held*: for the purpose of the applications to the Registrar of trade marks the words were to be deemed distinctive marks.—*Re CLARK & Co., LTD.* (1912), 32 N. Z. L. R. 690.—**N.Z.**

**104vi.** —.]—*Re MILLHOFF & Co., LTD.* (1915), 34 N. Z. L. R. 946.—**N.Z.**

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in respect of those bedsteads.—*Re WHITFIELDS BEDSTEADS' LTD.'S APPLICATION*, [1909] 2 Ch. 373; 78 L. J. Ch. 677; 101 L. T. 29; 53 Sol. Jo. 598.

*Annotation:—Refd. Re Lea's Appln., Re McEwan's Appln.*, [1912] 2 Ch. 32.

106. —[—]—*BOAKE (A.), ROBERTS & CO., LTD. v. WAYLAND (W. A.) & CO., Re BOAKE (A.), ROBERTS & CO., LTD.'S TRADE MARKS*, No. 713, *post*.

107. — *Latin word.*]—(1) A Latin word will not necessarily be refused registration as a trade mark because its English equivalent could not be registered. It may be registered if it has not become a part of the English language & has become distinctive of appcts.' goods by long user & there is no danger of confusion or inconvenience to other traders.

(2) When an application is referred by the Board of Trade to ct. under s. 9 (5) of the Act of 1905, the ct. will not make any declaration that the proposed mark is or may be distinctive, but will only direct the registrar to accept the application in order that it may be proceeded with in the ordinary way.—*Re AKT. B. A. F. HJORTH & CO.'S TRADE MARK "PRIMUS"*, [1910] 2 Ch. 64; 79 L. J. Ch. 448; 20 T. L. R. 463; 54 Sol. Jo. 476; 27 R. P. C. 461.

*Annotations:—As to (1) Refd. Re Lea's Appln.*, [1913] 1 Ch. 446; *Re Carl Lindström Akt.'s Trade Mk.*, [1914] 2 Ch. 103. *Generally, Refd. Re Italia Fabbrica di Automobile* (1910), 27 R. P. C. 193.

108. —[—]—*Re ITALIA FABBRICA DI AUTOMOBILI'S APPLICATION*, No. 319, *post*.

109. — [—]—The National Cash Register co. of the United States applied to register the word "National" in class 6 in respect of cash registering machines & other goods. The Registrar of Trade Marks held that the use of this word by a private trader would be calculated to lead the public to believe that the goods were produced under public auspices & for the common benefit, & that the proposed mark was not adapted to distinguish appct.'s goods; & on this ground as well as in the exercise of his discretion, he refused the application.—*Held*: the word "National" had identified appct.'s goods for thirty years; it was not calculated to deceive, & its registration ought not to be refused in the exercise of judicial discretion.—*Re NATIONAL CASH REGISTER CO.'S APPLICATION* (1917), 34 R. P. C. 354.

*Annotations:—Distd. Imperial Tobacco Co. of Great Britain & Ireland v. De Pasquall* (1918), 87 L. J. Ch. 293; *Re National Galvanizers' Appln.* (1920), 37 R. P. C. 202. *Refd. Re Diamond T Motor Car Co.*, [1921] 2 Ch. 583.

110. — [—] Since 1855 M. & his predecessors in business had used the words "Moore & Moore, London," as a trade mark in respect of pianofortes manufactured & sold by them. In 1915 M. applied for the registration of this mark as an old mark in class 9 in respect of pianofortes. The Registrar of Trade Marks refused the application & appct. appealed by motion to the ct. Appct. also made a special application for the registration of these words as a trade mark under Trade Marks Act, 1905 (c. 15), s. 9 (5), & asked that this application should be heard by the ct. on the two matters coming on for hearing before the ct., it being established that this mark had become distinctive of appct.'s goods, the Registrar was directed to proceed with the second application. No order in respect of the first application was made on the appeal, but this was to be without prejudice to any fresh application to register the mark as an old mark.—*Re MOORE'S APPLICATION* (1917), 34 R. P. C. 154.

111. —[—]—A co. organised under the laws of Massachusetts, U.S.A., had for many years carried on business as manufacturers of abrasive materials composed mainly of aluminium oxide. In 1900, they gave the invented name "Alundum" to their artificially produced abrasives to distinguish them from the natural product corundum. In the course of manufacture they employed a patented electric furnace, but the use of this furnace was not essential to the production of "Alundum." The co.'s goods were extensively sold in this country by selling agents. In 1907, the co. registered the name "Alundum" as a trade mark in the United States, & subsequently in other countries. In 1908, they applied in this country to register "Alundum" as a trade mark in class 50 in respect of grinding materials; this application was refused by the Registrar mainly on the ground that "Alundum" was the name of a patented article, he being misled by erroneous statements in a catalogue published by an agent of the co. In 1909, they entered into an agreement with A. & Co. of Chicago, relating to the purchase & sale by the latter of appct.'s abrasives; & by the agreement A. & Co. agreed to use appct.'s trade mark "Alundum" in conjunction with their own name on all abrasives made from "Alundum" but on no other abrasives. On May 2, 1916, appct. again applied for the registration of "Alundum" as a trade mark in class 50, in respect of abrasive materials composed substantially of aluminium oxide, but this application was also refused by the Registrar. Appct. appealed from this refusal by notice of motion to the ct. & filed evidence from which it appeared that the word "Alundum" was recognised throughout the trade as distinctive of appct.'s goods.—*Held*: on the evidence before the ct. "Alundum" was not a trade name or the name of a patented article, but was distinctive of appct.'s products, & this distinctiveness was not in any way limited by the agreement with A. & Co.—*Re NORTON CO.'S APPLICATION* (1919), 36 R. P. C. 153.

112. — [—]—*Re WILLIAMS-OVERLAND CO.'S APPLICATION* (1920), 37 R. P. C. 244.

113. — [—]—J. F. carried on a business in Lausanne, Switzerland, selling, amongst other things, self massage rollers of which he was the inventor & patentee. He was the registered proprietor in Switzerland & under the International Registration of a trade mark consisting of the words "Le Vampire," which was applied to his rollers. From Aug. 1926, Elaine Inescourt (afterwards Elaine de Winat) imported Freiss' rollers. The rollers were sent in cardboard boxes, the rollers & boxes bearing the words "Le Vampiro" & Freiss' trading name "Le Wilma, Lausanne," & with them were supplied pamphlets bearing the words "sold by Maison Wilma, Lausanne," & "La Wilma, Lausanne." Elaine Inescourt sold the rollers in England, putting her trading name, Blanche Verlain, on the inside of the boxes, & in most cases, covering Freiss' trading name on the pamphlets with her trading name. In Dec. 1926, Elaine Inescourt registered the words "Le Vampire" in England: in Apr. 1928, Julien Freiss moved to expunge the Trade Mark from the Register.

Appct. contended that "Le Vampire" rollers meant in England his rollers, & that resp. could not acquire a title to a mark used by appct. in England; Resp. alleged that there was no user of the trade mark in England by appct., & that the trade mark denoted her merchandise exclusively:—*Held*: there was a user by appct. in England of the words "Le Vampire"; the trade mark was



not distinctive of the goods of resp.; & the registration was made without sufficient cause, & the mark should be struck off the Register.—*Re INESCOURT'S TRADE MARK* (1928), 46 R. P. C. 13.

**114. — Within limited area.]**—A mere laudatory epithet cannot acquire by user the quality of distinctiveness within Trade Marks Act, 1905 (c. 15), s. 9 (5), so as to render it capable of registration as a trade mark.

Upon a special application to register the word "Perfection" as a trade mark for common soap it was proved that for many years past appcts. had advertised their soap under that name & had also used the name upon the cakes of soap sold by them, but always in conjunction with their own name & that in many parts of England appcts.' soap had become known to a large extent as "Perfection" soap:—*Held*: the word ought not to be admitted to registration.—*Re CROSFIELD (J.) & SONS, LTD.*, [1910] 1 Ch. 130; 79 L. J. Ch. 211; 101 L. T. 587; 26 T. L. R. 100; 26 R. P. C. 837, C. A.

*Annotations*:—*Consd.* *Re Gramophone Co.'s Appln.*, [1910] 2 Ch. 423. *Appld.* *Re Cassella*, [1910] 2 Ch. 240; *Re Pope's Electric Lamp Co.'s Apphs.*, [1911] 2 Ch. 382. *Consd.* *Teofani v. Teofani*, *Re Teofani's Trade Mk.*, [1913] 2 Ch. 545. *Appld.* *Re Massachusetts Saw Works* (1918), 35 R. P. C. 137. *Reftd.* *Re Akt. B. A. F. Hjorth's Trade Mk.*, [1910] 2 Ch. 64; *Thorne v. Sandow* (1912), 106 L. T. 926; *Re Lea's Appln.*, [1913] 1 Ch. 446; *Regr. of Trade Mks. v. Du Cros*, [1913] A. C. 624; *Sharpe v. Solomon*, *Re Sharpe's Trade Mk.* (1914), 81 L. J. Ch. 290; *Re Berna Commercial Motors*, [1915] 1 Ch. 414; *J. Garrett's Appln.*, [1916] 1 Ch. 436; *Re National Cash Register Co.* (1917), 31 R. P. C. 351; *Imperial Tobacco Co. of Great Britain & Ireland v. Pasquall*, *Re Imperial Tobacco Co.'s Trade Mks.*, [1918] 2 Ch. 207; *Re Burford's Appln.*, [1919] 2 Ch. 28; *Re National Galvanizers' Appln.* (1920), 37 R. P. C. 202; *Re Union Nationale Inter-Syndicale's Appln.*, *Re Bass, Ratcliff & Gretton's Opposition*, [1922] 2 Ch. 653; *Re Davis' Trade Mks.*, *Davis v. Sussex Rubber Co.*, [1927] 2 Ch. 345.

**115. User in foreign country.]**—*Re DIAMOND T MOTOR CAR CO.*, No. 68, *ante*.

**116. —.]**—*BANHAM (GEORGE) & CO. v. REDDAWAY (F.) & CO.*, No. 337, *post*.

**Geographical name.]**—*See* Sub-sect. 6, B., *ante*.  
**Surname.]**—*See* Sub-sect. 6, C., *ante*.

#### E. Other Cases.

**117. Mark in foreign characters.]**—*BROADHURST v. BARLOW*, [1872] W. N. 212.

*Annotation*:—*Reftd.* *Raggett v. Findlater* (1873), L. R. 17 Eq. 29.

**118. —.]**—*R. & co.* applied under Trade Marks Registration Act, 1875 (c. 91), to register the word "Tod" written in Arabic characters, as a trade mark. The Registrar of Trade Marks declined to register the mark, stating that he was acting in accordance with a regulation, established for his guidance by the Comrs. of Patents, that applications to register words in foreign character could not be entertained:—*Held*: the Comrs. of Patents had no power to make the rule referred to, & *R. & co.* were entitled to have their trade mark registered.—*Re ROTHERHAM'S TRADE MARK* (1880), 14 Ch. D. 585; 49 L. J. Ch. 511; 43 L. T. 1, C. A.

*Annotations*:—*Reftd.* *Re Leaf's Trade Mk.* (1886), 33 Ch. D. 477; *Re Trade Mk. of Dewhurst*, [1896] 2 Ch. 137.

**119. Initials coupled with symbol or word.]**—*Re BARROWS' TRADE MARKS*, No. 300, *post*.

**120. —.]**—A certain mark had been registered in 1902 as a trade mark consisting of a single circle, scrolls & three initials in the form of a triangle within the scrolls, the background being dark &

the circles & initials in relief. A similar mark only in the flat & treated by appcts. as identical & not registered had been continuously & extensively used by them since 1905 until Aug. 1916, when the Patent Office complained of its being used with the words "Registered trade mark." Appcts. thereupon without admitting any distinction filed a fresh application to register this mark:—*Held*: (1) it had become distinctive by uses within Trade Marks Act, 1905 (c. 15), s. 9 (5), & ought to be registered; (2) it was not an attempt to register initials & would not cause substantial difficulty or confusion in view of the rights of user of other traders.—*Re BRITISH THOMSON-HOUSTON CO.'S APPLICATION* (1917), 61 Sol. Jo. 353.

**121. Mark in common use in trade—Though prima facie distinctive.]**—*BURLAND v. BROXBURN OIL CO.*, *Re BURLAND'S TRADE MARK*, No. 474, *post*.

**122. —.]**—A trade mark consisting of the head & shoulders of the picture known as Gainsborough's "Duchess of Devonshire" was registered by plffs. in Jan. 1892, in class 38, for "hats, bonnets, & similar head coverings." It was alleged that deft., who also carried on a millinery business, had infringed plffs.' trade mark by affixing to his premises, while in the course of erection, a board upon which there was a painted reproduction of the Duchess; that he had also exhibited the same mark upon posters & advertisements in connection with his business, & that he used boxes for delivering millinery, etc., & notepaper containing reproductions of plffs.' trade mark. Deft. alleged that he had for seven years past or thereabouts used representations of the Duchess in various ways in connection with his business as a milliner. It was proved that the picture in question had from the year 1876 been in common use in the hat & millinery trade as an ornamentation upon various papers, circulars, etc., used by milliners in their business. Plffs. had never used the trade mark on the actual goods supplied by them, but they had often used it on labels affixed to the boxes in which the goods were delivered to customers as well as on bills, receipts, etc. Deft. had used the mark which constituted the alleged infringement in a similar manner:—*Held*: (1) in 1892, when the trade mark was registered, it was not "distinctive" or capable of distinguishing the goods of plff. as his manufacture or selection from the goods of all other persons; it was not therefore capable of registration, & it must be expunged from the register. *Semle*: (2) in order to justify the removal of a trade mark from the register on the ground of non-user, it must be shown either (a) that at the date of registration there was no *bona fide* intention to use it; & that it has never in fact been used; or (b) if there was a *bona fide* intention to use & actual user for a short time, there has been actual abandonment over a long period of time.—*LOUISE & CO., LTD. v. GAINSBOROUGH* (1902), 87 L. T. 591; 19 T. L. R. 99; 20 R. P. C. 61.

*Annotation*:—*As to* (1) *Reftd.* *Young v. Grierson*, *Oldham* (1924), 41 R. P. C. 548.

**123. —.]**—*WARWICK TRADING CO., LTD. v. URBAN*, *Re TRADE MARK NO. 216,821*, No. 21, *ante*.

**124. —.]** Application was made to register in class 50 in respect of window sash cords, trolley cords & arc light cords a trade mark consisting of diamond shaped spots arranged in pairs

#### PART I. SECT. 2, SUB-SECT. 6.—E.

**h. Descriptive letters.]**—The letters "C.A.P." standing for the words

"cream acid phosphates," a fancy name for acid phosphates manufactured by plffs., were held to constitute a valid trade mark.—*PROVIDENT CHEMI-*

*CAL WORKS v. CANADA CHEMICAL MANUFACTURING CO.* (1902), 4 O. L. R. 545; 1 O. W. R. 618; 22 C. L. T. 381. —*CAN.*

*Sect. 2.—What trade marks registrable: Sub-sect. 6, E.; sub-sect. 7.]*

positioned diagonally so as to form a double helix running the whole length of a cord. The application was opposed by several opponents, the grounds of opposition being that the mark was not in fact distinctive, that it was common to the trade & that its registration would preclude the opponents & other manufacturers from manufacturing cord having coloured threads as indicated in the mark which they were lawfully doing. The mark had been used in the United Kingdom by appets. since 1901, & they contended that it had become distinctive of their goods. The Registrar held the mark was not distinctive nor adapted to distinguish the goods of appets. from those of other persons & refused to register it. On appeal to the ct.:—*Held*: the mark in itself was not adapted to distinguish & had not become in practice & by use so adapted, but even if it had the Registrar was amply justified in refusing to exercise his discretion in favour of registration.—*Re SAMSON CORDAGE WORKS' APPLICATION* (1927), 44 R. P. C. 313.

**125. Word in popular use.]—***Re NATIONAL CASH REGISTER CO.'S APPLICATION*, No. 109, *ante*.

**126. —.]**—An application was made to register the word "National" as a trade mark in class 13 in respect of certain metal hollow ware goods. The word was registered by appets. for other goods in that class. The application was opposed by the secretary of the Wrought Hollow Ware Employers' Asscn. The Registrar refused the application on the ground that appets. had not discharged the *onus* of showing that the mark was free from objection & on the evidence before him, in the exercise of his discretion:—*Held*: the word "National," although *per se* registrable under Trade Marks Act, 1905 (c. 15), s. 9, para. (4), was *prima facie* a word which ought not to be allowed to be registered; without satisfactory evidence to the contrary, the word was one which would be deceptive within sect. 11; on the evidence the word was not distinctive of appets.' goods; the Registrar had exercised his discretion rightly & if it were necessary for the ct. to exercise a discretion, the ct. must exercise it in the same way.—*Re NATIONAL GALVANIZERS, LTD.'S APPLICATION* (1920), 36 T. L. R. 783; 37 R. P. C. 202.

**127. Mark distinctive of particular goods—Irrespective of proprietor.]—**(1) A German co. who were the owners of the Apollinaris mineral water spring at Neuenahr in Rhenish Prussia, applied to register the word "Apollinaris" in England in class 44 in respect of mineral waters. There was evidence of very extensive user of the word "Apollinaris," & that it meant the water from appets.' spring & no other water. The Board of Trade having required the application to be made to the Ch. Div.:—*Held*: on appets. undertaking "not to use the mark except in respect of water from their property at Neuenahr or the neighbourhood thereof," the word "Apollinaris" ought to be deemed a "distinctive mark" within the meaning of Trade Marks Act, 1905 (c. 15), s. 9 (5), & might fairly be registered under the Act.

(2) When the evidence shows that the word sought to be registered distinguishes the goods of the proprietor of the mark, it is not the less "distinctive" of the goods of the proprietor because it also distinguishes the goods irrespective of the proprietor.—*Re "APOLLINARIS" TRADE MARK*, [1907] 2 Ch. 178; 76 L. J. Ch. 437; 96 L. T. 877; *sub nom. Re ACT. APOLLINARIS*

*BRUNNEN VORMALS GEORG KREUZBERG*, 23 T. L. R. 515; 24 R. P. C. 436.

*Annotations:—As to (1) Consd. Re Lea, Re McEwan* (1912), 81 L. J. Ch. 489. *Reid. Re Karlsbad City Appln.* (1912), 29 R. P. C. 162; *Re Riddaway's Appln.*, [1914] 1 Ch. 856. *Generally, Reid. Teofani v. Teofani, Re Teofani's Trade Mk.*, [1913] 2 Ch. 545.

**128. —.]**—An application was made by M. to register the word "Demos" as a trade mark in class 49 in respect of fishing tackle, except fishing hooks. This application was opposed by R. on the ground that he was entitled to the mark, & he applied for registration of it as a trade mark in class 49 in respect of fishing gut substitute. The mark had been used in connection with that article by M. & R., but it was a matter of dispute between them what their business relations were & who was entitled to the mark. The Registrar refused to proceed with the applications until the rights of the parties had been determined by the ct. under Trade Marks Act, 1905 (c. 15), s. 20. M. applied by notice of motion to the ct. for the determination of such rights, & the matter was entered in the witness list, *videlicet* evidence being taken:—*Held*: the evidence showed that the word "Demos" in connection with fishing gut substitute had been used in a manner to identify it, not with the goods of any particular person, but with the particular article; R.'s application was refused, & M.'s application was also refused, so far as it related to fishing gut substitute; & as M. had been in the right as to the main dispute, namely, the ownership of the mark so far as it belonged to either him or R., while in general there should be no costs of the application & opposition, the taxing master should distinguish & give to M. such extra costs as should have been occasioned by R.'s claim to be the substantial owner of the business & of the trade mark so far as connected therewith.—*Re DE MAID'S APPLICATION & Re ROTHCHILD'S APPLICATION* (1914), 31 R. P. C. 305.

**129. —.]**—Appets. applied to register as a trade mark the word "Chocaroons" in respect of a new sweetmeat of the same character as chocolate macaroons, but differing from them in general appearance & taste:—*Held*: although the word was "an invented word" within Trade Marks Act, 1905 (c. 15), s. 9, & was not "calculated to deceive" within sect. 11 of the Act, it was not used for the purpose of indicating the goods of appets. within sect. 3 of the Act, but to denominate a particular kind of sweetmeat everybody had the right to make, & it ought not therefore to be registered as a trade mark.—*Re WILLIAMS & CO.'S, LTD. APPLICATION* (1917), 86 L. J. Ch. 273; 116 L. T. 456; 33 T. L. R. 199; 61 Sol. Jo. 335; 34 R. P. C. 197, C. A.

**130. —.]**—*Re DAVIS'S TRADE MARKS, DAVIS v. SUSSEX RUBBER CO.*, No. 67, *ante*.

**131. Undertaking to confine mark to particular goods.]—***Re "APOLLINARIS" TRADE MARK*, No. 127, *ante*.

**132. Mark assigned to limited company—Omission of "limited" from mark.]—***Re BRYANT & MAY, LTD.* (1888), 4 T. L. R. 675.

**133. Photograph of inventor—Used with descriptive mark.]—**A term which by judicial decision has become open to the trade as the proper description of an article made in accordance with the recipe of the original inventor, & is therefore *publici juris*, cannot be registered as a trade mark either alone or in combination with a portrait of the original inventor; & such portrait is not a sufficiently "distinctive device" within Trade Marks Act, 1875 (c. 9), s. 10, to be capable of registration as a trade mark *per se*.—*Re ANDERSON'S TRADE MARK* (1884), 20 Ch. D. 409;

53 L. J. Ch. 664; 32 W. R. 677; *affd.* (1885), 54 L. J. Ch. 1084, C. A.

*Annotations:—Expld. & Distd.* Rowland v. Mitchell (1896), 65 L. J. Ch. 837. *Reid.* Rowland v. Mitchell (1896), 65 L. J. Ch. 110; *Re* Faulder's Trade Mk. (1900), 83 L. T. 726.

**134. Photograph of manufacturer.]—**ROWLAND v. MITCHELL, *Re* ROWLAND'S TRADE MARK, No. 754, *post*.

**135. Pictorial representation of form in which article sold.]—**In 1861 pl'tfs. registered a design for the shape of blocks of black lead, being a cylinder terminated by a dome at one end. From that time they sold black lead in boxes upon which a black dome was impressed, & they imprinted a dome upon each block of black lead. This they did without regard to the shape of the blocks they sold, & there was evidence that the term "dome black lead" had become known in the trade as denoting black lead of pl'tfs.' manufacture. In 1877 they registered a black dome as their trade mark for "black lead." Pl'tfs. having brought an action to restrain infringement of their trade mark de'fts. applied to have it expunged from the Register, & PEARSON, J., ordered it to be expunged on the ground that it was only a representation of the thing sold, which thing everybody was at liberty to make, & therefore was not a good trade mark:—*Held*: there was no reason why a dome should not be a distinctive mark for black lead, the evidence showed it to be in fact distinctive, it was therefore capable of registration as a trade mark.—*Re* JAMES'S TRADE MARK, JAMES v. SOULBY (1886), 33 Ch. D. 392; 2 T. L. R. 868; *sub nom.* JAMES & SONS v. PARRY & CO., *Re* JAMES & SONS' TRADE MARK, 55 L. J. Ch. 915; 55 L. T. 415; 35 W. R. 67; 3 R. P. C. 340, C. A.

*Annotation:—Consd.* Louise v. Gainsborough (1902), 87 L. T. 591.

**136. Representation of prize medal awarded by trade exhibition.]—**In order to support an application for the registration of a trade mark, it must be shown, not merely that the trade mark consists of or contains an essential particular, as defined by sect. 64 of Patents, Designs, & Trade Marks Acts, 1883 to 1888, but that such essential particular has been claimed as such in the application in accordance with the same sect.

An application was made by Messrs. B. & M., match makers, for an order upon the Comptroller of Trade Marks to register a label as their trade mark for "wax vestas."

The label consisted of a slip of paper intended to fold round their small boxes of matches.

The upper portion of the label had on it two representations of a prize medal, obverse & reverse, surmounting a curved fillet, with the words "Medalla de Oro," & underneath the fillet were the words "Exposicion Universal de Barcelona."

There was evidence that no other match manufacturer was using a label similarly arranged:—*Held*: the label was not a distinctive label within the meaning of Patents, Designs, & Trade Marks Acts, 1883 to 1888.—*Re* BRYANT & MAY, LTD. (1890), 59 L. J. Ch. 763; 63 L. T. 676.

**137. Two ovals—Enclosing unregistrable description of goods.]—**B. registered a trade mark for corsets, consisting of two ovals, a smaller within a larger, & the words "Worth's Corsets" in ordinary type between the two. B. brought an action for infringement against T., who moved to expunge the trade mark:—*Held*: two ovals

were not distinctive when applied to a corset, & as this was so, & as "Worth's Corsets" in ordinary type was not registrable alone as a new mark, therefore the mark must be expunged from the Register.—*Re* BRADLEY'S TRADE MARK (1892), 9 R. P. C. 205.

*Annotations:—Consd.* *Re* Wright, Crossley's Appln. & Royal Baking Powder Co. of New York, [1900] 2 Ch. 218. *Distd.* *Re* Diamond T Motor Car Co., [1921] 2 Ch. 583.

**138. Initials of proprietors—Distinctive within limited area.]—**Motor cab proprietors in London applied for registration as trade marks for motor vehicles of two marks used by them for about three years on & in connection with their motor cabs in London. One mark consisted of the letters "W" & "G," joined by the copulative symbol "&," written in a running hand with a distorted tail to the "G" ending up under the "W." The other mark consisted of "W & G" in ordinary block letters. These marks had become in fact distinctive in the London district but not elsewhere. The Registrar refused the applications:—*Held*: the marks were not distinctive within the meaning of the word in Trade Marks Act, 1905 (c. 15), s. 9 (5), & were therefore not registrable.—*TRADE MARKS REGISTRAR v. DU CROS (W. & G.), LTD.*, [1913] A. C. 621; 83 L. J. Ch. 1; 109 L. T. 687; 29 T. L. R. 772; *sub nom.* *Re* DU CROS' APPLICATION, REGISTRAR OF TRADE MARKS v. DU CROS, 57 Sol. Jo. 728; 30 R. P. C. 660, H. L.

*Annotations:—Consd.* *Re* Slazengers' Appln. (1914), 31 R. P. C. 50. *Ap'd.* Sharpe v. Solomon, *Re* Sharpe's Trade Mk. (1914), 84 L. J. Ch. 200; *Re* Sharpe's Trade Mk. (1915) 2 Ch. 202; *Re* Garrett's Appln., [1916] 1 Ch. 136. *Consd.* *Re* Cording's Appln., [1916] 1 Ch. 422. *Distd.* *Re* British Thomson-Houston Co.'s Appln. (1917), 61 Sol. Jo. 333. *Consd.* *Re* National Cash Register Co. (1917), 34 R. P. C. 351; *Re* Burford's Appln., [1919] 2 Ch. 28; *Re* Diamond T Motor Car Co., [1921] 2 Ch. 583; *Banham v. Reddaway*, [1927] A. C. 406. *Ap'd.* *Re* Samson Cordage Work's Appln. (1927), 41 R. P. C. 313. *Reid.* *Re* Lea's Appln., [1913] 1 Ch. 446; *Imperial Tobacco Co. of Great Britain & Ireland v. Pasquall*, *Re* Imperial Tobacco Co.'s Trade Mks., [1918] 2 Ch. 207.

#### SUB-SECT. 7.—MARKS CALCULATED TO DECEIVE.

*See* Trade Marks Act, 1915 (c. 15), s. 11.

**139. Meaning of "calculated to deceive"—Deceptiveness inherent in mark itself—Not similarity to other trade marks.]—**The words "calculated to deceive," in Trade Marks Registration Act, 1875 (c. 91), s. 6, as applied to words registered in connection with trade marks, refer to deceptiveness in the words themselves, & not that arising from similarity to words used in other trade marks.—*Re* HORSBURGH & CO.'S APPLICATION (1878), 53 L. J. Ch. 237, n.; 50 L. T. 23, n.; 32 W. R. 530, n.

*Annotations:—Apprvd.* *Re* Dunn's Trade Mks. (1889), 41 Ch. D. 439. *See* (1890), 15 App. Cas. 232. *Reid.* *Blair v. Stock* (1884), 52 L. T. 123; *Leonard & Ellis v. Wells*, *Re* Leonard & Ellis's Trade Mk. (1881), 53 L. J. Ch. 603.

**140. ———.]—**ENO v. DUNN, No. 180, *post*.

**141. What may be calculated to deceive—Consideration of circumstances of particular case—Reasonable probability of injury to others.]—**The fact that upon a part of a label, the whole of which is registered as a trade mark, there is printed the word "trade mark," is not necessarily calculated to deceive as suggesting that that part alone constitutes the trade mark.

The ct. must decide from the circumstances of the particular case before it whether the position

#### PART I. SECT. 2, SUB-SECT. 7.

**141 i. What may be calculated to deceive—Consideration of circumstances**

*of injury to others.]—*LEVER BROTHERS, LTD. v. ABRAMS (1909), 8 C. L. R. 609.—*AUS.*

**141 ii. ———.]—**The question whether a mark so nearly resembles another as to be likely to deceive within the meaning of Trade Marks

**Sect. 2.—What trade marks registrable: Sub-sect. 7.]** of the word "trade mark" is calculated to deceive, & whether, if it is, there is a reasonable probability of any one being injured by it.

In 1876 a label was registered as a trade mark by a firm of brewers as an "old mark," *i.e.*, one which they had used for some years before Dec. 31, 1875. In the centre of the label was a diamond or four-sided figure, & the label was surrounded by an ornamental border. Upon the diamond was printed the word "trade mark." The firm also in 1876 registered the diamond alone as a trade mark. In 1900 a rival firm of brewers applied to have the label removed from the register, on the ground that the printing of the word "trade mark" upon the diamond was calculated to deceive, as suggesting that it alone constituted the trade mark, & that the remainder of the label might be imitated:—*Held*: under the circumstances the position of the word "trade mark" upon the label was not calculated to deceive; there was no reasonable probability of any one being injured by it; & there was no ground for removing the label from the register.—*Re BASS, RATCLIFFE & GRETTON, LTD. (No. 2) REGISTERED TRADE-MARKS, [1902] 2 Ch. 579; 71 L. J. Ch. 779; 87 L. T. 408; 51 W. R. 86; 18 T. L. R. 785; 46 Sol. Jo. 684; 19 R. P. C. 529, C. A.*

**142. — — — .]** An application having been made for the registration of a device as a trade mark in class 42 in respect of gelatine for use as food or as an ingredient in food, the application was opposed by a firm of general merchants, who had used an exactly similar device in respect of tapioca & sago; but this device was not registered as a trade mark. The Registrar, acting for the Comptroller, refused the application. Appets. appealed, & the appeal was referred to the Ct. The evidence filed on the appeal showed, contrary to that before the Registrar, that the opponents had not traded in gelatine:—*Held*: having regard to the difference between the goods & the general circumstances, there was no reasonable probability of deception, the application for registration was accordingly ordered to be proceeded with.—*Re LEINER'S APPLICATION (1903), 20 R. P. C. 253.*

**143. — — — .]** The use of a Spanish brand name as part of a trade mark in connection with cigars may be, but is not necessarily, "calculated to deceive" within the meaning of Trade Marks Act, 1905 (c. 15), s. 11, as containing the false suggestion that the cigars are made in Havana or some Spanish speaking country, when in fact they are made elsewhere. Each case must be judged by its own special circumstances.—*Re VAN DER LEEUW'S TRADE MARK, [1912] 1 Ch. 40; 81 L. J. Ch. 100; 105 L. T. 626; 28 T. L. R. 35; 56 Sol. Jo. 53.*

**144. — — — Mark formerly used with fraudulent addition.—Removal of fraudulent addition.]**—A cigar merchant applied to register as new marks certain labels to be applied to tobacco, whether manufactured or unmanufactured.

Previous to the year 1887 he had used the marks on boxes of cigars in combination with the word "Habana," though the cigars were in fact of Mexican growth & manufacture. The labels also contained words implying that he was the suc-

cessor in business of a certain firm of M. & co., which he was not. The marks for the registration of which application was now made, omitted the word "Habana," & substituting the true place of origin of his cigars, & his own name on the boxes, without any false addition as to previous businesses:—*Held*: the original fraudulent user of the marks disentitled appct. to have them registered as new marks, even though the dishonest portions were omitted, for to permit registration would in effect be enabling appct. to benefit by his former fraudulent conduct.—*Re FUENTE'S TRADE MARKS, [1891] 2 Ch. 166; 60 L. J. Ch. 308; 64 L. T. 196; 39 W. R. 489; 7 T. L. R. 289.*

*Annotations:—Refd. Paterson v. Kit Coffee Co. (1900), 27 R. P. C. 591; Bilo Bean Manufacturing Co. v. Davidson (1906), 22 R. P. C. 553.*

**145. — — — Use of word "London"—By maker in Coventry.]—Re HILL'S TRADE MARK, No. 441, post.**

**146. — — — Use of words "trade mark"—On part only of registered mark.]—Re BASS, RATCLIFFE & GRETTON, LTD. (No. 2) REGISTERED TRADE-MARKS, No. 141, ante.**

**147. — — — Use of word common to trade.]—WARWICK TRADING CO., LTD. v. URBAN, Re TRADE MARK No. 216,821, No. 21, ante.**

**148. — — — .]**—An application was made by L. & K., a Belfast firm of whisky distillers, to register a label including a scroll with a blank left in front of the words "V.O. Whisky." It appeared that the label had been actually used for some time with the word "Kinahan's" there inserted & that a representation had been made in appets.' price lists that it was already registered, & that appets. had done little business outside the Belfast district. The opponents, K. & Co., Ltd., trading as distillers in both Dublin & London, opposed the registration on the grounds that the term "Kinahan's Whisky" was invariably used for their whisky & meant their whisky, & that the trade mark applied for would deceive in use; & that appets. in view of one of their previous registrations ought not to be allowed to cumber the Register with this mark; & that as they had misrepresented their mark as registered their application to register it ought to be refused. The Registrar decided in favour of appets. on all three grounds & allowed the application:—*Held*: the term "Kinahan's Whisky" had no secondary meaning signifying the opponents' whisky only, & that the proposed trade mark was not calculated to deceive; & also the conclusions of the Registrar on the other two points were sound.—*Re LYLE & KINAHAN, LTD.'S APPLICATION (1907), 24 R. P. C. 219, C. A.*

*Annotation:—Refd. Re Bagots, Hutton's Trade Mk., [1916] 2 Ch. 103.*

**149. — — — Use of word "Royal"—Where not under royal patronage.]—Re ROYAL WORCESTER CORSET CO.'S APPLICATION, No. 348, post.**

**150. — — — Use of Spanish brand name—On cigars made in non-Spanish country.]—Re VAN DER LEEUW'S TRADE MARK, No. 143, ante.**

**151. — — — Invented word.]—Re SALTER'S APPLICATION, No. 40, ante.**

**152. — — — Use of word "Colleen"—Applied to non-Irish products.]—An application was made by a Scotch firm to register the word "Colleen" as a trade mark in class 18 in respect of all goods**

Act, 1905, s. 53, must be determined upon a consideration of the whole of the marks or designs upon pltf.'s & def't.'s goods.—*SCHWEPPE'S, LTD. v. ROWLANDS (E.) PROPRIETARY, LTD.*

(1910), 11 C. L. R. 347.—**AUS.**

**k. — — — Letters may be words.]—**Letters which are commonly used to denote words may be "words calculated to deceive" within the meaning

of Trades Marks Act (No. 2), 1890, s. 17. The letters "P. & O." held to be "words."—*Re FERGUSON & CO.'S TRADE MARK (1903), 29 V. L. R. 331.—AUS.*

included therein &, in particular, cooking ranges. The application was opposed by an Irish assocn. on the ground that the mark when applied to non-Irish goods was calculated to deceive, as it would convey the idea that the goods were manufactured in Ireland. The Comptroller-General, as Registrar, allowed the applications & the opponents appealed to the ct.:—*Held*: the fact that the word "Colleen" was upon a stove offered for sale in Ireland was not calculated to induce the belief that the stove was of Irish origin; the Registrar had arrived at a right conclusion when he decided that the application for registration should be allowed to proceed; & the appeal must be dismissed.—*Re JONES & CAMPBELL, LTD.'S APPLICATION* (1924), 41 R. P. C. 523.

**153. Whether mark registrable—Mark not in fact deceptive—Possibility of dishonest use immaterial.**—K. applied to register in class 3 for a proprietary medicine for human use, being a mineral salt preparation manufactured in Carlsbad, Bohemia, a mark consisting of the following particulars: the words "Kutnow's Improved Effervescent Carlsbad Powder," then below, a picture of the well known rock at Carlsbad with a chamois on the top, & below "Hirschensprung or Deer-leap, Carlsbad," with the name "S. Kutnow & Co." This application was opposed by the corpn. of Carlsbad, who are proprietors of the springs there, & their lessees, on the ground that the mark was calculated to deceive. According to the evidence, the term "Carlsbad Salts" in the trade was applied not only to natural salts from the opponents' springs, but also with distinguishing terms to salt sold by other persons, & not made from the products of the opponents' springs. Kutnow's goods were not got up in the same way as the opponents'. The actual rock at Carlsbad, though belonging to the corpn., was some considerable distance from the springs from which the salts came. It was alleged by the opponents that even if the powder originally manufactured by K. was made of genuine Carlsbad salt, he could no longer procure any, & would thus be deceiving the public:—*Held*: the mark was not intended or likely to deceive the public & the mere fact that a mark might be dishonestly used was no ground for refusing registration.—*Re KUTNOW'S TRADE MARK* (1893), 10 R. P. C. 401.

*Annotation*:—*Reid. Re McDowell's Appln.* (1926), 43 R. P. C. 313.

**154.** —.]—*Re SAUNION & Co.* (1878), Sebastian Digest of Trade Mark Cases, 381.

*Annotation*:—*Reid. Re Van Duzer's Trade Mk., Re Leaf's Trade Mk.* (1887), 31 Ch. D. 623.

**155.** —.]—Pltf., who was a wine & spirit merchant, registered a trade mark together with the words "Strathmore Blend," which was the name of a certain blend of various whiskies made & sold by him, & he advertised the same very widely. Many of pltf.'s customers were in the habit of ordering his whisky by calling it "Strathmore whisky," omitting the word "blend," & the whisky became known in the market as "Strathmore whisky." Def't. subsequently registered a trade mark & the name of "Strathmore" for a whisky blended & sold by him. The question was whether the use of the word "Strathmore" by def't. was calculated to deceive:—*Held*: (1) the

word "blend" described simply the operation of manufacturing, & was not an essential part of the name of pltf.'s whisky; the word "Strathmore" was a fancy name; the use of that word by any person, other than pltf., as a name for whisky would be calculated to deceive; & def't. must be restrained by injunction from using the word either as part of his trade mark, or otherwise; (2) it was not lawful for def't. to register the word "Strathmore" in combination with his trade mark, & the Register must be rectified by striking out the word.—*BLAIR v. STOCK* (1884), 52 L. T. 123.

*Annotations*:—*As to* (1) *Consd. Re Van Duzer's Trade Mk., Re Leaf's Trade Mk.* (1887), 34 Ch. D. 623. *Reid. Re Hanson's Trade Mks.* (1887), 57 L. T. 859.

**156.** —.]—The Swift Specific Co. applied to register a trade mark consisting of a distinctive device, but having in addition the words "Swift's Specific." A chemist named Swift opposed the application on the ground that he had for many years used those words, & that therefore the mark was calculated to deceive. The opponent secondly contended that the registration should be accompanied by a disclaimer of the exclusive use of those words. In an affidavit filed after the opposition app'ts. stated their willingness to make such disclaimer, but the opponent insisted that they ought to distinguish their specific as an American one:—*Held*: (1) the mere use of the words "Swift's Specific," without something to indicate that the goods sold by app't. were sold as those of the opponent, was not a ground for opposition; (2) without deciding whether the disclaimer should be contained in the application, there ought to be a disclaimer, but since the date of the offer the opponent was in the wrong.—*Re SWIFT SPECIFIC CO.'S TRADE MARK* (1889), 6 R. P. C. 352.

*Annotation*:—*As to* (2) *Consd. Re Apollinaris' Trade Mks.*, [1891] 2 Ch. 186.

**157.** —.]—William Edge registered two trade marks for blue, consisting, one of the words "Edge's Filtered Blue," & the other of those words combined with other particulars. J. moved to rectify the Register by expunging the first mark & also so much of the second as consisted of those words, or that E. might be ordered to disclaim the exclusive right to those words. E. put in evidence to show the word "Filtered" did not refer to either the character or the quality of the goods, as the blue did not go through any process of filtration:—*Held*: (1) the word either referred to the character or quality of the goods, or, if not was calculated to deceive, in either case the first mark was bad & must be expunged; (2) there must be a disclaimer as to the second mark of any exclusive right to the word "filtered."—*Re EDGE'S TRADE MARKS* (1891), 8 R. P. C. 207.

**158.** —.]—The S. Co. applied to register as a trade mark for armoured hose a representation of a triple knot of the armoured hose. This application was opposed by M., who had previously used as advertisements representations of armoured hose coiled in a similar manner, on the ground that the proposed mark so nearly resembled his advertisements that it was calculated to deceive. M. also said that the mark was not distinctive. The Comptroller having refused registration, app't. appealed to the Board of Trade by whom the

**153 i. Whether mark registrable—Mark not in fact deceptive—Possibility of dishonest use immaterial.**—It is not sufficient to render words incapable of registration as part of a trade mark by reason of Trade Marks Act (No. 2), 1890, s. 17, that they might by some possible use or in some possible combination lead to deception.

To so disentitle them it must appear that, in the particular combination or trade mark in or as part of which it is proposed to register them, they are calculated to deceive.—*Re HARPER & CO.'S TRADE MARK "MAIZO," Re NATIONAL STARCH CO.'S TRADE MARK "MAIZENA,"* [1906] V. L. R. 238.—*AUS.*

**154 i.** —.]—*LEYER BROTHERS v.*

*MOWLING & SON* (1908), 6 C. L. R. 136.—*AUS.*

**154 ii.** —.]—In the case of an application to register a trade mark it is incumbent on app't. to show affirmatively that the mark he puts forward is not calculated to deceive.—*MORLEY v. MACKY, LOGAN, CALDWELL, LTD.*, [1921] N. Z. L. R. 1001.—*N.Z.*

**SECT. 2.—What trade marks registrable: Sub-sects. 7 & 8, A.]**

matter was referred to the ct.:—*Held*: without deciding whether the mark was distinctive, the mark would probably cause deception, & in such a case the ct. would not assist appct.—*Re SPHINCTER GRIP ARMoured HOSE CO.'S TRADE MARK* (1893), 10 R. P. C. 84.

*Annotation*:—*Distd. Re Veilly's Trade Mk., Re Hall & Woodhouse's Trade Mk.* (1901), 18 T. L. R. 214.

**159.** —.—.]—*Re COMPAGNIE INDUSTRIELLE DES PÉTROLES' APPLICATION, Re PRICE'S PATENT 'CANDLE CO.'S TRADE MARK*, No. 232, *post*.

**160.** —.—.]—A person who carried on business in London, under the firm name of "Shamrock & Co.," as a printer & publisher of pictorial post-cards, applied for the registration of the device of a shamrock as his trade mark. The application was opposed by an assocn. for the development of Irish industries on the ground that, if the shamrock was registered & used as a trade mark, it would be calculated to deceive purchasers into the belief that appct.'s goods were of Irish origin, when in fact they were not:—*Held*: the application must be refused, as the mark would, within Trade Marks Act, 1905 (c. 15), s. 11, be "calculated to deceive."—*Re MCGLENNON'S APPLICATION FOR REGISTRATION OF SHAMROCK* (1908), 25 T. L. R. 23; 53 Sol. Jo. 14; 25 R. P. C. 797.

*Annotation*:—*Distd. Re Van der Leeuw's Trade Mk.*, [1912] 1 Ch. 40.

**161.** —.—.]—The opponents were manufacturers of all sorts of indiarubber goods, except boots & shoes. They had registered in 1899 a trade mark, of which the distinctive part was a Maltese cross, in class 40, for "goods manufactured from indiarubber or gutta-percha, not including dress shields or gusseted webs." Appets. applied to register in class 38 two trade marks of which the distinctive feature was a Maltese cross, one for "boots & shoes made wholly or partly of indiarubber," the other for "indiarubber footwear included in this class but not including gaiters or leggings or any goods of a like kind." Appets. had used the marks in Canada on all kinds of indiarubber goods. They had done some business in England, but only in boots & shoes:—*Held*: the opponents' trade mark was for "the same description of goods" as appets.' proposed marks, & they were "calculated to deceive," & registration ought to be refused under s. 19 & also under s. 11 of Trade Marks Act, 1905 (c. 15).—*Re GUTTA PERCHA & INDIA RUBBER CO. OF TORONTO'S APPLICATIONS*, [1909] 2 Ch. 10; 78 L. J. Ch. 427; 100 L. T. 756; 26 R. P. C. 428, C. A.

*Annotations*:—*Refd. Re Grosfield's Appln.* (1909), 79 L. J. Ch. 211; *Re Massachusetts Saw Works* (1918), 35 R. P. C. 137.

**162.** —.—.]—In 1899 & 1900 resps.' predecessors in business registered the word "Orlwoola" as a trade mark under Patents, Designs, & Trade Marks Act, 1888 (c. 50), & the mark had ever since been continuously used by resps., & had become identified with a woollen material manufactured by them. There was no evidence that the registration of the mark had caused any deception or given rise to any confusion or inflicted any hardship upon other traders. Appets. asked for the Register to be rectified by the expunging of the mark "Orlwoola," & they applied also for an order on the Registrar to proceed with the registration of the word "Osowoolo" as their trade mark. Resps. had disclaimed the words "all wool":—*Held*: the registration of the word "Osowoolo" would be calculated to deceive, & its registration must therefore be refused.—*Re TRADE MARKS ACT, 1905* (1909), 25 T. L. R. 695; *sub nom. Re "ORLWOOLA"*

*TRADE MARK*, 53 Sol. Jo. 672; *sub nom. Re BROCK (H. N.) & CO.'S APPLICATION*, "OSOWOOLO," 26 R. P. C. 681; *on appeal, sub nom. Re BROCK (H. N.) & CO., LTD.*, [1910] 1 Ch. p. 137, C. A.

*Annotation*:—*Refd. Re Davis' Trade Mks., Davis v. Sussex Rubber Co.*, [1927] 2 Ch. 345.

**163.** —.—.]—*Re CASSELLA (LEOPOLD) & CO.*, No. 54, *ante*.

**164.** —.—.]—Where two traders, dealing in the same class of goods, have a common surname, they should take special care to avoid anything which would tend to mislead buyers, & the surname printed backwards cannot be registered by one of them as a trade mark, being not sufficiently distinctive, & calculated to deceive within the meaning of Trade Marks Act, 1905 (c. 15).—*CORDING (GEO.), LTD. v. CORDING (J. C.), LTD. & TRADE MARKS REGISTRAR* (1916), 85 L. J. Ch. 742; 32 T. L. R. 672; *sub nom. Re CORDING (GEORGE), LTD.'S APPLICATION*, 115 L. T. 313; 60 Sol. Jo. 706; 33 R. P. C. 325, H. L.

**165.** —.—.]—*Re SALTER'S APPLICATION*, No. 40, *ante*.

**166.** —.—.]—An application was made for the registration of a trade mark in respect of articles of clothing, consisting of the device of a noble across which was written the word "Sterling." The application was opposed by the registered proprietors of a trade mark consisting of the representation of the symbol of a pound in a shield with the word "Sterling" above, & the word "lock-stitch" below, & registered for goods of the same description. The opponents alleged that their goods were known as "Sterling" goods, & they relied both on Trade Marks Act, 1905 (c. 15), ss. 11 & 19. The application was refused on the ground that the registration of the mark would lead to confusion in the trade & deception to the public. Appct. appealed to the ct.:—*Held*: (1) the application failed in regard to sect. 19; (2) on sect. 11 the opponents had made out a case sufficiently strong to leave the application in the condition of being *in dubio* & the application failed under that sect. also.—*Re CONNOR'S APPLICATION* (1924), 41 R. P. C. 158.

**SUB-SECT. 8. IDENTICAL TRADE MARKS.**

**A. In General.**

*See Trade Marks Act, 1905 (c. 15), s. 19.*

**167. Jurisdiction of court to order registration—Trade Marks Act, 1905 (c. 15), s. 19.]**—There was on the register of trade marks a mark belonging to Messrs. B. & Sons used in respect of butter & cheese, but never in respect of condensed milk; & appct. M., who was an importer of condensed milk, applied for the registration of a somewhat similar mark in respect of condensed skimmed milk. Both marks contained the representation of a cowslip. M. had sold condensed milk for upwards of twenty-five years under the same "Cowslip Brand Condensed Milk" or "Cowslip Condensed Milk" & that was the name by which his goods had been distinguished. Messrs. B. & Sons did not oppose M.'s application. It is provided by above Act, s. 19, that except by the order of the ct., which was the order made under sect. 21, or except in the case of certain old marks, "no trade mark shall be registered in respect of any goods or description of goods which is identical with one belonging to a different proprietor which is already on the register with respect to such goods or description of goods as nearly resembling such a trade mark as to be calculated to deceive."



Sect. 21 provides that "in cases of honest concurrent user or of other special circumstances which, in the opinion of the ct., make it proper to do so the ct. may permit the registration of the same trade mark, or of nearly identical trade marks, for the same goods or description of goods by more than one proprietor," subject, if thought right, to any conditions or limitations:—*Held*: (1) the words "calculated to deceive" in sect. 19 have a milder meaning than the same words have in sect. 11 of the Act; (2) the words "so nearly resembling such a trade mark as to be calculated to deceive" mean "so nearly identical as to be confusing"; (3) sect. 19 recognises that the ct. may order registration of a mark where it is either identical with a mark already registered or so nearly identical as to be confusing; (4) the words "same trade mark" in sect. 21 correspond with the word "identical" in sect. 19 & the words "nearly identical trade marks" in sect. 21 correspond with the words "so nearly resembling such a trade mark as to be calculated to deceive" in sect. 19; (5) the registrar had rightly refused the application; (6) this was a case in which the ct. in its discretion, under sects. 19 & 21, could & ought to order the registration of M.'s mark to be proceeded with.—*Re MAEDER'S APPLICATION*, [1916] 1 Ch. 304; 85 L. J. Ch. 737; 33 R. P. C. 77; *sub nom. Re MEADER'S APPLICATION*, 114 L. T. 393.

*Annotation*:—As to (6) *Apld. Re Lehmann's Appln.* (1918), 35 R. P. C. 92.

**168. When registration allowed.—Goods in same class.—Different in character.**—*Re JELLEY, SON & JONES'S APPLICATION*, No. 201, *post*.

**169.** — — — — —.]—There being under Trade Marks Registration Act, 1875 (c. 91), four trade marks including an anchor registered in respect of goods in Class 42 of Schedule I to the rules made under the Act, the ct. refused to give leave to the Registrar to register a new trade mark including an anchor in respect of goods in the same class, but different in character from those goods for which the four trade marks had been registered.—*Re HARRIS-REAVE'S TRADE MARK* (1879), 11 Ch. D. 669; 27 W. R. 451.

*Annotation*:—*Reid. Re Braby's Appln., Re Shropshire Iron Co.'s Trade Mks.* (1882), 46 L. T. 380.

**170.** — — — — —.]—A new mark may be registered for some of the goods in a class, even though an old mark of a similar kind has been already registered for other goods in the same class, provided that the goods & the trades of the proprietors are sufficiently distinct for no confusion to take place.—*Re BRABY (F.) & CO.'S APPLICATIONS, Re SHROPSHIRE IRON CO.'S TRADE-MARKS* (1882), 21 Ch. D. 223; 51 L. J. Ch. 637; 46 L. T. 380; 30 W. R. 675.

**171.—Goods in different classes Substantially of same description.**—*Re GUTTA PERCHA & INDIA RUBBER CO. OF TORONTO'S APPLICATIONS*, No. 161, *ante*.

**172.** — — — — —.]—*Re SHREEVE'S TRADE MARK*, No. 535, *post*.

**173.—Goods of different description.**—Appets., who were engineers, sought to register the word "Millennium" as a trade mark in Class 22 in respect of carriages generally. The opponents, who were flour millers, had in 1895 registered the word in Class 42 for food, including flour & bread, & they opposed the present application, mainly on the ground that the trade mark had for ten years past denoted their flour & bread, which had been for many years, both by themselves & by bakers in different parts of the country, sold out of vans, carts, & motor cars bearing the word displayed in large characters:—*Held*: the use of the

word "Millennium" on carriages & vehicles manufactured by appets., marked in the manner usual to such a trade, was not calculated to lead the public to think that bread & flour which might be sold out of them were of the opponents manufacture; the goods in respect of which the opponents were registered were not "the same description of goods" as those of appets.; & the word was therefore properly placed on the Register by the Comptroller.—*Re LAKE & ELLIOTT'S APPLICATION* (1903), 20 R. P. C. 605.

**174.** — — — — —.]—In 1905 J. M., Ltd., a co. which carried on business in the manufacture of motor cars & accessories as well as of push-bicycles, & had used the name "Sunbeam" as a trade mark for such goods, assigned to the Sunbeam Motor Car Co., Ltd., the goodwill of their business relating to motor cars & their accessories. Previously to such sale they had registered the word "Sunbeam" in Class 22 in respect of motor vehicles, & the assignment included all trade marks connected with the business assigned. Subsequently to the assignment the trade mark was limited to motor cars, & the Sunbeam Co. were registered as proprietors of the trade mark. The assignment contained covenants by the Sunbeam co. as to the use by them of the word "Sunbeam", which were subsequently varied. J. M., the governing director of J. M., Ltd., was chairman of the Board of the Sunbeam co., but the directors of J. M., Ltd., did not hold a controlling interest in the Sunbeam co. In 1914 the Sunbeam co. took up the manufacture of aeroplanes. J. M., Ltd. had never made aeroplanes or aeroplane parts, but they had since the assignment manufactured motor bicycles. In 1913 J. M., Ltd. registered, under No. 349,035, the word "Sunbeam" in Class 6 for goods which covered aeroplanes, but this was done inadvertently & the registration was cancelled in 1915, except in respect of engines & parts thereof included in Class 6 for motor bicycles & other purposes, but not including engines or parts thereof for aeroplanes or for other automobiles besides motor bicycles, & radiators for internal-combustion engines. The Sunbeam co. applied for the registration of the words "Sunbeam-Coatalen" as a trade mark for engines & parts thereof included in Class 6 for aeroplanes & motor vehicles other than motor bicycles. The mark had been largely used by them for some time. The Registrar refused the application on the ground of the resemblance of the proposed trade mark to the trade mark No. 349,035 & in exercise of his discretion, & also on the ground that the mark described goods which were the subject of a patent. Appets. appealed to the ct., & on the hearing of the appeal the last-mentioned ground of objection was not pressed, & the main objection was based on the splitting of the trade mark "Sunbeam" between two cos. carrying on, it was contended, substantially the same business:—*Held*: the goods, in respect of which registration was now applied for, were not either in fact or commercially of the same description as those for which the trade Mark No. 349,035 was registered; the businesses were essentially distinct; sect. 19 did not apply; & the registration of the trade mark applied for would tend, not to aggravate, but to neutralise the mischief, if any, due to the splitting of the "Sunbeam" mark.—*Re SUNBEAM MOTOR-CAR CO., LTD.'S APPLICATION* (1916), 32 T. L. R. 639; 33 R. P. C. 389.

*Annotation*:—*Apld. Re British Cycle & Motor Cycle Manufacturers' & Traders' Union Appln.* (1923), 40 R. P. C. 226.

**175.** — — — — —.]—A manufacturers' & traders' union applied under Trade Marks Act, 1905 (c. 15),

**Sect. 2.—What trade marks registrable: Sub-sect. 8, A. & B. (a).]**

s. 62, to register a device mark in respect of two & three wheel pedal cycles, motor cycles & cycle cars. Registration was opposed by a motor manufacturing co. on the ground of resemblance to their registered trade mark used on motor cars:—*Held*: the mark should be registered & there was not the same necessity for marks registered under the above sect. to possess, in the same degree, the distinctive character which is necessary in the case of an ordinary trader's mark.—*Re* BRITISH CYCLE & MOTOR CYCLE MANUFACTURERS' & TRADERS' UNION, LTD.'S APPLICATION (1923), 40 R. P. C. 226.

176. — **Goods of like kind.**—*Re* "HAWKEYE" APPLICATION (1927), 44 R. P. C. 208.

177. — **Application by owner of mark already on register.**—Appets. wished to registrar a trade mark identical in all essential particulars with a trade mark already registered by them:—*Held*: the mark ought not to be put upon the register.—*Re* PLAYER & SON'S TRADE MARK, [1901] 1 Ch. 382; 70 L. J. Ch. 359; 84 L. T. 190; 18 R. P. C. 65.

*Annotation*:- *Distd.* *Re* Crompton's Trade Mk., [1902] 1 Ch. 758.

**B. Similar Marks Calculated to Deceive.**

**(a) In General.**

*See* Trade Marks Act, 1905 (c. 15), s. 19.

178. **General rule—Registration refused.**—*Re* WORTHINGTON & CO.'S TRADE MARK, No. 191, *post*.

179. — **—**—*Re* BASCHIERA'S TRADE-MARK (1889), 5 T. L. R. 480.

180. — **—**—*(1)* The Patents, Designs, & Trade Marks Act, 1883, confers upon the Comptroller a discretion whether to register a trade mark or not, & he ought to refuse registration where it is not clear that deception may not result.

*(2)* Resp. applied to register the words "Dunn's Fruit Salt Baking Powder" as a trade mark for baking powder. Applt., who had for many years used the words "Fruit Salt" as his trade mark for a powder used in producing an effervescing drink, opposed the application:—*Held*: upon the evidence the proposed words were as a matter of fact calculated to deceive the public, the case therefore fell within Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 73, & the trade mark ought not to be registered. *ENO v. DUNN* (1890), 15 App. Cas. 252; 63 L. T. 6; 39 W. R. 161; 6 T. L. R. 379; 7 R. P. C. 311, II. L.; *reversg.* S. C. *sub nom.* *Re* DUNN'S TRADE-MARKS (1889), 41 Ch. D. 439, C. A.

*Annotations*:—As to (1) *Consid.* *Re* Kutnow's Trade Mk. (1893), 10 R. P. C. 101; *Re* Baker's Appln., *Re* Acated Bread Co.'s Appln., [1908] 2 Ch. 86. *Appld.* *Re* Garrett's Appln., [1916] 1 Ch. 436; *Re* Connor's Appln. (1921), 41 R. P. C. 158; *Banham v. Reddaway*, [1927] A. C. 106. *Re* Dewhurst Appln. (1896), 74 L. T. 388; *Re* Registrar of Companies, [1912] 3 K. B. 23; *Regr.* of Trade Mks. v. Du Cros, [1913] A. C. 621; *Re* Soc. Anon. Dubonnets' Appln., *Re* Hoord & Burke's Opposi-

tions (1914), 31 R. P. C. 453; *Re* Cadbury's Appln., [1915] 2 Ch. 307; *Re* Distributing Corp., (London), Ltd.'s Appln. (1927), 44 R. P. C. 225; *McDowell v. Standard Oil Co.* (New Jersey), [1927] A. C. 632. *As to (2)* *Appld.* *Dunlop Pneumatic Tyre Co. v. Dunlop-Truffault Cycle & Tube Manufacturing Co.* (1896), 12 T. L. R. 434. *Distd.* *Re* Lake & Elliott's Appln. (1903), 20 R. P. C. 605. *Appld.* *Re* Compagnie Industrielle des Pétroles' Appln., *Re* Price's Patent Candle Co.'s Trade Mk., [1907] 2 Ch. 435. *Re* Hill's Registered Trade Mk. (1893), 37 Sol. Jo. 339; *Re* Soc. Anon. des Verrieres de L'Etoile Trade Mk., [1894] 1 Ch. 61; *Valentine Meat Juice Co. v. Valentine Extract Co.* (1909), 83 L. T. 259; *Re* National Starch Co.'s Appln. (1908), 78 L. J. Ch. 31; *Re* Gutta Percha & India Rubber Co. of Toronto's Appln., [1909] 2 Ch. 10; *Re* Maeder's Appln. (1915), 85 L. J. Ch. 737. *Generally, Re* Cording's Appln., [1916] 1 Ch. 422. *Mentd.* *Eastman Photographic Materials Co. v. Comptroller General of Patents*, [1898] A. C. 571; *Re* Crompton's Trade Mk., [1902] 1 Ch. 758.

181. **Necessity for sanction of court.**—An application was made for an order upon the Comptroller of Trade Marks to register a mark having the words "Price's Patent Candle Co." in common letters round the upper border & "National Sperm" in the centre, with the address of the co. round the lower border. The Comptroller refused to register the mark, on the ground that there was a mark so nearly resembling this, already on the register, as to be calculated to deceive, & also because it was not a distinctive label within the terms of Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 61:—*Held*: (1) the name of the firm printed in common letters not being distinctive, & the words "National Sperm" not being fancy words "not in common use," the label did not fulfil the requirements of Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 61; (2) the Comptroller would be justified in refusing to register a label so nearly resembling another label already on the register as to be calculated to deceive, until the opinion of the ct. should have been obtained authorising him to do so.—*Re* PRICE'S PATENT CANDLE CO. (1884), 27 Ch. D. 681; 54 L. J. Ch. 210; 51 L. T. 653.

*Annotations*:—As to (1) *Appld.* *Re* Bradley's Trade Mk. (1892), 9 R. P. C. 205. *Expld. & Distd.* *Re* Diamond T Motor Car Co., [1921] 2 Ch. 583. *Re* Wragg's Trade Mk. (1885), 29 Ch. D. 551; *Re* Wright, Crossley's Appln. & Royal Baking Powder Co. of New York, [1900] 2 Ch. 218.

182. **Discretion of court.**—(1) When an application is made to direct the Comptroller-General of Patents to proceed to register a trade mark which has been objected to on the grounds of its similarity to a trade mark already on the register, the ct. has a discretion to determine whether it will direct registration, though the case may not be one where the registration is actually prohibited by Patents, Designs, & Trade Marks Act, 1883 (c. 57). O. registered a trade mark for "spirits" in 1881, & another in 1882. In each there was a representation of a golden fleece, with the words "Golden Fleece," adding in one case the words "Old Jamaica Rum," & in the other "Pure Old Scotch Whiskey." In May, 1887, a co. which had been formed in that year applied for registration of a trade mark for "wines," with the representation of a golden

[1923] S. C. R. 570; [1923] 2 W. W. R. 901.—**CAN.**

178 iii. — **—**—*MARKS, LTD. v. MOSETHAL & Co.*, [1906] T. S. 421. — **S. AF.**

182 i. **Discretion of court.**—Where it appeared to the ct. that a trade mark to be placed on packets of tea, for which registration was sought, possessed some points of similarity to an opponent's registered trade mark, but that the differences between the two were so marked & so easily dis-

**PART I. SECT. 2, SUB-SECT. 8. — B. (a).**

178 i. **General rule—Registration refused.**—Registration of a trade mark to be applied to the sale of whisky was refused, on the ground that it too closely resembled trade marks previously registered.—*MEAGHER BROTHERS & Co. v. HAMILTON DISTILLING CO., LTD.* (1903), 8 Exch. C. 311.—**CAN.**

178 ii. — **—**—*(A manufacturing co. had registered the word "Com-*

munity" as a general trade mark descriptive of the goods which it made, & another co. applied to have the same word registered as a specific trade mark to be used in connection with the sale of washing machines which were not made by the former co.:—*Held*: such use of the word "Community" as a specific trade mark was calculated to "deceive or mislead the public," & its registration was properly rejected.—*HOME APPLIANCE MANUFACTURING CO. v. ONEIDA COMMUNITY*, [1923] 3 D. L. R. 619;



fleece & the words "Golden Fleece, Australian Champagne, Sparkling Verdeillio." M., who was O.'s successor in business, opposed the registration:—*Held*: if wines were of "the same description of goods" as spirits within the meaning of sect. 72 (& *semble*, they were) the registration of the co.'s trade mark was prohibited by the Act; but if they were not, still the similarity of the marks was such as, having regard to the similarity of wines & spirits, to be calculated to induce the public to believe the co.'s wines to be the goods of the same persons as M.'s spirits, & the ct. ought not to direct the co.'s mark to be registered.

(2) The ct. has no jurisdiction to order an unsuccessful appt. for registration to pay the costs incurred by the opponent before the Comptroller.—*Re AUSTRALIAN WINE IMPORTERS, LTD.* (1889), 41 Ch. D. 278; 58 L. J. Ch. 380; 37 W. R. 578; 5 T. L. R. 338; 6 R. P. C. 311; *sub nom. Re AUSTRALIAN WINE IMPORTERS, LTD., & MASON, Re TRADE MARK "GOLDEN FLEECE,"* 60 L. T. 436, C. A.

*Annotations*:—*As to* (1) *Consd. Re Turney's Trade Mk.* (1893), 10 T. L. R. 175. *Reid. Re Farrow's Appl.* (1890), 63 L. T. 233; *Hargreave v. Freeman*, [1891] 3 Ch. 39; *Re Ehrmann's Appl.*, [1897] 2 Ch. 495; *Boord v. Juddart* (1903), 89 L. T. 718; *Finlay v. Shamrock Cos.* (1905), 22 L. J. P. C. 301; *Re Compagnie Industrielle des Pétroles' Appl.*, *Re Price's Patent Candle Co.'s Trade Mk.*, [1907] 2 Ch. 435; *Re National Starch Co.'s Appl.*, [1908] 2 Ch. 698; *Re Maeder's Appl.*, [1915], 85 L. J. Ch. 737; *Re Sunbeam Motor Car Co.'s Appl.*, [1916], 33 L. P. C. 389; *Re Egg Products Appl.*, (1922), 39 R. P. C. 155; *Re McDowell's Appl.*, (1926), 43 R. P. C. 313.

183. —. —.]—*Re MAEDER'S APPLICATION*, No. 167, *ante*.

184. Power of court to impose condition—Limitation to goods exported to particular country.]—*Re DEWILHURST (JOHN) & SONS, LTD.'S TRADE-MARK*, No. 188, *post*.

185. Burden of proof—Lies on applicant for registration.]—(1) If one trader appropriates a material & substantial part of a trade mark which belongs to another trader he is bound to use such precautions as to avoid the reasonable probability of error & deception, & the *onus* is on him to show that purchasers of the goods will not be deceived.

(2) If the goods of a trader have acquired in the market a name derived from a part of the trade mark which he affixes to them, a rival trader is not entitled to use a ticket which is likely to lead to the application of the same name to his goods, even though that name is not the only name by which the goods of the first trader have been known, or though it has been always used in conjunction with some other words.

(3) Where a trader has a right to a trade mark on goods sold in a foreign market, an injunction will be granted to restrain the export of goods under another trade mark which may deceive the

ultimate purchasers, although it would not deceive Englishmen or the dealers in the foreign market.

(4) Where a trader has innocently adopted a trade mark which is calculated to deceive by its similarity to another person's trade mark, his continuing to use it after complaint has been made is strong evidence of fraud.—*ORR EWING & CO. v. JOHNSTON & CO.* (1880), 13 Ch. D. 431; 42 L. T. 67; 28 W. R. 330, C. A.; *affd. sub nom. JOHNSTON v. ORR EWING* (1882), 7 App. Cas. 219; 51 L. J. Ch. 797; 46 L. T. 216; 30 W. R. 417, H. L.

*Annotations*:—*As to* (2) *Distd. Re Dexter's Appl.*, *Re Wills' Trade Mks.*, [1893] 2 Ch. 262. *Reid. Singer Manufacturing Co. v. Loeb* (1882), 8 App. Cas. 15. *As to* (3) *Appl. v. Daniell's Breweries, Re Paine's Trade Mks.*, [1893] 2 Ch. 567. *Distd. Re Soc. Anon. des Verreux Trade Mk.*, [1894] 1 Ch. 61. *Consd. Grand Hotel Co. of Caledonia Springs v. Wilson*, [1904] A. C. 103. *Distd. Boord v. Bagots, Hutton*, [1916] 2 A. C. 382. *Reid. Read v. Richardson* (1881), 45 L. T. 51; *Wilkinson v. Griffith* (1891), 8 R. P. C. 370; *Powell v. Birmingham Vinegar Brewery Co.*, [1896] 2 Ch. 51; *Reddaway v. Banham*, [1896] A. C. 199. *As to* (4) *Reid. Baker v. Rayson, Re Baker's Trade Mks., Re Rawson's Appl.*, [1890], 60 L. J. Ch. 49; *Bourne v. Swan & Edgar* (1902), 51 W. R. 213. *Generally. Reid. Somerville v. Schenck* (1887), 12 App. Cas. 433; *Montgomery v. Thompson*, [1891] A. C. 217; *Reddaway v. Bentham Hemp-Spinning Co.*, [1892] 2 Q. B. 639; *Hennessey v. Keating* (1907), 24 R. P. C. 481. *Mentd. White v. Mellin* (1895), 61 L. J. Ch. 308.

186. —. —.]—An application was made by H. to register as a trade mark in class 42 for bread the word "Hemvo" with other, but immaterial, words. The application was opposed by the proprietors of the trade mark "Harvo," which was registered (*inter alia*) in class 42 for bread, biscuits & cakes. The application alleged that, as the opponents used their mark only for a particular kind of malted cake, & appt. used his for bread, no confusion would arise:—*Held*: appt. had not discharged the *onus* that was on him to satisfy the ct. that the mark applied for did not so resemble the registered Trade Mark as to be calculated to deceive.—*Re HEMMINGS' APPLICATION* (1924), 41 R. P. C. 672.

187. —. —.]—*McDOWELL v. STANDARD OIL CO. (NEW JERSEY)*, No. 248, *post*.

188. Effect of consent to application.]—(1) When there are already on the register trade marks containing a representation of a golden fan, a trade mark containing the Burmese words for the "Golden Fan Brand" will not (at any rate without a disclaimer as to the exclusive right to use those words, as to the effect of which *qu.*) be allowed to be registered.

(2) The holder of the trade mark containing a picture of the object referred to by the words in question consented to the application for registration:—*Held*: this was important only as evidence that the use of the words was not calculated to deceive, & did not preclude the comptroller from deciding otherwise.

cernable to a purchaser of ordinary perceptions & ordinary sense that it could not reasonably be said that the trade mark sought to be registered was likely to deceive him into the belief that when buying a packet of tea bearing the latter mark he was buying the tea of opponent:—*Held*: application for registration be granted.—*CHARLICK (W.), LTD. v. WILKINSON & CO. PROPRIETARY, LTD.* (1913), 16 C. L. R. 370.—*AUS.*

185 i. Burden of proof—Lies on applicant for registration.]—An application for the registration of a trade mark in Class 42 for "fruit extracts" was opposed by the proprietor of a number of trade marks which were registered in Class 42 for (*inter alia*) preserved fruits, essence of coffee, & chicory, & soluble cocoa essence:—

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*Held*: there was such a similarity between "fruit extracts" & the other goods above mentioned that the public might be induced to confound the owners of one with the owners of the others; appts. had not discharged the *onus* which was upon them of showing that their mark, if registered, would not be likely to deceive the public.—*HAUPER & CO. PROPRIETARY, LTD. v. BOAKE, ROBERTS & CO., LTD.* (1914), 17 C. L. R. 514.—*AUS.*

185 ii. —. —.]—An application by respondent for the registration of the word "Superoid" as a trade mark in Class 17, in respect of roofing, flooring, damp course & waterproof cement was opposed by appt., who was the registered proprietor of a trade mark consisting of the word "Ruberoid" and registered in Class 17,

in respect of similar goods:—*Held*: resp. had not discharged the *onus* of proving that the use of the word "Superoid" as a trade mark was not likely to deceive, & therefore the word should not be registered as a trade mark.—*STANDARD PAINT CO. v. HALLIS, LTD.* (1920), 27 C. L. R. 350.—*AUS.*

185 iii. —. —.]—*PEARS (A. & F.), LTD. v. PEARSON SOAP CO., LTD.* (1925), 37 C. L. R. 310.—*AUS.*

185 iv. —. —.]—*LEVER BROTHERS v. NEWTON & SONS* (1907), 26 N. Z. L. R. 856.—*N.Z.*

185 v. —. —.]—*ABEL (J. & J.), LTD. v. JAMIESON (R.) & CO., LTD., JAMIESON (R.) & CO., LTD. v. ABEL (J. & J.), LTD.*, [1926] N. Z. L. R. 565.—*N.Z.*

*Sec. 2.—What trade marks registrable: Sub-sect. 8, B. (a) & (b).]*

(3) Under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 62 (4), (5), the ct. can order the registration of a trade mark subject to any conditions. Appets. were willing to accept a registration subject to a condition that the mark should only be put on goods sent to Burma, there being evidence that in Burma the use of the words would not be calculated to deceive:—*Held*: the ct. ought not to direct registration of a trade mark subject to a condition that it shall be used only in a particular country, such a condition not being contemplated by the Act, & being incapable of being enforced.—*Re DEWHURST (JOHN) & SONS, LTD.'S TRADE MARK*, [1896] 2 Ch. 137; 65 L. J. Ch. 618; 74 L. T. 388; 44 W. R. 672; 12 T. L. R. 325; 40 Sol. Jo. 436; 13 R. P. C. 288, C. A.

*Annotations.*—As to (1) *Distd. Boord v. Bagots Hutton*, [1916] 2 A. C. 382. *Refd. Re Garrett's Appl.*, [1916] 1 Ch. 136. As to (2) *Appl. Re Ehrmann's Appl.*, [1897] 2 Ch. 495. As to (3) *Consd. Re Ehrmann's Appl.*, [1897] 2 Ch. 495. *Appl. Re Clispin's Trade Mk.*, [1917] 2 Ch. 267.

**189. Construction of Trade Marks Act, 1905 (c. 15), s. 19—"Calculated to deceive."]—*Re MAEDER'S APPLICATION*, No. 167, *ante*.**

**190.** ——"So nearly resembling."]*—Re MAEDER'S APPLICATION*, No. 167, *ante*.

(b) *Matters for Consideration.*

**191. Likelihood of mistake—When fair use of both marks.]**—W. & co. proposed to register as a trade mark for ale a triangle with a double outline, inscribing within the double outline the words "Beccles Brewery. Established 1830," the inner triangle having within it a conspicuous figure of a church. B. & co., whose trade mark for pale ale was a plain triangle, which in use was coloured red, applied to prevent the registration of the proposed trade mark as being so similar to theirs as to be calculated to deceive:—*Held*: as W. & co. would be at liberty to print their trade mark in whatever colour they pleased, & if printed on a red ground it would be so similar to that of B. & co. that a purchaser might be misled, the registration ought not to be allowed.—*Re WORTHINGTON & CO.'S TRADE MARK* (1880), 14 Ch. D. 8; 49 L. J. Ch. 646; 12 L. T. 563; 28 W. R. 747, C. A.

*Annotations.*—*Expld. Re Robinson's Trade Mk.* (1880), 29 W. R. 31. *Consd. Re Hodson Fessler's Trade Mk.* (1881), 86 L. T. 185, n. *Appl. Re Marks & Telfer's Appl.* (1885), 63 L. T. 231, n.; *Re Christiansen's Trade Mk.* (1886), 2 T. L. R. 317. *Consd. Re Lyndon's Trade Mk.* (1886), 32 Ch. D. 109. *Appl. Re Biegel's Trade Mk.* (1887), 57 L. T. 217. *Consd. Coleman v. Smith, Re "Carvino" Trade Mk.*, [1911] 2 Ch. 572. *Refd. James v. Parry, Re James' Trade Mk.* (1883), 55 L. J. Ch. 214.

**192.** ——"L. had used from 1861, in respect of goods included in class 13, a trade mark consisting of the head of Minerva, down to & including the shoulders, the head bearing a helmet with ringlets hanging down behind. In 1884, being about to extend his business to class 12, he applied to register for that class the same head with the word "Athena" under it. This application was opposed by B., who had used from 1869 a cutler's mark consisting of a head with the word "way" under it. The head had a sort of wig upon it, with small curls behind,

& included the neck & part of the shoulders. In 1884 B. registered this mark under the Act of 1883 as an old cutler's mark, but the design actually registered departed from the old mark which he used, the head on the register being an uncovered head with a few sparse hairs upon it, & taking in only a small portion of the neck & no part of the shoulders:—*Held*: the question whether a new mark is so like another as to be calculated to deceive is to be decided by considering whether the new mark is so like the other that when both are fairly used one is likely to be mistaken for the other, regard being had to size, the material on which the mark is to be impressed, the effects of wear & tear, & other surrounding circumstances; L.'s mark was to be compared with the mark B. had put on the register, not with the mark which he had used; & B., whose evidence was directed to a comparison between L.'s mark & the mark which B. had used, which was much more like L.'s mark than B.'s registered mark was, had not made out that the new mark was calculated to deceive.—*Re LYNDON'S TRADE-MARK* (1886), 32 Ch. D. 109; 55 L. J. Ch. 456; 54 L. T. 405; 34 W. R. 403; 2 T. L. R. 356, C. A.

*Annotation.*—*Refd. Re Lambert's Trade Mk.* (1889), 61 L. T. 138.

**193.** ——"H. B. & co. applied to register, for goods in class 13, a trade mark consisting of a pig with the letters H. B. & co. underneath. The application was opposed by C. on the ground that the mark when stamped on the goods would so nearly resemble C.'s registered mark of a dog, with the word "Stanch" underneath, as to be calculated to deceive. H. B. & co. took out a summons that the registration be proceeded with:—*Held*: the marks must be compared when fairly struck, & when so struck, there was no resemblance between them which would lead to deception. H. B. & co.'s mark must be registered.—*Re HAINES, BATCHELOR & CO.'S TRADE MARK* (1888), 5 R. P. C. 669.

**194.** ——"Where an application for the registration of a trade mark is opposed by the proprietor of an earlier trade mark already on the Register, on the ground that the new mark has too great a resemblance to the old one, regard must be had to the way in which the new mark will be fairly used in the ordinary course of trade; & if, when so used, the mark will be likely to produce deception, registration will be refused.

An application by F. for the registration of a device of a charging bison, which he used with many other details on wrappers on tins of mustard, being opposed by Messrs. C., the proprietors of a registered device of a "bull's head," which they used with other details on wrappers on tins of mustard very similar to those used by F., & the general style & colouring of the wrappers & some of the details being in common use in the trade:—*Held*: F.'s mark, as it would be used, would be calculated to deceive, & registration must be refused.—*Re FARROW'S APPLICATION* (1890), 63 L. T. 233; 6 T. L. R. 319.

**195.** ——"A. W. & co. applied for registration of a trade mark for preserved goods in class 42. They were the registered owners of the word "skipper" for sardines in class 42, &

**PART I. SECT. 2, SUB-SECT. 8.—B. (b).**

**k. Likelihood of mistake.]**—*DON v. BURLEY* (1916), 22 C. L. R. 136.—**AUS.**  
**1.** ——"The object of sect. 11 of the Act respecting Trade Marks &

Industrial Designs, R. S. C., c. 63, as enacted in 54 & 55 Vict. c. 35 (D.), is to prevent the registration of a trade mark bearing such a resemblance to one already registered as to mislead the public, & to render it possible that goods bearing the trade mark pro-

posed to be registered may be sold as the goods of the owner of the registered trade mark.—*Re MELCHERS & DE KUYPER & SON* (1898), 6 Exch. C. R. 83.—**CAN.**

**m. —"—"]**—In an application for

they had since 1903 sold their sardines under a label containing not only the words "Skipper Sardines" or "Skipper Brand," but the head of a sailor with a pipe in his mouth taken from a photograph of which they owned the copyright. The mark they now sought to register consisted of this picture with the word "sailor" underneath it. G. H. & Co. opposed the application. They had been since the year 1907 the registered owners of the word "Skipper" for all goods in class 42 other than sardines, & they had since 1894 sold tinned salmon under a registered label consisting of the picture of a seaman throwing a life-belt overboard with the words "Skipper Salmon" upon it. They were also the registered owners of the word "Captain," & had sold tinned salmon under a registered label consisting of a picture of a seaman in oilskins & a pipe in his mouth with the words "Captain Brand" upon it. The opposition was based mainly on the ground that the picture proposed by appets. to be registered had become so associated in the public mind with the word "Skipper" in connection with the sardines sold by appets., they were in fact known as "Skipper Sardines," that the public would inevitably call goods sold with this picture upon them "Skipper goods," even though the word "Sailor" were printed upon or beneath it, & that thereby deception & confusion would be caused between the goods of appets. & of the opponents. The registrar refused the application:—*Held*: having regard to the fact that the mark was one calculated to distinguish appets.' goods from those of everybody else, & as a matter of fact the mark had become distinctive of appets.' sardines & would be distinctive of appets.' goods if applied to other articles, no such confusion or deception was likely to ensue which would justify the ct. in refusing registration.—*Re WATSON (ANGUS) & Co.'s APPLICATION* (1911), 28 R. P. C. 313.

**196. — When marks seen separately.**—Where an application to register a trade mark is opposed on the ground that it might lead to confusion with a trade mark already registered, the question is not whether there is a similarity between the two marks when placed side by side, but whether, when a person sees one mark apart from the other, he might take it for that other.—*Re SANDOW LTD.'s APPLICATION* (1914), 30 L. T. 391; 31 R. P. C. 196.

*Innotation* :—*Apld. Re Egg Products Appln.* (1922), 39 R. P. C. 155.

**197. — By foreigners abroad.**—An application was made by C. F. G. E. to register a trade mark which consisted of the pictorial representation of primitive Eastern Dye Works. The owners of a trade mark already on the Register, which consisted of another representation of primitive Eastern Dye Works, opposed the registration of appets.' mark on the ground that confusion would arise in the trade & with the public. The Registrar decided in favour of the opponents:—*Held*: there was a probability of both marks becoming known in eastern trade by the same name, & the mark applied for was likely to lead to confusion, & the decision of the Registrar was right.—*Re CHEMISCHE FABRIK GREISHEIM ELEKTRON'S APPLICATION* (1910), 27 R. P. C. 201.

**198. —**—*Re SOCIÉTÉ ANONYME DUBONNET'S APPLICATION*, No. 268, *post*.

**199. —**—*Re*—An application to register in class 43 for gin a trade mark consisting of a

pictorial label, of which the prominent feature was the representation of a cat in a sitting posture got up as a puss in boots, was opposed by the registered proprietors of an old trade mark for gin, consisting of the device of a cat standing on a barrel, on the ground that under this trade mark in the Eastern markets, where the opponents had acquired a great reputation, their goods had become known as "Cat" goods, & that the registration must cause confusion. The device of a cat *per se* had become *publici juris* in this country in connection with gin, & appets. disclaimed any right to the exclusive use thereof:—*Held*: appets.' mark was not calculated to deceive, there being no resemblance between the two marks, & the mere possibility of confusion arising from the insufficient description of the opponents' mark by ignorant people in foreign markets were not a ground for refusing registration.—*BOORD & SON, INCORPORATED v. BAGOTS, HUTTON & Co., LTD.*, [1916] 2 A. C. 382; 85 L. J. (Ch. 605; 115 L. T. 345; 32 T. L. R. 683; *sub nom. Re BAGOTS, HUTTON & Co., LTD.'s APPLICATION*, 33 R. P. C. 357, H. L.

*Annotations* :—*Apld. Re British Cycle & Motor Cycle Manufacturers' & Traders' Union Appln.* (1923), 40 R. P. C. 226. *Consd. Re Reddaway's Appln.*, [1925] 1 Ch. 693.

**200. Nature of goods.**—When comparing a trade mark tendered for registration with another mark already on the register or assigned by the Cutlers' Company, Sheffield, for the purpose of ascertaining whether the new mark so nearly resembles the old one as to be calculated to deceive, the ct. will have regard to the nature of the goods, to the nature & size of the mark, to the mode of affixing it to the goods, to the probable result in practice, & to all the circumstances of the case; & if, having regard to such circumstances, the new mark would be likely to be mistaken for the old one, registration will be refused.

*Re* applied for the registration of a new mark for cutlery & metal goods included in classes 12 & 13, such trade mark representing a part of his armorial bearings, & consisting of a curved horn, with a twist in the middle, & surmounted by two roses. The application was opposed by the Cutlers' Company of Sheffield on the ground that the mark so nearly resembled a Sheffield mark for similar articles assigned forty-five years previously to H., as to be calculated to deceive. H.'s mark consisted of a curved horn, suspended by a looped cord. The marks were sufficiently distinct when printed in a large size, but the Ct. of Appeal being of opinion that, in practice, when the two marks were stamped in a small size on small metal article & having regard also to the probability of blurring taking place in the process of stamping, the one mark would be likely to be mistaken for the other:—*Held*: registration must be refused.—*Re ROSING'S APPLICATION* (1878), 54 L. J. Ch. 975, n., C. A.

*Annotation* :—*Apld. Re Lyndon's Trade Mk.* (1886), 32 Ch. D. 109.

**201. —**—*Re LYNDON'S TRADE-MARK*, No. 192, *ante*.

**202. —**—*Re SANDOW, LTD.'s APPLICATION*, No. 196, *ante*.

**203. Size of mark.**—*Re ROSING'S APPLICATION*, No. 200, *ante*.

**204. —**—*Re LYNDON'S TRADE-MARK*, No. 192, *ante*.

the registration of a specific trade mark, where the resemblance to an existing registered trade mark is not

sufficient to cause deception, registration should be granted.—*AMERICAN SHEET & TIN PLATE Co. v. PITTSBURG*

|| *PERFECT FENCE Co., LTD. (Que.)* (1919), 18 Exch. C. R. 254; 44 D. L. R. 731.—*CAN.*

*Sect. 2.—What trade marks registrable: Sub-sect.  
8, B. (b) & (c) i.]*

**205. Effect of wear & tear—Possibility of blurring.]—***Re* ROSING'S APPLICATION, No. 200, *ante*.

206. —.]—*Re* LYNDON'S TRADE-MARK,  
No. 192, *ante*.

207. Mode of affixing mark to goods.]—*Re*  
ROSLING'S APPLICATION, No. 200, *ante*.

**208. Pending applications for registration.]**—The ct. will under rule 19 direct a trade mark to be registered, if satisfied of its dissimilarity to marks actually registered, without inquiring whether it be distinguishable from other marks the subject of pending applications to register.—*Re DUGDALE'S APPLICATION* (1880), 49 L. J. Ch. 303 : 28 W. L. 436.

**209. Possible use of colour.]—***Re* WORTHINGTON & CO.'S TRADE MARK, No. 191, *ante*.

210. - - - J. & co. registered a trade mark for fermented liquors, consisting of three triangles, two placed on a third, the space in the centre being blank. J. subsequently registered another mark for bottled beer, consisting of three triangles interlaced, the space in the centre containing a stag's head:—*Held*: having regard to the use which the mark subsequently registered might be put to by being coloured, it was calculated to deceive, & so much of the mark as consisted of the triangular arrangement must be expunged from the Register.—*Re BIEGEI'S TRADE MARK* (1887), 57 L. T. 247.

**211. Actual use of mark.**—In 1882 a new trade mark for matches was registered on behalf of C. In Feb. 1881, an old trade mark for matches was registered by N. N.'s mark, as registered, contained pictures of prize medals. C.'s mark, as registered, had two blanks, in which medals were inserted when the mark was used on matches. Both marks contained much that was common to the trade. C.'s mark had the word "medals" at the top, & N.'s mark had the word "Nittedals" in a similar place. N. moved to rectify the register by striking off C.'s mark.—*Held*: C.'s mark must be looked at as used, & not simply as registered, & as used it was calculated to deceive, & must be expunged from the register.—*Re CHRISTIANSEN'S TRADE MARK* (1886), 2 T. L. R. 317; 3 R. P. C. 51. C. A.

*Annotations :* **Apld.** *Re Farrow's Appln.* (1890), 6 T. L. R. 319. **Consd.** *Coleman v. Smith, Re "Carvino" Trade Mkt.* [1911] 2 Ch. 572. **Apld.** *Re Crispin's Appln.* (1917), 34 R. P. C. 349.

**212. Course of trade.**—The Comptroller had refused to register trade mark No. 53,722 in class 27 in respect of linen & hemp piece goods, on the ground that it too closely resembled three trade marks which had been already registered in the same class in 1876 & 1881. On summons to direct the Comptroller to proceed with registration of the trade mark:—*Held*: (1) though it were a case in which the similarity might not be such as to induce the ct. on that fact alone to grant an injunction, it was the duty of the Comptroller to consider, having regard to the course of trade whether the trade mark so nearly resembled the other as to be calculated to deceive & he would be right in saying “that this mark so nearly resembles the other that I will not encourage litigation by allowing a registration which would lead to litigation”; (2) this trade mark was likely to mislead persons wishing to buy linen stamped with one of the earlier trade marks.—*Re SPIER* (1887), 55 L. T. 880; 3 T. L. R. 276; 4 R. P. C. 521.

*Annotation* :—As to (1) **Apld.** *Re* Wheatley Akeroyd's  
Appls. (1920), 37 R. P. C. 137.

**213. Likelihood of litigation.]**—The object of the Acts which regulate the registration of trade marks is to prevent future litigation.

Registration ought, therefore, to be refused to new trade marks which, by reason of their similarity to marks already on the register, are likely, if registered & used, to lead to litigation.—*Re MARKS & TELLEFSEN'S APPLICATION* (1885), 63 L. T. 234, n.

**214. Totality of marks.]**—E. P., Ltd., applied to register the word “Egall,” which they had used as a trade mark for five years, in Part B. of the register in class 42 in respect of dried eggs. The application was opposed by H. & co. on the grounds (*inter alia*), that they were the proprietors of a trade mark “Egrol” registered in class 42 in respect of custard powders, blanc mange powders, baking powders & egg powders, & that the word “Egall” was not distinctive & was not a registrable trade mark. Appets. alleged that dried eggs were not the same description of goods as the opponents’ goods. The Registrar refused the application, & appets. appealed to the Ct.:—*Held*: (1) in application for registration in Part B. of the register the Registrar had no such general discretion to refuse a mark which satisfied the requirements of Trade Marks Act, 1919 (c. 79), s. 2, as he had in regard to applications to register in Part A. but that the Registrar’s discretion was not excluded in considering whether an application was inconsistent with Trade Marks Act, 1905 (c. 15), s. 19; in such application the *onus* of showing that the mark applied for, if registrable, was otherwise objectionable lay on an opponent; (2) user was a material consideration in determining whether a mark was capable of distinguishing the goods of an appct. within the meaning of Trade Marks Act, 1919 (c. 79), s. 2; the word “Egall” was not incapable of distinguishing appets.’ goods; appets.’ & the opponents’ goods were goods of the same description; the same considerations as to probability of confusion that applied in application for registration in Part A. applied in applications for registration in Part B.; (3) in cases of alleged confusion the interests of the public were a more important consideration than the relative rights of the parties; & (4) the first syllable “Eg” could not be disregarded because it had some relation to the nature of the goods, but in all such cases the totality of the two marks must be considered; “Egall” was so similar to “Egrol” as to make confusion likely & the appeal must be dismissed.—*Re Egg Products, Ltd.’s Application* (1922), 39 R. P. C. 155.

*Annotation* :—As to (1) **Refd.** *Re Davis' Trade Mks.*, *Davis v. Sussex Rubber Co.*, [1927] 2 Ch. 341.

**215. Interests of public.**—In 1915 the Havana Commercial co., a corp. carrying on business as cigar manufacturers in New York & Havana, applied to register in class 45 a trade mark of which the word “Cubanola” was an important feature. The application was opposed by George Wilks, Ltd., cigar merchants, who had for the past fourteen years used the word “Cubanola” in connection with cigars of British manufacture sold by them under the fictitious firm name of “de Lorenzo y Ca”; the principal ground of opposition was that the registration would cause confusion in the trade & to the public. The Registrar of Trade Marks decided that, although the opponents’ use of the word “Cuba nola” had been improper, he was bound to take notice of it, & he refused the application. From this decision appnts. appealed to the ct. It was admitted by a director of the opponent co. that their sales of “Cubanola” cigars had never been

more than 200 boxes *per annum*:—*Held*: though, in the circumstances, the opponents, as claimants to a mark, had no merits whatever, the matter did not depend solely upon their ownership of the mark & the application had to be considered from the point of view of the public, & there being a possibility of confusion in the mind of the public, if the application were acceded to, the Registrar's discretion ought not to be interfered with.—*Re HAVANA (COMMERCIAL CO.'S APPLICATION (1916), 33 R. P. C. 399.*

216. —[*Re EGG PRODUCTS, LTD.'S APPLICATION, No. 214, ante.*

217. Change of manufacture—Same persons under different name.]—*Re HOTPOINT ELECTRIC HEATING CO.'S APPLICATION, No. 62, ante.*

(c) Particular Instances.

i. Marks held Similar.

218. Picture of house described as “Gegenüber dem Elogius Platz”—Picture of house described as “Gegenüber dem Jullchs Platz.”—F. had long used & was the registered proprietor of three trade marks for Eau de Cologne, consisting of (a) a label with his signature & a seal in the corner, & used for pasting on the side of the bottle; (b) a circular stamp on a strip of paper, used for passing on the cork & down the neck of the bottle; (c) a label containing a picture of F.'s business premises. “Gegenüber dem Jullchs Platz,” Cologne, with medals & letterpress, & used for pasting on boxes in which bottles were packed. B., also a manufacturer of Eau de Cologne, applied for registration in his name of three marks similarly composed & to be respectively used in the same manner. On motion by F. under Trade Marks Registration Act, 1875 (c. 91), s. 6, for an injunction to restrain B. from proceeding with his application:—*Held*: (1) the marks were so nearly resembling F.'s marks as to be calculated to deceive, & the fact that the picture of the house on B.'s label described as “Gegenüber dem Elogius Platz,” Cologne, was said to be a correct view of the house in a street leading out of the Elogius Platz, did not prevent B.'s label being a colourable imitation of F.'s registered label, having regard to the similarity in the letterpress & the position of the medals; (2) the allegation by B. that he had used his marks for several years without interference did not, *prima facie*, entitle him to registration, since it was not proved that the original proprietor was aware of such user.—*Re FAUNA (No. 2) (1879), 27 W. R. 456.*

219. Sheep suspended by band with words “Golden Fleece Rum”—Sheep suspended by band with words “Golden Fleece.”—*Re AUSTRALIAN WINE IMPORTERS, LTD., No. 182, ante.*

220. Design including words “Parchment Bank”—“Pirle's Parchment Bank.”—Application was made for registration of a trade mark consisting of the design of a heart in combination with a number of words including “Parchment Bank,” the whole inclosed in a rectangular line, there being on the register a trade mark for the same class of goods consisting of the words “Pirle's Parchment Bank.” The application was rejected on the ground of resemblance calculated to deceive.—*Re GOODALL'S TRADE-MARK (1889), 42 Ch. D. 566; 38 W. R. 189.*

*Annotation*:—*Reid, The Wright, Crossley's Appln. & Royal Baking Powder Co. of New York, [1900] 2 Ch. 218.*

221. “Fruit Salt”—“Dunn's Fruit Salt Baking Powder.”—*ENO v. DUNN, No. 180, ante.*

222. Lion rampant in oval bearing name of trader—Lion rampant.]—M. applied to register a mark consisting of a lion rampant carrying a

sheaf with the words “*fortis et hospitalis*” above, & surrounded altogether by an oval bearing the inscription, “J. J. Murphy & Co., Ltd., Cork.” The Comptroller refused to register this mark on the ground of its resemblance to a mark registered by G. in the same class, without G.'s consent, which was refused. M. appealed to the Board of Trade, who referred the matter to the Ct., & directed them to serve G. with a notice of motion, which was done, & G. appeared to resist an Order for registration:—*Held*: it was important to see what was the essential part of the proposed mark, especially having regard to Patent, Designs & Trade Marks Act, 1883 (c. 57), which permitted of alterations to be made in non-essential parts; the lion rampant was an essential part of M.'s mark, & so closely resembled the lion rampant of G. as to be calculated to deceive; neither the oval, which was common to the trade, nor the inscription, “J. J. Murphy & Co., Ltd., Cork,” which was not printed or impressed in any distinctive or particular manner, was an essential particular, & although M.'s mark, as a whole, differed in appearance from G.'s, & M. offered an undertaking always to use the label as it then stood, the application being for a new mark, must be refused with costs.—*Re MURPHY'S TRADE MARK (1890), 7 R. P. C. 163.*

223. Large red diamond with small diamond inset—Red diamond.]—T. & Sons applied to register, for rum, a trade mark consisting of a diamond with a smaller diamond superposed & other matter, the outer diamond being, in use, coloured red. This was opposed by B., R., & G., as owners of a diamond trade mark registered for beer, & used in red, on the ground that the trade mark applied for would cause confusion & deceive the trade & the public into believing that appcts.' goods marked with their mark were goods emanating from or some way connected with the opponents. The application was refused, & appcts. appealed, & the appeal was referred to the Ct.:—*Held*: whether beer & rum are or are not the same description of goods, still, even if they are not, there was such a probability of deception that the Ct. ought not to say that the mark must be registered, & the appeal was dismissed with costs.—*Re TURNEY & SON'S TRADE MARK No. 161, 776 (1893), 10 T. L. R. 175; 11 R. P. C. 37.*

*Annotation*:—*Apld, Re Gutta Percha & India Rubber Co. of Toronto's Appln., [1909] 2 Ch. 10.*

224. “Ancross”—“Anchor.”—*Re THEWELLS & BLAKEY'S TRADE MARK, Re HUGHES & YOUNG'S TRADE MARK, No. 360, post.*

225. Star—Red star.]—*Re SOCIÉTÉ ANONYME DES VERREMERIES DE L'ÉTOILE TRADE MARK, No. 462, post.*

226. Device containing fighting cock—Different device containing fighting cock.]—C. applied to register a trade mark for whisky in class 43. The Comptroller refused registration on account of another trade mark registered by B. for whisky in 1883. Both marks contained the device of a fighting cock but in most other respects were dissimilar. C. appealed from the Comptroller's decision, & gave notice of a motion that the registration be proceeded with, which was served upon the Comptroller & also upon B. It appeared from the evidence filed on the motion that C.'s trade mark had been in use, with a slight variation, for about eleven years, & that B.'s trade mark had been in use since the early part of 1883:—*Held*: the Comptroller was right in refusing registration, as the mark applied for was calculated to deceive an unwary purchaser, & the

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motion was refused, with costs.—*Re CURRIE & CO.'S APPLICATION* (1896), 13 R. P. C. 681.

**227. Golden fan.—Foreign words meaning "Golden Fan Brand."**—*Re DEWHURST (JOHN) & SONS, LTD.'S TRADE MARK*, No. 188, *ante*.

**228. "Kodak Cycles" — "Kodak" photographic materials.**—[The E. Co. invented, & had for some years used, the word "Kodak" in connection with their goods, & especially for cameras; & the word occurred in all their registered trade marks. The co. had made a speciality of cameras suitable for bicyclists, & the appliances for fixing the same to bicycles, & had largely advertised "Bicycle Kodaks." They held all the shares in a limited co. called the Kodak Co., Ltd., which, however, had not commenced business. In Aug. 1897, the J. G. Co. applied for & obtained registration of the word "Kodak" as a trade mark in class 22, in which the E. Co. had no registered trade mark, for bicycles & other vehicles included in that class; & in Oct. 1897, the Kodak Cycle Co., Ltd., was registered, with a nominal capital of £100, & this co. & the J. G. Co. commenced to advertise "Kodak Cycles." The E. Co. & the Kodak Co., Ltd., commenced an action against the J. G. Co. & the Kodak Cycle Co., Ltd., to restrain deft. cos. (a) from carrying on business under the name Kodak Cycle Co., Ltd.; (b) from passing off their goods as the goods of plffs.; (c) from infringing the trade marks of the E. Co. They moved for an interlocutory injunction, & also moved to expunge the registration of "Kodak" by the J. G. Co.:—*Held*: the word "Kodak" had become identified with the E. Co. & with their goods; the evidence showed a close connection between the bicycle & photographic trades; registration had been obtained by an untrue statement to the Registrar; defts. were trying to get the benefit of the reputation of the E. Co., & the trade mark must be expunged as being calculated to deceive; also plffs. were entitled to an injunction to restrain defts. from trading under the name Kodak Cycle Co., Ltd., & from selling their goods as "Kodak."—*EASTMAN PHOTOGRAPHIC MATERIALS CO., LTD. v. JOHN GRIFFITHS (CYCLE CORPN., LTD.) & KODAK (CYCLE CO., LTD., Re TRADE MARK NO. 207,006* (1898), 15 R. P. C. 105.

*Annotations: Consd. Gulmariaens v. Fonseca & Vasconcellos* (1921), 38 R. P. C. 388. *Refd. Kodak v. London Stereoscopic & Photographic Co., Kodak v. Broughton, &c. Kodak's Trade Mks.* (1903), 19 T. L. R. 297; *Warwick Tyre Co. v. New Motor & General Rubber Co.*, [1910] 1 Ch. 218.

**229. Half apple with word "Pomril" — Apple with words "Apple Brand."**—[Resp. had for many years been the registered proprietors of a trade mark for cider, consisting of a circular label having in the centre the representation of an apple, with the words "Apple Brand" at the top. They had also registered the words "Apple Brand" alone. Their cider was known in the trade as "Apple Brand." Applts. were the registered proprietors of a trade mark for cider consisting of the word "Pomril" alone. They applied to register in respect of cider a trade mark consisting of the representation of half an apple showing the pips, & having certain words & letters printed across it, including the word "Pomril." The Comptroller refused to register it without resps. consent, on the ground that it had such resemblance to the resps.' registered mark as to be calculated to deceive, within Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 72 (2):—*Held*: the Comptroller had exercised

a right discretion.—*Re POMRIL, LTD.'S APPLICATION* (1901), 17 T. L. R. 279; 18 R. P. C. 181.

**230. "Jock Scott" — "Scotch Jock."**—[A co. sought to register two marks as trade marks in class 43, both having the device of a salmon fly, one of them having the words "Salmon Fly Brand" & the other having also the words "Jock Scott Salmon Fly." The Comptroller refused to register the marks on the ground of similarity to a mark consisting of the words "Scotch Jock" & also on the ground that other marks of a similar nature had already been refused. Appets. appealed, & the appeal was referred to the ct. At the hearing the owners of the "Scotch Jock" mark opposed, & there was evidence of use since 1896 of one of the marks of which registration had previously been refused. Appets. had made no inquiries as to these marks, although invited to do so by the Comptroller:—*Held*: the use of the words "Jock Scott" would be calculated to deceive, & as to the other mark that the Comptroller had exercised his discretion properly, & it ought not to be overruled.—*Re BOOTLE'S DISTILLERY CO., LTD.'S APPLICATIONS* (1903), 21 R. P. C. 18; *sub nom. Re APPLICATIONS* 249,746, & 249,747, 48 Sol. Jo. 15.

**231. "Tablones" — "Tabloids."**—[In 1905 the Capsuloid Co. applied for the registration of the words "Tablones, they remove the Cause" as a trade mark in class 3, in respect of a medicated preparation for human use, the right to the exclusive use of the words, other than Tablones being disclaimed. Since 1903, appets. had sold a proprietary medicine, namely a cure of indigestion, under the name Tablones. The Comptroller refused to register the mark on account of its likeness to the registered trade mark of B. W. & Co. consisting of or containing the word "Tabloid or Tabloids," registered in respect of all goods in class 3. Appets. appealed & the appeal was referred to the ct., B. W. & Co. being served with notice. Applts. relied on the distinction between the goods, alleging that when buying tabloids the name of the drug required was necessarily added, & appellants appealed direct to the public, whereas respondents appealed to the medical profession & their goods were ordered through chemists. Resps. called chemists to give evidence that the public often asked for tabloids for indigestion, or headache or other complaints:—*Held*: it was proved that the word "tablones" was calculated to deceive within the meaning of sect. 72, sub-sect. 2, Patents, Designs & Trade Marks Acts, 1883 to 1888.—*Re CAPSULOID CO., LTD.'S APPLICATION* (1906), 23 R. P. C. 782.

**232. "Motricine" — "Motorine."**—[In 1901 the opponents registered the word "motorine" as a trade mark for lubricating oil, with a disclaimer of the right to the exclusive use of the word "motor." Since registration they had sold large quantities of a lubricating oil suitable for, but not confined to, motors under that name. In 1906 appets. applied to register the word "motricine" as a trade mark for a spirit for motive power purposes derived from petroleum. The opponents opposed the application, & the registrar refused to register the mark. On an application by appets. that the registrar might be directed to proceed with the registration of their mark, & that the opponents' mark might be expunged from the register:—*Held*: (1) under Trade Marks Act, 1905 (c. 15), s. 11, the *onus* of showing that the proposed trade mark was not calculated to deceive rested on appets.; they had failed to discharge that *onus*; that being so the ct. would decline to exercise its discretion under Trade Marks



Act, 1905 (c. 15), s. 21, of allowing conditional registration; & the application to register must therefore be refused; (2) the word "motorine" had "no direct reference to the character or quality of the goods," & was therefore a good trade mark under Trade Marks Act, 1905 (c. 15), s. 9 (4), & the application to expunge it from the register must consequently be refused.—*Re COMPAGNIE INDUSTRIELLE DES PÉTROLES' APPLICATION, Re PRICE'S PATENT CANDLE CO.'S TRADE MARK*, [1907] 2 Ch. 435; 76 L. J. Ch. 646; 97 L. T. 235; 23 T. L. R. 672.

*Annotations:—As to (1) Refd. Re Baker's Appln., Re Aerated Bread Co.'s Appln.*, [1908] 2 Ch. 86; *Re Garrett's Appln.*, [1916] 1 Ch. 436; *Re McDowell's Appln.*, (1926), 43 R. P. C. 313. *Generally, Refd. Re Gutta Percha & India Rubber Co. of Toronto's Appln.*, [1909] 2 Ch. 10.

**233. "Aqua-Repela" — "Repellus."**—An application to register a trade mark for rainproof coats consisting of a label containing (*inter alia*) the word "Aqua-Repela," was opposed by the owners of two trade marks for similar articles which were already on the register & contained (*inter alia*) the word "Repellus." The Registrar refused the application:—*Held*: the words "Aqua-Repela" as part of a trade mark would be likely to lead to confusion, having regard to the fact that the word "Repellus" was already on the register as an essential particular of two trade marks in respect of the same class of goods.—*Re WILKS' (TRADING AS WILKS BROTHERS) APPLICATION* (1911), 29 R. P. C. 21.

*Annotation:—Refd. Re London Lubricants* (1920), Ltd.'s Appln. (1925), 42 R. P. C. 261.

**234. "Stateroom" — "State Express."**—The U. K. T. Co. applied to register the word "Stateroom" in respect of manufactured tobacco. The application was opposed by the A. T. Co. on the ground that it would lead to confusion with their trade mark "State Express" which was registered in respect of the same class of goods. The Comptroller-General held there was no reasonable probability of confusion or deception & allowed the mark to proceed to registration. Opponents appealed, & by leave, adduced further evidence showing that in practice the expression "State Express" was abbreviated to "State" & also sometimes "States." Appets. also filed evidence denying the alleged practice:—*Held*: appets. had not discharged the *onus* on them of showing that the proposed mark was free from all danger of leading to confusion or deception & on that ground leave to proceed with the registration ought to have been refused.—*Re UNITED KINGDOM TOBACCO CO., LTD.'S APPLICATION* (1912), 29 R. P. C. 489.

*Annotation:—Refd. Re London Lubricants* (1920), Ltd.'s Appln. (1925), 42 R. P. C. 264.

**235. "Schicht" — "Sunlight."**—Appets., Austrian soap manufacturers, applied to register the German word "Schicht" as a trade mark. The owners of certain trade marks, which consisted of the word "Sunlight" used in connection with soap, opposed the application:—*Held*: the application must be refused as the word "Schicht" stamped on soap would be calculated to deceive persons into taking soap so labelled as & for Sunlight soap.—*Re SCHICHT (GEORG) ACT'S APPLICATIONS* (1912), 28 T. L. R. 375.

**236. "Victor" — "Victory."**—*Re MASSACHUSETTS SAW WORKS' APPLICATION*, No. 288, *post*.

**237. "Harvino" — "Vino."**—Applications were made to register the words "Vyno" & "Vino" as trade marks in class 42 in respect of toffee. The applications were opposed on the grounds that the marks applied for so nearly resembled the opponent's trade mark "Harvino",

registered in class 42 in respect of confectionery, & used for toffee, as to be calculated to deceive, & that the words did not satisfy the requirements of Trade Marks Act, 1905 (c. 15), s. 9. The Registrar allowed the applications, & the opponent appealed to the ct. The second of the said objections was not pressed before the Registrar & was not argued before the ct.:—*Held*: the marks applied for so nearly resembled the opponent's trade mark as to be calculated to lead to confusion, & the appeal must be allowed.—*Re WHEATLEY AKEROYD & CO., LTD.'S APPLICATIONS* (1920), 37 R. P. C. 137.

**238. — "Vyno."**—*Re WHEATLEY AKEROYD & CO., LTD.'S APPLICATIONS*, No. 237, *ante*.

**239. "Zykol" — "Zee-Kol."**—An application was made in May, 1919, for registration of the word "Zykol" in ordinary type as a trade mark in class 2 in respect of chemical substances used for agricultural, horticultural, veterinary & sanitary purposes. The application was opposed by the proprietor of a trade mark "Zee-kol" registered in class 3 in respect of medicines for human use. The opponent in Aug. 1919, applied for registration of "Zee-kol" in class 2. The opponent alleged that large quantities of their pills & their ointment & soap each having antiseptic properties, had been sold to the public, that their goods were used for animals as well as human beings suffering from wounds for antiseptic purposes, & that there was possibility of deception & confusion. Appets. offered to limit their application to fluid disinfectants for sterilising purposes. The Registrar of Trade Marks, whilst holding that "Zykol" & "Zee-kol" were too near, if used for the same description of goods, held that there would be no probability of the goods coming into competition & that the goods were not goods of the same description, & that the application might proceed for fluid disinfectants for sterilising purposes in class 2 for use by surgeons & nurses. The opponent appealed to the ct. & further evidence was adduced:—*Held*: it was established that appct.'s preparation was intended for, & largely used by, the public in general; their disinfectant was of the same description of goods as the pills, ointment & soap with which the opponent's trade mark had been used, both being medicines for human use to alleviate similar diseases, & there was such similarity between the names "Zee-kol" & "Zykol" that risk of mistake was inevitable, & the application ought not to proceed.—*Re BROWN (J.) & CO., LTD.'S APPLICATION* (1920), 38 R. P. C. 15.

**240. "Egall" — "Egrol."**—*Re EGG PRODUCTS LTD.'S APPLICATION*, No. 211, *ante*.

**241. "Germeoce" — "Germolene" & "Homoece."**—A co. applied to register the word "Germeoce" as a trade mark in class 3 in respect of goods comprising amongst others a skin ointment prepared by them, & also in class 48 in respect of certain perfumery preparations. The proprietors of the registered trade mark "Germolene," which was registered & used for skin ointment, opposed the registration on the ground that confusion & deception might thereby be caused. In support of the opposition a declaration was made on behalf of the owners of the registered trade mark "Homoece," another skin ointment, who were too late to oppose formally. The Registrar, while not prepared to hold that appct.'s mark so nearly resembled "Germolene" as to cause confusion or to be calculated to deceive, refused to proceed, on the ground that the presence of "Homoece" on the

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Register was a factor which introduced a risk of confusion sufficient to justify his refusal:—*Held*: the Registrar's decision was justified, & the appeal must be dismissed.—*Re TAYLOR'S DRUG CO.'S APPLICATION*, [1923] 2 Ch. 174; 92 L. J. Ch. 556; 129 L. T. 84; 67 Sol. Jo. 576; 40 R. P. C. 193.

242. "Galaxy"—"Glaxo."—An application was made to register a mark consisting of the word "Galaxy" with the words "The Milky Way" appearing in an enclosure formed by lines springing out of the tail of the "y" in "Galaxy," the whole being enclosed in a circle, in class 42 in respect of substances used for food or as ingredients for food but not including toffee or goods of the like kind. The application was opposed on the ground that the mark applied for consisted essentially of the word "Galaxy," & that it so nearly resembled the opponents' mark "Glaxo," registered in class 42, as to be calculated to deceive. The opponents used this mark "Glaxo" in connection with a milk food for children, which had been extensively sold & advertised & which had a very wide reputation. There had been no user of the mark applied for. The Registrar allowed appet.'s mark to proceed, but limited the specification of goods by the addition of the words: "& not including dried, desiccated, & malted milk, condensed milk, & any milk food or milk production for children, invalids or other people":—*Held*: the predominant & essential feature of the mark applied for was the word "Galaxy"; the principles laid down in the *Pianolist Co.'s Application*, No. 257, *post*, applied where one of the marks, though not strictly a word mark, contained a word as its predominant feature; the evidence showed likelihood of, & actual cases of, confusion; appet.'s mark, considered as a whole, so nearly resembled the opponent's mark as to be likely to lead to confusion if used in connection with the same description of goods; & the words of limitation imposed by the Registrar were not too wide.—*Re SMITH'S APPLICATION* (1922), 40 R. P. C. 77.

243. Picture of ship.—One of four panels depicting ship.—William Henry Huxley, trading as Huxley & Co., applied to register as a trade mark for illuminating, etc., oils & greases a new label consisting of four pictorial panels intended to represent the history of oil from the well to the consumer. One panel depicted a ship. The application was opposed by Prices' Patent Candle Co., Ltd. & Prices' Co., Ltd., who were the registered owners of numerous trade marks consisting of a picture of a ship & also of a trade mark consisting of the words "Ship Brand," & whose goods were alleged to be known under the title "Ship Brand," on the ground (*inter alia*) that the mark applied for had such a resemblance to the opponents' trade mark as to be calculated to deceive. The application was refused. Appet. appealed to the ct.:—*Held*: on the evidence, the opponents' goods had become known as "Ship Brand" goods; the picture of a ship in appet.'s proposed trade mark, if it stood alone, would undoubtedly lead to confusion in relation to one of the registered trade marks of the opponents representing a battleship; the fact that this particular mark of the opponents might not have been much used made no difference, inasmuch as it was on the Register & the opponents were entitled to use it; the four pictures in the proposed trade mark were not combined in such a way as to take from the picture of the ship its own

individual significance &, that being so, there was a probability of confusion; & the appeal to the ear made by the proposed trade mark as well as the appeal to the eye was fatal to the application.—*Re HUXLEY'S (TRADING AS HUXLEY & CO.) APPLICATION* (1924), 41 R. P. C. 423.

*Annotation*:—*Held. Re McDowell's Appln.* (1926), 43 R. P. C. 313.

244. Noble & word "Sterling"—Pound in shield with word "Sterling."—*Re CONNOR'S APPLICATION*, No. 166, *ante*.

245. "Freia"—"Fry."—A Norwegian co. applied for the registration of the word "Freia," which formed part of their name, in script form as a trade mark in class 42 for goods including chocolate. There was no evidence of user in this country by appet's. The application was opposed by J. S. F. Ltd. on the ground that the mark applied for bore such resemblance both in appearance & pronunciation to their mark "Fry," which had been registered in 1886 & which was widely known in connection with chocolate, as to lead to confusion. The application was refused & the applicants appealed to the ct.:—*Held*: the two marks would not convey the same impression to the eye, but that, in view of the probability of "Freia" being pronounced as if it were spelt "F-r-y-e-r" & of the two words being used in the possessive case, the words would sound the same to the ordinary purchasers, & the appeal should be dismissed with costs.—*Re AKT. FREIA CHOCOLADE FABRIK'S APPLICATION* (1924), 41 R. P. C. 653.

246. "Permanol"—"Permanon."—*Re HEAR (S.) & SON, LTD.'S APPLICATIONS* (1925), 43 R. P. C. 137.

247. "Nujol"—"Nuvola."—An application was made for registration of a trade mark, consisting of the word "Nuvola," in class 3, in respect of a medicated food for human use, & in class 42, in respect of a preparation of fruits & oil for use as food. The application was opposed by the owners of a trade mark, consisting of the word "Nujol," registered in class 3, in respect of medicinal & curative preparations for human use. Appet. carried on business under the name of "The Health Centre" & sold food stuffs & natural remedies, including the fruit preparation to which he proposed to apply the trade mark. The opponents had used their trade mark in connection with refined paraffin oil for use as a remedy for constipation. They had sold their preparation in large quantities, & they alleged that "Nuvola," used in respect of appet.'s preparation, was calculated to deceive. They alleged also that the name "Nuvola" had been adopted fraudulently. Appet. alleged that the preparations sold under the names "Nujol" & "Nuvola" respectively were of very different appearance; that "Nujol" was a medicine, "Nuvola" a food; that the preparations would not be sold by the same dealers; & that the names were such that confusion would be impossible. The Registrar held that appet. had failed to prove that confusion would not arise, & he refused registration:—*Held*: the allegation of fraud was without foundation; that "Nuvola" was more of a medicine than a food & might come into competition with "Nujol"; the opponents might use their mark in connection with a remedy for constipation in a solid form, or with a medicated food; the two names might be mistaken for one another; they seemed to belong to a series of associated marks to which sects. 24 to 26 of Trade Marks Acts, 1905-1919 might be applicable; that the applicant had left the matter *in dubio*; & registration must be



refused.—*Re SAVAGE'S APPLICATION* (1926), 44 R. P. C. 1.

248. —“*Nurol*.”—An application by applt., a Liverpool oil merchant, to register the word “*Nurol*” as a trade mark in respect of illuminating, heating & lubricating oils was opposed by resps., the Standard Oil Co. of New Jersey, who were the registered owners of the word “*Nujol*” in respect of medicinal preparations for human use & had for several years past been selling by their agents in this country a preparation of highly refined paraffin under that name, & was refused by the registrar on the ground that the use of the word “*Nurol*” was calculated to deceive:—*Held*: applt. had not proved to the satisfaction of the House that confusion might not arise from the registration of his mark.—*McDOWELL v. STANDARD OIL CO. (NEW JERSEY)*, [1927] A. C. 632; 96 L. J. Ch. 386; 137 L. T. 734; 43 T. L. R. 592, H. L.; *sub nom. Re McDOWELL'S APPLICATION*, 44 R. P. C. 335, H. L.; *affy.*, 43 R. P. C. 313, C. A.

*Annotations*:—*Refd. Re Savage's Appln. for Regn. of Trade Mks.* (1926), 44 R. P. C. 1; *Re Fanfold's Appln.* (1928), 45 R. P. C. 323.

249. “*Ustikon*”—“*Justlekon*.”—*Re DAVIS'S TRADE MARKS, DAVIS v. SUSSEX RUBBER CO.*, No. 67, *ante*.

#### ii. Marks held Not Similar.

250. *Gold mohur—Silver rupee.*—*R.* applied for registration of a cotton trade mark which was coloured, being a gold mohur. It had been placed in the first class by the committee of experts & had been duly deposited for exhibition & advertised in the official paper under the Trade Marks Registration Acts & Rules & the Additional Rules with respect to cotton goods. *D.* was the proprietor of a cotton trade mark which was a silver rupee & he opposed the registration of *R.*'s mark:—*Held*: *R.*'s mark was not calculated to deceive for in such cases the mark which is protected is the registered mark which has been deposited & of which the representation can be seen at the places mentioned in the advertisement.—*Re ROBINSON'S TRADE MARK* (1880), 29 W. R. 31.

251. *Pipe & dart—Pipe alone.*—*Re LAMBERT'S TRADE MARK, No. 343, post.*

252. *Six pointed star in marine picture—Eight pointed star.*—*D.*, a British cigar manufacturer, applied to register as a new mark for manufactured tobacco a label containing the words “*Star of Hope*” & a marine picture with a small six-pointed star in the sky. The application was opposed by *W.* as the registered proprietor of two marks for the same class of goods. The first mark was registered as an old mark in 1877, & consisted of an eight-pointed star. This mark was chiefly used upon packet tobacco; but from 1870 to 1884 cigars were manufactured for *W.* by an English firm, upon which the mark was used as part of a label containing the name of an imaginary Spanish firm & the word “*Habana*.” *W.*'s trade in cigars was comparatively small, & was subsidiary to his trade in packet tobacco. The second mark was registered in 1886 as a new mark, & consisted of a pictorial label, & by the side of the label an eight-pointed star, to which the words “*trade mark*” were attached. *W.*'s goods were frequently ordered by the public as “*star*” goods. *D.* moved to expunge *W.*'s

marks:—*Held*: (1) *W.* had no exclusive right to the name or design of a star, apart from such claim, *D.*'s mark was not calculated to deceive, & *D.* was entitled to registration; (2) *W.*'s first mark was distinctive, & was not invalidated by the mode of user; because the misrepresentation accompanying the use of the mark upon cigars was not such as to destroy its distinctive character; & because there had been no general or very extensive user of the mark upon cigars; (3) *W.*'s second mark was misleading, by reason of the position of the words “*trade mark*,” & ought to be expunged except as to the star, subject to an application being made by *W.* to amend.—*Re DEXTER'S APPLICATION, Re WILLS'S TRADE MARKS*, [1893] 2 Ch. 262; 62 L. J. Ch. 545; 68 L. T. 793.

*Annotations*:—*As to* (1) *Fold. Re Bagots, Hutton's Trade Mk.*, [1916] 2 Ch. 103. *As to* (3) *N.F. Day v. Riley & Whittaker* (1900), 48 W. R. 556. *Generally, Refd. Board* (Incorporated) v. *Bagots, Hutton*, [1916] 2 A. C. 382.

253. *G. & M. 2d. Cigars—Great Two D Brand.*—*L. & co.*, the owners of a trade mark “*The Great Two D Brand*” which was registered in 1885, commenced an action to restrain deft. from using upon labels, bands, & wrappers for cigars certain words, letters, & figures alleged to be a colourable imitation of pltf.'s trade mark, & from selling special cigars under pltf.'s trade mark or trade description. The mark was originally registered by *M.* who supplied *L.* with cigars made up in boxes labelled with the mark, but the mark was designed by *L.*, registered by *M.* at *L.*'s request, & subsequently assigned by *M.* to *L.* The label, the use of which by the defendant was complained of was “*The G. & M. 2d. Cigars*.” Deft. submitted pltf.'s trade mark was not valid; he denied using the labels complained of, & he denied that the use of the words & letters complained of were colourable or calculated to deceive, & he alleged that the only reason for using “*2d.*” was to signify price. Deft. adopted his device in 1889; he had previously been in the habit of selling his cigars as “*London 2d. Wonders*.” Pltf.'s evidence was to the effect that this mark was a distinctive device well known to the trade as the “*Two D Brand*,” & as such had acquired a considerable reputation; deft.'s saleswoman had, when asked if she sold the “*Great Two Ds*,” said “*Yes*,” & supplied a box of cigars with the label of deft. which was complained of; that deft. himself had sold his cigars as “*The Two Ds*,” & had said they would sell as “*The Two Ds*,” & had offered them to another person with the avowed object of his reselling them as “*Two Ds*.” The evidence as to the saleswoman was denied by her, & deft. denied giving any authority to sell his goods as pltf.'s, & that he ever used the words “*Two Dec*” cigars; he said “*2d.*” meant twopenny. It was also shown that a very large number of cigars at the price of 2d., & having labels indicating that price, had been sold: in particular, “*London 2d. Wonders*” had been sold for years prior to the registration of pltf.'s trade mark:—*Held*: assuming that pltf. were entitled on the pleadings to make out a case of passing off, which was doubted, & assuming that the “*Great Two D*” had become exclusively associated with pltf.'s cigars, pltf. were attempting to claim an exclusive right to the expression “*Two D*,” & their case on this completely failed, the evidence in the cases, other than that of the

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*n. Bulldog's head with words “Read Bros., Ltd., London, The Dog's Head Bottling”*—*Bull's head with*

*words “Cowie & Co., Bull's Head Bottling.”*—*Appls.* were the registered proprietors of a trade mark consisting of a bulldog's head within a circle, round which were the words “*Read*

*Bros., Ltd., London, The Dog's Head Bottling.*” Resps. made application, which was granted by the Registrar of patents, to have registered a trade mark with a bull's head in a circle,

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shopwoman, only showed a use by defft. of the expression "Two D," in the case of the shopwoman it was doubtful whether she had used the expression "the Great Two D" but assuming that she had, as she had left defft.'s employ, & this was an isolated case of misrepresentation, there was no reason to suppose any continuance of misrepresentation, & the injunction ought not to be granted in such a case.—*LEAHY, KELLY & LEAHY v. GLOVER* (1893), 10 R. P. C. 141.

*Annotations:—* **Folds.** Rutter v. Smith (1900), 18 R. P. C. 49. **Appld.** Wellcome v. Thompson & Capper (1903), 20 T. L. R. 111. **Folds.** Bambergs v. Wadkinson (1906), 23 R. P. C. 111. **Refd.** Carr v. Cisp (1902), 19 R. P. C. 497. **Levcr.** Maslin Equitable Finance Soc. (1912), 106 L. T. 472. **Goddard v. Hyam** (1917), 35 R. P. C. 21; *Hayana, Cigar & Tobacco Factories* L. Oddenino, [1921] 1 Ch. 179.

**254. Ship with words "Unco Guid" — Two lions rampant with words "Unco Guid."—***Re LOFTUS' TRADE MARK*, No. 350, *post*.

**255. Triticine—Triticumina.**—In Mar. 1886, plf's. predecessors in business registered the word "Triticumina" as a trade mark in class 42, in respect of heaven & wheatmeal biscuits, bread, cakes, & other preparations from wheat. Patents were taken out in 1885 & 1886 for improvements in wheat meal by the same persons. In 1891, this trade mark & these patents became vested in plf's. In 1896, plf's. brought an action (a) for infringement of the trade mark, & (b) alleged passing off by defts. of their goods as plf's. by the use of the word "Triticine." Defts. alleged that they had used the words "Triticine" before the invention of the word "Triticumina." They moved to expunge the trade mark from the Register on the grounds (a) that it was the name of a patented article; (b) that it was descriptive. Plf's. had for some years sold "Triticumina" flour, "Triticumina" meal, "Triticumina" food, & other products in the name of which the word "Triticumina" occurred. It appeared that in certain advertisements plf's. had used the word "patent" in connection with these articles. The trial of the action & the hearing of the motion came on together:—*Held*: (1) the word "Triticine" had been used by defts. predecessors for wheat-meal products before the registration or use by plf's. of the word "Triticumina"; (2) plf's. had not shown that the use of "Triticine" by defts. would deceive, & the action must be dismissed, but, under the special circumstances of the case, without costs; (3) the word "Triticumina" was not a fancy word, being derived from "Triticum" wheat by the addition of the suffix "ina," & being intended to be descriptive; also the word was either the name of a patented article, in which case it was not a good trade mark, or else that plf's. & their predecessors had represented their articles sold under the word "Triticumina" as patented, & *semble*, without deciding the point, in such case the word could not be a good trade mark.—*MEABY & CO., LTD. v. TRITICINE, LTD.*, *Re MEABY & CO.'S TRADE MARK* (1897), 14 T. L. R. 42; 15 R. P. C. 1. *Annotation:—Generally, Refd.* Wellcome v. Thompson & Capper, *Re Burroughs Wellcome's Trade-mks.*, [1904] 1 Ch. 736.

**256. "Night Cap"—Red "Cap."**—In 1898 a firm of soap manufacturers registered the words "Mother Red Cap" in classes 47 & 48, & sub-

sequently the words "Red Cap" in class 47 for goods which included soap. In 1899 another firm of soap manufacturers, who alleged that they did not know of such registrations, registered the words "Night Cap" in classes 2, 47, 48, & 50, including in each class soap of some kind. In 1899 the owners of the marks "Mother Red Cap" & "Red Cap" applied to register "White Cap," & thereupon became aware of the registration of "Night Cap," & in 1900 moved to expunge "Night Cap" on the ground of the probability of confusion with their marks. The mark "Mother Red Cap" had never been used, & the mark "Red Cap" had not been used until some time in 1900. The mark "Night Cap" had been used prior to the use of "Red Cap," & had been largely used:—*Held*: under the circumstances the words "Night Cap" were not calculated to deceive, & the motions were dismissed with costs.—*RE HEDLEY'S TRADE MARKS* (1900), 17 R. P. C. 719.

**257. "Neola"—"Pianola."**—An application was made for the registration as a trade mark of the word "Neola" for a "piano player, being a musical instrument included in class 9." The registered proprietors of a Trade Mark "Pianola" registered for all goods in class 9 opposed the registration. The Comptroller decided against the opponents & ordered the registration to proceed. The opponents appealed. The appeal was referred to the Ct.:—*Held*: having regard to the kind of customers for such goods & a difference in the articles actually sold under the names, there was not likely to be any confusion.—*RE PIANOTIST CO.'S APPLICATION* (1900), 23 R. P. C. 774.

*Annotations:—* **Consd.** *Re Fox's Appln.* (1920), 37 R. P. C. 37. **Appld.** *Re Wheatley, Akers & Sons' Appln.* (1920), 37 R. P. C. 137; *Re Egg Products Appln.* (1922), 39 R. P. C. 155. **Re Connor's Appln.** (1921), 11 R. P. C. 458. **Refd.** *Re United Chemists' Trade Mk. Assocn.* (1923), 40 R. P. C. 219; *Re Huxley's Appln.* (1921), 11 R. P. C. 423.

**258. Shamrock leaf Inverted shamrock leaf surmounted by Crown.**—Appet. trading as S. & Co. sought to register in class 39 for picture post cards, a Trade Mark consisting of a shamrock leaf with the stalk continued so as to form "A & Co." The Registrar required the consent of the proprietors of an old mark, registered for stationery, consisting of an inverted Shamrock leaf bearing the letters "M. W. & Co." & surmounted by a Royal Crown. Appet. having failed to obtain this consent appealed. The proprietors of the registered mark did not appear to contest the application & no evidence was filed:—*Held*: there would not be any mis-leading results from the two marks being on the Register at the same time.—*RE SHAMROCK & CO.'S APPLICATION* (1907), 24 R. P. C. 569.

**259. Device containing letters "A. B. C."—Circular band containing "A. B. C." & A. Baker & Co., Ltd.**—In 1906 the Acredited Bread co. applied to register as a trade mark in class 45, in respect of cigars, cigarettes, & tobacco, a device which was a reproduction of the co.'s common seal having the letters A. B. C. in the centre, & which was already registered as their trade mark in class 42 in respect of bread, biscuits, cakes, & flour. Shortly afterwards A. Baker & Co. who carried on business as tobaccoconists, applied to register a series of four labels as trade marks in class 45 in respect of cigarettes. One of the distinguishing features in the series was a circular

with the words "Cowle & Co., Bull's Head, Bottling," around the circle. The trade mark registration of which was asked for by resp's. had been used

for many years, & no evidence was adduced tending to show that any person had been deceived thereby:—*Held*: the trade mark was not cal-

culated to deceive, & the application for registration should be granted.—*HEAD BROTHERS, LTD. v. COWIE & CO.* (1911), 30 N. Z. L. R. 1157.—**N.Z.**

band or garter in the centre of which appeared the letters A. B. C., & round the edge of which were contained the words "A. Baker & Co., Ltd." A. Baker & co. had for the last eleven years used the mark they sought to register & with perfect good faith claimed the right to the exclusive user of the letters "A. B. C." The Aerated Bread co. opposed A. Baker & co.'s application on the ground that there had been concurrent user of the letters A. B. C. by themselves, & others, & that A. Baker & co.'s labels should only be registered on a disclaimer by them of any right to the exclusive use of that part of the label. A. Baker & co. opposed the Aerated Bread co.'s application on the ground that their mark contained matter the use of which would, by reason of its being calculated to deceive, be disentitled to protection in a ct. of justice. The registrar refused to register either mark, & thereupon each co. applied to the ct. for a direction to the registrar to proceed with the registration of their respective marks. At the hearing A. Baker & co. failed to establish that the letters A. B. C. exclusively indicated their goods.

The evidence also showed that in the past the concurrent user of the letters A. B. C. for the same goods by the Aerated Bread co., A. Baker & co., & others had not led to any mistake, confusion, or complaint. On A. Baker & co.'s application:—*Held*: (1) in the circumstances the ct., in the exercise of its discretion under Trade Marks Act, 1905 (c. 15), s. 15, would not impose upon appets. a condition requiring them to disclaim any part of their combination although containing matter common to the trade, & they were entitled to have their trade marks registered.

The condition of a disclaimer is one for the imposition of which some good reason ought to be established rather than one which ought to be imposed unless some good reason to the contrary is made out.

(2) The failure of a claim to a monopoly, put forward & asserted with good faith does not necessarily involve the imposition of a disclaimer as a condition of registration.

(3) Appets.' trade marks were not "advertisements" within the meaning of s. 41 of Cos. Act, 1862 (c. 89), necessitating the mention therein of appct. co.'s name in legible characters; & there was nothing in Trade Marks Act, 1905 (c. 15), confining the name or signature of appct.

(4) On the Aerated Bread co.'s application:—*Held*: appets. had discharged the burden which lay upon them of showing that their trade mark was not calculated to deceive, & they were entitled to have their mark registered in class 45.—*Re BAKER (ALBERT) & Co.'s APPLICATION, Re AERATED BREAD Co.'s APPLICATION, [1908] 2 Ch. 86; 77 L. J. Ch. 473; 98 L. T. 721; 24 T. L. R. 467.*

*Annotation*:—As to (1) *Apld. Re Cadbury's Appln., [1915] 2 Ch. 307.*

**260. Head of Red Indian—Red Indian on horseback.**—An application was made for the registration in class 50, in respect of sharpening stones & other goods, of a trade mark consisting of a representation of the head of a Red Indian. The application was refused on the ground of the resemblance of the mark to a trade mark registered in 1904, by H. & co., in respect of emery & other goods, consisting of the representation of a Red Indian on horseback with the words "Red Indian" beneath; the words were disclaimed as added matter. Appets. appealed to the Board of Trade, who referred the appeal to the ct. H. & co. were made resps., but did not appear,

they however, refused their consent to the registration of the trade mark applied for. Appels. adduced evidence to show that their mark had been used in the United Kingdom for upwards of seven years, without any confusion resulting & was distinctive of their goods:—*Held*: having regard to the facts as to user of appets.' mark, the application ought to be allowed to proceed, although without prejudice to any opposition which might be entered by H. & co.—*Re CARBORUNDUM Co.'s APPLICATION (1909), 26 R. P. C. 504.*

**261. "Herogen"—"Ceregen."**—The owners of trade marks "Zoogen" & "Ceregen" registered in 1908 & 1909 for medicinal foods for human use, moved to remove from the register the trade mark "Herogen," registered in Apr. 1912 in respect of a food in class 42 on the ground of similarity in sound of the respective words, the likeness of their terminations, & the liability to goods covered by the trade mark "Herogen" being passed off as their goods:—*Held*: the real question being as to whether the names were so alike phonetically as to be calculated to deceive, not whether a dishonest trader would so use the word as to bring about deception, the articles would be purchased in reliance upon the letters which preceded the common termination, & these being sufficiently distinctive & appets.' & resps.' goods appealing to different classes of customers, the application to expunge failed.—*Re BRITISH DRUG HOUSES, LTD.'s TRADE MARK (1912), 107 L. T. 756.*

**262. Cat with "Snowdrop Trade Mark"—Cat & barrel.**—Application was made for the registration in respect of gin, of a label containing the representation of a cat in a sitting posture holding a glass in its paws & having on it the words "Cordial Old Tom Gin—Snowdrop Trade Mark." "Snowdrop" was a registered trade mark of appets. The application was refused at a hearing on the ground that the mark was calculated to deceive having regard to a cat & barrel mark on the register. Appets. appealed, & said that a cat was common to the trade in gin, & offered to disclaim the right to the exclusive use of a cat; they had made the same offer to the Comptroller:—*Held*: the application ought to be ordered to proceed.—*Re BAGOTS, HUTTON & Co., LTD.'s APPLICATION (1912), 29 R. P. C. 702.*

**263. ————.**—*Re BOORD & SON, INCORPORATED v. BAGOTS, HUTTON & Co., LTD., No. 199, ante.*

**264. Five pointed star in red—Eight pointed star.**—The Texas co. applied to register in class 47 a trade mark in respect of oils for heating, lighting & lubricating, motor spirit & other products of petroleum, in which they had a large trade. Appets.' mark consisted of a five-pointed star in red, with a certain word in black & the letter T in the centre of the star in green. Appets. stated that they desired that their mark, when registered, might be limited to the colours used in the representation on the form of application. There were existing marks on the Register in class 47, one consisting of an eight-pointed star, & the others consisting of two intersecting triangles in a broken-line circle, with lettering:—*Held*: there was no suggestion that there was any danger of the goods in connection with which the several marks were used being called "Star" goods; appets.' mark did not so closely resemble any of the existing marks as to be calculated to deceive, even if one of the existing marks were to be coloured red, as to which there was no suggestion that it had been, or was going to be, so coloured.—*TEXAS Co.'s APPLICATION (1913), 31 R. P. C. 53.*

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**265.** —“Two intersecting triangles in broken line circle.”—TEXAS CO.’S APPLICATION, No. 264, *ante*.

**266.** “Limit” —“Summit.”—On an application to register the word “Limit” as a trade mark in respect of collars & shirts, the application was opposed by the owners of the trade mark “Summit” registered in respect of collars & shirts on the ground that its similarity would lead to deception:—*Held*: the words “Limit” & “Summit” were words in common use, each conveying a perfectly definite idea; there was no possibility of anyone being deceived by the two marks; & there was no ground for refusing registration.—*Re* SMITH (THOMAS A.) LTD.’S APPLICATION (1913), 30 R. P. C. 363.

**267.** “Swankie” —“Swan.”—An application was made for the registration of the word “Swankie” in respect of a detergent. A co., being the proprietors of a trade mark consisting of the devise of a swan in conjunction with the word “Swan,” opposed the application on the ground that the use of appct.’s mark in connection with the goods sold by him would be calculated to deceive, & would cause goods marked therewith to be associated with the goods of the co.’s manufacture & so be mistaken & passed off & sold as goods of their manufacture:—*Held*: there was not the slightest connection between the words “Swan” & “Swankie” & the registration ought not to be refused.—*Re* CROOK’S TRADE MARK (1914), 110 L. T. 474; 30 T. L. R. 245; 58 Sol. Jo. 250; 31 R. P. C. 79.

**268.** Cat with words “Dubonnet Wine”—Cat on barrel.]—In 1913 a French co. applied for registration of a trade mark in class 43 in respect of “a wine.” The trade mark consisted of a label on which appeared a cat in a recumbent position & a bottle of wine in front of the cat & also the words “Dubonnet Wine.” The application was opposed by two English cos. The first of these was the registered proprietor of several trade marks registered in class 43, all of which had on them a barrel on its bilge, & on the barrel a cat standing up in a pugnacious attitude; this co. alleged extensive user of this mark for all goods in class 43, & a general reputation for their goods as “cat” goods, although their goods were also known as “cat & barrel” goods. The second opposing co. was registered proprietor of a trade mark used for port wine & containing the words Gato Brand,” “Gato” being the Spanish & Portuguese for “cat,” & a representation of a sitting cat & some initials & a signature. Their port sold under this label was sold principally abroad. They also sold “Gato” sherry with a similar representation of a cat & had also a trade in beer, stout & whisky under labels bearing a similar representation of a cat & they alleged a reputation for wine under their cat mark. Appcts. alleged the sale in this country by them & their predecessors in business for fifteen years of a particular preparation of Quinquina under the label applied for, or a label bearing a similar representation of a cat & bottle. Their label was registered in many foreign countries, including France, Portugal & Spain. It appeared that in the year 1898 appcts.’ predecessors applied for registration of a label bearing a similar representation of a cat & bottle, but with the words “Quinquina Dubonnet” on it instead of the words “Dubonnet Wine,” but the opponents’ marks were cited against it, & the application was not

proceeded with. Appcts. alleged that the representation of a cat was common in class 43. The opponents denied that a cat was common for wine, they relied on Trade Marks Act, 1905 (c. 15), s. 39. The Registrar refused the application, & appcts. appealed. It was held on appeal that the most distinctive part of the appcts.’ trade mark consisted in the words “Dubonnet Wine,” & that their label was not likely to be confused with either of the opponents’ labels; that, having regard to the many foreign registrations, the registration of their label in England could not affect the sale of the appcts.’ goods in those foreign countries, & that the question whether natives of foreign countries would be deceived need not be considered; that the fact that the Registrar had found in other proceedings that a cat was common for gin was material; & that sect. 39 did not preclude the ct. from taking the whole of the facts into consideration, including the presence of other cat marks on the Register; that there had been for fifteen years a fairly substantial sale of appcts.’ product under the mark applied for or under a mark substantially identical with it, & that it had always been known as “Dubonnet Wine,” & there had been no actual confusion or deception; that although the rule in *Eno v. Dunn*, No. 180, *ante*, was to be applied, the Registrar had concentrated his attention on the cat & put out of sight the distinguishing features; & that no confusion was likely to result from the registration. The decision of the Registrar was reversed, & the application was ordered to be proceeded with, but to be limited to appcts.’ particular preparation of Quinquina sold under the name of Dubonnet in accordance with an offer made by appcts. before the hearing before the Registrar:—*Held*: the question of foreign user ought to be taken into consideration, but even taking it into consideration appcts.’ trade mark was not calculated to deceive.—*Re* SOCIÉTÉ ANONYME DUBONNET’S APPLICATION (1915), 32 R. P. C. 211, C. A.

**269.** — Cat with words “Gato Brand.”] *Re* SOCIÉTÉ ANONYME DUBONNET’S APPLICATION, No. 268, *ante*.

**270.** Double cross—Plain cross.]—An application was made for registration in class 42 for condensed skimmed milk of a trade mark consisting of a label which as represented & used had a red & in the centre of it a white cross with the words “Lehmann’s Cross Milk” & two small black crosses on the white cross & the words “Double cross” at the sides of the white cross. The words the “Cross Brand” & also a number of small crosses appeared on other parts of the label. Appcts. also applied for registration of a somewhat similar label without the two black crosses & the words “Double Cross”:—*Held*: there had been honest concurrent user by appcts. & their brand had come to be known as the “Cross Brand” or the “Double Cross” & no other condensed milk was so known; that there was no likelihood of confusion with the mark registered for pig products & very slight possibility of deception by confusion with the “Diploma Cross” & under the circumstances the ct. ought to exercise its discretion under sect. 21 in favour of appcts.—*Re* LEHMANN (R.) & CO., LTD.’S APPLICATIONS (1918), 35 R. P. C. 92.

**271.** “Rito” —“Lito.”]—F., Ltd., were the registered proprietors of two trade marks, the word “Lito” & the word “y to,” coupled with a device, in class 47, in respect of soap, soap powder, & other articles included in the class. In Feb. 1917, L., Ltd., approached F., Ltd., with

a view to obtaining their consent to the registration of "Rito" in respect of substantially the same class of goods; this consent was refused; & the registration of "Rito" was refused by the Registrar of trade marks. F. & co. sold a soap paste principally for cleaning hands under the name "y to." L., Ltd., sold a soap which was a grease solvent for cleaning hands under the name of "Rito" & to this F., Ltd., objected on the ground that it was an infringement of their registered trade marks & they commenced an action against L., Ltd., in 1917, for the infringement of trade mark & passing-off. Defts. gave notice of motions to rectify the register, on the ground of non-user, by limiting the registration of "Lito" & by the removal of the "y-to" mark. Pltfs. gave particulars of various instances of the passing-off alleged by them. The motions came on for hearing with the trial of the action when pltfs. relied principally on infringement of their trade mark "Lito," & as regards passing-off on the resemblance of "Rito" to "y-to":—*Held*: "Rito" was not an infringement of either of pltfs.' trade marks, & there was no probability of deception in what defts. were doing.—*FITCHETTS, LTD. v. LOUBET & CO., LTD., Re REGISTERED TRADE MARKS* (1919), 36 R. P. C. 206.

*Annotation*:—*Appld., Re Fox's Appln.* (1920), 37 R. P. C. 37.

272. ——"Y-To."—*FITCHETTS, LTD. v. LOUBET & CO., LTD., Re REGISTERED TRADE MARKS*, No. 271, *ante*.

273. "Motrate" — "Filtrate."—An application was made for registration in class 47 of a trade mark consisting of the word "Moderate" in respect of lubricating materials. The application was opposed by the proprietors of a trade mark "Filtrate" registered in class 17 in respect of lubricating oils & greases. The opponents alleged that the word "Filtrate" had been used by them & their predecessor in business for many years, & was well known as distinguishing their goods; that the termination "trate" did not occur in any trade mark, except theirs, in use in the trade; & that the first parts of the words were not sufficiently unlike to prevent probability of deception. Several declarants for the opponents stated that they would have thought that there was some connection between the makers of the two articles if the word "Motrate" had come on the market in addition to the word "Filtrate." The Registrar of trade marks held that, in the absence of evidence as to what classes of persons were the consumers of the goods to which the mark was applied, & as to the way in which the goods were dealt in & packed, & the price, it had not been proved that there was a probability of deception, & that the opposition failed. The opponents appealed to the ct.:—*Held*: although the two words had the same ending, it was an ending in common use, & the first parts of the words were sufficiently different to distinguish the marks; there was a conflict of evidence as to the probability of deception, & the ct. must decide on the grounds that had been laid down in many cases; the appeal must be dismissed.—*Re Fox & Co.'s APPLICATION* (1920), 37 R. P. C. 37.

274. *Aquatite* — *Aquaturn*.—The owners of two Trade Marks, one consisting of the word "Aquatite," & the other of a label containing that word, both registered in Class 38 in respect of rainproof garments, moved to rectify the Register of Trade Marks by removing therefrom a Trade Mark consisting of the word "Aquaturn" in block letters registered for the same goods.

Appts. had also commenced an action for passing off & infringement of Trade Mark against the registered proprietor of the Trade Mark "Aquaturn," complaining in particular that one of defts.' labels, in which "Aquaturn" was used, was calculated to deceive by reason of its close resemblance to appts.' label containing their registered word "Aquatite"; & before the motion to rectify was heard an order was made in the action granting a perpetual injunction against passing-off & against infringement of their trade marks. Appts. relied on these facts in the motion to rectify. Words commencing in "aqua" were shown to be common for rainproof garments:—*Held*: although the word "Aquaturn" had been used by resp. as part of a label which had been held to be calculated to deceive, the Trade Mark itself was not calculated to deceive, & the application failed.—*Re COHEN'S TRADE MARK* (1921), 39 R. P. C. 33.

275. *Ace of spades of cumulative design* — *Ace of spades of flat design*.—Pltfs. were the proprietors of a registered trade mark in respect of playing cards consisting of a representation of the ace of spades composed of the superimposition one upon another of eight various aces with artistic embellishments. They had used their representation of an ace of spades for upwards of fifty years & in 1888 had registered it as a trade mark. In 1922 defts. commenced to use a representation of an ace of spades, the central features of which consisted of five various aces superimposed one upon another inclosed in a circle. It appeared at the trial that a peculiar representation of the ace of spades was commonly used in the trade to denote the origin of the goods, & in some cases to denote the different qualities of cards produced by the same manufacturer, but that it was seldom used for the purpose of effecting a sale, & that as a general rule it was not brought to a purchaser's notice until after the completion of a sale. At the trial, it was held that pltfs.' mark was characterised by great artistic merit & wealth of detail, that no one feature could be singled out as predominant, & that it was such as to leave on the mind a strong impression of cumulative design as opposed to flatness; that the predominant features of defts.' mark were aggressively obtrusive & that the design was characterised by flatness; that the superimposition of aces in defts.' mark bore little resemblance to the corresponding feature in pltfs.' mark in shape, colouring or surroundings; that the ordinary purchaser would not confuse the one with the other; & that the action must be dismissed with costs.

The appeal was dismissed on the ground of absence of probability of deception.—*GOODALL & SON, LTD. v. WADDINGTON, LTD.* (1921), 41 R. P. C. 658, C. A.

276. "Cream o' the North" — "Royal Northern Cream."—H. applied to register a label bearing the brand name "Cream o' the North" as a trade mark in class 43 in respect of Scotch whisky. The application was opposed by M. on the grounds (*inter alia*) that he was the registered proprietor of a mark registered in 1882 consisting of a label bearing the brand name "Royal Northern Cream" & that S., who did not join in the opposition, was the proprietor of a registered trade mark consisting of a label bearing the brand name "Cream of the North." Apart from the brand names all three labels were dissimilar, & both in the application & in S.'s registration the right to the exclusive use of the words "Cream of the North" was disclaimed. H. & his predecessors in business had for many years used the label applied for, the

*Sect. 2.—What trade marks registrable: Sub-sect. 8, B. (c) ii., C. & D.; sub-sect. 9, A.]*

business being that of blending whisky & selling it to retail customers in his own shops in Glasgow. M.'s headquarters were also in Glasgow, his business being wholesale & export. S. carried on a local trade in London. M. also claimed common rights in the names "Royal Northern Cream" & "Northern Cream":—*Held*: "Cream" was the common appellation of whisky in the trade; "Royal Northern Cream" had come to indicate the opponent's goods, but it had not been proved that "Northern Cream" bore that meaning; any possibility of confusion between the labels could lie only in the appeal to the ear; considering all the circumstances of the case no probability of such confusion had been shown, & the appeal must be dismissed.—*Re HUTCHISON'S APPLICATION* (1924), 41 R. P. C. 538.

277. "Tripcaströid" — "Castrol."—An application was made to register a mark consisting of the word "Tripcaströid" in class 47 in respect of lubricating preparations. The application was opposed by the owners of the Trade Mark "Castrol" which had been registered for more than seven years in the same class, in respect of oils for heating, lighting & lubricating, on the ground that the mark was calculated to deceive. Appets. had previously abandoned an application to register the word Castroid, the opponents having objected to this word & threatened to oppose its registration. The opponents now alleged that they used the word "triple" in connection with lubricating oils, & that the word "Tripcaströid" suggested Triple Castroid & that it would be assumed by users to mean a triple form of "Castroid" & *ergo* of "Castrol." Appets. in reply alleged that the Trade Mark "Castrol" consisted of the words castor oil mis-spelt & that the registration thereof was & always had been invalid, that appets. had abandoned their application to register "Castroid" in order that they might make their mark still more distinctive, that the word "Tripcaströid" was not calculated to deceive & that the opponents were endeavouring to prevent other manufacturers of lubricating oils from using any trade mark which contained any suggestion of castor oil being contained in such lubricant, even when it was in fact contained therein:—*Held*: upon the evidence & upon a reasonable construction & appreciation of the two words "Castrol" & "Tripcaströid" there was no reasonable ground for thinking that the public would be confused or that there would be deception of goods sold as "Tripcaströid" being mistaken for "Castrol"; the value of the prefix "Trip" as being of importance in the total word sought to be registered could not be neglected; there was no attempt on the part of appets. improperly to obtain any advantage from the reputation attaching to the opponents or to their commodities; there was no probability of the prefix "Trip" being dropped & of the word "Castroid" being used *simpliciter*.—*Re LONDON LUBRICANTS* (1920), LTD.'S APPLICATION (1925), 42 R. P. C. 261, (C. A.).

*Annotation:—Refd. Re Parkinson's Appln. (1926), 43 R. P. C. 341.*

#### C. Rival Claims.

*See Trade Marks Act, 1905 (c. 15), s. 20.*

278. Application of Trade Marks Act, 1905 (c. 15), s. 20.—R. & co. obtained registration of

a trade mark in 1910, it having been stated in the application that the mark had been used by R. & co. & their predecessors in business since 1887, the fact being that the mark had been registered in 1887, by a firm of S. & W. who some years later agreed to allow R. & co. to use the mark in Africa, subject to the right of S. & W. to have such use discontinued if & when they so desired:—*Held*: there had been no intention to deceive, but above sect. enabling the Registrar to deal with applications to register identical trade marks, only applied to simultaneous applications, the mark could not be registered with a limitation during the volition of the original proprietors, & it ought to be expunged.—*Re ROSKILL'S TRADE MARK* (1915), 85 L. J. Ch. 301; 113 L. T. 1143; 32 R. P. C. 577.

279. Applications by members of dissolved partnership—Marks registered in name of old firm.]

—A firm consisting of five partners was dissolved by a deed which provided that the business should in future be carried on by two separate firms comprised of various members of the old firm; that all the partners should be entitled to use the trade marks formerly used by the old firm; & that neither of the new firms should be exclusively entitled to the goodwill of the old business. The new firms applied simultaneously for the registration in their respective names of the marks which had been used by the old firm, some of which were registered in the name of the old firm & one of which was not registered in this country. The new firms mutually consented to each other's application:—*Held*: the registrations asked for ought not to be allowed.—*Re EHRMANN'S APPLICATIONS*, [1897] 2 Ch. 495; 66 L. J. Ch. 699; 77 L. T. 200; 45 W. R. 698; 13 T. L. R. 498; 41 Sol. Jo. 622.

*Annotation:—Refd. Re Maeder's Appln. [1916] 1 Ch. 304.*

#### D. Concurrent User.

*See Trade Marks Act, 1905 (c. 15), s. 21; Trade Marks Act, 1919 (c. 79), Sched. II.*

280. Trade Marks Act, 1905 (c. 15), s. 21—"Same Trade Mark."]—*Re MAEDER'S APPLICATION*, No. 167, *ante*.

281. — "Nearly Identical Trade Marks."]—*Re MAEDER'S APPLICATION*, No. 167, *ante*.

282. Jurisdiction of court.]—*Re MAEDER'S APPLICATION*, No. 167, *ante*.

283. — To sanction registration with limitation.]—*Re ROSKILL'S TRADE MARK*, No. 278, *ante*.

284. Jurisdiction of Registrar.]—A co. applied to register a label which they had used as a trade mark since Apr. 13, 1907, in Part B. of the Register in class 42 in respect of canned fruits. The application was opposed by another co. on the ground that they were the registered owners of similar marks in the same class for similar goods. The question arose whether Trade Marks Act, 1905 (c. 15), s. 21, as amended by Trade Marks Act, 1919 (c. 79), s. 12, gives the Registrar power to deal with cases of concurrent user where one of the marks is already upon the Register:—*Held*: the amendment to sect 21 gives this power, & on a consideration of the facts registration ought to be allowed.—*Re SIMPSON, ROBERTS & CO., LTD.'S APPLICATION* (1922), 39 R. P. C. 372.

285. — To register in part B.]—A co. applied to register a label which they had used as a trade mark since July 13, 1907, in part B. of the Register in class 42, in respect of Indian condiments,

#### PART I. SECT. 2, SUB-SECT. 8.—D.

a. *Honest concurrent user—Special circumstances.]—*An application for registration of a trade mark having

been opposed by the registered proprietor of a trade mark limited to New South Wales, was granted subject to a limitation to the States other than New South Wales:—*Held*:

appet.'s mark & that of opponent were the same or nearly identical, even if they were, there had been honest concurrent user of the marks in New South Wales, & there were



namely chutney, curry powder, & guava jelly. The application was opposed by another co. on the ground that they were the registered owners of similar marks in the same class for Indian sauces. The question arose whether concurrent user could be relied upon in an application for registration in part B.—*Held*: by Comptroller-General as Registrar of Trade Marks, that registration is properly permissible in part B. on the ground of concurrent user, & on a consideration of the facts, registration ought to be allowed.—*Re GEDYE & SONS, LTD.'S APPLICATION* (1922), 39 R. P. C. 377.

**286. Opponent ignorant of concurrent user.]—***Re FARINA* (No. 2), No. 218, *ante*.

**287. Similar marks used without confusion.]—***II. Ltd.* applied to register a trade mark in class 42 in respect of pickles & vinegar, consisting of a swan within an oval, having above it the words "Swann & Co.," & beneath it the words "Birmingham & Stourport, Worcestershire." The Registrar refused to proceed with the registration of this mark on the ground mainly that it so nearly resembled a mark already registered by B. & co. for goods in the same class that it would be calculated to deceive within the meaning of Trade Marks Act, 1905 (c. 15), s. 19. *II. Ltd.* appealed to the ct., who ordered B. & co. to be served with notice of the appeal. This was done, & B. & co. appeared to resist the application for an order to proceed with the registration. The evidence showed that the marks had been used concurrently for a considerable number of years, & that there was no evidence of any confusion having occurred.—*Held*: the mark did not so resemble the mark already on the Register as to be calculated to deceive, & the Registrar should proceed with the registration in the ordinary way.—*Re HOLBROOKS, LTD.'S APPLICATION* (1909), 26 R. P. C. 791.

**288. User with knowledge of registration of nearly identical mark.]—**An American co. in 1914 applied for the registration of two labels as trade marks in class 12 in respect of hack saw blades. The labels included the word "Victor" with the words trade mark added & the name of appets. The word "Victor" was the most prominent feature of the labels & had been used by appets. on their hack saw blades which had been largely imported into this country since about the year 1904 & was registered in most foreign countries. In 1909 appets. had applied for registration of the word "Victor" for the same goods but the application was opposed by an English co. who were the registered proprietors of a trade mark registered for the same goods & consisting of the word "Victory" in combination with a laurel wreath & the application was in 1910 refused by the Registrar of Trade Marks. The present applications were refused by the Registrar of Trade Marks, on the grounds that they raised substantially the same point as had been decided on the previous application & that registration was prohibited by Trade Marks Act 1905 (c. 15), s. 19, by reason of the existence on the Register of the "Victory" mark as well as in the exercise of his discretion. Appets. appealed & also relied on honest concurrent user & asked the ct. to exercise its jurisdiction under Trade Marks Act, 1905 (c. 15), s. 21, & direct the applications to proceed. The English co. was served with the notices of motion & appeared on the hearing & opposed the applica-

tions. Their trade mark was registered as an old mark :—*Held*: the applications were equivalent to a fresh application to register the word "Victor" as a trade mark there being nothing distinctive in either label except that word & that the Registrar was right on this & the other grounds in his refusal to proceed with the applications; the word "Victor" was not a word having no direct reference to the character or quality of the goods & that the labels were not registrable otherwise than on a special application under Trade Marks Act, 1905 (c. 15), s. 9 (5), & on the applications under Trade Marks Act, 1905 (c. 15), s. 21, the appets. had used the word "Victor," & not the labels, as their trade mark, & that the evidence did not establish user by them of the labels, as trade marks, & the user by appets. having been modern & the greater part of it at all events with full knowledge of the English co.'s registration the ct. would not in any case have exercised its discretion under Trade Marks Act, 1905 (c. 15), s. 21, in appets.'s favour. In any circumstances the ct. would not have permitted registration of a label which contained a statement that "Victor" was appets.'s trade mark.—*Re MASSACHUSETTS SAW WORKS' APPLICATION* (1918), 35 R. P. C. 137.

**Old marks.]—***See* Nos. 290-292, 294, *post*.

#### SUB-SECT. 9.—OLD MARKS.

##### A. In General.

*See* Trade Marks Act, 1905 (c. 15), s. 9 (5), 19.

**289. General rule—Old mark entitled to registration—Though similar to trade mark subsequently registered.]—**An application made in Nov. 1881, by an American firm of oil manufacturers for the registration under the Act of 1883 of a trade mark for illuminating oils, which mark had been used by them in America since 1872, & had been known in England as the "White Rose" mark prior to 1875, was refused by the Comptroller upon the ground that there had been on the register since 1878 a similar mark for illuminating oils called the "Rosaline" mark, of which an English firm were the proprietors :—*Held*: although there was enough similarity between the two marks to render it possible for the public to mistake the one for the other, yet as the "White Rose" was to all intents & purposes an old mark, it ought to be admitted to registration.—*Re "WHITE ROSE" APPLICATION* (1885), 30 Ch. D. 505; 51 L. J. Ch. 961; 53 L. T. 33; 33 W. R. 796.

*Annotation*: *Refd. Re Colman's Appln.* (1891), 70 L. T. 398.

**290. Concurrent user—By not more than three different persons—Right of each to register.]—**

(1) When a trade mark has been used by not more than three different persons in the same trade as an old mark, that is before Aug. 13, 1875, each may register it.

(2) When it has been used by one or two persons as an old mark, it can only be registered by another person as a new mark if the consent of the prior owner or owners is obtained.

(3) When a trade mark has been used by more than three different persons in the same trade, it is not distinctive but common to the trade, & cannot be registered by any of them.

special circumstances within the meaning of Trade Marks Act, 1905, s. 28, & consequently appet. was entitled to registration in respect of New South Wales.—*HEDGWOOD & CO. v. GRAHAM* (1909), 7 C. L. R. 752.—*AUS.*

#### PART I. SECT. 2, SUB-SECT. 9.—A.

**p. Three mark rule.]—**The three mark rule does not apply in New South Wales, where a trade mark can only be the property of one trader, under Trade Marks Act of 1865.—

*BLOGG v. ANDERSON* (1900), 21 N. S. W. Eq. 238; 17 N. S. W. N. 117.—*AUS.*

**q. Old marks & three marks rule.]—***ASHTON & PARSONS, LTD. v. MARSHALL'S CHEMICAL CO., LTD.* (1904), 23 N. Z. L. R. 762.—*N.Z.*

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(4) *Semble*: marks which so closely resemble one another that the use of the one might be restrained in an action by the owner of the other, will be treated as identical for the purposes of the above rules.—*Re WALKDEN AERATED WATERS CO.'s APPLICATION* (1877), 54 L. J. Ch. 394, n.

*Annotations*.—*As to (3) Rejd. Re Brook's Trade-Mks.* (1878), 26 W. R. 791. *Generally, Rejd. Re Wragg's Trade Mk* (1885), 29 Ch. D. 551.

291. — — — — —.]—A new mark may be registered in respect of some of the goods in a class, though a similar old mark is already registered for other goods in the same class, if the goods are distinct. Any mark used before Trade Marks Registration Act, 1875 (c. 91), is an old mark only in respect of the goods as to which it has been used. So far as regards other goods it will be treated as a new mark, & will not be registered if it clashes with another mark which is old in respect of those goods. Old marks may be registered up to the number of three by different persons in respect of the same goods, even if identical; but this rule does not apply to new marks, & if the same old mark has been used in respect of the same goods by more than three different persons, it is a common mark.—*Re JELLEY, SON & JONES'S APPLICATION* (1878), 51 L. J. Ch. 639, n.; 46 L. T. 381.

*Annotations*.—*Distd. Re Munch's Appln.* (1883), 50 L. T. 12. *Rejd. Benbow v. Low, Low v. Benbow* (1881), 11 L. T. 875.

292. — — — — —.]—*Re POWELL, Re PRATT* (1878), Sebastian Digest of Trade Mark Cases, 357. *Annotation*.—*Rejd. Mouson v. Bochm* (1881), 26 Ch. D. 398.

293. — — — — —.]—With respect to old trade marks, the rule of the ct. is to permit registration of even identical old marks up to the number of three, though if more than three applications for the registration of the same old mark are received, it must be treated as common.

Where an outgoing partner remained, under the circumstances, entitled to manufacture a particular article from the original recipe, the property of the partnership:—*Held*: he was entitled to use the old trade name of the article, but not to represent that it was manufactured by the old firm or their successors, & to use the old trade mark and have it registered, although identical with that of the successors of the old firm.—*BENBOW v. LOW, Low v. BENBOW* (1881), 41 L. T. 875; 29 W. R. 837.

294. — — — — —.]—*Concurrent foreign user by applicant.*—In 1842 the predecessors in business of L. & K. invented a trade mark, & used it on all the articles manufactured by them. L. & K. registered this as their property in 1880. M. now applied by summons for the registration of a trade mark identical with that of L. & K. with the exception that he substituted his own name & address for that of "Murray & Lanman," which appeared in the original trade mark. He alleged foreign user since 1869, & that he had registered abroad & claimed to have his trade mark registered here as an old mark under the "three-mark rule":—*Held*: the resemblance between the two trade marks was so close that the later one must have been copied from the earlier; there was no evidence of the user of the appet.'s trade mark in England; had it been attempted to be used in England appet. could have been restrained by an injunction; foreign user alone could not entitle appet. to registration or bring him within the operation of the "three-mark rule" as being contemporaneous user before Trade Marks Act, 1875 (c. 91), & the application must be refused with costs.—*Re MUNCH'S APPLICATION* (1883), 50 L. T. 12.

295. — — — — —.]—*Persons using substantially similar marks.*—*Re WRAGG'S TRADE MARK*, No. 407, *post*.

296. *Old mark only attaches in respect of goods as to which used.*—*Re JELLEY, SON & JONES'S APPLICATION*, No. 291, *ante*.

297. — — — — —.]—*Re LYNDON'S TRADE-MARK*, No. 192, *ante*.

#### *B. Conditions of Registration.*

##### *(a) User as Trade Mark.*

298. *General rule.*—*Re WOOD'S TRADE-MARK, WOOD v. LAMBERT & BUTLER*, No. 71, *ante*.

299. — — — — —.]—*BOURNE v. SWAN & EDGAR, LTD., Re BOURNE'S TRADE MARKS*, No. 311, *post*.

300. *User entitling owner to maintain action for infringements.*—Appetcs., who were iron manufacturers, had for a long period before the passing of the Trade Marks Registration Act, 1875 (c. 91), been in the habit of using as trade marks the letters B B II, which were the initials of the firm, & also the same marks coupled with symbols or words common to the trade, denoting the quality of the iron:—*Held*: every mark or combination of marks or words used as a trade mark before the passing of Trade Marks Registration Act, 1875 (c. 91), which would have entitled the proprietor to maintain a suit for infringement against any person imitating it, may be registered as a trade mark under the Act, & a trader is entitled to register a series of such marks which only differ from each other by combining in different modes a mark common to all of them & peculiar to the trader, with words merely indicative of the quality of the goods marked or symbols common to the trade, a note being in such a case entered in the register specifying the portions of the combination as to which no exclusive right is claimed.—*Re BARROWS' TRADE-MARKS* (1877), 5 Ch. D. 353; 46 L. J. Ch. 450; 36 L. T. 291; 25 W. R. 407; *on appeal*, 5 Ch. D. p. 361; 46 L. J. Ch. 725; 36 L. T. 780; 25 W. R. 564, C. A.

*Annotations*.—*Rejd. Re Brook's Trade Mks.* (1878), 26 W. R. 791; *Re Kuhn's Trade Mks* (1878), 53 L. J. Ch. 238, n.; *Re Anderson's Trade Mk.* (1881), 26 Ch. D. 409.

301. *Name stamped on goods.*—*Re CHORLTON & DUGDALE'S TRADE MARK*, No. 315, *post*.

302. *Single letter.*—A single letter which has been used by a firm as a trade mark before the passing of Trade Marks Registration Act, 1875 (c. 91), is not a trade mark within the definition contained in Trade Marks Registration Act, 1875 (c. 91), s. 10, & cannot be registered thereunder.—*Re MITCHELL'S TRADE MARK* (1877), 7 Ch. D. 36; 46 L. J. Ch. 876; 26 W. R. 326.

*Annotation*.—*Rejd. James v. Parry, Re James' Trade Mk.* (1885), 55 L. J. Ch. 214.

303. *Word designating particular class of machine.*—(1) H. & co. registered the word "Albion" as a trade mark, alleging use before 1875. They brought an action for infringement against W. & co. The alleged infringement consisted in taking a finger, marked "Albion," from one of plifs.' machines & putting it on to one of defts.' machines:—*Held*: defts. had not infringed.

(2) Defts moved to rectify the Register by expunging the trade mark, or limiting the registration to certain specified goods. Plifs. admitted that they had only used the trade mark before 1875 on the specified goods, & therefore did not oppose the proposed limitation. That they resisted the motion so far as it asked for an order to expunge:—*Held*: plifs. had only used the word Albion to denote design, & not as a trade mark, & therefore defts. were entitled to an order to expunge, but by agreement an order was only



made for limitation of the registration to the specified goods, subject to the Comptroller-General not objecting to an order in that form.

If I did not come to that conclusion [use of mark as design], I should be forced to the conclusion that he was only properly registered for certain articles on his own evidence. He could not possibly, because he used "Albion" for mowers, reapers, chaff cutters, & other things, register it for all agricultural & horticultural implements, & all other machinery, which is what he has done. It was never intended that a man having a trade mark for one class of machinery, should register it as a trade mark for all. But I need not go further into that, because I think that, if he really had only used the word "Albion" as designating a particular construction or class of machine, he did not use it as a trade mark before 1875. Therefore he ought not have been placed on the Register as the owner of a trade mark; & therefore the Register, being in that sense improper, must be rectified (*KEKEWICH, J.*), *HARRISON v. WOODROFFE, Re HARRISON'S TRADE MARK* (1889), 7 R. P. C. 25.

**304. Mark on goods lying in ships in port.]—***Re MEEUS'S APPLICATION*, No. 324, *post*.

**305. Necessity for proof of substantial public user.—Where similar old trade mark already registered.]—**Where it is sought to register, by virtue of the "three-mark rule," a trade mark alleged to have been used before Aug. 13, 1875, notwithstanding that a similar old trade mark is already on the register for the same goods, it must be proved that there was a substantial public user of the mark tendered for registration sufficient to confer upon the owner a concurrent right with the owner of the trade mark already registered.

*H. T. & Co.*, brewers, applied for leave to register a trade mark for beer, which they claimed to have used since 1872, & which consisted of a red diamond containing a representation of a lion with a fleur de lis. The application was opposed by *B. & Co.*, brewers, who were the proprietors of a trade mark registered in 1876, which consisted of a red diamond, & had been very extensively used since several years prior to *H. T. & Co.*'s application. The evidence as to *appet.*'s user, though showing some sales under the mark, was not satisfactory as to its extent:—*Held*: (1) *appet.*'s mark so nearly resembled the opponents' mark as to be calculated to deceive; (2) *appet.* had not shown a sufficient user of their mark to have acquired a concurrent right with the opponents.—*Re HODSON, TESSIER & CO.'S TRADE MARK* (1881), 86 L. T. 188, n.

**306. Effect of period of non-user.—Whether amounting to abandonment.]—***MOUSON & CO. v. BOEHM*, No. 497, *post*.

**307. —***J.*—An application was made to register the word "Emollio" as a trade mark in respect of "an article of perfumery," on the ground that the word was "a special & distinctive word used as a trade mark before Aug. 13, 1875," within the meaning of Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 64 (3). The word in question had been used on the labels in connection with a perfumed cream by *appet.*'s father & predecessor in business, who died in 1867. It was doubtful whether, subsequently to that date, there had been any sale of the article. In 1870 *appet.* had destroyed all the labels, which had "Emollio" upon them, & the word was never subsequently used upon any perfumed cream. Since 1881 *appet.* had sold a solid tablet contained in boxes, the covers of which were inscribed with "Emollio Tablet, Registered." Certain price lists of perfumery dealers, issued in 1874 & subsequently, referred to Emollio Perfumed Cream & Emollio Tablet. The registration was

opposed by persons who had sold a soap by the name of "Emolline," on the ground that the use of the word "Emollio" as a trade mark previously to 1875 had been abandoned:—*Held*: the use of the word "Emollio" on the labels on the perfumed cream had been abandoned, not only by cessation of the user, but also by the destruction of the labels in 1870, whereby an intention to abandon was clearly indicated.—*Re GROSSMITH'S TRADE MARK, "EMOLLIO"* (1889), 60 L. T. 612; 6 R. P. C. 180.

*Annotations:—*Consd. *Re Talbot's Trade Mk.* (1894), 63 L. J. Ch. 264. *Reid. Wellcome v. Thompson & Capper, Re Burroughs Wellcome's Trade-mks.*, [1904] 1 Ch. 736.

**308. Adverse user of mark of foreign proprietor.—Original fraudulent user.]—***Re HEATON'S TRADE-MARK*, No. 358, *post*.

**309. Words not being fancy words.]—**A motion was made to expunge from the register two trade marks, "Monopole" & "Dry Monopole," used in connection with champagne, & registered in 1882 by Heidsieck & co., of Rheims, under the Registration of Trade Marks Act, 1875 (c. 91), s. 10, as "special & distinctive word or words used as a trade mark before the passing of this Act."

The motion was made on the grounds (a) that the words were not special and distinctive; (b) that the words had not been used alone, but always in association with other words or marks. The alleged user related to labels, wrappers, corks, & packing cases. The label on each bottle bore the words "Monopole" or "Dry Monopole" in Roman letters, with the words "Heidsieck & co., Rheims, established 1875," underneath in a running hand. The wrapper round each bottle was substantially similar to the label. The corks were branded on the sides with the words "Monopole" or "Dry Monopole," & on the bottom with a comet with "Heidsieck & co.," round it.

The packing cases in which the wine was sold bore on one side the brand of "Monopole" & at one end the brand of "Heidsieck & co." in a circular or semi-circular form, & the word "Rheims" running across an anchor:—*Held*: in order to register a word or words of this kind, not being fancy words, it was necessary that they should have been used, & used by themselves, as trade marks before the passing of the Act.—*RICHARDS v. BUTCHER*, [1891] 2 Ch. 522; 63 L. T. 757; *affd.*, [1891] 2 Ch. p. 540; 60 L. J. Ch. 530; 8 R. P. C. 249, C. A.

*Annotations:—*Consd. *Re Hopkinson's Trade Mks.*, [1892] 2 Ch. 116; *Re Powell's Trade Mk.*, [1893] 2 Ch. 388; *Re Massachusetts Saw Works' Appln.* (1918), 35 R. P. C. 137. *Reid. Re Verity's Trade Mk., Re Hall & Woodhouse's Trade Mk.* (1901), 18 T. L. R. 214; *Re Lea's Appln.*, [1913] 1 Ch. 146.

(b) *Special and Distinctive Mark.*

**310. General rule.]—***Re WOOD'S TRADE-MARK, WOOD v. LAMBERT & BUTLER*, No. 71, *ante*.

**311. —***J.*—To entitle a person to register a word used as a trade mark before Aug. 13, 1875, as a trade mark, it is essential to show that it was (1) "special & distinctive" of his goods, & (2) that it was used as a trade mark.

(3) A trade mark may be infringed by being used in the advertisements & circulars of a rival trader, if it is used in them in relation to, or connection with the same class of goods & in such a manner as to be calculated to deceive.

(4) Delay in moving to rectify the register by expunging therefrom a trade mark will as a general rule deprive a successful *appet.* of his costs; but he may be refused relief altogether if his delay has placed resp. at an unfair disadvantage, e.g. if material evidence has been lost to resp. by reason of the delay.

A. was the owner of the two trade marks. One

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was the figure of a "Swan," with adjuncts, & the other was the word "Swanbill." Both marks were registered as old marks in 1876 in respect of the same class of goods, & for many years were used together. In 1890 A. *per incuriam* allowed the registration of the word "Swanbill" to lapse, but in 1892 registered it again as an old mark. In 1901 he brought an action against B. & co. for infringing his trade mark of a "Swan" in their advertisements & circulars; & thereupon they moved to expunge both A.'s marks from the register. They had become aware in 1896 of the registration in 1892 of the word "Swanbill." The action & motion were tried together, & at the trial B. & co. abandoned their motion so far as it sought to expunge A.'s trade mark of a "Swan," but succeeded in expunging the word "Swanbill." The action was dismissed. Under the circumstances & having regard to B. & co.'s delay in moving to rectify the register, A. was ordered to pay only two-fifths of the taxed costs of the action & motion.

An application by A. for a certificate on the ground that the validity of his trade mark of a "Swan" had come in question, was refused.—*BOURNE v. SWAN & EDGAR, LTD., Re BOURNE'S TRADE MARKS*, [1903] 1 Ch. 211; 72 L. J. Ch. 168; 51 W. R. 213; 19 T. L. R. 59; 47 Sol. Jo. 92; 20 R. P. C. 105.

*Annotations:—As to (3) Apd. Weingarten v. Bayer* (1903), 19 T. L. R. 239. *Consd. Re Davis' Trade Mks., Davis v. Sussex Rubber Co.*, [1927] 2 Ch. 315. *Reid. Hennessy v. Keating* (1907), 21 R. P. C. 185; *Royal Warrant Holders' Asscn. v. Deane & Beal*, [1912] 1 Ch. 10; *Nocton v. Ashburton*, [1914] A. C. 932. *As to (4) Reid. Todd v. N. E. Ry.* (1903), 51 W. R. 333.

**312. Right to register.]—**Pltfs. had, for fifteen years & upwards, manufactured & sold a medicine under the name of "Reinhardt's Celebrated Family Salve," & in the year 1876 they registered the words "Family Salve" as their trade mark in connection with such medicine, under Trade Marks Registration Acts. Def't. in 1868 registered at Stationers' Hall a similar preparation under the title of "Spalding's Universal Family Salve," & he had since manufactured & sold the salve under that name. Both salves were sold in packets encased in wrappers bearing the above titles in full, but the wrappers were so folded that until the packets were opened the words "Family Salve" alone were visible. In an action by pl'tfs. for an injunction:—*Held*: the words "Family Salve" were both a "distinctive heading," & also "special & distinctive words used before the passing of the Act," within Trade Marks Registration Act, 1875 (c. 91), s. 10; pl'tfs. having by the registration acquired a *prima facie* right to the exclusive use of the two words "family salve," the *onus* lay on def't. to displace that right; & def't. having failed to discharge that *onus*, an injunction must be granted.—*REINHARDT v. SPALDING* (1879), 49 L. J. Ch. 57; 28 W. R. 300.

**313. —**Where the name of an individual or firm printed in ordinary or ornamental type has been used as a trade mark for goods before Aug. 13, 1875, indicating the goods as having been sold or manufactured by that particular individual or firm, it may properly be registered as a "special & distinctive word or combination of letters used as a trade mark before Aug. 13, 1875," within Trade Marks Registration Act, 1875 (c. 91), s. 10, or Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 64 (ii).—*Re HOPKINSON'S TRADE-MARKS*, [1892] 2 Ch. 116; 61 L. J. Ch. 387; 66 L. T. 487; 9 R. P. C. 102.

*Annotation: Reid. Ry Clay & Bock*, [1892] 3 Ch. 519.

**314. —**Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 64 (3) (ii), enables only those old marks, which do not contain any of the essential particulars defined in the previous clauses of the sect., to be registered without any disclaimer. Therefore, where the old mark sought to be registered is a label consisting of a distinctive device & words or letters, it is registrable under sect. 64 (2), & the words or letters must be disclaimed, notwithstanding the circumstance that if the words or letters were used alone they could be registered as an old mark under sect. 64 (3) (ii).—*Re WRIGHT, CROSSLEY & CO.'S APPLICATION & ROYAL BAKING POWDER CO. OF NEW YORK*, [1900] 2 Ch. 218; 69 L. J. Ch. 589; 83 L. T. 150.

**315. — Mark distinctive by user.]—**C. & Co. in 1876 registered as a trade mark the words "Excelsior Spring Mattress." In 1883 they commenced an action in the Palatine Ct. of the Duchy of Lancaster against B. to restrain him from using their trade mark "Excelsior." B. moved to remove their trade mark from the Register on the ground that the word "Excelsior" had not been used as a trade mark before the passing of Trade Marks Registration Act, 1875 (c. 91). It appeared that the word had been used on bills & notices, but always applying to a mattress made under a patent of B.'s predecessors in business which expired in 1883; that it had been used in combination with a device of a man & a banner on metal plates which were affixed to the mattresses; that an india rubber stamp containing the words alone had been made, & was usually impressed upon the side of the mattress, & that a photograph was constantly used in selling the goods which showed the mattress with a label attached, having on it only the words "Excelsior Spring Mattress":—*Held*: there had been sufficient user as a trade mark, & the mark was rightly put on the Register.—*Re CHORLTON & DUGDALE'S TRADE MARK* (1885), 53 L. T. 337; 34 W. R. 60; 1 T. L. R. 643.

**316. —**—In 1877 a chemical manufacturer registered, under Trade Marks Registration Act, 1875 (c. 91), the word "Vaseline," which had been invented by him to denote a product of his manufacture, the word being registered as an old mark used by him for six years before 1877.

Upon an application made in 1900 by a rival manufacturer for the removal of the mark from the register:—*Held*: (1) the word had been properly registered as a "special & distinctive word" within Trade Marks Registration Act, 1875 (c. 91), s. 10, since appet. failed to show that the word had not been used by itself as a trade mark before the Act, whereas the evidence showed that the word had always been used before & since the passing of the Act to denote, not an article manufactured by a particular process, but an article identified with the name of the particular manufacturer.

(2) Where a person is seeking to remove a trade mark from the register, the *onus* is upon him to prove that it ought to be taken off, not upon the party registered to make out his right to retain it on the register; & especially so where the mark has been on the register for many years.—*Re CHEESEBROUGH'S TRADE MARK "VASELINE"*, [1902] 2 Ch. 1; *sub nom. Re PEARSON'S APPLICATION, Re CHEESEBROUGH MANUFACTURING CO.'S TRADE MARK "VASELINE"*, 71 L. J. Ch. 427; *sub nom. Re CHEESEBROUGH MANUFACTURING CO.'S TRADE MARK "VASELINE"*, *Re PEARSON'S APPLICATION*, 86 L. T. 665; *sub nom. Re "VASELINE" TRADE MARK*, 18 T. L. R. 468, C. A.; *reversg. S. C. sub nom.*

**Re "VASOGEN" & "VASELINE" TRADE MARKS** (1901), 17 T. L. R. 259.

**Annotations:**—*As to (1) Refd.* *Kodak v. London Stereoscopic & Photographic Co.*, *Kodak v. Houghton*, *Re Kodak's Trade Mks.* (1903), 19 T. L. R. 297. *As to (2) Consd.* *Wellcome v. Thompson & Capper*, *Re Burroughs, Wellcome's Trade Mks.*, [1904] 1 Ch. 736. *Apld.* *Re Keystone Knitting Mills Trade Mk.* (1928), 97 L. J. Ch. 316.

(c) *User in Same Form.*

**317. Necessity for user alone.]**—P. registered "braided fixed stars" as a trade mark for matches, alleging that he had used it as a trade mark before the passing of the Act. He also at the same time registered a label enveloping the boxes in which his matches were sold, which contained the words "braided fixed stars" in two places so as to be conspicuous on each side of the boxes, but also contained a number of other words. It was shown that at the time when P. introduced the term "braided fixed stars" the term "fixed stars" was known in the trade as denoting a particular class of fuses, & that he had just bought a patent for enveloping the stems of fuses with wire by means of a braiding machine. This patent expired in Aug. 1881. It appeared from the evidence that P. had not before the Act used "braided fixed stars" separately as a trade mark, or otherwise than as a part of the above-mentioned label. In Oct. 1881, an application was made by a rival trader to expunge the registration:—**Held:** (1) the registration must be expunged, for to entitle P. to register these words as a trade mark he must before the Act have used them as such alone, & not merely in conjunction with other words; (2) if they had been so used alone they ought not to have been registered, for they were only words properly descriptive of the patented article, & P. had no exclusive right to their use after the patent had expired.—*Re PALMER'S TRADE MARK* (1883), 24 Ch. D. 504; 50 L. T. 30; 32 W. R. 306, C. A.

**Annotations:**—*As to (1) Apld.* *Re Leonard & Ellis's Trade Mk.*, *Leonard & Ellis v. Wells* (1884), 26 Ch. D. 288. **Foll.** *Re Chorlton & Dugdale's Trade Mk.* (1885), 53 L. T. 337. *Apld.* *Re Spencer's Trade Mk.*, "Diamond Cast Steel" (1886), 54 L. T. 659. **Apprvd.** *Perry Davis v. Harbord* (1890), 60 L. J. Ch. 16. *Apld.* *Re Meens's Appln.*, [1891] 1 Ch. 11; *Richards v. Butcher* (1891), 60 L. J. Ch. 530. **Refd.** *Re Powell's Trade Mk.*, [1893] 2 Ch. 388; *Re Cheshbrough's Trade Mk.*, "Vaseline", [1902] 2 Ch. 1; *Andrew v. Kuehnrich*, *Re Kuehnrich's Appln.*, *Re Andrew's Appln.* (1912), 29 T. L. R. 181. *As to (2) Consd.* *Barlow v. Johnson* (1900), 7 L. P. C. 39. **Refd.** *Re Magnolia Metal Co.'s Trade Mks.*, (1897), 76 L. T. 572. **Generally.** *Mentid. Powell v. Birmingham Vinegar Brewery Co.*, [1891] 3 Ch. 449.

**318.** — *J.*—In order to entitle a person to register a trade mark under Trade Marks Registration Act, 1875 (c. 91), s. 10, consisting of special & distinctive words, or combination of figures or letters, used as a trade mark before the passing of that Act, the words must have been used as a trade mark by themselves, & not in conjunction with any other device.

In 1876 S. registered the words "Diamond Cast Steel," as a trade mark for steel & for files. The words were never used on goods by themselves, but always in combination with a device & a name. The words were, however, sometimes stamped on one side of the goods, whilst the device & name were stamped on the reverse side. Upon an application to rectify the register of trade marks by expunging this trade mark:—**Held:** the case was within the principles upon which *Re Palmer's Trade Mark*, No. 317, *anle*, was decided; & as there had been no separate user of the words as

a trade mark, the same ought not to have been registered, & must, therefore, be expunged from the register.—*Re SPENCER'S TRADE MARK "DIAMOND CAST STEEL"* (1886), 54 L. T. 659; 2 T. L. R. 343; 3 R. P. C. 73, C. A.

**Annotations:**—*Apld.* *Baker v. Rawson* (1890), 45 Ch. D. 519; *Richards v. Butcher*, [1891] 2 Ch. 522; *Re Crompton's Trade Mk.*, [1902] 1 Ch. 758. **Refd.** *Re Powell's Trade Mk.*, [1893] 2 Ch. 388; *Andrew v. Kuehnrich*, *Re Kuehnrich's Appln.*, *Re Trade Marks Act*, 1905, *Re Andrew's Appln.* (1912), 29 T. L. R. 181.

**319.** — *J.*—*Pltfs.* & their predecessors had for a hundred years carried on a brewery at Stone, & their ale had become known as "Stone Ale." They had registered several trade marks which contained the words "Stone Ale" in combination with some device or the name of their firm; & in 1888 they registered as an additional trade mark the words "Stone Ale" alone. *Def't.* built a brewery at Stone over which he placed the words "Stone Brewery," & when that was objected to by *pl'tfs.*, he altered it to "M.'s Stone Brewery," with a device containing the words "Stone Ale" & a monogram somewhat resembling *pl'tfs.*' trade mark. *Pl'tfs.* brought an action for an injunction, & *def't.* moved under the Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 71, to enter a disclaimer on the part of *pl'tfs.* of the exclusive use of the word "Stone" & otherwise to rectify the register:—**Held:** (1) the word "Stone" was not a word common to the trade, & consequently the case did not come within sect. 71, & the application for a disclaimer must be refused; (2) there being no evidence that *pl'tfs.* had used the expression "Stone Ale" by itself as a trade mark before Aug. 13, 1875, *pl'tfs.* could not register it as a trade mark under sect. 64 (3) of the same Act; (3) *pl'tfs.* had acquired by user a right to the use of the words "Stone Ale" within the principle of *H otherspoon v. Currie*, No. 1073, *post*, & the conduct of *def't.* being in the opinion of the ct. calculated to deceive the public into supposing that his ales were brewed by *pl'tfs.*, *pl'tfs.* were entitled to an injunction.—*THOMPSON v. MONTGOMERY, Re JOULE'S TRADE MARKS* (1880), 41 Ch. D. 35; *sub nom.* *THOMPSON v. MONTGOMERY, Re THOMPSON'S TRADE MARK*, 58 L. J. Ch. 371; 60 L. T. 766; 37 W. R. 637; 5 T. L. R. 305, C. A.; *aff'd.* *sub nom.* *MONTGOMERY v. THOMPSON*, [1891] A. C. 217, H. L.

**Annotations:**—*As to (1) Refd.* *Re Burland's Trade Mk.*, *Burland v. Birmingham Vinegar Brewery Co.*, [1896] 2 Ch. 51. *As to (2) Refd.* *Re Edgington's Trade Mk.*, *Edgington v. Edgington* (1889), 61 L. T. 323; *Re Talbot's Trade Mk.* (1891), 63 L. J. Ch. 261; *Re Croshfield's Appln.* (1909), 101 L. T. 587. *As to (3) Apld.* *Huntley & Palmets v. Reading Biscuit Co.* (1893), 37 Sol. Jo. 491; *Paine v. Daniels's Breweries*, *Re Paine's Trade Mks.*, [1893] 2 Ch. 567; *Thompson v. Miller*, *Re Thompson's Trade Mk.* (1895), 13 R. P. C. 35; *Powell v. Birmingham Vinegar Brewery Co.*, [1896] 2 Ch. 51; *Reidway v. Barnham*, [1896] A. C. 499; *Paine v. Mason* (1897), 77 L. T. 322; *Worcester Royal Porcelain Co. v. Locke*, *Worcester Royal Porcelain Co. v. Rhodes* (1902), 18 T. L. R. 712; *Kinnel v. Ballantine* (1909), 27 R. P. C. 185. **Refd.** *Baker v. Rawson* (1890), 45 Ch. D. 519; *Re Powell's Trade Mk.*, [1893] 2 Ch. 388; *London General Omnibus Co. v. Felton* (1896), 12 T. L. R. 213; *Cooper & McLeod v. MacLachlan* (1901), 18 R. P. C. 380; *Walter v. Ashton* (1902), 71 L. J. Ch. 839; *Plotzker v. Lucas* (1907), 21 R. P. C. 351; *Priest's Patent Candle Co. v. Ogston & Tennant* (1909), 26 R. P. C. 797. **Generally.** **Refd.** *Valentine Meat Juice Co. v. Valentine Extract Co.* (1900), 83 L. T. 259; *Grand Hotel Co. of Caledonia Springs v. Wilson*, [1904] A. C. 103.

**320.** — *J.*—To entitle "any special & distinctive word or words" to be registered as a trade mark under Trade Marks Registration Act, 1875 (c. 91), s. 10, they must have been used

PART I. SECT. 2, SUB-SECT. 9.—B. (c).

**3171. Necessity for user alone.]**—*DEWAR (JOHN) & SONS, LTD. v. DEWAR, DEWAR v. DEWAR & SONS, LTD.* (1900), 17 R. P. C. 341.—**SCOT.**

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alone as a trade mark before the passing of the Act, & not merely in combination with other words. Before the passing of Trade Marks Registration Act, 1875 (c. 91), applts. used the words "Perry Davis' Vegetable Pain Killer" as their trade mark for a medicine manufactured & sold by them. After the passing of the Act they registered the words "Pain Killer" as their trade mark under sect. 10. Upon a motion to amend the register:—*Held*: (1) the entry must be removed from the register, the words "Pain Killer" not having been used alone before the passing of the Act; (2) the words "Pain Killer" were not special & distinctive words within the meaning of sect. 10, there being nothing to distinguish goods manufactured by applts. from goods manufactured by other persons.—*PERRY DAVIS v. HARBORD* (1890), 15 App. Cas. 316; 60 L. J. Ch. 16; 63 L. T. 359, H. L.

*Annotations.*—As to (1) *Reid. R. Chesbrough's Trade Mk., "Vaseline,"* [1902] 2 Ch. 1. *Generally, Reid. R. Wright, Crossley's Appln. R. Royal Baking Powder Co. of New York,* [1900] 2 Ch. 218.

**321.** —.— In 1882, Heidsieck & co., a French firm of champagne growers, registered, under the Trade Marks Registration Act, 1875 (c. 91), the words "Monopole" & "Dry Monopole," as separate trade marks for separate kinds of champagne, on the ground of user of those marks before the Act; but they never had, in fact, used those words alone as marks; for upon the labels, wrappers, corks, & cases for their bottles they had always used them in conjunction with the name of the firm, "Heidsieck & Co.," which they also registered by itself in 1882 as a trade mark under the Act; & upon the corks & cases there were, besides, various devices which had been registered as trade marks under the Act. On the cases, "Monopole," or "Dry Monopole," appeared on one side alone, while on another side was "Heidsieck & Co.," alone, & on one of the ends was one of the firm's registered devices alone. The firm sold other brands of champagne under distinctive registered labels, bearing the name of the particular brand, & always the name of the firm underneath.

Upon a motion under the Act of 1875, & the Patents, Designs, & Trade Marks Acts, 1883, & 1888, to expunge "Monopole" & "Dry Monopole" from the register of trade marks:—*Held*: those words had not been so "used as trade marks before the passing of the Act," within the meaning of sect. 10 of the Act of 1875, as to entitle Heidsieck & co. to have them registered; & they were accordingly ordered to be expunged from the register.—*RICHARDS v. BUTCHER*, [1891] 2 Ch. 522; 60 L. J. Ch. 530; 8 R. P. C. 249, C. A.

*Annotations.*—*Reid. R. Hopkinson's Trade Mk.*, [1892] 2 Ch. 116; *R. Powell's Trade Mk.*, [1893] 2 Ch. 388; *Hirschel v. Hertz & Collingswood* (1895), 11 T. L. R. 466; *R. Verly's Trade Mk. R. Hall & Woodhouse's Trade Mk.* (1901), 18 T. L. R. 211; *Dental Manufacturing Co. v. De Trey*, [1912] 3 K. B. 76; *R. Lew's Appln.*, [1913] 1 Ch. 416; *R. Massachusetts Saw Works' Appln.* (1918), 35 R. P. C. 137; *Lactosote v. Alberman*, [1927] 2 Ch. 117.

**322.** —.— *K. & co., Ltd.*, applied to register as an old mark the word "Kinahan" in an oval. The application was opposed by a firm in which the name "Kinahan" occurred. It appeared that appcts. had branded the proposed mark on the sides of the corks of all bottles containing the different kinds of liquors sold by them, but this was not the only mark on the corks, e.g. there was generally a seal impressed on wax, with the words "Kinahan & co., Cognac, Carlisle Buildings," or other similar words: some of the corks

were not sealed, but in this case they were covered with capsules which bore the words "Dublin, Kinahan, London," or some such words. Labels, being either registered trade marks or parts of trade marks, with appcts.' name & address, were also placed on the bottles, & these labels had usually a caution, "Please observe that the name 'Kinahan' is branded on the cork"; & some "Please observe that the name 'Kinahan' on the seal & label, & branded on the cork," or similar expressions. The user of the mark was therefore always accompanied with something else. Appcts. had also registered trade marks in 1876:—*Held*: appcts. had failed to discharge the burden which lay on them of showing that the proposed mark was used alone as a trade mark, & their application must be refused. The point whether a mark only used on the side of a cork, & therefore hidden, could be said to be used as a trade mark at all, left undecided.—*Re KINAHAN & Co.'s APPLICATION* (1893), 10 R. P. C. 393.

**323.** —.— *M. D. & co., Ltd.*, applied for the registration in two classes of a device which prior to 1875, had been used by J. H., their predecessor in business. Their application was made in the name of J. H. & co. under which style J. H. was carrying on the business when he transferred it to appcts. J. H. now opposed the application on several grounds, but mainly on the grounds, (a) that the device sought to be registered as an old mark, had never been used by itself as a trade mark before 1875, without some accompaniment; and (b) that the application was not made in the name of the co. alone entitled to make it according to Cos. Act, 1862 (c. 89), s. 41:—*Held*: technically the application was in form not made by the right party; the device was never used before 1875; without the name of "J. H." or "J. H. & co." in juxtaposition to it & on the same cases, & the application for registration could not therefore proceed.—*Re HEDDIE (JAMES) & Co.'s APPLICATIONS* (1903), 20 R. P. C. 599.

**324. Necessity for user of whole mark.**—(1) An appet. seeking to register as an old mark, a distinctive device & combination of words, must show that the whole combination, just as he proposes to register it, has been used in its entirety prior to Aug. 13, 1875.

(2) *Semble*: user of a distinctive mark on goods lying in the holds of ships which are merely touching at British ports is not sufficient user to acquire a trade mark here.—*Re MEEUS' APPLICATION*, [1891] 1 Ch. 41; 60 L. J. Ch. 96; 63 L. T. 610; 39 W. R. 216.

*Annotations.*—*Generally, Reid. R. Wright, Crossley's Appln. & Royal Baking Powder Co. of New York*, [1900] 2 Ch. 218; *R. Player's Trade Mk.*, [1901] 1 Ch. 382.

**325. Material alterations in mark.—Substantially affecting identity.**—On July 26, 1926, the Winterbottom Book Cloth Co., Ltd. applied to register two labels as trade marks which they claimed to have used with additions or alterations not substantially affecting their identity, since before Aug. 13, 1875. Each mark consisted of an oblong label with rounded top & line border & contained the Royal Arms. The mark No. 471,122 had been altered from the form in which it was originally used by substituting for the words "Sagar's Patent, Jan. 1861, No. 123" the word "Sagar's" & omitting the words, "Trade Mark. Two red lines on each salvage full length of the piece." The Mark No. 471,123, had been altered from the form in which it was originally used by adding above the Royal Arms a Double Coat of Arms, by omitting the words "Broughton Dye Works, Manchester" & omitting the word "Patent" &

"1871, No. 398." The Registrar refused the applications on the ground that there were material alterations to the marks as originally used substantially affecting their identity:—*Held*: the Registrar having decided that these were variations in the marks as tendered from those originally used which were calculated to affect the identity of the new labels with the old, & having exercised his discretion against registration, that exercise of his discretion ought not to be interfered with.—*Re WINTERBOTTOM BOOK CLOTH CO., LTD.'S APPLICATIONS* (1927), 44 R. P. C. 402.

#### SUB-SECT. 10.—ASSOCIATED TRADE MARKS.

See Trade Marks Act, 1905 (c. 15), ss. 24–27.

**326. Necessity for association—Same goods or description of goods.**—(1) A co. which carried on several separate & distinct businesses registered the trade mark "B.S.A." in class 19 in respect of arms, ammunition, & stores. They subsequently applied to register the same trade mark in class 22 in respect of cycles, motor cycles, & automobiles. The Registrar required them, as a condition of registration, to agree that the marks should be associated in accordance with Trade Marks Act, 1905 (c. 15), s. 24.

On appcts. declining this condition, the Registrar, in the exercise of his discretion under s. 12 (2), of the Act, declined to register the mark:—*Held*: the discretion vested in the Registrar was not an absolute discretion, but one to be exercised subject to the provisions of the Act. Sect. 24 was one of such provisions, & had nothing to do with the registration of identical trade marks, but of marks "so closely resembling a trade mark of appct. already on the register for the same goods or description of goods as to be calculated to deceive or cause confusion if used by a person other than appct."; (2) the two classes of goods in question were also not the "same goods or description of goods," & the registrar must be directed to proceed with the registration of the mark in class 22 without the condition of association; (3) appcts., although successful, must pay the costs of the Registrar, who was a public official occupying a fiduciary position, & had done nothing to disentitle himself to costs.—*Re BIRMINGHAM SMALL ARMS CO.'S APPLICATION*, [1907] 2 Ch. 396; 76 L. J. Ch. 571; 97 L. T. 330; 23 T. L. R. 650; 51 Sol. Jo. 591; 24 R. P. C. 563.

*Annotation*:—As to (3) *Consd. Re Bampton's Appln.*, [1926] Ch. 255.

#### SUB-SECT. 11.—FANCY WORDS.

See Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 64; Trade Marks Act, 1905 (c. 15), s. 9 (5) (d), (e).

**327. Inapplicability of decisions.**—In *In re Farbenfabriken Application*, No. 22, *ante*. NORTH, J. said he did not see how he could hold "somatose" to be an invented word within Patents, Designs, & Trade Marks Act, 1888 (c. 50), s. 10 (5) (d), having regard to the decisions with respect to such words as "Herbalin" "Washerine" & "Valvoline." All these decisions had reference to the provisions of Trade Marks Act, 1883 (c. 57), s. 64, with regard to fancy words. In my opinion none of the decisions on that part of the original sect. have any bearing

on the new provisions to be found in the substituted sect. the purpose of which was, I think, to get rid of expressions which had occasioned much embarrassment & of all the distinctions & decisions which had been founded upon them. These decisions so far from affording any guide to the true interpretation of the particulars designated (d) & (e) in Trade Marks Act, 1905 (c. 15), s. 9 (5), are likely to lead to error if applied to these new provisions (LORD HERSCHL).—*EASTMAN PHOTOGRAPHIC MATERIALS CO. v. COMPTROLLER-GENERAL OF PATENTS, DESIGNS & TRADE MARKS*, [1898] A. C. 571; 67 L. J. Ch. 628; 79 L. T. 195; 47 W. R. 152; 14 T. L. R. 527; *sub nom. Re EASTMAN PHOTOGRAPHIC MATERIALS CO., LTD.'S APPLICATION*, 15 R. P. C. 476, H. L.

*Annotations*:—*Mentd.* Field v. Wages Syndicate, *Re Trade Mk.*, 96,997 (1900), 17 R. P. C. 266; *Re Linotype Co's Trade Mk.*, [1900] 2 Ch. 238; *Re "Unceda" Trade Mk.*, [1901] 1 Ch. 550; Kodak v. London Stereoscopic & Photographic Co., Kodak v. Houghton, *Re Kodak's Trade Mks.* (1903), 19 T. L. R. 297; Hommel v. Gebrüder, Hauser (1904), 20 T. L. R. 585; A-G v. Metropolitan Electric Supply Co., [1905] 1 Ch. 24; Christy v. Tipper, [1905] 1 Ch. 1; R. v. West Riding of Yorkshire County Council, [1906] 2 K. B. 676; *Re Gestetner's Trade Mk.*, [1908] 1 Ch. 513; *Re Trade Marks Act*, 1905 (1909), 25 T. L. R. 695; *Re Applns. of Soc. le Ferment* (1911), 28 T. L. R. 175; *Re Du Cros' Applns.*, [1912] 1 Ch. 611; *Re Carl Lindstrom Akt's Trade Mk.*, [1914] 2 Ch. 103; *Re Cording's Appln.*, [1916] 1 Ch. 422; *Re Garrett's Trade Mk.* (1916), 85 L. J. Ch. 350; O'Grady v. Wilmot, [1916] 2 A. C. 231; *Re Yalding Manufacturing Co.'s Appln.* (1916), 33 R. P. C. 285; Baubury v. Bank of Montreal, [1918] A. C. 626; Dobb v. Dobb (1918), 87 L. J. Ch. 321; *Re Wertheim, Wertheim v. Beit*, [1918] 1 Ch. 339; *Re Esman (London) Ltd.'s Appln.* (1920), 37 R. P. C. 135; *Re Diamond P. Motor Car Co.* (1921) 2 Ch. 583; *Re Salter's Appln.* (1923), 40 R. P. C. 102; *Re Davis's Trade Mks.*, Davis v. Sussex Rubber Co., [1927] 2 Ch. 315.

*NOTE*.—The expression "Fancy word or words not in common use" originally contained in the *Patents, Designs, & Trade Marks Act*, 1883 (c. 57), is now of no practical importance. See *Patents, Designs, & Trade Marks Act*, 1888 (c. 50), *Trade Marks Act*, 1905 (c. 15), s. 9 (5), where other expressions have been substituted. See, also, No. 32, *ante*. Decisions on "Fancy Words" therefore are only included in the following form.

**328. Registration as fancy word refused.**—*Re APOLLINARIS CO.'S TRADE MARKS*, [1891] 2 Ch. 186 (Apollinaris); *Re HARRIS'S TRADE MARKS* (1892), 9 R. P. C. 492 (Beatrice); DAVIS & CO. v. STRIBOLT & CO., *Re DAVIS, BERGENDAILL, & CO.'S TRADE MARK* (1888), 59 L. T. 851 (Bokol); HODGSON v. SINCLAIR (1891), 8 T. L. R. 45 (Britannia); *Re LLOYD & SONS' TRADE MARK* (1893), 10 R. P. C. 281 (Carnival); *Re GESTETNER'S TRADE MARK*, [1908] 1 Ch. 513 (Cyclostyle); *Re VAN DUZER'S TRADE MARK, Re LEAF, SONS & CO.'S TRADE MARK* (1887), 34 Ch. D. 623 (Electric Velveteen); *Re HANNAY'S TRADE MARK* (1889), 7 R. P. C. 46 (Electrod); *Re APOLLINARIS CO.'S TRADE MARKS*, [1891] 2 Ch. 186 (Friedrichshall); *Re ARBENZ' APPLICATION* (1887), 35 Ch. D. 218 (Gem); *Re LAING'S TRADE MARK* (1887), 3 T. L. R. 728 (Glenbowrie Highland Whisky); *Re HARDEN STAR HAND GRENADE FIRE EXTINGUISHER CO., LTD.* (1886), 55 L. J. Ch. 596 (Hand Grenade Fire Extinguisher); HUMPHRIES & CO. v. TAYLOR DRUG CO. (1888), 39 Ch. D. 693 (Herbaline); *Re APOLLINARIS CO.'S TRADE MARKS*, [1891] 2 Ch. 186 (Hunyadi Janos); PAINE & CO. v. DANIELLS & SONS' BREWERIES, *Re PAINE & CO.'S TRADE MARKS*, [1893] 2 Ch. 567 (John Bull); TOWGOOD BROTHERS v. ALEXANDER PIRIE & SONS, LTD. (1887), 56 L. T. 394 (Jubilee); *Re THOMPSON'S TRADE MARK* (1888), 6 R. P. C.

#### PART I. SECT. 2, SUB-SECT. 11.

*r. "Fruitatives."*—FRUITATIVES, LTD. v. COMPAGNIE PHARMACEUTIQUE (DE LA CROIX ROUGE, LTD. (1912), 14 Exch. C. R. 30.—CAN.

*Sect. 2.—What trade marks registrable: Sub-sect. 11.*  
*Sect. 3: Sub sect. 1.]*

213 (Manor); *Re VAN DUZER'S TRADE MARK, Re LEAF, SONS & CO.'S TRADE MARK* (1887), 34 Ch. D. 623 (Melrose Favourite Hair Restorer); *Re VIGNIER'S TRADE MARK "MONOBRUT"* (1889), 61 L. T. 495 (Monobrut); *Re PRICE'S PATENT CANDLE CO.* (1884), 27 Ch. D. 681 (National Sperm); *Re HANSON'S TRADE MARK* (1887), 37 Ch. D. 112 (Red, White & Blue); *WATERMAN v. AYRES, Re WATERMAN'S TRADE MARK* (1888), 39 Ch. D. 19 (Reversi); *THOMPSON v. MILLER, Re THOMPSON'S TRADE MARK* (1895), 13 R. P. C. 35 (Roadster); *Re SANITAS CO., LTD., TRADE MARK "SANITAS,"* (1887), 58 L. T. 166 (Sanitas); *LEVER v. GOODWIN* (1887), 36 Ch. D. 1 (Self-Washer); *Re BANKS & JAMES'S TRADE MARK* (1895), 44 W. R. 32 (Shakspeare); *GREAT TOWER-STREET TEA CO. v. HEDLEY SMITH, Re GREAT TOWER-STREET TEA CO.'S TRADE MARK* (1889), 5 T. L. R. 232 (Tower Tea); *Re LEONARD & ELLIS'S TRADE MARK, LEONARD & ELLIS v. WELLS* (1884), 26 Ch. D. 288 (Valvoline); *BURLAND v. BROXBURN OIL CO., Re BURLAND'S TRADE MARK* (1889), 42 Ch. D. 274 (Washerine); *Re FRIEDLANDER'S TRADE MARK, [1885] W. N. 85* (Zephyr Asiatic Walnut Pipe).

**329. Registration as fancy word allowed.]—***Re "ALPINE" TRADE MARK* (1885), 29 Ch. D. 877 (Alpine); *Re TRADE MARK NO. 58,405, "BOVRIL,"* [1896] 2 Ch. 600 (Bovril); *SLAZENGER v. MALINGS, [1885] W. N. 124* (Lawford Tennis Racquet); *Re DENSHAM'S TRADE MARK, [1895] 2 Ch. 176* (Mazawattoc); *Re BURGUYNE'S TRADE MARK* (1889), 61 L. T. 39 (Oomoo); *BLAIR v. STOCK* (1881), 52 L. T. 123 (Strathmore Whisky); *WELLCOME (TRADING AS BURROUGHS, WELLCOME & CO.) v. THOMPSON & CAPPER, Re BURROUGHS, WELLCOME & CO.'S TRADE MARKS, [1901] 1 Ch. 736* (Tabloid).

### SECT. 3.—REGISTRATION.

#### SUB-SECT. 1.—IN GENERAL.

*See Trade Marks Act, 1905 (c. 15), ss. 12 18, 28—31; Trade Marks Act, 1919 (c. 79), sched. II.*

**330. Registration at risk of person registering.]—***Re HYDE & CO.'S TRADE MARK, No. 431, post.*

**331. Objects of registration.]—**(1) The object of the Act of 1875 is not to give new rights, but to place a restriction on the bringing of actions for infringement of trade marks, by requiring the previous registration of such marks; & also, by means of registration, to facilitate the evidence of title to trade marks.

(2) If a person has been on the register for five years as the proprietor of a trade mark, sect. 3 is conclusive as to his right to bring an action for infringement of that mark, & the registration is in that action conclusive evidence of his right to the exclusive user of the mark. But sects. 3 & 5 being independent sects., the title acquired under the former is no bar to an application under the latter to rectify the register, even after five years' registration, & on such an application the ct. has to consider whether the mark is properly on the register.

(3) The registration is to be limited to the particular goods in connection with which the trade mark is used.

So, where E., a manufacturer of iron sheets, had registered for more than five years as proprietor of a trade mark generally for the whole of class 5, described as "unwrought," partly wrought metals used in manufacture," upon a summons taken out by a manufacturer of steel & iron wire, one of the articles comprised in that class, who had registered a similar trade mark confined to steel & iron wire, the register was rectified by limiting the registration of E.'s trade mark to the particular goods in which he was carrying on business—namely, iron sheets.

(4) If a man who has registered a trade mark for any particular goods wishes to extend his business to a new description of goods, & to use his trade mark in connection with those goods, a further registration of his trade mark in respect of those goods is necessary.

*Qu.*—whether a trade mark can be registered which is not in actual user as such at the time of registration.

(5) The assignee of a trade mark has no higher right than his assignor had, & he has therefore no exclusive right to a trade mark, unless the business of the assignor assigned to him is co-extensive with the trade mark as registered.—*EDWARDS v. DENNIS, Re EDWARDS' TRADE MARK* (1885), 30 Ch. D. 454; 55 L. J. Ch. 125; 54 L. T. 112; 2 T. L. R. 1, C. A.

*Annotations:—As to (1) Consd. Lambert & Butler v. Goodbody* (1902), 18 T. L. R. 391. *Reid. Re Lyndon's Trade-mk.* (1886), 32 Ch. D. 109. *As to (2) Consd. Re Wood's Trade-mk., Wood v. Lambert & Butler* (1886), 32 Ch. D. 217. *Appl. Re Schmidt's Trade Mk., Jackson v. Napper* (1886), 35 Ch. D. 162; *Baker v. Rawson* (1890), 45 Ch. D. 519. *Reid. Re Verity's Trade Mk., Re Hall & Woodhouse's Trade Mk.* (1901), 18 T. L. R. 214. *As to (3) Distd. Re Schmidt's Trade Mk., Jackson v. Napper* (1886), 35 Ch. D. 162; *Re Australian Wine Importers* (1889), 41 Ch. D. 278. *Ext'd. Hart v. Colley* (1890), 44 Ch. D. 193. *Appl. Hargreave v. Freeman*, [1801] 3 Ch. 39; *Re Registered Trade Mks. of Batt, Re Carter's Appln.*, [1898] 2 Ch. 432; *Re Crompton's Trade Mk.*, [1902] 1 Ch. 758; *Re Hart's Registered Trade Mk.*, [1902] 2 Ch. 621. *Distd. Board v. Huddart* (1903), 89 L. T. 718. *Appl. Anglo-Swiss Condensed Milk Co. v. Pearks, Gunston & Toe* (1901), 20 R. P. C. 509. *Consd. Finlay v. Shamrock Co.* (1905), 22 R. P. C. 301. *Distd. Walpamur Co. v. Sanderson* (1926), 43 R. P. C. 355. *Reid. Re Hudson's Trade Mks.* (1886), 32 Ch. D. 511. *Jay v. Ladler* (1888), 40 Ch. D. 649. *As to (5) Consd. Re Registered Trade Mks. of Batt, Re Carter's Appln.*, [1898] 2 Ch. 432. *Generally. Reid. Imperial Tobacco Co. of Great Britain & Ireland v. Pasquali, Re Imperial Tobacco Co.'s Trade Mks.*, [1918] 2 Ch. 207.

**332. Discretion of Registrar.]—***ENO v. DUNN, No. 180, ante.*

**333. —] Re SALTER'S APPLICATION, No. 40, ante.**

**334. — Whether subject to appeal.]—***Re BOOTH'S DISTILLERY CO., LTD.'S APPLICATIONS, No. 230, ante.*

**335. — — —]—**An application was made under the Act of 1883 by a Spanish co. to register for liqueurs & elixirs certain trade marks, an essential feature of which was either a diamond divided in two triangles, coloured yellow & green respectively in actual use, or a green diamond bearing a monogram. The Comptroller as a term of registration required the consent of Bass, Ratcliff & Gretton, Ltd., who had several diamond & triangle marks upon the register for beers & stout, & by reason of appts.' failure to get this consent, & for other reasons, the Comptroller under his discretion refused registration. On appeal, referred by the Board of Trade to the ct., this decision was upheld by JOYCE, J. on the ground that the Comptroller had exercised his

#### PART I. SECT. 3, SUB-SECT. 1.

**332i. Discretion of Registrar.]—***LINNEE v. LINCOLN MOTOR CO.* (1921), 20 C. L. R. 277.—AUS.

**332 ii. — —.]—**IRVINE & STEVENSON'S ST. GEORGE CO., LTD. v. ANGLO-BRITISH COLUMBIA PACKING CO., LTD., [1928] N. Z. L. R. 81.—N.Z.

*t. When entitled to registration.]—*An unregistered trade mark is only entitled to protection where there is unfair or fraudulent competition, &



discretion in a reasonable & proper manner. Appets. appealed, but the order of JOYCE, J. was by consent affirmed.—*Re UNION AGRICOLA SOCIEDAD ANONIMA'S TRADE MARKS* (1907), 25 R. P. C. 295, C. A.

**336.** — — —.]—Subject to the limitations imposed by Trade Marks Act, 1905 (c. 15), the Registrar has a discretion to refuse or accept an application for the registration of a mark, but his exercise of that discretion must not be unreasonable or capricious. G., trading as O. G. & Co., applied to register the word "Ogee" as a trade mark in class 3. O. G. & Co. were an old firm. They had many years ago used first the letters "O. G.," the initials of the firm, & afterwards the word "Ogee" to distinguish their goods. In 1898 & 1903 they had, without opposition registered "Ogee" in different classes, & had used the word as a trade mark in respect of goods in class 3, & their goods were known & sold as "Ogee" goods. The Registrar refused the application on the ground that "Ogee" was simply the letters O. G. spelt out, & that letters could not be registered as distinctive marks.—*Held*: Trade Marks Act, 1905 (c. 15), s. 12 (2), expressly gave the Registrar a discretion, & it was also clear that whilst the Registrar was in certain cases prohibited from registering, still he had in cases where there was no such prohibition a discretion which must not be unreasonably or capriciously exercised. In the present case the Registrar was right in refusing the application. If the application had been for the registration of the letters "O. G." it would have failed. "Ogee," although a dictionary word, represented the letters "O. G." written out. A trade mark appealed to the ear as well as the eye, & possible confusion might arise from the sound. The disclaimer of the exclusive right to use the letters themselves did not meet the case.—*Re GARRETT'S APPLICATION*, [1916] 1 Ch. 436; 85 L. J. Ch. 350; 114 L. T. 976; 60 Sol. Jo. 401; 33 R. P. C. 117, C. A.

*Annotations*:—*Fold*. *Re Yalding Manufacturing Co.'s Appln.* (1916), 33 R. P. C. 285. *Consid.* *Re British Thomson-Houston Co.'s Appln.* (1917), 61 Sol. Jo. 353; *Re National Galvanizers' Appln.* (1920), 37 R. P. C. 202. *Fold*. *Re Elman (London), Ltd.'s Appln.* (1920), 37 R. P. C. 134. *Reid*. *Re Standard Woven Fabric Co.* (1918), 35 R. P. C. 53; *Re Salter's Appln.* (1923), 40 R. P. C. 402.

**337.** — — —.]—(1) Appet. for registration of a trade mark has no absolute right, in cases where registration is not prohibited by the Trade Marks Act, 1905 (c. 15), to have the mark registered, but the registrar has a discretion whether to register or not, and the ct. will not interfere with his discretion except where he has gone clearly wrong.

(2) "Adapted to distinguish" means adapted to distinguish in this country, having regard to the practice & conditions of the trade here.

An application by a firm of canvas hose manufacturers to register, in respect of hose, a trade mark consisting of three parallel red lines woven in the hose throughout its whole length was opposed by several rival firms, & registration was refused by the registrar. Appets. had not used this mark on goods sold in this country, but had used it for many years on goods exported to other countries, where it had become identified with their goods. In 1914 appets. obtained registration of a trade mark for hose consisting of two blue lines with a red one between them running the whole length of the hose, on proof that the

mark had been used by them for many years in this country. The opponents proved that the use of coloured lines running the length of the hose was prevalent in the trade, & that in many cases these lines were put on the hose at the order of a customer to indicate ownership or to distinguish one set of hose from another:—*Held*: in the circumstances, the proposed mark was not adapted to distinguish the goods of appets. & the registrar had rightly refused registration.—*BANHAM (GEORGE) & Co. v. REDDAWAY (F.) & Co.*, [1927] A. C. 406; 136 L. T. 485; 43 T. L. R. 138; 71 Sol. Jo. 34; *sub nom. Re REDDAWAY (F.) & Co.'s APPLICATION*, 96 L. J. Ch. 117; 44 R. P. C. 27, H. L. *Annotations*:—*As to* (1) *Consid.* *Re Samson Cordage Works' Appln.* (1927), 44 R. P. C. 313. *Appl.* *Re Distributing Corp'n. (London), Ltd.'s Appln.* (1927), 44 R. P. C. 225; *Re Winterbottom Book Cloth Co.'s Appln.* (1927) W. N. 210; *Re Fanfold's Appln.* (1928), 45 R. P. C. 325. *Generally, Reid.* *McDowell v. Standard Oil Co.* (New Jersey), [1927] A. C. 632.

**338.** — — —.]—On Aug. 25, 1927, an application was made to register in class 39, as a trade mark in respect of paper forms, files, & stationery, a mark consisting of the words "Fanfold Ltd." above a scroll with flourishes at each end. The application was refused by the Registrar, on the grounds that the name "Fanfold Ltd." was the sole important feature of the mark, & was not represented in a special or particular manner, that the device of a scroll, its only other feature, was a well-known one, which any printer might use, & with nothing distinctive about it, that the mark consisted of little else than the word "Fanfold" which, being a combination of two ordinary English words, did not constitute an invented word, & that the word either had direct reference to the character and quality of the goods in connection with which it was sought to register it, or else was calculated to deceive.

Appet. appealed to the ct. The appeal was dismissed. It was held that the Registrar had correctly decided that the mark was not distinctive, that the word "distinctive" in Trade Marks Act, 1905 (c. 15), was indicative of a standard to which the Registrar had to have regard, that the Registrar's construction of the Act was in this case right & that the ct. would not interfere with his decision. Appet. appealed to the Ct. of Appeal:—*Held*: the Registrar had decided that the name of appet. was not represented in a special or particular manner & this decision was right, & moreover, that the ct. could not interfere with the exercise of his discretion by the Registrar.

A mark must, in order to be registered under any of the paragraphs of sect. 9 of Trade Marks Acts, 1907–1919, be distinctive.—*Re FANFOLD LTD.'S APPLICATION* (1928), 45 R. P. C. 325, C. A.

**339.** — — —.]—An application was made for the registration of a trade mark in respect of hosiery included in class 38. The mark consisted of a picture underneath which were the words "'Cabaret' Girl Hosiery." The application was opposed by the owners of a registered trade mark applicable to articles of clothing & consisting of a picture underneath which was the word "Carnival." The opponent was also the owner of a common law trade mark consisting of a picture similar to that in his registered trade mark but having upon it the words "Carnival hose," he had applied to register a mark similar to his common law mark but with the word "Columbine" upon

damage is caused to the proprietor of such mark.—*PABST BREWING Co. v. ECKERS & CANADIAN BREWERS, LTD.* (1902), Q. R. 21 S. C. 545.—*CAN.*

*a. Necessity for user.*—It is the

use of a trade mark, & not its invention, which creates the right to its registration. In cases of conflict as to prior user the test is: which claimant was the first to use the mark on his

goods to distinguish them from others, thus giving information to the trade that such goods are his.—*JONES v. HORTON* (1922), 65 D. L. R. 33; 21 Exch. C. R. 330.—*CAN.*

Sect. 3.—Registration: Sub-sects. 1 & 2.]

it. The registrar refused to register the mark of appets., & they appealed to the ct. :—*Held*: even if the evidence that had been before the registrar & upon which he had acted would have induced the ct. to come to a conclusion different from that to which the registrar had come, in the circumstances the ct. could not interfere because it could not be said on that evidence that the registrar in coming to the conclusion to which he had come had acted capriciously or unreasonably.—*Re DISTRIBUTING CORPN. (LONDON), LTD.'S APPLICATION* (1927), 44 R. P. C. 225.

*Annotation*:—*Re*ld. *Re* Samson Cordage Works' Appln. (1927), 44 R. P. C. 313.

**340. Foreign trade marks—Necessity for compliance with requirements of English Act—Trade mark must be within statutory definition.]**—Sect. 103 of Patents, Designs, & Trade Marks Acts, 1883 to 1888, does not authorise the registration of a trade mark outside the definition of a trade mark given by sect. 64.—*Re CARTER MEDICINE CO.'S TRADE MARK*, [1892] 3 Ch. 472; 61 L. J. Ch. 716; 67 L. T. 747; 41 W. R. 13; 8 T. L. R. 639; 36 Sol. Jo. 571; 3 R. 1.

**341. — Time for application—Within four months of application in foreign country.]**—A co. had, in America, where they had carried on business, registered a trade mark in 1885. Patents, Designs, & Trade Marks Act was passed in Aug. 1883, & sect. 103 enacted that if Her Majesty was pleased to make any arrangement with a foreign state for the mutual protection of trade marks, then any person who had applied for protection of a trade mark in such foreign state should be entitled to registration under the Act, provided that the application was made within four months from applying for protection in the foreign state. The International Convention for the Protection of Industrial Property was signed in Paris in Mar. 1883, & it contained a provision that every trade mark registered in the country of origin should be admitted to registration, & protected in all countries of the Union. The Convention was in Mar. 1884, acceded to by the Govt. of Great Britain, & in July, 1887, by the Govt. of America, & the provisions of sect. 103 of the Act were by an Order in Council in July, 1887, made applicable to America. In Feb. 1888, the co. applied to the Comptroller-General to register their trade mark under the provisions of sect. 103, & of the International Convention; & he refused to do so. On appeal to the ct. :—*Held*: the application for registration could be dealt with only under the provisions of the Act of 1883; & as it was not made within four months as required by the provisions of sect. 103, it must be refused. *Seem*: the provisions of the Convention of 1883, which stated that every trade mark duly registered in the country of origin should be admitted for registration & protection in the form originally registered in all the countries of the Union, now bound Great Britain, but the Act of 1883 did not afford the means of carrying out the provisions of the Convention.—*Re CALIFORNIAN FIG SYRUP CO.'S TRADE MARK* (1888), 40 Ch. D. 620; 58 L. J. Ch. 341; 60 L. T. 590; 37 W. R. 268; 5 T. L. R. 120.

**342. Jurisdiction of Franco-German Mixed Tribunal—Acting under Peace Treaty, 1919.]**—*Re MUMM (G. H.) & CO.'S APPLICATIONS*, No. 574. *post*.

**PART I. SECT. 3, SUB-SECT. 2.**

**b. Who may apply—Proprietor.]**—No person can be registered in re-

spect of a trade mark unless he is the proprietor of the trade mark.—*Re HICK'S TRADE MARK* (1897), 22

V. L. R. 636.—*AUS.*

c. — — —.]—The appct. for a trade mark must be the proprietor.

**343. Sheffield Register—Transference to register of unregistered marks assigned by Cutlers' Company—Ministerial not judicial Act.]**—W. & Sons were the registered owners of a trade mark of a tobacco pipe, stamped on metal, in respect of class 12 in the schedule to the rules under Patents, Designs & Trade Marks Act, 1883 (c. 57), viz. cutlery & edge-tools. L. was the registered owner of a trade mark of a pipe & dart stamped in respect of class 12, & also in respect of other classes relating to machinery & metal goods. Both were old marks issued by the Cutlers' Company many years ago. L.'s mark had been regranted in 1839 to X., a freeman of the company, & this was the last entry in the books of the company. No registration of this mark had been made under Trade Marks Registration Act, 1875 (c. 91), in the London register established under that Act for Sheffield marks. X. had assigned the mark to J. & Co., & on their business being taken by L. the pipe & dart mark had been assigned to a trustee for him. Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 81 (1), provides for the establishment of a new temporary register of trade marks at Sheffield; sub-sect. 2 enacts that the Cutlers' Company shall enter in the Sheffield register in respect of cutlery & other steel & iron goods, marks on the register established under the Act of 1875 belonging to persons carrying on business in Hallamshire or within six miles of it, & also enter in such register in respect of the same goods all the trade marks which shall have been assigned by the Cutlers' Company & actually used before the commencement of the Act, but not registered under the Act of 1875. Other sub-sects. provide for the registration of new trade marks by the Cutlers' Company. Sub-sect. 12 provides for an appeal to the comptroller by any person aggrieved by a decision of the Cutlers' Company subject to a further appeal to the ct. The marks on the Cutlers' register at Sheffield were to be put on the central register, & after a lapse of five years the new Sheffield register was to be closed. L.'s trade mark was not put on the register in the first instance by the Cutlers' Company, but on Sept. 16, 1887, on application made by L., the Cutlers' Company entered the mark on the Sheffield register in the name of L. This application was opposed by W. & Sons, but the Cutlers' Company refused to consider their opposition, & the comptroller declined to interfere on the ground that he had no jurisdiction. W. & Sons then moved to set aside the refusal of the Cutlers' Company & of the comptroller to hear their opposition to registration; or, in the alternative, to have the register rectified under sect. 90 of the Act of 1883, but the judge dismissed the application on both points:—*Held*: the Cutlers' Company & the comptroller had a mere ministerial duty to perform—viz., to enter on the new register the old corporate mark, & their so acting was not a decision under sub-sect. 12 of sect. 8.—*Re LAMBERT'S TRADE MARK* (1889), 61 L. T. 138; 5 T. L. R. 367, C. A.

**SUB-SECT. 2.—APPLICATION FOR REGISTRATION.**

*See* Trade Marks Act, 1905 (c. 15), ss. 12–13, 18; Trade Marks Act, 1919 (c. 79), sched. II.

**344. Who may apply—Joint adventure—Termination of adventure—Subsequent application by one**



party.]—R. J., a merchant in Manchester, for some time prior to the passing of Trade Marks Act, 1875 (c. 91), shipped cotton drills to A. & co., a firm at Manilla, for sale on commission, the goods, in common with other goods, sold by A. & co. for other people, bearing a trade mark representing the figure of Britannia, which mark was the property of A. & co. After the passing of the Act, doubts having arisen as to the propriety of using the Britannia mark, R. J. wrote to A. & co., suggesting the use of a new design; & they sent back a proposed trade mark which represented the house of business at Manilla of A. & co., with their name on the signboard. Beneath were three columns in Chinese characters. The first represented "R. J., Manchester," the second contained the crest of K., the Manilla partner of A. & co., with words indicating that it was his "chop" or mark, & the third represented "A. & co., Manilla." On the construction of the letters between the parties, the ct. held that there was no contract that the mark should be the property of R. J.:—*Held*: R. J., after the termination of the joint adventure, was not entitled to register the trade mark in his name.—*Re JONES' TRADE MARK* (1885), 53 L. T. 1, C. A.

**345. ——— Application by inventor of mark.]**—A foreign co. applied to register a mark consisting of the word "Val" in respect of all substances used as food or as ingredients in food. The application was opposed by the co.'s sole agent in this country on the grounds that the word was invented by him, that the co. was instructed to manufacture goods under the mark solely for him for sale within the British Empire, & that the expenses of advertising the mark had been borne by him:—*Held*: the mere fact of suggesting the word "Val" gave the opponent no claim to registration; the facts indicated a joint adventure; the mark should be registered in the joint names of appets. & the opponent; & the application should be allowed to proceed on the parties agreeing to this.—*Re NAAMLOOZE VENNOTSCHAP FABRIEK VAN CHOCOLADE EN SUKERWERKEN, KLOEKE & Co.'s APPLICATION* (1923), 40 R. P. C. 103.

— **Assignees.]**—*See* Sect. 6, sub-sect. 1, D., *post*.

**346. Application during action for infringement —Directions as to mode of hearing.]**—Defts. in an action for infringement of trade mark having applied for the registration of the trade mark which they had been restrained by injunction from using, order made that the manner in which the matter should be brought before the ct. should be by motion by appets. to proceed with the registration, with liberty to either party to use the evidence in the action for infringement, & with further provisions as to evidence.—*Re JOHNSTON'S TRADE MARK* (1880), 43 L. T. 672.

**347. Right of applicant to appoint agent—Validity of notices to agent.]**—Trade Marks Act, 1883 (c. 57), s. 63, is retrospective in its operation. There is nothing in Trade Marks Act, 1883 (c. 57), to take away the common law right of an appct. for registration who is *sui juris* to appoint an agent for all the purposes of his application, & if he does so the notices required by the Act may properly be sent to him through such agent.

S., a foreigner, applied in 1876, through an English trade mark society, for registration of a trade mark. The Cutlers' Co. gave notice of a similar mark which had been assigned by them, & the Registrar thereupon wrote to S. at the

society's address to say that he could not proceed with the application until S. had obtained the leave of the ct. This letter was never communicated to S. by the society, who proceeded no further with the application; but S. having seen the advertisement of his application in the Trade Marks Journal believed that his mark had been registered, & N., an agent of his, sold goods in England marked with his mark. In the year 1877 plffs. registered a mark resembling the Cutlers' mark, & in 1883 brought an action against N. to restrain him from infringement, & S., finding his mark was not on the Register, then made a fresh application for registration:—*Held*: (1) S. was "in default," & his original application must be deemed to have been "abandoned" within the meaning of Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 63, & could not now be proceeded with. (2) S. being under no disability from laches or conduct was not barred either by Trade Marks Registration Act, 1875 (c. 91), s. 3, or by Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 76, & was entitled to make a fresh application for registration.—*JACKSON & Co. v. NAPPER, Re SCHMIDT'S TRADE MARK* (1886), 35 Ch. D. 162; 56 L. J. Ch. 406; 55 L. T. 836; 35 W. R. 228; 3 T. L. R. 238.

*Annotations*:—18 to (1) *Refd.* Board v. Thom & Cameron, Thom & Cameron v. Board (1907), 24 R. P. C. 697. *Generally.* *Refd.* *Re Verity's Trade Mk., Re Hall & Woodhouse's Trade Mk.* (1901), 18 T. L. R. 211. *Mend.* *Re v. St. Mary Abbotts, Kensington Assmt. Com.*, [1891] 1 Q. B. 378.

**348. Special application—To court Indication of parties to be served—Power of court where parties not served.]**—(1) Even if the ct. is satisfied that a proposed mark is adapted to distinguish the goods of appct. from those of other persons, it will not order it to be deemed distinctive under Trade Marks Act, 1905 (c. 15), s. 9 (5), if the mark ought not to be registered for some other reason.

The Royal Worcester Corset Co., which carried on business as manufacturers of corsets at Worcester in the United States, applied under the Trade Marks Act, 1905 (c. 15), s. 9, for the registration of the words "Royal Worcester" in class 38 as a trade mark in respect of corsets generally. These words had been used for some years upon & in connection with advertisements of corsets manufactured by the co. in America & sold in this country, but with additional words indicating that the goods were made in America. The co. did not enjoy royal patronage:—*Held*: the words "Royal Worcester" were not in themselves "distinctive" within the meaning of Trade Marks Act, 1905 (c. 15), s. 9, & there was no evidence that, used alone, they were in fact distinctive of the co.'s goods; but the application ought also to be refused on the ground that the words, used alone, suggested Royal patronage, & were therefore "calculated to deceive" within the meaning of Trade Marks Act, 1905 (c. 15), s. 11.

(2) It is a convenient practice that the Board of Trade, in directing an application for registration of a trade mark to be made to the ct., should indicate the parties on whom the application is to be served. If appct. does not serve any party so indicated, the ct. can at its discretion proceed without such service or direct it to be made.—*Re ROYAL WORCESTER CORSET CO.'S APPLICATION*, [1909] 1 Ch. 459; 78 L. J. Ch. 309; 100 L. T. 235; 25 T. L. R. 241.

*Annotation*:—As to (1) *Distd.* *Re California Fig Syrup Co.'s Appln.*, [1909] 2 Ch. 99.

therefore a person who has assigned the right to use a trade mark & agreed not to use it himself cannot obtain valid

registration thereof.—*SEATTLE BREWING & MALTING CO. v. RAINIER BREWING CO. OF CANADA, LTF.*, [1925] 14

D. L. R. 940; [1924] 3 W. W. R. 502  
34 B. C. R. 334.—*CAN.*

SECT. 3.—Registration: Sub-sects. 2 & 3.]**349. — Order accepting application—**

**Form of order.]**—An Italian co. who were makers of motor cars applied under Trade Marks Act, 1905 (c. 15), s. 9 (5), to register the word "Itala" as a trade mark for motor cars. The application was referred by the Board of Trade to the ct. The application was resisted by an English co. who were concessionaires for sale of the Italian co.'s "Itala" cars, & who had sold & advertised them, on the ground that the public had come to connect the word "Itala" with themselves rather than with the Italian co.: *Held*: it being clear that, to the ordinary public an "Itala" car meant a car of a particular make, the word was capable of registration under sect. 9 (5) & the Registrar ought to be enabled to proceed; & if there was any real substance in the opponents' case it could be raised by an opposition in the usual way. The proper form of order in such cases having been considered, an order was made that for the purpose of the application to the Registrar the mark applied for was to be deemed a distinctive one within Trade Marks Act, 1905 (c. 15), s. 9 (5), & the Registrar do accept the application & proceed with the same accordingly.—*Re ITALIA FABBRICA DI AUTOMOBILI'S APPLICATION* (1910), 54 Sol. Jo. 652; 27 R. P. C. 493.

*Annotations:—* *Reid, Re Lea's Appln.*, [1913] 1 Ch. 416; *Re Teofani's Trade Mk.*, [1913] 1 Ch. 191.

**350. Second application—In respect of same trade mark—Registration not completed on first application.]**—In 1887, application was made for the registration of a trade mark for whisky. The mark consisted of a label which bore on it the device of a ship upon the sea, & also the words "Unco Guid." The Registrar allowed the application, & the mark was advertised in the Trade Marks Journal, but, in consequence of the omission of app't's agent to pay the registration fee, the mark was not actually registered. App't. was ignorant of this omission, & believed that the mark had been registered, & in this belief he proceeded to use it in his trade. In 1893 he discovered that the mark had not been registered, & he then renewed his application for registration. The Registrar refused the application, on the ground that in 1889 another mark had been registered for whisky, to which he thought the first mark had such resemblance as to be calculated to deceive. The second mark consisted of a label which bore the device of two lions rampant standing on opposite sides of a bottle, & also the words "The Unco Guid." The owner of this mark had, when he applied for its registration, disclaimed any right to the exclusive use of the words. The owner of the first mark made a similar disclaimer:—*Held*: (1) having regard to the disclaimers, there was no such resemblance between the two marks as was calculated to deceive, & the first mark ought to be registered; (2) the non-completion of the registration under the first application was not a bar to the making of a second.—*Re LOFTUS' TRADE MARK*, [1891] 1 Ch. 193; 63 L. J. Ch. 52; 69 L. T. 690; 12 W. R. 251; 38 Sol. Jo. 58; 8 R. 87.

**351. — — — Conduct or laches as bar to application.]**—*JACKSON & CO. v. NAPPER, Re SCHMIDT'S TRADE MARK*, No. 347, *ante*.

**352. — — — First application refused—Res judicata.]**—The predecessors in business of W. H. & S. registered two trade marks in 1876 as old

marks, & after the first renewal the marks were allowed to lapse. Application was made to have the marks re-registered as old marks, but this application was opposed by two other firms & was refused by the registrar on the ground of there not being sufficient evidence of user as old marks. W. H. & S., having obtained more complete evidence, again applied for the re-registration, & this was refused by the registrar on the ground of *res judicata*. W. H. & S. appealed to the ct. The motion was ordered to stand over to enable the two firms who had opposed to be served. On the motion coming on for hearing, it was ordered that the Registrar be directed to proceed with the registration, owing to the two firms not desiring to oppose at that stage. The Registrar's costs of the motion were ordered to be paid by app'ets.—*Re HUNT (WILLIAM) & SONS, THE BRADES LTD'S APPLICATION* (1911), 28 R. P. C. 302.

*Annotation:—* *Consol. Re Massachusetts Saw Works* (1918), 35 R. P. C. 137.

**353. Amendment of application.]**—J. Mann, a naturalised British subject born in Germany, who had for many years carried on business in this country as the Power Flexible Tubing co., & who, in order to comply with Registration of Business Names Act, 1916 (c. 58), subsequently traded as J. Mann, made applications to register the words "Duroflex," "Emmoflex" & "Ponoflex" in class 13 in respect of metallic tubing. The applications were originally made by him as "J. Mann, successor to the Power Flexible Tubing Co.," but the Registrar of Trade Marks directed him to amend "by claiming registration in the name of Jack Mann, trading as J. Mann, & as the Power Flexible Tubing Co. (if consistent with fact)." Overlooking the words in brackets app't. made the amendments exactly as suggested. The applications were opposed by the United Flexible Metallic Tubing Co., Ltd., mainly on the grounds of app'ets. German origin, the name under which he applied, & alleged non-compliance with Registration of Business Names Act, 1916 (c. 58). The application being refused by the Registrar, app't. appealed to the ct.:—*Held*: the applicant had substantially complied with the requirements of the Registration of Business Names Act, 1916 (c. 58), & the Registrar should have permitted him to amend the applications so as to restore them to their original form, & he should then have allowed the applications to proceed.—*Re MANN'S TRADE MARKS* (1919), 35 T. L. R. 371; 36 R. P. C. 189.

## SUB-SECT. 3. —OPPOSITION.

*See* Trade Marks Act, 1905 (c. 15), s. 14; Trade Marks Act, 1919 (c. 70), Sched. II.

**354. Grounds for—Party applying not entitled.]**—*Re HEDDLE (JAMES) & CO.'S APPLICATIONS*, No. 323, *ante*.

**355. — — — Statutory offence by applicant—Under Companies Acts.]**—*Re BAKER (ALBERT) & CO.'S APPLICATION, Re AERATED BREAD CO.'S APPLICATION*, No. 259, *ante*.

**356. — — — Under Registration of Business Names Act, 1916 (c. 58)—Trifling & technical breach.]**—M., a naturalised British subject born in Germany, who had for many years carried on business in this country as the Power Flexible Tubing co., & who, in order to comply with above Act, subsequently traded as J. Mann, made applications

## PART I. SECT. 3, SUB-SECT. 3.

*d. Who may oppose—Person interested.]—Re JACOBS, Ex p. BUSH*, [1926] 1 D. L. R. 18; [1926] Exch. C. R. 20. CAN.

to register the words "Duroflex," "Enmoflex," & "Fonoflex" in Class 13 in respect of metallic tubing. The applications were originally made by him as "J. Mann, successor to the Power Flexible Tubing Co.," but the Registrar of trade marks directed him to amend "by claiming registration in the name of Jack Mann, trading as J. Mann & as the Power Flexible Tubing Co. (if consistent with fact)." Overlooking the words in brackets, *appet.* made the amendments exactly as suggested. The application, were opposed by the United Flexible Metallic Tubing Co., Ltd., mainly on the grounds of *appet.*'s German origin, the name under which he applied, & alleged non-compliance with above Act. The applications being refused by the Registrar, *appet.* appealed to the *ct.*:—*Held*: *appet.* had substantially complied with the requirements of above Act, & the Registrar should have permitted him to amend the applications so as to restore them to their original form, & he should then have allowed the applications to proceed.—*Re MANN'S TRADE MARKS* (1919), 35 T. L. R. 371; 36 R. P. C. 189.

— **Trade mark not registrable.**—*See* Sect. 2, *ante*.

**357. Duty of opponent to apply for directions as to mode of trial.**—Where an oppose application for the registration of a trade mark stands for the determination of the *ct.* under rule 16 of the Trade Mark Rules, 1876, the proper course for the purpose of raising the question is for the Registrar to require the opponent to apply for a direction as to the mode of trial, whereupon the person seeking to register is usually directed to take out a summons which is adjourned into *ct.* A motion on behalf of the opponents for an injunction to restrain the proposed registration is irregular, for the application to the *ct.* referred to in rule 44 of the Trade Mark Rules, 1876, means an application by the person seeking to register.—*Re SIMPSON, DAVIES & SON'S TRADE MARK* (1880), 15 Ch. D. 525; 42 L. T. 675; 28 W. R. 760.

*Annotation*:—*Refd.* *Re Anderson's Trade Mk.* (1881), 53 L. J. Ch. 664.

**358. Evidence in support—Insufficient to support motion for injunction.**—(1) An adverse user in this country for fifty years of a trade mark belonging to a foreign proprietor does not necessarily make it *publici juris* where such user began in fraud & is still calculated to deceive.

In 1718 G.'s firm, who were the foremost manufacturers of iron in Sweden, registered in Sweden as their trade mark the letter L. enclosed in a hoop. In 1877 they registered in England the said hoop L. mark alone, & also in combination with the word "Leufsta." Since 1835 they had exported iron to England for the manufacture of a peculiar kind of steel known as blister steel, on which they used the hoop L. mark in combination either with the name of their English consignee or with the word "Leufsta" or with both, which they registered in Sweden as additional stamps to their hoop L. mark. H.'s firm, who were English iron & steel manufacturers, had, for fifty years past, used the said hoop L. mark in combination with the name of their firm as their trade mark upon blister steel manufactured by them from inferior brands of Swedish iron. For this purpose it was necessary to cut off the Swedish mark, as blister steel retained upon its surface every mark made upon the original iron. A similar practice also prevailed with some 30 other English firms; but this practice was not brought to G.'s knowledge until 1881. H. applied under Trade Marks Act, 1875 (c. 91), to register the hoop L. mark in combination with the words "Bradec Co., Warranted":—

*Held*: the mark had not become common, & the application must be dismissed.

(2) *Semble*: an opposition to registration may be sustained on evidence which would be insufficient to support a motion for an injunction.

(3) *Semble*: the fact that a trade mark has been used for a great number of years is not of itself an absolute bar to the obtaining of an injunction restraining the use of it, but the *onus* is upon those who object to its use to show that such use was originally fraudulent, & that it is still calculated to deceive; & where the user has extended over a very long period, proportionately strong evidence will be required to induce the *ct.* to grant an injunction.—*Re HEATON'S TRADE MARK* (1884), 27 Ch. D. 570; 53 L. J. Ch. 950; 51 L. T. 220; 32 W. R. 951.

**359. Notice of application—Amendment—Power of Court of Appeal to amend.**—*Re ROBERTSON, SANDERSON & CO.'S APPLICATION*, No. 391, *post*.

**360. Who may oppose—Persons entitled to use common device.**—T. & B. applied to register "Ancross" as a trade mark for umbrellas. H. & Y. opposed as the registered proprietors of an old trade mark, No. 9858, of which the material part was the device of an anchor. This mark was registered in 1876 by B. & co., who in 1881 transferred it to G. & K., who in 1891 assigned it to H. & Y. The Registrar disallowed the opposition & allowed registration of "Ancross," being of opinion that the assignment of 9858 was an inoperative assignment, & was taken by H. & Y. for the purpose of embarrassing T. & B. in their business. H. & Y. appealed, & the appeal being referred to the *ct.*, came before the judge, who after the argument by counsel, stated that he thought "Ancross" was within Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 72, & therefore he could do nothing if 9858 remained on the Register. He accordingly gave T. & B. leave to move to expunge it, & postponed judgment. T. & B. moved to expunge & filed affidavits that in 1876, when 9858 was registered by B. & co., there were three or more other umbrella manufacturers using the device of an anchor. Counsel for H. & Y. stated that on this evidence they could not resist the motion to expunge, on the ground that in 1876 the device of an anchor was common to the umbrella trade:—*Held*: (1) the device of an anchor being common to the trade in 1876, Trade mark 9858 must come off the Register, & the motion to expunge it would be allowed with costs; (2) the application to Register "Ancross" ought not to be allowed, as it was applied for in order that it might be used with a view to deceive, & although H. & Y. could not oppose on the basis of trade mark 9858, which was expunged, they could do so as persons entitled to use the common device of an anchor, & to prevent T. & B. from obtaining the monopoly of "Ancross" which was like "Anchor."—*Re THIRWELL & BLAKEY'S TRADE MARK, Re HUGHES & YOUNG'S TRADE MARK* (1893), 9 T. L. R. 592; 10 R. P. C. 369.

**361. — Any person having trade mark in use—Though not registered—Confusion with proposed trade mark likely.**—Appeal allowed on the ground that there was no evidence that *deft.* was imitating *plff.*'s trade mark. Trade Marks Act, 1905 (c. 15), s. 11, is a general sect., & enables any person who in fact has a trade mark ["A.B.C." steel] in use, though not a registered one, to oppose registration of a trade mark which has a resemblance to his trade mark so great as to be calculated to deceive.—*ANDREW (JOHN H.) & CO., LTD. v. KUEHNRICH* (1913), 29 T. L. R. 771; 30 R. P. C. 677, C. A.

*Annotation*:—*Refd.* *Re Imperial Tobacco Co.'s Trade Mks.* Imperial Tobacco Co. of Great Britain & Ireland v. Pasquall, [1918] 2 Ch. 207.

Sec. 3.—Registration: Sub-sects. 3, 4, 5 & 6.]

**Notice of opposition.—To agent of applicant for registration.]—***See* No. 347, *ante*.

**362. Withdrawal of opposition.]—***Re* PORTLAND CEMENT SELLING & DISTRIBUTING CO., LTD.'S APPLICATION (1928), 46 R. P. C. 20.

**SUB-SECT. 4.—DISCLAIMER.**

*See* Trade Marks Act, 1905 (c. 15), s. 15.

**363. Imposition of disclaimer—Good reason to be shown.]—***Re* BAKER (ALBERT) & CO.'S APPLICATION, *Re* AERATED BREAD CO.'S APPLICATION, No. 259, *ante*.

**364. ———.]—***Re* CADBURY BROTHERS' APPLICATION, No. 365, *post*.

**365. ——— Not to be imposed unnecessarily—Onus of proof of necessity.]—**Trade Marks Act, 1905 (c. 15), s. 15 represents a new departure in regard to the imposition, as a condition of the registration of a trade mark, of a disclaimer by appt., of any part of the mark to the exclusive use of which he is not entitled. The sect. throws the *onus* of justifying a disclaimer on those who seek to have it inserted; & disclaimers, unnecessary from a legal point of view, should not be placed on the Register, since they induce a disregard by the public of common law rights which may have been acquired to the use of the part disclaimed.—*Re* CADBURY BROTHERS' APPLICATION, [1915] 2 Ch. 307; 81 L. J. Ch. 827; 113 L. T. 813; 31 T. L. R. 523; 59 Sol. Jo. 598; 32 R. P. C. 456.

**366. Grounds for disclaimer—Trade mark containing matter common to the trade.]—***Re* KUHN & CO.'S TRADE MARKS, No. 528, *post*.

**367. ———.]—***Re* LEONARDT (1878), Sebastian Digest of Trade Mark Cases, 373. *Annotation* :—*Re* Anderson's Trade Mk. (1884), 26 Ch. D. 409.

**368. ———.]—***Re* HAYWARD'S TRADE MARKS, No. 473, *post*.

**369. ———.]—***Re* SWIFT SPECIFIC CO.'S TRADE MARK, No. 156, *ante*.

**370. ———.]—**On the registration, under Patents, Designs, & Trade Marks Act, 1883 (c. 57), of a trade mark consisting of a label, which contains as an essential part of it, not as an "addition" to it, words which are *primâ facie* distinctive, but are common to the trade, s. 74 does not apply, & the right to the exclusive use of those words need not be disclaimed by the owner of the mark.—*Re* CLÉMENT ET CIE'S TRADE MARK, [1900] 1 Ch. 114; 69 L. J. Ch. 52; 81 L. T. 400; 48 W. R. 67; 16 T. L. R. 28; 44 Sol. Jo. 40, C. A.

*Annotations* :—*Consd.* *Re* Faulder's Trade Mk., [1902] 1 Ch. 125. *Appl.* *Re* Royal Baking Powder Co.'s Trade Mk. (1902), 50 W. R. 454. *Re* Baker's Appln., *Re* Aerated Bread Co.'s Appln., [1908] 2 Ch. 86.

**371. ———.]—**BOORD & SON INCORPORATED v. BAGOTS, HUTTON & CO., LTD., No. 199, *ante*.

**372. ——— Exclusive use of particular word or words.]—***Re* EDGE'S TRADE MARKS, No. 157, *ante*.

**373. ———.]—**The co. had registered, under Patents, Designs, & Trade Marks Act, 1883 (c. 57), as their trade-mark, a label consisting of a target on which were two concentric circles, the inner containing certain words, black spots, & letters, & between the inner & the outer circle the words "Smokeless Powder Co., Ltd."; the target was supported on one side by a sportsman, & on the other by a soldier in uniform. On an application

by a rival co. to remove this mark from the register, unless a disclaimer of the words "Smokeless Powder" was entered :—*Held* : (1) the words were not "distinctive words," & no disclaimer was required; & the words being contained in a distinctive label registered as a whole, under the Act of 1883, need not be disclaimed under sect. 74, inasmuch as they formed a part of the label, & were not additions to it; (2) the words complained of were not "calculated to deceive" within sect. 73; & even if they had been additions to the label, they would have been protected from disclaimer, as part of the name of the owner of the trade mark.—*Re* SMOKELESS POWDER CO.'S TRADE MARK, [1892] 1 Ch. 590; 61 L. J. Ch. 391; 66 L. T. 407; 40 W. R. 507; 8 T. L. R. 348; 9 R. P. C. 109.

*Annotations* :—*As to* (1) *Consd.* *Re* Clément's Trade Mk., [1900] 1 Ch. 114; *Re* Faulder's Trade Mk., [1902] 1 Ch. 125. *Re* Baker's Appln., *Re* Aerated Bread Co.'s Appln., [1908] 2 Ch. 86.

**374. ———.]—**The proviso in sect. 64 (3) (i), of Patents, Designs, & Trade Marks Act, 1883-88, that "a person need not under this sect. disclaim his own name" is applicable in the case of a firm applying to register a trade mark on which the firm name appears, & whether appt. is an individual or a firm, the name need not be disclaimed, under sect. 64, sub-sect. 2, whether the name appearing on the trade mark is the whole name of the individual or firm, or not, so long as it is used fairly & *bonâ fide* as representing the name of the owner of the trade mark. The firm of J. & J. Colman consisting of five persons named Colman applied to register a label for mustard on which appeared the words "Colman's Mustard" :—*Held* : appts. need not disclaim the name.—*Re* COLMAN'S APPLICATION, [1894] 2 Ch. 115; 63 L. J. Ch. 403; 70 L. T. 398; 42 W. R. 555; 10 T. L. R. 283; 8 R. L. R. 208; 11 R. P. C. 129.

*Annotations* :—*Distd.* *Re* Birmingham Vinegar Brewery Co.'s Trade Mk. (1894), 70 L. T. 646. *Re* Lea's Appln., *Re* McEwan's Appln., [1912] 2 Ch. 32.

**375. ———.]—**In 1887 the F. co. registered, in connection with jams, a trade mark consisting of the word "Silverpan" in large type with their signature underneath, & subsequently the word by itself became identified in the market with their goods. In 1900, the R. co., rival jam manufacturers, applied that the entire trade mark might be removed from the register as "being calculated to deceive or otherwise disintituled to protection," within Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 73, or, in the alternative, that the word "Silverpan" might be disclaimed under s. 74 as being a "distinctive word" :—*Held* : the word "Silverpan" was to be regarded as an "addition" to, & not part of, the trade mark, & at the date of registration it was a word "distinctive" of the F. co.'s goods, that is, *primâ facie* distinctive, & therefore, ought to have been disclaimed under s. 74; but, the F. co. submitting, an order was made to remove the entire trade mark from the register.

The word "distinctive" in s. 74 means something which, at the time of registration, is chosen by the applicant & is *primâ facie* suitable, when used, for the purpose of distinguishing his goods from the goods of others.

*Qu.* : whether a disclaimer under s. 74 can be made or ordered subsequently to the application for registration of the trade mark.—*Re* FAULDER &

**PART I. SECT. 3, SUB-SECT. 4.**

V. L. R. 359.—AUS.

**3721. Grounds for disclaimer—Exclusive use of particular word or words.]—***Re* INNES'S TRADE MARK, [1923]

**37211. ———.]—**The word "Club," used with reference to soda, has acquired a descriptive meaning &

cannot be registered without a disclaimer of the exclusive right thereto. —WORDON & PEARSON v. CANTRELL & COCHRANE (1901), 18 S. C. 142; 11 C. T. R. 191.—S. AF.

Co.'s TRADE MARK, [1902] 1 Ch. 125; 71 L. J. Ch. 124; 86 L. T. 66; 46 Sol. Jo. 104, C. A.

**376. — Unsuccessful claim to monopoly.]—***Re BAKER (ALBERT) & CO.'S APPLICATION, Re AERATED BREAD CO.'S APPLICATION, No. 259, ante.*

**377. — Added matter.]—**On the registration under Patents, Designs, & Trade Marks Act, 1888 (c. 50), a disclaimer of any right to the exclusive use of such portion of a label as constitutes "added matter" must be made.—*Re ROYAL BAKING POWDER CO.'S TRADE MARK (1902)*, 50 W. R. 454; 18 T. L. R. 432; 46 Sol. Jo. 394.

**378. Effect of disclaimer—Ground for refusing injunction—Restraining user of disclaimed part.]—**A corset manufacturer registered a trade mark with initial letters added, disclaiming the right to the exclusive use of the added matter. He used those letters by themselves on a particular part of his corsets. A motion on his part to restrain a rival manufacturer from using the same initials on the same part of his corsets, as being calculated to deceive, was refused on the ground that plff. had disclaimed the right to the exclusive use of the initial letters.—*ROSENTHAL v. REYNOLDS*, [1892] 2 Ch. 301; 61 L. J. Ch. 508; 67 L. T. 102; 40 W. R. 521; 36 Sol. Jo. 428.

#### SUB-SECT. 5.—IMPOSITION OF CONDITIONS.

See Trade Marks Act, 1905 (c. 15), s. 21.

**379. Jurisdiction to impose conditions—User in particular countries or districts.]—***Re RABONE BROTHERS & CO., Re BURNS & CO. (1879)*, *Sebastian Digest of Trade Mark Cases*, 395.

*Annotation:—Apld. Re Mitchell's Trade mks., Re Houghton & Hallmark's Trade-mk. (1885)*, 28 Ch. D. 666.

**380. — — —.]—**Objections having been raised by the owner of a registered trade mark to the proposed registration of another trade mark for use in connection with goods included in classes for which the first mark was used, but no formal opposition having been lodged to the application for registration, an agreement was entered into between the registered owner & appt. that no formal opposition should be lodged; that appt. should use his mark in connection only with goods actually exported to certain specified countries; & that he would, in connection with the registration, cause a note of this restriction on the use of his trade mark to be entered on the register.

Upon an *ex p.* application by appt., in pursuance of this agreement, the ct. directed the Comptroller of Trade Marks to enter such a note on the register.—*Re KEMP'S TRADE MARK (1884)*, 26 Ch. D. 187; 54 L. J. Ch. 637; 50 L. T. 453; 32 W. R. 427.

*Annotation:—Consd. Re Trade mk. of Dewhurst, [1896] 2 Ch. 137.*

**381. — — —.]—**The entry, on the register of two similar trade marks in the same class, of a note that the use of the marks registered is restricted by an agreement between the respective owners, the effect of which is not stated, is irregular, & contrary to the provisions of Patents, Designs, & Trade Marks Act, 1883 (c. 57); but a note of the mutual undertakings not to use the marks except in a certain manner & within specified districts may be entered on the register.—*Re MITCHELL & CO.'S TRADE MARK, Re HOUGHTON & HALLMARK'S TRADE MARK (1885)*, 28 Ch. D. 666; 54 L. J. Ch. 809; 52 L. T. 575; 33 W. R. 408.

*Annotation:—Consd. Re Trade mk. of Dewhurst, [1896] 2 Ch. 137.*

#### PART I. SECT. 3, SUB-SECT. 5.

**384 i. Jurisdiction to impose condi-**

*tions—User in particular manner.]—**McKENZIE & CO. v. LESLIE (1909)*, 9 C. L. R. 247.—**AUS.**

**382. — — —.]—***Re DEWHURST JOHN & SONS, LTD.'S TRADE MARK, No. 188, ante.*

**383. — — —.]—**Except as provided by sect. 21 there is no jurisdiction under Trade Marks Act, 1905 (c. 15), to impose as a condition of registration that a mark shall only be used in a particular country.—*Re CRISPIN & CO.'S TRADE MARK, [1917] 2 Ch. 267; 86 L. J. Ch. 720; 117 L. T. 358; 33 T. L. R. 433; 61 Sol. Jo. 559.*

**384. — — —.]—**User in particular manner.]—W. applied for the registration of an old trade mark for goods comprised in classes 11, 12, & 13, having used the mark in connection with the goods comprised in those classes in a particular manner.

His application was opposed by a firm who had for many years used, & had obtained registration, of a similar mark, which they used in a different manner from that in which W. used his mark, but upon the same classes of goods:—*Held*: registration should be granted to W. on his undertaking, to be noted on the register, not to use his mark in the manner in which the opposing firm used their mark, nor otherwise than in the manner in which he had previously used it.—*Re WHITELEY'S TRADE MARK (1879)*, 43 L. T. 627, n.; 29 W. R. 235, n.

*Annotations:—Fold. Re Sykes' Trade Mks. (1880)*, 43 L. T. 626. *Refd. Re Mitchell's Trade Mks., Re Houghton & Hallmark's Trade Mk. (1885)*, 28 Ch. D. 666. *Mentd. Re Haines, Batchelor's Trade Mk. (1888)*, 5 L. P. C. 669.

**385. — — —.]—***Sykes & co. of Edgeley*, a firm of calico bleachers, having applied for registration as cotton marks of two marks long used by them, the committee of experts placed the marks in the second class, as not being trade marks within the meaning of the Act.

The marks consisted of a shield, in outline, containing the figure of a swan, & the letters "S. & Co. E.": it also contained three other letters, subject to variation, being indicative of the date of packing, & the hand employed to pack each particular parcel of calico: a shield in outline, with the letters "R. S. E." indicative of the former title of the firm, & varying letters as in the other marks.

Bleachers' marks are used in a particular mode, being stamped within the fold of the calico before the parcel is stitched up.

The committee considered the marks were not trade marks within the Act, on the ground that the letters were mere quality marks; swans are common marks in the trade, & borders must be disregarded: *Held*: registration of both marks ought to be proceeded with, & with the registration there should be entered upon the register a note of an undertaking by appts. not to use the marks otherwise than in the limited mode in which they had formerly applied them.—*Re SYKES & CO.'S TRADE MARKS (1880)*, 43 L. T. 626; 29 W. R. 235.

**386. — — —.]—**User confined to particular goods.]—*Re SMITH'S APPLICATION, No. 242, ante.*

**Disclaimer.]—**See Sub-sect. 4, *ante*.

#### SUB-SECT. 6.—EVIDENCE.

**387. Statutory declarations—Admissible in lieu of affidavit evidence—Special application referred to court.]—**Statutory declarations filed for use before the Registrar may in certain circumstances be used on a motion in the Ch. Div. made under rule 39 of the Trade Marks Rules, 1906, in lieu

**386 i. — — —.]—**User confined to particular goods.]—*Re NORTHAM WARREN CORPN. (1921)*, 56 D. L. R. 8.—**CAN.**

*Sect. 3.—Registration: Sub-sects. 6, 7, 8 & 9*  
*Sect. 4: Sub-sect. 1.]*

of the usual affidavit evidence for the purpose of saving expense.—*Re CADBURY BROTHERS, LTD.'S APPLICATION* (1914), 59 Sol. Jo. 58; 31 R. P. C. 500; *subsequent proceedings*, [1915] 1 Ch. 331.

**388. — Without cross-examination—Abuse of practice.]**—The practice of taking evidence by statutory declaration without cross-examination must not be abused.—*Re BAGOTS, HUTTON & CO.'S TRADE MARK*, [1916] 2 Ch. 103; 84 L. J. Ch. 918; 113 L. T. 67; 31 T. L. R. 373; 32 R. P. C. 333, C. A.; *affd.* on other grounds, *sub nom.* *BOORD & SON INCORPORATED v. BAGOTS, HUTTON & CO., LTD.*, [1916] 2 A. C. 382, H. L.  
*Annotations:—Mentd. Re British Cycle & Motor Cycle Manufacturers' & Traders' Union Appln.* (1923), 40 R. P. C. 226; *Re Reddaway's Appln.*, [1925] Ch. 693.

#### SUB-SECT. 7. CERTIFICATE OF REGISTRATION.

*See Trade Marks Act, 1905 (c. 15), s. 17.*

**389. Amounts to legal proof of registration.]**—The certificate of registration of a trade mark is the legal & proper proof of its registration.—*Re CRAWFORD (WILLIAM) & SONS' APPLICATION* (No. 1) (1917), 61 Sol. Jo. 336; *subsequent proceedings*, [1917] 1 Ch. 550.

#### SUB-SECT. 8.—APPEALS.

*See Trade Marks Act, 1905 (c. 15), ss. 12, 11, Trade Marks Act, 1919 (c. 79), sched. II.*

**390. Mode of appeal—By way of application to amend register.]**—A person whose application to register a trade mark has been refused by the Comptroller cannot appeal direct to the ct. from such refusal, as a person aggrieved by the omission of his name from the Register under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 90, but must take the special course prescribed by sect. 62 (1), of appealing to the Board of Trade from the Comptroller's decision.—*Re "NORMAL" TRADE MARK* (1887), 35 Ch. D. 231; 56 L. J. Ch. 513; 56 L. T. 216; 35 W. R. 461; 3 T. L. R. 407, C. A.  
*Annotations:—Reid. Re Albens' Appln.* (1887), 35 Ch. D. 218; *Re Lambert's Trade Mk.* (1889), 61 L. T. 138.

**391. Function of court—Confined to hearing & determining appeal—Power to allow amendment of notice of opposition.]**—G. & co. gave notice of opposition to the registration by R. & co. of a trade mark. On the hearing of the application to register G. & co. desired to adduce evidence in support of other grounds of opposition not stated in their notice of opposition. The Registrar, representing the Comptroller, rejected the fresh evidence & disallowed the opposition. G. & co. did not apply to the Registrar for leave to amend their notice of opposition or for an adjournment, but appealed to the Board of Trade, who referred the appeal to the ct. On an application by G. & co. for leave to amend their notice of opposition: *Held*: the ct. had no jurisdiction to allow an amendment of the notice of opposition, its functions being limited, under sect. 69 (4), of Patents, Designs, & Trade Marks Acts, 1883 & 1888, to hearing & determining the appeal.—*Re ROBERT-*

*SON, SANDERSON & CO.'S APPLICATION*, [1892] 2 Ch. 245; 61 L. J. Ch. 470; 66 L. T. 673; 40 W. R. 569; 8 T. L. R. 497; 36 Sol. Jo. 413.

**392. Appeal to court—Order varied by House of Lords—Order of House made order of Chancery Division.]**—Where under the provisions of the Trade Marks Registration Acts the Registrar cannot proceed with the registration of certain marks without the leave of the ct. & the original order of the ct. is varied by the House of Lords, it is necessary that the order of the House of Lords should be made an order of the High Ct., Ch. Div.; & where the Registrar is served with notice of an application to the ct. for leave to be given him to proceed with a registration, & he appears, but does not oppose the application, he must be paid his costs of appearance.—*Re ORR EWING & CO.'S TRADE-MARKS* (1880), 28 W. R. 412.

**393. Appeal to Board of Trade—Reference by Board to Court—Direction to serve specified persons—Service essential prior to hearing by court.]**—A co. having applied to register a trade mark for extract of meat in class 42, the application was refused by the Comptroller-General for want of essential particulars in the mark. Appets. appealed to the Board of Trade, & the appeal was referred to the ct. By their directions the Board of Trade directed the proceedings to be served on another co., but appets. did not comply with the directions & only served the Comptroller-General. On a preliminary objection being taken on behalf of the Comptroller-General:—*Held*: the ct. could not proceed until the other co. was served, & the proceedings were directed to stand over for the purpose of serving them, with liberty to amend.—*Re EXTRACT OF MEAT (BARON LIEBIG) PHOTOGRAPH BRAND LTD.'S APPLICATION* (1900), 17 R. P. C. 161.

**394. Admissibility of grounds of opposition—Withheld on application to Registrar.]**—K. & J. Ltd. applied to register the word "Multigraph" in respect of stationery of all kinds included in class 39. They had used it for eighteen years on stationery goods of various kinds, some of which had to do with the duplicating & manifold of documents, & it was proved that the word was well known in connection with their goods. The application was opposed by the American Multigraph co. & the International Multigraph co., the first mentioned co. being the manufacturers of a machine which they called the "Gammeter Multigraph," being a multiple typewriter & office printing press. The only ground of opposition stated in their notice was that the registration by appets. would injure the opponents' business, seeing that "Multigraph" had for some years formed part of their trading name in the United States of America & more recently in Great Britain & elsewhere in connection with the sale of "Gammeter Multigraphs" & accessories therefor. They adduced evidence of some user of the term "Gammeter Multigraph" in this country for about a year prior to the application for registration, but appets., when they became aware of it, objected to such user. It was held by the Registrar of Trade Marks that, the word having been the Trade mark of appets. for eighteen years, the use of it by other persons would cause confusion, & the opposition was disallowed.

#### PART I. SECT. 3, SUB-SECT. 8.

**a. Jurisdiction of Court of Session.]**—A co., whose registered office was in Scotland, presented an appeal to the Ct. of Session, under Trade Marks Act, 1905 (c. 15), s. 12 (3) against the refusal by the Registrar of an applica-

tion to register a trade mark. The ground of the refusal was that the trade mark did not satisfy the requirements of sect. 9 of the Act:—*Held*: the ct. had no jurisdiction to entertain the appeal, in respect that jurisdiction to entertain such an appeal was a

"special jurisdiction," within the meaning of sect. 69 of the Act, conferred upon the High Ct. of Justice in England alone.—*BUCHANAN (JOHN & JAMES), LTD. v. COMPTROLLER-GENERAL OF PATENTS, DESIGNS & TRADE MARKS*, [1928] S. C. 692.—*SCOT.*



The opponents appealed, & asked the leave of the ct. to rely on two further grounds of opposition, namely, first, that the word "Multigraph" was descriptive; & secondly, that appcts. had prior to their application advertised that word as their registered trade mark. The declarations which were before the Registrar included evidence on these points, but no application was made to him for leave to amend the notice of opposition, & the points were not relied on at the hearing before the Registrar.—*Held*: leave to bring forward the further grounds of opposition should not be given to the opponents.—*Re* KENRICK & JEFFERSON LTD.'S APPLICATION (1909), 26 R. P. C. 641.

*Annotation*:—*Re* Southall & Barclay's Trade Mk. (1911), 8 R. P. C. 481.

**395. Admissibility of further evidence.**—On appeal from the refusal of the Registrar of Trade Marks to register appcts.' trade mark the ct. gave leave to adduce further evidence.—*Re* OGSTON & TENANT, LTD.'S APPLICATION (1909), 26 T. L. R. 40.

**396. Leave to serve previous opponent.**—*Re* MASSACHUSETTS SAW WORKS' APPLICATION (1914), 31 R. P. C. 384.

**397. Dissolution of appellant company—Pending appeal.**—An application was made by the English Record co., Ltd., who were then in liquidation to register a trade mark for certain goods included in class 8. This was opposed by the Gramophone co., who alleged that the mark would conflict with a well known trade mark belonging to it. The Registrar allowed the application to proceed. The opponents appealed, & while the appeal was pending the English Record co. was dissolved. On the appeal coming before the ct. the opponents asked that an order be made that the Registrar do not proceed with the registration. The Registrar asked that it should appear that the ct. expressed no opinion on the merits.

An order was made that the Registrar should not proceed with the registration, the order stating that the ct. expressed no opinion as to whether if appct. co had not been dissolved, the opposition would have been successful or not.—*Re* ENGLISH RECORD CO., LTD.'S APPLICATION (1914), 31 R. P. C. 371.

#### SUB-SECT. 9.—COSTS.

**398. Jurisdiction of court—To interfere with costs before Registrar.**—"The costs of & incident to all proceedings in the High Ct." (R. S. C., 1875, Ord. 55), means the costs of & incident to all proceedings that have actually come into the High Ct. A case under the Trade Marks Registration Acts, 1875-1877, does not "stand for the determination of the ct.," within the 16th rule of the Trade Marks Rules, 1876, until the parties opposing registration have given security for costs as provided by that rule. Upon an application by summons for the registration of a trade mark being refused with costs, the ct., in exercising the discretionary power given to it by R. S. C., 1875, Ord. 55, as to the costs "of & incident to all proceedings in the High Ct.," has only jurisdiction to order the payment of costs incurred since the case "stood for the determination of the ct.," under the Trade Marks Rules, 1876, r. 16 that is, from the time of the parties opposing

registration giving security for costs as provided by that rule, & has no power to order payment of the costs of the previous proceedings before the Registrar of Trade Marks.—*Re* BRANDRETH'S TRADE-MARK (1878), 9 Ch. D. 618; 47 L. J. Ch. 816; 27 W. R. 281.

*Annotation*:—*Apld. Re* Hargreaves' Trade Mk. (1879), 11 Ch. D. 669.

**399.** ———.—*Re* AUSTRALIAN WINE IMPORTERS, LTD., No. 182, *ante*.

**400. Security for costs—Application by foreign resident out of jurisdiction.**—*Re* HURTER'S TRADE MARK, [1887] W. N. 71.

**401.** ———.—*Application in chambers.*—*Re* HURTER'S TRADE MARK, [1887] W. N. 71.

**402. Order of registrar made rule of court—Costs of application.**—PRACTICE NOTE, [1928] W. N. 168.

**403. Taxation—Review of taxation.**—The Registrar of Trade Marks having granted an application by W., C. & co. for the registration of their trade mark, an appeal was brought by the R. co., which was allowed by the judge. His Lordship gave the costs of the appeal to the R. co. except so far as they had been increased by certain issues, the costs of which were to be paid to W., C. & co. Upon the taxation of the costs, the taxing master disallowed the costs of a witness who had filed an affidavit upon which he had been cross-examined. The R. co. objected (*inter alia*) to the disallowance of these costs on the ground that the affidavit did not relate solely to the excepted issues. In his answer to objections, the taxing master overruled the objections. The R. co. took out a summons to review taxation:—*Held*: the decision of the taxing master was perfectly right; because the learned judge had distinctly separated the issues. *Re* WRIGHT, CROSSLEY & Co. (1902), 86 L. T. 280; 46 Sol. Jo. 357, C. A.

**404. Registrar's costs—Liability of applicant—Registrar appearing & not opposing.**—*Re* ORR EWING & Co.'S TRADE-MARKS, No. 392, *ante*.

**405.** ———.—*Re* HUNT (WILLIAM.) & SONS', THE BRADLES LTD.'S APPLICATION, No. 352, *ante*.

### SECT. 4.—EFFECT OF REGISTRATION.

#### SUB-SECT. 1. IN GENERAL.

*See* Trade Marks Act, 1905 (c. 15), ss. 38-45; Trade Marks Act, 1919 (c. 79), sched. 11.

**406. Registration coupled with lapse of time—Where indefeasible title to use of mark conferred—Mark not entitled to registration.**—The right to the exclusive use of a trade mark, after the expiration of five years from the date of registration, given by Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 76, is subject to & controlled by sect. 90, & therefore any person who considers himself aggrieved by any entry made in the Register without sufficient cause is not precluded by the expiration of five years from the date of such registration from showing that the mark ought not to have been registered.—*Re* LLOYD & SONS' TRADE MARK, LLOYD R. BOTTOMLEY (1884), 27 Ch. D. 646; 54 L. J. Ch. 66; 51 L. T. 898.

**407.** ———.—*Through common use in trade.*—The registration of a mark as a trade mark & the lapse of five years do not, under Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 76, confer on the person who has made the

costs awarded by the law officer on an appeal to him from the Registrar of trade marks.—FERGUSON (ALEXANDER) & Co. v. CRAWFORD (DANIEL) & Co., LTD. (1910), 10 C. L. R. 207.—*AUS.*

**400 i. Security for costs—Application by foreign resident out of jurisdiction.**—*Re* ENRIENHE REFINING & MANUFACTURING Co.'S TRADE MARK, [1927] 4 D. L. R. 107.—*CAN*

#### PART I. SECT. 3, SUB-SECT. 9.

**1. Jurisdiction of court—Appeal from law officer.**—The High Ct. has jurisdiction to entertain an appeal as to the

*Sect. 4.—Effect of registration: Sub-sects. 1 & 2.]*

registration an indefeasible title to the use of the mark as a trade mark if, by reason of its being at the time of registration in common use in the trade, it ought not to have been registered. The lapse of five years cannot make good a registration which was in its inception invalid. A trade mark which was originally improperly registered ought, even after the lapse of five years, to be removed from the register, because the registration might enable the person who has made it to commit a fraud:—*Held*: a mark which had been registered as a trade mark, was, at the time of registration, "common to the trade" because similar, though not in each case identical, marks were then in use by more than three persons engaged in the same trade, although in some of the cases the mark was not actually placed on the goods, but was only used on bill heads, trade circulars, advertisements, or show cards.—*Re WRAGG'S TRADE MARK* (1885), 29 Ch. D. 551; 54 L. J. Ch. 391; 52 L. T. 467; 1 T. L. R. 268.

*Annotations*:—*Distd. Re Velly's Trade Mk., Re Hall & Woodhouse's Trade Mk.* (1901), 18 T. L. R. 214. *Reid. Baker v. Rawson* (1890), 45 Ch. D. 519.

408. ————]—(1) Notwithstanding sect. 76 of Patents, Designs, & Trade Marks Acts, 1883–88, & the variation in language between sect. 90 of those Acts & Trade Marks Registration Act, 1875 (c. 91), s. 5, the registration of a trade mark which has been wrongfully registered may be rectified after it has stood for upwards of five years.

(2) Where a trade mark consisting of an essential particular, combined with a device common to the trade, has been registered under Trade Marks Registration Act, 1875 (c. 91), the register may, on the application of a person aggrieved, be rectified by adding a note stating that the added device is common to the trade.

(3) Where a trade mark has been registered with a claim of user prior to Aug. 13, 1875, & such trade mark was in fact not used as a whole before that date, the mark will be expunged from the Register on the application of a person aggrieved.

(1) In an action for infringement of a trade mark which is of a type in general use in the trade, it is important to show that the trade mark alleged to infringe, though generally similar to the trade mark alleged to be infringed, was not copied from it, & was adopted without an intention to deceive, & that no case of actual deception has taken place after several years' user. Under such circumstances the ct. declined to hold that defts.' mark was calculated to deceive, & dismissed the action, while accepting an undertaking offered by defts. to discontinue the use of a particular detail which might cause confusion.—*BAKER v. RAWSON* (1890), 45 Ch. D. 519; 63 L. T. 306; *sub nom. BAKER & SONS v. RAWSON BROTHERS, Re BAKER & SONS' TRADE MARKS, Re RAWSON BROTHERS' APPLICATION*, 60 L. J. Ch. 49. *Annotation*:—*Generally, Mentd. Re Playen's Trade mk.*, [1901] 1 Ch. 382.

409. ————]—Trade Marks Act, 1905 (c. 15), ss. 11, 41, are to be read together. Therefore a trade mark which has remained unchallenged on the Register for more than seven years may nevertheless be removed from the Register if at the date of its registration it was a mark common to the trade.

A combined trade mark which has been registered for more than seven years is not open to objection solely on the ground that part of it consists of a particular device which was common to the trade at the date of the registration of the trade mark. But if in an action for infringement the

alleged infringement is not the user of the trade mark as a whole, but the user of the particular device common to the trade, the action will fail & the proprietor of the combined mark may be required to place a note on the Register to the effect that no claim is made for the exclusive use of the particular device.—*WIGFULL (J.) & SONS, LTD. v. JACKSON (J.) & SON, LTD.*, [1916] 1 Ch. 213; 85 L. J. Ch. 170; 111 L. T. 347; 32 T. L. R. 182; *sub nom. WIGFULL (J.) & SONS, LTD. v. JACKSON (J.) & SON, LTD., Re TRADE MARKS NOS. 30, 759 & 247, 273, 33 R. P. C. 97; subsequent proceedings, sub nom. Re WIGFULL (J.) & SONS' TRADE MARKS*, [1919] 1 Ch. 52, C. A.

*Annotations*:—*Overd. Imperial Tobacco Co. of Great Britain & Ireland v. Pasquall, Re Imperial Tobacco Co.'s Trade Mks.*, [1918] 2 Ch. 207. *Consd. Re Wigfull's Trade Mks.*, [1919] 1 Ch. 52. *Reid. Re Burford's Appln.*, [1919] 2 Ch. 28.

410. ————]—Under statutes subsequent to registration.]—Pltfs., who were the proprietors of a preparation for the relief of gripes in children, had in 1876 registered the words "Gripe Water" with a floral scroll. Defts. sold a preparation for gripes which they also called "Gripe Water." Pltfs. brought an action against defts. claiming injunctions to restrain them from infringing their trade mark & also from passing off. Defts. moved to expunge the mark from the Register:—*Held*: (1) pltf.'s claim for an injunction to restrain passing off wholly failed; (2) whether the mark was a device with words added or words in common use with a device, the abstraction from it of the words "Gripe Water" was an infringement, & sect. 44 as to non-interference with the use of any *bona fide* description of the character or quality of goods only applied to marks actually registered under Trade Marks Act, 1905 (c. 15); (3) although the mark could not be registered at the present time, having regard to the provisions of sect. 11 of the Act, yet at the date of registration it was a valid mark, & ought not now to be removed.—*Re WOODWARD'S TRADE MARK, WOODWARD, LTD. v. BOULTON MACRO, LTD.* (1915), 85 L. J. Ch. 27; 112 L. T. 1112; 31 T. L. R. 269; 32 R. P. C. 173.

*Annotations*:—*Reid. Wigfull v. Jackson*, [1916] 1 Ch. 213; *Imperial Tobacco Co. of Great Britain & Ireland v. Pasquall, Re Imperial Tobacco Co.'s Trade Mks.*, [1918] 2 Ch. 207.

411. ————]—A tobacco co. was the registered owner of three trade marks for manufactured tobacco consisting, in part, of the Prince of Wales' feathers. The marks had been continuously used by the co. & their predecessors in title for a long series of years in connection with the sale of tobacco, & were all registered as old marks prior to 1905. No royal warrant had been granted to the co. for the right to use the feathers, nor, when a motion to expunge the marks was launched, were there any persons holding warrants from the present or any former Prince of Wales. Upon a motion by the Royal Warrant Holders' Assocn. under Trade Marks Act, 1905 (c. 15), s. 35, to have these three marks expunged from the register on the ground that they were contrary to law & calculated to deceive within the meaning of Trade Marks Act, 1905 (c. 15), s. 11—*Held*: on the evidence, appets. had not established that the marks were calculated to induce the belief that resps. held a Royal warrant, but even if they had been, s. 11 of the Act had no application to marks which were in no sense contrary to law when registered, & the use of which at the present time was identical with that which had obtained ever since they were registered. The mere fact that the marks contained matter now no longer registrable did not supply any reliable criterion for determining whether they were contrary to law,



or for measuring their alleged deceptive qualities. —*Re IMPERIAL TOBACCO CO. OF GREAT BRITAIN & IRELAND LTD'S TRADE MARKS*, [1915] 2 Ch. 27; 84 L. J. Ch. 613; 112 L. T. 632; 31 T. L. R. 408; 59 Sol. Jo. 456, C. A.

*Annotations*.—*Apld.* *Re Woodward's Trade Mk.*, Woodward v. Boulton Macro (1915), 85 L. J. Ch. 27. *Reid.* *Wigfull v. Jackson*, [1916] 1 Ch. 213.

412. — [The fact that a registered trade mark was, at the time of its registration, not properly registrable as not coming within Trade Marks Act, 1905 (c. 15), s. 9, or the corresponding sects. of the earlier Acts, does not render it "disentitled to protection in a ct. of justice" within the meaning of sect. 41; & after the lapse of seven years from the date of registration it cannot on that ground be removed from the register under sect. 35.—*IMPERIAL TOBACCO CO. OF GREAT BRITAIN & IRELAND v. PASQUALI, Re IMPERIAL TOBACCO CO'S TRADE MARKS*, [1918] 2 Ch. 207; 87 L. J. Ch. 481; 119 L. T. 271; 31 T. L. R. 408; 62 Sol. Jo. 602; 35 R. P. C. 185, C. A.

*Annotation*.—*Reid.* *Re Wigfull's Trade Mk.*, [1919] 1 Ch. 52.

413. — [No suggestion of fraud—Mark not calculated to deceive.]—*Pltfs.*, who were the proprietors of a wine & spirit business in London which had for a very long time been known as "Short's," & who also were the owners of a registered trade mark consisting of that name, brought an action against *deft.* for an injunction to restrain infringement of their trade mark & passing off. *Deft.* whose name was Ernest Louis Short had acquired the lease of certain licensed premises at Woolwich & had there exhibited his name as "Short's," & he had also so described his house & goods in various advertisements & on the labels of bottles. *Deft.* moved to rectify the Register of Trade Marks by expunging the trade mark therefrom. The evidence showed that *pltf.'s* was the only business in the trade known as "Short's," & that some few people had in fact mistaken *deft.'s* house for a branch of *pltf.'s*. Before *deft.'s* evidence was concluded an injunction was by consent granted, *deft.* paying an agreed sum for costs. On the motion to rectify:—*Held*: as the mark was an old one & had been on the Register for seven years & there was no suggestion of fraud, & it could not possibly be said that the mark was calculated to deceive, the motion to rectify failed.—*SHORT'S, LTD. v. SHORT* (1914), 31 R. P. C. 294.

414. — [Proceedings begun before protection absolute—Hearing subsequent.]—The provision of Trade Marks Act, 1905 (c. 15), s. 41, by which a mark shall be taken to be valid in all respects seven years after the original registration "in all legal proceedings relating to a registered trade mark," is not effective to prevent removal from the register in a case where the proceedings were begun within the period, although the hearing of a motion upon which the order for removal was made took place after the seven years had expired.

In such a case it was not necessary for the judge making the order to ante-date his judgment, under the discretion conferred upon him by Ord. 41, r. 3, so as to bring it within the seven years, the

initiation of the proceedings within the period being enough to give him jurisdiction.—*Re KEYSTONE KNITTING MILLS TRADE MARK* (1928), 97 L. J. Ch. 316; 45 R. P. C. 421, C. A.

#### SUB-SECT. 2.—EXTENT OF PROTECTION.

*See* Trade Marks Act, 1905 (c. 15), ss. 38-45; Trade Marks Act, 1919 (c. 79), sched. 11.

415. Mark registered under specific class—In respect of particular articles of class—Protection as to those articles only.—(1) A trade mark registered under one of the classes given by the rules, but in respect to some particular articles in that class, will be protected under Patents, Designs, & Trade Marks Act, as to those articles only.

(2) A trade mark need not be actually affixed to the article. It is sufficient if the trade mark is on the cover or wrapper in which the article is sold.

(3) The common law rights of a tradesman using a trade mark are not affected by the registration of the trade mark, so that, if he has acquired a right to a trade mark, as to a certain class of goods, & the trade mark as registered is confined to a part of that class of goods, he will be entitled to protection for the whole class of goods.—*JAY v. LADLER* (1888), 40 Ch. D. 619; 60 L. T. 27; 37 W. R. 505; 5 T. L. R. 57; 6 R. P. C. 136.

*Annotations*.—*As to* (2) *Reid.* *Louise v. Gainsborough* (1902), 87 L. T. 591. *Generally, Reid.* *Bourne v. Swan & Edgar, Re Bourne's Trade Mk.*, [1904] 1 Ch. 211.

416. — [Effect on common law right.]—*JAY v. LADLER*, No. 415, *ante*.

417. — [Protection to that class only.]—The registration of a trade mark for one class of goods does not entitle the registered proprietor to prevent another person from using the mark in connection with goods included in a different class. *Pltf.* registered a trade mark for the goods included in Class 6 in the first schedule to the Rules under the Trade Marks Registration Act, 1875 that is, "Machinery of all kinds, & parts of machinery, except agricultural machines included in Class 7." In his application for registration, *pltf.* stated that the article in connection with which the mark was to be used was "a toilet requisite, being a machine to hold a reel of perforated paper." *Pltf.* sold both the machines & the reels or rolls of paper, which were intended to be used together. The two things could, however, be purchased separately. When a roll of paper had been used up, another could be fixed in the machine. *Pltf.* did not place the mark upon the machine, but he placed it on the wrappers in which his rolls of paper were sold. *Deft.* sold similar rolls of paper with the same mark on the wrappers:—*Held*: paper not being included in Class 6, the registration did not entitle *pltf.* to prevent *deft.* from using the mark in connection with his rolls of paper; but on the evidence an injunction was granted to restrain *deft.* from passing off his goods as *pltf.'s*.—*HART v. COLLEY* (1890), 41 Ch. D. 193; 59 L. J. Ch. 355; 62 L. T. 623; 38 W. R. 440; 6 T. L. R. 216; 7 R. P. C. 93.

#### PART I. SECT. 4, SUB-SECT. 2.

*g. Colour of trade mark.*—Under the English Act a trade mark may be registered in any colour, & the registration confers on the registered owner the exclusive right to use the same in that or any other colour; & *semble*, our own Act has as extensive an application.—*SMITH v. FAIR* (1887), 11 O. R. 729.—*CAN.*

*h. General trade mark.*—While a general trade mark covers all the classes of merchandise in which *appt.* deals, & when registered prevents any subsequent registration of the same subject matter as a general trade mark, it would not confer an unlimited right to the mark the world over as against any one carrying on an entirely different business who applies for a specific trade

mark consisting of the same mark as applied to goods of a different character not manufactured by the owner of the general trade mark.—*Re GEBB NOBLE'S APPLICATION* (1913), 11 Exch. C. R. 499; 11 D. L. R. 385.—*CAN.*

*k. Registration limited to business in Canada.*—The registration of a trade mark under Trade Mark & Design

*Sect. 4.—Effect of registration: Sub-sect. 2. Sect. 5: Sub-sect. 1, A.]*

**418. — Use only in respect of one article in class—Whole class not protected.]—**EDWARDS v. DENNIS, *Re* EDWARDS' TRADE MARK, No. 331, *ante*.

**419. — — — — —.]** If a trade mark, although registered for an entire class of goods, be used for some only of the articles in the class, the proprietor is not entitled to the exclusive user of the trade mark for other articles in the class, although he may, in fact, manufacture & sell such articles.—HARGREAVE v. FREEMAN, [1891] 3 Ch. 39; 61 L. J. Ch. 23; 65 L. T. 487; 7 T. L. R. 535; 8 R. P. C. 237.

*Annotation: Distd. Board v. Huddart* (1903), 89 L. T. 718.

## SECT. 5. — CORRECTION OF REGISTER AND ALTERATION OF TRADE MARKS.

### SUB-SECT. 1. — CORRECTION OF REGISTER.

#### A. In General.

*See* Trade Marks Act, 1905 (c. 15), ss. 32-37; Trade Marks Act, 1919 (c. 79), scheds. I. & II.

**420. Jurisdiction of court—Registered owner domiciled in Ireland.]—**The High Ct. of Justice in England has jurisdiction, under Patents, Designs, & Trade Marks Acts, 1883 & 1888, to rectify the Register of trade marks kept under those Acts, notwithstanding that the registered proprietor of the mark affected is domiciled in Scotland or Ireland. *Qu.*: whether the Scottish or Irish cts. have a concurrent jurisdiction with the English cts. to rectify the Register.

No special procedure is prescribed by the Acts or rules as to the service on parties interested of notice of application to expunge a trade mark. Therefore it is sufficient if such notice is given as is required by natural justice.

Where the registered proprietor of a trade mark registered in England under Patents, Designs, & Trade Marks Act, 1883 (c. 57), was a British subject domiciled in Ireland, out of the jurisdiction of the English cts. & therefore could not be served with a notice of motion to expunge the trade mark, it was held sufficient to send him a copy of the notice of motion with a letter informing him that proceedings had been commenced which might affect his interests; & ct. heard the motion & made an order, although the registered proprietor did not appear. *Re* KING & CO.'S TRADE MARK, [1892] 2 Ch. 462; 62 L. J. Ch. 153; 67 L. T. 33; 40 W. R. 580; 8 T. L. R. 593; 9 R. P. C. 350, C. A.

*Annotations:—* *Consd.* Bayer v. Cornell (1897), 14 R. P. C. 275. *Reid.* *Re* Kay's Patent (1894), 70 L. T. 756; *Chiff.* Edwards v. Brown, [1895] 2 Ch. 21; *Raymont v. Raymont & Stuart, Chapman v. Chapman & Bunst*, [1910] 1 P. 271; *De Gasquet James v. Mecklenburg-Schwerdt*, [1914] P. 53; *Hunter v. Stadtische Hochschulerische Gesellschaft*, [1925] 2 K. B. 493.

**421. — Concurrent jurisdiction of Scottish courts.]—***Re* KING & CO.'S TRADE MARK, No. 420, *ante*.

**422. Discretion of court.]—**Pltfs. had a large export trade in bottled beer & a small local trade

in England. Defts. sold bottled beer in England only. Both sold beer in the north of London. In 1879 pltfs. registered as a new trade mark for beer a picture of a stout man, with the words "John Bull Brand"; & in 1886 they registered as a new mark for beer a label containing the old mark with some additional words. In 1884 defts., in ignorance of pltfs.' rights, adopted for their beer a label containing a picture of a fat man & the words "John Bull Registered"; & they continued this user after knowledge of pltfs.' marks. This label was not registered as a trade mark, but only registered at Stationers' Hall. Pltfs. moved to restrain defts. from infringing their trade marks & from passing off their beer as pltfs.' Defts. moved to have pltfs.' marks expunged. In the course of the trial it was discovered that the words "John Bull" had been used by another firm in connection with beer from 1875 to 1890, but their beer had only a local sale, & the use of those words was now abandoned:—*Held*: (1) assuming the registration of the words "John Bull" might have been successfully opposed, the ct. ought not now, in the exercise of its discretion under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 90, to order those words to be expunged; (2) pltfs. were entitled to an injunction both on the ground of trade mark & on the ground of their common law right, notwithstanding the absence of any evidence of actual deception.—PAINE & CO. v. DANIELLS & SONS' BREWERIES, *Re* PAINE & CO.'S TRADE MARKS, [1893] 2 Ch. 567; 62 L. J. Ch. 732; 68 L. T. 801; 42 W. R. 40; 9 T. L. R. 457; 2 R. 491; 10 R. P. C. 217, C. A.

*Annotations:—* *Generally.* *Reid.* *Re* Talbot's Trade Mk. (1894), 63 L. J. Ch. 261; *Re* Wright, Crossley's Trade Mk. (1898), 15 R. P. C. 377; *Re* Trade Mk. 96,997, Field v. Wagon Syndicate, [1900] 1 Ch. 631; *Bourne v. Swan & Edgar, Re* Bourne's Trade Mk. (1902), 72 L. J. Ch. 168; *Board v. Huddart* (1903), 89 L. T. 718; *Re* Crossfield, *Re* California Fig Syrup Co., *Re* Brock, [1910] 1 Ch. 130; *Scott Paper Co. v. Dayton Paper Works* (1927), 44 R. P. C. 529.

**423. — — — — —.]—***Re* GENTETNER'S TRADE MARK, No. 477, *post*.

**424. — — — — —.]—**In July, 1908, the Magneta Time Co., Ltd., registered as a trade mark the word "Magneta" for goods in class 10. In 1916 the goodwill & trade marks of the co. were sold in a debenture holders action to M. & assigned to him & in Nov. 1917, the co. was dissolved. On Nov. 30, 1917, a new co. was incorporated with the same name as the first co. & on Feb. 6, 1918, M. sold & assigned the goodwill & trade marks to the second co., but neither assignment had been registered when the time for renewal of the trade mark arrived in July, 1922. The usual notice as to renewal was sent by the Registrar to the address of the first co., but it was returned; & a second notice was sent to the address of the second co., as the Registrar had discovered that address, but was not aware that the second co. was a different co. In Apr. 1922, the second co. made an application for renewal & the registration was renewed as from July 14, 1922, & in June, 1922, the address on the register was altered to that of the second co.

of the register of trade marks, at the suit of any person aggrieved, notwithstanding that the matter has not been referred to the ct. by the Minister under the Trade Mark & Design Act.—*Re* "VULCAN" TRADE MARK (1915), 51 S. C. R. 411.—CAN.

*n. — Scottish Courts.]* An action was brought in the Ct. of Session, concluding (1) for declarator that a particular trade mark was improperly entered in the register & should be expunged; (2) for declarator that the said trade mark was incapable of regis-

ter, *Act*, R. S. C., 1906 (c. 71), does not entitle applt. to protection thereunder if he is not, or does not propose to be, engaged in business in Canada in the goods to which it is applicable.—SEATTLE BREWING & MALTING CO. v. TAINIER BREWING CO. OF CANADA, LTD., [1924] 4 D. L. R. 940; [1924] 3 W. W. R. 502; 34 B. C. R. 331, CAN.

### PART I. SECT. 5, SUB-SECT. 1.—A.

**1. Jurisdiction of court—Exchequer Court.]—**The ct. has jurisdiction to

rectify the register of trade marks in respect of entries made therein without sufficient cause, either before or subsequent to July, 10, 1891, the date on which 54 & 55 Vict. c. 35, (D.), came into force.—*DE KUYPER & SON v. VAN DULKEN, WEILAND & Co.* (1892), 3 Exch. C. R. 88; 24 S. C. R. 117.—CAN.

*m. — — — — —.]* Under Trade Mark & Design Act, R. S. C. (1906), c. 71, ss. 11-13, & 42, & Exchequer Ct. Act, R. S. C. (1906), c. 140, s. 25, the Exchequer Ct. of Canada has jurisdiction to order the rectification

In 1925 the second co. applied to register the assignment to them & they were registered as proprietors from Feb. 6, 1918. The second co. having commenced an action for infringement, defts. moved to rectify the Register by expunging the trade mark on the ground (*inter alia*) that the renewal was invalid, as there was then no registered proprietor in existence & the motion was heard on this point as a separate point:—*Held*: the trade mark was on the Register & would remain there unless removed; the ct. has under sect. 35 a discretion as to rectification of the Register; here the objection to the registration was based on a pure technicality which had been remedied; & the trade mark ought to remain on the Register.—*Re MAGNETA TIME CO., LTD.'S TRADE MARK* (1927), 44 R. P. C. 169.

**425. Simultaneous proceedings for infringement & removal from register—Grant of certificate of right to exclusive use.**—*FIELD (J. C. & J.) & CO., LTD. v. WAGEL SYNDICATE, LTD., Re TRADE MARK 96, 997, No. 33, ante.*

**426. Removal—Whether order conditional—Subject to application to amend.**—*Re DEXTER'S APPLICATION, Re WILLS'S TRADE MARKS, No. 252, ante.*

**427.** — — — — —. The ct. rejected the owner's contention that an order to expunge his mark, which had been registered under Patents, Designs, & Trade Marks Act, 1883 (c. 57), should only be made subject to an application to amend being made by him within a reasonable time, but made an order to expunge the mark absolutely.—*DAY & RILEY & WHITTAKER* (1900), 48 W. R. 556; 41 Sol. Jo. 502; 17 R. P. C. 517.

**428.** — — — — —. Grounds for removal same as grounds for opposing original registration—*Opposition to registration unsuccessful Res judicata.*—On a motion to expunge three trade marks from the Register an application was made to strike out certain grounds of objection to one of the marks on the ground that these objections had been already decided upon in a previous proceeding between the same parties, & that the matter was *res judicata*. In the opposition to the application to register this mark the I. M. co. had applied for leave to raise certain further grounds of objection, which application was dismissed by SWINFEN EADY, J. K. & J., Ltd., contended that the I. M. co. were not at liberty to raise these same objections on the motion, & that it was *res judicata* that the I. M. co. could not raise the objections, & moved to have them struck out. The I. M. co. contended that there was no estoppel on the motion to rectify, it being a different proceeding:—*Held*: it was not *res judicata* that the I. M. co. could not raise the objections, as the proceedings then before the ct. were different from the proceedings before (SWINFEN EADY, J.).—*Re KENRICK & JEFFERSON LTD.'S THREE TRADE MARKS* (1910), 28 R. P. C. 45.

**429.** — — — — —. Of mark dependent on registration of prior mark—*Prior mark removed.*—Pltf. Co., who were the proprietors of the letters patent for the well-known "Bowden Wire" used in connection with the transmission of power for cycle & motor cycle brakes, in 1901 promoted deft. co., & transferred to it that part of their business which was concerned with brakes for pedal cycles only. In 1903 pltf. co. registered a trade mark in class 13 for brakes for velocipedes, consisting of a picture of a coil of wire with the word "Bowden" enclosed

therein, & they granted a licence to deft. co. to use this mark in connection with brakes for pedal cycles. The licence was limited to the continuance of the letters patent. In 1901 pltf. co. registered the same trade mark in class 13 in respect of component parts, attachments, & accessories, other than brakes, of velocipedes, etc. The directors of the two cos. were substantially the same until shortly before the commencement of the action. On the expiration of the letters patent deft. co. continued to use the mark not only on brakes for pedal cycles but also in respect of brakes for motor cycles, which they then began to manufacture. Pltf. co. brought an action to restrain deft. co. from using the trade marks on any goods manufactured by them. Dft. co. contended that the licence was ineffective, & that the mark had been used by them for a great number of years, not only with the knowledge but also with the concurrence of pltf. co. Dft. co. moved to expunge the trade marks, & alleged that they were not distinctive, & that they were calculated to deceive:—*Held*: both trade marks must be removed from the register as not being distinctive & as being calculated to deceive.—*BOWDEN WIRE, LTD. v. BOWDEN BRAKE CO., LTD. (No. 1), Re BOWDEN WIRE, LTD.'S TRADE MARKS* (1913), 30 R. P. C. 580, C. A.; *on appeal*, 31 R. P. C. 385, H. L.

**430. Board of Trade order directing registration—Whether court precluded from hearing application to rectify.**—*THORNE (HENRY) & CO., LTD. v. SANDOW, LTD., No. 55, ante.*

**431.** — — — — —. *TEOFANI & CO., LTD. v. TEOFANI, Re TEOFANI & CO.'S TRADE MARK, No. 81, ante.*

**432. Appeal—From order for rectification—Enlargement of time for appeal.**—In Dec. 1915, an order was made by the judge rectifying the Register of Trade Marks by removing resps. trade mark therefrom. No appeal from that order was entered by resps. within the time limited for appeal. In May, 1918, the Ct. of Appeal in another case dissented from the view taken by the judge of the construction of Trade Marks Act, 1905 (c. 15), in resps. case & overruled his decision. On an application by resps., under R. S. C., Ord. 58, r. 15, for an order enlarging the time for appealing from the order of the judge: *Held*: the ct. had power to enlarge the time for appealing, if it were just that, under all the circumstances, an order enlarging the time should be made, but that the present appets. had shown no sufficient ground for making the order, & their application must therefore be refused; the fact that in a subsequent case the Ct. of Appeal had taken a different view of the construction of an Act of Parliament from that taken by the judge in a previous case was not necessarily a ground for enlarging the time for appealing from his decision.

For the purposes of an application under R. S. C., Ord. 58, r. 15, there is no distinction in meaning between granting special leave to appeal under the rule as it originally stood & enlarging the time for appeal under the rule in its present form.—*Re WIGFULL (J.) & SONS' TRADE MARKS*, [1919] 1 Ch. 52; 88 L. J. Ch. 30; 120 L. T. 78; 35 R. P. C. 263; *sub nom. Ex p. WIGFULL (J.) & SONS, LTD.*, 35 T. L. R. 26; *sub nom. Re TRADE MARK No. 30,759*, 63 Sol. Jo. 114, C. A.

*Annotation*:—*Reid, Prophet v. Roberts* (1918), 11 B. W. C. C. 301.

tration; (3) for declarator that defts. had no exclusive right to the trade mark in question; & (4) for reduction of an entry in the register:—*Held*: whether Patents, Designs & Trade

Marks Act, 1883, s. 90, conferred a privative jurisdiction on the English courts or not, the action was not an application for rectification of the register, & the Scottish cts. had jurisdic-

tion to entertain it.—*DEWAR v. DEWAR & SONS, LTD.* (1899), 2 F. (Ct. of Sess.) 249; 37 Sc. L. R. 188; 7 S. L. T. 263. —*SCOT.*

*Sect. 5.—Correction of register and alteration of trade marks: Sub-sect. 1, B. (a) & (b).]*

*B. The Application.*

*(a) In General.*

See Trade Marks Act, 1905 (c. 15), ss. 32-37; Trade Marks Act, 1919 (c. 79), scheds. I. & II.

**433. On refusal of Registrar to rectify—Motion—Notice to Registrar.]—**An application to the ct. by a person aggrieved by the refusal of the Registrar to enter his name upon the Register as the proprietor of a trade mark under Registration of Trade Marks Act, 1875 (c. 91), may be by way of motion that the Registrar may be rectified by entering his name as such proprietor, two clear days' notice of motion being given to the Registrar. — *Ex p. STEPHENS* (1876), 21 W. R. 819.

**434. Failure to oppose registration or see advertisement of registration—Whether bar to application.]—**(1) When a trade mark has been used by more than three persons engaged in the same trade, it is common to the trade, & cannot be registered by any one.

(2) A person who registers a trade mark does so at his own risk, & if he registers one which is common to the trade it will be removed from the Register on the application of the parties aggrieved, & he will have to pay the costs of the application. It makes no difference that he was the person who was the first to adopt the trade mark if it had become common at the date of registration.

(3) There is no obligation on persons interested to see an advertisement in the *Trade Marks Journal* of an application for registration, & the fact that they have not seen such an advertisement or opposed the application is no bar to their applying to have the mark removed from the Register after the registration is complete.—*Re HYDE & Co.'s TRADE MARK* (1878), 7 Ch. D. 724; 51 L. J. Ch. 395, n.; 38 L. T. 777; 26 W. R. 625.

*Annotations:—* 1s to (1) *Reff.*, *Re Munch's Appln.* (1883), 50 L. T. 12; *Re "Alpine" Trade Mk.* (1886), 53 L. T. 79, 18 to (2) *Reff.*, *Raisonné v. Graham* (1882), 51 L. J. Ch. 897. *Generally*, *Reff.*, *Re Lloyd's Trade Mk.*, *Lloyd v. Bottomley* (1881), 27 Ch. D. 616.

**435. Service of application—On registered owner—Bankruptcy of owner—Service on trustee in bankruptcy.]** The registered owner of a trade mark having, since notice of an application to strike the trade mark off the Register, gone into liquidation, leave was given under R. S. C., Ord. 50, r. 1, to serve notice of the application on the trustee in liquidation. The term "action" in Ord. 50, does not confine the operation of that order to proceedings in actions.—*Re ROWE'S TRADE MARK* (1882), 48 L. T. 388.

**436. — — — — — Necessity for formal notice—Letter.]—***Re KING & Co.'s TRADE MARK*, No. 420, *ante*.

**437. — — — — — Outside jurisdiction.]—**A notice of motion to rectify the Register by striking out a trade mark registered in the name of a foreign co. not carrying on business within the jurisdiction was served on the Comptroller & on the co. Service on the co. held bad & set aside.

*Semble:* the proper course was to proceed on the notice against the Comptroller, after sending a copy to the co. with an intimation that proceedings which might affect its interests were pending.—*Re COMPAGNIE GÉNÉRALE D'EAUX*

MINÉRALES ET DE BAINS DE MER, [1891] 3 Ch. 451; 60 L. J. Ch. 728; 40 W. R. 89; 7 T. L. R. 709; 8 R. P. C. 446.

*Annotations:—* *Consd. Re King* (1892), 67 L. T. 33. *Reff.*, *Re Cliff, Edwards v. Brown*, [1895] 2 Ch. 21.

**438. — — — — —**—A word was registered as a trade mark in 1891 upon the instructions & the name of an American giving Chicago as his address, with the name & address of an English firm of patent agents as his address for service. In 1899 an American co. applied for the registration of the same word as their trade mark, they having used it for a long time in America & also more recently in England. This application was objected to by the Comptroller, in view of the previous registration. Thereupon inquiries were instituted by the co., the result of such inquiries being that the registered proprietor could not be found to have ever used the mark, or done any business either in America or in England; that he could not be traced in Chicago or elsewhere; that letters addressed to him at Chicago were returned through the Dead Letter Office; & that the patent agents named as the address for service could give no information with respect to him. The co. then gave notice of motion to rectify the Register by expunging the mark, & left a copy of this notice at the address for service & sent another copy of it in a registered packet to Chicago, accompanied by a letter. On proof, of these facts, & the registered proprietor not appearing, though more than 28 days had elapsed since the dispatch of the packet & letter to Chicago:—*Held:* the mark should be expunged.—*Re ASHTON'S TRADE MARK* (1900), 18 W. R. 389; *sub nom. Re ASTON'S TRADE MARK*, 41 Sol. Jo. 212.

**439. — — — — — On Comptroller—Registered owner outside jurisdiction.]—***Re COMPAGNIE GÉNÉRALE D'EAUX MINÉRALES ET DE BAINS DE MER*, No. 437, *ante*.

**440. Time for application—Within statutory period giving protection.]** *TEOFANI & Co., LTD. v. TEOFANI, Re TEOFANI & Co.'s TRADE MARK*, No. 81, *ante*.

—After expiry of statutory period giving protection.]—*See Nos.* 406-413, *ante*.

**441. Merits of applicant irrelevant.]** — The words "Forrest, London," used as part of a trade mark for watches by a watchmaker at Coventry, who had no connection with London, held calculated to deceive. In 1883, H., a Coventry watchmaker, registered a trade mark for watches, consisting of a device of a tree with the words "Forrest, London." F. had been a watchmaker in London, who died in 1871. H. placed the words "Forrest, Trade Mark Registered" on his watches, & he also claimed, by his advertisements, to be entitled to various registered trade marks, among which he sometimes included the name "Forrest," sometimes "John Forrest," & sometimes "John Forrest, London." Sometimes the tree appeared in the advertisements, but more often not, & never in the form of the registered trade mark. In 1892, T., who claimed to have succeeded to F.'s business, wrote a letter of complaint, to which H.'s solrs. replied, claiming in effect an exclusive right to the name "Forrest." T. then commenced an action against H., & while this was pending, moved to rectify the Register by expunging H.'s trade mark. He claimed to have an exclusive

**PART I. SECT. 5, SUB-SECT. 1.—B. (a).**

**c. How made—Whether by counterclaim.]** An application to rectify the register of trade marks cannot be made by counterclaim.—*SPILLING BROTHERS*

*v. O'KELLY* (1904), 21 C. L. T. 119; 8 Exch. C. R. 426.—**CAN.**

**d. Time for application—Whether after lapse of five years.]—**A person aggrieved by an entry in the Register of Trade Marks is not excluded by the

lapse of five years from the date of the entry from presenting a petition for rectification of the register.—*HEBBERT v. COWIE BROTHERS & Co.* (1897), 21 L. (Cl. of Sess.) 361; 34 Sc. L. R. 280; 4 S. L. T. 243.—**SCOT.**

right to the name "Forrest" as being F.'s successor in business. H. alleged by his affidavits that the name "Forrest" was in common use in the trade in connection with English lever watches:—*Held*: (1) the registration of the words "Forrest, London" as part of the trade mark was calculated & intended to deceive, & the words had been used for the purpose of deception, the case was therefore within Registration of Trade Marks Act, 1875 (c. 91), & the entire mark must be removed from the Register.

(2) The merits or demerits of applt., I think, are irrelevant to the question I have to decide (CHITTY, J.). *Re HILL'S TRADE MARK* (1893), 37 Sol. Jo. 339; 10 R. P. C. 113.

*Annotation*:—As to (1) *Distd. Re Cohen's Trade Mk.* (1921), 39 R. P. C. 33.

**442. Delay in bringing application—Respondent placed in unfair advantage—Material evidence lost through delay—Refusal of relief.**—*BOURNE v. SWAN & EDGAR, LTD., Re BOURNE'S TRADE MARKS*, No. 311, *ante*.

(b) *Who may Apply.*

See Trade Marks Act, 1905 (c. 15), ss. 32-37; Trade Marks Act, 1919 (c. 79), sched. I. & II.

**443. Person aggrieved.**—*V. registered for champagne, etc., on June 5, 1884, a trade mark comprising conspicuously "Monobrut."* This trade mark had been previously registered in France. A specially dry wine was sold under this trade mark, & some of it was sold in the United Kingdom in 1885 & 1886. V. agreed to transfer the trade mark to L., who began to advertise & sell "Monobrut" champagne in the United Kingdom in 1889, whereupon R. & co. gave notice of motion to rectify the Register by expunging the "Monobrut" trade Mark. R. & co. had since 1883 the sole right to sell in the United Kingdom the champagnes of H. & co., which bore their registered trade marks "Monopole" & "Dry Monopole." R. & co. only became aware of the registration of "Monobrut" shortly before they moved:—*Held*: "Monobrut" was descriptive, & therefore could not be registered in England, & the fact that it had been registered in France made no difference; R. & co. were aggrieved persons; & the trade mark must be expunged.—*Re VIGNIE'S TRADE MARK "MONOBRUT"* (1889), 61 L. T. 495; 5 T. L. R. 686; 6 R. P. C. 490.

*Annotation*:—*Distd. Re Densham's Trade Mk.*, [1895] 2 Ch. 176.

**444.** —.] *BAKER v. RAWSON*, No. 108, *ante*.

**445.** —.] *Re TALBOT'S TRADE MARK*, No. 30, *ante*.

**446.** —.] On a motion to rectify the Register by expunging the name of R. as proprietor of the trade mark "Koptica," & by inserting instead the name of F., resp. alleged that appets. were estopped by their conduct, & the discretionary power of the Ct. ought not to be exercised in their favour, & that appets. were not persons aggrieved:—*Held*: appets. [who were the exors. of an assignee from the original registered owner], were persons aggrieved, & the name of R. must be expunged, but no costs were given as appets. had asked for something the Ct. had no power to grant. *Re HAINES' TRADE MARK* (1899), 17 R. P. C. 40.

#### PART I. SECT. 5, SUB-SECT. 1.— B. (b).

**443 i. Person aggrieved.**—*CROTHIES v. WILLIAMSON CANDY CO.*, [1925] 2 D. L. R. 844; [1925] S. C. R. 377. *CAN.*

**448 i.** — *Person having used registered word.*—In 1885 resp., by their corporate title, registered a trade mark, consisting of a label with the

name "Snow Flake Baking Powder" printed thereon, in the department of agriculture. Some four years after such registration by resp., claimant applied to register the word-symbol "Snow Flake" as a trade mark for the same class of merchandise, stating that he knew of resp.'s registration, & alleging that it was invalid by reason

**447.** —.]—Resps. were the proprietors of three old marks in respect of tobacco, two of which were registered in 1876, & the third in 1891, which bore (*inter alia*) the device of the Prince of Wales' Feathers & the words "Prince of Wales' Smoking Mixture." At the date of the registration of one of the marks its then owner did supply tobacco to Marlborough House, but since the accession of the present King no warrants had been granted by the Prince of Wales. All warrants granted by any prince determine on his death or accession. The Royal Warrant Holders' Assn., a corporate body of persons holding royal warrants, under authority to take proceedings moved to expunge these marks from the register as being "calculated to deceive" by leading to the belief that resps. held warrants from the Prince & supplied the smoking mixture to him: *Held*: appets. were not "persons aggrieved" within Trade Marks Act, 1905 (c. 15), s. 35. *Re IMPERIAL TOBACCO CO. OF GREAT BRITAIN & IRELAND, LTD.'S TRADE MARKS*, [1915] 2 Ch. 27; 81 L. J. Ch. 613; 112 L. T. 632; 31 T. L. R. 92; 59 Sol. Jo. 128; 32 R. P. C. 10; *affd.* without touching this point, [1915] 2 Ch. p. 41, C. A.

*Annotations*:—*Refd. Re Woodward's Trade Mk.*, Woodward v. Boulton Macro (1915), 55 L. J. Ch. 27; Wigfull v. Jackson, [1916] 1 Ch. 213. *Mentd.* Imperial Tobacco Co. of Great Britain & Ireland v. Pasquah, *Re Imperial Tobacco Co.'s Trade Mk.*, [1915] 2 Ch. 207.

**448.** *Person having used registered word.*—When a mere word, not used as a trade mark before Trade Marks Registration Act, 1875 (c. 91), is put on the register, any dealer who has used the word in his trade in connection with or as descriptive of an article in which he deals, is a person aggrieved by the registration, within the meaning of sect. 5. *ROSE v. EVANS* (1879), 48 L. J. Ch. 618.

*Annotation*:—*Refd. Re Hayward's Trade Mk.* (1885), 53 L. T. 187.

**449.** — *Former licensee of manufacturer—After expiration of patent.*—The assignee of a patent for a washing machine applied to it the name of "The Home Washer," & registered that name as his trade mark in respect of it. He did not manufacture the machines, or any other goods in the same class, but granted an exclusive licence to a manufacturing firm, who paid him royalties. They invented & patented various improvements in the machine, & after the expiration of the patent, six years from the registration of the trade mark, they continued to manufacture the improved machines & to describe them by the old name, but paid no royalties, & the registered proprietor had not, after a year & nine months from the expiration, begun to manufacture, though he had been in negotiation with manufacturers for them to do so in conjunction with him:—*Held*: the former licensee, against whom the registered proprietor was moving for an injunction, were "persons aggrieved" within rule 33, & the mark must be removed from the register of trade marks on the ground that, notwithstanding the negotiations, the registered proprietor was not "engaged in any business concerned in the goods within the same class as the goods with respect to which the mark was registered."—*Re RALPH'S TRADE-MARK, RALPH v. TAYLOR* (1883), 25 Ch. D. 191; 53 L. J.

of prior use by him & his predecessors in title. The evidence sustained claimant's allegation:—*Held*: the word-symbol in question had become the specific trade mark of claimant by virtue of first use, & the registration by the resp. must be canceled. *GHOIR v. SNOW DRIFT BAKING POWDER CO.* (1889), 2 Exch. C. R. 568. *CAN.*

*Stet. 5. -Correction of register and alteration of trade marks: Sub-sect. 1, B. (b).]*

Ch. 188; 19 L. T. 501; 48 J. P. 135; 32 W. R. 168.

*Annotations: Apud. Re GIANACIS' Trade Mk. (1889), 58 L. J. Ch. 782. Re RIVIERE'S Trade Mk. (1883), 53 L. J. Ch. 155.*

**450. - Person not carrying on business in England.] -** R. & co. registered a trade mark for brandy in England. M. & co., who carried on business at Madras, but neither carried it on nor intended to carry it on in England, applied to rectify the register by striking out the name of R. & co. and substituting that of M. & co. as owners of the trade mark, alleging that they, M. & co., were the owners of the trade mark, & had instructed R. & co. to register it in the name of M. & co., instead of which R. & co. had registered it in their own name. The judge held that as M. & co. neither used nor intended to use the trade mark in England they were not entitled to registration of it in England, & could not be persons aggrieved within the meaning of Trade Marks Act, 1875 (c. 91), s. 5, & that on this ground the application must be refused without entering on the merits:—*Held*: assuming M. & co. to have no right to register the trade mark in England, it did not follow as a necessary consequence that they could not be aggrieved by its being registered here in the name of another person, & the case must be dealt with on the merits.—*Qu.*: whether in order to entitle a person to have a trade mark registered, he must be carrying on or intending to carry on business in England.

Whether he is a "person aggrieved" is a matter to be tried on evidence.—*Re RIVIERE'S TRADE MARK* (1881), 26 Ch. D. 48; 53 L. J. Ch. 578; 50 L. T. 703; 32 W. R. 390, C. A.; *subsequent proceedings sub nom. Re RIVIERE & Co.* (1885), 55 L. J. Ch. 515, C. A.

*Annotations: Apud. Re GIANACIS' Trade Mk. (1889), 58 L. J. Ch. 782. Consd. Powell v. Birmingham Vinegar Brewery Co. [1891] A. C. 8. Apud. Re HARNES'S Trade Mk. (1900), 17 R. P. C. 40. Distd. Re NEUCHÂTEL ASPHALTE Co. (1913), 108 L. T. 966. Re RIVIERE'S Trade Mk. (1883), 53 L. J. Ch. 155; 32 W. R. 390, C. A.; *subsequent proceedings sub nom. Re RIVIERE & Co.* (1885), 55 L. J. Ch. 515, C. A. Re APOLLINARIS Co.'s Trade Mks., [1891] 2 Ch. 186; Re EUROPEAN BLAIR CAMERA Co.'s Trade Mk. (1896), 75 L. T. 63. Mentd. Dorkell v. Dougal (1899), 80 L. T. 556; Walter v. Ashton, [1902] 2 Ch. 282.*

**451. -** *Re NEUCHÂTEL ASPHALTE Co.'s TRADE MARK, No. 6, ante.*

**452. - Agent of proprietor of improper marks.] -** A Scottish firm of whisky blenders having commenced proceedings against a London firm of spirit merchants for infringement of their trade mark "Ben Ledi" for Scotch whisky, defts. applied to rectify the Register of trade marks by removal therefrom of pltf.'s trade mark. Pltfs. at the hearing of the application, admitted the invalidity of their trade mark, but contended that defts. were not entitled to make the application, as they had entered into an agreement to act as pltf.'s sole agents in England for the sale of Scotch whisky, & to sell none under the mark in question except that of pltf.'s.—*Held*: defts. were entitled to make the application as "persons aggrieved," within Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 90.—*Re AINSLIE & Co.'s TRADE MARK* (1887), 4 R. P. C. 212.

**453. - Defendant to proceedings relating to trade mark infringement action.] -** A person named N. Gianacis having registered in 1885 the words "Gianacis' cigarettes" in ordinary capital letters as his trade mark, not used before Aug. 1875, for cigarettes, in 1889 he brought an action against another cigarette dealer for selling cigarettes in boxes bearing labels with the name "N. Gianulis." The prayer of the claim did not refer to the registered trade mark, but the fact

of the registration was set out in detail in the body of the statement of claim. On motion by deft. for the removal of the mark from the register:—*Held*: (1) appet. was "a person aggrieved" by the wrongful registration, within Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 90, as being deft. in an action in which it was sought to make some use of the registration against him; (2) the mark should be removed from the register forthwith, without waiting for the trial of the action, since, even if fraud were then proved against deft., it would not validate the registration.—*Re GIANACIS' TRADE MARK* (1889), 58 L. J. Ch. 782.

**454. Trade opposing registration.] -**

(1) The intention of Trade Marks Registration Act, 1875 (c. 91), s. 5, & Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 90, in requiring an appet. for rectification of the Register of trade marks to be a "person aggrieved," is only to prevent the interference of common informers, or of persons actuated by merely sentimental notions, & not to require evidence of serious damage.

(2) Any person who is in the same trade as the person who has wrongfully registered a trade mark, & who desires to deal in goods covered by the wrongful registration, is *prima facie* a person aggrieved.

(3) Whenever one trader, by the wrongful registration of a trade mark, narrows the area of business open to his rivals, & thereby either immediately excludes, or with reasonable probability will in the future exclude, a rival from a portion of the trade into which he desires to enter, that rival is a "person aggrieved."

Although the effect produced, or likely to be produced, by the wrongful registration is not the exclusion, but only the hampering of the rival trader, the rival trader is a "person aggrieved."

(4) Whenever one trader uses the fact of his having a trade mark already on the register as any part of his case against another trader in any legal proceedings, *e.g.* for the purpose of supporting an application for the registration of another trade mark, which the second trader is opposing, the second trader is a "person aggrieved," & none the less because he may have other means of defending himself.—*Re APOLLINARIS Co.'s TRADE MARKS*, [1891] 2 Ch. 186; 61 L. J. Ch. 625; 65 L. T. 6; 8 R. P. C. 137, C. A.

*Annotations: As to (2) Re R. Powell v. Birmingham Vinegar Brewery Co., [1891] A. C. 8; Re Talbot's Trade Mk. (1891), 63 L. J. Ch. 261. As to (3) Re R. Board v. Thom & Cameron, Thom & Cameron v. Board (1907), 24 R. P. C. 697. Generally, Re R. Phillips' Trade Mks., [1891] 3 Ch. 139; Hammond v. Brunker (1892), 9 R. P. C. 301; Re Smokeless Powder Co.'s Trade mks., [1892] 1 Ch. 590; Re Dexter's Appln., Re Willis's Trade Mks., [1893] 2 Ch. 262; Re Soc. Anon. des. Verreries de l'Étoile's Trade Mk., [1894] 1 Ch. 61; Re European Blair Camera Co.'s Trade Mk. (1896), 75 L. T. 63; Re Magnolia Metal Co.'s Trade mks., [1897] 2 Ch. 371; Re Player's Trade-mk., [1901] 1 Ch. 382; Re Bass, Hatcliffe & Gifford's Registered Trade Mks. (No. 2), [1902] 2 Ch. 579; Re Gestetner's Trade Mk., [1907] 2 Ch. 478; Teofani v. Teofani, Re Teofani's Trade Mk., [1913] 2 Ch. 545; Lacteosote v. Abernethy, [1927] 2 Ch. 117.*

**455. - Person having no interest—Common informer.] -** *Re APOLLINARIS Co.'s TRADE MARKS*, No. 454, *ante*.

**456. - - Person actuated by sentimental motives.] -** *Re APOLLINARIS Co.'s TRADE MARKS*, No. 454, *ante*.

**457. - Person suffering limitation of rights—Person in same trade.] -** *Re APOLLINARIS Co.'s TRADE MARKS*, No. 454, *ante*.

**458. - - - - -** [(1) In an application to rectify the Register by the removal of a trade mark, wherever it can be shown that appet. is in the same trade as the person who has registered the trade mark, & that the trade mark, if remaining on the

Register would or might limit what would otherwise be the legal rights of appct., appct. is a "person aggrieved" within Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 90.

(2) Any trader is in the sense of the statute "aggrieved" wherever the registration of a trade mark operates in restraint of what would otherwise be his legal rights.—*POWELL v. BIRMINGHAM VINEGAR BREWERY CO.*, [1894] A. C. 8; 63 L. J. Ch. 152; 70 L. T. 1; 58 J. P. 296; 10 T. L. R. 84; 6 R. 52; *sub nom.* *Re POWELL'S TRADE MARK*, 11 R. P. C. 4, 11. 1.; *affg.* S. C. *sub nom.* *Re POWELL'S TRADE MARK*, [1893] 2 Ch. 388, C. A.

*Annotations*:—*As to (1) Consd. Re Talbot's Trade Mk.* (1894), 63 L. J. Ch. 261. *Refd.* *Re Soc. Anon. des Verrieres de l'Etoile Trade Mk.* [1894] 1 Ch. 61; *Cowie v. Herbert* (1897), 14 R. P. C. 436. *Generally, Refd. Re Verity's Trade Mk.*, *Re Hall & Woodhouse's Trade Mk.* (1901), 18 T. L. R. 214; *Re Chesebrough's Trade Mk.* "Vaseline," [1902] 2 Ch. 1.

459. — — — — — Any trader.] — *Re APOLLINARIS CO.'S TRADE MARKS*, No. 454, *ante*.

460. — — — — —.] — *POWELL v. BIRMINGHAM VINEGAR BREWERY CO.*, No. 458, *ante*.

461. — — — — — Mark unattached to goods & without support of goodwill.] *PINK v. SHARWOOD (J. A.) & CO., LTD.*, *Re ORD (SIDNEY) & CO.'S TRADE MARK*, No. 564, *post*.

462. — — — — — Owner of similar mark.] — *B. & Co.* carried on business in London as dealers in window glass, which they purchased in Belgium & shipped to Australia & other colonies. In 1876 they registered as a trade mark the device of a star, which they had used in connection with their glass since 1875, & their glass was known in the trade by the designation of "Star Brand." In 1885 a Belgian glass manufacturing company registered in Belgium, as a trade mark for glass, the device of a red star, which they had used there since 1880. In 1890 they registered in England as a trade mark for window glass, the words "Red Star Brand." They consigned large quantities of glass to England in cases marked with a red star, but did not deal directly with the colonies. *B. & Co.*, having discovered that glass was being sold in New Zealand under the description of "Red Star Brand," applied to expunge the Belgian co.'s mark from the Register:—*Held*: inasmuch as *B. & Co.* had the right, under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 67, to use their mark in whatever colour they deemed proper, the mere fact that the Belgian co.'s mark consisted of words instead of a device did not prevent it from being calculated to deceive; & therefore *B. & Co.* were "persons aggrieved" within the meaning of Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 90, & were entitled to have the mark expunged from the Register.—*Re SOCIÉTÉ ANONYME DES VERRERIES DE L'ÉTOILE TRADE-MARK*, [1894] 2 Ch. 26; 63 L. J. Ch. 381; 70 L. T. 295; 42 W. R. 420; 38 Sol. Jo. 287; 7 R. 183; *sub nom.* *Re TRADE MARK NO. 90,732, Ex p. SOCIÉTÉ ANONYME DES VERRERIES DE L'ÉTOILE MARCHIENNE BELGIUM*, 10 T. L. R. 315, C. A.

*Annotations*:—*Appld.* *Re Trade-mk. of Dewhurst*, [1896] 2 Ch. 137. *Re Dist.* *Boord v. Bagots, Hutton*, [1916] 2 A. C. 386. *Refd.* *Re Densham's Trade Mk.*, [1895] 2 Ch. 176; *Re Soc. Anon. Dubonnet's Appln.* (1915), 32 L. P. C. 241; *Re Garrett's Appln.*, [1916] 1 Ch. 436. *Mentd.* *Madschaplij voor Fondsenbezit v. Shell Transport & Trading Co.*, [1923] 2 K. B. 166.

463. — — — — — Person not suffering any damage.] — In 1887, Wright, Crossley & co. registered "Wright, Crossley & co." as a trade mark used prior to Aug. 13, 1875, in class 42. The Royal Baking Powder co. moved to rectify the Register by expunging this mark, the chief ground taken being that the words had not been used as a trade mark

prior to Aug. 13, 1875. Resps. objected that appcts. were not persons aggrieved within Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 90. There had been litigation of various kinds between appcts. & resps. On the hearing of the motion:—*Held*: that appcts. were not persons aggrieved, as they had not shown any practically possible way in which they might be damaged by the presence of the trade mark on the Register.—*Re WRIGHT, CROSSLEY & CO.'S TRADE MARK* (1898), 15 R. P. C. 377, C. A.

464. — — — — — Religious body.—Name used as mark.] — The Society of Friends:—*Held*: not to be persons aggrieved by the Registration of the word "Quaker" for spirits.

A firm of wine merchants having registered the word "Quaker" as a Trade Mark in class 43 for fermented liquors & spirits not including whiskey, the Secretary of the Society of Friends applied by motion to rectify the Register by the removal of the trade mark on the grounds that it was not entitled to protection in the Ct. or Registry, & was scandalous & liable to deceive, or had reference to the character or quality of the goods. There is no rule of total abstinence in the Society of Friends:—*Held*: no damage in a legal sense could accrue to the Society of Friends, or that portion of its members who were total abstainers, from the use of the Trade Mark, & they were not persons aggrieved.—*Re ELLIS & CO'S TRADE MARK* (1901), 21 R. P. C. 617.

465. — — — — — Proprietor of mark.—Registered by agent.] — For some time prior to 1895 A. had been carrying on business in America under the style of "the B. co." as a maker of cameras, registered in America as "Bull's eye." "The B. co." were in the habit of supplying these cameras to "the C. co." an English co., who claimed to be, but were not in fact, sole agents in this country. In June, 1895, "the C. co." registered that trade mark in this country, & in Aug. 1895 the business of "the B. co." was sold by A. to D. On a motion by D. to rectify the Register by expunging the trade mark registered by "the C. co." *Held*: as such registration appeared to have been effected without sufficient cause, D. was a "person aggrieved" within the meaning of Patents, Designs, & Trade Marks Act 1883 (c. 57), s. 90, & rectification was ordered accordingly. *Re EUROPEAN BLAIR CAMERA CO.'S TRADE MARK* (1896), 75 L. T. 63; 13 R. P. C. 600.

466. — — — — —.] — G. was the manufacturer of a patent "Cyclo-style" copying apparatus from 1882 onwards, and in 1888 invented improvements for his apparatus, which he then called "Neo-Cyclostyle." "Cyclostyle" was registered as a trade mark, but not "Neo-Cyclostyle." In 1884 he employed K. as his sole sub-licencee, & agent under an agreement for the sale of the goods in America. From Jan. 1889 G. made in England & exported to K. in America as his sole consignee similar goods marked "Neostyle." The word "Neostyle" had been invented by K. in 1887, but was only used by him in America on the goods ordered from G., who never sold the goods so marked in England. In 1900, K. to the knowledge of G. formed the Neostyle Manufacturing co., Ltd. in England for the sale of "Neostyle" goods, & in Oct. 1901 registered the word "Neostyle" as a trade mark:—*Held*: G. was a "person aggrieved" within the meaning of Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 90; as between G. & K. under the agreement of 1884 any names or designations in the nature of trade marks, applied to goods manufactured by G. for sale in America, would be acquired in the right of G. & not of K.;



*Sect. 5.—Correction of register and alteration of trade marks: Sub-sect. 1, B. (b), C. (a).]*

K. had himself acquired no exclusive right such as would entitle him to register "Neostyle" as a trade mark; & the sole right of the English co., resps., was that derived from the user of the word since 1900, which had probably deprived G. of any right to bring an action to restrain them from continuing that user, but could not possibly confer on the English co. an exclusive right to use the word "Neostyle" or to interfere with the business of G. The mark was accordingly ordered to be expunged from the Register.—*Re NEOSTYLE MANUFACTURING CO., LTD.'S TRADE MARK* (1903), 20 R. P. C. 803.

**467. — Person using mark previously.]—**A Ltd. co. having been registered as the proprietors of a trade mark, agreed to sell all its goodwill & assets to a new co., but without expressly mentioning the trade mark. Subsequently an application was made for the removal of the trade mark from the Register by an American co., who claimed to be entitled to it, & proved that it had been used prior to the date of the registration, & the liquidation of the first-mentioned co., who still remained on the Register as the proprietors of the mark, & the new co. were made resps. It was contended that appts. were not persons aggrieved & by the new co. that they ought not in view of a letter, they had written, to have been made resps., & they asked for their costs:—*Held*: appts. were persons aggrieved, & whether or not, they had in fact any rights in the mark, it ought to be removed from the Register.—*Re "ZONOPHONE" REGISTERED TRADE MARK* (1903), 20 R. P. C. 450.

**468. — Whether party aggrieved a matter of evidence.]—***Re RIVIÈRE'S TRADE MARK*, No. 450, *ante*.

*C. Grounds for Correction.*

*(a) In General.*

See Trade Marks Act, 1905 (c. 15), ss. 32-37; Trade Marks Act, 1919 (c. 79), sched. I & II.

**469. Mark calculated to deceive—Restriction of mark to particular goods.]—**Pltfs. in 1876 registered a trade mark for condensed milk & certain other specified articles. The mark consisted of a figure representing a milk maid or dairy maid, & their goods became known as "Milk Maid" brand or "Dairy Maid" brand. In 1883 deft. registered for "butterine & other fatty substances used as food or as ingredients in food" a mark which did not resemble pltf.'s mark, but had as part of it the words "Dairy Maid":—*Held*: the registration of deft.'s mark must be rectified by adding the words "other than condensed milk &" the other articles specified by pltfs. Deft. having sold condensed milk under his trade mark an injunction was also granted.—*ANGLO-SWISS CONDENSED MILK CO. v. METCALF, Re METCALF'S TRADE MARK* (1886), 31 Ch. D. 454; 55 L. J. Ch. 463; 34 W. R. 345; 30 Sol. Jo. 201.

*Annotation:—**Refd. Re Anglo-Swiss Condensed Milk Co.'s Trade Mks., Anglo-Swiss Condensed Milk Co. v. Pearks, Gunston & Tee* (1904), 20 T. L. R. 238.

**PART I. SECT. 5, SUB-SECT. 1.—**  
*C. (a).*

*q. Mark calculated to deceive.]—*Where the object of a trader in registering a trade mark is to deceive the public, the ct. will order the register of trade marks to be rectified by removal of the name of the person so registering.—*Re REMFREY'S TRADE MARK* (1897), 23 V. L. R. 44.—**AUS.**

*r. —.*—A trade mark for "cartridge cases" will be removed from

the register if at the time such mark was registered a trade mark similar to it, but in respect of "gunpowder" only had been registered, such cartridge cases as containing gunpowder being so much of the same class of goods as gunpowder that the use of the trade mark for cartridge cases might be calculated to deceive.—*Re WEBENDORFER BROTHERS' TRADE MARKS* (1897), 23 V. L. R. 34.—**AUS.**

*t. —.*—An order was made for

**470. — —.]—**In 1888 a trade mark was registered in class 47 in respect of oils for heating & lighting. The mark consisted of a device of a lighthouse, with words, including "Petroleum oil for burning" & "Safety Guaranteed." A firm acquired the mark in 1894, & in 1927 commenced an action for infringement & passing off against a firm that had erected at their filling stations for automobiles pumps constructed in the form of a lighthouse & used for the supply of petrol & other spirits of various brands & makers. Pltfs. carried on business, exclusively wholesale, as petroleum refiners & distillers of benzol, petrol & naphtha, & they contended that the use by defts. of the device of a lighthouse was understood by the trade & the public as indicating that the goods sold under it were pltf.'s goods. Pltfs. had been informed by the Registrar that petrol was included in class 47. Defts. moved to rectify the register by expunging the entry of the mark, or by limiting the specification of goods for which the mark was registered so as to exclude petrol:—*Held*: (1) up to Dec. 1926, the public did not know anything about "Lighthouse," either name or symbol, in connection with petrol; (2) a trade mark does not give a monopoly in the form of the article represented in the mark, but that the form may be so used as to indicate origin, & thereby constitute infringement; (3) defts.' pumps had not been used as an indication of origin of the contents & the user of them did not constitute an infringement; there had not been passing off; (4) petrol was to be regarded as a spirit, not as an oil, & if the mark covered petrol, it ought to be limited, & the specification of goods ought to be amended by the addition of words indicating that the mark did not cover petrol, but that the registrar should be heard, if he thought fit; (5) the action was dismissed with costs, defts. were given the costs of the motion, & pltfs. were ordered to pay the costs of the registrar.—*CARLESS, CAPEL & LEONARD v. PILMORE-BEDFORD (F.) & SONS* (1928), 45 R. P. C. 205.

**471. — In consequence of events subsequent to registration.]—**A trade mark may be expunged by the registrar if in consequence of events subsequent to registration it has become calculated to deceive.—*THORNE (R.) & SONS, LTD. v. PIMMS, LTD., Re PIMMS' TRADE MARK* (1909), 26 R. P. C. 221.

*Annotation:—**Apld. Bowden Wire v. Bowden Brake Co.* (1914), 30 R. P. C. 580.

*—.]—**See, generally, Sect. 2, sub-sect. 10, ante.*

**472. Mark containing matter common to trade Disclaimers.]—***Re MITCHELL'S TRADE MARK*, [1878] W. N. 101.

*Annotation:—**Dtd. & Distd. Re Dewhurst's Appln.* (1896), 65 L. J. Ch. 618.

**473. — —.]—**(1) An application for registration of a trade mark was made in the year 1879, but registration was not effected until Feb. 1885, after the commencement of Patents, Designs, & Trade Marks Act, 1883 (c. 57). Sect. 63 of that Act provides that "where the registration of a trade mark has not been & shall not be completed within twelve months from the date of the applica-

tion the rectification of the Register of Trade Marks by the removal therefrom of a trade mark of resp. on the ground of its resemblance to one trade mark of appt.—*LYSAGHT (JOHN), LTD. v. REID BROTHERS & RUSSELL PROPRIETARY LTD., [1907] V. L. R. 432.—AUS.*

*a. —.*—*MEAGHER BROTHERS & CO. v. HAMILTON DISTILLING CO., LTD.* (1903), 8 Exch. C. R. 311.—**CAN.**

*b. —.*—*W. C. Co. were owners of*



tion, by reason of default on the part of appct., the application shall be deemed to be abandoned"; & sect. 113 provides that the repeal of previous enactments therein contained shall not affect any application pending:—*Held*: the effect of sects. 63 & 113 read together was that such pending applications for registration as were not completed by registration within the period of twelve months prescribed by sect. 63 came within the operation of the last-mentioned sect., the Registrar of Trade Marks was therefore bound to treat the application as abandoned, & the mark was improperly registered.

(2) The ct., however, in exercise of the discretion given by sect. 90 of the Act, instead of directing the mark to be expunged, ordered that the register should be rectified by inserting an entry directing that the five years mentioned in sect. 76 should begin to run from the date of such entry.

(3) Where a trade mark, not otherwise objectionable, contained words which were admitted to be common in the trade, the ct. directed the register to be rectified by entering thereon a disclaimer of the intention to claim any right of exclusive use of such words.

(4) Where a trade mark contained the words "sole makers" immediately preceding words descriptive of an article, & it was admitted that the persons registering the mark were not the sole makers of that article, the ct. ordered the mark to be expunged from the register as being calculated to deceive.

(5) Where it appeared that the customers of a firm of H. & co. had for many years been accustomed to ask for a certain article by the name of "Coker Canvas," but it did not appear that the words "H.'s Coker Canvas" had been stamped upon any of the goods of the firm or advertised as a trade mark:—*Held*: there had been no use by the firm of the words "H.'s Coker Canvas" as a trade mark.—*Re HAYWARD'S TRADE MARKS* (1885), 54 L. J. Ch. 1003; 53 L. T. 487.

*Annotation*:—As to (1) *Refd.* *Re Schmidt's Trade Mk.*, Jackson v. Napper (1886), 35 Ch. D. 162.

474. ———.]—*Patents, Designs, & Trade Marks Act*, 1883 (c. 57), s. 74 (1b), must be read with reference to sect. 64 (1c); & the word "distinctive" means *primâ facie* distinctive, & the words "common to the trade" mean "open to the trade," & the explanation in sect. 74 (3), "publicly used by more than three persons," refers only to the registration of marks under sect. 74 (1a)—namely, old marks in use before Aug. 13, 1875.

A trade mark for a laundry preparation, registered in 1888, consisted of a label conspicuously displaying the word "Washerine," & containing printed matter & the signature of the registered owners' firm. The registered owners having moved for an *interim* injunction restraining defts. from infringing the mark by using the word "Washerine" for a similar article, & the motion being dismissed on the ground that "Washerine" was descriptive, & not "a fancy word not in common use" defts. moved for rectification of the register by expunging therefrom the word "Washerine," or for a disclaimer of the word to be entered thereon:—*Held*: defts. were entitled to

an order, notwithstanding that "Washerine" was registered together with the signature of plffs. & other printed matter.—*BURLAND v. BROXBURN OIL CO.*, *Re BURLAND'S TRADE MARK* (1889), 42 Ch. D. 274; 58 L. J. Ch. 816; 61 L. T. 618; 38 W. R. 89; 5 T. L. R. 433; 6 R. P. C. 482.

*Annotations*:—*Appl.* Thompson v. Miller, *Re Thompson's Trade Mk.* (1895), 13 R. P. C. 35. *Consd.* *Re Faulder's Trade Mk.*, [1902] 1 Ch. 125. *Expld.* *Re Baker's Appln.*, *Re Aorated Bread Co.'s Appln.*, [1892] 2 Ch. 86. *Held.* *Re Apollinaris Co.'s Trade Mks.*, [1891] 2 Ch. 186.

475. ———.]—*BAKER v. RAWSON*, No. 408, *ante*.

—.]—*See, also*, Sect. 3, sub-sect. 4, *ante*.

476. *Non-registrability of trade marks*.—*Discretion of court to rectify & not expunge.*—*Re HAYWARD'S TRADE MARKS*, No. 473, *ante*.

477. ———.]—*At date of registration*—*Operation of Trade Marks Act, 1905* (c. 15), s. 38.—(1) On an application to expunge a trade mark the ct. has power under above Act, s. 35, to vary the entry in such a way as it may think fit.

(2) Above Act, s. 36, is a saving clause & is to be read thus: If the particular trade mark were now taken off the register, & would on the facts & law of to-day be entitled to be put on again, then the mark is to be left on the register.—*Re GESTETNER'S TRADE MARK*, [1908] 1 Ch. 513; 77 L. J. Ch. 299; 98 L. T. 121, C. A.

*Annotations*:—As to (2) *Consd.* *Phillippart v. Whiteley*, *Re Phillipart's Trade Mk. "Diabolo"*, [1908] 2 Ch. 274; *Re Trade Marks Act*, 1905 (1909), 25 T. L. R. 695.

—.]—*See, generally*, Sect. 2, *ante*.

478. *Mark not used as trade mark but only as design.*—*HARRISON v. WOODROFFE*, *Re HARRISON'S TRADE MARK*, No. 303, *ante*.

479. *Determination of good will.*—*Plffs.* in 1893 granted a sole licence to manufacture closets under a patent to S., who afterwards transferred his business to a limited co. The licence terminated in 1898. In the five years S. & his successors manufactured closets under the licence, some of which were sold by plffs. & some by S. & his successors. The former were sold as "Turritt" & the latter as "Capstan." The word "Capstan," with the device of a capstan, was registered as a trade mark by S. by arrangement with plffs. The registration was for the whole of class 16, but the trade mark was only used on closets made under the licence until a few months after the determination of the licence, when the co. began to sell closets of a slightly different pattern as "Capstan No. 2." Plffs. thereupon brought an action to restrain the co. from selling any closets of their manufacture under the title of "Capstan," & from in any other manner passing off their goods as goods constructed under the licence of plffs. Plffs. moved for an interlocutory injunction, & also moved to expunge the trade mark from the Register on the ground that "Capstan" was the name of a patented article, & on the ground that the co. were no longer able to manufacture "Capstan" closets, & therefore their goodwill in such closets having determined the trade mark had determined also:—*Held*: both motions failed & must be refused.—*FREEMAN BROTHERS v. SHARPE BROTHERS & CO., LTD.* (1899), 16 R. P. C. 205.

*Exch. C. R. 183.*—*CAN.*

c. *Interests of "trade, public order & purity"*—*Discretion of court.*—In the interests of trade, public order, & the purity of the Register of Trade Marks the ct. will exercise its discretion by ordering the removal from the register of any entry made thereon under misrepresentation & "without sufficient cause."—*Re BILLINGS & SPENCER CO. OF HARTFORD, CONNECTI-*

the trade mark "Oh Henry," registered in the United States & there used by them, but no user thereof had been made in Canada, though they had extensively advertised in papers circulating there. The said trade mark having come to the notice of W. J. C. he adopted it as his, knowing the mark to be so registered & used as aforesaid, & registered the same in Canada as his own mark. The application by him

failed to disclose the existence of plffs' mark, & declared that he was the first & only user thereof. Hence the present action to expunge:—*Held*: defts. was not the "proprietor" of the said trade mark within Trade Mark & Designs Act, & the trade mark was improperly registered, was calculated to mislead & deceive the public & should be expunged.—*WILLIAMSON CANDY CO. v. CROTHERS CO.*, [1924]

*Sect. 5.—Correction of register and alteration of trade marks: Sub-sect. 1, C. (a), (b) & (c).]*

**480. Prior user by other firm—Mark not attached to goods.**—Upon an application to remove resp.'s trade mark from the register & to register appct.'s trade mark, it appeared that in 1875 appcts., who were brewers & wine & spirit merchants, adopted a badger as their trade mark, & used it in connection with their goods in that business. In 1882 they commenced the manufacture of aerated waters, & included them in their price lists, on the back of which they placed the picture of a badger, with the words "trade mark." From 1892 they headed their letter paper with the mark, describing themselves as wine & spirit merchants & aerated water manufacturers. They never used the mark in connection with aerated waters except as above mentioned, nor had they registered the mark for any class of goods. In 1887 resp., not knowing of appct.'s trade mark or business, adopted a badger, similar to appct.'s mark, as a trade mark in connection with his aerated water business, & in 1888 he registered the mark, & had since then used it on his bottles. Neither of the marks was an "old mark."—*Held*: that, as appct.'s mark had not been used upon the goods or upon any wrapper or case containing the goods, the registration of resp.'s mark in 1888 was valid & could not be removed from the register, & appct.'s mark could not be registered.—*Re VERITY'S TRADE MARK, Re HALL & WOODHOUSE'S TRADE MARK* (1901), 18 T. L. R. 214; 19 R. P. C. 58.

**481. Registration merely to prevent competition.**—The proprietors of a registered trade mark consisting of the word "Talisman" used on rubber heels, commenced an action for infringement of the trade mark, & defts. moved to rectify the Register by the removal of the mark. On the hearing of the motion it was proved that resps. had had rubber heels manufactured for them for the purposes of executing orders given by a firm in a foreign country. The heels had upon them the word "Talisman" & the initials of the name of the foreign firm. At that time the word was the trade mark in the foreign country of S., trading as the foreign firm for rubber goods in the foreign country. Subsequently the manufacturers who had made the heels for resps. executed an order for rubber heels given to them directly by S. & marked the heels with the trade mark & initials. Resps. then registered the trade mark in this country. After the registration, appcts. executed an order from S. for rubber heels bearing the trade mark & initials:—*Held*: resps. had merely been the agents for the foreign firm to stamp the goods which they were having made for the firm with the trade mark of the firm & its initials: there had been a limited user of the mark in this country sufficient to disentitle resps. to register it; the intention of resps. in registering the mark had been to prevent any one in this country from competing with them for business with the foreign firm; & they were not entitled to do that. The trade mark was ordered to be removed from the Register.—*Re NEW ATLAS RUBBER CO., LTD.'S TRADE MARK* (1918), 35 R. P. C. 269.

CUT, U. S., & CANADIAN BILLINGS & FENCER, LTD., & CANADIAN FOUNDRIES & FORGINGS, LTD. (1921), 20 Exch. C. R. 405; 57 D. L. R. 216.—CAN.

**d. —**—In the interests of trade, public order & purity of the Register of Trade Marks, the ct. will exercise its statutory discretion in ordering the removal from the register of any entry made therein without a sufficient cause.—*GOULIER v. IDA*

SERRE, dit. ST. JEAN (1922), 69 D. L. R. 64; 21 Exch. C. R. 342.—CAN.

#### PART I. SECT. 5. SUB-SECT. 1.—C. (b).

**483 i. Whether rectification ordered.**—B., a manager employed by a co. of chemical manufacturers, devised certain chemical preparations in the course of & as part of his duties as manager.

**482. Technical objection — Subsequently remedied.**—*Re MAGNETA TIME CO., LTD.'S TRADE MARK*, No. 424, ante.

#### (b) Wrongful Entry as to Ownership.

**483. Whether rectification ordered.**—M. obtained the registration in his own name of a trade mark belonging to L., without the knowledge or consent of L. Upon application for relief by L.:—*Held*: the Register could not be rectified by transferring the registration into the name of L.—*Re MARLER'S TRADE MARK, Ex p. LAWRENCE BROTHERS* (1878), 44 L. T. 98, n.; 29 W. R. 392, n. *Annotations*:—*Distd. Re Wellcome's Trade Mk., Re Burroughs, Wellcome's Trade Mk.* (1886), 32 Ch. D. 213. *Expld. Ex p. Kingsford* (1889), 61 L. T. 426.

**484. —**—The sole consignee in England of the wines grown at the vineyards in South Australia known as the Auldana vineyards, registered in his own name the word "Auldana" as a trade mark in respect of wines, intending, as he stated on affidavit, to use the registration solely in protection of the wines coming from the Auldana vineyards during the continuance of the agreement constituting him consignee. He subsequently went into liquidation, & the trustee in the liquidation sold & assigned his business & the trade mark to the Australian Wine co. Ltd., who procured themselves to be registered as the subsequent proprietors of the trade mark. On motion by the owners for the time being of the Auldana vineyards:—*Held*: the trade mark had originally been rightfully registered for the protection of the owners of the vineyards, & the Register must be rectified by removing therefrom the name of the Australian Wine co. Ltd., & inserting instead the names of the owners of the vineyards as proprietors.—*Re AUSTRALIAN WINE CO., LTD.* (1885), 61 L. T. 427, n.

**485. —**—Although upon an application under Trade Marks Registration Act, 1875 (c. 91), s. 5, for the rectification of the Register of trade marks & substitution thereon of appct.'s name, appct. may be entitled to an order for rectification, yet he will not be entitled to an order for substitution, inasmuch as every new registration must be attended with the preliminaries as to advertisement, etc., prescribed by the Act.—*Re RIVIÈRE & Co.* (1885), 55 L. J. Ch. 545; 53 L. T. 237, C. A. *Annotations*:—*Consd. Re Apollinaris Co.'s Trade Mks.*, [1891] 2 Ch. 186. *Apld. Re Ellis's Trade Mks.* (1904), 21 R. P. C. 617. *Refd. Re European Hair Camera Co.'s Trade Mk.* (1896), 75 L. T. 63.

**486. —**—*Re VALENTINE EXTRACT CO., LTD.'S TRADE MARKS*, No. 501, post.

**487. —**—In 1890 J. & H. were registered as proprietors of certain trade marks, & in 1898 they sold their business to a limited co., which entered into a contract with them to purchase the goodwill of the business together with its trade marks. The co. was subsequently wound up. In 1908, M. A. J. was registered as proprietor of the trade marks upon a statement by her, omitting any reference to the formation of & purchase by the co., but stating that the marks were still registered in the names of J. & H., the bkpy. of J., & stating assignments from the trustee of J. & from H. of the trade marks. On an application to remove the marks

He also suggested names for them, which were adopted by the co. While still in the employment of the co., & without their knowledge or consent, B. from time to time registered the names adopted by the co. for the preparations in his own name. Under an agreement with the co., B. was entitled, on leaving their service, to take with him any recipes that might be his:—*Held*: (1) the trade marks were the property of

from the Register:—*Held*: either the goodwill in respect of which the marks were registered had come to an end altogether, or the assignments made to M. A. J. did not include the goodwill, & the marks were ordered to be removed from the Register.—*Re JOHNSON'S TRADE MARKS* (1908), 26 R. P. C. 195.

**488.** —[—]—By the French Law of Associations, 1901, the Monastery of La Grande Chartreuse was dissolved & the property of the monks confiscated & vested in a liquidator appointed by the Govt. The monks for many years had manufactured, by a secret process, a liqueur known as "Chartreuse." The business & property of the monks were sold by the liquidator to a co. which made & sold a similar liqueur under the old name "Chartreuse." The liquidator procured the insertion of his name as owner of certain trade marks & labels formerly employed by the monks:—*Held*: the liquidator & his assignees were not entitled to the use of the word "Chartreuse" as descriptive of the goods made by them, & the monks were entitled to have the liquidator's name as owner of the trade marks & names expunged from the Register.—*LECOUTURIER v. REY*, [1910] A. C. 262; 79 L. J. Ch. 394; 102 L. T. 293; 26 T. L. R. 368; 54 Sol. Jo. 375; 27 R. P. C. 268, H. L.; *affg.* S. C. *sub nom.* *REY v. LECOUTURIER*, [1908] 2 Ch. 715, C. A.

*Annotations*:—*Consd.* *Re Neuchatel Asphaltic Co.'s Trade Mks.*, [1913] 2 Ch. 291. *Reid.* *Poirer v. Poirer & Nash* (1920), 37 R. P. C. 177; *Sedgwick, Collins v. Hostia Insco. of Petrograd, Employers' Liability Assoc. Corp.*, *Garnishoes*, [1926] 1 K. B. 1. *Menda.* *Aksionarnoye Obshchestvo A.M. Luther v. Sagar*, [1921] 3 K. B. 532; *Banque Internationale de Commerce de Petrograd v. Goukassow*, [1923] 2 K. B. 682.

**489.** —Registration by mistake—Trade mark property of partnership.]—A trade mark which was the property of a partnership firm was by mistake registered as the property of one of the partners trading under the style of the firm.

Upon application to the ct. by the firm, it was ordered that the Register be rectified by cancelling the name of the registered proprietor & registering the names of all the partners trading under the style of the firm.—*Re RUSK & Co.'s TRADE MARK* (1880), 44 L. T. 98, n.; 29 W. R. 393, n.

*Annotations*:—*Consd.* *Re Faime's Trade Mks.* (1881), 41 L. T. 99, n. *Reid.* *Re Greenlees' Trade Mks.* (1892), 9 R. P. C. 93.

**490.** —[—]—J. G., a partner in the firm of G. Bros., erroneously applied for the registration of three marks belonging to the firm in his own name, & the marks were so registered. He endeavoured afterwards to effect a transfer to the firm, but the Comptroller-General refused to alter the Register. J. G. & G. Bros. then applied for rectification by inserting in the Register the name of the firm instead of that of J. G.:—*Held*: where the application was made by a partner in his own name alone the proper course was for the partner whose name was on the Register to assign to the firm; & the ct. intimated that the Comptroller-General ought to register the assignment.—

the co.; (2) they were wrongfully entered on the register; & (3) they should be expunged.—*WALKER & SONS, LTD. v. KEO* (No. 1.) (1921), 38 R. P. C. 25.—*SCOT.*

#### PART I. SECT. 5, SUB SECT. 1.—C. (c).

**492 i.** *Actual non-user.*]—*BLACK-ADDER v. GOOD ROADS MACHINERY CO. INCORPORATED* (1926), 38 C. L. R. 332.—*AUS.*

**492 ii.** —[—]—The Exchequer Ct. has jurisdiction, on the application of any party aggrieved, to order the rectification of the register of trade

*Re GREENLEES' TRADE MARKS* (1892), 9 R. P. C. 93.

**491.** —[—]—Where trade marks belonging to A. were registered by mistake in the name of B. & an application was made by A. & B. that B.'s name & address might be expunged from the Register in respect of those trade marks, & that the same might be entered in the name of A., the application was refused so far as it asked for the entry of the trade marks in the name of A., & A. was directed to proceed in the usual way to obtain registration.—*Ex p. KINGSFORD & SON* (1889), 61 L. T. 426.

#### (c) Non-User.

*See Trade Marks Act, 1905 (c. 15), s. 37.*

**492.** *Actual non-user.*]—*BAKER v. RAWSON*, No. 408, *ante.*

**493.** —[—]—A trader is not entitled to register a trade mark for goods in which he does not deal & in which he has no *bona fide* intention of dealing. Registration under such circumstances may be expunged.—*BATT (JOHN) & Co. v. DUNNETT*, [1899] A. C. 428; 68 L. J. Ch. 557; 81 L. T. 94; 15 T. L. R. 424; 16 R. P. C. 411, H. L.; *affg.* S. C. *sub nom.* *Re BATT (JOHN) & Co.'s REGISTERED TRADE MARKS, Re CARTER'S APPLICATION*, [1898] 2 Ch. 432, C. A.

*Annotations*:—*Apld.* *Re Hart's Registered Trade Mk.*, [1902] 2 Ch. 621. *Consd.* *Louise v. Gainsborough* (1902), 87 L. T. 591; *Re Anglo-Swiss Condensed Milk Co.'s Trade Mks.*, *Anglo-Swiss Condensed Milk Co. v. Pearks, Gunston & Tee* (1904), 20 T. L. R. 238. *Apld.* *Re Nouchatel Asphaltic Co.'s Trade Mks.*, [1913] 2 Ch. 291; *Re Ducker's Trade Mk.* (1928), 97 L. J. Ch. 353. *Reid.* *Philippart v. Whiteley, Re Philpatt's Trade Mk.* "Diabolo," [1908] 2 Ch. 274.

**494.** —[—]—*Re HART'S TRADE MARK* (1907), 24 R. P. C. 263.

**495.** —(1) Pltfs. were a limited co. incorporated in the year 1890 & carrying on a business of cigarette manufacturers under the style of Muratti, Sons & Co., Ltd. The business was an old established one & prior to the incorporation of the co. had been carried on by the family of Muratti. Pltfs. established at the trial that their cigarettes were largely known simply as "Muratti's" or "Muratti's cigarettes." Deft. co. was incorporated in July, 1910, in the name of Murad, Ltd., for the purpose of carrying on a business of manufacturers & sellers of high-class Turkish cigarettes. Pltfs. brought an action to restrain deft. co. from carrying on business under their present name:—*Held*: upon the evidence, the name of deft. co. was calculated to deceive & pltfs. were entitled to an injunction.

(2) Pltfs. at the same time applied by motion to have a certain trade mark expunged from the Register. The trade mark in question had been registered in the year 1906 by one Allan Ramsay, who was one of the promoters of deft. company, & consisted of the word "Murad" with the signature, "Allan Ramsay" beneath it. It was admitted that from the date of registration in May, 1906, down to the date of the notice of

marks, by expunging therefrom a mark that, through non-use or abandonment, remains improperly thereon, to the embarrassment of trade.—*Re AUCTION SALES GUM & CHOCOLATE Co.'s PETITION* (1913), 14 Exch. C. R. 302; 14 D. L. R. 917.—*CAN.*

**492 iii.** —[—]—*RAYBROOK v. ABBESDONOS CO.*, [1923] 2 D. L. R. 44; [1923] Exch. C. R. 47.—*CAN.*

**492 iv.** —[—]—A trade mark properly registered cannot be expunged under Trade Mark Act, s. 42, if it ceases to be used as a trade mark & becomes merely descriptive of the article to which it has been applied.—

*BAYER CO., LTD. v. AMERICAN DRUGGISTS' SYNDICATE, LTD.*, [1924] S. C. R. 358.—*CAN.*

**492 v.** —[—]—In order to remove a trade mark from the register on the grounds of non-user it must be proved either that when the mark was registered there was no *bona fide* intention of using it, or that if it had been used for a time it had subsequently been disused for such a long period as to indicate an intention to abandon the mark.—*KIWI POLISH CO. v. KEMPTHORNE PROSSER & CO.*, *KEMPTHORNE PROSSER & CO. v. KIWI POLISH CO.*, [1925] N. Z. L. R. 26.—*N.Z.*

*Sect. 5.—Correction of register and alteration of trade marks: Sub-sect. 1, C. (c).]*

motion in Mar. 1911, there had been no user of this trade mark, & there was in fact no evidence of any user after that date. Deft. co. having alleged that the trade mark had been transferred to them were made resps. to the motion:—*Held*: upon the evidence, the trade mark was registered without any *bona fide* intention to use the same in connection with the goods for which it was registered, & there had in fact been no *bona fide* user of the same in connection therewith, & appcts. were entitled to an order to remove the trade mark from the Register.—*MURATTI (B.), SONS & Co., LTD. v. MURAD, LTD., Re RAMSAY'S TRADE MARK (1911), 28 R. P. C. 497.*

*Annotation:—Refd. Lines v. Farris (1925), 43 R. P. C. 64.*

496. —[J.—]The ct., notwithstanding the absence of resp. whom appct. had been unable to serve with notice of the application, made an order under Trade Marks Act, 1905 (c. 15), s. 37, removing a trade mark from the register on the ground that there had been no *bona fide* use thereof during the five years immediately preceding the application.—*Re SMOLLENS' TRADE MARK (1912), 28 T. L. R. 196; 56 Sol. Jo. 240.*

497. —[J.—]Amounting to abandonment.]—In order to deprive a manufacturer of his right to a trade mark, the use of which has been practically given up for a period of five years, mere discontinuance of user for lack of demand, though coupled with non-registration, & non-assertion of any right, is not enough, there must be evidence of distinct intention to abandon. In 1874, A., a German soap manufacturer, adopted a trade mark for a particular kind of soap, which for about two years was manufactured & sent to this country in large quantities for exportation to Australia, but from 1876 until 1882 the manufacture & sale of soap thus marked fell off, until it practically ceased, & the existence of the particular mark was in May, 1882, forgotten by A. In 1880, B., a manufacturer of soap in the same part of Germany, adopted, in complete ignorance of A.'s mark, a precisely similar mark for soap sent to this country for exportation to Australia, & in Aug. 1880, he registered his mark under the Trade Marks Acts in this country. In July, 1882, after the commencement of proceedings by B. to restrain an infringement of his registered trade mark by A., A. applied for registration of his mark of 1874. Upon applications (a) by B. to restrain the infringement of his trade mark; (b) by A. to have his trade mark registered; (c) by A. to have B.'s trade mark removed from the Register:—*Held*: (1) mere non-user by A. of his mark between 1876 & 1882, although coupled with non-registration, did not, having regard to the fact that he had not ceased to carry on his business, & had not broken up the mould, & a number indicating soap thus marked was retained on his price lists, amount to an abandonment by A. of the mark, so as to give B. any exclusive right to his registered mark; (2) the existence upon the register of B.'s mark did not prevent the ct. from granting leave for the registration of A.'s mark; (3) previous *bona fide* registration of B.'s mark in ignorance of any claim by A., followed by large dealings under that mark, prevented A., after the lapse of two years, from getting B.'s mark expunged from the register.—*MOUSON & Co. v. BOEHM (1884), 26 Ch. D. 398; sub nom. MOUSON (J. G.) & Co. v. BOEHM, Re BOEHM'S TRADE MARK, 53 L. J. Ch. 932; 50 L. T. 784; 32 W. R. 612.*

*Annotations:—As to (1) Refd. Re Hart's Registered Trade Mk., [1902] 2 Ch. 621. As to (3) Refd. Re Trade Mk. of*

Dewhurst, [1896] 2 Ch. 137. *Generally, Re Verity's Trade Mk., Re Hall & Woodhouse's Trade Mk. (1901), 18 T. L. R. 214.*

498. —[J.—]—*LOUISE & Co., LTD. v. GAINSBOROUGH, No. 122, ante.*

499. —[J.—]—The registered proprietors of a trade mark consisting of the word "Aladdin," & registered in class 47 in respect of soap, and other goods, were manufacturers of soap & had purchased in 1910 the goodwill of the T. Coap co., Ltd., which had gone into voluntary liquidation. The assets purchased included some thirty-five trade marks registered in class 47, amongst which was the mark "Aladdin." There had been a small sale of "Aladdin" soap prior to 1904, but there was no evidence of any use of the "Aladdin" mark by the T. co. after that date. An application was made to remove the trade mark from the register on the ground of non-user & abandonment. Resps. had not used the trade mark. Evidence was given by resps. to show that the non-user of the "Aladdin" mark had not been due to any intention to abandon it, that it would have been necessary to obtain new dies to make "Aladdin" soap, that owing to the war it had not been possible to obtain such dies, that owing to the war resps.' business had been restricted generally, & that they intended as soon as conditions should become normal to continue the manufacture & sale of soap under the name "Aladdin":—*Held*: there had been no *bona fide* use of the mark during the five years immediately preceding the application, such non-user had not been due to special circumstances in the trade, & the case came within Sect. 37 of the Trade Marks Acts, 1905-1919. *Semle*: the mark had been abandoned at common law.

In order that the saving provision in sect. 37 should apply non-user must be due to special circumstances in the trade, & not merely in the particular business, & must not be due to some other cause which would have operated whether the special circumstances had arisen or not.—*Re CREAN (JAMES) & SON, LTD.'S TRADE MARK (1921), 38 R. P. C. 155.*

500. —[J.—]Discontinuance for lack of demand.]—*MOUSON & Co. v. BOEHM, No. 497, ante.*

501. —[J.—]Of part of goods covered by mark.]—V. in 1897, registered three trade marks each consisting of the word "Valtine" for all goods in Classes 3 & 42, & in Class 43, for beer and spirits, & purported to assign them to a ltd. co. formed to carry on the business of meat extract manufacturers, with his goodwill, if any. Another co. obtained an injunction restraining the limited co. from selling meat extract or meat juice under the name of "Valtine" & subsequently moved to remove the marks from the Register of trade marks, the grounds of the application being that at the date of the assignment V. had no goodwill to assign, that the marks were deceptive, & had not been used except for meat extract. An Order was made removing the marks from the register with costs.—*Re VALENTINE EXTRACT CO., LTD.'S TRADE MARKS (1901), 18 R. P. C. 175.*

502. —[J.—]Limitation of operation of mark.]—*HARRISON v. WOODROFFE, Re HARRISON'S TRADE MARK, No. 303, ante.*

503. —[J.—]—Where a trade mark has been registered in a class & the party registering deals in some only of the goods mentioned in that class, a party aggrieved by the registration may apply to have the register rectified by limiting the trade mark to the goods actually dealt in, but he cannot have the trade mark struck off the register.—*Re CROMPTON (A. & A.) & Co.'S TRADE*

MARK, [1902] 1 Ch. 758; 71 L. J. Ch. 497; 86 L. T. 657; 50 W. R. 426; 18 T. L. R. 398; 46 Sol. Jo. 338.

504. ————.]—Where a trader has registered a mark for an entire class, & many years after registration, it is proved that he has never used the mark in connection with a particular article in that class, though his business included the sale of that article under other trade marks, the register may be rectified, upon the application of another trader desiring to register a similar mark for the particular article, by excluding that article from the specification of goods in respect of which the mark was originally registered, on the ground that at the date of registration there had been no actual user of the mark, & no *bonâ fide* intention of using it for that particular article of the class for which the mark had been registered.—*Re HART'S REGISTERED TRADE MARK*, [1902] 2 Ch. 621; 71 L. J. Ch. 809; 87 L. T. 426; 51 W. R. 107; 18 T. L. R. 778; 46 Sol. Jo. 685; 19 R. P. C. 569.

*Annotations*.—*Apld.* *Louise v. Gainsborough* (1902), 87 L. T. 591; *Anglo-Swiss Condensed Milk Co. v. Pearks, Gunston & Tce, Re Anglo-Swiss Condensed Milk Co.'s Trade Mks.* (1904), 20 R. P. C. 509. *Distd.* *Walpamur Co. v. Sanderson* (1926), 43 R. P. C. 385.

505. ————.]—In 1878 a co. registered a trade mark, consisting of a figure of a milkmaid with the words "Milkmaid Brand," in class 42, for substances used as food or ingredients in food, with the exception of certain goods, not including butter in such exceptions. In 1901 the same co. registered another trade mark consisting of a slightly different figure of a milkmaid with the same words for the whole of class 42. The co. had also other trade marks with the figure of a milkmaid in them, but not for butter. Their principal trade was in condensed milk & they never traded in butter in the United Kingdom until May, 1901, although they had formed the intention of so trading in 1897, & had traded abroad in butter. In 1902 they commenced an action against another co. for infringement of, in particular, the trade marks of 1878 & 1901, & for passing-off, & in it complained of the use by defts. of coloured posters & handbills having thereon the figure of a milkmaid with defts.'s trade name prominently thereon & the words "Milk Blended Butter"; these posters & handbills were first used in Nov. 1901. Plffs. alleged they had a reputation in various articles of dairy produce under the brand of a milkmaid, & that the posters were calculated to lead persons to believe that the butter to which they referred was plffs.' butter. Plffs. had only a small retail trade in butter, & used only the 1901 trade mark, & not that of 1878, in connection with such trade. Defts. had a very large retail trade in their milk blended butter. They denied infringement & passing-off, & moved to exclude butter from the goods for which the trade marks were registered on the grounds that plffs. had never used or intended to use the 1878 trade mark for butter, & that in 1901 a milkmaid was common to the trade. The action & motion were heard together:—*Held*: the action failed as to passing-off & the Register must be rectified so as to exclude butter from the class of goods for which the trade marks were registered on the ground, as to the 1878 trade mark, there had been no real intention to use it for butter.—*Re ANGLO-SWISS CONDENSED MILK CO.'S TRADE MARKS, ANGLO-SWISS CONDENSED MILK CO. v. PEARKS, GUNSTON & TEE, LTD.* (1904), 20 T. L. R. 238; 48 Sol. Jo. 245; 21 R. P. C. 261.

506. ————.]—*Re HARE'S TRADE MARK* (1907), 24 R. P. C. 263.

507. ————.]—*J. M., Ltd.*, had for some time used a mark containing the words "John Bull" & a label with those words & a figure of John Bull as trade marks for toffee. On applying to register in class 42 they were informed that P. & co., Ltd., were registered for a similar mark & label for all goods in class 42 except peas & beans. P. & co., Ltd., did not deal in toffee or sweetmeats generally, but they sold a malt extract of a saccharine nature which could by compression or evaporation be reduced to a substance resembling toffee. It was not alleged that their malt extract had been sold in this form. It was, however, largely sold to confectioners & sweetmeat makers for use in their preparations. *J. M., Ltd.* applied by motion to rectify the register by excluding toffee & sweetmeats from the goods in respect of which P. & co.'s marks were registered. Various offers had been made by P. & co. as to the limitation of their registration before these proceedings were begun & at the hearing, none of which would apparently have enabled appts. to get upon the register for their goods, but finally they expressed their willingness to submit to an order excluding toffee & confectionery:—*Held*: resps.' registrations must be limited so as to exclude toffee & confectionery; & resps. were ordered to pay the costs of the motion for rectification.—*Re PAINE & CO., LTD.'S REGISTERED TRADE MARKS* (1908), 25 R. P. C. 329.

508. ————.]—*Re SMITH'S TRADE MARK, No. 509, post.*

509. ————.]—An application was made to the Comptroller, as registrar of trade marks, for rectification of or removal from the register of a trade mark, consisting of the word "Komoline," in class 48, in respect of a toilet preparation for the hair. The application was opposed by the owner of the trade mark, who had obtained an assignment in Aug. 1925, of the mark, & of the goodwill of the business concerned in the goods for which it had been registered. Appt. had a trade in hair dyes in France & other countries including the United Kingdom & sold his products under the name of "Komol," & had been refused registration of the word "Komol" by the Assistant-Comptroller, for which he had applied on Apr. 4, 1925. Appt. alleged that there had been no *bonâ fide* user of the trade mark during the five years immediately preceding the application, that the presence of the trade mark in the register was illegal, that it had become, by assignment, dissociated from the goodwill of the business, & that the opponent had acquired it, not *bonâ fide*, but for the purpose of directly or indirectly preventing appt. from registering his trade mark "Komol" in respect of hair dyes. The application for rectification was refused & appt. appealed to the ct.:—*Held*: the mark was a manufacturer's mark & there had been no severance of one part of the goodwill from the other part of the goodwill but the whole passed by the assignment to resp., & there had been no abandonment & nothing had taken place to destroy the mark; & the conclusion of the Assistant-Comptroller was correct, & it ought to be affirmed, but the order of the ct. was not to prejudice any application which appt. might be advised to make hereafter for the purpose of limiting the scope of the trade mark. The application was dismissed, appt. being ordered to pay costs, including the costs of the Comptroller-General.—*Re SMITH'S TRADE MARK* (1927) 44 R. P. C. 533.

510. ————.]—*Due to special circumstances in trade—Not merely in particular business.*—*Re CREAN (JAMES) & SON, LTD.'S TRADE MARK, No. 499, ante.*

*Sec. 5.—Correction of register and alteration of trade marks: Sub-sect. 1, C. (c), & (d), D. & E.; sub-sect. 2, A.]*

**511. —** — — — **Unaffected by other independent causes.**—*Re CREAM (J.) & SON, LTD.'S TRADE MARK*, No. 499, *ante*.

**512. No bonâ fide intention to use.**—*BATT (JOHN) & CO. v. DUNNETT*, No. 493, *ante*.

**513. —** — — — *LOUISE & CO., LTD. v. GAINSBOROUGH*, No. 122, *ante*.

**514. —** — — — *Re HART'S REGISTERED TRADE MARK*, No. 504, *ante*.

**515. —** — — — *MURATTI (B.), SONS & CO., LTD. v. MURAD, LTD., Re RAMSAY'S TRADE MARK*, No. 495, *ante*.

**516. Nature of user required by Trade Marks Act, 1905 (c. 15), sect. 37.**—Above sect. only requires the *bonâ fide* user of the trade mark, namely, the registered mark, in connection with the goods for which it is registered; it does not in terms require the mark to be "used as a trade mark" & if the registered mark is *bonâ fide* impressed upon the goods there is a *bonâ fide* user of the mark in connection with the goods, within the meaning of the sect. although the house mark or other matter is added.—*ANDREW (JOHN H.) & CO., LTD. v. KUEHNRIICH, Re KUEHNRIICH'S APPLICATION, Re TRADE MARKS ACT, 1905, Re ANDREW (JOHN HENRY) & CO.'S APPLICATION (1912)*, 29 T. L. R. 181; *on appeal (1913)*, 29 T. L. R. 771, C. A. *Annotation:—Re Imperial Tobacco Co.'s Trade Mks.*, [1918] 2 Ch. 207.

(d) *Change of Name or Address of Owner.*

**517. Change of name—Company.**—A firm carrying on business as the P. co. registered two trade marks in the name of the P. co. The firm changed their style to the M. co. & then applied to the Comptroller to register the marks in the name of the M. co. There was no change in the constitution of the firm. The Comptroller refused the application saying it could only be effected through the ct. On application to the ct. The ct. granted the application & made an order directing the Comptroller to enter on the register the name of the M. co. formerly trading as the P. co.—*Re PATENT PLUMBAGO CRUCIBLE CO.'S TRADE MARKS (1890)*, 7 R. P. C. 282.

*Annotations:—Distd. Re BURGON & WILKINSON (1896)*, 40 Sol. Jo. 336. *Re New Ormonde Cycle Co. (1896)*, 75 L. T. 50.

**518. —** — — — *Re BURGON & WILKINSON, LTD. (1896)*, 40 Sol. Jo. 336.

**519. —** — — — *Re STOCKOWNERS' MEAT CO. OF NEW SOUTH WALES, LTD. (1897)*, 13 T. L. R. 502.

**520. —** — — — **Duty of Comptroller.**—Where a limited co. being the registered owner of a trade mark changes its name, it is the duty of the Comptroller on request to substitute the new name for the old name on the register.—*Ex p. NEW ORMONDE CYCLE CO.*, [1896] 2 Ch. 520; 40 Sol. Jo. 654; *sub nom. Re NEW ORMONDE CYCLE CO.'S TRADE MARK*, 65 L. J. Ch. 785; 75 L. T. 50.

**521. —** — — — *Re HAMMOND & STOW, LTD.'S REGISTERED TRADE MARK (1905)*, 22 R. P. C. 299.

**522. Change of address—& addition thereto.**—*Re COCKLE (JAMES) & CO.'S TRADE MARK (1903)*, 20 R. P. C. 353.

*D. Onus of Proof.*

**523. On applicant for correction.**—*Re EDGINGTON'S TRADE MARK, EDGINGTON v. EDGINGTON*, No. 532, *post*.

**PART I. SECT. 5, SUB-SECT. 1.—E.**

**a. Security for costs.**—On an application by plffs. to expunge defts.' trade mark from the register, defts., resident out of the jurisdiction, applied

for & obtained an order for security for costs against plffs., also resident out of the jurisdiction; plffs. thereupon applied for a similar order upon the ground that the matter was within

**524. —** — — — *Re CHESEBROUGH'S TRADE MARK "VASELINE," No. 318, ante.*

**525. —** — — — When a trade mark is impeached after it has been for a long time on the register, & has been openly & largely made use of, the presumption is in its favour, & the onus of proof that it was improperly registered is on the persons who seek to have it removed.—*WELLCOME (TRADING AS BURROUGHS, WELLCOME & CO.) v. THOMPSON & CAPPER, Re BURROUGHS, WELLCOME & CO.'S TRADE MARKS*, [1904] 1 Ch. 736; 73 L. J. Ch. 474; 91 L. T. 58; 52 W. R. 581; 20 T. L. R. 415, C. A.; *affg. S. C. sub nom. Re WELLCOME'S TRADE MARK (1903)*, 52 W. R. 205.

**526. —** — — — The proprietors of two registered trade marks, one consisting of the word "Peps," which was registered in 1906 in class 3, for pine extract pastilles for coughs, colds, & bronchitis, & the other consisting of a label with a tree device & the words, "Peps for coughs, colds, & bronchitis," appearing thereon, applied for the removal from the register of the trade mark "Pan-Pep," which had been registered in 1921 by another firm in respect of goods which covered dyspepsia & indigestion tablets for which it was used. The registrar dismissed the application & appcts. appealed.—*Held*: appcts. had failed to discharge the onus which was upon them of satisfying the ct. that there was a reasonable prospect of confusion if the trade mark attacked were allowed to remain on the register; & the appeal must be dismissed with costs.—*Re UNITED CHEMISTS' TRADE MARK ASSOCN., LTD. (1923)*, 40 R. P. C. 219.

*E. Costs.*

**527. Application successful—Liability of registered owner.**—*Re HYDE & CO.'S TRADE MARK*, No. 434, *ante*.

**528. —** — — — (1) When application is made for the registration of a trade mark composed in part of distinctive elements & in part of elements common to the trade, the proper form of registration is to register the entire mark, & to add a note disclaiming the exclusive right to the common elements.

(2) If in such a case the entire mark is registered without any disclaimer, the registration may afterwards, on an application by persons aggrieved, be rectified by adding a disclaimer, even though the registered proprietor does not consent to the rectification.

(3) Where the registration of certain trade marks, composed as above stated, was ordered to be rectified, & the registered proprietor did not consent to the rectification, but appeared by counsel on the hearing of the motion:—*Held*: resps. must pay the costs of the application, notwithstanding that no previous notice of it had been given them & that they had sent notice to all the trade when their registration was effected, after which a year & a half had passed before the motion to rectify was made. *Semble*: if it had been proved that the common elements in the marks had become common solely by the former common piracy of appcts. for rectification, resps. being foreigners, the latter would not have been made to pay the costs.—*Re KUHN & CO.'S TRADE MARKS (1878)*, 53 L. J. Ch. 238, n.

*Annotation:—As to (1). Follid. Re Hayward's Trade Mks. (1885)*, 54 L. J. Ch. 1003.

the discretion of the ct.:—*Held*: security should not be ordered against defts.—*WRIGHT, CROSSLEY & CO. v. ROYAL BAKING POWDER CO. (1898)*, 6 Exch. C. R. 143.—**CAN.**



529. ———.]—*Re HARE'S TRADE MARK* (1907), 24 R. P. C. 263.

530. ———.]—*Re PAINE & Co., LTD.'S REGISTERED TRADE MARKS*, No. 507, *ante*.

531. ——— **Delay in bringing application—Applicant deprived of costs.**]—*BOURNE v. SWAN & EDGAR, LTD., Re BOURNE'S TRADE MARKS*, No. 311, *ante*.

532. **Application unsuccessful—Liability of applicant.**]—A motion was made in this case by John Edgington & co., defts. in the action, to rectify the register of trade marks by expunging therefrom a trade mark consisting of the words "Frigi Domo" registered on June 29, 1875, in respect of undyed baize, made of wool & hair, for the protection of hothouses from the cold. The material had been sold by plffs.' predecessors under the name since 1854. Plffs., Benjamin Edgington, Ltd., bought the trade mark, & brought this action in 1889 to restrain defts. from infringing. Defts. moved to expunge the trade mark on the grounds (a) that at the time when the registration was made the registered words had become the ordinary name of the material; & (b) that they had not been used as a trade mark at any time:—*Held*: the burden of proof was upon defts. to prove the use of the words as the name of the article before the years 1875 & 1878, & also that the words were not used as a trade mark before 1875; this they had failed to do; motion, therefore, to rectify register refused, & perpetual injunction granted to restrain defts. from using the words "Frigi Domo," as a trade mark for any baize or other material intended to be used for horticultural or similar purposes & not manufactured by or for the plaintiffs, or selected by them. Defts. to pay the costs.—*Re EDGINGTON'S TRADE MARK, EDGINGTON v. EDGINGTON* (1889), 61 L. T. 323; 6 R. P. C. 513.

*Annotations*:—*Reid, Field v. Wagon Syndicate*, [1900] 1 Ch. 651; *Re Chosebrough's Trade Mk. "Vaseline"*, [1902] 2 Ch. 1.

533. **Application abandoned—Right of registered owner to costs.**]—When the registered proprietor of a trade mark has been served with an originating notice of motion to remove the mark from the register, & subsequently with a notice of discontinuance of the motion, he is entitled notwithstanding the notice of discontinuance, to apply in ct. for the costs as of an abandoned motion.—*Re DYSON'S TRADE MARK* (1891), 65 L. T. 488; 36 Sol. Jo. 42.

534. **No costs given—Application in respect of matter not within power of court to grant.**]—*Re HARNESS' TRADE MARK*, No. 446, *ante*.

535. **Registrar's costs—What party liable—Applicant.**]—P. & Sons registered in 1896 the word "Zarna" as a Trade Mark in class 13 for busks used in corsets. They also registered it in class 38 for corsets. In 1912 S. registered the same word in class 50 for bandeaux for hats. On discovering the registration of the word by S., proceedings were commenced by P. & Sons for rectification of the register by removing S.'s mark. On the hearing of the motion it was contended by P. & Sons that the goods in respect of which the two marks were used were of the same description, & evidence was given to show that they were dealt in by the same people & sold at the same counter. It was not suggested that resp. had knowingly copied appcts.' marks:—*Held*: the marks must be expunged from the register, but under the special circumstances of the case without costs. Appcts. were ordered to pay the Registrar's costs.—*Re SHREEVE'S TRADE MARK* (1915), as reported in 31 R. P. C. 24.

536. ———.]—In an action for (*inter alia*), the infringement of a registered trade mark consisting of a device with the words "The Waldorf" applicable to toilet paper, defts. alleged that they had been using a similar mark on toilet paper before the user & registration of the mark by plffs. Defts. also alleged that the registration was wrongful, & moved to rectify the register by expunging plffs.' mark. At the trial, it was held that, at the date of the registration of plffs.' mark, the mark used by defts. was distinctive of defts.' goods, that the action must be dismissed, & that plffs.' mark was invalid & must be removed from the register. Plffs. appealed to the Ct. of Appeal against the order for rectification. On the appeal coming on for hearing, defts. & the Registrar, in consequence of communications between him & plffs.' representatives, did not appear. The hearing was adjourned to enable the Registrar to be represented. At the adjourned hearing, plffs. produced an assignment, for valuable consideration, to plffs. of defts.' interest in the trade mark & goodwill:—*Held*: the Registrar not objecting, the appeal should be allowed, by consent; defts. were ordered to pay the Registrar's costs of the application.—*SCOTT PAPER CO. v. DRAYTON PAPER WORKS, LTD.* (1927), 44 R. P. C. 520, C. A.

537. ———.]—*Re SMITH'S TRADE MARK*, No. 509, *ante*.

538. ——— **Jointly with owner.**]—On an application to register a trade mark in class 42 in respect of fish of all kinds packed in tins, the Registrar objected that the same mark was already registered in respect of all goods in class 42 with certain immaterial exceptions. Appcts. gave notice of motion for rectification of the Register by removal of the registered mark from the Register, or by limiting the registration by excluding canned fish & goods of a like kind. The owners of the trade mark agreed out of ct. to an order to that effect, & did not at first appear on the motion, but on behalf of the Registrar an order for removal was asked for, & was made provisionally, notice to be given to the owners. Thereupon the owners appeared & filed evidence of long use on sugar, & it was agreed that an order should be taken limiting the registration to sugar. Appcts. did not ask that the owners should pay their costs, but asked that they should pay the Registrar's costs:—*Held*: under the circumstances it was fair that appcts. & the owners should each pay half the costs of the Registrar.—*Re BURKE'S TRADE MARK* (1917), 34 R. P. C. 213.

539. ——— **Defendants to motion.**]—*CARLESS, CAPEL & LEONARD v. PILMORE-BEDFORD (F.) & SONS*, No. 470, *ante*.

## SUB-SECT. 2.—ALTERATION OF TRADE MARKS.

### A. In General.

See Trade Marks Act, 1905 (c. 15), s. 34; Trade Marks Act, 1919 (c. 79), sched. II.

540. **Condition of granting leave—No prejudicial effect on others.**]—*Re REISS' TRADE MARK* (1888), 5 R. P. C. 291.

*Annotation*:—*Reid, Re Phillips' Trade Mks.*, [1891] 3 Ch. 139.

541. **Whether alteration of old trade mark permitted.**]—Labels registered in 1878 as old marks, contained, with other matter, the words "trade mark," so placed as to appear to have particular reference to the device on the labels, rather than to the labels as a whole:—*Held*: the marks, being old marks, ought to be registered just as they were used prior to Aug. 1875, & to strike out the

*Sect. 5.—Correction of register and alteration of trade marks: Sub-sect. 2, A. & B. Sect. 6: Sub-sect. 1, A.]*

words "trade mark" would be a material alteration; inasmuch as there had been an indication of an intention in these marks, as registered, to claim only the device as the trade mark, the public were entitled to have the same indication of a restricted claim & the consequent protection, retained on the register, & on these grounds the application must be refused.—*Re PHILLIPS' TRADE MARKS*, [1891] 3 Ch. 139; 61 L. J. Ch. 40; 65 L. T. 373.

*Annotations:—Apld. Re Clay & Bock*, [1892] 3 Ch. 549. *Refd. Re Adams' Trade Mks.* (1892), 66 L. T. 610.

**542.** —[—]—Labels registered 1876, as old marks, contained the word "Patent" used in connection with the description of the article to which the labels were applied. The predecessor of the registered proprietors had carried on business & had used three of the labels therein so far back as the year 1832, but it could not now be ascertained that any letters patent had ever been granted in respect of the articles to which the labels were applied. The registered proprietors of the labels now applied, under Patents, Designs, & Trade Mark Act, 1883 (c. 57), s. 92, for leave to alter the labels by striking out the word "Patent" & substituting therefore, in the case of three of the labels, the word "Perfect" & in the remaining label the word "Polish":—*Held*: (1) the ct. has power, under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 93, to give leave to add to, or alter a trade mark registered as an old mark; (2) an old mark must be registered, & must stand upon the register, in all substantial terms, as it was used before the year 1875; (3) the word "Patent" being an important part of the trade mark for advertising & trade purposes, was a substantial part of the trade mark, & ought not to be struck out.—*Re ADAMS' TRADE MARKS* (1892), 66 L. T. 610; 36 Sol. Jo. 308; 9 R. P. C. 174.

*Annotations:—As to (2) Refd. Re Winterbottom Book Cloth Co.'s Applns.* (1927), 44 L. P. C. 162. *As to (3) Refd. Re Clay & Bock*, [1892] 3 Ch. 549.

**543. Alteration confined to non-essential particulars.**—A trade mark for sewing cotton, as registered, consisted of a lion surrounded with the inscription in Russian, "Ermen & Roby, Manchester." The initial "E." was, however, in the English, & not in the Russian character. The owners of the mark had for two years used it in the Russian trade, with the alteration of the English E to the Russian E, & with the insertion of the word "of" in Russian before the word "Manchester." The Comptroller having declined to alter the register under sect. 91, application to the ct. was made by the owners, under sect. 92 of the Patents, Designs, & Trade Marks Act, 1883 (c. 57), for leave to add to & alter the registered mark in the manner in which it had been used, & the ct. acceded to the application, on the ground that the addition & alteration was non-essential particulars.—*Re ERMEN & ROBY'S TRADE MARK* (1886), 56 L. J. Ch. 177; 56 L. T. 230.

**544.** —[—]—*Re ADAMS' TRADE MARKS*, No. 542, *ante*.

**545.** —[—]—S., a Russian, in May, 1895, registered for Russia leather, as an old trade mark, a mark comprising among other things, certain words between two circles running round the mark. One of such words was the name of the place where S.'s manufactory was situated in Russian characters. In the following November, he moved for leave to strike out the words "St. Petersburg" between the circles & substitute his own name in Russian characters:—*Held*: leave should

be refused as to a person not understanding Russian; the mark when altered would be different to the original mark & the alteration proposed was in a very material particular.—*Re SAVIN'S TRADE MARK* (1895), 13 R. P. C. 21.

**546. Alteration a matter of grace—Granted on terms appearing just—Nature of terms.**—Motion asking for leave to alter the registration of certain trade marks by striking out of each of such trade marks as registered the words "trade mark," & by striking out of a French trade mark as registered the words "Marque de fabrique," or that the register might be otherwise altered as to the ct. should seem just. Appcts. had registered various labels under Patents, Designs, & Trade Marks Act, 1883 (c. 57), the labels containing the words "Trade mark" in such a manner as to refer to a particular part of the mark as being the essential part, as, for instance, in one label the words being used in close proximity to a bull's head:—*Held*: the alteration could only be allowed as a matter of grace, & upon such terms as the ct. thought right, as the law stood under the Act of 1888.—*Re COLMAN'S TRADE MARKS*, [1891] 2 Ch. 402; 60 L. J. Ch. 550; 64 L. T. 507; 39 W. R. 488; 7 T. L. R. 425.

*Annotation:—Distd. Re Phillips' Trade Mks.*, [1891] 3 Ch. 139.

**547. Costs of comptroller—Liability of applicants.** —*Re NATIONAL WHOLESALE TEA SUPPLY ASSOCN.'S REGISTERED TRADE MARKS* (1893), 10 R. P. C. 164.

*Annotation:—Refd. Re New Ormondo Cycle Co.* (1896), 75 L. T. 50.

#### *B. What Alteration Permitted.*

**548. Addition of word—"Limited."** —A limited co. being registered owners of a trade mark including a signature which was the name of the co., applied to the ct. for leave to alter the trade mark by adding the word "limited" under the signature:—*Held*: leave should be granted.—*Re GUINNESS & CO.'S TRADE MARK* (1888), 5 R. P. C. 316.

*Annotations:—Refd. Re Phillips' Trade Mks.*, [1891] 3 Ch. 139; *Re Clay & Bock*, [1892] 3 Ch. 549.

**549.** —[—]—A trade mark registered as an old mark ought to be registered & kept registered just as it was used, & in the absence of special circumstances rendering alteration necessary, no alteration of such mark ought to be allowed.

The circumstance that the proprietor of an old mark, whose name or initials form part of such mark, has transferred to another person the business in connection with which the mark has been used, is not sufficient to induce the ct. to allow an alteration of the mark by substituting the name or initials of the new proprietor for the name or initials of the former proprietor.—*Re HENRY CLAY & BOCK & CO.*, [1892] 3 Ch. 549; 62 L. J. Ch. 143; 67 L. T. 614; 3 R. 29.

**550.** —[—]—*Re RICHARD HAYWARD & SONS, LTD.'S TRADE MARKS* (1896), 13 R. P. C. 729.

**551.** —[—]—The registered proprietors of three trade marks, on which the words "Holbrook & Co." appeared in ordinary type, applied to alter these words to "Holbrooks Ltd." the name of the then proprietors of the marks. Leave was granted to alter subject to "Limited" being used in full instead of abbreviated.—*Re HOLBROOKS, LTD.'S REGISTERED TRADE MARKS* (1901), 18 R. P. C. 447.

**552.** —[—]—*"Royal."*—The Carron co. which was incorporated by Royal charter in 1773, & had a registered trade mark, adopted in 1901 a new device on their seal by adding the words "Incorporated by Royal Charter, 1773," & they



now applied for registration of an alteration in their trade mark by the addition of the words quoted above. The Registrar refused the application holding that as the appearance of the word "Royal" on a trade mark was absolutely prohibited by rule 12 of the Trade Mark Rules he could not allow an old mark to be so altered:—*Held*: (1) the proposed addition was not part of the correct legal designation of the co. & therefore was not entitled to registration as such under Trade Marks Act, 1905 (c. 15), s. 9; (2) the present application must be treated as relating to a new mark & under rule 12 of the Trade Mark Rules the Registrar had rightly refused to allow the registration of the word "Royal."—*Re CAIRRON CO.'S APPLICATION* (1910), 26 T. L. R. 458; 54 Sol. Jo. 476; 27 R. P. C. 412.

**553. Deletion of word—"Trade mark."**—*Re PHILLIPS' TRADE MARKS*, No. 541, *ante*.

**554. "Patent."**—*Re ADAMS' TRADE MARKS*, No. 542, *ante*.

**555. Blank not filled up.**—The owner of certain trade marks registered as used before Aug. 13, 1875, asked for leave to alter them by striking out certain names & addresses & either leaving the spaces blank or filling in appct.'s present firm, name, & business address. The Comptroller objected so far as it was proposed to leave blanks. The ct. gave leave to amend by striking out as proposed, with the substitution proposed by appct.—*Re BROWN'S TRADE MARKS* (1894), 71 L. T. 156; 8 R. 762.

**556. Substitution of initials.**—*Re NATIONAL WHOLESALE TEA SUPPLY ASSOCN.'S REGISTERED TRADE MARKS* (1893), 10 R. P. C. 164.

*Annotation*:—*Reid. Re New Ormonde Cycle Co.* (1896), 73 L. T. 50.

**557. Substitution of new name & address.**—*Re BROWN'S TRADE MARKS*, No. 555, *ante*.

## SECT. 6.—ASSIGNMENT AND DEVOLUTION OF TRADE MARKS.

### SUB-SECT. 1.—ASSIGNMENT.

#### A. In General.

**558. Registration of assignment—Duties of registrar.**—Upon the application, in pursuance of Trade Marks Act, 1905 (c. 15), s. 33, as amended by Trade Marks Act, 1919 (c. 79), s. 11, by a person entitled by assignment to a registered trade mark to register his title, the registrar in the investigation of the title is not entitled to go behind the terms of the assignment, & will adequately discharge his duties if he satisfies himself that, upon the true construction of the assignment, there is an assignment of the trade mark in connection with the goodwill within the territorial limits to which the Act extends, of the business concerned in the goods for which the trade mark is registered.—*Re CRANBUX, LTD.'S APPLICATION*, [1928] 1 Ch. 829; 97 L. J. Ch. 476; 72 Sol. Jo. 302; *sub nom. Re CRANBUX, LTD.'S APPLICATION, Re LINGNER-WERKE AXT.'S APPLICATION*, 44 T. L. R. 409; 45 R. P. C. 281.

### PART I. SECT. 6, SUB-SECT. 1.—A.

**559 i. Trade mark appurtenant to goodwill.**—There is no provision in our Trade Mark & Design Act, 1875, similar to 46 & 47 Vict. c. 51 (Imp.), s. 70, which provides that a trade mark when registered shall be assigned & transmitted only in connection with the goodwill of the business concerned in the particular goods for which it has been registered.—*SMITH v. FAIR* (1887), 14 O. R. 729.—**CAN.**

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Registration, generally, *see* Sect. 3, *ante*.

*See* Trade Marks Acts, 1905 (c. 15), ss. 22, 23, 27; 1919 (c. 79), ss. 6–9, 11, 12, sched. II.

**559. Trade mark appurtenant to goodwill.**—*LEATHER CLOTH CO. v. AMERICAN LEATHER CLOTH CO.*, No. 570, *post*.

**560.**—The inventor of a sauce gave it the name of the Licensed Victuallers' Relish, & designed a trade mark for labels on the bottles containing it, & employed his son to sell it. He permitted his son to describe himself in his circulars & invoices as the sole proprietor of the sauce. The son became bkpt. & his trustee sold his interest in the sauce & its trade mark to pltf.'s who now sought to restrain the inventor from infringing the trade mark. It appeared that pltf.'s did not know deft.'s recipe, but made a sauce which their witnesses deposed to be indistinguishable from deft.'s:—*Held*: a trade mark could not exist in gross, & as the pltf.'s did not know the recipe for the original article, they could not have a right to affix the trade mark to a sham article for the purposes of imposing on the public.—*COTTON v. GILLARD* (1874), 44 L. J. Ch. 90.

**561.**—The owners of a trade mark for cigars, consisting of the Spanish words "El Destino" on a label with various devices, in Oct. 1890, commenced an action for infringement & for passing off other goods as pltf.'s against B., who sold cigars under a similar label, bearing the words "El Destinacion." Pltf.'s title was as follows: G., a Mexican cigar manufacturer, first sold cigars as "El Destino" about 1875. His manufactory was also called "El Destino." In 1889, G. sold the brand to R., retaining his manufacturing business, but he was not to sell under that brand. R. sold half the rights acquired by him to pltf.'s, who had acted as agents for G., & had sold his "El Destino" cigars in England. It was stipulated that any registration should be in the joint names of R. & pltf.'s. Pltf.'s who trading as G. & Co., in March, 1890, registered the label in the name of G. & Co., specifying as essential particulars the words "El Destino" the *fac simile* signature & the combination of devices. Defts. denied infringement & passing off. They contended that pltf.'s registration was bad, & they counterclaimed for rectification of the Register by expunging pltf.'s trade mark. Defts. adduced evidence to show that S. registered "El Destino" in 1881, & sold the mark to his son S. & W., who carried on business till 1886; that W. then carried it on alone some time longer; that in Mar. 1890, he consented alone to the mark being expunged, though by the terms of his dissolution with S. the mark was to be sold. Defts. submitted on this (a) that the mark "El Destino" was *publici juris*; (b) that the registration by pltf.'s was not in the proper name; (c) that S.'s registration was improperly expunged, no notice having been given to S. the son; (d) that pltf.'s essential particulars had not been taken; (e) that "El Destino" was not capable of registration as it described the character of the goods in that they were Spanish, & was geographical as it was the name of the factory. The jury found that pltf.'s trade mark

**559 ii.**—A trade mark cannot be transferred or descend in gross, but only together with the goodwill of the business to which it relates.—*HANNAH v. JUGGERNATH & Co.* (1914), 1 L. R. 42 Cal. 262.—**IND.**

**f. Agreement to share profits.**—Whether permanent interest in secret process given thereby.—A person possessed of a secret invention for a medicine, a trade mark for its sale, & a market established for it, does not—

by entering into an agreement with another, for an indefinite time terminable at the pleasure of either, for the making of the article by the other, & by having sales on a joint account, dividing profits—give a permanent interest to the other in either the secret or the trade mark.—*WESTON v. HEMMONS* (1876), 2 V. L. R. (Eq.) 121.—**AUS.**

**g. Whether including trade mark not specifically mentioned.**—An assign-

**Sect. 6.—Assignment and devolution of trade marks :  
 Sub-sect. 1, A. & B.]**

was imitated, & that defts. fraudulently passed off cigars not being the pl'tfs.' as pl'tfs.' The judge on these findings gave judgment for pl'tf. on the claim & counterclaim, overruling defts.' objections. The defts. moved for a new trial. They raised the points taken before the judge & also contended that the assignment of the trade mark to pl'tf. was bad as being an assignment in gross:—*Held*: judgment should be entered for defts. on this last ground.—*PINTO v. BADMAN* (1891), 7 T. L. R. 317; 8 R. P. C. 181, C. A.

*Annotations*:—*Reid*, *Re Smokeless Powder Co.'s Trade Mk.*, [1892] 1 Ch. 590; *Re Trade Mk. 96,997*, *Field v. Wagon Syndicate*, [1900] 1 Ch. 651; *Leconturier v. Roy*, [1910] A. C. 262; *Lacteosote v. Alberman*, [1927] 2 Ch. 117.

**562.** —.]—*LEAHY, KELLY & LEAHY v. GLOVER*, No. 253, *ante*.

**563.** —.]—*Re JOHNSON'S TRADE MARKS*, No. 487, *ante*.

**564.** —.]—In 1893, P. who had commenced to manufacture preserves at premises at S. road, Bermondsey, adopted for his trade name the invented style of Sidney Ord & co. He registered in 1894, under Trade Marks Act 1888 (c. 50), a trade mark in which his trade name was a prominent feature, the essential particular of the mark being the written signature & the exclusive use of added matter, except as consisting in the name being disclaimed. In 1908, J. was, under Lunacy Act, 1890 (c. 5), s. 116, appointed, & continued under divers orders, receiver of the estate of P. The business including the goodwill was offered for sale in 1909, but was not then sold. P.'s family having objected to the sale of the goodwill, the business was closed, the plant, trade effects, & lease being sold in Apr. 1910. A circular was sent out stating that the business was being discontinued & the account books were burnt. Defts. sold marmalade which they stated was prepared by the manager of the late firm of Sidney Ord & Co. & under labels in which that name was very prominent. The action to restrain passing off by defts. & their motion to rectify the register of trade marks by removing P.'s trade mark coming on for hearing together:—*Held*: assuming pl'tf.'s right in the label & trade mark were subsisting, defts. would have infringed pl'tf.'s rights; pl'tf. having ceased manufacturing marmalade for three years, no right of property existed in him which enabled him to restrain defts. from passing off marmalade under labels or marks containing his assumed trade name. The right to use the trade mark came to an end when pl'tf.'s business was discontinued, & it was not competent even if desired to keep the goodwill alive. The trade mark as a derelict trade mark not attached to the goods of the trader who registered it & without any goodwill to support it was a danger to the trading community which any trader who desired to adopt the name was as "an aggrieved person" under sects. 22 & 35 of Trade Marks Act, 1905 (c. 15), entitled to have removed from the register.—*PINK v. SHARWOOD (J. A.) & Co., LTD., Re ORD (SIDNEY) & Co.'s TRADE MARK* (1913), 109 L. T. 594; 30 R. P. C. 725.

ment to pl'tfs. included *inter alia* all that concern or business carried on under the style & firm name of R. & Co., & all merchandise, effects, & premises, & all & whatsoever may appertain or belong to the same or any part thereof, including the goodwill of the business:—*Held*: the terms of the assignment were sufficient to include a trade mark which had been used by the firm of R. & Co. during a

period of 25 years to distinguish packages of dried fish shipped by them to the Brazil market, although such trade mark was not specifically mentioned in the assignment.—*ROMY v. HART* (1891), 23 N. S. R. (11 R. & G.) 316: *CAN.*

**h. Sale by custodian of enemy property** —*Whether Canadian trade marks passed on sale*.—*BAUER CHEMICAL CO., IN-*

**565.** —.]—*Re SMITH'S TRADE MARK*, No. 509, *ante*.

**566.** —.]—Trade Marks Act, 1905 (c. 15), s. 22, amended by the Trade Marks Act, 1919 (c. 79), embodies in statutory form the principle, laid down in *Leather Cloth Co. v. American Leather Cloth Co.*, No. 570, *post*, & recognised by Trade Marks Registration Act, 1875 (c. 91), s. 2, & Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 70, namely, that a trade mark can be validly assigned only with the goodwill of the business concerned in the goods for which it has been registered.

F., the proprietor of an English registered trade mark in the form of a label under which he had for many years manufactured a pharmaceutical preparation in France & imported it into England, assigned the English trade mark to pl'tfs. by deed containing the words "together with the goodwill of the business concerned in the goods"; but F. continued as before to manufacture the preparation in France under the same label. Pl'tfs. sought to restrain deft., who had purchased the pharmaceutical preparation from F. under the said label, from importing it into England in alleged infringement of pl'tfs.' registered trade mark. Deft. applied by motion to rectify the register by expunging pl'tfs.' registration:—*Held*: according to the intention of the parties evidenced by the facts, the goodwill of the whole of F.'s business was not assigned: but, even if it were, pl'tfs. must be treated as having abandoned the part of the business carried on in France. Therefore the mark not having been assigned in connection with the goodwill of F.'s manufacturing & vending business in France, as required by Trade Marks Act, 1905 (c. 15), s. 22, & having become deceptive owing to pl'tfs.' own conduct, the action failed & the mark must be expunged from the Register of Trade Marks.—*LACTEOSOTE, LTD. v. ALBERMAN*, [1927] 2 Ch. 117; 96 L. J. Ch. 305; 137 L. T. 319; 43 T. L. R. 336; 71 Sol. Jo. 451; *sub nom.* *LACTEOSOTE, LTD. v. ALBERMAN, Re LACTEOSOTE, LTD.'s TRADE MARK*, 44 R. P. C. 211.

*Annotations*:—*Reid*, *Impex Electrical v. Weinbaum, Re Impex Electrical Trade Mks.* (1927), 11 R. P. C. 403; *Re Cranbux's Appln.*, [1928] 1 Ch. 829.

**567. Registration in name of one partner—Necessity for assignment to firm.—To secure registration in name of firm.**—Certain trade marks belonging to a foreign firm trading with England had, owing to a mistake on the part of the managing members of the firm, been registered in the name of the senior member as sole proprietor. The senior member having died, & the whole goodwill of the business being the property of the firm:—*Held*: the proper course to adopt was for the firm to take an assignment of the trade mark from the legal personal representative in England of deceased.—*Re FARINA'S TRADE MARKS* (1881), 44 L. T. 99, n.; 29 W. R. 391.

*Annotations*:—*Consol. Re Wellcome's Trademark*, *Re Burroughs, Wellcome's Trademark*, (1886), 32 Ch. D. 213. *Appl. Re Greenlees' Trade Mks.* (1892), 9 R. P. C. 93.

**568.** —.]—*Re GREENLEES' TRADE MARKS*, No. 490, *ante*.

*CORPORATED v. SANATOGEN CO. OF CANADA, LTD., & BARRY* (1920), 20 Exch. C. R. 123; 65 D. L. R. 80.—*CAN.*

**k. —Sale of American trade mark** —*Whether Canadian trade mark could be sold by American custodian*.—*LEHN & FINK INCORPORATED v. BEIERADOLF & Co.*, (1922), 67 D. L. R. 352; 21 Exch. C. R. 383.—*CAN.*

**l. Assignment may be made although**

**569. Stamp duty on agreement.]**—By an agreement made in England appts., a limited co., bought from a firm of soap manufacturers in the United States their freehold works, book & other debts, together with the goodwill of the business & the trade marks used in connection therewith. The vendors were the owners of a trade mark, registered in England, relating to their soap, which trade mark was extensively circulated throughout England in newspapers & pictorial advertisements at the expense of the vendors, who had an office in London for that purpose, & by this means a large demand for the soap had been created in the United Kingdom. The vendors did not sell direct to the retail dealers in the United Kingdom, but to a syndicate of three firms, who gave orders for soap which was despatched to them in England & paid for by them by remittances sent to the vendors; the syndicate then resold it to retail dealers & others at such prices as they thought fit; about two-thirds of the total sales of the vendors were made to the English syndicate:—*Held*: the English trade mark & goodwill were "property" within the meaning of Stamp Act, 1891 (c. 39), s. 59 (1), & the agreement was liable in respect of them to *ad valorem* stamp duty.—*BROOKE & Co. v. INLAND REVENUE COMRS.*, [1890] 2 Q. B. 356; 65 L. J. Q. B. 657; 44 W. R. 670; 12 T. L. R. 418; 40 Sol. Jo. 517, D. C.

*Annotation*.—*Reid. Velazquez v. I. R. Comrs.*, [1914] 2 K. B. 404.

**Registration of assignments.]**—*See* Trade Marks Acts, 1905 (c. 15), ss. 4, 33; 1919 (c. 79), s. 11.

#### B. How Effected.

**570. On sale of business.]**—(1) A co. purchased all the property, utensils, goodwill of business, & trade marks, etc., of a manufacturer: this purchase would authorise the co., really carrying on business at the same place, to continue the use of the manufacturer's name & marks, so as to be protected therein against infringement of the same.

(2) There may be a property in a trade mark which, on the sale of the right to manufacture the goods which it designates, may also be sold & transferred. *Semble*: a paper descriptive of a trade does not constitute a "trade mark."

I think that the right to a trade mark may, in general, treating it as a property or as an accessory of property, be sold & transferred upon a sale & transfer of the manufactory of the goods on which the mark has been used to be affixed, & may be lawfully used by the purchaser. Difficulties, however, may arise where the trade mark consists merely of the name of the manufactures. When he dies, those who succeed him (grandchildren or married daughters, for instance) though they may not bear the same name, yet ordinarily continue to use the original name as a trade mark, & they would be protected against any infringement of the exclusive right to that mark. They would be so protected because according to the usages of trade, they would be understood as meaning no more by the use of their grandfather's or father's name, than that they were carrying on the manufacture formerly carried on by him (LORD CRANWORTH).

*assignor has no place of business—In country where trade mark assigned.*—*BATTLE CREEK TOASTED CORN FLAKE CO., LTD. v. KELLOGG TOASTED CORN FLAKES CO. (Ont.)*, [1923] 4 D. L. R. 643; 55 O. L. R. 127.—*CAN.*

*m. Grant to plaintiff equivalent to assignment.]*—*CHANNEL, LTD. v.*

*O'CEDAR CORPN.*, [1927] 3 D. L. R. 575; 60 O. L. R. 525.—*CAN.*

*n. Goodwill not passing—Intention of parties to contrary.*—*BELL v. CUL-LING* (1904), 24 N. Z. J. R. 501.—*N.Z.*

**PART I. SECT. 6, SUB-SECT. 1.—B.**  
*o. Whether under writ of execution.]*

(3) Where an advertisement, or trade mark, states that which is not true, it cannot be made the subject of protection by the Ct. of Ch.

(4) Persons of the name of Crockett manufactured leather cloth, & put on it a stamp, describing it as manufactured by them at "New Jersey, U.S., & West Ham, Essex," & as being patented & being tanned. Appts. bought their manufactured articles, their materials for manufacture, goodwill, & premises at West Ham, & their trade marks. *Semble*: on such a purchase the continued use by the purchaser of Crockett's original bill was not a fraud on their part, & if the use of it had been infringing, it might have been protected.

But where in a stamp used by depts., the form of the printed words, the words themselves, & the pictured symbol introduced among them, so much differed from that of plfts., that any person with reasonable care & observation must see the difference, & could not be misled into taking the one for the other:—*Held*: there had been no infringement.—*LEATHER CLOTH CO. v. AMERICAN LEATHER CLOTH CO.* (1865), 11 H. L. Cas. 523; 6 New Rep. 209; 35 L. J. Ch. 53; 12 L. T. 742; 29 J. P. 675; 11 Jur. N. 813; 13 W. R. 873; 11 E. R. 1435, H. L.; *affg.* (1863), 4 De G. J. & Sm. 137, L. C.

*Annotations*:—*As to (1) Apld.* Reddaway v. Banham, [1896] A. C. 199. *Reid.* Hury v. Bedford (1864), 4 De G. J. & Sm. 352; Morgan v. McAdam (1866), 36 L. J. Ch. 228; Pinto v. Badman (1891), 8 R. P. C. 181; *Lactosote v. Alberman*, [1927] 2 Ch. 117. *As to (2) Reid.* McAndrew v. Bassett (1864), 10 L. T. 442; Cheavin v. Walker (1877), 5 Ch. D. 850; Bow v. Hart (1905), 53 W. R. 372. *As to (3) Consd.* Sievert v. Findlater (1878), 7 Ch. D. 801. *Reid.* Ford v. Foster (1872), 7 Ch. App. 611. *As to (4) Consd.* Sisco v. Provezano (1860), 1 Ch. App. 192. *Follid.* Johnston v. Orr Ewing (1882), 7 App. Cas. 219. *Reid.* Blackwell v. Crabb (1867), 30 L. J. Ch. 504; Marshall v. Ross (1869), L. R. 8 Eq. 651; Cheavin v. Walker (1877), 5 Ch. D. 850; Somerville v. Schembri (1887), 12 App. Cas. 453; *Re* Hopkinson's Trade Mks., [1892] 2 Ch. 116; Lewis's v. Goodbody (1892), 67 L. T. 194; *Re* Paine's Trade Mks., Paine v. Daniel's Breweries (1893), 68 L. T. 801; Bile Bean Manufacturing Co. v. Davidson (1906), 23 R. P. C. 725; Havana Cigar & Tobacco Factories v. Oddenino, [1921] 1 Ch. 179. *Generally.* *Reid.* Wotherspoon v. Currie (1877), 22 L. T. 260; Cone v. Evans (1874), L. R. 18 Eq. 138. *Mentd.* Glenny v. Smith (1865), 2 Drew. & Sm. 476; Leather Cloth Co. v. Lonsont (1869), L. R. 9 Eq. 345.

**571. — By implication.]**—Where a business is sold the entire goodwill & right to use trade marks pass to the purchaser without any express mention of them being made in the deed of assignment; & the ct. will restrain any attempt on the part of the vendor to retain either for his own benefit or use.—*SHIPWRIGHT v. CLEMENTS* (1871), 19 W. R. 599.

**572. — —.]**—It is said that the ment of the goodwill of the business passes all the trade marks used in connection with the business. In my opinion it may or may not. If there was anything whatever to show that a trade mark did not pass, it may possibly be that it would not; but it does not at all follow that it does; & if the deed shows that, on the face of it, looking at the whole deed, it is not intended to pass, it will not pass by the use of the word "goodwill," though that word might have been sufficient to include it if there was nothing to the contrary (*NORTH, J.*).—*Re ROGER'S TRADE MARK* (1895), 12 R. P. C. 149; 13 R. 90.

*The right of property in a registered specific trade mark is not saleable by itself under a writ of execution.*—*GEGG v. BASSETT* (1902), 3 O. L. R. 263; 22 C. L. T. 114.—*CAN.*

*p. User.*—The mere fact that Bank imported & sold gold bars with a particular mark impressed upon them,

*Sect. 8.—Assignment and devolution of trade marks :  
Sub-sect. 1, B. & C.]*

**573. — By assignee in bankruptcy.]**—In substance there is no distinction between the sale of a business & goodwill by a trader himself, & a sale by his assignees in bkpcy. Therefore on sale of business by a trader's assignees in bkpcy. the trader has no right, upon setting up a fresh business after his discharge, to use the trade marks of his old business, or in any other way to represent himself as carrying on the identical business which was sold, although he has a right to set up again in business of the same kind next door to his old place of business. In such a case, it is no objection to the purchaser coming for the assistance of the ct., that he has continued to use the name of the old business which he found there.—*HUDSON v. OSBORNE* (1869), 39 L. J. Ch. 79; 21 L. T. 386.

*Annotations:—Apld. Hammond v. Malcolm, Brunker & Collins* (1892), 8 T. L. R. 324. *Mentd. Walker v. Mottram* (1881), 19 Ch. D. 355.

**574. — By custodian of alien property abroad —Trade mark registered in this country—No independent agency in this country.]**—A firm, M. & co., consisting of Germans, carried on, before the war, the business of manufacturers & merchants of champagne, at R. in France, & were the proprietors of four trade marks registered in England for champagne. The business in France was lawfully sequestered & sold to a French co. by the liquidator in France, & purchasers applied as successors of M. & co. to be registered as proprietors of the trade marks. The members of the old firm of M. & co. applied that the address in the register should be altered to an address of theirs in Switzerland, & alleged that the English goodwill & trade marks had not passed to the French co.; & they alleged that there was a secret in the manufacture by them of champagne. The question also arose whether a decision of the Franco-German mixed tribunal under the Peace Treaty determined the rights as between the purchasers & M. & co. as regards the English trade marks, & if so, whether that decision was binding in the present application:—*Held*: the marks were manufacturer's marks, & meant champagne wine manufactured & supplied by M. & co. at R.; that the business had always been carried on at R. & there was no independent agency or sale branch in this country, & the goodwill, clientèle & custom, so far as they related to the export trade, were indissolubly connected with the French business; the French co. were unquestionably now the proprietors of the French business; under these circumstances it followed that the marks must pass to the purchasers of the French business; there was no secret process in possession only of the M. family, & the trade marks would not be deceptive if used by purchasers; & apart from the decision of the mixed tribunal, the French co. had proved their right to be registered as subsequent proprietors of the trade marks; the tribunal could properly decide that, according to the law of France, the foreign trade marks passed to the French co., but it could not decide whether the registration of that co. as proprietors in England was premissible or whether it would be deceptive according to the law of England; in any case

their decision, if not conclusive, ought to be approached with every possible respect & it was favourable to the claims of the French co.

The application of the French co. was allowed on the condition imposed by the mixed tribunal, that words stating the French co. to be the successors of M. & co. in a prescribed form should appear on all labels used on wines manufactured by the French co. after the sale of the business to them. The application of M. & co. to remain proprietors with their altered address in Switzerland was refused.—*Re MUMM (G. H.) & Co.'s APPLICATIONS* (1922), 39 R. P. C. 379.

**575. — Effect limited to property within jurisdiction of custodian.]**—In an action, brought at Shanghai, for infringement of trade marks & passing off, *pltf.* was German by birth, but in 1886 had become naturalised as a Belgian subject. For many years he had carried on a business at Manila as a manufacturer of cigars that were sold under certain registered names & trade marks & in boxes with a facsimile of *pltf.'s* signature, & words of guarantee. Later, *pltf.* had established a factory at Hongkong. In 1918, the American custodian of alien property had sold the Manila business, with the goodwill & marks. The assignees of the business sold to *defts.* cigars in boxes similar to those in which *pltf.* had sold them, but with the addition of the assignees' name & the word "Successors," & *defts.* had sold the cigars at Shanghai. At the trial, *pltf.* contended that the assignment by the American custodian did not affect rights outside the Philippine Islands, that its recognition by a British ct. would be to give effect to penal legislation of the United States; & that the sale of cigars under the names & marks in question would lead the public in China to think that they were purchasing *pltf.'s* goods. It was held that on all of the three contentions of *pltf.* the action failed, & judgment was given for *defts.*, with costs. *Pltf.* appealed to the Privy Council; & at the hearing of the appeal *defts.* gave an undertaking not to use a particular label, or any other label upon which the name of *pltf.* should appear as the guarantor of the cigars or otherwise:—*Held*: the assignment of *pltf.'s* business could not transfer the title to trade marks or trade names in China, but could enable the assignees, as between themselves & *pltf.*, to say that they were not passing off goods to which they had no title, so long as they abstained from representing the goods as those of *pltf.*: *defts.* having given the undertaking as to the labels, the appeal must be dismissed.—*INGENOHL v. WING ON & CO. (SHANGHAI), LTD.* (1927), 44 R. P. C. 343, P. C.

**576. Employee learning trade secret—Practising secret after employer's death—Selling article under old name.]**—(1) When a man has learnt a trade secret from his employer, & practised it after the employer's death, selling the article under the old name, he will not acquire such a right to the exclusive use of the name as a trade mark as will be protected in a ct. of equity.

(2) *Semble*: where a trader acquiesces in a particular infringement of his trade mark for a considerable period during his life, his representatives will be unable to restrain it after his death.—*HOVEDEN v. LLOYD* (1870), 18 W. R. 1132.

a mark which was not originally theirs, but belonged to a Bank that had ceased to exist, & where there was no proof of any transfer or assignment of the mark, or that the new Bank succeeded the other in the sense either that it was a continuation of that Bank under another name, or that it

succeeded to the business or acquired the goodwill of that Bank:—*Held*: not to be sufficient to establish that the mark was the trade mark of the new Bank.—*ANOOKOOL CHUNDER NUNDY v. R.* (1900), 1 L. R. 27 Cal. 776.—*IND.*

*q. Court may look at surrounding circumstances.]*—In order that a trade

mark may be validly assigned it is not enough that an assignment in terms conforms to the very language of the statute. The ct. will go behind the formal words of the assignment & see what is really effected.—*DE MERIC, LTD. v. LYSOL, LTD.*, [1926] N. Z. L. R. 221.—*N.Z.*

**577. Foreign association vesting in liquidator abroad.—Right to trade marks registered in this country.]—***LECOUTURIER v. REY*, No. 488, *ante*.

*C. Validity of Assignment.*

**Appurtenancy of trade mark to goodwill.]—***See Nos. 509, 570, ante*.

**578. Mark granted by Cutlers' Company.]—**(1) Upon the formation of a partnership with a person entitled to a trade mark, such mark will, in the absence of express provisions in relation to it, become an asset of the partnership, for the whole trade is carried into the partnership, & the trade mark is but one element in it. Such a trade mark is, therefore, capable of being assigned by the partnership & the ct. will after an assignment to a purchaser restrain the firm, or any partner in it, from himself using the mark & from assigning it to any other person. Trade marks granted by the Cutlers' Company of Sheffield to persons not free of the Company, are, under the various Acts of Parliament regulating the Company, to be regarded as property capable of assignment by the grantee, & the principles enunciated above apply therefore to them also.

(2) If a personal trade mark be in any respect less assignable than one referring to locality only or a mere device, the distinction must be limited to cases where the mark is so clearly personal as to import that the goods bearing it are manufactured by a particular person.—*BURY v. BEDFORD* (1864), 4 De G. J. & Sm. 352; 4 New Rep. 580; 33 L. J. Ch. 465; 10 L. T. 470; 10 Jur. N. S. 1503; 12 W. R. 726; 46 E. R. 954, 11 J.J. *Annotation:—Reid, Leather Cloth Co. v. American Leather Cloth Co.* (1863), 1 Hem. & M. 271.

**579. Personal trade mark & mark referring to locality distinguished.]—***BURY v. BEDFORD*, No. 578, *ante*.

**580. Mark registered by sole selling agents.—For benefit of foreign manufacturers.—Assignment to manufacturers.]—***M. & R.*, carrying on business as co-partners in New York, instructed their agents in this country, *B. & W.*, to register two trade marks for goods of theirs, of which *B. & W.* had the exclusive sale. Such trade marks were registered by *B. & W.* as to one in the name of their firm, & as to the other in the name of *W.* only. *B. & W.*, having no beneficial ownership in the trade marks, in Aug. 1884, assigned them to *M. & R.* In Dec. 1884, one of the partners in the firm of *M. & R.* retired, & by a deed assigned all his interest in the business of the firm & in the trade marks to the continuing partners. In Dec. 1885, another partner retired, & three new partners joined the firm, but no assignment was executed by the retiring partner. On a motion by the present partners in the firm of *M. & R.*, & the last retiring partner, under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 78, that proper notices of the assignments of Aug. 1884, & Dec. 1884, might be entered on the Register, & the persons entitled under the last-mentioned assignment might be entered as the present proprietors of the trade marks:—*Held*: the application might be granted, as the trade marks had been transmitted in connection with the goodwill of the

business of *M. & R.* within the meaning of Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 70.—*Re WELLCOME'S TRADE MARK, Re BURROUGHS, WELLCOME & CO.'S TRADE MARK* (1886), 32 Ch. D. 213; 55 L. J. Ch. 542; 54 L. T. 493; 34 W. R. 453. *Annotation:—Reid, Re Magnolia Metal Co.'s Trademks.*, [1897] 2 Ch. 371.

**581. Goodwill assigned after trade mark.—To same person.]—***C.*, who carried on business as the London Pickle Co., was the registered owner of a mark, containing various devices, including a blank shield & the words the London Pickle Co. *C.* used the mark with the addition of an arm holding a dart on the shield & the words trade mark across the bottom of the shield. In Apr. 1891, *C.* became bkpt., & the trustee in his bkpcy. sold the mark to *H.* in July. *H.* sent a cheque to the trustee in purchase of the registered brand "The London Pickle Co." & all rights thereto. The trustee gave a receipt for the money, & in it he said he thereby transferred to *H.* the registered mark. *H.* then proceeded to use the mark as *C.* had done. In Dec. 1891, *H.* obtained from the trustee a formal deed of assignment of the mark, & of the goodwill of the part of *C.*'s business relating to the class of goods for which the mark was registered. In Jan. 1892, *H.* commenced an action against *M. & Co.*, & *C.*, who had become manager of part of *M.*'s business, for infringement of the mark & for passing off their goods as *H.*'s. Defts. used a very similar label in similar colours, bearing the words London Pickles, & in a shield the letters L.P. & also the words trade mark. Defts. contended that (a) the original assignment to *H.* was void as being an assignment in gross; (b) that both then, & at the date of the formal assignment, there was no goodwill existing to assign, & that therefore the assignment to pltf. was bad; (c) that pltf. did not use his mark as registered; (d) that the words trade mark in it were misleading; (e) that there was no infringement or passing off:—*Held*: (1) assuming the first assignment was not in proper form, it was cured by the formal assignment, & the trustee showed his intention of passing & had power to pass the goodwill, though it might be it was of little value, & the assignment was therefore valid; (2) mere additions to a trade mark did not disentitle a person who used the whole of it to an injunction.—*HAMMOND & CO. v. MALCOLM, BRUNKER & CO. & COLLYNS* (1892), 8 T. L. R. 324; 9 R. P. O. 301.

*Annotations:—As to (2) Reid, Re Clay & Bock* (1892), 67 L. T. 814. *Generally, Reid, Re Paine's Trade Mks.*, *Paine v. Daniel's Breweries* (1893), 68 L. T. 801.

**582. Assignment to designer.—Designer being purchaser of goods.]—***LEAHY, KELLY & LEAHY v. GLOVER*, No. 253, *ante*.

**583. Assignment of reversionary interest in goodwill.]—**(1) In order that the name of an article may be the trade mark of the manufacturer it must indicate not the article only, but also that the article is manufactured by the person claiming the name as a trade mark as distinguished from other persons. The name "Magnolia" being applied to a certain metal, by whomever manufactured, cannot be registered as a trade mark or as the essential part of one.

**PART I. SECT. 6, SUB-SECT. 1.—C.**

**General rule.]—**For the assignment of a trade mark to be operative in law, it is not sufficient that an assignment of goodwill should accompany or follow the transfer of the trade mark, so as literally to comply with the rule that a trade mark cannot be transferred in gross, but the trade mark must continue to be a representation of the truth as warranting

the origin of the goods to which it is attached, within the limits of deviation sanctioned by the usage of trade & commerce.—*BRITISH AMERICAN TOBACCO CO., LTD. v. MAHBOOB BUKSH* (1910), 1 L. R. 38 Calc. 110.—*IND.*

**t. Necessity for registration.]—**Although Trade Mark & Design Act, 1879, s. 4, requires registration of the trade mark before the proprietor can bring an action, & sect. 14 provides

for registration of an assignment, the latter sect. does not enact that registration shall be necessary to give the effect to such assignment.—*CAREY v. GOSS* (1886), 11 O. R. 619.—*CAN.*

**a. Assignment by alien properly custodian in Philippine Islands.—Extra-territorial effect of.]—***INGENHOHL v. OLSEN & CO. INCORPORATED & HONG KONG TRADE MARK REGISTRAR* (1922), 17 Hong Kong L. R. 4.—*HONG KONG.*

*Sect. 6.—Assignment and devolution of trade marks : Sub-sect. 1, C. & D.; sub-sects. 2 & 3. Sect. 7 : Sub-sects. 1 & 2, A.]*

(2) The words "Magnolia Anti-Friction Metal," as applied to bearings in machinery, have reference to the character & quality of the goods within Trade Marks Act, 1888 (c. 50), s. 10 (1) (e), "Magnolia" being the name applied to a well-known metal; but the word "Magnolia" alone, as applied to a metal, has not, although it had, prior to the registration of the word as a trade mark, become known as the name of the metal.

(3) A word does not become a "geographical name" within Trade Marks Act, 1888 (c. 50), s. 10 (1) (e), simply because some place on the earth has been called by it, its primary signification not being geographical, & it not being the name of the place where the article named after it is manufactured.

(4) An American co. manufactured a metal, the main use of which was in bearings for machinery. They had not sold any bearings in this country, but had by means of an English partnership trading under their authority procured bearings to be made, & had a commercial interest in their being made, & they had a reversionary right in the goodwill of the business so carried on:—*Held*: the American co. had a business concerned with the metal bearings, in connection with the goodwill of which a trade mark registered for bearings made of the metal in question could be assigned under Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 70.—*Re MAGNOLIA METAL CO.'S TRADE MARKS*, [1897] 2 Ch. 371; 76 L. T. 672; 13 T. L. R. 454; 41 Sol. Jo. 573; 14 R. P. C. 621, C. A.; *sub nom. Re MAGNOLIA METAL CO.'S TRADE MARKS*, *Ex p. ATLAS CO.*, 66 L. J. Ch. 598.

*Innovations*:—As to (1) *Földi*, *Re Gestetner's Trade Mk.*, [1908] 1 Ch. 513. As to (3) *Reid*, *Re Clement's Trade Mk.*, [1899] 81 L. T. 490. *Generally*, *Reid*, *Kodak v. London Stereoscopic & Photographic Co.*, *Kodak v. Houghton*, *Re Kodak Trade Mks.*, [1903] 19 T. L. R. 297.

584. Assignment of goodwill to part of business.]—*LACTEOSOTE, LTD v. ALBERMAN*, No. 566, *ante*.

#### *D. Rights of Assignee.*

585. Exclusive user—Mark registered for all goods in a class—Assignment of goodwill in only part of goods.]—*EDWARDS v. DENNIS*, *Re EDWARDS' TRADE MARK*, No. 331, *ante*.

586. To sue for infringement—Whether registration of assignment necessary.]—Where a trade mark has been registered, an assignee of the registered proprietor can bring an action to prevent the use of the trade mark, without having registered the assignment.—*ILLEE v. HENSHAW* (1886), 31 Ch. D. 323; 55 L. J. Ch. 273; 53 L. T. 949; 34 W. R. 269.

587. To deny allegation of passing off—If goods not represented to be those of plaintiff—Assignment by operation of law.]—*INGENHOHL v. WING ON & CO. (SHANGHAI), LTD.*, No. 575, *ante*.

#### SUB-SECT. 2.—DEVOLUTION.

588. Devolution on personal representatives of deceased owner.]—Partnership stock includes the goodwill of the business & the right to use the

trade mark; & on the purchase, by a surviving partner from the exors. of a deceased partner, of the partnership stock at a valuation, the value of the goodwill & the trade mark must be taken into account.—*HALL v. BARROWS* (1863), 4 De G. J. & Sm. 150; 3 New Rep. 259; 33 L. J. Ch. 204; 9 L. T. 561; 28 J. P. 148; 10 Jur. N. S. 55; 12 W. R. 322; 46 E. R. 873, L. C.

*Annotations*:—*Reid*, *Leather Cloth Co. v. American Leather Cloth Co.* (1863), 1 Hem. & M. 271; *Bury v. Bedford* (1864), 4 De G. J. & Sm. 352; *McAndrew v. Bassett* (1864), 4 New Rep. 12; *Maxwell v. Hogg*, *Hogg v. Maxwell* (1867), 2 Ch. App. 307; *Levy v. Walker* (1879), 10 Ch. D. 436; *Singer Manufacturing Co. v. Loog* (1882), 8 App. Cas. 15; *Goodfellow v. Prince* (1887), 35 Ch. D. 6; *Mental*, *Lainsworth v. Wainsley* (1890), L. R. 1 Eq. 518; *Reynolds v. Bullock* (1878), 47 L. J. Ch. 773; *Stewart v. Gladstone* (1879), 10 Ch. D. 626; *Borthwick v. Evening Post* (1888), 37 Ch. D. 449; *Trogo v. Hunt*, [1898] A. C. 7; *Page v. Ratcliffe* (1897), 76 L. T. 63; *Jennings v. Jennings* (1898), 77 L. T. 786.

589. —J.—*LEATHER CLOTH CO. v. AMERICAN LEATHER CLOTH CO.*, No. 570, *ante*.

590. —J.—*Re FARINA'S TRADE MARKS*, No. 567, *ante*.

591. —J.—An action to restrain the infringement of a registered trade mark with the usual claim for an account of profits & damages is not within the rule *actio personalis moritur cum persona*, but, being brought in respect of injury to the property of the owner of the mark, may be continued by his exors. after his death.—*OAKEY & SONS v. DALTON* (1887), 35 Ch. D. 700; 56 L. J. Ch. 823; 57 L. T. 18; 35 W. R. 709; 3 T. L. R. 701.

#### SUB-SECT. 3.—APPORTIONMENT ON DISSOLUTION OF PARTNERSHIP.

*See Trade Marks Acts*, 1905 (c. 15), s. 23; 1910 (c. 79), s. 12, Sched. II.

#### SECT. 7.—INFRINGEMENT OF TRADE MARKS.

##### SUB-SECT. 1.—IN GENERAL.

592. What amounts to infringement.]—A man may take the trade mark of another ignorantly, not knowing it was the trade mark of the other; or he may take it in the belief, mistaken but sincerely entertained, that in the manner in which he is taking it he is within the law, & doing nothing which the law forbids; or he may take it knowing it is the trade mark of his neighbour, & intending & desiring to injure his neighbour by so doing. But in all these cases it is the same act that is done & in all these cases the injury to pltf. is just the same. The action of the ct. must depend upon the right of the pltf., & the injury done to that right. What the motive of deft. may be, the ct. has very imperfect means of knowing. If he was ignorant of pltf.'s rights in the first instance, he is, as soon as he becomes acquainted with them & perseveres in infringing upon them, as culpable as if he had originally known them (*LORD CAIRNS, C.*).—*SINGER" MACHINE MANUFACTURERS v. WILSON* (1877), 3 App. Cas. 376; 47 L. J. Ch. 481; 20 W. R. 604, H. L.

*Annotations*:—*Consd.*, *Mitchell v. Henry* (1880), 15 Ch. D. 181; *Singer Manufacturing Co. v. Loog* (1882), 8 App. Cas. 15; *Bodega Co. v. Owens* (1889), 6 R. P. C. 236; *Bodega Co. v. Owens* (1889), 7 R. P. C. 31; *Powell v.*

#### PART I. SECT. 6, SUB-SECT. 1.—D.

b. *Exclusive user*.]—The essential elements of a legal trade mark are: (1) the universality of right to its use, i.e. the right to use it the world over as a representation of, or substitute for, the owner's signature; (2) exclusiveness of the right to use it.—

*BUSH MANUFACTURING CO. v. HANSON & McLAUGHLIN* (1888), 2 Exch. C. R. 557.—CAN.

#### PART I. SECT. 7, SUB-SECT. 1.

c. *Sale of goods stated to have gone through patent process*.]—*MACKEDIE v. McSTAVE* (1895), Q. R. 8 S. C. 411.—CAN.

d. *Right of person to appropriate to own use*.—*Names suggested by trade*.]—A person may to some extent appropriate to his own use a name suggested by his trade, without infringing the law relating to trade marks or trade descriptions.—*R. v. BAKAULLAH MALIK* (1904), 1 L. R. 31 Calc. 411.—IND.



Birmingham Brewery Co., [1886] 2 Ch. 54; *Bow v. Hart*, (1905) 1 K. B. 592. *Appl. Havana Cigar & Tobacco Factories v. Oddenino*, [1924] 1 Ch. 179. *Reid, Cheavin v. Walker* (1877), 5 Ch. D. 860; *Condy v. Mitchell* (1877), 37 L. T. 766; *Linoleum Manufacturing Co. v. Nairn* (1878), 7 Ch. D. 834; *Metzler v. Wood* (1878), 47 L. J. Ch. 625; *Siegert v. Findlater* (1878), 7 Ch. D. 801; *Orr Ewing v. Johnston* (1880), 13 Ch. D. 434; *Re Palmer's Trade Mk.* (1883), 24 Ch. D. 504; *Blair v. Stock* (1884), 52 L. T. 123; *Re Chorlton & Dugdale's Trade Mk.* (1885), 53 L. T. 337; *Slaenger v. Felcham* (1886), 6 R. P. C. 531; *Borthwick v. Evening Post* (1888), 37 Ch. D. 449; *Jay v. Lader* (1888), 60 L. T. 27; *Turton v. Turton* (1889), 42 Ch. D. 128; *Tallerman v. Dowling Radiant Heat Co.* (1900) 1 Ch. 1; *Re Verity's Trade Mk., Re Hall & Woodhouse's Trade Mk.* (1901), 18 T. L. R. 214; *Bourne v. Swan & Edgar* (1902), 51 W. R. 213; *Universal Winding Co. v. Hattersley* (1915), 32 R. P. C. 479; *Pullman v. Pullman* (1919), 36 R. P. C. 240; *Goodall v. Waddington* (1924), 41 R. P. C. 658. *Mentid. Re Crook's Trade Mk.* (1914), 110 L. T. 474.

**593. Infringement must be of mark as a whole.]**—The owners of a trade mark consisting of the words "Rugby Portland Cement," with other particulars, commenced an action to restrain defts. from infringing the trade mark & from executing orders for Rugby Portland Cement otherwise than by supplying pltf.'s cement & from using the word "Rugby" in connection with cement other than pltf.'s, & from passing off cement not of pltf.'s manufacture as & for pltf.'s, alleging that pltf.'s cement was known as "Rugby Portland Cement," & that "Rugby" where applied to Portland Cement, denoted pltf.'s cement, & no other. The only evidence as to infringement of the trade mark was that defts. supplied their cement to persons ordering Rugby & Rugby Portland Cement:—*Held*: (1) there was no evidence of any infringement of the trade mark as a whole, & that part of pltf.'s case failed on that ground; (2) the evidence showed that the terms "Rugby" & "Rugby Portland Cement" did not denote pltf.'s cement & no other, but were terms known in the trade as applied to cement from this district; (3) there was no evidence of deception on the part of defts.—*RUGBY PORTLAND CEMENT CO., LTD. v. RUGBY & NEWBOLD PORTLAND CEMENT CO., LTD.* (1891), 9 R. P. C. 46, C. A.

**594. Publicity to judgment in infringement action—Desirability of.]**—*SMITH (J. T.) & JONES (J. E.) LTD. v. SERVICE, REEVE & Co*, No. 728, *post*.

## SUB-SECT. 2.—TESTS OF INFRINGEMENT.

### A. In General.

**595. Resemblances & differences—Whether arising naturally from necessity of case.]**—In an alleged infringement of a right to trade marks, the ct. must ascertain whether the resemblances & the differences are such as naturally arise from the necessity of the case, or whether, on the other hand, the differences are simply colourable, & the resemblances such as are obviously intended to deceive the purchaser. Pltfs., in the manufacture & sale of "Taylor's Persian Thread," had acquired a right to certain distinctive marks by invention & user for a long period:—*Held*: they were entitled to an injunction to restrain the adoption of such marks by a third party.

*Semble*, in granting injunctions, the ct. looks rather to the points of resemblance, & the intention

of the parties in adopting them.—*TAYLOR v. TAYLOR* (1854), 2 Eq. Rep. 290; 23 L. J. Ch. 255; 22 L. T. O. S. 271.

**596. Imitation.]**—*BEARD v. TURNER*, No. 600, *post*.

**597. —.]**—*WYLLAM v. CLARKE*, [1876] W. N. 68.

**598. — Essential characteristics must be copied.]**—*WOOLLAM v. RATCLIFF*, No. 615, *post*.

**599. — Plaintiff's advertisements describing trade mark material.]**—*HENNESSY (JAMES) & Co. v. KEATING* (1908), 24 T. L. R. 534; 52 Sol. Jo. 455; 25 R. P. C. 361, H. L.

**600. — Use of different mark—Necessity for other indicia to show imitation.]**—(1) A trader may establish a trade mark by the use of a crest, & anything which amounted to an imitation of the crest as a trade mark would be restrained by the ct. But the use of a different crest by another trader, if ton accompanied by other *indicia* to make it a colourable imitation of the trade mark of pltf. will not be restrained.

(2) Pltf. laid by for two years before filing his bill for an injunction, having seen labels of deft. exhibited publicly, which he now complained of as being colourable imitations of his labels:—*Held*: such laches disentitled pltf. to relief.—*BEARD v. TURNER* (1866), 13 L. T. 746.

**601. — Of title & cover of book.]**—*HUTCHINGS v. SHEARD*, [1881] W. N. 20

**Use of same mark.]**—*See* Sub-sect. 2, C., *post*.

**Use of similar mark.]**—*See* Sub-sect. 2, D., *post*.

**602. Manufacturer supplying goods to plaintiff—Mark on goods registered by plaintiff—Supply of same goods to defendants—No contract for exclusive supply to plaintiff.]**—Pltf., a cigar merchant in London, registered a label at Stationers' Hall, which he requested G., the manufacturer at Havannah who supplied him with cigars of a particular description, to affix to each box consigned to him. G. accordingly affixed the label, with his own name as manufacturer, to all boxes so consigned. Pltf. subsequently discovered that G. was supplying cigars of the same description, & with the same label, to defts., who were G.'s agents, & brought his action to restrain the alleged infringement of his trade mark. On a motion for an injunction against defts.:—*Held*: there being no evidence of any contract that G. should supply pltf. exclusively with that description of cigars, the ct. could not, on an interlocutory application, restrain defts. from using the label. —*HURSCOT v. JONAS* (1870), 3 Ch. D. 584; 45 L. J. Ch. 364; 35 L. T. 228.

**603. Colour of marks.]**—In deciding the question of piracy of a trade mark, the colour of the marks cannot be taken into account, & the only test is a comparison of the uncoloured diagrams.—*NUTHALL v. VINING* (1880), 28 W. R. 330, C. A.

**604. Importation of foreign goods bearing infringing mark.]**—*JOSEPH RODGERS & SONS, LTD. v. ROTTGEN* (1889), 5 T. L. R. 678.

**605. —.]**—In an action for infringement of trade marks & a design, pltfs., who were manu-

## PART I. SECT. 7, SUB-SECT. 2.—A.

**596 i. Imitation.]**—*DARLING v. BAR-SALOU* (1880), 25 L. C. J. 31; 4 L. N. 37; Q. R. 1 Q. B. 218.—CAN.

**596 ii. —.]**—*SCHWEPPE'S, LTD. v. THOMSON, LEWIS & Co.* (1913), 32 N. Z. L. R. 1123.—N.Z.

**6. Word descriptive of material used in plaster.]**—The word "asbestic" prefixed to "wall plaster" being merely

descriptive of the material used in the plaster, the sale by other parties of plaster under that name is not an infringement of a registered trade mark, consisting of the words "asbestic wall plaster" surmounting a trellow on which was inscribed the letter "A" & the continuance of such sale cannot be prevented by injunction.—*ABBETSON & ASBESTIC CO. v. SCLATER* Co. (1900), Q. R. 18 S. C. 360.—CAN.

**f. Impression produced by mark.]**—In deciding whether there is infringement or not, the ct. will consider the impression produced by the mark as a whole.—*WAMPOLLE (HENRY K.) & Co., LTD. v. WALPOLE (HENRY S.) & Co. & HORNER*, [1925] Exch. C. R. 61.—CAN. *g. Similar mark previously registered in United States—Infringement by extending user of mark to another country.]*—*Applts.* in 1910 adopted &

**Sect. 7.—Infringement of trade marks: Sub-sect. 2, A. & B.]**

facturers of "Dunlop" pneumatic tyres, alleged that defts. had imported for sale in England tyres made by the French Dunlop co., which owned trade marks identical with those of the English Dunlop co. In an earlier action for a similar alleged infringement against a firm of B. & L., defts. in that action had submitted to an injunction & had undertaken to return to France the tyres complained of. Shortly afterwards, the business of B. & R. had been taken over by deft. co. It was alleged by deft. co. that six of the tyres as to which complaint was made by plffs. were tyres that had been ordered in the earlier action to be returned to France & accidentally had not been returned. Plffs. adduced evidence directed to prove an alleged sale of a tyre by defts. to an employee of plffs., & to prove that consignments of tyres from abroad to defts. had included French "Dunlop" tyres. Defts. adduced contrary evidence, & contended that plffs., having ascertained that the alleged infringing tyres were lying at the docks, & not having instituted criminal proceedings in respect of them, were disentitled to equitable relief:—*Held*: the sale of the six tyres was of relatively little importance; as to the alleged sale to plff.'s employee, the evidence of plffs. was to be accepted; there had been an importation by defts. of tyres, including French "Dunlop" tyres bearing the registered trade marks & registered design; & plffs. were not, by their conduct, disentitled to equitable relief. An injunction to restrain infringement of the trade marks & design was granted, with an order for delivery up or destruction & an inquiry as to damages. An application by defts. to be allowed to send the infringing tyres to their original source, as an alternative to delivery up, was refused.—*DUNLOP RUBBER CO., LTD. v. BOOTH (A. A.) & CO., LTD.* (1926), 43 R. P. C. 139.

**606. Consideration of circumstances of parties.]—**MELACHIRINO (M) & Co. v. MELACHIRINO EGYPTIAN CIGARETTE CO. & MELACHIRINO, No. 732, *post*.

**607. Taking marked part of plaintiff's machine—Putting part on one of defendant's machines.]—**HARRISON v. WOODROFFE, *Re* HARRISON'S TRADE MARK, No. 303, *ante*.

**608. Use of disclaimed part of mark.]—**In 1876 Hubbuck & Son registered a trade mark, consisting of a representation of the Royal Arms with the words "White Zinc" below them, & the words "Hubbuck's Patent, London," arranged in circular form round the Arms & the other words. The trade mark was registered in class 1 for paints, user for twenty years prior to 1876 being claimed. In 1879, the Register was rectified by order of the Ct. by a memorandum, by which the then proprietor of the mark disclaimed any exclusive right to use the coat of arms or the words "White Zinc," or the word "Patent." In 1897, Thomas Hubbuck & Son, Ltd., the successors of Hubbuck & Son, & the proprietors of the trade mark, commenced an action against William Brown, Sons & Co., to restrain infringement of the trade mark, & passing off of deft.'s goods as the goods of plffs. Defts. used a mark consisting of the Royal Arms surrounded by the words "William Brown, Sons, & Co., Glasgow & London," which were between

two concentric circles, & in a line below the circles the words, "White Zinc Paint" occurred. At the date of action, both plffs. & defts. used their marks by stencilling them in white on kegs of paint, plffs. putting the words "Trade Mark" in a line below their mark, & they both exported such kegs to Spanish-speaking countries, in which countries plffs. alleged that their mark had, by reason of the Royal Arms on it, acquired the name of "Dos Leones." Plffs. alleged a fraudulent course of conduct by defts. & their predecessors extending over a period of many years, & complained of the get-up of deft.'s goods. Defts. alleged long user by them of the Royal Arms in a circle, & acquiescence by plffs. They also alleged that the use by plffs. of the word "Patent" was a misrepresentation. It was held that the conduct of defts. had not been fraudulent; the distinctions between the marks were so obvious as to prevent any probability of deception; in view of the disclaimer, plffs. could not complain of the use by defts. of the Royal Arms, & if defts.' goods also acquired the name of "Dos Leones," by reason of their use of the Royal Arms, plffs., as they could not claim the exclusive use of such arms, could not complain. The action was dismissed:—*Held*: the trade mark was, in view of the disclaimer, only for a combination, & defts. had not taken that combination. On the passing off, plffs. had failed to establish their case.—*HUBBUCK (THOMAS) & SON, LTD. v. BROWN (WILLIAM) SONS & CO. (1900)*, 17 R. P. C. 638, C. A.

*Annotation.*—*Consd.* Alaska Packers' Assn. v. Crooks (1901), 18 R. P. C. 129.

**609. Salesman on commission having right to mark—Salesman refusing to accept delivery of goods—Sale of goods by defendant at request of railway company.]—**A salesman on commission may be the proprietor of a trade mark in respect of the goods which he sells on commission.

A trade mark may be registered in connection with vegetables & other natural products of the earth.

Plffs. were salesmen of vegetables on commission in Covent Garden market. They dealt largely in the vegetables of a grower named W., on whose care and skill in selecting, grading, & packing they knew they could rely. They registered a trade mark under classes 42 & 50 in Sched. 111. to the Trade Marks Rules, 1890, & painted the same upon the baskets in which they sold the vegetables. Their practice was to send baskets with their trade mark upon them to W., who filled the baskets & forwarded them by rail to plffs. Plffs.' trade mark was well known & goods sold by them under that mark had a high reputation in the market.

Owing to a dispute between them & the railway co. plffs. refused to take delivery of nine baskets forwarded by W. as aforesaid. The railway co. then procured defts. under an indemnity to sell in the market the contents of the nine baskets. Defts. sold the contents in or from the baskets themselves:—*Held*: the vegetables so sold by defts. were the goods of plffs. by virtue of selection, certification, dealing with, or offering for sale within the meaning of Trade Marks Act, 1905 (c. 15), s. 3; there was nothing to prevent plffs. from registering a trade mark in connection with

had since used in Newfoundland a certain trade mark in connection with tobacco. In 1915 they found that resp. was importing into & selling in Newfoundland tobacco bearing a similar mark. They thereupon registered their trade mark under the Newfoundland Trade Marks Act, &

commenced an action against resp. for infringement. The trade mark upon the imported tobacco had been used in the United States from 1896, & it was "protected by law" in the United States, within the meaning of sect. 2 of the above-mentioned statute. Appls. when they adopted their trade

mark were ignorant of the existence of the other trade mark:—*Held*: appls. were properly registered in Newfoundland in respect of their trade mark, & were entitled to an injunction against resp.—*IMPERIAL TOBACCO CO. (NEWFOUNDLAND), LTD. v. DUFFY*, [1918] A. C. 181, P. C.—*NFLD.*



those goods; & defts. had committed an infringement of that trade mark.—**MAJOR BROTHERS v. FRANKLIN & SON**, [1908] 1 K. B. 712; 77 L. J. K. B. 601; 98 L. T. 925.

**610. User on defendants' goods.**—Pltfs., who were the registered proprietors of trade marks consisting of or including the word "Carbotron" registered for fuel, brought an action to restrain infringement of trade marks, & passing off fuel not their goods as or for such goods by means of the use of the word "Carbotron" or otherwise, & moved for an interlocutory injunction. They alleged that fuel, not their goods had on two occasions been supplied by defts. in response to written orders, for "Carbotron" fuel, which orders were sent at the instance of pltfs. by hand to defts.' shop. There was a conflict of evidence as to what occurred on these occasions, but the receipts given referred to the goods merely as fuel, & deft.'s shopman did not use the name "Carbotron," & he alleged that fuel was verbally asked for:—**Held**: there had been no infringement of trade mark, there having been no use of the word "Carbotron" upon or in connection with the goods of defts.; & the evidence did not establish that the attention of the defts.' shopman was drawn to the fact that "Carbotron" was ordered. The motion was refused.—**PETERS (C. A.), LTD. v. DOMESTIC INVENTIONS CO.** (1908), 25 R. P. C. 387.

**611. — Same class of goods.**—**EDWARDS v. DENNIS, Re EDWARDS' TRADE MARK**, No. 331, *ante*.

**612. — — — — —**—**BOURNE v. SWAN & EDGAR, LTD., Re BOURNE'S TRADE MARKS**, No. 311, *ante*.

**613. Vocallisation.**—**OXO, LTD. v. KING, NO. 671, post**.

#### B. Deception.

**614. General rule.—Infringing mark must be calculated to deceive.**—(1) If A. has acquired property in a trade mark, which is afterwards adopted & used by B., in ignorance of A.'s right, A. is entitled to an injunction, but not to an account of profits or to compensation except in respect of any user by B. after he became aware of the prior ownership.

(2) The ct. must, however, be satisfied that the resemblance was such as would be likely to cause the one mark to be taken for the other.—**EDELSTEN v. EDELSTEN** (1863), 1 De G. J. & Sm. 185; 7 L. T. 768; 9 Jur. N. S. 479; 11 W. R. 328; 46 E. R. 72, L. C.

**Annotations.**—**Consd.** **Bourne v. Swan & Edgar, Re Bourne's Trade Mks.**, [1903] 1 Ch. 211; **Yeatman v. Homberger** (1912), 107 L. T. 712. **Refd.** **Moet v. Conston** (1864), 33 Beav. 578; **Cope v. Evans** (1874), L. R. 18 Eq. 138; **Johnston v. Orr Ewing** (1882), 7 App. Cas. 219; **Singer Manufacturing Co. v. Loog** (1882), 8 App. Cas. 15; **Lever v. Goodwin** (1887), 36 Ch. D. 1; **Humphries v. Taylor Drug Co.** (1888), 59 L. T. 820; **Saxlehner v. Apollinaris**

**Co.**, [1897] 1 Ch. 893; **Weingarten v. Bayer** (1905), 92 L. T. 511; **Slazenger v. Spalding**, [1910] 1 Ch. 267; **Spalding v. Gamage** (1915), 84 L. J. Ch. 449. **Mentd.** **Nocton v. Ashburton**, [1914] A. C. 932.

**615. — — — — —**—It is not necessary, in order to give a right to an injunction, that a specific trade mark should be infringed; it is sufficient that the ct. should be satisfied that there was, on the whole, a fraudulent intention of palming off deft.'s goods as those of pltf. But, in such a case, it is essential that the imitation should be necessarily calculated to deceive; & where it did not appear that any one had been, in fact, deceived, & a material part of pltf.'s peculiar marks had been omitted, the ct., notwithstanding strong circumstances of suspicion, refused to interfere.—**WOOLLAM v. RATCLIFF** (1863), 1 Hem. & M. 259; 71 E. R. 113.

**Annotation.**—**Refd.** **Cope v. Evans** (1874), L. R. 18 Eq. 138.

**616. — — — — —**—No trader can adopt a trade mark so resembling that of another trader that persons purchasing with ordinary caution are likely to be misled, though they would not be misled if they saw the two trade marks side by side. Nor can a trader, with even some claim to the mark or name, adopt a trade mark which will cause his goods to bear the same name in the market as those of a rival trader.—**SHIXO v. PROVEZENDE** (1866), 1 Ch. App. 192; 14 L. T. 314; 12 Jur. N. S. 215; 11 W. R. 357, L. C.

**Annotations.**—**Disd.** **Taggett v. Findlater** (1873), L. R. 17 Eq. 29. **Apld.** **Cope v. Evans** (1874), L. R. 18 Eq. 138; **Wilkinson v. Griffith** (1891), 8 R. P. C. 370; **London General Omnibus Co. v. Felton** (1896), 22 T. L. R. 213; **Powell v. Birmingham Vinegar Brewery Co.**, [1896] 2 Ch. 51; **Cooper & McLeod v. MacLachlan** (1901), 18 T. P. C. 380. **Refd.** **Wotherspoon v. Currie** (1872), L. R. 5 H. L. 508; **Orr Ewing v. Johnston** (1882), 40 L. T. 307; **Montgomery v. Thompson**, [1891] A. C. 217; **Pinet v. Malson Pinet** (1897), 77 L. T. 322; **Saxlehner v. Apollinaris Co.**, [1897] 1 Ch. 893; **Payton v. Snelling, Lampard** (1901), 85 L. T. 287; **Worcester Royal Porcelain Co. v. Locke, Same v. Rhodes** (1902), 18 T. L. R. 712; **Re Imperial Tobacco Co.'s Trade Mk.**, [1918] 2 Ch. 207.

**617. — — — — —**—Bill by traders, praying for a declaration of their right to a certain trade mark, & for an injunction to restrain defts. from using a brand alleged to be an imitation of it, dismissed with costs, there being no evidence of actual deception, & no such imitation of pltf.'s trade mark as, in the opinion of the ct., made deception probable.—**COPE v. EVANS** (1874), L. R. 18 Eq. 138; 30 L. T. 292; 22 W. R. 453.

**Annotations.**—**Refd.** **Re Meous' Appln.**, [1891] 1 Ch. 11; **Reddaway v. Benthall Hemp Spinning Co.** (1892), 67 L. T. 301.

**618. — — — — —**—In 1862 letters patent for an improved water filter were taken out by S. C. in the name of himself & his son G. C. In the same year S. C. died, & the business was afterwards carried on by G. C., who made & sold filters under

visual resemblance is not necessarily the only thing to be considered; the possibility of confusion to the ear may also be an element.—**DORAN v. HOGADORE** (1906), 11 O. L. R. 321; 7 O. W. R. 349.—**CAN.**

**614 viii. — — — — —**—**BALFOUR & CO. v. KILBURN & CO.** (1862), 1 Hyd. 270.—**IND.**

**614 ix. — — — — —**—**EWING v. GRANT, SMITH & CO.** (1863), 2 Hyd. 135.—**IND.**

**614 x. — — — — —**—A person has a right to use any marks he pleases so long as they are not calculated to mislead the public, & do not infringe anybody's trade mark.—**NEMI CHAND v. WALLACE** (1907), 1 L. R. 34 Calc. 495.—**IND.**

**614 xi. — — — — —**—**DAVIS v. WILCKENS** (1878), 4 N. Z. Jur. N. S. 35.—**N.Z.**

**614 xii. — — — — —**—**SANITAS CO., LTD. v. OGLE** (1895), 14 N. Z. L. R. 361.—**N.Z.**

#### PART I. SECT. 7, SUB-SECT. 2.—B.

**614 i. General rule.—Infringing mark must be calculated to deceive.**—**Re TILLEY'S TRADE MARK** (1900), 26 V. L. R. 203.—**AUS.**

**614 ii. — — — — —**—**FIST v. VICKERY & SON** (1911), 13 W. A. L. R. 200.—**AUS.**

**614 iii. — — — — —**—In an action for infringement of a trade mark registered under Trade Marks Act, 1865 (N.S.W.), where the mark used by the deft. is not an exact or substantially exact copy of pltf.'s registered mark, but is a colourable imitation of it, the ct. must be further satisfied that the use by deft. of his mark is likely to lead to deception, & for that purpose the ct. must take into consideration all the circumstances surrounding the use of both marks.—**CLAY (HENRY) & BOCK & CO., LTD. v. EDDY** (1915), 19 C. L. R. 641.—**AUS.**

**614 iv. — — — — —**—**FOGGITT v. DARLING**, [1924] St. R. Qd. 123.—**AUS.**

**614 v. — — — — —**—The imitation of labels & wrappers whereby the public are misled & pltf. injured will be restrained as a fraud upon him, & though an imitation will be deemed colourable, if it be such that a careful inspection is required to distinguish it, yet a ct. will not interfere where ordinary attention would enable a purchaser to discriminate. It is not enough that a careless, inattentive or illiterate purchaser might be deceived by the resemblance.—**JOHNSON v. L'ARRU** (circa 1874), R. E. D. 98.—**CAN.**

**614 vi. — — — — —**—**BOSTON RUBBER SHOE CO. v. BOSTON RUBBER CO. OF MONTREAL** (1902), 22 C. L. T. 275; 32 S. C. R. 315.—**CAN.**

**614 vii. — — — — —**—In deciding whether a trade mark so resembles another as to be calculated to deceive,

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the patent, & affixed to each filter a label bearing the inscription, "S. C.'s improved patent gold medal self cleaning rapid water filter." In 1865 the patent was allowed to drop. In 1867, G. C. began to use his own initials instead of his father's on the labels, & notwithstanding the expiration of the patent, he continued to place above the descriptive words a medallion containing the royal arms, surmounted by the words, "By her Majesty's Royal Letters Patent." In 1875, defts. who had formerly been in G. C.'s employ, commenced to manufacture & sell filters similar in appearance of those of G. C., & on which were affixed labels bearing the inscription "S. C.'s patent prize medal self cleaning rapid water filter, improved & manufactured by W. & Co.":—*Held*: G. C. was not entitled to an injunction restraining defts. from using the labels, (a) because the label used by G. C. was not a trade mark, but only a description of the article as made according to S. C.'s patent, which was common to all the public; (b) because deft.'s label was not a fraudulent imitation of that of G. C., calculated to deceive the public; (c) because G. C.'s label, taken in conjunction with the royal arms, constituted such a false representation of the substance of the patent as to disentitle him to relief.—*CHRAVIN v. WALKER* (1877), 5 Ch. D. 850; 46 L. J. Ch. 686; 37 L. T. 300, C. A.

*Annotations*.—*Dist.* Grdley v. Swinborne (1888), 52 J. P. 791. *Refd.* *Re Palmer's Trade Mk.* (1883), 24 Ch. D. 501; *Reid v. Banham*, [1895] 1 Q. B. 286; *Powell v. Birmingham Vinegar Brewery Co.*, [1896] 2 Ch. 54.

619. — — —.]—*ORR EWING & Co. v. JOHNSTON & Co.*, No. 185, *ante*.

620. — — —.]—*HUTCHINGS v. SHEARD*, [1881] W. N. 20.

621. — — —.]—*BLAIR v. STOCK*, No. 155, *ante*.

622. — — —.]—*M.* in 1893 purchased the business & trade marks of S. Griffiths & Sons, trap manufacturers, & in 1894 registered as an old mark for animal traps a trade mark consisting of the name S. Griffiths with three stars & I X L., which stars were commonly used in the trade to denote quality, & the exclusive use of them was disclaimed. S. Griffiths had also used similar marks with one & two stars instead of three. In 1876 S. Griffiths had registered "I X L." alone, & this mark was assigned to M. From early in 1894 E. Griffiths, who had been connected with S. Griffiths & Sons, carried on the business of trap manufacturer, using his name & the stars on his traps, & in 1899 he sold the business, which had then only a small turnover, to S. & S., trap manufacturers, for £50, & S. & S. continued to carry on the business under the name of E. Griffiths, marking their traps in the same way. M. commenced an action against S. & S. for infringement of his registered trade mark & for passing off. M. contended that his traps were known as "Griffiths'" traps, & that defts. had purchased E. Griffiths' business to secure the name Griffiths; defts. contended that "I X L." was the distinguishing mark of pltf.'s traps, & that they were known as "I X L." traps;—defts. had not infringed the trade mark & the "I X L." was the feature by which pltf.'s traps were known, & defts. goods were not calculated to deceive. The action was dismissed with costs.—*MARSHALL v. SIDEBOTHAM* (1900), 18 R. P. C. 43.

623. — — —.]—*H. & Co.* were the registered owners of label trade marks consisting of a frame of vine leaves surrounding a space, in which their name appeared, & enclosing in the top centre an "arm & battle axe" device, which was also registered by them as a trade mark; these labels

were used by them printed in gold on a white ground upon their bottles of Cognac brandy, in which they did an extensive & old-established trade. They brought an action for injunctions to restrain both infringement of trade mark & passing off against D., who served R. with a "third party notice," R. being joined as co-deft. at the trial, in respect of bottles of brandy, a limited quantity of which had accidentally been acquired by R. from whom D. had purchased a few, & which were labelled with a label printed in gold on a white ground, & consisting of a similar frame of vine leaves, surrounding a space in which appeared the name of "Jules Chateau et Cie," but in this case the small top centre space occupied by the device on pltf.'s label was filled up by continuing the vine leaf frame:—*Held*: although whoever designed deft.'s label must have copied the vine leaf part thereof from pltf.'s label, yet as the evidence showed that vine leaves encircling a label printed in gold on a white ground were common to the trade, deft.'s label, containing a different name & not containing the device of pltf.'s, was not calculated to deceive. The injunctions asked for were refused with costs.—*HENNESSY & Co. v. DOMPE* (1902), 19 R. P. C. 333.

624. — — —.]—*BOURNE v. SWAN & EDGAR, LTD., Re BOURNE'S TRADE MARKS*, No. 311, *ante*.

625. — — —.]—*FAIRBANK (N. K.) Co. v. COCOS BUTTER MANUFACTURING Co.* (1903), 20 T. L. R. 53.

626. — — —.]—*Pltfs.* who were a foreign firm & publishers of picture post cards, in Jan. 1910, opened a branch of their business in London & registered as their "Trade Mark" a heart shaped design with the initials "F.A.S." in the centre. They had previously used this mark abroad on their photographs, some of which had been sent to England & sold to wholesale dealers. Shortly after the establishment by pltfs. of the branch of their business in London, deft. co. was formed & registered for the purpose of publishing picture post cards, which had in the corner a heart, in the centre of which was printed very small a letter & a number. The design of pltf.'s heart was somewhat different from defts.' design being considerably broader than it was long, while deft.'s design was the conventional shape of a heart. Pltfs. brought an action against defts. for infringement of their trade mark & for passing off, & alleged that people had been misled by the mark on deft.'s cards:—*Held*: the characteristic feature of pltf.'s trade mark was the initials & not the design of a heart: there was no likelihood of deception & no one would be likely to mistake deft.'s mark for pltfs.—*SCHWERTFEGER (E. A.) & Co. Act. v. HART PUBLISHING Co., LTD.* (1912), 29 R. P. C. 236.

627. — — —.]—*ARDATH TOBACCO Co., LTD v. SANDORIDES (W), LTD.*, No. 673, *post*.

628. — — —.]—*Pltfs.* in an action for infringement of trade marks & for passing off carried on a large business as manufacturers of toy goods, including children's cycles, which they sold under the name "Faircycle," & they had trade marks, one being that name & others being the word "Fairy," alone or combined with words descriptive of the particular goods. Deft., a manufacturer of perambulators, including toy perambulators issued a circular containing a description of a new toy cycle of his manufacture. On motion, deft. stated that in the circular the name of his cycle had been put in the form "Farriscycle," by mistake, & he undertook not to use the words "The Farris Cycle" otherwise than as separate words. At the hearing, deft. alleged that, about the end of 1923,

he had had made for him, & had sold, a toy cycle that he had called "The Farrisette," & that, later, when the maker of it had entered deft.'s employment, deft. had altered the name to "the Farris Cycle." Pltfs. alleged that, in response to a written order for a "Fairycycle" at several shops of H. & Co., deft.'s cycle had been supplied, & that, in consequence, H. & Co. had submitted to an injunction against passing off:—*Held*: (1) the action was purely a name case, without any question of passing off by get-up; in the deft.'s circular, the name "Farriscycle" had been used by mistake. (2) Neither actual deception nor probability of deception had been proved; (3) upon deft.'s undertaking always to keep the words "Farris" & "cycle" separate, the action must be dismissed.—*LINES BROTHERS., LTD. v. FARRIS & Co. (1925), 43 R. P. C. 64.*

**629. —** —.—]—In 1926 pltf. registered a trade mark consisting of the words "Silent Knight" for cooking & heating apparatus in Class 18. Later in 1926, defts. applied to register a trade mark consisting of the device of a chess knight for the same class, with the words "Red Knight," but on pltf. objecting, the application was amended by striking out those words, pltf. understanding, that it was deft.'s intention not to use the words "Red Knight." In an action for infringement of pltf.'s trade mark & passing off, pltf. alleged that defts. had, since registration of their trade mark, advertised their gas stoves in connection with the words "Red Knight," & they moved to expunge deft.'s trade mark. Defts. gave notice of motion to expunge pltf.'s trade mark, but that was not pressed at the trial. There was evidence of actual confusion of the names "Silent Knight" & "Red Knight":—*Held*: (1) pltf.'s trade mark had been infringed, defts. had intended pltf. to understand that defts. would discontinue the use of the words "Red Knight" in connection with their stoves, & deft.'s device & the method in which they used it were calculated to deceive. Injunctions restraining infringement & passing off were granted, & deft.'s mark was ordered to be expunged from the register & their motion refused. (2) An order for delivery up & an inquiry as to damages were also granted & defts. were ordered to pay the costs of the action up to & including the order & the costs of the motions, including any costs of the Registrar.—*FORTH & CLYDE & SUNNYSIDE IRON COS., LTD. v. SUGG (WILLIAM) & Co., LTD. (1928), 45 R. P. C. 382.*

**630. Whom mark must tend to deceive — Members of public — Not manufacturers.]** — In cases of alleged colourable imitations of trade marks, the ct. has not to consider whether manufacturers could distinguish between the articles, but whether the public would probably be deceived by the alleged spurious imitation.—*SHRIMPTON v. LAIGHT (1854), 18 Beav. 164; 52 E. R. 65.*

**631. —** —.—]—**Not retail dealers.]**—Defts. sold certain soap made by them in packets with wrappers closely resembling those in which pltf.,

who were also soap manufacturers, had been in the habit of selling their soap:—*Held*: although the retail dealers, to whom alone defts. sold soap, would not be deceived, yet defts. put in their hands the means of committing a fraud on pltf., & pltf. were entitled to an injunction restraining defts. from using that form of wrapper, etc., & to an account of the profits made by them in selling soap in such packets, & the account ought not to be limited by excluding from it any soap sold by the retail dealers to persons who bought it as defts.' soap.—*LEVER v. GOODWIN (1887), 36 Ch. D. 1; 57 L. T. 583; 36 W. R. 177; 3 T. L. R. 650; 4 R. P. C. 492, C. A.*

*Annotations:—Apld. Saxlehner v. Appollinaris Co., [1897] 1 Ch. 893. Consd. Prices Patent Candle Co. v. Ogston & Tennant (1909), 26 R. P. C. 797. Distd. Edge v. Nicolls (1910), 80 L. J. Ch. 154. Consd. Smith's Potato Crisps v. Paige's Potato Crisps (1928), 45 R. P. C. 132. Mentd. Boake, Roberts v. Wayland (1909), 26 R. P. C. 251.*

**632. —** —.—]—**Person using ordinary vigilance.]**—*LEATHER CLOTH CO. v. AMERICAN LEATHER CLOTH CO., No. 570, ante.*

**633. —** —.—]—**Where goods sold in foreign market — Ultimate purchasers.]**—*ORR EWING & Co. v. JOHNSTON & Co., No. 185, ante.*

**634. —** —.—]—**Average intending purchaser.]**—*WARSOP (B.) & SONS, LTD v. WARSOP, No. 667, post.*

**635. Necessity for proof of actual deception.]**—*WOOLLAM v. RATCLIFF, No. 615, ante.*

**636. —** —.—]—*COPE v. EVANS, No. 617, ante.*

**637. —** —.—]—*RUGBY PORTLAND CEMENT CO., LTD. v. RUGBY & NEWBOLD PORTLAND CEMENT CO., LTD., No. 593, ante.*

**638. —** —.—]—*FAIRBANK (N.K) Co. v. COCOS BUTTER MANUFACTURING Co. (1903), 20 T. L. R. 53.*

**639. —** —.—]—*MCUAW, STEVENSON & ORR, LTD. v. LEE BROTHERS, No. 758, post.*

**640. —** —.—]—*LINES BROTHERS, LTD. v. FARRIS & Co., No. 628, ante.*

**641. —** —.—]—**Where similarity obvious.]**—*EDELSTEN v. EDELSTEN, No. 614, ante.*

**642. —** —.—]—*ABBOTT v. BAKERS & CONFECTIONERS' TEA ASSOC., [1872] W. N. 31, L. C.*

*Annotation:—Consd. Hookham v. Pottage (1872), 26 L. T. 755.*

**643. —** —.—]—*PAINE & Co. v. DANIELLS & SONS' BREWERIES, Re PAINE & Co.'s TRADE MARKS, No. 422, ante.*

**644. —** —.—]—**Where mark not actually copied.]**—In an action for infringement of a trade mark where the infringement is not an actual copy of the mark, pltf. must prove actual deception or probability of deception.—*LAMBERT & BUTLER, LTD. v. GOODBODY (1902), 18 T. L. R. 394; 10 R. P. C. 377.*

*Annotation:—Refd. Duncan Alderdee v. Burke (1916), 33 R. P. C. 341.*

**645. Duty to avoid possibility of deception.]**—*ORR EWING & Co. v. JOHNSTON & Co., No. 185, ante.*

**655 i. Necessity for proof of actual deception.]**—*ANHEUSER BUSCH BREWING ASSOC. v. EDMONTON BREWING & MALTING CO. (1911), 16 W. L. R. 547; 3 Alta. L. R. 370.—CAN.*

**b. Alleged infringement secondary feature only.—Marks quite distinct.]**—*GENERAL CIGAR CO., LTD. v. DESLONGCHAMP, [1927] Exch. C. R. 159.—CAN.*

**k. Whom mark must tend to deceive — Members of public.]**—*KALLI v. FLEMING (1878), 1 L. R. 3 Calc. 417; 2 C. L. R. 93.—IND.*

**l. —** —.—]—In order to deter-

mine whether a trade mark has such a resemblance to another as to be calculated to deceive, the ct. has not to scrutinise & compare them side by side, but to ascertain whether there is not such a resemblance as is calculated to deceive incautious buyers whether seeing them side by side or not.—*RE HAWKINS, Ex p. DUTTON (1892), 11 N. Z. L. R. 688.—N.Z.*

**m. —** —.—]—To entitle a trader to relief against infringement of his trade mark it is not necessary that the imitation should be so close as to

deceive persons seeing the two marks side by side; but the degree of resemblance must be such that ordinary purchasers proceeding with ordinary caution are likely to be misled.—*LEVY BROTHERS & LEWIS v. GOLDSTEIN (1890), 6 H. C. Part I., App. 1.—S. AF.*

**n. Intention to deceive should be reasonably inferred from facts.]**—In an action for infringing a trade mark an intention to deceive ought to be a reasonable inference from the facts proved.—*COOTE & Co. v. GREGG & Co. (1891), 10 N. Z. L. R. 139.—N.Z.*

*Sect. 7.—Infringement of trade marks: Sub-sect. 2, C. & D. (a) ]*

*C. Use of Same Mark.*

646. "Strathmore."—BLAIR v. STOCK, No. 155, *ante*.

647. "Dairy Maid."—ANGLO-SWISS CONDENSED MILK CO. v. METCALF, *Re* METCALF'S TRADE MARK, No. 469, *ante*.

648. "John Bull."—PAINE & CO. v. DANIELLS & SONS' BREWERIES, *Re* PAINE & CO.'S TRADE MARKS, No. 422, *ante*.

649. "Cat Brand."—Pltfs., a firm of distillers & wine & spirit merchants, had used a label with a cat & barrel depicted thereon since 1849. In 1879 they registered their mark in class 43 fermented liquors & spirits as an old mark. There are two other cat & barrel marks on the Register, in the same class, one scarcely used in England by traders who sold in bulk or used a label without a cat and barrel; the other was a barrel & three cats, & no user in this country was proved. Pltf.'s goods were well known as the "Cat & Barrel Brand" or the "Cat Brand." Deft. in 1899 commenced to sell sloe gin under a label whereon part of a cat & part of a barrel was depicted with the words "Cat Brand" underneath. Pltfs. did not manufacture sloe gin at the date of the registration of their mark:—*Held*: pltfs. were entitled to (a) an injunction to restrain deft., his agents & servants, from infringing pltf.'s registered trade mark; & (b) an injunction to restrain deft., his agents & servants from selling or passing off sloe gin not of pltf.'s manufacture as & for the goods of pltfs. in any way whatsoever & in particular by using the words "Cat Brand" in connection with the representation of a cat & a barrel, or any words, signs, figures or devices, which were calculated to enable deft.'s sloe gin or other liqueurs or goods of deft. to be passed off as & for the goods of pltfs. —BOORD & SON v. HUNNARD (1903), 89 L. T. 718; 20 T. L. R. 142; 48 Sol. Jo. 143; 21 R. P. C. 149.

*Annotation* :—*Refd. Re* Bagots, Hutton's Trade Mk., [1916] 2 Ch. 103.

650. "Cow Brand."—The owners of a trade mark, registered in respect of matches which had the device of a cow & the word "Cow" as essential particulars, brought an action for infringement. The infringement complained of consisted in the sale of matches in boxes having on them the device of a cow & the words "Cow Brand," the words "Mother Brand Safety Matches," & the words "Condensed Milk" underneath. Defts. were the registered proprietors of a trade mark which consisted of the device of a cow & was registered in respect of condensed milk, & the matches which they had sold & proposed to sell were intended to advertise their "Cow Brand" condensed milk. Pltfs. moved for an interlocutory injunction, & defts. offered an undertaking which pltfs. were not prepared to accept:—*Held*: there was an infringement of trade mark, & an interlocutory injunction was granted.—NITEDALS

TAENDSTIKFABRIK v. LEHMANN (R.) & CO., LTD. (1908), 25 R. P. C. 793.

651. "Bechstein."—B. & B. were piano makers carrying on business as "Carl Bechstein," & were the proprietors of two registered trade marks consisting of the word "Bechstein." They brought an action for infringement of trade mark & passing-off against F. A. B. They complained of certain advertisements of F. A. B. offering "Bechstein Model Pianos" for sale:—*Held*: "Bechstein Model" indicated that a piano was made by the firm of Bechstein; deft. had infringed pltf.'s trade marks & had dishonestly attempted to pass off pianos not of their manufacture as being of their manufacture; & a perpetual injunction must be granted with costs. An inquiry as to damages was directed.—BECHSTEIN v. BARKER & BARKER (1910), 27 R. P. C. 484.

652. "A.B.C." steel.—ANDREW (JOHN H.) & CO., LTD. v. KUHNENRICH, No. 361, *ante*.

653. "Gripe Water."—*Re* WOODWARD'S TRADE MARK, WOODWARD, LTD. v. BOULTON MACRO, LTD., No. 410, *ante*.

654. "A.1."—Manufacturers of mustard, who were very well known, registered in 1906 a trade mark for mustard consisting of the letter & numeral "A.1," & that mark had become known as indicating their goods. They brought an action for infringement against a co. carrying on the business of provision dealers in London, who were advertising mustard made by a German firm called Born Brothers as "A.1" Mustard, & applied for an interlocutory injunction. Defts. contended that they only used the expression "A.1" in conjunction with the words "Born's Mustard" or other words indicating manufacture by Borns, & that they had only used it as a *bona fide* description of the character or quality of the goods. Pltfs., however, exhibited a receipted invoice given on a trap order, which contained no reference to "Born's":—*Held*: it was a clear case of infringement of pltfs.' trade mark.—FARROW (JOSEPH) & CO., LTD. v. SEYFRIED (JOHN F.) & SONS, LTD. (1921), 38 R. P. C. 114.

655. "Dario."—In 1926 pltfs. obtained registration as a trade mark in classes 8 & 13 of the word "Dario" in respect of thermionic valves. They commenced an action against deft. for infringing the said trade mark by selling & offering for sale goods not those of pltf.'s to which the trade mark had been applied. Deft. gave notice of motion for the rectification of the Register by removing the said trade mark therefrom. At the trial of the action & hearing of the motion, deft. contended that, as pltfs. imported the goods to which the mark was applied from a foreign manufacturer who was the registered owner in France of the trade mark, the mark was not distinctive of pltf.'s goods, & should not have been registered in their name:—*Held*: there was no evidence of any user in this country prior to the application for registration of the trade mark or directed to show that the mark was not capable of being distinctive in this

**PART I. SECT. 7, SUB-SECT. 2.—C.**

*a. General rule.*—Where a person registers a trade mark consisting of a name with certain decorations, any person who uses that name, though without the decorations, may be liable to an action for infringement of such trade mark.—FERNE v. WILSON (1900), 26 V. L. R. 422.—AUS.

*p. "Singer."*—SINGER MANUFACTURING CO. v. CHARLESBOIS (1899), Q. R. 16 S. C. 167.—CAN.

*q. "John Dekuyffer."*—DE KUYPER

& SON v. VAN DULKEN, WEILAND & CO., VAN DULKEN, WEILAND & CO. v. DE KUYPER & SON (1895), 24 S. C. R. 114.—CAN.

*r. "Groceteria."*—GROCETERIA, LTD. v. EATON (T.) CO., LTD., [1926] 1 D. L. R. 26; [1926] 1 W. W. R. 1; 22 Alta. L. R. 92.—CAN.

*t. "Shamrock."*—FINLAY v. SHAMROCK CO. (1905), 22 R. P. C. 301.—IR.

*u. "Glenboig."*—DUNNACHIE v. YOUNG & SONS (1883), 10 R. (Ct. of Sess.) 874; 20 Sc. L. R. 588.—SCOT.

*v. "Stuart's Granolithic."*—STUART

& CO. v. VAL DE TRAVERS PAVING CO., LTD. (1885), 13 R. (Ct. of Sess.) 1; 23 Sc. L. R. 11.—SCOT.

*w. "Cura clava."*—MARSHALL v. HAWKINS (1885), 4 N. Z. L. R. 59 (S. C.).—N.Z.

*x. Mark moulded on aerated water bottles—Use by other manufacturers with label of their own—Practice of trade.*—THOMSON v. PHILLIPS (1895), 14 N. Z. L. R. 29.—N.Z.

*y. "Kangareta."*—STAPLES v. HANNAH (1898), 17 N. Z. L. R. 500.—N.Z.

country or that it was not properly registered, & there had been *bona fide* user of such mark. The motion to rectify was refused & an injunction to restrain infringement & an inquiry as to damages were granted.—*IMPEX ELECTRICAL, LTD. v. WEINBAUM, Re IMPEX ELECTRICAL, LTD.'S TRADE MARKS* (1927), 44 R. P. C. 405.

#### D. Use of Similar Mark.

##### (a) Words, Letters, and Figures.

**656. "Manufactured by Day & Martin"**—"Equal to Day & Martin's."—*DAY v. BINNING* (1831), Coop. Pr. Cas. 489; 47 E. R. 811.

**657. "Bull Dog Bottling"**—"Celebrated Terrier Bottling"—Plaintiff's beer known in colonies as "Dog's Head" beer.—Pltfs. & defts. were bottlers of beer for export. Pltf.'s label consisted of a bulldog's head on a black ground surrounded by a circular band on which were the words "Read Brothers, London. The Bull Dog Bottling." Def't.'s label represented a rough terrier's head on a black ground surrounded by a red circular band on which were the words "Celebrated Terrier Bottling, E. Richardson." Pltf.'s beer was well known in the colonies as the "Dog's Head" beer, & they alleged that defts., by exporting to certain colonies beer with the terrier's head label, led to their beer being substituted & taken for pltf.'s beer:—*Held*: pltfs. were entitled to an *interim* injunction restraining the continuance of the terrier's head in the label on the bottles of beer exported to such colonies by defts.

Pltfs. in obtaining an injunction upon an interlocutory application, must give an undertaking as to damages. If pltfs. have made out a *prima facie* case, the strong balance of convenience & inconvenience is in favour of granting the injunction (*COTTON, L.J.*).—*READ BROTHERS v. RICHARDSON & Co.* (1881), 45 L. T. 54, (C. A.).

*Annotation*:—*Apld. Re Baschiera's Trade Mk.* (1889), 5 T. L. R. 480.

**658. "Sanitas"**—"Condi-Sanitas."—Pltfs. registered the word "Sanitas," as a trade mark, under Patents, Designs, & Trade Marks Act, 1883 (c. 57), for goods manufactured & sold by them. Def't. advertised & sold under the name of "Condi-Sanitas" articles of a similar nature to those manufactured by pltfs.:—*Held*: the word adopted by def't. so resembled pltfs.' trade mark as to be calculated to deceive & mislead; & therefore an interlocutory injunction must be granted to restrain def't. from using the word "Sanitas" in conjunction with "Condi," or in any other way which would infringe pltfs.' trade mark.—*SANITAS CO., LTD. v. CONDY* (1886), 56 L. T. 621; 3 T. L. R. 226.

**659. "Apollinaris"**—"Apollinis."—*APOLLINARIS CO., LTD. v. HERRFELDT & CAMPBELL*, No. 810, *post*.

**660. "Era James Barber"**—"Edward Barber."—B. & her predecessors had for many years used on spring cutlery a trade mark which was registered in 1877 for cutlery & edge tools as an old mark, consisting of the words "Era James Barber, Sheffield." Pltf.'s spring cutlery was well

known in Ireland as "Barber's knives." M. sold knives stamped as "Edward Barber." "Edward Barber" had been registered in 1882 as an old mark by D. for table knives & forks, scissors, shears, files, & saws. This mark was as M. alleged assigned to him by D. in the latter part of 1882 with the goodwill of his business. At the trial the judge ruled that pltf.'s claim as it stood was for infringement of trade mark only, but he allowed an amendment extending it to passing off:—*Held*: pltf. was entitled to an injunction, confined to the Irish market, & to pocket knives only, & to the costs of the action.—*BARBER v. MANICO* (1893), 10 R. P. C. 93.

*Annotation*:—*Refd. Re Soc. Anon. des Verreries de l'Etoile's Trade Mk.*, [1894] 1 Ch. 61.

**661. "La Flor de Margareta"**—"Margarita."—B. registered the words "La Flor de Margareta" as an old trade mark for cigars, & brought an action for infringement against S. P. & co. for selling cigars in boxes branded "Margarita." Pltf. had sold cigars under his trade mark for many years. His cigar boxes had borne a label containing the words "Fabrica de Tabacos de la Vuelta Abajo," but this he had discontinued before the action was commenced. His cigar boxes, used at the time of the action, had a lid label which included the trade mark & other matters, & had printed at the bottom thereof "Regd. by H. B. 6458." Defts. denied infringement, & among other defences, they set up that pltf. was disentitled to maintain his action by reason to the said two labels which defts. alleged contained misrepresentations. In his cross-examination pltf. was asked to give the names & addresses of the manufacturers of his cigars sold under the trade mark; this he refused to do, & the judge ruled that, under the circumstances of the case, he was not bound to answer this question:—*Held*: defts. had infringed, & pltf. was entitled to succeed in his action.—*BENEDICTUS v. SULLIVAN, POWELL & Co.* (1894), 12 R. P. C. 25.

**662. "Tritidulina"**—"Tritidine."—*MEABY & Co., LTD. v. TRITICINE, LTD., Re MEABY & Co.'S TRADE MARK, No. 255, ante*.

**663. "Brooks"**—"J. Brookes."—Pltfs. were owners of Trade Mark No. 196, 435, (Class 37, which consisted of the word "Brookes," & was an old mark in use before Aug. 1875. J. Brookes was a manufacturer of cycle saddles. Def't.'s saddles were stamped with the name "J. Brookes." The N. co. advertised these saddles as "Brookes." Pltfs., commenced an action against J. Brookes & the N. co. to restrain infringement of their trade mark & passing off of def't. J. Brookes' saddles as pltf.'s by the use of the word "Brookes," & moved for an interlocutory injunction. The N. co. did not appear:—*Held*: an injunction must be granted against the N. co. to restrain infringement of the trade mark, & against other def't. to restrain passing off.—*BROOKS (J. H.) & Co., LTD. v. NORFOLK CYCLE CO. & BROOKES* (1899), 16 R. P. C. 523.

**664. "G.B.D."**—"J.B.D."—Pltfs. in an action for infringement of trade mark, were manufacturers of pipes, pipe cases, & cigar & cigarette cases in Paris. They had for many years sold

#### PART I. SECT. 7. SUB-SECT. 2.—

##### D. (a).

**1. "Australite"**—"Australite" & similar device to former trade mark.—*REKINGTON v. WEINBAUM, Re IMPEX ELECTRICAL, LTD.'S TRADE MARKS* (1914), 19 C. L. R. 237.—*AUS.*

**g. "Imperial"** soap—"Imperial Bibasic soap."—Pltf. had duly registered, as his trade mark in the manufacture of soap, the word "Imperial," with a star following it. Def't. put on

his boxes the words "Imperial Bibasic Soap." An injunction was granted restraining him from using the word "Imperial."—*CRAWFORD v. SHUTOCK* (1867), 13 Gr. 149.—*CAN.*

**h. "Cable Cigar, S. Davis"**—"C. P. R. & C. Cigar."—*DAVIS v. REID* (1870), 17 Gr. 69.—*CAN.*

**k. "Jersey Cream Yeast Cake"**—"Jersey Cream" on top of device "Yeast Cake" below it.—Defts. by selling yeast in packages labelled

"Jersey Cream Yeast Cake," the words "Jersey Cream" at the top & "Yeast Cake" at the bottom, with the representation of two Jersey cows & a milkmaid between, were:—*Held*: not to infringe pltf.'s mark.—*GILBERT v. LUMSDEN BROTHERS* (1904), 24 C. L. T. 345; 8 O. L. R. 168; 3 O. W. R. 851.—*CAN.*

**l. "Shur-on"**—"Staz-on."—A trader using the term "staz-on" as descriptive of goods is not guilty of

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pipes in Great Britain & Ireland stamped with the letters "G.B.D.," enclosed in an oval, which they had registered as a trade mark under the Act of 1875. Deft., a tobacconist in Londonderry sold pipes stamped "J.B.D.," also enclosed in an oval, but denied infringement on the grounds (a) of the difference in the letters; (b) that the stamp on his pipes was gilt, whereas pltf.'s trade mark was plain cut & ungilt; (c) that there was no evidence that he had sold them as of pltf.'s manufacture. Proceedings having been taken deft. offered to discontinue using the stamp complained of provided he was allowed to sell off the few gross of pipes in stock. This offer was not accepted, & the proceedings were continued. Pltfs. were granted a perpetual injunction, delivery up of the pipes & the instrument, if any, used for stamping the same, & costs.—*MATCHEAL & LUCHON v. M'COIGAN TRADING AS JOHN BALDRICK & Co. (1901)*, 18 R. P. C. 262.

665. "Cottolene"—"Cocosoline."—*FAIRBANK (N. K.) Co. v. C'OCOS BUTTER MANUFACTURING CO. (1903)*, 20 T. L. R. 53.

666. "Seccoline"—"Securline."—Pltfs. in 1894 registered the word "seccotine" as a trade mark for a cement, & used it extensively. Defts. began to sell a cement as "securine."—*Held*: "Securine" was a colourable imitation of "seccotine," & an injunction was awarded with consequential relief.—*McCaw, STEVILSON & ORR, LTD. v. NICKOLS & Co. (1903)*, 21 R. P. C. 15.

667. "B. Warsop's Cricket Bats."—"A. Warsop's World-renowned Cricket Bats."—Pltfs. were old established manufacturers of "B. Warsop's Cricket Bats." Deft. Alfred Warsop, who was formerly in pltf.'s employ, commenced to sell "A. Warsop's World-renowned Cricket Bats," stamped with his initial & surname, & with a device somewhat similar to that which appeared on pltf.'s bats. The word "registered" appeared on both bats, pltf.'s device being in fact registered as a trade mark, but not deft.'s although steps had been taken to obtain registration. On pltf.'s motion for an *interim* injunction, no order was made on deft. undertaking to sell his bats without any mark except his name & address "Marylebone":—*Held*: at the trial, the markings on the two bats were so distinct that it was impossible for an average man about to purchase a cricket bat to be deceived into thinking that deft.'s bat was pltf.'s & the action was dismissed, but without costs, by reason of deft.'s wrongful user of the word "registered."—*WAR SOP (B.) & SONS, LTD. v. WAR SOP (1904)*, 21 R. P. C. 481.

668. "Club Black Enamel"—"Hub Black Enamel."—M. was the registered proprietor of a trade mark consisting of an "ace of clubs" with the word "club" upon it, & used the same on labels pasted on stone bottles in which he sold "Club Black Enamel" with descriptive letterpress. C. commenced to sell "Hub Black Enamel" in similar bottles carrying similar labels

with the device of an "ace of spades" with very similar letterpress. An action was brought by M. against C. claiming an injunction, damages, & costs:—*Held*: it was a rank case of dishonesty, & an injunction was awarded to restrain infringement of trade mark & passing off, with one guinea damages & costs.—*MUNDAY v. CAREY (1905)*, 22 R. P. C. 273.

669. "Colonel"—"Colonial."—The St. M. M. Co. made & sold golf balls & put upon them "The Colonel" & the word "Colonel" had been registered by the Co. as a Trade Mark for golf balls. The Co. brought an action for infringement of trade mark & for passing off; the complaint being founded on the sale of "Colonial" golf balls by defts. The "Colonial" balls were sold at 1s. & the "Colonel" at 2s. & 2s. 6d. There was evidence adduced by defts. to show that no confusion was likely on account of the difference in the names & also in the price:—*Held*: the words "Colonel" & "Colonial" could not readily be mistaken the one for the other; in the make up & concomitants of their sale defts.' balls were essentially distinct from pltfs.; pltfs. had not proved confusion; it was impossible in the absence of gross fraud on the part of the vendors, for which defts. would not be responsible that their balls could be passed off as pltfs.'; defts. had not been guilty of passing off, nor had they infringed pltfs. trade mark.—*ST. MUNGO MANUFACTURING CO. v. VIPER & RECOVERING CO. (1910)*, 27 R. P. C. 420.

670. "Anzora"—"Onsoria."—I. registered the word "Anzora" as a trade mark in class 32 & used it for a hair cream. He discovered that deft. was using the word "Onsoria" on a hair cream & commenced an action to restrain him from infringing the trade mark, & from selling hair cream, not of pltf.'s manufacture, under the name "Onsoria" or any other colourable imitation of the word "Anzora," & from passing-off his preparation as & for the preparation of pltf. Pltf. moved for an interlocutory injunction:—*Held*: it appeared from the materials before the Ct. that the name adopted by deft. was calculated to deceive & an interlocutory injunction was granted.—*LEWIS v. VINE & VINE'S PERFUMERY CO. (1913)*, 31 R. P. C. 12.

671. "Oxo"—"Oxot."—Pltfs. were owners of a registered trade mark consisting of the word "oxo" under which their fluid beef & solid meat extracts were sold. Deft. offered for sale a preparation of meat put up in a cube form, but not made up like pltfs. cubes, under the name of "oxot." Pltfs. claimed an injunction restraining deft. from infringing their trade mark or from selling meat cubes as being pltfs.' goods under the name "oxot" or under any other names which were colourable imitations of the word "oxo" or were otherwise calculated to represent that the goods so sold were those of pltfs.:—*Held*: the difference in sound which arose when the word "oxot" is vocalised with or without the "t" at the end of the second syllable did not constitute a valid defence to the action, vocalisation being

infringement of any rights in the use of the term "shur-on" by another trader as his trade mark, nor of fraudulently counterfeiting similar goods described by the latter term: nor is such a use of the former term a colourable imitation of the latter term calculated to deceive purchasers, as the terms are neither phonetically nor visually alike.—*KRISTEIN, SONS & CO. COHEN BROTHERS, LTD. (Ont.) (1907)*, 39 S. C. R. 286, 27 C. L. T. 653.—*CAN.*

m. "Congoleum"—"Kugoleum."]

—*CONGOLEUM CO. OI CANADA v. CANADIAN LINOLEUMS & OILCLOTHS, LTD., [1923] Exch. C. R. 181.—CAN.*

n. "Imperial"—"Salada."—Deft. adopted for the sale of her tea a wrapper of the same material & size as that of pltf., with a label identical in design & colour thereto & with practically the same literature, save *inter alia* that the word "Imperial" was substituted for the word "Salada":—*Held*: where the general appearance of deft.'s trade mark & label taken as a whole may lead the unwary & un-

cautious purchaser to take deft.'s goods thinking they were pltf.'s, notwithstanding the substitution of the word "Imperial" for that of "Salada," deft.'s trade mark & label will be adjudged to be an infringement of the pltf.'s.—*SALADA TEA CO. OF CANADA, LTD. v. KEARNEY, [1925] Exch. C. R. 119.—CAN.*

o. Whether letter or combination of letters may constitute trade mark.—There is no warranty for the broad proposition that a letter or combination of letters cannot constitute a trade



but one of the elements to be taken into consideration in actions for infringement of trade marks; & the adoption of the name "oxot" by defts. for his meat cubes was not legitimate trading & plfts. were entitled to the injunction they claimed with costs.—*Oxo, LTD. v. KING* (1917), 34 R. P. C. 165.

672. "Lito" or "Y. To" — "Rito."] — *FITCHETTS, LTD. v. LOUBET & Co., LTD., Re REGISTERED TRADE MARKS, No. 271, ante.*

673. "999"—"99."]—In 1907 plfts.' predecessor in business registered as a trade mark the number "999" in respect of cigarettes. At the same time he also registered the numbers "111," "222," & "555" for the same goods. Plfts. were the registered proprietors of all these marks, & also of marks which included the numbers "333," "444," "666," & "777," but in each case with a disclaimer in respect of the numbers. The number "999" as also "555," was used for certain of the "State Express" cigarettes sold by plfts., such cigarettes being Virginia cigarettes, "999" being for a higher priced cigarette than "555." In 1922 defts. co. decided to bring out, & subsequently sold, Turkish cigarettes on the boxes & packets of which they put the number "99" & "double nine." The boxes & packets bore prominently the name "Lucana" & defts.' name & registered trade mark, & the get-up of them was quite different from that of plfts.' boxes & packets of their "999" cigarettes, & the price was considerably less. Defts. had had for some time previously on the market Virginia cigarettes bearing the number "66" & the word "Lucana." Plfts. brought an action against defts. for infringement of their trade mark "999" & for passing off. It was contended for plfts. that they were the only firm in the tobacco trade that used a series of recurring numerals & that any number consisting of recurring nines would lead to deception & confusion, & that their "999" cigarettes had come to be so asked for by customers that confusion would result. It was admitted that the use of numbers was common in the trade, & there was evidence of the use of a single "9" (*inter alia*) by a co. closely associated with defts., & of several instances of double recurring numerals, including in one case the number "99." At the trial plfts. alleged a dishonest intention on the part of defts.:—*Held*: there was no ground for the charge of dishonest intention; the idea of plfts.' trade mark was, at most, triplication & there was no infringement of plfts.' trade mark "999"; plfts.' "999" cigarettes were usually asked for as "State Express" cigarettes with a reference to the number & there was no short term without any reference to "State Express" by which those cigarettes were generally known to the public; & there was no risk of deception or confusion.—*ARDATH TOBACCO Co., LTD. v. SANDORIDES (W.), LTD.* (1924), 42 R. P. C. 50.

674. "Amami"—"Amata."]—Pltf. co. carried on business as manufacturers of perfumery, toilet preparations & other similar articles, & had for

many years distinguished their goods by the application thereto, & the use in connection therewith, of the word "Amami." In July, 1909, they registered that word as a trade mark for goods in Class 48. The trade mark was to be applied to perfumery, including toilet articles & preparations for the teeth & hair & perfumed soap. In Jan. 1924, defts. co. was incorporated for the purpose, according to the Memorandum of Assocn. of (a) carrying on business as wholesale manufacturers of toilet preparation, & (b) publishers of medical books & publications relating thereto, but the real object was to sell a medical book written by one of the two directors, & the co. had not sold toilet preparations, but on letter paper had described themselves as "Wholesale Manufacturers of Amata Toilet Preparations." The share capital was £100 divided into 100 shares, the whole of which were taken up by the two signatories to the Memorandum who were also the only directors of the co. Pltf. co. commenced an action against defts. co. & the two directors for an injunction restraining them (*inter alia*) "from selling or offering or exposing or advertising for sale or procuring to be sold any such goods as aforesaid"—i.e., perfumery or toilet articles or preparations—"not being plfts.' goods under the name 'Amata' or under any other name which by reason of colourable imitation of the word 'Amami' or otherwise is calculated to deceive" & from infringing plfts.' trade mark, & from carrying on business as manufacturers of toilet preparations under the name "Amata, Ltd." At the trial defts. claimed the right to use the word "Amata" for toilet preparations:—*Held*: (1) the sale of toilet preparations by defts. co. as "Amata" cream or "Amata" perfume, or any other toilet preparation with the word "Amata" affixed, would almost necessarily lead to confusion, & an injunction in the terms quoted above must be granted, but not the injunction asked for to restrain the use of the name Amata, Ltd., & defts. co. must pay plfts.' costs; there was no evidence that defts. co. had been formed by the other two defts. for the purpose of doing a wrongful act, & no claim had been established by plfts. against these defts. personally, & the action against them must be dismissed with costs.—*PRICHARD & CONSTANCE (WHOLESALE), LTD. v. AMATA, LTD.* (1924), 42 R. P. C. 63.

675. "Ustikon"—"Justikon."]—*Re DAVIS'S TRADE MARKS, DAVIS v. SUSSEX RUBBER Co., No. 67, ante.*

676. "Silent Knight"—"Red Knight."]—*FORTH & CLYDE & SUNNYSIDE IRON COS., LTD. v. SUGG (WILLIAM) & Co., LTD., No. 629, ante.*

#### (b) Designs.

677. Elephant.]—The owners of a trade mark, registered in 1877, of an elephant as applied to tea, commenced an action to restrain defts. from infringing the trade mark, & from selling any tea by the description of an elephant tea or tea of the elephant brand. Defts. were the owners of a

mark.—*BANARSI DAS v. R.* (1928), 1. L. R. 9 Lah. 491.—*IND.*

p. "Ajar"—"Ajex."]—*FABIAN v. CROSS*, [1917] N. Z. L. R. 203.—*N.Z.*

q. "African, Trafford, Pearl, Mistress & Fortress."—*South African, Stafford, Pearl, New Master, Mistress & Matron.*—*SMITH & WELLSTOOD v. CARRON Co.* (1896), 13 R. P. C. 108.—*SCOT.*

r. "Lavona"—"Lavroma."]—*TOKALON, LTD. v. DAVIDSON & Co.* (1914), 31 R. P. C. 74.—*SCOT.*

t. "Rooibosch"—"Roodbosch."] *Resp.* obtained the registration of trade mark for bush tea, one essential particular of which was the name of "Rooibosch" tea. Before this registration the same kind of tea had been known by several names, one of them being *Red Bush tea* or in Dutch "Roodbosch" tea, & appts. had sold similar tea under that appellation:—*Held*: as the words had reference to the quality of the tea & were not invented words, appts. were entitled to have the mark removed from the register.—*HEATLIE BROTHERS v.*

*HARTLEY* (1909), 26 S. C. 589; 19 C. T. R. 954.—*S.A.F.*

#### PART I. SECT. 7, SUB-SECT. 2.—D. (b).

677 i. Elephant.]—*BADISCHE, ANILINE & SODA FABRIK v. MANECKJI SHAPURJI KATRAK* (1893), 1. L. R. 17 Boim. 584.—*IND.*

a. *Similar drawings of town hall—Likely to deceive natives.*—*COWIE BROTHERS & Co. v. HERBERT* (1897), 24 It. (Ch. of Sess.) 353; 34 Sc. L. R. 280; 4 S. L. T. 243.—*SCOT.*

*Sect. 7.—Infringement of trade marks: Sub-sect. 2, D. (b), & E.: sub-sect. 3, A.]*

mark, registered in 1876, of an elephant applied to coffee, & had recently commenced to put this mark on packets of tea. The elephants in the two cases, when compared together, were different. On a motion for an interlocutory injunction:—*Held*: (1) defts. were infringing the trade mark, even though they put round their packets words stating that it was the elephant brand for coffee, & an injunction should be granted as to that; (2) plffs. had not, on the evidence, made out that their tea was known as elephant tea.—*UPPER ASSAM TEA CO. v. HERBERT & CO.* (1889), 7 R. P. C. 183, C. A.

*Annotation:—As to (1) Reff. Jarrett v. British North Borneo Cigar Co. (1892), 37 Sol. Jo. 116.*

**678. Dancing girl.]—JARRETT v. BRITISH NORTH BORNEO CIGAR CO.** (1892), 37 Sol. Jo. 116.

**679. Lion.]—H. & S.** took over in 1891 the business of The Lion Soap co. & subsequently sold "Red Lion Soap," "Golden Lion Soap," & "Lion (arbolesic Soap)," the first in large quantities. They were the owners of several registered trade marks, one being the word "Lion," & the others comprising the device of a lion, but they did not use any of their trade marks as such upon their soap wrappers. Their soaps became known as "Lion Soaps." K., a limited co., who dealt in arms & ammunition, & had registered & used for such goods the trade mark of a lion's head began to sell soap in four different wrappers, unlike H. & S.'s wrappers, but having thereon the representation of a lion's head in several places, & in some cases with the words "Trade Mark" attached. K.'s name was prominent on their wrappers. An action was brought by H. & S. against K. to restrain them from infringing plffs.' trade marks, & to restrain them from selling soap in wrappers or boxes bearing the device of a lion or a lion's head, & from using the device of a lion & the word lion in the course of their trade in soap:—*Held*: plffs. had not established a case of infringement of trade mark, but were entitled to an injunction to restrain defts. from selling, or offering for sale, soap in the wrappers complained of or so as to induce the belief that defts.' soaps are manufactured by plffs.—*HODGSON & SIMPSON v. KYNOCH, LTD.* (1898), 15 R. P. C. 465.

*E. Use in Printed Matter.*

**680. Price lists.]—T.** registered the word "Baffle" as a trade mark for safes, & brought an action against W. for infringement. T. moved for an interlocutory injunction in his action, & moved to expunge the trade mark on the ground that it was descriptive of an article which anyone could make & use. W. also proved that he did not use the word in question on his goods, but only in his price lists:—*Held*: T.'s trade mark was properly on the Register & ought not to be expunged, but W. had not infringed T.'s rights by using the word in his price lists as he had done.—*TALBOT v. WEBLEY, Re TALBOT'S TRADE MARK* (1886) 3 R. P. C. 276.

**681. Advertisements.]—Manufacturers of soap,** whose registered trade mark consisted of a ship, & whose goods had in consequence come to be known as "Ship Brand" soap, commenced an

action to restrain the use by another firm of soap manufacturers of a poster, on which a ship was a prominent feature. This ship was different from that of plffs., & bore on its sail a conspicuous Geneva cross, defts.' trade mark being a hospital nurse with a Geneva cross on one arm. The poster also bore defts.' name prominently, & the words "Fluid, Powder, Soap." Plffs. alleged that the poster was calculated to deceive by leading people to the conclusion that defts. were the makers of "Ship Brand Soap." They moved for an interlocutory injunction, which was refused by the judge. Plffs. appealed, & the action was settled in ct., plffs. accepting an offer by defts. not to use the poster in connection with powder or soap. *Seemle*: a trade mark may be infringed by advertisement.—*PRICE'S PATENT CANDLE CO., LTD. v. JEYES' SANITARY COMPOUNDS CO., LTD.* (1901), 19 R. P. C. 17, C. A.

**682. —.]—BOURNE v. SWAN & EDGAR, LTD., Re BOURNE'S TRADE MARKS, No. 311, ante.**

**683. —.]—Pltf.,** who was a boot retailer, registered a device in class 38, in respect of boots, shoes & leggings, etc., which consisted of the representation of a pick together with the word "Pick." Defts., who were also boot retailers, advertised their goods by show cards, & posters on which appeared a pick with the words, "Bargains, Pick them Out." Pltf. commenced an action against defts. to restrain them from infringing his registered trade mark & from passing off their goods as & for his goods, & applied for an interlocutory injunction. Defts. alleged that they had not infringed pltf.'s trade mark, inasmuch as they had not used the device of a pick on the goods themselves, & further, that they used the word "Pick," as a verb in calling attention to their goods:—*Held*: there must be an injunction till the trial to restrain defts. from using the device of a pick similar to that in the trade mark, or the word "Pick" in connection with their goods.—*BRIGGS (TRADING AS BRIGGS & CO.) v. DUNN & SON* (1911), 28 R. P. C. 704.

**684. —.]—The registered proprietors of these trade marks registered in class 13 in respect of steel belting lacing commenced an action for infringement of the trade marks, & gave notice of motion for an interlocutory injunction. The trade marks consisted respectively of the device of an alligator, the word "alligator," & the device of an alligator with the word "alligator" on it. Plffs. complained of an advertisement by defts. in a trade journal advertising "Stee lace Belting, Alligator Pattern—Prices from the sole manufacturers," followed by their name & address. Defts. contended that there was no user by them as a trade mark & that there was no infringement:—*Held*: there was a use by defts. of the word "Alligator" for the purpose of indicating the origin of the goods, indicating that defts. were making the goods which were really the goods of the owners of the trade marks. An interlocutory injunction from infringing the two last-mentioned trade marks was granted.—*STONE (J. B.) & CO., LTD. v. STEELACE MANUFACTURING CO., LTD.* (1928), 45 R. P. C. 127.**

**685. Specification.]—NOTES OF RULINGS BY THE COMPTROLLER-GENERAL, 1914 (A) (1914), 31 R. P. C. App. i.**

**PART I. SECT. 7, SUB-SECT. 2. —E.**

**681 i. Advertisements.]—Def't.,** a resident of Gaya, published advertisements & distributed hand-bills at M. advertising his medicine known as Ash "Sudha Sindhu." Pltf. alleged

that "Sudha Sindhu" was his registered trade mark & he brought this suit for an injunction & for damages:—*Held*: a trade mark could be infringed by means of advertisement.—*KHESHTRA PAL SHARMA v. PANCHAM SINGH*

*VARMA* (1915), I. L. R. 37 All. 446.—**IND.**

**b. Beer labels.]—MOLSON'S BREWERY v. ORIGINAL SALVADOR** (1915), 16 Q. J. R. 385.—**CAN.**



## SUB-SECT. 3.—PROCEEDINGS FOR INFRINGEMENT.

## A. In General.

See Trade Marks Act, 1905 (c. 15), s. 69.

**686. Right to jury—Discretion of court.]**—An action to restrain the use of a trade name involved, besides the usual trade mark issues the special question whether the name had not become the name of a specific machine. Upon motion by deft. for transfer of the action to a common law division & for a trial, & for the settlement of issues to be tried by judge & jury:—*Held*: under R. S. C., 1875, Ord. 36, rr. 3, 26, the action was unfit for a jury, & motion refused.—*SINGER MANUFACTURING CO. v. LOOG* (1879), 11 Ch. D. 656; 48 L. J. Ch. 647; 40 L. T. 647; 27 W. R. 903; *subsequent proceedings* (1882), 8 App. Cas. 15, H. L.

**687. — Issue of fact of minor importance.]**—Deft. to an action in the Ch. Div. for infringement of a trade mark is not entitled as of right, under R. S. C., 1875, Ord. 36, to have the action tried before a judge & jury, but only, subject to the discretion given to the ct. by R. S. C., 1875, Ord. 36, r. 26, to a trial by jury of issues of fact in the action; & such discretion of refusing a trial by jury will be exercised where the issue of fact fit to be tried by a jury is of minor importance as compared with the main questions involved in the action.—*SPRATT'S PATENT v. WARD & CO.* (1879), 11 Ch. D. 240; 48 L. J. Ch. 645; 40 L. T. 250; 27 W. R. 470.

*Annotation*:—*Expld. Singer Manufacturing Co. v. Loog* (1879), 11 Ch. D. 656.

**688. — Question of damages.]**—In an action brought by pltf. in the Ch. Div. against defts., in respect of an infringement by them of his registered trade mark, & claiming an account of profits or damages, defts. submitted to a perpetual injunction; & the only question remaining to be tried was what damages should be paid, pltf. waiving any account of profits. Pltf. applied to the ct. that the action might be transferred to the Q. B. Div., so that it might be tried with a jury. This application was opposed by defts., on the ground that, under R. S. C., 1883, Ord. 36, r. 4, the judge had a discretion; & that the damages could be as well ascertained by the judge in ct. or chambers as by a jury:—*Held*: the judge had no discretion, & under R. S. C., 1883, Ord. 36, r. 6, an order must be made for a trial with a jury; but even if the ct. had a discretion, this was not a case in which such discretion ought to be exercised, the only question remaining at issue in the action being in regard to the amount of damages for the infringement of the trade mark, which question would be more properly tried with than without a jury.—*FENNESSY v. RABBITS & SONS* (1887), 56 L. T. 138.

*Annotation*:—*Refd. Fennessy v. Clark* (1887), 57 L. J. Ch. 398.

**689. Security for costs—Motion by person resident abroad—Not party to action.]**—Pltf. obtained an injunction to restrain defts. from parting with goods alleged to bear improperly pltf.'s trade mark. Defts., who were shipowners, had no interest in the goods, which had only been put in

their hands for transmission. S., a resident in America, who claimed to be owner of the goods, served notice of motion that he might be at liberty to reship the goods to a foreign port, & that if necessary he might be added as deft. to the action:—*Held*: S. must give security for the costs of the motion, for that whatever his position as to costs might be if & when he was made deft., he must on this motion be treated as a person resident abroad coming forward to enforce a right, & stood in the position of pltf.—*APOLLINARIS CO. v. WILSON* (1886), 31 Ch. D. 632; 55 L. J. Ch. 665; 54 L. T. 478; 34 W. R. 537; 2 T. L. R. 355, C. A.

*Annotations*:—*Distd. Moser v. Maraden*, [1892] 1 Ch. 487. *Re Miller's Patent* (1894), 63 L. J. Ch. 324.

**690. Service out of the jurisdiction—Action not matter for English courts.]**—A summons by T. A. M., a manufacturer, resident in Scotland, for leave to register a trade mark, was pending before the judge & was opposed by J. M., also resident & carrying on a similar manufacture in Scotland, on the ground that the mark was similar to one belonging to J. M. J. M. applied for leave to issue a writ against T. A. M. for an injunction & damages, on the ground that T. A. M. was selling his goods in England in such a way as to lead the public to believe that they were J. M.'s goods. J. M. deposed that the same witnesses would be required on the summons & in the action, & that it would be most convenient & would save great expense if the action was brought in England, or that the summons & action could be tried together:—*Held*: as an injunction in England could only be enforced against agents of T. A. M., & not against himself, leave ought not to be given to issue the writ, the matter being one which was better left to the Cts. of Scotland.—*MARSHALL v. MARSHALL* (1888), 38 Ch. D. 330; 59 L. T. 484, C. A.

*Annotations*:—*Distd. Re Burland's Trade Mk., Burland v. Broxburn Oil Co.* (1889), 41 Ch. D. 512. *Apld. Kinahan v. Kinahan* (1890), 45 Ch. D. 78. *Refd. Badische Anilin und Soda Fabrik v. Johnson & Basile Chemical Works, Bindschedler*, [1896] 1 Ch. 25.

**691. — ]**—(1) An action was brought in England, by a firm having places of business in Dublin & London, to restrain defts., a limited co., having its registered office in Belfast, from infringing pltf.'s trade mark by the sale of goods under a similar trade mark in England. Defts. had no agents or depôts in England, but supplied occasional customers in England direct from Belfast. A motion was also pending in England by pltf. under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 90, to expunge defts.' trade mark, & it was proposed by pltf. that the action & motion should come on together:—*Held*: the action was to be regarded as practically an Irish & not an English action; & an order obtained *ex parte* by pltf. under R. S. C., 1883, giving them leave to issue & serve the writ out of the jurisdiction, was, notwithstanding the pending motion to expunge, discharged with costs.

(2) The fact that a motion on behalf of pltf. to rectify the Register by striking out defts.' trade mark is pending is not material in considering the balance of convenience to the parties.

## PART I. SECT. 7, SUB-SECT. 3.—A.

c. *Necessity for registration before action.*—The fact that pltf. has brought an action for infringement before registering his trade mark, which action has therefore proved abortive, does not prevent him from bringing another action after registering.—*SMITH v. FAIR* (1887), 14 O. R. 729.—*CAN.*

d. *Jurisdiction of court—Exchequer J.*—VOL. XLIII

*Court.*—The Exchequer Ct. of Canada has jurisdiction to restrain any infringement of a trade mark but has no jurisdiction to entertain an action seeking damages for passing off goods of pltf. as those manufactured & sold by deft.—*MICKELSON SHAPIRO CO. v. MICKELSON DRUG & CHEMICAL CO., LTD.* (1914), 15 Exch. C. R. 276; 8 W. W. R. 153.—*CAN.*

e. —.]—In granting injunctions to

prevent the infringement of trade marks, the ct. exercises its jurisdiction in the aid of cts. of law, i.e. when an action could be maintained in a ct. of law. But it does not exercise an independent jurisdiction.—*FOOT v. LEA* (1850), 13 L. Eq. R. 484.—*IR.*

f. —.]—*DAWSON v. STEWART* (1905), 22 R. P. C. 250.—*SCOT.*

g. *Whether petition for expunging of trade mark may be joined with claim*

*Sect. 7.—Infringement of trade marks: Sub-sect. 3, A., B., C., D., E. & F.]*

—KINAHAN v. KINAHAN (1890), 45 Ch. D. 78; 50 L. J. Ch. 705; 62 L. T. 718; 38 W. R. 655.

*Annotation:—As to (2) Refd. Re King's Trade Mk., [1892] 2 Ch. 462.*

**692. — Proceedings for rectification pending—Whether material.]—KINAHAN v. KINAHAN, No. 691, ante.**

**693. Certificate of right to exclusive use—Granted when right comes into question.]—FIELD (J. C. & J.) & CO., LTD. v. WAGEL SYNDICATE, LTD., Re TRADE MARK 96,997, No. 33, ante.**

**694. No jurisdiction in county court.]—The county ct. has no jurisdiction to entertain an action for an injunction to restrain an infringement of a registered trade mark.—Bow v. HART, [1905] 1 K. B. 592; 74 L. J. K. B. 341; 92 L. T. 181; 53 W. R. 372; 21 T. L. R. 251; 49 Sol. Jo. 258, C. A.**

*See, now, Trade Marks Act, 1905 (c. 15), s. 30.*

**695. Amendment of pleadings—Addition of claim for passing off—Claim in writ—Omitted in statement of claim.]—ROSSELL (HENRY) & CO., LTD. v. HODGES (1918), 35 R. P. C. 285; subsequent proceedings (1919), 36 R. P. C. 175.**

**696. Action against two defendants—Default in defence by one defendant—Whether judgment recoverable—Before trial of action against other defendant.]—In an action for infringement of a registered trade mark & for passing off against two defts., the A. co. & the B. co., the A. co. made default in delivering a defence. The B. co. delivered a defence & the action was set down for trial against that co. Pltfs. moved for judgment against the A. co. in default of defence & also moved to rectify the register by expunging the registration of certain trade marks which the A. co. had registered:—*Held*: the claim against the two defts. being severable, pltfs. were entitled to judgment against the A. co. without waiting for the trial of the action against the B. co. An order for rectifying the Register was also made.—WEINBERG v. BALKAN SOBRANIE CIGARETTES, LTD. 1923), 40 R. P. C. 399.**

#### *B. Who May Sue.*

**697. Person acquiring title by user—Long user.]—TAYLOR v. TAYLOR, No. 595, ante.**

**698. —.]—Long user of a trade mark gives such a property in it to the owner that another person cannot adopt the same device, even though it be his family crest.—STANDISH v. WHITWELL (1866), 14 W. R. 512.**

**699. —.]—Pltfs., a firm of pyrotechnists, & their predecessors in business had for nearly fifty years, namely, since 1868 down to 1910, been making & selling fireworks under the description "Crystal Palace Fireworks," they having throughout that period the exclusive right of giving firework displays at the Crystal Palace. In 1891 they had registered as an old trade mark in connection with fireworks the words "Crystal Palace." They had also registered two other trade**

**marks consisting of representations of the Crystal Palace.**

They used the term for all their goods of the firework class. It was not limited to the displays that they gave at the Crystal Palace. Their goods were asked for as "Crystal Palace Fireworks" & were supplied under that name.

Pltfs. having ceased to have the contract, defts., another firm of pyrotechnists, obtained in the year 1910 the right to give firework displays at the Crystal Palace, & thereupon they sought to describe their fireworks as "Crystal Palace Fireworks" with the addition of their own name:—*Held*: pltfs. having for nearly fifty years applied the words "Crystal Palace" to their goods, it was irrelevant to consider whether they had still got the right to give displays of fireworks at the Crystal Palace; the use of those words did not imply that they had; & therefore they were entitled to a perpetual injunction to restrain defts.—BROCK (C. T.) & CO.'S "CRYSTAL PALACE" FIREWORKS, LTD. v. PAIN (JAMES) & SONS (1911), 105 L. T. 976; 28 R. P. C. 697, C. A.

**700. —.]—There is no property in a trade mark; but a person who has been in the habit of using a particular mark may prevent other persons from fraudulently taking advantage of the reputation which his goods have acquired, by using his mark in order to pass off their goods as his to his injury.**

A foreign manufacturer has a remedy by suit in this country for an injunction & account of profits against a manufacturer here who has committed a fraud upon him by using his trade mark for the purpose of inducing the public to believe that the goods so marked were manufactured by the foreigner.

This relief is found upon the personal injury caused to pltf. by deft.'s fraud, & exists, although pltf. resides & carries on his business in another country, & has no establishment here, & does not even sell his goods in this country.—COLLINS v. BROWN (1857), 3 K. & J. 423; 30 L. T. O. S. 62; 3 Jur. N. S. 929; 69 E. R. 1174.

*Annotations:—Apld. Collins Co. v. Reeves (1859), 28 L. J. Ch. 66; Soc. Anon. des Anciens Etablissements Panhard et Levassor v. Panhard Levassor Motor Co., [1901] 2 Ch. 613. Mentd. Prioleau v. United States & Johnson (1866), L. R. 2 Eq. 659; U.S.A. v. Wagner (1867), L. R. 3 Eq. 724.*

**701. S. P. COLLINS Co. v. COWEN (1857), 3 K. & J. 428; 29 L. T. O. S. 245; 3 Jur. N. S. 929; 5 W. R. 676; 69 E. R. 1177.**

*Annotation:—Refd. Singer Manufacturing Co. v. Wilson (1876), 2 Ch. D. 434.*

**702. Allen.]—COLLINS Co. v. BROWN, No. 700, ante.**

**703. S. P. COLLINS Co. v. COWEN (1857), 3 K. & J. 428; 29 L. T. O. S. 245; 3 Jur. N. S. 929; 5 W. R. 676; 69 E. R. 1177.**

*Annotation:—Refd. Singer Manufacturing Co. v. Wilson (1876), 2 Ch. D. 434.*

**704. — Not usually selling goods in England.]—An alien can sue in the cts. of this country to restrain the fraudulent appropriation of his trade mark, although the goods on which such trade mark is affixed are not usually sold by him in this country.**

*for infringement.]—Where petitioner has filed a petition in this ct. asking that a trade mark be expunged, he should not be permitted to amend his petition by joining thereto a claim for infringement.—THERMOGENE CO., LTD. v. COMPAGNIE CHIMIQUE DES PRODUITS DE FRANCE LTEE., [1926] 2 D. L. R. 271; [1926] Exch. C. R. 111.—CAN.*

**PART I. SECT. 7, SUB-SECT. 3.—B.**

**700 i. Person acquiring title by user.]**

—HEINIGER v. DROZ (1900), 1 L. R. 25 Bom. 433.—IND.

**h. Vendor of goods.]—An action for the infringement of a trade mark is maintainable, even though pltf. be not the manufacturer or selector of the goods, but merely a vendor of them.—JAWALA PRASAD v. MUNNA LAL SROWJEE (1909), 1 L. R. 37 Calo. 204.—IND.**

**k. Importers of goods.]—Appits.**

sought to restrain resps. from selling in India a well known brand of cigarettes which for some years appits. alone had been importing into & selling in India; they were assignees of the trade mark & goodwill for India. Resps. having bought over 20,000,000 of the cigarettes cheaply from purchasers from the manufacturers (who granted appits. the sole rights for India) were able to undersell appits. The sales by resps. involved no breach of contract, mis-

—*COLLINS Co. v. REEVES* (1858), 28 L. J. Ch. 50; 33 L. T. O. S. 101; 4 Jur. N. S. 865; 6 W. R. 717.

*Annotation:—Mentd.* *U.S.A. v. Prioleau, Prioleau v. U.S.A.* (1866), 36 L. J. Ch. 36.

**705. Either of two persons separately entitled.]**—Deft. sold tobacco pipes packed in boxes or cases, upon which were labels or descriptions of a similar character to those of pltf., using pltf.'s name as being the real manufacturer, deft. having a person in his employ of that name:—*Held*: such colourable imitation & use of the labels & descriptions could be restrained by injunction.

Two persons, sons of their father, who had originated the manufacture of such pipes, & designated them as "Southern's Brosley pipes," on the death of their father, manufactured at Brosley, but at separate establishments, & for their separate benefit, pipes of a like character; one of the brothers instituted a suit to restrain the use of this trade mark, the other declining to join in such suit:—*Held*: the one brother might alone file a bill for an injunction & account.—*SOUTHERN v. REYNOLDS* (1805), 12 L. T. 75.

**706. Exporting agent—Effect of local custom.]**—An arrangement was made between W., R., & G., that W., a manufacturer, should consign cotton cloths to G. in Rangoon, paying him an inclusive commission. The goods were to be exported through R., who acted as shipping agent, & was to see to the goods being finished & packed, for which services he received a commission from G. A particular mark was by arrangement between the three parties adopted for the goods, of which some portions & the general arrangement were new, & other portions consisted of R.'s name & arms, & of a symbol which had formerly been used by G. After goods had been regularly exported for some years under this arrangement, W. ceased to send goods through R., & commenced exporting them to Rangoon through the agency of F., continuing to use the old mark except that the name & arms of F. were substituted for those of R. At the same time R. commenced exporting other goods under the old mark. Cross actions were commenced for injunctions, in which R. set up an alleged custom in Manchester, giving the right to the trade marks to the shipping agent:—*Held*: upon the evidence, no such custom existed, neither R. nor W. had any exclusive right to the use of the mark, & both actions must be dismissed.—*ROBINSON v. FINLAY, WARD v. ROBINSON* (1878), 9 Ch. D. 487; 39 L. T. 398; 27 W. R. 294, C. A.

*Annotations:—Apld.* *Re Jones's Trade Mk.* (1885), 53 L. T. 1. *Reid.* *Re Orr Ewing, Re Trade Marks Registration Acts*, 1875 & 1876 (1878), 47 L. J. Ch. 807; *Re Crompton's Trade Mk.* (1902), 1 Ch. 758; *Re Warschauer's Appln.* (1925), 43 R. P. C. 46.

**707. Executors.]**—*Oakey & Sons v. Dalton*, No. 591, *ante*.

—*Effect of acquiescence.]*—*See* No. 576, *ante*.

**708. Manufacturer—Not assignee of business to which goods supplied.]**—The manufacturer of articles has no right to sue for infringement of a trade mark attached to a business to which he supplies goods, but which has not been assigned to him.—*ULLMANN & Co. v. CESAR LEUBA*, [1908] A. C. 443; 78 L. J. P. C. 41; 99 L. T. 531, P. C.

**Assignee.]**—*See* No. 586, *ante*.

representation or infringement; further it was not shown that applts. had acquired any independent reputation as importers:—*Held*: the suit was not maintainable.—*IMPERIAL TOBACCO Co. of India v. BONNAN* (1924), 1 L. R. 51 Calc. 892.—*IND.*

*Sole agent for sale of goods.]*—A person who has the sole agency for the sale of goods manufactured by another cannot maintain an action for infringement of the trade mark used by the manufacturer.—*FULTON & Co. v. KNOX*, [1917] W. L. D. 48.—*S. AF.*

*C. Delay or Acquiescence.*

*See* Sub-sect. 5, C., *post*.

*D. Effect of Offer by Defendant.*

*See* Sub-sect. 5, D., *post*.

*E. Discovery and Interrogatories.*

**Discovery.]**—*See* DISCOVERY, Vol. XVIII., pp. 43, 60, 51, Nos. 17, 83–88.

**Interrogatories.]**—*See* DISCOVERY, Vol. XVIII., p. 221, No. 1690.

*F. Evidence.*

**709. Onus of proof—On plaintiff—To show special damage.]**—*LEATHER CLOTH Co. v. HIRSCHFIELD*, No. 825, *post*.

**710. — On defendant—To displace plaintiff's prima facie right.]**—*REINHARDT v. SPALDING*, No. 312, *ante*.

**711. — To show that purchasers will not be deceived.]**—*ORR EWING & Co. v. JOHNSTON & Co.*, No. 185, *ante*.

—*Where long user pleaded.]*—*See* No. 358, *ante*.

**712. Cross-examination—On matter not pleaded—User of "patent."]**—*JEVER & Co. v. GOODWIN BROTHERS*, as reported in [1887] W. N. 107, C. A.

*Annotations:—Fold.* *Boake, Roberts v. Wayland, Re Boake, Roberts' Trade Mk.* (1909), 28 R. P. C. 251. *Mentd.* *Saxlehner v. Apollinaris Co.*, [1897] 1 Ch. 893; *Price's Patent Candle Co. v. Ogston & Tennant* (1908), 26 R. P. C. 797; *Edge v. Nicolle* (1910), 80 L. J. Ch. 154; *Linos v. Farri's* (1925), 43 R. P. C. 64; *Smith's Potato Crisps v. Paige's Potato Crisps* (1928), 45 R. P. C. 132.

**713. — — — — —.]**—(1) In 1885, pltf.s, a firm of manufacturing chemists, began to manufacture, under Letters Patent granted to them in that year, a chemical salt which they called Kalium Meta Sulphite or "K.M.S." In the same year they registered two trade marks upon which appeared (*inter alia*) the letters "K.M.S." The Letters Patent expired in 1899. During the years in which the Letters Patent were in force, & afterwards up to the date of the trial, pltf.s continued to manufacture this salt & to put it upon the market. They sold it as Kalium Meta Sulphite, or more generally as "K.M.S." Upon their advertisements it was described as "K.M.S." with the full name Kalium Meta Sulphite added in brackets. In 1906 they registered the letters "K.M.S." as their trade mark. The ordinary English chemical name of the salt was Meta Sulphite of Potassium. Defts. were also manufacturing chemists, & for some years past had manufactured a salt of the same chemical quality & substance as that of pltf.s, but they did not at first advertise or sell their product as "K.M.S." In 1907, however, they began to advertise & sell their salt as "K.M.S."; pltf.s thereupon commenced this action. Defts. contended that the letters "K.M.S." were the descriptive name of the article & were not distinctive of pltf.s' manufacture, & they moved to expunge the pltf.s' trade marks from the Register:—*Held*: at the time when the action was commenced the letters "K.M.S." indicated the salt as manufactured by pltf.s.

**PART I. SECT. 7, SUB-SECT. 3.—F. m. What must be proved—Infringement likely to mislead & deceive public.]**—In a case of infringement it is not necessary that improper motives or fraudulent intention be made out; the only question is whether or not the

*Sec. 7.—Infringement of trade marks: Sub-sect. 3, F., G., H. & I.; sub-sect. 4.]*

(2) During the course of the trial defts.' counsel proposed to put to one of pl'tfs.' witnesses some of the pl'tfs.' circulars & advertisements & to cross-examine him upon them with regard to alleged user by the pl'tfs. of the word "Patent" long after the Patent had expired:—*Held*: such cross-examination was inadmissible, because no wrongful user of the word "Patent" had been pleaded.—*BOAKE (A.), ROBERTS & CO., LTD. v. WAYLAND (W. A.) & CO., Re BOAKE (A.), ROBERTS & CO., LTD.'S TRADE MARKS (1909), 26 R. P. C. 251.*

*Innovation:—Generally. Mend. La Radiotechnique v. Weinbaum, [1928] Ch. 1.*

**714. —Of directors of company—On affidavit made for purpose of interlocutory motion—Whether admissible against plaintiff company.]—APOLLINARIS CO. v. SNOOK, No. 743, *post*.**

**715. Issue of letters of request—Evidence of manner of dealing with goods in market.]—A co. who were manufacturers of lime juice commenced an action against another co. for infringement of pl'tfs.' trade marks & for passing-off their lime juice as pl'tfs.' lime juice. Pl'tfs. alleged that they owned certain trade marks & that they sold their lime juice in bottles which were moulded with representations of their trade marks, & they alleged that the moulding on defts.' bottles was calculated to deceive. Both pl'tfs. & defts. put labels on their bottles, but pl'tfs. alleged that such labels frequently got rubbed off. Both firms exported their lime juice to other countries, including South Africa. Pl'tfs. made an application for a commission to take evidence in South Africa or alternatively for letters of request to issue. They stated that they wished to obtain evidence as to the circumstances & conditions of the trade in South Africa. The application came before the judge in chambers, to whom certain proofs of the proposed witnesses were submitted by pl'tfs., & an order was made for letters of request to issue. Leave was given to defts. to appeal, & they appealed:—*Held*: evidence as to the manner in which the goods were dealt with in the market was material, & the ct. refused to interfere with the discretion of the judge, & held that the order made was right.—*ROSE (L.) & CO., LTD. v. ALEXANDER RIDGILL & CO., LTD. (1913), 31 R. P. C. 48, C. A.***

*G. Relief.*

*See Sub-sect. 5, post.*

## II. Appeal.

**716. Order for advancement—Injury caused by continuance of injunction—Irreparable if injunction wrongly granted.]—An appeal from a decree granting an injunction to restrain the use of a trade mark ordered to be advanced, on the ground that the injury done to deft. by the continuance of the injunction, if wrongly granted, would be irreparable.—*LAZENBY v. WHITE (1870), 6 Ch. App. 89; 19 W. R. 291, L. J.; subsequent proceedings (1871), 41 L. J. Ch. 354, n., L. J.J.***

*Annotation:—Reid. Roskill v. Whitworth (1871), 19 W. R. 804.*

**717. Costs of appearance of party—Notice that order for costs not to be questioned.]—UPMANN v. ELKAN, No. 782, *post*.**

## I. Costs.

*See Trade Marks Act, 1905 (c. 15), s. 46; & generally, R. S. C., Ord. 65.*

**718. Right to injunction carries costs—Effect of making excessive demand.]—MOET v. COUSTON, No. 780, *post*.**

**719. Defendant's conduct just avoiding injunction—Effect on costs.]—If a trader imitates another person's label or trade mark & sails so near the wind as just to avoid an injunction, though the ct. does not grant the injunction, it will not willingly give him any costs of the proceedings.—*BASS V. DAWBER (1869), 19 L. T. 626.***

**720. — — —.]—WYLLAM v. CLARKE, [1876] W. N. 68.**

**721. Both parties deceiving public.]—A bill was filed by the manufacturers of a substance used instead of hops for brewing beer to restrain defts. from making & selling a substance intended for the same purpose. As to some of the grounds for relief pl'tfs. had failed & as to others they were held to be too late in their application, & the bill was therefore dismissed:—*Held*: as the substances made by both pl'tfs. & defts. were intended to be used to deceive the public no costs would be given to defts.—*ESTCOURT v. ESTCOURT HOP ESSENCE CO. (1875), 10 Ch. App. 276; 44 L. J. Ch. 223; 32 L. T. 80; 23 W. R. 313, L. C. & L. J.J.***

*Annotations:—Reid. Goodfellow v. Prince (1887), 35 Ch. D. 9; Eno v. Dunn (1890), 15 App. Cas. 252; Rotch v. Crosbie (1909), 54 Sol. Jo. 30.*

**722. Taxation—Defendant submitting to perpetual injunction with costs—Whether grounds for taxation on higher scale.]—A submission to a perpetual injunction with costs by deft. in an action for the infringement of a trade mark does not afford a special ground upon which the ct. will direct taxation of the costs upon the higher scale under the provisions R. S. C., 1883, Ord. 65, r. 9.—*HUDSON v. OSGERBY (1884), 50 L. T. 323; 32 W. R. 566.***

**723. Set-off of costs—Patent action & trade mark action—Interference with solicitor's lien.]—Pl'tfs. brought an action against defts. in respect of a trade mark, & they also brought an action with reference to the alleged infringement of a patent. In Feb. 1888, the trade mark action was tried before Chitty, J., & judgment was given against defts., with costs. In Apr. 1888, the patent action was tried before Kay, J., & judgment was given against pl'tfs. with costs. On Nov. 10, 1888, Kay, J., upon pl'tfs.' motion in the patent action, made an order restraining defts. & each of them & their solr. & the former solr. of one of defts. from issuing any execution or taking other proceedings to enforce payment of costs payable under the order of Apr. 26, 1888, without setting off the amount of the costs payable by them to pl'tfs. under orders of Chitty, J. & the Appeal Ct. in the trade mark action. Pl'tfs. appealed in the patent action, but the appeal was dismissed with costs. On a motion in the patent action by pl'tfs. to enforce a set-off of the costs incurred in the trade mark action against those in the Appeal Ct., defts.' solr. objected that he had a lien on those costs which intercepted the right of set-off:—*Held*: the set-off of the costs was not intercepted as to the costs of the patent action; but as to the trade mark action the right of set-off was not to prevail so as**

alleged infringing mark is likely to mislead & deceive the public.—*SALADA TEA CO. OF CANADA, LTD. v. KEARNEY, [1925] Exch. C. R. 119.—CAN.*

*n. Onus of proof on defendant that trade mark abandoned by plaintiff.]—*

*In a suit for damages for infringement of trade mark the burden of establishing that pl'tfs. have abandoned the mark is on defts. & as it is a question of fact based upon intention.—NOOR JLAHI-MAGBUL JLAHI v. WOOD & CO.*

*(1927), 1 L. R. 9 Lah. 487.—IND.*

*o. —Reasonable ground of apprehension of injury.]—SINGER MANUFACTURING CO. v. KIMBALL & MORTON (1873), 11 Macph. (Ct. of Sess.) 267; 45 Sc. Jur. 201.—SCOT.*

to interfere with any right of lien which defts.' solrs. in that action might be able to prove.—**BLAKEY v. LATHAM** (1889), 41 Ch. D. 518; 60 L. T. 624; 37 W. R. 569; *on appeal*, 43 Ch. D. 23, C. A.

**Annotations.**—**Consd.** *Puddephatt v. Leith* (No. 2), [1916] 2 Ch. 168. **Reid.** *Re Bassett, Ex p. Lewis* (1895), 65 L. J. Q. B. 144; *Hassell v. Stanley* (1896) 1 Ch. 607; *Goodfellow v. Gray*, [1899] 2 Q. B. 498; *David v. Roes*, [1904] 2 K. B. 435; *Bako v. French* (1907) 76 L. J. Ch. 299; *Reid v. Cupper*, [1915] 2 K. B. 147. **Mentd.** *Norton v. Norton* (1908), 99 L. T. 709.

**724.** — In favour of one joint defendant.—**Costs of issue raised against other defendant only.**—**CHAMPAGNE HEIDSIECK ET CIE v. SCOTTO & BISHOP**, No. 787, *post*.

**725.** **Costs of interlocutory injunction—Costs in the action.**—**JARRETT v. BRITISH NORTH BORNEO CIGAR CO.** (1892), 37 Sol. Jo. 116.

**726.** **Apportionment of costs—Each party partially successful—Plaintiff not entitled to all relief asked for.**—In 1890 II. registered a trade mark. In 1896 P., who had infringed the said trade mark without knowing of II.'s registration or user of it, communicated with H., asking for the date of registration & disclaiming any intention to infringe. Negotiations ensued between the parties, in which P. was ready to give the undertaking asked for by H. subject to a condition that II. should not advertise it. H. was ready to agree to such condition on P. agreeing to disclose the names of his customers to whom he had supplied the goods. P. would not so agree, & the negotiations fell through. H. issued a writ asking for an injunction, damages or an account of profits, & costs. P., by his defence, offered an undertaking, but made no offer as to costs. At the trial it was admitted that II. was not entitled to damages or an account of profits:—**Held:** II. was entitled to an injunction & the costs of the action so far as it sought relief by way of injunction, but deft. was entitled to the costs of the action so far as it asked for damages or an account, such costs to be set off.—**HIPKINS (G. F.) & SON v. PLANT** (1898), 15 R. P. C. 294.

**727.** **No costs given—Defendant using "registered" wrongfully.**—**WARSON (B.) & SONS, LTD. v. WARSON**, No. 667, *ante*.

**728.** **Costs of moving for judgment in open court—In preference to application in chambers—Defendant consenting to judgment.**—Where pltf. in an action for the infringement of his registered design, or trade mark, or patent, is proceeding to obtain a judgment restraining the infringement, it is desirable that some publicity should be given to the order; & although deft. has consented to the order, pltf. is entitled to the costs of moving in open ct., & not merely to such costs as would have been incurred by applying by summons in chambers.—**SMITH (J. T.) & JONES (J. E.), LTD. v.**

**SERVICE REEVE & CO.,** [1914] 2 Ch. 576; 83 L. J. Ch. 876; 111 L. T. 669; 30 T. L. R. 590; 58 Sol. Jo. 687.

**Annotation.**—**Reid.** *Performing Right Soc. v. Mitchell & Booker (Palais de Danse)*, [1924] 1 K. B. 762.

**729.** **Defendants putting in joint defence—Separate orders for costs—Where one defendant infringing innocently.**—**CHAMPAGNE HEIDSIECK ET CIE v. SCOTTO & BISHOP**, No. 787, *post*.

**730.** **Liability for Registrars costs—In addition to costs of action.**—**FORTH & CLYDE & SUNNYSIDE IRON COS., LTD. v. SUGG (WILLIAM) & CO., LTD.**, No. 629, *ante*.

**Where infringement innocent.**—*See* Nos. 799–803, *post*.

**Effect of offer by defendant.**—*See* Nos. 762–774, *post*.

**Security for costs.**—*See* No. 689, *ante*.

**Costs of appearance of party at appeal.**—*See* No. 782, *post*.

#### SUB-SECT. 4.—DEFENCES.

*See* Trade Marks Acts, 1905 (c. 15), ss. 20, 21, 39, 41; 1919 (c. 79).

**731.** **Long user—Onus of proof that use fraudulent—& that mark still calculated to deceive.**—*Re* **HEATON'S TRADE MARK**, No. 358, *ante*.

**732.** **Use by plaintiff in trade mark—Of part for which registration refused.**—**Pltfs., M. Melachrino & co.**, a firm of cigarette manufacturers, having applied to the Comptroller for registration as a trade mark of a label for cigarettes, consisting (*inter alia*) of three foreign coats of arms, were granted registration of the mark, less the three coats of arms. **Pltfs.**, however, in using their trade mark, put in the coats of arms & used it in the form in which they had originally applied for registration. **U. Melachrino**, who was a brother of one of **pltfs.** **M. Melachrino**, & who had been formerly employed by **pltfs.** as their servant or assistant, entered into an agreement with one **Poulides** to act as manager of a cigarette business for **Poulides**, to be carried on under the style of the **Melachrino Egyptian Cigarette co.**, & the new firm commenced business in premises in the immediate neighbourhood of **pltfs.**' premises, & solicited customers of **pltfs.**' firm, & made use of labels in imitation of those used by **pltfs.** **Pltfs.** brought an action & moved for an *interim* injunction:—**Held:** (1) **defts.** business was in fact the business of **Poulides**, & **U. Melachrino** could not sell his name to **Poulides** for the purpose of enabling him to carry on a rival trade, & the less so because the purpose was that of carrying on a rival trade fraudulently, & therefore **pltfs.** were entitled to an injunction restraining **defts.** from carrying on business under the name of **Melachrino & Co.**, or of **Melachrino**; (2) the use by **pltfs.** in con-

#### PART I. SECT. 7, SUB-SECT. 4.

**p. Prior user.**—In an action for infringement of a trade mark which has been registered for more than five years, deft. may raise as a defence that the trade mark ought not to have been registered, as at that time it was in common use, & was not a distinctive mark.—**MITCHELL & CO. v. JOSHUA BROTHERS** (1891), 17 V. L. R. 736.—**AUS.**

**q.** —User of a trade mark in a foreign country is no justification for an infringement in the country where the action is brought.—**SMITH v. FAIR** (1887), 14 O. R. 729.—**CAN.**

**r.** —A person accused of infringing a registered trade mark may show that it was in common use before such registration & therefore, could

not properly be registered.—**PARTLO v. TOND** (Ont.) (1888), 17 S. C. R. 196.—**CAN.**

**t.** —**ERABRAHIM CURRIM v. ESSA ABBA SAIT** (1900), 1 L. R. 24 Mad. 163.—**IND.**

**a.** —**COWIE & Co. v. PATRIL BROTHERS** (1924), 1 L. R. 2 Kan. 278.—**IND.**

**b. No intention to defraud.**—**JONES v. GEDJE** (1909), 9 C. L. R. 263.—**AUS.**

**c.** —In an application for an injunction to restrain the use of a trade mark, it is not a sufficient defence to say there was no fraudulent intention, & that is no reason for not granting the appln.—**GRAHAM v. KEU, DODS & Co.** (1869), 3 B. L. R. App. 4.—**IND.**

**d. Cigars purported to be made in**

*Havana made in Germany.*—Action for an injunction to prevent deft. from selling a certain brand of cigars called **O.K. cigars**, the right of pltf. to sell which was protected by a Government certificate & trade mark. It appeared, however, that pltf.'s trade mark was registered by **R. F.** for another purpose entirely, **R. F.** having a particular kind of soap called **O.K. soap**. **Deft.** pleaded that the **O.K. cigar** was not new, nor the exclusive property of pltf.; also that the cigars, although they purported to be made in *Havana*, were really made in *Germany*. On proof of these allegations action dismissed with costs.—**LABBATT v. TRESTER** (1874), 7 R. L. O. S. 386.—**CAN.**

**e. Trade mark incapable of registration.**—**IL. v. CRUTTENDEN** (1905),

*Sect. 7.—Infringement of trade marks: Sub-sects. 4 & 5, A. & B.]*

nection with their registered trade mark, of the coats of arms for which registration had been refused did not invalidate their right to the protection of the portion of their label which had been registered, & therefore plffs. were entitled to an injunction restraining defts. from infringing their trade mark; (3) in deciding a question of the infringement of a label the ct. should not arrive at its decision by confining itself to a comparison of the infringing document with the infringed document by simply placing the two side by side, but should also consider the state of circumstances existing between the parties.—*MELACHRINO (M.) & Co. v. MELACHRINO EGYPTIAN CIGARETTE Co. & MELACHRINO* (1887), 4 R. P. C. 215.

*Annotations:—As to (1) Apprvd. Teofani v. Teofani, Itc Teofani's Trade Mark*, [1913] 2 Ch. 545. *Refd. Powell v. Birmingham Brewery Co.*, [1896] 2 Ch. 54. *As to (2) Fold. Hammond v. Brunker* (1892), 9 R. P. C. 301.

**733. Use by plaintiff of trade mark with additions.]—HAMMOND & Co. v. MALCOLM, BRUNKER & Co. & COLLYNS**, No. 581, *ante*.

**734. When trade mark common to trade—No imitation.]—BAKER v. RAWSON**, No. 408, *ante*.

**735. —No intention to deceive.]—BAKER v. RAWSON**, No. 408, *ante*.

**736. —No actual deception after several years user.]—BAKER v. RAWSON**, No. 408, *ante*.

**737. Misleading conduct of plaintiff.]—Plffs.**, who are the registered proprietors of the trade mark "Burgoyne," for wine, sold by auction wine in casks bearing the inscription "Burgoyne, London." The wine had been consigned to plffs. on approval & rejected by them, & was sold on account of the growers. Defts. purchased the wine at the auction, & resold it as "Burgoyne's Superior Australian Burgundy." On the trial of an action, to restrain defts. from infringing plffs.' trade mark, & from passing off the wine in question as being plffs.' wine, it was held, that the wine was not plffs.' wine, & that plffs. were not estopped by their conduct from restraining the sale of the wine as their wine. An injunction & an account of profits were granted. Defts. appealed:—*Held*: defts. were justified in coming to the conclusion that the wine was Burgoyne's wine, & they were so justified by reason of the conduct of plffs. in the matter, & plffs. were not entitled to any relief; the appeal was allowed with costs.—*BURGOYNE & Co., LTD. & BURGOYNE v. GODFREE & Co.* (1904), 22 R. P. C. 168, C. A.

**738. Prior user.]—In Oct. 1910**, the W. co. registered a trade mark for sweetmeats & confectionery. In Mar. 1911, they commenced an action for infringement of this mark against the M. co. The M. co. alleged that they had used the mark before the W. co.:—*Held*: as the W. co. had first used the mark in Nov. 1910, & according to their evidence the M. co.'s first actual user was in Jan. 1911, the W. co. had established their case, & were entitled to an injunction, damages, & costs.—*WILLIAMS'S, LTD. v. MASSEY* (1911), 28 R. P. C. 512.

**739. —Order for particulars of user—Form of order.]—In an action to restrain infringement of**

trade marks consisting of the word "Pelican" registered respectively in classes 1 & 39 in respect of inks & the like, defts. in their defence alleged that they & a predecessor had used the word "Pelican" from 1917 onwards in connection with inks & on bottles containing ink: & in a motion to rectify the register by expunging therefrom the entries of the said trade marks, they made similar allegations. Pltf. applied for particulars of the alleged user:—*Held*: defts. should give particulars of the user alleged in the defence of the word "Pelican" on or in connection with inks, & bottles as containers therefor bearing labels altered as alleged, giving the names & addresses of three representative customers to whom the alleged sales were made, & giving the best estimate of the total sales of ink in respect of which such user took place year by year from 1917 to 1925, stating whether the ink so sold was manufactured by the said predecessor or defts., & if not either by whom; & similar particulars of the alleged user by defts. from 1925 to the present date. Particulars substantially the same were ordered in the motion to rectify.—*BEINDORFF (TRADING AS WAGNER) v. CHAMBERS & Co., LTD.* (1928), 45 R. P. C. 122.

**740. Non-user—Necessity for proof of circumstances of trading.]—The registered owner, D.**, of a trade mark consisting of the word "Fram" applied to razors, formed a co., of which he was the only substantial shareholder, for dealing in the razors, but did not assign the trade mark to the co. In an action by the co. & D. for infringement of the trade mark, defts. alleged that they had acted innocently. In negotiations, they offered to give an undertaking, but later reserved the right to set up all defences open to them. At the trial they contended that the co. could not obtain an injunction, & that D. could not recover damages. It was held that defts. had acted innocently; that without saying that damages could not be awarded against an innocent infringer, D. was not, as a shareholder in the co., entitled to damages; that no damage to plffs. attributable to the infringement had been proved; & that D. was entitled to an injunction, & half the costs of the action. Pltf. co. was dismissed from the action without costs. Defts. appealed to the Ct. of Appeal, & contended that, as D. had not, since the formation of the co., used the trade mark, he was not entitled to an injunction:—*Held*: the co. could not be regarded as the agents of D.; as defts. had not repeated in their defence their offer of an undertaking, there was nothing to prevent D. from obtaining an injunction; without deciding whether non-user of a trade mark could not, in certain circumstances, be set up as a defence in such an action without a motion to rectify the register, it had not been pleaded, & in the absence of evidence as to the circumstances of the trading, the ct. would not say that D.'s non-user of the mark constituted a defence to the action. The appeal was dismissed with costs.—*FRAM MANUFACTURING Co., LTD. v. MORTON (ERIC) & Co.* (1922), 40 R. P. C. 33, C. A.

**Trade mark not registrable.]—See Sect. 2, ante.**  
**Innocent infringement.]—See Sub-sect. 5, E., post.**

25 C. L. T. 455; 6 O. W. R. 249; 10 O. L. R. 80.—*CAN.*

**1.**—In 1902 the New York Herald began the issue of a comic section of that paper under the title of "Buster Brown" & "Buster Brown & Tige," & have since continued to sell the same & licensed other newspapers to do so. In 1907 the Herald registered the titles as trade marks, & brought an

action against the Ottawa Citizen Co. for infringement, & an injunction against the use of them:—*Held*: the terms "Buster Brown," & "Buster Brown & Tige" were not susceptible of registration under the Act respecting trade marks.—*NEW YORK HERALD Co. v. OTTAWA CITIZEN Co.* (1909), 41 S. C. R. 229; 6 E. L. R. 312.—*CAN.*

**g. Defendants taking all reason-**

able steps to prevent prejudicial use of trade mark.]—*PREST-O-LITE Co. v. PEOPLE'S GAS SUPPLY Co.* (1917), 55 S. C. R. 440; 38 D. L. R. 379.—*CAN.*

**h. Invalidity.]—If deft. in an action for infringement of a trade mark pleads that plffs.' trade mark is invalid, he must give particulars of the invalidity alleged.**—*GROSVENOR CHEMICAL Co. v. GREENFIELD*, [1909] 1 I. R. 32.—*IR.*



## SUB-SECT. 5.—RELIEF.

## A. In General.

**741. Whether registration condition precedent to relief—Injunction.]**—A Dutch co. moved to restrain deft., a commission agent, from infringing their trade mark, & from shipping goods abroad with their trade mark stamped on them. The writ in the action was issued after the time for registration of trade marks limited by Trade Marks Registration Amendment Act, 1876 (c. 33), had expired, & before Trade Marks Registration Extension Act, 1877 (c. 37), had come into force. Pltf. co. had not before the motion for injunction registered their trade mark:—*Held*: (1) registration was not a condition precedent to pltf.'s right to an injunction; (2) *semble*: the Acts do not make the registration of their trade marks by foreigners a condition precedent to their right to sue for an infringement of them.—*TWENTSCHE STOOM BLEEKERY GOOR & HARPER v. ELLINGER & Co.* (1877), 26 W. R. 70.

**742. — Action by foreigner.]**—*TWENTSCHE STOOM BLEEKERY GOOR & HARPER v. ELLINGER & Co.*, No. 741, *ante*.

**743. — Presumption that marks right on Register—In absence of motion for rectification.]**—The A. co. registered a device as a trade mark. S. sold mineral water imported from abroad in bottles having labels bearing this device. This mineral water purported to come from springs belonging to O. & co. The co. brought an action for infringement. It was admitted that the device was adopted by O. & co. in Germany & was registered here by the co. with O. & co.'s knowledge & consent, & that O. & co. were using the device on their mineral water with the A. co.'s knowledge. It was alleged that the trade mark was only registered by the co. for the purpose of protecting an exclusive right to the sale of O. & co.'s mineral water in the United Kingdom which O. & co. had entered into a contract to give them:—*Held*: (1) it must be assumed that the trade mark in question was rightly on the register in the absence of a motion to rectify & A. & co. were entitled to register the mark as they did.

(2) S. was held entitled to read against the co. the cross-examination of one of their directors on an affidavit made for the purposes of an interlocutory motion in the action.—*APOLLINARIUS CO. v. SNOOK* (1890), 7 R. P. C. 474.

*Annotations*:—*As to* (1) *Refd.* *Re* Trade Mk. 96,997, Field v. Wagel Syndicate, [1900] 1 Ch. 651. *Generally, Refd.* *Re* Apollinaris Co.'s Trade Mk's., [1891] 2 Ch. 186.

**— Register as evidence of validity of original registration.]**—*See* Trade Marks Act, 1905 (c. 15), ss. 40, 50, 51.

## B. Trade Mark containing False Representation.

**744. Whether relief granted.]**—Pltf's., who were manufacturers of & dealers in cigars in England, imported from Germany cigars made of Havana tobacco. There was no direct evidence as to the place where they were manufactured, but the ct. found as a fact that they were also manufactured in Germany. Pltf's. sold these cigars in England in boxes on which was a label containing their trade mark, registered under Trade Marks Registration Act, 1875 (c. 91), which consisted of the words "La Pura," & a pictorial representation of an Indian woman in a state of semi-nudity holding

up a bundle of cigars, two winged boys each holding a shield, & a background representing a portion of some tropical country. On one shield was depicted the arms of Spain, & on the other those of Havana. In the trade mark as registered the shields were blank. A smaller label contained what was apparently the lithographed signature of "Ramon Romnedo." On each box were branded the words "La Pura" & "Habana." It was proved that "La Pura" was an old brand, long disused, of Havana cigars, & that there was no known existing person of the name of "Ramon Romnedo":—*Held*: as the trade mark & other marks on pltf's. boxes together amounted to a "dressing up" of pltf's. cigars, & a misrepresentation that they were cigars manufactured in the Havana the action must be dismissed.—*NEWMAN v. PINTO* (1887), 57 L. T. 31; 3 T. L. R. 685; 4 R. P. C. 508, C. A.; *reversg.* S. C. *sub nom.* NATHAN, *NEWMAN & Co. v. PINTO (HENRY) & SONS*, 3 T. L. R. 380.

*Annotations*:—*Apld.* *Lewis' v. Goodbody* (1892), 67 L. T. 194. *Consd.* *Warsop v. Warsop* (1904), 21 R. P. C. 481. *Apld.* *Bile Bean Manufacturing Co. v. Davidson* (1905), 22 R. P. C. 553. *Consd.* *Plotzker v. Lucas* (1907), 24 R. P. C. 551. *Refd.* *Jay v. Ladler* (1888), 40 Ch. D. 619; *Hargreave v. Freeman* (1891), 7 T. L. R. 535; *Jameson v. Jameson* (1898), 15 R. P. C. 169. *Merid.* *Baschet v. London Illustrated Standard Co.*, [1900] 1 Ch. 73.

**745. —.]**—*HUBBUCK (THOMAS) & SON, LTD. v. BROWN (WILLIAM) SONS & Co.*, No. 608, *ante*.

**746. — Injunction.]**—*LEATHER CLOTH CO. v. AMERICAN LEATHER CLOTH CO.*, No. 570, *ante*.

**747. —.]**—(1) The ct. will not interfere by injunction to restrain the imitation of a trade mark, if there is false representation in the trade mark, or if the trade itself is fraudulent. *Seem*: such false representation or fraud would be a good defence to an action at law for imitation of the trade mark, on the ground that *ex turpi causa non oritur actio*.

(2) But a collateral misrepresentation by the owner of the trade mark will not disentitle him to relief either at law or in equity.

In a case where pltf., whose trade mark was "Ford's Eureka Shirt," had falsely represented in his invoices & in a few advertisements that he was a "patentee" of the shirt:—*Held*: such false representation was not sufficient to prevent him from sustaining an action at law; & that his right at law being clear, he was entitled to an injunction in Ch.—*FORD v. FOSTER* (1872), 7 Ch. App. 611; 41 L. J. Ch. 682; 27 L. T. 219; 20 W. R. 818, L. J.J.; *reversg.* S. C. *sub nom.* *Re "FORD'S EUREKA SHIRT," FORD v. FOSTER*, 20 W. R. 311.

*Annotations*:—*As to* (1) *Apld.* *Newman v. Pinto* (1887), 57 L. T. 31. *Consd.* *Bile Bean Manufacturing Co. v. Davidson* (1905), 22 R. P. C. 553. *Refd.* *Cheavin v. Walker* (1877), 5 Ch. D. 850. *As to* (2) *Distd.* *Raggett v. Findlater* (1873), L. R. 17 Eq. 29. *Apld.* *Siegert v. Findlater* (1878), 7 Ch. D. 801; *Liebig's Extract of Meat Co. v. Anderson* (1886), 55 L. T. 206. *Generally, Refd.* *Hirst v. Denham* (1872), L. R. 14 Eq. 542; *Ort Ewing v. Johnston* (1880), 13 Ch. D. 434; *Re Heaton's Trade-Mk.* (1884), 27 Ch. D. 570; *Re Arbenz' Appln.* (1887), 35 Ch. D. 248; *Roddaway v. Benthams Hemp-Spinning Co.*, [1892] 2 Q. B. 639; *Powell v. Birmingham Vinegar Brewery Co.*, [1896] 2 Ch. 54; *Cellular Clothing Co. v. Maxton & Murray* (1899), 80 L. T. 809; *Re Crossfield*, [1910] 1 Ch. 118; *Goddard v. Watford Co-op. Soc.* (1924), 41 R. P. C. 218; *Havana Cigar & Tobacco Factories v. Oddonino*, [1924] 1 Ch. 179.

**748. —.]**—*CHEAVIN v. WALKER*, No. 618, *ante*.

**749. — Damages.]**—*FORD v. FOSTER*, No. 747, *ante*.

## PART I. SECT. 7, SUB-SECT. 5.—A.

**741i. Whether registration condition precedent to relief—Injunction.]**—*PORTER v. WEIR* (1885), 29 L. C. J. 220.—*CAN.*

## PART I. SECT. 7, SUB-SECT. 5.—B.

**k. Misrepresentations in trade mark itself will entitle plaintiff to injunction.]**—*TEMPLETON v. WALLACE* (1900), 4 Torr. L. R. 340.—*CAN.*

**Sect. 7.—Infringement of trade marks: Sub-sect. 5, B. & C. (a) & (b), D. & E.]**

**750. — Where misrepresentation collateral.]—**FORD v. FOSTER, No. 747, *ante*.

**C. Effect of Delay or Acquiescence.**

**(a) Delay.**

**751. Whether relief granted — Injunction.]—**FARINA v. GEBHARDT (1853), cited in 3 Eq. Rep. at p. 891.

*Annotation:—*Reid. Farina v. Silverlock (1855), 3 Eq. Rep. 883.

**752. — — —.]—**HARRISON v. TAYLOR, No. 781, *post*.

**753. — — — Strong proof of defendant's fraudulent intent—& actual injury to plaintiff.]—**The ct. will not refuse to grant an injunction to restrain the infringement of a trade mark, on the mere ground that a great number of years have elapsed since it was first infringed by deft. But when many years have elapsed before pltf. takes steps to restrain the infringement, the ct. will require clearer proof than it would otherwise have done that the trade mark was adopted by deft. originally with fraudulent intent, & will require pltf. to prove that he has been actually injured by the infringement.—RODGERS v. RODGERS (1874), 31 L. T. 285; 22 W. R. 887, L. J.

*Annotation:—*Apld. *Re* Heaton's Trade Mk. (1881), 27 Ch. D. 870.

**754. — — — Delay satisfactorily accounted for.]—**Pltf. was a manufacturer of & wholesale dealer in confectionery, & amongst other things, made & sold in packets & tins a particular kind of cough lozenge, described on the wrappers as "Rowland's Army & Navy Paregoric Tablets." The wrappers also bore a device consisting of a portrait, from a photograph, of pltf. in an oval frame, the portrait being the essential part of pltf.'s trade mark, which was registered as such in 1891. In 1892 pltf. had threatened with proceedings H., who was also selling cough lozenges in wrappers labelled "Army & Navy Paregoric Tablets," & got up in a manner closely resembling pltf.'s goods. Deft. subsequently purchased & carried on H.'s business, continuing the practices complained of. An action was brought for an injunction to restrain the infringement of pltf.'s trade mark, & the passing off of deft.'s goods as pltf.'s. There were circumstances in the case which satisfactorily accounted for pltf.'s delay in bringing the action. There was a concurrent motion by deft. to expunge pltf.'s trade mark from the Register, on the ground that a portrait was not a "distinctive device," & the proper subject-matter of a trade mark, within Patents, Designs, & Trade Marks Act, 1888 (c. 50), s. 10 (1) (c).—*Held*: (1) a portrait of a human face, if not already on the register nor common to the trade, might be, & the portrait here was, a

"distinctive device" within the sect.; (2) pltf. had not lost his right to relief by acquiescence or delay.—ROWLAND v. MITCHELL, *Re* ROWLAND'S TRADE MARK, [1897] 1 Ch. 71; 66 L. J. Ch. 110; 75 L. T. 498; 13 T. L. R. 84; 41 Sol. Jo. 111; 14 R. P. C. 37, C. A.

*Annotation:—*As to (2) *Consd.* Reddaway v. Stevenson (1902), 20 R. P. C. 276.

**755. — Account of profits.]—**HARRISON v. TAYLOR, No. 781, *post*.

**756. What delay material—Two years.]—**BEARD v. TURNER, No. 600, *ante*.

**757. — More than one year.]—**Pltfs. had registered a label which bore together with other letterpress, the words "The Derby Dry Plates," also the words "Extra Rapid," printed in red diagonally. Defts. had issued labels similar in all respects to pltfs., except that the word "Derwent" was substituted for "Derby." More than a year had elapsed since deft. had commenced to use his label.—*Held*: the application of pltfs. for an injunction was not too late, & they were entitled to an injunction to restrain defts. from infringing pltfs.' trade mark by imitating their labels.—DERBY PHOTOGRAPHIC DRY PLATE CO. v. GRAHAM & CO. (1886), 2 T. L. R. 276.

**758. — Four years.]—**In the year 1897 pltfs. registered the word "Glacier" as a trade mark in class 39 in respect of transparent paper as a substitute for stained glass, & that word had become identified with such goods as sold by pltfs. In Feb. 1900, defts. commenced to sell similar goods under the name "Glazine." In Mar. 1905, pltfs. commenced an action to restrain infringement of their trade mark & passing off. They alleged that their goods were sometimes ordered as "Glazier" or "Glacine." Defts. alleged that their use of "Glazine" was not calculated to deceive, & set up acquiescence on the part of pltfs. A director of pltf. co., who was called as a witness, admitted that he had known of "Glazine" for four years, he would not say it was not five years.—*Held*: under these circumstances pltfs. had failed to establish that "Glazine" was an infringement of the trade mark "Glacier" or was calculated to deceive; & pltfs. failed on the merits & by reason of their delay in bringing the action.—MCCAW, STEVENSON & ORR, LTD. v. LEE BROTHERS (1905), 23 R. P. C. 1.

**759. — — — Plaintiff aware of acts similar to those complained of.]—**GILLETTE SAFETY RAZOR CO. v. DIAMOND EDGE, LTD. (1926), 43 R. P. C. 310.

**(b) Acquiescence.**

**760. Acquiescence for considerable period during trader's life—Whether executors may sue after death.]—**HOVENDEN v. LLOYD, No. 576, *ante*.

**761. Whether relief granted—Delay satisfactorily accounted for.]—**ROWLAND v. MITCHELL, *Re* ROWLAND'S TRADE MARK, No. 754, *ante*.

**PART I. SECT. 7, SUB-SECT. 5.—**  
**C. (a).**

**1. General rule.]—**Mere delay short of the statutory limitation will not bar an action for infringement of a trade mark or the assertion of a right to an injunction.—PALMER (JOHN) CO., LTD. v. PALMER-McLELLAN, SHOEPACK CO., LTD. (1917), 45 N. B. R. 8; 37 D. L. R. 201.—CAN.

**m. — — —.]—**More lapse of time does not disentitle the owner of a trade mark to sue for infringements unless the case comes within Stat. Limitations.—LENBA & LENBA v. ULLMANN (J.) & CO. (1906), 1 Hong Kong L. R. 131.—HONG KONG.

**751. Whether relief granted—In-**

**junction.]—**SLATER v. RYAN (1907), 17 Man. L. R. 89; 6 W. L. R. 741.—CAN.

**n. What delay material—Five years.]—**B. & Son, who had been for five years the registered proprietors of a trade mark, raised an action for infringement against T. & Co. T. & Co. defended the action & raised a contention against B. & Son concluding, *inter alia*, for declarator that the trade mark was incapable of registration & should be expunged from the register, in respect that it was common property before its registration by B. & Son.—*Held*: the lapse of five years was no bar to the removal of the entry, & the question of B. & Son's right to be on the register had been competently raised.—BOORD & SON v. THOM & CAMERON,

[1907] S. C. 1326; 44 So. L. R. 939; 15 S. L. T. 341.—SCOT.

**PART I. SECT. 7, SUB-SECT. 5.—**  
**C. (b).**

**o. Plaintiffs allowing defendant to believe that no right in trade mark claimed.]—**Where pltfs. by their conduct led deft. to believe that they claimed no right to a certain trade mark & that it was open to deft. to adopt it as his own, & deft. did adopt it, & by his industry secured a wide popularity for it in the Indian market.—*Held*: pltfs. were estopped from denying deft.'s right to use the trade mark in the Indian market.—LAVERGNE v. HOOPER (1884), 1 L. R. 8 Mad. 149.—IND.



*D. Effect of Offer by Defendant.*

**762. On grant of injunction—Offer after action brought—Refusal to publish apology.]**—B. filed a bill against C. to restrain an infringement of a trade mark, & obtained an *interim* injunction: before the hearing of the cause C. offered to enter into an undertaking to refrain from using the trade mark & pay all costs, but declined to publish an apology, insisted upon by B., in the newspapers. The ct. at the hearing, while decreeing a perpetual injunction, ordered, in consequence of B.'s refusing C.'s offer, each party to pay his own costs.—*HUDSON v. BENNETT* (1866), 14 L. T. 698; 12 Jur. N. S. 519; 14 W. R. 911.

**763. ———.]**—Before commencing an action for infringement of trade marks & for passing off, plffs., through their solrs., demanded from defts. an undertaking to refrain in the future from infringement & passing off, that defts. should issue at their expense in two papers, to be named by plffs., an apology in terms to be settled by their solrs., & payment of an agreed sum as damages. Defts., whilst alleging that any infringement of plffs.' rights was by salesmen acting contrary to directions given to them, expressed their willingness to give an undertaking & damages, but refused an apology for publication. Plffs. commenced proceedings & moved for an interlocutory injunction. Several instances were proved of sales at a kiosk of defts. at the Wembley Exhibition of defts.' goods when plffs.' goods were ordered:—*Held*: plffs. were, under the circumstances, entitled to an injunction.—*KODAK, LTD. v. ILLINGWORTH (T.) & CO., LTD.* (1925), 43 R. P. C. 33.

**764. ——— Reservation of right to set up defences—Offer not repeated in defence.]**—*FRAM MANUFACTURING CO., LTD. v. MORTON (ERIC) & CO., No.*, 740 *ante*.

**765. ——— Offer before action brought—Refusal to make public admission.]**—W.'s manager, without the personal knowledge of W., affixed tickets with T.'s name printed thereon to certain goods of inferior quality to T.'s, & made by another manufacturer. On T.'s complaining of this, W. offered to give an undertaking that he would not use such tickets again, & to pay a certain sum, but declined to make a public admission that he had used the tickets in order to defraud T.:—*Held*: notwithstanding W.'s offer, T. was entitled to an injunction with costs, & also to an inquiry as to damages at his own risk.—*TONGE v. WARD* (1869), 21 L. T. 480.

**766. On costs—Offer after action brought.]**—*MILLINGTON v. FOX*, No. 778, *post*.

**767. ——— Refusal to publish apology.]**—*HUDSON v. BENNETT*, No. 762, *ante*.

**768. ——— Plaintiff's motion for injunction not unnecessary.]**—On June 12, 1886, one of defts.' travellers received an order from Nutting, of Lavender Hill, for sixty dozen cardboard boxes with labels bearing the words "Browne's Satin Polish for ladies' & children's boots & shoes, travelling bags, trunks, etc., manufactured by Browne of Lavender Hill." On July 6, 1886, pltf., the owner of a registered trade mark, 14,127 bearing the words "Brown's Satin Polish" issued a writ to restrain the infringement of his trade mark. On July 7, 1886, defts. offered to compensate pltf. without the necessity of legal proceedings & to destroy the labels, & comply with any reasonable request of pltf. On July 16, pltf. moved for an injunction:—*Held*: notwithstanding defts.' offer the motion was not an unnecessary proceeding, & defts. must pay the costs caused by what they had done.—*FENNESSY v. DAY & MARTIN* (1886), 55 L. T. 161.

**769. ———.]**—In an action to restrain defts. from using the Royal Arms & the words "By Appointment," defts. shortly after the issue of the writ agreed to minutes of an order except on the question of costs. Plffs. moved in ct. for an injunction. Defts. contended that the order might have been obtained in chambers, & asked that they might be only ordered to pay such costs as would have been incurred if the order had been made in chambers:—*Held*: plffs. were amply justified in moving in ct. for an injunction, & it was their proper course to do so. Defts. were ordered to pay the costs of the action.—*ROYAL WARRANT HOLDERS ASSOCN. v. KITSON, LTD.* (1909), 26 R. P. C. 157.

*Annotation*:—*Apld. Smith & Jones v. Service, Reeve*, [1914] 2 Ch. 576.

**770. ——— Offer before action brought—Refusal to make public admission.]**—*TONGE v. WARD*, No. 765, *ante*.

**771. ——— No offer as to passing off.]**—*HAT MANUFACTURERS SUPPLY CO., LTD. v. TOMLIN BROTHERS* (1906), 23 R. P. C. 413.

**772. ——— Plaintiff seeking injunction & account—Plaintiff not entitled to account—Offer to submit to injunction only without costs.]**—*MOER v. COUSTON*, No. 780, *post*.

**773. ——— Offer by innocent infringers.]**—*UPMANN v. ELKAN*, No. 782, *post*.

**774. ——— Offer to submit to injunction—Costs after offer.]**—*VERNON & SONS v. BUCHANAN'S FLOUR MILLS* (1905), 23 R. P. C. 17.

*E. Innocent Infringement.*

**775. When infringement not innocent—Agent ordered to stamp goods with mark not belonging to principal & having casually heard of plaintiff's right.]**—Where A. is ordered by B. to manufacture an article & stamp it with a trade mark, not B.'s, that alone leads to suspicion, but A. having caused the article to be manufactured, & admitting having casually heard of the party entitled to use such trade mark, must submit to a perpetual injunction, & pay the costs.—*COLLINS CO. v. WALKER* (1859), 7 W. R. 222.

**776. ——— After notice of plaintiff's right.]**—*ORR EWING & CO. v. JOHNSTON & CO.*, No. 185, *ante*.

**777. ———.]**—*HOBSFIELD v. WALKDEN (JOHN) & CO., LTD.*, No. 827, *post*.

**778. Whether injunction granted.]**—(1) The ct. will grant a perpetual injunction against the use, by one tradesman, of the trade marks of another, although such marks have been so used in ignorance of their being any person's property, & under the belief that they were merely technical terms.

(2) As a general rule, the costs of the cause should follow the result of the cause; but an exception will be made where a party has established his object by means of an unnecessary degree of litigation.—*MILLINGTON v. FOX* (1838), 3 My. & Cr. 338; 40 E. R. 956, L. C.

*Annotations*:—*As to* (1) *Consd. Crawshaw v. Thompson* (1842), 4 Man. & G. 357; *Perry v. Trustoft* (1842), 6 Beav. 66; *Welch v. Knott* (1857), 4 K. & J. 747. *Apld. Clement v. Maddick* (1859), 1 Giff. 98; *Dixon v. Pawcus* (1861), 3 E. & E. 537; *Cartier v. Carille* (1862), 31 Beav. 292. *Consd. Hall v. Barrows* (1863), 4 De G. J. & Sm. 150. *Apld. Leather Cloth Co. v. American Leather Cloth Co.* (1863), 4 De G. J. & Sm. 137; *Moet v. Couston* (1864), 33 Beav. 578. *Consd. McAndrew v. Bassett* (1864), 4 New Rep. 12; *Lee v. Haley* (1869), 21 L. T. 546. *Expld. Wotherspoon v. Currie* (1870), 23 L. T. 443. *Consd. Ford v. Foster* (1872), 7 Ch. App. 611. *Apld. Singer Manufacturing Co. v. Wilson* (1877), 3 App. Cas. 376; *Singer Manufacturing Co. v. Loog* (1884), 3 App. Cas. 15. *Consd. Reddaway v. Bentham Hemp-Spinning Co.* (1892) 2 Q. B. 639. *Apld. Powell v. Birmingham Vinegar Brewery Co.* (1896) 2 Ch. 54; *Cellular Clothing Co. v. Maxton & Murray*, [1899] A. C. 326. *Consd. Valentine's Meat Juice Co. v. Valentine*

*Sect. 7.—Infringement of trade marks: Sub-sect. 5, E. & F. (a) & (b) i.]*

*Extract Co.* (1900), 83 L. T. 259; *Bourne v. Swan & Edgar, Re Bourne's Trade Mks.*, [1903] 1 Ch. 211; *Brinsmead v. Brinsmead* (1913), 30 R. P. C. 493. *Reid. Spottiswoode v. Clark* (1846), 8 L. T. O. S. 230; *Burgess v. Burgess* (1853), 22 L. J. Ch. 675; *Edleston v. Vick* (1853), 18 Jur. 7; *Borthwick v. Evening Post* (1888), 37 Ch. D. 449; *Proctor v. Bayley* (1889), 42 Ch. D. 393, n.; *Baker v. Rawson, Re Baker's Trade Mks., Re Rawson's Appln.* (1890), 60 L. J. Ch. 49; *Paine v. Daniels Breweries, Re Paine's Trade Mks.*, [1893] 2 Ch. 567. *As to (2) Apd.*, *Colburn v. Simms* (1843), 2 Hare, 543. *Distd.*, *Pierce v. Franks* (1846), 15 L. J. Ch. 122. *Apd.*, *Moet v. Couston* (1864), 33 Beav. 578. *Distd.*, *Tonge v. Ward* (1869), 21 L. T. 480. *Reid.*, *Kelly v. Hooper* (1841), 1 Y. & C. Ch. Cas. 197; *Burgess v. Hills* (1858), 26 Beav. 214. *Generally, Reid.*, *Ainsworth v. Wainsley* (1860), 1 L. R. 1 Eq. 518; *Lovy v. Walker* (1879), 10 Ch. D. 436; *Orr Ewing v. Trades-Mks. Regt.* (1879), 4 App. Cas. 479; *Re Jiviere* (1884), 53 L. J. Ch. 578; *Thynne v. Thors* (1890), 45 Ch. D. 577; *Bow v. Hay*, [1905] 1 K. B. 592; *Boord v. Thorn & Cameron* (1907), 24 R. P. C. 697; *Re Du Cros' Appln.*, [1912] 1 Ch. 644; *Yeatman v. Homberger* (1912), 107 L. T. 742.

**779.** —.]—*EDELSTEN v. EDELSTEN*, No. 614, ante.

**780.** —.]—(1) A person innocently selling goods bearing the spurious trade mark of another person is not, in equity, liable to account for the profits made thereby, but the owner of the trade mark is entitled to an injunction.

(2) The right to an injunction ordinarily carries with the right to costs; but if pltf. asks for the costs, & for something more than he is entitled to, he will lose the costs he might otherwise have received.

(3) Where pltf. being entitled to an injunction seeks also for an account of profits to which he is not entitled, he will lose his right to costs, & if deft. submit to the injunction & offer pltf. his costs up to the filing of the bill, pltf. persevering in the suit will be ordered to pay all subsequent costs incurred by deft.—*MOET v. COUSTON* (1864), 33 Beav. 578; 4 New Rep. 86; 10 L. T. 395; 29 J. P. 69; 10 Jur. N. S. 1012; 55 E. R. 493.

**781.** —.]—The ct. granted an injunction with costs, to restrain the use of pltf.' trade mark, which defts. had adopted without knowledge of the fact that it belonged to pltf., but, on the ground of delay in filing the bill, refused an account of profits.—*HARRISON v. TAYLOR* (1865), 12 L. T. 339; 29 J. P. 532; 11 Jur. N. S. 408.

**782.** —.]—A firm of forwarding agents in London received from correspondents abroad several boxes of cigars bearing forged brands, which were to be delivered to several persons in England. On application by the makers whose brand had been forged, the agents gave information as to the consignors, & offered either to send back the cigars or to erase the brands. On a bill for injunction filed by the makers whose brands were forged:—*Held*: (1) the fact of the agents being merely carriers was no defence to the suit; but (2) as they had given sufficient information, & offered to erase the brands they were not to pay costs.

(3) Applt. gave notice to resp. whose costs applt. had been ordered to pay, that no alteration in the order as to his costs was asked for, & offered to pay his costs:—*Held*: resp. was not entitled to his costs of appearing on the appeal.—*UPMANN v. ELKAN* (1871), 7 Ch. App. 130; 41 L. J. Ch. 246; 25 L. T. 813; 36 J. P. 38; 20 W. R. 131, L. C.

*Annotations*:—*As to (1) Consd.*, *Upmann v. Forester* (1883), 24 Ch. D. 231. *Apd.*, *Catterson v. Anglo Foreign Manufacturing Co.* (1910), 28 L. P. C. 74. *Generally, Reid.*, *Moet v. Pickering* (1878), 8 Ch. D. 372.

**783.** —.]—*ELLEN v. SLACK* (1880), 24 Sol. Jo. 290.

*Annotation*:—*Reid.*, *Slazenger v. Spalding*, [1910] 1 Ch. 257.

**784.** —.]—*JOSEPH RODGERS & SONS, LTD. v. ROTTGEN* (1889), 5 T. L. R. 678.

**785.** —.]—*AMERICAN TOBACCO CO. v. GUEST*, No. 802, post.

**786.** —.]—When a registered trade mark is innocently infringed the proprietor of the trade mark is entitled to an injunction against the offender, but not to an account of profits or an inquiry as to damages unless the offender continues to infringe after notice of the proprietor's right.—*SLAZENGER & SONS v. SPALDING & BROTHERS*, [1910] 1 Ch. 257; 79 L. J. Ch. 122; 102 L. T. 390; 27 R. P. C. 20.

*Annotation*:—*Reid.*, *Horsfield v. Walkden* (1910), 28 R. P. C. 175.

**787.** —.]—Pltfs. in an action for infringement of trade marks & passing off sold one quality of champagne intended exclusively for continental consumption, & another quality intended exclusively for English consumption. They alleged that defts. S. & B. had sold in England the continental quality as the English quality, under labels that were forgeries of pltf.' labels. Defts. put in a joint defence. At the trial deft. S. did not appear; deft. B. appeared & alleged that he had acted innocently on behalf of S. It was admitted by pltfs. that the purchasers of the wine had acted in good faith:—*Held*: (1) there had not been fraud on the part of B.; but an injunction was granted against both defts., with an inquiry as to damages against S., but not against B.; (2) as to costs, separate orders were made, namely, against S. a full order, but against B., an order for the general costs of the action, except in so far as they had been increased by the issue of fraud, with a set-off in favour of B. of the costs of that issue.—*CHAMPAGNE HEIDSIECK ET CIE v. SCOTTO & BISHOP* (1920), 43 R. P. C. 101.

**788.** —.]—The proprietors of a trade mark, consisting of the word "Sferavox," & registered in classes 8 & 9 in respect of wireless loud speakers brought an action for infringement of the mark & for passing off. They had previously moved the Vacation Ct. for an injunction to restrain defts. from infringement & passing off: & defts. undertaking in terms of the notice of motion, no order was made on the motion except that the costs be costs in the action. Defts., who had acted innocently, admitted the sale under the name "Sferavox" of a single loud speaker not of pltf.' manufacture, but denied that pltf. were entitled to an injunction or to damages. They had for some time exhibited in their window a loud speaker not of pltf.' manufacture under the name "Sferavox":—*Held*: (1) pltf. were entitled to an injunction or to an undertaking in the terms of the statement of claim; (2) they were entitled to costs notwithstanding that they had asked for damages to which they did not show themselves to have been entitled.—*SOCIÉTÉ FRANÇAISE RADIO-ELECTRIQUE v. WEST CENTRAL WIRELESS SUPPLIES* (1928), 45 R. P. C. 276.

**789.** —.]—*Infringement by servant—Against defendant's orders.*—The name of a Covent Garden salesman was registered as an old mark, & was marked upon baskets belonging to him & used by growers of the vegetables consigned to him for sale on commission for the purpose of packing & forwarding their goods to him. Some of the baskets sent by him to one of such growers for such purposes were made use of to send vegetables to other salesmen, & the vegetables were exposed for sale in the baskets by the other salesmen. The business of the grower had been assigned to deft. as trustee for the grower's creditors & at the time of the wrongful use of the baskets the grower was carrying on the business as agent for deft.:—



*Sect. 7.—Infringement of trade marks: Sub-sect. 5, F. (b) i., ii. & iii., (c) & (d). Sect. 8.]*

**810. Limitation of operation of Injunction—Particular locality.]—**BARBER *v.* MANICO, No. 660, *ante*.

**811. — Particular goods.]—**BARBER *v.* MANICO, No. 660, *ante*.

**Innocent infringement.]—**See Nos. 796–803, *ante*.

**Effect of delay.]—**See Nos. 751–754, *ante*.

**Effect of acquiescence.]—**See No. 754, *ante*.

**Effect of offer by defendant.]—**See Nos. 767–770, *ante*.

## ii. Interlocutory Injunction.

**812. Plaintiff must give undertaking as to damages.]—**READ BROTHERS *v.* RICHARDSON & Co., No. 657, *ante*.

**813. Whether granted—Prima facie case shown by plaintiff.]—**READ BROTHERS *v.* RICHARDSON & Co., No. 657, *ante*.

**814. — Serious question to be tried.]—**EVANS *v.* SMITH (1887), 3 T. L. R. 390.

**815. — No proof of fraud on public.]—**HOP BITTERS CO., LTD. *v.* GRIFFITHS (1887), 3 T. L. R. 365.

**816. — No public & notorious sale of goods.]—**The Apollinaris co. having registered in 1876 the word “Apollinaris” as a trade mark, used for two years previously, brought an action against the agents in England for a German mineral water, for using the word “Apollinis” on the labels appearing as such water, & moved for an interlocutory injunction. Defts. proved that their principals had been using “Apollinis” in Germany since 1876 & that attempts to stop them had failed & further that the water in question had been sold in England under the labels complained of since 1881, in small quantities to persons who bought for private consumption & not for resale. Pltfs.’ secretary deposed that they were not aware of the sale of mineral water under the title “Apollinis” until shortly before the action was commenced:—**Held:** pltfs. were entitled to an injunction. As there was no motion to rectify the Register, the validity of the registration of pltfs.’ trade mark could not be called in question in the action; the use by defts. of “Apollinis” was an infringement of the registered trade mark “Apollinaris”; there had been no such public & notorious sale of the mineral water in question with the label complained of, as to deprive pltf. of their right to an interlocutory injunction.

I think we are justified in coming to the same conclusion as the learned judge in the ct. below did, that the use of this word “Apollinis” is nothing more than a colourable imitation of “Apollinaris” (LINDLEY, L.J.).—APOLLINARIS CO., LTD. *v.* HERRFELDT & CAMPBELL (1887), 4 T. L. R. 9; 4 R. P. C. 478.

*Annotations:—***Reid.** Free Fishers & Dredgers of Whitstable *v.* Elliott (1888), 4 T. L. R. 273; *Re* Apollinaris Co.’s Trade Mks., [1891] 2 Ch. 186.

**817. — Exclusive use of particular characteristic disclaimed.]—**ROSENTHAL *v.* REYNOLDS, No. 378, *ante*.

## PART I. SECT. 7. SUB-SECT. 5.—F. (b) iii.

**a. Colourable imitation.]—**Pltf. was a manufacturer of lime at Greenhead, & sold it in barrels marked “Greenhead lime,” & it had a market value & reputation as such. Defts. manufactured lime at the same place, & an injunction had been issued against them from using pltf.’s trade mark, or any colourable imitation thereof. Afterwards defts. marked their lime as “Extra No. 1 lime, manufactured by Raynes Bros. at Greenhead.” The general appearance of defts.’ mark resembled pltf.’s:—

*Held:* there had been a breach of the injunction.—ARMSTRONG *v.* RAYNES (1825–1897), N. B. Dig. 316.—CAN.

## PART I. SECT. 7. SUB-SECT. 5.—F. (c).

**r. To what period confined.]—**The account of profits in an action for infringement should not be confined to the period subsequent to registration, at any rate when the infringement has not been innocent.—SMITH *v.* FAIR (1887), 14 O. R. 729.—CAN.

**t. When granted.]—**In an action for infringement of a trade mark pltf. may make his choice of either payment of

**818. — Balance of facts in favour of grant.]—**JARRETT *v.* BRITISH NORTH BORNEO CIGAR CO. (1892), 37 Sol. Jo. 116.

**819. — Ex parte.]—**HICKS *v.* SUMNER & SUMNER (1894), 38 Sol. Jo. 724.

**Interlocutory Injunctions, generally.]—**See INJUNCTION, Vol. XXVIII., pp. 371 *et seq.*

## iii. Breach of Injunction.

**820. Motion for commitment—Defence of acquiescence—Acquiescence must amount to licence to use mark.]—**In 1847 Joseph R. & Sons obtained an injunction to restrain N. & William R. from using the trade mark “J. R. & Sons.” Soon afterwards W. R. entered into partnership with his father John R. & with a brother, & the three used the trade mark “J. R. & Sons,” with a colourable addition. Upon pltfs. moving, in 1853, to commit W. R., & denying notice of the breach of the injunction before July, 1852:—**Held:** (1) they were entitled to the order, & acquiescence, to constitute a defence to such a motion, must amount to a licence to use the mark; (2) pltfs. might move to commit W. R. without bringing his partners before the ct.—RODGERS *v.* NOWILL (1853), 3 De G. M. & G. 614; 22 L. J. Ch. 404; 20 L. T. O. S. 319; 17 Jur. 171; 1 W. R. 205, 216; 43 E. R. 241, L. J.J.

*Annotation:—***Generally.** **Reid.** Churton *v.* Douglas (1859), John. 171.

**821. — Of defendant against whom Injunction obtained—Infringement by partnership entered upon after injunction—Whether other partners must appear before court.]—**RODGERS *v.* NOWILL, No. 820, *ante*.

**822. — Subsequent infringement by agent—In absence of principal.]—**PARKER MANUFACTURING CO., LTD. *v.* COOPER (1901), 18 R. P. C. 319.

## (c) Account of Profits.

**823. Whether granted—Where defendant’s knowledge of mark must be proved—To enable plaintiff to recover damages.]—**A defendant is liable in equity to account for the profits made by the user of pltf.’s trade mark, though, at the time of the user, he may have been ignorant of the rights & of the existence of pltf., & notwithstanding that, to entitle him to recover damages at law, it may be necessary to prove a *scienter*.—CARTIER *v.* CARLILE (1862), 31 Beav. 292; 8 Jur. N. S. 183; 54 E. R. 151.

*Annotations:—***Consd.** **Moet** *v.* Couston (1864), 4 New Rep. 86. **Reid.** Slazenger *v.* Spalding (1909), 102 L. T. 390.

**824. — Innocent infringement.]—**See Sub-sect. 5, E., *ante*.

— **Effect of delay.]—**See No. 781, *ante*.

## (d) Damages.

**824. General rule—Damages prima facie right of plaintiff—At own risk as to costs.]—**HENRY HEATH, LTD. *v.* FREDERICK GORRINGE, LTD. (1924), 41 R. P. C. 457.

damages or an account; but, where the action is tried by a judge & jury, if the jury are not asked to assess the damages there is nothing to compel the ct. to grant an account or to fetter it in defining the scope or extent of such account.—KEMP *v.* LEUNG CHAK CHAUN (1909), 5 Hong Kong L. R. 65.—HONG KONG.

## PART I. SECT. 7. SUB-SECT. 5.—F. (d).

**a. Measure of damages—Loss of profits.]—**Where the infringement of pltfs.’ trade mark by defts. caused a loss of profit to pltfs., not by diminish-

**825. Measure of damages—No assumption from actual sales by infringer.]**—On an inquiry whether any & what damage has accrued to pltf.s. from the unlawful use by def.t. of their trade mark, the onus lies on pltf.s. of proving some special damage by loss of custom or otherwise, & it will not be intended in the absence of evidence that the amount of goods sold by def.t. under the fraudulent trademark would have been sold by pltf.s., but for def.t.'s unlawful use of pltf.s.' mark.—*LEATHER CLOTH CO. v. HIRSCHFELD* (1865), L. R. 1 Eq. 299; 13 L. T. 427; 30 J. P. 179; 14 W. R. 78.

*Annotations:—Distd. Davenport v. Rylands* (1866), 14 L. T. 53. *Refd. Leather Cloth Co. v. American Leather Cloth Co.* (1863), 1 Hem. & M. 271; *Alexander v. Henry, Mitchell Henry & Waller* (1895), 12 R. P. C. 360; *Saccharin Corp'n. v. Chemicals & Drugs Co.* (1900), 69 L. J. Ch. 820.

**826. — Reduction of prices necessitated by infringement.]**—(1) Pltf.s., in an action against three defts., obtained a judgment by consent for default of defence against defts. for an injunction to restrain infringement of pltf.s.' trade marks, with costs, & by the judgment it was referred to the Official Referee to inquire & report what sums of money if any, were fit to be awarded to pltf.s. for any damages sustained by them by the use of the infringing tickets. The Referee by his report found, for the reasons assigned by the report, that £3,067 ought to be paid by the first two defts. & £5,000 by the third. Defts. moved to vary the report, & pltf.s. moved that it be adopted:—*Held*: the report be adopted, & defts.' motions be dismissed with costs, & they must pay the costs of the reference.

(2) When the Chief Clerk or the Official Referee has had before him, not only the whole case, so that he may have considered it as an entirety but has had the witnesses before him, seen them, heard what they said & seen how they gave their evidence, the ct. ought to be unwilling to differ from him with regard to conclusions of fact. Where the evidence is all writing, then, of course, the ct. is in a very different position: but when the evidence is oral it would be presumptuous, dangerous, mischievous, in my opinion, for the judge, with only the transcript of the shorthand notes or the Referee's own notes before him, to say that this, or the other conclusion must follow because it is the necessary consequence of the grammatical meaning of certain language used by persons who may have been lying, or stating facts in language which they did not themselves understand, or did not mean to be understood in the sense which it grammatically bears (*KEKEWICH, J.*).—*ALEXANDER & CO. v. HENRY & CO., MITCHELL HENRY & WALLER & CO.*, (1895), 12 R. P. C. 360.

**827. — From time when defendant had notice of plaintiff's mark.]**—At the date of the registration of the trade mark hereinafter referred to, pltf. was carrying on business in partnership with one Joseph Berry as West African merchants & shippers under the style or firm of Horsfield, Berry & Co. On Jan. 3, 1901, J. J. H. & J. B., who were carrying on business in co-partnership, registered a trade mark in respect of cotton piece goods in class 24 consisting of two concentric circles of different radius forming a ring with the signs of the zodiac printed or impressed on such

ring in regular order reading from left to right. In 1905 the partnership was dissolved & the whole of the partnership business, goodwill, & property became vested in J. J. H. In Apr. 1910 J. J. H. discovered that J. W. & co. were exporting & selling at Lagos in West Africa cotton piece goods, the wrappers of which bore a mark containing the signs of the zodiac. J. J. H. thereupon commenced an action against J. W. & co. for infringement. Upon the hearing of a motion for an *interim* injunction defts. offered to submit to a perpetual injunction & to pay the costs of the action down to that date. Pltf. had refused defts.' offer, contending that he was entitled to an inquiry as to damages. The action came on for trial. Upon the evidence:—*Held*: defts. were not innocent infringers, but had been aware prior to the commencement of the action of the existence of pltf.'s trade mark, & pltf. was entitled to an inquiry as to damages from the date upon which defts. first became aware of the ownership by pltf. of the said trade mark.—*HORSFIELD v. WALKDEN (JOHN) & CO., LTD.* (1910), 28 R. P. C. 175.

**828. Attitude of court towards report of Referee —Reluctance to differ on conclusions of fact—Unless evidence is documentary.]**—*ALEXANDER & CO. v. HENRY & CO., MITCHELL HENRY & WALLER & CO.*, No. 826, *ante*.

**829. Inquiry as to damages—Form of inquiry—Infringement of trade mark & patent distinguished.]**—Distinction taken in the proper form of inquiry as to damages in respect of the infringement of a trade mark, & the infringement of a patent.—*DAVENPORT v. RYLANDS* (1865), L. R. 1 Eq. 302; 35 L. J. Ch. 204; 14 L. T. 53; 12 Jur. N. S. 71; 14 W. R. 243.

*Annotations:—Distd. Betts v. Gallais* (1870), L. R. 10 Eq. 392. *Refd. Penn v. Bibby, Penn v. Jack, Penn v. Fernie* (1866), L. R. 3 Eq. 308; *Fram Manufacturing Co. v. Morton* (1922), 40 R. P. C. 33. *Mentd. Fritz v. Hobson* (1880), 14 Ch. D. 542; *Leeds Industrial Co.-op. Soc. v. Slack* (1924), 40 T. L. R. 745.

**830. — Onus of proof of special damage.]**—*LEATHER CLOTH CO. v. HIRSCHFELD*, No. 825, *ante*.

**831. — Stay pending appeal—Necessity for consent of plaintiff.]**—*EVANS, TAUNTON (J. & J.), LTD. v. HOSKINS & SEWELL, LTD.* (1904), 21 R. P. C. 675.

**832. — Against whom ordered.]**—*CHAMPAGNE HEIDSIECK ET CIE v. SCOTTO & BISHOP*, No. 787, *ante*.

**833. —.]**—*IMPEX ELECTRICAL, LTD. v. WEINBAUM, Re IMPEX ELECTRICAL, LTD.'S TRADE MARKS*, No. 655, *ante*.

**834. —.]**—*FORTH & CLYDE & SUNNYSIDE IRON COS., LTD. v. SUGG (WILLIAM) & CO., LTD.*, No. 629, *ante*.

**Innocent infringement.]**—*See* Nos. 779–787, *ante*.

## SECT. 8.—OFFENCES.

*See* Trade Marks Act, 1905 (c. 15), ss. 66, 67.

**835. False representation that trade mark registered—Use of word "registered"—Mark registered abroad.]**—*MACSYMONS STORES, LTD. v. SHUTTLEWORTH* (1898), 15 R. P. C. 748, D. C.

ing the amount of goods sold by pltf.s., by taking away their customers or ousting them from their usual market, but by causing the goods actually sold by pltf.s. to be sold at a diminished price.—*Held*: defts. were liable for the loss sustained by pltf.s. & the amount of the reduction in the price of the goods sold was the measure of damages.—*MANOCKJI PETIT MANU-*

*FACTURING CO. v. MAHALAKMI SPINNING & WEAVING CO.* (1885), 1 L. R. 10 Bom. 617.—*IND.*

**b. — Extent to which defendant's infringement interferes with plaintiff's sales.]**—The true measure of damages is not the profit made by def.t., but the extent to which def.t.'s infringement has interfered with pltf.'s sales.—*BRECHAM v. HANLON* (1894), 12 N. Z. L. R. 11.

551.—*N.Z.*

**c. Damnum absque injuria.]**—*REID v. THOMSON & CO.* (1905), 22 R. P. C. 376.—*SCOT.*

## PART I. SECT. 8.

**d. Selling beverage in bottle with name of another on it.]**—*Lt. v. IRVINE* (1905), 5 O. W. R. 352; 9 O. L. R. 389.—*CAN.*  
**e. —.]**—Criminal Code, s. 490,

*Sect. 8.—Offences. Part II. Sects. 1 & 2. Part III. Sects. 1 & 2.]*

**836. — Use of word "trade mark".**—The use by a trader on his goods of the words "trade mark" in connection with a particular mark which he has used as a trade mark but for which he has not obtained registration, does not necessarily imply that the trade mark is registered so as to constitute an offence under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 105, & apart

from sect. 105 is not of itself such a misrepresentation as to disentitle him to relief in an action to restrain the imitation of the get up of his goods.—*SEN SEN CO. v. BRITTEN*, [1899] 1 Ch. 692; 68 L. J. Ch. 250; 80 L. T. 278; 47 W. R. 358; 15 T. L. R. 238; 43 Sol. Jo. 315; 10 R. P. C. 137.

*Annotation:—Refd. Hubbuck v. Brown* (1900), 17 R. P. C. 638.

**False pretences as to quality or value of goods.**—*See CRIMINAL LAW*, Vol. XV., pp. 996, 998, Nos. 11,132, 11,137, 11,142, 11,143.

## Part II.—Compulsory Marks.

### SECT. 1.—IN GENERAL.

*See Merchandise Marks Act, 1926 (c. 53).*

**837. What firearms must be marked.—Under private Act—Arms provisionally proved by Birmingham company.—**But not by Gunmakers company in London.]—18 & 19 Vict. c. cxlviii, does not make it obligatory on the Gunmakers Company, London, to receive & prove firearms by definitive proof, which have been provisionally proved by the Birmingham Company at Birmingham, but which have not been provisionally proved by the Gunmakers Company in London.—*GOODMAN v. SPENCER* (1857), 2 C. B. N. S. 93; 26 L. J. C. P. 177; 29 L. T. O. S. 80; 21 J. P. 628; 3 Jur. N. S. 414; 5 W. R. 524; 140 E. R. 346.

**Anchor & chain cables.**—*See Anchors & Chain Cables Act, 1899 (c. 23); SALE OF GOODS, Vol. XXXIX., p. 464, No. 899.*

**Articles bearing registered designs.**—*See Part IV., Sect. 2, post.*

**Butter, cheese & margarine.**—*See FOOD & DRUGS, Vol. XXV., pp. 123–125, Nos. 453–465.*

**Gun barrels.**—*See Gun Barrel Proof Act, 1868 (c. xiii), ss. 108, et seq.*

**Gunpowder.**—*See Explosives Act, 1875 (c. 17), s. 32.*

**Irish linen.**—*See Linen (Trade Marks) Acts, 1743 (c. 30); 1744 (c. 24); Irish Handloom Weavers Act, 1909 (c. 21).*

**Patented articles.**—*See Patents & Designs Act, 1907 (c. 29), s. 33.*

**Weights & measures.**—*See WEIGHTS & MEASURES.*

### SECT. 2. GOLD AND SILVER PLATE.

*See 2 Hen. 6, c. 17; 18 Eliz. c. 15; 12 & 13 Will. 3, c. 4; Plate Duty Act, 1719 (c. 11), ss. 1–3,*

which prohibits trading, without the consent of the owner, in bottles which have upon them the trade mark or name of another person, is wide enough to cover such trading in bottles to which the name of the owner is affixed by means of a paper label.—*R. v. WITTMAN (B. C.)*, [1917] 3 W. W. R. 438, 25 B. C. R. 108.—**CAN.**

**f. —***THWAITES v. McEVILLY, CANTRELL & COCHRANE v. MURPHY & BRADSHAW*, [1904] 1 L. R. 310; 21 R. P. C. 397.—**IR.**

**g. Using false trade mark.—***Contrary to Criminal Code.*—*R. v. LATIF* (1910), 1 L. R. 39 All. 123.—**IND.**

**h. False representation that trade mark registered.—**Use of word "registered."—Defts., who were merchants in Belfast, sold a box of baking powder, bearing a label with the words "Trade Mark—Royal—Registered"; & on the obverse side were the words "Manufactured by Royal Baking Powder Co.,

New York." The trade mark had been for many years, & at the time of the sale was registered in the United States, & had also been for some years registered in England; but seven weeks previous to the sale it had been expunged from the Register in this country. Defts. were prosecuted at petty sessions under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 105, for describing the trade mark as registered; & the magistrates being of opinion that the word "Registered" on the label did not necessarily imply that the trade mark was registered in the United Kingdom, & that being coupled with the words "Manufactured by Royal Baking Powder Co., New York," it might mean registered in the United States, they dismissed the summons; but stated a case for opinion of the Ct. as to whether the Act had been infringed or not.—*Held*: the use of the word "Registered" amounted to a representation that the

41; Plate Offences Act, 1738 (c. 26); Silver Plate Act, 1790 (c. 31); Gold Plate (Standard) Act, 1798 (c. 69); Wedding Rings Act, 1855 (c. 60).

**838. Action for penalties.—Limitation.**—To an action by an officer of the Company of Goldsmiths in London, suing on behalf of the said Company by virtue of Gold & Silver Wares Act, 1844 (c. 22), against a dealer in silver wares, for the sum of £10 upon each of six hundred & forty-three wares sold by him in 1872, each of the said wares having at the time they were sold a counterfeit imitation of the mark of an instrument theretofore used by the said company for marking silver wares, *deft.* stated in defence, amongst other things, that the alleged cause of action did not accrue within two years before this action was brought. Upon demurrer.—*Held*: this was not an action for penalties given by a statute to the party grieved within Civil Procedure Act, 1833 (c. 42), s. 3, nor an action by the Crown or by a common informer within 31 Eliz. c. 5, s. 5, the two years limitation consequently did not exist, & the demurrer must be allowed.—*ROBINSON v. CURREY* (1881), 7 Q. B. D. 465; 50 L. J. Q. B. 561; 45 L. T. 388; 46 J. P. 148; 30 W. R. 39, C. A.

*Annotations:—Refd. Saunders v. Wile*, [1892] 2 Q. B. 321; *Thomson v. Channorris*, [1899] 2 Ch. 523; *R. v. Canadian N. Ity.*, [1923] A. C. 714.

**839. Offence of transposing mark.—Whether intention to defraud essential.**—*R. v. SPITTLE* (1902), 18 T. L. R. 436.

**840. What is gold & silver plate.—Gold & silver watch cases.**—Gold & silver watch cases, forming parts of finished watches imported into the United Kingdom from abroad, are gold & silver plate within the meaning of Customs Act, 1842 (c. 47), s. 59.—*GOLDSMITHS' CO. v. WYATT*, [1907] 1 K. B.

trade mark was registered in the United Kingdom, which was not affected by the words describing where the article was manufactured, & the magistrates ought to have convicted.—*WRIGHT, CROSSLEY & CO. v. DOBBIN* (1898), 15 L. P. C. 21.—**IR.**

### PART II. SECT. 1.

**k. Flour barrels.**—The seller of flour in barrels not marked or branded under 4 & 5 Vict. c. 89, s. 23, is not liable to the penalty imposed, but only the manufacturer or packer.—*R. v. BEEKMAN* (1845), 2 U. C. R. 57.—**CAN.**

### PART II. SECT. 2.

**l. "Hall mark".—***Right to register.*—*GORHAM MANUFACTURING CO. v. ELLIS & CO.* (1904), 24 C. L. T. 119; 8 Exch. C. R. 401.—**CAN.**

**m. Breach of Gold & Silver Marking Act.—***Guaranteeing to wear for specified time.*—*R. v. LEE* (1911), 18



95; 76 L. J. K. B. 166; 95 L. T. 855; 71 J. P. 79; 23 T. L. R. 107; 51 Sol. Jo. 99, C. A.

*Annotations*.—*Refd.* Fabergé v. Goldsmiths' Co., [1911] 1 Ch. 286. *Mentd.* Waddle v. Sunderland Union (1908), 2 Konst. Rat. App. 506; Sadler v. Whitman, [1910] 1 K. B. 868.

**841.** — Every article subject to Plate (Offences) Act, 1738 (c. 26)—Provisions as to assaying & marking—Effect of use as foundation of enamel work.]—(1) The word "plate," as used in above Act, ss. 2, 6, Customs Act, 1842 (c. 47), s. 59, Revenue Act, 1883 (c. 55), s. 10, & the Hall-marking of Foreign Plate Act, 1904 (c. 6), included every article of gold or silver imported from abroad which, if it had been made in the United Kingdom, would have been subject to the provisions as to assaying & marking contained in Plate (Offences) Act, 1738 (c. 26). Where an article, such as a match-box, cigarette case, or letter clip, is once a "manufacture of gold or silver," within the meaning of that term as used in the Act of 1738, it does not cease to be such because it is used as the base or foundation of enamel work, however great the artistic merit of that work is as compared with the value of the gold or silver.

(2) Enamel worked on a gold or silver foundation, even if it is a jewel, is not "set" in the gold or silver within the meaning of that word as used in Plate (Offences) Act, 1738 (c. 26), s. 2.

An enamelled gold cigarette case, the enamel

of which is worked on the gold foundation, even if an enamel is a "jewel," is not "set" in the gold within the meaning of that word as used in Plate (Offences) Act, 1738 (c. 26), s. 6.

(3) Gold watches which are jewelled & set in gold chain bracelets are not exempt from being hall marked.—*FABERGÉ v. GOLDSMITHS' CO.*, [1911] 1 Ch. 286; 80 L. J. Ch. 97; 103 L. T. 555.

**842.** Enamel worked on gold or silver—Not "set" in gold or silver—Although a jewel.—*FABERGÉ v. GOLDSMITHS' CO.*, No. 841, *ante*.

**843.** Gold watches jewelled & set in gold chain brackets.—*FABERGÉ v. GOLDSMITHS' CO.*, No. 841, *ante*.

**Newcastle marks.**—*See* Plate (Offences) Act, 1738 (c. 26).

**Sheffield & Birmingham marks.**—*See* Plate Assay (Sheffield & Birmingham) Act, 1772 (c. 52).

**Nine, twelve & fifteen carat standards.**—*See* Gold & Silver Wares Act, 1854 (c. 96).

**Imported plate.**—*See* Customs Act, 1842 (c. 47), s. 59; Revenue Acts, 1883 (c. 55), s. 10; 1884 (c. 62), s. 4; Hall Marking of Foreign Plate Act, 1904 (c. 6); Assay of Imported Watch Cases (Existing Stocks Exemption) Act, 1907 (c. 8).

**Watch cases.**—*See* Merchandise Marks Act, 1887 (c. 28), ss. 7, 8, 17; Assay of Imported Watch Cases (Existing Stocks Exemption) Act, 1907 (c. 8).

## Part III.—False Marks and False Trade Descriptions.

### SECT. 1.—WARRANTY OF GENUINENESS.

*See* Merchandise Marks Act, 1887 (c. 28), s. 17.

**844.** Extent of warranty—Defendant in third party proceedings—Liability to indemnify co-defendant against costs of proceedings.]—*P. & C.*, the proprietors of a Trade Mark "Cathédrale" for herrings, brought an action against B. B. & Co. & W. B. for infringement. It appeared that W. B. had supplied B. B. & Co. with cases of herrings, bearing the mark "Cathédrale" with the representation of an edifice, with which they proceeded to deal. B. B. & Co. served a third party notice on W. B., claiming an indemnity from him in respect of the action, & an Order was made that the matter should be determined under the third party proceedings & pleadings were delivered therein. In the action an injunction was by consent ordered against both defts. with costs, without prejudice to the third party proceedings. An agreed sum of £200 for damages & an agreed sum of £175 for costs had been paid by W. B. to plffs. The third party proceedings came on for trial:—*Held*: W. B. had warranted that the trade mark had not been falsely applied & was under an obligation to indemnify B. B. & Co. against the costs of the action. He was ordered

to repay them the costs which they had paid, such costs to be taxed as between solr. & client, & to pay them the costs of the third party proceedings to be taxed as between party & party.

It seems to me that whether the goods were then manufactured or were going to be manufactured, were then marked or were going to be marked, they undoubtedly were so marked when the delivery of the goods took place, & it seems to me that it would make the sect. [Merchandise Marks Act, 1887 (c. 28), s. 17] ridiculous if I were to read it in any other way (*NEVILLE, J.*).—*PIDOUX & COOK v. BENEKENDORFF BERGER & CO. & BRUCE, BENEKENDORFF BERGER & CO. v. BRUCE* (1913), 31 R. P. C. 65.

### SECT. 2.—INTENT TO FRAUD.

*See* Merchandise Marks Act, 1887 (c. 28), ss. 2, 3, 18.

**845.** Necessity for intention to mislead.]—*S.*, the original patentee, without fraud, sells, in packets, "S.'s patent refined isinglass," a well-known article, which is really only gelatine:—*Held*: (1) he ought not to be convicted, under

O. W. R. 845; 2 O. W. N. 933; 23 O. L. R. 490; 18 Can. Crim. Cas. 480.—*CAN.*

*n.* — Rings misdescribed as 9 carat.]—It is an offence under Gold & Silver Marking Act, 7 & 8 Edw. VIII. (D), c. 30, s. 11, to sell 9 carat gold rings, filled with wax, etc., when the amount of gold in them is not 9/24 of the gross weight of the rings.—*R. v. AUSTIN* (1911), 20 O. W. R. 390; 3 O. W. N. 225; 25 O. L. R. 69; 19 Can. Crim. Cas. 70.—*CAN.*

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**845 i.** Necessity for intention to mis-

lead.]—*MADDER v. JONES* (1875), 10 N. S. R. (1 R. & C.) 82.—*CAN.*

**845 ii.** —.]—Defts., stove manufacturers, having in their possession a second hand stove of pltf.'s manufacture, repaired & refitted it. One of defts.' employees, obeying the instructions of one of the firm, put on the stove a plate bearing their own name, & it was sold with this plate on it, but the purchaser was informed that the stove had been manufactured by pltf. The stove was soon afterwards returned by the purchaser to defts., & another taken in its place. There having been no misrepre-

sentation or intention to deceive, & no damages proved, & the purchaser having been informed that the stove was of pltf.'s manufacture, pltf. had no right to recover damages.—*CHAPLEAU v. LAPORTE* (1899), Q. R. 18 S. C. 11.—*CAN.*

**845 iii.** —.]—*MACLAURIN v. McILVENEY*, [1924] N. Z. L. R. 293.—*N.Z.*

**845 iv.** —.]—*JENKINSON & INGLIS v. NELSON BROTHERS* (1899), 2 F. (Ct. of Sess.) (J.) 13; 37 Sc. L. R. 100; 7 S. L. T. 56.—*SCOT.*

**845 v.** —.]—By Merchandise Marks Act, 1887 (c. 28), s. 2 (2), a person who sells goods to which a false trade

Sec. 2.—Intent to defraud. Sec. 3.]

Merchandise Marks Act, 1887 (c. 28), s. 2, of a "false trade description" merely because the description is not in the present strict sense of the words an accurate indication of the material in the packet; *semble*: (2) to constitute the offence there must be an intention to mislead. A patentee who, after the expiration of his patent, continues selling the same articles under the description of patent articles, & with the Royal Arms on the wrappers, is not necessarily guilty of describing the goods falsely as the subject of an existing patent; it is a question of fact for the jury or justice to determine.—*GRIDLEY v. SWINBORNE* (1888), 52 J. P. 791; 5 T. L. R. 71.

*Annotations*:—As to (1) *Refd. It. v. Butcher* (1908), 24 T. L. R. 797. As to (2) *Refd. Starey v. Chilworth Gunpowder Co.* (1889), 6 T. L. R. 95.

**846.** —[Appl. & resp. being rival manufacturers of mineral waters, resp., without the authority of applt., filled with mineral water of his own manufacture certain bottles, the property of & moulded with the name of applt., with the intention of selling such mineral water to his, resp.'s customers. Resp., being found in possession of certain of such bottles so filled, was summoned under sects. 2, 3, of the Merchandise Marks Act, 1887 (c. 28), ss. 2, 3, for having in his possession for sale goods to which a false trade description, namely, the false name of applt., was applied. The magistrate found that resp. had no intent to defraud the purchasers of the water, & that he must, therefore, be taken to have "acted innocently" within the meaning of sect. 2, sub-sect. (2), & on these grounds dismissed the summons:—*Held*: the magistrate was wrong, for that an intent to defraud the purchasers was not a necessary ingredient of the offence charged.—*WOOD v. BURGESS* (1889), 24 Q. B. D. 162; 59 L. J. M. C. 11; 61 L. T. 593; 54 J. P. 325; 38 W. R. 331; 16 Cox, C. C. 729, D. C.

*Annotations*:—*Consd.* *Thwaites v. McEvilly* (1903), 20 R. P. C. 663. *Refd.* *Stone v. Burn* (1910), 80 L. J. Q. B. 560.

**847. Goods supplied of as good quality.**—In order to constitute the offence of applying a false trade description to goods with intent to defraud, within Merchandise Marks Act, 1887 (c. 28), s. 2 (1), it is not necessary that there should be any fraud in the sense of an intent to supply a worthless or inferior article, but it is sufficient that an article is intended to be supplied of a different description from that which the customer intends to purchase & believes he is purchasing.

Resps., who were manufacturers of gunpowder, entered into a contract with the Govt. to supply powder. Owing to an accident they were unable to manufacture the powder themselves, & in order to carry out their contract they bought German powder, & put it into barrels supplied by the Govt., & put labels upon the barrels containing their own name & a description applicable to the powder of their own manufacture which they would have delivered if they had not been prevented by the accident. The powder so delivered was, in fact, equal in quality to powder of resps.' own manufacture, but no indication was given

that the powder was of German manufacture:—*Held*: resps. were guilty of the offence of applying a false trade description to goods within Merchandise Marks Act, 1887 (c. 28), s. 2 (1) (d), & they had acted with intent to defraud within sect. 2, sub-sect. 1 (f), & were liable to be convicted.—*STAREY v. CHILWORTH GUNPOWDER CO.* (1889), 24 Q. B. D. 90; 59 L. J. M. C. 13; 62 L. T. 73; 54 J. P. 436; 38 W. R. 204; 6 T. L. R. 95; 17 Cox, C. C. 55, D. C.

*Annotations*:—*Consd.* *Thwaites v. McEvilly* (1903), 20 R. P. C. 663; *Allard v. Selfridge*, [1925] 1 K. B. 129. *Refd.* *Kirshenboim v. Salmon & Gluckstein*, [1898] 2 Q. B. 19. *Mentd.* *Derbyshire v. Houlston*, [1897] 1 Q. B. 772.

**848.** —[—*KIRSHENBOIM v. SALMON & GLUCKSTEIN*, No. 872, *post*.

**849. Vendor suspecting genuineness of trade mark — Warning to purchaser.**—Merchandise Marks Act, 1887 (c. 28), s. 2 (2), provides that a person selling goods to which a forged trade mark is applied is guilty of an offence against the Act unless he proves that, having taken all reasonable precautions, he had no reason to suspect the genuineness of the trade mark "or that otherwise he had acted innocently":—*Held*: a person who had reason to suspect the genuineness of the trade mark might nevertheless have acted innocently in selling goods to which the trade mark was applied, & might, therefore, be exonerated under this sub-sect.—*CHRISTIE, MANSON & WOODS v. COOPER*, [1900] 2 Q. B. 522; 69 L. J. Q. B. 708; 83 L. T. 54; 64 J. P. 692; 49 W. R. 46; 16 T. L. R. 442, D. C.

*Annotations*:—*Consd.* *Thwaites v. McEvilly* (1903), 20 R. P. C. 663; *R. v. Phillips*, *R. v. Phillips*, *R. v. Phillips* (1909), 73 J. P. 458. *Expld.* *Stone v. Burn*, [1911] 1 K. B. 927; *Allard v. Selfridge*, [1925] 1 K. B. 129. "In my opinion the judgments in that case must be read strictly in relation to the special facts there being considered, & they are not to be extended" (LORD HEWART, C. J.).

**850. Reasonable precautions not taken.**—Resps. were charged with selling goods to which a false trade description, namely, "silk," was applied. The magistrate found that stockings had been sold as silk which were, in fact, artificial silk. He held that all reasonable precautions had not been taken, but that the buyer employed by resps. had acted in perfect good faith; & that there being no *mens rea*, which the learned magistrate, in a written judgment annexed to the case, defined as "intent to cheat or defraud," resps. had "otherwise acted innocently" & were entitled to acquittal:—*Held*: Merchandise Marks Act, 1887 (c. 28), s. 2 (2), provides two alternative kinds of defence, one contained in clauses (a) & (b) together, & the other in clause (c); it is necessary to prove that all reasonable precautions were taken, as a foundation for the defence of "no reason to suspect the genuineness of the trade description"; the seller is not entitled to say that although he did not take all reasonable precautions, he had no reason to suspect the genuineness of the trade description, & therefore, "otherwise" acted innocently; such an interpretation would in effect omit the word "otherwise."—*ALLARD v. SELFLEDGE & CO.*, [1925] 1 K. B. 129; 94 L. J. K. B. 374; 132 L. T. 377; 88 J. P. 204; 41 T. L. R. 97; 22 L. G. R. 792; 27 Cox, C. C. 701.

description is applied is guilty of an offence unless he proves certain facts "or otherwise that he acted innocently."—*HADDOW v. NEILSON BROTHERS* (1899), 2 F. (Ct. of Sess.) (J.) 19; 37 Sc. L. R. 240; 7 S. L. T. 282.—*SCOT*.

**845 vi.** —[—*H.M. ADVOCATE v. JACOB*, [1906] S. C. (J.) 90; 45 Sc. L. R. 852; 16 S. L. T. 320.—*SCOT*.

**845 vii.** —[—*H.M. ADVOCATE v.*

*SUITS, LTD.*, [1908] S. C. 1163; 45 Sc. L. R. 886; 16 S. L. T. 323.—*SCOT*.

**845 viii.** —[—*M'CALLUM v. DOUGHTY*, [1915] S. C. (J.) 69; 52 Sc. L. R. 682.—*SCOT*.

**845 ix.** —[—*R. v. MARGET*, [1914] C. P. D. 953.—*S. AF.*

*o.* —*Importation of goods with false trade description—Forfeiture.*—Goods imported into New Zealand with a false trade description are liable to

forfeiture under Patents, Designs, & Trade Marks Act, 1889, s. 104, incorporating the Customs Law Consolidation Act, 1882, whereby all such goods are liable to seizure & forfeiture, notwithstanding that the owner, having acted innocently, has not committed an offence against the Act in the terms of sect. 89.—*TRADE & CUSTOMS COMR. v. BELL & CO.* (1902), 71 L. J. P. C. 109.—*N.Z.*



**851. Evidence of intent—Previous transactions.]**—BUDD v. LUCAS, No. 876, *post*.  
**Mens rea generally.]**—See CRIMINAL LAW, Vol. XIV., pp. 31–38, Nos. 31–82.

### SECT. 3.—APPLICATION OF FALSE TRADE DESCRIPTION.

See Merchandise Marks Act, 1887 (c. 28), ss. 2, 3, 17.

**852. What amounts to—Invoice.]**—BUDD v. LUCAS, No. 876, *post*.

**853. ———.]**—The provisions of Merchandise Marks Act, 1887 (c. 28), s. 2 (2), which make it an offence to sell goods to which a false trade description is applied, do not apply where the description is entirely oral.

Resp. asked a salesman in applt.'s shop for a small English ham; the salesman pointed to some American hams on a shelf, & said, "These are Scotch hams"; resp. chose one, which was weighed, & an invoice which did not contain the word "Scotch" was handed to resp. by another assistant. Resp. told the assistant to put the word "Scotch" on the invoice, as he had bought the ham as such; the assistant did so, & handed the invoice to resp., who then paid the amount:—*Held*: the description in the invoice was a false trade description sufficient to satisfy the statute.—COPPEN v. MOORE (No. 1), [1898] 2 Q. B. 300; 67 L. J. Q. B. 689; 78 L. T. 520; 62 J. P. 453; 46 W. R. 620; 14 T. L. R. 323; 42 Sol. Jo. 397; 19 Cox, C. C. 45, D. C.

*Annotations:—*Appl. Cameron v. Wiggins (1900), 70 L. J. Q. B. 15. *Refd.* Langley v. Bombay Tea Co., [1900] 2 Q. B. 460; 11 v. Butcher (1908), 99 L. T. 622.

**854. ——— Ticket inserted in packet.]**—Respt. bought from applts., who were tea merchants, one quarter pound of tea. The packet was already wrapped in silver paper & tied up with string. The shopman put a ticket under the string, wrapped the whole parcel in brown paper, & delivered it to resp. On the silver paper was printed the words "Star Tea Co.'s blend, quarter pound gross weight." On one side of the ticket was printed "Star Tea Co., Ltd., 1 lb. 2/8 tea ticket. 22 Park St., Walsall 1. 1886," & on the other side a notice to the effect that every purchaser of quarter pound of tea & upwards was given some useful article or check, in exchange for a number of which a valuable present would be given by applts. Resp. was not shown the silver paper, nor was it handed to him to read before it was wrapped in brown paper, nor was his attention

called to the words printed on it. There were only 3½ ounces of tea in the packet:—*Held*: the ticket constituted a false trade description within the meaning of Merchandise Marks Act, 1887 (c. 28), s. 2 (1) (d).—STAR TEA CO., LTD. v. WHITWORTH (1904), 91 L. T. 87; 68 J. P. 443; 20 T. L. R. 539; 48 Sol. Jo. 494; 2 L. G. R. 1000; 20 Cox, C. C. 658, D. C.

**855. ——— Oral description.]**—COPPEN v. MOORE (No. 1), No. 853, *ante*.

**856. ———.]**—CAMERON v. WIGGINS, No. 871, *post*.

**857. ——— Handling packet containing less than weight demanded.]**—Applt. went into resps.' shop & asked for two half pounds of tea. Resps.' salesman handed him two packets of tea for which he paid. The packets respectively contained less than half a pound weight of tea:—*Held*: the mere handing of the packets to applt. in response to his demand did not constitute an "application" to the goods of a false trade description of their weight within the meaning of Merchandise Marks Act, 1887 (c. 28), s. 2 (2).—LANGLEY v. BOMBAY TEA CO., [1900] 2 Q. B. 460; 69 L. J. Q. B. 752; 83 L. T. 175; 49 W. R. 27; 16 T. L. R. 411; 19 Cox, C. C. 551, D. C.

**858. ——— Selling beer in bottle marked with another brewer's name—Though proper label affixed.]**—Applt., a bottler of beer, having in the course of his business come into possession of certain bottles belonging to the F. Brewery co. & embossed with that co.'s name, filled them with beer brewed by Bass & co., placed Bass & co.'s labels upon them, & sold the contents as being Bass & co.'s beer:—*Held*: applt. had applied a false trade description, namely, the F. Brewery co.'s name, to the beer none the less because the presence of the Bass labels on the bottles would prevent any reasonable purchaser from supposing that he was buying anything but Bass's beer.—STONE v. BURN, [1911] 1 K. B. 927; 80 L. J. K. B. 500; 103 L. T. 540; 74 J. P. 450; 27 T. L. R. 6, D. C.

*Annotation:—*Consd. Allard v. Selfridge, [1925] 1 K. B. 129.

**859. Description "lawfully & generally applied" at passing of Act—Description known to trade but not to public.]**—At the time of the passing of Merchandise Marks Act, 1887 (c. 28), there was a trade in England in the sale of small fish, prepared in oil & packed in tins, under the description of "Norwegian sardines." Sardine is the French name for the pilchard. The persons engaged in the trade knew, but the purchasing public did not know, that the fish under the above description

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**p. What amounts to—Using bottle marked with another manufacturer's name—Though proper label affixed.]**—Pltfs. sold bitters in bottles stamped with the words "Dr. J. Hostetter's stomach bitters" labelled "Hostetter's celebrated stomach bitters." Defts. bought from bottle dealers plts.' empty bottles, & used them for the sale of bitters made by defts. which they labelled "celebrated stomach bitters." There was no resemblance between plts.' & defts.' labels, & defts. sold their bottles, in cases branded with the initials of their firm.

Injunction granted to restrain defts. from selling bottles so stamped & labelled.—HOSTETTER v. ANDERSON (1870), 1 V. L. (Eq.) 7.—AUS.

**q. ———.]**—CHAMPION & CO. v. SMITH (1900), 21 N. S. W. Eq. 110.—AUS.

**r. ———.]**—DONOHUE, LTD. v. CHERRY BROTHERS, LTD. (1908), 28 R. P. C. 545.—IR.

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**t. ———.]**—D., a firm of aerated water manufacturers, supplied minerals to customers in cases & bottles which were either branded with D.'s name or with the name coupled with the statement that they were D.'s property. The contents only of the bottles were sold, & D. supplied the bottles & cases on condition that they were to be returned; if unreturned, there was a fixed charge less than the value of the bottles & cases; & in the event of a subsequent return the charge was refunded. I., another firm of aerated water manufacturers, used certain of D.'s bottles & cases for the supply of their own minerals, but with their own labels fixed to the bottles. There was no suggestion that in so doing they were attempting to pass off the articles as D.'s. D. applied for an interdict against I.:—*Held*: granting the interdict; the property in the bottles & cases remained in D.; I. had contravened Act 22, 1888, s. 2 (2).—DALYS, LTD. v. ISRAEL & SON (1919),

40 N. L. R. 360.—S. AF.

**a. ——— Selling lower priced article —With higher priced brand.]**—The fact that the existence of any difference between two classes of an article which pltf. makes & sells with different brands & at different prices is doubtful, or that such difference, if it exists is so trivial as not to be generally appreciable is no answer to a claim for an injunction to restrain deft. who has purchased the lower priced article from pltf. from placing upon such article without pltf.'s authority the stamp or brand which pltf. puts only on the high priced article.—INGRAM & SONS v. INDIA RUBBER, ETC. CO. (1902), 29 V. L. R. 172.—AUS.

**b. ——— Advertisement.]**—Defts. by an advertisement in a newspaper described certain tea-sets as "quadruple plate," stating that the regular price thereof was \$12 a set, but that they would be sold for \$6:—*Held*: the use of the words "quadruple plate" in the advertisement was an

*Sect. 3.—Application of false trade description.  
Sects. 4, 5 & 6.]*

were not sardines, but were brisling, a Norwegian fish similar to the sprat. Resps. having sold in 1912 brisling prepared in the above manner under the description of "Norwegian sardines" were charged with an offence under sect. 2 (2) of the Act, & by way of defence relied on sect. 18 of the Act:—*Held*: a trade description was not "lawfully" applied to goods within sect. 18 if its use, although not involving the commission of a criminal offence, tended to mislead the public; a trade description was not "generally" applied unless it was a conventional term in general use, not only by the persons engaged in the particular trade, but by the public at large; the description "Norwegian sardines" was neither "lawfully" nor "generally" applied at the time of the passing of the Act to brisling prepared in oil & sold in tins; & resps. were, therefore, guilty of the offence charged. — *LEMY v. WATSON*, [1915] 3 K. B. 731; 84 L. J. K. B. 1099; 114 L. T. 140; 80 J. P. 17; 31 T. L. R. 612; 13 L. G. R. 1323; 25 Cox, C. C. 232.

**860. Time of applying false description.—After sale & before delivery.]**—*PIDOUX & COOK v. BENEKENDORFF BERGER & CO., & BRUCE, BENEKENDORFF BERGER & CO. v. BRUCE*, No. 844, *ante*.

**SECT. 4.—DESCRIPTION OF NUMBER, QUANTITY, ETC., OF GOODS.**

*See Merchandise Marks Act, 1887 (c. 28), s. 3 (1) (a).*

**861. Sale of one kilderkin of beer.—Delivery of cask containing less than eighteen gallons.]**—*G.* having ordered one kilderkin of mild ale received a cask of ale together with an invoice which stated: "Bought of North Eastern Breweries, Ltd. Oct. 21, 1903. Kils. 1 Mild Ale B.M. Per Brl. 48s.—£1." The cask held 17 gallons 1 quart & 1 pint, & a kilderkin is a cask holding 18 gallons. It was found as a fact that applts. knew that the process of coopering casks had the effect of diminishing their holding capacity:—*Held*: applts. were rightly convicted of applying a false trade description within Merchandise Marks Act, 1887 (c. 28), s. 2 (1) (d). — *NORTH-EASTERN BREWERIES, LTD. v. GIBSON* (1904), 91 L. T. 78; 68 J. P. 356; 20 T. L. R. 496; 48 Sol. Jo. 476; 20 Cox, C. C. 706.

**SECT. 5.—DESCRIPTION OF COUNTRY OF ORIGIN.**

*See Merchandise Marks Act, 1887 (c. 28), s. 3 (1) (b).*

**862. What is country of origin.—Place where finished product made.]**—A person had in his possession for sale margarine packed in cardboard boxes, marked with the words "French Factory." The margarine consisted of a substance manufactured from animal fat at a factory in Paris, & sent thence to an English factory where, by admixture with Danish butter & English milk, it assumed the form in which it was offered for sale:—*Held*: as the margarine became the finished product for the first time in England, the words

"French Factory" on the boxes was a false trade description within the meaning of Merchandise Marks Act, 1887 (c. 28), ss. 2, 3.—*BISCHOP v. TOLER* (1895), 65 L. J. M. C. 1; 73 L. T. 402; 59 J. P. 807; 44 W. R. 189; 12 T. L. R. 3; 40 Sol. Jo. 11; 18 Cox, C. C. 199; 15 R. 607, D. C. *Annotations*:—*Reid*, Williamson v. Tierney (1900), 83 L. T. 592. *Mentid*. Ballard v. Horton's Estate (1926), 24 L. G. L. 449.

**863. Description of foreign origin.—Greater part imported from alleged country of origin.—Mixed with other goods in England.]**—*BISCHOP v. TOLER*, No. 802, *ante*.

**864. ———— Tarragona port.]**—*R.* & co. sold to *H.* a bottle of wine bearing a label on which was printed in large letters "Stower's Tarragona Port," followed by the words "blended with wine produced from finest foreign grapes," in smaller letters. *T. Port* is a wine made in the province of T., in Spain, from fresh grapes grown in that province, & is a wine having a distinct taste, bouquet, & smell. One-third of the contents of the bottle consisted of a special kind of high-priced *T. Port* called "Mistella," which is a very heavy wine, not fit for drinking by itself, & imported for the purpose of being blended with other wines. The remaining two-thirds were composed of a wine purchased by resps. & made from "grape must." "Grape must" is made in Greece, & consists of the concentrated juice of fresh grapes grown in Greece. It is concentrated by the evaporation of about three-fourths of the natural water contained in the grape juice. When concentrated it is exported under the control of the Greek Govt., & imported into England, where it is converted into wine by adding a ferment & water to an amount corresponding to the amount previously removed by evaporation. The wine so produced is a wine, though not of high quality. An information for selling goods to which a false trade description had been applied having been dismissed:—*Held*: upon the evidence it was impossible to say that the magistrate was bound to find that there was a false trade description. — *HOOPER v. RIDDLE & CO.* (1906), 95 L. T. 424; 70 J. P. 417; 21 Cox, C. C. 277, D. C.

*Annotation*:—*Reid*, Holmes v. Pipers, [1914] 1 K. B. 57.

**865. ————]**—*Resps.* sold a bottle bearing the label "Fine British Tarragona Wine." The bottle did not contain Tarragona wine or anything like it, but a mixture composed as to 85 per cent. of a wine made & prepared in England from dried raisins, & as to 15 per cent. of Mistella, a heavy form of Tarragona wine made & used solely for blending purposes & not suitable for consumption by itself:—*Held*: the label on the bottle was a false trade description within Merchandise Marks Act, 1887 (c. 28), s. 3.—*HOLMES v. PIPERS, LTD.*, [1914] 1 K. B. 57; 83 L. J. K. B. 285; 109 L. T. 930; 78 J. P. 37; 30 T. L. R. 28; 12 L. G. R. 25; 23 Cox, C. C. 689, D. C.

*Annotation*:—*Reid*, Sandeman v. Gold, [1924] 1 K. B. 107.

**866. Description of English origin.—Part of watch made abroad.]**—*Applts.* sold a watch for £2 5s. to which they applied the description "English lever."

Certain parts were imported into this country from abroad in a more or less unfinished state.

application of a false trade description, in that such goods could not properly be described as such.—*R. v. EATON (T.) CO., LTD.* (1899), 20 C. L. T. 3; 31 O. R. 276.—*CAN.*

*e. ————]*—*Advertising the possession for sale of a certain brand of goods which advertiser, in fact, did*

not have for sale will constitute the offence of falsely applying a trade description to goods with intent to defraud.

—*R. v. GROSS & MILLER* (1918), Q. R. 28 K. B. 54; 31 Can. Crim. Cas. 36.—*AN.*

*d. ———— Label.]*—*Question whether the application of Merchandise Marks*

Act, 1887, s. 2 (2), is not limited to cases where a person sells, or exposes for or has in his possession for sale, goods on which a false description is stamped or attached by label.—*H.M. ADVOCATE v. JACOB*, [1908] S. C. (J.) 90; 45 So. L. R. 852; 16 S. L. T. 320.—*SCOT.*

The value of these parts in their rough condition, including the mainspring, hairspring, & certain screws, was 8d. The price of these parts when finished in England was estimated to be 4s. 5d. All these parts were dealt with in this country to enable them to go into a watch, & the watch was put together here.

The magistrate held that the imported parts were of foreign origin & of such importance that a description which failed to indicate them was a false description in a material respect, & that the finishing operations in this country were not of such a character as to destroy the characteristics of the foreign country in which they were made & produced. He accordingly convicted applts. of applying a false trade description to the watch:—*Held*: if he had come to this conclusion as one of fact on the evidence, & had simply stated the case to determine whether there was anything in point of law to prevent him coming to such conclusion, the ct. would not disturb his decision; but if he decided upon the view that the inclusion of certain parts partly manufactured abroad compelled him as a matter of law to hold that "English" was a false description, then his decision could not be supported.—*WILLIAMSON, LTD. v. TIERNEY* (1900), 83 L. T. 592; 65 J. P. 70; 17 T. L. R. 174.

**867. "Tarragona port"—Implication of Portuguese origin.**—By the Anglo-Portuguese Commercial Treaty Acts, 1914 & 1916, the description "port" applied to any wine other than wine the produce of Portugal which, on importation into the United Kingdom, is accompanied by a certificate that it is a wine to which by the law of Portugal the description "port" may be applied, is to be deemed to be a false trade description within Merchandise Marks Act, 1887 (c. 28).

Resp. sold a bottle of red Spanish wine known as "Tarragona" bearing a label with the words "Tarragona Port." "Tarragona" is not port, & the wine sold was not port but "Tarragona":—*Held*: resp. had applied a false trade description to the wine, as the Acts prohibit the unauthorised use of the word "port" either alone or when qualified by another word.—*SANDEMAN v. GOLD*, [1924] 1 K. B. 107; 93 L. J. K. B. 53; 130 L. T. 213; 88 J. P. 10; 40 T. L. R. 31; 68 Sol. Jo. 140; 21 L. G. R. 792; 27 Cox, C. C. 560, D. C.

See Anglo-Portuguese Commercial Treaty Acts, 1914 (c. 1), s. 1; 1916 (c. 39), s. 1.

Compare Nos. 864, 865, *ante*.

**868. What amounts to description of origin—Cigars sold in boxes with Spanish get up.**—Deft. was indicted under Merchandise Marks Act, 1887 (c. 28), s. 2 (2), for having sold two boxes of cigars to which a false trade description was applied. The evidence was to the effect that the cigars in question were British made, the tobacco used being largely Havana tobacco; that the cigars were not manufactured by deft., who merely sold them, & that he did not apply the trade description. On the outside of the boxes were the words, "Flor de Creanzo," "Creanzo y Cia. Gran Fabrica de Tabacos," & other Spanish words, & the picture of a Spanish lady, & there were no English words at all, or any words indicating that the cigars were British made. For many years British made cigars

had been sold under a similar get up. The jury having convicted deft.:—*Held*: the offence was the sale of the cigars with a false trade description, & it was not necessary to prove that the purchaser was misled; sect. 18 of the Act did not apply; & the jury were justified in convicting deft.—*R. v. BUTCHER* (1908), 90 L. T. 622; 72 J. P. 454; 24 T. L. R. 797; 52 Sol. Jo. 716; 21 Cox, C. C. 697; 1 Cr. App. Rep. 54, C. C. A.

*Annotations*:—*Consid. Lemy v. Watson*, [1915] 3 K. B. 731. *Refd. Ite Van der Leeuw's Trade Mk.*, [1912] 1 Ch. 40.

**869.** ———. *Cigars, not made in Cuba, of Havana tobacco with an outside leaf of Sumatra tobacco, described as "Bella de Cuba" cigars, sold in boxes "got up" with Spanish names & with the picture of a Spanish-looking lady, a registered trade mark upon them, may be goods to which a false trade description has been applied within the meaning of sects. 2 & 3 of the Merchandise Marks Act, 1887, although there is stamped upon the boxes inside & outside with a rubber stamp the words "Guaranteed British Make."*—*R. v. PHILLIPS (J.), R. v. PHILLIPS (P.), R. v. PHILLIPS (D.)* (1909), 73 J. P. 458; 25 T. L. R. 764; 2 Cr. App. Rep. 295, C. C. A.

*Annotation*:—*Refd. Ite Van der Leeuw's Trade Mk.*, [1912] 1 Ch. 40.

**870. Evidence of description—Trade custom.**—*WATSON v. JAEGER'S SANITARY WOOLLEN SYSTEM CO.* (1897), 13 T. L. R. 150, D. C.

**871.** ———. *Description added at request of customer.*—Although upon a sale of goods a purely oral indication of the country of their production will not amount to a trade description within the meaning of Merchandise Marks Act, 1887 (c. 28), any writing or mark, however unintelligible without explanation, will, if orally explained by the vendor at the time of sale to be intended to indicate a particular country as the country in which the goods were produced, constitute a sufficient trade description for the purposes of the Act. Applt. went into the shop of resp., a dealer in foreign meat, & asked for a leg of New Zealand mutton. Resp. handed him a leg of mutton, at the same time stating that it was New Zealand meat. Resp. also handed him an invoice in which the meat was described simply as a leg of mutton. Applt. then asked resp. to mark on the invoice that it was New Zealand meat; whereupon resp. wrote on it the letters "N. M.," intending thereby to represent that the mutton was New Zealand mutton. No evidence was given that those letters bore that meaning according to any custom of the trade:—*Held*: under the circumstances the letters "N. M." amounted to a trade description of the meat within Merchandise Marks Act, 1887 (c. 28), s. 3, notwithstanding the absence of any trade custom as to their meaning.—*CAMERON v. WIGGINS*, [1901] 1 K. B. 1; 70 L. J. Q. B. 15; 83 L. T. 428; 49 W. R. 237; 19 Cox, C. C. 580, D. C.

#### SECT. 6.—DESCRIPTION OF MODE OF MANUFACTURE OR PRODUCTION.

See Merchandise Marks Act, 1887 (c. 28), s. 3 (1) (c).

**872. Machine made cigarettes—Described as hand made.**—Resps. were charged with selling

*R. v. FERGUSON (ALEXANDRA) PROPRIETARY, LTD.*, [1922] V. L. R. 801.—*AUS.*

*e. Goods manufactured in Australia—Marked "English Manufacture."*—*BARNET GLASS RUBBER CO., LTD. v. McDONALD*, [1922] N. Z. L. R. 767.—*N.Z.*

#### PART III. SECT. 5.

**868.1. What amounts to description of origin—Cigars sold in boxes with Spanish get up.**—*A. G. v. MUELLER*, [1901] S. A. L. R. 5.—*AUS.*

**870.1. Evidence of description—Trade custom.**—A trade description, within Goods Act, 1915, s. 86 (1) (b), must, in

itself, according to the proper trade interpretation of the words used, be capable of possessing the meaning that the goods were made in a particular place or country; & it is not sufficient that it is, according to the custom of the trade, commonly taken to be an indication that the goods were so made.—

*Sect. 6.—Description of mode of manufacture or production. Sects. 7, 8 & 9. Part IV. Sects. 1 & 2: Sub-sect. 1, A.]*

cigarettes to which a false trade description namely "guaranteed hand made" was applied. The cigarettes were in fact machine made but were of equally good quality with hand made cigarettes. The magistrate held that there was no intention to deceive the buyer but only to save expense by using up a stock of old labels & that the description though untrue in fact was not a false trade description in any material respect as regarded the cigarettes sold, within Merchandise Marks Act, 1887 (c. 28), s. 3, & dismissed the information. On a case stated:—*Held*: (1) the fact that the cigarettes sold as hand made were of as good quality as hand made cigarettes afforded no defence; (2) the description was false in a material respect & *resps.* having knowingly applied the false description had not acted innocently & were guilty of an offence against the Act.—*KIRSHENHOIM v. SALMON & GLUCKSTEIN*, [1898] 2 Q. B. 19; 67 L. J. Q. B. 601; 78 L. T. 658; 62 J. P. 439; 46 W. It. 573; 14 T. L. R. 395; 42 Sol. Jo. 538; 19 Cox, C. C. 127, D. C.

*Annotation: As to (2) Reid. Davenport v. Apollinaris Co. (1903), 89 L. T. 19.*

#### SECT. 7.—DESCRIPTION OF MATERIAL OF WHICH GOODS COMPOSED.

*See Merchandise Marks Act, 1887 (c. 28), s. 3 (1) (d).*

**873. "Natural mineral water"**—Water restored to natural quality before bottling.]—*Resps.* sold bottled mineral water, which they described as "natural mineral water." The water was found in a spring several hundred feet deep. It was taken from a depth of about 60 feet, & conducted into tanks for the purpose of bottling. While in the tanks three things happened to it: (a) a small proportion of the iron existing in the water combined with the oxygen in the air, & was deposited as peroxide of iron; (b) common salt, in the proportion of 1 in 1,000 was added to the water in order to neutralise the effect of the sulphur contained in the water on the corks of the bottles; (c) a considerable quantity of carbonic acid gas escaped from the water, this was subsequently reintroduced into the water in the process of bottling, such carbonic acid gas being obtained from the spring & re-introduced under similar pressure as would prevail in the water at 60 feet, the depth from which the water was originally taken. There was no evidence given on which the magistrate could rely that the word "natural" had any special trade signification in connection with the sale of mineral waters. The magistrate came to the conclusion that the water as sold was in all essentials identical with the water as it existed in the spring at the depth of about 60 feet, & decided that the label was not a false trade description:—*Held*: the magistrate had come to a correct decision.—*DAVENPORT v. APOLLINARIS CO., LTD.* (1903), 89 L. T. 19; 67 J. P. 323; 19 T. L. R. 526; 20 Cox, C. C. 502, D. C.

**874. Linen—Mixture of linen & cotton.**]—*DEIMEL FABRIC CO. v. MIDDLETON* (1904), 48 Sol. Jo. 476, D. C.

**875. "Soda crystals"**—Generic name confined by usage of trade to particular species.]—Where the generic name of certain commodities has by the usage of the trade come to be confined to a

particular species, the fact that the application of that name to another species is literally correct will not prevent it from being a false trade description within the meaning of Merchandise Marks Act, 1887 (c. 28), s. 3 (1).

Washing soda & Glauber's salt are both salts of soda in a crystalline form; but the description "soda crystals" is by the usage of the trade of manufacturing chemists applied only to the former. *Appl't.* sold Glauber's salt under the name of "soda crystals":—*Held*: he had applied to the goods a false trade description.—*FOWLER v. CRIPPS*, [1906] 1 K. B. 16; 75 L. J. K. B. 72; 93 L. T. 808; 70 J. P. 21; 54 W. R. 299; 22 T. L. R. 73; 50 Sol. Jo. 45; 4 L. G. R. 9; 21 Cox, C. C. 52, D. C.

*Annotation:—Reid. Lemy v. Watson* (1915), 114 L. T. 140. *See, also*, Nos. 862–865, *ante*.

#### SECT. 8.—LIABILITY OF MASTER AND SERVANT

*See Merchandise Marks Act, 1887 (c. 28), ss. 2 (2), 19 (3).*

**876. Criminal liability of master for acts of servant—Effect of Merchandise Marks Act, 1887 (c. 28).**]—*Resp.* sold & caused to be delivered to *appl't.* six casks of beer, & at the same time or immediately afterwards delivered to him an invoice describing the six casks as barrels, a barrel meaning, according to the custom of the trade, 36 gallons. *Appl't.*, finding that the measure was short, preferred an information against *resp.* for unlawfully applying a false trade description contrary to Merchandise Marks Act, 1887 (c. 28). The justices were satisfied that short measure had been delivered, but refused to receive evidence of previous short deliveries, & considered that *resp.* had had no intention to defraud. They held that the delivery of the invoice was not a false trade description within the Act, & dismissed the information, but stated a case:—*Held*: remitting the case, without expressing an opinion whether the justices ought to have convicted or not on the evidence before them, the delivery of the invoice with the goods might, under the circumstances, be an application of a false trade description within the meaning of the statute; the justices were wrong in excluding the evidence tendered as to previous short deliveries; & the old law that a master is not liable criminally for the acts of his servant has not been altered by Merchandise Marks Act, 1887 (c. 28), with respect to offences thereunder except that the *onus* is placed on *deft.* of showing that he acted without intent to defraud.—*BURD v. LUCAS*, [1891] 1 Q. B. 408; 60 L. J. M. C. 95; 64 L. T. 292; 55 J. P. 550; 39 W. R. 350; 7 T. L. R. 242; 17 Cox, C. C. 248, D. C.

*Annotations:—Reid. Coppen v. Moore* (No. 1), [1898] 2 Q. B. 300; *Coppen v. Moore* (No. 2), [1898] 2 Q. B. 306.

**877. ———.**]—The provisions of Merchandise Marks Act, 1887 (c. 28), s. 2 (2), which made it an offence to sell goods to which a forged trade mark or false trade description is applied, make a master criminally liable for acts done by his servants in contravention of the sect. when acting within the general scope of their employment, although contrary to their master's orders, unless the master can show that he has acted in good faith & has done all that it was reasonably possible to do to prevent the commission of offences by his servants.—*COPPEN v. MOORE* (No. 2), [1898] 2 Q. B. 306; 67 L. J. Q. B. 689; 78 L. T. 520;

#### PART III. SECT. 7.

*t. Flannel—Mixture of wool & cotton.*]—*ROCHE v. TYLER*, [1917] V. L. R. 665.—**AUS.**

62 J. P. 453; 46 W. R. 620; 14 T. L. R. 414; 42 Sol. Jo. 539; 19 Cox, C. C. 45, D. C.

*Annotations*:—**Apld.** *Christie, Manson & Wood v. Cooper*, [1900] 2 Q. B. 522; *Trade & Customs Comr. v. Bell*, [1902] A. C. 563; *Buckingham v. Duck* (1918), 120 L. T. 84. **Refd.** *R. v. Butcher* (1908), 99 L. T. 622; *Armitage v. Nicholson* (1913), 108 L. T. 993. **Mentd.** *Hobbs v. Winchester Corpn.* (1910), 102 L. T. 841; *Moussell v. L. & N. W. Ry.*, [1917] 2 K. B. 836; *Burns v. Schofield* (1922), 128 L. T. 382.

#### SECT. 9.—SPECIAL PROVISIONS.

**Cutlery.**—*See* Cutlery Trade Act, 1819 (c. 7), ss. 3–5.

**Dyed goods.**—*See* Dyeing Trade (Frauds) Act, 1783 (c. 15), s. 3.

**Linen.**—*See* Linen (Trade Marks) Acts, 1743 (c. 30), ss. 1, 2; 1744 (c. 24), s. 3.

**878. Metal buttons—Sale of buttons as “gilt.”**  
—**Necessity for knowledge that buttons not “gilt.”**  
—A statute directs that no person shall expose to sale metal buttons marked with the word gilt, the same not being really gilt, knowing the same not to be

gilt, under a certain penalty; a conviction charging that defts. did the act unlawfully & fraudulently contrary to the form of the statute, is bad, without an express charge that they did it knowingly; & such a defect is not aided by a proviso in the statute that “no conviction for any offence in the Act should be set aside for want of form, or through the mistake of any fact, circumstance, or other matter, provided the material facts alleged were proved”; for this in effect requires all material facts to be alleged; & knowledge is a material fact to constitute such an offence.—*R. v. Jukes* (1800), 8 Term Rep. 536; 101 E. R. 1533.

*Annotation*:—**Refd.** *R. v. North* (1825), 6 Dow. & Ry. K. B. 143.

—*See* Metal Button Act, 1796 (c. 60), s. 2.

**Misapplication of marks of government departments.**—*See* Public Stores Act, 1875 (c. 25), s. 4; Forgery Act, 1915 (c. 27), ss. 3 (2) (e), (3) (e), 1, 5 (4), 6, 8 (1) (c), 15, 16.

**Non-inflammable fabrics.**—*See* Fabrics (Misdescription) Act, 1913 (c. 17), ss. 1, 3, 4; Statutory Rules & Orders, 1914, No. 48.

## Part IV.—Designs.

**NOTE.**—*The Acts now in force as to trade designs in England are Patent & Designs Act, 1907 (c. 29), & Patent & Designs Act, 1919 (c. 80), herein referred to as the 1907 Act & 1919 Act respectively. In considering the cases set out in this Part regard must be had to their date, the Act under which they were decided & the effect of subsequent Acts.*

#### SECT. 1.—DEFINITIONS.

**879. Design.**—(1) “Design” under the Patents, Designs, & Trade Marks Act, 1883 (c. 57), includes everything which ordinarily falls within the word, whether “pattern,” “shape,” “configuration,” or “ornament,” & a design registered as “applicable” for the pattern, is not to be confined to the pattern only to the exclusion of other elements in it.

(2) Where an accidental mistake has been made in the die with which registered goods are marked, the proprietor will be held to have taken “all proper steps” to ensure the marking, within Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 51, if he has given proper instructions to the workman who made the die, even though the mistake may not have been detected for some time.—**HEATH & SONS v. ROLLASON**, [1898] A. C. 499; 67 L. J. Ch. 505; 79 L. T. 1; 14 T. L. R. 478; 15 R. P. C. 441, II. L.; *affg.* S. C. *sub nom.* *Re ROLLASON’S REGISTERED DESIGN*, [1898] 1 Ch. 237, C. A.

*Annotation*:—*As to* (1) **Refd.** *Re Bayer’s Design* (1907), 25 It. P. C. 56.

—*See* 1919 Act, s. 10; Sect. 2, sub-sect. 1, B., *post*.

**880. Pattern.**—**HEATH & SONS v. ROLLASON**, No. 879, *ante*.

**Article.**—*See* 1907 Act, s. 93.

**Copyright.**—*See* 1907 Act, s. 93.

**Proprietor of a new & original design.**—*See* Sect. 3, sub-sect. 1, *post*.

#### SECT. 2.—REGISTRATION OF DESIGNS.

##### SUB-SECT. 1.—WHAT DESIGNS REGISTRABLE.

###### A. In General.

**881. General principles.**—A design in order to be registrable under 1907 Act, s. 49, must be some conception or suggestion as to shape, configuration, pattern, or ornament, & be capable of being applied to an article in such a way that the article to which it has been applied will show to the eye the particular shape, configuration, pattern, or ornament the conception or suggestion of which constitutes the design. The representation accompanying an application for registration must be something in the nature of a drawing or tracing, by means of which the conception or suggestion constituting the design may be imparted to others, so that persons looking at the drawing can form a mental picture of the shape, configuration, pattern, or ornament of the article to which the design has been applied; but a conception or suggestion as to a mode or principle of construction, though in some sense a design, is not registrable.

Inasmuch, however, as the mode or principle of construction of an article may affect its shape or configuration, the conception of such a mode or principle of construction may well lead to a conception as to the shape or configuration of the completed article, & a conception so arrived at may, if sufficiently definite, be registered under the Act.

A drawing was registered as a design in respect of vehicle wheels, the novelty in which was said to consist of the disposition of the tyre rim in relation to the hub & in the cross-sectional arrangement of three sets of spokes, such disposition & arrangement being shown in the drawing, which was a cross-sectional drawing of a vehicle wheel on the longitudinal central plane, a conventional drawing such as would be used by an engineer to

**PART IV. SECT. 2, SUB-SECT. 1.—A**  
**g. Design for article incomplete in**  
**itself.**—A design may be made the

subject of registration, though it depict an article incomplete in itself, but which is intended to be used in combination with & as part of another

article of manufacture.—**WALKER, HUNTER & CO. v. FALKIRK IRON CO.** (1887), 14 R. (Ct. of Sess.) 1072.—**SCOT.**

Sect. 2.—Registration of designs: Sub-sect. 1, A. & B.]

indicate how the wheel was to be constructed as regards the disposition of the wheel in relation to the hub & the arrangement of the spokes, but the drawing did not show what would in fact be seen if the wheel were cut on the longitudinal central plane. A competent mechanic could have easily constructed from the drawing a number of wheels whose configuration, from whatever standpoint they were looked at, would have little if anything in common except the disposition of the wheel in relation to the hub & the cross-sectional arrangement of the spokes. On the other hand, from each & every wheel so constructed a draughtsman, with a competent knowledge of the conventions of mechanical drawing, if asked to draw a cross-section on the longitudinal central plane showing this disposition of the rim in relation to the hub & the cross-sectional arrangement of the spokes, would inevitably, without actually cutting the wheel, arrive at the drawing in question. In an action by the owner of the registered design for an alleged infringement, a drawing of the machines made by defts., which were alleged to be infringements of the registered drawing, showed differences from the registered drawing, which, judging by the eye alone, were substantial differences, as a person looking at the drawings would see that the cross-sectional arrangement of the spokes was not substantially the same in each, unless he had in his mind a mode of construction rather than a conception of shape or configuration, & would not say that there was an imitation, unless he were judging both drawings by the method of construction involved rather than by the appearance they presented to the eye:—*Held*: either the registration was bad as an attempt to protect a mode of construction, or there had been no infringement, & the action failed.—*PUGH v. RILEY CYCLE CO.*, [1912] 1 Ch. 613; 81 L. J. Ch. 476; 106 L. T. 592; 28 T. L. R. 249; 29 R. P. C. 196.

*Annotations*:—*Apld.* Pilkington v. Abrahams (1914), 32 R. P. C. 61. *Apprvd.* Phillips v. Harbro Rubber Co. (1920), 37 R. P. C. 233. *Apld.* Wilson v. Chalco (1922), 39 R. P. C. 252; Jones & Attwood v. National Radiator Co. (1928), 45 R. P. C. 71. *Refd.* Pearson v. Harris (1912), 29 R. P. C. 632; Cartwright v. Coventry Radiator Co. (1925), 42 R. P. C. 351; Negretti & Zambra v. Stanley (1925), 42 R. P. C. 358.

**882. Design for patentable article.]**—A manufacturer invented a new form of brick; constructing the bricks so that, by means of corresponding apertures in their sides, cylindrical passages were formed between them when they were laid together, & advantages were afforded for ventilation & other purposes, & expense was saved:—*Held*: the design might properly be registered under 6 & 7 Vict. c. 63, as being for “the shape or configuration” of an “article of manufacture having reference to some purpose of utility.”

*Qu.*: & this, whether the invention might have been the subject of a patent or not.—*ROGERS v. DRIVER* (1850), 16 Q. B. 102; 20 L. J. Q. B. 31; 16 L. T. O. S. 364; 117 E. R. 817. *Annotations*:—*Consd.* *Re* Clarke's Design, [1896] 2 Ch. 38. *Refd.* *R. v. Bessell* (1851), 16 Q. B. 810.

**883. Design protected by letters patent—If no publication.]**—Patent rights & copyright of design may in certain circumstances co-exist in the same person in respect of the same article. The registration of a design which secures mechanical advantages may as an anticipation prevent a subsequent grant of letters patent in respect of the same article whether appltd. be the proprietor of the design or a stranger. A grant of a patent & the publication of the patented article would prevent a design of the article being novel so as

to obtain registration. Where, however, there is a provisional specification without publication of the patented article, & then registration of the design, & that is followed by the final specification, the two rights may co-exist, the right acquired by the registration of the design which was valid at the time of registration not being prejudiced by the subsequent filing of the final specification; but the right second in point of time, the copyright of design, would be held subject to the first. That would be so whether the owner of the patent & the owner of the design were the same person or two independent persons.—*WERNER MOTORS, LTD. v. GAMAGE (A. W.), LTD.*, [1904] 2 Ch. 580; 73 L. J. Ch. 770; 91 L. T. 588; 53 W. R. 167; 20 T. L. R. 796; 48 Sol. Jo. 709; 21 R. P. C. 621, C. A.

*Annotations*:—*Refd.* *Boustead v. Dempster, Moore* (1907), 25 R. P. C. 121; *Rose v. Pickavant* (1923), 40 R. P. C. 320.

**B. What are “ Designs.”**

*See* 1919 Act, s. 19.

**884. Mode or principle of construction.]**—*MOODY v. TREE*, No. 996, *post*.

**885.** —(1) When I run my eye over all the exhibits which have been produced & deal with the matter as according to the decisions on the Act [Patents, Designs, & Trade Marks Act, 1883 (c. 57)] I ought to deal with them—as a matter of eyesight—I find nothing which would justify me in saying that the design which the resp. has registered is new or original within the Act (*CHITTY, J.*).

(2) Resps. base their defence upon this proposition that the registered design consists of an original contraction of certain movements of the lace-making machine. Upon that there cannot be any question as a matter of law it is wholly immaterial how the design is produced, by what instruments. All the ct. has to do is to look at the product & that is the design itself—and however it may have been produced to say whether it is new or original & not previously published (*CHITTY, J.*).—*Re PLACKETT'S REGISTERED DESIGN* (1892), 9 R. P. C. 436.

**886.** —(1) In 1905 a design, No. 454,848, was registered applicable to women's stays. The application for registration included the following passage:—“Statement of nature of design, shape, or configuration of corset. The novelty consists in a corset having the gores or gussets cut horizontally & from the front of the busk towards the back of the corset, as shown in the representations.” The registered sketch showed a straight fronted corset, in which the seams were not exactly horizontal, but the gussets tapered towards the front. A representation was attached to the application. An application was made for rectification of the Register by removal of the design on the grounds it was not subject-matter for registration, being a mode of manufacture; that it was not novel; & that the owner had in advertisements misrepresented his design; & had sold articles differing substantially from the registered design but marked with the registered number. On the hearing of the motion for rectification it was held, that the design as registered was for a particular form of straight fronted corsets made with horizontal gussets; that the fact that the design incidentally described a mode of manufacture did not make it any the less a design; that there was subject-matter & that the design was novel, & that it was not shown that the pictures of the design in the advertisements were not covered by the design; & that a statement made after registration by the owner of the



design as to the extent of his protection ought not to affect the construction of the application or the validity of the registration. The motion was dismissed with costs. Appcts. appealed, fresh evidence being adduced by leave on the hearing of the appeal. It was held by the Ct. of Appeal that the representation attached to the application illustrated a method of manufacture, & that there was no design capable of registration, & that such method of manufacture was not novel. The appeal was allowed & an order made for the removal of the design from the Register, but the execution of the order was stayed pending a further appeal. Resp. appealed to the House of Lords.

The appeal was dismissed with costs, on the ground that what was registered was not a design within the meaning of Patents, Designs, & Trade Marks Act, 1883 (c. 15), but an illustration of a method of manufacture.—*BAYER v. SYMINGTON, Re BAYER'S DESIGN* (1907), 25 R. P. C. 56, II. L. Annotations:—*Consol. Pugh v. Riley Cycle Co.*, [1912] 1 Ch. 613. *Appl. Wilson v. Chalco* (1922), 39 R. P. C. 252. *Consol. Negretti & Zambra v. Stanley* (1925), 42 R. P. C. 358. *Appl. Jones & Attwood v. National Radiator Co.* (1928), 45 R. P. C. 71.

887. —.]—*PUGH v. RILEY CYCLE Co.*, No. 881, ante.

888. —.]—An action was brought for the infringement of a registered design for a wristlet of leather. Defts. denied infringement, & alleged that the design was invalid on the ground of want of novelty & want of subject-matter. The design was registered with the statement that "The novelty consists in the form of the strap *a* combined with the front portion *b*." The strap *a* was shown in a certain curved position which it might take up in the course of fastening the wristlet. At the trial defts. contended that, if the wristlet had any novelty, the design was merely for a method of construction, or, alternatively, it was only for the particular form shown:—*Held*: either the design was for a principle of construction, or, if not, it was not novel & had not been infringed.—*PEARSON (E. J.) & SONS v. HARRIS (D. B.) & SONS, LTD.* (1912), 29 R. P. C. 632.

889. —.]—In 1906 a design for the ornamentation of glass was registered, with a representation in the form of a photograph, taken by transmitted light, of a portion of a sheet of ornamented glass. The representation showed irregular lines enclosing darker hatched parts of irregular shape. In an action for infringement of the design, it was proved that plffs. had produced a new & successful article of manufacture, having a frosted or crystalline appearance, & known as "arctic glass." Defts. contended that their ornamentation was different from plffs., & that they had not infringed; that there was no sufficient registration, because there was nothing to show how the design was to be applied to the glass; that the representation, being taken through the glass, did not show the configuration of the glass surface; that the representation showed, not an article of definite outline, but merely a part of a surface, & consisted only of details; & that glass with raised surfaces was old, & there was nothing but the actual pattern that was capable of registration. Plffs. contended that the design might be infringed although the details were not reproduced:—*Held*: either the registration was invalid, as an attempt to protect a mode of construction of embossed glass giving the "arctic" effect, irrespective of the design, or else there had been no infringement.—*PILKINGTON BROTHERS, LTD. v. ABRAHAMS & SON* (1914), 32 R. P. C. 61.

890. —.]—A design was registered in class 1

in respect of its application to a metal boiler for heating water & warming dishes & the like & for cooking purposes. The representation of the design on the Register consisted of two photographs, front & back views of a portable independent boiler. In an action for infringement of the design it appeared that the boiler consisted of a water-container round the back & sides of the fire, with a metal plate on the top & devices in front by means of which, at will, the effect of either a closed or an open grate could be obtained. Defts. alleged (*inter alia*) that the registration was bad for ambiguity, because there was a doubt as to the nature of one of the front devices. Also, it appeared that before the registration of the design there had been kitchen ranges, fixed or portable, in which the fire could be wholly or partially closed, & that independent boilers & semi-circular or horseshoe boilers were not new, but that the boiler put upon the market by plffs., which differed somewhat in detail from the registered design, had been the first independent boiler giving the effect of a closed or open grate:—*Held*: the plea of ambiguity could not be sustained & the design could not be impeached on the ground of lack of novelty or originality; plffs. could not claim to protect a method or principle of construction; it had not been proved that there had been any actual confusion of the defts.' boilers with plffs.' marketed boilers, & obvious imitation had not been made out.—*JONES & ATTWOOD, LTD. v. NATIONAL RADIATOR Co., LTD.* (1928), 45 R. P. C. 71.

891. *Mechanical device.*—Registration in Class 1 was obtained for two designs to be applied to "a runner or suspender for suspending curtains or the like from a curtain or like rail or bar." The first design was adapted for running on a flat rail fitted in between the upper and lower pulleys shown in the first figure. The second design was for a similar curtain hook, but only had one pulley. Both were of wire so bent as to bring the point of suspension of the curtain immediately below the centre of the pulley. Defts. had sold three types of pulleys, the first almost identical with plffs.' first design, the second containing two pulleys of which the lower pulley was in effect merely a collar with flanges in the shape of a pulley; & the third like the second, save that the lower collar was less definitely in the shape of a pulley. Defts. denied infringement, & pleaded that the design if registerable at all, had been anticipated, that they were not novel or original, that they were not proper subject-matter for registration & that they were in substance mechanical devices:—*Held*: even if plffs. were entitled to rely on the definition of a "Design" in 1907 Act, s. 93, rather than on the definition in 1919 Act, s. 19, there was no subject-matter for registration.—*WILSON v. CHALCO, LTD.* (1922), 39 R. P. C. 252.

892. —.]—Plffs., who were the proprietors of a design registered in Class 1 in respect of its application to lubricators primarily for use on automobiles, commenced an action to restrain defts. from selling or exposing for sale an alleged infringement of the design. Defts.' nipple differed only from plffs.' in that the lower hexagonal nut was slightly thicker. Defts. denied that they had infringed the design, & alleged that the design was invalid for want of novelty, & on the ground that it was not proper subject-matter for registration, & gave notice of motion to rectify the register by expunging the design:—*Held*: the only feature in plffs.' design which might have been registrable was the sides of the nuts registering exactly with

*Sect. 2.—Registration of designs: Sub-sect. 1, B. & C. (a) & (b).]*

one another, but that as a nut was made for the purpose of being turned, it was impossible to prevent anyone from turning the nuts into any given position; & plffs.' design was in substance a mere mechanical device within the meaning of 1907 Act, s. 93.—*TECALEMIT, LTD. v. EWARTS, LTD.* (No. 2) (1927), 44 R. P. C. 503.

**893. Catalogue of designs.]**—Plff. co. which carried on the business of supplying cutter-crush machines & type & other materials used therewith, issued a catalogue consisting for the most part of a number of words which illustrated the products of the several sizes & shapes of type supplied by the Co. & customers ordered a particular class of type by referring to such words. Nearly all the words were selected by the managing director of the co. In 1922 defts. who were carrying on a similar business, circulated price lists which were practically copies of the price lists of plff. Co. the words used in plff. Co.'s catalogue & price lists to indicate the style of type being copied in defts.' price lists without alteration. Plff. Co. commenced proceedings for an injunction to restrain infringement of copyright in their catalogue & passing off of goods which were not their goods as being their goods. The type sold by defts. was found to be inferior to that sold by plffs. & was sold at a lower price than plffs.' type. On the question of copyright defts. contended (*inter alia*) that plffs.' catalogue was a design or collection of designs capable of registration under 1907 & 1919 Acts, & not the subject of protection under the Copyright Act, 1911:—*Held*: (1) there had been a deliberate & concerted attempt on the part of defts. to find a market for their own goods, which differed materially from the goods supplied by plff. Co., by means of conduct calculated & intended to induce people to believe that the goods offered by them were, contrary to the fact, the same as the goods supplied by plff. co.; & the conduct of defts. entitled plff. co. to an injunction:—(2) on the question of copyright the contentions put forward by defts. failed, & an injunction restraining infringement of the copyright of plff. in their catalogue was granted.—*MASSON SEELEY & CO., LTD. v. EMBOSOTYPE MANUFACTURING CO* (1924), 41 R. P. C. 160.

*C. Novelty or Originality.*

*(a) In General.*

**894. Meaning of.]**—*LE MAY v. WELCH, Re LE MAY'S REGISTERED DESIGN*, No. 929, *post*.

**895. Distinction between.]**—The registered proprietors of a design for a tile, brought an action for infringement thereof under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 58. Defts.' tile, of which plffs. complained, although resembling plffs.' registered design in most respects, differed from it in many details. Plffs. proved purchasing one hundred tiles from defts.:—*Held*: (1) defts.' tiles were not an obvious imitation of plffs.' registered design; (2) defts.' tiles were a fraudulent imitation of plffs.' registered design.

(3) It is clear to my mind that plffs.' design

was a new combination—a new arrangement of well known parts. It was not what I think the Act of Parliament means by an original design—that is to say suppose there had never been any ornamental tiles & a designer had designed this very design, that would have been original (*MANISTY, J.*).—*SHERWOOD & COTTON v. DECORATIVE ART TILE CO.* (1887), 4 R. P. C. 207.

*Annotations:—As to (1) Apld. Rose v. Pickavant* (1923), 40 R. P. C. 320. *As to (2) Apld. Rose v. Pickavant* (1923), 40 R. P. C. 320.

**896. —.]**—(1) C. registered a design for a "lamp for electric lighting, applicable for its shape." It was, in fact, a design for a lamp shade, consisting of a reflecting screen which had been commonly used for gas lights, & a ventilating top not materially differing from those which had been used before for gas, except that a chimney which was required for gas lights, but not for electric lights, was omitted:—*Held*: what C. had registered was substantially the old form of lamp shade with the omission of the chimney, which was useless when the shade was to be applied to electric lights, & there was no such originality or novelty in the design as to make it a proper subject of registration.

(2) I have no doubt that a combination of old shapes may result in a new or original design for shape; & if that is the result such design will be protected if registered under the Act. Nor do I say that even the omission of something from an old shape may not result in a new or original shape which may be protected. But when, as here . . . the new shape of an article is exactly like the old shape except that the useless upper part is omitted, I cannot say that the shape of what is left is new or original, or that the residuary shape has not been previously published (*LINDLEY, L.J.*).

(3) It is not easy to determine what distinction, if any, is . . . to be drawn between novelty & originality; but if there is any difference the design need not be both new & original (*LINDLEY, L.J.*).

(4) The design must be new & original with reference to the kind of article for which it is registered, meaning by kind of article, not the class of article mentioned in the schedule to the rules, but the kind of article having regard to its general character & use. A design may be new for a coal scuttle but not for a bonnet. On the other hand a design for a shade of a gas lamp can hardly be new if it was old for an oil lamp (*LINDLEY, L.J.*).—*Re CLARKE'S DESIGN*, [1896] 2 Ch. 38; 65 L. J. Ch. 629; 12 T. L. R. 397; 40 Sol. Jo. 498; *sub nom. Re CLARKE'S REGISTERED DESIGN, CLARKE, R. SAX & CO., LTD.*, 71 L. T. 631; 13 R. P. C. 351, C. A.

*Annotations:—As to (2) Consd. Allen West v. British Westinghouse Electric & Manufacturing Co.* (1916), 33 R. P. C. 157. *As to (4) Refd. Dover v. Nurnberger Celluloidwaren Fabrik Gebrüder Wolff*, [1910] 2 Ch. 25. *Generally, Refd. Re Rollason's Registered Design*, [1898] 1 Ch. 237.

**897. —.]**—Every design which is original is new, but every design which is new is not necessarily original (*CHITTY, L.J.*).—*Re ROLLASON'S REGISTERED DESIGN*, [1898] 1 Ch. 237; 67 L. J. Ch. 100; 77 L. T. 605; 14 T. L. R. 71; 14 R. P. C. 909, C. A.; *affd.* on other grounds *sub*

round each pole was omitted, & on the space thus left was raised lettering. In an action for infringement of copyright in H. & co.'s design:—*Held*: H. & co.'s design was novel; it was not necessary that it should be novel & original, & it was validly registered.—*HUTCHISON, MAIN & CO., LTD. v. ST. MUNGO MANUFACTURING CO.* (1907), 24 R. P. C. 265.—*SCOTT.*

**PART IV. SECT. 2, SUB-SECT. 1.—**  
*C. (a).*

**895 i. Distinction between.]**—H. M. & co. registered a design for a golf ball, showing a brambled ball having round each of the six poles, formed by axes at right angles through the centre of the ball, a small circular smooth raised band containing seven brambles & having lettering incised on it. The

brambles were arranged in concentric circles round the six poles. Concentric brambling round six poles & name circles round two poles had been previously employed, but never name circles round six poles. The H. M. & co. manufactured a ball having six poles at the extremities of axes at right angles through the centre of the ball, & concentric brambling round these poles. The first circle of brambles



*nom.* HEATH & SONS v. ROLLASON, [1898] A. C. 499, H. L.

*Annotation:—Mentd.* *Re* Bayer's Design (1907), 24 R. P. C. 65.

**898. Question of fact.**—It is a question for the jury whether a design is a new & original design. It is not to be withdrawn from them & decided as a question of law by the ct. not to be a "new & original design," because it is shown that the design is composed of a simple combination of two sizes of a previously well-known pattern.

A pattern, called the "honeycomb pattern," consisting of a certain cellular arrangement of the surface in cells of a uniform size had been for some time well known & applied to woven fabrics. Pltff. designed a pattern in which large & small honeycomb cells were arranged, so that a border of the larger cells surrounded an enclosed portion of the smaller cells:—*Held*: the jury were warranted in finding this to be a new & original design.—HARRISON v. TAYLOR (1859), 4 H. & N. 815; 29 L. J. Ex. 3; 5 Jur. 1219; 157 E. R. 1004, Ex. Ch.

*Annotations:—Distd.* LAZARUS v. CHARLES (1873), L. R. 16 Eq. 117; HOTHERSALL v. MOORE (1891), 9 R. P. C. 27; DOVER v. NÜRNBERGER (Ellioldwarens Fabrik Gebrüder Wolff, [1910] 2 Ch. 25. *Reid.* MULLONEY v. STOVENS (1864), 10 L. T. 190.

**899.** —] — *Re* PLACKETT'S REGISTERED DESIGN, No. 885, *ante*.

**900.** —] — C., the owner of a design, registered for shape or configuration, for corsets, brought an action for infringement & moved for an injunction. Deft. moved to rectify the Register by expunging C.'s design. In previous corsets the busks or pieces of steel were either sewn into the front of the corset or were laced in, so as to be easily removable by running lacing at the outer margin of the busks. In the former case the corset was sometimes fastened together by lacing the two inner margins of the busks; in the latter the corset was fastened by hooks & eyes. In C.'s corset the busks were laced in & thus easily removable, but the lacing was diagonal & was at the inner margin of the busks, & when closed this diagonal lacing gave the appearance of the corset being laced together, though the corset was really fastened by studs & clasps. C. in selling his corsets, placed on them a ticket with the words "New method for removing & refitting busks for repairs, etc."—*Held*: there was no practical difference in appearance or shape between the old laced corset & C.'s design, the eye is the test of a design, & so far as design, within Patents, Designs & Trade Marks Act, 1883 (c. 57), was concerned there was no novelty or originality in C.'s design sufficient to justify registration.—COOPER v. SYMINGTON (1893), 10 R. P. C. 264.

**901. Evidence of novelty—Immediate large sale.**—The owner of a design for water closet basins having brought an action for infringement, deft. moved to rectify the Register by expunging the design as not novel or original. The motion was adjourned, to come on as the trial of the action without pleadings:—*Held*: on the evidence, & especially having regard to the fact that directly the design was put on the market it acquired a large sale, the design was novel, useful, & had been infringed.—TYLER & SONS v. SHARPE BROTHERS & Co. (1893), 11 R. P. C. 35.

*Annotation:—Consd.* ALLEN WEST v. BRITISH WESTINGHOUSE Electric & Manufacturing Co. (1916), 33 R. P. C. 157.

#### PART IV. SECT. 2, SUB-SECT. 1.—C. (b).

**904 I. General rule.**—Variations which are mere trade variants without invention, originality or novelty, the

introduction or substitution of which in a design is not sufficient to make the design new or original, are not proper subject-matters for registration.—KAUFMAN RUBBER CO., LTD. v. MINER RUBBER CO., LTD., [1926] 1 D. L. R.

**902. Court not concluded by admission of parties.**—GRAMOPHONE CO., LTD. v. MAGAZINE HOLDER CO., No. 976, *post*.

**903.** —] — A design was registered in 1910 in two separate classes to be applied to switch boxes for use in electrical installations, & primarily intended for use in motor cars. The design was of a box with a vertical front & a sloping top, the whole surrounded by a beading; in the top there were two dials with a representation of a push plug between them, & on the upper part of the vertical front there was a row of tumblers for switches, six in number, set into a plate attached to the vertical front, & at the bottom of the right hand side of the box there were two plug holes. The switches were, in fact, intended for the dynamo of the motor, for each of its two head & two side lights, & for its rear light. The owners of the design brought an action for infringement of it, in which defts. set up the defences of want of novelty or originality, & non-infringement, & that pltfs. had placed the registered number of the design upon articles not made in accordance with it:—*Held*: (1) there was no novelty in the design in respect of shape, or in the placing of the dials, the beading was treated by pltfs. as unimportant & the placing of the plug holes could not entitle pltfs. to claim novelty for the whole design, & the claim to novelty really rested on the feature consisting of placing upon the vertical front the row of six tumblers; (2) the ct. was bound, apart from admissions or contentions of either party, to determine whether pltfs. had in fact established their claim or novelty; & (3) the improper marking was inadvertent & confined to very few boxes & this defence failed.—VANDERVELL & Co. v. LUNDBERG & SONS (1915), 33 R. P. C. 60.

#### (b) Necessity for.

**904. General rule.**—Distinction between the two Acts relating to the copyright of design (5 & 6 Vict. c. 100, & 6 & 7 Vict. c. 75). The first applies to new designs for the ornamentation of articles, the second to new designs of articles of utility.

A design of a carriage was registered under 6 & 7 Vict. c. 75. The inventor claimed four things as new, & as conducive to the "utility" of the design. There was no novelty as to three of them, & they did not contribute to the "utility." The fourth tended to its utility, but was the mere extension of a well-known principle:—*Held*: the claim to monopoly could not be supported under 6 & 7 Vict. c. 75, & the design was not protected under 5 & 6 Vict. c. 100 as an ornamental design, it not having been registered under that Act.

It is impossible to say that the application of the same thing for the same purpose can be made the subject of registration as a new & original design (ROMILLY, M.R.).—WINDOVER v. SMITH (1863), 32 Beav. 200; 1 New Rep. 349; 32 L. J. Ch. 561; 7 L. T. 776; 9 Jur. N. S. 397; 11 W. R. 323; 55 E. R. 78.

**905.** —] — S. in 1887 registered a design for firescreens, constructed of three palm leaf fans to hold a flower pot, & in 1889 brought an action for infringement. Defts. alleged that the Design was not new or original, and called evidence to show that a similar design had been previously published:—*Held*: even admitting that the

505; [1926] Exch. C. R. 26.—CAN.

**904 II.** —] — WALKER, HUNTER & Co. v. FALKIRK IRON Co. (1887), 14 R. (Ct. of Sess.) 1072; 24 Sc. L. R. 750.—SCOT.

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design was good subject-matter, which was doubted, & although the Judge was satisfied that pltf. had independently invented the design, on the evidence it had been used before pltf.'s registration. *Semble*: no part of the description of a design as registered can be rejected.—*SMOUT v. STAYMAKER & Co.* (1890), 7 R. P. C. 90.

**906.** —[In an action for infringement pltf. had registered a design No. 402,223, for caps in Class 10, registering for shape & pattern only. The caps put on the market under licence from pltf. differed in the proportionate size of the parts from the design as registered. These had been copied by defts., who moved to rectify the register by expunging the design. Defts.' case was (a) the design was not sufficiently indicated by the registration; (b) if it were sufficiently indicated, the caps made & marked thereunder did not correspond with the design & therefore defts. by copying these caps had not infringed; & (c) there was no novelty in the subject-matter of the design. In support of the plea of no novelty, evidence of general knowledge of similar caps in the trade was relied on, & three copies of caps made previously to the registration were also produced.—*Held*: the design was sufficiently indicated by the registration, & the articles sold were substantially in accordance with the design as registered, but there was evidence of prior user & the design was not novel. Judgment was given for defts. in the action, & the Register was ordered to be rectified by expunging the design.—*RE MANCHESTER'S DESIGN, MANCHESTER v. UMFREVILLE & SON* (1907), 24 R. P. C. 782.

**907.** —[Pltfs. were the proprietors of the copyright in a registered design for the bottom part of the frame or spring of a cycle saddle which embodied the principle of a patent granted for "truss beams" in 1890, & in which the two bottom wires & the two top wires were close together & supported each other, & were fastened together at the front & back. The pairs of wires opened in the centre, running parallel for some distance with a view to being joined together by a "boss" fitting to the L bar of the cycle. The wires were kept in their relative position by an arch at the rear. Defts. manufactured cycle saddle frames, in which the two top & bottom wires brought together at the ends supported each other with a sliding space in the centre for the admission of the "boss." An action was brought for the infringement of pltfs.' registered design:—*Held*: eliminating the functions which the articles were intended to perform & looking at the registered design & defts.' saddle spring, as a result of that view defts.' spring did not constitute an infringement of pltfs.' registered design. The judge stated that if he had held that defts. had infringed, he was prepared to hold that pltfs.' registered design had been anticipated.—*LEATHERIES, LTD. v. LYCETT SADDLE & MOTOR ACCESSORIES Co., LTD.* (1909), 26 R. P. C. 166.

**908.** —[(1) If the registration was valid at all, it must be taken in an extremely narrow & definite way, & it would not be an infringement unless the totality of the design, as registered, has been infringed; it is no infringement of a registered design to take a part out of that registered design & with an addition to make the total not identical with the registered design (*COZENS-HARDY, M.R.*).]

(2) I think that it is most important that the ct. should lay down that novelty or originality must be something substantial, & that where

there is nothing excepting just that variation which every skilled workman would make between the articles that he makes for different customers, the law should not hamper him by saying that it may make him guilty of infringement of rights acquired by registration (*FLETCHER MOULTON, L.J.*).

(3) In order to render valid the registration of a Design under 1907 Act, there must be novelty & originality, it must be a new or original design. To my mind, that means that there must be a mental conception expressed in a physical form which has not existed before, but has originated in the constructive brain of its proprietor, & that must not be in a trivial or infinitesimal degree, but in some substantial degree. The intention of the Act is to protect a person who has conceived & expressed in a physical form, the idea of something which is new or original as a design (*BUCKLEY, L.J.*).—*SIMMONS v. MATHIESON & Co., LTD.* (1911), 28 R. P. C. 486.

*(c) New Application of Old Designs.*

**909. Application of photograph to article of manufacture.**—[The portrait of a well known public character, copied from a photograph & applied as a design upon earthenware, is not a new & original design within 5 & 6 Vict. c. 100.—*ADAMS v. CLEMENTSON* (1879), 12 Ch. D. 714; 27 W. R. 379.

*Annotations*:—*Reid. Saunders v. Wiel*, [1893] 1 Q. B. 470. *Reid. Re Clarke's Registered Design* (1896), 65 L. J. Ch. 629.

**910.** —[The expression "new & original design" in Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 47, does not import novelty in the subject-matter of the design, but novelty in the application of the design to some article of manufacture.

A design in metal for the handles of spoons & forks represented a view of Westminster Abbey, & was taken from a photograph:—*Held*: such design was a proper subject for registration under the Act.—*SAUNDERS v. WIEL*, [1893] 1 Q. B. 470; 62 L. J. Q. B. 341; 68 L. T. 183; 41 W. R. 356; 9 T. L. R. 149; 37 Sol. Jo. 131; 4 R. 207, C. A.

*Annotations*:—*Reid. Re Clarke's Design*, [1896] 2 Ch. 38; *Re Rollason's Design* (1897), 67 L. J. Ch. 100; *Dover v. Nurnberger Celluloidwaren Fabrik Gebrüder Wolff*, [1910] 2 Ch. 23.

**911. Design registered in one class—Same design registered by another in another class.**—[Where a design has been registered in one or more of the classes of goods specified in sched. 3 to the Designs Rules, 1883, for a particular article of a certain material, a similar design cannot be registered by another person in another class for a similar article made of a different material, as not being new & original within the meaning of the Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 47.—*RE READ & GRESWELL'S DESIGN* (1889), 42 Ch. D. 260; 58 L. J. Ch. 624; 61 L. T. 450; 38 W. R. 88.

*Annotations*:—*Consd. Re Clarke's Design*, [1896] 2 Ch. 38. *Reid. Dover v. Bernstein* (1910), 54 Sol. Jo. 250.

**912.** —[A design already on the Register may be registered in another class for an article applied to a different purpose, but not for an article merely of a different material. A design for a lamp shade made of china in the shape of a rose, was registered in one class. A design for a lamp shade made of linen, also in the shape of a rose, had previously been registered in another class:—*Held*: though the materials were different, there was no novelty in the china design, which must, therefore, be removed from the Register.—*RE BACH'S DESIGN* (1889), 42 Ch. D. 661; 61 L. T. 765; 38 W. R. 174; 6 R. P. C. 376.

*Annotations*:—*Reid. Mothersall v. Moore* (1891), 9 R. P. C. 27; *Re Clarke's Design*, [1896] 2 Ch. 38.

**913. Application of old design to new substance for same purpose.]—***Re CLARKE'S DESIGN*, No. 898, *ante*.

**914. Application of old design to analogous article.]—**The 1907 Act, s. 49, provides for the registration of "any new or original design not previously published in the United Kingdom"; & the Act gives protection to a design so registered. The word "original" in that sect. contemplates that the designer has by the exercise of intellectual activity conceived an idea, which has not previously occurred to any one else, of applying a particular pattern or shape or ornament to the particular article to which he suggests that it shall be applied. If that state of things be satisfied, then the design may be "original" although the actual pattern or shape or ornament under consideration be old in the sense that it has existed previously with reference to another article.

Pltfs. were the owners of a registered design in class 3 for a pattern or ornament of hand grip for cycle handles. The design consisted of an engine turned pattern in wavy lines applied to the hand grip, & broken up into panels by deep longitudinal grooves, the hand grip terminating in a ring separating the panels from the smooth end of the cylindrical handle bar. The engine turning was of a common pattern & none of the other details of the design were new. In an action for infringement, the judge held that the design was "new & original" having regard to the kind of article for which it was registered:—*Held*: there was no novelty or originality in applying to a cycle handle a form of decoration which, as was proved, was in common use upon other articles of a cylindrical shape.—*DOVER, LTD. v. NURNBERGER CELLULOID-WAGEN FABRIK GEBRÜDER WOLFF*, [1910] 2 Ch. 25; 79 L. J. Ch. 625; 102 L. T. 634; 26 T. L. R. 170; 54 Sol. Jo. 504, C. A.; *reversg.* S. C. *sub nom.* DOVER BROTHERS v. BERNSTEIN, 51 Sol. Jo. 250.

*Annotation:—Reid. Phillips v. Harbro Rubber Co.* (1919), 36 R. P. C. 79.

(d) *Combinations.*

**915. Combination of old designs forming new & original design.]—**A case stated by order of a judge showed that a conviction had taken place under 5 & 6 Vict. c. 100, s. 3, for unlawfully applying an original design for ornamenting a button; that the design consisted of two parts, each in itself a well-known design for ornamenting buttons; & that there was conflicting evidence before the magistrate as to the novelty of the design:—*Held*: as a new & original combination might be the result of simultaneously applying two old & known designs to the ornamenting of a button, a rule for quashing the conviction ought to be discharged.—*R. v. FIRMIN* (1851), 3 H. & N. at p. 304; 15 J. P. 740; 157 E. R. 487.

*Annotations:—Consd. Lazarus v. Charles* (1873), L. R. 16 Eq. 117. *Distd. Hothersall v. Moore* (1891), 9 R. P. C. 27. *Reid. Norton v. Nicholls* (1859), 1 E. & E. 761.

**916. —[**(1) A new combination of several old & known designs may constitute a new "design," capable of being protected under 5 & 6 Vict. c. 100. But such combination must, to be so protected, constitute one design, & not a multiplicity of designs.

(2) The article of manufacture to which the new design is applied, whether such design be single or the result of a new combination of old & known designs, is not, itself, a "design" within the

meaning of the statute; & cannot be protected by registration.—*NORTON v. NICHOLLS* (1859), 1 E. & E. 761; 28 L. J. Q. B. 225; 33 L. T. O. S. 131; 5 Jur. N. S. 1203; 7 W. R. 420; 120 E. R. 1095; *previous proceedings* (1858), 4 K. & J. 475. *Annotations:—As to* (1) *Reid. Holdsworth v. M'Crea* (1867), L. R. 2 H. L. 380. *As to* (2) *Reid. M'Crea v. Holdsworth* (1866), 35 L. J. Q. B. 123. *Generally, Reid. Harrison v. Taylor* (1859), 4 H. & N. 815.

**917. —[***HARRISON v. TAYLOR*, No. 898, *ante*.

**918. —[***SHERWOOD & COTTON v. DECORATIVE ART TILE CO.*, No. 895, *ante*.

**919. —[**In an action to restrain the infringement of a design registered in class 13, "printed or woven designs on textile piece goods," pltf. complained of infringement by certain dusters made or sold by deft. Deft. alleged amongst other things (a) that pltf.'s so-called design was no design within the meaning of Patents, Designs & Trade Marks Act, 1883 (c. 57); (b) that dusters, though woven in lengths consisting of sets of twelve, were comprised in class 14, "printed or woven designs for handkerchiefs or 'shawls'" & not in class 13; (c) pltf. was not the proprietor of the design & therefore not entitled to register; (d) pltf. had not, since registering, complied with the requirements of sect. 51 as to marking the goods to which the registered design had been applied; (e) deft. had not infringed:—*Held*: deft.'s contention was right on each of these points, & the action must be dismissed with costs.—*HOTHERSALL v. MOORE* (1891), 9 R. P. C. 27.

*Annotation:—Reid. Re Clarke's Registered Design* (1896), 65 L. J. Ch. 629.

**920. —[**II., the owner of a registered design for a writing table, commenced an action against B. for infringement. II., previously to registering his design, & while perfecting it, consulted D., with whom he had business relations, as to the design, & sent him a sample for his inspection before registration. This sample was slightly altered by D. & returned. Another one was sent to D. which was paid for by D. after II. had registered his design. B., by his defence, alleged that the design was not novel or original, that II. had published it before registration, & that the registration was bad because the articles were marked Regd. instead of Rd., & he denied infringement:—*Held*: though no part of the table was novel in itself, considered as a whole the design was novel & original, & this was confirmed by the conduct of deft. himself in inserting in his catalogue a picture of the design taken bodily from D.'s catalogue, the design was not previously published, the registration was good, & deft. had infringed.—*HEINRICHS v. BASTENDORFF* (1893), 10 R. P. C. 160.

*Annotation:—Reid. Gunston v. Wincox*, [1921] 1 Ch. 165.

**921. —[**Pltfs., the owners of a registered design for shawls, which were sold in Eastern markets, discovered, on Nov. 16, 1894, that B. & Sons were printing & B. was shipping to the same markets calico shawls bearing a design alleged to be an infringement of the said registered design. A writ was issued on Nov. 21 against B. only, but no further step was taken. On Nov. 30, the writ in the present action was issued, & leave was obtained to serve notice of motion, for Dec. 3, for an injunction to restrain defts. from infringement, & to stay the delivery of the goods already shipped. Notwithstanding the delay, an order was made upon pltf.'s evidence only, restraining

PART IV. SECT. 2, SUB-SECT. 1.—  
C. (6).

**914. Application of old design to analogous article.]—**It is not invention

to combine old devices or elements into a new manufacture without producing a new mode of operation or a new result which is not merely analogous to the old result.—*DURABLE ELECTRIC AP-*

*PLIANCE CO., LTD. v. RENFREW ELECTRIC PRODUCTS, LTD., DURABLE ELECTRIC APPLIANCE CO., LTD. v. SUPERIOR ELECTRICS LTD.*, [1928] 4 D. L. R. 1004; 59 O. L. R. 527.—*CAN.*

*Sect. 2.—Registration of designs: Sub-sect. 1, C. (d) & (e), & D.]*

deft. B. from parting with the possession of any goods alleged to constitute an infringement until the further hearing of the motion, defts. B. & Sons undertaking not to print more shawls with the design complained of. At the further hearing of the motion:—*Held*: defts. had infringed pltfs.' registered design, & an injunction granted until the trial of the action.

It is said that the design is not new or original. I have pointed out already that I think the original black & white design may not be new or original; but that, combined with the woven pattern, it seems to me to be a new & original design (ROBINSON, V.O.).—KNOWLES (S.) & CO., LTD. v. BENNETT & SONS & BIGIO (1895), 12 R. P. C. 137.

922. —.]—*Re CLARKE'S DESIGN*, No. 896, *ante*.

923. —.]—Pltfs., as owners of a registered design to be printed or woven on textile piece goods, brought an action for infringement. Defts. denied infringement, alleged that pltfs. were not the proprietors of the design, that it was published prior to registration, & that there was no novelty:—*Held*: pltfs. were proprietors of the design, it was not published prior to registration, it was a new & original design, & defts. had infringed.—NEVILL v. BENNETT (JOHN) & SONS (1898), 15 R. P. C. 412.

924. —.]—Pltfs. had obtained registration for a design of a wallpaper of a type known as the "floral bedroom stripe." The design consisted of an arrangement of floral baskets, blossoms, & leaves, garlands or wreaths, & stripes. Defts., in pursuance of a custom in the wallpaper trade, made & sold a "follower" wallpaper in general imitation of pltfs.' design but differing from it in certain details of its composition. Defts. contended that pltfs.' design was neither new nor original, & they relied on a number of earlier designs each containing some of the same ingredients as pltfs.' design. They also denied that their design was an infringement of pltfs.:—*Held*: although pltfs. had made use of old materials for their design, they had arranged these old materials in a new & original combination, & pltfs.' design was a new & original design, & the defence of invalidity therefore failed; & as to infringement, defts.' design, although differing in certain details from pltfs.' was in substance a fraudulent or obvious imitation of it, & pltfs. were entitled to an injunction.—WALLPAPER MANUFACTURERS, LTD. v. DERBY PAPER STAINING CO. (1925), 42 R. P. C. 443.

925. Combination of old articles to produce new article.]—D. registered a design under 6 & 7 Vict. c. 65. By the description, it appeared to be a design for ventilation by opening a hinged pane of a window by means of a screw: & it was stated that the part or parts of the design which were not new or original were all the parts, if taken *per se* & apart from the purposes thereof, & that what was claimed as new was the general configuration & combination of the parts. The utility of the design was in fact not produced by the shape of any of the parts, but only by the mode of putting them together:—*Held*: not a proper subject of registration, 6 & 7 Vict. c. 65 not applying to designs which have reference to a purpose of utility through the combination of parts independently of their shape & configuration.—R. v. BESSELL (1851), 10 Q. B. 810; 4 New Sess. Cas. 692; 20 L. J. M. C. 177; 17 L. T. O. S. 104; 15 J. P. 533; 15 Jur. 773; 117 E. R. 1092.

926. —.]—Four old designs were respectively applied to three ribbons, & to a button; & the three ribbons were then united by the button, so as

to form a badge. The badge was then registered under 5 & 6 Vict. c. 100:—*Held*: this union did not amount to a new design within the above statute; & an injunction to restrain the manufacture & sale of a similar combination was accordingly refused.—MULLONEY v. STEVENS (1864), 10 L. T. 190.

*Annotations*:—*Apld.* Lazarus v. Charles (1873), L. R. 16 Eq. 117; Hothersall v. Moore (1891), 9 R. P. C. 27.

927. —.]—LAZARUS v. CHARLES, No. 950, *post*.

928. —.]—The registered proprietor of a design registered in class 3 in respect of its application to a combined press for neckties or the like & box to contain collars & other articles, commenced an action for infringement of the design, which was of a box of common pattern with a lid composed of a tie press of a well known type in common use. Deft.'s box differed in several respects:—*Held*: there was no novelty or originality in the design, but if it was a design within the definition contained in 1919 Act. s. 19, there were six small differences between deft.'s article & pltfs.' design & as an exact reproduction was necessary, there had been no infringement. The action was dismissed with costs, & a certificate that the particulars of objection were reasonable & proper was granted, & a threats action was dismissed without costs.

If a design consists of a description of the article itself as a particular arrangement of old & well known things, & none of the features described is in the least degree new, there can be no novelty or originality & the registration is invalid.—REPETITION WOODWORK CO., LTD. & HILTON v. BRIGGS (TRADING AS LIFFORD OFFICE EQUIPMENT MANUFACTURING CO.) (1924), 131 L. T. 556; 41 R. P. C. 449.

*(e) Improvements.*

929. Necessity for distinct difference.]—A design is not a proper subject of registration under the Patents, Designs, & Trade Marks Act, 1883 (c. 57), unless there is a clearly marked & defined difference involving substantial novelty between it & any design previously in use.

A design for a shirt collar was registered, the advantages claimed for which were the height of the collar above the stud which fastened it in front, the cutting away of the corners in a segment of a circle, & the absence of a band. A collar was shown to have been previously in use which had no band, & in which the corners were cut away in arcs of circles; but the cutting away was not so wide, & the height above the stud was not so great, as in the registered design:—*Held*: the registered design was not new or original within the meaning of the Act, & must be removed from the Register.

The meaning of the words "novel & original" is this, that the design must either be substantially novel or substantially original having regard to the nature & character of the subject-matter to which it is to be applied (FRY, L.J.).—LE MAY v. WELCH, *Re LE MAY'S REGISTERED DESIGN* (1884), 28 Ch. D. 24; 54 L. J. Ch. 279; 51 L. T. 867; 33 W. R. 33; 1 T. L. R. 34, C. A.

*Annotations*:—*Apld.* *Re Bach's Design* (1889), 42 Ch. D. 661; *Smith v. Hope*, *Re Smith's Registered Design* (1889), 6 R. P. C. 200; *Hothersall v. Moore* (1891), 9 R. P. C. 27; *Re Clarke's Design*, [1896] 2 Ch. 38; *Re Rollason's Registered Design*, [1898] 1 Ch. 237; *Hutcheon, Main v. St. Mungo Manufacturing Co.* (1907), 24 R. P. C. 265; *Allon West v. British Westinghouse Electric & Manufacturing Co.* (1916), 33 R. P. C. 157; *Phillips v. Harbro Rubber Co.* (1919), 36 R. P. C. 79. *Reid. Re Bayer's Design* (1906), 24 R. P. C. 65; *Dover v. Nürnberger Celluloidwaren Fabrik Gebrüder Wolf*, [1910] 2 Ch. 25.

930. —.]—Pltfs., the owners of a registered design for gentlemen's scarves commenced an action for infringement against defts., & moved for

an injunction. Defts. denied infringement, & moved to rectify the Register by striking off *pltf's.*' design. The hearing of the motions was treated as the trial of the action. Defts. alleged that *pltf's.*' design was not in any way new or original, & had been anticipated by several scarves, & that it practically consisted in a variation of pleating, which was not registrable.—*Held*: a design for such an article of dress as a tie to be registrable, must have a clearly marked & defined difference from that which had gone before; *pltf's.*' scarf did not substantially differ from a previous tie, & was consequently not new; & to hold that the *pltf's.*' design was registrable would be to hold that the difference of a few stitches constituted a proper subject-matter of registration.—*SMITH v. HOPE BROTHERS, Re SMITH'S REGISTERED DESIGN* (1889), 6 R. P. C. 200.

931. —.]—*SIMMONS v. MATHIESON & Co., LTD., No. 908, ante.*

932. —.]—In 1910 registration in class 1 was obtained for a design consisting of a drawing of a finger for electric controllers. In an action for infringement of the design defts. alleged anticipation by a controller finger having the same parts as the design, but having two of them at an angle different from the angle between the corresponding parts of the design. *Pltf's.* gave evidence to prove the utility of a finger in the form of the design, in that a finger of that form could be fitted into a smaller controller case, thus effecting an economy of space. Defts. contended that evidence as to the utility of the design was inadmissible, but that, even if that were not so, there was no such economy of space as was alleged.—*Held*: there was no advantage, *qua* design, in forming the parts at the particular angle shown in the design; the design, as a whole, was substantially identical with the alleged anticipation, & the alteration that had been made from the latter in arriving at the form of the design was not sufficient subject-matter for a design.—*ALLEN WEST & Co., LTD. v. BRITISH WESTINGHOUSE ELECTRIC & MANUFACTURING Co., LTD.* (1916), 33 R. P. C. 157.

*Annotations*:—*Apld.* *Wilson v. Chalco* (1922), 39 R. P. C. 252. *Consd.* *Negretti & Zambra v. Stanley* (1925), 42 R. P. C. 358.

933. —.]—Registration in class 3 was obtained for a design "applicable for the surface pattern of india rubber pads or plates for heels of boots & shoes." The design consisted of a pad in the shape of the heel of a boot or shoe having a plain central depression that might be filled in with leather or other substance, & ornamented on the surrounding portion with cross lines & being thicker at the back than at the front. The proprietor & licencees of the design brought an action for infringement of it. Defts. had sold rubber heels of the same form as the registered design, except that the ornamentation of the portion surrounding the depression was different from that in the design, & that the variation in thickness was absent. It was proved that, from a date prior to that of the registration, defts. had sold two forms of rubber heels similar in form to the registered design, but having the surrounding portion plain, & in the one case, a plain central depression, & in the other case, a central portion with a pattern at a slightly lower level than that of the surrounding portion. Defts. contended that, if the parts of the design were important elements of novelty, defts.' rubber heels had not those details, & there was no infringement; or, if the parts were not important, the design differed so little from the prior forms of heels that it was not new or original. At the trial it was held that the importance of the parts of a design is dependent

on the character of the design; & that there was no substantial novelty or originality in *pltf's.*' combination of old parts:—*Held*: a design cannot be rendered new or original merely by a change of the mode of construction of an article; the fact that registered designs are kept secret makes it necessary for the ct. to take special care that no design shall be considered new or original unless it is distinguished from what has previously existed by something different from ordinary trade variants; that there was no evidence as to the novelty or originality of the greater thickness of *pltf's.*' heel at the back than at the front, a feature that was not present in the alleged infringement, although it was evidently regarded by *pltf's.* as an essential feature of their design; that the central recess in that design was old & always intended to be filled with leather or a like substance; & the object of the registration of the design had been to get control of the manufacture of heels with a central recess, however it was filled up.

This strikingly illustrates . . . the difficulty of the task which is imposed on a ct. dealing with a registered design when the person registering it has not availed himself of his right to file with his application a statement of the matters which he claims, constitute its novelty. . . . Under existing legislation the Comptroller has the right to require such a statement to be lodged, & my experience of the present & other like cases leads me to hope that he will freely avail himself of this power in any case where doubt is likely to arise (*LORD MOULTON*).—*PHILLIPS v. HARBRO RUBBER Co.* (1920), 37 R. P. C. 233, H. L.

*Annotations*:—*Apld.* *Wilson v. Chalco* (1922), 39 R. P. C. 252; *Cartwright v. Coventry Radiator Co.* (1925), 42 R. P. C. 351; *Negretti & Zambra v. Stanley* (1925), 42 R. P. C. 358; *Jones & Atwood v. National Radiator Co.* (1928), 45 R. P. C. 71.

934. —.]—*Pltf's.*, who were the proprietors of a design registered in class 1 in respect of stove thermometers, commenced an action to restrain defts. from selling or offering for sale an alleged infringement of the design. *Pltf's.*' thermometer had an inlet tube bent at a right angle & a projecting & inclined flat scale face, the novelty claimed being "the stove thermometer having the scale face A projecting & being inclined as shown." The only substantial difference between *pltf's.*' design & the alleged infringement was that defts.' thermometer had a V-shaped scale face. Defts. denied that they had infringed the design, & alleged that the design was neither new nor original, & did not constitute valid subject-matter for registration:—*Held*: all the elements in *pltf's.*' design, except the means for securing the thermometer to the stove, were old, & all *pltf's.* had done had been to apply ordinary trade variants or trade adjustments well known & common for the purpose of making an instrument useful for the purpose for which it was intended; the fact that *pltf's.* had produced an article of commerce, the utility of which had been demonstrated, was wholly immaterial, & the design was not new or original; having regard to the extreme slightness of the differences between the design & the thermometers which had preceded it, there was sufficient distinction between defts.' article & the design to prevent the former being an infringement, even if the design were valid, & the action must be dismissed.—*NEGRETTI & ZAMBRA v. STANLEY (W. F.) & Co., LTD.* (1925), 42 R. P. C. 358.

#### D. Prior Publication.

See 1907 Act, ss. 49 (1), 50.

935. What amounts to prior publication.—*Design shown to customers to solicit orders.*—

*Sect. 2.—Registration of designs: Sub-sect. 1, D.; sub-sects. 2 & 3, A.]*

The owner of a design, before it had been applied to any fabric or been registered, exhibited it to his customers in his place of business for the purpose of soliciting orders in respect of goods to which it was to be applied. *Qu.*: whether this amounted to a publication of the design within 5 & 6 Vict. c. 100.—*DALGLISH v. JARVIE* (1850), 2 Mac. & G. 231; 2 H. & Tw. 437; 20 L. J. Ch. 475; 15 L. T. O. S. 341; 14 Jur. 945; 42 E. R. 89.

*Annotations:—Mentd.* London Assco. v. Mansel (1879), 11 Ch. D. 363; *Seaton v. Heath*, *Seaton v. Burnand*, [1899] 1 Q. B. 782; *Joel v. Law Union & Crown Insee.* (1908), 77 L. J. K. B. 1108; *R. v. Kensington Income Tax Comrs.*, *Ex p. Edmond de Polignac*, [1917] 1 K. B. 486.

**936.** — *Design shown to customers & order accepted before registration.*—(1) The inventor of a design showed it to & consulted his agent. The agent consulted another person, & also showed it to two customers, & asked them for orders:—*Held*: there had thus been a previous publication, & that subsequent registration of the design under Patents, Designs, & Trade Marks Act, 1883 (c. 57), was therefore invalid. (2) A narrow coloured trimming was sold by the maker in pieces of many yards, having round them paper bands bearing "Rd." & the registration number:—*Held*: they were sufficiently marked within Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 51.—*BLANK v. FOOTMAN, PRETTY & Co.* (1888), 39 Ch. D. 678; 57 L. J. Ch. 909; 59 L. T. 507; 36 W. R. 921; 4 T. L. R. 685.

*Annotations:—As to (1) Consd.* *Gunston v. Winox*, [1921] 1 Ch. 165. *Reid*, *Winfield v. Snow* (1890), 8 R. P. C. 15; *Gadd & Mason v. Manchester Corp.* (1892), 67 L. T. 569.

**937.** — *—*—*In an action for infringement of a registered design deft. pleaded prior publication.* It appeared that one M., a buyer for Messrs. O., suggested to plffs. to produce lace of a certain pattern. Plffs. accordingly had a design prepared from which they manufactured a sample. This was shown to M., who, having approved of it, gave an order on behalf of Messrs. O. for 1,200 yards of the lace, & took away part of the sample. It was suggested by plffs. that the order was conditional, namely, the pattern to be first registered. M. however denied this. The lace was delivered after the registration:—*Held*: the publication to M. was not confidential, only for the purpose of obtaining his advice, but he & plffs. dealt commercially for the purchase & sale of the lace, & that M. retained the sample for his employers; & accordingly the registration was vitiated by the prior publication, it being immaterial when or how the design first came to the knowledge of defts.—*WINFIELD & SON v. SNOW BROTHERS* (1890), 8 R. P. C. 15.

*Annotation:—Consd.* *Gunston v. Winox*, [1921] 1 Ch. 165.

**938.** — *—*—*1907 Act, s. 55, provides that the disclosure of a design by the proprietor to any other person, in such circumstances as would make it contrary to good faith for that other person to use or publish the design . . . shall not be deemed to be a publication of the design sufficient to invalidate the copyright thereof if registration thereof is obtained subsequently to the disclosure.* Before registering a design the proprietors thereof submitted it to the Premier Drug co., & obtained from them a large order for show cards embodying the design. The Drug co. knew of the intended registration, & before any of the show cards were delivered the design

was registered by the proprietors:—*Held*: on the evidence, plffs. had not shown the existence of any circumstances which would make it contrary to good faith for the Drug co. to use or publish the design before registration. The registration, therefore, was invalid, & defts. were entitled to judgment.—*GUNSTON v. WINOX, LTD.*, [1921] 1 Ch. 664; 90 L. J. Ch. 288; 125 L. T. 295; 37 T. L. R. 361; 65 Sol. Jo. 310; 38 R. P. C. 40, C. A.

**939.** — *Discussion with probable customer.*—*HEINRICHS v. BASTENDORFF*, No. 920, *ante*.

**940.** — *Design communicated from abroad—Put into shape by workman of plaintiff.*—*NEVILL v. BENNETT (JOHN) & SONS* (1898), 15 R. P. C. 412.

**SUB-SECT. 2.—REGISTRATION AND OFFICE PROCEDURE.**

*See* 1907 Act, ss. 49–53; Designs Rules, 1920, 13–34.

**941.** *Consideration by Comptroller—Refusal to prior applicant not material.*—The Assistant Comptroller refused to register a design on the ground that the office had already refused registration to an earlier appct. for practically an identical design, & that it would be a hardship on the previous appct. to register the design, the subject of the present application:—(1) *Held*: there having been no publication of the previous application, the fact that it had been refused by the Comptroller's office was not a good ground for refusing the present application; (2) as the previous appct. had not appealed against the decision of the Comptroller's office, it would be no hardship on him to grant the present application.—*Re BRAMPTON BROTHERS, LTD.'S APPLICATION*, [1926] Ch. 255; 95 L. J. Ch. 235; 134 L. T. 750; 70 Sol. Jo. 181; 43 R. P. C. 55.

**942.** — *Judge of novelty.*—An application was made for the registration of a design in class 3 applicable to golf balls. There was a well-known marking of a golf ball, called the "Silver King," consisting of an arrangement of square & other spaces separated by raised bands. The design was admittedly identical with that marking, except that, in the design, the bands were indented along the centre of their course. The application papers bore the following indorsement. "The novelty of the design lies in the pattern of the golf ball as shown in the representations." Appcts. contended that the design might be regarded as a series of frames around the spaces. The Assistant Comptroller decided that the "Silver King" marking anticipated the design, with one exception consisting of a series of indented lines that appeared on the bands & did not appear in any other golf ball marking, & that the application might be granted with an amended indorsement as follows. "The novelty lies in the configuration or pattern of the golf ball having the indented lines as shown in the representations." Appcts. contended that the proposed amendment did not set forth what they claimed to be their novelty of pattern, namely, "The surface pattern comprising a plurality of rows or rings of frames (say a) in relief round the ball with sunken areas (say b) within the frames & crossing grooves (say c), between the frames as shown in the representations." Appcts. appealed to the ct.:—*Held*: unless the Comptroller was proceeding upon some wrong principle, he must *primâ facie*



be the judge of novelty there was not anything wrong in principle in what he had done; & he was justified in refusing registration upon the description of novelty upon which the appcts. insisted.—*Re GAME BALLS Co., LTD.'s APPLICATION* (1928), 45 R. P. C. 26.

**943. Whether statement of matters in respect of which novelty claimed should be deposited.]—***PHILLIPS v. HARBRO RUBBER Co., No. 933, ante.*

#### SUB-SECT. 3.—EFFECT OF REGISTRATION.

##### A. What Registration Protects.

**944. Design registered for pattern, shape & configuration—Design as a whole protected.]—**

(1) Where a design is registered as applicable to pattern, shape & configuration, the registration applies to the design as a whole, & it is protected although in one of those particulars it may not be novel.

Pltfs. registered a design for an upright hexagonal metal stove, the sides of which had the representation in metal work of a church window, of a particular style of architecture, with tracery above & below, the design being registered as applicable to pattern, shape, & configuration. Defts. produced a hexagonal upright stove with a design of a church window, of a different style of architecture, with different tracery, but the general appearance of the stove was very similar to that of pltfs.' stove:—*Held*: defts.' stove was an obvious imitation of pltfs.' stove & an infringement of his copyright.

(2) The owner of a registered design is not deprived of his right to protection merely because he places on the articles which he sells, besides the registered number of his design, other numbers which ought not to be there.

(3) Where a design is registered, & before the expiration of the term of protection the same design with an unimportant variation is registered, the original design may be copied as soon as the original term of protection expires, provided the variation is not copied.—*HARPER (JOHN) & Co., LTD. v. WRIGHT & BUTLER LAMP MANUFACTURING Co., LTD.*, [1896] 1 Ch. 142; 65 L. J. Ch. 161; 73 L. T. 486; 44 W. R. 274; 12 T. L. R. 53; 12 R. P. C. 483, C. A.

*Annotations*:—*As to* (1) *Consd.* *Dover v. Nurnberger Celluloidware Fabrik Gebrüder Wolff*, [1910] 2 Ch. 25. *Distd.* *Pilkington v. Abrahams* (1914), 32 R. P. C. 61; *Repetition Woodwork Co. & Hilton v. Briggs* (1921), 131 L. T. 556. *Reid.* *Re Clarke's Design*, [1896] 2 Ch. 38. *Generally.* *Reid.* *Re Rollason's Registered Design* (1897), 77 L. T. 605; *Heath v. Rollason* (1898), 67 L. J. Ch. 565; *Werner Motors v. Gamage* (1904), 73 L. J. Ch. 770; *Phillips v. Harbro Rubber Co.* (1919), 36 R. P. C. 79; *Jones & Attwood v. National Radiator Co.* (1928), 45 R. P. C. 71.

**945. Design consisting of several parts registered as whole pattern—Parts not severally protected.]—**(1) The same nicety is not required in registering patterns or designs as in describing inventions sought to be protected under the Patent Laws. The provisions of 5 & 6 Vict. c. 100, & 21 & 22 Vict. c. 70, are complied with by a person who leaves with the Registrar copies of his design, though without any written description specifying precisely what is the extent of his claim. If what he claims as his design consists according to the pattern of different parts, any one of which might be deemed "a design," his registration of the whole pattern amounts to a claim of the combination, & not to any of the parts thus combined, any one of which, therefore, taken separately is not protected by the Registration. A. registered as a "design," within class 12, sect. 3, of 5 & 6 Vict. c. 100, a pattern of a woven fabric. He gave no

written description of his claim. The design consisted of six pointed stars on an Albert chain, arranged in a particular manner, & shaded, & he claimed, in his particulars in the action, "the particular collocation of the shaded & bordered stars upon the ornamental chain surface, as shown in the registered pattern, thus forming together the ornamentation of the woven fabric":—*Held*: the design, in respect of the combination, had been duly registered, & the pattern, as a combination, was protected.

(2) Whether, therefore, there be piracy or not is referred at once to an unerring judge, namely, the eye, which takes the one figure & the other figure, & ascertains whether they are or are not the same (*LORD WESTBURY*).—*HOLDSWORTH v. M'CREA* (1807), L. R. 2 H. L. 380; 36 L. J. Q. B. 297; 10 W. R. 226, H. L.; *affg.* S. C. *sub nom.* *M'CREA v. HOLDSWORTH* (1866), L. R. 1 Q. B. 264, Ex. Ch.; *subsequent proceedings* (1870), 6 Ch. App. 418, L. C.

*Annotations*:—*As to* (1) *Consd.* *Thom v. Syddall* (1872), 26 L. T. 15. *Distd.* *Re Clarke's Design*, [1896] 2 Ch. 38. *Apld.* *Sackett & Barnes v. Clozenberg* (1909), 27 R. P. C. 104. *As to* (2) *Apld.* *Hecla Foundry Co. v. Walker, Hunter* (1889), 14 App. Cas. 550. *Consd.* *Bourne v. Swan & Edgar, Re Bourne's Trade Mks.*, [1903] 1 Ch. 211. *Apld.* *Dover v. Nurnberger Celluloidware Fabrik Gebrüder Wolff*, [1910] 2 Ch. 25. *Generally.* *Consd.* *Hothersall v. Moore* (1891), 9 R. P. C. 27. *Reid.* *Saunders v. Wiel*, [1893] 1 Q. B. 470.

**946. — [ ]—**C. was the proprietor of three registered designs (No. 500,272, No. 511,323, No. 511,326) for sideboards. S. & B. had copied in one sideboard, with immaterial modifications, the glass & arrangement of the back of No. 511,326, adding thereto a pediment copied from No. 511,323, & in another sideboard had copied, with immaterial modifications, the glass & arrangement of the back of No. 511,323, adding thereto a pediment copied from No. 511,326, & in a third sideboard S. had copied the glass & back arrangement with pediment from No. 500,272, with immaterial modifications, in fact copied from No. 511,323. The carcasses were not imitations of defts.' designs. The designs had been registered as a whole. In a threats action brought by S. & B., C. counter-claimed for infringement of the registered designs:—*Held*: the sideboards complained of contained imitations of parts of the registered designs, but the general designs were distinct, & there had been no infringement.—*SACKETT & BARNES v. CLOZENBERG* (1909), 27 R. P. C. 104.

*Annotations*:—*Reid.* *Stephenson, Blake v. Grant, Legros* (1916), 86 L. J. Ch. 93; *Jones & Attwood v. National Radiator Co.* (1928), 45 R. P. C. 71.

**947. Manufacture during period of protection—For sale after protection expires.]—**A person having invented a design, & registered it under 5 & 6 Vict. c. 100, & 6 & 7 Vict. c. 65, obtained an injunction against another person who had manufactured with that pattern, but did not intend the same for sale until after the expiration of pltf.'s term of protection, restraining deft. generally, & ordering all articles manufactured & things used for the manufacture to be delivered up to be destroyed.—*MACRAE v. HOLDSWORTH* (1848), 2 De G. & Sm. 496; 64 E. R. 222; *sub nom.* *M'CREA v. HOLDSWORTH*, 12 Jur. 820.

**948. Manufacture in United Kingdom—For sale abroad.]—**Pltfs. were proprietors of a design registered in respect of a set of type metal letters, the claim being for the pattern. Defts. were manufacturers of matrices or moulds in which types are cast, & had recently sold & delivered to the India Office in London matrices for casting type for purposes of sale in India in accordance with pltfs.' registered design. It was admitted that the matrices were intended for shipment to Madras,

*Sec. 2.—Registration of designs: Sub-sect. 3, A. & B. Sect. 3: Sub-sects. 1 & 2, A. & B. (a) & (b).]*

& that the design would not be applied to any type in the United Kingdom:—*Held*: although the copyright in the design afforded pltf's. no protection in India, still the acts of defts. in this country were in contravention of the concluding words of Patents & Designs Act, 1907 (c. 15), s. 60 (1) (a).—*HADDON (JOHN) & Co. v. BANNERMAN (R. P.) & SON*, [1912] 2 Ch. 602; 81 L. J. Ch. 766; 107 L. T. 373; 56 Sol. Jo. 750.

#### *B. Infringement.*

*See Sect. 4, post.*

### SECT. 3.—“PROPRIETOR OF A NEW AND ORIGINAL DESIGN.”

#### SUB-SECT. 1.—WHO IS A PROPRIETOR.

*See 1907 Act, s. 93.*

**949. Author — Person drawing original rough sketch.**—This was a motion to expunge three registered designs for the bodies of perambulators, which came on for hearing together with the trial of an action for the infringement thereof. The designs were protected, & the action was brought both on account of shape & pattern. It was established that the pattern was old & had not been infringed, but that the shape of the sides & toe of the body was new for perambulators. It was held on the motion, that the designs were novel & that the registrations were good, the fact of two being duplicates, registered for shape & pattern respectively, making no difference, even though the pattern was old; & that the person who drew the original rough sketch of the shape desired, which coupled with verbal instructions proved sufficient for the workman to work by, was the author of the design. The motion was refused with costs:—*Held*: in the action, a perambulator, having an end & sides shaped substantially like those in the designs registered, was an infringement, although different in ornament & detail of shape, & an injunction was awarded against infringement, but as pltf's. failed to prove infringement in regard to pattern as alleged, no costs were given to them in the action.—*PEARSON v. MORRIS WILKINSON & Co.* (1906), 23 R. P. C. 738.

**950. Person acquiring design — Contractor for purchase of goods.**—Pltf's. registered, under 5 & 6 Vict. c. 100, a design consisting of a double card basket, formed of a combination of two baskets, admitted to be separately old in design. Pltf's. were not the designers, but had contracted to purchase the articles in Germany, & imported them to England:—*Held*: upon motion for an injunction to restrain the sale of an imitation basket, the articles were not new or original within the meaning of the Act, & pltf's., not being the designers, & not having purchased the design for value, were not entitled to the protection of the statute.—*LAZARUS v. CHARLES* (1873), L. R. 16 Eq. 117; 42 L. J. Ch. 507.

*Annotations*.—*Rafid. Adams v. Clementson* (1879), 12 Ch. D. 714; *Le May v. Welch, Re Le May's Registered Design* (1884), 28 Ch. D. 24; *Hothersall v. Moore* (1891), 9 R. P. C. 27.

**951. — With exclusive right of sale.**—A partial assignment of, or licence to use, a design under 5 & 6 Vict. c. 100, s. 6, must be in writing, & can only be made by a registered proprietor. By a verbal contract made in July, 1877, C., an American manufacturer, purported to sell to pltf. the exclusive right to sell in England an article newly designed & then about to be manufactured, & also to obtain such protection for the same as he could

do under English law, it being stipulated that pltf. should obtain the article exclusively from C.: by the same contract C. agreed to sell to pltf. the first twenty cases of the article for the price agreed upon, which was to cover both the right & the goods. In Sept. 1877, the cases were delivered in England to pltf., who paid the money due under the contract. Meanwhile, in Aug. 1877, pltf. had obtained registration of the design under 5 & 6 Vict. c. 100, & the copyright therein was granted to him for the term of three years. In an action to restrain the alleged infringement by deft. of pltf.'s copyright:—*Held*: on the evidence, pltf. had not acquired under the contract the right to apply the design to a manufactured article so as to entitle him to register it in his own name under the Act; pltf.'s right, if any, to protection could not have accrued till the completion of the purchase.—*JEWITT v. ECKHARDT* (1878), 8 Ch. D. 404; 26 W. R. 415.

*Annotation*.—*Rafid. Woolley v. Broad*, [1892] 1 Q. B. 806.

**952. — — — — —**—In May, 1885, G., who was acting as the sole agent & consignee in the United Kingdom, during the year 1885, of toys manufactured in the United States by an American co., & consigned to him by them, registered in his own name the designs in accordance with which some of such toys were manufactured. The co. had authorised him to register the designs in his own name, but had not assigned to him the designs, or the right to apply them to goods, the only arrangement between them & G. being that G. should sell in the United Kingdom goods manufactured & consigned to him by the co.:—*Held*: G. was not the proprietor of the designs within Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 61, & the registration in his name was therefore wrongful, & must be expunged.—*Re GUTTERMAN'S REGISTERED DESIGNS* (1885), 55 L. J. Ch. 300; *sub nom. Re REGISTERED DESIGNS, Ex p. WILD*, 2 T. L. R. 174.

**953. — Licencee with sole right of sale.**—The registered proprietor of a design applicable to lace goods, registered under the Patents, Designs, & Trade Marks Act, 1883 (c. 57), verbally agreed with pltf's. to supply to them all the goods manufactured by him according to the design, & to give them the exclusive right of selling such goods. On demurrer to a claim by pltf's. to recover damages against a third person for applying the design to lace goods, & selling goods to which it had been applied, without the licence or written consent of the registered proprietor or of pltf's.:—*Held*: the statement of claim disclosed no cause of action, because pltf's. were not the registered proprietors of the design, & the only right of action in respect of the injuries complained of was that given by Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 59, to the registered proprietor exclusively.—*WOOLLEY v. BROAD*, [1892] 1 Q. B. 806; 61 L. J. Q. B. 259; 66 L. T. 680; 40 W. R. 511; 8 T. L. R. 213; 9 R. P. C. 208, D. C.; *subsequent proceedings*, [1892] 2 Q. B. 317, C. A.

#### SUB-SECT. 2.—DUTIES OF PROPRIETOR.

##### *A. Deposit of Specimens.*

*See 1907 Act, s. 54 (1) (a); Design Rules, 1920, rr. 20–29.*

##### *B. Marking of Articles.*

###### *(a) Necessity for.*

*See 1907 Act, s. 54 (1) (b); Design Rules, 1920, r. 63.*

**954. What must be marked—Book of illustrations of design.**—An inventor of new designs



published & sold them in a book registered under 5 & 6 Vict. c. 100, & containing a notice that persons wishing to manufacture them for the purpose of sale must have the inventor's permission:—*Held*: such publication & sale did not amount to a licence to sell articles to which the designs had been applied.—*DE LA BRANCHARDIERE v. ELVEY* (1849), 4 Exch. 380; 18 L. J. Ex. 381; 154 E. R. 1260.

**955. — Pattern pieces.**—The proprietor of a design applied to paper hangings, registered according to the provisions of 5 & 6 Vict. c. 100, published pattern pieces, containing the whole design, not bearing the letters "Rd" & the proper number, as prescribed by sect. 4: the ordinary practice in the trade was to sell hangings in larger pieces, but to mark patterns such as those which were published:—*Held*: he was not protected by the Act against parties copying the design from such pattern pieces, & publishing articles with such design applied to them.—*HEYWOOD v. POTTER* (1853), 1 E. & B. 439; 22 L. J. Q. B. 133; 20 L. T. O. S. 207; 17 Jur. 528; 1 W. R. 127; 118 E. R. 501.

*Annotations*:—*Distd.* Fielding v. Hawley (1883), 18 L. T. 639. *Apld.* Blank v. Footman, Pretty (1888), 59 L. T. 507; *Hothersall v. Moore* (1891), 9 R. P. C. 27.

**956. — Articles sold abroad.**—The copyright of a registered design is lost, if the proprietor, English or foreign, sell the registered article abroad without the letters "Rd" being attached thereto, as required by 5 & 6 Vict. c. 100, s. 4.—*SARAZIN v. HAMEL* (No. 2) (1863), 32 Beav. 151; 1 New Rep. 253; 32 L. J. Ch. 380; 7 L. T. 660; 9 Jur. N. S. 192; 11 W. R. 326; 55 E. R. 59.

*Annotations*:—*Distd.* Fielding v. Hawley (1883), 18 L. T. 639. *Mentd.* Bromley v. Williams (1863), 11 W. R. 392.

**957. — Articles sold in unfinished state.**—(1) W., the registered proprietor of certain designs for lace, verbally agreed with W. & co. to sell them all lace manufactured by him according to the designs in the "brown" or unfinished state, & that W. & co. should have the exclusive right to sell lace manufactured according to the designs in the finished state. It was arranged that W. & co. should register the designs in W.'s name, & should mark the lace before it went on the market. W. & co. paid W. for the lace they took from him. W. & W. & co. commenced an action against B. for infringement of these designs. Deft. pleaded that the designs were not novel, that pltf. W. had delivered on sale articles to which the said designs had been applied without causing the articles to be marked as registered, & that W. & co. had no right of action. The action was set down & judgment given for deft. on this last point.

(2) On Mar. 10, 1892, about a week before the date of the assizes at which the action was to be tried, deft. discovered further particulars & gave information of these to pltf., telling him that he would give evidence of these at the trial. Pltf. objected. Whereupon deft. took out a summons for leave to deliver further particulars, & the judge at the assizes, to whom the summons was referred, gave such leave unconditionally. Pltf. appealed to the Div. Ct., who refused his application.

Pltf. appealed to the Ct. of Appeal, contending that a rule had been laid down in *Morris, Wilson, & Co. v. Coventry Machinists' Co.*, No. 1012, *post*, that the practice in patent actions in such cases was to be followed, namely, that pltf. ought to be allowed a certain time after the delivery of the fresh particulars in which to elect whether he would discontinue on certain terms as to costs:—*Held*: the judge had an absolute discretion which was not, & could not be, fettered by any rule of practice,

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& the appeal must be dismissed.—*WOOLLEY v. BROAD*, [1892] 2 Q. B. 317; 61 L. J. Q. B. 808; 67 L. T. 67; 40 W. R. 506; 36 Sol. Jo. 592; 9 R. P. C. 429, C. A.

*Annotation*:—*As to* (2) *Folld.* Wilson & Wilson Bobbin Co. v. Wilson (Barnsley) (1899), 16 R. P. C. 315.

**958. — Articles sold to licensee for re-sale.**—This was an action for infringement of a registered design of the pattern of a telephone transmitter with a receiver. Defts., by their defence, pleaded that A. & B., by whom the design was originally registered, had, before the assignment of the design to pltf., sold to defts. a certain number of telephones of pltf.'s design & pattern for the purpose of being resold by defts., which telephones were not marked as prescribed by Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 51. Defts. also alleged that the A. co., of which A. & B. were directors, granted defts. a licence to manufacture & sell telephones, which were in part made of pltf.'s pattern & design, without any stipulation that such telephones should be marked with a mark or figure denoting that the design was registered; & defts. had, to the knowledge of A. & B., manufactured & sold telephones of such design or pattern under the said licence without any such mark or figure. Defts. contended that on these facts the copyright in the design had ceased:—*Held*: at least one case was proved of a sale by A. to defts. of a telephone which was not marked, & probably others by A. & B.; it was clear that there was acquiescence by both A. & B. in sales by defts., under the licence, of unmarked articles; by such conduct A. & B. had lost their copyright under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 51, unless they could show that they had taken all proper steps to ensure the marking of the article; A. & B. had certainly failed to show that; & the action was dismissed, with costs.—*WEDEKIND v. GENERAL ELECTRIC CO., LTD.* (1897), 14 R. P. C. 190.

#### (b) Place of Mark.

**959. Article consisting of more than one part—Marking may be on any part.**—A butter dish under Copyright (Designs) Act, 1842 (c. 100), is properly stamped by the stamp being on the dish alone, & not on the cover, though the cover is separate & may be the chief place where the design is shown.—*FIELDING v. HAWLEY* (1883), 48 L. T. 639; 47 J. P. 582, D. C.

*Annotation*:—*Apld.* Blank v. Footman, Pretty (1888), 39 Ch. D. 678.

**960. —**—*INGRAM & KEMP, LTD. v. EDWARDS BROTHERS* (1904), 21 R. P. C. 463.

**961. Mark must be on part of article for which design registered.**—*Semble*: Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 51, requires the marking of an article to be, if possible, on the actual part to which the design is applied.—*RE MORTON'S DESIGN* (1899), 17 R. P. C. 117.

*Annotation*:—*Refd.* Allen, West v. British Westinghouse Electric & Manufacturing Co. (1916), 33 R. P. C. 157.

**962. —**—In 1902 ptfs. registered a design in class 1 for a lamp head to be attached to arc gas lamps, the design being for shape & configuration. Defts., having in 1904 manufactured a lamp head of a similar shape, this action was commenced by ptfs. to recover penalties under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 58. Ptfs. did not affix the registration mark to the lamp head, but to a metal ring at the base of the glass globe some little distance from the lamp head. Defts. alleged (a) that ptfs.' design was not novel; (b) there was no infringement; (c) the mark as applied by ptfs. was insufficient, having

*Sect. 3.—“ Proprietor of a new and original design ” :  
Sub-sect. 2, B. (b) & (c). Sect. 4 : Sub-sect. 1,  
A., B. & C.]*

regard to Patents, Designs, & Trade Marks Act, 1883 (57), s. 51:—*Held*: the mark prescribed by Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 51, was intended to show what part of the article it was that was protected & the marking applied by plffs. failed therefore to comply with the requirements of the sect.—*IEA & PERRINS v. PRICE & SON* (1904), 22 R. P. C. 122.

963. Article sold in bulk—To be divided & sold retail—Mark on wrapping of article in bulk.]—*BLANK v. FOOTMAN, PRETTY & Co., No. 936, ante.*

(c) *Mode of Marking.*

*See* 1907 Act, s. 54 (1) (b).

**984. Effect of mistake in marking by manufacturer or workman.—**Where proper instructions given by proprietor.]—Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 51, applies to the delivery on sale of articles to which a design registered under 5 & 6 Vict. c. 100, has been applied, & the marking of such goods since the Act of 1883 came into operation is regulated by that Act. Consequently, the proprietor of a design registered under 5 & 6 Vict. c. 100, is in a proper case entitled to the benefit of the proviso contained in sect. 51, which relieves him from the forfeiture of his copyright resulting from the omission to mark the articles with the prescribed mark, if he shows that he "took all proper steps to ensure the marking."

The proprietor of a registered design instructed the manufacturer, who made for him the articles to which the design was applied, to stamp the proper mark upon them, & furnished him with a die for the purpose. By inadvertence the manufacturer marked some of the articles with a mark which belonged to another design registered by the same proprietor, the copyright of which had expired, using for the purpose by mistake an old die which remained in his possession, & the proprietor, after Patents, Designs, & Trade Marks Act, 1883 (c. 51), came into operation, sold some of the articles thus wrongly marked without observing the error. The letters Rd. formed part of both the marks:—*Held*: the proprietor had not forfeited his copyright, but he was protected by the proviso in sect. 51.—*WITTMAN v. OPPENHEIM* (1884), 27 Ch. D. 260; 54 L. J. Ch. 56; 50 L. T. 713; *sub nom.* WILLMAN v. OPPENHEIM, 32 W. R. 766. *Annotation*:—*Reid*, *Smith v. Lewis, Roberts* (1888), 5 R. P. C. 611.

965. ———.]—HEATH & SONS v. ROLLASON,  
No. 879, *ante*.

**966.** — Error in word used.]—HEINRICHS v. BASTENDORFF, No. 920, *ante*.

**967. Addition of other numbers—To registered number.]—HARPER (JOHN) & CO., LTD. v. WRIGHT & BUTLER, LAMP MANUFACTURING CO., LTD., No. 944, *ante*.**

968. Marking of registered number on wrong design.]—VANDERVELL & Co. v. LUNDBERG & SONS, No. 903. *ante*.

#### SEC'T. 4.—INFRINGEMENT.

**SUB-SECT. 1.—WHAT CONSTITUTES INFRINGEMENT.**

### A. In General.

869. Question of fact.] — HOLDSWORTH v. MCCREA, No. 945, *ante*.

**PART IV. SECT. 3, SUB-SECT. 2.—**  
**B. (a).**

k. *Effect of mistake in marking by manufacturer or workman—Failure by proprietor to exercise care.*—JOHNSON

v. BAILEY (1893), 11 R. P. C. 21.—  
SCOT.

**PART IV, SECT. 4, SUB-SECT. 1.—A.**

1. *Designs made by servant adopted*

**970.** —[—]—Patents, Designs, & Trade Marks Act, 1883 (c. 57), consolidates the law relating to the copyright of designs, & by sect. 60 "design" is defined as meaning "any design applicable to any article of manufacture or to any substance," whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof."

Pursuers registered a design for the shape of a kitchen-range fire-door with a moulding on the top which had the effect of closing the range to cold air. Defendants manufactured a range fire-door with a moulding on the top which had the same effect:—*Held*: (1) the Ct. of Session in considering whether there had been an infringement of the copyright in the design for the shape of the fire-door were wrong in taking into account the question whether defendants' design accomplished the same useful object (*i.e.* that of excluding cold air) as the design of the pursuers; (2) there had been in fact an obvious imitation of the registered design & therefore an infringement of the copyright.—*HECLA FOUNDRY Co. v. WALKER, HUNTER & Co.* (1889), 14 App. Cas. 550, 59 L. J. P. C. 46; 61 L. T. 738; 6 R. P. C. 554, H. L.

**Annotations:—**As to (1) **Reid**, *Moody v. Treco* (1892), 40 W. 558; *Saunders v. Wiel* (1892), 68 L. T. 783; *Re Clark's Design*, [1896] 1 Ch. 188; *Re Harrison & Clark's Design*, [1902] 2 Ch. 580; *Re Iscor's Design*, (1907), 24 R. P. C. 65; *Dover v. Nurnberger Celluloidwaren Fabrik Gebrüder Wolff*, [1910] 2 Ch. 25; *Gramophone Co. v. Magazine Holder Co.* (1910), 102 L. T. 409; *Tokalon v. Davidson* (1915), 32 R. P. C. 133; *Allen West v. British Westinghouse Electric & Manufacturing Co.* (1916), 33 R. P. C. 157; *Jones & Altwood v. National Radiator Co.* (1928), 45 R. P. C. 71. As to (2) **Reid**, *Rothsall v. Moore* (1891), 9 R. P. C. 27; *Harper v. Wright & Butler*, [1896] 1 Ch. 142. *Generally*, **Reid**, *Bourne v. Swan & Edgar, Re Bourne's Trade Mks.*, [1903] 1 Ch. 211.

771. Not attainment of same object.]—HECLA  
FOUNDRY CO. v. WALKER, HUNTER & CO., No. 970,  
*ante*.

### B. Design Taken in Substance.

**972. Whether infringement.]**—Where a pattern of an article has been registered under 21 & 22 Vict. c. 70, s. 5, the design will be infringed by an article to all appearance the same, though not actually identical.—*M'Crea v. Holdsworth* (1870), 11 Ch. App. 418; 23 L. T. 444; *sub nom.* *McCREA v. HOLDSWORTH*, 19 W. R. 36, L. C.; *previous proceedings, sub nom.* *HOLDSWORTH v. M'CREA* (1867), L. R. 2 H. L. 380, H. J.

**Annotations:—***Consol. Thom v. Syddall* (1872), 26 L. T. 13. **Appld.** *Re Le May's Registered Design, Le May v. Welch* (1884), 28 Ch. D. 24. **Reid.** *Hothersall v. Moore* (1891), 9 R. P. C. 27; *Re Clarke's Design*, [1896] 2 Ch. 38; *Sackett & Barnes v. Clozenburg* (1909), 27 R. P. C. 104.

973. —. —Pltfs. as owners of a registered design for a pressure-bar for wringing & mangling machines, brought an action for infringement. Defts. denied infringement, & alleged that pltfs.' registered design was not subject-matter, & was anticipated by the various prior publications set forth in the particulars of objections:—*Held*: pltfs.' article & defts.' articles were practically identical; pltfs.' design had not been anticipated & pltfs. were entitled to succeed.—*VARLEY v. KEIGHLEY IRON WORKS SOCIETY, LTD.* (1890), 14 R. P. C. 169.

874. —]—Pltf. as owner of a registered design for gas jets for bakers' ovens brought an action for infringement. Def't. denied infringement, & alleged that pltf.'s registered design was not new or original & was anticipated by the

*by employer—Use by servant after termination of employment.]—Its EQUATOR MANUFACTURING CO., LTD., Ex p. PENDLEBURY (Ont.), [1926] 1 D. L. R. 1101; 7 C. B. R. 472.—CAN.*

various prior publications set forth in the particulars of objections, & that there was no similarity between pltf.'s & defts.' designs:—*Held*: pltf.'s registered design was not new & original, & also, even if it was, there was not sufficient similarity between the two designs to enable pltf. to succeed, & there was therefore no infringement.—*GILLARD v. WORRALL* (1904), 22 R. P. C. 76.

**975.** —.]—*PEARSON v. MORRIS WILKINSON & Co.*, No. 949, *ante*.

**976.** —.]—It is the duty of a ct. of justice to decide cases according to the truth & fact, & it is not bound to accept any fact as true merely because it is admitted between the parties to the action. Therefore where, in an action to restrain the infringement of a registered design, deft. has admitted the novelty & originality of pltf.'s design the ct. is not precluded from inquiring whether the design is in fact novel & original, & if it is of opinion that it is not so, giving judgment for deft. on that ground.

The principles by which the ct. is guided in dealing with patent cases are not applicable to the cases of registered designs, & a design must be an exact reproduction of the registered design to come within the Act; a merely colourable alteration is sufficient to take it out of the Act.—*GRAMOPHONE CO., LTD. v. MAGAZINE HOLDER CO.* (1911), 104 L. T. 259; 28 R. P. C. 221, H. L.

*Annotations*:—*Apld.* *Repetition Woodwork Co. & Hilton v. Briggs* (1924), 131 L. T. 556; *Negrotti & Zambra v. Stanley* (1925), 42 R. P. C. 358.

**977.** —.]—Assuming that a design for a fount of type is registrable, the user of the letters & symbols which make up the design is not an infringement unless it amounts to a copy or colourable imitation of the whole design.—*STEPHENSON, BLAKE & Co. v. GRANT, LEGROS & Co.* (1916), 86 L. J. Ch. 93; 115 L. T. 666; 33 T. L. R. 24; 61 Sol. Jo. 55; 33 R. P. C. 406; *on appeal* (1917), 86 L. J. Ch. 439, C. A.

**978.** —.]—J. the proprietor of a design for a garden sprayer, registered in respect of its application to articles in Class I., commenced an action against T. for infringement. Deft. denied infringement & alleged that the design was not new or original at the date of registration by reason of prior publication, prior user, & common knowledge:—*Held*: defts.' apparatus was not an exact copy or fraudulent imitation of pltf.'s design; pltf.'s design had not been anticipated & was a new design; the action failed on the issue of infringement; the defence failed on the issue of invalidity.—*JACKSON v. TESTAR* (1919), 36 R. P. C. 289.

*Annotation*:—*Refd.* *Jones & Attwood v. National Radiator Co.* (1928), 45 R. P. C. 71.

**979.** —.]—*REPETITION WOODWORK CO., LTD. & HILTON v. BRIGGS* (TRADING AS LIFFORD OFFICE EQUIPMENT MANUFACTURING CO.), No. 928, *ante*.

**980.** —.]—Registration in class 1 was obtained for a design in respect of a radiator for motor vehicles. In an action for infringement it was proved that the radiator was in fact fitted, & was extensively sold to be fitted, to Ford motor cars, & that defts. had originally sold for Ford motor cars a form of radiator without ribs at the top, such as existed in pltf.'s radiator, & that defts.' said radiator had not seriously competed with pltf.'s radiator. Subsequently, defts. began to sell a form of radiator for Ford motor cars having ribs at the top, & pltf.'s sales fell off. A traveller for pltf.'s radiator stated in evidence that, on seeing some of defts.' radiators, he had mistaken them for pltf.'s radiators. Defts. con-

tended that there could not be a monopoly for putting a ribbed top on a radiator for a Ford motor car, & pltf.'s design was not new or original, having regard to certain prior users:—*Held*: the form of defts.' radiator was identical in substance with pltf.'s design, & the prior users were not; pltf.'s design was new & original, & had been infringed.—*CARTWRIGHT v. COVENTRY RADIATOR CO.* (1925), 42 R. P. C. 351.

**981.** — *Omission of novel part of design.* — W. the proprietor of a registered design for a tin oil can for cyclists, with rounded edges at the top & bottom, & other details, having discovered that A., whom he had at one time employed to make the cans for him, was infringing the design, complained. A., after some correspondence, wrote a letter expressing his regret that he should have infringed the design, in any way & thereby undertook in the future not to manufacture, sell, or offer for sale, any cans similar to, or only colourably differing from W.'s

W., subsequently discovering, as he alleged, that A. was again infringing, commenced proceedings against him, & moved for an interlocutory injunction to restrain A. from infringement, & from a breach of his undertaking.

The cans manufactured by A. were in all respects similar to W.'s except that the edges at the top & bottom were sharp. A. did not dispute the validity of W.'s design, but contended that the only novelty in W.'s can was the rounded edges, & that he, A. did not infringe:—*Held*: the only novelty in pltf.'s design was the rounded edges, & A. did not infringe.—*WALKER & CO. v. SCOTT (A. G.) & CO., LTD.* (1892), 9 R. P. C. 482.

*Annotation*:—*Refd.* *Re Clarke's Design* (1896), 2 Ch. 38.

**982.** — —.]—S. registered a design consisting of a conical tower in the form of a lighthouse with a spiral slide round it, the design being intended to be applied to a means of popular amusement called by S. a "Helter Skelter." S. brought an action against W. for infringement of this design & obtained an interlocutory order for an injunction. W. afterwards made alterations in his tower, & as altered it had a machiolated tower instead of a lighthouse. A conical tower with a slide round it was old for the purpose. Pltf. contended that deft.'s tower, as altered, was still an infringement of his registered design & applied to commit deft., & obtained an order for committal, but the order was suspended on certain conditions:—*Held*: deft.'s tower, as altered, had not the only novel feature of pltf.'s design, namely, the lighthouse, & did not infringe pltf.'s design.—*STAPLES v. WARWICK* (1900), 23 R. P. C. 609, C. A.

**983.** — *Addition of new part to part of registered design.*—*SIMMONS v. MATHIESON & Co., LTD.*, No. 908, *ante*.

**984.** *Article produced on same principle — Different in style.*—Where pltf., who had registered a "pattern" by sample without specification under the Designs Acts, moved to restrain deft. from using a pattern, similar in principle, though differing in style, to his own.

The ct. refused to grant an injunction, & ordered the motion to stand over till the hearing of the cause.—*THOM v. SYDDALL* (1872), 26 L. T. 15; 20 W. R. 291.

*Annotations*:—*Apld.* *Sachett & Barnes v. Clozenburg* (1909), 27 R. P. C. 104. *Refd.* *Glyn v. Weston Feature Film Co.*, [1916] 1 Ch. 261.

#### C. Obvious or Fraudulent Imitation.

**985.** *Distinction between obvious & fraudulent.*—An article is an obvious imitation when it is apparent to the eye that it has been copied con-

*Sect. 4.—Infringement: Sub-sect. 1, C.; sub-sect. 2. Sect. 5: Sub-sects. 1 & 2.]*

sciously or unconsciously from the design. The phrase "obvious imitation" covers cases of fraudulent copying, though it is not confined to such cases. & it seems clear that the legislature in using the phrase "fraudulent imitation" is contemplating an article that is fraudulent without being obvious. It would therefore seem to be contemplating a case in which the difference between the article & the design are obvious, & in which recourse must be had to extrinsic evidence to establish the fact of deliberate copying. In such a case the existence of comparatively unimportant differences from the design sufficient to prevent the imitation from being obvious is not a fact of which the imitator can avail himself & may indeed be one of the elements of the imitator's fraud. — *ROSE v. PICKAVANT (J. W.) & Co., LTD. (1923), 40 R. P. C. 320.*

**986. Conscious imitation — Producing substantial similarity.**—Pltfs. registered & sold a design in braid, applied to a boy's jacket. Defts. sold jackets with a design in braid applied to them, which jackets were substantially of the same shape as pltf.'s. The designer of defts.' ornamented jackets had previously seen pltfs.' article:—*Held*: defts. had made a "fraudulent imitation" of pltfs.' design within the meaning of 5 & 6 Vict. c. 100, s. 7.

A fair imitation of a design is not prohibited by 5 & 6 Vict. c. 100, s. 7, but, under the words "an such design, or any fraudulent imitation thereof, there may be a case where, although there are slight variations, the "design" itself has been applied; fraudulent imitation" is equivalent to conscious imitation, where, that is, a man, having the design before him, knowingly imitates, & that imitation is not sufficiently original to be protected as a fair imitation. — *BARRAN v. LOMAS (1880), 28 W. R. 973.*

*Annotations: — Reifd. Sachett & Barnes v. Clozenberg (1909), 27 R. P. C. 101; Glyn v. Weston Feature Film Co., [1916] 1 Ch. 261.*

**987. — — — — —]**—Both pltfs. & defts. were calico printers. Pltfs. had registered four designs, & some months after registration discovered that goods bearing designs similar in effect to theirs were being sold by defts. Defts.' designs did not actually reproduce the minutiae of pltfs.' designs, but they were a combination of similar drawings so arranged & coloured as to produce a similar effect. Defts. admitted that they had submitted pltfs.' designs to their artist in Paris so that he might, whilst producing the same effect, which was the fashion in vogue, avoid imitating the minutiae of pltfs.' designs. The question arose whether a registered design, consisting of a dominant & of subordinate parts so arranged as to produce a certain general effect could be infringed by a design producing a similar effect, although such design imitated neither the dominant nor the subordinate parts of the original & registered designs. It was contended that general effect could not be registered:—*Held*: defts.' design was in a legal sense a "fraudulent & obvious

imitation" within Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 58, as the general effect of defts.' design was a reproduction of that of pltfs., & could not have been produced without copying the ideas of pltfs. & the ct. would grant an injunction against defts. until the trial.—*GRAFTON v. WATSON (1884), 50 L. T. 420; affd., 51 L. T. 141, C. A.*

*Annotations: — Apld. Sherwood & Cotton v. Decorative Art Tile Co. (1887), 4 R. P. C. 207. Consd. Nevill v. Bennett (1898), 15 R. P. C. 412. Distd. Pilkington v. Abrahams (1911), 32 R. P. C. 61. Apld. Wallpaper Manufacturers v. Derby Paper Staining Co. (1925), 42 R. P. C. 413. Reifd. Rose v. Pickavant (1923), 40 R. P. C. 320.*

**988. — — — — —]**—*SHERWOOD & COTTON v. DECORATIVE ART TILE CO., No. 895, ante.*

**989. — — — — —]**—The proprietor of a registered design for a dinner set in porcelain, brought an action against a person who was selling a dinner set in earthenware, alleging that deft.'s design was an imitation, & gave notice of motion for an interlocutory injunction. The nature of pltf.'s design was stated to be "richly embossed shape." Deft. gave notice of motion to strike pltf.'s design off the Register. By arrangement the motions were heard on affidavit evidence & treated as the trial of the action. The dishes, etc., of the two sets were nearly of the same size, & were both elliptical in shape. The ornamental decoration was, in the opinion of the judge, dissimilar:—*Held*: assuming deft. had imitated pltf.'s design in desiring to rival it, there was no such similarity as to amount to an infringement, & deft. not pressing his motion, the action & motion to strike off were both dismissed.

The two things are, according to my eye, quite different. There are some resemblances, & [counsel] says: "We know that they had our dish before them & were aware of it, & no doubt they imitated in the sense of wishing to rival them & bring out something which would attract public attention & become fashionable." That, of course, may be conceded; but where did the similarities come from? It is for defts., according to him, to explain when once the similarities are established, the want of good faith on their part. "It is not," he says, "my business to show the presence of bad faith." I demur to that unless you establish such similarities as of themselves constitute an infringement (*KEKEWICH, J.*).—*DEMARTIAL & CO. v. BOOTH (1892), 9 R. P. C. 409.*

**990. — — — — —]**—*HARPER (JOHN) & CO., LTD. v. WRIGHT & BUTLER, LAMP MANUFACTURING CO., LTD., No. 914, ante.*

**991. — — — — —]**—*WALLPAPER MANUFACTURERS, LTD. v. DERBY PAPER STAINING CO., No. 924, ante.*

**992. Adoption of general idea — Difference in treatment.**—This was an action for infringement of a registered design for lace. Pltfs.' design consisted of a scallop or border formed of roses at intervals, connected by arcs of five little rings with open-work centres; inside this was a flowing backing consisting of a continuous branch of coral, the centre line being open work, a branch extending to each rose, & there being also a little detached branch of coral inside the general line & between

#### PART IV. SECT. 4, SUB-SECT. 1.—C.

**9861. Conscious imitation — Producing substantial similarity.**—Pltfs. were registered owners of an industrial design for a cook-stove, called the "Royal Favourite, 9-25," which, as a special article of their manufacture, had become well known to the trade. Defts. procured one of such stoves, caused a model to be made from it, & with some minor alterations, chiefly in

the ornamentation, manufactured a stove called the "Royal National, 9-25," & subsequently registered it as an industrial design. In an action by pltfs. for infringement, & for an order to expunge defts.' design from the Register, the weight of evidence established that defts.' design was an obvious imitation of that of pltfs.:—*Held*: defts. should be enjoined from infringing pltfs.' design, & the registra-

tion of defts.' design should be expunged from the Register.—*FINDLAY v. OTTAWA FURNACE & FOUNDRY CO., LTD. (1902), 22 C. L. T. 200; 7 Exch. C. R. 338.—CAN.*

**m. Fraudulent imitation.**—The ct. will restrain the imitation of a trader's distinctive device & get up where the imitation is calculated to deceive. Where the imitation is fraudulent the ct. will not scrutinise the small

each rose. The design was placed on a ground work of point de Paris lace. Defts.' design alleged to be an infringement had a scollop consisting of a large circular design formed of six little rings surrounding an oval, all with open-work centres, in place of plfts.' roses, connected by open-work arcs; inside, a flowing backing of regularly shaped branch work, more like foliage than coral, the ends of the branches not being abrupt, with a branch extending to each rose, but no detached branch. The whole was placed on a similar ground work to plfts.' Defts. denied infringement, & alleged that plfts.' design was not novel or original, but this latter defence at the trial was only alleged as to the details of the design, not to the whole combination:—*Held*: plfts.' design was novel & valid, but had not been infringed, the differences being so considerable that the one could not be mistaken for the other. The action was dismissed with costs, except those of the issue of novelty, which were given to plfts.

The general idea of the design is old; that is to say, the design of a scalloped border with a flowing backing, & even the class of border & the class of backing is old in each case, & even a coral backing with a scalloped border was not novel. . . . The design is good, in my opinion, because it is a special & very pretty example of the general idea that I have referred to. It is a valid claim for a combination, & as so treated, it appears to me to be original, & as I have said, extremely pretty one too. But, this being so, in my opinion there has been no infringement. The design of defts. is not, in my opinion, an imitation of plfts.' design, treated, as I have said it ought to be, as a combination design. The differences are so considerable that, in my opinion, no one could, or would, mistake one design for the other or confuse the two. . . . It appears to me that the resemblances, so far as they exist, are only in those general ideas of plfts.' design, which were, as I have said, common & old; & this view of mine is really in accordance with the expert evidence, taken as a whole (ROMER, J.). *BIRKIN & Co. v. PRATT, HURST & Co., LTD.* (1895), 12 R. P. C. 371.

993. —.—.—[This was an action for infringement of a registered design for tombstones. Pltf.'s design showed a stone 2 feet 5 inches high & 2 feet 9½ inches in width, having on either side an octagonal pinnacle supported by a black porcelain pillar, with moulded brass & caps & three black studs or buttons. Deft.'s stone, which was plain, was of the same width as the pltf.'s but was 1 foot 6½ inches higher. There was a pinnacle on each side of the headpiece supported by a black porcelain pillar, but the pinnacles were oblong two sided instead of being octagonal:—*Held*: there was no infringement, & though defts. might have imitated pltf.'s general idea, they had not taken his registered design.—*HOLDEN v. HODGKINSON BROTHERS* (1904), 22 R. P. C. 102.

#### SUB-SECT. 2.—INFRINGEMENT BY RETAIL DEALER.

994. *Necessity for knowledge of registration.*—The owner of certain registered designs brought an action claiming an injunction & damages for infringement, & for having sold & exposed for sale goods bearing some of these designs or colourable imitations thereof, against defts., who were not

manufacturers but agents for the sale of goods on commission. The main defence relied on was that defts. had sold no goods to which any design of pltf. or any imitation thereof had been applied, knowing that the same had been so applied, without the consent of pltf., it was admitted that defts. had sold goods bearing designs similar to certain of pltf.'s designs without such knowledge:—*Held*: defts. had not sold with knowledge that the designs were registered, or that they had been applied without the consent of the registered proprietor; there was no intention to sell or expose for sale proved on the part of defts. since they acquired such knowledge.—*SMITH v. ROBERTS (LEWIS & Co. (1888), 5 R. P. C. 611.*

995. —.—.—[This was an action for infringement of a registered design for powder puffs. Deft. admitted that he had purchased three puffs infringing the design, one of which he had sold to an unknown customer, & another to pltf., on which occasion he first was informed that the puffs were an infringement. Deft. then at once promised to sell no more, & removed the third puff from his shop window; but deft. declined to give a formal undertaking demanded by pltf.'s solr. not to sell any more. Pltf. then commenced an action. Pltf. took out a summons for judgment under R. S. C., Ord. 32, r. 6, contending that as deft. admitted that he had still an infringing article in his possession, he ought to have given the undertaking, & that pltf. was therefore entitled to an injunction. The action was dismissed, with costs.—*JAN v. GROSSMAN & SKFWES* (1895), 12 R. P. C. 537.

#### SECT. 5.—LEGAL PROCEEDINGS.

##### SUB-SECT. 1.—JURISDICTION.

996. *County court.*—M. registered as a design a picture of a basket, stating that his claim was for the pattern of the basket, consisting in the osiers being worked in singly & all the butt ends being outside. M. commenced an action in the county ct. for infringement of this design. The action was tried before the judge & a jury. Deft. alleged the design was not novel, & was not a proper subject of registration. The jury found a verdict for pltf. on the question of novelty, but on the application of deft. for a new trial, the judge, doubting whether the design was a proper subject for registration, gave deft. leave to appeal:—*Held*: what pltf. had registered was, in reality, a process or mode of manufacture, & was not a design within the meaning of the Patents, Designs, & Trade Marks Act, 1883 (c. 57).—*MOODY v. TREE* (1892), 40 W. R. 558; 8 T. L. R. 511; 9 R. P. C. 333.

*Annotations*:—*Distd.* *Bayer v. Symington* (1907), 24 R. P. C. 65. *Re Clarke's Design*, [1896] 2 Ch. 38; *Pugs v. Riley* (Cyclo Co., [1912] 1 Ch. 613; *Allen West v. British Westinghouse Electric & Manufacturing Co.* (1916), 33 R. P. C. 157.

—.—.—[See 1907 Act, ss. 72, 92.

*Palatine Court of Lancaster.*—[See Chancery of Lancaster Act, 1890 (c. 23), s. 3.

*Scottish & Irish courts.*—[See 1907 Act, ss. 94, 95.

##### SUB-SECT. 2.—RECTIFICATION OF REGISTER.

See 1907 Act, s. 93.

997. *Jurisdiction of court to order rectification—In action for infringement—Though rectification not applied for.*—(1) Plfts., as proprietors of six

differences so carefully, but will look at the general get-up as well as the distinctive features in order to ascertain

whether there is any likelihood of deception.—*HATTINGHAM'S YEAST, LTD. v. FRIEDLIV*, [1919] T. P. D. 417.—*S. AF.*

PART IV. SECT. 5, SUB-SECT. 2.  
n. *Exchequer Court of Canada.*—The Exchequer Ct. of Canada has sole

*Sect. 5.—Legal proceedings: Sub-sects. 2, 3, 4, 5 & 6.]*

designs registered in class 15 for cloth for fancy vestings, brought an action for infringement. On their forms for application plffs. stated as follows: "The novelty being the arrangement of stripes between the edges of the piece & the ground pattern, as shown in the representations." Defts. pleaded non-infringement, prior user, the want of novelty, & denied that plffs. were the authors of the registered designs. At the trial plffs. set up a broad claim for cloth having woven borders between the ground pattern & the plain margins at the edges of the cloth, with the novel feature of an additional border & plain margin on one side only of the ground intended to be cut off & used for pocket bindings:—*Held*: as regards the feature of the designs alleged at the trial to be novel, namely, the additional border, plffs. were not the authors thereof, & fancy vestings with a plain margin & a composite stripe border were not new at the date of registration, & plffs. could not claim this broad feature as a novelty, & there was no substantial novelty or originality in any of the designs. The action was dismissed with costs.

(2) Defts. by their defence denied that any of the designs were new or original, & they denied infringement, & under orders made in the action upon plffs.' application, they furnished two sets of particulars of the want of novelty, anticipation & prior user alleged. There was not any cross application by defts. to rectify the Register, but as the action has been conducted throughout by both parties upon the footing that all the defences raised could be dealt with in the action I have determined to deal with it in the same way without raising any objection of form (SWINFEN EADY, J.).—*DOBLE v. SPAENDONCK* (1910), 27 R. P. C. 440.

998. —————.]—*SMITH v. GRIGG, LTD.*, No. 1005, *post*.

999. — **Registered proprietor out of jurisdiction.]—***Re COOK & BERHEIMER CO.'S REGISTERED DESIGN* (1913), 30 R. P. C. 407.

1000. **Rectification of name on register.—Limited company changing name.]—***Re PNEUMATIC TYRE CO.'S REGISTERED DESIGNS* (1894), 11 R. P. C. 636.

1001. — **Design inadvertently registered by agent in own name.]—**A design was registered by the instructions of the author, but was inadvertently registered by the agent in his own name. The author of the design moved to vary the register by removing the agent's name & substituting his own name as the proprietor of the design. The agent did not appear, & as it appeared by the evidence that it was a case of mistake & not fraud on the part of the agent, the order was not opposed by the Comptroller. The order was made, but no order was made for costs except as to the Comptroller's costs.—*Re GROCOTT'S DESIGN* (1899), 17 R. P. C. 139.

1002. **Manufacture exclusively outside United Kingdom.—Cancellation postponed to allow manufacture within United Kingdom.]—**Applications were made under 1907 Act by E. to cancel the registration of two designs (Nos. 614,643 & 615,469) registered by T. for filling wires for use in connection with loose leaf binders or files, on the ground that the designs were used for manufacture exclusively or mainly outside the United Kingdom. The applications were opposed by D. who had acquired the copyright in the designs by assign-

ment from T. It was admitted that as regards design No. 615,469 there had been no manufacture either in the United Kingdom or abroad at the time of the application. As regards No. 614,643 it appeared that the design had been used for manufacture exclusively outside the United Kingdom at the date of the application, but it was contended that satisfactory reasons had been given for non-use in the United Kingdom up to that time, & that, as to the future, arrangements had been made for manufacture to an adequate extent in this country. The arguments in support of this contention were (a) that D. was entitled to a reasonable time to commence work in this country & that period had not been exceeded, (b) that the impossibility of getting the necessary machines for manufacture earlier was in any case a sufficient excuse for not commencing work at an earlier date, (c) that D. had made all reasonable efforts to get such machines, & that in fulfilment of an agreement made between D. & T. the designs had, in fact, been assigned to D. before the commencement of these proceedings, while the first two machines were delivered within a fortnight of the filing of the application, & (d) that there was, in fact, at the time of the hearing, adequate manufacture of the design in the United Kingdom:—*Held*: (1) as regards design No. 615,469 there was no manufacture anywhere at the date of the application, & consequently the application failed. (2) As regards design No. 614,643 although the design was used for manufacture exclusively outside the United Kingdom at the date of the application, the proprietor of a design was entitled to a reasonable time to commence working in the United Kingdom, & as before the date of application arrangements had been made which, when completed, would result in an adequate manufacture of the design in the United Kingdom, the proper order was that the registration should be cancelled, not forthwith, but six months from the date of the order, unless in the meantime it was shown to the Comptroller's satisfaction that the design was manufactured to an adequate extent in the United Kingdom.—*Re TIMMLER'S DESIGNS* (1914), 31 R. P. C. 59.

**SUB-SECT. 3.—INJUNCTION.**

**Injunction generally.]—***See* INJUNCTION, Vol. XXVIII., pp. 355 *et seq.*

1003. **Interim injunction.—Necessity to prove novelty.]—***LIPMAN v. BRANCH & SONS* (1896), 40 Sol. Jo. 771.

1004. — **Validity genuinely in dispute.]—***WHITELOCK v. AUTOMATIC PHONOGRAPH CO.* (1908), 25 R. P. C. 615.

1005. —————.]—In an action for infringement of a registered design the ct. will, as a general rule, refuse to grant an interlocutory injunction if the registration is of recent date & its validity is genuinely disputed.

*Qu*: whether in order that the validity of a design may be put in issue, an application must be made to cancel the registration of the design.—*SMITH v. GRIGG, LTD.*, [1924] 1 K. B. 655; 93 L. J. K. B. 237; 130 L. T. 697; 40 T. L. R. 248; 68 Sol. Jo. 561; 41 R. P. C. 149, C. A.

1006. **Final order by consent.—Right to move in open court.]—**Where plff. in an action for the infringement of his registered design, or trade

original jurisdiction to entertain proceedings for expunging a registered industrial design, & should exercise

such jurisdiction without concerning itself with proceedings begun in a provincial ct. for the same purpose.—

*EPSTEIN v. O-PEE-CHKE CO., LTD.*, [1927] 3 D. L. R. 160; [1927] Exch. C. R. 156.—**CAN.**



mark, or patent, is proceeding to obtain a judgment restraining the infringement, it is desirable that some publicity should be given to the order; &, although deft. has consented to the order, pltf. is entitled to the costs of moving in open ct. & not merely to such costs as would have been incurred by applying by summons in chambers.—*SMITH (J. T.) & JONES (J. E.), LTD. v. SERVICE, REEVE & Co.*, [1914] 2 Ch. 576; 83 L. J. Ch. 870; 111 L. T. 669; 30 T. L. R. 599; 58 Sol. Jo. 687.

*Annotation*.—*Reidf. Performing Right Soc. v. Mitchell & Booker (Palais de Danse)*, [1924] 1 K. B. 762.

#### SUB-SECT. 4.—ACTION FOR PENALTY.

**1007. What penalty awarded.]**—The proprietors of a registered design for a combination of a bassinette & mail cart brought an action for infringement, claiming two penalties of £50 each. Defts. alleged that the design was not new or original & called evidence to show that a similar design had been previously published. The jury found that there had been no prior publication. Judgment was given for pltf. for £100 & an injunction.—*RIVETT v. GRIMSHAW* (1894), 11 R. P. C. 351.

**1008.** —.]—This was an action for infringement of a registered design for lace. Defts. did not say that pltf.' design was not new & original, but they alleged that, by reason of the publication of other lace designs, pltf.' design could not be widely construed & held to cover the design of defts.' lace:—*Held*: on a comparison of the two designs, defts.' design was a clear infringement.

Order made for an injunction, with costs, setting off any costs incurred on account of a claim by pltf. to a narrow width of lace, which was abandoned, & a penalty of £10, defts. undertaking to deliver up all infringing lace.—*OLIVER & Co. v. THORNLEY & Co.* (1896), 13 R. P. C. 490.

**1009. Penal action—Interrogatories not allowed.]**—By Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 58, which prohibits infringements of copyright in registered designs, it is enacted that "any person who acts in contravention of this sect. shall be liable for every offence to forfeit a sum not exceeding £50 to the registered proprietor of the design, who may recover such sum as a simple contract debt by action":—*Held*: a sum so forfeited must be taken to be a penalty, & pltf. in an action to recover such a sum is not entitled to interrogate deft. as to the infringements charged.—*SAUNDERS v. WIEL*, [1892] 2 Q. B. 321; 62 L. J. Q. B. 37; 67 L. T. 207; 40 W. R. 594; 8 T. L. R. 650; 36 Sol. Jo. 501; 4 R. 1, C. A.

*Annotations*.—*Fold. Astle v. Mansfield* (1905), 22 R. P. C. 356. *Mentd. Re Derbyshire County Council & Derby Corp.*, [1896] 2 Q. B. 53; *Thomson v. Clannorris*, [1900] 1 Ch. 718; *Jarvis v. Surrey County Council*, [1925] 1 K. B. 554.

**1010.** —.]—The registered proprietors of a design commenced an action for infringement, claiming an injunction, damages or alternatively penalties; & delivery up. Pltf., however, under an order elected to claim penalties & not damages, & amended their statement of claim accordingly. Deft. denied infringement & alleged the invalidity of the design. Pltf. then applied for leave to deliver interrogatories. Some of the proposed interrogatories related to the acts complained of & others to the issue of novelty.

The application was adjourned into ct.:—*Held*: the action was substantially an action to recover penalties, & leave to deliver interrogatories was refused.—*TITUS ASTLE, LTD. v. MANSFIELD* (1905), 22 R. P. C. 356.

#### SUB-SECT. 5.—IN RESPECT OF THREAT OF LEGAL PROCEEDINGS.

**1011. Common law action—On proof of mala fides—& resulting damages.]**—Declaration in case stated that pltf. was a printer of silk goods, & had delivered to deft. a lot of such goods, in which were woven fabrics of silk, printed by pltf. with a design for the ornamenting of them, which had been published by pltf. to deft. & others; & pltf. was about to print other fabrics of silk with the same design, & to publish the same in the way of his trade for gain; of all which deft. had notice: but deft., contriving to deceive, injure & defraud pltf., & induce him to desist from printing more with the design & to deprive him of the gains he would have made & to cheat him of the benefit of the design, & to acquire the same for the sole benefit of deft. & to put pltf. to expense, falsely, fraudulently & deceitfully represented to pltf. that in the lot there was a copy of a registered pattern:—*Held*: the declaration showed a cause of action, it appearing that deft. had knowingly uttered a falsehood with the design to deprive pltf. of a benefit & acquire it to himself, & the damage naturally flowing from pltf.'s belief & the innuendo was unnecessary, & could not therefore be the ground of an objection to the declaration.—*BARLEY v. WALFORD* (1846), 9 Q. B. 197; 15 L. J. Q. B. 369; 10 Jur. 917; 115 E. R. 1249; *sub nom. BARLEY v. WALFORD*, 7 L. T. O. S. 252.

*Annotations*.—*Reidf. Wren v. Wield* (1869), 20 L. T. 1007. *Mentd. Ritchardson v. Silvester* (1873), L. R. 9 Q. B. 31; *Low v. Bouverle*, [1891] 3 Ch. 82.

**Statutory action.]**—See 1907 Act, s. 61.

**Threats action in connection with patents.]**—See PATENTS, Vol. XXXVI., pp. 844–854, Nos. 3315–3422.

#### SUB-SECT. 6.—PRACTICE AND PROCEDURE.

**1012. Amendment of particulars of objection.]**—The rule of practice in a patent action that deft. will be allowed to amend his particulars of objections on terms that pltf. may elect to discontinue his action, & deft. bear the costs subsequent to the delivery of his first particulars, is applicable to actions to restrain infringement of copyright in registered designs.—*MORRIS WILSON & Co. v. COVENTRY MACHINISTS CO.*, [1891] 3 Ch. 418; 60 L. J. Ch. 524; 40 W. R. 152; 8 R. P. C. 353.

*Annotation*.—*Consd. Woolley v. Broad*, [1892] 2 Q. B. 317.

**1013.** —.]—*WOOLLEY v. BROAD*, No. 957, ante.

**1014. Successful appeal from refusal of Comptroller to register—Right of Comptroller to costs.]**—The question whether appcts. should pay the Comptroller's costs [on a successful appeal from refusal of Comptroller to register] was argued at a separate hearing, & appcts. contended that the main question decided in this case had been decided on a previous application by D., & that under the circumstances no costs should be given to the Comptroller:—*Held*: on D.'s application the

#### PART IV. SECT. 5, SUB-SECT. 6.

*o. Particulars—Of prior users.]*—*CALPURN v. SHORE*, [1926] 1 D. L. R. 631; [1926] 1 W. W. R. 209; 35 Man. L. R. 424.—CAN.

*Sect. 5.—Legal proceedings; Sub-sect. 6. Sects. 6 & 7. Part V. Sects. 1 & 2 Sub-sects. 1 & 2.]*

matter upon which appets. relied had not been pressed, & was not dealt with in the judgment; there ought to be uniformity in the practice in regard to trade marks & designs; the case could not be treated as a test case; & the costs of the Comptroller should be borne by appets., but in those costs there should not be included any costs of the separate discussion as to costs. - *Re BRAMPTON BROTHERS, LTD.'S APPLICATION*, [1920] Ch. 255; 95 L. J. Ch. 235; 134 L. T. 750; 43 R. P. C. 55.

#### SECT. 6.—ASSIGNMENTS AND LICENCES.

**1015. What amounts to licence—Publication of book of designs—Book containing notice that designer's permission necessary.]—***DE LA BRANCHARDIERE v. ELVERY*, No. 951, *ante*.

## Part V.—Trade Names and Passing Off.

### SECT. 1.—IN GENERAL.

**1017. Right of trader—No right to pass off goods as those of another.]—**Declaration stated that plffs., manufacturers of cutlery, were accustomed to mark their knives with certain marks denoting their manufacture, & that defts., intending to injure plffs., did fraudulently impose similar marks on knives made by defts., to induce the public to believe that the knives made by defts. were manufactured by plffs., etc.:—*Held*: it was properly left to the jury to consider, whether there was such a resemblance between defts.' marks & those used by plffs., as was calculated to deceive the public; & whether defts. used the marks with an intention to deceive.

No person has a right to sell his own goods as & for goods manufactured by another person.—*RODGERS v. NOWELL* (1847), 5 C. B. 109; 17 L. J. C. P. 52; 10 L. T. O. S. 88; 11 Jur. 1039; 130 E. R. 816.

*Annotations*:—*Refd.* *Reddaway v. Bentham Hemp-Spinning Co.*, [1892] 2 Q. B. 639; *Bow v. Hart*, [1905] 1 K. B. 592.

**1018. ———.]—**One trader cannot, without infringing the rights of another trader, represent goods which are not that other trader's goods or are not that other trader's goods of a particular class or quality to be that other trader's goods or that other trader's goods of that particular class or quality.—*SPALDING & BROTHERS v. GAMAGE (A. W.) LTD.* (1915), 84 L. J. Ch. 449; 31 T. L. R. 328, H. L.

**1019. ———.]—**To refer to rival's goods.]—(1) A trader has a right to make & sell machines similar in form & construction to those made & sold by a rival trader, & in describing & advertising his own machines to refer to his rival's machines & his rival's name, provided he does this in such a way

#### PART V. SECT. 1.

**1017 i. Right of trader—No right to pass off goods as those of another.]—**The principle on which the *cf.* protects trade marks is, that it will not permit a person to sell his own goods as the goods of another; a person, therefore, will not be allowed to use names, marks, letters, or other *indicia*, by which he may pass off his own goods to pur-

chasers as the manufacture of another person.—*McCALL v. THEAL* (1880), 28 Gr. 48.—**CAN.**

**1017 ii. ———.]—***CANADA PUBLISHING CO., LTD. & BEATTY v. GAGE* (1885), 11 S. C. R. 306.—**CAN.**

**1017 iii. ———.]—**No trader importing goods can lawfully adopt a trade mark which is calculated to cause his goods to bear in the market the

### SECT. 7.—OFFENCES.

*See* 1907 Act, s. 89.

**1016. Pirating design—What must be proved.]—**A conviction under 5 & 6 Vict. c. 100, ss. 7 & 8, for exposing to sale an article of manufacture to which a registered design had been applied, did not state that deft. had received knowledge that the consent of the proprietor had not been given to such application. The conviction & depositions taken before the magistrate were removed in this *ct.* by *certiorari*. The depositions left it uncertain whether it had been proved before the magistrate that deft. had received the notice required by the statute, or only notice that the proprietor had not consented to the exposure of the article for sale; but it was stated in the affidavits that a sufficient notice was, in fact, proved before the magistrate:—*Held*: the conviction was bad; & there were no satisfactory materials to enable the *ct.* to amend the conviction under Quarter Sessions Act, 1849 (c. 45), s. 7.—*R. v. WELCH* (1851), 17 L. T. O. S. 105; 15 J. P. 338.

as to obviate any reasonable probability of misunderstanding or deception.

(2) There is another way in which goods not plffs.' may be sold as & for plffs. A name may be so appropriated by user as to come to mean the goods of plffs., though it is not, & never was, impressed on the goods, or on the packages, in which they are contained, so as to be a trade mark, properly so called, or within the recent statutes. Where it is established that such a trade name bears that meaning, I think the use of that name, or one so nearly resembling it as to be likely to deceive, as applicable to goods not plffs.', may be the means of passing off those goods as & for plffs.' just as much as the use of a trade mark; & I think the law, so far as not altered by legislation, is the same (*LORD BLACKBURN*).—*SINGER MANUFACTURING CO. v. LOOG* (1882), 8 App. Cas. 15; 52 L. J. Ch. 481; 48 L. T. 3; 31 W. R. 325, H. L.

*Annotations*:—*As to* (1) *Apld.* *Re Leonard & Ellis's Trade Mk.*, *Leonard & Ellis v. Wells* (1884), 26 Ch. D. 238. *Distd.* *Slazenger v. Feltham* (1888), 6 R. P. C. 531; *Singer Manufacturing Co. v. Spence* (1893), 10 R. P. C. 207. *Consd.* *Powell v. Birmingham Brewery Co.*, [1896] 2 Ch. 51; *Armstrong Oiler Co. v. Patent Axlebox & Foundry Co.* (1910), 27 R. P. C. 362. *Distd.* *Pullman v. Pullman* (1919), 36 R. P. C. 240. *Refd.* *Symington v. Footman, Pretty* (1887), 56 L. T. 696; *Jay v. Ladler* (1888), 40 Ch. D. 619; *Reddaway v. Bentham Hemp-Spinning Co.*, [1892] 2 Q. B. 639; *Reddaway v. Banham*, [1896] A. C. 199; *Bourne v. Swan & Edgar*, *Re Bourne's Trade Mk.*, [1903] 1 Ch. 211; *Weingarten v. Bayer* (1903), 88 L. T. 168; *Kinnel v. Ballantine* (1909), 27 R. P. C. 185; *Horlicks Malted Milk Co. v. Summerskill* (1916), 114 L. T. 484; *Goddard v. Watford Co-op. Soc.* (1921), 41 R. P. C. 218. *As to* (2) *Apld.* *Goodfellow v. Prince* (1887), 35 Ch. D. 9. *Consd.* *Borthwick v. Evening Post* (1888), 37 Ch. D. 449; *Free Fishers & Dredgers of Whitstable v. Elliott* (1888), 4 T. L. R. 273; *Powell v. Birmingham Vinegar Brewery Co.*, [1891] 3 Ch. 449.

**1020. Test of infringement of right—Whether public misled.]—***LEE v. HALEY*, No. 1130, *post*.

same name as those of a rival trader.—*TAYLOR v. VIRASAMI CHETTI* (1882), 1 L. R. 6 Mad. 108.—**IND.**

*p.* ———.]—*DUN v. CROYSBILL* (1889), 18 L. L. O. S. 243.—**CAN.**

**1020 i. Test of infringement of right—Whether public misled.]—**The name of the British Columbia Permanent Loan & Savings Co. is not so similar to the name of the Canada Permanent Loan



## SECT. 2.—TRADING NAMES OF BUSINESSES.

## SUB-SECT. 1.—IN GENERAL.

**1021. Right to assume business name.]**—Everybody has a right to assume another name; he may take a business name & trade under it (COLERIDGE, J.).—R. v. WHITMORE (1914), 10 Cr. App. Rep. 204, C. C. A.

**1022. Right to nom de plume.]**—G. L. invented a *nom de plume* by which her contributions to a newspaper were signed & known. The name was also used by her on cards or certificates of membership of a league instituted by her for the purposes of the same paper:—*Held*: as against the proprietor of the paper G. L. was entitled to the exclusive right to print, publish, & use her *nom de plume* after her connection with the publication had ceased.—LANDA v. GREENBERG (1908), 24 T. L. R. 441; 52 Sol. Jo. 354.

**Right to trade under own name.]**—See Sub-sect. 2, *post*.

**Registration of business names.]**—See Sub-sect. 3, *post*.

## SUB-SECT. 2.—RIGHT TO USE OWN NAME.

**1023. General rule.—Person entitled to trade in own name.]**—BURGESS v. BURGESS, No. 1155, *post*.

**1024. ———.]**—NICHOLLS v. KIMPTON (1887), 3 T. L. R. 674.

**1025. ——— Though occasional confusion results.]**—TURTON v. TURTON, No. 1150, *post*.

**1026. ———.]**—A man, so long as he acts honestly, may trade under his own name, even though the similarity of such name to the name under which another person has previously been trading may occasionally lead to confusion or lead to the goods of the one being mistaken for the goods of the other trader.—AKT. HÖMMEL, HÄMATOGEN v. HÖMMEL (1912), 56 Sol. Jo. 399.

**1027. ——— In absence of misrepresentation & fraud.]**—Although, in the absence of fraud or false representation, a man is entitled to carry on business in his own name in competition with a similar business, previously well established under the same name, notwithstanding that confusion & mistake may in consequence arise, yet, if he has never carried on such a business on his own account or in partnership with others, he cannot, by promoting & registering a co. with a title of which his name forms a part, confer upon that co. the rights which he, as an individual possesses in the use of that name.—FINE COTTON SPINNERS & DOUBLERS' ASSOCN., LTD. & CASH (JOHN) & SONS, LTD. v. HARWOOD CASH & CO. LTD.,

[1907] 2 Ch. 184; 76 L. J. Ch. 670; 97 L. T. 45; 23 T. L. R. 537; 14 Mans. 285; 24 R. P. C. 533.

*Annotations*:—Apld. Kingston, Miller v. Kingston, [1912] 1 Ch. 575; Waring & Gillow v. Gillow & Gillow (1916), 32 T. L. R. 389. *Consd.* Donnan v. Meadows, [1922] 2 Ch. 332.

**1028. ———.]**—JAMIESON & CO. v. JAMIESON, No. 1151, *post*.

**1029. ———.]**—VALENTINE MEAT JUICE CO. v. VALENTINE EXTRACT CO., LTD., No. 1038, *post*.

**1030. ———.]**—CASH (J. & J.), LTD. v. CASH, No. 1039, *post*.

**1031. ———.]**—John Brinsmead & Sons, Ltd., the well-known pianoforte makers, brought an action against Edward George Stanley Brinsmead, a pianoforte manufacturer, & Waddington & Sons, Ltd., pianoforte dealers, to restrain them from passing off pianos made by Stanley Brinsmead as & for the pianos of pltf. co., & they also charged defts. with conspiring together to so pass off the pianos. Pltf. co. put on the fall of their pianos the words "John Brinsmead & Sons, London," in capital roman letters surrounded by lines. On the fall of the pianos made by deft. there appeared in a running hand the name "Stanley Brinsmead" with a broad dash at the foot of the "d" coming back under the whole of the name, & the word "London" in printed roman characters underneath. In the curls of the initial "S" in small letters were placed the names "Edward" & "George." The evidence showed that a "Brinsmead Piano" meant to the trade & to the public a piano made by pltf. co., & that the Christian names used by pltf. co. & that of deft. were not generally known. It also appeared that deft.'s pianos were cheap instruments, & had a sale amongst a different class of people from that to which pltf. co.'s new pianos were sold. Defts. Waddington & Sons, Ltd., previous to & at the trial offered to submit to an injunction restraining them from passing off if the charge of conspiracy were withdrawn, which offer was not accepted by pltf. co. The evidence against Waddington & Sons, Ltd., showed that they had advertised pianos of deft. Brinsmead as "Brinsmead" by itself, & had represented to customers that one of such pianos was a "Brinsmead" piano. It was held that deft. Brinsmead had put his name Stanley on his pianos as prominently as the word "Brinsmead" & had not attempted to imitate the mode in which pltf. co.'s name was used, & that he had not acted dishonestly, notwithstanding that he knew that he was deriving some advantage from the fact that his name was the same as that of well-known manufacturers; that the charge of

& Savings co. as to be calculated to deceive.—CANADIAN PERMANENT v. BRITISH COLUMBIA PERMANENT (1898), 6 B. C. R. 377.—CAN.

**1020 ii. ———.]**—GRAND TRUNK RY. CO. v. JAMES (ALTA.) (1916), 34 W. L. R. 1007; 10 W. W. R. 1075.—CAN.

**1020 iii. ———.]**—The question is whether a similar name is likely to deceive.—GROCETERIA, LTD. v. EALON (T.) CO., LTD. (ALTA.), [1928] 4 D. J. R. 708; [1928] 3 W. W. R. 533.—CAN.

**1020 iv. ———.]**—It is only when the use of a name deceives or is reasonably likely to deceive the public that it can be interfered with or prevented.—BARLOW v. GOBINDRAM (1897), 1 L. R. 24 Cal. 364; 1 C. W. N. 281.—IND.

**1020 v. ———.]**—EADY v. EADY (LEWIS R.) & SON, LTD., [1920] N. Z. L. R. 636.—N.Z.

**1020 vi. ———.]**—The proprietor

of a hotel near a railway station, known as the "Station Hotel," was not entitled to object to the proprietor of a neighbouring hotel adopting the designation "The Royal Station Hotel," in respect that the term "Station Hotel" was a descriptive appellation applicable to both, & the word "Royal" a sufficiently distinctive variation.—CHARLSON v. CAMPBELL (1876), 4 R. (Ct. of Sess.) 149; 14 Sc. L. R. 104.—SCOT.

**1020 vii. ———.]**—RESARTUS CO. v. SARTOR RESARTUS CO. (1908), 25 R. P. C. 808.—SCOT.

**1020 viii. ———.]**—SCOTTISH UNION & NATIONAL INSURANCE CO. v. SCOTTISH NATIONAL INSURANCE CO., LTD., [1909] S. C. 318; 46 Sc. L. R. 267; 16 S. L. T. 671; 26 R. P. C. 105.—SCOT.

## PART V. SECT. 2, SUB-SECT. 2.

**1023 i. General rule.—Person entitled**

*to trade in own name.*—Hiram Piper & Noah Piper carried on business under the name of Hiram Piper & Brother. They afterwards dissolved partnership, & each carried on a like business in his own name. Subsequently Hiram assigned his business to pltf., with authority to carry it on in Hiram's name, & then two sons of Noah Piper carried on a similar business next door, under the firm name H. Piper & Co. An injunction to restrain the use of that name was refused.—AIKINS v. PIPER (1869), 15 Gr. 581.—CAN.

**1023 ii. ———.]**—Although any person may use his own name for purposes of his trade, & no one bearing a similar name can arrogate to himself the exclusive use thereof, still he cannot use it to deceive the public to induce purchasers to buy his wares for those of another.—WAMPOLE (HENRY K.) & CO., LTD. v. WAMPOLE (HENRY S.) & CO. & HORNER, [1925] Exch. C. R. 61.—CAN.

*Sect. 2.—Trading names of businesses: Sub-sect. 2.]*

conspiracy failed. The action as against him was dismissed with costs. *Waddington & Sons, Ltd.*, having submitted to an injunction restraining them from passing off, an order was made against them with the costs of pltf. co. up to the date of their first offer except so far as the costs had been increased by the charge of conspiracy, but pltf. co. was ordered to pay the increased costs & the costs from the date of the offer. *Pltfs. appealed from the order dismissing the action against Edward George Stanley Brinsmead:—Held:* the use by deft. of his name alone did not deceive, & applt. had failed to prove any intention on his part to enable or induce dealers to pass off his pianos for those of applt. The appeal was dismissed with costs.—*BRINSMEAD (JOHN) & SONS, LTD. v. BRINSMEAD & WADDINGTON & SONS, LTD. (1913), 29 T. L. R. 706; 57 Sol. Jo. 716; 30 R. P. C. 493, C. A.*

*Annotation.—Reid. Jaeger v. Jaeger Co. (1927), 44 R. P. C. 437.*

**1032.** ———. *—J. W. G., trading as J. G. & Sons, commenced an action against F. J. H. & J. G. for an injunction to restrain defts. from selling plate powder not of pltf.'s manufacture under the description of "Goddard's non-mercurial Plate Powder" or "Goddard's Plate Powder" which names pltf. alleged meant his plate powder, & for delivery up & other relief. Before the trial of the action F. J. H. gave a perpetual undertaking in the terms of the writ & the action was stayed as against him, & J. G. died & her legal personal representative was added as a deft. & the claim was confined to delivery up damages & costs. At the trial it being held that the action for tort died with J. G. & that no relief could be obtained against her legal personal representative, by arrangement a sister of J. G. who was in fact continuing to sell the plate powder she had sold was added as a deft. in order to determine whether she was entitled to sell her plate powder under the names above mentioned. Deft. alleged a right to use the names as successor to a business originated by her father & further that the business had been carried on since 1892 by her father & sister with pltf.'s knowledge & that the right to do so had been challenged in 1892 & again subsequently but without proceedings being taken & further that she could not be restrained from using her own name Goddard, no fraud being alleged:—Held:* "Goddard's Plate Powder" & "Goddard's non-mercurial plate powder" had acquired a secondary meaning & meant pltf.'s plate powder & this position was not affected by the user by deft. or her predecessors which up to recently had been insignificant & in its origin the use by deft.'s father of his own name & his description of his preparation as "Goddard's Non-Mercurial Plate Powder" had been honest & deft. did not threaten or intend to do anything beyond that which was done by her father or after his death by her sister before she became associated with F. J. H. & as pltf. could not complain of this the action must be dismissed with costs.—*GODDARD v. HYAM & GODDARD (1917), 35 R. P. C. 21.*

*Annotation.—Consd. Goddard v. Watford Co-op. Soc. (1924), 11 R. P. C. 218.*

**1033.** ———. *—To the proposition of law that no man is entitled to carry on his business in*

*such a way as to represent that it is the business of another, or is in any way connected with the business of another, there is an exception, that a man is entitled to carry on his business in his own name so long as he does not do anything more than that to cause confusions with the business of another, & so long as he does it honestly. To the proposition of law that no man is entitled so to describe his goods as to represent that the goods are the goods of another, there is no exception (ROMER, J.).—JOSEPH RODGERS & SONS, LTD. v. RODGERS (W. N.) & Co. (1924), 41 R. P. C. 277.*

**1034. Duty to take precautions to avoid confusion.]—**A person is not entitled to use another's name in describing his goods in trade, though his own name is the same or he has assumed the same name, if by so doing he in fact represents that his own goods are from the other's manufactory.

Joseph Thorley for many years manufactured & sold extensively an article called "Thorley's Food for Cattle," made according to a recipe communicated to him & not known to the public, & down to his death he was the only person who made it. His exors. continued the business. Shortly after his death a co. was formed by other persons under the name of J. W. Thorley's Cattle Food co., in which J. W. Thorley, a brother of Joseph Thorley, took a 1s. share. J. W. Thorley had been employed by Joseph Thorley, & knew the secret of the manufacture, & was employed by the co. to conduct it. The co. sold the same article under the name of "Thorley's Food for Cattle":—*Held:* the co. were not at liberty to use the name "Thorley's Food for Cattle" unless they took such precautions as would prevent purchasers from supposing that the article sold by them was manufactured at the original establishment of Joseph Thorley.—*MASSAM v. THORLEY'S CATTLE FOOD CO. (1880), 14 Ch. D. 748; 42 L. T. 851; 28 W. R. 966, C. A.*

*Annotations.—Apld. Warner v. Warner (1889), 5 T. L. R. 327. Consd. Tussaud v. Tussaud (1890), 44 Ch. D. 678. Apld. Itedaway v. Bunham, [1896] A. C. 199. Consd. Morrell v. Housin (1905), 19 R. P. C. 557; Brinsmead v. Brinsmead (1913), 30 R. P. C. 493. Reid. Powell v. Birmingham Vinegar Co., [1894] 3 Ch. 449.*

**1035.** ———. *—JAMIESON & Co. v. JAMIESON, No. 1151, post.*

**1036.** ———. *—BROOKS (J. H.) & Co., LTD. v. NORFOLK CYCLE Co. & BROOKIES (1899), 16 R. P. C. 523.*

**1037.** ———. *—S. Chivers & Sons carried on business as jam manufacturers at Histon in Cambridgeshire since 1873. In 1888 they began to make table jelly. Samuel Chivers, of Cardiff, commenced making jam in 1877. In 1880 he took P. into partnership, & they carried on business as S. Chivers & co. In 1895 they were incorporated as a co. under the style of S. Chivers & co., Ltd. In 1898 they began making table jelly. In 1900 S. Chivers & Sons brought an action to restrain S. Chivers & Co., Ltd., from using the style "S. Chivers" or the word "Chivers" as descriptive of their table jelly or from so using the said style or word for their table jelly without clearly distinguishing such table jelly from that of pltf. :—Held:* pltf. had not proved that "Chivers' Table Jelly" meant their table jelly & nothing else, & defts. did not describe their jelly in such a way as to lead persons to believe it was pltf.'s jelly.—

**1034 i. Duty to take precautions to avoid confusion.]—**HUNT'S, LTD. v. HUNT, [1925] 2 D. L. R. 417; 56 O. L. R. 319.—*CAN.*

**1034 ii.** ———. *—LITTON v. R. (1892), 32 L. R. R. 115.—IR.*

**q. Distinction between individual & company.]—**A co. with a name of which a personal name forms a part has not the same natural right as the individual born with such name to trade under it, particularly when there

is a possibility of confusion between it & the name of an old established co.—*WAMPOLE (HENRY K.) & Co., LTD. v. WAMPOLE (HENRY S.) & Co. & HORNER, [1925] Exch. C. R. 61.—CAN.*

**CHIVERS (S.) & SONS v. CHIVERS (S.) & CO., LTD.** (1900), 17 R. P. C. 420.

*Annotations*.—**Consd.** *Goddard v. Watford Co-op. Soc.* (1924), 41 R. P. C. 218. *Refd.* *Aerators v. Tollitt*, [1902] 2 Ch. 319; *British Vacuum Cleaner Co. v. New Vacuum Cleaner Co.*, [1907] 2 Ch. 312; *Fine Cotton Spinners & Doublers' Assn. v. Cash v. Harwood Cash* (1907), 97 L. T. 45; *Teofani v. Teofani, Re Teofani's Trade Mk.*, [1913] 2 Ch. 515; *Waring & Gillow v. Gillow & Gillow* (1916), 32 T. L. R. 389. *Goddard v. Hyam & Goddard* (1917), 35 R. P. C. 21.

**1038.** —[.]—Pltf. co. had an old established business & reputation in a preparation of meat juice, which was mainly used by invalids, though sometimes by others, & was always sold under a title including the name "Valentine." Deft. co., which was promoted by deft. C. R. Valentine, who was also managing director of the co, manufactured & sold extract of meat made by a different process from that of pltf.s, & put up in a manner invented by deft. C. R. Valentine, which extract was intended to be used mainly as a food, but also by invalids. The only complaint made by pltf. co. was in regard to the name Valentine, the use of which, it was contended, must of necessity lead to deception. It was argued that, even in the absence of fraud, which was alleged, pltf.s. were entitled to an injunction. Defts. contended that, inasmuch as deft. co. were working under a patent granted to deft. Valentine, which he had sold to the co., & as deft. Valentine took an active part in the management of the co., they were within their legal rights. It was held at the trial, that defts. had not been guilty of fraud, & that pltf.s. were not entitled to an injunction.—*Held*: deft. C. R. Valentine had attempted to get the benefit of the reputation of pltf.'s article; defts. had so put their goods on the market that they would be mistaken for the goods of pltf.s., & pltf.s. were entitled to relief.

The action is for passing off, & the main defence set up by Mr. Upjohn was that the basis of the claim for passing off was the identity of the name of deft. & the name of pltf.s.; & that, so long as deft. used his own name, & that was the real source of the deception, his position could not be impugned. Now from that proposition I absolutely dissent. If you introduce into it that which has been found as a fact in the case, & which was proved, perhaps, more clearly by Mr. Upjohn's own witnesses than by anybody else, namely, that the name, which does form the basis of the deception, has acquired a secondary significance, & means only, in the markets where this product is sold, the juice or extract manufactured by pltf.s., it does not seem to me to matter a pin's point whether the deception arises from the use of a name which is, as it happens, the name of deft., or whether it arises from the use of any other description which in a sense, may be accurate of that which he sells. For, if the thing which he sells has come to be known in the market as meaning something made by somebody other than himself, it is impossible for him to sell it *simpliciter* by that name, although it be his own, without misleading purchasers (*COLLINS, L.J.*).—**VALENTINE MEAT JUICE Co. v. VALENTINE EXTRACT Co., LTD.** (1900), 83 L. T. 259; 10 T. L. R. 522; 17 R. P. C. 673, C. A.

*Annotations*.—**Consd.** *Morrall v. Hessin* (1902), 19 R. P. C. 557; *Rodgers v. Rodgers Simpson* (1906), 23 R. P. C. 297. *Apld.* *Brinsmead v. Brinsmead* (1913), 30 R. P. C. 493.

**1039.** —[.]—In 1895 J. & J. C., an old firm at Coventry dealing in textile goods, was converted into a limited co., pltf.s. in this action. Deft. J. C., was one of the directors. He retired in 1898 & set up in the same class of business at Coventry as "J. C. & co."—*Held*: deft. could not

be restrained from carrying on trade in his own name; but he must take reasonable precautions to clearly distinguish his goods from those of pltf.s., & to prevent the public being misled into the belief that the business carried on by him was that of pltf.s.—**CASH (J. & J.), LTD. v. CASH** (1902), 86 L. T. 211; 50 W. R. 289; 18 T. L. R. 299; 46 Sol. Jo. 265; 19 R. P. C. 181, C. A.

*Annotations*.—**Fold.** *Rodgers v. Rodgers Simpson* (1906), 23 R. P. C. 297. **Consd.** *Dorman v. Meadows*, [1922] 2 Ch. 332; *Jaeger v. Jaeger Co.* (1927), 44 R. P. C. 437.

**1040.** —[.]—J. Goddard & Sons of Leicester brought an action against The Watford Co-operative Society for an injunction to restrain defts. (*inter alia*), "from selling or supplying in response to orders for 'Goddard's Plate Powder' any plate powder not manufactured by pltf.s. without clearly ascertaining that it was not the pltf.'s plate powder that was required." Pltf.s. & their predecessors in business had continuously, since 1840, sold plate powder made in accordance with a secret formula invented by one Joseph Goddard, under the name "Goddard's Plate Powder" or "Goddard's Non-Mercurial Plate Powder." Defts. claimed to be entitled to sell, in response to orders for "Goddard's Plate Powder," a plate powder manufactured & supplied to them by one Rosina Goddard. The said Rosina Goddard had succeeded to the business originated by her father, who in or about 1856 had commenced to manufacture plate powder according to a secret recipe of his own invention & to sell it under the name of "Goddard's Non-Mercurial Plate Powder." In an action commenced by pltf.s. in 1916 in which the said Rosina Goddard was a deft., it had been held that "Goddard's Plate Powder" & "Goddard's Non-Mercurial Plate Powder" had acquired a secondary meaning & meant pltf.'s plate powder; & that that position was not affected by the user of Rosina Goddard or her predecessors which up to within a short time of that action had been insignificant; & that in its origin the use, by the said Rosina Goddard's father, of his own name & his description of his preparation as "Goddard's Non-Mercurial Plate Powder" had been honest & that the said Rosina Goddard had sufficiently distinguished her goods from the goods of pltf.s. & had not threatened or intended to do anything beyond what had been done by her predecessors in business, & that pltf.s. could not complain of that:—*Held*: the two sets of findings of fact in *Goddard v. Hyam*, No. 1032, *ante*, as regards the meaning & use of the expression "Goddard's Plate Powder" or "Goddard's Non-Mercurial Plate Powder" & as to the distinction between the goods were wholly distinct; upon their admission defts. must be taken to have admitted that these terms in 1917 meant & only meant in the trade the plate powder made by the Leicester firm; & in these circumstances the evidence called by pltf.s. was principally relevant to proving that the secondary meaning attaching to these expressions had continued to the present time; upon the evidence "Goddard's Plate Powder" meant pltf.s. plate powder universally throughout the country except for the few people who were satisfied to accept Miss Goddard's plate powder; her use of the expression "Goddard's Plate Powder" put a difficult *onus* upon a person who attempted to prove that it had acquired a secondary meaning, but, if that was established, then, for the purpose of a passing off case it was in exactly the same position *qua* passing off as a fancy word which originally had its own primary distinctive meaning; an order for "Goddard's Plate Powder" was an order for pltf.'s powder unless it was proved that the customer was referring to

*Sect. 2.—Trading names of businesses: Sub-sects. 2 & 3.]*

some less known plate powder which had a concurrent sale; because Miss Goddard had been held in *Goddard v. Hyam*, No. 1032, *ante*, entitled to sell her goods in the particular way mentioned, it did not in the least follow that a person purchasing her goods was entitled to hand them over the counter *simpliciter* & without explanation in response to an order for "Goddard's Plate Powder," which primarily meant pltf.'s goods; pltf's. were entitled to an injunction restraining defts., their servants & agents from selling or supplying in response to orders for "Goddard's Plate Powder" or "Goddard's Non-Mercurial Plate Powder" any plate powder not manufactured by pltf's. without clearly ascertaining that it was not pltf's. plate powder that was required or making it clear that the plate powder supplied was not pltf's.—*GODDARD v. WATFORD CO-OPERATIVE SOCIETY* (1924), 41 R. P. C. 218.

**1041.** ———.]—An action was brought for (*inter alia*) a declaration that pltf's. were entitled to use the word "Jaeger" upon, & in connection with, articles of clothing & analogous goods, & to carry on business in the sale of the goods under the style of "Prof. Dr. G. Jaeger," provided that they took reasonable precautions clearly to distinguish the goods & business from the goods & business of defts. Defts. counterclaimed for an injunction to restrain pltf's. from passing off their business or goods as those of defts., by the use of the name "Jaeger." At the trial, pltf's. asked for the declaration, qualified by the insertion, after the word "Jaeger," where it first occurred, of the words "as part of their business name." In 1883, Prof. Jaeger had authorised the formation of deft. co., & had conceded to it the sole right in this country to use his name & trade mark, & to sell articles, called "normal articles," of clothing made in accordance with the system of sanitary clothing originated by him, & he had undertaken to guarantee the quality of the articles made by his concessionaires in Germany. Defts. had undertaken to obtain normal articles from the concessionaires & to pay to Prof. Jaeger a royalty on all normal articles used in their business, but not manufactured by the concessionaires. From 1880, Prof. Jaeger had, under a firm name registered in Germany, carried on some business there in the sale of normal articles, & in 1907 he had constituted certain members of his family partners in the firm, the name of which had previously been changed to "Prof. Dr. G. Jaeger." On the outbreak of war in 1914, the agreements between Prof. Jaeger, pltf. firm, & the concessionaires on the one hand, & defts. on the other, had been determined. At the time, about one quarter of the goods sold by defts. were being obtained from the concessionaires, the remainder being manufactured in this country. Defts. continued to carry on the business, without paying any royalty. In 1920, three years after the death of Prof. Jaeger, pltf's. & the concessionaires demanded that defts. should cease to use the word "Jaeger" as part of their name, but defts. claimed to be entitled to continue to use the name, & disputed the right of pltf's. to trade in this country under a name of which "Jaeger" formed part. In 1924, pltf's. opened, in London, an office & then a retail shop; they invited defts. to take proceedings to test the right of the parties, & in default of proceedings by defts., they brought the action. Defts. alleged that pltf.'s firm had been guilty of fraud in trading under its name for the purpose of passing off its

goods as deft.'s & they made a counterclaim for an injunction to restrain pltf's. from passing off by the use of the name "Jaeger." Pltf's. claimed, in addition to the declaration, injunctions to restrain defts. from denying the rights of pltf's., & from prosecuting an application for registration of the name trade mark "Jaeger" until judgment had been entered in the action:—*Held*: the injunction granted against pltf's. must be modified so as to safeguard the right of pltf.'s to trade in their firm name.—*JAEGAR v. JAEGAR & CO., LTD.* (1927), 44 R. P. C. 437, C. A.

**1042. Right of assignee of business.]**—Prior to 1819 F. Truefitt commenced a hairdressing business which was continued by his widow & his son Walter Truefitt until the death of the latter in 1900, when deft. C. J. Edney, who was a hairdresser & "hair specialist," purchased the business, goodwill, stock-in-trade, & assets, including expressly the right to use the name "Walter Truefitt" or "Truefitt." In 1819 P. Truefitt, a relative & former partner of F. Truefitt, commenced a similar business in the neighbourhood, & was succeeded by his son H. P. Truefitt, who was also a "hair specialist." In 1880 H. P. Truefitt, sold his business to pltf. co., of which he became the managing director. In 1902 pltf. co. & H. P. Truefitt brought an action against deft. for an injunction restraining him from carrying on business as a hairdresser & "hair specialist" under the name or style of "Truefitt." At the trial the case was narrowed down to the question of fact as to whether on three specific occasions deft. had represented himself to be pltf. H. P. Truefitt, & that his business was the business of pltf. co.:—*Held*: no case of fraudulent misrepresentation by deft. had been made out, & the action must be dismissed. Satisfactory evidence of transactions of the nature of "trap orders" should show that pointed attention was called to what was being asked.—*TRUEFIT v. EDNEY* (1903), 20 R. P. C. 321.

**SUB-SECT. 3.—REGISTRATION OF BUSINESS NAMES.**

*See Registration of Business Names Act, 1916 (c. 58).*

**1043. Who must register - Successor in business.—Person successor to himself.]**—I think that, in a business sense, *appt.* may properly be described as carrying on business as successor to himself as formerly trading as the Power Flexible Tubing co. (*SARGANT, J.*).—*Re MANN'S TRADE MARKS* (1919), 35 T. L. R. 371; 36 R. P. C. 189.

**1044. ———. Trader using surname with addition of Christian names—All Christian names or initials must be used.]**—A trader trading under a business name consisting of his surname together with the addition of his Christian names or initials must, in order to be exempt from registration under Registration of Business Names Act, 1916 (c. 58), use all his Christian names or the initials thereof. It is not a compliance with the exception contained in sect. I. of the Act for him to trade under his surname together with one only of several Christian names or one initial.—*BROWN v. THOMAS & BURROWS* (1922), 39 T. L. R. 132, C. A.

**1045. What is sufficient description of business—Bookmakers described as "accountants."]**—Pltf's. a firm of bookmakers, made an application for registration under Registration of Business Names Act, 1916 (c. 58). In their application they included in their statement of particulars required by the Act a description of the general nature of their business as "accountants." In this action

they claimed from the deft. £907 17s. 11d., the amount, with interest, of five cheques drawn by him upon his bank payable to plffs. & delivered by him to them in payment of bets which he had lost to them & which had been dishonoured on presentation, & a further sum of £13 18s. 10d., the amount of a cheque paid by plffs. to deft. for bets won by him from them & duly paid by plffs.' bankers on presentation by deft.'s bankers to them. Pltf. claimed to be entitled to recover the £13 18s. 10d. under Gaming Act, 1835 (c. 41), s. 2 as money received by deft. to the use of plffs.:—*Held*: plffs.' description of their business as "accountants" was not sufficient to satisfy Registration of Business Names Act, 1916 (c. 58), s. 3 (1) (b).

*Semble*: pltf. had not made "default" within the meaning of Registration of Business Names Act, 1916 (c. 58), s. 8 (1), inasmuch as "default" in the sub-sect. means not furnishing a statement of particulars at all, as distinguished from furnishing insufficient particulars. —O'CONNOR & OULD v. RALSTON, [1920] 3 K. B. 451; 90 L. J. K. B. 261; 124 L. T. 508; 36 T. L. R. 768.

*Annotation*:—*Mentd.* Jeffrey v. Bamford, [1921] 2 K. B. 351.

**1048. What constitutes default—Insufficient description of business.**—O'CONNOR & OULD v. RALSTON, No. 1045, *ante*.

**1047. Effect of default—Limited to parties to contract.**—Registration of Business Names Act, 1916 (c. 58), s. 8 (1), provides that where a person who is required to be registered under that Act makes default in so doing "the rights of that defaulter under or arising out of any contract made or entered into by or on behalf of such defaulter in relation to the business in respect to the carrying on of which particulars were required to be furnished at any time while he is in default shall not be enforceable by action or other legal proceeding either in the business name or otherwise."

By an assignment dated Jan. 9, 1917, claimant, who carried on business in a name other than her true name but was not registered under Registration of Business Names Act, 1916 (c. 58), purchased the goodwill of the business and stock-in-trade of one R., & thereupon entered into occupation of the premises where R. had carried on business & where, till a few weeks before July 4, 1917, his name continued to appear over the premises, although in fact his connection therewith ceased in Jan. On June 12, 1917, the stock-in-trade so purchased was taken in execution at the instance of a judgment creditor of R., & being claimed by claimant, an interpleader issue was tried on July 4, 1917, in which claimant produced the assignment of Jan. 9. It was contended by the execution creditor that claimant was precluded by Registration of Business Names Act, 1916 (c. 58), s. 8 (1), from enforcing any right to the goods. The county ct. judge gave judgment for claimant & his decision was affirmed by the Div. Ct.:—*Held*: Registration of Business Names Act, 1916 (c. 58), s. 8 (1), did not preclude claimant from enforcing her right to the goods, for her right at the time of the claim rested on her common law title by possession & did not arise under or out of the assignment.

*Semble*: Registration of Business Names Act, 1916 (c. 58), s. 8 (1), is limited to prohibiting the

enforcement of contracts, coming within its scope, as between the immediate parties thereto.—DANIEL v. ROGERS, [1918] 2 K. B. 228; 87 L. J. K. B. 1149; 119 L. T. 212; 62 Sol. Jo. 583, C. A.

*Annotation*:—*Apld.* Hawkins v. Duché, [1921] 3 K. B. 226.

**1048. — Right to goods taken in execution—By execution creditor of assignor.**—DANIEL v. ROGERS, No. 1047, *ante*.

**1049. — Rights of assignees of defaulter.**—By Registration of Business Names Act, 1916 (c. 58), s. 8 (1), where any person required by the Act to furnish particulars of registration makes default in so doing, his rights under any contract made by him in relation to the business in respect to which he was required to furnish such particulars "shall not be enforceable by action," provided that the "Ct." which is defined by sub-sect. 2 to mean the "High Ct. or a judge thereof," & may grant relief against the disability imposed by the sect. on any grounds which it considers just & equitable:—*Held*: (1) the High Ct. has power to grant such relief after the action is begun as well as before writ issued; (2) the disability imposed by the sect. is limited to the defaulter & does not pass to his trustee in bkpcy. or other assignees.—HAWKINS v. DUCHÉ, [1921] 3 K. B. 226; 90 L. J. K. B. 913; 125 L. T. 671; 37 T. L. R. 748; [1921] B. & C. R. 173.

*Annotation*:—*As to* (1) *Apprvd.* *Re* Shaer, [1927] 1 Ch. 355.

**1050. — Relief from disability—Evidence.**—*Re* THOMPSON'S APPLICATION (1920), 150 L. T. Jo. 5.

**1051. — Jurisdiction of court to grant—After action begun.**—HAWKINS v. DUCHÉ, No. 1049, *ante*.

**1052. — — — — —**—Plffs. in an action made an application under Registration of Business Names Act, 1916 (c. 58), s. 8 (1), proviso (a), for relief against the disability imposed by that sect. on the grounds, which were not questioned by deft., that at the time when the action was brought they were not aware of the Act or that it was necessary for them to be registered under it, & that deft. knew that plffs. were the proprietors of the business & was not misled by their failure to register:—*Held*: these were grounds on which the ct., in the exercise of its discretion under the proviso, was entitled to conclude that it was just & equitable to grant to plffs. the relief which they sought, & to grant them relief accordingly.—WELLER v. DENTON, [1921] 3 K. B. 103; 90 L. J. K. B. 889; 125 L. T. 569; 37 T. L. R. 599; 65 Sol. Jo. 473, D. C.

*Annotation*:—*Refd.* Hawkins v. Duché, [1921] 3 K. B. 226.

**1053. — — — — —**—Under Registration of Business Names Act, 1916 (c. 58), s. 8 (1), the ct. has power to grant relief from the disability attaching to a contract, through failure of pltf. to register under the Act, in all proceedings on the contract not only up to judgment but also after judgment has been signed; & the relief so granted is retrospective in effect so as to restore the contract *ab initio* to the category of contracts enforceable at law & validate all subsequent proceedings in respect of it.—*Re* SHAEER, [1927] 1 Ch. 355; 42 T. L. R. 620; *sub nom.* *Re* SHAEER, *Ex p.* SILVERMAN, 96 L. J. Ch. 282; 136 L. T. 695; 70 Sol. Jo. 775, C. A.

"on being satisfied that the default was accidental, or due to inadvertence, or some other sufficient cause, or that on other grounds it is just & equitable to grant relief."—*Re* GLENESBATE MOTOR TRANSPORT CO., [1922] S. C. 18.—SCOTT.

#### PART V. SECT. 2, SUB-SECT. 3.

**10521. Effect of default—Relief from disability—Jurisdiction of court to grant.**—Registration of Business Names Act, 1916 (c. 58), s. 8 (1), enacts that any firm or person who is

required to register under the Act, & who fails to do so, shall be debarred from enforcing any contract made by or on behalf of the firm or person, provided that the defaulter may apply to the ct. for relief against this disability, & the ct. may grant relief

*Sect. 2.—Trading names of businesses: Sub-sects. 3, 4, 5 & 6. Sects. 3 & 4: Sub-sect. 1, A.]*

**1054.** ——— *Procedure.*—*Re SMITH, [1920] W. N. 115.*

**1055. Offences.—Nature of offence.—Not continuing offence.—Summary Jurisdiction Act, 1848 (c. 43), s. 11.]—**By Registration of Business Names Act, 1916 (c. 58), s. 9, "If any statement required to be furnished under this Act contains any matter which is false in any material particular to the knowledge of any person signing it, that person shall, on summary conviction," be liable to imprisonment or to a fine or to both.

A person, who was required under Registration of Business Names Act, 1916 (c. 58), to be registered, furnished to the Registrar on Mar. 16, 1917, a written statement signed by him, in compliance with sect. 3, but the written statement was false in a material particular to his knowledge. An information was preferred against him under sect. 9 of the Act on June 11, 1918, alleging that the offence was committed on May 16, 1918:—*Held*: the offence for which the penalty is imposed by sect. 9, is the offence of furnishing a statement containing matter false in a material particular to the knowledge of the person signing the statement; the offence is complete on the day when the statement is furnished; it is not a continuing offence; & therefore, as the information was not preferred until more than six months after the statement was furnished, it was by virtue of Summary Jurisdiction Act, 1848 (c. 43), s. 11 out of time.—*BOARD OF TRADE SOLICITOR v. ERNEST, [1920] 1 K. B. 816; 89 L. J. K. B. 766; 122 L. T. 781; 84 J. P. 43; 36 T. L. R. 200; 18 L. G. R. 128; 20 Cox, C. C. 600, D. C.*

#### SUB-SECT. 4.—ASSIGNMENT OF NAME.

**1056. Right to assign trade name.—Where no business or goodwill transferred.]—***Ptfs., M. Melachrino & co., a firm of cigarette manufacturers, having applied to the Comptroller for registration as a trade mark of a label for cigarettes, consisting (inter alia) of three foreign coats of arms, were granted registration of the mark, less the three coats of arms. Ptfs., however, in using their trade mark, put in the coats of arms & used it in the form in which they had originally applied for registration. U. Melachrino, who was a brother of one of ptfs., M. Melachrino, & who had been formerly employed by ptfs. as their servant or assistant, entered into an agreement with one Poulides to act as manager of a cigarette business for Poulides, to be carried on under the style of The Melachrino Egyptian Cigarette co., & the new firm commenced business in premises in the immediate*

neighbourhood of pltf.'s premises, & solicited customers of pltf.'s firm, & made use of labels in imitation of those used by ptfs. Ptfs. brought an action & moved for an *interim* injunction:—*Held*: 'defts.' business was in fact the business of Poulides, & U. Melachrino could not sell his name to Poulides for the purpose of enabling him to carry on a rival trade, & the less so because the purpose was that of carrying on a rival trade fraudulently, & therefore ptfs. were entitled to an injunction restraining defts. from carrying on business under the name of Melachrino & co., or of Melachrino.—*MELACHRINO (M.) & CO. v. MELACHRINO EGYPTIAN CIGARETTE CO. & MELACHRINO (1887), 4 R. P. C. 215.*

*Annotations:—Apld. Teofani v. Teofani, Re Teofani's Trade Mk., [1913] 2 Ch. 545. Refd. Hammond v. Brunker (1892), 9 R. P. C. 301; Powell v. Birmingham Vinegar Brewery Co., [1896] 2 Ch. 54.*

**1057.** ——— *—A co. "Madame Tussaud & Sons, Ltd." registered under Companies Act, 1862 (c. 89), was granted an injunction to restrain the registration of a proposed new co., "Louis Tussaud, Ltd.," which was promoted by Louis J. Tussaud & Friends, for the purpose of carrying on a similar business or exhibition to that of "Madame Tussaud & Sons," & in which Louis J. Tussaud was to be manager.*

*Qu.*: whether if Louis Tussaud had originally commenced & carried on business of a similar character in his own name & on his own account, & had taken partners, & as "Louis Tussaud & Co." they had transferred the business & goodwill to a co., of which Louis Tussaud was to be paid servant, that co. would have been prevented by injunction from proceeding to registration of it under his name as a limited co.

*Semble*: Louis Tussaud could not for valuable consideration or otherwise confer on another person the right to use the name of Tussaud in connection with a business which he had never carried on & in which he had no interest whatever.—*TUSSAUD v. TUSSAUD (1890), 44 Ch. D. 678; 59 L. J. Ch. 631; 62 L. T. 633; 38 W. R. 503; 6 T. L. R. 272; 2 Meg. 120.*

*Annotations:—Apld. Fine Cotton Spinners & Doublers' Assocn. & Cash v. Harwood Cash, [1907] 2 Ch. 181. Consd. Waring & Gillow v. Gillow & Gillow (1916), 32 T. L. R. 389. Refd. Dutton, Massey (Liverpool) v. Dutton, Massey (1923), 40 L. J. P. 413. Mtd. Cowley v. Cowley (1900), [83 L. T. 218.]*

**1058.** ——— *—THORNELOE v. HILL, No. 1276, post.*

**1059.** ——— *—FINE COTTON SPINNERS & DOUBLERS' ASSOCN., LTD. & CASH (JOHN) & SONS, LTD. v. HARWOOD CASH & CO., LTD., No. 1027, ante.*

**1060. Right to restrain use of name assigned.]—***MELACHRINO (M.) & CO. v. MELACHRINO EGYPTIAN CIGARETTE CO. & MELACHRINO, No. 1056, ante.*

*Where sale of business.]—See Sub-sect. 3, ante.*

**1054 i.** ——— *—Procedure.]—*A person who has omitted to comply with the provisions of Registration of Business Names Act, 1916, may obtain general relief from the disabilities imposed by that Act on proof that his omission was due to inadvertence & compliance with such directions as the ct. may give as to service of notice & of the application & publication of advertisements.—*Re MURPHY (1918), 53 L. L. T. 143.—IR.*

**r.** ——— *—LEGER & SON v. BOURQUE (1925), 52 N. B. R. 340.—CAN.*

**t. Similarity of names.]—**The opinion of the Registrar as to the similarity of the names of different cos. is not conclusive under Investment & Loan Societies Amendment Act, 1898 (c. 7),

s. 2.—*BRITISH COLUMBIA PERMANENT LOAN, ETC. CO. v. WOOTTON (1898), 6 B. C. R. 382.—CAN.*

#### PART V. SECT. 2, SUB-SECT. 4.

**1060 i. Right to restrain use of name assigned.]—**An assignee of the right to use a trade name can stand in no better position than his assignor.

T.; carrying on business as "T. & Co.," was restrained by injunction from using the name of "T." or "T. & Co." without adding thereto an express statement that the said firm had no connection with the firm of "T. Bros." ptfs. in this suit. T. subsequently assigned the goodwill & stock-in-trade of his business with his registered trade mark to deft. who took with notice of the injunction:—*Held*: deft. could

not trade in the name of "T." or "T. & Co." without the addition directed by the injunction.—*PRATTEN v. PEACOCK (1899), 20 N. S. W. Eq. 147.—AUS.*

**1060 ii.** ——— *—Debtor assigned to D., as trustee for the benefit of all his creditors, all real & personal effects to which debtor was entitled. No reference in specific terms was made to the goodwill of pltf.'s business or his trade name.—Held: pltf.'s trade name passed to D. under the deed of assignment. Though such assignor has the right himself, wholly independent of his assignee or trustee, to trade under his old trade name, he is not entitled to restrain any other person who is doing the same thing honestly, & could not restrain deft.*



## SUB-SECT. 5.—NAMES OF COMPANIES.

See COMPANIES, Vol. IX., pp. 63-72, Nos. 190-251.

## SUB-SECT. 6.—ACTION FOR PASSING OFF.

See Sect. 5, sub-sect. 4, *post*.

## SECT. 3.—TRADE NAMES OF BUSINESS PREMISES.

1061. General rule.—Owner entitled to use any name.]—NICHOLSON v. BUCHANAN, No. 1214, *post*.  
When use of name restrained.]—See Sect. 6, sub-sect. 7, F., *post*.

## SECT. 4.—TRADE NAMES OF GOODS.

## SUB-SECT. 1.—RIGHT TO EXCLUSIVE USER.

## A. In General.

1062. How right acquired.—By prior user.]—WOTHERSPON v. CURRIE, No. 1073, *post*.

1063. — Name of new article.]—  
(1) Pltf. manufactured a fluid which he sold under the name of "Aromatic Bitters," & it was described by this name upon the wrappers of the bottles in which it was sold. It became, however, generally known in the market by the name of "Angostura Bitters," it having been originally manufactured at the town of Angostura in Venezuela. The name of this town was afterwards by a decree of the state, changed to Ciudad Bolivar. After this change had taken place, deft. began to manufacture in the same town a different fluid, which he at first sold under the name of "Aromatic Bitters," but, having been restrained in an English colony from using that name, he adopted the name "Angostura Bitters," & placed it upon the wrappers of his bottles, also registering his wrappers at Stationers' Hall. His wrappers were very similar to those of pltf., but they contained a statement that the fluid was prepared by deft. After this pltf. adopted the name "Angostura Bitters," & placed it upon his wrappers, & he brought an action against deft., claiming an injunction to restrain him from imitating pltf.'s wrappers, & from using the name "Angostura Bitters." At the time when the action was brought pltf. had ceased to carry on his manufacture at Ciudad Bolivar:—*Held*: upon the evidence, deft. had been guilty of an attempt to deceive, & though he could not be restrained from using the name "Angostura Bitters," in case he should ever discover pltf.'s secret, & manufacture the same fluid, yet he must be restrained from using the name so as to deceive the public into the belief that his fluid was pltf.'s.

(2) It was alleged by deft. that pltf. was disentitled to relief, because, at the time of the trial, he was using wrappers which contained a misrepresentation. Pltf. did not begin to use those wrappers until after the action had been brought:—*Held*: there was in fact no misrepresentation in the wrappers in question, but, even if there had been, a misrepresentation not made till after the commencement of the action would not have affected pltf.'s title to relief.

(3) It is to be observed that the person who produces a new article, & is the sole maker of it, has the greatest difficulty, if it is not an impossibility, in claiming the name of that article as his own, because, until somebody else produces the same article, there is nothing to distinguish it from. No distinction can arise from using the name of the class so long as the class consists of only one species, for then the name of the species & the name of the class will be the same (FRY, J.).—SIEGERT v. FINDLATER (1878), 7 Ch. D. 801; 47 L. J. Ch. 233; 38 L. T. 349; 26 W. R. 459.

Annotations:—As to (1) *Consd.* Humphries v. Taylor Drug Co. (1888), 59 L. T. 177. *Appld.* Powell v. Birmingham Vinegar Brewery Co., [1894] 3 Ch. 449. *Refd.* Birmingham Vinegar Brewery Co. v. Powell, [1897] A. C. 710. As to (3) *Consd.* Powell v. Birmingham Vinegar Brewery Co., [1894] 3 Ch. 449. *Apprvd.* Cellular Clothing Co. v. Maxton & Murray, [1899] A. C. 326. *Refd.* Fels v. Hedley (1903), 19 T. L. R. 340; British Vacuum Cleaner Co. v. New Vacuum Cleaner Co., [1907] 2 Ch. 312; Edge v. Nicolls, [1911] 1 Ch. 3; Hock's Malted Milk Co. v. Summerskill (1916), 114 L. T. 481.

1064. — Long user.]—Pltfs., a firm of pyrotechnists, & their predecessors in business had for nearly fifty years, namely, since 1866 down to 1910, been making & selling fireworks under the description "Crystal Palace Fireworks" they having throughout that period the exclusive right of giving firework displays at the Crystal Palace. In 1891 they had registered as an old trade mark in connection with fireworks the words "Crystal Palace." They had also registered two other trade marks consisting of representations of the Crystal Palace. They used the term for all their goods of the firework class. It was not limited to the displays that they gave at the Crystal Palace. Their goods were asked for as "Crystal Palace Fireworks" & were supplied under that name. Pltfs. having ceased to have the contract, defts. another firm of pyrotechnists, obtained in the year 1910, the right to give firework displays at the Crystal Palace, & thereupon they sought to describe their fireworks as "Crystal Palace Fireworks" with the addition of their own name:—*Held*: pltfs. having for nearly fifty years applied the words "Crystal Palace" to their goods, it was irrelevant to consider whether they had still got the right to give displays of fireworks at the Crystal Palace; the use of those words did not imply that they had; & therefore they were

from using the said trade name.—FERNE v. WILSON (1900), 26 V. L. R. 422.—AUS.

1060 iii. —.]—The proprietor of a firm name of no pecuniary value *per se*, & not being merely his own name, who has sold the business with which it was connected, & with it the right to use the firm name for a limited period, cannot, after the expiry of the time, prevent the user of such name, when he himself does not carry on or intend to carry on business under it.—LOVE v. LATIMER (1900), 32 O. R. 231; 20 C. L. T. 456.—CAN.

## PART V. SECT. 3.

a. Right to exclusive use.—Necessity for personal user.]—User by the public is not sufficient to attach a designation to a business so as to make

it equivalent to proprietor's personal user thereof. A name in controversy being merely descriptive of the nature of the business & the locality of its operations, in the absence of evidence of user of the name by proprietor or that the name of the locality is so inseparably connected with their establishment that a secondary meaning is attributable to it, there is no ground for protecting the name.—ROBINSON v. BOGLE (1889), 18 O. R. 387.—CAN.

## PART V. SECT. 4, SUB-SECT. 1.—A.

1064 i. How right acquired.—Long user.]—While there is no property in the name of a manufactured article, yet where a particular article has for many years been manufactured & sold under a particular name, other persons fraudu-

lently taking advantage of such name will be restrained.—RUSSIA CEMENT Co. v. LE PAGE LIQUID GLUE, OIL & FERTILIZER Co., LTD. (1909), 11 B. C. R. 317.—CAN.

1064 ii. —.]—MATTHEWS v. OMANSKY (1913), 25 W. L. R. 603; 5 W. W. R. 382; 14 D. L. R. 168; 24 Man. L. R. 85.—CAN.

1064 iii. —.]—JAGANNATH & Co. v. CRESSWELL (1913), 1 L. R. 40 Calc. 814.—IND.

1064 iv. —.]—SWADESHI MILLS Co., LTD. v. JUGGI LAL, KAMLA-PAT COTTON MILLS Co., LTD. (1926), 1 L. R. 49 All. 92.—IND.

1064 v. —.]—ADAMJEE HAJEE DAWOOD & Co., LTD. v. SWEDISH MATCH Co. (1928), 1 L. R. 6 Ran. 221.—IND.



**Sect. 4.—Trade names of goods: Sub-sect. 1, A. & B.]**

entitled to a perpetual injunction to restrain defts.—**BROCK (C. T.) & Co.'s "CRYSTAL PALACE" FIREWORKS, LTD. v. PAIN (JAMES) & SONS (1911), 105 L. T. 976; 28 R. P. C. 697, C. A.**

**1065. — By repute.]**—Pltfs. purchased from a firm established in the United States, knowledge of a secret mode of making crucibles, which had acquired a reputation in America as "Patent Plumbago Crucibles," although the process had never been patented:—**Held:** pltfs. could not maintain a bill to restrain others from pirating this designation.—**MORGAN v. M'ADAM (1866), 36 L. J. Ch. 228; 15 L. T. 348.**

**1066. — —.]**—A manufacturer who has produced an article of merchandise, e.g. a new pattern of cloth & applied to it a particular fancy name, & sold it with a particular mark, under which name & mark it has obtained currency in the market, acquires an exclusive right to the use of such name & mark, & is entitled to restrain all other persons from using such name & mark to denote articles similar in kind & appearance, although he may have no exclusive right of manufacturing the article. If the use of such name & mark, by any other person than the first inventor, has been adopted for the purpose of selling goods of an inferior quality, though of similar external appearance, so that purchasers may be misled into the belief that they are buying the goods of the first inventor, the injury to the first inventor is one for which he is entitled to compensation in damages, & relief by injunction.—**ILURST v. DENHAM (1872), L. R. 14 Eq. 542; 41 L. J. Ch. 752; 27 L. T. 50.**

**Annotations:—** **Refd.** Cope v. Evans (1871), L. R. 18 Eq. 138; **Re** "Alpine" Trade Mk., Stapley & Smith's Appln. (1885), 51 L. J. Ch. 727.

**1067. — —.]**—**GOODFELLOW v. PRINCE, No. 1240, post.**

**1068. — —]**—**Though name used for other classes of goods.]**—Where A. introduces into the market an article which, though previously known to exist, is new as an article of commerce, & has required a reputation therefrom in the market by a name not merely descriptive of the article, B. will not be permitted to sell a similar article under the same name; & this, although the peculiarity of the name in question has long been in common use as applied to goods of a different kind. It will make no difference that pltf. has also a trade mark which has not been taken by deft.—**BRAHAM v. BUSTARD (1863), 1 Hem. & M. 447; 2 New Rep. 572; 9 L. T. 199; 27 J. P. 708; 11 W. R. 1061; 71 B. R. 195.**

**Annotations:—** **Appld.** Ford v. Foster (1872), 7 Ch. App. 611; **Taggett v. Findlater (1873), L. R. 17 Eq. 29.** **Distd.** Linoleum Manufacturing Co. v. Nahn (1878), 7 Ch. D. 834. **Expld.** Kelly v. Byles (1880), 13 Ch. D. 682. **Appld.** Powell v. Birmingham Brewery Co. (1896) 2 Ch. 54. **Refd.** Reddaway v. Banham, [1896] A. C. 199; **Re** Chesterbrough's Trade Mk., "Vaseline," [1902] 2 Ch. 1; **Re** Gesteiner's Trade Mk., [1907] 2 Ch. 478.

**1069. — —.]**—**All names there is no**

**1065 I. — By repute.]**—A party is entitled to prevent another from affixing his name to a machine generally known by his name, although he has not a patent, & the machine is not manufactured by him, nor under his authority.—**WILKIE v. McCULLOCH & CO. (1823), 2 Sh. (Ct. of Sess.) 413.—SCOT.**

**1070 I. Name common to trade.]**—Pltf., having registered as a trade mark the words "Imperial Cough Drops," sued deft. for infringement thereof by selling confectionery under the name "Imperial Cough Candy"—**Held:** inasmuch as the evidence showed that

the word "Imperial" as a designation or mark for cough drops or candy was really public property, & a common brand or designation for candy long before pltf.'s registration, pltf. had not the right to attribute to that which he might manufacture a name which had been for years before a well known & current name by which that article was defined; & the action must be dismissed.—**WATSON v. WESTLAKE (1886), 12 O. R. 449.—CAN.**

**1070 II. —.]**—The words "chicken traddies" having been in use in the trade for a long period prior to resp.'s trade mark, & such words forming

law or statute establishing the registration of trade marks, & no authority exists from which an exclusive right to a particular trade mark can be obtained; but by the general principles of the commercial law, as soon as a trade mark has been so employed in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm, it becomes to that extent the property of the firm. Where cigarettes made by applt.'s firm became favourably known under the trade mark "Kaiser-i-Hind":—**Held:** (1) the use of that trade mark by others for hats, soap, pickles, etc., could not impede the acquisition of an exclusive right to it as a trade mark for cigarettes; (2) resps. should be restrained from using for cigarettes a copy of the said mark with colourable variations, such copy being likely, even if not intended, to deceive purchasers into the belief that such cigarettes were manufactured by applt.'s firm.—**SOMERVILLE v. SCHEMBRI (1887), 12 App. Cas. 453; 56 L. J. P. C. 61; 56 L. T. 451; 3 T. L. R. 443, P. C.**

**Annotations:—** [as to (1) **Consd.** Humphries v. Taylor Drug Co. (1888), 59 L. T. 820. **Generally, Refd.** Bow v. Hart, [1905] 1 K. B. 592.

**1070. Name common to trade.]**—A manufacturer using, to describe articles made by him, the name of another manufacturer, must justify the use thus made of a name not his own, by showing that such name is understood by the trade & the public to denote a patented or other article of a particular type, structure or arrangement of parts, & not a mark or sign of a particular manufacturer. It makes no difference in this principle that such name does not appear upon the articles sold, but only in advertisements or price lists; nor that the articles bear the selling manufacturers' own trade mark & labels, stating them to be manufactured by him, & that statements to the same effect appear in the advertisements & price lists.—**"SINGER" MACHINE MANUFACTURERS v. WILSON (1877), 3 App. Cas. 376; 47 L. J. Ch. 481; 38 L. T. 303; 26 W. R. 664, H. L.**

**Annotations:—** **Consd.** Cheavin v. Walker (1877), 5 Ch. D. 850; Mitchell v. Henry (1880), 15 Ch. D. 181; **Re** Chorlton & Dugdale's Trade Mk. (1885), 53 L. T. 337; **Turton v. Turton (1889), 42 Ch. D. 128; Tallerman v. Dowling Radiant Heat Co. (1900) 1 Ch. 1; Universal Winding Co. v. Hattersley (1915), 32 Ll. P. C. 479.** **Refd.** Condy v. Mitchell (1877), 37 L. T. 766; Linoleum Manufacturing Co. v. Nahn (1878), 7 Ch. D. 834; Metzler v. Wood (1878), 47 L. J. Ch. 625; **Shogart v. Findlater (1878), 7 Ch. D. 801; Orr v. Ewing & Johnston (1880), 13 Ch. D. 434; Singer Manufacturing Co. v. Loog (1882), 48 L. T. 3; Re Palmer's Trade Mk. (1883), 24 Ch. D. 504; Blair v. Stock (1884), 52 L. T. 123; Slazenger v. Feltham (2) (1886), 6 R. P. C. 531; Borthwick v. Evening Post (1888), 37 Ch. D. 449; Jay v. Ladler (1888), 60 L. T. 27; Bodega Co. v. Owens (1889), 6 R. P. C. 236; Bodega Co. v. Owens (1889), 7 R. P. C. 31; Powell v. Birmingham Vinegar Brewery Co., [1896] 2 Ch. 51; **Re** Verity's Trade Mk., **Re** Hall & Woodhouse's Trade Mk. (1901), 18 T. L. R. 214; Bourne v. Swan & Edgar (1902), 51 W. R. 213; Pullman v. Pullman (1919), 36 R. P. C. 240; Goodall v. Waddington (1924), 41 R. P. C. 653; Havana Cigar & Tobacco Factories v. Oddenino, [1924] 1 Ch. 179. **Mentd.** Bow v. Hart, [1905] 1 K. B. 592; **Re** Crook's Trade Mk. (1914), 110 L. T. 475.**

**1071. —.]**—Pltfs. who were the manufacturers of a machine for textile winding known as the part of the English language & thereby become *publici juris*, could not be appropriated by any one as his trade mark, & further, that such words being descriptive of the character & size of the goods did not distinguish the goods of the proprietor of such trade mark from those of other persons, & a trade mark for the same was fundamentally null & void & should be expunged.—**WINDSOR (J. W.), LTD. v. MARITIME FISH CORPN., [1926] 1 D. L. R. 687; [1926] Exch. C. R. 31.—CAN.**

**b. Title of periodical.]**—**REED v. O'MEARA (1888), 21 L. R. Ir. 216.—IR.**

popularity in Australia. Deft., having become possessed of another spring in the same district, sold the mineral waters therefrom in bottles, the labels of which stated the waters to have

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ham Vinegar Brewery Co., [1894] 3 Ch. 449; Thompson v. Miller, *Re Thompson's Trade Mk.* (1895), 13 R. P. C. 35. **Consd.** Powell v. Birmingham Vinegar Brewery Co., [1896] 2 Ch. 54. **Folld.** Reddaway v. Banham, [1896] A. C. 199. **Appld.** Pinet v. Maison Pinet (1897), 77 L. T. 322. **Refd.** *Re Burland's Trade Mk.*, Burland v. Broxburn Oil Co. (1889), 42 Ch. D. 274; *Re Edgington's Trade Mk.*, Edgington v. Edgington (1889), 61 L. T. 323; Baker v. Rawson (1890), 45 Ch. D. 519; Huntley & Palmers v. Reading Blain Co. (1893), 37 Sol. Jo. 494; *Re Powell's Trade Mk.*, [1893] 2 Ch. 588; *Re Talbot's Trade Mk.* (1894), 63 L. J. Ch. 264; London General Omnibus Co. v. Felton (1896), 12 T. L. R. 213; Valentine Meat Juice Co. v. Valentine Extract Co. (1900), 83 L. T. 259; Walter v. Ashton (1902), 71 L. J. Ch. 839; Worcester Royal Porcelain Co. v. Locke, Same v. Rhodes (1902), 18 T. L. R. 712; Grand Hotel Co. of Caledonia Springs v. Wilson, [1904] A. C. 103; *Re Crossfield's Appln.*, *Re California Pigeon Syrup Co.'s Appln.*, *Re Brock* (1909), 101 L. T. 587; *Price's Patent Candle Co. v. Ogston & Tennant* (1909), 26 R. P. C. 797.

**1076.** —[J.—] *Resp.* had for years manufactured & sold under the name "Yorkshire Relish" a sauce made according to a secret recipe, & the term "Yorkshire Relish" had come to mean that particular manufacture. *Appls.* began to make a sauce, nearly resembling *resp.'s* sauce, which they sold as Yorkshire Relish so as to induce purchasers to believe that it was *resp.'s* "Yorkshire Relish," although the purchasers did not in fact know the name of *resp.* in connection with the sauce:—**Held:** *resp.* was entitled to an injunction restraining *appls.* from using the words "Yorkshire Relish" in connection with their sauce without clearly distinguishing it from *resp.'s* sauce.—**BIRMINGHAM VINEGAR BREWERY Co. v. POWELL**, [1897] A. C. 710; 66 L. J. Ch. 763; 76 L. T. 792; *sub nom.* POWELL v. BIRMINGHAM VINEGAR BREWERY Co., LTD., 14 R. P. C. 720, II. L.

**Annotations:**—**Consd.** Jamieson v. Jamieson (1898), 11 T. L. R. 160; Weingarten v. Bayer (1903), 88 L. T. 168. **Appld.** Leccurtier v. Rey, [1910] A. C. 262; Edge v. Nicolls, [1911] A. C. 693. **Disld.** Hotlick's Malted Milk Co. v. Sunmumskil (1916), 85 L. J. Ch. 338. **Refd.** Chivers v. Chivers (1900), 17 R. P. C. 420; Valentine Meat Juice Co. v. Valentine Extract Co. (1900), 83 L. T. 259; Cash v. Cash (1901), 84 L. T. 349; Kinnell v. Ballantine (1909), 27 R. P. C. 185; *Re Teofani's Trade Mark*, Teofani v. Teofani (1913), 109 L. T. 114.

**1077.** —[J.—] The original factory of china & porcelain known as "Worcester" or "Worcester China" was founded at Worcester in 1751. From 1786 to 1801 there were two factories & firms, from 1801 to 1840 three factories & firms, & from 1840 to 1889 two factories & firms engaged independently in this manufacture at Worcester. Since 1889 *pltf.*s, who claimed to be the successors of all the above-mentioned firms, had been the only manufacturers of china or porcelain in Worcester until 1897, when one Locke, who had been in their employment, set up a new manufactory. In 1898 Locke sold his business to *def.* co. It appeared that there were no natural advantages, in the way of soil or water or otherwise, attaching to the city or county of Worcester making it specially suitable for the manufacture of china & porcelain, & that the productions of the Worcester makers had never been confined to any special types, but had included specimens of all classes of such wares & all descriptions of design, subjects, & colouring. It also appeared that from some time prior to 1889 *pltf.*s had used, as generally as possible, the word "Royal" as well as "Worcester" in connection with their goods; & since, in 1889, they acquired the works & business of Grainger, the last surviving of the above-mentioned firms, they had kept those works as a

separate establishment, & had described products therefrom as "Grainger's Worcester China." In two actions brought by *pltf.*s against *def.* co. & against a retail dealer who sold the products of *def.* co. as "Worcester China":—**Held:** (1) between 1889 & the commencement of sales by Locke & *def.* co., the word "Worcester," as applied to current trade productions in china & porcelain, acquired & had a secondary meaning as denoting goods made by *pltf.*s at one or other of their manufactories to the exclusion of all other manufacturers of china or porcelain & similar articles; (2) *pltf.*s were not disentitled to relief either by reason of previous manufacturers having made at Worcester china now known as "Worcester" or by the fact that some of their goods were described as "Royal Worcester" or "Grainger's Worcester China"; (3) although no actual instance of deception had been proved, the acts of *def.*s. were calculated to deceive purchasers & the public into the belief that their goods were those of *pltf.*s.—**WORCESTER ROYAL PORCELAIN Co., LTD. v. LOCKE & Co., LTD., SAME v. RHODES** (1902), 18 T. L. R. 712; 19 R. P. C. 479.

**1078. Right acquired by repute.**—[J.—] Though no exclusive right of property can be acquired in the public & well known name of a geographical district, such a right may be acquired in the application of such a name to a particular article of manufacture, if the article has acquired a reputation in the market under such name as a trade mark.—**M'ANDREW v. BASSETT** (1864), 4 De G. J. & Sm. 380; 4 New Rep. 123; 33 L. J. Ch. 561; 10 L. T. 442; 10 Jur. N. S. 550; 12 W. R. 777; 40 E. R. 965, L. C.

**Annotations:**—**Consd.** Maxwell v. Hogg, Hogg v. Maxwell (1867), 2 Ch. App. 307; Raggett v. Findlater (1873), L. R. 17 Eq. 29. **Expld.** Kelly v. Byles (1880), 13 Ch. D. 682. **Consd.** *Re Salt's Appln.*, [1894] 3 Ch. 160. **Refd.** Leather Cloth Co. v. American Leather Cloth Co. (1865), 35 L. J. Ch. 53; Wolterspon v. Currie (1872), 42 L. J. Ch. 130; Mouson v. Bochm (1881), 26 Ch. D. 398; *Re "Alpine" Trade Mk.*, Stapley & Smith's Appln. (1885), 54 L. J. Ch. 727; *Re Schmidt's Trade Mk.*, Jackson v. Napper (1886), 35 Ch. D. 162; Borthwick v. Evening Post (1888), 37 Ch. D. 449; Licensed Victualler's Newspaper Co. v. Bingham (1888), 38 Ch. D. 139; *Re Paine's Trade Mks.*, Paine v. Daniel's Breweries (1893), 68 L. T. 801; *Re Densham's Trade Mk.* (1895), 43 W. R. 515.

**1079.** —[J.—] An injunction will be granted on an interlocutory motion to restrain the use or imitation of the name of a place, used as a trade mark, if *pltf.* proves *prima facie*, that such name in the market has come to mean *pltf.'s* article obtained from such place.—**RADDE v. NORMAN** (1872), L. R. 14 Eq. 348; 41 L. J. Ch. 525; 26 L. T. 788; 20 W. R. 766.

**Annotation:**—**Refd.** Free Fishers & Dredgers of Whitstable v. Elliott (1886), 4 T. L. R. 273.

**1080.** —[J.—] *Pltf.*s, under a grant from the owners, acquired the exclusive right of importing & selling in Great Britain, the mineral water produced by a natural spring called "Apollinaris," at Ahrweiler, in Prussia, which had for some years been known & sold in the English market under the name of Apollinaris Water, & advertised & sold the same as "Apollinaris Water." Subsequently, *def.*s. made & sold an artificial mineral water, being the chemical equivalent of the natural water, under the name & description of "London Apollinaris Water, possessing all the properties of the natural water":—**Held:** *pltf.*s were entitled to an *interim* injunction, to restrain the use of the words "London Apollinaris Water," or of any other name of which the word "Apollinaris" so formed part as to be calculated to mislead the

come from Helidon. In an action for an injunction to restrain *def.* from using the word "Helidon" in describing his mineral waters:—**Held:** the

word "Helidon," being a geographical name, & not a fancy name, *pltf.*s were not entitled to its exclusive use for the purpose of

waters & the action must fail.—**HELIDON SPA WATER Co., LTD. v. CAMPBELL** (1900), 10 Q. L. J. 1.—**AUS.**

public.—**APOLLINARIS CO., LTD. v. NORRISH** (1875), 33 L. T. 242.

**1081.** —[—]**—ROCKINGHAM RY. CO., LTD. & JARRAHDALE TIMBER CO., LTD. v. ALLEN** (1896), 13 T. L. R. 80, C. A.

**1082.** —[—]**—**The P. co. had registered a trade mark consisting of an oblong label with a panoramic view of London looking across Blackfriars Bridge with St. Paul's Cathedral prominent in the centre. On the right-hand side of the label was a double circle containing a ship in full sail. The P. co. used this as a label with the addition of the words "London Candles" in large letters printed across it for many years in the Morocco market. They designated their staple candles for that market "London Candles" & these candles were, at least to a large extent, known to customers by the native equivalent for these words. The candles were made up into packets wrapped in coarse blue paper with two orange labels, one being that described above, & the other an oval label bearing the words "London Candles." Wrapping candles in blue paper, with round & oval orange labels, was common to the trade. In 1906 O. & T. began to sell candles in the Morocco market, & a year later, after using a series of labels, each of which resembled the P. co.'s registered label more or less closely, they began to use an oblong label showing a panoramic view of a town looking across a bridge to a domed building similar to St. Paul's Cathedral. On the right hand side of the label was a circle containing a teapot with the words "Berrad Brand" (*anglice* teapot brand). The words "London Candles" were printed on the label in the same type & position as in the P. co.'s label. The get-up of the packets was the same as that of the P. co. The P. co. sought to have O. & T. interdicted from using these labels:—*Held*: (1) O. & T.'s label was an infringement of the P. co.'s registered trade mark; (2) at common law, O. & T.'s label, taking the words "London Candles" without regard to their meaning as part of the pictorial design, was a colourable imitation of the P. co.'s label, & O. & T. had been guilty of passing-off in using it, particularly in connection with the same get-up as that of the P. co., though that by itself was common to the trade; (3) the words "London Candles" had acquired a secondary meaning in the Morocco market in connection with the P. co.'s candles; & O. & T. were not entitled to use those words without clearly distinguishing their goods from those of the P. co.—**PRICE'S PATENT CANDLE CO., LTD. v. OGSTON & TENNANT, LTD.** (1909), 26 R. P. C. 797.

**1083.** Whether user permissible by rival trader—**User with distinguishing mark.**—In 1887, B. & co. commenced to sell Indian cigars under the brand "Flor de Dindigul," & had since sold the same in large quantities. The cigars were often asked for & sold as "Dindigul" cigars; the name "Dindigul" had not prior to B. & co.'s use been used as part of the name of a cigar. In 1897 H. commenced to sell cigars under the brand "Cigarro de Dindigul." B. & co. commenced an action

against H. to restrain H. from using in connection with cigars the words "Cigarro de Dindigul," "Dindigul," or "Flor de Dindigul," & also from using off his goods as the goods of B. & co. B. & co. alleged that in deft.'s shops deft.'s cigars had been sold in response to orders for "Flor de Dindigul's" cigars. Deft. claimed the right to use the name "Cigarro de Dindigul," on the ground that Dindigul was a district in India in which the tobacco was grown of which his cigars were made. B. & co. moved for an interlocutory injunction:—*Held*: B. & co. were entitled to an interlocutory injunction restraining deft. from using the name of "Flor de Dindigul" or "Cigarro de Dindigul" as the brand or title of any cigars not being pltf.'s cigars, & from supplying any cigars not being pltf.'s cigars in response to orders for "Flor de Dindigul" cigars, & from using the name "Dindigul" in connection with the sale of cigars not being pltf.'s cigars without clearly distinguishing such cigars from pltf.'s cigars; but the Order was not to prevent deft. from describing any cigars sold by him which were in fact made of "Dindigul" tobacco as being so made.—**BEWLEY & CO., LTD. v. HUGHES** (1898), 15 R. P. C. 290.

**1084.** —[—]**—HUNTLEY & PALMERS v. READING BISCUIT CO., LTD.** (1893), 9 T. L. R. 462; 37 Sol. Jo. 494.

**1085.** —[—]**—BIRMINGHAM VINEGAR BREWERY CO. v. POWELL**, No. 1076, *ante*.

**1086.** —[—]**—**Where the mineral waters of applt. derived from various Caledonia springs, so called from being in a township of that name, acquired in the market the name of "Caledonia Water"; & resps. having discovered other springs in the same township sold their goods as "from new springs at Caledonia." In an action for an injunction:—*Held*: applts. had not, in the circumstances, a right to the exclusive use of the word "Caledonia." Resps. were entitled to indicate the local source of their waters, & had sufficiently distinguished their goods from those of applts.—**GRAND HOTEL CO. OF CALEDONIA SPRINGS v. WILSON**, [1904] A. C. 103; 73 L. J. P. C. 1; 89 L. T. 456; 52 W. R. 286; 20 T. L. R. 10, P. C.

#### C. Descriptive Name.

**1087.** No right to exclusive user.]—An injunction to restrain the use by defts. upon their trade label of the term "Nourishing Stout," which pltf. had previously used, refused, on the ground that "Nourishing" was a mere English word denoting quality.—**RAGGETT v. FINDLATER** (1873), L. R. 17 Eq. 29; 43 L. J. Ch. 64; 29 L. T. 448; 37 J. P. 822; 22 W. R. 53.

*Annotation*:—**Refd. R. Barrows' Trade Mk.** (1877), 5 Ch. D. 353.

**2088.** —[—]**—**Pltfs. in 1882 in the United States designed & put upon the market for sale a tooth brush under the name "Prophylactic" & adopted a yellow carton for enclosing it & a certain get up. The brush so got up & marketed under that name had attained a large share of the business in tooth

#### PART V. SECT. 4, SUB-SECT. 1.—C.

**1087 i.** No right to exclusive user.]—**SAVAGE v. RAMETTE** (1895), Q. R. 7 S. C. 84.—**CAN.**

**1087 ii.** —[—]**—COHEN v. KRAUSS** (Man.), [1922] 1 W. W. R. 703.—**CAN.**

**1087 iii.** —[—]**—**When a person invents a new article & at the same time invents a word to designate it, he cannot claim the exclusive use of that word to denote his own manufacture as distinguished from others. The name given to the invented article becomes

part of the English language & is therefore *publici juris*.—**AMERICAN DRUGGISTS SYNDICATE, LTD. v. BAYER CO., LTD.**, [1923] Exch. C. R. 65; *reversd.* [1924] S. C. R. 558.—**CAN.**

**1087 iv.** —[—]**—VADILAL v. BURDITT & CO.** (1905), 1 L. R. 30 Bom. 61.—**IND.**

**1087 v.** —[—]**—**Appots. are entitled to have descriptive words registered, but not for the purpose of giving an exclusive right or use.—*Ex p. TESSIER* (1890), 7 Nfld. L. R. 423.—**NFLD.**

**1087 vi.** —[—]**—**A manufacturer of

a proprietary medicine who calls it by the descriptive name of a known drug, although it contains none of the drug, can acquire no right to restrain other manufacturers from the use of that name as descriptive of their manufactures from that drug.—**LOASBY'S WABOO MANUFACTURING CO., LTD. v. DUTTON** (1897), 16 N. Z. L. R. 182.—**N.Z.**

**1087 vii.** —[—]**—MONTGOMERIE v. DONALD & CO.** (1884), 11 R. (Ct. of Sess.) 506; 21 Sc. L. R. 338.—**SCOT.**

*Sect. 4.—Trade names of goods: Sub-sect. 1, C.]*

brushes in the United States & other countries of the world. Pltfs.' trade in the United Kingdom commenced, though on a small scale, in 1895, & continued on about the same scale until the outbreak of war; during the war there were restrictions on importation of the goods into the United Kingdom, & immediately after the war circumstances outside pltfs.' control militated against any large number of shipments by them, but from 1921 pltfs. started an advertising campaign in this country & thereby largely increased their sales here. In 1920 pltfs. discovered that defts. were manufacturing tooth brushes under the name "Prophylactic" & under a similar get up, & commenced an action for passing off. Defts. alleged that the word "Prophylactic" was common to the trade & that none of the features alleged by pltfs. to be distinctive of his goods were in fact distinctive:—*Held*: in this country the word "Prophylactic" was descriptive of a particular shape & make of tooth brush, & was open to every manufacturer or trader who in fact dealt in tooth brushes made according to that shape & pattern; pltfs. had no exclusive right to use the word "Prophylactic"; the elements found in both pltfs.' & defts.' cartons were all more or less in common use in the trade, & on the facts pltfs. had failed to establish that there was such a get up of defts.' goods, or of the packets in which they were contained, as to lead to the results of which pltfs. were apprehensive; there had been a user by others of the factors or elements of which pltfs. mainly complained for a length of time & in circumstances which at this date disentitled them to the relief claimed, & defts. had acted in a legitimate way & honestly, & the action must be dismissed with costs.

The necessary similarity of a common article increases the risk of deception, & it behoves manufacturers, in putting their products on the market, to be careful to avoid adopting any factors or elements which may be likely to confuse their article with an almost exactly similar article put on the market by another manufacturer.—*CORDES v. ADDIS (R.) & SON (1923)*, 40 R. P. C. 133.

**1089.** — Where no secondary or special meaning acquired.]—Where pltfs. without relying on their registered trade mark, which consisted in part of the term "Flaked Oatmeal," claimed that they had by user so intimately identified the term with their goods that the use of it by defts. in their trade mark had the effect of passing off their goods as pltf.'s goods:—*Held*: the term being one of ordinary & not exclusive description, & being applicable to defts.'s goods as well as pltf.'s, & defts.'s user thereof not having been proved to have had or to be calculated to have the above effect, the suit must be dismissed with damages resulting from the grant of an *interim* injunction.—*PARSONS v. GILLESPIE*, [1898] A. C. 239; 67 L. J. P. C. 21; 14 T. L. R. 142; 15 R. P. C. 57, P. C.

*Annotation* :—*Consd.* Bile Bean Manufacturing Co. v. Davidson (1905), 22 R. P. C. 553.

**1090.** — — — — —.]—Applts., an English co.,

**1089 i.** — — — — —.]—Where no secondary or special meaning acquired.]—*WOLFE v. HART* (1878), 4 V. L. R. (Eq.) 125.—**AUS.**

**1089 ii.** — — — — —.]—No person can have the exclusive right to the use of the term "Schnapps," or of the term "Schledam," or of the term "Aromatic," as applied to gin, for they have become *publii juris*.—*WOLFE v. ALSOR* (1886), 12 V. L. R. 887.—**AUS.**

**1089 iii.** — — — — —.]—The exclusive right to the use of a trade name which, in its primary meaning, is merely descriptive of a business, can be secured only by long use in the course of which the name has acquired a secondary meaning specially descriptive of the person or persons using it or of his or their goods.—*MATTHEWS v. OMANSKY* (1913), 25 W. L. R. 603;

claimed to have invented, or at least to have put upon the market, a fabric suitable for shirting & underwear woven in a particular manner; & alleged that they had for the last ten years described this fabric in their advertisements as made in a certain way; & that they had marked it & invoiced it under the name of "cellular cloth" largely in England & to some extent, in Scotland. The name had not been registered. Resps. were a wholesale firm in Edinburgh who sold cotton & woollen goods which they had recently described as "cellular":—*Held*: applts. were not entitled to relief on the grounds (a) that the word "cellular" was an ordinary English word which appropriately & conveniently described the cloth of which the goods sold by resps. were manufactured; & (b) that the term had not been proved to have acquired a secondary or special meaning so as to denote only the goods of applts.—*CELLULAR CLOTHING CO. v. MAXTON & MURRAY*, [1899] A. C. 326; 68 L. J. P. C. 72; 80 L. T. 809; 16 R. P. C. 397, H. L.

*Annotations* :—*Apld.* Ripley v. Griffiths (1902), 19 R. P. C. 590. *Consd.* Kels v. Hedley (1903), 19 T. L. R. 340; Imperial Tobacco Co. (of Great Britain & Ireland) v. Purnell (1901), 21 R. P. C. 368; Bile Bean Manufacturing Co. v. Davidson (1905), 22 R. P. C. 553; British Vacuum Cleaner Co. v. New Vacuum Cleaner Co., [1907] 2 Ch. 312; Randall v. Bradley (1907), 24 R. P. C. 773; Soc. of Accountants & Auditors v. Goodway & London Assoc. of Accountants, [1907] 1 Ch. 489; Kennell v. Hallantine (1909), 27 R. P. C. 182. *Apld.* Burberry v. Cording (1909), 100 L. T. 985. *Consd.* Edge v. Nicolls, [1911] 1 Ch. 5; Universal Winding Co. v. Hattersley (1915), 32 R. P. C. 479. *Apld.* Horlick's Malted Milk Co. v. Summerskill (1916), 45 L. J. Ch. 338. *Distd.* Havana Cigar & Tobacco Factories v. Oddenno, [1921] 1 Ch. 179. *Refd.* Chivers v. Chivers (1900), 17 R. P. C. 420; Valentine Meat Juice Co. v. Valentine Extract Co. (1900), 83 L. T. 259; Acrotars v. Tollitt, [1902] 2 Ch. 319; Carr v. Crisp (1902), 19 R. P. C. 197; Weingarten v. Bayer (1903), 88 L. T. 168; Hommel v. Gebroder Bauer (1904), 20 T. L. R. 585; Plotzker v. Lucas (1907), 24 R. P. C. 551; *Re* Kenrick & Jefferson's Appln. (1909), 26 R. P. C. 611; *Re* Crossfield, *Re* California Fig Syrup Co., *Re* Brock, [1910] 1 Ch. 130; *Re* Du Cros' Appln., [1912] 1 Ch. 644; *Ididgway Co. v. Hutchinson* (1923), 40 R. P. C. 335.

**1091.** — — — — —.]—Pltf. had for many years manufactured laundry blue made up in oval blocks or cakes, & until a few years ago no other maker of laundry blue had put blue on the market in oval shape. Pltf. alleged that, as a result of this & of the quality of his goods & of his extensive advertising, the public & the trade had come to call & know his blue as "Oval Blue," & that "Oval Blue" meant Ripley's "Oval Blue" & no other. Deft. was a retail grocer who had previously been a customer of pltfs., but was now selling laundry blue made up in similar blocks or cakes by another manufacturer, & labelled "Bobby Blue." Pltf. alleged that blocks of this latter blue had been fraudulently passed off by deft. upon purchasers sent by him with written or verbal orders for "Oval Blue," & he claimed relief on the footing that apart from any question of shape, the words "Oval Blue" signified laundry blue of only his manufacture:—*Held*: (1) pltf. had not sufficiently discharged the burden of proving that words, purely descriptive & in common use in the English language & accurately describing the article, had been acquired by him by evidence that he alone for several years had made the article in the shape so described by the

5 W. W. R. 382; 14 D. L. R. 168; 24 Man. L. R. 85.—**CAN.**

**1089 iv.** — — — — —.]—*RUBBERSET CO. & RUBBERSET CO., LTD. v. BORCKH BROTHERS CO., LTD.* (1919), 46 O. W. L. R. 11; 49 D. L. R. 13; 16 O. W. N. 308.—**CAN.**

**1089 v.** — — — — —.]—*MAHOMED ESUF v. RAJARATNAM PILLAI* (1909), 1 L. R. 33 Mad. 402.—**IND.**

words under which it was sold; (2) no personal fraud or intentional deception on the part of defts. had been proved; (3) on the conflict of testimony as to the purchases the evidence given on behalf of plff. was not entitled to credit. If you want the ct. to rely upon the testimony of persons trapping, when they have completed their trap, & have got the victim in it, the least they can do is to tell him that that is the occasion that they are going to give evidence about in ct., so that, then & there, he may be able to recall & recover his collection of the circumstances & be ready to give his account in ct., so that the ct. should not be asked to reply upon the testimony of the witnesses for plff. on the ground that defts. cannot possibly remember what took place (FARWELL, J.).—*RIPLEY v. GRIFFITHS* (1902), 19 R. P. C. 590.

*Annotations:—As to (3) Consd. Truettitt & Truettitt v. Edney* (1903), 20 R. P. C. 321. *Apld. Lever v. Masbro' Equitable Pioneers Soc.* (1911), 105 L. T. 918.

**1092.** ———.—J.—*FELS v. HEDLEY* (THOMAS) & CO., LTD. (1903), 20 T. L. R. 69; 21 R. P. C. 91, C. A.

*Annotation:—Consd. Bile Bean Manufacturing Co. v. Davidson* (1905), 22 R. P. C. 553.

**1093.** ———.—J.—W. B., an American firm, began to sell corsets in this country in Feb. 1901, under the title of "Erect Form Corsets." Their sales prior to action were not large. In Feb. 1902, they commenced an action against W. R. to restrain him from passing off his corsets as theirs by the use of "Erect Form," & in Apr. 1902, they commenced a similar action against H. S. & co. The two actions were in the list for trial on the same day, & were in effect tried together:—*Held*: "Erect Form" as applied to corsets was a descriptive term, & had not acquired a secondary signification as denoting plffs.' corsets, & the term had been in fact first used in this country by defts. S. & co.

It seems to me unless & until you have either shown that the words are not, properly speaking, descriptive, or that the trade has been so large in extent & so widely known, the difficulties in proving which are almost insuperable, that the primary signification in respect of the goods in question is lost & the secondary signification has attached to those words that they mean goods made by plff., instead of the primary signification, you cannot succeed. In this case it is absolutely impossible for anyone to hold that plffs. have carried on business in such a way or to such an extent as to have any reputation at all at the time of the issue of this writ in England as attaching to these words (FARWELL, J.).—*WEINGARTEN BROTHERS v. ROSENTHAL, WEINGARTEN BROTHERS v. SHERWOOD & CO.* (1904), 21 R. P. C. 212.

**1094.** ———.—J.—W. brought an action against W. & G. to restrain them from representing any band other than plff.'s band to be the "White Viennese Band," "the White Hungarian Band" or the "White Band," claiming these titles as the trade names of his band. At the trial he abandoned his case as to the last two titles:—*Held*: plff. had failed to establish that the title "White Viennese Band" had acquired a secondary signification as denoting his band only, & no case of passing off had been established out against defts.—*WURM v. WEBSTER & GIRLING* (1904), 21 R. P. C. 373.

**1095.** ———.—Name originally distinctive.—Descriptive by common user.—Plffs., in an action for passing off had long sold their pencils, which

were polished a dark brown, in two qualities, stamped in gold & silver letters respectively, with the inscriptions, "E. Wolff & Son's Selected Spanish Graphite \*H. B.," & "E. Wolff & Son's Penny Spanish Graphite \*H. B." About 1871 they had used raw graphite imported from Spain, but the supply of suitable material from that country had long since given out, & plffs. had subsequently prepared a blend of materials obtained elsewhere. Principal defts. were a German firm, who had supplied or were supplying different retail traders in England with pencils similarly got up, polished, & stamped, the stampings including the terms, "Spanish Graphite," "Spanish Cedar," & "Selected Graphite." It appeared that between 1874 & 1884 plffs. had regularly supplied their pencils to a trader whose name was put on in the place of their own in front of the words "Spanish Graphite," not only on the pencils but also on small show cases; but this practice had been subsequently stopped. It also appeared that in 1883 defts. had supplied pencils stamped "Spanish Graphite" to the English market, & that three other makers had done the same between that year & the date of the trial:—*Held*: plffs. were not entitled to an injunction to restrain the manufacture or sale of any of the pencils complained of.—*WOLFF & SON v. NORTSCHE* (1900), 17 R. P. C. 321; *on appeal*, 18 R. P. C. 27, C. A.

**1096.** ———.—J.—In 1850 plffs.' predecessors began to sell a preparation which he called "Gripe Water," & in 1876 he registered a trade mark which contained those two words. Plffs. brought an action against the defts (a) for infringement of the trade mark "Gripe Water," & (b) to restrain the sale of any goods except plffs.' under that name, & defts. moved to have the trade mark expunged from the Register:—*Held*: on the evidence plffs. had failed to prove that the words "Gripe Water" now meant plffs.' goods & therefore they were not entitled to succeed in their claim for passing-off, but defts. were not entitled to have the trade mark expunged from the Register as at the time of registration it was in fact distinctive, & plffs. were entitled to an injunction to restrain infringement of the trade mark.—*Re WOODWARD'S TRADE MARK, WOODWARD, LTD. v. BOULTON MACRO, LTD.* (1915), 85 L. J. Ch. 27; 112 L. T. 1112; 31 T. L. R. 269; 32 R. P. C. 173.

*Annotations:—Consd. Wigfull v. Jackson*, [1916] 1 Ch. 213. *Re Imperial Tobacco Co.'s Trade Mks.*, [1918] 2 Ch. 207.

**1097.** ———.—Name used in combination.—When a name which is truly descriptive of the article sold has always been associated with the particular name of the manufacturer, a monopoly of the name of the article, apart from the name of the manufacturer, cannot be acquired under ordinary circumstances.

Applts. had manufactured & sold milk prepared with malt or extract of malt as "Horlick's Malted Milk":—*Held*: they were not entitled to restrain resp. from selling a similar article manufactured by him as "Hedley's Malted Milk."—*HORLICK'S MALTED MILK CO. v. SUMMERSKILL* (1916), 86 L. J. Ch. 175; 115 L. T. 813; 33 T. L. R. 83; 61 Sol. Jo. 114; 34 R. P. C. 63, H. L.

**1098.** Name identified with goods of particular manufacturer.—Whether user by others permissible.—Necessity for distinguishing mark.—A trader is not entitled to pass off his goods as the goods of

**1098 i.** Name identified with goods of particular manufacturer.—Whether user by others permissible.—Necessity for

distinguishing mark.—The words "Camel Hair Belting" had acquired a special or secondary signification in

the Indian market, meaning that the belting so called was of plffs.' exclusive manufacture; defts. began to sell



**Sect. 4.—Trade names of goods: Sub-sect. 1, C, D. & E.]**

another trader by selling them under a name which is likely to deceive purchasers, whether immediate or ultimate, into the belief that they are buying the goods of that other trader, although in its primary meaning the name is merely a true description of the goods.

Pltf. had for some years made belting & sold it as "Camel Hair Belting," a name which had come to mean in the trade pltf.'s belting & nothing else. Defts. began to sell belting made of the yarn of camel's hair, & stamped it "Camel Hair Belting" so as to be likely to mislead purchasers into the belief that it was pltf.'s belting, endeavouring thus to pass off his goods as pltf.'s:—*Held*: pltf. was entitled to an injunction restraining deft. from using the words "camel hair" as descriptive of or in connection with belting made or sold or offered for sale by him & not manufactured by pltf. without clearly distinguishing such belting from pltf.'s belting.—*REDDAWAY v. BANHAM*, [1890] A. C. 199; 65 L. J. Q. B. 381; 74 L. T. 289; 44 W. R. 638; 12 T. L. R. 205; 13 R. P. C. 218, H. L.

**Annotations:—***Apld.* *Powell v. Birmingham Vinegar Brewery Co.*, [1896] 2 Ch. 54; *Rockingham Ry. & Jarrahdale Timber Co. v. Allen* (1896), 12 T. L. R. 345. *Consd.* *Saxlehner v. Apollinaris Co.*, [1897] 1 Ch. 893. *Apprvd.* *Parsons v. Gillespie*, [1898] A. C. 239. *Distd.* *Cellular Clothing Co. v. Maxton & Murray*, [1899] A. C. 326. *Consd.* *Chivers v. Chivers* (1900), 17 L. J. C. 420. *Apld.* *Valentine Meat Juice Co. v. Valentine Extract Co.* (1900), 83 L. T. 259; *Cash v. Cash* (1901), 84 L. T. 349. *Consd.* *Acrators v. Tollett*, [1902] 2 Ch. 319. *Apld.* *Reddaway v. Frictionless & Engine Packing Co.* (1902), 19 R. P. C. 505; *Reddaway v. Stevenson* (1902), 20 R. P. C. 276. *Re* *Baulder v. Rushton* (1903), 19 T. L. R. 452. *Distd.* *Bile Bean Manufacturing Co. v. Davidson* (1905), 22 R. P. C. 553; *British Vacuum Cleaner Co. v. New Vacuum Cleaner Co.*, [1907] 2 Ch. 312. *Apld.* *Plotzky v. Lucas* (1907), 24 R. P. C. 551; *Kinnel v. Ballantine* (1909), 27 R. P. C. 185. *Follid.* *May v. May* (1914), 31 R. P. C. 324. *Apld.* *Goddard v. Watford Co-op. Soc.* (1924), 41 R. P. C. 218. *Consd.* *Havana Cigar & Tobacco Factories v. Oddenino*, [1921] 1 Ch. 179. *Refd.* *Lever v. Bodinghead* (1898), 80 L. T. 100; *Willcox v. Pearson* (1901), 18 T. L. R. 220; *Randall v. British & American Shoe Co.* (1902), 18 T. L. R. 611; *Waingaton v. Hayer* (1903), 88 L. T. 168; *Imperial Tobacco Co. (of Great Britain & Ireland) v. Purnell* (1904), 21 R. P. C. 368; *Bruck's "Crystal Ball" Fireworks v. Pain* (1911), 105 L. T. 976; *Edge v. Nickolls*, [1911] 1 Ch. 5; *Brinsmead v. Brinsmead* (1913), 30 R. P. C. 493; *Spalding v. Gamage* (1914), 84 L. J. Ch. 449; *Re Woodward's Trade Mk.*, *Woodward v. Boulton Macro* (1915), 112 L. T. 1112; *Hidgway Co. v. Hutchinson* (1923), 40 R. P. C. 335. *Mentd.* *Tate v. Fullbrook* (1908), 24 T. L. R. 347.

**1099. — Necessity for proof of identification.]**—Pltfs. *Fels & co.*, were the manufacturers in America of a cold water household soap which from its commencement in 1894 they had sold under the name "Fels-Naptha," naphtha being in fact an important ingredient in the soap from its special cleansing qualities. They commenced substantial sales of their soap in England in Feb. 1900, under the above name, but it appeared that dealers & customers had frequently, while pltfs.' soap was the only soap of the kind on the market, designated this soap by the simple names "Naptha" or "Naptha Soap." In the latter part of 1902 defts. commenced to manufacture & sell a similar soap, which was put upon the market as "Christopher's Naptha Soap"—*Christr. Thomas & Brothers, Ltd., Bristol.* There was a conflict of expert evidence of analysts with respect to the

presence of naphtha in defts.' soaps, all the analysts called for pltfs. alleging that it did not contain naphtha but only contained a distinct chemical substance called naphthaline:—*Held*: the word being a descriptive term as applied to pltfs.' soap, pltfs. had not discharged the onus of proving the identification of the name "Naptha Soap" with themselves, which they must do in order to ask the ct. to find that defts. had intended passing-off; & the presence of naphtha in defts.' soap was irrelevant.—*FELS v. THOMAS (CHRISTOPHER) & BROTHERS, LTD.* (1903), 21 R. P. C. 85.

**1100. —***J.—BURBERRYS v. CORDING (J. C.) & Co., LTD., No. 1280, post.*

*D. Fancy Name.*

**1101. Name in general use among manufacturers & dealers—Whether right of inventor prejudiced.]**

—(1) A fancy name which designates a particular kind of article may be in general use in price lists which circulate between manufacturers & retail dealers without prejudicing the right of the inventor to the exclusive use of the fancy name as a trade mark in the sale of the article to the public.

(2) The exclusive right to the use of a fancy name as a trade mark is not lost by the inventor habitually using it in conjunction with his own name as maker of the article.

(3) In a case where pltf., whose trade mark was "Ford's Eureka Shirt," had falsely represented in his invoices & in a few advertisements that he was a "patentee" of the shirt:—*Held*: such false representation was not sufficient to prevent him from sustaining an action at law; & his right at law being clear, he was entitled to an injunction.—*FORD v. FOSTER* (1872), 7 Ch. App. 611; 41 L. J. Ch. 682; 27 L. T. 219; 20 W. R. 818, L. J.J.; *revers. S. C. sub nom. Re "FORD'S EUREKA SHIRT," FORD v. FOSTER*, 20 W. R. 311.

**Annotations:—***As to (1)* *Consd.* *Hirst v. Denham* (1872), L. R. 14 Eq. 542; *Ruggett v. Findlater* (1873), L. R. 17 Eq. 29; *Re Henton's Trade Mark* (1884), 27 Ch. D. 570; *Reddaway v. Benham Hemp-Spinning Co.*, [1892] 2 Q. B. 639; *Goddard v. Watford Co-op. Soc.* (1924), 41 R. P. C. 218. *Apld.* *Havana Cigar & Tobacco Factories v. Oddenino*, [1921] 1 Ch. 179. *Refd.* *Powell v. Birmingham Vinegar Brewery Co.*, [1896] 2 Ch. 54; *Cellular Clothing Co. v. Maxton & Murray* (1899), 80 L. T. 809. *As to (2)* *Refd.* *Re Crossfield's Appln.* (1909), 101 L. T. 587. *As to (3)* *Apld.* *Stegert v. Findlater* (1878), 7 Ch. D. 801; *Liebig's Extract of Meat Co. v. Anderson* (1886), 55 L. T. 206; *Newman v. Pinto* (1887), 57 L. T. 31. *Consd.* *Bile Bean Manufacturing Co. v. Davidson* (1905), 22 R. P. C. 553. *Generally, Refd.* *Cheavin v. Walker* (1877), 5 Ch. D. 850; *Orr Erwing v. Johnston* (1880), 13 Ch. D. 434; *Re Albenz' Appln.* (1887), 35 Ch. D. 248.

**1102. Name used in combination with name of manufacturer.]—***FORD v. FOSTER*, No. 1101, *ante*.

**1103. Name identified with goods of manufacturer—Whether user by others permissible—Necessity for distinguishing mark.]—**Pltfs. were jam manufacturers in Stockport, who in 1886 commenced to make their jams in silver instead of copper vessels, & adopted the word "Silverpan," which, in 1887, was registered as a trade mark, & had been used by them ever since on labels, circulars, & advertisements in combination with their own name *Faulder & co.* Prior to 1900 only four other jam manufacturers in fact made their jams in silver or silvered pans, which they advertised

belting made of camel hair, designating it as camel hair belting without clearly distinguishing it from the belting of pltfs. so as to be likely to mislead purchasers into the belief that it was pltfs.' belting, endeavouring thus to pass off their goods as pltfs.'—*Held*: pltfs. were entitled to an injunc-

tion restraining defts. from using the words "Camel Hair" as descriptive of, or in connection with, the belting made, sold or offered for sale by them & not manufactured by pltfs. without clearly distinguishing such belting from pltfs.' belting.—*SMITH v. REDDAWAY & Co.* (1905), 1 L. R. 32 Calc. 401; 9 C. W. N.

281.—*IND.*

**1098 II. —***J.—KINNELL & Co., LTD. v. BALLANTYNE & SONS*, [1910] S. C. 246.—*SCOT.*

**1098 III. —***J.—DR WILLIAMS' MEDICINE Co. v. ALEX-ANDER* (1905), 22 S. C. 589; 15 C. T. R. 871.—*S. AF.*



as "Boiled in silver pans." Defts. were retail grocers trading at many shops in Wigan & Chorley, who, being already supplied with jams by one of the four manufacturers, in 1900 issued in their district a circular advertising "Silverwell Silver Pan Strawberry, 10½d.," with their name, "O. & G. Rushton, Ltd." appearing in many places on such circular, & a large window poster including the words "Silver Pan." It appeared that, while pltf.'s goods had been advertised in the Wigan district & were known in Chorley, they had not there enjoyed the extensive sales which elsewhere had made their reputation. In an action to restrain defts. from passing off their goods as the goods of pltf.'s, defts. in the meantime having succeeded in expunging pltf.'s trade mark from the Register:—*Held*: the word "Silverpan" was a fancy word identified with pltf.'s firm & no other firm throughout England, & especially in that portion of Lancashire immediately contiguous to the Wigan district; defts. had not by their mode of printing the circular & poster sufficiently distinguished their jams from those of pltf.'s, & they must be restrained accordingly.—*FAULDER (HENRY) & Co., LTD. v. RUSHTON (O. & G.), LTD.* (1903), 19 T. L. R. 452; 20 R. P. C. 477, C. A.

**1104.** —[Prior to the year 1886 a combined mowing & reaping machine had been manufactured by a firm of R. & O. at certain works, & after the death of C. by R. alone & R.'s exors. The device of a crown had been affixed to the machine & the name "Crown" had been used in connection with it. In 1886 an agreement was entered into between R.'s exors. & pltf., under which pltf. became lessee of the works & bought the stock-in-trade, patterns, etc., at a valuation, which was in fact taken on the footing of a sale for use in a going concern. The lease was subsequently renewed, & until 1898 pltf. carried on business at the works as a branch of his Carlisle business & manufactured the same machine, using the device of a crown & later the word "Crown" on it, & he used both name & device continuously in connection with the machine & to denote his goods: & he also called the works "Crown Works." In 1898 on his lease coming to an end, pltf. removed the branch to Carlisle & continued the use of the name & device of a crown on & in connection with his machine. R.'s son thereupon commenced to carry on a business of the same nature at the works & in 1900 he issued advertisements containing the device of a crown & the words "Crown Combined Mowing & Reaping machine" & describing himself as "Late R. & O." & in subsequent advertisements & bill headings he applied the name "Crown" to the works & used the expression "Established 1875." Pltf. commenced an action to restrain deft. from using the word "Crown" & from passing off his goods & business as the goods & business of pltf. Deft. alleged that pltf. had not acquired the goodwill of the business, & that the reputation in the name "Crown," which he had during the twelve years acquired, if any, enured for the benefit of the reversioner, & that the right to use the patterns determined with the lease:—*Held*: pltf. in 1886 had acquired the right to represent himself as carrying on the old business, to use the patterns & device of a crown & to describe the machine as it had been described; even if this were not so pltf.'s goods had become known by the name & device of a crown; pltf.'s rights did not come to an end on the determination of his lease; & pltf. was entitled to the relief sought except as to the name "Crown" in connection with the works.—*RICKERBY v. REAY* (1903), 20 R. P. C. 380.

**1105. Name not distinctive of goods of claimant.]**

—*WARRINGTON, J.*, having held that the word "Hæmatogen" had not acquired a secondary meaning exclusively denoting pltf.'s goods:—*Held*: the decision was right.—*HOMMEL v. GEBRÜDER BAUER & Co.* (1904), 21 T. L. R. 80; 22 R. P. C. 43, C. A.

*Annotations*:—*Consd. Re Davis's Trade Mks., Davis v. Sussex Rubber Co.*, [1927] 2 Ch. 345. *Refr. Re Soc. Anon. Le Ferment's Appins.* (1912), 107 L. T. 515.

**1106. Name originally distinctive of brand—Meaning subsequently extended to description of size & shape.]**—For many years the brand name "La Corona" or "Corona" had been used by pltf.'s & their predecessors. It was not disputed that when used as a brand those words indicated cigars of pltf.'s manufacture. More than thirty years ago pltf. introduced a new size name "Coronas." Cigars of the Corona brand & Coronas, or Corona, size were known as "La Corona Coronas" or "Corona Coronas." This size name was adopted by other manufacturers & had for many years been used as a size name. In July, 1922, deft., in complying with a request for "some cigars, Coronas," supplied cigars of the Partagas brand & Coronas size. Deft. claimed the right in response to a request for a "Corona Cigar," or any similar request so phrased as not to indicate whether the word "Corona" was used to refer to brand or to size, to supply a cigar of any brand provided it was of the Corona size. In an action brought by pltf. claiming an injunction to restrain deft. from selling, or supplying, or offering or exposing for sale, or passing off, or inducing or enabling others to pass off, cigars not of pltf.'s manufacture as or for pltf.'s "La Corona" brand of cigars by the use of any words consisting of or containing the word "Corona" as a brand name, & from selling or supplying, in response to orders for "Corona" cigars, cigars not of pltf.'s manufacture:—*Held*: the words "a Corona cigar" being on the evidence proved to be ambiguous in meaning, deft. if he exercised the right which he claimed, would, in the majority of cases of a request for "a Corona cigar" be passing off goods not manufactured by pltf. as goods of their manufacture.

Pltf. were entitled to an injunction restraining deft. his servants & agents from selling or supplying a cigar not of the Corona brand, unless it was first ascertained that the customer did not require a cigar of the Corona & no other brand, or it was made clear to him by word of mouth or otherwise that the cigar supplied was of a brand other than pltf.'s brand.—*HAVANA CIGAR & TOBACCO FACTORIES, LTD. v. ODDENINO*, [1924] 1 Ch. 179; 93 L. J. Ch. 81; 130 L. T. 428; 40 T. L. R. 102; 68 Sol. Jo. 164; 41 R. P. C. 47, C. A.

*Annotation*:—*Consd. Goddard v. Watford Co-op. Soc.* (1924), 41 R. P. C. 218.

#### *E. Name of Patented Article.*

**1107. Whether use by other person restrained.]**—The ct. will restrain the use by a third party of an arbitrary name, which pltf. has invented & applied to a particular class of goods as sold by him, & which has thus become identified with pltf.'s goods, where the sale of that class of goods is open to the world. But where the class of goods is a patented article no such protection will be afforded; for the name becomes identified with the goods, not because they are pltf.'s but because he alone, as patentee, can make & sell them; & if the goods are the same, but made or manufactured in a totally different way from a totally different natural source, so that there is no infringement of the patent, a third party may use the name

*Sect. 4.—Trade names of goods: Sub-sect. 1, E. & F.; sub-sects. 2 & 3. Sect. 5: Sub-sect. 1.]*

fixed upon by the patentee.—*YOUNG v. MACRAE* (1862), 9 Jur. N. S. 322.

*Annotations:—*Consd. *Reddaway v. Banham*, [1895] 1 Q. B. 286. *Reid v. Browne v. Freeman* (1864), 12 W. R. 305; *Powell v. Birmingham Vinegar Brewery Co.*, [1896] 2 Ch. 54; *Re Chesbrough's Trade Mk. "Vaseline,"* [1902] 2 Ch. 1.

**1108.** —.]—The Magnolia Metal Co. were the proprietors of three trade marks, which had been registered in connection with anti-friction metals used for bearings of machinery. They respectively consisted of (a) a device, being the representation of a magnolia flower, without any words added thereto; (b) the same device, with the addition of the words "Magnolia Anti-friction Metal," the exclusive right to the words anti-friction metal being disclaimed; & (c) the word "Magnolia" alone.—*Held*: for years before the patents for the manufacture of Magnolia metal were taken out, & before the trade marks were registered, the word "Magnolia" had been treated, with or without additions thereto, as the name of an article manufactured by a secret process, & therefore presumably incapable of appropriation by being registered as a trade mark; & for these reasons, marks (b) & (c) had been wrongly registered.—*Re MAGNOLIA METAL CO.'S TRADE MARKS*, [1897] 2 Ch. 371; 76 L. T. 672; 13 T. L. R. 454; 41 Sol. Jo. 573; 14 R. P. C. 621; *sub nom. Re MAGNOLIA METAL CO.'S TRADE MARKS*, *Ex p. ATLAS CO.*, 66 L. J. Ch. 598, C. A.

*Annotations:—*Fold. *Re Gestetner's Trade Mk.*, [1908] 1 Ch. 513. *Reid v. Clement's Trade Mk.* (1899), 81 L. T. 400; *Kodak v. London Stereoscopic & Photographic Co.*, *Kodak v. Houghton*, *Re Kodak's Trade Mks.* (1903), 19 T. L. R. 297.

**1109.** —.]—Pltfs. in 1893 granted a sole licence to manufacture closets, under a patent to S., who afterwards transferred his business to a limited co. The licence terminated in 1898. In the five years S. & his successors manufactured closets under the licence some of which were sold by pltfs. & some by S. & his successors. The former were sold as "Turrit" & the latter as "Capstan." The word "Capstan" with the device of a capstan, was registered as a trade mark by S. by arrangement with pltfs. The registration was for the whole of class 16, but the trade mark was only used on closets made under the licence until a few months after the determination of the licence, when the co. began to sell closets of a slightly different pattern as "Capstan No. 2." Pltfs. thereupon brought an action to restrain the co. from selling any closets of their manufacture under the title of "Capstan" & from in any other manner passing off their goods as goods constructed under the licence of pltfs. Pltfs. moved for an interlocutory injunction, & also moved to expunge the trade mark from the Register on the ground that "Capstan" was the name of a patented article, & on the ground that the co. were no longer able to manufacture "Capstan" closets, & therefore their goodwill in such closets having determined the trade mark had determined also.—*Held*: both motions failed & must be refused.—*FREEMAN BROTHERS v. SHARPE BROTHERS & CO.*, *LTD.* (1899), 16 R. P. C. 205.

**1110.** — *Expiration of patent.*—*WHEELER & WILSON MANUFACTURING CO. v. SHAKESPEAR*, No. 1195, *post*.

**1111.** — —.]—Pltfs., under patents, made floor cloth of a new substance marked with the word linoleum.—*Held*: "linoleum" being the only name of the new substance, pltfs., at the expiration of the patents, were not entitled to the exclusive use of that word.—*LINOLEUM MANUFACTURING CO. v. NAIRN* (1878), 7 Ch. D. 834; 47 L. J. Ch. 430; 38 L. T. 448; 26 W. R. 463.

*Annotations:—**Apld. Re Palmer's Trade Mk.* (1883), 24 Ch. D. 504. *Consd. Re Ralph's Trade Mk.*, *Ralph v. Taylor* (1883), 25 Ch. D. 194; *Leonard & Ellis v. Wells*, *Re Leonard & Ellis's Trade Mk.* (1884), 53 L. J. Ch. 233. *Expld. Powell v. Birmingham Vinegar Brewery Co.*, [1894] 3 Ch. 449. *Consd. Powell v. Birmingham Vinegar Brewery Co.*, [1896] 2 Ch. 54. *Fold. Re Formalin Hygienic Co.'s Appln.* (1900), 17 R. P. C. 486. *Distd. Re Chesbrough's Trade Mk. "Vaseline,"* [1902] 2 Ch. 1. *Consd. Re Gestetner's Trade Mk.*, [1908] 1 Ch. 513. *Distd. Brock's "Crystal Palace" Fireworks v. Pain* (1911), 105 L. T. 976. *Apld. Edge v. Nicolls*, [1911] 1 Ch. 5. *Reid v. Johnstone* (1879), 40 L. T. 307; *Blair v. Stock* (1884), 52 L. T. 123; *Re Apollinaris Co.'s Trade Mks.*, [1891] 2 Ch. 186; *Horlick's Malted Milk Co. v. Summerskill* (1916), 31 Jt. P. C. 63.

**1112.** — *Language of patent ambiguous.*—In 1872 an inventor took out a patent in the United States for a product from petroleum "named by me 'vaseline.'" In 1874 he took out a patent in England for a similar product which he described as "a material which I term 'vaseline.'" In 1877 he registered the word "vaseline" in England under Trade Marks Registration Act, 1875 (c. 91), s. 10 as an old mark. On an application to remove the mark from the register:—*Held*: the language of both patents being ambiguous, as it might mean either that the name was given to the substance manufactured by the inventor or to the substance made according to the process described, the *onus* of proof was on appt. for the removal of the trade mark to show that it meant the latter; he had not discharged that *onus* & the mark ought not to be removed.—*Re CHESEBROUGH'S TRADE MARK "VASELINE,"* [1902] 2 Ch. 1; *sub nom. Re PEARSON'S APPLICATION, Re CHEESEBROUGH MANUFACTURING CO.'S TRADE MARK "VASELINE,"* 71 L. J. Ch. 427; *sub nom. Re CHESEBROUGH MANUFACTURING CO.'S TRADE MARK "VASELINE," Re PEARSON'S APPLICATION*, 86 L. T. 665; *sub nom. Re "VASELINE" TRADE MARK*, 18 T. L. R. 468, C. A.; *revisq. S. C. sub nom. Re "VASOGEN" & "VASELINE" TRADE MARKS* (1901), 17 T. L. R. 259.

*Annotations:—**Apld. Re Burroughs Wellcome's Trade Mk.*, *Wellcome v. Thompson & Capper*, [1901] 1 Ch. 736. *Reid v. Kodak v. London Stereoscopic & Photographic Co.*, *Kodak v. Houghton*, *Re Kodak Trade Mks.* (1903), 19 T. L. R. 297; *Re Keystone Knitting Mills Trade Mk.* (1928), 97 L. J. Ch. 316.

#### F. Other Particular Names.

**1113.** "Original."—The original inventor of a new manufacture, & persons claiming under him, are alone entitled to designate such manufacture as "the original"; & if he or they have been in the habit of so designating their manufacture, an injunction will be granted to restrain another manufacturer from applying the designation to his goods.—*COCKS v. CHANDLER* (1871), L. R. 11 Eq. 446; 40 L. J. Ch. 575; 24 L. T. 379; 35 J. P. 644; 19 W. R. 593.

*Annotations:—**Reid v. James v. James* (1872), 20 W. R. 431; *Raggett v. Flindler* (1873), L. R. 17 Eq. 29.

**1114.** "Guaranteed."—A firm of corset manufacturers had for upwards of four years been the exclusive makers & sellers of a corset which they called the "Guaranteed Corset," the wear of which

#### PART V. SECT. 4, SUB-SECT. 1.—F.

d. "King."—A manufacturer or dealer in cigars cannot acquire the right to an exclusive use, & be entitled to

registration, of a specific trade mark, of which the term "King" forms the leading feature, & is used in combination with the representation of some particular king, while other manu-

facturers or dealers use the same term with the likeness of their kings.—*SHILLING BROTHERS v. O'KELLY* (1904), 24 C. L. T. 119; 8 Exch. C. R. 426.—*CAN.*

they guaranteed for twelve months by undertaking to supply any purchaser with a new corset in case of complaint within that period. The corset was sold in a box bearing a printed label with the words "Guaranteed Corset" in large & conspicuous type, & in smaller type the words, "This corset is guaranteed to wear twelve months."

Defts., a rival firm of corset manufacturers, subsequently introduced a cheaper & inferior corset, the wear of which they also professed to guarantee for twelve months, & which they sold in a box bearing a printed label with the words "Guaranteed Corset" in large type, & words in smaller type similar to plffs. In an action by plffs. for an injunction:—*Held*: the word "guaranteed" was not so distinctly & exclusively applicable to plffs.' corset as that the ct. would restrain defts. from using the same word in connection with their corset.—*SYMINGTON & Co. v. FOOTMAN, PRETTY & Co.* (1887), 56 L. T. 696; 3 T. L. R. 488.

1115. "**Post Office Directory.**"—Plff. was the registered proprietor of the copyright of a directory entitled the "Post Office Directory of the West Riding of Yorkshire," & he had for several years published "Post Office Directories" of other counties. Defts. published a directory for the town of B., which is within the West Riding, intitled "The Post Office Directory," but it was not similar to plff.'s directory in price or appearance. There was no evidence to satisfy the ct. that the words "Post Office" in connection with directories had become necessarily connected in the minds of the public with the name of Kelly:—*Held*: plff. had no right to the exclusive use of the words "Post Office Directory" & his claim for an injunction was refused.—*KELLY v. BYLES* (1880), 13 Ch. D. 682; 49 L. J. Ch. 181; 42 L. T. 338; 28 W. R. 585, C. A.

*Annotations*:—*Reid, Ducks v. Yates* (1881), 18 Ch. D. 76; *Maple v. Junior Army & Navy Stores* (1882), 47 L. T. 589.

1116. "**Official.**"—*REUTER'S TELEGRAM CO., LTD. v. INTERNATIONAL GUIDE SYNDICATE & INTERNATIONAL EXPRESS, LTD.* (1893), 37 Sol. Jo. 325.

#### SUB-SECT. 2.—LOSS OF RIGHT.

1117. **Concurrent user by two firms—Discontinuance of user by one.**—Where there has been a concurrent user of a trade name by A. & B., but the user thereof by B. has practically ceased for some years, & A. has in the meantime acquired a large sale for his goods & a reputation in the market under the trade name, so that the name has become associated solely with the goods of A., B. may not afterwards revive the use of the name in his business in such a way as to pass off his goods as those of A.—*DANIEL & ARTER v. WHITEHOUSE*, [1898] 1 Ch. 685; 67 L. J. Ch. 262.

1118. **Cesser of manufacture.**—*THORNELOE v. HILL*, No. 1276, *post*.

1119. **Assignment.**—Plffs. were the American manufacturers of, & their English agents for, the sale of electrical lamps & other accessories. In 1896 an English syndicate called the "Stewart Electrical Syndicate Ltd." began to sell in England lamps made to their order by the American co., & sold by them under the name "Stewart Arc Lamps." In 1903 the syndicate was wound up, &

in 1904 the receiver sold its goodwill & its rights to the use of the word "Stewart" in connection with the goods by auction to defts., who continued the sale of the goods under that name. Plffs., having commenced to sell similar goods under the name "Stewart," sought an injunction to restrain defts. from selling them under that name; defts. thereupon counterclaimed for similar relief:—*Held*: the word "Stewart" as associated with the goods in question was the sole property of the syndicate & its successors defts., & plffs.' action was accordingly dismissed, & an injunction granted to restrain plffs. on defts.' counterclaim.—*DEFRIES (J.) & SONS, LTD. & HELIOS MANUFACTURING CO. v. ELECTRIC & ORDNANCE ACCESSORIES CO., LTD.* (1906), 23 R. P. C. 341.

#### SUB-SECT. 3.—ACTION FOR PASSING OFF.

*See* Sect. 5, sub-sect. 1, *post*.

#### SECT. 5. — PASSING OFF.

##### SUB-SECT. 1.—IN GENERAL.

1120. **What amounts to passing off—Defamation distinguished.**—Where, by the use of a name or otherwise, an article of manufacture is held forth to the public by one party in such a manner as to induce them to believe it to be the manufacture of another party, whose reputation in that respect stands high, & so as to diminish the profits of that party, an injunction will be granted to restrain such unfair dealing; but where the vendor of an article leads the public to believe that the article is prepared, or at least the sale of it by him approved & sanctioned by another party, whose authority would be a sufficient guarantee for its usefulness, but who, in fact, neither prepared nor sanctioned the sale of the article, & who is not in the habit of preparing or selling the same, or a similar or any article of the kind, that is no case for an injunction, but is, if anything, a defamation or libel case.—*TARK v. FREEMAN* (1848), 11 Beav. 112; 17 L. J. Ch. 112; 11 L. T. O. S. 22; 12 Jur. 149; 50 B. R. 759.

*Annotations*:—*Coned. Springhead Spinning Co. v. Riley* (1868), L. R. 6 Eq. 551; *Chappell v. Griffith* (1885), 53 L. T. 459; *Lee v. Gibbins* (1892), 67 L. T. 263; *Clerk v. Motor Car Co.* (1905), Ltd. & Ford (1904), 49 Sol. Jo. 418.

*Reid, Albert (Prince) v. Strange* (1819), 1 Mac. & G. 25; *Cox v. Cox* (1853), 11 Hare, 118; *Austria (Empress) v. Day & Kossuth* (1861), 3 De G. F. & J. 217; *Leather Cloth Co. v. American Leather Cloth Co.* (1863), 1 De G. J. 137; *Maxwell v. Hogg*, *Hogg v. Maxwell* (1867), 2 Ch. App. 507; *Dixon v. Holden* (1869), L. R. 7 Eq. 188; *Mulkern v. Ward* (1872), L. T. 13 Eq. 619; *Prudential Assoc. v. Knott* (1875), 10 Ch. App. 142; *Singer Manufacturing Co. v. Wilson* (1878), 26 W. R. 661; *Levy v. Walker* (1879), 10 Ch. D. 436; *Re Itiviere's Trade Mk.* (1881), 26 Ch. D. 48; *Williams v. Hodges* (1887), 4 T. L. R. 175; *Pollard v. Photographic Co.* (1888), 40 Ch. D. 345; *Monson v. Tussaud, Monson v. Tussaud* (1894), 63 L. J. Q. B. 454; *Dockrell v. Dougal* (1899), 80 L. T. 556; *Walter v. Ashton*, [1902] 2 Ch. 282.

**Defamatory statements as to trade, profession or calling.**—*See* LIBEL & SLANDER, Vol. XXXII., pp. 20 *et seq.*

1121. — **Publication of story under name of wrong author.**—Plff., a writer of reputation, sued defts. for damages for publishing in their magazine under plff.'s name a story of which he was not the writer. Plff. alleged that the story was of inferior quality, & being published as by him, was damaging

#### PART V. SECT. 5, SUB-SECT. 1.

o. **General rule.**—The general principle applicable to "passing off" is that nobody has the right to represent

his goods as the goods of somebody else.—*MUNNA LAL SEROWJEE v. JAWALA PRASAD* (1908), 1 L. R. 35 Cal. 311.—*IND.*

1. **Representation that defendant has**

*executed work—Work in fact done by plaintiff.*—*HENDERSON & SON v. MUNRO & Co.* (1905), 7 F. (Cl. of Sess.) 636; 42 Sc. L. R. 530; 13 S. L. T. 57.—*SCOT.*

**Sect. 5.—Passing off: Sub-sects. 1 & 2, A.]**

to his reputation. In summing up, the judge directed the jury that if they came to the conclusion that any one reading the story would think pltf. a mere commonplace scribbler they could give him damages for libel, & further, that on the claim for passing off, if they thought the facts proved & that damage must certainly ensue though it was not capable of present proof, they could find for pltf. with damages.—*RIDGE v. ENGLISH ILLUSTRATED MAGAZINE, LTD.* (1913), 29 T. L. R. 592.

*Annotation:—* *Reid. Pryce v. Pioneer Press* (1925), 42 T. L. R. 29.

**SUB-SECT. 2.—BY MISUSE OF TRADING NAMES OF BUSINESSES.****A. In General.**

**1122. When use restrained—Name calculated to deceive.**—It should never be forgotten in these cases that the sole right to restrain anybody from using any name that he likes in the course of any business he chooses to carry on is a right in the nature of a trade mark, that is to say, a man has a right to say, "You must not use a name, whether fictitious or real, you must not use a description, whether true or not, which is intended to represent, or calculated to represent, to the world that your business is my business, & so, by a fraudulent misstatement, deprive me of the profits of the business which would otherwise come to me." That is the principle, & the sole principle, on which this ct. interferes. The ct. interferes solely for the purpose of protecting the owner of a trade or business from a fraudulent invasion of that business by somebody else (*JAMES, L.J.*).—*LEVY v. WALKER* (1879), 10 Ch. D. 436; 48 L. J. Ch. 273; 30 L. T. 654; 27 W. R. 370, C. A.

*Annotations:—* *Consd.* *Chatteris v. Isaacson* (1887), 57 L. T. 177; *Thynne v. Shove* (1890), 45 Ch. D. 577. *Reid.* *Chappell v. Griffith* (1885), 53 L. T. 459; *Rodega Co. v. Owens* (1889), 6 R. P. C. 236; *Gray v. Smith* (1889), 43 Ch. D. 208; *Jennings v. Jennings*, [1898] 1 Ch. 378; *Re David & Matthews*, [1899] 1 Ch. 378; *Burchell v. Wilde*, [1900] 1 Ch. 551; *Pomeroy v. Sealé* (1900), 22 T. L. R. 795; *Pomeroy v. Sealé* (1906), 23 T. L. R. 170; *Waring & Gillow v. Gillow & Gillow* (1916), 32 T. L. R. 359.

**1123. Use of trade name of plaintiff.**—In England the assumption of a name, the patronymic of a family, by a stranger, who had never before been called by that name, is not the subject of a civil action, as by the English law there is no right of property in a person to the use of a particular name, to the extent of enabling him to prevent the assumption of his name by another. *Aliter*, as to the exclusive use of a name in connection with a trade or business, which right is recognised, & a party assuming it colourably or otherwise, being an invasion of another's rights, is a fraud, for which a remedy lies either at law or equity.—*DU BOULAY v. DU BOULAY* (1809), L. R. 2 P. C. 430; 6 Moo. P. C. C. N. S. 31; 38 L. J.

P. C. 35; 22 L. T. 228; 17 W. R. 594; 16 E. R. 638, P. C.

*Annotation:—* *Reid. Cowley v. Cowley*, [1901] A. C. 450.

**1124. ————Pltf. was the proprietor of an old established library business at the West End of London. Defts., being the promoters of a projected co., having for a principal object the carrying on of a library business in another quarter of the West end, proposed to adopt as the title of their undertaking the same trade name as that which pltf. had used for a considerable period, but with the addition of the word "Limited":—Held:** defts. must be restrained from carrying on in or near London the business in question under the proposed title, or under any other title only colourably differing from the name of pltf.'s business, & also from advertising the intended commencement thereof under such title.—*HOBY v. GROSVENOR LIBRARY CO., LTD.* (1880), 28 W. R. 386.

*Annotation:—* *Reid. Hendriks v. Montagu* (1881), 50 L. J. Ch. 156.

**1125. ————Whether use must be in respect of same trade.**—*LAWSON v. BANK OF LONDON*, No. 1413, *post*.

**1126. ————Where one trader complains of the use of a trade name by another trader carrying on a similar business as being calculated to mislead & deceive the public, the objects of the two businesses need not be absolutely identical to entitle him to relief if there is great similarity; but where two persons of the names of Robert & John F. Dunlop, who had carried on a motor & cycle repairing business in partnership for some years, turned the business into a limited co. under the name of the "Dunlop Motor co.":—Held:** a co. trading under the name of the "Dunlop Pneumatic Tyre co.", whose principal business was the manufacture of tyres for motors & cycles, who also dealt in various accessories for use in connection with motor cars, was not entitled to restrain them from using the name "Dunlop" in their business.—*DUNLOP PNEUMATIC TYRE CO., LTD. v. DUNLOP MOTOR CO.*, [1907] A. C. 430; 76 L. J. P. C. 102; 97 L. T. 259; 23 T. L. R. 717; 51 Sol. Jo. 715, 11 L.

*Annotations:—* *Consd.* *Waring & Gillow v. Gillow & Gillow* (1916), 32 T. L. R. 359. *Distd.* *Albion Motor Car Co. v. Albion Carriage & Motor Body Works* (1917), 31 R. P. C. 257. *Appl.* *Motor Manufacturers & Traders Soc. v. Motor Manufacturers, etc. Insec.*, [1925] Ch. 675.

**1127. ————A co. carrying on the business of insurance against motor risks adopted as part of its name the ordinary descriptive words "Motor Manufacturers & Traders" which had already been adopted as part of its name by a society having for its main objects the promotion, encouragement & protection of the motor trade generally. There was no charge of fraud & in the opinion of the ct. no tangible risk of injury to the society's business reputation owing to the similarity of names; the names being sufficiently distinguished & deft. co.'s business being wholly**

**PART V. SECT. 5, SUB-SECT. 2.—A.**

**1122 i. When use restrained—Name calculated to deceive.**—*MASTERS v. CAMERON*, [1904] St. R. Qd. 137.—*AUS.*

**1122 ii. ————**—*DAVIS v. KENNEDY* (1867), 13 Gr. 523.—*CAN.*

**1122 iii. ————**—*CAREY v. GOSS* (1886), 11 O. R. 619.—*CAN.*

**1122 iv. ————**—*McDONALD v. MILLER* (1904), 37 N. S. R. 46; 23 C. L. T. 299.—*CAN.*

**1122 v. ————**—In deciding whether two trade marks are so alike as to cause confusion, the ct. considers the impression likely to be conveyed

by the names as a whole. The use by defts. of the trade name "The Wheat City Fur Works," held to be calculated & intended to create confusion, & to have had the effect of causing confusion, between defts. business carried on under said name, & that of pltf. carried on under the name "The Wheat City Tannery Ltd."; & pltf. was held entitled to an injunction restraining the use of the former name.—*WHEAT CITY TANNERY, LTD. v. ABRAMSON (Man.)*, [1921] 1 W. W. R. 216.—*CAN.*

**1122 vi. ————**—*ARKIN v. POLINSKY*, [1923] 2 D. L. R. 365; 32 Man. L. R. 538; [1923] 1 W. W. R. 257.—*CAN.*

**1122 vii. ————**—*FASHIONS, LTD. v. BARSTON*, [1927] N. Z. L. R. 21.—*N.Z.*

**1122 viii. ————**—*GREAT NORTH OF SCOTLAND RY. CO. v. MANN* (1892), 19 R. (Ct. of Sess.) 1035; 29 Sc. L. R. 848.—*SCOT.*

**1122 ix. ————**—*COWAN v. MILLAR* (1895), 22 R. (Ct. of Sess.) 835; 32 Sc. L. R. 619; 3 S. L. T. 66.—*SCOT.*

**1122 x. ————**—*BAYER v. BARRI* (1898), 25 R. (Ct. of Sess.) 1142; 35 Sc. L. R. 913; 6 S. L. T. 98.—*SCOT.*

**1122 xi. ————**—*WILLIAMSON v. MEIKLE*, [1909] S. C. 1272; 46 Sc. L. R. 915; [1909] 2 S. L. T. 160.—*SCOT.*

different from that of the pltf. society:—*Held*: pltf. society was not entitled to a monopoly of its descriptive words or to any relief against deft. co.—**MOTOR MANUFACTURERS & TRADERS' SOCIETY v. MOTOR MANUFACTURERS', ETC. INSURANCE CO.**, [1925] Ch. 675; 94 L. J. Ch. 410; 133 L. T. 330; 41 T. L. R. 483; 42 R. P. C. 307, C. A.

**1128. — Mere similarity insufficient.]—**LONDON & COUNTY BANKING CO. v. CAPITAL & COUNTIES BANK (1878), cited in 9 Ch. D. at p. 567.  
*Annotation*:—**Refd.** Merchant Banking Co. of London v. Merchants' Joint Stock Bank (1878), 9 Ch. D. 560.

**1129. — Use calculated to deceive.]—**WILLIAMS v. OSBORNE, No. 1483, *post*.

**1130. — ]—**Pltfs. had carried on for some years at No. 22 Pall Mall, under the style of "The Guinea Coal co.," a large business, which had a considerable reputation. In Mar. 1860, deft., who had been their manager, set up a rival business in Beaufort Buildings, Strand, under the name of "The Pall Mall Guinea Coal co.," & at the end of Aug. removed it to No. 46 Pall Mall. On Nov. 24 pltfs., finding that many persons had been misled into giving orders to deft. in the belief that his concern was that of pltfs., filed their bill to restrain him from trading under the above style or any other colourable imitation of pltfs.' business style. Deft., among other grounds of defence, alleged that pltfs. had knowingly & habitually sold short weight, & that they had no exclusive right to the name "Guinea Coal co.," which was used by various other establishments about London. The Vice-Chancellor granted an injunction restraining deft. from using the name "The Pall Mall Guinea Coal co." in Pall Mall:—*Held*: (1) although pltfs. had no exclusive right to the name, the injunction had been properly granted, on the ground that deft. had no right to use the name in such a way as to lead persons to believe that his business was that of pltfs., & therefore there was no objection to confining the injunction to the use of the name in a particular place, inasmuch as its tendency to deceive greatly depended on the place where it was used; (2) there had been no such delay as to take away pltfs.' right to an injunction on interlocutory application; for in such cases a pltf. is not bound to come to the ct. until he has had time to obtain evidence that persons have been actually misled by the acts complained of, & the delay, even if unexplained, would not have been fatal to pltfs.' case, as the injunction asked for was of such a nature that deft. could not be injured by the delay in asking for it.—**LEE v. HALEY** (1860), 5 Ch. App. 155; 39 L. J. Ch. 284; 22 L. T. 251; 34 J. P. 228; 18 W. R. 242, J. J.

*Annotations*:—*As to* (1) **Apld.** Wotherspoon v. Curtis (1870), 22 L. T. 260. **Refd.** Hookham v. Portage (1872), 26 L. T. 755; Raggett v. Findlater (1873), L. R. 17 Eq. 29; Civil Service Supply Asscn. v. Dean (1879), 13 Ch. D. 512; Hendriks v. Montagu (1881), 17 Ch. D. 638; Liebig's Extract of Meat Co. v. Anderson (1886), 55 L. T. 206. *Generally, Mentd.* *Re* Barrows' Trade Mks. (1877), 5 Ch. D. 333.

**1131. — ]—**In suits to restrain the fraudulent use of a trader's name or of a trade mark it is not necessary to give proof of actual deception; it is enough if the acts of deft. are calculated to deceive.—**HOOKHAM v. PORTAGE** (1872), 26 L. T. 755; 20 W. R. 720; *affd.*, 8 Ch. App. 91, L. J.

*Annotations*:—**Apld.** Thorley's Cattle Food Co. v. Massam (1880), 14 Ch. D. 763. **Refd.** Walker v. Mottram (1881), 19 Ch. D. 355; Matthews v. Hodgson (1886), 2 T. L. R. 899; Trego v. Hunt, [1896] A. C. 7.

**1132. — ]—**A tradesman may use a name, although he is aware that a neighbouring tradesman intends to use that name.

A bootmaker having a shop running up Bedford street, with the front & entrance to the Strand,

wrote up over his shop the words "Civil Service Boot Supply." The Civil Service Supply Asscn. were at that time building a large store at the other end of Bedford street, in which when finished they opened a general shop, & they afterwards opened a boot & shoe shop in Tavistock street, which was not far off. One of the customers of the Asscn. had gone to the shop of the bootmaker, mistaking it for that of the Asscn. The Asscn. brought an action to restrain the bootmaker from using the words:—*Held*: under the circumstances there was no intention on the part of the bootmaker to deceive, & no rational person would have been deceived by the words so used.—**CIVIL SERVICE SUPPLY ASSCN. v. DEAN** (1879), 13 Ch. D. 512.

*Annotations*:—**Refd.** Bodoca Co. v. Owens (1889), 6 R. P. C. 236; Bourne v. Swan & Edgar, *Re* Bourne's Trade Mks., [1903] 1 Ch. 211.

**1133. — ]—**NICHOLLS v. KIMPTON (1887), 3 T. L. R. 674.

**1134. — ]—**HOLT v. SMITH (1888), 4 T. L. R. 320.

**1135. — ]—**A dealer in cycles having advertised his goods in a manner which satisfied the ct. that he intended the public to believe that the proprietors of *The Times* newspaper were either the vendors, for whom he acted as manager, or partners or in some way responsibly connected with the sale of "Times" cycles:—*Held*: as pltfs., the proprietors of *The Times*, were exposed to some risk & liability by the unauthorised use of the name of their newspaper by deft., & as there was a reasonable probability of *The Times* being exposed to litigation, & possibly being made responsible, had pltfs. not taken steps to disconnect the name of their newspaper from the advertisements & circulars issued by deft., an *interim injunction* ought to be granted restraining deft. from in any way representing that the cycles offered by him for sale were in fact offered for sale by pltfs., or that he was carrying on business as a department of *The Times*, or in any way holding out *The Times* to be the owners of or connected with his business.—**WALTER v. ASHTON**, [1902] 2 Ch. 282; 71 L. J. Ch. 839; 87 L. T. 196; 61 W. R. 131; 18 T. L. R. 445.

*Annotations*:—**Apld.** Clerk v. Motor Car Co. (1905), Ltd. & Ford (1905), 49 Sol. Jo. 418. **Refd.** Werthimer v. Stewart, Cooper (1906), 23 R. P. C. 481; Dutton, Massey (Liverpool) v. Dutton, Massey (1923), 10 R. P. C. 413; Harrods v. Harrod (1924), 40 T. L. R. 195; Motor Manufacturers & Traders Soc. v. Motor Manufacturers, etc. Insee., [1925] Ch. 675.

**1136. — ]—**E., trading as the Buttercup Dairy Co., carried on business in Scotland & the North of England, having a large number of shops in which he sold, among other things, margarine. The business was well known, & the trade in margarine was very considerable. The Buttercup Margarine Co., Ltd., was incorporated in Nov. 1916, & proposed to carry on a wholesale business in, among other things, margarine made by a special process. They stated that they did not intend to sell such margarine as "Buttercup Margarine," but under a special name not yet decided on. They were not yet in a position to start business. They had adopted their name innocently. In an action by E. to restrain the Buttercup Margarine Co. Ltd. from using that name, held, that the use of deft. co.'s name was either calculated to deceive & so divert business from pltf. to deft. co., or to occasion a confusion between the businesses; & that this was sufficient to entitle pltf. to relief. An injunction was granted to restrain the deft. co. from using or carrying on business under the name Buttercup Margarine Co., Ltd., or any other name colourably

Sec. 5.—Passing off: Sub-sect. 2, A. & B.]

resembling pltf.'s trade name, in connection with the manufacture &/or sale of butter substitutes, & dairy & farm produce of all kinds, or otherwise from carrying on such business under any title or description so as to mislead or deceive the public into the belief that deft.'s business is the business or a branch or department of the business of pltf.—*EWING v. BUTTERCUP MARGARINE CO., LTD.*, [1917] 2 Ch. 1; 86 L. J. Ch. 441; 117 L. T. 67; 33 T. L. R. 321; 61 Sol. Jo. 443; 34 R. P. C. 232, C. A.

*Annotations:—Folld.* Albion Motor Car Co. v. Albion Carriage & Motor Body Works (1917), 33 T. L. R. 316. *Refd.* Dutton, Massey (Liverpool) v. Dutton, Massey (1923), 40 R. P. C. 413.

**1137.** ———— [Pltf. co., incorporated in 1902, acquired the business of a firm which had carried on business as the Albion Motor Car co. in a large way as makers of engines & chassis of commercial & other motor cars, their goods being identified & known to the trade by the name "Albion," for which they had two trade marks. If pltf. were ordered to supply a motor car the body of the car would be supplied by other makers, & the car sold under pltf.'s responsibility. Deft. co. was incorporated by four persons in May, 1910, to take over the business of a carriage & motor body builder carried on at Albion Gardens, Hammersmith. Defts. did not make motor cars or manufacture engines or chassis. Pltf. alleged that the use of the word "Albion" in the title under which deft. co. was incorporated was calculated to deceive & lead to the belief that deft. co. was a branch of or connected with pltf. co., & they requested deft. co., as carrying on a business substantially the same in character as pltf. co.'s business, to cease the use of the word "Albion" in connection therewith. This deft. co. refused to do, & pltf. brought an action claiming an injunction:—*Held*: deft. co.'s business had not been proved to be the same class of business as that of pltf. co., yet the probability of confusion between the two cos., both being connected with the motor car industry, was proved; an injunction was granted, delivery up & damages being waived; deft. co. was given two months to change its name.—*ALBION MOTOR CAR CO., LTD. v. ALBION CARRIAGE & MOTOR BODY WORKS, LTD.* (1917), 33 T. L. R. 346; 34 R. P. C. 257.

**1138.** ———— [Intention to pass off.]—*OTARD, DUPUY & CO. v. OTARD, MONTEBELLO COGNAC CO., LTD.* (1893), 10 T. L. R. 67.

**1139.** ———— [—]—Where a person had taken a name as his own name for the purpose of using the name in trade to pass off his boots & shoes as the manufacture of another whose real name it was, he was restrained absolutely from using the name in connection with the sale or manufacture of boots or shoes.—*PINET (F.) ET CIE. v. MAISON LOUIS PINET, LTD.*, [1898] 1 Ch. 179; 67 L. J. Ch. 41; 77 L. T. 613; 46 W. R. 506; 14 T. L. R. 87.

**1140.** ———— [—]—From 1888 the D. P. T. co., Ltd., & their predecessors in title used the name "Dunlop" in connection with the goods of their manufacture. Such goods consisted of pneumatic tyres for cycles & other accessories such as pumps, inflators, etc. The name "Dunlop" had become identified with the goods of the D. P. T. co., Ltd. F. traded as the D. L. co., & dealt in oils & lubricants for cycles & other cycle accessories, but not the same class of accessories

as the D. P. T. co., Ltd. The word "Dunlop" was used prominently on all the goods of deft. The D. P. T. co., Ltd., brought an action to restrain defts. from so trading:—*Held*: there was evidence that F. was using the word "Dunlop" because it suggested pltf. co., & pltf. were entitled to an injunction.—*DUNLOP PNEUMATIC TYRE CO., LTD. v. DUNLOP LUBRICANT CO.* (1898), 16 R. P. C. 12.

**1141.** ———— [—]—Appls., in an action for infringement of trade mark & passing off, had in the year 1906 purchased from the inventor's widow the trade mark, goodwill & business, with the sole right to make "Stent's Dental Impression Composition." The composition was commonly sold in round tablets, applts., being of a reddish colour with the word "Stent's" in a panel on them across a sunk disc engine-turned. Resps. manufactured & sold round composition tablets of the same general nature as those of applts. with the name "Stent's" across a sunk disc engine-turned on them, & the initial "G." above. The other features were dissimilar from those of applts.' tablets. These had been sold by resps. & their predecessors for thirteen years at least. The word "Stent" had for thirteen years at least been also used by one H. C. Stent on similar tablets to the knowledge of applts. or their predecessors, but the initials "H. C." were on the tablets. The persons making resps.' composition had no connection with the name "Stent," & there never had been a "G. Stent" who dealt in such composition. Appls. claimed injunctions against the infringement of their trade mark which was a representation of their tablet, & against the use by resps. of the word "Stents" & the selling by resps. of a dental composition so got up as to deceive purchasers into the belief that it was of applts.' manufacture. It was held at the trial that, on the evidence, the word "Stents" by itself had come to distinguish applts.' goods; the name used by resps. being that of a rival trader the intention which must be imputed to them was that of gaining some reputation, not their own, by the use of that name which must have been originally used by them with a fraudulent intent; there was some possibility of deception; & applts. were entitled to the injunctions asked & to an order for delivery up on oath or destruction of infringing articles & to the costs of the action:—*Held*: (1) the infringement of the trade mark being negatived by the evidence of persons from the limited class of people to whom the goods were tendered that none of them would be deceived, the House of Lords would not take the contrary view; (2) as to passing off, although when an intention to deceive is proved, no ct. would be astute in concluding that a dishonest deft. had been unsuccessful in his fraudulent design, yet that such a charge ought to be explicitly pleaded & also proved by evidence. In this case it had not been proved that defts. necessarily acted dishonestly in using the word "Stents," & no witness had said that he had been or would be deceived.—*ASH (CLAUDIUS) SON & CO., LTD. v. INVICTA MANUFACTURING CO., LTD.* (1912), 29 R. P. C. 465.

**1142.** Use of name closely resembling trade name of plaintiff—Use causing confusion.]—Pltf., Paul Poiret, who had been with Worth, in the year 1903 set up business on his own behalf in Paris, & built up a great reputation & business as a costumier, dressmaker, designer of ladies' dresses & as a

**1142 i.** Use of name closely resembling trade name of plaintiff—Use causing confusion.]—*WILSON v. SAMUELS* (1913), 13 S. R. N. S. W. 394; 30 N. S. W. N. 98.—**AUS.**



theatrical costumier. He exhibited dresses in London in 1909 & had many customers in England, selling by himself or an agent in England, but had no place of business there. On the outbreak of war he was called up for military service, & his premises were taken over by the French Government as a factory for making soldiers' shirts. He did not resume his business until June, 1919. Deft., Alexander F. Nash, in Feb. 1914, set up in business, eventually as a costumier, dressmaker, & theatrical costumier, in London under the name of Jules Poiret, & he, under that name & subsequently a co. called Jules Poiret & Co. Ltd., promoted by him in 1917 & with which no person named Poiret had any connection, carried on business & acquired considerable custom & reputation as a theatrical costumier & ladies dressmaker. He alleged that when he adopted that name he had never heard of Paul Poiret or his business. Pltf. alleged that the acts of deft. had attracted custom & led customers to believe, by the use of the name Poiret, that the business was the same as, or a branch of, that of Paul Poiret, & thereby caused damage to pltf. & deceived the public, & he commenced an action against the co. & Nash to restrain their use of the name Poiret. Deft. denied the allegations & alleged that pltf.'s business had ceased during the period of the war, & that pltf. was guilty of laches in that, although he was given notice that deft. Nash had commenced business under the surname of Poiret, he failed to take any action in the matter:—*Held*: (1) deft. had taken the name of Poiret knowing of the reputation in dressmaking gained by it in Paris & in England & desiring to get the benefit of that reputation in the English market, & confusion had arisen with private customers & in the press solely due to the use by deft. of the surname of Poiret; (2) notwithstanding pltf. Paul Poiret had no place of business in London, he was entitled to the protection of his goods & reputation acquired in this country; (3) the continued use by the defts. of the name Poiret in the business would lead to confusion in the trade & among private customers; (4) there had been no laches on the part of pltf., & defts. had not acquired in the circumstances any concurrent right to the use of the name Poiret. An injunction was granted restraining defts. from using the name Poiret with or without the name Jules in connection with the manufacture, sale, advertisement or business of selling dresses, milliner, costumier or designer of dresses, with an inquiry as to damages & costs.—*POIRET v. POIRET (JULES) LTD. & NASH* (1920), 37 R. P. C. 177.

**1143. Use of telegraphic address.**—The short address "Street, London," was used for many years in sending telegrams from abroad to Street & Co., of Cornhill. A bank adopted by arrangement with the Post Office the phrase "Street, London," as a cypher address for telegrams from abroad to themselves:—*Held*: the ct. had no jurisdiction to restrain the bank from using such cypher address.—*STREET v. UNION BANK OF SPAIN & ENGLAND* (1885), 30 Ch. D. 156; 55 L. J. Ch. 31; 53 L. T. 262; 33 W. R. 901; 1 T. L. R. 554.

**1144. Use of name of third person.**—F. sought to restrain C. & V. from using the name "Richter Concerts," or from representing themselves as owners of the undertaking known by that name, or from representing that they were carrying on the "Richter Concerts" in succession to F.'s series; & also to restrain V. from acting in the matter as agent for C. F. alleged that he engaged Dr. Richter to conduct concerts, & in 1879 had originated the "Richter Concerts"; & that no

concerts had ever been given under that name excepting by him. It appeared that C. had announced a series of "Richter Concerts," & that V., notwithstanding a written agreement to act as F.'s agent, had held himself out as the agent of C. It was contended by F. that he had acquired the right to the exclusive use of the term "Richter Concerts," as a "trade name," by having originally introduced the name & obtained a list of subscribers, & by the introduction of original features as to price & music. Dr. Richter had declined to act any longer as the conductor of F.'s concerts, & had made arrangements with C.:—*Held*: it required a strong case to be made out to sustain a claim to the exclusive use of another person's name as a trade name; no such case had been established in the present instance; & there was no ground for saying that the term "Richter Concerts" had become dissociated from Dr. Richter himself, who was at liberty to carry his services to any market he chose.—*FRANKE v. CHAPPELL* (1887), 57 L. T. 141; 3 T. L. R. 524.

**1145. Use by agent of trade name of principal.**—*FINDLATER, MACKIE, TODD & CO., LTD. v. NEWMAN (HENRY) & CO., No. 1379, post.*

**1146. Sale of business by original owner.—Registration under new name by purchaser.—Use of old name by third party.**—Where the assets & goodwill of a co. in liquidation have been sold to purchasers who register the concern so purchased under a fresh name, no injunction can be granted against the use of the original co.'s name by a person who does not represent himself as the successor of such co., & whose use of the name has been acquiesced in by the liquidator of the old co. & the purchasers of his goodwill.—*MONTREAL LITHOGRAPHING CO., LTD. v. SAHSTON*, [1899] A. C. 610; 68 L. J. P. C. 121; 81 L. T. 135, P. C.

*Annotation*:—*Distd.* *Townsend v. Jarman* (1900), 69 L. J. Ch. 823.

#### B. Own Name.

**1147. Ground for restraining use.—Intention to pass off.**—Where pltf. marked his goods "Sykes Patent," to show that they were his own manufacture; & deft. copied the mark on his goods, to show that they were pltf.'s manufacture, & sold the goods so marked as & for pltf.'s manufacture:—*Held*: case would lie for the injury, though pltf. & deft. were both named "Sykes," & neither of them in fact had a valid patent.—*SYKES v. SYKES* (1824), 3 B. & C. 541; 5 Dow. & Ry. K. B. 292; 3 L. J. O. S. K. B. 46; 107 E. R. 834.

*Annotations*:—*Consd.* *Chappell v. Davidson* (1855), 2 K. & J. 123; *Farina v. Silverlock* (1855), 1 K. & J. 509; *Collins Co. v. Cowen* (1857), 3 K. & J. 428. *Distd.* *Collins Co. v. Reeves* (1858), 28 L. J. Ch. 56. *Apld.* *Wotherspoon v. Currie* (1870), 42 L. J. Ch. 130, n.; *Ford v. Foster* (1872), 7 Ch. App. 611; *Richards v. Williamson* (1874), 30 L. T. 746. *Consd.* *Singer Manufacturing Co. v. Wilson* (1876), 2 Ch. D. 431; *Singer Manufacturing Co. v. Loog* (1882), 8 App. Cas. 15. *Refd.* *Seecley v. Fisher* (1841), 10 L. J. Ch. 274; *Crawshaw v. Thompson* (1842), 5 Scott, N. R. 562; *Burgess v. Burgess* (1853), 22 L. J. Ch. 675; *Edelsten v. Vick* (1853), 11 Hare, 78; *Cheavin v. Walker* (1877), 5 Ch. D. 850; *Blair v. Stock* (1884), 52 L. T. 123; *Powell v. Birmingham Vinegar Brewery Co.*, [1896] 2 Ch. 54. *Mentd.* *Leather Cloth Co. v. Hirschfeld* (1865), L. R. 1 Eq. 299; *Fulwood v. Fulwood* (1878), 38 L. T. 380; *Mansell v. Valley Printing Co. & Rankine* (1908), 99 L. T. 464.

**1148.** ———.—A blacking manufactory had long been carried on under the firm of Day & Martin, at 97, High Holborn. The exors. of the survivor continued the business under the same name. A person of the name of Day having obtained the authority of one Martin to use his name, set up the same trade at 90½ Holborn Hill, & sold blacking as the manufacture of Day & Martin, 90½ Holborn Hill, in bottles & with labels having a general resemblance to those of the



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original firm. He was restrained by injunction.—*CROFT v. DAY* (1843), 7 Beav. 84; 49 E. R. 994.

*Annotations*.—*Distd.* Clark v. Freeman (1848), 17 L. J. Ch. 142. *Apld.* Edelsten v. Vick (1853), 11 Hare, 78. *Consd.* Lee v. Huley (1869), 21 L. T. 546; Merchant Banking Co. of London v. Merchants' Joint Stock Bank (1878), 9 Ch. D. 560; Turton v. Turton (1889), 42 Ch. D. 128; Daimler Motor Co. (1904), Ltd. v. London Daimler Co. (1907), 24 R. P. C. 379. *Refd.* Burgess v. Burgess (1853), 22 L. J. Ch. 675; Rodgers v. Nowell (1853), 3 De G. M. & G. 614; Taylor v. Taylor (1854), 22 L. T. O. S. 271; Leather Cloth Co. v. American Leather Cloth Co. (1863), 4 De G. J. & Sm. 137; Maxwell v. Hogg, Hogg v. Maxwell (1867), 36 L. J. Ch. 433; Wotherspoon v. Currie (1870), 18 W. R. 562; Cheavin v. Walker (1877), 37 L. T. 300; Massam v. Thorley's Cattle Food Co. (1877), 6 Ch. D. 574; Metzler v. Wood (1878), 8 Ch. D. 606; Hendriks v. Montague (1881), 44 L. T. 879; Free Fishers & Dredgers of Whitstable v. Elliot (1888), 4 T. L. R. 273; Tussaud v. Tussaud (1890), 41 Ch. D. 678; Dunlop Pneumatic Tyre Co. v. Dunlop Truflaut Cycle & Tube Manufacturing Co. (1896), 40 Sol. Jo. 544; Powell v. Birmingham Vinegar Brewery Co. (1896) 2 Ch. 54; Reddaway v. Banham, [1896] A. C. 199. *Valentine Meat Juice Co. v. Valentine Extract Co.* (1900), 83 L. T. 259. *Mentd.* Spottiswoode v. Clark (1816), 8 L. T. O. S. 230.

**1149.** ———.]—*Pltf.* Thomas Holloway sold a medicine as "Holloway's pills." Deft. Henry Holloway commenced selling pills as "H. Holloway's pills," but in boxes, etc., similar to pltf.'s, & with a view of passing off his pills as pltf.'s. He was restrained by injunction.—*HOLLOWAY v. HOLLOWAY* (1850), 13 Beav. 209; 51 E. R. 81.

*Annotations*.—*Refd.* Powell v. Birmingham Vinegar Brewery Co. [1896] 2 Ch. 54; Jamieson v. Jamieson (1898), 14 T. L. R. 160; Valentine Meat Juice Co. v. Valentine Extract Co. (1900), 83 L. T. 259; Bile Bean Manufacturing Co. v. Davidson (1905), 23 R. P. C. 725.

**1150.** ———.]—No man has the right to represent his goods as the goods of another person; if he simply uses his own name, that is no *prima facie* evidence of intention to misrepresent his goods. But if, besides using his own name, he does other things which show that he is intending to represent, & is in point of fact making his goods represent the goods of another person, then he is to be prohibited; but not otherwise. *Pltfs.* carried on their business under the firm of Thomas Turton & Sons. Deft., who carried on a similar business, & in the same town, under the firm of John Turton & co., took his sons into partnership & then changed the name of the firm to John Turton & Sons. There was no evidence that defts. did anything to represent their goods as the goods of pltf's. :—*Held*: there was no ground for injunction although it was shown that some of the customers of pltf's. purchased defts.' goods believing them to be those of pltf's.—*TURTON v. TURTON* (1889), 42 Ch. D. 128; 58 L. J. Ch. 677; 61 L. T. 571; 54 J. P. 151; 38 W. R. 22; 5 T. L. R. 545, C. A.

*Annotations*.—*Consd.* Tussaud v. Tussaud (1890), 41 Ch. D. 678; Saunders v. Sun Life Assce. of Canada, [1894] 1 Ch. 537. *Distd.* Reddaway v. Banham, [1896] A. C. 199. *Consd.* Cash v. Cash (1901), 84 L. T. 349. *Apld.* Rodgers v. Rodgers, Simpson (1900), 23 R. P. C. 297. *Consd.* Dutton, Massey (Liverpool) v. Dutton, Massey (1923), 40 R. P. C. 413. *Expld.* Rodgers v. Rodgers (1924), 41 R. P. C. 277. *Refd.* Lewis v. Lewis (1890), 45 Ch. D. 281; Otard Dupuy v. Otard de Montebello Cognac Co. (1893), 9 T. L. R. 295; Powell v. Birmingham Vinegar Brewery Co. [1896] 2 Ch. 54; Valentine Meat Juice Co. v. Valentine Extract Co. (1900), 83 L. T. 259; Daimler Motor Co. (1907), Ltd. v. London Daimler Co. (1907), 24 R. P. C. 379; Brynsmead v. Brynsmead & Waddington (1913), 29 T. L. R. 237; Teofani v. Teofani, Re Teofani's Trade Mks., [1913] 2 Ch. 545; Waring & Gillow v. Gillow & Gillow (1916), 32 T. L. R. 389.

**1151.** ———.]—The ct. will not restrain a man for trading in his own name except where he uses his name in such a way as to pass off his goods as the goods of another.

Here pltf's. had done up their goods in a particular form, but that form was common to the makers & sellers of harness composition, not only in Aberdeen, but everywhere else (*LINDLEY, M.R.*).

It was said that deft. was bound to take extra precautions because he happened to bear the same name as pltf's., but there was no authority for restraining the use of a man's own name in his trade unless he has done something to pass off his goods as the goods of another (*LINDLEY, M.R.*).—*JAMIESON & Co. v. JAMIESON* (1898), 14 T. L. R. 160; 42 Sol. Jo. 197; 15 R. P. C. 169, C. A.

*Annotations*.—*Consd.* Chivers v. Chivers (1900), 17 R. P. C. 420. *Apld.* Valentine Meat Juice Co. v. Valentine Extract Co. (1900), 83 L. T. 259; Cash v. Cash (1901), 84 L. T. 349; Warsop v. Warsop (1904), 21 R. P. C. 481. *Refd.* Cooper & M'Leod v. MacLachlan (1901), 18 R. P. C. 380; Havana Cigar & Tobacco Factories v. Oddenino, [1924] 1 Ch. 179.

**1152.** ———.]—The J. B. Williams co., an American corpn. well known for their shaving soap, brought two actions alleging that defts. had sold shaving sticks in boxes so closely resembling their boxes as to be calculated to deceive. In one action defts. were makers of soap which they were in a habit of sending out to retailers in boxes having the retailers' names & addresses on them. *Pltfs.* complained that in several instances the get up of such boxes containing shaving sticks, by reason of their resemblance in colour & shape to the maroon coloured, dome topped, tin lined boxes of pltf's., were calculated to deceive. They alleged that such get up was distinctive of their goods. Deft. in the second action, whose name was Williams, was a customer of pltf's.; he had obtained from the other defts. the boxes of which complaint was made in the second action. Defts. alleged that the shape & colour of the boxes complained of were common to the trade, & that in every case the names & lettering on the boxes clearly distinguished them from pltf's.' boxes. It was held at the trial, that the shape & colour of the boxes were common to the trade, & that pltf's. had established no monopoly in regard to them; that pltf's.' shaving stick was known as "Williams' shaving stick" & that the name "Williams" was distinctive of their shaving sticks: that the boxes complained of were all sufficiently distinct from pltf's.' boxes when really looked at; & that, as to deft. Williams & with reference to allegations made against him, there was no intention on his part of passing off his goods as those of pltf's.—*WILLIAMS (J. B.) Co. v. BRONLEY (II.) & Co., LTD., WILLIAMS (J. B.) Co. v. WILLIAMS* (1909), 26 R. P. C. 765, C. A.

**1153.** ———.]—*Intention to appropriate business.*—*NEWMAN v. NEWMAN* (undated), cited 9 Ch. D. at p. 564.

**1154.** ———.]—*CLAYTON v. DAY* (1881), 26 Sol. Jo. 43.

*Annotation*.—*Refd.* Powell v. Birmingham Vinegar Brewery Co., [1896] 2 Ch. 54.

**1155.** ———.]—*Fraud.*—Where a person is selling an article in his own name fraud must be shown to constitute a case for restraining him from so doing on the ground that the name is one in which another has long been selling a similar article.

Therefore, where a father had for many years exclusively sold an article under the title of "Burgess's Essence of Anchovies," the ct. would not restrain his son from selling a similar article under that name, no fraud being proved.—*BURGESS v. BURGESS* (1853), 3 De G. M. & G. 896; 22 L. J. Ch. 675; 21 L. T. O. S. 53; 17 Jur. 292; 43 E. R. 351, L. J.

*Annotations*.—*Distd.* Edelsten v. Vick (1853), 18 Jur. 7. *Consd.* Taylor v. Taylor (1854), 23 L. J. Ch. 255. *Distd.* Schweitzer v. Atkins (1868), 37 L. J. Ch. 847. *Consd.* Massam v. Thorley's Cattle Food Co. (1880), 14 Ch. D. 748. *Apld.* Turton v. Turton (1889), 42 Ch. D. 128; Tussaud v. Tussaud (1890), 44 Ch. D. 678. *Apprd.* Reddaway v. Banham, [1896] A. C. 199. *Apld.* Dunlop Pneumatic Tyre

Co. v. Dunlop Motor Co. (1907), 51 Sol. Jo. 715; Brinsmead v. Brinsmead & Waddington (1913), 29 T. L. R. 237.  
**Refd.** Lawson v. Bank of London (1856), 4 W. R. 481; Thorley's Cattle Food Co. v. Massam (1880), 14 Ch. D. 763; Nicholls v. Kilmington (1887), 3 T. L. R. 874; Free Fishers & Dredgers of Whitstable v. Elliott (1888), 4 T. L. R. 273; Starey v. Chilworth Gunpowder Co. (1889), 24 Q. B. D. 90; Warner v. Warner (1889), 5 T. L. R. 327; Otdard Dupuy v. Otdard de Montebello Cognac Co. (1893), 9 T. L. R. 295; Saunders v. Sun Life Assoc. of Canada, [1894] 1 Ch. 537; Birmingham Vinegar Brewery Co. v. Powell, [1897] A. C. 710; Jamieson v. Jamieson (1898), 14 T. L. R. 160; Cellular Clothing Co. v. Maxton & Murray, [1899] A. C. 326; Cash v. Cash (1900), 82 L. T. 655; Valentine's Meat Juice Co. v. Valentine Extract Co. (1900), 83 L. T. 259; Wein-garten v. Bayer (1903), 88 L. T. 168; Warsop v. Warsop (1904), 21 R. P. C. 481; Electromobile Co. v. British Electromobile Co. (1907), 98 L. T. 258; Onvah Ceylon Estates v. Uva Ceylon Rubber Estates (1910), 103 L. T. 16; Ash v. Invicta Manufacturing Co. (1911), 55 Sol. Jo. 348; Teofant v. Teofant, *Re Teofant's Trade Mk.*, [1913] 2 Ch. 545; Spadling v. Ginnage (1915), 8 L. J. Ch. 449; Waring & Gillow v. Gillow & Gillow (1916), 32 T. L. R. 389; Goddard v. Watford Co-op. Soc. (1924), 41 R. P. C. 218.

**1156.** ———. ———.]—**LAZENBY v. WHITE** (1871), 41 L. J. Ch. 354, n., L. J. J.

**Annotations:**—**Consd.** Cocks v. Chandler (1871), L. R. 11 Eq. 440. **Refd.** James v. James (1872), 41 L. J. Ch. 353; Reddaway v. Bentham Hemp Spinning Co. (1892), 67 L. T. 301.

**1157.** ———. ———.]—An injunction ought not to be granted unless there is evidence that deft. was using the name for fraudulent purposes. The ct. will grant an interlocutory injunction if it can see there is a probability that pltf. will succeed at the trial of the action, in order to keep things *in statu quo* (COTTON, L.J.).—**WARNER v. WARNER** (1889), 5 T. L. R. 359, C. A.

**Annotation:**—**Refd.** Valentine's Meat Juice Co. v. Valentine Extract Co. (1899), 48 W. R. 127.

**1158.** ———. ———.]—**BRINSMEAD (JOHN) & SONS, LTD. v. BRINSMEAD & WADDINGTON & SONS, LTD.**, No. 1031, *ante*.

**1159.** ———. ———.]—Long before 1868 the business carried on by pltf. co. was founded at Liverpool for the purpose of carrying on the business of coal merchants, factors & dealers, colliery proprietors, & forwarding agents. In 1868 the firm name of "Dutton, Massey & Co." was adopted. In 1922 pltf. co. was formed & acquired that business. In 1906 a London branch was started for the purpose of carrying on the business of metal & general merchants in London. It became a separate firm, which continued under the old name, & in 1921 it passed to a trustee of a deed of assignment. Early in 1922 the London business was sold & transferred to a co. registered under the name of "Dutton, Massey & Company (Eastern), Ltd." Subsequently the latter co., with the sanction of the Board of Trade, changed their original name by eliminating therefrom the word "Eastern," & in Oct. 1922, they opened an office in Liverpool under their name Dutton, Massey & Co., Ltd. & advertised themselves in the "*Journal of Commerce*" as general export merchants, coal, shipping & forwarding agents. Pltf. co. commenced an action for an injunction restraining deft. co. from representing or doing anything calculated to cause confusion & lead to the belief that the business carried on by them was that formerly carried on by Dutton, Massey & Co. of Liverpool, & from using the name Dutton, Massey & Co., Ltd., so as to induce such belief. Evidence of actual confusion was given at the trial:—**Held:** the word "Eastern" had been dropped by deft. co. for a fraudulent purpose, & the sanction of the Board of Trade to the change had been obtained by fraudulent means, & deft. co. must in the circumstances of the case be restrained by injunction (a) from using the name of Dutton, Massey & Co., Ltd., or any other name of which the words Dutton, Massey formed a part in the

businesses of coal merchants, factors & dealers, colliery proprietors, shipping & forwarding agents, & from in any other manner representing or causing or procuring to be represented or doing any other thing which was calculated to lead to the belief that they had been or were carrying on the business or were the successors in business of the late firm of Dutton, Massey & Co. of Liverpool, coal merchants, etc., & (b) from using in any business the name of "Dutton, Massey & Co., Ltd." or any other name of which the words "Dutton, Massey" formed part without, in such name, sufficiently distinguishing their name from the name of pltf. co.—**DUTTON, MASSEY & CO. (LIVERPOOL), LTD. v. DUTTON, MASSEY & CO., LTD.** (1923), 41 R. P. C. 67, C. A.

**1160.** ———. ———.]—**Use calculated to deceive.**—**HODGE v. HODGE, DIBB & Co.** (1896), 40 Sol. Jo. 728.

**1161.** ———. ———.]—**The Daimler Motor Co. (1904), Ltd.**, commenced an action to restrain a co. which had been recently registered under the name of the London Daimler Co., Ltd., from using the word Daimler either in its name or in connection with motor cars. In an action, brought in 1901, by the predecessors of pltf. co. it was held that the word Daimler indicated a system & that a Daimler motor indicated a certain form of motor; but pltf. alleged that that word had since acquired a secondary meaning indicating pltf. co. & its cars. About 37 per cent. of pltf.'s sales were effected in London, where they had show rooms. It did not appear what name defts. were going to give to their cars, but in a letter they said that their cars would be known as the "London Daimler," whereas pltf. were of Coventry:—**Held:** the word "Daimler" no longer indicated a type or system of motors: the name London Daimler Co., Ltd., was calculated to deceive & to cause confusion between the two cos., & pltf. were entitled to an injunction as to the name of deft. co. although not in so wide a form as that claimed.—**DAIMLER MOTOR CO. (1904), LTD. v. LONDON DAIMLER CO., LTD.** (1907), 24 R. P. C. 379, C. A.

**Annotations:**—**Consd.** Electromobile Co. v. British Electromobile Co. (1907), 97 L. T. 196. **Refd.** Waring & Gillow v. Gillow & Gillow (1916), 32 T. L. R. 389.

**1162.** ———. ———.]—**Intention to deceive.**—**VALENTINE MEAT JUICE CO. v. VALENTINE EXTRACT CO., LTD.**, No. 1038, *ante*.

**1163.** ———. ———.]—Pltf., Joseph Rodgers & Sons, Ltd., manufacturers of cutlery, brought an action against Joseph Rodgers Simpson to restrain defts. from passing off cutlery not being their goods as & for such goods, & from trading under the name Joseph Rodgers Simpson & Son, or any other name comprising the name "Rodgers," so as to be calculated to deceive. They alleged that deft. was using the said firm name so as to suggest that the first name in it was Joseph Rodgers. Deft. was on his knives using the device of a crown which was placed over the name Rodgers, in which position the pltf. had a crown on their knives, they having also the words "Cutlers to Her Majesty," Deft. alleged that his son, who was thirty-one years of age, assisted him in his business, but deft. also alleged that he had used the said firm name on knives twenty years previously. Deft. was carrying on a grocer's business, but he was also, as pltf. alleged that they had recently ascertained, selling knives marked as above mentioned. Deft. claimed that he had the right to use the name Joseph Rodgers Simpson & Son, & contended that his use of it was fair:—**Held:** deft. had made use of the fact that the middle word in his name was Rodgers in order to use it in a way calculated to

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deceive the public into believing that the cutlery which he was selling was pltf.'s cutlery. An interlocutory injunction was granted. A perpetual injunction was subsequently granted.—**RODGERS (JOSEPH) & SONS, LTD. v. SIMPSON (JOSEPH RODGERS) (1906), 23 R. P. C. 297, 348.**

**1164. — Name identified with particular manufacture.]**—A man may in certain circumstances be restrained even from using his own name, if that name is identified with a particular manufacture. If for instance blacking be sold as Warren's blacking & it has come to be known exclusively as blacking manufactured by a certain person named Warren & carrying on business in that name, & if another person of the name of Warren tried to carry on business as Warren's Blacking Co. & sells blacking as Warren's blacking, he might be restrained from doing so (**LORD HALSBURY**).—**ELECTROMOBILE CO., LTD. v. BRITISH ELECTROMOBILE CO., LTD. (1907), 98 L. T. 258; 24 T. L. R. 192; 25 R. P. C. 149, C. A.**

**1165. — — —.]**—**GODDARD v. WATFORD CO-OPERATIVE SOCIETY, No. 1040, ante.**

**C. Name of Locality.**

**1166. Ground for restraining use—No business acquired in locality—In respect of which name used.]**—Pltf. was the owner of & worked all the collieries in the parish of R. in Somersetshire, & owned all the coal in that parish, with a small exception. She carried on the business of working the collieries & selling the coal in her own name, adding to it on her wagons & bill heads the words "R. Collieries." Defts., from 1868, carried on at R. the business of coal merchants as the "R. Coal co.," having depots at various railway stations in the south & west of England, at which they sold different kinds of coal. They became in 1876 the lessees of & worked a colliery outside the parish of R., but in a district or basin in which coal was raised similar to that raised within the parish, coal raised in the district, but outside the parish, being known in the market as R. coal. In 1873 defts. began to sell coals at G., in Surrey, by means of a local agent, & in 1875 they bought the goodwill of a retail coal dealer named C. at G., who had become bkpt. They then advertised themselves in the Surrey newspapers, & otherwise in the neighbourhood, as "The R. Colliery Proprietors & Factors, Coal & Coke Merchants (late C. & co.)," & offered to supply coal of every description direct from the collieries:—**Held:** (1) defts. were not entitled to use the name "The R. Colliery Proprietors," unless & until they should acquire a colliery within the parish of R., or to use any style implying that their coal came from the parish of R., unless & until they should become authorised to sell coals raised from a colliery within that parish; (2) the acts of defts. being

calculated to induce purchasers to believe that defts. were selling pltf.'s coal, it was not necessary for pltf. to prove any instance of actual deception, or any actual damage.—**BRAHAM v. BEACHIM (1878), 7 Ch. D. 848; 47 L. J. Ch. 348; 38 L. T. 640; 26 W. R. 654.**

**1167. — Probability of deception—Actual deception not necessary.]**—**BRAHAM v. BEACHIM, No. 1166, ante.**

**1168. — — —.]**—Defts. have been carrying on business as the Hopton Stone & Marble Quarrying Co. & propose to transfer such business to a limited co. to be registered under the Companies Acts under the name of the Hopton Stone & Marble Quarry Co. with the addition of course of the word "limited." Pltfs. claim an injunction restraining defts. from carrying on business or registering any co. under this title or name, or under any title containing the word "Hopton." . . . They are not entitled to restrain the use of the word "Hopton" as part of defts.' business style or as part of the name of any co. they may register, but, inasmuch as "Hopton Wood" & "Hopton" in connection with "stone" mean really the same thing, some confusion may not improbably arise if defts. carry on business, or form a co. under, or with, a title of which the word "Hopton" is the first word. On this ground, I suggested in the course of the trial that if they, defts., carry on business as the "New Hopton Stone & Marble Quarrying Co.," or formed their proposed co. under the name of the "New Hopton Stone & Marble Quarrying co., Ltd.," all danger of any such confusion would be avoided (**PARKER, J.**).—**HOPTON WOOD STONE FIRMS, LTD. v. GETHING (1910), 27 R. P. C. 605.**

**D. Descriptive Name.**

**1169. Whether use restrained—Probability of deception.]**—**BOULNOIS v. PEAKE (1868), 13 Ch. D. 513, n.**

**1170. — — —.]**—A co., H. E. R., Ltd., who owned a number of retail boot & shoe shops, in or about the year 1897, opened certain shops, including one in Regent Street, for the exclusive sale of American-made boots & shoes, & for the purpose of this branch of their business, they adopted the name "American Shoe Co." as their trade name, using it, however, in conjunction with their registered name. Subsequently a trade grew up in this country in British-made boots & shoes made after American models & methods, & it became a common practice to call such goods "Anglo-American" or "British American." Defts., who had several shops in or near London & dealt in such goods, in the year 1906 determined to confine their business in one of their shops to such goods, & in Apr. 1907 commenced to use the trade name the "Anglo-American Shoe Co." at that shop. H. E. R., Ltd., complained of defts.' use of the name "Anglo-American Shoe Co." &

an injunction restraining a purchaser of the article of one quality passing it off as of the other.

In such a case it is immaterial that the two qualities are practically identical, the real test being whether the public distinguish between the two.—**KIRKER, GREER & CO., LTD. v. MAYMAN (1901), 1 S. R. N. S. W. (Eq.) 73; 18 N. S. W. N. 107.—AUS.**

**1169 ii. — — —.]**—**MCCORMACK v. MCCORMERY (1825 1897), N. B. Dig. 313.—CAN.**

**1169 id. — — —.]**—"MY VALET," **LTD. v. WINTERS (1912), 27 O. L. R. 286; 4 O. W. N. 318; 9 D. L. R. 306.—CAN.**

**PART V. SECT. 5, SUB-SECT. 2.—B.**

**1164 i. Ground for restraining use—Name identified with particular manufacture.]**—The name of a person may acquire a secondary meaning as denoting goods made by a certain manufacturer, so as to prevent another person applying that name without explanation or qualification to similar goods not made by that manufacturer. **COLLETT v. BORRALINO GIUSEPPE & FRATELLO SOCIETA ANONIMA (1913), 16 C. L. R. 314.—AUS.**

**1164 ii. — — —.]**—**CANADA PAINT CO., LTD. v. JOHNSON & SONS, LTD. (1893), Q. R. 4 S. C. 253.—CAN.**

**1164 iii. — — —.]**—**HURLBUT Co. v.**

**HURLBUT SHOE CO., [1925] 2 D. L. R. 121; [1925] S. C. R. 111.—CAN.**

**1164 iv. — — —.]**—**JAMESON v. DUBLIN DISTILLERS CO., [1900] 1 I. R. 43.—IR.**

**PART V. SECT. 5, SUB-SECT. 2.—C.**

**1168 i. Ground for restraining use—Probability of deception.]**—**MOUNT BALFOUR COPPER MINES v. MOUNT BALFOUR MINES, [1909] V. L. R. 542.—AUS.**

**PART V. SECT. 5, SUB-SECT. 2.—D.**

**1169 i. Whether use restrained—Probability of deception.]**—A manufacturer of an article in two qualities is entitled to

some negotiations took place, but finally H. E. R., Ltd., commenced this action claiming an injunction, & defts. by their pleadings claimed the right to use that name:—*Held*: defts. had adopted the name "Anglo-American Shoe Co." honestly; the term "Anglo-American" was descriptive of the class of goods dealt in by defts., & had been used to describe such goods; it distinguished the business which defts. were carrying on from a business in American goods; & defts.' business was not likely to be taken for pltf's. business.—*RANDALL (H. E.), LTD. v. BRADLEY (E.) & SON (1907)*, 24 R. P. C. 657; *affd.*, 24 R. P. C. 773, C. A.

1171. ——— **Test to be applied—Similarity of names in first & leading word.**—The Facsimile Letter Printing Co., Ltd., had been incorporate for some years, & had carried on an extensive business in facsimile letters & circulars & other documents printed or written in facsimile. They brought an action against F. & the Facsimile Typewriting Co. to restrain defts. from carrying on business under that name. In 1911 F. commenced to carry on business under the name complained of; that business was of a similar nature to that of pltf. co. & was intended to be a competing business. Pltfs. moved for an interlocutory injunction:—*Held*: confusion & mistakes had arisen owing to similarity of name, & communications intended for defts. had been made to pltfs. & *vice versa* & defts. having taken the first & leading word in pltfs.' name, pltfs. had made out a sufficient case to entitle them to an injunction until the trial.—*FACSIMILE LETTER PRINTING CO., LTD. v. FACSIMILE TYPEWRITING CO. (1912)*, 20 R. P. C. 557.

1172. ——— **Bona fide use of name—Sufficient distinction.**—*RANDALL (H. E.), LTD. v. BRADLEY (E.) & SON, No. 1170, ante.*

1173. ——— **Business not represented as plaintiff's.**—F. W. T. who had been agent in Cardiff of the National Cash Register Co., Ltd., upon leaving their service commenced business as the Cash Register Co. in the same street, & by his notices & advertisements offered to sell & did sell among other cash registers, National Cash Registers. The National Cash Register Co., Ltd., brought an action alleging that T. had by certain statements & acts made representations of agency & that his business was the business of the pltfs. or a branch or agency of pltfs. & alleging that his carrying on business under the title of the Cash Register Co. in conjunction with the facts alleged, was calculated to deceive the public, & claimed an injunction:—*Held*: deft. was entitled to trade as the Cash Register Co., & that he had not represented himself as agent, or his business as the business of pltfs. or a branch or agency of pltfs.—*NATIONAL CASH REGISTER CO., LTD. v. THEEMAN (1907)*, 24 R. P. C. 211.

#### *E. Fancy Name.*

1174. **Whether use restrained—When calculated to deceive—"Old-established dentist."**—The use of fancy words, e.g., "old-established dentist," formerly used by another person in business in a certain street, will be restrained when such use will lead people to wrongly suppose that the person formerly using the words has simply moved to a neighbouring house.—*MALLAN v. DAVIS (1886)*, 3 T. L. R. 221.

#### *F. Name of Assignor of Business.*

1175. **Use by assignor.**—Upon the dissolution of a partnership, which had been carried on for a J.—VOL. XLIII.

considerable time by John Douglas & others as stuff merchants, under the style or firm of "John Douglas & Co.," John Douglas assigned all his shares, rights, & interest in the business & the goodwill thereof, to his late partners & another, who thereupon proceeded to carry on the business under a new style or firm, consisting of their own names, with the addition of the words "late John Douglas & Co."

Upon bill filed by them, John Douglas was restrained by injunction from resuming or carrying on the business of a stuff merchant at or in the immediate neighbourhood, either alone or in partnership with any other persons whatsoever, under the style or firm of "John Douglas & Co." or in any other manner holding out that he was carrying on the business of a stuff merchant in continuation of or in succession to the business carried on by the late firm of John Douglas & Co.—*CHURTON v. DOUGLAS (1859)*, John. 174; 28 L. J. Ch. 841; 33 L. T. O. S. 57; 5 Jur. N. S. 887; 7 W. R. 385; 70 E. R. 385.

*Annotations*:—*Apld.* *Hudson v. Osborne (1869)*, 39 L. J. Ch. 79. *Consd.* *Scott v. Rowland (1872)*, 26 L. T. 391; *Levy v. Walker (1879)*, 10 Ch. D. 436; *Ginesi v. Cooper (1880)*, 14 Ch. D. 596; *Mogford v. Courtenay (1881)*, 45 L. T. 303; *Pomeroy v. Sealé (1906)*, 23 T. L. R. 170. *Refd.* *Leggett v. Barrett (1880)*, 15 Ch. D. 306; *Walker v. Mottram (1881)*, 19 Ch. D. 355; *Pearson v. Pearson (1884)*, 27 Ch. D. 145; *Trego v. Hunt (1896)* A. C. 7; *West London Syndicate v. I. R. Comrs. (1898)* 2 Q. B. 507; *Aerators v. Tollit (1902)*, 71 L. J. Ch. 727.

1176. ———]—In 1895 deft. commenced the business of a complexion specialist under the assumed name of "Mrs. Pomeroy." In 1896 a co., "Mrs. Pomeroy, Ltd.," was formed to carry on the business, deft. holding a preponderating proportion of the shares. The co. acquired a large business connection. In May, 1906, the co. went into voluntary liquidation, & the liquidator sold the assets to the promoter of a second co., also called "Mrs. Pomeroy, Ltd." Deft. commenced a similar business under the name of "Mrs. Jeannette Pomeroy," upon premises in a close proximity to the premises where she had formerly carried on, & where the new co. continued to carry on, the business. The second co. commenced an action for an injunction to restrain deft. from carrying on business under any style of which the name "Pomeroy" formed a part, & from representing or inducing the belief that she was connected with the business of pltf.'s or that formerly carried on by the first co., & from derogating from her grant of the goodwill of the business sold, from soliciting former customers, & for other relief. Pltfs. alleged that, on the transfer to the first co., deft. had, in addition to executing an agreement, executed a deed by which she assigned the goodwill of her business & the exclusive right to use the name of "Pomeroy." Deft. denied that she had executed the deed. The draft of the deed, which was produced, contained an assignment in the terms alleged by pltfs. Deft. claimed the right to use the name "Pomeroy," by which, as she alleged, she had become known in carrying on the business & which she had assumed by deed poll in June, 1906. Deft. alleged that pltfs. had falsely represented that she was connected with pltf. co., & had thereby disintituled themselves to relief by way of injunction:—*Held*: the deed alleged to have been lost had been executed by deft., although she believed that she had not done so, but, even if it had not, the terms of the contract made by defts. with the first co. were those contained in the draft conveyance, & having been acted upon by the parties, were binding upon deft.; in 1896 deft.'s name was not for all practical purposes "Pomeroy," but, even if it had been, she



**1183. — Where confusion & loss caused to former partner.]—Held:** deft., who was the assignee of the goodwill of the business, was entitled to use the name under which the business had been carried on—viz., the name of a former partner—though confusion & loss might thereby be caused to the former partner.—*ROSEYER v. YOUNG* (1901), 17 T. L. R. 347; 45 Sol. Jo. 344.

**1184. — Different class of goods sold by assignee.]—Pltf.,** who sold pills, which had a wide reputation as Holloway's Pills, commenced an action to restrain deft. from passing off his pills as pltf.'s & from using the name Holloway in connection with pills, & moved for an interlocutory injunction. Deft. had some years previously bought a business from a man named Holloway, it & alleged that he had the right to use the name; was contended on his behalf that, in any case, & he should not be restrained from using the name in connection with pills except so as to cause deception:—*Held:* deft. had not shown that his predecessor had dealt in pills; on the facts proved deft. had acted fraudulently, & an interlocutory injunction should be granted in the form asked.—*HOLLOWAY v. CLINT* (1903), 20 R. P. C. 525.

**1185. — Business purchased with fraudulent intention.]—Pltfs. & their predecessors** had carried on the business of needle manufacturers for about a hundred years under the style of "Abel Morrall" & their needles had acquired a great reputation & were sold & bought as "Abel Morrall's" or "A. Morrall's" or "Morrall's" or "Morralls' Needles" as was admitted by defts. during the trial. In 1891, pltfs. purchased the goodwill of the business of Joseph Mogg & Joseph John Richard Mogg trading under the styles of "Joseph Mogg & Co." & "Joseph J. R. Mogg & Co." & the market for the needles now sold by pltfs. under these names was in Ireland & Scandinavia, where they were well known as "Mogg's Needles." In 1900 deft., who had started business in 1893, in the same neighbourhood, purchased for £88 from one Jabez Yardley Morrall, a man in a small way of business, his goodwill & stock-in-trade, the latter having been just valued at £30 the deed of assignment binding him not to authorise his name to be used for the purpose of a needle manufacturer by any other person or persons. In 1897 by a similar transaction deft. had purchased from one William Mogg his machinery with the goodwill of his business & use of his name, it appearing that beyond the manufacture of crotchet hooks he did nothing to needles beyond packing them in paper. Pltfs., having brought an action against deft., under his trading style of T. H. & Co., for an injunction & other relief:—*Held:* the purchases from Jabez Yardley Morrall & William Mogg were not *bona fide* transactions, but were colourable devices for giving deft. some appearance of weight to use their names in order that by using surnames where different initials were insufficient to distinguish the goods & businesses, he might obtain trade intended for pltfs.; & this was sufficient fraud to enable the ct. to inquire into the motives of such transactions, even where it was the man's own name that had been purchased, irrespective of goodwill.—*MORRALL (ABEL), LTD. v. HESSIN & CO.* (1903), 20 R. P. C. 429, C. A.

**1186. —**—Pltfs., Mappin & Webb, Ltd., incorporated in 1898, were the successors in business of two old-established firms of Mappin Bros. & Mappin & Webb. Deft. L., a London retailer, sold goods similar to pltfs.' but made by one B., who was alleged, without strict proof, to have bought the business in Sheffield of one Theophilus

Mappin, trading as Mappin & Sons. The goods sold by deft. were marked "Mappin & Sons," & bore price tickets with such phrases as "Mappins' A1 Quality." Deft.'s salesmen had represented that the goods were the same as pltfs.' Separate proceedings were pending against B.:—*Held:* pltfs. were entitled to an injunction restraining deft. from selling goods not of pltfs.' manufacture as & for such goods.—*MAPPIN & WEBB, LTD. v. LEAPMAN* (1905), 22 R. P. C. 398.

**1187. — Name used fraudulently.]—In** Mar. 1904, Joseph Rodgers & Sons, Ltd., of Sheffield brought an action against F. M. Hearnshaw & W. F. Hearnshaw to restrain them from passing off their goods as & for the goods of pltfs. Pltfs. were a co. whose predecessors in business had carried on the same business as manufacturers of cutlery for over two hundred years, & their cutlery was well known by the style of "Rodgers' Cutlery" throughout the world. In Feb. 1889, defts. bought the business of Rodgers Bros., established in 1883, which was that of edged tool manufacturers, from the survivor of two brothers named Rodgers. In July, 1902, defts. commenced to manufacture cutlery, & in 1903 for the first time opened separate works for cutlery & described themselves as "Cutlery Manufacturers." As manufacturers & wholesale dealers they traded as "Hearnshaw Bros." or "Henry Brown & Sons & Co." They sold their goods labelled with the words "Rodgers Bros., Sheffield, manufacturers of celebrated cutlery, tools, etc.," & marked them with a trademark "John Bull" & the name "Rodgers Bros." which they had acquired with the business purchased from Rodgers Bros. No case of actual deception was proved:—*Held:* the name of "Rodgers" was known universally as referring to pltfs.' goods, & the manufacture & sale of goods as carried on by defts. was calculated & intended to deceive, & the name Rodgers Bros. was used for the purpose of enabling retailers to commit fraud.—*JOSEPH RODGERS & SONS, LTD., v. HEARNSHAW & HEARNSHAW* (1906), 23 R. P. C. 349.

**1188. — Use calculated to deceive.]—Defts.** Dodd's Drug Stores, Ltd. were successors in business to Richard Jefferson Dodd, & in an action brought by him & a co., which he had formed, an Order was made by consent restraining deft. co. from using as part of its name or upon its shops, etc. the word "Jefferson" or any other name or word, not being part of its registered name, calculated to induce the belief that deft. co. was carrying on the business of pltf. co. or of pltf. Richard Jefferson Dodd, but the injunction was not to prevent deft. co. from representing that it was the successor in business of pltf. R. J. D. & also restraining deft. co. from using the words "Dodd's Female Pills" & as to the name, complaining of the use of the name "Jefferson Dodd" on the lower fascia of a shop with the words "Successors to" on the window so as, as they alleged to be almost unnoticeable, & of the same words on a fanlight with a similar addition, & also of the use of "J. Dodd":—*Held:* "Dodd" was part of the registered name of deft. co. & "J." was neither a name or word, so that the use of neither of these was forbidden by the injunction, & as regards the fanlight the assertion was a proper one, but as regards the use of "Jefferson Dodd" on the fascia it was calculated to induce the belief that deft.



*Sect. 5.—Passing off: Sub-sect. 2, F., G., H. & J.]* co. was carrying on the business of pltf. co. or of pltf. "Richard Jefferson Dodd," & there was also a breach of the order by the use by defts. agents & servants of "Dodd's Female Pills."—*JEFFERSON DODD, LTD. v. DODD'S DRUG STORES, LTD.* (1907), 25 R. P. C. 16.

*G. Name of Former Employer.*

**1189. General rule.]**—A trader who has been a manager or a partner in a firm of established reputation, has a right, on setting up an independent business, to make known to the public that he has been with that firm; but he must take care not to do so in a way calculated to lead the public to believe that he is carrying on the business of the old firm or is in any way connected with it.—*HOOKHAM v. POTTAGE* (1872), 8 Ch. App. 91; 27 L. T. 595; 21 W. R. 47, L. J.

*Annotations:—Consd. Thorley's Cattle Food Co. v. Massam* (1880), 14 Ch. D. 763. *Distd. Matthews v. Hodgson* (1886), 2 T. L. R. 899. *Refd. Walker v. Mottram* (1881), 19 Ch. D. 355; *Trego v. Hunt*, [1896] A. C. 7.

**1190. Effect of use of "from."]**—*WILLIAMS v. OSBORNE*, No. 1483, *post*.

**1191. — Small letters.—Proof of deception.]**—Where S., a tradesman who had been in the employ of a large firm, put his own name over his shop, but on the plates under the shop windows & on the sun awning "from T. & G.," his former employers; the word "from" being much smaller than the words "T. & G.," & it was proved that some persons had been misled into thinking that the shop was the shop of "T. & G.": The ct. held that what S. was doing was calculated to mislead the incautious, unwary & heedless portion of the public; & on bill by T. & G., granted an injunction restraining him from using the name of their firm about his shop in such a way as to mislead the public into the belief that his shop was the shop of T. & G. or that their business was carried on there.—*GLENNY v. SMITH* (1865), 2 Drew & Sn. 476; 6 New Rep. 363; 13 L. T. 11; 11 Jur. N. S. 964; 13 W. R. 1032; 62 E. R. 701.

*Annotation:—Consd. Hookham v. Pottage* (1872), 8 Ch. App. 93, n.

**1192. — Business continued by widow.]**—N. was for several years in the employ of C. & co., as assistant in & manager of their coal business. Leaving their employ, he set up business on his own account as a coal merchant, under the style of "N. from C. & co.," which he habitually used in advertisements, letterpaper & coal waggons. Upon his death, within a year, his widow continued the business under the same style. C. & co. commenced an action for an injunction to restrain her from so doing, but were refused such injunction, & the action was dismissed with costs.—*RICKETT, COCKERELL & Co., LTD. v. NEVILL* (1904), 21 R. P. C. 394.

**1193. —.]**—Deflt. P. was for many years a journeyman sewer at P. & co.'s well known tailors in London. He was never employed there as a cutter or fitter. He entered into partnership with deflt. J. & started a tailor's business at Eastbourne.

P. cannot be restrained from announcing to the

public that he comes from P. & co.'s or from stating that he comes "with a reputation of fifteen years' successful experience with Messrs. P. & co., Savile Row, London, W., & is therefore in a position to advise clients in the very latest styles, uniformity, & fit in fashionable & smart clothing. Such statements, even if false, are puffing assertions, which cannot be restrained at the suit of a private person unless it appears that they tend to the passing off of one man's goods or business as another's, or amount to a holding out of pltf. as a partner, so exposing him to liability, or tend to disparage pltf.'s goods, & cause special damage.—*CUNDEY v. LERWILL & PIKE* (1908), 99 L. T. 273; 24 T. L. R. 584.

**1194. Effect of use of "late."]**—*GOODMAN v. WAX* (1892), 36 Sol. Jo. 830.

**1195. Use of name by former agent.]**—Where articles of a particular kind have become generally known in commerce under the name of the original manufacturer, or patentee as the case may be any person has a right after the expiration of the patent to manufacture such articles & sell them under that name; but he may not by inscribing the name, as a proper name, on his shop front or otherwise lead the public to believe that he is selling as agent for the original manufacturer.

Deflt. was the agent of the co. & as their agent he also represented himself as having the depot of Wheeler & Wilson's sewing machines. He had the name of "Wheeler & Wilson" as the names of the persons carrying on business on his door as the business designation; & then they are minded for reasons satisfactory to them to deprive him of the agency & they do so. After that he persists in a series of advertisements by which it is perfectly clear he intended to represent himself as still having the same connection with Wheeler & Wilson's sewing machine co. as he had before, that is to say not as being a person who is selling machines manufactured upon the principle patented by Wheeler & Wilson but as a person carrying on exactly the same kind of business with the same kind of relation to the manufacturer of the article as he had before, that is representing himself as continuing that agency. That is in my opinion a gross fraud upon pltf's. & an unjustifiable falsehood which the ct. will restrain (*JAMES, V. C.*).—*WHEELER & WILSON MANUFACTURING CO. v. SHAKESPEAR* (1869), 39 L. J. Ch. 36.

*Annotations:—Consd. Singer Manufacturing Co. v. Loog* (1882), 52 L. J. Ch. 481. *Refd. Barlow & Jones v. Johnson* (1890), 7 It. P. C. 395; *Armstrong Oiler Co. v. Patent Axlebox & Foundry Co.* (1910), 27 It. P. C. 362.

*H. Use of Firm Name by Partner.*

**When partnership a going concern.]**—*See PARTNERSHIP*, Vol. XXXVI., pp. 490, 491, Nos. 1562–1564.

**After dissolution of partnership.]**—*See PARTNERSHIP*, Vol. XXXVI., pp. 494–496, 517, Nos. 1014–1630, 1873.

*J. Use by Limited Company.*

**1196. Ground for restraining use.—Probability of deception.]**—There is nothing in Companies Act,

*h. Use of old name.—In conjunction with own name.]*—*MELROSE-DROVER, LTD. v. HEDDIE* (1901), 4 F. (Ct. of Sess.) 1120; 39 Sc. L. R. 529; 8 S. L. T. 361.—*SCOT*.

**PART V. SECT. 5, SUB-SECT. 2.—J.**

**11961. Ground for restraining use.—Probability of deception.]**—*CRAIG v. CRAIG*, [1922] N. Z. L. R. 199.—*N.Z.*

**PART V. SECT. 5, SUB-SECT. 2.—G.**

**11891. General rule.]**—*STRAINS, LTD. v. NOTT (Man.)* (1919), 49 D. L. R. 699.—*CAN.*

**11901. Effect of use of "from."]**—*BOSWELL v. MATHIE* (1884), 11 It. (Ct. of Sess.) 1072; 21 Sc. L. R. 727.—*SCOT*.

**g. Identical shop sign.]**—Pltf. carried on business in the city of L.,

having for his sign a figure of a gilt lion, & designating his place of business "The Golden Lion." Deflt. for some years had conducted his business, & having commenced on his own account in the same line of business, placed in front of his shop a figure somewhat similar to that used by pltf. The ct. restrained deflt. from using as a sign this or any similar figure.—*WALKER v. ALLEY* (1867), 13 Gr. 366.—*CAN.*



1862 (c. 89), to affect the right of a co. registered under a particular name to an injunction restraining another co. which notwithstanding the prohibition of sect. 20 against identity of names has been registered under an identical or similar name from carrying on its business under that name if it is proved that that name is calculated to deceive the principles applicable to individuals trading under identical or similar names applying equally to cos.—*MERCHANT BANKING CO. OF LONDON v. MERCHANTS JOINT STOCK BANK* (1878), 9 Ch. D. 560; 47 L. J. Ch. 828; 26 W. R. 847.

*Annotations*:—*Consd.* *Accident Insee. v. Accident, Disease & General Insee. Corp.* (1884), 54 L. J. Ch. 104; *Harrods v. Harrod* (1923), 40 T. L. R. 195. *Refd.* *Guardian Fire & Life Assce. v. Guardian & General Insee.* (1880), 50 L. J. Ch. 253; *Turton v. Turton* (1889), 42 Ch. D. 128; *Manchester Brewery Co. v. North Cheshire & Manchester Brewery Co.* (1898) 1 Ch. 339; *Dutton, Massey (Liverpool) v. Dutton, Massey* (1923), 40 L. J. P. C. 413; *Motor Manufacturers & Traders' Soc. v. Motor Manufacturers' & Traders' Mutual Insee.* (1925), 94 L. J. Ch. 410.

1197. ———.]—*BUMSTED v. GENERAL REVERSIONARY CO., LTD.* (1888), 4 T. L. R. 621.

1198. ———.]—*The A. & N. C. Society, Ltd.* commenced an action to restrain the A. N. & C. S. C. Society of India, Ltd., claiming an injunction, to restrain defts. from using the name or stamp of A. & N. C. Society, Ltd. either with or without "of India," or any other stamp or name so closely resembling the name of plfts. as to lead to deception, & moved for an interlocutory injunction. It appeared that on certain corks defts. had omitted part of their full name, using the words, *The A. & N. C. Society, Ltd.* round the edge of an oval & the words, "of India" in the middle. The corks were sent out to India & some had been used in bottles of wine. It was proved that the full title of defts. was put on a capsule, & on a label, which were placed on each bottle:—*Held*: there was great probability of confusion, & an injunction was granted, & it was ordered that the stamp should be erased from the corks already in use.—*ARMY & NAVY CO-OPERATIVE SOCIETY, LTD. v. ARMY, NAVY & CIVIL SERVICE CO-OPERATIVE SOCIETY OF INDIA, LTD.* (1891), 8 R. P. C. 426.

1199. ———.]—*The Army & Navy Co-operative Society, Ltd.*, which had been incorporated for thirty years, commenced an action against a recently incorporated co. called *Army, Navy, & Civil Service Co-operative Society of South Africa, Ltd.*, to restrain it from using that name, & moved for an interlocutory injunction:—*Held*: defts.' name was calculated to deceive, & a delay of three months since the incorporation of deft. co. was sufficiently explained. An interlocutory injunction was granted, but words were directed to be inserted in the order permitting deft. co. to use its name for a short period provided it added that it had no connection with plft. co. Defts. appealed. On the hearing of the appeal defts. undertook to change their name to *Naval, Military, & Civil Service Co-operative Society of South Africa, Ltd.*, & the appeal was dismissed with costs, the hearing of the motion being treated as the trial.

Now in what case would it be wrong? Plfts. have no right to the words "Army & Navy," or the words "Co-operative Society," or any combination of those words. Their right lies in this, that they may sue if deft. is fraudulently adopting a name for the purposes of pretending that his trade is their trade, & if he be not fraudulent at all, still plfts. may sue "in property" if he is adopting a name the result of which will be that deft. will be taking plfts.' property in the sense that persons will go to deft. to trade with him when they meant

to go to plfts., meaning to trade with them. Whether the fancy name adopted is one which will have that result or not is purely a question of fact in all these cases, & in the present case the question to be examined is, as a matter of fact, have defts. taken this name either fraudulently or so as to infringe plfts.' rights of property (BUCKLEY, J.).—*ARMY & NAVY CO-OPERATIVE SOCIETY, LTD. v. ARMY, NAVY & CIVIL SERVICE CO-OPERATIVE SOCIETY OF SOUTH AFRICA, LTD.* (1902), 19 R. P. C. 574, C. A.

1200. ———.]—A co., whose name included the word "Plasmon," & which sold various food preparations in the names of which the word "Plasmon," was used, brought an action against a co. registered under the name of *Plasmonade Ltd.* which was selling goods, namely, tablets & powder for making a beverage, under names of which "Plasmonade" formed part, to restrain the use of those words by defts., & to restrain passing off, & for other relief. Certain directors or officers were joined as defts. Defts. had applied to register "Plasmonoid" as a trade mark in certain classes, including 3 & 41. Plfts. had opposed such applications by deft. co. to register, & one had been refused, whilst the decision in the other had been postponed. Plfts. moved for an interlocutory injunction. Defts. contended that owing to the different natures of the goods & the differences in get-up, no deception was probable:—*Held*: an interlocutory injunction should be granted substantially restraining defts. from carrying on business in foods or preparations for human consumption under the name "Plasmonade, Ltd." or any other name or title of which "Plasmon" formed part, & from any name of which "Plasmonade," "Plasmonoid," or "Plasmon" with or without any suffix formed part for food preparations, & from passing off their goods as those of plfts.—*INTERNATIONAL PLASMON, LTD. v. PLASMONADE, LTD.* (1905), 22 R. P. C. 543.

1201. ———.]—In the year 1892, the *Royal Insurance Co.* purchased the business & goodwill of the *Midland Counties Insurance Co.* together with the use of the name of that co., & it continued to carry on, under its own name, & as a branch business, the business formerly carried on by the *Midland Insurance Co.* at the head premises in Lincoln of that co., such branch being generally referred to as the "Midland Counties Branch." On Mar. 3, 1908, the *Midland Insurance Co., Ltd.*, was incorporated with objects which included insurance of the nature undertaken by the *Royal Insurance Co., Ltd.*, & the *Royal Insurance Co., Ltd.*, commenced an action against the new co. & its directors to restrain them from using the name *Midland Insurance Co.*, alleging that it was calculated to deceive. It was held at the trial that, on the facts the use of the name of deft. co. for the purposes of their business would not be calculated to induce people to believe that such business was that of plfts., or was their *Midland Counties branch*.—*ROYAL INSURANCE CO., LTD. v. MIDLAND INSURANCE CO., LTD.* (1908), 26 R. P. C. 95, C. A.

1202. ———.]—*The Imperial Merchant Service Guild* was an unincorporated body, established in 1893, having for its object to promote the interests of officers in the *Merchant Service*. It was generally known as the *Merchant Service Guild* or *M.S.G.* In 1908 a co. was registered as the *Merchant Service Guild, Ltd.* An action was brought on behalf of the *Imperial Merchant Service Guild* to restrain the co. from using *Merchant Service Guild* or *M.S.G.* & an interlocutory injunction was moved for:—*Held*:

*Sect. 5.—Passing off: Sub-sect. 2, J.; sub-sect. 3.]* an injunction should be granted.—*TOMS & MOORE v. MERCHANT SERVICE GUILD, LTD.* (1908), 25 R. P. C. 474.

**1203.** ———.]—Pltfs. were a limited co. incorporated in the year 1890 & carrying on a business of cigarette manufacturers under the style of *Muratti, Sons & Co., Ltd.* The business was an old established one, & prior to the incorporation of the co. had been carried on by the family of *Muratti*. Pltfs. established at the trial that their cigarettes were largely known simply as "*Muratti's* or *Muratti's Cigarettes*." Deft. co. was incorporated in July, 1910, in the name of *Murad, Ltd.*, for the purpose of carrying on a business of manufacturers & sellers of high class Turkish cigarettes. Pltfs. brought an action to restrain deft. co. from carrying on business under their present name:—*Held*: upon the evidence, that the name of deft. co. was calculated to deceive & pltfs. were entitled to an injunction.—*MURATTI (B.) SONS & CO., LTD. v. MURAD, LTD., Re RAMSAY'S TRADE MARK* (1911), 28 R. P. C. 497.

*Annotation:—Refd. Lines v. Farris* (1925), 43 R. P. C. 64.

**1204.** ———.]—Injunction granted restraining defts. from carrying on business under the name of *Lloyds, Southampton, Ltd.*, or under any other name calculated to produce the belief that their business was the business of or any branch or department of *Lloyds* business.—*LLOYD'S & DAWSON BROTHERS v. LLOYDS, SOUTHAMPTON, LTD.* (1912), 28 T. L. R. 338; 29 R. P. C. 433, C. A.

*Annotations:—Apld. Harrods v. Harrod* (1923), 40 T. L. R. 195. *Refd. Waring & Gillow v. Gillow & Gillow* (1916), 32 T. L. R. 389.

**1205.** ———.]—The ct. granted an interlocutory injunction to restrain deft. co. from carrying on business under any name comprising the well known name of pltf. co. on the ground that defts.' use of the name was calculated to lead the public erroneously to believe that defts.' business had some connection with pltfs.' business.—*HARRODS, LTD. v. HARROD (R.), LTD.* (1923), 40 T. L. R. 195; 41 R. P. C. 74, C. A.

*Annotation:—Refd. Motor Manufacturers' Traders' Soc. v. Motor Manufacturers', etc., Insee.* [1925] Ch. 675.

**1206.** ———.]—The *Reliance Rubber Co., Ltd.*, & its predecessors, had been dealing in rubber goods since 1889. It had a large business in pneumatic tyres & in small solid tyres for trolleys, perambulators, & the like. All those goods had for many years been sold under the name "*Reliance*." The co. had also a small trade in solid band tyres for motor vehicles. Until 1922 the name "*Reliance*" had not been used in the rubber trade except in connection with the business of that co. Before 1922 there existed a co. trading in rubber tyres & rubber trolley wheels, & having a name in which the word "*Simplex*" formed the principal feature. That co. went into liquidation & its undertaking & assets were acquired by the *Reliance Tyre Co., Ltd.*, which had been formed for the purpose. The last-named co. sold solid tyres, but did not appear to sell pneumatic tyres. In Nov. 1922, the *Reliance Rubber Co.* endeavoured, without success, to induce the *Reliance Tyre Co.* to change its name, & in July, 1923, commenced an action to restrain the use of the name. At the trial, pltfs. adduced evidence of confusion arising from defts.' use of the name. Defts. alleged that the name had been chosen in ignorance of the existence of pltf. co., & that the cause of defts. reluctance to change the name was their expectation that a change would have resulted in the loss of a certain contract. Defts. relied also on delay, but pltfs. established

that any delay was in part due to circumstances beyond their control:—*Held*: (1) assuming an original innocent adoption of the word "*Reliance*," defts.' conduct after complaint had been such as to debar it from asserting their subsequent innocence; (2) the use of the name by defts. was calculated to deceive; (3) as to the alleged delay, there was nothing that would, on an application for final judgment, disentitle pltfs. to relief. Judgment was given for pltfs., with costs, & injunctions were granted to restrain defts. from using the name in carrying on business, & from selling tyres under that name. It was ordered that defts. should be allowed six weeks in which to change the name, but that there should not be a suspension of the injunction in regard to the selling of tyres.—*RELANCE RUBBER CO., LTD. v. RELANCE TYRE CO., LTD.* (1924), 42 R. P. C. 91.

**1207.** ———.]—Pltf. society, the *Society of Motor Manufacturers & Traders, Ltd.*, was incorporated in 1902 & had become a very well-known society & acquired a world-wide reputation. The primary purpose of the society was the encouraging, promoting, & protecting in the United Kingdom & elsewhere the interests of manufacturers & traders in motor vehicles of every description. Deft. co., *Motor Manufacturers' & Traders' Mutual Insurance Co., Ltd.*, was incorporated in 1924 for the purpose of carrying on the business of insurance against damage caused to motor cars, motor cycles, or vehicles of any description. Pltf. society took no part whatever, direct or indirect, in the promotion or incorporation of deft. co., but was purely a trade protection society, & did not itself engage in or carry on any manufacture or trade, but claimed in this action an injunction to restrain deft. co. from carrying on business under the name of *Motor Manufacturers' & Traders' Mutual Insurance Co., Ltd.*, or any other name comprising the combination of words "*motor manufacturers & traders*," or other similar combination of words calculated to cause confusion or to deceive or mislead the public or members of the motor trade into the belief that deft. co. was promoted by, or was connected with, the business of pltf. society, & damages. Pltf. society alleged that they would suffer damage to their business reputation if deft. co. were to be wound up or dispute its policies of insurances, & that they might desire to promote a co. for the insurance of motor vehicles & use the name taken by deft. co. No charge of fraud was made against deft. co.:—*Held*: the business of deft. co. being altogether different from, & in no way competing with, the business of pltf. society, & the name of pltf. society being descriptive & consisting entirely of words in ordinary use in the English language, & there being no suggestion that the public would mistake deft. co. for pltf. society, deft. co.'s name was not calculated to deceive & so cause damage to the business reputation of pltf. society in the manner alleged; & deft. co. was not liable to have its business stopped unless it changed its name, merely because a thoughtless person might unwarrantably jump to the conclusion that it was connected with pltf. society.—*MOTOR MANUFACTURERS & TRADERS' SOCIETY v. MOTOR MANUFACTURERS', ETC., INSURANCE CO.*, [1925] Ch. 675; 94 L. J. Ch. 410; 133 L. T. 330; 41 T. L. R. 483; 42 R. P. C. 307, C. A.

**1208.** ———.]—*Previous assignment of business for benefit of creditors—By person lending name to company.*—*William Edgcumbe Rendle*, the patentee of an invention for glass roofing, carried on business under the name of "*W. Edgcumbe Rendle & Co.*" His son, *John Edgcumbe Rendle*, having failed in his business of a bookseller, was

taken into his father's glass roofing business, & entered into an agreement not to carry on any opposition business. The father died, having by his will given the son an interest in the glass roofing business. The son then started business on his own account under the name of "J. Edgumbe Rendle & Co." He got into financial difficulties, & made an assignment for the benefit of his creditors of his business & of all his property. A co., of which he was the promoter & manager, was subsequently registered under the name of "J. Edgumbe Rendle & Co., Ltd.," to carry on the business of glass roofing in opposition to W. Edgumbe Rendle & Co. The trustees of the will of the father thereupon applied to the ct. for an injunction to restrain the co. & their manager from carrying on the business of glass roofing under the name of "J. Edgumbe Rendle & Co., Limited," or any other name calculated to mislead the public into the belief that such co. was carrying on or had succeeded to the business of W. Edgumbe Rendle & Co.:—*Held*: an injunction must be granted as the son, who was not at the time carrying on the business of glass roofing he having assigned all his interest to his creditors, had no right to lend his name to a co., which name from its being so like one already attached to an established business, would be calculated to deceive.—*RENDLE v. EDGUMBE RENDLE & CO., LTD.* (1890), 63 L. T. 94.

*Annotation*:—*Refd.* *Fine Cotton Spinners & Doublers Assocn. & Cash. v. Harwood Cash* (1907), 97 L. T. 45.

**1209.** — *Use of word indicating manufacturer.*—*DUNLOP PNEUMATIC TYRE CO., LTD. v. DUNLOP-TRUFFAULT CYCLE & TUBE MANUFACTURING CO., LTD.* (1896), 12 T. L. R. 434; 40 Sol. Jo. 544.

**1210.** — *Use of principal word of name.*—*PREMIER CYCLE CO., LTD. v. PREMIER TYRE CO., LTD.* (1896), 12 T. L. R. 481.

**1211.** — *Deception of persons of ordinary intelligence.*—A co., formed in the year 1907 & called Buttons, Ltd., carried on business in Birmingham, where it had works & manufactured buttons, including covered buttons, & it was in the habit of covering buttons with material supplied by customers. In 1918 deft. co. was formed under the name Buttons Covered, Ltd., with a small capital & it carried on business in Birmingham, its main business consisting in covering buttons with material supplied by customers. An action was brought by the first-mentioned co. to restrain deft. co. from using the name Buttons Covered, Ltd.:—*Held*: a person of ordinary intelligence would not be likely to confuse the name of deft. co. with that of pltf. co., & the action failed.—*BUTTONS, LTD. v. BUTTONS COVERED, LTD.* (1920), 37 R. P. C. 45.

**1212.** — *Whether injunction against directors.*—Pltfs. since 1920 had carried on business in Stafford as manufacturers of wood heels for shoes under the firm name of Heels, & were commonly known as Heels of Stafford. Deft. co. was incorporated on Oct. 14, 1926, under the name Stafford Heels, Ltd., to carry on the business of manufacturers of heels for shoes in Stafford. Pltfs. sought an injunction to restrain deft. co. & its directors from carrying on business under the name Stafford Heels, Ltd., or any other name calculated to mislead the public into the belief that the business of deft. co. was the business of pltfs. so as to cause confusion between the two

businesses:—*Held*: pltfs. were entitled to an injunction against deft. co., but as against the directors the action failed.—*HEELS v. STAFFORD HEELS, LTD.* (1927), 44 R. P. C. 299.

**1213.** — *Fraudulent intent.*—*ARMY & NAVY CO-OPERATIVE SOCIETY, LTD. v. ARMY, NAVY & CIVIL SERVICE CO-OPERATIVE SOCIETY OF SOUTH AFRICA, LTD., No. 1199, ante.*

*See, also, COMPANIES, Vol. IX., pp. 64-71, Nos. 104-243, 251.*

#### SUB-SECT. 3.—BY MISUSE OF TRADE NAMES OF BUSINESS PREMISES.

**1214.** *When use restrained—Name calculated to mislead—Separate assignments of business & site.*

—(1) A firm of distillers, whose principal business was in gin, were the owners of premises which had for many years been known as the Black Swan Distillery, & had on the front the sign of a black swan. They were also the owners of a trade mark registered in class 43 for spirits, the principal feature of which was a black swan. They conveyed the freehold of the premises to B., & subsequently assigned the goodwill of their business & the trade mark to N. B. was a whisky distiller, & continued to call the premises by the name of the Black Swan Distillery & to use the sign of a black swan on the premises, & used the words Black Swan Distillery extensively in advertisements. He did not use the premises as a distillery, but as offices & stores, his distillery being in Scotland. N. commenced an action to restrain B. from representing that he was carrying on the business formerly carried on by the vendors:—*Held*: pltfs. had not established that the acts of B. were calculated to mislead.

(2) As a general rule the owner of land or buildings of any kind may affix to it any name he pleases, but the ct. will interfere if a particular name be affixed with the view of making a dishonest reputation which would cause damage to another, as, for example, if it were used for the purpose of representing that a business carried on there was the business of another, or even if, without any dishonest intention the user were such as actually or probably to mislead (*STERLING, J.*)—*NICHOLSON v. BUCHANAN* (1900), 44 Sol. Jo. 408; 19 R. P. C. 321.

**1215.** — *Use on circulars & labels.*—*R. & J. P., Ltd., a co. which specialised in the manufacture of English deer leather, had a factory known as W. Miles, at G. The co. brought an action against J. P., who had been a member of the firm of R. & J. P., predecessors in the business of pltf. co., & had been chairman of the directors of pltf. co. from 1895 to 1906, complaining of certain circulars & labels sent out by him. It appeared that he had, since Aug. 1917, carried on a similar business at R. St., London, but those premises being taken over by a govt. dept., he had taken a house & premises at H. Hill, & had named them "W." & had carried on business on part of the premises, & issued circulars & labels complained of with the name "W." as part of his new address. The circulars & labels were sent to stewards & keepers from whom pltf. had been in the habit of purchasing skins & hides, & pltfs. alleged that such circulars & labels were calculated, & had in fact, cause deception or confusion:—*Held*: the circulars & labels were calculated to mislead people*

#### PART V. SECT. 5, SUB-SECT. 3.

**1.** *When use restrained—Tenant using hotel name for other premises.*—

Where a tenant transferred to other premises the name of the hotel leased to him:—*Held*:

entitled to an interdict restraining such use of the said name.—*BORNMAN v. BASSON* (1906 O. R. C. 3.—S. AF.

first instance.—**PERRY v. TRUEFITT** (1842), 6 Beav. 66; 49 E. R. 749.

*Annotations:—As to (1) Apld. Collins Co. v. Cowen* (1857), 3 K. & J. 428; *Glenny v. Smith* (1866), 2 Drew. & Sm. 476; *Wotherspoon v. Currie* (1870), 22 L. T. 260; *Singer Manufacturing Co. v. Wilson* (1876), 2 Ch. D. 434. *Reid. Croft v. Day* (1843), 7 Beav. 84; *Burgess v. Burgess* (1853), 22 L. J. Ch. 676; *Dixon v. Fawcett* (1861), 3 E. & E. 537; *Young v. Macrae* (1862), 9 Jur. N. S. 322; *Lee v. Haley* (1869), 21 L. T. 546; *Johnston v. Orr Ewing* (1882), 7 App. Cas. 219; *Re Paine's Trade Mks., Paine v. Daniel's Breweries* (1893), 68 L. T. 801; *Reddaway v. Banham*, [1896] A. C. 199; *Bile Bean Manufacturing Co. v. Davidson* (1906), 23 R. P. C. 725; *Havana Cigar & Tobacco Factories v. Oddenino*, [1924] 1 Ch. 179. *As to (2) Apld. Flavel v. Harrison* (1853), 10 Hare. 487. *Apld. Leather Cloth Co. v. American Leather Cloth Co.* (1865), 11 H. L. Cas. 523. *Consd. Ford v. Foster* (1872), 7 Ch. App. 611. *Reid. Rodgers v. Nowill* (1847), 6 Hare. 325; *Morgan v. McAdam* (1868), 36 L. J. Ch. 228. *Generally, Reid. Bow v. Hart*, [1905] 1 K. B. 592.

1219. —[—]**HIRST v. DENHAM**, No. 1066, *ante*.

1220. —[—]**WOTHERSPOON v. CURRIE**, No. 1073, *ante*.

1221. —[—]**LEVER v. GOODWIN**, No. 1562, *post*.

1222. —[—]**SAXLEHNER v. APOLLINARIS CO.**, No. 1571, *post*.

1223. —[—]No trader is justified in taking the peculiar symbol, device, or mark by which another trader distinguishes his goods on the market, & so attracting custom to himself from his rival.

Appls. sold their goods in boxes, with the name of the article printed in a particular manner on a "scroll." Resps. sold precisely similar goods under the same name, also printed on a similar scroll, with the addition of their initials "C. B." There was no evidence that any customers were in fact deceived, & after the commencement of the action resps. discontinued the use of the scroll:—*Held*: applts. were entitled to an injunction to restrain resps. from using the scroll in connection with their goods, & to an account of profits derived by resps. from the sale of goods in boxes distinguished by the scroll.—**WEINGARTEN BROTHERS v. BAYER & Co.** (1905), 92 L. T. 511; 21 T. L. R. 418; 22 R. P. C. 341, H. L.

1224. —[—]**P. Bros.** sold waterproofs as "Mattamac" which word was their registered trade mark. They sent test or trap orders to V. & co. for "Mattamac" goods which V. & co. executed by sending their own goods without explanation. P. Bros. brought an action against V. & co. for an injunction. Defts. contended that the persons giving the orders ought to examine the goods supplied to see if they bore the name "Mattamac" & if they had done this they would not have been deceived:—*Held*: an injunction should be granted with costs, to restrain defts. from selling or offering for sale any waterproofs not being pltf's. goods as "Mattamac," & from in any way passing off waterproofs not being pltf's. goods as & for pltf's. goods.—**PEARSON BROTHERS v. VALENTINE & Co.** (1917), 34 R. P. C. 267.

1225. **Name used for inferior goods.**—**HIRST v. DENHAM**, No. 1066, *ante*.

#### (b) Use of Same Name.

1226. **Goods not sold as goods of owner of name.**—No exclusive right in a subject, not protected by patent, preventing sale by another person under the same title, not assuming the name & character

*Annotations:—Apld. Boussod, Valadon v. Marchant* (1907), 24 T. L. R. 111. *Reid. Pomeroy v. Scalé* (1906), 23 T. L. R. 170. *Mentd. Leatham v. Johnstone-White*, [1907] 1 Ch. 322; *Dewes v. Fitch*, [1920] 2 Ch. 159.

#### 1217. —Use by former agent for long period.]

—Prior to a date in 1901, the trade reputation of pltf's. was so connected with the words "The Goupil Gallery," that a rival trader might have been restrained from calling his premises "The Goupil Gallery." Deft. having on that date purchased from pltf's. the premises known as "The Goupil Gallery," but not the goodwill of the business, & having agreed with pltf's. that he was to be their sole agent for the sale of pltf's. pictures for five years, & also to be at liberty to trade there in pictures on his own account:—*Held*: in the absence of stipulation respecting the use of the words "The Goupil Gallery," that in 1907 the trade reputation of deft. was so connected with the words "The Goupil Gallery," that he could not be restrained from so calling his premises after his agency had ceased, & on the principles applied in passing-off cases, pltf's. were not at liberty to call new premises, used for the same trade purposes as deft's. premises, "The Goupil Gallery."—**BOUSSOD, VALADON & Co. v. MARCHANT** (1907), 97 L. T. 301; 23 T. L. R. 681; 21 R. P. C. 665; *on appeal*, 24 T. L. R. 111, C. A.

#### SUB-SECT. 4.—BY MISUSE OF TRADE NAMES OF GOODS.

##### A. Right of Action.

##### (a) In General

1218. **General rule.**—(1) The ground on which the ct. protects trade marks is, that it will not permit a party to sell his own goods as the goods of another; a party will not, therefore, be allowed to use names, marks, letters, or other indicia by which he may pass off his own goods to purchasers as the manufacture of another person.

(2) If pltf. coming for an injunction in such a case appears to have been guilty of misrepresentations to the public the ct. will not interfere in the

it can or may be so used in connection with the goods to represent them as the goods of pltf. In applying the test in a "passing off" action, whether or not the goods of defts. have been represented as the goods of somebody else, the principle is the same even where the name is the name of both

persons as distinguished from a fancy name which has been created for the purpose of the particular goods. In "passing off" actions it is not necessary to prove intent to deceive.—**MICKELSON v. MICKELSON** (1916), 34 W. L. R. 155; 10 W. W. R. 261.—**CAN.**

#### PART V. SECT. 5, SUB-SECT. 4.—A. (b).

k. **General rule.**—The use of a trade name may be an element in the false representation required to support a "passing off" action, & even if it has not acquired any secondary meaning,

of pltf.—**CANHAM v. JONES** (1813), 2 Ves. & B. 218; 35 E. R. 302.

*Annotations:—Distd. Morison v. Moat* (1851), 9 Hare, 241. *Apld. Browne v. Freeman* (1864), 4 New Rep. 476. *Consd. Mellin v. White* (1896), 59 J. P. 628. *Refd. Lamb v. Evans*, [1893] 1 Ch. 218.

**1227. Goods sold as goods of owner of name.]—**

**SYKES v. SYKES**, No. 1147, *ante*.

**1228. —.]—MASSAM v. THORLEY'S CATTLE FOOD CO.**, No. 1034, *ante*.

**1229. —.]—FREE FISHERS & DREDGERS OF WHITSTABLE v. ELLIOTT** (1888), 4 T. L. R. 273.

**1230. —.]—**This was an action for infringement of two trade marks, infringement of copyright, & passing off. Pltf.'s firm had for over 40 years sold an animal medicine called "Day & Sons' Black Drink" in peculiar bottles, & had registered two trade marks in 1888, viz. the said name as a mark used for eighteen years prior to Aug. 13, 1875, & a copy of a label covering the bottles, composed in 1887 & used continuously since that date, & consisting of an upper section along which ran the words "Day & Sons' Black Drink, or Colic & Scour Mixture," with a device at the left hand end by which were set the words "Trade Mark," & a lower portion filled with printed matter, including directions for use; this label was also entered at Stationers' Hall prior to the commencement of this action. Defts. alleged that in 1896 they had purchased the recipe for the mixture from persons long since connected with pltf.'s firm. Defts. were selling the mixture in bottles which in shape, get up, & label closely resembled pltf.'s under the name of "Black Fluid Colic Draught." In the course of the action, pltf.s abandoned their claim in respect of the alleged infringement of the trade marks & of the copyright in the label; & defts. abandoned their resistance to the claim in respect of passing off. Defts. moved for the rectification of the Register by the removal of pltf.'s two trade marks:—*Held*: pltf. was entitled to an injunction restraining defts. "from passing off or attempting to pass off defts.' goods as & for pltf.'s goods & in particular from selling or offering for sale, so as to induce the belief that it is pltf.'s manufacture, any preparation of medicine for animals, not of pltf.'s manufacture, by means of the use of the title 'Black Drink,' or any title colourably differing therefrom, or by means of the use of bottles similar in shape to pltf.'s bottles or of labels similar to or only colourably differing from pltf.'s labels, or otherwise got up in any manner similar to or only colourably differing from pltf.'s preparation."—**DAY v. RILEY & WHITTAKER** (1900), 48 W. R. 556; 44 Sol. Jo. 502; 17 R. P. C. 517.

**1231. —.]—B. & B. were piano makers carrying on business as "Carl Bechstein," & were the proprietors of two registered trade marks consisting of the word "Bechstein." They brought an action for infringement of trade mark & passing off against F. A. B. They complained of certain advertisements of F. A. B. offering "Bechstein Model Pianos" for sale. An *interim* injunction was granted. Subsequently they moved to commit F. A. B. for breach of this injunction, complaining of a further advertisement. Copies of the affidavits were not served with the notice of motion. The trial of the action & the hearing of the motion came on together:—*Held*: "Bechstein Model" indicated that a piano was made by the firm of Bechstein; deft. had infringed pltf.'s trade marks & had dishonestly attempted to pass off pianos not of their manufacture as being of their**

manufacture; & a perpetual injunction must be granted.—**BECHSTEIN v. BARKER & BARKER** (1910), 27 R. P. C. 484.

**1232. —.]—**Pltf.s had long ago acquired the businesses of two firms whose styles commenced with the name "Fonseca," & their port had long been known as "Fonseca & co.'s Port," "Fonseca's Port," or "Fonseca Port." In Mar. 1921, deft. co. was incorporated under the name of Fonseca & Vasconcellos, Ltd., one of the directors being R. A. de Fonseca, & it carried on business as importer & seller of port. Pltf.s commenced an action against deft. co., & alleged that deft. co. had invoiced port as "Fonseca Alto Douro Port," & they claimed not only an injunction against passing off, but also an injunction against importing & dealing in port under the name Fonseca & Vasconcellos, Ltd., or any other name of which the name Fonseca formed part. Dft. co. on the hearing of a motion offered a perpetual undertaking not to use the name Fonseca except as part of their full corporate name, but pltf.s proceeded with the action:—*Held*: deft. co. had, in the instance alleged, deliberately attempted to pass off their port as pltf.s' well known port, & pltf.s were entitled to the first injunction; & as the use of "Fonseca" as part of deft. co.'s name might deceive persons not familiar with the trade into thinking that the port sold by deft. co. was pltf.s' well known "Fonseca" port, pltf.s. were also entitled to an injunction in a special form relating to the use of defts.' name.—**GUIMARAENS (M. P.) & SON v. FONSECA & VASCONCELLOS, LTD.** (1921), 38 R. P. C. 388.

**1233. —.]—**The name "Dorman" as applied to motor engines had become entirely associated with engines made by pltf. co., to many of which deft. co.'s "Meadows Gear Box" had been attached.

Pltf. co.'s sales manager, an engineer named J. E. Dorman, had recently left pltf. co. & become a director & sales manager of deft. co., for whom he designed a motor engine to which the Meadows Gear Box was to be attached. At his suggestion this was put on the market as the "Meadows-Dorman" engine so as to show the designer's as well as the maker's name.

Pltf. co. thereupon claimed an absolute injunction to restrain deft. co. from using the name "Dorman" in any shape or form in connection with motor engines.

Dft. co., while not opposing an absolute injunction as to the form "Meadows-Dorman" which had in fact led to confusion, contended that it was entitled to state the engine-designer's name, with proper safeguards to avoid confusion, & therefore only a limited injunction ought to be granted:—*Held*: deft. co. must be restrained.

First from using the form "Meadows-Dorman" at all in connection with its engines; secondly from using the name "Dorman" in connection with its engines without taking all proper precautions clearly to distinguish deft. co.'s business & goods from those of pltf. co.

Thirdly from so using or referring to the name "Dorman" as to lead purchasers or others to suppose that deft. co.'s goods were those of pltf. co., or that there had been any amalgamation or agreement between the two cos. as to their manufacture or sale.—**DORMAN (W. H.) & CO., LTD. v. MEADOWS (H.), LTD.**, [1922] 2 Ch. 332; 91 L. J. Ch. 728; 127 L. T. 655.

**1227 l. Goods sold as goods of owner of name.]—GILLET v. LUMSDEN BROTHERS** (1904), 24 C. L. T. 345; 8 O. L. R. 168; 3 O. W. R. 851.—**CAN.**

**1227 ll. —.]—VAN RYN WINE & SPIRIT CO., LTD. v. FRYE** (1909), 26 S. C. 227; 19 C. T. R. 389.—**S. AF.**

*Sect. 5.—Passing off: Sub-sect. 4, A. (b) & (c) i.]*

**1234. Name used without distinguishing mark.]—**In 1892 a patent was granted to B., an American, for improvements in "rubber stamps" & a patent for a similar invention was granted to him in America. L. sold certain rubber stamps which he imported from America, where he obtained them from H. These stamps bore, by arrangement with B. & H. the following, "Licensed Buck's Patent," "Made in America," "Patented in U.S.," & "Patented in England." The owners of B.'s English patent brought an action against L. to restrain him from infringing their patents & from selling stamps inscribed "Buck's Patent," or with any other words leading to the belief that the stamps were made under their patent, & they claimed an account of profits:—*Held:* deft.'s stamps were not infringements, & on deft. undertaking in future to use words showing that the American patent was alone referred to, no injunction would be awarded, no case of passing off had been made out by pltf's.—*PNEUMATIC RUBBER STAMP Co. v. LINDNER* (1898), 15 R. P. (C) 525.

**1235. —.]—**F. Reddaway & co., the successors in business of F. Reddaway, brought an action against Ahlers for an injunction to restrain him from continuing to use the word "Camel" or "Camel-hair" in such a manner as to deceive purchasers into the belief that they were purchasing pltf's' belting. What was complained of by pltf's. was the issue of certain trade documents by deft. in which "Belting of camel-hair" was offered for sale. In one of such documents no name appeared; in the others there appeared the name of Conrad Scholtz, who manufactured the belting in question, but such belting was not expressly described as being manufactured by Conrad Scholtz:—*Held:* "Camel-hair Belting" meant in the trade at the date of the action, as well as before, the belting of pltf's., & nothing else, & deft. was offering for sale or describing belting in such a manner as to be likely to be taken for pltf's' goods, & an injunction was granted.

A custom of the trade generally will not exonerate a trader, who is otherwise bound to do so, from the necessity of distinguishing his goods from those sold by another person.—*REDDAWAY (F.) & Co. v. AHLERS* (1901), 19 R. P. (C) 12.

*Annotation.* *Refd. Reddaway v. Frictionless & English Packing Co.* (1902), 19 R. P. (C) 505.

**1236. Name denoting particular type or pattern—Common to trade.]—**In 1885 F. S. W. registered a design for intercepting sewer traps, & his firm sold the same as "Winser Interceptors." The registration expired in 1890. The business of the firm was transferred to a limited co. The limited co. in 1898 commenced an action against A. & co. for an injunction to restrain them from passing off their goods as the goods of pltf. co., & in particular from selling interceptors not being pltf's' as "Winser Interceptors." The acts complained of by pltf. co. were the sale by defts. of four interceptors of theirs as "Winser Interceptors," & there was no other ground of complaint. Pltf. co.'s interceptors were, at the time of the commencement of the action, & always had been, marked with the name of their firm & the word "registered" & the number of the registered design. Defts.' interceptors had no similar mark. The action was tried with witnesses:—*Held:* upon the evidence "Winser's Interceptor" denoted an interceptor of a particular type or pattern, & not an interceptor supplied by pltf's., & defts. in supplying "Winser Interceptors" did not thereby intend to & did not thereby, in fact, represent their

goods to be the goods of pltf's.—*WINSER v. ARMSTRONG & Co.* (1899), 16 R. P. (C) 167.

**1237. Name used with different prefix.]—**F. Reddaway & Co., Ltd., successors in business of F. Reddaway, brought an action against Robert Stevenson & Brother, Ltd., & Anthony Stevenson in respect of the use of the words "Camel-hair" in connection with belting. Pltf's. complained of the use of the name "Stevenson's "Camel-hair Belting" & "Phoenix Brand Camel-hair belting." Defts. admitted that "Camel-hair Belting" used alone denoted belting made by pltf's. Pltf's. had first known of these acts of defts. April, 1898, but after inquiries into their position, had taken no steps against them:—*Held:* the conduct of defts. pointed to dishonest intention, & under the circumstances, the prefix of the proper name or the name of a brand, or both together, was not sufficient to distinguish defts.' Camel-hair Belting from the pltf's.; there had been no such acquiescence on the part of pltf's. as to debar them from suing for an injunction but, it debarred them from recovering damages for the past.—*REDDAWAY (F.) & Co., LTD. v. STEVENSON & BROTHER, LTD. & STEVENSON* (1902), 20 R. P. (C) 276.

**1238. Name indicating source of goods—User by merchant after cessation of dealing in goods—Goods dealt with by other merchant.]—**A vineyard known as the Quinta de Roriz, & a wine shipping business, C. N. Kopke & Co., were originally in the same hands, but belonged to different owners since 1847. The house of Kopke or the persons entitled to its goodwill took the entire produce of the Quinta de Roriz down to 1902. Since that date the sole consignee of such produce in England were pltf's. G. B. & co. In 1888 the successors of the Kopke business registered "Kopke Roriz" as a trade mark for wines as an old mark. In an action by the owner of the vineyard & the consignee to restrain the use by the owners of the Kopke business of this mark, it was proved that the wine shipped under it had come, recently at any rate, in some years only partly & in others not at all from the vineyard in question. There was evidence of representation to the public of a connection between the produce of the vineyard & the mark in question:—*Held:* the use of the mark "Kopke Roriz" by defts. was a representation that the wine was substantially the produce of pltf's' vineyard, & an injunction should be granted, on the ground of passing off, with damages, but not an account of profits.—*VAN ZELLER v. MASON, CATTLEY & Co.* (1907), 25 R. P. (C) 37.

**1239. Name used in error—On one isolated occasion.]—**Pltf's. were the makers of oilers for the axles of railway, & other carriages, known as "Armstrong Oilers." Defts. were manufacturers of axle boxes & oilers, & had been in the habit of receiving orders for pltf's' oilers, & executing them through pltf's. or their agents for some years. At a short time previous to the commencement of the action defts. had, in response to orders for "Armstrong Oilers," supplied oilers of their own make under the name of "Armstrong Type Oiler" with the knowledge of the customers that the oilers were not of pltf's' manufacture. In one instance owing to the mistake of a workman pltf's' brass plate with the name "Armstrong Oiler" was attached to the oilers manufactured by defts. Pltf's. brought an action for passing off:—*Held:* without deciding what was the primary meaning of the term "Armstrong Oiler," defts. had not done anything which they were not entitled to do except in the one instance; this was an isolated case & a mistake, & under the circumstances did not justify the grant of an injunction. Judgment was



given for debts. with costs, except so far as down to & including the hearing of a motion for an *interim* injunction, on which debts. gave a certain undertaking, the costs were increased by the complaint with reference to pltf.'s brass plate being put by mistake on debt.'s goods.—*ARMSTRONG OILER CO., LTD. v. PATENT AXLEBOX & FOUNDRY CO., LTD.* (1910), 27 R. P. C. 362.

**1240. French translation of name.]**—In July, 1885, M., of Dizi in France, commenced the consignment to pltf. in London of champagne under the label of "Le Court et Cie, Rheims," which had then recently been registered in France as his trade mark, & to which in Dec. 1886, his right was established in proceedings against X. before the French tribunal. Further consignments were made to pltf. down to July, 1886, & advertised & sold by him as Le Court et Cie's champagne. In Mar. 1886, debt., trading under the name of "Short & Co.," began to sell, chiefly at a wine bar across the counter, champagne which was sent to him from France by X. as Le Court et Cie's champagne; & it appeared that in 1882 he had proposed to register in France a label with the name Le Court et Cie as corresponding to his own trade name of Short & Co., but from difficulties in obtaining registration abandoned the idea. Upon motion by pltf. to restrain the use of the name & brand by debt.:—*Held*: neither on the ground of trade mark nor of trade name was pltf. entitled to an injunction against debt. because the evidence failed to show that either by long user or reputation had the wine sold under the name & brand "Le Court et Cie" become so associated with the wine of pltf. as to enable him to assert his common law right of restraining another person from passing off his goods as those of pltf.—*GOODFELLOW v. PRINCE* (1887), 35 Ch. D. 9; 56 L. J. Ch. 545; 56 L. T. 617; 35 W. R. 488; 3 T. L. R. 385, C. A.

*Annotations*:—*Dist. Re Apollinaris Co.'s Trade Mks.*, [1891] 2 Ch. 186. *Consd. Dental Manufacturing Co. v. De Trey* (1912), 107 L. T. 111.

**1241. Name used for different article.]**—The N. co. & their predecessors in business had, from 1895 onwards, dealt in "Nugget" boot & other polishes & had acquired a great reputation, & the word "Nugget" had become distinctive of their trade. The N. co. had registered as a trade mark the word "Nugget," with the device of a nugget underneath it, in the class including polishes. They had not dealt in, & had no immediate intention of dealing in, rubber heels. The H. co. had from 1907, sold rubber heels under various names, including the name "Nugget," & had used show cards having the name "Nugget" on them with the device of a nugget underneath it. They stamped the word "Nugget" on each heel, with the name "HARBORO" in addition. In 1911 the N. co. commenced an action against the H. co. to restrain them from using the word "Nugget" or the representation of a nugget in connection with the sale of rubber heels. It was proved that in 1907 one rubber heel manufacturer had sold polish, & pltf. alleged that recently a closer connection had arisen between the sale of rubber heels & that of polishes. It was also proved that rubber heels, & other articles, had been sold under the name "Nugget" to a considerable extent by other traders. No actual deception was proved to have occurred:—*Held*: the facts were to be considered as they stood in 1907, & the fact that an alteration had taken place in the trade since then ought not to affect the propriety of debt.'s

conduct; debt.'s representation of a nugget was not, as alleged, a copy of pltf.'s representation; & debt.'s use of the name "Nugget" was not such as to lead to a legitimate inference that their rubber heels were those of pltf.s.—*NUCKET POLISH CO., LTD. v. HARBORO RUBBER CO.* (1911), 20 R. P. C. 133.

**1242. — Accessories of principal article.]**—The Neostyle Manufacturing co., which traded in duplicating machines & manufactured & sold accessories for use therewith which, machines & accessories they sold under the name "Neostyle," commenced an action to restrain another co. from passing off ink, paper, & stationery not of pltf.'s manufacture or merchandise as & for the goods of pltf. by the use of the word "Neostyle" or otherwise, & from infringing their trade mark "Neostyle," registered in Class 39 in respect of paper, stationery, & bookbinding. Before the trial the trade mark was ordered by the Ct. of Appeal to be removed from the Register on the ground that pltf. had not an exclusive right to the word "Neostyle" for such goods. Defts. alleged (*inter alia*) that the term "Neostyle" was not distinctive of pltf.'s goods, & that, as applied to paper, ink, & accessories, it meant that such paper, ink, & accessories were suitable for use in the "Neostyle" machine. Defts. had described their accessories as being "for the Neostyle," & had used the term "Neostyle Ink" in a catalogue meant for the trade, & two cases of sale of "Neostyle Ink" were proved. At the trial pltf.'s adduced evidence to establish a case of passing off by means of the tins in which defts. sold their "ink for the Neostyle," which tins had not in all cases defts.' name on them. It was held at the trial that, although the word "Neostyle" had become identified in England with pltf.'s duplicating machines, they had never had any exclusive right to the word in connection with duplicator accessories; that defts. might sell ink & paper for use on the "Neostyle" machine, & so describe them, provided that they did not by words or get up represent their goods as those of pltf.; that there had been no passing off by defts.; & that pltf. had failed to establish a case entitling them to an injunction; but the Ct. suggested that debt.'s name should always appear on the tins of ink sold by them:—*Held*: the conclusion of fact arrived at on the trial ought not to be disturbed, & the appeal was dismissed.—*NEOSTYLE MANUFACTURING CO., LTD. v. ELIAM'S DUPLICATOR CO.* (1904), 21 R. P. C. 569, C. A.

**1243. — Different type of same class.]**—*WARWICK TYRE CO., LTD. v. NEW MOTOR & GENERAL RUBBER CO., LTD.*, No. 1101, *post*.

(c) Use of Similar Name.

i. In General.

**1244. Colourable imitation of name.]**—Pltf. Schweitzer sold a preparation of cocoa, labelled "Schweitzer's cocoatina." Debt. Atkins, who had been in his employ, set up business in partnership with a man also named Schweitzer, & sold a similar preparation of cocoa, labelled "Schweitzer, Atkins & Co.'s cacaoatine":—*Held*: this was a fraudulent & colourable imitation, & injunction granted accordingly.—*SCHWEITZER v. ATKINS* (1868), 37 L. J. Ch. 847; 19 L. T. 6; 16 W. R. 1080.

**1245. —.]**—*SOMERVILLE v. SCHEMBRI*, No. 1069, *ante*.

1243 i. Name used for different article—Different type of same class.]—*MICKELSON v. KILL-EM-QUICK CO., LTD.*, (Man.), 918] 1 W. W. R. 781.—CAN.



*Sect. 5.—Passing off: Sub-sect. 4, A. (c) i. & ii.]*

**1246.** —[—]Pltfs. registered a trade mark consisting of a Demon's face & the words "The Demon," & used it on tennis racquets with handles made according to a patent which had been declared invalid in a previous action. They also generally stamped the words "The Demon" on such racquets, which were known & ordered as "Demon racquets." Defts. sold racquets exactly like pltfs.' with the word "Demotic" stamped where pltfs. stamped "The Demon." Pltfs. brought an action to restrain defts. from using "Demotic" on their racquets. One of pltfs.' witnesses swore that the use of "Demotic" by defts. was calculated to deceive. All defts.' witnesses swore that it was not calculated to deceive:—*Held*: defts. ought to be restrained from using the word "Demotic" in such a way as to represent these goods as the goods of pltfs.—*SLAZENGER & SONS v. PELTHAM & CO.* (1889), 5 T. L. R. 365; 6 R. P. C. 531, C. A.

*Annotations:—Consd. Bailow & Jones v. Johnson* (1890), 7 R. P. C. 395. *Apud. Palao v. Daniell's*, *Browerles, &c. Paine's Trade Mks.*, [1893] 2 Ch. 567.

**1247.** —[—]The Singer Manufacturing Co. brought an action against the British Empire Manufacturing Co. to restrain them from advertising or using the name "Singer" in connection with sewing machines, not of pltfs.' manufacture, in any way calculated to induce the belief that such machines were of pltfs.' manufacture. Pltfs. alleged that the word "Singer" indicated their goods, but they admitted that in the inner circle of the trade a special class of machines had been known as being made on the "Singer system." Defts., who did not manufacture, issued advertisements in which "Singer" appeared in large letters with the words "latest improved" on one side of it & "system" on the other side. These words & defts.' name which headed the advertisements were in a smaller type than the word "Singer." The advertisements also contained prominently the prices of the machines advertised contrasted with the usual prices; they stated: "We have no agents" & "Send for illustrated price lists," followed by defts.' name & address. Defts.' machines themselves had not the word "Singer" on them. Pltfs. alleged that the words "Latest Improved Singer System" had no descriptive meaning either to the trade or public. They called as witnesses persons who had seen the advertisements & had thought that such advertisements referred to pltfs.' machines, & who had gone to pltfs.' branch establishments to ask for the machines advertised, or in one case, having before bought one of pltfs.' machines, complained to pltfs. of having been charged a higher price & not that in the advertisements. Defts. alleged that the words "latest improved Singer system" described machines of a particular class or type & that no one following the directions of the advertisements could be deceived:—*Held*: to ordinary purchasers there was nothing known as the "Singer system," & the advertisements were calculated & intended to deceive intending purchasers into the belief that the machines advertised were manufactured by pltfs.—*SINGER MANUFACTURING CO. v. BRITISH EMPIRE MANUFACTURING CO., LTD.* (1903), 20 R. P. C. 313.

**1248.** —[—]Pltfs., who sold "Iron-Ox Tablets," brought an action to restrain defts. from selling medicinal tablets under the description "Iron Oxide Tablets" & from passing off their goods as pltfs.' goods. Defts., being unable to obtain pltfs.' goods for sale, obtained from a manufacturer, & sold to retailers for re-sale,

"Compound Iron Oxide Tablets" which contained iron oxide, practically useless as a drug, & also other & useful drugs, with the avowed intention of facilitating competition with "Iron-Ox Tablets," which contained no iron oxide. There were other tablets called "Iron Oxide Tablets" placed upon the market after the time when pltfs. commenced advertising, but before defts.' sales began; pltfs. had stopped the sale of some of these tablets. Defts. contended that iron oxide was in popular demand as a medicine & that they were entitled to supply this demand in the way they did, there being no complaint of get-up & no actual deception, but only cases in which the person receiving defts.' goods ordered pltfs.' goods from the retailers, but was not himself deceived:—*Held*: defts. had not put "Iron Oxide Tablets" upon the market to satisfy a popular demand, but in order to supersede "Iron Ox Tablets," under the circumstances the choice of this name was not legitimate trading, & it would lead to confusion & was chosen for that reason, & not because it could in any sense be said to correctly describe the article.—*IRON-OR REMEDY CO., LTD. v. CO-OPERATIVE WHOLESALE SOCIETY, LTD.* (1907), 24 R. P. C. 425.

*Annotation:—Consd. Spalding v. Gamage* (1915), 81 L. J. Ch. 419.

**1249.** —[—]The Muralo co. were the makers of a distemper which they sold under the name of "Muralo" in the United Kingdom & in many parts of the world. Defts. manufactured a distemper under the name of "Murrilo," which they adopted after some correspondence with their agents. Pltfs. brought an action for an injunction to restrain defts. from selling their goods under this name, alleging that its similarity to their name had led to confusion in the trade, & they adduced evidence to show that the choice of the name by defts. was made with intent to deceive:—*Held*: the name "Murrilo" was calculated to lead to the belief that defts.' goods were pltfs.' goods, & the name was taken deliberately for that purpose.—*MURALO CO. v. TAYLOR & CO.* (1910), 27 R. P. C. 261.

**1250.** —[—]Pltfs. had for upwards of twenty-five years sold Havana cigars under the name "Bolivar." Evidence was given that pltfs.' cigars had become known to the trade & the public as "Bolivar" cigars. In Apr. 1920, pltfs. learnt that defts., Moliver & Co., Ltd., were selling cigars under the name "La Molivar" or "Molivar," & brought an action for passing-off against the co. & two persons, Moliver & Weinbaum, who were directors of the deft. co. Moliver & Co., Ltd. Defts.' cigars were British made. Deft., Moliver, was by birth a Russian, & said that in Russia his name was spelt Molivar:—*Held*: the similarity between "Bolivar" & "Molivar" was such as to be calculated to cause confusion & to enable dishonest traders to impose upon the public notwithstanding the difference between pltfs.' & defts.' cigars; defts. were not entitled to the name "Molivar"; the conduct of the individual defts. was an attempt to obtain, by means of the limited co., the benefit of pltfs.' reputation, & pltfs. were entitled to judgment against all three defts., with costs.—*MIDDLEMAS & WOOD v. MOLIVER & CO., LTD.* (1921), 38 R. P. C. 97.

**1251.** —[—]No intention to deceive.]—The proprietors of two trade marks consisting of the word "Mirabol," one in capital lettering & the other in script lettering on a label, & both registered in class 1 in respect of enamels, paints & varnishes, brought an action for infringement of the marks against the proprietors of a trade mark consisting

of the word "Muralol," & registered in class 1 in respect of colours, paints & varnishes. Pltfs. also alleged in the statement of claim that defts. had passed off goods by the use of the word "Muralol," but early in the proceedings pltfs. informed defts. that they did not intend to rely upon any specific acts of passing off. Defts. admitted that they had sold flat oil paints under the name "Muralol," but alleged that pltfs. had sold under the name "Mirabol" only undercoating & enamel, flat & glossy, not flat oil paint, & they denied that they had infringed the trade marks or passed off goods. Pltfs. gave notice of motion to remove defts.' mark from the register, & defts. gave notice of motion to limit the registration of pltfs.' mark:—*Held*: defts. had chosen the name "Muralol" honestly; defts.' goods were sold only to the trade, & there had not been any actual deception, but defts.' word "Muralol" was calculated to deceive.—*WALPAMUR CO., LTD. v. SANDESON (A.) & CO., LTD.* (1926), 43 R. P. C. 385.

#### ii. Particular Instances.

**1252. "Steelpens' Blue Black"**—For "Stephens' Blue Black."—A trader had produced & sold an ink which he designated "Stephens' Blue Black," & it was shown to the public in a label in white capital letters of large type. Pltfs. had sold an ink in bottles similar in size to pltfs.', designated as "Steelpens' Blue Black," also in white capital letters of large type:—*Held*: this was a colourable imitation of pltfs.' trade mark, & deft. was restrained by injunction from the further use of it.—*STEPHENS v. PEEL* (1867), 16 L. T. 145.

**1253. "Goodwin's Self-washing Soap"**—For "Sunlight Self-washer."—*LEVER v. GOODWIN*, No. 1562, *post*.

**1254. Starch gloss**—For "Starch Glaze."—*ASCOUGH v. JOHNSON & CO.* (1887), 3 T. L. R. 735, C. A.

**1255. "Demotic"** — For "Demon."—*SLEAZENGER & SONS v. FELTHAM & CO.*, No. 1246, *ante*.

**1256. "American syrup of figs"**—For "Callifornian syrup of figs."—Pltfs. in this action, the California Fig Syrup co., an American co., having a depot in England, sold Syrup of Figs under the name of "California Syrup of Figs," & advertised the same largely. Other firms sold "Syrup of Figs" both in England & America, but, except in the case of defts. to the action, there appeared to have been only a small use of the term "American" in reference to Syrup of Figs by two other firms. Defts. were an English co., who first sold the California co.'s article, & then commenced to sell "The American Syrup of Figs" under the name of "The American Syrup of Figs co." Certain orders were given to them for "California Syrup of Figs," the name "American" being added in some cases. These were executed by supplying defts.' preparation. An action being brought against them for an injunction & other relief, defts., among other things, set up that pltf. co. were disentitled to relief on the ground of misrepresentation, as there was little or no fig juice in the preparation which they sold as "Syrup of Figs." It was held at the trial that pltf. co. were entitled to an injunction to restrain defts. from selling their "Syrup of Figs" as "American," & to an account of profits &

costs, & they were not disentitled to relief in the action on the ground of misrepresentation:—*Held*: pltfs. had not established that defts. were passing off their goods as pltfs., & the appeal must be allowed.—*CALIFORNIA FIG SYRUP CO. v. TAYLOR'S DRUG CO.* (1897), 13 T. L. R. 438; 14 R. P. C. 564, C. A.

**1257. "Karmal-hair belting"**—For "Camel-hair, belting."—*F. Reddaway & co., Ltd.*, successors in business of F. Reddaway & co., brought an action against the Frictionless Engine Packing co., Ltd., in respect of the use of the words "Karmal" & "Camel-hair" in connection with belting. Pltfs. complained (a) of the use of the words "Camel-hair" without any distinctive word or prefix; (b) of the use of the word "Karmal," as being likely to deceive purchasers into the belief that by purchasing "Karmal-hair Belting" they were purchasing pltfs.' belting; (c) of the use of the name "Frictionless Engine Packing co.'s Camel hair Belting." Defts. admitted that "Camel-hair Belting" used alone denoted belting made by pltfs.:—*Held*: (1) defts. had used the words "Camel-hair Belting" without any distinction, & had, therefore, brought themselves within the decision in *Reddaway v. Banham*, No. 1098, *ante*; (2) the use of the word "Karmal" was likely to deceive & ought to be restrained by injunction; (3) the prefix of the proper name was sufficient to distinguish defts.' "Camel-hair Belting" from pltfs.—*REDDAWAY (F.) & CO., LTD. v. FRICTIONLESS ENGINE PACKING CO., LTD.* (1902), 19 R. P. C. 505.

**1258. "Vacuum A Mobiloil"**—For "Vacuum" oil.—The owners of a trade mark consisting of the word "Vacuum" registered for (*inter alia*), lubricating oils, began an action for infringement of same, & also for passing off by defts. of oils, not being the goods of pltfs. as & for their goods. Defts. had sold oil, not pltfs., out of a barrel in their shop marked "Vacuum Motor Oil" "A quality" & invoiced as "Vacuum A Mobiloil." They alleged in defence that "Vacuum Quality" was an expression used in practice in the trade to denote quality & would deceive no one:—*Held*: pltfs.' rights had been infringed & an injunction was granted against infringement of their trade mark & against passing off & an inquiry as to damages.—*VACUUM OIL CO., LTD. v. GOUGH & TARRANT* (1909), 27 R. P. C. 76.

**1259. "Lanco Belting"**—For "Lancashire Belting."—Prior to 1870, & subsequently, a co. & their predecessors manufactured & sold hair belting for machine driving under the name of "Lancashire Belting" or "Lancashire Patent Belting" & used in connection with the sale a trade mark consisting of the words "The Lancashire" registered in 1885, as an old mark. The co. also sold but did not manufacture balata belting. In 1904, pltfs. acquired the business of the co. Pltfs. sold hair belting under the name of "Lancashire Belting" but did not use that name in connection with their sale of balata belting. In 1905, defts. began to manufacture balata belting, which they sold under the name of "Lanco Belting," & in the same year they registered two trade marks, one consisting of the word "Lanco," & the other of the words "Lanco Balata Belting" with a device. Pltfs. commenced

#### PART V. SECT. 5, SUB-SECT. 4.— A. (c) ii.

1. "Gramm"—"*Gramm-Bernstein*."—When confusion & interference with the trade of an older co. had arisen from two rival machines being

put upon the market, one called the "Gramm" motor & the other the "Gramm-Bernstein":—*Held*: deft. co. had no right to use the name "Gramm" as a personal name, as against pltf. co.—*GRAMM MOTOR TRUCK CO. v. FISHER MOTOR CO.* (1913),

5 O. W. N. 419; 30 O. L. R. 1.—*CAN.*

m. "*Lochgelly Coal*"—"*Lochgelly spirit coal*."—*LOCHGELLY COAL & COAL CO. v. LUMPHREY & SONS* (1879), 6 L. (Ct. of Sess.) 482; 16 Sc. L. R. 268.—*SCOT.*

Sect. 5.—*Passing off*: Sub-sect. 4, A. (c) *ii.*, (d), & B. (a) & (b).]

an action to restrain passing off, & moved to expunge defts.' trade marks. They alleged that their belting was known by various abbreviations of the word "Lancashire" resembling the name "Lanco," & the use of that name was calculated & intended to deceive. Defts. denied that their "Lanco Balata Belting" could be mistaken by purchasers for pltf.'s "Lancashire" hair belting. At the trial, no actual deception was proved, the allegation of fraud was withdrawn & defts. put in evidence a correspondence with the Registrar of trade marks on their application to register their trade marks, from which correspondence it appeared that defts. had originally applied to register the word "Lanconie," stated as an abbreviation of "Lancashire cotton made in England," & their adoption of "Lanco" instead of "Lanconie" was in consequence of correspondence with the Registrar:—*Held*: the use of the name "Lanco" was not calculated to deceive.—REDDAWAY & CO., LTD. v. IRWELL & EASTERN RUBBER CO., LTD. (1907), 24 R. P. C. 203, C. A.

1260. "Aquatite" — For "Aquascutum." — Pltfs. who used "Aquascutum" as the name of garments sold by them, brought an action to restrain defts. from passing off garments not of pltfs.' manufacture & as for garments of such manufacture. Pltfs. complained of the use of the word "Aquatite" by defts. It appeared that words beginning with "Aqua" were in use in the trade:—*Held*: what defts. were doing was not having regard to the surrounding circumstances calculated to deceive.—AQUASCUTUM v. COHEN & WILKS (1909), 20 R. P. C. 651.

1261. "Glen Thorne" — For "Thorne's." — Pltfs. & their predecessors in business were a firm of whisky distillers of very old standing, & there was proof that their whisky for many years past had been known on the market as "Thorne's Whisky," & that it had acquired both in the trade & among the public a reputation under that name. Defts. & their predecessors in business, who were restaurant proprietors, had for many years obtained the whole of their whisky from pltfs.' London agents, & had dealt in no whisky but that of pltfs. In 1887 defts.' predecessors in business registered as a trade mark a label headed by the words "Glen Thorne," & followed by "Old Highland Whisky," & in small lettering, "Sole Proprietors, Pimm's & co.," the words Pimm's & co. being printed as a signature. The label also bore in the corner defts.' trade mark of three barrels with the address. Defts. continued to deal solely in pltfs.' whisky until the year 1900. In that year defts. ceased to buy or to deal in pltfs.' whisky; nevertheless they continued to use the label aforesaid & to supply their customers with "Glen Thorne" whisky. Pltfs. commenced an action to restrain passing off & moved to expunge defts.' trade mark. Pltfs. alleged at the trial that defts.' label was put on the Register subject to an arrangement between themselves & defts. Defts. denied that any such arrangement was made. Pltfs. adduced evidence to prove passing off on several different occasions:—*Held*: (1) defts.' trade mark was registered by arrangement with pltfs., & at the moment defts. ceased to supply "Thorne's Whisky" the trade mark became calculated to deceive; (2) there had been passing off by defts., & if defts. were allowed to continue to sell whisky other than pltfs.' under the name "Glen Thorne," passing off would be certain to occur again. An injunction was accordingly granted, & an order made to expunge the

trade mark from the Register.—THORNE (R.) & SONS, LTD. v. PIMMS, LTD., *Re PIMMS' TRADE MARK* (1909), 26 R. P. C. 221.

Annotation:—As to (2) *Appl. Bowden Wire v. Bowden Brake Co.* (1913), 30 R. P. C. 580.

1262. "Murrillo" — For "Muralo." — MURALO Co. v. TAYLOR & Co., No. 1249, *ante*.

1263. "Carvino" — For "Wincarnis." — (1) Pltfs. were the manufacturers of a medicated wine made from extract of meat & malt wine, which they sold under the name of "Wincarnis," which name was pltfs.' registered trade mark. Subsequently, defts., who were the manufacturers of another medicated wine made from wine & extract of meat, registered as their trade mark the name of "Carvino." On an application by pltfs. to have the name "Carvino" removed from the Register, & for an injunction to restrain defts. from selling their medicated wine in bottles so got up as to be calculated to lead to the belief that defts.' preparation was pltfs.' "Wincarnis":—*Held*: the word "Carvino" was not calculated to deceive; & the get-up of defts.' medicated wine was not calculated to deceive.

(2) An account of profits in a passing off action will not be stayed pending an appeal, unless irreparable injury would otherwise be caused.—*Re "CARVINO" TRADE MARK*, [1911] 2 Ch. 572; 28 T. L. R. 65, C. A.

1264. "The Regiment" — For "Regimental." — Pltfs.' predecessors in title had always sold their cigarettes as the "Smith's Regimental Cigarettes." In 1885 they registered the words "Regimental Cigarettes" as a trade mark, & in 1908 pltfs. registered the word "Regimental" for tobacco without altering the form in which they sold their cigarettes. In 1916 defts., without any knowledge of the existence of pltfs.' cigarettes or trade marks, began to sell cigarettes in boxes decorated with regimental badges, which he called Pasquali's "The Regiment" high class Virginia cigarettes. Pltfs. sought an injunction against defts. for infringement, & passing off, & defts. moved the ct. to remove pltfs.' marks from the register:—*Held*: (1) pltfs. had failed to prove passing off, as the word "Regimental," as used by them in the title "Smith's Regimental Cigarettes," had not acquired a secondary meaning; (2) the question whether the word "Regiment" was an infringement of the different word "Regimental" depended on whether it was calculated to cause defts.' goods to be taken by ordinary purchasers for those of pltfs., which was not so in this case.—IMPERIAL TOBACCO CO. OF GREAT BRITAIN & IRELAND v. PASQUALI, *Re IMPERIAL TOBACCO Co.'s TRADE MARKS*, [1918] 2 Ch. 207; 87 L. J. Ch. 293; 119 L. T. 271; 34 T. L. R. 313; 62 Sol. Jo. 422; 35 R. P. C. 185; *reversd.* without touching these points, [1918] 2 Ch. 218, C. A.

Annotation:—Generally, *Mentid. Re Wigfull's Trade Mks.*, [1919] 1 Ch. 52.

1265. "Molivar" — For "Bollvar." — MIDDLEMAS & WOOD v. MOLIVER & Co., LTD., No. 1250, *ante*.

1266. "Amata" — For "Amami." — Pltf. co. carried on business as manufacturers of perfumery, toilet preparations & other similar articles, & had for many years distinguished their goods by the application thereto, & the use in connection therewith, of the word "Amami." In July, 1909, they registered that word as a trade mark for goods in class 48. The trade mark was to be applied to perfumery, including toilet articles & preparations for the teeth & hair & perfumed soap. In Jan. 1924, defts. co. was incorporated for the purpose, according to the memorandum of assocn., of (a) carrying on business as wholesale manufacturers

of toilet preparations, & (b) publishers of medical books & publications relating thereto, but the real object was to sell a medical book written by one of the two directors, & the co. had not sold toilet preparations, but on letter paper had described themselves as "Wholesale Manufacturers of Amata Toilet Preparations." The share capital was £100 divided into 100 shares, the whole of which were taken up by the two signatories to the memorandum who were also the only directors of the co. Pltf. co. commenced an action against deft. co. & the two directors for an injunction restraining them (*inter alia*) "from selling or offering or exposing or advertising for sale or procuring to be sold any such goods as aforesaid," i.e., perfumery or toilet articles or preparations, "not being pltf.' goods under the name "Amata" or under any other name which by reason of colourable imitation of the word "Amami" or otherwise is calculated to deceive" & from infringing pltf.' trade mark, & from carrying on business as manufacturers of toilet preparations under the name "Amata, Ltd." At the trial defts. claimed the right to use the word "Amata" for toilet preparations:—*Held*: (1) the sale of toilet preparations by deft. co. as "Amata" cream or "Amata" perfume, or any other toilet preparation with the word "Amata" affixed, would almost necessarily lead to confusion, & an injunction in the terms quoted above must be granted, but not the injunction asked for to restrain the use of the name Amata, Ltd.—*PRICHARD & CONSTANCE (WHOLESALE), LTD. v. AMATA, LTD. (1924), 42 R. P. C. 63.*

(d) *Names of Publications & Newspapers.*

See COPYRIGHT, Vol. XIII., pp. 215, 216, Nos. 511–523; PRESS & PRINTING, Vol. XXXVII., pp. 546–548, Nos. 81–102.

B. Deception.

(a) *Actual Deception.*

1267. *Necessity for.*—The ct. does not recognise property in unpatented articles, & will not interfere to restrain the sale of spurious articles, though described to be the same as those manufactured by another, unless such articles are held out by the imitator to be the manufacture of that other person.

Where B. invented & sold a secret medicine called chlorodyne & F. advertised a spurious imitation of it as "the original chlorodyne" & the evidence showed that F.'s article was not mistaken for B.'s but only that F. was taken to be the first inventor:—*Held*: B. was not entitled to an injunction to restrain F. from issuing such advertisements.—*BROWNE v. FREEMAN (1864), 4 New Rep. 476; previous proceedings, 12 W. R. 305.*

1268. —]—*HOOHAM v. POTTAGE, No. 1131, ante.*

1269. —]—*RIPLEY v. GRIFFITHS, No. 1091, ante.*

1270. —]—The Apollinaris Co., Ltd., the sole consignees for the United Kingdom of "Apollinaris Water," & a German co., the owners of the Apollinaris Spring, commenced an action complaining of the sale by a firm of wholesale chemists & druggists of "Apollinaris Salts," & seeking to restrain the sale by them of salts not obtained

from pltf.' "Apollinaris Water" as or for salts obtained from such water & to restrain defts. from passing off or causing or enabling to be passed off any water made up with salts not obtained from pltf.' "Apollinaris Water" or any such salts, as or for pltf.' "Apollinaris Water" or salts obtained therefrom. Pltf. chiefly complained of the use by defts. of a catalogue containing "Salts for the production of natural mineral waters prepared according to the most reliable analyses of the respective waters," the list of such salts comprising Apollinaris, & of the sale of "Apollinaris Salts" with instructions for making "Apollinaris Water." They contended that persons ordering such salts would expect to get salts prepared from pltf.' "Apollinaris Water," & they alleged one case of actual deception. Defts. contended that it was clear from the catalogue that the salts were artificially prepared. Pltf. had made "Apollinaris Salts," but not since 1887, & never on a commercial scale:—*Held*: no actual deception had been proved; the catalogue contained no representation that defts.' "Apollinaris Salts" were obtained from or were capable of producing the real "Apollinaris Water," & the words "Apollinaris Salts" only represented that the salts sold under that name were the constituent salts of Apollinaris water, & there was no passing off of such salts as or for the goods of pltf. or as obtained from the Apollinaris water; although the sale of "Apollinaris Water," without distinguishing it from the natural water, would be an infringement of pltf.' rights, the sale of the salts by defts. was for the purpose of such salts being used in a manner which was not in itself an infringement of pltf.' rights, & defts. had not caused or enabled any person to do that which he was not lawfully entitled to do.—*APOLLINARIS CO., LTD. v. DUCKWORTH & CO. (1906), 22 T. L. R. 744; 23 R. P. C. 540, C. A.*

*Passing off by get up or mark.*—See Sub-sect. 5, C. (a), *post*.

(b) *Probability of Deception.*

1271. *Whether user restrained—User calculated to deceive.*—*LEE v. HALEY, No. 1130, ante.*

1272. —]—*APOLLINARIS CO., LTD. v. NOBUSH, No. 1080, ante.*

1273. —]—*SOMERVILLE v. SCHEMBRI, No. 1069, ante.*

1274. —]—*Eno* sold for many years a medicinal preparation in the form of a powder under the name of "Fruit Salt." D. & co. began to sell a medicinal preparation in the form of tablets under the name of "Dunn's Fruit Salt & Potash Lozenges" & subsequently as "Dunn's Fruit Salt & Chlorate of Potash Lozenges." E. commenced an action against D. & co. for an injunction to restrain them from selling any compound for medicinal purposes not being or containing pltf.'s "Fruit Salt" under the title of "Fruit Salt," or under any title of which "Fruit Salt" forms a part, & moved for an interlocutory injunction:—*Held*: the title of the tablets was calculated to deceive, & an injunction ought to be granted to restrain defts. from selling "Dunn's Fruit Salt & Potash Tablets" or any other compound for medicinal purposes not being or containing pltf.'s "Fruit Salt" under the title of "Fruit Salt" or under any other title of which "Fruit Salt" forms a part so as to induce the belief that such

PART V. SECT. 5, SUB-SECT. 4.—B. (a).

1267 i. *Necessity for.*—*WOOLLEY & SON v. MORRISON (1904), 6 F. (Ct. of Sess.) 451; 41 Sc. L. R. 344; 11 S. L. T. 717.—SCOT.*

PART V. SECT. 5, SUB-SECT. 4.—B. (b).

1271 i. *Whether user restrained—User calculated to deceive.*—In an action for damages & for an injunction restraining defts. from using a certain label for

"French Coffee" the jury found that defts.' label was a fraudulent imitation of pltf.'s, that the label & defts. dealing with it was calculated to lead incautious persons into the belief that defts.' "French Coffee" was that

*Sect. 5.—Passing off: Sub-sect. 4, B. (b); sub-sect. 5, A.]*

compound in fact is or contains pltf.'s Fruit Salt.—*ENO v. DUNN & Co.* (1893), 9 T. L. R. 376; 10 R. P. C. 261.

**1275.** ———.]—The Singer Manufacturing Co. brought an action to restrain J. S., a dealer in sewing machines, from applying the name "Singer" or "Improved Singer" to sewing machines not pltf.'s manufacture, or from so using the name "Singer" or "Improved Singer" as to induce the belief that machines not pltf.'s were of pltf.'s manufacture. Pltf. co. alleged that "Singer" meant their machines. They admitted that in the inner circle of the trade a special class of machines were known as machines made according to the "Singer system" or "Singer principle" but they maintained that deft., by issuing cards & advertisements to the public generally, of which the prominent part was "Improved Singer sewing machines," was passing off his goods as pltf.'s although in the majority of cases the advertisements also bore the name of the actual manufacturers of the machines, Frister & Rossmann, a German firm. Deft.'s case was that the word "Singer" did not mean machines of pltf.'s manufacture, but a particular type of machine which anybody was at liberty to make, & secondly, even if this were not so, deft.'s advertisements were not calculated to deceive as they gave the name of the manufacturers:—*Held*: the words "Singer" or "Singer's" sewing machine, *prima facie* & to a large part of the public, denoted a machine manufactured by pltf.s; the fact that a "Singer" system was also known to certain persons did not enable a trader to make an improper use of the term "Singer" without a context, deft.'s posters, etc., in which the important part was "Improved Singer sewing machines" were deceptive, although the name of the manufacturer was given; the real defts. in the case, the manufacturers, had fraudulent intentions in using such posters, & an injunction should be granted to restrain the use of the posters, etc., complained of & the use of the name "Singer" in such a way as to be calculated to deceive.—*SINGER MANUFACTURING Co. v. SPENCE* (1893), 9 T. L. R. 536; 10 R. P. C. 297.

**1276.** ———.]—(1) Although the purchaser of a business may, as a general rule, & where no deception is probable, mark & sell goods made by himself in the business with the trade name of his vendor, yet where deception would probably arise from the goods being so marked such marking will be fraudulent, & no right can be acquired, by long continuance of the practice, to allege that such marking denotes the goods of the successor in business of the original proprietor.

(2) The assignment of the right to use a particular name in trade, although expressed to include the goodwill of the business carried on under that name, cannot have any validity unless in substance & in fact the goodwill of the business to which the name is attached is also transferred.

(3) C. & co., a firm of watchmakers, granted to another firm for seven years a licence to put a particular name upon watches, & after the expira-

tion of the licence practically ceased themselves to sell or manufacture watches so marked:—*Held*: C. & co. had lost all right to prevent other persons from marking their watches with the particular name, & could not therefore assign any such right, even if it was one capable of being validly assigned.—*THORNELOE v. HILL*, [1894] 1 Ch. 569; 63 L. J. Ch. 331; 70 L. T. 124; 42 W. R. 397; 38 Sol. Jo. 201; 8 R. 718; *sub nom.* *THORNELOE v. HILL*, *THORNELOE v. READ*, 10 T. L. R. 200.

**1277.** ———.]—Pltf.s brought this action to restrain defts. from selling extract of meat in jars with wrappers so nearly resembling pltf.'s wrappers as to be calculated to deceive, & from passing off extract of meat not pltf.'s as & for pltf.'s:—*Held*: though there was no case proved of actual deception defts.' wrappers were calculated to deceive unwary purchasers. An injunction was granted.—*LIEBIG'S EXTRACT OF MEAT CO., LTD. v. CHEMISTS' CO-OPERATIVE SOCIETY, LTD.* (1896), 13 R. P. C. 730, C. A.

**1278.** ———.]—*REDDAWAY v. BANHAM*, No. 1098, *ante*.

**1279.** ———.]—*MAGNOLIA METAL CO. v. TANDEM SWEETING SYNDICATE, LTD.* (1900), 17 R. P. C. 477, H. L.

**1280.** ———.]—*Degree of probability necessary.*—Apart from trade mark legislation it is only rarely that an English word, primarily descriptive & which has become the name of a particular article of commerce, can be so distinctive of the goods of a particular manufacturer that the ct. will restrain its use as calculated to deceive, when there has been no actual deception & no intention to take any fraudulent advantage of another by using the word. Such an action is in effect a *qui timet* action, & unless the reasonable probability of deception be established, the proper course is to refuse an injunction, leaving pltf. to his remedy if cases of actual deception afterwards occur.—*BURBERRY'S v. CORDING (J. C.) & Co., LTD.* (1909), 100 L. T. 985; 25 T. L. R. 576; 26 R. P. C. 693.

*Annotations.*—*Reid. Re Gramophone Co.'s Appln.* (1910), 79 L. J. Ch. 658; *Spalding v. Gamage* (1915), 84 L. J. Ch. 449.

**1281.** ———.]—*Deception already attempted.*—*SIEGERT v. FINDLATER*, No. 1063, *ante*.

**1282.** ———.]—*Whether evidence of intention to deceive necessary.*—*SAXLEHNER v. APOLLINARIS CO.*, No. 1571, *post*.

**1283.** ———.]—*User not calculated to deceive.*—A co., which had for many years used the word "Wincarnis" as a name for an alcoholic beverage, being a combination of Liebig's Extract of Meat & a preparation of malt & wine, & which was the registered owner of trade marks consisting of the same word registered in class 43 & other classes, commenced an action to restrain B. & co. from selling invalid or other wine under the name of "Vincalis," & moved for an interlocutory injunction. Defts. alleged that their wine was a pure sherry, principally used for altar purposes, & that there was no probability of confusion. Pltf. co. alleged that both articles were wines for the special use of invalids, & that they would be sold by the same class of persons. At the hearing of the motion it was dismissed on the ground that there

manufactured by pltf., & that defts. so dealt with it for that deceitful purpose:—*Held*: as there was evidence to warrant the conclusion that the ordinary run of purchasers would be deceived, the verdict of the jury should not be interfered with.—*SPARKES v. HARPER & Co.* (1890), 3 Q. L. J. 201.—*AUS.*

**1283 ii.** ———.]—*Held*: Wotherspoon & co., who sold lozenges in wrappers bearing the words "Wotherspoon & co.'s Victoria Lozenges" were not entitled to interdict against Gray & co. selling lozenges under the style & title of Victoria Lozenges, & in

wrappers bearing the words "Gray & co.'s Victoria Lozenges," the ct. being of the opinion upon inspection of the wrappers, that they were essentially different from each other, & refusing to send the case to a jury.—*WOTHERSPOON & Co. v. GRAY & Co.* (1863), 2 Macph. (Ct. of Sess.) 38; 36 Sc. Jur. 24.—*SCOT.*

**1283 i.** ———.]—*User not calculated to*

was no reasonable probability of deception. Pltfs. appealed. The appeal was dismissed with costs.—*COLEMAN & CO., LTD. v. BROWN (JOHN) & CO. (1899)*, 16 R. P. C. 619, C. A.

1284. — [G. & Son, began to sell a floating soap as "Ivy Soap" in 1889. In 1899 G., who carried on the business, commenced an action to restrain the Ivory Soap Co., as agents for the P. & G. Co. an American Co. from selling "Ivory Soap" made by the P. & G. Co. The P. & G. Co. had admittedly sold "Ivory Soap" largely in America for a great many years & they alleged that they had advertised it largely in American journals, some of which came to England & that it had been sold in England prior to 1889 & since. Witnesses were called for the defence, who gave evidence of small sales in England of "Ivory Soap" during the period aforesaid, but mainly to American customers:—*Held*: pltf.'s & def't.'s goods being got up in a perfectly different manner, no one could mistake one for the other; any similarity in the sound there might be between "Ivy" & "Ivory" would not lead to the inevitable deduction that what defts. were doing must be calculated to deceive: & defts. had proved their right to the use of the word "Ivory."—*GOODWIN v. IVORY SOAP CO. (1901)*, 18 R. P. C. 389, C. A.

1285. — [Pltfs. & their predecessors had carried on business for many years as makers of cycles at the Star Cycle Works, Wolverhampton, & had used a trade mark, registered in 1891, & consisting of the device of a star, in connection with the sale of their cycles, which were well known as "Star" cycles. In an action for passing off & infringement of the trade mark, pltfs. complained of an advertisement of "Midland Star" cycles & cycle frames in def't.'s price list; they also charged def't. with having accepted an order for a "Star" cycle, but on a motion for an interlocutory injunction that charge failed, & it was held that probability of deception had not been established & no order was made except as to costs. Pltfs. claimed to be entitled to the exclusive right to the use of the word "Star," alone or in combination, in the sale of cycles & cycle parts & accessories, but at the trial they limited their claim to cycles & frames. Def't. proved that a considerable sale of cycles under various names of which "Star" formed a part had been going on openly for several years unchallenged by pltfs. Def't. alleged that the name "Midland Star" was innocently adopted; that his price list was issued, & his cycles were sold, to the trade only; that the advertisement could not deceive; that his device containing a Star had never been affixed by him to any cycle; that he had never sold a cycle or frame under the name "Midland Star"; & that pltfs. regularly sold cycles without any name on them. It was held at the trial, that def't. had adopted the name "Midland Star" without any fraudulent intention; that pltfs. had no exclusive right to the use of the word "Star"; & that probability of deception had not been established. The action was dismissed with costs. Pltfs. appealed. The appeal was dismissed with costs.—*STAR CYCLE CO., LTD. v. FRANKENBURGS (1907)*, 24 R. P. C. 405, C. A.

1286. — [Pltfs. in an action for infringement of trade marks & for passing off carried on a large business as manufacturers of toy goods, including children's cycles, which they sold under the name "Fairycycle," & they had trade marks, one being that name & others being the word "Fairy," alone or combined with words descriptive of the particular goods. Def't., a manufacturer of perambulators, including toy perambulators, issued

a circular containing a description of a new toy cycle of his manufacture. On motion, def't. stated that in the circular the name of his cycle had been put in the form "Farriscycle," by mistake, & he undertook not to use the words "The Farris Cycle" otherwise than as separate words. At the hearing, def't. alleged that, about the end of 1923, he had made for him, & had sold, a toy cycle that he had called "The Farrisette," & that, later, when the maker of it had entered def't.'s employment, def't. had altered the name to "The Farris Cycle." Pltfs. alleged that, in response to a written order for a "Fairycycle" at several shops of H. & Co., def't.'s cycle had been supplied, & that, in consequence, H. & Co. had submitted to an injunction against passing off:—*Held*: the action was purely a name case, without any question of passing off by get-up; in def't.'s circular the name, "Farriscycle" had been used by mistake; neither actual deception nor probability of deception had been proved; & upon def't.'s undertaking always to keep the words "Farris" & "Cycle" separate, the action must be dismissed.—*LINES BROTHERS, LTD. v. FARRIS & CO. (1925)*, 43 R. P. C. 64.

Passing off by get-up or mark.]—*See* Sub-sect. 5, C. (b), *post*.

#### SUB-SECT. 5.—BY GET-UP OR MARK.

##### A. In General.

1287. Passing off induced by fraud of third party.—*Liability of party passing off for damages—Right of indemnity against third party.*—A declaration alleged that pltf. was employed by def't. to make certain articles, & that def't. fraudulently directed pltf. to place on each of the said articles a mark which was the trade mark of R.; & that def't. did so innocently, & was thereby subjected to a Chancery suit at the suit of R., which he had to pay a large sum to compromise:—*Held*: as this suit could have been prosecuted by R., successfully for an injunction & an account, the declaration showed a good cause of action.—*DIXON v. PAWCUS (1861)*, 3 E. & B. 537; 30 L. J. Q. B. 137; 3 L. T. 693; 7 Jur. N. S. 895; 9 W. R. 414; 121 E. R. 544.

*Annotations*:—*Reid, Burrows v. Rhodes*, [1899] 1 Q. B. 816; *Bow v. Hart (1905)*, 74 L. J. K. B. 341. *Mentel, Britannia Hygienic Laundry Co. v. Thornycroft (1920)*, 135 L. T. 83.

1288. Right to use trade wrappers.—*Right of former servant.*—A servant is entitled, when he leaves his employment, to carry on a business of the same character as his former employer's, & to obtain the custom of his former employer's customers, & to use trade wrappers & other trade papers, notwithstanding that his former employer does so, & to employ the same printer; but in exercising these rights it is especially incumbent upon him to do so in such a manner as not to represent that his business and goods are the business & goods of his former master; & if he does so represent, an injunction will be granted to restrain him from so doing.—*HART v. COLLEY (1890)*, 44 Ch. D. 193; 59 L. J. Ch. 355; 62 L. T. 623; 38 W. R. 440; 6 T. L. R. 216; 7 R. P. C. 93.

1289. Get-up must be recognised description of plaintiff's goods.]—In order to succeed in a "passing off" action, not based upon an express representation, pltf. must prove that the name or the get-up or whatever it may be by which def't. describes his goods is the recognised description of pltf.'s goods or of a definite article or class of articles of pltf.'s goods as & for which the incriminated article or class of articles is being passed off. Further, if



*Sect. 5.—Passing off: Sub-sect. 5, A., B. & C. (a).]* the incriminated goods are the goods of pltf. himself, i.e., where deft. is selling certain goods dealt in by pltf. as & for other goods dealt in by pltf., it is equally essential that the pltf. should be able to define the goods for which the incriminated goods are passed off. In order to determine whether the incriminated goods are passed off or not the whole of the description of them must be looked at, & then the well-known & accepted description of the goods as & for which they are passed off must also be looked at, to see whether the description used by deft. will lead persons to believe that his goods are those which are denoted by the other description, & not the goods which they really are.

Pltfs., H. R. & co., were port wine shippers & merchants. Defts., who were retail wine merchants, issued a price list in which they advertised pltf.'s wine as H. R.'s "Grand Old Crusted Port. Over six years in bottle. . . . Usual credit price per doz. 60s. Now offered by us at per doz. 34s." Pltfs. sold two distinct classes of port wine, one a superior wine & the other an inferior & cheaper wine. In both cases, with a few exceptions, the wine was sold by them in the cask. Pltfs. alleged that defts. were passing off pltf.'s inferior wine as & for their superior wine. It was proved that pltfs. sold no wine matured in bottle as to which it could be said that it was part of its description that its usual credit price was 60s. per dozen:—*Held*: pltfs. having no separate & distinct class of wine to which the description "usual credit price per doz. 60s." was attached, the description in defts.' price list was inapplicable to pltfs.' superior wine, & therefore there was no passing off by defts. of pltf.'s inferior wine as & for their superior wine.—*HUNT, ROOPE, TEAGE & Co. v. EHRLMANN BROTHERS*, [1910] 2 Ch. 108; 79 L. J. Ch. 533; 103 L. T. 91.

*Annotation*:—*Reid, Harris v. Warren & Phillips* (1918), 87 L. J. Ch. 491.

#### B. Fraudulent Intent.

**1290. Whether essential to action.]—ANON.** (1590), cited in Cro. Jac. at p. 471; Poph. 144; 79 E. R. 402.

*Annotations*:—*Reid*, Southern v. How (1618), Cro. Jac. 468; Blanchard v. Hill (1742), 2 Atk. 484; Collins Co. v. Brown (1857), 3 K. & J. 423; Hall v. Barrows (1863), 11 W. R. 625.

**1291.** —[The declaration, after stating that pltfs. prepared, vended, & sold, for profit, a certain medicine called "Morison's Universal Medicine," which they were accustomed to sell in boxes wrapped up in paper, which had those words printed thereon, alleged that deft., intending to injure pltfs. in the sale of their said medicines, deceitfully & fraudulently prepared medicines in imitation of the medicines so prepared by pltfs., & wrapped up the same in paper, with the words "Morison's Universal Medicine" printed thereon, in order to denote that such medicine was the genuine medicine prepared & sold by pltfs.; & that deft., deceitfully & fraudulently, vended & sold, for his own lucre & gain, the last-mentioned boxes of the said articles, represented by him to be medicines by the name &

description of "Morison's Universal Medicine," which had been prepared & sold by pltfs.; whereas, in truth, pltfs. had not been the preparers, etc., thereof:—*Held*: on a motion to arrest the judgment, the declaration disclosed a sufficient cause of action.—*MORISON v. SALMON* (1841), 2 Man. & G. 385; 9 Dowl. 387; Drinkwater, 68; 2 Scott, N. R. 449; 10 L. J. C. P. 91; 133 E. R. 795.

*Annotations*:—*Reid*, Rodgers v. Nowill (1847), 5 C. B. 109. *Mentid*, Perry v. Dunn (1843), 12 L. J. Q. B. 351.

**1292.** —[Case, for "wrongfully knowingly & fraudulently" stamping bars of iron made by defts., with a stamp resembling one used by pltf., which defts. knew, & intended, to be in imitation of pltf.'s, & which was used by defts. in order to denote that their iron was made by pltf.; & for knowingly, etc. selling the iron so marked as & for pltf.'s iron. A correspondence between the parties was given in evidence, in which pltf. charged defts. with using the mark in question, as being a fraud upon him; defts., in answer, asserted that they had used the mark for many years continuously. This was not so, in fact; but it was shown that the mark had been adopted by them in the execution of orders received from foreign correspondents:—*Held*: (1) it was properly left to the jury to say; (a) whether defts.' mark bore such a close resemblance to pltf.'s as was calculated to deceive the unwary, & to injure the sale of pltf.'s goods; & (b) whether defts. used the mark with the intention of supplanting the plaintiff, or whether it was done in the ordinary course of business in execution of orders; (2) the notice of the resemblance of the mark given by pltf. to defts., did not, in the absence of proof of any intention to imitate it on the part of the defendants, give pltf. any cause of action. (3) The correspondence was commented upon by the counsel for pltf. in his reply, but not by the judge in summing up:—*Held*: it was not necessary that it should have been commented upon by the judge.—*CRAWSHAY v. THOMPSON* (1842), 4 Man. & G. 357; 5 Scott, N. R. 502; 11 L. J. C. P. 301; 134 E. R. 146.

*Annotations*:—*As to* (1) *Reid*, Cartier v. Carille (1862), 31 Beav. 292. *As to* (2) *Reid*, Edleston v. Vick (1863), 11 Hare, 78; Singer Manufacturing Co. v. Loog (1882), 8 App. Cas. 15. *Generally*, *Reid*, Rodgers v. Nowill (1847), 5 Hare, 325; Derry v. Peek (1889), 14 App. Cas. 337; Mansell v. Valley Printing Co. [1908] 2 Ch. 441.

**1293.** —[*WELCH v. KNOTT*, No. 1306, *post*.

**1294.** —[*JOSEPH RODGERS & SONS, LTD. v. ROTTGEN* (1889), 5 T. L. R. 678.

**1295.** —[*REDDAWAY v. BENTHAM HEMP-SPINNING CO.*, No. 1322, *post*.

**1296.** —[*E.* brought an action against J. & co. for damages, & an injunction to restrain them from making up their goods like pltf.'s, & from selling their goods as pltf.'s:—*Held*: there was evidence of fraud by defts. to go to the jury.

Now, it is quite correct, as the Master of the Rolls has said, to say that it cannot be suggested that in the sale from defts. to their immediate purchasers there was any evidence of fraud. The goods were sold by defts. to their immediate purchasers in boxes, upon which boxes that appeared which would prevent defts.' goods being mistaken for pltf.'s. But the suggestion was this, that defts. knew that the persons to whom they

#### PART V. SECT. 5, SUB-SECT. 5.—B.

**1290 i. Whether essential to action.]—JONES v. GEDJE** (1909), 9 C. L. R. 263.—*AUS.*

**1290 ii.** —[The basis of a passing off action is a false representation by deft.—*WODEHOUSE INVIGORATOR, LTD. v. IDEAL STOCK & POULTRY FOOD CO., LTD.* (1917), 39 O. L. R. 302; 12

O. W. N. 109; 35 D. L. R. 721.—*CAN.*

**1290 iii.** —[In an action asking for an injunction to restrain deft. from passing off his cards for those of pltf.:—*Held*: though there was no evidence of actual passing off by deft. the injunction should be granted if deft. had offered for sale cards which could

be passed off for those of pltf.—*UNITED STATES PLAYING CARDS CO. v. HURST* (Ont.) (1919), 58 S. C. R. 603; 47 D. L. R. 359.—*CAN.*

**1290 iv.** —[*CANTERBURY FROZEN-MEAT & DAIRY-PRODUCE EXPORT CO., LTD. v. CHRISTCHURCH MEAT CO., LTD.* (1889), 8 N. Z. L. R. 49.—*N.Z.*



sold in boxes would sell again to sub-purchasers, who would have to take the goods out of those boxes & sell the individual articles to people of the poorer classes who would want them & come to their small shops to ask for them (LOPES, L.J.).—*EDGE v. JOHNSON* (1892), 9 R. P. C. 134, C. A.

1297. —[—]—*PAYTON & Co. v. SNELLING, LAMPARD & Co.*, No. 1310, *post*.

1298. —[—]—*Carr & Sons*, manufacturers of window blind tapes, alleged that their best quality of such tapes only were known as "Carrs' Tapes," & that a co., carrying on business as drapers, etc., had by their assistants sold the second quality of their tapes & also the tapes of other manufacturers as "Carrs' Tapes," & brought an action to restrain the co. from so doing. Pltfs. had before action sent persons to defts.' shops to purchase "Carrs' Tapes," & at the trial the case turned on what took place on the occasions of the purchases by the persons so sent. Defts. contended that it was necessary for pltfs. to establish fraud:—*Held*: fraud was not necessary in order to sustain the action; but pltfs. had not established their allegations of passing off.—*CARR & SONS v. CRISP & Co., LTD.* (1902), 19 R. P. C. 497.

*Annotation*:—*Reid, Smith's Potato Crisps v. Paige's Potato Crisps* (1928), 45 R. P. C. 132.

1299. —[—]—To entitle a pltf. to succeed in a passing off case, he need not prove fraud in deft., or give evidence that any single person was deceived.—*BOURNE v. SWAN & EDGAR, LTD., Re BOURNE'S TRADE MARKS*, [1903] 1 Ch. 211; 72 L. J. Ch. 168; 51 W. R. 213; 19 T. L. R. 59; 47 Sol. Jo. 92; 20 R. P. C. 105.

*Annotations*:—*Reid, Weingarten v. Bayer* (1903), 19 T. L. R. 239; *Royal Warrant Holders' Assn. v. Deane & Beal*, [1912] 1 Ch. 10; *Nocton v. Ashburton*, [1914] A. C. 932; *Re Davis's Trade Mks., Davis v. Sussex Rubber Co.*, [1927] 2 Ch. 345. *Mentid, Todd v. N. E. Ry.* (1903), 51 W. R. 333.

1300. —[—]—*BIRMINGHAM SMALL ARMS CO., LTD. v. WEBB & Co.*, No. 1335, *post*.

1301. —[—]—Pltfs., who were pen manufacturers, alleged that defts., also manufacturers of pens, had colourably imitated certain pens & pen boxes of pltfs. with a view to defts.' pens & boxes being confused with & passed off as the pens & boxes of pltfs., & asked for an injunction. Pltfs.' pens in respect of which the claim was made were:—(a) No. 335 & No. 341, which they alleged had been imitated by defts.' "Terranova" & "President" pens, on which those numbers respectively were stamped & as to which a particular fraud in respect of an order from the Argentine was alleged; (b) the "Balance Spring Pen," No. 120, by defts.' "Spring Balance," No. 326, No. 01552, & "Superior" pens; & (c) "Universal School Pen" by the defts.' "University School Pen." Pltfs. made similar allegations in respect of defts.' boxes for pens in each of the three classes except No. 01552. Defts., while denying any imitation, relied on pltfs.' laches & acquiescence, & the fact that their pens & pen boxes had been wrongly described as "Patent" when no Patent existed in respect of them. Each of defts.' pens in question was of the same shape as the corresponding pen of pltfs., but the shapes & distinguishing numbers were common to the trade as was the name "Universal School Pen":—*Held*: as no characteristic of pltfs.' pens had been improperly adopted by defts. in the case of the "Terranova" or "President" pens with a view to leading purchasers to believe that those pens were of pltfs.'

manufacture, the mere user of the same numbers did not render those pens of defts. a colourable imitation of pltfs.' No. 335 & No. 341 pens, & on the pens alone pltfs.' case failed; (2) as regards No. 335 & No. 341 pltfs. had not established their charge of fraud & dishonesty, & upon the question whether the boxes supplied by defts. were in fact colourable imitations of pltfs.' box No. 341, there had been no such appropriation by defts. for their boxes No. 335 & No. 341 of pltfs.' materials as to amount to an actionable wrong; (3) as to defts.' pens in Classes (b) & (c) respectively, no case of actual deception having been proved & long user of defts.' pens & labels having been shown, the points of difference between pltfs.' boxes & defts.' far outweighed the points of similarity from the use in combination of an old fashioned box, an orange label &, in the case of boxes in Class 2 a blue band, & defts.' boxes were not colourable imitations of the pltfs.' boxes; (4) had pltfs. made out a case of colourable imitation, the defence founded on the use of the words "Patent" & "Patented," being a collateral representation only, would not have disentitled pltfs. to the relief sought.—*PERRY & Co. v. HESSIN (T.) & Co.* (1912), 56 Sol. Jo. 572; 29 R. P. C. 509, C. A.

1302. —[—]—*DUNHILL v. BARTLETT & BICKLEY*, No. 1347, *post*.

1303. —[—]—*Sufficiency of representation.*—[Pltf. being a thread manufacturer of repute, deft. bought in the market thread, wound on spools, not made by pltf., of inferior quality, & cheaper than his, & not bearing his name, but marked with the name of a firm of winders of thread who were known to be accustomed to purchase of pltf. thread in the hank for the purpose of winding, & selling it when wound. Dft. sold the goods to a wholesale customer, with the assurance, given, as he said, without knowledge of any misrepresentation, that they were of pltf.'s make, & invoiced them to the customer under the description of certain numbers, which pltf. had adopted & exclusively used in order to designate his particular manufacture:—*Held*: there was not such a degree of wilful misrepresentation on the part of dft. as would justify the ct. in granting an injunction, & bill dismissed, but without costs.—*AINSWORTH v. WALMSLEY* (1866), L. R. 1 Eq. 518; 35 L. J. Ch. 352; 14 L. T. 220; 30 J. P. 278; 12 Jur. N. S. 205; 14 W. R. 363.

*Annotations*:—*Reid, Re Wragg's Trade Mk.* (1885), 54 L. J. Ch. 391; *Free Fishers & Dredgers of Whitstable v. Elliott* (1888), 4 T. L. R. 273; *Richards v. Butcher*, [1891] 2 Ch. 522.

1304. —[—]—*Intention inferred from circumstances*—*Though no case of actual deception proved.*—*COUNTY CHEMICAL CO., LTD. v. FRANKENBURG*, No. 1333, *post*.

1305. —[—]—*Presumption that reasonable & natural consequences of act intended.*—*SAXLEHNER v. APOLLINARIS CO.*, No. 1571, *post*.

### C. Deception.

#### (a) Actual Deception.

1306. *Whether essential to action.*—[Injunction to restrain the sale in bottles stamped with pltf.'s name & address, followed by the words "genuine superior aerated waters," of soda water not manufactured by pltf., dissolved, the ct. being of opinion, upon the evidence, that dft. was not shown to have used the bottles either with an intention, or

### PART V. SECT. 5, SUB-SECT. 5.—C. (a).

1308 I. *Whether essential to action.*—*WHITNEY v. HICKLING* (1856), 5 Gr. 605.—*CAN.*

1308 II. —[—]—An action by manufacturers, to prevent defts. selling flour with the mark or brand "Gold Medal," or any other combination of marks or words so contrived as to

represent the marks or brands used by pltfs., etc.:—*Held*: pltfs. had failed to prove that dft. had sought to palm off his flour as the flour of pltfs.—*DOMINION FLOUR MILLS CO. v. MORRIS*

**Sect. 5.—Passing off: Sub-sect. 5, C. (a) & (b) i.]**

so as in fact, to mislead the public. But the user of such bottles, so as in fact to mislead the public, although unintentionally, would be restrained.—**WELCH v. KNOTT** (1857), 4 K. & J. 747; 4 Jur. N. S. 330; 70 E. R. 310.

**Annotations:—****Apprvd.** *Leather Cloth Co. v. American Leather Cloth Co.* (1863), 4 De G. F. & Sm. 137. **Consd.** "Singer" Machine Manufacturers v. Wilson (1877), 3 App. Cas. 376. **Distd.** *Thwaites v. McEvilly, Cantrell & Cochrane v. Murphy & Bradshaw* (1901), 20 R. P. C. 663. **Refd.** *Bradbury v. Beeton* (1869), 39 L. J. Ch. 57.

**1307.** —.]—**REDDAWAY v. BENTHAM HEMP-SPINNING CO.**, No. 1322, *post*.

**1308.** —.]—**LIEBIG'S EXTRACT OF MEAT CO., LTD. v. CHEMISTS' CO-OPERATIVE SOCIETY, LTD.**, No. 1277, *ante*.

**1309.** —.]—**LEVER BROTHERS, LTD. v. BED-INGFIELD**, No. 1329, *post*.

**1310.** —.]—(1) On a proceeding for an injunction to restrain a trader from selling goods in packets got up as a colourable imitation of plffs.' goods, if a fraudulent intent is not proved, it is necessary to show by positive evidence that some person has been deceived. It is not enough to call evidence that in the opinion of the witnesses purchasers might be deceived.

(2) Whether a customer would be likely to be deceived is not a proper question to put to a witness, for it is for the ct. & not for the witness to decide, after inspection of the exhibits & paying regard to the evidence, whether a customer would be likely to be deceived by the make-up of goods.

(3) Where an action is brought to restrain a colourable imitation of the make-up of goods, it must be proved beyond question that the goods are so got up as to be calculated to deceive. No general rule can be laid down, & each case must be judged by its own circumstances.—**PAYTON & CO. v. SNEILING, LAMPAUD & CO.**, [1901] A. C. 308; 70 L. J. Ch. 644; 85 L. T. 287; 17 R. P. C. 628, II. L.

**Annotations:—***As to (1) Consd.* *Imperial Tobacco Co. (of Great Britain & Ireland) v. Purnell* (1904), 21 R. P. C. 368. **Distd.** *Goddard v. Wafford Co-op. Soc.* (1924), 41 R. P. C. 218. **Refd.** *Edgo v. Nicolls*, [1911] 1 Ch. 5. *As to (2) Apld.* *Alaska Packers' Ass'n v. Crooks* (1901), 18 R. P. C. 129. **Consd.** *Lambert & Butler v. Goodbody* (1902), 18 T. L. R. 394; *Bourne v. Swan & Edgar, Re Bourne's Trade Mks.*, [1903] 1 Ch. 211; *Wolgarten v. Bayer* (1903), 88 L. T. 168; *Ouvah Ceylon Estates v. Uva Ceylon Rubber Estates* (1910), 103 L. T. 16; *Spalding v. Gamage* (1914), 84 L. J. Ch. 449. **Refd.** *Universal Winding Co. v. Hatterley* (1915), 32 R. P. C. 479. *As to (3) Consd.* *Smith's Potato Crisps v. Paige's Potato Crisps* (1928), 45 R. P. C. 132. **Refd.** *Schweppes v. Gibbens* (1905), 22 R. P. C. 601; *Perry v. Hessin* (1912), 56 Sol. Jo. 572. **Generally, Refd.** *Hennessy v. Keating* (1907), 21 R. P. C. 484; *Thorne v. Sandow & Sandow, Re "Health" Trade Mk.* (1912), 29 R. P. C. 410.

**1311.** —.]—**BOURNE v. SWAN & EDGAR, LTD., Re BOURNE'S TRADE MARKS**, No. 1299, *ante*.

**1312.** —.]—**DUNHILL v. BARTLETT & BICKLEY**, No. 1347, *post*.

**Deception as to trade name of goods.]—See Part V., Sect. 5, sub-sect. 4, B. (a), ante.**

**(b) Probability of Deception.****i. In General.**

**1313. Sufficient cause of action.]—**A manufacturer restrained from using certain letters & figures, which a patentee was in the habit of using.

If he [def't.] had been in the habit of marking his ploughs with only HH6, & if I could see the marks

so placed that no person could be deceived in purchasing the ploughs, then I might refuse the injunction as to that part of the prayer. But here def't. wants me to decide *ab ante* that no possible use of HH6 may not have the effect of misleading persons (**SHADWELL, V.-C.**).—**RANSOME v. BENTALL** (1834), 3 L. J. Ch. 161.

**1314.** —.]—**CRAWSHAY v. THOMPSON**, No. 1292, *ante*.

**1315.** —.]—**RODGERS v. NOWILL**, No. 1017, *ante*.

**1316.** —.]—**ONYON v. WASHBOURNE** (1850), 14 L. T. O. S. 503.

**1317.** —.]—(1) A manufacturer who has adopted a trade mark to designate some particular article as made by him has a right to the assistance of the ct. to prevent anyone from so using the same or any similar mark as to induce purchasers to believe, contrary to the fact, that they are buying that particular article to which the mark was originally applied.

(2) In a case, however, where the mark consisted of a label in a certain form, & it was shown that in very many instances labels the same as or similar to it might be sold for a legitimate purpose, the ct., in the absence of any proof of actual fraud, refused to restrain the printing & sale of such labels until the manufacturer, who alleged that they were used for a fraudulent purpose, had established his case by an action at law.—**FARINA v. SILVERLOCK** (1856), 6 De G. M. & G. 214; 26 L. J. Ch. 11; 27 L. T. O. S. 277; 2 Jur. N. S. 1008; 4 W. R. 731; 43 E. R. 1214, L. C.

**Annotations:—***As to (1) Consd.* *Dixon v. Fawcett* (1861), 3 E. & E. 537. **Fold.** *Rodgers v. Rodgers* (1889), 5 T. L. R. 678. **Refd.** *Collins v. Cohen* (1857), 3 K. & J. 428. *As to (2) Apld.* *Welch v. Knott* (1857), 4 K. & J. 747. **Refd.** *Farina v. Silverlock* (1856), 4 K. & J. 650; *Cullen v. Thomson* (1862), 6 L. T. 870; *Woolam v. Ratcliffe* (1863), 1 H. & M. 259. **Generally, Refd.** *Churton v. Douglas* (1859), 28 L. J. Ch. 811.

**1318.** —.]—The ct. will not restrain the use of a label on the ground of its general resemblance to the trade mark of another manufacturer, if it is different in the points which a customer would look at in order to see whose manufacture he was purchasing.—**BLACKWELL v. CRAIB** (1867), 36 L. J. Ch. 501.

**1319.** —.]—The ct. granted an injunction to restrain W. from making up lock plates & levers with R.'s trade mark upon them, which he had purchased as old iron in market overt, into fire arms, & allowing R.'s trade mark to remain on the lock plates & levers so as to induce the public to believe that the fire arms were manufactured by R.—**RICHARDS v. WILLIAMSON** (1874), 30 L. T. 746; 22 W. R. 765.

**1320.** —.]—**SIEGERT v. FINDLATER**, No. 1063, *ante*.

**1321.** —.]—Plffs. registered a trade mark for worsted goods described as "a white selvage on each side of the piece having a red & white mottled thread interwoven the full length of the selvage between the edge of the piece & the edge of the selvage," & deposited a specimen at the Patent Office Museum. The specimen so deposited was undyed, & the selvage was white, the warp being white cotton & the woof white mohair, & nearly in the middle of the selvage was a compound warp thread composed of a thread of white cotton & a thread of Turkey red cotton twisted together.

**1313 iii.** —.]—It is unnecessary in a passing off action to prove an actual intention to deceive. It is sufficient if in the result deception is likely to be produced.—**GLENTON & MITCHELL v. CEYLON TEA CO.**, [1918] W. L. D. 118. —S. AF.

(1912), 21 O. W. R. 540; 3 O. W. N. 729; 25 O. L. R. 561; 2 D. L. R. 830. —CAN.

**PART V. SECT. 5, SUB-SECT. 5.—**  
C. (b) i.

**1313 i. Sufficient cause of action.]—**

**HENNESSY v. WHITE** (1869), 6 W. W. & A. B. (Eq.) 216.—AUS.

**1313 ii.** —.]—**WHITWORTH (HERBERT), LTD. v. JAMNADAS LEMCHAND MEHTA** (1927), 1 L. R. 52 Bom. 228.—IND.

When the goods were dyed black the cotton threads took the dye imperfectly, so that the warp threads in the selvaige became grey, while the woof became black, so as to make the selvaige dark grey, with a dark red mottled line running along it. Defts. sold black mohair goods with a dark grey selvaige of nearly the same shade as that of pltf's., with a twisted thread running along its inner edge, which thread was originally white, red, & yellow, but in the course of dyeing the white became dark grey, & the yellow a dark olive, which could hardly be distinguished. Pltfs. sought to restrain the sale of these goods as an infringement, & moved for an injunction. There was evidence that the selvaige, though not actually white, was what was known in the trade as a white selvaige:—*Held*: the principles according to which the ct. acts in preventing a man from passing off his goods as those of another are not altered by the Trade Marks Registration Act, 1875 (c. 91), & the question could not be disposed of by simple inspection of the patterns without considering whether the selvaige was not according to the understanding of the trade, a white selvaige, & if it was, then whether the differences in quality & position of defts.' mottled thread were sufficient to distinguish defts.' goods from those of pltf's., so as to prevent purchasers from being misled, & as there was a conflict of evidence on these points the motion must stand over till the trial, defts. undertaking to keep an account.—*MITCHELL v. HENRY* (1880), 15 Ch. D. 181; 43 L. T. 186, C. A.

*Annotations*:—*Consd. Grafton v. Watson* (1884), 50 L. T. 420. *Reid, Blair v. Stock* (1884), 52 L. T. 123; *Re Van Duzer's Trade Mks., Re Leaf's Trade Mks.* (1887), 34 Ch. D. 623; *Jay v. Ladd* (1888), 40 Ch. D. 619; *Coventry Machinists Co. v. Helsby* (1896), 13 T. L. R. 92; *Saxlehner v. Apollinaris Co.*, [1897] 1 Ch. 893; *London General Omnibus Co. v. Lavell*, [1901] 1 Ch. 135; *Pullman v. Pullman* (1919), 36 R. P. C. 240.

**1322.** —[J.—At the trial of an action for an injunction to restrain defts. from passing off their goods as those of pltf's.' manufacture, the judge nonsuited pltf's., who admitted that they could not prove an intention to mislead, nor that anyone had, in fact, been misled. On appeal the nonsuit was set aside, & a new trial ordered on the ground that in such an action it was only necessary to prove that defts.' goods were so marked, made up, or described as to be calculated to mislead, & that there was evidence on which this question might have been left to the jury.

If a person sells his goods with the intention of deceiving purchasers, of inducing them to believe his goods are the goods of another, this is actionable, & entitles the latter to recover nominal damages, even though no special damage is proved. If an article has acquired a distinctive meaning in the trade, connecting it with a particular person's manufacture, & another so advertises, or describes, or makes up his goods as to lead purchasers to believe, or to create a probability of their believing, that they are buying the goods of the former, when, in fact, they are buying the goods of the latter, & this though there is no intention to deceive & no special damage proved, a ct. of equity will grant relief by way of injunction. The fraudulent intention is essential in the first case; it is unnecessary in the second.—*REDDAWAY v. BENTHAM HEMP-SPINNING CO.*, [1892] 2 Q. B. 639; 67 L. T. 301; 8 T. L. R. 734; 36 Sol. Jo. 696; 9 R. P. C. 503, C. A.

*Annotations*:—*Apld. Paine v. Daniels' Breweries, Re Paine's Trade Mks.*, [1893] 2 Ch. 567. *Distd. Reddaway v. Banham*, [1895] 1 Q. B. 286. *Reid, Powell v. Birmingham Vinegar Brewery Co.*, [1894] 3 Ch. 449; *Valentine Meat Juice Co. v. Valentine Extract Co.* (1900), 83 L. T. 259; *Goddard v. Watford Co-op. Soc.* (1924), 41 R. P. C. 218.

**1323.** —[J.—*HAMMOND & Co. v. MALCOLM,*

*BRUNKER & Co. & COLLYNS* (1892), 8 T. L. R. 324; 9 R. P. C. 301.

*Annotations*:—*Reid. Re Clay & Book* (1892), 67 L. T. 614; *Re Paine's Trade Mks., Paine v. Daniels' Breweries* (1893), 68 L. T. 801.

**1324.** —[J.—*LIEBIG'S EXTRACT OF MEAT CO., LTD. v. CHEMISTS' CO-OPERATIVE SOCIETY, LTD.*, No. 1277, ante.

**1325.** —[J.—*SAXLEINER v. APOLLINARIS CO.*, No. 1571, post.

**1326.** —[J.—C. sold lemonade powder in penny packets with a band label round them, the letterpress being printed in gold on white glazed paper. S. subsequently sold lemonade powder in penny packets with a somewhat similar band label printed in gold on white glazed paper. C.'s labels had "Eiffel Tower" on them. S.'s labels had not these words or anything like them. C. commenced an action against S. to restrain him from selling his packets, as being liable to be passed off as pltf's. packets. No other packets of lemonade powder were proved at the trial with labels in white & gold except one, which was discontinued after the commencement of the action on pressure by pltf. Two other penny packets of lemonade powder were proved to have been on the market before pltf.'s, one only having a band label:—*Held*: pltf. had not established that deft.'s packets were liable to be passed off as pltf.'s.—*CLARK v. SHARP* (1898), 15 R. P. C. 141.

**1327.** —[J.—H. & S. took over in 1891 the business of The Lion Soap Co., & subsequently sold "Red Lion Soap," "Golden Lion Soap," & "Lion Carbolic Soap," the first in large quantities. They were the owners of several registered trade marks, one being the word "Lion," & the others comprising the device of a lion, but they did not use any of their trade marks as such upon their soap wrappers. Their soaps became known as "Lion Soaps." K., a limited co., who dealt in arms & ammunition, & had registered & used for such goods the trade mark of a lion's head began to sell soap in four different wrappers, unlike H. & S.'s wrappers, but having thereon the representation of a lion's head in several places, & in some cases with the words "Trade Mark" attached. K.'s name was prominent on their wrappers. An action was brought by H. & S. against K. to restrain them from infringing pltf's. trade marks, & to restrain them from selling soap in wrappers or boxes bearing the device of a lion or a lion's head, & from using the device of a lion & the word lion in the course of their trade in soap:—*Held*: pltf's. had not established a case of infringement of trade mark, but were entitled to an injunction to restrain defts. from selling, or offering for sale, soap in the wrappers complained of, or so as to induce the belief that defts.' soaps were manufactured by pltf's.—*HODGSON & SIMPSON v. KYNOCH, LTD.* (1898), 15 R. P. C. 465.

**1328.** —[J.—The A. assocn., an American co., were the registered owners of two trade marks, one consisting of the head of a moose & the other a label embodying the first mentioned trade mark. Salmon in tins bearing the said label had been for many years imported into & sold in the United Kingdom. During the last five years the whole of the tins so imported had been bought by a wholesale firm carrying on business in London. The assocn. brought an action against C. & Co., of Liverpool, who were importing into England salmon in tins which in general appearance resembled pltf's. tins, & had a red deer's head in the place where the moose's head appeared on pltf's. tins. Pltf's. moved for an interlocutory injunction, which defts. resisted mainly on the

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ground of delay; but defts. also contended that as they were selling only in Liverpool & Manchester there was no danger of their tins being sold for pltf's. The tins complained of had arrived in England shortly before the motion was heard, & some of them had been sold:—*Held*: on comparison of the labels, infringement of trade mark was not established, but the get up of defts.' tins was such as to deceive an unwary purchaser, & on the balance of convenience & inconvenience, an interlocutory injunction ought to be granted to restrain defts. from selling the unsold portion of the tins which they had imported.—*ALASKA PACKERS' ASSOCN. v. CROOKS & Co.* (1899), 16 R. P. C. 503, C. A.; *subsequent proceedings* (1901), 18 R. P. C. 129.

**1329.** —[—]A brought an action to restrain B. from passing off his soap as A.'s soap by using wrappers which were alleged to have been copied in many respects from A.'s wrappers, & to be calculated to deceive, but no actual deception was proved. The ct. came to the conclusion that the draughtsman who designed B.'s wrapper had used A.'s wrapper when doing so, but that there was no probability of deception in the ordinary course of business:—*Held*: notwithstanding the copying of A.'s wrapper, he was not entitled to an injunction as B.'s wrapper was not calculated to deceive.—*JEVET BROTHERS, LTD. v. BEDINGFIELD* (1898), 80 L. T. 100; 16 R. P. C. 3, C. A.

*Annotation.*—*Fold.* Payton v. Snelling, Lampard (1899), 16 T. L. R. 56.

**1330.** —[—]*GOODWIN v. IVORY SOAP CO., No. 1284, ante.*

**1331.** —[—]In an action for infringement of a trade mark where the infringement is not an actual copy of the mark, pltf. must prove actual deception or probability of deception.—*LAMBERT & BUTLER, LTD. v. GOODBODY* (1902), 18 T. L. R. 394; 19 R. P. C. 377.

**1332.** —[—]B. & S., pltf's., distillers & wine & spirit merchants, registered in 1879, a trade mark No. 20,505 in class 43 for fermented liquors & spirits, including liqueurs, as having been used for twenty-five years prior to 1879. The mark comprised a cat with one paw uplifted standing on a barrel placed on its bilge. Sweetened gin, one of the articles sold by them, had long been known as "Old Tom," & with the mark they associated those words. In addition to selling gin they in 1893 began to sell a liqueur called "Sloe Gin" under their mark with suitable letterpress. Deft. H., in Nov. 1899, commenced to sell sloe gin under a label containing thereon a cat looking out of a barrel with the words "Cat Brand" on a scroll underneath it. No manufacturer's name appeared on the label, but there were the words, "Specially prepared & bottled for A. C. Huddart." H. obtained the article bottled & labelled from M. D. & co. M. D. & co., in response to a letter of complaint addressed to H., accepted the responsibility, gave H. an indemnity, claimed that the label complained of was their ordinary label used by them in their trade since 1876, & that it had been adapted for sloe gin by the addition of suitable letterpress. In 1887 M. D. & co. had applied to register a trade mark consisting of a cat & barrel. The application was refused on the ground that the mark was calculated to deceive. They, however, continued to use the mark, & placed upon their label the word "Registered." It was suggested by them, in answer to pltf's. inquiries, that this meant copyright registered. No registration, however, anterior in date to Feb. 4, 1899, was produced at

the trial. M. D. & co., who were not defts., sought to prove that a cat & barrel label was common to the spirit trade, & that pltf's., with knowledge of its use, had not been vigilant. They contended also that at the date of registration pltf's. did not manufacture "Sloe Gin," & that they could not claim the exclusive use of the mark for all articles in the class. Pltf's. contended that M. D. & co.'s user had been acquired in fraud of them by the use of the word "Registered"; & there was no satisfactory evidence of the user of similar marks; & claimed that they, pltf's., had acquired an exclusive reputation for goods of the same description as gin under the designation "Cat Brand" or "Cat & Barrel Brand":—*Held*: the label complained of was an infringement of pltf's. registered trade mark, & also was calculated to mislead & to induce the belief that goods so labelled were the manufacture of pltf's. An injunction was granted.—*BOORD & SON v. HUPPARD* (1903), 89 L. T. 718; 20 T. L. R. 142; 48 Sol. Jo. 143; 21 R. P. C. 149.

*Annotation.*—*Refd.* *Re Bagots, Hutton's Trade Mk.,* [1916] 2 Ch. 103.

**1333.** —[—]Pltf's. in Jan. 1902, commenced to make & sell materials for the repair of pneumatic tyres packed in tin boxes of a certain colour, shape & design. They claimed that, until the wrongful acts of deft., such boxes were used exclusively by them. In 1903 deft. sold inferior materials for the same purpose in boxes closely resembling those of pltf's.:—*Held*: (1) there was an intention to imitate; (2) intention to deceive might be inferred from the circumstances of the case although no case of actual deception was proved; (3) deft.'s boxes were calculated to deceive. An injunction was granted; but no Order was made for the delivery up of boxes which offended against the injunction because pltf's. had neglected to take action for six months after they became aware of the imitation.—*COUNTY CHEMICAL CO., LTD. v. FRANKENBURG* (1904), 21 R. P. C. 722.

**1334.** —[—]S., a limited co., sold soda water in bottles with a neck label round them, the body of the label being of chocolate colour, with a white border & a red medallion in the centre of the label. G. subsequently sold soda water in bottles with a somewhat similar neck label round them of the same colour, & with a central red medallion. S.'s labels had "Schweppes' Soda Water" printed on them in white characters. G.'s had "Gibbens' Soda Water." The medallions in the centre also differed:—*Held*: a fraudulent intention on the part of deft. ought not to be presumed, & deft.'s labels were not calculated to mislead.—*SCHWEPPE'S, LTD. v. GIBBENS* (1905), 22 R. P. C. 601, H. L.

*Annotations.*—*Apld.* Smith's Potato Crisps v. Paige's Potato Crisps (1928), 45 R. P. C. 132. *Refd.* Hennessy v. Keating (1907), 25 R. P. C. 361; Edge v. Nicolls, [1911] 1 Ch. 5. *Mentd.* La Radiotechnique v. Weinbaum, [1928] Ch. 1.

**1335.** —[—]The B.S.A., Ltd., manufactured & sold parts & accessories including spanners, & put upon them the letters B.S.A. & these letters had become associated with the co. & its goods. On its spanners, however, the letters did not appear alone, but in conjunction with a trade mark consisting of three filed rifles. The co. brought an action for passing off against a firm which had made spanners with the letters "B.S.A." on them, meaning, as they said "Best All-Round Spanners." They discontinued so doing before action, but claimed a right to do so. It was contended for defts. that the articles could not be mistaken when compared; that there was no evidence that pltf's. spanners were ordered as "B.S.A." Spanners; & that there was no probability of confusion. No actual deception was

proved :—*Held* : although no deliberate intention to deceive had been established, the letters "B.S.A." were calculated to cause defts.' goods to be confused with pltf's.—*BIRMINGHAM SMALL ARMS CO., LTD. v. WEBB & CO. (1906), 24 R. P. C. 27.*

**1336.** —.]—Pltf's., who were manufacturers of steam motor cars, & who alleged that their cars had become known as "Miesse Cars" brought an action against the Miesse Petrol Car Syndicate, Ltd., to restrain them from using the word "Miesse" in connection with cars sold by them. Defts. were the agents in this country of one Miesse & were selling motor cars as "Miesse Petrol Cars."

Pltf's. moved for an interlocutory injunction :—*Held* : having regard to the difference in the goods no passing-off had been established.—*TURNER'S MOTOR MANUFACTURING CO., LTD. v. MIESSE PETROL CAR SYNDICATE, LTD. (1907), 24 R. P. C. 531.*

**1337.** —.]—*VAN ZELLER v. MASON, CATTLEY & CO., No. 1238, ante.*

**1338.** —.]—*WILLIAMS (J. B.) Co. v. BRONNLEY (H.) & Co., LTD., WILLIAMS (J. B.) Co. v. WILLIAMS, No. 1152, ante.*

**1339.** —.]—*PRICE'S PATENT CANDLE CO., LTD. v. OGSTON & TENNANT, LTD., No. 1082, ante.*

**1340.** —.]—The St. M. M. Co. made & sold golf balls & put upon them "The Colonel" & the word "Colonel" had been registered by the co. as a trade mark for golf balls. The co. brought an action for infringement of trade mark & for passing off; the complaint being founded on the sale of "Colonial" golf balls by defts. The "Colonial" balls were sold at 1s. & the "Colonel" at 2s. & 2s. 6d. There was evidence adduced by defts. to show that no confusion was likely on account of the difference in the names & also in the price :—*Held* : the words "Colonel" & "Colonial" could not readily be mistaken the one for the other; in the name up & concomitants of their sale defts.' balls were essentially distinct from pltf's.; pltf's. had not proved confusion; it was impossible in the absence of gross fraud on the part of the vendors, for which defts. would not be responsible that their balls could be passed off as pltf's.; defts. had not been guilty of passing off, nor had they infringed pltf's. trade mark.—*ST. MUNGO MANUFACTURING CO. v. VIPER & RECOVERING CO. (1910), 27 R. P. C. 420.*

**1341.** —.]—*Wright, Crossley & co., spice merchants carrying on business in L., who were pltf's. in the action, had used continuously since 1875, on their packages of semolina a certain distinctive label printed in a particular combination of colours, & in 1908 they registered the same as a trade mark. In 1901 deft. commenced to use for packets of ground rice a label which pltf's. considered to be so similar to theirs in the combination of the colours that they complained of it as an infringement & deft. withdrew the label. In 1905 deft. commenced to sell semolina in packets & adopted a label which pltf's., who only became aware of its use in 1909, contended was practically a copy of the one withdrawn in 1901, & was an infringement of their rights :—Held : the label issued by deft. was calculated to mislead purchasers & an injunction was granted.—*WRIGHT, CROSSLEY & CO. v. BLEZARD (1910), 27 R. P. C. 290.**

**1342.** —.]—*P., the owner of Letters Patent for improvements in tobacco pipes, granted to A. F. & co. a sole & exclusive licence for the manufacture of such goods as were the subject of the*

*invention, & at the same time handed over to them a letter from Sir M. M. which referred to the invention in terms of approbation. A facsimile copy of this letter appeared on all the boxes used by A. F. & co. Some time after the expiry of the patent P. commenced to manufacture & used a get-up similar to that which A. F. & co. had adopted from the first. A. F. & co. brought an action against P. to restrain him from passing off, & P. counterclaimed to restrain A. F. & co. from using the letter, which he alleged was only intended to be used during the continuance of the licence & had not been an absolute gift to A. F. & co.; & he also alleged he had invented the get-up at the time the licence was granted :—Held : the get-up used by P. was calculated to deceive, & there was no copyright in the letter, the substance of which might be used by any one. An injunction was granted.—*ADOLPH FRANKAU & CO., LTD. v. PFLUEGER (1910), 28 R. P. C. 130.**

**1343.** —.]—In 1900 pltf's., an American firm, commenced to sell on the English market hooks & eyes affixed to cards on the top of which was printed the word "Mutual." At the bottom of the card appeared the words "Rust? Never!" To an ordinary person the name would appear to be distinctive. Pltf's. name was printed in large letters on the back of the card, but pltf's. attached no importance to this. In 1905, pltf's. commenced to sell to one firm similar cards having the name of "Welbeck" instead of "Mutual." In 1908 defts., an English firm, at the suggestion of a person who had formerly been employed by pltf's., commenced to sell hooks & eyes of the same type, on similar cards, each card having printed on it at the top the word, "Climax," & conspicuously at the bottom the words "British Make." It was found that defts. object in this was to gain whatever advantage there might be in selling English as opposed to foreign goods. The evidence showed that hooks & eyes were generally asked for by name, sometimes by reference to the words "Rust? Never!" sometimes by reference to the white card. Prior to 1905, hooks & eyes had been sold in bulk, but generally by the pound weight & in boxes. In that year pltf's. commenced to sell them in packets or cartons each containing a great gross. At each end of the packet they printed a description of the goods, e.g. "white brass," the trade or standard number of the hook; a picture of the hook or eye; the words "One great gross," & at the bottom, the words "Made in U.S.A." At first the carton bore pltf's. name, but this was dropped in 1907.

In 1909 defts. copied pltf's. carton in every material respect, except that the words "Made in England" appeared instead of "Made in U.S.A." Pltf's. claimed novelty (a) in the use of cartons for hooks & eyes; (b) in the marking of the carton at both ends; & (c) in the marking of the carton itself instead of attaching a label :—*Held* : purchasers who asked for "Mutual" or for cards with the words "Rust? Never!" could not be deceived by the "Climax" cards, & those who asked for white cards who were familiar with "Mutual" could not be deceived into believing that "Climax" were "Mutual," having regard especially to the prominence given by defts. to the words "British Make," & the claim for passing off by means of the cards failed; although there was novelty as regards the sales in bulk in points (b) & (c) there was nothing distinctive of pltf's. goods in their get up, inasmuch as pltf's. cartons did not bear their name, & no purchaser would believe that in purchasing hooks & eyes so put up in bulk he was getting goods of a particular maker, & this claim

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for passing off also failed.—*DE LONG HOOK & EYE CO. v. NEWBY BROTHERS, LTD.* (1911), 29 R. P. C. 49.

**1344.** —[—]—*Re "CARVINO" TRADE MARK, No. 1263, ante.*

**1345.** —[—]—Pltfs.' predecessor in business took out a patent, which was revoked before pltfs. took over the business, for parcelling up blue or other colour in a porous cloth or bag with a handle attached to it, so that the colour could be dissolved in water without staining the hands of the operator. During the continuance of the patent & for eighteen years after its revocation pltfs. & their predecessor in business sold laundry blue put up in a calico bag with a wooden stick attached to it of the kind shown in the drawings annexed to the specifications. These bags bore no name, but the get-up, of which the stick was the distinctive feature, had become identified in the mind of the public with pltfs.' goods. Defts. exactly imitated the get up of pltfs.' goods, except that they attached to the bags a label bearing their name. Pltfs. moved for an injunction to restrain defts. from passing off their laundry blue as pltfs.' by imitating the get-up of pltfs.' goods, but they disclaimed any monopoly in the use of any stick for the get-up for laundry blue:—*Held*: defts. were not entitled to appropriate pltfs.' get-up, either on the ground of the abortive patent or on the ground that the stick was an article of utility; defts.' get-up was calculated to deceive, the addition of the label, in the circumstances, not being a sufficient distinction; & defts. ought to be restrained by injunction.

If the only question were how far defts.' goods were likely to be mistaken for pltfs.' by the wholesale & retail dealers I think there would be a difficulty in suggesting that defts. had not sufficiently distinguished their goods from those of pltfs., for those connected with the trade have the requisite trade knowledge to protect them. Notwithstanding this, it may well be that purchasers from the retail trade, that is to say, the public buying over the counter, may be deceived; they have not the requisite trade knowledge to protect them & in this case the ultimate purchasers are those who are of final importance to pltfs. (*LORD GORELL*).—*WILLIAM EDGE & SONS, LTD. v. WILLIAM NICCOLLS & SONS, LTD.*, [1911] A. C. 693; 80 L. J. 744; 105 L. T. 459; 27 T. L. R. 555; 55 Sol. Jo. 737; 115 L.

**1346.** —[—]—*PERRY & Co. v. HESSIN (T.) & Co.*, No. 1301, *ante*.

**1347.** —[—]—Pltf. had since 1912 sold tobacco pipes of his own manufacture, marked on the mouthpiece with a white spot with the addition of the words "Dunhill, London," & had sold very large quantities of pipes & other smokers' requisites so marked. The minimum price of pltf.'s pipes was £1 1s. Evidence was given that a white spot on a pipe was identified in the minds of the public with pltf.'s goods, & that pltf.'s pipes were asked for as "white spot pipes" & sometimes, more particularly by ladies, as "spot pipes." The business of deft. firm was purchased in 1901 by J. who had continuously carried on business under the firm name since that date. In May, 1920, deft. registered the name "Barbic" as a trade mark, & in Sept. of that year deft. put upon the market a tobacco pipe manufactured for him & marked upon the mouthpiece with a red spot, & also marked on the stem, on one side with the word "Barbic" & on the other with the name & address of deft. firm. These pipes were sold at

12s. 6d. Pltf. alleged that the spot on deft.'s pipe, though of a different colour from pltf.'s spot, was calculated to deceive & brought an action for passing off. At the trial pltf. further alleged that the red spot had been adopted by J. with a fraudulent intention:—*Held*: (1) a red spot was placed on deft.'s pipes with no thought or intention of confusing deft.'s pipes with pltf.'s pipes; (2) the identification mark of pltf.'s pipes was not a spot but a white spot; no clear case had been established of an intending purchaser of a pltf.'s pipe finding himself deceived by reason of the red spot into buying a deft.'s pipe; (3) a trap display in a tobacconist's window consisting of three of pltf.'s pipes & three of deft.'s pipes, each pipe bearing a similar price ticket, except as to price, which led to a customer asking for a 12s. 6d. Dunhill, was too well baited to assist in proving deception; pltf. never having put any spot on his pipes but a white spot & the only point of similarity between pltf.'s & deft.'s pipes being a spot, the evidence failed to justify the claim that, where the essence of a mark of origin is its particular colour, a similar mark of a wholly different colour would indicate the same origin, & the action must be dismissed with costs.—*DUNHILL v. BARTLETT & BICKLEY* (1922), 39 R. P. C. 426.

**1348.** —[—]—In 1907 pltfs.' predecessor in business registered as a trade mark the number "999" in respect of cigarettes. At the same time he also registered the numbers "111," "222" & "555" for the same goods. Pltfs. were the registered proprietors of all these marks, & also of marks which included the numbers "333," "444," "666," & "777," but in each case with a disclaimer in respect of the numbers. The number "999," as also "555," was used for certain of the "State Express" cigarettes sold by pltfs., such cigarettes being Virginia cigarettes, "999" being for a higher priced cigarette than "555." In 1922 deft. co. decided to bring out, & subsequently sold, Turkish cigarettes on the boxes & packets of which they put the number "99" & "double nine." The boxes & packets bore prominently the name "Lucana" & defts.' name & registered trade mark, & the get-up of them was quite different from that of pltfs.' boxes & packets of their "999" cigarettes, & the price was considerably less. Defts. had had for some time previously on the market Virginia cigarettes bearing the number "66" & the word "Lucana." Pltfs. brought an action against defts. for infringement of their trade mark "999" & for passing off. It was contended for pltfs. that they were the only firm in the tobacco trade that used a series of recurring numerals & that any number consisting of recurring nines would lead to deception & confusion, & that their "999" cigarettes had come to be so asked for by customers that confusion would result. It was admitted that the use of numbers was common in the trade, & there was evidence of the use of a single "9" (*inter alia*) by a co. closely associated with defts., & of several instances of double recurring numerals, including in one case the number "99." At the trial pltfs. alleged a dishonest intention on the part of defts.:—*Held*: there was no ground for the charge of dishonest intention; the idea of pltfs.' trade mark was, at most, triplication & there was no infringement of pltfs.' trade mark "999"; pltfs.' "999" cigarettes were usually asked for as "State Express" cigarettes with a reference to the number & there was no short term without any reference to "State Express" by which those cigarettes were generally known to the public; & there was no risk of deception or con-



fusion.—**ARDATH TOBACCO CO., LTD. v. SANDORIDES (W.), LTD. (1924), 42 R. P. C. 50.**

**1349.** —[—]**SMITH'S POTATO CRISPS, LTD. v. PAIGES POTATO CRISPS, LTD., No. 1428, post.**

**1350.** —[—]**In 1926 plffs. registered a trade mark consisting of the words "Silent Knight" for cooking & heating apparatus in class 18. Later in 1926, defts. applied to register a trade mark consisting of the device of a chess knight for the same class, with the words "Red Knight," but on plffs. objecting, the application was amended by striking out those words, plffs. understanding, that it was defts.' intention not to use the words "Red Knight." In an action for infringement of plffs.' trade mark & passing off, plffs. alleged that defts. had, since registration of their trade mark, advertised their gas stoves in connection with the words "Red Knight," & they moved to expunge defts.' trade mark. Defts. gave notice of motion to expunge plffs.' trade mark, but that was not pressed at the trial. There was evidence of actual confusion of the names "Silent Knight" & "Red Knight":—*Held*: plffs.' trade mark had been infringed, defts. had intended plffs. to understand that defts. would discontinue the use of the words "Red Knight" in connection with their stoves, & defts.' device & the method in which they used it were calculated to deceive. Injunctions restraining infringement & passing-off were granted.—**FORTH & (LYDE & SUNNYSIDE IRON COs., LTD. v. SUGG (WILLIAM) & Co., LTD. (1928), 45 R. P. C. 382.****

**Deception as to trade name of goods.]—See Sub-sect. 4, B. (b), ante.**

#### ii. Test to be Applied.

**1351. Deception of ultimate purchaser.]—WYLAN v. CLARKE, [1876] W. N. 68.**

**1352.** —[—]**EDGE v. JOHNSON, No. 1296, ante.**

**1353.** —**Native purchaser—Not persons knowing English.]—W., manufacturers of French polish, exported it to India under an English label, printed on which were two red medals. The polish acquired a high reputation. No other polish in Bombay had a mark similar to the two red medals, & W.'s polish became known to the natives as "Lal Mohur" or "Lal Chap." "Lal Mohur" meaning red medal; "Lal Chap" meaning "red stamp." The two terms in the Bombay market came to denote W.'s polish. T. having used a label on polish different from W.'s, except in having two red medals, was restrained by injunction. G. who had first attempted to obtain orders for polish with a white label but unsuccessfully, then imitated T.'s label, & exported polish to Bombay with a label bearing a balloon & two red medals. W. commenced an action against G. to restrain him from exporting polish not plffs.' as "Lal Mohur," & from so labelling his polish that same might be passed off as "Lal Mohur." Evidence was adduced by plffs. as to the deception caused by G.'s new label:—*Held*: though deft.'s label placed side by side with plffs.' would not be likely to deceive most Englishmen, it would enable defts.' polish to be passed off on the natives as & for the plffs.' polish, & the defts.' polish had actually been so passed off & sold as "Lal Mohur" & "Lal Chap," that the user of this label was fraudulent on the part of defts.; it was no argument for defts. to say that plffs. were seeking to obtain a monopoly for red marks of every kind**

in the Bombay market, & an injunction should be granted.—**WILKINSON v. GRIFFITH (1891), 8 R. P. C. 370.**

**1354.** —[—]**Or persons in trade.]—An imitation of a trade mark will be restrained by injunction if it is likely to deceive the ultimate purchaser of goods.**

Where plffs. had acquired a trade mark for goods manufactured for the Indian market, defts. were restrained from the use of a mark calculated to be mistaken for plffs.' by ignorant natives, though not by any one in the trade or able to read English.—**JOHNSTON v. ORR EWING (1882), 7 App. Cas. 219; 51 L. J. Ch. 797; 46 L. T. 216; 30 W. R. 417, H. L.**

**Annotations:—Appl. Singer Manufacturing Co. v. Loog (1882), 8 App. Cas. 15. Distd. Upper Assam Tea Co. v. Herbert (1889), 7 L. P. C. 183. Folds. Wilkinson v. Griffith (1891), 8 L. P. C. 370. Appl. Paine v. Daniels & Brewster, Re Paine's Trade Mks., [1893] 2 Ch. 567; Powell v. Birmingham Vinegar Brewery Co., [1896] 2 Ch. 54; Reddaway v. Banham, [1896] A. C. 199. *Reid*. Road v. Richardson (1881), 45 L. T. 54; Somerville v. Schenbül (1887), 12 App. Cas. 453; Baker v. Rawson, Re Baker's Trade Mks., Re Rawson's Appln. (1890), 60 L. J. Ch. 49; Montgomery v. Thompson, [1891] A. C. 217; Reddaway v. Banham Hemp-Spinning Co., [1892] 2 Q. B. 639; Re Dexter's Appln., Re Willis' Trade Mks., [1893] 2 Ch. 262; Re La Soc. Anon. des Verrieres de l'Etoile Trade Mks., [1894] 1 Ch. 61; White v. Mellin (1895), 61 L. J. Ch. 308; Bonnie v. Swan & Edgar (1902), 62 W. R. 215; Grand Hotel Co. of Caledonia Springs v. Wilson, [1904] A. C. 103; Hennessy v. Kenting (1908), 24 R. P. C. 485; Boord v. Bagots Hutton, [1916] 2 A. C. 382.**

**1355.** —[—]**Plffs. have the trade merit, whatever it may be, of first putting "Sparkling Lime Wine" on the market; & they say, & there is no reason to doubt it, that they have got together a very considerable trade in the sale of this beverage. The mode in which they have to shape their case, speaking of the motion, is by saying that defts. have imitated what is commonly termed, & after all, I do not know a better term than the popular one, their "get-up" so as to be calculated to deceive the persons buying, which would really mean the ultimate customers, into the belief that the goods which defts. offer for sale are the goods of plffs. (CHITTY, L.J.).**

You have to consider what is likely to be done in the ordinary course of business by the retail dealer . . . who will put anything down on the counter before a customer in such a manner that the customer does not always get the opportunity of examining. The customer rarely, if ever, has the opportunity of putting the two things in the same shop one by the side of the other (CHITTY, L.J.).—**PACKHAM & CO., LTD. v. STURGESS & CO. (1898), 15 R. P. C. 669, C. A.**

**1356.** —[—]**WILLIAM EDGE & SONS, LTD. v. WILLIAM NICCOLLS & SONS, LTD., No. 1345, ante.**

**1357.** —[—]**Plffs. in an action for passing off & infringement of their trade mark "Selvyt" had long sold their polishing cloths for (*inter alia*) polishing spectacles & eyeglasses got up in squares of different sizes with printing in brown ink in a centre square & border lines in brown ink, outside which lines appeared the words "Selvyt" & "A Polishing Cloth Superior to Chamois Leather." The colour of the cloths was buff. Defts. made & sold polishing cloths for spectacles & eyeglasses of a colour similar to plffs. & with printing in brown ink in a centre square & alleged that these features were common to the trade & were adopted by their printers without any special instructions from them.**

#### PART V. SECT. 5, SUB-SECT. 5.—C. (b) ii.

**1351 i. Deception of ultimate purchaser.]—FRENCH REPUBLIC v. HYMAN (1915), 17 Q. P. R. 178.—CAN.**

**1351 ii. —[—]—SWEDISH MATCH CO. v. ADAMJEE HAJEE DAWOOD & Co., LTD. (1926), 1 L. R. 4 Ran. 381.—IND.**



*Sect. 5.—Passing off: Sub-sect. 5, C. (b) ii., & D. (a), (b) & (c).]*

Pltfs. contended that, although they had no monopoly in the colour & size of their cloths, yet it was incumbent on any one who adopted their size & colour to take care that they sufficiently distinguished their goods:—*Held*: there had been no attempt by defts. to produce a get-up for the purpose of deceiving, & there was no evidence of anybody having been deceived.

In my opinion, pltfs. have entirely failed to make out any case of a get-up calculated to deceive the public. The case does not stop there. The general public is not really in this case at all. Nobody pretends that any member of the general public was deceived. The only market which we have to deal with in this case is the market between the producers, in the one case the pltfs., in the other case the defts., & the opticians, & I cannot see one atom of evidence that, in the way in which defts. sell their goods, there was any possibility of deception of the opticians to whom they sold them. In most cases we do not look to that in a passing off case; we look to the trade with the ultimate purchasers, with the members of the general public. But this is a case where that element does not come in (FLETCHER MOULTON, L.J.).—JONES BROTHERS, LTD. v. ANGLO-AMERICAN OPTICAL CO. (1912), 29 R. P. C. 361, C. A.

**1358. Test by the eye.**—The ultimate test is by the eye, & in this case, although there are considerable differences, the resemblance in the general effect is calculated to deceive the unwary purchaser.—JONES v. HALLWORTH (1897), 14 R. P. C. 225.

**1359. Circumstances of case considered.**—PAYTON & CO. v. SNELLING, LAMPARD & CO., No. 1310, ante.

**1360. Deception of intelligent customers—Knowing distinguishing features.**—The A. assocn., an American co., were the registered owners of two trade marks for canned salmon, one consisting of the head of a moose & the other a label embodying the first-mentioned trade mark in a disc, & the words "Moose Head Brand" & the name of a canning co., with other features, principally common to the trade. Salmon in tins bearing the label had been for many years imported into & sold in the United Kingdom. During the last five years the whole of the tins so imported had been bought by a wholesale firm carrying on business in London. The assocn. brought an action against C. & co., of Liverpool, who were importing into England salmon in tins which had a red deer's head in a disc in the place where the moose's head appeared on pltfs.' tins with the words "Deerhead Brand" & the name of the packers, with other features which were common to the trade. Pltfs. relied both on trade mark & passing off:—*Held*: there was to the eye no probability of defts.' tin deceiving, & there was no evidence that it would deceive an intelligent customer who knew the distinguishing features of pltfs.' tin.—ALASKA PACKERS' ASSOCN. v. CROOKS & CO. (1901), 18 R. P. C. 129; *previous proceedings* (1899), 16 R. P. C. 503, C. A.

#### D. Particular Instances.

##### (a) Advertisements.

**1361. Advertisement calculated to deceive—By proprietor of one of two rival works.**—Where there are two rival works, the ct. will restrain the proprietor of one of them from advertising it in terms calculated to induce the public to believe that it is the other work, but will not restrain him

from publishing an advertisement tending to disparage that other work.—SEELEY v. FISHER (1841), 11 Sim. 581; 10 L. J. Ch. 274; 59 E. R. 998, L. C.

**1362. Imitation of method of advertising—Use of similar phrase—User established before plaintiff's user.**—A firm of boot manufacturers alleged that they had invented & used as their trade mark the phrase, "Fair wear or a free pair," & they commenced an action against a firm of retailers of boots & shoes, complaining of the use by defts. of the same phrase in connection with the sale of boots & shoes, & claiming an injunction against its use & against defts. representing their business to be connected with pltfs.' business:—*Held*: the evidence established user of the phrase prior to pltfs.' user by other persons. The action was dismissed with costs.—MIDGLEY (S. T.) & SONS, LTD. v. MORRIS & COWDERY (1904), 21 R. P. C. 314.

**1363. — Similarity of form.**—Pltf. had devised a novel but unregistered scheme of advertising the sale of his packets of garden seeds by inserting in numerous newspapers a "stereotyped" combination of lengthy letterpress surrounded by pictures of objects, any one of which he offered as a premium to purchasers. Dft. issued advertisements in precisely similar form, including the pictures & the arrangement, excepting that he substituted a new name for the seeds & a slightly different condition for earning the premium, & put his trading name at the foot of the advertisements. In an action for an interlocutory injunction:—*Held*: dft. had done nothing misleading which could injure any property in pltf., so that no injunction could be granted.—WERTHEIMER v. STEWART, COOPER & CO. (1906), 23 R. P. C. 481.

##### (b) Goods Passed Off as Superior Class.

**1364. Sale of inferior class of goods as superior class.**—Pltfs., who were distillers of Scotch whisky, & sold a whisky of a special quality known as "Teachers' Highland Cream Whisky," brought an action against defts., who owned or had the control of a large number of public houses, & alleged that defts. had sold inferior whisky, either of pltfs.' manufacture or of other persons, as "Teachers' Highland Cream Whisky," & claimed an injunction & other relief:—*Held*: on the evidence, although it was not established that defts. had sold as Teachers' whisky, whisky not emanating from Teachers', yet it was proved that defts. had sold inferior whisky as Teachers' better class whisky, & an injunction & an inquiry as to damages were granted.—TEACHER v. LEVY (1905), 23 R. P. C. 117.

*Annotation:—Distd. Hunt, Roope, Teague v. Ehrmann, [1910] 2 Ch. 198.*

**1365. —**Pltfs., who were manufacturers of footballs & other athletic goods, sued defts. for passing off certain of pltfs.' old & discarded footballs as their new & improved balls. It appeared that certain balls manufactured by pltfs. in 1910 sealed by the name of "orb" had been sold by them to a firm of waste rubber merchants on account of their being considered unsatisfactory & a new & improved ball was made & sold by pltfs. as the "Improved Orb." Defts. purchased from the waste rubber merchants the discarded balls & advertised & sold them under the name of "Improved Orb." Defts. admitted they were wrong in describing them as "Improved Orb" & withdrew the advertisement; for a time they advertised & sold them as "orb" balls & claimed the right to do so. At the trial it was held by SARGANT, J., that defts. had not by their second & corrected advertisement shown to the public that

the balls which were then advertised were different from those to which the first advertisement would be taken to refer & that the second advertisement was therefore likely to deceive. An injunction in a special form was granted & an inquiry as to damages was ordered & plffs. were given the costs of the action. Defts. appealed to the Ct. of Appeal. It was held that plffs. were not entitled to an injunction or damages. The appeal was allowed with costs. Plffs. appealed to the House of Lords. It was held that plffs. had established a case of misrepresentation calculated to produce damage & that they were entitled to an injunction & to an inquiry as to damages at their own risk. The appeal was allowed with costs & judgment of SARGANT, J., was restored. On the inquiry it was found that plffs. were entitled to £5,000 in respect of their loss of profit on sales of "Sewn Orb," or improved orb, footballs which would have been effected but for the acts of defts. the repetition whereof was restrained by the order & to £2,000 for injury to plffs.' reputation. Defts. moved that the finding might be varied or discharged & plffs. moved that it might be adopted. It was held on the hearing of the motions by YOUNGER, J., that the alleged wrong consisted in advertising an article sold by plffs. at a price less than they charged for it & was not actionable in the absence of fraud, that the alleged loss of profit even if proved was not recoverable, that if any damages were recoverable on that head the measure was the costs to plffs. when defts.' advertisements were published of issuing counter advertisements & that £100 was a sufficient payment on that head, that the alleged injury to plffs.' reputation was not within the scope of the action & had not been proved & that as defts. had paid £250 into ct. they were entitled to the costs of the inquiry & motions. Plffs. appealed:—*Held*: (1) defts. were liable for all loss actually sustained by plffs. which was the natural & direct consequence of the unlawful act of deft. including any loss of trade actually suffered by plffs. either directly from the acts complained of or properly attributable to injury to plffs.' reputation, business, goodwill & trade & business connection caused by the acts complained of; (2) the assessment of damages on the basis of the cost of counter advertisement was erroneous & did not give plffs. all to which they were entitled; but the claim made by plffs. was extravagant & absurd; plffs. had failed to prove any damages beyond £250 & the damages should be assessed at that sum.—SPALDING (A. G.) & BROTHERS v. GAMAGE (A. W.), LTD. (1918), 35 R. P. C. 101.

**1366. Sale of rejected goods as new & improved.]**—SPALDING (A. G.) & BROTHERS v. GAMAGE (A. W.), LTD., No. 1365, *ante*.

**1367. Sale of reconditioned goods as new.]**—The Gillette Safety Razor Co. sold safety razor blades under a well-known get-up, & it was a part of their policy that their blades should not be re-sharpened, owing to the fact that re-sharpening them would not re-condition them. F. advertised & sold as genuine blades of the Gillette Safety Razor Co. blades of that co.'s manufacture which either had been used or were by reason of age & neglect unusable, & put up such blades for sale in the Gillette Safety Razor Co.'s well-known wrappers & boxes. The Gillette Safety Razor Co. commenced an action for passing off against F.; & as he was an infant, & took no steps to obtain the appointment of a guardian *ad litem*, on the application of the Gillette Safety Razor Co. the Official Solicitor was appointed as guardian *ad litem*. Plffs. applied by motion for an *interim* injunction, & by consent the motion was treated

as the trial of the action:—*Held*: plffs. were entitled to an injunction restraining the sale or passing off of second hand, used or unusable blades as genuine blades.—GILLETTE SAFETY RAZOR CO. & GILLETTE SAFETY RAZOR, LTD. v. FRANKS (1924), 40 T. L. R. 606; 41 R. P. C. 499.

**1368. Sale of unusable goods—Goods unusable by age or neglect.]**—GILLETTE SAFETY RAZOR CO. & GILLETTE SAFETY RAZOR, LTD. v. FRANKS, No. 1367, *ante*.

**1369. Goods must be capable of being defined—Goods for which inoriminated article passed off.]**—HUNT, ROOPE, TEAGE & CO. v. EHLMANN BROTHERS, No. 1289, *ante*.

**1370. Existence of two classes must be proved.]**—Mrs. C. J. B., one of plffs. in the action, a composer of songs which had a great reputation & a large sale had composed & caused to be published in the United States in 1896 a song "Write to me often," the English copyright of which had been acquired in 1913 by W. & P., defts. in the action. The song "was considered by her to be without merit." In 1909 she composed another song, "A perfect day," which had achieved great success & for which a large demand had sprung up. Deft. published without plffs.' consent the song "Write to me often" with a title page which was alleged to be an imitation of the distinctive title-page of Mrs. C. J. B., & it was further alleged that defts. by advertising the song "Write to me often" as being "Now ready" represented it to be a new song by her & also as being one of the publications of her co-plffs. who were the holders of a licence from her to publish her musical compositions in the British Empire. Plffs. in a passing off action claimed an injunction to restrain defts. from publishing the song "Write to me often" so as to lead to the belief that it was a new & recent work of Mrs. C. J. B.:—*Held*: defts. as the owners of the copyright in "Write to me often" were entitled to publish it & offer it for sale as the work of Mrs. C. J. B., the composer, a fact which necessarily qualified & restricted her rights against defts.; plffs. had not alleged & proved what was necessary to be proved in an action for passing off goods of one class or quality for plffs.' goods of another class or quality, i.e. the existence of the two classes of goods & the evidence did not bear out plffs.' suggestion that the get-up of defts.' song "Write to me often" was a colourable imitation of the get-up of "A Perfect Day"; action dismissed with costs.—HARRIS v. WARREN & PHILLIPS (1918), 87 L. J. Ch. 491; 119 L. T. 217; 34 T. L. R. 440; 62 Sol. Jo. 568; 35 R. P. C. 217.

#### (c) Vehicles.

**1371. Omnibus—Use of similar device—Intention to deceive.]**—Injunction granted to restrain deft. from running an omnibus having upon it such names, words, & devices as to form a colourable imitation of the words, names, & devices on the omnibuses of plffs.—KNOTT v. MORGAN (1836), 2 Keen, 213; 48 E. R. 610.

*Annotations*:—*Fold*. London General Omnibus Co. v. Turner (1894), 38 Sol. Jo. 457. *Refd*. Craft v. Day (1853), 7 Beav. 84; Spottiswoode v. Clark (1846), 8 L. T. O. S. 230; Braham v. Bustard (1863), 27 J. P. 708; Wooliam v. Ratcliff (1863), 1 Hem. & M. 259; Raggett v. Findlater (1873), L. R. 17 Eq. 29.

**1372.** — — — — —]—LONDON GENERAL OMNIBUS CO. v. TURNER (1894), 38 Sol Jo. 457.

**1373.** — — — — —]—LONDON GENERAL OMNIBUS CO., LTD. v. FELTON (1896), 12 T. L. R. 213.

**1374. — Reasonable probability of deception.]**—In an action for deceit brought on the ground that a particular article used by deft. is a colourable imitation of plff.'s the conclusion of the judge, on a

*Sect. 5.—Passing off: Sub-sect. 5, D. (c) & (d).  
Sect. 6: Sub-sect. 1.]*

view by him of the two articles, such as two rival omnibuses, under R. S. C., 1883, Ord. 50, r. 4, that deft.'s article is calculated to deceive, is not sufficient by itself to support an injunction. The judge must be satisfied by independent evidence that there is at least a reasonable probability of deception.—*LONDON GENERAL OMNIBUS CO., LTD. v. JAVELL*, [1901] 1 Ch. 135; 70 L. J. Ch. 17; 83 L. T. 453; 17 T. L. R. 61; 18 R. P. C. 74, C. A.

*Annotations:—Consd. Alaska Packers' Assn. v. Crooks* (1901), 18 R. P. C. 129; *Bourne v. Swan & Edgar, Re Bourne's Trade Mks.*, [1903] 1 Ch. 211. *Reid. Hennessy v. Keating* (1907), 24 R. P. C. 485. *Ment. R. v. De Grey, Ex p. Fitzgerald* (1913), 109 L. T. 781.

**1375. Taxicabs.]—**Injunction granted restraining deft. from so getting up his taxicabs as to pass them off as & for the taxicabs of plfts.—*DU CROS (W. & G.) v. GOLD* (1912), 29 T. L. R. 163.

*(d) Other Cases.*

**1376. Use of plaintiffs' bottles or receptacles—Bottles filled with defendants' manufacture.]—***ROSE v. HENLEY* (circa 1876), cited in 47 L. J. Ch. at p. 578.

*Annotation:—Consd. Rose v. Loftus* (1878), 47 L. J. Ch. 576.

**1377. ———.]—**A perpetual injunction will be granted to restrain a trader from filling & sending out to the public articles of his own manufacture in bottles, casks or other receptacles having indelibly impressed thereon the name of another trader who manufactures an article of a like description even although such trader place on such bottles, casks or receptacles a label having his own name thereon.—*ROSE v. LOFTUS* (1878), 47 L. J. Ch. 576; 38 L. T. 409.

**1378. ———.]—***ALLEN v. RICHARDS* (1882), 20 Sol. Jo. 658.

*Annotation:—Reid. Thwaites v. McEvilly, Cantrell & Cochrane v. Murphy & Bradshaw* (1904), 21 R. P. C. 397.

*—[See, now, Merchandise Marks Act, 1887 (c. 28), ss. 2 (1) (b), (d); 5 (1) (b), (2).*

*—[See Nos. 1316, 1320, 1324, 1328, 1333, 1338, 1346, ante.*

**1379. Use of corks with initials of plaintiff.]—**Plfts., J. H. Todd & W. J. Todd, were the surviving partners in the old firm of Findlater, Mackie, Todd & co., wine & spirit merchants, trading in London. Deft., Henry Newman, traded as a wine & spirit merchant at Bournemouth under the style of Henry Newman & co., having in 1879 purchased the business from his father-in-law, T. Beechey.

Prior to 1879 Beechey had been agent or sole consignee in Bournemouth for the goods supplied by plfts.' firm, & this relation had continued between plfts.' firm & deft. It appeared that about 1879 the father of plfts., since deceased, had called on Beechey & deft., & had encouraged them to advertise the name of plfts.' firm in pushing the business at Bournemouth for their mutual benefit.

Deft.'s premises, bill heads, letter paper, & delivery books had for many years borne references to plfts.' firm, & it was alleged that his place of business had for many years been known as "Findlater's Corner." There was a gradual falling off in the business done between plfts. & deft., of which plfts. complained in 1898, although they had never prior to that date or since given any notice of terminating their connection with deft. Deft. admitted that a substantial number of corks branded "Findlater & Co., Bournemouth," had gone out to his customers in bottles containing goods not supplied by plfts., & it appeared that in 1898 & 1899 at least twenty-five gross of corks branded on their ends with "F., M., T. & Co." had been ordered by & supplied to deft. There was also some evidence of deft. using labels on which were printed "Findlater, Newman & Co." It appeared that there were three firms in the same line of business at Dublin, Brighton, & Manchester, in the styles of which the name "Findlater" was included:—*Held:* plfts. were not entitled to an injunction restraining deft. from using the name "Findlater" in connection with his business, but they were entitled, with respect to the initials "F., M., T. & Co.," the use of which had been discontinued by deft. before the issue of the writ, to a declaration negating deft.'s right to use same & to an account of profits limited in each case to "corks bearing the name or the initials or letters 'F., M., T. & Co.' & used for bottles containing wines or spirits not supplied by plfts. & limited as regards the account to six years from the date of the writ."—*FINDLATER, MACKIE, TODD & CO., LTD. v. NEWMAN (HENRY) & CO.* (1902), 19 R. P. C. 235.

**1380. Sale of cigars made in distinctive shape.]—**A co. which manufactured & dealt in cigars, had acquired a reputation in connection with cigars of a distinctive shape, which consisted in the cigars being flat-ended, & they sold these cigars under the name of "Bull-dog" cigars, & in boxes bearing the word "Bull-dog" & the picture of a bull dog; the cigars themselves had no bands on them. The co. commenced an action against a person who was selling

**PART V. SECT. 5, SUB-SECT. 5.—**  
**D. (c).**

**1375i. Taxicabs.]—**An action by plft. co. claiming injunctions to restrain each of defts. from using in their respective businesses as taxi proprietors cabs so painted & got up to resemble those of the plft. co. & to be calculated to deceive the public:—*Held:* plft. co. having established a reputation for a black & white taxicab substantially different in colour scheme & got up from other cabs plying for hire prior to plft. co.'s incorporation, the cabs of defts. H., S., & N. were got up as so nearly to resemble those of plft. as to be likely to deceive the public, & injunctions should be granted, although actual instances of deception had not been established in every case; but as to M., although it would appear that in adopting the colour he did for his cab he had in view the possibility that members of the public would be deceived into thinking his to be one of plft. co.'s cabs, yet there was not such a probability of deception as to render him liable to an injunction.—*BLACK & WHITE CABS CO. v. HOGREN*, [1927] N. Z. L. R. 535.—N.Z.

**1375ii. ———.]—**Appl. co. established a reputation for a taxicab painted black & white, having the colours arranged in a certain definite design. Resp. thereupon in painting his cab adopted a similar design for his cab, with the exception that he used a cream colour, where appellant co. had used white:—*Held:* granting an injunction restraining resp. from using his cab so painted, he had adopted the colour scheme in question with the intention of passing off his cab as that of applt. co. & his action was calculated to deceive the public.—*BLACK & WHITE CABS, LTD. v. MCENEANY*, [1927] N. Z. L. R. 862.—N.Z.

**1375iii. ———.]—**Plft. co. which had adopted a certain design of contrasting black & white colours for the painting of its cabs, dissimilar to any previously in use in the city in which it conducted its operations, sought by injunction to restrain defts. from using cabs painted a similar design of contrasting blue & white, on the ground that although the respective cabs might readily be distinguished in daylight, those of defts. were so got up as to be calculated at night to deceive people into believing

them plfts.' cabs. No instance of actual deception on defts.' part was proved, nor was any fraudulent intention on their part to mislead the public established:—*Held:* although the design in the colour adopted by plft. co. was dissimilar to any other previously in use in the district where it conducted its operations, it was not thereby entitled to a monopoly in the use of dark & light colours similarly arranged, & which had previously been used in the painting of cabs, on the ground that cabs so painted might be mistaken for their cabs at night, & in any event apart from painting, other distinguishing features of defts. cabs prevented their being confused with those of plft. by night as well as by day. Furthermore plft. having in previous proceedings concurred in the painting of defts.' cabs in a particular design & colour now had no ground for complaint.—*BLACK & WHITE CABS, LTD. v. NICHOLSON, NICHOLSON v. BLACK & WHITE CABS, LTD.*, [1928] N. Z. L. R. 273.—N.Z.

*n. Coaching line.]—*Plfts., by the long continued user of themselves & their predecessors in title, had acquired

cigars of the same shape & without bands under the name of "Turnbull" cigars in boxes bearing that word & the picture of a bull thrown down by a man, & claimed an injunction, first, to restrain the sale by deft. of his cigars in his boxes; & secondly, an injunction to restrain him from selling cigars made in pltf.'s distinctive shape without clearly distinguishing his cigars from pltf.'s cigars. Pltfs. moved for an interlocutory injunction to the above effect:—*Held*: the boxes were sufficiently distinct, but the cigars might be sold apart from the boxes so as to mislead purchasers, & pltf's. were entitled to the second injunction claimed until the trial.—*ELLIOTT (R. J.) & Co., LTD. v. HODGSON* (1902), 19 R. P. C. 518.

**1381.** —[—]—*HAVANA CIGAR & TOBACCO FACTORIES, LTD. v. ODDENINO*, No. 1106, *ante*.

**1382. Labels.**—[Pltf. invented & sold a medicine under his own name. Deft. also made & sold a similar medicine, & on his labels, he used pltf.'s name & certain certificates given of the efficacy of pltf.'s medicine, in such an ingenious manner, as, *prima facie*, though not in fact, to appropriate & apply them to his own medicine:—*Held*: although there were other differences in the mode of selling, the proceeding was wrongful, & deft. was restrained by injunction.—*FRANKS v. WEAVER* (1847), 10 Beav. 297; 8 L. T. O. S. 510; 50 E. R. 596.

*Annotations*:—*Consd.* *Wotherspoon v. Currie* (1872), L. R. 5 H. L. 508. *Distd.* *Tallerman v. Dowling Radiant Heat Co.*, [1900] 1 Ch. 1.

**1383.** —[—]—*BASS'S TRADE MARK CASE* (prior to 1857), cited in 4 K. & J. at p. 751; 70 E. R. 312. *Annotation*:—*Refd.* *Welch v. Knott* (1857), 4 K. & J. 747.

**1384.** —[—]—Where a deft. sold articles similar to, though not manufactured by, pltf. in boxes bearing pltf.'s labels.

The ct., on a motion for an injunction, restrained deft. from so selling or exposing for sale such articles.—*BARNETT v. LEUCHARS* (1865), 13 L. T. 495; 14 W. R. 166.

**1385.** —[—]—(1) Deft. sold tobacco pipes packed in boxes or cases, upon which were labels or descriptions of a similar character to those of pltf., using pltf.'s name as being the real manufacturer, deft. having a person in his employ of that name:—*Held*: such colourable imitation & use of the labels & descriptions could be restrained by injunction.

(2) Two persons, sons of their father, who had originated the manufacturer of such pipes, & designated them as "Southorn's Brosley pipes," on the death of their father, manufactured at Brosley, but at separate establishments, & for their separate benefit, pipes of a like character; one of the brothers instituted a suit to restrain the use of this trade mark, the other declining to join in such suit:—*Held*: the one brother might alone file a bill for an injunction & account.—*SOUTHORN v. REYNOLDS* (1865), 12 L. T. 75.

**1386.** —[—]—B. & co. for many years affixed a label or trade mark to the bottles in which their ale was sold. D. & co. adopted a label bearing a general resemblance to that of B. & co., but differing from it in several particulars. Bill by B. & co. to restrain D. & co. from using such label dismissed with costs.

If a trader imitates another person's label or

trade mark, & sails so near the wind as just to avoid an injunction, though the ct. does not grant the injunction it will not willingly give him any costs of the proceedings.—*BASS v. DAWBER* (1869), 19 L. T. 626.

*See Nos.* 1316–1318, 1323, 1326, 1334, 1339, 1341, 1345, 1353, 1359, 1360, *ante*.

**Cards.**—[*See No.* 1343, *ante*.]

**Letters & figures.**—[*See Nos.* 1313, 1335, *ante*.]

**Wrappers.**—[*See Nos.* 1320, 1327, 1329, *ante*.]

## SECT. 6.—ACTION FOR PASSING OFF.

### SUB-SECT. 1.—IN GENERAL.

**1387. Inspection of premises—Whether order made ex parte.**—[An order to enter for the purpose of inspecting & taking samples under R. S. C., Ord. 52, r. 3, may be made on a *ex p.* application.—*HENNESSEY v. ROHMANN, OSBORNE & Co.* (1877), 36 L. T. 51; *sub nom.* *HENNESSY v. BOHMANN, OSBORNE & Co.*, [1877] W. N. 14.]

**1388. Joinder of plaintiffs—Common cause of action.**—*R. S. C., Ord. 16, r. 1.*—[Pltfs., the two Universities of Oxford & Cambridge, claimed an injunction to restrain defts., who were publishers of educational & other words, from publishing & selling books or publications bearing the titles "The Oxford & Cambridge Publications" or "The Oxford & Cambridge Edition," & from using the words "Oxford & Cambridge," so as to lead to the belief that the publications of defts. were publications of the Universities or of either of them, or issued from the University Presses. Defts. had published a series of books bearing the titles complained of by pltf's.:—*Held*: the action arose out of the same series of transactions; common questions of fact would arise, namely, the fact of publication & the fact that a belief would be induced that the publications of defts. were those of pltf's.; therefore, the conditions mentioned in *Stroud v. Lawson*, [1898] 2 Q. B. 44, as being necessary to bring a case within the above rule, were fulfilled; & consequently pltf's. were entitled to join in one action.—*OXFORD & CAMBRIDGE UNIVERSITIES v. GILL (GEORGE) & SONS*, [1899] 1 Ch. 55; 68 L. J. Ch. 34; 79 L. T. 338; 47 W. R. 248; 15 T. L. R. 21; 43 Sol. Jo. 27.]

**1389. Delivery of particulars—Of allegations in statement of claim.**—[In an action for passing off pltf's. alleged that the cigars sold by them & their predecessors under the name "Marcella," printed on a narrow red band had come to be known as & called by the public by such names as "Little Red Band" cigars & "Red Banders." Upon the application of defts. pltf's. were ordered to give particulars, to the best of their information & belief, of the dates when the cigars in question were first known by the respective names; of the dates when & the names of the persons by whom & to whom defts.' cigars were alleged to have been passed off; of the names of the persons who had applied to defts.' cigars the names alleged by pltf's. to be distinctive of their own; & of the dates when & the names of the persons by whom & to whom the defts.' cigars were being sold & supplied under the names alleged.—*IMPERIAL TOBACCO Co. v. PURNELL & Co.* (1903), 20 R. P. C. 718.]

### PART V. SECT. 6, SUB-SECT. 1.

*c. Jurisdiction of Exchequer Court.* [—The exchequer ct. has no jurisdiction

a right of property in the words or name "Cobb & co." as a trade name in connection with a particular coaching line. Defts., a rival coaching firm, started an opposition service on the same line, & used the same name upon their vehicles & in their advertisements. Upon pltf's. bringing an action against defts. for an injunction to restrain them

from so using such name, defts. justified their use on the ground that the name had become *nomen generale* in the Australian Colonies to describe the American system of coaching:—*Held*: pltf's. had not lost the use of the name as a trade name in connection with their particular coaching line, & defts. were restrained from using

such name in connection with their service on that line.—*CARRISBY, YOUNG & Co. v. CAMPBELL & Co.* (1892), 11 N. Z. L. R. 124.—*N.Z.*

*Sect. 6.—Action for passing off: Sub-sects. 1 & 2, A. & B.]*

**1390. — Of defence — Defence merely traversing allegations.]**—An action for an injunction to restrain the sale or advertisement of wireless valves under the designation of "Radio Micro" or under any other designation so closely resembling pltf.'s designation as to be calculated to deceive. Pltfs. by their statement of claim alleged that they had long been accustomed to place certain of their valves on the market under the name "Radio Micro"; that the name was well known in the United Kingdom as indicating the goods of pltf's., & that cartons of a distinctive appearance containing their valves & bearing the words "Radio Micro" were well known to the trade & the public as signifying that such goods were the goods of pltf's. Further, that defts. had advertised & sold wireless valves marked "Radio Micro," packed in cartons also marked "Radio Micro," & so closely resembling pltf's. cartons as to be calculated to deceive; that the goods so sold by defts. were not the goods of pltf's., but a fraudulent & obvious imitation thereof. Pltfs. cited an instance of the type of the act complained of. Defts. having by para. 3 of their defence simply denied each & all of those allegations, pltf's. applied that para. 3 of the defence might be struck out, or that, in the alternative, particulars might be delivered as follows:—(a) If it were contended that the words "Radio Micro" were in use by others than pltf's., particulars of such user, stating the name of the person or firm, & the earliest date of such user; (b) If it were contended that pltf's. cartons were not distinctive, particulars of cartons, if any, in use by other firms & relied on by defts. & of the features alleged to be common to the trade, & by whom & when used:—*Held*: on the footing of the action being one of passing-off, defts.' denial involved no affirmative allegations on their part, & as the *onus* lay upon pltf's. to establish their allegations, the ct. would not order defts. to deliver particulars of their traverse of those allegations.—*LA RADIOTECHNIQUE v. WEINBAUM*, [1928] Ch. 1; 97 L. J. Ch. 17; 137 L. T. 638; 71 Sol. Jo. 824; 44 R. P. C. 361.

#### SUB-SECT. 2.—PARTIES.

##### A. Who may Sue.

**1391. Person having no interest.]**—(1) A., the inventor of a medicine, employed B., a foreigner residing abroad, to manufacture it for him there, & sold it in England for his own sole profit. A label & seal, denoting that the medicine was manufactured by B. & sold by A., were affixed to each of the bottles in which it was sold. Defts. imitated the labels & seals. Demurrer allowed to a bill to restrain the imitation, & for an account of the sales of the spurious labels & seals, A. having no interest. (2) The ct. will not protect a foreigner's copyright.—*DELONDRE v. SHAW* (1828), 2 Sim. 237; 57 E. R. 777.

*Annotations:—As to (1) Refid.* Wado v. Cox (1835), 4 L. J. Ch. 105; Farina v. Silverlock (1855), 1 K. & J. 509. *As to (2) Dtd.* D'Almaino v. Boosey (1835), 1 Y. & C. Ex. 288. *Consd.* Chappell v. Purday (1845), 14 M. & W. 303. *Dtd.* Cook v. Purday (1848), 5 C. B. 860. *Dtd.* Jefferys v. Boosey (1854), 4 H. L. Cas. 815. *Refid.* Boosey v. Purday (1849), 13 Jur. 918.

**1392. Party jointly interested.]**—*DENT v. TURPIN*, *TUCKER v. TURPIN*, No. 1481, *post*.

to restrain one person from selling his goods as those of another, or to give damages in such a case, or to prevent him from adopting the trade label or

device of another, notwithstanding the fact that he may thereby deceive or mislead the public, unless the use of such label or device constitutes an

**1393. —]**—*SOUTHORN v. REYNOLDS*, No. 1385, *ante*.

**1394. Mortgage of goodwill & right to trade name — Trade name not used—No allegation of intention to use.]**—The mtgee. of stock-in-trade & goodwill, & of the right to use a name, never having used the name & not intending to use the name, cannot obtain an injunction to restrain persons claiming under the mtgor. from using the name.—*BEAZLEY v. SOARES* (1882), 22 Ch. D. 660; 52 L. J. Ch. 201; 31 W. R. 887.

**1395. Foreigner.]**—*DELONDRE v. SHAW*, No. 1391, *ante*.

**1396. — Foreign company trading in England.]**—(1) A foreign co. trading in this country is entitled to restrain the use of a name so similar as to be calculated to deceive its customers.

(2) To state that the members of a co. which is pltf. are undischarged bkpts. is irrelevant to the action, & paragraph containing such an allegation will be struck out.—*NATIONAL FOLDING BOX & PAPER CO. v. NATIONAL FOLDING BOX CO., LTD.* (1894), 43 W. R. 156; 13 R. 60.

**1397. — No place of business in England—Goods not sold in this country.]**—A foreign manufacturer has a remedy by suit in this country for an injunction & account of profits, against a manufacturer here, who has committed a fraud upon him by using his trade mark, for the purpose of inducing the public to believe that the goods so marked were manufactured by the foreigner. This relief is founded upon the personal injury caused to pltf. by deft.'s fraud, & exists, although pltf. resides & carries on his business in another country, & has no establishment here, & does not even sell his goods in this country.—*COLLINS CO. v. BROWN*, *COLLINS CO. v. COWEN* (1857), 3 K. & J. 423; 29 L. T. O. S. 245; 30 L. T. O. S. 62; 3 Jur. N. S. 929; 5 W. R. 676; 69 E. R. 1174.

*Annotations:—Folld.* Soc. Anon. des Anciens Etablissements Panhard et Levassor v. Panhard Levassor Motor Co., [1901] 2 Ch. 513. *Refid.* Collins Co. v. Reeves (1859), 28 L. J. Ch. 56; Singer Manufacturing Co. v. Wilson (1876), 2 Ch. D. 434. *Mentd.* Prioleau v. United States & Johnson (1866), L. R. 2 Eq. 659; U.S.A. v. Wagner (1867), L. R. 3 Eq. 724.

**1398. — Frequent importation of goods.]**—A foreign trader who has no English agency, but whose goods are in fact frequently imported into England, has a sufficient English market to enable him to restrain piracy of his trade name.

Where a motor car manufacturing co. was registered in a name colourably resembling that of existing motor car manufacturers with the fraudulent intention of obtaining the benefit of their reputation in that business, the co. & the signatories to the memorandum, who were the only directors & shareholders, were restrained from using the name in connection with that business, & the signatories were further restrained from allowing the co. to remain registered under that name.—*SOCIÉTÉ ANONYME DES ANCIENS ETABLISSEMENTS PANHARD ET LEVASSOR v. PANHARD LEVASSOR MOTOR CO., LTD.*, [1901] 2 Ch. 513; 70 L. J. Ch. 738; 85 L. T. 20; 50 W. R. 74; 17 T. L. R. 680; 45 Sol. Jo. 641.

**1399. —]**—*POIRET v. POIRET* (JULES), *LTD. & NASH*, No. 1142, *ante*.

—*See COPYRIGHT*, Vol. XIII., pp. 180–182, Nos. 158–173.

**1400. Persons not connected in business—Trading under same name.]**—*ATTENBOROUGH v. JAY* (1898), 14 T. L. R. 365; *affd.*, 14 T. L. R. 439. C. A.

infringement of a registered trade mark.—*DEKUYPER & SON v. VAN DULKEN*, *WEILAND & CO.* (1894), 4 Exch. C. R. 71.—*CAN.*

**1401. Owner of goodwill—Business transferred—Whether transferees necessary parties.]**—For many years pltf's. manufactured & sold tyres for cycles & motor cycles under the name of "Warwick," & by the year 1905 that name was distinctive & meant to the trade & to the public tyros of their manufacture. In 1905 they transferred their business with the exclusive right to manufacture & sell Warwick tyres to the Dunlop co. for a term of years, but did not assign the goodwill in their trade name of "Warwick" to that co. Pltf's. never manufactured or sold tyres for motor cars, nor did the Dunlop co. sell such tyres under the name of "Warwick." Def'ts. manufactured & sold only tyres for motor cars, & in 1908, the name of their managing director being Warwick, commenced to sell their motor tyres under the name of "Warwick motor tyres." In an action by pltf's. to restrain def'ts. from using the name "Warwick" in connection with the sale of def'ts.' motor tyres on the ground that such user was calculated to lead the public to believe that def'ts.' motor tyres were tyres of pltf's. manufacture:—*Held*: pltf's. were entitled to an injunction; pltf's. although they were not themselves manufacturing or selling their Warwick tyres, were the proper parties to sue, as they had not parted with the goodwill in their trade name "Warwick," & the Dunlop co. were not necessary parties to the action.

*Qu.*: whether pltf. need prove damage in order to succeed in a passing off action.—**WARWICK TYRE CO., LTD. v. NEW MOTOR & GENERAL RUBBER CO., LTD.**, [1910] 1 Ch. 248; 79 L. J. Ch. 177; 101 L. T. 889.

**1402. Sole selling agent—Must show association of goods with himself—Mere allegation of loss of profits insufficient.]**—The sole agent for sale of an article made by a particular manufacturer cannot maintain a passing off action against a person who passes off an article made by himself as the article made by that manufacturer merely on the ground that his, the agent's, profits through sale of that article are thereby diminished.

A firm were the sole agents for sale in this country of an article made by a particular manufacturer in the United States. They sold the article just as it was made & got up by that manufacturer, & nothing in the "get-up" of the article as sold by them indicated any association of them or their business with that article. A co. having manufactured & sold articles of the same kind with a "get-up" alleged by the firm to be similar to that of the before-mentioned article as supplied by the manufacturer in the United States, the firm sued that co. for passing off those articles as articles sold by the firm:—*Held*: they could not maintain such an action against the co.

*Semble*: if the firm had sold the article under any "get-up" of their own, which the co. had imitated, they might have maintained a passing off action against the co.—**DENTAL MANUFACTURING CO., LTD. v. DE TREX (C.) & CO.**, [1912] 3 K. B. 76; 81 L. J. K. B. 1162; 107 L. T. 111; 28 T. L. R. 498, 81 C. A.

**1403. Importer of goods—Defendant acquiring goods from manufacturer.]**—An importer may acquire a valuable reputation for himself & for his wares by his care in selection, or his precautions in transit & storage, or because his local character is such that the article acquires a value by his testimony to its genuineness. But apart from contract or misrepresentation there is nothing to prevent a person from acquiring goods from a manufacturer & selling them in a competition with him, even in a country into which the manufacturer, or his agent, has been the sole importer.

Applts. sought to restrain resps. from selling in India a well known brand of cigarettes which for some years they alone had been importing into & selling in India; they were assignees of the trade mark & goodwill for India. Resps. having bought over twenty-one millions of the cigarettes cheaply from purchasers from the manufacturers, who had granted applts. the sole rights for India, were able to undersell applts. The sales by resps. involved no breach of contract, misrepresentation or infringement; further it was not shown that applts. had acquired any independent reputation as importers:—*Held*: the suit was not maintainable.—**IMPERIAL TOBACCO CO. OF INDIA, LTD. v. BONNAN**, [1924] A. C. 755; L. R. 51 Ind. App. 269; 93 L. J. P. C. 216; 131 L. T. 642; 40 T. L. R. 613; 41 R. P. C. 441, P. C.

#### B. Who may be Sued.

**1404. Engraver of blocks from which labels printed.]**—**GUINNESS v. ULLMER** (1847), 10 L. T. O. S. 127.

**1405. Printer of infringing labels—Printer not using labels—Sale to fraudulent users.]**—Where a manufacturer has the exclusive right to use a particular trade mark which he has been in the habit of procuring to be printed upon paper labels & wrappers, which he pasted on & wrapped round his manufactures, he may obtain an injunction upon interlocutory motion against a printer who has made & printed, & is in the habit of selling, imitations of pltf.'s labels to persons, for the purpose of using them fraudulently, to pass off other goods as those of pltf., although the printer himself makes no such use of them.

So also if pltf. alleges that persons bought the labels of def't. for such a fraudulent purpose, & proves that def't. was in the habit of selling them to any one who asked for them; & def't. denies collusion with any one, & also denies pltf.'s right to the exclusive use of the mark, & insists upon his own right to continue the printing & selling, the injunction will be granted, although pltf. does not allege or prove that def't. sold them with a fraudulent purpose, & does not distinctly prove that any of the labels sold by def't. were in fact made use of to defraud pltf. The ground of this equity is that def't., by knowingly printing labels in imitation of pltf.'s trade mark, & selling them to any one who asked for them, was supplying the means of committing, & was thus a party to, frauds which Cts. of Equity would interfere to stop at their source.—**FARINA v. SILVERLOCK** (1855), 1 K. & J. 509; 3 Eq. Rep. 883; 24 L. J. Ch. 632; 25 L. T. O. S. 211; 3 W. R. 532; 69 E. R. 560; *subsequent proceedings* (1858), 4 K. & J. 650.

*Annotations*:—**Reid**, Dixon v. Fawcus (1861), 3 E. & E. 537; **Woollam v. Ratcliffe** (1863), 1 Hem. & M. 259. **Mentd.** **Churton v. Douglas** (1859), 28 L. J. Ch. 841.

**1406. — Retailers justified in using labels.]**—**FARINA v. SILVERLOCK**, No. 1317, *ante*.

**1407. — —.]**—(1) Perpetual injunction to restrain a printer from printing or selling labels similar to those used by pltf. as his trade mark, notwithstanding the possibility that some labels so printed & sold might be purchased *bonâ fide* & for the purpose of being applied to articles of pltf.'s own manufacture from which his labels had been lost.

(2) Def't., insisting on an adverse right, after being made aware that pltf. had been defrauded through his agency, ordered to pay the costs of all the proceedings, both at law & in equity.—**FARINA v. SILVERLOCK** (1858), 4 K. & J. 650; 70 E. R. 270.

**1408. Trading corporation.]**—**LAWSON v. BANK OF LONDON**, No. 1413, *post*.



Sect. 6.—Action for passing off: Sub-sect. 2, B.; sub-sects. 3, 4 & 5, A. & B.]

**1409. Partner repudiating acts of passing off—& seeking dissolution.]—**MAGNOLIA METAL CO. v. ATLAS METAL CO. (1897), 14 R. P. C. 389, C. A.

**1410. Directors of limited company—Liability for specific wrongful acts.]—**Pltfs. in a passing-off action, who were the successors in business of H. S. Cropper & Co. & H. S. Cropper & Co., Ltd., their successors, & who claimed to be entitled to the trade name "Cropper," alleged that defts. were using "Cropper" in such a way as to deceive the trade & the public & to represent themselves as the successors in business of H. S. Cropper & Co. & H. S. Cropper & Co., Ltd., & were passing off their goods as pltfs.' Pltfs. claimed an injunction & other relief:—*Held*: (1) the documentary & oral evidence on behalf of pltfs. was of the flimsiest character & did not make out the charge of fraudulently attempting to pass off their goods as pltfs.' against defts.; (2) in an action against a limited company, it is wrong to add as co-defts. directors against whom no specific allegations are made other than that they are directors.—CROPPER MINERVA MACHINES CO., LTD. v. CROPPER, (HARLTON & CO., LTD. (1906), 23 R. P. C. 388.

**1411. ———.]—**MIDDLEMAS & WOOD v. MOLIVER & CO., LTD., No. 1250, *ante*.

#### SUB-SECT. 3.—PLEADING.

**1412. Pleadings giving right to begin—Allegation of fraud against plaintiff.]—**In an action for selling oil for the hair in bottles & with envelopes resembling those of pltfs., defts. pleaded that the oil sold by pltfs. was prepared from oil of an inferior quality, & was useless & valueless, & that pltfs. knew it, & that the oil sold by pltfs. was by reason thereof a fraud on all persons buying the same. Pltfs. replied *de injuria*:—*Held*: on these pleadings, deft. was entitled to begin.—ROWLAND v. BERNES (1843), 1 Car. & Kir. 46.

**1413. What plaintiff must allege—Claim for infringement of trade name—That he carries on same trade as defendant.]—**(1) A declaration stated that pltf. had established a bank in London called "The Bank of London" & was the first person who had established a bank by or under that name & had established the bank at great expense & caused the name to be published & affixed on the offices of the bank, so that same might be seen & known by the public & had caused prospectuses of the bank to be printed & circulated with the name & title of "The Bank of London" thereon, & the bank was then commonly known by the name of, & was the only bank named or styled "The Bank of London" whereby pltf. had acquired & was acquiring great gains & profits. It then proceeded to allege that defts. intending to injure pltf. in his bank & the business of his bank afterwards & while his bank was the only bank named or styled "The Bank of London" wrongfully & fraudulently established a certain other bank in

London under the name, style & title of "The Bank of London" in imitation of, & as representing the Bank of London of pltf., & wrongfully & fraudulently transacted business at the bank so established by defts. under the name & under the false colour & pretence that same was the bank established by pltf., & that thereby pltf. had been prevented from carrying on his business at the bank so established by him so fully & extensively as he would otherwise have done, & had been deprived of profits & that by means of the premises divers persons were induced to believe & did believe that the bank so established by defts. was the bank called "The Bank of London" established by pltf.:—*Held*: the declaration disclosed no cause of action, it not being averred that pltf. had ever carried on the business of a banker. (2) *Qu.*: whether an action of this description will lie against a trading corp.—LAWSON v. BANK OF LONDON (1856), 18 C. B. 84; 25 L. J. C. P. 188; 27 L. T. O. S. 134; 2 Jur. N. S. 716; 4 W. R. 481; 139 B. R. 1296.

*Annotations*:—As to (1) *Consd.* McAndrew v. Bassett (1864), 10 L. T. 442. *Generally*, *Refd.* Maxwell v. Hogg, Hogg v. Maxwell (1867), 2 Ch. App. 307. *Mentd.* Raggett v. Findlater (1873), L. R. 17 Eq. 299; *Licensed Victuallers' Newspaper Co. v. Bingham* (1888), 36 W. R. 433.

**1414. Allegation of bankruptcy of plaintiff—Relevancy.]—**NATIONAL FOLDING BOX & PAPER CO. v. NATIONAL FOLDING BOX CO., LTD., No. 1396, *ante*.

**1415. Amendment of pleadings—On what terms allowed—Payment of costs of application—& costs occasioned by amendment.]—**Pltfs. desire to make this case against defts. It is only a carrying out on a further scale of their original statement that defts. have been fraudulently passing off or attempting to pass off their golf balls as pltfs.' golf balls, & I think it falls amply within the authorities that at any stage, if no harm can be done which is not capable of being compensated for by costs, amendments ought to be made in order that the real issue between the parties may be tried. . . . I shall allow these amendments to be made on the terms that pltfs. pay the costs of this application & all costs of & occasioned by this amendment (ASTHURY, J.).—INDIA RUBBER, GUTTA PERCHA & TELEGRAPH WORKS, LTD. v. COUNTY GOLF CO. (1925), 42 R. P. C. 225.

#### SUB-SECT. 4.—DISCOVERY AND INTERROGATORIES.

**Discovery & interrogatories generally.]—**See DISCOVERY, Vol. XVIII., pp. 38 *et seq.*

**1416. Interrogatories—Answer disclosing names of customers & trade secrets.]—**Pltf. complained that deft. had sold, under pltf.'s name, sewing machines which had not been manufactured by him, & he sought a discovery of all the machines sold by deft., the price, the profit, the names of the purchasers & other particulars. Deft. refused to answer, saying that he would thereby disclose the names of his customers & the secrets of his trade:

#### PART V. SECT. 6, SUB-SECT. 3.

**p. What plaintiff must allege—Claim for infringement of trade name.]—**In a statement of claim making out a case for an injunction to prevent an infringement of pltf.' trade name, they may either allege in *torso* & general terms the acquisition of title by long user, or they may set out such facts in detail to prove the user, as they might have furnished by way of particulars, if demanded, in case they had confined themselves in the first instance to a general allegation of title

acquired by user.—NOEL (THLO) CO. v. VITAE ORE CO. (1907), 7 W. L. R. 353; 17 Man. L. R. 319.—CAN.

**q. Probability—Power to amend.]—**Mere prolixity in a pleading, not such as will embarrass or delay the fair trial of an action, does not warrant the striking out, under Rules 320 or 328 of the King's Bench Act, of any portions of it, & there is no power under any of the Rules, for the ct. to revise pleadings, which are merely over-lengthy by striking out or amending particular paragraphs in whole or in

part.—NOEL (THLO) CO. v. VITAE ORE CO. (1907), 7 W. L. R. 353; 17 Man. L. R. 319.—CAN.

**r. Affidavit—Injunction to restrain use of "trade name."]**—Affidavits in support of a motion for an injunction to restrain the use of a "trade name" should inform the ct. as to the origin & meaning of the term; whether it is a fancy name & invented name or a mere descriptive word.—DOUGLAS v. LOCKE (1915), 32 W. L. R. 251; 9 W. W. R. 42; 24 D. L. R. 238.—CAN.



—*Held*: he was bound to answer.—*HOWE v. M'KERNAN* (1862), 30 Beav. 547; 54 E. R. 1001.

**1417. — Directed to details of plaintiff's evidence—Sales of goods.**—In an action to restrain debts, from using a trade name & from selling their goods as the goods of plffs., debts. by counterclaim claimed the like relief, & also an account of the goods sold by plffs. as & for the goods of debts., & of the profits of such sale. Both plffs. & debts. claimed to derive their title under a partnership that had been dissolved in 1861, & both had since that time carried on the same business. An interrogatory exhibited by debts. required plffs. to set forth the quantities of goods sold by them since 1861, distinguishing the quantities sold in each year:—*Held*: the interrogatory was not for the ordinary purposes of discovery, but was directed to the details of plffs.' evidence, & was rightly disallowed.—*BENBOW v. LOW* (1880), 16 Ch. D. 93; 50 L. J. Ch. 35; 44 L. T. 119; 29 W. R. 265, C. A.

*Annotations*:—*Consd. McLean & Ligg v. Jones* (1892), 66 L. T. 653. *Refd. Holckow v. Fisher* (1882), 10 Q. B. D. 161; *Re Strachan*, [1895] 1 Ch. 439.

**1418. — Matters common to trade.**—P. & co., who were pen manufacturers, brought an action for an injunction to restrain T. H. & co., who were also manufacturers of pens, from passing off pens & boxes of pens of their manufacture as pens & boxes of plffs. Debts. desired to administer a number of interrogatories to plffs., four of which were interrogatories asking whether the type, shape, or pattern of certain specified pens of plffs., & the boxes in which they were sold, were common to the trade; & what other manufacturers used them, & in particular whether they had so sold pens similar in pattern:—*Held*: the interrogatories proposed were admissible with a substitution for the words "similar in pattern" of words making that part of the first interrogatory applicable to pens of the "same" pattern & shape, or only colourably differing therefrom.

Another interrogatory asked whether the labels on the boxes of certain of plffs.' pens bore certain specified trade marks now or formerly separately registered by plffs. This interrogatory was disallowed.—*PERRY & Co., LTD. v. HESSIN & Co.* (1910), 28 R. P. C. 108.

**1419. — Whether goods bore trade marks registered by plaintiff.**—*PERRY & Co., LTD. v. HESSIN & Co.*, No. 1418, *ante*.

#### SUB-SECT. 5.—EVIDENCE.

##### A. In General.

**Evidence generally.**—*See EVIDENCE*, Vol. XXII.

**1420. Probability of deception—Matter for court.**—*After inspection of exhibits & consideration of evidence.*—*PAYTON & Co. v. SNEILING, LAMPARD & Co.*, No. 1310, *ante*.

**1421. — Necessity for evidence—View by judge insufficient.**—*LONDON GENERAL OMNIBUS Co., LTD. v. LAVELL*, No. 1374, *ante*.

**1422. — Form of question to witness.**—*ROYAL WARRANT HOLDERS' ASSOCN. v. DEANE (EDWARD) & BEAL, LTD.*, No. 1586, *post*.

**1423. Letters of request—Evidence on manner of dealing with goods in market.**—A co. who were manufacturers of lime juice commenced an action against another co. for infringement of plffs.' trade marks & for passing off their lime juice as

plffs.' lime juice. Plffs. alleged that they owned certain trade marks & that they sold their lime juice in bottles which were moulded with representations of their trade marks, & they alleged that the moulding on debts.' bottles was calculated to deceive. Both plffs. & debts. put labels on their bottles, but plffs. alleged that such labels frequently got rubbed off. Both firms exported their lime juice to other countries, including South Africa. Plffs. made an application for a commission to take evidence in South Africa or alternatively for letters of request to issue. They stated that they wished to obtain evidence as to the circumstances & conditions of the trade in South Africa. The application came before *ASTHURY, J.*, in Chambers, to whom certain proofs of the proposed witnesses were submitted by plffs., & an order was made for letters of request to issue. Leave was given to debts. to appeal, & they appealed:—*Held*: evidence as to the manner in which the goods were dealt with in the market was material, & the ct. refused to interfere with the discretion of the learned judge; the order made was right.—*ROSE (L.) & Co., LTD. v. ALEXANDER RIDDLE & Co., LTD.* (1913), 31 R. P. C. 48, C. A.

##### B. Trap Orders and Displays.

**1424. Essentials to reliable trap orders—Notice to defendant—Of incident relied on—As soon as order fulfilled.**—*RIPLEY v. GRIFFITHS*, No. 1091, *ante*.

**1425. — — — — —.**—Plffs., who were manufacturers of lubricating oil known as "Castrol" & were the proprietors of a trade mark consisting of that word registered in class 47 in respect of lubricating oil, placed two trap orders, on Nov. 4, & Dec. 10, 1927, respectively, with debt., the proprietor of a garage & petrol filling station. On each occasion, it was alleged on behalf of plffs. the oil asked for was "Castrol C." & the oil supplied by the employees of debt. was not "Castrol" oil. Plffs. commenced an action to restrain passing off by debt. as "Castrol" oil of oil not manufactured by plffs. An application by debt. for further particulars of the statement of claim was adjourned into ct. as a procedure summons & was refused. Debt. denied the alleged passing off. On an application by debt. for particulars of the name & address of a customer to whom it was alleged that one of the sales in question had been made, no order was made on plffs. undertaking to call him at the trial. The action subsequently came on for trial:—*Held*: the two trap orders on which the action was based were not given either in sufficiently clear terms or to sufficiently responsible persons; it was essential that trap orders on which it was intended to base actions should be given in clear terms & to persons of responsibility; & notice should at the earliest date be given to debt. of the particular incident relied on; & the case had not been made out with sufficient clearness & certainty to justify the ct. in holding that there had been passing off.—*WAKEFIELD (C. C.) & Co., LTD. v. BOARD (TRADING AS BOARD (J. P.) & Co.)* (1928), 45 R. P. C. 261.

**1426. — — — — —.**—Plffs. in an action to restrain passing off had carried on since 1920 a business of manufacturing & selling potato crisps. At the time of the commencement of the action plffs. were selling very large quantities of the crisps the bulk of which they packed for sale by retail

**PART V. SECT. 6, SUB-SECT. 5.—A. t. Onus of proof.**—In the case of honest traders accused of passing off their goods as the goods of a rival

complainant the rule of the ct. is, that it lies upon complainant to make out beyond all question that the goods are so got up as to be calculated to

deceive.—*OGDEN (J. EDWARD) LTD. v. CANADIAN EXPANSION BOIT Co., LTD.* (1915), 8 O. W. N. 374; 33 O. L. R. 589.—*CAN.*

*Sec. 6.—Action for passing off: Sub-sect. 5, B.; sub-sect. 6, A., B. & C.]*

dealers in paper bags retailed at 2d. each. The get-up of plfts.' distributing vans & of the tins in which the bags were packed had remained constant for five years, & the get-up of the bags had remained constant for two years. In 1926, defts., P., had formed defts. co. of which he became the managing director. Plfts. alleged (*inter alia*) that defts. had got up their vans, tins & bags in imitation of those of plfts., & in particular, that plfts.' bags had on them the device of a diamond with the words "Smith's Potato Crisps" printed in colours inside the diamond, having the letters "IT" printed larger than the other letters, & that defts. had marked their bags with a device resembling a diamond, having the words "Paige's Potato Crisps" printed in it & having the letters "AI" printed larger than the other letters. Also, plfts. alleged that defts. had collected plfts.' empty tins from retailers & had packed them on defts.' vans in such a way as to produce the appearance of plfts.' vans. Defts. denied that their conduct of their business & the get-up of their vans, tins & bags were calculated to deceive the purchasing public into the belief that defts.' crisps were plfts.' Also, they alleged that their methods of printing their name & of dealing with the empty tins were common to the trade:—*Held*: although some persons in the trade had failed to recognise the distinction between plfts.' & defts.' tins, their failure had been only momentary; plfts. had failed to prove that there was any deception, or any risk of deception, & defts.' goods were so got up & marketed as to be clearly distinguishable from those of plfts.

In every case of a trap order, given either to defts. themselves or to third parties, particulars ought to be given. When trap orders are relied upon, they ought to be written orders & in the plainest terms (LAWRENCE, L.J.).—SMITH'S POTATO CRISPS, LTD. v. PAIGE'S POTATO CRISPS, LTD. (1928), 45 R. P. C. 132, C. A.

**1427. — Attention pointedly drawn to goods asked for.]**—TRUEFITT (H. P.), LTD. & TRUEFITT v. EDNEY, No. 1042, *ante*.

**1428. — Clear terms.]**—WAKEFIELD (C. C.) & CO., LTD. v. BOARD (TRADING AS BOARD (J. P.) & CO.), No. 1425, *ante*.

**1429. — —.]**—SMITH'S POTATO CRISPS, LTD. v. PAIGE'S POTATO CRISPS, LTD., No. 1426, *ante*.

**1430. — Must be given to responsible persons.]**—WAKEFIELD (C. C.) & CO., LTD. v. BOARD (TRADING AS BOARD (J. P.) & CO.), No. 1425, *ante*.

**1431. — Writing.]**—SMITH'S POTATO CRISPS, LTD. v. PAIGE'S POTATO CRISPS, LTD., No. 1426, *ante*.

**1432. Essentials to reliable trap displays.]**—DUNHILL v. BARTLETT & BICKLEY, No. 1347, *ante*.

#### SUB-SECT. 6.—DEFENCES.

##### A. In General.

**1433. Want of parties—Other parties necessary for part of relief sought—Whether plaintiff may allege waiver at hearing.]**—DENT v. TURPIN, TUCKER v. TURPIN, No. 1481, *post*.

**1434. Name of place applied to goods—Goods previously made at same place by others.]**—WORCESTER ROYAL PORCELAIN CO., LTD. v. LOCKE & CO., LTD., SAME v. RHODES, No. 1077, *ante*.

**1435. Omission of company to publish corporate name—Inadvertent omission.]**—The inadvertent

omission of a limited co., carrying on a business under a trade name, to publish at the same time its corporate name in compliance with Companies Act, 1862 (c. 89), s. 41, will not prejudice the co.'s right to have the use of its trade name protected by injunction, & it makes no difference whether the co. itself created & established such trade name, or acquired it by purchase.—RANDALL (H. E.), LTD. v. BRITISH & AMERICAN SHOE CO., [1902] 2 Ch. 354; 71 L. J. Ch. 683; 87 L. T. 442; 50 W. R. 697; 18 T. L. R. 611; 10 Mans. 109.

*Annotation:—Reid. Employers' Liability Assoc. Corp'n. v. Sedgwick, Collins, [1927] A. C. 95.*

#### **1436. Plaintiff's conduct misleading defendant.]**

—Plfts., who were the registered proprietors of the trade mark "Burgoyne," for wine, sold by auction wine in casks bearing the inscription "Burgoyne, London." The wine had been consigned to plfts. on approval & rejected by them, & was sold on account of the growers. Defts. purchased the wine at the auction, & resold it as "Burgoyne's Superior Australian Burgundy." On the trial of an action, to restrain the defts. from infringing the plfts.' trade mark, & from passing off the wine in question as being plfts.' wine:—*Held*: defts. were justified in coming to the conclusion that the wine was Burgoyne's wine, & they were so justified by reason of the conduct of plfts. in the matter, & plfts. were not entitled to any relief.—BURGOYNE & CO., LTD. & BURGOYNE v. GODFREY & CO. (1904), 22 R. P. C. 168, C. A.

**Name on business premises purchased by defendant.]**—See Nos. 1215–1217, *ante*.

**Delay or acquiescence.]**—See Sub-sect. 7, B., *post*.

**Innocent user.]**—See Sub-sect. 7, D., *post*.

##### B. Concurrent or General User.

**1437. Concurrent user.]**—G. P. & Sons commenced in 1880 to sell Sweet Guinea Gold Tobacco, & they registered "Sweet Guinea Gold" with their facsimile signature, as a trade mark on Dec. 3, 1880, & they sold their tobacco with a label comprising their registered trade mark. O. on Nov. 3, 1880, registered a trade mark for tobacco containing the words "Guinea Gold Cut." O. & his successors O. & Co., Ltd., sold Guinea Gold Cut tobacco, though not as largely as G. P. & Sons sold Sweet Guinea Gold. In 1886, G. P. & Sons commenced to sell "Sweet Guinea Gold" cigarettes. At first, they were sold in red boxes, but from July 24, 1893, they were sold in white boxes, the tops of which bore a label which was substantially a reproduction of G. P. & Sons tobacco label. Before July 24, 1893, O. & Co., Ltd., designed a label for cigarettes under the title of "Guinea Gold." A few sample boxes were sold in Sept. 1893, but the sale of these cigarettes commercially did not begin until Apr. 1894. O. & Co.'s boxes resembled somewhat in appearance G. P. & Sons' white boxes. G. P. & Co. brought an action against O. & Co., Ltd., to restrain them from selling their said cigarettes. It was proved, among other things, at the trial that plfts.' cigarettes were known as "Guinea Gold" as well as "Sweet Guinea Gold" & defts. had adopted their cigarette boxes in ignorance of plfts.' white boxes:—*Held*: the only important feature in either case was the words "Guinea Gold" to which plfts. & defts. had an equal right & action must be dismissed.—PHILLIPS (GODFREY) & SONS v. OGDEN (THOMAS) & CO., LTD. (1895), 12 R. P. C. 325.

**1438. —.]**—In 1888 E. commenced to call his blue "Dolly," & it was ordered, invoiced, & advertised thereafter as "Dolly." In 1894 a co. was formed which took over the business of E.

In 1898 the co. commenced an action against G. & Son for supplying blue not being ptfs.' to persons ordering "Dolly Blue." The blue so supplied was blue manufactured by R. & bore R.'s trade mark, which consisted of a washing tub called in some parts a "Dolly" tub & in other parts a "Peggy" tub with the handle of a dolly or peggy stick projecting from it. R. had used this trade mark since 1871, & registered it under the Trade Marks Act in 1876. It was admitted that R.'s blue was called "Oval Blue" & was invoiced as "Oval"; but defts.' case was that retail customers often asked for it as "Dolly Blue," both before 1888 & since, & that there had, in fact, been a concurrent use of the word "Dolly" to describe E.'s blue & R.'s blue. It was held at the trial ptfs. entitled to an injunction. Defts. appealed to the Ct. of Appeal, who held that concurrent user of the term "Dolly" to denote Ripley's blue as well as ptfs.' was proved, & the judgment of the judge at the trial was wrong. The appeal was allowed, with costs above & below, & ptfs.' costs of the trial, which had been paid by defts., were ordered to be repaid to them, but without interest. Ptfs. appealed to the House of Lords:—*Held*: the concurrent user was proved, & the judgments of the Ct. of Appeal were right.—*EDGE & SONS, LTD. v. GALLON & SON* (1900), 17 R. P. C. 557, H. L.

*Annotation*:—*Refd.* Ashworth v. English Card Clothing Co. (No. 2), [1904] 1 Ch. 704.

**1439. — Agreement for concurrent user void by foreign law.**—Ptfs. G., the Procurator of the Monastery of La Grande Chartreuse, & D., his London agent, brought an action to restrain A. from using the word "Chartreuse" in connection with liqueurs not made at the Monastery. Ptfs. alleged that "Chartreuse" meant liqueur made at the Monastery. Deft. A. was London agent of a French distillery at Voiron, Isere, in France. Deft. alleged that "Chartreuse" was a generic word & *publici juris*, & further alleged a concurrent right of user in his principal of the name under an agreement, the meaning of which had been determined by a French Ct. of First Instance. Ptfs. contended that the agreement was null & void, according to French law, & could have no effect in England:—*Held*: apart from the agreement, ptfs. were entitled to an absolute injunction; but having regard to the agreement & the French judgment thereon, an injunction would be granted in special terms, with liberty to apply should an appeal from the French judgment be successful.—*GREZIER & DOYLE v. AUTRAN* (1895), 13 R. P. C. 1.

*Annotation*:—*Consd.* Rey v. Lecouturier, [1908] 2 Ch. 715.

**1440. — Effect of discontinuance by one party.**—*DANIEL & ARTER v. WHITEHOUSE*, No. 1117, *ante*.

**1441. — What amounts to—Use during plaintiff's military service.**—*POIRET v. POIRET (JULES)*, *LTD.* & *NASH*, No. 1142, *ante*.

**1442. —**—*E. Y. & co.* were the registered proprietors of a trade mark registered in 1886 in class 43 in respect of wines & spirits. The trade mark consisted of a representation of a Portuguese bullock cart loaded with a pipe of wine, drawn by two oxen & accompanied by two human figures, the one in front of the cart & the other behind. In 1886 the predecessors in business of G. O. & co. commenced to use on circulars in connection with the sale of port a representation of a bullock cart loaded with a pipe of wine, drawn by two oxen & with one human figure standing on the cart. In 1912 G. O. & co. commenced to use their device on the labels of their bottles, & in 1919 they

commenced to use a label bearing their registered trade mark consisting of the word "Regent" & underneath it their bullock cart device. In an action for infringement & passing off brought by E. Y. & co. against G. O. & co. defts. contended that they had not infringed by reason of the differences between the two devices, & that, a representation of a bullock cart being common to the trade, in comparing the two marks everything except the differences must be disregarded; that there had been no passing off; that they had used their device since a date anterior to the user or registration by the ptfs. of their device; that ptfs. had acquiesced in their user:—*Held*: defts.' user of an ox cart device had been anterior to that of ptfs.; in view of the wide user & vague signification of an ox cart device, defts.' use of such a device had not been used as a trade mark, but this device had been used in pursuance of the common usage in the trade & was only an indication of trade & assocn. with Portugal, & defts. had not infringed ptfs.' trade mark.—*YOUNG & CO., LTD. v. GRIERSON, OLDFHAM & CO., LTD.* (1924), 41 R. P. C. 548, C. A.

*Annotation*:—*Consd.* Stone v. Steelcase Manufacturing Co. (1928), 45 R. P. C. 127.

**1443. General user.**—*WOLFF & SON v. NOPITSCH*, No. 1095, *ante*.

*C. Matter Common to Trade.*

**1444. Get up.**—*JAMIESON & CO. v. JAMIESON*, No. 1151, *ante*.

**1445. —**—*Ptfs.*, who sold "Royal" coffee in tins, some of which bore red, blue, & green labels, while others were enamelled in the same pattern on a red or blue ground, brought an action to restrain defts. from selling "Palais Royal" coffee in tins which were enamelled in a somewhat similar pattern on a green or chocolate ground. Defts. & their predecessors had for many years, & before ptfs., "Royal" coffee was on the market, sold "Palais Royal" coffee in tins with certain paper labels, which bore no resemblance to ptfs.' labels in pattern & colour, & they subsequently began to use enamelled tins having a green or chocolate ground, the use of which tins ptfs. sought to restrain:—*Held*: as the similarities between ptfs.' & defts.' tins were so great, & as defts.' tins as a whole so nearly resembled in general appearance ptfs.' tins as to be calculated to deceive, ptfs. were entitled to an injunction & other consequential relief. Defts. appealed. The appeal was allowed.

If the resemblance consists only in that which is common to the trade, to hold that ptff. is entitled to succeed would give a monopoly of the common features (*JINDLEY, M.R.*).—*PAXTON & CO., LTD. v. TITUS WARD & CO., LTD.* (1899), 17 R. P. C. 58, C. A.

*Annotation*:—*Refd.* *Re Crook's Trade Mk.* (1914), 110 L. T. 474.

**1446. —**—*The* predecessors of ptfs., who were cigar manufacturers, in 1888 commenced to sell cigars under the name "Marcella," having round them a narrow band of red paper five thirty-seconds of an inch in width, with the name of the brand printed thereon in white. They contended that these cigars were so well known, & so much asked for as "narrow red band" cigars, as to entitle them to an injunction restraining the sale by the deft. of cigars bearing similar bands three-sixteenths of an inch in width, & sold under the name "Purnella." Deft. alleged that he had sold "Purnella" cigars since 1882 in large quantities, & other cigars bearing similar bands since 1878, but produced no documentary evidence of orders

*Sect. 6.—Action for passing off: Sub-sect. 6, C., D. & E. (a), (b) & (c).]*

for or sales of "Purnella" cigars with a narrow red band prior to 1901, when pltf's. first knew of his cigars. Evidence was also given of other long uses of cigar bands of practically the same width & style:—*Held*: pltf's. had not established an exclusive right to a narrow red band, & upon the evidence as a whole, pltf's. had failed to satisfy the ct. that what def't. was doing was calculated or intended to deceive.—*IMPERIAL TOBACCO CO. (OF GREAT BRITAIN & IRELAND), LTD. v. PURNELL & CO. (1904)*, 21 R. P. C. 598, C. A.

**1447.** —J.—*WILLIAMS (J. B.) CO. v. BRONNLEY (H.) & CO., LTD., WILLIAMS (J. B.) CO. v. WILLIAMS, No. 1152, ante.*

**1448.** —J.—*CORDES v. ADDIS (R.) & SON, No. 1088, ante.*

*D. Trade Mark Not Registered or Not Registrable.*

**1449. Mark capable of registration.—But not registered.]**—Pltf's. in the action sold tea in packets in buff wrappers, having printed on them in chocolate coloured ink (a) pltf's. registered trade mark, which was circular, of a tower; (b) certain distinctive letterpress, the whole being arranged in a distinctive manner. They asked for an injunction to restrain def'ts., who were selling tea packed in buff wrappers, have printed on them (a) a circular trade mark which comprised four towers; (b) certain letterpress, the whole being arranged in a manner very similar to that adopted by pltf's. Def'ts. contended that pltf's. were precluded by Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 77, from bringing their action, because portions of the get up of their packets could have been registered under sect. 64 of the Act, & were not so registered:—*Held*: pltf's. were entitled to an injunction independently of Patents, Designs, & Trade Marks Act, 1883 (c. 57).—*GREAT TOWER STREET TEA CO. v. LANGFORD & CO. (1887)*, 5 R. P. C. 66.

**1450. Mark not registrable.—Concurrent user.—No opposition to registration.]**—Pltf's. had a large export trade in bottled beer & a small local trade in England. Def'ts. sold bottled beer in England only. Both sold beer in the north of London. In 1879 pltf's. registered as a new mark for beer a picture of a stout man, with the words "John Bull Brand"; & in 1880 they registered as a new mark for beer a label containing the old mark with some additional words. In 1884 def'ts., in ignorance of pltf's. rights, adopted for their beer a label containing a picture of a fat man & the words "John Bull Registered"; & they continued this user after knowledge of pltf's. marks. This label was not registered as a trade mark, but only registered at Stationers' Hall. Pltf's. moved to restrain def'ts. from infringing their trade marks & from passing off their beer as pltf's. Def'ts. moved to have pltf's. marks expunged. In the course of the trial it was discovered that the words "John Bull" had been used by another firm in connection with beer from 1875 to 1890, but their beer had only a local sale, & the use of those words was now abandoned:—*Held*: assuming the registration of the words "John Bull" might have been successfully opposed, the ct. ought not now, in the

exercise of its discretion under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 90, to order those words to be expunged.—*PAINE & CO. v. DANIELLS & SONS' BREWERIES, Re PAINE & CO.'s TRADE MARKS, [1893]* 2 Ch. 567; 62 L. J. Ch. 732; 68 L. T. 801; 42 W. R. 40; 9 T. L. R. 457; 2 R. 491; 10 R. P. C. 217, C. A.

*Annotations:—Consd. Re Talbot's Trade Mk. (1894)*, 63 L. J. Ch. 264; *Re Wright, Crossley's Trade Mk. (1898)*, 15 R. P. C. 131. *Reid. Field v. Wagon Syndicate, Re Trade Mk. 96,997, [1900]* 1 Ch. 651; *Bourne v. Swan & Edgar, Re Bourne's Trade Mk. (1902)*, 72 L. J. Ch. 168; *Boord v. Huddart (1903)*, 89 L. T. 718; *Re Crossfield, Re California Flg Syrup Co., Re Brook, [1910]* 1 Ch. 130; *Scott Paper Co. v. Drayton Paper Works (1927)*, 44 L. P. C. 529.

**1451. — Word publici juris.]**—(1) Where applts., in 1880, registered in the colony under Trade Marks Act, 1865, the word "Maizena," which they had invented in 1850, registered & enforced in other countries, but had for a quarter of a century allowed to be used in the Colony as a term descriptive of the article, & not of their own manufacture thereof:—*Held*: the word had thereby become *publici juris*, & was no longer registrable as a trade mark.

(2) Where resps. had applied the word to their own manufacture, but did not try to pass the same off as that of applts. by the use of labels & packets calculated to deceive the public on that point; stating, on the contrary, the name of the maker, place of manufacture, & other necessary particulars:—*Held*: they could not be restrained from so doing.—*NATIONAL STARCH MANUFACTURING CO. v. MUNN'S PATENT MAIZENA & STARCH CO., [1894]* A. C. 275; 63 L. J. P. C. 112; 6 R. 462, P. C.

—J.—*See, generally, Part I., Sect. 2, ante.*

*E. Misrepresentation by Plaintiff.*

(a) *In General.*

**1452. General rule.]**—*PERRY v. TRUEFIT, No. 1218, ante.*

**1453. Misrepresentation as to quality.]**—*ESTCOURT v. ESTCOURT HOP ESSENCE CO. (1875)*, 10 Ch. App. 276; 44 L. J. Ch. 223; 32 L. T. 80; 23 W. R. 313, L. C. & L. JJ.

*Annotations:—Reid. Goodfellow v. Prince (1887)*, 35 Ch. D. 9; *Eno v. Dunn (1890)*, 15 App. Cas. 252. *Mentd. Rotch v. Crosbie (1909)*, 54 Sol. Jo. 30.

**1454. — Injunction refused until plaintiff's title established.]**—Pltf. had made a new sort of mixed tea, & sold it under the name of "Howqua's Mixture"; but, as he had made false statements to the public as to the teas of which his mixture was composed, & as to the mode in which they were procured, the ct. refused to restrain def't. from selling tea under the same name, until pltf. had established his title at law.—*PIDDING v. HOW (1837)*, 8 Sim. 477; 6 L. J. Ch. 345; 59 E. R. 190.

*Annotations:—Reid. Perry v. Truefit (1842)*, 6 Beav. 66; *Flavel v. Harrison (1853)*, 10 Hare, 467; *Leather Cloth Co. v. American Leather Cloth Co. (1865)*, 6 New Rep. 20; *Morgan v. McAdam (1866)*, 36 L. J. Ch. 228; *Ford v. Foster (1872)*, 7 Ch. App. 611; *Chavvin v. Walker (1877)*, 37 L. T. 300; *Eno v. Dunn (1890)*, 15 App. Cas. 252; *Bile Bean Manufacturing Co. v. Davidson (1906)*, 23 R. P. C. 725.

**1455. Misrepresentation as to place of manufacture.]**—Pltf's., who were manufacturers of & dealers in cigars in England, imported from Germany cigars made of Havannah tobacco.

issued by them is relevant, & questions addressed to pltf's. manager, on his cross-examination on his affidavit filed in support of the motion, with a view to elicit evidence of such falsity, must be answered by him.—*NOEL (THEO) CO. v. VITZ ORE CO. (1907)*, 17 Man. L. R. 87.—*CAN.*

#### PART V. SECT. 6, SUB-SECT. 6.—E. (a).

**1452 I. General rule.]**—*BILE BEANS MANUFACTURING CO., LTD. v. DAVIDSON (1906)*, 8 F. (Ct. of Sess.) 1181; 43 Sc. L. R. 827; 14 S. L. T. 294.—*SCOT.*

**1453 I. Misrepresentation as to quality.]**—On a motion for an injunction to prevent the use or imitation of pltf's. trade names for their medicinal preparations, the truth or falsity of the representation as to the curative value & ingredients of such preparations made by pltf's. in the advertisements

There was no direct evidence as to the place where they were manufactured, but the ct. found as a fact that they were also manufactured in Germany. Pltfs. sold these cigars in England in boxes on which was a label containing their trade mark which consisted of the words "La Pureza," & a pictorial representation of an Indian woman in a state of semi-nudity holding up a bundle of cigars, two winged boys each holding a shield, & a background representing a portion of some tropical country. On one shield was depicted the arms of Spain, & on the other those of Havannah. In the trade mark as registered the shields were blank. A smaller label contained what was apparently the lithographed signature of "Ramon Romnedo." On each box were branded the words "La Pureza," & "Habana." It was proved that "La Pureza" was an old brand, long disused, of Havannah cigars, & that there was no known existing person of the name of "Ramon Romnedo":—*Held*: as the trade mark, & other marks on pltfs.' boxes together amounted to a "dressing-up" of pltfs.' cigars & a misrepresentation that they were cigars manufactured in the Havannah, the action must be dismissed.—*NEWMAN v. PINTO* (1887), 57 L. T. 31; 3 T. L. R. 685; 4 R. P. C. 508, C. A.; *revers*. S. C. *sub nom.* NATHAN, *NEWMAN & Co. v. PINTO* (HENRY) & SONS, 3 T. L. R. 386.

*Annotations*:—*Consd.* Lewis's v. Goodbody (1892), 67 L. T. 194; *Warsop v. Warsop* (1904), 21 R. P. C. 481. *Refd.* *Jay v. Ladler* (1888), 40 Ch. D. 649; *Hargreave v. Freeman* (1891), 7 T. L. R. 535; *Jamieson v. Jamieson* (1898), 15 R. P. C. 169; *Bible Bean Manufacturing Co. v. Davidson* (1905), 22 R. P. C. 553; *Plotzker v. Lucas* (1907), 21 R. P. C. 551. *Mentd.* *Baschet v. London Illustrated Standard Co.* (1900) 1 Ch. 73.

**1456. No intention to mislead.**—Pltff. is entitled to an injunction restraining a rival trader from the use of a name which is a substantial part of his trade mark, notwithstanding a misrepresentation of fact on the labels constituting the trade mark. Such a misrepresentation, in the absence of any design to mislead, does not disentitle pltt. to relief.

*Applt.*, pltt. in the action, was the owner of a trade mark registered in England in Jamaica, of which the words "Club Soda" were part. On the mark were the words "Manufactured in Ireland by H.M.'s Royal Letters Patent." There was no patent for the manufacture. Resps., whose labels were easily distinguishable from those of applt., used the words "Club Soda" on their labels to describe their own goods:—*Held*: applt. was entitled to an injunction restraining resps. from the use of those words.—*COCHRANE v. MACNISH*, [1896] A. C. 225; 65 L. J. P. C. 20; 74 L. T. 109, P. C.

*Annotation*:—*Refd.* *Powell v. Birmingham Vinegar Brewery Co.*, [1896] 2 Ch. 54.

(b) *As to Registration of Mark.*

**1457. Use of "trade mark"—What representations implied—That device was registered mark.**—A firm of retail dealers, who carried on business in several different branches of trade, registered a trade mark for wearing apparel. They subsequently employed the same mark, with the words "trade mark" attached thereto, upon the labels used in their tobacco department. No such mark had in fact been registered by them in respect of tobacco. Upon the same labels the firm used a device which had been registered by R. in respect of tobacco, & had been assigned by him to W., an employé of the firm. W., having left the employment of the firm, granted a licence to G. to use his trade marks, & G. sold tobacco with a label similar to that of the firm. The firm commenced proceedings against G. to restrain him from passing off his goods as & for the goods of the firm. Upon motion

for an *interim* injunction:—*Held*: (1) the use of the words "trade mark" on goods, attached to a device, amounted to a representation to the public that that device was a registered trade mark; (2) there was also a representation that the device registered by R. was the registered trade mark of pltt.; (3) pltfs. having been guilty of misrepresentation to the public, were not entitled to relief.—*LEWIS'S v. GOODBODY* (1892), 67 L. T. 194.

*Annotations*:—*As to* (1) *Expld.* *Sen Sen Co. v. Britten*, [1899] 1 Ch. 692. *Dbtd.* *Hubbuck v. Brown* (1900), 17 R. P. C. 148.

**1458.** ————*—*.—[In an action to restrain the passing off of goods as those of pltt., where deft. has so imitated the general get-up adopted by pltt. as to be likely to deceive an unwary purchaser into the belief that the goods he is buying are the goods of pltt.'s manufacture, the mere fact that pltt. has employed on packages of his goods the words "trade mark," when in fact he has no registered trade mark, but is only entitled to a trade mark by user, is not sufficient to disentitle him to relief by way of an interlocutory injunction; for the use of the word does not necessarily imply that the person using it has a registered trade mark. To disentitle pltt. to relief in such a case there must be other circumstances, besides the use of the word "trade mark" to imply, contrary to the fact that he has a registered trade mark.—*SEN SEN Co. v. BRITTEN*, [1899] 1 Ch. 692; 68 L. J. Ch. 250; 80 L. T. 278; 47 W. R. 358; 15 T. L. R. 238; 43 Sol. Jo. 315—16 R. P. C. 137.

*Annotation* —*Apld.* *Hubbuck v. Brown* (1900), 17 R. P. C. 148.

**1459.** ———— **That device was registered mark of plaintiff.**—*LEWIS'S v. GOODBODY*, No. 1457, *ante*.

**1460.** — - - **Whether bar to relief.**—*LEWIS'S v. GOODBODY*, No. 1457, *ante*.

**1461.** ————*—*.—*SEN SEN Co. v. BRITTEN*, No. 1458, *ante*.

**1462. Use of "registered"—Costs disallowed.**—Pltfs. were old established manufacturers of "B. Warsop's Cricket Bats." Deft., Alfred Warsop, who was formerly in pltfs.' employ, commenced to sell "A. Warsop's World-renowned Cricket Bats," stamped with his initial & surname, & with a device somewhat similar to that which appeared on pltfs.' bats. The word "registered" appeared on both bats, pltfs.' device being in fact registered as a trade mark, but not deft.'s, although steps had been taken to obtain registration. On pltfs.' motion for an *interim* injunction, no order was made on deft. undertaking to sell his bats without any mark except his name & address "Marylebone":—*Held*: the markings on the two bats were so distinct that it was impossible for an average man about to purchase a cricket bat to be deceived into thinking that deft.'s bat was pltfs.'; & the action was dismissed, but without costs, by reason of deft.'s wrongful user of the word "registered."—*WAR SOP (B.) & SONS, LTD. v. WAR SOP* (1904), 21 R. P. C. 481.

(c) *Use of "Patent" or "Patented."*

**1463. Whether bar to relief—No patent granted.**—*SYKES v. SYKES*, No. 1147, *ante*.

**1464.** ————*—*.—The ct. refused to grant an injunction at the suit of Flavel to restrain Harrison from making & selling a stove by the name of "Flavel's" Patent Kitchener, on the ground, first, that Flavel had falsely assumed to describe the article as being patented; & secondly, that he had known of the use of the name by Harrison four months before he applied for the injunction. But





**1476. — Absence of guilty knowledge.]**—The manufacturers & their London agents sold a liqueur known as "Crème de Menthe Glaciale" in bottles, shaped somewhat peculiarly but common for such liqueurs, with a label upon them bearing those words, & underneath that label a rectangular slip with the word "Cusenier" in plain letters. The managing director of the London agents, having had his suspicions aroused as to the passing-off of a liqueur which was not pl'tfs. at the bars of the Gaiety Theatre, which was controlled by defts., purchased from a barmaid there a bottle from which he had been supplied with liqueur in response to a request for a glass of "Cusenier's Crème de Menthe." The liqueur was not of pl'tfs.' manufacture, & the bottle bore the label of another manufacturer named Perrier with the "Cusenier" white rectangular slip stuck over the word "Perrier." It was not proved how the bottle had been put into this condition, & defts. sought to show by their cellar books that they could not have had, on the day in question, a Perrier bottle with or without an additional label:—*Held*: defts., whether with the guilty knowledge of their directors or not, had passed off as a liqueur of pl'tfs. that which was not a liqueur of pl'tfs., & pl'tfs. were entitled to an injunction, with 20s. damages & costs.—*CUSENIER (EL) FILS, AÎNÉ, ET COMPAGNIE & GEORGE IDLE CHAPMAN & CO., LTD. v. GAIETY BARS & RESTAURANT CO., LTD. (1902), 19 R. P. C. 357.*

**1477. — In absence of explanation.]**—Pl'tfs. were the owners of a brand of cigars well known as "La Corona," & were the proprietors of a trade mark registered under the Act of 1905 of which those words were a prominent part, & the words appeared on the outside & inside of the boxes in which their cigars were sold. Such cigars were asked for as "La Corona" or "Corona." The word "Coronas" was used by a number of manufacturers of cigars to indicate, not a brand, but a particular shape or a particular size & shape. Defts. were restaurant keepers in Cheapside, & sold cigars to their customers & sometimes to other people. Pl'tfs. complained of the sale by defts. of a bundle of cigars on the ribbon of which the words "Corona de Alfonso" appeared under the words "Arnyas del Rey," & complained also of two sales, one of "Corona" cigars & the other of "La Corona" cigars by a boy employed by pl'tfs. in the restaurant to sell cigars. On the first mentioned sale the goods were described as "Cabinet Coronas" in the receipt given to the purchaser. It was held at the trial that, having regard to the use of "Coronas" as a size mark, a person seeing the ribbon would not be entitled to assume that "Corona" as used on it meant the brand, & that the ribbon was not calculated to deceive, & that on the first sale there was no passing off; that on the other two sales there was passing off by the boy, but that it ought not to be inferred that he was authorised to do so or that defts. were guilty of passing off; & that there was no infringement of trade mark. Judgment was given for the defts. with costs. Pl'tfs. appealed, but on the appeal relied only on passing off:—*Held*: defts. were, in the absence of any explanation, responsible for the

passing off by the person entrusted with the sale of cigars, & on the facts pl'tfs. were entitled to an injunction.—*HAVANA CIGAR & TOBACCO FACTORIES, LTD. v. TIFFIN (1905), LTD. (1900), 20 R. P. C. 473, C. A.*

*Annotation:—Reid, Havana Cigar & Tobacco Factories v. Oddenino, (1924) 1 Ch. 179.*

**1478. — Absence of fraud — Distinction between claim for injunction & claim for damages.]**—Pl'tfs., who were respectively the proprietors of two well known soaps called "Lux" & "Monkey Brand," each commenced an action against deft. society claiming an injunction to restrain them from passing off any soap not manufactured by pl'tfs. as & for pl'tfs.' soap. Defts. were a co-operative society having several shops in the district of Masbro', & they received their supplies from a very large trading corp'n. called the Co-operative Whole sale Society, deft. society being, in conjunction with other & similar local societies, a constituent member of this corp'n. It appeared from the evidence that at a meeting of deft. society in 1906 it had been decided to discontinue the sale of private makers' soaps & to stock & sell only soaps made by the "C.W.S.," & instructions were then given to the managers & assistants of the various shops to say, when asked for private makers' soaps, that they did not stock them & to offer instead "C.W.S." soaps. Pl'tfs. instituted a series of test purchases, & called witnesses, who stated that "C.W.S." soap had been supplied in substitution for "Lux" & "Monkey Brand" without any remark being made. At the trial defts. offered to give an undertaking that no substitution should take place in the future; pl'tfs. however pressed for an injunction:—*Held*: (1) there had not been any actual fraud nor intention to deceive on the part of defts., & if anything wrong had been done, it had been accidental or inadvertent on the part of a careless shopman; all ground of complaint had long since ceased; & an undertaking being given on behalf of defts., there would be no injunction & no order as to costs.

(2) It has been suggested that the master ought to be treated in exactly the same way, whether a thing like this has been done by his servants or by himself. I agree that that would be so with regard to damages, but to say that a master threatens & intends to do acts which are directly in disobedience of his orders, which he admits ought never to be done, which he is willing to undertake never to do, & which it is not suggested he ever knew had been done, to say that such a master is to be put in the position of having an injunction granted by the ct. against his doing in future that which he has done his best not to have done, is a proposition to which I decline to assent (*FLETCHER MOULTON, J.J.*).—*LEVER BROTHERS, LTD. v. MASBRO' EQUITABLE PIONEER SOCIETY, LTD., BENJAMIN BROOKE & CO., LTD. v. SAME (1912), 106 L. T. 472; 28 T. L. R. 294; 29 R. P. C. 225, C. A.*

*Annotation:—As to (2) Conad. Goddard v. Watford Co-op. Soc. (1924), 41 R. P. C. 218.*

**1479. — Servants knowingly passing off.]**—Pl'tfs. manufactured & sold Bovril & other meat extracts in fluid form. Deft. co., restaurant keepers, who had refused to stock Bovril, had in response to "trap" orders by pl'tfs.' employees,

#### PART V. SECT. 6, SUB-SECT. 6.—F.

**1476 i. Whether employer liable — Absence of guilty knowledge.]**—Deft. was indicted & convicted under s. 400 (b) of the Criminal Code for having unlawfully filled bottles with an article of food for the purpose of sale or traffic therein, such bottles having stamped upon them the trade mark of an incorporated co. The evidence

showed that the bottles in question were filled by deft.'s servant without deft.'s knowledge. The jury returned a verdict of "guilty without knowledge":—*Held*: the clear object of the statute being to protect manufacturers & others in the use of their registered trade marks, knowledge on the part of deft. was not of the essence of the offence & the trial judge was right

in treating the verdict rendered as one of guilty.—*R. v. NEWCOMBE (1918), 52 N. S. L. 85; 40 D. L. R. 85; 29 Can. Crim. Cas. 249.—CAN.*

**1476 ii. —**—*MONTGOMERIE & CO., LTD. v. YOUNG BROTHERS (1904), 21 R. P. C. 285.—SCOT.*

**1476 iii. —**—*O. T. LTD. v. CUMMING & CO. (1914), 32 R. P. C. 69.—SCOT.*



*Sect. 6.—Action for passing off: Sub-sect. 6, F.; sub-sect. 7, A. & B. (a) & (b), & C.]*

through their servants & agents systematically supplied in response to orders for "Bovril" or "Bovril & Soda," at one of their establishments a fluid meat extract from a bottle plainly labelled "Oxo," without any explanation or statement. The purchasers did not in the majority of instances see the bottles from which they were supplied. Pltfs. brought an action for passing off & moved for an interlocutory injunction to restrain defts., their servants & agents, from passing off any meat extract, or other goods not of pltfs.' manufacture as & for the goods of pltfs.; defts. contested pltfs.' right to an injunction. The hearing of the motion was treated as the trial of the action:—*Held*: deft. co.'s servants having knowingly & systematically supplied Oxo in the place of Bovril were doing what was calculated to deceive & an injunction was granted with costs.—*BOVRIL, LTD. v. BODEGA Co., LTD.* (1916), 33 R. P. C. 153.

**SUB-SECT. 7.—RELIEF.**

*A. In General.*

**1480. Whether special damage must be proved.]**

—*BLOFIELD v. PAYNE*, No. 1555, *post*.

**1481. ———.]**—Pltf. & another person, who carried on distinct trades at different places of business, had derived, from a common predecessor in their respective businesses, the right to use the name of Dent as a trade mark. Defts. having infringed this right: *Held*: (1) pltf., without averring special damage, might sue alone for an injunction, & for the delivery up of the articles so marked to have the name erased; (2) he might sue alone for an account of profits made by deft. out of articles so marked, & for payment to pltf. of such part of such profits as pltf. should be entitled to.

(3) If other parties are necessary for any part of the relief prayed, that is sufficient to sustain a demurrer for want of parties; & it is no answer to such demurrer to say that that part of the relief may be waived at the hearing.—*DENT v. TURPIN, TUCKER v. TURPIN* (1861), 2 John. & H. 139; 30 L. J. Ch. 495; 4 L. T. 637; 7 Jur. N. S. 673; 9 W. R. 548; 70 E. R. 1003.

*Annotations:—As to (1) Distd. Batty v. Hill* (1863), 1 Hem. & M. 264. *Apld. Braham v. Beacham* (1878), 7 Ch. D. 848. *Consd. Sheehan v. G. E. Ry.* (1880), 16 Ch. D. 59. *Expld. Re Ehrmann's Applns.*, [1897] 2 Ch. 495. *Refd. Leather Cloth Co. v. American Leather Cloth Co.* (1863), 1 Hem. & M. 271; *Ainsworth v. Walmisley* (1866), L. R. 1 Eq. 518. *As to (2) Consd. Southorn v. Reynolds* (1865), 12 L. T. 75. *Generally, Refd. Thile v. Henshaw* (1886), 53 L. T. 919; *Goddard v. Watford Co-op. Soc.* (1924), 41 L. P. C. 218.

**1482. ———.]**—*WALKWICK TYRE CO., LTD. v. NEW MOTOR & GENERAL RUBBER CO., LTD.*, No. 1401, *ante*.

**1483. Necessity for representation to defendant—That use of name calculated to deceive.]**—(1) Before the ct. will interfere to prevent one trader from making fraudulent use of the name of another, it requires to be satisfied not only that the course taken by deft. is calculated to deceive the public, but that representation has been made to him by pltf. that it will have that effect.

(2) The ct. has always conceded to persons who have taken an important part in any business the full benefit of this, & the right of informing the whole world that they come from such business (*WIGRAM, V.-C.*).—*WILLIAMS v. OSBORNE* (1865), 13 L. T. 498.

*B. Acquiescence and Delay.*

*(a) Acquiescence.*

**1484. What amounts to acquiescence—Knowledge of wrongful acts—Failure to assert rights.]**—R., pltf., was the registered owner of an old trade mark for laundry blue consisting of the words "Oval Blue," & the evidence showed that "Oval Blue" had for many years meant pltf.'s, which was sold in packets of an oval shape. R. brought an action against B. to restrain him from passing off his goods as or for the goods of pltf. At the trial of the action, the only ground of complaint relied on in reference to the alleged passing off was the use by deft. of the oval shape in the get-up of his goods. It was held to be proved at the trial that, in three instances, pltf. had become aware of the user by other persons of the oval shape, & had neglected to attack them, & in one of these instances, had neglected so to do, although the person using such shape had expressly declined to discontinue using it:—*Held*: although common use of the words oval blue was not established, yet the action must be dismissed, owing to the neglect of pltf. to assert his rights.—*RIPLEY v. BANDEY* (1897), 14 R. P. C. 591.

*Annotation:—Dtd. Reddaway v. Stevenson* (1902), 20 R. P. C. 276.

**1485. ———.]**—*After inquiries as to position.]*—*REDDAWAY (F.) & Co., LTD. v. STEVENSON & BROTHER, LTD. & STEVENSON*, No. 1237, *ante*.

**1486. Whether bar to relief—Injunction.]**—*RIPLEY v. BANDEY*, No. 1484, *ante*.

**1487. ———.]**—*REDDAWAY (F.) & Co., LTD. v. STEVENSON & BROTHER, LTD. & STEVENSON*, No. 1237, *ante*.

**1488. ——— Damages.]**—*REDDAWAY (F.) & Co., LTD. v. STEVENSON & BROTHER, LTD., & STEVENSON*, No. 1237, *ante*.

**Laches & acquiescence generally.]**—*See EQUITY*, Vol. XX., pp. 523–541, Nos. 2488–2587.

*(b) Delay.*

**1489. What delay bars relief—Four months.]**—*FLAVEL v. HARRISON*, No. 1464, *ante*.

**1490. ——— Nine or ten months.]**—In a suit to restrain the user of names in trade in a fraudulent manner, the right to an interlocutory injunction is lost by a delay in filing the bill of nine or ten months since the discovery of the user.—*ISAACSON v. THOMPSON* (1871), 41 L. J. Ch. 101; 20 W. R. 196.

**1491. ——— Two to three years—Injunction claimed in aid of legal right.]**—When an injunction is sought in aid of a legal right, the ct. is bound to grant it if the legal right is established. Therefore mere lapse of time will not be a bar to the granting of the injunction, unless it would be a bar to the legal right. To an action for an injunction to restrain deft. from representing that the business carried on by him was the same as that carried on by pltf., it was objected that pltf. had known for between two & three years before issuing his writ the facts on which he relied:—*Held*: this delay was no bar to the action.—*FULLWOOD v. FULLWOOD* (1878), 9 Ch. D. 176; 47 L. J. Ch. 459; 26 W. R. 435; *sub nom. FULLWOOD v. FULLWOOD*, 38 L. T. 380.

*Annotations:—Apld. Rowland v. Michell* (1896), 75 L. T. 65. *Fold. Tollance Rubber Co. v. Tollance Tyro Co.* (1924), 42 R. P. C. 91. *Refd. Raggett v. Findlater* (1873), L. R. 17 Eq. 29; *Evans v. Davis* (1878), 27 W. L. 285; *Jameson v. Jameson* (1888), 15 R. P. C. 169; *London General Omnibus Co. v. Lavell* (1900), 83 L. T. 453.

**PART V. SECT. 6, SUB-SECT. 7.—B. (b).**

**1489 i. What delay bars relief—Four months.]**—*CHINN v. THOMAS* (1879), 5 V. L. R. (Eq.) 188.—**AUS.**

**1492. — Six months.]—COUNTY CHEMICAL Co., LTD. v. FRANKENBURG, No. 1333, ante.**

**1493. — Four years—Military service.]—POIRET v. POIRET (JULES), LTD. & NASH, No. 1142, ante.**

**1494. — Due to collection of evidence—As to cases of deception.]—LEE v. HALEY, No. 1130, ante.**

**1495. — Partially due to circumstances beyond control.]—RELIANCE RUBBER CO., LTD. v. RELIANCE TYRE CO., LTD., No. 1206, ante.**

**— Interlocutory injunction.]—See Nos. 1542, 1543, post.**

**1496. Necessity for knowledge of wrongful acts.]—We were invited to consider the case from the point of view that pltf. co. alone was the rightful producer & vendor of "Whitstable Oysters," & that the Sea Salter & Ham co., which I shall hereafter call the Sea Salter co., is to be treated as having originally sold its oysters wrongfully as "Whitstable Oysters," & has not been restrained from continuing the wrongful act merely owing to the laches of pltf. co. There is nothing before us to justify such a method of dealing with the case or with the evidence, & indeed on this point it is useful to refer to the reasons offered by Mr. Anderson the chairman of pltf. co., in his evidence, at page 40 of the printed shorthand notes for pltf. co. admitting the right of the Sea Salter co. to sell its oysters as "Whitstable Oysters," & to the statement there made by Mr. Anderson that pltf. co., when it had to consider the question of the rights of the Sea Salter co., had, up to that time, remained in ignorance of the conduct of that co. Admitting such ignorance, it is difficult to see how there could have been laches on the part of pltf. co. at that time. The fact is that we have to consider the state of things existing at the date of the alleged wrongful acts of defts., & at that time the right of the Sea Salter co. to sell oysters as "Whitstable" was clear & admitted (ROMER, L.J.). WHITSTABLE OYSTER FISHERY (Co. v. HAYLING FISHERIES, LTD. & TABOR (1901), 18 R. P. C. 434, C. A.**

**Laches & acquiescence, generally.]—See EQUITY, Vol. XX., pp. 524-541, Nos. 2488-2587.**

#### *C. Offer by Defendant.*

**1497. Whether order for relief made in court or in chambers.]—Pltfs. were owners of a trade mark consisting of a demon's head & the words "The Demon," & they manufactured tennis racquets & sold them stamped with this mark. They commenced this action to restrain deft. from passing off his racquets as & for pltfs.' racquets by the use of the title "The Demon," & claimed an account or damages. Deft. had purchased twenty-four racquets of the same shape as pltfs.' racquets, & his manager had exposed some of them for sale, attaching to them a small ticket with "Demon" written on it in ink, & also had written "Demon" on the paper covers for holding the racquets. Two of these racquets were sold by deft.'s manager to purchasers on behalf of pltfs., & at their request, the manager placed the word "Demon" on the invoices. On pltfs.' solr. writing to deft., the latter at once apologised. Pltfs., however, commenced the action. Deft. then offered to undertake not to interfere with**

pltfs.' trade mark, or to consent to an order in the terms of the writ to be obtained by summons in chambers, & to account for the profits of seven racquets which he admitted to have sold. Pltfs., however, moved for an injunction. An order was made for a perpetual injunction in the terms of the writ, with the costs of the action; but the costs were not to exceed such costs as would have been incurred if an order had been made in chambers, by consent, for an injunction; an account of profits was ordered, the costs of the accounts being reserved.—SLAZENGER v. PIGOTT (1895), 12 R. P. C. 439.

**Annotations:—***N.F. Smith & Jones v. Service, Reeve, [1914] 2 Ch. 576. Held. Fram Manufacturing Co. v. Morton (1922), 40 R. P. C. 33.*

**1498. —.]—Pltfs. having commenced an action to restrain defts. from using the name "Gandy" & from infringing their registered trade marks, defts. agreed to submit & to pay the costs, including the costs of obtaining an order of the ct. in the cheapest possible manner, namely, by summons. Minutes of an order having been agreed upon, pltfs. served notice of motion for an injunction, & the action came on in ct. as a short cause. Defts. raised the point that pltfs. were only entitled to the costs which would have been incurred if the order had been obtained in chambers:—*Held*: without laying down any general rule on the subject, pltfs. were entitled to bring on the matter in ct. & to the costs of the action.—GANDY BELT MANUFACTURING CO., LTD. v. FLEMING, BIRKBY & GOODALL (1901), 18 R. P. C. 276.**

**Annotations:—***Fold. Smith & Jones v. Service, Reeve, [1914] 2 Ch. 576. Held. Fram Manufacturing Co. v. Morton (1922), 40 R. P. C. 33.*

**1499. —.]—SMITH (J. T.) & JONES (J. E.), LTD. v. SERVICE, REEVE & CO., No. 1006, ante.**

**1500. —.]—A passing off action may be a case of such a character as that it is desirable, on a judgment for an injunction by consent, publicity, should be given to the order & that therefore pltf. should be allowed the costs of a motion for judgment in ct., & not merely the costs of obtaining an order in chambers & held that in this particular case such costs should be allowed.—FOX v. LUKE (1925), 43 R. P. C. 37.**

**1501. Effect on relief—Injunction—Offer after writ.]—SLAZENGER v. PIGOTT, No. 1497, ante.**

**1502. —.]—JAMESON & SON, LTD. v. CLARKE, No. 1512, post.**

**1503. —.]—Plaintiff unreasonably pursuing case.]—LEVER BROTHERS, LTD. v. MASBRO' EQUITABLE PIONEER SOCIETY, LTD., BROOKE (BENJAMIN) & CO., LTD. v. SAME, No. 1478, ante.**

**1504. —.]—Offer before writ—Infringing circulars remaining in circulation.]—Defts., exors. of L. H., a wine merchant, issued 35,000 circular price lists offering to sell "T.'s" 1908 vintage port at 27s. per dozen bottles. To the trade & public, vintage port described as "T.'s" denoted a wine of pltfs.' The wine mentioned in defts.' lists was not "T.'s," which sold at 34s. per dozen, but wine shipped by A. D. T. & the entry was made by inadvertence & in forgetfulness of pltfs.' rights. On their attention being called to the matter, defts. abandoned the use of the name "T.'s"**

from defts. before the issue of the writ to discontinue the use of the label.

Although pltfs. got the consequent relief of a perpetual injunction, pltfs. costs were under the circumstances refused.—ROBERTSON & SON v. PERKINS & CO., LTD. (1886), 2 Q. L. J. 173.—AUS.

#### **PART V. SECT. 6, SUB-SECT. 7.—C.**

**1501 I. Effect on relief—Injunction—Offer after writ.]—RADWAY v. COLEMAN (1868), 15 Gr. 50.—CAN.**

**1501 II. —.]—VALENTINE v. VALENTINE (1892), 31 L. R. Ir. 488.—IR.**

**a. Effect on costs—Offer before writ.]—Pltf. in this case sued defts. for using a label, like that of pltfs., bearing the name of William Teacher & Son, Dundee, claiming £1,000 damages, & a perpetual injunction. It was clear from the evidence, that pltfs. could have had an undertaking**

*Sec. 6.—Action for passing off: Sub-sect. 7, C., D., E. & F. (a) & (b) i.]*

& offered an undertaking not to use it again, but plffs., wishing to get a written apology & undertaking for publication commenced an action claiming an injunction against defts., passing off port wine not plffs.' as & for plffs.' port wine. Defts. in their pleadings offered an undertaking not to use the name, & having transferred L. H.'s business to a limited co., alleged that no cause of action existed at the issue of the writ in the action, & they paid 40s. into ct. by way of damages:—*Held*: the circulars remained a continuing offer, the effects of which were not counteracted by anything that defts. had done, & there was therefore a good cause of action for an injunction when the writ was issued, & an injunction ought to be granted.—*YEATMAN v. HOMBERGER & Co. (1912)*, 107 L. T. 43; 56 Sol. Jo. 614; 20 R. P. C. 561; *on appeal*, 107 L. T. 742, C. A.

*Annotation:—Refd. Hindhaugh v. Inch (1923)*, 40 R. P. C. 368.

**1505. — Account of profits.—Offer after writ.]**—*SLAZENGER v. PIGOTT*, No. 1497, *ante*.

**1506. Effect on costs.—Whether on scale as if order made in chambers.]**—*SLAZENGER v. PIGOTT*, No. 1497, *ante*.

**1507. — — —.]**—*GANDY BELT MANUFACTURING CO., LTD. v. FLEMING, BIRKBY & GOODALL*, No. 1498, *ante*.

**1508. — — —.]**—*FOX v. LUKE*, No. 1500, *ante*.

**1509. — Offer after writ.—Refusal to pay costs.—Action proceeding to trial.]**—Deft. innocently used plffs.' trade marks, & on being served with the bill, he removed the labels, & gave an undertaking not to sell any more, but refused to pay the costs. The suit was continued to a hearing, & the account of profits, which were very trifling, was waived:—*Held*: deft. must pay the whole costs of suit.—*BURGESS v. HILLS (1858)*, 26 Beav. 244; 28 L. J. Ch. 356; 32 L. T. O. S. 328; 5 Jur. N. S. 233; 7 W. R. 158; 53 E. R. 891.

*Annotation:—Refd. Moort v. Conston (1864)*, 33 Beav. 578.

**1510. — Offer unacceptable to plaintiff.]**—*HIRSCH v. HIRSCH (OSCAR) & Co. (1886)*, 2 T. L. R. 318.

**1511. — Plaintiff unreasonably pursuing case.]**—*LEVER BROTHERS, LTD. v. MASBRO EQUITABLE PIONEER SOCIETY, LTD., BROOKE (BENJAMIN) & Co., LTD. v. SAME*, No. 1478, *ante*.

**1512. — Costs after offer.]**—*J. J. & S.*, distillers of whisky in Dublin, which they sold in casks to retailers, supplied their customers with two descriptions of labels, one for three years old whisky bearing their registered trade mark "J. J. & S.", the other bearing the trade mark & three stars, for use on bottles containing whisky at least seven years old. C., having purchased from them some of their three years old whisky, & been supplied with a number of the first kind of label, got imitations made of the second description of label, with the distinctive mark of three stars, affixed same on bottles not containing seven years old whisky, & sold it as the seven years old whisky. On being written to he stated that he had used the label merely for ornament, & denied that he had sold the whisky as seven years old whisky or committed any fraud, & promised not to use the label again. The solrs. for J. J. & S. replied, "You have committed a gross fraud; plffs. will require you to pay £50; also £10 to Belfast General Hospital & £10 for costs; also to sign an apology to be published in two newspapers, & to deliver up all the imitation labels in your possession." The solr. for C. wrote characterising the terms as extortionate, but

offering to pay any costs incurred up to date & sign a letter of regret. J. J. & S. then commenced an action against C. Thereupon his solr. wrote on Oct. 11, 1901, to plffs.' solrs. offering to sign a consent to an injunction & to pay plffs.' solrs. costs properly & necessarily incurred. Plffs. went on to trial, & proved that deft. had on two occasions sold the whisky as plffs.' seven year old whisky. Deft.'s counsel, while not resisting the injunction, submitted that plffs. were entitled only to the costs incurred prior to the date of the letter in which they offered to consent & to pay the costs. The ct. held that deft. was not entitled to the exemption he asked for, & granted the injunction with costs.—*JAMESON & SON, LTD. v. LARKE (1902)*, 19 R. P. C. 255.

**1513. — Offer before writ.—Offer as to infringement of mark.—No offer as to passing off.]**—*HAT MANUFACTURERS SUPPLY CO., LTD. v. TOMLIN BROTHERS (1906)*, 23 R. P. C. 413.

#### *D. Innocent User.*

**1514. Whether relief granted.—Injunction.—No unnecessary litigation.]**—The bill alleged that deft. sold brushes, on which the trade mark of plff. was stamped, & prayed for an account & an injunction. Plff., directly after the filing of the bill, obtained the usual injunction. Deft. by his answer stated, that he had sold such brushes on two occasions only, when he believed that he had sold them to agents of plff.; but that he had had no intention to sell them without the leave or to the injury of plff.; & that, if plff. had made any application to him, he would have undertaken never to stamp any articles with plff.'s trade marks. Plff. set the cause down on the answer of deft., without entering into evidence; & waiving the account, asked for a perpetual injunction:—*Held*: there had not been any unnecessary litigation on the part of plff., & he was entitled to a perpetual injunction.—*PIERCE v. FRANKS (1846)*, 15 L. J. Ch. 122; 10 Jur. 25; *sub nom.* *PEARCE v. FRANKS*, 6 L. T. O. S. 314.

**1515. — — — Defendants refusing to admit plaintiffs' right to relief.]**—In a passing off action defts., who were commission agents, in pursuance of an order given to them, ordered goods from a manufacturer in Germany, & directed the goods to be made up in the same fashion as a case handed to them by their customer, which was one of plffs.' cases. The German manufacturer consigned the goods to retail dealers in England. Defts. alleged that they were innocent in the matter as they did not know that the case in question was a case used by any English manufacturer, still less that it was the case in which plffs. were in the habit of making up their goods. Defts., in reply to a complaint made before action by plffs.' solrs., wrote a letter in which they did not admit plffs.' right to relief, & stated that they had taken the matter up with the manufacturer & their customer. Plffs. moved for an interlocutory injunction:—*Held*: plffs. were entitled to an injunction in the terms of the notice of motion. By consent the injunction was made perpetual.—*CATTERSON (S. P.) & SONS, LTD. v. ANGLO FOREIGN MANUFACTURING CO., LTD. (1910)*, 28 R. P. C. 74.

**1516. — — —.]**—The proprietors of a trade mark, consisting of the word "Sferavox," & registered in classes 8 & 9 in respect of wireless loud speakers brought an action for infringement of the mark & for passing off. They had previously moved the vacation ct. for an injunction to restrain defts. from infringement & passing off: & defts. undertaking in terms of the notice of motion, no

manufacture were asked for, other goods were supplied. — THOMSON & Co. v. ROBERTSON (1888), 15 R. (Ct. of Sess.) 880; 25 Sc. L. R. 649 — SCOT.

"Avro" aeroplanes, aeroplanes not made by plfts., which defts. had since the war acquired from the Aircraft Disposal Board of the Ministry of Munitions. Defts. alleged that the name "Avro" was not distinctive of aeroplanes made by plfts., but indicated a machine of a certain type by whomsoever made :—*Held* : an injunction, which had been granted on *ex parte* application, restraining defts. from selling or offering for sale any aeroplanes not being of plfts.' manufacture as "Avro" goods, ought to be continued until the trial or further order with the addition, assented to by plfts., that was not to prevent deft. co. from selling aeroplanes made according to the design Avro 504 K. as aeroplanes "Avro type" or "type Avro."—*ROE (A. V.) & Co., LTD. v. AIRCRAFT DISPOSAL CO., LTD.* (1920), 37 R. P. C. 249.

*Annotation* :—**Reid.** Farina v. Silverlock (1855), 3 Eq. Rep. 883.

**Annotations:—***Apld.* Tallerman v. Dowsing Radiant Heat Co., [1900] 1 Ch. 1. *Refd.* Braham v. Bustard (1863), 1 Hen. & M. 447; Leather Cloth Co. v. American Leather Cloth Co. (1863), 2 New Rep. 481.

1533. — No intention to pass off. — Pltf. having invented a system of treating diseases by hot air, there appeared in a medical paper an article containing a favourable account of this system with particulars of its application to specific cases. Dft. who was the inventor of a rival system of hot air treatment, circulated amongst the patients of pltf. a pamphlet containing extracts from this article, but the extracts omitted all mention of pltf.'s name, & were so made as to induce the belief that the article, & the specific statements of fact therein, related to dft.'s system. There was evidence that some of pltf.'s patients were misled by these extracts, but no evidence of any actual damage. Upon motion for injunction: — *Held*: in the absence of any attempt by dft. to pass off his system as pltf.'s the ct. ought not to interfere by way of interlocutory injunction. — *TALBERMAN v. DOWSING RADIANT HEAT CO.*, [1900] 1 Ch. 1: 69 L. J. Ch. 40, C. A.

- **Effect of offer by defendant.**]—*See* Nos. 1497, 1504, *ante*.

ii. *Interlocutory Injunction.*

Interlocutory Injunctions generally.] — See INJUNCTION, Vol. XXVIII., pp. 371 *et seq.*

**1535. Whether granted—Plaintiffs' right not established.**—In cases of claims to the exclusive right to particular marks on manufactures, the ct. exercises a jurisdiction over legal right, & therefore will not interfere by injunction in the first instance, except in strong cases, & it generally does so, by putting the parties on the terms of asserting their legal right by action at law.

*Annotations*.—**Apld.** Collins *v.* Reeves (1858), 28 L. J. Ch. 56. **Refd.** Rodgers *v.* Nowill (1847), 6 Hare, 325. **Mentd.** Bury *v.* Bedford (1863), 32 L. J. Ch. 741; Hall *v.* Barrows (1863), 4 De G. J. & Sm. 150; *Re Du Cros*, [1912] 1 Ch. 644.

1537. — — — —.]—An injunction to restrain def. from using the particular style or title adopted by pltf., will not be granted if the ct. entertains the slightest doubt of pltf.'s right to sustain his title at law.—*PURSER v. BRAIN* (1848), 17 L. J. (Ch. 141).

**1538. Whether granted—Reasonable probability of damage to be shown.]**—To obtain an injunction on interlocutory application to restrain a co. from trading under a name very similar to that of a previously established co., it is not enough to show the similarity of the names, but also that there is a reasonable probability of damage in consequence to the business of pltf. co.—**GENERAL REVERSONARY INVESTMENT CO. v. GENERAL REVERSONARY CO., LTD.** (1888), 1 Meq. 65.

1539. —————. - L. M. Pinet, trading as Maison Pinet, who carried on a small & recently established business in boots & shoes made for a special purpose, sold that business to deft. co. One of the objects of the co. was, by its memorandum of assocn., stated to be "to carry on business in England & elsewhere as bootmakers & shoemakers." Pltfs. had for over forty years carried on business in the manufacture & sale of boots & shoes, their goods being commonly known as "Pinet's."

They accordingly applied for an interlocutory injunction to restrain deft. co. from carrying on business as manufacturers or vendors of boots or shoes under the name of "Maison Pinet, Ltd." or under any other name or description of which the name "Pinet" formed part, & which was so arranged or contrived as, by colourable imitation of pltf's. trading style or otherwise, to be calculated to represent or lead to the belief that deft. co. were carrying on pltf's. business, & from in any other manner representing or acting so as to lead to such belief as aforesaid :—*Held* : although the business of L. M. Pinet was not the same as pltf's. yet the co. formed to acquire it had no intention of restricting their operations in any way, & would probably develop that business as far as possible, & develop it at the expense of pltf's. ; therefore, a case had been made out justifying the interference of the ct. at the present stage of the proceedings.—PINET (F.) ET CIE v. MAISON LOUIS PINET, LTD. (1897), 77 L. T. 322; 14 T. L. R. 2; 14 R. P. C. 933, (C. A.; *subsequent proceedings*, [1898] 1 Ch. 179.

1540. — **Probability that plaintiff will succeed at trial.**—*WARNER v. WARNER*, No. 1157, *ante*.

1541. — *J. & J. C. for many years sold mustard in tins bearing a distinctive label. F. & Co. sold mustard in similar tins, bearing a label somewhat similar in colour, type, & letter-press & arrangements, to J. & J. C.'s label, to which J. & J. C. raised no objection. In 1897, F. & Co. changed their label for one having a much closer resemblance to J. & J. C.'s label. J. & J. C. thereupon brought an action against F. & Co. to restrain the use of this new label, & moved for an interlocutory injunction. Affidavits of traders were filed by both sides on the question of the probability of deception:—Held: the approximation of deft.'s new label to pltf.'s label was close: treating it as a matter to be judged simply by the eye, there was a reasonable probability that at the trial a case of deception would be made out, & an injunction ought to be granted until the trial to restrain defts. from using the label complained of, or any other label which would lead the public to believe that defts.' goods were the goods of pltf's. Subsequently, by consent, a perpetual injunction was granted in above terms.—*COLMAN (J. & J.), LTD. v. FARROW & CO.* (1897), 15 R. P. C. 198.*

1542. — **After delay.**—*DAWSON v. WHITE* (1897), 41 Sol. Jo. 797.

1543. — *Pltf's, Van Oppen & Co., Ltd., had for many years traded both in & out of the United Kingdom as carriers. From 1890 they had done business at Manchester, where in 1897 they appointed deft. Van Oppen to be their representative. In June, 1901, he left their service, but continued the business of a carrier at the same address as L. Van Oppen & from July, 1901, as L. Van Oppen & Co. He adopted a special form of consignment note, which was practically identical with that of pltf's. Upon pltf's motion for an injunction there was evidence that deft.'s carters were instructed to collect "goods for Van Oppen":—Held: pltf's were entitled, by way of interlocutory relief, to an injunction restraining deft. from so carrying on business as to lead to the belief that his business was that of pltf's, & from infringing the copyright in the consignment note; but the delay of pltf's disentitled them on the motion to relief with regard to the trade name L. Van Oppen & Co.—VAN OPPEN & CO., LTD. v. VAN OPPEN (1903), 20 R. P. C. 617.*

1544. — **Before defendant's answer to plaintiff's evidence—Only in extreme cases.**—*The owners & publishers of the well known Bradshaw Railway Guide commenced an action against an individual who had commenced to carry on business under the name Bradshaws Publishing co. to restrain him from using that name or any other name of which "Bradshaw" or "Bradshaws" formed part or otherwise calculated to induce the belief that his business was connected with pltf's business, & from publishing or advertising or obtaining or soliciting advertisements or subscriptions for "Bradshaws Directory" or any other publication the title of which comprised the word "Bradshaw" or "Bradshaws" & other relief; & pltf's moved for an interlocutory injunction. They had sometime before made complaint to deft. When the motion came on for hearing, it was stated that deft., who was then represented, was away on the Continent, & he had not answered pltf's evidence:—Held: on pltf's evidence deft. had been engaged in carrying on a series of gross frauds, & although it is only in extreme cases that the ct. will grant an injunction before a deft. has answered pltf's evidence, this was a case in which*

*an immediate order should be granted. An injunction until the trial or further order was granted.*—*BLACKLOCK (HENRY) & CO., LTD. v. BRADSHAW'S PUBLISHING CO.* (1920), 43 R. P. C. 97.

### iii. Form of Injunction.

1545. **Whether prohibition against selling goods included—No evidence of goods having been sold.**—*There will be no injunction against selling the sauce since that is unnecessary, there being no evidence that deft. has sold the same (BYRNE, J.).*—*POWELL v. FLATHER* (1897), 41 Sol. Jo. 726.

1546. — **Evidence of goods sold.**—*RELiance RUBBER CO., LTD. v. RELiance TYRE CO., LTD.*, No. 1206, *ante*.

1547. **Whether line of conduct prescribed for defendant.**—*Pltf. had a registered trade mark "Sweet Lips" for cachous, & defts. had sold in response to orders for "Sweet Lip Cachous" other cachous known as "Sweet Two Lips" & "Sweet Dreams." Defts. having agreed to consent to an injunction, pltf. submitted to them minutes of an injunction restraining defts. from selling any cachous, not being pltf's, under the name "Sweet Lips" or "Sweet Two Lips," or as or for cachous of those names, or in response to orders for cachous of those names. Defts. wished to add the words "but not so as to prevent defts. from selling cachous under the name of 'Sweet Dreams.'" It was left to the judge to decide the terms of the order:—Held: it was not the practice to insert any qualifying words which might leave it open to defts. to say that the ct. had, in anticipation, laid down a course of conduct which they might pursue.*—*KERFOOT v. COOPER (R. A.), LTD.* (1908), 25 R. P. C. 508.

1548. — *J. — ROE (A. V.) & CO., LTD. v. AIRCRAFT DISPOSAL CO., LTD.*, No. 1529, *ante*.

1549. — *J. — HAVANA CIGAR & TOBACCO FACTORIES, LTD. v. ODDENING*, No. 1106, *ante*.

1550. **Time allowed for change of name.**—*RELiance RUBBER CO., LTD. v. RELiance TYRE CO., LTD.*, No. 1206, *ante*.

1551. **Passing off patented article—Injunction limited to duration of patent.**—*In 1895 a patent was granted for "An improved device for holding or retaining ladies' hair." The device was a combination of a hinged binder as a means of making a secure foundation for the coiffure, with arms or wings as a means of coiling or arranging the hair so as to form a complete edifice. Pltf's, who in 1898 became the registered proprietors of the patent, in that year commenced large sales of the devices, each mounted for the purpose of sale on a show card, the goods so mounted coming to be known in the trade as pltf's. In 1900 defts., having been customers of pltf's, themselves offered for sale a similar device mounted in a similar manner, but not made by or for pltf's. Pltf's brought an action for injunctions to restrain the infringement of their patent & "passing off" with other relief. Defts., at the trial, abandoned their defence as to "passing off," but contended that pltf's patent was invalid for want of novelty & lack of invention, & that it had been anticipated by certain prior specifications:—Held: the interim injunction as to "passing off," which had been granted by the Ct. of Appeal should be made perpetual, with the addition of the words applicable to the expiration of pltf's patent.*—*PARKER & SMITH v. SATCHWELL & CO., LTD.* (1901), 45 Sol. Jo. 502; 18 R. P. C. 290.

*Annotation:—Beld, True & Variable Electric Lamp Syndicate v. Bryant Trading Syndicate* (1908), 25 R. P. C. 461.



*Sect. 6.—Action for passing off: Sub-sect. 7, F. (b) iv., (c) & (d); sub-sects. 8 & 9.]*

*iv. Breach of Injunction.*

**1552. Motion for commitment—Infringement by agent in absence of principal.]—PARKER MANUFACTURING CO., LTD. v. COOPER (1901), 18 R. P. C. 319.**

**1553. Sufficiency of evidence of breach—Absence of direct evidence.]—Pltf.** brought an action against deft. firm, of which S. was the sole partner, for an injunction to restrain them from passing off goods alleged to be a colourable imitation of those of pltf.'s manufacture.

S. made default in pleading, & the injunction was granted in due course.

Later it appeared that similar goods to those complained of were being put upon the market by N., for whom S. was acting as agent for sale.

Thereupon a motion was made for attachment of S. for breach of the injunction. No direct evidence was forthcoming, but the case was rested on admissions by S., which the ct. held to be insufficient, & on the fact that he, having allowed judgment to go against him by default, was estopped from denying that the goods complained of were an imitation of those of pltf.'s manufacture. It was decided that in these circumstances an attachment could not issue. *Pltf. appealed:—Held:* the decision was right & the appeal failed.—**RIPLEY v. ARTHUR & CO. (1902), 86 L. T. 735; 19 R. P. C. 443, C. A.**

*(c) Damages.*

**1554. Mode of relief—Alternative to injunction—Or indictment for false pretences.]—R. v. SMITH, No. 1527, ante.**

**1555. When damages given—Defendant fraudulently invading plaintiff's right—Defendant's goods not proved to be inferior.]—Declaration** stated that pltf., being the inventor & manufacturer of metallic hones, used certain envelopes for same, denoting them to be his; & that defts. wrongfully made other hones, wrapped them in envelopes resembling pltf.'s & sold them as his own, whereby pltf. was prevented from selling many of his hones & they were depreciated in value & reputation, those of defts. being inferior:—*Held:* pltf. was entitled to some damages for the invasion of his right by the fraud of the defts. though he did not prove that their hones were inferior or that he had sustained any specific damages.—**BLOFELD v. PAYNE (1833), 4 B. & Ad. 410; 1 Nev. & M. K. B. 353; 2 L. J. K. B. 68; 110 E. R. 509.**

*Annotations:—Consd. Hodgkiss v. Nowell (1847), 5 C. B. 109. Apud. Dent v. Turpin, Tuckers, Turpin (1861), 2 John. & H. 139; Leather Cloth Co. v. Hirschfeld (1865), L. R. 1 Eq. 299.*

*Consd. Spalding v. Gamage (1915), 81 L. J. Ch. 448. Rejd. Seeley v. Fisher (1841), 10 L. J. Ch. 274; (Tawshay v. Thompson (1842), 4 Man. & G. 357; Burgess v. Burgess (1853), 22 L. J. Ch. 675; Dixon v. Fawcus (1861), 7 Jur. N. S. 895; Singer Manufacturing Co. v. Loog (1882), 8 App. Cas. 15; Reddaway v. Benthall Hemp-Spinning Co. (1892) 2 Q. B. 639. Mentd. Pryce v. Bolcher (1846), 3 C. B. 58.*

**1556. ——— No special damage proved.]—BLOFELD v. PAYNE, No. 1555, ante.**

**1557. Measure of damages—Loss of trade actually suffered—Directly or indirectly.]—SPALDING (A. G.) & BROTHERS v. GAMAGE (A. W.), LTD., No. 1365, ante.**

**1558. ——— Cost of counter advertisement.]—SPALDING (A. G.) & BROTHERS v. GAMAGE (A. W.), LTD., No. 1365, ante.**

**PART V. SECT. 6, SUB-SECT. 7.—F. (o).**

**1559 i. Measure of damages—Injury to reputation.]—Pltf.** was a canvas maker, & manufactured canvas of a superior

quality, & defts. imported canvas of an inferior quality, & branded it with pltf.'s name & sold it as the pltf.'s:—*Held:* pltf. was entitled to substantial damages, for injury to his reputation as a canvas maker, without any proof

**1559. ——— Injury to reputation.]—SPALDING (A. G.) & BROTHERS v. GAMAGE (A. W.), LTD., No. 1365, ante.**

*(d) Account of Profits.*

**1560. Claim by one of several persons entitled—Plaintiff entitled to his share of profits.]—DENT v. TURPIN, TUCKER v. TURPIN, No. 1481, ante.**

**1561. Disclosure of names of buyers.]—Where** a decree has been made directing deft. to account for all goods sold by him with a particular stamp thereon, he is compellable to disclose the names of all persons to whom he has sold any such goods; & if he be unable to give such information precisely, he may then, but not otherwise, be required to disclose the names of all persons to whom he has sold any goods which he will not swear positively were unstamped.—**LEATHER CLOTH CO., LTD. v. HIRSCHFELD (1863), 1 Hem. & M. 295; 11 W. R. 933; 71 E. R. 129; subsequent proceedings (1865), L. R. 1 Eq. 299.**

*Annotation:—Consd. Saccharin Corp'n. v. Chemicals & Drugs Co. (1900), 69 L. J. Ch. 820.*

**1562. Follows right to injunction.]—Pltfs.** registered "The Self Washer" as a trade mark, & sold "Sunlight Self-Washer Soap" in 12 ounce tablets, put up in wrappers made of imitation parchment paper on which certain letterpress was printed in broken or spaced printing. Defts. sold "Goodwin's Self-Washing Soap" in 12 ounce tablets, put up in wrappers of imitation parchment paper, on which was printed in broken or spaced printing letterpress, different in wording from but somewhat similar in character to pltfs.' letterpress. The ct. held that "The Self-Washer" was not a good trade mark, but that the get up of defts.' soap was a fraudulent imitation of the get up of pltfs.' soap, & that pltfs. were entitled to an injunction to restrain the future sales of defts.' soap so got up, & an account of the profits of all sales thereof in the past:—*Held:* the injunction was rightly granted, & the account of profits was rightly directed & ought not to be confined to those sales where defts.' soap was bought under the belief that it was pltfs.' soap.

It is well known that both in trade mark cases & patent cases pltf. is entitled, if he succeeds in getting an injunction, to take two forms of relief as alternative; he may either say, "Now I claim from you the damage I have sustained from your wrongful act"; or, "I claim from you the profit which you have made by your wrongful act" (**COTTON, L.J.**).—**LEVER v. GOODWIN (1887), 36 Ch. D. 1; 57 L. T. 583; 36 W. R. 177; 3 T. L. R. 650; 4 R. P. C. 492, C. A.**

*Annotations:—Folld. Saxlehner v. Apollinaris Co., [1897] 1 Ch. 893. Consd. Smith's Potato Crisps v. Paige's Potato Crisps (1928), 45 R. P. C. 132. Rejd. Boake, Roberts v. Wayland, Re Boake, Roberts' Trade Mks. (1909), 26 R. P. C. 251; Price's Patent Candie Co. v. Ogston & Tennant (1909), 26 R. P. C. 797; Edge v. Nicolls (1910), 80 L. J. Ch. 154; Lines v. Farris (1925), 43 R. P. C. 64.*

**1563. ———.]—SAXLEHNER v. APOLLINARIS CO., No. 1571, post.**

**1564. In respect of what articles—Goods sold by buyers from defendants.]—LEVER v. GOODWIN, No. 1562, ante.**

**1565. When stayed pending appeal—Not unless irreparable injury likely to ensue.]—Re "CARVINO" TRADE MARK, No. 1263, ante.**

**Effect of offer by defendant.]—See No. 1497, ante.**

of special damage.—**WILSON v. SMITH (1902), 2 S. R. N. S. W. 174; 19 N. S. W. W. N. 124.—AUS.**

**1559 ii. ———.]—LITTLEJOHN & SON v. MULLIGAN (1885), 3 N. Z. L. R. 446 (S. C.).—N.Z.**



## SUB-SECT. 8.—APPEAL.

**1566. Grounds of appeal—Misdirection by judge—Failure to comment on correspondence—Commented on by plaintiff's counsel.]**—*CRAWSHAY v. THOMPSON*, No. 1292, *ante*.

**1567. Improper deprivation of costs.]**—*KING (F.) & Co. v. GILLARD & Co.*, No. 1578, *post*.

**1568. Time for appeal—Discretion as to extending time.]**—An action for passing off & a motion to expunge deft.'s trade marks were dismissed & refused respectively on July 11, 1906, & the orders were entered on July 26. Notices of appeal were given on Oct. 24. Pltfs. applied to the Ct. of Appeal for leave to appeal notwithstanding that the notices had not been given within the prescribed time, or that the time for giving the notices might be extended. They alleged that the delay in giving the notices was due to the fact that pltfs. had been advised by counsel, & also by a clerk in the Office of the District Registry in which the action was set down, that the time for giving notice of appeal ran from the date when the orders were entered:—*Held*: the Ct. of Appeal had no power to enlarge the time under the R. S. C., 1883, Ord. 64, r. 7, but it had power under Ord. 58, r. 15, & special leave to appeal ought to be granted.—*REDDAWAY & Co., LTD. v. IRWELL & EASTERN RUBBER CO., LTD.* (1906), 24 R. P. C. 93, C. A.; *subsequent proceedings* (1907), 24 R. P. C. 203, C. A.

## SUB-SECT. 9.—COSTS.

*See, generally, PRACTICE.*

**1569. General rule.]**—As a general rule, the costs of the cause should follow the result of the cause; but an exception will be made where a party has established his object by means of an unnecessary degree of litigation.—*MILLINGTON v. FOX* (1838), 3 My. & Cr. 338; 40 E. R. 956, L. C.

*Annotations:—**Apld.* *Colburn v. Simms* (1843), 2 Hare, 513; *Pierce v. Franks* (1846), 15 L. J. Ch. 122. *Consd.* *Moot v. Conston* (1864), 33 Beav. 578. *Refd.* *Kelly v. Hooper* (1841), 1 Y. & C. Ch. Cas. 197; *Burgess v. Hills* (1858), 26 Beav. 211; *Dixon v. Pauson* (1861), 3 E. & E. 537; *Tonge v. Ward* (1869), 21 L. T. 480. *Mentd.* *Crawshaw v. Thompson* (1842), 4 Man. & G. 357; *Perry v. Truefitt* (1842), 6 Beav. 66; *Spottiswoode v. Clark* (1846), 8 L. T. O. S. 230; *Burgess v. Burgess* (1853), 22 L. J. Ch. 675; *Edleston v. Vick* (1853), 18 Jur. 7; *Welch v. Knott* (1857), 4 K. & J. 747; *Clement v. Maddick* (1859), 1 Glff. 98; *Carlter v. Carlisle* (1862), 31 Beav. 292; *Hall v. Barrows* (1863), 4 De G. J. & Sm. 150; *Leather Cloth Co. v. American Leather Cloth Co.* (1863), 4 De G. J. & Sm. 137; *McAndrew v. Bassett* (1864), 4 New Rep. 12; *Ainsworth v. Wainsley* (1866), L. R. 1 Ex. 518; *Lee v. Haley* (1869), 21 L. T. 546; *Wotherspoon v. Curdie* (1870), 23 L. T. 443; *Ford v. Foster* (1872), 7 Ch. App. 611; “*Singer*” *Machine Manufacturers v. Wilson* (1877), 3 App. Cas. 376; *Levy v. Walker* (1879), 10 Ch. D. 436; *Orr Ewing v. Trade Mks. Regr.* (1879), 4 App. Cas. 479; *Singer Manufacturing Co. v. Loog* (1882), 8 App. Cas. 15; *Re Riviere* (1884), 53 L. J. Ch. 578; *Northwick v. Evening Post* (1888), 37 Ch. D. 449; *Proctor v. Bayley* (1889), 42 Ch. D. 390; *Baker v. Rawson*, *Re Baker's Trade Mks.*, *Re Rawson's Appln.* (1890), 60 L. J. Ch. 49; *Thynne v. Shove* (1890), 45 Ch. D. 577; *Reddaway v. Bonham Hemp-Spinning Co.*, [1892] 2 Q. B. 639; *Paine v. Daniells' Breweries, Re Paine's Trade Mks.*, [1893] 2 Ch. 567; *Powell v. Birmingham Vinegar Brewery Co.*, [1896] 2 Ch. 54; *Cellular Clothing Co. v. Maxton & Murray*, [1899] A. C. 326; *Valentine Meat Juice Co. v. Valentine Extract Co.* (1900), 83 L. T. 259; *Bourne v. Swan & Edgar, Re Bourne's Trade Mks.*, [1903] 1 Ch. 211; *Bow v. Hart*, [1905] 1 K. B. 592; *Boord v. Thorn & Cameron, Thorn & Cameron v. Boord* (1907), 24 R. P. C. 697; *Re Du Cros' Applns.*, [1912] 1 Ch. 644; *Yestman v. Homberger* (1912), 107 L. T. 742; *Brinsmead v. Brinsmead* (1913), 30 R. P. C. 403.

**1570. Discretion of court.]**—Although a successful deft. in a non-jury case has, in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs, the ct. has an absolute & unfettered discretion to award or not to award them to him.—*CAMPBELL*

(*DONALD*) & Co. v. *POLLAK*, [1927] A. C. 732; 96 L. J. K. B. 1132; 137 L. T. 650; 43 T. L. R. 787; 71 Sol Jo. 803, H. L.

**1571. Principles guiding court.]**—(1) The general proposition that nobody has a right to represent his goods as the goods of somebody else is without limit as regards name, origin, honesty of manufacture, or otherwise, & applies to a case where pltf.'s goods largely acquired their value through the exertions of defts. as the sole importers of those goods.

(2) If pltf. is entitled to an injunction in such a case, he is also entitled to an account of profits.

(3) If deft.'s goods on the face of them, & having regard to surrounding circumstances, are calculated to deceive, evidence to prove the intent to deceive is unnecessary, since a man must be taken to have intended the reasonable & natural consequences of his own acts. If, on the other hand, a mere comparison of the goods, having regard to the surrounding circumstances, is not sufficient, then it is allowable to prove from other sources that what is or may be apparent innocence was really intended to deceive.

(4) As regards costs, I intimated to pltf.'s counsel that I intended to be severe. The intention was based on a strong feeling long & increasingly entertained that the costs incurred in cases of this character are unduly large. They are often of little moment to the parties in such litigation by reason of the valuable interests involved; but there are others to be considered besides the parties to the particular litigation, & the importance of preserving a high standard in the administration of justice can scarcely be overrated. Purity, no doubt, stands first, but it is not the only essential, & as in the conduct of all other affairs, a sense of proportion ranks high & has large practical influence. The evil to which I am referring has been especially noticeable, & has again & again been noticed in patent cases; & litigation such as this, though not concerned with a patent, belongs to the same class. The temptation to multiply expert evidence, & to get as much as possible that can, in any event, be of value, “on the notes,” seems to be irresistible, & the difficulty of discriminating in this particular class of cases between what is admissible & what is not, is undoubtedly great. I confess to being by no means free from blame myself. It often seems to be better to allow witnesses to be called & questions to be asked which might with advantage & more strict application of rules, be excluded, rather than waste time in discussing whether they should be excluded or not; & one is apt to forget, until too late, that to sanction evidence in chief precludes objection to cross-examination. I earnestly think that unless judges & counsel co-operate to keep the evidence in this class of cases within narrower limits, they threaten to become a scandal fraught with danger alike to those for whom & those by whom justice is administered. Nevertheless, & although of opinion that in the present case there has been an excessive multiplication of evidence by pltf., & that much of the evidence given on her behalf has been useless, I do not see my way to depriving a successful litigant of any costs which upon taxation are properly allowed, except, of course, those which, as above mentioned, I intend pltf. to pay (*KEKEWICH, J.*).—*SAXLEHNER v. APOLLINARIS CO.*, [1897] 1 Ch. 893; 66 L. J. Ch. 533; 76 L. T. 617; 13 T. L. R. 258; 41 Sol. Jo. 331; 14 R. P. C. 645.

*Annotations:—Generally, Refd.* *Lever v. Bodingfield* (1898), 80 L. T. 100; *Cash v. Cash* (1900), 82 L. T. 655; *Slazenger v. Spalding*, [1910] 1 Ch. 257.

**1572. When defendant liable—Plaintiff partially**

*Sect. 6.—Action for passing off: Sub-sect. 9.*  
*Part VI.]*

unsuccessful—But proving whole case.]—*ONYON v. WASHBOURNE* (1850), 14 L. T. O. S. 503.

**1573. — Defendant insisting on adverse right.]**—A suit was instituted to restrain the user of a trade mark, & for an account. No application was made to deft. before suit, & deft. said he would have desisted if applied to. At the hearing the account was abandoned, but a perpetual injunction was granted:—*Held*: deft. must pay the costs.

A mass of costs has been caused by debt, not giving way in a matter in which in my opinion he had no right to resist (ROMILLY, M.R.).—BURGESS v. ILATELY (1858), 26 Beav. 249; 53 E. R. 894.

1574. ——— After notice that he has defrauded plaintiff.]—*FARINA v. SILVERLOCK*, No. 1107, *ante*.

1575. — Plaintiff asking for relief to which he is not entitled.] — SOCIÉTÉ FRANÇAISE RADIO-ELECTRIQUE v. WEST CENTRAL WIRELESS SUPPLIES, No. 1516, *ante*.

1576. When successful defendant refused costs—  
—Defendant's conduct precluding him from costs.]  
—BASS v. DAWBER, No. 1386, *ante*.

1577. — — — — Except costs of claim abandoned by plaintiff.]—WYLLAM v. CLARKE, [1876] W. N. 68.

**1578. - Irrelevant misrepresentation.]** — A successful deft. cannot be deprived of costs on the ground of improper conduct, *e.g.* a misrepresentation to the public, not connected with the issue between himself & pltf. If in such a case a successful deft. has been deprived of costs he has a right to appeal.

Defts., in an action for passing off their goods as those of pltf., had stated on the wrappers in which their goods were sold that they had obtained certain medals & awards at exhibition. Defts. did not state that the medals & awards had been obtained for the goods to which the action related, & in fact they had been obtained for other goods manufactured by defts. — *Held*: defts. had not acted dishonestly, but even if they had been guilty of misrepresentation it had no relation to pltf.'s case, & was not therefore a ground on which the judge had a discretion to deprive defts. of costs. — *KING (F.) & Co. v. GILLARD & Co.*, [1905]

2 Ch. 7 ; 74 L. J. Ch. 421 ; 92 L. T. 605 ; 53 W. R. 598 ; 21 T. L. R. 398 ; 49 Sol. Jo. 401, C. A.

**Annotations** :—**Consd.** Rotch v. Crosbie (1909), 54 Sol. Jo. 30; Lutter v. Godfrey, (1920) 2 K. B. 47. **Overd.** Campbell v. Pollak, [1927] A. C. 732. **Reid.** Higgins v. Higgins, [1916] 1 K. B. 640; Jackson v. Anglo-American Oil Co. (1923), 92 L. J. K. B. 1000. **Mentd.** Leckhampton Quarries Co. v. Ballinger & Cheltenham R. D. C. (1905), 93 L. T. 93.

1579. Isolated cases of passing off—No costs—  
Plaintiff proving breach of contract.] — JOHN  
KNIGHT & SONS, LTD. v. CRISP & CO., LTD., No.  
1522, *ante*.

1580. — — — Passing off by servant—Employer falling to explain circumstances.]—KODAK, LTD. v. GRENVILLE, No. 1520, *ante*.

1581. — — —.]—BURBERRYS v. WATKINSON,  
No. 1518, *ante*.

1582. — Defendant given costs—Exclusion of costs down to interlocutory injunction—When defendant gave undertaking.]—ARMSTRONG OILER CO., LTD. v. PATENT AXLEBOX & FOUNDRY CO., LTD., No. 1239, *ante*.

—.]—See Sub-sect. 7, E., *ante*.

**1583. Joint defendants.—One defendant innocent.—Separate orders.]**—Pltfs. in an action for infringement of trade marks & passing off sold one quality of champagne intended exclusively for (continental consumption, & another quality intended exclusively for English consumption. They alleged that defts. S. & B. had sold in England the Continental quality as the English quality, under labels that were forgeries of pltfs.' labels. Defts. put in a joint defence. At the trial deft. S. did not appear; deft. B. appeared & alleged that he had acted innocently on behalf of S. It was admitted by pltfs. that the purchasers of the wine had acted in good faith:—*Held*: there had not been fraud on the part of B.; but an injunction was granted against both defts., with an inquiry as to damages against S., but not against B. As to costs, separate orders were made, namely, against S. a full order, but against B., an order for the general costs of the action, except in so far as they had been increased by the issue of fraud, with a set-off in favour of B. of the costs of that issue. - (*CHAMPAGNE HEIDSIECK ET Cie. v. SCOTTO & BISHOP* (1926), 43 R. P. C. 101.)

**Costs against infant.**—*See* INFANTS, Vol. XXVIII., p. 181, Nos. 407, 408.

**Effect of offer by defendant.]—***See* Nos. 1497-1513, *ante*.

## Part VI.—Royal Arms.

*See* Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 106; Trade Marks Act, 1905 (c. 15), s. 68.

**1584. Registrability—Old marks.]—**Resps. were the proprietors of three old marks in respect of tobacco, two of which were registered in 1876, & the third in 1891, which bore (*inter alia*) the device of the Prince of Wales' Feathers & the words "Prince of Wales' Smoking Mixture." At the date of the registration of one of the marks it then owned did supply tobacco to Marlborough House, but since the accession of the present King no warrants had been granted by the Prince of

## PART VI.

c. *Whether English rule applies.*—The English rule prohibiting the use of the Royal Arms, representations

of His Majesty, or of any member of the Royal Family, or of the Royal Crown, or the national arms or flags of Great Britain, as the subjects of

trade marks, is not in force in Canada.—  
**SPILLING BROTHERS v. RYALL** (1903),  
 23 C. L. T. 102; 8 Exch. C. R. 185.—  
**CAN.**

from the register.—*Re IMPERIAL TOBACCO CO.'S TRADE MARKS*, [1915] 2 Ch. 27; 84 L. J. Ch. 643; 112 L. T. 632; 31 T. L. R. 408; 59 Sol. Jo. 456, C. A.

*Annotations*.—*Folld. Re Woodward's Trade Mk.*, Woodward v. Boulton Macro (1915), 85 L. J. Ch. 27. *Refd. Wigfull v. Jackson*, [1916] 1 Ch. 213; *Re Imperial Tobacco Co.'s Trade Mks.*, [1918] 2 Ch. 207.

—[See, now, Trade Marks Act, 1905 (c. 15), s. 68.

**1585. Improper use of Royal Arms—Remedy—Summary prosecution.**—A coal merchant who had had contracts with a Govt. Department, used bill heads, etc., with the Royal Arms printed thereon & the words "Late contractor to her Majesty's Government" printed close to the arms, but no such words as "by appointment" were used in connection with the said arms. He had no authority from her Majesty or any Govt. Department, etc., to use the Royal Arms:—*Held*: it was a mere question of fact whether the Royal Arms had been used in such a manner as to be calculated to lead other persons to believe that he was carrying on his trade by or under the authority of her Majesty, etc., & the conviction ought to be affirmed. —(CAMERON v. KENNEDY (1900), 64 J. P. 41.

**1586. — Injunction.**—(1) By Trade Marks Act, 1905 (c. 15), s. 68, "If any person, without the authority of His Majesty, uses in connexion with any trade, business, calling, or profession, the Royal Arms . . . in such manner as to be calculated to lead to the belief that he is duly authorised so to use the Royal Arms . . . he may . . . be restrained by injunction . . . from continuing so to use the same:—*Held*: the "belief" contemplated by the sect. was the belief on the part of the members of the public who see the display of the Royal Arms, & not merely that of present or prospective customers of the person wrongfully displaying them, the object of the sect. being to prevent the spreading of a belief among the public which might lead to an increase of prestige, &

consequent business to the person wrongfully using the Royal Arms.

(2) Defts. carried on business as engineers, manufacturers, & contractors. On the front of their premises above the shop front was fixed a cast-iron representation of the Royal Arms containing the shield with the supporters, crest, & mottoes. The arms had been in that position for at least thirty-five years & before defts. took a lease of the premises. No such words as "By appointment" were used in connection with the arms. Defts. had no authority to use the Royal Arms. In an action by properly constituted plffs. under Trade Marks Act, 1905 (c. 15), s. 68, for an injunction to restrain the unauthorised user by defts. of the Royal Arms:—*Held*: defts. were using the Royal Arms in connection with their trade or business & in such manner as to be calculated to lead to the belief that they were duly authorised so to use them, therefore plffs. were entitled to an injunction restraining the user by defts. of the Royal Arms in connection with their trade or business "on their premises or otherwise."

(3) The question put to a witness in examination, "What was the conclusion in your mind arising from the fact that defts. exhibited the Royal Arms on their business premises?" was held admissible by analogy to the question permitted in passing off cases, "Did you believe that deft.'s goods were plff.'s?"—*ROYAL WARRANT HOLDERS' ASSOCN. v. DEANE (EDWARD) & BEAL, LTD.*, [1912] 1 Ch. 10; 81 L. J. Ch. 67; 105 L. T. 623; 28 T. L. R. 6; 56 Sol. Jo. 12.

**1587. — User calculated to lead to belief that defendant is duly authorised—Question of fact.**—(CAMERON v. KENNEDY, No. 1585, *ante*.

**1588. — Belief of general public.**—*ROYAL WARRANT HOLDERS' ASSOCN. v. DEANE (EDWARD) & BEAL, LTD.*, No. 1586, *ante*.

**1589. — Admissibility of evidence.**—*ROYAL WARRANT HOLDERS' ASSOCN. v. DEANE (EDWARD) & BEAL, LTD.*, No. 1586, *ante*.

**1586 i. Improper use of Royal Arms—Remedy—Injunction.**—*ROYAL WARRANT HOLDERS' ASSOCN. v. SULLIVAN*, [1914] 1 L. R. 236.—*IR.*

**d. Royal Warrant of appointment—Part of goodwill.**—A Royal Warrant of appointment as tailors, granted to

a tailoring firm, is part of the goodwill of the business. —*BRUCE v. CORNWALL* (1869), 2 Buch. 295.—*S. AF.*

## TRADE SECRETS.

See AGENCY; COPYRIGHT AND LITERARY PROPERTY; DISCOVERY, INSPECTION, AND INTERROGATORIES; INJUNCTION; MASTER AND SERVANT.

## TRADE UNIONS.

See TRADE AND TRADE UNIONS.

## TRAFFIC.

See CARRIERS; COMPULSORY PURCHASE OF LAND AND COMPENSATION; HIGHWAYS, STREETS, AND BRIDGES; RAILWAYS AND CANALS; SHIPPING AND NAVIGATION; STREET AND AERIAL TRAFFIC.

# TRAMWAYS AND LIGHT RAILWAYS.

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*Street Traffic* . . . . „ STREET AND AERIAL  
 TRAFFIC.

## Part I.—Tramways.

### SECT. 1.—IN GENERAL.

1. Definition.—“Promoters.”—The expression “promoters” really means, not only the persons originally authorised to construct a tramway, but also their permitted assigns. It is, however, plain that neither lessees nor licencees are promoters. Moreover the term “promoters” does not include debenture holders (*per* (UR.).—MARSHALL *v.* SOUTH STAFFORDSHIRE TRAMWAYS Co., [1895] 2 Ch. 36; 64 L. J. Ch. 481; 72 L. T. 542; 43 W. R. 469; 11 T. L. R. 339; 39 Sol. Jo. 414; 2 Mans. 292; 12 R. 275, C. A.

*Annotations*.—*Mentd.* Pegge *v.* Neath District Tram. Co., [1895] 2 Ch. 508; *Re* St. Neots Water Co. (1906), 22 T. L. R. 478; *Re* Crystal Palace Co., Fox *v.* Crystal Palace Co. (1911), 104 L. T. 251; *Re* Woking Urban District Council (Basingstoke Canal) Act, 1911, [1911] 1 Ch. 300.

— *Tramways Act, 1870 (c. 78), s. 42.*—*See COMPANIES, Vol. X., p. 959, No. 6573.*

“Road authority.”—*See* No. 47, *post*.  
 “Tramcar.”—*See* Nos. 58–63, 288, *post*.  
 “Tramway.”—*Tramways Act, 1870 (c. 78), s. 43.*—*See* Nos. 113, 114, *post*.

2. — — — — — Whether “railroad.”—The Act [Workmen’s Compensation Act, 1897 (c. 37)] uses the word “railroad,” & that word is certainly capable of expressing a tramway. If one carries one’s mind back to older times, railroad was apparently the usual word to describe a road used as a tramway where horse power or some power other than steam was used; & it seems to me that “railroad” taken by itself is a good English word descriptive of what is now usually known as a tramway (COLLINS, M.R.).—FLETCHER *v.* LONDON UNITED TRAMWAYS, LTD., [1902] 2 K. B. 269; 71 L. J. K. B. 653; 86 L. T. 700; 86 J. P. 596; 50 W. R. 597; 18 T. L. R. 639; 4 B. W. C. C. O. S. 71, C. A.

*Annotation*.—*Re*ld. Back *v.* Dick, Kerr (1906), 22 T. L. R. 548.

### PART I. SECT. 1.

a. Whether separate account of income & expenditure on extension should be

*kept.*—A.-G. *v.* WELLINGTON CORPN., [1916] N. Z. L. R. 981.—N.Z.  
 b. Power of municipality to lay tram-

way.—*Must be exercised subject to statute.*—MIRAMAR CORPN. *v.* R. (1909), 28 N. Z. L. R. 727.—N.Z.

*Sect. 1.—In general. Sect. 2: Sub-sects. 1 & 2. Sect. 3: Sub-sects. 1 & 2, A.]*

3. ——— **Whether "railway"—General rule.**—In public legislation the word "railway" does not include a tramway unless it is expressly made to do so by the terms of the Act.—*TOTTENHAM URBAN COUNCIL v. METROPOLITAN ELECTRIC TRAMWAYS, LTD.*, [1913] A. C. 702; 83 L. J. K. B. 60; 109 L. T. 674; 77 J. P. 413; 29 T. L. R. 720; 57 Sol. Jo. 739; 11 L. G. R. 1071; 1 B. R. A. 100, H. L.; *reversg.* S. C. *sub nom.* *METROPOLITAN ELECTRIC TRAMWAYS, LTD. v. TOTTENHAM URBAN COUNCIL*, [1912] 2 K. B. 216, C. A.

————— **Public Health Act, 1875 (c. 55), s. 211 (1) (b).**—*See RATES & RATING*, Vol. XXXVIII., pp. 489, 490, Nos. 460, 462, 463.

————— **Companies Act, 1862 (c. 89), s. 199.**—*See COMPANIES*, Vol. X., p. 1193, No. 8473.

4. **Right of way under agreement—Between tenants & previous landowners—Tramroad abandoned for railway—Whether subsequent owner bound by agreement.**—Cromford Canal Act empowered the proprietors of mines & their lessees to make railways or roads across the lands of other persons, intervening between the mines & the canal to convey their materials to the canal. In 1843 an agreement was entered into between the lessees of coal mines & the owners of intervening lands to make a tramroad across them, subject to an annual rent of £5 5s. The lessees afterwards abandoned the tramroad, & without any consent, except that of the tenant, made a railroad across the lands in a different direction from the tramroad. They also erected an engine house, for which they subsequently agreed with the mtgee. in possession to pay an additional rent of £1 15s. Deft. subsequently became owner of the lands, & gave notice to the lessees that he should require an annual payment of £35; & the lessees refusing to pay that sum, he gave them notice to cease the use of the railway, & subsequently he took up the rails. Upon a bill filed by the lessees:—*Held*: deft. was bound by the agreement & acts of his predecessors; the abandonment of the tramroad for a railway had not affected the rights of the parties; deft. was not justified in taking up the rails; & plffs. were entitled to restore them, deft. being answerable in damages for the loss sustained by plffs.—*MOLD v. WHEATCROFT* (1859), 27 Beav. 510; 29 L. J. Ch. 11; 1 L. T. 226; 6 Jur. N. S. 2; 54 E. R. 202.

5. ——— **Between tenants & landlord—Landlord to give land for tramway.**—Tenants of quarries situated about three miles from their works, who were accustomed to convey the stones from the quarries to the works by carts, entered into an agreement with their landlord to construct a tramway from the quarry to the works to run (*inter alia*), "by the end of the policy" of the landlord; & they further agreed to compensate the farm tenants along the line for any damage done to their farms during the currency of their leases. The landlord agreed (*inter alia*) to give gratuitously the land required for the tramway. Outside the policy ground there was a private road the property of the landlord, which, before it reached the tenant's works, ran through another tenant's stone pavement yard. This was the only practical route outside the policy for the tramway; & it was alleged that the only obstacle to laying it along the road was that the other tenant might refuse to allow it being laid on that part passing through his yard, but for this there were no *termini habiles*. The tenants claimed that the landlord was bound

to give them the use & possession of land for the purpose of the tramway, & that, either (a) "within & by the end of the policy," or (b) "in any other place as suitable & convenient for them in every respect":—*Held*: under the agreement the stipulation was that the tramway should pass outside the walls which enclose the policy of the landlord; & by agreeing to give gratuitously the lands required, the landlord merely undertook to give the tenants such rights as were vested in him, leaving them, with the power to use his name, to settle with any persons who might have a right or interest entitling them to object to the formation of the tramway.—*SINCLAIR v. CAITNESS FLAGSTONE QUARRYING CO.* (1881), 6 App. Cas. 340, H. L.

————— **Whether agreement merged in subsequent conveyance.**—*See EASEMENTS*, Vol. XIX., p. 46, No. 254.

————— **Directors—Liabilities—Misrepresentations in prospectus.**—*See COMPANIES*, Vol. IX., p. 125, No. 642.

## SECT. 2.—PROMOTION.

### SUB-SECT. 1.—BY PROVISIONAL ORDER.

6. **Tramways Act, 1870 (c. 78)—Object of Act.**—(1) Above Act is to facilitate the construction & to regulate the working of tramways in England & Scotland: *Edinburgh Tramways Act, 1871*, is to authorise the construction of street tramways in certain parts of Edinburgh, Leith, & Portobello.

(2) Case in which the rule that 9 feet 6 inches shall intervene between the tramway rail & nearest footpath was departed from by statutory authority; the House reversing the decree complained of.

(3) Relying on certain preliminary agreements, the frontagers of a narrow thoroughfare abstained from opposing the *Edinburgh Tramways Bill*; but as it turned out that *Edinburgh Tramways Act, 1871*, when passed, allowed the very thing which the frontagers had been most anxious to prevent, they asked & obtained from the Ct. of Session an interdict against its execution. But the House of Lords recalled the interdict, holding that the question was determined by the statute, which the Tramways co. were not only entitled to carry out, but bound to obey.—*EDINBURGH STREET TRAMWAYS CO. v. BLACK* (1873), L. R. 2 Sc. & Div. 336; 37 J. P. 692, H. L.

7. **Application for order—Costs—Taxation.**—The costs of applications to the Board of Trade for provisional orders under *Tramways Act, 1870* (c. 78), are to be taxed on the Chancery & not on the Parliamentary scale.—*Re MORLEY* (1875), L. R. 20 Eq. 17; 32 L. T. 524; 23 W. R. 532.

*Annotation*:—*Apld. Re Peterson*, [1909] 2 Ch. 398.

8. **Confirmation of order—Effect—Confirming Act not in accordance with agreements withdrawing opposition.**—*EDINBURGH STREET TRAMWAYS CO. v. BLACK*, No. 6, *ante*.

9. **Cesser of powers under order—Substantial commencement of works—What amounts to.**—(1) In *Tramways Act, 1870* (c. 78), s. 18, which provides that the powers of promoters under a provisional order shall cease "if within one year from the date of the order the works are not substantially commenced," the term "works" means physical works actually executed.

A corpn., who had obtained a provisional order for the construction of electric tramways, had done no work within the year on the tramway itself, but had purchased land for offices & a generating station, & had entered into binding contracts for

the supply of electric cars & for the supply & installation of dynamos & electric machinery :—*Held*: the works had not been substantially commenced within the meaning of the sect.

(2) Tramways Act, 1870 (c. 78), s. 18, also provides that "a notice, purporting to be published by the Board of Trade, in the Gazette to the effect . . . that the work has not been substantially commenced . . . shall be conclusive evidence for the purposes of this sect. of such . . . non-commencement":—*Held*: in the absence of such a notice, other evidence of the non-commencement of the works was not excluded.—*A.-G. v. Bournemouth Corpn.*, [1902] 2 Ch. 714; 71 L. J. Ch. 730; 87 L. T. 252; 51 W. R. 129; 18 T. L. R. 744; 46 Sol. Jo. 648, C. A.

10. — **Evidence—Notice in London Gazette—Whether other evidence admissible.**—Promoters of a tramway applied for a return of the parliamentary deposit on the ground that the undertaking had been abandoned & the powers to make the tramway had determined :—*Held*: the proper evidence of the abandonment & cesser of the powers was a notice published in the London Gazette pursuant to Tramways Act, 1870 (c. 78), s. 18, & other evidence thereof could not be accepted. *Re Dudley & Kingswinford Tramways Co.* (1893), 63 L. J. Ch. 108; 69 L. T. 711; 42 W. R. 126; 8 R. 6.

*Annotation*: *N.F. A.-G. v. Bournemouth Corpn.*, [1902] 2 Ch. 711.

11. — — — — — *A.-G. v. Bournemouth Corpn.*, No. 9. *ante*.

— **Return & application of deposit.**—*See Sect. 11, post.*

#### SUB-SECT. 2.—BY PRIVATE ACT OF PARLIAMENT.

**Procedure for obtaining Act.**—*See PARLIAMENT, Vol. XXXVI., pp. 277-286.*

12. **Effect of Act—Not in accordance with agreements withdrawing opposition.**—*EDINBURGH STREET TRAMWAYS CO. v. BLACK, No. 6, ante.*

**Expenses of promotion—Agreement for payment by municipal corporation—Validity.**—*See LOCAL GOVERNMENT, Vol. XXXIII., p. 86, No. 553.*

— **Proof in winding up of company—By promoter's clerk.**—*See COMPANIES, Vol. X., p. 1112, No. 7829.*

— **By parliamentary agent.**—*See COMPANIES, Vol. X., p. 1113, No. 7830.*

— **Servants of company making profit under agreement with another company—Validity of agreement.**—*See CORPORATIONS, Vol. XIII., p. 357, No. 934.*

### SECT. 3.—CONSTRUCTION AND REPAIRS.

#### SUB-SECT. 1.—GAUGE AND RAILS.

13. **Distance from footpath.**—*EDINBURGH STREET TRAMWAYS CO. v. BLACK, No. 6, ante.*

14. — **Connecting line not shown on plans—& nearer footpath than authorised by Act—Removal ordered.**—*WILKINSON & MARSHALL v. NEWCASTLE-UPON-TYNE CORPN.* (1902), 18 T. L. R. 332.

15. **Power to lay extra rails—Consent of local authority—Necessity for.**—A co. owning a tramway along a road had power under their special Act to lay a second set of rails, with the consent

of the local authority, provided that no rail should be laid within 10½ feet of the footway on either side of the road, if one-third of the owners & occupiers of premises abutting on the place where the rail was to be laid objected. They proposed to lay rails within 10½ feet of the footpath on the east side of the road: on that side a promenade abutted on the road, & the corpn., as owners of the soil of the promenade, objected; on the west side houses & shops abutted on the road, & all the owners & occupiers thereof objected: the local authority also refused their consent. Nevertheless, the co. laid their rails :—*Held*: (1) they had committed a trespass, & must pay as damages the cost, at any rate, of restoring the road.

(2) *Qu.*: whether the refusal of the local authority to consent, was a "difference" to be submitted to arbn. under Tramways Act, 1870 (c. 78), s. 33; or whether, if it was groundless & arbitrary, the co. might disregard it; but the objections were valid for (a) the esplanade was "premises" entitling the corpn., as its owners, to object, & (b) even if it were not, the owners of premises on the west side could object to a rail being laid within the prescribed distance of either footway.—*BIDEFORD U. D. C. v. BIDEFORD, WESTWARD HO! & APPELDORRE RY. CO. & BRITISH ELECTRIC TRACTION CO., LTD.* (1903), 68 J. P. 123.

16. — **Right of owners of abutting premises to object—What are "premises."**—*BIDEFORD U. D. C. v. BIDEFORD, WESTWARD HO! & APPELDORRE RY. CO. & BRITISH ELECTRIC TRACTION CO., LTD., No. 15, ante.*

#### SUB-SECT. 2.—INTERFERENCE WITH OTHER TRAFFIC AND UNDERTAKINGS.

##### A. Roads, Footways and Bridges.

*See Tramways Act, 1870 (c. 78), s. 26.*

17. **Roads—Whether work interference with road—Or repair of road—Raising sleepers & rails to level of road.**—(1) *Plffs.*, as the road authority under Tramways Act, 1870 (c. 78), s. 26, claimed against *defts.* the expenses of superintending their opening & breaking up of roads under sect. 26, for the maintenance & renewal of their tramway :—*Held*: so far as *defts.* merely raised the sleepers & rails to the level of the road, or raised the stone packing of the road to the level of the surface of the rails, they were maintaining & keeping the road in good condition & repair under sect. 28, & were not liable to the superintendence of the road authority under sect. 26.

(2) There is sect. 26, which authorises them to break open the roads for the purpose of making, forming, laying down, maintaining & renewing any tramway duly authorised, subject to various conditions, which come to this, that when they are breaking open the roads for the purpose of (*inter alia*) maintaining any tramway, they are required to give seven days' notice, which, when the things are slight, they may be excused not giving; for instance, where things require to be done instantly (*BLACKBURN, J.*)—*ST. LUKE'S VESTRY v. NORTH METROPOLITAN TRAMWAYS CO.* (1876), 1 Q. B. D. 760; 35 L. T. 329; 40 J. P. 806.

18. — — — — — *BRENTFORD URBAN DISTRICT COUNCIL v. LONDON UNITED TRAMWAYS, LTD.* (1901), 45 Sol. Jo. 408; 3 L. G. R. 842, n.

*Annotation*:—*Consd. Wandsworth Borough v. London United Tramways* (1905), 3 L. G. R. 836.

#### PART I. SECT. 3, SUB-SECT. 2.—A.

a. **Omission to lay or keep rails flush with streets.**—A provision in an Ord.

in Council requiring a tramway co. to lay & keep their rails on a level with the surface of the street imposes upon

the co. only the duty of adjusting the rails to the level of the street, & does



*Sect. 3.—Construction and repairs: Sub-sect. 2, A. & B.]*

19. — *Necessity for notice to road authority.]—ST. LUKE'S VESTRY v. NORTH METROPOLITAN TRAMWAYS CO., No. 17, ante.*

— *Consent of road authority.—To tramway crossing.—Validity.]—See HIGHWAYS, Vol. XXVI., p. 414, No. 1334.*

20. — *Powers of promoters.—To form connection with generating station not belonging to promoters—& outside local authority's district.]—By a private Act a tramways co. obtained power to construct certain tramways to be worked by electricity. Sect. 27 of the Act provided that "The co. may execute all such works on or in connection with the tramways & in over or under the streets roads or bridges in or over which same are laid as may be necessary or expedient for working the tramways by mechanical power as aforesaid & may lay down construct erect & maintain on in under or over the surface or bed of any street road footway bridge river or place & may with the consent in writing of the owner & occupier of any house or building attach to such house or building such posts conductors wires tubes mains plates cables boxes & apparatus & may make & maintain such openings & ways in on or under any such surface or bed as may be necessary or convenient either for the working of the tramways or for connecting any portions of the tramways or for providing access to or forming connection with any generating station or other stations engines machinery or apparatus." The co. proposed, for the purpose of so working their tramways, to lay down a line of cables passing through, among other places, the borough of Wandsworth, to connect their tramways with a generating station in Chelsea belonging to another co. The borough council moved to restrain deft. co. from breaking up any of the roads within their jurisdiction:—*Held*: the co. was entitled under the latter part of sect. 27 of their Act, which was in perfectly general terms, to execute works in these streets necessary or convenient for forming a connection with the generating station.—*WANDSWORTH CORPN. v. LONDON UNITED TRAMWAYS (1901), LTD. (1905), 69 J. P. 340; 21 T. L. R. 529; 3 L. (4. R. 836.**

— *To obstruct highway during reconstruction of tramway.]—See PUBLIC AUTHORITIES, Vol. XXXVIII., p. 30, No. 167.*

— *Duty of promoters.—To substitute new road before converting tramway into railway.]—See RAILWAYS, Vol. XXXVIII., p. 277, No. 155.*

21. — *Liabilities of promoters.—Who entitled to sue.—Road authority or person liable to keep road in repair.]—Pltfs. contracted with a vestry to pave a public road with asphalt & to keep the pavement in repair for fifteen years, the pavement when laid to be the property of the vestry. Shortly after the pavement was completed, defts., acting under statutory powers, laid down a tramway along the pavement, but so constructed & maintained their tramway as to occasion unnecessary damage to the pavement. It being doubtful whether an action, commenced by pltfs. against defts. on the above facts, was brought in the name of the right pltfs., the ct., under S. C., Ord. 16, r. 2, ordered the vestry to be added or substituted as pltfs., on the terms that the vestry was to be indemnified by the original pltfs. for all costs & expenses.—*VAL DE TRAVERS ASPHALTE PAVING CO., LTD. v.**

*LONDON TRAMWAYS CO., LTD. (1879), 48 L. J. Q. B. 312; 40 L. T. 133; 43 J. P. 462.*

22. — *Injury to person using defective roadway.]—Defts. were the owners of a quay over which there was a public right of way to their docks. The G. E. R. co., by their private Act of Parliament, were empowered to & did enter into an arrangement with defts. to lay tramways connecting the docks with the railway system. The co. were to keep the tramways in good working order. Under Tramways Act, 1870 (c. 78), the co. as promoters gave notice to defts. of their intention to open & break up the road for the purpose of doubling the rails at a particular point. The co. did break up the highway for their tramway purposes. Pltf. was injured by being thrown from his cart through the defective condition of the roadway at the place where the works were being carried out, & brought his action for compensation against defts. as owners of the highway. The jury at the trial found that the accident to pltf. had been caused by the negligence of the railway co., who were in possession of the spot where the occurrence took place, & that the roadway was in a defective condition owing to a breach of duty on the part of the railway co., & gave pltf. substantial damages. It was contended, on argument on behalf of pltf., that on these findings he was entitled to have the verdict entered for him, & on the part of defts. that they amounted to a verdict for them:—*Held*: as the railway co. were carrying out their works not under the orders or as licencees of defts., but under their statutory powers, & were in the sole possession of the place where the accident happened, which was entirely under their control, & the negligence causing the accident was that of the railway co. & not of defts., the verdict ought to be entered for defts.—*BARHAM v. IPSWICH DOCK COMRS. (1885), 54 L. T. 23.**

— *Surplus material excavated during construction.—Who entitled to.]—See HIGHWAYS, Vol. XXVI., p. 280, No. 169.*

23. *Footways.—Powers of promoters.—To break up footway.]—HYDE CORPN. v. OLDHAM, ASHTON, & HYDE ELECTRIC TRAMWAY, LTD. (1900), 64 J. P. 596; 16 T. L. R. 492, C. A.*

24. — *To erect pole in footway.]—A corpn. purporting to act in the exercise of their powers under their special Tramways Act, which incorporated Tramways Act, 1870 (c. 78), & authorised the construction of an electric tramway, erected a pole & a fuse box in the footpath close to the principal entrance of pltfs.' premises:—*Held*: defts.' statutory powers authorised them to use the pavement for the purpose of doing that which was necessary for making their tramway an electrical tramway; the nuisance which the defendants were authorised to commit could not be interfered with unless pltfs. could prove that the powers conferred on defts. had been abused, which the pltfs. had failed to do.—*GOLDBERG & SON, LTD. v. LIVERPOOL CORPN. (1900), 82 L. T. 362; 16 T. L. R. 320, C. A.**

25. — *Where a local authority requires to open up the soil of a street, the surface only of which has been dedicated to the public, they do not commit a trespass on private property so long as the act to be done is within the area of their statutory powers:—Held: no trespass was committed by the digging of a hole in the footway in which to place a pole to carry the electric wire*

not impose the duty of bringing up depressions in the street to the level of the rails.—*DUNEDIN CITY & SUBUR-*

*BAN TRAMWAY CO. v. ROSS (1895), 13 N. Z. L. R. 366.—N.Z. d. —.]—CAPE DIVISIONAL COUNCIL*

*v. SOUTHERN SUBURBS OF CAPE TOWN TRAMWAYS CO., LTD. (1909), 19 C. T. R. 549.—S. AF.*

for a tramway scheme authorised by a private Act which incorporated the provisions of Lands Clauses Consolidation Act, 1845 (c. 18), the act complained of not amounting to a taking of land but only to the exercise of a right in the nature of an easement.—*ESCOTT v. NEWPORT CORPN.*, [1904] 2 K. B. 369; 73 L. J. K. B. 693; 90 L. T. 348; 68 J. P. 135; 52 W. R. 543; 20 T. L. R. 158; 2 L. G. R. 779.

*Annotations*.—*Reid, Andrews v. Abertillery U. D. C.* (1911), 80 L. J. Ch. 724; *Taff Vale Ry. v. Cardiff Ry.*, [1917] 1 Ch. 299.

**26. — To reduce width of footway.**—London County Council (Tramways & Improvements) Act, 1901 (c. cclxxi), s. 13, empowering the Council to reduce the width of the footway subject to the express provision that “no footway shall be reduced to a less width than 6 feet,” only applies to new tramways or reconstructed tramways the authority to construct or reconstruct which is specifically given by that Act; & where the Council have independent powers of reconstruction—as under London County Tramways (Electrical Power) Act, 1900 (c. ccxxxviii), the express provision as to the 6-feet limit in London County Council (Tramways & Improvements) Act, 1901 (c. cclxxi), s. 13, has no application, & does not prevent the reduction of a footway to a less width under the sanction of the local authority acting in exercise of the powers in that behalf conferred by Metropolitan Paving Act, 1817 (c. xxix).—*CONSELLIS v. LONDON COUNTY COUNCIL*, [1908] 1 Ch. 13; 77 L. J. Ch. 120; 98 L. T. 475; 71 J. P. 561; 24 T. L. R. 80; 6 L. G. R. 78, C. A.

**27. Bridges—Liability of promoters—Passing unusually heavy weight over bridge.**—Appl. *corp.*, having, under a colonial Act, *de facto* taken over the care & control of a certain bridge, in an action to recover damages from them for a fatal accident caused by the breaking down of the bridge over which a tramcar containing deceased was running:—*Held*: the finding of the jury that an act done by their officer had materially weakened the beam which afterwards broke amply justified a verdict against them.

One question might have arisen in this case, a seriously important question, namely, whether, if the original construction of the bridge was such, & the pressure placed upon it by the tramway co. was so great that, under any circumstances, independently of any decay, or misuse of the beam, . . . the weight placed upon it would have caused the destruction of the bridge. It might have been a very serious question whether or not the responsibility for passing that weight over the bridge at that point might not have rested upon those by whose act that unusual & extraordinarily heavy weight was passed over, without casting any responsibility on those whose duty it was to maintain & repair the bridge (*per cur.*).—*VICTORIA CORPN. v. PATTERSON, VICTORIA CORPN. v. LANG*, [1899] A. C. 615; 68 L. J. P. C. 128; 81 L. T. 270, P. C.

#### *B. Gas, Telegraphic, or Water Undertakings.*

See Tramways Act, 1870 (c. 78), s. 30.

**28. What work within Tramways Act, 1870 (c. 78), s. 30.**—*BRENTFORD URBAN DISTRICT COUNCIL v. LONDON UNITED TRAMWAYS, LTD.* (1901), 45 Sol. Jo. 408; 3 L. G. R. 842, n.

*Annotation*.—*Consd. Wandsworth Borough v. London United Tramways* (1905), 3 L. G. R. 836.

**Alteration of position of mains, pipes, wires, etc.—Jurisdiction of arbitrator to order.**—See *GAS*, Vol. XXV., p. 481, No. 68.

—After notice given by promoters—Time for giving counter-notice by owner of mains.]—See *GAS*, Vol. XXV., p. 481, No. 69.

**29. — Telegraph wires of railway company—Wires crossing highway—Power to enter on railway company's land.**—On the construction of a tramway worked by the overhead trolley system, the tramway co. have power, under Tramways Act, 1870 (c. 78), s. 30, to alter the position of a railway co.'s telegraph wires which cross the highway whereon the tramway is being constructed, where it is necessary to alter the position of such wires for the purpose of constructing the tramway in accordance with the special Act & the Board of Trade Regulations.

For the purpose of such alteration, the tramway co. has power to enter upon the land of the railway co.—*Re RHONDDA URBAN DISTRICT COUNCIL & TAFF VALE RY. CO.* (1907), 97 L. T. 892; 72 J. P. 44; 24 T. L. R. 213; *sub nom. RHONDDA URBAN DISTRICT COUNCIL v. TAFF VALE RY. CO.*, 6 L. G. R. 131, C. A.

**Liability for expenses—Additional expense caused by existence of tramway—What is.**—See *GAS*, Vol. XXV., p. 481, No. 70.

**30. — Injurious affection of telegraphic lines—Nature of liability.**—By a local Act, s. 65 (1), it is provided that in the event of the co.'s tramroad being worked by electricity the co. shall work their undertaking “with due regard” to the telegraphic lines of the Postmaster-General, & “shall use every reasonable means” in the working of their undertaking to prevent injurious affection of such lines.

By local Act, s. 65 (2): “If any telegraphic line of the Postmaster-General is injuriously affected . . . by the working of the undertaking of the co., the co. shall pay the expense of all such alterations in the telegraphic lines of the Postmaster-General as may be necessary to remedy such injurious affection.”

In 1898 *defts.* under the powers conferred by the said Act constructed an electric tramway along certain public roads. In 1914 the Postmaster-General laid underground along the same roads a telephone cable, which at one point came within seven feet of *defts.* lines. In 1916 a breakdown occurred in the cable in consequence of its being injuriously affected by an escape of electricity from *defts.* lines. In an action by the Postmaster-General under sect. 65 (2), to recover the expenses he had been put to the Div. Ct. held that the liability of *defts.*, under that sub-sect., which was to be read independently of sub-sect. 1, was an absolute liability, & that neither the fact that *defts.* had used every reasonable means in the working of their undertaking to prevent injurious affection to *pltf.*'s cable, nor that *pltf.* by laying his cable so near to *defts.* lines had courted the injury, afforded any defence:—*Held*: (1) sect. 65 (2) was an independent sub-sect. & in no way dependent upon sub-sect. 1; (2) if it was proved that the injurious affection of the Postmaster-General's cable was caused by the construction or working of *defts.* undertaking it would be no answer to a claim by the Postmaster-General for *defts.* to prove that he had been guilty of want of reasonable care & skill in selecting the place in which to lay his cable; (3) if *defts.* could show that the construction or working of their undertaking did not injuriously affect the cable but that the injurious affection was entirely due to the act of the Postmaster-General, then in all probability sub-sect. 2 would not apply.—*POSTMASTER-GENERAL v. BLACKPOOL & FLEETWOOD TRAMROAD CO.*, [1921] 1 K. B. 114; 90 L. J. K. B. 136; 124

*Sect. 3.—Construction and repairs: Sub-sect. 2, B. & C.; sub-sects. 3 & 4, A. & B.]*

L. T. 365; 85 J. P. 71; 37 T. L. R. 20; 19 L. G. R. 1, C. A.

*Annotations:—As to (2) Consd. Postmaster-General v. Liverpool Corpn., [1923] A. C. 587. Generally, Mend. Moriarty v. Regent's Garage Co., [1921] 2 K. B. 766; Nelson, Murdoch v. Wood (1922), 126 L. T. 715.*

#### C. Sewers and Drains.

*See Tramways Act, 1870 (c. 78), s. 31.*

**31. What work within Tramways Act, 1870 (c. 78), s. 31.]—BRENTFORD URBAN DISTRICT COUNCIL v. LONDON UNITED TRAMWAYS, LTD. (1901), 45 Sol. Jo. 408; 3 L. G. R. 842, n.**

*Annotation:—Consd. Wandsworth Borough v. London United Tramways (1905), 3 L. G. R. 836.*

**32. Conditions of interference—Notice by promoter with "all necessary particulars"—Sufficiency of particulars.]—BRENTFORD URBAN DISTRICT COUNCIL v. LONDON UNITED TRAMWAYS, LTD. (1901), 45 Sol. Jo. 408; 3 L. G. R. 842, n.**

*Annotation:—Consd. Wandsworth Borough v. London United Tramways (1905), 3 L. G. R. 836.*

#### SUB-SECT. 3.—COMPLETION OF WORKS AND REINSTATEMENT OF ROADS.

*See Tramways Act, 1870 (c. 78), s. 27.*

**Surplus material excavated during construction—Who entitled to.]—See HIGHWAYS, Vol. XXVI., p. 280, No. 169.**

#### SUB-SECT. 4.—REPAIR OF ROAD.

##### A. In General.

*See Tramways Act, 1870 (c. 78), s. 28.*

**33. Whether work repair of or interference with road—Raising sleepers & rails to level of road.]—ST. LUKE'S VESTRY v. NORTH METROPOLITAN TRAMWAYS CO., No. 17, ante.**

**34. Extent of obligation to repair—Area of undertaking—Space between up & down lines.]—ADAMS v. SHADDOCK, [1905] 2 K. B. 859; 75 L. J. K. B. 7; 93 L. T. 725; 54 W. R. 97; 22 T. L. R. 15; 50 Sol. Jo. 25; 8 W. C. C. 58, C. A.**

**—Strips of street on either side of track.]—See HIGHWAYS, Vol. XXVI., p. 539, No. 2385.**

**35. —Overhead wires.]—(1) It is important to consider what was the work which was undertaken by the corpn. It was to repair & keep in repair a tramway, & the area of the undertaking was the tramway as a whole (ROMER, L.J.).**

**(2) The undertakers are bound to keep the tramway in proper repair, & among other things to see that the overhead wires are in order & safe (MATTHEW, L.J.).—ROGERS v. CARDIFF CORPN., [1905] 2 K. B. 832; 75 L. J. K. B. 22; 93 L. T. 683; 70 J. P. 9; 54 W. R. 35; 22 T. L. R. 9; 50 Sol. Jo. 12; 8 W. C. C. 51; 4 L. G. R. 1, C. A.**

*Annotation:—Refd. Back v. Dick, Kerr (1906), 94 L. T. 802.*

**36. —Junction of paving with surface of roadway.]—NORWICH CORPN. v. NORWICH ELECTRIC TRAMWAYS CO., LTD., No. 52, post.**

**37. —Slippery road.]—Under Tramway Act, 1870 (c. 78), s. 28, a tramway co. are bound not only to maintain & repair the part of the road for which they are responsible, but also to keep it in a proper condition for traffic. Where an accident occurred in consequence of a tramway co. having neglected to sand the road in slippery weather:—Held: they were liable for the consequent damages.—DUBLIN UNITED TRAMWAYS CO. v. FITZGERALD, [1903] A. C. 99; 72 L. J. P. C.**

52; 87 L. T. 532; 67 J. P. 229; 51 W. R. 321; 19 T. L. R. 78; 1 L. G. R. 386, H. L.

*Annotation:—Dist. Acton District Council v. London United Tramways, [1909] 1 K. B. 68.*

**Removal of snow.]—See HIGHWAYS, Vol. XXVI., p. 439, No. 1563.**

**38. —Satisfaction of road authority—Reasonable satisfaction.]—Tramways Act, 1870 (c. 78), s. 28, provides that a tramway co. shall keep certain parts of the roadway in repair, in such manner as the road authority shall direct & to their satisfaction, provided that if the tramway co. fail to comply with this sect. the road authority may do the necessary work themselves at the expense of the tramway co. Tramways Act, 1870 (c. 78), s. 33, provides that if any difference arises between a tramway co. & the road authority in relation to any tramway, or on the question whether any work is such as ought reasonably to satisfy the road authority, the matter in difference shall be referred to an engineer nominated by the Board of Trade. The private Acts of a tramway co. incorporated the above sects. & imposed on the co. a penalty (a) for non-compliance with Tramways Act, 1870 (c. 78), s. 28; (b) for not keeping the tramways in repair to the satisfaction of the road authority, & (c) for not keeping the rails in repair & so as not to be a danger or annoyance to the ordinary traffic. The tramway co. were summoned, (a) for not keeping in repair, with such materials & in such manner as the road authority had directed, the portion of the road prescribed by Tramways Act, 1870 (c. 78), s. 28, (b) for not keeping their tramways in repair to the satisfaction of the road authority, & (c) for not keeping the rails in repair & so as not to be a danger or annoyance to the ordinary traffic:—Held: the obligation to keep in repair certain parts of the roads which is imposed by Tramways Act, 1870 (c. 78), s. 28, & the obligation imposed by the co.'s private Acts to keep the tramways in repair to the satisfaction of the road authority, was in each case an obligation to keep in repair, not to the satisfaction of the road authority absolutely, but to their reasonable satisfaction, & the question whether the road authority ought reasonably to be satisfied must go to arbn. under Tramways Act, 1870 (c. 78), s. 33, & was one with which the magistrate had no jurisdiction to deal, but the magistrate had jurisdiction to deal with the summonses for not keeping the rails in repair, as in this instance no question had arisen in regard to the satisfaction of the road authority.—R. v. GARRETT & HAMMERSMITH BOROUGH COUNCIL, Ex p. LONDON UNITED TRAMWAYS, LTD. (1909), 100 L. T. 533; 73 J. P. 188; 7 L. G. R. 511, D. C.**

**Effect of special agreement.]—See Sub-sect. 4, B., post.**

**39. Failure to repair—Collision caused by bad state of repair of track—Tramway company added as defendant.]—Pltf. brought his action against defts. for injuries sustained by their negligence. Defts.' statement of defence alleged that the injuries were caused through the rails of the T. co. not being on a level with the road & through the bad condition of roads & rails. Defts. served a notice on the T. co making them joint defts.:—Held: the notice must be set aside, there not being "a question in the action" which it was desirable to decide between the T. co. & defts.—HOWELL v. LONDON OMNIBUS CO. (1877), 2 Ex. D. 365; 46 L. J. Q. B. 700; 36 L. T. 637; 25 W. R. 610, C. A.**

**Mandamus—Direction to "maintain" Validity.]—See CROWN PRACTICE, Vol. XVI., p. 345, No. 1695.**

**40. — Liability to penalties — Continuing offence—Amount of penalty.]—**By Tramways Orders Confirmation Act, 1873 (c. xcivii), s. 8, the promoters of a tramway were to be subject to a penalty not exceeding £5 for every day on which they continued to omit to maintain & keep in good order & condition the rails & roads of their tramways. By an order of justices dated Dec. 15, 1893, they were fined £5 for not keeping the rails in good condition & repair on Oct. 23, 1893, & £1 for every day on which such act of omission should continue. By a subsequent order of justices, dated Feb. 8, 1895, they were ordered to pay £240 for penalties incurred under the order of Dec. 15, 1893, being £1 per day since the date of that order:—*Held*: on *certiorari*, that the order of Feb. 8, 1895, must be quashed on the ground that it was bad under Summary Jurisdiction Act, 1848 (c. 43), s. 11, & was founded on an order which was bad on the face of it in respect of the continuing penalty.—*R. v. STRUVE, ETC., (GLAMORGANSHIRE J.J. (1895), 59 J. P. 584, D. C.*

**— Enforcement of distress—Notwithstanding appointment of receiver & manager.]—***See COMPANIES, Vol. X., p. 1190, No. 8445.*

**41. — Work done by local authority—Recovery of expenses from promoters.]—**By local Act, s. 57, it was provided: "If the co. fail to maintain & keep in good condition to the satisfaction of the corp., . . . the junction of the paving laid & maintained by the co. with the surface laid & maintained by the corp., the corp. may, if they think fit, themselves at any time after seven days' notice to the co. do the work necessary for the repair & maintenance of the road, & the expense reasonably incurred by the corp. in so doing shall be repaid to them by the co. with the addition of 5 per cent. on such expense."

The surface of the road laid & maintained by the corp., owing to the traffic adjacent to the paving of the tramway, became worn down below the level of the paving at distances varying from 2 inches to 6 inches from such paving, & in certain cases it was necessary, in order to repair the roadway so worn down to take up the roadway to a distance of 18 inches from the paving. The corp. executed the repairs, & claimed the expenses of so doing from the co.:—*Held*: the expense so incurred was incurred in maintaining & keeping in good condition the junction of the paving with the surface of the roadway & the tramway co. was responsible for such expense.—*NORWICH CORPN. v. NORWICH ELECTRIC TRAMWAYS CO. (1908), 99 L. T. 133; 6 L. G. R. 1032; sub nom. Re NORWICH CORPN. & NORWICH ELECTRIC TRAMWAYS CO., LTD., 72 J. P. 178, C. A.*

**— Bridge over railway—Bridge widened by promoters under statutory powers.]—***See HIGHWAYS, Vol. XXVI., p. 576, No. 2079.*

**Liability for nuisance—Use of creosoted wood in paving road—Damage to plants.]—***See NUISANCE, Vol. XXXVI., p. 194, No. 350.*

**— Removal of snow from track—Snow left on streets.]—***See HIGHWAYS, Vol. XXVI., p. 439, Nos. 1562.*

**Removal of snow from track—Duty to remove.]—***See HIGHWAYS, Vol. XXVI., p. 439, No. 1563.*

**42. — Snow to be levelled to prescribed depth—Obligation to remove snow from streets.]—**Respondent co. were authorised by statute to construct & work a street railway in a town. The Act provided that the co. might remove snow & ice from its tracks so as to enable it to work its cars in the winter. "Provided, however, that in case such snow & ice shall be removed from it, track or disturbed or thrown out by the ploughs

leveller, or tools of the co., it shall be the duty of the co. within forty-eight hours to level the said snow or ice on each side of the track to a uniform depth, to be determined by the engineer of the council, & so as not to impede the ordinary traffic of the streets." The engineer determined a depth to which the snow was to be levelled which was admitted to be reasonable, but the co. could not comply with his requirements without removing some of the snow from the streets altogether:—*Held*: they were bound to remove the snow.—*SHEA v. REID-NEWFOUNDLAND CO., [1908] A. C. 520; 78 L. J. P. C. 43; 99 L. T. 743; 24 T. L. R. 879, P. C.*

**— Snow left on streets—Whether nuisance.]—***See HIGHWAYS, Vol. XXVI., p. 439, Nos. 1562.*

**Running powers over another company's line—Tramway defective—Injury to pedestrian—Liability for trespass.]—***See No. 105, post.*

### *B. Contracts for Repair.*

*See Tramways Act, 1870 (c. 78), s. 29.*

**43. Contract with road authority—Transfer of liability.]—**Where a tramway co. enters into a contract with the road authority under Tramways Act, 1870 (c. 78), s. 29, whereby the road authority undertakes the repair of the portion of the road upon which the tramway is laid, the liability for damage occasioned by the non-repair of that part of the road, which would but for such contract be cast for sect. 28 upon the tramway co., is transferred to the road authority.—*HOWITT v. NOTTINGHAM TRAMWAYS CO. (1883), 12 Q. B. D. 16; 53 L. J. Q. B. 21; 50 L. T. 99; 32 W. R. 248, D. C.*

*Annotations:—Consd. Steward v. North Metropolitan Tram. Co. (1886), 16 Q. B. D. 556. Apprvd. Aldred v. West Metropolitan Trams Co., [1891] 2 Q. B. 398. Follid. Barnett v. Poplar Corp., [1901] 2 K. B. 319. Refd. Barham v. Ipswich Dock Comrs. (1885), 51 L. T. 23.*

**44. — — —.]—**Where a tramway co. has entered into a contract with the road authority under Tramways Act, 1870 (c. 78), s. 29, whereby such authority has undertaken the repair of the portion of the road which, under sect. 28, the tramway co. had to repair, the tramway co. is not liable for injuries occasioned through non-repair of such portion of the road to a person using the same.—*ALDRED v. WEST METROPOLITAN TRAMWAYS CO., [1891] 2 Q. B. 398; 60 L. J. Q. B. 631; 39 W. R. 609; 7 T. L. R. 609; sub nom. ALDRED v. WEST METROPOLITAN TRAMWAYS CO., 65 L. T. 138; 55 J. P. 824, C. A.*

*Annotation:—Follid. Barnett v. Poplar Corp., [1901] 2 K. B. 319.*

**45. — — —.]—**Where a tramway co. has entered into a contract with the road authority under Tramways Act, 1870 (c. 78), s. 29, whereby that authority has undertaken the repair of the portion of the road which, under sect. 28 the tramway co. were bound to repair, the liability for injuries occasioned through non-repair of such portion of the road to persons using the same is transferred to the road authority.—*BARNETT v. POPLAR CORPN., [1901] 2 K. B. 319; 70 L. J. K. B. 698; 84 L. T. 845; 49 W. R. 574; 17 T. L. R. 461; 45 Sol. Jo. 486.*

**— — — Action against promoters—Amendment of defence by setting up contract.]—***See PUBLIC AUTHORITIES, Vol. XXXVIII., p. 136, No. 998.*

**— — — Division of expenses.]—***See HIGHWAYS, Vol. XXVI., p. 390, No. 1225.*

**Contract with private contractor — Contractor contracting with another contractor—Breach of contract — What damages recoverable.] —***See DAMAGES, Vol. XVII., p. 113, No. 233.*

*Sect. 3.—Construction and repairs: Sub-sect. 4, B.; sub-sects. 5 & 6. Sect. 4: Sub-sect. 1.]*

**46. — Breach of contract—Rights of assignees of lease of tramway.]—CITY OF BIRMINGHAM TRAMWAYS CO., LTD. v. LAW, No. 123, post.**

#### SUB-SECT. 5.—BREAKING UP ROAD ON WHICH TRAMWAY LAID.

*See Tramways Act, 1870 (c. 78), s. 32.*

**47. By "road authority"—Railway company—Reconstructing bridge over railway line.]—**A railway co. having, in the course of the reconstruction under statutory powers of a bridge carrying a road over their railway, necessarily removed the lines of a tramway co. worked under statutory powers over the bridge:—*Held*: on the true construction of Tramways Act, 1870 (c. 78), s. 32, the railway co. were a "road authority" within the meaning of the sect. & were not liable for the cost of restoring the tramways over the bridge or for damages for the interruption of the use thereof, provided that they had complied with the restriction contained in sub-sect. 1, & caused as little detriment or inconvenience to the tramway co. as circumstances admitted.—*WOLVERHAMPTON TRAMWAYS CO. v. GREAT WESTERN RY. CO.* (1886), 56 L. J. Q. B. 190; 56 L. T. 892; 3 T. L. R. 197, D. C.

**48. By telephone company—Under licence from Postmaster-General—Whether consent of tramway company necessary.]—**A telephone co., acting under a licence from the Postmaster-General pursuant to the Telegraph Acts, 1863 (c. 112), 1878 (c. 76), & 1892 (c. 59), need not obtain the previous consent of a tramway co. before proceeding to break open a street or public road on which tramway lines are laid for the purpose of laying telephone wires, even though the tramway co. is liable for the repair of that street or public road.—*BRISTOL TRAMWAYS & CARRIAGE CO. v. NATIONAL TELEPHONE CO.*, [1899] 2 Ch. 282; 68 L. J. Ch. 566; 80 L. T. 836; 63 J. P. 583; 15 T. L. R. 430; 43 Sol. Jo. 603.

**49. Causing more than least detriment to promoters—Measure of liability.]—WOLVERHAMPTON TRAMWAYS CO. v. GREAT WESTERN RY. CO., No. 47, ante.**

#### SUB-SECT. 6.—SETTLEMENT OF DIFFERENCES.

*See Tramways Act, 1870 (c. 78), s. 33.*

**50. What is a "difference"—Refusal of local authority to approve of particular paving.]—**By a local Tramway Act, passed after & incorporating Tramways Act, 1870 (c. 78), the space between the rails & for a distance of 18 inches beyond each external rail was to be paved by the co. to the satisfaction of the local authority for the district with wood or other paving to be approved of by the local authority. On an application by the co. the local authority declined to approve of a particular paving, & the co. thereupon laid it down without such approval. On an application by the local authority for a *mandamus* to the co. to take up the paving so laid down:—*Held*: the powers given to the local authority were subject to the provisions of Tramways Act, 1870 (c. 78), a difference had arisen within sect. 33 of that Act which ought to be determined by a referee appointed by the Board of Trade, & the *mandamus* ought not to be granted.—*R. v. CROYDON & NORWOOD TRAMWAYS CO.* (1886), 18

Q. B. D. 39; 56 L. J. Q. B. 125; 56 L. T. 78; 51 J. P. 420; 35 W. R. 299; 3 T. L. R. 32, C. A.

*Annotations:—Distd. Bristol Trams & Carriage Co. v. Bristol Corpn.* (1890), 25 Q. B. D. 427. *Apd. Norwich Corpn. v. Norwich Electric Tram. Co.*, [1906] 2 K. B. 119. *Consd. R. v. Garrett & Hammersmith B. C.*, *Ex p. London United Tramways* (1909), 100 L. T. 533.

**51. — Proposal by road authority to substitute wood for granite pavement.]—**A municipal corp., as being the road & local authority, proposed to alter a road within their district, upon which a tramway had been constructed by a tramway co. under Tramways Act, 1870 (c. 78), by taking up the existing granite pavement & laying down a wood pavement over the whole of the roadway, including the space between the rails of the tramways & 18 inches on each side thereof. The tramway co. objected to the alteration, so far as it concerned the last-mentioned portion of the roadway, & claimed to refer the matter as being a difference within Tramways Act, 1870 (c. 78), s. 33, to a referee to be appointed by the Board of Trade:—*Held*: (1) the difference was not one within the sect. 33, inasmuch as it was not with respect to any interference or control claimed to be exercised by the road authority "by virtue of the Act" or to "any subject or thing regulated by or comprised in the Act," (2) but with respect to the exercise of a power which belonged to the road authority independently of the Act, & which was preserved by sect. 60 of the Act.—*BRISTOL TRAMS & CARRIAGE CO. v. BRISTOL CORPN.* (1890), 25 Q. B. D. 427; 59 L. J. Q. B. 441; 63 L. T. 177; 55 J. P. 53; 38 W. R. 693; 6 T. L. R. 371, C. A.

**52. — Failure to repair "to satisfaction of local authority."]**—The provision for arbn. contained in Tramways Act, 1870 (c. 78), s. 33, ousts the jurisdiction of the High Ct. with regard to differences coming within the terms of the sect.

It was provided by the special Act of a tramway co., with which by Tramways Act, 1870 (c. 78), s. 22, Parts II & III of that Act were to be incorporated that if the co. failed to maintain & keep in good condition to the satisfaction of the corp., the junction of the paving laid & maintained by the co., with the service laid & maintained by the corp., the corp., might if they thought fit, themselves at any time after seven days' notice to the co. do the work necessary for the repair & maintenance of the road & that the expense reasonably incurred by the corp. in so doing should be repaid to them by the co. with the addition of 5 per cent. on such expense. The corp. did work by way of repair to roads on which tramways belonging to the co. were laid alleging that such work came within the above mentioned provision which the co. denied. In an action by the corp. against the co. to recover the expenses of the work, & for a declaration of their rights in the matter:—*Held*: the difference which had thus arisen between plffs., & defts. came within Tramways Act, 1870 (c. 78), s. 33, & therefore the ct. had no jurisdiction to entertain the action.—*NORWICH CORPN. v. NORWICH ELECTRIC TRAMWAYS CO., LTD.*, [1906] 2 K. B. 119; 75 L. J. K. B. 636; 95 L. T. 12; 70 J. P. 401; 54 W. R. 572; 22 T. L. R. 553; 50 Sol. Jo. 499; 4 L. G. R. 1114, C. A.

*Annotations:—Consd. West Suffolk County Council v. Olorenshaw*, [1918] 2 K. B. 687. *Mentd. Taylor v. National Amalgamated Approved Soc.*, [1914] 2 K. B. 352; *Smythe v. Wiles*, [1921] 2 K. B. 66.

**53. — — —.]—R. v. GARRETT & HAMMER-SMITH BOROUGH COUNCIL, Ex p. LONDON UNITED TRAMWAYS, LTD., No. 38, ante.**

**54. Mode of settlement—Arbitration—Ouster of jurisdiction of High Court—Mandamus.]—R.**

v. CROYDON & NORWOOD TRAMWAYS CO., No. 50, *ante*.

55. ————]—Action to recover costs of repair from promoters.]—NORWICH CORPN. v. NORWICH ELECTRIC TRAMWAYS CO., LTD., No. 41, *ante*.

56. ————]—London County Tramways (Electrical Power) Act, 1900 (c. ccxxxviii), s. 6, gives the county council power to reconstruct a bridge, when this is necessary, to enable them to adapt a tramway for use by electric power. All questions between the owners of the bridge & the county council must be determined by arb'n. under Tramways Act, 1870 (c. 78), s. 33.—REGENT'S CANAL DOCK CO. v. LONDON COUNTY COUNCIL (1907), 71 J. P. 201; 5 L. G. R. 958.

57. ————]—Ouster of jurisdiction of magistrate—Summons for failure to keep in repair.]—R. v. GARRETT & HAMMERSMITH BOROUGH COUNCIL, *Ex p.* LONDON UNITED TRAMWAYS, LTD., No. 38, *ante*.

#### SECT. 4.—EQUIPMENT AND WORKING.

##### SUB-SECT. 1.—CARRIAGES.

See Tramways Act, 1870 (c. 78), ss. 34, 54.

58. Tramway — Whether "carriage."] — A tramcar running on tramway rails in a highway is a "carriage" within the meaning of Art. 1 of the Motor Cars (Use & Construction) Order, 1904.—BURTON v. NICHOLSON, [1909] 1 K. B. 397; 78 L. J. K. B. 295; 100 L. T. 344; 73 J. P. 107; 25 T. L. R. 210, D. C.

59. ————]—Whether "coach."] —Tramcar held to be a coach within the meaning of 7 Geo. 3, c. lxxiii.—PLYMOUTH, STONEHOUSE & DEVONPORT TRAMWAYS CO. v. GENERAL TOLLS CO., LTD. (1898), 14 T. L. R. 531, H. L.  
*Annotations:—*Distd. Shippson v. Teignmouth & Shaldon Bridge Co., [1903] 1 K. B. 405. *Refd.* Cannan v. Abingdon [1900] 2 Q. B. 66; Smith v. Kynnersley, [1903] 1 K. B. 788.

60. ————]—It is easy to understand that a tramcar drawn by horses was a coach drawn by horses (WRIGHT, J.).—SIMPSON v. TEIGNMOUTH & SHALDON BRIDGE CO. (1901), [1903] 1 K. B. 405; 85 L. T. 726; 51 W. R. 545; *affd.*, [1903] 1 K. B. at p. 410, C. A.

*Annotation:—*Refd. Smith v. Kynnersley, [1903] 1 K. B. 788.

61. ————]—Whether "hackney carriage."] —A tramcar is a hackney carriage within meaning of s. 38 of the Town Police Clauses Act, 1847 (c. 89).—BLACKPOOL & FLEETWOOD TRAMROAD CO. v. BAILEY, [1920] 1 K. B. 380; 89 L. J. K. B. 784; 122 L. T. 275; 84 J. P. 1; 17 L. G. R. 749, D. C.

62. ————]—Whether "stage carriage."] —(1) A tramway car, as used under Metropolitan Street Tramways Act, 1869 (c. xciv), & 1870 (c. clxxiii), is a stage carriage within the meaning of London Hackney Carriages Act, 1843 (c. 86), & a penalty is incurred by the conductor for allowing a greater number of passengers to be carried than are allowed by the regulations within the meaning of Railway Passengers Duty Act, 1842 (c. 79).

(2) The conductor of a tramway car who allows persons beside himself to ride in the end of the

car, between the covered compartment & the extreme end, is liable to a penalty under London Hackney Carriages Act, 1843 (c. 86), s. 33, such being "the place provided for the conductor" within the meaning of that enactment.—ODELL v. MEE (1872), 36 J. P. 102.

63. ————]—By Stage Carriages Act, 1831 (c. 120), s. 5, the term "stage carriage" shall not be deemed to extend to or include any carriage used or employed wholly upon any railway:—*Held*: this means a railway in the ordinary sense of the term, & a tramcar is not excluded from the definition of stage carriage.—BRIAN v. AYLWARD (1902), 18 T. L. R. 371, D. C.

— Whether light railway carriage.]—See No. 288, *post*.

64. Right of unlicensed persons to run carriages on track—Wheels specially adapted to run on rails.]—LIVERPOOL TRAMWAYS CO. v. LIVERPOOL OMNIBUS CO., [1870] W. N. 126.

65. ————]—Flanged wheels.]—Tramway Act, 1870 (c. 78), s. 54, prohibits the user of the tramway by unlicensed persons with carriages "having flange wheels or other wheels suitable only to run on the rail of such tramway." *Appl't.*, an omnibus proprietor, attached to his vehicle a lever with arms having a small revolving disc or roller which the driver might drop into the groove of the rail at the lower side of each fore wheel when on the tramway, such discs operating when down as a flange at the point of contact with the rails, but when withdrawn by means of the lever leaving the vehicle free to travel over any part of the road:—*Held*: that this contrivance, though no obstruction to the tramway, was within the prohibition of the Act.—COTTAM v. GUEST (1880), 6 Q. B. D. 70; 50 L. J. Q. B. 174; 45 J. P. 95; 29 W. R. 305, D. C.

66. ————]—Ordinary wheels.] —MANCHESTER CORPN. & MANCHESTER CARRIAGE & TRAMWAY CO. v. ANDREWS & SON (1889), 5 T. L. R. 470.

Overcrowding—Contrary to Railway Passenger Duty Act, 1842 (c. 79)—Whether tramcar "stage carriage."]—See Nos. 62, 63, *ante*.

67. ————]—Persons riding on conductor's platform.]—ODELL v. MEE, No. 62, *ante*.

68. ————]—"Inside" & "outside" of tramcar—Upper compartment covered in.] —By Railway Passenger Duty Act, 1842 (c. 79), s. 15, if the number of passengers at any time conveyed in, upon, or about any stage carriage shall be greater in the whole, or upon the outside, or in the inside thereof than same is constructed to carry, a penalty is imposed on the driver & conductor; & by the London County Council (Tramways & Improvements) Act, 1913 (c. cii), s. 27, the council may during inclement weather or on Sundays or Bank or public holidays or on Saturdays, or with the consent of the Comr. of Police, on special occasions, carry, "inside" any carriage used by them on any tramways an additional number of passengers, not exceeding one-third of the number of inside passengers for which the carriage is licensed:—*Held*: upon the construction of these sects. the upper compartment of a tramcar which is covered in is the "outside"

#### PART I. SECT. 3, SUB-SECT. 6.

56 i. Mode of settlement—Arbitration.]—R. v. FITZGIBBON, [1910] 2 I. R. 236.—IR.

#### PART I. SECT. 4, SUB-SECT. 1.

6. Tramcar—Whether vehicle.] —A tramcar running on rails in a highway is a vehicle within sect. 2 (3) of the Regulations made under Motor-car Act, 1909.—GILLIN v. MALMGREN,

[1912] V. L. R. 26.—AUS.

1. Overcrowding—Evidence of permission.]—In a prosecution for an offence against a bye-law which prohibits a conductor from allowing any persons in excess of the maximum number allowed to travel on a tramcar, the fact that there are more than the prescribed number actually travelling is sufficient evidence of permission on the conductor's part.—KELLY v.

WIGZELL (1907), 5 C. L. R. 126.—AUS.

5. ————]—Contrary to Glasgow Police Act, 1866, s. 227.]—BLACK v. NEILSON (1867), 2 Adam. 421; 25 R. (Ct. of Sess.) (J.) 98; 35 Sc. L. R. 258; 5 S. L. T. 225.—SCOT.

h. Advertisements—Right to recompense for use of fittings on new tramcars.]—A tramway co. let the right of advertising on their cars to an



**Sect. 4.—Equipment and working: Sub-sects. 1, 2 & 3.]**

& not the "inside" of the tramcar, & an offence is committed under Railway Passenger Duty Act, 1842 (c. 79), s. 15, if more passengers are carried in the upper compartment than that compartment is licenced to contain, as such additional number are not carried "inside" the tramcar.—*PHENIX v. FISHER*, [1915] 1 K. B. 572; 84 L. J. K. B. 277; 112 L. T. 462; 79 J. P. 174; 31 T. L. R. 65; 13 L. G. R. 269, D. C.

— **Contrary to bye-law—Power of local authority to make bye-law.**—See Nos. 83, 84, *post*.  
69. — **What amounts to.**—*STOKELL v. BALDWIN* (1892), 8 T. L. R. 346, D. C.

70. — **Who may prosecute—Passenger.**—The Oxford Tramway co. made bye-laws, one of which forbade the co. to allow more persons to be carried in a carriage than was specified by measurement:—*Held*: a passenger incommode by excessive passengers was entitled to prosecute the conductor.—*BADCOCK v. SANKEY* (1890), 51 J. P. 564; 6 T. L. R. 170, D. C.

**Who liable to be prosecuted—Amendment of summons.**—See REGISTRATION, Vol. XXXIII., p. 329, No. 421.

71. **Alighting—From "hindmost or conductor's platform."**—*MONKMAN v. STICKNEY*, No. 86, *post*.

72. **Advertisements—Contract with advertising contractor—Payment of rent in respect of "regular running" cars.**—An advertising contractor entered into an agreement with the S. corpn., whereby it was agreed that the corpn. should permit the contractor for five years to use & enjoy the exclusive privilege of advertising on all the tramcars belonging to the corpn.; that the contractors should pay the corpn. certain specified annual rents for each & every "regular running" electric tramcar, such rents to be payable in advance upon the usual quarter days; & that the contractors should remove all advertisements from any vehicles which the corpn. might direct to be repaired & reinstate them after the completion of such repairs, & that the contractors should not be entitled to any compensation in respect thereof. The rents were paid during the whole period of the five years. The contractors contended that they were only liable to pay rent for vehicles which were regularly run, & not in respect of a vehicle while it was not running; & brought an action for an account of the number of regular running vehicles & of the money paid by them to defts.:—*Held*: "regular running" cars included any cars which were in the service of the undertaking as rolling stock for regular use at the commencement of the year the rent for which was in question, & which were intended for employment in the service as regular running cars; & regular running was not incompatible with occasional withdrawals from use for repairs.—*GRIFFITHS & MILLINGTON, LTD. v. SOUTHAMPTON CORPN.* (1906), 70 J. P. 179; 22 T. L. R. 301; 4 L. G. R. 316.

**Use of obscure or offensive language—Contrary to bye-law—Validity of bye-law.**—See No. 85, *post*.

advertising contractor, under a contract by which the advertising contractor undertook to supply the necessary fittings for holding the advertisements. New cars were constructed for the co., which as constructed were already supplied with the fittings required to hold the advertisements, & these fittings were utilised by the contractor for

that purpose. The fittings were also of use or ornament to the cars themselves:—*Held*: the co. was not entitled to recompense from the contractor for the use of the fittings in addition to the rent under the lease.—*EDINBURGH TRAMWAYS CO., LTD. v. COURTNEY*, [1909] S. C. 99; 46 Sc. L. R. 102; 10 S. L. T. 548.—*SCOT*.

73. **Lights—Application of county council bye-law.**—*ADAMSON v. MILLER* (1900), 16 T. L. R. 185; 44 Sol. Jo. 278, D. C.

— **On engines.**—See No. 80, *post*.

— **See, now, Road Transport Lighting Act, 1927 (c. 37).**

**SUB-SECT. 2.—MOTIVE POWER.**

See Tramways Act, 1870 (c. 78), s. 34.

74. **What power may be used—Animal or steam—Running powers over railway.**—Resps. owned & worked a single line of railway  $4\frac{1}{2}$  miles long, extending from the town of Swansea to the Mumbles. Appcts. were empowered to make a system of tramways in Swansea & the suburbs forming junctions with resps.' line which they had power to pass over & use with their carriages & servants, & for the purposes of traffic of all kinds. At the date of appcts.' Act containing this power resps.' line was worked by horse power; subsequently & at the date of the application, resps. used steam power:—*Held*: appcts.' running powers entitled them to use resps.' line with horse power.—*SWANSEA IMPROVEMENTS & TRAMWAYS CO. v. SWANSEA & MUMBLES RY. CO., LTD.* (1880), 3 Ry. & Can. Tr. Cas. 339, C. A.

— **Electricity—Rights & liabilities under contracts for supply of electrical energy.**—See ELECTRIC LIGHTING, Vol. XX., pp. 208, 216, Nos. 57, 100.

75. **Licensing of engines—Necessity for—Use of steam engines.**—The steam engines authorised by statute to be used on tramways are not locomotives within the meaning of Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 32, & therefore, do not require to be licenced by the county authority.—*BELL v. STOCKTON, ETC., TRAMWAY CO.* (1887), 51 J. P. 804; 3 T. L. R. 511, D. C.

76. **Rate of speed—Use of steam engines.**—The S. railway co. obtained the leave of parties interested in the soil of a highway & in streets of a town adjoining their terminus, & laid rails thereon & ran their railway engines & carriages over such street to a place beyond their terminus. No express power so to use the highway was given by any statute:—*Held*: Locomotives Act, 1865 (c. 83), s. 4, applied, & the co. could not go at a greater speed than 2 miles an hour, this being a case of driving a locomotive along a public highway within the meaning of that Act.—*LONDON & SOUTH WESTERN RY. CO. v. MYERS* (1881), 15 J. P. 731.

77. **Emission of steam—Liability of driver.**—H. was driver of a steam engine on a tramway; one of the bye-laws enacting that no steam shall be emitted from the engine, so as to be a reasonable ground of complaint to passengers or the public. H., as driver, was resting the engine, which was not in good repair, & he could not help emitting steam, & one passenger only, when passing, complained of it:—*Held*: H. was rightly convicted, as the bye-law was imperative, & the evidence was sufficient, though he had no *mens rea*, & one passenger only complained.—*HARTLEY v. WILKINSON* (1885), 49 J. P. 726, D. C.

**PART I. SECT. 4, SUB-SECT. 2.**

j. **Use of steam engine—Whether infringement of clause not to use traction engine.**—*TORONTO GRAVEL ROAD CO. & CONCRETE CO. v. YORK COUNTY CORPN.* (1885), 12 S. C. R. 517.—*CAN.*

k. **Steam motors.**—The Comr. for Railways in New South Wales has



78. — Emission of smoke & steam—Whether separate offences—Validity of conviction.]—D. was charged with emitting smoke & steam, contrary to bye-laws, from a tramway engine, & contended that these were two separate offences, & the summons was contrary to Summary Jurisdiction Act, 1848 (c. 43), s. 1 :—*Held* : the justices were right in overruling the objection, as emitting smoke was not the less an offence because steam was mixed with it.—*DAVIS v. LOACH* (1886), 51 J. P. 118, D. C.

79. — — — — — ]—A bye-law of the Board of Trade for the regulation of a steam tramway provided that "no smoke or steam shall be emitted from the engines so as to constitute any reasonable ground of complaint to the passengers or the public," under a penalty:—*Held*: an information & conviction for permitting smoke to escape from an engine "contrary to the bye-laws of the Board of Trade" was bad.—*COTTERILL v. LEMPRIERE* (1890), 24 Q. B. D. 634; 59 L. J. M. C. 133; 62 L. T. 695; 54 J. P. 583; 6 T. L. R. 262; 17 Cox. C. C. 97.

*Annotations*.—**Consd.** R. v. Jones, *Ex p.* Thomas, [1921]  
1 K. B. 632. **Mentd.** *Ex p.* Norman (1915), 111 L. T. 232,  
Pointon v. Cox (1926), 136 L. T. 506.

**80. Lights—Breach of Board of Trade regulation—Neglect of driver—Liability of promoters.]—**A tramway co. were convicted before justices of the breach of a regulation of the Board of Trade, made under a local Act, relative to lamps being placed & lighted in a conspicuous position on the front of a tramway engine:—*Held*: the regulation was not invalid as a regulation, & its subject-matter need not have been dealt with by a bye-law; the offence being stated in the words of the regulation was sufficiently described, & the co. were responsible for the personal neglect of their engine driver.—**ST. HELEN'S DISTRICT TRAMWAYS** (v. **WOOD** (1891), 80 L. J. M. C. 111; 56 J. P. 70. D. C.)

— On tramcars.] — See No. 73, *ante*.

— .—See, now, Road Transport Lighting Act, 1927 (c. 37).

SUB-SECT. 3.—BYE-LAWS.

*See* Tramways Act, 1870 (c. 78), s. 46.

*See, generally,* PUBLIC HEALTH, Vol. XXXVIII,  
pp. 155-167.

81. **Duty to make— Who may enforce.**— By local Act, s. 44, it was enacted that the corpn. should make bye-laws prescribing the distances at which carriages using the tramways should be allowed to follow one after the other. This clause was inserted on the petition of an accident insurance company, who were opponents of the bill. The corpn. made a bye-law that in the central area the distance at which a carriage should follow a preceding carriage using the same tramway should be such as might be directed by the police: —*Held*: that this bye-law was not a compliance with the sect., & the co. had a special interest entitling them to obtain a *mandamus* to the corpn. to fulfil their obligation under the sect.—*R. v. MANCHESTER CORPN.*, [1911] 1 K. B. 560; *sub nom.* *R. v. MANCHESTER CORPN.*, *Ex p.* *WISEMAN*, 80 L. J. K. B. 203; 104 L. T. 54; 75 J. P. 73; 9 L. G. R. 129.

**82. Validity—General requisites—Compliance with statute.]—R. v. MANCHESTER CORPN., No. 81, *ante*.**

**83. — Assent of lessees of tramway.]** — It is competent to the local authority of any borough to make & to enforce a bye-law, under Tramways Act, 1870 (c. 78), s. 48, for regulating the number of passengers to be carried in & upon tramcars, & the extent of accommodation to be afforded to them. The assent of the lessee of the line, under sect. 46, is not necessary to the validity of such bye-law. — **SMITH v. BUTLER** (1885), 16 Q. B. D. 349; 50 J. P. 260; 34 W. R. 416; 2 T. L. R. 69. D. C.

84. — — — Confirmation by quarter sessions.  
—WALLASEY TRAMWAY CO. v. WALLASEY LOCAL  
BOARD (1883), 47 J. P. Jo. 821, D. C.

85. — **Bye-law for prevention of nuisances** Omission of words “to annoyance of passengers.”]—Tramways Act, 1870 (c. 78), s. 46, enables the promoters of any tramway to make bye-laws for the prevention of nuisances in any carriage belonging to them. The promoters of a tramway made a bye-law providing: “No person shall swear or use offensive or obscene language whilst in or upon any carriage.”:—*Held*: the bye-law was valid although it did not contain any such additional words as “so as to be a nuisance or annoyance to others.”—*GENTEL v. RAPPS*, [1902] 1 K. B. 160; 71 L. J. K. B. 105; 85 L. T. 683; 20 Cox. C. C. 104; *sub nom.* *GEUTEL v. RAPPS*, 66 J. P. 117; 50 W. R. 216; 18 T. L. R. 72; 46 Sol. Jo. 69, D. C.

*Annotation* — **Refd.** Brabham v. Wooley (1901), 18 F. L. R. 99.

86. — — — **Certainty.**] — Under the powers given by Tramways Act, 1870 (c. 78), s. 46, a city corporn., who owned & worked the tramways of the city, made a bye-law that "every passenger shall enter or mount upon or depart from or get off a car by the hindermost or conductor's platform, & not otherwise." A passenger in a car on arriving at the terminus when the car was stationary insisted upon getting off & did get off the car by the end which during the journey was the driver's platform. The passenger, having been summoned for breach of the bye-law, contended that the bye-law was void for uncertainty:—*Held*: (1) the "hindermost or conductor's platform" in the bye-law must be taken to mean, in reference to a passenger in the car, the platform which was the conductor's platform during the journey which the passenger had undertaken; (2) the bye-law is clear & intelligible & applies whether the car is in motion or stationary, & it is therefore valid, & the passenger ought to have been convicted under it.—**MONKMAN v. STICKNEY**, [1913] 2 K. B. 377; 82 L. J. K. B. 992; 109 L. T. 142; 77 J. P. 368; 23 Cox. C. 474, D. C.

— — — Reasonableness.] — See No. 77, *ante* ;  
Nos. 89, 91-94, *post*.

87. Scope—Alighting from tramcars—"Hindermost or conductor's platform."—MONKMAN v. STICKNEY, No. 86, *ante*.

88. — Distance between tramcars.] — R. v. MANCHESTER CORPN., No. 81, *ante*.

— — **Stopping at cross roads.**]—*See* CORPORATIONS, Supp. IV., No. 907a.

89. — **Payment of fare—On demand—When fare demandable.**—P. was charged by the con-

authority, by virtue of Tramways Extension Act, 1880, s. 3, to use steam motors on tramways constructed under the 42 Vict. No. 18.—RAILWAYS COMR. v. TOOMEY (1884), 53 L. J. P. C. 91.—AUS.

1. —,] — Steam-motors may be

lawfully used on a tramway when the Ord. in Council under Tramways Act, 1872, authorising the tramway, directs the use of "mechanical or animal power."—*ENLUND v. CANTERBURY TRAMWAY CO.* (1887), 5 N. Z. L. R. 287 (S. C.).—N.Z.

**PART 1. SECT. 4, SUB-SECT. 8.**

m. By-law as to passengers standing on platform—Whether conductor of tramcar liable—Or tramway undertaker.] —(GRAHAM v. STRATHERN, [1927] S. C. (J.) 29. — SCOT.

*Sect. 4.—Equipment and working: Sub-sects. 3 & 4.*  
*Sect. 5: Sub-sects. 1, 2 & 3.]*

ductor of a tramway co. under a bye-law, which says, "Every passenger shall upon demand pay the fare legally demandable for the journey," with not paying upon demand made. The fare was demanded during the journey, & P. objected that it was not legally demandable until the completion of the journey. The co. were authorised by Act of Parliament to "make regulations for regulating the travelling in or upon any carriage belonging to them" & their Act also provided that "the tolls, etc., shall be paid to such persons & at such places upon or near to the tramways, & in such manner & under such regulations as the co. shall by notice appoint":—*Held*: the bye-law was authorised by the Act; it was reasonable, & as P. had become a passenger & was travelling upon the tramway, he was liable to pay the fare whenever it was demanded of him by the conductor.—*JEGINTON v. PEARL* (1875), 33 L. T. 428; 40 J. P. 56.

———— **Passenger breaking journey—Whether second fare payable.**—*See CARRIERS*, Vol. VIII., p. 98, No. 658.

**Lights.**—*See Nos. 73, 80, ante.*

90. — **Offensive language in tramcars.**—*GENTEL v. RAPPS*, No. 85, *ante*.

**Overcrowding.**—*See Nos. 69, 83, 84, ante.*

91. — **Ticket—Duty of passenger to show.**—By a bye-law made by a tramway co. & enforceable by a penalty, "Each passenger shall show his ticket, if any, when required so to do to the conductor or any duly authorised servant of the co." A passenger, having paid the fare & received a ticket, refused to show it to an inspector of the co., & was summoned for breach of the bye-law:—*Held*: the bye-law was not unreasonable, & the passenger ought to have been convicted.—*LOWE v. VOLP*, [1896] 1 Q. B. 256; 65 L. J. M. C. 48; 74 L. T. 143; 60 J. P. 232; 44 W. R. 442; 12 T. L. R. 206; 18 Cox, C. C. 253, D. C.  
*Annotation Refd. Hunt v. Green* (1906), 96 L. T. 23.

92. — **Duty of passenger to deliver up or pay fare again—Before termination of journey.**—A tramway bye-law imposed a penalty on passengers who refused to deliver up the ticket or pay the fare. H., a passenger, paid the fare & showed the ticket on demand, but refused to deliver it up, because he had gone only a part of the whole distance:—*Held*: H. was rightly convicted, as the bye-law was valid, & constituted a reasonable check on the tramway servants.—*HEAP v. DAY* (1886), 51 J. P. 213; 34 W. R. 627; 2 T. L. R. 687, D. C.

*Annotations:—Apld. Hanks v. Bridgman*, [1896] 1 Q. B. 253; *Low v. Volp*, [1896] 1 Q. B. 256; *Tuffey v. Tate* (1906), 96 L. T. 24. *Refd. Hunt v. Green* (1906), 23 T. L. R. 19.

93. — **Ticket lost.**—By a bye-law made by a tramway co. & enforceable by a penalty, "Each passenger shall . . . when required so to do either deliver up his ticket or pay the fare legally demandable for the distance travelled over by such passenger."

A passenger, having paid the fare & received a ticket, inadvertently lost it, & was thus unable to deliver it up when required. He declined to pay the fare over again, & was summoned by the co. for breach of the bye-law:—*Held*: the bye-law was not unreasonable, & the passenger ought to have been convicted.—*HANKS v. BRIDGMAN*, [1896] 1 Q. B. 253; 65 L. J. M. C. 41; 74 L. T. 26; 60 J. P. 312; 44 W. R. 285; 12 T. L. R. 193; 40 Sol. Jo. 277; 18 Cox, C. C. 224, D. C.

*Annotations:—Apld. Tuffey v. Tate* (1906), 96 L. T. 24. *Refd. Lowe v. Volp*, [1896] 1 Q. B. 256; *Hunt v. Green* (1906), 96 L. T. 23.

94. — — — — — **Ticket lying on floor.**—A bye-law of a tramway co. provided "Each passenger shall show his ticket if & when required to do so to the conductor or any duly authorised servant of the company & shall also when required to do so either deliver up his ticket or pay the fare legally demandable for the distance travelled by such passenger." Resp., on entering the car, paid his fare & received a ticket. In the course of the journey he lost it. On being asked to produce his ticket by the inspector he was unable to do so, though the conductor admitted he had paid for and received one. Resp. was then asked to produce his ticket, or pay the fare or leave the car, but failed to comply with any of these requests. He was summoned for a breach of the bye-law:—*Held*: the bye-law was reasonable, & resp. had infringed it.—*HUNT v. GREEN* (1906), 96 L. T. 23; 71 J. P. 18; 23 T. L. R. 19; 5 L. G. R. 67; 21 Cox, C. C. 333, D. C.

95. — — — — — **Ticket lying on floor.**—By a tramway bye-law made by the corp. of S. "Each passenger when tickets are issued shall as & when requested to do so show his ticket to the conductor or other servant of the corp. acting in performance of his duty, & shall also when requested to do so by the conductor or other servant of the corp. acting in the performance of his duty deliver up his ticket or, in case of failure to produce such ticket, pay the fare legally demandable for the distance travelled over by such passenger."

*Apltd.*, a passenger on one of the tramcars of the corp. of S., paid his fare, but refused to accept the ticket tendered by the conductor, on account of a condition printed on the back of it. The ticket fell on the floor of the top of the tramcar. Later an inspector asked *applt.* for his ticket, who pointed it out to him lying on the floor, but refused to take it up or to pay another penny for his fare:—*Held*: *applt.* had not committed any offence under the bye-law.—*WILSON v. FEARNFLEY* (1905), 92 L. T. 647; 69 J. P. 165; 3 L. G. R. 470, D. C.

**Liability of company Whether "person" within bye-law.**—*See CORPORATIONS*, Supp. IV., No. 907a.

#### SUB-SECT. 4.—EMPLOYEES.

**Contract of service—Forfeiture of wages—Validity of manager's certificate.**—*See MASTER & SERVANT*, Vol. XXXIV., pp. 92, 93, Nos. 689, 690.

— **Dismissal—Right to week's wages in lieu of holiday.**—*See MASTER & SERVANT*, Vol. XXXIV., p. 83, No. 614.

**Wrongful acts—Liability of promoters.**—*See Sect. 5, sub-sect. 3, post.*

**Driver of tramcar—Whether "workman"—Employer's Liability Act, 1880 (c. 42), s. 9.]** *See MASTER & SERVANT*, Vol. XXXIV., p. 222, No. 1839.

96. — **Duty to drive reasonably.**—*HARTLEY v. CHADWICK*, No. 127, *post*.

**Secretary—Scope of authority.**—*See COMPANIES*, Vol. IX., p. 542, No. 3572.

#### SECT. 5.—POWERS AND LIABILITIES.

##### SUB-SECT. 1.—IN GENERAL.

97. **Rights over roads—Extent.**—*BRISTOL TRAMS & CARRIAGE CO. v. BRISTOL CORPN.*, No. 51, *ante*.

**98.** — [Applts. were incorporated by statute to construct & maintain street railways in the city of Winnipeg, & the municipality was authorised by statute to make by-laws for authorising the construction of any street railway in the city. The municipality entered into an agreement with applts., conceding to applts. the right of making street railways in the city for twenty-five years. The agreement provided that, in the event of any other parties proposing to construct street railways on any of the streets not occupied by applts., the option of constructing such railway should be offered to applts.:—*Held*: neither the agreement nor the proviso conferred on applts. the exclusive right to use or occupy any street for railway purposes.—*WINNIPEG STREET RY. CO. v. WINNIPEG ELECTRIC STREET RY. CO. & CITY OF WINNIPEG*, [1894] A. C. 615; 64 L. J. P. C. 10; 71 L. T. 127; 6 R. 525, P. C.

**Ancillary business—Power to carry on—Running omnibuses.**—*See* LOCAL GOVERNMENT, Vol. XXXIII., pp. 109, 110, No. 735.

**Acting as carriers generally.**—*See* CORPORATIONS, Vol. XIII., p. 362, No. 972.

**Acquisition of land—Whether “interference with main structure.”**—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 178, No. 563.

**Amount of compensation payable—Injurious affection of land not taken.**—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 135, Nos. 219, 220.

**By local authority—Under agreement to assist promoters—Validity.**—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 297, No. 2277.

**Borrowing powers—Rights of debenture-holders.**—*See* Sect. 10, *post*.

**Contracts—Agreement with local authority as to future construction of further tramways—Validity.**—*See* CORPORATIONS, Vol. XIII., p. 366, No. 992.

**Dividends—Payment out of net profits—Ascertainment of profits.**—*See* COMPANIES, Vol. IX., p. 176, Nos. 1118, 1119.

**Sale of undertaking—Under Tramways Act, 1870 (c. 78), s. 43—To local authority.**—*See* Sect. 6, sub-sect. 1, *post*.

**Under Tramways Act, 1870 (c. 78), s. 44—At instance of debenture-holders.**—*See* Sect. 10, *post*.

**Shares—Transfer—To obtain voting powers—Legality.**—*See* COMPANIES, Vol. X., p. 1145, No. 8094.

**Promoters exceeding powers—Injunction—Jurisdiction of court.**—*See* INJUNCTION, Vol. XXVIII., p. 498, No. 999.

**Extent of liability to make discovery.**—*See* DISCOVERY, Vol. XVIII., p. 47, No. 51.

#### PART I. SECT. 5, SUB-SECT. 2.

**n. Tickets “not available on holidays” includes “half-holidays.”**—*COCHRANE v. TUTHILL*, [1908] V. L. R. 549.—*AUS.*

**o. Power to increase fares—Promoters authorised to substitute omnibuses on certain routes—& charge higher fares on omnibus routes.**—A tramway co. scheduled to their Act of Parliament distinct agreements with municipal authorities not to charge tramway passengers above a fixed fare; but they afterwards obtained legislative authority to substitute omnibuses on certain routes in lieu of the tramways, & to charge a higher fare on these routes:—*Held*: the co. had no power to increase the fare of passengers using the tramways only.—*EDINBURGH STREET TRAMWAYS CO. v. TORBAIN* (1877), 3 App. Cas. 58.—*SCOT.*

**p. “Over-riding”—No offence committed unless fraudulent intention.**—A person cannot be convicted of an offence under Tramways Act, 1870 (c. 78), s. 51, for “over-riding” unless it appears that he acted with fraudulent intention.—*NIMMO v. LANARKSHIRE TRAMWAYS CO.*, [1912] S. C. (J.) 23; 49 Sc. L. R. 549; [1912] 1 S. L. T. 305; 6 Adam, 571.—*SCOT.*

**q. Power to amend & increase maximum fares.**—*GREENOCK & PORT-GLASGOW TRAMWAYS CO. v. GREENOCK CORPN.* (1920), 57 Sc. L. R. 481.—*SCOT.*

**r. Right of postmen to travel on workmen’s cars at workmen’s fare.**—A tramway co. was required by its private Act to run a “reasonable number of carriages,” every morning & evening “for artisans, mechanics, daily labourers, clerks, & shop assistants,” at reduced fares. A post-

#### SUB-SECT. 2.—CHARGES, RATES AND TOLLS.

*See* Tramways Act, 1870 (c. 78), ss. 45, 51, 52.

**99. Workmen’s fares—“Daily labourer” Who is.**—Resp. was a corporal in the Royal Defence Corps & was engaged on guard duty at an internment camp, & on alternate days he acted as caretaker at an institute, where he cleaned the premises, looked after the heating apparatus, did repairs, & attended to the garden:—*Held*: resp. was not a “daily labourer” within a provision in a Tramway Order that “daily labourers” should be entitled to travel in the morning & evening at a reduced fare.—*MCDONALD v. BROWN* (1918), 87 L. J. K. B. 1119; 119 L. T. 56; 82 J. P. 173; 34 T. L. R. 358; 20 Cox, C. C. 291; 16 L. G. R. 640, D. C.

**100. Refusal to pay fare—When fare demandable.**—*EGINGTON v. PEARL*, No. 89, *ante*.

**Passenger breaking journey—Refusal to pay second fare.**—*See* CARRIERS, Vol. VIII., p. 98, No. 658.

**Nature of offence—Proceedings wrongfully taken against passenger—Liability of company for malicious prosecution.**—*See* MALICIOUS PROSECUTION, Vol. XXXIII., p. 470, No. 36.

**101. Remedies of promoters under Tramways Act, 1870 (c. 78).**—In the case of a person who enters a tramcar & refuses to pay the proper fare for the distance travelled, the remedy of the tramway authority is not limited to that given by above Act, s. 52, namely, the right to seize & detain him, if his name & address are unknown, until he can conveniently be taken before a justice or until he be otherwise discharged by due course of law; in such a case the tramway authority may treat the person offending as a trespasser & eject him from the tramcar provided no more force than is necessary is used.—*WHITTAKER v. LONDON COUNTY COUNCIL*, [1915] 2 K. B. 692; 84 L. J. K. B. 1446; 113 L. T. 544; 79 J. P. 437; 31 T. L. R. 412; 13 L. G. R. 950.

**Arrest & detention of passengers.**—*See* CARRIERS, Vol. VIII., p. 117, Nos. 779–781; Supp. IV., No. 781a.

**Removal of passengers from tramcars.**—*See* CARRIERS, Vol. VIII., pp. 114, 115, Nos. 767, 769, 770.

**Refusal to show or deliver up ticket.**—*See* Sect. 4, sub-sect. 3, *ante*.

#### SUB-SECT. 3.—LIABILITIES.

*See* Tramways Act, 1870 (c. 78), s. 55.

**102. Accidents—Extent of liability—General rule.**—Tramways Act, 1870 (c. 78), regulating tramway cos. authorised by statute to use tram-

man having claimed the right to travel at the reduced rates in cars specially set apart by the co. for the use of the privileged classes of passengers:—*Held*: (1) the co. was entitled to fulfil its statutory obligation by setting apart cars for the use of the privileged classes only; & (2) as a postman did not fall within any of these classes, the defender was not entitled to travel on cars so set apart.—*LANARKSHIRE TRAMWAYS CO. v. McNAUGHTON*, [1924] S. C. 35.—*SCOT.*

#### PART I. SECT. 5, SUB-SECT. 3.

**1. Liability for negligence—Dangerous exposure of electric wires of tramway.**—*WALMSLEY v. KALGOORLIE ELECTRIC TRAMWAYS, LTD.* (1903), 5 W. A. L. R. 49.—*AUS.*

**a. —**—A co., although authorised by statute to construct & maintain a system of electric tramways

**Sect. 5.—Powers and liabilities: Sub-sect. 3. Sect. 6: Sub-sect. 1.]**

cars in the public streets, enacts by sect. 55 that "The promoters or lessees, as the case may be, shall be answerable for all accidents, damages, & injuries happening through their act or default, or through the act or default of any person in their employment, by reason or inconsequence of any of their works or carriages. . . ."—*Held*: sect. 55 applies only to a wrongful act or default, & does not make the promoters or lessees answerable for mere accident caused without negligence by their use of tramcars.—*BROCKLEHURST v. MANCHESTER, BURY, ROCHDALE & OLDHAM STEAM TRAMWAYS CO.* (1886), 17 Q. B. D. 118; 55 L. T. 406; 51 J. P. 55; 34 W. R. 568, D. C.

*Annotation*:—*Distd. Midwood v. Manchester Corpn.*, [1905] 2 K. B. 597.

— **Whether promoters entitled to limit liability.**—*See CARRIERS*, Vol. VIII., p. 7, No. 14.

— **Identification of plaintiff with driver of vehicle guilty of contributory negligence.**—*See NEGLIGENCE*, Vol. XXXVI., p. 121, No. 808.

— **Insurance of promoters against liability—Construction of policy.**—*See INSURANCE*, Vol. XXIX., pp. 403, 404, No. 3191.

— **Within what time action must be begun—Public Authorities Protection Act, 1893 (c. 61), s. 1.**—*See PUBLIC AUTHORITIES*, Vol. XXXVIII., p. 103, No. 739.

— **Arrest & detention—Of passengers.**—*See CARRIERS*, Vol. VIII., p. 117, Nos. 779–781; Supp. IV., No. 781a.

— **Assaults—On passengers.**—*See CARRIERS*, Vol. VIII., pp. 114, 115, Nos. 767, 769, 770.

— **On trespassers.**—*See MASTER & SERVANT*, Vol. XXXIV., p. 148, No. 1165.

— **Bye-laws—Infringement of.**—*See Sect. 4, sub-sect. 3, ante.*

— **Compensation—Injurious affection of land not taken.**—*See COMPULSORY PURCHASE OF LAND*, Vol. XI., p. 135, Nos. 219, 220.

**103. — Who entitled to—Street vested in municipal authority.**—The vesting of a street in a municipal authority vests no property in such authority beyond the surface of the street & such portion as may be absolutely necessary to its repairs & management, but does not vest the soil or land in them as owners. Where a street is diverted into a tramway there is no taking of property, & no compensation is payable to the municipal authority.—*SYDNEY MUNICIPAL COUNCIL v. YOUNG*, [1898] A. C. 457; 67 L. J. P. C. 40; 78 L. T. 365; 46 W. R. 561, P. C.

— **Income tax—Assessment of profits—What deductions allowed.**—*See INCOME TAX*, Vol. XXVIII., p. 54, No. 276.

— **Interference with other traffic & undertakings.**—*See Sect. 3, sub-sect. 2, ante.*

upon a public highway, commits an actionable wrong if it places an un-insulated wire in the highway & allows part of its apparatus to become defective whereby a current of electricity is caused to remain in the wire, & a person coming into contact with it while using the highway is injured, it being practicable for the co. to insulate the wire & to discover & remedy the defect in the apparatus.—*FULLARTON v. NORTH MELBOURNE ELECTRIC TRAMWAYS & LIGHTING CO.*, [1916] V. L. R. 231; 21 C. L. R. 181.—*AUS.*

**b. — Vehicle injured by tram-line being worn away.**—*FERREMANVILLE MUNICIPAL TRAMWAYS & ELECTRIC LIGHTING BOARD v. WILLIS* (1911), 13 W. A. L. R. 110.—*AUS.*

**c. — Projections on tramlines.**—*MUNICIPAL TRAMWAYS TRUST v. STEPHENS* (1912), 15 C. L. R. 104.—*AUS.*

**d. — —**—*NIELSEN v. BRISBANE TRAMWAY CO., LTD.* (1912), 14 C. L. R. 354.—*AUS.*

**e. Liability of municipality or tramway company—For faulty construction of tramway track by promoter.**—*SADLER v. PERTH CORPN.* (1913), 15 W. A. L. R. 84.—*AUS.*

**f. — To keep roads & bridges in good repair.**—*BRISBANE CITY COUNCIL v. BRISBANE TRAMWAYS CO., LTD.*, [1920] St. R. Qd. 258.—*AUS.*

**g. Duty to keep road in good repair.**—*MORRIS v. CANTERBURY TRAMWAY CO., LTD.* (1892), 10 N. Z. L. R.

**Malicious prosecution—Proceedings against passenger for refusing to pay fare.**—*See MALICIOUS PROSECUTION*, Vol. XXXIII., p. 470, No. 36.

— **Proceedings against passengers for passing bad money.**—*See CARRIERS*, Vol. VIII., p. 117, No. 781.

— **Negligence—Injuries to passengers—Starting signal given by another passenger.**—*See CARRIERS*, Vol. VIII., p. 72, No. 487.

— **Tramcar slowing down & suddenly accelerating speed with jerk.**—*See CARRIERS*, Vol. VIII., pp. 84, 85, Nos. 582–584.

— **Fall of trolley arm.**—*See CARRIERS*, Vol. VIII., p. 73, No. 492.

— **Fall of overhead wire.**—*See CARRIERS*, Vol. VIII., pp. 73, 74, No. 493.

— **Injuries to persons lawfully using highway—Driving at dangerous speed.**—*See NEGLIGENCE*, Vol. XXXVI., p. 60, No. 377; Supp. IV., No. 765a.

— **Failure to stop.**—*See NEGLIGENCE*, Vol. XXXVI., p. 60, Nos. 373–375, 379.

— **Failure to keep proper look out.**—*See NEGLIGENCE*, Vol. XXXVI., p. 92, No. 607.

— **Defective brakes.**—*See RAILWAYS*, Vol. XXXVIII., p. 317, No. 361.

— **Failure to shut gate separating railway from tramway.**—*See RAILWAYS*, Vol. XXXVIII., p. 290, No. 229.

— **Loss of passengers' luggage.**—*See CARRIERS*, Supp. IV., No. 14a.

— **Nuisance—Unauthorised construction of tramway.**—*See HIGHWAYS*, Vol. XXVI., pp. 414, 419, 420, Nos. 1336, 1385, 1387.

— **Disturbance by electric current.**—*See NUISANCE*, Vol. XXXVI., pp. 188, 189, 197, Nos. 313, 372.

— **Smell from stables.**—*See NUISANCE*, Vol. XXXVI., p. 175, No. 206.

**104. — Working of machinery.**—*Sect. 60 of the Georgetown Electric Lighting Order, 1890*, provides that "Nothing in this order shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them."

*Appt. co. had acquired & combined two separate undertakings, a tramways co. & an electric lighting & power co. & on the same day on which the electric lighting order above mentioned was issued they obtained a licence under the Tramways Ordinance, 1890, authorising them to construct, maintain, & operate tramways in Georgetown & its vicinity, & to generate & supply electrical energy as a motive power "anything in any ordinance of the colony notwithstanding."*

The electric lighting & the tramways were being worked together as one business:—*Held*: the words in the licence did not relieve them from liability for a nuisance caused by the working of

524.—*N.Z.*

**h. —**—*HARRIS v. FORD* (1909), 28 N. Z. L. R. 426.—*N.Z.*

**k. —**—*INVERCARGILL BOROUGH v. MCKNIGHT*, [1923] N. Z. L. R. 1041.—*N.Z.*

**l. Maintenance of municipal tramway—Right of ratepayer to maintain action—Non-repair.**—*RITCHIE v. DUNDEE, ETC. POLICE COMRS.* (1886), 13 L. (Ct. of Sess.) (J.) 63; 23 Sc. L. R. 663.—*SCOT.*

**m. Whether Tramways Act, 1870, excludes action at common law—For injury to lines of plaintiff company.**—*LANAKESHIRE TRAMWAYS CO. v. MOTHERWELL BURGH* (1908), 16 S. L. T. 63.—*SCOT.*

**n. Construction of car—"To enable**

their machinery.—*DEMERARA ELECTRIC CO., LTD. v. WHITE*, [1907] A. C. 330; 78 L. J. P. C. 54; 98 L. T. 752; 51 Sol. Jo. 497, P. C.

— **Use of creosoted wood in paving road—Damage to plants.**—*See NUISANCE*, Vol. XXVII., p. 194, No. 356.

— **Removal of snow from track—Snow left on streets.**—*See HIGHWAYS*, Vol. XXVI., p. 439, Nos. 1562, 1563.

**Repair of roads.**—*See* Sect. 3, sub-sect. 4, *ante*.

**105. Trespass—Running powers over another tramway—Defect in line—Injury to passenger.**—*Defts.* were a co. authorised by Act of Parliament to run tramcars by steam, & had running powers over the line of another tramway co. along a highway. By reason of certain points upon such line being defective, a tramcar of *defts.*, while being drawn by a steam engine, went off the line & injured *pltf.*, who was upon the highway:—*Held*: the statutory powers of *defts.* could not be taken to authorise them to run their tramcars along the highway upon a tramway in a defective condition: the tramway being defective, *defts.* in running their tramcar on the highway were doing an unlawful act: & *defts.* were liable as for a trespass in respect of the injury occasioned to *pltf.* by their immediate action.—*SADLER v. SOUTH STAFFORDSHIRE & BIRMINGHAM DISTRICT STEAM TRAMWAYS CO.* (1889), 23 Q. B. D. 17; 58 L. J. Q. B. 421; 53 J. P. 694; 37 W. R. 582, C. A.

*Annotation*.—*Distd. Phillips v. Britannia Hygienic Laundry Co.*, [1923] 1 K. B. 539.

## SECT. 6.—POWERS OF LOCAL AUTHORITIES.

### SUB-SECT. 1.—POWER OF PURCHASE.

*See* Tramways Act, 1870 (c. 78), s. 43.

**106. Who may sell—Purchasers of undertaking from promoters—Sale not approved by Board of Trade.**—In 1895 a Provisional Order was obtained by certain promoters for the construction of tramways in the borough of West Hartlepool. This Order was confirmed by an Act passed in 1895 by which it was provided (*inter alia*) that *deft. corp.* might purchase the undertaking after the lapse of fourteen years. The Act provided that no sale of the undertaking by the promoters should have any validity until after approval by the Board of Trade.

In Aug. 1896, the promoters entered into an agreement with the British Electric Traction (Pioneer) Co., Ltd., to sell the undertaking to them; & by a further agreement made in Oct. 1896, the undertaking was purported to be sold to *pltf. co.* Neither of these agreements was approved by the Board of Trade. The construction of the tramway, which was commenced in Mar. 1897, was duly completed. In Jan. 1910, *deft. corporation* gave notice to the promoters & also to *pltf. co.* or "other the promoters," requiring them to sell their undertaking. The matter was referred to an arbitrator, who assessed the value at £12,963. In an action by the co., " & all others the promoters of the Hartlepool Electric Tramways Order, 1895," to recover this sum, the *corp.* contended that they could make no valid payment to the original promoters who now had no legal title to the tramway; & that they could not pay anything to *pltf. co.*, inasmuch as the assignment had not been approved by the Board

of Trade:—*Held*: by assignment from the promoters the tramway co. had, to the knowledge of the Board of Trade, by succession, themselves become the promoters of the undertaking, & that was quite sufficient to enable them to sell the tramway.—*HARTLEPOOL ELECTRIC TRAMWAYS CO., LTD. v. HARTLEPOOL CORPN.* (1911), 75 J. P. 537; 9 L. G. R. 1098, C. A.

**107. Time of purchase—Effect of private Act—Tramways Act, 1870 (c. 78), s. 43, not overriden.**—*WALLASEY UNITED TRAMWAYS & OMNIBUS CO. v. WALLASEY URBAN DISTRICT COUNCIL* (1900), 17 T. L. R. 152, H. L.

**108. Whether obligation to purchase whole undertaking—Several tramways incorporated in one undertaking.**—Where one tramway has been incorporated with others by statute in one undertaking, a local authority has got power to purchase such tramway within twenty-one years after the Act or Order authorising its construction, & although no right to purchase the other lines has arisen, or although they may not be within the district of the purchaser's authority, & although the general system of the tramlines "may be disconnected by such purchase."—*NORTH METROPOLITAN TRAMWAYS CO. v. LONDON COUNTY COUNCIL* (1895), 60 J. P. 23; 12 T. L. R. 101, C. A.

**109. — "Suitable to & used" for undertaking—Tramway system partly owned & partly leased—Depots used for entire system.**—By Tramways Act, 1870 (c. 78), s. 43, a local authority is empowered under certain circumstances to purchase compulsorily the tramways within its district "upon terms of paying the then value . . . of the tramways & all lands, works, materials, & plant of the promoters suitable to & used by them for the purpose of their undertaking within such district." Where part of the tramways within a local authority's district already belonged to the authority, but were worked by the promoters of the rest of the tramways within the district jointly with such promoters' part, on the local authority purchasing the promoters' part, it is bound under sect. 43 to take all the lands, works, materials & plant used by the promoters for the joint working of the whole system as "lands, works, materials, & plant of the promoters suitable & used by them for the purposes of" the part of the tramways belonging to the promoters.—*RE MANCHESTER CARRIAGE & TRAMWAYS CO. & MANCHESTER CORPN.* (1902), 87 L. T. 504; 67 J. P. 14; *sub nom* MANCHESTER CARRIAGE & TRAMWAYS CO. v. MANCHESTER CORPN., 18 T. L. R. 779; 46 Sol. Jo. 687; *on appeal* (1903), 19 T. L. R. 439, C. A.

*Annotation*.—*Reid. Toronto City Corp. v. Toronto Ry. Corp.*, [1925] A. C. 177.

**110. — — —.**—(1) A tramway co. were owners & lessees of a system of tramways running through the city of Manchester, the borough of Ashton-under-Lyne, & various urban districts. The *corp.* of Manchester & the councils of various urban districts through which the tramway system ran, served the co. with notices under Tramways Act, 1870 (c. 78), s. 43, requiring them to sell the lines owned by them within those districts. In an arbn. held to settle the sums to be paid the arbitrator decided that a depot in Ashton-under-Lyne should be taken by the purchasing authorities, & his decision was upheld by the judge. The purchasing authorities appealed from that

*driver to command fullest possible view of road.*)—*CASS v. EDINBURGH & DISTRICT TRAMWAYS CO., LTD.*, [1909] S. C. 1088; 46 Sol. L. R. 734; [1909] 1 S. L. T. 513.—*SCOT.*

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**o. Right to take seat if vacant—Even if full number of passengers aboard (car.)**—*TERRON v. JOHANNESBURG MUNICIPALITY*, [1918] T. P. D. 335.—*S. AF.*

## PART I. SECT. 6, SUB-SECT. 1.

**p. Principles of valuation—Enhancement of value of land because of projected purchase for tramway.**—*Re PRAHMAN*

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**Sect. 6.—Powers of local authorities: Sub-sect. 1.]**

decision, & in the Ct. of Appeal the judgment of the judge was set aside by consent of the parties upon terms which were not disclosed. Subsequently the *corp.* of Ashton-under-Lyne served the *co.* with notices under Tramways Act, 1870 (c. 78), s. 43, requiring them to sell the lines within the borough. In an *arbn.* held in consequence of those notices the *co.* contended that the *corp.* of Ashton-under-Lyne were bound to purchase the above-mentioned depot, & the arbitrator awarded that such depot should be purchased by the *corp.*:—*Held*: (1) the *corp.* were bound to purchase the depot in question as being suitable to & used for the purposes of the undertaking within their district within Tramways Act, 1870 (c. 78), s. 43, notwithstanding the fact that in the previous proceedings it had been decided that such depot was suitable to & used for the purposes of the undertaking within other districts; (2) in an *arbn.* to determine the amount to be paid by a local authority upon the purchase of a tramway undertaking under Tramways Act, 1870 (c. 78), s. 43, the arbitrator must take into consideration the costs incurred by the undertakers in obtaining Parliamentary powers to construct & work the tramway, & no allowance should be made for depreciation under that head. But the arbitrator should not take into account costs incurred by the undertakers in opposing bills in Parliament for the purpose of protecting their undertaking.—*Re MANCHESTER CARRIAGE & TRAMWAYS CO., LTD. & ASHTON-UNDER-LYNE CORPN.* (1904), 68 J. P. 570.

**111. — Buildings outside district.]—**By Tramways Act, 1870 (c. 78), s. 43, it is provided that "Where the promoters of a tramway in a district are not the local authority, the local authority . . . may . . . by notice in writing require such promoters to sell, & thereupon such promoters shall sell to them their undertaking, or so much of the same as is within such district . . . & all lands, buildings, works, materials, & plant of the promoters suitable to & used by them for the purposes of their undertaking within such district."

A local authority gave notice to a tramway *co.* that they were required under the above sect. to sell to them so much of their works & undertaking as was within the district of the local authority.

The *co.* were also the owners of a large depot situated outside the boundary of the district, which was found by an arbitrator to be "used with, & suitable to" the undertaking within the district:—*Held*: the local authority could be compelled to purchase the depot.

The words "within such district" qualify the word "undertaking," & not the words "lands, buildings, works, materials, & plant of the promoters."—*MANCHESTER CARRIAGE & TRAMWAYS CO., LTD. v. SWINTON & PENDLEBURY URBAN COUNCIL*, [1906] A. C. 277; 75 L. J. K. B. 839; 93 L. T. 820; 70 J. P. 81; 22 T. L. R. 154; 4 L. G. R. 214, H. L.; *revisg. S. C. sub nom. Re MANCHESTER CARRIAGE & TRAMWAY CO., LTD. & SWINTON & PENDLEBURY URBAN DISTRICT COUNCIL*, 21 T. L. R. 91, C. A.

*Annotations:—Reid.* North Metropolitan Tram. Co. v. Leyton U. D. C. (1907), 6 L. G. R. 1; L. & N. E. Ry. v. Easington Union Assmt. Com. & Easington-with-Thorpe Parish Council (1925), 95 L. J. K. B. 255; Toronto City Corp. v. Toronto Ry. Corp., [1925] A. C. 177.

& MALVERN TRAMWAYS TRUST & WARD'S ARBITRATION, [1915] V. L. R. 666.—**AUS.**

q. — On compulsory purchase

—According to special Act & Land Compensation Act.]—MELBOURNE TRAMWAY & OMNIBUS CO., LTD. v. TRAMWAY BOARD, [1919] A. C. 667, P. C.—**AUS.**

**112. — Car factory on private land.]—**North Metropolitan Tramways Act, 1870 (c. clxxii), s. 31, empowered the district council to require the tramway *co.* to sell to them their undertaking within the district "upon terms of paying the then value . . . of the tramways & all lands, buildings, works, materials, & plant of the *co.* suitable to & used by them for the purposes of their undertaking within such district" & the district council exercised that power.

A tramway of the *co.* within the district passed through the entrance gates to the yard of a large car factory erected by the *co.* upon their own land for a distance of about 20 yards, & then ran for a few feet under the roof & within the walls of the factory. The referee appointed to determine the value to be paid by the council to the *co.* determined that the car factory was not suitable to & used by the *co.* for the purposes of their undertaking within the district, & he awarded nothing to be paid in respect thereof, & he awarded & determined the value of the portion of the permanent way of the tramway upon the land of the *co.*, including the entrance gates, but not including the value of any buildings, to be the sum of £125:—*Held*: the local authority were not bound to purchase or pay for the whole or any part of the car factory or of the land belonging to the tramway *co.*—*NORTH METROPOLITAN TRAMWAYS CO. v. LEYTON URBAN DISTRICT COUNCIL* (1908), 98 L. T. 792; 72 J. P. 241; 6 L. G. R. 627, C. A.

**113. Price—Basis of valuation—"Tramway"** Cost of construction less proper deduction for depreciation.]—Applts., the Edinburgh Street Tramways *co.*, were authorised to construct tramways by a private Act which incorporated the general provisions of Tramways Act, 1870 (c. 78). Resps., the Lord Provost, etc., of Edinburgh, the local authority, gave notice in 1892, under Tramways Act, 1870 (c. 78), s. 43, to purchase applts.' undertaking:—*Held*: (1) on a sale to the local authority, the local authority become entitled to the exclusive use of the tramways, not by transference of any right from the promoters, but by virtue of the statute alone; (2) the word "tramway" could not be read as synonymous with "undertaking" but was used in Tramways Act, 1870 (c. 78), as meaning the structure laid down on the highway, & nothing more; therefore the "then value of the tramway" must be measured by what it would cost, at the date of the sale, to construct the lines, subject to a deduction for depreciation, & rental value must not be taken into consideration.—*EDINBURGH STREET TRAMWAYS CO. v. EDINBURGH CORPN.*, [1894] A. C. 456; 63 L. J. Q. B. 769; 71 L. T. 301; 10 T. L. R. 625; 6 R. 317, H. L.

*Annotations:—As to (1) Reid.* *Re Southampton Tram. Co. & Southampton Corp.* (1899), 81 L. T. 652. *As to (2) Fold.* *London Tram. Co. v. L. C. C.* (1898), 78 L. T. 361. *Consd.* *London, Deptford & Greenwich Tram. Co. v. L. C. C.*, [1905] 1 K. B. 316. *Appl.* *Dudley Corp. v. Dudley, Stourbridge & District Electric Traction Co.* (1907), 97 L. T. 556. *Consd.* *Hamilton Gas Co. v. Hamilton Corp.*, [1910] A. C. 300. *Appl.* *Melbourne Tramway & Omnibus Co. v. Tramway Board* (1919), 88 L. J. P. C. 102; *Oldham, Ashton & Hyde Electric Tramways v. Ashton Corp.*, [1921] 3 K. B. 511. *Reid.* *Toronto City Corp. v. Toronto Ry. Corp.*, [1925] A. C. 177. *Generally, Reid.* *Eccles Corp. v. South Lancashire Tram. Co.*, [1910] 2 Ch. 283; *Perth Gas Co. v. Perth Corp.*, [1911] A. C. 566. *Mentd.* *Mersey Docks & Harbour Board v. Birkenhead Assmt. Com.*, [1900] 1 Q. B. 143; *I. R. Comrs. v. Fitzwilliam*, [1913] 2 K. B. 593; *Re Working Urban District Council (Basingstoke Canal) Act*, 1911, [1914] 1 Ch. 300.

**r. Principle of valuation—Value** "as a going concern."]—*Re BELFAST CORPN. & CAVEHILL & WHITEWELL TRAMWAY CO.'S ARBITRATION* (1911), 45 L. T. 231, 283.—**IR.**



114. ———— [—]—LONDON TRAMWAYS Co. v. LONDON COUNTY COUNCIL, [1898] A. C. 375; 87 L. J. Q. B. 559; 78 L. T. 361; 62 J. P. 675; 40 W. R. 609; 14 T. L. R. 360, H. L. Annotation:—*Mentd.* Davidson v. M'Robb, [1918] A. C. 304.

115. ———— [—]—London Street Tramways Act, 1870 (c. clxxi), s. 44, enacts that the Metropolitan Board of Works may after twenty-one years from the passing of the Act require the London Street Tramways co. to sell to them their undertaking upon terms identical with those prescribed by Tramways Act, 1870 (c. 78), s. 43, viz. "upon the terms of paying the then value, exclusive of any allowance for past or future profits of the undertaking or any compensation for compulsory sale, or other consideration whatsoever, of the tramway & all lands, buildings, works, material & plant of the co. suitable to & used by them for the purposes of their undertaking." The London County Council, as successors to the Metropolitan Board of Works, required the co. to sell:—*Held*: (1) the word "tramway" meant the structure laid down & nothing more & did not include the statutory powers conferred on the co.; & (2) the arbitrator was right in rejecting all evidence of past & future profits, including evidence of the rental value of the tramways considered as let or capable of being let to a tenant, & in awarding that "the then value of the tramway & all lands, buildings, works," etc., must be measured by what it would cost to establish the tramway if it did not then exist, subject to a proper deduction in respect of depreciation.—LONDON STREET TRAMWAYS Co. v. LONDON COUNTY COUNCIL, [1894] A. C. 480; 10 T. L. R. 630, H. L.; *affg.* S. C. *sub nom.* *Re* LONDON COUNTY COUNCIL & LONDON STREET TRAMWAYS Co., [1894] 2 Q. B. 189, C. A.

Annotations:—*As to* (2) *Apld.* London, Deptford & Greenwich Tram. Co. v. L. C. C., [1905] 1 K. B. 316; Melbourne Tramway & Omnibus Co. v. Tramway Board (1919), 88 L. J. P. C. 102. *Refd.* Oldham, Ashton & Hyde Electric Tramway v. Ashton Corpn., [1921] 3 K. B. 511. *Generally*, *Refd.* Perth Gas Co. v. Perth Corpn., [1911] A. C. 566.

116. ———— Undertaking subject to contingency of compulsory sale.]—The Southampton tramways were constructed by a co. under a special Act passed in 1877. By a special Act in 1897 the Southampton corpn. were empowered to purchase "the undertaking of the co." upon such terms as, in case of dispute, might be settled by "arbn. under & according to the provisions of Lands Clauses Consolidation Act, 1845 (c. 18):—*Held*: in determining the price to be paid for "the undertaking of the co." the arbitrator should treat the undertaking as one which the co. only enjoyed subject to the contingency of being compelled to sell the same under the provisions of Tramways Act, 1870 (c. 78), s. 43.—*Re* SOUTHAMPTON TRAMWAYS Co. & SOUTHAMPTON CORPN. (1899), 81 L. T. 652; 63 J. P. 788; 16 T. L. R. 38, C. A.

117. ———— Parliamentary costs.]—*Re* MANCHESTER CARRIAGE & TRAMWAYS CO., LTD. & ASHTON-UNDER-LYNE CORPN., No. 110, *ante*.

118. ———— Contribution towards cost of street widening.]—By Tramways Act, 1870 (c. 78), s. 43, the local authority of the district in which a tramway is situate may require the promoters of the tramway to sell to them their undertaking "upon terms of paying the then value . . . of the tramway." A tramway co. were required by the local authority to sell their undertaking under the above sect. At the date of the requisition it was the practice, upon an application for Parliamentary powers by the promoters of a tramway, to require, as a condition of their obtaining such powers, that the streets in which the tramway was to be

laid should be widened, & that the promoters should contribute a certain proportion of the cost of the widening. But at the date when the co. obtained their Parliamentary powers that practice had not come into existence, & the streets in which their tramway was laid were in fact never widened:—*Held*: for the purpose of assessing "the then value" of the tramway under the above sect., the fact that the local authority would, if they had to make the tramway themselves at the date of their requisition to sell, have to contribute to the cost of widening the streets ought not to be taken into consideration.—LONDON, DEPTFORD & GREENWICH TRAMWAYS Co. v. LONDON COUNTY COUNCIL, [1905] 1 K. B. 316; 53 W. R. 411; 21 T. L. R. 177; *sub nom.* *Re* LONDON, DEPTFORD & GREENWICH TRAMWAYS Co. & LONDON COUNTY COUNCIL, 74 L. J. K. B. 143; 92 L. T. 124; 69 J. P. 98; 3 L. G. R. 103.

119. ———— [—]—Local authorities under the powers conferred on them by Tramways Act, 1870 (c. 78), s. 43, gave notice to a tram. co. to sell to them their tramway. In determining the "then value" of the tramway within the sect. & in the manner prescribed in *Edinburgh Street Tramways Co. v. Edinburgh Corpn.*, No. 113, *ante*, the arbitrator allowed to the co. (a) a sum in respect of the cost of raising capital; (b) a sum in respect of interest on capital during construction; & he held that neither of these two sums was subject to depreciation; but (c) that a sum which he allowed in respect of the cost of engineering was subject to depreciation. The arbitrator further allowed a sum in respect of the expenditure on alterations to a bridge in the following circumstances. In the order authorising the construction of the tramway a provision was inserted at the instance of a railway co., over whose lines the tramway passed by a bridge, that if the railway co. required at any time to make structural alterations to the bridge the promoters should temporarily divert the tramway. Some years afterwards the railway co. did so require, & the tramway was temporarily diverted:—*Held*: (1) the cost of raising capital could not be allowed; (2) the cost of diversion of the bridge could not be allowed; (3) the interest on capital during construction should be subject to depreciation in so far as the capital on which it was the interest was subject to depreciation, that is to say, according to whether the capital was spent on depreciating things, such as rails, or on a non-depreciating thing, such as excavation; (4) & the decision of the arbitrator that the cost of engineering should be subject to depreciation was a decision on a question of fact, with which the ct. could not interfere.—OLDHAM, ASHTON & HYDE ELECTRIC TRAMWAYS, LTD. v. ASHTON CORPN., [1921] 3 K. B. 511; 125 L. T. 391; 85 J. P. 181; 19 L. G. R. 327; *sub nom.* *Re* OLDHAM, ASHTON & HYDE ELECTRIC TRAMWAY & ASHTON CORPN., 90 L. J. K. B. 828, C. A.

Annotation:—*Generally*, *Mentd.* I. R. Comrs. v. Newcastle Breweries (1926), 95 L. J. K. B. 936.

120. Right to possession.—Before payment of purchase-money.]—A tramway had been worked by a tramway co. as a horse tramway. The tramway within the city of M. belonged to the corpn., but had been leased to the co. until Nov. 30, 1902. The tramway outside the city belonged to the co. The local authority gave notice to purchase under Tramways Act, 1870 (c. 78), s. 43, & the amount of the purchase-money was to be ascertained by arbn. The arbitrator made his award in the form of a special case, awarding different amounts. If the local authority was compelled to purchase the whole plant & stock of the co. a much larger



*Sect. 6.—Powers of local authorities: Sub-sects. 1, 2 & 3. Sect. 7.]*

amount was payable than if the local authority was only bound to take over a proportion of the stock & plant bearing the same proportion to the whole stock & plant of the co. that the tramway without the city bore to the whole tramway the co. formerly worked. The special case had been heard by the judge & was under appeal. The local authority claimed to be entitled to take possession of the line of the co. before the purchase-money had been finally ascertained:—*Held*: even if there had been a concluded agreement, it was impossible to say that property contracted to be sold could be treated as sold without payment of the purchase-money, & an injunction must be granted restraining defts. from taking or retaining possession of pltf's.' property.—*MANCHESTER CARRIAGE & TRAMWAYS CO. v. MANCHESTER CORPN. & STRETFORD URBAN DISTRICT COUNCIL* (1902), 87 L. T. 678; 67 J. P. 17.

**Effect of purchase—Liability of local authority for income tax as successors.]—***See INCOME TAX, Vol. XXVIII., p. 41, No. 209.*

**SUB-SECT. 2.—POWER OF LEASING.**

*See Tramways Act, 1870 (c. 78), s. 19.*

**121. Powers of lessees—To sub-assign lease.]—***OMNIBUS CONVEYANCE CO. v. LIVERPOOL UNITED TRAMWAYS & OMNIBUS CO.* (1882), 26 Sol. Jo. 580.

**122. — To grant licence to use tramway—Approval of Board of Trade.]—***Resp. corpn. was empowered by statute to construct tramways & to lease them to the owners of tramways in adjacent districts, subject to the approval of the Board of Trade. They constructed tramways under their powers, & with the approval of the Board of Trade, agreed to lease them to applt. corpn., who were the owners of tramways in an adjacent district. Applt. corpn. granted a licence to other applts. to use such tramways:—Held: they had not power to grant such licence without the consent of resps. & the approval of the Board of Trade.—SALFORD CORPN. v. ECCLES CORPN., [1912] A. C. 405; 81 L. J. Ch. 561; 106 L. T. 577; 78 J. P. 249; 28 T. L. R. 343; 56 Sol. Jo. 428; 10 L. G. R. 341, H. L.; affg. S. C. sub nom. ECCLES CORPN. v. SOUTH LANCASHIRE TRAMWAYS CO., [1910] 2 Ch. 263, C. A.*

**123. — Right to indemnify against contractor—Contract for repair of road between lessor & contractor—Lessee not party to contract.]—**The corpn. of a borough were the owners of a tramway in the borough, & they granted a lease of the tramways, of which lease pltf's. were the assignees. Under the lease the repairs necessary to keep the tramway in working order were to be executed by the corpn. at the cost of pltf's. During the currency of the lease the tramway required to be relaid at a certain place, & an agreement was entered into between the corpn. & pltf's., which after reciting that the corpn. at the request & with the consent of pltf's. had agreed to relay the tramway, provided that the corpn. would relay the tramway, & would during the execution of the work provide where necessary a temporary track for the purpose of enabling pltf's., as far as possible, to maintain their service of trams, & the agreement further provided that nothing therein contained should render the corpn. liable in the event of any accident, injury, or damage being occasioned to or sustained by pltf's., their servants or passengers or their rolling stock through or arising out of the execution by the

corpn. of the work, but that the corpn. would insert in the contract to be entered into by them a provision imposing upon the contractor full responsibility for all claims & demands resulting from any such accident, injury or damage. The corpn. thereupon made a contract with deft., to which pltf's. were not parties, which recited the lease & that the corpn. had at the request & with the consent of pltf's., subject to certain conditions, agreed to relay the tramway, & by which deft. agreed to execute the work of relaying the tramway & to indemnify the corpn. against all actions & claims for compensation to workmen & passengers carried on the tramway arising out of the execution of the work, & that deft. should, during the execution of the work, be responsible for all accidents. During the execution of the work the tramcars continued to run, & a car which was carrying passengers was derailed & overturned owing to the negligent manner in which certain of the work was being carried out at the place where the accident happened, & the passengers & driver were injured & the tramcar was damaged. Pltf's. paid compensation to the passengers & driver, & claimed to recover from deft. the amounts so paid & the cost of repairing the tramcar:—*Held*: though pltf's. were not parties to the contract between the corporation & deft. inasmuch as pltf's.' proprietary right as lessees of the tramway & their right of passage on the highway had been injuriously affected by the act of deft. & the latter was liable in damages to pltf; & as the work of relaying the tramway while the tramcars were running involved risk of danger to the passengers in the tramcars, pltf's. were liable to their passengers, & were entitled to recover from deft. the sum properly paid as compensation to the passengers who were injured, as well as the sum paid as compensation to the driver & the cost of repairing the tramcar.—*CITY OF BIRMINGHAM TRAMWAYS CO., LTD. v. LAW*, [1910] 2 K. B. 965; 80 L. J. K. B. 80; 103 L. T. 44; 74 J. P. 355; 8 L. G. R. 667.

**— Right to deduct income tax from rent—How amount calculated.]—***See INCOME TAX, Vol. XXVIII., p. 72, No. 380.*

**124. Liabilities of lessees—To pay local & imperial assessments, rates & taxes—Covenant to keep lessors "free from all expenses whatever."]**—The corpn. of Glasgow agreed to borrow money & to construct certain tramways in Glasgow & lease the undertaking to the Glasgow Tramway co. for twenty-three years. The co. agreed to make various payments to the corpn., & then agreed as follows: "The company shall also pay to the corpn. the expenses of borrowing, management, etc., & this provision shall be so construed as to keep the corpn. free from all expenses whatever in connection with the tramways." The lease exceeding twenty-one years, the co. under Valuation of Lands (Scotland) Act, 1854 (c. 91), s. 6, became primarily liable to pay & did pay during the whole term of the lease, "owner's assessments, rates & taxes," amounting in the aggregate to over £14,000. During the currency of the lease the co. intimated to the corpn. that they had a claim in this respect, but did not make any deduction from the rent when paid. The co. contended that the corpn. ought to reimburse them these outgoings or such other sum as might be ascertained to be the amount of owner's assessments, rates & taxes paid by the co. during the lease:—*Held*: the assessments, rates & taxes, whether imperial or local, levied on the owner in respect of a tramway or other erection *in solo*, were an expense connected with the tramway or erection, & that the co. were bound by their lease to relieve the

corp'n. from these expenses, & were not entitled to claim reimbursement.—*GLASGOW CORPN. v. GLASGOW TRAMWAY & OMNIBUS CO., LTD.*, [1898] A. C. 631; 14 T. L. R. 516, H. L.

*Annotation*.—*Refd.* Melbourne Tramway & Omnibus Co. v. Kidney, Melbourne Tramway & Omnibus Co. v. Melbourne Corp'n., [1905] A. C. 358.

**125. — Failure to provide sufficient service—Summary recovery of penalties—Jurisdiction of court.**—By an agreement made in 1902 between the D. corp'n. & the D. Tramways co. & scheduled to the D. corp'n. (General Powers) Act, 1902 (c. cccxiv), it was agreed that the corp'n. should construct certain tramways authorised by that & previous Acts, & on completion should lease them to the co. The agreement provided that the co. should be liable to a penalty if they did not give such a service as the corp'n. might reasonably require in the public interest. The Act of 1902, by sect. 13, ratified & confirmed the agreement, & provided that "any penalty under the agreement may be recovered in manner provided by the Summary Jurisdiction Acts." The corp'n. constructed the tramways & granted a lease to the co. in 1908 by which the co. covenanted that they would provide such a service as might be reasonably required by the corp'n. in the public interest, & that, if they failed to do this, the co. should be liable to a penalty. It was further provided that "any question which may arise as to the service of cars required in the public interest may be determined on the application of the co. or of the corp'n. or other body or persons by the Board of Trade"; & by a general clause it was provided that if any difference should arise between the corp'n. & the co. it should be determined by an arbitrator appointed by the Board of Trade. The corp'n. summoned the co. for penalties for failure to provide such services as were required by the lease:—*Held*: (1) the words in sect. 13 of the Act of 1902, "any penalty under the agreement," included a penalty under the lease, & although the agreement was merged in the lease, the penalties were recoverable summarily; (2) having regard to the position taken by the co., no difference had arisen between the co. & the corp'n. so as to make the provision for arb'n. applicable, & the jurisdiction of the justices was not ousted.—*R. v. DEVONPORT J.J., Ex p. DEVONPORT TRAMWAYS CO.* (1909), 101 L. T. 424; 73 J. P. 393; 7 L. G. R. 1028, D. C.

**126. Stamp duties—Covenants by lessees to pay annual sum in lieu of repairing road—& to pay minimum sum for electrical energy.**—By a lease of tramways to a traction co. by a municipal corp'n., made pursuant to Tramways Act, 1870 (c. 78), the co. were to pay rent at a fixed rate per cent. on the cost of the original purchase. They were also to pay to the lessors a given sum per mile of road along which the tramways were laid, in lieu of repairing any portion of such road, & maintaining the tramways, except the rails & electric bonds laid thereon. The minimum amount payable under this clause was £900 *per annum*, & a power of distress was reserved in respect of it. They were also bound to purchase from the vendors all electrical energy required for the purpose of the tramways, & to pay for same at a given rate, the minimum sum payable in any one year being £4,000. On a case stated:—*Held*: (1) the £900 payable in respect of the repair of the road was rent, & that *ad valorem* duty was payable upon it under Stamp Act, 1891 (c. 39), s. 4; (2) the £4,000 payable in respect of the supply of electrical energy was not rent, but it was payable under a covenant made in further consideration for the lease, & relating

to the matter of the lease, within Stamp Act, 1891 (c. 39), s. 77 (2), & the instrument was not chargeable with *ad valorem* duty in respect of it.—*BRITISH ELECTRIC TRACTION CO. v. INLAND REVENUE COMRS.*, [1902] 1 K. B. 441; 71 L. J. K. B. 92; 85 L. T. 663; 66 J. P. 83; 50 W. R. 280; 18 T. L. R. 105, C. A.

#### SUB-SECT. 3.—POWER TO WORK.

*See* Tramways Act, 1870 (c. 78), s. 19.

#### SECT. 7.—OFFENCES.

*See* Tramways Act, 1870 (c. 78), ss. 49–54.

**By promoters & their servants—Infringement of bye-laws.**—*See* Sect. 4, sub-sect. 3, *ante*.

**By passengers—Infringement of bye-laws.**—*See* Sect. 4, sub-sect. 3, *ante*.

**Refusal to pay fare—Nature of offence.**—*See* MALICIOUS PROSECUTION, Vol. XXXIII., p. 470, No. 36.

**By other persons—Unauthorised user of track.**—*See* Nos. 64–66, *ante*.

**127. — Obstruction—By driver of another vehicle—No room to pass on near side of road.**—The single lines of a tramway constructed under an Act of Parliament were at one place on a road, on an incline some 250 or 300 yards long, so placed that there was no room for a vehicle to pass between a tramcar & the kerb on one side of the road. At the top & at the bottom of the incline were loops which would enable a tram to pass another vehicle on that side of the road. There was ample room for a vehicle to pass a tramcar on the other side of the road. A dray coming down the incline proceeding on its near or left side of the highway met an electric tramcar which was lawfully running on the said lines, proceeding up the hill. As there was no room to pass both vehicles stopped, & remained facing each other for fifty minutes, at the end of which time the tramcar backed to the loop at the bottom of the incline. The driver of the dray had been instructed by his employers not to cross over the tramlines on to his wrong side to make way for tramcars. A summons was taken out under Tramways Act, 1870 (c. 78), s. 50, against the drayman for wilfully obstructing the tramcar. The justices dismissed the summons, saying that they were of opinion that the drayman had not acted unlawfully in maintaining his right to drive on his left or customary driving side, & that consequently there had been no wilful obstruction on the part of resp. They consented to state a case:—*Held*: as there was a doubt as to whether the justices meant that the drayman had an absolute right to continue on his left hand side or merely that, owing to the action of the tramcar driver, the drayman's obstruction was not wilful, the case must be remitted to the justices to decide whether there had been wilful obstruction on the part of the drayman, with the direction that the drayman had no absolute right to maintain his course on the left, putting the tramcar driver to any amount of inconvenience, & the tramcar driver had no absolute right to make all other vehicles get out of his way, if, by acting reasonably, he could avoid inconvenience to them. The drivers of both vehicles must act reasonably.—*HARTLEY v. CHADWICK* (1904), 68 J. P. 512, D. C.

**Sending dangerous goods.**—*See* Tramways Act, 1870 (c. 78), s. 53 & generally, CARRIERS, Vol. VIII., pp. 135–137.

**SECT. 8.—COMPULSORY LICENCES.**

*See* Tramways Act, 1870 (c. 78), ss. 35–40.

**128. Licencees—Not “promoters.”**—MARSHALL *v.* SOUTH STAFFORDSHIRE TRAMWAYS CO., No. 1, *ante*.

**SECT. 9.—ABANDONMENT AND DISCONTINUANCE OF WORKING.**

*See* Tramways Act, 1870 (c. 78), ss. 41, 43.

**129. What amounts to abandonment.**—By a special Act of 1885 a tramway co. was authorised to construct a tramway & a deposit was ordered to be paid.

The Parliamentary Deposits & Bonds Act, 1892, (c. 27) s. 1, provided that where in pursuance of any general or special Act of Parliament moneys had been deposited “to secure the completion by any co.” of any undertaking authorised by Parliament, & the undertaking had “not been completed” within the time limited in that behalf, the deposit fund should be applied towards compensating landowners &, in the case of a tramway co., the road authorities, & subject thereto, if, among other things, a receiver had been appointed, or the undertaking had been abandoned, for the benefit of the creditors of the co. The special Act of 1885 contained a substantially similar provision as to the application of the deposit fund if the co. did not complete the tramway within the time limit. In 1904, when the tramway had not been completed & before the expiration of the period for completion, a receiver of the undertaking of the co. was appointed & the uncompleted tramway was acquired by the London County Council under the powers of a special Act:—*Held*: (1) that both under the special Act of 1885 & under the general Act the deposit was paid to secure the completion of the undertaking by the co., & inasmuch as that event could never happen by reason of the transfer of the undertaking the time had passed within which the co. could complete; & (2) there had been an abandonment of the undertaking, by the co.; (3) the deposit moneys paid under the Act of 1885 were applicable for the benefit of creditors of the co. subject to the prior claims, if any, of the landowners & road authorities.—*Re* PECKHAM, DULWICH & CRYSTAL PALACE TRAMWAYS BILL, [1910] 2 Ch. 1; 79 L. J. Ch. 451; 102 L. T. 689; 74 J. P. 266; 54 Sol. Jo. 458; 8 L. G. R. 571, C. A.

—**Cesser of powers under Provisional Order.**—*See* Sect. 2, sub-sect. 1, *ante*.

**Effect of abandonment—Return & application of Parliamentary deposit.**—*See* Sect. 11, *post*.

—**Disused track—Whether dedicated to public**

**uses.**—*See* HIGHWAYS, Vol. XXVI., p. 291, No. 230.

**SECT. 10.—INSOLVENCY OF PROMOTERS.**

*See* Tramways Act, 1870 (c. 78), s. 42.

**Inquiry as to solvency of promoters—Injunction to restrain—Who are “promoters.”**—*See* COMPANIES, Vol. X., p. 959, No. 6573.

**Unregistered company—Jurisdiction of court to wind up.**—*See* COMPANIES, Vol. X., p. 1193, Nos. 8473–8475.

**Remedies of debenture-holders—Appointment of receiver & manager.**—*See* COMPANIES, Vol. X., pp. 1189, 1190, 1191, Nos. 8434, 8444, 8445, 8450; Supp. IV., No. 8444a.

—**Sale of undertaking.**—*See* COMPANIES, Vol. X., p. 1191, Nos. 8449, 8450.

—**Winding up of company.**—*See* COMPANIES, Vol. X., p. 1191, No. 8453.

**Proof of debts—Who may prove—Licencee of right to advertise in tramcars.**—*See* COMPANIES, Vol. X., p. 998, No. 6923.

**SECT. 11.—RETURN AND APPLICATION OF DEPOSIT.**

**Nature of deposit.**—*See* PARLIAMENT, Vol. XXXVI., p. 280, Nos. 277, 278, 280.

**When return ordered.**—*See* PARLIAMENT, Vol. XXXVI., p. 282, No. 290.

—**Abandonment of undertaking—What amounts to.**—*See* Sect. 9, *ante*.

**130. To whom paid.**—*Re* LONDON & COUNTY TRAMWAYS CO., [1875] W. N. 49.

*Annotation* :—*Apld. Re* Tynemouth Borough Tram. Co. (1875), 33 L. T. 8.

**131.**—A co., incorporated under the Companies Acts, obtained a Provisional Order to construct a tramway. No tramway was ever commenced, & the co. was ordered to be wound up. The only shareholders were the subscribers to the memorandum of assocn.; the only debt due from the co. was less than the amount of the deposit fund. The ct., on the petition of the official liquidator, under the discretion given by the Tramways Act, 1870 (c. 78), rule 26, ordered the deposit fund to be paid out to petitioner, to be applied by him for the benefit of the co.’s creditors, & refused to consider it forfeited to the Crown.—*Re* TYNEMOUTH BOROUGH TRAMWAY CO., LTD. (1875), 33 L. T. 8.

—*See, also*, PARLIAMENT, Vol. XXXVI., pp. 278, 280, 283, 284, Nos. 263, 277, 280, 307, 308, 311, 318–320.

## Part II.—Naval and Military Tramways.

*See* Military Tramways Act, 1887 (c. 65); Ministry of Transport Act, 1919 (c. 50), s. 2.

**PART I. SECT. 8.**

*t. Who are liable to pay for licences—Employers of conductors.*—MELBOURNE TRAMWAY & OMNIBUS CO. *v.* KIDNEY, MELBOURNE TRAMWAY & OMNIBUS CO. *v.* MELBOURNE CORPN., [1905] A. C. 358, P. C.—AUS.

## Part III.—Light Railways.

NOTE.—*The powers of the Light Railway Commissioners have now been transferred to the Minister of Transport & the cases in this Part must be read subject to Railways Act, 1921 (c. 55), ss. 68–74 & sched. IX. The Acts in force are Light Railways Act, 1896 (c. 48) & Light Railways Act, 1912 (c. 19), as amended by Railways Act, 1921 (c. 55), & are referred to as 1896 Act, 1912 Act & 1921 Act respectively.*

## SECT. 1.—IN GENERAL.

**132. Definitions—Light railway—Whether “lightway.”**—A light railway constructed under an order made under 1896 Act is a “lightway” within Customs & Inland Revenue Act, 1888 (c. 8), s. 4, which exempts from the licence duty on “carriages” thereby imposed any carriage drawn or propelled upon a railway by steam or electricity or other mechanical power.—A. G. v. YORKSHIRE (WOOLLEN DISTRICT) ELECTRIC TRAMWAYS, LTD., [1907] 2 K. B. 991; 77 L. J. K. B. 33; 97 L. T. 343; 71 J. P. 506; 23 T. L. R. 712; 5 L. G. R. 1098.

— — — — — **Public Health Act, 1875 (c. 55), s. 211, (1) (b).**—See RATES, Vol. XXXVIII., p. 489, No. 461.

— — — — — **What undertakings allowed as light railways.**—See Sect. 2, sub-sect. 1, E. (a), *post*.

— **Light railway carriage.**—See Sect. 4, *post*.

## SECT. 2.—PROMOTION.

## SUB-SECT. 1.—APPLICATION FOR ORDER.

## A. Who may Apply.

See 1896 Act, s. 2.

**133. Lunacy board.**—UPHALL & BANGOWR CASE (1899), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 1 Oxley's Light Rys. 83.

## B. Notices.

See 1896 Act, s. 7 (2).

**134. Necessity for public notice by advertisement.**—CHELTENHAM & DISTRICT CASE (1896) Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 1 Oxley's Light Rys. 120.

**135. —**—FINCHLEY, HENDON, EDGWARE & DISTRICT CASE (1899), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 1 Oxley's Light Rys. 246.

**136. —**—Application to work Parliamentary railway as light railway.—GIFFORD & GARVALD CASE (1897), 1 Oxley's Light Rys. 31.

**137. Necessity for service of notices on owners, occupiers, etc.**—CHATHAM, ROCHESTER & GILLINGHAM CASE (1898), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 1 Oxley's Light Rys. 156.

**138. —**—DEVON SOUTH HAMS CASE (1900), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 2 Oxley's Light Rys. 17.

**139. —**—HAYLING ISLAND CASE (1900), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 2 Oxley's Light Rys. 93.

**140. —**—Application to work Parliamentary railway as light railway.—GIFFORD & GARVALD CASE (1897), 1 Oxley's Light Rys. 31.

**141. —**—CENTRAL WILTS CASE (1903), Light Ry. Comrs. Report Parliamentary Papers (1904) No. 122.

## C. Deposits.

See Ministry of Transport (Light Railways Procedure) Rules, 1927.

**142. Necessity for.**—CHATHAM, ROCHESTER & GILLINGHAM CASE (1898), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 1 Oxley's Light Rys. 156.

**143. —**—MONMOUTH & ABERGAVENNY CASE (1898), 1 Oxley's Light Rys. 44; Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198.

**144. —**—Certificate of assent of shareholders of another company—Application for power to enter into working agreement with such company.—HADLOW CASE (1901), 2 Oxley's Light Rys. 46.

**145. Estimates of expenses—Must be sufficient & accurate.**—MIDDLESEX COUNTY (EXTENSIONS) (No. 4) CASE (1901), 2 Oxley's Light Rys. 126; Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198.

## D. Procedure on Application.

See 1896 Act, s. 7 (1).

**146. Withdrawal of application—Non-compliance with rules.**—GIFFORD & GARVALD CASE (1897), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 1 Oxley's Light Rys. 31.

**147. Local inquiry—Rejection of application without holding inquiry—Applicants not having power to construct or work light railway.**—UPHALL & BANGOWR CASE (1899), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 1 Oxley's Light Rys. 83.

**148. —**—Failure to publish prescribed advertisements.—FINCHLEY, HENDON, EDGWARE & DISTRICT CASE (1899), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 1 Oxley's Light Rys. 246.

**Costs—Taxation.**—See PARLIAMENT, Vol. XXXVI., p. 278, No. 261.

## E. Consideration of Application.

## (a) What Undertakings Allowed as Light Railways.

**149. Inclined railway—Funicular railway.**—MALVERN FUNICULAR LIGHT RY. CASE (1911), Light Ry. Comrs. Report Parliamentary Papers (1912) No. 108.

**150. —**—BABBACOMBE CLIFF LIGHT RY. CASE (1923), Ministry of Transport's Report of Proceedings for 1923, p. 8.

**151. —**—Mineral traffic only.—HINGSTON DOWN LIGHT RY. CASE (1924), Ministry of Transport's Report of Proceedings for 1924, p. 7.

**152. Mineral railway.**—BERE ALSTON & CAL STOCK CASE (1899), 1 Oxley's Light Rys. 102.

**153. —**—NORTH STAFFORDSHIRE RY. CASE (1905), Light Ry. Comrs. Report Parliamentary Papers (1907) No. 188.

**154. Parliamentary railway.**—CARMYLE CASE (1897), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 1 Oxley's Light Rys. 11.

**155. —**—NORTH SUNDERLAND RY. (EXTENSION) CASE (1898), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 1 Oxley's Light Rys. 36.

**156. —**—NORTH SHROPSHIRE LIGHT RY. CASE (1908), Light Ry. Comrs. Report Parliamentary Papers (1912) No. 108.

**157. —**—Derelict railway.—MAWDDWY RY. (LIGHT RY.) CASE (1909), Light Ry. Comrs. Report Parliamentary Papers (1912) No. 108.

*Sect. 2.—Promotion: Sub-sect. 1, E. (a) & (b) i., ii., iii., iv. & v.]*

**158.** ———.]—NORTH LINDSEY LIGHT RYS. CASE (1911), Light Ry. Comrs. Report Parliamentary Papers (1912) No. 108.

**159.** ———.]—NORTH STAFFORDSHIRE RY. (TRENTHAM, NEWCASTLE & SILVERDALE LIGHT RY.) CASE (1912), Light Ry. Comrs. Report Parliamentary Papers (1913) No. 113.

**160.** *Railway authorised by tramway order.]—*KINGSNORTH LIGHT RY. CASE (1926), Ministry of Transport's Report of Proceedings for 1926, p. 4.

**161.** *Tramway—Wholly within urban district.]—*TAUNTON CASE (1897), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 1 Oxley's Light Rys. 127.

**162.** ———.]—LONDON CORPN. FOREIGN CATTLE MARKET, DEPTFORD CASE (1897), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198.

**163.** ———.]—COLCHESTER CASE (1899), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 1 Oxley's Light Rys. 202.

**164.** ———.]—ABERDARE CASE (1900), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 1 Oxley's Light Rys. 242.

**165.** ———.]—FINCHLEY CASE (1900), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 1 Oxley's Light Rys. 249.

**166.** ———.]—LUTON & DISTRICT CASE (1902), 2 Oxley's Light Rys. 137.

**167.** ———.]—Partly within & partly outside borough.]—CREWE CASE (1898), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 1 Oxley's Light Rys. 111.

**168.** ———.]—POTTERIES CASE (1897), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 1 Oxley's Light Rys. 116; *subsequent proceedings* (1901), 2 Oxley's Light Rys. 110.

**169.** *Tube railway—Passing under river.]—*Application for power to construct a tube railway between North & South Shields passing under the river Tyne. A Provisional Order was made by the Minister of Transport, but Parliament refused to confirm it.—NORTH & SOUTH SHIELDS LIGHT RY. CASE (1927), Ministry of Transport's Report of Proceedings for 1928, p. 3.

**170.** *Railway for goods traffic only.]—*WALLEN & LAUGHTON CASE (1900), 2 Oxley's Light Rys. 23.

**171.** *Railway to serve dock.]—*GIRMSBY DISTRICT CASE (1902), Light Ry. Comrs. Report Parliamentary Papers (1907) No. 188.

**172.** *Railway to connect existing light railway—With tramway.]—*WESTON-SUPER-MARE JUNCTION LIGHT RY. CASE (1910), Light Ry. Comrs. Report Parliamentary Papers (1911) No. 105.

**173.** ———.]—HEYWOOD & MIDDLETON LIGHT RYS. CASE (1927), Ministry of Transport's Report of Proceedings for 1927, p. 4.

**174.** ———.]—With harbour.]—SOUTHWOLD HARBOUR LIGHT RY. CASE (1911), Light Ry. Comrs. Report Parliamentary Papers (1912) No. 108.

(b) *Grounds for Granting or Refusing Applications.*  
i. *In General.*

**175.** *Whole scheme not put forward—Scheme involving considerable road widening—No application for necessary powers to acquire land.]—*LONDON COUNTY (NEW CROSS, LEWISHAM & ELTHAM) CASE (1900), Light Ry. Comrs. Report Parliamentary Papers (1907) No. 188.

**176.** ———.]—LONDON COUNTY (CLAPHAM, WANDSWORTH & KINGSTON ROAD) CASE (1900), Light Ry. Comrs. Report Parliamentary Papers (1907) No. 188.

**177.** ———.]—Bill before Parliament to obtain necessary powers.]—LONDON COUNTY (DEPTFORD, SHOOTERS' HILL & WOOLWICH) CASE (1900), Light Ry. Comrs. Report Parliamentary Papers (1908) No. 133; 2 Oxley's Light Rys. 74.

**178.** *Scheme not sufficiently to public advantage.]—*PENARTH & CARDIFF CASE (1897), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198.

**179.** ———.]—PENZANCE, NEWLYN & ST. JUST (ST. JUST, LAND'S END, & GREAT WESTERN JUNCTION) CASE (1898), 1 Oxley's Light Rys. 57.

**180.** ———.]—WOLVERHAMPTON & BRIDGNORTH CASE (1899), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 1 Oxley's Light Rys. 107.

**181.** *Sufficient public need not shown.]—*MID-LOTHIAN CASE (1897), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 1 Oxley's Light Rys. 118.

**182.** ———.]—Opposition to scheme.]—WEST MANCHESTER CASE (1897), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198.

**183.** ———.]—By landowners.]—CUCKMERIE VALLEY CASE (1897), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 1 Oxley's Light Rys. 56.

**184.** ———.]—LASTINGHAM & SINGINGTON CASE (1897), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 1 Oxley's Light Rys. 24.

**185.** ———.]—BURNHAM, BERROW & BRENT KNOLL CASE (1898), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 1 Oxley's Light Rys. 66.

**186.** ———.]—& others.]—LYNMOUTH & MINEHEAD CASE (1898), Light Ry. Comrs. Report Parliamentary Papers (1901) No. 198; 1 Oxley's Light Rys. 54.

**187.** ———.]—FINCHLEY, HENDON & DISTRICT CASE (1898), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 1 Oxley's Light Rys. 130.

**188.** ———.]—BROMLEY & DISTRICT CASE (1903), Light Ry. Comrs. Report Parliamentary Papers (1904) No. 122.

**189.** ———.]—HEDDINGHAM & LONG MELFORD CASE (1898), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198.

**190.** ———.]—MIDLAND & SOUTH WESTERN JUNCTION RY. (LUDGERSHALL & MILITARY CAMPS) CASE (1898), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 1 Oxley's Light Rys. 43.

**191.** *Opposition to scheme—By landowners.]—*HASTINGS, BEXHILL & DISTRICT CASE (1898), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 1 Oxley's Light Rys. 162.

**192.** ———.]—& residents.]—LLANFAIR & BEAUMARIS CASE (1898), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 1 Oxley's Light Rys. 155.

**193.** ———.]—By all interested local authorities.]—LONDON, BARNET, EDGEWARE & ENFIELD CASE (1898), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 1 Oxley's Light Rys. 175.

**194.** ———.]—By frontagers—& residents.]—ISLE OF THANET LIGHT RY. (EXTENSIONS) CASE (1899), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198.

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**195.** *Scheme for line to pass along road—On which tramway authorised.]—*PAISLEY CASE (1898), 1 Oxley's Light Rys. 182.

**196.** — On which tramway not allowed.]—LONDON UNITED TRAMWAYS, LTD. (EXTENSIONS) CASE (1899), 1 Oxley's Light Rys. 224.

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**197. Application granted conditionally—Subject to appointment of responsible persons as directors.]—**ORPINGTON, CUDHAM & TATSFIELD CASE (1899), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198.

**198.** — Subject to bill before Parliament not passing.]—SPEN VALLEY (EXTENSIONS) CASE (1900), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198.

**199.** — Subject to connecting line being made between two sections.]—HOUNSLOW, SLOUGH & DATCHET CASE (1902), Light Ry. Comrs. Report Parliamentary Papers (1903) No. 124; 2 Oxley's Light Rys. 140.

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#### ii. *Danger to Public.*

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**200. Narrowness of roads.]—**LANFAIR & BEAUMARIS CASE (1898), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 1 Oxley's Light Rys. 155.

**201.** —]—ROCHESTER, CHATHAM & DISTRICT CASE (1898), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 1 Oxley's Light Rys. 156.

**202.** —]—CAMBORNE, REDRUTH & DISTRICT CASE (1899), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; Parliamentary Papers (1907) No. 188; 1 Oxley's Light Rys. 192.

**203.** —]—ISLE OF THANET LIGHT RY. (EXTENSIONS) CASE (1899), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198.

**204.** —]—HOUNSLOW, SLOUGH & DATCHET CASE (1902), Light Ry. Comrs. Report Parliamentary Papers (1903) No. 124; 2 Oxley's Light Rys. 140.

**205.** —]—CAMBORNE, REDRUTH & DISTRICT CASE (1899), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; Parliamentary Papers (1907) No. 188; 1 Oxley's Light Rys. 192.

**206. Line to cross railway on level.]—**PETERBOROUGH & DISTRICT (EXTENSIONS) CASE (1900), Light Ry. Comrs. Report Parliamentary Papers (1902), No. 198; 1 Oxley's Light Rys. 243.

#### iii. *Competition with Existing Railway.*

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**207. What amounts to.]—**POTTERIES (EXTENSIONS) CASE (1901), 2 Oxley's Light Rys. 110.

**208. Effect of—Refusal of application.]—**COAT-BRIDGE & AIRDRIE CASE (1898), 1 Oxley's Light Rys. 149.

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See, *now*, 1921 Act, s. 68 (2).

**209.** —]—BRIDGWATER, LANGPORT & GLASTONBURY CASE (1899), Light Ry. Comrs. Report Parliamentary Papers (1907) No. 188; 1 Oxley's Light Rys. 109.

**210.** —]—CAMBORNE, REDRUTH & DISTRICT CASE (1899), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; Parlia-

mentary Papers (1907) No. 188; 1 Oxley's Light Rys. 192.

**211.** —]—HAMILTON, MOTHERWELL & WISHAN CASE (1899), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 1 Oxley's Light Rys. 237.

**212.** —]—MUSSELBURGH CASE (1899), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 1 Oxley's Light Rys. 219.

**213.** —]—STAINES & EGHAM CASE (1900), 2 Oxley's Light Rys. 87.

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**214.** —]—SOUTH SHIELDS, SUNDERLAND & DISTRICT CASE (1901), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 2 Oxley's Light Rys. 133.

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**215.** —]—Although public need proved.]—ASHBY, SWADLINCOTE & BURTON CASE (1902), 2 Oxley's Light Rys. 138.

**216.** —]—RAMSBOTTOM, EDENFIELD & RAWTENSTALL CASE (1902), 2 Oxley's Light Rys. 158.

**217.** —]—LUTON & DISTRICT CASE (1902), 2 Oxley's Light Rys. 137.

**218.** —]—CAMBORNE, REDRUTH & DISTRICT CASE (1899), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; Parliamentary Papers (1907) No. 188; 1 Oxley's Light Rys. 192.

—Provisional order subject to confirmation by Parliament.]—See 1921 Act, s. 68 (2).

#### iv. *Financial Matters.*

**219. Appointment of responsible persons as directors—Application granted subject to appointment.]—**ORPINGTON, CUDHAM & TATSFIELD CASE (1899), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198.

**220. Scheme involving large expenditure outside promoter's district—Application by local authority.]—**BATH CITY CASE (1900), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 2 Oxley's Light Rys. 92.

**221. No prospect of return on large outlay.]—**NORWICH & DEREHAM CASE (1900), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 2 Oxley's Light Rys. 13.

**222. Scheme likely to become charge on rates.]—**CREWE CASE (1901), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 2 Oxley's Light Rys. 128.

**223. Financial position not put forward satisfactorily.]—**PRESTON & LYTHAM CASE (1901), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 2 Oxley's Light Rys. 157.

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**224. Safety of public—Although objection lodged too late.]—**SOUTHWOLD CASE (1901), 2 Oxley's Light Rys. 26.

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**225. Objections to scheme—Not lodged in time.]—**SOUTHWOLD CASE (1901), 2 Oxley's Light Rys. 26.

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**226. — When made—Application for tube railway passing under river.]—NORTH & SOUTH SHIELDS LIGHT RY. CASE (1927), Ministry of Transport's Report of Proceedings for 1928, p. 3.**

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**227. Incorporation of statutes—1896 Act, s. 13—Power to omit or vary.]—GOSFORTH & PONTELAND CASE (1899), 1 Oxley's Light Rys. 95.**

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**229. — Regulation of Railways Act, 1868 (c. 119)—Provisions for safety of public.]—CARMYLIE CASE (1897), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 1 Oxley's Light Rys. 11.**

**230. — — — — —.]—NORTH WALES NARROW GAUGE RYS. (BEDDLEBERT EXTENSION) CASE (1899), 1 Oxley's Light Rys. 101.**

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**232. Consents of local & road authorities—Consent of county council.]—LONDON UNITED TRAMWAYS, LTD. (LIGHT RY. EXTENSIONS) CASE (1898), 1 Oxley's Light Rys. 164.**

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**233. — — — — —.]—WALTHAM CROSS & ENFIELD CASE (1899), 1 Oxley's Light Rys. 196.**

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**234. — To exhibit list of fares inside carriages.]—NELSON & DISTRICT CASE (1899), 1 Oxley's Light Rys. 203.**

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**236. — To open railway if required for passenger traffic—Application for railway to be used for goods traffic only.]—WALES & LAUGHTON CASE (1900), 2 Oxley's Light Rys. 23.**

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**238. — To construct pier—For interchange of traffic—and to levy tolls thereon.]—DARTFORD DISTRICT (DEVIATION) CASE (1899), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 1 Oxley's Light Rys. 49.**

**239. Acquisition of railway by local authority—County council made purchasing authority.]—BROMSGROVE CASE (1899), 1 Oxley's Light Rys. 238.**

**240. — — — — —.]—WORCESTER & DISTRICT CASE (1900), 1 Oxley's Light Rys. 240.**

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**243. Purchase by local authority—Price—Basis of valuation.]—By an agreement entered into between an electric traction co. & the corp'n. of a borough, after reciting that the corp'n. had withdrawn their opposition to a Light Railways Order which the co. were promoting upon the terms thereafter appearing, it was agreed that the co. should construct railway, No. 5 under the Order, & should on the expiration of a period of four years from the making of the Order, sell the railway to the corp'n. at a price to be settled, in case of difference, by the Board of Trade, for which an arbitrator was subsequently substituted, & the Order authorised the corp'n. to purchase this railway at the time & in the manner prescribed by the agreement:—*Held*: on the construction of the agreement & the Order, that the price must be fixed upon the basis of a valuation of the structural value of the railway regarded as a railway *in situ* capable of earning a profit, & not upon the basis of the value of the railway to the co. as an income earning concern.—DUDLEY CORPN. v. DUDLEY, STOURBRIDGE & DISTRICT ELECTRIC TRACTION CO. (1907), 97 L. T. 556; 71 J. P. 481; 5 L. G. R. 1077; *sub nom.* *Re DUDLEY, STOURBRIDGE & DISTRICT ELECTRIC TRACTION CO., LTD. & DUDLEY CORPN.*, 51 Sol. Jo. 686, H. L.; *revisg.* S. C. *sub nom.* DUDLEY, STOURBRIDGE & DISTRICT ELECTRIC TRACTION CO., LTD. v. DUDLEY CORPN., 96 L. T. 340, C. A.**

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**245. Grounds for granting or refusing application—Sufficient public need not shown.]—EAST & WEST YORKSHIRE UNION LIGHT RYS. (EXTENSION) CASE (1911), Light Ry. Comrs. Report Parliamentary Papers (1912) No. 108.**

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**247. — — — — —.]—LLANDUDNO & COLWYN BAY LIGHT RY. (EXTENSION) (No. 2) CASE (1907), Light Ry. Comrs. Report Parliamentary Papers (1909) No. 97.**



248. —.—.]—TICKHILL LIGHT RY. CASE (1907), Light Ry. Comrs. Report Parliamentary Papers (1909) No. 97.

249. —.—.]—YORK CORPN. LIGHT RYS. (EXTENSIONS) CASE (1911), Light Ry. Comrs. Report Parliamentary Papers (1912) No. 108.

250. —.—.]—EAST KENT LIGHT RYS. (EXTENSIONS) CASE (1912), Light Ry. Comrs. Report Parliamentary Papers (1913) No. 113.

251. By deviation.]—DARTFORD DISTRICT (DEVIATION) CASE (1899), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 1 Oxley's Light Rys. 49.

252. —.—.]—WEST HARTLEPOOL (EXTENSIONS) CASE (1900), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198; 2 Oxley's Light Rys. 99.

253. —.—.]—HERTFORD COUNTY LIGHT RYS. (WATFORD DEVIATION) CASE (1912), Light Ry. Comrs. Report Parliamentary Papers (1913) No. 113.

254. By extension & deviation.]—CALLINGTON LIGHT RY. CASE (1907), Light Ry. Comrs. Report Parliamentary Papers (1909) No. 97.

255. —.—.]—TOTTEN, HYTHE & FAWLEY LIGHT RY. CASE (1923), Ministry of Transport's Report of Proceedings for 1923, p. 7.

256. By abandonment.]—CENTRAL ESSEX LIGHT RY. CASE (1908), Light Ry. Comrs. Report Parliamentary Papers (1909) No. 97.

257. —.—.]—HERTFORD COUNTY (CHESHUNT) LIGHT RYS. CASE (1911), Light Ry. Comrs. Report Parliamentary Papers (1912) No. 108.

258. —.—.]—LONDON, MIDLAND & SCOTTISH RY. (BURTON & ASHBY LIGHT RY. ABANDONMENT) CASE (1927), Ministry of Transport's Report of Proceedings for 1927, p. 4.

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259. Application for general purposes of railway of money raised under light railway order.]—ABERDEENSHIRE (ABERDEEN & ECHT) (ABERDEEN & ECHT EXTENSION) CASE (1897), 1 Oxley's Light Rys. 16.

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261. —.—.]—KENT & EAST SUSSEX (GENERAL POWERS) CASE (1907), Light Ry. Comrs. Report Parliamentary Papers (1908) No. 133.

262. —.—.]—LEEK CALDON, LOW & HARTINGTON LIGHT RY. (BORROWING POWERS) CASE (1911), Light Ry. Comrs. Report Parliamentary Papers (1912) No. 108.

263. Further borrowing powers.]—CAMPBELLTOWN & MACRIHANISH LIGHT RY. CASE (1907), Light Ry. Comrs. Report Parliamentary Papers (1909) No. 97.

264. —.—.]—KENT & EAST SUSSEX (GENERAL POWERS) CASE (1907), Light Ry. Comrs. Report Parliamentary Papers (1908) No. 133.

265. —.—.]—BRADFORD CORPN. (NIDD VALLEY) LIGHT RY. CASE (1908), Light Ry. Comrs. Report Parliamentary Papers (1909) No. 97.

266. Release of parliamentary deposit—& substitution of new provisions as to deposit fund.]—WOLVERHAMPTON & CANNOCK CHASE RY. (LIGHT RY.) CASE (1907), Light Ry. Comrs. Report Parliamentary Papers (1909) No. 97.

267. Power for local authority to subscribe to share capital.]—DERWENT VALLEY LIGHT RY. CASE (1911), Light Ry. Comrs. Report Parliamentary Papers (1912) No. 108.

#### (c) Other Purposes.

268. Revival of powers.]—HERTFORD COUNTY (CHESHUNT) LIGHT RYS. CASE (1911), Light Ry. Comrs. Report Parliamentary Papers (1912) No. 108.

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269. Extension of time.]—TICKHILL LIGHT RY. CASE (1907), Light Ry. Comrs. Report Parliamentary Papers (1909) No. 97.

270. —.—.] For revival of powers.]—BLACKBURN, WHALLEY & PADIHAM LIGHT RY. (EXTENSION OF TIME) CASE (1907), Light Ry. Comrs. Report Parliamentary Papers (1909) No. 97.

271. —.—.]—AVONMOUTH LIGHT RY. (REVIVAL & EXTENSION OF TIME) CASE (1911), Light Ry. Comrs. Report Parliamentary Papers (1912) No. 108.

272. —.—.]—GLAMORGAN COUNTY COUNCIL (MORRISTON TO PONTARDAWE) LIGHT RYS. CASE (1911), Light Ry. Comrs. Report Parliamentary Papers (1912) No. 108.

273. —.—.]—WEST CHESHIRE LIGHT RY. CASE (1911), Light Ry. Comrs. Report Parliamentary Papers (1912) No. 108.

274. —.—.]—CENTRAL ESSEX LIGHT RY. CASE (1908), Light Ry. Comrs. Report Parliamentary Papers (1909) No. 97.

275. —.—.] For repayment of loans.]—BRADFORD CORPN. (NIDD VALLEY) LIGHT RY. CASE (1908), Light Ry. Comrs. Report Parliamentary Papers (1909) No. 97.

276. —.—.]—LEEK CALDON, LOW & HARTINGTON LIGHT RY. (BORROWING POWERS) CASE (1909), Light Ry. Comrs. Report Parliamentary Papers (1912) No. 108.

277. —.—.]—DERWENT VALLEY LIGHT RY. CASE (1910), Light Ry. Comrs. Report Parliamentary Papers (1912) No. 108.

278. —.—.]—BARTON & IMMINGHAM LIGHT RY. (EXTENSION OF TIME) CASE (1911), Light Ry. Comrs. Report Parliamentary Papers (1912) No. 108.

279. —.—.]—MERTHYR TYDFIL LIGHT RY. CASE (1911), Light Ry. Comrs. Report Parliamentary Papers (1912) No. 108.

280. —.—.]—NORTH LINDSEY LIGHT RYS. CASE (1911), Light Ry. Comrs. Report Parliamentary Papers (1912) No. 108.

281. Increase of fares.]—BATH ELECTRIC TRAMWAYS (LIGHT RYS.) CASE (1908), Light Ry. Comrs. Report Parliamentary Papers (1909) No. 97.

282. —.—.]—CHELTENHAM & DISTRICT LIGHT RYS. CASE (1908), Light Ry. Comrs. Report Parliamentary Papers (1909) No. 97; application withdrawn (1912), Light Ry. Comrs. Report Parliamentary Papers (1912) No. 108.

283. Substitution of cattle guards for gates at certain level crossings.]—LONDON & SOUTH WESTERN RY. (BASINGSTOKE & ALTON) CASE (1899), Light Ry. Comrs. Report Parliamentary Papers (1902) No. 198.

284. Transfer of undertaking to parliamentary railway.]—TICKHILL LIGHT RY. CASE (1907), Light Ry. Comrs. Report Parliamentary Papers (1909) No. 97.

285. —.—.]—TOTTEN, HYTHE & FAWLEY LIGHT RY. CASE (1923), Ministry of Transport's Report of Proceedings for 1923, p. 7.

#### SECT. 3.—CONSTRUCTION AND REPAIR.

286. Rails — Provisions in Order — Minimum weight—Minimum radius of curves.]—NORTH WALES NARROW GAUGE RYS. (BEDDGELERT EXTENSION) CASE (1899), 1 Oxley's Light Rys. 101.

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**287. — Removal by local authority—Undertaking not completed within five years—Injunction.]—**WESTON, CLEVEDON & PORTISHEAD LIGHT RY. CO. v. CLEVEDON URBAN DISTRICT COUNCIL (1905), 49 Sol. Jo. 750.

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*Annotation:—*Reid. Blackpool & Fleetwood Tramroad Co. v. Thornton U. D. C. (1905), 94 L. T. 254.

**289. — Whether “omnibus.”]**—YORKSHIRE (WOOLLEN DISTRICT) ELECTRIC TRAMWAYS v. ELLIS, No. 288, *ante*.

**290. — Whether tramcar.]**—YORKSHIRE (WOOLLEN DISTRICT) ELECTRIC TRAMWAYS v. ELLIS, No. 288, *ante*.

**— Whether liable to carriage duty.]—**See No. 132, *ante*.

**— Provisions in Order—Maximum weight on wheels.]—**See No. 230, *ante*.

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**291. — Discretion of arbitrator—Lands Clauses Act, 1845 (c. 18), s. 34—Light Railways Act, 1896 (c. 48), ss. 12, 13.]—**The costs of the reference & award in an arbn. under Light Railways Act, 1896 (c. 48), are in the discretion of the arbitrator, as Arbitration Act. 1889 (c. 49), applies to such proceedings & not Lands Clauses Act, 1845 (c. 18), even although the order authorising the railway incorporates the Act of 1845.—BAXTER v. MIDLAND RY. CO. (1905), 93 L. T. 538; 69 J. P. 389; 21 T. L. R. 708.

*Annotation:—*Reid. *Re Cannings & Middlesex County Council*, [1907] 1 K. B. 51.

**Arbitrator—Recovery of fees.]—**See COMPULSORY PURCHASE OF LAND, Vol. XI., p. 203, No. 822.

**Right to possession—Before assessment of compensation—Inadequate valuation.]—**See COMPULSORY PURCHASE OF LAND, Vol. XI., p. 221, No. 1051.

#### SECT. 6.—POWERS OF LOCAL AUTHORITIES.

See 1896 Act, s. 3, as amended by 1912 Act, s. 5.

**292. To purchase railway—Price—Basis of valuation.]—**DUDLEY CORPN. v. DUDLEY, STOURBRIDGE & DISTRICT ELECTRIC TRACTION CO., No. 243, *ante*.

**To work railway—Injury to passenger—Time for bringing action against local authority.]—**See PUBLIC AUTHORITIES, Vol. XXXVIII., p. 102, No. 733.

**293. To lend money to promoters—Necessity for special resolution—Time for passing.]—**MIDDLESEX COUNTY (No. 2) CASE (1901), 2 Oxley's Light Rys. 59.

**294. — Railway outside local authority's district—Statutory declaration by clerk to local authority—Form.]—**SOUTHEND-ON-SEA & DISTRICT CASE (1899), 1 Oxley's Light Rys. 189.

**295. To charge expenses—On part only of parish.]—**WICK & LYBSTER CASE (1899), 1 Oxley's Light Rys. 88.

See, now, 1912 Act, s. 5 (4).

#### SECT. 7.—OFFENCES.

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#### SECT. 8.—LOANS AND SPECIAL ADVANCES BY TREASURY

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## Part IV.—Street Railways.

See Cases infra.

## PART IV.

a. *Procedure—When aid given to railway.*—Although, under 54 Vict. c. 42, s. 26 (O.), it is necessary, when aid is sought to be granted to a street railway by a portion of a municipality, that a majority in number representing one-half in value of the persons shown by the last assessment roll to be the owners of real property in such portion should petition for the passing of the bye-law, it is sufficient if the bye-law is carried at the poll by a majority of those voting upon it.—*ADAMSON v. ETOBICOKE TOWNSHIP CORPN.* (1892), 22 O. R. 341.—CAN.

b. *Submission to electors—Consent given to railway to use streets.*—A bye-law passed by a municipal council by which consent was given to the use by the British Columbia Electric Ry. Co. of the street of the municipality for their tramway lines, was quashed because it had not been submitted to the vote of the electors of a municipality, as required by Municipal Clauses Act, 1906, s. 64.—*Re POINT GREY BYE-LAW No. 15* (B. C.) (1911), 19 W. L. R. 638.—CAN.

c. ————.—[*BRITISH COLUMBIA ELECTRIC RY. CO., LTD. v. STEWART*, [1913] A. C. 816, P. C.—CAN.]

d. ————.—[A bye-law of a municipality purported to empower a street ry. co. to construct a line of railway upon certain streets of the municipality.—*Held*: the bye-law had no legal effect since it had not been submitted to the people as required by statute.—*MITCHELL & DRESCH v. SANDWICH, WINDSOR & AMHERSTBURG RY.* (1915), 26 O. W. R. 658; 3 O. W. N. 659; 7 O. W. N. 508; 32 O. L. R. 594; 22 D. L. R. 531; 19 Can. Ry. Cas. 300.—CAN.]

e. *Right of corporation—To percentages upon earnings of railway outside city limits.*—*MONTREAL v. MONTREAL STREET RY. CO.* (1904), 24 C. L. T. 163; 34 S. C. R. 459; *revid.*, [1906] A. C. 100.—CAN.]

f. ————.—[By agreement between the city of Hamilton & the Hamilton Street Ry. Co. the latter was authorised to construct its railway on certain named streets & agreed to pay to the city, *inter alia*, certain percentages on their gross receipts.—*Held*: such payment applies in respect to all traffic in the city including that originating or terminating in the adjoining township of Barton.—*HAMILTON STREET RY. CO. v. CITY OF HAMILTON CORPN.* (1906), 38 S. C. R. 106.—CAN.]

g. *Whether interest allowed on track rentals arrears.*—*TORONTO RY. CO. v. TORONTO CORPN.*, [1906] A. C. 117.—CAN.]

h. *Jurisdiction of Board of Railway Commissioners—Controlled by statute.*—*Re PORT ARTHUR ELECTRIC STREET RY.* (1909), 18 O. L. R. 376; 13 O. W. R. 811.—CAN.]

k. *To order whom should pay for construction.*—The Corp'n. of the city of Vancouver, wishing to alter the grading of four streets in the city which were crossed by the tracks of a Dominion ry. applied to the Board of Ry. Comrs. for Canada for authority to carry the streets over the railway tracks on bridges. Along two of the streets in question a railway co. working wholly within the Province under provincial statutory authority, ran tramways. The Board authorised the work & ordered that a part of the cost of construction should

be borne by the provincial co., on the ground that that co. would benefit by the alteration.—*Held*: the order, so far as it imposed part of the cost of the proposed work upon the provincial ry. co., was not within the powers conferred upon the Board of Ry. Comrs. by a Railway Act & was invalid.—*BRITISH COLUMBIA ELECTRIC RY. CO., LTD. v. VANCOUVER, VICTORIA & EASTERN RY. & NAVIGATION CO. & VANCOUVER CORPN.*, [1914] A. C. 1067, P. C.—CAN.]

l. *To order whom should pay for removal of poles & wires.*—*Re TORONTO ELECTRIC COMRS. & TORONTO RY. CO. & TORONTO CORPN.* (1920), 48 O. L. R. 115; 54 D. L. R. 645; 18 O. W. N. 366.—CAN.]

m. *To enforce order in respect of street railway.*—*MONTREAL STREET RY. CO. v. MONTREAL TERMINAL RY. CO.* (1905), 36 S. C. R. 389.—CAN.]

n. ————.—[*OTTAWA ELECTRIC RY. CO. v. CITY OF OTTAWA & CANADA ATLANTIC RY. CO.* (1906), 37 S. C. R. 354.—CAN.]

o. *To order opposition street railway company to operate.*—*Re TORONTO & TORONTO RY. CO.* (1912), 21 O. W. R. 723; 3 O. W. N. 1021; 3 D. L. R. 561.—CAN.]

p. *To order paving of road used by railway.*—*TORONTO SUBURBAN RY. CO. v. TORONTO CORPN.*, [1915] A. C. 590, P. C.—CAN.]

q. *To order company to issue tickets of a distinguishing colour.*—*Re NOVA SCOTIA TRAMWAYS & POWER CO., LTD., Re TICKETS FOR WORKING PEOPLE* (1918), 53 N. S. R. 17; 39 D. L. R. 657.—CAN.]

r. *To order extension of service.*—*Re TORONTO RY. CO. & CITY OF TORONTO* (1919), 44 O. L. R. 381; 15 O. W. N. 244; *revid.*, 61 D. L. R. 69.—CAN.]

t. *To order contribution towards cost of widening viaduct.*—*SHERBROOKE CORPN. v. CANADIAN PACIFIC RY. CO.* (1923), 28 Can. Ry. Cas. 343.—CAN.]

aa. *Whether conclusive on question of fact.*—*TORONTO & YORK RADIAL RY. CO. v. CITY OF TORONTO* (1916), 20 O. W. R. 414; 38 O. L. R. 88.—CAN.]

bb. *Operation in two municipalities of railway owned by one—Exclusive jurisdiction of Ontario Railway & Municipal Board.*—*WATERLOO CORPN. v. BERLIN CORPN.* (1913), 28 O. L. R. 206; 4 O. W. N. 799; 12 D. L. R. 390.—CAN.]

cc. *Right to increase fares—Fares fixed by bye-law having force of statute.*—*Re JOYCE & LONDON (CITY) (ONT.)* (1920), 53 D. L. R. 701; 7 O. L. R. 335.—CAN.]

dd. *Valuation of franchise—Possibility of exercise of franchise over thirty years.*—*Re TORONTO CITY & TORONTO STREET RY. CO.*, [1893] A. C. 511; 20 A. R. 125.—CAN.]

ee. *Right to allowance for franchise & compulsory taking.*—*Re BERLIN & WATERLOO STREET RY. CO. & BERLIN TOWN* (1908), 19 O. L. R. 57; 13 O. W. R. 157.—CAN.]

ff. *Liability for rates—After termination of franchise.*—A street ry. co. in Toronto was to be assessed in respect of repairs to the roadway traversed by the railway, as for local improvements, which, by the Municipal Act, constitute a lien upon the property assessed, but not a personal liability upon owners or occupiers after they have ceased to be such:

—*Held*: after the termination of its franchise the co. was not liable for these rates.—*TORONTO CITY v. TORONTO STREET RY. CO.* (1894), 23 S. C. R. 198.—CAN.]

gg. *Right to lay lines—Construction of authority given.*—Where a municipal council granted to a railway co. authority to construct, maintain, & operate railways in its street, with the exclusive right to such portion of any street as should be occupied by the railway, but with the plain intent that the co. should have no concern whatever with any portions of any street not in actual occupation by their rails.—*Held*: a subsequent clause in the deed of grant, giving to the co. the refusal, on terms, of other streets in the city for railway purposes, was insufficient to constitute, contrary to the plain meaning of the previous stipulations, a right of monopoly in any of the streets of the city.—*WINNIPEG STREET RY. CO. v. WINNIPEG ELECTRIC STREET RY. CO. & WINNIPEG CITY*, [1894] A. C. 615.—CAN.]

hh. *Construction of judgment.*—An Ord. in Council in pursuance of the judgment of their Lordships ([1907] A. C. 315) ordered that subject to certain conditions contained in their agreement it was for respondents not to apply, to determine what new lines should be laid down on streets within the city of Toronto. Thereafter an order was made by the Ontario Railway & Municipal Board that respondents construct between ten & fifteen additional miles of single track, & the co. selected certain streets for that purpose. Subsequently the Court of Appeal for Ontario affirmed a decision of the said Board that the co. had the right to select.—*Held*: the judgment in [1907] A. C. 315 was perfectly clear & the Order in Council thereon was unaffected by Ontario Act, 8 Edw. 7, c. 112, s. 1.—*TORONTO CORPN. v. TORONTO RY. CO.*, [1910] A. C. 312, P. C.—CAN.]

kk. *Power of Executive Government of Yukon Territory—To authorise construction of toll tramway or road.*—The Executive Govt. of the Yukon Territory may lawfully authorise the construction of a toll tramway or wagon road over Dominion lands in the territory, & private persons using such road cannot refuse to pay the tolls enacted under such authority.—*O'BRIEN v. ALLEN* (1900), 30 S. C. R. 340.—CAN.]

ll. *Omission to lay or keep rails flush with streets—What is appropriate form of action—Indemnity.*—*Def'ts.* Act of Incorporation required that "the rails of their railway shall be laid flush with the streets & highways, & the railway track shall conform to the grades of the same, so as to offer the least possible impediment to the ordinary traffic of the said streets & highways".—*Held*: an omission to lay the rails flush with the street would be indictable, without showing that any unnecessary impediment was offered to the traffic.—*R. v. TORONTO STREET RY. CO.* (1865), 24 U. C. R. 454.—CAN.]

mm. ————.—[*Information by Attorney-General.*]—*A. G. v. TORONTO STREET RY. CO.* (1868), 14 Gr. 673.—CAN.]

nn. ————.—[*Mandamus.*]—*HALLIFAX CITY v. CITY RY. CO.* (1878), H. E. D. 319.—CAN.]

oo. ————.—[*Changes in street level.*]—*JEDDY v. OTTAWA CITY PASSENGER RY. CO.* (1871), 81 U. C. R. 569.—CAN.]

pp. ————.—[*Approval of city engineer*

*o use projecting flange—Liability for injury to horse.*—*JOYCE v. HALIFAX STREET RY. CO.* (1889), 21 N. S. R. (9 R. & G.) 531.—CAN.

*q. Junction of electric railway with Canadian Pacific railway—Laying switch on highway—Power of Railway committee of Privy Council—To authorise expropriation of right of way.*—*TORONTO CITY CORPN. v. METROPOLITAN RY. CO.* (1900), 31 O. R. 367.—CAN.

*r. Right of city to decide upon establishment of new lines.*—*Sec. 11 of the agreement entered into between ptfs. & defts., set out in 55 Vict. c. 99 (O.), whereby defts. were required to establish & lay down new lines & to extend the tracks & street car service on such streets as might be, from time to time, recommended by the city engineer & approved by the city council, does not apply to territory which was not within the limits of the city at the date of the agreement, but has subsequently been annexed to & become part thereof.*—*TORONTO v. TORONTO RY. CO.* (1906), 12 O. L. R. 534; 8 O. W. R. 179.—CAN.

*t. —.*—*BLACK v. WINNIPEG ELECTRIC RY. CO.* (1907), 6 W. L. R. 238; 17 Man. L. R. 77.—CAN.

*a. —.*—*TORONTO v. TORONTO RY. CO.* (1907) A. C. 96.—CAN.

*b. —.*—*BRITISH COLUMBIA ELECTRIC RY. CO. v. STEWART* (1913), 25 W. L. R. 227; [1913] A. C. 816.—CAN.

*c. —.*—*ST. JOHN RY. CO. v. ST. JOHN CORPN.* (1915), 43 N. B. R. 417.—CAN.

*d. Exclusive right to operate upon streets—Ezpiry of franchise of another railway—Right to operate upon portion of street released.*—*Re TORONTO RY. CO. & TORONTO* (1915), 9 O. W. N. 62; 34 O. L. R. 456; *affd.*, [1916] 2 A. C. 542.—CAN.

*e. Seniority of street railway.*—*A street railway owned & operated by a city corpn. cannot be considered junior to a steam railway, in the case of an application by the city corpn. for leave to carry the street railway across the tracks of the steam railway, where the street along which the street railway runs is senior to the steam railway.*—*Re CITY OF EDMONTON & GRAND TRUNK PACIFIC RY. CO.* (1912), 21 W. L. R. 808; 4 D. L. R. 472.—CAN.

*f. Operation—Necessity for two men to be in charge of cars.*—*TORONTO CORPN. v. TORONTO STREET RY. CO.* (1888), 15 A. R. 30.—CAN.

*g. —.*—*Duty of company to operate cars over street specified in prior agreement.*—*The promoters of a street ry. co. entered into an agreement with a city corpn. in 1888, & agreed to run cars along Douglas Street to the northern boundary of the city limits. They became incorporated as a joint stock co., & in 1890 obtained a charter authorising the construction of tramways connecting the country districts with the city system, & in pursuance of the new powers continued the Douglas Street tramway northerly along the Spanish road. Traffic on this extension was discontinued in 1898, because it did not pay. In 1892 the city limits were extended so as to include a portion of the Spanish road on which the tramway had been built. In 1894 the co. obtained a private Act for the consolidation & confirmation of their rights, powers, & privileges, & ratifying the agreement of 1888, between the city & the original promoters:—*Held*: in an action for a declaration that the co. were bound to operate their tram system along Douglas Street to the extended city limits, that the co. were not bound to do so. *Quære*, whether a ratepayer could sue.—*YATES v. BRITISH COLUMBIA ELECTRIC RY. CO., LTD.* (1900), 7 B. C. R. 323; 20 C. L. T. 428.—CAN.*

*h. —.*—*Duty to have proper vestibules on cars.*—*R. v. TORONTO RY. CO.* (1901), 21 C. L. T. 120.—CAN.

*i. —.*—*Regulations controlling operation should be made by bye-law—Under Towns Incorporation Act, 1900.*—*LIVERPOOL & MILTON RY. CO. v. LIVERPOOL TOWN* (1903), 33 S. C. R. 180.—CAN.

*k. —.*—*—.*—*LONDON STREET RY. CO. v. LONDON CITY* (1904), 3 O. W. R. 123; 9 O. L. R. 439.—CAN.

*l. —.*—*Validity of bye-law.*—*HAMILTON CITY v. HAMILTON STREET RY. CO.* (1905), 25 C. L. T. 15; 10 O. L. R. 591; 6 O. W. R. 207.—CAN.

*m. —.*—*Penalty for breach of statutory duty—Fender at "front" of car—Car moving reversely.*—*TORONTO CITY v. TORONTO RY. CO.* (1905), 6 O. W. R. 574; 10 O. L. R. 730.—CAN.

*n. —.*—*Whether operation prevented if workmen's tickets not issued.*—*HAMILTON STREET RY. CO. v. CITY OF HAMILTON* (1906), 39 S. C. R. 673.—CAN.

*o. —.*—*Who are entitled to travel at reduced fares—Children under twelve years old.*—*Re SANDWICH EAST & WINDSOR & TECUMSEH ELECTRIC RY. CO.* (1908), 12 O. W. R. 370; 16 O. L. R. 611.—CAN.

*p. —.*—*Validity of grant in reversion.*—*TORONTO CORPN. v. TORONTO RY. CO.* (1916) 2 A. C. 542, P. C.—CAN.

*aa. —.*—*Conducive to public convenience.*—*CUNNINGHAM v. TAKAPUNA*, [1921] N. Z. L. R. 22.—N.Z.

*bb. Liability for negligence—Dangerous exposure of electric wires.*—*CONLON v. CITY RAILROAD CO.* (1871), 8 N. S. R. (2 G. & O.) 209.—CAN.

*cc. —.*—*—.*—*ADAMS v. HALIFAX CORPN.* (1880), 13 N. S. R. (1 R. & G.) 344.—CAN.

*dd. —.*—*—.*—*A street railway co. are not guilty of negligence in failing to take steps to prevent telephone wires crossing above their trolley wire from coming in contact, if broken, with the trolley wire, unless it be at some place known to be especially dangerous.*—*HINMAN v. WINNIPEG ELECTRIC STREET RY. CO.* (1906), 3 W. L. R. 351; 16 Man. L. R. 16.—CAN.

*ee. —.*—*—.*—*In an action against the proprietors of a railway car drawn by horses, for an accident to ptff. by the carelessness of the driver, an averment that the contract was to carry safely, does not mean safely at all events, & it is sufficient to prove that the accident arose from the driver's want of care & skill.*—*THOMPSON v. MACKLEM* (1846), 2 U. C. R. 300.—CAN.

*ff. —.*—*Sufficiency of evidence of contributory negligence.*—*Ptff., standing on the front platform of one of defts.' cars, which was crowded, was thrown off by a jolt & injured, but it did not appear whether, at the time of the accident, he was holding on to the iron rail on the platform or not:—*Held*: the fact of ptff. not proving affirmatively that he was so holding on was not a ground for nonsuit.*—*CORNISH v. TORONTO STREET RY. CO.* (1873), 23 C. P. 355.—CAN.

*gg. —.*—*Neglect to replace misplaced rail.*—*MCFARLANE v. GILMOUR* (1883), 5 O. R. 302.—CAN.

*hh. —.*—*Horses running away—Duty to use suitable horses on route crossing railway.*—*It is some evidence of negligence in a street ry. co. carrying passengers for reward, & carrying them in a closed vehicle, that they used horses which they had reason to suppose were skittish & frightened of a train, where the route passes over a much used ry. by a bridge, though the horses had been driven for eighteen*

months almost daily, many times a day over the route, & had never run away before the occasion on which the passenger was injured.—*RAINFIE v. ST. JOHN CITY RY. CO.* (1892), 31 N. B. R. 582.—CAN.

*kk. —.*—*"Defect in arrangement of plant."*—*BOND v. TORONTO RY. CO.* (1895), 22 A. R. 78; 24 S. C. R. 715.—CAN.

*ll. —.*—*Excessive speed.*—*Persons crossing the street railway tracks are entitled to assume that the cars running over them will be driven moderately & prudently, & if an accident happens through a car going at an excessive rate of speed, the street railway co. are responsible.*—*GOSNELL v. TORONTO RY. CO.* (1895), 21 A. R. 553; 24 S. C. R. 582.—CAN.

*mm. —.*—*—.*—*A car of defts.' electric street railway was moving very quickly along a down grade on a street in a city, where ptff., who was in the employment of the city corpn., was engaged in his duty of sweeping the roadbed. The motorman did not sound the gong on the car, as was customary, & into ptff., injuring him:—*Held*: although defts. had the right of way, the omission to sound the gong or give any warning of the approach of the car was actionable negligence.*—*GREEN v. TORONTO RY. CO.* (1895), 26 O. R. 319.—CAN.

*nn. —.*—*—.*—*Although a street railway co. may be permitted by its charter to run its cars on the public streets at high rates of speed, it is not, therefore, relieved from the duty of exercising proper care to prevent accidents.*—*LINES v. WINNIPEG ELECTRIC STREET RY. CO.* (1896), 11 Man. L. R. 77.—CAN.

*oo. —.*—*—.*—*SHERBROOKE STREET RY. CO. v. KERR* (1899), 1 Ont. Dig. 994.—CAN.

*pp. —.*—*—.*—*TORONTO RY. CO. v. SNEIL* (1901), 31 S. C. R. 241.—CAN.

*qq. —.*—*—.*—*BROWN v. MOORE JAW ELECTRIC RY. CO.* (1914), 30 W. L. R. 203; 7 W. W. R. 695.—CAN.

*rr. —.*—*—.*—*A newly constructed portion of a railway had a depression or "sink hole" in the roadbed which arose from an inherent weakness of the ground under the roadbed. The engineer, while driving a train over the said "sink hole," was killed by reason of the derailment of the train. At the time of the accident the deceased was driving the train at a rate of speed in excess of five miles per hour in violation of the express prohibition of the railway co.:—*Held*: the roadbed at the place where the accident occurred, although safe if passed over at the rate of five miles an hour, was dangerous if that speed were exceeded: that, therefore, the failure of the engineer to observe the express order of the railway co. was the proximate cause of the accident.*—*LEWIS v. GRAND TRUNK PACIFIC RY. CO.* (No. 2) (1914), 29 W. L. R. 989; 7 W. W. R. 504; *affd.*, 52 S. C. R. 227.—CAN.

*tt. —.*—*Wrongful act of servant—Pushing newsboy off car.*—*Defts. were held not liable where the motorman of one of their electric cars, who had no control over or authority to interfere with passengers or persons on the cars, pushed off the car a newsboy who was getting on to sell a paper to a passenger.*—*COLL v. TORONTO RY. CO.* (1898), 25 A. R. 55.—CAN.

*aaa. —.*—*Standard of care.*—*It is the duty of a motorman in charge of an electric car on a street railway to take special care to have the car sufficiently under control to enable him to avoid collision with aged & infirm persons on foot whose infirmities are plainly evident & who may be crossing the line of railway at a street crossing.*—*HAIGHT v. HAMILTON*

STREET RY. CO. (1898), 29 O. R. 279.  
—CAN.

r. — *Defect in condition of plank on platform.*—BURKE v. BRITISH COLUMBIA ELECTRIC RY. CO., LTD. (1900), 7 B. C. R. 85.—CAN.

t. — *Insufficient care causing horses to bolt—Plaintiff's signal to motorman ambiguous.*—MYERS v. BRANTFORD STREET RY. CO. (1900), 27 A. R. 513.—CAN.

a. — *Injury to passenger—Conductor attempting to pull passenger on moving car.*—DAWDY v. HAMILTON, GRIMSBY & BEAMSVILLE ELECTRIC RY. CO. (1902), 5 O. L. R. 92; 2 O. W. R. 789; 23 C. L. T. 44.—CAN.

b. — *Passenger alighting from front of car—Contributory negligence.*—WINNIPEG ELECTRIC STREET RY. CO. v. BELL (1906), 37 S. C. R. 515.—CAN.

c. — *Whether knowledge of danger good defence.*—MONTREAL PARK & ISLAND RY. CO. v. McDOUGALL (1905), 36 S. C. R. 1.—CAN.

d. — *Motorman failing to observe company's published rules.*—KING v. TORONTO RY. CO., C. R. (1908) A. C. 326; 12 O. W. R. 40; (1908) A. C. 260.—CAN.

e. — *Passenger projecting body beyond car.*—While it is impossible to lay down any specific rule for the guidance of railway or street railway cos. generally, a railway co. operating in a country in which tobacco chewing, or gum chewing, is not uncommon, must expect its patrons or some of them to be tobacco & gum chowers, & it is the custom of such passengers to put their heads past the lines of the car to expectorate, the railway co. should be held to know of such custom, & should either remove all obstructions from the side of the track a sufficient distance to avoid the probability of an accident, or prevent the passengers from projecting their heads over the side, or at least give proper warning as to the danger.—SIMPSON v. TORONTO & YORK RADIAL RY. CO. (1908), 16 O. L. R. 31; 11 O. W. R. 297.—CAN.

f. — *Failure to test car wheels.*—Action for damages for injury to pltt. by being thrown off defts.' street car.—Held: defts. were liable, they not having tested the wheels on purchasing nor inspected them properly while in use.—GAISER v. NIAGARA ST. CATHARINES & TORONTO RY. CO. (1909), 14 O. W. R. 42; 19 O. L. R. 31.—CAN.

g. — *Contributory negligence of plaintiff exonerates defendant.*—BALKE v. CITY OF EDMONTON (Alta.) (1912), 21 W. L. R. 22; 1 D. L. R. 876; 4 Alta. L. R. 406.—CAN.

h. — *Liability to trespassers.*—ANDREWS v. BRITISH COLUMBIA ELECTRIC RY. CO., LTD. (1913), 18 B. C. R. 25.—CAN.

k. — *Blasting operations in construction of tramway.*—A co. with statutory power to construct a tramway let the work of construction to a contractor, who, in the course thereof, blasted away a hillside by a method which resulted in throwing large quantities of rock upon pltt.'s adjoining land, which result could have been prevented by proper precautions.—Held: the co. was liable for the omission of the contractor to take the precautions necessary to prevent the blasting operations from causing injury to pltt.'s lands.—HOUNSOME v. VANCOUVER POWER CO. (1914), 18 B. C. R. 81; 49 S. C. R. 430.—CAN.

l. — *Injury to team of mares.*—McCARTHY v. MOORS JAW ELECTRIC RY. CO. (1914), 29 W. L. R. 271.—CAN.

m. — *Dangerous placing of trolley pole.*—A street ry. co. is not guilty of negligence & is not liable in damages for injuries to a motorist

resulting from a collision of a motor car with a trolley pole that had been shifted from its uniform position at the side of the street to the devil strip, without any lights to guard it at night.—HAMILTON STREET RY. CO. v. WEIR (1914), 51 S. C. R. 506.—CAN.

n. — *Use of grooved rail.*—Defts. had statutory authority to construct, maintain & operate a system of street railway upon, across & along the public streets of the city. The city, having selected cars with a standard wheel, used grooved rails constructed for carrying the wheels in question. One of pltt.'s horses was injured when the caulk of its shoe caught in the groove of the rails.—Held: the city was not guilty of negligence in the use of the grooved rail.—REGINA CARTAGE CO. v. REGINA (City) (1916), 31 W. L. R. 1141.—CAN.

o. — *Jolting or moving of car causing injury to passenger boarding it.*—HILL v. TORONTO RY. CO. (1917), 40 O. L. R. 393; 22 Can. Ry. Cas. 240; 40 D. L. R. 393.—CAN.

p. — *Johnson v. Halifax Electric Tramway Co., Ltd.* (1917), 51 N. S. R. 274; 36 D. L. R. 56.—CAN.

q. — *Whitford v. Nova Scotia Tramways, Etc. Co., Ltd.* (1918), 62 N. S. R. 105.—CAN.

aa. — *Squires v. Toronto RY. Co.* (1920), 47 O. L. R. 613; 54 D. L. R. 575; 18 O. W. N. 294.—CAN.

bb. — *Myers v. Nova Scotia Tramways & Power Co., Ltd.* (1920), 52 N. S. R. 466; 50 D. L. R. 484.—CAN.

cc. — *As long as the entrance doors of a street car are open while the car is standing at a passenger landing place there is an implied invitation extended to intending passengers to enter the car, & it is the duty of the conductor in charge of the car to afford them a reasonable opportunity to do so in safety. He is therefore negligent in giving the signal to start the car & causing it to close before the entrance doors are closed & before all persons attempting to board the car are safely on.—WILSON v. WINNIPEG ELECTRIC RY. CO. (Man.)* (1922) 2 W. W. R. 610; 68 D. L. R. 617.—CAN.

dd. — *GUILDAY v. WINNIPEG ELECTRIC RY. CO. (Man.)* (1922) 3 W. W. R. 498; 70 D. L. R. 517.—CAN.

ee. — *Allowing passengers to enter at both doors.*—WILLIAMS v. TORONTO & YORK RADIAL RY. CO. (1919), 45 O. L. R. 387; 48 D. L. R. 346; 16 O. W. N. 197.—CAN.

ff. — *Driver not keeping good look-out.*—FIELD v. SARNIA STREET RY. CO. (1921), 50 O. L. R. 260.—CAN.

gg. — *Duty of driver to take care although signal to move given.*—If a tramcar driver, having stopped at a railway crossing, restarts & proceeds to cross, & in a resulting collision with a train a tramcar passenger is killed, the fact (as to which there was conflicting evidence & no definite specific finding in the present case) that the railway signalman had given the "come on" signal would not necessarily relieve the tramcar co. from liability; the tramcar co.'s duty to the passenger is to use proper care, & there may be circumstances where, notwithstanding the signal, the driver should have seen that it was dangerous to cross.—DUTHIE v. BRITISH COLUMBIA ELECTRIC RY. CO. (1924) 2 D. L. R. 462; (1924) 2 W. W. R. 81; 33 B. C. R. 481.—CAN.

hh. — *Step of car badly constructed.*—ELLIOTT v. TORONTO TRANSPORTATION COMMISSION, (1927) 1 D. L. R. 259; 32 Can. Ry. Cas. 200; 59 O. L. R. 609.—CAN.

kk. — *Invitation to alight.*—The opening of the door of a street car by the motorman before the car stopped.—Held: not to be a representation to a passenger who had walked to the vestibule intending to alight that the car was not in motion, & that he might safely get off; & although an improper act because in violation of the rules on the subject, it was not that act, but the passenger's negligence in stepping off the car in an improper manner while the car was moving, that caused the accident which befell him.—WILLS v. CITY OF EDMONTON (Alta.), (1925) 3 W. W. R. 568.—CAN.

ll. — *Loose plank at street intersection crossing.*—SCOTT v. WINNIPEG ELECTRIC CO., (1927) 2 D. L. R. 686; (1927) 1 W. W. R. 739; 32 Can. Ry. Cas. 397; 36 Man. L. R. 357.—CAN.

mm. — *Standard of care—In fog.*—VANCOUVER ICE & STORAGE CO. v. BRITISH COLUMBIA ELECTRIC RY. CO., (1927) 1 W. W. R. 631; 38 B. C. R. 234.—CAN.

nn. — *While a motor-man is entitled to assume that a person approaching the car-line will use ordinary care, yet if there is anything to indicate that the person is oblivious to danger it is the motorman's duty to take immediate steps to obviate the danger.*—SYMONS v. WINNIPEG ELECTRIC CO., (1928) 1 D. L. R. 159; (1927) 3 W. W. R. 650.—CAN.

oo. — *Outwards projecting door injuring plaintiff.*—ODEGAARD v. WINNIPEG ELECTRIC CO., (1927) 4 D. L. R. 387; (1927) 1 W. W. R. 589; 36 Man. L. R. 592.—CAN.

pp. — *Liability to keep roadway in good repair.*—CONAN v. CITY RAILROAD CO. (1917), 8 N. S. R. (2 G. & O.) 209.—CAN.

qq. — *Consolidated RY. Co. v. Victoria City* (1897), 5 B. C. R. 266.—CAN.

rr. — *Re HAMILTON & HAMILTON STREET RY. CO.* (1910), 16 O. R. 279; 1 O. W. N. 948.—CAN.

tt. — *WEST TORONTO v. TORONTO RY. CO.* (1911), 20 O. W. R. 271; 25 O. L. R. 9; 3 O. W. N. 181.—CAN.

aaa. — *Liability to remove snow on track.*—MITCHELL v. HAMILTON CORPN. (1901), 2 O. L. R. 58; 21 C. L. T. 372.—CAN.

bbb. — *PRESTON v. TORONTO RY. CO.* (1905), 11 O. L. R. 56; 6 O. W. R. 786; (1906), 8 O. W. R. 504.—CAN.

ccc. — *Re TORONTO & TORONTO RY. CO.* (1908), 16 O. L. R. 205; 11 O. W. R. 275.—CAN.

ddd. — *WINNIPEG CORPN. v. WINNIPEG ELECTRIC RY. CO. (Man.)* (1915), 33 W. L. R. 219; 9 W. W. R. 391, 889; 25 D. L. R. 308.—CAN.

eee. — *CITY OF TORONTO v. TORONTO RY. CO.* (1919), 44 O. L. R. 308; 15 O. W. N. 227; *affd.*, 51 D. L. R. 48.—CAN.

fff. — *SHEA v. REID-NEW-FOUNDLAND CO.* (1908) A. C. 520.—NFLD.

ggg. — *Contract with steamboat owner—Whether ultra vires.*—CLARKE v. SARNIA STREET RY. CO. (1877), 42 U. C. R. 39.—CAN.

hhh. — *Removal of passenger—Expulsion from car for misconduct.*—A passenger on a street railway having refused when requested by the conductor of the car to remove his feet from the cushion of the opposite seat, & used strong language to the conductor, was ejected from the car.—Held: the conductor had a right to eject him.—DAVIS v. OTTAWA ELECTRIC RY. CO. (1897), 28 O. R. 654.—CAN.

kkk. — *Liability for loss of support.*—A street ry. co. in grading a street in

Vancouver, in accordance with an agreement entered into with the corp'n., pursuant to the Vancouver Incorporation Act & amendment of 1895, are not liable for damages for loss of support caused to lands adjoining the street.—*MACDONELL v. BRITISH COLUMBIA ELECTRIC RY. CO.* (1902), 9 B. C. R. 542.—**CAN.**

h. *Passenger on "through" car—*

*Refusal to stop car to let down passenger at intermediate point.*—*FIELDING v. HAMILTON & DUNDAS STREET RY. CO.* (1914), 28 O. W. R. 676; 6 O. W. N. 474; 18 Can. Ry. Cas. 82.—**CAN.**

k. *Right to extend switches & turnouts*—*The Toronto & York Radial Ry. Co.* has the power, under the agreements of its predecessors in title

with the county of York, & the various statutes relating to the co. & its predecessors to enlarge & increase their switches & turnouts, & to carry freight against the will of the successors in title of the county of York.—*Re WADDINGTON & TORONTO & YORK RADIAL RY. CO.* (1913), 23 O. W. R. 775; 4 O. W. N. 617; 9 D. L. R. 81.—**CAN.**

## TRANSFER OF ACTION.

*See* ADMIRALTY; BANKRUPTCY AND INSOLVENCY; COUNTY COURTS; INTERPLEADER; MAYOR'S AND CITY OF LONDON COURT; PRACTICE AND PROCEDURE.

## TRANSFER OF BILL OF LADING.

*See* SHIPPING AND NAVIGATION.

## TRANSFER OF CHOSSES IN ACTION.

*See* CHOSSES IN ACTION.

## TRANSFER OF GOODS.

*See* BILLS OF SALE; SALE OF GOODS.

## TRANSFER OF LAND.

*See* REAL PROPERTY AND CHATTELS REAL; SALE OF LAND.

## TRANSFER OF NEGOTIABLE INSTRUMENT.

*See* BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS.

## TRANSFER OF SHARES.

*See* COMPANIES; STOCK EXCHANGE.

## TRANSFER OF SHIPS.

*See* SHIPPING AND NAVIGATION.

## TRAWLING.

*See* FISHERIES ; SHIPPING AND NAVIGATION.

- - -

## TREASON AND TREASON FELONY.

*See* CRIMINAL LAW AND PROCEDURE.

## TREASURE TROVE.

*See* CONSTITUTIONAL LAW ; CORONERS ; CRIMINAL LAW AND PROCEDURE

## TREASURER.

*See* LOCAL GOVERNMENT.

## TREASURY.

*See* CROWN PRACTICE ; REVENUE.

## TREATIES.

*See* CONSTITUTIONAL LAW ; EXTRADITION AND FUGITIVE OFFENDERS.

## TREES.

*See* AGRICULTURE ; LANDLORD AND TENANT ; REAL PROPERTY AND CHATTELS REAL ;  
SETTLEMENTS.



# TRESPASS.

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*Action* . . . . . See ACTION.  
*Criminal Law* . . . . . „ CRIMINAL LAW.  
*Negligence* . . . . . „ NEGLIGENCE.  
*Nuisance* . . . . . „ NUISANCE.

*Police* . . . . . See POLICE.  
*Public Authorities Protection Act* . . . . . „ PUBLIC AUTHORITIES.  
*Seduction* . . . . . „ MASTER AND SERVANT.

## Part I.—In General.

## SECT. 1.—CHARACTERISTICS.

1. **What amounts to trespass—Injury resulting from legal act.]**—Trespass will not lie for an injury which is the consequence of a legal act.—WIGFORD v. GILL (1592), Cro. Eliz. 269; 78 E. R. 524.

*Annotation*:—**Refd.** Wiltshire v. Sildford (1827), 6 L. J. O. S. K. B. 151.

2. ——— **Purely accidental.]**—If in the prosecution of a lawful act an accident purely accidental arise, no action can be supported for an injury arising from such accident.—DAVIS v. SAUNDERS (1770), 2 Chit. 639.

3. ——— **Unintentional act.]**—ANON. (1466), Y. B. 6 Edw. 4, fo. 7, pl. 18.

*Annotations*:—**Consd.** Lambert v. Bessey (1680), T. Raym. 467; Smith v. Kenrick (1849), 7 C. B. 515. **Refd.** Scott v. Shepherd (1773), 2 Wm. Bl. 892.

4. ——— **]**—No man shall be excused of a trespass . . . except it may be judged utterly without his fault (*per cur.*).—WEAVER v. WARD (1616), as reported in Hob. 134; 80 E. R. 284.

*Annotations*:—**Consd.** Stanley v. Powell, [1891] 1 Q. B. 86. **Refd.** Anon. (1676), 1 Vent. 295; Bessey v. Olliot & Lambert (1682), T. Raym. 467; Dickenson v. Watson (1682), T. Jo. 205; Gibbon v. Pepper (1695), 2 Salk. 637; R. v. Kette (1696), 1 Ld. Raym. 138; R. v. Gill (1719), 1 Stra. 190; Scott v. Shepherd (1773), Wils. 403; *McManus v. Chickett* (1800), 1 East, 106; *Leame v. Bray* (1803), 3 East, 593; *Hall v. Fearnley* (1842), 12 L. J. Q. B. 22; *Sharrod v. L. & N. W. Ry.* (1849), 4 Exch. 580.

5. ——— **]**—A man is driving goods through a town, & one of them goes into another man's house, & he follows him, trespass does not lie for this, because it was involuntary, & a trespass ought to be done voluntarily, & so it is *injuria*, & a hurt to another, & so it is *damnum* (*DONDERIDGE, J.*).—MITTEN v. FAUDRYE (1626), Poph. 161; 79 E. R. 1259; *sub nom.* MILLEN v. FAWTREY, W. Jo. 131; Lat. 119; *sub nom.* MILLEN v. HAWERY, Lat. 13.

*Annotations*:—**Refd.** King v. Rose (1673), Freem. K. B. 347; Mason v. Keeling (1699), 1 Ld. Raym. 606; *Held*: with v. Shordike (1677), 4 Burr. 2092; *Gundy v. Feltham* (1786), 1 Term Rep. 331; *Deano v. Clayton* (1817), 7 Taunt. 489; *Anthony v. Haney* (1832), 8 Bing. 186; *Hines v. Touseley* (1926), 95 L. J. K. B. 773.

6. ——— **]**—BASELY v. CLARKSON (1681), 3 Lev. 37; 83 E. R. 505.

7. ——— **]**—Involuntary trespass may be justified, but not a voluntary one.—BECKWITH v. SHORDIKE (1767), 4 Burr. 2092; 98 E. R. 91.

*Annotations*:—**Refd.** Deano v. Clayton (1817), 7 Taunt. 489; *Sanders v. Teape & Swan* (1884), 51 L. T. 263.

8. ——— **]**—If the owner of a ship being himself on board & standing at the helm unintentionally runs her against another ship from unskilful management the remedy is trespass & not case.—COVELL v. LAMING (1808), 1 Camp. 497; 170 E. R. 1034, N. P.

9. ——— **]**—(1) If one does an injury by unavoidable accident an action does not lie; (2) *aliter* if any blame attaches to him, though he be innocent of any intention to injure.—WAKE-

MAN v. ROBINSON (1823), 1 Bing. 213; 8 Moore, C. P. 63; 1 L. J. O. S. C. P. 70; 130 E. R. 86.

*Annotations*:—*As to* (1) **Refd.** Cotterill v. Starkey (1839), 8 C. & P. 691; *Hall v. Fearnley* (1842), 3 Q. B. 919; *Stanley v. Powell*, [1891] 1 Q. B. 86.

10. ——— **]**—STANLEY v. POWELL, No. 568, *post*.

11. ——— **Not act of omission.]**—SIX CARPENTERS' CASE, No. 165, *post*.

12. ——— **Wilful act.]**—HOLMES v. MATHER, No. 567, *post*.

13. ——— **Negligent act.]**—COVELL v. LAMING, No. 8, *ante*.

14. ——— **]**—WAKEMAN v. ROBINSON, No. 9, *ante*.

15. ——— **]**—HOLMES v. MATHER, No. 567, *post*.

16. ——— **]**—BECKWITH v. SHORDIKE, No. 7, *ante*.

17. ——— **]**—STANLEY v. POWELL, No. 568, *post*.

18. ——— **Unauthorised act—Where authority required.]**—The vestry having done without authority that for which they wanted authority, have committed a trespass. Therefore there can be no compensation, but they are liable in damages if plff. can prove that he has suffered, but this he has failed to do (*KEKEWICH, J.*).—LONG v. FULHAM VESTRY (1898), 47 W. R. 56; 13 Sol. Jo. 28.

19. ——— **]** Plffs were a statutory body of drainage comrs., & defts. were the owners of a mill with a tumbling bar or weir adjoining it. Defts., as plffs. alleged, & as the jury found to a lesser extent, raised the weir to a greater height than they were entitled to, with the result that adjoining meadows were flooded. Plffs. pulled down the alleged enhancement, & defts. replaced it. In an action by plffs. for an injunction to restrain defts. from enhancing the weir, defts. counterclaimed for trespass:—**Held**: plffs. not having obtained a finding of two justices as required by Land Drainage Act, 1861 (c. 133), s. 18, were not entitled to remove the alleged enhancement & defts. were entitled to succeed on the counterclaim.—SALISBURY & FORDINGBRIDGE DRAINAGE DISTRICT BOARD v. SOUTHERN TANNING CO. (1920) LTD., [1927] 2 K. B. 566; 96 L. J. K. B. 1074; 137 L. T. 754; 91 J. P. 167; 43 T. L. R. 824; 25 L. G. R. 415.

20. ——— **Interference with superincumbent air—Overhanging board.]**—(1) Where deft. nails to his own wall a board which overhangs plff.'s close the remedy seems to be case & not trespass.

I do not think it is a trespass to interfere with the column of air superincumbent on the close (*LORD ELLENBOROUGH*).

(2) I am by no means prepared to say that firing across a field *in vacuo*, no part of the contents touching it, amounts to a *clausus fregit* (*LORD*

## PART I. SECT. 1.

a. **What amounts to trespass—Unintentional act.]**—Where, in a proceeding before two justices under 1 Rev. Stat. c. 133, for wilfully cutting & carrying away timber off complainant's land, there is shown to be a *bona fide* question of title or boundaries, & the act was done under a *bona fide* claim of right, the wilfulness of the act is negatived, & deft. should be discharged.—*Ex p. DONOVAN* (1874), 15 N. B. R. (2 Pug.) 389.—CAN.

b. ——— **]**—JEFFERY (F. W.) & SONS, LTD. v. COPELAND FLOUR MILLS, LTD.; FINLAYSON v. COPELAND FLOUR MILLS, LTD., [1923] 4 D. L. R. 1140; 52 O. L. R. 617.—CAN.

c. ——— **Wilful act.]**—LAWRENCE v. TOWN OF OWEN SOUND (1903), 5 O. L. R. 369; 1 O. W. R. 559; 2 O. W. R. 189.—CAN.

d. ——— **]**—KINCAID v. LAMB (Y. T.) (1906), 4 W. L. R. 167.—CAN.

e. ——— **]**—KAMMABOTYNA RAMADAS v. IT. (1926), 1 L. R. 49 Mad.

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131. ——— **Negligent act.]**—CRONIN v. CONNOR, [1913] 2 I. R. 119.—IR.

f. ——— **Illegal seizure.]**—Every illegal seizure is a trespass.—*BARTLETT v. HOUSE FURNISHING CO.* (1906), 16 Man. L. R. 350; 4 W. L. R. 567.—CAN.

g. ——— **Every invasion of private property.]**—Every invasion of private property is a trespass.—*BOYLE v. ROGERS*, [1921] 2 W. W. R. 701; 31 Man. L. R. 263; *affd.* 31 Man. L. R. 421.—CAN.



Foster v. Bates (1843), 12 M. & W. 226; Welchman v. Sturgis (1849), 18 L. J. Q. B. 211; Barnett v. Guildford (1855), 11 Exch. 19; *In the Goods of Pryse*, [1904] P. 301; Ocean Accident & Guarantee Corpn. v. Ilford Gas Co., [1905] 2 K. B. 493; Isaac v. Hobhouse, [1919] 1 K. B. 398.

— **Trespass to land.**—*See* Part II., Sect. 3, sub-sect. 3, *post*.

— — **Administrators.**]—*See* EXECUTORS, Vol. XXIII., pp. 69, 70, Nos. 532-535.

30. Trespasser not devoid of remedy for injury.]—

A trespasser may have a right of action for an injury sustained whilst in the act of trespassing.—*BARNES v. WARD* (1850), 9 C. B. 392; 19 L. J. C. P. 195; 14 Jur. 334; 137 E. R. 945.

Annotations.—**Distd.** M. S. & L. Ry. v. Walls (1854), 14 C. B. 213. **Appld.** R. Dant (1865) **Lc.** & **Ca.** 567. **Explid.** Murley v. G. Ry. (1882), 46 J. P. 360. **Refd.** Hardcastle v. South Yorkshire Ry. & River Dun Co. (1859), 4 H. & N. 67; Hounsell v. Smyth (1860), 7 C. B. N. S. 731; Hinks v. South Yorkshire Ry. & River Dun Co. (1862), 3 B. & S. 244; Robbins v. Jones (1863), 15 C. B. N. S. 221; Williams v. Groucott (1863), 4 B. & S. 149; Stansfeld v. Bolling (1870), 22 L. T. 799; Orr Ewing v. Colquhoun (1877), 2 App. Cas. 839; Wright v. Mid. Ry. (1884), 51 L. T. 639; Silvertown v. Marjott (1888), 59 L. T. 61; Ponting v. Noakes, [1894] 2 Q. B. 281; Lowery v. Walker, [1909] 2 K. B. 433. **Mentd.** Arnell v. L. & N. W. Ry. (1852), 12 C. B. 697; Ricketts v. East & West India Docks & Birmingham Junction Ry. (1852), 19 L. T. O. S. 309; Cornwell v. Metropolitan Sewers Comrs. (1855), 10 Exch. 771; Corby v. Hill (1858), 4 C. B. N. S. 556; Cornman v. Eastern Counties Ry. (1859), 29 L. J. 52; 94; Martell v. South Wales Ry. (1868), 29 L. J. C. P. 26; Martell v. Crowe & Co. v. Walker (1869), 2 B. & S. 770; Witherley v. Regent's Canal Co. (1862), 12 C. B. N. S. 2; Ohry v. Ryde Comrs. (1864), 10 Jur. N. S. 1048; Hadley v. Taylor (1865), L. R. 1 C. P. 53; Tarry v. Ashton (1876), 1 Q. B. D. 314; Pearson v. Cox (1877), 2 C. P. D. 369; Bathurst Borough v. Macpherson (1879), 4 App. Cas. 256; Owen v. De Winton (1894), 58 J. P. 833; A.-G. v. Itoe, [1915] 1 Ch. 235; Crane v. South Suburban Gas Co., [1916] 1 K. B. 33.

**Nuisance & trespass distinguished.**— See NUISANCE, Vol. XXXVI., p. 165, Nos. 70-73.

## SECT. 2.—LIABILITY FOR TRESPASS.

**Persons under disability—Infants.]—See IN-**  
FANTS, Vol. XXVIII., pp. 178-180, Nos. 381-  
395.

— **Married woman.**] —See HUSBAND & WIFE, Vol. XXVII., p. 215, Nos. 1867-1871.

— **Lunatics.**]—*See* LUNATICS, Vol. XXXIII., p. 141, No. 187.

**Public authorities.]—See PUBLIC AUTHORITIES,**  
Vol. XXXVIII., pp. 61-74.

**Surveyor of highways.**—See HIGHWAYS, Vol. XXVI., pp. 449, 450, Nos. 1658-1659.

**Liability for acts of others—Principal & agent.**—  
See AGENCY, Vol. I., pp. 603, 604, Nos. 2331-2337 ;  
& generally, pp. 418 *et seq.*

— **Carriers.**]—See CARRIERS, Vol. VIII., pp. 109, 113-115, Nos. 736, 764-770.

— **Corporations.**—See CORPORATIONS, Vol. XIII., p. 404, Nos. 1258–1260.

**Distress.**—See DISTRESS, Vol. XVIII., pp. 386-393.

**Execution.]—**See EXECUTION, Vol. XXI., pp. 456-468, 542-555.

— **Executors.**]—*See* EXECUTORS, Vol. XXIV., pp. 647, 648, Nos. 6739, 6740.

— **Husband & wife.**]—See HUSBAND & WIFE, Vol. XXVII., p. 215, Nos. 1861-1871.

— **Master & servant.**—See MASTER & SERVANT, Vol. XXXIV., pp. 135, 136, 147, 148, Nos. 1044-1055, 1155-1165, & *generally*, pp. 125-149, Nos. 964-1172.

— **Public authorities.**]—See PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 74-77.

— **Prison governor & officers.**—See PRISONS, Vol. XXXVII., p. 557, Nos. 13, 14, 16.

**Liability for acts of animals.]—See ANIMALS,**  
Vol. II., pp. 223-229, 233, Nos. 154-197, 218.

**Joint trespass.]—See Sect. 3, post.**

### SECT. 3.—JOINT TRESPASS.

Joint tortfeasors generally.]—See TORT, Vol. XLII., pp. 975-983.

31. General rule—Joint & several liability.]—  
BEADE *v.* ORME (1610), Nov. 136; 74 E. R. 1099.

32. — — —.]—(1) Release to one trespasser discharges all.

(2) If there be two disseisors of lands, & the disseisee releases all his right to one of them, it being a joint disseisin & trespass, the release shall hold his companion out.—(COCKE v. JENNOR (1614), Hob. 86 ; 80 E. R. 214.

**Annotations:—**As to (1) **Apld.** *Howe v. Oliver* (1908), 24 T. L. R. 781. **Refd.** *Pennington v. Healey* (1833), 1 Cr. & M. 402; *Duck v. Mayne*, [1892] 2 Q. B. 511. As to (2) **Refd.** *Lacy v. Kinaston* (1701), 1 Ld. Raym. 688.

32. --- [.]—In all cases of trespass, the action is joint & several & pltf. is not obliged to confine himself to trespassers committed individually; for the act of one is the act of all, & the act of all is the act of each (WOOD, B.).—*AGAR v. MORGAN* (1810), 2 Price, 120; 110 E. R. 43.

*Annotations* :— **Apld.** *Jones v. Simpson* (1830), 1 Cr. & J. 174. **Refd.** *Bax v. Jones* (1817), 5 Price, 168.

34. — — —]—If A. imprison B., & in continuation of that imprisonment, A. deliver B. into the charge of C., who keeps B. in custody, the acts & declarations of C. are evidence against A., in an action for false imprisonment.

Pltf. who brings an action for false imprisonment against several defendants jointly, may either recover against all for any joint act of imprisonment committed by the whole of them, or may give evidence of an act of imprisonment committed by one, two, or more of the number, & recover against such deft. or defts. only (GARROW, B.).—POWELL v. HODGETTS (1826), 2 C. & P. 432; 172 E. R. 196. N. P.

35. —. —.]— A sailor who had lodged for some weeks at a public-house, & also received advances of cash from the person who kept it, having been paid his wages in the presence of the father of the publican, went to the house of the latter, & there, after drinking some spirits, became intoxicated, & fell asleep. The father of the publican, in his son's presence, desired a young woman, an acquaintance of the sailor, to take the money out of his pocket, which she did, & laid it on the table. It was £13 17s. 6d. The publican took it up & said he would keep it till the man got sober. The father told her to say, when the sailor awoke, that his money was lost. The publican said she had better be there in the morning when he settled with the sailor. When he awoke & asked for his money, the father said it was all right till the morning. After this, by desire of the sailor, £1 in silver was given to the young woman out of the money, & the next morning, on his applying for the remainder, he was

**PART I. SECT. 8.**

**§ 11. General rule—Joint & several liability.**—In trespass against several defts., if they go upon the land with a common purpose they are jointly liable, though the acts of trespass are

separate & are committed on different parts of the land.—FERGUSON v. SAVOY (1858), 9 N. B. R. (4 All.) 263.—CAN.

31 il. ——.]—In joint trespassers each deft. is liable for the damage occasioned to pltt. by the joint act.—**GRANTHAM v. SEYERS** (1866), 25

U. C. R. 469.—CAN.

31 iii. —.]—The liability of joint wrongdoers in tort is joint & several, but this is not an inflexible rule.—**KAMALA PRASAD SUKUL v. KISHORI MOHAN PRAMANIK** (1927), I. L. R. 55 Cal. 668.—**IND.**

**Sect. 3.—Joint trespass. Part II. Sect. 1: Subsect. 1.]**

offered 2s. & some copper as the balance, after deducting what he owed the publican:—*Held*: a joint action of trespass was maintainable against both the publican & his father, & the sailor was entitled to recover the whole amount taken from him without any other deduction than that of the £1 afterwards given to the woman.—*PEDDELL v. RUTTER* (1837), 8 C. & P. 337; 173 E. R. 521, N. P.

**36. Action for trespass at particular time—Defendants present at different times—Duty of plaintiff to elect.]**—In a joint action of trespass *pltf.* should go for one trespass done at the same time, in which all were implicated; & if he goes for a trespass done at a time when all were not present he shall not afterwards be allowed to go for a time when they were.—*SEDDLEY v. SUTHERLAND* (1800), 3 Esp. 202; 170 E. R. 588, N. P.

*Annotations*:—*Consd.* Green v. Elgie (1843), 5 Q. B. 99. *Refd.* Codrington v. Lloyd (1838), 3 Nev. & P. K. B. 412; Howard v. Newton (1843), 2 Mood. & R. 509; Itumble v. Little (1844), 6 Q. B. 174.

**37. — — — — —.]**—(1) Where a distress was put into *pltf.*'s premises for rent on the 13th, & on the fifth day after, the 18th, *pltf.* entered into an agreement, whereby, in consideration of the landlord giving her the furniture distrained for rent, she undertook to give possession of the premises on or before one week from the date thereof, that is, by the 25th:—*Held*: such agreement amounted to leave & licence, which covered the alleged trespasses of breaking & entering, stopping chimneys, taking keys, etc., committed after the 25th.

(2) When an action is brought for trespasses, alleged to have been committed within a certain time, which may have been committed within such time by some, but cannot possibly have been committed by all *defts.*, *pltf.* must make an election, & proceed either for that set of trespasses which may have been committed by some, or by all; he cannot proceed against all, for those trespasses which could be committed only by some.—*FEITHAM v. CARTWRIGHT* (1839), 5 Bing. N. C. 569; 7 Scott, 695; 9 L. J. C. P. 67; 3 Jur. 606; 132 E. R. 1219.

**38. Person inducing others to trespass—Not committing trespass himself.]**—Where a person goes out sporting with his friends, & purposely leads them on to another's land, he is equally guilty of a trespass, although he may remain off the land whilst his friends go on it.—*HILL v. WALKER* (1806), Peake, Add. Cas. 234; 170 E. R. 256, N. P.

**39. Necessity for suing all parties.]**—Where B. commits a trespass on land of A., by the direction & for the benefit of C., & A. sues B. alone, the ct. will not order C. to pay A.'s costs.

There is a material distinction between an action of trespass *quare clausum fregit* & an action of ejectment. In ejectment no person is allowed to defend as tenant but the party in actual possession; in trespass, all the parties may be sued. Before the writ issues *pltf.* should take the trouble to inquire what parties are chargeable with the trespass of which he complains (LORD TENTERDEN,

C.J.).—*BERKELEY v. DEMERY* (1830), 10 B. & C. 113; 5 Man. & Ry. K. B. 442; 109 E. R. 393.

*Annotations*:—*Refd.* Lloyd v. Evans (1837), Will. Woll. & Dav. 50; Evans v. Rees (1842), 2 Q. B. 334.

**40. Evidence—Judgment by default against one defendant—Evidence to affect others only required.]**

—In trespass against several, if any suffer judgment by default, *pltf.* need only give evidence to affect the rest. It is matter for the jury whether the trespass proved be the same as that confessed, but *pltf.* cannot be non-suited.—*HARRIS v. BUTTERLEY* (1776), 2 Cowp. 483; 98 E. R. 1109.

**41. — — — — —.]**—Where justification that defendants acting in aid of civil authority.—In dispersing riotous assembly.]—Trespass by A. against B., C., D. & E. Plea, not guilty, & justifications (*inter alia*) that *defts.* were acting in aid of civil authority in executing a warrant, & also in dispersing a riotous & unlawful assembly, at which A. was present, etc.

A. proves that he was struck by B. whilst he & C., D. & E. were acting with a common object, as the members of a yeomanry corps of cavalry; he cannot go into evidence to show that other individuals were wounded on that occasion.—*REDFORD v. BIRLEY* (1822), 1 State Tr. N. S. 1071; 3 Stark. 76; 171 E. R. 773, N. P.

*Annotations*:—*Refd.* R. v. O'Connell (1815), 1 Cox, C. C. 403; R. v. Williams & Vernon (1818), 6 State Tr. N. S. 775.

**42. — — — — —.]**—Words of defendant indicating liability.]

—A party of eight persons hired a carriage & four horses with two post boys for the day, to go to Epsom races. *Def't.*, one of the party, was seated on the box, & could see what the post boys were doing. They left the line of carriages, without any directions to do so, & without *def't.*'s interfering to prevent it. In making an attempt to cut into the line again *pltf.*'s gig was upset. In answer to a demand for the name of the owner of the carriage, & the master of the post boys, *def't.* said he would be responsible. Three weeks afterwards, he said the accident was occasioned by *pltf.*'s fault, & that he had intended after they had got into the line to have pulled up & let *pltf.* in in front of them:—*Held*: in an action of trespass, upon this evidence *def't.* was liable as a co-trespasser, as present at & sanctioning the wrongful act of the post boys; & in such action it was immaterial whether the relation of master & servant existed between them or not.—*M'LAUGHLIN v. PRYOR* (1842), 4 Man. & G. 48; 4 Scott, N. R. 655; 11 L. J. C. P. 169; 6 Jur. 372; 134 E. R. 21.

*Annotations*:—*Refd.* Burgess v. Gray (1845), 1 C. B. 578; Gordon v. Toit (1849), 4 Exch. 365; Pidgeon v. Legge (1857), 21 J. P. 743; Holmes v. Mather (1875), L. R. 10 Exch. 271; Performing Right Soc. v. Mitchell & Booker (Palais de Danse), [1924] 1 K. B. 762. *Mentd.* Falcon v. Famous Players Film Co., [1926] 1 K. B. 393.

**43. Proof of joint trespass—Right to abandon joint trespass after proof—To prove different trespass by one defendant.]**—In an action of trespass against several, *pltf.* having proved a joint trespass committed by all *defts.* cannot waive that, & give evidence of another trespass committed by only one *def't.*—*TAIT v. HARRIS* (1833), 6 C. & P. 73; 1 Mood. & R. 282; 172 E. R. 1151.

*Annotation*:—*Refd.* Hitchen v. Toale (1837), 2 Mood. & R. 30.

**44. Release to or satisfaction against one—**

**44.1. Release to or satisfaction against one—[Discharge to all]—**Where *pltf.* by his own act, as by a reference & an award, has knowingly discharged one of two joint trespassers, he cannot bring an action against the other.—*ADAMS v. HAM* (1849), 5 U. C. R. 292.—*CAN.*

**1. Separate owners.]**—Separate owners of herds of cattle running

together on land owned jointly cannot be sued jointly for trespasses by cattle.—*OSBORNE v. RUDD* (1864), 3 N. S. W. S. C. R. (L.) 291.—*AUS.*

**k. Evidence—Sufficiency of proof.]**—Where there are a number of *defts.* in an action of trespass, & *pltf.* proves an act of trespass against some & not against all, & then goes on to prove another act against others of *defts.* not

implicated in the first act proved, he must be taken to have abandoned the first act & be confined to the last act proved.—*MALONEY v. PURDON* (1847), 5 N. B. R. (3 Kerr) 515.—*CAN.*

**1. — — — — —.]**—In trespass against several, if *pltf.* prove a cause of action against all upon one count, & attempts, but fails in proving, a second trespass on another count, proving it against





*Sect. 1.—What constitutes: Sub-sects. 1 & 2. Sects. 2 & 3: Sub-sect. 1, A.]*

55. ———. — By the law of England every invasion of private property, be it ever so minute, is a trespass (LORD CAMDEN, C.J.).—*ENTICK v. CARRINGTON* (1765), 2 Wils. 275; 19 State Tr. 1029, 1066; 95 E. R. 807.

*Annotations:—*Reid, *Howard v. Gosset* (1845), 10 Q. B. 359; *Dillon v. O'Brien & Davis* (1887), 16 Cox, C. C. 245; *Jones v. German*, [1896] 2 Q. B. 418. *Mentd.* *Gosset v. Howard* (1847), 10 Q. B. 411; *Harrison v. Bush* (1855), 5 E. & B. 344.

56. ———. — A., being possessed of a portion of a lammas field over which a right of common existed part of the year, took down the customary post & rail fence containing gaps through which the commoners' cattle might pass, & built a wall, with a single doorway, at which they might enter & return:—*Held*: this was an encroachment. One farthing damages will sustain the verdict for pltf. in an action of trespass.—*KITCHEN v. KNIGHT* (1824), M'Cle. 373; 148 E. R. 156.

57. *Abuse of legal right.*—*RUSSELL (LADY) v. NOTTINGHAM (LORD)* (1606), as reported in Moore, K. B. 786; 72 B. R. 906.

*Annotations:—*Reid, *Hemmings v. Stoke Poges Golf Club*, [1920] 1 K. B. 720. *Mentd.* *Butland's Cave* (1609), 8 Co. Rep. 55a; *R. v. Soley* (1707), 2 Salk. 594.

58. ———. — Where a party claims a right to use a piece of ground belonging to another for a lawful purpose, he must use it for such purpose in a lawful & proper way, otherwise he will be considered a trespasser.—*FITCH v. FITCH* (1797), 2 Esp. 541; 170 E. R. 449.

59. ———. — Where comrs., under an Act of Parliament, have taken a piece of land into a turnpike road, the legality of which conduct is disputed:—*Held*: ejectment would not lie for the recovery of the land so alleged to be illegally taken possession of by the comrs., for it is impossible for the ct. to consider either of the comrs. in the

light of a "tenant in possession," on whom notice of the action must be served by the lessee of pltf. in such an action. *Semble*: the proper remedy of the party is by an action of trespass against the comrs.—*DOE d. SMITH v. ROE* (1839), 3 J. P. 754.

60. *Breaking & entering—What amounts to.*—In an action of trespass for breaking & entering pltf.'s apartment, it appeared that pltf. had taken furnished lodgings in deft.'s house for a term, & that the only entrance to them was through deft.'s street door & lobby; & the evidence to show the breaking & entering by the deft. was, that before the term had expired deft. had prevented pltf. from entering the house, telling him he should no longer have the apartments:—*Held*: (1) this was sufficient evidence for the jury to infer a breaking & entering of the apartments by deft.

Pltf., by the permission of deft., had placed a brass plate, with his name upon it, on the outer door; & the declaration, after alleging the breaking & entry into the apartments, alleged that during the time aforesaid, to wit, etc., deft. removed & took a certain brass plate from the outer door of the dwelling-house, & kept it so removed, etc. Deft. pleaded (*inter alia*), that pltf. was not possessed of the brass plate. There was no evidence, & no point made at the trial, as to whether or not the plate was affixed to the door:—*Held*: (2) it must now be assumed that it was not affixed, & trespass would, therefore, lie for the removal of it. *Qu.*: whether it would have lain if it had been proved to be affixed; (3) the removal of it was sufficiently charged in the declaration, as against deft. who had pleaded to it, as a distinct trespass, & not as aggravation only.—*LANE v. DIXON* (1847), 3 C. B. 776; 16 L. J. C. P. 129; 8 L. T. O. S. 316; 11 Jur. 89; 136 E. R. 311.

*Annotation:—*As to (3) *Consd.* *Chulewis v. Laurie* (1848), 12 Q. B. 640.

& pltf., to whom one of the former lots belonged, could recover for a trespass on that part of his lot claimed as an allowance for road.—*FIELD v. KEMP* (1834), 3 O. S. 374.—*CAN.*

u. ———. — *BOULTON v. SHAND* (1853), 10 U. C. R. 361.—*CAN.*

a. ———. — *ROSS v. HUNTER* (1882), 7 S. C. R. 289.—*CAN.*

b. ———. — *GRAND JUNCTION RY. CO. v. MIDLAND RY. CO.* (1882), 7 A. R. 681.—*CAN.*

c. ———. — Deft. went on pltf.'s field to cut hay without the latter's permission. The field was laid out in lots. Deft. removed a number of survey posts, necessitating a re-survey:—*Held*: deft. liable in damages.—*OLIPHANT v. FISHER* (1909), 12 W. L. R. 636.—*CAN.*

57 l. *Abuse of legal right.*—Where a statute gave power to certain persons to enter on lands near a bridge to quarry stone to repair the bridge, doing no unnecessary damage therein:—*Held*: any abuse of power by excess was punishable in trespass.—*MYERS v. HOWARD* (1834), 4 O. S. 113.—*CAN.*

57 ll. ———. — A party who enters upon & takes possession of land to which he has a right, may maintain trespass against a person who, being in possession at the time of entry, wrongfully continues upon the land.—*MCDONALD v. SUTHERLAND* (1855), 2 N. S. R. (James) 363.—*CAN.*

57 lii. ———. — A surveyor sued in trespass cannot justify an entry upon the lands of one neighbour for the purpose of making a mere private survey for another neighbour.—*TURNBULL v. MCNAUGHT* (1864), 14 C. P. 375.—*CAN.*

57 lv. ———. — Where half lots, under

the double-front system of survey, did not correspond or meet in any point, & land was taken by the municipality from pltf.'s lot, in order to make a road to join the side line road allowances, without the passage of any by-law for the purpose:—*Held*: there was no power so to do, & trespass would lie against the municipality.—*TAYLOR v. VERULAM TOWNSHIP MUNICIPAL CORP.* (1870), 21 C. P. 154.—*CAN.*

57 v. ———. — *DEVYER v. SOUTH BAY BOOM CO.* (1872), 14 N. B. R. (1 Pug.) 109.—*CAN.*

57 vi. ———. — Deft., a pathmaster, without any instructions from the municipal council, & in defiance of pltf.'s warning, threw down pltf.'s fences & ploughed up his land, in order to open up streets which were laid down on a plan of part of pltf.'s land, made by a former owner, & found in the registry office: but it was not marked registered or filed, no sale was shown to have been made according to it, & the streets had never been opened or used:—*Held*: deft. was not acting within his jurisdiction, & was liable in trespass.—*CROOKS v. WILLIAMS* (1870), 35 U. C. R. 530.—*CAN.*

57 vii. ———. — *PICTOU SCHOOL TRUSTEES v. CAMERON* (N. S.) (1879), 2 S. C. R. 690.—*CAN.*

57 viii. ———. — *DEAL T. COOK* (1903), 23 C. L. T. 70.—*CAN.*

57 ix. ———. — *FOLEY v. SOUTH QU'APPELLE MUNICIPALITY* (1910), 15 W. L. R. 264.—*CAN.*

57 x. ———. — *CLARK v. MILLIGAN*, [1920] 1 W. W. R. 1044.—*CAN.*

57 xi. ———. — *JUKES v. MISKELLY*, [1923] 2 D. L. R. 561; 33 Man. L. R. 87; [1923] 1 W. W. R. 1057.—*CAN.*

57 xii. ———. — A private individual cannot justify an injury to property in the possession & enjoyment of another upon the mere ground that such property was a public nuisance.—*MCLOUGHLIN v. MARTIN* (1864), 5 Nfld. L. R. 44.—*NFLD.*

57 xiii. ———. — Where deft., a road contractor, cut & damaged the roots of trees of a proprietor abutting on the public road whilst in the course of levelling the same & undermined his fence. In an action for damages:—*Held*: as the trees were planted since the road was constructed, there was no liability, as the owner should have guarded against their roots intruding on the highway.—*EVANS v. BELL* (1891), 7 Nfld. L. R. 564.—*NFLD.*

57 xiv. ———. — A private road leading from a public road to miners' houses & to a coal pit, which was in the exclusive possession of the tenant of the colliery & of his workmen as inhabitants of the houses was entered upon against the remonstrances of the coalmaster by a number of picketers, for the purpose of dissuading the miners from working on a certain day. In a petition by the coal masters, praying that the picketers should be interdicted from trespassing on the road, defenders asserted their right to use the road as they had used it:—*Held*: the use made by the picketers of the road was a trespass.—*MERRY & CUNINGHAM v. AITKEN* (1895), 22 R. (Ct. of Sess.) 247; 32 Sc. L. R. 175; 2 S. L. T. 423.—*SCOT.*

d. *Liability of master.*—Where a contractor was employed by deft. to build a dam, deft. to supply the necessary timber, the same to be cut & hauled by the contractor, & the contractor wrongfully trespassed on

**61. Exercise of statutory duty.]**—Where the legislature has imposed on any persons duties the discharge of which requires entry on lands, these duties are imposed irrespective of the ownership of the lands in question, & acts done in due discharge of such duties do not constitute a trespass.—*WEST HARTLEPOOL CORPN. v. ROBINSON* (1897), 75 L. T. 677; 61 J. P. 200; 45 W. R. 312; 13 T. L. R. 182; 41 Sol. Jo. 257; *affd.*, 77 L. T. 387; 62 J. P. 35; 46 W. R. 218; 14 T. L. R. 18, C. A. *Annotation*.—*Mentd. lte* Stoker & Morpeth Corpn. (1914), 84 L. J. K. B. 1169.

—*J.*—*See, generally, TITLES passim.*

**Use of own property to another's trust.]**—*See* NUISANCE, Vol. XXXVI., pp. 187–199, Nos. 311–389.

**Particular instances.]**—*See* Sect. 1, sub-sect. 2, *post*.

#### SUB-SECT. 2.—PARTICULAR INSTANCES.

**Aerial traffic—Trespass by.]**—*See* STREET & AERIAL TRAFFIC, Vol. XLII., p. 880, Nos. 259, 260.

**Animals.]**—*See, generally, ANIMALS*, Vol. II., pp. 201 *et seq.*

**Billeting of troops.]**—*See* ROYAL FORCES, Vol. XXXIX., pp. 327, 328, Nos. 140–115.

**Compulsory purchase—Unauthorised entry by promoters.]**—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 213–215, Nos. 972–994.

**Distress—Wrongful levy.]**—*See* DISTRESS, Vol. XVIII., pp. 254 *et seq.*

**Docks—Wrongful occupation.]**—*See* SHIPPING, Vol. XII., p. 957, No. 8518.

**Easements.]**—*See* EASEMENTS, Vol. XIX., pp. 1 *et seq.*

**Ecclesiastical property.]**—*See* ECCLESIASTICAL LAW, Vol. XIX., pp. 210 *et seq.*

**Execution—Wrongful levy.]**—*See* EXECUTION, Vol. XXI., pp. 407 *et seq.*

**Executors—Entry to remove fixtures.]**—*See* EXECUTORS, Vol. XXIII., p. 304, No. 3690.

**Electric light undertakers—Breaking up streets.]**—*See* ELECTRIC LIGHTING, Vol. XX., pp. 201, 202, Nos. 18–20.

**Ferries.]**—*See* FERRIES, Vol. XXIV., pp. 967 *et seq.*

**Fisheries.]**—*See* FISHERIES, Vol. XXV., pp. 1 *et seq.*

**Game—Infringement of rights.]**—*See* GAME, Vol. XXV., pp. 364, 365, Nos. 130–135.

**Harbour—Improper user.]**—*See* SHIPPING, Vol. XII., p. 957, No. 8517.

**Highways.]**—*See* HIGHWAYS, Vol. XXVI., pp. 250 *et seq.*

**Markets & fairs—Disturbance.]**—*See* MARKETS, Vol. XXXIII., p. 558, Nos. 398–404.

pltf.'s land & cut down & used his trees:—*Held*: that defts. were liable, as in the cutting of the trees the contractor was acting as the servant of deft.—*FULTON v. MAPLE LEAF LUMBER CO.* (1914), 14 E. L. R. 354; 17 D. L. R. 128.—*CAN.*

**6. Jurisdiction to award damages.]**—Upon a complaint of a landowner that the railway co. had run a spur track through his land, using part of his land to obtain water, & damaging his crops, it appeared that no order had been obtained from the Board authorising the spur track, & that no proceedings for expropriation had been taken by the co. under Railway Act:—*Held*: the co. was merely a trespasser, & the Board had no jurisdiction to award complainant damages for the trespass.—*Re MASON*

& CANADIAN PACIFIC RY. CO. (1914), 28 W. L. R. 692.—*CAN.*

**1. Self-supporting walls touching—No trespass.]**—Where parties build adjoining houses & erect the walls as close as possible to the boundary line so that the walls are in contact, it is no trespass on either side but a necessary result of the full exercise of their legal rights.—*McCATMAN v. HILL* (1852), 3 Nfld. L. R. 261.—*NFLD.*

#### PART II. SECT. 3, SUB-SECT. 1.—A.

**62 i. General rule—Possession necessary.]**—Where pltf. brought trespass for cutting wood on land:—*Held*: he must show an actual possession.—*CAMERON v. McDONALD* (1844), 3 N. S. R. (2 Thom.) 240.—*CAN.*

**62 ii. — — —.]**—To support an

— **Unlawful erection of stalls.]**—*See* MARKETS, Vol. XXXIII., p. 529, Nos. 61, 62.

— **Removal—Resort by public to former market.]**—*See* MARKETS, Vol. XXXIII., p. 534, No. 115.

**Mines—Interference with mining ways & way-leaves.]**—*See* MINES, Vol. XXXIV., pp. 720, 721, Nos. 1042–1048.

— **Wrongful abstraction of minerals.]**—*See* MINES, Vol. XXXIV., pp. 651–652, 655, 656, Nos. 488–498, 554.

— **Discharge of water.]**—*See* MINES, Vol. XXXIV., p. 720, Nos. 1075–1077.

**Partnership property—Entry by partner after termination of partnership.]**—*See* PARTNERSHIP, Vol. XXXVI., p. 499, No. 1654.

**Party-walls.]**—*See* BOUNDARIES, Vol. VII., pp. 303, 304, Nos. 258, 260, 266.

**Pawn—Entry to remove.]**—*See* PAWNS & PLEDGES, Vol. XXXVII., p. 20, No. 162.

**Repair of demised premises—Entry by landlord.]**—*See* LANDLORD & TENANT, Vol. XXXI., p. 343, Nos. 4803–4806.

**Revenue authorities—Wrongful entry by.]**—*See* REVENUE, Vol. XXXIX., p. 223, Nos. 33–42.

**Seashore.]**—*See* WATERS & WATERCOURSES.

**Sewage, escape of.]**—*See* NUISANCE, Vol. XXXVI., pp. 189–191, Nos. 317–322.

**Tramways—Rails laid without necessary consent.]**—*See* TRAMWAYS & LIGHT RAILWAYS, p. 341, No. 15, *ante*.

**Trees—Liabilities of adjoining owners.]**—*See* AGRICULTURE, Vol. II., pp. 63–66.

— **Wrongful cutting down.]**—*See* AGRICULTURE, Vol. II., p. 112, Nos. 942–947; LANDLORD & TENANT, Vol. XXXI., p. 36, Nos. 1819, 1820.

**Waste—As between landlord & tenant.]**—*See* LANDLORD & TENANT, Vol. XXXI., pp. 355, 530, Nos. 4973, 4987–4989, 4997.

**Watercourses.]**—*See* WATERS & WATERCOURSES.

#### SECT. 2.—TRESPASS COMMITTED ABROAD.

*See* CONFLICT OF LAWS, Vol. XI., p. 346, Nos. 332–334

#### SECT. 3.—RIGHT TO RELIEF.

SUB-SECT. 1.—NECESSITY FOR, AND SUFFICIENCY OF POSSESSION.

##### A. In General.

**62. General rule—Possession necessary.]**—If one intrude upon the possession of the King & another man enters upon him, he shall not have an action of trespass for that entry; for he who is to

action of trespass, upon the plea of the close not being the close of pltf., pltf. must prove an actual & immediate occupation of the *locus in quo*, & the question of possession is a question of fact for the jury.—*McNEIL v. TRAIN* (1848), 5 U. C. R. 91.—*CAN.*

**62 iii. — — —.]**—*CREELMAN v. ATKINSON* (1857), 8 N. B. R. (3 All.) 450.—*CAN.*

**62 iii. — — —.]**—*MADRAS BOARD (GOVERNOR) v. RYAN* (1861), N. B. Dig. 746.—*CAN.*

**62 iv. — — —.]**—To maintain trespass, pltf.'s possession should have the characteristics of the possession of a permanent owner, shown by acts done with the apparent object of taking possession as owner: mere casual acts of a transient or temporary nature,

Sect. 3.—Right to relief: Sub-sect. 1, A. & B.]

have & maintain trespass ought to have a possession; but in such a case he has not a possession for every intruder shall answer to the King for his whole time & every intrusion supposes the possession to be in the King (ANDERSON, C.J.).—ANON. (1586), 4 Leon. 184; Godb. 133; 74 E. R. 809.

*Annotation*.—*Consd.* Harper v. Charlesworth (1825), 3 L. J. O. S. K. B. 265.

63. ———. ———.]—CAREY v. HINTON (1734), Kel. W. 153; 2 Barn. K. B. 363; 7 Mod. Rep. 213; Ridg. temp. H. 67; 2 Stra. 973; 25 E. R. 542.

64. ———. ———.]—Trespass is a possessory action only to be brought by person in possession, & from time of possession.—STANYNIGHT v. COSINS (1746), Barnes, 456; 94 E. R. 1002.

65. ———. ———.]—In order to maintain the action pltf. ought to have had possession, actual or constructive (TINDAL, C.J.).—TOPHAM v. DENT (1830), 6 Bing. 515; 4 Moo. & P. 264; 8 L. J. O. S. C. P. 172; 130 E. R. 1379.

66. ———. ———.]—BROWN v. NOTLEY, No. 161, *post*.

B. Necessity for Title in addition to Possession.

67. Whether possession sufficient.—JONES v. GRAVES (1654), Sty. 427; 82 E. R. 834.

68. ———. ———.]—In trespass pltf. need not make title.—GOSLYN v. WILLIAMS (1720), Fortes. Rep. 378; 92 E. R. 900.

*Annotation*.—*Refd.* Cary v. Holt (1745), 11 East, 69, n.

few in number & occurring at long intervals, are not sufficient.—GIDNEY v. BATES (1862), 10 N. B. R. (5 All.) 395.—CAN.

62 v. ———. ———.]—JOWETT v. HAACKE (1861), 14 C. P. 447.—CAN.

62 vi. ———. ———.]—MAHON v. McCULLY (1868), 7 N. S. R. (1 G. & O.) 323.—CAN.

62 vii. ———. ———.]—SHEY v. McHEFFY (1868), 7 N. S. R. (1 G. & O.) 350.—CAN.

62 viii. ———. ———.]—PALMOUTH (CHURCH WARDENS) v. VAUGHAN (1876), 11 N. S. R. (2 R. & C.) 438.—CAN.

62 ix. ———. ———.]—MOTT v. FREMOR (1876), 10 N. S. R. (1 R. & C.) 387.—CAN.

62 x. ———. ———.]—JOHNSTON v. CHRISTIE (1880), 31 C. P. 358.—CAN.

62 xi. ———. ———.]—Mtgees. out of possession, after their interest in the land has ceased to exist, cannot maintain an action for trespass to the land committed while they held the title, or recover the value of property severed during the same period.—BROWN v. BROOKFIELD (1893), 24 N. S. R. 476; 22 S. C. R. 398.—CAN.

62 xii. ———. ———.]—GARROUCH v. MCKAY (1901), 13 Man. L. R. 401.—CAN.

62 xiii. ———. ———.]—LEADLEY v. GAETZ (1904), 6 Terr. L. R. 98.—CAN.

62 xiv. ———. ———.]—JOHNSON v. CALMAN (1907), 3 E. L. R. 65; 38 N. B. R. 52.—CAN.

62 xv. ———. ———.]—MCGAW v. FISK (1908), 38 N. B. R. 354; 4 E. L. R. 512.—CAN.

62 xvi. ———. ———.]—FOX v. ROSS (1912), 22 O. W. R. 244; 3 O. W. N. 1347; 3 D. L. R. 878.—CAN.

62 xvii. ———. ———.]—CHRISTIE v. BURNS (1923), 56 N. S. R. 385.—CAN.

62 xviii. ———. ———.]—HARPER v. HARPER (1901), 20 N. Z. L. R. 317.—N.Z.

62 xix. ———. ———.]—It is sufficient for pltf. bringing action for trespass to prove his lawful occupation at the date of such trespass, & not his title to the land.—BREDA v. HOFMEYER (1837), 3 M. 459.—S. AF.

g. Whether actual entry necessary—*Before action taken.*—Though pltf. in an action of trespass be not in possession at the date of the trespass, he can maintain the action if he had a right to possession at that date, & he has entered into possession before action brought.—WYNE v. GREEN (1901), 1 S. R. N. S. W. 40; 18 N. S. W. N. 41.—AUS.

h. ———. ———.]—Entry upon land by a person entitled to the possession thereof related back to the time when his legal right to enter accrued, so as to entitle him to recover as against a wrongdoer for a trespass committed between the time when the right to enter accrued & that of the actual entry.—EBBEIS v. REWELL, [1908] V. L. R. 261.—AUS.

k. ———. ———.]—The King's grant enables the grantee to maintain trespass without actual entry.—CLENCH v. HENDRICKS (1826), Tay. 403.—CAN.

l. ———. ———.]—A grant from the Crown of a privilege to build mills in the bed of a river, does not convey any right to the soil: therefore the grantee cannot, before actual entry in the exercise of the privilege, maintain trespass against a person for building a mill upon the place where the privilege was granted.—FRINK v. HILL (1831), N. B. Dig. 242.—CAN.

m. ———. ———.]—A deed registered under the Act 26 Geo. 3, c. 3, will not enure to give possession to the grantee, so as to enable him to maintain trespass against a person in the actual adverse possession of the land, & who took possession subsequent to the registry of the deed & the entry of the pltf. under it, & continued such possession for several years before the alleged trespass.—DUNHAM v. R. (1831), N. B. Dig. 744.—CAN.

n. ———. ———.]—Where after delivery of a deed the grantor remains in possession, trespass will not lie against him or his tenant for cutting trees previous to actual entry of grantee.—LANGILLE v. LANGILLE (1841), 1 N. S. R. (1 Thom.) 159.—CAN.

o. ———. ———.]—FOSTER v. FOSTER (1853), 10 U. C. R. 607.—CAN.

p. ———. ———.]—A license granted by the Govt. to cut timber on Crown

69. ———. ———.]—Pltf., who had built a chapel, conveyed it to deft. by a deed, the validity of which was questionable. Deft. took possession, & gave the key to a gardener, who, with his permission, lent it to pltf. to preach in the chapel. Pltf. thereupon locked the chapel, & refused to redeliver the key:—*Held*: he had not sufficient possession to maintain trespass.

Possession alone is indeed sufficient [to sue in trespass] as against a wrongdoer, but it must be clear & exclusive possession (BEST, C.J.).—REVETT v. BROWN (1828), 5 Bing. 7; 2 Moo. & P. 12; 6 L. J. O. S. C. P. 194; 130 E. R. 961.

*Annotation*.—*Refd.* Humphrey v. Nowland (1862), 15 Moo. P. C. C. 343.

70. ———. ———.]—In trespass the declaration stated that deft. broke & entered a "certain close of pltf.," & deft. pleaded that the close was not pltf.'s close:—*Held*: the possession, & not the ownership of the close, was in issue.—HEATH v. MILWARD (1835), 2 Bing. N. C. 98; 1 Hodg. 198; 2 Scott, 160; 4 L. J. C. P. 292; 132 E. R. 39.

*Annotations*.—*Apld.* Ashmore v. Hardy (1836), 7 C. & P. 501. *Consd.* Browne v. Dawson (1840), 12 Ad. & El. 624; Jones v. Chapman (1849), 18 L. J. Ex. 456. *Refd.* Fleming v. Cooper (1836), 5 Ad. & El. 221; Carnaby v. Welby (1838), 8 Ad. & El. 872; Parnell v. Young (1838), 7 L. J. Ex. 80; Whittington v. Boxall (1843), 5 Q. B. 139; Coverdale v. Charlton (1878), 26 W. R. 687.

71. ———. ———.]—A possessory right, sufficient to sustain trespass, may be resorted to, even after it has appeared that pltf. has in fact no legal title,

land, gives the licensee no interest in the land; therefore he cannot maintain trespass under Rev. Stat. c. 133, against a person for entering on the land, & cutting down & taking away the trees.—BRECKENRIDGE v. WOOLNER (1856), 8 N. B. R. (3 All.) 303.—CAN.

q. ———. ———.]—BALL v. YOUNG (1850), 8 C. P. 231.—CAN.

r. ———. ———.]—BARRIE TOWNSHIP CORP. v. GILLIES (1871), 21 C. P. 213.—CAN.

t. ———. ———.]—CAMERON v. HUNTER (1873), 34 U. C. R. 121.—CAN.

u. ———. ———.]—ARMSTRONG v. McGOURTY (1882), 22 N. B. R. 29.—CAN.

a. ———. ———.]—BAKER v. MILLS (1866), 11 O. R. 253.—CAN.

b. ———. ———.]—Where a person is in possession with the assent of the Crown, paying rent, or where a person is a purchaser although the patent has not issued, such person can maintain trespass against a wrongdoer.—BRUYEA v. ROSE (1890), 19 O. R. 433.—CAN.

c. Extinguishment of right of action—*By acquiescence.*—A person in possession of land upon which another enters & commits a trespass does not, by allowing the trespasser to continue in the exclusive possession of the land for a period of nine months, thereby lose his right to maintain an action of trespass for the original wrongful entry.—APPLEBY v. DEVINE (1883), 23 N. B. R. 198.—CAN.

d. Effect of inclosure by another.—The mere enclosure of the land of another, by the adjoining proprietor, by a fence put up with the consent of & by arrangement with the owner, for the purpose of protecting the lands of both against cattle, does not dispossess the owner, nor prevent him from maintaining trespass against any one intruding therein, or using his land for purposes other than that for which it was enclosed.—CONWAY v. BROOKMAN (N. S.) (1903), 35 S. C. R. 185.—CAN.

PART II. SECT. 3, SUB-SECT. 1.—B.

671. Whether possession sufficient.—MAY v. MARTIN (1885), 11 V. L. R. 562.—AUS.

& when the *locus in quo* is the soil of a street, & the only actual possession he sets up is by his recent commencement of a building upon the *locus in quo*, the pulling down of the incomplete walls of which was pulled down on the suggestion that they constituted a nuisance to a highway. Thus, where plffs. in trespass, the owners of a street of houses, failed to show that the deed under which they claimed conveyed the soil of the street, & the trespass complained of was in pulling down the wall of a house they were building across one end of it, which had been commenced a short time before, & defts., Highway Comrs., pleaded not possessed, & justified in abatement of a nuisance on a highway, but did not justify under the owner of the soil; it was held, that plffs. had a possessory right sufficient to sustain the action, & were entitled to resort to it upon the issue on not possessed; & on such evidence, unrebutted, & the *locus in quo* not being proved to be part of the highway, plffs. ultimately recovered.—EVERY v. SMITH (1857), 26 L. J. Ex. 344.

*Annotations*:—*Refd.* Coverdale v. Charlton (1878), 26 W. R. 687. *Mentd.* Hartley v. Banks (1859), 28 L. J. C. P. 144.

**72.** ———— *Against wrongdoer.*—In trespass, possession is a sufficient title against a wrongdoer.—DENT v. OLIVER (1606), Cro. Jac. 122; 79 E. R. 106.

*Annotations*:—*Refd.* St. John v. Moody (1675), 1 Vent. 274; Cary v. Buckhurst (1886), Comb. 31. *Mentd.* Koble v. Hickeringill (1707), Kel. W. 273; Scot v. Shepherd (1773), 2 Wm. Bl. 892.

**73.** ———— *BIRD v. STROUD* (1696), 3 Salk. 12; Holt, K. B. 146; 91 E. R. 661; *sub nom.* BIRT v. STRODE, 12 Mod. Rep. 97; *sub nom.*

BURK v. STROWD, Comb. 370; *sub nom.* STRODE v. BIRT, 4 Mod. Rep. 411, 418; Skin. 621; 1 Com. 7. *Annotations*:—*Mentd.* Dorn v. Gasford (1696), 1 Com. 44; Iveson v. Moor (1698), 1 Com. 58; Winton Corp'n. v. Wilkes (1705), 2 Ld. Raym. 1129.

**74.** ———— *—*—*—*—In an action against a wrongdoer possession may perhaps be *prima facie* a sufficient title (ASHHURST, J.).—STOCKS v. BOOTH (1780), 1 Term Rep. 428; 99 E. R. 1177.

*Annotations*:—*Refd.* Newcastle v. Clark (1818), 2 Moore, C. P. 666; Spooner v. Brewster (1825), 40 Moore, C. P. 494. *Mentd.* Morgan v. Curtis (1828), 3 Man. & Ry. K. B. 389; Crisp v. Martin (1876), 2 P. D. 15; Phillips v. Halliday, [1891] A. C. 228; Proud v. Price (1893), 62 L. J. Q. B. 490.

**75.** ———— *—*—*—*—HARPER v. CHARLESWORTH, No. 118, *post*.

**76.** ———— *—*—*—*—PURNELL v. YOUNG, No. 312, *post*.

**77.** ———— *—*—*—*—In trespass for breaking & entering plff.'s house & taking his goods, defts. pleaded, as to the house, that plff. was not possessed thereof; as to the goods, that they were not plff.'s property. Issues were joined on these pleas. Defts. also pleaded, as to the breaking & entering two other pleas, justifying under a *fi fa.* & warrant of execution against the goods of B., which warrant was duly delivered to one of defts., a bailiff, to be executed; that goods of B. liable to be taken under the execution were in the house, & that, by virtue of the writ & warrant, defts., being the sheriff, bailiff, etc., broke & entered, etc. Replication, that although the writ issued & was delivered to the sheriff, & the warrant was made by him & delivered to the bailiff, in manner & form, etc.,

**72 i.** ———— *Against wrongdoer.*—HAUDY v. WISE (1856), 2 Legge, 897.—AUS.

**72 ii.** ———— *—*—*—*—Plff. obtained a lease under the great seal for a lot of land, & finding deft. in possession as an intruder, gave him notice of the lease, & requested him to leave the lot. Dft. afterwards cut off some valuable timber, for which act plff. brought trespass:—*Held*: plff. could recover without further proof of entry.—ST. LEGER v. MANAHAN (1836), 5 O. S. 89.—CAN.

**72 iii.** ———— *—*—*—*—MORRISON v. MCALPIN (1842), 3 N. B. R. (1 Kerr) 650.—CAN.

**72 iv.** ———— *—*—*—*—Where A., the owner of land, encroached upon an adjoining lot of the Crown, & took three successive crops off it without any permission; & another person who had taken possession of the same land, also without license, about ten years before, & paid taxes & made clearings on it, warned off A. after he had taken the third crop, & then cropped the land himself:—*Held*: A. had no property or possession to maintain trespass against him for that crop.—KILLICHAN v. ROBERTSON (1842), 6 O. S. 458.—CAN.

**72 v.** ———— *—*—*—*—Ejectment cannot be sustained by a mtgr. against a stranger where the mtgr. is overdue & unsatisfied, the fee & right of possession being in the mtgr.—DOE d. McBERNIE v. LUNDY (1843), 1 U. C. R. 186.—CAN.

**72 vi.** ———— *—*—*—*—GALLAGHER v. BROWN (1847), 3 U. C. R. 350.—CAN.

**72 vii.** ———— *—*—*—*—MORAN v. LAIRD (1847), 5 N. B. R. (3 Kerr) 403.—CAN.

**72 viii.** ———— *—*—*—*—SILLS v. HUNT (1858), 16 U. C. R. 521.—CAN.

**72 ix.** ———— *—*—*—*—FERGUSON v. SAVOY (1859), 9 N. B. R. (4 All.) 263.—CAN.

**72 x.** ———— *—*—*—*—BOWEN v. SHEARS (1872), 8 N. S. R. (2 G. & O.) 507.—CAN.

**72 xi.** ———— *—*—*—*—JUSON v. REYNOLDS (1873), 34 U. C. R. 174.—CAN.

**72 xii.** ———— *—*—*—*—DIXON v. SNET-SINGER (1873), 23 C. P. 235.—CAN.

**72 xiii.** ———— *—*—*—*—THERIAN v. BELLIVEAU (1875), 9 N. S. R. (3 G. & O.) 450.—CAN.

**72 xiv.** ———— *—*—*—*—MCARTHUR v. ALISON (1877), 40 U. C. R. 576.—CAN.

**72 xv.** ———— *—*—*—*—ROBINSON v. FEE & DEAN (1878), 42 U. C. R. 448.—CAN.

**72 xvi.** ———— *—*—*—*—SINNOTT v. SCOBLE (Man.) (1884), 11 S. C. R. 571.—CAN.

**72 xvii.** ———— *—*—*—*—Jud. Act (O.), s. 17 (b), enables a mtgr., entitled to the possession of land as to which the mtgr. has given no notice of his intention to take possession, to sue to prevent or recover damages in respect of any trespass or other wrong relative thereto in his own name only.—PLATT v. GRAND TRUNK RY. CO. OF CANADA (1886), 12 O. R. 119.—CAN.

**72 xviii.** ———— *—*—*—*—STEWART v. WAUGH (1886), 19 N. S. R. (7 R. & G.) 157; 7 C. L. T. 207.—CAN.

**72 xix.** ———— *—*—*—*—INCH v. FLEWELLING (1890), 30 N. B. R. 19.—CAN.

**72 xx.** ———— *—*—*—*—A person in possession of waste lands of the Crown, with the consent of the Crown can maintain trespass against persons having no title.—NELSON & POIT SHEPPARD RY. CO. v. PARKER (1897), 6 B. C. R. 1.—CAN.

**72 xxi.** ———— *—*—*—*—BROOKMAN v. CONWAY (1903), 35 N. S. R. 462.—CAN.

**72 xxii.** ———— *—*—*—*—In an action claiming damages for trespass the evidence showed that the *locus* was a water lot in Sydney harbour, & that plff.'s title thereto was derived under a grant from the Crown as represented by the Govt. of the Province of Nova Scotia:—*Held*: the grant under which plff. claimed was inoperative & void, & plff. could not recover.—KENNELLY v. DOMINION COAL CO., LTD. (1904), 36 N. S. R. 495.—CAN.

**72 xxiii.** ———— *—*—*—*—MILLS v. BRYCE (1908), 7 W. L. R. 738.—CAN.

**72 xxiv.** ———— *—*—*—*—A person in possession of Crown lands, with the consent of the Crown, may maintain trespass against a wrongdoer.—BROWN v. MOTIERLODE MINING CO. (1912), 20 W. L. R. 778; 2 D. L. R. 277; 17 B. C. R. 248.—CAN.

**72 xxv.** ———— *—*—*—*—Plff. in trespass claimed under deeds which gave him colour of title, & in addition, established a long series of acts of possession on the part of his father & himself, including working the property, & the use of the *locus*, the beach in front of the property, as a place for shipment of timber & produce & as a boat landing, & the taking from it of whatever sand, gravel, or other material of that nature they required:—*Held*: the occupation shown, coupled with the deeds giving colour of title, constituted a title in plff. which would enable him to maintain trespass against deft., an adjoining owner.—McDOUGALL v. McDOUGALL (1915), 49 N. S. R. 101.—CAN.

**72 xxvi.** ———— *—*—*—*—ETTINGER v. ATLANTIC LUMBER CO. (1917), 51 N. S. R. 523; 36 D. L. R. 788; *affd.* 59 S. C. R. 649.—CAN.

**72 xxvii.** ———— *—*—*—*—INDER LUMBERING & MILLING CO. v. MUNROK, [1927] 3 D. L. R. 1180.—CAN.

**72 xxviii.** ———— *—*—*—*—Twenty years undisturbed possession of a cove will enable the party who has had such possession to sustain an action against a wrongdoer.—RYAN v. THOMAS (1819), 1 Nfld. L. R. 178.—NFLD.

**72 xxix.** ———— *—*—*—*—GRAHAM v. THOMAS (1876), 2 N. Z. Jur. N. S. 268.—N.Z.

**e.** ———— *Isolated acts of trespass over period of years.*—Isolated acts of trespass, committed on wild lands from year to year, will not give the trespasser a title under Stat. Limitations.—SHERREN v. PEARSON (P. E. I.) (1887), 14 S. C. R. 581.—CAN.

**f.** *Effect of conveyance from grantor to himself & others.*—A man cannot convey land to himself: therefore a deed of bargain & sale from B. to C., M. & himself, & their heirs, being

**Sect. 8.—Right to relief: Sub-sect. 1, B. & C. (a).]** nevertheless defts. of their own wrong & without the residue of the cause in their plea alleged, committed the trespasses, etc. Issue thereon. On the trial, pltf. proved that he was in possession of the house & goods, which had been conveyed to him by B., & that the house was entered & the goods taken by defts., as under the process of execution against B. The case for defts. was, that the conveyance was fraudulent. The judge, in summing up, told the jury that on the pleadings it was admitted that the goods were *bona fide* taken in execution under the writ; on which point, therefore, he did not ask their opinion; & that the main question was, whether or not the property was in pltf., the burden of proving which fact lay on him:—**Held:** a misdirection. The fact that the seizure was under warrant was traversable. That fact not being admitted on the record, & no evidence of it having gone to the jury, defts. were in the situation of wrongdoers, against whom possession alone was a sufficient title.—**CARNABY v. WELBY** (1838), 8 Ad. & El. 872; 1 Per. & Dav. 98; 1 Will. Woll. & H. 597; 8 L. J. Q. B. 22; 2 Jur. 1005; 112 E. R. 1008.

**Annotation: Refd. Hewitt v. Macquhar** (1851), 7 Exch. 80.  
**78. — — —.] — WHITTINGTON v. BOXALL,** No. 313, *post*.

**79. — — —.] — ANON.** (1849), No. 152, *post*.

**80. — — —.] —** There can be no doubt whatever that mere possession is sufficient, against a person invading that possession without himself having any title whatever—as a mere stranger; that is to say, it is sufficient as against a wrongdoer. The slightest amount of possession would be sufficient to entitle the person who is so in possession, or claims under those who have been or are in such possession, to recover as against a mere trespasser (**LORD HATHERLEY**).—**BRISTOW v. CORMICAN** (1878), 3 App. Cas. 641, H. L.

**Annotation:—Refd. Johnston v. O'Neill**, [1911] A. C. 552.

**81. — — —.] —** It is a well-established principle in English law that possession is good against a wrongdoer, & the latter cannot set up a *jus tertii* unless he claims under it (**LORD DAVEY**).—**GLENWOOD LUMBER CO., LTD. v. PHILLIPS**, [1904] A. C. 405; 73 L. J. P. C. 62; 90 L. T. 741; *sub nom.* **GLENWOOD LUMBER CO., LTD. v. BISHOP**, 20 T. L. R. 531, P. C.

**Annotations:—Apld. McPherson v. Temiskaming Lumber Co.**, [1913] A. C. 145. **Refd. Eastern Construction Co. v. National Trust Co. & Schmidt**, [1914] A. C. 197. **Mentd. Clarkson & Foigie v. Wishart & Mver**, [1913] A. C. 528.

**82. — — —.] —** Oyster ponds or “layings” had existed as far back as living memory went upon the foreshore of an arm of the sea. The purpose for which these ponds were used was the storage of oysters, which were brought from elsewhere & laid down in the ponds in order to be fattened for the market. Certain ponds of this kind, which were enclosed by boards or concrete, were, & for more than twenty years had been, used in the manner above mentioned by pltf., who had purchased them in 1879 from others who had for a period of between twenty & thirty years previously so used them. There was some evidence that the foreshore had formed part of the waste of a manor, the lord of which had a several fishery thereon.

Defts. were an urban district council which had been constituted in 1894, their district being carved out of that of a previously existing rural sanitary authority. A sewer had been made in the district by the rural sanitary authority, from which an inconsiderable quantity of sewage had been discharged into the sea near the oyster ponds. Defts. made certain new sewers, & connected them with the first-mentioned sewer, & the quantity of sewage discharged from that sewer was thereby greatly increased. The sewage so discharged caused a nuisance to pltf.’s oyster ponds through pollution of the same with sewage to an extent which rendered them unfit for use. In an action by pltf. against defts. in respect of the nuisance so caused:—**Held:** irrespectively of the question of title to the soil or to a several fishery, pltf., as occupier of the oyster ponds, was entitled to maintain an action for trespass to the same by wrongdoers; defts., not having any right to discharge sewage into the sea so as to cause a nuisance, & having by their acts of commission caused such a discharge of sewage, were wrongdoers; & therefore the action was maintainable.—**POSTER v. WARBLINGTON URBAN COUNCIL**, [1906] 1 K. B. 648; 75 L. J. K. B. 514; 94 L. T. 876; 70 J. P. 233; 54 W. R. 575; 22 T. L. R. 421; 4 L. G. R. 735, C. A.

**Annotations:—Mentd. Owen v. Faversham Corpn.** (1908), 73 J. P. 33; **Jonas v. Jlanrwst U. C.**, [1911] 1 Ch. 393.

**83. — — —.] — Where defendant has prior possession.] — ARUNDELL’S (COUNTESS) CASE** (1650), Clay. 147, N. P.

**84. — — —.] — Action against true owner.] —** Certain premises were let to pltf. by P., who had previously mortgaged them to defts., the trustees of a benefit building society, to secure payment of subscriptions, etc., which might become due from him to the society. The mtge. deed gave power to defts. to distrain the goods of P., on the premises, for arrears of subscriptions due to the society, as for rent due on a demise. Defts. distrained on the premises for subscriptions due from P., & seized pltf.’s goods. Pltf. replevied the goods, & recovered in the action of replevin, in the county ct., as damages, the amount of the expenses of the replevin bond. Having sustained further consequential damages by reason of the seizure of his goods, he subsequently brought an action of trespass in the superior ct. to recover these damages, & also in respect of the trespass to the land:—**Held:** (1) the judgment in replevin was a bar to the action in respect of trespass to the goods, inasmuch as the special damage was recoverable in the action of replevin; (2) with respect to the trespass to the land; the judgment in replevin was no bar to the action, but defts. were entitled to the verdict on a plea of not possessed, inasmuch as they had done no act to recognise pltf. as a tenant.

It is said that pltf. can recover in respect of the trespass to the land, because he was the person in actual possession. It is clear, however, that defts. were the real owners & entitled to the possession of the land, & as against them the tenant could be at the very most merely a tenant at sufferance, & could not maintain trespass as against them (**BOVILL, C.J.**).—**GIBBS v. CRUIKSHANK** (1873), L. R. 8 C. P.

inoperative as to B., vests the whole estate in C., & M. as joint tenants, & an action of trespass cannot be maintained by the three on such title.—**CAMERON, MARSHALL & BARNETT v. STEVES** (1858), 9 N. B. R. (3 All.) 141.—**CAN.**

**E. Right of trespasser against licensee.]**

—A trespasser on Crown land cannot maintain an action against a licensee of the land for obstructing a road through it, & preventing pltf. from hauling away timber illegally cut.—**LEIGHTON v. BOHAN** (1866), 11 N. B. R. (6 All.) 440.—**CAN.**

**h. Notice of approval of application**

—**Whether sufficient to sustain action.] —**Pltf. had sufficient title in the land from the date of the notice to him of the approval by the Governor-in-Council of his application to enable him to proceed for a trespass.—**PHILLIPS v. GLENWOOD LUMBER CO.** (1900), 8 Nfld. L. R. 390.—**NFLD.**



—.]—McLAREN v. C. R. 151.—CAN. choose, & afterwards to cut & carry them away:—*Held*: he had not such a possession as would enable him





**103. Possession obtained by fraud.**—COLLINS v. THOMAS, No. 210, *post*.

**104. Ownership of vacant house.**—The owner of a vacant house is in possession, & may maintain trespass against any one who invades it (LUSH, J.).—R. v. ST. PANCRAS ASSESSMENT COMMITTEE (1877), 2 Q. B. D. 581; 46 L. J. M. C. 243; 41 J. P. 602; 25 W. R. 827; *sub nom.* WILLING v. ST. PANCRAS ASSESSMENT COMMITTEE, 37 L. T. 120.

*Annotations*.—**Consd.** L. C. C. v. Hackney B. C., [1928] 2 K. B. 688. **Refd.** Boodle Overseers v. Liverpool Warhousing Co., Same v. Webster (1901), 85 L. T. 45; Wolfe v. Surrey County Council, Reeve v. Same, [1905] 1 K. B. 439; Hackney B. C. v. Metropolitan Asylums Board (1924), 131 L. T. 136. **Mentd.** Smith v. New Forest Union Assmt. Com. (1889), 60 L. T. 927; Mitchell v. Workop Union Assmt. Com. (1904), 92 L. T. 62; Liverpool Corp'n. v. Chorley Union Assmt. Com. & Withnell Overseers, [1913] A. C. 197; Bach v. Daniels, [1925] 1 K. B. 626.

**105. Slightest amount of possession—Against wrongdoer.**—BRISTOW v. CORMICAN, No. 80, *ante*.

**106. Prior possession—Whether re-entry by plaintiff necessary.**—ARUNDELL'S (COUNTESS) CASE (1650), Clay, 147, N. P.

—, *Compare* REAL PROPERTY, Vol. XXXVIII., pp. 782, 783, Nos. 1151–1158.

#### (b) Possession of Part of Premises.

**107. Whether sufficient to protect possession of whole premises.**—Proof that pltf. was in separate possession of two rooms of a house:—**Held**: sufficient to satisfy an allegation that pltf. was in possession of the messuage, upon which deft. had taken issue.—FENN v. GRAFTON (1836), 2 Bing. N. C. 617; 2 Hodg. 58; 3 Scott, 56; 132 E. R. 238.

has a prior possession of the land under a Crown grant, & with lines run according to the grant: even though it conveys no title in consequence of the land having been previously granted.—CHAMBER v. WHIPPLE (1856), 8 N. B. R. (3 All.) 273.—CAN.

**k. Person without title dispossessed by another without title.**—Where a person who has been in possession of property for several years without title is dispossessed by another, who also has no title, the former is entitled to be restored to possession.—BODHA (HANNERY) v. ASHLOKE SINGH (1926), 1 L. R. 5 Pat. 765.—IND.

#### PART II. SECT. 3, SUB-SECT. 1.—C. (b).

**107 l. Whether sufficient to protect possession of whole premises.**—Where there is no actual title or claim of title, the occupant is not constructively in possession of more land than his occupation covers, & to this occupation when suing in trespass he will be strictly limited.—LAKE v. BRILEY (1848), 5 U. C. R. 136.—CAN.

**107 li. —, Semble**: a person who takes possession of part of a lot of land without title, does not, by running the exterior lines of the lot, acquire such a possession as will enable him to maintain trespass for an entry on the line beyond the bounds of his actual occupation.—CREAMER v. WHIPPLE (1856), 8 N. B. R. (3 All.) 273.—CAN.

**107 iii. —, Bailey v. McNeilly** (1861), 20 U. C. R. 451.—CAN.

**107 iv. —, McDonnell v. McKinty** (1847), 10 L. R. 514.—IR.

#### PART II. SECT. 3, SUB-SECT. 1.—D.

**113 l. Acts of ownership.**—The acts of a near relative & personal representative of a deceased person done in behalf of his minor children & heirs upon & in regard to land which was claimed by deceased, but under a

defective title, will enure to the benefit of such heirs, to show possession in them, as against a mere wrongdoer, & the title deed, though not sufficient to convey the land for want of due registry or livery of seisin, may be used to show the extent of the claim of possession. HADDER v. WHITE (1815), 4 N. B. R. (2 Kerr) 634.—CAN.

**113 ii. —, White v. Smith** (1859), 9 N. B. R. (1 All.) 335.—CAN.

**113 iii. —, The mere fact of a person having a registered deed of land does not give him possession of the land described, without showing acts of possession.**—MADRAS BOARD (GOVERNOR) v. RYAN (1861), N. B. Dig. 746.—CAN.

**113 iv. —, Deft. in trespass claimed the locus in quo under a grant from the Crown: pltf. gave evidence of acts of possession of the land for twenty years prior to the grant, by which he claimed that the Crown was out of the possession, & could not grant without office found:—Held**: this evidence of possession ought to have been left to the jury.—SMITH v. MORROW (1872), 14 N. B. R. (1 Pug.) 200.—CAN.

**113 v. —, McCully v. Blair** (1882), 15 N. S. R. (3 R. & G.) 435.—CAN.

**113 vi. —, Putting up boards on the land stating that the land was for sale, was a sufficient entry upon the owner's part to vest the legal possession in him & to enable him to maintain an action of trespass.**—DONOVAN v. HERBERT (1884), 4 O. R. 635.—CAN.

**113 vii. —, Fullerton v. Brundige** (1887), 20 N. S. R. (8 R. & G.), 182; 8 C. L. T. 378.—CAN.

**113 viii. —, Thomson v. Thomas** (1891), 23 N. S. R. (11 R. & G.) 325.—CAN.

**113 ix. —, McDougall v. McNeil** (1892), 24 N. S. R. (12 R. & G.) 322.—CAN.

**108. —, Price v. Coster** (1843), 2 L. T. O. S. 266.

**109. —, The tenant of a farm having sold pltf. his crops & tillages, & agreed to let him have possession of the farm to cultivate them, & having previously let deft. into possession of a mill & some fields, & into occupation of part of the mill house, the rest being occupied by the farm bailiff:—Held**: there being no proof of title in either, it was for the jury what the parties respectively had been put in possession of, & pltf. might, in trespass to the house, recover as to part of the house.—EDWARDS v. BOND (1862), 2 F. & F. 817, N. P.

**110. —, Induction of parson—No actual entry on land.**—By his induction the parson is put in possession of a part for the whole & may maintain an action for a trespass on the glebe land, although he has not taken actual possession of it.—BULWER v. BULWER (1819), 2 B. & Ald. 470; 106 E. R. 437.

*Annotation*.—**Mentd.** Davis v. Eyton (1830), 7 Bing. 154.

**111. Possession of bedroom—By servant of occupier.**—LEWIS v. PONSFORD, No. 390, *post*.

**112. —, By child of occupier.**—LEWIS v. PONSFORD, No. 390, *post*.

#### D. Evidence of Possession.

**113. Acts of ownership.**—CANVEY ISLAND COMRS. v. PREEDY, No. 99, *ante*.

**114. —, On part of land—Whether evidence of possession of other parts.**—HOLLS v. GOLDFINCH, No. 133, *post*.

**115. —, Pltf. claimed the whole bed of a stream which flowed between his & deft.'s**

**113 x. —, Isolated acts of cutting timber or wild grass are not sufficient evidence of possession to maintain trespass, or to give title as against any one who has documentary or possessory title.**—HOVEY v. LONG (1896), 33 N. B. R. 462.—CAN.

**113 xi. —, PAYZANT v. HAUBOLD** (1896), 29 N. S. R. 66.—CAN.

**113 xii. —, MARTIN v. MARTIN** (1906), 2 E. L. R. 70.—CAN.

**113 xiii. —, FULTON v. DAVIDSON** (1906), 2 E. L. R. 153.—CAN.

**113 xiv. —, In the absence of twenty years' continuous & exclusive enjoyment by pltf., occasional acts of cutting must be regarded as acts of trespass, or at the highest, as having been done with the consent of the owner.**—UGILVIE v. GRANT (1906), 41 N. S. R. 1.—CAN.

**113 xv. —, JENNINGS v. CHANDLER** (1906), 2 E. L. R. 67.—CAN.

**113 xvi. —, The casual use of land for pasturing cattle in common with other persons does not constitute an evidence of possession sufficient to maintain an action for trespass.**—TEMISCOUATTA RY. CO. v. CLAIR (N. B.) (1906), 38 C. C. R. 230.—CAN.

**113 xvii. —, YOUNG v. GREENOUGH** (N. S.) (1906), 1 E. L. R. 174.—CAN.

**113 xviii. —, HALIFAX POWER CO. v. CHRISTIE** (1915), 48 N. S. R. 264.—CAN.

**113 xix. —, McDOUGALL v. McDOUGALL** (1915), 49 N. S. R. 101.—CAN.

**113 xx. —, MATTHEWS v. GOODE** (1921), 56 N. S. R. 543.—CAN.

**113 xxi. —, HEGAN v. CAROLAN**, [1916] 2 I. R. 27.—IR.

**1. Proof of former occupation.**—In an action of trespass to a sheep station, in which deft. has pleaded "not possessed," pltf. is entitled to prove possession of the part of the station trespassed on, by showing that the former occupier, from whom he

**Sect. 3.—Right to relief: Sub-sect. 1, D. & E.; sub-sect. 2.]**

**farm.** Pltf.'s farm extended lower down on the one side of the stream than deft.'s & terminated opposite another farm, called C. which adjoined deft.'s, & which was bounded by the same continuous hedge:—**Held:** acts of ownership exercised by pltf. on the bed & banks of the stream & on the hedge at the farm of C. were admissible in support of pltf.'s claim.

It is impossible, in the nature of things, to confine the evidence to the very precise spot on which the alleged trespass may have been committed; evidence may be given of acts done on other parts, provided there is such a common character of locality between these parts & the spot in question as would raise a reasonable inference in the minds of the jury, that the place in dispute belonged to pltf. if the other parts did (PARKIE, B.).—**JONES v. WILLIAMS** (1837), 2 M. & W. 320; Murp. & H. 51; 6 L. J. Ex. 107; 150 E. R. 781.

**Annotations:—****Apprvd.** *Bristol v. Cornman* (1878), 3 App. Cas. 641. **Consd.** *Lord Advocate v. Hantyre* (1879), 4 App. Cas. 770. **Disd.** *Clark v. Elphinstone* (1880), 6 App. Cas. 164. **Consd.** *Lord Advocate v. Lovat* (1880), 5 App. Cas. 273; *Smith v. Lister* (1895), 64 L. J. Q. B. 154. **Apld.** *A.-G. v. Newcastle-upon-Tyne Corp.*, [1897] 2 Q. B. 384. **Consd.** *Craven v. Pridmore* (1901), 17 T. L. R. 399; *Hanbury v. Jenkins*, [1901] 2 Ch. 401; *University College v. Oxford Corp.* (1904), 68 J. P. 470. **Refd.** *Briscoe v. Lomax* (1838), 7 L. J. Q. B. 148; *Dendy Simpson* (1856), 18 C. B. 831; *Eccroyd v. Coulthard*, [1897] 2 Ch. 554; *Johnston v. O'Neill*, [1911] A. C. 552.

**116.** ————**J.**—By an award made under an Inclosure Act, passed in 1766, two private roads, E. & II., were set out. About 1818, the road E. became a public highway. Down to 1863, the surveyors of highways for the parish of C., within which E. & II. were situate, had from time to time let the pasturage upon E. & II. to various persons. A local board was formed in 1863 for the parish of C., who in 1876 let the pasturage upon E. & II. to pltf. He thereupon commenced to depasture the herbage with his cattle on the road. Deft. interfered with pltf.'s enjoyment of the pasturage:—**Held:** the local board having no power to demise II., being a private way, pltf. had not sufficient exclusive possession as occupier to enable him to maintain an action.

It is difficult to say that there is a *de facto* possession, when there is no possession except of those parts of the lane which are in actual possession, & these is an interference with the enjoyment of the parts which are not in actual possession. My meaning is this, if there were an inclosed field & a man had turned his cattle into it, & had locked the gate; he might well claim to

have a *de facto* possession of the whole field; but if there were an un-inclosed common of a mile in length, & he turned one horse on one end of the common he could not be said to have a *de facto* possession of the whole length of the common. If it would not be a *de facto* possession it would be a nominal possession. If no right were attached to it, it would not be a constructive possession (BRAMWELL, L.J.).—**COVERDALE v. CHARLTON** (1878), 4 Q. B. D. 104; 48 L. J. Q. B. 128; 40 L. T. 88; 43 J. P. 268; 27 W. R. 257, C. A.

**Annotations:—****Refd.** *Burgess v. Northwich L. B.* (1880), 6 Q. B. D. 264; *Rolls v. St. George the Martyr, Southwark Vestry* (1880), 14 Ch. D. 785; *Wandsworth Board of Works v. United Telephone Co.* (1884), 13 Q. B. D. 904; *Faroham L. B. & Faroham Electric Light Co. v. Smith* (1891), 7 T. L. R. 443; *Hill v. Wallasey L. B.*, [1894] 1 Ch. 133; *Leamington Colliery Co. v. Baird*, [1895] 1 Q. B. 301; *Tunbridge Wells Corp. v. Baird*, [1896] A. C. 434; *Escott v. Newport Corp.*, [1904] 2 K. B. 369. **Mentd.** *Nutter v. Accrington L. B. of Health* (1878), 4 Q. B. D. 375; *R. v. London County Keepers of Peace & J.J.* (1890), 25 Q. B. D. 357; *Bradford v. Eastbourne Corp.*, [1896] 2 Q. B. 205; *Salt Union v. Harvey* (1897), 61 J. P. 375; *St. Mary's, Battersea Vestry v. County of London & Brush Provincial Electric Lighting Co.* (1899), 80 L. T. 31; *Finchley Electric Light Co. v. Finchley U. C.*, [1903] 1 Ch. 437; *Westminster Corp. v. Johnson, Smeke v. Fuller*, [1904] 2 K. B. 737; *Pemsel & Wilson v. Tucker*, [1907] 2 Ch. 191; *Wednesbury Corp. v. Lodge Holes Colliery Co.*, [1907] 1 K. B. 78; *Foley's Charity Trustees v. Dudley Corp.*, [1910] 1 K. B. 317; *Jones v. New* (1910), 103 L. T. 165; *Nesbitt v. Mablethorpe U. C.*, [1912] 2 K. B. 1.

**117.** ————**J.**—Although acts done upon parts of a district of land may be evidence of possession of the whole yet as regards lands within a disputed boundary act, of ownership by either party outside the boundary are no evidence of title to the lands within it.—**CLARK v. ELPHINSTONE** (1880), 6 App. Cas. 164; 50 L. J. P. C. 22, P. C.

**Admissibility of private documents.**—*See EVIDENCE*, Vol. XXII., p. 360, Nos. 3670-3678.

**118. Payment of rent.**—(1) A. paid a nominal rent to the King for 1,000 acres of woodland, the wood being all reserved to the Crown. During four months in the year, A. exercised the privilege of shooting over the land, & by his permission another person took the grass:—**Held:** the payment of the rent, the exercise of the privilege of shooting, & the taking of the grass was sufficient evidence to show that A. was in the actual possession of the land, so as to entitle him to maintain trespass.

(2) A. occupied under a parol licence from the Crown, & the rent paid by him was much less than one third of the annual value of the land:—**Held:** as A. had no legal conveyance from the Crown by matter of record, & as the rent reserved was not one-third of the annual value of the land, as

purchased, occupied the ground in question.—**LESTER v. GIRARD** (1848), 1 Legge, 463.—**AUS.**

**m.** ————**J.**—Mere prior occupancy of land, without title to any estate therein, by a person who is in reality a trespasser, gives to him a title to sue for damages any subsequent trespasser who can show no older or better title in himself.—**SWALE v. ZURDAYK**, [1924] 2 W. W. R. 555; 18 Sask. L. R. 558.—**CAN.**

**n. Description of land in Crown grant inaccurate.**—In an action for trespass where a Crown grant is put in evidence, setting out, & purporting to describe the parcels, but the description obviously & by demonstration is incorrect, as not enclosing a space; such description is inoperative, & should be wholly rejected.—**STREX v. BELFRET SHIRE COUNCILLORS & RATEPAYERS** (1870), 1 V. R. (Law) 59.—**AUS.**

**o. Burden of proof.—On person**

**disputing possessory title.**—**MOUNT BISHOFF TIN MINING CO. REGISTERED v. MOUNT BISHOFF EXTENDED TIN MINING CO. NO LIABILITY** (1913), 15 C. L. R. 549.—**AUS.**

**p. Locus in quo partly fenced.**—**Trespass quare clausum fregit** describing the locus in quo by metes & bounds & as part of "what has heretofore been known as lot 15, 1st concession, Delaware." Deft. proved no title. Pltf. claimed by possession, & it appeared that more than twenty years ago, relying on a survey, he had fenced in a part of deft.'s lot 14 in the broken front concession. This fence, if continued, would have included the part in question, but it had never been extended to any part of lot 14 in the 1st concession:—**Held:** pltf. had no such possession of the locus in quo as would entitle him to recover.—**WELD v. SCOTT** (1855), 12 U. C. R. 537.—**CAN.**

**q. Bank receipt.**—Pltf. in proof of

his title put in at the trial a receipt from the Bank of Upper Canada at Kingston, which stated that the amount therein mentioned would appear at the credit of the Crown land department in the bank on lots Nos. 24 & 25 in the 9th concession of Hinchinbrooke, being the premises in question. On this receipt was indorsed a certificate of the sale & terms thereof, signed by the Crown land agents:—**Held:** sufficient, under 23 Vict. c. 2, to entitle pltf. to maintain trespass for cutting trees after the date of the certificate, but before the statute.—**WHITING v. KERNAHAN** (1862), 12 C. P. 57.—**CAN.**

**r. General entry on plot.**—The lines having been run by a provincial land surveyor between pltf.'s & deft.'s lot, it was found that deft. had encroached on a small portion of pltf.'s land, which he refused to give up:—**Held:** the general entry of pltf. on his lot, before deft. had encroached

required by Crown Lands Acts, 1702 (c. 7), s. 5, he had no legal right to retain possession of the land as against the Crown, but as he occupied with the permission of the Crown, his possession was sufficient to enable him to maintain trespass against a wrong-doer.—**HARPER v. CHARLESWORTH** (1825), 4 B. & C. 574; 6 Dow. & Ry. K. B. 572; 3 L. J. O. S. K. B. 205; 4 L. J. O. S. K. B. 22; 107 E. R. 1174.

*Annotations:—As to (1) Consd. Humphrey v. Nowland* (1862), 15 Moo. P. C. C. 343. *As to (2) Refd. Heartley v. Banks* (1859), K. & G. 219. *Generally, Refd. A.-G. v. Dakin* (1868), L. R. 3 Exch. 288. *Mentd. R. v. Bradfield* (1874), L. R. 9 Q. B. 552.

**119. Exercise of privilege of shooting.]—HARPER v. CHARLESWORTH, No. 118, ante.**

**120. Taking grass.]—HARPER v. CHARLESWORTH, No. 118, ante.**

**121. Any act showing intention.]—A party having the legal title to land having entered, may maintain trespass against a person wrongfully in possession at the time of entry, & continuing in such possession afterwards.**

If he who has the right to land, enters & takes possession, he may maintain trespass. It is not necessary that the party who makes the entry should declare that he enters to take possession; it is sufficient, if he does any act, to show his intention (LORD TENTERDEN, C.J.).—**BUTCHER v. BUTCHER** (1827), 7 B. & C. 399; 1 Man. & Ry. K. B. 220; 6 L. J. O. S. K. B. 51; 108 E. R. 772.

*Annotations:—Consd. Wiltshire v. Sidford* (1827), 6 L. J. O. S. K. B. 151. *Apld. Hey v. Moorhouse* (1839), 6 Bing. N. C. 52. *Consd. Newton v. Harland* (1840), 1 Man. & G. 644. *Apld. Jones v. Chapman* (1849), 2 Exch. 803. *Consd. Barnett v. Guildford* (1855), 11 Exch. 19. *Refd. Humphrey v. Nowland* (1862), 15 Moo. P. C. C. 343; *Hodgson v. Walker* (1872), L. R. 7 Exch. 55; *Ocean Accident & Guarantee Corpn. v. Ilford Gas Co.*, [1905] 2 K. B. 493.

#### E. Particular Instances.

See Sub-sect. 4, post.

#### SUB-SECT. 2.—AGAINST WHOM RELIEF OBTAINABLE.

**122. After entry by party entitled—Disselsor.]—LIFORD'S CASE, No. 227, post.**

**123.—Fcoffees of disselsor.]—LIFORD'S CASE, No. 227, post.**

—**Person wrongfully in possession & continuing in possession after entry.]—See Nos. 95-99, ante.**

**Lessor entering after expiration of term.]—See No. 151, post.**

**124. Party causing or acceding to trespass by another—Forcibly causing trespass.]—SMITH v. STONE** (1647), Sty. 65; 82 E. R. 533.

**125. —Absence of intention.]—Y., a candidate for election as member of Parliament, was accompanied through a borough by a crowd of persons forming a procession in his honour. The windows of certain houses, belonging to members of the opposite political party, were broken by the mob in their course; & Y., standing up in a carriage, waved his hat in the air, but with no intention of encouraging the mob in their acts of violence, & made no attempt to leave the carriage or stop the procession, though he remonstrated with those who could hear him on the disgraceful character of their proceedings:—*Held*: under these circumstances, Y. was not liable for the damage caused by the breaking of the windows.—**PEACOCK v. YOUNG** (1869), 21 L. T. 527; 34 J. P. 213; 18 W. R. 134.**

**126. —Clear proof of direction or instigation.]—To make a man responsible for a trespass committed by another, it should be clearly shown, either that he had directed the act to be done, or so sanctioned it as to make himself in the contemplation of law a participator in it.—**WARING v. GILL** (1875), 40 J. P. 25.**

**127. Lessor reserving power to cut trees—Improper exercise of power by assignee—Lessor & assignee liable.]—If a lease be made, with exception of the trees, & a power reserved to the lessor to enter & cut them down, he may assign this power to another person; but if it be not properly pursued, the lessee may maintain trespass, both against the lessor & his assignee.—**WARREN v. ARTHUR** (1882), 2 Mod. Rep. 317; 86 E. R. 1097.**

**128. Tenant at will—Action by feoffee of lessor.]—**BALL v. CULLMORE, No. 150, post.****

**129. Action against persons claiming right of way—Highway authority aiding in proof of right—Joinder of highway authority as defendant.]—Where an action for trespass is brought against persons who claim a right of way, & the highway authority of the district resolve to assist defts. in proving that there is such a right of way, such highway authority can be added as defts. to the action.**

The owner of an estate closed & locked the gates of a carriage drive upon the estate, with the object of excluding the public. Three persons broke the locks & entered upon the drive for the purpose of asserting a public right of way over it, upon which the owner brought an action against them for trespass. The Andover Rural District Council, acting under Local Government Act, 1894 (c. 73), s. 26, passed a resolution that the council should assist defts. in the action, in order that the right of way might be maintained, & instructed the clerk to the council to take all necessary steps. The owner thereupon obtained leave to amend his

thereon, was sufficient to entitle him to maintain this action, without proof of entry on the part in possession of deft.—**O'HEARN v. DONNELLY** (1863), 13 C. P. 513.—**CAN.**

**t. Effect of deed from Commissioner of Public Lands.]—**McMICKEN v. MCCARTHY** (1881), 2 P. E. I. 389.—**CAN.****

**a. Reliance upon blazes & stumps.]—**FORBES v. DIXON** (1906), 1 E. L. R. 498.—**CAN.****

**b. Onus of proof on plaintiff.]—**BARTLEY v. NOVA SCOTIA STEEL CO.** (1898), 38 S. C. R. 336.—**CAN.****

**c. —.]—**HOLDER v. WHITE** (1876), 2 N. Z. Jur. N. S. 89.—**N.Z.****

**d. Sufficiency of certificates of indefeasible title.]—**RORISON v. KOLOSOFF** (B. C.) (1910), 15 W. L. R. 497; 15 B. C. R. 419.—**CAN.****

**e. Application of Survey Act to private survey.]—**HOVEY v. TRIPP****

(1912), 21 O. W. R. 493; 3 O. W. N. 738; 25 O. L. R. 578; 2 D. L. R. 136.—**CAN.**

**f. Necessity for showing twenty years' exclusive occupation.]—**GRAVES v. CARRUTHERS** (B. C.) (1913), 24 W. L. R. 814; 4 W. W. R. 1074; 18 B. C. R. 261.—**CAN.****

**g. Evidence of surviving owner of conventional line contradicting deeds.]—**MCGREGOR v. WEBBER** (1917), 51 N. S. R. 226.—**CAN.****

**h. All boundary lines must be proved.]—**ETTINGER v. ATLANTIC LUMBER CO.** (1919), 59 S. C. R. 649.—**CAN.****

#### PART II. SECT. 3, SUB-SECT. 2.

**k. Owner of cattle.]—Unpaid vendor of cattle in his possession may be "owner" for purposes of trespass by them.—**R. v. WYATT, Ex p. RUTHERFORD** (1877), 3 V. L. R. (L.) 126.—**AUS.****

**l. Master.]—Master liable for tres-**

pass on land committed by his servant in charge of travelling stock.—**FORBESMAN v. MCNAMARA** (1897), 23 V. L. R. 501.—**AUS.**

**m. —.]—A master held responsible for his overseer whom he had employed to cut trees on his own property, passing over the known fence of an adjoining proprietor, & there cutting trees, although it was alleged he did so without authority.—**HILL v. MERRICKS** (1813), Hume, 397.—**SCOT.****

**n. Right of corporation to maintain action in absence of bye-law.]—A township corp., without having passed any bye-law on the subject, can maintain trespass for cutting & carrying away trees growing upon Govt. allowances for roads; for the power to pass bye-laws for preserving or selling such trees gave them also a right to recover from a wrongdoer their value, which**

**Sect. 3.—Right to relief: Sub-sects. 2, 3 & 4, A.]**

statement of claim in the action by adding the council as defts., & claimed against them a declaration that there was no right of way, together with an injunction to restrain them from so asserting:—*Held*: that although the council had not themselves or by their agents entered upon the land, nor taken any active part in the dispute, nevertheless, as claiming a right to assist in the assertion of the right of way, they were properly joined as parties to the action.—*THORNHILL v. WEEKS*, [1913] 1 Ch. 438; 82 L. J. Ch. 299; 108 L. T. 892; 77 J. P. 231; 57 Sol. Jo. 477; 11 L. G. R. 302; *subsequent proceedings, sub nom. THORNHILL v. WEEKS* (No. 3), [1915] 1 Ch. 106.

**Co-owner—At suit of co-owner.**—*See* Nos. 141-144, *post*.

**Exclusive possessor of surface—By owner of subsoil.**—*See* No. 134, *post*.

**SUB-SECT. 3.—TRESPASS BY RELATION.**

**130. In what cases doctrine applies—Person having prior right—After regaining possession.**—If A. disseise B. & C. disseise A., & B. afterwards enters upon C. B. may maintain trespass against C. for he is remitted to his first possession.—*HOLCOMB v. RAWLYNS* (1597), Cro. Eliz. 540; Moore, K. B. 461; 78 E. R. 786.

**131. —Assignment to solicitor by way of security—Subsequent trespass by execution against assignor.**—After verdict, but before judgment, W, plff. in ejectment, on July 11, assigned a field of potatoes, with the crop growing on it, which he held under a lease, the subject-matter of the action, to his attorney in the action, as a security for money advanced by the attorney, & for the amount due for costs already incurred in the action. One of defts., a sheriff's officer, on July 17, seized the crop of potatoes, under a *fi fa*, against W. On the same day, but afterwards, possession was delivered by another sheriff's officer of the field in question, under a *habere facias possessionem*, to W., who immediately transferred the possession to an agent attending for the attorney. On July, 30 the first sheriff's officer sold the potatoes, by

auction, as a separate lot, after notice given him of plff.'s title, to J, who, after taking an assignment of the lease from the sheriff entered & took the potatoes:—*Held*: an action *quare clausum fregit* lay for the attorney against the sheriff & his officers as his title related back to the time when it accrued.—*RADCLIFFE v. ANDERSON* (1860), E. B. & E. 819; 120 E. R. 715; *sub nom. ANDERSON v. RADCLIFFE & WALKER*, 29 L. J. Q. B. 128; 1 L. T. 487; 6 Jur. N. S. 578; 8 W. R. 283, Ex. Ch. *Annotations*:—*Apld.* Ocean Accident & Guarantee Corp. v. Ilford Gas Co., [1905] 2 K. B. 493. *Refd.* Dickinson v. Burrell, Stourton v. Burrell (1866), L. R. 1 Eq. 337; Dunlop v. Macedo (1891), 8 T. L. R. 43. *Mentd.* Guy v. Churchill (1888), 40 Ch. D. 41; Alabaster v. Harnes, [1894] 2 Q. B. 897.

**Customary lien of copyhold—After admittance.**—*See* COPYHOLDS, Vol. XIII., p. 108, No. 1384.

**Executor or administrator.**—*See* EXECUTORS, Vol. XXIII., p. 70, Nos. 534, 535.

**Mortgages.**—*See* MORTGAGE, Vol. XXXV., pp. 394, 398, No. 1363, 1403.

**SUB-SECT. 4.—PARTICULAR RIGHTS.****A. In General.**

**132. Contractors for doing work on land—Construction of canal.**—The contractors for making a navigable canal having, with the permission of the owner of the soil, erected a dam of earth & wood upon his close, across a stream there, for the purpose of completing their work, have a possession sufficient to entitle them to maintain trespass against a wrongdoer.—*DYSON v. COLLICK* (1822), 5 B. & Ald. 600; 1 Dow. & Ry. K. B. 225; 1 Dow. & Ry. M. C. 70; 106 E. R. 1310.

*Annotations*:—*Consd.* R. v. Brighton Gas Light & Coke Co. (1826), 5 B. & C. 466; Hastings Corp. v. Ivall (1875), 1 L. R. 19 Eq. 558. *Refd.* Harper v. Chalesworth (1825), 3 L. J. O. S. K. B. 265. *Mentd.* Rolls v. St. George the Martyr, Southwark Vestry (1880), 14 Ch. D. 785.

**133. Proprietors of navigation—Trespass to soil in bank adjoining excavation from new channel.**—By an Act of 1664 certain persons were authorised to make navigable the river Itchin, & certain other rivers, & to cut, dig, & make new channels, & to deepen or widen the rivers, channels, etc., &

right might be exercised without any bye-law.—*HURLING TOWNSHIP CORPN. v. HALES* (1867), 27 U. C. R. 72.—**CAN.**

**c. Municipal corporation.**—*VANEGMOND v. SKARFORTH CORPN.* (1883), 6 O. R. 599.—**CAN.**

**p. Landlord.**—A landlord is not liable in trespass for the wilful & unauthorised acts of his bailiffs, committed in the conduct of a distress.—*THYNNE v. RUSSELL* (1838), 1 Jebb & S. 155.—**IR.**

**q. Mortgagees & purchasers.**—A. & B. were the owners of two semi-detached houses at Villa Marie. B. mtgd. his house to C. & D. The mtgees. sold the house to E., who entered therein with others & pulled down & carried away both houses. A. took action to recover damages for the trespass & conversion, as well against C. & D., the mtgees., as against E., the purchaser, & the others who had entered upon the land:—*Held*: the purchaser & the others who had actually entered upon the land, were liable for damages for the trespass & wrongful conversion.—*POWER v. FOLEY* (1902), 8 Nfld. L. R. 540.—**NFLD.**

**PART II. SECT. 3, SUB-SECT. 3.**

**r. Land taken by Government—Retrospective effect of taking—Whether possessor may take action for trespass between date of retrospective order & date of order taking effect.**—**RAILWAYS**

*COMMISSION v. DAVIS (TRADING AS DAVIS BROTHERS) (No. 2) (1915), 18 W. A. L. R. 51.*—**AUS.**

**t. In what cases doctrine applies—Owner as against possessor.**—In trespass *quare clausum fregit* for cutting grass on July 31, plff. proved possession only: deft. justified as owner of the land under a deed dated July 15, but not registered till Aug. 1:—*Held*: as against plff. deft. had not title by relation from the date of the deed.—*LATTISON v. TINGLEY* (1863), 10 N. B. R. (5 All.) 553.—**CAN.**

**a. —Patent for Crown land not issued.**—Plff. held possession as purchaser under a receipt from the Crown land agent, & before deft. entered he had paid up in full, & was entitled to the patent, which however did not issue until some time after:—*Held*: he was entitled to recover for trespass committed before as well as after the patent.—*NICHOLSON v. PAGE* (1868), 27 U. C. R. 505.—**CAN.**

**b. —**After entry there is a relation back to the actual title as against a wrong-doer, & an action may be maintained for trespass prior to such entry.—*LECAIN v. HOSTERMAN* (1878), Cass. Dig. 2nd. ed. 827.—**CAN.**

**c. —**Plff. herein, a timber licensee, sold his interest in the license & limits to W., who entered & cut timber, but the transfer was not approved, & by the regulations of the

Crown lands department all transfers were to be in writing & subject to their approval, & were to be valid only from such approval:—*Held*: the legal title to the limits & timber thereon was in plff., & W.'s possession was plff.'s, who was entitled to maintain an action for damage done to the limits.—*BOOTH v. MCINTYRE* (1880), 31 C. P. 183.—**CAN.**

**d. —**—*HAMILTON PROVIDENT & LOAN SOCIETY v. CAMPBELL* (1884), 12 A. L. 250.—**CAN.**

**e. —**—A mtgee. of vacant lands:—*Held*: entitled to damages against third parties who entered the lands & removed timber therefrom after he had begun foreclosure proceedings & before he became registered owner thereunder, even though he was never in actual possession under the mtge.—*LEID v. GALLBRAITH* (B. C.), [1926] 4 D. L. R. 814; [1926] 3 W. W. R. 500.—**CAN.**

**PART II. SECT. 3, SUB-SECT. 4.—A.**

**f. Owner of private property.**—The charter of the Nova Scotia Telephone Co. authorised the construction & working of lines of telephone along the sides of, & across & under, any public highway or street of the city of Halifax provided that in working such lines the co. should not cut down or mutilate any trees:—*Held*: the owner of private property in the city could maintain an action for damages

to do all that might be fit for navigation, & to build locks, etc., upon any of the lands adjoining the rivers, etc., & to make towing paths; & it was expressly provided that the undertakers of the navigation should not make any trench, river, or watercourse, or use the locks, etc. upon the land of any person until a full agreement with, & satisfaction to the owners of the land had been made by the comrs. appointed by the Act, or by the persons authorised to make the navigation, nor until satisfaction should be paid to the respective owners of the lands, according to the determination of the comrs., or by agreement by the undertakers of the navigation. By a subsequent clause, the comrs. were to determine what satisfaction any person should have in respect of any prejudice, loss, or damage, sustained for such proportion of his lands next adjoining to the navigation as should be made use of for the purposes of the Act, in case the undertakers of the navigation should not have agreed beforehand, & satisfied the party so damaged. The proprietor of the navigation having brought trespass against the owner of the adjoining land, for cutting trees upon the bank of a channel made under this Act, the judge at the trial admitted evidence of acts of ownership exercised by the proprietors of the navigation upon other parts of the banks where the adjoining land did not belong to deft., & afterwards left the question to the jury, upon conflicting acts of ownership which were given in evidence; but stated, in the course of his address, that it might be assumed from the length of time that had elapsed since the passing of the Act, & from the provision that no land of any person was to be used until satisfaction was made to the owner, that some agreement had been made, by which all the land used for the purposes of the navigation by the proprietors thereof had been sold to them by the land owners. A rule having been obtained for a new trial:—*Held*: (1) by virtue of the provisions of this Act of 1664, the proprietors of the navigation did not necessarily acquire such an interest in the soil in a bank adjoining to & formed out of the earth excavated from a new channel, made for the first time under the Act, as would enable them to maintain trespass; (2) acts of ownership by the proprietor of the navigation upon different parts of the bank contiguous to new channels of the navigation made under the Act of Parliament were not admissible in evidence made under the Act of Parliament were not admissible in evidence to show that the soil in the bank in question belonged to the proprietor of the navigation.—*HOLLIS v. GOLDFINCH* (1823), 1 B. & C. 205; 2 Dow. & Ry. K. B. 316; 1 L. J. O. S. K. B. 91; 107 E. R. 76.

*Annotations*.—As to (1) *Reid*. Rochdale Canal Co. v. King (1849), 18 L. J. Q. B. 293. As to (2) *Consol.* River Lee Navigation Conservators v. Burton (1881), 6 App. Cas. 685. *Generally*, *Mentd.* Portmore v. Bunn (1823), 1 B. & C. 694; Badger v. South Yorkshire Ry. & River Dun Co. (1858), 1 E. & E. 359.

**134. Owner of sub-soil.—Against exclusive possessor of surface.**—The owner of the subsoil may maintain trespass against a person who has the exclusive right to the possession of the surface, for making holes of such a depth as to interfere with the right of the owner in the subsoil. Where the injury merely affects the surface, as in the case of a riding on a horse, the owner of the subsoil cannot in such case, sue in trespass.—*COX v. GLUE, COX*

against the co. for injuring ornamental shade trees on the street in front of his property while constructing or working the telephone line, there being nothing in the evidence to rebut the presumption of ownership *ad medium* or to show that the street had been

laid out under a statute of the province or dedicated to the public before the passing of any Expropriation Act.—*O'CONNOR v. NOVA SCOTIA TELEPHONE CO.* (1893), 22 S. C. R. 276.—*CAN.*  
*g. Whether plaintiff in possession under illegal decree of civil court.*—

*v. SAINT, COX v. MOUSLEY* (1848), 5 C. B. 533; 17 L. J. C. P. 162; 10 L. T. O. S. 374; 12 Jur. 185; 130 E. R. 987.

*Annotations*.—*Consol.* Richards v. Davies, [1921] 1 Ch. 90; Back v. Daniels, (1925) 1 K. B. 526. *Reid*. Pilgrim v. Southampton & Dorchester Ry. (1848), 12 L. T. O. S. 127.

**135. Trustees of turnpike road.**—By a provisional order of the General Board of Health Public Health Act 1848 (c. 63, except sect. 50 & a part of sect. 88 was ordered to be put in force, when such order should be confirmed by Act of Parliament within the borough of T., & the council of the borough were by the order appointed the local board of health, & by the order Towns Improvement Clauses Act, 1847 (c. 34), s. 63, was also ordered to be incorporated with the local improvement Act of the borough. Sect. 50 of Towns Improvement Clauses Act enacts that "the trustees of any turnpike road shall not collect any toll on any road within the limits of the special Act, or lay out any money thereon."

The provisional order, so far as the same was authorised by the Public Health Act, was afterwards confirmed by 14 & 15 Vict. c. 103, & made absolute:—*Held*: the trustees of a turnpike road were entitled to maintain trespass for the removal of turnpike gates within the borough of T. by the local board of health acting under Towns Improvement Clauses Act 1847 (c. 34), s. 63, & believing that the same was legally incorporated by the provisional order into their local improvement Act.—*CLAYTON v. FENWICK* (1856), 6 B. & B. 114; 25 L. J. Q. B. 226; 27 L. T. O. S. 119; 20 J. P. 180; 2 Jur. N. S. 635; 119 E. R. 807.

*Annotations*.—*Mentd.* Moseley v. Ely L. B. of Health (1856), 3 Jur. N. S. 42; *It. v.* Tunstall & Bosley Turnpike-road Trustees (1856), 27 L. T. O. S. 184; N. E. Ry. v. Tyne-mouth Corp'n. (1868), L. R. 3 Q. B. 723.

**136. Owner dedicating soil to public purposes.**—*Semble*: a power to grant a lease *prima facie* implies ownership; & a dedication of land by the owner of the soil to public purposes does not prevent an encroaching stranger being liable to an action of trespass or ejectment.—*THOMPSON v. WEST SOMERSET MINERAL RY. CO.* (1857), 29 L. T. O. S. 7; 5 W. R. 296.

**137. Person having equitable interest.**—The receiver of an estate, in which plff. had an equitable interest, under a settlement vesting it in trustees, let deft. into possession of the premises under an agreement with himself, in writing, in which he described himself as agreeing, "on behalf of the estate," to let for a term of years. Plff. declining to sanction any other than a yearly letting, a correspondence ensued between him & deft., in which the latter intimated that, as he could not get a lease, he should leave as soon as he could, & he did leave before he had been six months in possession:—*Held*: he was not liable to plff., either in trespass or use & occupation; & *semble*, he was not liable at all.

Plff. had not any legal title, & could not maintain trespass (*MARTIN, B.*).—*SLOPER v. SAUNDERS* (1860), 29 L. J. Ex. 275.

*Annotation*.—*Mentd.* *Re* De Keyzers Royal Hotel, De Keyzers Royal Hotel v. R., [1919] 2 Ch. 197.

**138. Managers of non-provided schools.—Must have special arrangement with owner.**—Managers appointed under Education Act, 1902 (c. 42), of a non-provided school have not such possession of the school building, in the absence of a special

UNIT NARAIN SINGH v. SHIB RAI (1898), 1 L. R. 20 All. 198.—*IND.*

*h. Mining lease applicant who has not complied with regulations.*—Appet. for a mining lease, who has not complied with the regulations in force as to the manner in which ground



*Sect. 3.—Right to relief: Sub-sect. 4, A., B., C., D., E., F., G. & H. (a).]*

arrangement with the owner, as will support an action of trespass.

The local education authority having ceased to maintain a non-provided school, sent their inspector, who informed the teachers & the children that the school would be closed, & told the children that they were to go to another school, & offered to the teachers employment, which they accepted, in other schools; & he wrote in the log book, "School closed, teachers transferred." The managers brought an action against the local education authority claiming damages for trespass & illegal acts in closing the school & inducing the teachers to leave the service of the managers without due justification:—*Held*: the managers not having pleaded or proved any special arrangement with the owner of the school building giving them possession in a legal sense, could not maintain the action.—*BLENCOWE v. NORTHAMPTONSHIRE COUNTY COUNCIL*, [1907] 1 Ch. 504; 76 L. J. Ch. 270; 96 L. T. 385; 71 J. P. 258; 23 T. L. R. 319; 51 Sol. Jo. 277; 5 L. G. R. 551.

*Annotation*.—*Mentd.* Wilford v. West Riding of Yorkshire County Council, [1908] 1 K. B. 685.

*Assignee in bankruptcy.*—*See* BANKRUPTCY, Vol. V., pp. 972, 973, Nos. 7960-7965.

*Commissioner of Sewers.*—*See* SEWERS & DRAINS, Vol. XLII, pp. 55, 56, No. 407.

*Ecclesiastical rights—Over churchyard.*—*See* BURIALS, Vol. VII., pp. 526, 533, Nos. 63-67, 133, 134; *ECCLESIASTICAL LAW*, Vol. XIX., p. 264, Nos. 476, 477.

*Possession of church—Churchwardens & vicar.*—*See* ECCLESIASTICAL LAW, Vol. XIX., pp. 286, 287, Nos. 757-765.

*Married women—Protection of own property.*—*See* HUSBAND & WIFE, Vol. XXVII., pp. 89, 259, Nos. 695, 2284.

**139. Mortgagee.**—Trespass will not lie against the occupier of land at the suit of the mtgee. who has never been in actual possession or been seised of the land has not obtained a judgment in ejectment either by default or by verdict.—*TURNER v. CAMERON'S COALBROOK STEAM COAT CO.* (1850), 5 Exch. 932; 20 L. J. Ex. 71; 16 L. T. O. S. 285; 155 E. R. 407.

*Annotations*.—*Refd.* Neate v. Harding (1851), 6 Exch. 349;

applied for should be marked out, cannot maintain an action for trespass against the holders of miners' rights, for entering on the land & marking out claims upon it in the manner prescribed by the regulations.—*HIGGINS v. DYER* (1875), 1 N. Z. Jur. Mining Law 26.—N.Z.

#### PART II. SECT. 3, SUB-SECT. 4.—D.

**141 i. Action between tenants in common—General rule.**—Where pltf. & deft. being each possessed of a farm agreed to work them together & divide the profits arising from them at the end of the season, & before the harvest deft. was dispossessed of his farm by ejectment, & pltf. thereupon gave him notice that he would not divide his crops with him, notwithstanding which deft. entered pltf.'s farm & took away his share of the crop.—*Held*: pltf. could not maintain trespass against him.—*WEMP v. MORMON* (1846), 2 U. C. R. 146.—CAN.

**141 ii.** ———.—One tenant in common may commit trespass by expelling his co-tenant & taking the whole enjoyment of the estate wrongfully to himself.—*PETRIE v. TAYLOR* (1847), 3 U. C. R. 457.—CAN.

**141 iii.** ———.—One tenant in common cannot sustain an action of trespass *quare clausum fregit* against

his co-tenant.—*ELLIOTT v. SMITH* (1858), 3 N. S. R. (2 Thom.) 338.—CAN.

**141 iv.** ———.—One tenant in common cannot maintain trespass or trover against his co-tenant for merely reaping & harvesting the crop; but he may, if his co-tenant has consumed the crop, or dealt with it so that he cannot retake it or pursue his remedies against the persons who have possession of it.—*BRADY v. ARNOLD* (1868), 19 C. P. 42.—CAN.

**141 v.** ———.—*WOODS v. GAMMON* (1890), 22 N. S. R. (10 R. & G.) 362.—CAN.

**141 vi.** ———.—*BOUDROIT v. SAMYSON* (1907), 41 N. S. R. 490.—CAN.

**141 vii.** ———.—Where a stranger to the property built upon certain land jointly held by several co-owners, & some of the co-owners purchased from the stranger the building so erected.—*Held*: the purchasers were *quoad* the building in suit, trespassers; & a suit might be maintained by the remaining co-owner to be put into joint possession of the building; & this though it was not shown that any special damage had been suffered by pltf. by reason of the building.—*MUHAMMAD ALI JAN v. FAIZ BAKSH*

*Harrison v. Blackburn* (1864), 10 Jur. N. S. 1131; *Phillips v. Homfray* (1883), 24 Ch. D. 439; *Wallis v. Hands*, [1893] 2 Ch. 75. *Mentd.* Blatchford v. Cole (1858), 5 Jur. N. S. 412.

—[*See, also*, MORTGAGE, Vol. XXXV., pp. 393, 394, Nos. 1362, 1363.

**Partnership property—Dissolution of partnership—Trespass by former partner.**—*See* PARTNERSHIP, Vol. XXXVI., p. 499, No. 1654.

#### B. Rights of Common.

*See* COMMONS, Vol. XI., pp. 1 *et seq.*

#### C. Copyholds.

**140. Copyholder with right to cut underwood.**—Underwood is a thing of inheritance & perpetuity, & may be granted in fee by copy of court roll; & will support trespass *quare clausum fregit*.—*HOE v. TAYLOR* (1595), Cro. Eliz. 413; *Moore, K. B.* 355; 4 Co. Rep. 30 b; *Jenk.* 274; 78 E. R. 655.

*Annotations*.—*Apld.* Wilson v. Mackreth (1766), 3 Burr. 1824. *Refd.* Heydon & Smiths Case (1610), 13 Co. Rep. 67; *Musgrave v. Gave* (1741), Willes, 319.

**Customary heir of copyhold—Before admittance.**—*See* COPYHOLDS, Vol. XIII., p. 108, Nos. 1375-1379, 1382.

—*After admittance.*—*See* COPYHOLDS, Vol. XIII., p. 108, No. 1384.

**Action for cutting trees.**—*See* AGRICULTURE, Vol. II., p. 70, Nos. 467, 468.

**Rights of common.**—*See, generally*, COMMONS, Vol. XI., pp. 1 *et seq.*

#### D. Co-Owners.

**141. Action between tenants in common—General rule.**—*RICHT v. HALL* (1661), 1 Keb. 18; 83 E. R. 785.

**142.** ———.—*NOYE v. REED*, No. 88, *ante*.

**143.** ———.—Trespass *quare clausum fregit* lies by one of several tenants in common against his co-tenant, where there has been an actual expulsion.—*MURRAY v. HALL* (1849), 7 C. B. 441; 18 L. J. C. P. 161; 12 L. T. O. S. 513; 13 Jur. 262; 137 E. R. 175.

*Annotations*.—*Refd.* Stedman v. Smith (1857), 26 L. J. Q. B. 314; *Henderson v. Mears* (1859), 33 L. T. O. S. 202.

**144.** ———.—*Necessity for ouster.*—*WILKINSON v. HAYGARTH*, No. 339, *post*.

(1896), 1 L. R. 18 All. 361.—IND.

**141 viii.** ———.—One tenant in common of a right of way cannot maintain trespass against another tenant in common for the user of such way.—*HOYTK v. HOGAN* (1840), Arn. M. & O. 4.—IR.

**141 ix.** ———.—*JONES v. READ* (1876), 1 L. R. 10 C. L. 315.—IR.

**141 i.** ———.—*Necessity for ouster.*—Pltf. & deft. were tenants in common of a certain dwelling house, & deft. took off the doors & carried them away, broke down partitions & did other injuries to the property, whereupon pltf. brought an action for trespass against him. Deft. pleaded that pltf. was not in possession of the house, but that he was & is in sole possession:—*Held*: the action could be maintained, & the acts of deft. amounting to an ouster there should be judgment for the pltf.—*MOORE v. MOORE* (1874), 9 N. S. R. (3 G. & O.) 436.—CAN.

**144 ii.** ———.—*ZWICKER v. MORASH* (1900), 34 N. S. R. 555.—CAN.

**144 iii.** ———.—Laying a drain in land, & the incidental temporary interference with the soil necessary for that purpose, cannot be regarded as an ouster or destruction or an act of waste, & will not entitle a tenant in common of the land to maintain an action



**145. — Pulling down old & rebuilding new wall.]**—The common user of a wall separating adjoining lands belonging to different owners, is *prima facie* evidence that the wall, & the land on which it stands, belongs to the owners of those adjoining lands in equal moieties as tenants in common. Where such an ancient wall was pulled down by one of the two tenants in common, with the intention of rebuilding the same, & a new wall was built of a greater height than the old one; it was held, that this was not such a total destruction of the wall as to entitle one of the two tenants in common to maintain trespass against the other.—*CUBITT v. PORTER* (1828), 8 B. & C. 257; 2 Man. & Ry. K. B. 267; 6 L. J. O. S. K. B. 300; 108 E. R. 1039.

*Annotations:—***Consid.** Murray v. Hall (1849), 7 C. B. 441. **Apld.** Standard Bank of British South America v. Stokes (1878), 9 Ch. D. 68; Watson v. Gray (1880), 14 Ch. D. 192. **Consid.** Jolliffe v. Woodhouse (1894), 10 T. L. R. 553; Newton v. Huggins (1906), 50 Sol. Jo. 617; Adams v. Marylebone B. C. (1907) 2 K. B. 822; Mason v. Fulham Corp., [1910] 1 K. B. 631; Vine v. Wenham (1915), 79 J. P. 423. **Refd.** Bradlee v. London Corp., (1842), 2 Dowl. N. S. 161; Colbeck v. Girdlers Co. (1876), 1 Q. B. D. 234; Minturn v. Bary (1912), 76 J. P. 441. **Mentd.** Holmes v. Bellingham (1859), 6 Jur. N. S. 534.

**146. —**—Where two persons are tenants in common of a field, the merely putting, by one of them, a lock upon the gate, not shown to be kept locked, will not constitute an ouster so as to enable the co-tenant in common to maintain trespass. There must, for such a purpose, be other circumstances attending the act. A. & B. were, without the knowledge of C, tenants in common of lands. C. had held them under A. In Mar. 1807, C. received from B. notice to quit at the end of six months. He did not quit, but afterwards made an agreement with A.'s agent for the renewal of the tenancy, continued the cultivation of the land, & paid the rent under the new lease. While C. was still in possession B. demised the premises to D. as from Mar. 1808, for six months. In June, 1808, D. entered the land, cut the grass, put a lock on the gate, & carried away the grass, & stacked it as hay:—**Held:** assuming C. & D. to be tenants in common, these circumstances did not amount to an ouster, so as to enable C. to maintain trespass against his co-tenant in common, D.—*JACOBS v. SEWARD* (1872), L. R. 5 H. L. 464; 41 L. J. C. P. 221; 27 L. T. 185; 36 J. P. 771, H. L.

*Annotation:—***Refd.** Birkin v. Smith, [1909] 2 K. B. 112.

**147. — What amounts to ouster.—Digging up & removing clay.]**—*WILKINSON v. HAYGARTH*, No. 339, *post*.

**148. Joint ownership.—Owner of playing field.—Field hired by committee.—Plaintiff & defendant members of committee.]**—Trespass for assault. Plea: that deft. & twenty-one others were possessed of a close, & were thereon lawfully playing a lawful game at cricket: that pltf. came unlawfully on the close, & interrupted deft. & the twenty-one in playing the lawful game, whereupon deft., in his own right & by authority of the twenty-one, requested him to depart from the close, & desist from disturbing their game, which he refused:

against another tenant in common.—*MOHENCHAND NEMOHAND GUJAR v. ISAKBHAI TANAI* (1900), 1 L. R. 25 Bom. 248.—**IND.**

**k. — Qu.: whether any & what acts short of the destruction of the joint property will enable one tenant in common to sustain trespass against his co-tenant.**—*WIGGINS v. WHITE* (1830), 2 N. B. R. (Ber.) 179.—**CAN.**

**1. Whether tenants in common may sue separately.]**—Tenants in common cannot sue separately for a trespass to their land, but each one may, I

think, separately defend his possession, & do any act which all might do jointly in defence of that possession, short of maintaining an action in respect of it.—*ESSON v. MAYBERRY* (1841), 1 N. S. R. (1 Thom.) 186.—**CAN.**

**PART II. SECT. 3, SUB-SECT. 4.—H. (a).**

**m. Person with clean certificate of title.]**—A tenant in possession under an agreement with a person who subsequently obtains a clean certificate of the land in respect of which such

whereupon deft. removed him out of the close. *De injuria*. The facts were that deft. & twenty-one others were playing, but were not otherwise possessed of the field: & pltf. interrupted them by remaining on the ground, occupied by the players, when requested to leave it:—**Held:** (1) the plea justified the trespass in right of the possession of the close, & was therefore not proved. *Semble:* that the facts might have constituted a justification in defence of the lawful game, if so pleaded.

By agreement between A., owner of a close, & the members of a committee of a cricket club, A. agreed to let to the committee, & the committee to hire, the close, to be used as a cricket ground by the club, & for that purpose only. Pltf. & deft. were members of the committee. Pltf. having sued deft. for an assault in removing pltf. from the close, deft. pleaded possession of the close in himself & justified the removal: pltf. replied that he & deft. were jointly possessed:—**Held:** (2) the facts supported this replication.—*HOLMES v. BAGGE* (1853), 1 E. & B. 782; 22 L. J. Q. B. 301; 21 L. T. O. S. 256; 17 J. P. 631; 17 Jur. 1095; 118 E. R. 620.

**Action against third party.—Right of defendant to plead tenancy in common.]**—*See REAL PROPERTY*, Vol. XXXVIII., p. 608, Nos. 429, 430.

**Particular actions for trespass.—Cutting grass.]**—*See AGRICULTURE*, Vol. II., p. 57, No. 314.

**— Cutting trees.]**—*See AGRICULTURE*, Vol. II., pp. 87, 88, Nos. 682–690.

**— Trespass to party walls.]**—*See BOUNDARIES*, Vol. VII., pp. 298, 299, Nos. 224–235.

*E. Growing Crops.*

*See AGRICULTURE*, Vol. II., pp. 37, 52, 53, 56, 57, Nos. 205, 280, 281, 285, 310, 314.

*F. Rights relating to Easements.*

*See EASEMENTS*, Vol. XIX., pp. 1 *et seq.*

*G. Rights of Fishery.*

*See FISHERIES*, Vol. XXV., pp. 1 *et seq.*

*H. Landlord and Tenant.*

(a) *Landlord.*

**149. Lessor of tenant at will.]**—*ANON.* (1440), Y. B. 19 Hen. 6, fo. 44, pl. 94.

*Annotations:—***Mentd.** Waterer v. Freeman (1619), Hob. 266; Ashby v. White (1703), 2 Ld. Raym. 938.

**150. Feoffee from lessor.—Against tenant at will.]**—A feoffment, with livery of seisin made on the land determines a tenancy at will, though the tenant be not present, nor assenting to the feoffment; & the feoffee may maintain trespass against the tenant at will who has entered on his possession.—*BALL v. CULLIMORE* (1835), 2 Cr. M. & R. 120; 1 Gale, 96; 5 Tyr. 753; 4 L. J. Ex. 137; 150 E. R. 51.

*Annotation:—***Refd.** Hogan v. Hand (1801), 14 Moo. P. C. C. 310.

**151. Lessor entering after expiration of term.—Rights against late tenant.—Or persons claiming under him.]**—Lessor, having entered at the expira-

tion of the term, is not a trespasser as against such person, until a fresh tenancy is created by possession & payment of rent.—*HUNTER v. PLAYER* (1875), 9 S. A. L. R. 100.—**AUS.**

**n. Whether action may be brought —Against tenant.—Trespass committed during tenancy.]**—Where deft., as agent of a third party, during the occupancy of a tenant of pltf., put up a fence on pltf.'s land, which continued there after pltf. resumed possession at the expiration of the tenancy:—**Held:** pltf. could not bring trespass against

*Sect. 3.—Right to relief: Sub-sect. 4, H. (a) & (b), L., J., K. & L. Sect. 4; Sub-sect. 1.]*

tion of the term, might sue in trespass persons claiming under the late tenant as well as the late tenant himself.—*HEY v. MOORHOUSE* (1839), 6 Bing. N. C. 52; 8 Scott, 156; 9 L. J. C. P. 113; 133 E. R. 20.

*Annotation:—Refd. Newton v. Hailand* (1810), 1 Man. & G. 644.

**152. Lessor under building agreement with tenant—Tenant to occupy building when completed.]—**(1) Mere possession is sufficient title against a wrongdoer.

(2) If the tenant of a close agrees that the landlord shall build a house on such a close, which the tenant is to rent from the landlord when the building is completed; this gives the landlord a sufficient possession to entitle him to bring trespass against a wrongdoer.—*ANON.* (1849), 13 L. T. O. S. 325.

**Action for cutting trees & timber.]—See AGRICULTURE, Vol. II., pp. 75, 95, 112, No. 539, 540, 740, 942-946.**

**Waste.]—See LANDLORD & TENANT, Vol. XXXI., pp. 356, 360, Nos. 4987-4989, 5061.**

(b) *Tenant.*

**153. Tenant at will.]—ANON.** (1440), Y. B. 19 Hen. 6, fo. 44, pl. 94.

*Annotations:—Mentd. Waterer v. Freeman* (1619), Hob. 266; *Ashby v. White* (1703), 2 Ld. Raym. 938.

**154. Necessity for entry.]—**Entry is not necessary to the vesting of a term of years in the lessee; but, for the purpose of maintaining an action of trespass, the lessee must enter, since that action is founded on the actual possession.—*HARRISON v. BLACKBURN* (1861), 17 C. B. N. S. 678; 5 New Rep. 90; 34 L. J. C. P. 109; 11 L. T. 453; 10 Jur. N. S. 1131; 13 W. R. 135; 144 E. R. 272.

*Annotations:—Refd. Wallis v. Hands*, [1893] 2 Ch. 75. **Mentd.** *Mitchele v. Westaway* (1864), 34 L. J. C. P. 113; *Debenham v. Digby* (1873), 28 L. T. 170; *Hawke v. Dunn*, [1897] 1 Q. B. 579.

**155. —.]—**The grant of a new lease in possession to a stranger with the oral assent of the lessee under a prior subsisting lease does not operate as a surrender at law of the prior lease, unless the tenant under such lease gives up possession to the new tenant at or about the time of the grant of the new lease to which he assents.

In 1884 N. granted a lease of certain coal mines

to P. & others for a term of forty-five years from June 24, 1884. In 1887 N., with the oral assent of the lessees, granted a new lease to pltf. of, amongst other property, the same coal mines, for a term of forty-two years from June 24, 1887, but pltf. did not enter into possession of the mines under this lease, or do any working thereunder according to the covenants. The lease of 1884 was subsequently assigned by the lessees under that lease, & the coal mines comprised therein were worked by the assignees. Pltf. brought an action against N. & the assignees of the lease of 1884, claiming a declaration of his title & damages against N. for breach of the covenant for quiet enjoyment implied in the lease of 1887, & damages against the assignees of the lease of 1884 who had worked the coal. Pltf. alleged a binding agreement between him & the lessors of the 1884 lease, which precluded in equity the lessees & those claiming under them with notice from setting up the lease of 1884 against him:—**Held:** the lease of 1884 was not surrendered by operation of law; there was no such agreement between pltf. & the lessees of the 1884 lease as alleged by pltf.; pltf. having only an *interesse termini*, & never having been in possession, he could not maintain an action on the covenant for quiet enjoyment, or an action for trespass, or for damages in respect of trespass.—*WALLIS v. HANDS*, [1893] 2 Ch. 75; 62 L. J. Ch. 586; 68 L. T. 428; 41 W. R. 471; 9 T. L. R. 288; 37 Sol. Jo. 284; 3 R. 351.

*Annotation:—Refd. Metcalfe v. Boyce*, [1927] 1 K. B. 758.

**156. — Lessee from tenant pur autre vie—Death of tenant pur autre vie.]—GEARY v. BEAR-CROFT** (1667), 1 Sid. 346; Cart. 57; O. Bridge. 481; 1 Lev. 202; 82 E. R. 1148; *sub nom.* *GEERY v. BEAR-CROFT*, 2 Keb. 148; *sub nom.* *BEAR-CROFT v. GEERY*, 2 Keb. 250, 285.

*Annotations:—Refd. Hadfield's Case* (1873), L. R. 8 C. P. 306. **Mentd.** *Burgess v. Wheate, A.-G. v. Wheate* (1759), 1 Eden, 177.

**157. Lessee under void lease.]—POWELL v. GODDARD** (1669), 2 Keb. 513; 84 E. R. 321.

**158. — Lease ultra vires highway authority.]—COVERDALE v. CHARLTON**, No. 116, ante.

**159. Lessee under unexecuted lease.]—**To entitle a party to maintain trespass for the mesne profits, it is not necessary to execute an *habere*, if pltf. has been let into possession by deft.—*CALVERT v. HORSEFALL* (1803), 4 Esp. 167; 170 E. R. 678.

deft. for the act done by him during the continuance of the lease.—*BOULTON v. JARVIS* (1812), 3 Ont. Dig. 6932.—**CAN.**

**a. — Against third party—Tenant in possession.]—**When promises have been let, & the tenant is in possession, the landlord cannot sue a person for breaking & entering the premises & pulling down the fences, unless that person has at some other time removed the rails & converted them to his own use.—*BLEEKER v. COLEMAN* (1816), 3 U. C. R. 172.—**CAN.**

**p. Landlord may bring action—If damage done to reversion.]—LEADLEY v. CRICKSHANK** (1901), 7 Terr. L. R. 170.—**CAN.**

**q. — —.]—**The law of England, that a landlord who has parted with his possession to a tenant cannot sue in trespass for damage to the property, unless the wrongful act complained of imports a damage to the reversionary interests, does not apply to landlords in India.—*VANKA-TACHALAM CHETTI v. ANDIAPPAN AMMALAM* (1879), 1 L. R. 2 Mad. 232.—**IND.**

**r. — For purpose of putting lessee into possession.]—**A landlord, though

he has given a lease to a third person, is entitled, for the purpose of putting his lessee in possession, to maintain a suit to eject a trespasser.—*DAMODAR PRASAD TEWARI v. LACHMI PRASAD SINGH* (1928), 1 L. R. 7 Pat. 496.—**IND.**

**t. Occupation of house after notice to quit.]—**Where deft. occupied & persisted in occupying after notice to quit a dwelling-house on pltf.'s land:—**Held:** pltf. was entitled to an injunction as well as damages for the trespass.—*BEALE v. LAWLER* (1912), 32 N. Z. L. R. 426.—**N.Z.**

**PART II. SECT. 3, SUB-SECT. 4.—H. (b).**

**a. General rule.]—**The lessee of a farm, although not empowered by the owner to sue, has a *locus standi* to sue for damages for trespass upon the land.—*THOROV v. NIEUWENHUIZEN* (1898), 15 S. C. 27.—**S. AF.**

**153 i. Tenant at will.]—NELSON v. COOK** (1851), 12 U. C. R. 22.—**CAN.**

**153 ii. —.]—**A party who has entered into possession of land under an agreement to purchase, & has refused to accept a deed of the land tendered to him, on the ground that he does not

consider the deed a proper one, has not by such a refusal so changed the character of his position as a tenant at will as to put himself in the position of a trespasser, & cannot be ejected without demand of possession.—*LEWER v. McCULLOCH* (1876), 10 N. S. R. (1 R. & C.) 315.—**CAN.**

**b. Closing of door.]—**Pltf. leased certain cellars & a passage to deft. On one side of the passage was a door standing in a recess in the wall. The recess was part of the premises leased to deft., but the door opened into & was hung on premises in pltf.'s occupation. The trespass complained of was the closing of the door by deft. There was evidence that the door could not be closed without going on or reaching over pltf.'s premises:—**Held:** whatever rights deft. might have had of blocking up the doorway, he was not entitled to go on to pltf.'s premises in order to shut the door.—*CURRAN v. FERRIER* (1883), 4 N. S. W. L. R. (L.) 280.—**AUS.**

**c. Lessee in possession under unregistered lease.]—**A lessee in possession under an unregistered lease may take proceedings for trespass where such trespass has been committed by

**160. Tenant from year to year—Trespass before tenant's bankruptcy.]—**Trespass *quare clausum fregit* may be maintained against a stranger by a tenant of the land for a trespass committed before his bkpcy.—*CLARK v. CALVERT* (1819), 8 Taunt. 742; 3 Moore, C. P. 96; 120 E. R. 573.

*Annotations:—*Refd. *Rogers v. Spence* (1844), 13 M. & W. 571; *Beckham v. Drake* (1849), 2 H. L. Cas. 579; *Rose v. Buckett*, [1901] 2 K. B. 449.

**161. Lessee from tenant for life—Death of tenant for life—Necessity for act showing intention to continue possession.]—**Where the interest of a tenant is determined by the death of a tenant for life under whom he holds, the possession ceases with the interest, & he cannot maintain trespass unless he does some act indicating an intention to continue the possession.—*BROWN v. NOTLEY* (1848), 3 Exch. 219; 18 L. J. Ex. 39; 12 L. T. O. S. 222; 154 E. R. 823.

**162. Lessor retaining control of premises—Control of outer door.]—**It is necessary to establish some criterion, & it is not always, perhaps, very easy to find one; but the one which has been adopted in such cases, & which is, perhaps, the most convenient, & the only one is, whether the landlord retains the control of the outer door, & has shown by his retaining the control of the outer door that he has the control of the whole of the premises; so that, although he may be liable to an action upon the breach of his contract to allow the tenant to occupy a portion of the premises so let to the tenant, yet the tenant could not maintain trespass against the landlord, because the landlord has retained in himself the dominion & control over the whole of the house (*COCKBURN, C.J.*).—*R. v. ST. GEORGE'S UNION* (1871), L. R. 7 Q. B. 90; 41 L. J. M. C. 30; 36 J. P. 550; 20 W. R. 179; *sub nom.* *MUTUAL TONTINE WESTMINSTER CHAMBERS ASSOCN. LTD. v. ST. GEORGE'S UNION ASSESSMENT COMRS.*, 25 L. T. 696.

*Annotations:—*Refd. *L. & N. W. Ry. v. Buckmaster* (1875), L. R. 10 Q. B. 414; *Smith v. Lambeth Assmt. Com.* (1882), 9 Q. B. D. 585. *Mentd.* *A.-G. v. Mutual Tontine Westminster Chambers Asscn.* (1876), 1 Ex. D. 469; *Saunders v. St. Mary, Lambeth* (1891), Ryde Rat. App. (1891-93) 1.

**163. Sub-lessee—Against landlord—Warrant of possession obtained against lessee—Sub-lessee not a party.]—**A warrant of possession obtained under

County Courts Act, 1856 (c. 108), s. 50, by a landlord proceeding in the county ct. against his tenant, but not against the person actually in possession, is not conclusive against the latter, who may notwithstanding the warrant bring an action of trespass against the landlord, if the landlord had not in fact a right to the possession of the premises.—*HODSON v. WALKER* (1872), L. R. 7 Exch. 55; *sub nom.* *HODSON v. WALKER*, 41 L. J. Ex. 51; 25 L. T. 937; 20 W. R. 489.

**Tenant at sufferance.]—**See *LANDLORD & TENANT*, Vol. XXXI., p. 47, Nos. 1953, 1954.

**Forcible entry by landlord.]—**See *LANDLORD & TENANT*, Vol. XXXI., pp. 547, 548, Nos. 6939-6947.

**Unlawful dispossession.]—**See *LANDLORD & TENANT*, Vol. XXXI., pp. 549, 550, Nos. 6960, 6967.

**Exception of woods & trees from premises demised.]—**See *LANDLORD & TENANT*, Vol. XXXI., p. 30, Nos. 1818-1823.

### I. Licencee.

See, generally, *LANDLORD & TENANT*, Vol. XXX., pp. 500-522.

**164. Licencee to build—With right to call for lease.]—***FRAMPTON v. WHITE (T.) & SONS* (1896), 40 Sol. Jo. 275.

### J. Mineral Rights.

See *MINES & MINERALS*, Vol. XXXIV., pp. 651, 652, Nos. 488-498.

### K. Rights of Reversioner.

See *BOUNDARIES*, Vol. VII., pp. 301, 302, Nos. 217, 248; *EASEMENTS*, Vol. XIX., pp. 185, 186, Nos. 1349-1371; *NUISANCE*, Vol. XXXVI., pp. 206-209, Nos. 480-515.

### L. Rights relating to Trees.

See *AGRICULTURE*, Vol. II., pp. 63-93.

## SECT. 4.—TRESPASS AB INITIO.

### SUB-SECT. 1.—IN GENERAL.

**165. What amounts to trespass ab initio—Abuse of lawful authority.]—**(1) When an entry, autho-

his lessor.—*PORR v. MONGSTON* (1895), Udal, 333.—**FIJI.**

**d. Person working farm on shares.]—**A person working a farm on shares, & occupying part of the house jointly with the owner of the farm, has not such a tenancy as to prevent the owner of the farm from maintaining trespass on the land.—*WILSON v. APTHERTON* (1853), 7 N. B. R. (2 All.) 653.—**CAN.**

**e. Lessee of pew.]—***JOHNSTON v. ST. ANDREW'S CHURCH, MONTREAL (MINISTERS & TRUSTEES)* (1877), 1 S. C. R. 235; 3 App. Cas. 159.—**CAN.**

**f. Lessee of grazing.]—***WEST v. MAYLAND (Man.)* (1913), 24 W. L. R. 573; 4 W. W. R. 851; 23 Man. L. R. 488.—**CAN.**

**g. Tenant from year to year.]—**A tenant from year to year, evicted by civil-bill decree, but still in actual occupation, entered into an agreement with the landlord, by which, according to its true construction, it was agreed that he should thenceforth be tenant from year to year at a rent to be ascertained by three persons named; & those persons having declined to determine the amount of the rent, & the tenant having refused to pay an increased rent demanded by the landlord, the latter took possession under the decree:—*Held:* the tenant was entitled to maintain trespass against the landlord.—*MC CREESH v. MCGOUGH* (1873), L. R. 7 C. L. 236.—**IR.**

**h. Right of tenant against landlord**

*Unauthorised trespasses.]—*A landlord having in a lease reserved right to work coal, etc., on payment of damages occasioned by his operations:—*Held:* the tenant was not entitled to damages for injury by unauthorised trespasses by the colliers.—*YOUNG v. COLT'S TRUSTEES* (1832), 10 Sh. (Ct. of Sess.) 666.—**SCOT.**

### PART II. SECT. 3, SUB-SECT. 4.—I.

**k. Licencee.]—**Trespass to land cannot be brought by a mere licensee with no right to exclusive possession.—*LONG v. DRINAN* (1877), Knox, 152.—**AUS.**

**l. —.]—***VAUGHAN v. BENALLA SHIRE* (1891), 17 V. L. R. 129.—**AUS.**

**m. —.]—***COLE v. BRUNT* (1874), 35 U. C. R. 103.—**CAN.**

**n. —.]—***WHITFORD v. ARMSTRONG* (1906), 2 E. L. R. 54.—**CAN.**

**o. —Of Crown lands.]—**A licensee of Crown land, without authority to cut & take away timber therefrom, may maintain an action on the case against a person who wrongfully cuts the timber, in consequence of which the licensee sustains damage.—*BECKWITH v. MCPHELM* (1852), 7 N. B. R. (2 All.) 501.—**CAN.**

### PART II. SECT. 3, SUB-SECT. 4.—J.

**p. Miners' rights.]—***AN TAN v. KAPATZO* (1875), 1 N. Z. Jur. Mining Law 16.—**N.Z.**

**q. Discharge of water & debris.]—**Where a person cannot exercise a right to discharge water & debris from a gold-mining claim without trespassing on his neighbour's land he is bound to refrain from exercising that right, & he may be held liable although he is only one of a number of persons whose united acts are doing the injury.—*McMILLAN v. GREAT EXTENDED SLUICING CO. (REGISTERED)* (1886), 1 N. Z. L. R. 377 (S. C.).—**N.Z.**

### PART II. SECT. 3, SUB-SECT. 4.—K.

**r. General rule.]—**The person having a reversionary interest in a wharf may sustain an action against the person obstructing the entrance thereto.—*CREAMER v. HOGAN* (1813), 3 N. S. R. (2 Thom.) 237.—**CAN.**

**t. —.]—**Where premises have been let, & the tenant is in possession, the landlord cannot maintain trespass against a stranger for taking down fences to make a road & hauling logs across the land where there has been no injury of a permanent character to the fences or land in question.—*CRAWFORD v. CLOWES* (1915), 43 N. B. R. 199; 24 D. L. R. 214.—**CAN.**

### PART II. SECT. 4, SUB-SECT. 1.

**a. What amounts to trespass—Abuse of lawful authority.]—***Ex p. BLACK* (1886), 7 N. S. W. L. R. (L.) 204.—**AUS.**

**b. — — —.]—**Where a person



pleaded, as to the breaking & entering the close & seizing & taking parcel of the goods & chattels, to wit, the other horse, a justification of the seizure of that horse as a heriot due in respect of another customary tenement whereof pltf.'s testator died seized. Pltfs. replied separately to each of the pleas, that defts. at the same time, place, & occasion, when they took the horse in the introductory part of that plea mentioned, also, seized & took the other horse, being the residue of the goods & chattels, under colour & pretence of the said heriot custom, & under an assertion & claim of right to seize & take the same other horse as & for the heriot custom:—*Held*: the replications were good, inasmuch as the seizure of the other horse rendered defts. trespassers *ab initio* as to the entry, as well as the seizure of the chattels.—*PRICE v. WOODHOUSE* (1847), 1 Exch. 559; 10 L. T. O. S. 191; 154 E. R. 238; *subsequent proceedings* (1849), 3 Exch. 616.

*Annotation*:—*Distd. Harrison v. Powell* (1894), 10 T. L. R. 271.

**176. Entry by police under warrant—Wrongful seizure of books & money.**—[The British Columbia Prohibition Act, 1916 (c. 49), B. C., & amending Acts, consolidated for convenience in 1920, prohibited within the Province the keeping for sale or sale of "liquor" as therein defined, exception being made of liquor kept for export & in certain other cases. Penalties were thereby imposed which were to be recovered or enforced under the Summary Convictions Act, 1915 (c. 59), B. C., save so far as the Act itself provided. The Act itself contained sections dealing with procedure, & by ss. 48 & 49 police officers were given a right to search premises without warrant & to seize liquor believed to be intended for sale in violation of the Act. The Summary Convictions Act, 1915, provided procedure for the recovery or enforcement of penalties prescribed by any Act of the Province which did not itself provide the procedure.

Appls., who were dealers in liquor as importers into & exporters from the Province, had in their warehouse there on July 15, 1920, a large stock of liquor. On a previous date a police officer had gone to the warehouse & purchased liquor, giving in payment marked money. On the date above named resp. police officers entered the warehouse & seized & removed the whole stock of liquor, together with books & papers & the marked money. A magistrate subsequently convicted applts. under Summary Convictions Act, 1915, of an offence under the Prohibition Act, finding that the whole stock of liquor in the warehouse was unlawfully kept there. Appls. sued resps. claiming replevin & other relief. At the trial applts. recovered the marked money, as to which there was no appeal. The books & papers were seized under a search warrant issued under the Summary Convictions Act, & had been returned to applts.:—*Held*: the police officers having lawfully entered applts.' premises did not become trespassers *ab initio* even if the seizure of the books, paper, & money was unlawful.—*CANADIAN PACIFIC WINE CO. v. TULEY*, [1921] 2 A. C. 417; 90 L. J. P. C. 233; 126 L. T. 78; 37 T. L. R. 944, P. C.

**Liability of sheriffs & bailiffs.**—*See EXECUTION*, Vol. XXI., pp. 479, 508, 547, Nos. 591, 840–843, 1221, 1224.

**Distress damage feasant—Abuse of distress.**—*See DISTRESS*, Vol. XVIII., pp. 448, 449, Nos. 1852–1857.

**Entry by officers of House of Commons—Under Speaker's warrant.**—*See PARLIAMENT*, Vol. XXXVI., p. 294, No. 442.

## SECT. 5.—REMEDIES.

### SUB-SECT. 1.—EXPULSION.

#### A. In General.

**177. Right to defend possession—By use of force.**—[To trespass for an assault & battery, deft. may plead that pltf. with force & arms & with a strong hand endeavoured forcibly to break & enter deft.'s close, whereupon deft. resisted & opposed such entrance, etc., & if any damage happened to pltf., it was in the defence of the possession of the said close.—*WEAVER v. BUSH* (1798), 8 Term Rep. 78; 101 E. R. 1276.

*Annotations*:—*Reidf. Poltghorn v. Wright* (1845), 8 Q. B. 197; *Jones v. Chapinan* (1849), 14 L. T. O. S. 45.

**178.** ———. (1) An assault made by a man in defence of his property is justifiable.

(2) Where A. threw a stick, which struck pltf., but it did not appear for what purpose the stick was thrown:—*Held*: it was fair to conclude that the stick was thrown for a proper purpose, & the striking of pltf. was an accident.—*ALDERSON v. WAISTELL* (1844), 1 Car. & Kir. 358.

**179.** ———. [Pltfs., a man & his wife, lived in a cottage belonging to defts., the man being in their service & being required by them to live in the cottage as part of his service & for the performance of his duties. He left their service, but refused to give up the cottage after notice to quit duly given. Thereupon by command of defts. several persons entered the cottage & removed pltfs. & their furniture, using no more force than was necessary for that purpose. In an action by pltfs. for assault, battery & trespass:—*Held*: defts. were not liable, their right of entry being a defence to civil proceedings for the acts complained of.—*HEMMINGS v. STOKE POGES GOLF CLUB*, [1920] 1 K. B. 720; 89 L. J. K. B. 744; 122 L. T. 479; 36 T. L. R. 77; 64 Sol. Jo. 131, C. A.

*Annotation*:—*Mentd. Anchor Trust Co. v. Bell*, [1926] Ch. 805.

**180.** ———. **Admission to British Museum Reading Room.**—*CHAFFERS v. TAYLOR* (1896), 12 T. L. R. 278; 40 Sol. Jo. 374, D. C.

**181.** ———. **Sufficiency of defence.**—[Trespass for assault. Plea, that defts., as the servants of W. & by his command, committed the trespass in defence of the possession & quiet enjoyment of his dwelling-house. New assignment, that the trespasses were committed out of & in a different place from the dwelling-house, to wit, in & upon a certain bridge in a certain farm, & in divers, to wit two yards, two fields, & two folds, of & in the same farm, & for another & different purpose. Plea to new assignment, that W. was possessed of the dwelling-house, & also of the bridge, yards, fields, & folds, which belonged & were adjacent to the dwelling-house; & that defts. committed the trespasses newly assigned in defence of the possession of the dwelling-house, bridge, yards, fields, & folds; & that they removed pltf. from them, & took him by the nearest & most direct way to a certain public highway near to the dwelling-house, bridge, yards, fields, & folds; & because they could not conveniently remove pltf. to such highway without passing over & across the bridge, yards, fields, & folds, they at the time in the new

## PART II. SECT. 5, SUB-SECT. 1.—A.

**1771. Right to defend possession—By use of force.**—*STROUD v. KANE* (1856), 13 U. C. R. 459.—CAN.

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assignment mentioned, necessarily & unavoidably led him over them. Replication, that W. was seised of the farm, & demised it to J. as tenant from year to year; that J. entered & being indebted to B., assigned to him, amongst other things, all the growing & other crops which then were or might thereafter be found in & about the farm, as a security for the debt, with a power for B., in default of payment, to take possession; that B. made default; that the bridge, yards, fields, & folds in the new assignment mentioned, & also a certain garden, were parcel of the farm demised to J.; that, at the time in the new assignment mentioned, W. was possessed of the garden & fields in which there were growing & other crops belonging to J.; that while J. was in possession *pltf.*, as the servant of B., entered & took possession & continued in possession of the growing crops, until W. became possessed of the bridge, yards, fields, & folds & of the garden; & that *pltf.* was removed by *defts.* from & off the bridge, etc., before a reasonable time had elapsed, & while the debt remained unpaid; & *defts.* dragged *pltf.* from the dwelling-house along the bridge & across the yards, fields, & folds, to the highway. On demurrer to the replication:—*Held*: (1) the plea to the new assignment was good, since it confessed & justified the trespasses therein alleged, namely, those committed on the bridge, yards, fields, & folds; & the stating in the plea that *defts.* removed *pltf.* to the highway, did not render that a part of the cause of action which it was necessary to justify, but was mere surplusage; (2) the replication was bad in substance, since it did not show any right in B. to retain possession of the premises after J.'s tenancy had ended.—*HAYLING v. OKEY* (1853), 8 Exch. 531; 22 L. J. Ex. 139; 20 L. T. O. S. 293; 17 Jur. 325; 1 W. R. 182; 155 E. R. 1461, Ex. Ch.

182. ——— Replication of ownership in plaintiff.]—*HAYLING v. OKEY*, No. 181, *ante*.

183. Party lawfully on premises.—Ground of expulsion.—Making disturbance.].—A. went to the house of B. to demand a debt, which B. said he could not pay. Angry words passed, & B. told A. to leave his house, this A. refused to do unless he was paid. Upon this B. sent for a police officer, & had A. locked up in the watch-house:—*Held*: if A. was making a disturbance, B. would have been justified in turning him out of his house, but that he was not justified in imprisoning him.—*GREEN v. BARTRAM* (1830), 4 C. & P. 308; 172 E. R. 717, N. P.

184. ——— Trespass for assaulting & beating *pltf.* Pleas, not guilty; secondly, that *deft.* was lawfully possessed of a public-house, into which *pltf.* entered & made a great noise & disturbance therein, whereupon *deft.* requested her to cease from making such noise, & disturbance, & to depart out of his house, which she refused to do, whereupon *deft.* gently laid his hands upon her, & removed her from the house. Replication *de injuria*:—*Held*: there being proof of the fact of a noise & disturbance in the house, in consequence of which *deft.* was legally entitled to remove *pltf.*, the motive & intention of *pltf.* in so removing her could not be inquired into under the replication *de injuria*.—*OAKES v. WOOD* (1837), 2 M. & W. 791; Murp. & H. 237; 6 L. J. Ex. 200; *subsequent proceedings*, 3 M. & W. 150.

Annotations:—*Refd.* Woods v. Durrant (1846), 16 M. & W. 149; Spotswood v. Barrow (1850), 5 Exch. 110; Allen v. Flood, (1898) A. C. 1. *Mentd.* Hooper v. Lane (1857), 6 H. L. Cas. 443.

185. ———]—To a declaration in tres-

pass for assault & battery, & false imprisonment, *deft.* pleaded, as to the assault & battery, that he was possessed of a dwelling-house, & that *pltf.* was there, making a noise & disturbance; that *deft.* requested him to leave, & to cease making such noise, etc.; but that he refused; wherefore *deft.* turned him out. Replication. That the house was a tavern, where *pltf.* lawfully was, drinking, etc., & that *deft.*, of his own wrong, committed the trespasses:—*Held*: the replication was bad.—*WEBSTER v. WATTS* (1847), 11 Q. B. 311; 17 L. J. Q. B. 73; 10 L. T. O. S. 226; 12 J. P. 279; 12 Jur. 243; 116 E. R. 492.

186. ———.]—*SHAW v. CHAIRITIE*, No. 673, *post*.

187. ——— Revocation of authority.—Auctioneer.].—An auctioneer has no right to remain on the premises for the purpose of delivering the goods sold by him to the purchasers, after his licence has been countermanded by his principal; & if he does, & his principal turns him off, the auctioneer cannot sue for the expulsion.—*TAPLIN v. FLORENCE* (1851), 10 C. B. 744; 20 L. J. C. P. 137; 17 L. T. O. S. 63; 15 Jur. 402; 138 E. R. 294.

Annotations:—*Refd.* Hurst v. Picture Theatres, [1915] 1 K. B. 1. *Mentd.* Campanari v. Woodburn (1854), 1 C. B. 400.

188. ——— Persons in theatre.].—*LEWIS v. ARNOLD*, No. 670, *post*.

Removal of passengers.].—*See* CARRIERS, Vol. VIII., pp. 113–115, Nos. 764–770.

189. Expulsion of animals.—Estray.].—When an estray comes within a manor, & walk there, this is a trespass, & the party in whose land the estray is damage feasant, may chase him out of his ground (*per* CUR.).—*PLEYDELL v. GOSMOORE* (1623), as reported in Illut. 67; 123 E. R. 1106. ———.]—*See* ANIMALS, Vol. II., pp. 214, 215, Nos. 104–106.

### B. Who may exercise Right.

190. General rule.—Party in possession.—Proof of title unnecessary.].—To trespass of assault & battery, *deft.* may justify that he was possessed of a house, & *manus mollior imposuit* in defence of his possession, without setting out his title specially; for his title or interest is not in issue.—*SKEVILL v. AVERY* (1628), Cro. Car. 138; 79 E. R. 722.

Annotation:—*Refd.* Johns v. Whitley (1770), 3 Wils. 63.

191. Master against servant.—Evidence of possession.].—Assault by a master on his servant. Justification of *mollior manus* to remove him from a house of which the master was possessed:—*Held*: evidence of another servant of *deft.*'s having the key to let himself in to work, nobody living in the house, is sufficient evidence of *deft.*'s possession as against *pltf.*, to support the plea.

Though as against the owner *deft.* certainly had not possession, yet as against his own servants he had (*BEST, C.J.*).—*HALL v. DAVIS* (1825), 2 C. & P. 33; 172 E. R. 16, N. P.

192. Stewards at musical festival.].—By a private Act of Parliament, the shire hall of G. was vested in the justices of the peace for the county, in trust, to allow cts. of justice to sit there, etc., & to permit & suffer it to be used for such other public purposes as major part of the justices in sessions should direct. The hall had always been used for the holding of the county musical festivals; but there was no evidence that the justices have under that Act. so directed it to be used:—*Held*: the stewards of one of these musical festivals had such a possession of the hall, that they might justify the turning out an intruder.—



THOMAS v. MARSH & NEST (1833), 5 C. & P. 596; 172 E. R. 1115, N. P.

**193. Hirer of steam boat.—Where owner's captain in charge.**—Deft. hired a steam boat for an excursion to Richmond, the owner's captain navigating the vessel:—*Held*: deft. had not such a possession as to justify him in forcibly turning out a stranger whom the captain had allowed to come on board.—DEAN v. HOGG (1834), 10 Bing. 345; 4 Moo. & S. 188; 3 L. J. C. P. 113; 131 E. R. 937

*Annotations*:—*Refd.* Roads v. Trunpington Overseers (1870), L. R. 8 Q. B. 56. *Mentd.* Fenton v. City of Dublin Steam Packet Co. (1838), 8 Ad. & El. 835; R. v. Sherard (1863), 33 L. J. M. C. 5; The Great Eastern (1868), L. R. 2 A. & E. 88.

**194. Lodger.—As against landlord.**—A plea, to trespass for assault & battery, that deft. was in possession of a dwelling-house, & that pltf. disturbed him in his possession, wherefore he turned him out, is not sustained by proof that deft. was a lodger, occupying one room in a house, the landlord keeping the key of the outer door.—MONKS v. DYKES (1839), 4 M. & W. 507; 1 Horn & H. 418; 8 L. J. Ex. 73; 3 J. P. 179; 3 Jur. 125; 150 E. R. 1546.

*Annotations*:—*Refd.* Wright v. Stavert (1860), 2 L. T. 175. *Mentd.* Wansey v. Perkins, Hill's Case (1845), 7 Man. & G. 151; R. v. Elswick (1860), 3 E. & E. 437; Cook v. Humber (1861), 11 C. B. N. S. 33; Henrette v. Booth (1863), 15 C. B. N. S. 500; Thompson v. Ward, Ellis v. Burch (1871), L. R. 6 C. P. 327.

**195. Member of cricket club.—Field let to committee.**—HOLMES v. BAGGE, No. 148, *ante*.

**196. Minister of chapel.—Entry by clerk after dismissal.**—Pltf. never received any appointment as clerk from deft., but continued to act as clerk without interruption until Aug. 18, 1855, when he received from deft. a notice to quit on the 26th inst. On Sept. 26, 1855, pltf. went to the vestry of the chapel to perform his duties as clerk, when deft. ordered him to leave, & on his refusal, had him turned out of the vestry room:—*Held*: the possession of the vestry room was in deft. as minister, so as to make the entry & remaining of pltf., the clerk, therein after a prohibition by deft. a wrong which justified defts. in removing pltf. & entitled defts. to judgment upon a plea alleging such facts by way of justification.—JACKSON v. COURTENAY (1857), 8 E. & B. 8; 27 L. J. Q. B. 37; 29 L. T. O. S. 262; 3 Jur. N. S. 889; 5 W. R. 752; 21 J. P. Jo. 499; 120 E. R. 3, Ex. Ch.

**Servants.**—See MASTER & SERVANT, Vol. XXXIV., pp. 147, 148, 185, 186, Nos. 1162–1165, 1615–1622.

**Gamekeepers.**—See GAME, Vol. XXV., p. 385, Nos. 356, 357.

### C. Necessity for Prior Request.

**197. General rule.—Prior request necessary.**—KINGSTON v. BOOTH (1685), Skin. 228; 90 E. R. 105.

**198. — — —.**—Where in entering H.'s close, there is only force in law, H. cannot lay hands on the trespasser before request to depart; otherwise

where there is actual force.—GREEN v. GODDARD (1702), 2 Salk. 641; 91 E. R. 540.

*Annotations*:—*Distd.* Polkinhorn v. Wright (1845), 8 Q. B. 197. *Refd.* Weaver v. Bush (1798), 8 Term Rep. 78.

**199. — — —.**—If a person enter a house, with force & violence, the person whose house is entered, may justify turning him out, using no more force than is necessary, without a previous request to depart. But if the person enter quietly, a request to depart is necessary, before turning him out.—TULLAY v. REED (1823), 1 C. & P. 6; 171 E. R. 1078, N. P.

**200. Entry with force & violence.**—GREEN v. GODDARD, No. 198, *ante*.

**201. — — —.**—TULLAY v. REED, No. 199, *ante*.

**202. — — —.**—A declaration in trespass alleged, that deft., on a certain day, assaulted pltf., & then seized & shook him, & struck him many blows. Second plea, a justification in defence of the possession of deft.'s close, which pltf. with a strong hand attempted forcibly to enter. Third plea, stating, that deft. was possessed of a cow, then being in a certain close; that pltf., against the will of deft., attempted to drive away the cow from the close & to dispossess deft. of her, & would forcibly & in breach of the peace have driven away & dispossessed deft. of her, wherefore, etc., justifying the trespass in defence of the possession of the cow. Replication, *de injuria*, & new assignment, that pltf. issued his writ, etc., not only for the trespasses in the pleas mentioned, but also for that deft., on other & different occasions, & with more force than necessary, seized & shook pltf.:—*Held*: it was unnecessary to allege in the pleas a request to pltf. to desist, before resisting with force.—POLKINHORN v. WRIGHT (1845), 8 Q. B. 197; 15 L. J. Q. B. 70; 10 Jur. 11; 115 E. R. 849; *sub nom.* PILKINGHOM v. WRIGHT, 6 L. T. O. S. 217.

**203. Original entry by leave & licence.**—Action for assault. Plea, that pltf. entered deft.'s close without leave & licence, & that deft. ordered him off: but he not going, deft. *molliter manus*, etc. Replication, *de injuria*:—*Held*: under this plea it is not necessary for deft. to rebut all leave & licence, because that is not material to the issue, deft.'s justification being complete, if he can show that he required pltf. to leave the close, & pltf. refused to do so, although pltf. had, in fact, entered at first by the leave & licence of deft., that leave & licence lasting only during deft.'s pleasure.—JELLY v. BRADLEY (1842), Car. & M. 270.

**204. — — —.**—WILLIAMS v. WARD (1861), 2 F. & F. 659, N. P.

### D. Degree of Force Permitted.

**205. No unnecessary force.**—(1) Wife may justify assault in defence of her husband. (2) Not of his freehold, but must plead *molliter*, etc.—LEEWARD v. BASILEE (1695), 1 Salk. 407; 91 E. R. 353; *sub nom.* LEWARD v. BASELY, 1 Ld. Rayn. 62.

**206. — — —.**—WILLIAMS v. WARD (1861), 2 F. & F. 659, N. P.

**207. — — —.**—In the case of a person who enters a tramcar & refuses to pay the proper fare for the distance travelled, the remedy of the tramway

### PART II. SECT. 5, SUB-SECT. 1.—C.

**197 i. General rule.—Prior request necessary.**—A trespasser should receive notice to leave before he is ejected.—LONG v. RAWLINS (1874), 4 Q. S. C. R. 86.—AUS.

**197 ii. — — —.**—There is a manifest distinction between endeavouring to turn a person out of a house into which he has previously entered quietly, & resisting a forcible attempt to enter; in the first case a request

to depart is necessary, but not in the latter.—R. v. O'NEILL (1879), 19 N. B. R. (3 P. & B.) 49.—CAN.

**200 i. Entry with force & violence.**—R. v. O'NEILL (1879), 19 N. B. R. (3 P. & B.) 49.—CAN.

### PART II. SECT. 5, SUB-SECT. 1.—D.

**205 i. No unnecessary force.**—If more force & violence be used than necessary to expel a person from a

house, after he has refused to leave, the excess must be replied.—DAVIS v. JENNON, HOGAN & FRASER (1852), 8 U. C. R. 599.—CAN.

**205 ii. — — —.**—*Held*: deft. was justified in using such force as was necessary to effect the removal of pltf. from his premises, but, as by his own admission, he did more than this, pltf. was entitled to recover for the excess.—DOUCETTE v. THERIO (1905), 38 N. S. R. 402.—CAN.



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authority is not limited to that given by Tramways Act, 1870 (c. 78), s. 52, namely, the right to seize & detain him, if his name & address are unknown, until he can conveniently be taken before a justice or until he be otherwise discharged by due course of law; in such a case the tramway authority may treat the person offending as a trespasser & eject him from the tramcar provided no more force than is necessary is used.—*WHITTAKER v. LONDON COUNTY COUNCIL*, [1915] 2 K. B. 676; 84 L. J. K. B. 1446; 113 L. T. 541; 79 J. P. 437; 31 T. L. R. 412; 13 L. G. R. 950.

**208.** ———.]—*HEMMINGS v. STOKE POGES GOLF CLUB*, No. 179, ante.

**209. What amounts to excessive force—Question for jury.]**—*ATKINS v. AMOS* (1854), 23 L. T. O. S. 300, N. P.

**210.** ———.]—A person having no possessory title to premises, but fraudulently pretending to have such title, & so allowed by the servant of the true owner to enter, does not thereby acquire possession, but may be forcibly expelled by him on discovery of the fraud; & if in such a case assaults are committed in consequence, the question for the jury will be, whether there has been an excess of violence. A subsequent attempt by force to re-enter & so causing an affray:—*Held*: an indictable offence, for which the party might be given in charge.—*COLLINS v. THOMAS* (1859), 1 F. & F. 416, N. P.

**211. — Personal injury.]**—*HALE v. GERRARD* (1627), Lat. 221; 82 E. R. 355; *subsequent proceedings*, *sub nom.* *HALE v. GERRARD*, Lat. 273.

*Annotations*:—*Refd.* *Stukeloy v. Butler* (1614), Hob. 168; *Vivian v. Jenkin* (1836), 3 Ad. & El. 741. *Mentd.* *Sciby v. Barlons* (1832), 3 B. & Ad. 2.

**212.** ———.]—*BUTLER v. AUSTEN* (1614), 1 Roll. Rep. 19; 81 E. R. 297.

*Annotation*:—*Refd.* *Green v. Goddard* (1702), 2 Salk. 611.

**213.** ———.]—You cannot justify the beating of a man in defence of your possession, but you may say that you did *molliter manus imponere*, etc. (*TWISDEN, J.*).—*JONES v. TRESILIAN* (1670), as reported in 1 Mod. Rep. 35; 2 Keb. 597; 86 E. R. 713.

*Annotations*:—*Consd.* *Shingleton v. Smith* (1699), 2 Lut. 1481; *Weaver v. Bush* (1798), 8 Term Rep. 78. *Mentd.* *Berrington d. Dormer v. Parkhurst* (1735), Lee temp. Hard. 162.

**214.** ———.]—A plea of *molliter manus imposuit*, in order to turn pltf. out of deflt.'s house, where she continued against his will, is no answer to a charge against deflt., for striking pltf. repeated blows, & with great force & violence several times knocking her down.—*GREGORY v. HILL* (1799), 8 Term Rep. 299; 101 E. R. 1400.

**215.** ———.]—If a man finds another breaking into his house, he has a right to push him out, & to use as much force as is necessary for that purpose: but he has no right to use such a weapon as that which was used by the prisoner in this case (*PARKE, B.*).—*R. v. SULLIVAN* (1841), Car. & M. 209, N. P.

**216.** ———.]—Where a person has gained possession of property, but has no title to it, being in fact a trespasser, the rightful owner is entitled to use force in ejecting him, so long as he does him no personal injury.—*SCOTT v. BROWN (MATTHEW) & Co., LTD.* (1884), 51 L. T. 746; 1 T. L. R. 54.

*Annotations*:—*Apprvd.* *Hemmings v. Stoke Poges Golf Club*, [1920] 1 K. B. 720. *Refd.* *Williams v. Taperell* (1892), 8 T. L. R. 241.

**217. ——— Overturning ladder.]**—*COLLINS v. RENISON* (1754), Say. 138; 96 E. R. 830.

*Annotations*:—*Consd.* *Gregory v. Hill* (1799), 8 Term Rep. 299. *Refd.* *Perry v. Fitzhove* (1846), 8 Q. B. 767.

**SUB-SECT. 2.—DETENTION.**

**218. Right to seize & detain—For purpose of obtaining address.]**—A person on whose land another has committed a trespass, merely by coming upon it, & is going away, has no right to seize & detain him, in order to compel him to give his address.—*BALL v. AXTEN* (1866), 4 F. & F. 1010, N. P.

**SUB-SECT. 3.—FORCIBLE ENTRY.**

*See, generally,* CRIMINAL LAW, Vol. XV., pp. 650-655, Nos. 6953-7027.

**Right of landlord on failure of tenant to give possession.]**—*See* LANDLORD & TENANT, Vol. XXXI., pp. 547, 518, Nos. 6937-6950.

**SUB-SECT. 4.—PREVENTION OR REMOVAL OF OBSTRUCTION.**

**219. Obstruction of ancient lights—Right to prevent by force—No defence to action for assault.]**

*NORRIS v. BAKER & BAKER* (1616), J. Bridg. 47; 1 Roll. Rep. 393; 123 E. R. 1190; *sub nom.* *MORRICE v. BAKER*, 3 Bulst. 196.

*Annotation*:—*Mentd.* *Lemmon v. Webb*, [1894] 3 Ch. 1.

**220.** ———.]—Trespass for throwing water over pltf.'s apartment & herself. It is no plea that pltf. was engaged in obstructing an ancient window of deflt.'s house, & that deflt. threw water over her to prevent it.—*SIMPSON v. MORRIS* (1813), 4 Taunt. 821; 128 E. R. 555.

**221. Building erected on land by stranger—Right to pull down.]**—If a mere stranger erect a building upon land belonging to another, the owner of the land is justified in pulling down the building for the purpose of ejecting the intruder; & the fact of the latter being at the time in the building will not be any ground for maintaining an action of trespass against the real owner.—*BURLING v. READ* (1850), 11 Q. B. 904; 19 L. J. Q. B. 291; 14 J. P. 574; 14 Jur. 395; 116 E. R. 711; *sub nom.* *BURDON v. REED*, 15 L. T. O. S. 86.

*Annotation*:—*Consd.* *Jones v. Jones* (1862), 1 H. & C. 1.

**222. Obstruction on party wall—Right to remove—Tenant in common.]**—If one of the two tenants in common of a party-wall excludes the other from the use of it by placing an obstruction on it, the only remedy of the excluded tenant is to remove the obstruction.—*WATSON v. GRAY* (1880), 14 Ch. D. 192; 49 L. J. Ch. 243; 42 L. T. 204; 44 J. P. 537; 28 W. R. 438.

*Annotations*:—*Mentd.* *Newton v. Higgins* (1906), 50 Sol. Jo. 617; *Mason v. Fulham Corp.*, [1910] 1 K. B. 631.

**223. Sewer laid on land—Right to remove.]**—If by way of trespass a conduit such as to fall within the definition of "sewer" has been laid upon land without the knowledge or sanction of the landowner, the landowner upon ascertaining the fact may cause it to be removed.—*PAKENHAM v. TICEHURST RURAL DISTRICT COUNCIL* (1903), 67 J. P. 448; 2 L. G. R. 19.

**Obstructions on highway.]**—*See* HIGHWAYS, Vol. XXVI., pp. 448-450, Nos. 1639-1662.

**2091. What amounts to excessive force—Question for jury.]**—*NAPIER v. FERGUSON* (1878), 18 N. B. R. (2 P. & B.) 415.—CAN.

**Buildings erected on common.]—See COMMONS, Vol. XI., p. 49, Nos. 706–709.**

**Overhanging branches of trees.]—See AGRICULTURE, Vol. II., p. 64, Nos. 403–406.**

#### SUB-SECT. 5.—DISTRESS DAMAGE FEASANT.

*See, generally,* DISTRESS, Vol. XVIII., pp. 436–449, Nos. 1730–1861.

**Right of commoner.]—See COMMONS, Vol. XI., p. 48, No. 694.**

**Right of lord of manor.]—See COMMONS, Vol. XI., p. 41, Nos. 565–569.**

#### SUB-SECT. 6.—ACTION FOR TRESPASS.

##### A. In General.

**224. Several issues—Right to trial of all—Although issue of possession fails.]—In trespass *quare clausum fregit*, where there are several issues, & amongst them one on pltf.'s possession of the close, pltf. has a right to a trial of all the other issues, though it appears on the opening of the evidence that he was not in possession of the close.—*FRY v. MONCKTON* (1840), 2 Mood. & R. 303, N. P.**

*Annotation* :—*Mentd.* *Hinton v. Acraman* (1846), 3 C. B. 737.

**225. Whether triable at county court—Plaintiff having undisputed possessory title.]—An action for trespass to land to which pltf. has an undisputed possessory title is not an action in which the title to any corporeal hereditament is in question, & is therefore triable in a county ct.—*HAWKINS v. RUTTER*, [1892] 1 Q. B. 668; 61 L. J. Q. B. 146; 40 W. R. 238; 36 Sol. Jo. 152, D. C.**

*Annotation* :—*Consd.* *Heworth v. Sutcliffe*, [1895] 2 Q. B. 358.

—*See* COUNTY COURTS, Vol. XIII., pp. 476–480, Nos. 258–296.

**Compulsory purchase—Where land not taken.]—See COMPULSORY PURCHASE OF LAND, Vol. XI., p. 136, Nos. 230, 231.**

**Action by clerk to conservators.]—See CORPORATIONS, Vol. XIII., p. 415, No. 1355.**

##### B. Damages.

*See, generally,* DAMAGES, Vol. XVII., pp. 76 *et seq.*

**226. Right to recover damages—Discharge of water over land of plaintiff.]—Pltf. was the owner of land in the neighbourhood of Croydon. Defts. permitted the surface drainage from certain roads in their district to flow across pltf.'s land, & claimed the right to do so either on the ground (a) that there was a watercourse across the land, or (b) on the ground that there was a sewer which ran across pltf.'s land, into which they were entitled to discharge the water in question. It appeared that from time immemorial there had been "bourne flows" of underground water from the chalk, which bourne flows had on divers occasions flooded the land occupied by pltf., & had followed the channel or watercourse which defts. alleged was a watercourse or a sewer. Pltf. claimed damages for trespass & an injunction :—*Held* : upon the facts, the bourne course was not a "watercourse" within Public Health Act, 1875 (c. 55), s. 17; it was not a sewer, & pltf. was, therefore, entitled to**

damages for trespass & an injunction.—*PEARCE v. CROYDON RURAL DISTRICT COUNCIL* (1910), 71 J. P. 429; 8 L. G. R. 909.

**227. What damages recoverable—Mesne profits—Against disseisor.]—As to cutting down of trees, grass, corn, & other things annexed to the soil, there are great variances of opinions in our books, not only against whom the action of *trespass vi et armis* shall be brought for recovery of damages, but also concerning the property of them. Therefore if one disseises me, & during the disseisin he cuts down the trees, or grass, or the corn growing upon the land, & afterwards I re-enter, I shall have an action of trespass against him *vi et armis*, for the trees, grass, corn, etc., for after my regress, the law, as to disseisor & his servants, supposes the freehold always continued in me; but if my disseisor makes a feoffment in fee, gift in tail, lease for life or years, etc., & afterwards I re-enter, I shall not have trespass *vi et armis* against those who came in by title; for this fiction of the law, that the freehold continued always in me shall not have relation to make him, who comes in by title, a wrong doer *vi et armis* for *in fictione juris semper equitas existit*: but in such case I shall recover all the mesne profits against my disseisor, in the same manner as the disseisee in such cases should recover in an assize at the common law before Statute of Gloucester, c. 1, damages only against the disseisor. Also it is to be presumed, that the feoffee has given consideration or recompense to the disseisor, & that the lessee has paid rent to him, or other consideration, & therefore in reason the disseisor is to be charged with the whole. The same law, if my disseisor is disseised, & afterwards I re-enter, I shall not have an action of trespass against the second disseisor, because the said fiction of law, as to action, extends only to my disseisor; & if I should punish the second disseisor, he would be twice charged; & therefore I shall recover all the mesne profits against my disseisor, his servants & others who have committed the trespass by his command, & in his right ('OKE, (C.J.).—*LIFORD'S CASE* (1614), 11 Co. Rep. 406; 77 E. R. 1206; *sub nom.* *STAMPE v. CLINTON (alias Liford)*, 1 Roll. Rep. 95.**

*Annotations* :—*Reid.* *Magdalen College, Cambridge (Case 1616)*, 11 Co. Rep. 66 b; *Berry v. Heard* (1631), Cro. Car. 242; *Rosewell v. Prior* (1701), 1 Ld. Raym. 713; *Garland v. Carlisle* (1837), 11 Bl. 421; *Hoy v. Moorhouse* (1839), 6 Bing. N. C. 52; *Hollawell v. Eastwood* (1851), 6 Exch. 295; *Howitt v. Isham* (1851), 7 Exch. 77; *Burnett v. Guildford* (1855), 11 Exch. 19; *Bailey v. Stephens* (1862), 12 C. B. N. S. 91; *Eastern Construction Co. v. National Trust Co. & Schmidt*, [1914] A. C. 197. *Mentd.* *Bowles's Case* (1615), 11 Co. Rep. 79 b; *Smith v. Bole* (1618), Cro. Jac. 458; *Whistler v. Paslow* (1618), Cro. Jac. 487; *Jemmot v. Cooley* (1687), 2 Keb. 270; *R. v. Rochester (Bp.) & Clark* (1875), 2 Mod. Rep. 1; *St. David's (Bp.) v. Lucy* (1699), 1 Ld. Raym. 539; *Parker v. Kett* (1701), 12 Mod. Rep. 466; *Mitchell v. Reynolds* (1711), 1 P. Wms. 181; *Turner v. Cordwell* (1734), Cunn. 129; *Wallis v. Pain* (1739), 2 Com. 633; *Bradly v. Strachy* (1740), Barn. Ch. 399; *A. G. v. Duplessis* (1752), Park. 144; *Walton v. Tryon* (1753), 1 Dick. 244; *Paul v. Paul* (1760), 1 Wm. Bl. 255; *Jefferson v. Durham (Bp.)* (1797), 1 Bos. & P. 105; *Ford v. Ruster* (1815), 4 M. & S. 130; *Herring v. St. Paul (Dean & Chapter)* (1819), 3 Swan. 492; *Place v. Fagg* (1829), 4 Man. & Ry. K. B. 277; *Logh v. Hoald* (1830), 1 B. & Ad. 622; *Elliot v. Bishop* (1854), 10 Exch. 496; *Mather v. Fraser* (1856), 2 K. & J. 536; *Walmesley v. Milne* (1859), 7 C. B. N. S. 115; *Delacherols v. Delacherols* (1864), 4 New. Rep. 501; *Summer v. Bromlow* (1865), 11 Jur. N. S. 481; *De Thomas, Ex p. Willoughby D'Erosby* (1881), 44 L. T. 781; *Goodhart v. Hyett* (1883), 25 Ch. D. 182; *Pwllbach Colliery Co. v. Woodman*, [1915] A. C. 634; *Re Londesborough, Spicer v. Londesborough*, [1923] 1 Ch. 500; *Kursell v. Timber Operators & Contractors* (1926), 95 L. J. K. B. 560.

#### PART II. SECT. 5, SUB-SECT. 6.—A.

**h. Limitation of action—Towns Incorporation Act—Continuing trespass.]—ARCHIBALD v. TRURO CORPN.** (1900), 33 N. S. R. 401; *affd.* 31 S. C. R.

#### 350.—CAN.

**k. Grant of Crown lands in fee simple from Dominion—Subsequent lease from province of coal rights—Action for trespass by grantee from**

**Dominion—Attorney-General of province as necessary party.]—ESQUIMAULT & NANAIMO RY. CO. v. McLELLAN** (B. C.), [1918] 3 W. W. R. 645; 44 D. L. R. 697.—CAN.

## Sect. 5.—Remedies: Sub-sect. 6, B.]

**228.** — [After judgment recovered in ejectment.]—Trespass will not lie for mesne profits after recovery in ejectment, though writ of error pending.—*DONFORD v. ELLYS* (1697), 12 Mod. Rep. 138; 88 E. R. 1219.

—[See, generally, *LANDLORD & TENANT*, Vol. XXXI., pp. 552-554, Nos. 6991-7009.

**229.** — [Against trespasser *ab initio*.]—Trespass for breaking & entering pltf.'s dwelling-house, & assaulting & imprisoning him, etc. Pleas—first, not guilty; secondly, as to all the trespasses alleged, except the breaking of the house, a justification under a writ of *ca. sa.* & warrant thereon, by virtue of which defts. entered the house, the outer door being open, & arrested pltf. Replication, admitting the writ & warrant, *de injuriâ absque residuâ causa*. It was proved that defts., who were bailiffs, in execution of the warrant broke open the outer door of pltf.'s house, & so gained an entrance, & arrested him:—*Held*: defts. having become trespassers *ab initio* by the breaking of the door, the jury were rightly directed that they might, even on the plea of not guilty, give damages in respect of all the injuries complained of in the declaration.—*KERBEY v. DENBY* (1836), 1 M. & W. 336; Tyr. & Gr. 688; 2 Gale, 31; 150 E. R. 463; *sub nom.* *KIRBY v. DENBY*, 5 L. J. Ex. 102.

*Annotations*:—*Refd.* *Brunswick v. Shownan* (1819), 18 L. J. C. P. 299; *Ryan v. Shilcock* (1851), 21 L. J. Ex. 55; *Perivall v. Stamp* (1853), 22 L. T. O. S. 90; *Hooper v. Lane* (1857), 6 H. L. Cas. 443; *American Concentrated Must Corp'n. v. Hendry* (1893), 62 L. J. Q. B. 388.

**230.** — [Injury to reversion—Pulling down house.]—In an action for pulling down a messuage & premises in the possession & occupation of H. as tenant to pltf., to the injury of his reversionary estate & interest, etc.; deft. pleaded that the messuage & premises were not in the possession & occupa-

tion of H. as tenant thereof to pltf., nor did the reversion thereof belong to pltf. It appeared at the trial that H. held at a profit rent of pltf. who had a limited interest in the premises, but that H. had given up possession to deft. a short time before the Act complained of, without however assigning away his interest:—*Held*: (1) the plea was substantially proved, pltf.'s right to the reversion in the premises being the substantial question raised by it; (2) the correct measure of damage was the amount less by which the reversion would sell in consequence of the act of deft.—*HOSKING v. PHILLIPS* (1848), 3 Exch. 168; 5 Ry. & Can. Cas. 560; 18 L. J. Ex. 1; 12 L. T. O. S. 198; 12 Jur. 1030; 154 E. R. 801.

*Annotations*:—*As to* (2) *Consd.* *Rust v. Victoria Graving Dock Co. & London & St. Katharine Dock Co.* (1887), 36 Ch. D. 113. *Refd.* *Davis v. Underwood* (1857), 22 J. P. 8; *Morgan v. Hardy* (1886), 17 Q. B. D. 770; *Joyner v. Weeks*, [1891] 2 Q. B. 31. *Generally*, *Mentd.* *Cotter v. Met. Ry.* (1864), 10 Jur. N. S. 1014.

**231.** — [Nominal damages—Where quantum of plaintiff's interest not proved.]—In trespass for breaking & entering pltf.'s close, pltf. relied upon the bare possession, though it appeared that he had originally become possessed as tenant to one W. under a written agreement. Dft. proved that, five days after the commencement of the trespass, he obtained a lease of the close in question from W., which he produced. The judge told the jury, that, in the absence of proof of the quantum of pltf.'s interest in the premises, by the production of the written agreement, he was only entitled to nominal damages:—*Held*: no misdirection.—*TWYMAN v. KNOWLES* (1853), 13 C. B. 222; 22 L. J. C. P. 143; 17 Jur. 238; 138 E. R. 1183; *sub nom.* *INGRAM v. KNOWLES*, 20 L. T. O. S. 208.

*Annotation*:—*Apld.* *Rust v. Victoria Graving Dock Co. & London & St. Katharine Dock Co.* (1887), 36 Ch. D. 113.

**232.** — [Loss sustained by plaintiff—Where benefit received by defendants from use of land.]—By an Order in Council of Aug. 13, 1877, issued

## PART II. SECT. 5, SUB-SECT. 6.—B.

**228 i.** *What damages recoverable—Mesne profits.*—[After judgment recovered in ejectment.]—*MOYI v. AVUTHIRAMAN* (1898), 1 L. L. L. 22 Mad. 197.—*IND.*

**1.** — [Exemplary damages.]—In an action for trespass the jury may award exemplary damages if satisfied that the deft. acted in a high handed manner, but the mere proof that the trespass was wrongful is not sufficient to establish that fact.—*GUEST v. HAVES* (1927), 27 S. R. N. S. W. 449; 44 N. S. W. W. N. 172.—*AUS.*

**m.** — [Nominal damages.]—*DILLMAN v. SIMSON* (N. S.) (1906), 2 E. L. R. 105.—*CAN.*

**n.** — [Unless actual damages be shown, nominal damages only will be allowed for trespass.]—*WOODBURY v. HUBNUT* (1884), 1 B. C. R. pt. 2, 39; 1 M. M. Cas. 31.—*CAN.*

**o.** — [Loss sustained by plaintiff—Where benefit received by defendant from use of land.]—Where trespasses were committed in wilful disregard of pltf.'s right, & were continued in defiance of repeated protest of pltf. for the pecuniary benefit of deft.:—*Held*: the measure of damages as to the part of the land excavated was its value for the purpose for which it was used by the wrongdoers, & as to the remaining land the measure of damages was the diminution in value to the pltf. by reason of the wrongful acts of deft.—*McISAAC v. INVERNESS RY., ETC. CO.* (1906), 40 N. S. 579.—*CAN.*

**p.** — [To extent of ultimate injury to crops ascertained at time of harvest.]—*THROOP v. FOWLER* (1858), 15 U. C. R. 365.—*CAN.*

**q.** — [Action by tenant in possession—Diminished value of interest.]—In trespass to land, where pltf. is a tenant only, the duration of his term must be shown, the measure of damages being the diminished value of his interest.—*FISHER v. GRACE* (1868), 27 U. C. R. 158.—*CAN.*

**r.** — [Several defendants—Some continuing after warning—Election to go against all.]—*McMILLAN v. FAIRLY* (1868), 12 N. B. R. (1 Man.) 501.—*CAN.*

**t.** — [Continuing trespass—Assessment down to time of assessment.]—*MILLER v. CORKUM* (1899), 32 N. S. R. 358.—*CAN.*

**a.** — [Trespass wrongful & wilful.]—Where in an action of trespass, the judgment is that the trespass was wrongful & wilful, the assessment of damages must be on the basis of such finding, & not as if the trespass was done innocently or *bonâ fide*.—*UNION BANK OF CANADA v. HUDRICK LUMBER CO.* (1909), 22 C. L. T. 114; 3 O. L. R. 269; *affd.* 4 O. L. R. 721.—*CAN.*

**b.** — [Bruno v. Warren (1909), 11 W. L. R. 228.—*CAN.*

**c.** — [Where timber cut.]—Where deft. was guilty of wilful & deliberate trespass upon pltf.'s timber limits, by entering thereon & cutting & removing timber therefrom:—*Held*: pltf.'s damages should be assessed by finding the value of the timber after it was severed & manufactured, so far as it was manufactured while on the pltf.'s limits.—*LAUREN v. McKINNON* (B. C.) (1912), 20 W. L. R. 384; 4 D. L. R. 718.—*CAN.*

**d.** — [Phillips v. Conger (1912), 22 O. W. R. 436; 3 O. W. N. 1436; 5 D. L. R. 188.—*CAN.*

**e.** — [Field v. Richards

(1913), 24 O. W. R. 606; 4 O. W. N. 1301; 11 D. L. R. 120; *affd.* 13 D. L. R. 943.—*CAN.*

**f.** — [Where there is a wilful, or which is the same in effect, a negligent, trespass & wrongful cutting of timber, the trespasser must pay the fair market price of the timber cut, less only the actual cost of felling the trees & fitting them for removal. Where the result of the trespass is to increase the cost of logging the area which has been trespassed upon, such increased cost is also recoverable as part of the damages.—*ADAMS POWELL RIVER CO. v. CANADIAN PUGET SOUND CO.* (1914), 28 W. L. R. 13; 19 B. C. R. 573; 17 D. L. R. 591.—*CAN.*

**g.** — [Property benefited by trespass.]—*LAMONTAGNE v. WOODLANDS* (1912), 21 W. L. R. 881; 5 D. L. R. 524; 22 Mun. L. R. 495.—*CAN.*

**h.** — [Bell v. Foley Brothers (1917), 51 N. S. R. 1.—*CAN.*

**k.** — [Smith v. McLELLAN (1913), 24 O. W. R. 740; 4 O. W. N. 1442; 11 D. L. R. 819.—*CAN.*

**aa.** — [Trespass continued after warning.]—Where the trespass complained of is committed through an error in the survey of lands, the trespasser, by continuing the trespass after being warned of the error, is not thereby to be deemed a deliberate & wilful trespasser, & the damages are to be limited to the value of the standing timber.—*CHEW LUMBER CO. v. HOWE SOUND TIMBER CO.* (1913), 18 B. C. R. 312.—*CAN.*

**bb.** — [Trespass with notice of superior title.]—*DICKIE v. ATLANTIC LUMBER CO.* (1914), 14 E. L. R. 8; 16 D. L. R. 46.—*CAN.*

**cc.** — [Plea of leave & licence not

under Pacific Islanders Protection Acts, 1872 to 1875, & the Foreign Jurisdiction Acts, 1843 to 1875, a High Comr.'s Ct. was established which by sect. 6 of the Order applied to "all British subjects for the time being within the Western Pacific Islands, whether resident there or not." By treaty between Her Majesty & the King of Samoa, dated Aug. 28, 1879, it was provided that civil suits in Samoa should be tried by the High Comr. In a suit in that ct. for the recovery of land in Samoa, & for damages for conversion of its produce, it appeared that defts. did not dwell within the bounds of the islands, but that they had a store in Samoa, affixed to which was a signboard with the name of their firm, where they carried on business by servants & agents:—*Held*: the measure of damages was the value of the produce which the lands were capable of yielding at the time they were taken possession of, after deducting the expenses of management. However wilful & long-continued the trespass might have been, there was no law which authorised the disallowance of such expenses or the infliction of a penalty on defts. beyond the loss sustained by pltf.—*McARTHUR & Co. v. CORNWALL*, [1892] A. C. 75; *sub nom. McARTHUR & Co. v. CORNWALL*, *CORNWALL v. McARTHUR & Co.*, 61 L. J. P. C. 1; 65 L. T. 718, P. C.

**233. Aggravation of damages—Assaulting servants.**—A man may have an action of trespass for entering the house & beating his servants, without saying *per quod servitium amisit*, because the beating the servant is part of the same trespass & only a description of it by way of aggravation (*HOLT, C.J.*).—*RUSSELL v. CORNE* (1704), 2 Ld. Raym. 1031; 6 Mod. Rep. 127; *Holt, K. B.* 699; 92 E. R. 185.

*Annotations*:—*Reid*, *Smalley v. Kerfoot* (1738), *Andr.* 242; *Woodward v. Walton* (1807), 2 Bos. & P. N. R. 476. *Mentd.* *Satterthwaite v. Dewhurst* (1785), 4 Doug. K. B. 315; *Saville v. Swoeny* (1833), 4 B. & Ad. 514; *Grinnell v. Wells* (1841), 2 Dow. & L. 610.

**234. — Admissibility of evidence—Conduct of**

*proven.*—In an action for damages for trespass on lands, for the taking of timber & injury to the soil, where defts. are unable to substantiate a plea of leave & licence, they may not necessarily be assessed in exemplary damages.—*Wilson & Langan v. Keystone Logging & Mercantile Co., Ltd.* (1919), 25 B. C. R. 569.—*CAN.*

**o. — Innocent trespass—Milder rule of assessment.**—*Esquimalt & Nanaimo Ry. Co. v. Wilson, Esquimalt & Nanaimo Ry. Co. v. Dunlop*, [1921] 1 W. W. R. 1233.—*CAN.*

**p. — Punitive damages.**—Upon pltf.'s claim for trespass by defts., in that they unlawfully broke into his warehouse & removed therefrom samples entrusted to him, the evidence established the wrong complained of but no actual damage:—*Held*: pltf. was entitled to recover punitive damages.—*Pollard v. Gibson*, [1924] 4 D. L. R. 354; 55 O. L. R. 424.—*CAN.*

**q. — Replacement value.**—*Miller v. Knight*, [1926] 1 D. L. R. 704; 36 B. C. R. 362.—*CAN.*

**r. — Trespass unintentional & under mistake—Punitive damages not awarded.**—*Berezowski v. Reimer, Berezowski v. Dyck* (Bask.), [1927] 3 D. L. R. 232.—*CAN.*

**t. — Variation according to interest.**—Damages vary considerably according to a party's interest in the land.—*Burma Ry. Cos., Ltd. v. Maung Hla Tin* (1927), 1 L. R. 5 Ran. 813.—*IND.*

**a. — Bonâ fide assertion of**  
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*title.*—In an action of trespass *quare clausum fregit* even where the evidence of pltf.'s right to the property in dispute was overwhelming, the ct. refused to give vindictive damages as the trespass had been committed under a *bonâ fide* belief in the ownership of the property.—*Stowe v. Warrick* (1883), 6 Nfld. L. R. 321.—*NFLD.*

**b. — Removal of fence—F frivolous assertion of right.**—Where, under a frivolous assertion of right, a deft. enters upon land & pulls down & removes a tenant's fence, a Magistrate, at the suit of the tenant, may, if he thinks proper, assess the damages at nearly the whole value of the fence, although it is at the time of removal an old fence.—*McBride v. Cameron* (1893), 12 N. Z. L. R. 316.—*N.Z.*

**c. Aggravation of damages.**—The jury in an action for damages for breaking & entering certain premises, may give exemplary, as distinguished from compensating, damages. If they believe, on the evidence, that deft. entered the premises in a mode which he at the time knew was illegal.—*Rekves v. Penrose* (1890), 26 L. R. 141.—*IR.*

**d. —**—*De Villiers v. Van Zyl* (1880), F. 77.—*S. AF.*

**e. Mitigation of damages—Admissibility of evidence—Value of buildings erected.**—In trespass for *mensæ profits* deft. may show in mitigation of damages the value of buildings erected on the premises by him.—*Lindsay v. McFarling* (1829), *Dra. G.* *CAN.*

*defendants.*—In an action of trespass against five for breaking into pltf.'s house, in which defts. have paid money into ct. pltf. cannot go into proof, as evidence of malice, that, nine months after the trespass, one of defts. indicted him for perjury.

Evidence of the conduct of the parties before the trespass, if it had reference to it, might be receivable; but not evidence of the act of one deft. done by him long after the trespass.—*Newton v. Holford & Wilson* (1844), 1 Car. & Kir. 537, N. P. —.—*See DAMAGES*, Vol. XVII., pp. 122–124, Nos. 308–323.

**235. Mitigation of damages—Admissibility of evidence—Recovery of damages against co-trespasser.**—In trespass, a recovery of damages against a co-trespasser not sued is not admissible in mitigation of damages under the plea of not guilty.—*Day v. Porter* (1838), 2 Mood. & R. 151, N. P.

**236. — — — Deed of conveyance to defendants.**—*Semble*: defts. having pulled down the wall, & pltf. having claimed substantial damages for this trespass beyond the sum necessary to establish their right, the subsequent conveyance by M. of the wall to defts. was evidence, not of their property in the wall, but of their *bonâ fide* belief that the wall was theirs, & was admissible in answer to pltf.'s claim for substantial damages.—*Skull v. Glenister* (1864), 10 C. B. N. S. 81; 3 New Rep. 389; 33 L. J. C. P. 185; 9 L. T. 763; 12 W. R. 554; 143 E. R. 1055.

*Annotations*:—*Reid*, *Williams v. James* (1867), L. R. 2 C. P. 577; *Finch v. G. W. Ry.* (1879), 5 Ex. D. 254; *Harris v. Flower* (1904), 74 L. J. Ch. 127. *Mentd.* *Royal v. Yaxley* (1872), 20 W. R. 903.

—*See DAMAGES*, Vol. XVII., pp. 128, 129, Nos. 362–371.

**Excessive damages—Whether ground for new trial.**—*See DAMAGES*, Vol. XVII., pp. 173, 175, Nos. 738, 774–779.

**Damages in lieu of or in addition to injunction.**—*See, generally, INJUNCTION*, Vol. XXVIII., pp. 412–419, Nos. 370–439.

**f. — — — Costs & expenses in collection of rent.**—*Altaf, Ali v. Lalji Mal* (1877), 1 L. R. 1 All. 518.—*IND.*

**g. Excessive damages—Whether ground for new trial.**—*Jeffries v. Markland* (1838), 5 O. S. 677.—*CAN.*

**h. — — —**—In trespass, for entry under colour of distress, the jury gave £75 damages, & although they seemed excessive, a new trial was refused.—*Chase v. Scripture* (1857), 14 U. C. R. 598.—*CAN.*

**k. — — —**—*Desmond v. Fairbanks* (1870), 10 N. S. R. (1 R. & C.) 279.—*CAN.*

**l. — — —**—*Robinson v. Hall* (1882), 1 O. R. 266.—*CAN.*

**m. — — — Reduction.**—*Bell v. Foley Brothers* (1917), 51 N. S. R. 1.—*CAN.*

**n. — — —**—*Chowell v. Nickerson* (1918), 52 N. S. R. 54.—*CAN.*

**o. Verdict not confined to proper damages—New trial.**—*Lyons v. Merritt* (1818), 6 N. B. R. (1 All.) 91.—*CAN.*

**bb. Judge directing for small damages for plaintiff—Verdict for defendant—New trial.**—*O'Flaherty v. Devine* (1863), 10 N. B. R. (5 All.) 434.—*CAN.*

**cc. Nominal damages claimed—New trial.**—*Simonds v. Chesley* (1891), 20 S. C. R. 174.—*CAN.*

**dd. Apportionment of damages—Joint & several trespasses—Several defendants guilty of different acts.**—*Stewart v. Teske* (1910), 15 W. L. R. 604; 20 Man. L. R. 167.—*CAN.*

*Secl. 5.—Remedies: Sub-secl. 6, B. & C. (a) & (b) i.]*

**Trespass to mines.**—See MINES, Vol. XXXIV., pp. 654-658, 717, Nos. 537-575, 1011.

**Trespass by animals.**—See ANIMALS, Vol. II., pp. 228, 229, Nos. 190-197.

### C. Injunction.

#### (a) In General.

See, generally, INJUNCTION, Vol. XXVIII., pp. 355 *et seq*

**237. Not granted as matter of course.**—WATERHOUSE v. WATERHOUSE (1905), 94 L. T. 133; 22 T. L. R. 195; 50 Sol. Jo. 169.

*Annotation:—*Distd. Stevens v. Stevens (1907), 24 T. L. R. 20.

**238. Plaintiff in possession—Trespass by utter stranger—Injunction not granted unless special circumstances.**—(1) Where a deft. is in possession of an estate & a pltf. claiming possession of it seeks to restrain him from cutting down trees & digging sods, & other such like acts, the ct. will not interfere, unless the acts complained of amount to such flagrant instances of spoliation as to justify the ct. in departing from the general rule.

(2) Where a pltf. is in possession & the person doing the acts complained of is an utter stranger, not claiming under colour of right, then the tendency of the ct. is not to grant an injunction, unless there are special circumstances, but to leave pltf. to his remedy at law; though if the acts tend to the destruction of the inheritance, the ct. will grant an injunction.

(3) Where a pltf. in possession seeks to restrain one who claims by an adverse title, the tendency of the ct. will be to grant an injunction; at least when the acts committed do or may tend to the destruction of the estate.—LOWNDES v. BETTLE (1864), 3 New Rep. 409; 33 L. J. Ch. 451; 10 L. T. 55; 10 Jur. N. S. 226; 12 W. R. 399.

*Annotations:—*As to (2) *Refd.* Stocker v. Planet Bldg. Soc. (1879), 27 W. R. 877. *As to (3)* *Apld.* Stanford v. Hurstone (1873), 9 Ch. App. 116. *Refd.* Springhead Spinning Co. v. Riley (1868), L. R. 6 Eq. 551. *Generally, Refd.* Wheeler v. Hitches (1919), 121 L. T. 636; Wheeler v. Keeble (1914), Ltd., (1920) 1 Ch. 57.

**239. —** Trespass by person claiming under adverse title.]—LOWNDES v. BETTLE, No. 238, *ante*.

**240. Defendant in possession—Trespass by committing waste.**—LOWNDES v. BETTLE, No. 238, *ante*.

**241. When peremptory injunction granted—Defendant pulling down house.**—FENNER v. BEDFORD (1875), Bitt. Prac. Cas. 54.

**242. When interim injunction granted—Imminent danger of injury.**—ATTENBOROUGH & SON v. LONDON, ETC. TELEPHONE CO., [1884] W. N. 2; Bitt. Rep. in Ch. 109.

**243. —** Restraint of hunting.] (ALVERT v. GOSLING (1889), 5 T. L. R. 185, D. C.)

#### (b) Grounds for Granting or Refusing.

##### i. In General.

**244. Temporary trespass.**—This ct. will not grant an injunction to restrain a person from

committing a trespass, where it is temporary only; otherwise where it has continued so long as to become a nuisance.—COULSON v. WHITE (1743), 3 Atk. 22; 26 E. R. 816, L. C.

*Annotation:—*Refd. Blakemore v. Glamorganshire Canal Navigation (1832), 1 My. & K. 154.

**245. Trespass amounting to nuisance.**—COULSON v. WHITE, No. 244, *ante*.

**246. —**—]—In cases of trespass, not in one of a single but of a continuous kind, & especially in cases of mines, the ct. would grant an injunction, the case being in the nature of a nuisance (*per cur.*)—HOPKINS v. CADDICK (1851), 18 L. T. O. S. 236.

**247. —**—]—The owner in fee of a garden over which the tenants of his adjoining houses had rights of enjoyment & management:—*Held*: entitled to an injunction to restrain continuing trespasses involving nuisances in the garden committed by a person acting under colour of a contract to improve the garden entered into between him & the tenants.—ALLEN v. MARTIN (1875), L. R. 20 Eq. 462; 32 L. T. 750; 23 W. R. 904.

**248. To prevent multiplicity of suits.**—(1) Injunction in the case of trespass to prevent irreparable mischief.

(2) Injunction in the case of trespass to prevent the multiplicity of suits.—HANSON v. GARDINER (1802), 7 Ves. 305; 32 E. R. 125, L. C.

*Annotations:—*As to (2) *Refd.* Attwood v. Burton, Same v. Bailey, Same v. Small (1839), 8 L. J. Ch. 145. *Generally, Refd.* A.-G. v. Hallett (1847), 16 M. & W. 569.

**249. Title in dispute.**—Injunction in trespass where the title was disputed.—KINDER v. JONES (1810), 17 Ves. 110; 34 E. R. 43, L. C.

*Annotations:—*Refd. Galbreath v. Armour (1845), 4 Bell. Sc. App. 374; A.-G. v. Hallett (1847), 16 M. & W. 569; Lowndes v. Bettie (1864), 3 New Rep. 409.

**250. —**—]—CANTRILL v. WINDSOR UNION GUARDIANS (1836), Donnelly, 103; 47 E. R. 255, L. C.

**251. —**—]—HAIGH v. JAGGAR, No. 266, *post*.

**252. —**—]—A.-G. v. HALLETT, No. 267, *post*.

**253. —**—]—Acts tending to destruction of estate.]—LOWNDES v. BETTLE, No. 238, *ante*.

**254. Damages inadequate remedy.**—NORTH UNION RY. CO. v. BOLTON & PRESTON RY. CO., No. 255, *post*.

**255. —**—]—In cases of trespass under colour of title, where the mischief apprehended is irreparable, a ct. of equity will exercise its jurisdiction to grant an injunction, & whether the mischief be irreparable or not, it will, by decree, if not by order, upon motion, extend the jurisdiction of preventive justice to all cases of trespass in which damages would be an inadequate & uncertain remedy, & the protection of the right *in specie* is the only mode of doing complete justice.

Pltfs. moved for an injunction to restrain defts. from using, in a manner alleged to be illegal, a communication carried by certain branch rails from pltfs.' to defts.' railway; & also from using certain other rails, which connected a certain

### PART II. SECT. 5, SUB-SECT. 6.—C. (a).

t. *When mandatory injunction granted.*—When a trespass is being continued & substantial damage is being caused, the ct. will generally interfere to restrain the further commission of the trespass & may grant a mandatory injunction.—SMITH v. PORTAGE LA PRAIRIE PUBLIC PARKS BOARD (1905), 15 Man. L. R. 249; 1 W. L. R. 237.—CAN.

a. —.]—A mandatory injunction should not be granted against a trespasser compelling him to come on

the land on which he had trespassed to remove an encroachment made thereon by him.—NAVROJI MANEKJI WADIA v. DASTUR KHARSEDDJI MANCHERJI (1904), 1 L. R. 28 Bom. 20.—IND.

b. —.]—Deft. alleged to be a trespasser on pltf.'s land had planted rubber trees & erected a hut on a portion of the land. On pltf. filing a suit for a mandatory injunction directing the removal of the trees & hut:—*Held*: the case was merely one of trespass; there was no obligation on deft.'s part to perform the acts

prayed for; a suit for a mandatory injunction would not lie.—EWIN SHANK WA v. V. PO. NYUM (1927), 1 L. R. 5 Kan. 404.—IND.

c. *Dispute as to boundary.*—FRASER v. WOODS (1912), 21 O. W. R. 972; 3 O. W. N. 1194; 2 D. L. R. 909.—CAN.

### PART II. SECT. 5, SUB-SECT. 6.—C. (b) 1.

**254 i. Damages inadequate remedy.**—JETHALAL HIRCHAND v. LALBHAI DALPATBHAI (1904), 1 L. R. 28 Bom. 298.—IND.

d. *Compensation adequate remedy.*

other railway with defts.' station north of F.; & also from using a station built by defts. on ground purchased by them of pltf's.—*Held*: a ct. of equity will not interfere by injunction, but will leave the parties to their legal remedies, pltf's. having failed to show, that, by using the communications, rails, or station, any destruction or irreparable injury would result.—*NORTH UNION RY. Co. v. BOLTON & PRESTON RY. Co.* (1843), 3 Ry. & Can. Cas. 345; 1 L. T. O. S. 478.

*Annotation*:—*Refd.* *Aldis v. Fraser* (1852), 15 Beav. 215.

256. —[—]Where a bill was filed for an injunction to restrain a deft., who appeared in *forma pauperis*, for committing acts of trespass against pltf's. the ct. granted the injunction, inasmuch as the recovery of damages at law would not constitute an adequate remedy.—*HODGSON v. DUCE* (1856), 28 L. T. O. S. 155; 2 Jur. N. S. 1014; 4 W. R. 576.

257. —[—]Defts., the owners of a cotton mill on the banks of a canal belonging to pltf's., were authorised, by the Act of Parliament under which the canal was made & pltf's. incorporated, to draw water, from the canal, for condensing steam, but not for any other purpose; nevertheless, they used the water for other purposes. In consequence of which pltf's. brought an action & obtained a verdict against them, but only for nominal damages. Defts. moved to arrest the judgment in the action, but without success; & afterwards, the judgment was affirmed on a writ of error in the Exch. Ch. Defts., however, continued to use the water as before. Whereupon the bill was filed for an injunction to restrain them from so doing. The answer stated a case of acquiescence on the part of pltf's.:—*Held*: pltf's. had sufficiently established their title at law, & but for their acquiescence, they would have been entitled to the injunction, notwithstanding they had recovered only nominal damages in the action.—*ROCHDALE CANAL Co. v. KING* (1851), 2 Sim. N. S. 78; 20 L. J. Ch. 675; 15 Jur. 962; 61 E. R. 270.

*Annotations*:—*Consd.* *A.-G. v. Sheffield Gas Consumers Co.* (1853), 3 De G. M. & G. 304. *Apld.* *Goodson v. Richardson* (1874), 30 L. T. 142; *Eardley v. Granville* (1876), 3 Ch. D. 826. *Distd.* *Cooper v. Crabtree* (1882), 20 Ch. D. 589. *Refd.* *Archbold v. Scully* (1861), 9 H. L. Cas. 361; *Davies v. Marshall* (1861), 1 Drew. & Sim. 557; *A.-G. v. Kingston-on-Thames Corp.* (1865), 34 L. J. Ch. 481; *A.-G. v. Mid-Kent Ry.* (1867), 3 Ch. App. 100; *Wilks & Berks Canal Navigation Co. v. Swindon Waterworks Co.* (1874), 30 L. T. 443; *McManus v. Cooke* (1887), 35 Ch. D. 681; *Martin v. Price* (1883), 70 L. T. 202; *London General Omnibus Co. v. Lavell* (1900), 83 L. T. 453. *Mentd.* *L. C. & D. Ry. v. Bull* (1882), 47 L. T. 413.

258. —[—]Where water pipes had, without the consent of the owner of the soil, been laid in the soil of a highway, an injunction to restrain the continuance of the pipes was granted; the owner of the soil not being left to his remedy at law, & not being required to establish his right at law.

The facts that the soil under the highway was of no value to the owner, & that his motive for applying to the ct. was not connected with the enjoyment of his land, were held not to be reasons against the granting of the injunction.—*GOODSON v. RICHARDSON* (1874), 9 Ch. App. 221; 43 L. J. Ch. 790; 30 L. T. 142; 38 J. P. 436; 22 W. R. 337, L. C. & L. JJ.

*Annotations*:—*Apld.* *Allen v. Martin* (1875), L. R. 20 Eq. 492. *Distd.* *Cooper v. Crabtree* (1882), 20 Ch. D. 589.

*Apld.* *L. & N. W. Ry. v. Westminster Corp.*, [1904]

—*THORDARSON v. AKIN* (1910), 15 W. L. R. 115.—*CAN.*

*e. Failure to prove location of boundary—Action to restrain interference with erection of fence.*—*LAKE ERIE EXCURSION CO. v. BERTI* (1912), 22 O. W. R. 42; 3 O. W. N. 1191; 4

D. L. R. 585.—*CAN.*

*f. Vague apprehension of recommencement of discontinued trespass.*—Where a trespass of a continuing nature has been committed by deft., but has been discontinued before suit brought, the ct. will not interfere by injunction

1 Ch. 759; *Marriott v. East Grinstead Gas & Water Co.* [1909] 1 Ch. 70. *Refd.* *Wimbeldon & Putney Commons Conservators v. Dixon* (1875), 33 L. T. 679; *Eardley v. Granville* (1876), 3 Ch. D. 826; *Ellis v. Griffith* (1878), 8 Ch. D. 521; *St. Mary, Battersea Vestry v. County of London & Brush Provincial Electric Lighting Co.* (1899), 80 L. T. 31; *Riley v. Halifax Corp.* (1907), 71 J. P. 428; *Butterley Co. v. New Hucksall Colliery Co.*, [1909] 1 Ch. 37; *Kennard v. Cory*, [1922] 1 Ch. 265.

259. —[—]He (def't.) has not a shadow of legal title; & as to acquiescence, there is no equitable title, consequently, as far as that is concerned, he is a mere trespasser, & he being a trespasser comes within the well-established doctrine of *Goodson v. Richardson*, No. 258, *ante*, & *Rochdale Canal Co. v. King*, No. 257, *ante*, where damages would be no compensation for a right to property, & pltf's. are entitled to prohibit him by injunction (*JESSEL, M.R.*).—*EARDLEY v. GRANVILLE* (1876), 3 Ch. D. 826; 45 L. J. Ch. 669; 34 L. T. 609; 24 W. R. 528.

*Annotations*:—*Refd.* *Tucker v. Linger* (1882), 21 Ch. D. 18; *Powell v. Vickerman* (1887), 3 T. L. R. 358; *Ituabon Brick & Terra Cotta Co. v. G. W. Ry.*, [1893] 1 Ch. 427; *Webb v. Knight, Hedley v. Webb* (1901), 70 L. J. Ch. 663; *Batten Pooll v. Kennedy*, [1907] 1 Ch. 256. *Mentd.* *G. W. Ry. v. Cefn Cribbwr Brick Co.*, [1894] 2 Ch. 157; *Derry v. Sanders*, [1919] 1 K. B. 223; *Thomson v. St. Catharine's College, Cambridge, etc.*, [1919] A. C. 468.

260. —[—]Injury to reversion.—An action brought by the reversioner of a cottage let on a weekly tenancy to restrain the continuance of a hoarding alleged to have been erected on pltf's. land, & to restrain a nuisance arising from the noise caused by the hoarding dismissed on the ground that he could not by reason of the tenancy maintain trespass, & that there was no injury to his reversion.

In considering whether an injunction should be granted, the amount of the injury sustained is material. Where a reversioner's possessory rights are being seriously injured by an act for which he would obtain very trifling damages at law, an injunction, being his only adequate remedy, may be granted.—*COOPER v. CRABTREE* (1882), 20 Ch. D. 589; 51 L. J. Ch. 544; 47 L. T. 5; 40 J. P. 628; 30 W. R. 649, C. A.

*Annotations*:—*Refd.* *Mayfair Property Co. v. Johnston*, [1894] 1 Ch. 508; *Meux's Brewery v. City of London Electric Lighting Co.*, *Shelfer v. Same* (1894), 42 W. R. 644.

261. Trespass unaccompanied by waste.—This ct. has no jurisdiction to restrain a trespass unaccompanied by waste. Pltf. was seized of lands on each side of a public road through L. common, in the parish of R., & such lands were covered with valuable fir trees. The district board of R. proceeded, under the above Act, to cut down, & did cut down, some of the trees, on the ground that they were an obstruction to the public highway.—*Held*: *prima facie* the board were justified in their acts, & upon the case made against them an injunction to restrain them was refused.—*TURNER v. RINGWOOD HIGHWAY BOARD* (1870), L. R. 9 Eq. 418; 21 L. T. 745; 18 W. R. 424.

*Annotations*:—*Consd.* *Cubitt v. Maxse* (1873), L. R. 8 C. P. 704. *Refd.* *Bagshaw v. Buxton L. B. of Health* (1875), 34 L. T. 112; *Nicol v. Beaumont* (1883), 53 L. J. Ch. 853; *Harrison v. Rutland*, [1893] 1 Q. B. 142; *Harris v. Northamptonshire County Council* (1897), 61 J. P. 599; *Harvey v. Truro R. D. C.* (1903), 89 L. T. 90.

262. Intention to trespass not proved.—Where the Legislature has pointed out a special tribunal for determining a question, as a general rule no

to restrain def't. from continuing such trespass, merely because pltf. entertains vague apprehensions that the trespass may be recommenced.—*CHARILDAAS LALLUBHAI v. BOMBAY MUNICIPAL COMRS.* (1871), 8 Bom. O. C. 85.—*IND.*



*Sect. 5.—Remedies: Sub-sect. 6, C. (b) i. & ii., & D. Sect. 6: Sub-sects. 1 & 2, A.]*

other ct. ought to restrain the proceedings before it; but where the question has come before another ct. in independent proceedings in which it is necessary to decide the whole matter between the parties, the ct. may in such case restrain the proceedings elsewhere by injunction in order to save expense. A dispute having arisen between defts., who were a local authority, & pltf. about a drain which pltf. had interfered with, defts. gave notice to pltf. that they would enter on his land & reinstate the drain; but they afterwards abandoned their intention, & instead took proceedings against him before the magistrate. Pltf. then brought an action against defts., claiming an injunction to restrain them from trespassing on his land, & from proceeding against him before the magistrate. In the statement of claim pltf. did not in terms allege that defts. threatened & intended to trespass on the land:—*Held*: as no intention to commit a trespass was proved or alleged, pltf. had not made out his case for an injunction against the trespass; & that being so, the ct. had no jurisdiction to restrain the proceedings before the magistrate.—*STANNARD v. ST. GILES, CAMBERWELL, VESTRY* (1882), 20 Ch. D. 190; 51 L. J. Ch. 629; 46 L. T. 243; 30 W. R. 693, C. A.

*Annotations* :—*Consd.* Grand Junction Waterworks Co. v. Hampton U. C., [1898] 2 Ch. 331; *Re* Connolly, Wood v. Connolly, [1911] 1 Ch. 731. *Refd.* North London Ry. v. G. N. Ry. (1883), 11 Q. B. D. 30; Barrett v. Day, Day v. Foster (1890), 43 Ch. D. 435; Merrick v. Liverpool Corp., [1910] 2 Ch. 449. *Mentd.* Barlow v. St. Mary Abbott's, Kensington (1883), 31 W. R. 511.

## ii. Quantum of Injury Requisite.

**263. Prevention of Irreparable Injury.]**—*HANSON v. GARDINER*, No. 248. *ante*.

**264.** —.]—*FLAMANG'S CASE* (circa 1783), cited 7 Ves. at p. 308; 32 E. R. 126.

*Annotations* :—*Refd.* Mitchell v. Dors (1801), 6 Ves. 147; *Hanson v. Gardiner* (1802), 7 Ves. 305; *Smith v. Collyer* (1803), 8 Ves. 80; *Crockford v. Alexander* (1808), 15 Ves. 138; *Thomas v. Oakley* (1811), 18 Ves. 184; *A.-G. v. Hallett* (1847), 16 M. & W. 569.

**265.** —.]—Injunction against trespass upon irremediable mischief, in nature of waste, on a bill by the lord of a manor & his lessees against taking stones, having a peculiar value, found at the bottom of the sea within the limits of the manor.—*COWPER (EARL) v. BAKER* (1810), 17 Ves. 128; 34 E. R. 50.

*Annotation* :—*Appld.* Lowndes v. Bettie (1861), 3 New Rep. 409.

**266.** —.]—Injunction to restrain a party claiming by an adverse legal title from committing acts of trespass, alleged to be productive of irreparable waste, refused, under the special circumstances of the case.

*Semble*: although a man be in full & complete possession of an estate by a title adverse to another who claims it against him, & there be no privity between the parties, & the party in possession swear that his own title is just & valid, or that the title of his adversary is unjust & invalid, that state of things does not prevent a ct. of equity from interfering, before judgment at law or decree in equity, to restrain the party in possession from committing waste upon the

inheritance.—*HAIGH v. JAGGAR* (1845), 2 Coll. 231; 63 E. R. 712.

*Annotations* :—*Refd.* East Lancashire Ry. v. Hattersley (1849), 8 Haro. 72; *Talbot v. Hope Scott* (1858), 4 K. & J. 96; *Lowndes v. Bettie* (1864), 3 New Rep. 409. *Mentd.* Doe d. Agar v. Brown (1853), 1 C. L. R. 1048; *Smith v. Smith* (1861), 8 Jur. N. S. 459; *Carrow v. Ferrior, Dunn v. Ferrior* (1868), 37 L. J. Ch. 569.

**267.** —.]—Where the title to land is in dispute, the Ct. of Exch. will not grant an injunction to restrain an act of trespass, but only to prevent an irreparable injury. The ct., therefore, refused an injunction to restrain the owner in fee of a piece of land claimed by the Crown, but denied by the owner to be part of a royal forest, from cutting down holly trees & underwood therein, in the manner in which they had been ordinarily cut down for twenty years previously.—*A.-G. v. HALLETT* (1847), 16 M. & W. 569; 16 L. J. Ex. 131; 8 L. T. O. S. 450; 11 J. P. 744; 153 E. R. 1316.

**268.** —.]—*LOWNDES v. BETTIE*, No. 238, *ante*.

**269.** — **What constitutes irreparable damage—Damage impossible to measure.]**—(1) The ct. will, by mandatory injunction, restrain a trespass, the continuance of which will inflict irreparable damage upon persons in possession.

(2) Damage which it is impossible to measure will be deemed irreparable.—*LONDON & NORTH WESTERN RY. CO. v. LANCASHIRE & YORKSHIRE RY. CO.* (1867), L. R. 4 Eq. 174; 36 L. J. Ch. 479; 17 L. T. 42; 15 W. R. 810.

**270. Possible as well as actual injury.]**—In considering the injury, the possible as well as the actual use of the injured premises will be regarded.—*ARDLEY v. ST. PANCRAS GUARDIANS* (1870), 39 L. J. Ch. 871.

**271. Must be serious injury.]**—*ANON.* (1876), Bitt. Prac. Cas. 108; *sub nom.* MAKIN v. BARROW, 2 Char. Cham. Cas. 6.

**272.** —.]—An injunction is a formidable legal weapon which the ct. will refuse to grant where the injury or inconvenience caused by the trespass is trivial.—*ILANDUDNO URBAN COUNCIL v. WOODS*, [1899] 2 Ch. 705; 68 L. J. Ch. 623; 81 L. T. 170; 63 J. P. 775; 48 W. R. 423; 34 Sol. Jo. 689.

*Annotations* :—*Folld.* Behrens v. Richards, [1905] 2 Ch. 611. *Mentd.* Brinckman v. Maltby, [1904] 2 Ch. 313; *Yeatman v. Homberger* (1912), 107 L. T. 742; *A.-G. v. Sewell* (1918), 88 L. J. K. B. 425.

**273. No injury suffered.]**—The ct. may refuse to grant an injunction to restrain persons from trespassing on land if the landowner is not injured thereby.

Pltf. bought land on an unfrequented part of the coast, & stopped up several paths which defts. asserted were public highways. Defts. removed the obstructions placed by pltf. & he brought an action against them for an injunction to restrain them from trespassing on his land. The A.-G. was not a party to the action:—*Held*: as between pltf. & defts. there were no public rights of way; pltf. was entitled to a declaration to that effect, & defts. must pay nominal damages; but inasmuch as pltf. was not, in the present estate of the neighbourhood, injured by the public use of the ways in question, no injunction ought to be granted.—*BEHRENS v. RICHARDS*, [1905] 2 Ch. 614; 74 L. J. Ch. 615; 93 L. T. 623; 69 J. P. 381;

injunction should not be sought where the alleged trespass was at best only technical & trivial.—*DOUGLASS v. BULLEN* (1913), 24 O. W. R. 890; 4 O. W. N. 1587; 12 D. L. R. 652.—*CAN.*

## PART II. SECT. 5, SUB-SECT. 6.—C. (b) ii.

**263 i. Prevention of irreparable injury.]**—Unless to prevent sudden & irreparable injury, the ct. will not interfere by injunction in a case of

trespass.—*SANDYS v. MURRAY* (1838), 1 L. Eq. R. 29.—*IR.*

**263 ii.** —.]—*OTAGO HARBOUR BOARD v. PORT CHALMERS CORPN.* (1888), 7 N. Z. L. R. 124.—*N.Z.*

**271 i. Must be serious injury.]**—An



54 W. R. 141; 21 T. L. R. 705; 49 Sol. Jo. 685; 3 L. G. R. 1228.

*Annotations*.—**Mentd.** A. G. v. Sewell (1918), 88 L. J. K. B. 425; Boulton v. Paignton U. D. C. (1928), 92 J. P. 98.

#### D. Declaration of Right.

**274. Jurisdiction of court.**—The Duke of Rutland was the owner of certain moors over which he had rights of shooting. These moors were intersected by certain highways the soil of which was vested in the duke as owner of the lands on each side adjoining the highways. Pltf. went on to part of the highway, not for the purpose of using the highway as one of the public, for passing & repassing, but for the express purpose of interfering with the duke's right of shooting, which right was being then exercised by certain of his friends. The duke's keepers, in order to prevent that interference, seised pltf. & held him down until the shooting was over. In an action for assault, defts. pleaded justification, & alternatively, paid 5s. into ct. as sufficient to satisfy pltf.'s claim. The jury at the trial found a general verdict for defts.:—**Held**: the ct. had power under R. S. C., Ord. 25, r. 5, to make a declaration that pltf., on the facts, was, at the time when he interfered with the legal right of the duke, a trespasser.—**HARRISON v. RUTLAND (DUKE)**, [1893] 1 Q. B. 142; 62 L. J. Q. B. 117; 68 L. T. 35; 57 J. P. 278; 41 W. R. 322; 9 T. L. R. 115; 4 R. 155, C. A.

*Annotations*.—**Reid**. Allen v. Flood, [1898] A. C. 1; Hickman v. Maisey, [1900] 1 Q. B. 752. **Mentd.** Luscombe v. G. W. Ry., [1899] 2 Q. B. 313; Fitzhardinge v. Purcell, [1908] 2 Ch. 139; City of London Land Tax Comr. v. C. L. Ry., [1913] A. C. 364.

**275. When granted**—Where no injury suffered.]—**BEHRENS v. RICHARDS**, No. 273, *ante*.

**276. Right to fish from towing paths of canal.**—Under a canal Act authorising the construction of a canal, there was granted to each owner of land through which the canal was made the sole, several & exclusive right of fishing in so much of the canal as was made in, over, or through his land; but the right of fishery thereby granted was to be exercised so that the canal, towing paths, banks & other works should not be prejudiced or obstructed. Under a deed of Mar. 31, 1845, a certain manor & estate through which the canal passed became vested in the Earl of S.; there was no express grant of this particular right of fishery, but there were general words in the deed passing all fisheries, profits, advantages, & appurtenances, whatsoever to the manor & estate respectively belonging, or in anywise appertaining.

By a lease of July 23, 1910, the Earl of S. granted to an angling club, of which deft. was a member, the exclusive right to fish for & take away all fish in a specified portion of the canal, at an annual rent, & the lessees covenanted so to exercise their rights as not to prejudice or obstruct the towing paths, banks & other works of the canal. Pltfs. having brought an action to test a claim by deft. to fish in the canal from the towing path, without

their consent:—**Held**: pltfs. were entitled to a declaration that deft. was not entitled to fish from the towing paths of the canal belonging to pltfs. without their consent, & that an injunction must be granted to restrain the trespass.—**STAFFORDSHIRE & WORCESTERSHIRE CANAL NAVIGATION v. BRADLEY**, [1912] 1 Ch. 91; 81 L. J. Ch. 147; 106 L. T. 215; 56 Sol. Jo. 91; 75 J. P. Jo. 555.

### SECT. 6.—DEFENCES.

#### SUB-SECT. 1.—IN GENERAL.

**277. Defence must cover whole trespass.**—**PRANCE v. TUCKLE** (1610), 1 Bulst. 64; 80 E. R. 765.

**278.** —.]—**KILBORNE v. VALLANCE** (1087), 2 Lut. 1347; 125 E. R. 744.

**279.** —.]—In trespass for breaking & entering pltf.'s house & expelling him from it: a justification as to the breaking & entering will cover the whole declaration; for the expulsion is to be considered as mere matter of aggravation, & not as making deft. a trespasser *ab initio*, unless pltf. insist upon it as a substantive trespass by a replication or new assignment.—**TAYLOR v. COLE** (1791), 1 Hy. Bl. 555; 126 E. R. 318, Ex. Ch.

*Annotations*.—**Consd.** Shorland v. Govett (1826), 5 B. & C. 485; Cubitt v. Porter (1828), 8 B. & C. 257; Bush v. Parker (1834), 1 Bing. N. C. 72; Newton v. Harland (1840), 1 Man. & G. 614; Harvey v. Bridges (1847), 1 Exch. 201; Jennings v. Stoke Poles Golf Club, [1920] 1 K. B. 720. **Reid**. Turner v. Maymott (1823), 7 Moore, C. P. 374; Lucas v. Nockells (1833), 10 Bing. 157; Baillie v. Kell (1838), 4 Bing. N. C. 638; Weeding v. Aldrich (1839), 8 L. J. Q. B. 119; Playfair v. Musgrove (1845), 14 M. & W. 239; Perry v. Fitzhew (1846), 8 Q. B. 757; Curlewis v. Laurie (1848), 11 L. T. O. S. 308; Davison v. Wilson (1848), 11 Q. B. 890. **Mentd.** Scott v. Scholey (1807), 8 East, 467; Gould v. Lasbury (1834), 1 Cr. M. & R. 254; Gore v. Bowser (1855), 3 Sm. & G. 1.

**280. Action between co-owners—Pleading.**—One tenant in common, sued in trespass by another, for destroying the property, may plead that, except in respect of a certain undivided share or shares, he, & not pltf., is entitled or interested, & as to such share or shares, payment into ct.—**CRESSWELL v. HEDGES** (1862), 1 H. & C. 421; 31 L. J. Ex. 497; 7 L. T. 70; 8 Jur. N. S. 767; 10 W. R. 777; 158 E. R. 950.

**Exercise of statutory power.**—*See* No. 61, *ante*, & generally, **TITLES** *passim*.

**Joint trespass.**—*See* Part I., Sect. 3, *ante*.

#### SUB-SECT. 2.—OWNERSHIP AND POSSESSION.

##### A. Ownership or Possession in Defendant.

**281. Defence to action.**—**GREY v. BETLEY** (1443), Y. B. 21 Hen. 6, fo. 26, pl. 9.

*Annotation*.—**Mentd.** Read's Case (1605), 5 Co. Rep. 33.

**282.** —.]—A justification in trespass, stating that A. was seised in fee of the place where, & made a lease for life thereof to deft., by virtue of which he entered, etc., is good.—**MOSE v. BENNET** (1723), 8 Mod. Rep. 120; 88 E. R. 94.

### PART II. SECT. 6, SUB-SECT. 1.

#### G. Putting in issue fact of possession.]

—In an action of trespass, where the only pleas were, that deft. did not enter pltf.'s close; that the land & soil were not the land & soil of pltf., but the land of deft.; leave & licence:—**Held**: deft. was precluded from proving that pltf. had not the possession.—**GROTT v. FARISH** (1858), 3 N. S. R. (2 Thom.) 291.—**CAN.**

### PART II. SECT. 6, SUB-SECT. 2.—A.

**281 i. Defence to action.**—**STROUD v. KANE** (1856), 13 U. C. R. 459.—**CAN.**

**281 ii.** —.]—**PICKETT v. PICKETT** (1868), 12 N. B. R. (1 Han.) 156.—**CAN.**

**281 iii.** —.]—**ALLAN v. KIRK**, [1917] 2 W. W. R. 527; 24 B. C. R. 153.—**CAN.**

**281 iv.** —.]—**COLE v. BRUNT** (1871), 35 U. C. R. 103.—**CAN.**

**281 v.** —.]—Deft. may in trespass *quare clausum fregit*, under the general issue, show title in himself, or that he entered by direction or authority of the person having title.—**HAMILTON v. HOLDER** (1874), 15 N. B. R. (2 Pug.) 222.—**CAN.**

**281 vi.** —.]—Action for breaking & entering & committing trespass on pltf.'s land:—**Held**: as deft. was equitable owner action must be dismissed.—**REYNOLDS v. LAFFIN** (N. S.) (1909), 7 E. L. R. 100.—**CAN.**

**281 vii.** —.]—**BLANK v. ROMKEY** (1913), 12 E. L. R. 451; 11 D. L. R. 661.—**CAN.**

**281 viii.** —.]—**GORDON v. GORDON** (1889), 7 Nfld. L. R. 394.—**NFLD.**

**h. Evidence of ownership.**—**Acts of ownership.**—**GRUB v. DAVIDSON** (1908), 43 N. S. R. 242; 6 E. L. R. 409.—**CAN.**

**Sect. 6.—Defences: Sub-sect. 2, A. & B.]**

**283.** —[—Declaration stated, that defts., with force & arms, broke & entered a certain messuage, cottage, & dwelling-house, situate in Nova Scotia Gardens in the parish of St. Martin, Bethnal Green, & then expelled pltf. from the possession & occupation of the same. Plea, that the messuage, cottage, etc., were the soil & freehold of defts., wherefore they committed the trespasses in the messuage, etc., as they lawfully might for the cause aforesaid:—*Held*: (1) the plea of *liberum tenementum* was a good plea to this declaration, although the close was particularly described in the declaration; (2) it was not to be inferred from the declaration that there was any breach of the peace or forcible entry, the averment of *vi et armis* being a mere formal allegation that the defts. entered with some force, sufficient to enable them to get into possession.—*HARVEY v. BRIDGES* (1845), 14 M. & W. 437; 3 Dow. & L. 55; 14 L. J. Ex. 272; 5 L. T. O. S. 287; 9 Jur. 759; 153 E. R. 546; *affd.* (1847), 1 Exch. 201, Ex. Ch.

*Annotations*:—As to (2) *Consd.* *Blades v. Higgs* (1861), 10 C. B. N. S. 713. *Apprvd.* *Lows v. Telford & Westray* (1876), 1 App. Cas. 414. *Consd.* *Jones v. Foley* (1891), 60 L. J. Q. B. 464. *Hemmings v. Stoke Poges Golf Club*, [1920] 1 K. B. 720. *Refd.* *Wright v. Burroughes* (1840), 3 C. B. 685; *Curlewis v. Laurie* (1848), 11 L. T. O. S. 308; *Jones v. Jones* (1862), 1 H. & C. 1; *Boddall v. Maitland* (1881), 17 Ch. D. 174.

**284.** —[—In trespass *quare clausum fregit*, under a traverse of the allegation in the declaration that the close was the close of pltf., deft. may show title in himself or some other person, under whose authority he claims to have acted.

I agree with the exception of pltf. in error that the question raised by the issue of not possessed is, whether pltf. was in actual possession or not; but it seems to me that as soon as a person is entitled to possession, or, which is exactly the same thing, any other person enter by the command of that lawful owner so entitled to possession, the law immediately vests the actual possession in the person who so entered (*MAULE, J.*).—*JONES v. CHAPMAN* (1849), 2 Exch. 803; 18 L. J. Ex. 456; 14 L. T. O. S. 45; 13 J. P. 730; 154 E. R. 717, Ex. Ch.

*Annotations*:—*Apld.* *Litchfield v. Ready* (1850), 5 Exch. 939. *Consd.* *Wilkinson v. Kirby* (1854), 15 C. B. 430. *Apprvd.* *Lows v. Telford* (1876), 1 App. Cas. 414. *Consd.* *Ramsay v. Margrett*, [1894] 2 Q. B. 18; *Kynoch v. Rowlands*, [1912] 1 Ch. 527. *Apld.* *Hemmings v. Stoke Poges Golf Club*, [1920] 1 K. B. 720; *Canvey Island Comrs. v. Freedy*, [1922] 1 K. B. 179. *Refd.* *Newnham v. Stevenson* (1851), 10 C. B. 713; *Sloccombe v. Lyall* (1851), 2 L. M. & P. 33; *Humphrey v. Nowland* (1862), 15 Moo. P. C. C. 343; *French v. Gething*, [1922] 1 K. B. 236.

**285.** —[—The expulsion of a person from his dwelling-house is an injury to the dwelling-house. Declaration in trespass for breaking pltf.'s dwelling-house, expelling pltf. & taking his goods. Pleas of *liberum tenementum* were pleaded as to the trespasses in & to the dwelling-house. Pltf. replied, denying the pleas, & new assigning the expulsion:—*Held*: the new assignment was bad, as the pleas justified the expulsion as well as the breaking of the house.—*MERITON v. COOMBS* (1850), 9 C. B. 787; 1 L. M. & P. 510; 19 L. J. C. P. 336; 137 E. R. 1101.

*Annotation*:—*Refd.* *Boddall v. Maitland* (1881), 17 Ch. D. 174.

**286.** — Whether defence must be specially

**287 1.** —[—*SOULES v. ARMSTRONG* (1917), 51 N. S. R. 315; 36 D. L. R. 778.—CAN.

**291 1.** — *Ownership only of part where trespass committed.*—In trespass *quare clausum fregit*, describing the close by abutals, deft. pleaded

*liberum tenementum*:—*Held*: under this plea, he was bound to prove that that part of the close described by abutals on which he entered was his soil & freehold, & having failed to prove title to a small piece of the land so described, on which part of the

pleaded.]—Dft. in trespass *quare clausum fregit*, may give evidence of soil & freehold under the general issue.—*ARGENT v. DURRANT* (1799), 8 Term Rep. 403; 101 E. R. 1457.

*Annotations*:—*Expld.* *Newton v. Harland* (1840), 1 Man. & G. 644. *Apld.* *Jones v. Chapman* (1849), 2 Exch. 803. *Consd.* *Hemmings v. Stoke Poges Golf Club*, [1920] 1 K. B. 720.

**287.** — *Evidence of ownership.*—Where, to an action of trespass, for seizing & taking away furze, deft. pleaded the general issue, & several special pleas, in which he justified the taking under a claim for estovers on a common:—*Held*: although he had limited his claim to estovers in his pleas, he might adduce evidence to show that he had exclusive right of possession, under the general issue; & parties claiming similar rights on the common with deft. were held to be competent witnesses to prove that deft. was entitled to the exclusive possession of the land on which the trespass was committed.—*PEARCE v. LODGE* (1826), 12 Moore, C. P. 50; 5 L. J. O. S. C. P. 9.

**288.** — *Acts of ownership—Within twenty years before.*—A plea of *liberum tenementum*, to an action of trespass *quare clausum fregit*, is not supported by proof of the exercise of acts of ownership by deft. for a period of less than twenty years, where it appears that before the commencement of that period, & also within twenty years, the estate was in a third person.—*BREST v. LEVER* (1841), 7 M. & W. 593; 10 L. J. Ex. 337; 151 E. R. 904.

**289.** — *Joinder of denial of plaintiff's possession.*—(1) To an action of trespass, deft. pleaded, first, not guilty; secondly, that pltf. was not possessed of the close in which, etc.; thirdly, that deft. was seised in fee of the close in question; fourthly, that A. B. was seised in fee of the close in question, & that by his command deft. committed the trespass. A summons having been taken out before a judge, to strike out the third & last pleas, on the ground, that the facts therein stated might be given in evidence under the second plea, the judge refused to make any order.

(2) In an action of trespass, the seisin in fee of the deft., or of another under whose command he justifies, may be pleaded together with a plea denying pltf.'s possession.—*MORSE v. APPERLEY* (1840), 6 M. & W. 145; 9 L. J. Ex. 61; 4 Jur. 702; 151 E. R. 358.

*Annotations*:—As to (1) *Refd.* *Pim v. Grazebrook* (1842), 3 Man. & G. 863. As to (2) *Consd.* *Sloccombe v. Lyall* (1851), 6 Exch. 119. *Generally, Mend.* *Slack v. Clifton* (1816), 8 Q. B. 524; *Brown v. McLean* (1849), 14 L. T. O. S. 199.

**290.** —[—In trespass *quare clausum fregit*, deft. is entitled to plead *liberum tenementum* together with a plea denying that the close in which, etc., is pltf.'s.—*SLOCOMBE v. LYALL* (1851), 6 Exch. 119; 2 L. M. & P. 33; 20 L. J. Ex. 95; 16 L. T. O. S. 372; 155 E. R. 479.

**291.** — *Ownership only of part where trespass committed.*—Pltf. declared in trespass for breaking his close, & set out the close by abutals. Dft. justified, alleging that the close in which, etc., was part of an allotment of six acres made by comrs. duly authorised, for certain purposes, in execution of which he entered. Pltf. denied that the close in which, etc., was part of the six acres in the plea supposed to have been allotted; &

trespass was committed, pltf. was entitled to a verdict.—*DESBRIAY v. LIVINGSTON* (1864), 11 N. B. R. (6 All.) 169.—CAN.

*k. v. Necessity for clear & positive evidence.*—In an action for trespass, pltf. being proved to be in

thereupon issue was joined. It appeared that the close set out by abutments was not all within the allotment, but that the part in which the actual trespass occurred was within it:—*Held*: the justification was made out.—*BASSETT v. MITCHELL* (1831), 2 B. & Ad. 99; 9 L. J. O. S. K. B. 140; 109 E. R. 1080.

*Annotations*:—*Consd.* *Tapley v. Wainwright* (1833), 5 B. & Ad. 395. *Distd.* *Pythian v. White* (1836), 1 M. & W. 216. *Apld.* *Smith v. Royston* (1841), 8 M. & W. 381. *Refd.* *Holt v. Daw* (1851), 17 L. T. O. S. 198.

**292.** ———.]—Trespass for breaking & entering three closes set out by abutments. Plea, that the closes in which, etc., were the close, soil & freehold of L. Replication deduced title from another person, under a fine & grant to the closes in which, etc. At the trial plff. proved title to two of them only:—*Held*: the issue was divisible, & the verdict was to be entered for plff., as to the two closes, & for defts., as to the other.—*PHYTHIAN v. WHITE* (1836), 1 M. & W. 216; 4 Dowl. 714; 1 Gale, 400; 5 L. J. Ex. 148; 150 E. R. 412; *sub nom.* *PHYTHIAN v. WHITE*, Tyr. & Gr. 515.

*Annotations*:—*Mentd.* *Anderson v. Chapman* (1839), 5 M. & W. 483; *Traberne v. Gardner* (1857), 8 E. & B. 161; *Alcock v. Wilshaw* (1860), 2 E. & B. 633.

**293.** ———.]—On a plea of *liberum tenementum* to an action for a trespass to a close named in the declaration, deft. is entitled to a verdict, if he establish a title to that part of the close on which the trespass was committed, & is not bound to prove a title to the whole close.—*SMITH v. ROYSTON* (1841), 8 M. & W. 381; 1 Dowl. N. S. 124; 10 L. J. Ex. 437; 151 E. R. 1086.

**294.** ———.]—To action for trespass & assault.]—To a declaration in trespass *quare clausum fregit*, charging an assault, it is no plea that the close was the soil & freehold of S., & that the assault was committed by the command of S. in removing plff., after request, from the premises, without alleging that S. was possessed of the close.

The plea of *liberum tenementum* implies that both the freehold & the right to the possession are in the party, otherwise it would be no answer to the declaration (*TINDAL, C.J.*).—*ROBERTS v. TAYLER* (1845), 1 C. B. 117; 3 Dow. & L. 1; 14 L. J. C. P. 87; 4 L. T. O. S. 314; 9 Jur. 330; 135 E. R. 481.

*Annotation*:—*Refd.* *Ryan v. Clark* (1849), 14 Q. B. 65.

**295.** ———.]—Defence must extend to whole issue.]—Declaration stated that defts. with force & arms, & with a strong hand & against the form of the statute in such case, etc., broke & entered plff.'s dwelling-house then in his actual occupation, made a noise & disturbance therein, & stayed therein making such disturbance, etc., & in a forcible manner & with a strong hand broke open the doors, broke the locks, etc., & with force & arms, etc., assaulted plff., & in a forcible manner & with a strong hand expelled him, etc. Pleas: not guilty: &, as to the breaking & entering, etc., making a noise, etc., & staying, etc., & breaking open the doors, etc., "as in the declaration mentioned," that the dwelling-house, etc., was the dwelling-house, soil & freehold of one deft., wherefore he in his own right, & the others as his servants, etc., at the time when, etc., broke & entered, etc., & committed the supposed trespasses. On special demurrer to the last plea:—*Held*:

possession, it is incumbent upon deft. to show by clear & positive evidence that the right of property is in him.—*LE BLANC v. CUTTER* (1872), 8 N. S. R. (2 G. O.) 552.—*CAN.*

**1.** *Plea of exclusive possession*—*Evidence of joint possession*.]—Where deft. pleaded, in justification to trespass, an exclusive possession, & the

evidence showed a joint possession with plff., & there was a verdict for plff., the ct. refused to disturb the verdict.—*MOORE v. HANNAN* (1858), 3 N. S. R. (2 Thom.) 291.—*CAN.*

**PART II. SECT. 6, SUB-SECT. 2.—B.**  
**m.** *Justification by command of owner of freehold*.]—A deft. in trespass

(assuming the averments in the count to be indivisible, & that all must be answered by the plea): the plea answered every material part of the declaration, the averments "with force & arms," "with a strong hand," & "against the form of the statute" being, on these pleadings, matter of aggravation only.—*DAVISON v. WILSON* (1848), 11 Q. B. 890; 17 L. J. Q. B. 196; 11 L. T. O. S. 125; 12 Jur. 647; 116 E. R. 708.

*Annotation*:—*Consd.* *Beddall v. Maitland* (1881), 17 Ch. D. 174.

**296.** ———.]—Declaration stated that plff. was entitled to work certain clay ground, & that deft. built a wall, & thereby obstructed plff. in the enjoyment of such right. Plea, that the close was the soil & freehold of deft., & that deft. built the wall on the edge, etc., & that the clay was exhausted in the place where the wall was built. New assignment, that the close in question abutted, etc.; that the wall was built on the edge of such close; & that plff. was hindered from taking the clay at another place than where the wall was built:—*Held*: the new assignment was good, & the plea was bad.—*GROVE v. WITHERS* (1850), 4 Exch. 875; 19 L. J. Ex. 188; 14 L. T. O. S. 422; 154 E. R. 1472.

**297.** ———.]—Land conveyed to plaintiff by trustee in breach of trust.]—To a declaration in trespass to land, & for throwing down a wall, deft. pleaded upon equitable grounds that one B. was seised of the land in trust for deft.'s wife for life, & by the permission of B., deft., & wife occupied it; that B. in breach of the trust, & with plff.'s knowledge of all the facts, conveyed the land to plff. who built the wall upon it, which deft. threw down:—*Held*: the plea was bad.—*DRAKE v. PYWELL* (1865), 4 H. & C. 78; 13 L. T. 714.

**298.** ———.]—Replication.—Not showing title in plaintiff.]—*CARY v. HOLT* (1745), 11 East, 69, n.; 2 Stra. 1238; 103 E. R. 930.

**299.** ———.]—Showing demise by defendant.]—Declaration in trespass *quare clausum fregit*: plea, freehold in deft.: replication, that deft., before the time when, etc., demised to R. for a term, & R., before the time when, etc., entered & became possessed, & the term continued till the time when, etc. On demurrer, replication held good.—*RYAN v. CLARK* (1849), 14 Q. B. 65; 18 L. J. Q. B. 267; 13 L. T. O. S. 300; 13 Jur. 1000; 117 E. R. 26.

*Annotations*:—*Refd.* *Hogan v. Hand* (1861), 14 Moo. P. C. C. 310; *Harrison v. Blackburn* (1864), 17 C. B. N. S. 678.

**Adverse possession**.]—See *LIMITATION OF ACTIONS*, Vol. XXXII., pp. 488, 489, Nos. 1501–1509.

### B. Ownership in Third Person.

**300.** *Justification as servant of alleged owner*.]—*TREVILLIAN'S CASE* (undated), cited 1 Leon. 301; 74 E. R. 274.

*Annotations*:—*Folld.* *Diersly & Nevels Case* (1589), 1 Leon. 301. *Refd.* *Argent v. Durrant* (1799), 8 Term Rep. 103; *Jones v. Chapman* (1848), 2 Exch. 803. *Mentd.* *Buckler v. Hardy* (1597), Cro. Eliz. 585; *Meryweather v. Stanton* (1599), Cro. Eliz. 667; *Cromwell's Case* (1601), 2 Co. Rep. 69 b.

**301.** ———.]—*DIERSLY & NEVELS CASE* (1589), 1 Leon. 301; 74 E. R. 274.

*Annotations*:—*Consd.* *Jones v. Chapman* (1848), 2 Exch. 803. *Refd.* *Argent v. Durrant* (1799), 8 Term Rep. 403.

may justify his entry by the command of the owner of the freehold, but not by his mere permission or licence.—*PARENT v. CORNELISON* (1837), 2 N. B. R. (Ber.) 373.—*CAN.*

**n.** *Justification under demise from tenant in common*.]—In an action of trespass alleging the land to be plff.'s, & that deft. ejected plff. & took all

*Secl. 6.—Defences: Sub-sect. 2, B. & C.; sub-sect. 3, A.]*

**302.** —[—] In trespass against five for fishing in a several & free fishery, one of defts. may plead property in his master, & that he did it by his command, & traverse the right of free fishery stated in the declaration; & deft. may reply, *de injuria sua propria*.—WINE v. RIDER (1676), 2 Mod. Rep. 67; 86 E. R. 945.

**303.** —[—] In trespass *quare clausum fregit*, if deft. plead soil & freehold in another by whose command he justifies the trespass, such command may be traversed by pltf.—CHAMBERS v. DONALDSON (1809), 11 East, 65; 103 E. R. 929.

*Annotations:—Distt.* Harper v. Charlesworth (1825), 4 B. & C. 574. *Consd.* Humphrey v. Nowland (1862), 15 Moo. P. C. C. 343. *Refd.* Dobree v. Napier (1836), 2 Bing. N. C. 781; Morse v. Apperley (1840), 6 M. & W. 145; Ryan v. Clarke (1849), 18 L. J. Q. B. 267. *Mentd.* Bennett v. Neale (1811), Wight. 324.

**304.** —[—] MORSE v. APPERLEY, No. 289, *ante*.

**305.** —[—] DAVIDSON v. WILSON, No. 295, *ante*.

**306.** —[—] JONES v. CHAPMAN, No. 284, *ante*.

**307.** *Defence must be specially pleaded.*—Where pltf. is in the actual occupation of the close, deft. cannot, in an action of trespass, give evidence of property in a stranger under the general issue.—PHILPOT v. HOLMES (1791), Peake, 97; 170 E. R. 92, N. P.

**308.** *Evidence of ownership—Recovery in ejectment.*—BIKKER v. BEESTON, No. 314, *post*.

#### C. Denial of Plaintiff's Ownership or Possession.

**309.** *Defence to action.*—MORSE v. APPERLEY, No. 289, *ante*.

**310.** —[—] SLOCOMBE v. LYALL, No. 290, *ante*.

**311.** —[—] In an action of trespass, pleas: not possessed; & also a justification under a right of way all over the *locus in quo*; an order having been made at the last assizes for a plan to be marked by pltf. so as to show the places at which the alleged trespasses were committed; & there having been no application for the plan on the part of deft. since notice of trial, an application on his behalf, to postpone the trial because of the non-delivery of the plan, was refused.

If the land on which the fence is was not pltf.'s, then there is an end of the case. If it is, then deft. must prove a right of way such as to justify breaking down the fence & going all over the land so that it does not appear how the marking the plan can be so material as that deft. cannot go to trial without it; & if it were so, he should have applied for it before (ERLE, C.J.).—BEARD v. WATSON (1860), 2 F. & F. 33.

**312.** — *Meaning of plea.*—To a declaration in trespass *quare clausum fregit*, a plea denying the close to be pltf.'s is a denial of possession, if deft. was a wrongdoer; if otherwise, of the right

to the possession; but on either supposition it is a denial of title, as even possession is title against a wrongdoer.—PURNELL v. YOUNG (1838), 6 Dowl. 347; 3 M. & W. 288; 1 Horn & H. 22; 150 E. R. 1153; *sub nom.* PARNELL v. YOUNG, 7 L. J. Ex. 80.

*Annotations:—Consd.* Harrison v. Dixon (1843), 1 Dow. & L. 454; Whittington v. Boxall (1843), 5 Q. B. 139; Jones v. Chapman (1849), 2 Exch. 803. *Refd.* Mills v. Stephens (1838), 3 M. & W. 460; Pugh v. Roberts (1838), 3 M. & W. 458; Thomas v. Davies (1838), 5 Ad. & El. 598; Drury-Lane Proprietors v. Chapman (1843), 1 L. T. O. S. 359.

**313.** — *Necessity for special plea.*—Under an issue, in trespass *quare clausum fregit*, on a plea that the close was not the property of pltf., pltf.'s possession at the time of trespass is alone in issue, & deft. cannot set up title to the close, without pleading in confession & avoidance.

The plea of not guilty in trespass only puts in issue the fact of committing the alleged act of trespass, & not pltf.'s possession or right of possession, which, if intended to be denied, must be specially traversed. . . .

As mere possession is sufficient to maintain trespass against any one who cannot show better title, pltf.'s allegation, that deft. broke the close of pltf. is satisfied *primâ facie* by proof that deft. broke a close in the possession of pltf.; & this is not only *primâ facie*, but ultimately sufficient against any one who cannot avoid the effect of it by showing that, notwithstanding the actual possession by pltf., he, deft., has a right to it.

Under a plea which merely denies that the close is the close of pltf. deft. is to be considered *primâ facie* at least a mere wrongdoer, & as against him possession is not merely evidence of title, but actual title. . . . If deft. not only contests the possession in fact, but also relies upon title, in case actual possession is proved by pltf., it is far more consistent . . . with the rules of pleading generally & with the principles of justice, that his defence on the ground of title should be pleaded specially, & not given in evidence under a traverse of an allegation in pltf.'s declaration, which is satisfied by proof of possession only (LORD DENMAN, C.J.).—WHITTINGTON v. BOXALL (1843), 5 Q. B. 139; Dav. & Mer. 184; 12 L. J. Q. B. 318; 7 Jur. 722; 114 E. R. 1201.

*Annotations:—Consd.* Harrison v. Dixon (1843), 1 Dow. & L. 454; Williams v. Hughes (1843), 8 J. P. 470. *N.F.* Jones v. Chapman (1849), 2 Exch. 803. *Refd.* Harvey v. Bridges (1845), 3 Dow. & L. 55; Slocombe v. Lyall (1851), 6 Exch. 119.

**314.** — *Admissibility of evidence—Evidence of title.*—Dft., in trespass, failing to justify under a writ of *habere*, the judgment in ejectment having been set aside as irregular, held entitled, either under a plea that pltf. was not possessed, or that a third party else was, to go into proof of the title upon which he recovered in the action of ejectment.—BIKKER v. BEESTON (1861), 2 F. & F. 410.

the issues & profits, deft. justified under a demise from one M., who, he alleged, was seised in fee as a tenant in common of the land. Pltf. excepted to the plea:—*Held*: the plea was good, as setting up title in a third party, for pltf. brought this action as owner of the whole, & not against deft. as co-tenant.—HERR v. WESTON & CRONAN (1872), 32 U. C. R. 402.—CAN.

*o. Trespasses pending action of ejectment.*—Trespass *quare clausum fregit* will not lie against a deft. for acts committed under the authority of the person in possession of & claiming the land during the time an action of ejectment by pltf. against such

person was pending.—STREET v. CROOKS (1856), 6 C. P. 124.—CAN.

*p. Evidence of ownership.*—WHITE v. SMITH (1859), 9 N. B. R. (4 All.) 335.—CAN.

#### PART II. SECT. 6, SUB-SECT. 2.—C.

**309 i.** *Defence to action.*—DUNDAS v. ARTHUR (1857), 14 U. C. R. 521.—CAN.

**309 ii.** —[—] JIVANJI JAMSHEDJI R. BARJORJI NASSERVANJI (1909), 1 L. R. 33 Bom. 499.—IND.

**314 i.** — *Admissibility of evidence—Evidence of title.*—In trespass to land, under a plea that the land is not pltf.'s deft. is at liberty to show title

in himself or in another under whom he acted.—GRAY v. HARDING (1861), 21 U. C. R. 241.—CAN.

*q.* —[—] PHILLIPS v. GLENWOOD LUMBER CO. (1900), 8 Nfld. L. R. 390.—NFLD.

*r.* — *Action against council—Effect of acceptance of rates.*—A council cannot defend an action of trespass to land on the ground that pltf. was not possessed when immediately before the action was brought they accepted from him payment of the rates assessed by them upon the land.—MACKENZIE v. YOUNG (BOROUGH) (1892), 13 N. S. W. L. R. (L.) 34 8 N. S. W. N. 92.—AUS.

## SUB-SECT. 3.—LEAVE AND LICENCE.

## A. In General.

**Licences generally.]—***See* LANDLORD & TENANT, Vol. XXX., pp. 500–522.

**315. Whether defence to action.]—**HAYES v. ALLEN (1591), Poph. 13; 79 E. R. 1135.

**316. —.]—**To trespass, *deft.* may plead a licence to enjoy the premises from such a day to such a day.—HALL v. SEABRIGHT (1669), 1 Mod. Rep. 14; 2 Keb. 561; 1 Sid. 428; 86 E. R. 694.

*Annotation:—*Expld. Kavanagh v. Gudge (1844), 1 Dow. & L. 928.

**317. —.]—**To an action of trespass on the case for disturbance of common, *deft.* may plead licence from the lord of the manor; but he must show that sufficient common was left for *pltf.*—SMITH v. FEVERELL (1675), 2 Mod. Rep. 6; 1 Freem. K. B. 190; 86 E. R. 909.

*Annotations:—*Refd. Atkinson v. Teasdale (1771), 2 Wm. Bl. 817. *Mentd.* Gilbert v. Parker (1704), 2 Salk. 629.

**318. — Effect of revocation of licence.]—**ANON. (1460), Y. B. 39 Hen. 6. fo. 7, pl. 12.

*Annotations:—*Refd. Bevil's Case (1583), 4 Co. Rep. 8 a. *Mentd.* Bucknall's Case (1600), 9 Co. Rep. 33 a.

**319. —.]—**A parol licence from A. to B. to enjoy an easement upon A.'s land, is counter-mandable at any time whilst it remains executory. If A. conveys the land to another, the licence is determined at once & without notice to B., who becomes a trespasser if he afterwards enters upon it.—WALLIS v. HARRISON (1838), 4 M. & W. 538; 1 Horn. & H. 405; 8 L. J. Ex. 44; 2 Jur. 1019; 150 P. R. 1543.

*Annotations:—*Apld. Wood v. Leadbiter (1845), 13 M. & W. 838; Roffey v. Henderson (1851), 17 Q. B. 574. *Refd.* Smith v. Colbourne, (1914) 2 Ch. 533.

**320. —.]—**When *deft.* found the gate locked, that was a tolerably clear indication to him that the licence was revoked, & that the agreement was broken on the part of *pltf.* It seems to me there was no right to break the gate, & the plea not being an entire answer, being bad in part, is bad altogether (BRAMWELL, B.).—HYDE v. GRAHAM (1862), 1 H. & C. 593; 32 L. J. Ex. 27; 7 L. T. 563; 8 Jur. N. S. 1229; 11 W. R. 119.

**321. Defence must be specially pleaded.]—**A father may bring an action of trespass for breaking, etc. his house, & debauching his daughter, *per quod servitium amisit*, though the daughter be above twenty-one years of age, where acts of service are proved, though there be no contract for service. Licence to enter *pltf.*'s house, if pleaded, is a bar to this action: but it cannot be given in evidence under the general issue.—BENNETT v. ALLCOTT (1787), 2 Term Rep. 166; 100 E. R. 90.

*Annotations:—*Consd. Woodward v. Walton (1807), 2 Bos. & P. N. R. 476; Ditcham v. Bond (1814), 2 M. & S. 436;

## PART II. SECT. 6, SUB-SECT. 3.—A.

**3151. Whether defence to action.]—**NELSON v. COOK (1854), 12 U. C. R. 22.—CAN.

**31511. —.]—**CURTISS v. TOWNSEND (1857), 6 C. P. 255.—CAN.

**315111. —.]—**MORGAN v. LAILEY (1873), 33 U. C. R. 369.—CAN.

**3151v. —.]—**ROSS v. HUNTER (N. S.) (1882), 7 S. C. R. 289.—CAN.

**315 v. —.]—**MCLEAN v. MCRAE (1917), 50 N. S. R. 536; 33 D. L. R. 128.—CAN.

**315 vi. —.]—**ISITT v. GRAND TRUNK PACIFIC RY. CO. (1919), 59 S. C. R. 686; 49 D. L. R. 687.—CAN.

**315 vii. —.]—**WELLINGTON CORPN. v. REEVES (1883), 2 N. Z. L. R. 121 (S. C.).—N.Z.

**t. — Effect of revocation of licence.]**  
—*Deft.*, in writing, agreed with *pltf.* to take a certain saw mill

according to the terms of a certain lease to *pltf.*, & with a provision that he was to take the pine off the land known as the S. lot first, as *pltf.* was bound to take off the same. *Pltf.* subsequently purchased the fee simple of the S. land.—*Held:* *pltf.* was entitled to revoke any licence implied by such agreement, & to maintain trespass against *deft.* for removing from the lot formerly owned by S. pine saw logs, after notice forbidding such removal.—CAMPBELL v. HOWLAND (1858), 7 C. P. 358.—CAN.

**s. — Revocation in interval between several trespasses.]—**The declaration charged the trespasses, breaking down fences, etc., as committed on divers days & times. *Deft.* pleaded leave & licence. It appeared that part of the fence was removed under a licence, & the remainder after it had been revoked, the interval from the first to the last removal being

Parker v. Bailey (1824), 4 Dow. & Ry. K. B. 215. *Distd.* Stammers v. Yearsley (1833), 10 Bing. 35. *Refd.* Newton v. Holford (1845), 4 L. T. O. S. 358; Allen v. Flood, (1898) A. C. 1. *Mentd.* Dean v. Peel (1804), 5 East, 45; Grinnell v. Wells (1844), 2 Dow. & L. 610; Thompson v. Ross (1859), 29 L. J. Ex. 1.

**322. — Licence in law.]—**(1) In trespass, a plea of leave & licence means, leave & licence in fact, & a licence in law must be specially pleaded; & *semble:* it may be pleaded to part of a count, if severable & distinct.

(2) A plea of leave & licence means a licence in fact, & before the trespass (COCKBURN, C.J.).—MOXON v. SAVAGE (1860), 2 F. & F. 182.

**323. Limitation of licence as defence—Licence must cover all trespasses.]—**To a declaration for several trespasses on *pltf.*'s land, on divers days, etc., the plea alleged, that at the several days, etc., *deft.* committed the several trespasses by licence of *pltf.*: & the latter replied that *deft.* of his own wrong, & without the cause alleged, committed the several trespasses, etc.:—*Held:* evidence of a licence which covered some, but not all of the trespasses proved, within the period laid in the declaration, did not sustain the justification upon the issue taken by the replication.—BARNES v. HUNT (1809), 11 East, 451; 103 E. R. 1078.

*Annotations:—*Apld. Symons v. Hearson & Fisher (1823), 12 Price, 369. *Distd.* Lambert v. Hodgson (1823), 8 Moore, C. P. 326; Bowen v. Jenkin (1837), 6 Ad. & El. 911. *Consd.* Hill v. White (1839), 6 Bing. N. C. 26. *Apld.* James v. Lingham (1839), 5 Bing. N. C. 553. *Expld.* Bracegirdle v. Peacock (1845), 8 Q. B. 174. *Distd.* Burton v. Scott (1847), 9 L. T. O. S. 313. *Apld.* Adams v. Andrews (1850), 15 Q. B. 284. *Refd.* Hayward v. Grant (1821), 1 C. & P. 418; Nicholls v. Bastard (1835), 2 Cr. M. & R. 659; Solly v. Neish (1835), 5 Tyr. 625; Isaac v. Farrar (1836), 1 M. & W. 65; Bolton v. Sherman (1837), 2 M. & W. 395; Dyte v. Hawker (1843), 12 L. J. Q. B. 338; Leader v. Purday (1849), 7 C. B. 4; Houle v. Penning (1851), 16 L. T. O. S. 87.

**324. —.]—**It altogether is a mistake to suppose, that a plea of leave & licence, if proved as to a breaking & entering, extends to all the trespasses complained of (HULLOCK, B.).—SYMONS v. HEARSON & FISHER (1823), 12 Price, 369; 147 E. R. 750.

**325. —.]—**In trespass *quare clausum fregit* on several days. Plea, leave & licence to the whole. If some of the trespasses were committed after the licence was revoked, *pltf.* need not new assign, as *deft.*, by his plea, undertakes to prove a licence sufficient to cover all the acts of trespass.

If *pltf.* is tenant of A., & has agreed that A. shall give three persons licence to sport over the lands, & *deft.* has such a licence from A., such a licence will not support the plea of leave & licence by *pltf.*—HAYWARD v. GRANT (1824), 1 C. & P. 448; 171 E. R. 1268; *subsequent proceedings* (1825), 1 C. & P. 677.

two or three years.—*Held:* *pltf.* was entitled to succeed, though it would have been otherwise if the declaration had only charged the trespasses as committed on the same day, for *deft.* could then have applied the licence to the only trespass charged.—MARRIS v. DAVIDSON (1867), 26 U. C. R. 641.—CAN.

**b. Limitation of licence as defence—Licence must cover all trespasses.]—**BAXTER v. FOSHAY (1849), 6 N. B. R. (1 All.) 413.—CAN.

**c. —.]—**Where *deft.* pleads leave & licence, he must prove a licence co-extensive with the trespass, & *pltf.* need not new assign if the licence was for part only.—THOMPSON v. VAN BUSKIRK (1857), 14 U. C. R. 388.—CAN.

**d. —.]—**A party acting under a licence must conform to it, & if the act done be not fully covered by





written order from A. had entered & forcibly expelled B. The foregoing agreement was given in evidence:—*Held*: the plea was sustained by the evidence.—*KAVANAGH v. GUDGE* (1844), 7 Man. & G. 316; 1 Dow. & L. 928; 7 Scott, N. R. 1025; 13 L. J. C. P. 99; 2 L. T. O. S. 497; 8 Jur. 362; 135 E. R. 132.

*Annotations*:—*Distd.* Lane v. Dixon (1847), 3 C. B. 776. *Refd.* Hewitt v. Isham (1851), 7 Exch. 77.

—*Re-entry on determination of term generally.*—See LANDLORD & TENANT, Vol. XXXI., pp. 460 *et seq.*

—*Reserving right to cut trees.*—See AGRICULTURE, Vol. II., p. 98, Nos. 785–787.

**338.** — *Reservation of portion to grantor & assigns—Licence by grantor.*—Plea to action of trespass to a shipyard, setting up an agreement by which the G. E. Ry. co. granted the shipyard to pltf. for a term "except a patent slip & the site thereof, & the dues & payments payable for the use thereof, & except & reserved to the said co., their successors & assigns, officers, servants, & workmen, free access to & from the said slip for using, working, or repairing the same or otherwise," & averring that the co. granted licence to deft. to work & use the slip, & the alleged trespass were an exercise of the right so reserved:—*Held*: a good plea.—*MITCALFE v. WESTAWAY* (1864), 17 C. B. N. S. 658; 34 L. J. C. P. 113; 11 L. T. 673; 10 Jur. N. S. 1202; 144 E. R. 264; *sub nonn.* *METCALFE v. WESTAWAY*, 5 New Rep. 126; 13 W. R. 181.

*Annotation*:—*Mentd.* Hammond v. Prentice, [1920] 1 Ch. 201.

**339.** Act must be lawful if done by licencor.]—

(1) To a declaration in trespass for breaking pltf.'s close, & digging up & carrying away the turf, deft. pleaded that the close was the close of W. & others as tenants in common, & justified under licence from W. On motion for judgment *non obstante veredicto*:—*Held*: (1) a bad plea, because W., the tenant in common, could not himself have done the act, which amounted to a destruction, & therefore he could not authorise another to do it.

(2) Deft. also pleaded that the close was not pltf.'s:—*Held*: he did not support his traverse by proof that pltf. was tenant in common with another person under whom deft. acted.

(3) Trespass lies by one tenant in common against his co-tenant for digging up & carrying away the soil of the close of which they are tenants in common, for such an act is an ouster.—*WILKINSON v. HAYGARTH* (1847), 12 Q. B. 837; 16 L. J. Q. B. 103; 8 L. T. O. S. 405; 11 Jur. 104; 116 E. R. 1085; *on appeal*, *sub nonn.* *HAYGARTH v. WILKINSON* (1848), 12 Q. B. 851, Ex. Ch.

*Annotation*:—*Generally*, *Refd.* Job v. Potten (1875), L. R. 20 Eq. 84.

**340.** Tacit assent.—Interference with party wall by tenant in common.]—In an action by one tenant in common of a party wall against a builder employed by the other tenant, for pulling it down carelessly & rebuilding it with unreasonable delay, special damage being laid in damage to fixtures, loss to business, etc., one count being as trespass, the other being grounded on a want of due care

& diligence; the tacit assent of pltf. to the work being commenced:—*Held*: to support a plea of leave & licence as to the count for trespass; but the plea was not applicable to the second count, alleging delay & negligence in rebuilding the wall, supposing that the action was sustainable.—*PFLUGER v. HOCKEN* (1858), 1 F. & F. 142.

#### SUB-SECT. 4.—ENTRY IN PURSUIT OF GAME OR VERMIN.

**341.** Whether defence to action.]—*GEDGE v. MINNE* (1613), 2 Bulst. 60; 80 E. R. 958; *sub nonn.* *GEUSH v. MYNNS*, Cro. Jac. 321; 1 Brownl. 224.

**342.** —.]—It is actionable at common law to hunt in the soil of another.—*BENNETT v. TALBOT* (1696), 5 Mod. Rep. 307; Holt, K. B. 661; 1 Salk. 212; Carth. 382; 12 Mod. Rep. 121; 1 Com. 26; 1 Ld. Raym. 149; Comb. 420; 87 E. R. 672.

*Annotations*:—*Refd.* Buxton v. Mingay (1757), 2 Wils. 70. *Mentd.* Milbourn v. Reade (1744), 7 Mod. Rep. 469; Batchelor v. Bugge (1772), 3 Wils. 319; Stead v. Gamble (1806), 7 East, 325; Wells v. Iggulden (1821), 3 B. & C. 186.

**343.** —.]—A person may justify trespass in following a fox with hounds over the grounds of another, if he do no more than is necessary to kill the fox.—*GUNDRY v. FELTHAM* (1786), 1 Term Rep. 334; 99 E. R. 1125.

*Annotations*:—*Distd.* Paul v. Summerhayes (1878), 4 Q. B. D. 9. *Mentd.* Lucas v. Nockells (1833), 10 Bing. 157.

**344.** —.]—*ESSEX (EARL) v. CAPEL* (1809), Locke on Game Laws, 5th ed. 45; Chitty on Game Laws, 2nd ed. 31, n.

*Annotation*:—*Foll.* Paul v. Summerhayes (1878), 4 Q. B. D. 9.

**345.** —.]—One who finds game on his own ground cannot justify pursuing it into the land of another.—*DEANE v. CLAYTON* (1817), 7 Taunt. 489; 1 Moore, C. P. 203; 129 E. R. 196.

*Annotations*:—*Consd.* Bird v. Holbrook (1828), 4 Bing. 628; *Jardin v. Crump* (1841), 8 M. & W. 782. *Refd.* Hott v. Wilkes (1820), 3 B. & Ald. 304; Lynch v. Nurdin (1841), 1 Q. B. 29; Corby v. Hill (1859), 4 C. B. N. S. 536; Ponting v. Noakes (1894), 2 Q. B. 284; Lowry v. Walker, [1910] 1 K. B. 173; Latham v. Johnson & Nephew, [1913] 1 K. B. 398; Hardy v. C. L. Ry. (1920), 124 L. T. 136.

**346.** —.]—A person is not justified in entering the land of another against his will for the purposes of the sport of fox hunting.—*PAUL v. SUMMERHAYES* (1878), 4 Q. B. D. 9; 48 L. J. M. C. 33; 39 L. T. 574; 43 J. P. 188; 27 W. R. 215; 11 Cox, C. C. 202, D. C.

*Annotation*:—*Distd.* Calvert v. Gosling (1889), 5 T. L. R. 185.

**347.** —.]—*CALVERT v. GOSLING* (1889), 5 T. L. R. 185, D. C.

**348.** — *Under grant.*—Trespass for breaking & entering two closes, parcel of Forton Farm. Plea, that one J. W. before & at the time when, etc., was seised in fee of 50 acres of land next adjoining the *locus in quo*, & that by deed of Feb. 17, 1736, between F. C. who was seised in fee of the *locus in quo*, & one R. W. who was seised in fee of the 50 acres, F. C. granted to R. W. & his heirs & assigns, for the time being owners in fee of the 50 acres, the liberty & privilege of

—*HENDERSON v. CLANFIELD* (1892), 31 N. B. R. 568.—*CAN.*

p. *Licence by one tenant in common.*—*HUTCHISON v. Y.M.C. ASSOC. (TRUSTEES)* (1879), 19 N. B. R. (3 P. C. B.) 65.—*CAN.*

q. *Demise of land—Breach of covenant not to sublet.*—A lessee, holding under a lease containing a clause against subletting, sublet a portion of the premises to pltf. as tenant from year to year; the mesne lessor having

died, deft. trespassed on pltf.'s part of the premises:—*Held*: in trespass *quare clausum fregit*, the subletting to pltf. was, at least, a licence to occupy; & pltf. being in possession was entitled to hold it until the licence was revoked by competent authority; & authority derived from an administratrix of the mesne lessor, who obtained administration after the committing of the trespass, did not relate back so as to justify it.—*LITTLETON v. McNAMARA* (1875), 1 R. 9 L. C. 417.—*IR.*

r. *Licence to enter house & seize chattels—Breaking & entering without demand—Or intimation of authority.*—A licence by deed to enter a dwelling-house at any time or times, & seize certain chattels & sell the same, will not justify a breaking & entering unless a demand of the goods has been first made, together with an intimation of the authority under which such demand is made.—*AIKINS v. BRUNTON* (1866), 14 W. R. 636.—*IR.*



**Sect. 6.—Defences: Sub-sects. 4, 5, 6 & 7.]**

hunting for game with dogs in the *locus in quo*. The plea then justified the trespass as the servant of J. W. Replication that F. C. did not grant the liberty & privilege as in that plea mentioned, upon which issue was joined. At the trial there was no proof of any such grant as that stated in the plea, but it appeared that by a deed of that date R. W., being then seised in fee of the manor of Middleton, conveyed Forton Farm to F. C. reserving all royalties; but it appeared further that from the year 1753 the gamekeepers of the lord of the manor of Middleton were accustomed to sport over Forton Farm with the knowledge of pltf. & his landlords the owners of Forton Farm; that about fourteen years ago pltf. by desire of his landlord gave notice to the then gamekeeper of the lord of the manor not to trespass, but he afterwards continued to sport there by order of the lord, without any further interruption:—**Held:** it lay upon deft. upon this issue to prove, (a) that he had such a royalty; & (b) that at the time in question he was in the due exercise of it.—**PICKERING v. NOYES** (1825), 4 B. & C. 639; 7 Dow. & Ry. K. B. 49; 4 L. J. O. S. K. B. 10; 107 E. R. 1198.

**Annotations:**—**Refd.** Dayrell v. Hoare (1840), 12 Ad. & El. 356; Wickham v. Hawker, Heath & Rolph (1840), 10 L. J. Ex. 153. **Pannell v. Mill** (1846), 11 Jur. 109; **Sowerby v. Smith** (1871), L. R. 9 C. P. 521.

**SUB-SECT. 5.—ENTRY to RETAKE OR REMOVE GOODS.**

**349. Whether defence to action—Entry to retake own goods—Goods deposited on land by thief.]—HIGGINS v. ANDREWES** (1819), 2 Roll. Rep. 55; 81 E. R. 656.

**Annotations:**—**Refd.** Anthony v. Haney (1832), 1 L. J. C. P. 81. **Mentd.** Foot v. Berklay (1670), 2 Keb. 654.

**350. ——— Goods on land by wrongful act of defendant.]—Trespass for entering pltf.'s close. Plea, that certain goods of defts. were there, & that they entered to take them, doing no unnecessary damage:—**Held:** ill.—**ANTHONY v. HANEY** (1832), 8 Bing. 186; 1 Moo. & S. 300; 1 L. J. C. P. 81; 131 E. R. 372.**

**Annotations:**—**Expld.** Patrick v. Colerick (1838), 3 M. & W. 483. **Refd.** Jay's Furnishing Co. v. Brand, [1914] 2 K. B. 132.

**351. ——— Cattle straying from common.]—ANON.** (1480), 17 C. B. N. S. 251, n.; Y. B. 20 Edw. 4, fo. 10, pl. 10.

**Annotations:**—**Consd.** Fletcher v. Rylands (1866), L. R. 1 Exch. 265. **Gaylor & Pope v. Davies** (1924), 93 L. J. K. B. 702. **Refd.** Heat v. Edwards (1864), 17 C. B. N. S. 245.

**Mentd.** Wakefield v. Costard (1586), 1 And. 151; Gateward's Case (1607), 6 Co. Rep. 59 b.

**352. ——— Goods on land by wrongful act of plaintiff.]—A plea to a declaration in trespass for breaking & entering pltf.'s close, that deft. being possessed of certain goods, pltf., without his**

leave & against his will, took the goods & placed them on the close in the declaration mentioned, wherefore deft. made fresh pursuit, & entered to retake the goods, is a good plea, & a good justification of the entry on pltf.'s close.—**PATRICK v. COLERICK** (1838), 3 M. & W. 483; 1 Horn & H. 125; 7 L. J. Ex. 135; 2 Jur. 377; 150 E. R. 1235.

**Annotations:**—**Apld.** Burridge v. Nichollette (1861), 6 H. & N. 383. **Refd.** Wood v. Leadbitter (1845), 13 M. & W. 838; Austin v. Dowling (1870), L. R. 5 C. P. 534; Cornish v. Stubbs (1870), 39 L. J. C. P. 202; Jays Furnishing Co. v. Brand, [1914] 2 K. B. 132.

**353. ——— Cattle chased from right of way.]—If a man had a way over the land of another for his cattle; & upon the way he scares his cattle, so that they run out of the way upon the land of the owner, & the party who drives the cattle freshly pursues them, etc. In trespass he who had the way might plead this special matter in justification (**RICHARDSON, C.J.**).—**ANON.** (1631), Het. 166; 124 E. R. 426.**

**354. ——— Fraudulent purchase by plaintiff.]—A. bought goods to a large amount from a tradesman, & paid to the tradesman £20, which was not, however, taken on account, A., in the opinion of the jury, having a preconceived intention of not paying for the goods, & having misrepresented her ability to pay:—**Held:** the tradesman was justified in rescinding the contract, & retaking the goods from A.'s house within a reasonable time; but he was guilty of excess in remaining in possession, by means of his servants, of a portion of A.'s house from Saturday morning to Monday, when the goods were taken away.—**DIXON v. HEWETSON** (1867), 16 L. T. 295, N. P.**

**355. ——— Goods fraudulently deposited—By tenant to defendant.]—In an action of trespass for breaking & entering pltf.'s house & taking his goods, a special plea, justifying an entry to seize goods fraudulently removed by deft.'s tenant, should be confined to the breaking & entry: & the property in the goods should be traversed in a separate plea. *Qu.*: whether, in trespass *de bonis*, etc., a special plea, showing property in another, gives sufficient implied colour to pltf., if it distinctly admits his possession?—**FLETCHER v. MARILLIER** (1839), 9 Ad. & El. 457; 1 Per. & Dav. 354; 2 Will. Woll. & H. 14; 8 L. J. Q. B. 176; 112 E. R. 1285.**

**Annotation:**—**Distd.** Williams v. Roberts (1852), 7 Exch. 618.

**356. ——— Entry to search for stolen goods.]—TOPLADYE v. STALYE** (1649), Sty. 165; 82 E. R. 615.

**357. ———.]—In trespass for entering a yard, deft. was allowed to plead that he entered for the purpose of viewing a mare then in a stable in the yard, which had been recently stolen from him.—**WEBB v. BEAVAN** (1844), 6 Man. & G. 1055; 7 Scott, N. R. 936; 134 E. R. 1220.**

**358. ——— Entry to deposit plaintiff's goods—Wrongfully placed on defendant's land.]—If A.**

pltf. forcibly ejected him & detained the goods, & deft., with such force as he lawfully might use, entered upon the land & seized the goods:—**Held:** a good plea.—**Cox v. BATH** (1893), 14 N. S. W. L. R. (L.) 263; 9 N. S. W. W. N. 171.—**AUS.**

**a. ——— Necessity for fault or neglect on part of defendant.]—A man cannot justify an entry on the land of another for the purpose of taking his own property, unless he shows that it was upon the land without any fault or neglect on his part.—**HEAD v. SMITH** (1836), 2 N. B. R. (Ber.) 288.—**CAN.****

**b. ——— Goods illegally placed on land of another.]—When A.'s goods have been wrongfully taken by another**

**PART II. SECT. 6, SUB-SECT. 5.**

**349 i. Whether defence to action—Entry to retake own goods—Goods deposited on land by thief.]—Where goods have been stolen, the owner of the land where those goods are placed with his privity, although ignorant that the felony has been committed, cannot complain if the owner of the goods enters upon his land & retakes them. No notice or demand is necessary. The rule is founded on public policy, & that the ends of justice may not be defeated.—**CUNNINGHAM v. YEOMANS** (1868), 7 N. S. W. S. C. R. (L.) 149.—**AUS.****

**350 i. ——— Goods on land by wrongful act of plaintiff.]—In trespass for breaking & entering pltf.'s barn,**

deft. justified on the ground that his cattle had been wrongfully taken by pltf., who locked them up in his barn, & refused to give them up.—**Held:** sufficient, & deft. had a right to take his cattle from pltf., who was a wrongdoer.—**GRAHAM v. GREEN** (1862), 10 N. B. R. (5 All.) 330.—**CAN.**

**350 ii. ———.]—TURNER v. SMITH** (1888), 29 N. B. R. 567.—**CAN.**

**350 iii. ———.]—DILLMAN v. SIMPSON** (N. S.) (1906), 2 E. L. R. 105.—**CAN.**

**t. ———.]—Plea to an action of trespass to land justifying the entry on the ground that certain goods of deft. were on pltf.'s land, & deft. was with the consent of pltf. on the land & in possession of the goods, & thereafter**

wrongfully place goods in B.'s building B. may lawfully go upon A.'s close adjoining the building, for the purpose of removing & depositing the goods there for A.'s use.—*REA v. SHEWARD* (1837), 2 M. & W. 424; 6 L. J. Ex. 125; 1 Jur. 433; 150 E. R. 823; *sub nom.* *RAY v. SHEWARD*, Murph. & H. 68.

**359. — Entry to remove books for audit—From county court registrar's office—Entry by treasurer.]**—A registrar of a county ct. rented offices in which he carried on his business as a solr. & also the county ct. business, he being allowed by the Treasury an annual sum for the part of the offices used for county ct. purposes. The treasurer of the county ct. gave the registrar notice of his intention to audit the accounts on a Saturday, when, by a county ct. rule, the office closed at one o'clock. The treasurer went to the office after one o'clock, & finding it closed, broke the locks of an inner door & a cupboard in which the books were kept, & having taken away the books & audited them, returned them to the office. The registrar having brought an action of trespass against him:—*Held*: he was justified in so doing under the county ct. Acts.—*HURRIDGE v. NICHOLETS* (1861), 6 H. & N. 383; 30 L. J. Ex. 145; 3 L. T. 703; 9 W. R. 345; 158 E. R. 158.

*Annotation*:—*Refd.* Hyde v. Graham (1862), 32 L. J. Ex. 27.  
**— Entry to remove own furniture from dwelling-house—Removal of minister from pastoral charge.]**—*See ECCLESIASTICAL LAW*, Vol. XIX., p. 540, No. 4010.

#### SUB-SECT. 6.—PRESERVATION OF PROPERTY OR LIFE.

**360. Whether defence to action—Preservation of property—Making drain to carry off water.]**—*HARCOURT v. SPICER* (1521), Y. B. 12 Hen. 8, fo. 2, pl. 2.

*Annotation*:—*Refd.* Vaspur v. Edwards (1701), 12 Mod. Rep 658.

**361. — — — Extinguishing fire in preservation of shooting rights—Acts reasonably necessary.]** If a fire breaks out on land, the tenant of the sporting rights is entitled to adopt such means on the land for extinguishing the fire as may in the circumstances be necessary for the preservation of his sporting rights. The justification of a trespass for that purpose depends on the state of things at the moment of interference, & not upon the inference as to necessity to be drawn from the event. It is not therefore the law that the intervention of the tenant should be proved by the event to have been in fact necessary for the preservation of the property in the sense that, but for that intervention his property would have been destroyed or injured; it is a good defence in law if, there being a real & imminent danger, the means taken by the tenant to avert it were reasonably necessary in the sense that they were acts which in all the circumstances of the case a reasonable man would do to meet such a real danger.

Pltf., an owner of land, let the shooting rights over the land to one C., whose bailiff & head gamekeeper deft. was. A fire broke out on the land, & while men in the employ of pltf. were

endeavouring to beat it out deft. set fire to strips of heather between the fire & a part of the shooting where were some nesting pheasants, the property of his master. Shortly afterwards pltf.'s men succeeded in extinguishing the fire. Pltf. brought an action of trespass in the county ct. & the jury were asked two questions: (a) "Was the method adopted by deft. in fact necessary for the protection of his master's property," & (b) "If not, was it reasonably necessary in the circumstances." They answered the first question in the negative, the second in the affirmative. The county ct. judge gave judgment for deft.:—*Held*: upon the findings of the jury deft. was entitled to judgment.—*COPE v. SHARPE* (No. 2), [1912] 1 K. B. 496; 81 L. J. K. B. 346; 106 L. T. 56; 28 T. L. R. 157; 56 Sol. Jo. 187.

*Annotation*:—*Refd.* Kirby v. Chessum (1913), 30 T. L. R. 15.

**362. — — — Underpinning adjoining wall—Danger of collapse during building operations.]**—Pltf. was the landlord of certain premises & defts. entered into a contract with the Comrs. of Works for the extension of adjoining premises. A clause in the contract provided that defts. should indemnify the Comrs. against claims for damage, this clause not being limited to damage caused during the progress of the work. Defts. placed beneath pltf.'s wall a mass of brickwork & concrete, some of which would require to be cut away in the event of pltf. desiring to make a cellar. During the excavations there was danger of one of pltf.'s walls collapsing, & the architect representing the Comrs. ordered defts. to underpin the wall. Defts. underpinned the wall without pltf.'s consent, although the danger was not so imminent as to make it reasonably necessary to do the work without it. Pltf. brought an action of trespass against defts., & the latter claimed an indemnity from the Comrs. as third parties:—*Held*: the imminence of the danger did not affect the right of pltf. to complain of injury to his premises, & defts. had not justified the trespass & were liable to pay damages to pltf. but that they were entitled to an indemnity from the Comrs. as the contract provided that they were to proceed with the work in accordance with the instructions of the Comrs.' architect.—*KIRBY v. CHESSUM & SONS* (1914), 79 J. P. 81; 30 T. L. R. 660; 12 L. G. R. 1136, C. A.

**— — — Abatement of nuisance.]**—*See NUISANCE*, Vol. XXXVI., p. 204, Nos. 457–463.

**363. — — — Preservation of life.]**—*HOWARD v. FRITH* (1666), 2 Keb. 58; 84 E. R. 37.

**364. — — — Prevention of murder.]**—A private person may justify breaking & entering pltf.'s house & imprisoning his person, to prevent him from committing murder on his wife.—*HANDCOCK v. BAKER* (1800), 2 Bos. & P. 260; 126 E. R. 1270.

#### SUB-SECT. 7.—ACCORD AND SATISFACTION.

**365. Whether defence to action.]**—*PETO v. CHEY* (1611), 2 Brownl. 128; 123 E. R. 854.

**366. —.]**—Plea to declaration in trespass alleged, that, after the committing of the trespass, it was agreed that deft. should pay to pltf. £5, as

& placed on the land of B., & the latter, although requested by A. to allow him to remove them, does not permit him to do so.—*Held*: A. may then lawfully enter & remove his goods.—*HAMILTON v. CALDER* (1883), 23 N. B. R. 373.—*CAN.*

*Annotation*:—*Refd.* *MORRISON v. THOMAS*, [1922] 1 W. W. R. 215; 45 D. L. R. 364; 15 Sask. L. R.

#### 110.—*CAN.*

*d.* — *Entry to search for stolen goods.]*—*RAYSON v. GRAHAM* (1864), 15 C. P. 36.—*CAN.*

#### PART II. SECT. 6, SUB-SECT. 6.

*a.* *Whether defence to action—Preservation of property.]*—*HARGREAVE v. MEADE* (1859), 10 L. C. L. R. 117.—*IR.*

#### PART II. SECT. 6, SUB-SECT. 7.

**365 i. Whether defence to action.]**—In trespass *quare clausum fregit* deft. pleaded a reference after action, & payment & acceptance of 5s. in pursuance of the award, in full satisfaction of the damages & costs:—*Held*: a good plea of accord & satisfaction.—*HALL v. WARNER* (1845), 2 U. C. R. 392.—*CAN.*

**Sect. 6.—Defences: Sub-sects. 7, 8 & 9.]**

full satisfaction & discharge of all damages sustained by pltf. by reason of the trespass; & that, in pursuance of such agreement, deft., before the commencement of this suit, paid to pltf. £5, as a full satisfaction & discharge of all damages sustained by pltf. by reason of the trespass; & pltf. accepted the same from deft., as such satisfaction & discharge. Replication, traversing the agreement. Verdict was given for pltf. on that issue:—*Held*: satisfaction, independently of the accord, was no bar to the action, & therefore, the replication did not raise an immaterial issue.—*BAINBRIDGE v. LAX* (1846), 9 Q. B. 819; 16 L. J. Q. B. 85; 8 L. T. O. S. 213; 11 Jur. 123; 115 E. R. 1490.

**367.** —[—]—In an action for a trespass committed by deft. as servant & by command of P., acceptance of satisfaction by pltf. from P. is a defence. Where deft. introduces an immaterial averment in his plea, pltf. cannot in his replication so traverse the matters of the plea as to include such immaterial averment in the issue; therefore where deft. in trespass pleaded that the trespass was committed by command of P. & then stated an executed accord between pltf. & P. with the consent of deft., & acceptance thereof by pltf. in satisfaction of the trespasses:—*Held*: a replication traversing the accord & execution thereof with the consent of deft., was bad, for, as no rights of the deft. appeared to be compromised by the accord, his consent was unnecessary.—*THURMAN v. WILD* (1840), 11 Ad. & El. 453; 3 Per. & Dav. 289; 113 E. R. 487.

*Annotations*:—*Mentd.* *Kling v. Norman* (1847), 4 C. B. 884; *Jones v. Broadhurst* (1850), 9 C. B. 173; *Penny v. Wimbledon U. C.* (1899), 68 L. J. Q. B. 704.

**SUB-SECT. 8.—TENDER OF AMENDS.**

**368. Whether defence to action.]**—A plea of tender of amends is not good where the trespass was voluntary, as for battery or breaking deft.'s close, or putting cattle into his ground.—*WALGRACE'S CASE* (circa 1590), Noy, 12; Cas. Pract. K. B. 168; 74 E. R. 983.

**369.** —[—]—Tender no plea in trespass.—*CURBIT v. HARRISON* (1601), Cro. Eliz. 820; 78 E. R. 1047.

**370.** —[—]—In trespass, tender must be of sufficient amends; *contra* of an estray.—*ANON.* (1706), 11 Mod. Rep. 71; 88 E. R. 895.

**371.** — **Pleading.]**—Where a deft. in trespass pleads that he tendered pltf. a certain sum, being a sufficient amends, pltf. should reply that deft. did not tender the sum named, or that that sum was insufficient & not that he did not tender sufficient amends. *WILLIAMS v. PRICE* (1832), 3 B. & Ad. 695; 1 L. J. K. B. 258; 110 E. R. 254.

*Annotations*:—*Refd.* *Marks v. Lubee* (1837), 3 Bing. N. C. 408. *Mentd.* *Lohain v. Philpot* (1875), 39 J. P. 584.

**372.** —[—]—By a local Act certain comrs. were empowered to cause any "present or future

sewers, ditches, drains, etc., to be opened, enlarged, altered, or cleansed": & it was enacted, that in case any action should be brought against any person for anything done in pursuance of the Act, or in relation to the matters therein contained, pltf. should not recover in any such action, if tender of amends should have been made to him, etc., or his attorney, by or on behalf of deft., etc., before such action brought; & in case no such tender should be made, that it should be lawful for deft., by leave of the ct., to pay money into ct.; & if the matter should appear to have been done in pursuance & under the authority of the Act, or after sufficient satisfaction made or tendered as aforesaid, then that the jury should find for deft.

The comrs., of whom deft. was one, appointed a committee to inspect a certain ditch, with a view to widening the same, & to report thereon. The committee having reported thereon in favour of widening the ditch, the comrs. appointed a second committee, of whom deft. was one, to confer with a surveyor respecting the work, with power to two of them to act. Deft. being afterwards told by the clerk to the comrs. that he might proceed without further instructions from the comrs., took pltf.'s land for the purpose of widening the drain, without having given him notice or obtained his consent. The land was taken for the *bona fide* purpose of widening the drain. Deft., before action, tendered £10 as amends, which pltf. refused to accept; but no tender was pleaded, nor was the amount paid into ct. The jury found the trespass, & that the damage amounted to £5:—*Held*: (1) although neither deft. nor the comrs. were authorised to take pltf.'s land without his consent in writing, yet deft. was entitled to the protection of the Act; (2) deft. was not bound to plead the tender, or pay the amount tendered into ct.—*JONES v. GOODAY* (1842), 9 M. & W. 736; 1 Dowl. N. S. 914; 11 L. J. Ex. 297; 152 E. R. 311.

*Annotations*:—*As to* (1) *Refd.* *Thomas v. Stephenson* (1853), 1 C. L. R. 410; *Wigsell v. School for Indigent Blind* (1882), 8 Q. B. D. 357. *Generally, Mentd.* *Wilkinson v. Willats* (1849), 3 New Mag. Cas. 148.

**SUB-SECT. 9.—OTHER CASES.**

**373. Cattle straying.—Defect of fences—Plaintiff's duty to repair fence—Liability by prescription.]**—To trespass, deft. may plead that pltf. is bound by prescription to repair the fences; but it is not sufficient to say that by agreement he ought to repair; for he may have a remedy upon the covenant.—*NOWEL v. SMITH* (1599), Cro. Eliz. 709; 78 E. R. 943.

*Annotation*:—*Consd.* *Lawrence v. Jenkins* (1873), L. R. 8 Q. B. 274.

**374.** —[—]— **Liability by contract.]**—*NOWEL v. SMITH*, No. 373, *ante*.

**375.** —[—]— **Fences property of plaintiff—and property contiguous.]**—Dft. may justify killing pltf.'s mastiffs to prevent them from killing deft.'s hogs, although the hogs were trespassing. A plea excusing a trespass by cattle from the defect of

**PART II. SECT. 6, SUB-SECT. 9.**

**1. Question for jury.]**—In an action for false imprisonment of a charge of wilfully trespassing on land, & refusing to leave after being warned to do so by the owner (Act No. 265, s. 17, VI), it is a question for the jury whether pltf. did the act complained of under a fair & reasonable supposition that he had a right to do it.—*BAILEY v. HART* (1883), 9 V. L. R. (L.) 66.—*AUS.*

**g. Preventing criminal act by plaintiff.]**—To trespass for breaking &

entering pltf.'s house, deft. pleaded that pltf. was violently assaulting his (ptf.'s) wife & child, & that he entered to prevent pltf. committing the said breach of the peace:—*Held*: plea bad in substance.—*ROCKWELL v. MURRAY* (1848), 6 U. C. R. 412.—*CAN.*

**h. Right of way.]**—*SMITH v. INGOLDSBY* (1852), 9 U. C. R. 207.—*CAN.*

**k. — Plea of private way—Proof of public way.]**—*COMEAU v. LEBLANC* (1870), 8 N. S. R. (3 G. & O.) 13.—*CAN.*

**l. —.]**—*McCORMACK v. DENNISON*

(1882), 15 N. S. R. (3 R. & G.) 71.—*CAN.*

**m. — Necessity to show title.]**—*COLQUHOUN v. CREIGHTON* (1893), 40 N. S. R. 607.—*CAN.*

**n. —.]**—*McKINNON v. CLARK* (1908), 5 E. L. R. 102.—*CAN.*

**o. —.]**—*PETIPAS v. MYETTE* (N. S.) (1913), 12 E. L. R. 537.—*CAN.*

**p. Justices' warrant restoring possession.]**—In trespass *quare clavium fregit* deft. pleaded that pltf. complained of a forcible entry & detainer under the statutes, & the justices

fences must show the fences to be pltf.'s & the closes to be contiguous.—*KING v. ROSE* (1873), 1 Freem. K. B. 347; 89 E. R. 258; *sub nom.* ROSE v. KING, 1 Freem. K. B. 356.

**376. —**—*Defendant's duty to repair.*—*BAYNARD v. SMITH* (1874), 3 Keb. 417; cited in 10 Q. B. at p. 637; 84 E. R. 798; *sub nom.* RIGHT v. BAYNARD, Freem. K. B. 379.

*Annotations.*—*Exfld.* Jones v. Robin (1847), 10 Q. B. 620.

**377. Compulsion — Defendant compelled to commit trespass—By threats of third party.**—*GILBERT v. STONE* (1847), Aleyn, 35; Sty. 72; 82 E. R. 902.

*Annotations.*—*Refd.* Lambert v. Bessey (1880), T. Raym. 467; Scott v. Shepherd (1773), 2 Wm. Bl. 892.

**378. Exercise of right of market.**—*POPHAM v. WOOLCOTT* (1866), 1 Sid. 291; 82 E. R. 1112.

**379. —**—*Where by custom a market is of right held on a certain close, a person attending the market for the purposes of buying & selling is not liable in trespass for placing his goods on the ground in such close.*—*TOWNEND v. WOODRUFF* (1850), 5 Exch. 506; 19 L. J. Ex. 315; 15 L. T. O. S. 258; 155 E. R. 221.

*Annotations.*—*Apld.* A.-G. v. Tynemouth Corpn. (1900), 17 T. L. R. 77. *Refd.* Great Yarmouth Corpn. v. Groom, Same v. Daniel (1882), 32 L. J. Ex. 74.

**380. Act for public good.**—*ANON.* (1468), Y. B. 8 Edw. 4, fo. 23, pl. 41.

*Annotations.*—*Apld.* The King's Prerogative in Saltpetre Case (1807), 12 Co. Rep. 12. *Refd.* Skewys' Exors. v. Chamond, (1544) 1 Dyer, 59 b. *Mentd.* Mouse's Case (1608), 12 Co. Rep. 63.

**381. —**—*ANON.* (1469), Y. B. 9 Edw. 4, fo. 35, pl. 10.

*Annotations.*—*Refd.* Batens' Case (1610), 9 Co. Rep. 53 b; Lifford's Case (1615), 11 Co. Rep. 46 b; James v. Hayward (1629), W. Jo. 221; Pomfret v. Ricfort (1669), 2 Keb. 569; Hodgson v. Field (1806), 7 East, 613; Patrick v. Colerich (1838), 2 Jur. 377; Goodhart v. Heytt (1853), 53 L. J. Ch. 219; Cope v. Sharpe, [1901] 1 K. B. 168. *Mentd.* Strata Mercella's Case (1591), 9 Co. Rep. 24 a; Langham v. Revett (1627), Cro. Car. 68.

**382. —**—*We will well agree that in some cases a man may justify the commission of a tort, & that is in cases where it sounds for the public good; as in time of war a man may justify making fortifications on another's land without licence; also a man may justify pulling down a house on fire for the safety of the neighbouring houses: for these are cases of the common weal. So also is it, if the sheriff pursue a felon to a house, & in order to take him break open the doors of the house, this is justifiable (per (T.R.)).*—*MALEVERER v. SPINKE* (1537), 1 Dyer, 35 b; 73 E. R. 79.

*Annotations.*—*Refd.* Mouse's Case (1608), 12 Co. Rep. 63; Lifford's Case (1614), 11 Co. Rep. 46 b; Secheverel v. Dale (1626), Poph. 193; Cope v. Sharpe, [1901] 1 K. B. 168; Cope v. Sharpe, [1912] 1 K. B. 496. *Mentd.* Russel v. Gulwel (1599), Cro. Eliz. 657; Parliament in Ireland Case (1613), 12 Co. Rep. 110; Simmons v. Norton (1831), 9 L. J. O. S. C. P. 185.

**383. —**—*POPHAM v. WOOLCOTT* (1666), 1 Sid. 291; 82 E. R. 1112.

summoned a jury & heard the complaint & made a warrant for restoring pltf. to his possession, & that this was the trespass complained of:—*Held*: bad.—*BOULTON v. FITZGERALD* (1844), 1 U. C. R. 343.—*CAN.*

**q. Entry on ground opposed to title as mortgage.**—*Setting up mortgage.*—*MURTHREW v. Sisson* (1847), 5 N. B. R. (3 Kerr) 373.—*CAN.*

**r. Justification by statute.**—*Necessity that act be regularly done under the statute.*—*PHILLIPS v. REDPATH* (1830), Dfa. 72.—*CAN.*

**t. —**—*Necessity of act complained of.*—*DOMINION TELEGRAPH CO. v. GILCHRIST*, Cass. Dig., 2d ed. 844.—*CAN.*

**u. Exercise of powers under by-law.**—*MAGRATH v. BROCK TOWNSHIP*

*MUNICIPALITY* (1856), 13 U. C. R. 629.—*CAN.*

**b. —**—*BLACK V. WHITE* (1859), 18 U. C. R. 362.—*CAN.*

**c. —**—*CONNOR v. MIDDAGH, HILL v. MIDDAGH* (1889), 16 A. R. 356.—*CAN.*

**d. Necessity — Deviation from highway.**—*Highway impassable & out of repair.*—*Trespass quare clausum Frigid*: Plea, that at the time when, etc., there was a highway adjoining pltf.'s said land, which said highway was in certain places impassable & out of repair, wherefore deft., for the purpose of using such highway, necessarily deviated a little therefrom on to pltf.'s said land, going no further from said highway than was necessary, & returning thereto as soon as practicable,

**384. Bonâ fide mistake—Made voluntarily.**—*BASELY v. CLARKSON* (1681), 3 Lev. 37; 83 E. R. 565.

**385. Letters patent to trade guild—Powers to supervise trade.**—*The Crown by Letters Patent granted to the master & wardens of the Corporation of Bakers, there being four wardens, by themselves & their deputy or deputies, full power to overlook & correct the trade of baking:—Held*: the master & one warden could not justify entering the house of a baker to overlook bread; for if they acted as principals, they did not amount to a majority of the persons to whom the power was given; & if they acted as deputies, it should have appeared that they were appointed by the majority.—*COOK v. LOVELAND* (1799), 2 Bos. & P. 31; 126 E. R. 1138.

*Annotation.*—*Refd.* Blacket v. Blizard (1829), 9 B. & C. 851.

**386. Preventing criminal act by plaintiff—Murder.**—*HANDCOCK v. BAKER*, No. 364, ante.

**387. Prevention of tortious act by plaintiff—Replication of licence legalising act—Licence to be pleaded.**—*Where deft. justifies a trespass for preventing a tortious act of pltf., if pltf. relies on a licence which rendered his act lawful, he ought to reply the licence.*—*TAYLOR v. SMITH* (1816), 7 Taunt. 156; 129 E. R. 62.

*Annotation.*—*Refd.* Lucas v. Nockells (1833), 10 Bing. 157.

**388. Repairs of work on public navigable river—Failure of plaintiff to keep in repair.**—*Trespass for breaking & entering pltf.'s manor. Pleas, first general issue; second, that from time immemorial there hath been & still is a public port partly within the said manor, & also in a river which has been a public navigable river from time immemorial, & that there is in that part of the port which is within the manor, an ancient work necessary for the preservation of the port, & for the safety & convenience of the ships resorting to it; that this work was, at the several times when, etc., in decay; that pltf. would not repair it, but neglected so to do, wherefore defts. entered & repaired. Replication, de injuria. Verdict for pltf. on first plea, & for defts. on the second:—Held*: pltf. was entitled to judgment non obstante veredicto, as the second plea did not state that immediate repairs were necessary, or that any one bound to do so had neglected to repair after notice, or that a reasonable time for repairing had elapsed, or that defts. had occasion to use the port.—*LONSDALE (EARL) v. NELSON* (1823), 2 B. & C. 302; 3 Dow. & Ry. K. B. 556; 2 L. J. O. S. K. R. 28; 107 E. R. 396.

*Annotations.*—*Consd.* Campbell Davys v. Lloyd, [1901] 2 Ch. 518. *Refd.* Lyne (Legis Corpn. v. Henley (1834), 1 B. & N. C. 222; Jones v. Williams (1843), 1 M. & W. 176; Lemmon v. Webb, [1895] A. C. 1; Noble v. Harrison, [1926] 2 K. B. 332; Lagan Navigation Co. v. Lambeg Bleaching, Dyeing & Finishing Co., [1927] A. C. 226. *Mentd.* Gwynne v. Burnell (1840), 6 Bing. N. C. 453.

**389. Act advantageous to plaintiff's property—**

& doing no unnecessary damage in that behalf, which are the alleged trespasses:—*Held*: a good plea.—*CARRICK v. JOHNSTON* (1866), 26 U. C. R. 65.—*CAN.*

**e. Justification under award of fence viewers.**—*WARREN v. DESLIPPES* (1872), 33 U. C. R. 59.—*CAN.*

**f. Direction of commissioner of public works.**—*BURY v. BRITTON & ELLIOT* (1872), 32 U. C. R. 547.—*CAN.*

**g. Justification as trustees of school.**—*PICTOU SCHOOL TRUSTEES v. CAMERON* (1878), 2 R. & C. 328; 2 S. C. R. 690.—*CAN.*

**h. Justification under authority of Order in Council.**—*DUNKIN v. COCKBURN* (1888), 15 A. R. 493.—*CAN.*

**k. Entering private house where liquor**

*Sect. 6.—Defences: Sub-sect. 9. Part III. Sect. 1: Sub-sect. 1, A. (a) & (b).]*

**Cutting bank adjoining public road—Fence thereby improved.**—In an action by a reversioner against a surveyor of highways for cutting away a small portion of the soil of a bank or fence adjoining a public road, it is no answer that the fence was thereby in fact improved.—*ALSTON v. SCALES* (1832), 9 Bing. 3; 2 Moo. & S. 5; 1 L. J. M. C. 95; 131 E. R. 515.

*Annotation:—Mentd.* Holliday v. St. Leonard, Shoreditch Vestry (1861), 11 C. B. N. S. 192.

**390. Entry by husband to reclaim wife—Admissibility of evidence of deed of separation.**—(1) If a husband, by a deed of separation executed by himself, but not executed by either of the trustees, give his wife licence to live where she pleases, he is not justified in entering the house of a third person to reclaim his wife, as being improperly harboured there; & the husband, before doing so, should at least have given distinct notice to the third person, that, as far as by law he could, he revoked the licence.

(2) In an action of trespass, with a plea of justification that deft. entered pltf.'s house to reclaim his wife, who was wrongfully harboured there, a deed of separation of deft. & his wife is admissible in evidence, if executed by deft., although not executed by either of the trustees.

(3) *Seemle*: the daughter, or even a female servant, of the occupier of a house, has such a possession of her bedroom as will enable her to maintain trespass against a person who wrongfully forces himself into it while she is in bed.—*LEWIS PONSFORD* (1838), 8 C. & P. 687; 173 E. R. 674.

**391. Payment into court—Admissibility of evidence of want of ownership in plaintiff.**—In an action of trespass for entering the close of pltf., evidence showing that pltf. had no beneficial ownership in the land is admissible under a plea of payment into ct.—*BISHOP v. CANNON* (1850), 14 L. T. O. S. 400.

**392. Right of way.**—*BEARD v. WATSON*, No. 311, *ante*.

**393. — Right over part of land—Way becoming impassable—Use of adjoining part.**—It is not a good justification in trespass, that deft. has a right of way over part of pltf.'s land, & that he had gone over the adjoining land, because the way was impassable from being overflowed by a river.—*TAYLOR v. WHITEHEAD* (1781), 2 Doug. K. B. 745; 99 E. R. 475.

*Annotations:—Folld.* Bullard v. Harrison (1815), 4 M. & S. 387. *Mentd.* Weston v. Foster (1836), 2 Bing. N. C. 701; Thomas v. Jones (1838), 4 M. & W. 28; Miller v. Hancock,

[1893] 2 Q. B. 177; *Huggett v. Miers*, [1908] 2 K. B. 278; Jones v. Pritchard, [1908] 1 Ch. 630; *Lucy v. Bawden* (1914), 110 L. T. 580.

**394. — — — — —.**—A person who prescribes in a *que* estate for a private way cannot justify going out of it on the adjoining land, because the way is impassable.—*BULLARD v. HARRISON* (1815), 4 M. & S. 387; 105 E. R. 877. *Annotation:—Refd.* Russell v. Shenton (1842), 3 Q. B. 449.

**395. — Removal of obstruction.**—Trespass for breaking & entering pltf.'s close called the Moor Croft, which was set out by abutments, & breaking pltf.'s gates, hedges, & fences standing thereon, & destroying the grass growing thereon. Plea, that there was a public footpath over the close, & that deft., because the gates, etc., obstructed the way, pulled them down. Replication, joinder of issue. At the trial pltf. admitted the right of way alleged in the plea, & the judge thereupon directed a verdict for deft.:—*Held*: the ruling of the learned judge was right.—*HUDDART v. RIGBY* (1869), L. R. 5 Q. B. 139; 10 B. & S. 911; 39 L. J. Q. B. 19; 21 L. T. 641; 18 W. R. 213, Ex. Ch.

**Pleadings.**—*See* EASEMENTS, Vol. XIX., pp. 122, 123, Nos. 825–827.

**396. Exercise of right at specified times—Evidence that entry not at proper times.**—Issue being taken on pleas justifying a trespass, in the exercise of an alleged right, with a general averment that all times had arrived, etc.:—*Held*: evidence was admissible to show that the entry was not at a proper time, & pltf. having resisted the entry on that ground, an amendment, if necessary, would be allowable.—*LYNN v. COMER* (1860), 2 F. & F. 244.

**Right to glean.**—*See* AGRICULTURE, Vol. II., p. 60, Nos. 345–346.

**Rights of common.**—*See, generally*, COMMONS, Vol. XI., pp. 1 *et seq.*

**Compulsory purchase of land.**—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 106, 212, 217, 218, Nos. 30, 32, 969, 1013–1023.

**Custom.**—*See* CUSTOM & USAGES, Vol. XVII., pp. 1 *et seq.*

**Execution of legal process.**—*See* EXECUTION, Vol. XXI., pp. 471 *et seq.*; DISTRESS, Vol. XVIII., pp. 338, 368–395, 408–412, Nos. 725–730; SHERIFFS & BAILIFFS, Vol. XII., pp. 75 *et seq.*

**Effecting arrest.**—*See* CRIMINAL LAW, Vol. XIV., pp. 186, 189, Nos. 1656–1660, 1688–1693.

**Abatement of nuisance.**—*See* NUISANCE, Vol. XXXVI., pp. 204, 205, Nos. 450–478.

**Exercise of statutory duties.**—*See, generally*, PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 15 *et seq.*, & TITLES *passim*.

*is supposed to be sold—Necessity for well grounded belief.*—*WHITE v. BECKHAM* (1893), 26 N. S. R. (14 R. & G.) 50.—**CAN.**

**1. Expropriation of land—Statutory authority.**—*DOMINION IRON & STEEL Co. v. McLENNAN* (1903), 34 S. C. R. 394.—**CAN.**

**m. Laches & acquiescence.**—*DELTA v. WILSON* (1911), 17 W. L. R. 680.—**CAN.**

**n. Acting in course of duties as pathmaster.**—*MILES v. FREEL* (1912), 23 O. W. R. 45; 4 O. W. N. 79; 5 D. L. R. 679.—**CAN.**

**o. Work reasonably necessary for enjoyment of easement.**—*DAVEY v. FOLEY-REIGER Co.* (1912), 21 O. W. R. 408; 3 O. W. N. 856; 2 D. L. R. 479.—**CAN.**

**p. Application to purchase from Crown.**—It is no answer to an action

for trespass to land to say that defts.' assignor had applied to purchase the land from the Crown.—*BROWN v. MOTHERLODE MINING Co.* (1912), 20 W. L. R. 778; 2 D. L. R. 277; 17 B. C. R. 248.—**CAN.**

**q. Removal of building erected on Crown land under licence from Governor—Licence revocable at pleasure.**—*HOYLES v. ISLAND* (1819), 1 Nfld. L. R. 160.—**NFLD.**

## Part III.—Trespass to Goods.

### SECT. 1.—WHAT AMOUNTS TO TRESPASS TO GOODS.

#### SUB-SECT. 1.—INTERFERENCE WITH POSSESSION.

##### A. Sufficiency of Possession.

###### (a) Owner.

**Taking goods intermixed with goods of another—Where distinguishable.**—See BAILMENT, Vol. III., p. 71, No. 120.

**397. Damage to bailed goods—By third party.**—The owner of chaises & horses let out to hire is liable for accidents arising from misconduct or negligence of the drivers, not the person who hires the chaise, the owner may therefore maintain trespass *vi et armis*, for an injury done to his horses & carriage while so employed & against the person who has hired them.—*DEAN v. BRANTHWAITE* (1803), 5 Esp. 35; 170 E. R. 728, N. P.

*Annotation* :—*Consd. Laughner v. Pointer* (1826), 5 B. & C. 547.

See, also, BAILMENT, Vol. III., p. 111, Nos. 354–356.

**Damage to tombstones.**—See BURIALS, Vol. VII., p. 533, Nos. 133, 134.

**398. Goods lawfully on land—Where land not in possession.**—*DRIVER v. SIMPSON* (1815), 8 Taunt. 614, n.; 2 Moore, C. P. 682, n.; 129 E. R. 523, n. *Annotation* :—*Refd. Newcastle v. Clark* (1818), 2 Moore, C. P. 666.

**Materials of bridge dedicated to public—Bridge destroyed & materials taken by wrongdoer.**—See HIGHWAYS, Vol. XXVI., p. 590, No. 2797.

**Landlord — Stranger felling timber.**—See AGRICULTURE, Vol. II., p. 75, Nos. 539, 540.

##### (b) Person in Possession.

**399. Right to sue.**—*LEE v. ATKINSON & BROOK* (1609), Yelv. 172; Cro. Jac. 236; 80 F. R. 114. *Annotation* :—*Refd. Donald v. Suckling* (1866), L. R. 1 Q. B. 585.

**400.**—]—But the only question in this case is, if one who hath a special property may bring an action of trespass against him who hath the general property? I conceive, that he may well enough. As if I lend my horse for a week, & within the week I take him again, trespass lieth (*WARBURTON, J.*).—*HEYDON v. SMITH* (1610), 2 Brownl. 328; 13 Co. Rep. 67; Godb. 172; 123 E. R. 970.

*Annotations* :—*Refd. Rowles v. Mason* (1612), 2 Brownl. 192; *Ashmead v. Ranger* (1699), Fortes. Rep. 152; *The Winkfield*, [1902] P. 42.

**401.**—]—(1) Trespass will lie in respect of possession only, independent of the right; but the damages are, in such a case, to be given in respect of the possession only.

(2) But the actual possession must be clear & unequivocal.

Where there was a previous dispute between two parties, as to the right to a certain chattel, which had not come into the possession of either; &, in a scuffle to obtain the possession, it had been snatched by one of the claimants out of the hand of the servant of the other :—*Held* : the servant

### PART III. SECT. 1, SUB-SECT. 1.—A. (a).

*r. What evidence admissible to prove plaintiff's title.*—In an action of trespass *de bonis asportatis*, evidence of title to land in a foreign country is admissible to prove ptfr.'s right to the property taken.—*MANN v. CHAMBERLAIN* (1828), N. B. Dig. 337.—*CAN.*

*t. Person without possession.*—A person purchasing a crop of wheat at sheriff's sale may bring trespass against a person converting or injuring it, though he may never have received possession of the field.—*HEYDON v. CRAWFORD* (1831), 3 O. S. 583.—*CAN.*

*a.*—]—The person clearing land under an agreement to enter upon & clear land, & take the wood after it is cut down in payment of the labour, may maintain trespass against the owner of the land for taking away the wood after it is cut down, although he has no possession in the land to enable him to maintain trespass *quare clausum fregit*.—*HAMILTON v. McDONELL* (1836), 3 O. S. 720.—*CAN.*

*b.*—]—Where a horse was stolen from ptfr. & bought by deft. at public auction, but not in market overt, & ptfr. afterwards seeing the horse took possession of it, & deft. immediately retook it :—*Held* : ptfr. had a right to retake it, no property having passed to deft. by the sale; & although it was in his possession only for a moment, yet the property reverted in him, & he could maintain trespass against deft. for the retaking.—*BOWMAN v. YIELDING* (1830), 3 Ont. Dig. 6751.—*CAN.*

*c.*—]—On June 7 deft., a collector, seized ptfr.'s vessel for a breach of the revenue laws. Ptfr. petitioned the Govt. & on July 7 received an answer from deft. informing him that the Govt. had refused to interfere. On July 8 ptfr. served a notice of claim :—*Held* : no notice having been given within the time

allowed, the vessel was thereby condemned; & by the act of seizure ptfr. was deprived of his right of property, & therefore unable to maintain trespass.—*DAME v. CARBERRY* (1853), 10 U. C. R. 374.—*CAN.*

*d.*—]—Though ptfr. is not in possession of land, if he has the title he may, since 21 Vict. c. 20, s. 3, maintain trespass *de bonis asportatis* for carrying away trees from it.—*HUMPHREYS v. HELMES* (1861), 10 N. B. R. (5 All.) 59.—*CAN.*

*e. Owner of land subject to estate for life.*—The owner of land, subject to an estate for life, may maintain trespass *de bonis asportatis* for carrying away trees which have been wrongfully cut upon the land.—*ALEXANDER v. HARTT* (1858), 12 N. B. R. (1 Ham.) 161.—*CAN.*

### PART III. SECT. 1, SUB-SECT. 1.—A. (b).

**399i. Right to sue.**—Where stones were tortiously removed & severed from the land & cut & shaped into mill stones :—*Held* : the person who had so taken them could not maintain trespass against the owner of such land, who had got them into his possession by directing the carriers of them to deliver them on his premises, as the property had not been changed by the work done to the stones.—*BAKER v. FLINT* (1833), 3 O. S. 89.—*CAN.*

**399ii.**—]—Where personal property of deft. is in the actual possession of ptfr. under an agreement between them, the latter may sustain trespass against the former for taking it away.—*HOLMES v. CLARK* (1836), 2 N. B. R. (Ber.) 167.—*CAN.*

**399iii.**—]—Trespass for taking ptfr.'s cattle. Plea, not possessed. It was proved that the cattle had belonged to deft., from whom ptfr. had leased them with a farm, but ptfr. had detained them after the

term had expired, for which deft. had sued him & recovered damages to the value of the cattle after this action was brought :—*Held* : ptfr. could not treat this verdict as giving him a title to the cattle, by relation back, at the time this action was commenced.—*ABRAMS v. MOON* (1844), 1 U. C. R. 552.—*CAN.*

**399iv.**—]—A. having a reversionary interest in goods leased to B. The sheriff seized them under an execution against B., but did not sell or remove them. A. sued the sheriff for an alleged injury to his reversionary interest :—*Held* : if any trespass was committed by the seizure, B. should sue & not A.—*HENDERSON v. MOODIE* (1846), 3 U. C. R. 348.—*CAN.*

**399v.**—]—B. assigned to ptfr. certain household goods by a bill of sale, which contained a proviso for redemption on a day certain, with a covenant that in case of default in payment, or of B. attempting to dispose of the goods, ptfr. might take possession & sell or retain them for his own use, but which contained no clause authorising B. to remain in possession until default :—*Held* : ptfr. had sufficient right to possession of the goods to maintain trespass against the sheriff under a *f. fa.* against B., the jury having found the note to be *bona fide*.—*PORTER v. FLINTOFF* (1857), 6 C. P. 335.—*CAN.*

**399vi.**—]—When ptfr., a constable, had seized a horse under a distress warrant, & the horse escaped to a railway & was killed, owing to defts.' neglect to fence :—*Held* : ptfr. had sufficient property in the horse to entitle him to sue.—*SIMPSON v. GREAT WESTERN RY. CO.* (1850), 17 U. C. R. 67.—*CAN.*

**399vii.**—]—*SWIM v. SHIREFF, HUTCHINSON v. SHIREFF* (1850), 20 N. B. R. (4 P. & B.) 25.—*CAN.*

**399viii.**—]—*McDONALD v. LANE* (N. S.) (1882), 7 S. C. R. 462.—*CAN.*



*Sect. 1.—What amounts to trespass to goods: Sub-sect. 1, A. (b) & (c), & B. (a).]*

could not maintain trespass in his own name, on a possession so transient & equivocal.—*PEACHEY v. WING* (1826), 5 L. J. O. S. K. B. 55.

402. —[In trespass against ten debts, for breaking the house of A. & taking his woollen yarn, debts, may, under the general issue, show that the yarn was afterwards condemned under Frauds by Workmen Act, 1777 (c. 56), in order to make out that A. could have no property in it. But the condemnation of the yarn, unless the parties had a search warrant, will not justify the entering of a house.—*DAVIS v. NEST* (1833), 6 C. & P. 167; 2 Nev. & M. M. C. 161; 172 E. R. 1192.

*Annotation:—Mentd. R. v. Wilcock* (1845), 7 Q. B. 317.

403. —[Deft., a naval commander, stationed on the coast of Africa, with instructions to suppress the slave trade, was requested by the Governor of Sierra Leone to obtain the liberation of two British subjects detained as slaves at the Gallinas by the son of the King of that country, & in effecting that object to use force, if necessary. He accordingly proceeded to the Gallinas with an armed force, & having landed at Dombocorro, took military possession of a barracoen belonging to pltf., who was a Spaniard, carrying on the slave trade at the Gallinas. He then communicated with the King of the country, & the two British subjects having been released, deft. concluded a treaty for the abolition of the slave trade in that country. In execution of this treaty, deft. fired the barracoens of pltf., & carried away his slaves to Sierra Leone, where they were liberated. Some of pltf.'s goods, used in the slave traffic, were claimed by the King as forfeited, & delivered up to him; other goods were destroyed. These proceedings having been communicated to the Lords of the Admiralty, & the Secretaries of State for the foreign & colonial departments, they respectively, by letter, adopted & ratified the act of deft. —*Held: pltf. had a property in his slaves, & might maintain trespass for their seizure, the slave trade not being piratical by the law of nations, & it not appearing that Spain had passed any law abolishing the slave trade pursuant to the treaty embodied in 6 & 7 Will. 4, c. 6.—BURON v. DENMAN* (1818), 2 Exch. 167; 3 New Pract. Cas. 62; 6 State, Tr. N. S. 525; 10 L. T. O. S. 523; 154 E. R. 450.

*Annotations:—Consd. Doss v. Secretary of State for India in Council* (1875), L. R. 19 Eq. 509. *Reid. Secretary of State for India v. Sahabu* (1859), 13 Moo. P. C. C. 22; *Mill v. Hawker* (1874), L. R. 9 Exch. 309; *Dixon v. Farrer* (1886), 18 Q. B. D. 43; *Commercial & Estates Co. of Egypt v. Board of Trade*, [1925] 1 K. B. 271. *Mentd. Santos v. Illidge* (1859), 28 L. J. C. P. 317; *Scott v. Seymour* (1862), 8 Jur. N. S. 568; *Feather v. R.* (1865), 6 B. & S. 257; *London Corp. v. Cox* (1867), L. R. 2 H. L. 239; *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1; *Rustomjee v. R.* (1876), 24 W. R. 428; *Frails, Times v. Carr* (1900), 82 L. T. 698; *Johnstone v. Pedlar*, [1921] 2 A. C. 262.

404. —As against mere wrongdoer—Widow of owner of goods.]—Where goods, apparently the property of A., pass upon his death into the possession of his widow, she is entitled, upon her mere possessory right, & without showing that she is her husband's legal representative, to maintain trespass against a wrongdoer for the taking of the goods; or, if they be sold, she may waive the tort, & maintain *assumpsit* for the proceeds, without proof of title.—*OUGHTON v. SEPPINGS* (1830), 1 B. & Ad. 241; 8 L. J. O. S. K. B. 394; 109 E. R. 776.

*Annotation:—Reid. White v. Mullett* (1851), 6 Exch. 713.

405. —[—*BAGGALLEY v. DAVEY* (1857), 29 L. T. O. S. 211.

—Auctioneer in possession for purposes of sale.]—*See AUCTION*, Vol. III., p. 45, Nos. 313, 314.

—Person in possession of estray.]—*See COPYHOLDS*, Vol. XIII., p. 22, No. 148.

406. Nature of possession necessary—Clear & unequivocal.]—*PEACHEY v. WING*, No. 401, *ante*.

407. —Actual possession.]—Pltf. & deft. were owners of boats employed in a fishery. Pltf.'s boat cast a fishing sear round a shoal of mackerel, with the exception of a comparatively small opening which the sear did not quite fill up, but through which, in the opinion of witnesses, the fish could not escape. Deft.'s boat then came in through the opening, & took the mackerel:—*Held: pltf. could not maintain trespass for taking his fish, his possession not having been complete.*

The fish were reduced to a condition in which it was in the highest degree probable that pltf. would become possessed of them. But . . . he had not become possessed. Whether the necessary possession be rightly described by the word "*custodia*" or "*occupatio*" . . . it is not attained until pltf. has brought the animals into his actual power (*DENMAN, C.J.*).—*YOUNG v. HICHENS* (1844), 6 Q. B. 606; 1 Dav. & Mer. 592; 2 L. T. O. S. 420.

*Annotations:—Reid. Allen v. Flood*, [1898] A. C. 1; *The Tubantia*, [1924] P. 78.

408. —[—*JOHNSON v. DIPROSE*, No. 547, *post*.

409. —Possession without title.]—Possession without property is a good cause to maintain an action in general, *e.g.* trespass (*DODDERIDGE, J.*).—*HOLEMAN v. KARWITHY* (1613), 2 Bulst. 134; *Jenk. 326*; 80 E. R. 1012, Ex. Ch.

410. —[—Pltf. needs not make any title in an action of trespass, same being a possessory action; but if he do make a title in the way of evidence, he ought then to pursue same, & make it good (*DODDERIDGE, J.*).—*WILLMORE v. BAMFORDE* (1614), 2 Bulst. 288; 80 E. R. 1128.

411. —[—*BROOKE v. BROOKE* (1664), 1 Sid. 184; 82 E. R. 1046.

*Annotation:—Mentd. Fannin v. Anderson* (1845), 7 Q. B. 811.

412. —Constructive possession.]—*JOHNSON v. DIPROSE*, No. 547, *post*.

#### (c) Person entitled to Possession.

413. General rule—Right to possession—Necessity for.]—In trespass *de bonis asportatis*, pltf. must show that he had at the time either an actual or constructive possession of the property.—*BURSER v. MARTIN* (or *PURSER v. WALTER*) (1604), *Cro. Jac. 46*; 79 E. R. 39; *sub nom. PURRELL v. BRADLEY*, Brownl. 192; *sub nom. PURCELL v. BRADLEY*, Yelv. 30.

414. —[—A. brought an action of trespass against B., for taking two tables & a chair. B. pleaded not guilty, & no other plea. It was proved that B. took two chairs & a table in the house of D., but none of the witnesses knew A.; & there was no evidence of any kind to connect A. with the goods taken in D.'s house:—*Held: to entitle pltf. to recover on these pleadings, there must be some evidence to connect pltf. with the goods taken; & if there was no such evidence, deft. would be entitled to a verdict on his plea of not guilty.*—*FORMAN v. DAWES* (1841), Car. & M. 127, N. P.

#### PART III. SECT. 1, SUB-SECT. 1.—

A. (c).

1. Plaintiff having title to goods.]—

Though pltf. is not 'in' possession of land, if he has the title he may, since 21 Vict. c. 20, s. 5, maintain trespass

*de bonis asportatis* for carrying away trees from it.—*HUMPHREYS v. HELMES* (1861), 10 N. B. R. (5 All.) 59.—*CAN.*



415. ————.]—Trespass for breaking & entering the dwelling-house of plttf., & taking away certain goods therein, not alleging them to be plttf.'s goods. Plea, not guilty by statute. The judge at the trial having directed the jury to find a verdict for plttf., with nominal damages, for the trespass to the house:—*Held*: plttf. was not entitled to damages also for the value of the goods, as they were not alleged to be the property of plttf.—*PRITCHARD v. LONG* (1842), 9 M. & W. 686; 1 Dowl. N. S. 883; 11 L. J. Ex. 306; 6 Jur. 562; 152 E. R. 281.

*Annotation*:—*Refd.* *Curlewis v. Laurie* (1848), 12 Q. R. 640.

416. ————.]—*ATKINSON v. STACEY* (1845), 5 L. T. O. S. 38, 176.

417. ————.]—*JOHNSON v. DIPROSE*, No. 547, *post*.

418. Person forcibly dispossessed.]—*ANON.* (1885), Jenk. 166; 145 E. R. 107.

419. Master—Against servant having custody of goods.]—*BLOSS v. HOLMON* (1587), Owen, 52; Gouldsb. 66, 72; 74 E. R. 893.

420. ————.]—*ANON.* (1586), Moore, K. B. 248; 72 E. R. 560.

421. Grantee of wreck.]—*MOWBRAY v. ODRICH* (1333), cited in 2 Wils. at p. 24; 95 E. R. 605.

422. — Before wreck officially seized.]—The grantee of wreck has a special property in all goods stranded within his liberty, & may maintain trespass against a wrongdoer for taking them away, though such goods were part of the cargo of a ship from which some person escaped alive to land, & though the owners within a year & a day claimed & identified them; & though the taking was before any seizure on behalf of the grantee.

That the grantee of wreck may maintain an action of trespass, without seizure for wreck cast away within the precincts of his liberty, is clear. . . . The same is the case with respect to an estray. In both, the right to possession draws after it a constructive possession, which is sufficient to support the action (*PARKE, J.*).—*DUNWICH CORPN. v. STERRY* (1831), 1 B. & Ad. 831; 9 L. J. O. S. K. B. 167; 109 E. R. 995.

423. Tenant—Against stranger—Severing fixtures.]—Where A. took the lease of a house & premises for a term of years, & took the tenant's fixtures in the house at a valuation from the landlord, & afterwards assigned the term to B., by way of mtge., expressly including the fixtures, & subsequently became bkpt.:—*Held*: the fixtures were not goods & chattels within the order & disposition of the bkpt., & did not pass to his assignees.

Suppose a person enters a house, & severs part of the materials of the house, cannot the tenant bring trespass *de bonis asportatis*? I am aware that, in the case of timber, the property in it, when severed, vests in the landlord; but you find no authority that the tenant cannot maintain trespass *de bonis asportatis* against a stranger who has severed & carried away the materials of a house (*PARKE, B.*).—*BOYDELL v. M'MICHAEL* (1834), 1 Cr. M. & R. 177; 3 Tyr. 974; 3 L. J. Ex. 264; 149 E. R. 1043.

*Annotations*:—*Consd.* *Re Walsh, Ex p. King* (1840), 4 Jur. 510. *Refd.* *Re Maberley, Ex p. Belcher* (1835), 4 Deac. & Ch. 703; *Minshall v. Lloyd* (1837), 2 M. & W. 450; *Hitchman v. Walton* (1838), 4 M. & W. 409; *Re Gye & Hughes, Ex p. Reynal* (1841), 2 Mont. D. & De G. 443; *Waterfall v. Penistone* (1856), 6 E. & B. 876. *Mentd.* *Re Butterworth, Ex p. Wilson* (1835), 4 Deac. & Ch. 143; *Re Garwan, Ex p. Barclay* (1855), 5 De G. M. & G. 403; *Wilde v. Waters* (1855), 24 L. J. C. P. 193.

424. Person for whom goods bought by agent—Before purchase assented to.]—A. commissioned her brother to buy a cow for her, & a fortnight afterwards he bought a cow; but before the cow

had either come to plttf.'s hands, or she had assented to the purchase, the cow was taken by deft.:—*Held*: A. had such a property in the cow as would enable her to maintain trespass.

The evidence shows a property in plttf. at her election; & by bringing the action, she has elected to take to the bargain, & to make the cow hers (*LORD DENMAN, C.J.*).—*THOMAS v. PHILIPS* (1836), 7 C. & P. 573; 173 E. R. 253, N. P.

*Annotation*:—*Expld.* *Wheeler v. Montefiore* (1841), 2 Q. B. 133.

425. Person to whom property transferred—Trustees for creditors—Though debtor continuing in possession.]—A. assigned his effects to trustees for the benefit of his creditors. By the deed, the trustees were enabled to allow A. to remain in possession of any part of them until the remainder should be sold, & the debts collected. They sold part of the goods by public sale, describing them as A.'s property, & suffered him to remain in possession of the remainder, on the security of which B. knowing them to be the property of the trustees, gave credit to A. Execution afterwards issued at the suit of B., and the goods were sold under a *fi. fa.*:—*Held*: the trustees might recover against the sheriff in an action of trespass, B. having had notice of the change of property, & the possession of A. being consistent with the deed.—*WOODERMAN v. BALDOCK* (1819), 8 Taunt. 676; 3 Moore, C. P. 11; 129 E. R. 547.

*Annotations*:—*Consd.* *Aldred v. Constable* (1844), 3 L. T. O. S. 299. *Refd.* *Barker v. Furlong*, (1891) 2 Ch. 172. *Mentd.* *Hickman v. Cox* (1858), 30 L. T. O. S. 279.

— — — —.]—*See, also*, *BANKRUPTCY*, Vol. V., p. 973, No. 7905.

Ballor against third party.]—*See* *BAILMENT*, Vol. III., pp. 111, 112, Nos. 354–357.

Bailee against third party.]—*See, generally*, *BAILMENT*, Vol. III., pp. 112–114, Nos. 359–379.

Grantee of bill of sale—Grantor in possession.]—*See* *BILLS OF SALE*, Vol. VII., p. 151, No. 823.

Mortgagee.]—*See* *MORTGAGE*, Vol. XXXV., pp. 393, 394, Nos. 1362, 1363.

Owner of goods let or hired—Execution against lessee or hirer.]—*See* *EXECUTION*, Vol. XXI., p. 501, Nos. 756–762.

Personal representatives.]—*See* *EXECUTORS*, Vol. XXIII., pp. 61, 69, 70, 301, Nos. 407–409, 532–534, 3664–3666.

Sheriff—Interference with goods seized.]—*See* *SHERIFFS*, Vol. XLI., p. 121, Nos. 766–773.

Transferee of bill of lading.]—*See* *SHIPPING*, Vol. XLII., p. 397, No. 2412.

### B. What Amounts to Interference.

#### (a) Materiality of Intention.

426. Intention in larceny & trespass distinguished.]—*R. v. PHILIPPS & STRONG* (1801), 2 East, P. C. 662; 2 Russell on Crimes, 8th ed., 1169. *Annotation*:—*Refd.* *R. v. Holloway* (1848), 1 Den. 370.

427. ————.]—Where a man drove away a flock of lambs from a field, & in doing so inadvertently drove away along with them a lamb, the property of another person, & as soon as he discovered that he had done so, sold the lamb for his own use, & then denied all knowledge of it:—*Held*: as the act of driving the lamb from the field in the first instance was a trespass, as soon as he resolved to appropriate the lamb to his own use, the trespass became a felony.—*R. v. RILEY* (1853), Dears. C. C. 149; 22 L. J. M. C. 48; 20 L. T. O. S. 228; 17 J. P. 69; 17 Jur. 189; 6 Cox, C. C. 88, C. C. R. *Annotation*:—*Refd.* *R. v. Ashwell* (1885), 16 Q. B. D. 190.

— Intention in larceny generally.]—*See* *CRIMINAL LAW*, Vol. XV., pp. 884–890.

428. Wilful act.]—If A. wilfully run his vessel

**Sect. 1.—What amounts to trespass to goods: Sub-sect. 1, B. (a) & (b); sub-sect. 2. Sect. 2.]**

against B.'s, & damage ensue, B. may bring trespass: but if A. so negligently steer his vessel that it runs foul of B.'s, then case is the proper action.—*OGLE v. BARNES* (1799), 8 Term Rep. 188; 101 E. R. 1338.

**Annotations:—***Consd.* *Leame v. Bray* (1803), 3 East, 593; *Moreton v. Hardern* (1825), 4 B. & C. 223. *Refd.* *M'Manus v. Crickett* (1800), 1 East, 106; *Williams v. Holland* (1833), 10 Bing. 112.

**429. Accidental act.]—**Where one accidentally drove his carriage against another's, the remedy is trespass & not case, the injury being immediate from the act done, though he were no otherwise blameable than driving on the wrong side of the road in a dark night. The distinction is, that where the injury is immediate from an act of force done by deft, the remedy is in trespass; where the injury is only consequential to an act before done by deft, there an action on the case lies.—*LEAME v. BRAY* (1803), 3 East, 593; 102 E. R. 724.

**Annotations:—***Dtd.* *Rogers v. Imbleton* (1806), 2 Bos. & P. N. R. 117; *Huggett v. Montgomery* (1807), 2 Bos. & P. N. R. 446. *Apld.* *Lotan v. Cross* (1810), 2 Camp. 464. *Consd.* *Moreton v. Hardern* (1825), 4 B. & C. 223; *M'Laughlin v. Pryor* (1842), 4 Man. & G. 48; *Carr v. Cole* (1850), 16 L. T. O. S. 148. *Disid.* *Holmes v. Mather* (1875), L. R. 10 Exch. 261. *Consd.* *Stanley v. Powell*, [1891] 1 Q. B. 86. *Refd.* *Hopper v. Reeve* (1817), 1 Moore, C. P. 407; *Williams v. Holland* (1833), 10 Bing. 112; *Aldridge v. G. W. Ry.* (1841), 2 Ry. & Can. Cas. 852; *Magnay v. Brit* (1843), 5 Q. B. 381; *Fletcher v. Rylands* (1865), 3 H. & C. 774.

**430. —.]—**If an injury is received from the immediate, though unintentional, act of another, the remedy is trespass, & not case; & the Ct. of K. B. will not permit this doctrine to be questioned on a motion for a new trial.—*LOTAN v. CROSS* (1810), 2 Camp. 464; 170 E. R. 1219, N. P.

**Annotations:—***Consd.* *Hall v. Pickard* (1812), 3 Camp. 187. *Refd.* *Laugher v. Pointer* (1826), 5 B. & C. 547.

**431. — Arising from negligence.]—***SHELDON v. ABERY*, No. 441, *post*.

**432. —.]—**Declaration against deft. for driving his cart against pltf.'s house with force & violence alleging it to have been done by & through the mere negligence, inattention & want of proper care of deft., on demurrer to this declaration as not being in trespass:—*Held:* this declaration in case was good.—*ROGERS v. IMBLETON* (1806), 2 Bos. & P. N. R. 117; 127 E. R. 568.

**Annotations:—***Apld.* *Carr v. Cole* (1850), 16 L. T. O. S. 148. *Refd.* *Moreton v. Hardern* (1825), 4 B. & C. 223; *Williams v. Holland* (1833), 10 Bing. 112.

**433. — Ship.]—***OGLE v. BARNES*, No. 428, *ante*.

**434. —.]—**If one ship run against another by the negligence of the pilot while the owner is on board the remedy against the owner is an action on the case.—*HUGGETT v. MONTGOMERY* (1807), 2 Bos. & P. N. R. 446; 127 E. R. 702.

**Annotation:—***Refd.* *Moreton v. Hardern* (1825), 4 B. & C. 223.

**435. —.]—***COVELL v. LAMING*, No. 8, *ante*.

**436. Taking with intention of protecting goods.]—***KIRK v. GREGORY*, No. 527, *post*.

(b) Particular Instances.

**437. Damage to goods—Destruction of deed.]—***ANON.* (1328), Y. B. 2 Edw. 3, fo. 2, pl. 5.

**438. — Goods damaged after lawful seizure.]—**

*v. GIBSON* (1611), Lane, 90; 145 E. R. 324. **Annotation:—***Consd.* *Freeman v. Roshier* (1849), 13 Q. B. 780.

**439. — Animals—Beating.]—**On not guilty for beating a horse, deft. may justify in evidence.

This [beating a horse] differs from trespass *vi et armis* for assaulting a man, where the assault is a cause of action; but here the assault on the horse is no cause of action unless accompanied with a special damage. . . . If a hackney coach stands before a tradesman's door & hinders customers; he may lawfully take hold of the horses & lead them away, & is not bound to take his remedy for damages (RAYMOND, C.J.).—*STATER v. SWANN* (1730), 2 Stra. 872; 93 E. R. 906.

**440. —.]—***MARLOW v. WEEKES* (1743), Barnes, 452; 94 E. R. 999.

**441. — Killing.]—**Trespass *vi et armis* lies for killing pltf.'s horse, though the injury arose from negligence.—*SHELDON v. ABERY* (1793), 1 Esp. 55; 170 E. R. 278, N. P.

**— Infection of other animals by diseased animals.]—**See ANIMALS, Vol. II., p. 295, No. 657.

**442. — Arms placed in church.]—***WYCHUR (LADY) v. —* (1469), Y. B. 9 Edw. 4, fo. 14, pl. 8; *sub nom.* *GRAY'S (LADY) CASE*, cited in Moore, K. B. 878.

**Annotations:—***Consd.* *Corven's Case* (1612), 12 Co. Rep. 105; *May v. Gilbert* (1613), 2 Bulst. 150. *Apld.* *Spooner v. Brewster* (1825), 3 Bing. 136. *Refd.* *Frances v. Ley* (1615), Cro. Jac. 366.

**443. — Scratching panel of carriage.]—**(1) The position, in 2 *Wms. Saunders*, 47, K, that "whenever trespass for taking goods will lie, that is, where they are taken wrongfully, trover will also lie," is incorrect.

(2) Scratching the panel of a carriage would be a trespass; but it would be a monstrous thing to say that it would be a ground for an action of trover (*ALDERSON, B.*).—*POULDES v. WILLOUGHBY* (1841), 8 M. & W. 540; 1 Dowl. N. S. 86; 10 L. J. Ex. 364; 5 Jur. 534; 151 E. R. 1153.

**Annotations:—***As to* (1) *Apld.* *Burroughs v. Bayne* (1860), 5 H. & N. 296. *Refd.* *Edmondson v. Nuttall* (1864), 17 C. B. N. S. 280. *Generally, Refd.* *Crouch v. G. N. Ry.* (1856), 11 Exch. 742; *England v. Cowley* (1873), L. R. 8 Exch. 126; *Hollins v. Fowler* (1875), L. R. 7 H. L. 757. *Mentd.* *Needham v. Rawbone* (1844), 9 Jur. 274; *Hilbery v. Hatton* (1864), 3 New Rep. 671; *Hlort v. Bott* (1874), 22 W. R. 414; *Moritt v. N. E. Ry.* (1876), 34 L. T. 94.

**444. — Goods damaged in course of forcible entry.]—**Damages cannot be recovered against the rightful owner for a forcible entry on land, for 5 Rich. 2, statute 1, c. 7, only makes a forcible entry an indictable offence, & does not create any civil remedy for it. But for any independent wrong, such as an assault or an injury to furniture, committed in the course of the forcible entry, damages can be recovered, even by a person whose

### PART III. SECT. 1, SUB-SECT. 1.—B. (b).

**441. 1. Damage to goods—Animals—Killing.]—***BREMNER v. WALKER* (N. W. T.) (1905), 2 W. L. R. 347.—*CAN.*

*g. — Burst boiler.]—*Pltf. had workmen working at a steam mill. Dft., being interested in getting saw logs cut up, removed pltf.'s fireman & placed another man in his stead, & added several of his own workmen to those employed by pltf. Owing to some mismanagement the boiler burst:—*Held:* there was evidence for the

jury that dft. was a trespasser; whether he was responsible as such for the injury done to the boiler depended on the nature & extent of his interference, & how far he was implicated in the acts which caused the explosion.—*ELIGH v. WINTERS* (1856), 5 C. P. 491.—*CAN.*

*h. — Loss of logs caused by breaking of plaintiff's boom.]—**AUGER v. COOK & DOLLER* (1876), 39 U. C. R. 531.—*CAN.*

*k. Attorney directing sheriff not to give up goods.]—*Where an attorney directed the sheriff not to give up

the goods of A., seized under an attachment as the goods of B.:—*Held:* he became a trespasser by such direction.—*RAIDENHURST v. McLEAN & McPHERSON* (1836), 4 O. S. 281.—*CAN.*

*l. Taking down list of goods.]—*If a stranger having no legal process goes to deft. in execution, & takes down in his presence a list of his goods, & tells him he must not remove them, & does nothing more, he cannot be sued in trespass.—*CAMERON v. LOUNT* (1848), 4 U. C. R. 275.—*CAN.*

*m. Magistrate without jurisdiction issuing warrant.]—**GRAY v. MCCARTHY*,

possession was wrongful, for the statute makes a possession obtained by force unlawful, even when it is so obtained by the rightful owner.—*BEDDALL v. MAITLAND* (1881), 17 Ch. D. 174; 50 L. J. Ch. 401; 44 L. T. 248; 29 W. R. 484.

*Annotations*:—*Obtd.* Scott v. Brown (1884), 51 L. T. 746. *Overd.* Hemmings v. Stoke Poges Golf Club, [1920] 1 K. B. 720. *Refd.* Jones v. Foley, [1891] 1 Q. B. 730. *Mentd.* Andrew v. Aitken (1882), 51 L. J. Ch. 784; Gray v. Webb (1882), 21 Ch. D. 802; Toko v. Andrews (1882), 8 Q. B. D. 428; Fraser v. Cooper, Hall (1883), 31 W. R. 714; McGowan v. Middleton (1883), 11 Q. B. D. 464; Lowe v. Bentley (1928), 44 T. L. R. 388.

**445.** ———.]—*HEMMINGS v. STOKE POGES GOLF CLUB*, No. 179, *ante*.

— *Church pew.*]—*See ECCLESIASTICAL LAW*, Vol. XIX., pp. 467, 474, Nos. 3173, 3302, 3306.

— *Tombstones in churchyard.*]—*See BURIALS*, Vol. VII., p. 533, No. 133.

**446.** Sufficiency of taking—*Locking up goods in room.*]—If, in trespass for taking goods, defts. plead that W. L. was possessed of a room, & that they, as his servants, removed the goods, which were incumbering the room, to a convenient distance, this plea is disproved if it be shown that defts. locked up the goods in the room & took away the key.—*JONES v. LEWIS* (1830), 7 C. & P. 343; 173 E. R. 153.

**447.** ———.]—*Belonging to plaintiff.*]—Deft., claiming a sum of money as due to him from pltf., his lodger, locked up pltf.'s goods in a room which he held of deft., & in which pltf. had put them, kept the key, & refused pltf. access to them, saying that nothing should be removed till deft.'s bill was paid:—*Held*: not such a taking of the goods as would sustain an action of trespass.—*HARTLEY v. MOXHAM* (1842), 3 Q. B. 701; 3 Gal. & Dav. 1; 12 L. J. Q. B. 41; 6 J. P. 717; 6 Jur. 946; 114 E. R. 675.

*Annotations*:—*Distd.* Lane v. Dixon (1847), 3 C. B. 776. *Consd.* White v. Bayley (1861), 10 C. B. N. S. 227.

**448.** ———.]—*Fraudulent taking.*]—*POWELL v. HOYLAND* (1851), 6 Exch. 67; 20 L. J. Ex. 82; 16 L. T. O. S. 369; 155 E. R. 456.

#### SUB-SECT. 2.—GOODS SUBJECT-MATTER OF TRESPASS.

**449.** Arms placed in church.]—*WYCHE (LADY) v. —* (1469), Y. B. 9 Edw. 4, fo. 14, pl. 8; *sub nom.* GRAY'S (LADY) CASE, cited in Moore, K. B. 878.

*Annotations*:—*Consd.* Corven's Case (1612), 12 Co. Rep. 105; May v. Gilbert (1613), 2 Bulst. 150. *Apld.* Spooner v. Brewster (1825), 3 Bing. 136. *Refd.* Frances v. Ley (1615), Cro. Jac. 366.

**450.** Animals.]—*ANON.* (1527), Jenk. 204; 145 E. R. 138.

**451.** ———.]—*DYE v. LEATHERDALE* (1769), 3 Wils. 20; 95 E. R. 910.

*Annotations*:—*Refd.* Taylor v. Cole (1789), 3 Term Rep. 292; Shorland v. Govett (1826), 5 B. & C. 485. *Mentd.* Lucas v. Nockells (1833), 10 Bing. 157.

—.]—*See, also*, Nos. 439–441, *ante*, & ANIMALS, Vol. II., pp. 214–217, Nos. 104–125.

*KEYS & WHELAN* (1863), 22 U. C. R. 568.—*CAN.*

*n. Seizure of property of tenant.*]—Pltf. were owners as tenants in common with M. of certain hay, grain & straw. The property was taken & sold by the sheriff under an execution against M., & was purchased by deft., who resold part of it & used the balance.—*Held*: as there was such a carrying away of property as would disabie pltf. from having the lawful use or benefit of it, pltf. were entitled to maintain their action.—*McLELLAN v. McDUGALL* (1895), 28 N. S. R. (16 R. C.) 237.—*CAN.*

*o. Cutting holes in ship to remove &*

**452.** Deed.]—*ANON.* (1328), Y. B. 2 Edw. 3, fo. 2, pl. 5.

**453.** Fixtures.]—In trespass the declaration was for taking goods, chattels, & effects:—*Held*: pltf. might recover the value of fixtures under these words.—*PITT v. SHEW* (1821), 4 B. & Ald. 206; 106 E. R. 913.

*Annotations*:—*Consd.* Twigg v. Potts (1834), 1 Cr. M. & R. 89. *Refd.* Hallen v. Runder (1834), 1 Cr. M. & R. 266.

**454.** ———.]—*BOYDELL v. M'MICHAEL*, No. 423, *ante*.

**455.** Timber.]—*ANON.* (1586), Moore, K. B. 248; 72 E. R. 560.

—.]—*See, generally*, AGRICULTURE, Vol. II., pp. 61–93.

*Church pew.*]—*See ECCLESIASTICAL LAW*, Vol. XIX., pp. 467, 474, Nos. 3173, 3302, 3306.

*Ship.*]—*See* Nos. 8, 428, *ante*.

*Tombstone.*]—*See BURIALS*, Vol. VII., p. 533, Nos. 133, 134.

#### SECT. 2.—RELATION OF TRESPASS AND TROVER.

**456.** Trespass distinguished from trover.]—There is a great difference between trespass & trover, as to the action being local, etc.; for trespass is local, but trover is transitory. Trover lies for trees, when they are cut down, because then they are chattels; but before they are cut down they participate of the nature of the land, & trespass lies (POWELL, J.).

Trover lies for carrying it away [a tree that has been cut down], for it is a chattel so soon as it is severed from the freehold; & for the severing thereof trespass lies (HOLT, C.J.).—*ANON.* (1708), 11 Mod. Rep. 181; 88 E. R. 975.

**457.** ———.]—That which makes a man a trespasser may not amount to a conversion.—*BUSHEL v. MILLER* (1718), 1 Stra. 128; 93 E. R. 428.

*Annotation*:—*Apld.* Foulds v. Willoughby (1841), 1 Dowl. N. S. 86.

**458.** ———.]—*ISRAEL v. ETHERIDGE* (1721), Bunb. 80; 145 E. R. 602.

*Annotations*:—*N.F.* Tinkler v. Poole (1770), 5 Burr. 2657; Shipwick v. Blanchard (1795), 6 Term Rep. 298.

**459.** ———.]—The distinction between action of trespass & trover is well settled:—the former is founded on possession, the latter on property. Here pltf. had no possession (LORD KENYON, C.J.).—*WARD v. MACAULEY* (1791), 4 Term Rep. 489; 100 E. R. 1135.

*Annotations*:—*Consd.* Gordon v. Harper (1796), 7 Term Rep. 9. *Refd.* Izod v. Lamb (1830), 1 Cr. & J. 35; Jolks v. Hayward (1905), 92 L. T. 692.

**460.** ———.]—In trespass, therefore, a party is liable if he takes the thing only for an instant in trover, not, unless he proceeds to a conversion (BEST, C.J.).—*PRICE v. HELYAR* (1828), 4 Bing. 597; 1 Moo. & P. 541; 6 L. J. O. S. C. P. 132; 130 E. R. 898.

*Annotations*:—*Refd.* Jacobs v. Latour (1828), 2 Moo. & P. 201; Balme v. Hutton (1833), 9 Bing. 471; Garland v. Carlisle (1837), 4 Bing. N. C. 7.

*save cargo.*]—*DRYER v. SMITH* (1881), 6 Nfld. L. R. 268.—*NFLD.*

#### PART III. SECT. 1, SUB-SECT. 2.

**453 I.** Fixtures.]—*TRAVIS-BARKER v. REED*, [1920] 3 W. W. R. 623; 54 D. L. R. 405.—*CAN.*

**453 II.** ———.]—In trespass for taking away mill machinery, millstones, wheels, etc., doct. pleaded not possessed, & it appeared that the injury was done by severing fixtures in the mill & taking them away:—*Held*: the action would lie, as when they were severed they became personal property, for which the owner could maintain trespass.—*MEYERS v. MARSH*

(1816), 2 U. C. R. 148.—*CAN.*

#### PART III. SECT. 2.

**456 I.** Trespass distinguished from trover.]—Cattle supposed to have been stolen were taken by A., a constable, to B., an innkeeper, to take care of. After some time B., wishing to be paid for the keep, applied to C., a magistrate, who had nothing to do with the original caption, for directions. C. told him to sell the cattle & settle his claim, which B. did. The owner of the cattle sued C. in trespass:—*Held*: trover & not trespass should have been the action.—*MARSH v. BOULTON* (1818), 4 U. C. R. 334.—*CAN.*

*Sect. 2.—Relation of trespass and trover. Sects. 3, 4 & 5: Sub-sects. 1 & 2.]*

461. —[—]—*FOULDES v. WILLOUGHBY*, No. 443, *ante*.

462. —[—]—Trespass will not lie for a chattel of which there has been a bailment to deft. or his servant, but trover is the proper remedy.—*LAMPRELL v. MARKHAM* (1844), 2 L. T. O. S. 377.

463. —[—]—*PRATT v. PRATT*, No. 468, *post*.

464. *Right to elect remedy—By trover or trespass.*—If beasts be wrongfully seized for an heriot, the owner may bring either trover or trespass at his election.—*BISHOP & JURDAIN v. MONTAGUE (Viscountess)* (1804), Cro. Jac. 50; 79 E. R. 42; *previous proceedings* (1601), Cro. Eliz. 824.

*Annotation:—Refd. Cooper v. Shephard* (1846), 7 L. T. O. S. 282.

465. —[—]—Where goods are wrongfully seized you may waive trespass & bring trover, either action will lie (*HOLROYD, J.*).—*PARKER v. BAILEY* (1824), 4 Dow. & Ry. K. B. 215.

466. —[—]—*MOSSOP v. JOHNSTONE* (1844), 4 L. T. O. S. 110.

467. *Effect of recovery in trespass—Whether bar to action of trover.*—A judgment in trespass is no bar to trover for the same goods.—*PUTT v. RAWSTERN* (1881), 3 Mod. Rep. 1; 2 Mod. Rep. 318; Poll. 634; 2 Show. 211; T. Raym. 472; 87 E. R. 1; *sub nom.* *FOOT v. RASTALL*, Skin. 48, 57.

*Annotations:—Consd. Lechmere v. Toplady* (1690), 2 Vent. 169. *Refd. Anon.* (1704), 2 Salk. 655; *Hitchin v. Campbell* (1772), 2 Wm. Bl. 827; *Buckland v. Johnson* (1854), 15 C. B. 145. *Mentd. Lechmere v. Fletcher* (1833), 3 Tyr. 450; *Lloyd v. Mason* (1845), 4 Hare, 132.

468. *Action for trespass & conversion—Defence to trespass only.*—In trespass for breaking & entering pltf.'s dwelling-house, & seizing, taking & converting his goods, the conversion is mere matter of aggravation; & a plea which only justifies the seizing & taking is good on special demurrer, though it does not in its commencement except the conversion.

Conversion is not a trespass. You could not in an action of trespass, after all the trespasses have been justified, go on with the action for conversion without new assigning it as a distinct trespass (*ROLFE, B.*).—*PRATT v. PRATT* (1848), 2 Exch. 413; 6 Dow. & L. 20; 17 L. J. Ex. 299; 11 L. T. O. S. 204; 154 E. R. 553.

### SECT. 3.—TRESPASS AB INITIO.

469. *What constitutes.*—*BAGSHAW v. GAWARD* (1807), Yelv. 96; Cro. Jac. 147; Noy, 119; 80 E. R. 65.

*Annotations:—Consd. Lawton v. Ward* (1696), 1 Ld. Raym. 75. *Refd. Vaspur v. Edwards* (1701), 12 Mod. Rep. 658; *Gates v. Bayley* (1760), 2 Wils. 313. *Mentd. H. v. Cotton* (1751), Park. 112; *Atkinson v. Teasdale* (1772), 3 Wils. 278; *Sayre v. Rochford* (1777), 2 Wm. Bl. 1165; *Clark v. Gilbert* (1835), 2 Scott, 620.

470. —[—]—If a sheriff or any person in his aid make replevin after a claim of property notified to him, he is a trespasser *ab initio*.—

### PART III. SECT. 3.

489 i. *What constitutes.*—Deft., having entered on the premises of pltf. to distrain for rent, confessedly due though it was, & having sold the goods of pltf. distrained on without having given the notice required by Statute, was a trespasser in his first act & in every subsequent act of his proceedings.—*CORNELIUS v. BURTON* (1873), 9 N. S. R. (3 G. & O.) 337.—CAN.

489 ii. —[—]—*HOOPER v. CRAIG & HUNTER* (1885), 12 A. R. 72.—CAN.

489 iii. —[—]—*Qu.*: if a mtgee. rightfully seize, but unlawfully sell, the mtgd. goods he is a trespasser *ab initio*.—*DEDERICK v. ASHDOWN* (1888), 15 S. C. R. 227; 4 Man. L. R. 139.—CAN.

489 iv. —[—]—The notice of sale being bad, defts. in an action for illegal distress are trespassers *ab initio*.—*CANADIAN CANNING Co. v.*

*LEONARD v. STACY* (1704), 6 Mod. Rep. 139; Holt, K. B. 143; 87 E. R. 899.

471. —[—]—Trespass lies for working an estray, although the original taking be admitted to be lawful.—*OXLEY v. WATTS* (1785), 1 Term Rep. 12; 99 E. R. 944.

472. —[—]—The taking an unreasonable quantity of goods under process of attachment does not make the officer a trespasser *ab initio*.—*MOORE v. TAYLOR* (1813), 5 Taunt. 69; 128 E. R. 612.

*Annotations:—Mentd. Hall v. Gumble* (1831), 1 Cr. & J. 539; *Watson v. Locke* (1832), 2 Cr. & J. 203.

473. —[—]—By a railway Act, the tolls authorised by the Act were to be paid to such persons, at such places upon or near the railway, & in such manner as the directors should, by notice to be annexed to the list of tolls, appoint; & in case of refusal or neglect, on demand, to pay such tolls, the person to whom the tolls ought to have been paid is empowered to seize the goods for or in respect of which such tolls ought to have been paid, or any other goods belonging to the party which shall pass on or along the railway, & detain the same until payment of the tolls & charges; & if the goods are not redeemed within five days, the same shall be appraised & sold, & such tolls & charges satisfied thereout, as the law directs in cases of distress for rent:—*Held*: where the co. seized & sold without complying with these several conditions no demand of the tolls having been made, & the seizure not having been made by "the person to whom the tolls ought to have been paid," & the sale having taken place without an appraisement, they became trespassers *ab initio*.—*NORTH, ETC. (ASSIGNEES OF PRIOR) v. LONDON & SOUTH WESTERN RY. Co.* (1863), 14 C. B. N. S. 132; 2 New Rep. 33; 32 L. J. C. P. 156; 143 E. R. 395.

*Trespass to land.*—*See Part II., Sect. 4, ante.*

### SECT. 4.—WHO MAY BE LIABLE.

*See, generally, Part I., Sect. 2, ante.*

474. *Person receiving goods from another.*—*DAY v. AUSTIN* (1595), Owen, 70; 74 E. R. 908.

475. —[—]—A person who knowingly receives from another a chattel which the latter has wrongfully seized, & afterwards, on demand, refuses to give it back to the owner, does not thereby become a joint trespasser, unless the chattel was seized for his use.—*WILSON v. BARKER* (1833), 4 B. & Ad. 614; 1 Nev. & M. K. B. 409; 110 E. R. 587.

*Annotation:—Refd. Eastern Construction Co. v. National Trust Co. & Schmidt*, [1911] A. C. 197.

476. *Lawful custodian of goods distrained—Where distress wrongful.*—Trespass *vi et armis* does not lie against a pound keeper merely for receiving a distress, though the original taking be tortious. *Secus*, if he exceed his duty & assent to the trespass.—*BADKIN v. POWELL* (1776), 2 Cowp. 476; 98 E. R. 1195.

*Annotation:—Mentd. Brandling v. Kent* (1785), 1 Term Rep. 60.

*FAGAN* (1906), 12 B. C. R. 23; 3 W. L. R. 38.—CAN.

469 v. —[—]—Where process is irregular only, & not void, the action is on the case, trespass not being maintainable until the process is set aside; but where the process is void & a mere nullity, trespass lies.—*HICKS v. MCCUNE* (1921), 49 O. L. R. 41; 58 D. L. R. 431; 19 O. W. N. 423.—CAN.

bb. *Justice of the peace.*—The judgment of an inferior ct., involving a question of jurisdiction, is not conclusive; therefore, a justice of the peace is liable in an action of trespass for issuing an execution on a judgment recovered before him in a case in which he had no jurisdiction because the title to land came in question, though the judgment remains unreversed.—PICKETT v. PERKINS (1868) 12 N. B. R. (1 Han.) 131.—CAN.

*Sect. 5.—Remedies: Sub-sects. 2 & 3, A. & B.*  
*Sect. 6: Sub-sect. 1.]*

25 J. P. 743; 7 Jur. N. S. 1289; 142 E. R. 634; *subsequent proceedings* (1865), 11 H. L. Cas. 621, H. L. *Annotations*.—*Reid*. Chambers v. Miller (1862), 13 C. B. N. S. 125; *Hemmings v. Stoke Poges Golf Club*, [1920] 1 K. B. 720. *Mentd*. Musgrave v. Foster (1871), 24 L. T. 614.

487. —.]—The Benchers of an Inn of Court being engaged in an inquiry into the conduct of a barrister, a member of the Inn, especially in relation to certain transactions in a co.; he produced before them a director as a witness in his favour: & they, having procured, from the solr. of the co., a manifold letter book containing copies of letters to & from divers persons, mostly relating to the affairs of the co., but containing also two or three private letters, cross-examined him therefrom; he afterwards asked for it, in order, as he said, to offer an explanation, & having got it, put it in his pocket & declared he should keep it, & when requested, refused to return it; whereupon they directed their porters to retake it by force; in an action for the assault, they justified, on the above facts, & it appeared that he had bought & paid for the book in blank:—*Held*: unless the book was the private, personal book of pltf., they had lawful possession, & he had no right to retake it.—HUDSON v. SLADE (1862), 3 F. & F. 390.

SUB-SECT. 3.—DAMAGES.

*A. In General.*

488. Whether damages recoverable.—Trespass to animals.—Necessity for special damage.]—SLATER v. SWANN, No. 439, *ante*.

—Trespass by animals.—Seizure of animal.]—See ANIMALS, Vol. II., p. 229, No. 196.

—Damage through wrongful sale by sheriff.—Loss sustained after Interpleader order.]—See INTERPLEADER, Vol. XXIX., p. 484, No. 345.

—Illegal, irregular, or excessive distress.]—See DISTRESS, Vol. XVIII., pp. 386-392, Nos. 1258-1346.

489. Effect of recovery of damages.—Against one co-trespasser.]—BROWN v. WOOTTON (1605), Cro. Jac. 73; Moore, K. B. 762; 79 E. R. 62; *sub nom*. BROOME v. WOOTON, Yelv. 67.

*Annotations*.—*Consd*. Lechmere v. Fletcher (1833), 1 Cr. & M. 623; King v. Hoare (1844), 2 Dow. & L. 382; Buckland v. Johnson (1854), 15 C. B. 145. *Apld*. Brinsmead v. Harrison (1872), L. R. 7 C. P. 547. *Reid*. The Kourek, [1924] P. 140. *Mentd*. Greenlands v. Wilmhurst & London Assocn. for Protection of Trade, [1913] 3 K. B. 507.

490. —Right of defendant to retain goods.]—BLUNT v. BASSET (1626), Benl. 171; 73 E. R. 1033.

Assessment of damages.—Question for jury.] See DAMAGES, Vol. XVII., pp. 155, 175, Nos. 579, 774-779; REVENUE, Vol. XXXIX., p. 223, Nos. 34, 35.

Measure of damages.]—See Sub-sect. 3, B., *post*.

491. Proceeds of sale of goods taken.—Payment to plaintiff.—Whether grounds for mitigation of damages.]—In an action for trespass in taking

pltf.'s goods, deft., having pleaded only the general issue, cannot, even in mitigation of damages, give in evidence a repayment by him, after action brought, of money produced by the sale of the goods. In trespass for taking pltf.'s goods, not guilty being pleaded, & pltf. having proved deft., an attorney, delivered a *fi. fa.* to the sheriff, who thereupon took the goods, *qu.*: whether deft. may give in evidence a judgment on which the *fi. fa.* issued.—RUNDLE v. LITTLE (1844), 6 Q. B. 174; 13 L. J. Q. B. 311; 3 L. T. O. S. 100; 8 Jur. 668; 115 E. R. 68.

492. Price of goods retaken by unpaid seller.—Whether set-off against damages recovered by buyer.]—A person having obtained several very valuable articles without paying for them, the tradesmen, on hearing that he was reputed to be a swindler, went to his house, gained admittance, & broke open an inner door, & took away part of the goods. He brought an action of trespass, the jury gave him a verdict, & the ct. refused to reduce the damages by allowing the tradesmen to set off against it the amount of the debts due to them.—HAWKINS v. BAYNES (1823), 1 L. J. O. S. K. B. 167.

493. —.—.]—Pltf. having purchased goods of deft., secretly absconded with the goods before he paid for them; deft. followed him, & forcibly retook the goods:—*Held*: in trespass for taking them, the measure of damage was the value of the goods, & the jury could not consider the debt due from pltf. to deft., or treat it as reduced by the retaking.—GILLARD v. BRITTAN (1841), 1 Dowl. N. S. 424; 8 M. & W. 575; 11 L. J. Ex. 133; 151 E. R. 1168.

*Annotations*.—*Apld*. Edmonson v. Nuttall (1864), 17 C. B. N. S. 280. *Consd*. Johnson v. L. & Y. Ry. (1878), 3 C. P. D. 499. *Reid*. Lee v. Cooke (1857), 2 H. & N. 584.

—.—.]—See, *now*, R. S. C., Ord. 19, r. 3.

494. Effect of payment into court.]—After verdict, a plea of payment into ct. will be held good in an action of trespass to the pltf.'s goods & person, notwithstanding the exception in Civil Procedure Act, 1833 (c. 42), s. 21.—ASTON v. PERKES (1846), 15 M. & W. 385; 15 L. J. Ex. 241; 7 L. T. O. S. 92, 186; 153 E. R. 899. *Annotations*.—*Reid*. Key v. Thimbleby (1851), 6 Exch. 692; Thompson v. Sheppard (1854), 4 E. & B. 53.

*B. Measure of Damages.*

495. Where no special damage proved.]—SLATER v. SWANN, No. 439, *ante*.

496. —.—.]—In an action of damages for taking goods under irregular legal process where special damage is alleged & claimed but not proved, pltf. is nevertheless entitled at least to nominal damages, or to such substantial damages as the jury think adequate.—MUDHUN MOHUN DOSS v. GOKUL DOSS (1866), 10 Moo. Ind. App. 563; 19 E. R. 1085; *sub nom*. DOSS v. DOSS, 14 L. T. 646; *sub nom*. MUDUN MOHUN DOSS v. GOKUL DOSS, 14 W. R. 590, P. C.

497. Goods seized under judgment subsequently set aside.—Costs of proceedings.]—Deft., on whose application a judgment has been set aside for irregularity in practice, without costs, cannot recover such costs as damages in an action of trespass against pltf.'s attorney, for taking his goods

PART III. SECT. 5, SUB-SECT. 3.—A.  
*r. Whether damages recoverable.*—BROSS v. HUBER (1858), 15 U. C. R. 625.—CAN.

PART III. SECT. 5, SUB-SECT. 3.—B.  
*1. General rule.*—In trespass, the inquiry is, what damages will compensate or restore pltf. financially to his original position as nearly as

possible at the time when the trespass was committed.—UNION BANK OF CANADA v. RIDRAU LUMBER CO. (1902), 23 C. L. T. 11; 4 O. L. R. 721; 1 O. W. H. 764.—CAN.

*a. Difference between value at sale & seizure.*—Where sheep had been wrongfully seized by deft., & transferred by him to his creditor who sold them, & a mtgee. of the sheep

had recovered from the person selling the value at the time of the sale, as damages for the conversion:—*Held*: pltf., the mtgor., could recover, in trespass against the person who so seized, the difference between such value & the value at the time of seizure.—CAVE v. BEVERIDGE (1877), 3 V. L. R. (L.) 302.—AUS.

*b. Value of goods seized.*—In tres-



under colour of the judgment.—*LOTON v. DEVEREUX* (1832), 3 B. & Ad. 343; 1 L. J. K. B. 103; 110 E. R. 129.

*Annotations*.—*Distd.* Pritchett v. Boevey (1833), 1 Cr. & M. 775. *Refd.* Cordington v. Lloyd (1838), 8 Ad. & El. 449.

**498.** ———.]—In trespass for taking pltf.'s goods in execution under a warrant of attorney & judgment which were afterwards set aside as illegal, pltf. cannot claim as part of the damage his costs incurred in vacating the warrant of attorney & judgment.—*HOLLOWAY v. TURNER* (1845), 6 Q. B. 928; 14 L. J. Q. B. 143; 4 L. T. O. S. 372; 9 Jur. 180; 115 E. R. 349.

*Annotations*.—*Distd.* Foxall v. Barnett (1853), 2 E. & B. 928. *Refd.* Abthorp v. Bedford & Cambridge Ity. (1863), 8 L. T. 200.

**499. Removal of goods—Natural consequences of removal.**—A person who has moved the goods of another without a lawful right to do so, even to put it out of the way:—*Held*: liable only for the natural consequences of the removal.—*WALKER v. SHEERMAN* (1862), 3 F. & F. 259.

**500. Trespass by animals.**—The damage in respect of which trespassing animals may be distrained damage feasant is not confined to damage to the freehold, but includes injuries to other animals.—*BODEN v. ROSCOE*, [1894] 1 Q. B. 608; 58 J. P. 388; 42 W. R. 445; *sub nom.* *ROSCOE v. BODEN*, 63 L. J. Q. B. 707; 70 L. T. 450; 10 T. L. R. 317; 10 R. 173; *sub nom.* *ROSCOE v. RODEN*, 38 Sol. Jo. 291, D. C.

**Trespass to animals.**—*See DAMAGES*, Vol. XVII., p. 123, Nos. 320, 321.

**Destruction of libellous picture.**—*See LIBEL*, Vol. XXXII., p. 11, No. 14.

**Taking minerals.**—*See MINES*, Vol. XXXIV., pp. 654-657, Nos. 537-572.

**Wrongful seizure under bill of sale.**—*See BILLS OF SALE*, Vol. VII., pp. 133-135, Nos. 756-762.

**Illegal execution.**—*See EXECUTION*, Vol. XXI., pp. 515, 544, Nos. 911, 1195.

**Illegal, irregular & excessive distress.**—*See DISTRESS*, Vol. XVII., pp. 368, 369, 387-392, Nos. 1090-1092, 1277-1283, 1289-1301, 1331-1337.

pass for taking timber, the ct. refused to disturb the verdict on the ground that the damages were beyond the value of the logs taken.—*FLINT v. BIRD & CORBY* (1854), 11 U. C. R. 444.—*CAN.*

**c. — & interest.**—In an ordinary action of trespass for taking goods, the measure of damages is the value of the goods when taken (which the jury may estimate liberally) & interest.—*MAXWELL v. CRANN* (1856), 13 U. C. R. 253.—*CAN.*

**d. — & compensation for inconvenience.**—In the removal of pltf.'s goods by the sheriff, pltf.'s loom was taken down & injured, but the possession was restored to him with his other goods.—*Held*: he was not entitled to damages for the loss of time & work consequent on his not having repaired the loom; & the true measure of damages could not have exceeded the value of the article damaged at the time of the trespass, & compensation for any temporary inconvenience occasioned by its sudden removal.—*BENSON v. CONNOR* (1857), 6 C. P. 356.—*CAN.*

**e. — ] — VEDDER v. CHADSEY** (1884), 1 B. C. R., pt. 2, 76.—*CAN.*

**f. — ] — LAW v. MADDEN** (1909), 11 W. L. R. 6.—*CAN.*

**g. — & damages for injury to business.**—*WHITE v. CUBAK* (1909), 10 W. L. R. 553; 2 Sask. L. R. 106.—*CAN.*

**h. — ] — HAGGAN v. PASLEY** (1878), 2 L. R. Ir. 573.—*IR.*

**k. — ] —**Although an action may

be for trespass to goods as well as for trover & detinue, yet, unless circumstances of aggravation are shown, the measure of damages is the value of the goods with interest, as in trover.—*SMITHIES v. UNIVERSAL SUPPLY CO., LTD.* (1904), 23 N. Z. L. R. 1090.—*N.Z.*

**l. Loss of profits.**—*AUGER v. COOK & DOLLER* (1876), 39 U. C. R. 537.—*CAN.*

**m. Difference between goods seized & rent due.**—After a tender the goods distrained (illegally so, in the first place) were sold by the bailiff:—*Held*: by reason of the illegal distress pltf. would be entitled to recover as damages the difference between the goods & the rent due; but as the sale was after the tender, pltf. could recover the full value of the goods.—*HOWELL v. LISTOWEL RINK & PARK CO.* (1886), 13 O. R. 476.—*CAN.*

**n. For wrongful & violent entry & seizure.**—*JOHNSTON v. DOMINION STEEL & IRON CO.* (1901), 21 C. L. T. 311.—*CAN.*

**By public officer.**—*WIN GAT v. JOHNSON* (1908), 1 Sask. L. R. 476; 9 W. L. R. 293.—*CAN.*

**p. Injury to credit & reputation.**—*SEMPLE v. SAWYER-MARNEY CO.* (1910), 13 W. L. R. 428.—*CAN.*

**q. Depreciation of goods.**—In an action for trespass to goods the fact that they cannot be made as good as they were before the trespass is not a ground for holding them worthless. In such a case, if the goods still exist, the damages to which pltf. is entitled

## SECT. 6.—DEFENCES.

**SUB-SECT. 1.—DENIAL OF PLAINTIFF'S RIGHT OF OWNERSHIP OR POSSESSION.**

**501. Whether good defence.**—In trespass for taking goods a justification which denies pltf.'s right of property, must show that he was possessed.—*HALLER v. BIRT* (1697), 1 Ld. Raym. 218; 12 Mod. Rep. 120; 3 Salk. 272; 5 Mod. Rep. 248; Carth. 380; Skin. 674; 91 E. R. 1042; *sub nom.* *HOLLER v. BUSH*, 1 Salk. 394.

*Annotations*.—*Mentd.* Wilson v. Hobday (1815), 4 M. & S. 120; Thompson v. Farden (1840), 1 Man. & G. 535.

**502.** ———.]—*DAVIS v. NEST*, No. 402, *ante*.

**503.** ———.]—In trespass for taking goods, the plea that the goods were not the goods of pltf. puts no more in issue than the plea of not guilty did formerly; & if pltf. shows that he was in the peaceable possession of the goods when they were taken, deft. will not be allowed to show that the goods were the property of a third person.—*ASHMORE v. HARDY* (1836), 7 C. & P. 501; 173 E. R. 222.

**504.** ———.]—Trespass for seizing & taking certain goods. Plea, that the goods were not the property of pltf.:—*Held*: deft., under this plea, might give in evidence a judgment in his favour in the Peveril Ct., & execution thereon, under which the alleged trespass was committed.—*ASHBY v. MINNITT* (1838), 8 Ad. & El. 122; 3 Nev. & P. K. B. 231; 1 Will. Woll. & H. 155; 112 E. R. 782; *sub nom.* *ASHLEY v. MINNETT*, 7 L. J. Q. B. 133; 2 Jur. 888.

**505.** ———.]—The rules of a society established for the purpose of providing the shareholders with canal boats, provided that as soon as a certain sum was raised, a boat should be ordered by & for a particular number selected by lot, to whom on the dissolution of the society, the boat should belong, the holder in the meantime paying to the society for the use of it 5 per cent. on the sum expended by the society in its completion, "as such boat shall not be the property of the member to whom the same shall be allotted, until the

are measured by the extent to which the goods have been depreciated.—*SMITH v. STANDARD TRUSTS CO. (Man.)*, [1918] 3 W. W. R. 762.—*CAN.*

**r. Loss sustained by deprivation of use of goods.**—Deft. seized & converted the goods of pltf. before the latter was discharged as an insolvent:—*Held*: after his discharge pltf. might maintain trespass to recover damages for the loss he had sustained by being deprived of the use of his goods for the period between the commission of the trespass & the assignment of his property to the provisional assignee.—*ASPINALL v. ARBOTT* (1837), Jo. & Car. 145; 1 L. L. R. 261.—*IR.*

**t. — ] — PETERS v. JOSEPH** (1877), 3 N. Z. Jur. N. S. 142.—*N.Z.*

## PART III. SECT. 6, SUB-SECT. 1.

**501 l. Whether good defence.**—*STEWART v. JARVIS* (1868), 27 U. C. R. 467.—*CAN.*

**a. Justification under execution.**—A sheriff sued in trespass or trover for taking goods seized under execution can justify under the execution without showing the judgment.—*CROWE v. ADAMS (N. S.)* (1892), 21 S. C. R. 342.—*CAN.*

**b. Any valid ground.**—Trespass may be justified upon any valid ground, & that although some invalid reason may have been given at the time of the trespass.—*DEDERICK v. ASHDOWN* (1888), 15 S. C. R. 227; 4 Man. L. R. 139.—*CAN.*

**aa. Property delivered to avoid execution.**—In trespass for taking hay,



**Sect. 6.—Defences: Sub-sects. 1, 2 & 3.]**

society shall be discontinued, but belong to the committee for the time being in trust for the society"; & further stipulated that, until the dissolution of the society, every boat should be kept in good repair "by the member to whom the same shall be allotted; & at such dissolution the boats shall become the absolute property of the respective persons to whom they shall have been allotted." The rules also provided that if any member, "after he shall have obtained a boat by allotment, shall make default in paying the remainder of his subscription money, forfeits, & interest, in respect of every share he may hold in this society, when due, it shall be lawful for the committee, without any notice whatever, to seize every such boat so allotted to such defaulter, & let out the same for hire, for the benefit of all the members of the society; & the defaulter shall not be entitled to resume the possession of, or use such boat, until the expiration of three calendar months after he shall have fully paid all subscriptions, forfeits, & interest due from him."

W., a member of the society, became the allottee of a boat, & subsequently sold it to A., his landlord, for a certain sum credited to W. in his rent, A. at the time not having notice of the nature of the title of W. who subsequently became a defaulter to the society, who thereupon seized the boat:—*Held*: the society was entitled to the boat as against W., & *semble*; the special facts might be given in evidence under a plea of not possessed to a declaration in trespass by A.—*ATWOOD v. HILL* (1852), 19 L. T. O. S. 353.

506. —. —.]—*BAGGALLEY v. DAVEY* (1857), 29 L. T. O. S. 211.

**SUB-SECT. 2.—DISTRESS.**

507. Whether good defence—Unauthorised person acting as bailiff—Distress subsequently ratified.]—*ANON.* (1857), 2 Leon. 196; Godb. 109; 74 E. R. 473.

*Annotations*:—*Consd.* Wilson v. Tummon & Fretson (1843), 12 L. J. C. P. 306. *Refd.* Britton v. Cole (1897), 12 Mod. Rep. 175; Lucas v. Nockolls (1833), 10 Bing. 157.

508. —. —.]—*Stranger assisting bailiff.*—To trespass for entering a house & taking goods, deft. may plead, that he entered in aid of a bailiff, & took the goods of another.—*TEMPLEMAN v. CASE* (1711), 10 Mod. Rep. 24; 88 E. R. 608.

509. —. —.]—*Distress irregular—Irregularity in form only.*—Trespass will not lie for an irregular distress, where the irregularity complained of, is not in itself an act of trespass, but consists merely in the omission of some of the forms required in conducting the distress:—such as procuring goods to be appraised before they are sold. The true construction of the provision in Distress for Rent Act, 1738 (c. 19), s. 19, that the party may recover

which pltf. claimed to have been delivered to him by deft. in payment of a debt.—*Held*: evidence was admissible on the part of deft., to show that the hay was delivered to pltf. in order to prevent its being seized on execution against deft., & that no property was intended to pass to pltf.—*KNOWLES v. ADAMS* (1863), 10 N. B. R. (5 All.) 445.—*CAN.*

**PART III. SECT. 6, SUB-SECT. 2.**

514i. Whether good defence.—Replevin lies by the owner of land for timber cut upon & taken away from it; & the proceedings will not be set aside, although the party taking the timber claims title to the land on which

it was cut.—*LYONS v. GORAM* (1831), N. B. Dig. 685.—*CAN.*

514ii. —. —.]—*An admission by deft.* that he had killed pltf.'s ox & ought to pay for it, will not support an action of trespass for taking the ox, there being some evidence that the ox had been worked by deft., by consent of pltf.'s agent.—*BRANSFIELD v. BISHOP* (1836), 2 N. B. R. (Ber.) 171.—*CAN.*

514iii. —. —.]—*In trespass against a pound-keeper for seizure & selling pltf.'s horse, deft., in justifying the act, because pltf. had not paid him the damages awarded according to the statute, must show that he was in a position to claim such damages, & set*

a compensation for the special damage he sustains by an irregular distress "in an action of trespass or on the case" is, that he must bring trespass, if the irregularity be in the nature of an act of trespass, & case, if it be in itself the subject matter of an action on the case.—*MESSING v. KEMBLE* (1809), 2 Camp. 115; 170 E. R. 1099, N. P.

—. —.]—*See, also, PUBLIC AUTHORITIES*, Vol. XXXVIII., p. 87, No. 636.

—. —.]—*Illegal, irregular & excessive distress.*—*See CORPORATIONS*, Vol. XIII., p. 337, No. 760; *DISTRESS*, Vol. XVIII., pp. 392, 393, 410–412, Nos. 1338–1346, 1503–1527; *POOR LAW*, Vol. XXXVII., p. 215, No. 106.

510. —. —.]—*Distress damage feasant.*—In trespass *vi et armis* for taking pltf.'s goods in Dale, deft. cannot plead in justification generally, that the place where is his freehold, & that the goods were there damage feasant.—*ELWIS v. LOMBE* (1704), 6 Mod. Rep. 117; 87 E. R. 875; *sub nom.* *HELVIS v. LAMB*, 2 Salk. 453.

*Annotations*:—*Refd.* Lambert v. Stroother (1740), Willes, 218; Martin v. Kesterton (1776), 2 Wm. Bl. 1089.

511. —. —.]—*ANON.* (1709), 2 Salk. 643; 91 E. R. 542.

*Annotation*:—*N.F.* Taylor v. Eastwood (1801), 1 East, 212.

512. —. —.]—*In trespass for taking & driving pltf.'s cattle, to which there was justification that deft. was lawfully possessed of a certain close, & that he took the cattle there damage feasant pltf. may specially reply title in another, by whose command he entered, etc., & it does not vitiate the replication that it unnecessarily proceeded farther to give colour to deft.*—*TAYLOR v. EASTWOOD* (1801), 1 East, 212; 102 E. R. 83.

*Annotation*:—*Mentd.* Richards v. Fry (1838), 7 L. J. Q. B. 68.

—. —.]—*See, also, DISTRESS*, Vol. XVIII., pp. 436, 437, 442–444, Nos. 1730–1744, 1793–1813.

513. —. —.]—*Seizure of goods already distrained.*—Defts., as overseers of the poor, distrained the goods of a party for poor's rates, under a warrant of a magistrate, such goods having been previously distrained by the landlord for rent, whose bailiff remained in possession. The magistrate at the time of granting the warrant, told the overseers not to distrain any property which might have been previously distrained for rent:—*Held*: the overseers were not entitled to the protection of Constables Protection Act, 1751 (c. 44), s. 6; & therefore, the landlord might maintain trespass against them, without a previous demand of the perusal & copy of the warrant.—*KAY v. GRACE* (1831), 5 Moo. & P. 140; 1 Nev. & M. M. C. 231; *sub nom.* *KAY v. GROVER*, 7 Bing. 312; 9 L. J. O. S. C. P. 112; 131 E. R. 120.

514. —. —.]—*A plea in trespass for breaking & entering a messuage & seizing goods justified under a distress for rent due to deft. from A. B. The plea was held to be sufficient without giving express colour to pltf., as deft. did not claim a*

out in his plea the existence of all those facts from which his right arises.—*BROWN v. WILLIAMS* (1843), 6 O. S. 556.—*CAN.*

514iv. —. —.]—*It is a good plea to a declaration in trespass for taking goods, that the goods were distrained for rent, & not being replevied within five days were appraised, & after such appraisal kept & detained in satisfaction of the rent.*—*ROGERS v. BUNTIN* (1843), 4 N. B. R. (2 Kerr) 230.—*CAN.*

514v. —. —.]—*CAMPBELL v. WHEELER* (1868), 12 N. B. R. (1 Han.) 269.—*CAN.*

514vi. —. —.]—*LONG v. MONCK* (1872), 22 C. P. 387.—*CAN.*

possessory title.—*GIBSLIN v. GREGORY* (1848), 11 L. T. O. S. 124.

**Distress for one cause—Justification for another.]**—See DISTRESS, Vol. XVII., p. 338, Nos. 725–730.  
**Payment of excessive sum demanded as damages**  
**—Whether recoverable in action for money had & received.]**—See DISTRESS, Vol. XVIII., p. 448, Nos. 1845–1847.

#### SUB-SECT. 3.—EXECUTION.

**515. Whether good defence.]**—When an action of trespass is brought for the taking of goods, how far debt. may be allowed to prove a title to those goods under an execution, notwithstanding he has pleaded the general issue.—*BANGHAN v. LOTHER* (1734), 2 Barn. K. B. 452; 94 E. R. 613.

**516. — Goods seized by bailiff— Action against sheriff.]**—Trespass does not lie against a sheriff to recover damages for the seizure of property by his bailiff, under a writ of *levari facias* issued on a suit in the county ct., because the sheriff is, in such case, a judicial & not a ministerial officer.—*TINSLEY v. NASSAU* (1827), 2 C. & P. 582; Mood. & M. 52; 172 E. R. 265, N. P.

**Annotations:—***Folld. Tunno v. Morris* (1835), 2 Cr. M. & R. 298. *Refd. Pitcher v. King* (1838), 1 Per. & Dav. 297; *Bradley v. Carr* (1841), 3 Man. & G. 221; *Houlden v. Smith* (1850), 7 State Tr. N. S. 1039.

**517. — — — — —.]**—Trespass is not maintainable against a sheriff, for the acts of the bailiff, in executing process on a judgment in the county ct.—*TUNNO v. MORRIS* (1835), 2 Cr. M. & R. 298; 1 Gale, 259; 5 Tyr. 949; 4 L. J. Ex. 234; 150 B. R. 120.

**Annotation:—***Distd. Houlden v. Smith* (1850), 14 Q. B. 841.  
 — — — — —.]—See, also, EXECUTION, Vol. XXI., p. 546, No. 1210.

**518. — — — — — Action against judicial officer.]**—The steward of a court baron is a judicial officer; & trespass will not lie against him where his bailiff by mistake took the goods of B. under a precept commanding him to take in execution the goods of A.—*HOLROYD v. BREARE* (1819), 2 B. & Ald. 473; 106 E. R. 439.

**Annotations:—***Apld. Tinsley v. Nassau* (1827), Mood. & M. 62; *Tunno v. Morris* (1835), 2 Cr. M. & R. 298. *Folld. Bradley v. Carr* (1841), 3 Man. & G. 221. *Distd. Houlden v. Smith* (1850), 14 Q. B. 841. *Refd. He Yarrington, Iawes v. Rawes* (1836), 5 L. J. Ch. 114; *Sterry v. Clifton* (1850), 9 C. B. 110; *Gelen v. Hall* (1837), 2 H. & N. 379.

**519. — — — — —.]**—The steward of a ct. baron is a judicial officer, & is not liable for the acts of the regular bailiffs of the ct., in executing the process of the ct.

But where the steward issued an attachment to compel debt's appearance, addressed to special bailiffs, nominated by the party who sued out the process, & who gave the steward an indemnity to

protect him from the consequence of any misconduct of the bailiffs:—*Held*: he was liable for their act, in wrongfully seizing the goods of a third party.—*BRADLEY v. CARR* (1841), 3 Man. & G. 221; 3 Scott, N. R. 521; 11 L. J. C. P. 22; 133 E. R. 1123.

**Annotation:—***Refd. Sterry v. Clifton* (1850), 9 C. B. 110.

**520. — — — — — Action against execution creditor.]**—Where pltf. in the county ct. obtained a judgment, & execution was issued & a levy made by the bailiff of the ct., who seized the goods of pltf. in the action, who thereupon brought a suit for the trespass against pltf. in the action in the county ct.:—*Held*: the act was that of the officer of the ct., & the action, if maintainable at all, could only be sustained against such officer.—*BRYANT v. HATTON* (1848), Cox, M. & H. 179; 10 L. T. O. S. 445, N. P.; *subsequent proceedings*, 11 L. T. O. S. 87.

**521. — — — — —.]**—Deft. obtained a judgment in the county ct. against J., a brother of pltf. & a warrant of execution having issued to take J.'s goods, debt. by letter, informed the bailiff of the ct. that he "had reason to believe in the possibility of a third person claiming the goods, etc. at the address given on the back of the execution. He would, however, contest any claim that might be made, & he desired that the officer who levied would not in any way be deterred from putting the warrant in force, by reason of any party setting up a claim." The warrant was accordingly executed at pltf.'s house, which was the address given on the writ, & certain goods of pltf. were seized as well as those belonging to J. An action was then brought by pltf. to recover damages from debt. for the trespass to his house & goods. At the trial several objections were taken by debt's counsel, & the judge nonsuited pltf. with leave to move on all the points taken:—*Held*: the nonsuit was perfectly correct. The letter to the bailiff did not necessarily make debt. liable to an action. It contained no express authority to seize the specific goods that were seized, but was simply a direction to the officer not to be prevented by any adverse claim from seizing goods that were liable to seizure; or, in other words, to do his duty. Debt. therefore, as execution creditor, was not personally responsible for the wrongful act of the officer.—*CRONSHAW v. CHAPMAN* (1862), 7 H. & N. 911; 31 L. J. Ex. 277; 6 L. T. 54; 10 W. R. 323; 158 E. R. 738.

**522. — — — — — Process in inferior court.]**—Where it is the regular course of proceeding of an inferior ct., on a verdict being found therein, for the judges of the ct. to issue execution for the debt in case of non-payment, & levy the amount, the fact of pltf.'s bringing his plaint in the inferior ct., & not countermanding the execution, renders him liable

**514 vii. — — — — —.]**—*HALLETT v. WILMOT & BROWN* (1876), 40 U. C. R. 263.—CAN.

**514 viii. — — — — —.]**—*DALE v. O'BRIEN* (1888), 20 N. B. R. 118.—CAN.

**514 ix. — — — — —.]**—A plea justifying a trespass on the ground of its having been committed in taking a distress is bad, if it does not aver compliance with the requirements of 9 & 10 Vict. c. 111.—*NAUGHTON v. KELLY* (1867), 15 W. R. 995.—IR.

#### PART III. SECT. 6, SUB-SECT. 3.

**515 i. Whether good defence.]**—Trespass will not lie against a person who without authority procures the issue of an execution on a judgment admitted to be valid & satisfied, & the seizure of pltf.'s goods thereunder.—*MCQUADE v. LIZARS & MCPHERSON* (1876), 39 U. C. R. 215.—CAN.

**515 ii. — — — — —.]**—After the commencement of an action in the Supreme Ct. pltf.'s claim was settled, but, in ignorance of the settlement, pltf.'s solr. signed judgment & issued execution, under which debtor's goods were seized, but not sold:—*Held*: an action for trespass was not maintainable, the process being valid & subsisting at the time it was acted upon.—*ROGERS v. STAVELY* (circa 1870), Mac. 437.—N.Z.

**516 i. — Goods seized by bailiff— Action against sheriff.]**—*VON MEYER v. TAYLOR* (1874), 12 N. S. W. S. C. R. (L.) 252.—AUS.

**516 ii. — — — — —.]**—*SWIM v. SHERIFF*, Cass. Dig. 2nd ed., 142.—CAN.

**516 iii. — — — — —.]**—*CROWE v. ADAMS* (N. S.) (1892), 21 S. C. R. 342.—CAN.

**520 i. — — — — — Action against execution creditor.]**—*MURPHY v. GOLDMAN* (1886), 7 N. S. W. L. R. (L.) 331; 3 N. S. W. W. N. 23.—AUS.

**520 ii. — — — — —.]**—*OSBORNE v. ROBINSON* (1886), 7 N. S. W. L. R. (L.) 193; 2 N. S. W. W. N. 90.—AUS.

**520 iii. — — — — —.]**—*FOX v. ASHWIN* (1887), 8 N. S. W. L. R. (L.) 384; 4 N. S. W. W. N. 78.—AUS.

**520 iv. — — — — —.]**—*KERNS v. PHELAN* (1869), 19 C. P. 288.—CAN.

**520 v. — — — — —.]**—Where judgment is signed a day too soon & execution issued, & the goods of debt. seized, an action for trespass will lie against pltf. & his solr. upon the judgment & execution being set aside.—*WARD v. GRUT* (circa 1868), Mac. 560.—N.Z.

Sect. 6.—Defences: Sub-sects. 3, 4, 5 & 6.]

in trespass for the seizure, unless he justify under the process of the inferior ct.—*COOMER v. LATHAM* (1847), 16 M. & W. 713; 10 L. J. Ex. 175; 153 E. R. 1377.

**523. — Irregular execution.]** — Justices authorised by an Act of Parliament to proceed by warrant in execution, to enforce payment of rent to a co. for gas supplied by that co., ought not to do so without a previous summons to the party against whom the warrant is to be issued.

Persons applying under such a statute for a warrant, & who by themselves or their officer afterwards execute it, cannot set up the warrant as their justification, in an action of trespass brought against them by the party whose goods have been seized under it.—*PAINTER v. LIVERPOOL OIL GAS LIGHT CO.* (1836), 3 Ad. & El. 433; 2 Har. & W. 233; 6 Nev. & M. K. B. 736; 5 L. J. M. C. 108; 111 E. R. 478.

*Annotations:—*Refd. *Morrell v. Martin* (1841), 3 Man. & G. 581; *Re Hammersmith Rent charge* (1849), 4 Exch. 87; *Hammond v. Bendyshe* (1849), 13 Q. B. 869; *Bessell v. Wilson* (1853), 20 L. T. O. S. 233; *Labalmondier v. Frost* (1849), 5 Jur. N. S. 789; *Cronmire v. MacColla* (1893), 9 T. L. R. 519. *Mentd.* *Attwood v. Jolliffe* (1818), 10 L. T. O. S. 392.

— **Execution against man cohabiting with woman—Seizure of woman's goods.]** — *See* EXECUTION, Vol. XXI., p. 500, No. 750.

— **Seizure under writ of extent—Writ subsequently set aside.]** — *See* CROWN PRACTICE, Vol. XVI., p. 228, No. 199.

— **Seizure of goods of bankrupt.]** — *See* BANKRUPTCY, Vol. V., p. 825, Nos. 7009, 7010.

— **Seizure of goods sold by debtor—Sale to defraud creditors.]** — *See* EXECUTION, Vol. XXI., p. 517, No. 931.

— **Seizure of goods let to debtor.]** — *See* EXECUTION, Vol. XXI., p. 501, No. 750.

**524. — Seizure of mortgaged goods.]** — Where a mtge. deed embraces all present & future property on the premises mortgaged, & under an execution against the tenant, certain fixtures are sold: *qu.*: whether, without proof that they existed before the dates of the mtge., the mtgee. can maintain trespass against the sheriff for selling & removing them.—*ANON.* (1840), 8 L. T. O. S. 321; *subsequent proceedings, sub nom. BIGGS v. LAURIE* (1847), 8 L. T. O. S. 347.

**525. —.]** — In trespass for seizing pltf.'s goods, deft. pleaded a judgment recovered by C. against F., & a *fi. fa.* sued out thereon, directed to deft. as sheriff, commanding him to levy on the goods of F., by virtue of which deft. seized & took in execution "the goods & chattels of F.," *quae est eadem*:—*Held*: bad on demurrer.—*HARRISON v. DIXON* (1843), 12 M. & W. 142; 1 Dow. & L. 454; 13 L. J. Ex. 247; 2 L. T. O. S. 151; 152 E. R. 1145.

*Annotation:—*Refd. *Jones v. Chapman* (1848), 2 Exch. 803.

— *See, also, COUNTY COURTS*, Vol. XIII., p. 453, Nos. 36–42.

## SUB-SECT. 4.—PROTECTION OF PROPERTY.

**526. Protection of landlord's goods—Where fraudulently removed by tenant.]** — *FLETCHER v. MARILLIER*, No. 355, *ante*.

**527. Protection of deceased relative's goods—Reasonable precautions.]** — A near relative of

deceased person bring in the house at the death, removed some jewelry of deceased from one room to another. The exor. having brought trespass for this asportation, the jury found that deft. removed the goods *bonâ fide* for their preservation:—*Held*: this was no answer to the action. *Semble*: if deft. had proved not merely that the interference was made *bonâ fide* for the preservation of the goods, but that it was reasonably necessary, & that it was carried out in a reasonable manner, this would have constituted a good defence.—*KIRK v. GREGORY* (1876), 1 Ex. D. 55; 45 L. J. Q. B. 186; 34 L. T. 488; 24 W. R. 614.

*Annotations:—*Distd. *Kirby v. Chessum* (1913), 30 T. L. R. 15. *Refd.* *Cope v. Sharpe* (No. 2), [1912] 1 K. B. 496.

**528. Intervention to prevent destruction of property.]** — *ANON.* (1506), Keil. 88; 72 E. R. 251.

**529. —.]** — *COPE v. SHARPE* (No. 2), No. 361, *ante*.

**530. Intervention to prevent interference by stranger.]** — The only ground upon which the authority of a servant is traversable in an action of trespass, is, the protection of the person or property of a party from the officious & wanton interference of a stranger, where the principal might have been willing to waive his right.—*DOBREE v. NAPIER* (1830), 2 Bing. N. C. 781; 3 State Tr. N. S. 621; 2 Hodg. 84; 3 Scott, 201; 5 L. J. C. P. 273; 132 E. R. 301.

*Annotations:—*Refd. *Ryan v. Clark* (1849), 14 Q. B. 65. *Mentd.* *R. v. Leslie* (1860), 8 Cox. C. C. 269; *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1; *The M. Moxham* (1875), 1 P. D. 43; *Companhia de Mocambique v. British South Africa Co., De Sousa v. Same*, [1892] 2 Q. B. 358; *Carr v. Fracls*, Times, [1902] A. C. 176.

**Trespass to animals.]** — *See* ANIMALS, Vol. II., pp. 214–217, Nos. 95–125.

## SUB-SECT. 5.—PLAINTIFF'S WRONGFUL ACT.

**531. Intermixture with goods of defendant—Goods indistinguishable.]** — *ANON.* (1594), Poph. 38; 79 E. R. 1156.

**532. —.]** — *WARDE v. ABEYRE* (1615), 2 Bulst. 323; *Cro. Jac.* 366; 80 E. R. 1157; *sub nom. WARD v. EIRENS*, 1 Roll. Rep. 133.

*Annotations:—*Consd. *Leeds v. Amherst* (1850), 20 Beav. 239. *Refd.* *Spence v. Union Marine Inscc.* (1868), L. R. 3 C. P. 427.

**533. Removal of goods placed in defendant's vessel by plaintiff.]** — *ANON.* (1610), 1 Bulst. 96; 80 E. R. 794.

**534. Right exceeded by plaintiff—Goods removed to abate excess.]** — In trespass for cutting lines of pltf. & throwing down linen thereon hanging; deft. pleaded that he was possessed of a close, & because the linen was wrongfully in & upon the close he removed it. Replication that J. G. being seised in fee of the close & of a messuage, with the appurtenances contiguous to it, by lease & release conveyed to W. H. the messuage & all the easements, liberties privileges, etc., to the said messuage belonging or therewith then or later used, etc.; that before & at the time of such conveyance, the tenants & occupiers of the messuage used the easement, etc., of fastening ropes to the said messuage, & across the close to a wall in the said close, in order to hang linen thereon, & of hanging linen thereon to dry, as often as they had occasion so to do, at their free will & pleasure, & that pltf., being tenant to W. H., of the said messuage did put up the lines, etc. Rejoinder

## PART III. SECT. 6, SUB-SECT. 5.

**5311. Intermixture with goods of defendant—Goods indistinguishable.]** — *LAWRIE v. RATHBUN* (1876), 38 U. C. R. 255.—*CAN.*

*d. Breaking open stable door to recover horse.]* — *DILLMAN v. SIMPSON* (N. S.) (1906), 2 E. L. R. 105.—*CAN.*

took issue on the right as alleged in the replication:—*Held*: proof of a privilege for the tenants to hang lines across the yard, for the purpose of drying the linen of their own families only, did not support the alleged right.—*DREWELL v. TOWLER* (1832), 3 B. & Ad. 735; 1 L. J. K. B. 228; 110 E. R. 268.

*Annotation*:—*Mentd.* *Moody v. Steggles* (1879), 12 Ch. D. 261.

**Publication of libellous picture—Destruction of picture.**—*See* LABEL, Vol. XXXII., p. 11, No. 14.

#### SUB-SECT. 6.—LEGAL RIGHT.

**535. Whether good defence—Act of state.**—*CREAMER v. TOKELY* (1626), Lat. 188; 82 E. R. 339.

**536. ——— Lawful prize.**—To trespass for taking a ship, a plea that deft. was the captain of a man of war, & that he took her on the high seas as a prize, & carried her into a port abroad, where she was condemned in the Admty. Ct. as prize, is no justification; for it does not appear that she was lawful prize; or before whose ct., or by what judge she was condemned.—*BEAKE v. TYRRELL* (1688), 1 Show. 6; Carth. 31; Comb. 120; Holt, K. B. 47; 89 E. R. 411; *sub nom.* *BEAK v. THYRWHITT*, 3 Mod. Rep. 194.

*Annotation*:—*Mentd.* *Omychund v. Barker* (1744), 1 Atk. 21.

—*See, also*, CONFLICT OF LAWS, Vol. XI., pp. 412, 413, Nos. 796, 798.

**537. ——— Goods taken in satisfaction of tolls.**—Deft. justifies for tolls & need not say he gave notice how much the toll was.—*MORGAN v. SKINNER* (1722), Bunb. 114; 145 E. R. 615.

**538. ——— Goods taken in satisfaction of penalty on conviction—Conviction quashed.**—*FELTHAM v. TERRY* (OR *TYRRELL*) (1773), Lofft, 207; 98 E. R. 613.

*Annotations*:—*Distd.* *Lindon v. Hooper* (1776), 1 Cowp. 414; *Birch v. Wright* (1786), 1 Term Rep. 378. *Refd.* *Bennett v. Francis* (1801), 2 Bos. & P. 550; *Thurston v. Mills* (1812), 16 East, 254.

—**Goods taken in satisfaction of tithes.**—*See* ECCLESIASTICAL LAW, Vol. XIX., p. 247, No. 304.

**539. ——— Goods seized by revenue officers.**—In trespass for taking a portfolio & drawings, deft. & officer of the Customs, may justify seizure by showing that the portfolio contained drawings liable to seizure for non-payment of duty, which pltf. was in the act of carrying ashore out of a foreign packet; though the seizure was in fact made not as a forfeiture but for the purpose of examination; & though the articles seized were in fact returned after being examined; & no demand of them had been made before the seizure. *Semble*: if pltf. had sued for the assault, deft. could not have justified without showing either a previous demand or some circumstance

to warrant the use of force in the first instance.—*DE GONDOUN v. LEWIS* (1839), 10 Ad. & El. 117; 2 Per. & Dav. 283; 9 L. J. Q. B. 148; 3 Jur. 1168; 113 E. R. 45.

—*See, also*, REVENUE, Vol. XXXIX., pp. 223, 306, Nos. 39–41, 828.

**540. ——— Animals seized for non-payment of debt.**—To trespass for taking a mare, a justification under the lord of a manor, stating that he & all those, etc., *semper habuerant curiam legalem* for the manor, etc., & that the taking was by process from the ct. is good.—*LAMB v. MILLS* (1694), 4 Mod. Rep. 377; Holt, K. B. 554; Skin. 587; 87 E. R. 453.

*Annotation*:—*Mentd.* *Fisher v. Magnay* (1843) 5 Man. & G. 778.

—**Agistment.**—*See* ANIMALS, Vol. II., p. 254, No. 358.

**541. ——— Removal of goods unlawfully on land.**—Commoner cannot justify dispersing fern ashes burnt by a stranger.

If pltf. did him any damage he has his action (*per* CUR.).—*WOODSON v. NAWTON* (1727), 2 Stra. 777; 93 E. R. 842.

*Annotations*:—*Consd.* *Rackham v. Jesup* (1772), 3 Wils. 332. *Refd.* *De la Warr v. Miles* (1880), 49 L. J. Ch. 476.

**542. ———**—A defence to an action of trespass for destroying a machine, that it was on deft.'s ground without his licence, & that it was injured in removing it, must be specially pleaded. A man is liable in trespass, on the general issue, for the injury done to the machine in such removal by himself, with his assistants.—*PAGE v. RATCHEFF* (1832), 1 L. J. C. P. 57.

**543. ———**—Pltf. was the owner of a house & garden adjoining a passage which was the property of defts. Beneath the surface of the passage was a pipe which by reason of the fact that it received the drainage of more than one building, was a sewer within Public Health Act, 1875 (c. 55). Pltf. for the purpose of draining his house, carried a pipe through his garden, & the local authority, at his request, placed a pipe in the soil of the passage to connect pltf.'s drain with the sewer. Defts. removed the connecting pipe from the passage, & pltf. sued them for trespass in so doing:—*Held*: although pltf. was entitled under Public Health Act, 1875 (c. 55), s. 21, to connect his drains with the sewers of the local authority, neither pltf. nor the local authority had any right to place the connecting pipe in deft.'s land, & the action, therefore, failed.—*WOOD v. EALING TENANTS, LTD.*, [1907] 2 K. B. 390; 76 L. J. K. B. 764; 97 L. T. 520; 71 J. P. 456; 5 L. G. R. 1055.

*Annotation*:—*Distd.* *Grant v. Derwent*, [1928] Ch. 902.

**544. ——— Removal of obstruction.**—*SLATER v. SWANN*, No. 439, *ante*.

—**Goods removed by constable—Not covered by warrant.**—*See* CRIMINAL LAW, Vol. XIV., p. 190, No. 1700.

#### PART III. SECT. 6, SUB-SECT. 6.

**a. Whether good defence—Goods in plaintiff's possession as bailee.**—*See* GREAT WESTERN RY. CO. v. McEWAN (1869), 23 U. C. R. 528.—*CAN.*

**f. ——— Goods in custodia legis.**—*MINAKER v. BOWER* (1885), 2 Man. L. R. 265.—*CAN.*

**g. ——— Goods comprised in lien note.**—*BELL v. SCHULTZ* (1912), 21 W. L. R. 408; 4 O. L. R. 400; 2 W. W. R. 491.—*CAN.*

**h. ———**—Pltf., a music teacher, purchased a piano for \$610 at an auction, & brought it to her studio. Eight years previously deft. co. sold the piano to A. on a lien note, & after being with A. for some years

was taken from his house & eventually came into the hands of the auctioneer. Shortly after pltf. purchased, there being still due \$365 on the lien note, a bailiff, under a warrant issued by deft. co., proceeded to pltf.'s studio & after being refused entry, forced his way in while a pupil was entering the open door. He then forcibly moved pltf. away from the piano, & with his men took the piano away. In an action for forcible entry trespass & personal injuries.—*Held*: there being no contractual relationship between the parties, the forcible entry was illegal & the damages given by the trial judge were in the circumstances justifiable.—*BENNETT v. KENT PIANO CO., LTD. & BOIRQUE* (1921), 29

B. C. R. 465.—*CAN.*

**k. ——— Suspension of authority to export bait fishes.**—*HANN v. SULLIVAN* (1894), 7 Nfld. L. R. 826.—*NFLD.*

**l. ——— Legal warrant.**—Deft. broke into & entered pltf.'s premises, not being within a mile of any mine or mining works, & seized & destroyed intoxicating liquors found thereon. Pltf. brought an action of trespass, & deft. justified under a warrant commanding him to seize all the liquors found or to be found by him on the premises. Verdict for deft. set aside.—*HEAD v. PUTNAM* (1879), 13 N. S. R. (1 R. & G.) 16.—*CAN.*

**m. ———**—*See* GRAHAM v. McLACHLAN (1853), 1 W. R. 536.—*SCOT.*

*Sect. 6.—Defences: Sub-sects. 7, 8, 9 & 10.*  
*Part IV. Sect. 1: Sub-sects. 1 & 2, A. (a.)*

**SUB-SECT. 7.—CLAIM OF POSSESSION BY DEFENDANT.**

**545. Goods taken by executor.]—**ANON. (1467), Y. B. 7 Edw. 6, fo. 3, pl. 9.

**546. Trespass by servant to master's goods.]—**BLOSS v. HOLMAN (1587), Owen, 52; Gouldsb. 60; 74 E. R. 893; *subsequent proceedings, sub nom. BLOSSE'S CASE*, Gouldsb. 72.

**547. Goods seized by grantee of bill of sale.]—**The grantee of a bill of sale, given by way of security for the payment of money, seized the goods on default by the grantor in payment of an instalment due under the deed. At the expiration of five days from the seizure the grantee began to remove the goods, & the grantor then tendered the amount due for debt, interest & expenses. The grantee refused to accept the tender, & the grantor brought an action, claiming in trespass for damages for removal of the goods, & for injury to them in the course of removal, & further, claiming to redeem:—*Held*: the action of trespass would not lie, as at the time of the removal of the goods the property in & the right to possession of the goods were in the grantee, & the grantor was only entitled to redeem on payment of the debt, interest & expenses, & the costs arising from the claim to redeem.

Pltf. in an action of trespass must at the time of the trespass have the present possession of the goods, either actual or constructive, or a legal right to the immediate possession (LORD ESHER, M.R.).—JOHNSON v. DIPROSE, [1893] 1 Q. B. 512; 62 L. J. Q. B. 291; 68 L. T. 485; 57 J. P. 517; 41 W. R. 371; 9 T. L. R. 266; 37 Sol. Jo. 267; 4 R. 291, C. A.

*Annotation:—Refd. Re Wood Ex p. Woolfe*, [1894] 1 Q. B. 805.

**SUB-SECT. 8.—JUS TERTII.**

**548. Whether good defence.]—**In trespass for seizing goods, in the possession & apparent ownership of pltf., deft. cannot set up the title of a third person to defeat the action.—NELSON v. CHERRIE (1832), 8 Bing. 316; 1 Moo. & S. 452; 1 L. J. C. P. 95; 131 E. R. 415.

**549. —.]—**In trespass, on pleas of (a) not guilty, & (b) that the goods were not the goods of pltf., & issues thereon, deft. cannot set up property in a stranger, under whom he does not justify, in answer to pltf.'s possession.—CARTER v. JOHNSON (1839), 2 Mood. & R. 263, N. P.

**550. —.]—**It is not disputed that the *jus tertii* cannot be set up as a defence to an action of trespass for disturbing the possession. In this respect I see no difference between trespass & trover (LORD CAMPBELL, C.J.).—JEFFRIES v. GREAT WESTERN RY. CO. (1850), 5 E. & B. 802; 25 L. J. Q. B. 107; 20 L. T. O. S. 214; 2 Jur. N. S.

**PART III. SECT. 6, SUB-SECT. 7.**

*n. No demand by plaintiff & refusal by defendant.]* TUFTS v. MOTTASHED (1879), 29 C. P. 529.—CAN.

*o. Sale by sheriff.—Bidding by plaintiff who had forbidden sale.]—*SCOTT v. PALMER (1881), 21 N. B. R. (5 P. & D.) 304.—CAN.

**PART III. SECT. 6, SUB-SECT. 8.**

**548 I. Whether good defence.]—**O'CALLAGHAN v. COWAN (1877), 41 U. C. R. 272.—CAN.

**548 II. —.]—**In an action against a division ct. bailiff for selling under execution a horse which pltf. claimed to be exempt, it appeared that at the

time of the seizure & sale the horse was included in a chattel mtge. given by pltf. to M.:—*Held*: the deft. could not set up the right of the mtgee. as a defence.—MCMARTIN v. HURLBURT (1877), 2 A. R. 146.—CAN.

**548 III. —.]—**RUTHERFORD v. GRIEVE (1855), 4 Nfld. L. R. 61.—NFLD.

**PART III. SECT. 6, SUB-SECT. 9.**

**551 I. Whether good defence.]—**LUNN v. TURNER (1848), 4 U. C. R. 282.—CAN.

**551 II. —.]—**HOOD v. CRONKITE (1869), 29 U. C. R. 98.—CAN.

**551 III. —.]—**HALFENNY v. PEN-NOCK (1873), 33 U. C. R. 229.—CAN.

230; 119 E. R. 680; *sub nom. JEFFRIES v. SOUTH WESTERN RY. CO.*, 4 W. R. 201.

*Annotations:—*Foild, Baggeley v. Davey (1857), 29 L. T. O. S. 211. *Consd.* The Winkfield, [1902] P. 42. Glenwood Lumber Co. v. Phillips, [1904] A. C. 405. *Refd.* Freshney v. Wells (1837), 28 L. J. Ex. 129; Eastern Construction Co. v. National Trust Co. & Schmidt, [1914] A. C. 197.

**SUB-SECT. 9.—LEAVE AND LICENCE.**

**551. Whether good defence.]—**If trespass for taking & selling pltf.'s goods be brought against two persons, & the one suffers judgment to go by default, & the other justifies the taking on a distress for rent by command of his co-deflt., & the selling by the licence of pltf., & issue be taken on the licence, & found for deflt., the judgment suffered by default shall be arrested.—BIGGS v. GREENFIELD & BINGER (1724), 8 Mod. Rep. 217; 88 E. R. 155.

**552. — Consent of plaintiff's agent.]—**A man who takes possession of a ship by the consent of pltf.'s agent, not liable to an action of trespass.—MILES v. DAWSON (1795), as reported in Peake, Add. Cas. 54; 170 E. R. 192, N. P.

*Annotations:—*Mentd. Amey v. Long (1808), 9 East, 473; Doe d. Egremont v. Date (1842), 11 L. J. Q. B. 220.

**553. — Consent obtained by misrepresentation.]—**Under a plea of leave & licence to an action of trespass for taking pltf.'s goods, it was proved that pltf.'s father having become bkpt. pltf., upon examination, was told by the comr., incorrectly, that the goods belonged to his father; whereupon pltf. said he would give them up. Deft. was present, but it did not appear he had heard what the comr. said. The jury having been directed to consider whether pltf.'s consent was obtained by an untrue representation, without any question being put as to deflt.'s participation in such representation, & a verdict having been found for pltf., the ct. granted a new trial.—ROPER v. HARPER (1837), 4 Bing. N. C. 20; 5 Scott, 250; 1 Jur. 800; 132 E. R. 696.

**554. — Clause in tenancy agreement.]—**KAVANAGH v. GUDGE, No. 337, *ante*.

*In respect to trespass to land.]—See Part II., Sect. 6, sub-sect. 3, ante.*

**SUB-SECT. 10.—OTHER CASES.**

**555. Tender of amends.]—**Amends not pleadable to a voluntary trespass.—BAILEE v. VIVASH (1723), 1 Stra. 549; 93 E. R. 692.

**Inevitable accident.]—See ANIMALS**, Vol. II., p. 232, Nos. 210-212.

**Trespass by contractor.]—See MASTER & SERVANT**, Vol. XXXIV., pp. 159, 160, No. 1247.

**556. Judgment recovered in replevin.]—**GIBBS v. CRUIKSHANK, No. 84, *ante*.

**Improvement of common.—Animals of commoners driven off.]—See COMMONS**, Vol. XI., p. 44, No. 615.

**PART III. SECT. 6, SUB-SECT. 10.**

*p. Statutory protection.]—*Where a claim for goods was brought before the comrs. of customs, under 4 Geo. 4, c. 11, & they restored the property to claimant, without any trial or verdict passing upon the matter, but gave a certificate to the officer who had seized that there was a probable cause of seizure, such certificate, however, not being entered of record in any way, in trespass against the officer for the seizure:—*Held*: the certificate afforded him no protection, either under Provincial statute 4 Geo. 4, c. 11, s. 27, or Imperial statute 3 & 4 Wm. c. 59, s. 72.—LEWIS v. KIRBY (1844), 1 U. C. R. 486.—CAN.

## Part IV.—Trespass to the Person.

## SECT. 1.—ASSAULT AND BATTERY.

## SUB-SECT. 1.—MATERIALITY OF INTENTION.

557. *Whether intention material.*] — KERIFORD'S CASE (1633), Clay. 22.

558. —.]—The intention as well as the act makes an assault . . . if one intending to assault strike at another & miss him this is an assault: so if he held up his hand against another in a threatening manner & say nothing it is an assault (*per cur.*).—TUBERVILLE v. SAVAGE (1669), 1 Mod. Rep. 3; 86 E. R. 684; *sub nom.* TURBERVELL v. SAVADGE, 2 Keb. 545.

*Annotation.*—*Reid*, It. v. Light (1857), 27 L. J. M. C. 1.

559. —.]—DICKENSON v. WATSON (1682), T. Jo. 205; 84 E. R. 1218.

*Annotations.*—*Reid*, Scott v. Shepherd (1773), 3 Wils. 403; M'Manus v. Crickett (1800), 1 East, 106; Aldridge v. G. W. Ry. (1841), 2 Ry. & Can. Cas. 852.

560. —.]—BLAKE v. BARNARD, No. 586, *post*.

561. —.]—READ v. COKER, No. 578, *post*.

562. —.]—COWARD v. BADDELEY, No. 610, *post*.

563. —. *Presumption against intention to assault.*]—ALDERSON v. WAISTELL, No. 178, *ante*.

564. —. *Accidental injury.*]—WEAVER v. WARD, No. 4, *ante*.

565. —.]—GIBBONS v. PEPPER, No. 690, *post*.

566. —.]—Trespass lies for an accidental hurt.—UNDERWOOD v. HEWSON (1724), 1 Stra. 596; 93 E. R. 722.

*Annotations.*—*Conad*, Leame v. Bray (1803), 3 East, 593; Stanley v. Powell, [1891] 1 Q. B. 86. *Reid*, Scott v. Shepherd (1773), 2 Wm. Bl. 892.

567. —. *Arising from negligence.*] — (1) To maintain an action for injury to the person the injurious act must be wilful or the result of negligence.

(2) Deft. had two horses at a livery stable, & wishing to try them, had them harnessed to a phaeton & driven by the groom of the livery stable keeper, deft. himself sitting beside the groom. Shortly after they started the horses were frightened by a dog & ran away. The groom begged deft. to sit still & do nothing; deft. complied, & left the guidance of the horses entirely with the groom. He endeavoured to turn them down a side street, so as to avoid running into a shop, & in so doing directed them so that they ran against female pltf. & injured her; had the groom not endeavoured to turn the horses, they would not have run against her. The jury found at the trial that there was no negligence

on the part of deft. or the groom:—*Held*: an action of trespass was not maintainable against deft.—*HOLMES v. MATHER* (1875), L. R. 10 Exch. 261; 44 L. J. Ex. 170; 33 L. T. 361; 39 J. P. 567; 23 W. R. 869.

*Annotations.*—*As to* (1) *Distd.* Sadler v. South Staffordshire & Birmingham District Steam Tram. Co. (1889), 23

*Admiralty Comrs.* v. S.S. *Amerika*, [1917] A. C. 38; *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 1 K. B. 539. *Generally*, *Mentd.* Dulleu v. White, [1901] 2 K. B. 669.

568. —.]—A trespass to the person is not actionable if it be neither intentional nor the result of negligence.

Deft., who was one of a shooting party, fired at a pheasant. One of the pellets from his gun glanced off the bough of a tree & accidentally wounded pltf., who was engaged in carrying cartridges & game for the party. The jury found that deft. was not guilty of any negligence in firing as he did:—*Held*: deft. was not liable.—*STANLEY v. POWELL*, [1891] 1 Q. B. 86; 60 L. J. Q. B. 52; 63 L. T. 809; 55 J. P. 327; 39 W. R. 76; 7 T. L. R. 25.

*Annotation.*—*Generally*, *Reid*, *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 1 K. B. 539.

—. *Driving vehicle against another.*]—*See* Sub-sect. 2, B. (b) ii., *post*.

*Absence of intention as factor in mitigation of damages.*]—*See* No. 711, *post*.

## SUB-SECT. 2.—WHAT CONSTITUTES ASSAULT, AND ASSAULT AND BATTERY.

## A. Assault.

## (a) In General.

569. *Necessity for physical contact.*]—It is not an assault in law to give a person into custody upon a charge before magistrates.

It is not necessary that there should be personal contact to constitute an assault in point of law. The locking a man up in a room may be an assault (*POLLOCK, C.B.*).—*REGLIN v. NELHAM* (1846), 6 L. T. O. S. 455; *sub nom.* *REYLIN v. NETHAM*, 10 J. P. 203, N. P.

570. *Sufficiency of mere words.*]—*ANON.* (1853), 27 Lib. Ass., fo. 134, pl. 11.

571. —.]—*I*—v. *W*— (1348), 22 Lib. Ass., fo. 99, pl. 60.

*Annotations.*—*Conad*, *Wilson v. Dodd* (1615), 2 Bulst. 335. *Reid*, *Evley v. Slouly* (1615), 2 Bulst. 326; *Cole v. Turner* (1766), Holt, K. B. 103.

& any operation without his consent is an unlawful infringement of his right to personal security entitling him to compensation for such damage as he has suffered.—*STOJBERG v. ELLIOT*, [1923] C. P. D. 148.—*S. AF.*

570 i. *Sufficiency of mere words.*]—Words cannot of themselves amount to an assault.—*MCLEOD v. WARD* (1897), 40 N. S. R. 630.—*CAN.*

570 ii. —.]—*OICKLE v. OICKLE* (1911), 9 E. L. R. 301.—*CAN.*

q. *Locking person out of house.*]—Deft. rented to pltf. for a short term a furnished house upon terms set out in a memorandum which was lost. Deft. demanded possession of the house & pltf. refused to leave. Deft. then went to the house with two men & told pltf.'s wife he had come to take possession, & proceeded to remove pltf.'s effects. Pltf.'s wife went out of the house to

## PART IV. SECT. 1, SUB-SECT. 1.

557 i. *Whether intention material.*]—Pltf. & deft. were working together boring an oil well. Pltf. was at the bottom, & deft.'s brother had been at the top directing the ram used to drive down the pipe. He asked deft. to attend to it while he went away for a short time, & deft., not knowing that pltf. was below, let down the ram & injured pltf.'s hand:—*Held*: trespass would lie, deft.'s intention being immaterial.—*ANDERSON v. STIVER* (1867), 26 U. C. R. 526.—*CAN.*

557 ii. —.]—*HICKEY v. FITZGERALD* (1877), 41 U. C. R. 303.—*CAN.*

557 iii. —.]—*MCLEOD v. MEEK* (1898), 6 Terr. L. R. 431.—*CAN.*

557 iv. —.]—*LEWIS v. MCINNES, LEWIS v. DOMINION LUMBER & FUEL Co. (Man.)* (1911), 17 W. L. R. 309.—*CAN.*

## PART IV. SECT. 1, SUB-SECT. 2.—A. (a).

569 i. *Necessity for physical contact.*]—To touch a person without his consent or some other lawful reason is actionable.—*STEWART v. STONEHOUSE*, [1926] 2 D. L. R. 683; [1926] 1 W. W. R. 929; 20 Sask. L. R. 459.—*CAN.*

569 ii. —.]—*BROWN v. GIBSON-CRAIG* (1834), 13 Sh. (Ct. of Sess.) 697; 6 Sc. Jur. 504.—*SCOT.*

569 iii. —.]—It amounts to assault if a man on horseback rides at a foot passenger so as to place him in danger & in reasonable alarm, although he should not be actually touched.—*EWING v. MAR (EARL)* (1851), 14 Dunl. (Ct. of Sess.) 314, 330.—*SCOT.*

569 iv. —.]—A patient by entering a hospital does not submit himself to such surgical treatment as the doctors in attendance may consider necessary,



*Sect. 1.—Assault and battery: Sub-sect. 2, A. (a) & (b), & B. (a) & (b) i.]*

**572. Causing determination of tenancy—Threats of violence to tenants.]—**CONESBY v. — (1493), Y. B. 9 Hen. 7, fo. 7, pl. 4.  
*Annotation:—*Refd. Allen v. Flood, [1898] A. C. 1.

**573. Pointing fire arm—Weapon bursting while being used by defendant.]—**On the trial of an action of trespass for pointing & levelling a gun at pltf., whereby pltf. was injured, it was proved that the gun burst while it was in the hands of, & being used by a boy. The judge left to the jury the question whether deft. caused the accident, & the jury gave a verdict for pltf.:—*Held*: the question was properly left to the jury, & deft. was liable in that form of action.—BROWN v. WHITE (1839), 3 Jur. 951.

**574. — Whether loaded or not.]—**It is an assault to present a pistol at all whether loaded or not (PARKE, B.).—R. v. ST. GEORGE (1840), 9 C. & P. 483; 173 E. R. 921.

*Annotations:—*Apld. R. v. Ladyman (1851), 15 J. P. 581. Refd. R. v. Bird (1851), 5 Cox, C. C. 20; R. v. Duckworth, [1892] 2 Q. B. 83. Mentd. R. v. Cheeseman (1862), 9 Cox, C. C. 100; R. v. Brown (1883), 10 Q. B. D. 381; R. v. Linneker, [1906] 2 K. B. 99.

**Menace of violence.]—**See Nos. 586, 587,

*post.*

**575. Arrest.]—**WILLIAMS v. JONES, No. 592,

*post.*

**576. —.]—**REGLIN v. NELHAM, No. 569,

*ante.*

(b) *Menace of Violence.*

**577. General rule.]—**TUBERVILLE v. SAVAGE, No. 558, *ante.*

**578. Intention & ability to commit violence.]—**A menace of violence, with present intention & ability to commit it, amounts to an assault in law. In an action for assault, the evidence was, that deft. brought men who "mustered round" pltf., & said that, "if he did not go out they would break his head," upon which he, being afraid that they would strike him, went out:—*Held*: an assault.—READ v. COKER (1853), 13 C. B. 850; 1 C. L. R. 746; 22 L. J. C. P. 201; 21 L. T. O. S. 156; 17 Jur. 990; 1 W. R. 413; 138 P. R. 1437.

*Annotations:—*Refd. Hall v. Semple (1862), 3 F. & F. 337. Mentd. Jones v. Howell (1859), 1 L. T. 330; Hermann v. Seneschal (1862), 13 C. B. N. S. 392; Orchard v. Roberts (1863), 3 New Rep. 213; Leete v. Hart (1868), L. R. 3 C. P. 322.

**579. Reasonable cause for apprehending violence.]—**Pltf. was a domestic servant in the service of Capt. & Mrs. B. In consequence of a suspicion entertained by Mrs. B., she sent for the doctor & requested him to examine pltf. to see if she was in the family way. The doctor did so without

using any force or doing anything more than was necessary for the purpose of the examination. Pltf. strongly expressed her dislike to take her clothes off, & cried most of the time, but offered no further resistance, & did what the doctor told her. She afterwards brought an action of assault against the master & mistress & the doctor. At the trial she swore that what was done was not done with her consent. The judge withdrew the case from the jury as against the master & mistress, & the jury found a verdict for the other deft.:—*Held*: to maintain the action pltf. must have been overpowered by force or must have had reasonable cause for apprehending violence; the facts showed that she reluctantly submitted to her mistress's orders; the case was rightly withdrawn from the jury as against the master & mistress, & the verdict of the jury was right.—LATTER v. BRADDELL (1881), 50 L. J. Q. B. 448; 44 L. T. 369; 45 J. P. 520; 29 W. R. 366, C. A.

**580. Brandishing hatchet.]—**I— v. W— (1348), 22 Lib. Ass. fo. 99, pl. 60.

*Annotations:—*Refd. Evelyn v. Slouly (1615), 2 Bulst. 326; Wilson v. Dodd (1616), 2 Bulst. 335; Cole v. Turner (1705), Holt, K. B. 108.

**581. Waving sword.]—**ANON. (1674), 1 Vent. 250; 84 E. R. 733.

*Annotation:—*Refd. Johnson v. Northwood (1817), 1 Moore, C. P. 420.

**582. Holding up fork.]—**The bailiff has no remedy but an action for the assault, for the holding up of the fork at him when he was within reach, is good evidence of that (*per* CUR.).—GENNER v. SPARKS (1704), 6 Mod. Rep. 173; 1 Salk. 79; 87 E. R. 928.

*Annotations:—*Consd. Williams v. Jones (1735), Lee temp. Hard. 298. Apprd. Hampshire, Sheriff v. Godfrey (1739), 7 Mod. Rep. 288. Apld. Sandon v. Jervis (1859), E. B. & F. 942. Refd. Russen v. Lucas (1824), 1 Ky. & M. 26; Nicholl v. Darley (1828), 2 Y. & J. 399; Rich v. Woodley (1831), 7 Binn. 651; Grainger v. Hill (1838), 1 Arn. 42; Brown v. Chapman (1848), 6 C. B. 365.

**583. Riding after person.]—**Riding after a person & obliging him to run away into a garden to avoid being beaten is an assault.—MORTIN v. SHOPPEE (1828), 3 C. & P. 373; 172 E. R. 402, N. P.

**584. Party almost within striking distance—When stopped.]—**A. was advancing in a threatening attitude, with an intention to strike B., so that his blow would have almost immediately reached B., if he had not been stopped:—*Held*: it was an assault in point of law, though, at the particular moment when A. was stopped he was not near enough for his blow to take effect.—STEPHENS v. MYERS (1830), 4 C. & P. 349; 172 E. R. 735, N. P.

**585. In answer to menace by plaintiff.]—**(1) If,

OGLE (1856), 28 L. T. O. S. 72.—IR.

**b. Communication of venereal disease.]—**The communication of venereal disease during illicit sexual intercourse is not an actionable wrong if the act of intercourse has been voluntary, & consent to the intercourse is not vitiated by the fact that it has been induced through wilful concealment of the disease.—HEGARTY v. SHINE (1878), 4 L. R. Ir. 288.—IR.

**c. What must be proved in action against police officer.]—**To make a relevant case of assault on the part of a police officer on duty, it is necessary to aver, either (1) that the order which the officer was seeking to enforce was unlawful, that is, not within the scope of his duty; or, (2) that the pursuer was willing to comply with the order, in which case the use of force would be unnecessary; or, (3) that the force was manifestly in excess of the requirements of the case.—MASON v. ORR

(1901), 4 F. (Cl. of Sess.) 220; 39 Sc. L. R. 148; 9 S. L. T. 269.—SCOT.

#### PART IV. SECT. 1, SUB-SECT. 2.—A. (b).

**579 i. Reasonable cause for apprehending violence.]—**INGLEFIELD v. MEUKEL (1873), 9 N. S. L. R. (3 G. & O.) 188.—CAN.

**579 ii. —.]—**SHAND v. POWER (1911), 9 E. L. R. 342.—CAN.

**579 iii. —.]—**Any gestures calculated to excite in the party threatened a reasonable apprehension that the party threatening intends immediately to offer violence, or, in the language of the Penal Code, is "about to use criminal force" to the persons threatened, constitute if coupled with a present ability to carry such intent into execution, an assault in law.—CAMA v. MORGAN (1864), 1 Bom. 205.—IND.

**579 iv. —.]—**MACKINTOSH v. SQUIR (1868), 40 Sc. Jur. 561.—SCOT.

bring in an article removed & deft. locked the door & kept her out:—*Held*: this did not constitute an assault on pltf.'s wife.—NILAN v. MCANDLESS (Man.) (1912), 22 W. L. R. 685; 8 D. L. R. 169.—CAN.

**r. Resisting forcible entry.]—**Pltf. herein held not to have been guilty of an assault in resisting with no more force than was necessary a forcible entry by deft.—GARLER v. CYMBALISKI, [1922] 2 W. W. R. 716; 15 Sask. L. R. 457.—CAN.

**t. Action for indecent assault—Burden of proof.]—**In an action for damages for indecent assault the burden of proof is on pltf., & substantially the same degree of proof is required as in a criminal case, because if the facts pltf. alleges did occur, a criminal offence was perpetrated.—MONTGOMERY v. MCKENZIE (1923), 32 B. C. R. 232.—CAN.

**u. Expulsion from shop on termination appointment.]—**M'ALISTER v.



in an action for an assault, deft. plead that he was possessed of a public-house, in which pltf. was making a disturbance, & that, pltf. refusing to depart, deft. laid hands on him, & turned him out. This plea is proved, if it be shown that, in consequence of pltf. refusing to go, deft. assaulted him, with a view of turning him out of the house, though in fact deft. could not succeed in actually turning pltf. out.

(2) If A. comes up to attack B., & B. puts himself into a fighting attitude to defend himself, this is not an assault by B., & will not, in an action by B. against A. for an assault, support a plea by A. of *son assault demesne*.—*MORIARTY v. BROOKS* (1834), 6 C. & P. 684; 2 Nev. & M. M. C. 624; 172 E. R. 1419.

**588. Pointing firearm—Loaded.**—In an action for an assault the declaration stated that deft. assaulted pltf., "& also then presented a certain pistol loaded with gunpowder, ball, & shot, at pltf., & threatened & offered therewith to shoot pltf., & blow out his brains." To this deft. pleaded not guilty, & it was proved that the parties being on board a ship, deft., who was the captain, went into his cabin & brought out a pistol & cocked it, & presented it at pltf.'s head, saying, that if pltf. was not quiet he would blow his brains out:—*Held*: (1) if deft., at the time he presented the pistol, used words showing that it was not his intention to shoot pltf., this would be no assault; (2) it was incumbent on pltf. to substantiate the allegation in the declaration, that the pistol was loaded with gunpowder, ball, & shot, & unless the jury were satisfied that the pistol was loaded they ought to find for deft.—*BLAKE v. BARNARD* (1840), 9 C. & P. 626; 173 E. R. 985, N. P.

**587. ———**—[A threat to shoot a person, coupled with the act of presenting a loaded fire arm at him, although it is "half-cock," is in law an assault.

To shoot a man is not a lawful way of repelling an assault. No doubt the charge of shooting with intent was idle, & the assault was only a misdemeanor. The handcuffing was utterly unlawful (*WILLES, J.*).—*OSBORN v. VETICH* (1858), 1 F. & F. 317.

#### B. Assault and Battery.

##### (a) In General.

**Materiality of intention.**—See Sub-sect. 1, *ante*.

**588. Battery includes assault.**—A declaration in trespass for assault & battery stated that deft. assaulted pltf., & wrenched a stick from his hands, & with the said stick, & with his fists, gave pltf. many violent blows, etc. Plea, as to the assaulting pltf. with the said stick & with his fists giving him blows, etc., *son assault demesne*:—*Held*: after verdict, the plea sufficiently justified the battery with the stick as well as the assault with it.

Every battery includes an assault (*LORD ABINGER, C.B.*).—*BLUNT v. BEAUMONT* (1835), 2 Cr. M. & R. 412; 5 Tyr. 1100; 4 Dowl. 219; 150 E. R. 178.

**589. What is battery—Touching another party—Without excuse.**—*PATRICK v. JOHNSON* (1694), 3 Lev. 403; 2 Lut. 925; Nels. 287; 83 E. R. 752.

*Annotations*.—*Consd. Williams v. Jones* (1736), *Lee temp. Hard.* 298; *Rowe v. Tuttle* (1737), *Willes*, 14. *Mentd. Titley v. Foxall* (1758), *Willes*, 688; *Blanchenay v. Burt* (1843), 4 Q. B. 707; *Re Hawksbee* (1850), 16 L. T. O. S. 262.

**590. ———**—*In anger.*—(1) The least touching of another in anger is a battery (*HOLT, C.J.*).

(2) If two or more meet in a narrow passage, & without any violence or design of harm, the one touches the other gently, it is no battery (*HOLT, C.J.*).

(3) If any of them use violence against the other, to force his way in a rude inordinate manner, it is a battery; or any struggle about the passage, to that degree as may do hurt, is a battery (*HOLT, C.J.*).—*COLE v. TURNER* (1704), *Holt*, K. B. 108; 6 Mod. Rep. 149; 90 E. R. 958, N. P.

*Annotation*.—*As to* (1) *Refd. Johnson v. Northwood* (1817), 1 Moore, C. P. 420.

**591. ———**—**No intention of violence.**—*COLE v. TURNER*, No. 590, *ante*.

**592. ———**—[ ]—(1) One cannot justify a battery by barely showing an arrest.

There is no case in all the books that says that a battery may be justified, barely by showing an arrest; or, that it is repugnant to plead not guilty of the battery, & to justify the residue of the trespass by an arrest. . . . An arrest must necessarily be an assault, but is not necessarily a battery (*LORD HARDWICKE, C.J.*).

(2) It does not follow, that an arrest cannot be made without touching the person; for if a bailiff comes into a room, & tells deft. he arrests him, & locks the door, that is an arrest, for he is in custody of the officer (*LORD HARDWICKE, C.J.*).

(3) Supposing there was a laying on of hands in the present case, every laying on of hands is not a battery; for the party's intention must be considered: for people will sometimes by way of joke, or in friendship, clap a man on the back; & it would be ridiculous to say that in every such case a man must justify, & may not plead not guilty (*LORD HARDWICKE, C.J.*).—*WILLIAMS v. JONES* (1736), *Lee temp. Hard.* 298; 2 Stra. 1049; 95 E. R. 193.

*Annotations*.—*As to* (1) *Consd. Tottage v. Petty* (1736), *Lee temp. Hard.* 358. *Refd. Rowe v. Tuttle* (1737), *Willes*, 14; *Titley v. Foxall* (1758), *Willes*, 688; *Emmett v. Lyne* (1805), 1 Bos. & P. N. 255.

**593. ———**—**Wounding.**—*ANON.* (1630), *March*, pl. 100; 82 E. R. 415.

**594. ———**—**Beating.**—*BLUNT v. BEAUMONT*, No. 588, *ante*.

**595. ———**—**Throwing water on another.**—*PURSELL v. HORN*, No. 596, *post*.

**596. ———**—**Personal violence implied.**—(1) Throwing water on a person is a battery.

(2) A battery . . . must imply personal violence (*LORD DENMAN, C.J.*).—*PURSELL v. HORN* (1838), 8 Ad. & El. 602; 3 Nev. & P. K. B. 564; 1 Will. Woll. & H. 392; 112 E. R. 966; *sub nom. PURCELL v. HORNE*, 7 L. J. Q. B. 228.

##### (b) Particular Instances.

###### i. In General.

**597. Throwing a squib—Indirect injury.**—Trespass & assault will lie for originally throwing a squib, which after having been thrown about in self-defence by other persons, at last put out pltf.'s eye.—*SCOTT v. SHEPHERD* (1773), 2 Wm. Bl. 892; 3 Wils. 403; 96 E. R. 525.

*Annotations*.—*Consd. Sneyby v. L. & Y. Ry.* (1871), L. R. 9 Q. B. 263. *Apld. Clark v. Chambers* (1878), 3 Q. B. D. 327. *Consd. Whalley v. L. & Y. Ry.* (1884), 13 Q. B. D. 131. *Apld. H.M.S. London*, (1814) P. 72. *Consd. The Paludina*, (1825) P. 40. *Refd. Leano v. Bray* (1803), 3 East. 593; *Clifford v. Brooke* (1806), 13 Vos. 131; *Fitzsimons v. Inglis* (1814), 5 Taunt. 534; *Langridge v. Levy* (1837), 6 L. J. Ex. 137; *McLaughlin v. Pryor* (1842), 4 Scott, N. R. 655; *Rich v. Basterfield* (1846), 2 Car. & Kir. 257; *Gilbertson v. Richardson* (1848), 5 C. B. 502; *Sharrod v. L. & N. W. Ry.* (1849), 4 Exch. 580; *Coward v. Baddeley* (1859), 33 L. T. O. S. 125; *Seymour v. Greenwood* (1861), 6 H. & N. 359; *Clark v. Hoskins* (1868), 37 L. J. Ch. 561; *The George & Richard* (1871),

**586 i. Pointing firearm—Loaded.**—*R. v. KELLY* (1802), 1 Craw. & D. 203.—*IR.*

**Sect. 1.—Assault and battery: Sub-sect. 2, B. (b) i. & ii.]**

*L. R. 8 A. & E. 466; Holmes v. Mather (1875), 44 L. J. Ex. 176; Latham v. Johnson, [1913] 1 K. B. 398; Ruoff v. Long, [1916] 1 K. B. 148; Bradley v. Newsom, [1919] A. C. 16; Weld-Blundell v. Stephens, [1920] A. C. 956; Britannia Hygienic Laundry Co. v. Thornycroft (1925), 135 L. T. 83; S.S. Singleton Abbey v. S.S. Paludina, [1927] A. C. 16. **Mentl. R. v. Ashwell (1885), 16 Q. B. D. 190.***

**598. Removing driver from place on vehicle.—To ascertain name of owner of vehicle.]—**13 Geo. 3, c. 78, s. 60, imposing a penalty on the driver of a cart, etc., for riding thereon under the circumstances therein mentioned, authorises a justice on his own view, or upon the oath of one witness, to convict the offender, & in case the offender refuses to discover his name, or the name of the owner of the cart, etc., he is subjected to a like penalty, & may, without warrant, be apprehended forthwith by the person seeing the offence committed. Where the driver of a waggon committed an offence within this Act, in the view of a justice, & having placed himself before the board on which his master's name was painted, so as to prevent the discovery of the owner, & the justice, in order to ascertain the name, stopped the horses & laid hands on the driver, & removed him from his position before the board, & thereby informed himself of the ownership:—*Held*: this was a trespass, & gave the driver a right of action.—*JONES v. OWEN (1823), 2 Dow. & Ry. K. B. 600; 1 Dow. & Ry. M. C. 290; 1 L. J. O. S. K. B. 139.*

**599. Touching person in order to serve process.]—**A person may, under particular circumstances, lay hands on another, in order to serve him with process.—*HARRISON v. HODGSON (1830), 10 B. & C. 445; 5 Man. & Ry. K. B. 392; 3 Man. & Ry. M. C. 38; 8 L. J. O. S. K. B. 223; 109 E. R. 515.*

**600. —.]—**Resp. was deft. in an action in the county ct. in which an order for discovery had been made against him. Applt., who was acting on behalf of the solr. for pltf., having overtaken resp. in the street, tendered to him the order for discovery, & resp. refused to accept & peruse it in the public street. Applt. thereupon thrust it into the inner fold of resp.'s coat. On a summons by resp. against applt. for assault, the justices convicted applt. on the ground that he had touched resp. unnecessarily & that the order would have been effectually served by applt.'s drawing the attention of resp. to it & dropping it in the street in his presence on his declining to accept it, but that resp.'s person was sacred & that applt. was not justified in laying hands upon him:—*Held*: the touching of resp. was not unnecessary, inasmuch as he refused to accept the document, & there being no evidence that applt. had touched resp. more than was necessary for the purpose of bringing the document home to him, the conviction must be quashed.—*ROSE v. KEMPTHORNE (1910), 103 L. T. 730; 75 J. P. 71; 27 T. L. R. 132; 155 Sol. Jo. 126; 22 Cox. C. 356, D. C.*

**601. Forcibly cutting hair.]—**If parish officers cut off the hair of a pauper in the poor house, by force, & against the will of such pauper, this is an assault.—*FORDE v. SKINNER (1830), 4 C. & P. 239; 2 Man. & Ry. M. C. 294; 172 E. R. 687.*

**602. Moving on a person — By constable.]—**A police constable is not justified under Metropolitan Police Act, 1829 (c. 44), s. 7, in laying hold of, pushing along the highway, & ordering to be off, a person found by him conversing in a crowd with another, merely because the person with whom he happens to be conversing, is known to be a reputed thief.—*STOCKEN v. CARTER (1831), 4 C. & P. 477; 2 Man. & Ry. M. C. 408; 172 E. R. 789, N. P.*

**603. Throwing stone.]—**A captain of a ship is

not justified in throwing a stone at a person in a boat, who has fastened it to the ship, & thereby impeded & endangered it, for the purpose of making him let go, unless it was not possible either at the time or before the immediate pinch of the danger, to adopt any other mode for the purpose.—*EYRE v. NORWORTHY (1831), 4 C. & P. 502; 172 E. R. 800, N. P.*

**604. Ejection of servant from premises.—**By one of two partners—After expiration of notice to quit—Authority from other partner to remain.]—A servant of two partners may maintain trespass against one of the partners for turning him out of the joint dwelling-house, where the business is carried on, after the expiration of a notice to quit by that partner, if he has been authorised by the other partner to remain.—*DONALDSON v. WILLIAMS (1833), 1 Cr. & M. 345; 3 Tyr. 371; 2 L. J. Ex. 173; 149 E. R. 432.*

**605. Resisting lawful expulsion from premises.]—**If a person conducts himself in a disorderly manner in a public-house, & the landlord requests him to depart, & he refuse to do so, the landlord is justified in laying hands on him to put him out; & if, while the landlord has hold of him to put him out, the person lays hands on the landlord this is an assault.—*HOWELL v. JACKSON (1834), 6 C. & P. 723; 2 Nev. & M. M. C. 627; 172 E. R. 1435, N. P.*  
*Annotation:—Reid. Sealey v. Tandy (1901), 85 L. T. 459.*

**606. Passive obstruction—Of entry to premises.]—**A policeman prevented a member of a society from entering the society's room:—*Held*: if the policeman was wholly passive, & merely obstructed his entrance as any inanimate object would, this was not an assault by the policeman.—*INNES v. WYLIE (1844), 1 Car. & Kir. 257; sub nom. INNES v. BOUCHER, 8 J. P. 280, N. P.; subsequent proceedings, sub nom. INNES v. WYLIE, 3 L. T. O. S. 52, 74.*

*Annotations:—Mentl. Wood v. Woad (1874), L. R. 9 Exch. 190; Kelly v. National Soc. of Operative Printers (1915), 113 L. T. 1055.*

**607. Giving person into custody — On charge before magistrate.]—***REGLIN v. NELHAM, No. 569, ante.*

**608. Locking up person in room.]—***REGLIN v. NELHAM, No. 569, ante.*

**609. Criminal intercourse.]—**Where there had been criminal intercourse, accompanied, in the first instance, with some degree of violence, an action was maintainable for an assault.—*DESBOROUGH v. HOMES (1857), 1 F. & P. 6, N. P.*

**610. Touching person in order to attract attention.]—**A person cannot justify giving another into custody for merely laying hands on him to attract his attention, provided it be not done hostilely.—*COWARD v. BADELEY (1859), 4 H. & N. 478; 23 L. J. Ex. 260; 33 L. T. O. S. 125; 23 J. P. 296; 5 Jur. N. S. 414; 7 W. R. 466; 157 E. R. 927.*

**611. Forcibly seizing property in possession of party—Rightful possession.]—**Pltf. presented a cheque at a bank, which the cashier of defts., the bankers, took, & gave pltf. in return notes & gold. Whilst pltf. was counting the notes one of defts., having discovered that the drawer of the cheque had no assets, demanded the money back. Pltf. refused to give it up, & defts. thereupon took it by force. In an action by A. of assault & trespass for taking the money from him by force:—*Held*: he was entitled to recover.—*CHAMBERS v. MILLER (1862), 13 C. B. N. S. 125; 1 New Rep. 95; 32 L. J. C. P. 30; 7 L. T. 856; 9 Jur. N. S. 626; 11 W. R. 236; 143 E. R. 50.*

*Annotations:—Mentl. R. v. Prince (1868), 19 L. T. 384; Pollard v. Bank of England (1871), L. R. 6 Q. B. 623; Deutsche Bank (London Agency) v. Beriro (1895), 73*

*I. T. 668; Soc. des Hôtels Le Touquet Paris-Plage v. Cummings*, [1922] 1 K. B. 451; *Barclay v. Malcolm* (1925), 133 L. T. 512; *Jones v. Waring & Giffow*, [1925] 2 K. B. 612.

**612. Medical examination of female.]**—A magistrate has no right to order an examination of the person of a prisoner. An examination by medical men, in pursuance of such an order, of the person of a female, in custody upon the charge of concealing the birth of her illegitimate child, constitutes an assault.—*AGNEW v. JOHNSON* (1877), 47 L. J. M. C. 67; 42 J. P. 424; 13 Cox, C. C. 625.

**613. —.]**—*LATTER v. BRADDELL*, No. 579, *ante*.  
**614. Resisting entrance of ministerial officer—Balliff—Acting in excess of authority.]**—B., a county ct. bailiff, went to levy a judgment debt on W. & calling at W.'s door; upon W. opening it, B. put his foot inside & tried to get in against the wish of W., who assaulted B. W. being summoned for assaulting B.:—*Held*: as B. was not in the execution of his duty in forcing a debtor's door, the justices properly dismissed the summons.—*BROUGHTON v. WILKERSON* (1880), 44 J. P. 781.

*Annotation:—Fold, Rositer v. Conway* (1893), 58 J. P. 350.

**615. — Constable—Resistance by wife of owner of premises.]**—C., a constable, in executing a warrant of distress for a general district rate in arrear went to the door of debtor's house & debtor's wife resisted his entry & assaulted him when entering against her will:—*Held*: the wife had implied authority to admit or exclude the constable executing civil process & was justified in using force to exclude him.—*ROSSITER v. CONWAY* (1893), 58 J. P. 350.

**616. Overpowering force.]**—*LATTER v. BRADDELL*, No. 579, *ante*.

**617. Running tramway in defective condition—Injury resulting.]**—Defts. were a co. authorised by Act of Parliament to run tramcars by steam, & had running powers over the line of another tramway co. along a highway. By reason of certain points upon such line being defective, a tramcar of defts., while being drawn by a steam engine, went off the line & injured pltf., who was upon the highway:—*Held*: the statutory powers of defts. could not be taken to authorise them to run their tramcars along the highway upon a tramway in a defective condition, the tramway being defective, defts. in running their tramcar on the highway were doing an unlawful act, & therefore defts. were liable as for a trespass in respect of the injury occasioned to pltf. by their immediate action.—*SADLER v. SOUTH STAFFORDSHIRE & BIRMINGHAM DISTRICT STEAM TRAMWAYS CO.* (1889), 23 Q. B. D. 17; 58 L. J. Q. B. 421; 53 J. P. 604; 37 W. R. 582, C. A.

*Annotation:—Conn. Phillips v. Britannia Hygienic Laundry Co.*, [1923] 1 K. B. 539.

**618. Wound from glancing shot.]**—*STANLEY v. POWELL*, No. 568, *ante*.

**619. Forcibly stopping person—To demand name & address.]**—A police constable has no power to apprehend a person who is riding a bicycle on the highway at night without having a lighted lamp, as required by the regulations contained in Local Government Act, 1888 (c. 41), s. 85, as the provision in that sect. declaring bicycles to be carriages within the meaning of the Highway Acts, does not include or incorporate the power to arrest without a warrant given by sects. 78 & 79 of Highway Act, 1835 (c. 50), & consequently, if a constable, for the purpose of obtaining the name & address of the offender, who refused to stop when called upon, stop the bicycle & thereby throw the rider to the ground, he is guilty of assault.—*HARTON v. TREEBY*, [1897] 2 Q. B. 452; 66 L. J. Q. B. 729; 77 L. T. 309; 61 J. P. 586;

46 W. R. 6; 13 T. L. R. 556; 18 Cox, C. C. 633, D. C.

**620. Forcible feeding of prisoner.]**—It is the duty of prison officials to preserve the health of prisoners in their custody, & *a fortiori* to preserve their lives, & it is for the jury to say whether the means adopted by those officials, for example the feeding of prisoner by force, are necessary for that purpose.—*LEIGH v. GLADSTONE* (1909), 26 T. L. R. 139.

**621. Forcible ejection from place of entertainment—Mistaken belief that seat not paid for.]**—Where therefore pltf., who had purchased a ticket for a seat at a cinema show, was forcibly turned out of his seat by the direction of the manager, who was acting under a mistaken belief that pltf. had not paid for his seat:—*Held*: in an action for assault & false imprisonment pltf. was entitled to recover substantial damages.—*HURST v. PICTURE THEATRES, LTD.*, [1915] 1 K. B. 1; 83 L. J. K. B. 1837; 111 L. T. 972; 30 T. L. R. 642; 58 Sol. Jo. 739, C. A.

*Annotations:—Mend. Cox v. Coulson*, [1916] 2 K. B. 177; *British Actors Film Co. v. Glover*, [1918] 1 K. B. 299; *Joel v. International Circus & Christmas Fair* (1920), 121 L. T. 459; *Said v. Butt*, [1920] 3 K. B. 497; *Messenger v. British Broadcasting Co.* (1928), 97 L. J. K. B. 251.

**Restraint of lunatics.]**—See LUNATICS, Vol. XXXIII., p. 269, Nos. 1872–1875.

**Effecting rescue.]**—See SHERIFFS, Vol. XII., p. 101, Nos. 490–492.

**Enforcing discipline on crew of ship.]**—See SHIPPING, Vol. XLI., p. 247, Nos. 874–881.

## ii. Driving Vehicle Against Another.

**622. Whether trespass.]**—It is a direct trespass to injure the person of another by driving a carriage against the carriage wherein such person is sitting, although the last-mentioned carriage be not the property nor in the possession of the person injured.—*HOPPER v. REEVE* (1817), 1 Moore, C. P. 407; 7 Taunt. 698; 129 E. R. 278.

**623. —.]**—Case against three defts., proprietors of a stage coach. The declaration stated that defts. so carelessly managed their coach & horses, that the coach ran against pltf. & broke his leg. It appeared in evidence that one of defts. was driving at the time when the accident happened, & the jury found that it happened to be through his negligent driving:—*Held*: pltf. might maintain case against all the proprietors, although he might perhaps have been entitled to bring trespass against the one that drove the coach.—*MORETON v. HARDERN* (1825), 4 B. & C. 223; 6 Dow. & Ry. K. B. 275; 107 E. R. 1042.

*Annotations:—Conn. Williams v. Holland* (1833), 10 Bing. 112. *Beld, Wells v. Odv* (1836), 1 M. & W. 452; *Ashworth v. Stanwix* (1861), 3 E. & E. 701.

**624. —.]**—*HOLMES v. MATHER*, No. 567, *ante*.

**625. — Accident.]**—*LEAME v. BRAY*, No. 429, *ante*.

**626. — — Necessity for special plea.]**—In an action of trespass for driving a carriage against pltf., the defence of inevitable accident must be specially pleaded.—*COTTERILL v. STARKEY* (1839), 8 C. & P. 691; 173 E. R. 676, N. P.

*Annotation:—Mend. Phillips v. Britannia Hygienic Laundry Co.*, [1923] 1 K. B. 539.

**627. — —.]**—In trespass for driving a cart over pltf., the deft. endeavoured to show, under the plea of "not guilty," that pltf. slipped off the edge of the pavement just before deft.'s horse & cart, & that the injury occurred without any negligence of deft.:—*Held*: this admitted the trespass to have been the act of deft. & set up matter of excuse, & it should therefore have been specially pleaded.—*HALL v. FEARNLEY* (1842), 3

*Sect. 1.—Assault and battery: Sub-sect. 2, B. (b) ii. & iii.; sub-sects. 3, 4 & 5, A., B., C., D., E., F. & G.]*

Q. B. 919; 3 Gal. & Dav. 10; 12 L. J. Q. B. 22; 7 Jur. 61; 114 E. R. 761.

*Annotation:—*Refd. Stanley v. Powell, [1891] 1 Q. B. 86.

*Compare NEGLIGENCE, Vol. XXXVI., pp. 87–89, Nos. 575–590.*

iii. *Injury from Man Traps, Spring Guns.*

*See Offences against the Person Act, 1861 (c. 100), s. 31.*

**628. Whether defendant liable.]** — *JAY v. WHITFIELD* (1817), cited in 3 B. & Ald. at p. 308; 106 E. R. 676.

*Annotations:—*Folld. *Bird v. Holbrook* (1828), 4 Bing. 628. Refd. *Lynch v. Nurdin* (1841), 1 Q. B. 29; *Clark v. Chambers* (1878), 3 Q. B. D. 327.

**629.** —.] — A trespasser having knowledge that there are spring guns in a wood, although he may be ignorant of the particular spots where they are placed, cannot maintain an action for an injury received in consequence of his accidentally treading on the latent wire communicating with the gun, & thereby letting it off. — *LOTT v. WILKES* (1820), 3 B. & Ald. 304; 106 E. R. 674.

*Annotations:—*Consd. *Bird v. Holbrook* (1828), 4 Bing. 628. Expld. *Lynch v. Nurdin* (1841), 1 Q. B. 29. Distd. *Clark v. Chambers* (1878), 3 Q. B. D. 327. Refd. *Jordin Crump* (1841), 8 M. & W. 782; *Brown v. Mallett* (1848), 5 C. B. 599; *Degg v. Mid. Ry.* (1857), 1 H. & N. 773; *Cleghorn v. Oldham* (1927), 43 T. L. R. 465. Mentd. *It. v. Mountford* (1835), 1 Mood. C. C. 441.

**630.** —.] — Deft., for the protection of his property, some of which had been stolen, set a spring gun, without notice, in a walled garden, at a distance from his house: pltf., who climbed over the wall in pursuit of a stray fowl, having been shot: — *Held:* deft. was liable in damages. — *BIRD v. HOLBROOK* (1828), 4 Bing. 628; 2 Man. & Ry. M. C. 699; 1 Moo. & P. 607; 6 L. J. O. S. C. P. 146; 130 E. R. 911.

*Annotations:—*Expld. *Jordin v. Crump* (1841), 8 M. & W. 782. Apld. *Lynch v. Nurdin* (1841), 1 Q. B. 29; *Barnes v. Ward* (1850), 9 C. B. 392. Distd. *M. S. & L. Ry. v. Wallis* (1854), 14 C. B. 213; *Ponting v. Noakes*, [1894] 2 Q. B. 281. Refd. *Degg v. Mid. Ry.* (1857), 1 H. & N. 773; *Clark v. Chambers* (1878), 3 Q. B. D. 327; *Lowery v. Walker*, [1910] 1 K. B. 173; *Latham v. Johnson & Nephew*, [1913] 1 K. B. 398; *Ruff v. Long* (1915), 114 L. T. 186. Mentd. *Bowman v. Secular Soc.*, [1917] A. C. 406.

**631.** —.] — Pltf. entered deft.'s garden at night, & without his permission, to search for a stray fowl, & whilst looking closely into some bushes, he came in contact with a wire, which caused something to explode with a loud noise, knocking him down & slightly injuring his face & eyes: — *Held:* deft. was not liable for this injury at common law, nor, in the absence of evidence that it was caused by a spring gun or other engine "calculated to inflict grievous bodily harm" under the statute 7 & 8 Geo. 4, c. 18, s. 1. — *WOOTTON v. DAWKINS* (1857), 2 C. B. N. S. 412; 140 E. R. 477; *sub nom. WOOTTON v. DORKING*, 29 L. T. O. S. 80; *previous proceedings*, 29 L. T. O. S. 64.

SUB-SECT. 3.—RIGHT OF ACTION FOR TRESPASS COMMITTED AGAINST ANOTHER.

**Husband & wife.]** — *See HUSBAND & WIFE, Vol. XXVII., p. 80, Nos. 631–639.*

PART IV. SECT. 1, SUB-SECT. 5.—C.

**d. Leave & licence.]** — Pltf. declared in trespass, in the first count, complaining of breaking & entering his close & debauching his daughter, & in the second count for debauching his daughter only: & deft. pleaded to each count, as to all but the force & arms,

etc., the leave & licence of the daughter.

*Held:* the pleas were bad. — *ROSS v. MERRITT* (1846), 2 U. C. R. 421. — **CAN.**

**e. —.]** — Assault & battery. Plea, leave & licence. Deft. contended that because pltf. had previously challenged him to fight, the plea was

**Master & servant—Seduction.]** — *See MASTER & SERVANT, Vol. XXXIV., pp. 171–180, Nos. 1342–1448.*

**Personal injury to servant.]** — *See MASTER & SERVANT, Vol. XXXIV., pp. 180–183, Nos. 1449–1490.*

SUB-SECT. 4.—LIABILITY FOR TRESPASS COMMITTED BY ANOTHER.

*See Part I., Sect. 2, ante.*

SUB-SECT. 5.—DEFENCES.

**A. Accident.**

**Materiality of intention.]** — *See Sect. 1, sub-sect. 1, ante.*

**Necessity for special plea—Trespass by driving carriage against plaintiff.]** — *See No. 626, ante.*

**As matter in mitigation of damages.]** — *See No. 711, post.*

**B. Action Barred.**

**Limitation of action.]** — *See LIMITATION OF ACTIONS, Vol. XXXII., p. 343, Nos. 257, 258.*

**Action in respect of felonious tort.]** — *See ACTION, Vol. I., pp. 60–66, Nos. 490–545.*

**Estoppel—Proceedings against one of several joint trespassers.]** — *See ESTOPPEL, Vol. XXI., p. 222, Nos. 564, 565.*

**Previous criminal or quasi criminal proceedings.]** — *See ESTOPPEL, Vol. XXI., pp. 220, 227, Nos. 564–600.*

**Previous judgment—Action for subsequent loss.]** — *See ESTOPPEL, Vol. XXI., p. 208, Nos. 493–495.*

**Certificate of dismissal by magistrates.]** — *See MAGISTRATES, Vol. XXXIII., pp. 347, 348, Nos. 565–576.*

**Action by wife against husband—Divorce intervening between assault & action.]** — *See HUSBAND & WIFE, Vol. XXVII., p. 260, No. 2292.*

**Felonious trespass by servant—Effect of conviction on liability of master.]** — *See MASTER & SERVANT, Vol. XXXIV., p. 147, No. 1153.*

**C. Consent.**

**632. Whether defence valid.]** — *MATTHEW v. OLLETON* (1692), as reported in Comb. 218; 90 E. R. 438.

*Annotations:—*Apld. *Boulter v. Clark* (1747), Bull. N. P. 16. Refd. *R. v. Coney* (1882), 8 Q. B. D. 534. Mentd. *Sharman v. Brandt* (1871), L. R. 6 Q. B. 720.

**633.** —.] — *BOULTER v. CLARK* (1747), Bull. N. P. 16.

*Annotation:—*Consd. *R. v. Coney* (1882), 8 Q. B. D. 534.

**634.** —.] — *MILNER v. WILSON* (1755), Barnes, 364; 94 E. R. 956.

**635.** —.] — **Plea admitting assault.]** — A plea that admits an assault & justifies it under leave & licence is bad as amounting to the general issue. — *CHRISTOPHERSON v. BARE* (1848), 11 Q. B. 473; 17 L. J. Q. B. 109; 10 L. T. O. S. 393; 12 J. P. 153; 12 Jur. 374; 116 E. R. 554.

*Annotations:—*Expld. *R. v. Coney* (1882), 8 Q. B. D. 534. Refd. *Hegarty v. Shine* (1878), 14 Cox, C. C. 145; *Latter v. Braddell* (1880), 50 L. J. Q. B. 166.

**636.** —.] — **Servant acting under master's order.]** — *LATTER v. BRADDELL, No. 579, ante.*

sustained, & pltf. should have replied an excess or unfair advantage if he relied thereon: — *Held:* it did not apply, for a challenge to fight at once could not *prima facie* authorise the attack by deft. after some time with a club. — *ST. JOHN v. PARR* (1856), 7 C. P. 142. — **CAN.**

*D. Defence of Person.*

**637. How far assault justified.]**—ANON. (1319), Y. B. 12 Edw. 2, fo. 381.

**638. — Wounding.]**—Defendant may justify an assault in defence of his person or of his wife. . . . So he may justify in defence of his father or another or children within age & even a wounding may be justified in defence of his person but not of his possessions. . . .

A master may justify beating his apprentice, servant, scholar, etc., if the beating is in the nature of correction only & with a proper instrument (HOLT, C.J.).—ANON. (circa 1695), 3 Salk. 46; 91 E. R. 683.

**639. — — —.]**—BUTLER v. AUSTEN (1614), 1 Roll. Rep. 19; 81 E. R. 297.

*Annotation:—*Refd. Green v. Goddard (1702), 2 Salk. 641.

**640. — — —.]**—HUDSON v. CRANE (1607), Noy, 115; 74 E. R. 1080.

**641. — — —.]**—COOK v. BEAL, No. 706, *post*.

**642. — — —.]**—**Plaintiff's assault violent.]**—*Son assault demesne* a good plea in mayheor where the first assault was violent.—COCKCROFT v. SMITH (1705), 2 Salk. 642; Holt, K. B. 699; 11 Mod. Rep. 43; 91 E. R. 511; *subsequent proceedings*, 11 Mod. Rep. 52.

*Annotations:—*Consd. Cook v. Beal (1697), 1 Ld. Raym. 176. *Appld.* Dale v. Wood (1822), 7 Moore, C. P. 33. *Consd.* Reece v. Taylor (1835), 4 Nev. & M. K. B. 469. *Refd.* Dix v. Brookes (1717), 1 Stra. 61. *Mentd.* Carter v. Fish (1725), 1 Stra. 645.

**643. — — —.]**—**Commensurate with assault by plaintiff.]**—REECE v. TAYLOR, No. 687, *post*.

**644. Excess of violence by defendant.]**—When a deft. pleads that pltf. struck him first, how far he shall not be allowed to give in evidence a very violent battery by way of justification under that plea.—BRIDGMAN v. SKINNER (1734), 2 Barn. K. B. 418; 94 E. R. 591.

**645. — — —.]**—DEAN v. TAYLOR, No. 703, *post*.

**646. Self defence to battery in church.]**—Self defence no justification in battery in a church.—FRANCES v. LEY (1615), Cro. Jac. 366; 79 E. R. 314; *sub nom.* DAY v. BEDDINGFIELD, Noy, 104.

*Annotations:—*Refd. Spooner v. Brewster (1825), 10 Moore, C. P. 494. *Mentd.* It. v. London (Bp.) (1743), 13 East, 420, n.; Fletcher v. Sowles (1826), 3 Bing. 501; Bryan v. Whistler (1828), 8 B. & C. 288; Winstanley v. North Manchester Overseers [1910] A. C. 7.

**647. Resistance to improper arrest.]**—When a warrant has been issued to apprehend a person for an offence less than felony, the police officer who executes it must have the warrant in his possession at the time of arrest. *Appltd.* was summoned to answer an information charging him with trespass in pursuit of conies; as he did not appear in obedience to the summons, a warrant was issued for his apprehension. Resp., being a police officer, to whom the warrant was directed, but not having it in his possession, attempted to arrest *applt.*, who thereupon committed an assault upon him:—*Held*: *applt.* could not be convicted upon an information charging him with assaulting

resp. in the execution of his duty.—Codd v. CABE (1876), 1 Ex. D. 352; 45 L. J. M. C. 101; 34 L. T. 453; 40 J. P. 566; 13 Cox, C. C. 202.

*Annotations:—*Refd. *For p.* Smith (1897), 61 J. P. Jo. 410; Betts v. Stevens (1909), 79 L. J. K. B. 17.

**648. Defence of another—Parent & child—Defence of parent.]**—ANON. (circa 1695), No. 638, *ante*.

—.]—GREIS CASE (1647),

Clay. 120.

**650. — — —.]**—**Defence of child.]**—ANON. (circa 1695), No. 638, *ante*.

**651. — — —.]**—**Husband & wife—Defence of wife.]**—ANON. (circa 1695), No. 638, *ante*.

**652. — — —.]**—**Defence of husband.]**—LEEWERD v. BASILEE, No. 205, *ante*.

— **Master & servant—Defence of master.]**—*See* MASTER & SERVANT, Vol. XXXIV., p. 187, Nos. 1537–1540.

— **Defence of servant.]**—*See* MASTER & SERVANT, Vol. XXXIV., p. 180, Nos. 1449, 1450.

*E. Defence of Property.*

**Defence of land.]**—*See* Part II., *ante*.

**Defence of goods.]**—*See* Part III., *ante*.

*F. Execution of Process.*

**653. Lawful arrest.]**—A private person may justify arresting a common gambler whom he detects cheating with false dice.—HOLYDAY v. OXENBRIDGE (1631), Cro. Car. 234; W. Jo. 249; 82 E. R. 131.

*Annotation:—*Mentd. R. v. Griepo (1696), 1 Ld. Raym. 250.

**654. — — —.]**—(1) To trespass, assault & false imprisonment, three defts. pleaded a joint plea of justification under process, etc., in which one said that he, as attorney for the party suing out that process, delivered the warrant to the other two defts., to whom it was directed, to be executed, etc.; & the two others that they executed it, etc.; & held a good plea.

(2) Deft. may justify a battery by pleading *mollior manus impositus*, etc., in order to arrest, etc.—ROWE v. TUTTE (1737), Willes, 14; 125 E. R. 1031.

*Annotation:—*Refd. Titley v. Foxall (1758), Willes, 688.

**655. — — —.]**—**No justification for battery.]**—WILLIAMS v. JONES, No. 592, *ante*.

**656. — — —.]**—**Necessity for previous commission of felonious act.]**—MATHEWS v. BIDDULPH, No. 778, *post*.

**On civil process.]**—*See* SHERIFFS, Vol. XLI., p. 103, Nos. 528–539.

**657. Resistance to rescue.]**—An attempt to rescue will justify an assault.—ANON. (1705), 11 Mod. Rep. 64; 88 E. R. 889.

**Service of process.]**—*See* Nos. 599, 600, *ante*.

*G. Expulsion of Trespasser.*

**658. Whether valid defence.]**—In justification of an assault, defts. pleaded, that they were duly

## PART IV. SECT. 1, SUB-SECT. 5.—D.

**644 i. Excess of violence by defendant.]**—SHORE v. SHORE (1831), 2 O. S. 65.—CAN.

**644 ii. — — —.]**—SPIRES v. BARRICK (1857), 14 U. C. R. 420.—CAN.

**644 iii. — — —.]**—SAVAGE v. STACK (1878), 17 N. B. R. (1 P. & B.) 604.—CAN.

**644 iv. — — —.]**—Where, in an action for assault, deftd. pleaded *son assault demesne* & gave evidence in support of the plea, pltf. was allowed at the close of the evidence to add a replication of excess.—WHITE v. MCKIEEL (1889), 28 N. B. R. 39.—CAN.

**644 v. — — —.]**—MORASH v. GELDERT (1906), 2 E. L. R. 56.—CAN.

**644 vi. — — —.]**—Damages are due for a blow inflicted with a heavy iron bar on the head, to the danger of life, although the party so struck had previously given a slight blow or push with his hand, & was alleged to have begun the affray.—DOWIE v. DOUGLAS (1822), 1 Sh. Sc. App. 125.—SCOT.

## PART IV. SECT. 1, SUB-SECT. 5.—F.

**653 i. Lawful arrest.]**—MARKS v. NAVYOMBE (1883), 22 N. B. R. 419.—CAN.

**655 i. — — —.]**—**No justification for battery.]**—Clear proof of a warrant to arrest must be given in an action for assault & battery, but its production will not justify gross & unnecessary violence in the execution of it.—

BEICH v. ARNOTT (1859), 9 C. P. 68.—CAN.

**f. — Right of defendant to set up arrest by act of court.]**—Where the whole proceedings leading to the arrest of pltf., & the justices who act, have been procured by deftd. for his own purpose, deftd. cannot set up the defence that the false imprisonment was the act of the ct. & not his own act.—A. KROYD v. BISHOP (1891), 9 N. Z. L. R. 250.—N. Z.

## PART IV. SECT. 1, SUB-SECT. 5.—G.

**658 i. Whether valid defence.]**—FLOWMAN v. PALMER (1914), 18 C. L. R. 339.—AUS.

**658 ii. — — —.]**—MCCULLEY v. CUNARD (1843), 4 N. B. R. (2 Kerr) 131.—CAN

**Sect. 1.—Assault and battery: Sub-sect. 5, G., H., I., J. & K.]**

assembled as a select vestry, & extruded pltf., being an intruder. One of the select vestry having received no notice of the meeting:—*Held*: the justification was not made out.—*DOBSON v. Fussy* (1831), 7 Bing. 305; 2 Man. & Ry. M. C. 470; 5 Moo. & P. 112; 9 L. J. O. S. C. P. 72; 131 E. R. 117.

**659.** —.]—A society not possessing any property in which its members have a joint interest, may, after due notice, expel any of its members for misconduct; as for instance, threatening one of the members while present at a meeting, with personal violence. But when such a society expelled a member without due notice; it was held to have acted illegally.—*INNES v. WYLIE* (1844), 1 Car. & Kir. 257; *sub nom.* *INNES v. BOUCHER*, 8 J. P. 280, N. P.; *subsequent proceedings, sub nom.* *INNIS v. WYLIE*, 3 L. T. O. S. 52, 74.

*Annotations*:—*Apld.* *Wood v. Wood* (1874), L. R. 9 Exch. 190. *Consd.* *Kelly v. National Soc. of Operative Printers* (1915), 113 L. T. 1055.

**660.** — **Undue violence in expulsion.**—*GREGORY v. HILL*, No. 214, *ante*.

**661.** — **Plaintiff rightfully on premises.**—Action for assault. Plea, that deft. was possessed of an office & premises wherein pltf. was trespassing, whereupon deft. requested him to leave the office & premises, which pltf. refused to do, & thereupon deft. gently removed him, etc. Replication, (that before & at the time, etc., M. had instituted liquidation proceedings under Bankruptcy Act, 1869 (c. 71), in the county ct., & had convened a general meeting of his creditors, to be holden at the office & premises in the plea mentioned on Feb. 3, 1874, & deft. was the solr. of M. in such proceedings, & in & about summoning the meeting, which was duly held at the time & place; & pltf., then being the solr. & duly appointed proxy of T., a creditor of M., attended the meeting as such, & deft. was present at the meeting as solr. & on behalf of M., & officiated thereat as the duly elected chairman thereof; & a proof made under the proceedings by T., then being such creditor, & a writing under T.'s hand duly appointing pltf. his proxy in the matter of the proceedings, were produced to deft., then being such chairman, & afterwards & during the continuance of the meeting, & before the termination or adjournment thereof, & whilst pltf. was lawfully attending same as such proxy at the office & premises in the plea mentioned, pltf. refused to leave same when so requested by deft., as he lawfully might for the cause aforesaid:—*Held*: pltf. was not a trespasser on the occasion. Dft. having given pltf. leave to be present at the meeting as proxy for a creditor, the latter had a right, coupled with an interest, entitling him to be on deft.'s premises.—*VAUGHAN v. HAMPSON* (1875), 33 L. T. 15.

**662.** — **Exclusion of Member of Parliament—Under resolution of House of Commons.**—To a claim for damages for an assault committed on pltf., a Member of Parliament, whilst attempting to

enter the House of Commons for the purpose of taking his seat, deft. pleaded in justification thereof that the House had previously resolved & ordered that deft., one of its officers, should "remove pltf. from the House until he should engage not further to disturb the proceedings of the House" & that, acting in pursuance of such order, deft. resisted & removed pltf.:—*Held*: the plea was good.—*BRADLAUGH v. ERSKINE* (1883), 47 L. T. 618; 31 W. R. 365.

*Annotation*:—*Refd.* *Bradlaugh v. Gossett* (1884), 50 L. T. 620.

**Expulsion by innkeeper.**—*See* *INNS & INN-KEEPERS*, Vol. XXIX., pp. 3, 7, 8, Nos. 11, 72–86.

**Expulsion of trespasser on property.**—*See* Part II., *ante*.

**H. Justification as Servant of Another.**

*See* *MASTER & SERVANT*, Vol. XXXIV., pp. 184–187.

**I. Lawful Correction.**

**663. Correction by father—Interference with.**—In an action for assaulting pltf., defts. pleaded that pltf. was beating "a certain boy whose name is to defts. unknown," & that defts., to prevent his beating "the said boy," quietly laid their hands on him. Replication that, "the said boy" in the plea mentioned "was one Barnes, W., & was & is the lawful son of pltf.," of the age of ten years, & that "the said Barnes, W." refused to obey his lawful commands, whereupon pltf. moderately chastised him. Rejoinder, that pltf., at the time when, etc., was beating, "the said Barnes, W." with more violence than was proper & reasonable. Rejoinder, that pltf., "did not beat," etc., the said Barnes, W. "with more violence than was proper & reasonable." On the part of pltf., evidence was given, that pltf., just before defts. interfered with him, had been beating his son Barnes, W., who was ten years old, with a strap, but not immoderately; but the last witness for pltf. stated that pltf. had another son, aged eight. It was proved for defts., that, after pltf. had beaten his eldest son, Barnes, W., he began beating the younger, when defts. laid hold of him:—*Held*: on these pleadings the issue was limited to the question of the excessive beating of Barnes, W., & anything pltf. did to the younger boy was not in issue; & the judge at the trial would not allow any amendment as to the name of Barnes, W., as the two boys had both been beaten, & if the issue had been different pltf. might have adduced other evidence as to the extent of the beating of the younger boy.—*WINTERBURN v. BROOKS* (1840), 2 Car. & Kir. 16, N. P.

**664. Correction by master—Apprentice.**—*ANON.* (*circa* 1695), No. 638, *ante*.

**665.** —.]—*PENN v. WARD*, No. 701, *post*.

**666.** — **Servant.**—*ANON.* (*circa* 1695), No. 638, *ante*.

**667.** — **Scholar.**—*ANON.* (*circa* 1695), No. 638, *ante*.

—.]—*See, also*, *EDUCATION*, Vol. XIX., pp. 599, 600, Nos. 271–282.

**658iii.** —.]—A passenger on a street railway having refused when requested by the conductor of the car to remove his feet from the cushion of the opposite seat, & used strong language to the conductor, was ejected from the car:—*Held*: the conductor had a right to eject him.—*DAVIS v. OTTAWA ELECTRIC Ry. Co.* (1897), 28 O. R. 654.—*CAN.*

**658 iv.** —.]—*MITCHELL v. WARREN* (1869), 5 Nfld. L. R. 275.—*NFLD.*

**658 v.** —.]—When the jury found

that deft. committed an assault on & with violence to pltf., but also found that no more violence was used than was necessary to give deft. possession of land to the possession of which he was entitled, the ct., considering the finding indefinite, looked at the evidence to ascertain what degree of violence was used, & finding that the agents of deft. gently laid hands on pltf., judgment was given on the above finding for deft.—*BURT v. ROSS* (1886), 5 N. Z. L. R. 161 (S. C.).—*N.Z.*

**PART IV. SECT. 1, SUB-SECT. 5—I.**

**666 i. Correction by master—Servant.]**

—Where in trespass for an assault & battery, for wounding & kicking, & for tearing pltf.'s clothes, deft. justified as for a moderate correction of pltf. as his servant—the plea was held bad on demurrer, as it afforded no answer to the wounding & tearing the clothes of pltf.—*MITCHELL v. DEFRIES* (1840), 2 U. C. R. 430.—*CAN.*

**667 i. — Scholar.]**—A school-master may punish for school offences



—Master of ship.]—See SHIPPING, Vol. XLII., pp. 247, 248, Nos. 874–882.

*J. Preservation of Order.*

**668. Disturbance at funeral.**—To an action of assault & battery, a plea that pltf. disturbed a congregation while the minister was performing the rites of burial, & that deft., though neither constable, churchwarden, nor other officer, *molliter manus imposuit* to prevent such disturbance, is a good justification.—GLEVER v. HYNDE (1673), 1 Mod. Rep. 168; 86 E. R. 806; *sub nom.* LEVER v. HYNDE, 1 Freem. K. B. 131.

*Annotation* :—*Reid*. Burton v. Henson (1842), 10 M. & W. 105.

**669. Breach of peace—Blow by constable.**—If a constable is preventing a breach of the peace, & any person stands in his way with intent to hinder him from doing so, the constable is justified in taking such person into custody, but not in giving him a blow.—LEVY v. EDWARDS (1823), 1 C. & P. 40; 171 E. R. 1094, N. P.

**670. Disturbance on premises—Ejection of disturbers—Without undue force.**—If three persons be told on entering a theatre that there is room, when in fact there is not, their proper course is to leave the theatre, & demand the return of their money; & such persons are not justified in getting into a private box in the theatre, & if they do, the proprietor may remove them, using no more force than is necessary.—LEWIS v. ARNOLD (1830), 4 C. & P. 354; 172 E. R. 737, N. P.

*Annotation* :—*Reid*. Said v. Butt, [1920] 3 K. B. 497.

**671.** ————]—HOWELL v. JACKSON, No. 605, *ante*.

**672.** ————]—MORIARTY v. BROOKS, No. 585, *ante*.

**673.** ————]—If a person comes into a house, or is in it, & makes a noise & disturbs the peace of the family, although no assault has been committed, the master of the house may turn him out or call a policeman to do so.—SHAW v. CHAIRITIE (1850), 3 Car. & Kir. 21, N. P.

**674.** ————]—From church.]—BALLARD v. BOND (1837), 1 J. P. 102; 1 Jur. 7.

—————]—See, further, ECCLESIASTICAL LAW, Vol. XIX., pp. 287, 467, Nos. 766–772, 3174.

but if he exceeds the bounds of moderation either in manner instrument or quantity of the punishment he is answerable for the excess.—SMITH v. BRYNE, *Ex p.* O'DRYNE (1894), 5 Q. L. J. 126.—AUS.

**667 ii.** ————]—R. v. ZINCK (1910), 8 E. L. R. 178.—CAN.

**667 iii.** ————]—HANSEN v. COLE (1890), 9 N. Z. L. R. 272.—N.Z.

**667 iv.** ————]—SCORRIG v. LAURIE (1883), 10 R. (Ct. of Sess.) 610; 20 Sc. L. R. 397.—SCOT.

*g. Correction by stranger—Of plaintiff's son.*—MADDEN v. FARLEY (1849), 6 U. C. R. 210.—CAN.

*h. Use of boys skylarking on railway.*—Resp. was an inspector of the railway dept., & as the result of some skylarking by some schoolboys on a train was struck in the face by a door. He cuffed applt. & pulled his ear, not for the purpose of restoring order, but because he was provoked by the door striking him in the face. Applt. had not taken part in the disturbance.—*Held*: there was nothing to justify resp. in administering corporal punishment to applt.—LOWRY v. BARLOW, [1921] N. Z. L. R. 318.—N.Z.

PART IV. SECT. 1, SUB-SECT. 5.—J.

*k. Disturbance of public worship.*—*Reid* v. INGLES (1862), 12 C. P.

191.—CAN.

*1. Breach of peace.*—A person who when using the force necessary to prevent a continuance or renewal of a breach of the peace was struck by the party he was attempting to control.—*Held*: justified in striking back.—R. v. MANSON, [1925] 1 W. W. R. 671; 43 Can. Crim. Cas. 30.—CAN.

*m.* ————]—GOURI PRASAD DEY v. CHARTERED BANK OF INDIA (1925), 1 L. R. 52 Calc. 615.—IND.

*n. Removal of party emblem from plaintiff.*—HUMPHRIES v. CONNOR (1864), 17 I. C. L. R. 1.—IR.

*o. Excess in carrying out legal directions.*—O'BRIEN v. HARTINGTON (MARQUIS), [1877] 1 R. 11 C. L. 445.—IR.

*p. Right of soldiers to repel trespass upon themselves.*—Soldiers have no right to force a way through a crowd by violence, or to remove any obstruction by arms, still less by discharging deadly firearms. They have no right to repel a trespass on themselves, or on the party escorted, by firing or inflicting mortal wounds.—*Re CASEY* (1852), 8 State Tr. N. S. 1078.—IR.

PART IV. SECT. 1, SUB-SECT. 5.—K.

*q. Previous conviction for same cause.*—A plea of conviction under Petty Trespass Act to an action for

**675. Control of crowd on public occasion.**—One of the marshals of the City of London, whose duty it was on the day of a public meeting in the Guildhall to see that a passage was kept for the transit to their carriages of the members of the corps. & others, directed a person in the front of a crowd at the entrance to stand back, & on being told by him that he could not for those behind him struck him immediately on the face, saying that he would make him :—*Held*: in so doing the marshal exceeded his authority, & he should have confined himself to the use of pressure, & should have waited a short time to afford an opportunity for removing the party in a more peaceable way.—IMASON v. COPE (1831), 5 C. & P. 103; 172 E. R. 936, N. P.

**676. Disturbance at public meeting.**—Proof of annoyance & disturbance by a person present at a meeting, such as crying "hear, hear," & putting questions to a speaker, & making observations on his statements, will not justify the chairman of the meeting in giving such person in charge to the police; but, to justify such a course of proceeding, it must be shown that what was done amounted to a breach of the peace.—WOODING v. OXLEY (1839), 1 C. & P. 1; 173 E. R. 714, N. P.

*Arrest & imprisonment.*—See Sect. 2, *post*.

*K. Other Defences.*

**677. Tender of amends.**—WALGRACE'S CASE, No. 368, *ante*.

**678. Order of House of Commons.**—VERDON v. TOPHAM (1682), T. Jo. 208; 84 E. R. 1220.

**679. Assertion of right of precedence—At funeral.**—A battery cannot be justified in order to maintain a right of precedence at a funeral.—ASHTON v. JENNINGS (1675), 1 Freem. K. B. 393; 2 Lev. 133; 3 Keb. 462; 89 E. R. 291.

**680. Prevention of act of supposed indecency.**—BOOTH v. HANLEY (1826), 2 C. & P. 288; 172 E. R. 128, N. P.

**681. Payment into court.**—ASTON v. PERKES, No. 494, *ante*.

**682. Exercise of contractual powers—Terms of contract not complied with.**—The corps. of B. had leased their tramway lines to pltf., a tramway co., & under the lease the repairs of tramways were to be executed by the corps. at the cost of

assault & battery, is not supported by proof of a conviction for an assault alone.—DELONG v. McDONELL (1838), 3 Ont. Dig. 6936.—CAN.

*r.* ————]—To an action for assault & battery, deft. pleaded that he had been convicted of the trespass complained of before a justice of the peace, & so released from this action. Pltf. replied "*nul tiel record*" of the conviction.—*Held*: replication good.—THOMPSON v. LESLIE (1852), 9 U. C. R. 360.—CAN.

*t.* ————]—GREEN v. HENNEGHAN (Alta.), [1918] 3 W. W. R. 658; 43 D. L. R. 272; 14 Alta. L. R. 106.—CAN.

*u.* ————]—MURRAY v. FITZPATRICK (1914), 78 J. P. Jo. 521.—IR.

*b. "Molliter manus imposuit."*—Pltf. declared for an assault & battery, & beating, bruising, & wounding; & deft. justified the assault & battery by a plea of "*molliter manus imposuit*."—*Held*: sufficient.—MCLEOD v. BELL (1846), 3 U. C. R. 61.—CAN.

*c.* ————]—SMITH v. INGOLDSBY (1852), 9 U. C. R. 207.—CAN.

*d. Justification under search warrant.*—JONES v. ROSS & BARNES (1847), 3 U. C. R. 328.—CAN.

*e. No special direction given to execution officer.*—Where either the execution pltf. or his attorney direct the seizure of particular goods, they are liable, but not where the writ is given



*Sect. 1.—Assault and battery: Sub-sect. 5, K.; sub-sect. 6.]*

the co. In 1908 it was considered desirable to reconstruct certain lines of tramway, & on May 7, an agreement was entered into between the corp. & ptfs., for this purpose, which provided for facilities to ptfs. to maintain the service of trams during the execution of the works & also that the corp. should insert in the contract, to be entered into by them with their contractor, a provision imposing upon the contractor full responsibility for all claims resulting from accident, injury, or damage sustained by the co. from the execution of the work. On May 15 the corp. entered into a contract with deft. for relaying the tramway lines; & by it deft. agreed to indemnify the corp. & undertook to be responsible for all damage consequent upon or arising out of the execution of the work. Ptfs. were not parties to this agreement. During the execution of the work a tram-car became derailed & was overturned & damaged owing to deft.'s negligence, & ptfs. were compelled to pay damages as compensation to passengers so injured:—*Held*: ptfs. were entitled to recover from deft. damages for the injury to the tramcar, as well as the amount so paid to injured passengers. For the acts of defts. injuriously affected both the proprietary rights of ptfs. as lessees & their rights of passage on the highway; & inasmuch as, apart from the contracts of May 7 & 15, deft. would have been a trespasser *ab initio* & his dealings with the tramway a nuisance at common law, he could only justify such trespass & nuisance by relying on his contract with the corp., with which he had not complied.—*BIRMINGHAM CITY TRAMWAY CO., LTD. v. LAW*, [1910] 2 K. B. 965; 80 L. J. K. B. 80; 103 L. T. 44; 74 J. P. 355; 8 L. G. R. 667.

**SUB-SECT. 6.—PLEADING.**

*See R. S. C., Ord. 19, rr. 4, 15.*

**683. Defence—Must cover each separate trespass.]**—Where in an action for assaulting, beating, & ill treating, deft., as to the assaulting & ill treating, justified turning ptlf. out of his house, but the issue on the justification was found against him:—*Held*: upon the whole justification a battery appeared admitted, & the excuse not being proved, ptlf. was entitled to full costs, without a judge's certificate.—*JOHNSON v. NORTHWOOD* (1817), 7 Taunt. 689; 1 Moore, C. P. 420; 129 E. R. 274.

**684. ———.]**—In trespass, the first count of the declaration stated, that deft. assaulted & imprisoned ptlf.; & during such imprisonment, struck, pulled, & pushed him about. Justification, that deft. arrested ptlf. under process of ct.; & that ptlf., whilst in custody, having conducted himself in a violent manner, deft. necessarily, & to prevent his escape, struck, etc.:—*Held*: (1) this

latter part of the justification not being proved, ptlf. was entitled to judgment; & it was not necessary to new assign the battery by deft.; (2) the second count of the declaration, which omitted the battery, having been justified by proof of the writ & warrant, & arrest under them, ptlf., although one assault only was proved, was still entitled to judgment, having proved the trespass as laid in the first count.—*PHILLIPS v. HOWGATE* (1821), 5 B. & Ald. 220; 106 E. R. 1173.

*Annotations:—As to (1) Apld. Stammers v. Yearsley* (1833), 10 Bing. 35; *Bush v. Parker* (1834), 1 Bing. N. C. 72. *Refd. Lamb v. Burnett* (1831), 1 Cr. & J. 291; *Penn v. Ward* (1835), 2 Cr. M. & R. 338; *Curlewis v. Laurie* (1848), 11 L. T. O. S. 308.

**685. ———.]**—A plea which professes to justify several assaults & false imprisonments laid in separate counts, must show distinct occasions upon which deft. was justified in committing each particular trespass.—*M'CURDAY v. DRISCOLL* (1833), 1 Cr. & M. 618; 3 Tyr. 571; 2 L. J. Ex. 185; 149 E. R. 546.

**686. ———.]**—In trespass against defts., for beating, pulling ptlf. about, turning him out of a certain close, etc., & dragging him into & through a certain pond, defts. pleaded the general issue, & justified the turning out of the close, beating, & pulling about, without referring or alluding to the dragging into & through the pond. Verdict for ptlf. on the general issue, & for defts. on the remainder of the record. On motion to enter up judgment for defts., *non obstante veredicto*, on the ground that the plea on which the verdict was found for them was an answer to the whole complaint, & that the dragging through the pond being mere aggravation, need not be justified:—*Held*: the plea was not an answer to the whole charge, as the dragging into & through the pond was a distinct substantive trespass, & not mere aggravation, & consequently that it should be justified.—*BUSH v. PARKER* (1834), 1 Bing. N. C. 72; 4 Moo. & S. 588; 3 L. J. C. P. 242; 131 E. R. 1044.

*Annotations:—Refd. Curlewis v. Laurie* (1848), 12 Q. B. 640; *Huddart v. Rigby* (1869), 10 B. & S. 911.

**687. ———.]**—(1) Where there are a series of matters complained of in trespass, & the plea amounts to a justification of all; in order to entitle deft. to a verdict, it is incumbent upon him to make out all the material allegations in his plea; therefore, where the declaration complained of an assault, putting ptlf. out of a shop, & imprisoning him in custody of a police officer, & the plea was *mollior manus imposuit* to remove ptlf. from deft.'s shop, & a justification of the imprisonment because ptlf. had assaulted deft., & the assault on deft. was not proved:—*Held*: although without it, the first part of the plea, was sustainable, yet being a material allegation to maintain the plea as to the imprisonment, it was necessary to prove it to entitle deft. to a verdict.

to the officer to be acted upon in the usual course & with no special direction.—*McCLEVERTIE v. MASSIE* (1871), 21 C. P. 516.—*CAN.*

**1. Right to enter farm—Purchaser at sheriff's sale.]**—*MCSWAIN v. CHAPTELL* (1880), 2 P. E. I. 317.—*CAN.*

**g. Conductor's right to eject from car.]**—*THOMAS v. GELDART* (1880), 20 N. B. R. (4 P. & B.) 95.—*CAN.*

**h. Refusal to redeliver bond.]**—*HOLMES v. McLEOD* (1891), 25 N. S. R. (13 R. & G.) 67.—*CAN.*

**k. Use of insulting or profane language.]**—The use of insulting or profane language by deft. towards ptlf. held not to be a justification for an

assault committed by the latter upon the former.—*WENZEL v. WINACHT* (1907), 41 N. S. R. 406.—*CAN.*

**l. ———.]**—No words, however opprobrious, disgraceful, annoying or vexatious, will justify an assault or battery, though they may mitigate the damages.—*EVANS v. BRADBURN* (1915), 32 W. L. R. 585; 9 W. W. R. 281; 25 D. L. R. 6; 9 Alta. L. R. 523.—*CAN.*

**m. Refusal to leave pew belonging to parishioner.]**—*KING v. POE* (1866), 15 L. T. 37.—*IR.*

**n. Plaintiff no longer clerk in charge of church.]**—*EARLE v. SIMMS* (1861), 4 Nfld. L. R. 541.—*NFLD.*

**o. Ignorance of fact.]**—Ignorance of a party being a police officer is no defence for assaulting him.—*R. v. HERRIDGE* (1882), 6 Nfld. L. R. 460.—*NFLD.*

**p. Danger of mutiny of plaintiff.]**—*REEKIE v. NORRIE* (1842), 4 Dunl. (Cl. of Sess.) 368; 15 Sc. Jur. 151.—*SCOT.*

**q. Orders given by employer to remove bad characters.]**—*WALLACE v. MOONEY* (1885), 12 R. (Cl. of Sess.) 710; 22 Sc. L. R. 454.—*SCOT.*

**PART IV. SECT. 1, SUB-SECT. 8.**

**r. Right to amend declaration.]**—In an action for assault & battery ptlf.

(2) *Semble* : it is not necessary to reply excess in every case where the allegations in a declaration in trespass are covered by a plea of justification ; but evidence of acts consistent with the declaration, but not within the justification, may be given under *de injuriâ*.

(3) Upon issue taken on a plea of *son assault demesne*, it is necessary to prove an assault commensurate with the trespass sought to be justified.—*REECF v. TAYLOR* (1835), 1 Har. & W. 15 ; 4 Nev. & M. K. B. 469 ; 3 Nev. & M. M. C. 35 ; 5 L. J. K. B. 74.

*Annotation* :—As to (3) *Dbltd. Penn v. Ward* (1825), 2 Cr. M. & R. 338.

688. ———.]—In trespass, the count alleging that deft., on, etc., assaulted, beat & ill treated pltf., & then knocked him down on the deck of a ship, deft. pleaded, as to the assaulting, beating & ill treating, that deft. was captain of a vessel conveying passengers, of whom pltf. was one ; that pltf. made a noise, disturbance & affray on board the vessel, & “ was then fighting with a certain other person then also being a passenger,” & “ whose name is to deft. unknown,” & was striving to beat such person, & also deft., so being the captain, etc. ; whereupon deft., so being the captain, etc., for the preservation of the peace, & of order & discipline on the said vessel, & to separate pltf. & the said other person, & to prevent pltf. from beating the said person & deft., as he otherwise would have done, *molliter manus*, etc. It appeared on the trial that the person with whom pltf. had been fighting was not unknown by name, & was not a passenger, but the mate of the vessel :—*Held* : the justification was sufficiently maintained notwithstanding the variance, the name & description of the party not being material, but pltf. must recover for the knocking down, that being alleged as a distinct trespass from the assaulting, beating & ill treating, & not covered by the justification.—*NODEN v. JOHNSON* (1850), 16 Q. B. 218 ; 20 L. J. Q. B. 95 ; 16 L. T. O. S. 281 ; 15 Jur. 424 ; 117 F. R. 862.

689. ——— *Traverse of locus in quo*.]—In trespass, if deft. justifies at another place or county & traverses the place alleged, where the place is not material, it is bad ; for he must plead his justification where the cause arose.—*PURSET v. HUTCHINGS* (1601), Cro. Eliz. 842 ; 78 E. R. 1068.

690. ——— *Justification must confess cause of action—Accident not justification*.]—Every justification must confess a cause of action. Therefore a plea to an action of assault & battery that deft. was on horseback, & his horse on a sudden fright ran away with him, that he called to pltf. to get out of the way, & upon his neglect the horse ran over him against deft.'s will, is bad.—*GIBBONS v. PEPPER* (1695), 1 Ld. Raym. 38 ; 4 Mod. Rep. 404 ; 2 Salk. 637 ; 91 E. R. 922.

*Annotations* :—*Consd.* Scot v. Shepherd (1773), 3 Wils. 403. *Apld.* Hall v. Fearley (1842), 3 Gal. & Dav. 10. *Consd.* Stanley v. Powell, [1891] 1 Q. B. 86. *Refd.* Boss v. Litton (1832), 5 C. & P. 407.

691. ——— *To battery—Gentle laying on of hands*.]—A plea of *molliter manus* does not extend to justify battery or wounding.—*JEROME v. PHEAR & NEALE* (1588), Cro. Eliz. 93 ; 78 E. R. 352.

*Annotation* :—*Refd.* Rowe v. Tutte (1737), Wiles, 14.

692. ———.]—To an action for an assault & battery, *molliter manus imposuit* may be pleaded to the battery.—*TOTTAGE v. PETTY* (1736), Lee temp. Hard. 358 ; 95 E. R. 232.

was allowed at the trial to amend his declaration, by adding that he thereby “ became & was & is permanently injured ”.—*Held* : the amendment was proper.—*GLASS v. O'GRADY* (1866),

17 C. P. 233.—*CAN.*

t. ———.]—*GALLANT v. CALDER* (1883), 23 N. B. R. 73.—*CAN.*

a. *Excess of force—Whether evidence*

693. ——— *Whether defence must be specially pleaded*.]—Trespass against two for assaulting pltf. & tearing his clothes. The fourth plea stated, that before the committing those trespasses, pltf. was found by deft. on the land of W. S. in search of game, without the licence & against the will of W. S., & that pltf. had in his possession a hare which appeared to have been recently killed. Whereupon one deft. as servant of, & by command of W. S. demanded the hare, which pltf. refused to deliver, & had in his possession. That afterwards, & just before committing the trespasses, said deft. demanded the hare from pltf., & because he refused to deliver it, & kept it in his possession, both defts., as such servants, & by such command, in order to take the same for the use of W. S., seized pltf. & took it from him, according to the form of Game Act, 1831 (c. 32), s. 36. The fifth plea stated, that just before the trespasses, pltf. had in his possession a dead hare belonging to W. S. without his leave & licence ; wherefore defts. did, as his servants, & by his command, demand the same from pltf., which he refused to deliver, & detained ; whereupon defts., as such servants, etc., seized pltf., concluding as in the former plea. The replication to the fourth plea stated, that at the several times of the demands of deft. & refusal by pltf., pltf. was lawfully on the highway. A similar replication to the demand & refusal in the fifth plea. On demurrer to the replications :—*Held* : the fourth plea was bad, for not sufficiently showing when the second demand was made, or that it was made on the land of W. S. ; & the fifth plea was also bad, for not stating that defts. gently laid their hands on pltf. in order to take the game, & that because he resisted, they necessarily committed the trespasses complained of, doing as little damage, & using as little violence to pltf. as they could on that occasion.—*WISDOM v. HODSON* (1833), 3 Tyr. 811.

694. ———.]—In an action for an assault, it is competent to deft. to give evidence of an assault by pltf., without a plea of *son assault demesne*.—*SYERS v. CHAPMAN* (1857), 2 C. B. N. S. 438 ; 29 L. T. O. S. 183 ; 140 E. R. 488.

695. ——— *Must answer trespass alleged*.]—Pltf. complained of assault & battery, of being taken in custody along the streets, & of being imprisoned on a charge of assault with intent to commit a felony : Deft. pleaded that pltf. having assaulted him, deft. gave pltf. in charge of a peace officer, who laid hands on him, & took him before a justice. At the trial, although one assault only was proved, the facts pleaded were held to be an insufficient answer to the facts declared on.—*STAMMERS v. YEARSLEY* (1833), 10 Bing. 35 ; 3 Moo. & S. 410 ; 2 L. J. C. P. 256 ; 131 E. R. 818.

*Annotation* :—*Consd.* Bush v. Parker (1834), 1 Bing. N. C. 72.

696. ——— *Proof sufficient to cover declaration*.]—To a declaration containing one count only in trespass for assault & false imprisonment, the plea justified the apprehending pltf. on a charge of felony, & proceeded to aver that pltf. resisted, whereupon he beat him, etc. At the trial, the justification as to the apprehension for felony was proved ; but deft. did not prove the resistance of pltf. The jury having found for deft. :—*Held* : the verdict was right ; deft. having proved as much of his plea as was necessary to cover the declaration, & it not being necessary for him to

of is available to plaintiff upon pleadings—Without any new assignment.]—*COLLINS v. KEENAN* (P. E. I.) (1914), 11 E. L. R. 242 ; 18 D. L. R. 795.—*CAN.*

**Sect. 1.—Assault and battery: Sub-sects. 3 & 7.**  
**Sect. 2: Sub-sects. 1 & 2.]**

prove what was unnecessarily alleged.—**ATKINSON v. WARNE** (1835), 1 Cr. M. & R. 827; 5 Tyr. 481; 149 E. R. 1315.

**Annotation:—***Consd. Hayling v. Okey* (1853), 8 Exch. 531.

**697. —Pleading to matters of aggravation.]—**To a count in trespass for assaulting pltf. on board a ship on the high seas, & forcing & compelling him, he then being sick, to stand & remain standing on the deck for the space of one hour, a plea justifying the forcing & compelling pltf. to stand & remain standing upon the deck, is bad, as being pleaded to that which is mere matter of aggravation.—**GRIFFITHS v. DUNNETT** (1844), 7 Man. & G. 1002; 8 Scott, M. R. 836; 4 L. T. O. S. 135, A.; 135 E. R. 407.

**Annotation:—***Refd. Lane v. Dixon* (1847), 3 C. B. 776.

**698. —Variance as to name on description of party.]—****NODEN v. JOHNSON**, No. 688, *ante*.

**699. Replication—Justification of first assault by plaintiff.]—****KING v. PHIPPARD** (1693), Carth. 280; 90 E. R. 766.

**Annotations:—***Consd. SARRA v. Rochford* (1777), 2 Wm. Bl. 1165; *Dale v. Wood* (1822), 7 Moore, C. P. 33.

**700. —As to excess by defendant.]—**Where in an action for an assault, pltf. declared that deft. beat, bruised, & wounded him. Plea, *son assault demesne*, & pltf. replied *de injuriâ sua propriâ*: & it was proved, that the latter, being on horseback, got off, & held up his stick at deft., when the latter struck him:—**Held**: pltf. should have replied specially; & it having been left to the jury, whether from the evidence, pltf. was so far the aggressor, as to justify the assault committed on him by deft., & they having found in the affirmative, the ct. refused a new trial.—**DALE v. WOOD** (1822), 7 Moore, C. P. 33.

**701. —**—Trespass for assault & battery. Plea, that pltf. was deft.'s apprentice, & conducted himself improperly, wherefore deft. moderately chastised him. Replication *de injuriâ*:—**Held**: on these pleadings pltf. could not recover on the ground of the chastisement being excessive; for the replication *de injuriâ* put in issue only the cause alleged in the plea; that was, in this case, whether pltf. misconducted himself as an apprentice.

The plea says . . . "I had a right to beat my apprentice because he misconducted himself." That is, on the face of it, a satisfactory answer to pltf.'s complaint (**HOLLAND, B.**).—**PENN v. WARD** (1835), 2 Cr. M. & R. 338; 4 Dowl. 215; 1 Gale, 189; 5 Tyr. 975; 4 L. J. Ex. 304; 150 E. R. 146.  
**Annotation:—***Refd. Oakes v. Wood* (1837), Murp. & H. 237.

#### PART IV. SECT. 1, SUB-SECT. 7.

**b. Apportionment of damages.]—**In an action for assault, in which the verdict was against two defts.:—**Held**: the second deft. was liable for damages equally with the first, though the principal injury was caused by the latter.—**DUNHAM v. POWELL** (1838), 5 O. S. 675.—**CAN.**

**c. —**—**DAWE v. FADDY & CONNELL** (1818), 1 Nfld. L. R. 120.—**NFLD.**

**d. Mitigation of damages—Matters in mitigation—Libellous & abusive articles.]—**In an action for assault, that libellous & abusive articles reflecting on deft., published on the day of, & preceding the assault, in a newspaper of which pltf. was the proprietor, were admissible in evidence in mitigation of damages.—**PERCY v. GLASCO** (1872), 22 C. P. 521.—**CAN.**

**e. —**—**Technical assault.]—****ILER v. GARR** (1909), 7 E. L. R. 98.—**CAN.**

**f. —**—**Justification.]—**In an

action of trespass for assault & battery, deft. could not, under the general issue, give in evidence, by way of mitigation of damages, matter of defence which, if pleaded, would amount to a justification.—**PUJOLAR v. HOLLAND** (1841), 3 I. L. R. 533; Long. & T. 177.—**IR.**

**g. —**—**Verbal provocation.]—**In an action to recover damages for assault committed at a public meeting, it appeared that pursuer was a surgeon & defender was an advocate & a landed proprietor, etc., whose speech at the meeting in question was quite in order, but was interrupted by pursuer in a most offensive manner. After the assault defender stated to the meeting that he had chastised one of the greatest blackguards in the neighbourhood:—**Held**: mere verbal provocation could not justify a personal assault though it was cause for mitigation of damages.—**THOM v. GRAHAM** (1835), 13 Sh. (Ct. of Sess.) 1129.—**SCOT.**

**702. —**—**]**—**REECE v. TAYLOR**, No. 687, *ante*.

**703. —**—**]**—In an action of assault & battery, to which deft. pleads the plea given by C. L. P. Act, 1852 (c. 76), Sched. B, that "pltf. first assaulted deft. who thereupon necessarily committed the alleged assault in his own defence," pltf. may, under the general form of replication, joining issue on the plea & without replying excess, show that, although he struck the first blow, deft. was guilty of excess.—**DEAN v. TAYLOR** (1855), 11 Exch. 68; 150 E. R. 748.

**Annotation:—***N.F. Rimmer v. Rimmer* (1867), 16 L. T. 238.

**704. —**—**]**—Where, to a declaration for assault & battery, deft. pleads (*inter alia*), *son assault demesne*, & issue is joined on such plea, pltf. cannot under that issue set up as an answer to deft.'s case that he (def.) was guilty of excess in resisting the assault. He ought, in order to avail himself of such an answer, to new assign the excess on the part of the deft.—**RIMMER v. RIMMER** (1867), 16 L. T. 238, N. P.

#### SUB-SECT. 7.—DAMAGES.

*See, generally, DAMAGES, Vol. XVII., pp. 76 et seq.*

**705. Severability of damages—Action for assault & wounding.]—**The jury cannot assess several damages in trespass of assault & wounding, although the general issue be pleaded as to one, & a justification to the other.—**v. CANDISH** (1610), Cro. Jac. 251; 79 B. R. 215.

**706. Increase of damages after verdict—Where inadequate.]—**(1) In an action for a battery if the wound was visible, & the damages are inadequate, the ct. will increase them either after verdict.

(2) A man cannot justify a maim for every assault (*per CUR.*).—**COOK v. BEAL** (1697), 1 Id. Raym. 176; 3 Salk. 115; 91 E. R. 1014.

**Annotation:—***As to* (1) *Refd. Armitage v. Hayley* (1843), Dav. & Mer. 139.

**707. Mitigation of damages—Matters in mitigation—Must be specially pleaded.]—**In trespass for assault & battery & not guilty pleaded, the jury are not at liberty to take into consideration the circumstances of the assault & battery, with a view to reduce the verdict below the amount of the damage actually sustained, if those circumstances could have been pleaded.—**WATSON v. CHRISTIE** (1800), 2 Bos. & P. 224; 126 E. R. 1248.

**Annotations:—***Refd. The Lowther Castle* (1825), 1 Hag. Adm. 384; *Linford v. Lake* (1858), 3 H. & N. 276; *Watt v. Watt*, [1905] A. C. 115.

**h. —**—**]**—**ANDERSON v. MARSHALL** (1835), 13 Sh. (Ct. of Sess.) 1130.—**SCOT.**

**i. —**—**]**—**FALCONER v. COCHRAN** (1837), 15 Sh. (Ct. of Sess.) 891.—**SCOT.**

**l. Nominal damages.]—**An assault by a blow from a *sjambok* constitutes an *injuria* in respect of which, in the absence of justification, some damages should be awarded, even though no severe pain has been caused thereby.—**O'KELLY v. JAMIESON**, [1906] T. S. 822.—**S. AF.**

**m. Arrest before indorsement of warrant—Detention after.]—**A warrant for the arrest of pltf., who had made default in paying a fine on conviction for an infraction of the Liquor License law, was sent from an outlying county to a city. Before it was indorsed by a magistrate in the city pltf. was arrested there by two of defts., the chief constable & a detective & confined. Some hours after the arrest the

**708.** — From evidence on cross-examination of plaintiff's witness—Though no justification pleaded.]—*MOORE v. ADAM*, No. 712, *post*.

**709.** — Provocation to assault.]—*JUDGE v. BERKELEY* (1825), 7 C. & P. 371, n.; 173 E. R. 165.

**710.** — — — — —.]—A. having written a novel, B. published a libel on A. & his family in the form of a critique on the novel, for which A. beat him. B. brought an action for the assault & A. a cross action for the libel:—*Held*: in the action for the assault, the libel might be given in evidence in mitigation of damages, although it was the subject of another action; but that being so, deft. ought not to derive much advantage from it in diminishing the damages.—*FRASER v. BERKELEY* (1836), 7 C. & P. 621; 2 Mood. & R. 3; 173 E. R. 272, N. P.

*Annotations*:—*Reid*, *Thomas v. Powell* (1837), 7 C. & P. 807; *Pearson v. Lemaitre* (1843), 5 Man. & G. 700; *Linford v. Lake* (1858), 6 W. R. 515.

**711.** — Absence of intention to injure.]—If one of two persons fighting unintentionally strikes a third, he is answerable in an action for an assault, & the absence of intention can only be urged in mitigation of damages.—*JAMES v. CAMPBELL* (1832), 5 C. & P. 372; 172 E. R. 1015, N. P.

**712.** Directness & remoteness—Remote consequences—Special damage.]—(1) In an action for an assault, though deft. has not pleaded a justification, he may extract evidence in mitigation of damages, on the cross-examination of pltf.'s witnesses.

(2) Pltf. cannot give remote consequences in evidence as special damages.—*MOORE v. ADAM* (1816), 2 Chit. 198; *subsequent proceedings*, 5 M. & S. 156.

**713.** — — — — — Plaintiff turned out of train—Loss of racing glasses.]—Pltf. was travelling with other passengers in a carriage of a railway co., & on the tickets being collected there was found to be a ticket short. Pltf. was charged by the collector with being the defaulter, & on his refusing to pay the fare or leave the carriage, he was removed from the carriage by the officers of the co. without any unnecessary violence. It turned out that pltf. had a ticket, & he brought an action for the assault against the co., laying as special damage the loss of a pair of race-glasses, which he had left behind him in the carriage when he was removed. There was also a count in trover; but there was no evidence that the glasses had come to the possession of any of the co.'s servants:—*Held*: pltf. could not recover for the loss of the glasses.—*GLOVER v. LONDON & SOUTH WESTERN RY. CO.* (1867), L. R. 3 Q. B. 25; 37 L. J. Q. B. 57; 17 L. T. 139; 32 J. P. 39.

Damages against joint trespassers.]—See DAMAGES, Vol. XVII., pp. 162, 163, Nos. 619–644.

warrant was properly indorsed, & the detention of pltf. was continued until payment of the fine:—*Held*: the only damages recoverable by pltf. were for the trespass up to the time of the backing of the warrant.—*SCUTWICK v. HARE* (1894), 24 O. R. 528.—CAN.

n. Substantial damages.]—A man may recover substantial damages for an assault which has done him no physical harm whatever.—*STEWART v. STONERHOUSE*, [1926] 2 D. L. R. 683; [1926] 1 W. W. R. 929; 20 Sask. L. R. 459.—CAN.

o. Joint tort joint reparation.]—If a concert by two or more persons be proved to have been entered into

to assault another, & that person is assaulted, it is not necessary to show which of them inflicted the blow, all being equally liable in reparation.—*DANNERNAN v. FENWICKS* (1817), 1 Murr. 253.—SCOT.

p. — — — — —.]—*BEATSON v. DRYSDALE* (1819), 2 Murr. 151.—SCOT.

q. Competency of question as to character of pursuer.]—In damages for assault it is competent to ask if pursuer is a violent man.—*JAMIESON v. MAIN* (1830), 2 Sc. Jur. 159; 6 Murr. 117.—SCOT.

#### PART IV. SECT. 2, SUB-SECT. 2.

714. General rule.]—The detaining

### SECT. 2.—FALSE OR ILLEGAL IMPRISONMENT.

#### SUB-SECT. 1.—DISTINGUISHED FROM MALICIOUS PROSECUTION.

See MALICIOUS PROSECUTION, Vol. XXXIII., pp. 465–468, Nos. 1–19.

#### SUB-SECT. 2.—WHAT CONSTITUTES IMPRISONMENT.

**714. General rule.**—Any restraint upon the personal liberty, not warranted by law, is a false imprisonment.—*BRIDGETT v. COYNEY* (1827), 1 Man. & Ry. K. B. 211; 1 Man. & Ry. M. C. 1; 6 L. J. O. S. M. C. 42.

**715.** — — — — —.]—Deft., the owner of a beer-house, placed pltf. therein to carry on the business as his servant at weekly wages, with an agreement for a month's notice to determine the service. Having given him a week's notice, deft. made up the account & required pltf. to pay him the balance; & on pltf.'s refusal to accede to this request, on the ground that he had not received the stipulated month's notice, deft. brought in a superintendent & a sergeant of police, & one who, on pltf.'s attempting to go upstairs, refused to permit him to do so, & ultimately only allowed him to go accompanied by an officer. After some further altercation about the money, & pltf.'s again refusing to hand it over at the request of the superintendent, the latter asked deft. if he should take him: it did not appear what answer deft. made, but the officer took pltf. into custody, & entered a charge of embezzlement against him at the station house, & afterwards carried him before the magistrates, by whom he was discharged. In an action in the county ct. for the false imprisonment the judge told the jury that there were three questions for their consideration—(a) whether there was any imprisonment, (b) by whom it was committed, (c) whether there was any legal ground for it. Upon (a), he told them that "to constitute an imprisonment, it was not necessary that the person should be locked up within four walls, but that, if he was restrained in his freedom of action by another, that was an act of imprisonment, & that the way in which pltf. had been constrained in his own house & the restraint put upon his person by refusing him permission to leave the room & go upstairs in his own house, was in itself an imprisonment, independent of his being conveyed before a magistrate"; upon (b), "that, if they found deft. was the moving party in causing the imprisonment, he was responsible for it"; & upon (c), "that pltf., as tenant or as lawful occupier, under an agreement not then terminated, of the premises was not legally liable to be ejected by compulsion & without notice, & that, if he refused to leave the house, deft. could only eject him by adopting the proper legal proceedings to obtain possession, & that there was no evidence whatever to support

of a person in a particular place, or the compelling him to go in a particular direction by force of an exterior will overpowering or suppressing in any way his own voluntary action, is an imprisonment on the part of the person exercising that exterior will.—*PARAMAKSAM NARASAYA PANTULU v. STUART* (1865), 2 Mad. 396.—IND.

**714 ii.** — — — — —.]—To support an action for false imprisonment, nothing short of actual detention & complete loss of freedom is sufficient.—*MAHAMMAD YUSUFUDDIN v. SECRETARY OF STATE FOR INDIA* (1903), L. L. R. 30 Cal. 372; 7 C. W. N. 729; L. R. 30 Ind. App. 154.—IND.

**Sec. 2.—False or illegal imprisonment: Sub-sect. 2.]**

or justify the charge of embezzlement." The jury having found for pltf. :—*Held*: although the latter part of the summing-up, which seemed to assume that there was a tenancy or quasi tenancy, was somewhat inaccurate, it did not amount to a misdirection in point of law.—*WARNER v. RIDDIFORD* (1858), 4 C. B. N. S. 180; *Saund. & M.* 225; 140 E. R. 1052.

*Annotations*:—*Refd.* *Meering v. Grahame-White Aviation Co.* (1919), 122 L. T. 44. *Mentd.* *Irving v. Askew* (1870), 39 L. J. Q. B. 118.

**716.** ———.]—*MEERING v. GRAHAM-WHITE AVIATION CO., LTD.*, No. 784, *post*.

**717. Necessity for restraint.]**—Averment in an action for a malicious arrest, that deft. detained plt. until he found bail. If some detention be proved, it is sufficient to support the action, although no bail was put in.—*BRISTOW v. HEYWOOD* (1815), 1 Stark. 48; 4 Camp. 213; 171 E. R. 397, N. P.

*Annotations*:—*Mentd.* *Gadd v. Bennett* (1818), 5 Price, 540; *Webb v. Hill* (1828), 3 C. & P. 485; *Drummond v. P'gou* (1835), 2 Scott, 228.

**718.** ———.]—In trespass for false imprisonment, proof must be given of circumstances from which the judge & jury may decide whether there was or was not a restraint or detention of the person; & it is not enough for witnesses to swear that they considered pltf. was in custody, & thought that he was under restraint; nor is it enough to show that deft., at a police office, stood before pltf. & said, "You cannot go away till the magistrate comes," if it appears that he relinquished that attitude, & went to another part of the office before pltf. had made any attempt to depart.—*CANT v. PARSONS* (1834), 6 C. & P. 504; 172 E. R. 1339, N. P.

**719.** ——— **Restraint must be total.]**—An action for false imprisonment will not lie against a man for fastening one of two doors in a room in which A. is, though A. cannot go through the other without trespassing.—*WRIGHT v. WILSON* (1699), 1 Ld. Raym. 739; 91 E. R. 1394.

**720.** ———.]—Pltf., attempting to pass in a particular direction, was obstructed by deft., who prevented him from going in any direction but one, not being that in which he had endeavoured to pass:—*Held*: no imprisonment. This, whether pltf. had or had not a right to pass in the first mentioned direction.—*BIRD v. JONES* (1845), 7 Q. B. 742; 15 L. J. Q. B. 82; 5 L. T. O. S. 406; 10 J. P. 4; 9 Jur. 870; 115 E. R. 668.

*Annotations*:—*Consd.* *Syed Mahamad Yusuf-ud-Din v. Secretary of State for India in Council* (1903), 19 T. L. R. 498; *Herd v. Weardale Steel, Coal & Coke Co.*, [1913] 3 K. B. 771. *Refd.* *Warner v. Riddiford* (1858), 4 C. B. N. S. 180; *Meering v. Grahame-White Aviation Co.* (1919), 122 L. T. 44.

**721.** ——— **Whether plaintiff must be aware of restraint.]**—Deft., a schoolmaster, improperly, & under a claim for money due for schooling, refused to allow the mother of an infant scholar to take her son home with her, & the son was, though

frequently demanded by the mother, kept at school during a part of the holidays, but there was no proof that the infant knew of the demand or denial, or that any restraint had been put upon him; an action of trespass for assault & false imprisonment having been brought by the infant:—*Held*: it was not maintainable.—*HERRING v. BOYLE* (1834), 1 Cr. M. & R. 377; 6 C. & P. 496; 4 Tyr. 801; 3 L. J. Ex. 344; 140 E. R. 1126, N. P.

**722.** ———.]—*MEERING v. GRAHAM-WHITE AVIATION CO., LTD.*, No. 784, *post*.

**723. What amounts to restraint—Whether words sufficient.]**—*WILLIAMS v. JONES*, No. 592, *ante*.

**724.** ———.]—*HOMER v. BATTYN* (1739), Bull. N. P. 62.

*Annotations*:—*Apld.* *Grainger v. Hill* (1838), 1 Arn. 42. *Consd.* *Bird v. Jones* (1845), 7 Q. B. 742. *Refd.* *Nicholl v. Darley* (1828), 2 Y. & J. 399.

**725.** ———.]—In order to constitute an arrest it is not necessary that there should be actual contact of deft.'s person.—*GRAINGER v. HILL* (1838), 4 Bing. N. C. 212; 1 Arn. 42; 5 Scott, 561; 7 L. J. C. P. 85; 132 E. R. 769; *sub nom.* *GRANGER v. HILL*, 2 Jur. 235.

*Annotations*:—*Apld.* *Warner v. Riddiford* (1858), 4 C. B. N. S. 180. *Refd.* *Powell v. Hoyland* (1851), 6 Exch. 67. *Mentd.* *Do Medina v. Grove* (1847), 10 Q. B. 172; *Parton v. Hill* (1864), 4 New Rep. 103; *Assets Development Co. v. Close* (1901), 46 Sol. Jo. 12; *Giblan v. National Amalgamated Labourers' Union of Great Britain & Ireland*, [1903] 2 K. B. 600.

**726.** ——— **Plaintiff given in charge—Refusal to take into custody.]**—The merely giving a person in charge to a peace officer, where the officer never takes the person of the deft. into custody, is not an imprisonment which will support an action.—*SIMPSON v. HILL* (1705), 1 Esp. 431; 170 E. R. 409, N. P.

**727.** ———.]—A. telling a policeman to take charge of B. is the same as his telling the policeman to take B. into custody, & is sufficient to support an action for false imprisonment by B. against A.—*WHEELER v. WHITING* (1840), 9 C. & P. 262; 173 E. R. 828, N. P.

**728.** ——— **Warrant shown to plaintiff—Plaintiff proceeding voluntarily to police station.]**—If a magistrate's warrant be shown by the constable who has the execution of it to the person charged with an offence, & he thereupon, without compulsion, attend the constable to the magistrate, & after examination be dismissed, it seems this is not such an arrest as will support trespass & false imprisonment.—*ARROWSMITH v. LE MESURIER* (1806), 2 Bos. & P. 211; 4 Dow. & Ry. M. C. 538, n.; 11 Moore, C. P. 440, n.; 127 E. R. 605.

*Annotations*:—*Apld.* *Berry v. Adamson* (1827), 6 B. & C. 528. *Consd.* *Wood v. Lane* (1834), 6 C. & P. 774; *Brown v. Hobson* (1845), 6 L. T. O. S. 194. *Refd.* *Warner v. Riddiford* (1858), 4 C. B. N. S. 180. *Refd.* *Hates v. Pilling* (1834), 4 Tyr. 231; *Brown v. Chapman* (1848), 11 L. T. O. S. 453.

**729.** ——— **Charge made to police officer—Plaintiff going to station on instruction from officer.]**—A constable directed by deft. to take pltf. on a charge of felony, told the latter, "you

**717 i. Necessity for restraint.]**—The right violated by false imprisonment is freedom of locomotion. The gist of the offence is a restraint whereby pltf. is hindered & prevented from going wherever he pleases.—*MACK SING v. SMITH* (1908), 1 Sask. L. R. 454; 9 W. L. R. 28.—*CAN.*

**719 i. Restraint must be total.]**—*BALMAIN NEW FERRY CO., LTD. v. ROBERTSON* (1906), 4 C. L. R. 379.—*AUS.*

**719 ii.** ———.]—To support an action for false imprisonment there must be actual detention (not necessarily forcible, as long as there is

assumption of control) & complete loss of freedom.—*FERGUSON v. JENNEN, O'BRIEN v. JENSEN* (Sask.), [1920] 2 W. W. R. 1034; 53 D. L. R. 616.—*CAN.*

**719 iii.** ———.]—Holding a man by the sleeve with the thumb & finger, or even laying the hand on his shoulder or catching him by the shoulder does not amount to false imprisonment, where it is not said that he could not have got away if he had desired to do so. There must be some restraint of pltf.'s liberty.—*MACINTOSH v. COHEN* (1904), 24 N. Z. L. R. 625.—*N.Z.*

**723 i. What amounts to restraint—**

**Whether words sufficient.]**—There may be an arrest without imposition of hands provided there be a constraint on a person's will.—*GREENWOOD v. ITAN* (1846), 1 Legge, 275.—*AUS.*

**728 i.** ——— **Warrant shown to plaintiff—Plaintiff proceeding voluntarily to police station.]**—It is not necessary to the execution of a warrant of commitment by a constable, that he should actually lay hands on or physically interfere with the person to be arrested. It is an arrest if the person to be arrested asks for & peruses the warrant & agrees to accompany the constable; &c., *semble*, it is sufficient

must go with me," upon which pltf. without further compulsion attended the constable: *Held*: this was a sufficient imprisonment to support an action, & pltf. failing in proving the imprisonment as laid, might recover on the count for a common assault.—*Pocock v. Moore* (1825), Ry. & M. 321; 171 E. R. 1035, N. P.

**730.** ———— *J.*—*CHINN v. MORRIS*, No. 862, *post*.

**731.** ———— *Plaintiff going to station voluntarily.*—In an action of trespass & false imprisonment for causing a person to be taken to a police station house, if it appear that the going proceeded originally from pltf.'s own will, deft. will be entitled to a verdict on either "Not guilty" or "leave & licence," pleaded; but pltf. will not be deprived of his right to recover damages, if it appear that, being acted upon by deft.'s having made a charge of felony against him in the presence of a policeman, he went voluntarily with the policeman to the station house for the purpose of meeting the charge.—*PETERS v. STANWAY* (1835), 6 C. & P. 737; 172 E. R. 1442, N. P.

**732.** ———— *No further action by defendant.*—There was evidence to show that deft. upon a suspicion of felony had not merely made a complaint & charge to the police upon which they had of themselves acted & taken pltf. into custody, in which case trespass for false imprisonment would not have been maintainable, but deft. had expressly directed the police to take pltf. into custody, which was an imprisonment by deft. for which trespass would lie (*LORD CAMPBELL, C.J.*).—*CHIVERS v. SAVAGE* (1855), 5 E. & B. 697; Saund. & M. 115; 25 L. J. Q. B. 85; 26 L. T. O. S. 148; 20 J. P. 451; 2 Jur. N. S. 137; 4 W. R. 117; 119 E. R. 611.

*Annotation* :—*Apld.* *Brandt v. Craddock* (1858), 27 L. J. Ex. 314.

**733.** ———— *Direction to take plaintiff into custody.*—*CHIVERS v. SAVAGE*, No. 732, *ante*.

**734.** ———— *Statement by police officer that he holds a writ—Not followed by arrest.*—An officer employed to arrest a man goes with his warrant to his house, & tells him that he has a writ against him. He does not actually take him into custody, or touch him, but takes his word that he will attend & give bail in a day or two. He then goes away receiving a gratuity from the party against whom he had the writ, & goes at his desire to his attorney, & desires him to put in bail which is accordingly done. This is no arrest.—*GEORGE v. RADFORD* (1828), 3 C. & P. 464; Mood. & M. 244; 173 E. R. 1146, N. P.

**735.** ———— *Impersonation of sheriff's officer.*—Where an attorney's clerk accompanied a creditor to his debtor, & pretended that he was a sheriff's officer, & in consequence, the debtor went away with them not willingly, but supposing they had power to compel him:—*Held*: it was a sufficient arrest to maintain trespass for false imprisonment, although no writ was produced; & it did not distinctly appear that either the creditor or the clerk touched the debtor at all.—*WOOD v. LANE* (1834), 6 C. & P. 774; 172 E. R. 1458, N. P.

**736.** ———— *Requesting party to attend & give bail.*—Where a sheriff's officer, to whom a warrant upon a writ against A. was delivered, sent a message to A., & asked him to fix a time to call

& give bail, & A. accordingly fixed a time, attended, & gave bail:—*Held*: this was not an arrest, & an action for a malicious arrest would not lie against the party suing out the writ, although he had no cause of action.—*BERRY v. ADAMSON* (1827), 6 B. & C. 528; 9 Dow. & Ry. K. B. 558; 108 E. R. 546.

*Annotations* :—*Apld.* *Reece v. Griffiths* (1829), 5 Man. & Ry. K. B. 120; *Amor v. Blofield* (1832), 9 Bing. 91. *Refd.* *George v. Radford* (1828), 3 C. & P. 464; *Bates v. Pilling* (1834), 2 Cr. & M. 374; *Brown v. Chapman* (1848), 6 C. B. 365.

**737.** ———— *Confinement to house.*—In an action against the Governor of Gibraltar, for assault & false imprisonment, it was proved that a party of soldiers, under the command of his military secretary, surrounded pltf.'s house, & that while a search was making in the adjoining house for a Spaniard who was suspected to be concealed there, pltf., in attempting to leave his house, was prevented from so doing by a sentinel placed at the door, who compelled him to return. The jury having returned their verdict for pltf.:—*Held*: they were warranted in coming to the conclusion that deft. had ordered the search, & the act complained of was a necessary consequence of the deft.'s orders.—*GLYNN v. HOUSTON* (1841), 2 Man. & G. 337; 4 State Tr. N. S. App. A, 1368; 2 Scott, N. R. 548; 5 Jur. 195; 133 E. R. 775.

*Annotation* :—*Refd.* *Scott v. Seymour* (1869), 10 W. R. 739.

**738.** ———— *Mere touch sufficient.*—To effect a good arrest it is not necessary to have the power of actual capture.

Where a bailiff put his hand through a broken pane in a window of pltf.'s dwelling-house & touched him:—*Held*: there was a good arrest, the window not having been broken by the bailiff.—*SANDON v. JERVIS* (1859), 12 B. & E. 942; 28 L. J. Ex. 156; 32 L. T. O. S. 375; 5 Jur. N. S. 860; 7 W. R. 290; 120 E. R. 760, Ex. Ch.

*Annotations* :—*Consd.* *Thomas v. Rawlings* (1859), 28 L. J. Ex. 347. *Distd.* *Nash v. Lucas* (1867), L. R. 2 Q. B. 590.

**739.** ———— *Accused on bail.*—Where a prisoner has been arrested under a warrant on a criminal charge & is released on bail pending the hearing of the charge, & the warrant is subsequently set aside, the time for bringing an action for false imprisonment runs from the date of the release on bail, & not from the date of the warrant being set aside.—*SYED MAHAMAD YUSUF-UD-DIN v. SECRETARY OF STATE FOR INDIA IN COUNCIL* (1903), 19 T. L. R. 496, P. C.

**740.** ———— *Passenger prevented from leaving wharf without paying authorised toll.*—In an action for damages for assault & false imprisonment it appeared that pltf. had contracted with defts. to enter their wharf & stay there till the boat should start & then be taken by the boat to the other side. No breach of defts.' undertaking was alleged, but pltf. after entry changed his mind & desired to effect an exit from their wharf without payment of the prescribed toll for exit, & was for a time forcibly prevented:—*Held*: he ought to have been nonsuited. The toll imposed was reasonable & defts. were entitled to resist a forcible evasion of it.—*ROBINSON v. BALMAIN NEW FERRY CO., LTD.*, [1910] A. C. 295; *sub nom.* *ROBERTSON v. BALMAIN NEW FERRY CO.*, 79 L. J. P. C. 84; 26 T. L. R. 143, P. C.

*Annotation* :—*Apld.* *Herd v. Weardale Steel, Coal & Coke Co.*, [1915] A. C. 67.

If he agrees to accompany the constable on his statement that he has the warrant in his possession.—*ALDERICH v. HUMPHREY & YOUNG* (1898), 20 O. R. 427.—*CAN.*

*r.* ———— *Statement by police officer that he holds warrant—Plaintiff volun-*

*tarily going to justice & allowed to go away without bail—Discharge on return next day.*—Deft., as a justice, issued a warrant against the pltf., upon a complaint for detaining the clothes of K. Pltf., on being told by the constable that he had the warrant,

went alone to deft., heard the evidence, was allowed to go away without giving bail, & returned the next day, when he was discharged:—*Held*: no imprisonment was proved.—*THORPE v. OLIVER* (1860), 20 U. C. R. 264.—*CAN.*

*t.* ———— *Plaintiff proceeding*



**SECT. 2.—False or illegal imprisonment: Sub-sects. 2, 3 & 4, A. (a).]**

**741. — Miner not allowed to leave mine till end of shift—Refusal by miner to work.]—**A miner descended a coal mine at 9.30 a.m. for the purpose of working therein for his employers, the owners of the colliery. In the ordinary course he would be entitled to be raised to the surface at the conclusion of his shift, which expired at 4 p.m. On arriving at the bottom of the mine the miner was ordered to do certain work which he wrongfully refused to do, & at 11 a.m., he requested to be taken to the surface in a lift, which was the only means of egress from the mine. His employers refused to permit him to use the lift until 1.30 p.m. although it had been available for the carriage of men to the surface from 1.10 p.m. & in consequence he was detained in the mine against his will for twenty minutes. In respect of this detention the miner sued his employers for damages for false imprisonment:—*Held*: on the principle of *volenti non fit injuria*, the action could not be maintained.—*HERD v. WEARDALE STEEL, COAL & COKE CO., LTD.*, [1915] A. C. 67; 84 L. J. K. B. 121; 111 L. T. 600; 30 T. L. R. 620, II. L.

**742. Continuing trespass—Detention exceeding lawful requirements.]—**Where in an action of trespass for an assault & false imprisonment, the declaration contained two counts, & deft. pleaded, (a) the general issue: & (2) that he & W. having justified as bail for pltf., in an action then pending, he arrested pltf., to render him in discharge of the recognisance, & detained him in custody, until he had satisfied the demand for which the latter action was brought; & pltf. replied *de injuria*: & it appeared in evidence, that deft., in addition to detaining pltf. until he had satisfied such demand, caused him to be detained an hour longer, & until he had given a security for the expenses incurred by deft.'s becoming bail:—*Held*: this was one continuing trespass & imprisonment, & therefore pltf. ought either to have newly assigned or replied the excess, in order to entitle him to recover for the additional detention or imprisonment which was unjustifiable or illegal.—*LAMBERT v. HODGSON* (1823), 1 Bing. 317; 8 Moore, C. P. 326; 1 L. J. O. S. C. P. 114; 130 E. R. 128.

**SUB-SECT. 3.—RESPONSIBILITY OF DEFENDANT.**

**743. Effect of intervening judicial act.]—***BENNIS v. GUYLDLEY* (1618), Cro. Jac. 505; 79 E. R. 431.

**744. —]**Trespass will not lie against a party who lays a complaint before a magistrate on a subject-matter over which he has a general

voluntarily to police station.]—*ALDERICH v. HUMPHREY & YOUNG* (1898), 29 O. R. 427.—*CAN.*

**a. — Submission to process—& actual confinement.]—***WILSON v. BRECKER* (1861), 11 C. P. 268.—*CAN.*

**b. — Directing bailiff to drive to gaol on refusal of plaintiff to settle.]—***CONWAY v. SHIBLY* (1876), 39 U. C. R. 519.—*CAN.*

**c. — Workman in factory quitting work before end of day—Gate of factory locked—Refusal of employer to give facilities for leaving factory.]—***BURNS v. JOHNSTON*, [1917] 2 I. R. 137.—*IR.*

**PART IV. SECT. 2, SUB-SECT. 3.**

**743.1. Effect of intervening judicial act.]—**Procuring, commanding, aiding or assisting in a trespass makes a person a trespasser; & it affords no defence to one who has been instru-

mental in procuring or promoting the imprisonment of another under a warrant of a magistrate, that he was merely the legal adviser of the magistrate, the imprisonment itself being illegal.—*THOMPSON v. HATCH* (1844), 4 N. B. R. (2 Kerr) 425.—*CAN.*

**743 ii. —]***WATSON v. ROBERTS & HARDING* (1848), 6 N. B. R. (1 All.) 108.—*CAN.*

**743 iii. —]***BALBHADDAR PANDE v. BASUO PANDE* (1906), 1 L. R. 29 All. 44.—*IND.*

**743 iv. —]***DICKSON v. CAFES, STUART & TYRRELL* (1854), 5 L. C. L. R. 182; 7 Ir. Jur. 165.—*IR.*

**743 v. —]**Where an imprisonment took place by virtue of a warrant signed & issued by a magistrate:—*Held*: such imprisonment could not be regarded as an act of false imprisonment.—*LEFPAHL v. DREDGE*, [1910] C. P. D. 452; 20 C. T. R. 335.—*S. AF.*

jurisdiction, & the magistrate thereupon grants a warrant, although the particular case is one in which the magistrate had no jurisdiction.—*WEST v. SMALLWOOD* (1838), 6 Dowl. 580; 3 M. & W. 418; 1 Horn & H. 117; 7 L. J. Ex. 144; 2 J. P. 251; 2 Jur. 328; 150 E. R. 1208.

*Annotations:—**Reid, Re Martin, Ex p. Sandau* (1846), 7 L. T. O. S. 133; *Brown v. Chapman* (1848), 6 C. B. 365; *Eggington v. Lichfield Corpn* (1855), 5 E. & B. 100; *Austin v. Dowling* (1870), L. R. 5 C. P. 534.

**745. —]**A party who merely originates a suit by stating his case to a ct. of justice is not guilty of trespass though the proceedings should be erroneous or without jurisdiction (*LORD DENMAN, C.J.*).—*CARRATT v. MORLEY* (1841), 1 Q. B. 18; 1 Gal. & Dav. 275; 10 L. J. Q. B. 259; 6 Jur. 259; 113 E. R. 1036.

*Annotations:—**Dirtd. Coomer v. Latham* (1847), 16 M. & W. 713. *Consd. R. v. Davies* (1861), 8 Cox, C. C. 486; *Pease v. Chaytor* (1863), 3 B. & S. 620. *Apld. Saunders v. Swansea Finance Co. & Home* (1905), 21 T. L. R. 317. *Reid, Green v. Elgie* (1843), 5 Q. B. 89; *Dews v. Ritley* (1851), 11 C. B. 434; *London Corpn. v. Cox* (1867), L. R. 2 H. L. 239; *Aspey v. Jones* (1884), 48 J. P. 613.

**746. —]**If an individual prefers a complaint to a magistrate, & procures a warrant to be granted, upon which the accused is taken into custody, complainant is not liable in trespass for that imprisonment; & that even although the magistrate had no jurisdiction. Pltf. voluntarily went before a police magistrate to meet a charge of embezzlement which was there about to be made against him by deft.: the magistrate declining to entertain the matter, unless a charge were formally made, deft. said: "Well, then, I charge him with embezzling 30s.": pltf. was then ordered by one of the constables in attendance to go into the dock, the charge was gone into, & the pltf. held to bail:—*Held*: the act of deft. amounted to no more than calling upon the magistrate to exercise his jurisdiction, & consequently, he was not liable to an action of trespass, for the imprisonment of pltf.—*BROWN v. CHAPMAN* (1848), 6 C. B. 365; 3 New Mag. Cas. 14; 17 L. J. C. P. 329; 11 L. T. O. S. 453; 12 Jur. 799; 136 E. R. 1292.

*Annotation:—**Distd. Warner v. Riddiford* (1858), 4 C. B. N. S. 180.

**747. —]**Trespass for an assault & false imprisonment. Deft. had given pltf. into custody & had him taken to a police office on a charge of felony. The magistrate heard the charge & remanded the prisoner. On a subsequent examination he was discharged, it being then discovered that the charge had been made under a mistake. The declaration charged the carrying pltf. in custody before a magistrate, & the remand, as distinct acts of trespass; & the jury gave damages for both:—*Held*: damages could not be given for

d. *Defendants employing special constable.]—*C. was a special constable appointed by defts., who were wharfingers & shipowners, for the protection of their property & the keeping of order on their wharf. He was paid by defts. C. arrested pltf. & took him into custody on a false charge of having stolen goods from defts.' wharf. In an action by pltf. against defts. for false imprisonment:—*Held*: defts. liable for the acts of their special constable.—*PROCKSTAYNE v. SMITH* (1882), 3 N. S. W. L. R. (L.) 275.—*AUS.*

**e. Arrest taking place & writ set aside for irregularity in an affidavit.]—**Pltf. was arrested on a ca. sa. issued by defts. on an order which, together with the writ, was subsequently set aside because of an irregularity in the jurat of one of the affidavits on which the order was granted:—*Held*: an action for false imprisonment would not lie.



the remand, which was the judicial act of the magistrate, & therefore not the subject of an action of trespass against deft.—*LOCK v. ASHTON* (1848), 12 Q. B. 871; 3 New Mag. Cas. 70; 18 L. J. Q. B. 76; 12 L. T. O. S. 241; 13 Jur. 167; 12 J. P. Jo. 788; 116 E. R. 1097.

*Annotations:—**Distd. Parker v. Plumer & Burdon* (1849), 14 L. T. O. S. 451. *Apd. Harnett v. Bond*, [1924] 2 K. B. 517. *Refd. Welley v. McConnell* (1849), 19 L. J. Q. B. 162.

748. —[.]—*PARKER v. PINNER & BURDON* (1849), 14 L. T. O. S. 451, N. P.

749. —[.]—Deft. having missed two pairs of horse clippers from his stables, sent for a police constable & said, "I have had two pairs of clippers stolen from me, & they were last seen in the possession of Danby." Thereupon the constable, having made inquiry, & without communicating with deft., arrested pltf., who was taken before the magistrate & committed for trial:—*Held*: there was no evidence that deft. was actively instrumental in putting the criminal law in force, & therefore he was not the prosecutor, & not liable in an action for false imprisonment & malicious prosecution.—*DANBY v. BEARDSLEY* (1880), 43 L. T. 603.

750. —[.]—*SAUNDERS v. SWANSEA FINANCE CO., LTD. & HOME* (1905), 21 T. L. R. 317, C. A. Acts of agent.]—*See AGENCY*, Vol. I., pp. 602–604, Nos. 2322–2330, 2337.

Acts of servant.]—*See MASTER & SERVANT*, Vol. XXXIV., pp. 135, 136, Nos. 1044–1055; *CARRIERS*, Vol. VIII., pp. 115–117, Nos. 771–783.

Acts of wife.]—*See HUSBAND & WIFE*, Vol. XXVII., p. 215, No. 1875.

#### SUB-SECT. 4.—LIABILITY OF PARTICULAR PERSONS.

##### A. Private Persons.

###### (a) In General.

751. Giving information leading to arrest.]—If A. states positively to the commander of a press gang that B. is liable to the impress service, who in truth is not so, & B. in consequence of this information, is impressed, A. is liable to an action of trespass & false imprisonment at the suit of B.—*FLEWSTER v. ROYLE* (1808), 1 Camp. 187, N. P.

*Annotations:—**Expld. Gosden v. Elphick* (1849), 4 Exch. 445. *Refd. de Chivers v. Savage* (1855), 26 L. T. O. S. 148; *Grinham v. Willey* (1859), 4 H. & N. 496.

752. —[.]—A party who, seeing a man in

custody of a constable for a supposed offence, points out another as the real offender, but does not direct the constable to take him into custody, is not liable in trespass if the constable does illegally take him into custody.—*GOSDEN v. ELPHICK* (1849), 4 Exch. 445; 19 L. J. Ex. 9; 7 Dow. & L. 194; 154 E. R. 1287; *sub nom. GOSDEN v. ELPHICK*, *VASS v. SAME*, *MAYNARD v. SAME*, 14 L. T. O. S. 157; 14 J. P. 38; 13 Jur. 989.

*Annotation:—**Refd. Gribham v. Willey* (1859), 28 L. J. Ex. 242.

753. —[.]—*HUDSON v. HOWARD* (1837), 1 Jur. 658.

754. Giving in charge & assisting constable in arrest.]—The person giving another in charge for a felony, & assisting a constable in the arrest, is not entitled to an acquittal on the general issue in trespass brought against him together with the constable.—*HOUGH v. MARCHANT & EDWARDS* (1830), Mood. & M. 510, N. P.

755. Effect of signing charge sheet.]—A felony having been committed, deft. sent for a policeman, who, on deft.'s information, & on inquiries made by himself, arrested pltf. Deft. accompanied the policeman to the station & signed the charge sheet:—*Held*: deft. was not liable in an action of trespass.—*GRINHAM v. WILLEY* (1859), 4 H. & N. 496; 28 L. J. Ex. 212; 33 L. T. O. S. 110; 23 J. P. 280; 5 Jur. N. S. 444; 7 W. R. 463.

*Annotations:—**Distd. Harris v. Dignam* (1859), 1 L. T. 169. *Apd. Edwards v. Annett* (1887), 3 T. L. R. 671. *Refd. Austin v. Dowling* (1870), 1 L. R. 5 C. P. 534; *Rowe v. London Planeforte Co.* (1876), 34 L. T. 459; *Swell v. National Telephone Co.* [1907] 1 K. B. 557. *Mentd. Lees v. Smith* (1860), 2 L. T. 252.

756. —[.]—That a person signed the charge sheet on an arrest is strong, though not conclusive, evidence that he was a party to it. An article was stolen out of a back room upstairs, it being missed during the absence of the only servant who knew where it was, & had gone out openly, leaving doors & windows open, the family being in the back garden:—*Held*: no reasonable cause for her arrest, & her master having gone with the owner to the police & signed the charge sheet, & a witness being allowed to give the only statement of what deft. had read to her about pltf.'s arrest, held, liable for the false imprisonment.—*HARRIS v. DIGNAM* (1859), 1 F. & F. 688; 29 L. J. Ex. 23; 1 L. T. 169.

757. —[.]—The signing of a charge sheet, standing alone, is not evidence of anything directly

—*MOCK SING v. DAT* (1902), 2 S. R. N. S. W. 333; 19 N. S. W. N. 230. —*AUS.*

f. Policeman making arrest.—*Admissibility of evidence.*]—*FOLLEY v. TUCKER* (1857), 12 N. B. R. (1 Han.) 52.—*CAN.*

g. Execution for lesser amount than judgment.—*Imprisonment after refusal of tender.*]—*CARMAN v. WILSON* (1864), N. B. Dig. 373.—*CAN.*

h. Arrest by police in excess of authority.—*Liability of corporation.*]—*GRESHAM v. SYDNEY MINES TOWN COUNCIL* (1894), 27 N. S. R. (15 R. & G.) 320.—*CAN.*

#### PART IV. SECT. 2, SUB-SECT. 4.—A. (a).

751 i. Giving information leading to arrest.]—A party who merely sues out a process & delivers it to an officer to execute, is not liable as a trespasser.—*CARTER v. PURRINGTON* (1851), 7 N. B. R. (2 All.) 226.—*CAN.*

751 ii. —[.]—The mere laying an information or originating a suit or proceeding before a competent judicial authority, does not render the com-

plainant liable in trespass for what is done, even if the proceedings should be erroneous or without jurisdiction.—*SMITH v. EVANS* (1863), 13 C. P. 60.—*CAN.*

751 iii. —[.]—A person is not liable to an action for false imprisonment who merely lodges a complaint before a justice, & leaves the proceedings to be taken in the discretion of the magistrate.—*BROWN v. MOORE* (1874), 15 N. B. R. (2 P. G.) 407.—*CAN.*

751 iv. —[.]—A party applying to a magistrate for a warrant to arrest another for an alleged offence, is deemed only to appeal to the magistrate to exercise his jurisdiction, & is not liable in trespass for an arrest under the warrant.—*KINGSTON v. WALLACE* (1886), 25 N. B. R. 573.—*CAN.*

751 v. —[.]—*ANDERSON v. WILSON* (1894), 25 O. R. 91.—*CAN.*

751 vi. —[.]—The laying of an information by deft. against pltf. & the subsequent pointing out by deft. of pltf. for the purpose of identification to the policeman who is about to wrongfully arrest him is not sufficient to make deft. liable for false imprison-

ment.—*ELLIOTT v. WINKENWEDER*, [1920] 1 W. W. R. 429; 51 D. L. R. 716; 33 Can. Crim. Cas. 389; 13 Alta. L. R. 133.—*CAN.*

754 i. Giving in charge & assisting constable in arrest.]—A party who sues out a process & delivers it to an officer to execute gives special direction to the officer or takes part in the arrest, he is liable in trespass unless there is a regular judgment to authorise execution.—*CARTER v. PURRINGTON* (1851), 7 N. B. R. (2 All.) 226.—*CAN.*

754 ii. —[.]—*HUNT v. MCARTHUR* (1865), 24 U. C. R. 254.—*CAN.*

754 iii. —[.]—*STEPHENS v. STEPHENS* (1874), 24 C. P. 424.—*CAN.*

754 iv. —[.]—If a party applying to a magistrate for a warrant to arrest another for an alleged offence interferes in the exercise of the ministerial powers under the warrant, he will be liable in trespass.—*KINGSTON v. WALLACE* (1886), 25 N. B. R. 573.—*CAN.*

754 v. —[.]—*GRIMES v. MILLER* (1896), 23 A. R. 764.—*CAN.*

754 vi. —[.]—*RINI v. CARR*, [1921] E. D. L. 239.—*B. AF.*

k. Arrest without warrant.—*Join*

**Sect. 2.—False or illegal imprisonment: Sub-sect. 4, A. (a) & (b).]**

causing the imprisonment of the person charged, & will not support an action for false imprisonment against the person who signs.—*SEWELL v. NATIONAL TELEPHONE CO., LTD.*, [1907] 1 K. B. 557; 76 L. J. K. B. 196; 96 L. T. 483; 23 T. L. R. 226; 51 Sol. Jo. 207, C. A.

**758. Arrest without warrant—Retaking prisoner.]**—*WARD v. DUNCE* (1734), 2 Barn. K. B. 453; 94 E. R. 614.

**759. — Arrest of trespasser—Detention until next day.]**—(1) In an action for false imprisonment the deft. justified under 1 Geo. 4, c. 56, commonly called the petty trespass Act, as the owner of land on which pltf. was trespassing. It was held that to make out his justification he must give positive proof of actual damage being done, so as to enable the jury to decide on the quantum of it; & that the jury were not to presume damage from the mere fact of a trespass being committed.

(2) Because a man is a wilful trespasser another has no right to take him up & keep him in custody from Sunday till Monday morning (*BEST, C.J.*).—*BUTLER v. TUNLEY* (1827), 2 C. & P. 585; *Mood. & M. 54*; 172 E. R. 266.

*Annotation:—As to (1) Rehd. Gardner v. Mansbridge* (1887), 19 Q. B. D. 217.

**760. — Trespass not in fact committed.]**—An Act of Parliament having passed to authorise a railway co. to enter upon certain land, A. was employed by the co. to enter thereon before the conditions of the Act were complied with, of which fact A. was ignorant. The owner of the land apprehended A. under 7 & 8 Geo. 4, c. 30, s. 24, & caused him to be fined before a magistrate. The jury having found that the apprehension of A. was under a *bona fide* & reasonable belief that he was an offender under the Act:—*Held*: notwithstanding that, the owner was liable in an action of trespass at the suit of A. because he had not in fact committed an offence under the Act.—*HARRINGTON v. MOORE* (1848), 12 J. P. 629.

**761. — Misdemeanour.]**—*MATHEWS v. BIDDULPH*, No. 778, *post*.

**762. — Possession of stolen goods.]**—*DAVIS v. SWIFT* (1843), 1 L. T. O. S. 253; 7 J. P. 672.

**763. — Forcible entry.]**—Pltf. was tenant to deft., with a covenant in the lease for the payment of rates, & a proviso for re-entry, on non-payment. The rates were in arrear; deft. entered in pltf.'s absence, & put locks on the doors; pltf., on his return, broke the locks, & was given into custody. In trespass for false imprisonment:—*Held*: deft. was lawfully in possession of the premises, & he was authorised by Metropolitan Police Act, 1839 (c. 47), ss. 54, 66, to give pltf. into custody.—*DAVIS v. BURRELL & LANE* (1851), 17 L. T. O. S. 56, N. P.; *subsequent proceedings*, 10 C. B. 821.

**764. — Malicious damage to property.]**—*STEWART v. PERRY* (1886), 3 T. L. R. 164.

**For felony.]**—*See* Sub-sect. 4, A. (b), *post*.  
**Breach of the peace.]**—*See* Sub-sect. 4, A. (c), *post*.

**Statutory provisions.]**—*See* CRIMINAL LAW, Vol. XIV., pp. 183–185, Nos. 1623–1636.

*arrest by defendant & constable.]*—*ROBTAILE v. MASON & YOUNG* (1903), 9 B. C. R. 499.—*CAN.*

*1. Charge sheet not signed.]*—*GREEN v. McEVoy* (1904), 4 S. R. N. S. W. 667; 21 N. S. W. W. N. 223.—*AUS.*

*m. Removing party from premises—Subsequent arrest & imprisonment by constable.]*—Deft. ordered pltf. off his wharf & sent for a policeman, who came

& took pltf. to the lock-up where he placed him in a cell:—*Held*: deft. had a right to have him removed from the wharf, & was not responsible for the subsequent arrest & imprisonment.—*HURLEY v. BOAK* (1882), 16 N. S. L. (4 R. & G.) 82.—*CAN.*

*n. Presence at arrest.]*—*MADDOX v. MURPHY* (1888), 27 N. B. R. 263.—*CAN.*  
*o. Imprisonment under legal warrant*

—*See, generally, CRIMINAL LAW, Vol. XIV., pp. 175–177, Nos. 1534–1539.*

**765. Arrest on civil process—Irregular process.]**—*ADAMS v. FREEMAN* (1753), 2 Wils. 5; 95 E. R. 655.

**766. — —.]**—Where in trespass for false imprisonment, deft. justifies under process of outlawry, & pltf. replies that there was no affidavit of debt made & filed, etc., & deft. rejoins that there was such affidavit, & sets out an irregular affidavit, & pltf. demurs:—*Held*: deft. was entitled to judgment, trespass not being maintainable where the process is irregular merely, & not void.—*RIDDELL v. PAKEMAN* (1835), 2 Cr. M. & R. 30; 1 Gale, 104; 5 Tyr. 721; 150 E. R. 13; *sub nom. RIDDELL v. PAKEMAN*, 3 Dowl. 714; 4 L. J. Ex. 130.

**767. — No sum due when judgment entered up.]**—A. executes a warrant of attorney to B. to enter up judgment & take out execution, with a decesance on payment of a certain sum of money. B., after payment of this money, enters up judgment, & takes A. in execution. A. moves the ct. to set aside the judgment & execution, & after a rule *nisi* has been obtained, the whole is referred to a barrister, who awards that nothing was due to B. when he entered up the judgment, & that the judgment & warrant of attorney shall be set aside.

A., in an action of trespass & false imprisonment against B., who pleads the general issue only, is entitled to recover.—*ROGERS v. POPKIN* (1818), 2 Stark. 401.

**768. — Party privileged from arrest.]**—An action of trespass is not maintainable against pltf. in an action, or his attorney, for suing out an execution, & causing deft. to be arrested under it, deft. having at the time an order for protection from arrest under 5 & 6 Vict. c. 116, s. 4, of which pltf. had no notice.—*YEARSLEY v. HEANE* (1845), 14 M. & W. 322; 3 Dow. & L. 265, n.; 153 E. R. 499.  
*Annotations:—Apld. Phillips v. Naylor* (1858), 3 II. & N. 14. *Rehd. Ewart v. Jones* (1845), 14 M. & W. 774.

**Arrest of witness.]**—*See* EVIDENCE, Vol. XXII., pp. 444, 445, Nos. 4622–4625.

**769. — Proceedings against wrong person.]**—In trespass for false imprisonment, deft. pleaded that he sued out a summons against pltf. in the county ct. for debt, that the summons was personally served upon pltf., that he did not appear, & that it was adjudged that he should pay the debt by instalments: that a minute of the judgment was served upon him, & that the instalments were not paid; that a fraud summons was then obtained & served upon him; that he did not appear, & was committed by the judge to prison; justification under the process, etc. Replication, *de injuriâ*, & issue thereon. The evidence in support of this issue was, that deft., having a debt due from one J., entered a plaint against him in the county ct. by his right name, which was an entirely different name from pltf.'s, & that he served pltf. with the several proceedings, which were all directed against J. by name, under the belief that pltf. was J.; that J. never appeared in ct.; that pltf. uniformly stated that he was not J., & on the service of each proceeding, gave notice of the mistake; but that deft. directed the officer

*—Extradition proceedings.]*—Where a prisoner has been imprisoned in the colony by virtue of a legal warrant issued by the Deputy Governor for the purposes of extradition to a foreign state, no action for false imprisonment can lie against the person by whom the requisition was addressed to the Deputy Governor.—*BOUVY v. DE COURTE* (COUNT) (1901), 20 N. Z. L. R. 312.—*N.Z.*

to take pltf. :—*Held* : (1) as the proceedings were against J. by name, & were intended to be against him, & were served upon pltf. only by reason of a mistaken supposition that he was J., the plea was not proved. (2) Whether commitment on a fraud summons under County Courts Act, 1846 (c. 95), s. 99, be in the nature of punishment or execution, deft. was responsible for the wrongful imprisonment under it.—*WALLEY v. McCONNELL* (1849), 13 Q. B. 903; Cox, M. & H. 257; 19 L. J. Q. B. 162; 14 Jur. 193; 116 E. R. 1508; *sub nom.* *WALLEY v. McCONNELL*, 13 L. T. O. S. 506; 13 J. P. 585.

*Annotations* :—As to (1) *Reid*, Dunston v. Paterson (1857), 2 C. B. N. S. 495; R. v. Mulany (1865), 6 New Rep. 183. As to (2) *Apprvd.* Kelly v. Lawrence (1861), 3 H. & C. 1.

—[*See, further*, EXECUTION, Vol. XXI., pp. 457, 458, 467, 468, 580, Nos. 390, 398, 484–493, 1562, 1564.

**770.** — County court proceedings.] — *WALLEY v. McCONNELL*, No. 769, *ante*.

**771.** — —[One of two co-pltfs. in an action in the county ct. uttered a threat that he would enforce against deft. an invalid order of the county ct. Deft. was subsequently arrested under a warrant issued upon the order. It was the practice of the county ct. to give pltfs. a plaint note when they entered their plaint; & before any proceedings of the ct. could be enforced it was necessary that pltfs should produce the plaint note to the clerk of the ct. :—*Held* : in an action for false imprisonment against pltf., who uttered the threat, there was no evidence to go to the jury that he was the person who sued out the warrant. —*ABLEY v. DALE* (1851), 11 C. B. 378; 2 L. M. & P. 433; 20 L. J. C. P. 233; 15 J. P. 757; 15 Jur. 1012; 138 E. R. 519.

*Annotations* :—*Mentd.* *Ex p.* Christie (1855), 4 E. & B. 714; *George v. Somers* (1855), 16 C. B. 539; *Swan v. Dakins* (1855), 3 C. L. R. 602; *Watson v. Humphrey* (1855), 10 Exch. 781; *Copeman v. Rose* (1857), 7 E. & B. 679; *River Wear Comrs. v. Adamson* (1877), 2 App. Cas. 743.

**772. Joint Liability—False Imprisonment by one party—Assault by second party during imprisonment.**—If while A. is unlawfully imprisoned by B., C. commits an assault upon him, C. is guilty of the false imprisonment as well as B., & if A. sues both separately the pendency of one suit may be pleaded in abatement of the other.—*BOYCE v. DOUGLAS* (1807), 1 Camp. 60; 170 E. R. 876, N. P. *Annotation* :—*Reid*, *Henry v. Goldney* (1846), 15 M. & W. 494.

(b) *Arrest for Felony.*

**773. Justification for arrest—Reasonable suspicion of felony—Necessity for.]**—I take the law to be this—if a man directs a constable to act upon a suggestion of felony he must prove the truth of such suggestion. He is bound to show probable cause of suspicion (*BAYLEY, J.*).—*MCCLOUGHAN v. CLAYTON & RIDING* (1816), Holt, N. P. 478, N. P.

**774.** — —[—*J.*—(1) To an action of false imprisonment & putting pltf. in irons, deft. pleaded that he was commander of a ship, & deft. was his servant, & had charge of his cabin & its contents, & access thereto; that two sums of money were stolen on two occasions out of deft.'s desk in his cabin, which had been opened by means of a key; that pltf. had access to where the key of the desk was kept, & that deft. believed no one could have had access to the key without the pltf.'s

knowledge, & that deft. believed pltf. was either guilty or concerned in the stealing of the money. The plea averred that putting in irons was a reasonable mode of detainer. At the trial the verdict on this plea was found for deft.; & upon a motion in arrest of judgment, it was held to be a good defence to the action.

(2) The plea must show reasonable & probable grounds of suspicion. . . . It is enough if the plea sets out facts which raise a reasonable suspicion, without setting out all the evidence thereof (*LORD CAMPBELL, C.J.*).

(3) It is for the ct. to say whether the facts in the plea show a reasonable cause for the acts done by deft. (*WIGHTMAN, J.*).—*BROUGHTON v. JACKSON* (1852), 18 Q. B. 378; 21 L. J. Q. B. 205; 19 L. T. O. S. 88; 16 J. P. 550; 16 Jur. 880; 118 E. R. 141.

**775.** — —[—*J.*—In false imprisonment it is a good plea that deft. apprehended pltf. on a reasonable suspicion of felony; but *semble*, it is not enough that the suspicion was merely *bona fide*.—*SAYER v. LICHFOLD* (1854), 23 L. T. O. S. 324.

**776.** — —[—*Felony must have taken place.]*—In order to justify [a private individual] in causing the imprisonment of a person he must not only make out a reasonable ground of suspicion but he must prove that a felony has actually been committed (*LORD TENTERDEN, C.J.*).—*BECKWITH v. PHILBY* (1827), 6 B. & C. 635; 9 Dow. & Ry. K. B. 487; 4 Dow. & Ry. M. C. 304; 5 L. J. O. S. M. C. 132; 108 E. R. 585.

*Annotations* :—*Appld.* *Nicholson v. Hardwick* (1833), 5 C. & P. 495. *Reid*, *Davis v. Russell* (1829), 5 Bing. 354; *West v. Buxendale* (1850), 9 C. B. 141; *R. v. Chivers v. Savage* (1855), 26 L. T. O. S. 148; *Griffin v. Coleman* (1859), 4 H. & N. 265; *King & King v. Met. Dist. Ry.* (1908), 99 L. T. 278; *Walters v. Smith*, [1914] 1 K. B. 595.

**777.** — —[—*J.*—Deft., a private individual, apprehended & imprisoned pltf. At the trial deft. proved that one, C. M., had stolen his property, & that he had reasonable grounds of suspicion that pltf. had received it, knowing it to be stolen.

*Semble* : such a defence is not an answer to an action for trespass & false imprisonment, & deft. ought to have shown that a felonious act of receiving the goods had actually taken place, & he had reasonable grounds to suspect the prisoner. —*DEAN v. LEARMOUTH* (1838), 2 Jur. 808.

**778.** — —[—*J.*—Trespass for assaulting pltf., & causing him to be taken to a police station, & afterwards before a magistrate upon an unfounded charge of having unlawfully attempted to procure from the banking house of deft. a blank cheque book. Deft. pleaded that he & certain other persons carried on the business of bankers, & that one, T., kept an account with them; that pltf. did unlawfully endeavour to obtain from the bankers a blank cheque book, by falsely pretending that T. was his master, & had sent him for it; that in pursuance of such unlawful endeavour pltf. induced one, A., to go into the banking house & to ask for a blank cheque book, & did falsely pretend to A. that T. was his master, & did direct A. to tell the bankers that the cheque book was wanted for T.; that A. accordingly did so, & stated that he had been so sent by pltf., & that pltf. was waiting outside for it, whereupon deft. accompanied A. to the place where pltf. was waiting; &

for trespass for false imprisonment deft. pleaded that a felony had been committed, & he had reasonable grounds to suspect pltf., & therefore arrested & detained him until he was taken before a magistrate :—*Held* :

the confession of a third person that he, together with pltf., committed the felony was not admissible in evidence as proof of the felony.—*BLAIR v. HOPKINS* (1842), 3 N. B. R. (1 Kerr) 540.—*CAN.*

#### PART IV. SECT. 2, SUB-SECT. 4.— A. (b).

p. *Justification for arrest—Reasonable suspicion of felony—Evidence—Confession of accomplice.*—In an action J.—VOL. XLIII.

**Sect. 2.—False or illegal imprisonment: Sub-sect. 4, A. (b) & (c), & B.]**

A. stated in the presence & hearing of pltf. that he had been so sent by pltf.; wherefore deft., having good & probable cause of suspicion, & vehemently suspecting that pltf. had, by such false & fraudulent pretences as aforesaid, unlawfully endeavoured to obtain from the bankers a blank cheque book for unlawful & unauthorised purposes, committed the trespasses complained of:—*Held*: the plea was bad, inasmuch as it neither alleged that a felony had been committed, so as to make it a good justification at common law, nor that pltf. had been "found committing" any offence against the provisions of 7 & 8 Geo. 4, c. 29, so as to justify his apprehension without warrant, under sect. 63 of the statute.

The general understanding undoubtedly is that where a misdemeanour only has been committed a warrant must be procured (*TINDAL*, (C.J.).—*MATHEWS v. BIDDULPH* (1841), 3 Man. & G. 390; 4 Scott, N. R. 54; 11 L. J. M. C. 13; 133 E. R. 1195.

*Annotations*:—*Reid*, Davis v. Swift (1843), 7 J. P. 672; *Walters v. Smith* (1913), 83 L. J. K. B. 335.

**779.** ————*]*—In an action for false imprisonment, deft. pleaded that his goods had been stolen, & having cause to suspect pltf. of the felony he gave her into custody, the plea stating several grounds of suspicion. Pltf. called a policeman to prove that deft. directed him to take pltf. into custody; & in his cross examination the policeman said that, at the same time, & in the presence of pltf., deft. stated that the goods had been stolen, & also stated some of the grounds of suspicion mentioned in the plea:—*Held*: (1) this was evidence for the jury to consider, & from which they might find, that the felony had been committed; & deft. had good cause to suspect pltf., if this evidence satisfied them that the facts really were so; (2) although in this plea deft. ought to set out his grounds of suspicion, yet that he would be entitled to a verdict without proof of the whole of them, if he proved that a felony was in fact committed, & proved so much of the grounds of suspicion as satisfied the jury that he had reasonable cause to suspect pltf.—*WILLIAMS v. CROSSWELL* (1846), 2 Car. & Kir. 422, N. P.

**780.** ————*]*—In an action for giving into custody on a false charge of felony a plea justifying upon the ground of reasonable suspicion, held to fail, for want of proof of an alleged false pretence on the part of pltf. for an act stated as one of the grounds of suspicion.—*MASTERS v. SCULLY* (1858), 1 F. & F. 408, N. P.

**781.** ————*]*—A customer of a bank, having a paid cheque of his sent back to him by the bankers, altered the style of handwriting, so as to make it appear not his, & then returned it, declaring it to have been a forgery, & got credit from them for the amount on account; at the same time making a statement to the effect that pltf. had forced the cheque, supporting that statement by specific facts, which, if true, would have constituted reasonable ground for suspecting that pltf. had been guilty of forgery. The bank having thereupon given pltf. into custody on a charge of forgery:—*Held*: (1) there had been no forgery by the customer; (2) even if there had been, there was not, therefore, reasonable ground for suspecting pltf. to have been guilty of felony; (3) as the real offence committed was only misdemeanour in obtaining money by false pretences, there was no justification for giving pltf. into custody.—*BRITTAIN v. BANK OF LONDON* (1863), 3 F. & F. 465; 2 New Rep. 24; 8 L. T. 382; 11 W. R. 569.

**782.** ————*]*—*Qu.*: where is a person entitled to lock up another suspected of felony.

A person must prove that a felony has been committed & that he has reasonable ground for believing that the person whom he charges has committed the felony (*BLACKBURN, J.*).—*ROSS v. LASCELLES & SCOTT* (1866), 15 L. T. 293, N. P.

**783.** ————*]*—A private person is justified in arresting another on suspicion of having committed a felony if, & only if, he can show that the particular felony for which he arrested the other was in fact committed, & that he had reasonable & probable cause for suspecting the other of having committed it.—*WALTERS v. SMITH* (W. H.) & SON, LTD., [1914] 1 K. B. 595; 83 L. J. K. B. 335; 110 L. T. 345; 78 J. P. 118; 30 T. L. R. 158; 58 Sol. Jo. 186.

**784.** ————*]*—(1) A private prosecutor not having the privilege that a police constable possesses of imprisoning a person on mere suspicion that a felony has been committed, false imprisonment results if the person is detained by the private prosecutor.

(2) What constitutes imprisonment has been long ago defined. It is to be found in a work of very good authority in the application of the common law, namely, *Termes de la Ley*, in these words: "Imprisonment" is no other thing but the restraint of a man's liberty, whether it be in the open field, or in the stocks, or in the cage in the streets . . . or in a man's own house, as well as in the common gaol; & in all the places the party so restrained is said to be a prisoner so long as he has not his liberty freely to go at all times to all places whither he will without bail or main, prise or otherwise (*DUKE, L.J.*).—*MEERING v. GRAHAME-WHITE AVIATION CO., LTD.* (1919), 122 L. T. 44, C. A.

**785.** ————*]*—**What amounts to.**—A person of decent repute, while attending a fair at a town in which he was a stranger in the way of his business as a horse dealer having unknowingly uttered a forged note, for which he is afterwards apprehended by private persons without warrant, on his way home, & carried before a magistrate for examination by whom he is immediately discharged, cannot maintain an action for false imprisonment against those who so apprehended him under such circumstances. Those circumstances may be pleaded in justification &, if proved, will entitle deft. to a verdict; at least, the ct. will not grant a new trial where the jury have been so directed, although deft. had also pleaded the general issue.—*GUPPY v. BITTLEBANK & POTTER* (1818), 5 Price, 525; 146 E. R. 683.

*Annotation*:—*Reid*, *Beckwith v. Philby* (1827), 5 L. J. O. S. M. C. 132.

**786.** ————*]*—*WILLIAMS v. CROSSWELL*, No. 779, *ante*.

**787.** ————*]*—*BROUGHTON v. JACKSON*, No. 774, *ante*.

**788.** ————*]*—It is doubtful whether in an action for false imprisonment mere personal resemblance between pltf. & the person who had committed a felony can afford reasonable ground of suspicion, justifying an arrest on the part of a private person without warrant. But at all events, the plea will fail unless either deft. himself saw the felony committed, or unless the person who saw it, & on whose information he acted, spoke positively to the identity.—*RAYNER v. GERMAN* (1859), 1 F. & F. 700, N. P.

**789.** ————*]*—Under Offences against the Person Act, 1861 (c. 100), ss. 23, 24, if a noxious thing is unlawfully administered with intent only to injure or annoy, & does in fact

inflict grievous bodily harm, a felony is committed. Therefore in an action for false imprisonment on a charge of administering poison, the jury finding that a noxious thing had been so administered, & that it inflicted grievous injury in fact, & also finding facts which amounted to reasonable cause of suspicion:—*Held*: deft. was entitled to the verdict on a plea of justification on the ground of reasonable suspicion of a felony.—*TULLY v. CORRIE* (1867), 17 L. T. 140; 10 Cox, C. C. 640.

— **Question of law for court.**—*See* Subsect. 5, *post*.  
— *See, further*, CRIMINAL LAW, Vol. XIV., p. 177, Nos. 1540–1554.

(c) *Arrest for Breach of the Peace.*

**Arrest for breach of the peace.**—*See* CRIMINAL LAW, Vol. XIV., p. 179, Nos. 1574–1578.

**What amounts to breach of the peace.**—*See* CRIMINAL LAW, Vol. XIV., pp. 180–182, Nos. 1593–1608.

B. *Judicial Officers.*

*See* PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 77–96.

**790. Magistrates—Whether liable—Acts within jurisdiction.**—Three magistrates, under Municipal Corporations Act, 1835 (c. 76), ss. 60, 65, convicted the late town crier of the borough of E. of refusing to deliver up to his successor a bell, which was stated in the convictions to have been lately used by him in his office, & to be the property of the council of the borough, & adjudged him to be imprisoned until he should deliver up the bell, or give satisfaction to the town clerk in respect of it:—*Held*: the magistrates had jurisdiction to convict under the Act; & there being nothing in the conviction itself to render it void, trespass

would not lie against them.—*BAYLIS v. STRICKLAND* (1840), 1 Man. & G. 591; 1 Scott, N. R. 540; 10 L. J. M. C. 61; 4 Jur. 823; 133 E. R. 469. *Annotation*:—*Reid*. *Jones v. Gurdon* (1842), 2 Q. B. 600.

**791. ———— Acts done in absence of jurisdiction—Invalid conviction.**—*R. v. COTTEN* (1733), as reported in Kel. W. 125; 25 E. R. 526.

**792. ————**—*Where a statute gives a magistrate summary jurisdiction over certain complaints, & authorises him to fine & imprison a party convicted, he must, if more than one deft. be convicted, impose a separate fine on each, or otherwise the conviction will be bad, & trespass may be maintained against him.*—*MORGAN v. BROWN* (1836), 4 Ad. & El. 515; 1 Har. & W. 717; 6 Nev. & M. K. B. 57; 3 Nev. & M. M. C. 509; 5 L. J. M. C. 77; 111 E. R. 881.

**793. ————**—*By the 9 Geo. 4, c. 31, s. 27, power is given to two justices, in cases of assault, to impose upon the offender a fine, not exceeding £5, "to be paid to some one of the overseers of the poor, or to some other officer of the parish, township, or place in which the offence shall have been committed, to be by such overseer or officer paid over to the use of the general rate of the county, riding, or division, in which such parish, township, or place shall be situate": & s. 35 provides that the conviction may be drawn up in a given form, or in any other form of words to the same effect:—Held: a conviction, by which the penalty was ordered to be paid "to the treasurer of the county of C., in which the offence was committed, to be by him applied according to the directions of the statute," etc., or the party, in default, to be imprisoned for two months, etc., was bad; & the justices were liable in trespass, for the imprisonment of the party under it.*—*CHADDOCK v. WILBRAHAM* (1848), 5 C. B. 645; 3 New Sess. Cas. 226; 17 L. J. M. C. 79; 10 L. T.

PART IV. SECT. 2, SUB-SECT. 4.—B.

**790 i. Magistrates—Whether liable—Acts within jurisdiction.**—*WARR v. TEMPLEMAN* (1872), 3 V. R. (Law) 56.—**AUS.**

**790 ii. ————**—*Where Justices acting on a mistaken view of the law, upon evidence which is insufficient to prove any offence, convict & cause to be detained an accused person who is before them on an information which in fact discloses no offence they are not liable in an action of false imprisonment as having acted without jurisdiction.*—*HITCHIN v. PHIPPS* (1903), 29 V. L. L. 422.—**AUS.**

**790 iii. ————**—*When magistrates commit a person upon a general charge of felony given upon oath, they will not be liable to an action of trespass, although the facts sworn to in order to substantiate that charge may not in point of law support it.*—*GARDINER v. BURWELL* (1825), Tay. 189.—**CAN.**

**790 iv. ————**—*BRIGGS v. SPILSBURY* (1827), Tay. 440.—**CAN.**

**790 v. ————**—*CLARK v. LAWRENCE* (1846), 5 N. B. R. (3 Kerr) 152.—**CAN.**

**790 vi. ————**—*GATES v. DEVENISH* (1849), 6 U. C. R. 260.—**CAN.**

**790 vii. ————**—*Deft., as a justice, issued a warrant against plff., upon a complaint for detaining the clothes of K. Plff., on being told by the constable that he had the warrant, went alone to deft., heard the evidence, was allowed to go away without giving bail, & returned the next day when he was discharged:—Held: no imprisonment was proved; & deft., having jurisdiction over the subject matter of the complaint, was not liable in trespass, even if the information were*

insufficient in point of form.—*THORPE v. OLIVER* (1860), 20 U. C. R. 261.—**CAN.**

**790 viii. ————**—*MESSEY v. WALLACE* (1867), 7 N. S. R. (1 (I. & O.) 34.—**CAN.**

**790 ix. ————**—*GARNER v. COLEMAN* (1868), 19 C. P. 106.—**CAN.**

**790 x. ————**—*The falsity of a charge cannot give a cause of action against a magistrate who acts upon the assumption & belief of its truth; & an allegation that he acted without any just cause upon a false charge, but not charging malice, means only that the charge being false he had no just cause.*—*SPRING v. ANDERSON* (1873), 23 C. P. 152.—**CAN.**

**790 xi. ————**—*CRAWFORD v. BEATTIE* (1876), 39 U. C. R. 13.—**CAN.**

**790 xii. ————**—*STONESS v. LAKE & WALKER* (1877), 40 U. C. R. 320.—**CAN.**

**790 xiii. ————**—*MARTER v. PRYOR* (1883), 16 N. S. R. (4 R. & G.) 498.—**CAN.**

**790 xiv. ————**—*ARSCOTT v. LILLEY* (1887), 14 A. R. 283.—**CAN.**

**790 xv. ————**—*DONAHOE v. KEOGH* (1865), 17 I. C. L. R. 39.—**IR.**

**790 xvi. ————**—*Where a man was arrested by a constable under the direction of a county inspector of constabulary, & taken before a magistrate, before whom an information was sworn, asking for the further detention of prisoner, & prisoner was accordingly detained:—Held: the fact of taking the information with the knowledge that prisoner would be detained did not render the magistrate acting without malice liable to an action for false imprisonment.*—*DONO-*

*HOF v. THOMPSON* (1866), 15 L. T. 131.—**IR.**

**q. ———— Invalid conviction.**—*Where a justice of the peace has jurisdiction to try a complaint, & there has been a regular information, but the conviction & warrant of commitment are defective, he is not liable in trespass for anything done prior to the conviction.*—*SEWELL v. OLIVER* (1859), 9 N. B. R. (4 All.) 391.—**CAN.**

**r. ———— Irregular warrant.**—*MCKINLEY v. MUNSIE* (1865), 15 C. P. 230.—**CAN.**

**t. ————**—*APPLETON v. LETTER* (1869), 20 C. P. 135.—**CAN.**

**a. ————**—*An information was sworn before deft., a justice of the peace, of the commission of an alleged offence by—Garrison (the Christian name being omitted); deft. afterwards filled in plff.'s Christian name, & issued a warrant against him, on which he was arrested:—Held: the warrant was void, & deft. liable in trespass.*—*GARRISON v. HARDING* (1872), 14 N. B. R. (1 Pag.) 166.—**CAN.**

**b. ————**—*Deft., a stipendiary magistrate, issued a warrant of commitment, imposing hard labour during the imprisonment, which the conviction did not impose & which was not authorised by the statute upon which the proceeding was founded. In an action by deft. for false imprisonment:—Held: the issuing of the warrant was a ministerial, not a judicial act, & that the magistrate was liable for including in the warrant of commitment the imposition of hard labour.*—*MCIVOR v. MCGILLIVRAY* (1904), 40 N. S. R. 459.—**CAN.**

**c. ————**—*HODGINS v. POE* (1867), 16 W. R. 224.—**IR.**





**803. — Warrant defective on its face.]**—A commitment under a warrant which does not specify the crime the party is charged with, is false imprisonment; & therefore, if a serjeant at mace justifies an arrest by command of the mayor, his plea must show in certainty for what cause the arrest was made. *BOUCHIER'S CASE* (1605), *Cro. Jac.* 81; 79 E. R. 69.

*Annotation:—Apld.* *Wickes v. Clutterbuck* (1825), 10 Moore, C. P. 63.

**804. — Authority of officer exceeded.]**—One condemned by justices of peace in the penalty of £13 for harbouring run goods, is attached by their warrant till he pay the same, he offers to pay £13 but the officer detains him till he pays 5s. 4d. more for costs, this is false imprisonment.—*SMITH v. SIBSON* (1746), 1 Wils. 153; 95 E. R. 545.

**— Officers of county court.]**—*See COUNTY COURTS*, Vol. XIII., pp. 452–455.

**— Constables.]**—*See* Part IV., Sect. 2, sub-sect. 4, C. (b), *post*.

**— Sheriffs & bailiffs.]**—*See* Part IV., Sect. 2, sub-sect. 4, C. (c), *post*.

(b) *Constables.*

**Arrest without warrant—For felony.]**—*See CRIMINAL LAW*, Vol. XIV., pp. 178, 179, Nos. 1555–1572.

**— For breach of the peace.]**—*See CRIMINAL LAW*, Vol. XIV., pp. 179, 180, Nos. 1579–1590.

**— What amounts to breach of the peace.]**—*See CRIMINAL LAW*, Vol. XIV., pp. 180–182, Nos. 1593–1608.

**— Brawling in church.]**—*See CRIMINAL LAW*, Vol. XV., p. 659, No. 7100.

**— Statutory provisions.]**—*See CRIMINAL LAW*, Vol. XIV., p. 183, Nos. 1617–1622; Suppl. IV., p. 443, No. 1622a.

**—]**—*See, generally*, *CRIMINAL LAW*, Vol. XIV., pp. 175–177, Nos. 1534–1539.

**Arrest under warrant—General warrant.]**—*See CRIMINAL LAW*, Vol. XIV., pp. 186, 187, Nos. 1663 1665.

**—]**—*See, generally*, *CRIMINAL LAW*, Vol. XIV., pp. 186–189, Nos. 1661–1693.

**Constables Protection Act.]**—*See PUBLIC AUTHORITIES*, Vol. XXXVIII., pp. 71–74, Nos. 478–518.

(c) *Sheriffs and Bailiffs.*

*See SHERIFFS*, Vol. XII., pp. 102, 103, Nos. 516–539.

**805. When action lies—Detention after discharge or supersedeas.]**—False imprisonment lies against a sheriff if he detain a prisoner on mesne process, after a discharge by plff., or a *supersedeas* by the ct.; for every detainer is a new imprisonment.—*WITHERS v. HENLEY* (1615), *Cro. Jac.* 379; 3 Bulst. 96; 1 Roll. Rep. 240; 79 E. R. 324.

*Annotations:—Apld.* *Barker v. St. Quintin* (1844), 1 Dow. & L. 542. *Refd.* *Bessey v. Olliot & Lambert* (1882), T. Raym. 421, 467; *Bealy v. Sampson* (1889), 2 Vent. 93. *Mentd.* *Rosewell v. Prior* (1700), 1 Ld. Raym. 713.

apprehend him, & take him to the station house or gaol, such imprisonment is illegal, & the magistrate cannot justify the arrest.—*POWELL v. WILLIAMSON* (1843), 1 U. C. R. 154.—*CAN.*

**6. — Warrant wider than information.]**—*CLELAND v. ROBINSON* (1862), 11 C. P. 416.—*CAN.*

**7. — Jurisdiction over the individual the test.]**—*CONNORS v. DARLING* (1864), 23 U. C. R. 541.—*CAN.*

**8. — Warrant omitting amount.]**—*Deft.*, a justice, issued his warrant under C. S. C. c. 103, s. 67, to commit plff. for thirty days for

non-payment of the costs of an appeal to the quarter sessions, unless such sum & all costs of the distress & commitment & conveying plff. to gaol should be sooner paid, but he omitted to state in the warrant the amount of costs of the distress & commitment. Plff. having been committed on this warrant, sued *deft.* for false imprisonment.—*Held*: though it was the duty of the justice to ascertain & state such amount, yet the omission to do so, though it might have occasioned plff.'s discharge, did not show either a want or an excess of jurisdiction, but rather an irregular exercise of it; & *deft.*, therefore, was not liable in trespass.—*DICKSON v. CRABB* (1865), 24 U. C. R.

**806. — —.]**—Notice from plff.'s attorneys to bailiff charged with a warrant under a *ca. sa.*, that it is withdrawn is sufficient to render the bailiff liable for an arrest.—*FUTCHER v. HINDER* (1858), 3 H. & N. 757; 28 L. J. Ex. 28; 32 L. T. O. S. 132; 7 W. R. 57; 157 E. R. 673.

**807. — Arrest without warrant—Warrant obtained next day.]**—If a bailiff arrest a person without warrant on a Sunday, & detain him by virtue of a warrant procured the next day the ct. will grant an attachment against the officer, but will not discharge the prisoner, for he may have an action for the false imprisonment.—*LIDFORD v. THOMAS* (1704), 6 Mod. Rep. 96; 87 E. R. 853.

**808. — Arrest in wrong name.]**—If *deft.* be arrested by a wrong Christian name, the ct. will discharge him on motion; & the sheriff is liable to an action.—*WILKS v. LORCK* (1810), 2 Taunt. 399; 127 E. R. 1133.

*Annotations:—Consd.* *Morley v. Law* (1820), 4 Moore, C. P. 369. *Refd.* *Kingston v. Llewellyn* (1820), 4 Moore, C. P. 317. *Mentd.* *Griffith v. Ricketts* (1846), 15 L. J. Ch. 230.

**809. — Arrest after direction from execution creditor not to execute process.]**—To trespass for false imprisonment, *deft.* justified as sheriff, under a writ of *ca. sa.*, sued out by F., on a judgment in Q. B. Replication, that after the delivery to *deft.* of the writ, & before execution, F. released the debt, & gave notice to *deft.* of the release, & thereby then discharged & forbade *deft.* from executing the writ: Rejoinder, that T., an attorney of the Ct. of Q. B., was retained by F., to prosecute a suit against the now plff. on the terms that T. should have a lien on the judgment; that it was corruptly agreed between the now plff., & F., for the purpose of defrauding T. of his lien, that F. should execute a release of the judgment, & that in pursuance of such agreement, he executed the release in the replication mentioned; that *deft.* having notice of the premises, did, at the request of T., execute the writ, & commit the alleged trespass, *modo et forma*: *Held*: a sheriff to whom a writ of *ca. sa.* was delivered, was bound to obey the directions of plff. respecting it, & if he arrested *deft.* after notice from plff. not to execute it, he was liable in trespass. *BARKER v. ST. QUINTIN* (1844), 12 M. & W. 441; 1 Dow. & L. 542; 13 L. J. Ex. 144; 2 L. T. O. S. 330; 152 E. R. 1270.

*Annotations:—Consd.* *Hunt v. Hooper* (1814), 1 Dow. & L. 626. *Refd.* *Walker v. Hunter* (1845), 2 C. B. 324; *Hooper v. Lane* (1857), 6 H. L. Cas. 413; *Langley v. Headland* (1865), 19 C. B. N. S. 42; *Shaw v. Kirby* (1885), 4 T. L. R. 314. *Mentd.* *Lloyd v. Mansell* (1853), 22 L. J. Q. B. 110; *Hough v. Edwards* (1856), 1 H. & N. 171; *Bransdon v. Allard* (1859), 2 E. & E. 19; *Williams v. Lloyd*, *Ex p.* *Games* (1864), 3 H. & C. 294; *Butler v. Knight* (1867), 15 L. T. 621; *The Leader* (1868), L. R. 2 A. & E. 314; *Mercer v. Graves* (1872), L. R. 7 Q. B. 499.

**810. — Liability of sheriff for acts of bailiff or officer.]**—An action for false imprisonment lies against the sheriff for an arrest made by the bailiff after the return day of the writ.—*PARROT v.*

491.—*CAN.*

**h. — — — — —.]** *MOFFAT v. BARNARD* (1865), 21 U. C. R. 498.—*CAN.*

PART IV. SECT. 2, SUB-SECT. 4.—  
C. (6).

**k. Justification—Process—Re-arrest after warrant expired & prisoner escaped.]**—*WALL v. MAYRICK* (1879), 5 V. L. R. (L.) 260.—*AUS.*

**l. — Arrest on second surrender—After conditional surrender.]**—*THOMPSON v. LEONARD* (1832), 3 O. S. 151.—*CAN.*

**m. — — — — —.]**—Trespass will not lie against a sheriff for executing the





*H. Solicitors.*

See EXECUTION, Vol. XXI., pp. 467, 468, Nos. 484-487, 493; SOLICITORS, Vol. XLII., p. 367, Nos. 4173-4180.

*I. Other Persons.*

**822. Overseers of the poor.]**—Bkpt., who has obtained an order for protection under Bankruptcy Act, 1849 (c. 106), s. 112, at the time of his bkpcy., is in arrears for two poor rates, & had been assessed to a third, which, however, was not allowed or published until after his bkpcy. The overseers of the poor, pending the protection, summon him for the non-payment of the three rates; he does not attend before the justices, but returns the summons to the assistant overseer, stating in writing on it the fact of his having a protection order, etc., & the assistant overseer sees the messenger of the Ct. of Bkpcy. in possession of his goods, which are afterwards sold. The justices, on the application of the overseers, then issue a distress warrant on his goods for the amount of the three rates, which warrant is returned *nulla bona* & a warrant of commitment issues, under which he is arrested & imprisoned, until he is released by an order of a comr. in bkpcy. The bkpt. then brings an action against the overseers for maliciously, & without reasonable or probable cause, procuring & obtaining from the justices a warrant of commitment against pltf., & under that arresting & imprisoning, etc., pltf., & also for assaulting pltf., & giving him into custody, etc.:—*Held*: trespass would not lie against the overseers for causing the bkpt. to be arrested under the warrant of commitment.—*PHILLIPS v. NAYLOR* (1859), 4 H. & N. 565; 28 L. J. Ex. 225; 33 L. T. O. S. 167; 23 J. P. 660; 5 Jur. N. S. 966; 7 W. R. 504; 157 E. R. 962, Ex. Ch.

*Annotation*:—*Reid*. *Ames v. Waterlow* (1869), L. R. 5 C. P. 53.

**Schoolmaster.]**—See EDUCATION, Vol. XIX., p. 600, Nos. 278, 279.

**Officers of House of Commons—Committal for contempt.]**—See PARLIAMENT, Vol. XXXVI., pp. 288, 293, 294, Nos. 368, 434-442.

**Captor.]**—See PRIZE LAW, Vol. XXVII., p. 607, No. 484.

**Custody of children.]**—See INFANTS, Vol. XXVIII., pp. 256-274.

**Right of husband to custody of wife.]**—See HUSBAND & WIFE, Vol. XXVII., pp. 78, 79, Nos. 607-620.

## SUB-SECT. 5.—JUSTIFICATION—EVIDENCE AND PRACTICE.

**823. Onus of proof on defendant.]**—Pltf. having been arrested & imprisoned, under a magistrate's warrant, brought trespass against the party suing it out, for false imprisonment:—*Held*: it was not necessary for pltf. to produce the warrant; but it was incumbent on deft. to do so, to show that it had been properly issued.—*HOLROYD v. DONCASTER* (1826), 3 Bing. 492; 11 Moore, C. P. 440; 4 Dow. & Ry. M. C. 537; 4 L. J. O. S. C. P. 178; 130 E. R. 603.

**824. Reasonable & probable cause—Question for judge.]**—In actions of trespass & false imprisonment, the question of reasonable & probable cause for the apprehension of pltf. cannot be left to the jury.—*HILL v. YATES* (1818), 8 Taunt. 182; 2 Moore, C. P. 80; 129 F. R. 353.

*Annotation*:—*Reid*. *Davis v. Russell* (1829), 5 Bing. 354.

**825. ———.]**—*BROUGHTON v. JACKSON*, No. 774, *ante*.

**826. ——— On facts found by jury.]**—A plea which professes to justify an assault & imprisonment, on the ground that there was reasonable & probable cause to suspect pltf. of felony, must state the particular facts which amount to reasonable & probable cause. The truth of the facts only is to be ascertained by the jury. Their legal result, on the question of probable cause, is for the decision of the ct.—*HAYNES v. MERVIS* (1826), 5 L. J. O. S. K. B. 47.

**827. ———.]**—Upon a plea of justification to an action for false imprisonment, the jury are to find what facts are proved, & the question of reasonable & probable cause on those facts is to be determined by the judge.—*WEST v. BAXENDALE* (1850), 9 C. B. 141; 19 L. J. C. P. 149; 14 L. T. O. S. 376; 137 E. R. 846.

*Annotations*:—*Reid*. *Jones v. Williamson* (1858), 32 L. T. O. S. 317. *Mentid*. *Hermann v. Seneschal* (1862), 13 C. B. N. S. 392.

**828. ———.]**—In an action for false imprisonment, the question of reasonable & probable cause is one of law for the judge to decide, & not for the jury.—*HAILLES v. MARKS* (1861), 7

## PART IV. SECT. 2, SUB-SECT. 4.—I.

**n. Joint liability of municipal officer & corporation.]**—A municipal officer illegally issuing a warrant under which a delinquent ratepayer was arrested was held guilty of trespass, & on the application of the maxim *respondent superior* the municipality was held liable in damages.—*MCORLEY v. ST. JOHN CORPN.* (N. B.) (1882), 6 S. C. R. 631.—CAN.

**o. Municipal corporation—Arrest by constable appointed by police commissioners—Constable paid by corporation.]**—The charter of the defts. provided for the appointment of a police force, the members to be appointed by, & hold office during the pleasure of, a board of police comrs. Defts. provided the pay of the men. A member of the force arrested pltf. for an alleged breach of a bye-law of the defts. In an action for assault & false imprisonment:—*Held*: defts. were not liable.—*WISHART v. BRANDON CITY CORPN.* (1887), 4 Man. L. R. 453.—CAN.

## PART IV. SECT. 2, SUB-SECT. 5.

**8231. Onus of proof on defendant.]**—*SMITH v. BARTON* (1848), 1 Legge, 445.—AUS.

**p. Arrest under Vagrant Act & conviction complete answer to action—Conviction remaining unreserved.]**—*ARMSTRONG v. FULLER* (1866), 5 N. S. W. S. C. R. (L.) 269.—AUS.

**q. Sufficiency of answer to plea.]**—In an action for false imprisonment, defts. justified under a writ of *capias* issued under a judge's order. Pltf. replied that that order & all subsequent proceedings had been set aside by an order of the same judge:—*Held*: on demurrer, to afford no answer to the plea.—*WESTON v. COLLINGWOOD GAS CO.* (1870), 1 V. L. R. (Law) 98.—AUS.

**r. Whether justification in part allowed.]**—Trespass by unlawful imprisonment is undivided & cannot be justified in part.—*RAY v. McMACKIN* (1875), 1 V. L. R. (L.) 271.—AUS.

**t. Reasonable & probable cause.]**—A reasonable suspicion that a person has in a foreign country or in another part of the British Dominion committed an offence which if committed in Victoria would be a felony does not justify a constable in arresting such person in Victoria without a warrant & is therefore not a defence to an action by such person against constable for false imprisonment.—*BROWN v. LIZARDS* (1905), 2 C. L. R. 837.—AUS.

**u. ———.]**—*HAZELTON v. POTTER* (1907), 5 C. L. R. 445.—AUS.

**a. ———.]**—*WHITE v. KAIN*, [1921] S. A. S. R. 339.—AUS.

**b. ———.]**—*DORLOFF v. BROWNING* (1921), 17 Tas. L. R. 35.—AUS.

**c. ———.]**—*PATTERSON v. SCOTT* (1876), 38 U. C. R. 642.—CAN.

**d. ———.]**—*WARD v. OUTHOUSE & READ* (1882), 22 N. B. R. 220.—CAN.

**e. ———.]**—*SINCLAIR v. RUDELL* (1906), 16 Man. L. R. 53.—CAN.

**f. ———.]**—*WAH KIE v. CALGARY CORPN.* (1914), 28 W. L. R. 747; 19 D. L. R. 378; 23 Can. Crim. Cas. 325.—CAN.

**g. ———.]**—*WILLIAMS v. LAING* (1923), 55 O. L. R. 26.—CAN.

**h. ———.]**—*LEBIANC v. PETROPOLIS*, [1925] 2 D. L. R. 619; 58 N. S. R. 100.—CAN.

**k. ———.]**—*HARVEY v. MAYNE* (1872), L. R. 6 C. L. 417.—IR.

**l. ———.]**—*CARILL v. FITZGIBBON* (1885), 16 L. R. Ir. 371.—IR.

**aa. ———.]**—Knowledge by a police constable that a warrant has been issued by a duly authorised magistrate for the arrest of a particular person for felony constitutes a sufficient ground

**Sect. 2.—False or illegal imprisonment: Sub-sect. 5.]**

H. & N. 56; 30 L. J. Ex. 389; 4 L. T. 805; 25 J. P. 808; 7 Jur. N. S. 851; 9 W. R. 808; 158 E. R. 391.

**Annotation.**—*Mentid*. R. v. Turberfield (1861), 31 L. J. M. C. 20.

**829.** ———. ———.]—It is a rule of law that the jury must find the facts on which the question of reasonable & probable cause depends, but that the judge must then determine whether the facts found do constitute reasonable & probable cause. No definite rule can be laid down for the exercise of the judge's judgment. It is desirable that reasonable & probable cause should be an inference of fact for determination by the jury rather than by the judge.

L. was the owner of a rifle, which was left in the care of his coachman H. The rifle had been seen & admired by P. who said he wished he had one like it. It was stolen. H. told that fact to L. his master, & at the same time informed him that R., the coachman of a near neighbour, said he had seen it in a barn belonging to P.'s father, & P. hearing of this statement, denied it, & offered to take H. & R. to the barn & show them the gun he had there; that he did take them to the barn & showed them a gun, which was not L.'s gun, & that R. said that was not the gun he had previously seen in the barn. L. caused P. to be apprehended for felony. P. was tried & acquitted, & brought an action for a malicious prosecution. Whether L. saw R. before, or only after, the apprehension, was a matter of contradictory evidence at the trial. The jury found that he had not seen R. before ordering P.'s apprehension. The judge directed the jury that that being so, he considered L. to have acted on hearsay evidence alone, & therefore without reasonable & probable cause, & consequently that P. was entitled to the verdict:—*Held*: this was a misdirection, & there must be a new trial.—*LISTER v. PERRYMAN* (1870), L. R. 4 H. L. 521; 39 L. J. Ex. 177; 23 L. T. 269; 35 J. P. 4; 19 W. R. 9, H. L.; *reversg.* S. C. *sub nom.*

of reasonable suspicion that a felony has been committed by such person, so as to authorise such constable to arrest him.—*CREAG v. GAMBLE* (1888), 21 L. R. Ir. 458.—*IR.*

**n.** ———.]—Although it is the duty of a police officer to take all reasonable steps to prevent a breach of the peace, including, where the circumstances demand it, the arrest & detention of an innocent person, such arrest & detention is undertaken at the peril of the officer responsible, & it is no defence to an action for false imprisonment, at the instance of an innocent person so arrested & detained, that the officer *bond fide* believed him to be in danger at the hands of wrongdoers & accordingly detained him for his own protection.—*CONNORS v. PEARSON, McLAUGHLIN v. SCOTT*, [1921] 2 I. L. 51.—*IR.*

**o.** ———.]—*STRANG v. STRANG* (1849), 11 Durl. (Ct. of Sess.) 378; 21 Sc. Jur. 108.—*SCOT.*

**p.** ——— *Matter of degree.*—The question of malice & want of probable cause is always one of degree, & the more eminently so where it is a matter connected with the evidence, & only coming out in the course of trial.—*SMITH v. GREEN* (1853), 1 W. R. 340.—*SCOT.*

**q.** ———.]—*SHIELDS v. SHEARER*, [1913] S. C. 1012; 50 Sc. L. R. 794; [1913] 2 S. L. T. 68.—*SCOT.*

**r.** ———.]—In an action against a constable for malicious arrest, it appeared that he arrested pltf. upon information supplied by the owner of a coat which had been stolen from

along a roadside, & which he had found in the possession of pltf. shortly afterwards:—*Held*: deft. having acted *bond fide* upon credible information supplied to him by others which would justify a conviction of pltf. for theft was protected from liability.—*JERSON v. JONES* (1883), 10 S. C. 200; 3 C. T. R. 248.—*S. AF.*

**t.** *Plea of justification under civil process.*—*SMITH v. COTTON* (1927), 27 S. L. N. S. W. 41; 44 N. S. W. N. 89.—*AUS.*

**a.** ———.]—In trespass for false imprisonment a plea justifying under process of an inferior ct., which had been set aside for irregularity on the terms of no action being brought, cannot be sustained.—*FERRIS v. DYER & McDONALD* (1835), 4 O. S. 182.—*CAN.*

**b.** ——— *Arrest set aside—Writ still in force.*—*JAMES v. ELLIS* (1854), 11 U. C. R. 449.—*CAN.*

**c.** ———.]—The present pltf. had been arrested under a writ of *capias* & brought before a magistrate who decided that the *capias* & service were void, & that therefore he had no jurisdiction in the matter. This action was then brought against the present deft. for false imprisonment:—*Held*: the present deft. was not precluded, in this action, from showing that the *capias* & service were not void.—*IRWIN v. LAWSON* (1901), 40 N. S. R. 279.—*CAN.*

**d.** ———.]—*MURRAY v. BYRNE* (1856), 6 I. C. L. R. 576; *affd.* (1857), 10 Ir. Jur. 54.—*IR.*

*PERRYMAN v. LISTER* (1868), L. R. 3 Exch. 197, Ex. Ch.

**Annotations.**—*Distd.* *King v. Henderson*, [1898] A. C. 720. *Reid.* *Brooks v. Blain* (1869), 39 L. J. C. P. 1; *Walker v. S. E. Jty.*, *Smith v. Same* (1870), L. R. 5 C. P. 640; *King v. Chamberlain* (1871), 40 L. J. C. P. 273; *Shrobsbery v. Osmonston* (1877), 37 L. T. 792; *Hicks v. Paulkner* (1882), 46 L. T. 127; *Abratt v. N. B. Jty.* (1883), 49 L. T. 618; *Quartz Hill Consolidated Gold Mining Co. v. Eyre* (1884), 50 L. T. 274; *Loog, R. v. Nahmaschinen Fabrik Act. & Hese* (1888), 4 T. L. R. 268; *Lea v. Charrington* (1889), 61 L. T. 222; *Brown v. Hawkes*, [1891] 2 Q. B. 718; *Bradshaw v. Goodwin* (1894), 10 T. L. R. 491.

**830.** ———. ———.]—It is a question for the judge to decide as to the "reasonableness of a pawnbroker's suspicion," under Pawnbrokers Act, 1872 (c. 93), s. 34, which enables a pawnbroker to give into custody a person offering in pawn an article which the pawnbroker "reasonably suspects" has been stolen; & in an action for false imprisonment against the pawnbroker, before pltf. can recover, he must show an absence of reasonable suspicion on the part of the pawnbroker.

A notice had been circulated by the police, describing several articles which had been stolen, & amongst them were two articles described as a "gold horseshoe pin, set with seven diamonds, massive," & a "gent's gold ring, set with three diamonds." This notice had been sent to deft., who was a pawnbroker. Some days after, pltf., a man of good character, entered deft.'s shop & offered to pawn a gold horseshoe pin, set with seven diamonds, & a gold diamond ring. Deft., after referring to the notice, asked pltf. if he was a dealer; pltf. said he was not. He then asked him where he got the articles, & he replied from a Mr. N. for the purpose of pawning, giving at the time Mr. N.'s address & his own name & address, which statements were correct. Deft., believing that the pin offered by pltf. was the stolen pin, sent for a constable, & gave pltf. into custody. In an action for false imprisonment against the pawnbroker:—*Held*: the question of the "reasonableness of the pawnbroker's suspicion" was a question for the

**e.** *Pleading in actions against constables.*—To a plea of "son assault demesne," a replication that deft. committed a breach of the peace, & that pltf. being a constable, & having view thereof, arrested him, is a good answer.—*Fido v. Wood* (1837), 5 O. S. 558.—*CAN.*

**f.** ———.]—Deft. in trespass for false imprisonment cannot urge that he arrested as a constable, & that the action was brought in a wrong county, if he has omitted to insert in the margin of his plea, "by statute," unless the ct. can say, upon the facts proved at the close of pltf.'s case, that deft. was acting as constable.—*Brown v. SNEA* (1848), 5 U. C. R. 141.—*CAN.*

**g.** *Arrest under Act subsequently disallowed.*—Where an Act passed by the Provincial Legislature was subsequently disallowed, but while in force pltf. had been convicted under it by defts., & a warrant was properly issued by defts. for his arrest & imprisonment, which, however, was not executed until after the disallowance of the Act was published in the Gazette:—*Held*: as the conviction & warrant were legal, defts. could not be considered as trespassers.—*CLAPP v. LAWRASON* (1841), 6 O. S. 319.—*CAN.*

**h.** *Replication to plea of justification.*—It is a good count in trespass against a justice on motion in arrest of judgment, that he with force & arms issued his warrant, whereby he caused pltf. to be wrongfully imprisoned without any reasonable cause, until pltf. gave his note to A.

judge & not for the jury, & there must be some evidence of the absence of reasonable suspicion, & as there was no such evidence in the present case *deft.* was not liable.—HOWARD v. CLARKE (1888), 20 Q. B. D. 558; 58 L. T. 401; 52 J. P. 310; 4 T. L. R. 261, D. C.

*Annotation*.—*Consd.* Carter v. Kimbell (1894), 10 T. L. R. 554.

**831.** — Question for jury.]—Where a party has given another in charge for felony to a constable, the question whether he did so *bona fide*, & without malice, & that as to whether the constable acted through him, are questions for the jury.—PEATE v. UTTERTON & MACARTHY (1838), 2 J. P. 694; 2 Jur. 919.

**832.** — —.] — In trespass for false imprisonment *pltf.'s* wife was given in charge & taken before a magistrate by *deft.*, for doing malicious injury to a house, of which *pltf.*, who was then in prison, was tenant to *deft.*, & who alleged that he had acted under Malicious Injury to Property Act, 1827 (c. 30), ss. 24, 28, & was entitled to notice of action under sect. 41. The judge thought *pltf.'s* wife had a right, her husband being then the tenant of the house, to do the act complained of, & *deft.* was not within the Act: *Held*: the judge should have asked the jury whether *deft.* acted *bona fide*, or believed he was doing so, & on their answering in the affirmative, nonsuited *pltf.* for want of notice.—HORN v. THORNBOROUGH (1849), 3 Exch. 846; 6 Dow. & L. 651; 18 L. J. Ex. 349; 13 L. T. O. S. 166; 13 J. P. 446; 154 E. R. 1087.

*Annotations*.—*Distd.* Parker v. Plinner & Burdon (1819), 14 L. T. O. S. 451. *Consd.* Booth v. Clive (1851), 10 C. B. 827; Read v. Coker (1853), 13 C. B. 850.

**833.** — —.]—It is the duty of a judge to tell the jury what allegations in a plea setting up the defence of reasonable & probable cause are sufficient to constitute such defence; & where evidence has been given in proof of allegations sufficient to constitute a good plea, but no evidence has been given in proof of other allegations in the plea, the case should be left to the jury upon those allegations in the plea of which evidence has been given, & which are by themselves sufficient to make a good plea.—JONES v. WILLIAMSON (1859), 32 L. T. O. S. 317; 23 J. P. 182.

to obtain his discharge.—BRENNAN v. HATELEY (1841), 6 O. S. 308.—CAN.

**k.** — —.]—Where *deft.* justified under a bailable writ, & *pltf.* replied that the writ was set aside, without stating upon what grounds & without averring that the arrest so set aside was the same arrest under which *deft.* justified:—*Held*: replication bad.—MONFORTH v. MONFORTH & RABY (1848), 4 U. C. R. 338.—CAN.

—]—WATSON v. ROBERTS & HARDING (1848), 6 N. B. R. (1 All.) 108.—CAN.

**m.** — —.]—STILES v. BREWSTER (1859), 9 N. B. R. (4 All.) 414.—CAN.

**n.** Justification by sheriffs may be given under general issue.]—The sheriff, when sued in trespass for having arrested *deft.* under a warrant issued by the justices of the peace sitting in quarter sessions, may give this justification in evidence under the general issue.—FRASER v. DICKSON (1848), 5 U. C. R. 231.—CAN.

**o.** Declaration alleging arresting, bruising & beating.—Whether justification of arrest sufficient.]—BRAMER v. DARLING (1848), 4 U. C. R. 211.—CAN.

**p.** Admission of constable.]—The admission by a constable, sued in trespass with two justices, that a paper produced at the trial was a copy of the warrant under which he committed the trespass, is not sufficient evidence as

against the justice to entitle the constable to claim an acquittal under 24 Geo. 3, c. 44, s. 6.—KALAR v. CORNWALL, STOVER & SIROUD (1849), 8 U. C. R. 168.—CAN.

**q.** Arrest of married woman for debt.]—A married woman living on terms of separation from her husband, who was in Europe, was arrested for debt. It was not shown that the creditor had any knowledge of her having a husband living.—*Held*: although the wife might be entitled to her discharge on application, such arrest would not support an action of trespass.—KENNET v. WOODS (1853), 11 U. C. R. 20.—CAN.

**r.** Attachment for contempt.]—*Defts.* justified under an attachment for contempt against *pltf.*, to which *pltf.* replied that the rule on which the attachment issued was irregular, & that the *ct.* afterwards, by rule, ordered that it & the rule on which it issued, & the arrest of *pltf.* thereon, should be set aside, as having been obtained *ex p.* —*Held*: replication good, for that the attachment being set aside for irregularity was displaced *ab initio*, & afforded no protection to *defts.* —REID v. JONES & CAHILL (1855), 4 C. P. 424.—CAN.

**t.** Attorney suing out order regular on its face.—Not sufficient justification.]—PONTON v. BULLEN (1861), 2 E. & A. 379.—CAN.

**834.** — Necessity to state circumstances in defence.]—A plea justifying an arrest by a private person, on suspicion of felony, must show the circumstances, from which the *ct.* may judge, whether the suspicion were reasonable.

Action of false imprisonment, *defts.* pleaded that before the time when, etc., certain persons unknown had forged receipts on certain forged dividend warrants, & received the money purporting to be due in respect thereof in bank notes of the Bank of England, amongst which was a note for £100, which was afterwards exchanged there for other notes, & amongst them one for £10, the date & number of which was afterwards altered; that afterwards, & a little before the time when, etc., *pltf.* was suspiciously possessed of the altered note, & did, in a suspicious manner, dispose of the same to one A. B., & after, & before the time when, etc., in a suspicious manner departed & left England & went to Scotland, & there continued; whereupon *defts.* had reasonable cause to suspect, & did suspect, that *pltf.* had forged the said receipts, whereupon *defts.* gently laid their hands on *pltf.*, & carried to & detained in a gaol in Scotland, in order that he might be conveyed, by a warrant to be issued by a justice of the county of Middlesex, to be dealt with according to law:—*Held*: this plea was too general on demurrer; for it is necessary to show in pleading the causes of suspicion in certainty, in order that the *ct.* may judge of their reasonableness, & using the term suspicious will not aid what is necessary to be averred. MURE v. KAYE (1811), 4 Taunt. 34; 128 E. R. 239.

*Annotations*.—*Refd.* Panton v. Williams (1841), 2 Q. B. 169. *Mentd.* McLeod v. Schultze (1844), 13 L. J. Ex. 321.

**835.** — — —.]—M'CURDAY v. DRISCOLL, No. 685, *ante*.

**836.** — — —.]—In trespass for false imprisonment, *deft.*, under the plea of "not guilty" may give in evidence the excuse, if it merely goes in mitigation of damages, though he cannot do so without a special plea, if it amounts to a justification.—LINFORD v. LAKE (1858), 3 H. & N. 276; 27 L. J. Ex. 334; 31 L. T. O. S. 120; 6 W. R. 515; 157 E. R. 475.

**u.** Sufficiency of notice of action.]—In an action brought by husband & wife for the imprisonment of the wife, the notice of action was signed "J. G. C., attorney for the said Priscilla Gables" (the wife):—*Held*: insufficient, & it ought to have been signed on behalf of the husband.—GABLES v. DOUGLAS (1861), 11 N. B. R. (6 All.) 55.—CAN.

**a.** Sufficiency of evidence to connect all defendants with trespass.]—CAMPBELL v. McDONELL (1868), 27 U. C. R. 313.—CAN.

**b.** Detainer on valid process after an illegal arrest.]—*Ex p.* McMANUS (1891), 32 N. B. R. 481.—CAN.

**c.** Warrant in prescribed form.]—Warrant following prescribed form justifies officer who executes it even though bad in fact or quashed or set aside.—HURLBERT v. SLEETH (1895), 27 N. S. R. (15 R. & G.) 375; *revid.* 25 S. C. R. 620.—CAN.

**d.** Justice's order justifying removal of solicitor from court.—Second removal from court.—Justice's order for first removal only.]—BULMER v. O'SULLIVAN (1896), 28 N. S. R. (16 R. & G.) 406.—CAN.

**e.** Execution issued out of magistrate's court.]—An execution issued out of a magistrate's *ct.* on a judgment by default against an infant on his promissory note is a good answer to an

**Sec. 2.—False or illegal imprisonment: Sub-sects. 5, 6 & 7, A.]**

**837. Arrest on illegal warrant—Justification by legal warrant.]**—Suppose one has a legal & an illegal warrant & arrests by virtue of the illegal warrant yet he may justify by virtue of the legal one for it is not what he declares but the authority which he has in his justification (*110LT, C.J.*).—*GRENVILLE v. COLLEGE OF PHYSICIANS* (1700), as reported in 12 Mod. Rep. 388; 88 E. R. 1398; *sub nom. GROENVELT v. BURWELL*, 1 Com. 76; 1 Ld. Raym. 454.

**Annotations:—***Apld. Crowther v. Ramsbottom* (1798), 7 Term Rep. 654. *Consd. Lucas v. Nockells* (1833), 10 Bing. 157; *Baillie v. Kell* (1838), 4 Bing. N. C. 638; *Hooper v. Laue* (1857), 6 H. L. Cas. 443. *Refd. Ridgway v. Hungerford Market Co.* (1835), 4 Nov. & M. K. B. 797; *R. v. Thomas* (1838), 8 Ad. & El. 183; *Phillips v. Whitford* (1860), 2 E. & E. 804; *R. v. Saddlers' Co.* (1863), 10 H. L. Cas. 404; *Grimwood v. Moss* (1872), L. R. 7 C. P. 360; *Serjeant v. Nash* (1903), 89 L. T. 112. *Mentd. R. v. Dublin (Dean & Chapter)* (1722), 1 Stra. 536; *R. v. Scarborough Bailiffs* (1728), 1 Barn. K. B. 113; *R. v. Despard* (1798), 7 Term Rep. 736; *Brittain v. Kinnaird* (1819), 1 Brod. & Bing. 432; *Scott v. Eye* (1824), 2 Bing. 344; *Basten v. Carew* (1825), 3 B. & C. 649; *Garnett v. Ferrand* (1827), 6 B. & C. 611; *Bristol Poor Governors v. Watt* (1834), 1 Ad. & El. 264; *Lindsay v. Leigh* (1848), 12 Jur. 288; *R. v. Hallett* (1851), 3 Car. & Kir. 139; *Ebon v. Neville* (1861), 10 W. R. 8; *Kemp v. Neville* (1861), 10 C. B. N. S. 623; *Wildes v. Russell* (1866), L. R. 1 C. P. 722; *R. v. Nicholson, etc.*, *R. v. Greenhalgh, etc.*, *R. v. Bamber* (1899), 81 L. T. 257.

**838. Evidence in support—Statement of magistrate on previous proceedings.]**—On the trial of an action for assault & false imprisonment, on a charge of felony, if pltf.'s counsel ask his witness what was said by deft. when the parties were before the magistrate, deft.'s counsel may ask, on cross-examination, what was said by the magistrate.

Where a plea of justification in such a case states that the pltf. committed the felony, the jury must try that question in the same way as if they were sitting in the criminal ct. trying pltf. for the offence itself; & if a witness, who admits that he stole similar property at the same time, be called to sustain the plea, though he is not exactly in the situation of an accomplice, yet it seems that his testimony ought to receive some confirmation.—*RICHARDS v. TURNER* (1840), *Car. & M.* 414, N. P.

**839. Character of plaintiff.]**—In trespass for false imprisonment of a criminal charge, deft. cannot cross-examine as to the bad character of pltf., nor as to previous charges made against

him.—*DOWNING v. BUTCHER* (1841), 2 Mood. & R. 374, N. P.

**840. Previous charges against prisoner.]**—*DOWNING v. BUTCHER*, No. 839, *ante*.

**841. Justification of act done by servant—Must allege authority.]**—In assault & false imprisonment, a plea showing the grievance to have been committed by deft.'s servant, & justifying his act without showing authority from deft., is bad.—*EVANS v. LUND* (1843), 2 L. T. O. S. 147.

**Justification by sheriff or bailiff.]**—See Sub-sect. 4, C. (c), *ante*.

**SUB-SECT. 6.—REMEDIES.**

**842. Use of reasonable force to obtain release.]**

—On a declaration for false imprisonment on a charge of felony, an amendment substituting a charge of assault, refused. A. seized the bridle of the horse on which B. was riding:—*Held*: B. after a request to desist, was justified in striking A. with his riding whip, using no more force than was necessary to obtain his release.—*ROWE v. HAWKINS* (1858), 1 F. & F. 91.

**843. Prosecution.]**—Mere false imprisonment without any belief of the existence of any legal authority, though no actual assault or battery took place, is an indictable offence.—*R. v. LINSBERG & LIES* (1905), 69 J. P. 107.

**Habeas corpus.]**—See CROWN PRACTICE, Vol. XVI., pp. 248-275.

**SUB-SECT. 7.—DAMAGES.**

**A. In General.**

**844. Imprisonment of trespasser—Necessity for proof of damage—No presumption of damage by jury.]**—*BUTLER v. TURLEY*, No. 759, *ante*.

**845. Costs necessary to restore plaintiff to status quo—Cost actually paid.]**—A., having been illegally arrested on mesne process, applied to the ct. to be discharged. The rule was referred to a Judge at chambers, who ordered him to be discharged, & would have given him the costs of the rule if he would have undertaken to bring no action; but, as he refused to give such undertaking, nothing was ordered as to costs.

In an action of trespass & false imprisonment brought by A. for the arrest:—*Held*: (1) he was

an action for false imprisonment under the execution.—*McGAW v. Fisk* (1908), 38 N. H. R. 354; 4 E. L. L. 512.—*CAN.*

**f. Plaintiff keeper of bawdy house.]**—*HOPPER v. CLARK* (1911), 10 E. L. L. 305; 40 N. B. R. 568.—*CAN.*

**g. Justification not sustained by evidence.]**—In an action for false imprisonment, deft. pleaded a justification, which was not sustained by the evidence:—*Held*: notwithstanding the rule, that what might have amounted to a justification, if pleaded, cannot, if not pleaded, be relied on in mitigation of damages, the judge may tell the jury that the deft. might have justified by another plea, if he thinks the cause of public morals requires such a declaration.—*SHIELDS v. BOLTON* (1841), *Arm. M. & O.* 235.—*IR.*

**h. Justification as magistrate.]**—A. & B. were charged jointly & in one count with assault, battery, & imprisonment of deft. A. pleaded a justification as a justice of the peace. Trespassers, including an assault, battery, & imprisonment, were proved to have been done by A. & B. jointly, & afterwards on the same day another imprisonment, but without an actual battery, done by A. alone, to which last

the justification alone applied:—*Held*: no new assignment by pltf. was necessary, & the judge was right in telling the jury to confine their attention to the joint trespass only.—*KEARNEY v. TOTENHAM* (1867), 15 W. R. 1020.—*IR.*

**k. Commission to inquire into causes of wreck.]**—*ELIAS v. O'BRIEN & GRIEVE* (1859), 4 Nid. L. R. 880.—*NFLD.*

**l. Necessity for averment of want of probable cause.]**—In an action of damages against a private party for wrongful apprehension by the police on a criminal charge preferred by defender:—*Held*: it is necessary for pursuer to aver malice, & want of probable cause.—*CALLENDER v. MILLIGAN* (1849), 11 Duml. (Ct. of Sess.) 1174; 21 Sc. Jur. 463.—*SCOT.*

**PART IV. SECT. 2, SUB-SECT. 6.**

**m. Indictment for perjury or action for false imprisonment.]**—When deft. swore that he was arrested on a Sunday, & the bailiffs swore that it was on a Monday, the ct. refused summarily to decide upon the legality of the arrest; nor would they, on motion, discharge him, but would leave him to his remedy at law, either by indictment for perjury of the bailiffs, or by

an action for false imprisonment.—*WHITE v. BURROW, Rowe*, 431.—*IR.*

**n. Compensation.]**—The ct. will not allow a person to bring an action at law for damages for an improper arrest, under an attachment, but will refer it to the master to inquire what compensation he ought to receive.—*BACHELOR v. BLAKE* (1824), 1 Hog. 98.—*IR.*

**o. Where a party is improperly arrested under an attachment, he may apply to the ct. for compensation for the arrest, but he will be restrained from proceeding at law.]**—*HYDE v. HOLMES* (1825), 2 Mol. 373.—*IR.*

**p. Damages.]**—*RADEMAYER v. VANDER MERWE* (1895), 12 S. C. 450; 5 C. T. R. 475.—*S. AF.*

**PART IV. SECT. 2, SUB-SECT. 7.—A.**

**q. All costs of defence.]**—Deft. was a coroner & unlawfully committed pltf. to goal on a charge of arson, acting on the expression of opinion of a jury, at an inquest on a case of fire, holden under 24 Vict. No. 10. Pltf. was afterwards tried & acquitted. In an action for false imprisonment:—*Held*: pltf. could not recover as damages the

entitled to recover those costs as special damage if properly laid in his declaration; (2) as the declaration only alleged that he had been forced & obliged to pay & had paid C., he could not recover the whole of the bill of costs of his attorney which he had not paid, though he was liable to pay them; but he might recover so much of the bill of costs as consisted of money actually paid by the attorney, as that might be considered as money paid by him through his agent.

*Semble*: under an averment that he had been forced & obliged to, & had become liable, etc., he might have recovered damages for such liability.—*PRITCHET v. BOEVEY* (1833), 1 Cr. & M. 775; 3 Tyr. 949; 2 L. J. Ex. 251.

*Annotation*:—As to (2) *Reid*. *Richardson v. Chasen* (1847), 10 Q. B. 756.

**846.**—Costs for which plaintiff liable.] —*PRITCHET v. BOEVEY*, No. 845, *ante*.

**847.**—Costs of returning home.] —(1) Where a party has been convicted summarily by justices under 9 Geo. 4, c. 69, & committed to prison, under an illegal warrant, he is entitled to recover the costs of procuring his discharge by writ of *habeas corpus* as special damage in an action of trespass against such justices.

(2) Where a party has been illegally imprisoned, he is entitled to recover as damages all costs reasonably necessary to reinstate him in his *status quo ante bellum*. Where, therefore, he obtains his discharge under a writ of *habeas corpus* in London, he can recover the costs of returning home.—*FLETCHER v. CALTHROP* (1845), 1 New Sess. Cas. 529; 5 L. T. O. S. 432; 9 J. P. 249; *previous proceedings*, 6 Q. B. 880.

**848.**—Costs of quashing coroner's inquisition.]—Def't., by a warrant of commitment on a coroner's inquisition held without jurisdiction, caused pl'tf. to be imprisoned. Pl'tf. was bailed & afterwards, while on bail, procured the inquisition to be quashed:—*Held*: in an action for such false imprisonment, pl'tf. was entitled, under an allegation that he had incurred expense in procuring his discharge from custody, to recover damages for the expense of quashing the inquisition.—*FOXALL v. BARNETT* (1853), 2 F. & B. 928; 2 C. L. R. 273; 22 L. T. O. S. 100; 2 W. R. 61; 118 E. R. 1014.

**849.** *Imprisonment on ship—Expenses of transshipment—& passage in another ship.*—In an action for false imprisonment on board a ship pl'tf. cannot recover as special damages the expense he incurred in leaving the ship & taking his passage on board another unless the injury continued to the moment of his transshipment.—*ROYCE v. BAYLIFFE* (1807), 1 Camp. 58; 170 E. R. 875, N. P.

*Annotations*:—*Reid*. *Hodgkinson v. Fernle* (1857), 2 C. B. N. S. 415; *Hoey v. Felton* (1861), 11 C. B. N. S. 142.

*Mentl*. *Henry v. Goldney* (1846), 7 L. T. O. S. 211.

costs he had incurred in defending himself at the trial.—*CHIFFELL v. THOMSON* (1869), 8 N. S. W. S. C. R. (L.) 219.—*AUS*.

*r.* —*GUNN v. COX* (1879), 2 L. C. S. 528; 3 S. C. R. 290.—*CAN*.

*t. Three cents damage according to statute.*—Action against a magistrate for wrongful arrest & imprisonment, upon a conviction for selling liquors without license. The first count was in trespass, the second in case. At the trial the offence of which pl'tf. was convicted was fully proved:—*Held*: on either count the damages must be reduced to three cents, under C.S.U.C. c. 126, s. 17, as pl'tf. was proved "guilty of the offence of which he was convicted," & this applies as well to trespass as to case.—*HAAKE v. ADAMSON* (1864), 14 C. P. 201.—*CAN*.

*a. Twopence damages.*—In trespass against justices of the peace for false imprisonment, it appeared that pl'tf., having committed an assault, was convicted by def'ts. under 1 Rev. Stat. c. 159, s. 27, & fined £8, & in default of payment sentenced to a month's imprisonment, & that, having refused to pay the fine, he had been imprisoned for a month:—*Held*: as the imprisonment did not exceed that assigned by the Act for the offence, pl'tf. was only entitled to recover twopence damages under 1 Rev. Stat. cap. 126, s. 11, though the fine was greater than the justices had power to impose by the Act.—*DAVIS v. RAYMOND* (1865), 11 N. B. R. (6 All.) 317.—*CAN*.

*b. Exemplary damages.*—*CLISSOLD v. MACHELL & MOSELY* (1865), 25 U. C. R. 80; *affd.* (1866), 26 U. C. R. 422.—*CAN*.

## 850. Damages for imprisonment after remand.]

—A. caused B. to be taken into custody on suspicion of felony, & taken before a magistrate, who remanded B. for two days, & then discharged him:—*Semble*: B., on a declaration for false imprisonment, in the usual form, cannot recover for the two days' imprisonment after the remand. *Qu.*: whether he could do so if it were stated as special damage.—*HOLTUM v. LOTUN* (1834), 6 C. & P. 726; 172 E. R. 1437, N. P.

*Annotation*:—*Reid*. *Lock v. Ashton* (1848), 12 Q. B. 871.

**851.** *Costs of proceedings on habeas corpus.*—*FLETCHER v. CALTHROP*, No. 847, *ante*.

**852.** *Damages for joint trespass—Assessed on whole injury sustained—Irrespective of degree of guilt of each joint trespasser.*—Where two persons are jointly sued for false imprisonment, one of whom has acted from improper motives, the damages ought not to be assessed with reference to the act & motives of the most guilty, or the most innocent party, but the true criterion of damage is the whole injury which pl'tf. has sustained from the joint act of trespass.—*CLARK v. NEWSAM* (1847), 1 Exch. 131; 5 Ry. & Can. Cas. 69; 10 L. J. Ex. 296; 9 L. T. O. S. 199; 11 J. P. 840; 154 E. R. 55.

*Annotations*:—*Mentl*. *R. v. West* (1847), 2 Car. & Kir. 496; *Smith v. Streatfield*, [1913] 3 K. B. 761.

## 853. Sum extorted by wrongful imprisonment.]

—A. being indebted in £17 19s. 6d. for poor rate, application was made to B. & C., two justices of Sussex, who issued a warrant to levy that sum & 6s. for costs, making in all £18 5s. 6d. No goods being found in Sussex, & A. having removed to London, B. & C. issued their warrant reciting the former warrant, & the fact that it was impossible to levy the "said sum" & commanding E., the constable of Sussex, to apprehend A. & take him to Petworth gaol, there to remain, without bail or mainprize, till he should pay the said sum. This warrant was backed by the Lord Mayor, & A. being thereupon taken by E. in London, was detained till he paid the sum of £18 5s. 6d. While he was in custody the clerk of his attorney requested a copy of the warrant, & after some demur he obtained it. After the discharge of A., the clerk served on E. a formal written demand for a copy of the warrant which was signed by the attorney of A., but no copy was given. In an action of trespass against B., C., and E. jointly:—*Held*: the damages could not be reduced to the amount of the costs merely, but pl'tf. was entitled to recover the rate, which, though a just debt, had been extorted from him by illegal means.—*CLARK v. WOODS* (1848), 2 Exch. 395; 3 New Mag. Cas. 30; 3 New Sess. Cas. 213; 17 L. J. M. C. 189; 11 L. T. O. S. 225; 12 J. P. 480; 154 E. R. 545.

*Annotation*:—*Apld*. *Norton v. Monckton* (1895), 43 W. R. 350.

*c.* —*]*—*BIRYAU PERSHAD v. ISHAREE* (1871), 3 N. W. 313.—*IND*.

*d. Nominal damages.*—*ARMSTRONG v. MCCAFFERTY* (1869), 12 N. B. L. (1 Han.) 525.—*CAN*.

*e.* —*]*—*DOWLING v. MCNEILLY* (1879), 19 N. B. L. (3 P. & B.) 42.—*CAN*.

*t. Arrest before endorsement of warrant—Detention after.*—A warrant for the arrest of pl'tf., who had made default in paying a fine on conviction for an infraction of the liquor license law, was sent from an outlying county to a city. Before it was indorsed by a magistrate in the city pl'tf. was arrested there by two of def'ts., the chief constable & a detective, & confined. Some hours after the arrest the warrant was properly indorsed & the detention of pl'tf. was continued until payment of



*Sect. 2.—False or illegal imprisonment: Sub-sect. 7, A. & B. Sect. 3.]*

**854.** —[Pltf. having been arrested by a sheriff's officer under a *capias* to hold to bail against another person, protested that he was not the right person; but in order to obtain his release he paid the sum endorsed, etc., & the officer released him, under 43 Geo. 3, c. 46, s. 2. The money having been paid into ct. by the sheriff, the usual summons was taken out & served on pltf.; but he did not appear, & the money was paid to the person at whose suit pltf. had been arrested:—*Held*: pltf. was not precluded from recovering the money from the sheriff.—*DE MESNIL v. DAKIN* (1867), L. R. 3 Q. B. 18; 8 B. & S. 650; 37 L. J. Q. B. 42; *sub nom.* *DAKIN v. DE MESNIL*, 16 W. R. 145.

**855.** —[Pltf. was arrested under a committal warrant signed & issued by deft., a justice of the peace, for non-payment of a debt made up of a certain sum of money alleged to be due from pltf. to the local sanitary authority, under an order made at quarter sessions, & of the costs awarded:—*Held*: such a warrant was altogether bad, & pltf. was entitled to recover from deft., as special damages, the whole amount so paid by him to obtain his release from gaol.—*NOTTON v. MONCKTON* (1895), 43 W. R. 350; 11 T. L. R. 242; 39 Sol. Jo. 286, D. C.

**856. Damages for loss of employment—Failure to attend at time for engagement—Failure due to physical effect of imprisonment.**—[Deft., caused pltf. to be apprehended upon an unfounded charge, & to be detained from half-past one until two o'clock. In support of a claim for special damage in an action for false imprisonment, pltf. proved that he would have been engaged as a journeyman by S., if he had presented himself at the factory at two o'clock on the day in question; but that, being unwell from the treatment he had received, he went home, & did not go to the factory until the next morning, when he found that his intended employer had engaged another man:—*Held*: this damage was too remote.—*HOEY v. FELTON* (1861), 11 C. B. N. S. 142; 31 L. J. C. P. 105; 5 L. T. 354; 8 Jur. N. S. 764; 10 W. R. 78; 142 E. R. 749.

**857. Loss of directors' fees.**—[Pltf. was given into the custody of the police by deft. on a charge of larceny, & was taken to the police station, where deft. signed the charge sheet but went bail for pltf. Before the magistrates deft. wished to withdraw the charge, but they did not allow this & remanded pltf. on bail. At the adjourned hearing the magistrates dismissed the charge, the only ground being that the proceedings were not *bond fide*. In an action for false imprisonment the jury awarded pltf. general damages & a sum of £350, which he claimed as special damages for loss of directors' fees on the ground that when his co-directors saw that he had been taken into custody charged with

larceny they demanded his resignation from the board & he resigned. It was admitted that this special damage would flow from malicious prosecution. The only claim was, however, for false imprisonment:—*Held*: as the inevitable result of the signing of the charge sheet was pltf.'s appearance before the magistrates, & as pltf.'s co-directors would hear of his arrest before the magistrates dealt with the case, it was open to the jury to take the view that the special damage flowed from the false imprisonment.—*CHILDS v. LEWIS* (1924), 40 T. L. R. 870.

*B. Aggravation and Mitigation of Damages.*

Aggravation & mitigation of damages generally, see *DAMAGES*, Vol. XVII., pp. 120 et seq.

**858. Aggravation—Evidence of malice—Trespass to goods of plaintiff.**—(1) In an action for false imprisonment, where a verdict with £200 damages was given for one night's confinement in a prison, evidence of a trespass by deft. on the goods of pltf., arising out of the same transaction committed on the following day, was admitted for the purpose of showing that deft. was actuated by malice:—*Held*: to be no ground for granting a new trial.

(2) Deft. having in mitigation of damages, adduced evidence of the state of accounts between himself & the owners of the fund which pltf. was removing under an irregular order, at the time of his being given into custody, & the jury having been told that the fact shown was no mitigation of deft.'s conduct, deft.'s witnesses were allowed to be cross-examined as to bill transactions between deft. & the owners of the fund, for the purpose of negating the state of accounts set up by deft., although it was objected that such an inquiry could not be gone into unless the bills were produced:—*Held*: to be no ground for granting a new trial.—*EDGEELL v. FRANCIS* (1840), 1 Man. & G. 222; 1 Scott, N. R. 118; 4 Jur. 360; 133 E. R. 314; *sub nom.* *EDGEILL v. FRANCIS*, *JAMES v. SAME*, 9 L. J. C. P. 233.

**859.—Persisting in charge—Plea of felony committed by plaintiff—Plea abandoned by counsel.**—[To an action of trespass for false imprisonment, deft. pleaded, by way of justification, that pltf. had committed a felony. At the trial, his counsel abandoned the plea, & exonerated pltf. from the charge:—*Held*: it was not a misdirection in the judge, to tell the jury that the putting of such a plea on the record was a persisting in the charge contained in it, & was to be taken into account by them in estimating the damages.—*WARWICK v. FOULKES* (1844), 12 M. & W. 507; 1 Dow. & L. 638; 13 L. J. Ex. 109; 2 L. T. O. S. 331; 8 Jur. 85; 152 E. R. 1298.

*Annotations*:—*Reid*, *Wilson v. Robinson* (1845), 7 Q. B. 68; *Caulfield v. Whitworth* (1868), 16 W. R. 936. *Mend.* *Bolton v. Kuttin* (1848), 2 Exch. 665; *Simpson v. Robinson* (1848), 12 Q. B. 511.

**860.—Mistaken arrest—Arrest of eminent**

the fine:—*Held*: the only damages recoverable by pltf. were for the trespass up to the time of backing the warrant.—*SOUTHWICK v. HARE* (1894), 24 O. R. 528.—*CAN.*

**g. Plaintiff stripped & searched by police.**—[In an action for false imprisonment it appeared that deft. gave pltf. into custody on a charge of larceny; that thereupon pltf. was taken to the police office, & there stripped & searched in accordance with what was proved to be the practice of the police in such cases. The jury found for pltf. with £100 damages. Upon motion for a new trial on the ground that the evidence of searching was inadmissible, or that, if at all

admissible it should have been alleged as special damage in the summons, & plaint, & also on the ground that the damages were excessive:—*Held*: the evidence was rightly admitted, & the verdict should stand.—*DUNPHY v. MOORE* (1865), 13 L. T. 119.—*IR.*

**h. Damages for loss of employment.**—[*SLEVIN v. MANDERS* (1868), 1 R. 2 C. L. 659.—*IR.*

**k. "Modified damages."**—[*RICHMOND v. THOMSON* (1838), 16 Sh. (Ct. of Sess.) 995.—*SCOT.*

**PART IV. SECT. 2, SUB-SECT.**

**1. Aggravation—Oppressiveness of defendant.**—[In trespass for false im-

prisonment, where deft. justified under a *ca. sa.*, & pltf. replied that it had been set aside before action brought, the judge at *nisi prius* allowed pltf. to go into evidence of facts & circumstances previous to the arrest, with a view of showing the oppressive conduct of deft. in issuing the *ca. sa.*:—*Held*: such evidence was admissible as affecting the damages, though not the right of action.—*ROBERTSON v. MEYERS* (1850), 7 U. C. R. 423.—*CAN.*

**m. Offensive conduct at trial.**—[A direction to the jury that offensive questions put by deft.'s counsel on cross-examination, after consultation with his client & a warning by the judge, might be considered in esti-



**barrister.**]—D., an equity barrister of eminence, was arrested by the officers of the sheriff of Surrey, in mistake for another person of the same name, the officers acting *bond fide*, on information given them by the clerk of the attorney who had sued out the writ. Under such circumstances, & without any special damage, *pltf.* is entitled to substantial & liberal compensation. But where there is no special damage, 250 guineas is sufficiently in excess of what is required, as to be ground for granting a rule absolute for reducing the damages, or for a new trial.—*DAVIDSON v. MOLYNEUX* (1861), 17 L. T. 289.

**861. Mitigation — Conduct of plaintiff.**] — *BINGHAM v. GARNAULT* (1788), Bull. N. P. 17; 2 Roscoe's Evidence in Civil Actions, 19th ed. p. 802.

**862. — Reasonable suspicion of felony.**] — (1) If a constable tell a person given into his charge, that he must go with him before a magistrate, & such person in consequence goes quietly, without any force being used by that constable, it is a sufficient imprisonment to support an action of trespass.

(2) Evidence of reasonable suspicion of felony may be given in mitigation of damages, in an action of false imprisonment.—*CHINN v. MOURIS* (1826), 2 C. & P. 361; Ry. & M. 424; 172 E. R. 163, N. P.

*Annotations:—As to (2) Apd. Linford v. Lake* (1858), 3 H. & N. 276. *Refd. Perkins v. Vaughan* (1812), 5 Scott, N. R. 881.

**863. — —.**] — Trespass was brought against three *defts.* for an assault committed in Bristol. Two of them were constables of Oxford, & had come down & taken *pltf.* at Bristol, thus committing the assault, on suspicion of his having stolen a horse belonging to the other *deft.* in

Oxfordshire. The declaration set out all the trespasses to have been done without reasonable or probable cause. The two constables pleaded not guilty only:—*Held*: they might give that special matter in evidence in mitigation of damages, to show that there was reasonable & probable cause.—*ROWCLIFFE v. MURRAY* (1842), Car. & M. 513, N. P.

**864. — Persistent annoyance.**]—In an action for false imprisonment, by giving *pltf.* in charge to a police officer, *deft.* may, in mitigation of damages, go into evidence to show that *pltf.* had, for several days, been in the habit of going after him & annoying him.—*THOMAS v. POWELL* (1837), 7 C. & P. 807; 173 E. R. 352, N. P.

**865. — State of accounts between plaintiff & defendant—Where trespass to goods proved in aggravation of damages.**]—*EDGEELL v. FRANCIS*, No. 858, *ante*.

**866. — Recent losses of property—Inducing suspicion of theft.**]—In an action for false imprisonment on a charge of stealing money, where there is no plea of justification, *deft.* cannot, in mitigation of damages, give evidence of recent apparent losses of money on his part, though offered for the purpose of explaining the circumstances which induced in his mind a belief in *pltf.*'s guilt.—*YARDLEY v. HINE* (1867), 17 L. T. 264.

#### SECT. 3.—TRESPASS COMMITTED ABROAD.

*Sec. generally, CONFLICT OF LAWS*, Vol. XI., pp. 409, 410, Nos. 780–783.

**Trespass against seaman—By local authority in foreign port—At instigation of master.**] — *See SHIPPING*, Vol. XLII., p. 247, No. 880.

mitting damages in an action for assault & battery, is erroneous, & where the jury, under the influence of such direction, found a verdict of \$250, it was set aside.—*DRISCOLL v. COLLINS* (1892), 31 N. B. R. 604.—**CAN.**

**n. Mitigation of damages—Endeavours to escape.**]—In an action for malicious arrest the statement of defence set up that there was a war-

rant in the hands of a constable for the apprehension of *pltf.* on a charge of misdemeanour; that *pltf.* was avoiding arrest; that *defts.* therefore watched him; & when he endeavoured to escape detained him until the arrival of the constable, & then gave him into custody; & that *defts.* did this in the *bond fide* belief that they were justified in thus aiding the arrest:—*Held*.

although these facts did not constitute an answer to the action, yet they could be given in evidence in mitigation of damages, & therefore it was proper that they should appear upon the record. *PURSELY v. BENNETT* (1885), 11 P. R. 64.—**CAN.**

**o. — Hearsay evidence.**] — *SULLIVAN v. TAINE* (circa 1863), Mac. 533 — **N.Z.**

## TRIAL.

*See ADMIRALTY; COUNTY COURTS; CRIMINAL LAW AND PROCEDURE; HUSBAND AND WIFE; INTERPLEADER; JURIES; MAGISTRATES; PRACTICE AND PROCEDURE.*

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*See CRIMINAL LAW AND PROCEDURE.*

## TRINITY HOUSE AND BRETHREN.

*See ADMIRALTY; SHIPPING AND NAVIGATION.*

## TROUT.

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## TROVER AND DETINUE.

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<i>Criminal Law</i> . . . . .	„ CRIMINAL LAW.

<i>Market Overl</i> . . . . .	<i>See</i> MARKETS; SALE OF GOODS.
<i>Sale of Goods</i> . . . . .	„ SALE OF GOODS.
<i>Tort</i> . . . . .	„ TORT.
<i>Trespass</i> . . . . .	„ TRESPASS.

## Part I.—Nature and Subject-Matter.

### SECT. 1.—NATURE OF TROVER

1. **Historical origin of action.**—In form [an action of trover] is a fiction: in substance a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes deft. may have come lawfully by the possession of the goods. . . . Where deft. takes them wrongfully & by trespass, pltf. if he thinks fit to bring this action waives the trespass & admits the possession to have been lawfully gotten (LORD MANSFIELD).—*COOPER v. CHITTY* (1756), 1 Burr. 20; 1 Keny. 395; 1 Wm. Bl. 65; 97 E. R. 166.

*Annotations*:—*Consd.* *Hollins v. Fowler* (1875), L. R. 7 H. L. 757. *Refd.* *Smith v. Miles* (1786), 1 Term Rep.

475; *Price v. Helyar* (1828), 4 Bing. 597; *Balme v. Hutton* (1833), 9 Bing. 471; *Garland v. Carlisle* (1833), 2 Cr. & M. 31; *White v. Teal* (1840), 12 Ad. & El. 106; *Consolidated Co. v. Curtis*, [1892] 1 Q. B. 495. **Mentd.** *Brassey v. Dawson* (1733), *Ridg. temp. H.* 12; *Coppendale v. Bridgen* (1759), 2 Burr. 814; *Timbrell v. Mills* (1760), 1 Wm. Bl. 205; *Hitchin v. Campbell* (1772), 2 Wm. Bl. 827; *Aldridge v. Ireland* (1784), 3 Doug. K. B. 397; *Rorke v. Dayrell* (1791), 4 Term Rep. 402; *Lafkon v. Eamer* (1795), 2 Hy. Bl. 437; *Smith v. Stokes* (1801), 1 East. 363; *Payne v. Drew* (1804), 4 East. 523; *R. v. Wells* (1807), 16 East. 278; *Williams v. Nunn* (1809), 1 Taunt. 270; *R. v. Giles* (1820), 8 Price. 293; *Lazarus v. Walthman* (1821), 5 Moore, C. P. 313; *Giles v. Grover* (1832), 9 Bing. 128; *Groves v. Cowham* (1833), 10 Bing. 5; *Savory v. Chapman* (1840), 11 Ad. & El. 829; *Tharpe v. Stallwood* (1843), 6 Scott, N. R. 715; *Cannan v. S. E. Ry.* (1852), 7 Exch. 843; *Hope v. Meek* (1855), 10 Exch. 829; *Gloucestershire Banking Co. v. Edwards* (1887), 20 Q. B. D. 107.

2. —.]—The commencement of an action of trover, which may be abandoned at any time, & which assumes that the goods came into the possession of deft. lawfully, cannot, without more, be taken to be an election on the part of the assignees to avoid the transfer.—*NEWMHAM v. STEVENSON* (1851), 10 C. B. 713; 20 L. J. C. P. 111; 17 L. T. O. S. 5; 15 Jur. 360; 138 E. R. 282; *subsequent proceedings, sub nom.* *STEVENSON v. NEWMHAM* (1853), 13 C. B. 285.

*Annotations* :—*Refd.* *Clough v. L. & N. W. Ry.* (1871), L. R. 7 Exch. 26. *Menid.* *Jeffries v. G. W. Ry.* (1856), 5 E. & B. 802; *Re Johnson, Ex p. Rayner* (1872), 41 L. J. Q. B. 26; *Re Clarke, Ex p. Dickinson* (1894), 70 L. T. 284.

—.]—*BURROUGHS v. BAYNE*, No. 100, *post*.

4. **Gist of action—Conversion.**—In trover, the conversion is the tort which is the substance of the action, & therefore traversable.—*STRANSHAM'S CASE* (1588), Cro. Eliz. 98; 78 E. R. 356.

*Annotation* :—*Refd.* *White v. Teal* (1810), 12 Ad. & El. 106.

5. —.]—Conversion is the gist in an action of trover.—*GUMBLETON v. GRAPTON* (1600), Cro. Eliz. 781; 78 E. R. 1011.

6. —.]—*COOPER v. CHITTY*, No. 1, *ante*.

7. —.]—*WEYMOUTH v. BOYER*, No. 343, *post*.

8. —.]—*BURROUGHS v. BAYNE*, No. 100, *post*.

**Trover distinguished from trespass.**—*See TRESPASS*, pp. 421, 422, Nos. 456–462, *ante*.

9. **Whether an action for a “demand.”**—Trover is an action for a demand within the meaning of 6 Geo. 4, c. 16, s. 92.—*ROBSON v. ALEXANDER* (1828), 1 Moo. & P. 448; 6 L. J. O. S. C. P. 111.

## SECT. 2.—NATURE OF DETINUE.

10. **Gist of action—Adverse detention.**—To a declaration in detinue upon a special bailment of scrip certificates to be re-delivered to pltf. on payment of a sum of money, deft. pleaded that the scrip was deposited as a pledge & security for money advanced by him to pltf., & that on repayment thereof he tendered & offered to deliver up & return to pltf. the scrip certificates which pltf. then refused to accept & receive.—*Held*: the word “detain” in detinue means an adverse detention, & consequently the plea was bad, as amounting to *non detinet*.—*CLEMENTS v. FLIGHT* (1846), 16 M. & W. 42; 4 Dow. & L. 261; 1 New Pract. Cas. 567; 16 L. J. Ex. 11; 8 L. T. O. S. 166; 153 E. R. 1090.

*Annotations* :—*Refd.* *Crossfield v. Such* (1852), 22 L. J. Ex. 65; *Bryant v. Herbert* (1878), 3 C. P. D. 389; *Pullen v. Carlton* (1918), 26 Cox. C. C. 296.

11. —.]—In detinue the gist of the action is the detainer (*WILDE, C.J.*).—*LOSSMAN v. WHITE* (1849), 7 C. B. 43; 18 L. J. C. P. 151; 137 E. R. 18.

12. —.]—**Wrongful parting with possession.**—The action for detention supposes that deft. has the document or has wrongfully parted with it (*per Cur.*).—*ROUX v. WISEMAN* (1857), 1 F. & F. 45.

13. **Whether founded on contract or tort.**—*Semble*: detinue is an action of contract & not of

tort.—*HAND v. DANIELS* (1850), 1 L. M. & P. 420; *Rob. L. & W.* 490; *Cox, M. & H.* 343; 14 J. P. 434; 14 Jur. 722.

14. —.]—The first count in debt was for a large sum of money; the second count was in detinue. A large sum was paid into ct. on the first count, & a verdict on the issue as to whether more was due, found for deft. On the count in detinue, the jury found for pltf. with ls. damages. The judge certified to deprive pltf. of costs.—*Held*: 24 & 25 Vict. c. 126, s. 34, did not apply, inasmuch as detinue cannot be said to be brought merely to recover damages for a wrong.—*DANBY v. LAMB* (1861), 11 C. B. N. S. 423; 31 L. J. C. P. 17; 5 L. T. 353; 10 W. R. 43; 142 E. R. 861.

*Annotations* :—*Consd.* *Keates v. Woodward*, [1902] 1 K. B. 532. *Refd.* *Bryant v. Herbert* (1878), 3 C. P. D. 189. *Mand.* *Deverell v. Milne*, [1920] 2 Ch. 52.

15. —.]—In an action claiming the return of a picture or its value & damages for its detention, pltf. recovered a verdict of £10, being its value as assessed by the jury, & ls. damages for its detention.—*Held*: the action was founded on tort, within County Courts Act, 1867 (c. 142), s. 5, & pltf. were entitled to their costs.—*BRYANT v. HERBERT* (1878), 3 C. P. D. 389; 47 L. J. Q. B. 670; 39 L. T. 17; 43 J. P. 52; 26 W. R. 898, C. A.

*Annotations* :—*Refd.* *Fleming v. M. S. & L. Ry.* (1878), 4 Q. B. D. 81; *Meux v. G. E. Ry.* (1895), 64 L. J. Q. B. 657; *Taylor v. M. S. & L. Ry.*, [1895] 1 Q. B. 134; *Turner v. Stallbrass*, [1898] 1 Q. B. 56; *Keates v. Woodward*, [1902] 1 K. B. 532; *Steljes v. Ingram* (1903), 19 T. L. R. 534; *Bradley & Cohn v. Ramsay* (1912), 106 L. T. 771; *White v. Smith* (1927), 96 L. J. K. B. 397.

## SECT. 3.—SUBJECT-MATTER.

### SUB-SECT. 1.—GOODS MUST BE SPECIFIC.

16. **General rule.**—*PRICE v. DAVIES* (1676), *Freem.* K. B. 438; 3 Keb. 693; 89 E. R. 328; *sub nom.* *DAVIS v. PRICE*, 1 Vent. 317.

17. —.]—Defts. contracted to sell to K. 50 hogsheads of sugar, called double loaves at 100s. per cwt., to be delivered free on board a British ship; K. sold to pltf. by the same description & defts. assented to the resale, the sugar not having been delivered or weighed.—*Held*: pltf. could not recover for it in trover against defts., the first vendors.

Trover cannot be maintained but for specific goods (*MANSFIELD, C.J.*).—*AUSTEN v. RAVEN* (1812), 4 Taunt. 644; 128 E. R. 483.

*Annotations* :—*Refd.* *White v. Wilks* (1813), 1 Marsh. 2; *Gillet v. Hill* (1834), 3 L. J. Ex. 145; *Laurie & Morewood v. Dudin*, [1926] 1 K. B. 223.

18. —.]—*ORTON v. BUTLER*, No. 48, *post*.

19. —.]—Pltf., by bought & sold notes, contracted to sell to deft. oil at a certain price “to be free delivered & paid for in fourteen days by cash, less £2 10s. per cent. discount.” Having at the time oil at a wharf, he gave an order to the wharfinger to transfer some of that to deft. The wharfinger transferred it in his books to deft.’s name, & signed a notice of the transfer directed to deft., which pltf.’s clerk on the same day took to deft. & demanded a cheque in payment. Deft. refused to give the cheque, but retained the notice & got possession of the oil against the will of pltf., who, as the jury found, never intended to part with the notice or the oil except on condition

passing in favour of one but against others.—*BOARD OF LAND & WORKS v. GLASS, Sichel & MOCKMORTON* (1893), 2 W. & W. 58.—*AUS.*

18 II. —.]—Detinue is an action of tort.—*BYRNE v. M’EVOY* (1871), 1 R. 5 C. L. 568.—*IR.*

**PART I. SECT. 2.**  
131. *Whether founded on contract or tort.*—Though the action of detinue partakes both of the nature of the action founded on tort yet no case has yet been decided that a verdict for one of several defts. in detinue must

enure to the benefit of all as in other actions founded wholly in contract. By parity of reasoning defts., like pltf. in detinue, do not stand in the same position as in other actions on contract & are therefore not precluded from the consequence of a verdict

**Sect. 3.—Subject-matter: Sub-sects. 1, 2, 3, 4 & 5.]**

that a cheque was given:—*Held*: as the sale was of no specific oil & as deft. refused to comply with the condition, no property passed to him by the transfer in the wharfinger's books, & plff. could maintain trover.—*GONTS v. ROSE* (1855), 17 C. B. 229; 25 L. J. C. P. 61; 26 L. T. O. S. 240; 1 Jur. N. S. 1173; 4 W. R. 120; 139 E. R. 1058.

*Annotations*:—*Refd.* Campbell v. Mersey Docks & Harbour Board (1863), 14 C. B. N. S. 412; Laurie & Morewood v. Dudin, [1926] 1 K. B. 223. *Mentd.* Fitzgerald v. Dressler (1859), 5 Jur. N. S. 598.

**20. As to quantity.**—A declaration in trover for ten chests & coffers, need not show how many of each; & this action lies for money out of a bag.—*DRAYCOT v. PIOT* (1601), Cro. Eliz. 818; 78 E. R. 1045.

**21. —.**—A declaration in trover must specify the quantity of the goods; but if the verdict finds that deft. converted them to his own use, it is not good though tantamount to not guilty.—*GRAMVEI v. RHOBOTHAM* (1601), Cro. Eliz. 865; 78 E. R. 1092.

*Annotation*:—*Mentd.* Pritchard v. Long (1842), 9 M. & W. 608.

**22. —.**—Trover for so many ounces of cloves, mace, & nutmegs, without specifying the quantity of each, good after judgment by default.—*HARTFORT v. JONES* (1700), 1 Ld. Raym. 588; 2 Salk. 654; 91 E. R. 1293.

*Annotation*:—*Refd.* Bern v. Mattaire (1735), Lee temp. Hard. 119.

**23. As to description.**—In trover the value of each article must be particularly specified.—*WOOD v. SMITH* (1606), Cro. Jac. 129; 79 E. R. 112; *previous proceedings* (1601), Cro. Eliz. 817.

*Annotation*:—*Refd.* Usher v. Bushell (1661), 1 Sid. 39.

**24. —. Manufactured goods.**—A declaration for stockings, or for any other manufactured article, need not show of what kind they are. *Sed. aliter* for a thing never converted out of its kind.—*MIDDLETON v. TROT* (1601), Cro. Eliz. 837; 78 E. R. 1063.

**25. —. Goods not altered.**—*MIDDLETON v. TROT*, No. 24, *ante*.

**26. —. Hawk.**—Trespass will lie for killing a hawk, without specifying the species, or showing that it was reclaimed; but in trover this must be shown.—*VINCENT v. LESNEY* (1625), Cro. Car. 18; 79 E. R. 621.

**27. —. Ends of boards.**—*KNIGHT v. BARKER*, No. 78, *post*.

**28. —. Parcel—Pack cloths, wrappers & cords.**—In trover for a parcel of pack cloths, wrappers, & cords, no objection can be taken on account of the uncertainty of the word "parcel," after judgment by default.—*HARRISON v. BOTTOMLEY* (1729), 2 Ld. Raym. 1529; 92 E. R. 492; *sub nom.* *BOTTOMLEY v. HARRISON*, 2 Stra. 809; *sub nom.* *BOTAMLEY v. HARRISON*, 1 Barn. K. B. 65.

**29. —. —. Diamonds.**—*WHITE v. GRAHAM* (1729), 2 Stra. 827; 93 E. R. 877, II. L.

*Annotation*:—*Refd.* Harrison v. Bottomley (1729), 2 Ld. Raym. 1529.

**30. As to value.**—*WOOD v. SMITH*, No. 23, *ante*.

**PART I. SECT. 3, SUB-SECT. 1.**

**231. A to description.**—M. received money from plff. & from others to buy grain on commission. He bought in his own name, & from time to time appropriated the warehouse receipts among his principals, without distinguishing in his books, or other-

wise, from whom any particular grain had been bought:—*Held*: under the circumstances, plff. could not maintain trover against M.'s assignee in insolvency for grain not specifically appropriated to him.—*WILSON v. BOCKUS* (1870), 20 C. P. 467.—**CAN.**

**23 II. —.**—*SCOTT v. PATTERSON* (Sask.), [1923] 1 D. L. R. 783.—**CAN.**

**SUB-SECT. 2.—ANIMALS, GAME, ETC.**

**Dog.**—*See* *ANIMALS*, Vol. II., p. 204, Nos. 2, 3.  
**Hawk.**—*See* *ANIMALS*, Vol. II., p. 206, Nos. 22–24.

**Musk cat, monkey & parrot.**—*See* *ANIMALS*, Vol. II., p. 207, Nos. 35, 36.

**Game.**—*See* *GAME*, Vol. XXV., p. 365, Nos. 136, 137.

**SUB-SECT. 3.—DOCUMENTS.**

**31. Title deeds.—In receptacle.**—*HOLMES v. WINEGREEN* (1626), Lat. 195; 92 E. R. 342.

**32. —.**—*ANON.* (1368), Y. B. 42 Edw. 3, fo. 13, pl. 21.

**33. —.**—*— v. THOMAS* (1365), Y. B. 39 Edw. 3, fo. 7 b.

**34. —.**—*— v. WILLIAM* (1366), Y. B. 40 Edw. 3, fo. 25, pl. 28.

**35. —.**—*ANON.* (1343), Y. B. 17 Edw. 3, fo. 45, pl. 1.

*Annotations*:—*Dbtd.* Williams v. Archer (1847), 5 C. B. 318. *Refd.* Isaack v. Clark (1615), 2 Bulst. 306; Edmondson v. Nuttall (1864), 17 C. B. N. S. 280.

*—.*—*See, further*, Part III., Sect. 2, sub-sect. 4, E., *post*.

**36. Bond.**—*DE UTRED v. —* (1350), Y. B. 24 Edw. 3, fo. 24, pl. 1.

**37. —.**—Trover does not lie for a bond.—*WATSON v. SMITH* (1599), Cro. Eliz. 723; 78 E. R. 957.

**38. —.**—Trover lies for a bond, as a writing obligatory, & the date need not be shown.—*UPCHARD v. TATAM* (1622), Cro. Jac. 637; 79 E. R. 550.

**39. —.**—Trover lies for not delivering a bond; & it is not necessary to show the date, or to allege the time or place of conversion.—*WILSON v. CHAMBERS* (1632), Cro. Car. 262; 79 E. R. 828.

*Annotation*:—*Refd.* *ANON.* (1704), 2 Salk. 655.

**40. —.**—Trover lies for a bond & a warrant, described as the goods & chattels of plff.—*COOK v. BOSINGER* (1692), 4 Mod. Rep. 156; 87 E. R. 321.

**41. Warrant.**—*COOK v. BOSINGER*, No. 40, *ante*.

**42. Lottery tickets.**—Goldsmith has lottery tickets of A. & B., & delivers A.'s tickets to B. for his own. A. may maintain trover against B.—*FORD v. HOPKINS* (1701), 1 Salk. 283; Holt, K. B. 119; 90 E. R. 964.

*Annotations*:—*Consd.* Hartop v. Hoare (1743), 3 Atk. 44; Miller v. Itace (1758), 1 Burr. 452; Wooley v. Pole (1820), 1 B. & Ald. 1. *Refd.* Ekins v. Mackintosh (1753), Amb. 184; Moss v. Hancock (1899), 68 L. J. Q. B. 657. *Mentd.* Nightingale v. Dodd (1729), 1 Barn. K. B. 257.

**43. Grant of arms.**—A. obtained from the Herald's College a grant of arms, to be borne by him & his descendants & the descendants of his brother. He died without issue, leaving two nephews, the sons of his brother:—*Held*: the nephews had not such an exclusive interest in the exemplification or instrument issued to A. by the College as to entitle them to maintain an action of detinue against his widow, who retained possession of it, & to whom all the household effects were bequeathed.—*STUBS v. STUBS* (1862), 1 H. & C. 257; 31 L. J. Ex. 510; 158 E. R. 881.

*Annotation*:—*Refd.* Hannay v. Smurthwaite, [1893] 2 Q. B. 412.

**Insurance policy.**—*See* *BANKRUPTCY*, Vol. V., pp. 673, 674, 1091, Nos. 5960, 8921; *INSURANCE*, Vol. XXIX, p. 73, Nos. 324, 325.

**a. —. Stock-in-trade of plaintiff.**—In detinue, the plaintiff must specify distinctly the nature of the goods sought to be recovered; & the description—"stock in trade of plff."—is not a sufficiently definite description.—*FRIEDEL v. CASTLEBROUGH* (1877), 11 I. C. L. R. 93.—**IR.**

**Negotiable instruments.**—See Part II., Sect. 1, sub-sect. 2, H., & Part III., Sect. 2, sub-sect. 4, R., *post*.

**Measure of damages.**—See Part III., Sect. 3, sub-sect. 1, C. (h) viii., *post*.

See, also, Part III., Sect. 2, sub-sect. 4, E., *post*.

#### SUB-SECT. 4.—FIXTURES.

See AGRICULTURE, Vol. II., p. 50, Nos. 269, 271, 273; LANDLORD & TENANT, Vol. XXXI., pp. 186, 201, 203, 206, 212, Nos. 3205, 3418, 3435, 3467-3471, 3510-3519; SALE OF LAND, Vol. XL., p. 278, Nos. 2417, 2419-2421.

**Measure of damages.**—See Part III., Sect. 3, sub-sect. 1, C. (h) iii.

#### SUB-SECT. 5.—MONEY.

**44. Necessity for identification.**— - - v. THOMAS (1365), Y. B. 39 Edw. 3, fo. 7 b.

**45. —**—An action of detinue does not lie for money at large.—BANKS v. WHETSTON (1596), (Cro. Eliz. 457; Moore, K. B. 394; 78 E. R. 711.

**46. —**—Trover for money out of a bag is good after verdict; but damages for the conversion only, & not for the taking, can be given.—KINASTON v. MOOR (1627), (Cro. Car. 89; 79 E. R. 678.

**47. —**—*Qu.*: if a declaration in trover for fifty pieces of gold coined within the kingdom, without naming of what denomination of money, is good. Trover *de viginti vasibus* was too general. SALISBURY v. PROCTOR (1697), 5 Mod. Rep. 324; 87 E. R. 683.

**48. —**—A count stating that debt. had & received to the use of pltf. a certain sum of money, to be paid by debt. to pltf. upon request; & the non-payment upon request & that debt. converted & disposed thereof to his own use, is bad upon demurrer.

The action of trover is only maintainable for specific property; it will lie for so many pieces of gold or silver, & in that case debt. can only redeem himself by rendering to pltf. the same specific pieces. But in this case he clearly might do so, by returning an equal sum of money. There is, therefore, not merely a want of certainty in the count, but it states that which is not the subject of an action of trover at law (ABBOTT, C.J.)—ORTON v. BUTLER (1822), 5 B. & Ald. 652; 1 Dow. & Ry. K. B. 282; 106 E. R. 1329.

*Annotations*:—*Refd.* Hensworth v. Fowkes (1833), 4 B. & Ad. 440; Sinclair v. Brougham, [1914] A. C. 398.

**49. —**—You may take it as a fact that they [bank notes] cannot be identified, & as law that there could be no recovery in trover without identification (ROSE, J.).—*Re* MABERLEY, *Ex p.* SOLOMONS (1833), Mont. & B. 308, Ct. of R.

**50. —**—Whether money must be in a bag.—Trover lies for "money in a purse," *ut de bonis propriis*, though the conversion be alleged in *retardationem executionis testamenti*; & the jury may find damages to the sum laid, & costs besides.—RIVERS v. OODSKIRT (1597), (Cro. Eliz. 568; 78 E. R. 812.

**51. —**—Trover lies for money out of a bag.—HALL v. DEAN (1601), (Cro. Eliz. 841; 78 E. R. 1068; *sub nom.* HALL v. WOOD, Owen, 131.

**52. —**—*DRAYCOT v. PIOT*, No. 20, *ante*.  
**53. —**—ISAACK v. CLARK (1615), 2 Bulst. 306; Moore, K. B. 841; 80 E. R. 1143; *sub nom.* ISACK v. CLARKE, 1 Roll. Rep. 126.

*Annotations*:—*Refd.* Manby v. Scott (1662), O'Bridg. 229; Mires v. Solebay (1677), 2 Mod. Rep. 242; Mason v. Farnell (1844), 1 Dow. & L. 576; Whitehead v. Harrison (1844), 6 Q. B. 423; Cooper v. Willomatt (1845), 1 C. B. 672; Clements v. Flight (1846), 8 L. T. O. S. 166; Hollins v. Fowler (1875), L. R. 7 H. L. 757. *Mentd.* Parker v. Kett (1701), 12 Mod. Rep. 466; Garland v. Carlisle (1837), 4 Scott, 587.

**54. —**—An action will not lie for money unless in a bag (POLLOCK, C.B.).—FOSTER v. GREEN (1802), as reported in 31 L. J. Ex. 158. *Annotation*:—*Mentd.* Jones v. Waring & Gillow, [1925] 2 K. B. 612.

**55. —**—Distinction between trover & detinue.—An action of trover lies for money, although it be not in bags; but not an action of detinue.—CLARK'S CASE (1613), Godb. 210; 78 E. R. 128.

**56. Money delivered to defendant to keep.**—Trover would lie for money which was delivered by pltf. himself to debt. to keep, though not in bags.—DAVIES v. DYOS (1648), Aleyn. 91; 82 E. R. 931.

**57. Purchase of securities with bankrupt's money**—Seizure of part of securities by assignee.—Whether trover lies for purchase-money of remainder.—A. knowing of B.'s bkpcy. at the request of B.'s wife & with his money buys thirty South Sea bonds & gives them to her. B.'s assignee seizes twenty-two as part of the bkpt.'s estate, he cannot maintain trover against A. for the money with which he purchased the other eight.—WILSON v. POULTER (1730), 2 Stra. 859; 1 Barn. K. B. 118, 284; 93 E. R. 898.

*Annotation*:—*Mentd.* Peru Republic v. Peruvian Guano Co. (1887), 36 Ch. D. 439.

**58. Cheque—Of no value.**—The assignees of a bkpt. cannot recover the amount of a cheque paid by the bkpt.'s bankers after the bkpcy. in trover for the cheque against the creditor, to whom the cheque was delivered & the money paid.

How can you sue for a piece of paper of no value (CHAMBRE, J.).—MATHEW v. SHERWELL (1810), 2 Taunt. 439; 127 E. R. 1148.

**59. Bill of lading representing specie.**—JACKSON v. ANDERSON, No. 60, *post*.

**60. —**Where whole converted.—F. advised pltf. that he had remitted to them 1,069 dollars, consigned to L. L. received 4,700 dollars & pledged the bill of lading to debt. who received the price of the dollars at the bank of England, where they were deposited for safe custody, on a sale of them to the bank:—*Held*: (1) the letter was a sufficient appropriation of the dollars to pltf.; (2) although no specific dollars had been severed for pltf. yet, as debt. had converted all pltf.'s & all his own, trover would lie for pltf.'s share; (3) although the dollars remained in the same unaltered custody, yet the delivery, by debt., of the bill of lading, which was the symbol of them, & the receipt of the value, was a conversion.—JACKSON v. ANDERSON (1811), 4 Taunt. 24; 128 E. R. 235.

*Annotations*:—As to (3) *Refd.* *Re* O'Sullivan, *Ex p.* Baller (1892), 61 L. J. Q. B. 228. *Generally Refd.* Featherstonehaugh v. Johnston (1813), 2 Moore, C. P. 181; Barton v. Williams (1822), 5 B. & Ald. 395.

**61. Bank note.**—*Re* MABERLEY, *Ex p.* SOLOMONS, No. 49, *ante*.

(1886), 11 P. R. 251.—CAN.

#### PART I. SECT. 3, SUB-SECT. 5.

**61. Bank note.**—WALSH v. BROWN (1868), 18 C. P. 60.—CAN.

#### PART I. SECT. 3, SUB-SECT. 4.

*b. Must be severed from freehold.*  
—Trover cannot be maintained for a fixture so long as it remains annexed

to the freehold.—OATES v. CAMERON (1849), 7 U. C. R. 228.—CAN.

*c. —*—BUNNELL v. TUTTIER (1853), 10 U. C. R. 414.—CAN.

*d. —*—BUSHELL v. MOSS



Sec. 3.—*Subject-matter: Sub-sects. 5, 6 & 7. Part II. Sect. 1: Sub-sect. 1.]*

62. —.—.]—A count in detinue for a bank note, & a count in debt for the non-payment of the note, allowed.—*KIRKPATRICK v. BANK OF ENGLAND* (1840), 8 Dowl. 881; Woll. 57; 10 L. J. Ex. 97.

—Notes stolen or obtained by fraud.]—*See BANKERS*, Vol. III., pp. 130–131, Nos. 61–71.

Negotiable instruments.]—*See* Part III., Sect. 2, sub-sect. 4, R., & Sect. 3, sub-sect. 1, C. (h) vi., *post*.

#### SUB-SECT. 6.—NATURAL PRODUCTS.

63. Ricks of hay.]—Trover for “ricks of hay” is good after verdict.—*WOOD v. DAVIES* (1670), 1 Mod. Rep. 289; 86 E. R. 892; *sub nom.* *WEST v. DAVIES*, 1 Lev. 301; 2 Keb. 703.

Annotation :—*Refd.* *Hartford v. Jones* (1698), 2 Salk. 654.

64. Trees—Planted in boxes in garden.]—Trover will lie for trees planted in boxes in a garden.—*OLIVER v. VERNON* (1705), 6 Mod. Rep. 170; *Holt*, K. B. 332; 87 E. R. 926.

65. —When severed.]—Trover lies for trees when they are cut down, because then they are chattels (*POWELL, J.*).—*ANON.* (1708), 11 Mod. Rep. 181; 88 E. R. 975.

66. —.—.]—The right to trees severed by the tenant of a copyhold or customary freehold is *prima facie* in the lord; & in general he may maintain trover for them when so severed.—*FLEMING (LADY) v. SIMPSON* (1828), 6 L. J. O. S. K. B. 207.

—.]—*See* AGRICULTURE, Vol. II., pp. 70, 75, 79, 85, 112, 113, Nos. 465, 538, 590, 603, 948–952.

67. Rushes—When severed.]—Pltf. claiming a right to cut rushes on a common, cuts 5 or 6 loads, which debts, carry away, trover lies.—*RACKHAM v. JESUP* (1772), 3 Wils. 332; 95 E. R. 1084.

68. Fruit of overhanging trees.]—Where the branches of fruit trees growing near their owner's boundary overhang the land of the adjoining owner, the right of the adjoining owner to lop the branches does not carry with it the right to pick & appropriate the fruit, & if he does so he is guilty of conversion & liable to the owner for its value.—*MILLS v. BROOKER*, [1919] 1 K. B. 555; 88 L. J. K. B. 950; 121 L. T. 254; 35 T. L. R. 261; 63 Sol. Jo. 431; 17 L. G. R. 238, D. C.

69. Crops.]—*ANON.* (1583), 4 Leon. 202; 74 E. R. 822.

—.]—*See, also*, AGRICULTURE, Vol. II., p. 37, Nos. 208, 209.

#### SUB-SECT. 7.—OTHER CASES.

70. Articles of small value.]—*ANON.* (1308), Y. B. 42 Edw. 3, fo. 13, pl. 21.

71. Barley—To be made into malt.]—*ADAMS v. HUTTON* (1730), 1 Barn. K. B. 431; 94 E. R. 290.

72. Boots & spurs.]—Trover for a pair of boots & spurs; or for a set of curtains & valance, is good.—*HANCOCK v. HODGES* (1673), 1 Freem. K. B. 357; 3 Keb. 253; 89 E. R. 266.

73. Set of curtains & valance.]—*HANCOCK v. HODGES*, No. 72, *ante*.

74. Flotsam—Wrongfully taken after coming to land.]—Trover lies to recover flotsam wrongfully taken after it has come to land.—*WYNDHAM'S (LADY) v. ASE* (1678), 2 Mod. Rep. 294; 86 E. R. 1081.

75. Suit of child bed linen & muff.]—Trover for a suit of child bed linen & a muff, unexceptionable after verdict.—*HELYNG v. JENNINGS* (1696), 1 Ld. Raym. 133; 91 E. R. 985.

76. Treasure trove.]—*SLOANE v. HEATFIELD* (1717), Bunb. 18; 145 E. R. 579.

77. Plate.]—Trover for so many ounces of plate, good.—*CAMPBELL v. ST. JOHN* (1694), 1 Ld. Raym. 20; Comb. 306; 2 Salk. 219; 91 E. R. 909.

Annotation :—*Mentd.* *Turner v. Cordwell* (1734), Cunn. 129.

78. Ends of boards.]—Trover lies for “pieces of ends of boards.”—*KNIGHT v. BARKER* (1705), 11 Mod. Rep. 66; 2 Ld. Raym. 1219; 88 E. R. 890.

79. Diamonds.]—*WHITE v. GRAHAM* (1729), 2 Stra. 827; 93 E. R. 877, II. L.

Annotation :—*Refd.* *Harrison v. Bottomley* (1729), 2 Ld. Raym. 1529.

80. Altar piece.]—*SOMERSET (DUKE) v. COOKSON*, No. 689, *post*.

81. Curios.]—*SOMERSET (DUKE) v. COOKSON*, No. 689, *post*.

82. Ship.]—*REID v. FAIRBANKS*, No. 481, *post*.

83. Part of chattel.]—Trover lies for an undivided part of a chattel.—*WATSON v. KING* (1815), 1 Stark. 121; 4 Camp. 272; 171 E. R. 87, N. P.

Annotations :—*Mentd.* *Hundell v. Beaumont* (1828), 1 Moo. & P. 396; *Gausson v. Morton* (1830), 5 Man. & Ry. K. B. 613; *Doe d. Knight v. Nepean* (1833), 5 B. & Ad. 86; *Gillett v. Abbott* (1838), 7 Ad. & El. 733; *Smart v. Sanders* (1848), 5 C. B. 805; *Carter v. King* (1882), 20 Ch. D. 225.

84. —Where whole converted.]—*JACKSON v. ANDERSON*, No. 60, *ante*.

85. —.—.]—In trover for paper, it appeared that pltf. & deft. had been in partnership together as paper manufacturers & iron merchants. The partnership was dissolved by a deed, which recited, that it had been agreed that the business of a paper manufacturer should belong exclusively to deft., & the business of an iron merchant to pltf., but that pltf. should receive out of the stock paper to the value of £898 4s. 11d., which should remain in the paper mill for a year, at his option. The deed also recited, that in performance of that arrangement paper to the value of £898 4s. 11d. had been delivered to pltf., & same was then in the mill, as pltf. acknowledged. It was then witnessed, that in performance of the arrangement pltf. & deft. dissolved partnership, & pltf. assigned to deft. the stock-in-trade of the business of a paper manufacturer, except the £898 4s. 11d. worth of paper so delivered to pltf. as aforesaid, & deft. assigned to pltf. the stock-in-trade of the business of iron merchants: there were also mutual releases. No paper whatever was set apart or delivered to pltf., but the jury found that deft. had converted the whole stock:—*Held*: (1) the parties were estopped by the deed, to say that no such delivery had taken place; (2) as deft. had converted the whole, pltf. might maintain trover for his share of the stock, although no specific portion had been set apart for him.—*WILES v. WOODWARD* (1850), 5 Exch. 557; 20 L. J. Ex. 261; 155 E. R. 244; *sub nom.* *WILLS v. WOODWARD*, 15 L. T. O. S. 395.

Annotation :—*As to* (1) *Refd.* *S. E. Ry. v. Warton* (1861), 31 L. J. Ex. 515.

Corpse.]—*See* BURIALS, Vol. VII., p. 520, No. 1.

Minerals.]—*See* MINES, Vol. XXXIV., pp. 652, 653, Nos. 499–504.

Soil.]—*See* COPYHOLDS, Vol. XIII., p. 80, No. 1016; LANDLORD & TENANT, Vol. XXXI., p. 355, No. 4973; MINES, Vol. XXXIV., p. 700, No. 904.

## Part II.—Liability for Conversion and Detinue.

## SECT. 1.—WHAT AMOUNTS TO CONVERSION.

## SUB-SECT. 1.—GENERAL PRINCIPLES.

**86. Positive wrongful act—Negligence insufficient.]—**WALGRAVE v. OGDEN (1591), 1 Leon. 224; 74 E. R. 205; *sub nom.* MULGRAVE v. OGDEN, Cro. Eliz. 219; *sub nom.* MOSGRAVE v. AGDEN, Owen, 141.

*Annotation:—*Refd. Coggs v. Bernard (1703), 2 Ld. Raym. 909.

**87. ———.]—**A. entrusted B. with goods to sell in India, agreeing to take back from B. what he should not be able to sell, & allowing him what he should obtain beyond a certain price, with liberty to sell them for what he could get if he could not obtain that price; B. not being able to sell the goods in India himself, left them with an agent to be disposed of by him, directing the agent to remit the money to himself in England:—*Held: A. could not maintain trover against B. for the goods.*

The conduct of deft., however, cannot amount to a conversion in any point of view. It is agreed that mere negligence is not sufficient. . . . To support an action of trover there must be a positive tortious act (HEATH, J.).—BROMLEY v. COXWELL (1801), 2 Bos. & P. 438; 126 E. R. 1372.

**88. ———.]—**A horse was kept at deft.'s stables; & one day, when he was from home, three or four of his servants being in charge of the premises, the horse was taken away. Deft. blamed his ostlers for letting it be taken; but on being himself remonstrated with, replied, that it was of no consequence, because he was indemnified:—*Held: in such case, trover would not lie.*

It appears, on the evidence, that the horse has been got away by C.; & that his taking it might, & ought to have been prevented by deft.'s servants; but, unless they concurred, C. was a trespasser; & deft. is not liable in trover though he may be in another form of action (ABBOTT, C.J.).—BARNARD v. HOW (1824), 1 C. & P. 366; 171 E. R. 1233, N. P.

**89. ———.]—**HEALD v. CAREY, No. 95, *post*.

**90. ——— Excess of lawful right—Working animals taken damage feasant.]—**AGAR v. LITTLE (1613), as reported in 1 Brownl. 5; 123 E. R. 629. *Annotation:—*Refd. It. v. Haughton (1718), 1 Stra. 83.

**91. ——— Interference to prevent damage to chattel.]—**Where an injury has been done to a chattel belonging to another, in endeavouring to do a service to such person out of charity, or to prevent mischief, from the act of such persons, an action of trover will not lie for it.—DRAKE v. SHORTER (1802), 4 Esp. 165; 170 E. R. 678, N. P.

**92. ——— Demand by owner without tender of compensation.]—**A quantity of timber, placed in a dock on the bank of a navigable river, being accidentally loosened, is carried by the tide to a considerable distance, & left at low water upon a towing path. A. finding it in that situation, voluntarily conveys it to a place of safety, beyond the reach of the tide, at high water. A. has no lien on the timber for the trouble or expense to which he may have put himself in the carriage of it, but is liable to an action of trover, unless he deliver it up to the owner on demand, though nothing be tendered him by the owner by way of compensation. But in such a case, in all pro-

bability, A. might maintain an action against the owner for a compensation.—NICHOLSON v. CHAPMAN (1793), 2 Hy. Bl. 245; 126 E. R. 536.

*Annotations:—*Refd. Aitchison v. Lohre (1879), 4 App. Cas. 755; The Gas Float Whitton No. 2, [1896] P. 42. *Mentd.* Vivian v. Mersey Docks Board (1869), L. R. 5 C. P. 19; Hingston v. Wendt (1876), 1 Q. B. D. 307; Porvian Huano Co. v. Dreyfus (1887), [1892] A. C. 170, n.; Gwilliam v. Twiss, [1895] 2 Q. B. 84; Prager v. Blatspiel Stamp & Heacock, [1924] 1 K. B. 566; Jebara v. Ottoman Bank, [1927] 2 K. B. 254.

**93. ——— Mere deprivation of possession not sufficient.]—**THOROGOOD v. ROBINSON, No. 146, *post*.

**94. Dealing with goods in manner inconsistent with rights of owner.]—**A person is guilty of a conversion who intermeddles with my property & disposes of it (LORD ELLENBOROUGH).—STEPHENS v. ELWALL (1815), 4 M. & S. 259; 105 E. R. 830.

*Annotations:—*Consd. Garland v. Carlisle (1837), 4 Scott. 587. *Apprvd.* Hollins v. Fowler (1875), L. R. 7 H. L. 757. *Consd.* Delaney v. Wallis (1884), 15 Cox, C. C. 525; Gordon v. London, City & Midland Bank, Gordon v. Capital & Counties Bank (1900), 83 L. T. 762. *Appld.* Winter v. Bancks (1901), 84 L. T. 504. *Refd.* Alexander v. Southey (1821), 5 B. & Ald. 247; Price v. Helyar (1828), 1 Moo. & P. 541; Hutton v. Balme (1832), 2 Tyr. 620; Balme v. Hutton (1833), 9 Bing. 471; Crouch v. White (1835), 1 Bing. M. C. 414; Keston v. Cruch (1845), 14 M. & W. 266. *Symonds v. Atkinson* (1856), 1 H. & N. 146; Fowler v. Hollins (1872), L. R. 7 Q. B. 618; McKintire v. Potter (1889), 22 Q. B. D. 438; Barker v. Furlong, [1891] 2 Ch. 172. *Mentd.* Sharland v. Mildon, Sharland v. Loosemore (1846), 5 Hare, 469.

**95. ———.]—**To constitute a conversion of goods, there must be some repudiation by deft. of the owner's right, or some exercise of dominion over them by him inconsistent with such right. A. sent by railway from Paris seven cases of pictures, etc., addressed to "A. Custom House, London Bridge, via Dunkirk, per Steamer." Upon their arrival at Dunkirk, one of the packages was found to be damaged, & was, according to the course of proceedings in France, detained there for official examination; the remaining six being sent forward by B., the agent at Dunkirk of the railway co., & also of the steam shipping co., under a bill of lading making them deliverable "to Custom House, London Bridge, or to order," upon payment of freight. These six cases duly arrived in London, & were received by A. The remaining case, having been examined & re-packed, was forwarded by B., by another vessel belonging to the same co., under a bill of lading making it deliverable "to C., to hold at the disposal of A., Custom House, London Bridge, or to his order," upon payment of freight. Both bills of lading contained a memorandum stating that the goods were to be taken out twenty-four hours after the steam boat was reported at the Custom House, or the same would be transhipped into lighters, or warehoused, at the expense & risk of the proprietors of the goods. Upon the arrival of the vessel in London, the last-mentioned case was landed by C., who was the agent in London of the shipping co., who paid the duty on the contents, & placed it, in his own name, in a free warehouse on Brewer's Quay, a usual & accustomed & proper place for the purpose. The wharfinger shortly afterwards, for his own convenience, & without the knowledge of C., removed the case in question, with other goods, to another warehouse of the same description belonging to him, in Seething Lane,

## PART II. SECT. 1, SUB-SECT. 1.

**1. Positive wrongful act.]—**To constitute conversion there must be a

positive & wrongful act.—STUART v. FULLER (Sask.), [1922] 3 W. W. R. 566; 70 D. L. R. 21.—CAN.

**91 i. ——— Interference to prevent damage to chattel.]—**AMOD SALIE v. RAGOON, [1903] T. S. 100.—S. AF.

*Sect. 1.—What amounts to conversion: Sub-sect. 1.]* where it was destroyed by an accidental fire:—*Held*: C. did not exceed his duty, in landing & warehousing the goods, & consequently was not guilty of a conversion, or responsible for their loss, although the jury found that he was not acting with a view to do his best, or as a prudent man would have acted intending to do his best, for the benefit of the owner of the goods, but with a view to his own profit; & the circumstance of his having paid the duty upon the goods made no difference.

There is no doubt that a negligent dealing by a bailee with goods is not a conversion (MAULE, J.).—*HEALD v. CAREY* (1852), 11 C. B. 977; 21 L. J. C. P. 97; 18 L. T. O. S. 64, 209; 16 Jur. 197; 138 E. R. 762.

*Annotations.—Consd.* Evans v. Wright (1857), 2 H. & N. 527. *Refd.* Crouch v. G. W. Ry. (1857), 26 L. J. Ex. 418; Hollins v. Fowler (1875), L. R. 7 H. L. 757.

96. —.]—To constitute a conversion there must be either a taking of the entire property in the goods, or a depriving the owner of the possession. A partial destruction, when the nature of what is left remains unchanged, is no conversion.

Deft. was the owner of a close, & plff. of certain timber which was buried in the soil. Deft. dug a hole, for the purpose, as he alleged, of making a saw pit, & in so doing cut through plff.'s timber:—*Held*: the motive of deft. in so making the hole should not be left to the jury to consider in judging as to whether or not a plea of justification was proved.—*SIMMONS v. LILLYSTONE* (1853), 8 Exch. 431; 22 L. J. Ex. 217; 21 L. T. O. S. 45; 1 W. R. 198; 155 E. R. 1417.

*Annotation.—Consd.* Hollins v. Fowler (1875), L. R. 7 H. L. 757.

97. —.]—When a man perfectly well knows that the goods belong to another, & will not let him have them, he is liable in an action of trover, & the law calls his refusal to let him have them, "a conversion" (POLLOCK, C.B.).

When a man detains another's goods, he knowing that they belong to that person, or with the means of knowing it, & if he had made proper inquiry he would have ascertained they were his, in my judgment the detention of those goods is what the law has thought fit to apply the term "conversion" to. It may be an unfortunate term to use, but it is as old as the time of Lord Holt (MARTIN, B.).—*PILLIOT v. WILKINSON* (1863), 2 H. & C. 72; 2 New Rep. 175; 32 L. J. Ex. 201; 8 L. T. 361; 9 Jur. N. S. 523; 12 W. R. 15; on appeal (1864), 3 H. & C. 345, Ex. Ch.

*Annotation.—Refd.* Hiert v. L. & N. W. Ry. (1879), 4 Ex. D. 188.

98. —.]—A broker who merely negotiates the sale of chattels without the authority of the true owner commits no tort at all. The sale is a mere void act. It divests the true owner of no right, & it does not physically interfere with his control or possession of the goods. But if in addition to negotiating a sale the broker meddles with the goods themselves & hands them to the buyer with the object & intention of transferring to the buyer the property & possession in pursuance of the unauthorised sale, then he makes himself liable in trover to the true owner, for he is guilty of an act in relation to the goods themselves which is inconsistent with the rights of the true owner (BIGHAM, J.).—*EDELSTEIN v. SCHULER & Co.*, [1902] 2 K. B. 144; 71 L. J. K. B. 572; 87 L. T. 204; 50 W. R. 493; 18 T. L. R. 597; 46 Sol. Jo. 500; 7 Com. Cas. 172.

*Annotations.—Refd.* Clayton v. Le Roy, [1911] 2 K. B. 1031. *Meind.* Webb, Hale v. Alexandria Water Co. (1905), 21 T. L. R. 572.

99. —.]—A railway co., received fourteen drums of crude phenol to be forwarded to the order of certain consignees. When the goods arrived at a station near their proper destination they were by mistake & without the authority of the real consignees delivered to deft. through his agent at the station, & deft. appropriated six of them to his own use. He subsequently returned eight of the fourteen to the railway co. The real consignees brought suit against the railway co. for misdelivery of six drums of phenol & recovered £82. In an action by the railway co. & the real consignees against deft. for conversion, or alternatively for money paid, deft. proved that he was expecting creosote in casks on another order at the same time & contended that as the railway co. had misled him by delivering creosote, they were estopped from recovering damages for the conversion:—*Held*: there was no estoppel & deft. was liable for conversion.

Dealing with the goods in a manner inconsistent with the right of the true owner amounts to a conversion, provided it is also established that there is an intention on the part of deft. in so doing to deny the owner's right, or to assert a right which is in fact inconsistent with the owner's right (*per Cur.*). *LANCASHIRE & YORKSHIRE RY. Co., LONDON & NORTH WESTERN RY. Co. & GRAESER, LTD. v. MACNICOLL* (1918), 88 L. J. K. B. 601; 118 L. T. 596; 34 T. L. R. 280; 62 Sol. Jo. 365, D. C.

100. —.]—C., the landlord of a house, the rent of which was in arrear from the tenant, being informed that E., the holder of a bill of sale of the tenant's furniture in the house, was removing the furniture between 8 & 9 o'clock in the evening, went to the house, accompanied by a policeman, & informed E. that he was the landlord & that unless a quarter's rent, which he claimed to be due, was paid to him he would not permit the furniture to be removed. Thereupon, no physical force having been used, E. desisted from removing the furniture & quitted the house, leaving a man behind in possession. On the following day C. levied a distress on the goods in the house for the quarter's rent. E. brought trover against C. for the wrongful conversion of his goods, & the jury having found a verdict for the deft.: *Held*: discharging a rule for a new trial, C. had not so interfered with the possession or dominion of the goods as to amount to a conversion, or to give the plff. E. a right to maintain trover.

The depriving an owner of the use of his goods so as to amount to conversion, must be a total & entire deprivation of the general dominion over them, a preventing him from doing anything at all with them, & not merely preventing him from using them in one particular way.—*ENGLAND v. COWLEY* (1873), L. R. 8 Exch. 126; 42 L. J. Ex. 80; 28 L. T. 67; 21 W. R. 337.

*Annotation.—Consd.* Van Oppen v. Tredgears (1921), 37 T. L. R. 504.

101. — Disposition for own benefit or that of another — Possession obtained fraudulently.—Though a fraudulent vendee may be sued in trover by the vendor, yet the right of action does not exist against every person into whose hands the property may have passed subsequently.

If G. obtained the goods from plffs. by fraud, & sold them to defts., yet, if defts. were not privy to the fraud, they are not liable to the plffs. in trover.

G. bought cotton goods of plffs. to the amount of £816, & they were afterwards sold by R. to defts. for £589. No transactions were shown between G. & R.:—*Held*: the connection between plffs.

& debts. were too remote to raise a cause of action, unless the jury were convinced that G. obtained the goods originally by fraud, & debts. bought them under circumstances which must have convinced them that the goods were so obtained.—*SHEPPARD v. SHOOLBRED* (1841), Car. & M. 61, N. P.

*Annotation* :—*Refd.* White v. Garden (1851), 10 C. B. 919.

**102. —Possession obtained innocently.]**—Any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, & disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion. Where, therefore, B. had fraudulently obtained cotton from F., & H., whose ordinary business was that of a cotton broker, & who was utterly ignorant of the fraud of B., purchased it from B. in the belief & expectation that M., one of his ordinary clients, would accept it, & M. did afterwards accept it, though H. only received from M. a broker's commission & not a trade profit on the sale :—*Held* : in this instance H. had made himself a principal, & by transferring the cotton to M. had committed an act of conversion, which made him liable in trover to F., the real owner of the cotton. *HOLLINS v. FOWLER* (1875), L. R. 7 H. L. 757 ; 41 L. J. Q. B. 169 ; 33 L. T. 73 ; 40 J. P. 53, II. 1.; *affg.* S. C. *sub nom.* FOWLER v. HOLLINS (1872), L. R. 7 Q. B. 616, Ex. Ch.

*Annotations* :—*Apld.* *Cochrane v. Rymill* (1879), 40 L. T. 744. *Consd.* *Delaney v. Wallis* (1884), 15 Cox. C. C. 525. *Distd.* *Turner v. Hockey* (1887), 56 L. J. Q. B. 301. *Consd.* *Barker v. Ebrington*, [1891] 2 Ch. 172; *Consolidated Co. v. Curtis*, [1892] 1 Q. B. 495. *Apld.* *Winter v. Bancks* (1901), 84 L. T. 504. *Consd.* *Underwood v. Bank of Liverpool*, Same v. Barclays Bank, [1924] 1 K. B. 775. *Refd.* *England v. Cowley* (1873), L. R. 8 Exch. 126; *Hiorf v. Bott* (1874), 30 L. T. 25; *Arnold v. Chequo Bank*, *Arnold v. City Bank* (1876), 1 C. P. D. 578; *Lindsay v. Cundy* (1876), 1 Q. B. D. 318; *Iredale v. Kendall* (1878), 40 L. T. 362; *Glyn Mills, Currie & Co. v. East & West India Dock Co.* (1880), 6 Q. B. D. 475; *McEntire v. Potter* (1889), 22 Q. B. D. 438; *New York Breweries Co. v. A.-G.*, [1890] A. C. 62; *Didsheim v. London & Westminster Bank*, [1900] 2 Ch. 15; *Mansell v. Valley Printing Co.*, [1908] 1 Ch. 567; *Morison v. London County & Westminster Bank*, [1914] 3 K. B. 356; *London & Montrose Shipbuilding & Repairing Co. v. Barclays Bank* (1925), 31 Com. Cas. 67.

**103. Repudiation of right of owner.]—HEALD v. CAREY**, No. 95, *ante*.

**104. —[A mere refusal by deft. to deliver to pltf. a chattel of his which is on deft.'s premises, is not evidence of a conversion; but a denial by deft. of pltf.'s right to it, or a refusal by which deft. exercises a dominion over the chattel is. *WILDE v. WATERS* (1855), as reported in 24 L. J. C. P. 193.**

*Annotations* :—*Mentd.* *Re Garwan, Ex p. Barclay* (1855), 5 De G. M. & G. 403; *Walmesley v. Milne* (1859), 7 C. B. N. S. 115; *Holland v. Hodgson* (1872), L. R. 7 C. P. 328; *Childley v. West Ham* (1874), 32 L. T. 486.

**105. —[LANCASHIRE & YORKSHIRE RY. CO., LONDON & NORTH WESTERN RY. CO. & GRAESSER, LTD. v. MACNICOLL**, No. 99, *ante*.

**106. —Defendant claiming right to goods in himself.]—(1)** If a person detains goods under any claim of interest in himself, so as to deprive the person entitled to the possession of them of his dominion over them, it is a conversion.

F., being in possession of a billiard table, which pltf. had lent to him on hire by bill of sale assigned the goods in his house, & with them the billiard table, to deft. Deft. took possession, but did not remove the table. Pltf. demanded the table. Deft. desired to see the writing under which it was lent to F. On the following day pltf.'s son produced the document upon which an agreement

for the sale of the billiard table, which had not been carried into effect, was indorsed. Deft. was at first willing to give up the table, but subsequently wished to consult his attorney. Pltf. refused to permit deft. to have a copy of the document, & gave him notice that he would call for the table on the following day at 12 o'clock. Accordingly at that hour pltf. called & saw deft.'s man, but did not get the table, the room in which it was being locked. The table was afterwards seized by F.'s landlord for rent. In an action for trover by pltf. for the table :—*Held* : there was evidence from which the jury were warranted in finding a conversion of the table by deft.

(2) So, notwithstanding that deft. might have given directions to his man to give up the table when called for, such directions not having been communicated to pltf. *Qu.* : whether deft.'s taking possession of the table under the bill of sale was not a conversion.

(3) There is no more common cause of action than where an owner of goods complains that another has wrongfully taken possession of them. The law has provided four forms of action applicable to such a state of things. (a) The action of trespass, which appears more immediately directed to the taking of a man's property out of the possession of the owner; (b) the action of replevin in respect of goods taken but restored to the owner by process of law. But at common law the more direct remedy for the recovery of possession, or damages, where a chattel was detained from the owner, was the action of detinue. There existed, however, an objection to that action, which was that deft. was entitled to wage his law, & the consequence was, that deft. in an action of detinue, by himself swearing to the non-existence of the cause of action, could at once defeat pltf. In consequence of this, the cts. of law, in very early times, invented the action of trover. They permitted pltf. to state that he lost goods which he never lost, & that deft. found goods which he never found, & that deft. converted the goods so found to his own use. The cts. took upon themselves to prohibit deft. from denying either the averment of the losing or the finding by deft.; & thus they gave an action, a species of action on the case, in which deft. could not wage his law. That, I believe, was the origin of the action of trover—an action devised for the purpose of preventing pltf. from being defeated by the wager of law. The origin of the action of "*indebitatus assumpsit*" was the same. For the purpose of preventing the wager of law in an action to recover a debt, the cts. devised the action of "*indebitatus assumpsit*," wherein it was alleged that deft. was indebted to pltf., & being so indebted, he promised to pay the debt, but broke his promise. This was an action on the case, & wager of law could not be made. This, I believe was the true origin of the action of trover, & in my judgment, we ought to extend its operation to all cases where a right of action in detinue properly exists, & not throw difficulties in the way of a man's recovering where his goods are wrongfully detained (*MARTIN, B.*).—*BURROUGHS v. BAYNE* (1860), 5 H. & N. 296; 29 L. J. Ex. 185; 2 L. T. 16; 157 E. R. 1196.

*Annotations* :—*As to* (1) *Apld.* *Pillot v. Wilkinson* (1863), 2 H. & C. 72. *Consd.* *Hollins v. Fowler* (1875), L. R. 7 H. L. 757. *Apld.* *Clayton v. Le Roy*, [1911] 2 K. B. 1031. *Refd.* *Hilbery v. Hutton* (1864), 3 New Rep. 670; *Hiorf v. L. & N. W. Ry.* (1879), 4 Ex. D. 188. *As to* (3) *Refd.* *Hollins v. Fowler* (1875), L. R. 7 H. L. 757; *Consolidated Co. v. Curtis*, [1892] 1 Q. B. 495.

**103 i. Repudiation of right of owner.]—STIMSON v. BLOCK** (1885), 11 O. R. 96.—*OAN.*

**103 ii. —[There is no conversion where there is detention not adverse to the owner or other person entitled**

**to the possession.—MARSHALL v. DIBBLE**, [1920] N. Z. L. R. 497.—*N.Z.*

*Sect. 1.—What amounts to conversion: Sub-sects. 1 & 2, A. (a).]*

**107. Act of physical control.]—**WORTLEY v. CAMPLING, No. 136, *post*.

**108. —.]—**A. having sold to B. some growing trees, B. entered to cut them down, whereupon C. who was on the land as a trespasser, served B. with a notice not to fell any of the timber. B. having desisted in obedience to the notice, C. subsequently cut down a tree, but left it upon the ground, & did not further interfere with it:—*Held*: C. not having detained or exercised any physical control over the felled tree when it was severed, from the soil, had not been guilty of a conversion of it, notwithstanding the notice, which was not an assertion of title to a chattel, but a claim of dominion over the tree before its severance from the reality.—BIRD v. BOND (1863), 1 New Rep. 444.

**109. —.]—**EDELSTEIN v. SCHULER & Co., No. 98, *ante*.

**110. —.]—**Plffs., who were carriers, delivered certain goods by mistake to a wrong firm, & defts.' managing director, who happened to see the goods, claimed them as the property of defts. & purported to sell them to the firm to whom they had been delivered by mistake:—*Held*: although defts. had not physically dealt with the goods plffs. had a good cause of action for conversion.—VAN OPPEN & Co., LTD. v. TREDEGARS, LTD. (1921), 37 T. L. R. 504.

**111. — Necessity for complete exclusion of owner.]—**ENGLAND v. COWLEY, No. 100, *ante*.

**112. —.]—**HIORT v. BOTT, No. 221, *post*.

**113. — Representation of possession not sufficient.]—**An advice note sent by a railway co. to a consignee of goods is not such a representation of the possession by them of the goods as will, without evidence of a custom to do so, entitle the consignee to act upon it in the way of reselling the goods; nor will it, in the absence of wilful misstatement or culpable negligence, leading proximately to the consignee's suffering loss, estop the co. in an action of trover from denying that they in fact ever had the goods, although the consignee had paid them the carriers' charges in respect of them.

Trover by estoppel will not lie upon any representation of the possession of goods, if, in fact, the goods were never at any time in defts.' possession.—CARR v. LONDON & NORTH WESTERN RY. CO. (1875), L. R. 10 C. P. 307; 44 L. J. C. P. 109; 31 L. T. 785; 39 J. P. 279; 23 W. R. 747.

*Annotations:—*Consd. Seton v. Lafone (1887), 19 Q. B. D. 68; L. & Y. Ry. L. & N. W. Ry. & Grueser v. MacNicol (1918), 88 L. J. K. B. 601. *Refd.* Farneloe v. Bala (1876), 1 C. P. D. 445; Joseph v. Webb, Joseph v. Lyons, Joseph v. Pidecock, Joseph v. Jones (1883), Cab. & Kl. 262; Gillman, Spencer v. Carbutt (1889), 61 L. T. 281; Tomkinson v. Balkis Consolidated Co., [1891] 2 Q. B. 614. *Mentd.* Johnson v. Credit Lyonnais, Johnson v. Blumenthal (1877), 47 L. J. Q. B. 211; Harris v. Truman (1881), 7 Q. B. D. 340; Coventry v. G. E. Ry. (1883), 11 Q. B. D. 776; Manchester & Oldham Bank v. Cook (1883), 49 L. T. 671; Barnetts, Hoares v. South London Tram. Co. (1886), 12 T. L. R. 818; Proctor v. Bemis (1887), 36 Ch. D. 740.

**107 i. Act of physical control.]—**SMITH v. WHITE (1879), 18 N. B. R. (2 P. & B.) 443.—CAN.

**107 ii. —.]—**DICKEY v. McCaul (1887), 14 A. R. 166.—CAN.

**111 i. — Necessity for 'complete exclusion of owner.]—**ROURKE v. UNION INSURANCE CO. (1894), 23 S. C. R. 314.—CAN.

**111 ii. —.]—**CENTRE STAR MINING CO., LTD. v. ROSLAND-KOOTENAY MINING CO., LTD. (1905), 11 B. C. R. 231; 2 M. M. Cas. 271.—CAN.

**E. Necessity for intention to convert.]—**DONALD v. FULTON (1908), 39 N. B. R. 9; 5 E. L. R. 54; 6 E. L. R. 397.—CAN.

**h. —.]—**LONG v. SMILEY (1913), 24 O. W. R. 826; 4 O. W. N. 1452; 12 D. L. R. 61.—CAN.

**PART II. SECT. 1. SUB-SECT. 2.—**A. (a).

**115 i. Wrongful taking.]—**HUGHES v. SUTHERLAND (1842), 3 N. B. R. (1 Kerr) 574.—CAN.

**115 ii. —.]—**M'MILLAN v. RITCHIE

Low v. Bouverie, [1891] 3 Ch. 82; Sarat Chunder Dey v. Gopal Chunder Lala (1892), 8 T. L. R. 732; *Re* Bontley & Yorkshire Breweries, *Ex p.* Harrison (1893), 69 L. T. 204; Foster v. Tyne Pontoon & Dry Docks Co. & Renwick (1893), 63 L. J. Q. B. 50; Dixon v. Kennaway, [1900] 1 Ch. 833; Whitechurch v. Cavanagh, [1902] A. C. 117; Comitti v. Maher (1905), 94 L. T. 158; Compania Naviera Vasconzada v. Churchhill & Sim, Same v. Burton, [1906] 1 K. B. 237; L. & N. W. Ry. v. Hudson, [1920] A. C. 324; Colley v. Overseas Exporters, 1919, Ltd., [1921] 3 K. B. 302; Dominion Coal Co. v. Maskinonge S.S. Co., [1922] 2 K. B. 132; Bradford v. Price (1923), 92 L. J. K. B. 871; Jones (Holloway) v. Woodhouse, [1923] 2 K. B. 117.

**Refusal after demand.]—**See Sect. 2, *post*.

**114. Negotiation for unauthorised sale of broker.]—**EDELSTEIN v. SCHULER & Co., No. 98, *ante*.

## SUB-SECT. 2.—ACTS AMOUNTING TO CONVERSION.

### A. Taking.

#### (a) In General.

**115. Wrongful taking.]—**A wrongful taking is sufficient to support a count in trover, without proving a subsequent demand & refusal.—GRAINGER v. HILL (1838), 4 Bing. N. C. 212; 1 Arn. 42; 5 Scott, 561; 7 L. J. C. P. 85; 132 E. R. 760; *sub nom.* GRANGER v. HILL, 2 Jur. 235.

*Annotations:—*Refd. Powell v. Hoyland (1851), 6 Exch. 67; Warner v. Riddiford (1858), 4 C. B. N. S. 180. *Mentd.* De Medina v. Grove (1847), 10 Q. B. 172; Parton v. Hill (1864), 4 New Rep. 103; Assets Development Co. v. Close (No. 2) (1901), 46 Sol. Jo. 12; Giblin v. National Amalgamated Labourers' Union of Great Britain & Ireland, [1903] 2 K. B. 600.

**116. — Necessity for intent to convert.—To use of taker or third person.]—**Trover for two horses. It appeared at the trial that deft. was the manager of a ferry from B. to L. & that pltf. embarked on board deft.'s ferry boat at B. having with him the horses in question, for the carriage of which he had paid the usual fare. When deft. came on board, it having been suggested that pltf. had behaved improperly on board, he, deft., told pltf. he would not carry the horses over the water, & that he must take them on shore. Pltf. refused to do this, & deft. took them from pltf. & put them on shore, & they were conveyed to an hotel kept by deft.'s brother. Pltf. remained on board & was conveyed over the water. On the following day pltf. sent for the horses, but they were not delivered up; a message was, however, afterwards sent to pltf., that he might have the horses on sending for them & paying for their keep, but that if he did not send for them, they would be sold to pay the expenses. The latter was accordingly done, & this action was brought. The defence set up was, that pltf. having miscondacted himself on board, the horses were put on shore in order to get rid of pltf. by inducing him to follow them.

The judge, in summing up, told the jury that deft. by taking the horses from pltf. & turning them out of the vessel, had been guilty of a conversion, unless they thought pltf.'s conduct justified his removal from the steamboat, & he had refused to go without his horses:—*Held*:

(1851), 7 N. B. R. (2 All.) 242.—CAN.

**115 iii. —.]—**CLARKE v. WINNIEGAN CORPN. (1876), *Temp.* Wood, 56.—CAN.

**115 iv. —.]—**If a person makes an agreement concerning goods, & in fraud of that agreement takes possession of them, it is a conversion.—M'KEEVER v. M'KAIN (1846), Bl. D. & Osb. 80.—IR.

**115 v. —.]—**NCOTAMA v. N'CUOME (1893), 10 S. C. 207; 3 C. T. R. 261.—S. AF.

**k. — Thresher's lien.—Excessive quantity of grain taken.]—**STRONGMAN

this amounted to a misdirection, as a mere wrongful asportation of a chattel does not amount to a conversion, unless the taking or detention of the chattel is with intent to convert it to the taker's own use, or that of some third person, or unless the act done has the effect either of destroying or changing the quality of the chattel.—*FOULDES v. WILLOUGHBY* (1841), 8 M. & W. 540; 1 Dowl. N. S. 86; 10 L. J. Ex. 364; 5 Jur. 534; 151 E. R. 1153.

*Annotations*:—*Consd.* *Crouch v. G. N. Ry.* (1856), 11 Exch. 742. *Appl.* *Burroughes v. Bayne* (1860), 5 H. & N. 286. *Refd.* *Needham v. Rawbone* (1844), 9 Jur. 274; *Edmonson v. Nuttall* (1864), 17 C. B. N. S. 280; *Hilbery v. Hutton* (1864), 3 New Rep. 671; *England v. Cowley* (1873), L. R. 8 Exch. 126; *Hollins v. Fowler* (1875), L. R. 7 H. L. 757; *Moritt v. N. E. Ry.* (1876), 31 L. T. 94.

**117. — Effect of redelivery.]—***RUTLAND'S (COUNTESS) CASE* (1597), *Moore, K. B.* 266; 1 Roll. Abr. 5; 72 E. R. 571.

*Annotations*:—*Refd.* *Lemasons & Dickson's Case* (1626), Poph. 189; *Jones v. Morley* (1697), 12 Mod. Rep. 159; *Evans v. Lewis* (1835), 3 Dowl. 819; *Moon v. Raphael* (1835), 1 Hodg. 289; *Heald v. Carey* (1852), 21 L. J. C. P. 97; *Hemming v. Hale* (1859), 7 C. B. N. S. 487; *Edmonson v. Nuttall* (1864), 17 C. B. N. S. 280.

**118. Putting money into bag.]—**By receiving money, & putting it into a bag, the property is altered, & detainee will lie for it.—*CARTER v. SHEPHERD* (1698), Comb. 475; 5 Mod. Rep. 398; 12 Mod. Rep. 189; 2 Salk. 507; 90 E. R. 600; *sub nom.* *CANTER v. SHEPHERD*, 1 Ld. Raym. 330.

**119. Wrongful seizure by officer—Seizure of game by constable.]—**In Poaching Prevention Act, 1862 (c. 114), s. 2, "the value" of the game which is to be restored to an innocent person from whom it has been taken by a police officer, in pursuance of the power of seizure given by the sect., means the value of the game at the time of the termination in favour of the innocent person of proceedings subsequently taken against him by the police officer under the provisions of the section, & not the value of the game at the time it was seized.

A police officer seized certain partridges' eggs in accordance with the provision of Poaching Prevention Act, 1862 (c. 114), s. 2, under which partridges' eggs are "game," but subsequently took out a summons against the person from whom he seized them, charging him before justices with an offence against Game Act, 1831 (c. 32), s. 24, which contains no power of seizure. A conviction under the summons was on a case stated by the justices, quashed. By order of the justices the eggs were destroyed:—*Held*: the police officer was liable for the value of the eggs at the time they were seized in an action founded on trover, inasmuch as it is a condition subsequent to any steps that a police officer takes under Poaching Prevention Act, 1862 (c. 114), s. 2, that he should continue to proceed under that section in order to be entitled to its protection. If he seizes game with a *bona fide* intention of acting under Poaching Prevention Act, 1862 (c. 114), s. 2, but subsequently proceeds under a different statute his act of seizure is thereby rendered unlawful & he becomes in law a trespasser.—*STOWE v. BENSTEAD*, [1909] 2 K. B. 415; 78 L. J. K. B. 837; 101 L. T. 38; 73 J. P. 370; 25 T. L. R. 546; 53 Sol. Jo. 543, D. C.

*v. DOW & SASKATCHEWAN WESTERN ELEVATOR CO.*, [1919] 1 W. W. R. 963; 46 D. L. R. 691; 12 Sask. L. R. 140.—*CAN.*

**l. Removal contrary to agreement—Without notice.]—***KING v. BULLI COAL MINING CO.* (1877), *Knox*, 389.—*AUS.*

**m. Removal for purpose of as-**

*serting right over chattel.]* *MOYI v. AVUTHRAMAN* (1898), 1 L. R. 22 Mad. 197.—*IND.*

**n. Removal of crop—After severance.]—***MCARTHUR v. NILES, LTD.* (1919), 45 O. L. R. 280; 16 O. W. N. 16; 48 D. L. R. 45.—*CAN.*

**o. Removal of building.]—***CLEAVER*

*Customs officer.]—See* *REVENUE*, Vol. XXXIX., pp. 222, 223, Nos. 26–32.

*Sheriff.]—See* Sub-sect. 2, A. (c), *post*.

**120. Taking possession of effects of testator—Appointment as executor revoked.]—**Where an exor. had obtained probate of a will, with notice that testator had made a subsequent will, appointing another exor., & he acted by taking possession of testator's effects:—*Held*: the exor. under the second will, who had obtained probate might maintain trover for the effects so taken possession of.—*WOOLEY v. CLARK* (1822), 5 B. & Ald. 744; 1 Dow. & Ry. K. B. 409; 106 E. R. 1363.

*Annotations*:—*Refd.* *Morgan v. Thomas* (1853), 8 Exch. 302; *Thompson v. Harding* (1853), 22 L. J. Q. B. 448; *Boxall v. Boxall* (1884), 27 Ch. D. 220; *Ellis v. Ellis* (1905), 74 L. J. Ch. 296; *Hewson v. Shelley*, [1914] 2 Ch. 13. *Mentd.* *Welchman v. Sturgis* (1849), 13 Q. B. 552; *Meyappa Chetty v. Supramanian Chetty*, [1916] 1 A. C. 603.

**121. Taking excessive toll.]—**Where a person entitled to toll of a commodity, wheat, for instance, takes more than he is entitled to, an action of trover lies against him for the excess, although the part lawfully taken be mixed up with the excess.—*NORMAN v. BELL* (1831), 2 B. & Ad. 190; 9 L. J. O. S. K. B. 177; 109 E. R. 1114.

*Annotation*:—*Refd.* *Batchelor v. Vyse* (1831), 4 Moo. & S. 552.

**122. Removal of virgin soil by tenant.]—**If a tenant of land, during his tenancy, remove a dung heap, & at the time of his so doing, digs into & removes virgin soil that is beneath it, the landlord may maintain either trespass *de bonis asportatis* or trover for the removal of the virgin soil.

I am of opinion that, if a tenant, during the tenancy, remove virgin soil, it becomes by operation of law the personal property of the landlord (*PARKE, B.*).—*HIGGON v. MORTIMER* (1834), 6 C. & P. 616; 172 E. R. 1389, N. P.

**123. Taking under threat—Sufficiency of duress.]—**Pltf. being lawfully possessed of certain bills of exchange given him by D., a trader, deft., acting on behalf of creditors of D., who had taken proceedings to make him bkpt., came to pltf. when ill in bed, & demanded the bills, & on pltf.'s refusal to give them up, told him that if he did not the expense of the bkptcy. would fall on him, & the comr. would be very severe with him. Pltf. was much agitated, & delivered up the bills. Pltf.'s agent afterwards, while the bills were in deft.'s possession, informed him of the circumstances under which they had been given to pltf., & told him that he, deft., & his employers had no right to them; but deft., notwithstanding, handed them over to his employers. In trover for the bills:—*Held*: (1) the original taking was not a conversion, inasmuch as there was no such duress as would have avoided a contract, or have enabled pltf. to maintain trespass *de bonis asportatis*; (2) deft. was guilty of a conversion by delivering the bills to his employers after notice of the facts.—*POWELL v. HOYLAND* (1851), 6 Exch. 67; 20 L. J. Ex. 82; 16 L. T. O. S. 369; 155 E. R. 456.

**124. Taking property of lunatic—For purpose of protection.]—**The wife of a lunatic ordered the medical gentleman having the care of the lunatic to take from him certain letters & papers, which was done accordingly:—*Held*: the medical gentleman was not liable in an action of trover

*v. CULLODEN* (1858), 15 U. C. R. 582.—*CAN.*

**p. Removal of seals—Seals panned on ice fields—Abandonment.]—***POWER v. JACKMAN* (1859), 4 Nfld. L. R. 333.—*Nfld.*

**q. — — — — —.]—**If a party leave seals scattered about on the ice



*Sect. 1.—What amounts to conversion: Sub-sect. 2, A. (a), (b) & (c).]*

brought against him subsequently by the lunatic.—*HILL v. PHILP* (1852), 19 L. T. O. S. 284.

**125. Removal of fixtures—By outgoing tenant.]**—Pltf. purchased a farm from the devisees in trust of the father of deft., & the premises were conveyed by a deed, to which deft. was a party, as one of the devisees. Pltf. demised the premises to M. immediately after the conveyance, & deft., who was in the occupation of the farm, at the time of the conveyance, under a lease from the devisees, removed some rick staddles, a thrashing machine, & a granary from the premises after the demise to M. The deed conveyed the land & all fixtures: the articles in question had been put on the land by deft.'s father:—*Held*: the removal of it [the granary] would not support a count for an injury to the reversionary estate of pltf., nor a count in trover.—*WILTSHEAR v. COTTRELL* (1853), 1 E. & B. 674; 22 L. J. Q. B. 177; 20 L. T. O. S. 259; 17 Jur. 758; 118 E. R. 589.

*Annotations*—*Mentid*. *Elliot v. Bishop* (1854), 10 Exch. 496; *Holland v. Hodgson* (1872), L. R. 7 C. P. 322; *Chidley v. West Ham* (1874), 32 L. T. 436; *Hobson v. Gorringe*, [1897] 1 Ch. 182; *Monti v. Barnes*, [1901] 1 K. B. 205; *Polo-Carew v. Western Counties & General Manure Co.*, [1920] 2 Ch. 97; *Vaudeville Electric Cinema v. Muriset*, [1923] 2 Ch. 74.

**126. Removal by tenant in common—Without knowledge of co-tenant.]**—*JONES v. BROWN*, No. 434, *post*.

**127. Removal of goods by assignee in bankruptcy.]**—Pltf. agreed with K. to purchase from K. 100 out of 200 quarters of barley which pltf. had seen in bulk & approved of; & he paid part of the price. It was agreed that pltf. should send sacks for the barley, & that K. should fill the sacks with the barley, take them to a railway, place them upon trucks free of charge, & send them to pltf. Pltf. sent sacks enough for a part only of the 100 quarters; these K. filled; & K. also endeavoured to find trucks for them, but was unable to do so. Pltf. repeatedly sent to K. demanding the barley. K. finally detained it, & emptied the barley from the sacks back into the bulk. K. having become bkpt. after he had emptied the barley from the sacks into the bulk, & defts., his assignee, having removed the whole together:—*Held*: this was a conversion, by the assignee, of all the barley, if any, which, by the putting it into the sacks, had become pltf.'s property.—*ALDRIDGE v. JOHNSON* (1857), 7 E. & B. 885; 26 L. J. Q. B. 296; 3 Jur. N. S. 913; 5 W. R. 703; 119 E. R. 1476.

*Annotations*—*Apld*. *Langton v. Higgins* (1859), 4 H. & N. 402. *Consd*. *Jenner v. Smith* (1869), L. R. 4 C. P. 270. *Apld*. *Ogg v. Shuter* (1875), 44 L. J. C. P. 161. *Refd*. *Anderson v. Morice* (1876), 1 App. Cas. 713. *Mentid*. *Heilbutt v. Hickson* (1872), L. R. 7 C. P. 438.

**128. Sailing with goods—Without giving bill of lading.]**—Pltf., a salt merchant at Liverpool, was in the habit of shipping cargoes of salt there for M., a merchant in London, on board vessels chartered by M., charging him a commission in addition to the price, & getting bills of lading making the salt deliverable to his order, which bills of lading he sent with the invoice & a draft at four months to M. In Nov. 1863, M. chartered the ship "S. F.," belonging to defts., to carry a cargo of salt from Liverpool to Calcutta,—freight to be paid one-third by freighter's acceptance at four months from the sailing of the vessel, the remainder on delivery of the cargo at Calcutta.

Pursuant to instructions from M., pltf. proceeded to load the "S. F.," & had shipped 1,007 tons, for which he took the mate's receipts, in his own name, when he learned that M. had stopped payment. He thereupon refused to load any more, & defts. filled up the loading themselves. Pltf. then produced to defts. the mate's receipts for the 1,007 tons, & demanded a bill of lading for that quantity, making it deliverable to his order. This defts. refused, & the vessel sailed with the salt on board:—*Held*: it was properly left to the jury to say whether or not pltf. put the salt on board the "S. F.," with the intention of passing the property therein to M.; & the jury having found that pltf. did not intend to pass the property to M., the sailing from Liverpool without giving pltf. a bill of lading in exchange for the mate's receipts, as demanded, was a conversion; & the proper measure of damages was, the value of the salt at Liverpool at the time of sailing.—*FALK v. FLETCHER* (1865), 18 C. B. N. S. 403; 5 New Rep. 272; 34 L. J. C. P. 146; 11 Jur. N. S. 176; 13 W. R. 346; 144 E. R. 501.

*Annotations*—*Consd*. *Jones v. Hough* (1879), 5 Ex. D. 115. *Refd*. *Galabarron v. Kreeft*, *Kreeft v. Thompson* (1875), L. R. 10 Exch. 274; *Cassaboglou v. Gibb* (1883), 11 Q. B. D. 797.

**129. Leaving man in possession—Goods in cart.]**—Trespass for stopping & turning back pltf.'s cart, & seizing & converting the goods in it. Plea, not guilty, as to converting the goods: judgment by default, as to stopping & turning back the cart. Evidence, that deft. had authorised the stopping & taking back the cart, & saying to a man, that he left him in possession. The judge thought this not sufficient evidence of the conversion of the goods; & therefore, the jury found a verdict for deft. upon the issue; & gave nominal damages on the judgment by default:—*Held*: to be right.—*HOPKINS v. AINSWORTH* (1831), 9 L. J. O. S. K. B. 71.

**130. Picking fruit from overhanging branches.]**—*MILLS v. BROOKER*, No. 68, *ante*.

#### (b) Taking by Way of Distress.

*See, generally*, DISTRESS, Vol. XVIII., pp. 254 *et seq.*

**131. Intermeddling with goods distrained.]**—*GOMERSALL v. MEDGATE* (1610), Yelv. 194; 80 E. R. 128; *sub nom.* *GOMERSALL v. WAXTS*, Cro. Jac. 255; *sub nom.* *HEWET v. NORBEROW*, 1 Bulst. 52.

*Annotation*—*Refd*. *Clark v. Gilbert* (1835), 2 Scott, 520.

**132. Sale of goods distrained—Without removal from premises—After irregular notice of replevy.]**—The sale of goods under a distress, after service of an irregular notice of replevy, without removing the goods off the premises, is not a conversion.—(*CUCKSON v. WINTER* (1828), 2 Man. & Ry. K. B. 313; 6 L. J. O. S. K. B. 309.

—*After notice of assignment to third party.]*—*See* DISTRESS, Vol. XVIII., p. 354, No. 914.

**133. Taking inventory of goods—Notice that goods distrained.]**—Where defts. meddled with & took an inventory of pltf.'s goods & gave him notice they had distrained them:—*Held*: there was sufficient evidence to go to the jury of a conversion of the goods to deft.'s own use.—*NEILAU v. HANNY* (1849), 2 Car. & Kir. 710, N. P.

**134. Seizure of part in name of whole.]**—*BLEASDALE v. ATKINSON* (1850), 15 L. T. O. S. 207.

fields without any reasonable hope of recovering them, & they are taken by another party, the original owner has no remedy against the party so taking the seals.—*NOEL v. WARREN* (1861)

4 Nfld. L. R. 557.—*NFLD*.

*r. Removal of timber—Licence on Crown lands—Removal off limits of licence.*—A person having a licence from the Crown to cut timber on Crown

land cannot maintain trover against a wrongdoer for timber cut & carried away by the latter from off the limits of the licence.—*KERR v. CONNELL* (1836), 2 N. B. R. (Ber.) 233.—*CAN*.



**Seizure of goods not in inventory.**—See DISTRESS, Vol. XVIII., p. 339, Nos. 739, 740.

**Illegal, irregular & excessive distress.**—See, generally, DISTRESS, Vol. XVIII., pp. 393, 394, Nos. 1351–1359.

**Taking distress damage feasant.**—See DISTRESS, Vol. XVIII., pp. 447–449, Nos. 1838–1843, 1852–1857.

**Wrongful seizure by revenue officer.**—See REVENUE, Vol. XXXIX., pp. 222–223, Nos. 26–32.

(c) *Taking in Execution.*

See, generally, EXECUTION, Vol. XXI., pp. 407 et seq.

**135. Wrongful execution—Seizure of property of third party.**—SAUNDERS v. POWELL (1664), 1 Sid. 183; 1 Keb. 693; 82 E. R. 1045; *sub nom.* SANDERS v. POWELL, 1 Lev. 129.

*Annotations* :—*Consd.* Adamson v. Jarvis (1827), 4 Blng. 66. *Mentd.* R. v. Lawley (1731), 1 Barn. K. B. 459.

**136.** ———. ———. In an action of trover it appeared that debtfs., acting as constables, under a warrant of justices, authorising them to levy the sum of £3 18s. 6d. on the goods of a publican for church rates, proceeded to his house, & in the cellar said they seized four dozen of wine, & refused to go out of it until the sum demanded was paid, but did not manually touch or take possession of any portion of the wine, which was in a large binn :—*Held* : there was a sufficient conversion.—WORTLEY v. CAMPLING (1847), 11 J. P. 390.

**137.** ———. ———. **Sale by bailiff.**—Where, under an execution in the county ct., goods of which the owner is entitled to take possession are seized & sold by the bailiff, the bailiff is liable in trover at the suit of the owner.

Goods were seized by the high bailiff in execution of a judgment recovered in the county ct., which were not the property of judgment debtor, but had been let to him by claimants under a hire purchase agreement. The goods were sold by the high bailiff & possession delivered to the purchasers. The hire-purchase agreement provided that if the goods were taken in execution claimants might without previous notice terminate the hiring & re-take possession. Claimants did not know of the seizure until after the goods had been sold & possession delivered to the purchasers, when they served notice upon the high bailiff that the goods belonged to them, & claimed damages from him for conversion :—*Held* : as at the time of the sale claimants were entitled under the agreement to retake possession of the goods, the sale was an act of conversion as against them for which they could maintain trover against the high bailiff.—JELKS v. HAYWARD, [1905] 2 K. B. 460; 74 L. J. K. B. 717; 92 L. T. 692; 53 W. R. 686; 21 T. L. R. 527; 49 Sol. Jo. 685, D. C.

—See EXECUTION, Vol. XXI., pp. 543–545, Nos. 1186–1191, 1202, 1203; SHERIFFS, Vol. XII., pp. 116, 117, Nos. 742–745.

**138. Attachment of goods in hands of garnishee.**—

*Semble* : the attaching by process from the Sheriffs Ct. in London of property in the hands of the garnishee is not such a conversion as will enable the owner to maintain trover.—MALLALIEU v. LAUGHER (1828), 3 C. & P. 551; 172 E. R. 541, N. P.

**139. Seizure of fixtures—Execution against lessee—Fixtures assigned to plaintiffs.**—A tenant's right to things affixed to the freehold is at an end if he omits to detach them during his term or possession; & he cannot afterwards treat them as chattels, in an action of trover brought against the sheriff, for taking them under a writ of *fi. fa.*

Accordingly, where the lessee of certain collieries, assigned goods & chattels, & engines partly affixed to the freehold, to ptfs., & the lessor afterwards took possession of the collieries & engines, by reason of a forfeiture :—*Held* : ptfs. could not maintain an action of trover against the sheriff, who had taken the engines under a *fi. fa.* against the lessee, inasmuch as the latter had not detached them during the continuance of his possession.—MINSHALL v. LLOYD (1837), 2 M. & W. 450; Murp. & H. 125; 6 L. J. Ex. 115; 1 Jur. 336; 150 E. R. 834.

*Annotations* :—*Apld.* Mackintosh v. Trotter (1838), 3 M. & W. 181; Weeton v. Woodcock (1840), 7 M. & W. 14. *Consd.* Wilde v. Waters (1855), 16 C. B. 637; Gough v. Wood, [1894] 1 Q. B. 713. *Refd.* Elliott v. Bishop (1854), 10 Exch. 496; Walmsley v. Milne (1859), 7 C. B. N. S. 115; *Re* Roberts, *Ex p.* Brook (1878), 10 Ch. D. 100; *Re* De Falbe, Ward v. Taylor, [1901] 1 Ch. 523.

**140. Effect of bankruptcy of debtor.**—(1) The words “fraudulent & void as against the assignee of such” persons contained in Judgments Act, 1837 (c. 110), s. 59, do not mean fraudulent & void absolutely, but only as to the assignee, so that a transaction forbidden by that sect., & declared “fraudulent & void as to the assignee,” may be valid as to other persons.

Where therefore F., a debtor, intending to petition the Insolvent Debtors' Ct., voluntarily gave Y., one of his creditors, a warrant of attorney on which Y. entered up judgment & issued execution, & the sheriff seized & sold the goods; & F. afterwards presented his petition, & an assignee was appointed :—*Held* : the assignee could not treat the transaction as void from the beginning, & maintain trover against Y., on an alleged wrongful conversion at the time of the seizure.

(2) The assignee brought trover, alleging in the first count, that the creditor Y. wrongfully deprived F. of the goods. Y. pleaded not guilty, & also the warrant of attorney & the execution under it. The assignee replied, that after Judgments Act, 1837 (c. 110), & within three months before F.'s imprisonment, F., being in insolvent circumstances did, with the intent of petitioning the ct., etc., voluntarily, fraudulently, & contrary to the statute, charge his estate in favour of Y., a creditor, by means of a warrant of attorney, fraudulent & void within the statute, whereby Y. obtained execution, etc. :—*Held* : on this pleading trover was not maintainable against Y.—YOUNG v. BILLITER (1860), 8 H. L. Cas. 682; 30 L. J. Q. B. 153, 7 Jur. N. S. 269; 11 E. R. 596; *sub nom.* BILLITER v. YOUNG, 3 L. T. 196, H. L., *reversing* S. C. *sub nom.* BILLITER v. YOUNG (1856), 6 E. & B. 1; 3 L. T. 196, Ex. Ch.

*Annotations* :—*As to* (1) *Refd.* Marks v. Feldman (1870), L. R. 3 Q. B. 275. *Generally, Refd.* Topping v. Keysell (1844), 33 L. J. C. P. 225; *Hellbut v. Newell* (1870), L. R. 6 C. P. 478. *Mentd.* Fitzmaurice v. Bayley (1858), 4 Jur. N. S. 506; Hollingsworth v. White (1862), 6 L. T. 604; Clough v. L. & N. W. Ry. (1871), L. R. 7 Exch. 26.

**141. Creditor having notice.**—A sheriff had sold goods taken under an execution against A., at the suit of B., to B., who shortly before had

PART II. SECT. 1, SUB-SECT. 2.—  
A. (c).

t. *Wrongful execution—Improper sale.*—A. issued an execution against B., under which a levy was made of B.'s goods, but no sale, the execution being withdrawn. A second execution under another judgment was issued

by A. against B., & the sheriff, after selling goods to satisfy that execution, proceeded to sell other goods of B. to satisfy him for fees on the first execution :—*Held* : such sale by the sheriff was a wrongful conversion, & trover would lie.—MILLER v. WELDON (1871), 13 N. B. R. (2 Han.) 188.—CAN.

a. — *Seizure of property of tenants in common—Only one tenant in common liable.*—Ptfs. were owners, as tenants in common with M., of certain hay, grain & straw. The property was taken & sold by the sheriff under an execution against M., & was purchased by debt., who re-sold part & used the

*Sect. 1.—What amounts to conversion: Sub-sect. 2, A. (c), & B. & C.]*

received notice that A. had filed a petition for arrangement in the Ct. of Bkpcy. under Bankrupt Act, 1849 (c. 106), s. 133. This petition was afterwards dismissed, & on the same day A. was duly adjudicated a bkpt., which made the filing of the petition for arrangement an act of bkpcy. under sect. 76, from the time of filing the petition. In an action of trover by the assignees of A. against B.:—*Held*: they were entitled to recover, for B. had notice of an act of bkpcy. prior to the sale to him, & therefore the transaction was not protected under sect. 133.—*EDWARDS v. GABRIEL* (1861), 7 H. & N. 520; 31 L. J. Ex. 113; 9 L. T. 201; 8 Jur. N. S. 592; 10 W. R. 95; 158 E. R. 578, Ex. Ch.

*Annotations*:—*Refd.* Birmingham Gas Co. v. Adams (1870), 19 W. R. 123. *Mentd.* Bothamley v. Heyward (1862), 8 Jur. N. S. 1156; *It* Boocock, [1916] 1 K. B. 816.

—*J*—*See* BANKRUPTCY, Vol. V., pp. 824, 825, Nos. 6996–7008.

**142. Evidence of conversion—Receipt of poundage by sheriff.**—A sheriff, before the passing of 6 Geo. 4, c. 16, having no notice of a previous act of bkpcy. committed by a trader, seized his goods under a *fu. fa.*, but withdrew upon an arrangement entered into between the execution creditor & the trader, receiving however his poundage in the ordinary manner. A commission was afterwards issued on this act of bkpcy.:—*Held*: the assignees might maintain trover against the sheriff for the goods seized.

*Semble*: the receipt of poundage was evidence of a conversion by the sheriff.—*GARLAND v. CARLISLE* (1837), 4 Cl. & Fin. 693; 4 Bing. N. C. 7; 11 Bli. N. S. 421; 3 M. & W. 152; 4 Scott, 587; 7 E. R. 263, H. L.; *affy.* (1833), 2 Cr. & M. 31, Ex. Ch.; & *sub nom.* CARLISLE v. GARLAND (1831), 7 Bing. 298.

*Annotations*:—*Consd.* Balmie v. Hutton (1833), 9 Bing. 471; *Cannan v. S. E. Ry.* (1852), 7 Exch. 843; *Hollins v. Fowler* (1875), L. R. 7 H. L. 757. *Refd.* Dillon v. Langley (1831), 9 L. J. O. S. K. B. 143; *Grainger v. Hill* (1838), 1 Arn. 42; *Tharpe v. Stallwood* (1843), 5 Man. & G. 760. *Heslop v. Baker* (1853), 22 L. J. Ex. 333; *Edwards v. Scarsbrook* (1862), 3 B. & S. 280. *Mentd.* Reynolds v. Wedd (1838), 7 L. J. C. P. 244; *O'Connell v. R.* (1844), 11 Cl. & Fin. 155.

*B. Detaining.*

**143. Keeping goods of intestate—Goods taken during life.**—Goods taken in intestate's life & kept till his death, though used afterwards, is a trover & conversion in intestate's life.—*CROSSIER v. OGLEBY* (1717), 1 Stra. 60; 93 E. R. 385.

**144. Detaining article of no value—Bill of exchange—Plaintiff having no title to value thereof.**—*PEREIRA v. JOPP* (1793), 5 Man. & Ry. K. B. 304, n., N. P.

**145. Detaining furniture of tenant—After expiration of tenancy.**—Pltf. hired a part of deft.'s house, & there resided for some time, furnishing the rooms & bringing goods there. On the expiration of the tenancy, deft. refused to permit him to

take away his goods, on pretence that the rent was not paid, & he proceeded to lock the doors of the rooms & otherwise prevented pltf. from taking away his goods. Pltf. brought trespass, but was nonsuited on the ground that trover was the proper form of action, the owner of the house having sufficient possession for an unlawful conversion to rest upon:—*Held*: the nonsuit was right.—*HARTLEY v. MOXHAM* (1842), 3 Q. B. 701; *Car. & M.* 504; 3 Gal. & Dav. 1; 12 L. J. Q. B. 41; 6 J. P. 717; 6 Jur. 948; 114 E. R. 675.

*Annotations*:—*Distd.* Lane v. Dixon (1847), 3 C. B. 776. *Refd.* White v. Bayley (1861), 10 C. B. N. S. 227.

**146. Detaining produce of own land—Chalk dug by plaintiff before ejectment—Converted into lime.**—A. having taken possession of land belonging to B., dug chalk from the soil, & converted it into lime. B. recovered judgment in ejectment, & upon execution of the writ of possession, turned A.'s servants off the premises, refusing, at the same time, to allow them to remove the lime remaining on the premises. Upon trover for the lime:—*Held*: these facts did not necessarily amount to a conversion.

*Semble*: by the change of the chalk into lime, the property in it vested in A.—*THOROGOOD v. ROBINSON* (1845), 6 Q. B. 769; 14 L. J. Q. B. 87; 4 L. T. O. S. 292; 9 Jur. 274; 115 E. R. 290.

**147. Detaining goods after justifiable removal—Unfounded claim of lien.**—A justifiable removal of goods followed by a detention of them under an unfounded claim of lien is a conversion.—*TEAR v. FREEBODY* (1858), 4 C. B. N. S. 228; 140 E. R. 1071; *sub nom.* SEAR v. FREEBODY, 31 L. T. O. S. 131; 22 J. P. 707; *sub nom.* FEAR v. FREEBODY, 6 W. R. 520.

*Annotations*:—*Mentd.* Simpson v. Smith (1871), L. R. 6 C. P. 87; *Manners v. Johnson* (1875), 1 Ch. D. 673; *St. Mary, Islington Vestry v. Goodman* (1889), 23 Q. B. D. 154.

**148. Detention of fixtures by lessee—Fixtures mortgaged by previous lessee.**—A., having mortgaged to pltf. the fixtures in a house of which he was tenant, before the fixtures were severed, surrendered his lease to his landlord, who demised to deft. Dft. then entered & took possession of the house, together with the fixtures:—*Held*: the mtgor. could not defeat his own act by the surrender, & pltf. had a right to enter & sever the fixtures notwithstanding; & they were entitled, in an action of trover for the fixtures, to recover their value.—*LONDON & WESTMINSTER LOAN & DISCOUNT CO., LTD. v. DRAKE* (1859), 6 C. B. N. S. 798; 28 L. J. C. P. 297; 5 Jur. N. S. 1407; 7 W. R. 611; 141 E. R. 664.

*Annotations*:—*Apld.* Saint v. Pilley (1875), L. R. 10 Exch. 137. *Consd.* *It* Glasdri Copper Works, English Electro-Metallurgical Co. v. Glasdri Copper Works, [1904] 1 Ch. 819. *Refd.* Moss v. James (1877), 47 L. J. Q. B. 160; *Clements v. Matthews* (1883), 11 Q. B. D. 808; *It* Walker, *Ex p.* Gould (1884), 13 Q. B. D. 454.

**149. Detention under claim of interest.**—*BURROUGHS v. BAYNE*, No. 106, *ante*.

*Detention after demand.*—*See* Sect. 2, *post*.

*Detention of goods by unpaid seller.*—*See, generally, SALE OF GOODS*, Vol. XXXIX., pp. 607–630, Nos. 2047–2351.

balance:—*Held*: there was such a carrying away of the property as would disable pltf. from having the lawful use or benefit of it, & pltf. were therefore entitled to maintain their action.—*MCLELLAN v. McDUGALL* (1896), 28 N. S. R. (16 R. G.) 237.—*CAN.*

**PART II. SECT. 1, SUB-SECT. 2.—B.**

**149 i. Detention under claim of interest.**—*HEDLEY v. SCISSONS* (1873), 33 U. C. R. 215.—*CAN.*

**149 ii.** —*J*—*POLSON v. DEGEER* (1886), 12 O. R. 275.—*CAN.*

**149 iii.** —*J*—*WINCHESTER v. BUSBY* (1888), 16 S. C. R. 336.—*CAN.*

**b. Detention of lumber—Seizure under Canal Act—Refusal to deliver on tender of payment for charges.**—Trover lies against a lock keeper on the Rideau canal for refusing to deliver up lumber seized & detained by him under the provisions of the Rideau Canal Act, for obstructing the navigation, on a tender of the charges occasioned by such seizure & the removal of the obstruction.—*GOULD v. JONES* (1832), 3 O. S. 53.—*CAN.*

**c. Detention of pumo—During action—Whether evidence of detention.**—*SCHAFER v. DUMBLE* (1884), 5 O. R. 716.—*CAN.*

**d. Detention of horses by innkeeper—Dispute as to charges—Right to retain horses for keep—Unless special agreement.**—*DIXON v. DALBY* (1853), 11 U. C. R. 79.—*CAN.*

**e. Goods left by former tenant—Refusal of succeeding tenant to deliver—Without consent of landlord.**—*RUEL v. MCLEROY* (1855), 8 N. B. R. (3 All.) 212.—*CAN.*

**Detention by landlord — Of fixtures.]—See LANDLORD & TENANT, Vol. XXXI., pp. 211–213, Nos. 3502, 3503, 3510–3521.**

**— Of goods distrained by broker.]—See DISTRESS, Vol. XVIII., p. 351, No. 882.**

**Failure of carrier to redeliver.]—See SALE OF GOODS, Vol. XXXIX., p. 638, Nos. 2338–2345.**

### C. Sale.

**150. Bonâ fide sale without notice.]—Qu.:** if in trover, a *bonâ fide* sale without notice is a conversion.—*GYBSON v. GARBIN* (1596), Cro. Eliz. 480; 78 E. R. 732.

**151. Sale of wood by copyhold tenant.]—Where** by agreement dated 1656, between the lord & certain tenants of customary tenements within a manor, the tenants covenanted, that they, their heirs & assigns, would not cut down, sell or dispose of any wood standing or growing, or hereafter to stand or grow, without the licence of the lord, & the lord covenanted to set out yearly, upon the request of tenants, sufficient for the repairing of their houses, etc., & other necessary uses in & about the tenements, & that in case any of the tenants, their heirs, or assigns, should plant any wood upon the tenements, it should be lawful for them to cut down, use, & dispose of all or any such wood for repairing their houses, etc., of for any other their necessary uses without disturbance of the lord:—*Held:* deft., who was tenant of one of the customary tenements comprised in the above agreement, was not entitled without licence of the lord to cut down & sell wood which had been planted on the tenement by a tenant since the agreement, & having so done, the lord might maintain trover against her for the wood.—*BLACKETT v. LOWES* (1814), 2 M. & S. 494; 105 E. R. 465.

**152. Sale on plaintiff's account.]—Proof** that deft., in trover, stated that he sold the property in question on pltf.'s account is not *primâ facie* evidence of a conversion.—*ENGLISH v. CHARTERS* (1816), 2 Stark. 30; 171 E. R. 562, N. P.

**153. Sale by order of court—Delivery of ship's register to purchaser.]—The** owner of a ship consigned her to persons abroad who hypothecated her, & directed the captain to sign a bottomry bond. On her arrival in London, he, by their direction, delivered the register to deft., the agent of the consignees, who gave it to their solr., to institute proceedings in the Ct. of Admty., on the bottomry bond. The ship was sold, by order of that ct., & the register decreed to be given up to the purchaser. The owner became bkpt., & his assignees brought an action of trover for the register:—*Held:* they could not recover, as they might have appeared in the Admty. Ct., & prevented the sale of the vessel, & as the delivery of the register to the purchaser, under the decree of that ct., was not a conversion.—*HOSSACK v. MASSON* (1820), 4 Moore, C. P. 361.

**154. Sale by broker.]—(1)** N. & co., commission agents, employed defts., who were sworn brokers, to buy eighteen chests of indigo for them at one of the East India co.'s sales. N. & co. dealt on behalf of another party, pltf., but this was not mentioned. Defts. paid for the chests & kept the India warrants, & the goods remained in the co.'s warehouses. The principal, being informed of the purchase, paid N. & co. the amount. They afterwards directed defts. to sell the indigo, & apply the

proceeds in reduction of a balance due to them from N. & co., which was done; the defts. not knowing that any other party had a claim to the goods, & never having been paid, specifically, for the advance which they had made in respect of them. There had been a running account between N. & co. & defts. for some time, during which the latter held a number of warrants for indigos purchased by them for N. & co., & for which defts. had made advances. N. & co. occasionally withdrew the warrants, & at or near the same time paid in money to their account with defts., to about the value. There was no express agreement as to this, but an understanding that the warrants were not to be taken away upon credit. The payments were made & entered generally. Between the time of purchasing the eighteen chests & that of the direction to resell them, N. & co. had paid in this manner more than the value of the eighteen chests, but had also, during all that time, been indebted to the defts. in a larger amount. On trover brought by the principal against defts.:—*Held:* the above payments on account could not be considered as appropriated to the discharge of defts.' claim on the eighteen chests, & they consequently had a lien upon these at the time of the sale, which, under the circumstances, was an answer to the present action.

(2) N. & co. purchased & paid for twenty-three chests of indigo, on behalf of the same principal, & were paid the amount by him, but retained the warrants, & the chests remained in the East India co.'s warehouses. Being desirous of withdrawing some other warrants which they had in the hands of defts., they deposited these in lieu of them; & they afterwards authorised defts. to sell the twenty-three chests, & appropriate the proceeds, which they did, not knowing that any party was interested in them but N. & co. At the time of this transaction N. & co. were creditors in account with their principal to an amount much below the value of the indigo:—*Held:* the sale of the twenty-three chests was a conversion, & defts. were liable to the principal in trover.—*TAYLOR v. KYMER* (1832), 3 B. & Ad. 320; 1 L. J. K. B. 114; 110 E. R. 120.

*Annotations:—As to (1) Consd. Bonzi v. Stewart* (1842), 4 Man. & G. 295. *As to (2) Expd. Shenstone v. Hilton*, (1891) 2 Q. B. 452. *Generally, Mentd. Cole v. North Western Bank* (1875), L. R. 10 C. P. 354; *Lowther v. Harris*, [1827] 1 K. B. 393.

**155. —.]—EDELSTEIN v. SCHULER & Co.**, No. 98, ante.

**156. —.]—Pltf.**, a diamond merchant, entrusted certain diamonds to a broker who stated that he had customers for them, & mentioned the names of two firms. The broker did not offer the diamonds to either firm, but gave them to B., asking him to sell them. B. took the diamonds to F. & W., explaining that he came from the broker, & asked them to purchase them on joint account with himself. F. & W. agreed, & paid the price required by the broker, debiting B. in their books with one-half thereof, & afterwards disposed of the diamonds, crediting B. with half the profits realised. In an action for conversion by pltf. against B. & F. & W., the jury found that the broker obtained the diamonds from pltf. by larceny by a trick; that F. & W. had acted in good faith but that B. had not:—*Held:* for the particular purpose of purchasing the diamonds B., F. & W. were partners; & though F. & W.

### PART II. SECT. 1, SUB-SECT. 2.—C.

**1. Sale by order of court—Interpleader—Effect of acceptance of part of proceeds.]—Where** claimant, under an

interpleader order, after first directing a sale, & then countermanning it, accepted part of the proceeds of the sale of the goods, he thereby adopted

the sale, & could not hold the execution creditor liable for a conversion.—*APPLEBY v. WITKAL* (1859), 8 C. P. 397.—CAN.

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personally had acted in good faith, B.'s want of good faith deprived them, as well as himself, of the protection of Factors Act, 1889 (c. 45), s. 2, & they were all jointly liable to pltf. for the conversion of the diamonds.—*OPPENHEIMER v. FRAZER & WYATT*, [1907] 2 K. B. 50; 76 L. J. K. B. 806; 97 L. T. 3; 23 T. L. R. 410; 51 Sol. Jo. 373; 12 Com. Cas. 280, C. A.

*Annotations:—***Expld.** *Folkes v. King*, [1923] 1 K. B. 282. **Refd.** *Oppenheimer v. Attenborough*, [1908] 1 K. B. 221; *Whitehorn v. Davison*, [1911] 1 K. B. 463; *Mehta v. Sutton* (1913), 108 L. T. 214; *Hoap v. Motorists' Advisory Agency*, [1923] 1 K. B. 577; *Lowther v. Harris*, [1927] 1 K. B. 393. **Mentd.** *Lake v. Shummons*, [1926] 2 K. B. 51.

**157. Sale by servant.—Subject bankruptcy of master.**—A trader absconded from his place of business, leaving an assistant there, who, *bonâ fide*, but without any express order, sold certain goods of the former, & received the money. More than two months afterwards, a commission of bkpcy. issued against the trader, upon the act of bkpcy. committed by his absconding.—*Held*: such sale by the assistant was a conversion.—*PEARSON v. GRAHAM* (1837), 6 Ad. & El. 899; 2 Nev. & P. K. B. 636; Will. Woll. & Dav. 691; 7 L. J. Q. B. 247; 112 E. R. 344.

*Annotations:—***Refd.** *Bowman v. Malcolm* (1813), 11 M. & W. 833; *Kynaston v. Crouch* (1815), 9 Jur. 584. **Mentd.** *Re Matabule, Ex p. Schulte* (1874), 9 Ch. App. 409.

**158. — Without authority.—Bonâ fide purchase by defendant.**—Where A. refused to give up certain chattels when demanded by the owner, on the ground that he had purchased them from B., who was the owner's servant; & it appeared that B. had no authority to sell:—*Held*: this was evidence of a conversion by A., although he had made the purchase *bonâ fide*, & in the belief that B. had such authority.—*METCALFE v. LUMSDEN* (1844), 1 Car. & Kir. 309.

**159. Sale by auctioneer.**—If a person is stopped with a horse under suspicious circumstances, & the horse be placed at an inn by the police, the innkeeper has no lien on the horse for its keep, & if an auctioneer, by the direction of the innkeeper, sell the horse for its keep, he is liable to be sued in trover by the owner of the horse.—*BINNS v. PIDOT* (1840), 9 C. & P. 208; 173 E. R. 804, N. P.

**160. — —**—The nephew of pltf. having a horse to sell, some negotiations took place between them; but as they could not agree as to price the horse was not sold; subsequently, however, pltf. wrote to his nephew, making an offer for the horse, stating in his letter that he should consider it a bargain if he did not hear to the contrary. His

nephew did not reply, & having a sale shortly afterwards of some of his effects, the horse was sold by mistake, the auctioneer having had instructions from the nephew not to sell it. Two days after the sale the nephew wrote to pltf., the contents of which letter showed that he intended to accept his uncle's offer. In an action by pltf. against the auctioneer for the conversion of the horse:—*Held*: as there was no memorandum in writing binding the nephew at the time of the sale, & no evidence that he had at that time accepted the offer, the property in the horse had not then vested in pltf., & he could not rely on the subsequent letter of the nephew, as that would not relate back so as to complete pltf.'s title at the time in question.—*FELTHOUSE v. BINDLEY* (1863), 1 New Rep. 401; 7 L. T. 835; 11 W. R. 429, Ex. Ch.

—*See, also, AUCTION & AUCTIONEERS*, Vol. III., pp. 45-47, Nos. 315-331.

**161. Sale by sheriff.**—Declaration in trover by assignees of bkpt. stated that M. & H., bkpts., before their bkpcy., were lawfully possessed of certain goods; that before the bkpcy. they came to the possession of defts., & that defts., knowing the goods to belong to pltf.s as assignees, after the bkpcy., converted them. A separate commission issued against M. alone on Nov. 7; on Nov. 8 the goods were sold by deft., as sheriff; on Nov. 9 a joint commission issued against M. & H., under which pltf.s were appointed assignees; & pltf.s afterwards, & after the goods were delivered to the purchasers, demanded them of defts., who refused them:—*Held*: the sale, & not the demand & refusal, constituted the conversion.—*EDWARDS v. HOOVER* (1843), 11 M. & W. 363; 12 L. J. Ex. 304; 7 Jur. 378; 152 E. R. 844.

—*See EXECUTION*, Vol. XXI., p. 501, No. 761; *SHERIFFS & BAILIFFS*, Vol. XI., pp. 116, 117, Nos. 742, 745.

**162. Sale by innkeeper.—Goods of guest.**—B. purchased horses & carriages of pltf. & took them to deft.'s inn, where he was entertained, & his horses & carriages kept for a long time. B. never paid pltf. the price of the horses & carriages, & absconded from deft.'s inn without paying his bill, & leaving the horses & carriages there. Subsequently, having been taken into custody on a charge of swindling, he re-assigned the horses & carriages to pltf., to whom, however, deft. refused to give them up until B.'s bill was paid. Dft. afterwards sold the horses by public auction, & still retained the carriages:—*Held*: the sale by deft. of the horses was a wrongful conversion, for which pltf. could maintain his action, & the measure of damages was the value of the horses.—*MULLINER*

**159 I. Sale by auctioneer.**—*PUBLIC TRUSTEE v. JONES* (1925), 25 S. R. N. S. W. 426; 42 N. S. W. W. N. 173.—**AUS.**

**159 II.** —*Stewart v. People's National Bank of Charleston, Cas. Dig.*, 2nd ed. 81.—**CAN.**

**g.** —*Ship's cargo.—Whether passenger's baggage included.*—*STOKES v. BREGA* (1874), 2 N. Z. Jur. 9.—**N.Z.**

**h. Sale by sheriff.—Goods of stranger**—*Notice.*—A. having on hire for a term certain goods belonging to B., deft., as sheriff, having notice that the goods were the property of B., sold them under an execution against A.:—*Held*: B. could maintain trover against the sheriff, the sale by him & subsequent sale by the vendee being a complete conversion, although the goods were afterwards left in A.'s possession.—*MORRISON v. CARRALL* (1851), 1 C. P. 226.—**CAN.**

**k. Sale of goods purchased by false**

*pretences of supposed agent of purchaser.*—*EBY-BLAIN Co. v. FRANKEL* (1903), 23 C. L. T. 173.—**CAN.**

**l. Sale by constable.—Under an execution.—Chattel jointly owned.—Execution only against one.—*PRESCOOT v. MOORE* (1890), 29 N. B. R. 295.—**CAN.****

**m. Sale by stationmaster.—Cattle killed in transit.—*O'ROKKE v. GREAT WESTERN RY. Co.* (1864), 23 U. C. R. 427.—**CAN.****

**n. Sale by agent.—At less price than authorised.—Where deft. received two horses from pltf. to sell at a certain price, & without his assent or authority sold them for a less price:—*Held*: he was liable in trover for the difference, the unauthorised sale being a conversion.—*THESTMAN v. KENDRICK & BERNARD* (1832), 3 O. S. 66.—**CAN.****

**o. Sale by warehouseman.—*BENEDICT v. KER* (1878), 29 C. P. 410.—**CAN.****

**p. Sale by carrier.—On non-payment of freight.—*WILSON v. CANADIAN DEVELOPMENT Co.* (1903), 33 S. C. R. 432.—**CAN.****

**q.** —*On refusal to take delivery.—Before period prescribed by regulations.*—*BENGAL & NORTH-WESTERN RY. v. MATRU RAM* (1920), 1 L. R. 49 All. 300.—**IND.**

**r.** —*Animal killed in sea transit.—No claim by owner's agent.*—One of deft.'s animals having been accidentally killed in the sea transit, without, as was admitted, any default of pltf.s, & the carcass not being claimed by deft.'s agent, who was present at the arrival of the steamer, pltf.s sold the carcass to the best advantage:—*Held*: the sale under such circumstances was not a wrongful conversion.—*LONDON & NORTH-WESTERN RY. Co. v. HUGHES* (1889), 26 L. R. Ir. 165.—**IR.**

**t. Sale by one.—Purchase by another**

*v. FLORENCE* (1878), 3 Q. B. D. 484; 47 L. J. Q. B. 700; 38 L. T. 167; 42 J. P. 293; 26 W. R. 385, C. A.

**Annotations:**—*Apld.* *Johnson v. L. & Y. Ry.* (1878), 3 C. P. D. 499. *Consd.* *Whiteley v. Hill*, [1918] 2 K. B. 808. *Refd.* *Cox v. Liddell* (1895), 2 Mans. 212. *Mentd.* (*Chesham Automobile Supply v. Beresford Hotel* (Birmingham) (1913), 29 T. L. R. 584.

**163. Sale by mortgage—Lease.**—Deft. having in his possession a lease belonging to S., which had been deposited with him as a security for moneys advanced by him to S., & upon which he claimed a lien for costs as against S. & also as against the assignee appointed under a commission of bkpt. issued against S. in 1830, concurred with the assignee in the sale of the lease, & received from him, in satisfaction of his demand, the amount of the purchase-money, & also received with the assent of the assignee certain sums due for rent of the premises, etc. The sale took place after deft., as solr. to the assignee, had notice that a petition to supersede the commission, on the ground of the insufficiency of petitioning creditor's debt, was pending. In Jan. 1832, the commission against S. was superseded, & in Mar. a second fiat issued against him:—*Held:* the assignees under the last-mentioned fiat were entitled to recover from deft. the several sums so received by him from or with the assent or under the authority of the assignee under the superseded commission.

If, instead of keeping the thing pledged, he sells it, or enables any other person to sell it, by concurring in the sale, he is guilty of a direct conversion, & makes himself liable for the value of the lease in an action for trover (*TINDAL, C.J.*).—(*LARK v. GILBERT* (1835), 2 Bing. N. C. 343; 2 Scott, 520; 1 Hodg. 347; 5 L. J. C. P. 61; 132 E. R. 135.

**Annotations:**—*Refd.* *Chinery v. Viall* (1860), 5 H. & N. 288; *Cox v. Liddell* (1895), 2 Mans. 212.

**164. — Shares.**—Defts., who were stockbrokers, bought certain shares on behalf of pltf. In pursuance of an arrangement between pltf. & defts. the shares were entered on the register in the name of defts., & held by them as security for the purchase-money. Defts. made repeated applications to pltf. for payment of the purchase-money, but never received more than a portion of it. The co. announcing a scheme of reconstruction, defts. wrote to pltf. for instructions & for payment of his debt. Receiving no reply they applied for shares in the new co. in their own names. They subsequently sold these shares in the belief that they were rightful owners. Pltf. now alleged that the sale was improper & claimed redemption of the shares, or in the alternative damages for improper conversion:—*Held:* defts., as mtgees. of the shares with no fixed time for payment, were entitled to sell them on giving reasonable notice to the mtgor.; their letters to pltf. demanding payment constituted such notice; & they were not precluded from exercising their power of sale by the fact that they sold in the belief that they were absolute owners; consequently the sale was good, & defts. were only liable to account for the proceeds as mtgees.—*DEVERGES v. SANDEMAN, CLARK & Co.*, [1902] 1 Ch. 579;

71 L. J. Ch. 328; 86 L. T. 269; 50 W. R. 404; 18 T. L. R. 375; 46 Sol. Jo. 316, C. A.

**Annotation:**—*Consd.* *Stubbs v. Slater*, [1910] 1 Ch. 632.

**165. —**—Pltf. instructed defts., a firm of stockbrokers on the London Stock Exchange, to effect some "carrying over bargains" on certain shares. In the contracts sent to pltf. defts. inserted a figure, followed by the word "net" to indicate the number of pence per share charged for the transaction. This led pltf. to assume that the charge was a contango rate paid wholly to the jobber, & that defts. received nothing thereout by way of remuneration for arranging the carrying over which was contrary to the fact. It was, however, proved that this method of signifying a commission did indicate to members of the London Stock Exchange, & even to other persons, that the charge included a remuneration to the broker as well as the jobber's contango rate. Pltf. having failed to pay the accumulated differences due from him on these transactions, deposited by way of security with defts. a certificate for certain other shares & executed a transfer in blank. Ultimately defts., after giving due notice to pltf. closed their account with him & sold those other shares accounting afterwards to pltf. for the proceeds:—*Held:* defts., as mtgees., had an implied power of sale over the whole of the shares deposited with them; they had executed that power reasonably; & there had been no wrongful conversion.—*STUBBS v. SLATER*, [1910] 1 Ch. 632; 79 L. J. Ch. 420; 102 L. T. 444, C. A.

**Annotations:**—*Mentd.* *Aston v. Kelsey*, [1913] 3 K. B. 314; *Baker v. Hawes & Brown* (1913), 109 L. T. 320; *London County & Westminster Bank v. Tompkins*, [1918] 1 K. B. 515; *Ellis' Trustee v. Dixon-Johnson*, [1924] 1 Ch. 342.

**Sale by agent.**—*See AGENCY*, Vol. I., pp. 424, 683–685, Nos. 1178, 2930, 2932, 2940.

**Sale by bailee.**—*See BAILMENT*, Vol. III., pp. 110, 111, Nos. 344–348.

**Sale by executor de son tort.**—*See EXECUTORS*, Vol. XXIII., pp. 71, 72, Nos. 555–561.

**Sale by innkeeper.**—*See INNS & INNKEEPERS*, Vol. XXIX., p. 23, No. 294.

**Sale by master of ship.**—*See SHIPPING*, Vol. XLI., pp. 514, 515, 516, 517, Nos. 3442, 3450, 3460, 3462.

**Sale by pledgee.**—*See PAWNS & PLEDGES*, Vol. XXXVII., pp. 11, 12, 14, 15, 19, Nos. 68–70, 108–121, 150–153.

**Sale of stolen goods in market overt.**—*See MARKETS*, Vol. XXXIII., p. 563, Nos. 479–487.

#### D. Alteration and Destruction.

**166. General rule—Destruction or alteration amounts to conversion.**—*POULDES v. WILLOUGHBY*, No. 116, *ante*.

**167. Partial destruction—Whether conversion of whole—Taking part & spoiling remainder.**—Taking part & spoiling the rest is a conversion of the whole.—*RICHARDSON v. ATKINSON* (1723), 1 Stra. 576; 93 E. R. 710, N. P.

**Annotations:**—*Distd.* *Philpott v. Kelley* (1835), 3 Ad. & El. 106. *Refd.* *Simmons v. Lillystone* (1853), 8 Exch. 431.

**168. —**—(1) The demand & refusal necessary to afford evidence of a conversion in trover must be absolute & unqualified.

—*Joint conversion.*—*FORD v. BOWSER* (1885), 24 N. B. R. 510.—*CAN.*

**a. Sale of interest in land—Right to cut & remove timber for twenty years—Resale by vendor within five years.**—*MCNEILL v. HAINES* (1889), 17 O. R. 479.—*CAN.*

**b. Sale by Crown—Hay supplied to government—Hay not up to contract requirements—Sale on neglect to remove.**—*POIRIER v. R.* (1910), 13 Exch. C. R.

321; 9 E. L. R. 375.—*CAN.*

**c. Sale under Thresher's Lien Ordinance.**—*PRINNEVEAU v. MORDEN & JONES* (Alta.) (1913), 24 W. L. R. 268; 4 W. W. R. 637; 1 D. L. R. 272.—*CAN.*

**d. Sale—With option to repurchase—Sale before repurchase completed.**—*MOORE v. SIRHALD* (1869), 29 U. C. R. 487.—*CAN.*

**e. Sale & delivery of goods—With knowledge of owner's claim.**—*SMITH v.*

*SHARENOVITZ* (1903), 20 S. C. 591; 13 C. T. R. 1029.—*S. AF.*

**f. Resale by vendor before delivery.**—*HEFFERNAN v. BERRY* (1873), 32 U. C. R. 518.—*CAN.*

#### PART II. SECT. 1, SUB-SECT. 2.—D.

**1661. General rule—Destruction or alteration amounts to conversion.**—*SEAMAN v. CUTTER* (1871), 8 N. S. R. (2 G. & O.) 455.—*CAN.*

**Sect. 1.—What amounts to conversion: Sub-sect. 2, D. & E.]**

(2) A pipe of wine belonging to pltf. was deposited in deft.'s cellar, & was bottled at a time during which there were conflicting claims to it by pltf. & the assignees of the party to whom it was sent, & who resided in deft.'s house; by whom, or by whose orders the wine was bottled, did not appear, though there was some evidence that it was likely to be injured from not being bottled:—*Held*: it was a question for the jury, whether the act of bottling operated as a conversion; (3) it was a question for the jury to say, under all the circumstances, whether the drinking of a part of the wine, taken in connection with the bottling, amounted to a conversion; & they having found that it did not, the ct. refused to disturb the verdict.

The mere taking away & destroying a part of property which is in the hands of a bailee, who may deliver up the rest, is not a conversion of the whole, so as to enable the party entitled to maintain trover for the whole.—*PHILPOTT v. KELLEY* (1835), 3 Ad. & El. 106; 1 Har. & W. 134; 4 Nev. & M. K. B. 611; 4 L. J. K. B. 139; 111 E. R. 353.

*Annotations*.:—*Generally*, *Refd.* Parry v. Roberts (1835), 3 Ad. & El. 118. *Mentd.* Plant v. Cotterill (1860), 5 Il. & N. 430.

**169. — Nature of remainder unchanged—Goods wrongfully on defendant's land.]—***SIMMONS v. LILLYSTONE*, No. 96, *ante*.

**170. Destroying seals on deeds.]—** - - *v. MALPRAZ* (1455), Y. B. 33 Hen. 6. fo. 26, pl. 12.

*Annotations*.:—*Refd.* Isaac v. Clark (1615), 2 Bulst. 306; *Mason v. Farnell* (1844), 13 L. J. Ex. 142.

**171. —**]—In an action of trover for deeds, pltf., to show a conversion, proved that the seals had been cut off by deft., & also gave in evidence a statement by him, in which he admitted having done this act, but asserted an authority for doing it:—*Held*: this assertion did not necessarily destroy the effect of the admission; & even if it did, still that it did not disprove the conversion, which was shown by an act independently of deft.'s statement.—*STANDING v. GRUNDY* (1837), 6 L. J. Ex. 181.

**172. Making oats into oatmeal—Contrary to directions of owner.]—***ANON.* (1638), 1 Com. Dig. 428.

*Annotation*.:—*Refd.* Hollins v. Fowler (1875), L. R. 7 H. L. 757.

**173. Bottling wine—Drinking part.]—***PHILPOTT v. KELLEY*, No. 168, *ante*.

**174. Alteration of property—Theatrical stage.]—***BRIANT v. DORMER* (1848), 2 Car. & Kir. 692, N. P.

**175. Cutting timber — By tenant for life.]—**Where improperly cut [timber by tenant for life], the owner of the inheritance or the heir has a legal right, which accrues immediately upon the commission of the wrongful act, of bringing trover for the trees; & his remedy is at law, & not in equity.—*GENT v. HARRISON* (1859), John. 517; 20 L. J. Ch. 68; 1 L. T. 128; 5 Jur. N. S. 1285; 8 W. R. 57; 70 E. R. 526.

*Annotations*.:—*Refd.* Seagram v. Knight (1867), 2 Ch. App. 628; *Higginbotham v. Hawkins* (1872), 7 Ch. App. 677, n.; *Lowndes v. Norton* (1877), 6 Ch. D. 139.

—.]—*See* AGRICULTURE, Vol. II., pp. 112, 113, Nos. 948–952.

**176. By use in business.]—***LANCASHIRE & YORKSHIRE RY. CO., LONDON & NORTH WESTERN RY. CO. & GRAESER, LTD. v. MACNICOLL*, No. 90, *ante*.

**E. Delivery to Third Person.**

**177. Delivery to winner of bet—Money deposited with stake holder.]—**If a stake holder deliver money deposited in his hands on account of the wager to the winner, this is not a conversion.—*LEDESHAM v. LUBRAM* (1602), Cro. Eliz. 870; 78 E. R. 1096.

**178. Delivery of bill of lading—Receipt of value.]—***JACKSON v. ANDERSON*, No. 60, *ante*.

**179. Delivery to purchaser by seller's agent—Before completion of purchase—Contrary to instructions of principal.]—**A. having a quantity of hemp in the hands of B. sells part of it to C. at a certain price, payable by C.'s acceptance at a stated time, fourteen days allowed for delivery; & gives to C. an order upon B. to weigh & deliver the hemp so sold to C. or bearer. Before the fourteen days had expired, A. gives B. notice not to deliver the hemp to C. The hemp not having been weighed off, & no bill of exchange having been given in payment for it:—*Held*: the sale of it to C. was incomplete, & B. was liable for it in an action of trover by A.—*SHEPLEY v. DAVIS* (1814), 5 Taunt. 617; 1 Marsh. 252; 128 E. R. 832.

*Annotations*.:—*Refd.* Swanwick v. Sothorn (1839), 9 Ad. & El. 895; *Acraman v. Morrice* (1849), 8 C. B. 449.

**180. Delivery on instructions of owner.]—***SAXBY v. WYNNE* (1825), cited in 3 Starkie on Evidence, 3rd ed. at p. 1159.

*Annotation*.:—*Distd.* Cranch v. White (1835), 1 Bing. N. C. 411.

**181. Delivery to daughter of defendant.]—**(Goods were placed in the possession of deft., & subsequently a demand of the re-delivery was made; an evasion of the delivery is equivalent to a refusal, & is evidence for the jury of a conversion.)

So a delivery of the goods by deft. to his daughter, allowing her to have the control over them, is a conversion.—*MYERS v. MARKS* (1850), 15 L. T. O. S. 329.

**182. Delivery after notice of plaintiff's title.]—***POWELL v. HOYLAND*, No. 123, *ante*.

**183. — Re-delivery to party from whom goods received.]—***MYERS v. STAPLES* (1854), 23 L. T. O. S. 157.

**184. Delivery by master of ship—To indorsee of bill of lading—After notice of stoppage in transitu.]—**

The owner chartered his vessel to N., who put her up as a general ship for Calcutta. Pltfs. bought spelter for C., & at C.'s request put it on board the vessel, receiving the mate's receipt, the course of dealing between pltfs. & C. being that the property in the goods was not parted with to C. unless C. paid for them. C. did not pay for the spelter or obtain the mate's receipt from pltfs., but by means of the shipbrokers, without the knowledge of pltfs., obtained the bill of lading & indorsed it away for value. Subsequently C. stopped payment, whereupon pltfs. gave notice to the owner of the ship that they held the mate's receipt & were unpaid vendors, & that they stopped the goods *in transitu*. The owner wrote to the master at Calcutta to warehouse the goods, as the property was disputed; but the master being indemnified, delivered the goods to the indorsee of the bill of lading:—*Held*: the goods belonged to pltfs., & had not passed to C., & the delivery of the goods to the indorsee of the bill of lading was a conversion.—*SCHUSTER v. MCKELLAR* (1857), 7 E. & B. 704; 26 L. J. Q. B. 281; 29

**PART II. SECT. 1, SUB-SECT. 2.—E.**

**180 I. Delivery on instructions of owner.]—***WILSON v. MACNAB* (1862), 21 U. C. R. 493.—**CAN.**



L. T. O. S. 225; 3 Jur. N. S. 1320; 5 W. R. 656; 119 E. R. 1407.

*Annotations*.—**Reid**. *Dalyell v. Tyrer* (1858), E. B. & E. 899; *The St. Cloud* (1863), Brown, & Lush. 4; *Sandeman v. Scurr* (1866), L. R. 2 Q. B. 86; *Haethesing v. Laing*, Laing v. Zeden (1873), L. R. 17 Eq. 92; *Omoa Coal & Iron Co. v. Huntley* (1877), 2 C. P. D. 464; *Wagstaff v. Anderson* (1879), 4 C. P. D. 283; *Baumvoll Manufactur von Scheibler v. Glichrest*, [1891] 2 Q. B. 310.

**185. Delivery of stolen goods by police officer.**—When a subordinate police officer having the possession of stolen goods, after a demand by the true owner for their delivery to him, delivers the same to a person other than the true owner, he is liable in trover although he acted upon the orders of a superior officer. A. bought a gig. It was stolen from him, & afterwards found by the police in the possession of B. B. was indicted for larceny of the gig & acquitted. B. on his acquittal wrote to the police officer in possession of the gig demanding delivery of it to him, & A. afterwards by letter & personally applied for its delivery over to him. The police officer acting on the instruction of his superior officer, after giving notice to A. of his intention to do so, delivered the gig to B. as the person from whom it had been taken by the police:—**Held**: the police officer so delivering it was liable in trover to A., who was found to be the true owner of the gig.—**WINTER v. BANCKS** (1901), 84 L. T. 504; 65 J. P. 468; 49 W. R. 574; 17 T. L. R. 446; 19 Cox, C. C. 687, D. C.

**186. Re-delivery to unpaid vendor—By warehousemen—Stoppage in transitu.**—S. bought a quantity of barley from B., which was sold "on rail" at a certain railway station, & the seller gave a written order to the railway co. directing them to transfer the barley "to await the order of S." On the arrival of the barley at the station the co. sent to S. an advice note, stating that the goods awaited his orders & were then held by them, not as common carriers, but as warehousemen.

S. did not reply to this advice note or inspect the barley, but afterwards he unsuccessfully tried to resell the barley, using a sample obtained from the seller. S. became bkpt. soon after without having paid for the barley, & B. as unpaid vendor claimed & obtained from the co. redelivery of the barley to him.

In an action by the trustee in the bkpcy. of S. against the railway co. for conversion of the barley:—**Held**: the transit & the right to stop *in transitu* ceased when by agreement between S. & the co., which must be taken to have existed after a reasonable time from the receipt of the advice note, the co. held the goods as warehousemen for S. & not as common carriers, & the transit being at an end, the delivery of the goods by the co. to the vendor was a conversion for which they were liable.—**TAYLOR v. GREAT EASTERN RY. CO.**, [1901] 1 K. B. 774; 70 L. J. K. B. 499; 84 L. T. 770; 49 W. R. 431; 17 T. L. R. 394; 45 Sol. Jo. 381; 6 Com. Cas. 121.

**187.** ———.—**T.** bought certain goods from R. on Mar. 10, 1913, for shipment to South Africa. On Mar. 13 the buyers sent shipping instructions to the sellers directing them to forward the goods by the quickest route to defts.' steamship *Armada Castle* at the Docks, Southampton. Accompanying the instructions was a note on defts.' printed form addressed to the L. & S. W. Ry. requesting them to receive the goods for shipment per Union Castle Line. The documents gave the marks to be put upon the bales & the destination, viz. Algoa Bay. The goods were packed by the sellers' instructions, at Manchester, & handed, in pursuance of the buyers' instructions, to the G. N. Ry.,

who passed them on to the L. & S. W. Ry., who delivered them to defts. alongside the *Armada Castle*. The buyers, on Mar. 17, sent shipping instructions giving the marks, destination Algoa Bay, & description of the goods. On the same day the buyers, in anticipation of insolvency, wrote to defts. to stop all their shipments per *Armada Castle*, promising further instruction later. Defts. received the instructions & letter by the same post, & held back one package which had not been already shipped.

The bale remained in the custody of defts., who charged the buyers with warehouse rent for it, until Apr. 26, 1913, when defts. delivered it to the sellers, who had not been paid & who claimed the right to stop *in transitu*. Pltf., who was the trustee of the buyers under a deed of assignment dated Apr. 24, 1913, sued defts. for conversion of the bale:—**Held**: though the original transit was to Algoa Bay, that transit had been ended by the buyers at Southampton as they were entitled to do, as they had not contracted with the sellers that the goods should go to Algoa Bay, & therefore the attempted stoppage *in transitu* by the sellers was too late, & defts. were liable for delivering the goods to the sellers.—**REDDALL v. UNION CASTLE MAIL S.S. CO., LTD.** (1914), 84 L. J. K. B. 360; 112 L. T. 910; 13 Asp. M. L. C. 51; 20 Com. Cas. 86.

**188. Delivery under alleged illegal contract—Illegality due to outbreak of war.**—Resp., a British subject residing in Manchester, was in the habit of consigning Manchester goods to customers in Beyrout. The course of business was for him to draw a bill at sight on the customers for the amount in sterling, representing the cost of the goods & commission, & to hand it, with the bills of lading & invoices, to the Manchester branch of applts., a bank incorporated in Turkey. The Manchester branch then made an advance to him on the bill, & sent the documents to their Beyrout branch, who collected the price from the customer in exchange for the goods. On the Manchester branch being advised by the Beyrout branch that the price had been paid, a cheque for the sterling value of the goods, less any advance made, was handed to resp. In accordance with this practice resp. consigned to Beyrout goods which arrived there shortly before the outbreak of war, on Nov. 5, 1914, between this country & Turkey, on which date applts. held the bills & the documents representing the goods. The bills were in the following form: "Please pay to our order value cheque on London the sum of £ sterling. Shipping documents attached to be given up on payment." After the outbreak of war the Beyrout branch of applts. delivered the goods to the customers, taking payment in piastres of a sum fixed by the Beyrout branch as the price of sterling in London, & on the conclusion of the war, the piastres having fallen in value, applts. claimed that they were only liable to pay resp. an amount in sterling which at the then current rate of exchange represented the value of the piastres they had received for the goods.

Resps. sued applts. to recover the sterling amount of the bills, or, alternatively, damages for the conversion of the goods:—**Held**: the bank at Beyrout & the Syrian merchant both being Turkish subjects, the outbreak of war did not prevent the delivery of the goods to the customers, & the claim for conversion failed.—**OTTOMAN BANK v. JEBARA**, [1928] A. C. 269; 97 L. J. K. B. 502; 139 L. T. 194; 44 T. L. R. 525; 72 Sol. Jo. 516; 33 Com. Cas. 260, H. L.; *revisg. S. C. sub nom. JEBARA v. OTTOMAN BANK*, [1927] 2 K. B. 254, C. A.

**Misdelivery by carrier.**—See CARRIERS, Vol.



*Sect. 1.—What amounts to conversion: Sub-sect. 2, E., F., G. & H.]*

VIII., pp. 18, 32-34, 36, 227, 228, Nos. 84, 182, 183, 189-193, 204, 1466-1470.

*Misdelivery by bailee.]—See BAILMENT, Vol. III., pp. 58, 60, 77, 78, 108-111, Nos. 36, 91, 164-168, 329-338, 342-352.*

*Misdelivery by pawnee.]—See PAWNS & PLEDGES, Vol. XXXVII., p. 24, Nos. 192-194.*

*Misdelivery by shipowner.]—See, generally, SHIPPING, Vol. XLI., pp. 529-531, Nos. 3571-3594.*

*Misdelivery by captain of ship.]—See SHIPPING, Vol. XLI., p. 557, No. 3829.*

#### F. User.

**189. Use or abuse.]—MULGRAVE v. OGDEN** (1501), Cro. Eliz. 219; 78 E. R. 475; *sub nom.* MOSGRAVE v. AGDEN, Owen, 141; *sub nom.* WALGRAVE v. OGDEN, 1 Leon. 224.

*Annotation:—Refd. Coggs v. Bernard* (1703), 2 Ld. Raym. 909.

**190. Wearing jewel.]—**Wearing a jewel is a conversion of it.—*PETRE (LORD) v. HENEAGE* (1701), as reported in 12 Mod. Rep. 519; 88 E. R. 1491.

**191. Using building materials—Contract ended by building owner.]—**Pltf. agreed to build a house for deft., who prepared a specification which contained particulars of the different portions of the work. Under the head "Carpenter & Joiner" there was specified the scantling of the joists for the different floors, the rafters, ridge & wall pieces, but no mention was made of the flooring. The specification stated that "the whole of the materials mentioned or otherwise in the foregoing particulars, necessary for the completion of the work, must be provided by the contractor." At the foot of the specification pltf. signed a memorandum, whereby he agreed with deft. "to do all the works of every kind mentioned & contained in the foregoing particulars, according in every respect to the drawings furnished or to be furnished, for the sum of £1,100. The house to be completed & fit for deft.'s occupation by Aug. 1, 1853." Pltf. prepared the flooring boards, brought them to the premises, & planed & fitted them to the several rooms, but refused to lay them down without extra payment, because the flooring was not mentioned in the specification, whereupon deft. put an end to the contract, took possession of the works, & proceeding to complete the building used the flooring boards so prepared & fitted by deft.:—*Held*: pltf. could not maintain trover for the flooring boards left on the premises by him & subsequently used by deft.—*WILLIAMS v. FITZMAURICE* (1858), 3 H. & N. 844; 32 L. T. O. S. 149; 157 E. R. 700.

**192. Using workman's tools—Detained as security by employer.]—**In an action by a working bricklayer against his employer for detention of his tools, etc., & also for extras on a contract:—*Held*: the contract being in writing was necessary for the latter part of pltf.'s claim, it was not so as

to the former; there being no clause in the contract as to the tools, etc., except that pltf. was to provide them, & deft. having claimed to detain them as security for repayment of alleged overpayments, & having admitted that he had used some of them, he had no right to detain the goods unless there was an agreement to that effect, & even if there was, the user was a conversion.—*POULTON v. WILSON* (1858), 1 F. & F. 403.

**193. User by purchaser from sheriff—Damage to chattel.]—**The mere sale by the sheriff, not in market overt, under a *fi. fa.* of a chattel let to the execution debtor, without notice of the owner's interest in it, is not a conversion or ground of action against the sheriff, but an absolute sale & delivery of the chattel under the sale, to a purchaser; & a user by the purchaser, causing damage to the chattel, constitutes a cause of action.—*LANCASHIRE WAGON CO. v. FITZTHUGH* (1861), 6 H. & N. 502; 30 L. J. Ex. 231; 3 L. T. 703; 158 E. R. 206.

*Annotations:—Consol. Hollins v. Fowler* (1875), L. R. 7 H. L. 757; *Jelks v. Hayward* (1905), 92 L. T. 692. *Refd. Johnson v. Stear* (1863), 15 C. B. N. S. 330; *Consolidated Co. v. Curtis*, [1892] 1 Q. B. 495.

#### G. Obstruction of Access to Goods.

**194. Preventing access to chattel by rightful owner.]—**If deft., by his acts, prevents pltf. from obtaining access to a chattel, to which he is entitled, such prevention by deft. is evidence of a conversion.—*WANSBOROUGH v. MATON* (1835), 4 L. J. K. B. 154.

**195. —.]—**(1) Deft. having prevented a person possessed of goods from removing them, held liable in an action for taking & detaining them.

(2) Pltf. having assigned them, held, entitled only to damage for the injury to her possession.—*VAN TOLL v. WALL* (1859), 1 F. & F. 504.

**196. —Article purchased.]—**To a declaration against defts. who were auctioneers, for non-delivery of a rick of hay sold by them to pltf. at an auction on July 24. Defts. pleaded (a) that they did not promise, & (b) that they did deliver. The hay had been sold by defts. for the landlord under a distress for rent, & a week was fixed by one of the conditions of sale as the time for taking away the hay. Several persons at the sale having objected to the period as too short, a written permission was obtained by defts. from the tenant, that the hay might stay on the premises until Sept. 28. This permission was indorsed by defts. on the conditions of sale. Pltf. having purchased the hay, & having obtained permission from defts. to remove it, subsequently & before Sept. 28, went to the land for the purpose of removing it, but was prevented doing so by the tenant:—*Held*: there was a sufficient delivery of the hay by defts. to pltf. to prevent their liability, as they had done all in their power to give pltf. the possession of it.

*Semble*: trover would lie against the tenant.—

#### PART II. SECT. 1, SUB-SECT. 2.—F.

**f. Use of animal.]—**A., having been arrested at the suit of B., placed a mare in B.'s possession, on an agreement that if B. provided a demand against A., by his own oath or that of others, B. was to pay it & keep the mare till repaid. B. did pay £10, but it was not shown that he did so in consequence of its being sworn to; & the mare remaining with him, he used her once in the plough:—*Held*: such use of the mare was not a conversion.—*FORRESTER v. SPENCER* (1832), 3 O. S. 47.—*CAN.*

**h. Using fruit crop—Part devised to plaintiff.]—**Where a devise was made

to pltf. of half the fruit which might grow on a certain farm devised to another person, & the latter gathered the whole of the fruit, & disposed of it for his own use:—*Held*: an action of trover could be maintained.—*TAYLOR v. NUGENT* (1841), 6 O. S. 549.—*CAN.*

**k. Using lime—Contract broken off by plaintiff.]—***McLACHLAN v. KENNEDY* (1889), 21 N. S. R. 271.—*CAN.*

**l. Using tools.]—***NEROS v. SWANSON* (Alta.) (1912), 20 W. L. R. 175; 1 W. W. R. 711.—*CAN.*

**m. —.]—**Certain tools were left on deft.'s premises for the convenience & intended use of pltf.,

without any undertaking on deft.'s part to take care of them, & therefore at pltf.'s own risk:—*Held*: the mere user of them would not constitute a conversion. At the most it would amount to a trivial trespass which the law would not regard.—*McDONALD v. STOCKLEY* (1914), 14 E. L. R. 328; 16 D. L. R. 743.—*CAN.*

**n. Using timber.]—***PARSANTHA v. MADRAS DEPOSIT & BENEFIT SOCIETY* (1888), 1 L. R. 11 Mad. 333.—*IND.*

#### PART II. SECT. 1, SUB-SECT. 2.—G

**194. Preventing access to chattel by rightful owner.]—***SMALLEY v. GALLAGHER* (1876), 26 C. P. 531.—*CAN.*

**SALTER v. WOOLLAMS** (1841), 2 Man. & G. 650; Drinkwater, 146; 3 Scott, N. R. 59; 10 L. J. C. P. 145; 133 E. R. 908.

*Annotations*.—**Refd.** *Taplin v. Florence* (1851), 15 Jur. 402; *Wood v. Baxter* (1883), 49 L. T. 45.

**197.** ———.]—C. made a written proposal to D., debt., for the exchange to him of a new engine for an old one, with £10 & a ton of iron. D. afterwards verbally assented to these terms, with the exception of the ton of iron; & in the course of the conversation, advised C. to remove the fittings at once, & subsequently told him that he could not allow the engine to remain on his premises beyond quarter-day. Before quarter-day, C. sold the old engine to pltf.; but debt. refused to let pltf. have it, alleging that the bargain was, as the written proposal rather imported, that it was not to be removed until the new engine was completely fitted up, & that this had not been done. In an action against D. for conversion of the old engine, the judge told the jury it was for them to consider, under all the circumstances, whether or not the contract between C. & D. was for an immediate transfer of the old engine, & if so, to find for pltf., which they did.—**Held**: as the written proposal had not been accepted *simpliciter*, the real contract was by parol; the direction was right; & there was evidence to sustain the verdict.—**STONES v. DOWLER** (1860), 29 L. J. Ex. 122.

**198.** ———.]—Article on hire purchase—**Instalment unpaid**.]—A. agreed to build an organ for B. & to fix it in the parish church of C. for £768 to be paid by certain yearly instalments. The agreement then provided that, in the event of the organ being completed & erected as aforesaid, & the sum of £768 or any part thereof not being paid at the time or times thereinbefore mentioned, then it was thereby declared & agreed that the whole sum or balance, with the interest then due thereon, should become due & payable to W., & might be sued for & recovered accordingly; & in the meantime, & until the balance & interest should be paid & discharged, W. should have a lien on the organ; & in default of any or either of such payments as aforesaid at the time or times thereinbefore mentioned, W. might either dispose of or remove the organ as he might think proper. The instalments being unpaid A. demanded the organ of the vicar of C. & the churchwardens. The vicar kept the church door locked, & refused to allow the organ to be removed, claiming a lien upon it. The churchwardens did nothing.—**Held**: the vicar was liable in trover, & not the churchwardens.—**WALKER v. CLYDE** (1861), 10 C. B. N. S. 381; 142 E. R. 500.

**Goods distrained**.]—See **DISTRESS**, Vol. XVIII., p. 311, No. 460.

#### H. Dealing with Negotiable Instruments.

See, generally, **BILLS OF EXCHANGE**, Vol. VI., pp. 1 *et seq.*

**199.** Act of creditor after bankruptcy of drawer—**Receiving payment**.]—**JONES v. FORT**, No. 232, *post*.

**200.** ———.]—**Giving up bill to acceptor—Taking another bill in lieu**.]—Where the drawer of a bill of exchange deposits it with a creditor, giving him authority to receive the proceeds, & apply them in a specified way, if the creditor, after an act of bkpcy. by such drawer, gives up the original bill to the acceptor, taking another bill in lieu of it, this is a conversion by the creditor, & the assignees of the drawer may support trover.—**ROBSON v. ROLLS** (1832), 1 Mood & R. 239, N. P.

**201.** Discounting bill of exchange—**Misapplication of proceeds**.]—If a party, authorised by the holder of a bill of exchange to get it discounted, & to apply the proceeds in a particular way, does get it discounted, but misapplies any part of the proceeds, he cannot be sued in trover for the bill, but must be sued for money had & received.—**PALMER v. JARMAN** (1837), 2 M. & W. 282; 150 E. R. 702; *sub nom.* **PALMER v. TARMAN**, 1 Jur. 216.

**202.** Obtaining money on bill—**Bill deposited by bankrupt**.]—Where a bill of exchange for £1,600 was deposited with debt. by a bkpt. as an indemnity to a third person against a bond which he had executed to the petitioning creditor, under Judgments Act, 1837 (c. 110), s. 8, & debt. refused to deliver up the bill on the demand of the assignees of the bkpt., although they showed him the bond in a cancelled state; & he afterwards obtained £300 on the bill:—**Held**: in trover by the assignees for the bill that the obtaining money on the bill was an actual conversion of the bill for which the bkpt., if no bkpcy. had intervened, might have sued.—**ALSAGER v. CLOSE** (1812), 10 M. & W. 576; 12 L. J. Ex. 50; 152 E. R. 600.

*Annotation*.—**Refd.** *Heald v. Carey* (1852), 21 L. J. C. P. 97.

**203.** Cashing crossed cheque—**Person not a banker**.]—The crossing of a cheque payable to bearer does not affect the negotiability of the instrument, but imports that it is to be paid through a banker; & if a person, not a banker, cashes a crossed cheque for a fraudulent holder, & is afterwards sued for the conversion, the proper question to be submitted to the jury is, whether he took it *bonâ fide*, & for value.—(**ARLON v. IRELAND** (1856), 5 E. & B. 705; 25 L. J. Q. B. 113; 26 L. T. O. S. 195; 2 Jur. N. S. 39; 119 E. R. 666; *sub nom.* **CORLIAN v. IRELAND**, 4 W. R. 200.

*Annotation*.—**Refd.** *Smith v. Union Bank of London* (1875), 1 Q. B. D. 31.

**Liability of banker**.]—See **BANKERS**, Vol. VII., pp. 239–242, Nos. 674–678, 680–692.

**204.** Cashing post office order.]—Pltfs. banked with debts. It was the duty of pltfs.' secretary to pay all moneys received by him on behalf of pltfs. into debts' bank to the credit of pltfs. The secretary without the knowledge of pltfs. kept an account at debts' bank. He paid into debts' bank to his own credit certain post office orders belonging to pltfs. which debts. subsequently cashed. The Post Office regulations with regard to post office orders provide that, when presented for payment by a banker, they shall be payable without the signature by the payee of the receipt contained in the order, provided the name of the banker presenting the order is written or stamped upon it.—**Held**: there had been a wrongful conversion of the post office orders above mentioned by debts.—**FINE ART SOCIETY v. UNION BANK OF LONDON** (1886), 17 Q. B. D. 705; 56 L. J. Q. B. 70; 55 L. T. 536; 51 J. P. 69; 35 W. R. 114; 2 T. L. R. 883, C. A.

*Annotations*.—**Consd.** *McEntire v. Potter* (1889), 22 Q. B. D. 438; *Gordon v. London, City & Midland Bank*, *Gordon v. Capital & Counties Bank*, (1902) 1 K. B. 242. **Refd.** *Kleinwort v. Comptoir National d'Escompte de Paris*, (1894) 2 Q. B. 157; *Lacaze v. Crédit Lyonnais*, (1897) 1 Q. B. 148; *Baylis v. London & South-Western Bank* (1899), 81 L. T. 655; *Morison v. London County & Westminster Bank*, (1914) 3 K. B. 356; *Underwood v. Bank of Liverpool*, *Same v. Barclays Bank*, (1924) 1 K. B. 775.

**205.** Cashing bill or cheque—**On forged indorsement**.]—Cashing a bill according to the tenor of a forged indorsement is a conversion apart from any

#### PART II. SECT. 1, SUB-SECT. 2.—H.

**205.1.** Cashing bill or cheque—**On forged indorsement**.]—**GANESDAS RAMNARAYAN v. LACHMINARAYAN** (1894), 1 L. R. 18 Bom. 570.—**IND.**

*Sect. 1.—What amounts to conversion: Sub-sect. 2, H. & J.]*

question of negligence.—*KLEINWORT, SONS & CO. v. COMPTOIR NATIONAL D'ESCOMPTE DE PARIS*, [1894] 2 Q. B. 157; 63 L. J. Q. B. 674; 10 T. L. R. 424; 10 R. 250.

*Annotations:—Fold.* *Lacave v. Crédit Lyonnais*, [1897] 1 Q. B. 148. *Consd.* *Gordon v. London, City & Midland Bank, Gordon v. Capital & Counties Bank* (1900), 83 L. T. 762. *Refd.* *Morison v. London County & Westminster Bank*, [1914] 3 K. B. 356; *Underwood v. Bank of Liverpool, Same v. Barclays Bank*, [1924] 1 K. B. 775.

**206.** ———.]—Deft. bank carried on business in London & had a branch in Paris. A cheque was drawn on deft. bank in London in favour of pltf.s., specially indorsed by pltf.s. to a firm in London & posted for collection to that firm, but it never reached them. After the posting a forged indorsement was put on the cheque, & it was presented at defts.' bank in Paris by a person, purporting to be the last indorsee, who had no account at defts.' bank. Defts. paid the cheque, & sent it to their bank in London, who credited their bank in Paris with the value. The London bank refused to deliver the cheque to pltf.s. The cheque, when it reached defts., was crossed generally. In an action for conversion of the cheque:—*Held*: defts., by paying the cheque, & forwarding it to their London bank, & crediting their Paris bank with the value, were guilty of a conversion of the cheque in England, & therefore the case was governed by English law.—*LACAVE & CO. v. CRÉDIT LYONNAIS*, [1897] 1 Q. B. 148; 60 L. J. Q. B. 226; 75 L. T. 514; 13 T. L. R. 60; 2 Com. Cas. 17.

*Annotations:—Distd.* *Embricos v. Anglo-Austrian Bank*, [1905] 1 K. B. 677. *Refd.* *Gordon v. London City & Midland Bank, Gordon v. Capital & Counties Bank*, [1902] 1 K. B. 242. *Mentd.* *G. W. Ry. v. London & County Banking Co.*, [1900] 2 Q. B. 464.

**207.** ———.]—The drawer of a cheque induced by the fraud of W. drew the cheque to the order of K., an existing person, & intended him to be the payee. W. forged K.'s indorsement, & paid the cheque into his own account at his bankers, who received the amount of the cheque from the drawer's bank:—*Held*: the drawer could recover the amount of the cheque from W.'s bankers.—*NORTH & SOUTH WALES BANK, LTD. v. MACBETH, NORTH & SOUTH WALES BANK, LTD. v. IRVINE*, [1908] A. C. 137; 77 L. J. K. B. 464; 98 L. T. 470; 24 T. L. R. 397; 52 Sol. Jo. 353, 354; 13 Com. Cas. 219, H. L.; *affg.* S. C. *sub nom.* *MACBETH v. NORTH & SOUTH WALES BANK*, [1908] 1 K. B. 13, C. A.

*Annotations:—Refd.* *Crumplin v. London Joint Stock Bank* (1913), 109 L. T. 856; *Morison v. London County & Westminster Bank*, [1914] 3 K. B. 356.

**208.** ———.]—*In good faith—In accordance with law merchant.*—Pltf.s., a partnership firm at Liverpool, sold certain goods to the N. P. co. & drew upon the co. a bill for a large amount payable in three months in payment for the goods. The N. P. co. accepted the bill payable at deft. bank at Liverpool, where they kept their account. Shortly before the bill became payable the N. P. co., who were then overdrawn at deft. bank, asked that bank to order payment of the bill & charge to the account of the N. P. co. Deft. bank were willing to act upon this advice because they had an arrangement for a running overdraft with the N. P. co., & the bill was within the limits of that overdraft. When the bill became due it was brought by W., a servant of pltf.s., to a partner of pltf. firm, who, at W.'s request, indorsed the bill in blank. W., instead of taking the bill to pltf.s.' bank for the purpose of collection, through the Clearing House, presented the bill for payment over the counter to deft. bank

& received the money, which he then fraudulently converted & stole. Pltf.s. sued deft. bank to recover the amount of the bill on the grounds of negligence, money had & received, & conversion of the bill. Evidence was given at the trial that there is an almost universal custom at Liverpool that trade bills should be presented through the Clearing House for payment to the bank at which they were accepted payable, but evidence was also given that presentation of such bills over the counter, though most unusual, was not irregular:—*Held*: deft. bank were also not liable to pltf.s. for the conversion of the bill, because the bill was a negotiable instrument, & they paid it in good faith without notice of any defect in title & in accordance with the law merchant. A bank was not bound to make inquiries merely because a bill indorsed in blank or an open cheque was presented for payment over the counter. According to the law merchant such presentation, although unusual, was always recognised as due presentation; sufficient to require the bankers to pay, in the absence of very special circumstances of suspicion, which were not present here.—*AUCHTERONI & CO. v. MIDLAND BANK, LTD.*, [1928] 2 K. B. 294; 97 L. J. K. B. 625; 139 L. T. 344; 44 T. L. R. 441; 72 Sol. Jo. 337; 33 Com. Cas. 345.

**209.** ———.]—*Solicitors acting as bankers—Cheques paid out of funds belonging to plaintiff—To party indebted to plaintiff.*—Pltf.s. were a limited co. formed to amalgamate certain firms & cos. controlled by F., two of the directors of pltf.s. being F. & deft. T. The latter was a member of the firm of T. & C., who were the solrs. of pltf.s. & also of F. Pltf.s. had moneys standing to their credit in the books of T. & C., & F. also had a running account with T. & C. During a period when F. was in debt to pltf.s. he drew for his own purposes on the moneys standing to the credit of pltf.s. in the books of T. & C. At the time of these transactions deft. T. was not aware of F.'s indebtedness to pltf.s., but the ct. found that deft. T. knew enough of F.'s methods to be put on inquiry as to what F. was doing. Subsequently pltf.s. brought the present action against T. in respect of these moneys on the ground of conversion & for money had & received & for breach of duty & negligence as one of their directors & as their solr. Deft. T. pleaded acquiescence by pltf.s.:—*Held*: deft. T. was liable in conversion.—*FENTON TEXTILE ASSOCN., LTD. v. THOMAS* (1929), 45 T. L. R. 264.

**210.** *Taking cheque improperly filled up by clerk.*—Pltf., a stockbroker, employed a confidential clerk. On settling days on the Stock Exchange, it was pltf.'s practice to sign a number of blank cheques & to hand them over to the clerk, giving him authority to fill in the names of persons with whom pltf. did business & whose accounts he wished to settle, & the amount of the sums due to him. The authority of the clerk was absolutely limited to this. The clerk had entered into betting transactions with defts. & had incurred certain debts. To pay these debts he wrongfully filled in seven of the blank cheques with the name of defts., who took them in good faith, & certain sums which he owed them from time to time.

Pltf. sued defts. for damages for the conversion of the cheques & their proceeds:—*Held*: pltf. was entitled to recover. When the holder of a negotiable instrument was not a holder for value, the drawer of the instrument was not estopped from saying as against such holder that the body of the instrument had been wrongly filled up.—*PAINE v. BEVAN & BEVAN* (1914), 110 L. T. 933; 30 T. L. R. 395.

**Taking under threat.**—See No. 123, *ante*.

**Liability of banker.**—See, generally, BANKERS, Vol. III., pp. 123 *et seq.*

**Liability of agent.**—See AGENCY, Vol. I., pp. 684, 685, Nos. 2935, 2938, 2943.

### J. Other Acts.

**211. Dealing with goods.—After sale in market overt.**—PANTON v. HASSEL (1627), Het. 62; 124 E. R. 344.

**212. Compromise of action by administrator—In consideration of future payment.**—Exor. having an action of trover in right of testator, compounds it by articles for payment of so much at a future day, this is a conversion & assets in his hands before payment.—NORDEN v. LEVIT (1677), 2 Lev. 189; 3 Keb. 778; T. Jo. 88; 1 Freeman. K. B. 442; 1 Eq. Cas. Abr. 240; 83 E. R. 512; *affd.*, cited in 1 Vern. at p. 474, II. L.

*Annotations* :—Consd. Farr v. Newman (1792), 4 Term Rep. 621. Refd. Jenkins v. Plombe (1704), 6 Mod. Rep. 91.

**213. Removal of gate—Obstructing alleged right of way.**—If to an action of trespass for pulling down & carrying away a gate, deft. plead a right of way, & that the gate being wrongfully erected across the same, he took it down & deposited it in a convenient place for the use of pltf., to which pltf. replies a subsequent conversion; proof that deft. put the gate upon his own premises, from whence pltf. might have taken it, if he had pleased, will not sustain the replication.—HOUGHTON v. BUTLER (1791), 4 Term Rep. 304; 100 E. R. 1066.

**214. Loss of goods.—By carrier.**—A carrier is bound to deliver goods entrusted to him at the place to which they are addressed; & if he deliver them elsewhere, trover lies against him. *Scus*, if goods be stolen or lost. Where, therefore, defts., as carriers, had received a box at Birmingham, directed to J. West, 27, Great Winchester Street, London, & on its being taken there, the house was found to be shut up, and no person of the name of West resided in the street, & a week afterwards defts. received a letter from a person naming himself West, desiring that the box might be sent to him at an inn at St. Alban's which defts. accordingly did :—*Held* : this was a mis-delivery, for which they were liable in trover, although West was the person for whom the box was intended, the property in the goods not having passed to West, as he had obtained them from pltf. by fraud; & it was properly left to the jury to say whether defts. had caused the goods to be delivered in the due & ordinary course of business, & according to their duty as carriers.—STEPHENSON v. HAIR (1828), 4 Bing. 476; 1 Moo. & P. 357; 6 L. J. O. S. C. P. 97; 130 E. R. 851.

*Annotations* :—Refd. Crouch v. G. N. Ry. (1856), 11 Exch. 742; Heugh v. L. & N. W. Ry. (1870), L. R. 5 Exch. 51; McKean v. M'ivor (1870), L. L. 6 Exch. 36.

**215. ———.**—A stage coachman is responsible for the loss of a parcel which he receives to carry without reward, if it is lost through gross negligence on his part.—BEAUCHAMP v. POWLEY (1831), 1 Mood. & R. 38.

*Annotation* :—Refd. Baile v. West (1853), 13 C. B. 466.

**216. ———.**—If a railway co. notify, & their course of business is, that they do not receive cattle to carry unless tickets are given, signed by their clerks or servants, & specifying the number & other particulars; a porter has no authority to receive cattle to be carried without giving such signed tickets; & if he do so, the co. will not be liable for the loss of cattle so received by their servants from parties acquainted with the notice & course of business.

In such a case, the evidence being that the porter,

having received cattle without giving a ticket, put them into a pen, & said it was all right, & that the cattle had never been delivered to or for the owner, who had applied for them; there being no evidence as to what had become of the cattle :—*Held* : (1) the co. were not liable as carriers, there being no evidence that they received the cattle as carriers; (2) they were not liable for the conversion of the cattle, there being no evidence, except of loss.—SLIM v. GREAT NORTHERN RY. CO. (1854), 14 C. B. 647; 2 C. L. R. 864; 23 L. J. C. P. 166; 18 Jur. 1119; 2 W. R. 585; 139 E. R. 266.

*Annotations* :—Generally, Refd. G. N. Ry. v. Harrison (1854), 2 C. L. R. 1136; Peck v. North Staffordshire Ry. (1863), 10 H. L. Cas. 473.

**217. Buying goods of bankrupt.**—If one buys goods of a bkpt. under such circumstances as will entitle his assignees to maintain trover for them, such buying is in itself a conversion, & the assignees need not adduce evidence of a demand & refusal.—YATES v. CARNSEW (1828), 3 C. & P. 99; 172 E. R. 341, N. P.

**218. Pledging goods.—On behalf of third person.**—PARKER v. GODIN (1728), 2 Stra. 813; 93 E. R. 866.

*Annotations* :—Refd. Wilson v. Poulter (1730), 2 Stra. 850; Hollins v. Fowler (1875), L. R. 7 H. L. 757. *Mentd.* Munday v. Bush (1811), 2 L. T. O. S. 370.

— **Liability of agent.**—See AGENCY, Vol. I., p. 563, Nos. 2101, 2102.

**219. Obtaining by fraud—Policy of insurance.**—A policy of insurance on the life of A. had been assigned to pltf.; deft. having privately ascertained that A. was dangerously ill, treats with pltf. for the purchase of the policy for a small sum, representing it as the then value of the policy, pltf. not being aware of A.'s illness :—*Held* : the sale was void, & pltf. might recover the value of the policy in an action of trover.—JONES v. KEENE (1841), 2 Mood. & R. 348, N. P.

**220. Receiving back more than just share—Goods entrusted to bailee.**—LONSDALE v. MITCHELL (1858), 30 L. T. O. S. 273.

**221. Indorsing delivery order—Indorsement obtained by fraud—Bonâ fide intention to correct mistake.**—(1) Pltfs. sent to deft. an invoice for barley, which stated that the barley was bought by deft. of pltfs. through G. as broker, & also a delivery order, which made the barley deliverable to the order of the consignor or consignee. Dft. had not in fact ordered any barley of pltfs. G. called on deft., who showed him the documents, & told him it was a mistake. G. said that it was so, & asked deft. to indorse the order to him, for the purpose, as he said, of saving the expense of obtaining a fresh delivery order. Dft. indorsed the order to G., who possessed himself of the barley & disposed of it, & then absconded. On the trial of an action of trover for the barley, the jury found that deft. had no intention of appropriating the barley to his own use, but indorsed the order for the purpose of correcting what he believed to be an error, & returning the barley to pltfs. :—*Held* : deft., having indorsed the order without any occasion to do so, & without authority, was liable.

(2) Conversion is best defined as doing an act unauthorised which deprives another of his property for an indefinite time.—HUNT v. BOTT (1874), L. R. 9 Exch. 86; 43 L. J. Ex. 81; 30 L. T. 25; 22 W. R. 414.

*Annotations* :—As to (1) Consd. Jones v. Hough (1879), 5 Ex. D. 115; Gordon v. London, City & Midland Bank, Gordon v. Capital & Counties Bank (1900), 83 L. T. 762. Refd. New York Breweries Co. v. A.-G., [1899] A. C. 62; Van Oppen v. Tredegar (1921), 37 T. L. R. 504.

**222. Deposit of lease.**—MILLER v. DELL, No. 236, *post*.

## SECT. 2.—DEMAND AND REFUSAL

## SUB-SECT. 1.—WHEN NECESSARY.

## A. Action for Conversion.

## (a) In General.

**223. Demand & refusal necessary—Act not *prima facie* conversion.]—**HERN & STUB'S CASE (1627), Godb. 400; 78 E. R. 236; *sub nom.* HERN v. STUBBERS, Lat. 208.

*Annotations:—*Refd. Rowe v. Young (1820), 2 Bl. 391. *Mentd.* Hutton v. Isenmonger (1725), 1 Stra. 641; Fisher v. Lane (1772), 2 Wm. Bl. 831.

**224. ———.]—**WARD v. MARTINE (1661), 1 Sid. 66; 82 E. R. 973.

**225. ———.]—**When the owner of goods on board a vessel directed the captain not to land them on the wharf against which the vessel was moored, which he promised not to do, but afterwards delivered them to the wharfinger for the owner's use, under the idea of the wharfinger's having a lien thereon for the wharfage fees, because the vessel was unloaded against the wharf, the owner upon demand & denial may maintain trover against the captain, unless the latter can establish the wharfinger's right.—SYEDS v. HAY (1791), 4 Term Rep. 260; 100 E. R. 1008.

*Annotations:—*Refd. Moon v. Raphael (1835), 2 Bing. N. C. 310; It. v. Wynn (1887), 56 L. T. 749. *Mentd.* Gatlin v. Bourne (1838), 5 Scott, 667.

**226. ———.]—**A. having agreed to purchase of B. the remainder of a term, the latter delivered to him the lease, in order that he might get an assignment made out; A. then obtained an enlargement of the term from the original landlord, & refused to accept an assignment or pay the full price agreed on, because B.'s undertenant had removed some fixtures:—*Held*: B. might insist on A. accepting the assignment, & after demand & refusal of the lease might maintain trover for it.—PARRY v. FRAME (1801), 2 Bos. & P. 451; 126 E. R. 1379.

**227. ———.]—**When goods are delivered under a contract, as to do something with them, & to deliver them according to the party's undertaking, an omission of the party's doing what he so undertook to do will not sustain an action of trover, unless there has been an actual refusal to redeliver.—SEVERIN v. KEFFEL (1802), 4 Esp. 156; 170 E. R. 674, N. P.

**228. ———.]—**M'COMBIE v. DAVIES, No. 332, *post*.

**229. ———.]—**If a thing be deposited by one, with the authority of another, & received by the bailee, to keep on the joint account of the two, one alone cannot lawfully demand it without the authority of the other, so as to maintain trover upon the bailee's refusal to deliver it. But where it only appeared that it had been agreed between the assignor & the assignee of a lease, that, to save the expense of a counterpart, it should be deposited in the hands of a third person, & the assignee afterwards delivered it to the bailee to keep, but without mentioning that it was on the joint account, & no communication was made of the deposit to the assignor, who never interfered further in the matter; but deft. afterwards, with the privity of the bailee who acted as his agent, procured an illegal & void conveyance of the property in it from the assignee:—*Held*: the assignee or his legal representatives might alone maintain trover

for it, after demand & refusal.—MAY v. HARVEY (1811), 13 East, 197; 104 E. R. 845.

**230. ———.]—**One employed to sell goods by commission pawns them; the owners of the goods may maintain trover against the pawnbroker after a demand & refusal, although the duplicate has not been tendered according to 39 & 40 Geo. 3, c. 99, s. 5.—PEET v. BAXTER (1816), 1 Stark. 472; 171 E. R. 533, N. P.

*Annotations:—*Refd. Singer Manufacturing Co. v. Clark (1879), 5 Ex. D. 37.

**231. ———.]—**In an action against Excise officers for the detention & negligent custody of certain malt, etc., taken under a distress upon a conviction under 43 Geo. 3, c. 74, it appeared that pltf. having been convicted in a penalty, a warrant issued, directing defts. to levy the same, & that they seized & removed pltf.'s goods from his premises; & that afterwards he paid the penalty. Defts., ten days after this payment, brought the goods back to pltf.'s premises, but in a damaged state:—*Held*: in order to make the detention unlawful, pltf. ought to have demanded the goods, & there having been no demand, the detention was not unlawful. HUTCHINGS v. MORRIS (1827), 6 B. & C. 464; 4 Dow. & Ry. M. C. 309; 9 Dow. & Ry. K. B. 499; 5 L. J. O. S. M. C. 144; 108 E. R. 522.

**232. ———.]—**Where bills of exchange were delivered by a trader, in contemplation of bkpcy., to a creditor, with a view of giving him the preference, & the amount due on the bills was received by him after the bkpcy. In an action of trover by the assignees to recover the bills:—*Held*: the receipt of the money by the creditor was not a conversion, & therefore, that it was necessary for them to prove a demand & refusal before the bills became due. JONES v. FORT (1829), 9 B. & C. 764; 4 Man. & Ry. K. B. 517; 7 L. J. O. S. K. B. 220; 109 E. R. 284; *previous proceedings* (1828), 1 Mood. & M. 196, N. P.

*Annotations:—*Distd. Robson v. Rolfs (1832), 1 Mood. & R. 239. *Consd.* Billiter v. Young (1856), 6 B. & B. 1. *Refd.* Heinckey v. Earle (1858), 4 Jur. N. S. 848; Exley v. Ingils (1868), L. R. 3 Exch. 247.

**233. ———.]—**A man is not justified in entering the close of another person to take away his own goods & chattels, through any wrongful or negligent act of his own, standing & being in that close.

Trover will lie by the owner of such goods & chattels against the owner of the close after demand & refusal, or after demand & neglect to deliver.—ANTHONY v. HANEY (1832), 8 Bing. 186; 1 Moo. & S. 300; 1 L. J. C. P. 81; 131 E. R. 372.

*Annotations:—*Refd. Patrick v. Colclick (1838), 3 M. & W. 483; Jay's Furnishing Co. v. Brand, [1914] 2 K. B. 132.

**234. ———.]—**Trover for goods. It appeared at the trial, that deft. came to pltf.'s house, which was left in the care of a servant, & said that, having authority from the Lord Chancellor, he was come to take charge of the goods in the house; he put a man in possession, & took an inventory of the goods, & subsequently the servant was by him refused admittance into the house. The learned judge nonsuited pltf., on the ground that, without a demand, there was no evidence of a conversion:—*Held*: there was some evidence which ought to have been submitted

PART II. SECT. 2, SUB-SECT. 1.—  
A. (a).

**2231. Demand & refusal necessary—Act not *prima facie* conversion.]—**GAHAN v. ST. LAWRENCE & OTTAWA RY. CO. (1878), 3 A. R. 392.—CAN.

**22311. ———.]—**Where the possession of goods by a person who is

not the owner is not tortious possession a demand by pltf. for return of the goods followed by a wrongful refusal is necessary before action.—CRAIG v. MCCREATH (Sask.), [1922] 2 W. W. R. 1276.—CAN.

**o. ———.]—***Semble*, where a person purchases the goods of another at

public sale, a notice by the owner at such sale dispenses with the necessity of a demand & refusal to maintain trover.—HAREN v. LYON (1826), Tay. 370.—CAN.

**p. ———.]—**WHITE v. BATTY (1864), 23 U. C. R. 487.—CAN.

**q. ———.]—**STOCKTON v. BEATTY

to the jury.—**NEEDHAM v. RAWBONE** (1844), 6 Q. B. 771, n.; 9 Jur. 274; 115 E. R. 291, n.  
*Annotation*:—**Apld.** **Thorogood v. Robinson** (1845), 6 Q. B. 769.

**235.** ———.]—**Pltf. lent a pianoforte to W., in whose hands it was seized under a distress for rent. While the landlord's bailiff remained in possession by W.'s consent, a *fi. fa.* against W., at the suit of another creditor, was put into the premises, & the officer seized the pianoforte, & removed it to the premises of deft., an auctioneer, for sale:—Held: pltf., after demand & refusal to deliver it, was entitled to recover it from deft. in trover.**—**TURNER v. FORD** (1846), 15 M. & W. 212; 15 L. J. Ex. 215; 10 J. P. 426; 153 E. R. 826.  
*Annotation*:—**Mentd.** **Beckham v. Drake** (1849), 2 H. L. Cas. 579.

**236.** ———.]—**A lease belonging to pltf. was fraudulently taken from him by his son, & was deposited, without pltf.'s knowledge, with B. in 1881 as security for the repayment of money lent by B. B. held the lease without knowledge of the fraud. B. having become bkpt., his trustee in 1889 assigned the debt to deft. & handed the lease over to him. Subsequently pltf. demanded the lease of deft., & upon his refusal to return it brought an action for detinue & conversion, to which deft. pleaded the Stat. Limitations.**

*Qu.*: whether the original receipt of the lease by B. was sufficient evidence of a conversion by him.—**MILLER v. DELL**, [1891] 1 Q. B. 468; 60 L. J. Q. B. 404; 63 L. T. 693; 39 W. R. 342; 7 T. L. R. 155, C. A.

*Annotations*:—**Refd.** **Clayton v. Le Roy**, [1911] 2 K. B. 1031. **Mentd.** **London & Midland Bank v. Mitchell**, [1899] 2 Ch. 161; **Bradford Old Bank v. Sutcliffe**, [1918] 2 K. B. 833.

**237.** ———.]—**Offer to return articles not demanded.**—The committee of a society having dismissed their manager, entered on & excluded him from a house they had put him into possession of & allowed him to occupy as such manager, & in which he had also been allowed to carry on his own business as a bookseller, & took possession of, but offered to return his stock, etc., which however he never had applied for:—**Held**: he could not sue them, either in trespass or trover.—**WHITE v. BAYLEY** (1861), 2 P. & F. 385; *subsequent proceedings*, 10 C. B. N. S. 227.

(b) *Where Act Amounts to Conversion.*

**238. Demand & refusal unnecessary—Actual taking of goods.**—**BRUEN v. ROE** (1665), 1 Sid. 264; 82 E. R. 1095.

*Annotations*:—**Consd.** **Fowler v. Hollins** (1872), L. R. 7 Q. B. 616. **Refd.** **Garland v. Carlisle** (1833), 2 Cr. & M. 31.

**239.** ———.]—**One who comes into possession of land, on which he finds a block of stone belonging to another, is not justified in removing it to a distance. Such removal supersedes the necessity of proving a formal demand in an action of trover.**—**FORSICK v. COLLINS** (1816), 1 Stark. 173; 171 E. R. 437, N. P.

**240.** ———.]—**BECKWITH v. CORRAL**, No. 544, *post*.

(1879), 10 N. B. R. (3 P. & B.) 104.—**CAN.**

r. ———.]—**BARRETT v. SUTTIS** (1884), 17 N. S. R. (5 R. & G.) 262.—**CAN.**

t. ———.]—**ADOLPH v. GOOD** (1912), 20 W. L. R. 401; 1 W. W. R. 936; 5 Sask. L. R. 106; 1 D. L. R. 750.—**CAN.**

a. ———.]—**HARYANA COTTON MILLS CO., LTD. v. B. B. & C. I. Ry. Co.** (1927), 1 L. R. 8 Lah. 555.—**IND.**

**PART II. SECT. 2, SUB-SECT. 1.—**  
**A. (b).**

**238 1. Demand & refusal unnecessary—Actual taking of goods.**—**BROWN v.**

**MACKENZIE** (1871), 10 N. S. W. S. C. R. 302.—**AUS.**

**238 II.** ———.]—**Where a son turned his father out of his house & refused to let him remove personal property belonging to him, it was held that the father might maintain an action of conversion without having made any demand therefor.**—**LOWE v. LOWE** (N. S.) (1911), 10 E. L. R. 277.—**CAN.**

**242 1.** ———.]—**Wrongful distress.**—Where goods are illegally seized & sold under a *fi. fa.* it is not necessary in an action of trover by the owner against the sheriff to prove a demand &

**241.** ———.]—**Wrongful taking of a chattel is a sufficient conversion to support trover, without proof of a subsequent demand or refusal.**—**GRAINGER v. HILL** (1838), 4 Bing. N. C. 212; 1 Arn. 42; 5 Scott, 561; 7 L. J. C. P. 85; 132 E. R. 769; *sub nom.* **GRANGER v. HILL**, 2 Jur. 235.

*Annotations*:—**Distd.** **Powell v. Hoyland** (1851), 6 Exch. 67. **Mentd.** **De Medina v. Grove** (1847), 10 Q. B. 172; **Warner v. Hiddiford** (1858), 4 C. B. N. S. 180; **Parton v. Hill** (1864), 4 New Rep. 103; **Assets Development Co. v. Close** (No. 2) (1901), 46 Sol. Jo. 12; **Giblan v. National Amalgamated Labourers' Union of Great Britain & Ireland**, [1903] 2 K. B. 600.

**242.** ———.]—**Wrongful distress.**—Where goods are distrained which are not liable, an action of trover may be brought by the owner without a demand & refusal.—**WARD v. VENTOM** (1797), as reported in **Peake Add. Cas.** 126; 170 E. R. 217, N. P.

**243.** ———.]—**Discounting bill of exchange—After notice of loss by holder.**—A banker after notice, discounts a bill drawn on a customer, & by the acceptance made payable at his bank, after it has been lost by the holder, & afterwards debits his customer with the amount of the bill, writes a discharge on it, & delivers it up to the customer as the banker's voucher of his account:—**Held**: the banker is thereby guilty of a conversion & the loser of the bill may recover in trover without a previous demand of the bill.—**LOVELL v. MARTIN** (1813), 4 Taunt. 799; 128 E. R. 515.

**244.** ———.]—**Books held by assignees in bankruptcy—Commission wrongfully issued.**—A jury having found that a keeper of hounds, who bought dead horses for his dogs & then sold the skins & bones for a profit, was not thereby a trader, the ct. refused to grant a new trial, or to disturb the verdict. **Pltf.**, against whom a commission of bkpt. had been wrongfully issued, being required by the assignees under the commission to deliver up his books, did so:—**Held**: he might recover of the assignees in trover, without formally demanding a restoration of the books.—**SUMMERSETT v. JARVIS** (1821), 3 Brod. & Bing. 2; 6 Moore, C. P. 56; 129 E. R. 1182.

**245.** ———.]—**Money paid under mistake of fact.**—Where money has been paid under a mistake of fact which was shared by both the party paying & the party receiving it, in order to entitle the payor to maintain an action for the recovery back of the money so paid it is not necessary that he should have given the payee notice of the mistake & demanded repayment. In such a case the cause of action is complete the moment the money is paid.—**BAKER v. COURAGE & CO.**, [1910] 1 K. B. 56; 79 L. J. K. B. 313; 101 L. T. 854.

*Annotations*:—**Refd.** **Jones v. Waring & Gillow**, [1925] 2 K. B. 612; **Ire Mason**, [1928] 1 Ch. 385. **Mentd.** **Ire Robinson, McLaren v. Public Trustee** (1911), 104 L. T. 331.

(c) *Goods of Bankrupt.*

**246. Collusive sale.**—A trader on the eve of bkpy. makes a collusive sale of goods to A. The assignees cannot maintain trover for them with-

refusal in order to establish a conversion.—**MORICE & CHAPMAN** (1889), 1 N. B. R. 221.—**CAN.**

b. ———.]—**THOMSON v. WALSH** (1852), 7 N. B. R. (2 All.) 369.—**CAN.**

—.]—**MCDONALD v. MCADAM** (1903), 40 N. S. R. 597.—**CAN.**

**PART II. SECT. 2, SUB-SECT. 1.—**  
**A. (c).**

**d. Assignment in contemplation of insolvency.**—**Pltf.**, as assignee in insolvency, brought an action of trover for goods which had been conveyed by R. to deft., in contemplation of insolvency. The goods had been sold



*Sect. 2.—Demand and refusal: Sub-sect. 1, A. (c), & B.; sub-sects. 2 & 3, A. (a).]*

out proving a demand & refusal.—*NIXON v. JENKINS* (1793), 2 Hy. Bl. 135; 126 E. R. 471.

*Annotations:—Distd.* *Soames v. Watts* (1824), 1 C. & P. 400. *Consd.* *Young v. Billiter* (1860), 8 H. L. Cas. 682; *Heilbutt v. Nevill* (1870), L. R. 5 C. P. 478. *Refd.* *Stevenson v. Newham* (1853), 13 C. B. 285; *Exley v. Ingils* (1808), L. R. 3 Exch. 247.

247. —[*YATES v. CARNSEW*, No. 217, *ante*.

248. Goods taken in execution by sheriff.—Notice by assignees not to sell.]—Where after a secret act of bkpey. the sheriff took in execution the goods of a trader under a *fi. fa.* & removed them to a broker's, & the assignees of the bkpt. afterwards served a notice upon him not to sell them, for which reason they were allowed to remain unsold at the broker's:—*Held*: the sheriff was liable to an action of trover at the suit of the assignees, without any demand of the goods.—*WYATT v. BLADES* (1813), 3 Camp. 396; 170 E. R. 1423, N. P.

*Annotations:—Consd.* *Balme v. Hutton* (1833), 9 Bing. 471. *Apprd.* *Gorland v. Carlisle* (1837), 4 Cl. & Fin. 693. *Ap'd.* *Graluger v. Hall* (1838), 4 Bing. N. C. 212.

249. Goods in order & disposition of bankrupt.]—

In trover by the assignees of a bkpt., to recover property in his order & disposition at the time of the act of bkpey., no demand & refusal are necessary.—*SOAMES v. WATTS* (1824), 1 C. & P. 400; 171 E. R. 1248, N. P.

*Annotation:—Mentd.* *Sumption v. Monzani* (1836), 4 Ad. & El. 1007.

250. Bankruptcy of vendee.—Order to brokers to sell goods.—Delivery by brokers to vendor.]—A & co., as brokers for B., sold goods, then in their possession, to C. which were paid for by a bill drawn by C. & accepted by D. C. ordered A. & co. to keep the goods in their hands & sell them if they could make a certain profit. Before the bill became due D. failed, & A. & co. applied to C. for security for the bill: whereupon he gave them an order to sell the goods & apply the proceeds in payment of the bill. C. afterwards, & before the goods were sold, became bkpt. A. & co. handed over the goods to B. at his request, but he afterwards returned them, & after they were returned, C.'s assignees, having made a demand of the goods, brought trover:—*Held*: they could not maintain it; for after the order given by C. to A. & co. to sell the goods & apply the proceeds in payment of the bill, they remained in their hands, subject to that charge, because A. & co. must be presumed to have asked security as agents for B., whose ratification of their act for his benefit might also be inferred.—*BAILEY v. CULVERWELL* (1828), 8 B. & C. 448; Dan. & J.L. 176; 2 Man. & Ry. K. B. 504; 7 L. J. O. S. K. B. 10; 108 E. R. 1109.

*Annotations:—Refd.* *Re Douglas, Ex p. Hankey* (1838), 4 Deac. 1. *Mentd.* *Hutchinson v. Heyworth* (1838), 9 Ad. & El. 375.

by deft. before action brought:—*Held*: evidence was not necessary of a demand & refusal.—*HUGH v. DARRING* (1882), 15 N. S. R. (3 L. & G.) 248.—*CAN.*

**PART II. SECT. 2, SUB-SECT. 1.—B.**

251 i. *Whether necessary.*]—Where deeds were deposited as security for a loan & the loan was repaid, but the deeds were not returned:—*Held*: before demand of the deeds, there was no wrongful detention, so as to form a "cause of action or matter in difference," within a reference to arbitration, made & proceeded on before any demand was made.—*TIMWELL v. VIRGOE* (1868), 5 W. W. & A'B. 147.—*AUS.*

251 ii. —[Goods were left in the possession of F. more than twelve

months before an information was filed for their detention. No demand was made until the day on which the information was filed.—*Held*: the matter of complaint did not arise till demand.—*Ex p. FISHER* (1879), 2 N. S. W. S. C. R. N. S. 32.—*AUS.*

251 iii. —[*McFATRIDGE v. HOLSTEAD* (1889), 21 N. S. R. 325.—*CAN.*

251 iv. —[*GRAY & SMITH v. GURNSEY* (1902), 5 Terr. L. R. 439.—*CAN.*

251 v. —[Pltf. sold to deft. two horses & took a lien note for the price, which was not paid at maturity. Pltf. retook the horses under his lien note, but that was after this action had been brought for unlawful detention of the horses:—*Held*: to succeed in the action of detinue pltf. must show that deft. detained the horses after pltf.

*B. Action for Detinue.*

251. *Whether necessary.*]—*v. MALPAZ* (1455), Y. B. 33 Hen. 6, fo. 26, pl. 12.

*Annotations:—Refd.* *Isaack v. Clark* (1615), 2 Bulst. 306; *Mason v. Farnell* (1844), 13 L. J. Ex. 142.

252. —[*HERN & STUB'S CASE* (1627), Godb. 400; 78 E. R. 236; *sub nom.* *HERN v. STUBBERS*, Lat. 208.

*Annotations:—Refd.* *Rowe v. Young* (1820), 2 BH. 391. *Mentd.* *Hatton v. Isenmonger* (1725), 1 Stra. 641; *Fisher v. Lane* (1772), 2 Wm. Bl. 834.

253. —[*WARD v. MARTINE* (1601), 1 Sid. 66; 82 E. R. 973.

254. —[*CLAYTON v. LE ROY*, No. 314, *post*.

255. —[*Viscount C.* had claimed the delivery up by deft., W., of books & lists containing names & addresses of persons to whom pltf. had through deft., his confidential secretary for that purpose down to June, 1914, issued vouchers for admission to the Royal Inclosure at the Ascot Race Meeting, of which documents, after having removed & kept them, pltf. alleged deft. had made unwarrantable & improper use.

When the writ was served . . . the books & documents were not rightfully in deft.'s possession, & in these circumstances the action was properly brought without the necessity of any further notice to deft. (*EVE, J.*).—*CHURCHILL (LORD) v. WHETNALL, ABERCONWAY (LORD) v. WHETNALL* (1918), 87 L. J. Ch. 524; 119 L. T. 34.

**SUB-SECT. 2.—SUFFICIENCY OF DEMAND.**

256. Demand of payment for goods.]—*ROOKEY'S CASE* (1647), Clay. 122.

257. —[A demand of payment for goods, for which an action of trover is brought, is a good demand to support the action.—*THOMPSON v. SHIRLEY & BODY* (1793), 1 Esp. 31; 170 E. R. 271, N. P.

258. Demand in writing.—Left at defendant's house.]—A demand in writing left at deft.'s house is sufficient in trover.—*LOGAN v. HOULDTCH* (1793), 1 Esp. 22; 170 E. R. 268, N. P.

259. —*Admissibility of copy.*]—Notice to produce a written demand of a thing, for which an action of trover is brought, unnecessary.—*HAMMOND v. PLANK* (1796), Peake Add. Cas. 90; 170 E. R. 204, N. P.

260. —[*BRIANT v. DORMER* (1848), 2 Car. & Kir. 692, N. P.

261. Verbal & written demands made at same time.—Evidence of verbal demand sufficient.]—

If a verbal demand & a demand in writing are made at the same time, for the purpose of bringing an action of trover, & the one has no reference to the other, evidence of the verbal demand is sufficient without the production of the writing.

In trover for a deed, the evidence of conversion

made a demand; the *onus* was on pltf.—*MACLEOD v. SCRAMLLEN* (1910), 14 W. L. R. 262; 3 Sask. L. R. 155.—*CAN.*

251 vi. —[An action of detinue does not lie against a bailee of goods until demand made by the bailor, after the determination of the bailment & before action brought.—*CULLEN, ALLEN & Co. v. BARCLAY* (1881), 10 L. R. Ir. 224.—*IR.*

251 vii. —[*BROCKET v. BOWDEN'S TRUSTEES* (1895), 13 N. Z. L. R. 371.—*N.Z.*

**PART II. SECT. 2, SUB-SECT. 2.**

c. *Condition precedent unfulfilled by plaintiff.—Demand insufficient.*]—*KAYNER v. HARLOW* (N. S.) (1922), 68 D. L. R. 67; 55 N. S. R. 143.—*CAN.*



was, that when the deed was demanded from deft. he said he would not deliver it up, but that it was then in the hands of his attorney, who had a lien upon it:—*Held*: insufficient.

To make a demand & refusal sufficient evidence of a conversion, the party when he refuses must have it in his power to deliver up or detain the article demanded (*per Cur.*).—*SMITH v. YOUNG* (1808), 1 Camp. 439; 170 E. R. 1014, N. P.

*Annotations*:—*Reid*, Featherstonhaugh v. Johnston (1818), 8 Taunt. 237; Catterall v. Kenyon (1842), 6 Jur. 507.

**262. Demand by vendors of goods—Repayment of purchase-money on refusal—Necessity for new demand.**—Where plffs. sold goods to T., who paid for them, & was to take them away, but deft. becoming possessed of the place in which the goods were deposited, plffs.' attorney, accompanied by T., demanded them of deft., telling him that they belonged to plffs., & that they had sold them to T.; to which deft. answered that he would not deliver them to any person whatsoever, & afterwards plffs. repaid the money to T. & brought trover against deft.:—*Held*: this demand & refusal were sufficient evidence of a conversion to support the action, & a new demand by plffs., after they had repaid the money to T., was not necessary.—*PATTISON v. ROBINSON* (1816), 5 M. & S. 105; 105 E. R. 990.

**263. Joint owner—Demand by one in own name.**—Where two or more who are jointly interested in a chattel, deposit it with a stranger, a demand by one in his own name only, & not on behalf of all, will not entitle such one to maintain detinue for it.—*ATWOOD v. ERNEST* (1853), 13 C. B. 881; 22 L. J. C. P. 225; 21 L. T. O. S. 185; 1 W. R. 436; 138 E. R. 1449; *sub nom.* *ATTWOOD v. ERNEST*, 1 C. L. R. 738; 17 Jur. 603.

**264. —**—*Four partners pledged goods with deft., with a power of sale, as security for repayment of advances made by deft. to them. Afterwards the partnership was dissolved & the property of three of the four partners vested in plff. under several deeds of assignment. Plff., without authority from the fourth partner, tendered to deft. the amount for which the goods were a security, & demanded the whole of the goods. Deft. refused to deliver the goods to plff.:—Held*: the refusal by deft. was not such a conversion of the goods as would entitle plff. to maintain an action of trover against deft.—*HARRIS v. GODSELL* (1870), 1 L. R. 5 Q. B. 422; 39 L. J. Q. B. 185; 18 W. R. 954.

*Annotations*:—*Mentid*, Hawksley v. Outram, [1892] 3 Ch. 359; Jacobs v. Morris, [1901] 1 Ch. 261.

**265. General demand.**—In an action for damages for conversion it was proved that plff., an exor., had made a general demand of "the goods of the deceased," & that deft. had replied in effect that the goods were claimed by another party:—*Held*: the demand not being specific, the refusal of deft. did not render him liable in the action.—*NIXON v. SEDGER* (1890), 7 T. L. R. 112, C. A.

**266. — In excess of plaintiff's right.**—In an action of trover for timber, the only evidence of a conversion was, that plff.'s agent gave to deft. a written demand of "all those staves, deals, &

quarterings now in your yard," & inquired whether deft. intended to give them up; to which his answer was, "I do not." Plff. was entitled only to demand the quarterings:—*Held*: the general demand & refusal was sufficient evidence of a conversion of the quarterings.—*GREENSLADE v. EVANS* (1848), 12 L. T. O. S. 124.

**Issue of writ as sufficient demand.**—*See Sub-sect. 1, B., ante.*

### SUB-SECT. 3.—SUFFICIENCY OF REFUSAL.

#### A. Action for Conversion.

##### (a) In General.

**267. Mere refusal.**—*ISAACK v. CLARK* (1615), 2 Bulst. 306; Moore, K. B. 841; 80 E. R. 1143; *sub nom.* *ISACK v. CLARKE*, 1 Roll. Rep. 126.

*Annotations*:—*Reid*, Manby v. Scott (1662), O'Bridg. 229; Mires v. Solebay (1678), 2 Mod. Rep. 242; Parker v. Kett (1701), 12 Mod. Rep. 466; Garland v. Carlisle (1837), 4 Scott, 587; Mason v. Farnell (1844), 1 Dow. & L. 576; Whitehead v. Harrison (1844), 8 Q. B. 423; Cooper v. Willomatt (1845), 1 C. B. 672; Clements v. Flight (1846), 8 L. T. O. S. 166; Hollins v. Fowler (1875), L. R. 7 H. L. 557.

**268. —**—In 1820 the right to recover certain court rolls & other documents accrued; in that year a letter demanding them was written, & in 1822 another letter on the subject was written. No distinct refusal was shown. A bill to compel their delivery was filed in 1844:—*Held*: it was too late, Stat. Limitations being a bar, as the letters, followed by non-compliance, were sufficient evidence of conversion; but leave was given to bring an action.—*WELLS (DEAN & CHAPTER) v. DODDINGTON* (1845), 2 Coll. 73; 14 L. J. Ch. 304; 5 L. T. O. S. 170; 9 Jur. 768; 63 E. R. 642.

*Annotation*:—*Reid*, Beaumont v. Jeffery, [1925] Ch. 1.

**269. —**—*WILDE v. WATERS*, No. 104, *ante*.

**270. Refusal must be absolute.**—*PHILPOTT v. KELLEY*, No. 168, *ante*.

**271. —**—Bailee of a gun overcharged & burst it. The owner required him forthwith to deliver it back in the same good plight in which he received it. Bailee refused to do the repair, & the gun not having been returned, the owner brought trover:—*Held*: the refusal to comply with a demand of redelivery, qualified as above, was not of itself evidence of a conversion.—*RUSHWORTH v. TAYLOR* (1812), 3 Q. B. 699; 3 Gal. & Dav. 3; 12 L. J. Q. B. 80; 6 Jur. 915; 114 E. R. 674.

**272. —**—*INNES v. FITCH* (1843), 2 L. T. O. S. 99.

**273. Must relate to act of conversion.**—*WEYMOUTH v. BOYER*, No. 343, *post*.

**274. Demand by party unknown—Or not properly authorised.**—Where in an action of trover the demand of the goods is not made by the party himself, a refusal, on the ground that the party applying is unknown, or not properly authorised, is not sufficient to support the action.—*SOLOMONS v. DAWES* (1794), 1 Esp. 81; 170 E. R. 287, N. P. *Annotations*:—*Reid*, Garland v. Carlisle (1837), 11 Bl. N. S. 421, p. 520; Charrington v. Johnson (1845), 13 M. & W. 856.

**275. Persons refusing must have power to deliver or detain.**—*SMITH v. YOUNG*, No. 261, *ante*.

### PART II. SECT. 2, SUB-SECT. 3.—A. (a).

**267 i. Mere refusal.**—*PARKER v. BLIGH* (1910), 9 E. L. R. 94.—*CAN.*

**270 i. Refusal must be absolute.**—Where a demand is necessary in trover to prove a conversion, if it be oral, the answer must be positive; & where an oral demand was made on deft. while driving at a distance from his house, where the property demanded was, &

no answer was returned:—*Held*: no evidence of a conversion.—*MCLEAN v. GRAHAM* (1838), 5 O. S. 741.—*CAN.*

**270 ii. —**—*ANNAND v. MERCHANTS' BANK* (1878), 12 N. S. R. (3 R. & C.) 229.—*CAN.*

**275 i. Persons refusing must have power to deliver or detain.**—*WALKER v. CUNNINGHAM* (1877), 12 N. S. R. (3 R. & C.) 1.—*CAN.*

**275 ii. —**—Where a deft. had

already sold the goods in a manner which the ct. considered to have been authorised by plff.; though the goods were demanded of him & he refused them, nevertheless:—*Held*: to make the demand & refusal sufficient evidence of a conversion he must have had it in his power to deliver up or retain the articles demanded.—*LEACHMAN v. HARRISON* (1850), 3 Nfld. L. R. 153.—*NFLD.*

**Sect. 2.—Demand and refusal: Sub-sect. 3, A. (a) & (b).]**

**276.** —.]—Trover for a bill of exchange. Pleas, not guilty; & not possessed. At the trial it was proved that pltf. had demanded the bill from deft., who said it was in the hands of his attorney; but if pltf. would call again on a day named he would give him the bill. Another demand was made on the day appointed, but the bill was not forthcoming. Verdict passed for deft. On motion to set aside the verdict & enter it for pltf. or for a new trial:—*Held*: pltf. was entitled to the verdict upon the plea of not possessed, but the ct. refused to disturb the verdict on the issue of not guilty, holding that the conduct of deft. did not amount to a conversion, & that the jury were warranted, upon the facts, in finding for deft.—*TOWNE v. LEWIS* (1849), 7 C. B. 608; 13 L. T. O. S. 71; 137 E. R. 241.

*Annotations*:—*Consd. Pillott v. Wilkinson* (1864), 3 H. & C. 345. *Reid. How v. Kirchner* (1857), 11 Moo. P. C. C. 21.

**277. Person having custody ignorant of real owner—Refusal until ownership proved.]**—Refusal to deliver goods, by person ignorant of real owner, no evidence of conversion.—*GREEN v. DUNN* (1811), 3 Camp. 215, n.; 170 E. R. 1359, N. P.

*Annotation*:—*Reid. Garland v. Carlisle* (1837), 11 Bl. N. S. 421, p. 520.

**278. Refusal by general agent—Necessity for proof of special authority.]**—In an action of trover against deft., for not delivering some wine deposited with her by way of security for an advance of money:—*Held*: it was not sufficient evidence of a conversion to show that her son, who acted as her general agent, refused to give it up; & it was necessary to prove, that such agent acted under a special direction, in order to make deft. liable.—*POTHONIER v. DAWSON* (1816), Holt, N. P. 383; 171 E. R. 279, N. P.

*Annotations*:—*Reid. Martin v. Reid* (1862), 11 C. B. N. S. 730; *Donald v. Suckling* (1866), L. R. 1 Q. B. 585; *Burdick v. Sewell* (1883), 10 Q. B. D. 363.

**279. Article received for repair—Refusal to deliver until cost paid.]**—The servant of deft., a coach spring maker, received a spring of pltf.'s to repair, & promised to bring it back by a certain hour. Dft., after that, refused to return without being first paid for the repair:—*Held*: not a sufficient conversion to support trover.—*FAIRMAN v. GRIMBLE* (1826), 2 C. & P. 266; 172 E. R. 120, N. P.

**280. General refusal—Just reason for refusal—No reason given.]**—If, upon a demand of goods, & a refusal to deliver them, there is, in fact, a just reason for the refusal, unless he who demands will make a certain compensation; but the person, who holds the goods, does not allege the just reason as an excuse, & gives a general unqualified refusal; his doing so is evidence of a conversion sufficient to maintain trover.—*THOMPSON v. TRAIL* (1826), 6 B. & C. 36; 2 C. & P. 334; 9 Dow. & Ry. K. B. 31; 5 L. J. O. S. K. B. 34; 108 E. R. 366.

*Annotations*:—*Reid. Cowas-Joe v. Thompson* (1845), 5 Moo. P. C. C. 165; *Thompson v. Small* (1845), 1 C. B. 328. *Mentd. Bushel v. Wheeler* (1844), 15 Q. B. 442, n.; *Tindall v. Taylor* (1854), 4 E. & B. 219; *The Bahia* (1864), 11 Jur. N. S. 90.

**281. Title to some goods only.]—Qu.** whether in trover, if seven things are demanded

when there is a right to five only of them, a general refusal is evidence of a conversion of such five.—*ABINGTON v. LIPSCOMB* (1841), 1 Q. B. 776; 1 Gal. & Dav. 230; 10 L. J. Q. B. 330; 6 Jur. 257; 113 E. R. 1328.

*Annotation*:—*Reid. Harrison v. Powell* (1894), 10 T. L. R. 271.

**282. Refusal to deliver to particular person—Willingness to deliver to another.]**—A., who was paying his addresses to a lady, lost her letters & two memorandum books containing remarks of his own; B. found them, & kept them, on the ground that the books contained matter injurious to him, & also showed them to others; A. sent a person to demand them of B., who, at first, refused to give them up at all, but before the person left, said he would not give them to him, but would to C. or D. C. went, & B. offered to give him the letters & one book, which C., after consulting with A., accepted, saying that he made a sacrifice to obtain the letters:—*Held*: there was a conversion of the whole; but the verdict was only for nominal damages.

The refusal to deliver to one person, though accompanied by a declaration of willingness to deliver to another, is a conversion (*PATTESON, J.*).—*CLENDON v. DINNEFORD* (1831), 5 C. & P. 13; 172 E. R. 855, N. P.

*Annotation*:—*Distd. Philpott v. Kelley* (1835), 3 Ad. & El 106.

**283. Refusal to give complete delivery—Retention of some articles demanded.]**—*CLENDON v. DINNEFORD*, No. 282, *ante*.

**284. Refusal followed by offer to restore—Before issue of writ.]**—Defts. had in their possession a boiler belonging to pltf's. Pltf's demanded it, & defts. at first refused to restore it; but afterwards, & before the issuing of the writ, tendered it:—*Held*: no conversion.—*HAYWARD v. SEAWARD* (1832), 1 Moo. & S. 459.

**285. Ambiguous statement followed by non-delivery.]**—A. lent goods to B., who died, & on his death the goods came into the possession of C., who, when the goods were demanded of him, said that he should do nothing but what the law required. C. did not afterwards deliver up the goods:—*Held*: in an action of trover, to be a sufficient conversion by C.—*DAVIES v. NICHOLAS* (1836), 7 C. & P. 330; 173 E. R. 151.

**286. Reference to solicitor.]**—The widow & administratrix of an insolvent, being applied to by his assignees for some papers that had been in his possession at the time of his decease, answered that they were in the hands of her attorney:—*Held*: not sufficient evidence of a conversion to sustain an action of trover.—*CANOT v. HUGHES* (1836), 2 Bing. N. C. 448; 1 Hodg. 410; 2 Scott, 663; 5 L. J. C. P. 177; 132 E. R. 176.

**287. Refusal on ground of property.]**—*TRIPP v. ARMITAGE*, No. 335, *post*.

**288. Refusal by deceased person—Action against executor.]**—In trover against an exor., it appeared that the watch which was the subject-matter of the action had been given by testatrix to one S. in Sept. 1837; that S. redelivered it to testatrix in Mar. 1838, for the purpose of its being pawned by her; that, on its being demanded by pltf. in Dec. 1838, testatrix said that she would consult her solr.; & that testatrix died in Mar. 1839:—

**286 i. Reference to solicitor.]**—Where the solr. of pltf. went to the Bank of Upper Canada & demanded from the president certain boats, & the president told him he had no answer to give, & referred him to the solr. of the bank, who told him that he was not authorised to give any answer:—

*Held*: sufficient evidence of a demand & refusal to support trover.—*McDONELL (BETHUNE'S ASSIGNEES) v. BANK OF UPPER CANADA* (1850), 7 U. C. R. 252.—*CAN.*

**1. Refusal by servant.]**—Though a refusal by a servant to give up property in his possession, until he can obtain

directions from his master, may not amount to a conversion; he has no right to insist on the owner of the property obtaining the master's consent to the delivery.—*RUEL v. McLEROY* (1855), 9 N. B. R. (3 All.) 212.—*CAN.*

**g. Refusal after action.]**—*BLACKLEY v. DOOLEY* (1889), 18 O. R. 381.—*CAN.*

*Held*: this was sufficient evidence to warrant the jury in finding a conversion within six months before the death.—**RICHMOND v. NICHOLSON** (1839), 8 Scott, 134; 9 L. J. O. P. 1.

**289. Articles "mixed up with other concerns."]**—**INNES v. FITCH** (1843), 2 L. T. O. S. 99.

**290. Reference by defendant to third person—Defendant having control of goods.]**—**MARSHALL v. NEWSOME** (1843), 1 L. T. O. S. 203; 7 Jur. 991.

**291. Refusal to deliver document—Without order of court.]**—In pursuance of a contract for the sale of an estate an abstract of title was delivered, & afterwards returned to debt., who was solr. for the vendor, with remarks & queries. The vendor failing to make out a good title within the time agreed upon, a suit was instituted by the purchaser to compel a specific performance. During the pendency of this suit, the purchaser demanded the abstract from debt., who continued solr. for the vendor in the suit. Debt. answered that he could not part with it without an order from the ct. of, or a master in, Chancery:—*Held*: in an action of trover by the purchaser, such refusal was not evidence of a conversion.—**MACKERETH v. DUNN** (1843), 7 Jur. 278.

**292. Expression of intention to consult solicitor—Followed by non-delivery.]**—(1) A written notice of demand, to deliver up certain deeds, was served on three debts. at different times & places:—*Held*: it was for the jury to say, from the whole of the evidence, whether debts. had not previously agreed to act in such a manner, with reference to the deeds in question, as to render their refusal, although separately given, evidence of a joint conversion.

(2) On one of debts. being served with notice of demand, he merely said, "that he would consult his attorney":—*Held*: this expression, coupled with his subsequent conduct in not giving up the deeds, amounted to evidence of a conversion.—**ATKIN v. SLATER** (1844), 1 Car. & Kir. 356.

**293. ———.]**—**BURROUGHS v. BAYNE**, No. 100, *ante*.

**294. Joint refusal.]**—**ATKIN v. SLATER**, No. 292, *ante*.

**295. Refusal entailing slight delay.]**—The mere fact of a demand & refusal is not conclusive of a conversion, but may be rebutted by surrounding circumstances. Where, therefore, furs were deposited to secure a debt, for which an action was commenced, & stayed upon a judge's order to pay debt & costs, & were demanded upon tender of the debt & costs, but refused by debt., on the ground that his clerk had managed the case, & that he must first see him:—*Held*: the furs having been tendered in a very short time afterwards, there was no evidence of conversion.—**EVANS v. BELL** (1847), 10 L. T. O. S. 109.

**296. Evasion of delivery.]**—**MYERS v. MARKS**, No. 181, *ante*.

**297. Hesitation as to delivery.]**—**SCHREIBER v. ARTIGUES** (1853), 21 L. T. O. S. 142.

**298. Refusal because article destroyed—Defendant not called as witness to destruction.]**—In an action for the conversion of a bill of exchange, it being proved that debt. had said, in answer to a demand for it, that he could not give it up because it had been burnt, & debt. not being called as a witness:—*Held*: the case was rightly left to the jury, & their verdict for pltf. was justified by the evidence.—**M'KEWEN v. COTCHING** (1857), 27 L. J. Ex. 41; 6 W. R. 16.

*Annotation*:—**Mentd.** West v. West (1911), 17 T. L. R. 476.

**299. Claim of lien—Excessive claim.]**—Where a party claims to detain goods upon two causes of lien, in such a way as to dispense with tender of either, he is guilty of a conversion unless he can

sustain both.—**KERFORD v. MONDEL** (1859), 28 L. J. Ex. 303; 33 L. T. O. S. 289.

—*Refd.* Allen v. Smith (1863), 11 W. R. 440.  
—*Refd.* Watson v. Pearson (1853), 11 W. R. 702; The Norway (1864), Brown, & Lush. 377.

**300. Action on promissory note—Payment of amount into court—Refusal to deliver cancelled note—Until money drawn out.]**—A promissory note having been sued upon in a county ct., & the money paid into ct., & a demand was made for the cancelled note after the holder had notice of the payment, but before he had had time to take the money out of ct.:—*Held*: his refusal to give up the note did not constitute a detention.—**NORTON v. BLACKIE** (1864), 13 W. R. 80.

**301. Refusal to sign bill of lading—By master of ship.]**—By a charterparty debts. agreed to carry for plf's. a cargo of coke from C. to B., the master to sign the bill of lading as presented within twenty-four hours after the cargo should be on board, or pay 4d. per ton per day for each day's delay as damages. The cargo having been loaded, a bill of lading was presented to the master, which he refused to sign without inserting a clause that the vessel should not be liable for duties on cargo caused by non-arrival before a specified date. Plf's. having declined to accept such a bill of lading, the master sailed with the cargo for B. without signing any bill of lading. Plf's. directed their consignee to deduct the penalty under the foregoing clause. The master was willing to deliver the cargo on payment of the freight in full, but the consignee having insisted upon deducting the penalty, the master declined to deliver the cargo, & landed it & stored it at B.:—*Held*: there had been no conversion of the cargo.—**JONES v. HOUGH** (1879), 5 Ex. D. 115; 49 L. J. Q. B. 211; 42 L. T. 108; 4 Asp. M. L. C. 248, C. A.

*Annotations*:—**Refd.** Armstrong v. Allan (1892), 9 T. L. R. 38. **Mentd.** The Princess (1894), 70 L. T. 388; Rayner v. Redemakt, Coudor, [1893] 2 Q. B. 289.

(b) *Delivery made Dependent on Unwarranted Condition.*

**302. Payment of expenses—Keep of lost dog.]**—Trover lies for a dog that was lost, & which debt. refuses to deliver, unless paid for his keeping.—**BINSTEAD v. BUCK** (1776), 2 Wm. Bl. 1117; 96 E. R. 660.

*Annotations*:—**Consd.** Nicholson v. Chapman (1793), 2 Hy. Bl. 254; Jebara v. Ottoman Bank, [1927] 2 K. B. 254.

**303. ——— Of auctioneer—Goods sent by wrong-doer.]**—The hirer of a piano, who lends it to an auctioneer to be sold, is guilty of a conversion; & so is the auctioneer who refuses to deliver it up unless the expense incurred be first paid.—**LOESCHMAN v. MACHIN** (1818), 2 Stark. 311; 171 E. R. 656, N. P.

*Annotations*:—**Distd.** Ferguson v. Cristall (1829), 5 Bing. 305. **Apld.** Cooper v. Willomatt (1845), 1 C. B. 672. **Refd.** Fenn v. Bittleston (1851), 7 Exch. 152.

**304. Demand of inventory & receipt.]**—If A. has in his possession a box containing papers belonging to a person deceased, & send the box with its contents to his solrs. with directions to deliver the box & papers to the exor. on his giving an inventory of them, & a receipt:—*Held*: trover lies against the solrs. if they refuse to deliver the box & papers to the exor., he refusing to give an inventory & receipt, although the solrs. offered to give them up if the exor. would give an inventory & receipt.

Defts. had no right to insist upon an inventory before they delivered up the box. Pltf., as exor., was entitled to the possession of the papers of the deceased, & that being so he is entitled to recover

*Sect. 2.—Demand and refusal: Sub-sect. 3, A. (b), (c) & (d).]*

in this action (ABBOTT, C.J.).—COBBETT v. CLUTTON (1826), 2 C. & P. 471; 172 E. R. 213, N. P.

**305. Payment of debt due.]**—If a person who has possession of another's goods is desired by the owner to send them to a particular place, & he not only refused to send them to that place, but says generally that he will not deliver them up unless payment of a debt due from the owner to him is guaranteed; such general refusal is evidence of a conversion, although he might not be bound to send the goods to any particular place.—SHARP v. PRATT (1827), 3 C. & P. 34; 172 E. R. 311, N. P.

**306. Payment of salvage.]**—(1) A vessel having run ashore on the coast of Essex was assisted by the owner of a smack, who put down an anchor & an hawser attached to the vessel for the purpose of securing her. The smack then left her for the purpose of carrying away some of her stores, with the intention however of returning. The owner of another smack came to her afterwards, & finding no one in or near the vessel & her deck under water, took away the anchor & hawser, & delivered them up to the deputy vice-admiral of Essex:—*Held*: the anchor & hawser were not parted with, or left & abandoned, within the meaning of 1 & 2 Geo. 4, c. 75, s. 1, & the deputy vice-admiral was not justified in detaining them until salvage was paid, or security given for its payment.

(2) The deputy vice-admiral, who received the anchor & hawser, alleged to have been left at sea, from the finder, refused, on application by the real owner, to deliver them up until the salvage was paid, or security given for the payment of it:—*Held*: this was a conversion; but if he had merely refused to deliver them up until it was ascertained whether salvage was due or not it would not have amounted to a conversion.—CLARK v. CHAMBERLAIN (1836), 2 M. & W. 78; 2 Gale, 217; 6 L. J. Ex. 2; 150 E. R. 676.

*Annotations:—As to (2) Distd. Kerford v. Mondel (1859), 28 L. J. Ex. 303. Apd. Burroughes v. Bayne (1860), 5 H. & N. 296.*

**307. Carriage of goods to particular station.]**—Pltfs. bought timber at Hull, which was by their direction delivered to the York & North Midland Ry. co. at Hull, to be forwarded to pltfs. at Nottingham. The timber was carried over the Ambergate Ry. co. to the Nottingham station, which belonged to the Midland Ry. co., & came into the possession of the Midland co. Pltfs. made a written demand of the timber on the Midland co., with an offer to pay any expenses to which it was liable, but this was refused, & they were told that they could only have it by taking it back to the first station on the Ambergate line, five miles from Nottingham:—*Held*: evidence of a conversion by the Midland Ry. co.—ROOKE v. MIDLAND RY. CO. (1852), 2 Saund. & M. 81; 20 L. T. O. S. 178; 16 J. P. 821; 16 Jur. 1069.

**308. Delivery of bills of lading.]**—Shipping brokers having represented that a ship, described as on their "line," would sail on or about a certain day. *Qu.*: whether there is evidence in which a jury can find them liable as on a warranty that she should so sail. *Semle*: if they, without authority in fact, reship the goods in another ship, insuring them in their own names, & refusing delivery except on handing over the bills of lading sent by the first ship, there being no authority in law, so to act, there is evidence of a conversion on which they may be liable.—SIMPSON v. YOUNG (1859), 1 F. & F. 708, N. P.

**309. Demand of receipt.—Knowledge of plaintiff's ownership.]**—A person having in his possession the goods of another, whom he knows to be the owner, has no right to retain them until he has a written receipt for them.—BARNETT v. CRYSTAL PALACE CO. (1861), 2 F. & F. 443, N. P.; *subsequent proceedings*, 4 L. T. 403.

**310. Payment of freight & charges.]**—Pltf. contracted to purchase a certain quantity of goods from P. & co. P. & co. purchased the goods from C., whom they paid, & shipped them from Cyprus to London for & on account of defts., & delivered the invoice to pltf. They drew a bill on pltf.'s firm in London to the order of C. C. discounted it with defts. & forwarded it to defts.' London agents, together with bills of lading drawn to the order or assigns of P. & co., with instructions that pltf.'s London firm would be ready to accept & pay it at maturity against the delivery of the bills of lading. The bill being presented to pltf. he refused to accept it without receiving the bills of lading. Thereupon defts. took possession of the cargo, & notwithstanding that pltf. offered to pay the bill of exchange, refused to deliver to him the bill of lading without payment of the bill, together with the freight & charges, & eventually sold the cargo for less than its value. On a special case the arbitrator found, as a matter of fact, that the parties had intended that the property should pass to pltf. on shipment of the goods:—*Held*: such finding was justified by the facts; the property had passed to pltf., on the tender of payment of the bill of exchange, & as defts. had no title to the goods, pltf. could maintain an action against them for the conversion thereof.—MIRABITA v. IMPERIAL OTTOMAN BANK (1878), 3 Ex. D. 164; 47 L. J. Q. B. 418; 38 L. T. 597; 3 Asp. M. L. C. 591, C. A.

*Annotations:—Consd. The Annie Johnson, The Kronprinsessan Margareta, [1918] P. 154. Rejd. Dupont v. British South Africa Co. (1901), 18 T. L. R. 24; Biddell v. Clemens Horst Co. [1911] 1 K. B. 934; Arnold v. Karberg v. Blythe Green, Jourdain, Theodor Schneider v. Burrell & Newsum, [1915] 2 K. B. 379; The Parchim, [1918] A. C. 157. Mentd. Re Nathan, Ex p. Stapleton (1879), 10 Ch. D. 586; The Miramichi, [1915] P. 71; Guaranty Trust Co. of New York v. Hannay, [1918] 2 K. B. 623; Wilcock v. Pinto, [1925] 1 K. B. 30.*

*(c) Refusal during Reasonable Time for Inquiry.*

**311. Refusal not tortious.]**—CLARK v. CHAMBERLAIN, No. 308, ante.

**312. —.]**—On July 24 goods were pledged with deft., a pawnbroker, in the name of Mary Warne, & the duplicate was made out accordingly; she was, in fact, the wife of pltf. Vaughan, but it did not appear that this fact was then known to deft. A few days afterwards the same person applied to deft. for a copy of the duplicate, & a form of declaration of the loss of it, pursuant to 39 & 40 Geo. 3, c. 99, 16, & Statutory Declarations Act, 1835 (c. 62), s. 12. On Aug. 6, pltf. produced the duplicate to deft., & demanded the goods, tendering the money advanced on them & the interest, but deft. refused to deliver them, on the ground of the declaration having been obtained. Pltf. applied to a magistrate to compel him, & deft. then, on Aug. 9, learnt that the party who pledged the goods was pltf.'s wife:—*Held*: upon these facts the judge at the trial was wrong in directing the jury that the detention of the goods was in point of law a conversion, & he ought to have left it to them to say whether deft. had a *bonâ fide* doubt as to the title to the goods, & if so, whether a reasonable time for that doubt to be cleared up, by the party's going before a magistrate & verifying the declaration, pursuant to the 39 Geo. 3, c. 99, s. 16, & elapsed on Aug. 6; &

if it had, the refusal then to deliver them to pltf. amounted to a conversion.—*VAUGHAN v. WATT* (1840), 6 M. & W. 492; 9 L. J. Ex. 272; 151 E. R. 506.

*Annotations*:—*Consd.* Charrinton v. Johnson (1845), 13 M. & W. 856. *Apld.* Pillott v. Wilkinson (1864), 3 H. & C. 345. *Consd.* Hollins v. Fowler (1875), L. R. 7 H. L. 757. *Refd.* Burslem v. Attenborough (1873), L. R. 8 C. P. 122; Dalton v. Angus (1881), 6 App. Cas. 740.

313. —.]—*PILLOTT v. WILKINSON*, No. 97, ante.

314. —.]—(1) Pltf.'s watch, which had been bought some years previously at deft.'s shop, was stolen from pltf., who gave information of the theft to deft. The watch was pledged with a pawnbroker, & eventually, together with a large number of other unredeemed pledges, was sold by auction in a room on the first floor of a building in the City of London, which room was used solely for the sale by auction of all classes of goods. Shortly afterwards the watch was purchased in a jeweller's shop in the country by B., who sent it to deft. for an opinion as to whether it was a genuine antique watch. Deft. wrote both to pltf. & to B., telling them that it was the watch which had been stolen, & inquiring as to their wishes in the matter. No answer was sent by pltf. to deft.'s letter, but a few days afterwards a clerk of pltf.'s solrs. called at deft.'s shop &, on being shown the watch, demanded that it should be then & there handed over to him, & on this request being refused at once served deft. with a writ in detinue which he had taken out on behalf of pltf. about two hours previously:—*Held*: upon the facts given in evidence there had been no wrongful refusal on the part of deft. to return the watch to pltf. before the date of the issue of the writ, & pltf. had no cause of action against deft. either in detinue or in trover.

The authorities show clearly, as one would expect, that a man does not act unlawfully in refusing to deliver up property immediately upon demand made. He is entitled to take adequate time to inquire into the rights of claimant (*FLETCHER MOULTON*, L.J.).

(2) The next event in the history of the case is the issue of the writ, & pltf. must establish that at the moment of its issue he was in a position to bring an action of detinue: in other words, that there had been a wrongful denial by deft. of pltf.'s title to the watch (*FLETCHER MOULTON*, L.J.).—(*LAYTON v. LE ROY*, [1911] 2 K. B. 1031; 81 L. J. K. B. 49; 105 L. T. 430; 27 T. L. R. 479; 75 J. P. 521, C. A.)

*Annotations*:—*Generally*, *Refd.* Eastern Construction Co. v. National Trust Co. & Schmidt, [1914] A. C. 197; *Akdonalnoye Obshchestvo A.M. Luther v. Sagor*, [1921] 1 K. B. 456.

#### (d) Claim by Third Party.

315. *Whether refusal sufficient.*—A. brought an action of trespass against B. for taking away a filly; B. justified the taking as the servant of C. The jury found a verdict for A. with damages, subject to a reference to D., one of the jurors, to ascertain to whom she belonged, which was to depend on whether a scar should appear on a certain part of her body, & in case it should, the verdict for A. was to stand, if not, it was to be entered for B. The filly was delivered to D. by the consent of all parties, he made his award & found her to belong to A., & accordingly ordered the verdict found for him to stand. C., ten days after the award, demanded the filly of D., who refused to deliver her, & a fortnight after, he brought an action of trover for her recovery:—*Held*: the detention of the filly by D. did not, under the circumstances, amount to a conversion, as C. was no party to the

original action, & as it did not appear that he was authorised by B. to make the demand, to whom alone D. was bound to deliver her, he only being liable for the damages awarded to A.—*GUNTON v. NURSE* (1821), 2 Brod. & Bing. 447; 5 Moore, C. P. 259; 129 E. R. 1039.

316. —.]—The captain of a ship, who had taken goods on freight, & claimed to have a lien upon them, delivered them to a bailee. The real owner demanded them of the latter, & he refused to deliver them without the directions of the bailor:—*Held*: the bailor not having any lien upon the goods, the refusal by the bailee was sufficient evidence of a conversion.—*WILSON v. ANDERTON* (1830), 1 B. & Ad. 450; 9 L. J. O. S. K. B. 48; 109 E. R. 855.

*Annotations*:—*Consd.* Wetherman v. London & Liverpool Bank of Commerce (1914), 31 T. L. R. 20. *Refd.* Hawkes v. Dunn (1831), 1 Tyr. 415; *Catterall v. Kenyon* (1842), 6 Jur. 507; *Marshall v. Newson* (1843), 7 Jur. 991; *Skinner v. Lambert* (1850), 16 L. T. O. S. 244; *Lee v. Bayes* (1856), 18 C. B. 599; *Thorne v. Tilbury* (1858), 31 L. T. O. S. 206; *The Tigris* (1863), Brown & Lush. 38; *Biddle v. Bond* (1865), 6 B. & S. 225; *Glyn, Mills, Currie v. East & West India Dock Co.* (1880), 5 Q. B. D. 129.

317. —.]—In an action of trover for a chaise, it appeared that B. had hired the chaise in question from pltf., & had placed it at livery with deft., & that whilst it was in deft.'s possession, in the City of London, it was attached by process out of the Sheriff's Ct. Pltf. demanded the chaise, but deft., alleging that it had been attached, refused to deliver it:—*Held*: there was no evidence of a conversion by deft., the chaise being at the time of the demand in the custody of the law, & not of deft.—*VERRALL v. ROBINSON* (1835), 2 Cr. M. & R. 495; 4 Dowl. 242; 1 Gale, 244; 5 Tyr. 1069; 150 E. R. 213.

*Annotations*:—*Distd.* *Catterall v. Kenyon* (1842), 3 Q. B. 310; *Pillott v. Wilkinson* (1864), 3 H. & C. 345. *Refd.* *Towne v. Lewis* (1819), 7 C. B. 608; *Levy v. Lovell* (1880), 14 Ch. D. 234.

318. —.]—The mere possession of a chattel by A., which has been taken from the premises of pltf. by B., & his subsequent refusal to deliver it up without the consent of B., is not enough in itself to fix A. in trover; but it is necessary to go further & show that he was lending himself to further the views of B.—*JENNINGS v. WALKER & HAWES* (1839), 3 J. P. 504.

319. —.]—In trover, a demand, & a qualified refusal to deliver on the ground that deft. had received a notice of demand from a third party, is evidence of a conversion.—*ATKINSON v. MARSHALL* (1842), 12 L. J. Ex. 117.

320. —.]—In trover, a demand & a refusal on the ground of a claim of right by a third party, is evidence of a conversion.—*CAUNCE v. SPANTON* (1844), 7 Man. & G. 903; 135 E. R. 367; *sub nom.* *CANNEE v. SPANTON*, 8 Scott, N. R. 714; 14 L. J. C. P. 23; 8 Jur. 1008.

321. —.]—*PILLOTT v. WILKINSON*, No. 97, ante.

322. —.]—A wharfinger received notice that certain goods deposited at his wharf were marked with a fraudulent imitation of a trade mark, & that the owner of the trade mark was about to apply to the Ct. of Ch. for an injunction to prevent the sale of the goods; after the injunction had been granted, but before the wharfinger had notice that it had been granted, he refused to deliver the goods to the owner:—*Held*: he was justified in equity in such refusal, & the owner of the goods would be restrained from suing him at law for a wrongful conversion of the goods.—*HUNT v. MANIERE* (1865), 5 New Rep. 295; 34 L. J. Ch. 142; 11 L. T. 723; 11 Jur. N. S. 73; 13 W. R. 363, L. J.J.

*Sec. 2.—Demand and refusal: Sub-sect. 3, A. (d), & B.; sub-sect. 4. Sect. 3.]*

**328.** —[Pltf., a British subject, instructed his London bankers to transfer certain shares to defts. "to the order of" a German bank, which had arranged to transfer them to New York. The shares were accordingly handed over to defts. "to the order of" the German bank, but the latter failed to give directions for their transfer to New York, & when war broke out between England & Germany the shares were still in deft.'s hands. Pltf. claimed them back from defts. & brought an action for their delivery to him. The German bank had no lien upon the shares:—*Held*: as pltf. had a right, as against the German bank, to the delivery of the shares, defts. were bound to hand them over to pltf.

I cannot see how it is an answer for defts. to say "Yes, the shares are yours, but we will not give them up except by the authority of a third person, although you have a right as against that third person to have them handed over" (SCRUTTON, J.).—*WETHERMAN v. LONDON & LIVERPOOL BANK OF COMMERCE, LTD.* (1914), 31 T. L. R. 20.

#### *B. Action for Detinue.*

**324. Mere refusal.**—*ISAACK v. CLARK* (1615), 2 Bulst. 306; *Moore, K. B.* 841; 80 E. R. 1143; *sub nom.* *ISAACK v. CLARKE*, 1 Roll. Rep. 126.

*Annotations*:—*Refd.* Manby v. Scott (1662), Q. Bridg. 229; Mires v. Solobay (1677), 2 Mod. Rep. 242; Cooper v. Willomatt (1815), 1 C. B. 672; Clements v. Flight (1846), 1 New Pract. Cas. 567; Hollins v. Fowler (1875), L. R. 7 H. L. 757. *Mentd.* Parker v. Kett (1701), 12 Mod. Rep. 466; Garland v. Carlisle (1837), 4 Scott, 587; Mason v. Farnell (1844), 1 Dow. & L. 576; Whitehead v. Harrison (1844), 6 Q. B. 423.

#### *SUB-SECT. 4.—OPERATION OF REFUSAL.*

**325. Whether conversion or evidence of conversion.**—[Non-delivery of goods upon demand is evidence of a conversion.—*EASON v. NEWMAN* (1596), 1 Cro. Eliz. 495; 78 E. R. 745; *sub nom.* *EANTON v. NEWMAN*, *Moore, K. B.* 460; *sub nom.* *EAST v. NEWMAN*, *Goulds*. 152.

**326.** —[*AGAR v. LITTLE* (1617), Hob. 187; *Brownl.* 5; *Hut.* 10; 80 E. R. 331.

*Annotations*:—*Refd.* Calvert v. Arnold (1662), 1 Sld. 96; R. v. De Haughton (1718), 1 Stra. 83.

**327.** —[*WEBB v. WASHBORN* (1652), Sty. 300; 82 E. R. 777.

*Annotations*:—*Refd.* Taylor v. Wells (1670), 2 Saund. 74; Hartford v. Jones (1697), 2 Salk. 654. *Mentd.* Nat v. Bartlett (1710), Park. 278.

**328.** —[The demand & refusal . . . is no conversion, though it is as evidence of it to the jury (*per CUR.*).—*MIRES v. SOLEBAY* (1677), 2 Mod. Rep. 242; 86 E. R. 1050.

*Annotations*:—*Refd.* Anon. (1704), 2 Salk. 655; Alexander v. Southey (1821), 5 B. & Ald. 247; Davies v. Vernon (1844), 6 Q. B. 443.

**329.** —[*HEYLING v. HASTINGS* (1699), as reported in 1 Ld. Raym. 421; 1 Com. 54; 5 Mod. Rep. 425; 12 Mod. Rep. 223; 91 E. R. 30.

*Annotations*:—*Refd.* Anon. (1704), 2 Salk. 655. *Mentd.* Stafford v. Forcer (1714), 10 Mod. Rep. 311; Loyd v. Lee (1718), 1 Stra. 94; Hurt v. Parker (1817), 1 B. & Ald. 92; Verham v. Raynal (1824), 2 Bing. 306; Soles v. Jacob (1826), 11 Moore, C. P. 553; Tanner v. Smart (1827), 6 B. & C. 603; Williams v. Moor (1843), 12 L. J. Ex. 253; Spencer v. Hennerde, [1922] 2 A. C. 507.

**330.** —[If a captain of a ship refuse to deliver a sailor his clothes, etc., it is a conversion.—*ANON.* (1699), 12 Mod. Rep. 344; 88 E. R. 1368.

**331.** —[A demand of goods by, & a refusal to restore them to, the right owner, is not merely an evidence, but an actual conversion of them.—

*BALDWIN v. COLE* (1704), 6 Mod. Rep. 212; Holt, K. B. 707; 87 E. R. 964, N. P.

*Annotations*:—*Consd.* M'Comble v. Davies (1805), 6 East, 538; Mallalieu v. Laugher (1828), 3 C. & P. 551; Burroughes v. Bayne (1860), 2 L. T. 16; Spackman v. Foster (1853), 48 L. T. 670. *Refd.* Weeding v. Aldritch (1839), 1 Per. & Dav. 657; White v. Teal (1840), 12 Ad. & El. 106; Pillot v. Wilkinson (1863), 2 H. & C. 72.

**332.** —[Taking the property of another by assignment from one who had no authority to dispose of it; as taking an assignment of tobacco in the King's warehouse by way of pledge from a broker who had purchased it there in his own name for his principal; & refusing to deliver it to the principal after notice & demand by him; none other than the person in whose name it is warehoused being able to take it out; is a conversion.—*M'COMBLE v. DAVIES* (1805), 6 East, 538; 2 Smith, K. B. 557; 102 E. R. 1393; *subsequent proceedings*, 7 East, 5.

*Annotations*:—*Distd.* Spackman v. Foster (1853), 11 Q. B. D. 99. *Apld.* Lloyds Bank v. Chartered Bank of India (1928), 97 L. J. K. B. 609. *Refd.* Pickering v. Busk (1812), 15 East, 38; Featherstonehaugh v. Johnston (1818), 2 Moore, C. P. 181; Mallalieu v. Laugher (1828), 3 C. & P. 551; Weeding v. Aldrich (1839), 9 Ad. & El. 861; Towne v. Lewis (1849), 7 C. B. 608; Bird v. Bond (1863), 1 New Rep. 444; Donald v. Suckling (1866), L. R. 1 Q. B. 585; Cole v. North Western Bank (1875), L. R. 10 C. P. 354; Fine Art Soc. v. Union Bank of London (1886), 17 Q. B. D. 705; Gordon v. London, City & Midland Bank, Gordon v. Capital & Counties Bank, [1902] 1 K. B. 242; Clayton v. Le Roy (1911), 81 L. J. K. B. 49; Morrison v. London, County & Westminster Bank, [1914] 3 K. B. 356; Lowther v. Harris, [1927] 1 K. B. 393; Reckitt v. Barnett, Pembroke & Slater, [1928] 2 K. B. 244.

**333.** —[In trover for a landau, proof of a demand of the landau & non-delivery in pursuance of it, is evidence of a conversion.—*WATKINS v. WOOLLEY* (1819), Gow, 60, N. P.

**334.** —[A bill against an attorney was filed of Michaelmas term, & appeared by the memorandum to have been filed on Nov. 28:—*Held*: a demand & refusal is evidence of a prior conversion, & therefore where deeds were in deft.'s possession prior to Michaelmas term, & the demand & refusal proved were on the day after that term, it was held that this was evidence of a conversion before the term.—*WILTON v. GIRDLESTONE* (1822), 5 B. & Ald. 847; 106 E. R. 1400; *sub nom.* *WILSON v. GIRDLESTONE*, 1 Dow. & Ry. K. B. 488.

*Annotations*:—*Consd.* Slatter v. Slatter (1834), 1 Scott, 82. *Refd.* Whipple v. Manley (1836), 1 M. & W. 432; Clayton v. Le Roy, [1911] 2 K. B. 1031.

**335.** —[B., a builder, contracted with A. & others, trustees of a new hotel about to be erected by a co. of proprietors, to build the hotel, except as to the ironmonger's, plumber's, & glazier's work, for a specified sum, & covenanted to complete certain portions of the work, within certain specified periods, being paid by instalments at corresponding dates; & that, if he should neglect to complete any portion within the time limited, he should forfeit & pay the sum of £250 as liquidated damages. The agreement then contained a clause empowering the trustees, in case (*inter alia*) B. should become bkpt., to take possession of the work already done by him, & to put an end to the agreement, which should be altogether null & void: & that the trustees, in such case, should pay B. or his assignees only so much money as the architect of the co. should adjudge to be the value of the work actually done & fixed by B., as compared with the whole work to be done. The course of business during the progress of the work was for the clerk of the works to inspect every article which came in under the contract, & none were received except on his approval. After the works had proceeded some time, B. became bkpt. Before his bkpy., certain wooden sash frames had



been delivered by him on the premises of the co., approved by the clerk of the works, & returned to B. for the purpose of having iron pulleys, belonging to the trustees, affixed to them; & at the time of the bkpcy., these frames, with the pulleys attached to them, were at B.'s shop. He afterwards, but before the issuing of the fiat, redelivered them to the trustees; & the sash frames being afterwards demanded of them by B.'s assignees, they gave an unqualified refusal to deliver them up:—*Held*: (1) the property in the wooden sash frames had not passed to the trustees at the time of the bankruptcy; (2) they were not entitled to retain them under the agreement, as being work already done, they not having been fixed to the hotel; but even if they were within that clause of the agreement, it could not bind the assignees, inasmuch as their right accrued on the bkpcy., whereas the option of the trustees was not to be exercised until after the bkpcy.; (3) the refusal of the trustees not having been limited to the pulleys, the demand & refusal were sufficient evidence of a conversion by them of the wooden sash frames, so as to entitle B.'s assignees to recover them in trover.—*TRIPP v. ARMITAGE* (1839), 4 M. & W. 687; 1 Horn & H. 442; 8 L. J. Ex. 107; 3 Jur. 249; 150 E. R. 1597.

*Annotations*:—As to (1) *Apld. Re Blyth Shipbuilding & Dry Docks Co., Forster v. Blyth Shipbuilding & Dry Docks Co.*, [1926] Ch. 494. *Refd. Turley v. Bates* (1863), 2 H. & C. 200. As to (2) *Apld. Rouch v. G. W. Ry.* (1841), 2 Ry. & Can. Cas. 505. *Apprvd. Seath v. Moore* (1886), 11 App. Cas. 350. *Refd. Clarke v. Bulmer* (1843), 1 Dow. & L. 367; *Banbury & Cheltenham Direct Ry. v. Daniel* (1884), 54 L. J. Ch. 265. *Generally, Mentd. Young v. Cooper* (1851), 6 Exch. 259.

336. —.]—Under the plea of not guilty in trover, deft. cannot set up an absolute property in himself in the chattel, by sale from pltf., although the only evidence of a conversion is a demand & refusal.—*BARTON v. BROWN* (1839), 5 M. & W. 298; 151 E. R. 127.

*Annotation*:—*Refd. White v. Teal* (1840), 12 Ad. & El. 106. 337. —.]—*RUSHWORTH v. TAYLOR*, No. 271, *ante*.

338. —.]—*TINGLEY v. DALTON* (1847), 8 L. T. O. S. 388.

339. —.]—*MYERS v. MARKS*, No. 181, *ante*.

340. —.]—Trover, for quicks & plants, against a railway co. Plea: not guilty. On the trial, the judge ruled that there was sufficient evidence of a conversion by defts.:—*Held*: to give up, or refuse to give up, on demand, goods left with defts. in the course of their trade as carriers, was an act within the scope of such authority; & on the construction put on the bill of exceptions by the majority of the judges, these thorns were so left, & therefore there was evidence of a conversion by defts.—*GILES v. TAFF VALE RY. CO.* (1853), 2 E. & B. 822; 2 C. L. R. 132; 22 L. T. O. S. 157; 18 Jur. 510; 118 E. R. 975; *sub nom. TAFF VALE RY. CO. v. GILES*, 23 L. J. Q. B. 43; 2 W. R. 57, Ex. Ch.

*Annotations*:—*Mentd. Slim v. G. N. Ry.* (1854), 23 L. J. C. P. 166; *Goff v. G. N. Ry.* (1861), 3 E. & E. 672; *Moore v. Met. Ry.* (1872), L. R. 8 Q. B. 36; *Apollo (Owners) v. Port Talbot Co., The Apollo*, [1891] A. C. 499.

341. —.]—In trover, when it appears that

deft. has had possession of pltf.'s goods, & has not in fact returned them when demanded, he will be liable as for a conversion, even though he has not used them, nor in terms claimed them as his; for a jury will be told to look to his acts rather than his words, & the proper course, if he does not claim the goods, is to return them; & if he has not done so before action, to take out a summons to stay proceedings on delivering them up.—*FOTHERGILL v. LOVEGROVE* (1860), 2 F. & F. 132, N. P.

Time begins to run.—For purpose of limitation of actions—Recovery of title deeds.—See LIMITATION OF ACTIONS, Vol. XXXII., p. 344, Nos. 269–272.

### SECT. 3.—PERSONS LIABLE.

342. Only persons having had possession.]—*HARRISON v. PRYSE* (1740), as reported in Barn. Ch. 524; 27 E. R. 664, L. C.

*Annotation*:—*Mentd. Davis v. Bank of England* (1824), 2 Bing. 393.

343. —.]—Trover does not lie for one not having the property, nor against one in possession under & making sale by order of the owner, for conversion is the gist of it; & if no conversion at the moment of sale, refusal afterwards will not do.—*WYEMOUTH v. BOYER* (1792), 1 Ves. 416; 30 E. R. 414.

*Annotations*:—*Mentd. Harford v. Rees* (1853), 9 Hare, App. II. LXX; *Blogg v. Johnson* (1867), 2 Ch. App. 225.

344. —.]—*JONES v. DOWLE*, No. 517, *post*.

345. —.]—In Sept. 1889, pltf. pledged a piano with husband of deft. The same year he converted it to knowledge of pltf. In Mar. 1897, he died, & pltf. then tendered the money to present deft., his extrix, & widow, & demanded the return of the piano:—*Held*: deft. could not be liable, & as she never had possession of or any property in the piano no action of conversion would lie against her.—*HINCHCLIFFE v. SHARPE* (1898), 77 L. T. 714, D. C.

346. Person selling by order of owner.]—*WEYMOUTH v. BOYER*, No. 343, *ante*.

347. Person fraudulently asserting possession.—Thereby inducing plaintiff to bring action.]—If a person who writes an answer to a demand made upon another person of certain things says that he has got them, & thereby induces claimant to bring an action against him, he is liable to such claimant in detinue, although it does not appear that he had the general controlling power over the things.—*HALL v. WHITE* (1827), 3 C. & P. 136; 172 E. R. 136, N. P.

348. Person improperly parting with possession.]—*JONES v. DOWLE*, No. 517, *post*.

349. Tenant in common.—At suit of co-tenant.]—One of two tenants in common of a chattel is not liable in trover at the suit of his co-tenant for the mere sale of the chattel; though he may be, for such a disposition as amounts to a destruction of it. Deft., an officer of the Palace Ct., seized, under a *fi. fa.* against A., partnership effects of A. & B. & sold them to various purchasers, who carried them away. In trover at the suit of the

possession.—*UNION BANK OF CANADA v. LUND (Alta.)*, [1922] 2 W. W. R. 1297; 65 D. L. R. 267.—CAN.

k. Infant.—In possession under lien agreement.]—An infant who sells goods of which he is in possession under a lien agreement is liable in damages for the conversion, since it is not a wrong connected with the contract.—*MCCALLUM v. URCHAK (Alta.)*, [1926] 1 W. W. R. 137.—CAN.

l. Joint liability.]—Logs were wrongfully cut on pltf.'s land by P., one of

### PART II. SECT. 3.

342 i. Only persons having had possession.]—Pltf., having a licence from the owner of land to cut timber thereon, contracted with A. to manufacture the timber & raft it for pltf.:—*Held*: the property in the timber vested in pltf. as soon as it was cut without any delivery, & he could maintain trover for it against a person to whom A. had wrongfully sold it.—*SEGEE v. PERLEY* (1841), 3 N. B. R. (1 Kerr) 439.—CAN.

342 ii. —.]—*BELL v. CARLYLE* (1883), 22 N. B. R. 453.—CAN.

342 iii. —.]—*BUCK v. KNOWLTON* (1892), 21 S. C. R. 371.—CAN.

342 iv. —.]—*KIRKLAND v. RIND-ERNIGHT* (1899), 4 Tett. L. R. 195.—CAN.

342 v. —.]—*MACKINTOSH v. GALBRAITH & ARTHUR* (1900), 3 F. (Ct. of Sess.) 66; 38 Sc. L. R. 53; 8 S. L. T. 241.—SCOT.

h. Person innocently parting with



**Sect. 3.—Persons liable. Part II. Sects. 1 & 2:**  
**Sub-sect. 1, A. & B.]**

assignees of B., who had become bkpt. :—*Held*: the seizure & sale, under the circumstances, did not amount to a conversion.—*MAYHEW v. HERRICK* (1849), 7 C. B. 229; 18 L. J. C. P. 179; 13 Jur. 1078; 137 E. R. 92.

*Annotations*:—*Consd.* *Fraser v. Kershaw* (1856), 2 K. & J. 496. *Expld.* *Jacob v. Seward* (1872), L. R. 5 H. L. 464. *Mentd.* *Tancred v. Allgood* (1859), 28 L. J. Ex. 362.

**350. Joint liability—Partners.]**—The managing partner conducting the business of a mining co-partnership refused to deliver up ore belonging to the former tenants of the mine, on the ground that it was partnership property, & there was subsequently a notice by the attorney for defts., offering to deliver up tools that were in the same building with the ore, but the notice was silent as to the ore :—*Held*: evidence of conversion by all the partners.—*LLOYD v. BELLIS* (1856), 27 L. T. O. S. 203.

**Principal & agent.]**—*See, generally*, *AGENCY*, Vol. I., pp. 257 *et seq.*

**Ballor & ballee.]**—*See* *BAILMENT*, Vol. III., pp. 51 *et seq.*

**Carriers.]**—*See* *CARRIERS*, Vol. VIII., pp. 227, 228, Nos. 1460–1470.

**Companies & corporations.]**—*See* *COMPANIES*, Vol. X., p. 1176, No. 8345; *CORPORATIONS*, Vol. XIII., p. 399, No. 1222.

**Executor.]**—*See* *EXECUTORS*, Vol. XXIV., p. 647, Nos. 6731–6738.

**Husband & wife.]**—*See* *HUSBAND & WIFE*, Vol. XXVII., pp. 214, 215, Nos. 1853–1860.

**Innkeeper.]**—*See* *INNS & INNKEEPERS*, Vol. XXIX., p. 17, No. 223.

**Master & servant.]**—*See* *MASTER & SERVANT*, Vol. XXXIV., pp. 148, 186, 187, 521, Nos. 1167, 1532–1536, 4396, 4397.

**Acts of contractors & other servants.]**—*See, generally*, *MASTER & SERVANT*, Vol. XXXIV., pp. 155 *et seq.*

**Pawners & pawnees.]**—*See* *PAWNS & PLEDGES*, Vol. XXXVII., pp. 11, 12, Nos. 63–74.

**Sheriffs & bailiffs.]**—*See* *BANKRUPTCY*, Vol. V., pp. 824, 825, Nos. 6996–7008; *EXECUTION*, Vol. XXI., pp. 543, 544, Nos. 1185–1191; *SHERIFFS & BAILIFFS*, Vol. XLII., pp. 116, 117, Nos. 742–745.

## Part III.—Enforcement of Liability.

### SECT. 1.—JURISDICTION OF COURT.

**Jurisdiction of county court.]**—*See* *COUNTY COURTS*, Vol. XIII., pp. 469, 473, 517, Nos. 180–188, 218, 667–670.

**Detention of railway trucks.]**—*See* *CARRIERS*, Vol. VIII., pp. 205, 206, Nos. 1314–1319.

### SECT. 2.—RIGHT TO RELIEF.

#### SUB-SECT. 1.—NECESSITY FOR POSSESSION OR RIGHT TO POSSESSION.

##### A. In General.

**351. General rule.]**—*ANON.* (1356), Y. B. 30 Edw. 3, fo. 2, B.

*Annotation*:—*Mentd.* *Frances v. Ley* (1615), Cro. Jac. 366.

**352. —.]**—In detinue, pltf. must show a right to have the goods delivered to him.—*LAND v. NORTH (LORD)* (1785), 4 Doug. K. B. 266; 99 E. R. 873.

*Annotation*:—*Mentd.* *Re Ferdinand, Ex-Tsar of Bulgaria*, [1921] 1 Ch. 107.

**353. —.]**—*WEYMOUTH v. BOYER*, No. 343, *ante*.

defts., who afterwards sold them to T., the other deft.; pltf. demanded the logs from T., who refused to give them up, & denied pltf.'s right to them :—*Held*: this was evidence of a joint conversion by the defts. at the time of the sale by P. to T.—*HENDRICKS v. TRUS* (1870), 13 N. B. R. (2 Han.) 77.—*CAN.*

**m. —.]**—H. wrongfully sold logs, the property of G., to R., who sawed them up into slabs :—*Held*: a joint action of trover would lie against both H. & R.—*GIBSON v. MCKEAN & RANDOLPH* (1876), 16 N. B. R. (3 Pug.) 299.—*CAN.*

**n. Sale by mortgagees.]**—*POWER v. FOLEY* (1902), 8 Nfld. L. R. 540.—*NFLD.*

#### PART III. SECT. 2, SUB-SECT. 1.—A.

**351 i. General rule.]**—*SWINDEN v. CHARLES* (1878), 12 S. A. L. R. 24.—*AUS.*

**351 ii. —.]**—*WILCOX v. BURNSIDE* (1835), 4 O. S. 288.—*CAN.*

**351 iii. —.]**—*TORIN v. HUTCHESON* (1846), 5 N. B. R. (3 Kerr) 233.—*CAN.*

**351 iv. —.]**—*LAND v. WOODWARD* (1848), 5 U. C. R. 190.—*CAN.*

**351 v. —.]**—*RALPH v. LINK* (1848), 5 U. C. R. 145.—*CAN.*

**351 vi. —.]**—*POLLOK v. FISHER* (1849), 6 N. B. R. (1 All.) 515.—*CAN.*

**351 vii. —.]**—*COOL v. MULLIGAN* (1856), 13 U. C. R. 613.—*CAN.*

**351 viii. —.]**—*CHILDS v. NORTHERN Ry. Co. of Canada* (1866), 25 U. C. R. 165.—*CAN.*

**351 ix. —.]**—The entry of a person on timber limits to cut hay, & his cutting & stacking it on the land, do not give him such property in the hay cut as to enable him to maintain trover for its removal against persons claiming by virtue of Crown licences then in force.—*MCDONALD v. BONFIELD & TURNER* (1869), 20 C. P. 73.—*CAN.*

**354. —.]**—Where goods leased as furniture with a house have been wrongfully taken in execution by the sheriff, the landlord cannot maintain trover against the sheriff pending the lease, because to maintain such an action he must have the right of possession as well as the right of property at the time.—*GORDON v. HARPER* (1796), 7 Term Rep. 9; 2 Esp. 465; 101 E. R. 828.

*Annotations*:—*Consd.* *Hall v. Pickard* (1812), 3 Camp. 187. *Distd.* *Davis v. Connop* (1814), 1 Price, 53; *Farrant v. Thompson* (1822), 5 B. & Ald. 826. *Fold.* *Pain v. Whittaker* (1824), 1 Ky. & M. 99. *Apld.* *Donaty v. Crowther* (1826), 11 Moore, C. P. 479; *Ferguson v. Cristall* (1829), 5 Bing. 305. *Consd.* *Izod v. Lamb* (1830), 1 Cr. & J. 35. *Distd.* *Nicholls v. Bastard* (1835), 2 Cr. M. & R. 659. *Consd.* *Owen v. Knight* (1837), 4 Bing. N. C. 54; *White v. Teal* (1840), 12 Ad. & El. 106. *Apld.* *Bradley v. Copley* (1845), 1 C. B. 685. *Consd.* *Manders v. Williams* (1849), 4 Exch. 339. *Distd.* *Fenn v. Bittleston* (1851), 7 Exch. 152; *White v. Morris* (1852), 11 C. B. 1015. *Apld.* *Wiltshire v. Cottrell* (1853), 1 E. & B. 674. *Consd.* *Nyburg v. Handelaar* (1892), 61 L. J. Q. B. 709. *Refd.* *Bloxam v. Sanders* (1825), 4 B. & C. 941; *Mears v. L. & S. W. Ry.* (1862), 11 C. B. N. S. 850; *Jolls v. Hayward*, [1905] 2 K. B. 460; *Nelson Murdoch v. Wood* (1922), 126 L. T. 745.

**355. —.]**—*PAIN v. WHITTAKER*, No. 373, *post*.

**351 x. —.]**—*BUTTERS v. STANLEY* (1871), 21 C. P. 402.—*CAN.*

**351 xi. —.]**—*CASSELMAN v. HERSEY* (1872), 32 U. C. R. 333.—*CAN.*

**351 xii. —.]**—*CORNISH v. NIAGARA DISTRICT BANK* (1874), 24 C. P. 262.—*CAN.*

**351 xiii. —.]**—*MASON v. REDPATH* (1876), 39 U. C. R. 157.—*CAN.*

**351 xiv. —.]**—*MORGAN v. RICE* (1883), 16 N. S. R. (4 It. & G.) 368.—*CAN.*

**351 xv. —.]**—*MINAKER v. BOWER* (1885), 2 Man. L. R. 265.—*CAN.*

**351 xvi. —.]**—*DICKEY v. McCaul* (1887), 14 A. R. 166.—*CAN.*

**351 xvii. —.]**—*ROGERS v. DEVITT* (1894), 25 O. R. 84.—*CAN.*

**351 xviii. —.]**—*DUTTON v. CANADIAN NORTHERN Ry. Co.* (1915), 31 W. L. R. 367.—*CAN.*

**351 xix. —.]**—*DOYLE v. KELLY* (1841), 4 I. L. R. 9.—*IR.*

**356.** —[—]—*HUNTER v. WESTBROOK*, No. 403, *post*.

**357.** —[—]—Trove may lie where the thing never has been in the possession of the party (*BOSANQUET, J.*).—*R. v. HART* (1833), 6 C. & P. 106; 172 E. R. 1166.

*Annotations*:—*Mentd.* R. v. Smith (1852), 5 Cox, C. C. 533; *Stoossiger v. S. E. Ry.* (1854), 3 E. & B. 549; *R. v. Bowerman*, [1891] 1 Q. B. 112.

**358.** —[—]—The action of trover is founded upon a right of property, & to maintain the action it is essentially necessary to show property in *pltf.* & possession & conversion by *deft.* (*VAUGHAN, B.*).—*GILLET v. HILL* (1834), as reported in 2 Cr. & M. 530; 3 L. J. Ex. 145; 149 E. R. 871.

*Annotations*:—*Refd.* *Knights v. Wiffen* (1870), L. R. 5 Q. B. 660; *Henderson v. Williams* (1894), 72 L. T. 98; *Sterna v. Vickers*, [1923] 1 K. B. 78; *Wait & James v. Midland Bank* (1926), 31 Com. Cas. 172. *Mentd.* *Thames Sack & Bag Co. v. Knowles* (1918), 88 L. J. K. B. 585; *Laurie & Morewood v. Dudin* (1926) 1 K. B. 223.

**359.** —[—]—A bill of exchange was sent from Honduras by U. to his agent in London, indorsed to Mrs. B. The agent wrote a letter to Mrs. B. saying, that he was commissioned to pay her some money on account of U.'s children, & inquiring how she would have it sent. He then procured the bill to be accepted. After the acceptance, & before any further act, U. countermanded the delivery of the bill to Mrs. B.:—*Held*: the property therein has not passed & the agent was not liable in trover for the bill at the suit of Mrs. B.'s husband.—*BRIND v. HAMPSHIRE* (1836), 1 M. & W. 365; 2 Gale, 33; Tyr. & Gr. 790; 5 L. J. Ex. 197; 150 E. R. 475.

*Annotations*:—*Refd.* *Bank of Bengal v. Macleod* (1849), 5 Moo. Ind. App. 1. *Mentd.* *Marston v. Allen* (1841), 8 M. & W. 494.

**360.** —[—]—*Pltf.* cannot bring trover until he has the right of possession as well as the right of property (*TINDAL, C.J.*).—*MILGATE v. KEBBLE* (1841), as reported in *Drinkwater*, 225; 10 L. J. C. P. 277.

*Annotations*:—*Refd.* *Chinery v. Viall* (1860), 5 H. & N. 288; *Donald v. Suckling* (1866), L. R. 1 Q. B. 585.

**361.** —[—]—In order to maintain trover *pltf.* must have a right to the present possession of the goods.

Where goods were conveyed to A. by a *mtgce.* deed, subject to a right of redemption upon payment of a sum of money on demand, with a proviso, that until default should be made in payment of the sum on demand the *mtgor.* should possess & enjoy the goods without the hindrance of the *mtgce.*:—*Held*: in the absence of any previous demand of the money, the *mtgce.* could not maintain an action of trover against the sheriff, who seized & sold the goods under a writ of *fi. fa.* issued against the *mtgor.*—*BRADLEY v. COPLEY* (1845), 1 C. B. 685; 14 L. J. C. P. 222; 5 L. T. O. S. 198; 9 Jur. 599; 135 E. R. 711.

*Annotations*:—*Consd.* *Manders v. Williams* (1849), 4 Exch. 339. *Distd.* *Fenn v. Bittleson* (1851), 7 Exch. 152. *Consd.* *White v. Morris* (1852), 11 C. B. 1015. *Distd.* *Barker v. Furlong*, [1891] 2 Ch. 172. *Expld.* *Jelks v. Hayward*, [1905] 2 K. B. 460.

**365 i. Right to possession—Must be immediate.**—In order to maintain an action for the conversion of a chattel *pltf.* must show a right to the immediate possession of the chattel.—*WERTHEIM v. CHEEL* (1885), 11 V. L. R. 107.—*AUS.*

**365 ii.** —[—]—*BAILEY v. NEW SOUTH WALES MONT DE PIETE DEPOSIT & INVESTMENT CO. LTD.*, [1918] V. L. R. 16.—*AUS.*

**365 iii.** —[—]—It is not necessary for *pltf.* in trover to have a right of possession in the goods at the time of action brought, provided he had such right of possession at the time the cause of action accrued.—*STALKER v. WIER* (1854), 2 N. S. R. (James)

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**362.** —[—]—Where a deed of composition with creditors has been executed under terms of which certain persons constituted trustees under the deed are in possession of the promissory notes given to satisfy the amount agreed on as composition, such trustees are, as between the parties to the deed, stakeholders, & are not the servants either of the persons who gave the notes or of the persons, who, under the provisions of the deed, would be entitled to receive them. If therefore the person who made the notes, & handed them over to the trustees to deal with them under the deed, should afterwards give notice to the trustees not to hand them over to a particular creditor, the creditor cannot maintain *detinue* against such person, the notes not being in his possession either really or constructively.—*JATTER v. WHITE* (1872), L. R. 5 H. L. 578; 41 L. J. Q. B. 342, H. L.

**363.** —[—]—Trustees having a title to chattels with an immediate right of possession can sue in trover for the chattels, although they may never have taken actual possession, but have allowed the goods to remain in the occupation of their *cestui que trust*; & although the title may be liable to be defeated by the claim of some third party, yet the wrongdoer cannot set up the title of that third party as a defence to an action against himself for the recovery of the goods.—*BAKER v. FURLONG*, [1891] 2 Ch. 172; 60 L. J. Ch. 368; 64 L. T. 411; 39 W. R. 621; 7 T. L. R. 406.

*Annotations*:—*Refd.* *Consolidated Co. v. Curtis*, [1892] 1 Q. B. 495. *Mentd.* *Re Magnus, Ex p. Salaman* (1910), 80 L. J. K. B. 71.

**364.** —[—]—*JELKS v. HAYWARD*, No. 137, *ante*.

**365. Right to possession—Must be immediate.**—*GORDON v. HARPER*, No. 354, *ante*.

**366.** —[—]—*BRADLEY v. COPLEY*, No. 361, *ante*.

**367.** —[—]—*BARKER v. FURLONG*, No. 363, *ante*.

**368.** —[—]—*JELKS v. HAYWARD*, No. 137, *ante*.

**369.** — Whether separable from right of property—When absolute & adverse right.]—While the right of property in a chattel is admitted to be in one person, the right of possession of that chattel cannot be absolutely & adversely in another.—(*TERK v. ADAM* (1832), 1 Cl. & Fin. 242; 6 E. R. 908, H. L.

**370. Evidence of possession—Admission by defendant—Of demand by plaintiff.**—The question is who is the real owner of the goods? If not being denied that *pltf.* had demanded them of *deft.*, that would be strong evidence to show that he had not lost his property in them (*BLACKBURN, J.*).—*OSBORN v. THOMAS* (1861), 2 F. & F. 383.

*B. Whether Title Necessary in addition to Possession.*

**371. Whether possession sufficient title.**—Action upon the case for a trover & conversion. Possession without property is a good cause to

248.—CAN.

**365 iv.** —[—]—*CARMAN v. McLEOD* (1870), 13 N. B. R. (2 Han.) 66.—CAN.

**365 v.** —[—]—*MURRAY v. BOURGEOIS* (1880), 20 N. B. R. (1 P. & B.) 149.—CAN.

**365 vi.** —[—]—*ADAIR v. MALONE* (1827), 1 Hud. & B. 19.—IR.

**365 vii.** —[—]—In order to succeed in an action of trover *pltf.* must have the immediate right of possession in the article wrongfully converted.—*INKPEN v. STEVENSON* (1867), 5 Nfld. L. R. 220.—NFLD.

**365 viii.** —[—]—*POWER v. KENNEDY, KENNEDY v. POWER* (1884), 7

Nfld. L. R. 34.—NFLD.

o. — After-acquired property—*Foal.*—*TEMPLE v. NICHOLSON*, Cass. Dig., 2nd ed. 114.—CAN.

p. — *Proof of.*—*WOOD v. MASON BROTHERS, LTD.* (1892), 13 N. S. W. L. R. (L.) 66; 8 N. S. W. N. 114.—AUS.

q. — *Proof of.*—*COATES v. GOSLING* (1881), 20 N. B. R. 323.—CAN.

r. — *Proof of.*—*UNION BANK OF CANADA v. BLACKWOOD (Man.)* (1906), 2 W. L. R. 574.—CAN.

**PART III. SECT. 2, SUB-SECT. 1.—B.**  
**371 i. Whether possession sufficient title.**—*CLARKE v. FULLERTON* (1871), 8 N. S. R. (2 G. & O.) 345.—CAN.

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*Sect. 2.—Right to relief: Sub-sect. 1, D. (b), & E.; sub-sects. 2, 3 & 4, A. (a) & (b), & H.]*

**Banknotes stolen or obtained by fraud.]—See, generally, BANKERS, Vol. III., pp. 130, 131, Nos. 61–71.**

**Sale in market overt.]—See MARKETS, Vol. XXXIII., pp. 560–563.**

**Right to sue pawnee of stolen goods.]—See PAWNS & PLEDGES, Vol. XXXVII., p. 22, No. 173.**

#### *E. Relation Back.*

**395. Sufficiency of title to maintain action.]—**Declaration in detinue for title deeds. Plea, that the deeds were entrusted to & deposited with deft. by one G., deceased; that pltf. claimed the right to the possession of them as devisee under the will of G.; that the detention was a loss of them by deft. before the death of G., & that deft. never had possession of them since the death of G. On demurrer to this plea:—*Held*: the plea was bad, as it did not allege that the deeds were destroyed; & therefore, assuming that they were still existing, & as the property in them was vested by the devise in pltf., he might maintain detinue.—*GOODMAN v. BOYCOTT* (1862), 2 B. & S. 1; 31 L. J. Q. B. 69; 6 L. T. 25; 8 Jur. N. S. 763; 121 E. R. 974.

*Annotations:—Consd. Bristol & West of England Bank v. Mid. Ry., [1891] 2 Q. B. 653. Refd. Bullen v. Swan Electric Engraving Co. (1907), 23 T. L. R. 258.*

**396. —.]—Game found & killed by a trespasser under such circumstances as that it would be the property of the owner of the soil or of the owner of the right of free warren, if it had been found & killed by such owner instead of by the trespasser, in law becomes the absolute property of the owner of the soil or privilege immediately on its being so caught & killed by the trespasser.—***BLADES v. HIGGS* (1865), 11 H. L. Cas. 621; 20 C. B. N. S. 214; 6 New Rep. 274; 34 L. J. C. P. 286; 12 L. T. 615; 29 J. P. 390; 11 Jur. N. S. 701; 13 W. R. 927; 11 E. R. 1474, II. L.; *affy.* (1863), 13 C. B. N. S. 844, Ex. Ch.; (1862), 12 C. B. N. S. 501.

*Annotations:—Refd. Chambers v. Miller* (1862), 13 C. B. N. S. 125; *Lead v. Edwards* (1864), 17 C. B. N. S. 245; *Hooper v. Clark* (1867), 36 L. J. Q. B. 79; *It. v. Roe* (1870), 22 L. T. 414; *It. v. Townley* (1871), L. R. 1 C. C. R. 315; *R. v. Petch* (1878), 38 L. T. 788; *It. v. Read* (1878), 37 L. T. 722; *Elwes v. Brigg Gas Co.* (1886), 33 Ch. D. 562; *Hemmings v. Stoke Poges Golf Club.* (1920) 1 K. B. 720. *Mentd. R. v. Dowdall Iron Co.* (1868), 10 B. & S. 208; *Musgrave v. Foster* (1871), 24 L. T. 614.

**397. —.]—He who ought to produce the goods of the man who has the title to the goods & the property in the goods cannot discharge himself by saying, "I have wrongfully made away with them, but that was before the accruer of your title" (FRY, L.J.).—***BRISTOL & WEST OF ENGLAND BANK v. MIDLAND RY. CO., [1891] 2 Q. B. 653; 61 L. J. Q. B. 115; 65 L. T. 234; 40 W. R. 148; 7 Asp. M. L. C. 69, C. A.*

*Annotations:—Consd. London Joint Stock Bank v. British Amsterdam Maritime Agency* (1910), 104 L. T. 143.

**Bankruptcy.]—See BANKRUPTCY, Vol. V., pp. 638–646, Nos. 5739–5797, p. 824, Nos. 6996–7001.**

#### SUB-SECT. 2.—WHEN RIGHT MUST EXIST.

**398. At time of conversion.]—It is a rule that pltf. must have the property of the goods in him**

at the time when they were taken (*per CUR.*).—*ROBERTS v. WITHERED* (1896), 5 Mod. Rep. 191; 87 E. R. 602; *sub nom.* *ROBERTS v. WETHERALL*, 1 Salk. 223.

*Annotation:—Refd. The Annandale* (1877), 46 L. J. P. 68.

**399. —.]—PAIN v. WHITTAKER, No. 373, ante.**

#### SUB-SECT. 3.—EFFECT OF FRAUD OF PLAINTIFF.

**400. Deposit of goods with fraudulent motive.]—**Pltf. sued in trover to recover damages for the detention of papers which he had deposited with deft. in furtherance of a fraudulent purpose, & the jury having found a verdict for deft., the ct. refused to grant a new trial.—*DE WÜTZ v. HENDRICKS* (1824), 2 Bing. 314; 9 Moore, C. P. 586; 2 State, Tr. N. S. 125; 130 E. R. 326; *sub nom.* *DE WITTS v. HENDRICKS*, 3 L. J. O. S. C. P. 3.

*Annotations:—Refd. Thompson v. Barclay* (1831), 9 L. J. O. S. Ch. 215. *Mentd. Yrisarri v. Clement* (1825), 2 C. & P. 223.

**401. Fraud by partner—Whether firm may sue.]—**A., B. & C. carried on trade in partnership, & A. was also in partnership with D. A. being indebted to the firm of A., B. & C. before the dissolution of that partnership, unknown to D., indorsed a bill & paid over money, belonging to A. & D., in discharge of the private debt due from A. to A., B. & C., & immediately afterwards indorsed the same bill to a creditor of the firm of A., B. & C. The partnership between A., B. & C. having been dissolved:—*Held*: A. & D. could not maintain trover against B. & C. for the bill.—*JONES v. YATES* (1820), 9 B. & C. 532; 4 Man. & Ry. K. B. 613; 7 L. J. O. S. K. B. 217; 109 E. R. 198.

*Annotations:—Consd. Wallace v. Kelsall* (1840), 7 M. & W. 264. *Refd. Gibson v. Winter* (1833), 5 B. & Ad. 96; *Gordon v. Ellis* (1844), 2 How. & L. 308; *Jones v. Smith* (1848), 1 Exch. 831; *Smith v. Johnson* (1858), 3 H. & N. 222; *Cooper v. Law* (1859), 6 C. B. N. S. 502; *Heilbut v. Nevill* (1870), L. R. 5 C. P. 478; *Kendal v. Wood* (1871), L. R. 6 Exch. 243; *Begbie v. Phosphate Sewage Co.* (1875), L. R. 10 Q. B. 491; *Scott v. Brown, Doering, McNab, Slaughter & May v. Brown, Doering, McNab*, [1892] 2 Q. B. 724.

**402. Intention to defraud creditors.]—***OLDERSHAW v. BERESFORD* (1851), 16 L. T. O. S. 476.

**403. Fraudulent purpose not executed.]—**Pltf., being in embarrassed circumstances, in pursuance of an agreement between him & A., made over all his stock-in-trade to A., & fictitious bills of exchange were given by A. in pltf.'s favour. Possession of the goods was given to A., together with an inventory, but no bill of sale was executed by pltf. The object of the transaction was to prevent pltf.'s creditors getting hold of the goods, & so being paid in full. Deft. was a creditor for £100, & was cognisant of what was concocted between pltf. & A. After A. had removed the goods from pltf.'s premises, two meetings of pltf.'s creditors were held, but no compromise was effected with the creditors. Some months afterwards A. executed a bill of sale of the goods to deft., for the alleged purpose of securing the debt due from pltf. to deft., but pltf. was no party to the bill of sale, nor did he sanction or know of it. Pltf. having demanded the goods from A. & deft., brought an action against deft. for the detention:—*Held*: the fraudulent purpose not having been carried out, pltf. was not relying on the illegal

#### PART III. SECT. 2, SUB-SECT. 1.—E.

**395 i. Sufficiency of title to maintain action.]—***HEFFERNAN v. BERRY* (1873), 32 U. C. R. 518.—CAN.

#### PART III. SECT. 2, SUB-SECT. 3.

**1. General rule.]—***DUNCAN v. COOPER*

(Sask.) (1922), 69 D. L. R. 435.—CAN.

**g. Mixing one's own property with another's.]—**Pltf. cut timber, part on land belonging to deft., & part on other land, & wrongfully mixed it with other timber belonging to deft.,

so that it could not be distinguished from deft.'s timber:—*Held*: as the mixing of the timber was the wrongful act of pltf. deft. had a right to the whole of the timber, & his taking it was not conversion. *TUCKER v. MURHEAD* (1866), 11 N. B. R. (6 All.) 420.—CAN.

transaction, but was entitled to repudiate it, & recover his goods from A., & debt. had no better title than A., as he knew how A. had become possessed of the goods.—*TAYLOR v. BOWERS* (1876), 1 Q. B. D. 291; 46 L. J. Q. B. 39; 34 L. T. 938; 24 W. R. 499, C. A.

*Annotations*:—*Distd. Re Great Berlin Steamboat Co.* (1884), 54 L. J. Ch. 68. *Dbtd. Kearley v. Thomson* (1890), 24 Q. B. D. 742. *Consd. Hermann v. Charlesworth* (1905), 74 L. J. K. B. 620. *Refd. Wilson v. Strugnell* (1881), 7 Q. B. D. 548; *Petherporial Chetty v. Munlandj Serval* (1908), 24 T. L. R. 462; *Gordon v. Metropolitan Police Chief Comr.*, [1910] 2 K. B. 1080.

## SUB-SECT. 4.—PARTICULAR RIGHTS.

## A. Goods Subject of Bailment.

## (a) In General.

*See, generally*, BAILMENT, Vol. III., pp. 53–117, Nos. 1–402.

**404. Action by bailee—Against third party.]**—*DRAKE v. ROYMAN* (1591), Sav. 133; 123 E. R. 1055. —[*See, also*, BAILMENT, Vol. III., pp. 112, 113, Nos. 359–369.

**405. Action by bailor.]**—*BUCKMYR v. DARNALL* (1704), 2 Ld. Raym. 1085; 92 E. R. 219; *sub nom.* *BUCKMIRE v. DARNELL*, Holt, K. B. 606; 6 Mod. Rep. 248; *sub nom.* *BOURKMIRE v. DARNELL*, 3 Salk. 15.

*Annotations*:—*Refd. Mountstephen v. Lakeman* (1871), L. R. 7 Q. B. 196. *Mentd. Tomlinson v. Gill* (1756), Amb. 330.

**406. Goods stolen.]**—*HALL v. SKARROK HUNDRED* (1658), 2 Sid. 44; 82 E. R. 1247.

—[*See, also*, BAILMENT, Vol. III., p. 64, Nos. 70–73.

**407. Refusal of bailee to deliver goods.]**—1 & 2 Geo. 4, c. 87, does not require a corn factor to return the name of the person to whom corn, when sold, is actually delivered. The quantity, & the persons for & to whom it is sold, & the prices, being sufficient to satisfy the terms of the statute. Where, therefore, plffs., as corn factors, returned that they had sold corn to T. L., & afterwards paid the lastage on the delivery of the quantity returned as sold to him:—*Held*: (1) they were not thereby precluded from showing, that, although the corn was sold to T. L., it was delivered to defts., on the condition that they were to hold it for plffs., & not to part with it to T. L., until he had paid for it; & T. L. having become bkpt. while the corn was in the custody of defts., on which plffs. demanded it from them; (2) plffs. might maintain trover on defts. refusing to deliver it up.—*WOODLEY v. BROWN* (1825), 2 Bing. 527; 1 C. & P. 593; 10 Moore, C. P. 201; 3 L. J. O. S. C. P. 104; 130 E. R. 410.

**408. Bailment for work & labour—Tender of payment for work done.]**—If A. deliver a chattel to B. under a contract by the latter to perform certain work thereon at a fixed price, & before such work is completed, A. countermand the order, & demand the chattel from B., at the same time tendering a sum sufficient to pay for the work actually done, he will be entitled to maintain trover therefor, without tendering the contract price.—*LILLEY v. BARNESLEY* (1844), 1 Car. & Kir. 344; 2 Mood. & R. 548, N. P.

*Annotation*:—*Mentd. Green v. All Motors*, [1917] 1 K. B. 625.

## PART III. SECT. 2, SUB-SECT. 4.—

## A. (a).

**4071. Action by bailor—Refusal of bailee to deliver goods.]**—*MOFFATT v. GRAND TRUNK Ry. Co.* (1865), 15 C. P. 392.—*CAN.*

*h.*—*Apiistment & herding of cattle—Loss of cattle through gross*

*negligence of bailee.]*—Pltf. was held entitled to recover in detinue for damages (the value of the cattle) sustained through the loss of cattle left by him with deft. for agistment & herding, & lost through the gross carelessness of deft., & that alone, the ownership of the cattle in pltf. & a sufficient demand being shown.—

—**Delivery to wrong person.]**—*See* BAILMENT, Vol. III., p. 78, Nos. 165–168.

—**Against third party.]**—*See* BAILMENT, Vol. III., pp. 110, 111, Nos. 342–352.

**Action by joint bailors.]**—*See* BAILMENT, Vol. III., p. 110, Nos. 394–397.

**Measure of damages.]**—*See* Sect. 3, sub-sect. 1, C. (h) i., *post*.

## (b) Hired Goods.

**Goods wrongfully seized in execution—Action by owner of goods.]**—*See* EXECUTION, Vol. XXI., p. 501, Nos. 756–762.

**Goods wrongfully seized by assignees of bankrupt—Action by hirer.]**—*See* BAILMENT, Vol. III., p. 113, No. 367.

**Goods transferred during continuance of hire-purchase agreement—By hirer to third party.]**—*See* BAILMENT, Vol. III., pp. 92, 93, 97, 98, Nos. 241, 245, 262–267, Suppl. IV., No. 262 a.

## B. Rights Arising on Bankruptcy.

*See* BANKRUPTCY, Vol. V., p. 983, Nos. 8038–8044.

**409. Whether bankruptcy bar to action—Conversion before bankruptcy.]**—Bkpy. is no bar to an action of trover, though the conversion happened before the bkpy. Where a person has his election either to bring trover or an action for money, had & received, he may maintain the former notwithstanding the bkpy. of the debtor after the cause of action accrued & though the bkpy. would be a bar to the latter.—*PARKER v. NORTON* (1796), 6 Term Rep. 695; 101 E. R. 777.

*Annotations*:—*Apld. Parker v. Crole* (1823), 5 Bing. 63. *Woolley v. Smith* (1816), 3 C. B. 610. *Mentd. Ausell v. Waterhouse* (1812), 2 Chit. 1.

**410. Right of assignee to sue—Purchaser from bankrupt's vendee—Purchase before assignment.]**—The assignee of bkpt. may bring trover against a man who bought goods of a vendee of bkpt. before the assignment.—*KIRNEY v. SMITH* (1700), 1 Ld. Raym. 741; 91 E. R. 1396.

**411.**—[*After* L., a trader, had committed a secret act of bkpy., M. & co., his creditors, knowing him to be embarrassed, pressed him for payment. L. said he had no money, but that if they could get a customer for his goods, they should be paid. M. & co. accordingly procured deft. A., a creditor of their own, to buy goods of L. No money passed from A. to L. or to M. & co., but A. gave M. & co. credit on account. This transaction was communicated to L., & a receipt was given him by M. & co. signed by them, specifying it to be “by payment of deft. A. agreeably to his order, balancing their account with him.” A fiat having issued against L. his assignees sued A. in *assumpsit* for the price of the goods sold to him:—*Held*: if the appropriation of the price to M. & co. was parcel of the contract between A. & L. & by its terms irrevocable, the action should have been trover.—*BRADBURY v. ANDERTON* (1834), 1 Cr. M. & R. 486; 5 Tyr. 152; 4 L. J. Ex. 21; 149 E. R. 1171.

**412. Pledgee holding goods for advances—No knowledge of act of bankruptcy.]**—If A. have a lien on goods of bkpt. in his hands, & B., without

*HARVEY v. FARNELL* (Sask.) (1913), 24 W. L. R. 44; 4 W. W. R. 488; 11 D. L. R. 740; 6 Sask. L. R. 101.—*CAN.*

## PART III. SECT. 2, SUB-SECT. 4.—B.

*k.* **Assignment for creditors—Covenant to reconvey.]**—*SCOTT v. WILSON* (1869), 16 Gr. 182.—*CAN.*



Sect. 2.—Right to relief: Sub-sect. 4, B. & C.]

knowledge of any act of bkpcy., pay A. the sum for which he has a lien, & advance a further sum to bkpt. upon those goods, which are delivered to him, trover will not lie by assignees.—*DIXON v. PURSE* (1800), Peake, Add. Cas. 187; 170 E. R. 250, N. P.

**413.** ———.]—In Aug. 1821, A., a trader, being indebted to B. & C., then in partnership, but about to separate, gave a warrant of attorney to secure payment by instalments to B. alone, who knew that A. was then insolvent. In Oct. A. committed an act of bkpcy.: & in Nov., at B.'s desire, he sent goods to the warehouse of B. & C. as a further security for the debt. In Dec. B. & C. dissolved partnership, & the former afterwards received from A. several sums of money on account of the warrant of attorney, & also sold the goods, towards satisfaction of the debt. A commission of bkpt. issued against A. in Jan. 1823, & in Nov. of that year B. died:—*Held*: A.'s assignees might recover from C. the money paid by A. on the warrant of attorney by an action for money had & received, & the value of the goods by an action of trover.—*BIGGS v. FELLOWS* (1828), 8 B. & C. 402; 2 Man. & Ry. K. B. 450; Dan. & L. 121; 6 L. J. O. S. K. B. 357; 108 E. R. 1092.

**414.** ——— **Fraudulent conduct by bankrupt—Misappropriation by partner.]**—*JONES v. YATES*, No. 401, ante.

**415.** ——— **Collusively obtaining execution.]**—B. gave a warrant of attorney to deft., & afterwards being in difficulties, fraudulently procured all his goods to be taken in execution by deft., who was not cognisant of the fraud. A fiat in bkpcy. afterwards issued against B., the procuring of his goods to be taken in execution being the act of bkpcy.:—*Held*: the assignees were entitled to recover the goods in an action of trover, on the ground that the transaction was invalid, being in the nature of a fraudulent preference of deft.—*HALL v. WALLACE* (1841), 7 M. & W. 353; 10 L. J. Ex. 133; 5 Jur. 198; 151 E. R. 802.

*Annotations*:—*Consd.* *Belcher v. Magnay* (1813), 12 M. & W. 102; *Newnham v. Stevenson & Wood* (1850), 17 L. T. O. S. G. *Refd.* *Ellis v. Russell* (1847), 11 Jur. 821; *Columbine v. Penhall*, *Penhall v. Miller* (1853), 1 Sm. & G. 228; *Smith v. Cannan* (1853), 2 E. & B. 35; *Shears v. Goddard* (1896), 12 T. L. R. 234.

**416.** ——— **For bills sent to creditor—To be discounted & applied to particular purposes.]**—Where debtor sends bills to his creditor to be discounted, & applied to a particular purpose, creditor cannot apply the proceeds of the bills to his own debt & against the particular purpose for which they were remitted. If in such a case debtor become bkpt., his assignees may maintain either trover for the bills, or money had & received for their produce.—*BUCHANAN v. FINDLAY* (1829), 9 B. & C. 738; 4 Man. & Ry. K. B. 593; 7 L. J. O. S. K. B. 314; 109 E. R. 274.

*Annotations*:—*Distd.* *Thorpe v. Thorpe* (1832), 3 B. & Ad. 580; *Re Douglas, Ex p. Thompson, Hankey, Cheape & Pennell* (1838), 2 Jur. 734. *Appld.* *Muttyloli Seal v. Dent* (1853), 6 Moo. Ind. App. 328. *Refd.* *Clarke v. Fell* (1833), 4 B. & Ad. 404; *Groom v. West* (1838), 8 Ad. & El. 758; *Russell v. Bell* (1841), 8 M. & W. 277.

**417.** ——— **Goods delivered on transaction not valid by bankrupt—Delivery must be after act of bankruptcy—& after creditor's debt accrues.]**—Assignees of bkpt. cannot recover in trover goods delivered upon a transaction which bkpt. himself could not impeach, unless the delivery is subsequent to an act of bkpcy. taking place after petitioning creditor's debt has accrued.—*WARD v. CLARKE* (1830), Mood. & M. 497; 173 E. R. 1237, N. P.

*Annotation*:—*Refd.* *Cannan v. Wood* (1837), 2 M. & W. 465.

**418.** ——— **Goods seized by execution creditor—After imprisonment of debtor.]**—Where goods are seized, under a judgment entered upon a warrant of attorney, before the imprisonment of an insolvent, & are sold by the sheriff after the imprisonment, execution creditor is liable to an action of trover, at the suit of the insolvent's assignee, to recover the goods.—*KELSEY v. MINTER* (1835), 1 Bing. N. C. 721; 1 Hodg. 177; 1 Scott, 616; 131 E. R. 1295; *sub nom.* *KELSEY v. MINTER*, 4 L. J. C. P. 208.

**419.** ——— **After secret act of bankruptcy.]**—The assignees of bkpt. are entitled to maintain trover for goods seized by execution creditor under a *fi. fa.* on a judgment on a warrant of attorney, after a secret act of bkpcy., notwithstanding 2 & 3 Vict. c. 29, if they are not sold until after the date & issuing of the fiat, & notice thereof.—*SKEY v. CARTER* (1843), 11 M. & W. 571; 2 Dowl. N. S. 831; 5 Scott, N. R. 877; 12 L. J. Ex. 511; 1 L. T. O. S. 173; 7 Jur. 427; 152 E. R. 933, Ex. Ch.

*Annotations*:—*Refd.* *Belcher v. Magnay*, *Cheston v. Gibbs*, *Edwards v. Evans* (1843), 7 Jur. 1180; *Cheston v. Gibbs* (1843), 1 Dow. & L. 420; *Lackington v. Elliot* (1844), 7 Man. & G. 538; *Whitmore v. Greene* (1844), 2 Dow. & L. 174.

**420.** ——— **Lessors of bankrupt lessee—Machinery subject of valuation covenant.]**—By indenture of demise, debts. leased to E. & W. for twenty-four years, a fulling mill & machinery. The lease, after reciting that the machinery had been valued at a certain sum, contained covenants, that at the end or sooner determination of the term the machinery should be again valued by two indifferent persons, one to be chosen by the lessees & the other by the lessors, & that according as the second valuation exceeded or fell short of the first, the lessors were to pay or receive the difference. A fiat in bkpcy. afterwards issued against E. & W. during the continuance of the term, under which plffs. were appointed assignees. Plffs. declined to take the lease, but they required debts. to appoint a person to value the machinery, & upon their refusal, appointed one themselves, who valued the property at an amount exceeding the original valuation. They then delivered possession of the premises to debts., the machinery being still therein, & demanded the difference between the two valuations, which debts. refused to pay. The plffs. afterwards demanded the goods, &, on debts. refusing to deliver them, brought an action of trover for the machinery:—*Held*: the assignees could not maintain an action of covenant against debts., for not appointing a valuer, or paying the difference between the two valuations, as the covenants had been determined by the bkpcy., but that the action of trover would lie.—*FAIRBURN v. EASTWOOD* (1840), 6 M. & W. 679; 9 L. J. Ex. 226.

*Annotation*:—*Refd.* *Weeton v. Woodcock* (1840), 7 M. & W. 14.

**421.** ——— **Whether commencement of action election to avoid transfer.]**—*NEWNHAM v. STEVENSON*, No. 2, ante.

**422.** **Goods transferred by bill of sale—Before adjudication in bankruptcy—Effect of sale of goods by transferee.]**—J. executed a bill of sale to deft. as security for a debt, & was adjudicated a bkpt. on his own petition. Before the adjudication deft. seized & sold the goods & received the proceeds. In an action by the assignee, the jury found that the bill of sale was a fraudulent preference, & gave a verdict for pltf. A rule to enter the verdict for deft. was obtained, on the ground that there was no relation back to the date of the bill of sale so as to enable pltf. to recover:—*Held*: the assignee was entitled to recover the proceeds of



431 H. ————.]—An action for conversion of his interest in a chattel lies by one tenant in common against his co-tenants in common if the chattel owned in common is destroyed by them, or so dealt with by them as in effect, to put an end to his rights.—**MCINTOSH v. PORT HURON PETRIFIED BRICK CO.** (1900), 20 C. L. T. 200; 27 A. R. 262.—**CAN.**

**Sect. 2.—Right to relief: Sub-sect. 4, C., D. & E.]**

**435.** ———. ———.]—In order to enable one tenant in common to maintain trover against another, there must not merely be a carrying away of the property, but such a carrying away of it as will disable the party complaining from having the lawful use or benefit of the property, or there must be the destruction of it. *A. & B. were, without the knowledge of C., tenants in common of lands. C. had held them under A. In Mar. 1867 C. received from B. notice to quit at the end of six months. He did not quit, but afterwards made an agreement with A.'s agent for the renewal of the tenancy, continued the cultivation of the land, & paid the rent under the new lease. While C. was still in possession B. demised the premises to D. as from Mar. 1868, for six months. In June, 1868, D. entered the land, cut the grass, put a lock on the gate, & carried away the grass, & stacked it as hay:—Held: assuming C. & D. to be tenants in common, these circumstances did not amount to an ouster, so as to enable C. to maintain trespass against his co-tenant in common, D., nor to a destruction of the common property so as to enable C. to maintain trover for the grass.*—*JACOBS v. SEWARD* (1872), 1 L. R. 5 H. L. 464; 41 L. J. C. P. 221; 27 L. T. 185; 36 J. P. 771, H. L.

*Annotation:—Refd. Harkin v. Smith, [1909] 2 K. B. 112.*

**436.** ———. ———.]—**Complete deprivation of plaintiff's control.**—*ANON.* (1877), No. 431, *ante*.

**437.** ———. ———.]—*FENNINGS v. GRENVILLE* (LORD), No. 433, *ante*.

**438.** ———. ———.]—*MAYHEW v. HERRICK*, No. 349, *ante*.

**439.** ———. ———.]—*JACOBS v. SEWARD*, No. 435, *ante*.

**440.** ———. ———.]—**Mere taking from plaintiff's possession.**—*JONES v. BROWN*, No. 434, *ante*.

**441.** ———. ———.]—*JACOBS v. SEWARD*, No. 435, *ante*.

**442.** ———. ———.]—**& third party.**—A member of an amicable society entrusted with a box containing the fund, & bound by bond to keep it safely, cannot maintain trover against another member & a third person, who take it from him.—*HOLLIDAY CAMSELL & WHITE* (1787), 1 Term Rep. 658; 99 E. R. 1305.

**443.** ———. ———.]—**Representatives of co-owner.**—After an act of bkpcy. committed by one partner the other delivers goods of their joint property to creditor for a joint debt & dies, & afterwards a commission issues against the surviving partner:—*Held: creditor by virtue of such delivery by the solvent partner became tenant in common of the goods with the assignees of bkpt. by relation from the act of bkpcy. which was in the lifetime of the solvent partner; & the assignees cannot maintain trover against such creditor.*—*SMITH v. ORIELI* (1801), 1 East, 368; 102 E. R. 142.

*Annotations:—Consd. Harvey v. Crickett* (1816), 5 M. & S. 336. *Refd. Buckler v. Barber* (1851), 6 Exch. 164; *Morgan v. Marquis* (1853), 9 Exch. 145.

**444.** ———. ———.]—After an act of bkpcy. committed by one of two partners joint effects are sent away, which come to deft.'s hands; then the solvent partner dies, leaving deft. his exor.; & afterwards a commission of bkpt. is taken out against the surviving partner; & his estate assigned to plffs.:—*Held: they are tenants in common with the solvent partner, & after his*

decease with his representatives by relation of law from the act of bkpcy.; & cannot maintain trover against deft. claiming under such solvent partner. —*SMITH v. STOKES* (1801), 1 East, 363; 102 E. R. 141.

*Annotation:—Refd. Morgan v. Marquis* (1853), 9 Exch. 145.

**445.** ———. ———.]—**The assignee of bkpt. partner is a tenant in common of the partnership goods with the solvent partner, & therefore cannot maintain an action of trover, for their conversion, against an auctioneer for selling such goods by direction of the solvent partner.**—*LEWIS v. WHITE* (1863), 2 New Rep. 81; 8 L. T. 320.

**446. Action against third party.—By all co-owners.—Effect of death of one before judgment.**—*SPRING & ——— v. BARRETT* (1614), 2 Bulst. 262; 80 E. R. 1108.

**447.** ———. ———.]—**By two out of three co-owners.**—*NELTHORPE & FARRINGTON v. DORRINGTON* (1674), 2 Lev. 113; 83 E. R. 475.

*Annotations:—Consd. Addison v. Overend* (1796), 6 Term Rep. 766. *Refd. Brown v. Hedges* (1708), 1 Salk. 299; *Scott v. Godwin* (1787), 1 Bos. & P. 67; *Sedgworth v. Overend* (1797), 7 Term Rep. 279; *Wyburd v. Tuck* (1799), 1 Bos. & P. 458; *Jones v. Smith* (1818), 1 Exch. 831. *Mentd. R. v. Paulson*, [1921] 1 A. C. 271.

**448.** ———. ———.]—**By one co-owner.**—*BROWN v. HEDGES*, No. 426, *ante*.

**449.** ———. ———.]—The declaration stated that pltf. was possessed as of his own property of certain cattle, to wit, four horses, which deft., converted & disposed of to his own use. Pleas, (a) that they were not the property of pltf.; (b) that a judgment was recovered against F., & that deft., a sheriff's officer, seized them under an execution against F., the same being the goods & chattels of F., & liable to be seized & taken as aforesaid, & not being the property of pltf. To which pltf. replied, that they were the cattle & property of pltf. *modo et formâ*. At the trial it was found by the jury that they were the property of pltf. & F. jointly:—*Held: the issue raised by deft. was, whether the cattle were the sole property of F., & the jury having found that they were the joint property of pltf. & F., pltf. was entitled to recover.*—*FARRAR v. BESWICK* (1830), 1 M. & W. 682; 2 Gale, 153; Tyr. & Gr. 1053; 5 L. J. Ex. 225; 150 E. R. 608.

*Annotations:—Refd. Higgins v. Thomas* (1816), 8 Q. B. 908; *Mayhew v. Herrick* (1849), 7 C. B. 229.

**450.** ———. ———.]—**Co-owners making joint orders for disposition of goods.**—In an action of trover, where the question was, whether goods were the property of pltf. alone, or jointly with S.:—*Held: whether S. were admissible as a witness to prove this fact or not, yet, as pltf. & S. had made joint orders for the disposition of the goods, pltf. alone could not recover.*—*NATHAN v. BUCKLAND* (1818), 2 Moore, C. P. 153.

*Annotation:—Mentd. Doe d. Teynham v. Tyler* (1830), 6 Bing. 561.

**451.** ———. ———.]—**Against transferee of other co-owner.**—Pltf., who was owner of a personal chattel, parted with a half share of it to another person on an agreement that pltf. was to have possession of the chattel until it should be sold. Pltf. entrusted the chattel to his co-owner for the purpose of its being taken to an auctioneer for sale. The co-owner lodged the chattel with deft. as security for a debt due from him to deft. In an action by pltf. to recover the chattel from deft.:—

**438 i.** ———. ———.]—**Complete deprivation of plaintiff's control.**—One tenant in common cannot maintain trespass or trover against his co-tenant for merely reaping & harvesting the crop; but he may, if his co-tenant has consumed the crop, or dealt with it so

that he cannot retake it or pursue his remedies against the persons who have possession of it.—*BRADY v. ARNOLD* (1868), 19 C. P. 42.—**CAN.**

1. ———. ———.]—**Sawing logs & mixing with others.**—Sawing up logs, of which

def't. is a tenant in common, & mixing the deals with others so that they cannot be distinguished, is evidence of conversion by one tenant in common against the other.—*MCKAY v. CROCKER* (1861), 10 N. B. R. (5 All.) 20.—**CAN.**

*Held*: under the agreement, pltf. had a special property in the entire chattel which entitled him to the possession of it & to recover it from deft.—*NYBERG v. HANDELAAR*, [1892] 2 Q. B. 202; 56 J. P. 604; *sub nom.* *NYBERG v. HANDELAAR*, 61 L. J. Q. B. 709; 67 L. T. 361; 40 W. R. 545; 8 T. L. J. 549; 30 Sol. Jo. 485, C. A.

#### 452. — Co-owners making.

—Two persons, jointly interested in a chattel, having made a joint demand of it, may, notwithstanding, maintain separate accounts of trover in respect of it against a person who unjustly detains it.—*BLEADEN v. HANCOCK* (1829), 4 C. & P. 152; *Mood. & M.* 465; 172 E. R. 648, N. P.  
*Annotation*:—*Mentd.* *Steadman v. Hockley* (1846), 15 M. & W. 553.

453. — By assignees in bankruptcy of both co-owners—Partners.]—If one of two partners become bkpt., the solvent partner may, if for a valuable consideration & without fraud, dispose of the partnership effects; & if he afterwards fail, the assignees, under a joint commission against both, cannot maintain trover against the *bond fide* vendee of such partnership effects.—*FOX v. HANBURY* (1776), 2 Cowp. 445; 98 E. R. 1179.

*Annotations*:—*Apld.* *Salomons v. Nissen* (1788), 2 Term Rep. 674; *Distd.* *Mayer v. Sharpe* (1813), 5 Taunt. 74; *Fraser v. Kershaw* (1856), 2 K. & J. 496. *Refd.* *Taylor v. Fields* (1799), 4 Ves. 396; *Dutton v. Morrison* (1810), 17 Ves. 193; *Harvey v. Crickett* (1816), 5 M. & S. 336; *Brickwood v. Miller* (1817), 3 Mer. 279; *Ite Houghton & Watts, Ex p. Robinson* (1833), 3 Deac. & Ch. 376; *Morgan v. Marquis* (1853), 9 Exch. 145. *Mentd.* *Crawshaw v. Collins* (1808), 15 Ves. 218; *Dickson v. Cass* (1830), 1 B. & Ad. 343.

454. — By assignees in bankruptcy of one co-owner.]—One of two tenants in common of certain goods committed an act of bkpcy., after which defts. by direction of the other tenant in common, sold the goods:—*Held*: the assignees of bkpt. could not recover from defts. the proceeds of the sale in an action for money had & received, nor maintain detinue.—*MORGAN v. MARQUIS* (1853), 9 Exch. 145; 2 C. L. R. 276; 23 L. J. Ex. 21; 22 L. T. O. S. 91; 156 E. R. 62.

*Annotation*:—*Apld.* *Lewis v. White* (1863), 2 New Rep. 81.

#### D. Goods Distrained.

*See, generally*, *DISTRESS*, Vol. XVIII., pp. 254 *et seq.*

455. Right of purchaser under irregular distress.]—A party who purchases goods under a distress irregularly conducted has a sufficient title to maintain trover.—*LYON v. WELDON* (1824), 2 Bing. 334; 9 Moore, C. P. 629; 3 L. J. O. S. C. P. 27; 130 E. R. 334.

*Annotations*:—*Refd.* *Fawcett v. Fearnie* (1844), 6 Q. B. 20; *Load v. Green* (1846), 15 M. & W. 216; *Kling v. England* (1864), 4 B. & S. 782. *Mentd.* *The Itaby* (1900), 83 L. T. 438.

456. Right of assignee of bankrupt tenant—Against landlord having wrongful possession.]—Where a landlord is in lawful possession under a distress at the commencement of the tenant's bkpcy., & the possession subsequently becomes tortious, the trustee in bkpcy. of the tenant may recover damages for the conversion; but in arriving at the true measure the landlord must be allowed what the trustee, if he had asserted his title at the commencement of the bkpcy., would have had to pay to obtain possession.—*COX v. LIDDELL* (1895), 2 Mans. 212.

Measure of damages.]—*See* Sect. 3, sub-sect. 1, C. (h) ii., *post*.

PART III. SECT. 2, SUB-SECT. 4.—D.  
m. *Distress on goods not covered by chattel mortgage—Adoption—Receipt of proceeds.*—*STEVENS v. PENNOCK & ARMSTRONG* (1870), 30 U. C. R. 51.—CAN.

PART III. SECT. 2, SUB-SECT. 4.—E.  
n. *General rule—Action lies.*—Trover as well as detinue may be maintained for leases or other title deeds.—*ANDERSON v. HAMILTON* (1848), 4 U. C. R. 372.—CAN.

#### E. Documents of Title and Title Deeds.

*Compare* Part I., Sect. 3, sub-sect. 3, *ante*.

457. Delivery order—Right of transferee—To sue wharfinger—Order given to previous transferee for same goods.]—Where A., being indebted to B., gave him for security a delivery order for goods in the hands of a wharfinger, which the wharfinger accepted, & afterwards A., being indebted to C., gave him another delivery order for the same goods, which was taken to the wharfinger, who said that he could not transfer the goods, as he held them for B., but that if C. could get B.'s order he would transfer them, & promised that he would not give up the goods without first letting C. know; & afterwards B., his debt remaining unsatisfied, gave a delivery order for the same goods to A., who gave notice of it to the wharfinger:—*Held*: C. had no property upon which trover could be maintained against the wharfinger.—*MELLING v. KESHAU* (1830), 1 Cr. & J. 184; 1 Tyr. 109; 9 L. J. O. S. Ex. 45; 148 E. R. 1385.

458. — — — — —.]—A., a manufacturer at S., gives goods to the carrier there to have delivered at defts.' wharf, London, & receives the usual receipt. He then hands over to pltf., in consideration of an advance of money, the carrier's receipt, invoice, & an order upon defts. to deliver the goods in question upon their arrival:—*Held*: upon disobeying such order, etc., previously lodged with & acknowledged by them, defts. were liable in trover; though pltf. were never in actual possession of the goods & the measure of damages was the value of the goods, not the sum actually advanced.—*HOLL v. GRIFFIN* (1833), 10 Bing. 246; 3 Moo. & S. 732; 3 L. J. C. P. 17; 131 E. R. 898.

*Annotation*:—*Refd.* *Swan v. North British Australasian Co.* (1862), 7 H. & N. 603.

459. — — — — — To sue vendor Goods deposited in name of vendor's vendor.]—Deft. having purchased of one T., timber which was warehoused in T.'s name in the West India Docks, contracted to sell it to P. & Son, received from them a bill at seven months' date for the price, & gave them a delivery order. The dock co. declined to act upon this order, but required the order of T. P. & Son, afterwards, & before T.'s order was obtained, became bkpt., the bill remaining unpaid. Deft. afterwards obtained the timber from the docks:—*Held*: the assignees of P. & Son were not entitled to maintain trover for the timber, & deft. was not stopped by the order given by him from intercepting the delivery.—*LACKINGTON v. ATHERTON* (1844), 7 Man. & G. 360; 8 Scott, N. R. 38; 13 L. J. C. P. 140; 3 L. T. O. S. 57; 8 Jur. 407; 135 E. R. 151.

Bill of lading—Rights on transfer.]—*See, generally*, *SHIPPING*, Vol. XLI., pp. 397, 398, Nos. 2411–2441.

— Right of pledgee.]—*See* *SHIPPING*, Vol. XII., p. 388, No. 2327.

Title deeds of land.]—*See, generally*, *SALE OF LAND*, Vol. XL., pp. 299 *et seq.*

— Follow the land.]—*See* *REAL PROPERTY*, Vol. XXXVIII., p. 709, Nos. 532–537.

— Right of vendor's solicitor to retain under lien.]—*See* *SOLICITORS*, Vol. XLII., p. 287, Nos. 3014, 3015.

Measure of damages.]—*See* Sect. 3, sub-sect. 1, C. (h) viii., *post*.

o. *Deeds not wrongly detained.*—*MURRAY v. HARRIS* (1880), 1 N. S. W. L. R. 270.—AUS.

p. *Title in plaintiff's name—Defendant claiming ownership.*—*HAWKS v. HAWKS*, [1920] 3 W. W. R. 774.—CAN.

*Sect. 2.—Right to relief: Sub-sect. 4, F., G., H., I., J., K., L., M., N., O., P., Q. & R.]*

*F. Goods Taken in Execution.*

*See, generally, EXECUTION, Vol. XXI., pp. 407 et seq.*

**Property in goods seized, generally.]—See EXECUTION, Vol. XXI., pp. 507, 508, Nos. 817-835; SHERIFFS & BAILIFFS, Vol. XL., pp. 120-122, Nos. 759-778.**

**Action against sheriff by execution creditors.]—See BANKRUPTCY, Vol. V., pp. 824, 825, Nos. 6906-7008.**

*G. Executors and Administrators.*

**460. Conversion by co-executor—Right of surviving executor—To sue transferee.]—If one of two exors. deliver a bond due to testator to a stranger, in satisfaction of his own debt & dies, an action of detinue will not lie by the surviving exor. to recover it back.—KELSACK v. NICHOLSON (1596), Cro. Eliz. 496; 78 E. R. 746.**

**461. Conversion by executor de son tort With notice of subsequent will—Right of executor under later will.]—WOOLLEY v. CLARK, No. 120, ante.**

**462. Right of purchaser from executor de son tort.]—HOUNSLOW v. FOUNTAIN, No. 375, ante.**

**Right of administrator before grant.]—See EXECUTORS & ADMINISTRATORS, Vol. XXIII., pp. 66, 67, 69, Nos. 501, 502, 527-531.**

**Right of executor.]—See EXECUTORS, Vol. XXIII., p. 296, Nos. 3610-3612.**

**Liability of representative—Tort of deceased.]—See EXECUTORS, Vol. XXIV., p. 647, Nos. 6734-6738.**

*H. Goods Found or Goods Stolen.*

**Goods found.]—See, generally, BAILMENT, Vol. III., pp. 64-67, Nos. 75-95.**

**Goods stolen.]—See Sub-sect. 1, D. (b), ante.**

*I. Gifts.*

**463. Right of donor—Gift by father to son.]—A father gave his son a watch, some printed books, & several articles of wearing apparel:—Held: though the son was under age, viz. about sixteen years old, the father could not maintain trover against a person who detained the property, because the right of possession was not in him, but in his son.—HUNTER v. WESTBROOK (1827), 2 C. & P. 578; 172 E. R. 203, N. P.**

**464. Right of donee—Having sufficient possession.]—BOURNE v. FOSBROOKE, No. 520, post.**

**Property in gifts generally.]—See GIFTS, Vol. XXV., pp. 498 et seq.**

*J. Husband and Wife.*

**Action against husband—Detinue of separate estate.]—See HUSBAND & WIFE, Vol. XXVII., p. 259, Nos. 2285-2287.**

*K. Landlord and Tenant.*

**465. Right of landlord to sue—Goods distrained by landlord.]—MONEUX v. GOREHAM (1741), cited 2 Selwyn's N. P., 11th ed. p. 1362.**

**Annotations:—Expld. Symons v. Hearson & Fisher (1823), 12 Price, 369. Rejd. Gubbins v. Roger (1850), 10 L. T. O. S. 65.**

**PART III. SECT. 2, SUB-SECT. 4.—G.**

**g. Conversion—Unauthorised sale by widow of intestate—Right of administratrix to sue purchaser.]—MAHER v. HUBLEY (1884), 17 N. S. R. (5 R. & G.) 295.—CAN.**

**PART III. SECT. 2, SUB-SECT. 4.—K.**

**r. Right of landlord to sue.]—An agreement by a tenant of a shop, that if the landlord would make certain improvements, the tenant would put in**

gas fittings, & leave them there when the lease expired, is executory only, & vests no property in the gas fittings in the landlord, unless they are left by the tenant in the shop. If they are removed by the tenant before he leaves the landlord cannot maintain trover for them.—DUNN v. GARRETT (1851), 7 N. B. R. (2 All.) 218.—CAN.

**t. Right of tenant to sue.]—Manure lying in heaps in a barn yard is a chattel which may be taken away by the outgoing tenant, even after his**

**466. ———.]—Pltfs., brewers, were the lessors of a public-house to D. under an agreement which gave them all the rights & remedies of landlords for rent against the effects of the tenant for the recovery of any book debts for liquors sold by them to him. There being moneys due in respect of such debts, pltfs. sent in their bailiff with a written authority to distrain for the amount, who showed his authority to deft., an auctioneer then on the premises, took an inventory & made a valuation. The tenant D. & deft. thereupon proceeded to sell the goods in disregard of such distress, deft. putting up & knocking down the goods by auction, the tenant handing them to the purchasers:—Held: though pltfs. had not such possession as to enable them to sue for conversion, they could maintain an action for a rescue against deft., for knowingly assisting in transferring the dominion & property in the goods seized to the respective purchasers.—IREDALE v. KENDALL (1878), 40 L. T. 362.**

**467. ———.]—For recovery of lease—On expiration of term.]—Trover lies not at the suit of the lessor against the lessee to obtain possession of the indenture of lease, upon the expiration of the term by forfeiture or otherwise.—HALL v. BAILL (1811), 3 Man. & G. 242; 3 Scott, N. R. 577; 10 L. J. C. P. 285; 133 E. R. 1133.**

**Annotations:—Rejd. Elworthy v. Sandford (1864), 3 H. & C. 330; Knight v. Williams, [1901] 1 Ch. 256. Mendt. R. v. Hinckley Overseers (1863), 3 B. & S. 885.**

**468. ———.]—Removal of fixtures—By assignees of bankrupt tenant.]—Where the term, pursuant to a proviso in the lease, was forfeited by the bkpcy. of the lessee, & the lessor entered upon the assignees, in order to enforce the forfeiture, & three weeks afterwards the assignees of the lessee, still continuing in possession, removed & sold a fixture put up by the lessee for the purposes of trade; & the jury found that it was not removed within a reasonable time after the entry of the lessor:—Held: they had no right so to remove it, & the lessor might recover it in trover. *Semble:* such would have been the case even without such finding of the jury.—WRETON v. WOODCOCK (1810), 7 M. & W. 14; 10 L. J. Ex. 183; 151 E. R. 659.**

**Annotations:—Apld. Roffey v. Henderson (1851), 17 Q. B. 574. Consd. Leader v. Homewood (1858), 5 C. B. N. S. 546; Re Roberts, Ex p. Brook (1878), 10 Ch. D. 100; Barff v. Frobyn (1895), 64 L. J. Q. B. 557. Rejd. Pugh v. Arton (1869), 20 L. T. 885; Re Glasdr Copper Works, English Electro Metallurgical Co. v. Glasdr Copper Works, [1904] 1 Ch. 819; Lechallus v. Woolf, [1908] 1 Ch. 611; Slough Picture Hall Co. v. Wade, Wilson v. Neville, Rejd (1916), 32 T. L. R. 542.**

**———.]—See, also, LANDLORD & TENANT, Vol. XXXI., p. 211, Nos. 3502, 3503.**

**Right of tenant to sue—Removal of fixtures.]—See LANDLORD & TENANT, Vol. XXXI., p. 212, Nos. 3510-3519.**

**Crops.]—See AGRICULTURE, Vol. II., p. 37, Nos. 208, 209.**

*L. Letters.*

**Property in letters.]—See, generally, COPYRIGHT, Vol. XIII., p. 200, Nos. 355-360.**

**Measure of damages.]—See Sect. 3, sub-sect. 1, C. (h) v., post.**

tenancy has expired, & trover will lie for it, if held or taken away by the landlord.—FORAY v. BARNES (1869), 12 N. B. R. (1 Han.) 450.—CAN.

**a. ———.]—LEWIS v. GODSON (1888), 15 O. R. 262.—CAN.**

**b. ———.]—SIMONS v. MULHALL (1913), 24 O. W. R. 736; 4 O. W. N. 1424; 11 D. L. R. 781.—CAN.**

**c. ———.]—CLOONEY v. WATSON (1851), 2 I. C. L. R. 129; 4 Ir. Jur. 39.—IR.**

*M. Goods Subject to Lien.*

**469. Right of solicitor to sue—Whether continuance of lien necessary—Delivery to arbitrator—No express reservation of lien.]—**Where an attorney, having a lien on papers, delivers them to an arbitrator to examine for the purposes of the arbn., he may maintain trover in case the arbitrator refuse to redeliver them, although, at the time of giving them up, he has not expressly reserved his lien.—*WHALLEY v. ITALLEY* (1829), 8 L. J. O. S. K. B. 6.

**470. ———.]—**If the agent [a solr.] has parted with the possession of the papers by his own act, though by mistake, his lien is at an end; but if the papers did not get lawfully out of his possession, his lien continues, & he may maintain trover for them.—*DICAS v. STOCKLEY* (1836), 7 C. & P. 587; 173 E. R. 258.

**Property in goods subject to lien, generally.]—**See *LIEN*, Vol. XXXII., pp. 222–224, Nos. 70–85.

**Execution on goods subject to lien.]—**See *EXECUTION*, Vol. XXI., pp. 502, 503, Nos. 768–776.

*N. Master and Servant.*

**471. Servant—Gift of suit of clothes after year's service—Dismissal before end of year—Action to recover suit.]—**A servant being engaged for a year at thirty guineas & a suit of clothes, was provided with a livery suit on his entering the service. He was wrongfully turned away within the year:—*Held*: he could not maintain trover for the clothes, that not being the proper form of action.

This action is founded in property. If pltf. was dismissed without reasonable cause, whereby he was prevented from becoming entitled to this suit of clothes, he has his action for that, but he cannot maintain an action of trover, because he has no property in the clothes till he has served a year (LORD TENTERDEN, C.J.).—*CROCKER v. MOLYNEUX* (1828), 3 C. & P. 470; 172 E. R. 506.

**Right to sue third persons—Loss of master's property.]—**See *MASTER & SERVANT*, Vol. XXXIV., p. 193, Nos. 1577, 1578.

**Liability in trover to third persons.]—**See *MASTER & SERVANT*, Vol. XXXIV., pp. 186 187, Nos. 1532–1536.

**Master—Right to sue third persons—Loss of master's property.]—**See *MASTER & SERVANT*, Vol. XXXIV., p. 183, Nos. 1491–1496.

**Right to apprentice's earnings.]—**See, generally, *MASTER & SERVANT*, Vol. XXXIV., pp. 518, 519, Nos. 4356–4364.

*O. Mineral Rights.*

**Right to sue for wrongful taking of minerals.]—**See *MINES & MINERALS*, Vol. XXXIV., pp. 652, 653, Nos. 499–504.

*P. Mixed Goods.*

See, generally, *BAILMENT*, Vol. III., pp. 70–72, Nos. 120–132.

*Q. Mortgage.*

**472. Loss of inventory of goods mortgaged—Action against finder.]—**Goods were mortgaged to a feme sole by deed, with a proviso that if interest & principal should be paid at stated times, the deed should be void. The goods were described

in an inventory annexed to the deed. The mtgee. married, & she & her husband declared in trover for the inventory, alleging, after recital of the deed, that they had not, nor had either of them, received possession of the goods; that they were lawfully possessed of the indenture & inventory; & that, being so possessed, they lost the inventory, which deft. found, & converted, to their damage. The declaration did not allege any default of the payments mentioned in the proviso:—*Held*: the wife might properly be joined as a pltf.—*AYLING v. WHICHER* (1837), 6 Ad. & El. 259; 1 Nev. & P. K. B. 416; Will. Woll. & Dav. 154; 6 L. J. K. B. 134; 112 E. R. 99; *sub nom.* *AYLING v. JONES*, 1 Jur. 54.

**Goods wrongfully seized for tolls.]—**See *MORTGAGE*, Vol. XXXV., p. 394, No. 1364.

**Goods sold by order of mortgagor—Action against auctioneer.]—**See *MORTGAGE*, Vol. XXXV., p. 394, No. 1366.

**473. Action against trustee of bankrupt principal debtor—Seizure of goods assigned to surety.]—**A., by indenture, reciting that B. had mortgaged to C. certain premises to secure a sum of £400 advanced by C. to A. & that A. had agreed with B. to execute an effectual indemnity against the payment of the said sum & interest, did grant, bargain, sell, & assign to B. a certain messuage, & also, secondly, certain household furniture, goods, & chattels specified therein, to have, hold, receive, & take the said furniture & other effects, unto the said B. for her own use, subject to the trusts & provisions, & with the powers thereafter contained; the trusts were, that the effects should be a protection, defence, & indemnity to B. against the payment of the £400; & that for that purpose, in case the said B. should at any time be called upon to pay that sum, or any part thereof, etc., then it should be lawful for B. immediately to enter & take possession & sell the effects. Before B. had been called upon to pay any part of the £400 A. became bkpt., & his assignees took possession of the goods & sold them:—*Held*: A. was entitled to recover their value in an action of trover.—*LETTIS v. WHITMORE* (1852), 18 L. T. O. S. 254.

**Goods removed by trustee.]—**See *MORTGAGE*, Vol. XXXV., pp. 304, 307, 394, Nos. 538, 549, 1365.

*R. Negotiable Instruments.*

Compare Part II., Sect. 1, sub-sect. 2, II., *ante*.

**474. Maker of promissory note—One of several makers.]—**Trover lies at the suit of one of the makers of a promissory note, especially if the other maker signed as surety.—*ANON.* (1819), 1 Chit. 501.

**475. ——— Maker paying on forged indorsement.]—**Defts. made & delivered to pltf. a promissory note in payment for goods. Before the note became due, & before pltf. had indorsed it, it was stolen by a clerk of pltf.' who forged their indorsement thereon, & presented the note with such forged indorsement at defts.' bankers, who paid the amount, & in the usual course handed the note over to defts. Pltf. did not discover the felony till six weeks after the note had arrived at maturity & been paid. Upon a special case stating these facts, & containing no allegation of negligence

PART III. SECT. 2, SUB-SECT. 4.—M.  
d. Lien for repairs—Refusal of  
tender of amount claimed.]—*HARTNEY*  
*v. BOULTON* (Sask.) (1914), 27 W. L. R.  
618; 7 Sask. L. R. 97.—CAN.

PART III. SECT. 2, SUB-SECT. 4.—N.  
e. Goods sold without authority—

*Tender—Demand.]—*MORTON *v.* STONE  
(1870), 30 U. C. R. 158.—CAN.

PART III. SECT. 2, SUB-SECT. 4.—Q.  
1. Tenant of mortgagor attorning to  
mortgagee—Subsequent yearly tenancy  
from mortgagee—Removal of shop fit-  
tings on termination of tenancy.]—

DENHOIM *v.* COMMERCIAL BANK (1845),  
1 U. C. R. 369.—CAN.

g. Right of mortgagee to bring ac-  
tion—Necessity for entry.]—*REYNOLDS*  
*v.* DECHMAN (1881), 14 N. S. R.  
(2 R. & G.) 459; 2 C. L. T. 261.—  
CAN.

**Sect. 2.—Right to relief: Sub-sect. 4, R., S. & T. (a) & (b).]**

on the part of plffs.:—*Held*: plffs. were entitled to recover the value of the note from defts., in an action of trover.—*JOHNSON v. WINDLE* (1836), 3 Bing. N. C. 225; 2 Hodg. 202; 3 Scott, 608; 6 L. J. C. P. 5; 132 E. R. 396.

*Annotation*.—*Mentd. Orr & Barber v. Union Bank of Scotland* (1852), 20 L. T. O. S. 16.

**Forged indorsement on bill of exchange generally.]—See BILLS OF EXCHANGE, Vol. VI., pp. 103 *et seq.***

**476. Exchange of bills—Right to sue for bills exchanged.]—**A person having three bills of exchange, applied to a country banker, with whom he had had no previous dealings, to give for them a bill on London of the same amount, & the bill given by the banker was afterwards dishonoured:

*Held*: this was a complete exchange of securities, & trover would not lie for the three bills of exchange.—*HORNBLLOWER v. PROUD* (1819), 2 B. & Ald. 327; 106 E. R. 386.

*Annotations*.—*Reid. Cumming v. Baily* (1830), 6 Bing. 363. *Mentd. Re Middleton, Ex p. Middleton* (1864), 33 L. J. Bcy. 36.

**477. Acceptor—Right to sue indorsees—Who receive in bad faith.]—**The acceptor of a bill of exchange is entitled to maintain trover for it against indorsees, who received it from the drawer, with the full knowledge that as between him & the acceptor, there was no value received; & that he had no authority to part with it; provided it appear that the acceptor supplied the stamp & paper, or that he is liable to be charged with it, in account between him & the drawer.—*EVANS v. KYMER* (1830), 1 B. & Ad. 528; 9 L. J. O. S. K. B. 92; 109 E. R. 883.

**478. Delivery to stranger after acceptance—Right of owner to sue—Action against person wrongfully delivering out bill.]—**(1) It is the regular & usual course of business in commercial transactions to deliver out a bill of exchange, left for acceptance, to any person who mentions the amount, & describes any private mark or number upon it; & if the clerk of the party leaving it by his conduct enables a stranger to discover the mark or number, in consequence of which the bill is delivered out to him, the party leaving it cannot maintain trover for the bill against the party who so delivered it out.

(2) The questions . . . will be, (a) whether there was any negligence on the part of plffs. in their conduct with respect to the bill; (b) whether there was negligence on the part of deft. If . . . there was negligence on the part of plffs., then they will not be entitled to recover; but, if the negligence was on the part of deft., then plffs. will be entitled to the verdict (*LITTLEDALE, J.*).—*MORRISON v. BUCHANAN* (1833), 6 C. & P. 18; 172 E. R. 1127, N. P.

*Annotation*.—*As to (2) Distd. Johnson v. Windle* (1836), 3 Scott, 608.

**479. Person to whose order bill payable—Bill not accepted.]—**L. & co., a London firm, agreed with C. & co., also a London firm, to make advances on a cargo per *S.*, consigned to M. & co., at Moulmein; on the terms that L. & co. should have a lien on the cargo & its proceeds; & that M. & co. should remit the proceeds as soon as realised through L. & co. L. & co. accordingly advanced to C. & co. £6,000. M. & co. were informed of the arrangement & agreed to it. Afterwards L. & co. requested C. & co. to pay off their advances. C. & co. informed M. & co. of this, & requested them to draw on them in favour of L. & co. in anticipation. L. & co. were not aware of this application. M. & co. wrote to C. & co.

expressing dislike to the style of draft, but assenting to do as requested, & adding, in a letter of the same date, "we trust you will take care we are protected in this matter." Inclosed was a letter, addressed to L. & co. unsealed, advising them of a draft. The draft was on C. & co. payable six months after sight to L. & co. C. & co. accepted the draft, handed it & the letter to L. & co., & afterwards duly honoured the draft. Afterwards a similar draft was sent in a similar letter, stating the draft to be "in anticipation of the arrival of the *S.* addressed to L. & co., but open, & in a letter to C. & co. When it arrived, C. & co. were in such circumstances as to be aware that they could not honour it. They therefore suppressed both letter & draft; M. & co. approved of their conduct. Subsequently C. & co. became bkpts.; & the unaccepted draft came into the hands of his assignees. L. & co., whose advances had not been paid off, demanded the draft from them, & on its being refused, brought trover. On a special case stating the above facts:—*Held*: L. & co. had no property in the draft, which had not been drawn under the agreement to which they were a party, but under a separate arrangement between C. & co. & M. & co.; & under the arrangement between C. & co. & M. & co., the former would have done wrong if they had handed over the draft to L. & co. when aware that they could not protect it.

We are of opinion that the property in the bills of exchange, for the conversion of which this action is brought, never vested in pltf. Both bills were payable to his order; but no act was ever done by M. & co., the drawers, or under their authority, to give him any title to them which will support this action. . . .

The circumstance, that the bills were remitted to C. in an unsealed envelope addressed to pltf., entirely accords with the notion that the bills were not to be handed over to pltf. till C. had accepted them, & that C. was not to accept them unless he was in a situation to honour them when they became due. . . . We are therefore of opinion that . . . pltf. acquired no property or interest in them by their accidentally coming into his possession (*LORD CAMPBELL, C.J.*).—*DE LIZARDI v. PENNELL* (1856), 6 E. & B. 742; 25 L. J. Q. B. 387; 119 E. R. 1041; *sub nom. LIZARDI v. PENNELL*, 2 Jur. N. S. 1227.

**Loser of bill.]—See BILLS OF EXCHANGE, Vol. VI., pp. 422, 423, Nos. 2740–2748, 2750.**

**Measure of damages.]—See Sect. 3, sub-sect. 1, C. (h) vi., *post*.**

*S. Parish Books.*

**480. Right of vestry clerk—Books annexed to his office.]—***Mandamus* to the churchwardens to deliver a vestry book to the vestry clerk refused.

If the muniments belonged to him as annexed to his office, he may bring an action of detainer or trover (*LORD ELLENBOROUGH, C.J.*).—*ANON.* (1816), 2 Chit. 255.

**481. Right of churchwardens—Books of account kept by surveyor of highways.]—**The overseers & churchwardens of a parish have not such a special property in the books of account kept by the surveyor of highways under 13 Geo. 3, c. 78, s. 48, & the Vestries Act, 1818 (c. 69), s. 6, as to enable them to maintain trover against a surveyor who has gone out of office, but who refuses to deliver up the books. They must proceed against him under the provisions of these statutes.—*ADDISON v. ROUND* (1836), 4 Ad. & El. 799; 7 C. & P. 285; 6 Nev. & M. K. B. 422; 3 Nev. & M. M. C. 629



5 L. J. K. B. 152; 111 E. R. 984; *sub nom.* HARRISON v. ROUND, 2 Har. & W. 18.

*Annotations* :—*Consd.* R. v. Reynolds (1839), 3 J. P. 752. *Reid.* Moss v. Thorniley (1856), 27 L. T. O. S. 101.

**482. — Churchwardens de facto—Right to sue predecessors.]**—Parish books of the chapelry district were purchased out of rates levied over the whole chapelry district, & passed from time to time from the churchwardens to their successors. After the purchase the district was contracted under the Church Building Acts, & also under an Act for dividing the parish in which the ancient chapelry was situate, & churchwardens for the contracted district provided, who *de facto* succeeded the old churchwardens, though the area of the district was not so extensive:—*Held*: the churchwardens *de facto* were entitled to sue the old churchwardens in detinue for the parish books.—*MOSS v. THORNILEY* (1856), 27 L. T. O. S. 101; 20 J. P. 660; 4 W. R. 514.

*T. Goods Subject of Pledge.*

(a) *In General.*

**483. Goods pledged to secure bail—Demand by unauthorised person.]**—*BLOOMFIELD v. BLAKE*, No. 386, *ante*.

**Goods pawned—Action by pawner.]**—*See PAWNS & PLEDGES*, Vol. XXXVII., pp. 10, 11, 12, 24, Nos. 47, 63–72, 188.

**Action by pawnee—Against third parties.]**—*See PAWNS & PLEDGES*, Vol. XXXVII., pp. 16, 17, Nos. 135–137.

**Action by true owner.]**—*See PAWNS & PLEDGES*, Vol. XXXVII., pp. 18–22, Nos. 143–174.

**Action by assignee of pawner—Refusal of pawnee to deliver—On redemption by assignee.]**—*See PAWNS & PLEDGES*, Vol. XXXVII., p. 10, No. 55.

**Bankrupt pledgor—Action by assignees—Against pledgee.]**—*See BANKRUPTCY*, Vol. V., pp. 710, 911, Nos. 6212, 7457, 7459.

**484. Rights of grantee of bill of sale.]**—A. contracted with B., a shipbuilder in Nova Scotia, for the building of a vessel. B. was already largely indebted to A. upon a general consignment account, & A. from time to time made considerable advances on account of the ship whilst in progress, & also supplied anchors, cables, & other stores for her. On June 20, 1848, B., by a bill of sale, reciting that A. had made advances to B., & had agreed to make such further advances as he might require to build, launch, rig, & fully equip the vessel for sea, “for the security & repayment of all such sum or sums of money as A. had already advanced or might thereafter advance, to aid & assist him to complete & finish the vessel,” bargained, sold, assigned, & transferred to A. “a certain ship or vessel now in course & progress of building” by him, at etc., particularly describing it, together with certain timber in B.’s possession—“to have & to hold the ship or vessel, etc., goods & chattels, etc., to A., his exors., etc., to their absolute use & benefit of behoof for ever, when the ship or vessel shall be complete & finished, in as full, ample, & perfect a manner as if the said ship or vessel were ready for sea, & ready to be delivered to the said A. at the time of executing these presents.”

On Jan. 30, 1849, B. signed a builder’s certificate & declaration of ownership stating A. to be the sole owner of the vessel, & thereupon obtained a certificate of registry in A.’s name, pursuant to 8 & 9 Vict. c. 89, s. 11. This certificate B. retained in his own possession.

On Mar. 29, 1849, B. induced the comptroller of the customs at Pictou, in Nova Scotia, to cancel

the above certificate, & to grant him a fresh one in his own name as owner, & on the same day executed an assignment of the ship, then in an unfinished state, to C., who took possession of her, finished her, & sent her to Liverpool with a cargo on his own account:—*Held*: the property in the ship passed to A. by the bill of sale of June 20, 1849, & his right was in no degree limited by the *habendum*; & consequently, C. was liable in trover.

The parties having agreed that the amount of damages should be assessed by an average stater, the ct. suggested, & the parties assented, that the proper principle on which to estimate such damages, would be, the value of the ship & all her stores, etc. on Mar. 29, 1849, when C. took possession of her; & as a mode of ascertaining such value, the referee should consider what would have been the value of the ship at Pictou, if she had been completed by B. according to his contract with A., & deduct therefrom the money that would necessarily have been laid out by B. after that date, in order to complete her according to the contract.—*REID v. FAIRBANKS* (1853), 13 C. B. 692; 1 C. L. R. 787; 21 L. T. O. S. 166; 138 E. R. 1371; *sub nom.* *REID v. FAIRBANKS*, 22 L. J. C. P. 206; 17 Jur. 918.

*Annotations* :—*Consd.* Chinery v. Viall (1860), 5 H. & N. 288; *Peruvian Guano Co. v. Droyfus* (1887), [1892] A. C. 170, n. *Reid.* Wood v. Bell (1856), 2 Jur. N. S. 664; *Bell v. Bank of London* (1858), 28 L. J. Ex. 116. *Mentd.* Jones v. Williams (1859), 4 H. & N. 706.

**Disposal of chattels by grantor.]**—*See BILLS OF SALE*, Vol. VII., pp. 143 *et seq.*

(b) *Securities.*

**485. Pledge as security for debt—Bills of lading of expected cargo—Unauthorised disposal of goods by agents of owner—Recovery by assignees of bankrupt owner of substituted goods delivered to pawnee.]**—A merchant pledges for value the bills of lading of an expected cargo, his property, in the profits of which his agents abroad were interested in a certain proportion. His agents, without the knowledge of the owner or the pawnees, dispose of part of the cargo abroad, after which the owner becomes a bkpt.; he induces the agents to replace the goods disposed of by others, of which the agents give him bills of lading, & he sends them to the pawnees, to make good their security:—*Held*: the assignees of the bkpt. might recover the substituted goods against the pawnees.—*MEYER v. SHARPE* (1813), 5 Taunt. 74; 128 E. R. 614.

**486. — Title deeds—By purchaser before conveyance—Action by trustees of bankrupt.]**—A. having agreed to purchase an estate of B., & having received the title deeds, borrowed money of C., & deposited the title deeds with him as a security, agreeing to mtge. the estate to him whenever he should receive the deed of conveyance. A. afterwards received from B. the deed of conveyance of the estate, which he then delivered to C. as a further security. In the interval C. refused to complete the mtge. unless A. would pay usurious interest on the money lent, to which A. agreed. A. afterwards became bkpt., & his assignees bought trover against C. for the deed of conveyance:—*Held*: the original possession of the title deeds being good, gave C. a right to the estate whenever it should be conveyed to A., & therefore C. was entitled to retain the deed of conveyance of the estate against the assignees of A.—*WOOD v. GRIMWOOD* (1830), 10 B. & C. 679; 5 Man. & Ry. K. B. 551; 8 L. J. O. S. K. B. 192; 109 E. R. 602.

**487. — By tenant for life—Action by reversioners.]**—On the death of a tenant for life,



**Sect. 2.—Right to relief: Sub-sect. 4, T. (b), & U., V., W., X., Y. & Z.]**

who had granted a lease under a power in a will, the reversioners were held entitled to recover the title deeds from an assignee of the lease, with whom they had been deposited as security for money advanced to the tenant for life & the lessee. —*EASTON v. LONDON* (1863), 33 L. J. Ex. 34; 9 L. T. 843, n.; 12 W. R. 53.

**488. — Promissory note.—Action by pledgor after tender.**—To a count in detinue, on the bailment of a promissory note to be redelivered on request, deft. pleaded, that pltf. had deposited the note with him, to be kept as a pledge & security for the repayment of a loan of £50; pltf. replied, a tender of the £50:—*Held*: the replication was good, & no departure. —*GLEDSTANE v. HEWITT* (1831), 1 Cr. & J. 565; 1 Tyr. 445; 9 L. J. O. S. Ex. 145; 148 E. R. 1548.

**Annotations:—***Appld.* Walker v. Jones (1831), 4 Tyr. 915. *Consd.* Whitehead v. Harrison (1841), 6 Q. B. 423; Clements v. Flight (1846), 16 M. & W. 42. *Appld.* Clossman v. White (1849), 7 C. B. 43; Reeve v. Palmer (1859), 5 C. B. N. S. 84. *Consd.* Goldman v. Hill, [1919] 1 K. B. 443. *Refd.* Danby v. Lamb (1861), 11 C. B. N. S. 424; Bryant v. Herbert (1878), 3 C. P. D. 189.

**489. — Lease—By assignee of lease—Action by pledgor.**—Pltf. being possessed of the lease of a messuage by assignment, delivered it to F. with authority to raise money on the security of the deed. Deft., who had advanced money, which was not repaid, having refused to deliver up the deed, pltf. sued him in trover: *Held*: deft. might give these facts in evidence under a plea that pltf. was not possessed of the deed as his own property at the time of the action, & pltf. was not entitled to recover. —*OWEN v. KNIGHT* (1837), 4 Bing. N. C. 54; 6 Dowl. 244; 3 Hodg. 245; 5 Scott, 307; 7 L. J. C. P. 27; 1 Jur. 869; 132 E. R. 709.

**Annotations:—***Consd.* Samuel v. Duke (1838), 6 Dowl. 536. *Appld.* Isaac v. Belcher (1839), 5 M. & W. 139. *Consd.* White v. Teal (1840), 12 Ad. & El. 106; Leake v. Loveday (1842), 3 Tr. 17. *Appld.* Webb v. Tripp (1842), 11 L. J. Q. B. 154. *Consd.* Mason v. Farnell (1844), 1 Dow. & L. 576; Dorrington v. Carter (1847), 1 Exch. 566. *Refd.* Scarfe v. Morgan (1838), 4 M. & W. 270; Gregg v. Wells (1839), 10 Ad. & El. 99; Jackson v. Cummins (1839), 5 M. & W. 342; Tripp v. Armitage (1839), 8 L. J. Ex. 107.

**490. — Dock warrant for goods—Wrongful delivery to third person.**—A. deposited a dock warrant for brandies with B., as a security for a loan, which was to be repaid on Jan. 29, or, in default, the brandies were to be forfeited. On Jan. 28, B. agreed for the sale of the brandies to C., & on Jan. 29 delivered to him the dock warrant, & C. took actual possession of the brandies on Jan. 30:—*Held*: (1) the sale on Jan. 28, & the delivery of the dock warrant to the vendee on Jan. 29, A. having the whole of that day to redeem it, amounted to a conversion; (2) the proper measure of damages was the actual damage A. had sustained by the wrongful conversion, which, as there was no intention on his part to redeem the pledge, was merely nominal. —*JOHNSON v. STEAR* (1863), 15 C. B. N. S. 330; 3 New Rep. 425; 33 L. J. C. P. 130; 9 L. T. 538; 10 Jur. N. S. 99; 12 W. R. 347; 143 E. R. 812.

**Annotations:—***As to (1)* *Consd.* Pigot v. Cabley (1864), 15 C. B. N. S. 701. *Appld.* Donald v. Suckling (1866), L. R. 1 Q. B. 585. *Expld.* Mulliner v. Florence (1878), 3 Q. B. D. 484. *As to (2)* *Distd.* Swire v. Leach (1865), 18 C. B. N. S. 479. *Apprvd.* Halliday v. Holgate (1868), L. R. 3 Exch. 299. *Distd.* Mulliner v. Florence (1878), 3 Q. B. D. 484. *Appld.* Cox v. Liddell (1895), 2 Mans. 212. *Refd.* Edmondson v. Nuttall (1864), 17 C. B. N. S. 280; Johnson v. L. & Y. Ry. & Wigan Wagon Co. (1878), 3 C. P. D. 499; Bel-size Motor Supply Co. v. Cox, [1914] 1 K. B. 244.

**— Insurance policy—Action by assignees of bankrupt pledgor.**—*See* BANKRUPTCY, Vol. V., p. 771, Nos. 6024, 6028.

**— Certificate of ship's register—Action by shipowner.**—*See* SHIPPING, Vol. XLI., p. 168, Nos. 93, 94.

**— Share certificates.**—*See* COMPANIES, Vol. IX., pp. 412, 414, Nos. 2656, 2669; PAWNS & PLEDGES, Vol. XXXVII., pp. 10, 14, Nos. 46, 104.

**Measure of damages generally.**—*See* Part III., Sect. 3, sub-sect. 1, C. (h) vii., post.

**U. Principal and Agent.**

*See, generally,* AGENCY, Vol. I., pp. 257 et seq.

**491. Right of Agent—Against principal—Taking documents entrusted to agent by court.**—A party to a suit having obtained from his own attorney or agent, documents in a cause, in custody of a ct., & by the ct. entrusted to the agent, on his undertaking to return them:—*Held*: the agent was entitled to maintain either detinue or *assumpsit* against his employer to recover them. —*GRAIG v. SHEDDEN* (1859), 1 F. & F. 553, N. P.

**492. — — — — —**—*A* Scottish agent, having, by the desire & for the purposes of his employer, obtained documents out of the custody, of a Scottish ct., upon an undertaking to return them:—*Held*: entitled to maintain an action against his employer for the detention of them. —*SANDS v. SHEDDEN* (1859), 1 F. & F. 556, N. P.

**493. Right of principal—Principal holding out agent—No notice to defendant that goods belong to plaintiff.**—The declaration stated, that whereas Y., at the request of deft., caused to be delivered to deft., & continued to deft. until the committal of the grievance, etc., a certain horse of pltf.'s, to be left by deft. for Y. for certain reward, to be paid to deft. in satisfaction of all his claims; & it thereupon became the duty of deft. to re-deliver the horse upon the request of Y., upon being paid all his demands in respect of the horse. The declaration then averred, that Y. requested deft. to deliver the horse to pltf., & pltf. then paid deft. all his demands in respect of the horse, & requested deft. to deliver to him the horse; yet deft. refused to deliver the horse to pltf., but wrongfully kept & detained it from pltf. for a long time, by means whereof pltf. was deprived of the profit & advantage that he might have derived from the possession & employment of the horse, & was prevented from applying his care, etc., about the treatment of the horse, for want whereof the horse became lame, etc.:—*Held*: (1) this was not a defective count in trover; (2) as pltf. had recognised the right of Y. to make a contract with deft., & had not shown that he gave notice to deft. that the horse was his property, he had shown the right of action to be in Y., & not in himself, & the judgment ought to be arrested. —*TOLLIT v. SHENSTONE* (1839), 7 Dowl. 455; 5 M. & W. 283; 8 L. J. Ex. 244; 151 E. R. 120.

**494. — Principal not holding out agent—Wrongful sale by agent.**—Applts. were timber merchants, & kept large quantities of timber warehoused in their name at the docks.

The dock co. were authorised to accept & act upon delivery orders signed by C., appts.' manager, who had authority to sell timber in ordinary quantities to regular customers.

C. from time to time fraudulently transferred timber belonging to applts. to a fictitious purchaser, & then sold it to resps. in the assumed name of such purchaser.

Resps. bought & paid for the timber in good faith without any suspicion of fraud. They were not customers of applts., & did not know them in any way in the transaction:—*Held*: there was no holding out of C. by applts. to resps. as a person

having authority to dispose of the timber, & resps. acquired no better title to the timber than that of U., who had stolen it, & were liable for the value of it to applts. in an action of detainee.—*FARQUHARSON BROTHERS & Co. v. KING & Co.*, [1902] A. C. 325; 71 L. J. K. B. 667; 86 L. T. 810; 51 W. R. 94; 18 T. L. R. 665; 46 Sol. Jo. 584, H. L. *Annotations*:—*Distd.* Commonwealth Trust v. Akotey, [1926] A. C. 72. *Refd.* Herdman v. Wheeler, [1902] 1 K. B. 361; Weiner v. Gill, Same v. Smith, [1906] 2 K. B. 574; Truman v. Attenborough (1910), 103 L. T. 218; Bradford v. Price (1923), 92 L. J. K. B. 871; Jones v. Waring & Gillow, [1926] A. C. 670. *Mentd.* Timmer v. Webster, [1902] 2 Ch. 163; Macmillan v. London Joint Stock Bank, [1917] 2 K. B. 439.

— *To follow property into hands of third parties.*—See AGENCY, Vol. I., pp. 562–566, Nos. 2094–2119.

— *Authority of agent to pledge goods.*—See AGENCY, Vol. I., pp. 330–346, Nos. 467–570.

#### V. Seller and Buyer.

*Action by buyer—Necessity for transfer of property.*—See SALE OF GOODS, Vol. XXXIX., pp. 399, 497, 499, 505, 521, 523, Nos. 352, 353, 1153, 1167, 1230, 1363, 1376.

— *Before delivery.*—See SALE OF GOODS, Vol. XXXIX., p. 542, No. 1524.

— *Breach of Contract.*—See SALE OF GOODS, Vol. XXXIX., pp. 680, 681, Nos. 2659–2675.

*Action by seller—For goods on sale or return.*—See SALE OF GOODS, Vol. XXXIX., pp. 508, 511, Nos. 1258, 1286, 1296.

— *Where right of disposal reserved by seller.*—See SALE OF GOODS, Vol. XXXIX., pp. 514, 516, 517, Nos. 1312, 1329, 1331, 1337.

— *Contract cancelled.*—See SALE OF GOODS, Vol. XXXIX., p. 531, No. 1438.

— *Property not transferred.*—See SALE OF GOODS, Vol. XXXIX., pp. 534, 543, 555, 640, Nos. 1454, 1535, 1630, 2364.

— *Refusal of buyer to take delivery.*—See SALE OF GOODS, Vol. XXXIX., pp. 561, 628, Nos. 1679, 2256, 2257.

— *Effect of disposition by buyer.*—See SALE OF GOODS, Vol. XXXIX., pp. 614, 632, 633, 635, 636, Nos. 2127, 2292, 2302, 2311, 2318, 2322.

— *Breach of contract.*—See SALE OF GOODS, Vol. XXXIX., p. 645, No. 2401.

*Action by trustee of bankrupt seller—Property transferred.*—See SALE OF GOODS, Vol. XXXIX., p. 483, No. 1036.

*Action by trustee of bankrupt buyer—Property not transferred.*—See SALE OF GOODS, Vol. XXXIX., p. 498, No. 1155.

— *Trover by purchaser of horse bought in market—Necessity for proof of compliance with statutory formalities.*—See MARKETS, Vol. XXXIII., p. 539, No. 155.

#### W. Ships and Cargo.

**495. Right of vendor of ship—After sale—To sue for certificate of registry.**—(1) There is nothing in the character or nature of the certificate of registry of a ship which excludes it from the jurisdiction of the ct. to decree its delivery as against a party unlawfully detaining it.

(2) The vendor of a ship, with a covenant for title, retains, after the sale, in order that he may fulfil his contract, & defend himself against an action brought upon his covenant, such an interest in the certificate of registry as enables him to sustain a suit for its delivery against a party unlaw-

fully detaining it.—*GIBSON v. INGO* (1847), 6 Hare, 112; 67 E. R. 1103.

*Annotations*:—*As to* (1) *Apld.* The Celtic King, [1894] P. 175. *Generally, Mentd.* Knight v. Bowyer (1853), 2 De G. & J. 421.

**496. Detention of property of seaman—Guilty of breach of discipline—Liability of captain.**—Where the second mate of a vessel was ordered with three other seamen to take the ship's boat & convey the captain on board, who had gone on shore at the Mauritius, & on their getting on shore they refused to return with him, but remained there all night, & he was obliged to get back to his ship in another boat, & redeem his own on the following morning, when such mate was taken before a magistrate at the Mauritius, & committed to prison for a month:—*Held*: this was such an act of disobedience as to warrant the captain to detain his property on board the vessel by way of forfeiture, & consequently that trover could not be maintained against the captain for such detention.—*WEATHERPEN v. LAIDLIER* (1823), 8 Moore, C. P. 37.

**497. Trover for ship with apparel & appurtenances—Whether ship's boat included.**—In trover for a ship "with the apparel & appurtenances thereto belonging," pltf. cannot set up a distinct title to a new boat & cordage.—*SHANNON v. OWEN* (1827), 1 Man. & Ry. K. B. 392; 61 L. J. O. S. K. B. 61.

*Ownership of ships generally.*—See SHIPPING, Vol. XLI., pp. 162 et seq.

*Wrongful sale of cargo—Rights of cargo owner.*—See, generally, SHIPPING, Vol. XLI., pp. 514–516, Nos. 3440–3458.

— *Right of shipowner.*—See SHIPPING, Vol. XLI., p. 516, No. 3462.

#### X. Trees and Timber.

See AGRICULTURE, Vol. II., pp. 75, 112, 113, Nos. 537, 538, 948–952.

*Property in trees & timber generally.*—See AGRICULTURE, Vol. II., pp. 63–93, Nos. 397–735.

#### Y. Trustee and Cestui que Trust.

See, generally, TRUSTS & TRUSTEES.

**498. Trustee—Actual possession not necessary.**—*BARKER v. FURLONG*, No. 363, ante.

*Cestui que trust—Right to sue bailee of trustee.*—See BAILMENT, Vol. III., p. 116, No. 391.

#### Z. Other Cases.

**499. Trooper ordered to retain horse—Right to sue captain for detention.**—A trooper may, on the King's order to retain his horse, maintain trover against his captain for detaining it.—*ANON.* (1699), 12 Mod. Rep. 311; 88 E. R. 1342.

**500. Legatee—After assent of executor.**—A specific legacy being left to L., he applied to pltf. the exor., who assented; but delaying to deliver it, L. brought an action of trover for it, & had a verdict & £200 damages; the exor. preferred his bill here, & insisted, (a) an action of trover would not lie for a legacy; (b) that it is a verdict against conscience, the damages being excessive. The ct. held, that after an exor. has assented, an action of trover certainly lies for a legatee; & that this was not a case where they would relieve against a verdict, & therefore allowed the plea of the verdict & judgment.—*WILLIAMS v. LEE* (1745), 3 Atk. 223; 26 E. R. 930, L. C.

**501. Person having right to cut rushes on common.**—*RACKHAM v. JESUP*, No. 67, ante.

**502. Persons entitled to grant of arms.**—*STUBS v. STUBS*, No. 43, ante.

#### PART III. SECT. 2, SUB-SECT. 4.—Z.

*h. Prize competition*—"Cup to be won twice in succession"—*Detinue.*—*PORTRER v. PARK* (1926), 26 S. R. N. S. W. 512; 43 N. S. W. N. 159.—*AUS.*

**Sect. 2.—Right to relief: Sub-sect. 4, Z. Sect. 3: Sub-sect. 1, A. & B. (a), (b) & (c).]**

**503. Person contracting for work & labour—Property in goods supplied not passing.]—**By a contract between pltf.s, the owners of a steamship, & defts., engineers, defts. were to supply new boilers & various parts of machinery for the ship, & to alter the engines according to a specification, & the engines & boilers & connections were to be completed ready for sea & tried under steam previous to being handed over to pltf.s. Due notice was to be given by pltf.s. to defts. of the date at which the ship was to be placed in the hands of the defts., after the work was ready, to have the engines completed. The price to be £5,800, payable as the work progressed, as follows: viz., when boilers were plated £2,000; when the whole of the work was ready for fixing on board, £2,000; & when the ship was fully completed & tried under steam, £1,800. These payments were to be made only on the certificate of pltf.s.' inspector that the conditions entitling defts. to receive such payment had been fulfilled. The whole of the old materials necessarily taken from the vessel by reason of the execution of the contract was to become the property of defts., & the value of such old materials was £353.

Pltf.s. gave defts. due notice that the vessel was ready to be placed in their hands on a certain date, but on hearing that defts. could not promise to be ready by that date, pltf.s. sent her on a voyage on which she was lost by perils of the sea. The boilers were plated by a certain day, & afterwards, on a certain other day, the whole of the work was ready for fixing on board the vessel, & pltf.s.' inspector having, on each occasion, given the necessary certificate, pltf.s. paid the first & second £2,000 according to the contract. At the time of the payment of such second £2,000, pltf.s. knew but defts. did not know of the loss of the vessel:—*Held*: the contract was substantially one for work & labour to be done by defts., & the two payments of £2,000 each were intended only to be paid on account of a contract to be performed as a whole, & therefore as the full performance of the contract had been rendered impossible by the loss of the vessel, no property in any portion of the work certified by the inspector to have been properly done & in respect of which the two sums were so respectively paid, had passed to pltf.s. so as to entitle them to recover in detinue for its detention.—*ANGLO-EGYPTIAN NAVIGATION CO. v. RENNIE* (1875), L. R. 10 C. P. 271; 44 L. J. C. P. 130; 32 L. T. 467; 23 W. R. 626; *on appeal*, L. R. 10 C. P. 571, Ex. Ch.

*Annotations*.—*Refd.* Seath v. Moore (1884), 11 App. Cas. 358, n.; Lloyd v. Royal Barge Soc. Anon. v. Stathatos (1917), 33 T. L. R. 390.

**Agistment—Right of owner to sue agister.]—***See ANIMALS*, Vol. II., p. 253, Nos. 348, 349.

#### PART III. SECT. 3, SUB-SECT. 1.—A.

**k. Whether trover appropriate action.]—**Cattle supposed to have been stolen are taken by A., a constable, to B., an innkeeper, to feed & take care of. After some time, B., wishing to be paid for their keep, applies to C., a magistrate, who had nothing to do with the original caption, for directions. C. tells him to sell the cattle & satisfy his claim, which B. does. D., the owner of the cattle, sues C., the magistrate, in trespass:—*Held*: as against the magistrate, trover, & not trespass, should have been the form of action.—*MARSH v. BOULTON* (1848), 4 U. C. R. 364.—*CAN.*

**1. No action lies against sheriff—Unless plaintiff makes him acquainted with claim when making execution.]—**

*CLARK v. OIRK* (1854), 11 U. C. R. 436.—*CAN.*

**m. Right of action by wife against husband.]—**A married woman, married in 1870, who had without any just cause left her husband's house, & was living apart, demanded from him chattels & household furniture which, having been her property before marriage, came into his possession upon & by virtue of the marriage, & had been used by them jointly in his dwelling house, & on his refusal brought trover:—*Held*: under C. S. U. C. c. 73 & 75, & 35 Vict. c. 16, the action could not be maintained.—*McGUIRE v. McGUIRE* (1873), 23 C. P. 123.—*CAN.*

**n. Partial failure of consideration under contract—Whether contract may be rescinded & action for trover brought.]—**

#### SECT. 3.—REMEDIES.

##### SUB-SECT. 1.—ACTION IN TROVER OR DETINUE.

###### A. In General.

**504. Election to sue in trover or trespass.]—**Either trover or trespass will lie, at the election of pltf., for goods taken by wrong, but in trover damages shall be given for the conversion only.—*BISHOP v. MONTAGUE* (VISCOUNTESS) (1804), Cro. Eliz. 824; Cro. Jac. 50; 78 E. R. 1051.

*Annotation*.—*Refd.* Cooper v. Shepherd (1846), 7 L. T. O. S. 282.

###### B. Defences.

###### (a) Denial.

**505. Denial of plaintiff's right.]—OWEN v. KNIGHT**, No. 489, *ante*.

**506. —.]—BARTON v. BROWN**, No. 336, *ante*.

**507. —.]—**In an action of trover for a heifer, upon a plea of not possessed, an apparent sale & transfer of the heifer from deft. to pltf. having been proved:—*Held*: deft. was at liberty to show that that sale & transfer was merely colourable, & the jury having so found, the verdict could not be disturbed.—*STEWART v. WILKINSON* (1846), 7 L. T. O. S. 81.

**508. —.]—**In trover, pltf. having proved a taking of the goods from his premises by deft., & a subsequent demand & refusal, deft. may prove, under "not possessed," that pltf.'s wife, with his authority, gave the goods to deft. in discharge of a debt due to him from pltf.—*RINGHAM v. CLEMENTS* (1848), 12 Q. B. 260; 17 L. J. Q. B. 289; 11 L. T. O. S. 353; 12 Jur. 580; 116 E. R. 806.

*Annotation*.—*Refd.* Bourne v. Fosbrooke (1865), 34 L. J. C. P. 161.

**509. —.]—**B. & co., merchants at Liverpool, sent orders to M. & co., merchants at Charlestown, to ship on account of B. & co. a cargo of cotton on board a vessel of B. & co.'s which was sent to Charlestown with an outward cargo, & also to receive the cotton. M. & co. thereupon purchased cotton from time to time & shipped it on board B. & co.'s vessel. The master of the vessel executed to M. & co. a bill of lading, which stated that the cotton was to be delivered at Liverpool "to order or to our assigns, paying for freight for the cotton nothing, being owner's property." M. & co. indorsed the bill of lading. "Deliver the within to the Bank of Liverpool or order M. & co." Afterwards M. & co. sent to B. & co. an abstract invoice of the cotton, in which they stated that they had shipped the cotton on board the vessel "by order & for account & risk" of B. & co. & addressed "to order"; & still later they sent to B. & co. a full invoice stating that the cotton was shipped "by order & for account of B. & co. & to them consigned." M. & co. not having sufficient funds of B. & co. to pay for the cargo of cotton, drew bills on B. & co. for the amount,

—*VANBUSKIRK v. VANWART* (1904), 30 N. B. R. 422.—*CAN.*

**o. Purchase by agent in his own name—Non-disclosure of existence of intending purchaser—Subsequent agreement for sale at an advance—Sale to agent set aside—Return of chattel property—Damages for conversion.]—***NEWTEAD v. HOWE* (Sask.) (1911), 17 W. L. R. 471.—*CAN.*

**p. Whether trover will lie for timber cut in Quebec.]—**Trespass or trover will lie in Ontario for timber cut in the Providence of Quebec (the declaration not charging any trespass to the reality), although it may be necessary in such action to try the title to the land on which it was cut.—*McLAREN v. RYAN* (1875), 36 U. C. R. 307.—*CAN.*

& wrote to B. & co. informing them of the drawing of the bills & desiring them to insure the cotton. M. & co. sold the bills they had so drawn to the bank at Charlestown, & delivered to the bank the bill of lading so indorsed as a security for the payment of the bills, which were ultimately dishonoured & taken up by M. & co. B. & co. became bkpts. before the arrival of the vessel. M. & co., by means of their agent, on its arrival put in a claim to the cargo. The assignees of B. & co. brought detinue against M. & co.'s agents, who pleaded that bkpts., B. & co., were not possessed, & that plffs. were not possessed as assignees:—*Held*: M. & co. did not by transferring bill of lading as security to the bank at Charlestown, lose their property in the goods so as to prevent their claiming them as against B. & co. or their assignees, & the defence might be raised under the plea of not possessed.—*TURNER v. LIVERPOOL DOCKS TRUSTEES* (1851), 6 Exch. 543; 20 L. J. Ex. 393; 17 L. T. O. S. 212; 155 E. R. 659, Ex. Ch.

*Annotations*:—*Consd.* Falk v. Fletcher (1865), 18 C. B. N. S. 403; Shepherd v. Harrison (1869), 14 R. 4 Q. B. N. 196. *Refd.* Brown v. North (1852), 8 Exch. 1; Key v. Cotesworth (1852), 7 Exch. 595; Gurney v. Behrend (1854), 3 E. & B. 622; Browne v. Haro (1859), 4 H. & N. 822; Shand v. Sanderson (1859), 4 H. & N. 381; Joyce v. Swann (1861), 17 C. B. N. S. 81; Gabarron v. Kreeft, Kreeft v. Thompson (1875), L. R. 10 Exch. 274; Ogg v. Shuter (1875), 44 L. J. C. P. 161; *Mirabita v. Imperial Ottoman Bank* (1878), 3 Ex. D. 161. *Mentd.* Berndtson v. Strang (1867), L. R. 4 Ex. 481; Schotmans v. L. & Y. Ry. (1867), 2 Ch. App. 332; *Imperial Ottoman Bank v. Cowan*, *Cowan v. Imperial Ottoman Bank* (1873), 21 W. R. 770; *Re Cook*, *Ex p. Rosevear China Clay Co.* (1879), 11 Ch. D. 560; *Re Bruno*, *Silva*, *Ex p. Francis* (1887), 56 L. T. 577; *The Annie Johnson*, *The Kronprinzessin Margareta*, [1918] P. 154; *The Dirigo*, *The Hallingdall*, [1919] P. 204.

510. —[In an action of trover by the owner of the goods against the assignees of bkpt., the defence, that the goods were at the time of the bkpy. in the order & disposition of bkpt. with the consent of the true owner, & that the title to the goods vested in the assignees by virtue of an order made by the Ct. of Bkpy., is admissible under a plea of not possessed, although the order was applied for & made after action brought.—*HESLOP v. BAKER* (1853), 8 Exch. 411; 22 L. J. Ex. 333; 20 L. T. O. S. 191; 17 J. P. 136; 155 E. R. 1408.

*Annotations*:—*Refd.* Fielding v. Lee (1865), 18 C. B. N. S. 499; Webb's Policy (1867), 36 L. J. Ch. 341; Cooke v. Hemming (1868), L. R. 3 C. P. 331.

511. —[*Replication that possession of defendant obtained without consideration.*]—(1) A party who, being employed by pltf. to procure a bill of exchange to be discounted, lodged it instead with deft. as a security for a debt due to deft., was held a competent witness for pltf. in an action of trover brought by pltf. for the recovery of the bill.

(2) To trover for a bill of exchange, deft. pleaded that the drawer being lawfully possessed of the bill, indorsed it to P., & that P. for good consideration indorsed it to deft.: pltf. replied, that there was no good consideration for P.'s indorsing the bill.

The jury having found for pltf. on this replication, the ct. refused to arrest judgment or award a replender.—*FANCOUR v. BULL* (1835), 1 Bing. N. C. 681; 1 Hodg. 98; 1 Scott, 645; 4 L. J. C. P. 249; 131 E. R. 1279.

512. *Denial of detention—Discounting negotiable instrument.*—A., to whom B. was indebted, re-

ceived a bill from B. "to get discounted or return on demand." A. sent the bill to C. with directions to place it to A.'s account with C.; which C. did, minus the discount. In trover for the bill by B. against A.:—*Held*: this was substantially a discounting of the bill by A., & A. was entitled to a verdict under a plea of not possessed.—*WILKINSON v. WHALLEY* (1843), 5 Man. & G. 590; 1 Dow. & L. 9; 6 Scott, N. R. 631; 12 L. J. C. P. 270; 7 Jur. 468; 134 E. R. 696; *sub nom.* *WILLIAMS v. WHALLEY*, 1 L. T. O. S. 146.

### (b) Estoppel.

513. *Res judicata—Former judgment—Foreign judgment.*—To an action of trover deft. pleaded, that deft. being within the jurisdiction of the Admty. Ct. of Sierra Leone, pltf. recovered a judgment against him in that ct. for the same cause of action:—*Held*: ill.—*SMITH v. NICOLLS* (1839), 5 Bing. N. C. 208; 7 Dowl. 282; 1 Arn. 474; 7 Scott, 147; 8 L. J. C. P. 92; 132 E. R. 1081.

*Annotations*:—*Refd.* Henderson v. Henderson (1844), 6 Q. B. 288; Spence v. Chadwick (1847), 16 L. J. Q. B. 313; *Bank of Australasia v. Harding* (1850), 9 C. B. 661; *Thelwall v. Yelverton* (1864), 16 C. B. N. S. 813; *Re Henderson*, *Nouvion v. Freeman* (1887), 35 Ch. D. 704; *Re King & Beesley*, *Ex p. King & Beesley*, [1895] 1 Q. B. 189. *Mentd.* *Cowan v. Braidwood* (1840), *Drinkwater*, 40; *Garclas v. Ricardo* (1844), 8 Jur. 1037; *Brine v. G. W. Rty.* (1862), 2 B. & S. 402.

514. —[In detinue for a lease, the ct. allowed defts., upon a rule to plead several matters, to plead, in addition to a denial of the detainer, the following pleas:—(a) That pltf. sued defts. for the detention of the lease, & recovered judgment, in a former action, & issued execution, & took other proceedings to enforce the judgment, that the sum of £150, to secure which the lease was deposited, was still due, & that no tender of that sum had been made since the judgment in the said former action, nor had any demand of the lease been made after the termination of the proceedings in the said former action; (b) for a defence on equitable grounds, as to the detention of the lease, that it was deposited to secure payment, to defts. of £150 & interest, by way of equitable mtg., upon the terms of an agreement in writing, the former recovery, & proceedings thereon, that the £150 was still due, that, after the commencement of this action, defts. tendered & offered to deliver up the lease to pltf. upon payment of the £150, & defts. also tendered & offered pltf. his costs of this action up to that time, & that such tender & offer were refused.—*CHILTON v. CARRINGTON* (1855), 16 C. B. 206; 3 C. L. R. 606; 24 L. J. C. P. 153; 1 Jur. N. S. 477; 3 W. R. 376; 139 E. R. 735.

—[See *ESTOPPEL*, Vol. XXI., pp. 207, 208, 212, 226, Nos. 485–487, 511, 592.

—*Joint tortfeasors.*—See *ESTOPPEL*, Vol. XXI., pp. 221, 222, 225, Nos. 555, 566, 567, 582–585.

*Convictions & orders in criminal proceedings.*—See *ESTOPPEL*, Vol. XXI., p. 228, Nos. 602, 603.

*Conduct of plaintiff.*—See, generally, *ESTOPPEL*, Vol. XXI., pp. 287–404.

### (c) Justification.

515. *Sufficiency of defence.*—*SPARROW v. SHERWOOD* (1627), Poph. 208; 79 E. R. 1298.

(1 P. & B.) 587.—*CAN.*

515 ii. —[*HANNON v. McLEAN* (1878), 12 N. S. R. (3 R. & C.) 101.—*CAN.*

515 iii. —[*BEEMER v. INKSTER* (1866), 3 Man. L. R. 534.—*CAN.*

515 iv. —[Deft. in execution of a warrant placed in his hands as a county constable for county rates due

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### PART III. SECT. 3, SUB-SECT. 1.—B. (b).

q. *Res judicata.*—A person who has applied to a magistrate under Police Act, 1892, for an order for the delivery up of goods not exceeding £50 in value, which order is, after inquiry, refused, is not precluded, by having taken these proceedings, from bringing J.—VOL. XLIII.

an action of trover for the goods.—*COMMONWEALTH FURNITURE SUPPLY CO. v. WATERMAN* (1915), 18 W. A. L. R. 36.—*AUS.*

### PART III. SECT. 3, SUB-SECT. 1.—B. (c).

515 i. *Sufficiency of defence.*—*HARRIS v. VAIL* (1877), 17 N. B. R.

Sect. 3.—Remedies: Sub-sect. 1, B. (c) & (d).]

**516.** —.]—Trover for an oak tree, the property of pltf. Plea, that deft. was seized in fee of a close, & being so seized, he, deft., cut down the tree, which he afterwards delivered to one R., to be kept for the use of him, deft.; & that R. afterwards delivered it to pltf., whereupon deft. took it out of the possession of pltf., as he lawfully might do for the cause aforesaid, which was the same conversion in the declaration mentioned:—*Held*: the plea was good.—*MORANT v. SIGN* (1836), 2 M. & W. 95; 5 Dowl. 319; 2 Gale, 237; 6 L. J. Ex. 14; 150 E. R. 684.

*Annotations*:—*Distd.* *Acranian v. Cooper* (1842), 10 M. & W. 585. *Fold.* *Ashton v. Brevitt* (1845), 14 M. & W. 106. *Refd.* *Young v. Cooper* (1851), 2 L. M. & P. 217.

**517.** —.]—An action of detinue will lie against an auctioneer, who, having sold a picture to pltf., & received a deposit on the sale by the hands of his clerk, afterwards sells it *bond fide* to a third party, who refuses to deliver it to pltf.

Detinue does not lie against him who never had possession of the chattel (*PARKE, R.*).—*JONES v. DOWLE* (1841), 9 M. & W. 19; 1 Dowl. N. S. 391; 11 L. J. Ex. 52; 152 E. R. 9.

*Annotations*:—*Mentd.* *Whitehead v. Harrison* (1844), 6 Q. B. 423; *R. v. Johnson* (1884), 50 L. T. 759.

**518.** —.]—Trover for 20 tons weight of hay. Plea, that W. B. was lawfully possessed as of his own property of three undivided fourths of the goods & chattels in the declaration mentioned; that W. B. being so possessed thereof delivered them to R., to be by him kept for the use of him, W. B.; that before the said time when, etc., R. delivered them to pltf., whereupon deft. at, etc., as the servant of W. B., & by his command, seized & carried away the same. Replication, so far as the plea relates to 7 tons weight of the hay, portion of the goods & chattels in the declaration mentioned that, admitting deft. as a servant of W. B., & by his command, converted the said last-mentioned goods & chattels, yet that W. B. was not possessed of three undivided fourths of the said last-mentioned goods & chattels, & so far as the plea relates to 7 tons weight of hay, other portion of the goods & chattels in the declaration mentioned, that, admitting that W. B. was possessed, etc., of the goods & chattels last aforesaid, yet that deft. of his own wrong, etc., converted the said last-mentioned goods & chattels:—*Held*: (1) the plea was good on the authority of *Morant v. Sign*, No. 516, *ante*; (2) the replications were bad, on the ground that the words "last-mentioned goods & chattels" meant all the goods & chattels in the declaration mentioned.—*ASHTON v. BREVITT* (1845), 14 M. & W. 106; 14 L. J. Ex. 297; 153 E. R. 408; *sub nom.* *ASTON v. BREVITT*, 2 Dow. & L. 903; 5 L. T. O. S. 96.

& unpaid by T. A. W., seized & sold the goods of pltf., T. J. W. The warrant was issued by a Justice of the peace under R. S. c. 58. In an action brought by pltf. for the taking & conversion of his goods deft. relied for his justification on two points:—*Held*: deft. had failed to establish any reasonable ground for supposing that the thing done by him was done in execution or under the authority of the Act.—*WALLACE v. STEWART* (1890), 22 N. S. L. 340.—CAN.

**515 v.** —.]—*BOLTON v. MACDONALD* (1894), 3 Terr. L. R. 269.—CAN.

**515 vi.** —.]—*MOHAN v. DUNDALK, NEWRY & GREENORE RY. CO.* (1880), 6 L. R. Ir. 477.—IR.

**515 vii.** —.]—*DILLON v. O'BRIEN & DAVIS* (1887), 20 I. R. Ir. 300.—IR.

**515 viii.** —.]—Where property was seized by a Customs officer for breach of revenue law, & it became forfeited & was sold at public auction, the owner afterwards sued the purchaser in trover for the property, alleging that the Crown or Customs authority had not property in the same & could not sell the same:—*Held*: the right of property & possession was in the Crown, & there was a sufficient cause to justify a seizure & consequent forfeiture, & once the property became forfeited the Crown had a sufficient title to sell.—*MCPHERSON v. BROWN-RIGG* (1892), 7 Nfld. L. R. 691.—NFLD.

**PART III. SECT. 8, SUB-SECT. 1.—**  
B. (d).

*r. When defence may be set up—Defendants in possession.*—Pltf. having

(d) *Jus tertii.*

**519.** When defence may be set up—Plaintiff in possession—No claim under third party made.]—At the trial it appeared that pltf. was in possession of goods which he claimed as his own property, under an assignment to him from O. Defts. seized the goods in pltf.'s possession, claiming them under an assignment from O. to them, made whilst O. was in apparent ownership of the goods, but of a later date than the assignment to pltf. This was the conversion. Defts. offered as a defence to prove that O. had become bkpt. before pltf. took possession, & that the goods were in his order & disposition, & therefore vested in the assignees before the conversion. The judge refused to permit this defence. On a motion for a new trial:—*Held*: the judge did right; for pltf. being in possession, & defts. being wrongdoers not claiming in any way under the assignees, defts. could not set up the *jus tertii* as a defence in trover.—*JEFFRIES v. GREAT WESTERN RY. CO.* (1856), 5 E. & B. 802; 25 L. J. Q. B. 107; 26 L. T. O. S. 214; 2 Jur. N. S. 230; 119 E. R. 680; *sub nom.* *JEFFRIES v. SOUTH WESTERN RY. CO.*, 4 W. R. 201.

*Annotations*:—*Fold.* *Baggallay v. Davcy* (1857), 29 L. T. O. S. 211. *Consd.* *The Winkfield*, [1902] 12 42; *Glenwood Lumber Co. v. Phillips*, [1904] A. C. 405. *Refd.* *Freshney v. Wells* (1857), 26 L. J. Ex. 129; *Eastern Construction Co. v. National Trust Co. & Schmidt*, [1914] A. C. 197.

**520.** —.]—A wife, though living apart from her husband, cannot lawfully dispose by gift, even accompanied by actual delivery of possession, of chattels acquired by her during the coverture. But, in an action by the donee against a wrongdoer, for the conversion of chattels so given, it is not competent to deft. to set up the title of the husband.

A., as exor. of B., seized & sold as the goods of his testator a watch & several articles of dress & jewellery which C., the niece of B.'s deceased housekeeper, claimed to be hers by gift, some of them from her aunt, & some from B., in whose house she had for many years lived with her aunt as a sort of adopted member of the family.

The jury having found upon sufficient evidence that the articles in question had in fact been given to C., & were in her "possession" at the time of the conversion:—*Held*: C. was entitled to recover their value; & it was not competent to A., who was a mere wrongdoer, to urge that, as to those articles which came to C. by gift from her aunt, the latter, having a husband living, who, however, made no claim to them, had no authority to dispose of them.—*BOURNE v. FOSBROOKE* (1865), 18 C. B. N. S. 514; 5 New Rep. 375; 34 L. J. C. P. 164; 11 Jur. N. S. 202; 13 W. R. 497; 144 E. R. 545.

*Annotations*:—*Refd.* *Fell v. Whitaker* (1871), 41 L. J. Q. B. 78; *Cochrane v. Moore* (1890), 25 Q. B. D. 57.

cut timber without license on Crown Land in Canada, brought it into this province, & put it in possession of defts. to be raffed for him; defts. delivered it to M. who claimed it as having been cut on land licensed to him, but in fact his license had expired at the time the timber was cut. In trover for the timber:—*Held*: defts. could not set up a right either in M. or in the Canadian Govt., M. having no legal right to the timber, & the Govt. not having made any claim to it.—*LE BEL v. FREDERICTON BOOM CO.* (1858), 9 N. B. R. (4 All.) 198.—CAN.

**t.** —.]—*Right of mortgagees.*—Pltf. mtgd. his goods to A., to whose estate deft. was administratrix. The goods came into the possession of deft., but under what circumstances did not appear. The mtge. contained an agreement that on default the mtgee. might

**521.** ———.—]—**BARKER v. FURLONG**, No. 363, *ante*.

**522.** ———.—]—In an action against a stranger for loss of goods caused by his negligence, the bailee in possession can recover the value of the goods, although he would have had a good answer to an action by the bailor for damages for the loss of the thing bailed.

It seems to me that the position, that possession is good against a wrongdoer & that the latter cannot set up the *jus tertii* unless he claims under it, is well established in our law (COLLINS, M.R.).—**THE WINKFIELD**, [1902] P. 42; 71 L. J. P. 21; 85 L. T. 668; 50 W. R. 246; 18 T. L. R. 178; 40 Sol. Jo. 163; 9 Asp. M. L. C. 259. C. A.

*Annotations*:—**Consd.** Eastern Construction Co. v. National Trust Co. & Schmidt, [1914] A. C. 197; The Joannis Vatis, [1922] P. 92. **Apld.** The Zelo, [1922] P. 9. **Refd.** Glenwood Lumber Co. v. Phillips, [1904] A. C. 405; The Rosalind (1920), 90 L. J. P. 126; Elliott Steam Tug Co. v. Shipping Controller, [1922] 1 K. B. 127; G. N. Ity. v. L. E. P. Transport & Depository, [1922] 2 K. B. 742; Mersey Docks & Harbour Board v. Hay, [1923] A. C. 345. **Mentd.** Placoyed Collieries Co. v. Partridge Jones (1912), 81 L. J. K. B. 723.

**523.** ———.—]—**GLENWOOD LUMBER CO., LTD. v. PHILLIPS**, No. 377, *ante*.

**524.** ———.—**Claims by assignees in bankruptcy—Successive bankruptcies.**]—6 Geo. 4, c. 16, s. 127, does not entitle the assignee of bkpt. under a second commission, where a dividend of 15s. in the pound has not been paid, to maintain trover against the assignee of a third commission, for effects acquired by bkpt. subsequent to obtaining his certificate under the second commission, & in his possession, order or disposition at the time of the third bkpcy., as such effects vest in the latter assignee, for the benefit of the creditors, under sect. 72 of the statute, which is to be taken in conjunction with sect. 127.

Where bkpt., subsequently to the second commission, has become an insolvent, it is competent to deft. in such action to put in evidence the proceedings in the Insolvent Debtor's Ct., & set up the *jus tertii*, or the right of the provisional assignee to the goods, under sect. 30.—**BUTLER v. HOBSON** (1838), 4 Bing. N. C. 290; 1 Arn. 93; 5 Scott, 798; 7 L. J. C. P. 148; 132 E. R. 800; *subsequent proceedings*, 5 Bing. N. C. 128.

*Annotations*:—**Apld.** Isaac v. Belcher (1839), 5 M. & W. 139. **Consd.** Morgan v. Knight (1864), 15 C. B. N. S. 669. **Refd.** Benjamin v. Belcher (1840), 11 Ad. & El. 350; Engelbach v. Nixon (1875), L. R. 10 C. P. 645. **Mentd.** Buckton v. Frost (1838), 8 Ad. & El. 814.

**525.** ———.—]—Where assignees of bkpt. brought trover for goods obtained by deft. from bkpt. by a fraudulent assignment made in contemplation of bkpcy., deft. was held not entitled to defeat pltf.'s claim by setting up the title of assignees under a former bkpcy. under which bkpt. had not obtained his certificate, those assignees not having intervened to claim the goods.—**MORGAN v. KNIGHT** (1861), 15 C. B. N. S. 669; 3 New Rep. 469; 33 L. J. C. P. 168; 9 L. T. 803; 12 W. R. 428; 143 E. R. 947.

*Annotations*:—**Consd.** Re Clark, *Ex p.* Beardmore, [1894] 2 Q. B. 393. **Refd.** Barker v. Furlong, [1891] 2 Ch. 172. **Mentd.** Re Roberts, *Ex p.* Watson (1879), 12 Ch. D. 380.

**526.** ———.—**Sale by sheriff.**]—In Dec. 1837, certain goods of C. were seized by the sheriff under

a writ of *fi. fa.*, & by him conveyed to pltf. by bill of sale, the goods remaining in C.'s possession under a secret arrangement between him & pltf. In Dec. 1838, a fiat issued against C., under which he was duly declared bkpt. In Aug. 1841, the goods, which still remained in C.'s possession, were again seized by the sheriff under other writs of *fi. fa.*, & by him sold, & the proceeds paid over under an indemnity to the assignees, who then for the first time asserted their right. In trover by pltf. against the sheriff, the jury having found that the goods were in the order & disposition of C. as the reputed owner at the time of his bkpcy., with the consent of the true owner:—**Held**: the sheriff was not under the circumstances precluded from setting up the title of the assignees as an answer to the action.—**LEAKE v. LOVEDAY** (1842), 4 Man. & G. 972; 2 Dowl. N. S. 624; 5 Scott, N. R. 908; 12 L. J. C. P. 65; 7 Jur. 17; 134 E. R. 399.

*Annotations*:—**Distd.** Nownham v. Stevenson (1851), 10 C. B. 713. **Consd.** Turner v. Hardcastle (1862), 11 C. B. N. S. 683. **Refd.** Mason v. Farnell (1844), 12 M. & W. 674.

**527.** ———.—]—In detinue, under a plea of not possessed, deft. may show that the property in the goods detained is vested in the provisional assignee of the Insolvent Ct., pltf. having petitioned that ct., & a vesting order having been made.—**KERNOT v. PITTIS** (1853), 2 C. L. R. 242.

**528.** ———.—**Goods transferred by bill of sale.**]—Pltf., being possessed of some plate, transferred it by bill of sale to M. & B. for a valuable consideration, but in order to defeat the execution of a judgment creditor. Pltf. continued in possession of the plate, & the creditor having assigned his judgment to M. & B., they issued execution thereon; whereupon pltf., in order to defeat the execution, deposited the plate with deft. In trover by pltf. for the plate:—**Held**: deft. was entitled to set up the right of M. & B.—**CHEESMAN v. EXALL** (1851), 6 Exch. 341; 20 L. J. Ex. 209; 155 E. R. 574.

*Annotations*:—**Refd.** Sheridan v. New Quay Co. (1858), 28 L. J. C. P. 58; Thorne v. Tilbury (1858), 27 L. J. Ex. 407; Biddle v. Bond (1865), 6 B. & S. 225; Singer Manufacturing Co. v. Clark (1879), 5 Ex. D. 37.

**529.** ———.—**Subsequent bill of sale to plaintiff.**]—Claimant was pltf., & an execution creditor deft., in an interpleader issue, to try whether certain goods were, at the time of the seizure thereof by the sheriff under a writ of execution, the goods of pltf. Pltf. proved a valid bill of sale to him of the goods:—**Held**: it was competent for deft. to defeat pltf.'s title by proving a prior bill of sale to a third party.—**GADSDEN v. BARROW** (1854), 9 Exch. 514; 2 C. L. R. 1063; 23 L. J. Ex. 134; 2 W. R. 241; 156 E. R. 220.

*Annotations*:—**Apld.** Green v. Stevens (1857), 2 H. & N. 146. **Consd.** Richards v. Jenkins (1886), 17 Q. B. D. 544. **Refd.** Edwards v. English (1857), 7 E. & B. 564; Shingler v. Holt (1861), 7 H. & N. 65; Peake v. Cartor, [1916] 1 K. B. 652; Daniel v. Rogers, [1916] 2 K. B. 228. **Mentd.** Nicholson v. Cooper (1858), 31 L. T. C. S. 184.

**530.** ———.—**Goods sold as debtor's—After act of bankruptcy.**]—M., the owner of certain goods, put C. into possession of them, who remained so until after the death of the owner who died

take possession, & a statement that a delivery of possession was given at the time of executing the mtge. There was no evidence that the mtgo.-money had been paid. Pltf. afterwards executed three other mtges. of the same goods to other persons, each containing similar agreement upon default, & a similar statement as to delivery of possession:—**Held**: under these circumstances pltf. could not recover

either in trover or detinue, & deft. might, as against him, set up the right of the other mtgees.—**RUTAN v. BEAMISH** (1861), 10 C. P. 90.—**CAN.**

**a.** ———.—**Plaintiff in possession—Defendant cannot set up *jus tertii*.**]—**MCDUGALL v. SMITH** (1871), 30 U. C. R. 607.—**CAN.**

**b.** ———.—**Defendant pleading assignee's title.**]—**O'CALLAGHAN v. COWAN** (1877),

41 U. C. R. 272.—**CAN.**

**c.** ———.—**Plaintiff not in possession.**]—In an action of trover for quartz, etc., deft. pleaded denying pltf.'s property in the goods, & gave evidence that the property had been seized under execution against pltf. & sold to a third party. Pltf., at the time of the alleged conversion, was out of possession:—**Held**: as pltf. was out of possession, deft. could set up the *jus tertii*



*Sect. 3.—Remedies: Sub-sect. 1, B. (d), (e), (f), (g), (h) & (i).]*

intestate. After M.'s death, deft. sold the goods by the desire & as the property of C., who had previously committed an act of bkpcy., of which deft. was cognisant. Intestate's goods had not been administered, & the ordinary had not claimed them.

In an action by the assignee of C. for the conversion of the goods:—*Held*: deft. was not entitled to set up the right of the ordinary to the goods; & therefore deft. could not insist that the property was not shown to have been in the order & disposition of bkpt. with the consent of the true owner.—*WHITE v. MULLETT* (1851), 6 Exch. 713; 20 L. J. Ex. 291; 17 L. T. O. S. 146; 155 E. R. 732.

**531. —Sale to plaintiff by bankrupt.—With authority of creditors.**—B., an undischarged bkpt., to whom his creditors had given, by a resolution duly passed, a certain quantity of his furniture, assigned that furniture by bill of sale to pltf., & afterwards sent it to deft., an auctioneer, who sold it & paid the money received to bkpt. In an action for conversion:—*Held*: pltf. was entitled to the furniture, for bkpt. could, under the resolution of his creditors, dispose of it to pltf., & there was no *jus tertii* which deft. could set up.—*BROWN v. HICKINBOTHAM* (1881), 50 L. J. Q. B. 426, C. A.

—**Ballor & bailee.**—See *BAILEMENT*, Vol. III., pp. 100–105, 115, 116, Nos. 281–306, 385–392.

(e) *Lien*.

*Sec. generally, LIEN*, Vol. XXXII., pp. 212 *et seq.*

**532. Whether defence available.**—Wherever pltf. has a lien he may retain in trover, as well as in any other action, or in a ct. of equity (*YATES, J.*).—*GREEN v. FARMER* (1768), as reported in 4 Burr. 2214; 98 E. R. 154.

*Annotations:—Folld.* Webb v. Fox (1797), Peake, Add. Cas. 167; Savill v. Barchard (1801), 4 Esp. 53. *Refd.* Bennett v. Johnson (1784), 2 Chit. 455; Lempiere v. Pasley (1788), 2 Term Rep. 485; Jones v. Smith (1791), 2 Ves. 372; Kirkman v. Shaw-Joss (1794), 6 Term Rep. 14; Houghton v. Matthews (1803), 3 Bos. & P. 485; Birdwood v. Raphael (1818), 5 Price, 593; Rose v. Hart (1818), 2 Moore, C. P. 547; Scarfo v. Morgan (1838), 4 M. & W. 270; Barnett v. Brandao (1843), 6 Man. & G. 630. *Mentd.* Wilson v. Creighton (1782), 3 Doug. K. B. 132; Olive v. Smith (1813), 5 Taunt. 56; Graham v. Russell (1816), 3 Price, 227; Young v. Bank of Bengal (1856), 1 Deac. 622; Turner v. Thomas (1871), L. R. 6 C. P. 610; *Re Witt, Ex p. Shubbrook* (1876), 2 Ch. D. 489.

**533. —**—In an action of trover, though you aver the property to be in pltf., it is a defence to the action that there is a lien in defts. (*LORD ELDON, C.*).—*Re WILKINSON, Ex p. SEAFORTH* (1812), 1 Rose, 306; 19 Ves. 235; 31 E. R. 505, L. C.

**534. —**—Issue being joined upon a plea of not guilty in trover & pltf. having proved property, demand, & refusal, deft. offered to prove a lien:—*Held*: not admissible on this issue.—*WHITE v.*

*TEAL* (1840), 12 Ad. & El. 106; 4 Per. & Dav. 43; 9 L. J. Q. B. 377; 4 Jur. 890; 113 E. R. 751.

*Annotation:—Consd.* Mason v. Farnell (1844), 1 Dow. & L. 576.

**535. —**—On a plea, in detinue, that the goods were not the goods of pltf., deft. may set up a lien.—*JANE v. TEWSON* (1841), 12 Ad. & El. 116; 1 Gal. & Dav. 584; 11 L. J. Q. B. 17; 5 Jur. 1037; 113 E. R. 754.

*Annotations:—N.F.* Mason v. Farnell (1844), 1 Dow. & L. 576. *Apprvd.* Brandao v. Barnett (1846), 3 C. B. 519.

**536. —**—It is hardly disputed that under the plea of "not possessed" a lien may be made available as a defence (*LORD CAMPBELL*).—*BRANDAO v. BARNETT* (1846), 12 Cl. & Fin. 787; 3 C. B. 519; 8 E. R. 1622, 11 L.; *on appeal* from S. C. *sub nom.* BARNETT v. BRANDAO (1843), 6 Man. & G. 630, Ex. Ch.

*Annotations:—Refd.* Ireland v. Armstrong (1843), 1 L. T. O. S. 12; Cooper v. Shepherd (1846), 7 L. T. O. S. 282; Foley v. Hill (1848), 2 H. L. Cas. 28; Brock v. Gorrisson (1860), 2 De G. F. & J. 434. *Mentd.* Reynell v. Lewis, Wyld v. Hopkins (1846), 4 Ry. & Can. Cas. 351; Smart v. Sanders (1846), 3 C. B. 380; Bank of Australasia v. Brellat (1847), 6 Moo. P. C. C. 152; Gibson v. Small (1853), 4 H. L. Cas. 353; Jones v. Peppercorne (1858), John. 430; Hare v. Henty (1861), 10 C. B. N. S. 65; Thayer v. Lister (1861), 30 L. J. Ch. 427; Frith v. Forbes (1862), 31 L. J. Ch. 793; Wyld v. Radford (1863), 33 L. J. Ch. 51; Jeffries v. Aggra & Masterman's Bank (1866), L. R. 2 Eq. 674; Webb v. Whitney (1868), 13 L. T. 523; Brinsmead v. Harrison (1871), L. R. 6 C. P. 581; Crouch v. Credit Foncier of England (1873), L. R. 8 Q. B. 374; Leese v. Martin (1873), L. R. 17 Eq. 224; Goodwin v. Roberts (1875), L. R. 10 Exch. 337; Misa v. Currie (1876), 1 App. Cas. 554; London Chartered Bank of Australia v. White (1879), 4 App. Cas. 413; Stumore v. Campbell, [1892] 1 Q. B. 314; Buchananland Exploration Co. v. London Trading Bank, [1898] 2 Q. B. 658; *Re* London & Globe Finance Corp., [1902] 2 Ch. 416; Biddell v. E. Clemens Horst Co., [1911] 1 K. B. 934; Hope v. Glendinning, [1911] A. C. 419.

**537. —**—In trover, a lien for tolls may be given in evidence, under the plea of not possessed.—*WEBB v. THURP* (1812), 11 L. J. Q. B. 154; 6 Jur. 237.

**538. —**—In detinue for a picture, the ct. allowed a plea of "lien" to be added to pleas of "non delict" & "not possessed," it being at the least doubtful whether the former defence could be given under either of the latter pleas.—*BARNWALL v. WILLIAMS* (1844), 7 Man. & G. 403; 8 Scott, N. R. 120; 3 L. T. O. S. 57, 127; 135 E. R. 168.

**539. —**—*WHITE v. SPETTIGUE*, No. 567, *post*.

**540. —Necessity for special plea.**—*MASON v. FARNELL*, No. 565, *post*.

**541. —Action against solicitor—Lien of London agent.**—*ANDERSON v. PASSMAN*, No. 627, *post*.

**542. —Deed subject to solicitor's lien.**—It is not answer to an action of detinue by the rightful owner of a deed for deft. to say the deed is in the possession of his attorney, who has a lien upon it, & claims to hold it for money due to him from deft.—*JORDAN v. ROBERTS* (1862), 7 L. T. 68.

under a plea denying pltf.'s property.—*CAMPBELL v. YEADON* (1884), 17 N. S. R. (5 R. & G.) 212.—*CAN.*

**d. —**—*Defence may not be set up.*—*HAGGAN v. PASLEY* (1878), 2 L. R. Ir. 573.—*IR.*

**e. —**—*Defendant bailee.*—*PEACOCK v. ANDERSON* (1878), 4 N. Z. Jur. N. S. 67.—*N.Z.*

**PART III. SECT. 3, SUB-SECT. 1.—B. (e).**

**532 i. Whether defence available.**—The mere fact of a warehouseman, who has a lien on goods for a certain sum for storage, claiming also to hold them for an untenable claim for money alleged

to be due either to himself or a third person, does not dispense with a tender of the sum due, & amount to a conversion, unless the evidence fairly warrants the conclusion that such tender would be useless, as it would be refused.—*LLADO v. MORGAN* (1874), 23 C. P. 517.—*CAN.*

**532 ii. —**—Pltf. sold to R. a quantity of furniture under a lien & hire agreement, in the usual form, duly registered, by which the property in the furniture was retained by pltf's. It, before making all her payments, stored the furniture with deft., a warehouseman, without the consent or knowledge of pltf. After the furniture

had remained with deft. for some months, pltf. demanded it under the agreement, but deft. refused to deliver it up until his warehouse charges had been paid; & pltf. brought this action for damages for the wrongful detention & conversion of the goods:—*Held*: deft. was not entitled to retain the goods until his warehouse charges were paid.—*SMITH v. CAMPBELL* (B. C.) (1911), 17 W. L. R. 493; 16 B. C. R. 505.—*CAN.*

**532 iii. —**—*WELCH v. SCOTT* (1920), 28 B. C. R. 349.—*CAN.*

**532 iv. —**—*LONDON & NORTH WESTERN Ry. Co. v. HUGHES* (1889), 26 L. R. Ir. 165.—*IR.*



**543. — Lien in respect of guarantee.]**—In an action of detinue, a plea setting up a lien on the chattel detained, in respect of a guarantee entered into by deft., at pltf.'s request, for a debt to be incurred by a third party, but not stating that the debt has been, or is about to be, incurred, is good; & pltf. must show, by way of answer, that the guarantee is terminated. — *MECKLENBURGH v. GLOYN* (1865), 13 W. R. 291.

— **Extinguishment of lien.]**—*See, generally, LIEN*, Vol. XXXII., pp. 229–238, Nos. 141–219.

— **Innkeeper's lien.]**—*See INNS & INN-KEEPERS*, Vol. XXIX., pp. 18–22, Nos. 238–285.

— **Insurance broker & client.]**—*See INSURANCE*, Vol. XXIX., pp. 84–86, Nos. 429–445.

— **Carriage of goods by sea.]**—*See SHIPPING*, Vol. XLI., pp. 582–592, Nos. 4054–4156.

(f) *Limitation of Actions.*

*See LIMITATION OF ACTIONS*, Vol. XXXII., pp. 327, 343–345, Nos. 136, 259–272.

**Action by administrator.]**—*See EXECUTORS*, Vol. XXIII., p. 302, No. 3670.

(g) *Negligence of Plaintiff.*

**544. General rule.]**—(1) If a party possess himself of a stolen bill or note improperly, a demand & a refusal are not necessary previous to an action of trover brought for its recovery by the loser.

(2) If a party be robbed of a negotiable security eight days before it is payable, & he does not give notice of his loss till the end of seven days, & then only to the payer, but gives no notice of any kind to the public, he does not use due diligence, & cannot recover in trover against a party who discounted such security six days after the loss. — *BECKWITH v. CORRAL* (1826), 3 Bing. 444; 2 C. & P. 261; 11 Moore, C. P. 335; 4 L. J. O. S. C. P. 139; 130 E. R. 581.

**545. —.]**—*MORRISON v. BUCHANAN*, No. 478, ante.

**546. —.]**—It appeared that N. had pledged with pltf's. two separate consignments of tobacco. He paid off the advance on one consignment, & presented to pltf's. a properly drawn delivery order in respect of it. They signed it, & N. subsequently added above their signature the description & distinguishing marks of the other consignment, & thus obtained from defts. delivery of both consignments:—*Held*: an action for conversion would lie against defts., since pltf's. had not been guilty of any negligence which was the proximate cause of the wrongful delivery. — *UNION CREDIT BANK, LTD. v. MERSEY DOCKS & HARBOUR BOARD, UNION CREDIT BANK, LTD. v. MERSEY DOCKS & HARBOUR BOARD & NORTH & SOUTH WALES BANK, LTD.*, [1899] 2 Q. B. 205; 68 L. J. Q. B. 842; 81 L. T. 44; 4 Com. Cas. 227.

*Annotations:—Refd.* Colonial Bank of Australasia v. Marshall, [1906] A. C. 559; London Joint Stock Bank v. Macmillan & Arthur, [1918] A. C. 777.

(h) *Payment into Court.*

**547. Whether admissible.]**—In an action against a coach owner for losing a trunk deft. was allowed to pay into ct. the amount of the sum to which he had by notice limited his responsibility. — *HUTTON v. BOLTON* (1782), 3 Doug. K. B. 59; 1 Hy. Bl. 299, n.; 99 E. R. 537.

*Annotations:—Mentd.* Yate v. Willan (1801), 2 East, 128; Broadhurst v. Baldwin (1817), 4 Price, 58.

**548. —.]**—(1) If in trover the declaration enumerate a great number of articles, & deft. pay money into ct., & plead that pltf. has sustained no greater damages, pltf. must show what articles

deft. has converted; & a declaration in trover being general, deft., by this plea, does not admit anything beyond his payment into ct.; & in such a case the proper measure of damages is the value of the articles which pltf. proves that deft. has taken & kept.

(2) If in trover for stone masons' tools pltf. prove that deft. took & used some of the tools & returned them, this is a conversion, but one for which the jury ought to give small damages & not the value of the tools so used. — *COOK v. HARTLEY* (1838), 8 C. & P. 508; 173 E. R. 621, N. P.

*Annotation:—As to* (1) *Apld.* Story v. Flinns (1851), 6 Exch. 123.

**549. —.]**—To an action of trover there was a plea that the conversion complained of was the sale of certain cattle after deft. had seized & impounded the same as the surveyor of the highway, & that pltf. ought not further to maintain the said action, in respect of the said conversion, because deft. now brings into ct. the sum of £10 ready to be paid to pltf., & that he had not sustained damages to a greater amount:—*Held*: bad, on special demurrer, as not warranted by the new rules. — *KEY v. THIMBLEBY* (1851), 6 Exch. 692; 2 L. M. & P. 478; 20 L. J. Ex. 292; 17 L. T. O. S. 243; 15 Jur. 565.

*Annotations:—Refd.* Thompson v. Sheppard (1851), 4 E. & B. 53; Borden v. Greenwood (1878), 3 Ex. D. 251.

**550. —.]**—*CROSSFIELD v. SCHEI*, No. 560, post.

**551. —.]**—To an action of detinue, deft. cannot plead payment of money into ct. in satisfaction of the value of the goods. — *ALLAN v. DUNN* (1857), 1 H. & N. 572; 26 L. J. Ex. 185; 28 L. T. O. S. 257; 156 E. R. 1330.

**552. — Offer to return goods.]**—In trover for goods deft. pleaded payment of money into ct., & pltf. replied that he had sustained more damages; deft. paid into ct. the cost price of the goods, having offered the goods in specie to pltf. two days only after they ought to have been delivered. Pltf. proved that he had sustained inconvenience & loss by not having the goods delivered at a proper time. The jury, however, found for deft. & the ct. refused to set aside the verdict. — *EVANS v. LEWIS* (1835), 3 Dowl. 819.

**553. Effect of plea.]**—A plea of payment into ct. has a different effect when pleaded to a count in trover & a count for money had & received. In the former case, it admits any evidence admissible under not guilty to reduce the damages; in the other case it admits of no evidence which, admitting a debt for a certain cause, goes to reduce its amount, by proof of payment or set-off.

In an action of trover & for money had & received, brought by an administratrix against a party who by mistake had acted as exor. *de son tort*:—*Held*: under a plea of payment into ct. to the whole declaration, deft. could not prove in reduction of the amount recoverable under the *indebitatus* count payments made by deft. & which pltf. would have been bound to make in course of rightful administration. — *GOLDY v. GOLDY* (1856), 26 L. J. Ex. 29.

(i) *Release and Waiver.*

**554. Release—Defence to action—Release of co-defendant.]**—A release to one deft. of "all actions, etc.," will discharge a co-deft. in trover. — *KIFFIN v. WILLIS* (1695), 4 Mod. Rep. 379; 87 E. R. 455; *sub nom.* KIFFIN'S CASE, Comb. 310.

**555. —.]**—*ANON.* (1773), 10ff, 323; 98 E. R. 674.

*Walver.]—See Sect. 4, post.*

*Sect. 3.—Remedies: Sub-sect. 1, B. (j) & (k), & C. (a) & (b) i.]*

*(j) Return or Tender of Goods.*

**556. Whether defence to action.]—**RUTLAND'S (COUNTRESS) CASE (1597), Moore, K. B. 266; 1 Roll. Abr. 5; 72 E. R. 571.

*Annotations:—*Apld. Moon v. Raphael (1835), 1 Hodg. 289. *Consd.* Hemming v. Hale (1859), 7 C. B. N. S. 487. *Distd.* Edmondson v. Nuttall (1864), 34 L. J. C. P. 102. *Refd.* Lemasons & Dickson's Case (1626), Poph. 189; Evans v. Lewis (1835), 3 Dowl. 819; Heald v. Carey (1852), 21 L. J. C. P. 97.

**557. — Before action brought.]—**If a man find my horse, & after ride him, & then delivers the horse unto me, & I bring an action of trover for the conversion, it is no plea that you have delivered the horse to me before the action brought, for you ought to answer to the conversion (POPHAM, J.).—ANON. (1601), Gouldsb. 155; 75 E. R. 1061.

**558. — —.]—**HAYWARD v. SEAWARD, No. 284, ante.

**559. — After action brought.]—**CHILTON v. CARRINGTON, No. 514, ante.

**560. — Goods converted by two persons — Action against one for all goods converted.—Return of goods taken by one.]—**Under a will, which was afterwards discovered to be imperfectly executed, & therefore altogether inoperative, certain goods were given to A. & B., which, on the decease of the maker of the imperfect will, they respectively carried away. Subsequently, on the discovery of the will being inoperative, administration was obtained, & the administrator sued A. in detinue for all the goods. A. restored the goods he had himself taken, & pleaded it, paying one shilling into ct. as damages for the detention, & pleaded *non delinquit* as to the portion taken by B.:—*Held*: the administrator could not recover against A.—CROSSFIELD v. SUTCH (1853), 8 Exch. 825; 1 C. L. R. 668; 22 L. J. Ex. 325; 21 L. T. O. S. 187; 1 W. R. 470; 155 E. R. 1587.

*Annotation:—*Mentd. Law Guarantee & Trust Soc. v. Bank of England (1890), 21 Q. B. D. 406.

*(k) Other Defences.*

**561. Purchase in market overt.—Effect of plea.]—**A justification in trover that the goods were bought in market overt, impliedly confesses the allegation that they belonged to pltf. —COMYNS v. BOYER (1596), Cro. Eliz. 485; 78 E. R. 736.

*Annotations:—*Apld. Fancourt v. Bull (1835), 1 Bing. N. C. 681. *Consd.* Cooper v. Shepherd (1846), 3 C. B. 266. *Mentd.* Drury v. Defontaine (1808), 1 Tamm. 131; Begbie v. Levi (1830), 1 Cr. & J. 180.

**562. Promise to pay sum of money.]—**ALLEN v. HARRIS (1696), 1 Ld. Raym. 122; 2 Lut. 1537; 91 E. R. 978.

*Annotations:—*Refd. Lynn v. Bruce (1794), 2 Hy. Bl. 317; Allen v. Milnor (1831), 2 Cr. & J. 47. *Mentd.* Gascoyne v. Edwards (1826), 1 Y. & J. 19; Bayley v. Homan (1837), 3 Bing. N. C. 915.

### PART III. SECT. 3, SUB-SECT. 1.— B. (j).

**557 i. Whether defence to action.—**Before action brought.]—SUTTAL v. OYLER (1921), 55 N. S. R. 105.—CAN.

**559 i. — After action brought.]—**BROWN v. CANADA PORT HUBON CO. (1905), 15 Man. L. R. 638; 2 W. L. R. 151.—CAN.

### PART III. SECT. 3, SUB-SECT. 1.— B. (k).

**561 i. Purchase in market overt.—**Effect of plea.]—A sale on the public market of Grahamstown, of stolen property, does not vest the property so sold in the purchaser as against the true owner.—VAN DER MERWE v. WYNN (1883), 3 E. D. C. 97.—S. AF.

**561 ii. — —.]—**A *bonâ fide* purchaser at a public market of stolen

property is entitled to retain such property against the true owner until the latter repays him the purchase price.—RETIEF v. HAMERSBACH (1884), 1 S. A. R. 171.—S. AF.

**561 iii. — —.]—**JANTJE v. PRETORIUS (1889), 3 S. A. R. 65.—S. AF.

**561 iv. — —.]—**WOODHEAD, PLANT & CO. v. GUNN (1894), 11 S. C. 4; 4 C. T. R. 20.—S. AF.

**1. Land Act or Statute of Frauds.]—**Pltf. contracted orally with deft. that he should clear & plough part of deft.'s land & take as compensation the crop which he might raise. Pltf. cleared & sowed the land, reaped the crop & removed it for safe custody to deft.'s house on another part of the land. In an action of trover for the crop:—*Held*: neither Land Act or Stat. Frauds afforded any defence.—

**563. Pledge by third party to defendant.]—**To an action of trover, plea, that one lawfully in possession of goods pledged them to deft.:—*Held*: ill.—JAULLERY v. BRITTEN (1838), 4 Bing. N. C. 242; 5 Scott, 655; 132 E. R. 781.

**564. Joint ownership — Non-joinder of co-owners.]—**In detinue, upon issue joined on a plea denying property in pltf., it is no defence that there are other persons, co-tenants with pltf., who are not joined in the action.—BROADBENT v. LEDWARD (1839), 11 Ad. & El. 209; 3 Per. & Dav. 45; 113 E. R. 395.

*Annotation:—*Apld. Mason v. Farnell (1844), 1 Dow. & L. 576.

**565. — With plaintiff —Necessity for special plea.]—**In detinue sur trover a defence that deft. was tenant in common with pltf. cannot be given in evidence under "*non delinquit*" or "not possessed," but must be specially pleaded.

If deft. has any right to detain arising as in this case out of a joint interest or as in other cases out of a lien or pledge, we think he must plead such right specially on the record (*per* CUR.).—MASON v. FARNEILL (1844), 12 M. & W. 674; 1 Dow. & L. 576; 13 L. J. Ex. 142; 2 L. T. O. S. 424; 152 E. R. 1369.

*Annotations:—*Apld. Barnwell v. Williams (1841), 7 Man. & G. 403; Whitehead v. Harrison (1844), 6 Q. B. 423. *Consd.* Clossman v. White (1849), 7 C. B. 43. *Expld.* Morgan v. Marquis (1853), 9 Exch. 145. *Refd.* Clements v. Flight (1846), 16 M. & W. 42.

**566. — —.]—**To a declaration in trover, deft. pleaded that, before & at the time of the committing, etc., he & pltf. were jointly & together the owners and proprietors of the chattel:—*Held*: bad, on special demurrer, because, if the conversion was denied, the plea amounted to not guilty, & if it was confessed, the plea could be understood only as confessing a destruction of the chattel, which was not justified.—HIGGINS v. THOMAS (1846), 8 Q. B. 908; 15 L. J. Q. B. 261; 10 Jur. 753; 115 E. R. 1116.

**567. Theft.—Failure to prosecute to conviction.]—**(1) An action of trover is maintainable to recover the value of goods which have been stolen from pltf., & which deft. has innocently purchased, although no steps have been taken to bring the thief to justice; for the obligation which the law imposes on a person to prosecute the party who has stolen his goods does not apply where the action is against a third party innocent of the felony. *Qu.*: whether pltf. can maintain such action against a party who has received the goods knowing them to have been stolen.

(2) *Seem*: in order to set up as a defence that the goods had been stolen, & that pltf. has not prosecuted the thief to conviction, it ought to be specially pleaded.

(3) *Qu.*: whether in trover evidence of a lien

LORENZ v. HEFFERNAN (1877), 3 V. L. R. (L.) 129.—AUS.

*g. Purchase by defendant.]—*HAMILL v. KENYON, [1924] St. R. Qd. 78.—AUS.

**h. — —Necessity to plead specially.]—**Where in trover the defence is that the property was purchased from pltf. by deft. it should be specially pleaded.—GUNN v. GILLESPIE (1836), 2 U. C. R. 124.—CAN.

**k. Notes given as collateral security.]—**MAYBEE v. BANK OF TORONTO (1870), 29 U. C. R. 566.—CAN.

**l. Plaintiff's right barred under Statute of Limitations.]—**KEITH v. MCMURRAY (1877), 27 C. P. 428.—CAN.

**m. Goods not property of plaintiff.]—**MORICE v. CHAPMAN (1889), 28 N. B. R. 224.—CAN.

**n. Detention ordered by arbiter ex**

on the goods is admissible, under the plea of not possessed.—*WHITE v. SPETTIGUE* (1845), 13 M. & W. 603; 1 Car. & Kir. 673; 14 L. J. Ex. 99; 4 L. T. O. S. 317; 9 J. P. 761; 9 Jur. 70; 153 E. R. 252.

*Annotations* :—As to (1) *Appl. Lee v. Bayes* (1850), 18 C. B. 599. *Consd. Wells v. Abraham* (1872), L. R. 7 Q. B. 554. *Reid, Osborn v. Gillett* (1873), L. R. 8 Exch. 88; *Midland Insee. v. Smith* (1881), 6 Q. B. D. 561. *Generally, Men d. Appelby v. Franklin* (1885), 55 L. J. Q. B. 129; *Smith v. Selwyn*, [1914] 3 K. B. 98; *Admiralty Comrs. v. S.S. Amerika*, [1917] A. C. 38.

—*Sec. also, ACTION*, Vol. I., p. 61, Nos. 499–505.

**568. Loss of subject-matter.**—If an attorney who has received his client's deed to keep for him loses it, & nothing appears respecting the cause of the loss, he is liable to an action of detinue on the part of his client.—*REEVE v. PALMER* (1859), 28 L. J. C. P. 168; 5 Jur. N. S. 916; 7 W. R. 325, Ex. Ch.

*Annotations* :—*Distd. Goodman v. Boycott* (1862), 2 B. & S. 1. *Appl. Wilkinson v. Verity* (1871), L. R. 6 C. P. 206. *Expld. Bullen v. Swan Electric Engraving Co.* (1907), 23 T. L. J. 258. *Consd. Coldman v. Hill*, [1919] 1 K. B. 443. *Mentd. City of Haroda (Cargo Owners) v. Hall Line* (1926), 42 T. L. R. 717.

**569. Before property acquired by plaintiff.**—*GOODMAN v. BOYCOTT*, No. 395, *ante*.

**Infancy.**—*See INFANTS*, Vol. XXVIII., p. 180, Nos. 403, 404.

### C. Damages.

#### (a) In General.

**570. Title alleged to be in third person—Cross-examination for purpose of mitigating damages.**—*FINCH v. BLOUNT*, No. 574, *post*.

**571. Goods not produced by defendant—Slight evidence of kind & quality sufficient.**—(1) In trover for converting goods received but not produced by deft., slight evidence of the kind & quantity of such goods may properly be given effect to.

(2) Money paid on demand by plffs. as bailees of goods to the owner of them is receivable in evidence as damage sustained in such action.—*GREAT WESTERN RY. Co. v. GURTON* (1858), 1 F. & F. 359, N. P.

*proprio nota.*—*ROBINSON & RIDLEY v. NORTH BRITISH RY. Co.* (1864), 2 Macph. (Ct. of Sess.) 841.—*SCOT*.

**o Substantial damages.**—In an action of detinue, substantial damages for the detention may be awarded & held, though the chattels be given up.—*WILSON v. THOMPSON* (1878), 4 V. L. J. (L.) 281.—*AUS*.

**p. Gold detained by order of Government.**—*JUDELMAN v. COLONIAL GOVERNMENT* (1909), 3 Rach. A. C. 416; 19 C. T. R. 442.—*S. AF*.

### PART III. SECT. 3, SUB-SECT. 1.—C. (a).

**q. Mitigation of damages.**—Money voluntarily expended in paying off mortgage.—In an action for conversion, deft. is entitled in reduction of damages to have taken into consideration moneys voluntarily expended by him in paying off a mtge. debt secured upon the subject-matter of the action for which plff. would otherwise have been liable.—*HILL v. ZIYMACK* (1908), 7 C. L. R. 352.—*AUS*.

**r. Damages sustained by trader from loss of prospective winnings by bet—& of profits obtained by supplying information to others—Whether damages too remote.**—*HOWE v. TEEFY* (1927), 27 S. R. N. S. W. 301; 44 N. S. W. W. N. 102.—*AUS*.

**t. Exemplary damages.**—A. & B. both claimed the ownership of a crop of wheat, A. as being tenant of B. & B. on the ground that the lease

had expired. The question was whether the oral agreement between the parties was for one or five years. B. had cut & stacked eight stacks but had not interfered with the rest of the wheat which was cut & put up by A. in six stacks. A. had a verdict \$650. Upon a motion for a new trial: *Held*: the judge was correct in telling the jury that if they found a verdict for A. they were not limited in estimating damages to the actual pecuniary loss, but could allow exemplary damages in addition.—*MONKMAN v. FOLLS* (1888), 5 Man. L. R. 317.—*CAN*.

**a. Vindictive or primitive damages.**—In an action of detinue vindictive or punitive damages cannot be awarded.—*CAMPBELL v. NORTHERN CROWN BANK* (1914), 29 W. L. R. 551; 7 W. W. R. 321; 18 D. L. J. 187; 24 Man. L. R. 725.—*CAN*.

**b. Replacement value.**—In an action of trespass & conversion of buildings on the property trespassed upon, replacement value is not a measure of damages.—*MILLER v. KNIGHT*, [1926] 1 D. L. R. 764; 36 B. C. R. 362.—*CAN*.

**c. Damages for temporary detention of car—Not for value of car destroyed by fire after action begun.**—*DZAMAN v. RIGGS*, [1927] 4 D. L. R. 835; [1927] 3 W. W. R. 433.—*CAN*.

**d. Must be proved—Impounding of pigs.**—*EDWARDS v. HYDE*, [1903] T. S. 381.—*S. AF*.

—**Presumption of highest value.**—*See* Subsect. 1, C. (b) i., *post*.

**572. Matter for consideration—Money paid on demand by plaintiff.**—*GREAT WESTERN RY. Co. v. GURTON*, No. 571, *ante*.

**573. Effect of appointment of receiver.**—*PERUVIAN GUANO Co. v. DREYFUS BROTHERS & Co.*, No. 605, *post*.

### (b) Value of Goods.

#### i. In General.

**574. Value of goods converted—General rule.**—In an action of trover the general rule is, that the damages should be the value of the thing taken; & if in trover deft. only plead that he did not convert the goods, his counsel will not be allowed to cross-examine plff.'s witnesses, to show, in mitigation of damages, that the goods taken really belonged to a third person.—*FINCH v. BLOUNT* (1830), 7 C. & P. 478; 173 E. R. 212, N. P.

**575. "Money in a purse."**—*RIVERS v. OODSKIRT*, No. 50, *ante*.

**576. Goods assigned for money advanced.**—A, a manufacturer at Stockton-upon-Tees, gives goods to the carrier there to have delivered at deft.'s wharf, London, & receives the usual receipt. He then hands over to plffs., in consideration of an advance of money, the carrier's receipt, invoice, & an order upon defts. to deliver the goods in question upon their arrival:—*Held*: upon disobeying such order, etc., previously lodged with & acknowledged by them, defts. were liable in trover, though plffs. were never in actual possession of the goods, & the measure of damages was the value of the goods, not the sum actually advanced.—*HOLL v. GRIFFIN* (1833), 10 Bing. 246; 3 Moo. & S. 732; 3 L. J. C. P. 17; 131 E. R. 898.

*Annotation* :—*Mentd. Swan v. North British Australasian Co.* (1862), 7 H. & N. 603.

**577. Goods deposited as security for usurious loan.**—As a cloak for a usurious loan, A. purchases of B. for ready money, malt, which he immediately resells to B. at an advanced price, payable in bills, the malt to be held by A. as a security. B. demands the malt without paying

### PART III. SECT. 3, SUB-SECT. 1.—C. (b) i.

**574 i. Value of goods converted—General rule.**—The measure of damages in an action for the conversion will be the value of the goods, free from any deduction on account of the debt.—*OSBORNE v. SYNNOT* (1877), 3 V. L. R. (L.) 148.—*AUS*.

**574 ii.**—In an action for the conversion by deft. of certain logs of plff. which had been cut without permission on plff.'s land, & purchased by deft. & hauled to his mill, & there cut into lumber:—*Held*: the measure of damages was the value of the logs as they were in deft.'s yard at the time they were demanded by plff. —*SMITH v. BAETCHER* (1889), 18 O. R. 293.—*CAN*.

**574 iii.**—In trover the measure of damages is the value of the thing taken.—*MANNING v. JONAS* (1894), 14 N. Z. L. J. 53.—*N.Z.*

**a.**—Plff. recovering full value of yacht run down by defts.' steamers, cannot also recover remains of the yacht from defts. as on conversion.—*KING v. BULL COAL MINING Co.* (1877), Knox, 389.—*AUS*.

**i. To plaintiff.**—*DOYLE v. EGGLETS* (1807), 17 C. P. 644.—*CAN*.

**g. & Damages for detention.**—Plff. placed a mare in the custody of B. for sale with permission to make use of her pending the finding of a purchaser. While the mare was in the

Sect. 3.—Remedies: Sub-sect. 1, C. (b) i. & ii.]

the bills:—*Held*: B. may recover in trover the full value of the malt, without deduction or recouper of the money received by him upon the simulated sale.—*HARGREAVES v. HUTCHINSON* (1834), 2 Ad. & El. 12; 4 Nev. & M. K. B. 11; 4 L. J. K. B. 17; 111 E. R. 5.

*Annotation*.—*Reid*, *Lodge v. National Union Investment Co.*, [1907] 1 Ch. 300.

**578.** — *Where no special damage alleged.*—*COOPER v. SHEPHERD*, No. 666, *post*.

**579.** *Greatest value presumed—Where goods not produced.*—*ARMORY v. DELAMIRIE* (1722), 1 Stra. 505; 93 E. R. 661.

*Annotations*.—*Apud*, *Lupton v. White*, *White v. Lupton* (1808), 15 Ves. 432; *Mortimer v. Cradock* (1843), 12 L. J. C. P. 166; *Gray v. Haig*, *Haig v. Gray* (1854-55), 20 Beav. 219; *Hammersmith & City Ry. v. Brand* (1869), L. R. 4 L. J. 171; *Wilson v. Northampton & Banbury Junction Ry.* (1874), 43 L. J. Ch. 503; *The Winkfield*, [1902] P. 42; *Coldman v. Hill*, [1919] 1 K. B. 443. *Reid*, *Dean v. Thwaite* (1855), 21 Beav. 621; *Broadbent v. Imperial Gas Co.* (1857), 7 De G. M. & G. 436; *Playwood Collieries Co. v. Pontridige, Jones* (1912), 81 L. J. K. B. 723. *Mentd.* *Webb v. Fox* (1797), 7 Term Rep. 391; *Sutton v. Buck* (1810), 2 Taunt. 302; *Burton v. Hughes* (1824), 9 Moore, C. P. 334; *Taylor v. Haygarth* (1844), 8 Jur. 135; *Whitehead v. Harrison* (1844), 6 Q. B. 423; *Bridges v. Hawksworth* (1851), 21 L. J. Q. B. 75; *White v. Mullett* (1851), 6 Exch. 713; *Ancona v. Marks* (1862), 7 H. & N. 686; *Chowne v. Baylis* (1862), 31 Beav. 351; *R. v. Gardner* (1862), 1e. & Ca. 243; *Buckley v. Gross* (1863), 3 B. & S. 566; *Williams v. Williams* (1863), 33 Beav. 306; *Wentworth v. Lloyd* (1864), 10 H. L. Cas. 589; *Bourne v. Fosbrooke* (1865), 18 C. B. N. S. 515; *Taunton Petn.* (1869), 21 L. T. 169; *Musammatt Sundar v. Musammatt Parbati* (1889), 5 T. L. R. 683; *Keighley, Mexted v. Durant*, [1901] A. C. 240; *Eastern Construction Co. v. National Trust Co. & Schmidt*, [1914] A. C. 197; *Daniels v. Rogers*, [1918] 2 K. B. 228; *Smith v. G. W. Ity.*, [1921] 2 K. B. 237.

**580.** — *Where articles, forming an entire set, e.g. diamonds in the form of a diamond necklace, have been taken from the owner's custody without his knowledge, & a part of the set is proved to have been in deft.'s possession shortly after they were taken, & he cannot give any satisfactory proof of the mode in which they came into his possession:—Held: a jury, in an action of trover, may fairly be directed to presume that the whole set came to deft.'s hands; & the full value of all the articles lost is a proper measure of damages.*—*MORTIMER v. CRADOCK* (1843), 12 L. J. C. P. 166; 7 Jur. 45.

**581.** — *Where a man, . . . having converted property, refused to produce it, that its exact value may be known, he is liable for the greatest value that such an article could have* (*SCRUTTON, L.J.*).—*COLDMAN v. HILL*, [1919] 1 K. B. 443; 88 L. J. K. B. 491; 120 L. T. 412; 35 T. L. R. 146; 63 Sol. Jo. 166, C. A.

**582.** *Cargo wrongfully sold by master—Cost price of cargo—With freight paid.*—In consequence of damage, the vessel put into B., & under advice

the captain sold the cargo & repaired the vessel, & came home. The jury found that the sale was unnecessary. Damages were composed of the cost price of the cargo here, & the amount of freight actually paid:—*Held*: a reasonable estimate.

The captain, acting *bond fide* in the course of his employment, but under a mistake, the effect of circumstances or authority, has been guilty of an act amounting to a conversion. His act was not so *ultra* his employment as to be without the scope of his authority; for though acting under a mistake, he meant to act under his authority. I cannot find any circumstances to sever the owners from the captain; & I think that the act amounts to a conversion against the owner (*WILDE, C.J.*).—*EWBANK v. NUTTING* (1849), 7 C. B. 797; 13 L. T. O. S. 94; 137 E. R. 316; *sub nom.* *THE TRITON*, *EWBANK v. NUTTING & HOARD*, 4 L. T. 621.

*Annotations*.—*Reid*, *Notara v. Henderson* (1872), L. R. 7 Q. B. 225. *Mentd.* *Coulthurst v. Sweet* (1860), L. R. 1 C. P. 649; *Weir v. Bell* (1878), 3 Ex. D. 238; *Wagstaff v. Anderson* (1880), 5 C. P. D. 171; *Prager v. Blatspiel Stamp & Heacock*, [1924] 1 K. B. 566.

**583.** *Sale price of goods—Delivery to purchaser frustrated by conversion.*—Pltf. purchased champagne lying at deft.'s wharf at 14s. per dozen, & resold it at 21s. to the captain of a ship about to leave England. Defts. refused to deliver the wine & pltf. was unable to fulfil his contract, champagne of a similar quality not being procurable in the market. Defts. had no knowledge of the sale, or of the purpose for which pltf. required delivery of the champagne. In an action for the conversion:—*Held*: pltf. was entitled, as damages, to the price at which he had sold the champagne.—*FRANCE v. GAUDICH* (1871), L. R. 6 Q. B. 199; 40 L. J. Q. B. 121; 19 W. R. 622.

*Annotations*.—*Reid*, *Horne v. Mid. Ry.* (1873), L. R. 8 C. P. 131; *The Star of India* (1876), 1 P. D. 466; *Johnson v. Hook* (1883), 31 W. R. 812. *Mentd.* *Attenborough v. London & St. Katherine Docks Co.*, *Attenborough v. Same* (1878), 26 W. R. 583.

**584.** *Amount realised by sale of goods.*—The registered proprietor of the copyright in a book, to whom a special action on the case against an infringer is given by Copyright Act, 1842 (c. 45), s. 15, is also entitled to bring an action against him under sect. 23 in detinue for the copies of the book retained, & also in trover for damages arising from the wrongful conversion. The measure of damages will be the total amount realised by the sale of the books.—*MUDDOCK v. BLACKWOOD*, [1898] 1 Ch. 58; 67 L. J. Ch. 6; 77 L. T. 493; 46 W. R. 166; 14 T. L. R. 43; 42 Sol. Jo. 46.

## ii. At Time of Conversion.

**585.** *General rule.*—*MERCER v. JONES*, No. 621, *post*.

possession of B. she was levied upon under an execution issued on a judgment recovered by deft. against B. & was delivered to deft. in settlement of the debt & costs:—*Held*: pltf. was entitled to recover against deft. the value of the mare & damages for her detention.—*GARDEN v. NEELY* (1898), 31 N. S. R. (19 R. & G.) 89.—*CAN.*

*h.* — *JORDISON v. ROSS* (N. W. T.) (1907), 6 W. L. R. 388.—*CAN.*

*k.* — *LAMB v. KINCAID* (1907), 38 S. C. R. 516.—*CAN.*

*l.* — *LAMB v. THOMPSON* (1913), 24 W. L. R. 404.—*CAN.*

*m.* — *Deft. held certain shares in trust to secure a debt due to pltf. by P. On pltf. demanding the shares he learned deft. had delivered them back to P. over a year before:—Held: the damages recoverable by*

pltf. were the value of the shares at the date of his demand, not at the date deft. parted with them.—*STANTON v. WOLVIN*, [1920] 3 W. W. R. 399.—*CAN.*

*n.* *Full value of land.*—In trover for a deed passing a fee simple, the jury can only give the full value of the land at or after the conversion, as damages.—*BURK v. MUNRO* (1839), 6 O. S. 57.—*CAN.*

*o.* *Damages in excess of value of property.*—M. having sold produce, & received notes in payment, refused to give up the property. In trover, the jury gave £25 damages over the actual value of the property, which they at the same time estimated too high:—*Held*: deft. was not entitled to a new trial for the excess of value allowed, but it was granted, on the ground of the £25 damages, on payment of costs.—*GOWLAND v. MEADE* (1857), 6 C. P.

**353.**—*CAN.*

*p.* *Not necessarily value of goods.*—The measure of damages in trover was not necessarily the value of the goods.—*O'TOOLE v. WALLACE* (1883), 16 N. S. R. (4 R. & G.) 257.—*CAN.*

*q.* *Amount realised by sale of converted goods & not actual value.*—*CANADIAN NATIONAL Ry. Co. v. MARSHALL* (Sask.), [1923] 4 D. L. R. 952.—*CAN.*

## PART III. SECT. 3, SUB-SECT. 1.—C. (b) ii.

**585 i.** *General rule.*—In trover the principle of law (though not an inflexible one) is, that the jury can give no more damages than the value of the goods at the time of the conversion.—*MORTON & McGUIRE v. McDOWELL* (1850), 7 U. C. R. 338.—*CAN.*

**585 ii.** — *The measure of*

**586.** — In an action for the conversion of goods of which pltf. has the immediate right of possession, the true measure of damages is the full value of the goods at the time of the conversion.

Pltf. had certain looms in deft.'s mill, & demanded possession of them, deft. having no right to detain them. Deft., however, having obtained a judgment against pltf. in the county ct., in respect of which he would be entitled to issue execution against him on the next day, refused to deliver them up; & the looms were taken in execution on the following morning, & sold. In an action for this wrongful conversion:—*Held*: the liability of the looms to the county ct. process, & the fact that by the wrongful seizure pltf.'s debt was apparently satisfied, were not circumstances which the jury could take into consideration in estimating the damages.—**EDMONDSON v. NUTTALL** (1864), 17 C. B. N. S. 280; 4 New Rep. 366; 34 L. J. C. P. 102; 13 W. R. 53; 144 E. R. 113.

*Annotations*:—**Apld.** *Johnson v. L. & Y. Ry.* (1878), 3 C. P. D. 499. *Refd.* *Brinsmead v. Harrison* (1871), L. R. 6 C. P. 584; *Underwood v. Bank of Liverpool*, Same v. *Barclays Bank*, [1921] 1 K. B. 775; *Lloyds Bank v. Chartered Bank of India, Australia & China* (1928), 97 L. J. K. B. 609.

**587. At subsequent time—Discretion of jury.**—

In trover, the jury are not limited to find as damages the mere value of the property at the time of the conversion, but they may find as damages the value at a subsequent time, in their discretion.—**GREENING v. WILKINSON** (1825), 1 C. & P. 625; 171 E. R. 1344, N. P.

*Annotations*:—*Distd.* *Johnson v. Hook* (1883), 31 W. R. 812. *Dtd.* *Rold v. Fairbanks* (1853), 13 C. B. 692.

**588.** — *Reid v. Fairbanks*, No. 481, *ante*.

**589.** — *Pltf. warehoused hops with defts.* The warehouse rent not being paid, defts., on July 7, sold the hops to R. On July 29 R. sold them back to defts., who, on the same day, sold them to L. On Aug. 16 L. sold them to K., who, on Sept. 20, removed them from defts.' warehouse, where they had remained up to that time, not having been removed by any of the purchasers. None of these sales was in market overt. A letter was sent by defts. to pltf. on July 5, giving him notice of their intention to sell, & a second letter was sent on July 22, informing pltf. of the sale, & enclosing a cheque for the balance of the purchase-money after deducting the warehouse rent. Pltf. never received either of these letters. In an action to recover damages for the conversion of the hops:—*Held*: the measure of damages was not to be restricted to the value of the hops on July 7, but was their value on Sept. 20, when K. removed them from defts.' warehouse.—**JOHNSON v. HOOK** (1883), 1 Cab. & El. 89; 31 W. R. 812.

**590. Where no special damage.**—Special damage may be recovered in trover if laid in the declaration. Therefore, where, in trover for a horse, it was laid as special damage that pltf. was obliged to hire other horses, *semble*, the amount of damages should be the value of pltf.'s horse when

taken & the sum he paid for hire, deducting what would have been the expense of keeping his own horse for the time.

In cases of trover, where no special damage is laid, the value of the article at the time of the conversion is the measure of damages (**PEAKE, B.**).—**DAVIS v. OSWELL** (1837), 7 C. & P. 801; 173 E. R. 351, N. P.

*Annotations*:—*Consd.* *Reld v. Fairbanks* (1853), 13 C. B. 692. *Refd.* *Bodley v. Reynolds* (1846), 8 Q. B. 779.

**591. Where offer by defendant to restore.**—In trover, the conversion proved was a refusal to deliver upon demand; but it was also proved that after writ issued deft. offered to return the chattels; which offer was then declined:—*Held*: the measure of the damages was the value of the chattels at the time of the conversion, & not the difference in their value between the time of the conversion & the offer to return.—**HOMER v. MALLARS** (1858), 30 L. T. O. S. 241.

**592. At time of sailing of ship containing goods.**—**FALK v. FLETCHER**, No. 128, *ante*.

**593. Sale by auctioneer after notice of claim by third party.**—An auctioneer has not merely the custody of goods entrusted to him for sale, but also an interest in & possession of them, whether the sale be on the premises of the owner or in public auction room.

An auctioneer having been requested by A. to sell certain goods, agreed to do so at a warehouse where they were stored by A. The day before the sale he received notice that B. claimed the goods, notwithstanding which he put them up for sale & returned to A. those not sold. B. having proved her right to the goods:—*Held*: the auctioneer was liable for the value of the goods returned to A., as well as of those sold.—**DAVIS v. ARTINGSTALL** (1880), 49 L. J. Ch. 609; 42 L. T. 507; 29 W. R. 137.

**594. Goods held by warehouseman for fraudulent vendor—Refusal of warehouseman to deliver to innocent purchaser.**—The owner of goods lying at a warehouse was induced by the fraud of F. to instruct the warehouseman to transfer the goods to the order of F., & the goods were accordingly placed at F.'s disposal. F. then sold the goods to an innocent purchaser, who, before paying the price, obtained a statement from the warehouseman that he held the goods at the purchaser's order. On the discovery of F.'s fraud the warehouseman refused to deliver the goods to the purchaser. In an action by the purchaser against the warehouseman:—*Held*: the warehouseman, having attorned to the purchaser, was estopped from impeaching his title, the refusal to deliver was a conversion, & the measure of damages was the market value of the goods at the date of the refusal to deliver.—**HENDERSON & Co. v. WILLIAMS**, [1895] 1 Q. B. 521; 64 L. J. Q. B. 308; 72 L. T. 98; 43 W. R. 274; 11 T. L. R. 148; 14 R. 375, C. A.

*Annotations*:—*Distd.* *Farquharson v. King*, [1902] A. C. 325. *Refd.* *Compagnia Naviera Vascongada v. Churchhill & Sim.* Same v. *Burton* (1906) 1 K. B. 237. *Mentd.* *Herdman v. Wheeler*, [1902] 1 K. R. 361.

damages in trover is the value of the property at the time of the conversion.—**SCOTT v. McALPINE** (1837), 6 C. P. 302.—**CAN.**

**585 iii.** — *Bussy v. Winches* (1888), 27 N. B. R. 231.—**CAN.**

**585 iv.** — *Gallagher v. Ketchum & Co.* (1912), 21 O. W. R. 696; 3 O. W. N. 843; 2 D. L. R. 871.—**CAN.**

**585 v.** — *Phillips v. Conger* (1912), 22 O. W. R. 436; 3 O. W. N. 1436; 6 D. L. R. 188.—**CAN.**

**585 vi.** — *In fixing damages for conversion at the value of the goods converted, the jury or judge acting as a jury may fix the value at the time of*

the conversion or at any subsequent time, in their or his discretion.—*Hogg v. Benito Farmers' Elevator Co.*, [1923] 2 D. L. R. 778; 33 Man. L. R. 63; [1923] 1 W. W. R. 1303.—**CAN.**

**585 vii.** — *The proper measure of damages for wrongful detention of property is the difference between the value of the property when seized & its value when restored.*—**NUNDELL RAM SINGH v. Inderchund Dogare** (1865), Cor. 89.—**IND.**

**585 viii.** — *ALLIANCE BANK OF SIMLA v. GHANANDI LAL-JAINI LAL* (1927), 1 L. R. 8 Lah. 373.—**IND.**

*r. Or at subsequent time.*—*Pltf., an ex-soldier who had enlisted in England*

& served with the British Expeditionary Force, claimed (*inter alia*) from defts. damages for the wrongful conversion by defts. of certain machinery & plant which they had seized & sold. A wrongful conversion having been established:—*Held*: in the circumstances the proper measure of damages was the value of the machinery at the time of conversion, but if pltf. had wished to carry on his business & had been obliged to purchase other machinery at a higher price to use in the place of that which had been taken different considerations would have applied in assessing the damages he had sustained.—**KIDD v. McRAE** (1921), 23 W. A. L. R. 98.—**AUS.**

Sect. 3.—Remedies: Sub-sect. 1, C. (c), (d), (e) & (f). ](c) *Nominal Damages.*

**595. Insurance policy—On non-insurable life—Payment ex gratia by insurance company.]—**A. effected an insurance on the life of B., & after an act of bkpey. assigned the policy to C., who was aware of A.'s circumstances at the time. On the death of B. it was discovered that his life was not insurable. On a memorial presented by A. to the co., they ordered half the sum for which B.'s life was insured to be paid as a gratuity, which C. received, & the policy was then cancelled, & remained in the hands of their officer. In an action of trover brought by the assignee of A. against C. to recover the value of the policy:—*Held*: he was only entitled to the parchment on which the policy was written, & not to the sum paid by the co. to C., as it was a mere gratuitous & voluntary payment.—*WILKS v. WELLS* (1818), 8 Taunt. 264; 2 Moore, C. P. 247; 129 E. R. 385.

*Annotation*.—*Distd. Ravins & Sims v. London & South Western Bank*, [1900] 1 Q. B. 270.

**596. Where no evidence of value of goods.]—**Case for an injury done to pltf.'s reversionary interest in land, by cutting & carrying away branches of trees growing there. Second count in trover for the wood carried away. Pltf. proved that deft. carried away some branches of the trees, but gave no evidence of the value:—*Held*: he was entitled to nominal damages on the count in trover.—*COTTEWILL v. HOBBS* (1825), 4 B. & C. 465; 6 Dow. & Ry. K. B. 551; 3 L. J. O. S. K. B. 276; 107 E. R. 1133.

*Annotation*:—*Refd. Strobber v. Barr* (1828), 5 Bing. 136.

**597. Goods restored by defendant.]—**Deft., a sheriff, who held goods taken in execution, delivered them to pltf.s, assignees of a bkpt., after an action of trover had been commenced by them. Pltf.s. accepted the goods without condition:—*Held*: they could not recover in the action more than nominal damages, at all events, not without alleging special damage in the declaration.—*MOON v. RAPHAEL* (1835), 2 Bing. N. C. 310, 1 Hodg. 289; 2 Scott, 489; 5 L. J. C. P. 46; 132 E. R. 122.

*Annotations*:—*Distd. Rodley v. Reynolds* (1846), 15 L. J. Q. B. 219. *Consd. Edmondson v. Nuttall* (1864), 17 Q. B. N. S. 280.

**598. —.]—***CROSSFIELD v. SUCH*, No. 560, *ante*.  
—*See, also*, BAILMENT, Vol. III., p. 78, No. 108.

**599. Goods retaken by vendor from purchaser—Before delivery complete.]—**Deft. sold to pltf. a clock upon a month's trial. After it had been up eleven days, deft. came in the morning before pltf. was up, & under the pretence of repairing it, took it away. Pltf. saw him in the evening, & asked him to return it, & why he had taken it away, he said, "Because I supplied the clock in the shape of a cash transaction, & I will not bring it back until I have my money"—*Held*: this, coupled with a letter from pltf.'s attorney, requiring

him to deliver up the clock, was evidence of conversion in an action of trover; & inasmuch as the delivery was not complete, & pltf. could not therefore be liable to pay for it, the judge who tried the cause was right in directing the jury to find nominal damages only. But *semble*, even then, if it had been taken away in a very insulting or aggravating manner, the ct. might sustain a verdict for damages to the full amount of the article.—*DAVIES v. MITCHELL* (1846), 1 New Pract. Cas. 588; 8 L. T. O. S. 193.

**600. Goods deposited as security for loan—Sale before day conditioned—No intention to repay loan.]—***JOHNSON v. STEAR*, No. 490, *ante*.

(d) *Special Damage.*

**601. Whether awarded.]—**In trover, damages may be given in respect of special damage, besides the value of the goods converted, if special damage be laid in the declaration. As where, in trover for carpenter's tools, special damage was laid in respect of pltf., a carpenter, being hindered from working.—*BODLEY v. REYNOLDS* (1846), 8 Q. B. 779; 15 L. J. Q. B. 219; 7 L. T. O. S. 61; 10 Jur. 310; 115 E. R. 1060.

*Annotations*:—*Consd. France v. Gaudet* (1871), L. R. 6 Q. B. 199. *Refd. Wood v. Bell* (1856), 5 E. & B. 772.

**602. —.]—**Although pltf., in a suit for an injury done, really has a right of action against deft., the jury are entitled to look at all the circumstances of the case, & at the conduct of both parties, & if they think that in going on with the action pltf. has acted in an obstinate & perverse manner, they may take that into consideration when estimating the damages.

A party delivered to a railway co. certain goods to carry from A. to B., paying the carriage, to be delivered to a party there. Part of the transit was effected by another railway co., which refused to deliver up the goods to the consignee without payment of an additional specified sum; but an action having been threatened against the contracting co., an offer was made to deliver them up without that payment. The action was, however, persevered in, pltf. declaring against the co. as carriers, with a count in trover for the conversion of the goods, subsequently to which they were given up in a damaged state:—*Held*: the additional sum demanded for the goods was not the measure of damage.

*Qu.*: whether pltf. was entitled to recover for deterioration of, & damage done to, his goods while detained by the co., or for loss of profits arising from his being deprived of the use of them during that time?—*DAVIS v. LONDON & NORTH WESTERN RY. CO.* (1858), 32 L. T. O. S. 148; 4 Jur. N. S. 1303; 7 W. R. 105.

(e) *Interest on Value of Goods.*

*See* Civil Procedure Act, 1833 (c. 42), s. 29.

**603. Whether recoverable—Discretion of jury.]—**In trover for a bill of exchange, the jury may, if

**PART III. SECT. 3, SUB-SECT. 1.—**  
C. (c).

**t. Debts of intestate paid.]—**In trover by an administrator, when it appeared that deft. had appropriated goods of intestate, but had paid debts of intestate to the amount of the value of such goods, which, however, was not pleaded:—*Held*: after verdict, for deft., that pltf. was entitled to a verdict for nominal damages, as such payment was not admissible as a bar.—*SHIRMAN v. SHIPMAN* (1856), 5 C. P. 358.—*CAN.*

**a. Detention of goods for few days.]—***STIMPSON v. BLOCK* (1885), 11 O. R. 96.—*CAN.*

**b. Threshers' Lien Act—Seizure of grain threshed—Excessive claim & seizure.]—***DELBIDGE v. PICKERHILL* (Sask.) (1912), 21 W. L. R. 285.—*CAN.*

**c. Raft of lumber taken possession of by mistake.]—***MACKENZIE v. SCOTIA LUMBER & SHIPPING CO., LTD.* (1913), 12 E. L. R. 464; 11 D. L. R. 729.—*CAN.*

**PART III. SECT. 3, SUB-SECT. 1.—**  
C. (d).

**d. Loss of profits.]—**In an action of trover for a vessel:—*Seible*: the loss of profit may be recovered.—*BROWN v. HEATY* (1874), 35 U. C. R. 328.—*CAN.*

**e. —.]—**Trees cut by locattee under the Free Grant & Homestead Act, in the actual process of cultivation, were sold to pltf., a mill owner, & were seized by defts., the timber licensees, who also had a mill, & were taken by them thereto & cut up into lumber. It was proved that pltf. could not get other logs at that season of the year:—*Held*: pltf. was entitled to the loss of profits sustained by him by being deprived of cutting the logs into lumber at his mill.—*COCKBURN v. MUSBOKA MILL & LUMBER CO.* (1886), 13 O. R. 343.—*CAN.*

**f. —.]—***MCIVOR v. STAINBANK* (1869), 5 Mad. 70.—*IND.*



they think fit, include the amount of the interest in the damages, & this although there is no mention of interest in the declaration, & no special damage laid.—*PAINE v. PRITCHARD* (1827), 2 C. & P. 558; 172 E. R. 253, N. P.

**604. — Effect of delay in bringing action.]—**A shipload of timber having been consigned to defts., the consignor sent the bill of lading & other shipping documents, & also a bill of exchange, to plths., in pursuance of the usual course of business between him & them, to cover certain advances which they from time to time made to him. Plths. placed the shipping documents & bill of exchange relating to the cargo of timber in the hands of agents, who acted between plths. & defts. The agents, at the request of plths., forwarded the documents to defts., in order to have the bill of exchange accepted by them. Shortly afterwards defts. informed the agents that the cargo was thoroughly out of condition, & that they could not take it in its then state. The agents replied that, unless defts. returned the bill of exchange accepted, they ought to send back the shipping documents. This defts. declined to do, as they had paid part of the freight, & intended to take possession of the cargo. Later on they stated that they had been compelled to remove the cargo under the rules of the dock co., but that, if the agents would repay them the freight & certain charges and their profits on a portion of the cargo which they had sold, they would return the documents. The agents replied that the matter must be left in the hands of plths., the owners of the cargo. Defts. then returned to the agents the bill of exchange unaccepted, but retained the bill of lading as security against freight & charges. They offered to yield up the bill of lading on the freight & charges being refunded. Thereupon plths. commenced an action against defts., asking that they might be ordered to accept & deliver up the bill of exchange; & that it might be declared that, until such acceptance & delivery defts. were not entitled to retain the bill of lading. They also asked for an injunction, a receiver, & damages. Owing to delay, caused by the fault of both parties, the action did not come on for hearing until about four years after its commencement:—*Held*: defts. must pay damages, in the nature of interest, for keeping plths. out of possession of their goods; the ordinary measure of such damages would be 5 per cent. on the value of the cargo from the time defts. wrongfully took possession thereof; but, having regard to the delay which had occurred in bringing the action on for hearing, attributable no less to plths. than defts., half damages, computed at the rate of 2½ per cent. only, would be awarded.—*REW v. PAYNE, DOUTHWAITE & Co.* (1885), 53 L. T. 932; 5 Asp. M. L. C. 515.

**605. —.]—**In an action in the Ch. Div. plths. claimed delivery of cargoes of guano, an injunction to restrain defts. from delivering otherwise than to plths., & the appointment of a receiver. Defts. who claimed the right to the cargoes, after the issue of the writ took possession of them under a consent order by which it was agreed that the receipt of the cargoes by defts. should be "without prejudice to any question between the parties, & that they would keep separate accounts of their expenditure & receipts in respect of the cargoes, & abide by any order the ct. should make with

respect to the cargoes." An order for the appointment of a receiver was afterwards made, & to the receiver when appointed defts. delivered the unsold cargoes & the proceeds of the cargoes they had sold. The action was defended on the ground that the cargoes were not the property of plths. At the hearing the Vice-Chancellor made a decree declaring that plths. were entitled to the cargoes, & that defts. were not entitled to reimbursement of any expenses, & directing an inquiry "what damages had been sustained by plths. by reason of the detention of the cargoes by defts." On appeal this House having regard to the terms of the consent order varied the decree by declaring that defts. were entitled to receive out of the proceeds of the cargoes payment of all sums properly disbursed by them on account of freight & landing charges, & otherwise affirmed the decree. Upon the inquiry as to damages the chief clerk found that the detention began on the arrival of the cargoes respectively at their ports of discharge, & computing the damages on the principle that the illegal detention continued until the decree of the Vice-Chancellor, allowed interest at 5 per cent. upon the proceeds of the cargoes until the decree, less the interest gained in ct. & paid in by the receiver. Upon a summons to vary the chief clerk's certificate:—*Held*: after the order for the appointment of a receiver the cargoes were in the possession of the ct. & any damages suffered by plths. were due to the law's delay & not to any wrongful act of defts.; interest at 5 per cent. ought therefore to be allowed until the order for the appointment of a receiver but not after.—*PERUVIAN GUANO Co. v. DREYFUS BROTHERS & Co.*, [1892] A. C. 166; 61 L. J. Ch. 749; *sub nom.* *DREYFUS BROTHERS v. PERUVIAN GUANO Co.*, *PERUVIAN GUANO Co. v. DREYFUS BROTHERS*, 66 L. T. 536; 8 T. L. R. 327; 7 Asp. M. L. C. 225, II. L.; *varying* (1889), 43 Ch. D. 316, C. A.

*Annotations*: *Reid*, Phillips v. Homfray (1890), 44 Ch. D. 694; *Dakshina* Mohun Roy v. Saroda Mohun Roy (1893), 9 T. L. R. 582; *Re A. B.* (No. 2), [1900] 2 Q. B. 429; *Cowper v. Laidler*, [1903] 2 Ch. 337. *Mentid*, Martin v. Price, [1894] 1 Ch. 276; *Shelfer v. City of London Electric Lighting Co.*, *Meux's Brewery Co. v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287; *Leeds Industrial Co-op. Soc. v. Slack*, [1921] A. C. 851.

#### (f) Deductions Allowed.

**606. Money expended on goods by defendant Without authority.]—**In trover deft. cannot justify detaining goods till money laid out upon them without authority is paid. But it may be deducted in damages.—*STONE v. JINGWOOD* (1725), 1 Stra. 651; 93 E. R. 759.

**607. — Maintenance of animal seized damage feasant—Wrongful seizure.]—**If the owner of the freehold seize an animal which has done damage to the freehold, but which has ceased doing so, & it be not necessary to detain the animal to prevent further damage, & the owner of the freehold detain the animal & feed it for several days, & then sell it for its full value, the owner of the animal is entitled in trover to recover the full value of the animal, without any deduction for the feeding, as the owner of the freehold seized the animal in his own wrong.—*WORMER v. BIGGS* (1845), 2 Car. & Kir. 31.

**608. — Seizure under wrongful execution—Expenses incurred by sheriff.]—**Where a sheriff seizes & sells goods under an execution & it after-

#### PART III. SECT. 3, SUB-SECT. 1.—C. (i).

**g. Sum pledged for goods.]—**In an action for damages for the detention of ornaments pledged with

deft. which deft. has wrongfully converted to his own use, the measure of damages is the value of ornaments, less the sum for which they have been pledged.—*HASANI KARAM v. GOMA*

*JADAVJI* (1868), 5 Bom. O. C. 140.—IND.

**h. Cost of carriage.]—**In an action for the wrongful conversion of certain timber, plf. claimed to recover as



*Sect. 3.—Remedies: Sub-sect. 1, C. (f), (g) & (h) i., ii., iii., iv., v., vi., vii. & viii.]*

wards appears that the sheriff was not warranted in levying on the goods, in consequence of which an action of trover is brought against the sheriff, the jury, in estimating the damages, may deduct the costs & expenses necessarily incurred by the sheriff in bringing the goods to a sale.—*CLARKE v. NICHOLSON* (1835), 1 Cr. M. & R. 724; 3 Dowl. 454; 1 Gale, 21; 5 Tyr. 233; 4 L. J. Ex. 66; 149 E. R. 1272.

*Annotation:—Refd. Peruvian Guano Co. v. Dreyfus* (1887), [1892] A. C. 170, n.

**609. — Goods of bankrupt sold by auctioneer—Money in respect of rent & expenses of sale.]**—In an action of trover by the assignees of bkpt. against an auctioneer who sold bkpt.'s property, the auctioneer should be allowed any sum that he has paid for rent, & also a reasonable sum for the expenses of the sale, but not any part of the expense of removing the goods from the premises.—*GRIMSHAW v. ATTERWELL* (1837), 8 C. & P. 6; 173 E. R. 375.

**610. — Payment for work ordered by plaintiff.]**—Deft. converted certain japanned skins of pltf., whereupon pltf. brought trover; after action, deft., without pltf.'s request, paid the japanner the costs of japanning them. The japanning being done upon pltf.'s orders:—*Held*: pltf. was entitled to recover the full value of the goods in their japanned state, & deft. was not entitled to deduct the sum he had paid the japanner.—*SALMON v. HORWITZ* (1854), 23 L. T. O. S. 77.

**611. Money due from principal to agent—Goods sold by assignee of agent—Action by principal against assignee.]**—Where a factor having no specific authority to sell or pledge his principal's goods deposited them with another as a security for an antecedent debt, & he sold them, the latter was liable to the principal in trover under 6 Geo. 4, c. 94, s. 3.—*TAYLOR v. TRUMAN* (1830), L. & Welsb. 184; Mood & M. 453.

**612. Money expended in satisfaction of distress—By defendant.]**—In trover to recover the value of certain goods claimed by deft. & verdict for pltf., the former will, upon motion, be allowed to reduce the damages by a certain sum to which the goods were liable, & for which a distress was levied upon them.—*PLEVIN v. HENSHALL* (1833), 10 Bing. 24; 2 Dowl. 743; 3 Moo. & S. 403; 2 L. J. C. P. 253; 131 E. R. 814.

*Annotation:—Refd. Underwood v. Bank of Liverpool, Same v. Barclays Bank*, [1924] 1 K. B. 775.

(g) *Effect of Return of Goods.*

**613. Mitigation of damages.]**—*RUTLAND'S (COUNTESS) CASE* (1597), Moore, K. B. 206; 1 Roll. Abr. 5; 72 E. R. 571.

*Annotations:—Consd. Evans v. Lewes* (1835), 3 Dowl. 819; Edmonson v. Nuttall (1861), 17 C. B. N. S. 280. *Refd. Lemason & Dickinson's Case* (1626), Poph. 189; Moon v. Raphael (1835), 2 Scott, 489; Heald v. Carey (1852), 21 L. J. C. P. 97; Hemming v. Hale (1859), 7 C. B. N. S. 487.

**614. Damages for injury to goods.]**—If the sheriff take the goods of one man under an execution against the goods of another person, & restore them before a suit commence, yet an action of trover can be maintained against him. & if any of the goods are damaged by the omission of some act which the owner would have done if

the sheriff had not seized the goods, the sheriff is liable to answer in damages for that injury.—*ROBINSON v. WALKER* (1824), 2 L. J. O. S. K. B. 144.

**615. Difference in value between conversion & return.]**—In detinue for scrip shares, where it appeared that, after action brought & before verdict, the scrip had been delivered up to pltf.:—*Held*: the jury might, as a measure of damages, take into consideration the difference in value of the scrip shares between the time of the demand & refusal, & the time of the delivery of them to pltf., & in such case the jury might find the facts specially & confine themselves to an assessment of damages for the detention.—*WILLIAMS v. ARCHER* (1847), 5 C. B. 318; 5 Ry. & Can. Cas. 289; 17 L. J. C. P. 82; 136 E. R. 899, Ex. Ch.; *previous proceedings, sub nom. ARCHER v. WILLIAMS* (1846), 2 Car. & Kir. 26, N. P.

*Annotations:—Consd. Phillips v. Jones* (1850), 15 Q. B. 859. *Disd. Edmonson v. Nuttall* (1861), 17 C. B. N. S. 280. *Consd. Serrao v. Noel* (1885), 15 Q. B. D. 549. *Expld. Williams v. Peel River Land & Mineral Co.* (1886), 55 L. T. 689. *Refd. Wilkinson v. Verity* (1871), L. R. 6 C. P. 206.

*See, also, Nos. 597, 598, ante; Nos. 631-641, post.*

(h) *Particular Instances.*

i. *Goods Subject of Bailment.*

*See, generally, BAILMENT, Vol. III., pp. 111-114, Nos. 357, 370-375.*

**Goods hired.]**—*See BAILMENT, Vol. III., pp. 97, 98, 99, Nos. 262, 267, 274.*

**Seizure of goods by sheriff—After notice of bankruptcy of hirer.]**—*See BANKRUPTCY, Vol. V., p. 825, No. 7005.*

**Goods stored in other than agreed place—Damage to goods.]**—*See BAILMENT, Vol. III., p. 77, Nos. 161-163.*

**Misdelivery of goods.]**—*See BAILMENT, Vol. III., p. 78, Nos. 165, 168.*

ii. *Goods Distrained.*

*See, generally, DISTRESS, Vol. XVIII., pp. 368-395, Nos. 1090-1370.*

**616. Where possession of landlord subsequently tortious—Action by trustee of bankrupt tenant.]**—*COX v. LIDDELL*, No. 456, *ante*.

**Sale of goods seized—Full value obtained—Nominal damages.]**—*See DISTRESS, Vol. XVIII., p. 389, Nos. 1296, 1297.*

iii. *Fixtures.*

**617. Amount recoverable—Value of fixtures.]**—The tenant of leasehold premises assigned them by way of mtge., & afterwards became bkpt. The lease contained a covenant to yield up all fixtures to the messuage belonging or to belong:—*Held*: the fixtures did not pass to the assignees as goods & chattels in the possession, order, & disposition of bkpt.

I think, therefore, that pltf. may maintain trover, & that the measure of damage is the value of the fixtures (*PARKE, B.*).—*HITCHMAN v. WALTON* (1838), 4 M. & W. 409; 1 Horn & H. 374; 8 L. J. Ex. 31; 150 E. R. 1489.

*Annotations:—Consd. Walsley v. Milne* (1859), 7 C. B. N. S. 115. *Refd. Weeton v. Woodcock* (1839), 5 M. & W. 143. *Mentd. Doe d. Higginbotham v. Barton* (1840), 11 Ad. & El. 307.

—*See, also, LANDLORD & TENANT, Vol. XXXI., p. 211, Nos. 3505, 3506.*

damages the market value of the timber at the town of Ilangoon, to which it was being conveyed at the time of the conversion:—*Held*: the cost of carriage to Ilangoon from the place where the wrongful conversion occurred must be deducted.—*BOMBAY*

*BURMAH TRADING CORPN. v. MAHOMED ALLY & BURMAH CO., LTD* (1878), 1 L. R. 4 Calc. 116.—*IND.*

PART III. SECT. 3, SUB-SECT. 1.—C. (g).

j. *Whether damages for deterioration*

*allowed.]*—In an action of trover, pltf. cannot recover damages for the deterioration of the property contested, when it has been returned; his remedy is by special action.—*QUAILEY v. EDWICK* (1835), 3 Ir. L. Rec. N. S. 56.—*IR.*

iv. *Sale of Goods.*

**618. Sale by sheriff—Price at which goods sold.]**—The price at which goods are sold at a sheriff's sale is not necessarily the measure of damages in trover, if the sale be wrongful; but when pltf. is an assignee, as he must have sold the goods if they had come to him, juries are often induced to find a verdict for no more than the sum at which the sheriff actually sold.—*WHITEHOUSE v. ATKINSON* (1828), 3 C. & P. 344; 172 E. R. 449, N. P.

—**Damage for failure to obtain best price.]**—*See EXECUTION*, Vol. XXI., p. 515, No. 911.

**Sale under interpleader order—Subsequent withdrawal of party claiming—Damage caused through unnecessary sale.]**—*See INTERPLEADER*, Vol. XXIX., p. 484, No. 344.

**Sale under void bill of sale.]**—*See BILLS OF SALE*, Vol. VII., p. 141, No. 785.

**In action by buyer.]**—*See SALE OF GOODS*, Vol. XXXIX., pp. 680, 681, Nos. 2672-2675.

v. *Letters.*

**619. Nominal damages.]**—*CLENDON v. DINNEFORD*, No. 282, *ante*.

**620. Substantial damages.]**—Deft. wrongfully communicated to another person a letter which had been written by a third person to pltf. & which had got into deft.'s possession, & pltf. brought an action to recover damages for the detention & conversion of the letter:—*Held*: pltf. could recover substantial damages, & not merely the value of the thing converted.—*THURSTON v. CHARLES* (1905), 21 T. L. R. 659.

vi. *Negotiable Instruments.*

**621. Bill of exchange—Amount of principal & interest due—At time of conversion.]**—In trover for a bill of exchange, the damages are to be calculated according to the amount of the principal & interest due upon the bill at the time of the conversion.—*MERCER v. JONES* (1813), 3 Camp. 477; 170 E. R. 1452, N. P.

*Annotations*:—*Dtd.* Greening v. Wilkinson (1825), 1 C. & P. 625. *Refd.* Reid v. Fairbanks (1853), 13 C. B. 692.

**Conditional written order for payment—Amount realised by conversion.]**—*See BANKERS*, Vol. III., p. 243, No. 693.

vii. *Valuable Securities.*

**622. Scrip—Loss sustained through detention.]**—Where deft., after signing an acknowledgment that certain scrip had been "lodged in his hands" by pltf., & was to be redelivered to him on request, wrongfully detained the scrip for a considerable time, so that its market value had been much diminished, & did not redeliver it until action brought, & where pltf. suffered loss by the detention, in this, that he was thereby deprived of the means of paying up his deposits, which would have

entitled him to claim an allotment of one hundred other shares:—*Held*: the damage was too remote, & pltf. could not recover.—*ARCHER v. WILLIAMS* (1846), 2 Car. & Kir. 26, N. P.; *subsequent proceedings*, *sub nom.* *WILLIAMS v. ARCHER* (1847), 5 C. B. 318, Ex. Ch.

*Annotation*:—*Refd.* Duckworth v. Ewart (1863), 2 H. & C. 129.

**623. Stock—Loss sustained through fall in value—Substantial damages.]**—Pltfs. having instructed their brokers to sell stock, the latter fraudulently deposited the certificate with the C. Bank. Pltfs. commenced an action for an injunction to restrain the transfer of the stock, & for damages for the unlawful detention. On a motion for an interlocutory injunction, an order by consent was taken by which the bank undertook not to sell or deal with the stock until the trial or further order, & pltfs. undertaking in the usual form to abide by any order as to damages in case the bank had sustained any by entering into their undertaking, the co. in which the stock was were restrained from permitting a transfer without the consent of pltfs. The order was made without prejudice to any question. The action went on for some months, after which the bank gave up their claim to the stock, but declined to pay more than nominal damages. Pltfs. accordingly brought the action on for trial on the question of damages:—*Held*: pltfs. were entitled to substantial damages on account of the fall in the stock, the order having been obtained to prevent a wrongful sale by the bank.—*WILLIAMS v. PEEL RIVER LAND & MINERAL CO., LTD.* (1886), 55 L. T. 689; 3 T. L. R. 76, C. A. *Annotations*:—*Consd.* Peruvian Guano Co. v. Dreyfus, [1892] A. C. 166. *Refd.* Simmons v. London Joint Stock Bank, Little v. London Joint Stock Bank, [1891] 1 Ch. 270; Shaw v. Holland, [1900] 2 Ch. 305.

**Savings bank book—Amount of deposit.]**—*See BANKERS*, Vol. III., p. 137, No. 111.

viii. *Documents.*

**624. Unstamped guarantee.]**—In trover for an unstamped guarantee mutilated by deft., pltf. is entitled to such damages as he might have recovered in an action on the guarantee.—*M'LEOD v. M'GHEE* (1811), 2 Man. & G. 326; Drinkwater, 95; 2 Scott, N. R. 604; 133 E. R. 771.

**625. Insurance policy—On uninsurable life—Nominal damages.]**—*WILLS v. WELLS*, No. 595, *ante*.

**626. — Money received on policy.]**—Here is an assignment executed for the benefit of creditors, expressed in the largest & most comprehensive terms possible. There can be no doubt that the legal interest in the instrument of assurance passed by this, & that an interest in the contract contained in the instrument passed in equity. Therefore in no point of view was the extrix. of the assignor entitled to receive the proceeds of the policy;

## PART III. SECT. 3, SUB-SECT. 1. — C. (h) iv.

**k. Resale by seller.]**—Pltf. claimed \$1,000 damages for taking & conversion by deft. of fifty tons of timber. Deft. alleged he purchased from vendor, who sold to pltf., & before the property had passed to him.—*Held*: pltf. was entitled to recover for thirty tons, that quantity having passed to him before it was sold the second time to deft. by the original vendor.—*HAYES v. CARTER* (1884), 7 Nfld. L. R. 1.—*NFLD.*

## PART III. SECT. 3, SUB-SECT. 1. — C. (h) vi.

**1. Measure of damages—Value of bill at time of conversion.]**—*M'DONALD v.*

*EVERETT* (1847), 5 N. B. R. (3 Kerr) 569.—*CAN.*

**m. — Damages for risk of liability.]**—In an action of trover for a paid bill of exchange, pltf. is entitled to damages for the risk of liability, although the bill was valueless.—*DUNNE v. THORPE* (1846), Bl. D. & Osb. 128.—*IR.*

## PART III. SECT. 3, SUB-SECT. 1. — C. (h) vii.

**n. Deed of settlement.]**—*LYDD v. SADDLER* (1861), 14 Ir. Jur. 15.—*IR.*

## PART III. SECT. 3, SUB-SECT. 1. — C. (h) viii.

**o. Value of goods.]**—In an action of detinue, evidence was given that

defts. had detained from pltf. certain business papers & documents. It was agreed that damages should be assessed for the value of the goods. With the exception of a small amount pltf. did not prove any special damage from the loss of the documents. The jury having awarded pltf. £50 damages:—*Held*: the damages were not unreasonable.—*TURNER v. NEW SOUTH WALES MOUNT DE PIETE DEPOSIT & INVESTMENT CO., LTD.* (1910), 10 C. L. R. 539.—*AUS.*

**p. Inability to obtain horses to cultivate farm.]**—In detinue for a deed:—*Qu.*: whether pltf. can recover damages for having been prevented by the want of it from obtaining horses to cultivate his farm.—*WOOD v.*

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not in equity, because the assignment passed the equitable interest; not in law, because the legal interest in the instrument passed. I think, therefore, that, having received the money unlawfully, she is liable to an action for money had & received. But, independently of that, the trustees, under the assignment, were entitled to have the instrument. Deft. wrongfully applies it to her own purposes; she thus converts it to her own use. I think, therefore, that the amount which she receives is the measure of damages, because, if plffs. had had the instrument, they would have had no difficulty in obtaining that amount (COCKBURN, C.J.).—*WATSON v. McLEAN* (1858), 5 B. & E. 78; 6 W. R. 721; 120 E. R. 436, Ex. Ch.

**627. Assessment of value of each paper—Duty of jury.]** (1) If A. has employed B. as his attorney, & has paid his bill, A. has a right to have his papers delivered up to him; & it is no defence to an action of detinue brought by A. against B. for B. to show that his London agent detains the papers, he having a lien on them as against B. for a balance of account for business done.

(2) In an action of detinue for papers, the jury must find the value of each paper separately; & it is the duty of pltf. to prove the value of the articles he sues for.—*ANDERSON v. PASSMAN* (1835), 7 C. & P. 193; 173 E. R. 85, N. P.

**628. Proof by plaintiff of value of papers—Necessity for.]**—*ANDERSON v. PASSMAN*, No. 627, *ante*.

*ix. Other Cases.*

**629. Goods wrongfully consigned—Sale of part by consignee.]**—Where A. consigned the goods of B. to C., & C., without notice of the right of B., sold a part, & kept the remainder in his possession:

*Held:* C. was liable in an action of trover by B. for the value of the goods that were sold, as well as for those that remained in his possession.—*FEATHERSTONHAUGH v. JOHNSTON* (1818), 8 Taunt. 237; 2 Moore, C. P. 181; 129 E. R. 374.

*Annotation:—Reid. Barker v. Furlong*, [1891] 2 Ch. 172.

**630. Conversion of tools—Tools used by defendant.]** *COOK v. HARTLE*, No. 548, *ante*.

*Bowden* (1864), 23 L. C. R. 466. —*CAN.*

**q. Pamphlets attacking Christianity.]**—Trover for pamphlets. Plea, not guilty. On the production of one of the pamphlets sued for at the trial, the judge in the county ct. directed that pltf. was not entitled to maintain the action because the pamphlet was a scolding & indecent attack on Christianity, & ordered a non-suit. On appeal.—*Held:* pltf. held property in the materials composing the pamphlets, independently of what was printed on them, & he would have a right to be indemnified therefor.—*BOUCHER v. SHEWAN* (1861), 14 C. P. 419.—*CAN.*

**r. Detention of certificate of title.]**—In an action for detention of a certificate of title where no special damages are claimed or proved, £100 damages are excessive.—*SCHROEDER v. HARCOURT* (1886), 5 N. Z. L. R. 226 (S. C.).—*N.Z.*

**PART III. SECT. 3, SUB-SECT. 1.—C. (h) ix.**

**t. Whether tenant's share of grain available for damages—For loss of owner's cattle.]**—Under a lease on the crop-payment plan the tenant's share of the grain was held not available in satisfaction of the owner's right to damages for loss of the owner's cattle of which the lessee had possession

under the terms of the lease, & an arbn. clause in an agreement collateral to the lease was held not to enlarge the owner's rights.—*BANQUE D'HOCHELAGA v. HAYDEN & GILLESPIE ELEVATOR CO.*, [1922] 1 W. W. R. 1054; 63 D. L. R. 511; 17 Alta. L. R. 277.—*CAN.*

**a. Sale of shares void under bankruptcy law—Amount received on sale.]**—Where an assignment before the date of a bankruptcy is avoided by the official assignee, but the assigned property has been sold before the date of the avoidance, the measure of damages is the amount received on account of the sale.—*Re WATERS, Ex p. HODGINS* (1887), 5 N. Z. L. R. 431 (S. C.).—*N.Z.*

**PART III. SECT. 3, SUB-SECT. 1.—D.**

**b. Sufficiency of declaration, plea or replication.]**—To a count in trover by members of a partnership, one of the defts. pleaded that the conversion complained of was a seizure & sale of the goods of the firm by the other deft. under a writ of *f. fa.* against one of the partners. *Replication* setting up negligence in the sale whereby the goods realised much less than their value.—*Held:* bad on demurrer.—*LANE v. TAYLOR* (1866), 5 N. S. W. S. C. R. 81.—*AUS.*

**c. —.]**—Where in trover for bills of exchange, deft. pleaded a lien by

*D. Practice and Procedure.*

**631. Stay of proceedings—Delivery of goods—Payment of costs.]**—A specific thing demanded in trover may be brought into ct. upon payment of costs.—*FISHER v. PRINCE* (1762), 3 Burr. 1363; 97 E. R. 876.

*Annotations:—Distd. Hutton v. Bolton* (1782), 3 Doug. K. B. 59. *Consd. Makinson v. Rawlinson* (1822), 9 Price, 460. *Reid. Earle v. Holderness* (1828), 1 Moo. & P. 254. *Mentd. Hedreochund v. Elphinstone* (1830), 2 State Tr. N. S. 379.

**632. ———.]**—*WATTS v. PHIPPS* (1767), Bull. N. P. 49.

**633. ———.]**—In trover for a packet of letters, deft. was allowed to stay proceedings as to one of them, upon delivering it up & paying costs.—*EARLE v. HOLDERNESSE* (1828), 4 Bing. 462; 1 Moo. & P. 254; 6 L. J. O. S. C. P. 68; 130 E. R. 845.

*Annotation:—Reid. West v. Taunton* (1830), 4 Moo. & P. 79.

**634. ——— Damages.]**—In trover the ct. will, on application of deft., stay proceedings on delivery of a portion of the goods & payment of costs & any damage, & in the event of pltf. refusing such terms, the ct. will permit deft. to deliver up the goods, pltf. to pay the costs incurred subsequently to such delivery; in the event of his not recovering in respect of some other articles than those delivered up, or more than nominal damages in respect of those delivered up.—*PEACOCK v. NICHOLS* (1840), 8 Dowl. 367; 4 Jur. 368.

**635. ——— Goods damaged by defendant.]**—*ROYDEN v. BATTY* (1741), Barnes, 3rd ed. 284.

*Annotation:—Reid. Earle v. Holderness* (1828), 1 Moo. & P. 251.

**636. ——— Special damage claimed.]**—In trover, if the value of the thing be uncertain, or pltf. insists upon going for special damages, the ct. will not stay proceedings on delivery of the thing sued for & costs.—*WHITTEN v. FULLER* (1773), 2 Wm. Bl. 902; 96 E. R. 533.

**637. ——— Question of damage disputed.]**—A rule granted to show cause why, on deft. delivering up to pltf. a horse, for which he had brought trover, & paying his costs, all further proceedings should not be stayed, on an affidavit that the animal was not in a worse state than when

agreement, & pltf. replied a tender, without averring that the sum tendered was sufficient.—*Held:* the replication was bad, on general demurrer.—*CONGER v. HUTCHINSON* (1842), 6 O. S. 644.—*CAN.*

**d. —.]** Trover for 3,000 feet of oak timber & 200 bushels of wheat. Plea, that deft. was seized in fee of a certain close, & being so seized he cut the said wheat & timber thereon growing, & afterwards, etc., delivered the same to A., to be kept, who delivered them to pltf., wherefore deft. took them out of his possession, etc.—*Held:* plea good.—*MILLARD v. KIRKPATRICK* (1848), 4 U. C. R. 248.—*CAN.*

**e. —.]** In trover for a deed, an agreement that pltf. should deliver the deed to deft. to be returned on certain conditions, need not be specially pleaded, but would be admissible either under "not guilty," or "license," as it negatives the alleged wrongful conversion.—*DOWLING v. MILLER* (1852), 9 U. C. R. 227.—*CAN.*

**f. —.]**—The replication of *de injuria* to a plea of lien in trover appears to have been in numerous cases treated as admissible.—*NICOLS v. DUNCAN* (1854), 11 U. C. R. 332.—*CAN.*

**g. — Necessity to plead re-delivery of goods.]**—A redelivery of the goods to pltf. pending the suit, or after plea,

he came into the possession of deft., but in an improved condition, discharged, on cause shown, with costs.—*MAKINSON v. RAWLINSON* (1822), 9 Price, 460; 147 E. R. 151.

*Annotation*:—*Reid*. *Clendon v. Dinneford* (1831), 5 C. & P. 13.

**638.** ————*Proceedings by assignees of bkpt. against the sheriff for the value of goods of bkpt. improperly sold by him under an execution will not be stayed unless plffs. agree as to the amount to be recovered.*—*GIBSON v. HUMPHREY* (1833), 1 Cr. & M. 544; 2 Dowl. 68; 3 Tyr. 588; 2 L. J. Ex. 234; 149 E. R. 516.

*Annotation*:—*Expld.* *Moon v. Raphael* (1835), 2 Bing. N. C. 310.

**639.** ————*Value of goods unascertained.*—In an action of trover, where the value of the goods converted was not ascertained, the ct. refused to stay proceedings upon delivery of the goods to pltf. or payment of the value thereof.—*TUCKER v. WRIGHT* (1826), 3 Bing. 601; 11 Moore, C. P. 500; 4 L. J. O. S. C. P. 190; 130 E. R. 645.

*Annotations*:—*Reid*. *West v. Taunton* (1830), 4 Moo. & P. 79; *Moon v. Raphael* (1835), 2 Bing. N. C. 310.

**640.** ————*In an action of detinue for deeds the ct. will on delivery up of a portion of them either stay proceedings or put pltf. under terms, if he insists on a proceeding in order to prevent his obtaining an undue advantage.*—*PHILLIPS v. HAYWARD* (1835), 3 Dowl. 362; 1 Har. & W. 108.

**641.** ————*In Mar. 1881, pltf. handed to B., a broker, shares in a mining co., with a transfer signed, a blank being left for the name of the transferee for the purpose of sale. B. died; & it was then discovered that he had, without the knowledge or authority of pltf., lodged the shares with deft.'s firm as security for an advance. Having received notice from the co. that they were about to register the shares in the name of deft., pltf. commenced an action in the Ch. Div. of the High Ct. to restrain deft.'s firm & the co. from parting with the shares or registering deft. as transferee, concluding with*

the usual prayer for "such further or other relief as the nature of the case might require." On Feb. 23, 1882, defts. in that action consented to an order for the delivery up of the shares to pltf. forthwith. The order directed that "upon delivery of the deed or form of transfer & the securities representing the same, & upon payment of costs to pltf. & the mining co., all proceedings in the said Ch. action should be stayed." The shares were not delivered up to pltf. until Apr. 28, 1882, when they were sold at a considerable loss. In an action against deft. in the Q. B. Div. to recover damages for this detention, the jury found that pltf. did not authorise B. to pledge the shares for his own debt, or lend them to him for that purpose:—*Held*: pltf. was estopped by the consent order made in the Ch. action Feb. 23, 1882, from recovering in this action damages for such detention, & deft. was not responsible for the detention of the shares by the mining co. after the order had been made in the suit in the Ch. Div.—*SERRAO v. NOEL* (1885), 15 Q. B. D. 549; 1 T. L. R. 581, C. A.

*Annotations*:—*Consd.* *Conquer v. Boot*, [1928] 2 K. B. 336. *Reid*. *Worman v. Worman* (1880), 43 Ch. D. 296.

**642.** ————*Injunction—Chancery suit pending.* In a suit by pltf., alleging that deft. had been employed by him as his agent for the sale of horses, & that, being unable to obtain from deft. particulars of the transactions as to the sales & purchases, he, pltf., had served deft. with notice to determine the agency, & had subsequently removed several horses from deft.'s premises, upon which deft. had commenced an action of trover. Injunction to restrain the action, on the ground that the Ct. of Ch. ought to ascertain the questions of fact or direct an issue, refused with costs.—*CURLEWIS v. CARTER* (1863), 3 New Rep. 60; 33 L. J. Ch. 370; 9 L. T. 407; 9 Jur. N. S. 1148; 12 W. R. 97.

**643.** ————*Administration suit.* Action in detinue for bonds, part of the estate, brought by the executor stayed on account of a

must be pleaded. *JOHNSON v. LAMB* (1856), 13 U. C. R. 508.—*CAN.*

*h.* ————*Of conversion of partnership property.*—*TAYLOR v. BROWN* (1867), 17 C. P. 387.—*CAN.*

*k.* ————*Detinue for the keys of pltf.'s dwelling house. Plea, leave & license. Second replication, that before the detention pltf. revoked the alleged leave, of which deft. had notice. Defendant, that within a reasonable time after the revocation & notice of it, deft. redelivered the keys to pltf., who accepted them:—*Held*: replication & rejoinder both good.*—*BAIN v. McDONALD* (1872), 32 U. C. R. 190.—*CAN.*

*l.* ————*Accord & satisfaction—Verdict against weight of evidence.*—*MONTGOMERY v. HART* (1877), 11 N. S. R. (2 R. & C.) 533.—*CAN.*

*m.* ————*Right to dower admitted.*—To a summons under Dower Procedure Act, R. S. O. 1877, c. 55, with the statutory notice indorsed under sect. 10, claiming damages, deft. entered an appearance under sect. 20, with an acknowledgment that he was tenant of the freehold, & consent that pltf. might have judgment for her dower, & take the necessary proceedings to have the same assigned to her. Pltf. then served a declaration claiming dower as well as damages for its detention:—*Held*: the declaration was bad, in claiming dower when pltf.'s right to it was admitted.—*HARVEY v. PEABALL* (1880), 31 C. P. 239.—*CAN.*

*n.* ————*CHRISTIE v. THOMAS* (1882), 15 N. S. R. (3 R. & C.) 203.—*CAN.*

*o.* ————*The statement of claim alleged that on about a certain date pltf. was the owner of certain goods & chattels described, & that, on or about the date mentioned, deft. converted them to his own use:—*Held*: pleas which denied that pltf. was the owner of the goods & chattels described, without adding the words "or any of them," & which confined the denial of pltf.'s ownership of the goods & chattels, & deft.'s conversion of them, to the dates mentioned in the statement of claim, were bad & must be set aside.*—*McDONALD v. LOWE* (1901), 34 N. S. R. 531.—*CAN.*

*p.* ————*A defence denying "conversion" of goods, "as alleged" is embarrassing, for it may either mean to deny the fact of converting the goods, or pltf.'s property in them.*—*STEPHENSON v. LAWLER* (1867), 16 W. R. 279.—*IR.*

*q.* ————*Incomplete administration must be pleaded.*—In an action of trover incomplete administration was put forward as a ground on a motion for a non-suit:—*Held*: want of perfected administration should have been pleaded & not as a ground for non-suit.—*SOMMERVILLE v. BUIEN* (1885), 7 Nfld. L. R. 41.—*NFLD.*

*r.* ————*Necessity for demand to support action—Sufficiency of authority to make demand.*—In an action of detinue for the recovery of books, belonging to a mining co., it was proved that the authority to demand the property was not signed by a quorum of directors, nor by the manager *qua* manager:—*Held*: the authority to make the demand was insufficient.—*ALLADIN*

& TRY AGAIN UNITED GOLD MINING CO., LTD. v. SCHAW (1871), 2 V. R. (L.V.) 18.—*AUS.*

*t.* ————*In an action of detinue pltf. must give evidence of a demand for the delivery of the goods, & a refusal to comply with that demand.*—*LOYD v. OSBORNE* (1899), 20 N. S. W. L. R. 190; 15 N. S. W. N. 267.—*AUS.*

*a.* ————*Admissibility of evidence—Parol evidence.*—Where, in an action for the conversion of sheep, the question is whether they were trespassing on land which deft. held under a pastoral license from the Crown, deft., may, in addition to the plan annexed to his license, adduce parol evidence to show that the *locus in quo* was comprised within his license.—*COURTS v. JAY* (1878), 4 V. L. R. 10.—*AUS.*

*b.* ————*That "letting" used for immoral purposes.*—In an action for the conversion of goods of pltf. in the possession of a third person if deft. justify for the conversion as under a distress by him for rent due from such third person. Pltf. may show that the letting to such third person was for an immoral purpose & may take advantage of such fact though a stranger to the contract of letting.—*NICHOLSON v. WEST* (1879), 5 V. L. R. (L.) 80.—*AUS.*

*c.* ————*Of special damage.*—In trover, pltf. offered evidence to prove that in consequence of being deprived of the tools for which this action was brought, he had been prevented from undertaking work as a master carpenter; & this was laid in the declaration as special damage:—*Held*:

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suit for the administration of the estate having been commenced by the present deft. in the Chancery Division.—*GEOGHEGAN v. DOMEH* (1875), Bitt. Prac. Cas. 36; 1 Char. Cham. Cas. 8.

**644.** ———. ———.]—Stay of proceedings in action of trover against the exors. for goods sold by them under an order of the ct. while an administration suit was pending, refused.—*WOOD v. WAKEFIELD*, [1875] W. N. 238; Bitt. Prac. Cas. 50; 1 Char. Cham. Cas. 9.

**645.** ———. ———.]—Jurisdiction of court of bankruptcy.—Bkpey. Act, 1869 (c. 71), gives the Ct. of Bkpey. jurisdiction to restrain by injunction the proceedings in an action at law brought to try the legal question whether certain goods form part of a bkpt.'s estate.

A trader procured a loan of £55 on the security of two bills of sale which included the whole of his property, which was worth more than £600. At the same time he agreed verbally with the lender of the money that the bills of sale should be given up & fresh ones substituted for them within the time allowed for registration under the Bills of Sale Act, & that this should be repeated from time to time. The original bills were executed in May, 1870, & they were renewed in June, & again in July, no fresh advance being made to the mtgor. of either occasion. Early in Aug. the mtgor. filed a petition for liquidation by arrangement, & the July bills were then registered within the proper time:—*Held*: the proceedings in an action of trover brought by the mtgee. against the trustee to recover the goods were properly restrained by

such evidence was rightly rejected.—*LOTT v. FRENCH* (1853), 10 U. C. R. 385.—**CAN.**

**d.** ———.]—*Statement at time of demand.*—A. executed a bill of sale to pltf. & delivered it to deft., who agreed to hold it as the agent of both parties. In trover for the bill of sale:—*Held*: deft.'s declarations made at the time of a demand, stating his reasons for refusing to give up the bill of sale, were admissible in evidence.—*DEVER v. MYNIBALL* (1856), 8 N. B. R. (3 All.) 351.—**CAN.**

**e.** ———.]—*Of lien.*—Where the goods have been replevied under 14 & 15 Vict. c. 61, & the declaration is for detaining merely, the pleadings should be as in detinue, & a lien cannot be given in evidence under a plea denying pltf.'s property.—*STEPHENS v. COUSINS* (1858), 16 U. C. R. 329.—**CAN.**

**f.** ———.]—*Of acts of conversion on several days.*—In trover for several articles, pltf. may give evidence of acts of conversion on several days, though there is but one count in the declaration alleging one conversion.—*ULTICAN v. MORTATT* (1859), 9 N. B. R. (1 All.) 298.—**CAN.**

**g.** ———.]—*Of appropriation of timber.*—*LITTLE v. FOLEY* (1864), 24 U. C. R. 177.—**CAN.**

**h.** ———.]—*Agreement to deliver timber.*—*Proof of plaintiff's title.*—*LITTLE v. FOLEY* (1864), 24 U. C. R. 177.—**CAN.**

**k.** ———.]—*Of damaged state of goods.*—In detinue if deft. plead the return & acceptance of the goods after action brought, evidence on the part of pltf. to show their damaged state after the commencement of the action is admissible.—*M'GRATH v. BOURNE* (1876), 1 R. 10 C. L. 160.—**IR.**

**l.** ———.]—*Whether verbal contract may be set up.*—During course of action.—*To contradict written document relied on.*—*WRIGHT v. CARMODY* (1897), 16 N. Z. L. R. 155.—**N.Z.**

**m.** ———.]—*Grant of new trial.*—Goods transferred by duress.]—Where in trover it was apparent that the goods for which

the action was brought, were transferred by pltf. to deft. when under duress, & the jury found a verdict for deft. against the justice of the case, the ct. granted a new trial.—*SLWART v. BYRNE* (1840), 6 O. S. 116.—**CAN.**

**n.** ———.]—Where, in trover for a schooner, the evidence as to pltf.'s title to the vessel was unsatisfactory, & deft. was not proved to have used or employed it, but merely to have allowed the person who left it with him to take away, & the jury found for deft., the ct. refused a new trial.—*BROWN v. ALLEN* (1846), 3 U. C. R. 57.—**CAN.**

**o.** ———.]—In an action for taking goods, the jury having found a general verdict for deft., the ct. granted a new trial to pltf. on his undertaking to restrict himself at such trial to a certain portion of the property, as to which they thought the weight of evidence in his favour.—*TOWNSEND v. HAMILTON* (1856), 5 C. P. 230.—**CAN.**

**p.** ———.]—*Refusal of counsel to elect against defendants.*—In trespass & trover against five defts. for taking & converting a steam boiler, it appeared that deft., J., had nothing to do with the original taking, but the boiler had been placed in his yard by the others, or by some of them, not acting in concert with him, & that he had afterwards refused to give it up to pltf. At the trial, pltf.'s counsel declined to elect, but went to the jury against all defts., claiming exemplary damages, & a general verdict was rendered. The ct. ordered a new trial without costs, & refused to allow the verdict to stand against P. alone.—*MENTON v. LEE* (1870), 30 U. C. R. 281.—**CAN.**

**q.** ———.]—Where the evidence showed that pltf. had killed a certain quantity of seals & that the same had been taken, & that deft.'s vessel was the only one in the neighbourhood to take the same, & the jury found for pltf.; the ct. refused to grant a rule to set aside the verdict.—*WHITE v. MCBRIDE* (1857), 4 Nfld. L. R. 178.—**NFLD.**

**r.** ———.]—*Question for jury.*—*Detention by*

injunction.—*Re SPARKE, Ex p. COHEN* (1871), 7 Ch. App. 20; 41 L. J. Bcy. 17; 25 L. T. 473; 20 W. R. 69, L. JJ.

*Annotations:—Reid.* Halliday v. Harris (1874), L. R. 9 C. P. 668; Re Barnett, Ex p. Reynolds (1885), 15 Q. B. D. 169. *Mentid.* Re Couston, Ex p. Ward (1872), 27 L. T. 502; Re Bent, Ex p. Mackenzie (1873), 42 L. J. Bcy. 25; Ramsden v. Lupton (1873), L. R. 9 Q. B. 17; Re Cook, Ex p. Izard (1874), 9 Ch. App. 271; Re Stevens, Ex p. Stevens (1875), L. R. 20 Eq. 756; Re Jackson, Ex p. Hall (1877), 4 Ch. D. 682; Re Wood, Ex p. Musgrave (1878), 10 Ch. D. 94.

**646.** Joint defendants.—Necessity for proof of joint conversion by all.]—In trover against several defts., all cannot be found guilty on the same count, without proof of a joint conversion by all; therefore where pltf. brought trover for goods against A. & B. bkpts., & C. & D. their assignees, & proved that the bkpts., before the bkpey., received & afterwards disposed of the goods by way of pledge, having no authority so to do; & that the assignees, after the bkpey. took possession of the goods, & refused to deliver them to pltf. on demand, & the jury found all defts. guilty, there being only one count in the declaration:—*Held*: the evidence did not warrant such finding.—*NICOLL v. GLENNIE* (1813), 1 M. & S. 588; 105 E. R. 220.

**647.** Admissibility of evidence.—As to property in goods.—Finding of sheriff's jury.]—An inquisition made by the sheriff's jury to ascertain to whom the property of goods taken under *fi. fa.* belongs, though found in favour of A., is not admissible evidence in an action of trover for the goods brought by A. against the sheriff.—*LATKOW v. EAMER* (1795), 2 11y. Bl. 437; 126 E. R. 636.

*agent of grantor.*—*PARKER v. STEVENS* (1862), 12 C. P. 81.—**CAN.**

**t.** ———.]—*Defendant's bona fide doubt of plaintiff's title.*—*GILPIN v. ROYAL (CANADIAN BANK* (1868), 27 U. C. R. 310.—**CAN.**

**u.** ———.]—*Conversion or no conversion.*—*JOHNSON v. LOUNSBURY* (1893), 32 N. B. R. 86.—**CAN.**

**b.** *Joinder of counts.*—*Detinue & assumpsit*.]—Joining counts in detinue & assumpsit is a misjoinder & is a ground of general demurrer.—*ALLEN v. BANK OF NEW BRUNSWICK* (1877), 17 N. B. R. (1 P. & B.) 446.—**CAN.**

**c.** ———.]—*Detinue & independent causes of action in tort.*—The joinder of a cause of action in detinue, with independent causes of action in tort, does not preclude the action from being remitted for trial to county court, under C. L. P. (Amendment) Act, 1870, s. 6, as extended by County Cts. Act, 1877, s. 51.—*LOWRY v. WEBB* (1891), 28 L. R. Ir. 110.—**IR.**

**aa.** *Interest on verdict.*—In an action of trover the ct. will not allow interest on the verdict where the signing of judgment is delayed by the opposite party.—*NEW BRUNSWICK IR. Co. v. MURRAY* (1878), 18 N. B. R. (2 P. & B.) 412.—**CAN.**

**bb.** *Whether appeal lies in action of replevin.*—There is no appeal in an action of replevin because the question in issue is not a money demand, but one of title to goods.—*HADDOCK v. RUSSELL* (1892), 8 Man. L. R. 25.—**CAN.**

**cc.** *Joinder of third party.*—In an action for the conversion of goods, deft. may bring in the person who sold him the goods as a third party, the words "any other relief over" in rule 209 being wide enough to include a claim made by deft. against his vendor.—*CONFEDERATION LIFE ASSOCN. v. LABATT* (No. 2) (1898), 18 P. R. 266.—**CAN.**

**dd.** ———.]—*RANDALL v. ROBERTSON* (1898), 2 Terr. L. R. 332.—**CAN.**

**ee.** *Question for judge.*—*Construction of words.*—In an action brought by

**648. — As to acts done by parties—Evidence of claim in bankruptcy.]**—In an action of trover by the assignees of a bkpt. it appeared that the goods had been assigned by the bkpt. to B., who assigned them to C, to whom the purchase-money as was contended, was advanced by pltf., to whom C. subsequently transferred the goods by bill of sale. In order to show that these transactions were fictitious, certain evidence was adduced; & a question was asked, "whether C. had not made a claim to these goods after the bkpcy.":—*Held*: the question could properly be asked, as the claim was an act done by one of the parties to the alleged fraud.—*FORD v. ELLIOTT* (1849), 4 Exch. 78; 18 L. J. Ex. 447; 154 E. R. 1132.

**649. — Admission by counsel—Of client's possession of goods.]**—Where a party appears by counsel before the ct. or a judge at chambers in any stage of the cause, & counsel makes an admission of a fact, though unsupported by affidavit, the ct. will regard such statement as presumably true, & will admit it in evidence when offered by the other side.

In an action of detinue to recover possession of certain papers deft. took out a summons before a judge at chambers to change the venue, & appeared by counsel to support the application. In the course of the proceedings before the judge counsel admitted that his client had the papers:—*Held*: this admission was rightly received in evidence at the trial of the cause, as a statement made by counsel in discharge of his functions as counsel, relevant to the matters at issue, & made for the purpose of influencing the judge to take a step in favour of his client.

When counsel makes before the ct. or a judge a statement, or does an act in the presence of the attorney on the record, or any authorised person who represents him, & the statement or the act is not repudiated by the attorney or his representative, that amounts to an assent to or adoption of it, & it becomes the statement or act of the attorney (*WILLIAMS, J.*).—*HALLER v. WORMAN*

pltf. against deft. to recover damages for the conversion of a quantity of hay, pltf.'s right to recover depended upon whether the hay in question was "upland" or "intervale":—*Held*: the question was peculiarly one for the trial judge, the evidence being contradictory, & the question being one that the judge had exceptional advantages for determining.—*GUILD v. DODD* (1898), 31 N. S. R. (19 R. & G.) 193.—*CAN.*

**k. Sufficiency of direction of judge to jury.]**—*RITCHIE v. LAW* (1905), 37 N. B. R. 36.—*CAN.*

**l. Whether action may be continued against executors of deceased defendant.]**—Where one converts to his own use & sells the goods of pltf., & dies after writ issued, but before declaration, the action may be continued against his exors. & they are liable on a count for money had & received.—*FREDERICK v. GIBSON* (1905), 37 N. B. R. 126.—*CAN.*

**m. Right to amend pleadings.]**—Pltf.'s claim was for damages for the alleged wrongful detention of five horses. He did not allege conversion of the horses. The evidence at the trial, however, in the opinion of the trial judge, showed a conversion of the horses by defts. to their own use absolutely; that defts. were not taken by surprise; & that the amount for which defts. could be found liable in detinue would exceed their liability for conversion.—*Held*: pltf. should have leave to make all proper amendments to the statement of claim, & should have judgment for the value of

the five horses as in an action for conversion of them to his own use.—*MCCUTCHEON v. JOHNSON* (1913), 24 W. L. R. 868; 13 D. L. R. 41; 23 Man. L. R. 559.—*CAN.*

**n. —.]**—*LEO v. KEARNS* (1864), 16 Ir. Jur. 318.—*IR.*

**o. Failure of plaintiff to identify horses converted.]**—*FOLLIS v. BAIRD & HAAG* (1915), 31 W. L. R. 536.—*CAN.*

**p. Onus of proof on defendant.]**—Where in an action for return of goods & damages for detention it was alleged in defence that the goods had been seized by the collector of customs for alleged infraction by pltf. of the customs laws:—*Held*: defts. were bound to show not only that the goods were held under that seizure at the time the action was commenced, but also that the customs authorities were entitled to make the seizure.—*LOMAX v. BROWER* (Alta.), [1919] 3 W. W. R. 385.—*CAN.*

**q. Stay of proceedings.]**—In an action of detinue, although alleging no special damage, the ct. will compel pltf. to elect whether he will stay all proceedings on delivery of the chattel in dispute, on payment by deft. of nominal damages, & all the costs of the action, or will proceed for greater damages at the risk of all costs.—*LYONS v. KELLER* (1864), 15 I. C. L. R. App. 1.—*IR.*

**r. Right to plead several special defences.]**—In an action against a pawnbroker for conversion & detinue of goods pawned, deft. will not be allowed to plead special defences under

(1861), 2 F. & F. 165; 3 L. T. 741; 0 W. R. 348.

**650. Competency of witness—Party enabling defendant to convert.]**—*FANCOURT v. BULL*, No. 511, *ante*.

**651. Right of defendant to set-off or counterclaim.]**—A distress for rent was levied upon certain property, & cattle lent for hire by pltf. to the tenant were seized. Deft., the holder of a bill of sale upon the goods & chattels of the tenant, then paid off the distress, & seized the cattle in question under his bill of sale. Upon an action for trover & wrongful conversion:—*Held*: deft. was not entitled to set off & counterclaim the amount paid by him to relieve the cattle from the distress.—*JONES v. SIMMONS* (1881), 45 J. P. 606.

**652. —.]**—Pltf. co. had deposited cigars with defts. to secure a debt. An order for winding up the co. was afterwards made, & the secured debt having been paid off, the liquidator of the co. claimed a return of the cigars, but defts. refused to give them up. The liquidator brought an action of detinue for the cigars. Their value having been assessed in the action, defts. claimed by way of counterclaim to set off another debt due from the co. to them against such value by virtue of the conjoint effect of sect. 38 of Bkpcy. Act, 1883, (c. 52), & sect. 10 of Jud. Act, 1875 (c. 77), which applies the rules of bkpcy. law to cases of winding up:—*Held*: they were not entitled to do so, on the ground that sect. 38 is only applicable where the claims on each side are such as result in pecuniary liabilities, whereas the right of pltf. was to a return of the goods.—*FRERLE'S HOTELS & RESTAURANT CO. v. JONAS* (1887), 18 Q. B. D. 450; 58 L. J. Q. B. 278; 35 W. R. 407; 3 T. L. R. 421, C. A. *Annotations*:—*Consd.* *Palmer v. Day*, [1895] 2 Q. B. 618; *Re Thorne*, [1914] 2 Ch. 438. *Reid*, *Elgoud v. Harris*, [1896] 2 Q. B. 491; *Re Mid-Kent Fruit Factory* (1896), 3 Mans. 59; *Re Daintrey*, *Ex p. Maut*, [1900] 1 Q. B. 546; *Lister v. Hooson* (1907), 77 L. J. K. B. 161; *Lord's Trustee v. G. E. Ry.*, [1908] 2 K. B. 54; *Re Taylor*, *Ex p. Norvell*, [1910] 1 K. B. 562.

**653. —.]**—In an action of trover & for goods sold & delivered deft. cannot set off a claim for

Pawnbroking Acts, along with traverses of the property & of the acts complained of.—*WILHELM v. HALBERT* (1867), 15 W. R. 1079.—*IR.*

**t. Whether court will strike out groundless counts & remit action.]**—When the ct. was satisfied that counts in detinue had been introduced into a summons & plaint without any *bond fide* foundation & for the purpose of ousting the jurisdiction of the ct. to remit the action to the civil bill ct., & that, if the other counts in the summons & plaint had been the sole causes of action, the case might properly be remitted, the ct. struck out the counts in detinue & remitted the action.—*KEOGH v. ALLENE* (1874), 1 I. R. 8 C. L. 337.—*IR.*

**u. Procedure on motion for non-suit.]**—On a trial for the detinue of a ship on the termination of pltf.'s case a motion for a non-suit was made. The judge was of opinion that there had not been any sufficient demand & refusal of the vessel but ordered deft. to go on with his defence, who supplied by his evidence the defects in pltf.'s case. On a renewal of motion for a non-suit:—*Held*: the ct. in considering the motion was not bound to reject the evidence supplied by deft., not to confine itself to what had been given when the motion was first made, but could have regard to the whole of the evidence.—*SNEA v. COADY* (1880), 6 Nfld. L. R. 199.—*NFLD.*

**v. Whether assignee in bankruptcy may sue for conversion.]**—A right of action by a trustee in bkpcy. for



*Sect. 3.—Remedies: Sub-sect. 1, D. & E. (a), (b), (c), & F.]*

unliquidated damages which he has against a third party on another transaction, although the third party happens to be plff.'s principal.—TAGART & Co. v. MARCUS & Co. (1888), 36 W. R. 469. D. C.

**Discovery.**—See DISCOVERY, Vol. XVIII., p. 222; Nos. 1706, 1707.

**Interpleader.**—See INTERPLEADER, Vol. XXIX., pp. 455, 456, 462, 471, 472, 477, 493, 505, Nos. 40, 46, 100, 190, 215, 260, 443, 503.

### *E. Judgment.*

(a) *Form of Judgment.*

*See R. S. C., Ord. 13, r. 5, Ord. 48, rr. 1, 2.*

654. Action for detinue.—Judgment for recovery of goods.—Or value.]—ANON. (1505), Keil. 64 b; 72 E. B. 224.

**Annotations :—***Appl.* Phillips v. Jones (1850), 15 Q. B. 859.  
**Consd.** Taylor v. Addyman (1853), 13 C. B. 309.

855. ————.]—PALER & BARTLET v.  
HARDYMAN (1605), Yelv. 71; 1 Browne, 87; 80  
E. R. 49.

*Annotation* :—**Appl.** Phillips v. Jones (1850), 15 Q. B. 859.

656. ——— & damages for detention.]—In detinue the judgment must be conditional, to recover the thing detained; or if that cannot be had, then the value found, & damages for the detention.—PETERS v. HEYWARD (1623), Cro. Jac. 682; 79 E. R. 591.

**Annotations:—***Apld. Phillips v. Jones* (1850), 15 Q. B. 859.  
**Refd.** *Donald v. Suckling* (1866), L. R. 1 Q. B. 585;  
*Eberle's Hotels & Restaurant Co. v. Jonas* (1887), 18  
Q. B. D. 459.

857. —————.]—Detinue of goods. Judgment, by default, that pltf. recover the goods or, if deft. should not render the same, the value thereof, & also pltf.'s damages by reason of the detention. Writ of inquiry to ascertain the damages and costs, but making no mention of the value. Return, damages £40, costs 40s. Judgment that pltf. recover the goods, or, if deft. should not render them, the value thereof, & also that he recover his damages, costs & charges aforesaid, & £27 costs of increase: award of *distrafas*, etc., so that deft. render to pltf. the goods. Error thereon:—*Held*: (1) the judgment was final, & the writ of error could not be quashed; (2) the judgment was erroneous for not ascertaining the value, or giving any means of ascertaining it.—*PHILLIPS v. JONES* (1850), 15 Q. B. 859; 19 L. J. Q. B. 374; 16 L. T. O. S. 4; 14 Jur. 1005; 117 E. R. 683, Ex. Ch.

**Annotations:—**As to (2) *Reid. Taylor v. Addyman* (1853), 13 C. B. 309. *Generally, Mentd. Eyre v. Eyre* (1901), 45 Sol. Jo. 653.

658. ——— Necessity for ascertainment of value.]—*PHILLIPS v. JONES*, No. 657, *ante*.

659. Action for trover—Action against two defendants—Judgment against defendants severally

—As to part of property.]—In trover against two, the jury may find defts. severally guilty as to part of the property, & not guilty as to the residue.—*PLAYER v. WARN & DEWS* (1626), Cro. Car. 54; 79 E. R. 651, Ex. Ch.

**660. Judgment for value of chattel—Provision for nominal damages—If chattel delivered.** In trover, where the question was as to the identity of the chattel, & upon a verdict for plff., deft. was willing to deliver it up to pltf.; in order to entitle pltf. to costs, the verdict should be entered for the value of the chattel, with a memorandum that only nominal damages should be levied, if the chattel be delivered up to pltf.—*WINTLE v. RUDGE* (1841), 5 Jur. 274. N. P.

(b) *Effect of Judgment.*

**661. Whether property in chattel transferred to defendant—Satisfaction of judgment.]—ANON. (1505), Jenk. 189 ; 145 E. R. 126.**

**Annotations:—***Apld.* Cooper v. Shepherd (1846), 15 L. J. C. P. 237. *Consd.* Buckland v. Johnson (1854), 15 C. B. 185. *Apld.* Brinsmead v. Harrison (1871), L. R. 6 C. P. 584.

662. ———.] — When a man recovers against another in trover, there the property of the goods vests in deft., against whom the damages were recovered (*per* CUR.).—UNDERWOOD *v.* MORDANT (1691), as reported in 2 Vern. 238; 23 E. R. 754

663. ———.]—A judgment creditor in an action of detinue not having received the value of the goods, the property in the goods remains in him until execution has issued on the judgment.—*Re SCARTH* (1874), 10 Ch. App. 234; *sub nom. Re SCARTH, Ex p. SCARTH*, 44 L. J. Bcy. 29; 31 L. T. 737; *sub nom. SCARTH v. SCARTH*, 23 W. R. 153, L. J.J.

**Annotations:**—**Consd.** Eberle's Hotels & Restaurant Co. v. Jonas (1887), 18 Q. B. D. 459. **Refd.** Peruvian Guano Co. v. Dreyfus (1887), [1892] A. C. 170, n.

684. ———.]—Judgment for pltf. in an action of detinue held not to change the property in the detained chattel until satisfaction of the value found by the judgment; even though satisfaction was prevented by the bkpye. of deft.—*Re WARE, Ex p. DRAKE* (1877), 5 Ch. D. 866; 46 L. J. Bcy. 105; 36 L. T. 677; 25 W. R. 641. C. A. *Annotations*.—*Consd. Eberle's Hotels & Restaurant Co. v. Jonas* (1887), 18 Q. B. D. 459. *Distd. Bradley & Cohn v. Ramsay* (1912). 106 L. T. 771.

**865.**— **Interlocutory judgment.**—Where in an action of trover *pltf.* has obtained judgment for want of a plea, but there has been no assessment of damages, such interlocutory judgment does not vest the property in the chattel, the subject-matter of the action, in *def.* so as to enable him to give a good title to a third party.—**MARSTON v. PHILLIPS** (1863), 3 New Rep. 35; 9 L. T. 289; 12 W. R. 8. *Annotation.*—**Consd.** *Brinsmead v. Harrison* (1871), 40 L. J. C. P. 281.

666. —.]—A recovery in trover vests the

conversion & to recover goods belonging to bkpt.'s estate is an assignable chose in action, & may be sued on in the name of the assignee.—*TAYLOR v. KNAPMAN* (1884), 2 N. Z. L. R. 265 (S. C.).—N.Z.

**PART III. SECT. 3, SUB-SECT. 1.—**  
**E. (a).**

**6561. Action for delinque—Judgment for recovery of goods—Or value—& damages for detention.]**—In an action to recover possession of an engine & attachments & other chattels:—*Held*: the title to the property in those chattels had become vested in plts., & plts. were entitled to delivery thereof to them by deft., who obtained them upon a pretended sale, made with the

object of defeating plffs.; & judgment was ordered to be entered for plffs. for a return of the chattels or payment of their value & damages for detention. —REID & DONNELLY v. MOORE (Sask.) (1913), 24 W. L. R. 575; *affd.* 7 Sask. L. R. 69.—CAN.

*c.* ——— On payment of defendant's solicitor & client's costs.)—  
MCDONALD v. CONNELL (1924), 26  
W. A. L. R. 140.—AUS.

**d. Action for conversion—Judgment for recovery of goods—Or value.**—In an action for conversion the proper form of judgment is for a return of the goods or their value.—**LACKERIDGE v. REEDER**, [1920] 2 W. W. R. 511; 52 D. L. R. 706; 13 Sask. L. R. 579.—**CAN.**

PART III. SECT. 3, SUB-SECT. 1.—  
E. (b).

6811. *Whether property in chattel transferred to defendant—Satisfaction of judgment.*—A judgment in an action in conversion does not pass the property to deft. unless & until it is satisfied: in this respect there is no difference between a judgment in an action in detinue & one in trover or conversion. —SINNAN CHETTY v. ALAGERI AIYER (1923), I. L. R. 46 Mad. 852.—IND.

681 ff. —.]—A judgment against deft. in an action of trover without satisfaction does not vest the property in the goods in deft.—BUBBY v. SCHOFIELD (1889), 29 N. B. R. 407.—CAN.



property in the chattel in debt. as against pltf. In trover by A. against B. for a bedstead, B. pleaded a former recovery by A. in trover for the same identical bedstead against C.; averring that the conversion by C., for which that action was brought, was a conversion not later in point of time than the conversion mentioned in the declaration against B., & that, before the conversion in that declaration mentioned, C. being possessed of the bedstead, sold it to B., who paid him for the same, & received it under such sale, & that the taking under such sale was the conversion complained of in the declaration against B.:—*Held*: this plea was a good answer to the action.

Pltf., in trover, where no special damage is alleged, is not entitled to damages beyond the value of the chattel he has lost; & after he has once received the full value, he is not entitled to further compensation in respect of the same loss (TINDAL, C.J.).—COOPER v. SHEPHERD (1846), 3 C. B. 266; 4 Dow. & L. 218; 15 L. J. C. P. 237; 7 L. T. O. S. 282; 10 Jur. 758; 136 E. R. 107.

*Annotations*.—*Consd.* Buckland v. Johnson (1854), 15 C. B. 145; Brinsmead v. Harrison (1871), L. R. 6 C. P. 584. *Refd.* Salmon v. Horwitz (1841), 23 L. T. O. S. 77.

667. —[*J*.]—*Semble*: a judgment in trover vests the property in the goods in the debt, from the time of the conversion.—BUCKLAND v. JOHNSON (1854), 15 C. B. 145; 2 C. L. R. 784; 23 L. J. C. P. 204; 23 L. T. O. S. 190; 18 Jur. 775; 2 W. R. 565; 139 E. R. 375.

*Annotations*.—*Distd.* Marston v. Phillips (1863), 3 New Rep. 35. *Dbtd.* Brinsmead v. Harrison (1871), L. R. 6 C. P. 584. *Refd.* Smith v. Baker (1873), L. R. 8 C. P. 350. *Flitters v. Allfrey* (1874), L. R. 10 C. P. 29; *Wegg Prosser v. Evans*, [1894] 2 Q. B. 101; *Rice v. Reed*, [1900] 1 Q. B. 54; *Isaacs v. Salbstein*, [1916] 1 K. B. 139. *Mentd.* Roulledge v. Hlop (1860), 2 E. & E. 549; *St. Losky v. Green* (1860), 9 C. B. N. S. 370; *Phillips v. Ward* (1863), 2 H. & C. 717; *Cambefort v. Chapman* (1887), 19 Q. B. D. 229.

668. —[*J*.]—A judgment against debt. in trover without satisfaction does not vest the property in the goods in debt.—BRINSMEAD v. HARRISON (1871), L. R. 6 C. P. 584; 40 L. J. C. P. 281; 24 L. T. 798; 19 W. R. 956; *on appeal* (1872), L. R. 7 C. P. 547; 41 L. J. C. P. 190; 27 L. T. 99, Ex. Ch.

*Annotations*.—*Apld.* *Re Ware*, *Ex p. Drake* (1877), 5 Ch. D. 866. *Distd.* Bradley & Cohn v. Ramsay (1912), 106 L. T. 771. *Apld.* *Re Gmnsbourg*, [1920] 2 K. B. 426. *Re Crook*, *Ex p. Collins* (1891), 68 L. T. 29; *Re London & General Bank*, *Ex p. Theobald* (1895), 73 L. T. 304; *Penny v. Wimbledon U. D. C.* (1899), 80 L. T. 615; *Howe v. Oliver & Haynes* (1908), 24 L. R. 781; *London Assocn. for Protection of Trade v. Greenlands*, [1916] 2 A. C. 15; *Goldrei, Foucard v. Sinclair & Russian Chamber of Commerce in London*, [1918] 1 K. B. 180; *Parr v. Snell*, [1923] 1 K. B. 1; *The Koursk*, [1924] P. 140; *Cumberland v. Lanarkshire Tram. Co.* (1927), 20 B. W. C. C. 780.

669. Judgment for defendant—No defence to action for money had & received.]—A judgment for debt. in trover is not a bar to an action against him for money had & received for pltf.'s use.—*v. CAMPBELL* (1771), 3 Wils. 240; 2 Wm. Bl.

### PART III. SECT. 3, SUB-SECT. 1.—E. (c).

e. Stay of execution—On ground of equitable set-off.]—Where pltf. has recovered damages in an action for conversion, equity will not, on the ground of equitable set-off, restrain pltf. from issuing execution to recover the amount of the verdict, merely because there are unsettled accounts pending between the parties, although the subject-matter of the accounts consists of dealings & transactions affecting the property in respect of which the action was brought.—HILL v. ZYMACK (1908), 7 C. L. R. 352.—AUS.

### PART III. SECT. 3, SUB-SECT. 1.—F.

#### 1. Right to costs under Common Law

779; 95 E. R. 1034; *subsequent proceedings*, *sub nom.* KITCHEN v. CAMPBELL (1772), 3 Wils. 304.

*Annotations*.—*Refd.* Phillips v. Berryman (1783), 3 Doug. K. B. ...; Richardson v. Tomkies (1832), 9 Bing. 51; Garland v. Carlisle (1837), 11 Bl. 421; Buckland v. Johnson (1854), 15 C. B. 145.

#### (c) Execution.

670. Stay of execution—Jurisdiction to order—Stay until plaintiff perfects defendant's title—To subject-matter of action.]—The ct. will not interfere to stay execution on a judgment recovered in trover against debt. till pltf. shall do any act, however reasonable, to make debt. a title to the subject-matter of the action. They have no jurisdiction to do so. A rule for that purpose discharged, with costs.—BUTTS v. BILKE & HAVELOCK (1817), 4 Price, 291; 140 E. R. 468.

—[*J*.]—*See, generally*, EXECUTION, Vol. XXI, pp. 444, 445.

671. Writ of assistance—For delivery of specific articles—Ordered to be delivered up.]—Although for the purpose of recovering land the old writ of assistance has been superseded by the writ of possession, the writ may still be issued for the purpose of recovering possession of & preserving chattels which have been ordered to be delivered to a receiver.—WYMAN v. KNIGHT (1888), 39 Ch. D. 165; 57 L. J. Ch. 886; 59 L. T. 164; 37 W. R. 76.

*Annotation*.—*Refd.* *Re Maudslay & Field*, *Maudslay v. Maudslay & Field*, [1900] 1 Ch. 602.

672. —[*J*.]—*Re* TAYLOR, TAYLOR v. RAWSON, [1913] W. N. 212.

—[*J*.]—*See, also*, EXECUTION, Vol. XXI, pp. 584, 585, Nos. 1619–1631.

Writ of delivery.]—*See* EXECUTION, Vol. XXI, pp. 583, 584, Nos. 1602–1618.

#### F. Costs.

673. Action by executor or administrator—Liability for costs—Conversion after death of deceased.]—In trover by an administrator, if the conversion be in his own time he shall pay costs.—ATKEY v. HEARD (1831), Cro. Car. 219; W. Jo. 241; 79 E. R. 791.

674. —[*J*.]—If an administrator bring trover on a conversion in his own time he shall pay costs on a verdict for debt.—COATSWORTH v. SHAFTO (1722), 8 Mod. Rep. 109; 88 E. R. 85.

675. —[*J*.]—Where an exor. declares in trover on the possession of his testator & a conversion after his death, & is nonsuit, the exor. must pay costs.—HARRIS v. HANNA (1735), Lee temp. Hard. 204; 95 E. R. 131.

676. —[*J*.]—If an exor. declare on a trover & conversion in testator's lifetime, & also on a trover & conversion after his death, & be nonsuited, he is not liable to pay costs.—COCKERILL

*Procedure Act*.]—In an action of detinue pltf. recovered a verdict for the return of certain goods or their value, £17 10s., & for £8 damages for their detention. Debt. did not return the goods:—*Held*: sect. 287 of the above Act did not apply, & pltf. was entitled to recover his costs.—MILLER v. SMITH (1927), 27 S. R. N. S. W. 491; 44 N. S. W. W. N. 191.—AUS.

g. —[*J*.]—O'SULLIVAN v. DUBLIN, WICKLOW & WATERFORD RY. CO. (1867), 16 W. R. 86.—IR.

h. Refusal of court to order taxation of costs.]—GINN v. SCOTT (1854), 11 U. C. R. 542.—CAN.

j. Right of plaintiff to costs up to offer to confess judgment & right of defendant to subsequent costs.]—Debt., in trover, about a month after the

conversion, offered to confess a judgment under 18 Vict. c. 9, for \$18, which pltf. refused. On the trial (upwards of two years afterwards), pltf. recovered a verdict for \$19—a part, \$15.50 being found by the jury as the value of the goods, & the balance as damages in the nature of interest since the conversion:—*Held*: as the amount tendered was more than the value of the goods & damages up to that time, pltf. was only entitled to costs up to the time of the offer, & debt. was entitled to the subsequent costs.—BELYEA v. STEPHENSON (1860), 11 N. B. R. (6 All.) 513.—CAN.

k. Deprivation of costs of successful party—Discretion of judge.]—JENKINS v. MCADAM (1905), 38 N. S. R. 124.—CAN.

l. —[*J*.]—The disallowance of

*Sect. 3.—Remedies: Sub-sect. 1, F.; sub-sects. 2, 3 & 4.]*

*v. KYNASTON (1791), 4 Term Rep. 277; 100 E. R. 1017.*

*Annotations:—Dtd. Bollard v. Spencer (1797), 7 Term Rep. 358. Refd. Tattersall v. Grootte (1800), 2 Bos. & P. 253; Ord v. Fenwick (1802), 3 East, 104; Cowell v. Watts (1805), 6 East, 405; Hollis v. Smith (1808), 10 East, 293.*

**677.** ————]—If the conversion were in the time of the administratrix & she be non-suited in the action of trover she is liable to pay costs though she never was in fact in possession of the goods since intestate's death.—*BOLLARD v. SPENCER (1797), 7 Term Rep. 358; 101 E. R. 1018.*

*Annotations:—Refd. Tattersall v. Grootte (1800), 2 Bos. & P. 253; Hollis v. Smith (1808), 10 East, 293; Grimstead v. Shibley (1809), 2 Taunt. 116; Squire v. Arnison (1884), Gab. & El. 365.*

**678.** ————]—Administrators declaring in trover on a possession of the goods by their intestate, & a conversion in their own time & being nonsuited, are liable to costs; for the fact of their possession is immaterial; & they may sue in their own right.—*HOLLIS v. SMITH (1808), 10 East, 393; 103 E. R. 780.*

*Annotation:—Refd. Jones v. Jones (1823), 1 Bing. 249.*

**679.** ————]—Conversion in lifetime of deceased.]—*COCKERILL v. KYNASTON, No. 676, ante.*

**680. Scale of costs.]**—Trespass, the breaking of a jar is sufficient to entitle pltf. to full costs under a count, alleging an asportation & conversion.—*GOSSON v. GRAHAM (1815), 1 Stark. 55; 171 E. R. 400, N. P.*

**681. — On footing of tort.]**—Pltf., a dealer, bought a hydraulic press from deft., an auctioneer, at a sale, under conditions of sale requiring payment before delivery. Time was allowed for payment. Payment was tendered within the time allowed, but deft. refused to deliver the press, having contracted to resell it, & in fact reselling it, subsequent to the tender. Pltf. had also contracted to resell the press, after delivery, at a profit. In the action the sole issue in dispute, namely, whether there had been tender within the time allowed for payment, was found in favour of pltf., & evidence of pltf.'s loss of profit on resale having been given as a measure of damage, judgment was given for pltf. for £29 15s. 3d. Deft. contended that the action was one for breach of contract, & that costs would therefore only be recovered on the county ct. scale:—*Held:* the action was for a wrongful conversion subsequent to & independent of the contract passing the property, & it was therefore an action of tort in which, more than £20 having been recovered, costs followed on the High Ct. scale.—*COHEN v. FOSTER (1892), 61 L. J. Q. B. 643; 66 L. T. 616; 8 T. L. R. 519, D. C.*

**682. — Articles returned—During progress of case.]**—Pltf. brought an action in the High Ct. to recover from defts. certain drawings that had been deposited with them as agents for sale, & damages for their detention & he claimed also an account in respect of such of the drawings as had

been sold, & the amount that might be proved to be due on the taking of the account. Defts. pleaded that they had always been ready & willing to return the drawings in their possession, & offered to return them forthwith on obtaining a proper receipt. Pltf. replied accepting the offer to return the drawings, & they were accordingly returned to him. They were of the value of £20 & upwards. The action went to trial on the question of the amount due from defts. in respect of the drawings that had been sold, & resulted in a verdict for pltf. for £33:—*Held:* pltf. was entitled to costs on the High Ct. scale on the grounds (a) that he had recovered the drawings through the exigency of the writ, & that the return of them during the progress of the case did not affect the rights of the parties at the date of the writ; & (b) that the action being one of detinue in which pltf. had recovered the things claimed *in specie*, it was not within the class of actions founded on tort to which County Courts Act, 1888 (c. 43), s. 116 (2), applies.—*Du PASQUIER v. CADBURY, JONES & Co., LTD., [1903] 1 K. B. 104; 72 L. J. K. B. 78; 87 L. T. 519; 51 W. R. 113; 19 T. L. R. 41; 47 Sol. Jo. 49, C. A.*

*Annotation:—Folld. Trotter v. Windham (1907), 23 T. L. R. 676.*

**683. — After judgment.]**—Pltf. in an action of detinue recovered judgment for the return of the goods claimed or £6 10s. their value & the goods were returned to him:—*Held:* County Courts Act, 1888 (c. 43), s. 116 (2), did not apply & pltf. was entitled to costs.—*TROTTER v. WINDHAM & Co. (1907), 23 T. L. R. 676; 51 Sol. Jo. 625, C. A.*

**684. Security for costs—Action by bankrupt.]**—In an action of trover, by an insolvent debtor, to recover property acquired subsequently to adjudication, the ct. will not direct him to give security for costs, unless the Insolvent Debtors Ct., on an application by the assignees, under 7 Geo. 4, c. 57, s. 57, have permitted execution to issue in respect of such property.—*CLAPWORTHY v. COLLIER (1832), 2 Cr. & J. 631; 1 L. J. Ex. 229; 149 E. R. 265.*

**685. Divisibility of costs—Partial success of both parties.]**—In trover for waggons, wheelbarrows, iron rails, etc., a verdict was given for pltf. at the trial for £1,850, but afterwards, on the argument of a special case, was reduced by consent to £600, & the following rule was drawn up:—

"It is ordered, by consent, that the verdict found for pltf. on the trial of this cause be reduced to the sum of £600, & that as to the residue of the claim, the verdict be entered for defts.:—*Held:* this was the proper course, the issue being divisible, & pltf. were not entitled to have the verdict entered generally for them, but defts. were entitled to a verdict & to their costs, as to so much of the cause of action as they had succeeded on.—*WILLIAMS v. GREAT WESTERN RY. Co. (1841), 8 M. & W. 856; 1 Dowl. N. S. 10; 10 L. J. Ex. 472; 151 E. R. 1287.*

**686. Items of costs—Fraudulent sale by bankrupt—Costs incurred in proving fraud.]**—In an action of trover for goods by the assignee of an

costs to deft. on dismissing an action for conversion:—*Held:* to have been a proper exercise of his discretion.—*GORREL v. CANADIAN BANK OF COMMERCE, [1922] 1 W. W. R. 255; 63 D. L. R. 723; 15 Sask. L. R. 151, CAN.*

**m. ———.]**—The ct. refused to allow a successful deft. costs when the action was against a police officer in an action for the conversion of goods.

—*NETHERALL v. MITCHELL (1866), 5 Nfld. L. R. 157.—NFLD.*

**n. Costs on district court scale with usual set-off.]**—*HAMILTON v. LINDSAY & LINDSAY, [1923] 1 W. W. R. 1243; 16 Sask. L. R. 510.—CAN.*

**o. Right of one defendant to indemnify for costs against another.]**—In an action for wrongful seizure & detention of chattels, the co. which, under instructions from the principal

deft. had removed & stored the chattels, was joined as deft., after judgment had been given in pltf.'s favour in respect of detention of the chattels, the co. applied for an order that the other deft. should pay the costs of the action:—*Held:* in the absence of any evidence of an express or implied contract by the other deft. to indemnify the co. the order could not be made.—*SCHOLLUM v. BARRIFF (No. 2), [1917] N. Z. L. R. 448.—N.Z.*

insolvent, *pltf.*, in order to establish the insolvent's title to the goods in question at a certain time, gave in evidence a bill of sale, by which the insolvent, in consideration of the sum of £499 sold absolutely the goods to *deft.* & other persons, & *pltf.* then produced evidence to impeach the validity of the bill of sale, by showing that it was wholly void on the ground of fraud. *Pltf.* having obtained a verdict:—*Held*: he was entitled to the costs incurred in the production of that evidence.—*HARDY v. TINGEY* (1850), 5 Exch. 294; 19 L. J. Ex. 233; 155 E. R. 126.

*Annotation*:—*Mentd.* *Simpson v. Wood* (1852), 7 Exch. 349.

#### SUB-SECT. 2.—ELECTION TO SUE ON CONTRACT. *See* CONTRACT, Vol. XII., pp. 562–567.

#### SUB-SECT. 3.—RECAPTURE.

**687. Right to recapture.**—If a man bails goods to another at such a day to rebail & before the day the bailee does sell the goods in market overt, yet at the day the bailor may seize the goods, for the property of the goods was always in him & not altered by the sale in market overt (*per* *CUR.*).—*ANON.* (1609), *Godb.* 160; 78 E. R. 97, 98.

—*J.*—*See, also*, CRIMINAL LAW, Vol. XV., p. 831, Nos. 9115, 9116; PERSONAL PROPERTY, Vol. XXXVII., pp. 164, 165, Nos. 74–78.

—*Goods wrongfully distrained.*—*See* DISTRESS, Vol. XVIII., pp. 260, 308, 309, 324, 366, 367, 448, Nos. 2, 440, 586, 1044, 1052, 1053, 1056, 1848–1851.

#### SUB-SECT. 4.—REMEDIES IN EQUITY.

**688. Jurisdiction of court to order specific delivery.**—Land held by the tenure of a horn. Bill brought by the heir for the horn.

If the land is held by the tenure of a horn or carriage, the heir would be well entitled to the horn at law (*LORD GUILDFORD, LORD KEEPER*).—*PUSEY v. PUSEY* (1684), 1 Vern. 273; 23 E. R. 465.  
*Annotations*:—*Consd.* *Fells v. Read* (1796), 3 Ves. 70; *Nutbrown v. Thornton* (1804), 10 Ves. 159. *Refd.* *Macclesfield v. Davis* (1814), 3 Ves. & B. 16. *Refd.* *Dowling v. Betjemann* (1862), 2 John. & H. 544; *Re* *Wait*, [1927] 1 Ch. 606.

**689.** —*J.*—A bill lies to compel the delivery of an article or other curiosity *in specie*.—*SOMERSET (DUKE) v. COOKSON* (1735), 3 P. Wms. 390; 24 E. R. 1114.

*Annotations*:—*Refd.* *East India Co. v. Kynaston* (1821), 3 Bill. 153; *Re* *Wait*, [1927] 1 Ch. 606.

**690.** —*J.*—The ct. will decree a specific chattel to be delivered up without measuring the value, where from its nature there can be no compensation by damages.—*FELLS v. READ* (1796), 3 Ves. 70; 30 E. R. 809.

*Annotations*:—*Consd.* *Nutbrown v. Thornton* (1804), 10 Ves. 159. *Refd.* *Dowling v. Betjemann* (1862), 2 John. & H. 544. *Refd.* *Lloyd v. Loaring* (1802), 6 Ves. 773; *A.-G. v. Elliott & Des Barres* (1813), 2 Price, 48; *Macclesfield v. Davis* (1814), 3 Ves. & B. 16. *Mentd.* *Meux v. Maltby* (1818), 2 Swan. 277.

**691.** —*J.*—Demurrer to a bill by some members of a Lodge of Freemasons against others to have the dresses & decorations, books, papers, & other effects of the Society delivered up, & an injunction was allowed on the ground that they affected to sue in a corporate character; but

leave was given to amend, the ct. holding jurisdiction for the delivery of a chattel.—*LLOYD v. LOARING* (1802), 6 Ves. 773; 31 E. R. 1302.

*Annotations*:—*Mentd.* *Meux v. Maltby* (1818), 2 Swan. 277; *Clough v. Ratcliffe* (1847), 1 De G. & Sm. 164; *Re Lead Co.'s Workmen's Fund Soc.*, *Lowes v. Smelting down Lead with Pit & Sea Coal*, [1904] 2 Ch. 196.

**692.** —*J.*—Jurisdiction for specific delivery of a chattel, the value of which is not to be estimated by damages.—*NUTBROWN v. THORNTON* (1804), 10 Ves. 159; 32 E. R. 805.

**693.** —*J.*—Jurisdiction by bill in equity for the delivery of a specific chattel.—*LOWTHER v. LOWTHER* (1806), 13 Ves. 95; 33 E. R. 230.

*Annotations*:—*Mentd.* *Bower v. Cooper* (1843), 2 Hare, 408; *Dunne v. English* (1874), L. R. 18 Eq. 524.

**694.** —*J.*—Jurisdiction for the specific delivery of chattels personal, especially in the nature of heirlooms.—*MACCLESFIELD (EARL) v. DAVIS* (1814), 3 Ves. & B. 16; 35 E. R. 385.

**695.** —*J.*—*GIBSON v. INGO*, No. 495, *ante*.

**696.** —*J.*—The ct. has jurisdiction to order the delivery up to an artist of a picture painted by himself, as having a special value, the legal remedy being inadequate. But where, by the terms of an agreement & the frame of the pleadings, *pltf.*, an artist, seeking restitution of a picture, had, in effect, put a fixed price upon it:—*Held*: damages would be an adequate remedy, & there was no jurisdiction in a ct. of equity to interfere.—*DOWLING v. BETJEMANN* (1862), 2 John. & H. 544; 6 L. T. 512; 26 J. P. 531; 8 Jur. N. S. 538; 10 W. R. 574; 70 E. R. 1175.

*Annotations*:—*Refd.* *Whitley v. Hill*, [1918] 2 K. B. 808; *Cohen v. Roche*, [1927] 1 K. B. 169.

**697. Jurisdiction of court to restrain alienation.**—

—On a bill filed by a trustee to restrain a person who had obtained possession of trust chattels under a bill of sale by the person to whom *pltf.* had intrusted the goods, from selling them, the ct. interfered by injunction to restrain the person intrusted with the property from disposing of it until the legal right had been ascertained by an action at law.—*WOOD v. ROWCLIFFE* (1847), 2 Ph. 382; 17 L. J. Ch. 83; 10 L. T. O. S. 281; 11 Jur. 915; 41 E. R. 990, L. C.

*Annotations*:—*Mentd.* *Carrington v. Pell* (1849), 3 De G. & Sm. 512; *Daniell v. Daniell* (1849), 3 De G. & Sm. 337; *Farina v. Silverlock* (1857), 5 W. R. 827; *Gohd Chander Solt v. Ryan* (1861), 16 Moo. P. C. C. 230; *Sohn v. Ryan* (1861), 5 L. T. 559; *Lamb v. Attenborough* (1862), 1 B. & S. 831; *Baines v. Swainson*, (1863), 4 B. & S. 270; *Cole v. North Western Bank* (1875), L. R. 10 C. P. 354; *Lowther v. Harris*, [1927] 1 K. B. 393.

**698.** —*J.*—Where specific chattels are necessary for carrying on a particular trade, & a right is asserted by those who have acquired a lien upon them to sell them, the ct. has jurisdiction to restrain, by injunction, a threatened sale, where an injury would ensue from such sale to the trader or other person whose right would be interrupted & whose position in life would be injured by a sale.

A railway co. claimed a lien on certain coal waggons in their possession belonging to B., & threatened to sell them. B. thereupon filed a bill to restrain the sale & detention of such waggons. By arrangement the co. agreed not to sell them, until after a specified day. Subsequently to that day, B. brought an action of trover & detinue against the co., & in that action he recovered possession of the coal waggons from the co. No further proceedings had been taken in the suit instituted in equity. Upon a motion

retake or to sue in detinue for goods supplied by them on credit. On the death of the infant the right accrues against his execs. if the goods could

have been identified notwithstanding their subsequent sale in the administration of the estate.—*Re HENDERSON* (1916), 12 Tas. L. R. 40.—*AUS.*

#### PART III. SECT. 3, SUB-SECT. 3.

**687.1. Right to recapture.**—Creditors of an infant trader are entitled to

**Sect. 3.—Remedies: Sub-sects. 4 & 5. Sect. 4: Sub-sects. 1 & 2.]**

by B., the ct. ordered all proceedings in the suit in equity to be stayed, & the costs of such suit to be paid by the co.—**NORTH v. GREAT NORTHERN Ry. Co.** (1880), 2 Giff. 64; 29 L. J. Ch. 301; 1 L. T. 510; 6 Jur. N. S. 244; 66 E. R. 28.

**699.** —.]—Injunction to restrain deft. from parting with goods refused, when an action of trover was pending respecting them. Receiver of

the goods also refused.—**ANON.** (1875), Bitt. Prac. Cas. 89; 1 Char. Cham. Cas. 14.

**700.** —.]—**FOWLER v. LEWY** (1875), 1 Char. Cham. Cas. 14.

**701.** —.]—**BATEY & Co. v. MORGAN** (1886), 2 T. L. R. 316.

**SUB-SECT. 5.—REPLEVIN.**

See Cases *infra*.

**PART III. SECT. 3, SUB-SECT. 5.**

**p. Right to follow goods.**—**GURUDAS P'YNE v. RAN NARAIN SAHU** (1884), 1 L. R. 10 Calc. 860; L. R. 11 Ind. App. 69.—**IND.**

**q. Pleading.—Non cepit.**—Lumber was replevied out of the possession of deft., who appeared to the action, & pleaded, first, *non cepit*; second, property in deft.; third, property in W. B., & fourth, property in the Crown:—**Held**: the plea of *non cepit* only put in issue the taking, & it was sufficient for plff., to entitle him to recover, to prove that deft. had the goods in the place in which, etc., & that the *onus* of proving property out of plff. was on deft.; & this was equally the case where there was a plea of property in the Crown.—**ORDEN v. BOURGEOIS** (1874), 15 N. B. R. (2 P. G.) 365.—**CAN.**

**r.** —.]—**WATERS v. RUDDELL** (1854), 11 U. C. R. 181.—**CAN.**

**t.** —.]—**FITZPATRICK v. CASSELLMAN** (1869), 29 U. C. R. 5.—**CAN.**

**a.** —.]—**TUFFTS v. MOTTARSHED** (1879), 29 C. P. 539.—**CAN.**

**b. Goods in custodia legis.**—**SWIM v. SHIREFF, HUTCHINSON v. SHIREFF** (1880), 20 N. B. R. 25.—**CAN.**

**c. Non-joinder of replevin must be pleaded in abatement.**—**COOK v. FOWLER** (1855), 12 U. C. L. 568.—**CAN.**

**d. Justification.—Under warrant for school taxes.**—**SPRY v. MCKENZIE** (1859), 18 U. C. R. 161.—**CAN.**

**e.** —.]—**BELL v. SCHULTZ** (1912), 21 W. L. R. 408; 4 O. L. R. 400; 2 W. W. L. 491; 5 Sask. L. T. 273.—**CAN.**

**f. Pleading with party as owner & not as plaintiff's agent.**—Deft. purchased lumber from D., who claimed to be the owner. In replevin by plff., who owned the lumber, deft. cannot set up as a defence that D. had authority from plff. to sell the lumber for a certain price; deft. in purchasing having dealt with D. as the owner of the lumber, & not as plff.'s agent.—**DAVIS v. CUSHING** (1862), 5 All. 383.—**CAN.**

**g. Jus tertii.**—**CLARKE v. CASEY** (1864), 6 All. 187.—**CAN.**

**h. —.]—Property in Crown.**—**DEBRISAY v. LITTLE** (1866), 6 All. 392.—**CAN.**

**k. —.]—Lien on lodger's goods.**—**LIGHT v. ABEL** (1866), 6 All. 400.—**CAN.**

**l. —.]—Letters of administration null & void.**—**KERR v. MCLELLAN** (1875), 9 N. S. R. 502.—**CAN.**

**m. —.]—Lien for board of horses.**—In an action of replevin for the detention of horses deft. avowed for money due for board of the horses. Plff. pleaded that "at the time of the said detention defts. had not posted up in the office & in two other places in their said stable a copy of the Act of the Legislature of the Province of Manitoba, passed in the 47th year of Her Majesty's reign, c. 15"—**Held**: the plea was bad.—**DUDLEY v. HENDERSON** (1886), 3 Man. L. R. 472.—**CAN.**

**n. When action will lie.—Whether when trespass lies.**—**Semble**: replevin can be maintained whenever trespass will lie for taking chattels.—**LYONS v. GORAM** (1831), N. B. Dig. 685.—**CAN.**

**o. —.]—Whether before Replevin Act.**—**Qu.**: could replevin be sustained in any ct. before Replevin Act, upon a more tortious taking or detention not in the nature of a distress.—**FOSTER v. MILLER** (1849), 5 U. C. R. 509.—**CAN.**

**aa. —.]—Liquors seized under justice's warrant.**—Replevin will not lie for liquors seized under a warrant issued by a Justice of the peace under prohibitory liquor law, 18 Vict. c. 36.—**BREEZE v. STOCKFORD** (1856), 3 All. 329.—**CAN.**

**bb. —.]—Condition as to payment of notes.**—Plff. sold to F. certain goods, taking notes in payment, a written agreement being entered into that unless the notes were promptly paid the property should not vest. F. sold the property to deft., giving him notice of plff.'s claim. The notes not being paid:—**Held**: plff. was entitled to replevy the goods.—**WEEKS v. LALOR** (1859), 8 C. P. 239.—**CAN.**

**cc. —.]—Goods seized because of non-payment of tolls.**—**WILSON v. MIDDLESEX COUNTY CORPN. & LANGHAM** (1859), 18 U. C. R. 348.—**CAN.**

**dd. —.]—Amount due to plaintiff by agreement.**—A. & B. entered into an agreement to saw lumber for plff. for one year at \$1.87½ per thousand feet, to be delivered on the platform outside the mill, & a person to be chosen to measure it, plff. to furnish the logs, & A. & B., when not otherwise paid for cutting, to have, every month, one-third of the quantity cut piled for their security. Under this agreement plff. seized & replevied a quantity of sawn lumber at the mills, A. & B. refusing to deliver it to him:—**Held**: although in the general accounts plff. was indebted to deft. still replevin would lie for the amount due to plff. under the agreement.—**BUSH v. FIMLOTT** (1859), 9 C. P. 54.—**CAN.**

**ee. —.]—Refusal of vendor to deliver goods.**—**O'ROURKE v. LEE** (1859), 18 U. C. R. 609.—**CAN.**

**ff. —.]—All stock sold contrary to agreement.**—A. agreed to manage B.'s farm, for which B. agreed to give him, among other things, one-third of the increase of young stock raised. B. left the country & died, & A. sold all the stock upon the farm:—**Held**: he had no right to do so, & B.'s administratrix might recover in replevin from the vendees.—**DUFFILL v. ERWIN** (1859), 18 U. C. R. 431.—**CAN.**

**gg. —.]—Gold watch taken under search warrant.**—A gold watch having been taken on a search warrant from a person who absconded, plff. claimed title to it, & brought replevin therefor against a city police magistrate, who applied to stay proceedings under 16 Vict. c. 180, s. 6:—**Held**: replevin did not come within the Act; & the application was dismissed.—**MANSON v. GURNETT** (1859), 2 P. R. 389.—**CAN.**

**hh. —.]—No tender or satisfaction of lien.**—C., being indebted to deft., assigned to him with plff.'s consent his lien on a buggy owned by plff., on which he, C., had a claim for repairs amounting to \$25.25. Plff. subsequently demanded the buggy, but without any tender or offer to pay the lien. Upon replevin:—**Held**: deft. was entitled to succeed, there being

no evidence of a tender or satisfaction of the lien.—**LAKE v. BIGGAR** (1861), 11 C. P. 170.—**CAN.**

**kk. —.]—Against master of fishing vessel.—For vessel & fish.**—**LANE v. DORSEY** (1863), 5 N. S. R. (1 Old). 575.—**CAN.**

**ll. —.]—For logs cut by defendants on land bought by plaintiff & defendant on joint account.**—Replevin will not lie for logs cut by defts. on lands purchased by plff. on their joint account, & of which they have had a joint possession which has not been regularly terminated, although the deed of the land was to plff. alone, & defts. had not paid their share of the purchase-money, according to the agreement.—**FREEMAN v. HARRINGTON** (1863), 1 Old. 352.—**CAN.**

**mm. —.]—Property in cheese passing on ascertainment of weight.**—**BANK OF MONTREAL v. MCWHIRTER** (1867), 17 C. P. 506.—**CAN.**

**nn. —.]—Replevin will lie in this country, though there has been no wrongful taking, but a detention only is complained of, & the thing the writ & declaration charge both, for every detention is a new taking.**—**DEAL v. POTTER** (1867), 26 U. C. R. 578.—**CAN.**

**oo. —.]—Taker becoming trespasser ab initio.**—**McGOWAN v. BETTS** (1871), N. B. Dig. 686.—**CAN.**

**pp. —.]—Replevin will lie for goods & chattels that have been in the possession of plff. & wrongfully taken, or when lawfully taken or received have been unlawfully withheld.**—**GRANT v. ROBERTSON** (1871), 8 N. S. R. 247.—**CAN.**

**qq. —.]—Against receiver.**—**CAMPBELL v. LEFAN** (1871), 21 C. P. 363.—**CAN.**

**rr. —.]—Default in payment of instalments on piano.**—**MASON v. JOHNSON** (1876), 27 C. P. 208.—**CAN.**

**tt. —.]—HEINTZMAN v. GRAHAM** (1887), 15 O. R. 137.—**CAN.**

**aaa. —.]—Misappropriation by agent.**—**STEWART v. ROUNDS** (1882), 7 A. R. 515.—**CAN.**

**bbb. —.]—Goods not in possession of defendant at time of seizure.**—**MARSHALL v. ANDERSON** (1863), 4 T. & G. 431.—**CAN.**

**ccc. —.]—Goods affixed to realty.**—A writ was issued to recover certain machinery in a planing mill. Plffs. claimed the goods as vendors, under a hire & sale receipt. Defts. claimed property as part of the realty under a mtge. from the purchaser under the same receipt. On motion to set aside the writ:—**Held**: replevin would lie.—**WATEROUS ENGINE WORKS Co. v. HENRY** (1884), 1 Man. L. R. 36.—**CAN.**

**ddd. —.]—Property not taken out of plaintiff's possession.**—**DOBSON v. MCKAY** (1884), 17 N. S. R. (5 R. & G.) 5.—**CAN.**

**eee. —.]—Against assignee in bankruptcy.**—**FRANCIS v. TURNER** (1895), 25 S. C. R. 110.—**CAN.**

**fff. —.]—To recover drill & gang plough.**—**WEBBROOK v. WILLOUGHBY** (1895), 10 Man. L. R. 690.—**CAN.**

**ggg. —.]—Unlawful detention of goods.**—Replevin will lie for the unlawful detention of goods as well as for an

## SECT. 4.—WAIVER.

## SUB-SECT. 1.—IN GENERAL.

**702. Right to waive.]—**Plaintiff may waive a tort, & bring an action purely of a civil nature, where it is for the benefit of deft.—*FELTHAM v. TERRY* (or *TYRREL*) (1773), *Lofft*, 207; 98 E. R. 613. *Annotations:—**Reid*, *Lindon v. Hooper* (1778), 1 Cowp. 414; *Birch v. Wright* (1786), 1 Term Rep. 378; *Bonnett v. Francis* (1801), 2 Bos. & P. 550; *Thurston v. Mills* (1812), 16 East, 254.

**703. Effect of waiver.]—***FELTHAM v. TERRY* (or *TYRREL*), No. 702, *ante*.

**704. —.]—**The assignees of a bkpt. having once affirmed the acts of a person who wrongfully sold the property of the bkpts., cannot afterwards treat him as a wrongdoer, & maintain trover.—*BREWER v. SPARROW* (1827), 7 B. & C. 310; 1 Man. & Ry. K. B. 2; 6 L. J. O. S. K. B. 1; 108 E. R. 730.

*Annotations:—**Reid*, *Burn v. Morris* (1834), 4 Tyr. 483; *Lindon v. Sharp* (1843), 6 Man. & G. 895; *Valpy v. Sanders* (1848), 5 C. B. 886; *Lythgoe v. Vernon* (1860), 6 H. & N. 180.

unlawful taking, or, in other words, wherever trover will lie.—*GATES v. BENT* (1899), 31 N. S. R. 544.—**CAN.**

**d. —.]—***Plaintiff with equitable title.]*—*WRIGHT v. BATTLE* (1905), 24 C. L. T. 278.—**CAN.**

**e. —.]—***Plaintiff replevied goods & defendant re-replevied.]*—*GRAHAM v. WHITE* (1910), 14 W. L. R. 287.—**CAN.**

**f. —.]—***Goods in custodia legis.]*—*Replevin does not lie for goods in custodia legis.*—*WOODS v. FINLEY* (1921), 48 N. B. R. 398.—**CAN.**

**g. —.]—***Recovery of motor car.]*—In an action of replevin brought by the administrator of deceased for the recovery of a motor car, deft. & his wife gave evidence, that the car was purchased by deft. from the owner in his lifetime. The trial judge received as corroborated evidence, satisfying the statute, the fact that a policy of insurance on the car was assigned by the owner in his lifetime to deft. & was delivered to the agent of the company & acted upon by the company:—*Held*: pltf.'s appeal must be dismissed, & the goods replevied returned to deft.—*PATTERSON v. KILCUP* (1922), 55 N. S. R. 532.—**CAN.**

**h. —.]—***Refusal to deliver up organ.]*—Dft. purchased a piano from pltf. under a hiring & purchasing agreement, for an agreed price in cash, & an organ which was then in deft.'s possession, deft. at the time giving his promissory notes to cover the amount of the cash price. On the following day pltf. tendered the piano according to agreement & demanded possession of the organ. Dft. refused to receive possession of the piano and declined to give possession of the organ:—*Held*: the transaction was a sale of the organ as part of the consideration, & that replevin lay for its recovery.—*SMITH v. BILLARD* (1922), 55 N. S. R. 502.—**CAN.**

**k. Matters settled by agreement between two trials—Whether second trial can proceed.]**—*CANNIFF v. BOGERT* (1858), 7 C. P. 81.—**CAN.**

**l. Writ of replevin set aside—Seizure of vessel by revenue authority.]**—A vessel seized for breach of the revenue laws having been replevied from the collector, the writ of replevin was set aside.—*SCOTT v. McRAE* (1861), 3 P. R. 16.—**CAN.**

**m. Award in replevin—Whether void for inconsistency.]**—An award, in replevin for a promissory note, that declared deft. to have detained the note illegally, & at the same time awarded that it should be delivered up upon payment of a certain sum (which amount was due thereon) was not void for inconsistency, as it effected substantial justice between the parties.—*LUND v. SMITH* (1801), 10 C. P.

## SUB-SECT. 2.—WHAT AMOUNTS TO WAIVER.

**705. Affirmance of implied contractual relationship—Between plaintiff & tortfeasor.]**—In a simple case, such as that of a wrongdoer having taken property of pltf. & sold it at a price beyond its ordinary market value, there is no difficulty. The question of affirmance [of contract] here concerns only the relation between two persons, the owner & the tortfeasor, & by waiving the tort & treating the latter as his agent in selling, the owner secures the advantage of the high price received (*per CUI.*).—*JOHN v. DODWELL & Co.*, [1918] A. C. 563; 87 L. J. P. C. 92; 118 L. T. 661; 34 T. L. R. 261, P. C.

*Annotations:—**Consol. Reckitt v. Barnett, Pembroke & Slater*, [1920] A. C. 176. *Reid*, *Corpn. Agencies v. House Bank of Canada*, [1927] A. C. 318; *Lloyds Bank v. Chartered Bank of India, Australia & China* (1928), 97 L. J. K. B. 609.

**706. Demand of price.]**—The servant of a bkpt., without authority, sold bkpt.'s goods to deft., who had notice of the act of bkpy. The assignees

443.—**CAN.**

**n. When relief granted.]**—Several persons united in purchasing a printing press & material for the establishment of a newspaper to advocate certain views, & agreed with a printer that he should establish the newspaper, & should have a legal transfer of the property on paying to the several persons the sums they had respectively contributed. This agreement was acted on, & the printer paid some of the contributors accordingly. One of them, who asserted that he had not been paid, took possession of the press & material by writ of replevin:—*Held*: the printer was entitled to relief in equity, & an injunction was granted to stay proceedings in the replevin suit on security being given.—*DREWHEURST v. MCCORPIN* (1870), 17 Gr. 572.—**CAN.**

**o. Whether plaintiff may recover special damage.]**—In replevin for iron, pltf. cannot recover for loss sustained by not being able to get the iron at a certain time, for the purpose of manufacturing it, unless such special damage is alleged in the declaration.—*DOMVILLE v. KEEVAN* (1871), N. B. Dig. 248.—**CAN.**

**p. Grant of new trial—Mixture of articles.]**—Where pltf. replevied certain logs from defts. under a bill of sale, & among those rightfully belonging to him were a number belonging to defts., which the latter had mixed up with them under the belief that they were all their own:—*Held*: there should be a new trial, in order that defts. might have an opportunity of proving what part belonged to them & what to pltf.—*STEWART v. WHEELER* (1874), 9 N. S. R. 414.—**CAN.**

**q. —.]—***Misdirection.]*—*REID v. McDONALD* (1876), 26 C. P. 147.—**CAN.**

**r. Who may sue—Plaintiff in possession—Although without title against Crown.]**—*GILMOUR v. BUCK* (1874), 24 C. P. 187.—**CAN.**

**t. —.]—***McDONALD v. LANE* (1881), 7 S. C. R. 462.—**CAN.**

**u. —.]—***Plaintiff as agent of hirers.]*—*COQUILLARD v. HUNTER* (1875), 36 U. C. R. 316.—**CAN.**

**b. Action on replevin bond for non-return of timber replevied.]**—*PATTERSON v. FULLER* (1874), 32 U. C. R. 240.—**CAN.**

**c. —.]—***BATES v. MACKAY* (1882), 1 O. R. 34.—**CAN.**

**aa. Whether 1 Rev. Stat. c. 126, takes away common law right to bring trover for conversion.]**—*GIBSON v. MCKEAN & RANDOLPH* (1876), 3 Pug. 299.—**CAN.**

**bb. Replevin for goods obtained by false representations.]**—Where an action of replevin was brought for goods sold

by pltf. to deft., & there was evidence to justify the judge who tried the cause without a jury in coming to the conclusion that deft. had made false representations to pltf. as to his solvency, knowing them to be false, the ct. refused to disturb the judgment for pltf.—*HOSSACK v. NEILLY* (1880), 1 R. & G. 388.—**CAN.**

**cc. Necessity for proof of demand for goods.]**—Pltf. brought an action of replevin for certain goods seized under a warrant of distress for water rates claimed by the city, & the writ alleged an unjust detention, but contained no allegation of an unlawful taking. Dft. denied the detention, & pleaded a second plea, justifying under a distress for water rates, to which pltf. replied, disputing the liability:—*Held*: as there was no complaint in the writ of an unlawful taking, & no proof of a demand of the goods by pltf., he could not recover in this form of action.—*INGLIS v. GREENWOOD* (1881), 14 N. S. R. (2 R. & G.) 2; 1 C. L. T. 192.—**CAN.**

**dd. Whether notice of writ notice of disaffirmance of contract.]**—*STOEGER v. SPRINGER* (1892), 7 A. R. 497.—**CAN.**

**ee. Seizure of liquors—Dismissal of complaint for unlawfully keeping liquor for sale—Right of defendant to have liquors restored to him.]**—*TENNANT v. BELYEA* (1884), 24 N. B. R. 238.—**CAN.**

**ff. Contents of affidavit—On setting aside writ of replevin.]**—*KREIER v. TODD* (1885), 1 B. C. R. pt. 2, 249.—**CAN.**

**gg. Licence to take possession of deft.'s goods—If in pltf.'s opinion he should be incapable of carrying on business.]**

*If opinion formed bona fide, the court cannot review it.]*—*TURNER v. FRANCIS* (1894), 10 Man. L. R. 340.—**CAN.**

**hh. Admissibility of evidence of collateral verbal agreement as to default in payment.]**—*McMILLAN v. BYERS* (1899), 15 S. C. R. 194.—**CAN.**

**kk. Replevin for dogs—Dispute as to terms of keeping dogs.]**—*McKINNON v. MINATTY* (Y. T.) (1905), 1 W. L. R. 272.—**CAN.**

**ll. Property not passing—Assignment by vendor to third person—Return of goods by vendee to vendor before maturity of note—Right of assignee to replevy goods from vendor.]**—*TUDHOPE-ANDERSON Co. v. KEIR* (1913), 25 W. L. R. 332; 5 W. W. R. 1352.—**CAN.**

## PART III. SECT. 4, SUB-SECT. 1.

**mm. Effect of waiver.]**—*DAVIDSON v. DENNIS* (1887), 8 N. S. W. L. R. (L.) 282; 4 N. S. W. L. N. 73.—**AUS.**

**nn. —.]**—*FLEWELLING v. LAWRENCE* (1882), 21 N. B. R. (5 P. & B.) 529.—**CAN.**

Sec. 4.—Waiver: Sub-sects. 2 & 3.]

delivered to deft. a bill of parcels as for goods sold & delivered by bkpt., & made two several demands for payment, which deft. refused, & he also refused to deliver up the goods when they were subsequently demanded:—*Held*: the demand for payment amounted only to a qualified offer by the assignees to adopt the sale, & that they were not thereby precluded from suing in trover.—*VALPY v. SANDERS* (1848), 5 C. B. 886; 17 L. J. C. P. 249; 11 L. T. O. S. 201; 12 Jur. 483; 136 E. R. 1128.

*Annotation*:—*Reid*. *Rice v. Reed*, [1900] 1 Q. B. 54.

**707.** —[At a sale by auction of A.'s goods, B., who was a creditor of A., became a purchaser, & contrary to the conditions of sale, removed the goods without paying for them:—*Held*: if the auctioneer, after satisfaction of his charges, could maintain an action against B. for the price, B. might in that action, or in a similar action by the assignees under the subsequent bkpcy. of A., set-off the amount of A.'s debt to him, by way of equitable defence, if not at law; but a mere demand of the price by the auctioneer & the assignees was not a waiver of the tort, & consequently the assignees might maintain trover for the goods wrongfully removed.—*HORMES v. TUTTON* (1855), 5 E. & B. 65; 3 C. L. R. 1343; 24 L. J. Q. B. 346; 25 L. T. O. S. 177; 1 Jur. N. S. 975; 119 E. R. 405.

*Annotations*:—*Reid*. *Manley v. Berkett*, [1912] 2 K. B. 329; *Benton v. Campbell, Parker*, [1925] 2 K. B. 410. *Mentid*. *Turner v. Jones* (1857), 1 H. & N. 878; *Newman v. Hook* (1858), 4 C. B. N. S. 434; *Tilbury v. Brown* (1860), 30 L. J. Q. B. 46; *Murray v. Arnold* (1862), 3 H. & S. 287; *Hoopkins v. Clarke* (1864), 4 B. & S. 836; *European Bank v. Fox* (1866), 15 L. T. 288; *Wood v. Dunn* (1866), L. R. 2 Q. B. 73; *Re Adams, Ex p. Greenaway* (1873), 29 L. T. 75; *Emanuel v. Bridger* (1874), L. R. 9 Q. B. 286; *Re Koyworth, Ex p. Banner* (1874), 9 Ch. App. 380; *Lowe v. Blakemore* (1875), L. R. 10 Q. B. 485; *Stevens v. Phillips* (1875), 10 Ch. App. 417; *Re Watt, Ex p. Joselyne* (1878), 8 Ch. D. 327; *Re Stanhope Silkstone Collieries Co.* (1879), 40 L. T. 204.

—[See, also, SALE OF GOODS, Vol. XXXIX., p. 531, No. 1438.

**708. Demand of proceeds of sale—Effect of demand—Demand unsatisfied.]**—The master of a ship, which was injured by the perils of the sea, put into the Mauritius, & there abandoned the ship & cargo, which were afterwards sold under an order of the Vice-Admty. Ct. there, & the proceeds paid into that ct. The cargo was not damaged or perishable, nor was there any pressing necessity for the sale of it. The owners of the cargo brought an action on the case against the owners of the ship for wrongfully selling the cargo instead of carrying it to London, according to their contract, with a count in trover, & recovered a general verdict for the value of the ship & freight, which was one-fifth of the value of the cargo. They also sent out a power of attorney to an agent at the Mauritius to procure from the Vice-Admty. Ct. there the proceeds of the sale which had been paid in. The agent demanded them, but they had been previously remitted to the High Ct. of Admty. in this country. In an action for money had & received by the owners against the purchaser of the goods:—*Held*: the proceeds of the sale at the Mauritius not having been paid when demanded, plffs. were in the same situation as if no such demand had been made, & therefore entitled to recover the value of the goods from deft.—*MORRIS v. ROBINSON* (1824), 3 B. & C. 196; 5 Dow. & Ry. K. B. 34; 107 E. R. 706.

*Annotations*:—*Apld*. *Valpy v. Saunders* (1848), 5 C. B. 886; *Brinsmead v. Harrison* (1871), L. R. 6 C. P. 584; *Rice v. Reed*, [1900] 1 Q. B. 54. *Mentid*. *Knight v. Leigh* (1828), 1 Moo. & P. 528; *Cammell v. Sewell* (1860), 6 Jur. N. S. 918.

**709. ——— Payment of part of proceeds.]—**

If the owner of goods, after a tortious sale of them, waives the conversion & claims the proceeds of the sale, part of which are paid to him, he cannot afterwards treat the seller as a wrongdoer & maintain trover against him.—*LYTHGOE v. VERNON* (1860), 5 H. & N. 180; 29 L. J. Ex. 164; 157 E. R. 1148.

**710. Receipt of proceeds of sale.]—***LYTHGOE v. VERNON*, No. 709, *ante*.

**711.** —[The trustee of bkpt.'s estate applied, under Bankruptcy Act, 1869 (c. 71), s. 72, to the Ct. of Bkpcy. to declare a bill of sale, made by bkpt. previously to his bkpcy., fraudulent & void as against himself as trustee & to order the assignee under the bill of sale who had previously to the bkpcy. sold the goods comprised therein, to pay over the proceeds of the sale to himself as such trustee. The Ct. of Bkpcy. having made the order prayed for, & the assignee having accordingly paid over the proceeds of the sale:—*Held*: the trustee could not afterwards bring an action of trover against the assignee under the bill of sale to recover the difference between the value of the goods & the amount realised by the sale, inasmuch as by the proceedings in bkpcy. to recover the proceeds of the sale he had affirmed such sale & waived the tort.—*SMITH v. BAKER* (1873), L. R. 8 C. P. 350; 42 L. J. C. P. 155; 28 L. T. 637; 37 J. P. 567.

*Annotations*:—*Consd*. *Rice v. Reed*, [1900] 1 Q. B. 54. *Apld*. *Comitiff v. Maher* (1905), 94 L. T. 158; *Re Wilson*, [1916] 1 K. B. 382. *Consd*. *Re A Bankruptcy Notice*, [1924] 2 Ch. 76. *Reid*. *Roe v. Mutual Loan Fund* (1887), 19 Q. B. 1347; *Edwards v. Motor Union Inscoe*, [1922] 2 K. B. 249; *Huddersfield Fine Worsted v. Todd* (1925), 134 L. T. 82. *Mentid*. *Morcer v. Vans Colina* (1897), 4 Mans. 363; *Davis v. Petrie* (1905), 93 L. T. 511.

**712.** —[Pltf.'s servant wrongfully sold goods of his master to deft., who knew that the servant was improperly dealing with them, & the servant paid the proceeds of the sale into his account at his bank. Pltf. brought an action against the servant & the bank, claiming as against the servant damages for conversion of the goods, & in the alternative for money had & received, & as against the servant & the bank an injunction to restrain them respectively until the trial of the action from drawing out or parting with the sum of £1,500 then standing to the servant's credit at the bank. Pltf. applied for an *interim* injunction as above upon an affidavit that £1,500 at the least could be specifically traced to the servant's account as being moneys paid by deft. for the goods wrongfully sold. An *interim* injunction was granted, but no further steps in the action were taken, an agreement being arrived at between pltf. & the servant that £1,125 out of the £1,500 then at the bank should be paid to pltf. in full settlement of all claims against the servant, without prejudice to pltf.'s claim against deft. This agreement was embodied in a judge's order, but no judgment was signed. Before the agreement was made pltf. had brought an action against deft. claiming damages for the conversion of the goods:—*Held*: pltf. had not, by his proceedings in the former action & by his dealings with the servant therein, elected to affirm the sale & to waive the tort, & the action against deft. was maintainable.—*RICE v. REED*, [1900] 1 Q. B. 54; 69 L. J. Q. B. 33; 81 L. T. 410, C. A. —[See, also, SALE OF GOODS, Vol. XXXIX., p. 485, No. 1048.

## SUB-SECT. 3.—ELECTION TO SUE ON CONTRACT.

See CONTRACT, Vol. XII., pp. 562–567.

## TRUCK ACTS.

*See* FACTORIES AND SHOPS.

## TRUE OWNER.

*See* BILLS OF SALE.

## TRUSTEE.

*See* TRUSTS AND TRUSTEES.

## TRUSTEE IN BANKRUPTCY.

*See* BANKRUPTCY AND INSOLVENCY.



# TRUSTS AND TRUSTEES.

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<i>Assets, Administration of . . . . .</i>	<i>See</i> EXECUTORS.	<i>Name and Arms</i>	<i>See</i> NAME AND ARMS ;
<i>Assignments of Trusts . . . . .</i>	DEEDS.	<i>Clauses . . . . .</i>	SETTLEMENTS.
<i>Equity, Principles of . . . . .</i>	EQUITY.	<i>Partition . . . . .</i>	PARTITION.
<i>Executors and Administrators . . . . .</i>	EXECUTORS.	<i>Perpetuities . . . . .</i>	PERPETUITIES.
<i>Fraudulent Conveyances . . . . .</i>	FRAUDULENT AND VOIDABLE CONVEYANCES.	<i>Powers generally . . . . .</i>	POWERS.
<i>Gifts . . . . .</i>	GIFTS.	<i>Real Property, Estates and Interest in . . . . .</i>	REAL PROPERTY.
<i>Limitation of Actions . . . . .</i>	LIMITATION OF ACTIONS.	<i>Receivers . . . . .</i>	RECEIVERS.
		<i>Settlements . . . . .</i>	SETTLEMENTS.
		<i>Solicitor and Client . . . . .</i>	SOLICITORS.
		<i>Wills . . . . .</i>	WILLS.

## Part I.—Trusts.

### SECT. 1.—NATURE AND CHARACTERISTICS.

1. **Creation of equity.**—*UVEDALE v. ETRICK* (1682), 2 Cas. in Ch. 130; 22 E. R. 880, L. C.

2. — **Confidence between parties.**—A trust is where there is such a confidence between parties that no action will lie, but is a case merely for the consideration of equity.—*STURT v. MELLISH* (1743), 2 Atk. 610; 26 E. R. 765, L. C.

*Annotation* :—*Consd. Wilson v. Bury* (1880), 5 Q. B. D. 518.

3. — **Agreement between parties.**—Agreement concerning any subject, though in form personal, raises a trust in equity against the party himself, volunteers, & claimants, with notice under him, except where the effect would be to restore the power of violating it, as where tenant in tail has suffered a recovery contrary to his covenant.

Wherever persons agree concerning any particular subject, that in a Court of equity as against the party himself & any claiming under him voluntarily or with notice, raises a trust (*LORD HARDWICKE, C.*)—*LEGARD v. HODGES* (1792), 1 Ves. 477; 3 Bro. C. C. 531; 30 E. R. 447, L. C.; *subsequent proceedings* (1793), 4 Bro. C. C. 421, L. C.

*Annotations* :—*Consd. Tailby v. Official Receiver* (1888), 13 App. Cas. 523. *Reid. Re Lind, Industrials Finance Syndicate v. Lind*, [1915] 2 Ch. 345. *Mentd. Legard v. Johnson* (1797), 3 Ves. 352.

4. **Whether distinct from use.**—An use which

is but a trust & confidence, & a thing in equity & conscience, shall be by operation of law to him who in truth was owner of the land, without having regard to estoppels or conclusions, which are averse to truth & equity (*per CUR.*)—*BECKWITH'S CASE, COLGATE v. BLITHE* (1589), 2 Co. Rep. 56 b; 76 E. R. 541.

*Annotations* :—*Mentd. Bury & Taylor's Case* (1610), Godb. 179; *Floyer's Case* (1611), 9 Co. Rep. 125 b; *Berry v. Perry* (1615), 3 Bulst. 62; *Child v. Baylye* (1620), Palm. 48; *Collingwood v. Pays* (1664), 1 Sid. 193; *Harris v. Evans* (1666), O. Bridg. 547; *Bushell v. Burland* (1708), Holt, K. B. 733; *Acherley v. Vernon* (1739), Willes, 153; *Armstrong d. Neve v. Woolsey* (1755), Barnes, 467; *Tarleton v. Liddell* (1851), 17 Q. B. 390.

5. —.]—*BROUGHTON v. LANGLEY* (1703), Holt, K. B. 708; 2 Ld. Raym. 873; 1 Lut. 814; 1 Eq. Cas. Abr. 383; 2 Salk. 679; 90 E. R. 1291.

*Annotations* :—*Reid. Garth v. Baldwin* (1755), 2 Ves. Sen. 646; *Legard v. Hodges* (1792), 3 Bro. C. C. 531. *Mentd. Idgitt d. Phillips v. Smith* (1810), 12 East, 455.

6. —.]—We take trusts & uses to be the same, in respect of trusts in their larger extent, & so within the Statute of Uses (*HOLT, C.J.*)—*BUSHELL v. BURLAND* (1708), Holt, K. B. 733; 11 Mod. Rep. 196; 90 E. R. 1304.

7. —.]—The common law makes no distinction between trusts & confidences & uses; & there is no foundation to make a difference



*Sect. 1.—Nature and characteristics. Sect. 2: Sub-sect. 1, A. & B.; sub-sect. 2.]*

between trusts & uses, since 27 Hen. 8 though they have done it in Chancery; & now since Stat. Frauds no stranger can take a use by any parol averment (HOLT, C.J.).—ALTHAM (LORD) v. ANGLESEY (EARL) (1709), Gilb. Ch. 16; 11 Mod. Rep. 210; 25 E. R. 12; *sub nom.* ANGLESEA (LORD) v. ALTHAM (LORD), Holt, K. B. 736.

*Annotations:—*Reid, *Fordyce v. Willis* (1792), 3 Bro. C. C. 577. *Mentd.* Long v. Buckleridge (1718), 1 Stra. 106; *Cave v. Holford* (1798), 3 Ves. 650.

8. —[—]. . . Deeds on the Statute of Uses which are trusts at common law (LORD HARDWICKE, C.).—RIGDEN v. VALLIER (1751), 2 Ves. Sen. 252; 3 Atk. 731; 28 E. R. 163, L. C.

*Annotations:—*Reid, *Fisher v. Wigg* (1700), 1 P. Wms. 14. *Mentd.* Goodtitle d. Ford v. Stokes (1753), Say. 67; *Campbell v. Campbell* (1792), 4 Bro. C. C. 15; *Morley v. Bird* (1798), 3 Ves. 629; *Avelin v. Knipe* (1815), 19 Ves. 441; *Fletcher v. Fletcher* (1844), 4 Hare, 67; *Harrison v. Barton* (1860), 1 John. & H. 287; *Mason v. Dennis* (1864), 4 De G. J. & Sm. 315; *Steeds v. Steeds* (1889), 22 Q. B. D. 537.

9. —[—].—BURGESS v. WHEATE, A.-G. v. WHEATE, No. 638, *post*.

10. —[—].—The term "trust" would be read . . . in the old sense in which it was understood before & in the Statute of Uses, which admitted of no difference between "uses" and "trusts" (CHITTY, J.).—*Re BROOKE, BROOKE v. BROOKE*, [1894] 1 Ch. 43; 63 L. J. Ch. 159; 70 L. T. 71; 42 W. R. 186; 10 T. L. R. 64; 8 R. 24.

11. *Distinguished from power.*—Power considered as distinguished from trust. This ct. cannot execute a mere power; but will execute a trust, which fails by the death of the trustee, or accident.—BROWN v. HIGGS (1803), 8 Ves. 561; 32 E. R. 473, L. C.; *affg.* (1800), 5 Ves. 495; *on appeal* (1813), 18 Ves. 192, H. L.

*Annotations:—*Consd. *Cowper v. Mantell* (No. 2), *Cooper v. Mantell* (No. 2) (1856), 22 Beav. 231; *Re Edlowes* (1861), 1 Drew. & Sm. 395. *Apld.* *Robson v. Flitig* (1864), 34 Beav. 110. *Consd.* *Re Hughes, Hughes v. Footner*, [1921] 2 Ch. 208. *Reid.* *Longmore v. Broom* (1802), 7 Ves. 124; *Birch v. Wade* (1814), 3 Ves. & B. 198; *Provost v. Clarke* (1816), 2 Madd. 458; *Meredith v. Henegage* (1824), 1 Sim. 542; *Denson v. Whittam, Hemming v. Whittam* (1831), 5 Sim. 22; *Fisher v. Parry* (1833), 2 M. & K. 138; *Toldervy v. Colt* (1836), 1 M. & W. 250; *Burrough v. Philcox, Lacey v. Philcox* (1840), 5 My. & Cr. 71; *Wilbraham v. Scarisbrick* (1847), 1 H. L. Cas. 167; *Penny v. Turner* (1848), 2 Ph. 493; *Christ's Hospital v. Grainger* (1849), 1 H. & Tw. 533; *Prendergast v. Prendergast* (1850), 3 H. L. Cas. 195; *Sheffield v. Coventry* (1852), 17 Jur. 289; *Robinson v. Wheelwright* (1855), 21 Beav. 214; *Joel v. Mills, Harvey v. Mills* (1857), 3 K. & J. 458; *Salisbury v. Denton* (1857), 3 K. & J. 529; *Bernard v. Minshull* (1859), John. 276; *Howarth v. Dewell* (1860), 6 Jur. N. S. 1360; *Re White's Trusts* (1860), John. 656; *Golding v. Inwood* (1861), 3 Giff. 139; *Pilcher v. Randall* (1861), 4 L. T. 398; *Re Strickland's Trust* (1862), 1 New Rep. 164; *Izod v. Izod* (1863), 32 Beav. 242; *Lambert v. Rendle* (1863), 3 New Rep. 247; *Re Joffresson's Trusts* (1866), 12 Jur. N. S. 660; *Shattock v. Shattock* (1866), 35 L. J. Ch. 509; *Re Pheno's Trusts* (1868), L. R. 5 Eq. 346; *Butler v. Gray* (1869), 5 Ch. App. 26; *Briggs v. Upton* (1872), 26 L. T. 485; *Carthow v. Enraght* (1872), 26 L. T. 834; *Pocock v. A.-G.* (1876), 3 Ch. D. 342; *Porter v. Baddley* (1877), 5 Ch. D. 542; *Re Sprague, Milcy v. Cape* (1880), 43 L. T. 236; *Re Blight, Blight v. Hartnoll* (1881), 30 W. R. 513; *Wilson v. Duguid* (1883), 24 Ch. D. 244; *Re Brierley, Brierley v. Brierley* (1894), 43 W. R. 36; *Re Lowman, Devenish v. Poster*, [1895] 2 Ch. 348; *Re Weekes' Settltmt.*, [1897] 1 Ch. 289; *Re Llewellyn's Settltmt.*, *Official Solicitor v. Evans*, [1921] 2 Ch. 281; *Re Combe, Combe v. Combe*, [1925] 1 Ch. 210. *Mentd.* *Blackburn v. Jepson* (1814), 2 Ves. & B. 359; *Deerhurst v. St. Alban's* (1831), 2 Russ. & M. 702; *Marker v. Kekewich* (1850), 8 Hare, 291; *Moller v. Stanley* (1864), 2 De G. J. & Sm. 183; *Re Fickus, Farina v. Fickus* (1899), 69 L. J. Ch. 161.

12. *Distinguished from agency.*—CAVE v. MACKENZIE (1877), 46 L. J. Ch. 564; 37 L. T. 218.

*Annotations:—*Consd. *James v. Smith*, [1891] 1 Ch. 384. *Reid.* *Chattock v. Muller* (1878), 8 Ch. D. 177.

13. *Distinguished from contract.*—(1) If the only relation which it is proved deft. or person

charged bears to the matter is a contractual relation, he is not in the view of equity a trustee at all, but only a contractor (LORD ESHER, M.R.).

(2) A constructive trust is therefore, . . . "a trust to be made out by circumstances (BOWEN, L.J.).—SOAR v. ASHWELL, [1893] 2 Q. B. 390; 69 L. T. 585; 42 W. R. 165; 4 R. 602, C. A.

*Annotations:—*As to (1) *Consd.* *Trevor v. Hutchins* (1897), 76 L. T. 183. *As to* (2) *Apld.* *Re Lands Allotment Co.* (1894), 63 L. J. Ch. 291. *Consd.* *Price v. Phillips* (1894), 11 T. L. R. 86; *Re Gallard, Ex p. Gallard*, [1897] 2 Q. B. 8. *Apld.* *North American Land & Timber Co. v. Watkins*, [1904] 1 Ch. 242. *Consd.* *Taylor v. Davies*, [1920] A. C. 636. *Apld.* *Re Eyre-Williams, Williams v. Williams*, [1923] 2 Ch. 533. *Reid.* *Mara v. Browne*, [1895] 2 Ch. 69; *Re Dixon, Heynes v. Dixon*, [1900] 2 Ch. 561; *Re Robinson, McLaren v. Public Trustees*, [1911] 1 Ch. 602; *Henry v. Hammond*, [1913] 2 K. B. 515; *Re Mason*, [1928] Ch. 385. *Generally, Reid.* *Friend v. Young*, [1897] 2 Ch. 421; *Itcheffoucauld v. Boustaad*, [1897] 1 Ch. 196.

14. *Distinguished from charge.*—DAWSON v. CLARKE, No. 270, *post*.

15. —[—].—KING v. DENISON, No. 93, *post*.

16. *Obligation to do act in respect of property.*—An obligation to do an act with respect to property creates a trust; & if the party who is subject to the obligation acquires or retains by means of his neglect of duty a greater interest than he would otherwise have had, he becomes a trustee of such excess for the benefit of those who would have been entitled to it if the obligation had been duly fulfilled.—FLEEMING v. HOWDEN (1808), L. R. 1 Sc. & Div. 372.

*Annotations:—*Dttd. *Bank of Scotland v. Macleod*, [1914] A. C. 311. *Reid.* *Heritable Reversionary Co. v. Millar*, [1892] A. C. 598.

17. —[—].—(1) Trusts, i.e. equitable obligations to deal with property in a particular way, can be imposed in any language which is clear enough to show an intention to impose them (LINDLEY, L.J.).

(2) There is . . . abundant authority for saying that, if property is left to a person in confidence that he will dispose of it in a particular way as to which there is no ambiguity, such words are amply sufficient to impose an obligation (LINDLEY, L.J.).—*Re WILLIAMS, WILLIAMS v. WILLIAMS*, [1897] 2 Ch. 12; 66 L. J. Ch. 485; 76 L. T. 600; 45 W. R. 519; 41 Sol. Jo. 452, C. A.

*Annotations:—*As to (1) *Consd.* *Re Hanbury, Hanbury v. Fisher*, [1904] 1 Ch. 415. *Apld.* *Re Oldfield, Oldfield v. Oldfield*, [1904] 1 Ch. 549. *Reid.* *Re Burley, Alexander v. Burley*, [1910] 1 Ch. 215. *As to* (2) *Apld.* *Re Oldfield, Oldfield v. Oldfield*, [1904] 1 Ch. 549. *Generally, Reid.* *Re Atkinson, Atkinson v. Atkinson* (1911), 80 L. J. Ch. 370.

18. *Necessity for trustee & cestui qui trust.*—There is a trust in almost every relation of life in which one person does something for another. Those who deal . . . with a broker trust him to make a selection of certain securities. In a broader sense, & one frequently used, we are all trustees, some for the public, some for different sections of the public, of our abilities, our time, our goods, & so on. But in cts. of equity, & in the text books & authorities, trustee & cestui que trust have a technical & defined meaning. You must have a person who is a trustee, then you must have property, which may be chattels, or land, or money, or anything, & you must have persons who are the cestui que trust—in trust for whom that property is held by the person who is the trustee. That combination must exist before you get the relation of trustee & cestui que trust (KEKEWICH, J.).—DOOBY v. WATSON (1888), 39 Ch. D. 178; 57 L. J. Ch. 805; 58 L. T. 943; 36 W. R. 764; 4 T. L. R. 584.

*Annotation:—*Reid, *Hackney v. Knight* (1891), 7 T. L. R. 254.

19. —.]—In order to constitute a man a trustee there must be a person or persons for whom he is a trustee—called *cestui* or *cestuis que trust*—& there must be property vested in him of which he is trustee for such person or persons (KEKEWICH, J.).—*Re BARNEY, BARNEY v. BARNEY*, [1892] 2 Ch. 265; 61 L. J. Ch. 585; 67 L. T. 23; 40 W. R. 637.

*Annotations*.—*Reid*. Cowper v. Stoneham (1893), 3 R. 242; Brinsden v. Williams (1894), 8 R. 574.

20. *Necessity for subject-matter of trust.*—DOOHY v. WATSON, No. 18, *ante*.

21. —.]—*Re BARNEY, BARNEY v. BARNEY*, No. 19, *ante*.

*Whether chose in action.*—See CHOSSES IN ACTION, Vol. VIII., pp. 422, 423, Nos. 15–19.

## SECT. 2.—EXPRESS AND IMPLIED TRUSTS.

### SUB-SECT. 1.—EXPRESS TRUSTS.

#### A. In General.

22. *What is an express trust*—Trust created by act of parties.]—All trusts are either express trusts, which are raised & created by act of the parties, or implied trusts, which are raised or created by act or construction of law; again, express trusts are declared either by word or writing; & these declarations appear either by direct & manifest proof, or violent & necessary presumption. These last are commonly called presumptive trusts; & that is, when the ct., upon consideration of all circumstances presumes there was a declaration, either by word or writing, though the plain & direct proof thereof be not extant (RAYNSFORD, C.J.).—*COOK v. FOUNTAIN* (1876), 3 Swan. 585; 36 E. R. 984.

*Annotation*.—*Mentd.* Gloucester Corpn. v. Wood (1843), 3 Hare, 131.

23. — Trust created by express words—Oral or in writing—Presumptive trust.]—*COOK v. FOUNTAIN*, No. 22, *ante*.

24. —.]—An express trust is a trust which has been expressed, either in writing or by word of mouth, & does not include a trust which arises from the acts of the parties. The term does not apply . . . to a resulting trust, to an implied trust, or to a constructive trust (FRY, J.).—*SANDS v. THOMPSON* (1883), 22 Ch. D. 614; 52 L. J. Ch. 406; 48 L. T. 210; 31 W. R. 397.

*Annotations*.—*Mentd.* Charles v. Jones (1887), 35 Ch. D. 544; Warren v. Murray, [1894] 2 Q. B. 648.

25. — — — — — Not by facts & circumstances.]—FITZGERALD v. STEWART, No. 969, *post*.

26. — — — — — In will or other written instrument.]— . . . Express trusts, that is trusts ex-

pressly declared by a deed or a will or some other written instrument (KINDERSELEY, V.-C.).—*PETRE v. PETRE* (1853), 1 Drew. 371; 1 W. R. 139; 61 E. R. 493.

*Annotations*.—*Extd.* Banner v. Berridge (1881), 18 Ch. D. 254. *Reid*. Sands v. Thompson (1883), 22 Ch. D. 614. *Mentd.* Vane v. Vane (1873), 3 Ch. App. 333; Lawrence v. Nooreys (1888), 39 Ch. D. 213; Willis v. Howe, [1893] 2 Ch. 545; Price v. Phillips (1894), 13 R. 191; Re Astley & Tyldesley Coal & Salt Co. & Tyldesley Coal Co. (1899), 68 L. J. Q. B. 252; Re McCallum, McCallum v. McCallum, [1901] 1 Ch. 143.

27. — — — — —.]—CUNNINGHAM v. FOOT, No. 259, *post*.

28. — — — — —.]—I do not think that is an exhaustive definition of an express trust, namely, that it must be a trust expressly declared by a deed, will, or some other written instrument (KAY, J.).—*BANNER v. BERRIDGE* (1881), 18 Ch. D. 254; 50 L. J. Ch. 630; 44 L. T. 680; 29 W. R. 844; 4 Asp. M. L. C. 420.

*Annotations*.—*Reid*. Price v. Phillips (1894), 13 R. 191. *Mentd.* Dooby v. Watson (1888), 39 Ch. D. 178; Firth v. Slingsby (1888), 58 L. T. 481; Soar v. Ashwell, [1893] 2 Q. B. 390; The Benwell Tower (1895), 72 L. T. 664; Friend v. Young, [1897] 2 Ch. 421; Rochefoucauld v. Boustead, [1897] 1 Ch. 196; Kossisoglu v. Balli (1903), 47 Sol. Jo. 738.

#### B. Distinguished from Other Trusts.

29. *Implied trusts.*—*COOK v. FOUNTAIN*, No. 22, *ante*.

30. —.]—An express trust is required by the statute [3 & 4 Will. 4, c. 27] in opposition to trusts by implication & trusts arising by operation of law (LORD WESTBURY, C.).—*DICKENSON v. TEASDALE* (1862), 1 De G. J. & Sm. 52; 1 New Rep. 141; 7 L. T. 655; 9 Jur. N. S. 237; 40 E. R. 21, L. C.

*Annotations*.—*Apld.* Cunningham v. Foot (1878), 3 App. Cas. 974. *Reid*. Proud v. Proud (1862), 32 Beav. 234. *Mentd.* Coope v. Cresswell (1866), 2 Ch. App. 112; Re England, Steward v. England, [1895] 2 Ch. 100; Re Chant, Bird v. Godfrey, [1905] 2 Ch. 225; Re Lacey, Howard v. Lightfoot, [1907] 1 Ch. 330; Read v. Price, [1909] 1 K. B. 577.

31. —.]—CUNNINGHAM v. FOOT, No. 259, *post*.

32. —.]—*SANDS v. THOMPSON*, No. 24, *ante*.

33. *Resulting trusts.*—*DICKENSON v. TEASDALE*, No. 30, *ante*.

34. —.]—*SANDS v. THOMPSON*, No. 24, *ante*.

35. *Trusts arising by operation of law.*—*DICKENSON v. TEASDALE*, No. 30, *ante*.

36. —.]—*SANDS v. THOMPSON*, No. 24, *ante*.

### SUB-SECT. 2.—IMPLIED TRUSTS.

See Sect. 14, *post*.

## PART I. SECT. 2, SUB-SECT. 1.—A.

a. *What is an express trust*—Surplus of deceased's estate after payment of debts.]—An administratrix, desiring to borrow money in order to pay off certain mtgs. on a station belonging to the estate of deceased, & in order to carry on the business of the said station, applied to the ct. under Trustee Act, 1900, s. 45, for leave to mtge. the station. A question was referred to the full ct. to decide whether the administratrix was a constructive trustee under Trustee Act, 1900.—*Held*: the administratrix was an express trustee for the next-of-kin as regards the surplus of the estate after payment of debts, & was therefore, a trustee under Trustee Act, 1900.—*Re MATTHEWS* (1915), 17 W. A. L. R. 61.—*AUS.*

b. —. —. —. Trust for specific purpose.]—Testator bequeathed his personal estate

to his extrix. & exors., in trust for the purposes of his will, & he gave to them, in the quality of trustees, for the use of his son for life, & after his death for the use of his son's children, or child, if there should be but one, "the sum of £1,500, due to me by C. & secured by a certain mtgo." etc.—*Held*: the legatee was entitled to claim more than six years' arrears of interest, the trust being express, & the statute therefore not applying to the case.—*LORING v. LORING* (1866), 12 Gr. 374.—*CAN.*

c. —.]—*NANALAI LALLUBHOY v. HARLOOHAND JAGUSHIA* (1889), 1 L. R. 14 Bom. 476.—*IND.*

d. —.]—The phrase "trust for a specific purpose" in Limitation Act, s. 10, is merely a more explained mode of expressing the same idea, as that conveyed by the expression "express trust" in English law.—

*BHURABHAI v. BAI RUXMANI* (1908), 1 L. R. 32 Bom. 394.—*IND.*

e. —. —. Trustee taking notice of trust for filling of vacancy in benefice.]—*A.-G. v. DAVIS* (1870), 18 W. R. 1132.—*IR.*

f. —. —. Trust for payment of charges on land.]—*CAREY v. CUTTREK* (1875), 9 L. R. Eq. 330.—*IR.*

## PART I. SECT. 2, SUB-SECT. 1.—B.

g. *Trusts of a general nature.*—The words "in trust for a specific purpose" are intended to apply to trusts created for some defined or particular purpose or object as distinguished from trusts of a general nature such as the law impresses upon exors. & others who hold recognised fiduciary positions.—*GREENDER CHUNDER GHOSH v. MACKINTOSH* (1879), 1 L. R. 4 Calc. 897; 4 C. L. R. 193.—*IND.*

## SECT. 3.—CREATION OF TRUSTS.

## SUB-SECT. 1.—THE STATUTE OF FRAUDS—LAW OF PROPERTY ACT, 1925.

## A. Necessity for Writing.

## (a) In General.

See Law of Property Act, 1925 (c. 20), s. 53.

Statute of Frauds generally, see CONTRACT, Vol. XII., pp. 118-172.

37. Whether writing necessary.]—Declarations of trust ought to be in writing (*per* CUR.).—SHALES v. SHALES (1701), Freem. Ch. 252; 1 Eq. Cas. Abr. 382; 22 E. R. 1191.

38. —.]—SKETT v. WHITMORE (1705), Freem. Ch. 280; 22 E. R. 1211.

39. —.]—ALTHAM (LORD) v. ANGLESEY (EARL), No. 7, ante.

40. —.]—WILLIS v. WILLIS, No. 68, post.

41. —.]—The same solemnities required by Stat. Frauds to dispose of a trust or equitably interest in freehold lands, as of a legal estate in such lands; nor can testator revoke a trust, any more than he can devise it, without these solemnities.—ADLINGTON v. CANN (1744), 3 Atk. 141; 26 E. R. 885, L. C.

Annotations:—*Distd.* Bosen v. Statham (1760), 1 Cox, Eq. Cas. 16. *Consd.* Muckleston v. Brown (1801), 6 Ves. 52. *Refd.* A.-G. v. Duplessis (1752), Park. 144; Stickland v. Aldridge (1804), 8 Ves. 516; Podmore v. Gunning (1836), Donnelly, 74; Lomax v. Ripley (1855), 3 Sm. & G. 48; Wallgrave v. Tebbis (1855), 2 K. & J. 313; Teo v. Ferris (1856), 25 L. J. Ch. 437. *Mentd.* Nichols v. Leo (1797), 3 Anst. 910; Briggs v. Penny (1851), 21 L. J. Ch. 265; Sweeting v. Sweeting (1863), 3 New Rep. 240.

42. —.]—A writing signed by the party who has power to make the trust declaring a trust upon the will is good though such writing be not attested by three witnesses according to the solemnities of Stat. Frauds (HENLEY, LORD KEEPER).—BOSON v. STATHAM (1760), 1 Cox, Eq. Cas. 10; 1 Eden, 508; 29 E. R. 1041.

Annotations:—*N.F.* Wallgrave v. Tebbis (1855), 2 K. & J. 313. *Refd.* Lomax v. Ripley (1855), 3 Sm. & G. 48; *R.* Fleetwood, Sidgeaves v. Brewer (1880), 49 L. J. Ch. 514.

43. —.]—WALLGRAVE v. TEBBIS, No. 455, post.

44. —.]—A. asked B. to go with him to an auction of a house which he wished to buy, & "be his friend." At the auction a verbal agreement was come to between them that B. should bid, so that A. might become the purchaser. The house was knocked down to B., who paid the deposit, & procured the conveyance of the house to himself. In an action by A. against B. to have it declared that B. was his agent & trustee, & should reconvey the house to him, B. denied the agency, & pleaded Stat. Frauds, s. 4.

After the reply to A.'s counsel B. sought leave to amend by pleading sect. 7, which had been mainly relied upon in argument:—*Held*: although by sect. 4 an agency might be established by

parol, sect. 7 applied, by which all declarations of trusts of lands, tenements, etc., must be proved by some writing, but, as sect. 7 had not been pleaded, & could not be added by amendment at so late a stage, it was not available as a defence.

—JAMES v. SMITH, [1891] 1 Ch. 384; 63 L. T. 524; 39 W. R. 396; on appeal, 65 L. T. 544, C. A.

Annotation:—*Refd.* Rochefoucauld v. Boustead, [1897] 1 Ch. 196.

45. — Trusts arising by operation of law.]—ANON. (1683), 2 Vent. 361; 86 E. R. 486.

46. —.]—SMITH v. BAKER (1737), 1 Atk. 385; West temp. Hard. 98; 26 E. R. 240, L. C.

Annotations:—*Consd.* Lewis v. Lane (1834), 2 My. & K. 449. *Refd.* Dyer v. Dyer (1788), 2 Cox, Eq. Cas. 92; Chapman v. Gibson (1791), 3 Bro. C. C. 229; Jeans v. Cooke (1857), 27 L. J. Ch. 202.

See, now, Law of Property Act, 1925 (c. 20), s. 53 (2).

47. — Trust in course of being executed—Long possession by beneficiary—By permission of heir.]—HARRIS v. HORWELL (1708), Gilb. Ch. 11; 25 E. R. 8, L. C.

48. — To prove trust—Writing subsequent to creation of trust.]—FORSTER v. HALE, No. 85, post.

49. —.]—Distinction between Stat. Frauds, s. 4, requiring the agreement to be in writing, & signed by the party to be charged, & sect. 7 requiring, that the trust shall be manifested, not that it shall be constituted, by writing. —RANDALL v. MORGAN (1805), 12 Ves. 67; 33 E. R. 26.

Annotations:—*Refd.* Montgomery v. Reilly (1827), 1 Bl. N. S. 364; De Bell v. Thomson (1841), 12 Cl. & Fin. 61, n.; Barkworth v. Young (1856), 4 Drew. 1; Warden v. Jones (1857), 6 W. R. 180; Goldcutt v. Townsend (1860), 28 Beav. 445; *R.* Holland, Gregg v. Holland, [1902] 2 Ch. 360. *Mentd.* Watson v. Parker (1843), 6 Beav. 283.

— Copyhold estates.]—See COPYHOLDS, Vol. XIII., pp. 76, 77, Nos. 979, 980.

## (b) Trust of Personal Estate inter vivos.

50. Trust may be created by parol.]—A trust may arise by parol.—PARY v. JUXON (1609), 3 Rep. Ch. 38; 21 E. R. 722; *sub nom.* POREY v. JUXON, Nels. 135.

51. —.]—Mtgee. assigns over his mtge. to S. & declares a trust by parol for other persons. S. acknowledges the trust. There being an express trust declared, though by parol only, shall prevent a resulting trust to the assignor.—BELLASIS (LADY) v. COMPTON & FRANKLAND (1693), 2 Vern. 294; 23 E. R. 790.

52. —.]—If A. devise all her personal estate to B. to be disposed of as B. shall think fit, & add by parol, "You may, if you please give £180 to my niece;" B. on a bill in the answer to which the parol declaration is admitted, shall be decreed to

by a writing signed by the party declaring the trust, is a rule of procedure, & applies in an English action in relation to trusts, even though the subject of the trust is land abroad.—LI CHOK HUNG v. LI PUI CHOI (1910), 6 Hong Kong, L. R. 12.—HONG KONG.

37 xii. —.]—BURTT v. EARL (1880), 1 N. Z. L. R. 145 (S. C.).—N.Z.

37 xiii. —.]—HANNAN v. STAMPS COMR. (1902), 21 N. Z. L. R. 409.—N.Z.

37 xiv. —.]—Stat. Frauds, s. 7, requires a trust to be only "manifested & proved" by writing, & a signed document clearly containing the terms of the trust will be sufficient to satisfy the statute, though such document be not contemporaneous with actual creation or declaration of the trust.—STYAK v. MOUNTAIN, [1921] N. Z. L. R. 137.—N.Z.

## PART I. SECT. 3, SUB-SECT. 1.—A. (a).

37 i. Whether writing necessary.]—MEYENBERG v. PATTERSON (1890), 3 Q. L. J. 184.—AUS.

37 ii. —.]—Though a deed to C. appears absolute on its face, Stat. Frauds, s. 7, will be satisfied by any subsequent acknowledgment in writing declaring the trust, & such acknowledgment given at any time will relate back to the creation of the trust.—HARPER v. PATTERSON (1864), 14 C. P. 538.—CAN.

37 iii. —.]—A bill to enforce a trust need not allege that there is any evidence in writing of the trust.—SMITH v. ROSS (1863), 15 Gr. 374.—CAN.

37 iv. —.]—MORLEY v. DAVISON (1873), 20 Gr. 96.—CAN.

37 v. —.]—BANK OF MONTREAL

v. STEWART (1887), 14 O. L. 482.—CAN.

37 vi. —.]—MORRISON v. McLEOD (N. S.) (1906), 1 E. L. R. 112.—CAN.

37 vii. —.]—*Re* WORK'S CAVEAT (1909), 3 Sask. L. R. 431.—CAN.

37 viii. —.]—*Re* PINSONNAULT (1915), 9 O. W. N. 30; 34 O. L. R. 388.—CAN.

37 ix. —.]—REYNOLDS v. JACKSON (Sask.) (1918), 41 D. L. R. 168.—CAN.

37 x. —.]—Where A. seeks to charge B. as his trustee, & the trust is not manifested in any writing between them, if the trust sufficiently appear from letters proved to be in the handwriting of B. it will take the case out of Stat. Frauds.—O'HARA v. O'NEILL (1717), 7 Bro. Parl. Cas. 227.—IR.

37 xi. —.]—Stat. Frauds, s. 7, which requires trusts to be evidenced

pay the £180 to the niece.—*NAB v. NAB* (1718), 10 Mod. Rep. 404; 88 E. R. 783, L. C.

*Annotation* :—*Reid. M'Fadden v. Jenkyns* (1842), 1 Hare, 458.

53. —.]—*BENBOW v. TOWNSEND*, No. 924, *post*.

54. —.]—A., shortly before his death, sent a verbal message to B. his debtor, desiring him to hold the debt in trust for C. B. accepted the trust, & the transaction was communicated to C. both by A. & B. On a bill filed by C. against B., & the personal representative of A., who had brought an action against B. for the recovery of the debt :—*Held* : the trust, although voluntary, was binding upon A.'s estate.

A declaration by parol is sufficient to create a trust of personal property (*LORD LYNTHURST, C.*).—*M'FADDEN v. JENKYNs* (1842), 1 Ph. 153; 12 L. J. Ch. 146; 7 Jur. 27; 41 E. R. 589, L. C.

*Annotations* :—*Reid. Coningham v. Plunkett* (1843), 2 Y. & C. Ch. Cas. 245; *Re Caplen's Estate*, *Bulbeck v. Silvester* (1870), 45 L. J. Ch. 280; *Harris v. Truman* (1881), 7 Q. B. D. 340.

55. —.]—The reputed parent of an illegitimate child placed a sum of money in a bank, in the name of the uncle of the child, & stated at the time to a clerk at the bank that he intended the money for the child :—*Held* : on claim after the parent's decease, a parol declaration of trust had been created in favour of the child.—*PETTY v. PETTY* (1853), 22 L. J. Ch. 1065; 22 L. T. O. S. 10; 17 Jur. 646.

56. —.]—Parol declaration of trust of money handed over to a third party, on trust, by a person *in extremis*, supported, but held invalid as to stock, for which a power of attorney had been given by the settlor, but which had not been acted on at her death.—*PECKHAM v. TAYLOR* (1862), 31 Beav. 250; 6 L. T. 487; 54 E. R. 1134.

57. —.]—A husband may constitute himself a trustee for his wife; the declaration need not be in writing but the words must be clear, unequivocal & irrevocable.

The question here is, whether the husband has used words which are equivalent to a declaration of trust. . . . These words need not be in writing. . . . They must be clear, unequivocal & irrevocable, but it is not necessary to use any technical words; it is not necessary to say, "I hold the property in trust for you," nor is it necessary to say, "I hold the same for your separate use." Any words that show that the donor means, at the time he speaks, to divest himself of all beneficial interest in the property are, in my opinion, sufficient for the purpose of creating the trust (*ROMILLY, M.R.*).—*GRANT v. GRANT* (1865), 34 Beav. 623; 6 New Rep. 347; 34 L. J. Ch. 641; 12 L. T. 721; 11 Jur. N. S. 787; 13 W. R. 1057; 55 E. R. 776.

*Annotations* :—*Apld. Baddeley v. Baddeley* (1878), 9 Ch. D. 113. *N.E. Re Breton's Estate*, *Breton v. Woolven* (1881), 17 Ch. D. 416. *Reid. Moore v. Moore* (1874), 1 L. R. 18 Eq. 474; *Williams v. Mercer* (1882), 51 L. J. Q. B. 594. *Mentid. Browne v. Collins* (1872), 21 W. R. 222.

58. —.]—(1) A parol declaration of trust in favour of a volunteer may be valid, & may be enforced in equity.

A father put a cheque into the hand of his son of nine months old, saying, "I give this to baby for himself," & then took back the cheque & put it away. He also expressed his intention of giving the amount of the cheque to the son. Shortly afterwards the father died, & the cheque was found amongst his effects :—*Held* : under the circum-

stances there had been no gift to or valid declaration of trust for the son.

(2) When there has been a declaration of trust, then it will be enforced, whether there has been consideration or not (*LORD CRANWORTH, C.*).—*JONES v. LOCK* (1865), 1 Ch. App. 25; 35 L. J. Ch. 117; 13 L. T. 514; 11 Jur. N. S. 913; 14 W. R. 149, L. C.

59. —.]—*HARTOPP v. HARTOPP* (1887), 3 T. L. R. 384.

60. —.]—*Trustee must accept trust.*—*FORDYCE v. WILLIS* (1791), 3 Bro. C. C. 577, n.; 29 E. R. 714. *Annotation* :—*Reid. M'Fadden v. Jenkyns* (1842), 1 Hare, 458.

### (c) Effect of Fraud.

*See, generally, CONTRACT, Vol. XII., pp. 167, 168.*

61. *Statute cannot be used to cover fraud.*—Stat. Frauds cannot be used by deft. to cover a fraudulent act. Pltf. conveyed an estate to deft. by a deed, in which the conveyance was expressed to be absolute in consideration of a sum of money paid by deft.; but no purchase-money actually passed, & pltf. alleged that he conveyed the estate to deft. as a trustee for him. Deft. in his answer admitted that he gave no consideration for the estate, but stated that pltf. made the conveyance fearing that an adverse decision would be made against him in a suit then pending in Chancery; & that it was understood that deft. should account to pltf. for the rents until he could make arrangements for paying the purchase-money, & if no such arrangements could be made, that he should reconvey the estate. Deft. claimed to hold the estate discharged of any trust, & claimed the benefit of Stat. Frauds :—*Held* : Stat. Frauds could not be pleaded in answer to pltf.'s claim; & as the evidence did not establish the existence of any such agreement as was alleged by deft., deft. must reconvey the estate to pltf.—*HAIGH v. KAYE* (1872), 7 Ch. App. 469; 41 L. J. Ch. 567; 26 L. T. 675; 20 W. R. 597, L. J.

*Annotations* :—*Fold. Re Marlborough, Davis v. Whitehead*, [1894] 2 Ch. 133. *Reid. Rochefoucauld v. Boustead*, [1897] 1 Ch. 196.

62. —.]—By an indenture dated in 1890 the Duchess of M., in consideration of natural love & affection, assigned to her husband the Duke a leasehold house belonging to her. The deed was in form an absolute assignment. The Duke subsequently mortgaged the house for the purpose of raising money to pay his debts. The Duchess joined with the Duke in covenanting to pay the mtge. debt, but the equity of redemption was reserved to the Duke alone. Upon the death of the Duke in 1892, the Duchess claimed to be entitled to the house subject to the mtge. There was evidence that she had assigned the house to the Duke solely to enable him to mtge. it in his own name, & that it was part of the arrangement between them that he should re-assign to her, which, if he had lived, he would have done :—*Held* : the case fell within the authorities which forbid Stat. Frauds to be used to cover what would amount to a fraud, & consequently the Statute could not be successfully pleaded in opposition to the claim of the Duchess.—*Re MARLBOROUGH (DUKE), DAVIS v. WHITEHEAD*, [1894] 2 Ch. 133; 63 L. J. Ch. 471; 70 L. T. 314; 42 W. R. 456; 10 T. L. R. 296; 38 Sol. Jo. 289; 8 R. 242.

*Annotations* :—*Distd. Isaacs v. Evans* (1899), 16 T. L. R. 113. *Reid. Rochefoucauld v. Boustead*, [1897] 1 Ch. 196.

### PART I. SECT. 3, SUB-SECT. 1.— A. (c).

61 i. *Statute cannot be used to cover*

*fraud.*—*PHILLIPS v. SELEGOVITCH & MIROSLAVA OTKOVITCH* (1922), 25 W. A. L. R. 50.—*AUS.*

61 ii. —.]—*RESOUL v. MITCHELL*

(1925), 27 W. A. L. R. 78.—*AUS.*

61 iii. —.]—*SUTHERLAND v. MCKAY* (1898), 40 N. S. R. 223.—*CAN.*

*Sect. 3.—Creation of trusts: Sub-sect. 1, A. (c), & B.]*

63. ——— *ROCHEFOUCAULD v. BOUSTEAD*, No. 87, *post*.

64. *Admissibility of parol evidence to prove trust—Property in name of trustee on parol trust—Molety of rent paid by beneficiary.*—*RIDDLE v. EMERSON* (1882), 1 Vern. 108; 23 E. R. 348.

65. ——— *Consideration expressed to be paid by purchaser—Articles providing for settlement.*—Though in the purchase deed, the consideration money is mentioned to be paid by the purchaser, & there is no express declaration of a trust; yet upon the circumstances of the case, decreed a trust, though to the disappointment of the purchaser's will & of his creditors.

We think it a trust, upon the face of the deeds; though creditors are favourites, we must not pay them out of other men's estate (*per CUR.*).—*PLYMOUTH (EARL) v. HICKMAN* (1690), 2 Vern. 167; 23 E. R. 712.

66. ——— *Molety of mortgage money paid by another.*—Mtge. in fee for £700 paid by A. but half of the money was B.'s, yet for want of a declaration in writing B. was not admitted to read to the proof of it, so as to create a trust for him, being against Stat. Frauds.—*NEWTON v. PRESTON* (1699), Prec. Ch. 103; 24 E. R. 50.

67. ——— *Conveyance taken by son-in-law—For convenience of infirm mother-in-law.*—C. lends money upon the mtge. of a copyhold estate, but being infirm & unable to travel, the surrender, etc., is taken in the name of D., her son-in-law, who executes a declaration of trust. C. afterwards purchases the equity of redemption, & the second surrender is, for the same reason, taken in the name of D. but no declaration of trust is made on occasion of this purchase:—*Held*: the heir of D. was a trustee of the estate for the heir of C., & D. having expressly declared the trust as to the first surrender, there was no necessity for a new declaration of trust as to the equity of redemption; even under Stat. Frauds.—*ACHERLEY v. ACHERLEY* (1732), 7 Bro. Parl. Cas. 273; 3 E. R. 177, H. L.

68. ——— *Mean circumstances of pretended owner.*—(1) All declarations of trust under the statute must be in writing. (2) He who pays the purchase-money has a resulting trust, but then he must clearly prove the payment. (3) Parol evidence admitted to show a trust from the mean circumstances of the pretended owner of the real estate.—*WILLIS v. WILLIS* (1740), 2 Atk. 71; 26 E. R. 443.

*Annotation:—As to (3) Refd. Heard v. Pilley* (1869), 4 Ch. App. 548.

69. ——— *Payment with money of another.*—Where land was paid for with the money of A. parol evidence to show that the purchase was on behalf of B. refused.—*BARTLETT v. PICKERSGILL* (1760), 1 Eden, 515; 1 Cox, Eq. Cas. 15; 4 East, 578, n.; 28 E. R. 785.

*Annotations:—Consd. Abrahams v. Bunn* (1768), 4 Burr. 2251; *Heard v. Pilley* (1869), 4 Ch. App. 548; *James v. Smith*, [1891] 1 Ch. 384. *Overd. Rochefoucauld v. Boustead*, [1897] 1 Ch. 196. *Refd. Blakemore v. Glamorganshire Canal Co.* (1835), 2 Cr. M. & R. 133. *Mentd. R. v. Boston* (1804), 4 East, 672; *A.-G. v. Woodhead* (1815), 2 Price, 3; *Thurvell v. Beaumont* (1823), 1 Bing. 339; *It. v. Dunston* (1824), Ry. & M. 109; *Maclean v. Maclean* (1829), 2 Hag. Ecc. 601; *Kenrick v. Kenrick* (1831), 4 Hag. Ecc. 114; *Stoate v. Stoate* (1860), 30 L. J. P. M. & A. 162.

70. ——— *Receipt in name of trustee.*—In the case of a purchase by A. & a receipt in his name, yet evidence has been admitted to prove the purchase to be in trust for B. (*CLARKE, M.R.*).

—*KNIGHT v. PECHEY* (1759), 1 Dick. 327; 21 E. R. 295.

71. ——— *For purpose of mortgage by transferee.*—A son conveys an estate to his father nominally as purchaser, but really as a trustee, & in order that the father, who was in better credit than the son, might raise money upon it by way of mtge., for the use of the son: the father died shortly afterwards & before any money was raised, having by a will, subsequent to the conveyance, made a general devise of all his real estates: the case is within Stat. Frauds, & parol evidence is not admissible to prove the trust; but the son has a lien on the estate as vendor for the apparent consideration, no part of which was paid.—*LEMAN v. WHITLEY* (1828), 4 Russ. 423; 6 L. J. O. S. Ch. 152; 38 E. R. 864.

*Annotations:—N.F. Re Marlborough, Davis v. Whitehead*, [1894] 2 Ch. 133. *Mentd. Hughes v. Scanor* (1869), 18 W. R. 108.

72. ——— *Re MARLBOROUGH (DUKE), DAVIS v. WHITEHEAD*, No. 62, *ante*.

73. ——— *Assignment in expectation of conviction for felony.*—Pltf. under a mistaken apprehension that he was indictable for bigamy, conveyed & assigned certain real estate & other property to deft. absolutely, for a mere nominal consideration, which was never paid. The evidence showed that when the conveyance & assignment was executed there was a verbal understanding that deft. was to hold the property for pltf. till the termination of the affair. Pltf. continued in possession of the property. It subsequently appeared that he was not liable to be indicted; & he then requested deft. to reconvey the property. Deft. refused. Pltf. then filed a bill for relief accordingly. Deft. demurred to the bill, but the demurrer was overruled. By his answer he denied the alleged verbal agreement, claimed the property as his own, relied on Stat. Frauds as a bar to pltf.'s suit, & contended that he was in fact only an agent of deft.:—*Held*: as the evidence clearly showed the real nature of the transaction between the parties, deft. could not be allowed to set up Stat. Frauds, & must reconvey the property to pltf.—*DAVIES v. OTTY* (1865), 35 Beav. 208; 5 New Rep. 391; 34 L. J. Ch. 252; 12 L. T. 789; 10 Jur. N. S. 506; 13 W. R. 484; 55 E. R. 875.

*Annotations:—Refd. Haigh v. Kaye* (1872), 7 Ch. App. 469; *Booth v. Turle* (1873), L. R. 16 Eq. 182; *Rochefoucauld v. Boustead*, [1897] 1 Ch. 196; *Gascoigne v. Gascoigne*, [1918] 1 K. B. 223.

74. ——— *Assignment to avoid adverse judgment.*—*HAIGH v. KAYE*, No. 61, *ante*.

75. ——— *Collateral agreement.*—A plaintiff in the county ct. stated that pltf. had assigned to deft. the agreement for a lease of certain premises, but it was alleged that there was a parol agreement that part of the premises were to be held by deft. in trust for pltf. Evidence was given on both sides, but the judge, being of opinion that actual fraud had not been proved against deft., & there being no resulting trust in the assignment, decided that Stat. Frauds was applicable, & dismissed the plaintiff without coming to any distinct decision upon the evidence:—*Held*: the judge ought to have decided that Stat. Frauds had no application, & the ct., upon a consideration of the evidence, decided that pltf. was entitled to relief, & reversed the decree.—*BOOTH v. TURLE* (1873), L. R. 16 Eq. 182; 37 J. P. 710; 21 W. R. 721.

*Annotations:—Refd. Chattock v. Muller* (1878), 8 Ch. D. 177; *Rochefoucauld v. Boustead*, [1897] 1 Ch. 196.

76. ——— *Trustee relying on statute to obtain land.*—*ROCHEFOUCAULD v. BOUSTEAD*, No. 87, *post*.

*B. Sufficiency of Writing.*

See Law of Property Act, 1925 (c. 20), s. 53.

**77. Writing showing existence & nature of trust.**—When the ct. is called upon to establish or act upon a trust of lands, it must not only be manifested & proved by writing signed by the person by law enabled to declare the trust that there is a trust, but it must also be manifested & proved by writing signed as above what the trust is.—*SMITH v. MATTHEWS, Re MATTHEWS'S SETTLEMENT* (1861), 3 De G. F. & J. 139; 30 L. J. Ch. 445; 4 L. T. 266; 7 Jur. N. S. 378; 9 W. R. 644; 45 E. R. 831, L. JJ.

*Annotation*:—*Consd. Rochefoucauld v. Boustead*, [1897] 1 Ch. 196.

**78. Requirements as to signature—Party by law enabled to declare trust.**—*SMITH v. MATTHEWS, Re MATTHEWS'S SETTLEMENT*, No. 77, *ante*.

**79. — Beneficial owner only.**—Where lands are held in trust, the declaration of trust, required by Stat. Frauds, s. 7, to be signed "by the party who is, by law, enabled to declare such trust," must be signed by the beneficial owner, & not by the trustee who has the legal estate.—*TIERNY v. WOOD* (1854), 19 Beav. 330; 23 L. J. Ch. 895; 23 L. T. O. S. 266; 2 W. R. 577; 52 E. R. 377.

*Annotations*:—*Apld. Kronheim v. Johnson* (1877), 7 Ch. D. 60. *Mentd. Re Chrimmes, Locorich v. Chrimmes*, [1917] 1 Ch. 30.

**80. — — — — —**—When the legal estate in land is vested in a trustee for an absolute beneficial owner, "the party who is by law enabled to declare a trust" of the land, within Stat. Frauds, s. 7, is the beneficial owner only. The absolute beneficial owner of land vested in a trustee wrote a letter to the mother of her infant grandson. The letter was signed with the writer's initials. Inclosed in the same envelope, but on a separate piece of paper, was another document in the handwriting of the same person, & headed "Supplement." This document was not signed in any way. It commenced thus, "I had quite omitted to tell you," but it contained no other reference to the letter, & the letter in no way referred to it. It was alleged that the "supplement" contained a declaration of trust of the land in favour of the infant:—*Held*: the "supplement" was not signed so as to satisfy the statute.—*KRONHEIM v. JOHNSON* (1877), 7 Ch. D. 60; 47 L. J. Ch. 132; 37 L. T. 751; 26 W. R. 142.

**81. — Unsigned supplement to letter—Not referred to in letter.**—*KRONHEIM v. JOHNSON*, No. 80, *ante*.

**82. — Fee simple of intended wife—Agreement before marriage—Signature by intended husband.**—In order that the fee simple of an intended wife may be affected with a trust for her separate use by an agreement made between the intended husband & wife before marriage, the agreement must be in writing & signed by the wife as well as by the husband: if it is signed by the husband alone, it is, owing to Stat. Frauds, s. 7, invalid as a declaration of trust for separate use as to the fee simple.—*DYE v. DYE* (1884), 13 Q. B. D. 147; 53 L. J. Q. B. 442; 51 L. T. 145; 33 W. R. 2, C. A.

**83. Declaration of trust—After death of beneficiary.**—A., as freeman of London, purchases in the name of B. but no trust declared; A. dies, & B. gives a declaration of trust; this is good

against the custom. Evidence of a trust where an estate is purchased in another's name.

The strength of the evidence was, that this purchase made in the life of A. in the names of E. & his clerk, was in trust for A. However, it plainly appearing, upon the evidence on both sides, that the consideration-money of this purchase was the proper money of A., had it not been for Stat. Frauds, this would have made a resulting trust; & the said E., after the death of A. executing the declaration of trust, this plainly took it out of the statute. . . . The declaration given by E. was evidence of the trust (*LORD COWPER, C.*).—*AMBROSE v. AMBROSE* (1716), 1 P. Wms. 321; 24 E. R. 407, L. C.

*Annotations*:—*Mentd. Banks v. Sutton* (1732), 2 P. Wms. 700; *Bruin v. Knott* (1843), 12 Sim. 436.

**84. Letter—By party against whom trust established.**—A. agrees for a beneficial lease of forty-one years, B. advances money towards paying the fine, etc., & the lease is taken in B.'s name, without any declaration of trust:—*Held*: (1) B. was a trustee for A., & upon being paid the money he advanced, with interest, should assign the lease to A. account with him for the profits, & pay him his costs; (2) the trust being proved by letters of B.'s own handwriting, this case was not within Stat. Frauds.—*O'HARA v. O'NEILL* (1717), 7 Bro. Parl. Cas. 226; 3 E. R. 148.

*Annotation*:—*As to* (2) *Folld. Forster v. Hale* (1798), 3 Ves. 696.

**85. — Paper referred to in letters—Undated & unsigned.**—Trust raised by implication from letters, & a paper, referred to by them, & in the handwriting of the party, though not signed or dated, & by operation of law from advances of money. Stat. Frauds requires, not that a trust shall be created by writing, but that it shall be proved by writing; which may be subsequent to the commencement of it.—*FORSTER v. HALE* (1798), 3 Ves. 696; 30 E. R. 1226; *affd.* (1800), 5 Ves. 308, L. C.

*Annotations*:—*Apld. Dale v. Hamilton* (1846), 5 Hare, 369; *Re Matthew's Settltm.*, *Smith v. Matthews* (1861), 3 De G. F. & J. 139; *Rochefoucauld v. Boustead*, [1897] 1 Ch. 196; *Re De Nicols, De Nicols v. Curlier*, [1900] 2 Ch. 410. *Reid. Gray v. Smith* (1889), 43 Ch. D. 208. *Mentd. Isaacs v. Evans* (1899), 16 T. L. R. 113; *Arsculaterne v. Perera*, [1928] A. C. 173.

**86. — Parol evidence of circumstances of writing.**—A person who occupied a large farm as tenant under a lease fell into difficulties & surrendered his lease to his landlord. The tenant had, by means of his private expenditure, increased the value of the property by about the rate of £100 *per annum*. The brother of the tenant's wife then applied to the landlord to become tenant of the farm for the residue of the term, at the rent & under the covenants comprised in the surrendered lease. This application was made by letter, in which the writer stated it to be his wish to be of use to his unfortunate sister & her young family, & spoke of his disinterested motives. The application was acceded to by the landlord with the sole view, as he stated in his evidence, of benefiting the sister & her family. By a subsequent arrangement it was agreed that a third person should be joined as lessee with the brother, who should manage the bulk of the property, & give the brother £55 *per annum* for his occupation, the brother underletting the residue of the property. In his letters respecting this arrangement the brother expressed himself as having taken the farms with

## PART I. SECT. 3, SUB-SECT. 1.—B.

771. *Writing showing existence & nature of trust.*—*HUNTER v. RUTLEDGE* (1869), 6 W. W. & A.B. 331.—*AUS.*

77 II. — — — — —]—*SCOTT v. BROWNIGG* (1881), 9 L. R. 1r. 246.—*IR.*

84 I. *Letter—By party against whom trust established.*—*GILMORE v.*

*GRIFFS* (1904), 7 Terr. L. R. 225—*CAN.*

84 II. — — — — —]—*MOUNTAIN v. STYAN*, [1922] N. Z. L. R. 131.—*N.Z.*



**Sect. 3.—Creation of trusts: Sub-sect. 1, B. & C.; sub-sect. 2, A. (a) & (b).]**

no selfish motives, but from a wish to assist his sister & her unfortunate family. This arrangement was acted upon until the brother's death; the brother for some years receiving the £55, which was secured to him by the bond of his co-lessee, & underletting the residue of the premises at £45 per annum:—*Held*: by means of the letters, which the ct. considered to be a sufficient manifestation in writing within Stat. Frauds, aided by parol evidence of the circumstances under which they were written, a trust was created of the annual sums of £55 & £45 in favour of the sister & her children.—*MORTON v. TEWART* (1842), 2 Y. & C. Ch. Cas. 67; 63 E. R. 29.

*Annotation*:—*Reid*, *Re Matthew's Settlement*, *Smith v. Matthews* (1861), 3 De G. F. & J. 139.

**87. — Partial evidence of trust.]—**(1) Prior to 1873 *pltf.*, a married woman, was owner of certain estates in Ceylon subject to a considerable *mtge.* In 1873 the *mtgees.* sold & conveyed the estates to *deft.*, who, without the privity of *pltf.*, raised large sums by *mtge.* of them, & afterwards became *bkpt.* in 1879, & obtained his discharge in 1880. The estates were afterwards sold by the *mtgees.* *Pltf.'s* case was that *deft.* had purchased the estates as trustee for her subject to a lien for his advances. In 1880 *deft.'s* trustee in *bkpcy.* repudiated *pltf.'s* title. *Deft.* never expressly did so, & *pltf.* never gave either of them to understand that she had given up her claim; but she took no active steps to assert it till 1894, when she commenced an action against *deft.* asking for a declaration that *deft.* purchased as a trustee for her, & for an account of his dealings with the property, & payment of what should be found due from him. *Deft.* pleaded—(a) that the estates were conveyed to him as beneficial owner; (b) that the trust alleged by *pltf.* was not evidenced by any writing signed by *deft.*, & that Stat. Frauds was a defence; (c) that *pltf.'s* claim, if proved, was barred by *deft.'s* *bkpcy.*; by the Statutes of Limitations; by laches & delay. The judge held that no trust was proved, & dismissed the action on the first ground. The Ct. of Appeal, being of opinion that the evidence, which partly consisted of letters signed by *deft.*, completely proved that *deft.* purchased as a trustee for *pltf.* & held the estates as such trustee subject to a lien for his expenditure:—*Held*: even if the letters signed by the *deft.* did not contain enough to satisfy s. 7 of the Stat. Frauds, parol evidence was admissible; & as the whole of the evidence taken together established that *deft.* had purchased as a trustee, *pltf.* was entitled to a decree.

(2) Stat. Frauds does not prevent proof of a fraud, & it is a fraud for a person to whom land is conveyed as a trustee, & who knows it was so conveyed, to deny the trust & claim the land as his own. Therefore a person claiming land conveyed to another may prove by parol evidence that it was so conveyed on trust for claimant, & may obtain a declaration that the grantee is a trustee for him.—*ROCHEFOUCAULD v. BOUSTEAD*,

[1897] 1 Ch. 196; 66 L. J. Ch. 74; 75 L. T. 502; 45 W. R. 272; 13 T. L. R. 118, C. A.

*Annotations*:—As to (2) *Reid*, *Isaacs v. Evans* (1899), 16 T. L. R. 113. Generally, *Reid*, *Taylor v. Davies*, [1920] A. C. 636. *Mentid*, *Re Gallard*, *Ex p. Gallard*, [1897] 2 Q. B. 8; *Brooks v. Muckleston*, [1909] 2 Ch. 519.

**88. Pencil entries in accounts—Not communicated to cestui que trust.]—***Re COZENS, GREEN v. BRISLEY*, No. 129, *post*.

**C. Pleading.**

*Sec, now*, R. S. C., Ord. 19, rr. 15, 20; *see, generally*, CONTRACT, Vol. XII., pp. 171, 172.

**89. Effect of admission on pleadings.]—***JONES v. NABBS* (1718), Gilb. Ch. 146; 1 Eq. Cas. Abr. 404; 25 E. R. 102.

*Annotations*:—*Consd*, *Smith v. Attersoll* (1826), 1 Russ. 266. *Reid*, *Drakeford v. Wilks* (1747), 3 Atk. 539; *Malim v. Keighley* (1795), 2 Ves. 526.

**90. Necessity for pleading—Plea not added by amendment.]—***JAMES v. SMITH*, No. 44, *ante*.

**SUB-SECT. 2.—DECLARATION OF TRUST.**

**A. What Amounts to.**

**(a) In General.**

**91. Requisites to creation of trust—Sufficient words—Express or technical terms unnecessary.]—***Testatrix* bequeathed to her sister B. for life; declaring, that it was her absolute desire, that she bequeath to those of her own family what she has power to dispose of, provided they behave well to her.

B. by her will declaring, she meant to make no disposition of her sister's property, it was held a trust for the next of kin of B.

Requisites to constitute a trust; sufficient words; a definite subject; & a certain object.—*CRUWY'S v. COLMAN* (1804), 9 Ves. 319; 32 E. R. 626.

*Annotations*:—*Consd*, *Pigg v. Clarke* (1876), 45 L. J. Ch. 849. *Reid*, *Liley v. Hey* (1842), 1 Hare, 580; *Gregory v. Smith* (1852), 9 Hare, 708; *Re Hamilton*, *Re Ashtown*, *Trench v. Hamilton* (1895), 72 L. T. 748.

**92. — — — — —.]—**For the constitution of a . . . trust no express words are necessary (LORD SELBORNE).—*LYELL v. KENNEDY, KENNEDY v. LYELL* (1889), 14 App. Cas. 437; 59 L. J. Q. B. 268; 62 L. T. 77; 38 W. R. 353, H. L.

*Annotations*:—*Reid*, *Trevor v. Hutchesin* (1897), 76 L. T. 183; *Keighley Maxsted v. Durant*, [1901] A. C. 240; *Reid-Newfoundland Co. v. Anglo-American Telegraph Co.*, [1912] A. C. 555; *Henry v. Hammond*, [1913] 2 K. B. 515. *Mentid*, *Bolton Partners v. Lambert* (1889), 41 Ch. D. 295; *Finn v. Shelton Iron, Steel & Coal Co.* (1924), 131 L. T. 213.

**93. — — — — — Terms importing confidence.]—**(1) Construction of a devise in fee subject to & chargeable with annuities, upon the intention, collected from the whole will, a beneficial devise, & not a trust resulting to the heir as to the surplus beyond the annuities.

If the whole frame of the will creates a trust for the particular purpose of satisfying which the estate is devised, the law is the same, though the word "trust" is not used (LORD ELDON, C.).

**PART I. SECT. 3, SUB-SECT. 2.—A. (a).**

**h. Requisites to creation of trust—Sufficient words.]—**T. in anticipation of death handed over his property to *deft.*, his brother, & verbally directed him to pay certain specified debts & to apply the surplus for the necessities & support of his family:—*Held*: a good trust was created at any rate so far as the debts were concerned.—*SUDDASOOK MOOTARY v. RAMCHUNDER* (1890), 1 L. R. 17 Calc. 620.—*IND.*

**k. — — — — —.]—***BALAMBA v. KRISHNANAYYA* (1913), 1 L. R. 37 Mad. 483.—*IND.*

**l. — — — — —.]—***Re DAVIDSON'S ESTATE* (1893), 31 L. R. 19; 249; *affd.*, [1894] 1 I. R. 56.—*IR.*

**m. — — — — —.]—***Re FRASER* (1910), 29 N. Z. L. R. 1004.—*N.Z.*

**n. — — — — —.]—***Indorsement on insurance policy.]—PUBLIC TRUSTEE v. SHEPHERD* (1912), 32 N. Z. L. R. 643.—*N.Z.*

**o. — — — — — In document under seal.]—**While *deft.'s* application for a land transfer title to a parcel of land was pending he signed a document under seal by which he admitted that his sister was entitled to a moiety of the land & he agreed to transfer such moiety to her conditionally upon her paying a proportion of the land tax & of the expenses of perfecting the title to the property:—*Held*: all requisitions for an effective declaration of trust were present in the document



(2) Distinction between a direct trust & a charge; though enforced in equity much in the same way.—*KING v. DENISON* (1813), 1 Ves. & B. 260; 35 E. R. 102. L. C.; *previous proceedings*, *sub nom. SMITH v. KING* (1812), 16 East, 283.

*Annotations*:—As to (1) *Apld. Southouse v. Bate* (1814), 2 Ves. & B. 396. *Consd. Cooke v. Stationers' Co.* (1831), 3 My. & C. 262; *Wood v. Cox* (1837), 2 My. & C. 684; *Mullen v. Bowman* (1844), 1 Coll. 197; *Re Foord, Foord v. Conder*, [1922] 2 Ch. 519. *Refd. Cook v. Hutchinson* (1836), 1 Keen, 42; *Clarke v. Hilton* (1866), L. R. 2 Eq. 810; *Croome v. Croome* (1888), 59 L. T. 582; *Re West, George v. Grose*, [1900] 1 Ch. 84. As to (2) *Consd. Watson v. Saul* (1859), 1 Giff. 188. *Refd. Re Jordison, Raine v. Jordison*, [1922] 1 Ch. 440. *Generally, Refd. Barra v. Fewkes* (1865), 34 L. J. Ch. 522; *Merchant Taylors' Co. v. A.-G.* (1871), 6 Ch. App. 512; *Re Glukman, A.-G. v. Jefferys*, [1908] 1 Ch. 562.

94. —————.]—A trust may well be created in the absence of any expression importing confidence; & the obligation on the surviving partner created by the partnership articles, with reference to the legal interest in the partnership, did not in substance differ from a trust, & therefore the articles of partnership created a trust in favour of the wife, to arise on the death of testator leaving a widow surviving, which would attach on the property as it should then exist.

In cases of this nature the ct. is to regard the substance & effect & not the mere form of the instrument, & that a trust may well be created although there may be an absence of any expression in terms importing confidence (*TURNER, V.-C.*).—*PAGE v. COX* (1852), 10 Hare, 163; 68 E. R. 882.

*Annotations*:—*Apld. Re Flavell, Murray v. Flavell* (1883), 25 Ch. D. 89. *Consd. Byrne v. Reid*, [1902] 2 Ch. 735. *Refd. Ehrmann v. Ehrmann* (1894), 72 L. T. 17.

95. —————.]—Testator, having nine children, by his will gave all his property to one of them, who, at the funeral, said he would divide the property equally between his brothers & sisters & himself, & that the whole should be sold, that it might not be said he had taken any more than the others. He subsequently acted, in respect of a portion of the property, according to the intention thus expressed; & with the assent of the other children, & at a valuation approved by them, he became the purchaser of a house & premises, part of the estate:—*Held*: with regard to the property which remained undivided, the expressions of the devisee were no more than a promise to give & divide it amongst the brothers & sisters, & as such promise it was *nudum pactum*, & did not amount to a declaration of trust in their favour.

I agree that it is not necessary that the precise words "trust" or "confidence" should be used in order to make a trust, & that any expressions will suffice from which it is clear that the party using them considers himself a trustee & adopts that character (*PAGE WOOD, V.-C.*).—*DIPPLE v. CORLES* (1853), 11 Hare, 183; 68 E. R. 1239.

96. —————.]—Intention to create trust must appear.—*DIPPLE v. CORLES*, No. 95, *ante*.

97. —————.]—*GRANT v. GRANT*, No. 57, *ante*.

98. —————.]—The consent of a married woman had been given before comrs. for the transfer & payment to her husband of sums of stock & cash standing in ct. to her separate

account:—*Held*: this did not amount to a declaration of trust, & it was competent to her at any time before the transfer had been completed to retract her consent.

It is now held that any instrument may be a sufficient declaration of trust; no form being necessary; the only material question being, "Did the grantee, or did he not, mean at once to pass the property (*PAGE WOOD, V.-C.*).—*PENFOLD v. MOULD* (1867), L. R. 4 Eq. 562; 36 L. J. Ch. 981; 17 L. T. 59; 15 W. R. 1196.

99. —————.]—*RICHARDS v. DELBRIDGE*, No. 107, *post*.

100. —————.]—*Re WILLIAMS, WILLIAMS v. WILLIAMS*, No. 17, *ante*.

101. —————.]—Clear, unequivocal & irrevocable.—*GRANT v. GRANT*, No. 57, *ante*.

102. —————.]—*Re COZENS, GREEN v. BRISLEY*, No. 129, *post*.

103. —————.]—Grantor must have parted with his interest.—In order to give validity to a declaration of trust of property it is necessary that the donor or grantor should have absolutely parted with his interest in the property & have effectually put such interest beyond his own reach.—*WARRNER v. ROGERS* (1873), L. R. 16 Eq. 340; 42 L. J. Ch. 581; 28 L. T. 863; 21 W. R. 766.

*Annotations*:—*Apld. Richards v. Delbridge* (1874), L. R. 18 Eq. 11. *Consd. Re Shield, Pethybridge v. Burrow* (1885), 53 L. T. 5; 1 L. R. Comrs. v. Allan (1925), 9 Tax Cas. 234. *Refd. Heartley v. Nicholson* (1875), L. R. 19 Eq. 233; *Baddeley v. Baddeley* (1878), 48 L. J. Ch. 36.

104. —————.]—Some time before his death testator informed his daughter's companion F. that he intended to give her a debenture bond in the M. S. & L. Ry. Co. Shortly afterwards he signed the following memorandum, "I wish to communicate to my exors. that I have today given to Miss F. my £1,000 debenture bond of the M. S. & L. Ry. Co., but as I shall require the annual dividends to meet my necessary expenses I retain the document in my own possession for my lifetime, requesting you, on my decease, to hand it over to Miss F. & communicate to the secretary of the ry. co. at the M. office relative to the transfer of the said bond being entered in their books given under my hand this 9th Feb. 1882. As witness my hand G. S. P.S. you will find the bond in my deed box attached to this memorandum." After testator's death a certificate of debenture stock for £1,000 in the M. S. & L. Ry. Co. was found with the memorandum in the deed box:—*Held*: the memorandum was an uneffectual attempt to assign the debenture stock & did not amount to a good declaration of trust, & F. had no interest in the debenture stock.—*Re SHIELD, PETHYBRIDGE v. BURROW* (1885), 53 L. T. 5, C.A.

#### (b) Transfer of Property.

105. Transfer of property by settlor—Accompanied by declaration.—*HUGHES v. STUBBS*, No. 149, *post*.

106. —————.]—Testator transfers stock into the names of trustees on a parol trust for certain annuitants, & for masses for the souls of testator, the poor dead, & other parties named. On the question whether such trusts were a violation of

thus signed.—*PARK v. DUNN*, [1916] N. Z. L. R. 761.—N.Z.

p. —————.]—"For behoof of his family."—Testator, by his holograph will bequeathed one-fifth share of residue to his brother A., "for behoof of his family":—*Held*: this expression was equivalent to "in trust for his children," & the beneficial right was

in the children only.—*MICHEE'S EXECUTORS v. MICHEE* (1905), 7 F. (Ct. of Sess.) 509; 42 Sc. L. R. 386; 12 S. L. T. 738.—SCOT.

#### PART I. SECT. 3, SUB-SECT. 2.—A. (b).

q. Acknowledgment of pre-existing trust.—The fact that the purpose

with which a man has put property into his wife's name as a trustee for him is to defraud his creditors does not prevent him from afterwards recovering the property from her, or her representatives after her death, provided that the illegal purpose has in no respect been carried into effect. A wife who was the registered pro-

*Sect. 3.—Creation of trusts: Sub-sect. 2, A. (b) & (c) i.]*

Wills Act, 1837 (c. 26), charitable uses, or superstitious uses, & whether the property went to the Crown:—*Held*: they were not a violation of Wills Act, 1837 (c. 26), nor charitable, but were superstitious; but good *pro tanto* as to the annuities, & bad as to the rest.—*HEATH v. CHAPMAN* (1854), 2 Drew. 417; 2 Eq. Rep. 1264; 23 L. J. Ch. 947; 24 L. T. O. S. 31; 18 J. P. 693; 2 W. R. 649; 61 E. R. 781.

*Annotations*:—*Reid, Re Fleetwood, Sidgeveas v. Brower* (1880), 15 Ch. D. 594; *Bourne v. Keane*, [1919] A. C. 815. *Mentd. Re Michel's Trust* (1860), 28 Beav. 39; *Choa Choon Neoh v. Spottiswoode* (1869), 1 Kyshe's Reports, 216.

107. —.—.]—D., who was possessed of leasehold business premises & stock-in-trade, shortly before his death purported to make a voluntary gift in favour of his grandson E., who was an infant & who assisted in the business, by the following memorandum, signed & indorsed on the lease: "This deed & all thereto belonging I give to E. from this time forth, with all the stock-in-trade." The lease was then delivered to E.'s mother on his behalf:—*Held*: there was no valid declaration of trust of the property in favour of E.

A man may transfer his property, without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, & thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognised as amounting to a valid declaration of trust, constitute himself a trustee. . . . He need not use the words, "I declare myself a trustee," but he must do something which is equivalent to it & use expressions which have that meaning (*JESSEL, M.R.*).—*RICHARDS v. DELBRIDGE* (1874), L. R. 18 Eq. 11; 43 L. J. Ch. 459; 22 W. R. 584.

*Annotations*:—*Consd. Heartley v. Nicholson* (1875), L. R. 19 Eq. 233. *N.F. Baddeley v. Baddeley* (1878), 9 Ch. D. 113. *Consd. Re Breton's Estate, Breton v. Woolven* (1881), 17 Ch. D. 416; *Re Ashcroft, Ex p. Todd* (1887), 19 Q. B. D. 186; *Carter v. Carter*, [1896] 1 Ch. 62; *I. R. Comrs. v. Allan* (1925), 9 Tax Cas. 234. *Distd. Royal Exchange Assoc. v. Hope*, [1928] Ch. 179. *Reid, Moore v. Moore* (1874), L. R. 18 Eq. 474; *Re Caplan's Estate, Bulbeck v. Silvester* (1876), 45 L. J. Ch. 280; *Re Shield, Pethybridge v. Burrow* (1885), 53 L. T. 5; *Re Patrick, Bills v. Tatham* (1890), 63 L. T. 752; *Re Gompertz's Estate, Parker v. Gompertz* (1911), 56 Sol. Jo. 11; *German v. Yates* (1915), 32 T. L. R. 52; *Re Chrimes, Locovich v. Chrimes*, [1917] 1 Ch. 30.

108. —.—.]—A husband, being about to leave England for a residence in India, executed an assignment by deed to his wife, who was to remain in England, of a leasehold dwelling-house, "to hold the same unto" the wife, "her exors., administrators, & assigns, as her separate estate." No trustees were appointed, the husband & wife being the only parties to the deed. The title deeds were allowed to remain in the possession of the wife:—*Held*: the deed of assignment operated as a valid declaration of trust in favour of the wife.

prior of certain land upon which there was a house signed a document in these terms: "I hold in trust" the property, specifying it, "for my husband . . . it's all his":—*Held*: the document was not a declaration of a new trust, but an acknowledgment of an already existing trust of the existence of which it was evidence.—*PERPETUAL EXECUTORS & TRUSTEES ASSOCN. OF AUSTRALIA, LTD. v. WRIGHT* (1917), 23 C. L. R. 185.—*AUS. v. Fund deposited with trust company in names of donees.*—*TORONTO GENE-*

*RAL TRUSTS CORPN. v. KEYES* (1907), 10 O. W. R. 86; 15 O. L. R. 30.—*CAN.*

*t. Construction of annuity clause in will—Whether absolute trust created where no request made for transfer of fund.*—*Re FISHER TRUSTS* (1907), 3 E. L. R. 492; 3 N. B. Eq. Rep. 536.—*CAN.*

*a. Necessity for clear intention—Owner of property constituting himself trustee—Father opening an account in name of his son.*—In order that the owner of the fund may constitute

—*FOX v. HAWKS, HAWKS v. FOX* (1879), 13 Ch. D. 822; 49 L. J. Ch. 579; 42 L. T. 622; 28 W. R. 656.

*Annotation*:—*Distd. Re Breton's Estate, Breton v. Woolven* (1881), 17 Ch. D. 416.

109. *Declaration without transfer.*—*HUGHES v. STUBBS*, No. 149, *post*.

110. —.—.]—A husband by deed poll recited as follows: "Whereas I am beneficially possessed of the ground rents hereby intended to be settled," & continued as follows: "I do hereby settle, assign, transfer & set over unto my wife as though she were a single woman" several leasehold houses & the ground rents thereof. The deed was voluntary:—*Held*: this deed was not void as being an intended assignment from husband to wife but operated as a declaration of trust.—*BADDELEY v. BADDELEY* (1878), 9 Ch. D. 113; 48 L. J. Ch. 36; 38 L. T. 906; 26 W. R. 850.

*Annotations*:—*Reid, Fox v. Hawks, Hawks v. Fox* (1879), 13 Ch. D. 822; *Re Breton's Estate, Breton v. Woolven* (1881), 17 Ch. D. 416.

111. —.—.]—A husband, by three letters written & signed by him & handed to his wife, gave her furniture & other articles for her sole & absolute use. He afterwards made his will bequeathing certain legacies & making other dispositions of his property & giving the residue of it to trustees in trust for his wife for life with remainder to six nieces absolutely. The furniture & other articles were at the time of the husband's death in the house which had been occupied by him & his wife, & the whole had been used by them in the ordinary way:—*Held*: the furniture, etc., formed part of the husband's estate.—*Re BRETON'S ESTATE, BRETON v. WOOLVEN* (1881), 17 Ch. D. 416; 50 L. J. Ch. 369; 44 L. T. 337; 29 W. R. 777.

*Annotation*:—*Consd. Re Whittaker, Whittaker v. Whittaker* (1882), 21 Ch. D. 637.

112. —.—.]—*Clear & distinct evidence required—Acts & writings of donor.*—The ct., in order to give effect to voluntary settlements, requires, where the settlor is the legal owner, everything to have been done which is requisite to transfer the legal ownership; & where he is the equitable owner, clear & distinct evidence of a declaration of trust in favour of the donee.

A father being entitled, during the life of his son, to the dividends on funds standing in the names of himself & three other trustees, directed two of the trustees to pay over the dividends for the future to his son. They acted on the direction, & testator afterwards recognised the gift:—*Held*: there was a valid & effectual voluntary settlement, which this ct. would give effect to.

The ct. requires clear & distinct evidence of a declaration of trust in favour of the donee; & for that purpose it looks at the acts & writings of the donor, to see if from them clear evidence of a declaration of trust can be gathered (*ROMILLY, M.R.*).—*BENTLEY v. MACKAY* (1851), 15 Beav. 12; 51 E. R. 440.

*Annotations*:—*Consd. Dipple v. Corles* (1853), 11 Hare, 183. *Reid, Re Chrimes, Locovich v. Chrimes*, [1917] 1 Ch. 30.

113. —.—.]—*Assignment of stock & money to*

himself a trustee, of it, he must either expressly declare himself a trustee, or must use language which, taken in connection with his acts, shows a clear intention on his part to divest himself of all beneficial interest in it, & to exercise dominion & control over it exclusively in the character of a trustee.—*ASHABAI v. HAJI TYEN HAJI RAHIMTULLA* (1882), 1 L. R. 9 Bom. 115.—*IND.*

*b. Transfer of property on trust by convict sentenced to transportation.*—*B. having been sentenced to trans-*

**trustees—No actual transfer—Voluntary settlement.**—Settlor, by a voluntary settlement, assigned a sum of Consols standing in his name, & also his money at his banker's, to trustees, upon trust for himself for life, & upon trust after his decease to settle the same, so that his three reputed daughters should receive the income for their lives without anticipation, with trusts over. The stock remained untransferred, & the £8,000 continued at his banker's, in settlor's name, until his decease twelve days afterwards:—*Held*: the trusts of the voluntary settlement were effectually fastened upon both the Consols & money. —*AIREY v. HALL* (1850), 3 Sm. & G. 315; 27 L. T. O. S. 196; 2 Jur. N. S. 658; 4 W. R. 587; 65 E. R. 675.

*Annotation*:—*Refd.* *Dilrow v. Bone* (1862), 3 Giff. 338.

**114. — Direction to debtor to pay beneficiaries.**—Testator, who had bequeathed two legacies of £50 & £200 afterwards, in order to avoid legacy duty, revoked the legacies, & verbally instructed F., who owed him £300 secured by a deposit of title deeds, to pay similar sums to the legatees, adding that one of the donees was to "hold the writings." F. accepted the trust, but the deeds remained in the custody of the donor:—*Held*: notwithstanding the retention of them by the donor, a valid trust was effectually created in favour of the donees. —*PARKER v. STONES* (1868), 38 L. J. Ch. 46; 19 L. T. 259.

**115. — Settlor declaring himself a trustee.**—*RICHARDS v. DELBRIDGE*, No. 107, *ante*.

**116. —**—[A declaration of trust in a deed stating that settlor, or other the trustee or trustees of the deed, would stand seised of the property comprised therein upon trust for sale & to hold the proceeds when invested upon the trusts therein mentioned, is sufficient to divest settlor of all interest in the property settled; & if settlor is proved to have been solvent without the aid of the settled property at the date of the settlement, it is valid on settlor's bkpcy. within ten years of the settlement, against the trustee in bkpcy., notwithstanding that there is no actual transfer of the property to a trustee or trustees. — *SHRAGER v. MARCH*, [1908] A. C. 402; 77 L. J. P. C. 105; 99 L. T. 33; 24 T. L. R. 611; 52 Sol. Jo. 580; 15 Mans 310.

*Annotation*:—*Refd.* *Re Mathieson*, [1927] 1 Ch. 283.

**Incomplete gift inter vivos.**—*See, generally*, *GIFTS*, Vol. XXV., pp. 529–543.

(c) *Letters, Entries, and Memoranda.*

i. *Letters.*

**117. Instructions as to separate account**—"Subject to my control alone."—C., M., & J. in 1829 mortgaged certain estates & plantations, of which they were joint owners in equal shares, to F. & co. of Bombay, as a security for advances with interest, the repayment being further secured by the joint

& several covenants of C., M., & J. The estates were for a long time not cultivated to a profit. In 1830 the firm of F. & co. was reduced to two partners only, C. & J. In 1836 the interest charged in the books of F. & co., in account with the proprietors of the estates, was directed to be divided under two heads, one being carried to an account called "reserved interest account" & the amount of the balance of this account was to be held subject to the instructions of C. Both the partners concurred in these directions thus given to F. & co. In 1837 both the partners concurred in another letter to F. & co. of Bombay, directing that as to the portion of the interest thus passed to the "reserved interest account" part of it should be carried to a new account to be intitled "C. for himself, M., & J.," & in such letter it was further directed that the balance of such new account was to be subject to the control of C. alone, & that in the absence of other instructions from C., it was to be applicable towards the liquidation of the account of the proprietors of the estates in question, for which the three proprietors, C., M., & J. were responsible. In 1839 M. died. In 1840 estates sold for more than enough to liquidate all demands of the mtgees. In 1841 C., with the concurrence of J., directed one-third of the balance at the credit of the account "C. for himself, M., & J." to be paid to himself another third to J. & the remaining one-third to be retained subject to the future instructions of C. In 1843 C., with the like concurrence of J., directed F. & co. of Bombay to remit the remaining one-third to London subject to his orders, & stated his intention to be to hand it over to the family of the late Mr. M. in such manner as he might think proper. The fund was accordingly remitted to F. & co. of London "subject to the orders of C." & so remained up to the decease of C. C. died in 1849, without having ever made any further disposition of the fund. On a bill by the widow & extrix. of M.:—*Held*: (1) by the letter of 1836 there was no declaration of trust or other clear appropriation of the fund, for the benefit of C., M., & J. in equal shares, which would have entitled M. to file a bill for his share; (2) by the letter of 1837 there was no declaration of trust, or clear expression of intention which would enable the family of M. to make a claim.

*Semble*: the expressions enabling C. to retain the control over the balance of this account, though used with the full knowledge of J., would not authorise C. to appropriate the whole balance to his own use, irrespective of the rights of J.

*Semble*: the letter of 1836 did not amount to a declaration of trust in favour of C., M., & J. generally with a power of revocation & new appointment in C. but rather to a contingent declaration in favour of C., M., & J. in one event only, viz. a deficiency on a realisation of the estates; & there being

portation for life, presented a petition in the revenue ct. in which, stating that he owned a certain zamindari estate, that he had been so sentenced & that it was necessary to make arrangements for the payment of the Govt. revenue & the management of the estate, he prayed that his name might be removed from the revenue registers, & that of P. be recorded in its stead:—*Held*: the transfer of the property by R. to P. was in the nature of a trust. —*HART RAM v. DURGA PRASAD* (1883), 1 L. R. 4 All. 609.—*IND.*

**PART I. SECT. 3, SUB SECT. 2.—**  
A. (i).

c. *Letter in reply to attorney's letter*—Attorney's letter "uncandid & not stating law or facts properly."—TEN J.—VOL. XLIII.

*NANT v. BELL* (1868), 5 W. W. & A'B. 46.—*AUS.*

d. *Will not referring to letter shown to creditors.*—*Re DOIG, CARTER v. GRAMSCH*, [1916] V. L. R. 698.—*AUS.*

e. *Letter using words "our, we, you, I, us"*—*Trust raised by implication.*—*GILMORE v. GRITS* (1904), 7 Terr. L. R. 225.—*CAN.*

f. *Whether parol evidence admissible to establish trust.*—*GORDON v. HANDFORD* (1906), 16 Man. L. R. 292.—*CAN.*

g. *Property purchased by partner—Letter showing that property bought for creditors.*—*JOHNSON v. PERRIN* (1831), Haycs, 322.—*IR.*

h. *Agreement to pay premium on policy.*—W. assigned a leasehold house

to J., upon trust, leaving to W. a resulting interest in the residue of the rents. W. afterwards gave Lt., a creditor, the following letter:—"I have handed you a policy of insurance as a collateral security for my debt; the premiums on said policy to be paid out of the balance of the profit rent arising from the house assigned to J." On this letter J. endorsed:—"I agree to pay the premium of the within-mentioned policy to R., out of the profit rent arising from the said house."—*Held*: these documents amounted to a complete declaration of trust, & that no consideration was required to give them validity. —*WOODROFFE v. JOHNSON* (1854), 4 I. Ch. R. 319.—*IR.*

k. *Charge on lands made by guarantor.*—*WILCOCKS v. HANNYNGTON*

*Secl. 3.—Creation of trusts: Sub-sect. 2, A. (c) i, ii. & iii.]*

ultimately no deficiency, there never had been any positive declaration.—*FORBES v. FORBES* (1857), 30 L. T. O. S. 176; 3 Jur. N. S. 1206; 6 W. R. 92.

**118. —Series of letters—Fund remaining in control of settlor.]**—*A. V.*, a merchant in China, directed his correspondents in London to transfer £1,000 from his tea account, & employ it in exchange transactions for the benefit of his children. In subsequent letters he wrote to the same correspondents "that he had declined giving any opinion as to the reinvestment of the fund, as he considered he had no further control over it, as it belonged to his children," "that he had appropriated it to them, & his correspondents were to consider it as theirs." The correspondents accordingly opened a separate account, headed "*A. V., Esq.*, exchange account on account of children," previously informing him of their intention so to do:—*Held*: by the first letter a trust was well created in favour of the children, although the fund was still so far in the control of *A. V.* as to be liable to his drawing: & notwithstanding *A. V.*, in one of the letters, had desired his correspondents to consider it as "subject to the order of his exors." in the event of his death.—*VANDENBERG v. PALMER* (1858), 4 K. & J. 204; 32 L. T. O. S. 87; 70 E. R. 85.

**119. Letter referring to intention to create a trust.]**—Testator gave certain legacies to *A. M.* by his will, & by a codicil thereto bequeathed to him a stud of horses & a sum of £10,000 in terms importing an absolute gift which he, testator, declared to be "in addition to all the benefits given to him by my will." But by a letter addressed to & duly received & answered by *A. M.*, testator stated that he had left a letter with his solr. expressing a wish that the sum of £10,000 which he described as left for that purpose, should be settled on *H. M.* & *F. M.* for their joint use in the event of their intermarrying. No such letter was left with his solr. or any one else:—*Held*: that the £10,000 was bequeathed upon trust, & *A. M.* could not in any event take it beneficially.—*BAILLIE v. WALLACE* (1869), 17 W. R. 221.

**120. Debentures transferred to three persons—Letter to solicitor declaring trust.]**—*B.*, in 1842, transferred to three persons a debenture, without any declaration of trust other than an expression in a letter written by him to his solr. shortly before the transfer, in which the three persons were named as trustees, & the trusts of a proposed settlement of the debenture were stated to be "for my niece *Mrs. C. M.* & her children":—*Held*: a valid trust was declared by the letter in favour of *C. M.* for life, & afterwards of her children as joint tenants.—*Re BELIASIS' TRUST* (1871), L. R. 12 Eq. 218; 24 L. T. 466; 19 W. R. 699.

*Annotation:—Reid. Brennan's Trustees v. Scanlan* (1925), 9 Tax Cas. 427.

**121. Document of testamentary nature—Receipt.]**—*NORTH v. MEDLEY* (1891), 8 T. L. R. 141.

(1855), 5 I. Ch. R. 38; 7 Ir. Jur. 281. —IR.

1. *Letter written as to rents & profits of estate.]*—*M'KEAN v. GRAY* (1855), 7 Ir. Jur. 317.—IR.

m. *Letter amounting to testamentary disposition.]*—*A* paper writing in the form of a letter & commencing "My dear C.—This is my last will & letter to you" contained the expressions

"I have invested this . . . to save you the trouble & expense of taking out administration," & "I leave my plate & the family plate to T." The existence of the document was never communicated to the beneficiaries:—*Held*: the language & the circumstances connected with it indicated an intention that it should operate as a testamentary disposition & that it

ii. *Entries in Books.*

**122. Sum entered to "trustee account"—As "private property" of beneficiary.]**—*W. E.*, a partner in the firm of *S., E. & co.*, previously to Apr. 1854, advanced to the firm certain moneys, some of which were standing in the books to the credit of an account intitled "*W. E.'s Trustee Account*," & others to his private account. *Defts. M. & C. F.* had in that month certain sums belonging to them standing in the books of the firm to their credit. On Apr. 1854, *W. E.* transferred a sum of £2,700 from his trustee account to *M. & C. F.'s* account, by entries in the books of the firm, & on the same day, *S., E. & co.* signed a promissory note for that amount, which bore interest at 5 per cent., & gave it to *W. E.*, who placed it in an envelope, upon which he wrote, "This note of hand stands to the credit of *M. & C. F.* in the books of *S., E. & co.*, & is to be the property of *Mrs. E.*" *W. E.* in the presence of *Mrs. E.*, told *M. F.* that he had got a security from his firm for his wife's money; that the note of hand securing it was in the joint names of her & her sister *C. F.*, & that they were to recollect that it was his wife's money, & not theirs. *W. E.*, in Sept. 1854, without the knowledge or consent of *pltf.* or of *M. & C. F.*, transferred the said sum from *M. & C. F.'s* account to his own "trustee account" & at the same time wrote across the above memorandum, "The within amount of £2,700 is transferred to *W. E.'s* trustee account, but it is to be considered the private property of *Mrs. E.*" *W. E.*, by his will dated in June, 1853, after bequeathing an annuity to his wife of £1,000, gave the residue of his estate to his niece. No reference was made to the £2,700. *W. E.* died in 1856, & at his decease only £2,661 18s. 6d. was standing to the credit of his "trustee account" in the partnership books. On bill filed by *Mrs. E.*, the ct. declared that a valid trust had been created for her sole & separate use, & that she was entitled to the sum of £2,700, with interest at 5 per cent. from the death of her husband.—*EVANS v. JENNINGS* (1858), 32 L. T. O. S. 34; 4 Jur. N. S. 551; 6 W. R. 616.

*Annotation:—Reid. Re Pryce, Nevill v. Price*, [1917] 1 Ch. 234.

**123. Appropriation of future proceeds of annuity.]**—Testator entered in a memorandum book, & signed a memorandum, that he had decided to invest the future proceeds of an annuity which had been absolutely assigned to him by his second son *F.*, & that he intended to leave the proceeds at his death to *F.'s* daughter.

An account, also in testator's handwriting, was found of the investments of the annuity "from the period that I determined thus to appropriate this money."

On his death bed testator referred his eldest son to the account book, & said that he wished the accumulations to be given to the daughter of *F.*, & the annuity at his death to revert to *F.* The annuity & accumulations were undisposed of by the will:—*Held*: there was no declaration of trust, & the annuity & accumulations went to the next of kin.—*Re GLOVER* (1862), 2 John. & H. 186; 70 E. R. 1023.

**124. Declaration in residuary account—Re-**

was not a declaration of trust.—*TOWERS v. HOGAN* (1889), 23 L. R. 1r. 53.—IR.

PART I. SECT. 3, SUB-SECT. 2.—A. (o) ii.

n. *Entry in company's books of appropriation of shares.]*—*NARRONDAS v. NARRONDAS* (1907), 1 L. R. 31 Bom. 418.—IND.

tained to pay outstanding legacies—Payment of interest by executor.]—T. G. by his will, bequeathed a legacy of £500 to W. G. to be paid after the death of testator's wife. Testator died in 1863, & a residuary account was passed then, & also on the death of the widow in 1875. The account contained, on both occasions, the item "Retained to pay outstanding legacies to William Glover, £500." Deft., the acting exor., became trustee of a marriage settlement which comprised the £500, & continued to pay interest on the sum of £500 to the beneficiary until 1884, when he, for the first time alleged insufficient assets & declined to continue such payment:—*Held*: the item in the residuary account, coupled with the continued payment of interest, was equivalent to a declaration of trust, & the exor. could not now, in an action to make him liable for the £500, be permitted to adduce evidence to show that the residuary account was erroneous.—*BREWSTER v. PRIOR* (1886), 55 L. T. 771; 35 W. R. 251; 3 T. L. R. 205.

125. — *Intention to retain for use of beneficiary.*—A. bequeathed her residuary personalty to her nephew J. & appointed her sister B. extrix. B. apparently thinking there was an intestacy as to the residue in the residuary account prepared for the revenue authorities, declared it was correct, & offered to pay duty on a certain sum as "being the said residue & moneys to which I am entitled, & intend to retain to my own use & for the use of J., being a sister & a descendant of a brother of deceased":—*Held*: B. had not thereby declared a trust of the residue for J. so as to prevent Stat. Limitations from running against J.—*Re ROWE, JACOBS v. HIND* (1889), 58 L. J. Ch. 703; 61 L. T. 581, C. A.

*Annotations*:—*Fold*. *Re Gompertz*, *Parken v. Gompertz* (1911), 105 L. T. 664. *Reid*. *Re Lacy*, Royal General Theatrical Fund Assocn. v. Kydd, [1899] 2 Ch. 149; *Re Mackay*, *Mackay v. Gould*, [1906] 1 Ch. 25; *Re Gompertz's Estate*, *Parker v. Gompertz* (1910), 55 Sol. Jo. 76.

126. — [A residuary account] is not a document which is intended to have the operation of a declaration of trust (*LORD HALDANE, C.*).—*ATTENBOROUGH v. SOLOMON*, [1913] A. C. 76; 82 L. J. Ch. 178; 107 L. T. 833; 29 T. L. R. 79; 57 Sol. Jo. 76; *affg.* S. C. *sub nom.* *SOLOMON v. ATTENBOROUGH*, [1912] 1 Ch. 451, C. A.

*Annotations*:—*Mentd.* *Hewson v. Shelley* (1913), 82 L. J. Ch. 551; *Re De Leeuw*, *Jakens v. Central Advance & Discount Corp'n.*, [1922] 2 Ch. 540; *Wise v. Whitburn*, [1924] 1 Ch. 460.

127. Entries in accounts of executors—Funds earmarked for persons interested.]—Exors., although not trustees under the provisions of the will by which they are appointed, may become express trustees by reason of entries in their accounts earmarking certain sums as held for or on account of the persons interested.—*Re GOMPERTZ ESTATE, PARKER v. GOMPERTZ* (1910), 55 Sol. Jo. 76.

128. — [The mere fact that an exor., who is not also appointed a trustee by the will, retains a fund to answer the claim of a particular next of kin, is not enough to turn the exor. into an express trustee of the fund, but if, in addition, he earmarks the fund as the fund of the particular next of kin & uses express words which show that he intends to hold the fund not for himself but for persons entitled to it, he does become an express trustee of the fund.—*Re GOMPERTZ*,

*PARKEN v. GOMPERTZ* (1911), 105 L. T. 664; 56 Sol. Jo. 11.

129. Private accounts of defaulting trustee—Pencil entry.]—In all cases where it is alleged that a defaulting trustee has appropriated securities to make good his breaches of trust, & a declaration of trust is relied on, the ct. must be satisfied that a present irrevocable declaration has been made.

The ct. refused to accept as evidence of such a declaration of trust pencil entries in private accounts kept by the defaulting trustee never communicated to any one, & which in some cases appeared to have been altered.

*Semble*: the absence of communication in itself raises a strong inference against an intention to make the appropriation irrevocable.—*Re COZENS, GREEN v. BRISLEY*, [1913] 2 Ch. 478; 82 L. J. Ch. 421; 109 L. T. 306; 57 Sol. Jo. 687.

*Annotation*:—*Consd.* *Ridcliffe v. Abbey Road & St. John's Wood Permanent Bldg. Soc.* (1918), 87 L. J. Ch. 557.

Money in hands of banker.]—*See BANKERS & BANKING*, Vol. III., pp. 184, 185, Nos. 354–359.

### iii. Memoranda.

130. Purchase of land by trustee—Admission that purchase made from trust funds.]—Where A. receives a sum of money, which he covenants to lay out in land to be settled to certain uses, & afterwards purchases an estate which he does not settle, but does by writing own that this purchase was made with the trust money, this binds the estate, & is a declaration of trust.—*DEG v. DEG* (1727), 2 P. Wms. 412; 24 E. R. 791, L. C.

*Annotations*:—*Mentd.* *Baily v. Ploughman* (1729), Mos. 95; *Hall v. Kendall* (1730), Mos. 328.

131. Promise to declare trust.]—A. being in possession of the office of clerk of the Crown, etc., in the K. B., in which B. has also an estate for life, procures B. to surrender, & solicits a patent for himself & C., & takes a note from C. promising to declare a trust for A. The patent afterwards is obtained; A. dies in debt, & without calling for a declaration of this trust; this note was held to be a sufficient declaration of trust.—*BELLAMY v. BURROW* (1735), Cas. temp. Talb. 97; 25 E. R. 684, L. C.

*Annotations*:—*Consd.* *Layng v. Paine* (1745), Willes, 571; *Garforth v. Pearson* (1787), 1 Hy. Bl. 327. *Reid*. *Schellenger v. Blackley* (1749), Belk. Sup. 161. *Mentd.* *Law v. Law* (1735), Cas. temp. Talb. 140.

132. Receipt—"For the use of" cestui que trust.]—A receipt in the following form: "Received of D., for the use of A., £100, to be paid to A. at D.'s death, but interest at £1 per cent. to be paid to D."—*Held*: a sufficient declaration of trust *inter vivos*.—*MOORE v. DARTON* (1851), 4 De G. & Sm. 517; 20 L. J. Ch. 626; 18 L. T. O. S. 24; 64 E. R. 938.

*Annotations*:—*Consd.* *Paterson v. Murphy* (1853), 11 Hare, 88. *Reid*. *Tate v. Letthead* (1854), Kay, 658; *Re Dillon*, *Duffin v. Duffin* (1890), 44 Ch. D. 76; *Re Andrews*, *Andrews v. Andrews*, [1902] 2 Ch. 394; *Re Weston*, *Bartholomew v. Menzies*, [1902] 1 Ch. 680; *Re Kirkley*, *Cort v. Watson* (1909), 25 T. L. R. 522.

133. Memorandum with deposit of document—Mortgage by deposit of title deeds—Direction to mortgagor as to investment of instalments payable—For benefit of named persons.]—A lady, who had lent a sum of money on an equitable mtge. by a deposit of title deeds, signed a memorandum accompanying the deposit, which expressed that the mtgor. should pay off the mtge. debt by certain quarterly instalments, & after paying a specified

### PART I. SECT. 3, SUB-SECT. 2.—A. (a) iii.

o. Memorandum acknowledging custody of Government securities.]—Deceased by memorandum in writing

dated Nov. 15, duly acknowledged that he held certain Govt. securities in trust for certain named persons, who were his nephews & nieces or grand-nephews & grand-nieces. The

memo., together with all except one of the securities mentioned, which had been sold, was deposited in a box with deceased's bank. The interest received on all the securities mentioned

*Sect. 3.—Creation of trusts: Sub-sect. 2, A. (c) iii., & (d) & (e).]*

amount to the mtgee. should invest the remaining instalments in Consols for the benefit of the children of A. The mtgee. subsequently signed another memorandum, directing the mtgor. to continue to pay the instalments of the debt to her, & not invest them in Consols as before directed. Both of these documents were made in the handwriting of the mtgor., under the directions of the mtgee., & the mtgor. thereby had notice of them; & it was held, in a suit for the administration of the estate of the mtgee., that, by the effect of the first memorandum & the notice thereof to the mtgor., he became a trustee for the children of A. of the moneys directed to be invested in Consols; & that the first memorandum constituted a voluntary declaration of trust, which the mtgee. could not revoke, & to the benefit of which the children of A. were entitled as against the next of kin of the mtgee.—*PATERSON v. MURPHY* (1853), 11 Hare, 88; 22 L. J. Ch. 882; 21 L. T. O. S. 86; 17 Jur. 298; 68 E. R. 1198.

*Annotations:—**Reid, Petty v. Petty* (1853), 22 L. J. Ch. 1065; *Lambe v. Orton* (1860), 8 W. R. 202; *Re Chrimes, Loeovich v. Chrimes*, [1917] 1 Ch. 30.

**134. — By defaulting trustee.]**—A sole trustee, who had appropriated £4,000, part of the trust property, deposited in the box in which he kept the trust deed & the securities for other portions of the trust funds two policies of assurance, one on his own life for £2,000, the other on the life of his father for £3,000, inclosing them in an envelope with a memorandum that, "in the event of his" (the trustee's) "death," the amount of the inclosed policies was to be applied to the repayment of £4,000 borrowed by him of the *cestui que trust*. Six years afterwards the trustee became bkpt. The policy for £2,000 was found by the officer of the Ct. of Bkpcy. inclosed with the memorandum in the box, the other policy having been paid to the bkpt. upon his father's death:—*Held*: as between the *cestui que trust* & the assignees in bkpcy., notwithstanding the words, importing contingency, the memorandum was a valid declaration that the policy was in any event subject to the trusts of the settlement.—*Re BANKHEAD'S TRUST* (1856), 2 K. & J. 560; 4 W. R. 589; 69 E. R. 905.

**135. — —.]**—Bkpt. shortly before his bkpcy. deposited certificates of shares in a box with memoranda to the effect that they were deposited as securities for the moneys due to several trust estates. The certificates remained in his custody & control, & the transaction had not been communicated to the beneficiaries:—*Held*: the transaction constituted a good declaration of trust in respect of the shares in favour of the trust estates.—*NEW, PRANCE & GARRARD'S TRUSTEE v. HUNTING*, [1897] 2 Q. B. 19; 66 L. J. Q. B. 554; 76 L. T. 742; 45 W. R. 577; 13 T. L. R. 397; 41 Sol. Jo. 511; 4 Mans. 103, C. A.; *affd. sub nom. SHARP v. JACKSON*, [1899] A. C. 419, H. L.

*Annotations:—**Apld.* *Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon*, [1901] 2 Ch. 231; *Re Pidecock, Penny v. Pidecock* (1907), 51 Sol. Jo. 514. *Consd.* *Wigan v. English & Scottish Law Life Assce. Assoon.*, [1909] 1 Ch. 291; *Re Cozens, Green v. Brisley*, [1913] 2 Ch. 478. *Apld.* *Radcliffe v. Abbey Road & St. John's Wood Permanent Bldg. Soc.*, (1918), 87 L. J. Ch.

in the memo. had been paid by deceased until shortly before his death to the persons named:—*Held*: the memo. created a valid & enforceable trust in favour of the named persons, & the proceeds of the security sold were subject to the like trust.—*Re HAMPTON*, [1922] S. A. S. R. 286.—*AUS.*

*p. Statement recorded in village record-of-rights.*—*KAMAL SINGH v. BATUL FATIMA* (1879), 1 L. R. 2 All. 460.—*IND.*

*q. —.]*—*BARAKAT v. DAULAT* (1892), 1 L. R. 4 All. 187.—*IND.*

*r. Memorandum that lease on death of lessee should become property of another.*—*KELLY v. WALSH* (1878), 1

557. *Refd.* *Re Blackpool Motor Car Co., Hamilton v. Blackpool Motor Car Co.*, [1901] 11 Ch. 77; *Re Lake, Ex p. Dyer*, [1901] 1 K. B. 710. *Mentd.* *Hermoux v. Harbord* (1898), 14 T. L. R. 243; *Re Blackburn, Buckley's Case*, [1899] 2 Ch. 725; *Re Vautin, Ex p. Saffery*, [1900] 2 Q. B. 325; *Re Cohen, Ex p. Trustee*, [1924] 2 Ch. 515; *Re Hoyle, Ex p. Trustee*, [1924] B. & C. R. 22; *Re Drage, Palmer & Roberts v. Knight* (1920), 134 L. T. 765.

**136. — By defaulting solicitor.]**—Solr. to a trust misappropriated the trust funds & subsequently in part discharge of his liability signed a declaration of trust appropriating to the trust property of his own which was in mtge. to debt. society. Solr. died insolvent & the trustees now claimed to redeem the mtge.:—*Held*: they were entitled to do so, the declaration not being revocable & not being void under either 13 Eliz. c. 5, or Deeds of Arrangement Act, 1914 (c. 47), s. 1.—*RADCLIFFE v. ABBEY ROAD & ST. JOHN'S WOOD PERMANENT BUILDING SOCIETY* (1918), 87 L. J. Ch. 557; 119 L. T. 512; 62 Sol. Jo. 607; [1919] B. & C. R. 84.

**137. —.]**—M. was adopted by C., her deceased mother's first cousin, & lived with her twelve years. C. then wrote to T. informing him of her intention to invest £1,800 on mtge. in his name, saying, "It is after six months of my decease dear M.'s property." The next day she instructed her solrs., by letter, to prepare the mtge., inclosing a cheque for the amount, on the counterfoil of which she wrote, "In trust for M." Twelve days after she had an interview with T., of which she entered this memorandum in her diary: "T. came, & agreed to take charge of £1,800 for dear M."—*Held*: the above several documents in the handwriting of C., combined with the relationship & adoption of M., constituted a complete & final declaration of trust in favour of M., which could not admit of any parol variation by T.'s present recollections of what passed at the interview.—*Re CAENE'S TRUSTS* (1867), 36 L. J. Ch. 744; 17 L. T. 112.

**138. Memorandum given to beneficiary.]**—A memorandum of a voluntary gift in this form, "I hereby give & make over to M. an India bond, value £1,000," was signed by S., & given by him to M., without handing over the bond. S. died, & the residuary legatees under his will claimed the bond:—*Held*: the memorandum was a good declaration of trust in favour of M., & he was entitled to the bond.—*MORGAN v. MALLESON* (1870), L. R. 10 Eq. 475; 39 L. J. Ch. 680; 23 L. T. 336; 35 J. P. 37; 18 W. R. 1125.

*Annotations:—**Dbtd.* *Warriner v. Rogers* (1873), L. R. 16 Eq. 340. *N.F.* *Richards v. Delbridge* (1874), L. J. 18 Eq. 11. *Foll.* *Baddeley v. Baddeley* (1878), 9 Ch. D. 113. *Refd.* *Re King, Sewell v. King* (1879), 14 Ch. D. 170; *Re Breton's Estate, Breton v. Woolven* (1881), 17 Ch. D. 416; 1 R. Comrs. v. Allan (1925), 9 Tax Cas. 234.

—*See, also*, Nos. 104, 107, 123, ante.

**139. Memorandum authorising claim by beneficiary—After death of person making—Memorandum retained until death.]**—Testator, after making certain dispositions of his property by his will, executed the following memorandum: "I authorise my brother R. to claim as his after my death the sum of £150 out of the money now lying in the bank at Carlisle, for the service rendered me during my lifetime." Testator retained possession of the document until his death:—*Held*: in the administration of his estate, the document was a valid declaration of trust.—*ARMSTRONG v. TIMPERON* (1871), 24 L. T. 275; 19 W. R. 558.

L. R. Ir. 275.—*IR.*

*r. Receipt.]*—*BROGAN v. PUBLIC TRUSTEE* (1915), 34 N. Z. L. R. 548.—*N.Z.*

*a. Memorandum revoking all former settlements.]*—*BAIRD v. JAAP* (1850), 18 Dunal. (Ct. of Scse), 1246; 28 Sc. Jur. 626.—*SCOT.*



**140. Indorsement on envelope containing bonds.]**—Deft., an illiterate woman, having wrongfully possessed herself of certain bonds belonging to the estate of testator, whose exor. pltf. was, was ordered to repay the proceeds of the sale of the bonds, although there was much doubt as to the equitable jurisdiction of the ct. in such a case.

It was alleged by the deft. that testator, by whom she had several illegitimate children, had shown her an envelope containing the bonds & bearing an indorsement to the effect that they were to be delivered to her as the property of her & her children. The envelope was lost, & testator had always retained possession of the bonds:—*Held*: there was some foundation of truth in the story of deft., though uncorroborated, & such an indorsement would have created a trust for her & her children, which, though a slight equity, might give the ct. jurisdiction.—*INGLIS v. PASCO* (1873), 27 L. T. 818.

(d) *Money of Trustee added to Trust Fund.*

**141. Moneys invested impressed with trust—Admission that aggregate fund held in trust—Parent trustee for children.]**—Testatrix gave her personal estate to B. for the benefit of B.'s daughters. B. invested the produce, together with £1,000 of his own moneys, in the funds in his own name, & afterwards treated & admitted the aggregate fund as held in trust for his daughters. On the death of B. the fund was found mixed with like funds of his own:—*Held*: under the circumstances, there was sufficient to constitute a trust of the £1,000 in favour of the daughters.—*THORPE v. OWEN* (1842), 5 Beav. 224; 11 L. J. Ch. 129; 49 B. R. 563.

**142. — Intention of testator to give further sum—Intention effectuated by trustee.]**—Testatrix gave to A. & B., in trust for the benefit of C., her sister, a sum of £2,000 3 per cent. Consols. She afterwards expressed to B., whom she also appointed her extrix., an intention that C. should have a further sum of £2,000 Consols. but she did not alter her will. A. died in her lifetime: after her death B., the surviving trustee & extrix., sold £2,000 consols, & invested the produce in her name in the 3 per cent. Reduced, & shortly afterwards she invested a further sum of £2,000 3 per cent. Reduced in her name: she was proved to have declared frequently her intention of carrying out testatrix's intention:—*Held*: the second sum of stock was duly impressed with a trust in favour of C.—*GRAY v. GRAY* (1852), 2 Sim. N. S. 273; 21 L. J. Ch. 745; 20 L. T. O. S. 23; 61 E. R. 345.

(e) *Other Cases.*

**143. Power of attorney.]**—The other question involves . . . whether the power of attorney amounts here to a declaration of trust? It is clear, that this Ct. will not assist a volunteer: yet, if the Act is completed, though voluntary, the ct. will act upon it (*LORD ELDON, C.*)—*Ex p. PYE, Ex p. DUBOST* (1811), 18 Ves. 140; 34 E. R. 271, L. C.

*Annotations:—**Distd. Cotton v. Missing* (1815), 1 Madd. 176; *Meek v. Kettlewell* (1842), 1 Hare, 464; *Apld. M'Fadden v. Jenkyns* (1842), 1 Hare, 458; *Kekewich v. Manning* (1851), 1 De G. M. & G. 176; *Weale v. Ollive* (1853), 17 Beav. 252. *Consd. Airey v. Hall* (1856), 3 Sm. & G. 315.

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A. (e).

declaration of trust within the meaning of R. S. O. 1887, c. 136, s. 5.—*McKIBBON v. FEEGAN* (1893), 21 A. R. 87.—*CAN.*

c. *Consent to accept equal share of property with next-of-kin.]—MILLER v.*

*Richardson* (1867), L. R. 3 Eq. 686; *Warriner v. Rogers* (1873), L. R. 18 Eq. 340. *Reid. Hooper v. Goodwin* (1818), 1 Swan. 485; *Edwards v. Jones* (1836), 1 My. & Cr. 226; *Hughes v. Stubbs* (1842), 1 Hare, 476; *Griffith v. Ricketts*, *Griffith v. Lunell* (1849), 7 Hare, 299; *Price v. Price* (1851), 14 Beav. 598; *Dipple v. Corles* (1853), 11 Hare, 183; *Donaldson v. Donaldson* (1854), Kay, 711; *Tierney v. Wood* (1854), 19 Beav. 330; *Parnell v. Hingston* (1856), 3 Sm. & G. 337; *Forbes v. Forbes* (1857), 3 Jur. N. S. 1206; *Peckham v. Taylor* (1862), 31 Beav. 250; *Forrest v. Forrest* (1865), 34 L. J. Ch. 428; *Grant v. Grant* (1865), 34 Beav. 623; *Penfold v. Mould* (1867), L. R. 4 Eq. 562; *Carter v. Hungerford* (1916), 115 L. T. 857. *Mentd. Wetherby v. Dixon* (1815), Coop. G. 279; *Colvin v. Fraser* (1829), 2 Hag. Ecc. 266; *Platt v. Platt* (1830), 3 Sim. 503; *Wharton v. Durham* (1834), 3 My. & K. 472; *Powys v. Mansfield* (1837), 3 My. & Cr. 359; *Pym v. Lockyer* (1841), 5 My. & Cr. 29; *Walker v. Jeffreys* (1842), 1 Hare, 341; *Suisse v. Lowther* (1843), 2 Hare, 424; *Kirk v. Eddowes* (1844), 3 Hare, 509; *Thomas v. Thomas* (1850), 8 W. R. 71; *Tucker v. Burrow* (1865), 2 Hem. & M. 515; *Chichester v. Coventry* (1867), L. R. 2 H. L. 71; *Bennet v. Bennet* (1879), 10 Ch. D. 474; *Harding v. Harding* (1886), 17 Q. B. D. 442; *Montagu v. Sandwich* (1886), 32 Ch. D. 525; *Re Hamlet, Stephen v. Cunningham* (1888), 38 Ch. D. 183; *Re Lacon, Lacon v. Lacon*, [1891] 2 Ch. 482; *Re Ashton, Ingram v. Papillon*, [1897] 2 Ch. 574; *Re Jaques, Hodgson v. Brailsley*, [1903] 1 Ch. 267; *Re Roby, Howlett v. Newington*, [1908] 1 Ch. 71; *Re Dawson, Swainson v. Dawson*, [1919] 1 Ch. 102.

**144. Direction to cut trees—In aid of testator's real & personal estate.]**—Direction to trustees to cut trees in aid of testator's real & personal estate held not a trust, but a mere power, upon the whole of the will.—*GOWER v. EYRE* (1815), Coop. G. 156; 35 E. R. 514.

**145. Instructions for settlement—After expression of intention to settle—In conversation with executor—Instructions given by executor.]**—A mother, entitled to a considerable property under the will of a relation, in a conversation with the exor. of that relation, expressed an intention to make a settlement of part of that property, which was standing in his name, upon her daughter, & requested the exor. to instruct her solr. to prepare such a settlement; on the prepared settlement being brought to her for execution, she had changed her mind, & refused to sign it:—*Held*: her intention, expressed in the conversation with the exor. of her relation, did not amount to a declaration of trust, although the property was personal estate.—*BAYLEY v. BOULCOTT* (1828), 4 Russ. 345 38 E. R. 835.

*Annotations:—**Apld. M'Fadden v. Jenkyns* (1842), 1 Hare, 458. *Consd. Drosler v. Brereton* (1851), 15 Beav. 221. *Reid. Kekewich v. Manning* (1851), 1 De G. M. & G. 176.

**146. — Death before seeing settlement—& before stock transferred to trustees.]**—A person who was entitled to certain stock standing in the names of two trustees gave instructions to his attorney to prepare a settlement of it for the benefit of A., B. & C., & to procure from the trustees a transfer for the purposes of settlement. The settlement was prepared, & a power of attorney for the transfer of the stock executed by both the trustees, but the intended settlor died without having seen the settlement, & before the stock was actually transferred:—*Held*: no trust of the stock was constituted for A., B. & C.—*CONINGHAM v. PLUNKETT* (1843), 2 Y. & C. Ch. Cas. 245; 63 E. R. 108.

**147. — Signature of proposed heads of settlement.]**—A. & C. were married at Malta. Shortly after their marriage a paper was sent out from England by the advisers of C., the wife, headed as "proposals for a settlement upon the intended marriage of A. & C.," & containing certain terms upon which C.'s fortune was to be settled; amongst

*HARRISON* (1871), 5 I. R. Eq. 324.—*IR.*

d. *Agreement to permit person to purchase property without interference.]*—Pltf. purchased a farm, having agreed with deft. that, if pltf. were permitted



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others, that if no child of the marriage, the property to be disposed of by C. by will; if no disposition by her will, to go to her next of kin. This paper was signed by A. & C., but nothing further done by way of settlement. Soon after the marriage C. died intestate, without having had a child:—*Held*: A., who had taken out administration to C., & possessed himself of her property, in which was included a reversionary interest, was entitled to it for his own benefit, no declaration of trust in favour of the next of kin having been created by this agreement to execute a future instrument.—*POWELL v. ANDERSON* (1856), 2 Jur. N. S. 857; 4 W. R. 407.

**148. Direction by cestui que trust to trustee—To pay dividends—For maintenance of infant—Infant stranger to cestui que trust.**—A. the *cestui que trust* of money in the hands of a trustee, by deed, without consideration, directed part of the dividends to be paid by him for the maintenance of an infant, a stranger to A. & covenanted to indemnify him, & agreed to allow the same out of the dividends of the trust fund. The trustee accepted the new trust, & acted upon the deed:—*Held*: there was a valid executed trust created, which A. could not revoke.—*RYCROFT v. CHRISTY* (1840), 3 Beav. 238; 4 Jur. 599; 49 E. R. 93.

*Annotation*.—*Reid*, *Re Chrimmes, Locovich v. Chrimmes*, [1917] 1 Ch. 30.

**149. Instructions to donee of cheque—To apply part in increase of legacy—Legacy given to another—No alteration in will.**—Testatrix drew a cheque on her bankers for £150 in favour of A., & she verbally directed A. to apply that sum or so much of it as might be necessary to make up to a legatee the difference in value between a legacy of £100, which testatrix, by her will, had given to the legatee, & the price of a £100 share in a certain railway; testatrix informing A. that she intended to give the share instead of the legacy, but she did not think it necessary to alter her will. The bankers gave credit to A. for the £150. Testatrix afterwards died. In a suit for the administration of her estate:—*Held*: no trust in respect of the £150 was created for the benefit of the legatee.—*HUGHES v. STUBBS* (1842), 1 Hare, 476; 6 Jur. 831; 60 E. R. 1119.

*Annotations*.—*Distd.* Paterson v. Murphy (1853), 11 Hare, 88. *Consd.* Vandenberg v. Palmer (1858), 4 K. & J. 204. *Reid*. Malcolm v. Scott (1843), 3 Hare, 39.

**150. —To invest for benefit of wife & children.**—*ROBERTS v. ROBERTS*, No. 167, *post*.

**151. Direction to invest in joint names—With express declaration of trust—Notice of bank's refusal of trust.**—A. directed his agents to invest part of his balance in their hands, in the purchase of £4,000 stock, in the names of himself & his wife, in trust for his infant son. The agents made the purchase in the joint names; but without any trust expressed, because, as they afterwards informed A., the bank objected to trust accounts appearing on their books. A. allowed the stock to remain without any trust being declared, & received the dividends of it down to his decease:—*Held*: neither his son nor his wife, who survived him, were entitled to the stock, but it formed part of his assets.—*SMITH v. WARDE, DUCKETT v. WARDE* (1845), 15 Sim. 56; 15 L. J. Ch. 105; 6 L. T. O. S. 234; 9 Jur. 981; 60 E. R. 537.

*Annotations*.—*Distd.* Bentlev v. Mackay (1851), 15 Beav. 12. *Consd.* Vandenberg v. Palmer (1858), 4 K. & J. 204.

**152. Deposit of money in bank—Accompanied by declaration.**—*PETTY v. PETTY*, No. 55, *ante*.

**153. —Guarantee of interest on bonds.**—D., the agent of a foreign railway co., deposited with plffs., who were bankers in England, certain bonds of the co., & a sum of £5,000, to guarantee the payment of the interest on the same bonds, which was payable at the plffs.' bank; & in case of non-payment of the interest, the £5,000 was to be forfeited, & divided among the bondholders. The interest was not duly paid:—*Held*: plffs. were trustees of the money for an unascertained class of individuals, & they could not be called upon to ascertain, at their own risk & expense, who was included in that class; & therefore deft., who claimed to be an unsatisfied bondholder, & had in that character commenced his action against plffs. for part of the £5,000, was restrained by injunction.—*Seem*: the trust was so clear in its creation that the £5,000 might in that respect have been brought into ct. under Trustee Relief Act, 1847 (c. 96).—*HANKEY v. MORLEY* (1858), 4 Jur. N. S. 234.

**154. Purchase of stock in name of another—Accompanied by declaration to beneficiary.**—A married woman, out of the savings of her separate estate, purchased stock in the name of a niece, & told the niece by letter that it was her intention that the stock should be for the niece herself, but took from the niece a power of attorney to receive the dividends & sell the stock:—*Held*: on the death of the aunt, the niece was entitled to the stock.—*BEECHER v. MAJOR* (1865), 2 Drew. & Sm. 431; 6 New Rep. 370; 13 L. T. 54; 13 W. R. 1054; 62 E. R. 681, L. C.

**155. Acknowledgment by owner of estate—Charged with annuity for lunatic—That arrears of annuity held for lunatic.**—Where the owner of an estate charged with an annuity in favour of the lunatic had acknowledged that she had in hand certain arrears of the annuity, which she was ready to pay to any person on his behalf who could give a good receipt for it:—*Held*: this was a declaration of trust which entitled the curator to sue in equity for those arrears.—*SCOTT v. BENTLEY* (1855), 1 K. & J. 281; 3 Eq. Rep. 428; 24 L. J. Ch. 244; 25 L. T. O. S. 114; 1 Jur. N. S. 394; 3 W. R. 280; 69 E. R. 464.

*Annotations*.—*Mentd.* Mackie v. Darling (1871), 19 W. R. 796; *Re Garnier* (1872), L. R. 13 Eq. 532; *Re Barlow's Will* (1887), 38 Ch. D. 287; *Re Brown*, [1895] 2 Ch. 666, *Didisheim v. London & Westminster Bank*, [1900] 2 Ch. 15; *Thlery v. Chalmers, Guthrie*, [1900] 1 Ch. 80; *New York Security & Trust Co. v. Keyser*, [1901] 1 Ch. 666.

**156. Payment of instalment of annuity—By consignee.**—Where a consignee undertakes with his consignor to make certain payments mentioned, to creditors of the consignor out of the produce of property consigned to him from abroad, & in pursuance pays an annuity to one of the creditors named, a trust is created by such payment in favour of the annuitant, & the consignee cannot afterwards discontinue such payment, so long as he has any proceeds of consignments in his hands.

An annuity, though from its nature payable by instalments is, nevertheless, an entire sum; & a payment of one instalment under the above circumstances creates a trust which a ct. of equity will enforce in favour of a stranger.—*KIRWAN v. DANIEL* (1847), 5 Hare, 493; 16 L. J. Ch. 191; 8 L. T. O. S. 554; 11 Jur. 235; 67 E. R. 1006; *subsequent proceedings* (1849), 7 Hare, 347.

*Annotations*.—*Apld.* Harland v. Binks (1850), 15 Q. B. 713. *Reid*. Siggers v. Evans (1855), 5 K. & B. 367. *Mentd.* Cochrane v. Willis (1864), 9 L. T. 792.

to purchase alone, he would cede part thereof to deft. In an action by plff. for an injunction restraining deft. from

going on a portion of the lands:—*Held*: plff. had lulled deft. into silence, & must be deemed a trustee for deft.

as to the portion formerly occupied by deft.—*DEVINE v. FIELDS* (1920), 54 I. L. T. 101.—*IR*.

**157. Payment of interest by executor—On greater sum than sum bequeathed—Belief in testator's intention to give larger sum.]**—Testator bequeathed £2,000 on certain trusts, & he empowered his exor., who was also his residuary legatee, to retain the amount in his hands uninvested, he paying interest thereon. After testator's death, the exor., being satisfied that testator intended to bequeath £3,000, & not £2,000, promised to make it up £3,000; he made no investment, but continued to pay interest on the £3,000 to his death:—*Held*: there was a complete voluntary trust as to the additional £1,000, which this ct. would enforce.—*GEE v. LIDDELL* (No. 1) (1866), 35 Beav. 621; 55 E. R. 1038.

**158. Provision in partnership deed—For securing annuity to third party.]**—Testator by his will gave his property in a certain newspaper in trust, out of the residue of the profits thereof to pay an annuity to his daughter for life. By a deed, to which the daughter was not a party, made upon the introduction of a new partner, it was agreed that a certain proportion of the profits should be annually set apart with a view to forming a capital fund of £1,000 for the purpose of answering the said annuity, whereby the partnership property would be cleared of the same; & certain sums were so set apart accordingly:—*Held*: the relationship of trustee & *cestui que trust* was created by the above deed, & the daughter was entitled to the £1,000.—*BURTON v. JACKSON* (1856), 26 L. T. O. S. 321; 2 Jur. N. S. 224; 4 W. R. 271.

**159. Approval of draft trust instrument.]**—Upon evidence that a married woman desiring to execute a voluntary settlement transferred stock to which she was entitled for her separate use into the names of trustees, & approved of a draft declaration of trust:—*Held*: there was a *locus penitentie* & the trusts did not attach, unless the draft had been finally authorised before the transfer to the trustees.—*Re SYKES' TRUSTS* (1862), 2 John & H. 415; 6 L. T. 350; 70 E. R. 1120.

*Annotations*:—*Reid*. *Re Ellis' Trusts* (1874), L. R. 17 Eq. 409; *Roberts v. Watkins & Howells* (1877), 46 L. J. Q. B. 552; *Re Croughton's Trusts* (1878), 8 Ch. D. 460; *Pike v. Fitzgibbon*, *Martin v. Fitzgibbon* (1881), 17 Ch. D. 454; *Re Bown*, *O'Halloran v. King* (1884), 27 Ch. D. 411. *Mentid*. *Re Quartz Hill*, etc. Co., *Ex p. Young* (1882), 21 Ch. D. 642.

**160. Direction by holder of promissory note—Interest & principal payable to named persons—Possession retained by holder.]**—Testatrix, who had lent £300 to S. on his promissory note, payable on demand, directed him, after her death to pay the interest to her sister for her life, & afterwards to divide the principal among her sister's children, which S. agreed to do. Testatrix died without having demanded payment of the note, which was found uncanceled among her papers at her death:—*Held*: as testatrix had not parted with her legal title to the money, the direction did not create a trust.—*Re CAPLEN'S ESTATE*, *BULBECK v. SILVESTER* (1876), 45 L. J. Ch. 280.

**161. Declaration by testator—Variation of property bequeathed.]**—Testator having varied or re-invested the proceeds of certain investments which had been specifically bequeathed by his will to his wife, made frequent declarations in his lifetime that the substituted property was or would be his wife's property after his death:—*Held*: this did not amount to a declaration of trust.—*Re STALLON*, *STALLON v. STALLON* (1907), 51 Sol. Jo. 628.

**162. —.]**—Settlor entered into a voluntary covenant in an indenture under seal to settle upon

certain trusts any freehold properties, with one exception, that he should afterwards acquire in Kent, & that until such assurance should have been actually made he, his heirs, exors., & administrators "shall & will stand seised of all & any such after-acquired hereditaments upon such trusts & with & subject to such powers & provisions as last aforesaid." Settlor afterwards acquired four freeholds in Kent that came within the covenant. Settlor by his will, which was executed after the two first freeholds had been acquired by him, confirmed the settlement, & declared that the benefits under the will were to be in addition to those under the settlement. After acquiring the last two freeholds testator executed two codicils, in each of which he confirmed his will.—*Held*: by confirming the settlement in his will & directing that the benefits under the settlement & will should be cumulative, testator had declared in his lifetime that the trustees of the settlement were entitled to the first two freeholds, & that he, testator, held them on the trusts of the settlement & by confirming his will in the two codicils he republished his will at the dates of the codicils, & so made the same declaration with regard to the two freeholds last acquired, & that therefore the exors. of the will were entitled to assure to the present trustees of the settlement the freeholds aforesaid.—*Re NORTON-CLIFFE*, *ARNHOLZ v. HUDSON*, [1925] Ch. 651; 95 L. J. Ch. 41; 133 L. T. 466.

**163. Letter inviting subscriptions—For gift to retiring employee.]**—The Council of the Royal Botanic Society, upon the retirement of *pltf.*, who was an old servant of the society, sent a circular to the members stating that, as the society was unable to provide a pension, it was thought that a purse of money would be the most acceptable gift, & Fellows & members of the society were invited to send donations to the secretary. A large sum of money was subscribed, & in view of that fact the council sent a circular to each of the subscribers suggesting that an annuity should be purchased for *pltf.* & his wife, & stating that unless they heard from the subscribers to the contrary they would assume that he approved of the proposal. A large majority of the subscribers did not reply, & the subscriptions of the dissenting subscribers were paid to *pltf.* *Pltf.* brought an action for an injunction to restrain the society from dealing or parting with the money except to *pltf.*, or as he might direct:—*Held*: under the first circular there was a trust of the fund subscribed for the benefit of *pltf.*, & he was entitled to have it paid over to him.—*PARKES v. ROYAL BOTANIC SOCIETY OF LONDON* (1908), 24 T. L. R. 508.

**164. Recital in deed—That person seised as trustee.]**—An abstract of title delivered to a purchaser under a contract for sale of freeholds disclosed a recital in a partition deed that F., one of the parties thereto, was then seised of the freeholds in question & other hereditaments "as trustee partly for himself & partly for L., the other party to the deed, as he F. did thereby admit":—*Held*: the recital being clear & unambiguous in its terms & in itself a sufficient declaration of trust, the purchaser was not entitled to inquire how the trust was created.—*Re CHAFER & RANDALL'S CONTRACT*, [1916] 2 Ch. 8; 85 L. J. Ch. 435; 114 L. T. 1076; 60 Sol. Jo. 444; C. A.

*Annotations*:—*Reid*. *Re Soden & Alexander's Contract*, [1918] 2 Ch. 258. *Mentid*. *Re Balen & Shepherd's Contract*, [1924] 2 Ch. 365.

**165. Endowment policy in name of insured—For benefit of daughter.]**—An endowment policy taken out by a person in his own name for the benefit

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of his daughter, to mature on her attaining a specified age, creates no legal estate in the daughter, & she cannot sue on the contract, nor does the assured thereby constitute himself a trustee for his daughter of the policy & of the moneys payable thereunder. If, therefore, the assured dies before the policy matures, the policy money belongs, not to the daughter, but to the estate of the assured, & must be paid to his exors.—*Re ENGELBACH'S ESTATE, TIBBETTS v. ENGELBACH*, [1924] 2 Ch. 348; 93 L. J. Ch. 616; 130 L. T. 401; 68 Sol. Jo. 208.

*Annotation:—Refd. Royal Exchange Assce. v. Hope*, [1928] Ch. 179.

**Money on current account at bank.]—See BANKERS**, Vol. III., pp. 184, 185, Nos. 354–359.

**Trust declared after bankruptcy.]—See BANKRUPTCY**, Vol. V., p. 698, No. 6137.

**Promissory note with trust.]—See BILLS OF EXCHANGE**, Vol. VI., pp. 10, 204, Nos. 16, 1254, 1255.

**Bill of sale.]—See BILLS OF SALE**, Vol. VII., pp. 80, 81, Nos. 455–457.

**Declaration of charitable trust.]—See CHARITIES**, Vol. VIII., pp. 288, 289, Nos. 644–658.

**Trust for conversion.]—See EQUITY**, Vol. XX., pp. 340–353, Nos. 819–924.

**Imperfect gift.]—See GIFTS**, Vol. XXV., pp. 531, 532, 536–538, Nos. 216, 251–263.

**Invalid exercise of power of appointment—Accompanied by declaration of intention.]—See POWERS**, Vol. XXXVII., p. 433, No. 397.

**Express trust for purposes of Real Property Limitation Act, 1833 (c. 27), s. 25.]—See LIMITATION OF ACTIONS**, Vol. XXXII., pp. 467–469, Nos. 1316–1320.

**Option to enter partnership.]—See PARTNERSHIP**, Vol. XXXVI., p. 428, Nos. 957, 958.

**Trust created by Royal Warrant.]—See ROYAL FORCES**, Vol. XXXIX., p. 345, Nos. 303, 304.

#### *B. Evidence of Declaration.*

**166. Must be clear & distinct.]—BENTLEY v. MACKAY**, No. 112, *ante*.

**167. —.]—(1)** Where a person sets up a case of declaration of trust, the *onus probandi* is upon him, & the evidence must be clear & distinct; the ct. must determine according to the evidence on both sides, having special regard to the consideration on whom the burden of proof lies.

**(2)** A lady, having some money belonging to her in the hands of her son, drew a cheque upon him in favour of his wife. A few days afterwards she told him to take the cheque, & to invest the money for the benefit of his wife & children. He took it accordingly, & after his mother's death he invested the money in the names of himself &

his wife:—*Held*: a valid trust of the £500 was constituted by the mother in favour of the son's wife & children.—*ROBERTS v. ROBERTS* (1866), 15 L. T. 260; 12 Jur. N. S. 971; 15 W. R. 117, L. JJ.

**168. Acts & writings of donor.]—BENTLEY v. MACKAY**, No. 112, *ante*.

**169. Necessity for corroboration—Evidence of plaintiff.]—The ct. will not establish a trust in favour of pltf. where his own evidence in support of it is uncorroborated, or where a considerable length of time has elapsed between the creation of the trust & the assertion of the claim to establish it.—POOLE v. FOXWELL (1864), 11 L. T. 441; 13 W. R. 199.**

**170. Burden of proof—On party seeking to establish.]—ROBERTS v. ROBERTS**, No. 167, *ante*.

**— Husband & wife.]—See HUSBAND & WIFE**, Vol. XXVII., p. 90, Nos. 699, 700.

#### **SUB-SECT. 3.—DECLARATORY WORDS, PRECATORY WORDS, ETC.**

*A. Words "Trust" or "Confidence."*

*(a) In General.*

**171. Not necessary.]—KING v. DENISON**, No. 93, *ante*.

**172. —.]—An instrument may be effectual as a declaration of trust or tantamount to a declaration of trust, although it contains not the word "confidence," the word "trust," or the word "trustee."—KEKEVICH v. MANNING (1851), 1 De G. M. & G. 176; 21 L. J. Ch. 577; 18 L. T. O. S. 263; 16 Jur. 625; 42 E. R. 519, L. JJ.**

*Annotations:—Refd. Page v. Cox* (1852), 10 Hare, 163; *Richards v. Delbridge* (1871), L. R. 18 Eq. 11; *Baddley v. Baddley* (1878), 48 L. J. Ch. 36; *Re Flavell, Murray v. Flavell* (1883), 25 Ch. 19, 89. **Mentd. Bridge v. Bridge** (1852), 16 Beav. 315; *Paterson v. Murphy* (1853), 11 Hare, 88; *Beech v. Keep* (1854), 18 Beav. 285; *Donaldson v. Donaldson* (1854), Kay, 711; *Voyle v. Hughes* (1854), 2 Sm. & G. 18; *Cramer v. Moore* (1855), 3 Sm. & G. 141; *Scales v. Maude* (1855), 6 De G. M. & G. 43; *Crofts v. Middleton* (1856), 8 De G. M. & G. 192; *Pownall v. Anderson* (1856), 2 Jur. N. S. 857; *Bartlett v. Bartlett* (1857), 3 Sm. & G. 533; *Wilkinson v. Wilkinson* (1857), 4 Jur. N. S. 47; *Consolidated Investment Insee. v. Riley* (1859), 29 L. J. Ch. 123; *Dickenson v. Wright* (1860), 6 H. & N. 401; *Clarke v. Wright* (1861), 6 H. & N. 849; *Milroy v. Bone* (1862), 31 L. J. Ch. 417; *Milroy v. Lord* (1862), 4 De G. F. & J. 264; *Gilbert v. Overton* (1864), 10 L. T. 900; *Pentfold v. Mould* (1867), L. R. 4 Eq. 562; *Richardson v. Richardson* (1867), L. R. 3 Eq. 686; *Glegg v. Rees* (1871), 7 Ch. App. 71; *Warriner v. Rogers* (1873), L. R. 16 Eq. 340; *Price v. Jenkins* (1876), 4 Ch. D. 483; *Re King, Sewell v. King* (1879), 14 Ch. D. 179; *Paul v. Paul* (1880), 15 Ch. D. 580; *Re Walhampton Estate* (1884), 26 Ch. D. 391; *Re Lucan, Harding v. Cobden* (1890), 45 Ch. D. 470; *Johnstone v. Mappin* (1891), 60 L. J. Ch. 241; *Re Patrick, Bills v. Tatham*, [1891] L. Ch. 82; *Re Ellenborough, Towry Law v. Burne*, [1903] 1 Ch. 697; *Re Spark's Trusts, Spark v. Massey*, [1904] 1 Ch. 451; *Vavasseur v. Vavasseur* (1909), 25 T. L. R. 250.

**173. —.]—DIPPLE v. CORLES**, No. 95, *ante*.

#### **PART I. SECT. 3, SUB-SECT. 2.—B.**

**166 i. Must be clear & distinct.]—HILL v. HIBLE (1906), 7 Terr. L. R. 386; 4 W. L. R. 276.—**CAN.****

**166 ii. —.]—SNOWBALL v. SULLIVAN (1921), 48 N. B. R. 253.—**CAN.****

**166 iii. —.]—Before a declaration of trust of land will be held to have been made it must be found that there was an intention to do so, & that such intention was manifested in writing, not necessarily technical in expression, but such as clearly indicates the object & intention of the trust.—McPHERSON v. L'HIRONDDLE & SOLDIER SETTLEMENT BOARD (Alta.), [1927] 2 D. L. R. 1076; [1927] S. C. R. 429.—**CAN.****

**166 iv. —.]—HIRBAI v. JAN MAHOMED KHALAKDINA (1881), L. L. R. 7 Bom. 229.—**IND.****

**166 v. —.]—Where there is no clear proof of a trust between father & son, the law will never imply a trust.—REDINGTON v. REDINGTON (1794), 3 Add. Parl. Rep. 166.—**IR.****

**168 i. Acts & writings of donor.]—MERBAI v. PEROZEBAI (1881), L. L. R. 5 Bom. 268.—**IND.****

**170 i. Burden of proof—On party seeking to establish.]—GORDON v. HANDFORD (1906), 16 Man. L. R. 292.—**CAN.****

**e. Evidence of subsequent declarations.]—Pltf. & deft. were sisters. Their father shortly before his death transferred certain money in the Govt. Savings Bank & certain bank deposit receipts into the name of deft. under circumstances *prima facie* importing an advancement:—*Held*: evidence of a subsequent declaration, by the father was not admissible to**

show an intention that the money should be held by deft. in trust for herself & pltf.—*COLLETT v. NAIRN* (1899), 6 Q. L. J. 164.—**AUS.**

**f. Declaration of trust not registered.]—An assignment registered, with a separate declaration of trust not registered:—*Held*: invalid.—FRANKS & CAMERON v. GLADSTONE & MORRISON (1861), 11 C. P. 125.—**CAN.****

**g. Evidence of approbation of marriage.]—FOSTER v. PATTERSON (1868), 15 Gr. 426.—**CAN.****

**h. Receipt acknowledging moneys "in trust for investment."]—P. deposited with pltf. \$3,000 in the names of three of her relatives, defts. \$1,000 for each, & obtained from pltf. three documents acknowledging the receipt from each of defts. of \$1,000, "in trust for investment" & guaranteeing the**

174. ———.]—GRANT *v.* GRANT, No. 57, *ante*.

175. "Confidence"—Equivalent to trust.]—(1) Bequest "of all my property to my husband, hoping he will leave it after his death to my son, if he is worthy of it," accompanied by the following explanation: "My reason for leaving all I have to dispose of to my husband, & in his entire power, is, that my son is already certain of a fortune, & that I cannot now feel any certainty what sort of character he may become. I therefore leave it to my husband, in whose honour, justice, & parental affection I have the fullest confidence. If my son dies before my husband, though I leave all without reservation to my dear husband to dispose of as he thinks fit, yet should my son leave any children, I do not doubt it will go to them from him, knowing his steady principles, & clear judgment of right & wrong, & his sense of justice"—*Held*: not to create a trust.

(2) The word "confidence" was the old name for trust, & may now by virtue of the context be of the same efficacy as the word "trust" (STUART, *V.-C.*).—EATON *v.* WATTS (1867), L. R. 4 Eq. 151; 16 L. T. 311.

176. "Trust"—Does not necessarily create obligation—Construction as recommendation.]—A ct. of equity will look at the circumstances existing at the date of a will, & if necessary, construe words importing a trust, as an expression of hope or confidence.

Testator devised real estate in the Isle of Man, consisting of a farm, to his wife for life, & after her death to D. "in trust for his son being brought up to work the farm," with a gift over in the event of D. having no male issue. D. had no male issue at the date of the will, but had a son born after testator's death:—*Held*: under the will, D.'s son did not take any beneficial interest in the real estate, the words "in trust for his son being brought up to work the farm," being a mere recommendation or expression of hope or confidence, that his oldest or only son should be brought up to work the farm.—QUAYLE *v.* DAVIDSON (1858), 12 Moo. P. C. C. 268; 32 L. T. O. S. 362; 7 W. R. 164; 14 E. R. 913, P. C.

177. ——— Crown & public officers—"In trust for."—Now the words "in trust for" "are quite consistent with, & indeed are the proper manner of expressing, every species of trust . . . a trust not only as regards those matters which are the proper subjects for an equitable jurisdiction to administer, but as respects higher matters, such as might take place between the Crown & public officers discharging, under the directions of the Crown, duties or functions belonging to the prerogative & to the authority of the Crown. In the lower sense they are matters within the jurisdiction of, & to be administered by, the ordinary cts. of equity; in the higher sense they are not. What their sense is here is the question to be determined, looking at the whole instrument & at its nature & effect" (LORD SELBORNE, C.).—KINLOCH *v.* SECRETARY OF STATE FOR INDIA (1882), 7 App. Cas. 619; 51 L. J. Ch. 885; 47 L. T. 133; 30 W. R. 845, H. L.

*Annotations*:—*Re* *Te Toira Te Paeva v. Te Roera Tareha*, [1902] A. C. 56. *Mentd.* *R. v. Secretary of State for War*,

payment of interest. P. informed the three doctrs. of what she had done, saying that the money deposited was theirs & they could draw it. She however, retained the receipts in her own possession, where they remained until her death, & did not inform doctrs. of their existence. The cheques for the interest which accrued during P.'s lifetime were made payable to the three doctrs., but were indorsed by them

in favour of P. & were cashed by her for her own benefit:—*Held*: there was a complete & executed trust created by P. enforceable by doctrs., the *cestui que trust*.—TORONTO GENERAL TRUSTS CORP. *v.* KEYES (1907), 15 O. L. R. 30.—CAN.

*k. Property transferred by mother to daughter—Declarations of deceased mother.*—CAMPBELL *v.* CAMPBELL (B. C.) (1910), 15 W. L. R. 487.—CAN.

[1891] 2 Q. B. 326; Dunn *v.* Macdonald (1897), 76 L. T. 444; Hollinshead *v.* Hazleton, [1916] 1 A. C. 428.

178. ——— Unascertained class.]—The expression "to be held in trust" for a definite class of persons is not always sufficient to create an equitable right or obligation which can be enforced by legal proceedings.

The idea that the grantees were to hold in trust for an unascertained & practically unascertainable class of natives who were loyal in the old rebellion, or who came in & submitted within a reasonable time after Jan. 12, 1867, appears to their lordships too extravagant to require serious comment (*per CUR.*).—TE TEIRA TE PAEA *v.* TE ROERA TAREHA, [1902] A. C. 56; 71 L. J. P. C. 11; 85 L. T. 558; 18 T. L. R. 44, P. C.

*Annotation*:—*Mentd.* Kapua *v.* Harmona, [1913] A. C. 761.

*Precatory words.*—*See* Sub-sect. 3, H., *post*.

(b) *Precatory Words of Confidence.*

i. "Confidence."

179. Whether trust created—General rule.]—Such expressions as "in confidence," & the like, though not in ordinary language used as equivalent to a positive trust, must, in the absence of any contrary indication, receive that construction (PAGE WOOD, *V.-C.*).—SHEPHERD *v.* NOTTIDGE (1862), 2 John. & H. 766; 1 New Rep. 15; 7 L. T. 399; 70 E. R. 1268.

180. ———.]—EATON *v.* WATTS, No. 175, *ante*.

181. ——— "Full trust & confidence"—"In her justice & equity."—Testator devised a copyhold estate to his wife, upon trust to sell, & invest the money in the funds; & gave & bequeathed the interest & dividends to her use. He also gave & bequeathed to her all his effects whatsoever & wheresoever for her maintenance, upon full trust & confidence in her justice & equity that at her decease she would make a proper distribution of what effects might be left in money, goods, or otherwise, to his children; accounting what they had already received in money or effects as part of their shares. The widow, extrix., entitled to the produce of the copyhold estate for life only, with a resulting trust as to the capital for the heir.—WILSON *v.* MAJOR (1805), 11 Ves. 205; 32 E. R. 1066.

182. ——— "Joint benefit of herself & his children."—WEBB *v.* WOOLLS, No. 292, *post*.

183. ——— "Full confidence"—"Devise the property to my family."—WRIGHT *v.* ATKYNS, No. 283, *post*.

184. ——— "Unfettered & unlimited."—A recommendation or desire expressed in a will, that the devisee to whom the will declared testator "has devised & bequeathed the whole of his real & personal estate, unfettered & unlimited, in full confidence, with the firmest persuasion "that she will adopt it," i.e. in the words of the will, "that in her future disposition & distribution thereof she will distinguish the heirs of my late father, by devising & bequeathing the whole of my estate, together & entire, to such of my father's heirs as she may think best deserves her preference," is not confined strictly to the heirs at law of the original testator, but may be applied to any or

PART I. SECT. 3, SUB-SECT. 3.—  
A. (b) i.

1. *Whether trust created*—"Relying with confidence."—Testator left his real & personal property to his wife for her life, with power to dispose of all the property, both real & personal, as she might judge best & wisest, he relying with confidence on her discretion: & that she would make such a distribution or disposal of it as

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either of all his direct descendants.—*MEREDITH v. HENEAGE* (1824), 1 Sim. 542; 10 Price, 306; 147 E. R. 322, H. L.; *affg. S. C. sub nom. HENEAGE v. ANDOVER* (LORD) (1822), 10 Price, 230.

**Annotations:—***Apld.* White v. Briggs (1845), 15 Sim. 17. *Consd.* *Re* Williams, Williams v. Williams, [1897] 2 Ch. 12. *Refd.* *Crawford v. Crawford* (1825), 3 L. J. O. S. Ch. 105; *Parker v. Bolton* (1835), 5 L. J. Ch. 98; *Knight v. Knight* (1840), 9 L. J. Ch. 354; *Greene v. Marsden* (1853), 1 Eq. Rep. 437; *Godfrey v. Godfrey* (1863), 2 New Rep. 16; *Eaton v. Watts* (1867), L. R. 4 Eq. 151; *Irvine v. Sullivan* (1869), L. R. 8 Eq. 673.

**185. ———— Apply for benefit of children.]—**Testator bequeathed all his property to his widow, her heirs, exors., administrators & assigns, for her sole benefit, in full confidence that she would appropriate & apply same for the benefit of his children:—*Held*: this amounted to a gift of an estate for life in the property to the widow, with a power of appointment in favour of the children, with a gift in default of appointment to the children as joint tenants.—*WACE v. MALLARD* (1851), 21 L. J. Ch. 355; *sub nom. WARE v. MALLARD*, 18 L. T. O. S. 194; 16 Jur. 492.

**Annotations:—***Distd.* *Howarth v. Dewell* (1860), 6 Jur. N. S. 1360. *Fold.* *Shovelton v. Shovelton* (1863), 32 Beav. 143. *Apld.* *Curnick v. Tucker* (1874), L. R. 17 Eq. 320; *Fordham v. Speight* (1875), 23 W. R. 782.

**186. ———— “Bulk of residuary estate.”]—***PALMER v. SIMMONDS*, No. 319, *post*.

**187. ———— “Sufficient & judicious provision.”]—**Testator devised & bequeathed his real & personal estate to his widow, “to & for her own use & benefit absolutely, having full confidence in her sufficient & judicious provision for my dear children”:—*Held*: there was no trust in favour of the children.—*FOX v. FOX* (1859), 27 Beav. 301; 54 E. R. 118.

**Annotation:—***Distd.* *Shovelton v. Shovelton* (1863), 32 Beav. 143.

**188. ———— Dispose for benefit of children.]—**Testator gave the residue of his personal estate to his wife “for her own absolute use & benefit in the fullest confidence that she would dispose of same for the benefit of her children according to the best exercise of her judgment & as family circumstances might require at her hands”:—*Held*: the widow was entitled for life with a precatory trust in remainder in favour of her children.—*SHOVELTON v. SHOVELTON* (1863), 32 Beav. 143; 1 New Rep. 226; 55 E. R. 56.

**Annotations:—***Apld.* *Re* Williams, Williams v. Williams, [1897] 2 Ch. 12. *Refd.* *Greene v. Greene* (1869), 17 W. R. 487; *Smith v. Gibson* (1871), 20 W. R. 88; *Ellis v. Ellis* (1875), 23 W. R. 382.

**189. ———— ]—**Gift by will to testator's wife of all property whatsoever that he might die possessed of “for her sole use & benefit, in the full confidence that she will bestow it on her decease to my children in a just & equitable spirit, & in such manner & way as she feels would meet with my full approval”:—*Held*: the widow took a life interest, with a power of disposition amongst the children, the actual extent of which must be determined at the hearing of the cause.—*LE MARCHANT v. LE MARCHANT* (1874), L. R. 18 Eq. 414; 22 W. R. 839.

**Annotations:—***Refd.* *Parnall v. Parnall* (1878), 9 Ch. D. 96; *Re Adams & Kensington Vestry* (1883), 24 Ch. D. 199; *Re Williams, Williams v. Williams*, [1897] 2 Ch. 12.

**190. ———— ]—**Testator appointed his wife sole extrix., & left to her all his pro-

perty, landed & personal, of every description, for her sole use & benefit, in the full confidence that she would so dispose of it amongst all their children, during her lifetime & at her decease, doing equal justice to all of them:—*Held*: the wife took a life interest, with a power of appointment amongst the children as she might think fit.—*CURNICK v. TUCKER* (1874), L. R. 17 Eq. 320.

**Annotations:—***Refd.* *Le Marchant v. Le Marchant* (1874), L. R. 18 Eq. 414; *Re Adams & Kensington Vestry* (1883), 24 Ch. D. 199; *Re Williams, Williams v. Williams*, [1897] 2 Ch. 12.

**191. ———— ]—***Re ADAMS & KENSINGTON VESTRY*, No. 296, *post*.

**192. ———— Trust expressly negatived.]—**Testator gave all his real & personal estate to his wife “absolutely, with full power for her to dispose of same as she may think fit for the benefit of my family, having full confidence that she will do so”:—*Held*: the will created no precatory trust in favour of testator's family, i.e. his children, but that his wife took absolutely.—*Re HUTCHINSON & TENANT* (1878), 8 Ch. D. 540; 26 W. R. 904; *sub nom. Re HUTCHINSON v. TENANT*, 39 L. T. 86.

**Annotations:—***Apld.* *Re Adams v. Kensington Vestry* (1884), 27 Ch. D. 394; *Re Williams, Williams v. Williams*, [1897] 2 Ch. 12. *Consd.* *Re Atkinson, Atkinson v. Atkinson* (1911), 80 L. J. Ch. 370. *Refd.* *Mussoorie Bank v. Raynor* (1882), 7 App. Cas. 321; *Re Hamilton, French v. Hamilton*, [1885] 1 Ch. 373. *Mentd.* *Re Muffett, Jones v. Mason* (1886), 55 L. T. 671.

**193. ———— ]—***WHITWORTH v. DARBISHIRE* (1893), 68 L. T. 216; 41 W. R. 317; 9 T. L. R. 211; 37 Sol. Jo. 214; 5 R. 198, D. C.

**194. ———— ]—***Re WILLIAMS, WILLIAMS v. WILLIAMS*, No. 17, *ante*.

**195. ———— ]—**Testator gave, devised & bequeathed to his wife “the whole of my real & personal estate & property absolutely in full confidence that she will make such use of it as I should have made myself, & that at her death she will devise it to such one or more of my nieces as she may think fit, & in default of any disposition by her thereof by her will or testament I hereby direct that all my estate & property acquired by her under this my will shall at her death be equally divided among the surviving nieces”:—*Held*: upon the true construction of the will there was an absolute gift of testator's real & personal estate to his wife subject to an executory gift of same at her death to such of his nieces as should survive her, equally if more than one, so far as his wife should not dispose by will of the estate in favour of such surviving nieces, or any one or more of them.—*COMISKEY v. BOWRING-HANBURY*, [1905] A. C. 84; 74 L. J. Ch. 263; 53 W. R. 402; 21 T. L. R. 252; *sub nom. COMISKEY v. HANBURY*, 92 L. T. 241, H. L.; *revg. S. C. sub nom. Re HANBURY, HANBURY v. FISHER*, [1904] 1 Ch. 415, C. A.

**Annotations:—***Refd.* *Re Hanbury, Comiskey v. Hanbury* (1909), 101 L. T. 32; *Re Burley, Alexander v. Burley*, [1910] 1 Ch. 215; *Re Conolly, Conolly v. Conolly*, [1910] 1 Ch. 219.

**196. ———— Full assurance & confidence—Education of children.]—***MACNAB v. WHITBREAD*, No. 321, *post*.

**197. ———— Entire & implied confidence—Provision for children.]—**W. devised & bequeathed all his real & personal estate unto his wife C. & her heirs, etc., absolutely for ever, “entertaining as he did the most entire & implicit confidence that she would, during her life, appropriate same, or the

would thoroughly accord with his wishes on the subject, with all of which she was perfectly acquainted. There was some evidence of testator having communicated some wishes to his wife, but none as to what they

were:—*Held*: the terms of the gift, to the wife did not amount to a precatory trust, & she took the property, both real & personal absolutely.—*FIELD v. ATKINSON* (1871), 5 L. R. Eq. 373.—*IR. m. —Every confidence.]—*Testa-

trix left all her property to deff. “to be disposed of by him as to him might appear just, having every confidence he would act fairly & in accordance with her wishes”: in a conversation between testatrix & deff., previously to

interest thereof, with maternal discretion, prudence, & economy, as well towards the maintenance, support, & liberal education of their children as towards the immediate support & maintenance of herself, & that she would bequeath so much & such part of his estate thereby devised to her, as might be by her judicious management preserved for their family, unto & equally between & amongst all & every their children who should be living at the time of the decease of C., & the lawful issue of such of them as should be then dead, in equal shares," etc. C. was appointed sole extrix. of the will & guardian of the children. W. died in Oct. 1826, leaving real & personal estate of large amount; & there remained, after payment of all the debts, etc., a considerable residue, which under the management & control of C. was increased in value, & became greatly augmented. Testator left five children & two granddaughters, the children of a daughter of testator who died in his lifetime, one of whom died an infant, & the other, A., was deff., him surviving. Subsequently, to testator's decease his eldest son died, leaving two sons him surviving. C., on the supposition that under the will of W. she took an absolute estate for her own benefit in the property thereby devised & bequeathed to her by her will, dated in Apr. 1856, devised & bequeathed the real & personal estate in manner therein-mentioned, for the benefit of her sons, daughter, granddaughter, A., & two grandsons. Questions having arisen as to whether the real & personal estate of W. became absolutely vested in C., & whether same was effectually disposed of by her will, this bill was filed by one of her sons:—*Held*: the widow did not take the property absolutely, the granddaughter, A., was under the will of W. entitled to a share of the property; & a granddaughter who died in the lifetime of the widow was not entitled to a share.—*SMITH v. SMITH* (1856), 2 Jur. N. S. 967.

**198.** — Every confidence — Provision for children & grandchildren.]—Testator gave his residuary real & personal estate to his widow, "to & for her own sole use & benefit for ever, feeling assured & having every confidence that she will hereafter dispose of the same fairly, justly & equitably amongst my two daughters & their children," & he appointed her sole extrix. & residuary legatee:—*Held*: the widow took beneficially for life, with remainder to the two daughters & their children, as she should appoint.—*GULLY v. CREGOE* (1857), 24 Beav. 185; 53 E. R. 327.

*Annotations*:—*Fold*. Shovelton v. Shovelton (1863), 32 Beav. 143. *Ald*. Curnick v. Tucker (1874), L. R. 17 Eq. 320. *Reid*. Howarth v. Dewell (1860), 6 Jur. N. S. 1360.

**199.** — "Comply with my wish."—Testatrix by her will after giving & bequeathing several legacies, among others some for charitable purposes, proceeded as follows: "I give, demise & bequeath to T., deff., all my real estates both freehold & copyhold, in," etc., " & all the residue of my personal estate & effects, 'to hold to him, T., his heirs, exors., administrators & assigns for ever'; upon this express condition, that if my personal estate should be insufficient for the purpose that he or they do & shall, within twelve

months after my decease pay & discharge all & every the legacies hereinafter bequeathed, & I feel confident that he will comply with my wish, it being my particular desire that all the above legacies shall be paid. I do hereby charge & make chargeable all my real & personal estate with the payment of the aforesaid legacies & bequests":—*Held*: these words did not show that testator intended to make a gift of an estate to deff. on a condition, of which the heir might take advantage by way of forfeiture, if deff. failed to perform it by paying the legacies within the twelve months; & the true construction was that they created a trust in deff., the performance of which was cognisable in a ct. of equity.—*WRIGHT v. WILKIN* (1862), 2 B. & S. 232; 31 L. J. Q. B. 196; 6 L. T. 220; 9 Jur. N. S. 715; 10 W. R. 403; 121 E. R. 1070, Ex. Ch.

*Annotations*:—*Reid*. Macdonald v. Irvine (1878), 8 Ch. D. 101; *Re* Gwynnes Charity, Charity Comrs. v. Moulden (1891), 10 T. L. R. 428; *Re* Williams, Williams v. Williams, [1897] 2 Ch. 12.

**200.** — "Act justly to our children."—(1) Testator gave to his widow the whole of his real & personal property "feeling confident that she will act justly to our children in dividing same when no longer required by her":—*Held*: the widow took an absolute interest, & the doctrine of precatory trusts did not apply.

(2) The current of decisions now prevalent for many years in the Ct. of Ch. shows that the doctrine of precatory trusts is not to be extended (*per* CUR.).—*MUSSOORE BANK v. RAYNOR* (1882), 7 App. Cas. 321; 51 L. J. P. C. 72; 46 L. T. 633; 31 W. R. 17, P. C.

*Annotations*:—*As to* (1) *Reid*. *Re* Hamilton, Trench v. Hamilton (1895), 43 W. R. 577. *As to* (2) *Consd*. *Re* Adams & Kensington Vestry (1881), 27 Ch. D. 391. *Reid*. *Re* Atkinson, Atkinson v. Atkinson (1911), 80 L. J. Ch. 370. *Generally*. *Mentd*. Toronto Ry. v. Toronto (City), [1920] A. C. 426.

**201.** — Perfect confidence—Provision for nephew.]—*Re* LOVETT, LOVETT v. LOVETT (1912), 132 L. T. Jo. 297.

## ii. "Trusting."

**202.** Whether creating trust — "Spiritual & temporal good of herself & children."—Testator gave all his property to his wife, trusting that she would use it for the spiritual & temporal good of herself & children, remembering always the Church & the poor:—*Held*: wife took absolutely.—*CURTIS v. RIPPON* (1820), 5 Madd. 434; 56 E. R. 961.

**203.** —]—Testator bequeathed the whole of his property to his wife, for her life, & directed that upon her death one-third should devolve on his daughter, & that the other two-thirds should be at the sole & entire disposal of his wife, trusting that, should she not marry again & have other children, her affection for their daughter would induce her to make the daughter her principal heir. The widow died unmarried:—*Held*: she took an absolute interest in the two-thirds under the will.—*HOY v. MASTER* (1834), 6 Sim. 568; 3 L. J. Ch. 134; 58 E. R. 706.

**204.** — "Wholly confiding in his honour."—Testatrix, by her will, bequeathed all her personal estate to C., whom she appointed one of her exors.,

the date of the will, she said to him she would wish him to give some of her property to pils., but without specifying any particular portion:—*Held*: no trust binding on deff. was created by the will.—*CREAGH v. MURPHY* (1873), 7 L. R. Eq. 182.—*IR*.

*n.* — "Full confidence."—*SPENCE v. PATERSON'S TRUSTEES* (1873), 1 R. (Ct. of Sess.) 46.—*SCOT*.

## PART I. SECT. 3, SUB-SECT. 3.—A. (b) ii.

*o.* Whether creating trust—"Giving a full return to my heirs."—*ROSE v. EDJALL* (1872), 19 Gr. 544.—*CAN*.

*p.* — "Trusting that."—*K.*, by his will, devised all his estate—real & personal—to his wife "for her own use & disposal, trusting that she will make such disposition thereof as shall

be just & proper among my children":—*Held*: this operated as an absolute devise to the widow, who had the power of conveying such a title to the lands as a purchaser under her vendice was bound to accept; & no trust was created.—*NELLES v. ELLIOT* (1878), 25 Gr. 320.—*CAN*.

*q.* — "I can surely trust you."—Testator had the sum of \$1,500,



*Sect. 3.—Creation of trusts: Sub-sect. 3, A. (b) ii. & iii.]*

for his own use and benefit for ever, trusting & wholly confiding in his honour, that he would act in strict conformity with her wishes. Afterwards, on the same day, she executed a testamentary paper, which contained a list of a number of persons by name, & among others, the name of the person who was her sole next of kin, with the several sums to be given to them respectively, & concluded with a declaration that such was testatrix's wish:—*Held*: C. took the personal estate for his own use, absolutely, subject only to the payment of the legacies specified in the testamentary paper, & three other sums, which, by his answer, C. admitted that testatrix had directed him, & which he submitted, to pay.—*WOOD v. COX* (1837), 2 My. & Cr. 684; 6 L. J. Ch. 366; 1 Jur. 720; 40 E. R. 801, L. C.

*Annotations*:—*Consd.* Briggs v. Penny (1851), 21 L. J. Ch. 265. *Apld.* Shelley v. Shelley (1868), L. R. 6 Eq. 540. *Fold.* Irvine v. Sullivan (1869), L. R. 8 Eq. 673. *Reid.* Stubbs v. Sargon (1838), 3 My. & Cr. 507; Greene v. Marsden (1853), 1 Eq. Rep. 437; *Re* Baillie, Fitzgerald v. Noad (1886), 2 T. L. R. 660; *Re* Williams, Williams v. Williams (1897), 45 W. R. 519.

205. —J —POPE v. POPE, No. 370, *post*.

206. —“I trust to the liberality of my successors.”]—R. being entitled, under a settlement & will of his grandfather, to real estates in tail male, with remainders to his cousins in tail, with remainder to himself in fee as right heir of settlor, suffered a recovery, & acquired the fee simple. He had other estates in fee simple by purchase, & considerable personal estate. He by his will gave all his estates, real & personal, to his brother T., if living at his own decease, & if not, to T.'s son, T. the younger; & in case he should die before testator, to his eldest son or next descendant in the direct male line; & in case he should leave no such descendant, to the next male issue of his said brother & his next descendant in the direct male line; but in case no such issue or descendant of his brother or nephew should be living at the time of testator's decease, to the next descendant in the direct male line of his grandfather, according to the purport of his will, under which testator inherited those estates, subject in every case to certain reservations out of the rents; & he appointed the person who should inherit his estates under his will, his sole exor. “& trustee, to carry the same & everything contained therein duly into execution, confiding in the approved honour & integrity of his family to take no advantage of any technical inaccuracies, but to admit all the comparatively small reservations which he made out of so large a property, according to the plain & obvious meaning of his words.” He then, after giving some legacies, gave his gems & other articles to the British Museum, “on condition that the next descendant in the direct male line then living of his grandfather should be made an hereditary trustee, to be continued in perpetual succession to his next descendants in the direct male line.” & he concluded thus: “I trust to the liberality of my successors to reward any others of my old servants & tenants according to their deserts; & to their justice, in continuing the estates in the male succession, according to the will of the founder of the family, my above-named grandfather.”

T. survived testator, & died without leaving

belonging to claimant, in his hands at the time of his death. By his will he left claimant a legacy of £2,500, concerning which he had written to her in the following terms not long before

his death:—“Now I have willed you £2,500. I can surely trust you to give it to him, J. (an infant son of claimant).”—*Held*: the amount of the legacy should not be applied in satis-

any son:—*Held*: T. took the estates in fee, absolutely, & no trust was, or was intended to be, created by the will, a discretion being left to the devisees to defeat testator's expressed desire. *Semble*: the property to which the words of desire applied, & the nature of the estate to be taken in it, were not sufficiently certain to raise a trust.—*KNIGHT v. BOUGHTON* (1844), 11 Cl. & Fin. 513; 8 Jur. 923; 8 E. R. 1195, H. L.; *affg.* S. C. sub nom. *KNIGHT v. KNIGHT* (1840), 3 Beav. 148.

*Annotations*:—*Apld.* Green v. Marsden (1853), 1 Drew. 646; *Smith v. Smith* (1856), 2 Jur. N. S. 967. *Distd.* Shelley v. Shelley (1868), L. R. 6 Eq. 540. *Apld.* Greene v. Greene (1869), 17 W. R. 487. *Consd.* *Re* Williams, Williams v. Williams, [1897] 2 Ch. 12; *Re* Oldfield, Oldfield v. Oldfield, [1904] 1 Ch. 519; *Re* Atkinson, Atkinson v. Atkinson (1911), 80 L. J. Ch. 370. *Reid.* Williams v. Williams (1851), 1 Sim. N. S. 358; *Reeves v. Baker* (1854), 18 Beav. 372; *Lomax v. Ripley* (1855), 3 Sm. & G. 48; *Re* Pinckard's Trusts (1858), 4 Jur. N. S. 1041; *Wheeler v. Smith* (1860), 1 Giff. 300; *Scott v. Key* (1865), 35 Beav. 291; *Ellis v. Ellis* (1875), 44 L. J. Ch. 225. *Mentd.* *Holmesdale v. West* (1866), L. R. 3 Eq. 474.

207. —J—Testator bequeathed stock to A. trusting that he would preserve the same, so that after his decease it might go to his four children, or such of them as should survive him:—*Held*: to create a trust in favour of the survivor of the children after the decease of A.—*BAKER v. MOSLEY* (1848), 11 L. T. O. S. 372; 12 Jur. 740.

*Annotation*:—*Fold.* Fordham v. Speight (1875), 23 W. R. 782.

208. —“That she will carry out my wishes.”]—(1) Testator, after a devise of all his real & personal estate to A., B. & C., whom he afterwards appointed as his exors., upon trust to sell, directed that the “moneys arising from the sale, & otherwise forming or representing my estate & effects, after payment of my just debts & funeral & testamentary expenses, & the expenses of carrying out the trusts of this my will, shall be paid by my trustees, & I thereby give & bequeath the same to D. absolutely, trusting that she will carry out my wishes with regard to the same with which she is acquainted.” Testator had shortly before the date of his will expressed to D., to whom he had been some time engaged to be married, his wish that she would, out of the property which he should leave her, make gifts to certain persons. D. wrote down, after leaving testator, his wishes, but the paper was not submitted to or signed by him:—*Held*: D. took the residue of testator's estate beneficially, subject only to the performance of testator's wishes communicated to her, which were treated as legacies carrying interest at 4 per cent. from the expiration of one year from testator's death.

(2) Parol evidence inadmissible for the purpose of explaining testator's intention even against the heir-at-law.—*IRVINE v. SULLIVAN* (1869), L. R. 8 Eq. 673; 38 L. J. Ch. 635; 17 W. R. 1083.

*Annotations*:—*As to* (1) *Distd.* *Re* Fleetwood, Sldgreaves v. Brewer (1880), 15 Ch. D. 594. *Fold.* *Re* Baillie, Fitzgerald v. Noad (1886), 2 T. L. R. 660. *Apld.* *Re* Downing's Residuary Estate (1888), 60 L. T. 140. *Reid.* *Re* Williams, Williams v. Williams, [1897] 2 Ch. 12; *Re* Maddock, Llewelyn v. Washington, [1902] 2 Ch. 220; *Re* Hanbury, Hanbury v. Fisher (1904), 73 L. J. Ch. 222; *Re* Atkinson, Atkinson v. Atkinson (1911), 80 L. J. Ch. 370. *As to* (2) *Fold.* *Croome v. Croome* (1888), 59 L. T. 582.

209. —“That she will do justice to my children.”]—Under a bequest of “all my property & effects, whatsoever & wheresoever, unto my dear wife, S., trusting that she will do justice to any children we may have, for her own absolute

faction of the debt due by testator to claimant, but should go intact to claimant as trustee for her infant son.—*Re MARSHALL* (N. S.) (1911), 10 E. L. R. 287.—CAN.



use & benefit." S. was held entitled to the property absolutely.—*ELLIS v. ELLIS* (1875), 44 L. J. Ch. 225; 31 L. T. 875; 23 W. R. 382.

### iii. Other Words.

**210. "Not doubting that."**—Devise "not doubting but she will give," etc., is a trust.—*MASSEY v. SHERMAN* (1739), Amb. 520; 27 E. R. 335.

*Annotation*:—*Refd.* *Bland v. Bland* (1745), 2 Cox, Eq. Cas. 349.

**211. —**—*WYNNE v. HAWKINS*, No. 303, *post*.

**212. —**—*Devise to a nephew in fee "not doubting, in case he should have no child, but that he will dispose & give my real estate to the female descendants of my sister in such part or parts & manner as he shall think fit, in preference to any descendant on his own female line."* A trust in the event described for the sister's children.—*PARSONS v. BAKER* (1812), 18 Ves. 476; 34 E. R. 397.

**213. —**—*TAYLOR v. GEORGE*, No. 342, *post*.

**214. —**—*Testator having given an annuity to one of his next of kin, & expressed a reason for giving nothing to the others, gave the residue of his property to his wife, recommending to her & not doubting that she would consider his near relations, as he would have done if he had survived her:—Held*: there was no trust for the next of kin, but the wife took the residue absolutely.—*SALE v. MOORE* (1827), 1 Sim. 534; 57 E. R. 678.

*Annotation*:—*Refd.* *Knight v. Knight* (1840), 4 Jur. 839.

**215. "Well knowing."**—*Testator bequeathed all his property, both real & personal, to his son C., his heirs, exors., etc., to & for his & their own use & benefit, well knowing he would discharge the trust testator reposed in him by remembering his, testator's, sons & daughters, W., E., M., etc.:—Held*: no trust was created for the sons & daughters; but C. took the property for his own benefit absolutely.—*BARDSWELL v. BARDSWELL* (1838), 9 Sim. 319; 7 L. J. Ch. 268; 59 E. R. 381.

*Annotation*:—*Consd.* *Reeves v. Baker* (1854), 18 Beav. 372.

**216. —**—*BRIGGS v. PENNY*, No. 285, *post*.

**217. "Fully satisfied."**—*Testator gave all the residue of his property to his wife, "her heirs & assigns, for ever, being fully satisfied that she would dispose of it, by will or otherwise, in a fair & equitable manner, to their united relatives, bearing in mind that his relatives were generally in better circumstances than hers":—Held*: no precatory trust was created.—*REEVES v. BAKER* (1854), 18 Beav. 372; 2 Eq. Rep. 476; 23 L. J. Ch. 599; 23 L. T. O. S. 54; 18 Jur. 588; 2 W. R. 354; 52 E. R. 147.

*Annotation*:—*Apld.* *Lambe v. Eames* (1870), L. R. 10 Eq. 267.

**218. "Under the firm conviction."**—*Testator bequeathed to his wife all his property "under the firm conviction that she would dispose of & manage the same for the benefit of their children":—Held*: under these words the wife took the property of testator only as a trustee, for the absolute benefit of the children.—*BARNES v. GRANT* (1856), 26 L. J. Ch. 92; 28 L. T. O. S. 78; 2 Jur. N. S. 1127; 5 W. R. 14.

*Annotation*:—*Distd.* *Greene v. Greene* (1869), 17 W. R. 487.

**219. "Being convinced."**—*Testator gave his wife £4,000 "to be used for her own & the children's benefit, as she shall in her judgment & conscience think fit, being convinced that it will be disposed of conscientiously & properly by her, for the pur-*

*poses mentioned; at the same time recommending her not to diminish the principal, but to vest it in govt. or freehold securities":—Held*: this was a gift to the wife for life to be employed, in such manner as she should think fit, for the benefit of herself & the children, she fairly & honestly exercising that discretion; & subject to such life estate, the children took an interest in the capital.—*HART v. TRIBE* (1854), 18 Beav. 215; 23 L. J. Ch. 462; 23 L. T. O. S. 124; 2 W. R. 289; 52 E. R. 85; *subsequent proceedings* (1863), 1 De G. J. & Sm. 418, L. J.J.

*Annotation*:—*Refd.* *Curnick v. Tucker* (1874), L. R. 17 Eq. 320.

**220. "Being well assured."**—*Bequest of the principal & interest of one-third of the residue to a widow "being well assured that she will husband the means that may be left to her by me with every prudence & care for the sake of herself & children":—Held*: this raised no precatory trust & the widow took absolutely.—*SCOTT v. KEY* (1865), 35 Beav. 291; 6 New Rep. 349; 11 Jur. N. S. 819; 13 W. R. 1030; 55 E. R. 907.

*Annotation*:—*Apld.* *Greene v. Greene* (1869), 17 W. R. 487.

**221. "Relying upon."**—*Testator gave all his property, real & personal, to his wife, "relying upon her doing what was right." He left his wife & four daughters surviving, to whom the widow by her will left all her property in joint tenancy. A railway co. took part of the land & raised an objection to the title that there was a precatory trust:—Held*: there was not.—*RE CROCKFORD'S ESTATE* (1869), 21 L. T. 85; 17 W. R. 1004.

**222. "In the full belief."**—*Testator, by his will, gave all his property to his wife absolutely for her own sole & separate use, in the full belief that she would so dispose thereof by deed, will, or otherwise, that at her decease the whole might be equally divided between his children, share & share alike:—Held*: a precatory trust was created in favour of the children.—*FORDHAM v. SPEIGHT* (1875), 23 W. R. 782.

**223. "I am assured."**—*Under a settlement, made in 1828, testator had power to appoint by will to & among his children a sum of £35,000. By his will, made in 1865, he bequeathed £150,000 to his daughter J., & directed that this legacy should be paid to four trustees named in the will, & should be held by them upon trust for her during her life, with remainder for her issue. The will then recited the power of appointment contained in the settlement, & by virtue of that power testator appointed £10,000, part of the £35,000, to the same daughter; but his will was that the same should be paid to the trustees thereinbefore named with reference to the legacy of £150,000, & should be held by them upon the trusts thereinbefore declared thereof. Testator then appointed two sums of £10,000 & £7,000 respectively in favour of two other daughters, & he appointed the residue of the £35,000 to his son] R. absolutely. & in case he had exceeded his power in not appointing the £10,000 to his daughter J. unconditionally, but in directing the settlement thereof, & in case his daughter, or her husband, or others having any right or power to object to the settlement thereof as aforesaid, should so object, or should not confirm such settlement, if required so to do, then he appointed that the sum of £10,000 should go & belong to his son R., "but who will I am assured settle the same voluntarily in the manner in which I have attempted to settle the same as aforesaid*

### PART I. SECT. 3, SUB-SECT. 3.—A. (b) iii.

r. "As she might think most expedient & proper."—*MORRIN v. MORRIN* (1886), 19 L. R. Ir. 37.—IR.

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so as thereby to carry out my wishes." After testator's death the son R. executed a declaration of trust of the £10,000 to carry out his father's wishes. There was no evidence, other than the will itself, of any bargain between the son & testator that the former would settle the £10,000:—*Held*: the appointment of the £10,000 in favour of the daughter J. was invalid; the £10,000 did not pass to the son under the appointment of the residue to him; but, under the last appointment to him, there being only an expression of testator's wish, & no evidence of any bargain by the son that the fund should be settled, it passed to him absolutely, free from any obligation to settle it, & was, therefore, validly appointed.—*Re CRAWSHAY, CRAWSHAY v. CRAWSHAY* (1890), 43 Ch. D. 615; 59 L. J. Ch. 395; 62 L. T. 489; 38 W. R. 600.

*B. Directions as to Employment of Particular Persons.*

**224. Appointment of sugar factor**—"Recommend"—"My desire."—A. by will devises all his estates to his eldest son in tail male, with remainders over; part of the property consisted of an estate in Jamaica, & therefore testator added the following clause: " & I recommend to my exors., that all sugars, rum, & other plantation produce that is sent to the Port of London, be consigned to the house of C., E. & co. until such time as any of my sons shall set up in the business of a sugar factor; then my desire is, that the consignments may pass through his or their hands." C., a natural son of testator's, set up the business of a sugar factor, during the minority of the devisee, & accordingly got the consignments. Upon the devisee's coming of age, C. accounted with him, but insisted on being entitled to his commission not only upon the produce which he had actually sold, but also upon the produce which had been consigned to him, but was not then arrived in the Port of London:—*Held*: the words of the above clause were not imperative, or amounted to words of bequest in favour of C. but were recommendatory only.—*BECKFORD v. BECKFORD* (1783), 4 Bro. Parl. Cas. 38; 2 E. R. 26, H. L.  
*Annotation*:—*Mentd. Ilcey v. Blakeman* (1799), 4 Ves. 596.

**225. Agent & manager**—"Desire."—*FRISWELL v. MOORE* (1819), cited in 5 Cl. & Fin. at p. 142; 7 E. R. 358, L. C.

*Annotation*:—*Distd. Finden v. Stephens* (1846), 1 Coop. temp. Cott. 318.

**226.**—"My particular desire."—*SHAW v. LAWLESS*, No. 316, *post*.

**227.**—"Wish & desire."—*FINDEN v. STEPHENS*, No. 395, *post*.

**228. Solicitor to trust estate.**—A direction in a will appointing a particular person solr. to the trust estate imposes no trust or duty on the trustees of the will to continue such person their solr. in the management & affairs of the estate.—*FOSTER v. ELSLEY* (1881), 19 Ch. D. 518; 51 L. J. Ch. 275; 30 W. R. 596.

*Annotation*:—*Reid. Re Cleveland's S. E.*, [1902] 2 Ch. 350.

**Precatory words.**—*See* Sub-sect. 3, H., *post*.

**PART I. SECT. 3, SUB-SECT. 3.—B.**

**1. Appointment of son to manage estate.**—*Re LARKIN, PERPETUAL TRUSTEE CO. v. LARKIN* (1913), 13 S. R. N. S. W. 69; 30 N. S. W. N. 167.—*AUS.*

**PART I. SECT. 3, SUB-SECT. 3.—D.**

**u. "Universal heir."**—A will written

in the German language, after directing payment of funeral expenses & debts, read (as translated) as follows:—"Third.—I make my wife, E. v. *née* W., my universal heir. She shall faithfully administer my legacy before God & men for her own use & the welfare of the children after mutual deliberation with the family. Fourth:—I appoint my wife E., *née* W., to be

*C. Power in the Nature of a Trust.*

*See* POWERS, Vol. XXXVII., pp. 523–532, Nos. 1135–1233.

**Construction of powers.**—*See* POWERS, Vol. XXXVII., pp. 387–405; Nos. 22–162.

**Precatory words.**—*See* Sub-sect. 3, H., *post*.

*D. Intention to Benefit Persons Other than or in Addition to Donee.*

**229. Donee & children**—"For her better preferment."—A. demises £300 to B. which he wills him to give C., his daughter, at his death, or sooner, if there be occasion, for her better preferment. B. dies before testator, but C. survived & died at the age of sixteen; this is not a lapsed legacy, but shall go to the representatives of C., B. being only in the nature of a trustee.—*EALES v. ENGLAND* (1702), 1 Prec. Ch. 200; 24 E. R. 96; *affd. sub nom. EELES v. ENGLAND* (1704), 2 Vern. 466.

*Annotations*:—*Apld. Harding v. Glyn* (1739), 1 Atk. 469. *Reid. Bull v. Vardy* (1791), 1 Ves. 270; *Mallin v. Keighley* (1795), 2 Ves. 529. *Mentd. Burgess v. Wheato* (1759), 1 Eden, 177.

**230.**—"In consideration of her promise"—"To her & my children at her death."—Devise to L. in consideration of her promise to give, etc., is a trust.

Sir Thomas Lombe's will has these words: "In consideration that Lady Lombe has promised to give what I shall give her to her & my children at her death, I give her," etc.:—*Held*: the children entitled.—*CLIFTON v. LOMBE* (1751), Amb. 519; 27 E. R. 335.

*Annotation*:—*Mentd. A.-G. v. Lloyd* (1747), 1 Ves. Sen. 32.

**231.**—"Enable him to provide."—Legacy to a father the better to enable him to provide for his younger children: he consented to secure the capital: but was held entitled to the interest.—*BROWN v. CASAMAJOR* (1799), 4 Ves. 497; 31 E. R. 255, L. C.

*Annotations*:—*Distd. Benson v. Whittam* (1831), 5 Sim. 22. *Consd. Camden v. Benson* (1835), 4 L. J. Ch. 256; *Italkes v. Ward* (1842), 1 Hare, 445. *Reid. Crockett v. Crockett* (1842), 1 Hare, 451; *Thorp v. Owen* (1843), 2 Hare, 607.

**232.**—"Maintain" until shares assignable.]—Testatrix, under a power given by her marriage settlement, bequeathed a sum of stock to trustees in trust to pay the interest to her husband, in order the better to enable him to maintain the children of the marriage until their shares should become assignable to them; & if no children, or none that should live till their shares became assignable, she gave the interest of the fund to her husband for his life, & after his decease the principal to such person or persons as should be her next of kin. There was only one child of the marriage:—*Held*: this bequest was a trust for the benefit of the child, until the principal should become assignable to the child, & gave no beneficial interest so as to entitle trustees for creditors, to whom the husband had assigned all his personal property, to claim the income or any part of it.—*WETHERELL v. WILSON* (1836), 1 Keen, 80; Donnelly, 4; 5 L. J. Ch. 235; 48 E. R. 237.

*Annotations*:—*Consd. Ralkes v. Ward* (1842), 1 Hare, 445. *Reid. Crockett v. Crockett* (1842), 1 Hare, 451; *Keasley v. Woodcock* (1843), 3 Hare, 185; *Thorp v. Owen* (1843), 2 Hare, 607.

my extrix." Some of the children were adults, others infants, at the time of testator's death.—*Held*: by the terms, "universal heir" & "legacy" testator referred to the whole residue of his estate real & personal after payment of his debts & funeral expenses; & the children were clearly pointed out as the objects of the gift along with the wife so as to create a trust in their

**233.** — “Manage & appropriate in the best manner” — “Welfare of her family.”]—Testator bequeaths the whole of his property to C., the wife of his elder brother, “for her to manage & appropriate in the best manner for the welfare of her family.” He then mentions that he makes this disposition on account of the exceedingly embarrassed circumstances of his elder brother which might leave nothing for his family; to obviate which testator adds, that all his property is to be placed in trustees’ hands, for C.’s sole & separate use:—*Held*: there was no trust for the children of the elder brother, & C. was entitled to the fund absolutely.—*CRAWFURD v. CRAWFURD* (1825), 3 L. J. O. S. Ch. 105.

**234.** — Dispose for benefit of donee & children — “As to her shall seem meet.”]—Testator devised his real estate to his wife, “for her own sole & separate use, to dispose of as she should think proper,” & out of his real & personal estate to provide for his children in such manner as to her should seem meet”:—*Held*: the widow had power to sell the real estate.—*PRATT v. CHURCH* (1830), 4 Beav. 177, n.; 49 E. R. 307.

**235.** — “As donee deem most advantageous — Effect of relationship.”]—(1) A., by his will, gives all his moneys, etc., to his wife, “to the intent that she may dispose of same for the benefit of herself & our children, in such manner as she may deem most advantageous,” & appointed his wife executrix. *Seemle*: the wife does not take an absolute interest in the fund, but there is a trust for the children to some extent.

(2) The relation of the parties, as parent & child, is an ingredient in determining the question whether there is a trust or not.—*RAIKES v. WARD* (1842), 1 Hare, 445; 11 L. J. Ch. 276; 6 Jur. 530; 66 E. R. 1106.

*Annotations*.—As to (1) *Consd. Hodgson v. Green* (1842), 11 L. J. Ch. 312. *Distd. Thorp v. Owen* (1843), 2 Hare, 607. *Consd. Cruckett v. Crockett* (1848), 2 Ph. 553; *Webb v. Woods* (1852), 2 Sim. N. S. 267. *Distd. Lambe v. Eames* (1870), L. R. 10 Eq. 267. *Refd. Browne v. Paull, Higgins v. Paul* (1850), 1 Sim. N. S. 92; *Greene v. Greene* (1869), 17 W. R. 487.

**236.** — “According to her discretion.”]—A. by his will directed as follows: “I desire everything to remain in its present position during the lifetime of my wife for her use & benefit; & after her decease, I devise my real estate to my then male heir, & his heirs in strict tail male; & I wish my personal estate to be then equally divided among all my children. I give the above devise to my wife, that she may support herself & her children according to her discretion, & for that purpose.” Testator left several children, adults & infants:—*Held*: the wife took an absolute estate for life, without any binding trust in favour of the children.—*THORP v. OWEN* (1843), 2 Hare, 607; 12 L. J. Ch. 417; 1 L. T. O. S. 286; 7 Jur. 894; 67 E. R. 250.

*Annotations*.—*Distd. Re Harris* (1852), 7 Exch. 314; *Kennett v. Gadbury* (1864), 12 W. R. 1072. *Consd. Lloyd v. Jackson* (1867), 15 W. R. 408. *Refd. Gloucester Corp. v. Wood* (1843), 3 Hare, 131.

**237.** — “As donee should see fitting & proper.”]—Gift of residuary real & personal estate to testator’s wife with power to her to dispose of the same unto & amongst all testator’s children or to any one or more of them for such estate either in fee simple or in tail term of life or other interest temporary or lasting or in such other shares, proportions or interest as his wife should in her

discretion see most fitting & proper:—*Held*: an absolute gift to the wife.—*HOWORTH v. DEWELL* (1860), 29 Beav. 18; 6 Jur. N. S. 1360; 9 W. R. 27; 54 E. R. 531.

*Annotation*.—*Apld. Lambe v. Eames* (1870), L. R. 10 Eq. 267.

**238.** — —]—Testator, by his will, directed that all his property should be “at the disposal of his wife for herself & children”:—*Held*: there was no joint tenancy between the widow & children; but the widow, though not entitled to the property absolutely, had a personal interest in it; & as between herself & her children, was either a trustee of the fund with a large discretion as to the application of it, or she had a power in favour of the children subject to a life interest in herself.—*CROCKETT v. CROCKETT* (1848), 2 Ph. 553; 17 L. J. Ch. 230; 10 L. T. O. S. 409; 12 Jur. 234; 41 E. R. 1057, L. C.

*Annotations*.—*Apld. Hodgson v. Green* (1842), 11 L. J. Ch. 312. *Distd. Thorp v. Owen* (1843), 2 Hare, 607; *Webb v. Woods* (1852), 2 Sim. N. S. 267. *Apld. Hart v. Tribe* (1854), 18 Beav. 215. *Distd. Alexander v. Alexander* (1856), 27 L. T. O. S. 333. *Consd. Smith v. Smith* (1856), 2 Jur. N. S. 967. *Apld. Ward v. Grey* (1859), 26 Beav. 485. *Distd. Lambe v. Eames* (1871), 6 Ch. App. 597. *Consd. Hicks v. Ross* (1872), L. R. 14 Eq. 141; *Newill v. Newill* (1872), 7 Ch. App. 253. *Refd. Byne v. Blackburn* (1858), 26 Beav. 41; *Salmon v. Tilmarch* (1859), 5 Jur. N. S. 1380; *Bibby v. Thompson* (No. 1) (1863), 32 Beav. 646; *Izod v. Izod* (1863), 1 New Rep. 462; *Armstrong v. Armstrong* (1869), 38 L. J. Ch. 463; *Greene v. Greene* (1869), 17 W. R. 487.

**239.** — —]—A bequest to a wife “for the benefit of herself & children” constitutes a joint tenancy, as between the children, in the beneficial interest.

*Qu.*: whether it creates a trust for the wife for life, with remainder to the children, or a trust for the wife & children collectively.—*ARMSTRONG v. ARMSTRONG* (1869), L. R. 7 Eq. 518; 38 L. J. Ch. 463; 20 L. T. 776; 17 W. R. 570.

*Annotations*.—*Consd. Nowill v. Newill* (1872), 7 Ch. App. 253; *Re Hill, Public Trustee v. O'Donnell*, [1923] 2 Ch. 259. *Mentd. Baillie v. Trehearne* (1881), 17 Ch. D. 388; *Re Butler's Trusts, Hughes v. Anderson* (1888), 38 Ch. D. 286.

**240.** — —]—L. bequeathed to his wife his freehold house & all his personal property, the whole “to be at her disposal in any way she may think best for the benefit of herself & family”:—*Held*: these words did not operate to create any trust, but the widow was entitled to dispose of the property by her will, as she pleased.—*LAMBE v. EAMES* (1871), 6 Ch. App. 597; 40 L. J. Ch. 417; 25 L. T. 175; 19 W. R. 659, L. J.J.

*Annotations*.—*Apld. Mackett v. Mackett* (1872), L. R. 14 Eq. 49. *Distd. Curnick v. Tucker* (1874), L. R. 17 Eq. 320; *Le Marchant v. Le Marchant* (1874), L. R. 18 Eq. 414. *Folld. Re Hutchinson & Tenant* (1878), 8 Ch. D. 510. *Apld. Re Adams v. Kensington Vestry* (1884), 27 Ch. D. 394. *Consd. Re Hamilton, Trench v. Hamilton*, [1895] 1 Ch. 373; *Re Williams, Williams v. Williams*, [1897] 2 Ch. 123. *Apld. Re Hill, Public Trustee v. O'Donnell*, [1923] 2 Ch. 259. *Refd. Humble v. Bowman* (1877), 47 L. J. Ch. 62; *Re Roper's Trusts* (1879), 27 W. R. 408; *Mussoorie Bank v. Raynor* (1882), 7 App. Cas. 321; *Re Diggle, Gregory v. Edmondson* (1888), 39 Ch. D. 254, n.; *Hill v. Hill*, [1897] 1 Q. B. 483; *Re Atkinson, Atkinson v. Atkinson* (1911), 80 L. J. Ch. 370; *Re Keighley, Keighley v. Keighley*, [1919] 2 Ch. 388.

**241.** — From the benefit of his children.]—Testatrix, by her will, directed her trustee to pay £1,000 into the hands of C., to be laid out by him in the education of his two eldest sons, who should be alive at testatrix’s death; if only one son, then £500, for the like purpose; if no son of C. living at her death, she directed the legacy in his favour to fall into the residue. C. died before

favour.—*Re YOST ESTATE* (Alta.), [1927] 2 D. L. R. 1001; [1927] 1 W. W. R. 925.—*CAN.*

a. Donee & children.—“As my wife

may direct & desire.”]—Testator bequeathed all his property to his wife C. “absolutely for her benefit & the benefit of my children as my wife may direct & desire”:—*Held*: no

trust created by the words used “as my wife may direct & desire” being consistent only with an absolute gift.—*Re CULLEN*, [1921] N. Z. L. R. 209.—*N.Z.*



**257.** — “To enable him to assist”—Such of the children of his brother—“As he should find deserving of encouragement.”—Testator gave annuities out of any money arising from whatever dividends he might die possessed of in the Bank of England, & the residue of the dividends to his brother A., to enable him to assist such of the children of his brother F. as he should find deserving of encouragement, & upon the demise of the annuitants or any of them, testator gave each annuitant's proportion of the before-mentioned dividends to his brother A., to be at his disposal, but the principal to remain in the bank:—*Held*: no trust was created for the children of F., but A. took absolutely the capital of testator's stock, subject to the annuities.—*BENSON v. WHITAM*, *HEMMING v. WHITAM* (1831), 5 Sim. 22; 1 L. J. Ch. 94; 58 E. R. 246.

*Annotations*:—*Apld.* *Thorpe v. Owen* (1813), 2 Hare, 607. *Refd.* *Hodgson v. Green* (1842), 11 L. J. Ch. 312; *Gloucester Corp'n. v. Wood* (1843), 3 Hare, 131.

**258.** — “To maintain or bring up.”—Testatrix gave £1,000 to her nephew to maintain & bring up her natural son, F.; & she directed the interest of one-fourth of her residue to be applied for the maintenance & education of F. during his infancy, & the capital to be paid to him on his attaining twenty-one:—*Held*: the nephew was not a trustee of the £1,000 for F., but was entitled to it for his own benefit.—*BIDDLES v. BIDDLES* (1847), 16 Sim. 1; 60 E. R. 772; *sub nom.* *WARD v. BIDDLES*, 16 L. J. Ch. 455; 11 Jur. 624.

**Gifts with superadded powers.**—See **POWERS**, Vol. XXXVII., pp. 389–399, Nos. 34–118.

**Precatory words.**—See Sub-sect. 3, II., *post*.

#### *E. Trust by Imposition of a Condition.*

**259. General rule—Construction according to context.**—(1) “An express trust,” by which I understand the legislature to mean a trust which arises upon the construction of the written instrument, not upon any inference of law imposing a trust upon the conscience; a trust arising upon the words of the instrument itself (*LORD CAIRNS, C.*).

(2) There is no authority for affirming the creation of an express trust binding a particular estate from an imposition of collateral duties, & a general direction that testator's purposes should be carried into effect. The words “on condition” may or may not import a trust according to their collocation in the sentence (*LORD O'HAGAN*).—*CUNNINGHAM v. FOOT* (1878), 3 App. Cas. 974; 38 L. T. 889; 26 W. R. 858, II. L.

*Annotations*:—*As to* (1) *Consd.* *Price v. Phillips* (1894), 11 T. L. R. 86. *Apld.* *Toates v. Toates*, [1926] 2 K. B. 30. *Generally*, *Refd.* *Re Lacy*, *Royal General Theatrical Fund Assoc'n. v. Kydd*, [1899] 2 Ch. 149.

**260.** — **Intention of testator.**—Testator devised land at M. to his son R. in fee, on the express condition that R., his exors. or administrators, should, within three months after testator's death, relinquish all claim to a sum of £3,400 due to him by testator; & he devised other land to trustees, on trust for sale, & to stand possessed of the proceeds of sale, after payment of the deficiency, if any, of his residuary personal estate to pay his debts as thereafter mentioned, on trust for his wife for her life, with remainder in trust for some grandchildren; & he devised all other his real estate not thereinbefore disposed of to his sons J. & R. in fee, in equal shares; & after making some specific bequests of personal estate, he bequeathed the residue of his personal estate to trustees upon trust for conversion, & to stand possessed of the proceeds upon trust to pay his

debts, except the debt of £3,400 due to R. & two other specified debts, & on trust to retain the surplus for the benefit of his sons J. & R. in equal shares. But, in case his residuary personal estate should be insufficient to pay his debts, except as aforesaid, he directed that the deficiency should be paid out of the proceeds of the sale of the real estate which he had directed to be sold. R. died before testator without issue:—*Held*: the condition bound the land at M. notwithstanding the lapse of the devise, & the debt of £3,400 must be discharged out of it.

The lien will be bound if the ct. can see that the real intention of the testator was to create a trust (*FRY, J.*).—*Re KIRK, KIRK v. KIRK* (1882), 21 Ch. D. 431; 47 L. T. 36; 31 W. R. 94, C. A.

**261. “To pay.”**—*CRICKMERE v. PATERSON* (1588), Cro. Eliz. 146; 78 E. R. 403; *sub nom.* *CRICKMERE v. PATTERSONS*, 1 Leon. 174.

*Annotations*:—*Refd.* *Freake v. Lee* (1679), 2 Show. 36; *Wright v. Wilkin* (1860), 2 B. & S. 232.

**262.** — *J.*—*MOHUN'S (LORD) CASE* (undated), cited in 3 Swan, at p. 592.

*Annotations*:—*Refd.* *Cook v. Fountain* (1676), 3 Swan, 585; *Pyke v. Pyke* (1750), 1 Ves. Sen. 376.

**263. Payment of legacies.**—A. devised all his lands to his younger son, charged with legacies to be paid within a certain time out of the lands, & amounting to more than the profits of the lands during that time:—*Held*: (1) an estate in fee passed to the son; (2) the payment of the legacies was a trust & not a condition.—*REAKE v. LEA* (1679), 1 Freem. K. B. 479; 89 E. R. 360.

**264.** — *J.*—*CUNNINGHAM v. FOOT*, No. 259, *ante*.

**265. Payment of annuity.**—Testator bequeathed his business to trustees, upon trust to permit J. to carry on & manage the business upon condition (*inter alia*) that he should pay a certain annuity to pltf. The annuity was not paid, & pltf. filed her bill against J. for the purpose of enforcing the performance of the condition. To this bill J. demurred for want of equity, on the grounds that he was not a trustee for the annuitant but beneficial owner of the business, & also for want of parties, submitting that the exor. ought to be a party to the suit. He also answered as to certain parts of the bill:—*Held*: the condition was equivalent to a trust, & the exor. was not a necessary party to the suit.—*REES v. ENGELBACK* (1871), L. R. 12 Eq. 225; 40 L. J. Ch. 382; 24 L. T. 417; 19 W. R. 809.

*Annotations*:—*Refd.* *Re Williamses*, *Andrew v. Williamses* (1885), 54 L. T. 105; *Bathany v. Walford* (1886), 31 Ch. D. 624; *Jay v. Jay*, [1924] 1 K. B. 826.

**266. Condition against waste.**—A lady, tenant for life of an estate, subject to a condition not to commit waste, married; & during the coverture her husband cut & sold timber on the estate:—*Held*: the condition was not in the nature of a trust, & consequently, neither the wife nor her estate, but the husband alone was answerable for the waste.

If a person to whom an estate for years is given, coupled with an express trust to raise money for payment of debts or to do any other act, assigns the term to a third person upon the trusts declared, he is guilty of a breach of trust, because he had no authority to make the assignment (*SHADWELL, V.-C.*).—*KINGHAM v. LEE* (1846), 15 Sim. 396; 16 L. J. Ch. 49; 8 L. T. O. S. 359; 11 Jur. 4; 60 E. R. 673.

*Annotation*:—*Refd.* *Powys v. Blagrave* (1854), Kay, 495.

**267. Condition for relinquishment of claim.**—*Re KIRK, KIRK v. KIRK*, No. 260, *ante*.

**Sect. 3.—Creation of trusts: Sub-sect. 3, E., F., G. & H. (a) & (b) i.]**

**268. To provide a home.]—**Testator directed his trustees to pay the interest on £5,000 to M. A. while unmarried provided she should act as guardian to his children & provide a home for such of them as should require it, but this condition was not to deprive her of the income, while unmarried, although no child should so reside with her:—*Held*: the bequest was for the benefit of M. A. & did not create a trust which would exempt it from legacy duty.—*A.-G. v. SHARPE* (1800), 7 T. L. R. 165, D. C.; *affd.* (1801), 7 T. L. R. 558, C. A.

**269. — Residence in settled house.]—**Testatrix gave her residuary estate, in the events which happened, to her niece C. on condition that she resided in testatrix's house during the life of testatrix's sister M., & provided there a home for M. so long as she wished; in the event of C. not complying with the condition, to another niece upon the like condition; in the event of neither niece complying with the condition, upon trust for M. for life with other trusts over on her death. At the date of testatrix's death M. was a lunatic not so found, confined in an asylum, & was not expected to recover her faculties. Upon a summons by C. under the Settled Land Acts:—*Held*: C. was a person having the powers of a tenant for life, the condition as to providing a home was void so far as it prevented C. from exercising her power of sale, & she was entitled to sell the house & keep the proceeds absolutely.

This provision . . . is in truth a condition, & not merely a trust or reservation for the benefit of this lunatic (*JOYCE, J.*).—*Re RICHARDSON, RICHARDSON v. RICHARDSON*, [1904] 2 Ch. 777; 73 L. J. Ch. 783; 91 L. T. 775; 53 W. R. 11; 48 Sol. Jo. 888.

**Conditions creating charitable trusts.]—***See CHARITIES*, Vol. VIII., pp. 322, 323, Nos. 1042–1051.

**F. Trust by Creation of a Charge.**

**270. General rule.—Distinction between trust & charge—"Charged & chargeable."]**—General devise & bequest to two persons, their heirs, exors., administrators, etc., upon trust in the first place to pay, & charged & chargeable with all testator's debts & funeral expenses, & the legacies after given.

Those persons, being afterwards appointed exors., taking the absolute property, subject only to a charge, are entitled to the residue undisposed of, including a legacy to a charity, void by charitable Uses Act, 1736 (c. 36), for their own benefit, against the claim of the next of kin; the whole property being personal. Upon their right, as exors., *qu.*

The difficulty I feel is, whether I am to construe the words "upon trust" to mean "charged & chargeable" . . . The question is whether upon the whole will this is to be taken as a devise & bequest to these exors. with reference to their office; upon a trust to pay; or as giving them the

absolute property subject only to a charge; & I think the latter was the intention (*LORD ELDON, C.*).—*DAWSON v. CLARKE* (1811), 18 Ves. 247; 34 E. R. 311, L. C.

**Annotations:—***Apld.* *Southouse v. Bate* (1814), 2 Ves. & B. 396; *Madgin v. Lumley* (1823), 1 L. J. O. S. Ch. 236. *Distd.* *Rhodes v. Rudge* (1826), 1 Sim. 79. *Consd.* *Russell v. Clowes* (1846), 2 Coll. 648. *Apld.* *Mapp v. Elcock* (1849), 2 Ph. 793. *Consd.* *Read v. Stedman* (1859), 26 Heav. 495. *Reid.* *Parsons v. Saffery* (1821), 9 Price, 578; *Woollett v. Harrie* (1821), 5 Madd. 452; *Wood v. Cox* (1837), 2 My. & Cr. 684; *Mullen v. Bowman* (1844), 1 Coll. 197; *Andrew v. Andrew* (1845), 1 Coll. 688; *Barra v. Fowkes* (1864), 2 Hem. & M. 60; *Clarke v. Hilton* (1866), L. R. 2 Eq. 810; *Merchant Taylors' Co. v. A.-G.* (1871), 6 Ch. App. 512. *Mentd.* *Salé v. Moore* (1827), 1 Sim. 534.

**271. — — —.]—***KING v. DENISON*, No. 93, ante.

**272. Charge of annuity.—Lands devised to trustees upon trusts.]—**Testator gave an annuity to A., & charged the same upon all his freehold & leasehold estate. He afterwards devised his freehold estates to trustees, who were also his exors., upon trust, subject to the charge to, & for the use of his grandson & his heirs. The trustees, being in possession of the estates, paid the annuity to A. during the minority of the grandson, & within twenty years before the filing of the bill by A. against the grandson:—*Held*: the grandson was not a trustee for the annuitant within Real Property Limitation Act, 1833 (c. 27), s. 5, or otherwise.—*FRANCIS v. GROVER* (1845), 5 Harc. 39; 15 L. J. Ch. 99; 6 L. T. O. S. 235; 10 Jur. 280; 67 E. R. 818.

**Annotations:—***Apld.* *Cunningham v. Foot* (1878), 3 App. Cas. 974. *Reid.* *Petre v. Petre* (1853), 1 Drew. 371; *Re Ashwell's Will* (1859), *John. 112*; *Re England, Steward v. England* (1895), 65 L. J. Ch. 21; *Re Jordison, Raine v. Jordison*, [1922] 1 Ch. 440. *Mentd.* *Hughes v. Williams* (1852), 3 Mac. & G. 683; *Lewis v. McKay, Algate v. Vugler, Clark v. Potter* (1924), 93 L. J. K. B. 840.

**273. — — — "Paying."]**—Testator devised freeholds & copyholds to his son for life, & after his decease, to his first & other sons, paying £10 a year to M. for life:—*Held*: the word "paying" created a charge & not a trust.—*HODGE v. CHURCHWARD* (1847), 16 Sim. 71; 60 E. R. 799.

**Annotation:—***Folld.* *Cunningham v. Foot* (1878), 3 App. Cas. 974.

**Provision for payment of debts.]—***See EXECUTORS*, Vol. XXIII., pp. 311–316, 341, 364–366, Nos. 3751–3816, 4056–4061, 4319–4341; *LIMITATION OF ACTIONS*, Vol. XXXII., pp. 508, 509, Nos. 1678–1686.

**Devise of realty charged with legacies.]—***See LIMITATION OF ACTIONS*, Vol. XXXII., p. 406, Nos. 844, 845.

**G. Beneficial or Fiduciary Interest of Executor in Residue.**

*See EXECUTORS*, Vol. XXIII., pp. 469–472, Nos. 5382–5408.

**Precatory words.]—***See Sub-sect. 3, H., post.*

**H. Precatory Words.**

**(a) In General.**

**274. General rule.]—**Devise of absolute interest to one, with any expression that he shall dispose of

**PART I. SECT. 3, SUB-SECT. 3.—E.**

**2681. To provide a home.]—***BURNS v. BURNS* (1874), 21 Gr. 7.—*CAN.*

**2681i. — — —.]—***WILKINSON v. WILSON* (1894), 26 O. R. 213.—*CAN.*

**b. Conditional upon accepting burden of trust.]—**The will of testator appointing D. & B. his sole exors., & administrators contained the following clause "To each of my said trustees, D. & B., who shall accept of this trust the sum of \$500 each":—*Held*: the legacies were conditional upon the legatees undertaking the burden of the

trust & that the exors. were not entitled to take by way of compensation more than the amount of the legacies.—*Re LENDRUM* (1915), 32 W. L. R. 556; 9 W. W. R. 245; 24 D. L. R. 885.—*CAN.*

**c. Worship performed & festivals duly observed.]—***MURLIHAR v. DIWAN CHAND* (1916), 1 L. R. 38 All. 214.—*IND.*

**PART I. SECT. 3, SUB-SECT. 3.—F.**

**d. General rule.]—**Every charge on

an estate does not create a trust, although it imposes a burden; but it may create a trust depending on the nature of the charge. If the gift is an express one, & if the person taking the estate is bound to give effect to the gift as a trustee, then it is an express trust.—*CHARITABLE DONATIONS & BEQUEST COMRS. v. WYBRANTS* (1845), 2 Jo. & Lat. 182; 7 I. Eq. R. 510.—*IR.*

**e. — — —.]—***HUNT v. BATMAN* (1848), 10 I. Eq. R. 360.—*IR.*

**f. Charge of legacies.]—***Re HAZLETTE*, [1915] 1 I. R. 285.—*IR.*



the whole or part to A. not properly a devise but a trust for A. which ct. will execute after death of the first devisee.—*BULL v. VARDY* (1791), 1 Ves. 270; 30 E. R. 338.

*Annotations*:—*Consd. Brown v. Higgs* (1800), 5 Ves. 495; *Morice v. Durham* (Rp.) (1805), 10 Ves. 522; *Re Brierley*, *Brierley v. Brierley* (1894), 43 W. R. 36. *Reid. Cowper v. Mantell* (No. 2), *Cooper v. Mantell* (No. 2) (1856), 22 Beav. 231.

**275. Necessity for object.**—The will of testator contained the following devise, "I give, devise, & bequeath unto my said two daughters, the said A. H. & A. M., all my freehold & leasehold messuages, dwelling-house, lands, hereditaments, & premises at . . . with their & every of their rights, members, & appurtenances to hold the same freehold & leasehold messuages, dwelling-houses, lands, hereditaments, premises, unto & to the use of my said two daughters, the said A. H. & A. M. & their respective heirs, exors., administrators, & assigns, unto & equally between them, share & share alike, as tenants in common, & not as joint tenants, & to & for their several & respective sole & separate use & benefit absolutely, & it is my will & request that they shall not sell or dispose of any part of my said freehold or leasehold premises." A subsequent part of the will contained a bequest of a sum of stock to trustees, in trust to pay the income to another daughter for her life "for her own sole & separate & inalienable use & benefit, & without power of anticipation":—*Held*: the words of the devise, even if they had stood alone, would have been insufficient to operate as a restraint on anticipation; the cases as to precatory trusts did not apply, as there was no trust imposed in favour of some other person; & the subsequent bequest strengthened this construction by showing that testator, when he intended to impose a restraint on anticipation, knew of & used the appropriate words for so fettering the estate.

The ct. often implies a trust from precatory words, but only in favour of some other person (*COTTON, L.J.*).—*Re HUTCHINGS to BURT* (1888), 59 L. T. 490, C. A.

#### (b) Construction.

##### i. In General.

**276. General rule—Gift accompanied by words of entreaty.**—*EATON v. WATTS*, No. 175, *post*.

**277.** ———] The words "precatory trust" . . . [are] used as a roundabout way of saying that the ct. found that there was a trust, although the trust was not expressed as such, but by words of prayer or suggestion or the like (*CHITTY, J.*).—*Re SANSON, SANSON v. TURNER* (1896), 12 T. L. R. 142.

**278.** ———]—*Re ATKINSON, ATKINSON v. ATKINSON*, No. 378, *post*.

**279. Construction depends on circumstances of case.**—(1) It is necessary for a person in his will *velle*, not only *petere & rogare*, & whether such expressions are declarations of testator's absolute will & pleasure, or only a request to be granted or refused, depends upon the circumstances of the case (*LORD HARDWICKE, C.*).

(2) The question here is, whether the words of testatrix are imperative, & it is plain they are not so: there is no request to settle the whole lands, or any particular part, but a power is left in him to dispose of, sell, or give away the whole estate in his life, & only so much as he should stand seised of at his death, she requests he should settle (*LORD HARDWICKE, C.*).—*BLAND v. BLAND* (1745),

2 Cox, Eq. Cas. 349; 9 Mod. Rep. 478; 30 E. R. 161.

*Annotations*:—*As to* (1) *Reid. Cunliffe v. Cunliffe* (1770), Amb. 686; *Pierson v. Garnet* (1786), 2 Bro. C. C. 38; *Sprange v. Barnard* (1789), 2 Bro. C. C. 585; *Malm v. Keighley* (1795), 2 Ves. 529. *Generally, Reid. Gibson v. Rogers, Rogers v. Gibson* (1750), Amb. 93. *Mentd. Constable v. Bull* (1849), 13 Jur. 619.

**280.** ———]—The proposition that the ct. does not presume & that merely precatory words do not create a trust, supposes the whole intention of testator, so far as it had been committed to writing, to be before the ct., & that the uncertainty is occasioned by the intention which is declared, & does not apply to a case in which, from the terms of the bequest, it would appear that there was a written expression of the intention of testator, which is not before the ct., & uncertainty is occasioned by the absence of that written declaration.—*GLOUCESTER CORPN. v. WOOD* (1843), 3 Hare, 131; 2 L. T. O. S. 117; 7 Jur. 1125; 67 E. R. 326; *on appeal, sub nom. GLOUCESTER CORPN. v. OSBORN* (1847), 1 H. L. Cas. 272, II. L.

*Annotations*:—*Reid. Briggs v. Penny* (1851), 3 Mac. & G. 546. *Mentd. A. G. v. Windsor* (Dean & Canons) (1858), 24 Beav. 679; *Lord v. Colvin* (1861), 1 Drew. & Sm. 475; *Aston v. Wood* (1868), L. R. 6 Eq. 419; *Willoughby v. Storer* (1870), 22 L. T. 896; *Re Dutton, Ex p. Peake* (1878), 40 L. T. 430; *Falle v. Godfray* (1888), 14 App. Cas. 70.

**281.** ———]—The doctrine of precatory trusts is not to be extended, & in considering whether precatory words create a trust, the ct. will not look only to particular expressions, but see whether on the whole will testator's intention was to create a trust, & regard will be had to any embarrassment & difficulty which would arise from a trust. Testatrix gave all her property, real & personal to her daughter, "her heirs & assigns; & it is my desire that she allows to [my relative & companion] A. G. an annuity of £25 during her life, & that A. G. shall if she desire it have the use of such portions of my household furniture as may not be required by my daughter." The daughter & her husband were appointed exors.:—*Held*: no trust or obligation to pay the annuity was imposed upon the daughter, but there was only a request to the daughter, not binding her in law, to make that provision for A. G.—*Re DUGGLES, GREGORY v. EDMONDSON* (1888), 39 Ch. D. 253; 59 L. T. 884, C. A.

*Annotations*:—*Apld. Re Downing's Residuary Estate* (1888), 60 L. T. 140; *Re Hamilton, Trench v. Hamilton*, [1895] 2 Ch. 370. *Consd. Re Atkinson, Atkinson v. Atkinson* (1911), 80 L. J. Ch. 370. *Distd. Re Jevons, Jevons v. Public Trustee* (1911), 56 Sol. Jo. 72. *Reid. Re Oldfield, Oldfield v. Oldfield*, [1904] 1 Ch. 549.

**282.** ———]—*Re HAMILTON, TRENCH v. HAMILTON*, No. 376, *post*.

**283. Words amounting to command.**—(1) Devise to A. & her heirs for ever, in the fullest confidence that after her decease she will devise the property to my family; A. is tenant in fee.

(2) To create a trust by means of an obligation imposed upon the conscience of a devisee, the words must be imperative, the subject must be certain, & the object as certain as the subject.

(3) The words "in the fullest confidence" are imperative.

(4) Do the words "my family" import a class of persons among whom she is to make a selection, capable of such precise definition, that it can be said, that the objects of this trust are certain (*LORD ELDON, C.*).—*WRIGHT v. ATKYNS* (1823), Turn. & R. 143; 37 E. R. 1051, L. C.

*Annotations*:—*As to* (1) *Apld. Re Williams, Williams v. Williams*, [1897] 2 Ch. 12. *Reid. Crawford v. Crawford*

certain, the desire so expressed, amounts to a command.—*CARY v. CARY* (1804), 2 Sch. & Lef. 173.—*IR.*



*Sec. 3.—Creation of trusts: Sub-sect. 3, II. (b) i. & ii.]*

(1825), 3 L. J. O. S. Ch. 105. *As to* (2) *Refd. Knight v. Knight* (1840), 3 Beav. 148; *Thorp v. Owen* (1843), 2 Hare, 607; *Greene v. Marsden* (1853), 1 Eq. Rep. 437. *As to* (4) *Refd. Lilley v. Hey* (1842), 1 Hare, 580; *De Beauvoir v. De Beauvoir* (1852), 3 H. L. Cas. 524; *Wingfield v. Wingfield* (1878), 9 Ch. D. 658. *Generally, Mentd. Langdale v. Briggs* (1856), 8 De G. M. & G. 391; *Turner v. Wright* (1860), 2 De G. F. & J. 234; *Blake v. Peters* (1863), 1 De G. J. & Sm. 345.

**284.** —.]—As a general rule, it has been laid down, that when property is given absolutely to any person, & the same person is, by the giver who has power to command, recommended or entreated or wished, to dispose of that property in favour of another, the recommendation, entreaty, or wish shall be held to create a trust, first, if the words are so used, that upon the whole they ought to be construed as imperative; secondly, if the subject of the recommendation or wish be certain; & thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain (*LORD LANGDALE, M.R.*).—*KNIGHT v. KNIGHT* (1840), 3 Beav. 148; 9 L. J. Ch. 354; 4 Jur. 839; 49 E. R. 58; *on appeal, sub nom. KNIGHT v. BOUGHTON* (1844), 11 Cl. & Fin. 513, II. L.

*Annotations:—Distd. Shelley v. Shelley* (1868), L. R. 6 Eq. 549. *Consd. Re Williams, Williams v. Williams*, [1897] 2 Ch. 12. *Apld. Re Oldfield, Oldfield v. Oldfield*, [1904] 1 Ch. 549. *Refd. Williams v. Williams* (1851), 1 Sim. N. S. 358; *Green v. Marsden* (1853), 1 Drew. 646; *Loceves v. Baker* (1854), 18 Beav. 372; *Lomax v. Ripley* (1855), 3 Sm. & G. 48; *Smith v. Smith* (1856), 2 Jur. N. S. 967; *Re Pinckard's Trusts* (1858), 4 Jur. N. S. 1011; *Wheeler v. Smith* (1860), 1 Giff. 300; *Scott v. Key* (1865), 35 Beav. 291; *Greene v. Greene* (1869), 17 W. R. 487; *Ellis v. Ellis* (1875), 41 L. J. Ch. 225; *Re Atkinson, Atkinson v. Atkinson* (1911), 80 L. J. Ch. 370. *Mentd. Holmesdale v. West* (1866), L. R. 3 Eq. 474.

**285.** — *Intention to create trust.*—(1) Testatrix, by her will, after giving, among other legacies, a sum of £3,000 to S. & a like sum of £3,000, in addition for the trouble she would have in acting as extrix., bequeathed all her residuary personal estate & effects unto S., “well knowing that she will make a good use & dispose of it in a manner in accordance with my views & wishes”; testatrix appointed S. sole extrix. of her will:—*Held: S.* did not take the residue for her own benefit, but the words of the bequest created a trust.

(2) Words accompanying a gift or bequest, expressive of confidence, or belief, or desire, or hope, that a particular application will be made of such bequest, will be deemed to import a trust upon these conditions: (a) that they are so used as to exclude all option or discretion in the party who is to act, as to his acting according to them or not; (b) the subject must be certain; & (c) the objects expressed must not be too vague or indefinite to be enforced.

Vagueness in the object will, unquestionably, furnish reason for holding that no trust was intended yet this may be counterbalanced by other considerations, which show that a trust was intended, while, at the same time, such trust is not sufficiently certain & definite to be valid & effectual.

(3) It is not necessary to exclude the legatee from a beneficial interest that there should be a valid or effectual trust; it is only necessary that it should clearly appear that a trust was intended.—*BRIGGS v. PENNY* (1851), 3 Mac. & G. 546; 21 L. J. Ch. 265; 18 L. T. O. S. 101; 16 Jur. 93; 42 E. R. 371, L. C.; *subsequent proceedings, sub nom. LANGDALE (LADY) v. BRIGGS* (1856), 8 De G. M. & G. 391, L. J.

*Annotations:—As to* (1) *Distd. Reynolds v. Kortright* (1854), 18 Beav. 417. *Consd. Greene v. Greene* (1869), 17 W. R.

487. *Distd. Irvine v. Sullivan* (1869), L. R. 8 Eq. 673; *Stead v. Mellor* (1877), 5 Ch. D. 225. *Apld. Re Boyes, Boyes v. Carritt* (1884), 26 Ch. D. 531. *Refd. Cawood v. Thompson* (1853), 17 Jur. 798; *Peace v. Hains* (1853), 11 Hare, 151; *Shepherd v. Nottidge* (1862), 2 John. & H. 766; *Re Fleetwood, Sidgreaves v. Brewer* (1880), 15 Ch. D. 594; *Re Eyre, Eyre v. Eyre* (1883), 49 L. T. 250. *As to* (2) *Consd. Cowman v. Harrison* (1852), 10 Hare, 234. *Apld. Bernard v. Minshull* (1859), John. 276. *Generally, Mentd. Johnson v. Ball* (1851), 5 De G. & Sm. 85; *Brenchley v. Lynn* (1852), 2 Mob. Eccl. 441; *Topham v. Portland* (1863), 1 De G. J. & Sm. 517; *Barrs v. Fewkes* (1865), 6 New Rep. 355.

**286.** —.]—Where a gift is in terms absolute, but accompanied with an expression of wishes in favour of another object, & of confidence in the legatee, unless the language is so express as to be in terms imperative & to exclude all discretion, it cannot bind the legatee.—*LOMAX v. RIPLEY* (1855), 3 Sm. & G. 48; 3 Eq. Rep. 301; 24 L. J. Ch. 254; 65 E. R. 558; *sub nom. LOMAX v. RIPLEY, RAYNE v. RIPLEY*, 24 L. T. O. S. 323; 1 Jur. N. S. 272; 3 W. R. 269.

*Annotations:—Consd. Rowbotham v. Dunnott* (1878), 8 Ch. D. 430. *Refd. Cullen v. A.-G.*, for Ireland (1866), 12 Jur. N. S. 631, n.; *Re Crawshaw, Crawshaw v. Crawshaw* (1890), 43 Ch. D. 615.

**287.** —.]—Testatrix devised real estate to two persons, their heirs & assigns, as tenants in common, for their personal use & benefit, without any restriction, trust, or condition whatever. One of the devisees was a mere acquaintance of testatrix, & the other was her solr., who prepared her will & to whom she expressed her intention of leaving her property to charitable purposes. The solr. informed her that such a devise would not be legal, & this absolute gift was then executed. No undertaking, express or implied, was given by the devisees to accept a charitable trust, though testatrix probably expected that the devisees would apply the property to some good & useful, but not necessarily charitable, purpose:—*Held: whatever might have been the wish or expectation of testatrix, the devisees were not bound by any secret trust to carry out such intention, but were free to dispose of the property as they pleased; & an action claiming to have the devise declared void was dismissed.*—*ROWBOTHAM v. DUNNETT* (1878), 8 Ch. D. 430; *sub nom. ROBOTHAM v. DUNNETT*, 47 L. J. Ch. 419; 38 L. T. 278; 26 W. R. 520.

*Annotation:—Refd. Freeman v. Laing*, [1899] 2 Ch. 355.

**288.** —.]—N., by his will dated Dec. 13, 1901, devised & bequeathed all his estate & effects of every description to his brother, C. T. C., absolutely, & he appointed his brother, H. J. M., & C. G. exors. & trustees of his will. On Jan. 11, 1902, N. signed a document or letter which was headed “Instructions to my exors. C. M., & G.—Dear brother C. (I dictated this to G.)—Like many others who have gone before me, I have failed to make provision for the distribution of my property amongst my relatives & friends before it became too late to do it with care. For this reason I have left all my estate to you in the fullest reliance that you will, as far as possible & to the uttermost, carry out any wish that I may express in writing now or later, or which may be conveyed to you verbally by G. or my good-hearted cousin H. I have made a settlement on P. which should suffice for him in the struggle of life which we all have to face. As regards our family, you will be the best judge how & when a suitable distribution should be made. I do not fetter your discretion in any way. You are an old man, & therefore do not delay the distribution.” Then followed directions as to the disposal of certain property & amounts to be paid to certain persons. The document concluded: “Finally, these are the instructions referred to in my will. They are not in any way to fetter





subject-matter & a certain object: but it is not necessary that the object should be so defined that it can be distinctly ascertained: if there is a definite object intended, that is a sufficient creation of a trust to exclude the legatee from taking beneficially.

Thus, where testatrix bequeathed to her husband absolutely a specific sum of £13,000, & requested that after reserving to his own absolute use & benefit £2,000, he would make such disposition of the remainder as he might deem most desirable to carry out her wishes, often expressed to him by word, & it appeared that she had never expressed any wishes on the subject, it was held, that there was a definite object intended; & though that object could not be ascertained, there was a sufficient creation of a trust to exclude the husband from taking the beneficial interest in the remainder of the fund, although the trust itself failed.—*BERNARD v. MINSHULL* (1859), *John*. 276; 28 L. J. Ch. 649; 5 Jur. N. S. 931; 70 E. R. 427.

*Annotations*:—*Apld.* *Irvine v. Sullivan* (1869), L. R. 8 Eq. 673. *Consd.* *Re Eyre, Eyre v. Eyre* (1883), 49 L. T. 259. *Reid.* *Thomas v. Jones* (1862), 2 John. & H. 475. *Mentd.* *Noble v. Willock* (1873), 42 L. J. Ch. 321; *Re Bagot, Paton v. Ormerod*, [1893] 3 Ch. 348.

**312. — What degree of certainty required.**—*BERNARD v. MINSHULL*, No. 311, *ante*.

**313. — "Relations."**—Testator bequeathed all his furniture, etc., & other property to his wife, & for her "to do justice to those relations on my side such as she think worthy of remuneration, but under no restriction to any stated property, but quite at liberty to give & distribute what & to who" she "may please":—*Held*: no precatory trust was created.—*Re BOND, COLE v. HAWES* (1876), 4 Ch. D. 238; 46 L. J. Ch. 488; 25 W. R. 95.

**314. —**—The widow of a peer stated in a letter or memorandum sent to her solr. that certain diamonds had been given to her upon her marriage by the mother of her husband, then heir-presumptive to the peerage, for her life with the request that at her death they might be left as heirlooms:—*Held*: the terms of the gift as stated did not import a precatory trust, & therefore the absolute property in the diamonds passed under it to the donee.

It is incumbent on those who claim that there is a trust, whether created by precatory words or otherwise, to point out with reasonable certainty who are the objects of the trust; these objects must be ascertained from the words used construed reasonably (*CHITTY, L.J.*).—*HILL (VISCOUNT) v. HILL (DOWAGER VISCOUNTESS)*, [1897] 1 Q. B. 483; 66 L. J. Q. B. 329; 76 L. T. 103; 45 W. R. 371; 13 T. L. R. 227; 41 Sol. Jo. 292, C. A.

*Annotations*:—*Consd.* *Re Atkinson, Atkinson v. Atkinson* (1911), 80 L. J. Ch. 370. *Reid.* *Re Williams, Williams v. Williams*, [1897] 2 Ch. 12. *Re Oldfield, Oldfield v. Oldfield*, [1904] 1 Ch. 549. *Mentd.* *Re Hill, Hill v. Hill*, [1902] 1 Ch. 537.

**315. Certainty of subject.**—*BLAND v. BLAND*, No. 279, *ante*.

*See, also*, Nos. 323, 324, *post*.

**316. —**—Testator devised certain real estates to trustees for the use of W. S. for life, with remainders over, & he directed the residue of his personal estate to be invested in the purchase of other real estates. He gave a legacy of £100 to B. E. L. as a token of esteem. The will then contained this clause: "& it is also my particular desire that my said exors., whilst acting in the management of all or any of my affairs under this my will, as also my friend W. S. when he shall enter into the receipt & perception of my said rents of K. V. & K., shall continue the said B. E. L. in the receipt & management thereof, & likewise

shall employ & retain him in the receipt, agency, & management of the rents & issues of such other lands & premises as shall & may be purchased & settled in pursuance of the directions hereinbefore contained, at the usual fees allowed to agents, he having acted for me since I became possessed of said estates fully to my satisfaction":—*Held*: these words did not create a trust in favour of B. E. L.

There is, it is true, a great variety of cases in which the expression of a wish has been held to create a trust; but the rule of construction in these cases is, that there should be certainty in the object & in the subject of a trust so created (*LORD COTTENHAM, C.*).—*SHAW v. LAWLESS* (1838), 5 Cl. & Fin. 129; 7 E. R. 353, H. L.

*Annotations*:—*Apld.* *Finden v. Stephens* (1846), 2 Ph. 142. *Reid.* *Consett v. Bell* (1842), 1 Y. & C. Ch. Cas. 59. *Knott v. Cottee* (1847), 2 Ph. 192; *Foster v. Elsley* (1881), 19 Ch. D. 618. *Mentd.* *Stammers v. Rothorham* (1862), 3 Giff. 556; *Rhodes v. Forwood* (1876), 1 App. Cas. 256. **317. —**—*FINDEN v. STEPHENS*, No. 395, *post*.

**318. —**—A gift of the yearly interest, dividends, proceeds & profits, to arise from the shares of testator in a pottery, shipbuilding yard, shipping, trust moneys, effects & premises, to his wife for her life, for the maintenance, education & support of herself & his children; & subject to some bequests & trusts for the advancement of the children, a bequest of the residue to the children equally: & testator particularly recommended, desired & directed his wife, at his decease, by will or otherwise, to divide or dispose of what money or property she might have saved from the yearly income thereinbefore given to her amongst all his children, in equal shares:—*Held*: the attempted disposition of the savings of the widow was in the nature of a precatory gift; but, the widow having taken a beneficial interest, & being empowered to spend the whole, there was no certainty of the subject of the gift, & no trust created of the savings in favour of the children; & the same, therefore, belonged to the estate of the widow.—*COWMAN v. HARRISON* (1852), 10 Hare, 234; 22 L. J. Ch. 993; 21 L. T. O. S. 148; 17 Jur. 313; 1 W. R. 96; 68 E. R. 913.

*Annotation*:—*Reid.* *Parnall v. Parnall* (1878), 9 Ch. D. 96.

**319. — "Bulk of her residuary estate."**—Testatrix gave her residuary estate to A., his heirs, exors., administrators & assigns for ever, for his own use & benefit, as she had full confidence in him that, if he should die without lawful issue, he would, after providing for his widow during her life, leave the bulk of her residuary estate to B., C., D. & E. equally:—*Held*: this language did not describe the subject of gift with sufficient certainty to create a precatory trust.—*PALMER v. SIMMONDS* (1854), 2 Drew. 221; 2 W. R. 313; 61 E. R. 704.

*Annotations*:—*Distd.* *Shovelton v. Shovelton* (1863), 32 Beav. 143. *Consd.* *Curnick v. Tucker* (1874), L. T. 17 Eq. 320. *Reid.* *Le Marchant v. Le Marchant* (1874), L. R. 18 Eq. 414; *Fordham v. Speight* (1875), 23 W. R. 782.

**320. — No restriction to any stated property.**—*Re BOND, COLE v. HAWES*, No. 313, *ante*.

**321. Obscurity of declaration—No trust.**—Testator gave all his real & personal property to his widow, her heirs, etc., "absolutely & for ever, in the full assurance & confident hope" that she would bring up, educate, & provide for his children, as it would have been his intention if living:—*Held*: though the words "full assurance & confident hope" would create a precatory trust, yet the trusts were too obscure to carry into effect, & the widow took absolutely.—*MACNAB v. WHITBREAD* (1853), 17 Beav. 299; 1 W. R. 473; 51 E. R. 1049.

*Sec. 3.—Creation of trusts: Sub-sect. 3, H. (c), (d) & (e).]*

(c) *Desire.*

**322. When creating trust—General words—As to objects—& amount.]**—A baron gives all his estate to his wife, & says, "I desire & request my said wife to give all her estate which she shall have at the time of her death to her & my nearest relations equally amongst them."

The words being so very general, both in respect of the money, & of the persons to take it, it does not amount to a devise, but it is only a recommendation to the wife to make such a disposition; but if he had desired she would have given it to a particular person, it would have been a good devise, & a trust (*per CUR.*).—*ANON.* (1712), 2 Eq. Cas. Abr. 291; 8 Vin. Abr. 72; 22 E. R. 244.

**323.** ————] — *PALMER v. SCHRIEB* (1713), 2 Eq. Cas. Abr. 291; 8 Vin. Abr. 289; 22 E. R. 244.

*Annotations:—Apld.* *Pleron v. Garnet* (1786), 2 Bro. C. C. 38. *Refd.* *Sprango v. Barnard* (1789), 2 Bro. C. C. 585.

**324.** ————]—Testator expressing his will & desire, that one-third of the principal of his estate & effects be left entirely to the disposal of his wife, among such of her relations as she may think proper after the death of his sisters, a trust for her next of kin at the time of her death, having made no disposition.—*BIRCH v. WADE* (1814), 3 Ves. & B. 198; 35 E. R. 454.

*Annotations:—Refd.* *Burrough v. Philcox* (1840), 5 My. & Cr. 72; *Re Briceley*, *Briceley v. Briceley* (1894), 43 W. L. R. 36; *Re Weekes's Settlement*, [1897] 1 Ch. 289.

**325.** ————]—"If she thinks fit."—*JONES v. NABBS* (1718), 1 Eq. Cas. Abr. 404; *Gilb. Ch.* 146; 25 E. R. 102.

*Annotations:—Refd.* *Drakeford v. Wilks* (1747), 3 Atk. 539; *Mallin v. Keighley* (1795), 2 Ves. 529; *Smith v. Attersoll* (1826), 1 Russ. 260.

**326.** ————]—"As he should think fit."—*MASON v. LIMBURY* (1735), cited in *Amb.* at p. 4; 27 E. R. 1.

*Annotations:—Refd.* *Foley v. Parry* (1833), 2 My. & K. 138; *Re Diggle*, *Gregory v. Edmondson* (1888), 39 Ch. D. 253.

**327.** ————] **To sell to particular societies.]**—*R. S.*, incumbent of the rectory of B., devises his perpetual advowson, donation & patronage of the parish church of B. & all glebe lands, profits, & appurtenances to the same belonging, to G. S. willing & desiring her to sell & dispose of the same to Eton College, & on their refusal, to Trinity College, Oxford, & on the refusal of both these societies, to any of the colleges in Oxford or Cambridge, who will be the best purchaser. There is in this case no resulting trust of the advowson of B. to the heirs-at-law of testator, but a devise of the beneficial interest therein to G. S., with an injunction

only to sell to particular societies.—*HILL v. LONDON (BP.)* (1738), 1 Atk. 618; 26 E. R. 388, L. C.

*Annotations:—Consd.* *King v. Denison* (1813), 1 Ves. & B. 260. *Refd.* *Walton v. Walton* (1807), 14 Ves. 318; *Cook v. Hutchinson* (1836), 1 Keen, 42; *Wood v. Cox* (1837), 2 My. & Cr. 684; *Clarke v. Hilton* (1860), L. R. 2 Eq. 810; *Croome v. Croome* (1888), 59 L. T. 582; *Re Foord*, *Foord v. Condor*, [1922] 2 Ch. 519.

**328.** ————]—*HARDING v. GLYN*, No. 300, *ante*.

**329.** ————]—Testator "desires" J. "to leave" D. £500, at her death, out of the money bequeathed her:—*Held*: to amount to a legacy from the original testator, & not to lapse by D.'s death in J.'s lifetime, he having survived testator.—*MEDLICOT v. BOWES* (1749), 1 Ves. Sen. 207; 27 E. R. 985, L. C.

*Annotations:—Refd.* *Blamire v. Geldart* (1809), 16 Ves. 314; *Freeman v. Lomas* (1851), 9 Hare, 109; *Middleton v. Pollock*, *Ex p. Nugee* (1875), L. R. 20 Eq. 29.

**330.** ————]—"To take care of his daughter."—Testator gave his whole property to his wife, making no express provision for his daughter, "but in case of death happening to his wife, desired his exors. to take care of the whole for his daughter." The wife shall have the whole for life only, with remainder absolutely to the daughter.—*NOWLAN v. NELLIGAN* (1785), 1 Bro. C. C. 489; 28 E. R. 1257, L. C.

*Annotations:—Consd.* *King v. Taylor* (1801), 5 Ves. 806. *Refd.* *Pleron v. Garnet* (1786), 2 Bro. C. C. 38; *Douglas v. Chalmer* (1795), 2 Ves. 501; *Cambridge v. Rous* (1802), 8 Ves. 12; *Home v. Pillans* (1833), *Coop. temp. Brough*, 198.

**331.** ————]—"To dispose of among children."—Testator gave the residue of his personal estate to his wife, desiring her to provide for his daughter A. out of the same, as long as she, his wife, should live, & at her decease to dispose of what shall be left, among his children, in such manner as she shall judge most proper. There is not an absolute trust for the children after the death of the wife.—*PUSHMAN v. MILLITER* (1795), 3 Ves. 7; 30 E. R. 864.

*Annotations:—Refd.* *Parker v. Bolton* (1835), 5 L. J. Ch. 98; *Montresor v. Montresor* (1845), 1 Coll. 693.

**332.** ————]—"Absolute desire."—*CRUWYS v. COLMAN*, No. 91, *ante*.

**333.** ————]—*FORBES v. BALL*, No. 365, *post*.

**334.** ————]—"Desire & direct."—Devise of a copyhold estate upon certain trusts. *Proviso* thus, "Provided also, & I do desire & direct that the present tenant of the said copyhold estate, or any of his children desiring to be continued tenant or tenants thereof, be suffered to hold & occupy the said premises, upon payment of the present rent, & the taxes & levies which the said present tenant hath been accustomed to pay, & also all future taxes, during the time he or they shall respectively be tenant or tenants of the same, & upon entering into proper agreements not to commit any waste,

of all my children as much as it is possible to do & I also desire that at her death she will divide the estate that I now give her among our children in the most just manner possible" did not constitute a precatory trust.—*Re SOULIERE & McCRACKEN* (1913), 24 O. W. R. 400; 4 O. W. N. 1092; 9 D. L. R. 879.—*CAN.*

**o.** ————]—"Shall execute & carry out directions."—*CAREY v. McHUGH (N.B.)* (1917), 37 D. L. R. 286.—*CAN.*

**p.** ————]—"I desire & request."—*RAYLEY v. PUBLIC TRUSTEE* (1907), 27 N. Z. L. R. 659.—*N.Z.*

**q.** ————]—"I desire."—Testator by his will devised to his daughter his freehold estate with house thereon. The will then proceeded as follows: "And I desire that at her death she should leave the fee-simple of this house to her son & my grandson S. & in case of the prior decease of S. that she devise

**PART I. SECT. 3, SUB-SECT. 3.—H. (c).**

**g. When creating trust—"As she may think fit."—***Re BUTTERWORTH, BUTTERWORTH v. BUTTERWORTH*, [1916] S. A. L. R. 180.—*AUS.*

**h.** ————]—"In such manner as she shall deem just & equitable."—Testator, by his will, made an absolute gift of all his property to his wife, subject to the payment of debts, legacies, funeral & testamentary expenses, & by a subsequent clause provided as follows: "And it is my wish & desire after my decease, that my said wife shall make a will dividing the real & personal estate & effects hereby devised & bequeathed to her among my said children & in such manner as she shall deem just & equitable."—*Held*: this did not create a precatory trust.—*BANK OF MONTREAL v. BOWER* (1889), 18 O. R. 226.—*CAN.*

**k.** ————]—"As she sees fit & proper."—Where testator by his will said: "I . . . do give & bequeath unto my wife all the property which I possess at my death, to dispose of to the best advantage for the support of the family & to leave the residue as she sees fit & proper at her death."—*Held*: no trust for the family was created, & the wife took absolutely.—*SINCLAIR v. MALAY* (1900), 40 N. S. R. 181.—*CAN.*

**l.** ————]—"As she may deem most fit & proper."—*PETTYPIECE v. TURLEY* (1906), 13 O. L. R. 1; 8 O. W. R. 617.—*CAN.*

**m.** ————]—"My wish & desire."—*Re WALTON* (1911), 16 W. L. R. 679; 20 Man. L. R. 686.—*CAN.*

**n.** ————]—"In the most just manner possible."—The following clause in a will following an absolute gift:—"It is my desire that she takes good care

or do any damage by sowing the same with flax, hemp, or woad, or by any other means whatsoever":—*Held*: this was merely a trust; & gave no legal interest to the tenant, or any of his children.—*DOE d. GRIFFIN v. GRAFTER* (1831), 9 L. J. O. S. K. B. 260.

**335.** — *Leave such property among testator's children.*—Testator bequeathed all his personal estate to his wife, & declared it to be his will that, although he had given the whole of his property to his said wife, yet it was his desire that, if his children conducted themselves to her approbation, she would "leave such property equally amongst all his children":—*Held*: this was not an absolute gift to the widow; & the obligation amounted to a trust.—*BONSER v. KINNEAR* (1860), 2 Giff. 195; 2 L. T. 345; 6 Jur. N. S. 882; 60 E. R. 82.

**336.** — *Charitable purposes.*—A clause in a will appointing A. residuary legatee, with the desire that the residuary estate shall be afterwards left by her, in her own & testator's name, to charitable purposes, does not raise a trust, but operates as an absolute gift.—*McCULLOCH v. McCULLOCH* (1863), 1 New Rep. 535; 11 W. R. 504.

**337.** — *"As they shall think most agreeable to my wishes."*—Testatrix gave all her personal estate to trustees upon trust, after payment of her funeral & testamentary expenses, debts, & legacies, to hold the residue "in trust for such of my nieces A. & B. as shall be living at my death, my desire being that they shall distribute such residue as they think will be most agreeable to my wishes." A. & B. both survived testatrix:—*Held*: they took the residue for their own benefit.—*STFAD v. MELLOR* (1877), 5 Ch. D. 225; 46 L. J. Ch. 880; 36 L. T. 498; 25 W. R. 508.

*Annotations*:—*Consd. Re Eyre, Eyre v. Eyre* (1883), 49 L. T. 259. *Re Diggle, Gregory v. Edmondson* (1888), 39 Ch. D. 254, n.

**338.** — *Provision for companion.*—*Re DIGGLES, GREGORY v. EDMONDSON*, No. 281, *ante*.

**339.** — *Annual allowance.*—Testatrix gave all her property equally amongst her two daughters "as tenants in common for their own absolute use & benefit," & appointed them her ex-trixes. She then added, "My desire is that each of my said two daughters shall during the lifetime of my son pay to him one third of the respective incomes of my said two daughters accruing from the moneys & investments under this my will":—*Held*: no trust was created in favour of the son.—*Re OLD-FIELD, OLDFIELD v. OLDFIELD*, [1904] 1 Ch. 519; 73 L. J. Ch. 433; 90 L. T. 392; 48 Sol. Jo. 298, C. A.

**340.** — *Earnest desire.*—*DOBIE v. EDWARDS*, No. 379, *post*.

**341.** — *"As she shall think fit."*—The words "I desire the £300 which I have bequeathed to A. to be divided by her on her death, as she shall think fit, amongst the daughters of my cousin B." create a trust capable of being enforced.—*Re JEVONS (DECEASED), JEVONS v. PUBLIC TRUSTEE* (1911), 56 Sol. Jo. 72.

(d) *"Entreat" or "Enjoin."*

**342.** *Entreat*—"Require & entreat."—*Codicil*, requiring & entreating the exor., who was also

residuary legatee, by will or deed to settle & secure £500, to be paid at his decease; testator declaring, that he had omitted to express it in his will, not doubting that the exor. will readily comply with the request; a trust, by way of legacy out of the assets; not a condition imposed, independent of them.—*TAYLOR v. GEORGE* (1814), 2 Ves. & B. 378; 35 E. R. 362.

**343.** — *"Words of entreaty in a will held to raise a trust."*—*PREVOST v. CLARKE* (1816), 2 Madd. 458; 56 E. R. 403.

**344.** — *"Seriously & warmly entreat."*—The words "I seriously & warmly entreat," etc. . . . [are] sufficient to raise a trust in a proper place (*RICHARDS, B.*).—*HENEAGE v. ANDOVER (LORD)* (1822), 10 Price, 230; 147 E. R. 297; *on appeal, sub nom. MEREDITH v. HENEAGE* (1824), 1 Sim. 542, H. L.

*Annotations*:—*Reid, Crawford v. Crawford* (1825), 3 L. J. O. S. Ch. 105; *Parker v. Bolton* (1835), 5 L. J. Ch. 98; *Knight v. Knight* (1840), 9 L. J. Ch. 354; *White v. Briggs* (1846), 15 L. J. Ch. 182; *Greene v. Marsden* (1853), 1 Eq. Rep. 437; *Godfrey v. Godfrey* (1863), 2 New Rep. 16; *Katon v. Watts* (1867), L. R. 4 Eq. 151; *Irvine v. Sullivan* (1869), L. R. 8 Eq. 673; *Re Williams, Williams v. Williams*, [1897] 2 Ch. 12.

**345.** — *"To be kindly, considerate & liberal to relations."*—G. gave the residue of his personal estate to trustees for his wife for life, & after her decease to his nephew R., for his own use & benefit absolutely. After the death of G. an, undated letter was found in his handwriting, addressed to R., entreating him, as a last request, to accept the letter in explanation, lest there should be anything not fully explanatory of his intention in the terms of his will. The paper then went on to make certain requests in very vague & ambiguous language. It was admitted to probate. One of the Vice-Chancellors decided that the absolute gift of the residue contained in the will was cut down to a life estate by the terms of the letter; but on appeal, it was held, that though the letter was a testamentary instrument, it was uncertain in its meaning, & did not revoke or cut down the absolute gift to R. in the will; & moreover, that the words of the letter were not sufficient to create a trust which this ct. could enforce.—*Re PINCKARD'S TRUST* (1858), 27 L. J. Ch. 422; 31 L. T. O. S. 67; 4 Jur. N. S. 1041, L. J.

**346.** *Enjoin*—"To take care of as may seem best in future."—Bequest as follows:—"I give to my brother, in trust for my sisters M., C. & H., £4,000 . . . on condition that they will support M.; at the demise of either or any of the above, the survivors or survivor to receive the increased income produced thereby. They are hereby enjoined to take care of my nephew J., as may seem best in the future":—*Held*: the sisters took absolutely as joint tenants; & there was no precatory or other trust in favour of the nephew.—*Re MOORE, MOORE v. ROCHE* (1886), 55 L. J. Ch. 418; 54 L. T. 231; 34 W. R. 343.

(e) *"Hope."*

**347.** *"Leave them to my son."*—*v. —* (circa 1610), cited in 1 Cas. in Ch. at p. 310; 22 E. R. 815.

*sire.*—*STRUBEN v. ESTATE STRUBEN*, [1916] C. P. D. 614.—S. AF.

PART I. SECT. 3, SUB-SECT. 3.—H. (d).

b. *"I beg."*—*CORBET v. CORBET* (1873), 7 I. R. Eq. 456.—IR.

PART I. SECT. 3, SUB-SECT. 3.—H. (e).

a. *"Hope" & "Anxious desire."*—Testator bequeathed his movable

the property at her death in equal shares to my two sons L. & V.":—*Held*: the expression of desire amounted to an imperative direction, & the daughter took only a life interest, with a remainder to the grandson & other sons.—*Re KLEE, DRUMMOND v. MCGILL* (1912), 31 N. Z. L. R. 830.—N.Z.

f. *making bequests has in his will used the words, "I desire that the immo-*

vable property in my estate shall be kept in the family name as long as possible," cannot be deemed to have imposed a *fidei-commissum* on the property, & to have thereby prohibited its alienation outside the family.—*Re CAREY* (1894), 11 S. C. 123.—S. AF.

t. *"I hereby specially desire."*—*CAMPBELL'S TRUSTEES v. KINREY-MORGAN'S TRUSTEES*, [1915] S. C. 298.—SCOT.

a. *"My express will & de-*



*Sect. 3.—Creation of trusts: Sub-sect. 3, H. (e), (f), (g) & (h).]*

**348.** "Continue in the family."—*HARLAND v. TRIGG*, No. 301, *ante*.

**349.** "Earnest hope & particular request."—Testator devised real estates to his son in fee, coupled with the earnest hope & particular request that he would keep the estate, & would not sell, alien, or dispose of the same, or any part thereof, except by way of exchange, or for reinvesting the value in the purchase of other lands:—*Held*: the son took the estates in fee simple, free from any trust.—*HOOD v. OGLANDER* (1865), 34 Beav. 513; 6 New Rep. 57; 34 L. J. Ch. 528; 12 L. T. 626; 11 Jur. N. S. 498; 13 W. R. 705; 55 E. R. 733.

**350.** "To her son if he was worthy."—*EATON v. WATTS*, No. 175, *ante*.

(f) "Request."

**351.** Whether creating trust—Use of general words—As to objects—& amount.]—*ANON.* (1712), No. 322, *ante*.

**352.** ————.]—*BERNARD v. MINSHULL*, No. 311, *ante*.

**353.** ———— Absolute gift qualified.]—A. by will devised his collieries, etc., to trustees upon trust, to dispose & convey the same in such manner as his daughter M., whether *sole* or *covert*, should direct or appoint; & for want of such direction or appointment, to apply the money arising thereby to certain purposes in his will mentioned. He then declared, "that though his meaning was to give his daughter the absolute disposal of the collieries, etc., to prevent the expenses & trouble that must attend the management of affairs of such a nature, under the direction of the Ct. of Ch.; he requested his daughter to direct the money arising therefrom, to be applied in such manner as he had directed the same in default of her direction & appointment." The daughter made an appointment in favour of her husband absolutely. But this appointment was held to be void, as being contrary to testator's intention.—*BUTE (EARL) v. STUART* (1762), 1 Bro. Parl. Cas. 476; 1 E. R. 700, H. L.

*Annotation*:—*Reid. Henega v. Andover* (1822), 10 Price, 230.

**354.** ———— "My dying request."—The words, "it is my dying request," in a will raise a trust.—*PIERSON v. GARNET* (1787), 2 Bro. C. C. 226; 29 E. R. 126, L. C.

*Annotations*:—*Consd. Pughman v. Filhiter* (1795), 3 Ves. 7; *Morice v. Durham (Bp.)* (1805), 10 Ves. 522; *Henega v. Andover* (1822), 10 Price, 230. *Reid. Sprange v. Barnard* (1789), 2 Bro. C. C. 585; *Mallin v. Keighley* (1795), 2 Ves. 529; *Brown v. Higgs* (1803), 8 Ves. 561; *Kirkbank v. Hudson* (1819), Dan. 259; *Wright v. Atkins* (1823), Turn. & L. 143; *Foley v. Parry* (1833), 2 My. & K. 138. *Mentid. Clarke v. Blake* (1788), 2 Bro. C. C. 320; *Malcolm v. Martin* (1790), 3 Bro. C. C. 50; *Bourne v. Ricketts* (1804), 10 Ves. 330; *Lansdowne v. Lansdowne* (1820), 2 Bl. 60.

**355.** ————]—Testator in India gives all his estate & effects to A. in England in trust, & directs his

property to be remitted to him; & after several legacies he gives A. £800, & requests him as soon as the property is remitted to lay out the same in the funds or other securities which shall appear most advantageous for those who shall be benefited by it hereafter: the £800 is a beneficial legacy, not in trust.—*WADLEY v. NORTH* (1797), 3 Ves. 384; 30 E. R. 1056.

*Annotations*:—*Reid. Hammond v. Maule* (1844), 13 L. J. Ch. 386; *Merry v. Hill* (1869), L. R. 8 Eq. 619.

**356.** ————]—Testator bequeaths to his wife the residue of his estate, requesting that she would, at her death, leave three legacies of £200 each to three persons whom he describes, & that she would leave the remainder of her property to his two nephews, in such proportions as she thought proper:—*Held*: subject to the three legacies the widow was entitled to the residue absolutely, & no trust, as to any portion of it, was raised in favour of the nephews.—*EADE v. EADE* (1825), 4 L. J. O. S. Ch. 44, L. C.

*Annotation*:—*Consd. Cowinan v. Harrison* (1852), 10 Harv. 234.

**357.** ———— Superintend & care for education—"Particular wish & request."—*FOLLEY v. PARRY*, No. 368, *post*.

**358.** ———— "Especially requesting them."—Testator duly appointed a fund in favour of objects of the power absolutely, & he also bequeathed to them his own property, "especially requesting them" to leave the appointed fund to persons not objects of the power:—*Held*: this did not raise a case for election.—*BLACKETT v. LAMB* (1851), 14 Beav. 482; 21 L. J. Ch. 46; 18 L. T. O. S. 115; 16 Jur. 142; 51 E. R. 371.

*Annotations*:—*Apld. Langslow v. Langslow* (1856), 21 Beav. 552. *Reid. Stephens v. Gadsden* (1855), 20 Beav. 463; *Tomkyns v. Blane* (1860), 28 Beav. 422; *Box v. Barratt* (1866), L. R. 3 Eq. 244; *Churchill v. Churchill* (1867), L. R. 5 Eq. 14.

**359.** ———— "Beg & request."—Testator by his will gave certain shares of freehold & leasehold houses to his wife for her sole use & benefit, begging & requesting that at her death she would give & bequeath the same in such shares as she should think proper, & unto such members of her own family as she should think most deserving of the same. He gave her all his moneys in the funds & all the money he might be entitled to, for her sole use & benefit, begging & requesting that at her death she would give & bequeath what should be remaining in such sums as she should think proper, unto such members of her own & his family that she should think most deserving, & were entitled to the same. He made a codicil by which he gave in terms his residuary estate to his wife:—*Held*: both as to the freehold & leasehold property & the moneys there was no trust, but the wife took absolutely.—*GREEN v. MARSDEN* (1853), 1 Drew. 646; 1 Eq. Rep. 437; 22 L. J. Ch. 1092; 22 L. T. O. S. 17; 1 W. R. 511; 61 E. R. 598.

*Annotation*:—*Reid. Burt v. Hellyar* (1872), L. R. 14 Eq. 160.

estate to his widow, expressing in the testament an "anxious desire" & in a subsequent writing, a "hope" that she should make a testament bequeathing one-half of the means which might belong to her at her death to certain of his relatives, testator's widow having died intestate:—*Held*: her exor. was not bound or entitled to give any effect to testator's request.—*BARCLAY'S EXECUTOR v. McLEOD* (1880), 7 R. (Ct. of Sess.) 477; 17 Sc. L. R. 311.—*SCOT*.

PART I. SECT. 3. SUB-SECT. 3.—H. (I).

355 i. Whether creating trust.]—Tes-

tator devised thus: "All the residue of my property, real & personal, I devise to my wife, requesting her to will the same to our children, as she shall think best." The widow devised the whole of the property to one child out of a number:—*Held*: that the words used were directory, not precatory only; & that the widow was bound to divide her property among all the children, although she might, in her discretion, give personality to one & realty to another.—*FINLAY v. FELLOWS* (1867), 14 Gr. 66.—*CAN*.

**355 ii.** ————]—Testator, by his will, gave & bequeathed all his property, both real & personal, to his wife for her

use & benefit, & then added: "I request my wife to pay to P. R. (an adopted son), at her death, or should she sell the farm on which I now live before her death, \$400"—*Held*: the gift to testator's wife was subject to a precatory trust in favour of P. R.—*RENEHAN v. MALONE* (1897), 1 N. B. Eq. Rep. 506.—*CAN*.

**355 iii.** ————]—*Re O'BIERNE* (1844), 1 Jo. & Lat. 352.—*IR*.

**355 iv.** ————]—*MORIARTY v. MARTIN* (1852), 3 I. Ch. R. 26; 4 Ir. Jur. 321.—*IR*.

d. "I would ask you to give or send."—*THE KING'S ESTATE* (1888), 21 L. R. Ir. 273.—*IR*.



**360.** — **Jewels to go as heirlooms.**—Jewels were bequeathed to testatrix's nephew A., "to go & be sold as heirlooms by him & by his eldest son on his decease, & to go & descend to the eldest son of such eldest son, & so on to the eldest son of his descendants, as far as the rules of law or equity will permit; & I request my said nephew to do all in his power, by his will or otherwise, to give effect to this my wish as to these things so directed to go as heirlooms as aforesaid":—*Held*: a valid executory trust was created for A. for life, with remainder to B., A.'s eldest son, for his life, & upon the death of B. in trust for B.'s eldest son, to be a vested interest in him when he should attain twenty-one; but if he should die in B.'s lifetime, or after B.'s death, without having attained twenty-one, leaving an eldest son born before B.'s death, in trust for such last-mentioned eldest son, to be a vested interest when he should attain twenty-one. Subject to these limitations, the jewels vested in A. absolutely, & passed by his will. The objection, if any, to limiting personal estate as heirlooms, where there is no real estate to guide the limitations, does not apply to the case of family jewels.—*SHELLEY v. SHELLEY* (1808), 1 L. R. 6 Eq. 540; 37 L. J. Ch. 357; 16 W. R. 1036.

*Annotations*:—*Consd.* *Montagu v. Inchiquin* (1875), 23 W. R. 592; *Re Hill, Hill v. Hill* (1902), 50 W. R. 434. *Reid.* *Exmouth v. Praed* (1883), 52 L. J. Ch. 420; *Re Johnston, Cockrell v. Essex* (1884), 26 Ch. D. 538; *Hill v. Hill*, [1897] 1 Q. B. 483; *Re Beresford-Hope, Aldenham v. Beresford-Hope*, [1917] 1 Ch. 287.

**361.** — *HILL (VISCOUNT) v. HILL* (DOWAGER VISCOUNTESS), No. 314, *ante*.

**362.** — *J.*—Testator gave his real & personal estate to his son, *pltf.*, appointing him his exor. "in trust for the payment, execution, & discharging the intentions & devises thereinafter made, & to which my property, real & personal, so devised, is hereby made subject." Testator then made several bequests, & gave the residue of his real & personal estate to *pltf.* after payment of his debts, "requesting him that if he should not find an opportunity to dispose of my freehold estate at W. greatly to his advantage & for the benefit of his family that the estate should belong after him to his eldest son"—*Held*: no trust was created of the estate at W. in favour of *pltf.*'s family or his eldest son, but *pltf.* took it absolutely.—*HOUSE v. HOUSE* (1874), 31 L. T. 427; 23 W. R. 22.

(g) "Will."

**363.** When creating trust—"Will & desire."—*HILL v. LONDON (BP.)*, No. 327, *ante*.

**364.** — *J.*—*BIRCH v. WADE*, No. 324, *ante*.

**365.** — *J.*—"I give to A. C. £500, & it is my will & desire that A. C. may dispose of the same amongst her relations, as she by will may

think proper":—*Held*: a trust for the relations of A. C.—*FORBES v. BALL* (1817), 3 Mer. 437; 36 E. R. 168.

*Annotations*:—*Consd.* *Re Weekes's Settlement*, [1897] 1 Ch. 289. *Reid.* *Davies v. Thomas* (1849), 3 De G. & Sm. 347; *Re Brierley, Brierley v. Brierley* (1894), 43 W. R. 36. *Mentd.* *Lake v. Currie* (1853), 21 L. T. O. S. 26.

**366.** — *J.*—*HARDING v. GLYN*, No. 300, *ante*.

**367.** — "Will & require"—"Advise & assist his brothers as I have done."—*COCHRANE v. DUN- DONALD* (1894), 10 T. L. R. 262.

(h) "Wish."

**368.** When creating trust—"Particular wish & request"—"Superintend & take care of education."—Testator gave his real & personal estates to his wife for life, remainder to his great-nephew F., son of his late nephew, & expressed it to be his particular wish & request that his wife, together with F.'s grandfather, should superintend & take care of his education, so as to fit him for any respectable profession or employment.—*Held*: F. was entitled to be maintained & educated during his minority in the manner described, out of the income of testator's estates.—*FOLEY v. PARRY* (1832), 5 Sim. 138; 58 E. R. 289; *affd.* (1833), *Coop. temp. Brough*, 219, L. C.

*Annotations*:—*Folld.* *Kilvington v. Gray* (1839), 10 Sim. 203. *Apd.* *Batt v. Anns* (1811), 11 L. J. Ch. 52. *Consd.* *Gardiner v. Barber* (1851), 2 Eq. Rep. 888. *Reid.* *Shaw v. Lawless* (1838), 5 Cl. & Fin. 129; *Jalke v. Ward* (1812), 1 Hare, 445; *Lloyd v. Jackson* (1867), 15 W. R. 408; *Parnall v. Parnall* (1878), 26 W. R. 851; *Wilkins v. Jodrell* (1879), 49 L. J. Ch. 26. *Mentd.* *Ewan v. Morgan* (1858), 32 L. T. O. S. 19.

**369.** — "This is my last wish."—Testator gave all his property to trustees, & declared that he had made no provision for his granddaughter K. because her deceased father had, in his lifetime, received more than his other children would become entitled to under his will. He then declared trusts of an equal share of his property for each of his surviving children, for their lives, with remainders to their children. He then made a codicil as follows: "My dear daughters, is that you do give my dear granddaughter, K., £1,000, & that you will be kind to E.; & it is my desire that you do give her some part of my table linen & sheeting. This is my last wish." By a subsequent codicil he made some alteration in the bequest made, by his will, in favour of one of his daughters, & subject thereto, confirmed his will: *Held*: the second codicil confirmed the first, as being part of the will, & the concluding sentence of the first codicil was sufficient to create a bequest of the £1,000 to K., & as the articles specifically given by it to E., passed, by the will, to the trustees, & not to the daughters, so the £1,000 was to be paid, not by the daughters out of their life interests, but by the trustees, out of testator's general

#### PART I. SECT. 3, SUB-SECT. 3.— H. (g).

**6.** Whether creating trust—"Will & intention."—*GRAY v. GRAY* (1860), 11 L. Ch. lt. 218.—*IR.*

#### PART I. SECT. 3, SUB-SECT. 3.— H. (h).

**1.** Whether creating trust—"Very earnest wishes."—*Re DEMPSEY, BIRNE v. GARVEY*, [1914] St. R. Qd. 200.—*AUS.*

**6.** — "Wish & desire."—Testator, by his will, gave the residue of his real & personal property to his daughter, the lands to be held by her in fee tail; & in a subsequent part of the will added, "I wish & desire that my daughter shall make a competent provision for my niece." By a codicil, executed on the same day as the will, after making alterations in his will,

he added, "I do hereby devise to my niece, the lot containing one-fifth of an acre fronting on School street, in the town of Kingston":—*Held*: the words "I wish & desire" were not precatory merely but directory, & formed a charge upon the residuary estate.—*BABY v. MILLER* (1847), 1 E. & A. 218.—*CAN.*

**h.** — *J.*—*Re HAMILTON* (1912), 23 O. W. R. 549; 4 O. W. N. 441; 27 O. L. R. 445; 8 D. L. R. 529.—*CAN.*

**k.** — *J.*—Testator left all his property to his wife; his will, after several suggestions or recommendations as to his wife's conduct after his decease, contained this clause: "I also wish if you die soon after me that you will leave all you are possessed of to my people & your people equally divided between them":—*Held*: looking at the whole will, & having regard

to the fact that the "wish" covered the wife's own property as well as what he was leaving her, that the "wish" was no more than a suggestion, to be accepted or not by the wife, but not amounting to a mandate or an obligatory trust.—*JOHNSON v. FARNEY* (1913), 29 O. L. R. 223; 4 O. W. N. 1517.—*CAN.*

**l.** — *J.*—The expression in a will of testator's wish or desire that a donee will at her death dispose of a certain way of the property acquired under the will held to be no more than a suggestion, to be accepted or not as the donee thought fit, & not to amount to a mandate or obligatory trust.—*PERRY v. PERRY (Man.)*, [1918] 2 W. W. R. 485; 40 D. L. R. 628.—*CAN.*

**m.** — "His earnest wish."—Testator devised to his wife his house

**Sect. 3.—Creation of trusts: Sub-sect. 3, H. (h) & (i).]**

personal estate.—**HINXMAN v. POYNDR** (1832), 5 Sim. 546; 58 E. R. 443.

**370.** —[—]—Testator gave whatsoever property or effects he might die possessed of, after his debts were paid, or might become entitled to, to his wife, & appointed her sole extrix. of his will: “& my reason for so doing is the constant abuse of trustees which I daily witness among men; at the same time trusting she will, from the love she bears to me & our dear children, so husband & take care of what property there may be, for their good; & should she marry again, then I wish she may convey, to trustees, in the most secure manner possible, what property she may then possess, for the benefit of the children as they may severally need or deserve, taking justice & affection for her guide”; & at the conclusion of his will, he gave the capital of his business to his wife, trusting that she would deal justly & properly to & by all their children.—**Held**: no trust was created for the children.—**POPE v. POPE** (1839), 10 Sim. 1; 59 E. R. 512.

**Annotation**.—**Refd.** *Macnab v. Whitbread* (1853), 1 W. R. 473.

**371.** —[—]—**“Most earnestly wish.”**—**YOUNG v. MARTIN**, No. 280, *ante*.

**372.** —[—]—**“Allowed to participate.”**—Leaseholds were conveyed to trustees, & it was declared that when settlor's eldest son attained twenty-one they should be in trust for him, & that the same should be assigned accordingly, but so that settlor's wish that his other children “might be allowed by the eldest son to participate with him in the same,” should be observed by him.—**Held**: the younger children were entitled to equal share with the eldest, as tenants in common.—**LIDDARD v. LIDDARD** (1860), 28 Beav. 266; 29 L. J. Ch. 619; 2 L. T. 200; 6 Jur. N. S. 439; 54 E. R. 308.

**373.** —[—]—**Property to be used by widow—“As to her seemed best”**—**“For own & children's welfare.”**—Testator expressed his wish that property bequeathed to his wife should be used as to her seemed best for her own & her children's welfare.—**Held**: the widow was not absolutely entitled.—**GODFREY v. GODFREY** (1863), 2 New Rep. 16; 8 L. T. 200; 11 W. R. 554.

**Annotation**.—**Distd.** *Lambe v. Eames* (1871), 6 Ch. App. 597.

**374.** —[—]—**Property to be settled on marriage.**—Testator devised real estate to his daughter, & expressed a wish that in case she should marry she should settle it to her separate use for life, & to such uses as she should appoint by will. **Semle**: this created no trust to settle.—**TEASDALE v. BRAITHWAITE** (1877), 5 Ch. D. 630; 46 L. J. Ch. 725; 36 L. T. 601; 25 W. R. 546, C. A.

**Annotations**.—**Mentd.** *Re Foster & Lister* (1877), 6 Ch. D. 87; *Welman v. Welman* (1880), 15 Ch. D. 570; *Shurmur v. Sedgwick, Crossfield v. Shurmur* (1883), 24 Ch. D. 597; *Schreiber v. Dinkel* (1884), 54 L. J. Ch. 241.

**375.** —[—]—**To be equally divided among my children.**—Testator gave his wife the whole of his real & personal property for her sole use & benefit, & continued, “It is my wish that whatever property my wife might possess at her death be equally divided between my children”—**Held**: this was

not a gift coupled with a trust, & the widow took an absolute interest in the property.—**PARNALL v. PARNALL** (1878), 9 Ch. D. 96; 26 W. R. 851.

**Annotation**.—**Mentd.** *Re Jones, Richards v. Jones* (1898), 46 W. R. 313.

**376.** —[—]—**Money to be divided among two families—“In such manner as they shall consider right.”**—A will contained a bequest of £2,000 each to two legatees, followed by the words, “& I wish them to bequeath the same between the families of my nephew, Silver Oliver, & my dear niece, Mrs. Pakenham, in such mode as they shall consider right”—**Held**: the words did not create a precatory trust, but the legatees were absolutely entitled to the legacies.

If we were only to be guided by the earlier authorities there would be strong grounds for saying that this would be a precatory trust, but it seems to me perfectly clear that the current of decisions with regard to precatory trusts is now changed & that the result of the change is this, that the ct. will not allow a precatory trust to be raised unless on the consideration of all the words employed it comes to the conclusion that it was the intention of testator to create a precatory trust (**LOPES, L.J.**).—**Re HAMILTON, TRENCH v. HAMILTON**, [1895] 2 Ch. 370; 64 L. J. Ch. 799; 43 W. R. 577; 39 Sol. Jo. 524; 12 R. 355; *sub nom.* *Re HAMILTON, Re ASHTOWN, TRENCH v. HAMILTON*, 72 L. T. 748, C. A.

**Annotations**.—**Apid.** *Re Conolly, Conolly v. Conolly*, [1910] 1 Ch. 219; *Re Atkinson, Atkinson v. Atkinson* (1911), 80 L. J. Ch. 379; *Re Jevons, Jevons v. Public Trustee* (1911), 56 Sol. Jo. 72. **Refd.** *Hill v. Hill*, [1897] 1 Q. B. 483; *Re Williams, Williams v. Williams* (1897), 2 Ch. 12; *Re Hanbury, Hanbury v. Fisher*, [1904] 1 Ch. 415; *Re Oldfield, Oldfield v. Oldfield*, [1904] 1 Ch. 649; *Re Burley, Alexander v. Burley*, [1910] 1 Ch. 215.

**377.** —[—]—**Use of legacy for charitable purposes.**—Testatrix by her will gave to R. a legacy of £2,300. By a codicil dated the same day as the will she declared as follows: “I wish R. to use £1,000, part of the legacy given to him by my above will, for the endowment on his own name of a cot in the I. Hospital, & to retain the balance of the said legacy for his own use & benefit.” By a second codicil in 1905 she declared: “I wish R., after endowing a cot as provided by the first codicil, to use the balance of the legacy given to him by my will for such charitable purposes as he shall in his absolute discretion think fit.” R. disclaimed the legacy.—**Held**: a trust was created for the charitable purposes mentioned in the codicils.—**Re BURLEY, ALEXANDER v. BURLEY**, [1910] 1 Ch. 215; 79 L. J. Ch. 182; 101 L. T. 805; 26 T. L. R. 127.

**Annotation**.—**Refd.** *Re Conolly, Conolly v. Conolly*, [1910] 1 Ch. 219.

**378.** —[—]—**“Specific wish.”**—(1) Testator made the following bequest: “To my father, if living at my death, & if not, to my younger sister, I bequeath absolutely £5,000, but it is my specific wish that the sum shall be distributed as follows: £4,000 to ‘a certain school’; £500 to another school; & £500 ‘to be given to’ ten or more deserving people as therein mentioned”—**Held**: testator's father, who survived testator, was entitled to the legacy of £5,000, free from any trust or legal obligation.

words: “But it is my wish that my children shall not alienate the aforesaid property from the family”—**Held**: in the absence of a clearly expressed intention to prohibit such alienation, no *fidei commissum* was created by the will.—**Ex p. TERWILL** (1908), 25 S. C. 890.—**S. AF.**

**F. —[—]**—**Re ESTATE LOURENS**, [1912] C. P. D. 643.—**S. AF.**

**t. —[—]**—When in a mutual will

at G. & declared it to be “his earnest wish that his sister should reside at G. with his wife during her life”—**Held**: there was not any trust created in favour of testator's sister.—**GRAVES v. GRAVES** (1862), 13 I. Ch. R. 182.—**IR.**

**n. —[—]**—**Re HUMPHREY'S ESTATE**, [1916] 1 L. R. 21.—**IR.**

**o. —[—]**—**“Wish of trust.”**—**Re TAYLOR (DECEASED), TAYLOR v. THOM-**

**SON**, [1927] N. Z. L. R. 236.—**N.Z.**  
**p. —[—]**—**CAMPBELL v. KINSEY-MORGAN'S TRUSTEES**, [1915] S. C. 298; 52 Sc. L. R. 289; [1915] 1 S. L. T. 89.—**SCOT.**

**q. —[—]**—Testator after giving & bequeathing a certain farm to his children in equal shares with the household furniture in the homestead & the movable property in the mill & appertaining thereto added the following

(2) The case is one of the class known as "precatory trust" cases. I am not very fond of the word "precatory." But I think that we all understand what it means. In order to create a trust it is not necessary that we should use the word "trust." There may be other words that in form may be less mandatory than the word "trust," which, taking the will as a whole, the ct. will construe as creating a trust. It is beyond all doubt that, in years gone by, words which were in form merely expressing hope, desire, wish, intention, & so on, were construed in a manner which would not now be followed. It has been pointed out by the cts. for the last quarter of a century & longer that the current has turned. The leaning of the cts. is now undoubtedly not to extend the doctrine of precatory trusts. I think I may go further & say that the leaning of the cts. is now not to construe words used in a will, not being words of a strict definite legal character or words that are beyond all doubt, equivalent words, in short, as creating a trust (COZENS-HARDY, M.R.).—*Re ATKINSON, ATKINSON v. ATKINSON* (1911), 80 L. J. Ch. 370; 103 L. T. 860, C. A.

**379. — Earnest wish & desire.**—Testator appointed his wife universal legatee. The will continued, "it is my earnest wish & desire that my wife should during her lifetime pay out of my estate to my sister . . . the sum of 30s. each & every week":—*Held*: this expression of a wish did not amount to a precatory trust or direction to pay, & gave to the sister of testator no interest to propound his will.—*DOBIE v. EDWARDS* (1911), 80 L. J. P. 119; 27 T. L. R. 464; *sub nom. Re HAMMER, DOBIE v. EDWARDS*, 55 Sol. Jo. 537.

(i) *Words of Recommendation or Advice.*

**380. Recommend—Imperative word.**—A gift of the residue of testator's personal estate to trustees for the perpetual endowment & maintenance of a school would be a valid bequest, & not within Charitable Uses Act, 1735 (c. 36). But if, after such completed bequest, testator goes on to recommend the trustees to collect the residue, & lay it out at a convenient time in the purchase of freehold lands, etc., for that purpose, it comes within the statute, because the word "recommend" is imperative on the trustees, & leaves them no discretion, but raises a trust which must be carried into execution, unless there be in some other part of the will an express option given to them in terms so to lay out the money, or not in their discretion.—*KIRKBANK v. HUDSON* (1819), 1 Dan. 259; 7 Price, 212; 146 E. R. 951, Ex. Ch.

**381. — As to dispositions of donee's will.**—F. C. having two sons, & being engaged in the sugar trade, devised his sugar houses, etc., to his eldest son; nevertheless, in case his eldest son should die without a son or sons of his body, then he recommended to him to give & devise the sugar houses, etc., to his brother, testator's second son. The eldest son died without issue male, leaving a daughter, & without devising to his brother:—*Held*: not a trust for the brother, but a mere recommendation.—*CUNLIFFE v. CUNLIFFE (LADY)* (1770), Amb. 686; 27 E. R. 446.

*Annotations*:—*Expld. Mallin v. Kelghley* (1795), 2 Ves. 529. *Apld. Pushman v. Fullter* (1795), 3 Ves. 7. *Expld.*

the testators stated it to be their wish and desire that the land bequeathed should remain exclusively in the family & pass over to the third generation, but immediately thereafter proceeded to state that in case a profitable opportunity should arise the lands could with the consent of the heirs be sold & the proceeds divided:—*Held*: no *fidei commissum* had been

imposed & the order authorising transfer free from the expressed wish & desire might be granted.—*Er p. VAN ROOYEN, ESTATE* (1917), 38 N. L. R. 79.—S. AF.

PART I. SECT. 3, SUB-SECT. 3.—  
H. (I).

a. *Suggestion.*—The expression in

*Kirkbank v. Hudson* (1819), 7 Price, 212. *Refd. Pierson v. Garnet* (1787), 2 Bro. C. C. 226; *Parker v. Bolton* (1835), 5 L. J. Ch. 98.

**382. —**—[Testator gave to his wife all his personal estate, relying that if she should marry again she would secure whatever she should possess under his will for her separate use; & he recommended her to give by her will, what he should die possessed of under his will, to certain persons whom he named:—*Held*: the wife's exor. was a trustee of the whole of the property possessed by her under the will for the persons named.—*HORWOOD v. WEST* (1823), 1 Sim. & St. 387; 1 L. J. O. S. Ch. 201; 57 E. R. 155.

*Annotations*:—*Distd. Parnall v. Parnall* (1878), 9 Ch. D. 96. *Refd. Parker v. Bolton* (1835), 5 L. J. Ch. 98.

**383. —**—["Such of my relations as she shall think proper."]—Gift of a legacy to testator's wife, "to be disposed of by her will in such way as she shall think proper; but I recommend her to dispose of one-half thereof to her own relations, & the other half to such of my relations as she shall think proper":—*Held*: not to create a trust.—*JOHNSTON v. ROWLANDS* (1848), 2 De G. & Sm. 356; 17 L. J. Ch. 438; 11 L. T. O. S. 511; 12 Jur. 769; 64 E. R. 160.

**384. —**—["Relations & kindred of testatrix's mother"]—Due regard to aiding & assisting.]—A devise to A., for life, with liberty to leave the same to whom she thought most deserving of it, recommending to her to have a due regard to testatrix's mother's relations, is not mandatory as to the objects of the appointment.—*RANDAL v. HEARLE* (1794), 1 Anst. 121; 145 E. R. 820.

**385. — Settlement of property.**—Testator devised all his real estate to his sister for life; remainder to her children as she should appoint; for want of appointment, to all her children & their heirs as tenants in common.

His sister having two daughters, by a codicil, declared to be a codicil to his will not then at hand, he gave one of them an annuity, & directing his annuities to be paid out of his 3 per cent. stock, he charged them on his real estate in case of a deficiency; & directing the residue of his personal estate to be invested in freehold lands & hereditaments, he recommended to his sister to settle & convey, or join with her husband in settling & conveying, all his estates & property, which she might derive from him after his decease, to the use of her two daughters for life, in such parts, shares, & proportions, as she should approve, with remainder to their respective issue, & cross remainders, & the usual powers & clauses in strict settlement. Testator's sister died in his life, & her two daughters were his co-heiresses. Some real estates were purchased between the executions of the will & codicil. As to the real estate, the will is not revoked but is republished by the codicil; & the two nieces are entitled to all the real estates, & to those directed to be purchased as tenants in common in fee.—*MEGGISON v. MOORE* (1795), 2 Ves. 630; 30 E. R. 813, L. C.

*Annotations*:—*Consd. Knight v. Knight* (1840), 3 Beav. 148. *Refd. Greene v. Marsden* (1853), 1 Eq. Rep. 437.

**386. —**—[A recommendation by testator to his devisee, in case of her marriage, to settle the devised estate in a specified way:—

a will of testator's wish or desire that a donee will at her death dispose in a certain way of the property acquired under the will held to be no more than a suggestion, to be accepted or not as the donee thought fit, & not to amount to a mandate or obligatory trust.—*PERRY v. PERRY (Man.)*, [1918] 2 W. W. R. 485; 40 D. L. R. 628.—*CAN.*

*Sect. 3.—Creation of trusts: Sub-sect. 3, H. (i), (j) & (k), & I.; sub-sect. 4.]*

*Held:* not to amount to a trust.—*Re GREAT WESTERN RAILWAY ACT, Ex p. PAYNE* (1837), 2 Y. & C. Ex. 630; 7 L. J. Ex. Eq. 1; 1 Jur. 818.

**387.** ———.]—Testator bequeathed to his daughter A., the wife of B., a legacy of £10,000, payable six months after his decease, & he recommended his daughter & her husband to settle it, together with such sum of money of the husband as he should choose for the benefit of A. & her children:—*Held:* a trust for the children, & the legacy did not lapse by the death of A. in the lifetime of testator.—*FORD v. FOWLER* (1840), 3 Beav. 146; 9 L. J. Ch. 352; 4 Jur. 958; 49 E. R. 57.

*Annotation:—Reid. Flisk v. A.-G.* (1867), L. R. 4 Eq. 521.

**388.** ———.]—Testatrix willed that, after payment of her legacies, the whole of her property should be given to her sister Mary, to be hers independent of any husband; & earnestly recommended her to take such measures as she might deem best for making it sure that whatever she might inherit might go at her decease to her children:—*Held:* the children on their mother's death were entitled to the property as joint tenants absolutely.—*CHOLMONDELEY v. CHOLMONDELEY* (1845), 14 Sim. 590; 60 E. R. 487.

**389.** ———.]—Disposition of principal after death of donee.]—Trust raised under a recommendation by will to a legatee to dispose of her legacy among certain persons after her death.—*MALIM v. KEIGHLEY* (1795), 2 Ves. 529; 30 E. R. 700.

*Annotations:—Overd. Re Hamilton, Trench v. Hamilton,* (1895) 2 Ch. 370. *Consd. Re Oldfield, Oldfield v. Oldfield,* [1904] 1 Ch. 549. *Reid. Pushman v. Ffilliter* (1795), 3 Ves. 7; *Kirkbank v. Herdson* (1819), Dan. 259; *Heneago v. Andover* (1822), 10 Price, 230; *Parker v. Bolton* (1835), 5 L. J. Ch. 98; *Knight v. Boughton* (1844), 11 Cl. & Fin. 513; *Montresor v. Montresor* (1845), 1 Coll. 693; *White v. Briggs* (1846), 6 L. R. O. S. 477; *Recevs v. Baker* (1854), 18 Beav. 372; *Smith v. Smith* (1856), 2 Jur. N. S. 967; *Eaton v. Watts* (1867), L. R. 4 Eq. 151.

**390.** ———.]—Bequest to A. for life, with power on her marriage to appoint the interest to her husband for life, & a recommendation to dispose of the principal after her own death & the determination of the preceding trusts among the children of B., the recommendation being held an absolute trust, it is a vested interest in all the children.—*MALIM v. BARKER* (1790), 3 Ves. 150; 30 E. R. 942.

*Annotation:—Reid. Parker v. Bolton* (1835), 5 L. J. Ch. 98.

**391.** ———.]—*Re HAMILTON, TRENCH v. HAMILTON*, No. 376, *ante*.

**392.** ———.]—Tenant to remain in occupation.]—Devise to a son, recommending him to continue his cousins, A. & B., in the occupation of their respective farms in the county of W. as heretofore & so long as they continue to manage the same in a good & husband like manner & to duly pay their rents. A trust for the cousins, who had been tenants at will; & the son, being the heir was put to his election.—*TIBBITS v. TIBBITS* (1816), 19 Ves. 656; 2 Mer. 96, n.; 34 E. R. 659, L. C.

*Annotations:—Reid. Parker v. Bolton* (1835), 5 L. J. Ch. 98; *Shaw v. Lawless* (1838), 5 Cl. & Fin. 129; *Finden v. Stephens* (1846), 1 Coop. temp. Cott. 318.

**393.** ———.]—“But not absolutely enjoin.”]—*YOUNG v. MARTIN*, No. 289, *ante*.

**394.** ———.]—Work qualifying absolute gift.]—Testator bequeathed to his wife for her life the use of all his property, & directed that certain specific chattels should be finally appropriated as she pleased, with a sum of £4,000; which sum, however, he recommended her to divide among certain persons:—*Held:* no trust was created in favour of any of those persons as to any part of the

£4,000.—*WHITE v. BRIGGS* (1846), 15 L. J. Ch. 182; 6 L. T. O. S. 477, L. C.

**395.** ———.]—No trust unless subject certain.]—Wish & desire that a particular person should be appointed manager of testator's estate for all purposes for which his trustees might have occasion for a manager, considered only as opinion & advice & not as a trust.

Words of recommendation are never construed as trusts, unless the subject be certain.—*FINDEN v. STEPHENS* (1846), 2 Ph. 142; 1 Coop. temp. Cott. 318; 16 L. J. Ch. 63; 8 L. T. O. S. 249; 10 Jur. 1019; 47 E. R. 874, L. C.

*Annotations:—Reid. Knott v. Cottee* (1847), 2 Ph. 192; *Stevens v. Keating* (1850), 14 Jur. 157; *Saunders v. Rotherham* (1862), 3 Giff. 556; *Foster v. Elsley* (1881), 19 Ch. D. 518.

**396.** ———.]—Guardianship of children.]—Words of recommendation or desire in a will will not raise a trust if such construction would conflict with other provisions of more definite & positive import in the same instrument; but the ct. will give such effect to them as may not be inconsistent with those provisions.

A father having by his will appointed a guardian to his children, with a recommendation that, in the event of their mother's death during their minorities, they should be placed under the care of two female relations:—*Held:* on a contest between those ladies & the testamentary guardian, in reference to the management of the children after the mother's death, the ct. was bound to give effect to the recommendation, but not further than might be consistent with preserving to the testamentary guardian the general superintendence & control over the children & their fortunes, which, by virtue of his office, it was his right & duty to exercise.—*KNOTT v. COTTEE* (1847), 2 Ph. 192; 8 L. T. O. S. 462; 41 E. R. 915, L. C.

*Annotation:—Reid. Ware v. Mallard* (1851), 18 L. T. O. S. 191.

**397.** “Advise” — Settlement of estate.]—Testator devised some copyhold estates to his son T., & “advised him to settle it upon himself, & his issue male by his lawful wife, & for want of such issue, upon E. & his lawful issue:—*Held:* these words created a trust.—*PARKER v. BOLTON* (1835), 5 L. J. Ch. 98.

**398.** “Directions to my executors” — Investment—Recommendation only.]—Testator, by his will, devised his residuary real estates to trustees, in trust for certain tenants for life, with remainder to D. F. for life, with remainder in trust for the sons of D. F., as tenants in common in tail male, with cross remainders & remainders over, & he directed his residuary personal estate to be laid out in the purchase of land, to be settled to the same uses. By a testamentary paper of the same date as the will, & headed, “Memorandum, alias, directions to my exors,” he directed, as to his residuary personal estate that his exors. should apply for an estate of an uncle of testator as an investment “for the use & behoof of D. F.”; & if not attainable, to inquire if any part of a certain other estate was to be disposed of.

Neither of the specified properties could be obtained on fair terms, as an investment:—*Held:* D. F. did not take any further interest under the codicil than under the will, & testator thereby either meant to express merely a recommendation to his trustees as to the mode of laying out his residuary personalty, or expressed no intention on which the ct. could act.—*FITCH v. FRIEND* (1848), 2 De G. & Sm. 405; 64 E. R. 181.

(j) Words of Confidence.

See Sect. 3, Sub-sect. 3, A. (b), *ante*.

## (k) Other Precatory Words.

**399. Words of expectation—Not amounting to a recommendation.]**—Words of expectation in a will not amounting to recommendation will not create a trust.—*LECHMERE v. LAVIE* (1832), 2 My. & K. 197; 39 E. R. 919.

*Annotations:—**Refd.* *Briggs v. Penny* (1849), 3 De G. & Sm. 525; *Parnall v. Parnall* (1878), 26 W. R. 851.

**400. "Conjure"—Following absolute gift.]**—Testator, after reciting that he was desirous of making a suitable provision for his wife, as well as for his daughter & grandchild, in order to mark his unbounded confidence in his wife, & his belief that she would be actuated by the most maternal regard towards his child, gave her all his property, for her own use, benefit & disposal absolutely, implicitly relying on her attachment to his daughter & grand-daughter. He then directed his exors. to sell his property, & to invest the proceeds on Govt. or real securities, in his wife's name alone, or jointly with his exors., with power to change the securities: "To hold the same unto my wife for her own absolute use, benefit & disposal; & whereas I have hereby manifested abundant proof of entire confidence in my dear wife, by thus giving her the sovereign control over the whole of my property, for her sole use & benefit, which she will duly appreciate accordingly; but in so doing I, nevertheless, earnestly conjure her, under the advice of my exors., to proceed forthwith to make ample provisions, by deed or will, for our only child & grandchild." The will concluded with a power to the wife, who was extrin., & to the exors. to retain their expenses out of testator's estate:—*Held*: no trust was created by the will in favour of either the daughter or the granddaughter.—*WINCH v. BRUTTON* (1844), 14 Sim. 379; 4 L. T. O. S. 271; 8 Jur. 1086; 60 E. R. 404.

*Annotation:—**Apld.* *Reeves v. Baker* (1854), 18 Beav. 372.

**401. "I would have"—Imperative.]**—Testator had a power to appoint the produce of a policy on his life amongst his children, by writing or will. By his will he bequeathed all his personal estate to his daughter F. By a contemporaneous writing, unattested & headed "memorandum," he gave directions to F. as to his property, & said, "the money from the Equitable Insurance Office I would have equally divided between my daughters F., G. & A.," & it also expressed his wish that his two sons should have certain interests out of his own property:—*Held*: the words "I would have" were imperative & not mere instructions to F.—*PROBY v. LANDOR* (1860), 28 Beav. 504; 30 L. J. Ch. 593; 6 Jur. N. S. 1278; 9 W. R. 47; 54 E. R. 460.

*Annotation:—**Refd.* *Topham v. Portland* (1862), 31 Beav. 525.

## I. Other Cases.

**402. "Sufficient to pay & discharge all estate duty"—Whether trust for payment.]**—Testator by a codicil to his will, executed after the passing of Finance Act, 1894 (c. 30), bequeathed to his eldest son, to whom certain settled estates would pass on testator's death, "a sum of money sufficient to pay & discharge all the estate duty which may be payable by" him; & he directed such sum to be paid out of moneys in the hands of his bankers at his death, but if the sum at the bankers should not be sufficient, he declared that no other

part of his estate should be liable to make good the deficiency:—*Held*: the legacy was a gift to the eldest son for his own benefit absolutely, & was not impressed with a trust to pay the estate duty out of it.—*MEXBOROUGH (EARI.) v. SAVILE* (1903), 88 L. T. 131; 19 T. L. R. 287, II. L.; *revers.* S. C. *sub nom. Re MEXBOROUGH, SAVILE v. MEXBOROUGH* (1902), 86 L. T. 331, C. A.

**Words of declaration in letters or memoranda.]**—*See* Sub-sect. 2, A. (b), *ante*.

## SUB-SECT. 4.—DESIGNATION OF SUBJECT-MATTER.

**403. Subject-matter must be certain.]**—*SPRANGE v. BARNARD*, No. 410, *post*.

**404. —.]**—*CRUWYS v. COLMAN*, No. 91, *ante*.

**405. —.]**—*WRIGHT v. ATKYNS*, No. 283, *ante*.

**406. —.]**—(1) If once you get a married woman who is merely a bare trustee, then under Trustee Act, 1893, (c. 53), s. 16, she can convey & surrender as if she were a feme sole. But here she is not a bare trustee, for the principal, interest, & costs have not been paid, & therefore she has not been denuded of her beneficial interest in the property (*KEKEWICH, J.*).

(2) Now, in order to create a trust you must have three things, namely, the person who is a trustee, the person or class of persons who form the *cestui que trust*, & the property which the trustee holds on behalf of the *cestui que trust* (*KEKEWICH, J.*).—*Re BROOKE & FREMLIN'S CONTRACT*, [1898] 1 Ch. 647; 67 L. J. Ch. 272; 78 L. T. 416; 46 W. R. 412; 14 T. L. R. 321; 42 Sol. Jo. 431.

*Annotation:—**As to* (1) *Apld.* *Re West & Hardy's Contract*, [1901] 1 Ch. 145.

**407. What subject-matter sufficiently certain — "So much as shall be remaining at his death."]—***SPRANGE v. BARNARD*, No. 410, *post*.

**408. — Fund contingent on certain event.]**—Testator devised certain estates by name, together with his farming stock & furniture, to his beloved wife to sell, to discharge all his creditors; & he constituted his wife & W. his exors., whom he appointed to sell & dispose of all his estates & chattels, in such manner as they should jointly agree upon, or not to sell if it seemed most advisable to keep them, or in any way they should think proper, so that every creditor had his money, & if sold, all overplus to his wife, towards her support & her family:—*Held*: testator's children had such an interest in the devised estates as enabled them to sustain a bill against the widow & her co-exor., impeaching a sale on the ground of fraud, & praying an account of the rents & profits.

Now, I have already stated it to be my clear opinion, that in a certain event, the event, namely, of a sale, the widow would take the property, subject to a trust (*LORD COTTENHAM, C.*).—*WOODS v. WOODS* (1836), 1 My. & Cr. 401; *Donnelly*, 61; 40 E. R. 429, I. C.

*Annotations:—**Apld.* *Gilbert v. Bennett* (1839), 10 Sim. 371. *Consd.* *Italkes v. Ward* (1842), 1 Hare. 445; *Crockett v. Crockett* (1848), 2 Ph. 553. *Refd.* *Hodgson v. Green* (1842), 11 L. J. Ch. 312; *Longmore v. Elcum* (1843), 2 Y. & C. Ch. 363; *Thorpe v. Owen* (1843), 2 Hare. 407; *Re Parkinson's Trust, Ex p. Thompson* (1851), 1 Sim. N. S. 242; *Webb v. Woods* (1852), 2 Sim. N. S. 267; *Greene v. Greene* (1869), 17 W. R. 487; *Lambe v. Eames* (1871), 6 Ch. App. 597.

## PART I. SECT. 3, SUB-SECT. 3.—H. (k).

**b. Words of belief.]**—Testator directed that the whole of his estate be given to T. "believing that she will do justice to my relatives":—*Held*: no trust was created, but T. took the whole of the estate absolutely.—*Re*

*WARREN'S WILL, VERGA v. TAYLOR*, [1907] V. L. R. 325.—*AUS.*

*c. Relying wholly on his wife's sense of justice & her kindness of heart.]*—*Re STANTON* (1912), 23 O. W. R. 849; 4 O. W. N. 504; 9 D. L. R. 261.—*CAN.*

*d. "Well knowing her sense of jus-*

*tice & love to her family."—**GREENE v. GREENE* (1869), 3 I. R. Eq. 90.—*IR.*

## PART I. SECT. 3, SUB-SECT. 4.

**a. Shares in company not yet incorporated.]**—*BRENNAN v. MORPHETT* (1908), 6 C. L. R. 22.—*AUS.*

*Sect. 3.—Creation of trusts: Sub-sects. 4 & 5, A. & B. (a) & (b).]*

**409. Alternative gifts—Effect of word “prefer.”]**—Testator by a holograph letter, which by the law of Scotland is a testamentary writing, instructed his solr. to pay to applt., a single lady, on the first of each month after his death, the sum of £12 10s., being at the rate of £150 a year. “But in lieu of this I would prefer that as soon as you conveniently can, that the sum of £3,000 should be taken from my life insurance funds & paid over to her.”

Testator's trust disposition contained a general direction for payment of debts, & the insurance funds, after paying off the charges upon them, amounted to £1,900:—*Held*: the trustees were bound to pay over the capital sum of £3,000 to A., & had no option to decide whether she was to receive the monthly allowance or the capital sum.

The use of the word “prefer” indicates not an alternative for selection by the trustee, but that there has been an alternative in the mind of testator, which he proceeds to resolve in the document before your lordships (LORD LOREBURN, C.).—*DAWSON v. REID* (1915), 113 L. T. 52, H. L.

**Charitable trusts.**—*See, generally, CHARITIES, Vol. VIII., pp. 298–302, Nos. 756–811.*

**Precatory trusts.**—*See Sub-sect. 3, H. (b) ii., ante.*

**SUB-SECT. 5.—DESIGNATION OF OBJECTS.**

*A. Necessity for Certainty.*

**410. General rule—Object must be certain.]**—Wife having a power to dispose by will, signed & sealed by her, of £300 in the hands of trustees, having made a will agreeable to the power, afterwards made a testamentary paper, by which she gives it to her husband; but so much as shall be remaining at his death, etc., to her brother & sisters. This paper is not sealed, but is on a stamp. The stamp is equivalent to a seal. It vests absolutely in her husband, & was decreed to be paid to him, the property not being sufficiently certain to raise a trust.

The property & the person to whom it is to be given must be certain in order to raise a trust (ARDEN, M.R.).—*SPRANGE v. BARNARD* (1789), 2 Bro. C. C. 585; 29 E. R. 320.

**411. ———.]**—*CRUWYS v. COLMAN*, No. 91, *ante*.

**412. ———.]**—*Re BROOKE & FREMLIN'S CONTRACT*, No. 400, *ante*.

**413. ——— Limitations of trust of heirlooms.]**

—When a trust is created to secure the devolution of chattels as heirlooms, any limitations which are to take effect by way of postponement of defeasance of any absolute interest are subject to all the rules which govern the validity of conditions subsequent. Such limitations, therefore, must be certain, not only in expression, but also in operation, & it is essential to their validity that it should be capable of ascertainment at any given moment

of time, whether the limitation has or has not taken effect. Testator, who was a peer, bequeathed chattels to trustees, upon trust to permit & suffer the same to go & be held & enjoyed with the title, so far as the rules of law & equity would admit, by the person who for the time being should be actually possessed of the title, in the nature of heirlooms, & so that no person in existence at the time of testator's decease, or born in due time afterwards, & afterwards coming to the title, should have any other than a life interest in the same, & so that no person should acquire an absolute interest in the same till the expiration of twenty-one years after the decease of all such persons as should be in existence at the time of testator's decease & afterwards attaining the title:—*Held*: the latter clause of the limitations was void for uncertainty in operation, & the first person born after the death of testator who attained the title acquired an absolute interest in the chattels, notwithstanding that there was still living a person who was alive at the time of testator's death, & who was capable of inheriting the title.—*Re EXMOUTH (VISCOUNT), EXMOUTH (VISCOUNT) v. PRAED* (1883), 23 Ch. D. 158; 52 L. J. Ch. 420; 48 L. T. 422; 31 W. R. 545.

*Annotations*:—*Consd. Re Johnston, Cockerell v. Essex* (1881), 26 Ch. D. 538; *Re Lanyon, Lanyon v. Lanyon*, [1927] 2 Ch. 264. *Reid. Jeffreys v. Jeffreys* (1901), 84 L. T. 417; *Re Moore, Prior v. Moore*, [1901] 1 Ch. 936; *Re Hill, Hill v. Hill*, [1902] 1 Ch. 807; *Re Sandbrook, Noel v. Sandbrook*, [1912] 2 Ch. 471; *Re Fowler, Fowler v. Fowler*, [1917] 2 Ch. 307.

**Charitable trusts.]**—*See CHARITIES, Vol. VIII., pp. 292–298, Nos. 694–755.*

**Precatory trusts.]**—*See Sub-sect. 3, II. (b) ii., ante.*

*B. What Objects Sufficiently Certain.*

*(a) In General.*

*See, generally, WILLS.*

**414. “My family.”]**—*WRIGHT v. ATKYNS*, No. 283, *ante*.

**415. In accordance with my wishes verbally expressed—Admissibility of parol evidence.]**—Testator by his will appointed his wife sole extrix, & gave her his property for life. He then desired & empowered her by her will or in her lifetime to dispose of his estate “in accordance with my wishes verbally expressed by me to her”:—*Held*: parol evidence could not be admitted to show what testator's verbally expressed wishes were, & the power of disposition given to the widow was void for uncertainty.—*Re HETLEY, HETLEY v. HETLEY*, [1902] 2 Ch. 866; 71 L. J. Ch. 769; 87 L. T. 265; 51 W. R. 202.

*Annotation*:—*Consd. Re Blackwell, Blackwell v. Blackwell*, [1928] Ch. 614.

**416. “Most reputable” relations—Right of heir to take.]**—*CLARKE v. TURNER* (1691), Freem. Ch. 198; 2 Eq. Cas. Abr. 492; 22 E. R. 1158.

*Annotation*:—*Reid. Kemp v. Kemp* (1801), 5 Ves. 819.

**417. Infant en ventre sa mère—Executory trust in tail.]**—An executory trust in tail for an only son of A. *en ventre* at testator's death, not void for

**PART I. SECT. 3, SUB-SECT. 5.—A.**

**410 i. General rule—Object must be certain.]**—*Re BOURKE'S WILL, CUNNINGHAM v. RUBENACH*, [1907] V. L. L. 171.—*AUS.*

**410 ii. ———.]**—Testator by his will provided: “I leave my house furniture & land situate in K. & twenty shares in the Bank of Victoria . . . in trust to my extrix, for K. D. . . . until she attains 18.” He then gave certain pecuniary legacies & went on—“The residue of my estate I leave to my extrix. In trust to be

disposed of in whatever manner she may think fit.”—*Held*: the extrix took the residue as a trustee: the trust was void for uncertainty, & the next-of-kin was entitled.—*Re DWYER'S WILL*, [1916] V. L. R. 114.—*AUS.*

**410 iii. ———.]**—A., by marriage articles, agreed with trustees named therein, that he “should from time to time thereafter effect such assurances on his own life, at such periods & for such amounts respectively as his income would fairly admit of,” & assign the same to the trustees on trusts

in the articles specified:—*Held*: this agreement was so uncertain that a ct. of equity would not decree specific performance of it.—*TOTTENHAM v. TOWNSEND* (1855), 5 I. Ch. R. 225.—*IR.*

**410 iv. ———.]**—*M'CARTHY v. A.-G.* (1863), 16 Ir. Jur. 4.—*IR.*

**PART I. SECT. 3, SUB-SECT. 5.—B. (a).**

**1. “Children now living & such children as I may hereafter have.”]**—*Re ANGEL'S TRUST* (1907), 9 Nfld. L. R. 353.—*NFLD.*



uncertainty, nor too remote.—**BLACKBURN v. STABLES** (1814), 2 Ves. & B. 367; 35 E. R. 358.

*Annotations*.—**Apld.** *Re Wilmer's Trusts*, *Moore v. Wingfield*, [1903] 1 Ch. 874. **Refd.** *Marshall v. Bousfield* (1817), 2 Madd. 166; *Parker v. Bolton* (1835), 5 L. J. Ch. 98; *Holloway v. Collier* (1853), 1 W. R. 266; *Sackville-West v. Holmesdale* (1870), L. R. 4 H. L. 543. **Mentd.** *Shelton v. Watson* (1849), 18 L. J. Ch. 223; *Silcocks v. Silcocks*, [1916] 2 Ch. 161.

**418. Conditional trust—Subject to satisfaction of judgment in contemplated suit.**—A sum of money was deposited by plff. in the Bank of England in the names of A. & B., & it was declared by a deed that in case A. should not bring a certain action specified therein within a limited time, or having brought such action should not prosecute it with due diligence, the money was to be in trust for plff., otherwise to abide the result of the action. The action was duly brought, but not prosecuted to judgment. A general demurrer by A. to a bill alleging that the action had not been prosecuted with due diligence, & claiming the fund overruled on the ground of there being an existing trust in which plff. was interested.—**PORTUGAL (KING) v. RUSSELL** (1861), 3 Giff. 287; 31 L. J. Ch. 34; 5 L. T. 277; 7 Jur. N. S. 1143; 10 W. R. 36; 66 E. R. 418.

(b) *Discretion given to Trustees.*

**419. General discretion.**—Residuary bequest to trustees & exors., described both by their character & names, to be disposed of to such person & persons, & in such manner & form, & in such sum & sums of money, as they in their discretion shall think proper & expedient, an absolute interest to them beneficially; or an absolute power of appointment; excluding the next of kin, & the heir as to produce of real estate.—**GIBBS v. RUMSEY** (1813), 2 Ves. & B. 294; 35 E. R. 331.

*Annotations*.—**Expld.** *Ellis v. Selby* (1836), 1 My. & Cr. 286. **Distd.** *Buckle v. Bristow* (1864), 5 New Rep. 7; *Yeap Cheah Neo v. Ong Cheng Neo* (1875), L. R. 6 P. C. 381. **Re** *Sinclair, Young v. Sinclair*, [1903] W. N. 113. **Distd. & Dtd.** *Re Howell, Re Buckingham, Liggins v. Buckingham*, [1914] 2 Ch. 173. (See [1915] 1 Ch. 211.) **Refd.** *Whitaker v. Tatham* (1831), 7 Bing. 628; *Briggs v. Penny* (1819), 3 De G. & Sm. 525; *Pocock v. A.-G.* (1876), 3 Ch. D. 312. **Mentd.** *Green v. Jackson* (1828), 5 Russ. 35; *Amphlett v. Parke* (1831), 2 Russ. & M. 221; *Cooke v. Stationers' Co.* (1831), 3 My. & K. 262.

**420.** —[**FOWLER v. GARLICK**, No. 804, *post*.]

**421.** —[**Testator** directed his trustees to pay an annuity to his brother until he should attempt to charge it or some other person should claim it & then to apply it for his support & maintenance. The annuitant having become insolvent:—**Held**: his assignees were entitled to the annuity.—**YOUNGHUSBAND v. GIBBORNE** (1816), 15 L. J. Ch. 355; 7 L. T. O. S. 221; 10 Jur. 834, L. C.; *affg.* (1844), 1 Coll. 400.

*Annotations*.—**Distd.** *Re Coleman, Henry v. Strong* (1888), 39 Ch. D. 413. **Consd.** *Re Evans, Public Trustee v. Evans*, [1920] 2 Ch. 304; *Re Smith, Public Trustee v. Aspinall*, [1928] Ch. 915. **Apld.** *Re Nelson, Norris v. Nelson*, [1928] Ch. 920, n. **Refd.** *Re Fitzgerald, Sorman v. Fitzgerald*, [1903] 1 Ch. 933. **Mentd.** *Watkins v. Watkins*, [1896] 1 P. 222.

**422.** —[**Testator**, by his will, gave the residue of his property upon trust for his exors. to hold the same for such uses & purposes as he might by codicil or deed direct or appoint, & in default thereof, then for the same to be expended & appropriated within three years after his decease, in such way & manner, & for such purposes, as they, or the majority of them, might in their judgment & discretion agree upon. By a codicil executed the same day, he gave legacies to each

of his exors., irrespective of any interest they might ultimately take in the residue of his estate:—**Held**: the gift in the will was a trust, & not a power including ownership, & it was not affected by the words in the codicil, & therefore the exors. & trustees were not entitled beneficially under an appointment made to themselves.

In such a case the trust is void, as being too uncertain for the ct. to act on, & the heir-at-law & next of kin are entitled to the property.—**BUCKLE v. BRISTOW** (1864), 5 New Rep. 7; 11 L. T. 265; 10 Jur. N. S. 1095; 13 W. R. 68.

*Annotations*.—**Consd.** *Re Howell, Re Buckingham, Liggins v. Buckingham*, [1914] 2 Ch. 173. **Refd.** *Yeap Cheah Neo v. Ong Cheng Neo* (1875), L. R. 6 P. C. 381.

**423.** —[**Testatrix**, after appointing four exors., made over to them by her will "as such" all her property & effects, "but in trust always for the purposes, hereinafter mentioned"; & after directing them to preserve certain houses as a family house, & giving certain specific bequests, disposed of the residue of her estate as follows:—

"As regards the remainder of my real & personal property of what kind soever, not already disposed of, I direct that my exors. shall receive & collect the same from all persons whatever, & in such manner as to them may seem proper, & I direct that they, their heirs, successors, representatives, or descendants, may apply & distribute the same, all circumstances duly considered, in such manner & to such parties as to them may appear just"—**Held**: according to the true construction of the above clause, there was no absolute gift to the exors. as individuals. The residue was not severed from the trust with which testatrix had clothed all her property in the hands of her exors., but although a trust was intended to be created it failed for want of adequate expression of it.—**YEAP CHEAH NEO v. ONG CHENG NEO** (1875), L. R. 6 P. C. 381, P. C.

*Annotations*.—**Distd.** *Re Howell, Re Buckingham, Liggins v. Buckingham* (1914), 84 L. J. Ch. 209. **Mentd.** *Elliott v. Totnes Union* (1892), 57 J. P. 151; *Re Manser, A.-G. v. Lucas* (1904), 74 L. J. Ch. 95; *Bourne v. Keane*, [1919] A. C. 815.

**424.** —[**STEAD v. MELLOR**, No. 337, *ante*.]

**425.** —[**Re SINCLAIR, YOUNG v. SINCLAIR**, [1903] W. N. 113.]

*Annotation*.—**Refd.** *Re Howell, Re Buckingham, Liggins v. Buckingham*, [1915] 1 Ch. 211.

**426.** —[**Testatrix** by her will appointed G. her exor., & directed him to pay her debts & funeral & testamentary expenses. She then bequeathed various pecuniary legacies, including a legacy to G. " (my exor.) " & concluded her will in the following terms:—"After the aforesaid legacies have been duly paid the remainder or residue of my property (if any) shall be at the discretion of my exor. & at his own disposal"—**Held**: G. took the residuary estate of testatrix as a beneficiary & not as trustee for the next of kin of testatrix.—**Re HOWELL, Re BUCKINGHAM, LIGGINS v. BUCKINGHAM**, [1915] 1 Ch. 241; 84 L. J. Ch. 209; 112 L. T. 188, C. A.

*Annotations*.—**Distd.** *Re Booth, Hattersley v. Cowgill* (1917), 86 L. J. Ch. 270; *Re Chapman, Hales v. A.-G.*, [1922] 2 Ch. 479.

**427.** —[**Re NELSON, NORRIS v. NELSON**, (1918), [1928] Ch. 920, n.; 97 L. J. Ch. 443, n.; 140 L. T. 371, n., C. A.]

*Annotation*.—**Consd.** *Re Smith, Public Trustee v. Aspinall*, [1928] Ch. 915.

**428.** —[**Where** trustees are directed to apply at their absolute discretion the whole or any

PART I. SECT. 3, SUB-SECT. 5.—B. (b).

**419 i. General discretion.**—**MILLER v. BLACK'S TRUSTEES** (1837), 2 M. & M. 866.—**SCOT.**

**g. Discretion as to application of fund—Trust for maintenance of children.**—**Re ANTROBUS, HENDERSON v. SHAW & MORTON**, [1918] N. Z. L. R. 364.—**N.Z.**

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**Sect. 3.—Creation of trusts: Sub-sect. 5, B. (b) sub-sects. 6, 7 & 8.]**

part of a fund for the benefit of A., but are obliged to apply the rest of the fund so far as it is not applied for the benefit of A., to or for the benefit of B. A. & B. together are the sole objects of the discretionary trust & are entitled between them to have the whole fund applied to or for their benefit.—*Re SMITH, PUBLIC TRUSTEE v. ASPINALL*, [1928] 1 Ch. 915; 97 L. J. Ch. 441.

**429. Discretion to select among class.]—CIVIL v. RICH** (1879), 1 Cas. in Ch. 309; 2 Rep. Ch. 141 22 E. R. 815, L. C.  
*Annotation:—Reid, McGibbon v. Abbott* (1885), 10 App. Cas. 653.

**430. —.]—**Testator declared it to be his will, that the sum of £6,000 3 per cent. bank annuities should continue standing, as it then was, in his own name, until the contingencies mentioned in his will were completed. He also gave real estates to trustees & their heirs, & declared it to be his intention that they should have no further trouble in it than to prevent the aforementioned estates being alienated before the contingencies mentioned in his will were completed. Testator gave life interests in the property to his son & daughter respectively, with remainder to their children; but in case they should die without leaving lawful issue, the longest liver of his two children was to have power to dispose of all his real & personal estate amongst his nephews & nieces or their children, either all to one of them, or to as many of them as his surviving child should think proper:—*Held*: a trust was created by the will for nephews & nieces & their children, subject only to a power of selection in the survivor of the son & daughter of testator.

Where there is a general intention in favour of a class, & a particular intention in favour of a portion of it to be selected by an individual named, the ct. will carry into effect the general intention in favour of the class, & will not suffer the gift to fail on account of the neglect of the donee to exercise his power (*per Cur.*).—*BURROUGH v. PHILCOX, LACEY v. PHILCOX* (1840), 5 My. & Cr. 72; 5 Jur. 453; 41 E. R. 299, L. C.

*Annotations:—Consd. Prendergast v. Prendergast* (1850), 3 H. L. Cas. 195; *Cowper v. Mantell* (No. 2), *Cooper v. Mantell* (No. 2) (1856), 22 Beav. 231; *Poock v. A.-G.* (1876), 3 Ch. D. 342. *Distd. Re Weekes' Settlement*, [1897] 1 Ch. 289. *Reid, Faulkner v. Wynford* (1845), 15 L. J. Ch. 8; *Penny v. Turner* (1818), 2 Ph. 493; *Re White's Trusts* (1850), *John, 636*; *Wilson v. Duguid* (1883), 24 Ch. D. 244; *Re Llewellyn's Settlement*, *Official Solicitor v. Evans*, [1921] 2 Ch. 281; *Re Combe, Combe v. Combe*, [1923] Ch. 210.

**431. — Trust for education of children.]—**Testator bequeathed his residuary estate to trustees; &, after making a provision out of it for the benefit of his son for his life, &, after the son's death, for his wife & children, directed that, if his son should assign or charge the interest to which he was entitled for life, or attempt or agree to do or commit any act whereby the same, or any part thereof, might, if the absolute property thereof were vested in him, be forfeited to or become vested in any person or persons, then the trustees should pay & apply the interest for the maintenance & support of his son, & my wife & child or children he might have, & for the education of such issue as the trustees should, in their discretion, think fit. Some years after testator's death the son became bkpt.:—*Held*: the trust for the benefit of the son, his wife & children, was valid, & the assignees were not entitled to any part of the provision.—*GODDEN v. CROWHURST* (1842), 10 Sim. 642; 11 L. J. Ch. 145; 59 E. R. 765.

*Annotations:—Dtd. Youngusband v. Gisborne* (1846), 15 L. J. Ch. 355. *Consd. Re Coleman, Henry v. Strong* (1888),

39 Ch. D. 443. *Distd. Re Bullock, Good v. Lickorish* (1891) 60 L. J. Ch. 341.

**432. Discretion to select among family or relations.]—**Where a donor recommends or directs that the donee at her death shall give his personal property to such of his family or such of his relations as she shall think fit, the donee has a power to select the objects of her bounty, amongst his relations or family, though not within the degree of next of kin. But if the donee does not exercise the power, the word "relations" or the word "family" will be construed "next of kin," unless the special expressions of the donee have a different import.—*GRANT v. LYNAM* (1828), 4 Russ. 292; 6 L. J. O. S. Ch. 129; 38 E. R. 815.

*Annotations:—Reid, Lilley v. Hoy* (1842), 1 Haro. 580; *Re Deakin, Starkey v. Eyres*, [1894] 3 Ch. 565.

**433. Discretion to give to either branch of donor's family.]—STUBBS v. SARGON**, No. 890, *post*.

**434. Discretion as to application of fund—Trust for maintenance of wife & children.]—**Settlement of husband's estate on his marriage, in trust to pay the rents, etc., "unto or for the maintenance & support of the husband, wife, & children, or otherwise, if the trustees should think proper to permit the same to be received by the husband during his life, without power to charge, etc.," on the bkpty. of the husband:—*Held*: a trust had been created for the maintenance & support of the wife & children out of the property during the husband's life.—*PAGE v. WAY* (1840), 3 Beav. 20; 49 E. R. 8; *sub nom. PAGE v. MAY*, 4 Jur. 600.

*Annotations:—Distd. Duncan v. Campbell* (1842), 12 Sim. 616. *Apld. Kearsley v. Woodcock* (1843), 3 Haro. 185.

**435. —.]—**Bequest of a share in certain trust funds, in trust for A., his exors., administrators, & assigns, provided that, if A. should, during the life of B. or C. assign, charge, or otherwise dispose of his share in the principal or interest thereof, or attempt or agree so to do, or do any act whereby his share in the moneys, if payable to himself or his exors., or administrators, would become vested in some other person, then, & in such case, all his estate, right, title, & interest in such trust moneys should absolutely cease & determine, & thereby & thereupon become absolutely forfeited; & the trustees should thenceforward stand possessed of the shares or share so forfeited, in trust to pay, apply, & dispose of the annual produce thereof, during the lives of B. & C., for the support & maintenance of A., & of his wife & family, or otherwise for his & their benefit, in such manner as the trustees should think proper, & after the death of B. & C. should settle & assure, or pay & apply, & dispose of the share so forfeited, in trust for, or for the benefit of, A., & his family, in such manner as they should in their discretion think proper. A. assigned all his property to trustees for his creditors, & thereby committed an act of bkpty., & a fiat being issued against him, he was declared a bkpt.:—*Held*: upon the execution by A. of the assignment, his share & interest in the trust moneys became subject to the trust declared by the will for the benefit of A. & his wife & family; that A. was not of necessity entitled to any part of the income of the trust moneys separately from his wife & children; but any interest of A. in the trust moneys not applicable for the support & maintenance of his wife & children passed to his assignees on his bkpty.—*KEARSLEY v. WOODCOCK* (1843), 3 Haro. 185; 1 T. O. S. 410; 8 Jur. 120; 67 E. R. 348.

*Annotations:—Reid, Roobford v. Hackman* (1852), 9 Haro. 475; *Wallace v. Anderson* (1853), 16 Beav. 633; *Carr v. Living* (1880), 28 Beav. 644; *Re Coleman, Henry v. Strong* (1888), 39 Ch. D. 443; *Re Bullock, Good v. Lickorish* (1891), 60 L. J. Ch. 341; *Re Smith, Smith v. Smith*, [1916] 1 Ch. 369; *Re Clark, Clark v. Clark*, [1926] Ch. 833.

**436. Effect of failure to exercise discretion—Validity of gift.]**—Where a legacy is intended to be given, & only the application of it left to discretion or left to accident, if that discretion is not exercised or that accident happens which prevents the employment of it in the way which is contemplated, the gift does prevail; the main object of the gift, the mode of application, may fail, but that will not interfere with the substance of the gift (*LORD COTTENHAM, C.*).—*GOUGH v. BULT* (1848), 18 Sim. 45; 17 L. J. Ch. 401; 13 L. T. O. S. 86; 12 Jur. 859; 60 E. R. 789, L. C.

*Annotation:—Apld. Re Stanger, Moorsom v. Tate* (1891), 60 L. J. Ch. 326.

**437. Effect of death before discretion exercisable.]**—Gift of a share of residue, after the determination of a life tenancy therein, to trustees, upon trust to "pay or apply all or any portion of the income or corpus of the same in or towards the support or maintenance or otherwise for the benefit of their brother R., in such manner & proportion in every respect & at such times as they shall deem most conducive to his welfare." The brother predeceased the tenant for life:—*Held*: the effect of the gift was to empower the trustees to apply so much of the share as might be required for the personal benefit of their brother, but no trust was to be implied in his favour as to the whole of the share; consequently the share did not pass to his legal personal representative.—*Re STANGER, MOORSOM v. TATE* (1891), 60 L. J. Ch. 326; 64 L. T. 693; 39 W. R. 455.

#### SUB-SECT. 6.—PROVISIONS AS TO DURATION.

**438. Duration must be certain.]**—Testatrix bequeathed the sum of £500 New Consols to trustees, upon trust to apply the dividends thereof in maintaining & keeping in repair the tomb of her brother in Africa "for the longest period allowed by law, that is to say, until the period of twenty-one years from the death of the last survivor of all persons who shall be living at my death":—*Held*: the gift was void for uncertainty.—*Re MOORE, PRIOR v. MOORE*, [1901] 1 Ch. 936; 70 L. J. Ch. 358; 84 L. T. 501; 49 W. R. 484; 17 T. L. R. 356.

**Application of rule against perpetuities.]—See, generally, PERPETUITIES, Vol. XXXVII., pp. 55 et seq.**

#### SUB-SECT. 7.—NECESSITY FOR LEGAL ESTATE.

**439. Whether legal estate necessary—Co-extension with trust.]**—*BURGESS v. WHEATE, A.-G. v. WHEATE*, No. 638, *post*.

**440. —.]**—(1) Trust estates do not depend upon the legal estate for an existence. A ct. of equity considers devises of trusts as distinct substantive devises, standing on their own basis, independent of the legal estate, or of one another; & the legal estate is nothing but the shadow which always follows the trust estate, in the eye of a ct. of equity (*WILMOT, C.J.*).

(2) Executory trusts fall under a very different consideration, for when the freehold is put into trustees, & the vacuum, which the law so much abhors, is thereby avoided, a trust to arise out of a remainder for a person not existing but who must exist within the compass of a life or lives in being,

will be as good, & to be supported by a ct. of equity as much, as a trust for a person in *esse*; & therefore, suppose a remainder, limited to trustees & their heirs, in trust for the first son which A. shall have & his heirs; the trust being in the mind & intention of testator for a person not then existing, but to exist, & where that existence must happen within the compass of a life or lives, would be clearly good. So in this case, testator does not only declare his intention to give to a person not in *esse*, but is actually giving directions for the creation of that person; & there is no difference between the cases, but that one is an executory trust for a natural person to be created & the other is for a political person to be created (*WILMOT, C.J.*).—*A.-G. v. DOWNING (LADY)* (1767), Wilm. 1; 97 E. R. 1; *subsequent proceedings* (1769), Amb. 571, L. C.

*Annotations:—Generally, Reid, White v. White* (1778), 1 Bro. C. C. 12; *Robson v. Flight* (1864), 34 Beav. 1110. *Mentd. Moggridge v. Thackwell* (1803), 7 Ves. 36; *A.-G. v. Brodie* (1846), 11 Jur. 137, n.

**441. —.]**—It is not, in my opinion, necessary to constitute a trust that the person in receipt of the rents of the estate should have the legal estate; if so, no equitable owner could create a trust (*ROMILLY, M.R.*).—*KNIGHT v. BOWYER* (1857), 23 Beav. 609; 26 L. J. Ch. 769; 30 L. T. O. S. 95; 3 Jur. N. S. 968; 6 W. R. 28; 53 E. R. 239; *on appeal* (1858), 2 De G. & J. 421, L. J.J.

*Annotations:—Mentd. Radcliffe v. Anderson* (1860), E. B. & F. 819; *Dickinson v. Burrell, Stourton v. Burrell* (1866), L. R. 1 Eq. 337; *Bagnall v. Carlton* (1877), 6 Ch. D. 371; *East Stonchouse U. C. v. Willoughby*, [1902] 2 K. R. 318; *Hunt v. Luck*, [1902] 1 Ch. 428; *Re Jordison, Raine v. Jordison*, [1922] 1 Ch. 440.

**442. —Trustee holding against Crown—Crown claiming by escheat.]**—Trustee, not having the legal estate, cannot hold against the Crown, claiming by escheat.—*WALKER v. DENNE* (1793), 2 Ves. 170; 30 E. R. 577, L. C.

*Annotations:—Reid, Henchman v. A.-G.* (1831), 3 My. & K. 485; *Taylor v. Haycraft* (1811), 11 Sim. 8; *Harvey v. Wadkin* (1857), 24 Beav. 1; *Sharp v. St. Souvenir* (1871), 7 Ch. App. 343; *Re Bond, Palmer v. A.-G.* (1900), 82 L. T. 612; *Talbot v. Jovers*, [1917] 2 Ch. 363. *Mentd. Swann v. Fomereau* (1796), 3 Ves. 41; *Whitdale v. Partridge* (1803), 8 Ves. 227; *Curtis v. Hutton* (1808), 14 Ves. 537; *Hereford v. Ravenhill* (1842), 5 Beav. 51; *Re Twopenny's Settlement*, *Monio v. Twopenny*, [1924] 1 Ch. 522.

**Voluntary settlement.]—See SETTLEMENTS, Vol. XL., pp. 533–537, Nos. 768–800.**

#### SUB-SECT. 8.—COMMUNICATION TO TRUSTEE.

**443. Effect of failure to communicate trust—Right of donor to revoke—Funds at bank carried over to trustees' accounts.]**—Where A. having certain funds standing to his credit at his bankers, by letter, directed them to carry some parts of such funds to the account of certain persons, as trustees for his wife, & after her decease, for his son; & other parts thereof to the account of certain persons, as trustees for his son; & such sums were accordingly carried over by the bankers to the account of such persons in their books, & the dividends were from time to time carried to the same accounts; but testator never communicated the facts to the trustees; & there was some evidence that testator had directed the transfers under an impression that he should be able, by that means, to evade the legacy duty, & that he had shown an intention to exercise some acts of ownership over the funds:—*Held*: the

pleted by delivery, alleged in their bill filed to declare & for the enforcing of the trusts, that the deed creating the trust, if any, was not executed or

**PART I. SECT. 3, SUB-SECT. 6.**  
h. *Continuing trust.*—*BRANFORD'S TRUSTEES v. POWELL*, [1924] S. C. 436.—*SCOT*.

**PART I. SECT. 3, SUB-SECT. 8.**  
k. *Effect of failure to communicate trust.*—Persons claiming as cestuis que trust under a deed of trust not com-

**Sect. 3.—Creation of trusts: Sub-sect. 8. Sect. 4: Sub-sect. 1, A. & B.]**

appropriations were void, & testator might at any time have revoked them.—*GASKELL v. GASKELL* (1828), 2 Y. & J. 502.

*Reid.* *Hughes v. Stubbs* (1842), 1 Hare, 476; *Stapleton v. Stapleton* (1844), 14 Sim. 186; *Kokewich v. Manning* (1851), 1 De G. M. & G. 176.

**444. — Declaration of trust.]—***Re COZENS, GREEN v. BRISLEY*, No. 129, *ante*.

**445. — Memorandum by testator retained until death.]—***ARMSTRONG v. TIMPERON*, No. 139, *ante*.

**Secret trusts.]—***See* Sect. 4, sub-sect. 2, *post*.

**Charitable trusts.]—***See* CHARITIES, Vol. VIII., pp. 289, 290, Nos. 659-669.

**SECT. 4.—SECRET TRUSTS.**

**SUB-SECT. 1.—HOW ARISING.**

**A. In General.**

**446. Circumstances inconsistent with absolute gift—Admissibility of parol evidence.]—**Bill brought to set aside an assignment of a leasehold estate, etc., upon suggestion that it was not intended as an absolute assignment, but subject to a trust for plff.'s benefit. Though no express trust in the deed, yet as it might be collected from circumstances arising out of the assignment itself inconsistent with an absolute disposition, Lord Chancellor admitted parol evidence to explain this transaction.—*HUTCHINS v. LEE* (1737), 1 Atk. 447; *West temp. Hard.* 257; 26 E. R. 284, L. C. **Charitable trusts.]—***See* CHARITIES, Vol. VIII., pp. 289-291, Nos. 659-685.

**B. Trust Expressed by Parol.**

**447. Whether trust valid.]—***PARY v. JUXON* (1609), 3 Rep. Ch. 38; 21 E. R. 722; *sub nom.* *POREY v. JUXON*, Nels. 135.

**448. —.]—***NAB v. NAB*, No. 52, *ante*.

**449. —.]—**Where there is a gift of property *inter vivos*, accompanied with the expression of a wish as to the mode of employing it, & at the same time with a declaration that no legal obligation is

assented to by the persons therein appointed trustees; that the contents of the deed were never communicated to them by grantors; & that when the contents were afterwards communicated the trustees so appointed expressly renounced, & refused to execute the trusts therein contained. Plffs. were volunteers—*Held*: no interest passed by the deed, & it was void.—*SMITH v. STUART* (1866), 12 Gr. 246.—**CAN.**

**PART I. SECT. 4, SUB-SECT. 1.—A.**

**449i. Circumstances inconsistent with absolute gift—Admissibility of parol evidence.]—**M. agreed by written contract to give to B. an absolute deed of property as security for a loan the same to be held by B. in trust for the time the loan was to run. By B.'s directions the deed was made out in his daughter's name. The daughter having claimed that she purchased the property absolutely, & for her own benefit an action was brought by M. against her & B. for specific performance of the contract with B. & for a declaration that the daughter was a trustee only subject to repayment of the loan. Defts. denied the allegation of collusion & conspiracy made in the statement of claim & pleaded Stat. Frauds:—*Held*: the evidence showed that the daughter was aware of the agreement made with B. & Stat. Frauds did

not prevent parol evidence given of such agreement.—*HARTON v. McMILLAN* (Ont.) (1892), 20 S. C. R. 401.—**CAN.**

**1. Conversation between testator & another—After execution of Will.]—***BALFE v. HALPENNY*, [1904] 1 I. R. 486.—**IR.**

**PART I. SECT. 4, SUB-SECT. 1.—B.**

**447 i. Whether trust valid.]—**A., who was greatly addicted to drinking, gave to B. a mtge. to secure a small debt; the property was worth at least seven times the debt; & the rent of half the property for three years would have paid off the claim; but five years before the debt was payable A., without any additional consideration, released his equity of redemption to B.; & B. was allowed to remain in possession for seven or eight years after the mtge. debt was paid off by rents.—*Held*: the facts & evidence showed that the release was given on a parol trust, for the benefit of the mtgr. & his family, & to set up the release as an absolute purchase was a fraud on B., against which the ct. should relieve notwithstanding the lapse of time & the death of some of the witnesses.—*CRIPPEN v. OGILVIE* (1871), 18 Gr. 253.—**CAN.**

**447 ii. —.]—**Testator having declared, by parol, to his residuary legatee, certain trusts to which he

intended to be imposed, the clear intention is thereby shown to be that the dominion of the property should remain in the grantee, & the evidence of the want of any consideration moving from the grantee cannot raise a resulting trust.—*WHEELER v. SMITH* (1860), 1 Giff. 300; 29 L. J. Ch. 194; 1 L. T. 430; 6 Jur. N. S. 62; 8 W. R. 173; 65 E. R. 928.

**450. — Trust referred to in will.]—**Testator appointed a lady his extrix., & gave her all his real & personal property upon trust to carry out his verbal wishes. He had, prior to the execution of the will, verbally given her to understand that she might help & educate certain of his relations if it were necessary, & that, subject to her doing so, the property was all her own:—*Held*: as there was nothing to show on the face of the will that the lady was to take beneficially the trusts failed, & the realty belonged to the heir, & the personality to the next-of-kin of testator.—*Re BAILLIE, FITZGERALD v. NOAD* (1886), 2 T. L. R. 660.

**451. —.]—**Testatrix, by her will, appointed applt., L., & his daughter W., her exors. & trustees, & after leaving money for a charitable bequest, directed that her trustees & exors. should "expend all or any the residue of my estate in such manner as they know to be most in agreement with my desires." There was evidence that testatrix had been for a long time on very intimate terms of friendship with L. & his family, & that she had told them on one or more than one occasion that she intended to leave her property to L.'s daughters:—*Held*: the evidence was not sufficient to establish a trust in favour of the daughters, & the residue must go to testatrix's next-of-kin.—*LE PAGE v. GARDOM* (1915), 84 L. J. Ch. 749; 113 L. T. 475; 59 Sol. Jo. 599, 11 L.; *affg.* S. C. *sub nom.* *Re GARDOM, Le PAGE v. A.-G.*, [1914] 1 Ch. 602, C. A.

**Annotations.—***Distd.* *Re Gardner, Huey v. Cunningham*, [1920] 2 Ch. 523. *Reid.* *Re Blackwell, Blackwell v. Blackwell*, [1928] Ch. 614. *Mentd.* *Re Clarke, Bracey v. Royal National Lifeboat Institution*, [1923] 2 Ch. 407.

**452. Admissibility of parol evidence.]—***FANE v. FANE* (1681), 1 Vern. 30; 23 E. R. 284, L. C.

**Annotations.—***Reid.* *Pett v. Smith* (1695), 1 P. Wms. 7; *Harris v. Lincoln* (Bp.) (1723), 2 P. Wms. 135; *Francis v. Diehlstedt* (1742), 2 Coop. temp. Cott. 531. *Mentd.* *Ulrich v. Litchfield* (1742), 2 Atk. 372.

wished £2,000 to be applied, afterwards made a codicil, stating that he had instructed the residuary legatee, as to the disposition of his property:—*Held*: the parol trusts could be enforced against the personal representative of the residuary legatee.—*A.-G. v. DILLON* (1862), 13 I. Ch. R. 127.—**IR.**

**447 iii. —.]—**Testator bequeathed personality to O., "to be distributed as he thinks right." He appointed no exor. O. was the person who prepared testator's will, & was verbally informed at the time of the execution thereof by testator that he wished him to do "as he thought fit with the money, to distribute it, after payment of debts, etc., among five named persons, of whom B. (one of the next-of-kin) was one. O. accepted the trust:—*Held*: O. was, under the terms of the will, entitled for his own benefit; but that as a secret trust had been accepted by him, he took on a trust enforceable by the ct. for the beneficiaries named by testator.—*O'BRIEN v. CONDON*, [1905] 1 I. R. 61; 38 I. L. T. 252.—**IR.**

**452i. Admissibility of parol evidence.]—***McGILL v. McGLASHAN* (1857), 6 Gr. 324.—**CAN.**

**452 ii. —.]—**A deed was made by one joint owner of property at the instance of the other to a third person, under a parol agreement that

**453.** —.]—One by will makes A. & C. exors. in trust & gives them a legacy of 20s. apiece for a remembrance above their charges. Parol proof admitted that this was in trust for the wife only.—*PRING v. PRING* (1689), 2 Vern. 99; 23 E. R. 673.

*Annotations:—***Re**fd. *Gainsborough v. Gainsborough* (1891), 2 Vern. 252; *Re Fleetwood, Sidgreaves v. Brewer* (1880), 15 Ch. D. 594. **Mentd.** *Bowker v. Hunter* (1783), 1 Bro. C. C. 328; *Nourse v. Finch* (1793), 4 Bro. C. C. 239.

**454.** —.]—Parol evidence of the declarations of a devisee admitted, to prove her being only a trustee.—*STRODE v. WINCHESTER* (1767), 1 Dick. 397; 21 E. R. 323, L. C.

**455.** —.]—Testator devised freeholds to A. & C. as joint tenants in fee, & also bequeathed to them as joint tenants £12,000. An unsigned paper was found after testator's death, in his desk, indicating his wish & intention that the devise & bequest should be applied for specified charitable purposes. Upon a bill by next of kin to set aside these gifts as involving a secret trust for charity, & consequently void:—**Held:** testator having given this property absolutely by his will so that no trust whatever legally attached upon the conscience of the legatees, the ct. could not admit parol testimony to show testator's intention as expressed in the unsigned paper, & thereby raise a trust.—*WALLGRAVE v. TEBBS* (1855), 2 K. & J. 313; 25 L. J. Ch. 241; 26 L. T. O. S. 147; 20 J. P. 84; 4 W. R. 194; 60 E. R. 800; *sub nom.* *WALGRAVE v. TEBBS*, 2 Jur. N. S. 83.

*Annotations:—***Apld.** *Tee v. Ferris* (1856), 2 K. & J. 357. **Consd.** *Jones v. Budley* (1868), 3 Ch. App. 362; *Re Maddock, Llewellyn v. Washington*, [1902] 2 Ch. 220. **Refd.** *Proby v. Lander* (1860), 28 Beav. 504; *Cullen v. A.-G. for Ireland* (1866), 12 Jur. N. S. 531; *Juniper v. Batchelor* (1868), 19 L. T. 200; *Rowbotham v. Dunnett* (1878), 8 Ch. D. 430; *Re Boyes, Boyes v. Carritt* (1884), 26 Ch. D. 531.

**456.** —.]—*IRVINE v. SULLIVAN*, No. 208, *ante*.

**457.** —.]—Testator, who died in Jan. 1885, by his will dated in Dec. 1884, bequeathed unto his friends, A. & B., the sum of £500 free of legacy duty to be raised, & be paid out of his pure personalty "relying, but not by way of trust, upon their applying the sum in or towards the object or objects privately communicated to them" by him. The exors. objected to pay over the bequest, on the ground that there was a secret trust, & that such trust appeared to be an illegal one. The legatees accordingly applied to the ct. to order payment of the legacy. The exors. tendered affidavits to show that the bequest was upon a trust. The legatees objected that the ct. could

not go beyond the terms of the will:—**Held:** the evidence was admissible.—*Re SPENCER'S WILL* (1887), 57 L. T. 519; 3 T. L. R. 822, C. A.

*Annotation:—***Consd.** *Re Falkiner, Mead v. Smith*, [1924] 1 Ch. 88.

**458.** —.]—Testator, who died in 1879, by his will dated in the same year gave his residuary real & personal property to his exors. on trust to convert & pay the proceeds of such conversion "to my friends A. & B. in equal shares, & I bequeath the said proceeds to the said A. & B., their exors., administrators & assigns absolutely in the full confidence that they will carry out my wishes in respect thereof." Both A. & B. survived testator but were dead when the action to administer his estate was begun:—**Held:** parol evidence of a conversation in which testator told the witness that he had communicated his wish to benefit a charity to one of the legatees, was inadmissible.—*Re DOWNING'S RESIDUARY ESTATE* (1888), 60 L. T. 140.

**459.** —.]—*Re HETLEY, HETLEY v. HETLEY*, No. 415, *ante*.

**460.** —.]—Testator by a codicil to his will executed by him after he had become physically but not mentally incapable, gave to his five friends £12,000 upon trust to invest the same as they should think fit, & apply the yearly income "for the purposes indicated by me to them," with power to pay over the capital sum of £8,000 "to such person or persons indicated by me to them" as they thought fit, & to pay the balance of £4,000 to the trustees of his will to be held as part of his residuary estate. Detailed parol instructions for this codicil were given by testator to C., one of the five friends, & the object of the trust was known in outline to & accepted by all the rest before the execution of the codicil. On the same day, soon after the execution of the codicil, C. wrote out & signed a memorandum of the instructions given to him to the effect (*inter alia*), that the interest of the £12,000 was to be paid to a lady, whose name & full address were given, for the benefit of her & her son, whose full name followed. In an action by the widow of testator & her son against the trustees & beneficiaries to test the validity of the trust legacy of £12,000:—**Held:** (1) parol evidence was admissible to establish the trust on the authority of *Re Fleetwood, Sidgreaves v. Brewer*, No. 463, *post*; (2) a complete valid & consistent trust of this pecuniary legacy for the lady & her son had been established by the codicil & the memorandum of even date.—*Re BLACKWELL, BLACKWELL v. BLACKWELL*, [1928] Ch. 614; 97 L. J. Ch.

the grantee should hold the property to secure money which he was to advance to pay interest on a mtge. on the property, & subject thereto in trust for the wife of such other joint owner, who remained in possession:—**Held:** parol evidence of the agreement was admissible.—*CAMPBELL v. DUKIN* (1870), 17 Gr. 80.—**CAN.**

**452 iii.** —.]—*SHAW v. SHAW* (1870), 17 Gr. 232.—**CAN.**

**452 iv.** —.]—*BARTON v. McMILLAN* (Ont.) (1892), 20 S. C. R. 404.—**CAN.**

**452 v.** —.]—Among other claims in this action, plff. asked to have it declared that the purchase made by deft. of a lot of land was made by him as trustee & agent for plff., & that plff. was entitled to the profits & an account. There was no writing evidencing the alleged trust:—**Held:** plff. was at liberty to prove by parol evidence (if he could do so) the existence of the alleged trust.—*HULL v. ALLEN* (1902), 22 C. L. T. 138; 1

O. W. R. 782.—**CAN.**

**452 vi.** —.]—*LEMON v. CHARLTON* (EXCEUTOR) (1906), 44 N. B. R. 476; 34 D. L. R. 235.—**CAN.**

**452 vii.** —.]—An oral agreement under which one party thereto becomes a trustee for the other of an undivided interest in a mine recorded in the trustee's name, may be asserted by the *cestui que trust* notwithstanding Stat. Frauds.—*REYNOLDS v. JACKSON* (Sask.), [1917] 3 W. W. R. 507.—**CAN.**

**452 viii.** —.]—*SPOURLE v. CLEMENTS* (B. C.), [1925] 2 D. L. R. 781.—**CAN.**

**m. Application of Trusts Act, 1915, s. 71.**—It is settled law that a deft. shall not be allowed to set up the above act. as an instrument of fraud. What may be the precise limits to be assigned to the operation of the doctrine, & how much actual operation it may leave to the sect. in cases of verbal agreements to create trusts, may be difficult to define: but it is clear that the doctrine takes

out of the sect. cases in which any person has become possessed of another's land upon a verbal agreement to hold that property on certain trusts & where he or his representatives insist upon claiming to possess the property free from such trusts.—*ORGAN v. SANDWELL*, [1921] V. L. R. 622.—**AUS.**

**n. Right to costs of suit.**—Where a person claimed, on the ground of a parol trust, to be entitled to a conveyance of land from the heirs of the legal owner, & they required him to establish the trust by a suit, which he did:—**Held:** he was not entitled to the costs of the suit.—*ENGLISH v. ENGLISH* (1868), 15 Gr. 330.—**CAN.**

**o. Money held by solicitors in trust for creditors of insolvent trader.**—*Application upon originating notice for interpretation of trust & directions as to distribution of money.*—Non-existence of instrument to be construed.—*Re LANGDON* (1920), 46 O. L. R. 553; 17 O. W. N. 299.—**CAN.**

**Sect. 4.—Secret trusts: Sub-sect. 1, B., C. & D.]**

257; 139 L. T. 200; 44 T. L. R. 521; 73 Sol. Jo. 318, C. A.

—**Charitable trusts.**—See CHARITIES, Vol. VIII., pp. 303, 304, Nos. 821–828.

**C. Trusts Expressed in Writing.**

**461. Whether valid trust—Writing by trustee—Trust communicated by parol.**—Devise of £1,500 to A. & B. for such uses as testator had declared to them, & by them not to be disclosed. A. in the life of B. writes a letter disclosing the trust. This is a good declaration of the trust.—*CROOK v. BROOKING* (1689), 2 Vern. 106; 23 E. R. 679.

**Annotations.**—*Folld. Smith v. Attersoll* (1826), 1 Russ. 266. *Consd. Re Fleetwood, Sidgroves v. Brewer* (1880), 15 Ch. D. 594. *Refd. Re Hopkins' Trusts* (1878), 9 Ch. D. 131. *Mentd. Wyth v. Blackman* (1749), 1 Ves. Sen. 196; *Hussey v. Berkeley* (1763), 2 Eden, 191; *Kelley v. Fowler* (1768), Wilms. 298; *Newton v. Bennet* (1782), 1 Bro. C. C. 134; *It. v. Darlington* (1792), Nolan, 124; *Radcliffe v. Buckley* (1804), 10 Ves. 195; *Doe d. Stewart v. Sheffield* (1811), 13 East, 526; *Fenn v. Deane* (1856), 2 Jur. N. S. 700; *Crook v. Whitley* (1857), 7 De G. M. & G. 490; *Pride v. Pooks* (1858), 3 De G. & J. 252; *Berry v. Berry* (1861), 3 Giff. 131; *Re Atkinson, Pybus v. Boyd*, [1918] 2 Ch. 138.

**462.** ——— **Addition in handwriting of testator.**—Testator bequeaths a legacy to A. & B. in trust for certain purposes, which the will states to have been fully explained to them. On the same day a paper writing is signed by A. & B., in which they declare that the bequest is upon trust for six persons, whose names are stated: &, after their signature, some lines are added in the handwriting of testator, by which a seventh person, an unborn child, is admitted to a share of the legacy. Upon a bill, filed by one of the six persons named in the body of the paper writing, the ct. recognised the paper writing as a valid declaration of trust, though it had not been proved as a testamentary paper.—*SMITH v. ATTERSOLL* (1820), 1 Russ. 266; 38 E. R. 103.

**Annotations.**—*Consd. Re Fleetwood, Sidgroves v. Brewer* (1880), 15 Ch. D. 594. *Refd. Johnson v. Ball* (1851), 5 De G. & Sm. 85.

**463.** ——— **Pencil memorandum.**—Testatrix who had by will & three codicils made a complete disposition of her real & personal estate, afterwards executed a fourth codicil in the following words: "I hereby bequeath to B., to whom I have willed my landed property, also all my personalty, such as cash, furniture, etc., to be applied as I have requested him to do." B. gave evidence that before executing this codicil testatrix had stated to him the alterations she desired to make in her will, & that he had made a pencil memorandum of her various fresh bequests, repeating each item to her, & that, except so far as to give effect to the new wishes so stated to him, testatrix did not intend to alter her previous dispositions. The memorandum was not signed by testatrix.—*Held*: the nature of the trust was sufficiently established by the evidence of B., & being so established the ct. would give effect to it.—*Re FLEETWOOD, SIDGROVES v. BREWER* (1880), 15 Ch. D. 594; 40 L. J. Ch. 514; 29 W. R. 45.

**Annotations.**—*Apld. Re Huxtable, Huxtable v. Crawford*, [1902] 1 Ch. 214. *Re Page v. Gardom* (1915), 84 L. J. Ch. 749. *Consd. Re Gardner, Huey v. Cunningham*, [1920] 2 Ch. 523. *Apld. Re Blackwell, Blackwell v. Blackwell*, [1928] Ch. 614. *Refd. Re Hetley, Hetley v. Hetley*, [1902] 2 Ch. 866; *Ward v. Van Der Loeff, Burnyeat v. Van Der Loeff*, [1924] A. C. 653. *Mentd. Bourne v. Keane*, [1919] A. C. 815.

**PART I. SECT. 4, SUB-SECT. 1.—C.**

**464 i. Whether valid trust—Writing by testator—Signed after date of will.**—*SULLIVAN v. SULLIVAN*, [1903] 1 I. R. 193.—*IR.*

**464 ii.** ——— **Where testatrix repeatedly told exor. that she intended to make him residuary legatee, to use property for purposes that she would not put in her will, & mentioned those purposes to him, & wrote them on**

**464.** ——— **Writing by testator—Signed after date of will.**—Testator gave a policy of assurance to two trustees, "to hold same upon uses appointed by letter signed by them & myself." No such letter existed at the date of the will, but testator had previously asked the trustees, who had consented, to accept the bequest for the benefit of persons & objects then named by testator. Long after the date of his will, testator wrote a letter, addressed to his exors., stating that he had, by his will, left the policy to the two trustees, to be delivered up to them for the purposes they had agreed to carry out. At the same time testator signed an unattested memorandum, declaring the trusts on which the trustees were to hold the policy given to them by his will. The trustees retained the letter & the memorandum until after testator's death. Upon a claim by one of the persons beneficially interested under the memorandum, against the exors. & trustees:—*Held*: testator could not prospectively create for himself a power to dispose of property by an instrument not duly executed as a will; & the letter would not operate as a gift *inter vivos*; & the trustees held the proceeds of the policy in trust for the residuary legatees under testator's will.—*JOHNSON v. BALL* (1851), 5 De G. & Sm. 85; 18 L. T. O. S. 182; 16 Jur. 538; 64 E. R. 1029.

**Annotations.**—*Apld. Re Roves, Roves v. Carritt* (1884), 26 Ch. D. 531. *Refd. Re Fleetwood, Sidgroves v. Brewer* (1880), 15 Ch. D. 594; *Re Hetley, Hetley v. Hetley*, [1902] 2 Ch. 866; *Re Gardner, Huey v. Cunningham*, [1920] 2 Ch. 523; *Re Blackwell, Blackwell v. Blackwell*, [1928] Ch. 614.

**465.** ——— **Where trust also expressed verbally.**—Testatrix by her will, dated in 1909, bequeathed all her real & personal estate to her husband for his use & benefit during his life, "knowing that he will carry out my wishes." Four days after the date of her will she signed an unattested memorandum expressing her wish that "the money I leave to my husband" should, on his death, be equally divided among certain named beneficiaries. She died in 1919 possessed of personal estate only, & her husband died four days later. After his death his wife's will & the memorandum were found in his safe, & there was parol evidence that shortly after the execution of the will testatrix had said, in his presence, that her property after his death was to be equally divided between the named beneficiaries, & that he assented thereto.—*Held*: the husband, who took *jure mariti* the corpus of his wife's estate for his own benefit, could not properly refuse to carry into effect her wishes as to the disposition of the property after his death, expressed to him by her before her death, & assented to by him. He therefore held the corpus, subject to his life interest, as a trustee for the beneficiaries named in the memorandum.—*Re GARDNER, HUEY v. CUNNINGHAM*, [1920] 2 Ch. 523; 89 L. J. Ch. 649; 124 L. T. 40; 36 T. L. R. 784; 64 Sol. Jo. 650, C. A.

**Annotations.**—*Consd. Re Gardner, Huey v. Cunningham*, [1923] 2 Ch. 230. *Refd. Re Blackwell, Blackwell v. Blackwell*, [1928] 1 Ch. 614.

**466.** ——— **Letter referred to in will.**—

*MCCORMICK v. GROGAN*, No. 480, *post*.

**467.** ——— **Gift of specific part of residuary personal estate.**—Where residuary personal estate has been given by will & a specific part of it is bound in the hands of the residuary legatee by a secret memorandum of trust not executed as a will, the

a separate sheet of paper which she read to him:—*Held*: exor. was trustee for the purposes set out on the separate sheet.—*Re ELLIS, OWEN v. BENTLEY* (1918), 53 I. L. T. 6.—*IR.*

et. will, as between the residuary legatee & the beneficiary, give effect to the secret trust as if the part of the residue bound by it had been specifically bequeathed.—*Re MADDOCK, LLEWELYN v. WASHINGTON*, [1902] 2 Ch. 220; 71 L. J. Ch. 507; 86 L. T. 644; 50 W. R. 598, C. A.

**Annotations.**—*Reid*. O'Grady v. Wilmot, [1916] 2 A. C. 231; *Re Gardner, Huey v. Cunningham*, [1920] 1 Ch. 501; *Re Gardner, Huey v. Cunningham*, [1923] 2 Ch. 230. **Mentd.** *Re Power, Re Stone, Acworth v. Stone*, [1901] 2 Ch. 659; *Re Fearnside, Baines v. Chadwick*, [1903] 1 Ch. 250; *Re Dodson, Gibson v. Dodson*, [1907] 1 Ch. 284; *Re Orlebar, Wynter v. Orlebar*, [1908] 1 Ch. 136; *Re Hadley, Johnson v. Hadley*, [1909] 1 Ch. 20.

**468. — Deed of gift by testator—Not communicated to donees.**—In 1900 testator, a North Sea skipper, by a deed of gift gave his sons W. & F. in fee simple in equal moieties certain land at P. & at S. In July, 1901, he sold the land at S. & bought additional land at P. In Aug. 1901, W. died. Testator by his will, dated 1913, gave to F. all the land at P., & his residue to the children of a deceased son. Testator received the rents of the land at P. down to his death in 1914, the sons never having known of the deed of gift. F. died in 1915:—*Held*: as testator might have thought the deed non-effective until communicated to his sons, there had been no "concealed fraud" by him, & he had not become a trustee for W. & F.—*Re LEVESLEY, GOODWIN v. LEVESLEY* (1915), 32 T. L. R. 145; 60 Sol. Jo. 142.

**469. — Declaration in will against testamentary character.**—Testator by his will bequeathed £650 to the trustees of the Benevolent Fund of the Savage Club, in order that they might devote the income to the purposes set out in a memorandum. The will stated that the memorandum was not to form part of the will. The purposes set out in this memorandum consisted in the provision of free drinks & smokes for members of the club. Its contents were not communicated to the trustees until after testator's death:—*Held*: as testator had expressly directed that the above memorandum was not to form part of the will the trust failed.—*Re LOUIS, LOUIS v. TRELOAR* (1916), 32 T. L. R. 313.

**470. —**—*By her will dated Apr. 22, 1922, testatrix devised & bequeathed her real & personal estate to two persons upon trust for sale & conversion & investment of the net proceeds as therein mentioned. She then bequeathed to the two persons by name "absolutely as joint tenants one half of the residuary trust moneys, with the request that they will dispose of same in accordance with any memorandum or paper signed by me & deposited with this my will or left amongst my papers at my death." There was a similar gift of the other half of the residuary trust moneys, subject to a life interest. She then declared that any such memorandum or paper should not have any testamentary character, "& the above expression of my wishes as to the disposal of the sums shall not create any trust or legal obligation, even if same shall be communicated to my trustees in my lifetime." The two persons were the partners in the firm of solrs. which prepared her will, & an earlier will dated Aug. 9, 1921, which contained the same bequests & declarations. Before the date of the first will testatrix sent to one of the partners a list containing the names of those she wished to benefit, & in preparing her first will he did his utmost to induce her to allow the names of*

beneficiaries to be inserted in the ordinary way, but she refused. On Oct. 18, 1921, testatrix sent him revised lists of the persons & institutions she wished to benefit, & requested him to destroy the earlier list, & he replied next day, "I have your letter of the 18th inst. with the enclosures, & quite understand your instructions." Subsequently she wrote letters making slight alterations in the lists, which he similarly acknowledged:—*Held*: the true inference was, seeing that the partners had full knowledge of the contents of testatrix's will, that they only agreed to give effect to testatrix's wishes in accordance with the scheme of the will, including the provision that there was to be no trust or legal obligation & accordingly they took the property bequeathed to them absolutely for their own benefit.—*Re FALKNER, MEAD v. SMITH*, [1924] 1 Ch. 88; 93 L. J. Ch. 76; 130 L. T. 405; 68 Sol. Jo. 101.

**471. Effect of loss of writing.**—Testator, by his will, after devising his real estate according to certain limitations therein stated, bequeathed all the rest of his property to trustees, "to form a trust fund to purchase land to go with the inheritance in a manner described in a paper marked "X." At his death no such paper was forthcoming:—*Held*: notwithstanding the absence of the paper marked X, the gift was not void for uncertainty, but there was a trust declared by the will, which was imperative as to the conversion of the residue of the personal estate into land, & that such land when purchased was to go according to the limitations which described the way in which the lands devised by testator were to be inherited.—*WILLOUGHBY v. STORER* (1870), 22 L. T. 896; 18 W. R. 658.

#### D. Promise by Donee.

**472. Express promise inducing gift—Parol promise.**—A man makes his will, & his wife executrix: the son afterwards prevails on his mother to get the father to make a new will, & to name him exor., he promising to be a trustee only for his mother. Trust decreed, notwithstanding Stat. Frauds, etc.—*THYNN v. THYNN* (1684), 1 Vern. 296; 1 Eq. Cas. Abr. 380; 23 E. R. 479.

**Annotations.**—*Reid*. *Whitton v. Russell* (1739), 1 Atk. 448; *Blount v. Doughty* (1747), 3 Atk. 481; *Drakeford v. Wilks* (1747), 3 Atk. 539; *Reech v. Kennogal* (1748), 1 Ves. Sen. 123; *Podmore v. Gunning* (1836), 7 Sim. 644; *Allen v. M'Pherson* (1817), 1 H. L. Cas. 191.

**473. —**—*SELLACK v. HARRIS* (1708), 2 Eq. Cas. Abr. 46; 22 E. R. 40.

**Annotations.**—*Reid*. *Podmore v. Gunning* (1836), Donnelly, 74; *Caton v. Caton* (1865), 1 Ch. App. 137.

**474. —**—*If a legatee promises testator that, in consideration of a disposition in favour of her, she will do an act in favour of a third person, she who undertook to do the act must perform.*—*DRAKEFORD v. WILKS* (1747), 3 Atk. 539; 26 E. R. 1111.

**Annotations.**—*Reid*. *Proby v. Lander* (1860), 28 Beav. 504; *Re Maddock, Llewellyn v. Washington*, [1902] 2 Ch. 220.

**475. — Testator refraining from making specific bequest.**—A copyholder by his will intending to give the greatest part of his estate to his godson, & the other part to his wife; the wife persuades him to nominate her to the whole, & that she would give the godson the part designed for him; decreed against the wife, notwithstanding Stat. Frauds.—*DEVENISH v. BAINES* (1689), Prec. Ch. 3; 2 Eq. Abr. 43; 24 E. R. 2.

#### PART I. SECT. 4, SUB-SECT. 1.—D.

**P. Admissibility of parol evidence.**  
—*McCUR v. SMITH* (Alta.) (1911), 17 W. L. R. 145.—*CAN.*

**Q. —**—*A will directing a pecuniary legacy to be disposed of by the legatee in a manner in which he alone should be cognisant, & as contained in a memorandum, which*

*testator should leave to him. It was proved by parol evidence that, before the execution of the will, testator had verbally informed the legatee that he intended to bequeath the legacy in*



*Sect. 4.—Secret trusts: Sub-sect. 1, D.; sub-sect. 2.]*

**476. — Testator refraining from making specific bequest.**—Provision by will increased upon evidence of testator's request to the exor. & residuary legatee, & his promise; upon which testator refused to make a new will, & said he would leave it to the generosity of exor.—*BARROW v. GREENOUGH* (1796), 3 Ves. 152; 30 E. R. 943.

*Annotation:—Reid. Re Maddock, Llewelyn v. Washington, [1902] 2 Ch. 220.*

**477. —**—The bill, alleging the suppression of a codicil, an assurance by testator, that he had directed his exors. & residuary legatees to pay an annuity, & their promise to him accordingly, repeated after his death, & acted upon by actual payment for several years, plea, merely denying the execution of any codicil, & any such direction overruled.

Relief upon fraud in not performing a promise, relying on which testator forbore to bequeath.—*CHAMBERLAIN v. AGAR* (1813), 2 Ves. & B. 259; 35 E. R. 317.

*Annotations:—Reid. Re James, Ex p. Mudie* (1842), 6 Jur. 1093; *Briggs v. Penny* (1849), 3 De G. & Sm. 525.

**478. —**—Testator devised & bequeathed the residue of his estate, both real & personal, to his wife, her heirs, exors., administrators, & assigns, for her own separate use & enjoyment, "having a perfect confidence she would act up to those views which he had communicated to her, in the ultimate disposal of his property after her decease." On the death of the wife intestate, a bill was filed on the part of two natural daughters of testator, to recover the residue of his estate, alleging that he had intended to leave his residuary property to them after the decease of his wife, & had made the disposition before mentioned, on the faith of a promise & undertaking given by his wife to carry such his intentions into effect:—*Held*: in case of such a promise & undertaking being clearly proved, plffs. would be entitled to the relief of the ct., but as plffs. failed to make out such a case the bill was dismissed, with costs.—*PODMORE v. GUNNING* (1830), 7 Sim. 644; *Donnelly*, 74; 5 L. J. Ch. 266; 47 E. R. 235.

*Annotations:—Reid. Gingell v. Home* (1839), 9 Sim. 539; *Re James, Ex p. Mudie* (1842), 6 Jur. 1093; *Allen v. M'Pherson* (1847), 1 H. L. Cas. 191; *Cross v. Sprigg* (1849), 6 Har. 552; *Reynolds v. Kortright* (1854), 18 Beav. 417; *Proby v. Landor* (1860), 28 Beav. 504; *Re Fleetwood, Sidgroves v. Brewer* (1880), 13 Ch. D. 593; *Re Applebee, Leveson v. Beales*, [1891] 3 Ch. 422.

**479. —**—Where a person, knowing that testator in making a disposition in his favour intends it to be applied for purposes other than for his own benefit, either expressly promises, or by silence implies, that he will carry testator's intention into effect, & the property is left to him upon the faith of that promise or undertaking, it is in effect a case of trust.

Testatrix devised & bequeathed all her real estate, & all such moneys as might be secured to her upon mtge. of real estates, & all her property not applicable under her will for the purposes of mortmain, to defts. J. & P., their heirs, exors., administrators, & assigns, as joint tenants. Testatrix had considerable real estate & large personal property, mixed & unmixed. It was alleged that testatrix thought she had given the above property to J. & P. for charitable purposes, & on a secret trust which she also thought that they, or one of them at all events, had promised

to perform. Defts., J. & P., claimed the property absolutely:—*Held*: whatever charitable desire or object might have existed in the mind of testatrix when she made the devise of her residue, plffs. had entirely failed to show that any secret trust for charity was communicated to, much less accepted or acquiesced in, by defts. or either of them.—*JONES v. BADLEY* (1868), 3 Ch. App. 362; 9 L. T. 106; 16 W. R. 713, C. A.

*Annotations:—Consd. Rowbotham v. Dunnett* (1878), 8 Ch. D. 430. *Apld. Re Stead, Witham v. Andrew*, [1900] 1 Ch. 237; *Re Maddock, Llewelyn v. Washington*, [1902] 2 Ch. 220. *Reid. Jumper v. Batchellor* (1868), 19 L. T. 200; *Re Crawshay, Crawshay v. Crawshay* (1890), 43 Ch. D. 615; *Freeman v. Laing*, [1899] 2 Ch. 355.

**480. —**—C. made a will leaving his whole property, real & personal, to G., whom he also appointed his exor. When about to die, C. sent for G., & in a private interview told him of the will, & on G.'s asking whether that was right, said he would not have it otherwise. C. then told G. where the will was to be found, & that with it would be found a letter. This was all that was known to have passed between the parties. The letter named a great many persons to whom C. wished sums of money to be given & annuities to be paid; but it contained several expressions as to G. carrying into effect the intention of testator as he "might think best," & this sentence, "I do not wish you to act strictly on the foregoing instructions, but leave it entirely to your own good judgment to do as you think I would, if living, & as the parties are deserving; & as it is not my wish that you should say anything about this document, there cannot be any fault found with you by any of the parties, should you not act in strict accordance with it." G. paid money to some of the persons mentioned in the letter, but not to all:—*Held*: in this case there was not any trust created binding on G.

If a legatee states to testator that upon testator's confiding his property, apparently disposing of it, to him, the legatee, by a regular & formal instrument, he will carry into effect all such intentions as testator shall confide to him, then that legatee . . . shall have fastened upon his conscience the trust of carrying into full effect those instructions which he received upon such representations (*LORD HATHERLY*).—*McCORMICK v. GROGAN* (1869), L. R. 4 H. L. 82; 17 W. R. 961, H. L.

*Annotations:—Consd. Rowbotham v. Dunnett* (1878), 8 Ch. D. 430; *Re Fleetwood, Sidgroves v. Brewer* (1880), 13 Ch. D. 594. *Apld. Re Stead, Witham v. Andrew*, [1900] 1 Ch. 237; *A-G v. Chamberlain* (1904), 90 L. T. 581. *Consd. Re Blackwell, Blackwell v. Blackwell*, [1928] Ch. 614. *Reid. Norris v. Frazer* (1875), L. R. 15 Eq. 318; *Re Boyes, Boyes v. Carritt* (1884), 26 Ch. D. 531; *Re Maddock, Llewelyn v. Washington*, [1902] 2 Ch. 220; *Re Pitt Rivers, Scott v. Pitt Rivers*, [1902] 1 Ch. 403; *Re Levesley, Goodwin v. Levesley* (1915), 32 T. L. R. 145.

**481. — Testator destroying codicil.**—By the will & five codicils of testator real estates were settled to the use of his wife during widowhood, remainder to the use of A. for life, remainder to the use of the first & every other son of A. successively in tail male, remainder to the use of such person or persons of a special class as A. should by deed or will appoint, remainder in default of such appointment to B. for life, remainder to the first & every other son of B. successively in tail male, with remainders over.

A. was married but had no children. He was a member of the class, B. was not. Testator's wife, desiring that B. should not be excluded from

trust for a person whom he then named, & that the legatee had consented to accept the legacy for this purpose, & had promised testator to carry out his wishes respecting it. The residuary

legatee of testator having claimed the benefit of the legacy:—*Held*: a valid trust for the person named by testator had attached to the bequest.—*RICHARDAN v. BANON* (1876), 10 L. R. 69.

469.—IR.

*r. Document found with will—Wife agreeing to pay four sums of money mentioned therein.*—*MORRISON v. M'FERRAN*, [1901] 1 L. R. 360.—IR.



succeeding to the estates, induced testator to make a sixth codicil by which he revoked the power of appointment given to A. by the fifth codicil. On hearing of this A. had an interview with testator's wife, at which he gave her his written promise to leave the estates to B. on acquiring the power to do so if she would get testator to revoke the sixth codicil. Testator's wife communicated this promise to testator, who thereupon destroyed the sixth codicil. After testator's death, A. by deed appointed the estates to himself in fee on failure of his issue male. In an action by B. to enforce the promise:—*Held*: the appointment was fraudulent & void, for A. could not exercise the power so as to interfere with B.'s right of succeeding to the estates.—*THARP v. THARP*, [1916] 1 Ch. 142; 85 L. J. 162; 114 L. T. 495; 60 Sol. Jo. 176; *on appeal*, [1916] 2 Ch. 205, C. A.

**482. Express promise subsequent to gift.]**—Testator gave the residue, which amounted in value to about £6,500, of his personal estate upon trust to permit a married woman to receive the income during her life, with remainder after her death for the benefit of her children, & if no children, for the husband absolutely. In the event of the death of the wife in the lifetime of her aunt N., testator directed that the then legally secured income of the aunt, if below £250 a year, should be made up to that amount. From the death of testator, in Apr. 1861, down to Feb. 1865, an annuity of £300 was regularly paid to N. by arrangement, out of the husband's banking account; but the wife having eloped in Sept. 1864, the payment was, after the above date, discontinued. In 1869, the bill was filed by N. against the husband & wife, alleging by amendment, after the answer of the wife, who supported pltf.'s case, had come in, that the husband & wife both promised testator, at his request, on his death bed, to make an allowance of £300 a year to pltf., & praying for a declaration that the income of testator's residuary real & personal estate "was & is subject to a trust" for the payment of £300 a year to pltf. during the wife's life, if pltf. should so long live; & for payment of the arrears of the annuity by the husband. The husband denied having made any such promise; but it having been found as a result of the evidence that a promise, as alleged, was made to testator by the wife, & was assented to by the husband:—*Held*: the income of testator's estate was subject to the alleged trust.—*NORRIS v. FRAZER* (1873), L. R. 15 Eq. 318; 21 W. R. 431.

**483. Promise implied from tacit acceptance.]**—Testator devised real & personal property to F. & pltf.s, their heirs, exors., etc., as tenants in common; & by a memorandum of even date, addressed to them & signed by testator but not attested, he expressed his confidence that they would appropriate the property to charitable objects. On the day of testator's death the will & the memorandum, which for sixteen months had been kept secret by testator, were read over to him in the presence of F. by a solr., who was in attendance at testator's request, communicated through F. to take instructions for a codicil. Pltf.s remained in ignorance of the existence of the memorandum, & of its contents until after testator's death:—*Held*: (1) with respect to F., the case was the same as if testator had himself com-

municated to him the contents of the memorandum; & F.'s silence when the memorandum was read was equivalent to an undertaking on his part to carry testator's intentions, as therein expressed, into effect; the ct. therefore declared that the one-fourth share given to F. was affected by the trusts of the memorandum, so far as they were valid; & such trusts were invalid as to real estate, & as to personal estate affected with realty; (2) the devise, being to F. & pltf.s. as tenants in common, pltf.s. were not affected by the communication of testator's intentions to F. & were entitled to the remaining three-fourths as tenants in common.—*TEE v. FERRIS* (1856), 2 K. & J. 357; 25 L. J. Ch. 437; 20 J. P. 563; 2 Jur. N. S. 807; 4 W. R. 352; 69 E. R. 819.

*Annotations*:—As to (1) *Consd.* *Re Maddock, Llewelyn v. Washington*, [1902] 2 Ch. 220. *Reffd.* *Topham v. Portland* (1863), 1 De G. J. & Sm. 517. *As to (2)* *Appld.* *Rowbotham v. Dunnell* (1878), 8 Ch. D. 430. *Reffd.* *Re Stead, Witham v. Andrew*, [1900] 1 Ch. 237.

**484. —.]**—"If they, by their silence, bid him to believe they would so apply it, I apprehend it is quite clear that a trust would be created & that it is altogether immaterial whether the promise is made before or after the execution of the will, that being a reasonable instrument" (*PAGE WOOD V.-C.*).—*MOSS v. COOPER* (1861), 1 John. & H. 352 4 L. T. 790; 70 E. R. 782.

*Annotations*:—*Reffd.* *Topham v. Portland* (1863), 1 De G. J. & Sm. 517; *McCormick v. Grogan* (1866), 15 W. R. 290. *Re Fleetwood, Sidgroves v. Brewer* (1880), 15 Ch. D. 594. *Re Stead, Witham v. Andrew*, [1900] 1 Ch. 237; *Re Blackwell, Blackwell v. Blackwell*, [1928] 1 Ch. 614.

**485. —.]**—*JONES v. BADLEY*, No. 479, *ante*. **Charitable trusts.]**—*See CHARITIES*, Vol. VIII., p. 290, Nos. 666, 670–673.

#### SUB-SECT. 2.—COMMUNICATION TO TRUSTEE.

**486. Necessity for.]**—*Semble*: it is impossible for the ct. to intend any trust, unless it can convert the legacies into trustees, by proof of some communication between them & testator, importing that he intended a trust, which they, in effect undertook, & by which, therefore, their consciences would be bound.—*CARTER v. GREEN* (1857), as reported in 3 K. & J. 591; 26 L. J. Ch. 845; 3 Jur. N. S. 905; 5 W. R. 856; 69 E. R. 1245.

*Annotations*:—*Reffd.* *Re Fleetwood, Sidgroves v. Brewer* (1880), 15 Ch. D. 594; *Re Piercy, Whitlam v. Piercy*, [1898] 1 Ch. 565. *Mentd.* *Wilkinson v. Barber* (1872), L. R. 14 Eq. 96.

**487. —.]**—A. instructed his solr. to prepare for him a will leaving all his property to the solr. himself absolutely, but to be held & disposed of by him according to written directions to be subsequently given, & a will was prepared & executed accordingly, under which the solr. was universal legatee & sole exor. No such directions were, however, given to the solr., by testator in his lifetime, but after his death an unattested paper was found, by which testator stated his wish that X. should have all his property except a small sum of money which he gave to the solr. The solr. claimed no beneficial interest in testator's property, except to the extent of his legacy, & claimed to hold the rest of the property as trustee for X.:—*Held*: as testator had not in his own lifetime communicated to the solr. the object of the trust, no

#### PART I. SECT. 4, SUB-SECT. 2.

**488 I. Necessity for.]**—A party setting up a secret trust must adduce evidence to prove that it was communicated by testator to the universal legatee, & that the legatee agreed to accept the property bequeathed on

the terms of the trust.—*KALI CHARAN GHOSAL v. RAM CHANDRA MANDAL* (1903), 1 L. R. 30 Calc. 783.—*IND.*

**t. One legatee informed of trust.]**—Testator devised certain houses & also a legacy of £600. charged on the

remainder of his property, which comprised landed property, to three persons absolutely, as tenants-in-common, coupled with a secret trust for charitable purposes. One of the legatees at the time the will was made was informed of the trust, the other

*Sect. 4.—Secret trusts: Sub-sect. 2. Sect. 5: Sub-sects. 1 & 2, A. & B.]*

valid trust in favour of X. had been constituted, & accordingly the solr. held the property as trustee for the next of kin of testator.—*Re ROYES, ROYES v. CARRITT* (1884), 26 Ch. D. 531; 53 L. J. Ch. 654; 50 L. T. 581; 32 W. R. 630.

].—*See, generally, Sect. 3, sub-sect. 8, ante.*

**488. Gift to more than one—Effect of failure to communicate to all.]**—Testator devised freeholds & leaseholds to four persons, intending them to hold the same in trust for an alien, & shortly afterwards informed three of them of his intent; & those three, at his request, wrote letters to him acknowledging the intended trust. After his death a suit was instituted by two of the devisees against the other two, the alien, testator's next of kin & the A.G. as representing the Crown, to have the rights of the parties declared.

The ct. refused to make any declaration, except that the lands were not subject to any trust.—*BURNEY v. MACDONALD* (1845), 15 Sim. 6; 6 L. T. O. S. 1; 9 Jur. 588; 60 E. R. 518.

*Annotations:—**Reid, Re Stead, Witham v. Andrew*, [1900] 1 Ch. 237. *Mentd, Barrow v. Wadkin* (1857), 24 Beav. 1; *Sharp v. St. Sauveur* (1871), 7 Ch. App. 343.

**489. ——— Void trust.]**—A devise & bequest of testator's residuary estate of two persons, with an oral intimation given by testator to one, if not both, of the devisees that he had confidence in them, & was satisfied they would carry out his intentions, which they well knew, & an assent by one of the devisees to this intimation:—*Held: to be an undertaking by the devisee that he would carry out the intention, & to be, therefore, a gift upon a secret trust.*—*RUSSELL v. JACKSON* (1852), 10 Hare, 204; 68 E. R. 900.

*Annotations:—**Consd, Wallgrave v. Tebbis* (1855), 2 K. & J. 313; *Tee v. Ferris* (1856), 2 H. & J. 357. *Apld, Re Spencer's Will* (1887), 57 L. T. 519. *Reid, Carter v. Green* (1857), 3 K. & J. 591; *Proby v. Laidor* (1869), 28 Beav. 504; *Moss v. Cooper* (1861), 1 John. & H. 352; *Jones v. Badley* (1868), 3 Ch. App. 362; *Rowbotham v. Dunnett* (1878), 8 Ch. D. 430; *Re Fleetwood, Sidgreaves v. Brewer* (1880), 15 Ch. D. 594; *Re Stead, Witham v. Andrew*, [1900] 1 Ch. 237; *Re Maddock, Llewelyn v. Washington*, [1902] 2 Ch. 220. *Mentd, Sinnett v. Herbert* (1872), 7 Ch. App. 232; *O'Rourke v. Darbishire*, [1920] A. C. 581.

**490. ——— Communication after date of will.]**—A secret trust intended to affect an absolute bequest to two persons as joint tenants, & communicated after the date of the will to & accepted by one of them only, will not be binding on the other if he has no notice of the trust until after testator's death, because his interest in the bequest is not tainted with any fraud in procuring the execution of the will. *Secus: when the will is made on the faith of an antecedent promise to perform the trust by one alone of two joint tenants, for in that case the other joint tenant, although ignorant of the trust until after testator's death, cannot claim an interest under a fraud committed by his co-legatee.*—*Re STEAD, WITHAM v. ANDREW*, [1900] 1 Ch. 237; *sub nom. Re STEAD, WITHAM v. ANDREW*, 69 L. J. Ch. 49; 81 L. T. 751; 48 W. R. 221; 44 Sol. Jo. 146, C. A.

**491. ——— Gift induced by antecedent promise by one.]**—*Re STEAD, WITHAM v. ANDREW*, No. 490, *ante*.

**Charitable trusts.]**—*See CHARITIES, Vol. VIII., pp. 289, 290, Nos. 659-669.*

two had no knowledge of it until after the death of testator. Testator died within three months after making his will:—*Held: the bequest of the one-third of the property to the trustee,*

who was aware of the trust, was invalid, but that the other two-thirds went absolutely to the other two devisees.—*GEDDIS v. SEMPLE*, [1903] 1 I. R. 73.—*IR.*

**SECT. 5.—REFERENTIAL TRUSTS.**

**SUB-SECT. 1.—IN GENERAL.**

**492. Time of taking effect—General reference.]**—*HARE v. HARE, No. 490, post.*

**493. Construction—Referential trusts in same instrument.]**—Testator bequeathed his residuary estate, referred to as "the residuary trust funds," as to two-thirds in trust for the children & remoter issue of his son as his son should appoint, & in default of appointment for the children of his son as therein mentioned, but so that no appointee should take any part of the trust funds remaining unappointed without bringing the share appointed into hotchpot, & as to a moiety of the other third upon "the like trusts" in favour of his son & issue as had previously been declared of the two-thirds. In the events which happened A. became entitled to the two-thirds under an appointment, & to a share in the one-third in default of appointment:—*Held: there was no presumption or rule of law applicable to a case of this kind, & upon the true meaning & effect of the will the hotchpot clause applicable to the two-thirds had no reference to anything except the two-thirds, & the hotchpot clause referentially incorporated in the trusts of the moiety of the one-third had reference only to the moiety of the one-third, so that A. could take her share in the one-third without bringing the two-thirds into hotchpot.*—*Re WOOD, WOODHOUSE v. WOOD*, [1913] 2 Ch. 574; 83 L. J. Ch. 59; 109 L. T. 347; 57 Sol. Jo. 835, C. A.

*Annotations:—**Distd, Re Fraser, Ind v. Fraser*, [1913] 2 Ch. 221. *Reid, Re Campbell's Trusts, Public Trustee v. Campbell*, [1922] 1 Ch. 551.

**494. Whether accretion to original trust—Separate instruments.]**—Where testator gave a share of his residuary estate to the trustees of his will upon trust for his married daughter, & declared that his trustees should hold the same "upon the same trusts & with & subject to the same powers" as were in her marriage settlement contained with respect to the funds thereby settled:—*Held: inasmuch as there were different instruments, different settlors, different funds, & different sets of trustees, the rule of construction to be applied was to read into the will the trusts & powers of the settlement as though they were therein set out, & there was consequently no accretion to the funds of the settlement, but testator had by his will created a new & distinct settlement.*—*Re BEAUMONT, BRADSHAW v. PACKER*, [1913] 1 Ch. 325; 82 L. J. Ch. 183; *sub nom. Re BEAUMONT, BEAUMONT-NESBITT v. PACKER*, 108 L. T. 181; 57 Sol. Jo. 283.

*Annotations:—**Consd, Re Campbell's Trusts, Public Trustee v. Campbell*, [1922] 1 Ch. 551. *Reid, Re Fraser, Ind v. Fraser*, [1913] 2 Ch. 224; *Re Arnell, Re Edwards, Prickett v. Prickett* (1924), 93 L. J. Ch. 276.

**495. ———.]**—It will be observed that in no instance in the case of separate instruments, at separate dates, & with separate settlors, has the fund ever been treated as one aggregate fund, either for the purpose of hotchpot, or as regards multiplication of charges, or for any other purpose (*RUSSELL, J.*).—*Re CAMPBELL'S TRUSTS, PUBLIC TRUSTEE v. CAMPBELL*, [1922] 1 Ch. 551; 91 L. J. Ch. 433; 127 L. T. 236.

**Referential powers.]**—*See POWERS, Vol. XXXVII., pp. 402, 403, Nos. 142-145.*

**Application of hotch-pot clause.]**—*See SETTLEMENTS, Vol. XL., pp. 560-568, Nos. 1046-1054.*

**PART I. SECT. 5, SUB-SECT. 1.**

**a. Mutual wills of husband & wife.]**—*HUDSON v. GRAY* (1927), 39 C. L. R. 473; [1927] *Argus* L. R. 363.—*AUS.*

**Settlement of personality to devolve as realty.]—**See SETTLEMENTS, Vol. XL., pp. 794–796, Nos. 3236–3242.

## SUB-SECT. 2.—HOW ARISING.

### A. In General.

**496. Intention of settlor—Settlement conformable to limitations of real estate.]—**Devise in strict settlement, with power to the tenants for life to jointure, on condition that two-thirds of the portion should upon such marriage be settled; one-third upon the eldest son of the marriage & one other third upon the younger children.

Upon the intention, that the settlement should be conformable to the limitations of the real estate, a trust for the father for life was established; & the interest of the eldest son was not to be divested except by his death under twenty-one without issue male.—*BURRELL v. CRUTCHLEY* (1809), 15 Ves. 544; 33 E. R. 860, L. C.

*Annotation:—Reid, Scarsdale v. Curzon* (1860), 1 John. & H. 40.

**497. Mortgage with provision for reconveyance on trusts of settlement—By tenant in tail in possession.]—**Under a settlement of real estates made in 1831, A., in 1884, was tenant for life in possession, B. first tenant in tail, & C. second tenant in tail in reversion. B., being a lunatic, C., with the consent of A., disentailed his interest & resettled the estates, with a power to charge the same, which was exercised. In 1893 B., who was then tenant in tail in possession, acting by C. as his committee, mortgaged the estates with a proviso that on redemption they should be “reconveyed by the mtgees. to the uses, upon the trusts & with & subject to the powers & provisions in & by the settlement (of 1831) declared & contained”:—*Held*: notwithstanding that the estate tail was barred by virtue of Fines & Recoveries Act, 1833 (c. 74), s. 21, the proviso for redemption in the mtge. of 1893 was valid & operative, so that the uses, created by the settlement of 1831 were revived subject to the re-settlement of 1881.—*Re OXENDEN'S SETTLED ESTATES, OXENDEN v. CHAPMAN* (1904), 74 L. J. Ch. 234.

### B. Use of Particular Words.

**498. Trusts “capable of taking effect”—Estate tail not revived.]—**An Act of Parliament reciting a will by which estates were devised to A. for life, remainder to his first & other sons in tail, remainder to B. in tail, & that B. had suffered a recovery to the use of A. in fee; directed the estates to be sold, & other estates to be purchased & conveyed to such of the uses of the will as, at the time of the sale, should be existing, undetermined & capable of taking effect. The estates were sold, & the proceeds invested in other estates, which were conveyed to such of the uses of the will as were then existing, etc.:—*Held*: B. did not take an estate tail in the purchased estates.—*WORTHAM v. MACKINNON* (1831), 4 Sim. 485; 58 E. R. 181.

**499. — Time for taking effect.]—**(1) A general reference in a gift to the terms of a former disposition does not determine the time when the gift is to take effect.

(2) By a marriage settlement a fund was settled by the husband upon trusts in favour of the husband & wife during their respective lives, & after the decease of the survivor in trust for the children. Another fund was settled by the husband's mother in trust for herself for life, & after her decease upon such of the trusts thereinbefore declared concerning the first fund in favour of

the children as should be then subsisting or capable of taking effect:—*Held*: the trust of the second fund in favour of the children arose at once upon the death of the tenant for life in the lifetime of the husband & wife.—*HARE v. HARE* (1876), 24 W. R. 575.

*Annotation:—Generally, Mentd. Re North, Meates v. Bishop* (1897), 76 L. T. 186.

**500. — Appointment under settlement—Hotchpot clause inserted in previous appointments.]—***SMYTH-PIGOTT v. SMYTH-PIGOTT*, [1884] W. N. 149.

**501. — Effect of failure of part of original trust.]—**(1) Where property is appointed, under a special power, to the uses of a prior settlement or such of them as are “capable of taking effect,” & some of the uses so incorporated fail for remoteness or by reason of the *cestuis que trust* not being objects of the power, the void trusts may be disregarded as not being “capable of taking effect,” & the power will be otherwise well exercised.

(2) The phrase “capable of taking effect” means what the law allows to take effect, & is not confined to trusts which by reason of the intervening circumstances are still in fact subsisting & capable of coming into existence.—*Re FINCH & CHEW'S CONTRACT*, [1903] 2 Ch. 486; 72 L. J. Ch. 690; 89 L. T. 162.

**502. “Same trusts”—“As near as might be.”]**—A. by deed, granted a rentcharge on certain freehold estates to trustees, in trust for C. for life, for her sole & separate use, remainder to her children in fee as she should appoint, & in default of appointment, to them equally, remainder to E., the sister of C. & her children in like manner, remainder to the settlor. The deed also contained a power to C. to appoint all or such part of the rentcharge as she thought fit to her husband, & a proviso that it should be lawful for the settlor to redeem the rentcharge upon the payment of £10,000 to be settled to the same uses. Soon after the settlor made a codicil to his will, whereby he gave £10,000 to G. on the same trusts, “as near as might be,” as those in the deed, for her “sole use & benefit”:—*Held*: G. took a life interest in the fund, with powers of appointment to her children & husband; but in default of appointment, the children took nothing.—*BERCHTOLDT (COUNTESS) v. HERTFORD (MARQUIS)* (1844), 7 Beav. 172; 2 L. T. O. S. 325; 8 Jur. 50; 49 E. R. 1029.

**503. — Realty on trusts of personality.]—**By the marriage settlement of A. a sum of £8,000 stock was settled upon himself & his intended wife for their joint lives, & the life of the survivor, & then for the benefit of their children; & if no children, in trust for the settlor, his exors., administrators & assigns. After his marriage A. made his will & thereby gave his real estate to P. & his heirs, upon the same trusts, as near as could be, as were declared of the stock by the settlement; & after giving certain pecuniary legacies he bequeathed all the rest of his moneys & property of any kind to P., his exors., administrators & assigns upon trust & for the benefit of the objects of his settlement as he might think best. A. died, leaving his widow, but no issue of the marriage. P. declined to take probate of the will:—*Held*: whether the course taken by P. had or had not the effect of depriving him of the discretionary power given to him by the will, he could not, in the events that had happened, exercise that power so as to affect the rights of the parties interested under the will & settlement; & the effect of these instruments was to give a life interest to the widow in the real & residuary personal estate, impeachable of waste as to the

Secl. 5.—Referential trusts: Sub-sect. 2, B.]

real estate; with remainder as to the real estate to testator's heirs, & as to the residuary personal estate to his next of kin.—*FORD v. RUXTON* (1844), 1 Coll. 403; 63 E. R. 474.

**504.** ———.]—Personal estate was given upon a contingency, & the "income" was to accumulate in the meanwhile as long as lawful. There was a proviso, that subject thereto, the "income" was to be paid to the person "entitled in immediate expectancy." The rents of the real estate were then given upon the same trusts as had been declared concerning the "residuary personal estate," & upon the personal estate becoming vested, to convey the real estate to the same person:—*Held*: all the trusts of the personal estate were applicable to the real estate, & the person entitled in immediate expectancy to the income of the personal estate was also entitled to the rents of the real estate.—*WESTCAR v. WESTCAR* (1856), 21 Beav. 328; 25 L. J. Ch. 866; 52 E. R. 886.

**505.** ———.]—By deed of settlement, on Mar. 7, 1818, certain leaseholds were settled, as to a third share thereof, in trust, in the events which happened, for A. & B. absolutely in equal shares. In 1819 certain freeholds were settled "upon such & the same trusts, & for such & the same ends, intents, & purposes, & subject to such & the same powers, provisos, & declarations as in the indenture of Mar. 7, 1818, are expressed, declared, & contained of & concerning the premises therein mentioned & described, or as near thereto as the difference of the respective estates of A. M., M. J., & A. J.," the trustees, " & their respective heirs, exors., & administrators, therein respectively would admit, to the intent that the rents, issues, & profits of the hereditaments & premises might be had, received, & taken, & the hereditaments & premises held, sold, conveyed & assigned, & the produce thereof paid & applied unto such person or persons, & in such manner, & at such time & times, in every respect as in the indenture of Mar. 7, 1818, is expressed & declared of & concerning the premises therein particularly mentioned & described" :—*Held*: the want of proper words of inheritance was not fatal, but A. & B. took equitable estates in fee simple, & not for life only, in one-third share of the freeholds.—*PUGH v. DREW* (1869), 17 W. R. 988.

*Annotations*:—*Consd.* *Re Irwin, Irwin v. Parkes*, [1904] 2 Ch. 752; *Re Bostock's Settlement*, *Norrish v. Bostock*, [1921] 2 Ch. 469. *Held.* *Re Tringham's Trusts*, *Tringham v. Greenhill*, [1904] 2 Ch. 487.

**506.** ———.]—*Personality on trusts of realty.*—Testator directed real estate to be purchased & settled in strict settlement, & declared that his trustees should stand possessed of his personal estate upon such trusts, etc., as were thereby declared concerning the lands directed to be purchased, or as near thereto as the rules of law & equity would permit, provided that the personal estate should not vest absolutely in any tenant in tail unless such person should attain the age of twenty-one :—*Held*: the trusts of the personality were not executory.—*GOSLING v. GOSLING* (1862), 1 De G. J. & Sm. 1; 1 New Rep. 36; 32 L. J. Ch. 233; 7 L. T. 579; 9 Jur. N. S. 109; 11 W. R. 97; 46 E. R. 1, L. C.; *affd. sub nom.* *CHRISTIE v. GOSLING* (1866), L. R. 1 H. L. 279, H. L.

*Annotations*:—*Consd.* *Martell v. Holloway* (1872), L. R. 5 H. L. 532. *Held.* *Hartell v. Harrington* (1871), L. R. 5 H. L. 87; *Burton v. Newbery* (1878), 45 L. J. Ch. 202; *Re Cresswell, Parkin v. Cresswell* (1883), 24 Ch. D. 102; *Wharton v. Masterman*, [1895] A. C. 186; *Re Fothergill's Estate, Price-Fothergill v. Price*, [1903] 1 Ch. 149; *Re Dayrell, Hastie v. Dayrell*, [1904] 2 Ch. 496; *Re Trevanion, Trevanion v. Lennox*, [1910] 2 Ch. 538; *Portman v.*

*Portman*, [1922] 2 A. C. 473. *Mentid.* *Burnell v. Firth* (1867), 15 W. R. 546; *Re Parry, Powell v. Parry* (1889), 60 L. T. 489; *Re Johnston, Mills v. Johnston* [1894] 3 Ch. 204; *Re Couturier, Couturier v. Shea*, [1907] 1 Ch. 470; *Re Jeffery, Nussey v. Jeffery* (1913), 110 L. T. 11; *Re Atkinson, Atkinson v. Atkinson*, [1916] 1 Ch. 91.

**507.** ———.]—A. on the marriage of his daughter I. covenanted to pay to the trustees of the settlement then made, as a provision for his daughter on her marriage, £2,000. The trusts were to pay the income to I. for life, & after her death to her husband for life, & after the decease of the survivor to the children, & if there should be no child then to such person as she should appoint, & in default of appointment then to her next of kin; & in the same settlement he covenanted that his exors. should pay the further sum of £2,000 to the trustees, to be held upon the same trusts within six months after his decease. On the marriage of his daughter E. he covenanted to pay to the trustees of the settlement then made £2,000 within one month after the marriage. The trusts of this sum were to pay the income to G., the husband of E., for his life, & after his death to E. for her life, & after the death of the survivor to the children, & if there should be no child then to such person as E. should appoint, & in default of appointment to her next of kin. By his will testator directed "that the covenants on his part contained in the settlements made on the marriage of his daughters, for the payment of moneys & annuities for the benefit of themselves & their respective children & grandchildren as therein stated, should be performed"; & proceeded as follows:—"In addition to the property settled by my daughter I.'s marriage settlement, I give the further sum of £8,000 to the trustees, etc., to be held, etc., upon the same trusts in all respects, for the benefit of my daughter I. & her children, as thereby declared as to the property thereby settled; & in addition to the property settled by my daughter E.'s marriage settlement, I give the further sum of £8,000 to the trustees of such settlement, to be held upon the same trusts in all respects, for the benefit of my daughter E. & her children & grandchildren, as thereby declared as to the property thereby settled :—*Held*: the words "to be held, etc., upon the same trusts in all respect for the benefit of my daughter & her children & grandchildren, as thereby declared as to the property thereby settled," were to be construed as words of reference, incorporating the trusts of the settlements in the will.—*Re PALMER* (1858), 3 H. & N. 26; 30 L. T. O. S. 309; 157 E. R. 374.

**508. Upon similar trusts.**—By a settlement made on the marriage of J. & E. certain amounts of stock were invested in the names of trustees upon trust, in the events which happened, as E. should by deed or will appoint, & the trustees, out of other stocks therein mentioned, were empowered to raise £20,000 & invest the same in the purchase of lands with power to resell the same, & it was declared that it was the intention of the parties thereto that the same should be considered as personal estate. An estate called S. was accordingly bought by the trustees, who held the same in fee simple upon the trusts of the settlement.

E. survived her husband J., & by her will, dated in 1836, reciting the above settlement, gave the first-mentioned stock to which she was thereunder entitled, & all the residue of her estate upon trust as to a moiety for B. for life, with remainder, if the trustees should think fit, in trust for B.'s husband for life; & as to the other moiety thereof, on similar trusts, in favour of H. & her husband; & in certain events, which came to pass "upon the same trusts in favour of B. & her issue," as were

thereinbefore declared concerning the other moiety. H. predeceased B., who was married to P.; & after the death of B. the trustees declared that B.'s husband should have the income of both moieties for life:—*Held*: the trustees were right in their determination.—*ASHBURNHAM v. ASHBURNHAM* (1849), 14 L. T. O. S. 367; 13 Jur. 1111.

509. Upon the trusts & for the purposes mentioned.]—Testator gave all his real estate to trustees upon trust for his wife for life, & after her decease upon trust to sell & divide the proceeds as in the will mentioned. He also gave the residue of his personal estate to his widow absolutely. By a codicil to his will, after reciting that he had sold part of his real estate, he directed his trustees to sell the residue, & hold the proceeds upon trust for his wife for life, & after her decease, upon the trusts & for the purposes in his will expressed & declared, as concerning "all his real & personal estate":—*Held*: the proceeds of the sale of the remaining real estate must be held upon the trusts declared by the will concerning the real estate.—*BAKER v. RICHARDS* (1859), 27 Beav. 320; 34 L. T. O. S. 36; 5 Jur. N. S. 697; 54 E. R. 125.

510. "Same or like trusts."]—By the marriage settlement of B. & A. a sum of £7,500 4 per cent. Bank Annuities was settled upon trust for B. for his life, then for A. for her life, & after the death of the survivor of B. & A. for the children of B. by A. equally; the shares of sons to vest at twenty-one, or dying under that age leaving issue then living. The settlement contained the usual maintenance & advancement clauses; & a covenant to settle after-acquired property of A. on her for life, & after her death "for all & every the issue of the then intended marriage upon the same or the like trusts, & subjects to the usual powers & provisos as were therein-before expressed & declared of & concerning the sum of £7,500 4 per cent. Bank Annuities." A. died, leaving two sons, the only children of the marriage, both of whom had attained twenty-one, married, & had issue, each three children, all infants. On a bill filed to obtain a declaration as to the construction of the covenant to settle the after-acquired property:—*Held*: the word "issue" in the covenant must be restricted to "children" & the two sons, having survived their mother, & attained twenty-one, were entitled to her after-acquired property absolutely between them.—*MARSHALL v. BAKER* (1862), 31 Beav. 608; 7 L. T. 303; 9 Jur. N. S. 396; 11 W. R. 78; 54 E. R. 1275.

511. —.]—Testator by his will gave his residuary estate to trustees upon trust to divide it equally between his children, & by a codicil directed them to hold the sum of £2,000, part of the share of his daughter E., in trust for her for life, & after her death for her children, with an ultimate trust for the survivors or survivor of testator's children, & the issue of such of them as should be then dead leaving issue; & testator directed his trustees to hold the sum of £2,000, part of the share of his daughter C., in trust for her for life, & after her death "upon such & the like trusts as are hereinbefore declared of the sum of £2,000 secured for the benefit of my daughter E., as fully & effectually as if such trusts were here fully repeated"; & testator directed his trustees to hold the sum of £2,000, part of the share of his daughter L. "upon such & the like trusts as are hereinbefore declared of the two several sums of £2,000 & £2,000 secured for the separate use & benefit of my daughters E. & C., as fully & effectually as if such trusts were here fully repeated." E. died, leaving issue, & C. without having had any issue:—*Held*: the £2,000

forming part of the share of C. did not pass after her death upon the same trusts as E.'s £2,000, i.e. to the issue of E., but upon trusts corresponding to those, but having C.'s name substituted for E.'s, so that, in the events which had happened, it passed to the survivors of testator's children, & the issue of such of them as were dead leaving issue.—*Re SMITH, BASHFORD v. CHAPLIN* (1881), 45 L. T. 246.

512. —.]—Under a settlement the ultimate trust, after certain prior trusts which failed & determined, was for the settlor, his exors., administrators, & assigns for his & their absolute benefit. By his will the settlor bequeathed a moiety of his residuary estate upon such & the same or like trusts as were declared by the settlement:—*Held*: the ultimate trust for the settlor to be read into his will was inoperative.—*Re POWELL, BODVEL-ROBERTS v. POOLE*, [1818] 1 Ch. 407; 87 L. J. Ch. 237; 118 L. T. 567; 62 Sol. Jo. 330.

513. "In like manner."]—Testatrix directed trustees to make an investment, & out of the dividends to pay annuities of £100 each to his two nieces & his nephew for life, & the capital to their children respectively, & to apply £100 a year in the maintenance of the children of D., a deceased nephew, until twenty-one, when he gave them the capital fund producing this annuity. He bequeathed his residue to his two nieces & nephew & the children of D. "in equal shares, in like manner as was therein-before mentioned with respect to the annual sums of £100 bequeathed to them respectively":—*Held*: the children of D. took one-fourth only of the residue.—*EAMES v. ANSTEE* (1863), 33 Beav. 264; 55 E. R. 369.

514. —.]—By a settlement, trustees were to raise £2,000 for A. for life, with remainder to her children, with powers for maintenance, advancement "or otherwise," & in default of children the fund was given to C. A like sum was given to B. for life, with remainder to her children, with the like provision for their maintenance " & otherwise," as before expressed, in respect to the £2,000 given to A. & her children, " & otherwise in like manner, to all intents & purposes, as if such trusts & provisions were there fully repeated":—*Held*: this included the gift over to C., & on the death of B. without children C. was entitled to the second sum of £2,000.—*Re SHIMLEY'S TRUSTS* (1863), 32 Beav. 394; 55 E. R. 154.

515. "At same times & in same manner."]—Where there is a bequest to A. for life, & then to the surviving children of A. to be paid to them on attaining twenty-one, & a bequest to B. for life, & then to the children of B. "at the same times, & in the same manner" the surviving children only of B. take under the second bequest.—*SWIFT v. SWIFT* (1863), 1 New Rep. 353; 32 L. J. Ch. 479; 11 W. R. 334.

516. "In same manner."]—Testator gave to his sons H. & J. £16,000 upon special trust & confidence to invest & to pay the income of £8,000, part thereof, to his daughter A. for life for her separate use, & after her death to divide the £8,000 amongst her children at twenty-one years of age. He then directed that H. & J. should pay the income of the remaining £8,000 to his daughter S. for life in the same manner in every respect & subject to the same control as he had directed as to his daughter A., it being his intention that his daughters' fortunes should not be subject to the debts of their husbands. He then gave to H. & J. a sum of £6,000, to invest & pay the income to his son S., & to divide the principal amongst his children. The sums were charged on real estate. There was power to apply the income for the maintenance &

**Sect. 5.—Referential trusts: Sub-sect. 2, B.; sub-sects. 3 & 4.]**

education of the daughters' & sons' children. The daughter S. died, leaving four children who had attained the age of twenty-one. The fund representing to £8,000 had been paid into ct.:—*Held*: by implication the four children were entitled to the fund.—*SWEETING v. PRIDEAUX* (1876), 2 Ch. D. 413; 45 L. J. Ch. 378; 34 L. T. 240; 24 W. R. 776.

*Annotations*:—*Appl. Re Redfern, Redfern v. Bryning* (1877), 6 Ch. D. 133. *Reid. Mellor v. Daintree* (1886), 33 Ch. D. 198.

**517. On such trust as shall correspond with trusts hereinbefore declared.]**—Testatrix, having by her will directed her trustees to stand possessed of a fifth of her residuary estate upon trust for a woman for life, & after her death upon trust for her children, directed them to stand possessed of three other fifth parts upon such trusts for three other women respectively as should correspond with the trusts thereinbefore declared concerning the fifth part or share of the first-mentioned woman:—*Held*: the three women took only life interests, with remainder to their respective children, in the same manner as the first-mentioned woman & her children took.—*SMITH v. GREENHILL* (1860), 14 W. R. 912.

**518. "On like trusts."]**—Settlement contained a covenant that "any real or personal property, estate, or effects whatsoever" accruing to the wife or to the husband in her right at any time after the settlement should be settled "upon & for the like trusts, intents, & purposes as were thereinbefore declared of & concerning the said principal sum of money." The wife did become entitled to real estate during the coverture:—*Held*: the expression "like trusts" was equivalent to "corresponding trusts," the intention of the parties having been that, in the events which had happened, personal estate should go to the wife's next of kin, real estate to her heir-at-law.—*BRIGG v. BRIGG* (1885), 51 L. J. Ch. 464; 52 L. T. 753; 33 W. R. 451.

**SUB-SECT. 3.—EXERCISE OF POWERS.**

*Sec. generally, POWERS, Vol. XXXVII., pp. 401–403, Nos. 134–145.*

**519. Power of sale—Trust created upon powers "ulterior to limitations" in settlement—Conveyance by tenant for life.]**—By an indenture of settlement certain estates were settled upon A. for life, with remainder to his son for life, with remainders over. A power was also given to the trustees to sell the estate during the lives of A. & his son. By a subsequent deed A. conveyed his life estate to his son, & after his death to remain & continue to the several uses & estates, & upon the powers, provisoes, declarations, & agreements, expressed & declared of & concerning the hereditaments by the previous indenture anterior to the limitations therein for the respective lives of A. & his son:—*Held*: it was not intended, under this clause, to limit a new life estate to the son, without the subsequent powers, during his life, but the estate was still subject to those powers which, in the first deed, were to be found subsequent & in addition to the limitations to the son for life; & the trustees consequently retained the immediate power of sale.—*MORGAN v. RUTSON* (1848), 10 Sim. 234; 17 L. J. Ch. 419; 11 L. T. O. S. 238; 12 Jur. 813; 60 E. R. 863.

**520. — Whether power to give receipts included.]**—Testatrix, by her will, declared that every person thereby made tenant for life should

have such & the like powers of leasing, selling & exchanging any part of the devised estate as were by her father's will given to the tenants for life & in tail mentioned in his will, or to the trustees thereof. It appeared that the father's will did not give a tenant for life or in tail any power of leasing, selling or exchanging, but gave trustees full power to sell & exchange the hereditaments therein comprised, & to give receipts for the purchase-money:—*Held*: tenant for life in possession of the estate devised by testatrix had the same powers of selling & exchanging that estate as were by the father's will given to the trustees, but such powers did not extend to giving receipts.—*Cox v. Cox* (1855), 1 K. & J. 251; 60 E. R. 451.

**521. Power to charge—Whether subject to restrictions applicable to original power.]**—A., tenant for life in possession, joined with B., the next heir, in the settlement of certain estates. The settlement contained, among other things, a power for B. in case of the death of his first wife & his marrying again, to charge the settled estates with portions for the younger children of his second marriage, the amounts being regulated with reference to the number of children that might be born of the first marriage. The deed contained a proviso that if the brothers of B. should respectively come into possession of the settled estates, "either before or after their marriage with any woman or women," they might charge all or any part of the estates with "the like sum or sums of money for the portion or portions of their child or children, other than an eldest or only son, as B. is entitled to do before or after his marriage with any woman or women after the decease of his first taken wife by virtue of the provision hereinbefore contained:—*Held*: this was an absolute power, which, with reference to a younger brother of B. succeeding to the settled estates, was not subject to the restrictions & contingencies which applied to B. himself in making a charge for the children of his second marriage.—*HARRINGTON (EARL) v. HARRINGTON (DOWAGER COUNTESS)* (1868), L. R. 3 H. L. 295, H. L.

**522. Who may exercise powers—Trusts created by tenant for life—On powers of original settlement.]**—The trustees of a settlement had vested in them a power of leasing during the minority of the beneficial owners, a power of sale & exchange at the request of the tenants for life, & a power to cut timber, but they had no legal estate, except to preserve contingent remainders. The first tenant for life devised his own estates to other trustees in fee, to the same uses & subject to like powers as the settled estates stood limited:—*Held*: the powers over the devised estates were exercisable by the trustees of the settlement, & not by the trustees of the will.—*TAYLOR v. MILES* (1860), 28 Beav. 411; 3 L. T. 115; 6 Jur. N. S. 1063; 54 E. R. 424.

**SUB-SECT. 4.—MULTIPLICATION OF CHARGES.**

**523. Presumption against multiplication.]**—A trust created by reference to other trusts ought not, generally speaking, to be so read as to create a duplication of charges.—*HINDLE v. TAYLOR* (1855), 5 De G. M. & G. 577; 25 L. J. Ch. 78; 26 L. T. O. S. 81; 1 Jur. N. S. 1029; 4 W. R. 62; 43 E. R. 994, L. C.

*Annotations*:—*Appl. Boyd v. Boyd* (1863), 2 New Rep. 486. *Consd. Leigh v. Leigh* (1870), 22 L. T. 837; *Re Beaumont, Bradshaw v. Packer*, [1913] 1 Ch. 325; *Re Arnell, Re Edwards, Prickett v. Prickett*, [1924] 1 Ch. 473. *Reid. Cooper v. Macdonald* (1873), L. R. 16 Eq. 258; *Trew v. Perpetual Trustee Co.*, [1895] A. C. 264; *Re Bristol, Grey v. Grey*, [1897] 1 Ch. 946; *Re Wood, Wodehouse v. Wood*, [1913] 2 Ch. 574.



§ 524. —.]—In cases where trusts of a fund are declared by way of reference to the trusts of a prior fund, such limitations ought not to be so construed as to multiply the charges which had been made on such prior fund.

Where, therefore, A. by his will bequeathed to trustees a considerable sum of money in trust for R. during his life, after his decease in trust to raise portions of £5,000 each for the younger children of R. as therein named, with gifts over, subject to these charges, & he also bequeathed one-fifth of his residuary personal estate upon the trusts before declared concerning the capital sum of which the dividends were given to R. for life, the residuary personal estate being of very considerable amount:—*Held*: the children of R. were not entitled to double portions of £5,000 each.—*BOYD v. BOYD* (1863), 2 New Rep. 486; 9 L. T. 166.

§ 525. —.]—Trusts of residue created by reference to other trusts are not to be read as creating a duplication of charges on the estate in the absence of testator's clear intention to that effect.

Where testator gave to his widow the interest of £20,000 during widowhood, & on remarriage the interest of £10,000 for her life, the interest on the balance of the £20,000 to be in that case for the benefit of their children; " & as to all his residuary estate " gave it upon the same trusts as were declared in regard to the £20,000 & the widow remarried:—*Held*: the residuary clause did not operate to give to her either the income for life of a moiety of the residuary estate or of an additional £10,000.—*TREW v. PERPETUAL TRUSTEE CO.*, [1895] A. C. 204; 64 L. J. P. C. 49; 72 L. T. 241; 43 W. R. 636; 11 T. L. R. 259; 11 R. 423, P. C.

*Annotations*:—*Consd.* *Re Bristol*, Grey v. Grey, [1897] 1 Ch. 916; *Re Beaumont*, Bradshaw v. Packer, [1913] 1 Ch. 325; *Re Campbell's Trusts*, Public Trustee v. Campbell, [1922] 1 Ch. 551; *Re Arnell*, *Re Edwards*, Prickett v. Prickett, [1924] 1 Ch. 473. *Refrd.* *Re Fraser*, Ind v. Fraser, [1913] 2 Ch. 224.

§ 526. —.]—A marriage settlement declared trusts of the wife's fund in favour of the children of the marriage, with a hotchpot clause. The ultimate trust was in favour of the wife. The settlement also declared trusts of policy moneys on the husband's life by reference to the trusts of the wife's fund except that the ultimate trust was in favour of the husband. The wife's fund was appointed unequally; the policy moneys went in default of appointment. On a question whether the hotchpot clause operated on both funds:—*Held*: the two funds were distinct for the purposes of hotchpot. Such clauses are only read as one with the view of preventing duplication of charges, & with no other object.—*Re BRISTOL (MARQUIS)*, (GREY (EARL) v. GREY, [1897] 1 Ch. 946; 66 L. J. Ch. 446; 70 L. T. 757; 45 W. R. 552; 41 Sol. Jo. 451.

*Annotations*:—*Consd.* *Re Cavendish*, Grosvenor v. Butler, [1912] 1 Ch. 794; *Re Fraser*, Ind v. Fraser, [1913] 2 Ch. 224. *Apld.* *Re Wood*, *Re Wood*, Woodhouse v. Wood, [1913] 1 Ch. 303.

—Power to charge.]—*See POWERS*, Vol XXXVII., p. 405, Nos. 161, 162.

§ 527. *Rebuttal of presumption*.—Power to appoint income of residuary estate.]—By will, made in 1846, M. devised specific real estate upon trust for each of his children for life, with remainder to their children as tenants in common in tail, with cross-remainders between them; & in default of such issue, upon trust for M.'s other children equally, & the heirs of their respective bodies, as tenants in common; & if there should be only one of the children then living, in trust for that child, & the heirs of his or her body.

with trust limitations in the nature of cross-remainders between such children as to both original & accruing shares, & failing all such issue then upon the trusts thereafter declared; & M. empowered each of his children to appoint in favour of his or her wife or husband a yearly rentcharge not exceeding one-third of the income of the hereditaments to which he or she might be entitled for life; & he devised & bequeathed his residuary estate upon the like trusts, & with the like powers, in favour of all his children, & should correspond with those thereinbefore declared concerning the estates specifically devised:—*Held*: the rule against duplication of charges did not apply, & M.'s children were empowered to appoint to their wives or husbands annuities charged on their shares of the residuary estate, not exceeding one-third of the income of those shares, in addition to the rentcharges on the properties specifically devised.—*COOPER v. MACDONALD* (1873), L. R. 16 Eq. 258; 42 L. J. Ch. 533, 539; 28 L. T. 693; 21 W. R. 833.

*Annotations*:—*Consd.* *Re Beaumont*, Bradshaw v. Packer, [1913] 1 Ch. 325; *Re Campbell's Trusts*, Public Trustee v. Campbell, [1922] 1 Ch. 551. *Apld.* *Re Arnell*, *Re Edwards*, Prickett v. Prickett, [1924] 1 Ch. 473. *Refrd.* *Stevenson v. Masson* (1873), L. R. 17 Eq. 78; *Re Walker's Estate*, Church v. Tyacke (1879), 12 Ch. D. 205; *Askew v. Askew* (1888), 57 L. J. Ch. 629; *Crichton v. Crichton* (1895), 13 R. 770; *Re Firth*, Loveridge v. Firth, [1914] 2 Ch. 386.

§ 528. —.]—W., by his will in 1880, bequeathed a legacy of £10,000 upon trust for his daughter C., who afterwards was married to G., for her life, with remainder in trust for such of her children or remoter issue & in such manner as she should by deed or will appoint & in default of appointment, in trust for her children as therein mentioned & in default of children & in the events which happened of testator's son B. dying in the lifetime of the daughter without leaving issue, in trust for testator's next of kin at her death. The will then conferred a testamentary power upon the daughter to appoint a life interest in the settled legacy to any husband of hers, such life interest to take effect in precedence of the trusts thereinbefore declared concerning the legacy after the decease of the daughter. The residue was given, as to one moiety thereof, " upon the same trusts as are hereinbefore declared of the legacy of £10,000 hereinbefore bequeathed by me for the benefit of my daughter C. & her issue." The other moiety was settled upon the testator's son B. for life with remainder for his children, with an ultimate remainder, in default of children, " upon the same trusts, both as to the capital & the income thereof, as are hereinbefore declared of the legacy of £10,000, hereinbefore bequeathed by me for the benefit of my daughter C. & her issue or as near thereto as the circumstances of the case will admit."

Testator's son, B., died in 1894, without having had issue; & C. died in 1923, without having had issue, & having made certain testamentary dispositions. Thereupon questions arose: (a) whether upon the true construction of testator's will his daughter C. had power to appoint a life interest in favour of her husband, G., in the residuary estate of the testator, & (b) whether, if she had that power, she had effectually exercised it. As regards (b), it is sufficient to state that the ct. decided that question in the affirmative:—*Held*: upon the true construction of testator's will, notwithstanding that the bequest of the residue contained no reference in terms to any powers applicable to the settled legacy, inasmuch as the power extended to an appointment of the whole income of the legacy & was not limited to



*Sect. 5.—Referential trusts: Sub-sect. 4. Sect. 6: Sub-sect. 1.]*

an appointment of a definite sum, the effect of the referential words was to make the power of appointment in favour of a husband applicable to the residue as well as to the settled legacy; & such construction of the will did not offend the rule against a multiplication of charges; & *deft., G.*, was entitled to a life interest in the residuary estate of testator as well as in the settled legacy of £10,000.—*Re ARNELL, Re EDWARDS, PRICKETT v. PRICKETT*, [1924] 1 Ch. 473; 93 L. J. Ch. 276; 130 L. T. 700; 68 Sol. Jo. 367.

**529. Express provision against multiplication.]—**By the will of *B.*, personal estate of very great value was given to trustees upon trust to purchase land to be settled to such of the uses, & upon & for such of the trusts, & subject to such of the powers & provisions in & by a certain indenture of settlement limited & declared of & concerning the family estates thereby settled as at the time of testator's decease should be subsisting or capable of taking effect, but not so as to multiply any charges or powers of charging. At the time of testator's death the family estates stood limited to *H.* for life, remainder to *C.* for life, remainder to his first & other sons successively in tail.

Both *H.* & *C.* had powers of charging the estates with jointures for their widows & portions for their younger children. *H.* had charged a jointure for his widow which never took effect. *C.* had charged a jointure of £1,000 a year for his widow, & £10,000 for the portion of each of his younger children. *H.* died in 1891, & in 1892 *C.* & his eldest son executed a disentailing deed of (*inter alia*), the personal estate directed to be laid out in the purchase of lands to be settled, whereby the disentailed property was conveyed to such uses as they should appoint. This was a summons by *C.* & his eldest son, asking that the personal estate might be paid to them:—*Held*: the lands to be purchased with testator's personal estate would be subject only to the powers of charging existing & exercisable at the date of his death, not to the charges which had then not been created in exercise of those powers, & therefore, upon *C.*, & his eldest son releasing their powers of charging, which still subsisted, the personal estate might be transferred & paid to them for their own use.—*Re BERNERS, BERNERS v. CALVERT* (1892), 67 L. T. 819; 41 W. R. 188; 37 Sol. Jo. 80; 3 R. 153.

## SECT. 6.—EXECUTORY TRUSTS.

### SUB-SECT. 1.—IN GENERAL.

**530. Distinguished from executed trust.]—A.** devised £10,000 to trustees in trust to be laid out in lands, & to be settled on *B.* for life, without waste, remainder to trustees & their heirs for the life of *B.* to support contingent remainders, with a power to *B.* to make a jointure, remainder to the heirs of the body of *B.* remainders over, & by the same will devises lands to *B.* to the same uses, & dies, leaving *C.* exor.; *B.* sues *C.*, the exor., for the deeds relating to the lands that are in his hands, & to have the money laid out in lands & settled. Decreed to have an estate tail in the lands devised, & consequently to be entitled to the deeds relating thereto, though as to the lands to be purchased, that being executory, & in the power of

the *ct. B.* was to be but tenant for life, with remainder to his first, etc., son.

**LORD KING, C.**, declared the *ct.* had a power over the money directed by the will to be invested in land; that the diversity was, where the will passes a legal estate & where it is only executory & the party must come to this *ct.* in order to have the benefit of the will: that in the latter case the intention should take place & not the rules of law.—*PAPILLON v. VOICE* (1728), 2 P. Wms. 471; Kel. W. 27; 1 Eq. Cas. Abr. 185, n.; 24 E. R. 819, L. C.

*Annotations:—Reid, A.-G. v. Young* (1733), 1 Com. 423; *Glenorchy v. Bosville* (1733), Cas. temp. Talb. 3; *Williams v. Brown* (1734), 2 Barn. K. B. 416; *Hopkins v. Hopkins* (1738), 1 Atk. 581; *Roberts v. Dixwell* (1738), 1 Atk. 607; *Roe d. Gulliver v. Wickett* (1738), Andr. App. 1; *Newcoman v. Bothlem Hospital* (1741), Amb. 785; *Roe d. Fulham v. Wickett* (1741), Willes, 303; *Bagshaw v. Spencer* (1748), 1 Ves. Sen. 142; *Garth v. Haldwin* (1755), 2 Ves. Sen. 646; *Sayer v. Masterson* (1757), Amb. 344; *Austen v. Taylor* (1759), Amb. 376; *Doe d. Long v. Laming* (1760), 2 Burr. 1100; *Green v. Stephens* (1810), 17 Ves. 61; *Jervoise v. Northumberland* (1820), 1 Jac. & W. 559; *Doe d. Bagnall v. Harvey* (1825), 7 Dow. & Ry. K. B. 78; *Jordan v. Adams* (1861), 9 C. B. N. S. 483; *Davenport v. Davenport* (1863), 1 Hem. & M. 775.

**531. —]**—*A.* devises lands to his sister *B.* & *C.* & their heirs & assigns, upon trust, that until his granddaughter *D.* should marry or die, to receive the profits, & thereout to pay her £100 a year for her maintenance, the residue to pay debts & legacies.

After payment thereof, in trust for the said *D.* & upon further trust, that if she lived to marry a protestant of the Church of England, & at the time of such marriage be of the age of twenty-one or upwards, or if under that age, such marriage be with the consent of the said *B.* then to convey, with all convenient speed, after such marriage, to the use of the said *D.* for life, sans waste, voluntary waste in houses excepted; remainder to her husband for life; remainder to the issue of her body, with remainders over; & upon further trust, that if the said *D.* die unmarried, then to the use of *B.* for life; remainder to the son of his other granddaughter *E.* in tail; remainder to *deft. C.*; remainder to his first & other sons; remainder to *A.*'s right heirs; & upon further trust, that if *D.* marry not according to the will, then upon such marriage to convey to trustees, as to one moiety to the use of *D.* for life, then to trustees to preserve contingent remainders: remainder to her first & every other son, being a protestant, with remainders over; & as to the other moiety, to the son of his daughter *E.* in like manner. *A.* dies, *D.* attains her full age; & upon a treaty of marriage with *F.* applies to *B.* & *C.* for a conveyance to herself for life; remainder to her intended husband for life; remainder to the issue of her body; *B.* executes such conveyance, but *C.* refuses; *D.* suffers a recovery of the whole to the use of herself in fee, & then marries *F.* who made a considerable settlement upon her; she covenants to settle her estate upon husband & wife; remainder to first, etc., sons in tail, remainder to survivor of husband & wife in fee. They bring a bill to compel *C.* to convey, etc., decreed, not an estate tail to *D.*, but an estate for life sans waste, *ut supra*, as being the intent of *A.* upon the will with remainders over in strict settlement.

I think in cases of trusts executed or immediate devises the construction of the *cts.* of law & equity ought to be the same; for there testator does not suppose any other conveyance will be

### PART I. SECT. 6, SUB-SECT. 1.

*b. Definition.]—*In the proper sense an executory trust is a trust in which something more is to be done.—

*BOSWELL, v. DILLON* (1844), 6 I. Eq. R. 389.—*IR.*

*c. Difficulty of construction.]—*There is no difference between executory

trusts, whether created by marriage articles, by a voluntary settlement, or by a will; in the latter cases there is more difficulty in arriving at the

made; but in executory trusts he leaves somewhat to be done; the trusts to be executed in a more careful & more accurate manner (LORD TALBOT, C.).—GLENORCHY (LORD) v. BOSVILLE (1733), Cas. temp. Talb. 3; 2 Eq. Cas. Abr. 743; 25 E. R. 628, L. C.

*Annotations*.—*Consd.* Read v. Snell (1743), 2 Atk. 642. *Refd.* Meuro v. Meuro (1737), 2 Atk. 265; Roberts v. Dixwell (1738), 1 Atk. 607; Bagshaw v. Spencer (1748), 1 Ves. Sen. 142; Exol v. Wallace (1751), 2 Ves. Sen. 318; Austen v. Taylor (1759), Amb. 376; White v. Carter (1760), 2 Eden, 366; Kelley v. Fowler (1768), Wilm. 298; Jones v. Morgan (1783), 1 Bro. C. C. 206; Bold v. Hutchinsson (1855), 5 De G. M. & G. 558.

532. —[—]There is a difference between a trust which by the words of a will is executed, & a trust which is only executory; as a devise to A. & his heirs, upon trust to convey to B. & the heirs of his body, is a trust executory, & this ct. will make heirs of the body words of purchase; but a devise to A. & his heirs in trust for B. & the heirs of his body is a trust executed, & B. will have an estate tail; & this ct. has greater right to interfere in one case than the other. As all trusts in notion of law were executory before the Statute of Uses, which has executed many of them, which are thereby become legal estates, & wherewith this ct. does not interfere, therefore in order to bring a trust within the jurisdiction of this ct. it must be executory; but where a trust is executed testator has left nothing for a ct. of equity to do.—(LORD HARDWICKE).—BAGSHAW v. SPENCER (1748), 1 Wils. 238; 1 Ves. Sen. 142; 95 E. R. 594.

*Annotations*.—*Consd.* Exol v. Wallace (1751), 2 Ves. Sen. 318; Garth v. Baldwin (1755), 2 Ves. Sen. 646; Jones v. Morgan (1783), 1 Bro. C. C. 206. *Refd.* Theehridge v. Kilburne (1751), 2 Ves. Sen. 233; Lister v. Lister (1753), 3 Keny. 1; Sayer v. Masterman (1757), Wilm. 386; Wright v. Pearson (1758), Amb. 358; King v. Burcholl (1759), 1 Eden, 424; Doe d. Long v. Lamius (1760), 2 Burr. 1100; Le Rousseau v. Rede (1761), 2 Eden, 1; Rooke v. Rooke (1761), 2 Eden, 8; Strong v. Teatt (1769), 2 Burr. 912; Thong v. Bedford (1783), 1 Bro. C. C. 313; Goodright v. Hering (1785), 4 Doug. K. B. 298; Brydgos v. Brydgos, Phillips v. Brydgos (1796), 3 Ves. 120; Harton v. Harton (1798), 7 Term Rep. 652; Goodtitle d. Sweet v. Herring (1801), 1 East, 264; Kenrick v. Beauchereck (1802), 3 Bos. & P. 175; Poole v. Poole (1804), 3 Bos. & P. 620; Roe d. Thong v. Bedford (1815), 4 M. & S. 362; Jervoise v. Northumberland (1820), 1 Jac. & W. 559; Rimington v. Cannon (1853), 19 C. B. 18; Scarisdale v. Curzon (1860), 1 John. & H. 40; Re Brooke, Scarce v. Dickson, [1923] 2 Ch. 265. *Mentd.* Hodgson v. Ambrose (1780), 1 Doug. K. B. 337.

533. —[—]Devise to trustees to raise by mtgc., or lease, so much money as would pay testator's debts, & afterwards to permit A. to receive the rents & profits for his life, & after his decease, to permit his eldest son, & the issue male of such eldest son, to receive, etc., & for want of issue of A. to B., in like manner; & for want of issue of both, or if their issue should die without issue, then over:—*Held*: a trust estate, & A. took an estate tail.

The distinction between trusts executed & executory seems to be ill expressed. . . . In all cases of the latter description something is left to the judgment of the trustees, & consequently of the ct. (LORD NORTHINGTON, C.).

Words declaring a trust must be expounded in this ct. as they would be at law (LORD NORTHINGTON, C.).—STANLEY v. LENNARD (1758), 1 Eden, 87; Amb. 355; 28 E. R. 617.

*Annotations*.—*Refd.* Doe d. Gallini v. Gallini (1835), 3 Ad. & El. 340; Atkinson v. Holthby (1863), 10 H. L. Cas. 313; Allgood v. Blake, Roach v. Blake, Clennell v. Blake, Reed v. Blake (1872), L. R. 7 Exch. 339.

534. —[—]It is said that this is an executory trust, & that it is a general rule in the case of an

executory trust, that where an estate for life is given, together with a limitation to the heirs of the body, this ct. will take the words to be words of purchase, & direct a conveyance of the estate accordingly. The words executory trust seem to me to have no fixed signification. LORD KING, in the case of *Papillon v. Voice*, No. 530, ante, describes an executory trust to be, where the party must come to this ct. to have the benefit of the will. But that is the case of every trust; & I am very clear that this ct. cannot make a different construction on the limitation of a trust than cts. of law could make on a limitation in a will, for in both cases the intention shall take place. & it would be most dangerous to say, that this ct., & a ct. of law, could be warranted in raising different interests from the same words. Yet I am of opinion that the determinations on those cases, which are called cases of executory trusts are sound determinations (LORD NORTHINGTON, C.).—AUSTEN v. TAYLOR (1759), 1 Eden, 361; Amb. 376; 28 E. R. 725.

*Annotations*.—*Consd.* Jervoise v. Northumberland (1820), 1 Jac. & W. 559. *Refd.* Hodgson v. Ambrose (1780), 1 Doug. K. B. 337; Dodson v. Hay (1791), 3 Bro. C. C. 404; Green v. Stephens (1810), 17 Ves. 64; Parker v. Bolton (1835), 5 L. J. Ch. 98.

535. —[—]Devise of copyhold estates, the legal estate being outstanding, "To my son R. W. G. to be entailed upon his male heirs & failing such to pass to his next brother, & so on from brother to brother allowing £2,500 to be raised upon the estates for female children each." Whether a trust executed or executory; & if the latter, whether an estate tail in R. W. G. *Qu.*: the point too doubtful to compel a purchaser to take the title. No difference between marriage articles & executory trusts in wills except that the former afford *prima facie* evidence of intent, which does not belong to the latter.

One is a good deal confused by the inaccuracy of the expressions trust executory & executed. The latter, no doubt, in one sense of the word, is a trust executory; that is, if A. B. is a trustee for C. D., or for C. D. & others, that, in this sense, is executory, that C. D., or C. D. & the other persons, may call upon A. B. to make a conveyance & execute the trust (LORD ELDON, C.).—JERVOISE v. NORTHUMBERLAND (DUKE) (1820), 1 Jac. & W. 559; 37 E. R. 481, L. C.

*Annotations*.—*Consd.* Lincoln v. Arcedeckne (1844), 1 Coll. 98. *Refd.* Stonor v. Curwen (1832), 5 Sim. 261; Parker v. Bolton (1835), 5 L. J. Ch. 98; Jones v. Price (1841), 11 Sim. 557; Pyrie v. Waddingham (1852), 10 Hare, 1; Collard v. Sampson (1853), 4 De G. M. & G. 224; Egerton v. Brownlow (1853), 4 H. L. Cas. 1; Shelley v. Shelley (1868), L. R. 6 Eq. 540; Duncan v. Bluet (1870), 19 W. R. 41.

536. —[—]The devise is to trustees in fee in trust to convey to certain uses, but testator has directed that the estates shall be conveyed to the uses of the trusts & subject to the provisos afterwards stated, & in the meantime the estates are to go to the uses & subject to the powers & provisos stated in the will. . . . I do not doubt that every trust directed to be performed is executory in a certain sense, because the estate is in the trustees, & they are to convey it to the uses, but beyond that, I submit this as a point not at all in doubt, that this is not an executory trust in the sense in which we employ that term in equity (LORD ST. LEONARDS).—EGERTON v. BROWNLOW (EARL) (1853), 4 H. L. Cas. 1; 10 E. R. 359, H. L.

*Annotations*.—*Mentd.* Korkin v. Kerkin (1854), 3 E. & B. 399; Boan v. Griffiths (1855), 1 Jur. N. S. 1045; Hilton v. Eckersley (1855), 6 E. & B. 47; Kialmark v. Kialmark

conclusion, that a particular trust is executory, for, in the first case, the nature of the instrument establishes

the fact, in the latter, it must be collected from the nature of the dispositions in the instrument.—ROCHFORD

v. FITZMAURICE (1842), 4 I. Eq. R. 375; 1 Con. & Law. 168; 2 Dr. & War. 1.—IR.

**Sect. 6.—Executory trusts: Sub-sects. 1 & 2, A. & B.]**

(1856), 26 L. J. Ch. 1; *Scott v. Avery* (1856), 5 H. L. Cas. 811; *H. & W.* (1857), 3 K. & J. 382; *Clavering v. Ellison* (1859), 7 H. L. Cas. 707; *Shrewsbury v. Scott* (1859), 6 C. B. N. S. 1; *Wright v. Wilkin* (1860), 2 B. & S. 232; *Tatham v. Vernon* (1861), 29 Beav. 604; *Christie v. Gosling* (1866), L. R. 1 H. L. 279; *Elliot v. Richardson* (1870), L. R. 5 C. P. 744; *Re Harrison's Estate* (1870), 5 Ch. App. 408; *Sackville-West v. Holmesdale* (1870), L. R. 4 H. L. 543; *Thompson v. Fisher* (1870), L. R. 10 Eq. 207; *Re Exmouth, Exmouth v. Praed* (1883), 23 Ch. D. 158; *Lound v. Grimwade* (1883), 39 Ch. D. 605; *Davies v. Davies* (1887), 36 Ch. D. 359; *Windhill L. B. of Health v. Vint* (1890), 45 Ch. D. 351; *Maxim Nordenfolt Guns & Ammunition Co. v. Nordenfolt*, [1893] 1 Ch. 630; *Savill v. Langman* (1898), 79 L. T. 44; *Re Keceley, Tyson v. Keceley*, [1899] 2 Ch. 530; *Marlborough v. Marlborough* (1900), 83 L. T. 578; *Jeffreys v. Jeffreys* (1901), 84 L. T. 417; *Re Greenwood, Goodhart v. Woodhead*, [1902] 2 Ch. 198; *Janson v. Driefontein Consolidated Mines*, [1902] A. C. 484; *Re Hope Johnstone, Hope Johnstone v. Hope Johnstone*, [1904] 1 Ch. 470; *Prince v. Haworth*, [1905] 2 K. B. 768; *Wilson v. Camley*, [1908] 1 K. B. 729; *R. v. L. G. Board, Ex p. Arldige*, [1913] 1 K. B. 453; *Continental Tyre & Rubber Co. (Great Britain) v. Daimler Co., Same v. Tilling*, [1915] 1 K. B. 893; *Montefiore v. Menday Motor Components Co.*, [1918] 2 K. B. 241; *Rodriguez v. Sneyer*, [1919] A. C. 59; *Kemp v. Glasgow City Corp.*, [1920] A. C. 836; *Re Wallace, Champion v. Wallace*, [1920] 2 Ch. 274; *Jamos v. British General Insec.*, [1927] 2 K. B. 311.

**537.** —[Every trust where the act is to be done, or a common conveyance to be executed, is an executory trust, no doubt, in a sense; but not in the sense in which lawyers speak of it. That is a trust executed; but a trust executory means not simply a trust under which an act is to be done, which applies to every case, but one in which there is something to be performed which is not defined by the original settlor, where he has expressed an intention in general words, which is to be carried out in a complete & legal form by persons who are intrusted with the estate (LORD ST. LEONARDS).—*Graham v. Stewart* (1855), 26 L. T. O. S. 29, II. L.

**538.** —[The distinction between trusts executed & executory does not lie only in the circumstance that something additional is to be done by the trustee.—*Tatham v. Vernon* (1861), 29 Beav. 604; 4 L. T. 531; 7 Jur. N. S. 814; 9 W. R. 822; 54 E. R. 762.

**Annotations.**—*Reid, Re Whiston's Settlement*, Lovatt v. Williamson, [1894] 1 Ch. 661; *Re Hudson, Kuhne v. Hudson* (1895), 72 L. T. 892; *Re Irwin, Irwin v. Parkes*, [1904] 2 Ch. 752; *Re Tringham's Trusts, Tringham v. Greenhill*, [1904] 2 Ch. 487; *Re Clarke's Settlement, Trust, Wanklyn v. Stratfield*, [1916] 1 Ch. 467; *Re Bostock's Settlement, Norrish v. Bostock*, [1921] 2 Ch. 469.

**539. Necessity for object in esse.**—[A.—G. v. DOWNING (LADY), No. 440, *ante*.

**SUB-SECT. 2.—HOW ARISING.**

**A. In General.**

**540. Direction to convey on trust—Estate tail after life interest.**—[S. by will directs his trustees to convey a full fourth part of all his freehold lands, etc., to the use of his daughter P. for life, & so as she alone, or such person as she shall appoint, take & receive the rents & profits thereof, & so as her husband is not to intermeddle therewith, & from & after her decease, in trust for the heirs of the body of P. for ever. This being an executory trust, the wife took an estate for life only, & the husband, therefore, not entitled to be tenant by the curtesy.—*ROBERTS v. DIXWELL* (1738), 1 Atk. 607; *West temp. Hard.* 536; 2 Eq. Cas. Abr. 668; *Sugden on Powers*, 8th ed., 930; 26 E. R. 381, L. C.

**Annotations.**—*Reid, Read v. Snell* (1743), 2 Atk. 642; *Trash v. Wood* (1839), 4 My. & Cr. 324. *Mentd. Hopkins*

*v. Hopkins* (1739), *West temp. Hard.* 606; *Bagshaw v. Spencer* (1743), 2 Atk. 570; *Garth v. Baldwin* (1755), 2 Ves. Sen. 646; *Kenworthy v. Bate* (1802), 6 Ves. 793; *Morgan v. Morgan* (1820), 5 Madd. 408; *Thornton v. Bright* (1836), 2 My. & Cr. 230; *Douglas v. Willes* (1849), 7 Hare, 318; *Williams v. Lewis* (1859), 6 H. L. Cas. 1013; *Re Jeaffreson's Trusts* (1866), L. R. 2 Eq. 276; *Appleton v. Rowley* (1869), L. R. 8 Eq. 139; *Cooper v. Macdonald* (1877), 7 Ch. D. 288; *Re Rodgate, Marsh v. Rodgate* (1902), 72 L. J. Ch. 204; *Re Adams' Trustees & Frost's Contract*, [1907] 1 Ch. 695; *Re Hudson, Cassels v. Hudson*, [1908] 1 Ch. 655.

**541. Will operating as appointment of equitable estate.**—[*LLOYD v. ABRAHAM* (1754), cited in 1 *Hov. Supp.* at p. 378; 34 E. R. 835, L. C.

**542. Gift over on failure of issue.**—[Testator devised his real & personal estate to trustees, & gave life estates therein to several persons, namely A., B., etc.; & after their death he directed the trustees to pay the income to M. & N., during their respective lives, share & share alike; & in case either of them should, after the deaths of A., B., etc., depart this life without leaving issue male of his body, in trust to pay the whole income to the survivor for life; & he directed that if M. should, after the deaths of A., B., etc., die before N. leaving issue male, then the trustees should convey, a moiety of the real estate, to the use of the first & other sons of M. in tail male, with remainder to N. for life, with remainder to his first & other sons in tail, & in default to testator's right heirs, & lay out a moiety of the personal estate in land, & convey same to trustees to the like uses. Testator made a similar disposition *mutatis mutandis* of the other moiety in case of the death of N., after the death of A., B. leaving issue male, & he provided that in case M. & N. should die without leaving issue male, or if such issue male should die without leaving any issue male, the trustees should convey the property to such person as should, at the death of the survivor of M. & N., be the right heir of testator. It will be seen that no provision was made for the event, which happened, of M. dying without issue before the death of A., B. N. survived M. & A., B., etc., & M. died without issue:—*Held*: the trusts on which the question arose were not executory so as to alter the construction as arising on an executed trust.—*FRANKS v. PRICE* (1840), 3 Beav. 182; 9 L. J. Ch. 383; 4 Jur. 909; 49 E. R. 72.

**543.** —[A will contained a direction to trustees to convey to testator's son in strict settlement, if he should marry, followed by a declaration that if the son should die unmarried, or without lawful issue, the property should be limited & devolve upon A. for life, remainder to A.'s eldest son for life, remainder to his issue male, & in failure of such issue to A.'s other sons in succession, the eldest of such sons & his heirs male always to be preferred:—*Held*: the trusts in favour of A. & her sons were not executory.—*Re NELLEY'S TRUSTS* (1877), 26 W. R. 88, C. A.

**544. Gift of sum to be settled.**—[Testatrix by her will gave £500 to each of her two nieces to be settled as she should thereafter describe, & directed that the provision therein made for her nieces should not be subject to the control of any husbands they might marry, but should remain vested in her exors. in trust until a proper settlement was made. By a codicil she directed that if either of her nieces should die without leaving issue, the legacy given to her should devolve to the other niece & her children, with a gift over if both should die without issue:—*Held*: this was an executory trust.—*HOLLOWAY v. COLLIER* (1853), 1 W. R. 266.

**PART I. SECT. 6, SUB-SECT. 2.—A.**

**5421. Gift over on failure of issue.**—[*HARRIS v. LOFTUS* (No. 2), [1903] 1 I. R. 203.—*IR.*

**545. — On marriage.]—**M., by his will, left shares of his property to his daughters "to be settled on themselves at their marriage." One of the daughters attained twenty-one, & applied to have her share paid to her absolutely:—*Held*: she was absolutely entitled to her share, & there was no trust for settlement.—*MAGRATH v. MORRHEAD* (1871), L. R. 12 Eq. 491; 41 L. J. Ch. 120; 24 L. T. 868.

*Annotation:—**Reid, Re Bannister, Heys-Jones v. Bannister* (1921), 90 L. J. Ch. 415.

**546. Direction to purchase realty.—Trust to divide after life interest.]—**Testator empowered his trustees to purchase freeholds "to the amount of £1,500 of his personal estate, for the use of A. during life, & then divided among his issue, if any":—*Held*: this was executory.—*HADWEN v. HADWEN* (1857), 23 Beav. 551; 53 E. R. 217.

**547. Provision for settlement.—Direction for shifting clause.]—**Testator devised real estate to trustees, upon trust to convey & settle same to the use of A. for life; remainder to the use of the children of A. in strict settlement; remainder to the use of B. for life; with remainders over. Testator directed that the settlement should contain a name & arms clause; & in case of refusal, the estate of the person refusing was to cease, & was to go over to the person next entitled in remainder under the limitations, as if the person so refusing, being tenant for life, were dead, or tenant in tail, were dead without issue, but without prejudice nevertheless to prior contingent estates. The settlement was also to contain a shifting clause, directing, in the events which happened, namely, that if A. should succeed to certain other estates, he should resettle them; & in default, that the settled estates should go to such uses, etc., as if the limitations in A.'s favour had not been inserted. A. had no children, & made default in resettling the other estate:—*Held*: the trust was executory.—*D'EYN-COURT v. GREGORY* (1864), 34 Beav. 36; 3 New Rep. 628; 10 L. T. 317; 10 Jur. N. S. 484; 12 W. R. 679; 55 E. R. 545.

*Annotation:—**Mentd. Re Conyngham, Conyngham v. Conyngham*, [1921] 1 Ch. 491.

— *In will.]—See, generally, SETTLEMENTS*, Vol. XL., pp. 450–456, Nos. 4–62.

**Marriage articles.]—See, generally, SETTLEMENTS, Vol. XI., pp. 470–493, Nos. 272–421.**

#### B Use of Particular Words.

**548. "Release & convey"—Reference to distinct trust of realty.]—**A settlement, on marriage, of real estate, upon trust for the intended wife for life, remainder to the husband for life, & after the death of the survivor, "in trust for & to be released & conveyed unto" the children, as the parents or the survivor should appoint; in default, "in trust for & to be released & conveyed unto" the children as tenants in common in tail; & in default of issue, if the wife should survive the husband, "in trust for & to be released & conveyed unto" the wife, "her heirs & assigns for ever." By the same deed, personal property was assigned to the same trustees, upon trust to pay the income & principal "to such person & persons, for such uses, ends, intents, & purposes, & in such manner & form, & subject to the same powers, provisoes, contingencies, declarations, & agreements as were thereinbefore expressed concerning the payment

by the trustees of the rents & profits of the said real estate thereby conveyed, & concerning their release & conveyance of the same, or as near thereto as circumstances & the nature of the case would admit":—*Held*: this trust of the personality was not rendered executory by reference to the direction to release & convey the real estate, such direction being merely superadded to a distinct declaration of trust of such real estate.—*DONCASTER v. DONCASTER* (1856), 3 K. & J. 26; 2 Jur. N. S. 1066; 69 E. R. 1007.

*Annotation:—**Mentd. Foxwell v. Van Grutten* (1898), 79 L. T. 617.

**549. "So far as rules of law or equity will permit"—Settlement of personality to devolve as realty.]—**A bequest or settlement of chattels upon the same limitations as real estate, whether immediate or by way of trust executed, vests them absolutely in the first tenant in tail at birth, & this whether the limitations of the chattels be expressed *in extenso* or created by reference to the limitations of the realty; & such reference may be effectually made either by declaring that the chattels are to go upon the limitations of the realty or by saying that they are to be treated as heirlooms.

The addition of the words "as far as the rules of law or equity will permit" & the circumstance that the legal interest is left in exors., will not prevail to alter the general rule or make the trusts executory.—*SCARSDALE (LORD) v. CURZON* (1860), 1 John. & H. 40; 29 L. J. Ch. 249; 3 L. T. 29; 6 Jur. N. S. 209; 70 E. R. 653.

*Annotations:—**Consd. Re Hill, Hill v. Hill*, [1902] 1 Ch. 537; *Re Beresford-Hopce, Aldenham v. Beresford-Hopce*, [1917] 1 Ch. 287; *Portman v. Portman*, [1922] 2 A. C. 473; *Reid, Holmesdale v. West* (1866), L. R. 3 Eq. 474; *Re Johnson's Trusts* (1866), L. R. 2 Eq. 710; *Re Angerstein, Angerstein v. Angerstein*, [1895] 2 Ch. 883; *Re Fothergill's Estate, Price-Fothergill v. Price*, [1903] 1 Ch. 149; *Re Chesham's Settlement, Valentia v. Chesham*, [1909] 2 Ch. 329; *Re Lewis, Busk v. Lewes*, [1918] 2 Ch. 308. *Mentd. Hogg v. Jones* (1863), 32 Beav. 45; *Clifford v. Koe* (1880), 43 L. T. 322; *Re Parker, Parker v. Parkin*, [1910] 1 Ch. 581.

**550. ———.]—**By his will testator bequeathed to trustees certain chattels upon trust "to permit the same to go & be held," so far as the rules of law & equity would admit, with the B. estate, devised by the will of his mother, as heirlooms, for the person, or persons, who, under the trusts of the same will concerning that estate, should for the time being be entitled thereto, & so that none of the articles should, for the purpose of transmission, vest absolutely in any person who might become tenant in tail male by purchase of the B. estate & should not attain twenty-one.

By a second gift testator bequeathed to the same trustees certain other chattels commonly used with mansion house at B. "upon such trusts, & subject to such powers as, having regard to the nature thereof, & so far as the rules of law & equity will permit, will best correspond with the uses, trusts, & powers" declared & contained of the B. estate, yet so that none of the same chattels should, for the purpose of transmission, vest absolutely in any tenant in tail by purchase of the same estate who should not attain twenty-one.

Under the will of testator's mother the B. estate was settled, in the events which had happened, upon testator for life, with remainder to his son P., born in the lifetime of testator's mother, for his life, with remainder to the use of the first & every other son of P., of whom there were none, with

#### PART I. SECT. 6, SUB-SECT. 2.—B.

a. "Suitably provided for."—*BRENNAN v. BRENNAN* (1868), 2 I. R. Eq. 266. I.—R.

• "Lands to be entailed & "go to next heir."—Testator left all his landed property, which included W., subject to certain reservations, to his eldest son, & directed "the lands of W. to be

entailed & go to next heir, & not to be sold or otherwise disposed of":—*Held*: the trust was executory.—*Re BUTLER, DELAP v. BUTLER*, [1919] 1 I. R. 74.—IR.

*Sect. 6.—Executory trusts: Sub-sect. 2, B.; sub-sects. 3 & 4. Sects. 7 & 8: Sub-sects. 1, 2 & 3, A.]*

remainder to the use of the first & other sons of testator born after the death of his mother, in tale male, with remainders over.

Testator died in 1887, when P. became tenant for life of the B. estate & entitled to a life interest in the heirlooms.

In 1899 the B. estate was sold, & also certain of the heirlooms in the second gift, & the proceeds invested. C., another son of testator, born in 1885, became entitled under the settlement to an estate in tail male by purchase of the B. estate expectant on the death of P. without issue male. C. attained twenty-one in 1876, but died in 1906, before his estate came into possession, & without having disentailed the proceeds. By his will he left everything he possessed to his wife, the second deft., & appointed her extrix. The first deft., H., was his only son. In May, 1910, P. died without issue male, & H. became tenant in tail in possession of the estate, & disentailed the proceeds of sale.

Upon an originating summons by the trustees of testator's will to have it determined to whom the heirlooms went:—*Held*: by the gift of the second set of chattels testator had created an executory trust which must be executed by the ct.—*Re BERESFORD-HOPE, ALDENHAM v. BERESFORD-HOPE*, [1917] 1 Ch. 287; 86 L. J. Ch. 182; 116 L. T. 79.

*Annotations*.—*Consd.* Pole v. Pole, Mundy Pole v. Pole, Martin v. Pole, [1924] 1 Ch. 156. *Reid.* *Re Lewis, Busk v. Lewis*, [1918] 2 Ch. 308; Portman v. Portman Viscount, [1922] 2 A. C. 473.

551. — *Trusts previously declared of other property.*]—*GOSLING v. GOSLING*, No. 506, *ante*.

552. — *Settlement of heirlooms.*]—*SHELLEY v. SHELLEY*, No. 360, *ante*.

553. — *—*]—I have to consider whether in the present case the articles have been effectually settled in the manner contended for by deft., & whether the words which I have read are sufficient to create an executory trust & cut down the interest taken by pltf. to a defeasible interest, in the event of his dying within the period of twenty-one years from the death of testatrix. That the mere addition of the words "so far as the rules of law & equity will permit" will not make the trust executory or amount to a direction to settle appears from *Scarsdale (Lord) v. Curzon*, No. 549, *ante* (SWINFEN EADY, J.).—*Re HILL, HILL v. HILL*, [1902] 1 Ch. 537; 71 L. J. Ch. 222; 86 L. T. 146; 18 T. L. R. 267; *affd.*, [1902] 1 Ch. 807, C. A.

554. "To be enjoyed with & go with the title"—*Gift of plate & leaseholds.*]—Testatrix by a codicil to her will bequeathed to A., sixth Earl of E. & to his successors, all her plate, & also gave, devised, & bequeathed a leasehold house to him & "to his successors, & to be enjoyed with & to go with the title," & as to all her household furniture, paintings, books, china, & the whole contents of her house, she bequeathed the same to her trustees & exors. upon trust that they should in the first place "select & set aside a collection of the best paintings, statuary, & china for the Earl of E. & his successors, to be held & settled as heirlooms, & to go with the title," & she authorised them to give the Earl or his successors any articles of furniture which they should think fit, & as to all the rest & residue of the contents of her house upon trust for her trustees to select presents for her friends, & directed them to present any portion of the residue of the contents of her house to her cousins if they should think fit, or to sell the same, & the moneys so received to form part of her residuary personal estate, & she directed all the legacies left by her

will & codicil to be paid free of legacy duty. Testatrix died possessed of considerable personal estate, which comprised amongst other things a number of articles of jewellery which were at her death in a box at her banker's, which jewellery had been bequeathed to her. It was proved that it had been the practice of testatrix, also of the former owner, to send such box for safe custody to the bankers when they respectively were away from London:—*Held*: (1) the plate & leasehold house passed to the sixth Earl absolutely; the words "to be enjoyed with & go with the title" not being sufficient in themselves to create an executory trust or to cut down the interest to a life estate; (2) the gift to the trustees of the whole contents of the house upon trust to "select & set aside a collection of the best paintings, statuary, & china, for the said Earl of E. & his successors, to be held & settled as heirlooms & to go with the title" was a clear direction to settle & created an executory trust, & a settlement was directed (to be settled in chambers) giving a life interest to the sixth Earl with remainder to the next heir to the Earldom for his life.—*Re JOHNSTON, COCKERELL v. ESSEX (EARL)* (1884), 26 Ch. D. 538; 53 L. J. Ch. 645; 52 L. T. 44; 32 W. R. 634.

*Annotations*.—*As to* (2) *Reid.* *Re Finch & Chew's Contract*, [1903] 2 Ch. 486. *Generally*, *Reid.* *Hill v. Hill*, [1897] 1 Q. B. 483; *Re Hill, Hill v. Hill*, [1902] 1 Ch. 807. *Mentd.* *Re Miller, Daniel v. Daniel* (1889), 61 L. T. 365; *Re Pettitt, Flaxman v. Pettitt* (1894), 39 Sol. Jo. 531; *Re Rayer, Rayer v. Rayer* (1903), 87 L. T. 712; *Re Zouche, Dugdale v. Zouche*, [1919] 2 Ch. 178.

#### SUB-SECT. 3.—CONSTRUCTION.

See Sect. 10, sub-sect. 2, *post*.

#### SUB-SECT. 4.—PERFORMANCE.

555. *Rules of law followed.*]—When a question arises how a trust ought to be executed by a conveyance, there is no better rule than to observe & follow what has been done at law in the executing of conditions that are matters executory, & to be performed, so far as the case will admit of (LORD COWPER, C.).—*NEWCUMEN v. BARKHAM* (1716), as reported in 2 Vern. 729; 23 E. R. 1078; *sub nom.* *BROWN v. BARKHAM*, 1 Stra. 35, L. C.; *subsequent proceedings*, *sub nom.* *NEWCUMEN v. BETHLEM HOSPITAL* (1741), Amb. App. A. 785, L. C.

*Annotations*.—*Mentd.* *Dawes v. Forrester* (1722), 2 P. Wins. 1; *Channell v. Beeby* (1745), cited in 1 Nov. Supp. p. 441; *Goodright d. Brooking v. White* (1775), 2 Wm. Bl. 1010; *Hony v. Purcell* (1775), 2 Wm. Bl. 1002; *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1; *Chambers v. Taylor* (1837), 2 My. & Cr. 376; *Winter v. Perrett* (1843), 9 Cl. & Fin. 606; *Lightfoot v. Maybery*, [1914] A. C. 782.

556. *When court will carry into effect—Necessity for clear intention of testator.*]—In an executory trust effected by the ct., it is sufficient, if it can satisfy itself of testator's intention to carry it into execution, therefore where testator gave his real estate in A. to a devisee in strict settlement & ordered other estates to be sold & converted into personalty, & the produce with the residue of his property, to be laid out in lands in A. contiguous, & convenient to his estate in A. & by strong expressions, though without direct words, showed he intended it to be to the same uses, it was decreed so to be.—*BROWNE v. DE LAET* (1794), 4 Bro. C. C. 527; 29 E. R. 1024, L. C.

*Annotations*.—*Consd.* *Caldecott v. Caldecott* (1841), 10 L. J. Ch. 178. *Mentd.* *Key v. Key* (1853), 4 De G. M. & G. 73.

557. *Modification of invalid clause—Shifting clause.*]—Testator devised his freehold estates in Worcestershire to his third son & his issue male,

with remainder to his fourth son & his issue male, in strict settlement; & he devised his freehold estates in Cardiganshire to his fourth son & his issue male, with remainder to his fifth son & his issue male, in strict settlement. By a shifting clause it was provided that if his fourth son, or any issue male of his fourth son, should become actually entitled to the possession of his Worcestershire estates, & if his fifth son or any of his issue male should be then living, the limitations of his Cardiganshire estates in favour of his fourth son, or his issue male, should absolutely cease. He bequeathed his leasehold estates in Cardiganshire to trustees upon such trusts as, regard being had to the difference in the tenure of the premises respectively, would best or most nearly correspond with the uses declared of the Cardiganshire freeholds. The third son died a bachelor in the lifetime of the fourth son, who thereupon entered into possession of the Worcestershire estates:—*Held*: the fifth son was entitled to the rents & profits of the Cardiganshire leaseholds, because they were given upon an executory trust; & assuming the shifting clause, if applied *verbatim* to the leaseholds, to be bad for remoteness, it ought to be so modified as to render it free from that objection.—*MILES v. HARRFORD* (1879), 12 Ch. D. 691; 41 L. T. 378.

*Annotations*.—*Follid. Re Beresford-Hope, Aldenham v. Beresford-Hope*, [1917] 1 Ch. 287. *Reid. Re Bence, Smith v. Bence*, [1891] 3 Ch. 242; *Re Norton, Norton v. Norton*, [1911] 2 Ch. 27; *Portman v. Portman*, [1922] 2 A. C. 473; *Pole v. Pole, Mundy Pole v. Pole, Martin v. Pole*, [1924] 1 Ch. 156.

**What limitations inserted.**—*See SETTLEMENTS*, Vol. XL., pp. 453–456, Nos. 30–60.

## SECT. 7.—VOLUNTARY ASSURANCES

*See, generally, GIFTS*, Vol. XXV., pp. 498 *et seq.*; *FRAUDULENT & VOIDABLE CONVEYANCES*, Vol. XXV., pp. 145 *et seq.*

**Voluntary settlements.**—*See SETTLEMENTS*, Vol. XL., pp. 531–538.

**Voluntary assignments of chose in action.**—*See CHOSSES IN ACTION*, Vol. VIII., pp. 496–500.

**Whether consideration necessary.**—*See Sect. 12*, sub-sect. 2, *post*.

**Voluntary conveyance as resulting trust.**—*See Sect. 14*, sub-sect. 2, A. (c) iii., *post*.

## SECT. 8.—VALIDITY OF TRUSTS.

SUB-SECT. 1.—AS TO CREATION.

*See Sect. 3, ante*.

### SUB-SECT. 2.—AS TO SUBJECT-MATTER.

**558. Peage.**—There can be no use or trust in the case of a peage. Therefore, where, in a patent of peage, there were successive limitations of the peage in the ordinary form of descent, & then a clause was introduced which, on the happening of a collateral event, would transfer the enjoyment of the peage from the existing peer & his heirs to a new holder, such clause was held to be invalid.—*BUCKHURST PEAGE CASE* (1876), 2 App. Cas. 1, H. L.; *subsequent proceedings*, *sub nom. COPE v. DE LA WARR* (EARL) (1877), 5 Ch. D. 666, C. A.

*Annotations*.—*Reid. Rhondda's Claim*, [1922] 2 A. C. 339. *Mentd. Cooper v. Stuart* (1889), 41 App. Cas. 286.

### PART I. SECT. 8, SUB-SECT. 3.—A.

**1. Whether trust valid—Perpetual trust for care of grave.**—A direction in a

will to the exors. to deposit a sum in a bank or invest it, “the yearly interest to be devoted to the care of my grave,” creates, leaving statutory provisions

**Personalty—By settlement.**—*See SETTLEMENTS*, Vol. XL., p. 796, Nos. 3216–3250.

— **Insurance policies.**—*See SETTLEMENTS*, Vol. XL., pp. 796–798, Nos. 3251–3262.

— **By will.**—*See WILLS*.

— **Life interests in consumable articles.**—*See WILLS*.

### SUB-SECT. 3.—AS TO OBJECTS.

#### A. In General.

**559. Whether trust valid—Covenant to surrender copyholds—& to stand possessed for trustees until surrender—Covenant not enforceable.**—Upon a voluntary covenant to surrender copyholds, & in the meanwhile to stand possessed of them for trustees for the volunteers, though the covenant to surrender *per se* cannot be enforced, yet a valid trust is constituted for the volunteers.—*STEELE v. WALLER* (1860), 28 Beav. 466; 3 L. T. 74; 6 Jur. N. S. 1004; 54 E. R. 445.

*Annotation*.—*Mentd. Garland v. Mead* (1871), L. R. 6 Q. B. 411.

**560. — No cestui que trust to enforce.**—Testator bequeathed £12,000 to trustees upon trust to invest the whole or part in the purchase of an advowson; & until his son should be presented to a benefice producing a net £1,000 *per annum* or die, the trustees were to present some fit person to the benefice, the advowson whereof they had purchased, & subject as aforesaid, were to hold the advowson in trust for the son, his heirs & assigns; & in the meantime, & until such investment, the trustees were to lay out the £12,000 upon certain securities, & during twenty-one years from testator's death, to accumulate the income, & the income of the £12,000 & the accumulations was, after the twenty-one years, in case the advowson had not been purchased, to belong to the son, his exors. or administrators; & if the son died or was presented to a benefice of £1,000 a year before a contract for the purchase of the advowson had been entered into, or if part of the £12,000 or the accumulations remained after completing such contract, the same was to be paid to the son, his exors. or administrators. The £12,000 having been set apart & invested & accumulated, but no advowson having been bought, the son, thirteen years after testator's death, claimed the entire fund:—*Held*: although there was no person who could enforce the trust, yet, as the trustees were willing to carry it out, & could present any fit person they chose to the benefice when they had bought the advowson, the son was not the exclusive object of the trust, & was not entitled to a transfer of the fund.—*GOTT v. NAIRNE* (1876), 3 Ch. D. 278; 35 L. T. 209.

**561. —**—Then it is said, that there is no *cestui que trust* who can enforce the trust & that the c. will not recognise a trust unless it is capable of being enforced by some one. I do not assent to that view. There is not the least doubt that a man may if he pleases, give a legacy to trustees, upon trust to apply it in erecting a monument to himself, either in a church or in a churchyard, or even in unconsecrated ground, & I am not aware that such a trust is in any way invalid, although it is difficult to say who would be the *cestui que trust* of the monument (NORTH, J.).—*Re DEAN, COOPER-DEAN v. STEVENS* (1889), 41 Ch. D. 552; 58 L. J. Ch. 603; 60 L. T. 813; 5 T. L. R. 404.

*Annotation*.—*Mentd. Re Grove-Grady, Plowden v. Lawrence* (1928), 44 T. L. R. 760.

out of consideration, a perpetual trust; & as the purpose is not charitable, is void.—*Re JONES* (1918), 42 O. L. R. 62; 13 O. W. N. 405.—**CAN.**



*Sect. 8.—Validity of trusts: Sub-sect. 3, A. & B.*  
*Sect. 9: Sub-sects. 1, 2, 3, 4, 5 & 6, A., B., C., D., E. & F.]*

**562. — Trust rendering subject-matter useless—Direction to block up house for twenty years.]**—Testatrix gave & devised her dwelling-house & premises to trustees, upon trust that they should immediately after her funeral, cause the doors & windows of every room thereof, except the kitchen, middle attic, & hall, to be well & effectually bricked up from the outside, with the furniture therein, for a period of twenty years; & from & after that term, testatrix devised, the property to a devisee for life, with remainder to another person in fee:—*Held*: the directions regarding the blockade must be treated as ineffectual & there was intestacy as to the term of twenty years, in the property, which must be distributed as undisposed of real & personal estate.—*BROWN v. BURDETT* (1882), 21 Ch. D. 667; 52 L. J. Ch. 52; 47 L. T. 94.

*Annotation:—Refd. Formby v. Barker* (1903), 89 L. T. 249.

**Validity of charitable objects.]—See, generally, CHARITIES, Vol. VIII., pp. 241–287.**

**Application of rule against perpetuities.]—See, generally, PERPETUITIES, Vol. XXXVII., pp. 55–122.**

**Charitable trusts.]—See CHARITIES, Vol. VIII., pp. 325–329, Nos. 1078–1116.**

**Restriction of accumulation.]—See PERPETUITIES, Vol. XXXVII., pp. 130 *et seq.***

**Trusts for illegal purposes.]—See Sect. 9, sub-sect. 2, *post*.**

#### *B. Trust Comprising Lawful and Unlawful Objects.*

**563. To what extent trusts enforced—When discretion given to trustees.]—**When the fund is applicable at discretion to several purposes, some of which are void, & the others not, it will be confined to the latter.—*A.-G. v. HINXMAN* (1820), 2 Jac. & W. 270; 37 E. R. 630.

*Annotations:—Refd. Trye v. Gloucester Corpn.* (1851), 14 Beav. 173; *Edwards v. Hall* (1853), 11 Hare, 1. *Mend. Cherry v. Mott* (1836), 1 My. & Cr. 123; *Mitford v. Reynolds* (1842), 1 Ph. 185; *Mitford v. Reynolds* (1848), 16 Sim. 105; *Ruddall v. Warren* (1857), 29 L. T. O. S. 204; *Ewan v. Morgan* (1858), 32 L. T. O. S. 19; *Fowler v. Fowler* (1864), 33 Beav. 616; *Re Taylor, Martin v. Freeman* (1888), 58 L. T. 538.

**564. — Presumption in favour of legal objects.]—**Where trustees have by the terms of a gift a discretion to apply the benefit of it either in a way which the law allows or in one which the law disallows, the presumption ought to be, that the discretion will be exercised in the former mode.—*FAVERSHAM CORPN. v. RYDER* (1854), 5 De G. M. & G. 350; 2 Eq. Rep. 749; 23 L. J. Ch. 905; 23 L. T. O. S. 282; 18 J. P. 455; 18 Jur. 587; 2 W. R. 573; 43 E. R. 905, L. J.

*Annotations:—Consd. Martin v. Wellstead* (1854), 23 L. J. Ch. 927. *Refd. Dunn v. Bownas* (1855), 1 K. & J. 596; *Re Piercy, Whitwam v. Piercy*, [1898] 1 Ch. 565.

**565. — Legal trusts of separation deed—Some trusts in deed illegal.]—**Ct. of Ch. will carry out the trusts of a separation deed which are legal & proper, although the deed contain other trusts

which are illegal.—*HAMILTON v. HECTOR* (1872), L. R. 13 Eq. 511; 36 J. P. 676.

**Charitable trusts—Trusts for alternative charitable & other purposes.]—See CHARITIES, Vol. VIII., pp. 294–297, Nos. 719–740.**

**Gift of fund after invalid gift.]—See CHARITIES, Vol. VIII., pp. 299, 300, Nos. 763–779.**

**Apportionment when some of objects illegal.]—See CHARITIES, Vol. VIII., p. 301, Nos. 785–795.**

**Alternative independent limitations—One void for remoteness.]—See PERPETUITIES, Vol. XXXVII., pp. 102–106, Nos. 374–398.**

### SECT. 9.—OBJECTS OF TRUSTS.

#### SUB-SECT. 1.—ALIENS.

**Rights as to property generally.]—See ALIENS, Vol. II., pp. 134–138, Nos. 97–129.**

#### SUB-SECT. 2.—ILLEGAL OR IMMORAL PURPOSES.

**Trusts in separation agreements.]—See HUSBAND & WIFE, Vol. XXVII., pp. 219–227, Nos. 1900–1980.**

**Charitable purposes contrary to public policy.]—See CHARITIES, Vol. VIII., p. 265, Nos. 268–272.**

**Conditions in restraint of marriage.]—See WILLS.**

**Contracts for illegal purposes generally.]—See CONTRACT, Vol. XII., pp. 234–303.**

**Conversion for void or illegal purpose.]—See EQUITY, Vol. XX., pp. 380–382, Nos. 1172–1191.**

**Fraudulent & voidable conveyances.]—See, generally, FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 145 *et seq.***

**Provision for illegitimate children.]—See SETTLEMENTS, Vol. XL, pp. 574, 575, Nos. 1096–1103; WILLS.**

#### SUB-SECT. 3.—MAINTENANCE AND ADVANCEMENT.

**Maintenance & advancement of infants, generally.]—See INFANTS, Vol. XXVIII., pp. 216 *et seq.***

**Portions—Under settlements.]—See SETTLEMENTS, Vol. XL, pp. 597–634, Nos. 1328–1732.**

**Under wills.]—See WILLS.**

#### SUB-SECT. 4.—PUBLIC PURPOSES.

**566. Commissioners raising money for parish purposes—Authorisation by statute.]—**Comrs. were authorised, by an Act, to raise money on the security of the assignments of parish rates. Interest on the debentures was to be paid *pari passu*, & the debentures were to be paid off by ballot:—*Held*: the relation of trustee & *cestui que trust* was constituted by the Act & the holders of the debentures were entitled to sue in this ct. for an account of the moneys received by the trustees & of their payments, & they were not bound to proceed on their

#### PART I. SECT. 8, SUB-SECT. 3.—B.

**g. Lottery & trust to sell.]—**A debtor conveyed his real estate to trustees for the benefit of his creditors, to be disposed of by the trustees, first, by a lottery, & failing that plan, then in trust to sell as they should deem best:—*Held*: although the deed was void as to the trust for a lottery, it was valid as to the other trusts.—*GOODEVE v. MANNERS* (1855), 5 Gr. 114.—*CAN.*

**h. One part of trust statute barred.]—HEMANGINI DASI v. NOBIN CHAND**

*GHOSE* (1882), 1 L. R. 8 Cal. 788; 11 C. L. R. 370.—*IND.*

#### PART I. SECT. 9, SUB-SECT. 2.

**k. Transferee not to be treated as trustee.]—**Where an illegal purpose has been effected by a transfer of property, transferee is not to be treated as a trustee holding it for the benefit of transferor.—*CHEVVIRAPPA BIN VIRBHA-DRAPPA v. PUTTAPPA BIN SHIVRASAPPA* (1887), 1 L. R. 11 Bom. 708.—*IND.*

**l. Validity of gift by deed—To un-**

*born illegitimate child.]—THOMPSON v. THOMAS* (1891), 27 L. R. Ir. 457.—*IR.*

#### PART I. SECT. 9, SUB-SECT. 4.

**m. "Cricket & other athletic sports."]—**"Where land is granted to trustees in trust "for cricket & other athletic sports & for no other purpose whatsoever," the trustees are entitled to permit the use of the land for any lawful purpose not inconsistent with its use when required as a place for holding athletic sports, & in particular for any



bonds at law.—*FLETCHER v. GIBBON* (1856), 23 Beav. 212; 53 E. R. 83, L. C.  
*Annotation*.—*Mentd. Preston v. Great Yarmouth Corpn.* (1872), 7 Ch. App. 655.

**567. Funds voted for public service—Not trust funds in hands of Secretary of State.**—The fund voted by Parliament for the public service are not trust funds in the hands of the Secretaries of State who receive them from the Treasury; & the Ct. of Ch. has no jurisdiction to take any account of the application of such funds.—*GRENVILLE-MURRAY v. CLARENDON (EARL)* (1869), L. R. 9 Eq. 11; 39 L. J. Ch. 221; 21 L. T. 448; 18 W. R. 124.  
*Annotation*.—*Reff. Hayman v. Rugby School* (1874), L. R. 18 Eq. 28.

**Charitable purposes.**—*See, generally, CHARITIES, Vol. VIII., pp. 232 et seq.*

**Trusts for protestant dissenters.**—*See ECCLESIASTICAL LAW, Vol. XIX., pp. 541-544, Nos. 4018-4040.*

#### SUB-SECT. 5.—RESTRAINT OF ANTICIPATION OR ALIENATION.

**568. Trusts to convey to cestui que trust—Whether evidence of restriction on alienation admissible.**—*LAKE v. PHILIPS & LAKE* (1837), 1 Rep. Ch. 110; 21 E. R. 522.

**Restraint on alienation of personal property, generally.**—*See PERSONAL PROPERTY, Vol. XXXVII., p. 171, Nos. 131-136.*

**Forfeiture clause in case of bankruptcy.**—*See, generally, BANKRUPTCY, Vol. V., pp. 653-673, Nos. 5839-5956.*

**Restraint on anticipation of property of married woman.**—*See, generally, HUSBAND & WIFE, Vol. XXVII., pp. 101-132, Nos. 793-1082.*

**Life interests under settlements determinable on bankruptcy on alienation.**—*See SETTLEMENTS, Vol. XL., pp. 558-562, Nos. 987-1009.*

**Conditions in wills.**—*See WILLS.*

#### SUB-SECT. 6.—TENANT FOR LIFE AND REMAINDERMAN.

**A. Rights and Liabilities in respect of Waste.**

*See SETTLEMENTS, Vol. XL., pp. 644-654, Nos. 1816-1941.*

**B. Right to Income.**

*See SETTLEMENTS, Vol. XL., pp. 654-677, Nos. 1942-2131.*

**Wasting property & unauthorised investments.**—*See Sub-sect. 6 F., post.*

**Interest pending conversion or investment.**—*See Sub-sect. 6, F., post.*

**Compulsory purchase of land—Money deposited in bank.**—*See COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 236-252, Nos. 1268-1581.*

**Fines in respect of copyholds.**—*See COPYHOLDS,*

*Vol. XIII., p. 93, Nos. 1161-1163; SETTLEMENTS, Vol. XL., p. 656, No. 1952.*

**Mines, minerals & quarries.**—*See MINES, Vol. XXXIV., pp. 629-631, 643, 644, Nos. 261-277, 402-417.*

**Proceeds of sale of timber.**—*See AGRICULTURE, Vol. II., pp. 79-86, 103, 104, Nos. 585-670, 838-849.*

**Trustees empowered to carry on business.**—*See EXECUTORS, Vol. XXIII., p. 562, No. 6014.*

**Interests on legacies.**—*See EXECUTORS, Vol. XXIII., pp. 405-414.*

**Income accumulated on infant's property.**—*See INFANTS, Vol. XXVIII., pp. 225, 226, Nos. 832-838.*

#### C. Apportionment.

**Apportionment generally.**—*See EQUITY, Vol. XX., pp. 280-285, Nos. 391-435.*

**Between tenant for life & remainderman.**—*See SETTLEMENTS, Vol. XL., pp. 677-680, Nos. 2132-2157.*

**Partnership profits.**—*See PARTNERSHIP, Vol. XXXVI., p. 450, Nos. 1158, 1159.*

**Rentcharges & annuities.**—*See RENTCHARGES & ANNUITIES, Vol. XXXIX., pp. 168-172; SETTLEMENTS, Vol. XL., pp. 693, 694, Nos. 2289-2297.*

**Rent.**—*See LANDLORD & TENANT, Vol. XXXI., pp. 261, 262, Nos. 4023-4033.*

**Fines & expenses of renewal of lease.**—*See LANDLORD & TENANT, Vol. XXXI., pp. 84-86, Nos. 2283-2293.*

**D. Rights and Liabilities in respect of Insurance.**

*See SETTLEMENTS, Vol. XI., pp. 680, 681, Nos. 2158-2171.*

**E. Wasting Property and Unauthorised Investments.**

**Necessity for conversion into permanent securities.**—*See SETTLEMENTS, Vol. XL., pp. 672-674, Nos. 2090-2100.*

**Settlement by will.**—*See WILLS.*

**Interest until conversion.**—*See Sub-sect. 6, F., post.*

**Getting in & investment of property by personal representation.**—*See EXECUTORS & ADMINISTRATORS, Vol. XXIII., pp. 321-330, Nos. 3887-3902.*

**F. Interest pending Conversion and Investment.**

**569. Direction to convert & invest—Right to accruing income—From end of first year.**—Testator directed the residue of his personal estate, subject to the payment of legacies, annuities, debts & funeral expenses, with all convenient speed to be laid out in real estates to be settled in strict settlement; & that the interest of such residue should accumulate & be laid out in lands to be settled in like manner. Various circumstances having delayed the collection & investment of the personal estate, the tenant for life was held

purpose which, while not interfering with such use, is conducive to the main object of the trust.—*DOWN v. A.-G. (QUEENSLAND)* (1905), 2 C. L. R. 639.—**AUS.**

**n. Power of Crown to divert property to other purposes.**—*A.-G. v. GRABETT* (1860), 8 Gr. 130.—**CAN.**

**o. Right of forfeiture on breach of trust to make roads through virgin forests.**—*CLARK v. VANCOUVER CORPN. (B. C.)* (1904), 35 S. C. R. 121.—**CAN.**

**p. Fund to afford relief & sustenance to volunteers & irregulars.**—Where the objects of a trust fund were to afford relief & sustenance to members of the

Volunteer or Irregular Forces of the Province, & such Forces ceased to exist by act of Legislature & were replaced by the Defence Forces, & the trust deed empowered the trustees to apply to the ct., in case the objects of the trust became impossible of execution for leave to vary or alter the same for some other beneficial public object within the Province, the ct., under the *cy pres* doctrine, added to the objects the power to afford similar relief to members of the Defence Forces.—*Ex p. TRANSVAAL VOLUNTEER'S SUBSTITUTION FUND (TRUSTEES)*, [1914] W. L. D. 105.—**S. AF.**

**PART I. SECT. 9, SUB-SECT. 5.**  
**g. Trust for support of another person.**—*ROYAL TRUST CO. v. HOLDEN* (1915), 8 W. W. R. 500; 21 B. C. R. 185.—**CAN.**

**PART I. SECT. 9, SUB-SECT. 6.—F.**  
**r. Land taken for public purposes—Tenant for life entitled to income from compensation money.**—*PERPETUAL TRUSTEE CO. v. HOLT* (1894), 15 N. S. W. Eq. 18; 10 N. S. W. N. 152.—**AUS.**

**t. Direction to convert & invest—Right to interest on capital.**—Where property, part of which produces no income, is directed by will to be

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entitled to the interest from the end of a year after the death of testator.—*SITWELL v. BERNARD* (1801), 6 Ves. 520; 31 E. R. 1174, L. C.

*Annotations:—*Consd. *Gibson v. Bott* (1802), 7 Ves. 89; *Elwin v. Elwin* (1803), 8 Ves. 547. *Apld.* *Noel v. Henley* (1819), 7 Price, 241; *Taylor v. Hibbert* (1820), 1 Jac. & W. 308. *Expld.* *Dist.* *Angerstein v. Martin* (1823), *Turn. & R.* 232. *Expld.* *Hewitt v. Morris* (1824), *Turn. & R.* 241. *Fold.* *Kilvington v. Morris* (1825), 2 Sim. & St. 396. *Consd.* *Stair v. MacGill* (1827), 1 Bl. N. S. 662; *Douglas v. Congreve* (1836), 1 Keen, 410; *Casamajor v. Pearson* (1841), 8 Cl. & Fin. 69; *Taylor v. Clark* (1841), 1 Hare, 161; *Macpherson v. Macpherson* (1852), 19 L. T. O. S. 221; *Bulkeley v. Stephens* (1863), 3 New Rep. 105. *Reid.* *Wood v. Penoyre* (1807), 13 Ves. 325; *Clifton v. Cockburn* (1834), 3 My. & K. 76; *Caldecott v. Caldecott* (1842), 1 Y. & C. Ch. Cas. 312; *Maokie v. Mackie* (1845), 5 Hare, 79; *Grosley v. Chesterfield* (1851), 13 Beav. 288; *Ludlow v. Stevenson* (1854), 23 L. T. O. S. 294; *Shore v. Shore* (1859), 28 L. J. Ch. 940; *Yates v. Yates* (1860), 3 L. T. 9; *Alhussen v. Whittell* (1867), L. R. 4 Eq. 295; *Re Whitehead, Peacock v. Lucas*, [1894] L. Ch. 678; *Re Hall, Foster v. Metcalfe* (1903), 72 L. J. Ch. 554. *Mentd.* *Bernard v. Mountague* (1816), 1 Mer. 422; *Re Campbell, Campbell v. Campbell*, [1893] 3 Ch. 468.

570. ————]—Testator after devising lands to uses in strict settlement gives the residue of his personalty to be invested in lands to be settled to the same uses. The tenant for life is not entitled to the interest of the residue till one year from testator's death. The general rule fixing the end of the first year as the period at which the enjoyment of the tenant for life is to commence is not to be departed from unless it appears that testator's intention is incompatible with it.—*TAYLOR v. HIBBERT* (1820), 1 Jac. & W. 308; 37 E. R. 393.

*Annotations:—*Consd. *Douglas v. Congreve* (1836), 1 Keen, 410. *N.F.* *Taylor v. Clark* (1841), 1 Hare, 161. *Reid.* *Hewitt v. Morris* (1824), *Turn. & R.* 241; *Knight v. Bowyer* (1857), 26 L. J. Ch. 769; *Bulkeley v. Stephens* (1863), 10 L. T. 225.

571. ————]—Testator directed his residuary personal estate to be invested in land from time to time & at all convenient opportunities, & in the meantime to be accumulated:—*Held*: the tenant for life of the land was entitled to the interest of the uninvested personalty, as from a year from testator's death.

In the same case, testator gave £400 a year to his wife if she recovered her mental faculties, otherwise £200 a year, & to be paid out of his govt. stock; & he directed, as soon as conveniently might be after her death, the investment of the stock out of which the annuity was payable, in land to be conveyed in strict settlement. The wife did not recover:—

*Held*: the extra £200 a year became part of the residue to be invested, & did not belong to the tenant for life.—*TUCKER v. BOSWELL* (1843), 5 Beav. 607; 49 E. R. 713.

572. ————]—Testator directed his residuary estate to be laid out in the purchase of land as soon as a convenient purchase could be found in the county of Y. which, upon a fair letting, would produce a yearly rent equal to 3½ per cent. upon the amount of the purchase-money, & in the meantime, the interest of his residuary estate to be accumulated. The tenant for life will be entitled to the interest of the residuary estate, from the end of one year after testator's death, until it is laid out as directed.—*KILVINGTON v. GRAY* (1825), 2 Sim. & St. 396; 4 L. J. O. S. Ch. 80; 57 E. R. 397.

*Annotation:—*Reid. *Clifton v. Cockburn* (1834), 3 My. & K. 76.

573. ————]—From testator's death.]—Devise

converted but is retained for a time unconverted for the benefit of the estate, the tenants for life thereof are until actual conversion entitled to receive out of the income actually produced an

annual sum equal to 2½ per cent. on the estimated capital value of the whole property as at the date at which such property should have been converted, & not only an annual sum equal to 2½

per cent. on the capital value of so much of the property as is income producing.—*WENTWORTH v. WENTWORTH* (1903), 4 S. R. N. S. W. 45; 21 N. S. W. N. 17.—*AUS.*

of an estate to trustees, to sell the same without fixing any time for that purpose, & to apply the interest on the moneys to arise by the sale of the use of pltf. for life, & then over.

The estates continued unsold, & pltf., as the heir-at-law, claimed the rents & profits of the estate for the first year after the death of testatrix, as being undisposed of; & held, that he was entitled to the same.—*FITZGERALD v. JERVOISE* (1820), 5 Madd. 25; 56 E. R. 804.

*Annotation:—*Expld. *Re Searle, Searle v. Baker*, [1900] 2 Ch. 829.

574. ————]—Testator having devised land to A. for life, remainder to his children in strict settlement, directs the residue of his personal estate subject to the payment of debts & legacies with all convenient speed to be laid out in the purchase of lands to be settled forthwith to the same uses with a proviso that the trust moneys until they should be laid out might be invested upon govt. or real securities, the dividends & interest of which were to go & be paid as the rents of the lands to be purchased would go & be payable. A large portion of testator's personal estate, not required for the payment of debts & legacies, being invested in the funds & upon securities carrying interest the tenant for life was held entitled to the interest of that portion from the death of testator.—*ANGERSTEIN v. MARTIN* (1823), *Turn. & R.* 232; 2 L. J. O. S. Ch. 88; 37 E. R. 1087, L. C.

*Annotations:—*Consd. *Stair v. Macgill* (1827), 1 Bl. N. S. 662. *Fold.* *Douglas v. Congreve* (1836), 1 Keen, 410. *Dtd.* *Taylor v. Clark* (1841), 1 Hare, 161. *Consd.* *Macpherson v. Macpherson* (1852), 19 L. T. O. S. 221. *Reid.* *Alhussen v. Whittell* (1867), L. R. 4 Eq. 295. *Reid.* *Hewitt v. Morris* (1824), *Turn. & R.* 241; *Caldecott v. Caldecott* (1842), 1 Y. & C. Ch. Cas. 312; *Morgan v. Morgan* (1851), 14 Beav. 72; *Morley v. Mendham* (1856), 2 Jur. N. S. 998; *Bulkeley v. Stephens* (1863), 3 New Rep. 105.

575. ————]—Testator directs his exors. to invest the residue of his estate, after payment of debts & legacies in the funds or upon securities, the interest to be paid to A. for life, & after his death the principal to be held upon trusts for his children; the tenant for life was held to be entitled to interest accruing within the year next after testator's decease, upon funds on which testator's property stood invested at the time of his death, & which were not required for the payment of debts & legacies.—*HEWITT v. MORRIS* (1824), *Turn. & R.* 241; 2 L. J. O. S. Ch. 87; 37 E. R. 1090, L. C.

*Annotations:—*Apld. *La Terriere v. Bulmer* (1827), 2 Sim. 18. *Consd.* *Douglas v. Congreve* (1836), 1 Keen, 410; *Macpherson v. Macpherson* (1852), 19 L. T. O. S. 221. *Apld.* *Alhussen v. Whittell* (1867), L. R. 4 Eq. 295. *Reid.* *Stair v. Macgill* (1827), 1 Bl. N. S. 662; *Morgan v. Morgan* (1851), 14 Beav. 72; *Bulkeley v. Stephens* (1863), 3 New Rep. 105.

576. ————]—The tenant for life of a residue, which is directed to be laid out in certain securities, is entitled to the income accrued in the first year after testator's decease on such parts of testator's estate as are invested, at his death, in the proper securities, & on such parts as are afterwards so invested within the same year; but the income, before such investment, forms part of the capital of the residue.—*LA TERRIERE v. BULMER* (1827), 2 Sim. 18; 57 E. R. 697.

*Annotations:—*Consd. *Douglas v. Congreve* (1836), 1 Keen, 410. *Fold.* *Taylor v. Clark* (1841), 1 Hare, 161. *N.F.* *Morgan v. Morgan* (1851), 14 Beav. 72. *Consd.* *Macpherson v. Macpherson* (1852), 19 L. T. O. S. 221.

577. ————]—Testator gave all the residue of his real & personal estate to trustees,

upon trust, to convert the same into govt. securities, & pay the dividends to A., for her separate use for life, with remainder over:—*Held*: she was entitled to the actual income of the first year.—*DOUGLAS v. CONGREVE* (1836), 1 Keen, 410; 6 L. J. Ch. 51; 48 E. R. 364.

*Annotations*.—*N.F. Taylor v. Clark* (1841), 1 Hare, 161. *Consd. Morgan v. Morgan* (1851), 14 Beav. 72. *Apprvd. Macpherson v. Macpherson* (1852), 19 L. T. O. S. 221. *Reid. Caldecott v. Caldecott* (1842), 1 Y. & C. Ch. Cas. 312. *Mentd. Butcher v. Butcher* (1851), 14 Beav. 222; *Ker v. Ruxton* (1852), 19 L. T. O. S. 268; *Ramsden v. Smith* (1854), 2 Drew. 298; *Re D'Estampes' Settlement*, *D'Estampes v. Crowe* (1884), 53 L. J. Ch. 1117.

578. ————]—Testator directed his real & personal estate to be converted, got in, & invested in govt. or real securities, & the interest, dividends, & annual produce to be paid to his wife for her life. The greater part of testator's property at his death consisted of capital in a partnership business abroad, to be withdrawn by instalments, in the course of three or five years, at the discretion of his exors., & bearing interest at 5 per cent. in the meantime:—*Held*: the tenant for life would be entitled to the income actually produced by such of the property of testator as was invested according to his will, from the time of such investment; but she was not entitled during the first year after testator's death to a larger income, in respect of such part of testator's property as was not so invested, than the property would have produced, if invested according to the will.—*TAYLOR v. CLARK* (1841), 1 Hare, 161; 11 L. J. Ch. 189; 6 Jur. 76; 68 E. R. 990.

*Annotations*.—*Consd. Morgan v. Morgan* (1851), 14 Beav. 72. *Apprvd. Macpherson v. Macpherson* (1852), 19 L. T. O. S. 221. *Fold. Brown v. Cellardy* (1867), 2 Ch. App. 751. *Reid. Caldecott v. Caldecott* (1842), 1 Y. & C. Ch. Cas. 312; *Anderson v. Read* (1874), 22 W. R. 527.

579. ————]—Testator gave the residue of his personal estate to his exors., in trust, to be from time to time, as they should think best, turned into moneys for the payment of his debts & legacies; & subject thereto he directed them from time to time to invest the same, with all accumulating produce, in the purchase of other lands, to be situated as conveniently as might be to certain real estates devised by him in a former part of his will; & his will was, that such purchased premises should be conveyed to the same uses, etc., as his devised lands; & that the interest & produce of his said personal estate, which should from time to time arise & be made before & until the said money should be so invested, should be paid to the person who would be entitled, under the trusts of his will, to the rents & profits of the said premises if actually purchased, as an addition thereto:—*Held*: subject to the usual provisions for the payment of testator's debts & legacies, the tenant for life was entitled to the income, as from testator's death, of such parts of his personal estate as were at the time of his death, & had since remained in such investments as would have been recognised by the ct. as proper.

—*CALDECOTT v. CALDECOTT* (1842), 1 Y. & C. Ch. Cas. 312; 11 L. J. Ch. 158; 6 Jur. 232; 62 E. R. 903; *subsequent proceedings*, 1 Y. & C. Ch. Cas. 737.

*Annotations*.—*Reid. Anderson v. Read* (1874), 22 W. R. 527; *Thursby v. Thursby* (1875), L. R. 19 Eq. 395. *Mentd. Re McEuen, McEuen v. Phelps*, [1913] 2 Ch. 704.

580. ————]—Testator bequeathed his residuary personal estate, to trustees, in trust, with all convenient speed after his death, to sell such part or parts as they or the survivor of them, or the exors. or administrators of such survivor, or their or his assigns, should think proper, of any moneys in the funds, & also to call in, sell & convert into money all such parts of the rest of his general personal estate as should not consist of money, & out of his general personal estate & the moneys

forming part thereof & to arise thereby, to pay his debts, etc., & to invest the residue of the moneys to arise from his general personal estate which should remain after answering the purposes aforesaid, in the usual securities, & from time to time, to alter, at their or his discretion, as well the same stocks, funds & securities, as also such of the stocks, funds or securities being part of his personal estate, which they or he should not think proper to sell & convert into money; & to stand possessed of all the trust moneys, stocks, funds & securities which should be so purchased as aforesaid, & which should remain unconverted into money as aforesaid, in trust to pay the interest, dividends & annual produce thereof, as & when the same should be received, to pltf.

The residue of testator's estate, after payment of his debts, etc., consisted, in part, of sums of long annuities & bank & East India stock, which still remained unsold:—*Held*: pltf. was entitled to the income accrued on those sums, from testator's death.—*WREY v. SMITH* (1844), 14 Sim. 202; 60 E. R. 334.

581. ————]—Testator bequeathed all his money, securities for money, money in the funds, household furniture, cattle, & all other his personal estate & effects unto two trustees, upon trust to pay his debts & legacies, & subject to the payment of a legacy, to stand possessed upon the trusts after mentioned. He then devised his freehold estates to trustees, upon trust to permit his wife to reside at his house & to use the household furniture, plate, linen, & china therein for her life, & to "pay the rents & profits of his real estate," & "the interest, dividends & proceeds to arise from his money, & securities for money, money in the funds, & personal estate thereinbefore bequeathed" to her for life, & after her decease, to sell his real estate, & divide & pay the purchase-moneys; & pay, assign, or transfer his money & securities for money, money in the funds, & personal estate" unto his children. Testator possessed long annuities & leaseholds:—*Held*: (1) they ought to be converted into 3 per cents., & the widow was merely entitled to the dividends thereon; (2) a tenant for life of a residue was entitled during the first year to the dividends on so much 3 per cents. as would have been produced by the conversion of the property at the end of that year.—*MORGAN v. MORGAN* (1851), 14 Beav. 72; 51 E. R. 214.

*Annotations*.—*As to* (1) *Consd. Morley v. Mendham* (1856), 2 Jur. N. S. 998; *Holgate v. Jennings* (1857), 24 Beav. 623. *Distd. Yates v. Yates* (1860), 28 Beav. 637. *Consd. Re Llewellyn's Trust* (1861), 29 Beav. 171; *Re Pitcairn, Brandreth v. Colvin*, [1896] 2 Ch. 199. *Reid. Macdonald v. Irvine* (1878), 8 Ch. D. 101. *As to* (2) *Reid. Re Game, Game v. Young*, [1897] 1 Ch. 881. *Generally, Reid. Wearing v. Wearing* (1856), 23 Beav. 99; *Craig v. Wheeler* (1860), 29 L. J. Ch. 374; *Rowe v. Rowe* (1861), 29 Beav. 276; *Thursby v. Thursby* (1875), L. R. 19 Eq. 395; *Re McEuen, McEuen v. Phelps*, [1913] 2 Ch. 704.

582. ————]—Express gift of income—Share in leasehold premises.—Testator gave the residue of his estate upon trust to convert, with power to postpone conversion, & directed his trustees to pay the income of his residuary estate to his daughter for life. Testator was entitled to a share of the rents of leasehold premises in which at the time of his death he had an undivided interest:—*Held*: the gift of income included the income of testator's share of the leasehold premises while unconverted.—*Re ASTE, MOSSOP v. MACDONALD* (1918), 87 L. J. Ch. 660; 118 L. T. 433.

*Mesne rents of lands directed to be sold.*—*See EQUITY*, Vol. XX., pp. 375–377, Nos. 1124, 1134–1142.

*Property subject to trust for sale.*—*See SETTLEMENT*, Vol. XL., pp. 669–672, Nos. 2065–2089.

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**Effect of provision for postponement of conversion—Interest payable to tenant for life.]—**See EQUITY, Vol. XX., pp. 368–370, Nos. 1062–1074; EXECUTORS, Vol. XXIII., pp. 464, 465, Nos. 5358–5363.

**583.** ———.]—Testator was in trade in partnership with other persons for a term of years, under articles, by which the share of any partner dying was to be left in the concern till the expiration of the term, & then to be paid off by instalments, with interest & share of profits in the meantime. By his will he bequeathed all the residue of his real & personal estate to trustees, to get in, etc., with all convenient speed, & invest the moneys, & pay the interest or dividends to the widow for life, remainder to his children. A subsequent proviso in the will empowered the trustees to postpone any sale, etc., at their direction, & directed the rents & produce of any unsold part to go as the interest of the sales moneys would have gone if such part had been sold. The books were made up half yearly. The trustees did not get in the share in the partnership:—*Held*: the widow was entitled to 5 per cent. interest on the amount at which testator's stock-in-trade had stood in the books of the concern on the periodical stock taking next preceding his decease, from the day of his death up to the day of the periodical stock taking next succeeding his death, the widow was entitled to all the profits accruing on testator's share from such next succeeding stock taking up to the determination of the partnership, over & above interest.—*JOHNSTON v. MOORE* (1858), 27 L. J. Ch. 453; 31 L. T. O. S. 353; 4 Jur. N. S. 356; 6 W. R. 490.

*Annotations*:—*Distd.* *Browne v. Collins* (1871), L. R. 12 Eq. 588. *Consd.* *Rowlls v. Bebb*, *Re Rowlls*, *Walters v. Treasury Solicitor*, [1900] 2 Ch. 107. *Reid.* *Ibbotson v. Elam* (1865), L. R. 1 Eq. 188; *Cooper v. Laroche* (1869), 38 L. J. Ch. 591.

**584.** ———.]—Where testator left his residuary real & personal estate to trustees upon trust to convert & invest upon Govt. or real securities & the will authorised the trustees to postpone conversion so long as they should think fit:—*Held*: the estate consisting of unauthorised but not wasting securities, the tenant for life was entitled to the income of the fund in specie from testator's death.—*BULKELEY v. STEPHENS* (1863), 3 New Rep. 105; 10 L. T. 225

*Annotations*:—*Expld.* *Freman v. Whitbread* (1865), L. R. 1 Eq. 266. *N.F.* *Re Chaytor, Chaytor v. Horn*, [1905] 1 Ch. 233. *Reid.* *Bulkeley v. Stephens*, [1866] 2 Ch. 241.

**585.** ———.]—Testator, possessed of shares in several ships, bequeathed his personal estate to trustees, upon trust for sale & conversion, & to pay the income arising therefrom to his wife for life. The will contained a power for the trustees to postpone such sale & conversion "for so long as they may think fit," & a direction that the income arising from his unconverted personal estate should be paid & applied in the same manner as the income of the moneys produced by such conversion would be payable or applicable. The ships were not sold until two years after testator's death, & in the interval made several voyages, from which large profits resulted:—*Held*: such profits must be treated as income & not capital, & were, therefore, payable to the tenant for life.—*LEAN v. LEAN* (1875), 32 L. T. 305; 23 W. R. 484.

**586.** ———.]—Testator devised & bequeathed all his real & personal estate not by his will otherwise disposed of to trustees upon trust to sell & convert the same, with power to postpone conversion, as long as the trustees thought proper & to retain any investments subsisting at his death,

whether of the kind thereafter authorised or not, & out of the proceeds to pay debts & legacies, & at the discretion of the trustees to invest the residue & to stand possessed of the residuary trust moneys & the investments for the time being representing the same, thereafter called "the residuary trust funds," in trust to pay the income thereof to his wife during her life.

At the time of his death testator was possessed of preference & ordinary shares in a coalmining co. The ordinary shares, although not of a wasting character, were not authorised by the investment clause in the will. The trustees therefore sold some of them, & proposed to sell more on a favourable opportunity. They declined to pay to the widow in the meantime the full dividends on the ordinary shares thus retained:—*Held*: in the absence of any express or implied gift of the income pending conversion, the widow was entitled only to interest at 3 per cent. on the value of the ordinary shares at testator's death, & the rest of those dividends must be invested. This rule was well settled, & applied to unauthorised securities whether they were of a wasting character or not.—*Re CHAYTOR, CHAYTOR v. HORN*, [1905] 1 Ch. 233; 74 L. J. Ch. 106; 92 L. T. 290; 53 W. R. 251.

*Annotations*:—*Distd.* *Re Wilson, Moore v. Wilson*, [1907] 1 Ch. 394; *Re Inman, Inman v. Inman*, [1915] 1 Ch. 187. *Reid.* *Re Bates, Hodgson v. Bates* (1906), 23 T. L. R. 15; *Re Beech, Salnt v. Beech*, [1920] 1 Ch. 40.

**587.** ———.]—This was an adjourned summons to determine how the proceeds of a policy of insurance for £1,050, taken out on Mar. 25, 1844, should be dealt with. Testator, who was entitled to the policy, died on July 24, 1876, & after his death £140 was expended out of his estate in premiums. Testator's will was dated Apr. 3, 1876, & under it there were two tenants for life, & there were two remaindermen. There was a trust for sale & conversion, but the trustees had power to postpone conversion. The policy fell in on Feb. 13, 1891. It was argued on behalf of the tenants for life that after repaying the premiums the sum that would produce the amount received at 4 per cent. compound interest, calculated from one year from testator's death, was capital, & that the surplus was income, & belonged to the tenant for life.—*Re NASH, SWEET v. NASH* (1894), 38 Sol. Jo. 478.

**588.** ———.]—**Whether rule applicable.]—**The general rule of the ct. that interest must be calculated at 4 per cent. has not been altered. Interest on advances which have to be brought into hotchpot must still be paid at that rate.—*Re DAVY, HOLLINGSWORTH v. DAVY*, [1908] 1 Ch. 61; 77 L. J. Ch. 67; 97 L. T. 654, C. A. *Annotation*:—*Reid.* *Re Cooke, Randall v. Cooke*, [1916] 1 Ch. 480.

**589.** ———.]—**3 per cent.]—**In adjusting the rights as between tenant for life & remaindermen in respect of a reversionary interest which ought to have been but was not converted by trustees:—*Held*: interest should be calculated at the rate of 3 per cent.—*ROWLLS v. BEBB, Re ROWLLS, WALTERS v. TREASURY SOLICITOR*, [1900] 2 Ch. 107; 69 L. J. Ch. 502; 82 L. T. 633; 48 W. R. 562; 44 Sol. Jo. 448, C. A.

*Annotations*:—*Appld.* *Re Woods, Gabellini v. Woods*, [1904] 2 Ch. 4. *Consd.* *Re Baker, Baker v. Public Trustee*, [1924] 2 Ch. 271. *Reid.* *Re Hargreaves, Hargreaves v. Hargreaves* (1902), 86 L. T. 43; *Re Whiteford, Ingills v. Whiteford*, [1903] 1 Ch. 889; *Re Beech, Saint v.* [1920] 1 Ch. 40.

—*See, also*, No. 582, *ante*.  
**Wasting property & unauthorised investments.]—**See SETTLEMENTS, Vol. XL., pp. 674, 675, Nos. 2101–2122.

**590. — Value set on property—Interest from testator's death.]—**Principle of arrangement as to personal estate between the persons entitled for life & in remainder that the subject being an interest wearing out or capable of immediate sale, though future in enjoyment, shall be valued & the person entitled for life shall have interest upon the amount from the death of testator, in this instance a share in trade to be ascertained & paid at certain periods after his death.—*FEARNS v. YOUNG* (1804), 9 Ves. 549; 32 E. R. 716, L. C.

*Annotations:—Apld.* *Dimes v. Scott* (1828), 4 Russ. 195. *Consd.* *Johnston v. Moore* (1858), 27 L. J. Ch. 453. *Apld.* *Jackson v. Jackson* (1869), 20 L. T. 354. *Refd.* *Angerstein v. Martin* (1823), Turn. & R. 232; *Douglas v. Congreve* (1836), 1 Keen, 410; *Meyer v. Simonsen* (1852), 19 L. T. O. S. 337; *Bulkeley v. Stephens* (1863), 10 L. T. 225; *Stanley v. Hodgkinson* (1903), 73 L. J. Ch. 170.

**591. — — — — —.]—**By articles of partnership it was provided that the partners should carry out certain contracts, & that the partnership should continue until the contracts were completed, but that if either partner should die, then that his exors. should be bound by his obligations & that there should be no division of the profits till the completion of the contracts. One of the partners died, & by his will bequeathed all of his property upon trust after conversion & investment for his widow for life with remainder over. The contracts were not completed until six years after testator's death, when his share of the partnership assets was paid to the trustees.—*Held*: his widow was entitled to interest at 4 per cent. from his death on the value of his share in the partnership assets.—*JACKSON v. JACKSON* (1869), 20 L. T. 354; 17 W. R. 547.

**592. — — — — — Interest at 4 per cent.]—**General residuary bequest, including a leasehold farm, with the stock, to be converted into money as soon as conveniently may be, upon trust to pay the interest, etc., for life, & as to the capital for the children. The stock being considerably increased between the death in Apr. & the sale at Michaelmas, it was decreed, that the conversion was in a reasonable time; & the party entitled for life should have interest from the conversion; & as to premises, that from a defect of title could not be sold, that, being for the interest of all, that they should not be sold, a value should be set upon them, to carry interest at 4 per cent. from the death.—*GBSON v. BOTT* (1802), 7 Ves. 89; 32 E. R. 37, L. C.

*Annotations:—Distd.* *Mills v. Mills* (1835), 7 Sim. 501. *Consd.* *Douglas v. Congreve* (1836), 1 Keen, 410. *Refd.* *Angerstein v. Martin* (1823), Turn. & R. 232; *Taylor v. Clark* (1841), 1 Hare, 161; *Caldecott v. Caldecott* (1842), 1 Y. & C. Ch. Cas. 312; *Morgan v. Morgan* (1851), 14 Beav. 72; *Meyer v. Simonsen* (1852), 5 De G. & Sm. 723; *Thursby v. Thursby* (1875), L. R. 19 Eq. 395; *Re Woods, Gabellini v. Woods*, [1904] 2 Ch. 4; *Re Robbins, Robbins v. Legge*, [1906] 2 Ch. 648.

**593. — — — — —.]—**Residuary personal estate of testator, which, at the time of his death stood invested in securities not recognised by this ct., having been valued by the master as at the period of one year after testator's death, the ct. ordered the interest on the value so taken, not exceeding 4 per cent., to be paid to the tenant for life from testator's death.—*CALDECOTT v. CALDECOTT* (1842), 1 Y. & C. Ch. Cas. 337; 11 L. J. Ch. 414; 6 Jur. 1032; 62 E. R. 1094.

*Annotation:—Refd.* *Meyer v. Simonsen* (1852), 5 De G. & Sm. 723.

**594. — — — — —.]—**Testator gave the residue of his real & personal estate to trustees, upon trust, to pay or permit his widow to receive the income & profits; & after her death he gave the capital over. The will contained no direction as to the conversion of his estate. Part of testator's

estate consisted of £12,000, invested in a partnership. Under a stipulation in the deed of partnership the surviving partner gave a warrant of attorney to the exors. of testator, securing payment of the £12,000 by instalments of £1,500 a year, with interest at 5 per cent. on the unpaid balances:—*Held*: the rule laid down in *Howe v. Lord Dartmouth*, 7 Ves. 137, as applied to this case, required the trustees not to convert the property, but to set a value upon it, & to give the tenant for life 4 per cent. on the value, & to invest the residue of the surplus income, paying the income of these investments to the tenant for life, & appropriating the corpus to the remainderman.—*MEYER v. SIMONSEN* (1852), 5 De G. & Sm. 723; 21 L. J. Ch. 678; 10 L. T. O. S. 337; 64 E. R. 1316.

*Annotations:—Apld.* *Re Llewellyn's Trust* (1861), 29 Beav. 171. *Fold.* *Brown v. Gellatly* (1867), 2 Ch. App. 751. *Apld.* *Re Eaton, Daines v. Eaton* (1894), 70 L. T. 761; *Re Nicholson, Nicholson v. Nicholson*, [1895] W. N. 106; *Wentworth v. Wentworth*, [1900] A. C. 163; *Re Beech, Saint v. Beech*, [1901] 1 Ch. 40; *Re Evans, Will Trusts, Pickering v. Evans*, [1921] 2 Ch. 309. *Refd.* *Thursby v. Thursby* (1875), L. R. 19 Eq. 395; *Re Chancellor, Chanceller v. Brown* (1884), 26 Ch. D. 42; *Re Woods, Gabellini v. Woods*, [1904] 2 Ch. 4; *Re Oliver, Wilson v. Oliver*, [1908] 2 Ch. 74.

**595. — — — — —.]—**Where a part of testator's assets were so situated, that it could not be realised immediately without loss to the estate, & was producing 5 per cent., the tenant for life was held entitled, in the meanwhile, to 4 per cent. on the value.—*Re LLEWELLYN'S TRUSTS* (1861), 29 Beav. 171; 54 E. R. 592.

*Annotations:—Refd.* *Thursby v. Thursby* (1875), L. R. 19 Eq. 395; *Porter v. Baddeley* (1877), 5 Ch. D. 542.

**596. — — — — —.]—**Testator directed his exors., to convert his personal estate when & in such manner as they should see fit, & gave them power to sail his ships for the benefit of the estate, till they could be satisfactorily sold. He gave his residuary estate to tenants for life, with remainders over, & gave his exors. power to invest at their discretion, or allow to remain as then invested, all his funds in certain specified shares & securities. His ships gained considerable earnings after his death; & he had, at his decease, large sums invested in such shares & securities, as he had specified, & large sums invested in shares & securities of other descriptions, & not proper for the investment of trust moneys:—*Held*: the tenants for life were not entitled to the earnings of the ships as income; but they were entitled to interest at 4 per cent. on the value of the ships from testator's death.—*BROWN v. GELLATLY* (1867), 2 Ch. App. 751; 17 L. T. 131; 15 W. R. 1188, L. J.

*Annotations:—Apld.* *Cooper v. Laroche* (1869), 38 L. J. Ch. 591. *Distd.* *Fisher v. Gilpin* (1869), 38 L. J. Ch. 230. *Apld.* *Anderson v. Read* (1874), 22 W. R. 527. *Distd.* *Thursby v. Thursby* (1875), L. R. 19 Eq. 395. *Fold.* *Porter v. Baddeley* (1877), 5 Ch. D. 542. *Distd.* *Re Leonard, Theobald v. King* (1880), 43 L. T. 664; *Re Chancellor, Chanceller v. Brown* (1884), 26 Ch. D. 42. *Apld.* *Re Nicholson, Nicholson v. Nicholson*, [1895] W. N. 106; *Wentworth v. Wentworth*, [1900] A. C. 163. *Consd.* *Re Woods, Gabellini v. Woods*, [1904] 2 Ch. 4. *Refd.* *Lambert v. Lambert* (1872), 27 L. T. 59; *Loan v. Loan* (1875), 32 L. T. 305; *Gow v. Forster* (1884), 26 Ch. D. 672; *Re Thomas, Wood v. Thomas*, [1891] 3 Ch. 482; *Re Crowther, Midgley v. Crowther* (1895), 43 W. R. 571; *Re Chaytor, Chaytor v. Horn*, [1905] 1 Ch. 233; *Re Darnley, Clifton v. Darnley*, [1907] 1 Ch. 159; *Re Oliver, Wilson v. Oliver*, [1908] 2 Ch. 74; *Re Beech, Saint v. Beech*, [1901] 1 Ch. 40. *Montd.* *Hichens v. Hichens* (1876), 36 L. T. 8.

**597. — — — — —.]—**H., by his will, gave his property to trustees upon trust, to convert, or in their discretion to retain present investments. The estate was administered by the ct., & acting on the chief clerk's certificate, some of the investments were retained, & in particular several shares in the West Middlesex Water Works, which were shown to have paid a high dividend, & also to

*Sect. 9.—Objects of trusts: Sub-sect. 6, F. & G.; sub-sects. 7 & 8, A. & B.]*

have increased in value since the death of testator. On a question as to the apportionment of the dividends on these shares between a tenant for life & remaindermen:—*Held*: the tenant for life was only entitled to interest at 4 per cent. *per annum* on the value of the shares at the death of testator.—*FURLEY v. HYDER* (1873), 42 L. J. Ch. 626.

598. ———.—[—Testator gave the residue of his estate to his exors. upon trust to permit his wife to receive & take the rents, issues, profits & annual income thereof for her sole & separate use during her life, & after her death testator declared that the trustees of his will should hold all his residuary estate & the investments or income thereof in trust for his nephew absolutely. There was no trust for conversion & no investment clause. Part of the estate consisted of stocks in a gas co. The question was raised whether the gas stock should be sold, & the proceeds invested in New Consols; & whether testator's widow was entitled to retain the whole of the income of testator's estate which she had actually received & any accruing income of the gas stock:—*Held*: the tenant for life under a will could not take *in specie* the income of property which was of a perishable or wasting nature; in order to give the wife the income of the property as it stood, you must find something equivalent to a specific gift; there being no specific gift here, the rule in *Meyer v. Simonsen*, No. 594, *ante*, applied, & the trustees should be required not to convert the stocks, but set a value upon them, & give the tenant for life 4 per cent. upon the value.—*Re EATON, DAINES v. EATON* (1891), 70 L. T. 761; 10 T. L. R. 594.

**Money deposited on compulsory purchase of leases & reversions.]—See COMPULSORY PURCHASE OF LAND**, Vol. XI., pp. 247, 248, Nos. 1464-1490.

**Interest on legacy.]—See EXECUTORS**, Vol. XXIII., pp. 405-415, Nos. 4754-4873.

**Income of settled residue.]—See EXECUTORS**, Vol. XXIII., pp. 464, 465, Nos. 5358-5363.

#### *G. Adjustment of Burden and Losses between Capital and Income.*

*See SETTLEMENTS*, Vol. XL., pp. 681-700, Nos. 2172-2341.

**Fines & expenses on renewal.]—See LANDLORD & TENANT**, Vol. XXXI., pp. 84-87, Nos. 2278-2306.

**Rentcharges & annuities.]—See RENTCHARGES & ANNUITIES**, Vol. XXXIX., pp. 143-153, 158, 159, 172-174, Nos. 373-457, 505-517, 625-639.

———.]—*See SETTLEMENTS*, Vol. XL., pp. 693, 694, Nos. 2289-2297.

#### SUB-SECT. 7.—TRUST FOR MARRIED WOMEN.

**Effect of marriage on wife's property.]—See HUSBAND & WIFE**, Vol. XXVII., pp. 83-96.

**Disposition of property.]—See HUSBAND & WIFE**, Vol. XXVII., pp. 101-175.

**Effect of divorce or separation on wife's property.]—See HUSBAND & WIFE**, Vol. XXVII., pp. 96-101.

#### SUB-SECT. 8.—TRUSTS FOR CREDITORS.

##### *A. In General.*

**Compositions, schemes & deeds of arrangement.]—See BANKRUPTCY**, Vol. V., pp. 1056-1194.

599. **Trust for benefit of nephew—Subject to payment of debts—Right to maintenance.]—BUTLER'S (OF WOODHALL) CASE** (circa 1712), cited 1 Ves. Sen. 95; 27 E. R. 913, L. C.

*Annotations*:—*Apld.* *Revel v. Watkinson* (1748), 1 Ves. Sen. 93. *Reid. Havelock v. Havelock, Re Allan* (1881), 17 Ch. D. 807.

600. **Action by Incumbrancer—To establish rights & declare priority—Parties.]—Where estates have been conveyed to trustees in trust for such of the creditors of the grantor as should execute the conveyance, & a bill is filed by an incumbrancer, some of whose securities are prior, & others, subsequent to the trust deed, praying that his rights & interests under his securities may be established, & the priorities of himself & the other incumbrancers declared, all the creditors who have executed the conveyance, however numerous they may be, must be made parties to the suit.—*NEWTON v. EGMONT (EARL)* (1832), 5 Sim. 130; 58 E. R. 286.**

601. **Creditors claiming against deed—Under mortgage security—Not permitted to take advantage of deed.]—Debtor executed a deed, by which, after reciting that he was owner of the lease of his house of business, & of the fixtures & stock-in-trade & furniture, he purported to assign the property to trustees, in trust for the benefit of creditors, parties to the deed; & the deed contained a general release from the creditors of all claims against debtor. Certain creditors who had notice of the deed, & after such notice, made use of a mtge. security, which had been previously given them by debtor in respect of a debt due at the time of the execution of the deed, were not permitted to take advantage of the deed, after having claimed in opposition to it by asserting their title as mtgees. in respect of a debt prior to the execution of the trust deed.—*PERRETT v. LATREILLE* (1834), 3 L. J. Ch. 121.**

602. **Term included in property—Whether trustees entitled to disclaim.]—Qu.**: whether where a termor assigns his goods, estate & effects to trustees for the benefit of his creditors, whether the trustees have the same option of accepting or rejecting the term, with assignees of a bkpt.; & whether they can divest themselves of it without a formal disclaimer. But, although the assignment be sufficient to vest the term in the trustees unless disclaimed, & they do not disclaim, *assumpsit* for use & occupation cannot be maintained against them without proof that they have actually occupied. It is not sufficient for this purpose to prove that they placed persons temporarily upon the premises to take care of & sell goods which were part of the assigned property, & which were accordingly sold on the premises;

#### PART I. SECT. 9, SUB-SECT. 7.

**a. Trusts for protection of female beneficiaries—in case of marriage—Absolute enjoyment of property not to be interfered with by trusts longer than is necessary for protection of beneficiaries.]—Re JORDAN'S TRUSTS**, [1903] 1 I. R. 119.—IR.

#### PART I. SECT. 9, SUB-SECT. 8.—A.

**b. Charge of debts by testator.]—When particular property is given upon**

trust to pay a particular debt or debts the trustee has a new duty—not the ordinary duty of an exor. pay debts generally out of property generally, but a duty to apply a particular property to secure a particular debt; & there is a trust within the meaning of Limitation Act, s. 10.—*ANUND MOYE DANI v. GRISH CHUNDER MYRT* (1881), 1 L. R. 7 Calo. 772; 9 C. L. R. 327.—IND.

**c. What debts included in trust.]—**

A. being indebted, by debts which did not affect his real estates, conveyed by deed poll real estates, upon trust, to raise money "for the purpose of paying all debts due by him to any person whatsoever, & which then affected his said estates thereby conveyed." A. was then indebted upon bonds, with warrants, etc.; but no judgments had been entered:—*Held*: the trust included his bond debts, but not those of simple contract.—*DOUGLASS v.*



& that, under a mistake of the law, they paid rent to the landlord for the half year in which the assignment took place.—*How v. KENNETT* (1835), 3 Ad. & El. 659; 1 Har. & W. 391; 5 Nev. & M. K. B. 1; 4 L. J. K. B. 220; 111 E. R. 564.

*Annotations*:—*Consd.* *Lowe v. Ross* (1850), 5 Exch. 553; *White v. Hunt* (1870), L. R. 6 Exch. 32. *Refd.* *Prichard v. Timothy* (1866), 14 L. T. 443.

**603. Policy of insurance—Application of fund to maintain.]**—*LUCENA v. PARKES* (1849), 13 L. T. O. S. 41.

**604. Action to set aside deed—Parties—Creditors executing deed.]**—By a deed between A. of the first part, B. & C., stated to be creditors of A., of the second part, & the creditors of A. who should execute the deed, of the third part, A. assigned his property to B. & C., on trust to pay H. a sum of money in respect of a lien on some of the property, & to divide the residue among the creditors. B. never executed the deed, & his exors. filed a bill to set it aside. The bill alleged that B. had died directly after the date of the deed, that C. was a bkpt., that H. had not any lien, & had acted improperly in the matter, & that it was the interest of the creditors who had executed the deed that it should be set aside. The only debts were C., his assignees, & H.:—*Held*: one or more of the creditors who had executed the deed were necessary parties to the suit.—*GORE v. HARRIS* (1850), 20 L. J. Ch. 74; 17 L. T. O. S. 23; 15 Jur. 761.

**Payment of income tax.]**—*See INCOME TAX*, Vol. XXVIII., p. 70, Nos. 307, 371.

**Right of trustees to plead Statute of Limitations.]**—*See LIMITATION OF ACTIONS*, Vol. XXXII., pp. 508, 509, Nos. 1678–1886.

### B. Application of Fund.

Rights of creditors generally, *see* *BANKRUPTCY*, Vol. V., pp. 1110–1174.

**605. For what sum claim admitted—Subsequent debts—Trustees appointed to pay sum raised.]**—A term in trust to raise any sum not exceeding the £1,500 for payment of debts, he should owe at his death, & after borrows £1,000, & appoints trustees to pay that £1,000, & dies indebted to several others, yet the £1,000 to take place according to the appointment, & not to be divided amongst all creditors.—*SEYMOUR v. FOTHERBY* (1691), *Proc. Ch.* 44; 24 E. R. 23.

**606. — Debt barred by Statute of Limitations.]**—*Qu.*: where a trust is created for payment of debts, whether it lets in debts barred above statute.—*OUCHTERLONEY v. POWIS* (EARL) (1754), *Amb* 231; 27 E. R. 153.

*Annotation*:—*Consd.* *Burke v. Jones* (1813), 2 Ves. & B. 275.

**607. — Bond debt—Not beyond penalty.]**—A person conveyed estates to trustees upon trust to sell & apply the produce of sale in discharging all his bond debts, together with the interest then due, & to grow due for same, to the day of payment. A bond creditor claiming under this deed

amount of the penalty of the bond.—*HUGHES v. WYNNE* (1832), 1 My. & K. 20; 2 L. J. Ch. 28; 39 E. R. 588.

*Annotations*:—*Apld.* *Clowes v. Waters* (1852), 21 L. J. Ch. 840. *Refd.* *Matthews v. Keble* (1867), L. R. 4 Eq. 467.

**608. — — — — —.]**—Bond creditors are only entitled to prove for the amount of the penalties in their bonds.—*CLOWES v. WATERS* (1852), 21 L. J. Ch. 840; 16 Jur. 632; *sub nom.* *COLES v. WATERS*, 19 L. T. O. S. 371.

—*See, further, BANKRUPTCY*, Vol. V., pp. 1134, 1135, Nos. 9213–9216.

**609. Priorities—Bonds—Simple contract debts.]**—*WOOLSTONCROFT v. LONG* (1663), *Freem. Ch.* 175; 2 Eq. Cas. Abr. 458; 22 E. R. 1141; *sub nom.* *WOLESTONCROFT v. LONG*, 1 Cas. in Ch. 32; *sub nom.* *WOOLSTONCROFT v. LONG*, 3 Rep. Ch. 12.

**610. — — — — —.]**—A trust term is raised pay all debts equally, & the party dies indebted by bond & simple contract; the bond creditors may be paid part of their debts out of the personal estate, & shall nevertheless come in upon the trust term for the remainder, equally with the simple contract debts.—*CAR v. BURLINGTON* (COUNTS) (1713), 1 P. Wms. 228; 2 Eq. Cas. Abr. 529; 24 E. R. 364, L. C.

*Annotations*:—*Distd.* *Lloyd v. Williams* (1740), 2 Atk. 108. I apprehend the reporter [1 P. Wms. 228] has been deceived (LORD HARDWICKE, C.). *Consd.* *Barwell v. Parker* (1751), 2 Ves. Sen. 363; *Bath v. Bradford* (1754), 2 Ves. Sen. 587.

**611. — — — — —.]**—A debtor conveyed real & personal estate to a trustee for sale, with a declaration that the proceeds of the sale should be applied by the trustee in satisfaction & discharge of the several debts & sums of money mentioned in the schedule to the conveyance, “& now remaining justly due & owing” by debtor to the persons named in the schedule “according to the priority, nature & specialty of such debts respectively”:—*Held*: upon the construction of the whole instrument a bond debt mentioned in the schedule, with interest, the principal & interest not exceeding the penalty of the bond, was payable in priority to a simple contract debt mentioned in the schedule.—*PASSINGHAM v. SELBY* (1846), 2 Coll. 405; 63 E. R. 791.

**612. — Mortgage—Unsecured debts.]**—*POVYE'S CASE* (1680), *Freem. Ch.* 51; 2 Eq. Cas. Abr. 256; 22 E. R. 1052.

**613. Right to interest—Simple contract debts.]**—A debt by simple contract does not carry interest in its nature, nor will this ct. direct it to be paid (LORD HARDWICKE, C.).—*LLOYD v. WILLIAMS* (1741), 2 Atk. 108; *Barn. Ch.* 224; 26 E. R. 468, L. C.

*Annotations*:—*Mentd.* *Re Yates, Throckmorton v. Pike* (1907), 96 L. T. 758; *Re Walford, Kenyon v. Walford*, [1912] 1 Ch. 219.

**614. — — — — —.]**—(1) Under a trust term, by deed, to pay debts & legacies:—*Held*: simple contract debts did not carry interest.

(2) *Contra*, however, if by any deed in the nature

*ALLEN* (1842), 2 Dr. & War. 213; 1 Con. & Law. 567.—*IR.*

**d. Bequest of a legacy.]**—A. being seised of certain estates, devised them to trustees in trust for the “payment & discharge of the debts of his father”:—*Held*: this was a bequest of a legacy, & was not a trust for the benefit of the creditors whose debts were subsisting at the period of the death of the father.—*CAN v. O'CONNOR* (1851), 18 L. T. O. S. 11.—*IR.*

**PART I. SECT. 9, SUB-SECT. 8.—B.**  
**e. Priorities.]**—Trustee Act, R. S. O. 1914, c. 121, s. 63 (1), abolished all

priority among creditors in the administration of the estates of deceased persons; & any lien derived from an execution against the exor. of deceased placed in the hands of a sheriff, gives the execution creditors no priority over the other creditors. The assets of deceased become, in the hands of his representative, a trust for the benefit of the creditors; & this trust has, by virtue of that sect., priority over & prevails against any execution.—*Re WILLIAMSON, PENNELL v. McCUTCHION* (1917), 9 O. L. R. 413; 12 O. W. N. 154, 202; 36 D. L. R. 783.—*CAN.*

**f. —.]**—A., seised in fee of lands,

& possessed of a chattel lease, executed a settlement conveying both denominations to trustees, subject to a trust term of 500 years, to enable the trustees to raise £7,000, to pay debts mentioned in a schedule, & referred to as charges affecting the estates, & to which A. was liable, some being simple contract, others judgment debts:—*Held*: the creditors were entitled in equal priority with the party beneficially interested in the surplus of the property after the debts were paid, & the person claiming under the settlement could not displace them.—*GREENE v. STOREY* (1850), 2 Ir. Jur. 1.—*IR.*





the scheduled debts, & praying that his debt might be raised & paid out of such parts of those estates as should not be sold for payment of the scheduled debts, & that an account might be taken of the receipts & payments of the trustees, & for a receiver & an injunction to restrain the trustees from paying any part of the rents or produce of the estates to debtor. The trustees demurred, because the scheduled creditors who had executed the conveyance were not parties to the bill. Demurrer allowed.—*COCKER v. EGMONT (LORD)* (1833), 6 Sim. 311; 58 E. R. 610.

**625. — Who have not executed deed.]**—To a bill filed for carrying the trusts of a creditor's deed into execution, the scheduled creditors, who have not executed the deed, need not be parties.—*PROSSER v. EDMONDS* (1835), 1 Y. & C. Ex. 481; 160 E. R. 196.

*Annotations:—***Refd.** *Bruty v. Edmundson* (1915), 113 L. T. 1197. **Mentd.** *Wilson v. Short* (1848), 6 Hare, 366; *Cook v. Field* (1850), 15 Q. B. 460; *Cockell v. Taylor, Collett v. Preston, Preston v. Collett* (1852), 15 Beav. 103; *Radcliffe v. Anderson* (1860), E. B. & E. 819; *Dickinson v. Burrell, Stourton v. Burrell* (1866), L. R. 1 Eq. 337; *Bradlaugh v. Newdigate* (1883), 11 Q. B. D. 1; *Alabaster v. Harness*, [1895] 1 Q. B. 339; *Dawson v. G. N. & City Ry.*, [1905] 1 K. B. 260; *Fitzroy v. Cave*, [1905] 2 K. B. 364; *British Cash & Parcel Conveyors v. Lamson Store Service Co.*, [1908] 1 K. B. 1006; *Befries v. Milne*, [1913] 1 Ch. 98; *Oram v. Huff*, [1913] 1 Ch. 259; *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251; *Neville v. London Express Newspaper*, [1919] A. C. 368; *Ellis v. Torrington*, [1920] 1 K. B. 399.

**626. — —.]**—*GOODALL v. WING* (1843), 1 L. T. O. S. 251.

**627. — Debtor—Where ultimate trust for debtor.]**—*BEDFORD v. GATES*, No. 622, *ante*.

**628. — —.]**—*BATEMAN v. MARGERISON*, No. 623, *ante*.

**629. — Personal representative of debtor.]**—*BATEMAN v. MARGERISON*, No. 623, *ante*.

**630. — Whether all trustees necessary parties.]**—Parties to bill by creditors against trustees for sale.—*ROUTH v. KINDER* (1789), 3 Swan. 158; 36 E. R. 810.

**631. — Settlor.]**—To a suit for the execution of a trust, created for the benefit of plffs. & other specified creditors, against the trustees, the fund having been brought into ct., the person who created the trust, or his personal representative, is a necessary party.—*KIMBER v. ENSWORTH* (1842), 1 Hare, 293; 11 L. J. Ch. 151; 6 Jur. 105; 66 E. R. 1043.

**632. — Action by trustees—Cestuis que trust not necessary parties.]**—In a suit by the trustees of a composition deed to compel the assignor to perfect the transfer of a portion of the trust property the *cestuis que trust* are not necessary parties, but a purchaser to whom the trustees had contracted

to sell the property in question is a necessary party.—*ALEXANDER v. CANA* (1847), 1 De G. & Sm. 415; 63 E. R. 1129.

**633. — Trust for creditors of Incumbrancers—Provision excluding creditors from enforcing trust.]**—*COSSER v. RADFORD* (1863), 1 De G. J. & Sm. 585; 46 E. R. 232, L. J.J.

*Annotations:—***Refd.** *Johns v. James* (1878), 8 Ch. D. 744; *Re Parsons, Stockley v. Parsons* (1890), 45 Ch. D. 51.

**634. Form of decree.]**—(1) Where a trust is created by deed for the payment of debts; if a bill is filed by one of the creditors to enforce the payment of his debt; that purpose can only be effected by the general execution of the trust. The decree ought to direct such execution & an inquiry as to all the debts owing & payable under the trust, & that they should be paid according to their priorities.

(2) A decree for payment of the debt of one creditor, under a deed of trust, which provides for the payment of other creditors is erroneous. So if the bill, stating A. to have been the survivor of the trustees named in the deed, makes the heir of A. a party to the suit, as such supposed survivor & that allegation proves to be false, the decree made upon such state of the pleadings is erroneous.

(3) A debt by simple contract does not carry interest, because provision for its discharge is made by a deed of trust; such a deed *per se* does not import contract or trust for the payment of interest, especially where the creditors have not signed the deed, & no agreement is made to charge the land & discharge the person.—*HAMILTON v. HOUGHTON* (1820), 2 Bli. 169; 4 F. R. 290.

*Annotations:—***Generally.** **Refd.** *Bateman v. Margerison* (1853), 16 Beav. 477. **Mentd.** *Colclough v. Sterum* (1821), 3 Bli. 181; *White v. Parnter* (1829), 1 Knapp, 179.

**635. Stay of proceedings—Decree for execution of trusts in Irish court.]**—Trustees for creditors, after a decree for the execution of the trusts, restrained from proceeding in a suit in the Ct. of Ch. in Ireland, having the same objects.—*HARRISON v. GURNEY* (1821), 2 Jac. & W. 503; 37 E. R. 743.

*Annotation:—***Refd.** *Carron Iron Co. v. MacLaren* (1855), 5 H. L. Cas. 416.

## SECT. 10.—CONSTRUCTION OF TRUSTS.

### SUB-SECT. 1.—IN GENERAL.

**636. According to intention of parties.]**—The case is one of trust & not of legacy, & a trust is expounded according to the intent of the parties.—*PAWLET (LADY) v. PAWLET (LORD)* (1685), 2 Rep.

## PART I. SECT. 9, SUB-SECT. 8.—C.

**631 i. Parties to action for enforcement—Settlor.]**—*FROST v. KERR* (1874), 2 Pug. 338.—CAN.

**g. — Creditor.]**—In a suit against a trustee to carry out the trusts of a deed for the benefit of creditors, a payment to plff. was proved by the evidence of the trustee only. Although this was considered sufficient to discharge the estate from liability in respect of this sum, still he could not thus discharge himself from liability to plff.—*WRIGHTMAN v. HELLIWELL* (1867), 13 Gr. 330.—CAN.

**h. — —.]**—Where a trust is created by deed for the payment of debts, if a bill is filed by one of the creditors to enforce the payment of his debt; the purpose can only be effected by the general execution of the trust.—*HAMILTON v. HAUGHTON* (1820), 2 Bli. N. S. 169.—IR.

**k. — —.]**—*OLDHAM v. WILKINS* (1838), 1 I. Eq. R. 59.—IR.

**l. — —.]**—By an agreement between A. of the one part & B. & C. of the other part, it was provided that in consideration of the conveyance by A. to B. & C. of his estate, they should pay his debts. A. made the conveyance & B. & C. paid certain debts. In an action by D. a creditor of A. prior to the conveyance to B. & C. claiming payment from B. & C. of the debt originally due by A.:—**Held:** a trust was created which was enforceable by D.—*JERRETT v. JERRETT* (1906), 9 Nfld. L. R. 177.—NFLD.

**m. — —.]**—*Of joint partner—Right to claim against partnership estate.]*—*SEATON v. PROWSE* (1856), 4 Nfld. L. R. 112.—NFLD.

## PART I. SECT. 10, SUB-SECT. 1.

**636 i. According to intention of parties.]**—By the use of no form of words can a trust be created contrary to the real intention of the persons alleged to have created it.—**STAMP**

**DUTIES COMR. (QUEENSLAND) v. JOLLIFFE** (1920), 28 C. L. R. 178.—AUS.

**636 ii. —.]**—Where strict conveying language with a definite legal meaning is used in a deed creating a trust of an equitable estate, a ct. of equity must give effect to that meaning notwithstanding that a contrary intention is apparent from reading the deed as a whole.—*SEXTON v. HORTON*, [1926] Angus L. R. 373.—AUS.

**636 iii. —.]**—*McKENZIE v. McKENZIE*, [1925] 1 D. L. R. 373; 56 O. L. R. 247.—CAN.

**636 iv. —.]**—*PLUNKETT v. MANSFIELD* (1845), 2 Jo. & Lat. 344.—IR.

**636 v. —.]**—*Re BAYLEY'S ESTATE &c.* p. O'CONNELL (1863), 16 I Ch. R. 215; 16 Ir. Jur. 398.—IR.

**636 vi. —.]**—*KEOGH v. M'GRATT* (1860), 5 L. R. Ir. 478.—IR.

**633 vii. —.]**—*Re CROSS'S TRUSTS, CROSS v. CROSS*, [1915] 1 I. R. 304.—IR.

Sect. 10.—Construction of trusts: Sub-sects. 1 & 2.]

Ch. 286; 1 Eq. Cas. Abr. 267; 1 Vern. 321; 21 E. R. 680; *affd.*, 14 Lords Journals, 87, H. L.; *sub nom.* PAULETT'S (LORD) CASE, Freem. Ch. 93; *sub nom.* PAULETT'S CASE, 2 Vent. 366.

**Annotations:—***Refd.* Rivers v. Derby (1688), 2 Vern. 72; Harrison v. Buckle (1719), 1 Stra. 238; Harvey v. Aston (1737), 1 Atk. 361; Hall v. Terry (1738), 1 Atk. 502; Prowse v. Abington (1738), West temp. Hard. 312; Lowther v. Condon (1741), 2 Atk. 130; Nicholls v. Judson (1742), 2 Atk. 300; A.-G. v. Milner (1744), 3 Atk. 112; Sherman v. Collins (1745), 3 Atk. 319; Godwin v. Munday (1779), 1 Bro. C. C. 191; Remnant v. Hood (1860), 1 L. T. 423; Davies v. Huguenin (1863), 1 Hem. & M. 730; Bellairs v. Bellairs (1874), L. R. 18 Eq. 510; Henty v. Wray (1882), 21 Ch. D. 332. *Mentd.* Smith v. Smith (1688), 2 Vern. 92; Yates v. Phetiphal (1700), 2 Vern. 416; King v. Withers (1735), Cas. temp. Talb. 117; Whaley v. Cox (1737), 2 Eq. Cas. Abr. 519; Hutehins v. Foy (1740), 2 Com. 716; Hodgson v. Itawson (1747), 1 Ves. Sen. 44; Tunstall v. Brachen (1753), Amb. 167; Manning v. Herbert (1769), Amb. 575.

**637. — If not inconsistent with rules of law & equity.**—(1) J. devised his real estate to trustees & their heirs, to the use of them & their heirs, upon several trusts thereafter mentioned. These words are declaratory of his intention, that the legal estate so given, should be used to support all these trusts & limitations after declared, part of which were to the after-born sons of J. II., & the ct. made such a construction as supported the intention, being of opinion it was not inconsistent with the rules of law & equity.

(2) Cts. of equity have given the same power to *cestui que trusts* as to alienation, as if it was an use executed.—HOPKINS v. HOPKINS (1739), 1 Atk. 581; West temp. Hard. 606; 26 E. R. 365, L. C.

**Annotations:—***As to* (1) *Refd.* Morrice v. Langham (1840), 11 Sim. 260; Lyddon v. Ellison (1854), 21 L. T. O. S. 123. *Generally.* *Refd.* Gibson v. Montfort (1750), 1 Ves. Sen. 485; Portsmouth v. Effingham (1750), 1 Ves. Sen. 430; Sherrard v. Harborough (1753), Amb. 165; Gale v. Gale (1789), 2 Cox, Eq. Cas. 136; Vincent v. Stansfeld, Habergam v. Vincent (1793), 4 Bro. C. C. 353; Thellusson v. Woodford (1798), 4 Ves. 227; Stanley v. Stanley (1809), 16 Ves. 491; Cholmondeley v. Clinton (1821), 4 Bl. 1; Doe d. Harris v. Howell (1830), 8 L. J. O. S. K. B. 123; Bective v. Hodgson (1864), 10 H. L. Cas. 656; *Re* Finch, Abbiss v. Burney (1881), 17 Ch. D. 211; *Re* Scott, Scott v. Scott, [1911] 2 Ch. 374; *Re* Willis, Crossman v. Kirkaldy, [1917] 1 Ch. 365; *Re* Conyngham, Conyngham v. Conyngham, [1921] 1 Ch. 491. *Mentd.* Doe d. Morris v. Underdown (1741), Willis, 293; Robinson v. Robinson (1751), 2 Ves. Sen. 225; Doe v. Fonnoreau (1780), 2 Doug. K. B. 487; Hodgson v. Ambrose (1780), 1 Doug. K. B. 337; Church v. Mundy (1808), 15 Ves. 396; Tregonwell v. Sydenham (1815), 3 Dow. 194; Vanderplank v. King (1843), 3 Hare, 1; East v. Twyford (1853), 4 H. L. Cas. 517; Lambard v. Peach (1859), 4 Drew. 553; D'Eyncourt v. Gregory (1864), 34 Beav. 36; Edgeworth v. Edgeworth (1869), 17 W. R. 714; Thellusson v. Liddard, [1900] 2 Ch. 635; *Re* Mortimer, Gray v. Gray (1905), 71 L. J. Ch. 745.

**638. — If not against public policy.**—(1) The intention of a person creating a trust chiefly governs where not against good policy.

(2) An use & a trust may essentially be looked upon as two names for the same thing (LORD MANSFIELD, C.J.).

(3) There can be no trust where there is not a legal estate created co-extensive with it (CLARKE, J.R.).

(4) When once a trust became the object of

equity, the same governing principles were observed in trusts as before in uses.

The analogy between uses & trusts must be confined to those cases where they are considered as distinct from the legal estates; in other cases they both fall within the rules of law.—BURGESS v. WHEATE, A.-G. v. WHEATE (1759), 1 Eden, 177; 1 Wm. Bl. 123; 28 E. R. 652.

**Annotations:—***Generally.* *Refd.* Dolder v. Bank of England (1805), 10 Ves. 352; Cholmondeley v. Clinton (1820), 2 Jac. & W. 1; Doe d. Shelley v. Edlin (1836), 4 Ad. & El. 582; Taylor v. Haygarth (1844), 14 Sim. 8; Onslow v. Wallis (1849), 1 Mac. & G. 506; Cox v. Parker (1856), 23 L. J. Ch. 873; Barrow v. Wadkin (1857), 24 Beav. 1; Brookman v. Smith (1871), L. R. 6 Exch. 291. *Mentd.* Middleton v. Spicer (1780), 1 Bro. C. C. 201; Barclay v. Russell (1797), 3 Ves. 424; Craufurd v. Hunter (1798), 8 Term Rep. 13; Williams v. Lonsdale (1798), 3 Ves. 752; Mackreth v. Symmons (1808), 15 Ves. 329; Gordon v. Gordon (1821), 3 Swan. 400; Langley v. Sneyd (1822), 1 L. J. O. S. Ch. 14; A.-G. v. Leeds (1833), 2 My. & K. 343; Downe v. Morris (1844), 3 Hare, 394; Davall v. New River Co. (1849), 3 De G. & Sm. 394; Beale v. Symonds (1853), 16 Beav. 406; Wythes v. Lee (1853), 3 Drew. 396; Haywood v. Cope (1858), 25 Beav. 140; Masulpatam v. Cavalry Vencata Narrainapah (1861), 8 Moo. Ind. App. 529; Sweeting v. Sweeting (1863), 3 New Rep. 240; Delacherois v. Delacherois (1864), 4 New Rep. 501; *Re* Gosman (1880), 15 Ch. D. 47; *Re* Van Hagan, Spelling v. Rochfort (1880), 16 Ch. D. 18; Bradlaugh v. Clarke (1883), 8 App. Cas. 354; Gallard v. Hawkins (1884), 27 Ch. D. 298; *Re* Bond, Panes v. A.-G. (1900), 82 L. T. 612; Talbot v. Jevors, [1917] 2 Ch. 363.

**639. —**—J.—AUSTEN v. TAYLOR, No. 534, *ante*.

**640. —**—Expressed or implied.]—STANDING v. BOWLING, No. 862, *post*.

**641. —**—By a settlement dated Dec. 14, 1852, S. appointed lands after her death to the use of trustees, their heirs & assigns, upon trust that the trustees should secure the rents, & after payment of outgoings apply the residue to the maintenance of A. during her minority & after her attainment of the age of twenty-one to permit her to use & occupy the premises & secure the rents thereof during her life for her separate use & after the death of A. to the use of the children of A. for such interest or shares as she should by deed appoint, & in default of appointment to the use of the children of A. as tenants in tail in equal shares with cross-remainders between them, & in default of such issue to the use of certain other persons. By deed poll dated Dec. 3, 1896, A. appointed that the trustees of the settlement should from & after her death stand possessed "of the trust funds & property" in trust for her four sons "in equal shares," without proper words of limitation. The settlement consisted of lands & money, then invested in stocks, upon trust for purchase of land. A question having arisen as to whether the appointment passed the fee simple or only the life interest to the four sons:—*Held*: words of limitation were not absolutely indispensable in grants of an equitable fee simple, because the estate granted depends upon the intention as expressed in the whole deed, & in this case the fee simple in the realty passed because it was unlikely that the appointer intended to grant the absolute interests in the stocks & only the life interest in the realty.—*Re* NUTT'S SETTLEMENT, McLAUGHLIN v. McLAUGHLIN, [1915] 2 Ch. 431; 84 L. J. Ch. 877; 113 L. T. 914; 59 Sol. Jo. 717.

as a perpetual inheritance for the heirs of such property:—*Held*: as there was no restriction against alienation & no clear expression of intention to create a *fidei commissum*, no *fidei commissum* had been created.—*SCHOEMAN v. REGISTRAR OF DEEDS*, [1918] T. P. D. 11.—S.A.F.

**6401. —**—Express or implied.]—MACKENZIE v. DEVONSHIRE (DUKE) (1896), 23 R. (Ct. of Sess.) (H. L.) 32; 33 Sc. L. R. 628; 4 S. L. T. 12.—SCOT.

**636 viii. —**—J.—MACLEAN & GRAHAM v. SMITH & MACKINTOSH, [1927] N. I. 109.—IR.

**636 ix. —**—J.—BROTCHIE v. STEWART (1889), 7 Macph. (Ct. of Sess.) 1031; 41 Sc. Jur. 583.—SCOT.

**636 x. —**—J.—BARR'S TRUSTEES v. BARR'S TRUSTEES (1891), 18 R. (Ct. of Sess.) 541; 28 Sc. L. R. 387.—SCOT.

**636 xi. —**—J.—M'CALL'S TRUSTEES v. MURRAY (1901), 3 F. (Ct. of Sess.) 380; 38 Sc. L. R. 292; 8 S. L. T. 299.—SCOT.

**636 xii. —**—J.—*Re* STRAUSS (1894), 11 S. C. 205.—S.A.F.

**636 xiii. —**—J.—DE JAGER v. DE JAGER'S ESTATE, (1907), 25 S. C. 703; 18 C. T. R. 811; (1909), 3 Buch. A. C. 347.—S.A.F.

**636 xiv. —**—J.—SAMARADIWAKARA v. DE SARAM, [1911] App. D. 465.—S.A.F.

**636 xv. —**—J.—Testator bequeathing landed property to his children stipulated that the property should remain from generation to generation

**642. By same rules as legal estate.]—**Trusts & legal estates are to be governed by the same rules, is a maxim which has obtained universally; it is so in the rules of descent, as in Gavelkind & Borough English lands, there is a *possessio fratris* of a trust, as well as of a legal estate; the like rules in limitations, & also of barring entails of trusts, as of legal estates. . . . There is no exception out of this general rule, nor indeed is there any reason there should; & it would be impossible to fix the boundaries, & show how far, & no further, it ought to go (JEKYLL, M.R.).—**BANKS v. SUTTON** (1732), 2 P. Wms. 700; 24 E. R. 922.

**Annotations:—****Consd.** *Buchanan v. Harrison* (1861), 1 John. & H. 662. **Refd.** *Burgess v. Wheate, A.-G. v. Wheate* (1759), 1 Eden, 177; *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1. **Mentd.** *Godwin v. Winsmore* (1742), 2 Atk. 525; *Curtis v. Curtis, Day v. Leman* (1789), 2 Bro. C. C. 620; *Smith v. Adams* (1854), 5 De G. M. & G. 712; *Meek v. Chamberlain* (1881), 8 Q. B. D. 31.

**643. —[—]**—**GLENORCHY (LORD) v. BOSVILLE**, No. 531, *ante*.

**644. —[—]**—**STANLEY v. LENNARD**, No. 533, *ante*.

**645. —[—]**—The same construction ought to be put upon words of limitation in cases of trusts & of legal estates, except where the limitations are imperfect, & something is left to be done by the trustees.—**WRIGHT v. PEARSON** (1758), 1 Eden, 119; *Amb. 358*; 2 Keny. 361; 28 E. R. 629.

**Annotations onsd.** *Green v. Wood v. Verdon* (1854), 1 K. & J. 74. **Refd.** *King v. Burchell* (1759), 1 Eden, 424; *Jones v.*

**646. —[—]**—**BURGESS v. WHEATE, A.-G. v. WHEATE**, No. 638, *ante*.

**647. —[—]**—An equitable limitation, by way of trust executed, now has the same construction as a legal limitation.—*Re WHISTON'S SETTLEMENT, LOVATT v. WILLIAMSON*, [1894] 1 Ch. 661; 63 L. J. Ch. 273; 70 L. T. 681; 42 W. R. 327; 38 Sol. Jo. 263; 8 R. 175.

**Annotations:—****Consd.** *Re Irwin, Irwin v. Parkes*, [1904] 2 Ch. 752. **Apld.** *Re Bostock's Settlement, Norrish v. Bostock*, [1921] 2 Ch. 449. **Refd.** *Re Tringham's Trusts, Tringham v. Greenhill*, [1841] 2 Ch. 487; *Re Gillies' Settlement, Archer v. Penney*, [1917] 2 Ch. 205. **Mentd.** *Dearberg v. Letchford* (1895), 72 L. T. 489.

**648. Absence of words of limitation.]—**If land be given to a man without the word heirs, & a trust be declared of that estate, & it can be satisfied by no other way but by the *cestui que trust*'s taking an inheritance, it has been construed that a fee passes to him even without the word heirs (LORD HARDWICKE, C.).—**VILLIERS v. VILLIERS** (1740), 2 Atk. 71; 26 E. R. 444, L. C.

**Annotations:—****Refd.** *Hodsell v. Bussell* (1739), 9 Mod. Rep. 236. **Mentd.** *Tottil v. Pitt* (1770), 2 Dick. 432; *Munn v. Godbold* (1825), 3 Bing. 292.

**649. —[—]**—One lease for lives to the lessee & her heirs, & another to her & her exors., *qu.*: as to the effect in equity of a declaration of trust for A. simply, but, if the leases were merely renewals by a guardian, the trust must follow the actual interest of the infant, viz. in one estate to the heir, in the other to the exor.—**MYNER v. HAREWOOD (LORD)** (1811), 18 Ves. 259; 34 E. R. 315, L. C.

**Annotations:—****Refd.** *Davies v. Davies* (1870), L. R. 9 Eq. 468. **Mentd.** *Fitzroy v. Howard* (1828), 3 Russ. 225;

**642 i. By same rules as legal estate.]—****ADAMSON v. ADAMSON** (1889), 17 O. R. 407, CAN.

**648 i. Absence of words of limitation.]**—When lands are given to trustees & their heirs in trust for A. the *cestui que trust* takes the absolute interest, though there are no words of limitation on & in the declaration of trust as to him.—**MALCOLMSON v. MALCOLMSON** (1851), 17 L. T. O. S. 44.—**IR.**

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**648 ii. —[—]**—A limitation in a deed of an equitable estate without words of limitation confers the equitable fee, where a sufficient indication is found on the face of the deed that an estate in fee simple is intended to pass.—*Re MURPHY & GRIFFIN'S CONTRACT*, [1919] 1 I. R. 187.—**IR.**

**n. Surrounding circumstances considered.]—**A.-G. of NOVA SCOTIA v. AXFORD, SMITH & ZINCK (1885), 13

*Field v. Moore, Field v. Brown* (1855), 7 De G. M. & G. 691; *Helps v. Clayton* (1864), 17 C. B. N. S. 553; *Jarratt v. Aldam* (1870), L. R. 9 Eq. 463.

**650. —[—]**—Where testator gave real estates to trustees in fee in trust for three children, but added no words of inheritance to the gift of the interest of the *cestui que trust*:—*Held*: they took trust estates in fee.—**MOORE v. CLEGHORN** (1848), 10 Beav. 423; 17 L. J. Ch. 400; 13 L. T. O. S. 85; 12 L. T. O. S. 265; 12 Jur. 591; 50 E. R. 645, L. C.

**Annotations:—****Disid.** *Holliday v. Overton* (1852), 15 Beav. 480. **Consd.** *Smith v. Smith* (1861), 11 C. B. N. S. 121; *Yarrow v. Knightly* (1878), 8 Ch. D. 736. **Refd.** *Doe d. Kimber v. Cafe* (1852), 7 Exch. 675; *Re Pollard's Estate* (1863), 3 De G. J. & Sm. 541; *Oakley v. Wood* (1808), 37 L. J. Ch. 28; *Maden v. Taylor* (1876), 45 L. J. Ch. 569; *Cuthbert v. Robinson* (1882), 51 L. J. Ch. 238; *Re Jones, Last v. Dobson*, [1915] 1 Ch. 246.

**651. —[—]**—The rule, that the estate of the *cestui que trust* is commensurate with that given to the trustees; is inapplicable to limitations in a deed.

Where an estate was limited to trustees in fee, but the trust in favour of the *cestuis que trust* wanted the ordinary words of inheritance:—*Held*: they took life estates only.—**HOLLIDAY v. OVERTON** (1852), 15 Beav. 480; 21 L. J. Ch. 769; 19 L. T. O. S. 211; 16 Jur. 346; 51 E. R. 623; *on appeal, sub nom. HALLIDAY v. OVERTON*, 20 L. T. O. S. 12, L. J. J.; *previous proceedings*, 14 Beav. 467.

**Annotations:—****Consd.** *Re Irwin, Irwin v. Parkes*, [1904] 2 Ch. 752; *Re Tringham's Trusts, Tringham v. Greenhill*, [1904] 2 Ch. 487. **Refd.** *Lucas v. Brandreth* (No. 2) (1860), 28 Beav. 274; *Osborn v. Bellman* (1860), 3 L. T. 265; *Re Whistons Settlement, Lovatt v. Williamson*, [1894] 1 Ch. 661; *Re Hudson, Kuhne v. Hudson* (1895), 72 L. T. 802; *Re Bostock's Settlement, Norrish v. Bostock*, [1921] 2 Ch. 469.

**652. —[—]**—In the case of a gift to trustees of an estate in fee, with a direction that they are to hold it to the use of the *cestuis que trust*, without limiting it to any special estate in the subject of the trust, the whole interest of the trustees passes to the *cestui que trust*.—**DRAYCOTT v. WOOD** (1850), 28 L. T. O. S. 196; *on appeal*, 5 W. R. 158, L. C.

**Annotation:—****Refd.** *Smith v. Spencer* (1856), 29 L. T. O. S. 59.

—[—]**See, also, REAL PROPERTY**, Vol. XXXVIII, pp. 668, 669, Nos. 107–116; **SETTLEMENTS**, Vol. XL., pp. 634–636, Nos. 1741, 1752; **WILLS**.

**Executory trusts.]—***See* Sub-sect. 2, *post*.

## SUB-SECT. 2.—EXECUTORY TRUSTS.

**653. Construed according to intention.]—**In matters executory, as in case of articles, “or a will, directing a conveyance, where the words of the articles or will were improper, or informal, that *et.* would not direct a conveyance, according to such improper or informal expressions in the articles or will, but would order the conveyance or settlement to be made in a proper & legal manner, so as might best answer the intent of the parties (LORD COWPER, C.).—**STAMFORD (EARL) v. HOBART** (1710), 3 Bro. Parl. Cas. 31; 1 E. R. 1157, H. L.

**Annotations:—****Consd.** *Papillon v. Voice* (1728), Kel. W. 27; *Glenorchy v. Bosville* (1733), *Cas. temp. Talb.* 3. **Apld.** *Hopkins v. Hopkins* (1738), 1 Atk. 581. **Consd.** *Roberts v. Dixwell* (1738), 1 Atk. 607; *Baskerville v. Baskerville*

S. C. R. 294.—**CAN.**

## PART I. SECT. 10, SUB-SECT. 2.

**653 i. Construed according to intention.]—**In an executory trust, a *ct.* of equity is sometimes obliged to depart from the words of a will, in order to direct a conveyance to be made, which will answer the intention of testator.—**STNGE v. HALES** (1814), 2 Ball. & B. 507.—**IR.**

**Sect. 10.—Construction of costs: Sub-sect. 2. Sect. 11: Sub-sects. 1 & 2. Sect. 12: Sub-sect. 1.]**

(1741), 2 Atk. 279; *Bagshaw v. Spencer* (1748), 1 Ves. Sen. 142; *Dodson v. Hay* (1791), 3 Bro. C. C. 405. *Apld.* *Lyddon v. Ellison* (1854), 19 Beav. 563; *Sackville-West v. Holmesdale* (1870), L. R. 4 H. L. 543.

**654. ———.]—PAILLON v. VOICE, No. 530, ante.**

**655. ———.]—**A ct. of equity should give a construction to an executory covenant of this kind, agreeable to what would have been the direction of a conveyancer, consulted by the party; informed that he had settled his real estates in strict settlement, & had leasehold estates, which he wished to have tied up, as far as the rules of law would admit. If he does not express his intention distinctly the ct. cannot act. If he will be his own conveyancer, & create the estate, the ct. has no jurisdiction to alter that estate, so created by the party himself; but upon such a covenant as this the ct. has jurisdiction, & it is reasonable that the intention shall be executed, when the ct. can see it (*per Cur.*).—*LINCOLN (COUNTS) v. NEWCASTLE (DUKE)* (1806), 12 Ves. 218; 33 E. R. 84, 11 L. L.; *varying S. C. sub nom. NEWCASTLE (DUKE) v. LINCOLN (COUNTS)* (1797), 3 Ves. 387, L. C.

*Annotations:—Distd. Ware v. Polhill* (1805), 11 Ves. 257. *Consd. Jervoise v. Northumberland* (1820), 1 Jac. & W. 559. *Expld. Ibbetson v. Ibbetson* (1840), 5 My. & Cr. 26. *Distd. Audsley v. Horn* (1859), 1 De G. F. & J. 226. *Consd. Scarsdale v. Curzon* (1860), 1 John. & H. 40. *Refd. Carr v. Erroll* (1808), 14 Ves. 478; *Burrell v. Crutchley* (1809), 15 Ves. 544; *Tollemache v. Coventry* (1834), 8 BH. N. S. 547; *Bankus v. Le Despencer* (1840), 10 Sim. 576; *Dungannon v. Smith* (1846), 12 Cl. & Fin. 546; *Rowland v. Morgan* (1848), 6 Hare, 463; *Egerton v. Brownlow* (1853), 4 H. L. Cas. 1; *Cox v. Sutton* (1856), 25 L. J. Ch. 846; *Holmesdale v. West* (1866), L. R. 3 Eq. 474; *Shelley v. Shelley* (1868), L. R. 6 Eq. 540; *Re Harcourt, Portman v. Portman*, [1921] 2 Ch. 491. *Mentd. Martell v. Holloway* (1872), L. R. 5 H. L. 532.

**656. ———.]—**(1) The general intent of testator in creating an executory trust for a settlement of his property, not any strictly technical meaning attached to the words he has used, is to govern the preparation of the settlement.

(2) The manner of executing an executory trust must be guided by the object of the author of the trust, provided such object is one which can be legally effectuated.

(3) There is no difference between the construction to be put on an executory trust created by marriage articles, & on an executory trust created by a will, except so far as the former, by its very nature, furnishes more emphatically the means of ascertaining the intention of those who created.—*SACKVILLE-WEST v. HOLMESDALE (VISCOUNT)* (1870), L. R. 4 H. L. 543; 39 L. J. Ch. 505, H. L.; *affy. S. C. sub nom. HOLMESDALE (VISCOUNT) v. WEST* (1866), L. R. 3 Eq. 474.

*Annotations:—As to 1 Consd. Re Johnston, Cockerell v. Essex* (1884), 26 Ch. D. 538. *Generally. Refd. Dawkins v. Penrhyn* (1877), 6 Ch. D. 318. *Mentd. Cope v. De La Warr* (1877), 5 Ch. D. 666.

**657. Construction of words of limitation—"Heirs of the body"—Construed as words of purchase.]—***BAGSHAW v. SPENCER*, No. 532, ante.

**658. ———.]—***AUSTEN v. TAYLOR*, No. 534, ante.

**659. ———.]—Distinguished from case of legal estates.]—***WRIGHT v. PEARSON*, No. 645, ante.

**SECT. 11.—ESTATE OF BENEFICIARIES.**

**SUB-SECT. 1.—IN GENERAL.**

**Necessity for legal estate in trustee.]—See Sect. 3, sub-sect. 7, ante.**

**660. Descent.—As of legal estate.]—***BANKS v. SUTTON*, No. 642, ante.

**661. ———.]—**Equitable estates are guided by the same rules of descent as legal estates.—*COWPER v. COWPER (EARL)* (1734), 2 P. Wms. 720; 24 E. R. 930; *on appeal* (1736), 2 P. Wms. 755, n., 11 L.

*Annotations:—Consd. Buchanan v. Harrison* (1861), 1 John. & H. 662. *Refd. Bagshaw v. Spencer* (1743), 2 Atk. 570. *Mentd. Burgess v. Wheate* (1759), 1 Eden, 177; *Farr v. Newman* (1792), 4 Term Rep. 621; *Craufurd v. Hunter* (1798), 8 Term Rep. 13; *Re Reay* (1847), 8 L. T. O. S. 476; *Haywood v. Cope* (1858), 25 Beav. 140; *Dean v. Brown*, [1900] 2 K. B. 573.

**Equitable estate in copyholds.]—See COPYHOLDS, Vol. XIII., p. 104, Nos. 1331, 1332.**

**———.]—See, generally, DESCENT & DISTRIBUTION, Vol. XVIII., pp. 1 et seq.**

**Vesting of interests under settlements.]—See SETTLEMENTS, Vol. XI., pp. 570–574, Nos. 1069–1095.**

**Vesting of testamentary gifts.]—See WILLS. Whether available for distribution in bankruptcy.]—See BANKRUPTCY, Vol. V., pp. 652, 653, Nos. 5827–5838.**

**SUB-SECT. 2.—DEALINGS WITH ESTATE.**

**662. Power of alienation.—As of legal estate.]—**Trust of lands limited to A. & his heirs & assigns, or to such as he or they shall appoint; *cestui que trust* devises these lands by a will attested but by two witnesses; the will void, & will not operate as an appointment.

There could be no question but that a trust of an inheritance could not be devised otherwise than by a will attested by three witnesses in the same manner as a legal estate; for if the law were otherwise it would introduce the same inconveniences as to frauds & perjuries, as were occasioned before the statute by a devise of a legal estate in fee simple (*LORD MACCLESFIELD, C.*).—*WAGSTAFF v. WAGSTAFF* (1724), 2 P. Wms. 258; 24 E. R. 721, L. C.

*Annotations:—Consd. Habbergham v. Vincent* (1793), 4 Bro. C. C. 353. *Refd. Doe d. Cook v. Danvers* (1806), 7 East, 299; *Wilson v. Dent* (1830), 3 Sim. 385; *Atkinson v. Smith* (1858), 3 De G. & J. 186.

**663. ———.]—***HOPKINS v. HOPKINS*, No. 637, ante.

**664. ———.]—***ADLINGTON v. CANN*, No. 41, ante.

**665. ———.]—**The ct. has determined that such equitable estates are to be held perfectly distinct & separate from the legal estates. They are to be enjoyed, in the same condition, entitled to all the same benefits of ownership, disposable, divisible, & barrable, exactly as if they were estates executed in the party (*ARDEN, M.R.*).—*BRYDGES v. BRYDGES, PHILIPS v. BRYDGES* (1796), 3 Ves. 120; 30 E. R. 927.

*Annotations:—Refd. Selby v. Alston* (1797), 3 Ves. 339; *Wykham v. Wykham* (1811), 18 Ves. 395; *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1; *Re Douglas, Wood v. Douglas* (1884), 28 Ch. D. 327.

**653 H. ———.]—***M'GUIRE v. SCULLY* (1820), Beav. 370.—*IR.*

**653 H. ———.]—***GRAHAM v. LYNDOCH'S (LORD) TRUSTEES* (1853), 1 W. R. 340.—*SCOT.*

**653 iv. ———.]—***Re DUNNILL'S TRUSTS* (1872), 6 I. R. Eq. 322.—*IR.*

**653 v. ———.]—***BRASH'S TRUSTS v. PHILLIPSON*, [1916] S. C. 271.—*SCOT.*

**PART I. SECT. 11, SUB-SECT. 1.**

**660 1. Descent.—As of legal estate.]—***RE BENNETT'S ESTATE*, [1898] 1 I. R. 185.—*IR.*

**660 II. ———.]—***SPENS v. MONY-PENNY'S TRUSTEES* (1876), 3 R. (C. of Sess.) 50; 13 Sc. L. R. 25, 45.—*SCOT.*  
**Conveyance of land to trustee for lunatic.]—***Doe d. SNYDER v. MASTERS* (1851), 8 U. C. R. 55.—*CAN.*

**PART I. SECT. 11, SUB-SECT. 2.**

**p. Enforcing contract of testator—Parties.]—**Where the whole of testator's property, real & personal, & the whole control of it, were vested in trustees subject to the trusts declared by the will.—*Held: not necessary to make any of the cestui que trust parties to a suit for the purpose of enforcing a contract of purchase which*

**666. Notices to trustees—Unnecessary to validity of assignment.]**—A voluntary assignment by deed of the assignor's interest in a sum of stock standing in the names of trustees, upon trust for him, is a complete transfer of such interest as between the donee & the representatives of the donor, although no notice of the deed was given to the trustees, in the donor's lifetime; because no further act on the part of the donor was requisite to complete the gift.

In such a case the donee could compel the trustees to transfer the stock to him, without making the donor or his representatives parties to the suit.

If, however, the trustees, before notice of the deed, transferred the stock to another person, the donee would have no remedy against them.—*DONALDSON v. DONALDSON* (1854), Kay, 711; 23 L. J. Ch. 788; 23 L. T. O. S. 306; 1 Jur. N. S. 10; 2 W. R. 691; 69 E. R. 303.

*Annotations:*—*Reid, Lambe v. Orton* (1860), 1 Drew. & Sm. 125; *Re Way's Trusts* (1864), 2 De G. J. & Sm. 365; *Re Walhampton Estate* (1884), 26 Ch. D. 391; *Re Lucan, Hardinge v. Cobden* (1890), 45 Ch. D. 470; *Re Patrick, Bills v. Tatham*, [1891] 1 Ch. 82; *Re Griffin, Griffin v. Griffin*, [1899] 1 Ch. 408.

**667.** ———.]—It is said that no notice was given to the trustee, but it is a mistake to suppose that the fact of notice creates the relation of trustee & *cestui que trust*. All that is done by a notice is to secure to the person who gives it his priority over any incumbrancer who may give subsequent notice, that is the sole value of the notice (*ROMILLY, M.R.*).—*Re LOWES' SETTLEMENT* (1861), 30 Beav. 95; 54 E. R. 825.

**668.** ———.]—On a voluntary assignment of an equitable reversion, there being no power in the assignor to deal with the legal interest, notice to the trustees is not necessary to the validity of the assignment.—*Re WAY'S TRUST* (1864), 2 De G. J. & Sm. 365; 5 New Rep. 67; 34 L. J. Ch. 49; 11 L. T. 495; 10 Jur. N. S. 1166; 13 W. R. 149; 46 E. R. 416, L. J. J.

*Annotations:*—*Apld, Re Patrick, Bills v. Tatham* (1890), 63 L. T. 752. *Reid, Hall v. Hall, Hall v. Hall* (1872), L. R. 14 Eq. 365; *Garnham v. Skipper* (1885), 2 T. L. R. 64; *Re Lucan, Hardinge v. Cobden* (1890), 45 Ch. D. 470; *Re Paulson*, [1921] 1 A. C. 271.

**669.** ———.] **What amounts to notice—Accidental knowledge.]**—An assignment by the Comrs. in Bkcy., under the old law, of the choses in action of a bkpt., is not equivalent to a reduction into possession, & such assignment made without notice given to the trustees is not entitled to priority over a subsequent assignment for value, of which notice is given.

The issuing of the commission is not sufficient notice.

*Semble*, nor does the mere accidental knowledge of one of the trustees amount to notice.—*Re BARR'S TRUSTS* (1858), 4 K. & J. 219; 27 L. J. Ch. 548; 32 L. T. O. S. 9; 4 Jur. N. S. 1013; 6 W. R. 424; 70 E. R. 92.

*Annotations:*—*Consd. Re Vickress's Trusts* (1859), 7 W. R. 542; *Webb's Policy* (1867), 36 L. J. Ch. 341; *Sempill's v. Queensland Sheep Investment Co.* (1873), 29 L. T. 737. *Apld, Palmer v. Locke* (1881), 18 Ch. D. 381; *Mercer v. Vans Collina* (1897), [1900] 1 Q. B. 130, n. *Reid, Re Coombe's Trusts* (1859), 1 Giff. 91; *Re Currie* (1871), 41 L. J. Bcy. 55.

———.]—*See CHOSSES IN ACTION*, Vol. VIII., pp. 466–468, Nos. 371–391, & *generally*, EQUITY, Vol. XX., pp. 310–333.

testator had entered into during his lifetime.—*DELISLE v. McCRAW* (1875), 23 Gr. 254.—CAN.

#### PART I. SECT. 12, SUB-SECT. 1.

**670 I. Necessity for beneficial interest.]**—*FITCH v. CURRIE* (1887), 7 R. & G. 522; 8 C. L. T. 59.—CAN.

**670 II.** ———.]—*KHERODEMONEY DOSSER v. DOORGAMONEY DOSSER* (1878), 1 L. R. 4 Calc. 455; 3 C. L. R. 315.—IND.

**q. Enforcing illegal transaction.]**—It is the constant & continuous duty of the ct. to refuse to lend its aid to the

— **To whom notice to be given.]**—*See CHOSSES IN ACTION*, Vol. VIII., pp. 460–464, Nos. 323–346.

— **Time for notice.]**—*See CHOSSES IN ACTION*, Vol. VIII., pp. 465, 466, Nos. 356–370.

— **Fund in reputed ownership of bankrupt.]**—*See BANKRUPTCY*, Vol. V., pp. 773, 774, Nos. 6644–6649.

— **Sufficiency of notice.]**—*See BANKRUPTCY*, Vol. V., pp. 778, 779, Nos. 6682–6687.

— **Assignment of chose in action.]**—*See CHOSSES IN ACTION*, Vol. VIII., pp. 459–478.

— **Effect on priority of trustee in bankruptcy.]**—*See BANKRUPTCY*, Vol. V., pp. 633–635, Nos. 5704–5712.

— **Effect on priorities of equitable assignees—Assignment of chose in action.]**—*See CHOSSES IN ACTION*, Vol. VIII., pp. 468–477.

— **Effect on transfer by trustee—Assignment of personal property.]**—*See CHOSSES IN ACTION*, Vol. VIII., pp. 485–487.

— **Notice by stop order—Effect on priorities.]**—*See CHOSSES IN ACTION*, Vol. VIII., pp. 471–476, Nos. 442–458.

— **Priority of purchaser of legal estate.]**—*See EQUITY*, Vol. XX., pp. 296–304, Nos. 509–580.

— **Priority between equitable interests inter se—Effect of breach of trust.]**—*See EQUITY*, Vol. XX., p. 309, Nos. 612, 613; *BANKERS*, Vol. III., p. 290, No. 900.

— **Invalid transfer of shares.]**—*See COMPANIES*, Vol. X., pp. 1140, 1141, No. 8058.

— *See, generally*, EQUITY, Vol. XX., pp. 305–309, Nos. 586–613.

### SECT. 12.—ENFORCEMENT OF TRUSTS.

#### SUB-SECT. 1.—IN GENERAL.

**670. Necessity for beneficial interest.]**—When a trust is declared of land for the person entitled thereto, no party can avail himself of this trust without establishing *alibiunde* that he is entitled thereto.—*WALTERS v. WEBB* (1869), L. R. 9 Eq. 83; 39 L. J. Ch. 414; 21 L. T. 657; 18 W. R. 86; *on appeal* (1870), 5 Ch. App. 531, L. C. & L. J.

*Annotations:*—*Mentd. Chetnam v. Houare* (1870), L. R. 9 Eq. 571; *Re Liddard & Jackson's & Broadley's Contract* (1889), 42 Ch. D. 254.

**671. Execution of trusts of will—General direction—No account ordered.]**—*BOSON v. BOSON* (1757), 1 Dick. 300; 21 E. R. 284.

**672.** ———.] **Bill by devisee—Costs.]**—*BOSON v. BOSON* (1757), 1 Dick. 300; 21 E. R. 284.

**673.** ———.] **Application for leave by trustees.]**—Leave given to exors. & devisees in trust to file a claim to have the will established, & the trusts performed, & the administration of the estate.—*RICKFORD v. YOUNG* (1850), 12 Beav. 537; 19 L. J. Ch. 311; 15 L. T. O. S. 201; 50 E. R. 1166; *sub nom. ANON.*, 14 Jur. 428.

**674.** ———.] **Effect of decree—Validity of trusts not implied.]**—A decree directing the trusts of a will to be carried into execution does not imply that all the trusts are valid.—*GOOCH v. GOOCH* (1853), 3 De G. M. & G. 366; 2 L. J. Ch. 1089; 21 L. T. O. S. 249; 1 W. R. 397; 43 E. R. 143, L. C.

*Annotations:*—*Mentd. Cattlin v. Brown* (1853), 11 Hare, 372; *Storrs v. Benbow* (1853), 3 De G. M. & G. 390;

enforcing of illegal transactions, & where an officer of the ct. is administering a trust it will refrain from giving a direction which would be tantamount to enforcing such a transaction.—*Re GHEE, Ex p. LOWE KING, PUBLIC TRUSTEE v. LOWE KING*, [1928] N. Z. L. R. 266.—N.Z.



**Sect. 12.—Enforcement of trusts: Sub-sects. 1, 2 & 3.]**

*Courtier v. Oram* (1855), 21 Beav. 91; *Maynard v. Wright* (1858), 26 Beav. 285; *Knapping v. Tomlinson* (1864), 12 W. R. 784; *Hampton v. Holman* (1877), 5 Ch. D. 183; *Dias v. De Livera* (1879), 5 App. Cas. 123; *Re Ashforth, Sibley v. Ashforth*, (1905) 1 Ch. 535.

**675. —Establishment of will not necessary.]**—This ct. will interfere to establish a will against an heir-at-law, as well when there are trusts to be executed under it as when there are not.

The establishment of a will is not a necessary incident to the execution of the trusts.—*BOYSE v. ROSSBOROUGH* (1854), 3 De G. M. & G. 817; 2 Eq. Rep. 675; 23 L. J. (Ch. 305; 23 L. T. O. S. 30; 18 Jur. 205; 2 W. R. 290; 43 E. R. 321, L. C. & L. J.J.; on appeal, *sub nom.* COLCLOUGH v. BOYSE (1857), 6 H. L. Cas. 1, H. L.  
*Annotation:—Mentd.* *Jones v. Gregory* (1863), 33 L. J. Ch. 679.

**676. Delay in performance—Owing to disputed validity of will—Further time allowed.]**—*MOSELY v. MOSELEY* (1873), Cas. temp. Finch, 53; 23 E. R. 28.

*Annotation:—Refd.* *Clarke v. Turner* (1694), Froom. Ch. 198.

**677. Trusts for sale of estate—Trustees not found—Substituted service on defendant's solicitor.]**—On a bill to enforce the performance of trusts for the sale of estates, part of which had been sold, against the trustees who could not be found, substituted service was ordered on deft.'s solr., who had acted on his behalf in the business of the preparation of the trust deed, & of all the sale which had taken place under it.—*HORNBY v. HOLMES* (1845), 4 Hare, 306; 9 Jur. 225, 796; 67 E. R. 604.  
*Annotation:—Refd.* *Cope v. Russell* (1847), 16 L. J. Ch. 369.

**678. Order for execution & accounts—Notwithstanding pendency of action—In which additional relief sought.]**—The ct., upon the hearing of a claim, made an order for taking accounts & executing a trust; & held that the pendency of a suit by bill, in which the same accounts & directions would be necessary, & which sought additional relief in respect of alleged breaches of trust, was not a ground for staying the order upon the claim.—*SCOTT v. HASTINGS (LORD)* (1851), 9 Hare, 35; 20 L. J. Ch. 530; 17 L. T. O. S. 220; 15 Jur. 572; 68 E. R. 404.

**679. Trust of personal chattel.]**—(1) Cts. of equity will not lend their assistance to enforce the specific performance of ordinary contracts for the sale & purchase of chattels, unless there be something very special in the nature of the contract. On the other hand, if a trust be created, the circumstance that the subject-matter is a personal chattel will not prevent this ct. from enforcing the due execution of that trust.

(2) Trusts may be constituted not merely by direct declaration of trust, but also by the constructive operation of the consequences flowing from the acts of parties.—*POOLEY v. BUDD* (1851), 14 Beav. 34; 51 E. R. 200.

*Annotation:—Generally.* *Mentd.* *Gunn v. Bolekow, Vaughan* (1876), 10 Ch. App. 491.

**680. Necessity for statement of claim.]**—Where an action is brought to carry into execution the trusts of a deed, or other written instrument, a statement of claim should be delivered.—*BOYES v. COOK* (1876), 33 L. T. 778; 3 Char. Pr. Cas. 101.

**681. Enforcement against corporation—Information by Attorney-General.]**—A suit against a corp'n. to compel the performance of a public trust should be by information by the A.-G.—*EVAN v. AVON CORPN.* (1860), 29 Beav. 144; 30

L. J. Ch. 165; 3 L. T. 347; 6 Jur. N. S. 1361; 9 W. R. 84; 54 E. R. 581.

*Annotation:—Apld.* *Watson v. Hythe B. C.* (1906), 70 J. P. 153.

**682. Enforcement against foreign government.]**—By a contract dated in Mar. 1862, between the Peruvian Govt. & a Peruvian co., the co. were to have, for eight years from the date of the contract, the exclusive privilege of consigning guano to Great Britain & Ireland, & the net proceeds were to be held in London by the consignees, T., B., & co., at the disposal of the Peruvian Govt., after setting apart preferentially the sums required for payments in respect of the Peruvian debt.

The Peruvian Loan, 1862, was raised in London by the issue of bonds upon the express hypothecation, in addition to the guarantee of the Peruvian Govt., of the guano to be imported into the Colonies & Belgium, as well as the guano to be consigned by the Consignment co. to Great Britain & Ireland. 8 per cent. on the sums subscribed was to be applied by T., B., & co. out of the proceeds of guano towards the redemption of the bonds by purchases at the market price whenever the bonds were at or below par, & by drawings whenever the bonds were above par.

In 1865 the Peruvian Loan, 1865, was contracted by the issue of bonds at 83½, since which time T., B., & co., as general financial agents of the Peruvian Govt., had, instead of redeeming bonds of 1862 by purchases at the market price, cancelled such bonds, which had been received in exchange for bonds of 1865, issued at 83½, such price being higher than the quoted price of bonds of 1862 at the time.

In a suit by a bondholder on behalf of himself & the other bondholders against T., B., & co., the co. & the Peruvian Govt. to have all the guano in Great Britain & Ireland & the colonies consigned to & coming to the hands of T., B., & co., pursuant to the contract between the Peruvian Govt. & the co., applied in the redemption of the loan of 1862, according to the terms of the bonds:—*Held*: the doctrines of the ct. as to trusts were not applicable either to the foregoing contract or to the contract between the Peruvian Govt. & the bondholders, both of which were Peruvian contracts, & to be construed according to the law of Peru, & assuming that the doctrines as to trusts did apply, the ct. could have no jurisdiction to enforce them against the property of a foreign Govt. in the hands of its agent in this country.—*SMITH v. WEGUELIN* (1869), L. R. 8 Eq. 198; 38 L. J. Ch. 465; 20 L. T. 724; 17 W. R. 904.

*Annotation:—Mentd.* *Goodwin v. Roberts* (1876), 1 App. Cas. 476.

**Enforcement of voluntary settlements.]**—*See SETTLEMENTS*, Vol. XL., pp. 537, 538, Nos. 801–811.

**Enforcement of trusts for creditors.]**—*See Part I., Sect. 9, sub-sect. 8, C., ante.*

**Enforcement of charitable trusts.]**—*See CHARITIES*, Vol. VIII., p. 389, Nos. 2080–2089.

**Administration of estates by court.]**—*See EXECUTORS*, Vol. XXIV., pp. 750 *et seq.*

**SUB-SECT. 2.—CONSIDERATION.**

*See, generally,* FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 145 *et seq.*

**683. Whether necessary—Trust completely constituted.]**—A bond, & all sums of money recoverable in respect thereof, were assigned to trustees,

**PART I. SECT. 12, SUB-SECT. 2.**

**683 I. Whether necessary—Trust completely constituted.]**—*CORBETT v. MCNEIL* (1906), 41 N. S. R. 110; 2 E. L. R. 257.—CAN.



in trust for such intents & purposes, & such person or persons as E., a married woman, should direct or appoint; & in default of appointment, for her separate use. E. afterwards appointed her interest in the bond to certain persons, in order to indemnify them in case they should not be able to recover the whole of a sum appropriated by her husband, who was their solr., & for no other consideration appearing upon the deed:—*Held*: this was an executed trust, to which, though without consideration, the ct. would give effect.

A declaration of trust is considered in a ct. of equity as equivalent to the transfer of a legal interest in a ct. of law; & if the transaction by which the trust is created is complete, it will not be disturbed for want of consideration (LORD LANGDALE).—*COLLISON v. PATRICK* (1838), 2 Keen, 123; 7 L. J. Ch. 83; 48 E. R. 575.

*Annotations*:—*Reid*, *McFadden v. Jenkins* (1842), 1 Hare, 458; *Meek v. Kettlewell* (1842), 1 Hare, 464.

684. ———.]—*A cestui que trust*, though a volunteer, can enforce his rights against the trustee as soon as the trust funds come to the hands of the trustee.—*WESTBURY v. CLAPP* (1864), 3 New Rep. 633; 12 W. R. 511.

685. ———.]—*JONES v. LOCK*, No. 58, ante.

686. ———.]—When the transaction is completed & the donor has created a trust in favour of the object of his bounty, equity will interfere to enforce it. The reason why equity will not interfere in favour of a mere volunteer, but requires a valuable consideration for the transaction, is that in such a case there is nothing wrong in the donor changing his mind (WILLS, J.).—*HARDING v. HARDING* (1886), 17 Q. B. D. 442; 55 L. J. Q. B. 462; 34 W. R. 775; 2 T. L. R. 856, D. C.

*Annotations*:—*Reid*, *Re Hancock, Hancock v. Berrey* (1888), 57 L. J. Ch. 793; *Re Hughes* (1888), 59 L. T. 588; *Brandts v. Dunlop Rubber Co.*, [1901] 1 K. B. 387; *Re Westerton, Public Trustee v. Gray*, [1919] 2 Ch. 104.

687. ———.]—*Incomplete trust*.]—Devise of copyhold estates to the wife of A. to be disposed of as she should appoint; & a bequest of two hundred guineas to pay the fines of her admission, the surplus to herself. She is not admitted, but appoints to her husband, who is the residuary legatee, & gives her credit for the two hundred guineas in account. He becomes bkpt.:—*Held*: the credit in account was a mere declaration of trust without consideration & not binding upon his creditors.—*Re SMITH, Ex p. SMITH* (1812), 1 Rose, 208, L. C.

*Annotation*:—*Consid. Parsons v. Coke* (1858), 27 L. J. Ch. 828.

688. ———.]—If a trustee holds property under a voluntary deed, the ct. will make him perform the trusts with regard to that property: but it will take no steps to enforce completion of a trust by the author of a voluntary settlement.—*WALROD v. WALROD* (1858), John. 18; 28 L. J. Ch. 97; 32 L. T. O. S. 122; 22 J. P. 754; 4 Jur. N. S. 1099; 7 W. R. 33; 70 E. R. 322.

*Annotations*:—*Reid*, *Crouch v. Waller* (1859), 4 De G. & J. 302; *Gibbs v. Harding* (1870), 39 L. J. Ch. 374.

689. ———.]—A married woman executed a voluntary settlement containing a recital that

she had paid £2,000 to the trustee, & declaring trusts of that sum. In point of fact she had not paid, & never did pay any money to the trustee. The trustee also executed the deed:—*Held*: neither the settlor nor the trustee incurred any obligation whatever in respect of the £2,000.—*MARLER v. TOMMAS* (1873), L. R. 17 Eq. 8; 43 L. J. Ch. 73; 22 W. R. 25.

690. ———.]—*HARDING v. HARDING*, No. 686, ante.

*Enforcement by stranger to consideration*.]—*See CONTRACT*, Vol. XII., p. 46, Nos. 245, 249.

*Consideration for settlements—Who are within the consideration*.]—*See FRAUDULENT & VOIDABLE CONVEYANCES*, Vol. XXV., pp. 177, 178, 237–239, Nos. 200–208, 636–664; *SETTLEMENTS*, Vol. XL., pp. 525–529, Nos. 699–731.

——.]—*See, generally, SETTLEMENTS*, Vol. XL., pp. 524–538.

*Voluntary assignment of chose of action*.]—*See CHOSES IN ACTION*, Vol. VIII., pp. 496–500.

*Incomplete gifts*.]—*See GIFTS*, Vol. XXV., pp. 529–541.

——.]—*Assistance of court to complete*.]—*See GIFTS*, Vol. XXV., pp. 533–538, Nos. 231–263.

### SUB-SECT. 3.—PARTIES.

*See R. S. C.*, Ord. 16, rr. 32–47.

691. *Infant*.]—Where the legal estate is in trustees & an execution of a trust is to be directed, there is no occasion to give an infant a day (*per CUR.*).—*THORNTON v. BLACKBOURNE* (1731), 2 Eq. Cas. Abr. 303; 22 E. R. 255.

692. *Beneficiaries*.]—Bill by a trustee of a sum secured by a policy of assurance, to compel the person, on whose life the assurance was effected, to replace the sum assured, which he had lost by fraudulently surrendering the policy for value to the assurance society. Demurrer, because the *cestuis que trusts* were not parties, allowed without costs.—*FORTESCUE v. BARNETT* (1833), 1 Coop. temp. Cott. 367; 2 L. J. Ch. 98; 47 E. R. 899.

693. *Settlor*.]—Where a voluntary trust is perfected, the settlor is not a necessary party to a suit by the *cestui que trust* against the trustee, to compel its performance.—*REED v. O'BRIEN* (1843), 7 Beav. 32; 49 E. R. 974.

694. *Trustees—Trust to sell & pay mortgage debt—Subsisting term to secure portions—Whether trustees of portions term necessary parties*.]—An estate was charged with a mtge. & with portions, & a term was vested in trustees for securing the portions. A second estate was conveyed on trust to sell and pay the mtge. & portions. In a suit for the execution of the trusts, the mtgee. objected that the trustees of the term were not parties; but the objection was overruled.—*DALTON v. HAYTER* (1844), 7 Beav. 313; 49 E. R. 1085.

*Annotations*:—*Reid*, *Boyes v. Rosborough* (1853), Kay, 71; *Chaffers v. Day* (1855), 3 W. R. 263; *Gilbert v. Lewis* (1862), 32 L. J. Ch. 347; *Brown v. Wales* (1872), 27 L. T. 410. *Mentl. Inman v. Wearing* (1859), 3 De G. & Sm. 729; *Jervis v. Berridge* (1873), 24 W. R. 395; *Re Nobbs, Nobbs v. Law Reversionary Interest Soc.*, [1896] 2 Ch. 830.

695. *Remainderman—Presumptive next of kin*.]—Where property is settled in trust, in remainder,

687 i. ———.]—*Incomplete trust*.]—*GARDINER v. GARDINER* (1861) 12 I. C. L. R. 565.—*IR.*

687 ii. ———.]—*HAMILTON v. MOLLOY* (1880), 5 L. R. Ir. 339.—*IR.*

### PART I. SECT. 12, SUB-SECT. 3.

692 i. *Beneficiaries*.]—*MULHOLLAND v. MERRIAM* (1873), 20 Gr. 152.—*CAN.*

*r. Stranger*.]—Land having been conveyed in consideration of the grantee agreeing to convey a certain portion to a third person, who was no party to the transaction:—*Held*: this person could maintain a suit in his own name for such portion.—*SHAW v. SHAW* (1870), 17 Gr. 282.—*CAN.*

*t. Party having interest*.]—*BROOK-*

*FIELD v. NEW BRUNSWICK & CANADA RY. & LAND CO.* (1871), N. B. Dig. 774.—*CAN.*

u. ———.]—*MCNEIL v. CORBETT* (N. S.) (1907), 39 S. C. R. 808.—*CAN.*

a. ———.]—*INTERNATIONAL MINING SYNDICATE v. STEWART* (1914), 48 N. S. R. 172; 14 E. L. R. 189.—*CAN.*

b. ———.]—*SIMMONDS v. PALLAS*

*Sect. 12.—Enforcement of trusts: Sub-sects. 3 & 4. Sect. 13: Sub-sects. 1 & 2. Sect. 14: Sub-sect. 1, A. & B.]*

for the persons who should be the next of kin of the tenant for life at her death, the presumptive next of kin are not necessary parties to a suit instituted for the execution of the trusts during the lifetime of the tenant for life.—*FOWLER v. JAMES* (1847), 1 Ph. 803; 1 Coop. temp. Cott. 290; 16 L. J. Ch. 266; 41 F. R. 838, L. C.

*Annotations:—Reid, Roberts v. Roberts* (1848), 2 De G. & Sm. 29; *Paul v. Paul* (1880), 43 L. T. 239.

**696. Persons entitled to moiety.—Enforcement of trusts of other moiety.]—**Bequest in trust to invest & pay the interest of a moiety to A., & afterwards to her children, & the other moiety to B. & afterwards to her children.

The interest on a moiety of £1,000 invested on mtge. was paid to A. for thirty years. On her death, the mtge. was got in:—*Held: A.'s children could maintain a suit for their moiety, without making B. & her children parties.*—*HARES v. STRINGER* (1852), 15 Beav. 206; 51 E. R. 516.

**697. Appointment of person to represent state.]—**The action was for execution of the trusts of a will under which the following persons & classes had distinct interests dependent upon the construction of a reversionary gift (a) the heir-at-law; (b) the next of kin; (c) children of the heir who had died before the period of distribution; (d) children of the heir living at that period; (e) children living at that period of next of kin who were then dead; (f) children of next of kin who had survived their parents & died before the period of distribution. The only parties before the ct. belonged to class (c); & there was evidence that it would be difficult to answer inquiries as to (a), (b), (c) & (d). The judgment directed that persons should be appointed at chambers to represent, for the purpose of determining the questions of construction, the persons & classes (a), (b), (c) & (d); inquiries as to (c) & (f), & if it should appear that there were any persons within class (e), & that they had all since died, or that there were any persons within class (f), then the like direction as to those classes respectively; the chief clerk to certify with respect to the above matters independently in the first instance.

The reversionary gift raised a distinct interest in H., who had gone to California in 1848, two years before testator's death, & had not been

heard of for twenty years past. *Ptff. was the actual legal personal representative of testator:—*The judgment directed that if it should appear that H. survived testator & had no legal personal representative, a person should be appointed at chambers to represent his estate for the purposes of the action.—*Re PEPPITT'S ESTATE, CHESTER v. PHILLIPS* (1876), 4 Ch. D. 230; 46 L. J. Ch. 95; 25 W. R. 211.

*Annotation:—Reid, Moore v. Simkin* (1885), 53 L. T. 815.

**Parties to enforcement of trust for creditors.]—***See Nos. 621–633, ante.*

#### SUB-SECT. 4.—LOSS OF RIGHT BY DELAY.

*See Part IV., Sect. 2, sub-sect. 4, post.*

### SECT. 13.—REVOCATION, AVOIDANCE, AND RECTIFICATION OF TRUSTS.

#### SUB-SECT. 1.—REVOCATION AND AVOIDANCE.

**698. Provision for revocation — Disentailing agreement providing for trust—For son with limited control—Power of revocation exercised by son.]—**A father, being desirous to disentail his estate, procured the consent of the next heir, his eldest son. The minute of agreement between them provided that the father should pay absolutely to the son £4,000; & secondly, should pay to trustees the further sum of £3,000, for the benefit of the son; it being open to the father to limit the power & control of the son over the said £3,000, to such extent, & in such manner, as he should think proper; “& in particular,” to direct the trustees to hold it for the son's behoof “in life rent only, & for the issue of his body in fee, whom failing, to his nearest heirs & assignees.” Three months afterwards, a bond was executed by the father as security for the £3,000, in favour of the trustees “& for the ends, uses, & purposes expressed in a declaration of trusts,” of even date therewith. The deed of declaration restricted the son's interest to an alimentary life rent; & failing his issue, the fee was given to his aunt & her children. The son declared his acquiescence in the bond, & declaration of trusts, which were subsequently delivered to the trustees, who paid the income of

(1845), 8 I. Eq. R. 335; 2 Jo. & Lat. 489.—*IR.*

*c. Attorney-General of province.]—A.-G. OF NEW SCOTIA v. AKEFORD, SMITH & ZINCK* (1885), 13 S. C. R. 294.—*CAN.*

*d. —.]—LANGILLE v. NASS* (1917), 51 N. S. R. 429; 36 D. L. R. 368.—*CAN.*

#### PART I. SECT. 13, SUB-SECT. 1.

*e. Provision for revocation.]—*There may be cases in which, where no other person but the settlor is interested, the deed may be regarded as a mere direction as to the manner in which the settlor's property should be applied for his benefit, & as such revocable by the settlor, but where there is an infant beneficiary, the deed cannot be revoked.—*GOLAM YASSIN v. OFFICIAL TRUSTEE OF BENGAL* (1882), 1 L. R. 8 Calc. 887.—*IND.*

*f. —.]—BROWNE v. CAVENTISH* (1844), 7 I. Eq. R. 369; 1 Jo. & Lat. 606.—*IR.*

*g. —.]—Re CHARLEVILLE (EARL)* (1861), 13 I. Ch. R. 6.—*IR.*

*h. —.]—UNITED FREE CHURCH OF SCOTLAND v. BLACK*, [1909] S. C.

#### 25.—SCOT.

*k. Whether revocation allowed.]—*Where a husband directed by writing certain persons to hold moneys in trust, to pay the interest to his wife for life, & such directions were acted upon, & payment made accordingly:—*Held: the husband could not afterwards revoke such directions & sue the trustees for the money.*—*COWPER v. PLAISTED* (1868), 5 W. W. & A'B. 88.—*AUS.*

*l. —.]—*Where personal property is assigned *bond fide* to pay a debt due to the trustee, who accepts the trust, its revocation may be implied from subsequent conduct of the parties wholly inconsistent with the trust.—*FALCONER v. SAWYER* (1851), 2 N. S. R. (James) 277.—*CAN.*

*m. —.]—HERVEY v. BOOMER* (1870), 17 Gr. 558.—*CAN.*

*n. —.]—FROST v. KERR* (1874), 2 Pug. 338.—*CAN.*

*o. —.]—POHNIER v. BRULÉ (B. C.)* (1891), 20 S. C. R. 97.—*CAN.*

*p. —.]—MINGEAUD v. PACKER* (1891), 21 O. R. 267.—*CAN.*

*q. —.]—*Where a trust has been once perfectly created although there

may have been no transmutation of possession, it cannot be defeated by any subsequent act of the settlor.—*JAMSETJI JIJIBHAI v. SONABAI* (1865), 2 Bom. 133.—*IND.*

*r. —.]—IRWIN v. ROGERS* (1848), 12 I. Eq. R. 159.—*IR.*

*t. —.]—MACDOWALL v. GORDON* (1833), 11 Sh. (Ct. of Sess.) 952.—*SCOT.*

*u. —.]—SMITTON v. TOD* (1839), 2 Duml. (Ct. of Sess.) 225; 16 Fac. Coll. 227.—*SCOT.*

*v. —.]—*A trust-disposition & deed of settlement might be validly revoked even as regards heritage in Scotland by a will executed in England in English form.—*LEITH'S TRUSTEES v. LEITH* (1848), 10 Duml. (Ct. of Sess.) 1137; 20 Sc. Jur. 418.—*SCOT.*

*aa. —.]—*A young lady, the day after she became of age conveyed to trustees by a deed, which she only saw the day before, her whole funds, the fee to be held for the issue of a contemplated marriage:—*Held: she was entitled four days afterwards to revoke this deed.*—*MURISON v. DICK* (1864), 16 Duml. (Ct. of Sess.) 529; 26 Sc. Jur. 239.—*SCOT.*

*bb. —.]—KIPPEN [v. KIPPEN'S*

the £3,000 to the son. After the father's death, the son married, & subsequently died, survived by his widow, but without issue. He left a deed by which he revoked the destination in the declaration of trusts in favour of his aunt & her children, & bequeathed the £3,000 to his widow.

The son could not possibly be bound by any erroneous interpretation which the trust deed might have put upon the original contract, so as to substantially vary its operation & effect (*LORD SELBORNE*).—*WIGHTMAN v. COSTINE* (1879), 4 App. Cas. 228, H. L.

**Power of debtor to revoke trust for creditors.]—**See *BANKRUPTCY*, Vol. V., pp. 1179–1182, Nos. 9532–9552.

**Revocation of settlements.]—**See *SETTLEMENTS*, Vol. XL., pp. 540–551, Nos. 884–936.

**Avoidance of settlements.]—**See *SETTLEMENTS*, Vol. XL., pp. 551–557, Nos. 937–979.

**Avoidance of conveyance in fraud of creditors.]—**See *FRAUDULENT & VOIDABLE CONVEYANCES*, Vol. XXV., pp. 207–216, Nos. 429–501.

## SUB-SECT. 2.—RECTIFICATION.

**699. Trust for raising money—Charged on void term—Transferred to another term.]—**A trust for raising a sum of money on a term which happens to be void, transferred by another term, whereon the grantor had power to charge it.—*BISCO v. BANBURY (EARL)* (1876), 1 Cas. in Ch. 287; 22 E. L. R. 804; *sub nom.* *BRISCO v. BANBURY (LADY)*, *Freem. Ch.* 309; *Freem. K.B.* 309, L. C.  
*Annotations:—Mentd.* *Mortins v. Jolliffe* (1756), *Amb.* 311; *Jones v. Smith* (1841), 1 *Hare*, 43.

**Debenture trust deed—No jurisdiction in court to vary—Without consent of all parties.]—**See *COMPANIES*, Vol. X., p. 813, No. 5193.

**Rectification & variation of settlements.]—**See *SETTLEMENTS*, Vol. XI., pp. 530–545, 577, 578, Nos. 812–883, 1123–1125.

**Variation of settlements on dissolution of marriage.]—**See *HUSBAND & WIFE*, Vol. XXVII., pp. 517–533, Nos. 5570–5778.

*TRUSTEES* (1871), 10 *Maaph.* (Ct. of Sess.) 134; 44 *Sc. Jur.* 84.—**SCOT.**

**e.** —.]—*KERR v. URE* (1873), 11 *Maaph.* (Ct. of Sess.) 780; 45 *Sc. Jur.* 137.—**SCOT.**

**f.** —.]—*MACKENZIE v. MACKENZIE'S TRUSTEES* (1878), 5 *R.* (Ct. of Sess.) 1027; 15 *Sc. L. R.* 690.—**SCOT.**

**g.** —.]—*HAMILTON'S TRUSTEES v. HAMILTON* (1879), 6 *R.* (Ct. of Sess.) 1216; 16 *Sc. L. R.* 722.—**SCOT.**

**h.** —.]—*ROBERTSON v. ROBERTSON'S TRUSTS* (1892), 19 *R.* (Ct. of Sess.) 849; 29 *Sc. L. R.* 758.—**SCOT.**

**k.** —.]—*SHEDDEN v. SHEDDEN'S TRUSTEES* (1895), 23 *R.* (Ct. of Sess.) 228; 33 *Sc. L. R.* 154; 3 *S. L. T.* 180.—**SCOT.**

**l.** —.]—*BYRES'S TRUSTEES v. GEMMELL* (1895), 23 *R.* (Ct. of Sess.) 332; 33 *Sc. L. R.* 236; 3 *S. L. T.* 214.—**SCOT.**

**m.** —.]—*LYON v. LYON'S TRUSTEES* (1901), 3 *F.* (Ct. of Sess.) 653; 38 *Sc. L. R.* 568; 8 *S. L. T.* 489.—**SCOT.**

**n.** —.]—*MIDDLETON'S TRUSTEES v. MIDDLETON*, [1909] *S. C.* 67; 46 *Sc. L. R.* 48; 16 *S. L. T.* 431.—**SCOT.**

**o.** —.]—*On grounds of fraud.]—**TAYLOR v. TWEEDIE* (1865), 3 *Maaph.* (Ct. of Sess.) 928; 37 *Sc. Jur.* 482.—**SCOT.**

**p.** —.]—*When declared irrevocable.]—**WALKER v. AMEY* (1906), 8 *F.* (Ct. of Sess.) 876; 43 *Sc. L. R.* 242; 13

*S. L. T.* 657.—**SCOT.**

**q.** *Necessity for notice of repudiation.]—**STEWART v. SAUNDERS (Man.)* (1912), 21 *W. L. R.* 499; 4 *D. L. R.* 312; *affd.* (1913), 22 *W. L. R.* 620; 7 *D. L. R.* 812.—**CAN.**

**r.** *Non-performance of condition—Whether trust avoided.]—*If a trust or endowment be created *bona fide*, the mere fact that the parties in possession of the trust or endowed property do not carry out the conditions of the trust does not invalidate the transactions.—*KASHFESHURE DASSER v. KRISHNA-KANUNGER DASSER* (1863), 2 *Hay* 557.—**IND.**

## PART I. SECT. 13, SUB-SECT. 2.

**t.** *Rectification of trust deed.]—*A deed of trust was executed by a debtor, & by a mistake in setting out the metes & bounds a portion of the property intended to be conveyed was omitted; subsequently to which a creditor obtained & registered a judgment against the debtor.—*Held*: the assignees in trust were entitled to have the mistake rectified & the lien of the judgment creditor did not attach upon the land.—*McMASTER v. PHIPPS* (1856), 5 *G. 253*.—**CAN.**

**a.** —.]—*A-G v. WILLIAMS* (1914), 33 *N. Z. L. R.* 913.—**N.Z.**

## PART I. SECT. 14, SUB-SECT. 1.—A.

**700.1.** *How created—By implication of law.]—**Re TERRY* (1886), 7 *N. S. W. L. R.*

## SECT. 14.—CONSTRUCTIVE AND IMPLIED TRUSTS.

### SUB-SECT. 1.—CONSTRUCTIVE TRUSTS.

#### A. In General.

See *Law of Property Act*, 1925 (c. 20), s. 53 (2).

**700.** *How created—By implication of law.]—**COOK v. FOUNTAIN*, No. 22, *ante*.

**701.** —.]—Constructive trusts, or trusts resulting by implication of law, are not within Stat. Frauds by an express exception in the statute itself. They arise from the apparent nature of the transaction.—*ESPINASSE v. LOWE* (1764), 7 *Bro. Parl. Cas.* 345; 3 *E. R.* 223, H. L.

**702.** —.]—*Presumed from circumstances.]—*The presumption of a trust for a particular person may be assumed from the circumstances.—*Re EMERY'S TRUSTS* (1851), 17 *L. T. O. S.* 59.

**703.** —.]—*STANDING v. BOWRING*, No. 862, *post*.

**704.** —.]—*SOAR v. ASHWELL*, No. 13, *ante*.

**705.** —.]—*Consequences of acts of parties.]—**POOLEY v. BUDD*, No. 679, *ante*.

—.]—*Copyhold fine paid by first tenant of estate for lives.]—*See *COPYHOLDS*, Vol. XIII., p. 64, Nos. 790–794.

—.]—*Failure to exercise power.]—*See *POWERS*, Vol. XXXVII., pp. 526–528, Nos. 1166–1189.

*Distinguished from express trusts.]—*See *Sect. 2*, sub-sect. 1, B., *ante*.

**706.** *Whether within Statute of Frauds.]—**ESPINASSE v. LOWE*, No. 701, *ante*.

*Whether within Statutes of Limitation.]—*See *LIMITATION OF ACTIONS*, Vol. XXXII., p. 469, Nos. 1330–1334.

*Whether within county court jurisdiction.]—*See *COUNTY COURTS*, Vol. XIII., p. 475, No. 242.

*Charitable trusts—Jurisdiction of court on petition.]—*See *CHARITIES*, Vol. VIII., p. 403, No. 2327.  
*Constructive trustees.]—*See *Part II.*, *Sect. 7*, *post*.

#### B. Renewal of Leases.

See, generally, *LANDLORD & TENANT*, Vol. XXXI., pp. 68–87, Nos. 2155–2306.

**707.** *General rule.]—*Where a lease, renewable for ever, had expired by the dropping of the lives,

(*L.*) 23; 2 *N. S. W. W. N.* 83.—**AUS.**

**700.ii.** —.]—*FINUCANE v. REGISTRAR OF TITLES*, [1902] *St. R.* Qd. 75.—**AUS.**

**700.iii.** —.]—An administrator purchased from Govt. in his own name, & with his own funds, land in which intestate as occupant had a pre-emptive right, at the same price as it had been agreed to sell to intestate; but being administrator the Govt. did not require him to pay the value of improvements made by intestate.—*Held*: he was a trustee for the heir-at-law of intestate, & could not purchase for his own benefit.—*FOSTER v. MCKINNON* (1856), 5 *Gr.* 510.—**CAN.**

**700.iv.** —.]—*MCDONOUGH v. BELL* (1863), 10 *Gr.* 283.—**CAN.**

**700.v.** —.]—*PICKARD v. CENTRAL BANK* (1863), 5 *All.* 472.—**CAN.**

**700.vi.** —.]—*MAGUIRE v. MAGUIRE & TORONTO GENERAL TRUSTS CORP.N.* (1921), 64 *D. L. R.* 204; 50 *O. L. R.* 162.—**CAN.**

**700.vii.** —.]—*ALLEYNE v. ALLEYNE* (1845), 8 *I. Eq. R.* 493; 2 *Jo. & Lat.* 544.—**IR.**

**b.** —.]—*KIERMAN v. M'CANN*, [1920] 1 *I. R.* 99.—**IR.**

**c.** *Whether sum deposited in bank impressed with trust.]—**MERCHANTS BANK OF CANADA v. THOMSON (LIQUIDATOR OF THE CANADIAN AGENCY, LTD.)* (Alta.), [1919] 1 *W. W. R.* 855; 58 *S. C. R.* 287; 45 *D. L. R.* 616.—**CAN.**

**Sect. 14.—Constructive and implied trusts: Sub-sect. 1, B.]**

so that, in fact, only a tenancy from year to year existed, but the owner in fee of the lands, the tenants & their subtenants had all been acting for years on the terms of the lease which was at length duly renewed:—*Held*: no one of them could subsequently set up in equity claims adverse to the several characters they bore under such lease & sub-lease.—*ARCHBOLD v. SCULLY* (1861), 9 H. L. Cas. 360; 5 L. T. 160; 7 Jur. N. S. 1169; 11 E. R. 769, H. L.

**Annotations:—***Menid. Le Clere v. Greene* (1873), 22 W. R. 428; *Webster v. Southey* (1887), 36 Ch. D. 9; *Beighton v. Beighton* (1895), 64 L. J. Ch. 796; *Re Astley & Tyldesley Coal & Salt Co. & Tyldesley Coal Co.* (1899), 68 L. J. Q. B. 252; *Domfion Coal Co. v. Maskinonge S.S. Co.*, [1922] 2 K. B. 132; *Weld v. Petre* (1928), 97 L. J. Ch. 399.

**708. Whether trust created—Renewal by person partly interested—Trust only when special duty exists.]**—There is no authority for the general proposition that if a person only partly interested in an old lease obtains from the lessor a renewal, he must be held a constructive trustee of the new lease, whatever may be the nature of his interest or the circumstances under which he obtained the new lease. A person renewing is only held to be a constructive trustee of the new lease if, in respect of the old lease, he occupied some special position by virtue of which he owed a duty towards the other persons interested: as, for example, in the case of a renewal by a tenant for life of settled leaseholds, or by a partner of a partnership lease, or by a mtgee. of a mortgaged lease. In all such cases the new lease is treated as engrafted on or as forming part of the original lease.

A lessor granted a lease for seven years of a house in which the lessee carried on a profitable business. On the expiration of the term, the lessor refused to renew, but allowed the lessee to remain as tenant from year to year at an increased rent. During that tenancy the lessee died intestate, leaving a widow & three children, one being an infant. The widow took out administration to her husband's estate, & she & the two adult children, one of whom was a son, continued to carry on the business under the existing yearly tenancy. The widow & son each applied to the lessor for a new lease for the benefit of the estate, which he refused to grant, but, having determined the yearly tenancy by notice, he granted to the son "personally" a new lease for three years at a still further increased rent.

In an action which had in the meantime been instituted by the three children, including the infant, against the administratrix for administration of intestate's estate, the administratrix applied to have the new lease treated as having been taken by the son for the benefit of the estate & for an account of the rents & profits received by him:—*Held*: the evidence took the case out of *Ex p. Grace*, No. 710, *post*, in that it showed that the right or hope of renewal had been determined by the lessor himself before the son intervened, so that the new lease could not be treated as an accretion to the estate of deceased, & also that the son had in no way abused his position nor stood in any fiduciary relation towards nor owed any duty to the other persons interested in the estate; & he was therefore entitled to retain the lease for his own benefit.—*Re BISS, BISS v. BISS*, [1903]

2 Ch. 40; 72 L. J. Ch. 473; 88 L. T. 403; 51 W. R. 504; 47 Sol. Jo. 383, C. A.

**Annotation:—***Reid. Griffith v. Owen*, [1907] 1 Ch. 195.

**709. — Co-lessee.]**—Three lessees of a church lease. One renews in his own name, it shall be a trust for all.—*PALMER v. YOUNG* (1684), 1 Vern. 270; 1 Eq. Cas. Abr. 380; 23 E. R. 468.

**Annotations:—***Consd. Re Biss, Biss v. Biss*, [1903] 2 Ch. 40. The case was one of clear breach of faith & was decided on its own special circumstances & is no authority whatever to support the more general proposition for which it is often cited (*ROMER, L.J.*). *Reid. Re Lulham, Brinton v. Lulham* (1884), 33 L. J. Ch. 928.

**710. — Co-lessee with infant.]**—If a person jointly interested with an infant in a lease, obtain a renewal to himself only, & the lease prove beneficial, he shall be held to have acted as trustee, & the infant may claim his share of the benefit; but if it do not prove beneficial he must take it upon himself.—*Ex p. GRACE* (1799), 1 Bos. & P. 376; 126 E. R. 902.

**Annotation:—***Distd. Re Biss, Biss v. Biss*, [1903] 2 Ch. 40.

**711. — Renewal by tenant for life—Under covenant to assign to trustees.]**—A. on the marriage of B. his son settles a lease on B. for life, to his wife for life, & then to the issue of the marriage. B. covenants from time to time to renew the lease, & to assign it on the same trust. He renews the lease, but does not assign it to the trustees, & dies greatly indebted. This lease is bound by the marriage agreement, & is not assets for payment of B.'s debts.—*PLOWMAN v. PLOWMAN* (1693), 2 Vern. 289; 23 E. R. 786.

**712. — Tenant for life under a settlement of a Crown lease gets a renewal in reversion it shall go to the uses of the settlement.]**—*TASTER v. MARRIOTT* (1768), Amb. 668; 27 E. R. 433.

**Annotations:—***Reid. Randall v. Russell* (1817), 3 Mer. 190; *Re Biss, Biss v. Biss*, [1903] 2 Ch. 40.

**713. — Where tenant right estate settled upon marriage is renewed the renewal is to the uses of the settlement.]**—*PICKERING v. VOWLES* (1783), 1 Bro. C. C. 197; 28 E. R. 1080, L. C.

**Annotations:—***Apd. Randall v. Russell* (1817), 3 Mer. 190; *Re Lulham, Brinton v. Lulham* (1884), 33 L. J. Ch. 928. *Reid. Re Biss, Biss v. Biss*, [1903] 2 Ch. 40.

**714. — Testator gives to his daughter B. a leasehold, held under the corpn. of L. for three lives & twenty-one years after the death of the survivor, "for all his estate & interest therein." He gives other parts of his property to his son, & two other daughters; & the residue of his estate, real & personal, to be equally divided between his three daughters & his son; with a proviso that, in case of the death of any without leaving issue "the dying child or children's share or shares" should go over to & be divided among the survivors; followed by a clause that any or either of his children who should dispute his will should have no benefit from any thing therein contained, but the share or shares therein before given to him, her, or them should go to the others. B. enters on the leasehold given her by the will, & after the expiration of the three lives, but during the twenty-one years which commenced on the death of the survivor, obtains a renewal. She then dies, after the expiration of the twenty-one years, without issue, having by her will given the premises to J. "for all her estate & interest therein." On her death, S., the only surviving child of testator, enters by virtue of the proviso in his will. J. brings ejectment & recovers possession; & after-**

**PART I. SECT. 14, SUB-SECT. 1.—B.**

**712 i. Whether trust created—Renewal by tenant for life.]**—*EYRE v. DOLPHIN* (1813), 2 Ball. & B. 290, 298.—*IR.*

**712 ii. — — — — —.]**—*O'BRIEN v. EGAN*

(1880), 5 L. R. Ir. 633.—*IR.*

**712 iii. — — — — —.]**—*BARRETT v. HANBURY*, [1919] 1 I. R. 275.—*IR.*

**712 iv. — — — — —.]**—*BRADY v. BRADY*, [1920] 1 I. R. 170.—*IR.*

**d. — — — Settlor.]**—*Re ANDERSON'S ESTATE* (1869), 18 W. R. 248.—*IR.*

**e. — — — & remainderman.]**—*Lands, held under a lease for lives,*

wards purchases the reversion in fee, for which the option is given him, as tenant of the premises, by the corp'n.—*Held*: (1) the proviso in the will, with reference to the subsequent clause, extended to all the interests taken by the children under the will, & was not confined to the residue only; the meaning of the word shares being explained by that subsequent clause; (2) the renewed lease was purchased by B. as trustee of the term, & went over to S. upon her death without issue; (3) with respect to the reversion in fee, J. was a purchaser thereof for his own benefit, there not being enough in the case to extend to it the principle upon which the renewed lease was held to be taken for the benefit of those in remainder.—*HARDMAN v. JOHNSON* (1815), 3 Mer. 347; 36 E. R. 133.

*Annotations*:—As to (3) *Distd. Fosbrooke v. Balguy* (1833), 2 L. J. Ch. 135. *Consd. Trumper v. Trumper* (1872), 1 L. R. 14 Eq. 295. *Aberdeen Town Council v. Aberdeen University* (1877), 2 App. Cas. 544. *Distd. Re Ranelagh's Will* (1884), 28 Ch. D. 560. *Consd. Bevan v. Webb*, [1905] 1 Ch. 620. *Refd. Giddings v. Giddings* (1827), 3 Russ. 241; *Lloyd-Jones v. Clark-Lloyd*, [1919] 1 Ch. 424.

715. ———. ]—*RANDALL v. RUSSELL*, No. 736, *post*.

716. ———. ]—If a tenant for life of an underlease for eighteen years granted by a person who himself holds the premises so underlet along with other property under a lease for twenty-one years purchases the interest of his immediate lessor & obtains from the superior lessor a renewal of the lease thus purchased, the renewed lease is subject so far as regards the premises which were comprised in the underlease to the same trusts as would have affected the underlease if it had not been signed or had not expired by the effluxion of time. The same rule holds though the lease at the time of the purchase was vested in a trustee upon trusts under which he could not have granted a renewal of the underlease & though the tenant for life outlived by twenty-five years the time at which the underlease would have expired by effluxion of time.—*GIDDINGS v. GIDDINGS* (1827), 3 Russ. 241; 58 E. R. 367.

*Annotations*:—*Refd. Lloyd-Jones v. Clark-Lloyd*, [1919] 1 Ch. 424. *Mentd. Bradford v. Brown-John* (1868), 3 Ch. App. 711.

717. ———. ]—**Subsequent purchase of reversion.**—W. was beneficially entitled for his life to renewable leaseholds for three lives, held on trust to renew, & subject to certain charges. All the *cestui que vie* having died, & W.'s right to renew being disputed by the reversioner, the trustee of the leaseholds, with the consent of the persons entitled to the charges, in order to facilitate the obtaining of a renewal, transferred the legal estate to W. by a deed, which recited, though contrary to the fact, that the charges had been paid by W. Thereupon W. obtained a renewal, without prejudice to the question in dispute, & subsequently, to avoid litigation, purchased the reversion in fee. He subsequently paid off the charges, & mortgaged the premises in fee. By his will, reciting that the charges were

subsisting, he devised his interest in the premises to T., subject to the charges.—*Held*: T. took the fee subject to the charges.—*TRUMPER v. TRUMPER* (1873), 8 Ch. App. 870; 42 L. J. Ch. 641; 29 L. T. 86; 21 W. R. 692, 1 J. J.

718. ———. ]—**Lease renewable by custom.**—The doctrine that a renewal of leaseholds by a tenant for life enures for the benefit of the remainderman applies equally to a purchase of the reversion. Testatrix devised leaseholds renewable by custom to J. for the residue of the term & after the death of J. during the residue of the term to the children of J. in equal shares. J. renewed the leaseholds more than once, & finally purchased the reversion.—*Held*: the fee simple in the property passed by the devise in the will to the children of J. & became subject to the trusts of the will.—*PHILLIPS v. PHILLIPS* (1885), 29 Ch. D. 673; 54 L. J. Ch. 943; 53 L. T. 403; 33 W. R. 803, C. A.

*Annotations*:—*Consd. Longton v. Willsby* (1897), 76 L. T. 770; *Bevan v. Webb*, [1905] 1 Ch. 620; *Griffith v. Owen*, [1907] 1 Ch. 195.

719. ———. ]—*Re BISS, BISS v. BISS*, No. 708, *ante*.

720. ———. ]—**Renewal by trustee—Trustee for benefit of infant—Lessor refusing to renew to infant.**—Lease of a market devised to a trustee for the benefit of an infant; lessor, before expiration of the lease, refuses to renew to the infant; trustee takes it himself, shall be obliged to convey to the infant, & account for the profits.—*KERCH v. SANDFORD* (1726), Sel. Cas. Ch. 61; 2 Eq. Cas. Abr. 741; *Cas. temp. King*, 61; 25 E. R. 223, L. C.

*Annotations*:—*Distd. Norris v. Le Neve* (1743), 3 Atk. 26. *Appld. Taster v. Marriott* (1768), Amb. 668; *Re Anderson's Estate* (1869), 18 W. R. 218. *Distd. Longton v. Willsby* (1897), 76 L. T. 770. *Appld. Griffith v. Owen*, [1907] 1 Ch. 195; *Lloyd-Jones v. Clark-Lloyd*, [1919] 1 Ch. 424. *Refd. Owen v. Williams* (1773), Amb. 734; *Stone v. Theed* (1787), 2 Bro. C. C. 243; *Randall v. Russell* (1817), 3 Mer. 190; *Aberdeen City v. Blaikie* (1854), 2 Eq. Rep. 1281; *Re Adams & St. Mary Abbots, Kensington* (1884), 51 L. T. 382; *Re Biss, Biss v. Biss*, [1903] 2 Ch. 40; *Bevan v. Webb*, [1905] 1 Ch. 620.

721. ———. ]—Nothing is better established as a general proposition than that where a trustee for an infant renews a lease in his own name, the renewed lease shall enure for the infant's benefit. This is a doctrine founded on general policy to prevent frauds, & has long been an established rule in cts. of equity.—*BLEWETT v. MILLETT* (1774), 7 Bro. Parl. Cas. 367; 3 E. R. 238, II. 1.

*Annotation*:—*Refd. Re Biss, Biss v. Biss*, [1903] 2 Ch. 40.

722. ———. ]—If trustees, mtgees., & persons interested, obtain renewal, the new lease is always subject to the trusts & limitations of the old lease (*LORD BATHURST*).—*RAWE v. CHICHESTER* (1773), Amb. 715; 27 E. R. 463; *sub nom. BROMFIELD v. CHICHESTER*, RAW v. DUTHELEY, 2 Dick. 480, L. C. *Annotations*:—*Appld. Pickering v. Vowles* (1783), 1 Bro. C. C. 197; *Webb v. Lugar* (1836), 2 Y. & C. Ex. 247; *Mill v. Hill* (1852), 3 H. L. Cas. 828; *Re Biss, Biss v. Biss*, [1903] 2 Ch. 40. *Refd. Randall v. Russell* (1817), 3 Mer. 190; *Bradford v. Brown-John* (1868), 37 L. J. Ch. 198.

having been devised to M. for life, & after her death, to T. absolutely, they joined in surrendering the lease, & procured a new one for lives to themselves & their heirs, as joint-tenants; T. devised the lands, but M. survived him & devised to defts.—*Held*: the legal estate granted by the new lease was vested in defts. as devisees of M., in trust for pltf., as the heir of T. & also of his devise.—*HILL v. HILL* (1874), 8 I. R. Eq. 140.—*IR*.

1. ———. ]—**Personal representatives.**—*JACKSON v. WELCH* (1850), L. & G. temp. Plunk. 346.—*IR*.

5. ———. ]—*McCRACKEN v. McCLELLAND* (1877), 11 I. R. Eq.

172.—*IR*.

722i. ———. ]—**Renewal by trustee.**—The renewal of a lease taken by a trustee, shall enure to the benefit of the *cestui que trust*.—*GRIFFIN v. GRIFFIN* (1804), 1 Sch. & Lef. 352.—*IR*.

722ii. ———. ]—Trustee of a lease renewing for his own benefit, considered in equity as still holding for his *cestui que trust*, even when clear that lessor would not have renewed for the benefit of the *cestui que trust*.—*FITZGIBBON v. SCANLAN* (1813), 1 Dow. 261.—*IR*.

722iii. ———. ]—Renewable leaseholds having been devised upon trusts, one of the trustees obtained a renewal

of the lease of the devised lands, & a new lease of additional lands, in one lease, at a bulk rent.—*Held*: *quoad* the additional land, the renewal was not a graft upon the old lease.—*ACHESON v. FAIR* (1843), 2 Con. & Law. 208; 3 Dr. & War. 512.—*IR*.

722iv. ———. ]—*M'ALLISTER v. WALSH* (1845), 8 I. Eq. R. 250.—*IR*.

722v. ———. ]—*LOVATT v. KNIPE* (1849), 12 I. Eq. R. 124.—*IR*.

722vi. ———. ]—*KIERNAN v. M'CANN*, [1920] 1 I. R. 99.—*IR*.

722vii. ———. ]—*RUSSELL v. DURL EXECUTORS*, [1920] N. Z. L. R. 91.—*N.Z.*

*Sect. 14.—Constructive and implied trusts: Sub-sect. 1, B. & C.]*

**723.** ———.]—F. holds a lease as trustee; lease expires, & he renews it for his own benefit. This not impeached for nearly twenty years from the time of renewal. Trustee held in equity to have renewed for benefit of his *cestui que trust*, & his representative ordered to account accordingly.

Where a trustee held a lease for the benefit of a *cestui que trust*, & made use of the influence which his situation enabled him to exercise to fit a new lease, *cts.* of Equity had said that he should hold it for the benefit of the *cestui que trust* (LORD ELDON, C.).—*FITZGIBBON v. SCANLAN* (1813), 1 Dow. 261; 3 E. R. 694.

*Annotations:—*Refd. Clegg v. Edmondson (1857), 8 De G. M. & G. 787. *Mentd.* Inglis v. Mansfield (1835), 3 Cl. & Fin. 362; Donald Campbell v. Pollak, [1927] A. C. 732.

**724.** ———.]—If a trustee renews a lease, the *cestui que trust* has the benefit of such renewal.—*Re EMMETT, Ex p. ANDREWS* (1816), 1 Madd. 573; 56 E. R. 210; *sub nom.* *Re EMMETT, Ex p. ANDREWS*, 2 Rose, 410.

*Annotations:—*Refd. Henson v. Blackwell (1845), 4 Hare, 434; Dobson v. Land (1850), 8 Hare, 216; Dalby v. India & London Life Assce. (1854), 18 Jur. 1024; Crompton v. Huber (1855), 25 L. T. O. S. 43.

**725.** ——— *Renewal by quasi tenant in tail.*—A. possessed of a church lease for three lives devised it to trustees for certain purposes, till his son R. should attain twenty-one & when his son should attain that age, he directed his trustees to stand seised of it to the use of his son & the heirs of his body; & by a codicil he directed that if his son R. should die without issue, his son P. should inherit the estate in the same manner as R. was to inherit it. R. being quasi tenant in tail, if he surrender this lease & take a new one to himself & his heirs for three new lives, there is no equity on behalf of P. to make R. or his devisees trustees of the new lease for P.—*BLAKE v. BLAKE* (1786), 1 Cox, Eq. Cas. 266; 3 P. Wms. 10, n.; 29 E. R. 1160.

*Annotations:—*Refd. Lloyd v. Johns (1804), 9 Ves. 37; Moody v. Walters (1809), 16 Ves. 283; Slade v. Pattison (1835), 5 L. J. Ch. 51; Cresswell v. Hawkins (1857), 3 Jur. N. S. 407.

**726.** ——— *Renewal by personal representative.*—If a trustee of a term surrender & take a further term, that shall be for the benefit of *cestui que trust*.—*HOLT v. HOLT* (1670), 1 Cas. in Ch. 190; 22 F. R. 756.

*Annotation:—*Refd. Rawe v. Chichester (1773), Amb. 715.

**727.** ———.]—*ANON.* (1685), 2 Cas. in Ch. 207; 22 E. R. 913.

**728.** ———.]—An exor. in trust for an infant residuary legatee renews a lease, part of testator's personal estate in his own name, & having mortgaged it, assigns the equity of redemption to a trustee to sell for payment of his own debts. The trustee sells to one who had notice of the infant's title. Purchase set aside.—*WALLEY v. WALLEY* (1687), 1 Vern. 484; 23 E. R. 609; *sub nom.* *ANON.*, 1 Eq. Cas. Abr. 332, pl. 7.

*Annotations:—*Refd. Brown v. Blount (1830), 9 L. J. O. S. Ch. 74; Rowley v. Gleaner, [1897] 2 Ch. 503. *Mentd.* Peacock v. Burt (1834), 4 L. J. Ch. 33; Willats v. Busby (1842), 5 Beav. 193.

**729.** ———.]—Bequest of leaseholds for years, determinable upon lives, for life, with remainder over, for all the residue of the term & interest testator shall have to come therein at his decease. The term expired in the life of testator; who continued to hold; & paid half a year's rent before his death, as tenant by the year.

Upon the general words, unrestrained, comprising the interest from year to year, & the intention upon the whole will, a subsequent lease, obtained by the extrin., the widow & tenant for life under the will, was held subject to the uses of the will; as the residue of the term at his death, however short, would have been.

If the representative having become tenant for life of that interest, had acquired a lease through the opportunity afforded him during that short period, my opinion was, that she would be a trustee (*per OUR.*).—*JAMES v. DEAN* (1808), 15 Ves. 236; 33 E. R. 744, L. C.; *previous proceedings* (1805), 11 Ves. 383, L. C.

*Annotations:—*Apld. Archbold v. Scully (1861), 9 H. L. Cas. 360. *Refd.* Randall v. Russell (1817), 3 Mer. 190; *Re* Bliss, Bliss v. Bliss, [1903] 2 Ch. 40; Lloyd-Jones v. Clark-Lloyd, [1919] 1 Ch. 424.

**730.** ———.]—Testator devised leaseholds for lives to his daughter F. & the heirs of her body & in default of such issue to A. & her heirs, the daughter being at the time of his death a married woman & of unsound mind her husband took out administration to testator with his will annexed & as such administrator renewed the leases & assigned them to a trustee for his own benefit. F. survived her husband:—*Held*: upon the death of F. A. became entitled to the renewed leases.—*FITZROY v. HOWARD* (1828), 3 Russ. 225; 7 L. J. O. S. Ch. 10; 38 F. R. 561, L. C.

*Annotation:—*Refd. Welgall v. Brome (1833), 6 Sim. 99.

**731.** ———.]—An exor., six years after the death of testator, surrendered a lease belonging to testator, & took a renewed lease, including additional property & at an increased rent, in his own name. He afterwards deposited the lease as security for money advanced to him, which he applied to his own purposes. The renewed lease contained no mention of the surrender, & the mtgee. did not know that the borrower was an exor., or that he was not the beneficial owner of the lease. He did not, however, make any inquiry into the title. An action was afterwards brought to administer testator's estate, & a consent order was made for the sale of the leasehold property, without prejudice to any right, the mtgee. giving up the lease to facilitate the sale. He claimed to be paid the amount due to him by the exor. out of the proceeds of sale:—*Held*: the lease was in equity part of testator's estate, & the equity of the estate being prior to the equity of the mtgee., must prevail against it.—*Re MORGAN, PILGOREM v. PILGOREM* (1881), 18 Ch. D. 93; 50 L. J. Ch. 834; 45 L. T. 183; 30 W. R. 223.

*Annotations:—*Consd. Jennings v. Mather, [1901] 1 K. B. 108. *Refd.* *Re* Gorton, Dowse v. Gorton (1889), 60 L. T. 305; Graham v. Drummond, [1898] 1 Ch. 968.

**732.** ——— *Renewal by settlor.*—In 1865 A., by a post-nuptial settlement, in consideration of natural love & affection, assigned a lease for a term expiring in 1905 to trustees, in trust for the benefit of his wife. In 1870, without disclosing the settlement, A. obtained a lease of the same premises for forty years, in consideration of a premium of £91, & the surrender of the former lease.

The old lease, cancelled, & the new lease, were delivered by A. to his wife:—*Held*: in taking the new lease A. acted for the benefit of his wife, & as agent for her & the trustees of the settlement, & although there was no written declaration of trust of the new lease, such lease was "by operation of law" subject to the trusts of the settlement declared in respect of the old lease.—*Re LULHAM, BRINTON v. LULHAM* (1885), 53 L. T. 9; 33 W. R. 788, C. A.



**733. — Renewal by mortgagee.]—**RAWE v. CHICHESTER, No. 722, *ante*.

—See MORTGAGE, Vol. XXXV., pp. 310, 311, Nos. 571–573.

**—Renewal by mortgagor.]—**See MORTGAGE, Vol. XXXV., p. 311, Nos. 574, 575.

**—Renewal by partner.]—**See PARTNERSHIP, Vol. XXXVI., pp. 422, 423, Nos. 917–920; MINES, Vol. XXXIV., pp. 625, 626, Nos. 222–224.

### C. Acquisition of Reversion.

**734. By tenant for life.]—**HARDMAN v. JOHNSON, No. 714, *ante*.

**735. —.]—**PHILLIPS v. PHILLIPS, No. 718, *ante*.

**736. — Purchase from assignee—Distinguished from purchaser from original reversioner.]—**Testator, seized in fee of a moiety of an estate at L. & in possession of the other moiety as tenant from year to year to St. J. College, his lease from the College having expired, gives to his wife, *durante viduitate*, "all that his messuage or tenement, with the farm & lands at L. & all his estate & interest therein, she paying the rent reserved to St. J. College," etc. The widow, after his death, obtains a new lease, & subsequently purchases the reversion of one to whom it had been conveyed by the College under an Act of Parliament:—*Held*: (1) the renewed lease was taken subject to the trusts of the will, & those in remainder to contribute to the fine paid by the widow in proportions to be settled by the master; (2) the purchase of the reversion, not from the College, but from the person to whom it had been conveyed by the College, was not, under the circumstances, to be taken subject to the trusts of the will.—**RANDALL v. RUSSELL** (1817), 3 Mer. 190; 36 E. R. 73.

*Annotations:—As to (2) Dist. Giddings v. Giddings* (1827), 3 Russ. 241. *Apld.* Longton v. Wilsby (1897), 76 L. T. 770. *Consd.* Bevan v. Webb, [1905] 1 Ch. 620. *Refd.* Griffith v. Owen, [1907] 1 Ch. 195; Lloyd-Jones v. Clark-Lloyd, [1919] 1 Ch. 424. *Generally, Consd.* Trumper v. Trumper (1872), L. R. 14 Eq. 295. *Mentd.* Cockayne v. Harrison (1872), L. R. 13 Eq. 432.

**737. — Assignee of first life tenancy—Entitled in ultimate remainder—Reversion acquired on failure to renew lease.]—**A leasehold for lives was devised by testator who died in 1820 to trustees, on trust for a tenant for life & other persons in remainder, the ultimate remainder in fee being given to the tenant for life. The first trust was to renew the lease from time to time, paying the

necessary fines & expenses out of the rents, or raising them by mtge. In 1825 the trustees obtained a renewed lease for three lives, one of which was that of the tenant for life. In 1855 & 1859 respectively the other two lives dropped. In Oct. 1870, the tenant for life contracted to sell all his interest in the property to B., & a conveyance was executed in Mar. 1879. In Dec. 1876, the Ecclesiastical Comrs., in whom the reversion subject to the lease was then vested, & who would not renew the lease, contracted to sell the reversion to B., & in Aug. 1879, they executed a conveyance to him, the conveyance being expressly made subject to "such trusts, equities, estates, & interests" as then affected the leasehold interest. In June, 1878, the School Board for London, under their statutory powers, took part of the property, & in Jan. 1880, they paid the purchase-money & compensation money into ct. The legal estate in the lease was outstanding in the representatives of the last surviving trustee of the will:—*Held*: irrespectively of the form of the conveyance of the reversion to B., it was, according to the ordinary doctrine of a ct. of equity, impossible for him to purchase the reversion otherwise than as a trustee for the persons interested in the lease under the trusts of the will, & subject to his right to be recouped the purchase-money, he was only entitled to an order for payment on the interest on the fund in ct. during the life of the tenant for life under the will.—*Re RANELAGH'S (LORD) WILL* (1884), 20 Ch. D. 590; 53 L. J. Ch. 689; *sub nom. Re RANELAGH'S (VISCOUNT) WILL, BEETON v. LONDON SCHOOL BOARD*, 51 L. T. 87; 32 W. R. 714.

*Annotation:—Refd.* De Reehberg v. Beeton (1888), 38 Ch. D. 192.

**738. — Tenant for life in remainder—Lease not renewable by custom or contract.]—**By his will, J., the lessee of certain leaseholds, not renewable, gave the same to his brother for life, with remainder to E. for life, with remainder for the benefit of the children of E. During the life of the first tenant for life E. purchased the reversion expectant on the determination of the lease. On a summons taken out in these circumstances to ascertain whether the purchaser was a trustee for the remaindermen:—*Held*: there being no case in which the doctrine of *Keach v. Sandford*, No. 720, *ante*, had been applied to leaseholds not renewable by contract or custom, the purchaser

**7331. — Renewal by mortgagee.]—**The principles on which cts. of equity act, in considering renewed interests obtained by mtgees. trustees, etc., grants, are: that the advantage was procured either by being in possession; or when out of it, by a contrivance to allow the lessee of the benefit of renewal.—**NESBITT v. TREDEENICK** (1808), 1 Ball. & B. 29.—*IR.*

**h. —.]—**NICHOLSON v. GANDER (1809), 8 C. L. R. 648.—*AUS.*

**j. — Renewal by erroror de son tort.]—**MULVANY v. DILLON (1810), 1 Ball. & B. 409.—*IR.*

**k. —.]—**M'NULTY v. HAMILL (1815), Beat. 544.—*IR.*

**l. — Renewal by person about to be evicted—Whether land thereby freed from annuity.]—**Where a party is in possession of premises as the assignee of a lease, subject to an annuity, amongst other charges, & pending an eviction for non-payment of rent, enters into a new agreement, whereby, subject to the right of redemption, he is, in consideration of a sum of £750, to get a lease at a less rent, to commence from the termination of the nine months allowed for redemption; there

though the ejectment proceeding has been perfected, & the eviction actually had, yet the new interest is a graft upon the old, & as such, subject to the annuity.—**JONES v. KEARNEY** (1842), 1 Dr. & War. 131.—*IR.*

**m. — Renewal to widow of tenant.]—**The widow & administratrix of a tenant from year to year of a holding in Ulster continued in possession for two years after his death, & the tenancy having been then determined by notice to quit, offered no resistance to an ejectment brought by the landlord, who took formal possession, but left her in undisturbed occupation at the same rent:—*Held*: that, though there was no fraud in the transaction, the new tenancy was a graft on the old for the benefit of the next-of-kin of the intestate; even though there were a custom on the estate that a holding should not be divided amongst the next-of-kin of an intestate, but he given to the widow, if a desirable tenant.—**KELLY v. KELLY** (1874), 8 I. R. Eq. 403.—*IR.*

**n. — Renewal by tenant in common.]—**Where a lease held by tenants in common has expired, & the lessees' interest is determined & no

tenancy or interest continues or has sprung up in the former co-owners of the lease, there is no necessary incapacity which debars one of such tenants in common from obtaining a new lease to himself personally, if he does not abuse or take an inequitable advantage of his position, & if the lessor has power to give, & intends to give, it to him to the exclusion of the other former co-owners.—**HUNTER v. ALLEN**, [1907] 1 I. R. 212.—*IR.*

**o. — Renewal by husband of tenant-wife.]—***Re LOCAL REGISTRATION OF TITLE (IRELAND) ACT, 1891, & SMITH* (1918), 52 I. L. T. 113.—*IR.*

### PART I. SECT. 14, SUB-SECT. 1.—C.

**p. By underlessee.]—**A. demises lands to B. for 99 years; B. demises same to C. reserving a reversion of two years. C. demises the premises to occupying tenants, & afterwards without notice to B. applies for, & obtains a reversionary lease of the premises from A.; such lease is not a graft upon the original lease.—**MAUNSEL v. O'BRIEN** (1835), 1 Jo. Ex. Ir. 170.—*IR.*

**q. By trustee.]—**GABBETT v. LAWDER (1883), 11 L. R. Ir. 295.—*IR.*



*Sect. 14.—Constructive and implied trusts: Sub-sect. 1, C., D. & E.]*

was not a trustee for the remaindermen.—*LONGTON v. WILSBY* (1897), 76 L. T. 770.

*Annotations:—Folld. Bevan v. Webb*, [1905] 1 Ch. 620. *Refd. Re Bliss, Bliss v. Bliss*, [1903] 2 Ch. 40; *Griffith v. Owen*, [1907] 1 Ch. 195.

**739. — In possession of mortgaged premises—Purchase under power of sale in mortgage.]—A.** by will gave N. House & M. House to his daughter S., the wife of O., for life, with remainder to their children as tenants in common, & gave B. House, W. House, & Y. House to the children of J. equally. At the death of A. the children were infants, & N. House, M. House, & B. House were comprised in a single mtge. to X. to secure £1,350, while W. House & Y. House were subject to several mtges. to other persons. S. & O. & J. determined that, to give effect to the will the mtge. debt of £1,350 should be apportioned between N. House & M. House on the one hand & B. House on the other. O. & J. communicated with X., the mtgee., & it was arranged that N. House & M. House should be purchased by O. & B. House, W. House, & Y. House by J. for amounts equal to the sums due on the mtges., there being no valuation or bargaining, or evidence of the previous intention of the mtgees. to sell, although the power to sell had become exercisable. O. at once began to look out for sub-purchasers of N. House & M. House, & in Mar. 1880, a sub-purchaser of N. House having been found to buy it, O. raised the balance of the purchase-money payable by him on a mtge. of M. House. On completion the properties were conveyed to O. & J. respectively in the manner & with the recitals usual in the case of mtgees. selling under their powers of sale, & O. conveyed N. House to the sub-purchaser & mortgaged M. House for the balance. The value of the two houses was at least £1,580, whereas O. paid only about £1,246 for them. S. died in 1882:—*Held: O. was a trustee of N. House & M. House, subject to the life interest of S., for the children of O.—GRIFFITH v. OWEN*, [1907] 1 Ch. 195; 76 L. J. Ch. 92; 96 L. T. 5; 23 T. L. R. 91.

—*See SETTLEMENTS*, Vol. XL., p. 794, Nos. 3231–3235.

**740. By trustee—Lease not renewable by custom or contract.]—The doctrine that wherever the reversion or a lease which forms part of a trust estate is purchased by the trustee of the lease the purchase is for the benefit of the trust estate applies only to leaseholds which are renewable by custom or contract. Therefore if a trustee of a lease which is not thus renewable buys the reversion in the lease, he may, in the absence of fraud, hold it for his own benefit.—*BEVAN v. WEBB*, [1905] 1 Ch. 620; 74 L. J. Ch. 300; 93 L. T. 298; 53 W. R. 651.**

*Annotation:—Refd. Griffith v. Owen*, [1907] 1 Ch. 195.

**Purchase of equity of redemption by tenants in common.]—See REAL PROPERTY**, Vol. XXXVIII., p. 686, No. 269.

*D. Accretions to Trust Property.*

**741. By encroachment on Crown lands—Grant of land by Crown.]—A.**, having made an encroachment on the lands of the Crown in the Forest of Dean, died seised of it, leaving a will by which he devised it to his widow for life, with remainder to plffs. The widow entered into possession, & afterwards, under 1 & 2 Vict. c. 42, authorising the making grants from the Crown for nominal considerations to the holders of the encroachments, she procured a conveyance from the Crown to herself in fee, & died, having devised the

property to defts.:—*Held: on the construction of the Act, it contained nothing to take the case out of the general rule, according to which, the grant having been obtained by the widow by virtue of a possession referable to her husband's will, must be treated in equity as made for the benefit of his devisees, & on the death of the widow, the plffs. were entitled to the land.*

If a lease had been granted under the Act to a trustee, he would have held it on trust (*TURNER, L.J.*).—*YEM v. EDWARDS* (1857), 1 De G. & J. 598; 3 K. & J. 504; 27 L. J. Ch. 23; 30 L. T. O. S. 110; 22 J. P. 495; 4 Jur. N. S. 647; 6 W. R. 20; 44 E. R. 855, L. JJ.

**742. Augmentation of trust fund—Investment of dividends.]—B.**, a married woman, being possessed of money invested in the funds which she had saved out of her separate estate, transferred same into the names of C. & D., & by a deed declared the trusts to be for herself for life for her separate use, & after her decease for her husband for life, & after the decease of the survivor of them, for their two sons equally to be divided between them, to & for their own absolute use & benefit, & to be paid to them on their respectively attaining the age of twenty-five. It was also provided that if either of the two sons should die before attaining twenty-five, his share should become the property of the survivor, unless he should leave a wife or child; but in case both should die before attaining twenty-five, without leaving a wife or child then the fund was to be paid to B.'s sister. B. afterwards invested various other sums of money in the names of the same trustees, partly arising from the dividends of the original fund, & partly from the savings of her separate estate. The husband died in 1852; one of the sons in 1854, having appointed his brother his exor.; the other son in 1856, having appointed plffs. his exors. Neither of them were ever married. B. after the death of her husband & sons, claimed the fund, alleging that she thought, when the deed was executed, & at the time when she made the additions to the original fund, that if her sons died in her lifetime without leaving issue, she would be entitled to it absolutely:—*Held: the accumulations & also the additional moneys added to the fund were subject to the trusts of the settlement.—MUGGERIDGE v. STANTON* (1859), 1 De G. F. & J. 107; 1 L. T. 144; 8 W. R. 69; 45 E. R. 300, L. C. & L. JJ.

**743. — Additions by settlor.]—MUGGERIDGE v. STANTON**, No. 742, *ante*.

**744. — —.]—(1)** A sum of Consols was vested in the trustees of a marriage settlement, upon the usual trusts, for the husband & wife successively for life, with remainder for the benefit of the children. The husband directed the bankers who received the dividends & paid them to him under a power of attorney from the trustees, to invest an additional sum of £2,000 Consols in the names of the same trustees, so that they might receive the dividends as before. The bankers invested the sum as directed, & paid the dividends of the aggregate fund to the husband during his life. No notice was given to the trustees of the fresh investment:—*Held: there was no resulting trust of the sum of £2,000 for the husband, but it became subject to the trusts of the settlement as an augmentation of the trust fund.*

(2) A fund was vested in trustees on the usual trusts of a marriage settlement. The husband added a further sum of £2,000 as an augmentation of the trust fund. Four years afterwards the husband & wife, under a power in the settlement, appointed the original fund, "or the trust fund & property representing same," to two of their

children :—*Held* : the appointment passed only the original fund, & not the augmentation.—*RE CURTEIS' TRUSTS* (1872), L. R. 14 Eq. 217; 41 L. J. Ch. 631; 26 L. T. 863.

**745. — Additions by trustee to settled share—On erroneous construction of will.]**—Where the trustees of a will had voluntarily added certain sums to the settled share of a beneficiary under an erroneous impression as to the true construction of the will, & the will was subsequently construed by the ct. adversely to their impression :—*Held* : there was nothing on the evidence to show that the trustees held the contributed fund on the trusts of the will as construed by the ct., but only that they held the money for the benefit of the beneficiary under the will.—*RE WALTERS, NEISON v. WALTERS* (1890), 63 L. T. 328, C. A.

— **Money of trustee added to trust fund.]**—*See* Sect. 3, sub-sect. 2, A. (d), *ante*.

**746. Acquisition of fishing rights—Adjacent to trust estate.]**—*ABERDEEN TOWN COUNCIL v. ABERDEEN UNIVERSITY*, No. 760, *post*.

**747. Gift of ground rents to "present mortgagees"—Leasehold premises mortgaged to trustees—Trustees hold on trusts of settlement.]**—B., by will dated Mar. 24, 1884, devised his freehold ground rent arising out of the house & premises, No. 7, W. terrace, formerly held by H., & all his interest in the premises, "to the present mtgees. thereof." At the date of the will, & of B.'s death, there was no mtg. of the freehold ground rent in existence, but the leasehold premises out of which the rent arose were mortgaged by demise to the trustees of a certain settlement to secure moneys advanced by them out of the trust funds. These trustees & the beneficiaries under the settlement were alike strangers to B. :—*Held* : the ground rent passed under the devise to the trustees of the settlement, but they took upon the trusts of the settlement, & not beneficially.—*RE PAYNE'S SETTLEMENT, KIRBLE v. PAYNE* (1886), 54 L. T. 840.

**748. Legacy to be appropriated out of estate—Appreciation of estate pending conversion—Trustee not liable for apportionment of increased value.]**—Testator by his will gave his real & residuary personal estate upon trust for sale & conversion, & as to the sum of £20,000, part of the trust moneys, upon trust for his son C. for life, with remainder to C.'s children, giving the residue of the trust moneys between his other two sons, & giving his trustees a discretionary power to postpone the sale & conversion of the estate so long as seemed to them expedient. The trustee, who was one of the residuary legatees, neither paid nor appropriated funds to meet the legacy of £20,000, but retained the trust estate in its original state of investment, meanwhile paying C. interest at 4 per cent. upon the amount of the legacy. The investments of the estate having risen considerably in value, C. & his children, more than ten years after the death of testator, claimed to participate in the increase of value, on the ground that the trustee, being a residuary legatee, could not retain profits caused by his own default :—*Held* : the residuary legatees must be treated as owners of the estate, subject to a charge thereon of the legacy, & C. & his children were only entitled to the amount of their legacy with interest at 4 per cent. from the end of the year after the death of testator.—*RE CAMPBELL, CAMPBELL v. CAMPBELL*, [1893] 3 Ch. 468; 62 L. J. Ch. 878; 69 L. T. 134; 37 Sol. Jo. 582.

**749. Acquisition of adjoining property—Purchase by tenant for life—Exercise of adjoining owner's right of pre-emption.]**—The tenant for life of settled property, having a statutory right of pre-emption as adjoining owner, purchased on his own

account from turnpike trustees the site of a disused tollhouse, the conveyance being made to himself in fee. He made lasting improvements thereon, & died having devised the site to defts. :—*Held* : defts. were trustees of the site for the remaindermen entitled to the settled property, but the remaindermen could only enforce this equity on the terms of recouping the estate of the tenant for life not only the amount of the purchase-money but also the value of the lasting improvements.—*ROWLEY v. GINNEVER*, [1897] 2 Ch. 503; 66 L. J. Ch. 669; 77 L. T. 302.

*Annotation.*—*Expld. Re Coulson's Trusts, Prichard v. Coulson* (1907), 97 L. T. 754.

**750. Advantage obtained by tenant for life—Surrender of mineral rights by Crown.]**—A tenant for life, impeachable for waste, under a settlement which included real estate & unopened mines severed from the surface, which was not included in the settlement, granted a take note or licence for three years to search for & work gold or other ores in the mines subject to the rights of the Crown, if any. The tenant for life subsequently acquired a lease from the Crown for twenty-one years of the gold & silver ores in the mines together with a release of the Crown's statutory right of pre-emption over the base ores. He then granted further take note & leases of the mines for short terms, all of which expired during his life, & received rents & premiums. None of the take notes or leases were valid under Settled Land Acts, under which alone he had power to deal with the mines. On the expiration of the Crown lease he obtained a renewal for a further period of twenty-one years, & granted valid separate sub-leases of the gold & silver ores & of the base minerals for the residue of the Crown term less one day. On the death of the tenant for life in 1916 the tenant in tail in remainder, who had barred the entail, brought an action against the exors. of the tenant for life claiming the amount of the premiums & three-fourths of the rents received by him, & a declaration that *pltf.* was entitled to the subsisting Crown lease subject to & with benefit of the sub-leases :—*Held* : the tenant for life had used his position to obtain the Crown lease, & so far as the release of the right of pre-emption over the base ores was concerned that lease extended to something which was included in the settlement. He must therefore be taken to have acquired the lease as trustee for the beneficiaries, & *pltf.* was entitled to the unexpired portion of the lease subject to & with benefit of the sub-leases.—*LLOYD-JONES v. CLARK-LLOYD*, [1919] 1 Ch. 424; 88 L. J. Ch. 278; 120 L. T. 578; 35 T. L. R. 273; 63 Sol. Jo. 317, C. A.

*E. Profits obtained by Person in Fiduciary Position.*

**751. Co-owner—Agreement to purchase by moieties—Abatement obtained by one.]**—*CARTER v. HORNE* (1728), 1 Eq. Cas. Abr. 7; 21 E. R. 832.

**752. Partner—Negotiation for lease—Secret commission paid to one partner.]**—A person employed on behalf of himself & his co-partners in negotiating the terms of a lease is not entitled to stipulate clandestinely with the lessors for any private advantage to himself. Where therefore a sum of £12,000 was paid in pursuance of such a stipulation, the party receiving it was declared to hold it in trust for the partnership.—*FAWCETT v. WHITEHOUSE* (1829), 1 Russ. & M. 132; 8 L. J. O. S. Ch. 50; 39 E. R. 51, L. C.

*Annotations.*—*Consd. New Sombrero Phosphate Co. v. Erlanger* (1877), 5 Ch. D. 73. *Re Id. Imperial Mercantile Credit Assn. v. Coleman* (1871), 6 Ch. App. 562, n.; *Dunne v. English* (1874), L. R. 18 Eq. 524; *Re Canadian Oil Works Corpn., Hay's Case* (1875), 10 Ch. App. 593.

**Sec. 14.—Constructive and implied trusts: Sub-sect. 1, E. & F.]**

**753. — Purchasing for firm.—Purchases made for personal profit.]—**(1) One of several partners was employed to purchase goods for the firm. He, unknown to his co-partners, purchased goods of his own at the market price, but he made a considerable profit thereby:—*Held*: the transaction could not be sustained, & that he was accountable to the firm for the profit thus made.

(2) An agent employed to purchase cannot buy his own goods for his principal, neither can an agent, employed to sell, purchase for himself his principal's goods. Principals may either repudiate such transactions altogether or adopt & take the benefit of them.

The same rule applies to the case of trustee & *cestui que trust* & to other relations, & even though the transaction be perfectly *bona fide*.—*BENTLEY v. CRAVEN* (1853), 18 Beav. 75; 52 E. R. 29.

*Annotations:—As to (1) Expld. Re Cape Breton Co.* (1885), 29 Ch. D. 795. *Reid. Williams v. Frye* (1854), 18 Beav. 366; *Bank of London v. Tyrrell* (1859), 5 Jur. N. S. 924; *v. Lambert* (1913), 108 L. T. 565. *Generally, Armstrong v. Jackson*, [1917] 2 K. B. 822.

**Duty to account for profit received.]—See** PARTNERSHIP, Vol. XXXVI., pp. 420–422, Nos. 904–916.

**754. Mortgagor & mortgagee.]—**The principle upon which the ct. restrains persons filling a fiduciary character from having any dealings for their own benefit does not necessarily apply to the case of mtgor. & mtgee.—*DOBSON v. LAND* (1850), 8 Hare, 216; 19 L. J. Ch. 484; 14 Jur. 288; 68 E. R. 337.

*Annotations:—Apld. Kirkwood v. Thompson* (1865), 2 Hem. & M. 392. *Consd. Banner v. Berridge* (1881), 18 Ch. D. 254; *White v. City of London Brewery Co.* (1888), 39 Ch. D. 559. *Reid. Charles v. Jones* (1887), 56 L. J. Ch. 745. *Mentd. Bellamy v. Brickendon* (1861), 2 John. & H. 137.

**755. —.]—**It was said that a trustee or an heir or exor. cannot buy in a debt at an under-value & charge the full amount, but this is otherwise according to the authorities where the trustee is also an incumbrancer. That has always been the law (*PAGE-WOOD, V.-C.*).—*KIRKWOOD v. THOMPSON* (1865), 2 Hem. & M. 392; 34 L. J. Ch. 305; 12 L. T. 446; 11 Jur. N. S. 385; 13 W. R. 495; 71 E. R. 515; *on appeal*, 2 De G. J. & Sm. 613, L. C.

*Annotations:—Mentd. Locking v. Parker* (1872), 8 Ch. App. 30; *Re Alison, Johnson v. Mounsey* (1879), 11 Ch. D. 284; *Banner v. Berridge* (1881), 18 Ch. D. 254; *Warner v. Jacob* (1882), 20 Ch. D. 220; *Charles v. Jones* (1887), 35 W. R. 646.

**Company director.]—See** COMPANIES, Vols. IX., X., pp. 491–496, 1150, Nos. 3224–3263, 8132.

**756. Trustee—Purchase of land from profits of trust estate.]—**A trustee purchases lands out of the profits received out of the trust estate, & takes the conveyance in his own name; & though possible, if he be unable to make other satisfaction for the profits so misapplied, those lands may be sequestered; yet they cannot be decreed to be a trust for the *cestui que trust*, no more than if A. borrow money of B. & therewith purchases lands; these purchased lands are no trust for B., for it is not a trust in writing; & resulting trust it cannot be, because that would be to contradict the deed by parol proof, directly against Stat. Frauds; but if the purchase had been recited to have been made with the profits of the trust estate, this appearing in writing might ground a resulting trust.—*KIRK v. WEBB* (1698), Prec. Ch. 84; Freem. Ch. 229; 2 Eq. Cas. Abr. 743; 24 E. R. 41, L. C.; *affd.* (1699), Prec. Ch. p. 88, H. L.

*Annotations:—Distd. Halcott v. Markant* (1701), Prec. Ch. 168. *Apld. Heron v. Heron* (1701), Prec. Ch. 163; *Kendar v. Milward* (1702), 2 Vern. 440. *Reid. Hooper v. Eyles*

(1704), 2 Vern. 480; *Lane v. Dighton* (1762), Amb. 409; *Taylor v. Plumer* (1815), 3 M. & S. 562.

**757. —.]—HERON v. HERON** (1701), Prec. Ch. 163; 24 E. R. 78.

**758. — Bona fide transaction.]—BENTLEY v. CRAVEN**, No. 753, *ante*.

**759. — Profits from property or from office.]—**Profit derived by a trustee, either from the trust property or from his office of trustee, belongs to the *cestui que trust*.

It is a well-settled principle that if a trustee make a profit of his trusteeship, it shall enure to the benefit of his *cestui que trust* (*STUART, V.-C.*).—*SUGDEN v. CROSSLAND* (1856), 3 Sm. & G. 192; 25 L. J. Ch. 563; 26 L. T. O. S. 307; 2 Jur. N. S. 318; 4 W. R. 343; 65 E. R. 620.

*Annotation:—Reid. Re Thorpe, Vipont v. Radcliffe*, [1891] 2 Ch. 360.

**760. —.]—**Where trustees acquire a benefit as ostensible owners of trust property, that benefit cannot be retained by them, but must be surrendered to those who are beneficially interested. Where the trustees of land affecting actual ownership acquire from the Crown a right of salmon fishing in the adjacent sea, the acquisition enures to the benefit of the *cestui que trust*.—*ABERDEEN TOWN COUNCIL v. ABERDEEN UNIVERSITY* (1877), 2 App. Cas. 544, H. L.

*Annotation:—Reid. Briggs v. Massey* (1881), 29 W. R. 926.

**761. — Bribe.]—**If a man receives money by way of a bribe for misconduct against a co. or *cestui que trust*, or any person or body towards whom he stands in a fiduciary position, he is liable to have that money taken from him by his principal or *cestui qui trust* (*JAMES, L.J.*).—*METROPOLITAN BANK v. HEIRON* (1880), 5 Ex. D. 319; 43 L. T. 676; 29 W. R. 370, C. A.

*Annotations:—Consd. Lister v. Stubbs* (1890), 45 Ch. D. 1. *Reid. Re Sharpe, Re Bennett, Masonic & General Life Assco. v. Sharpe*, [1892] 1 Ch. 154; *The Pongola* (1895), 73 L. T. 512; *Re Sale Hotel & Botanical Gardens Co., Hosketh's Case* (1897), 77 L. T. 681. *Reid. Clarkson v. Davies*, [1923] A. C. 100. *Mentd. Re Fitzroy Bessmer Steel Co.* (1884), 50 L. T. 144.

**762. —.]—**Testator gave his residence to trustees on trust to invest in such stocks, funds, & securities as they “shall think fit.” The trustees invested a portion of the estate in debentures of a limited co. One of the trustees without the knowledge of the others who had since died, received a commission or bribe of £300 for making the investment:—*Held*: as the surviving trustee could not have “honestly” thought fit to make the investment, having received a bribe, he was liable to make good any loss occasioned by the investment: but the estate of deceased trustee was not liable as he had made the investment honestly. In addition to making good any loss, the surviving trustee was also ordered to refund the bribe as money received when the investment was made on behalf of the trust estate.—*Re SMITH, SMITH v. THOMPSON*, [1896] 1 Ch. 71; 65 L. J. Ch. 159; 73 L. T. 604; 44 W. R. 270.

*Annotations:—Reid. Re Wragg, Wragg v. Palmer*, [1919] 2 Ch. 58. *Mentd. Re Roth, Goldberger v. Roth* (1896), 74 L. T. 50.

**763. — Profit costs paid to solicitor trustee.]—**Under an order made on further consideration of an administration action, costs were paid to solrs. The solrs. paid over half the profit costs to a deft., a trustee of the estate being administered:—*Held*: there was no jurisdiction on summons in the action to order deft. trustee to pay into ct. the amount so paid to him.—*Re THORPE, VIPONT v. RADCLIFFE*, [1891] 2 Ch. 360; 60 L. J. Ch. 529; 64 L. T. 554.

**764. — Salary earned as servant of firm.—**Subsequent to nomination as partner trustee.]—

Testator appointed one of his sons to be a trustee of his will, & thereby also nominated the same son to be a partner in testator's firm as a trustee for himself & other beneficiaries. The son accordingly became a partner on the death of testator, & agreed with his co-partner to continue an arrangement which had existed in testator's lifetime under which the son acted as salesman to the firm & received a salary for his services.—*Held*: the son was under no obligation to account for the salary to testator's estate as a trustee, but was entitled to retain it beneficially.—*Re LEWIS, LEWIS v. LEWIS* (1910), 103 L. T. 495; 55 Sol. Jo. 29.

**Renewal of lease in own name.]—See Nos. 720, 723, *ante*.**

**Acquisition of reversion.]—See No. 740, *ante*.**

**Company promoter.]—See COMPANIES, Vol. IX., pp. 46–52, Nos. 72–101.**

**Agent—Personal profit in transaction for principal.]—See AGENCY, Vol. I., p. 469, No. 1538.**

#### F. Other Cases.

**765. Purchase from feeoffee to uses—With notice of trust.]—RAGLAND'S CASE** (1581), Sav. 15; 123 E. R. 986.

**766. Particular bequest—Executor trustee of surplus.]—WILLIS v. BRADY** (1740), Barn. Ch. 64; 27 E. R. 550.

**Annotation.]—Distd. Newstead v. Johnson** (1740), 9 Mod. Rep. 242.

**767. Debtor as trustee for creditors.]—W.,** landlord to P., having the power to distrain for rent in arrear, & having actually distrained for part, & being a creditor of P. for money lent, as well as for rent in arrear, upon P.'s representing to him that he is also indebted to G. to the amount of about £900, for which he is in fear of arrest & about to leave the country, undertakes that if P. will give up to him the farm, & execute an assignment of all his property, he will pay G.'s debt in the first instance, out of the proceeds, & apply the residue in satisfaction of his own demand, & the surplus, if any, to P., who executes a bill of sale to W. accordingly on the faith of such undertaking. Upon the bill of G. & P. this agreement was enforced against W. to the extent of £900, the alleged amount of G.'s debt, but no further; the actual debt having proved to exceed that amount; & not prevented from having effect, either by the circumstance that P.'s property fell short of the estimated amount, or of P.'s being at the time indebted to other persons besides G. & W., which formed no part of the consideration for the agreement, although noticed in W.'s undertaking as having been represented otherwise. The engagement to pay G. in the first instance, not being made directly to G. but through the medium of P., by whom also the consideration was furnished, P. held in a ct. of equity to be a trustee for G. But *qu.*: if pliffs. could recover at law upon such an agreement.—*GREGORY v. WILLIAMS* (1817), 3 Mer. 582; 36 E. R. 224.

**Annotations.]—Consd. English, Scottish & Australian Chartered Bank v. Royal Mail Steam Packet Co. & European & Australian Royal Mail Co.** (1862), 7 L. T.

**PART I. SECT. 14, SUB-SECT. 1.—F.**  
**r. Agent of station owner purchasing land on his own account through his special knowledge.]—LEMPRIERE v. WARE** (1871), 2 V. R. 1.—**AUS.**

**t. Administratrix recovering damages under Lord Campbell's Act.]—An administratrix, who recovers damages under Lord Campbell's Act (here "The Statute of Wrongs" 1865, No. 251, Part III) is a trustee of the amount**

recovered for the persons amongst whom the jury has directed such amount to be divided.—*KOERCKE v. MIDDLEMISS* (1885), 11 V. L. R. 472.—**AUS.**

**a. Person fraudulently obtaining forfeiture of mine—Whether trustee for previous owner.]—Where the mining property of a co. was forfeited owing to the fraudulent representations of a person made to the Minister for Mines,**

**211. Expld. Re Empress Engineering Co.** (1880), 18 Ch. D. 125. **Appl. Lloyd's v. Harper** (1880), 16 Ch. D. 290. **Refd. Grundy v. Heathcote** (1863), 1 Hem. & M. 172; **Drew v. Martin** (1864), 2 Hem. & M. 130; **Touche v. Met. Ry. Warehousing Co.** (1871), 6 Ch. App. 671; **Re Flavell, Murray v. Flavell** (1883), 25 Ch. D. 89; **Royal Exchange Assoc. v. Hope**, [1928] 1 Ch. 179.

**768. Creditor as trustee for other creditors—Recovery of judgment on bond—Bankruptcy after judgment.]—To an action of debt on an Irish judgment, deft. pleaded that the judgment was entered up on a warrant of attorney given to pltf. to secure payment on a bond: that after the bond & warrant of attorney were given, & before the judgment was entered up, pltf. became bkpt., & the debt in question was vested in his assignees, who had brought an action on the judgment before that commenced by pltf., & that the same was still depending:—*Held*: pltf. was the person by whom the judgment ought to have been entered up, though after his bkpcy.; in so doing, & in bringing the action, he might be considered as a trustee for the creditors; & the pendency of the other action, as here pleaded, was no defence.—*GUINNESS v. CARROLL* (1830), 1 B. & Ad. 459; 9 L. J. O. S. K. B. 11; 109 E. R. 858.**

**769. — Assignment of share of debt—Compromise between assignor & debtor.]—A. sued B., a debtor of his, intestate, upon a bond debt, & obtained a decree against him for the amount. B. appealed from this decree to the Sudder Ct. By a deed of arrangement entered into by A. & C. after the commencement of the suit, C. became entitled to a six ana share of the debt. Pending the appeal to the Sudder Ct., A. entered into a compromise with B., postponing the payment of the amount recovered by the decree, for three years, & foregoing altogether interest upon the principal. This was done without the privy or consent of C. B. failed to pay the amount within the stipulated time, & proceedings were taken by A. against him, but he had not realised the amount of the decree. In a suit by C. against A. to make him chargeable for the six ana share in the decree, the Sudder Ct. held that A. was chargeable to C. for such share, with interest.**

Upon appeal, such decree reversed; the Judicial Committee holding, that A. must be treated as a trustee for C., & that in the absence of fraud upon the *cestui que trust* in executing the compromise, or that it was not beneficial for all parties, he was responsible only to C. for such amount of the debt as had been recovered, or without his wilful default might have been recovered.—*DOORGA PERSAD ROY CHOWDRY v. TARRA PERSAD ROY CHOWDRY* (1849), 4 Moo. Ind. App. 452; 18 E. R. 772, P. C.

**770. Direction by debtor to receiver—To keep down interest on debt—No trust for creditor.]—If an agreement be in part unperformed, the principle of a ct. of equity is compensation, not forfeiture. Where a debtor, by a deed poll, directs (*inter alia*) the receiver of the rents of his estate to keep down the interest of a certain debt, the direction does not create a trust in favour of a creditor, if it be without consideration, & without the privy of the creditor.—*PAGE v. BROOM* (1827),**

**& that person afterwards took up the mine:]—*Held*: he was a trustee of the mine for the co.—*HOMEWARD BOUND GOLD MINING Co. v. McPHERSON* (1896), 17 N. S. W. Eq. 281.—**AUS.****

**b. Moneys advanced by corporation as loan—Lands transferred as security by another corporation.]—Action by liquidator to compel deft. A. to convey certain lands to pltf. a liquidator, & to pay moneys due on unpaid shares of**

*Sec. 14.—Constructive and implied trusts: Sub-sect. 1, F.]*

4 Russ. 6, 224; 38 E. R. 707, 789; *on appeal* (1830), 2 Russ. & M. 214, L. C.

*Annotations:—***Held**, *Re Sanders' Trusts* (1878), 47 L. J. Ch. 667. **Mentd.**, *Re Sea, Fire & Life Assoc.*, Port of London Assoc. Co.'s Case (1854), 5 De G. M. & G. 465.

**771. Sale of shares—Incomplete transfer—Liability of vendor.**—The deed of settlement of a co. provided that the liability of a vendor of shares in the co. should cease after the approval of the purchaser by the directors, & entry of his name in the share register book. A. verbally agreed with B. to sell him certain shares in the co., & received the purchase-money for them, but the deed of transfer was not executed until after an order had been made for the winding up of the co. The official assignee refused to acknowledge the purchaser as proprietor of the shares:—**Held**: the agreement was conditional, on the approval of the purchaser by the directors, & the vendor could not enforce specific performance of it. *Semble*, in the absence of special stipulations, the payment of the purchase-money did raise a constructive trust, so as to entitle the vendor to indemnity from the purchaser against liabilities incurred in respect of the shares.—**BIRMINGHAM v. SHERIDAN**, *Re WATERLOO CO.* (No. 4) (1864), 33 Beav. 660; 3 New Rep. 699; 33 L. J. Ch. 571; 10 Jur. N. S. 415; 12 W. R. 658; 55 E. R. 525; *sub nom.* **BIRMINGHAM v. SHERIDAN**, 10 L. T. 256.

*Annotations:—***Distd.**, *Evans v. Wood* (1867), L. R. 5 Eq. 9. **Consd.**, *Paine v. Hutchinson* (1868), 3 Ch. App. 388. **Refd.**, *London Founders' Assocn. & Palmer v. Clarke* (1887), 3 T. L. R. 709.

*See, generally*, COMPANIES, Vol. IX., pp. 347-404, Nos. 2192-2590.

**772. Purchaser let into possession—Purchase-money unpaid.**—A contract for the sale of an estate was made in Mar. 1811, the agreement being that the purchase-money should be paid on May 13, following; & the purchaser was let into possession immediately on the execution of the contract. The purchase-money was not paid; but the purchaser, & persons claiming under him, continued in possession. In 1844 the assignees of the vendor filed their bill, claiming a lien on the estate for the purchase-money & interest from the day fixed for the completion of the contract:—**Held**: under a contract for the sale of land, the equitable title of the vendor, & those representing him, to recover from the vendee, & the obligation of the vendee to pay, the purchase-money, in the sense in which it is described as a trust, is not an express trust within 3 & 4 Will. 4, c. 27, s. 25; & therefore, the right of the vendor, as such *cestui que trust*, to a lien or charge upon the land for the amount of the purchase-money is not kept on foot, under the provision contained in that sect.—**TOFT v. STEPHENSON** (1848), 7 Hare, 1; 68 E. R. 1; *on appeal* (1851), 1 De G. M. & G. 28, L. J.J.; *subsequent proceedings* (1854), 5 De G. M. & G. 735, L. J.J.

*Annotations:—***Mentd.**, *Fordham v. Wallis* (1853), 1 W. R. 118; *Pears v. Laing* (1871), L. R. 12 Eq. 41; *Adnam v. Sandwich* (1877), 46 L. J. Q. B. 612; *Lewin v. Wilson* (1886), 11 App. Cas. 639.

the co.'s capital stock. As the parties could not be placed *in statu quo*:—**Held**: deft. A. was entitled to a charge upon the lands for moneys advanced; subject thereto, he was declared a trustee of the lands.—**WESSEL v. TUDGE** (Saek.) (1909), 10 W. L. R. 499.—CAN.

**c. Money for specific purpose placed in bank by agent.**—Where money is given to an agent for a specific purpose & by him placed to the credit of a bank account against which he

draws a cheque which he forwards to the designated beneficiary & the money is lying to the credit of the account when the cheque is presented, the transaction has passed beyond the stage of agency & is impressed with a trust in favour of the payee of the cheque & the cheque is irrevocable.—**MERCHANTS BANK OF CANADA v. THOMSON** (Alta.), [1918] 1 W. W. R. 972; 39 D. L. R. 684.—CAN.

**d. Purchase of securities by legal**

**773. Executor suing on promissory note—Legatee convicted of felony—Trust for Crown.**—**Wills Act**, 1844 (c. 26), s. 3, empowering testator to bequeath all personal estate which, if not bequeathed, would devolve upon his exor., does not enable testator to bequeath a promissory note made to him, so as to pass the right to sue in respect of it. Such right is in the exor. Where the legatee of such promissory note is convicted of felony, the forfeiture caused by such conviction does not divest the exor. of his right to sue; though he is a trustee for the Crown in respect of the proceeds of the suit.—**BISHOP v. CURTIS** (1852), 18 Q. B. 878; 21 L. J. Q. B. 391; 19 L. T. O. S. 217; 17 Jur. 23; 118 E. R. 332.

**Property of wife in name of husband—Devisee of husband trustee for wife.**—*See HUSBAND & WIFE*, Vol. XXVII., p. 173, No. 1407.

**774. Money raised by statutory mortgage—Where in excess of statutory requirements.**—A corp'n. entitled to an old canal commenced improvements in it, & borrowed large sums of money for that purpose, which they secured by mtges., comprising the canal & other property. They afterwards obtained an Act, which authorised them to complete the works, & empowered them to raise money for that purpose by mtge. of the canal & its tolls, without limit as to amount, & directed them to apply such money in completing the works, but did not, in the opinion of the ct., authorise them to apply any part of it in paying off existing mtges. The corp'n. raised money under this power, & applied part of it in paying off some of the old mtges.:—**Held**: the money borrowed from the statutory mtgees., beyond what was wanted for purposes authorised by the Act, ought to have been repaid to them, & such moneys were to be treated as moneys held by the corp'n. in trust for the statutory mtgees., & not as borrowed moneys.—**TREVILLIAN v. EXETER CORPN.** (1854), 5 De G. M. & G. 828; 3 E. Q. Rep. 896; 24 L. J. Ch. 157; 24 L. T. O. S. 149; 18 J. P. 806; 18 Jur. 1019; 3 W. R. 45; 43 E. R. 1091, L. J.J.

**775. Property intended for inclusion in trust for named cestui que trust—Conveyance by settlor to third person.**—R. P., being seised in tail of the estate R., executed in 1826 a settlement, by which on the marriage of his eldest son D., it was settled, subject to an annuity to himself, on D. for life, then to the first son of D. by that marriage, " & of the heirs male of such son lawfully issuing," & for want of such issue to the second, third, & fourth, etc., sons in the same manner, & for want of such issue to the right heirs of D. In 1827 R. P. entered into an agreement with D. by which, for valuable considerations therein mentioned, he covenanted to convey to D., subject to a life estate in himself, to the same uses as those of the R. estate, another estate called C., if, as he expected, he should become possessed of it through the death, without issue & intestate, of a lunatic brother. A commission was taken out against this brother, who was found to have been lunatic from 1823. In 1829, the lunatic died, & R. P. took possession of the estate C. In 1830, R. P. executed a deed,

**adviser.**—Appl't. having acted for a long time as counsel & legal adviser of C., had in that employment acquired an intimate knowledge of C.'s property & liabilities, & had acted for him in compromising securities. After the relation of counsel & client had ceased, & without notice to C., appl't. bought those securities at a price less than their nominal amount, whilst a compromise was pending & feasible:—**Held**: the purchase was a trust for C., & appl't.

by which, subject to an annuity to himself, he conveyed the estate C. to H., his second son. D.'s wife died in 1829, & in 1833 D. married again, & covenanted to settle on this marriage the estate C. to the same uses as those declared of the estate R. in the first settlement. D., his second wife, & the children of both marriages, filed a bill against R. P. & H., to set aside the deed of 1830, as fraudulent, & to have a conveyance of the estate C. executed according to the deed of 1827; & in 1840, this House on appeal made an order to that effect. In the meantime G., a natural son of the lunatic, had raised a claim, as devisee of the estate C., under a will alleged to have been made by the lunatic before 1823. R. F. died, & G. & H. entered into an arrangement by which, in consideration of G. releasing his claims under the alleged will, H. agreed to convey to G. part of the estate C., of a certain value, & to assure to him the other part to supply any possible deficiency in that supposed value. D., his wife, & all his children, filed a supplemental bill against H. & G., to have a conveyance to the estate C. executed in conformity with the order of this House:—*Held*: H. was in the situation of a trustee of D. of the estate C., & must execute a conveyance of it, & that he was not relieved from that liability by any purchase of the alleged rights of G.—*PERSSE v. PERSSE* (1856), 5 H. L. Cas. 682; 27 L. T. O. S. 224; 2 Jur. N. S. 551; 4 W. R. 629; 10 E. R. 1069, H. L.

**776. Recognition of trust by will**—By surviving trustee.]—By a will, dated in 1701, a trust was created in favour of a certain class of testator's relations, nearly all of whom were paid their proportions. The surviving exor. & trustee of testator had the remainder of the funds standing in his name at his death, & by his will he recognised the existence of the trust & directed that it should devolve upon his nephew. Administration *de bonis non* was granted in 1822 to the surviving exor.'s estate, & subsequently to another person in 1826, when the remaining trust fund was mixed up with such administrator's personal estate & applied in the purchase of real estate. A bill was filed by a person claiming part of the legacy under the original testator's will, charging a breach of trust by the surviving exor., & that his real & personal estate were liable to make good the amount:—*Held*: upon demurrer to the bill, the real estate could not be charged with the legacy; there was an implied trust created by the will.—*HENDERSON v. ATKINS* (1859), 28 L. J. (Ch. 913; 33 L. T. O. S. 159; 7 W. R. 387.

**777. Direction by testator to purchase stock**—To increase pecuniary legacy.—Death before purchase completed.]—A direction by a testator to purchase Consols, obviously with a view of increasing a pecuniary legacy to his grandson, to whom he had bequeathed all the money & stock in the funds "which he might be possessed of, or entitled to, at the time of his decease," which direction was transmitted by the testator's country bankers on the same day they received it by letter to their brokers in London, will not constitute the person into whose name the stock is transferred a trustee for the specific legatee in case the testator

should die before the purchase of the stock be completed.—*THOMAS v. THOMAS* (1859), 27 Beav. 537; 29 L. J. Ch. 281; 1 L. T. 208; 5 Jur. N. S. 1237; 8 W. R. 71; 54 E. R. 212.

**778. Money paid for transmission to another.]**—It was argued that the relation of trustee & *cestui que trust* was created by the mtgee. to S., but the trusteeship was only a constructive one. When a man paid another £100 to be given to A. the person who received the money became a constructive trustee for A., but was in no other sense a trustee (*ROMILLY, M.R.*).—*ADSETTS v. HIVES* (1863), 33 Beav. 52; 2 New Rep. 474; 9 L. T. 110; 27 J. P. 691; 9 Jur. N. S. 1063; 11 W. R. 1092; 55 E. R. 286.

**779. Bank holding fund**—For payments agreed between other parties.]—L. entered into a contract, dated Nov. 30, 1870, with the French Minister of War, represented by J., his delegate at London, to supply 20,000,000 of ball-cartridges of a certain quality, the whole to be supplied by Jan. 10, 1871. Time was to be considered of the essence of the contract. L. desired some arrangements to be made as to payment. M. & co., who acted in London as financial agents for the French Govt., wrote to L. a letter dated Dec. 1, 1870, in these terms:—"We are instructed by J. to advise you that a special credit for the sum of £40,000 has been opened with us in your favour, & that it will be paid to you rateably as the goods are delivered, upon receipt of certificate of reception issued by the French Ambassador or by J." The goods were not delivered according to the contract:—*Held*: this letter did not constitute Messrs. M. & co. trustees for L. as to the sum named, nor constitute an equitable assignment as of a fund in their hands, & consequently this was not a matter for the exercise of the jurisdiction of the Ct. of Ch.—*MORGAN v. LARIVIERE* (1875), L. R. 7 II. L. 423; 44 L. J. Ch. 457; 32 L. T. 41; 23 W. R. 537, H. L.; *revgg. S. C. sub nom. LARIVIERE v. MORGAN* (1872), 7 Ch. App. 550, L. C.

*Annotations*:—*Mentd.* The Charkieh (1873), L. R. 4 A. & E. 59; Foreign Bondholders' Corp'n. v. Pastor (1874), 23 W. R. 109; Twycross v. Dreyfus (1877), 5 Ch. D. 605; The Parlement Belge (1880), 5 P. D. 197; Aksionarnoye Obchestvo A. M. Luther v. Sakor, [1921] 3 K. B. 532; The Tervaeke, [1922] P. 259; Duff Development Co. v. Kelantan Government, [1923] 1 Ch. 385.

**780. Mortgagee of life interest**—Not trustee for persons in remainder.]—A mtgee. of an equitable life interest in leaseholds was put in receipt of the rents during the mtgor.'s lifetime, by order of the ct. in an administration suit. The mtgor. disappeared, & was absent more than seven years. The mtgee. remaining in possession. The ct. having held that the mtgor. must be presumed to be dead, & that on the facts her death must be taken to have happened shortly after her disappearance:—*Held*: the mtgee. occupied no fiduciary position towards the persons entitled in remainder.—*HICKMAN v. UPSALL* (1876), 4 Ch. D. 144; 46 L. J. Ch. 245; 35 L. T. 919; 25 W. R. 175, C. A. *Annotation*:—*Mentd.* *Re Corbishley's Trusts* (1880), 49 L. J. Ch. 266.

**781. Guarantee fund by vendor of business for payment of dividends.]**—By an agreement for the sale of mining property to a trustee for a co. in

was entitled only to the sum which he actually paid, with the usual interest.—*CARTER v. PALMER, PALMER v. CARTER* (1839), 1 I. Eq. R. 289; Dr. & Wal. 122; *affd.* (1842), 8 Cl. & Fin. 657.—*IR.*

**8. Rents & fines.**—A tenant applying for a fee farm grant or renewal is bound to pay rent & fines due before his landlord's title to the reversion

accrued. As to such rent & fines, the landlord is a trustee for those entitled.—*COURTENAY v. PARKER* (1864), 16 I. Ch. R. 320.—*IR.*

**1. Subscriptions to testimonial to Member of Parliament.]**—A number of persons, principally in the county for which B. was Member of Parliament, subscribed to present him with a testimonial. The amount subscribed was

transferred to treasurers, who were the present depts., to be retained by them until a meeting should be held at which a public presentation of the testimonial was to be made to B. Before the meeting took place political differences arose between the subscribers & B. in consequence of which depts. refused to give B. the money subscribed:—*Held*: there was no



*Sect. 14.—Constructive and implied trusts: Sub-sect. 1, F.; sub-sect. 2, A. (a) & (b) i.]*

formation it was agreed that the sum of £15,000 should be paid in cash by the vendors to two trustees, who should hold the same in trust to secure the payment, & if necessary thereout pay a minimum dividend of 10 per cent. *per annum* on the preferred shares of the co., for a term of three years, payable quarterly, & subject thereto for the vendors. The guarantee was announced in a prospectus, & the agreement confirmed by the arts. of assocn. of the co., which was registered shortly afterwards.

The trustees paid the sums necessary to make up the guaranteed dividend for every quarter during the three years, except the last, to the directors, who distributed them to the shareholders. The trustees had also paid some surplus moneys to the vendors, retaining sufficient to meet the accruing dividends. Shortly after the last quarter's payment became due the co. was ordered to be wound up, & the official liquidator claimed the fund then remaining in the hands of the trustees:—*Held*: the agreement created a trust for the individual shareholders.—*Re GELLY DEG COLLIERY CO. (1878), 38 L. T. 440.*

**782.** —[By an agreement for the sale of a colliery to a trustee for a co. in formation, the vendor agreed to pay to the co. during two years from the date of its incorporation such a sum as, together with the net profits of the co., should be equal to interest at five per cent. *per annum* on the paid-up capital of the co. This agreement was stated & adopted in the arts. of assocn. of the co. One of the arts. provided that no dividend should be payable except out of the profits arising from the business of the co. Each half-year the vendor had to make a payment under this agreement to the directors for distribution among the shareholders, the profits not amounting to five per cent. After the expiration of the second year, but before the deficiency of dividend for the fourth half-year had been paid, the co. went into voluntary liquidation, & the vendor afterwards paid to the individual shareholders the amount necessary to make their fourth half-year's dividend equal to five per cent.—*Held*: the agreement created a trust for the individual shareholders, & the liquidator could not claim the amount so paid by the vendor as part of the assets of the co.—*Re SOUTH LLANHAIRN COLLIERY CO., Ex p. JEGON (1879), 12 Ch. D. 503; 41 L. T. 567; 28 W. R. 194, C. A.*

*Annotations*:—*Foldi, Richardson v. English Spelter Co. (1885), 1 T. L. R. 249. Distd. Clifford v. Imperial Brazilian Natal & Nova Cruz Ry. & Gibbs (1888), 60 T. T. 60; Re Menell, Regent Street Fur Co. v. Diamant (1915), 84 L. J. Ch. 593.*

—[See COMPANIES, Vol. IX., p. 599, Nos. 4000, 4001; Vol. X., pp. 889, 890, Nos. 6053–6056.

**783. Regrant of gale to free miner—To be assigned to trustee & cestui que trust—Only free miner entitled to grant.]—HOLMES v. WILLIAMS, [1895] W. N. 116.**

trust created in favour of pltf.—O'BRIEN v. McMEEL, [1898] 1 I. R. 366.—IR.

**g. Mortgage before marriage—Redemption by & reconveyance to husband—Rights of wife's heir & husband's representatives.]**—Where a husband redeems a mgtg. on his wife's real estate & takes a reconveyance in fee to himself, in the event of the wife dying intestate the husband becomes a trustee of the legal estate for the wife's heir, & the husband's representatives

will have a claim against the redeemed property for the amount paid for redemption.—MASON v. MACKERRAS (1844), 2 N. Z. L. R. 331 (S. C.).—N.Z.

**PART I. SECT. 14, SUB-SECT. 2.—A. (a).**

**h. Operation of law.]**—When a partnership, or an agreement for a partnership for the purpose of buying & selling land exists between A. & B., & afterwards in pursuance thereof A. purchases land in his own name, the

**784. Money received in satisfaction of debt—Cheque retained & cashed.]**—Deft., an officer of the British Army, when on service in India gave to pltf., who were a firm of money-lenders there, a promissory note for 1,500 rupees & interest, to secure repayment of a sum advanced by them to him. The father of deft., in response to an application by pltf., made them an offer of a less sum "in full settlement" of their claim against deft. Pltf. declined that sum, & again asked for what amount deft.'s father would "settle" his son's debt. The father replied offering 650 rupees, & enclosing a draft for that amount. Pltf. cashed the draft & retained the proceeds. Pltf. then brought an action against deft. on the promissory note, claiming the amount thereof, & interest, less the amount of the draft.

Assuming, however, that the promissory note did not cease to be a negotiable instrument, then, in the alternative, I say that when the cheque sent by T. (the father) to pltf. on the terms I have mentioned was retained & cashed by pltf., the result was that a trust was created under which any further money recovered by pltf. from deft. as maker of the promissory note would be held by them in trust for T. (VAUGHAN WILLIAMS, L.J.).—HIRACHAND PUNAMCHAND v. TEMPLE, [1911] 2 K. B. 330; 80 L. J. K. B. 1155; 105 L. T. 277; *sub nom.* PUNAMCHAND SHRICHAND & Co. v. TEMPLE, 27 T. L. R. 430; 55 Sol. Jo. 519, C. A.

*Annotation*.—*Mentd. Soc. des Hôtels Lo Touquet Paris-Plage v. Cummings, [1922] 1 K. B. 451.*

**Patent obtained by servant.]—See PATENTS, Vol. XXXVI., pp. 538, 539, Nos. 45–50.**

## SUB-SECT. 2.—RESULTING TRUSTS.

### A. When Presumption Arises.

#### (a) In General.

**785. No resulting trust where trusts subsisting.]**—Where articles of agreement under seal are entered into between husband, wife, & a trustee, reciting that the husband, who was entitled to a share of residue under a will, as a condition of a mutual separation which had been agreed on, had agreed to assign his interest under the will to the trustee upon trust to pay the interest thereof to the wife & then as to the principal for the three children of the marriage, & the wife covenants not to molest the husband, & are followed by a separation & nine months afterwards by reconciliation & return to cohabitation:—*Held*: upon the true construction of the articles, the trusts thereby declared in favour of the wife & children were subsisting notwithstanding the reconciliation, & there was no resulting trust for the settlor, the husband, of the property comprised therein.—*Re SPARK'S TRUSTS, SPARK v. MASSEY, [1904] 1 Ch. 451; sub nom. Re SPARK'S TRUSTS, MASSEY v. SPARK, 73 L. J. Ch. 259; 90 L. T. 54; 52 W. R. 428; on appeal, [1904] 2 Ch. 121, C. A.*

**786. Agreement for inclosure of common—Waste allotted to trustees for commoners—Whether**

land becomes part of the stock-in-trade of the firm, & the agreement can be enforced by B. against A., although it was not reduced to writing, for Stat. Frauds is not violated, inasmuch as a resulting trust is created by operation of law.—FORD v. COMBER (1890), 16 V. L. R. 540.—AUS.

**k. —.]**—If the trusts declared in a deed of settlement are too vague & uncertain to be executed, a trust in favour of the next of kin would result by operation of law, & the trustees



resulting trust as to ownership of soil.—To lord of manor.]—Where the lord of a manor by feoffment grants certain parcels of common or waste lands to trustees, for the benefit of themselves & the rest of the tenants of the manor, in lieu & recompense of their several claims of common in all the rest of the wastes & commonable grounds in the manor, the whole of the lord's interest passes, & there is no resulting trust for him as to the ownership of the soil.—*IRWIN (VISCOUNT) v. SIMPSON* (1758), 7 Bro. Parl. Cas. 306; 3 E. R. 199, II. L.

**787. Insurance of cestui que vie**—By devisee of leaseholds for lives—Resulting trust of insurance moneys.]—A., being the assignee of leaseholds, which were held for three lives, by will devised the same in trust for his son B. for life, & after his death for the benefit of his children with remainders over. He directed that B. should, when & so often as a life or lives should die, renew the same at his own expense; & in default the property was to be held in trust for C. After A.'s death, one of the *cestuis que vie* died, but no renewal was made. B. died without issue, & C. became tenant for life. After B.'s death, C., in order to protect himself against loss, assured the younger of the two lives for sums amounting to £4,000 in the joint names of himself & the two exors. of A.'s will. C. paid the premiums during his life & died leaving the two exors. surviving him. After his death the premiums were paid out of the rents of the estate by a receiver. On the death of the surviving *cestui que vie*, the moneys arising from the policies were paid into ct. The representative of C. petitioned to have the fund transferred to her, she offering to allow to the estate the amount of the premiums paid by the receiver; or in the alternative prayed to be recouped the premiums which had been paid by C.:—*Held*: C., having been one only of three persons to whom the moneys were made payable, & in the events which had happened not being the survivor, his representative

had no right to the fund; & the same was subject to a resulting trust in favour of the persons interested in the estate.—*BROWNE v. BROWNE* (1860), 2 Giff. 304; 3 L. T. 119; 6 Jur. N. S. 1143; 8 W. R. 726; 66 E. R. 127.

**788. Resulting trust for grantor**—Proceeds of sale of settled land.]—*O'CONNOR v. TANNER*, [1917] A. C. 25, II. L.

**Resulting uses.**—See REAL PROPERTY, Vol. XXXVIII., pp. 731, 732, Nos. 750–765.

(b) *Trusts Not Exhaustive.*

i. *In General.*

**789. Distinction between settlements & wills.**—Though there may not be any different rule of construction applicable to wills & settlements, yet the different character of the instrument is a circumstance to be weighed in determining the effect of the disposition it contains: shares under a settlement being held not to be vested might create a resulting trust for the settlor whilst in a will the residuary legatee might take.—*FARMER v. BARKER* (1852), 9 Hare, 737; 68 E. R. 712.

*Annotations*:—*Refd.* *Malden v. Maine* (1855), 2 Jur. N. S. 206; *Swallow v. Bluns* (1855), 1 K. & J. 417; *Dalton v. Hill* (1862), 6 L. T. 446; *Re Thorne's Trust* (1862), 10 W. R. 338; *Re Crosbie's Will* (1863), 32 L. J. Ch. 344; *Jackson v. Dover* (1864), 2 Hem. & M. 209; *Williams v. Hathorne*, *Williams v. Williams* (1871), 6 Ch. App. 782; *Re Hamlet*, *Stephen v. Cunningham* (1888), 38 Ch. D. 183; *Leader v. Duffey* (1888), 13 App. Cas. 294.

**790. Resulting trust for legatee**—Absolute gift to legatee—Mode of enjoyment restricted for legatee's benefit.]—If testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it, to secure certain objects for the benefit of the legatee; upon failure of such objects, the absolute gift prevails: but, if there be no such absolute gift as between the legatee & the estate, & particular modes of enjoyment are prescribed, & those modes of enjoyment fail, the legacy forms part of testator's estate, as not having

would not take for their own benefit.—*FONSECA v. JONES* (1911), 21 Man. L. R. 168.—CAN.

i. —.]—Where a trust is so indefinite as to make its terms incapable of determination, a resulting trust of the whole property affected arises in favour of the creator of the trust.—*ROBERTS v. ROBERTS* (B. C.), [1923] 2 W. W. R. 137, 138.—CAN.

m. *No intention to transfer beneficial interest.*—*HOUSE v. CAFFYN*, [1922] V. L. R. 67.—AUS.

n. *Part of money advanced by beneficiary & part by trustee.*—*DENNY v. LITHGOW* (1869), 16 Gr. 619.—CAN.

o. *Trust for devisee.*—By virtue of a will A. had a life interest in certain lands, with remainder to ptfr. in fee. The land was afterwards sold at sheriff's sale under circumstances which made the sale void in equity, & the purchaser a trustee for the devisee. A. (the life tenant), for valuable consideration conveyed his life interest to the purchaser:—*Held*: ptfr. could not claim the benefit of that transaction.—*GILPIN v. WEST* (1871), 18 Gr. 228.—CAN.

p. *Payment of part of purchase money by husband, wife & daughter*—On death of husband whether resulting trust to him.]—*OWEN v. KENNEDY* (1873), 20 Gr. 163.—CAN.

q. *Payment of premium by insured*—On understanding that policy would cure to benefit of new beneficiary.]—Deceased made his fiancée the beneficiary in a life policy. They disagreed & he said he would make his mother the beneficiary, & the premium was paid on that understanding. No change, however, was made in the beneficiary. Insured died intestate:—

*Held*: there is a resulting trust in favour of the mother, & it should go to her in her own right.—*ALLEN v. WENTZELL* (N. S.) (1909), 7 E. L. R. 575.—CAN.

r. *Property purchased with firm's money*—Conveyance taken in name of sister of one member—Resulting trust in favour of firm & for benefit of creditors of firm.]—*SHARP v. McNEIL* (N. S.) (1913), 13 E. L. R. 425; 15 D. L. R. 73.—CAN.

t. *Land of married woman conveyed to purchaser*—Mortgage for part of purchase-money taken in name of husband—Subsequent release of equity of redemption to husband on payment of money—Death of husband & subsequent death of wife.]—*HAFT v. TORONTO GENERAL TRUSTS CORPN.* (1920), 47 O. L. R. 387; 18 O. W. N. 17.—CAN.

a. *Benami transaction.*—The purchase by a Rajput of a bungalow, of which the deed of sale was registered in the name of his mistress, was a benami transaction, which resembled the doctrine of English law that the trust of the legal estate results to the person who pays the purchase-money.—*MUSAMMAT BILAS KUNWAR v. DESHAJ RANJIT SINGH* (1915), 31 T. L. R. 562, P. C.—IND.

b. *Sum given to daughter considered dedication to uses.*—Where a sum of money given by a father to his daughter on her marriage, is considered as a dedication to the uses of the settlement, if there be no issue, there is a resulting trust for the father; but if the sum be considered as a marriage portion, there is a resulting trust for the daughter to whom the portion is given.—*WARD v. DYAS* (1835), L. & G.

*temp. Sugd.* 177.—IR.

c. *Bond given by trader for wife's fortune.*—Where a simple money bond is given by a trader for his wife's fortune but there is no deed or note in writing declaring that the obligees are trustees for her, if they levy the amount before bkpcy. they will as such trustees be entitled to it, there being a verbal agreement to that effect. There can be no resulting trust to the husband where his own property was not settled.—*Re BOLE* (1858), 31 L. T. O. S. 371.—IR.

d. *Sufficiency of evidence to rebut proof of resulting trust.*—*Semble*: weaker or less definite evidence is required to rebut a resulting trust arising from a purchase in the name of another, than to prove a trust by parol. In the former it is only necessary to show that he who paid the price did not intend to take the benefit of the purchase.—*NICHOLSON v. MULLIGAN* (1869), 3 I. R. Eq. 308.—IR.

e. *Policy taken out on life of another.*—A policy of insurance was taken out by L. in the name of & on the life of J. L. paid the premiums, & retained possession of the policy, & dealt with it as his own property, J. never making any claim thereto. J. afterwards was adjudicated bkpt. & subsequently died:—*Held*: the policy moneys were payable to L., & not to J.'s assignees in bkpcy.—*Re SLATTERY*, [1917] 2 I. R. 278.—IR.

PART I. SECT. 14, SUB-SECT. 2.—A. (b) i.

1. *Resulting trust for settlor.*—*DEVEREUX v. CALM*, [1916] 1 I. R. 121.—IR.

*Sect. 14.—Constructive and implied trusts: Sub-sect. 2, A. (b) i. & ii.]*

in such event been given away from it.—*LASSENE v. TIERNEY* (1849), 1 Mac. & G. 551; 2 H. & Tw. 115; 15 L. T. O. S. 557; 41 E. R. 1379; *sub nom.* *LASSENE v. TIERNEY*, *LASSENE v. LIESCHER*, 14 Jur. 182, H. L.

*Annotations:—Consd.* *Kellett v. Kellett* (1868), L. R. 3 H. L. 160. *Apld.* *Re Houghton*, *Houghton v. Brown* (1884), 53 L. J. Ch. 1018; *Re Boyd*, *Nield v. Boyd* (1890), 63 L. T. 92; *Re Currie's Settlement*, *Re Rooper*, *Rooper v. Williams*, [1910] 1 Ch. 329; *Re Connell's Settlement*, *Re Benett's Trusts*, *Fair v. Connell*, [1915] 1 Ch. 867; *Re Harrison*, *Hunter v. Bush*, [1918] 2 Ch. 59. *Extd.* *Moryoseph v. Moryoseph*, [1920] 2 Ch. 33. *Reid.* *Barrow v. Barrow* (1858), 4 K. & J. 409; *Salmon v. Salmon* (1860), 29 Beav. 27; *Re Skinner's Trusts* (1860), 1 John. & H. 102; *Whiteway v. Fisher* (1861), 9 W. R. 433; *Caton v. Caton* (1866), 1 Ch. App. 137; *Churchill v. Churchill* (1867), L. R. 5 Eq. 44; *McDonald v. McDonald* (1875), L. R. 2 Sc. & Div. 482; *Re Richards*, *Williams v. Gorvin* (1883), 50 L. T. 22; *Cooke v. Cooke* (1887), 38 Ch. D. 202; *Re Crawshaw*, *Crawshaw v. Crawshaw* (1890), 43 Ch. D. 615; *Re Pinhorn*, *Moreton v. Hughes* (1894), 42 W. R. 438; *Re Whitehead*, *Peacock v. Lucas*, [1894] 1 Ch. 678; *Re Wilcock*, *Kay v. Dewhurst*, [1898] 1 Ch. 95; *Spencer v. Registrar of Titles*, [1906] A. C. 503; *Re Walter*, *Turner v. Walter* No. 2 (1912), 56 Sol. Jo. 632; *Re Witty*, *Wright v. Robinson*, [1913] 2 Ch. 666; *Re Jones*, *Last v. Dobson*, [1915] 1 Ch. 246; *Re Monk*, *Giffen v. Wedd*, [1927] 2 Ch. 197; *Re Payne*, *Taylor v. Payne*, [1927] 2 Ch. 1; *Re Marshall*, *Graham v. Marshall*, [1928] Ch. 661. *Mentd.* *Re King's College Hospital Act*, 1851, *Ex p. Pinniger*, *Surmeo v. Pinniger* (1853), 3 De G. M. & G. 571; *Fild v. Moore*, *Fild v. Brown* (1855), 7 De G. M. & G. 691; *Warden v. Jones* (1857), 23 Beav. 487; *Goldcutt v. Townsend* (1860), 28 Beav. 445; *Savage v. Tyers* (1872), 7 Ch. App. 356; *Caillit v. Caillit* (1883), 8 App. Cas. 420; *Maddison v. Alderson* (1883), 9 App. Cas. 467; *McManus v. Cooke* (1887), 35 Ch. D. 681; *Johnstone v. Maplin* (1891), 60 L. J. Ch. 241; *Sharman v. Sharman* (1892), 47 L. T. 834; *Hancock v. Watson*, [1902] A. C. 14; *Re Holland*, *Giegg v. Holland*, [1902] 2 Ch. 360; *Re A Bankruptcy Notice*, [1924] 2 Ch. 76.

**791.** ————]—Testatrix under her marriage settlement had power to appoint the settled funds amongst the children & issue of the marriage. By her will testatrix gave all her residuary real & personal estate “which by virtue of any power or authority or of any separate right of property she was competent to dispose of” to trustees upon that to sell & convert into money, & thereout pay her funeral & testamentary expenses, & to invest the residue & hold the same upon trust to pay the income to her husband during his life, & after his decease as to one-seventh part in trust for her son, & as to the remaining six-sevenths in trust for her daughters, with a direction that the trustees were to retain the daughter's shares upon trusts in favour of each daughter for life for her separate use without power of anticipation, & after her death in favour of her children:—*Held*: the doctrine of *Lassene v. Tierney*, No. 790, *ante*, applied, & the daughters took their shares of the settled funds free from the fetters attempted to be imposed by the subsequent direction.—*Re Boyd*, *Nield v. Boyd* (1890), 63 L. T. 92.

**792.** ————]—Where there is an absolute gift to a legatee in the first instance, & trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect, so far as the trusts have failed, to the exclusion of the residuary legatee or next of kin as the case may be.—*HANCOCK v. WATSON*, [1902] A. C. 14; 71 L. J. Ch. 149; 85 L. T. 729; 50 W. R. 321, H. L.; *affg.* S. C. *sub nom.* *Re HANCOCK*, *WATSON v. WATSON*, [1901] 1 Ch. 482, C. A.

*Annotations:—Apld.* *Re Currie's Settlement*, *Re Rooper*, *Rooper v. Williams*, [1910] 1 Ch. 329. *Extd.* *Moryoseph v. Moryoseph*, [1920] 2 Ch. 33. *Apld.* *Re Atkinson*, *Atkinson v. Weightman*, [1925] W. N. 30. *Distd.* *Re Payne*, *Taylor v. Payne*, [1927] 2 Ch. 1. *Apld.* *Re Marshall*, *Graham v. Marshall*, [1928] Ch. 661. *Reid.* *Re Wood*, *Wood v. Wood*, [1901] 2 Ch. 578; *Re Davies & Kent's*

*Contract* (1910), 102 L. T. 622; *Re Norton*, *Norton v. Norton*, [1911] 2 Ch. 27; *Re Hewett's Settlement*, *Hewett v. Eldridge*, [1915] 1 Ch. 810; *Re Jones*, *Last v. Dobson*, [1915] 1 Ch. 246; *Re Harrison*, *Hunter v. Bush*, [1918] 2 Ch. 59; *Re Monk*, *Giffen v. Wedd*, [1927] 2 Ch. 197.

**793.** ————]—Testator gave the residue of his estate to his trustees upon trust for children living at his death as tenants in common, & provided that the share which “would belong” to any daughter married at his decease should be paid to the trustees of her marriage settlement to be held upon the trusts of certain moneys settled thereby “or such of them as shall be then subsisting & capable of taking effect.” The settled funds of a married daughter were held in default of issue, in trust for testator, his exors., administrators, & assigns. A share of testator's residue was paid over to the trustees of this settlement. The daughters survived testator & died without issue:—*Held*: there was no effective disposition of the daughter's share of residue after her death without issue, & it went to her representatives by virtue of the original absolute gift to her in the will.—*Re CURRIE'S SETTLEMENT*, *Re ROOPER*, *ROOPER v. WILLIAMS*, [1910] 1 Ch. 329; 79 L. J. Ch. 285; 101 L. T. 899; 54 Sol. Jo. 270.

*Annotations:—Apld.* *Re Harrison*, *Hunter v. Bush*, [1918] 2 Ch. 59. *Reid.* *Re Powell*, *Bodvel-Idoberts v. Poole*, [1918] 1 Ch. 407.

**794.** ————]—*Re CONNELL'S SETTLEMENT*, *RE BENETT'S TRUSTS*, *FAIR v. CONNELL*, No. 836, *post*.

**795.** ————]—The rule in *Lassene v. Tierney*, No. 790, *ante*, & *Hancock v. Watson*, No. 792, *ante*, applies equally to the case where a legacy is bequeathed to trustees in trust for the legatee as to the case where it is bequeathed directly to the legatee in the first instance.—*Re HARRISON*, *HUNTER v. BUSH*, [1918] 2 Ch. 59; 87 L. J. Ch. 433; 118 L. T. 756; 62 Sol. Jo. 568.

*Annotation:—Reid.* *Re Monk*, *Giffen v. Wedd*, [1927] 2 Ch. 197.

**796.** ————]—When real estate is given absolutely & the absolute gift is then modified by the settlement of the property upon trusts, the absolute gift prevails to the extent to which those trusts are not exhaustive.—*MORYOSEPH v. MORYOSEPH*, [1920] 2 Ch. 33; 89 L. J. Ch. 376; 123 L. T. 569; 64 Sol. Jo. 497.

*Annotations:—Reid.* *Re Atkinson*, *Atkinson v. Weightman*, [1925] W. N. 30; *Re Monk*, *Giffen v. Wedd*, [1927] 2 Ch. 197.

**797.** ————]—*Re ATKINSON*, *ATKINSON v. WEIGHTMAN*, [1925] W. N. 30, C. A.

*Annotation:—Reid.* *Re Monk*, *Giffen v. Wedd*, [1927] 2 Ch. 197.

**798.** ————]—Testator devised & bequeathed his residuary estate to his trustees upon trust to divide the same into five equal shares, & to appropriate one of such shares to each of his sons then living, whether such son survived him or not, provided always & he directed that the share so directed to be appropriated to each of his sons should not vest absolutely in them or their representatives, but should be retained by his trustees upon the trusts thereafter declared, & he directed that his trustees should hold each share upon certain trusts therein contained during the lifetime of each son respectively, & he directed that his trustees should stand possessed of the share of each of his sons after his decease, or the decease of testator in the case of a son predeceasing him, upon trust to appropriate such share unto the child or children of such deceased son, whether living at testator's death or born afterwards or having died in testator's lifetime leaving issue, & he empowered each of his sons who might survive him at any time by deed

revocable or irrevocable or by will or codicil to alter the shares in which the share of such son should, after his death, be appropriated to his children if more than one.

Testator died in 1917. One of his sons, F., died in 1926 without leaving issue, having by his will left all his estate to his wife, & appointed her his sole extrix. :—*Held*: the rule in *Lassence v. Tierney*, No. 790, *ante*, & *Hancock v. Watson*, No. 792, *ante*, did not apply, & the share of F. was undisposed of by the will of testator.—*Re PAYNE, TAYLOR v. PAYNE*, [1927] 2 Ch. 1; 96 L. J. Ch. 291; 137 L. T. 117.

*Annotation*. :—*Distd. Re Marshall, Graham v. Marshall*, [1928] Ch. 661.

799. ————.]—Testator directed that his trustees should, after the death or remarriage of his wife, stand possessed of a trust fund & the income thereof upon trust to divide the same into seven parts, & to pay or transfer two seventh parts thereof to his son, M., provided always that such two seventh parts should not vest absolutely in M., but should be retained by the trustees, & be held by them upon the trusts thereafter declared concerning the same, & in the event of the death of M. without any children him surviving, then testator directed that the two seventh parts should sink into & form part of his residuary estate thereafter mentioned, & he directed that his trustees should divide his residuary estate among such charitable or benevolent objects as they should in their absolute discretion select. Testator died in 1924. M. died in 1926, a bachelor & intestate. The gift over of the residuary estate was held to be invalid:—*Held*: the gift over having failed, the rule in *Lassence v. Tierney*, No. 790, *ante*, & *Hancock v. Watson*, No. 792, *ante*, applied, & the share of M. passed to his legal personal representative.—*Re MARSHALL, GRAHAM v. MARSHALL*, [1928] Ch. 661; 97 L. J. Ch. 415; 139 L. T. 189.

800. Resulting trust for grantor—Discontinuance of interests granted—Life estate subject to condition subsequent.]—By a marriage settlement, dated in 1875, personal property of the wife was settled upon trust for the wife for life, & after her death upon trust to pay the income to the husband "so long as he shall remain unmarried, & from & after the death of the survivor," to hold the capital in trust for the children of the marriage, as the husband & wife or the survivor should appoint, & in default for sons at twenty-one & daughters at that age or marriage. There was a power of advancement exercisable with the consent of the husband & wife or the survivor during their lives. The ultimate trust in default of issue was for the wife if she survived, & if the husband survived for the appointee of the wife by will, & in default for her next of kin, as if she had died without having been married. The settlement also comprised a policy on the life of the husband which was settled upon like trusts, except that if the wife survived & married again the policy moneys were to be held upon the same trusts as if she were then dead. Then there was a covenant in the common form for the settlement of other & after-acquired property of the wife. There were six children of the marriage. The wife died in 1886, & the husband took out administration to her estate. In Jan. 1889, he married again. The question was, who since the husband's second marriage was entitled

to the income of the property of the wife which was included in the settlement:—*Held*: upon the marriage again of the surviving husband, there was a resulting trust of the income during the rest of his life, to the legal personal representative of the wife; & the husband as administrator of his wife was entitled to the undisposed of income.—*Re WYATT, GOWAN v. WYATT* (1889), 60 L. T. 920.

*See, also*, *PERPETUITIES*, Vol. XXVII., pp. 121, 122, Nos. 533–545.

Rights of executors to residue.]—*See* EXECUTORS, Vol. XXIII., pp. 468–473, Nos. 5377–5424.

Rights of Crown—Escheat.]—*See, generally*, DESCENT, Vol. XVIII., pp. 28–32, Nos. 284–316.

Bona vacantia.]—*See, generally*, DESCENT, Vol. XVIII., pp. 32–35, Nos. 317–350.

Failure of objects of friendly society.]—*See* FRIENDLY SOCIETIES, Vol. XXV., p. 343, Nos. 430, 431.

Dissolution of creditor corporation.]—*See* BANKRUPTCY, Vol. IV., pp. 340, 341, No. 3200.

Where trust for conversion.]—*See, generally*, EQUITY, Vol. XX., pp. 370, 371, Nos. 1078–1083.

Rights of persons entitled on intestacy—Trusts ineffectually created.]—*See* Nos. 801–805, *post*.

Property not disposed of.]—*See* Nos. 808–817, *post*.

Interest postponed until fulfilment of condition precedent.]—*See* Nos. 820–822, *post*.

Lapse of interests granted.]—*See* No. 833, *post*.

Trusts for creditors.]—*See* Nos. 837, 838, *post*.

—.]—*See, generally*, SETTLEMENTS, Vol. XI., pp. 579–580, Nos. 1140–1215.

## ii. Trusts Ineffectually Created.

801. Trusts created by will—Resulting trust for persons entitled on intestacy.]—*MORICE v. DURHAM* (BP.), No. 305, *ante*.

802. ————.]—Under a devise of all the residue of testator's estate & effects whatsoever & wheresoever, of what nature or kind soever, to trustees, upon trusts applicable only to personal property held that the real estate passed, with a resulting trust for the heir.—*DUNNAGE v. WHITE* (1820), 1 Jac. & W. 583; 37 E. R. 490.

*Annotations*. :—*Fold. Longley v. Longley* (1871), L. R. 13 Eq. 133. *Expld. Kirby-Smith v. Parnell*, [1903] 1 Ch. 483. *Refd. Fullerton v. Martin* (1853), 1 Eq. Rep. 221.

803. ————.]—If a testator means to create a trust, & the trust be ineffectually created, or fails, the next of kin take.—*OMMANNEY v. BUTCHER* (1823), Turn. & R. 260; 37 E. R. 1098.

*Annotations*. :—*Refd. Briggs v. Penny* (1851), 21 L. J. Ch. 265. *Mentd. Williams v. Kershaw* (1835), 5 Cl. & Fin. 111; *Douglas v. Congreve* (1836), 1 Keen, 410; *Dowson v. Gaskoin* (1837), 2 Keen, 14; *Lowe v. Thomas* (1834), 23 L. J. Ch. 453; *Larner v. Larner* (1857), 26 L. J. Ch. 668; *Whicker v. Hume* (1858), 7 H. L. Cas. 124; *Patrick v. Yeatherd* (1864), 3 New Rep. 367.

804. ————.]—Testatrix gives the residue of her property to exors., upon trust to dispose of the same at such times & for such purposes as they should think fit; it being her intention that the distribution thereof should be left entirely to their discretion:—*Held*: the next of kin were entitled to the residue.—*FOWLER v. GARLIKE* (1830), 1 Russ. & M. 232; 8 L. J. O. S. Ch. 66; 39 E. R. 90.

*Annotations*. :—*Consd. Ellis v. Selby* (1836), 1 My. & Cr. 286. *Refd. Buckle v. Bristow* (1864), 5 New Rep. 7.

## PART I. SECT. 14, SUB-SECT. 2.—A. (b) ii.

*E. Trust created on face of policy—No resulting trust to settlor.*—A policy was taken out in Victoria by H. (who

usually lived in Tasmania) on his own life but expressed on the face of it to be for the benefit of his two children, J. & A. H. shortly afterwards returned to Tasmania & the policy was

transferred to the Tasmanian register. J. died unmarried & intestate:—*Held*: the policy was for the benefit of J. & A. as joint tenants & assuming the Victorian & Tasmanian law of joint

*Sect. 14.—Constructive and implied trusts: Sub-sect. 2, A. (b) ii., iii. & iv.]*

**805.** ———.]—Certain property was conveyed by deed to trustees upon trust to permit any person or persons who should be eligible as in the deed mentioned, in the discretion of the trustees, being a lineal descendant or lineal descendants of settlor, with his or their families, to occupy the house & part of the property for three calendar months only in each year, & if there should be no such lineal descendant to be approved by the trustees, then upon the trusts thereafter declared concerning the residue; & upon further trust to let the remaining part of the property, except the mansion-house, to any person or persons being such descendant or descendants as aforesaid for any term not exceeding seven years; & upon further trust out of the rents & profits to allow the trustees the costs of managing & maintaining the property & certain other outgoings, & to apply the residue for the support or benefit of any poor or aged persons being such descendants as aforesaid as the trustees should think fit; & as to so much of the residue as should not be so applied to apply the same towards the maintenance or relief of any sick or aged poor person living within six miles of the dwelling-house, & to apply so much as should not be so appropriated towards the support & extension of religious instruction or religious or general education or any other benevolent objects, subject to the restrictions therein mentioned:—*Held*: the whole of the trusts were invalid, & the heir-at-law was entitled to the property.—*PEEK v. PEEK* (1869), 17 W. R. 1059.

**806.** Trust created by deed.—Resulting trust for grantor.]—*PARNELL v. HINGSTON*, No. 819, *post*.

**807.** ———.]—By a voluntary settlement executed on Dec. 2, 1873, certain property was settled upon trust for W. during his life, with remainder to his children; & it was declared that, if there should be no child of W. who should take a vested interest in the trust property, the trustees were to stand possessed of the trust property in trust for J. & her child or children, "subject to the like trusts, limitations, provisos, declarations, & agreements as are expressed & declared of & concerning certain trust property & premises settled, comprised in, & assured by a certain indenture bearing even date with these presents, & made between Charles Wilcock & Mary his wife of the one part & Thomas Charles Wilcock of the other part." No such indenture was ever executed. At the time, however, when the settlement was prepared an indenture was prepared & engrossed by which certain property was settled upon trust for J. for life, with remainder to her children. This indenture, however, was never executed, but instead thereof a deed was prepared conveying the property to J. absolutely. This deed was executed on the same day as the settlement, but it was not made between the same parties. W. died without leaving a child:—*Held*: no trusts were sufficiently declared either for J. or for J. & her children. Consequently there was a resulting trust for the benefit of the settlor.—*Re WILCOCK, WILCOCK v. JOHNSON* (1890), 62 L. T. 317.

tenants to be similar, A. was entitled by survivorship to the benefit of the whole policy & there was no resulting trust in favour of H. as to the moiety of the policy to which J. would have been entitled if she had survived.—*Re*

*HEWITT* (1906), 2 Tas. L. R. 88.—**AUS.**

**PART I. SECT. 14, SUB-SECT. 2.—**

**A. (b) iii.**

*h. General rule.*—Where there is a trust covering the whole estate, &

**iii. Property Not Disposed of.**

**808.** Resulting trust for persons entitled on intestacy.]—A devise of all estate real & personal for payment of debts, is a devise in fee. No implied trust of the surplus for the heir.—*NORTH v. CROMPTON* (1671), 1 Cas. in Ch. 106; 22 E. R. 759.

*Annotations*:—*Apld.* *Cook v. Fountain* (1676), 3 Swan. 585. *Consd.* *Gainsborough v. Gainsborough* (1691), 2 Vern. 252. *Foll.* *Dormer v. Bertie* (1699), Prec. Ch. 94. *Dist.* *Roper v. Radcliffe* (1712), 9 Mod. Rep. 181. *Consd.* *Loder v. Loder* (1730), Mos. 356. *Refd.* *Bushnell v. Parsons* (1703), Prec. Ch. 218; *Bristol v. Hungerford* (1709), 2 Vern. 645; *Rogers v. Rogers* (1733), Cas. temp. Talb. 268; *Hopkins v. Hopkins* (1734), Cas. temp. Talb. 44; *Hewes v. Wright* (1780), 1 Bro. C. C. 86; *Barnes v. Fewkes* (1865), 11 Jur. N. S. 669. *Ment.* *Nourse v. Finch* (1793), 4 Bro. C. C. 239; *Walton v. Walton* (1807), 14 Ves. 318.

**809.** ———.]—Where lands are devised to exors. to be sold for several purposes & the surplus is expressly devised to them there can be no resulting trust for the benefit of the heir.—*DORMER v. BERTIE* (1699), 2 Eq. Cas. Abr. 430; Prec. Ch. 94; 24 E. R. 45.

**810.** ———.]—A. by will devises his lands to trustees to sell, & to dispose of the money as he by writing should appoint, & for want of appointment, to his four nephews. A. by writing appoints his trustees to pay several sums to several persons, but not near the value of the lands. Decreed the surplus to the heir, & not to the nephews, as an interest resulting, & not disposed of.—*LONDON (CITY) v. GAWWAY* (1706), 2 Vern. 571; 23 E. R. 972.

*Annotations*:—*Apld.* *Loder v. Loder* (1730), Mos. 356. *Refd.* *Hill v. London (Bp.)* (1738), 1 Atk. 618.

**811.** ———.]—*LLOYD & JOBSON v. SPILLET*, No. 885, *post*.

**812.** ———.]—*NORTH & GUILDFORD (LORD) v. PURDON* (1752), 2 Ves. Sen. 405; 28 E. R. 317.

*Annotations*:—*Consd.* *Seley v. Wood* (1804), 10 Ves 71; *Giraud v. Hanbury* (1817), 3 Mer. 150.

**813.** ———.]—H. devises his manors, advowsons, etc., to trustees, to pay his son £1,000 for life, & the rest of the profits to be laid out in land during his son's life, & then settled:—*Held*: the son had a right to present to the living when vacant, not under the devise, but as heir-at-law, it being a fruit undisposed of.—*SIERRARD v. HARBOROUGH (LORD)* (1753), Amb. 165; 27 E. R. 110.

*Annotation*:—*Refd.* *Briggs v. Sharp* (1875), 23 W. R. 806.

**814.** ———.]—E. by deed conveyed several sums of money, secured by mtges., amounting to £30,000, to trustees in trust, to be laid out in the purchase of lands, to the use of himself for life, remainder, as to sums to the amount of £28,000, to his wife for life, remainder to his son R. for life, with several remainders over, remainder to J. in fee; & as to sums amounting to £23,000, to R. for life, with several intermediate remainders; remainder to T. in fee; & as to one particular mtge. of £8,500, & some leasehold estates to secure annuities; the surplus to R. in fee, with power of revocation. By his will he gave these leasehold estates, & the mtge. for £8,500, together with another mtge. of £6,700, in trust to secure the annuities; the surplus interest, or rents of the lands purchased, to be paid to R. for life, & to be settled in the same manner as his other estates:—*Held*: it being uncertain which of the limitations they were to

the bequests do not exhaust the estate, the trustees are express trustees of the residue for the heir of the testator.—*MATHURADAS v. VANDRAWANDAS* (1906), 1 L. R. 31 Bom. 222.—**IND.**  
**k. Resulting trust for beneficiary**—

follow, they were undisposed of, & passed to R. as heir-at-law, & from him to his general devisee E., who having died intestate, as to real estate, they go to her heir-at-law.—*LESLIE v. DEVONSHIRE (DUKE) (1787)*, 2 Bro. C. C. 187; 29 E. R. 107.

*Annotation* :—*Consd. Cogan v. Stephens (1835)*, 5 L. J. Ch. 17.

**815.** —.]—Wherever land, or any interest in land, which would descend to the heir-at-law, is devised for purposes which the law will not permit to take effect, the heir-at-law shall have the benefit of the interest so devised as undisposed of, whether testator intended that he should have it or not; for there is this distinction between the case of a devisee & that of an heir-at-law, that the devisee takes by force of the intent of testator, & can only take what is given him by the will; whereas the heir-at-law takes whatever is undisposed of, not by force of the intent, but by the rule of law.—*TREGONWELL v. SYDENHAM (1815)*, 3 Dow, 194; 3 E. R. 1035, H. L.

*Annotations* :—*Consd. Cogan v. Stephens (1835)*, 5 L. J. Ch. 17. *Reid. Sidney v. Shelley (1815)*, 19 Ves. 352; *Re Cooper's Trusts (1853)*, 23 L. J. Ch. 27, n.; *Oddie v. Brown (1859)*, 4 De G. & J. 179; *Smith v. Lomas (1864)*, 33 L. J. Ch. 578; *Simmons v. Pitt (1873)*, 21 W. R. 860; *Re Conyngham, Conyngham v. Conyngham*, [1920] 2 Ch. 495.

**816.** —.]—Testator devised & bequeathed all his estate & effects to trustees, their heirs, exors., & administrators, upon trust to convert his personal estate, not being money, & to stand possessed of the money to arise by such sale, & of the rest & residue of his estate & effects upon trust to invest the same in Govt. or real securities, & to stand possessed of such investments upon trusts for the benefit of the widow & children & brothers & sisters of testator:—*Held*: the real estate of testator passed to the trustees but the beneficial interest therein was undisposed of by the will, & consequently resulted to testator's heir.—*LONGLEY v. LONGLEY (1871)*, L. R. 13 Eq. 133; 41 L. J. Ch. 168; 25 T. T. 736; 20 W. R. 227.

*Annotation* :—*Reid. Kirby-Smith v. Parnell*, [1903] 1 Ch. 483.

**817.** —.]—A., by a voluntary settlement in 1838 conveyed freeholds to trustees upon trust, together with a sum of stock already transferred, for himself for life, & after his death in trust for his reputed son, W., when & in case he attained twenty-one, with a trust for maintenance if W. should be under twenty-one at the settlor's death; & in case W. should die under twenty-one, or die in the settlor's lifetime, without leaving issue living at his decease, then over. There were no words of limitation in the trust for W. There was a power of sale in the settlement, but no trust to invest the proceeds in land. A. died in 1849, having made his will in 1843, which recited the settlement & confirmed it, except as to the stock which had been sold. W. attained twenty-one, & died in 1872:—*Held*: W. took a life estate only in the freeholds under the settlement, & there was a resulting trust for the settlor.—*MIDDLETON v. BARKER (1873)*, 29 L. T. 643.

*Annotations* :—*Reid. Re Hudson, Kühne v. Hudson (1895)*, 72 L. T. 892. *Mentd. Re Whiston's Settlement*, *Lovatt v. Williamson*, [1894] 1 Ch. 661.

**818. Resulting trust for beneficiary.**—Devise of all testatrix's real estate to her cousins M. A. & A. I., who were females, their heirs & assigns for ever, subject to certain annuities (*inter alia*), one to her brother A., her heir-at-law, & another

to her sister S., & their children, for life; & testatrix charged her real estate therewith, & directed that the surplus profits should go to A. for life, remainder to his children for life, remainder to S. for life, remainder to the surviving children of her brothers & sisters for life, but gave no directions as to the remainder in fee:—*Held*: M. A. & A. I. took the remainder to their own use, although they also took legacies under the will; & there was no resulting use to the heir-at-law.—*SMITH v. KING (1812)*, 16 East, 283; 104 E. R. 1007; *subsequent proceedings*, *sub nom. KING v. DENISON (1813)*, 1 Ves. & B. 260, L. C.

**819. Resulting trust for settlor.**—In the declaration of trust there is no specific mention of the benefit of the contract for purchase of the real estate which purported to be assigned to the trustee & there are no general words which include it. Therefore as no trusts are declared of it would seem that there must as to that part of the property be a resulting trust in favour of the settlor (*STUART, V.-C.*).—*PARNELL v. HINGSTON (1856)*, 3 Sm. & G. 337; 28 L. T. O. S. 217; 2 Jur. N. S. 854; 4 W. R. 794; 65 E. R. 684.

**Failure to exercise power.**—Whether trust implied in favour of objects of power.—*See POWERS, Vol. XXXVII.*, pp. 526–532, Nos. 1160–1233.

#### iv. Interest Postponed until Fulfilment of Condition Precedent.

**820. Resulting trust for persons entitled on Intestacy.—Of interim rents & profits.**—Devise upon a future contingency; & no intermediate disposition of the rents & profits: a resulting trust for the heir.—A.-G. v. *BOWYER (1798)*, 3 Ves. 714; 30 E. R. 1235, L. C.

*Annotations* :—*Mentd. Moggridge v. Thackwell (1803)*, 7 Ves. 36; *Abbott v. Fraser (1874)*, L. R. 6 P. C. 96.

**821.** —. —.]—Rents & profits under a trust to accumulate, being in the event not disposed of, belong to the heir-at-law.—*STANLEY v. STANLEY (1809)*, 16 Ves. 491; 33 E. R. 1071.

*Annotations* :—*Consd. Morrice v. Langham (1840)*, 11 Sim. 260; *Phipps v. Ackers (1812)*, 9 Cl. & Fin. 583; *Lambarde v. Peach (1859)*, 4 Drew. 553; *Turton v. Lambarde (1860)*, 1 De G. F. & J. 495. *Distd. D'Eyncourt v. Gregory (1864)*, 31 Beav. 36. *Reid. Graham v. Stewart (1855)*, 26 L. T. O. S. 29. *Mentd. Ackland v. Lutley (1839)*, 9 Ad. & El. 879.

**822.** —. —. —.]—Testator devised all his real estates to trustees & their heirs. He directed that his mansion house & furniture should not be let or occupied except by the persons put therein to keep the same in good order “until the end of twenty-one years after my death, or until my brother & three sisters” (to whom he gave annuities) “are all dead.” He declared that his trustees should apply the rents of all his real estate in paying the annuities & keeping the mansion house & furniture in repair, & should accumulate the surplus, & lay out the accumulations in the purchase of real estates to be settled to the same uses. He declared that “no such accumulations shall under any circumstances exceed the term of twenty-one years” from his death. He declared that “at the end of the term of twenty-one years from the day of my death, or if my brother & three sisters shall all die within that period, then on the death of the survivor of them, whichever event shall first happen,” the trustees should stand possessed of the real estates, upon trust to pay the annuities, & subject thereto, in

*Marriage settlement by father.*—*WARD v. DYAS (1835)*, L. & G. temp. Sugd. 177. —IR.

I. —. —. —.]—*DOYLE v. CREAM*,

[1905] 1 I. R. 252.—IR.

m. —. —.]—*COPP v. WOOD (N. B.)*,

[1926] 2 D. L. R. 224.—CAN.

n. —. —.]—*DOYLE v. CREAM*, [1905]

1 I. R. 252.—IR.

o. —. —.]—*Heir-at-law.*—*SALTER v. CAVANAGH (1838)*, 1 Dr. & Wal. 668.—IR.

**Sect. 14.—Constructive and implied trusts: Sub-sect. 2, A. (b) *iv.*, v. & *vi.*]**

trust for the first son of his brother in tail male; & failing such issue, in trust for the second & every other younger son of testator's nephew W., in tail male; & failing such issue, in trust for the first & every other son of testator's nephew H. in tail male; & failing such issue, over; with an ultimate limitation, "failing such issue," upon trust to sell the estates for the benefit of testator's next of kin.

Testator's brother died without issue before the expiration of the twenty-one years' term. At the expiration of the term, two of testator's sisters, annuitants, were still living. His nephews, W. & H., were living, each having one son only, & several daughters.

There not having been born a second son of W., the son of H. claimed the estates as tenant in tail in possession indefeasibly, or as tenant in tail in possession, subject to defeasance in the event of a second son of W. being born:—*Held*: during the suspense period, until it should be ascertained whether or not there would be a second son of W., the rents of the real estate & the proceeds of the personal estate, after the expiration of the twenty-one years' term, were undisposed of, & belonged to the heir-at-law & next of kin respectively.—*WADE-GEHY v. HANDLEY* (1876), 1 Ch. D. 653; 45 L. J. Ch. 457; 34 L. T. 233; *affd.*, 3 Ch. D. 374, C. A.

**823. Resulting trust for grantor—Condition not fulfilled.**—If A., tenant *pur autre vie*, parts with the beneficial interest contingently, & the contingency does not happen, then there will be a resulting trust in favour of A. of the interest which he has not effectually parted with.—*NORTHEN v. CARNEGIE* (1859), 4 Drew. 587; 28 L. J. Ch. 930; 33 L. T. O. S. 355; 7 W. R. 481; 62 E. R. 225.

*Annotation*.—*Mentd. Re Mitchell, Moore v. Moore*, [1892] 2 Ch. 87.

— **Recovery of donor of gift mortis causa.**—*See GIFTS*, Vol. XXV., p. 550, Nos. 355, 356.

**Right to intermediate income of contingent legacies.**—*See, generally, EXECUTORS*, Vol. XXIII., pp. 409–412, Nos. 4802–4817.

*v. Lapse of Interests Granted.*

**824. Resulting trust for grantor—Grantee refusing grant—No other trust declared.**—A grant of the next avoidance to one without his privy held a resulting trust for the grantor, no other trust being declared.—*NORFOLK (DUKE) v. BROWNE* (1697), Prec. Ch. 80; 24 E. R. 38.

**825. — Failure of life estate.**—Property agreed to be settled consisted of leaseholds in possession, & of money to be received on the husband's death, which was to be invested in the usual securities, & the trustees were to stand possessed of the leaseholds in trust for the husband for life, & after his death, of one moiety of the leaseholds, stocks, funds & securities for the wife

for life; in case she survived her husband, & of the other moiety of the leaseholds, stocks, funds & securities, after the husband's death, & of the whole of the stocks, funds & securities, after the wife's death, in trust for the children. The wife died in the husband's lifetime:—*Held*: there was a resulting trust as to the leaseholds, for the husband, the settlor.—*WILSON v. PAUL* (1836), 7 Sim. 620; 58 E. R. 975.

**826. — Defective exercise of power—No trusts in default.**—Renewal of a college lease by tenant for life, with a power of appointment, in her own name, & at her expense, has not the effect of an appointment in her own favour. By the death of her appointee, therefore, in her life, a resulting trust by lapse for the representative of the author of the power.—*BROOKMAN v. HALES* (1813), 2 Ves. & B. 45; 35 E. R. 235.

**827. — Interposition of vested interest.**—Trustees of a settlement were to stand possessed of the trust fund, consisting of twelve-fifteenths of a larger fund, in trust as to one share for the settlor's daughter A. for her life, & then for her children, who were to take vested interests, if sons, at twenty-one, & if daughters, at twenty-one of marriage; & if A. should have no children who should live to attain a vested interest in the fund, then to stand possessed of the share so given to A. & her children, in trust as to one moiety for the settlor's daughter B. & her children, & as to the other moiety for his daughter C. & for children under the same limitations & restrictions to which the gift to A. & her children had been subjected. Then followed similar dispositions of the remainder of the trust fund in favour of B., & her children & C., & her children, with limitations over of each share, in the event of either B. or C. dying without leaving children who should attain a vested interest, to the other two daughters & their children, in moieties as before. But in case there should not be any child or children of A., B. & C. who should live to gain a vested & transmissible interest in the said twelve-fifteenths parts of any part thereof under & by virtue of the settlement, then the trustees were to pay, assign & transfer the whole of the twelve-fifteenths parts unto the next of kin of the settlor. The settlor died, having by his will made A., B. & C. his residuary legatees. After his death C. died without issue. Then B. died without issue, leaving A. surviving her, who had two children, one of whom, a daughter, was married:—*Held*: A. having a child who had lived to gain a vested & transmissible interest in the fund was not entitled to any portion of it under the limitation to the "next of kin" of settlor; consequently, so much of the funds as did not pass under the limitations other than that to the next of kin resulted to the settlor & passed under his will to his residuary legatees.—*WESTWOOD v. SLATER* (1846), 1 De G. & Sm. 1; 63 E. R. 945; *affd.* (1847), 10 L. T. O. S. 477, L. C.

— **Limitation void for remoteness.**—*See PERPETUITIES*, Vol. XXXVII., p. 119, Nos. 512, 513.

**PART I. SECT. 14, SUB-SECT. 2.—A. (b) v.**

*p. Money impressed with trust—Failure of object.*—Money was advanced by the pltf. for the express purpose of being deposited in a bank in order to meet a cheque of L. & C., given by their agent J. H. C. This cheque never was paid or presented after such deposit, & the amount remained in the bank to the credit of L. & C., who were trustees, claiming no beneficial interest in the money. On a bill filed for that purpose the ct. declared that the estate

of J. H. C., who had since died, had not any claim or interest in the fund, & ordered the amount, together with the interest allowed on the deposit, to be paid to pltf.—*GAMBLE v. LEE* (1878), 25 Gr. 326.—*CAN.*

*q. Expenses of prosecuting speculative undertaking.*—Where certain persons, including G., advanced money to complete the building of a yacht at Cobourg, in order to sail for prizes at New York & Philadelphia, & scrip under seal was executed, declaring, that G. was to hold the yacht in trust

as security for the advances; & G. incurred certain running expenses in taking the yacht to the race:—*Held*: G. was entitled to a first charge on the proceeds of the sale of the yacht, for these expenses, as they had been incurred in prosecuting the enterprise for which the trust was created.—*BURN v. GIFFORD* (1879), 8 P. R. 44.—*CAN.*

*r. Resulting trust for grantor—Cesser of trust at death of grantor.*—*BUCHANAN v. OAKES* (Man.) (1914), 26 W. L. R. 549; 15 D. L. R. 582.—*CAN.*



**828. Resulting trust for persons entitled on intestacy.**—*MORICE v. DURHAM* (Bp.), No. 305, *ante*.

**829.** —.]—Resulting trust for the heir; the only express devise being to convey to the testator's son from & after his age of thirty, which he did not attain; & no devise by implication from a declaration, that he shall have no power over the estate until his age of thirty.—*NASH v. SMITH* (1810), 17 Ves. 29; 34 E. R. 12.

**830.** —.]—*OMMANNEY v. BUTCHER*, No. 803, *ante*.

**831.** —.]—By a marriage settlement, a sum of £1,500 belonging to the husband was settled in trust to pay the interest to the husband during his life, & after his death to the wife, & after the death of the survivor the fund was to be held in trust for the children of the marriage & if there should be no children, absolutely for the survivor of husband & wife; & certain foreign securities to which the wife was entitled were held upon trust to pay the income to the husband, for the joint lives of himself & his wife; then as the wife, notwithstanding coverture, should appoint by will, & in default of such appointment in trust for the persons who would have been entitled to the same if the wife had died intestate & unmarried.

In Feb. 1863, the husband made his will, & left all his property to his wife absolutely; & in Apr. 1872, the wife made her will, leaving all her property to her husband for life, & after his death to her sisters equally.

The husband & wife started in Apr. 1874, from Liverpool for Madeira & had never since been heard of.

Pltf. claimed, as exor. of the husband to be entitled to both funds, on the ground that the marriage settlement was a reduction into possession:—*Held*: each fund must go by way of resulting trust to the representatives of the settlor.—*WOLLASTON v. BEUKLEY* (1876), 2 Ch. D. 213; 45 L. J. Ch. 772; 34 L. T. 171; 24 W. R. 360.

**832.** —.]—The effect of a testamentary appointment, either of real or personal estate, to a trustee upon trust for A., who dies in the lifetime of the appointor, is that the appointed property does not revert to the donor of the power, nor to those who would have taken under a gift over, if any, in default of appointment, but remains part of the general estate of the appointor. Where, therefore, testatrix having a general testamentary power of appointment over real estate, subject to a gift over in default of appointment, devised the property to trustees upon trust for A., who died in her lifetime:—*Held*: the property remained vested in the trustees as part of the general estate of testatrix, subject to a resulting trust for her heir-at-law, if any.—*Re VAN HAGAN, SPERLING v. ROCHFORD* (1880), 16 Ch. D. 18; 50 L. J. Ch. 1; 44 L. T. 161; 29 W. R. 84, C. A.

*Annotations*:—*Apld.* *Re Scott, Scott v. Hanbury*, [1891] 1 Ch. 298. *Distd.* *Re Elen, Thomas v. McKechnie* (1893), 68 L. T. 816. *Consd.* *Coxen v. Rowland*, [1894] 1 Ch. 406. *Re Id.* *Re Ickeringill's Estate, Hinsley v. Ickeringill* (1881), 17 Ch. D. 151; *Re Boyd, Kelly v. Boyd*, [1897] 2 Ch. 232; *Re Hadley, Johnson v. Hadley*, [1909] 1 Ch. 20; *Re Pryce, Lawford v. Pryce* (1911), 105 L. T. 51.

**833.** —.]—**Defective exercise of power.**—*WHITTING v. WHITTING* (1908), 53 Sol. Jo. 100.

*Annotations*:—*Re Id.* *Re Nash, Cook v. Frederick*, [1909] 2 Ch. 450; *Re Park's Settlement, Foran v. Bruce*, [1914] 1 Ch. 595. *Mentd.* *Re Bullock's Will Trusts, Bullock v. Bullock*, [1915] 1 Ch. 493; *Re Garnham, Taylor v. Baker*, [1916] 2 Ch. 413.

#### vi. *Ultimate Trusts Not Declared.*

**834. Resulting trust for grantor.**—Lands are devised to three persons & their heirs to the use of

them & their heirs, upon the trusts after mentioned, & then testator directs them to convey part to A. for life, & other part to B. in tail; but gives no direction as to the remainder in fee. Though two of the trustees were related to testator; yet the remainder in fee will not belong to them, but be a resulting trust for testator's heir.—*HOBAIT v. SUFFOLK (COUNTRESS)* (1709), 2 Vern. 644; 23 E. R. 1020, L. C.

*Annotations*:—*Apld.* *Habergham v. Vincent* (1793), 2 Ves. 204. *Re Id.* *Hill v. London (Bp.)* (1838), 1 Atk. 618. *Clarke v. Hilton* (1866), L. R. 2 Eq. 810.

**835.** —.]—By her marriage settlement G. conveyed certain freehold & copyhold hereditaments to trustees to hold in trust for her during her life for her separate use, & after her death in trust for such person or persons & in such manner as she should by her will appoint, & in default of & until such appointment & so far as no such appointment should extend "in trust for the heir-at-law of G."—*Held*: the rule in *Shelley's Case* (1581), 1 Rep. 93 b, did not apply, & under the limitations of the settlement C. took an estate for life; the person who at her death answered the description of her heir-at-law took an estate for life, & there was a resulting trust in favour of C. as settlor.—*Re DAVISON'S SETTLEMENT, CATERMOLE DAVISON v. MUNBY*, [1913] 2 Ch. 498; 83 L. J. Ch. 148; 109 L. T. 606; 58 Sol. Jo. 50.

**836.** —.]—By a settlement made in 1881 on the marriage of M., the daughter of B., to C., after reciting that C. & B. were respectively entitled to certain funds, & that B. had transferred from his own funds to the trustees a sum of £1,670 Consols to be held as part of "the trust estate hereby constituted," C. & M. respectively assigned their own funds to the trustees upon the trusts therein-after declared. The settlement then declared that the trustees should hold "all the trust estate hereby constituted" until the marriage upon trust for the persons to whom same respectively then belonged; & after the marriage to pay the income to C.'s fund to him during the joint lives of C. & M.; & as to the £1,670 Consols & M.'s fund to pay the income to M. during the same joint lives; & after the death of either C. or M. to pay the income of "all the trust estate hereby constituted" to the survivor for life; & after the survivor's death upon trust as to corpus for the children of the marriage. In default of there being a child of the marriage, C.'s fund was to belong to him, & the £1,670 Consols & M.'s fund, if M. died in the lifetime of C., were to be held in trust for such persons as she should appoint, & in default of appointment to the persons who, if she had died intestate & unmarried, would have been entitled to pay her personalty under the Statutes of Distribution; but there was no declaration of trust as to these two funds in case of C. dying in the lifetime of M. & there being no child of the marriage. B., in the lifetime of C. & M., made a will whereby he declared that his trustees should stand possessed of one-fourth of his residuary estate, "hereinafter referred to as M.'s share," upon trust to transfer same to the trustees of her settlement, to be held by them upon the trusts by that settlement declared concerning "the fortune brought in settlement by or on behalf of M." C. died in the lifetime of M., & there was no child of their marriage. It was conceded that as regarded the fund which belonged to M. & was settled by her there was a resulting trust in favour:—*Held*: (1) as regarded the £1,670 Consols there was a resulting trust, subject to the

**828. Resulting trust for persons entitled on intestacy.**—*HEDDERWICK'S TRUSTEES v. HEDDERWICK'S EXECUTORS*, [1910] S. C. 333.—*SCOT*.



**Sect. 14.—Constructive and implied trusts: Sub-sect. 2, A. (b) vi., vii., & viii., & (c) i. & ii.]**

life interest of M., in her favour of B., the father; (2) the fourth share of his residue had been completely severed from B.'s estate & given to M.'s trustees for her benefit, & there was an ultimate trust of this share in favour of M.—*Re CONNELL'S SETTLEMENT, Re BENNETT'S TRUSTS, FAIR v. CONNELL*, [1915] 1 Ch. 867; 84 L. J. Ch. 601; 113 L. T. 234.

**Annotation:—***As to (2) Reid, Re Harrison, Hunter v. Bush*, [1918] 2 Ch. 59.

**vii. Trusts for Conversion.**

**Surplus after satisfaction of purpose of conversion.]—***See EQUITY*, Vol. XX., pp. 386–388, Nos. 1237–1255.

**Estate not wholly disposed of by testator or settlor.]—***See EQUITY*, Vol. XX., pp. 388, 389, Nos. 1256–1265.

**Proceeds of sale of realty blended with personalty.]—***See EQUITY*, Vol. XX., pp. 389–391, Nos. 1267–1279.

**Exercise of power of sale by mortgagee—Resulting trust of surplus proceeds.]—***See EQUITY*, Vol. XX., p. 365, No. 1026.

**Devise of advowson on trust for sale—When resulting trusts implied—For persons entitled on intestacy.]—***See ECCLESIASTICAL LAW*, Vol. XIX., p. 384, Nos. 2085, 2086.

**viii. Trusts for Creditors.**

**837. Resulting trust of surplus—For persons entitled on intestacy of assignor.]—**A. devised to his wife a rentcharge of £200 for thirteen years, in trust, nevertheless, for the payment of his debts & legacies; he also devised to her certain lands, in augmentation of her jointure. The surplus of this rentcharge, after debts & legacies paid, is not a beneficial trust for the wife, but a resulting trust for the heir.—*WYCH v. PACKINGTON* (1712), 3 Bro. Parl. Cas. 44; 1 E. R. 1166, II. 1.

**Annotations:—***Reid, Pawlett v. Morley* (1702), 2 Freem. Ch. 263; *Bristol v. Hinzford* (1709), 2 Vern. 645; *Roper v. Radcliffe* (1712), 9 Mod. Rep. 181; *Loder v. Loder* (1730), Mos. 356; *Hewitt v. Wright* (1780), 1 Bro. C. C. 86.

**838. ———.]—**A. devise to A. upon special trust & confidence, that he should pay all testator's just debts, is a resulting trust to the heir, after debts paid.—*KIRCKE v. BRANSHEY* (1727), 2 Eq. Cas. Abr. 508; 22 E. R. 430.

**839. — For tenant for life.]—**A. by will, gave to trustees for terms, remainder to T. & E. for life. The trusts of the terms were for payment of scheduled debts, & to make an allowance to T. & E. The debts being stated to be paid, a trust results to the tenants for life.—*DAVIDSON v. FOLEY* (1787), 2 Bro. C. C. 203; 29 E. R. 115, I. C.

**Annotations:—***Consd. Sidney v. Shelley* (1815), 19 Ves. 352. *Reid, Kirby v. Dillon* (1824), 2 L. J. O. S. Ch. 140.

**840. — For assignor.]—**By a mtge. deed debtor covenanted to pay principal & interest, & a surety covenanted to pay the interest in default. Debtor afterwards, by deed, assigned his property to a trustee on trust to sell & divide the proceeds amongst his creditors; the creditors releasing the debtor from the debts due to them respectively;

but there was a proviso in the deed that nothing therein should affect any right or remedy which any creditor might have against any other person in respect of any debt due by the debtor:—*Semble*: under such a deed of assignment there would be a resulting trust of any surplus for debtor.

—*GREEN v. WYNN* (1869), 4 Ch. App. 204; 38 L. J. Ch. 220; 20 L. T. 131; 17 W. R. 385, L. C.

**Annotations:—***Reid, Bateson v. Gosling* (1871), L. R. 7 C. P. 9. *Mentl. Forbes v. Jackson* (1882), 19 Ch. D. 615; *Re Whitehouse, Whitehouse v. Edwards* (1887), 37 Ch. D. 683.

**841. ———.]—**The partners in a business, by a deed reciting the inability of the firm to pay their creditors, assigned the business & property of the firm to trustees upon certain trusts for the benefit of the creditors of the firm. The deed contained no provision in the event of there being a surplus:—*Held*: upon the natural & true construction of the deed there was an absolute disposal of all the proceeds to be realised for the benefit of the creditors, & no resulting trust for the benefit of the assignors could be implied.—*SMITH v. COOKE, STOREY v. COOKE*, [1891] A. C. 297; 60 L. J. Ch. 607; 65 L. T. 1; 40 W. R. 67, H. L.; *reversg. S. C. sub nom. COOKE v. SMITH*, 45 Ch. D. 38, C. A.

**Annotations:—***Apld. Cunnack v. Edwards*, [1896] 2 Ch. 679. *Reid, Re Printers & Transferers' Amalgamated Trades Protection Soc.* (1890), 47 W. R. 619.

**842. — For assignee—Whole property assigned to surety for payment of composition.]—**Resolutions were passed in favour of composition & for assigning all the estate of the debtor to D. as security for the composition, he becoming surety for the payment of the composition & being appointed trustee. Afterwards a deed was executed by debtor, creditors, & D. assigning all the estate to D. but not declaring any trusts:—*Held*: D. was absolutely entitled to the surplus of the estate after the payment of the composition & the costs, & there was no resulting trust in favour of debtor.—*Re WILCOCKS, Ex p. WILCOCKS* (1874), 44 L. J. Bv. 12; 31 L. T. 520.

**843. Resulting trust of unclaimed dividends—For claiming creditors.]—**Where an assignment is made for the benefit of creditors, those creditors who have received dividends out of the property assigned are, in the absence of any stipulation to the contrary, entitled to any unclaimed dividends in the hands of the trustees, in preference to the trustees & *semble*, also to the original debtor.—*WILD v. BANNING* (1866), L. R. 2 Eq. 577; 35 L. J. Ch. 594; 14 L. T. 845; 12 Jur. N. S. 464.

**Annotation:—***Expld. Ashley v. Ashley* (1877), 4 Ch. D. 757.

**Right of debtor to have property reconveyed—On payment of composition.]—***See BANKRUPTCY*, Vol. V., p. 1185, Nos. 9566, 9567.

**(c) Property Put in Name of Another.**

**i. Purchase in Name of Another.**

**Purchase by father in child's name.]—***See GIFTS*, Vol. XXV., pp. 610–612, Nos. 67–85.

**844. Purchase in name of stranger—Trust for purchaser presumed.]—***WOODMAN v. MORREL* (1678), Freem. Ch. 32; 22 E. R. 1040; *on appeal*, Freem. Ch. 34, n., L. C.

*woman.—Hoig v. GORDON* (1870), 17 Gr. 599.—CAN.

**844 iv. ———.]—***McDONALD v. DUNLOP* (No. 2) (1898), 2 Terr. L. R. 238.—CAN.

**844 v. ———.]—***Joos v. HENSCHALL* (Sask.) (1911), 18 W. L. R. 191.—CAN.

**844 vi. ———.]—***ENNOS v. McLEAN* (1919), 52 N. S. R. 485.—CAN.

**844 vii. ———.]—**The bare fact of payment of the purchase price is

**PART I. SECT. 14, SUB-SECT. 2.—A. (b) viii.**

**t. Resulting trust to creditors—Consideration moving from creditors.]—***PAGE v. CHAMBERS* (1879), 13 N. S. R. (1 R. & G.) 232.—CAN.

**a. ———.]—***DONALD v. McMANUS* (N. B.) (1911), 10 E. L. R. 200.—CAN.

**PART I. SECT. 14, SUB-SECT. 2.—A. (c) i.**

**844 i. Purchase in name of stranger—**

*Trust for purchaser presumed.]—**TOOTH v. POWER*, [1891] A. C. 284, P. C.—AUS.

**844 ii. ———.]—***McDONALD v. McMILLAN* (1867), 14 Gr. 99.—CAN.

**844 iii. ———.]—**A man & woman lived together as husband & wife, the man having a wife living at the time; & land purchased in the man's name was paid for by the woman out of money of her own:—*Held*: there was a resulting trust in favour of the

845. ———.]—ANON. (1683), 2 Vent. 361 ; 86 E. R. 486.

846. ———.]—AMBROSE v. AMBROSE, No. 83, *ante*.

847. ———.]—SMITH v. BAKER (1737), West temp. Hard. 98 ; 1 Atk. 385 ; 25 E. R. 840, L. C. *Annotations*:—*Apid*. Lewis v. Lane (1834), 2 My. & K. 449. *Reid*. Dyer v. Dyer (1788), 2 Cox, Eq. Cas. 92 ; Chapman v. Gibson (1791), 3 Bro. C. C. 229 ; Jeans v. Cooke (1857), 27 L. J. Ch. 202.

848. ———.]—Where an estate is purchased in the name of one, & the money paid by another, it is a trust notwithstanding there is no declaration in writing by the nominal purchaser.—RYALL v. RYALL (1739), 1 Atk. 59 ; 26 E. R. 39, L. C.

*Annotations*:—*Consd*. Lane v. Dighton (1762), Amb. 409. *Reid*. Lench v. Lench (1805), 10 Ves. 511. *Mentd*. *Re* West of England & South Wales District Bank, *Ex p*. Dale, Young (1879), 48 L. J. Ch. 600.

849. ———.]—LLOYD & JOHNSON v. SPILLIT, No. 885, *post*.

850. ———.]—WILLIS v. WILLIS, No. 68, *ante*.

851. ———.]—Trusts by implication arise where one person pays the purchase-money, & the conveyance is taken in the name of another ; but the rule is not so large as to extend to every voluntary conveyance.—YOUNG v. PEACHY (1742), 2 Atk. 254 ; 26 E. R. 557, L. C.

*Annotation*:—*Mentd*. Houghton v. Houghton (1852), 15 Beav. 278.

852. ———.]—LADE v. LADE (1743), 1 Wils. 21 ; 95 E. R. 470, L. C.

853. ———.]—WITHERS v. WITHERS (1752), Amb. 151 ; 27 E. R. 99, L. C.

*Annotation*:—*Reid*. Zouch v. Forse (1806), 7 East, 186.

854. ———.]—Purchase in the name of another, not a child or wife, a trust for the person advancing the money ; unless the presumption from that circumstance is repelled by evidence.—RIDER v. KIDDER (1805), 10 Ves. 360 ; 32 E. R. 884, L. C.

*Annotations*:—*Distd*. George v. Howard & Bank of England (1819), 7 Price, 646. *Consd*. *Re* Policy, No. 6402 of Scottish Equitable Life Assce. Soc., [1802] 1 Ch. 282. *Reid*. Dummer v. Pitcher (1833), Coop. temp. Brough. 257 ; Sims v. Thomas (1840), 12 Ad. & El. 536 ; Freeman v. Tatham (1846), 5 Hare, 329 ; Barrack v. McCulloch (1850), 3 K. & J. 110 ; Nicholson v. Mulligan (1869), 17 W. R. 659 ; Ayerst v. Jenkins (1873), L. R. 16 Eq. 275 ; Phillips v. Probyn (1899), 68 L. J. Ch. 401.

855. ———.]—Purchase in the name of another a trust for the party, who pays the consideration ; except by a parent in the name of his child ; which is presumed an advancement. The presumption capable of being rebutted ; but does not give way to slight circumstances.—FINCH v. FINCH (1808), 15 Ves. 43 ; 33 E. R. 671, L. C.

*Annotations*:—*Reid*. Crabb v. Crabb (1834), 1 My. & K. 511 ; Skeats v. Skeats (1842), 12 L. J. Ch. 22 ; Tucker v. Burrow

in, or making an advancement to them : *Held* : there was a resulting trust in her & lands declared to be hers.—MOORE v. MOORE (1895), 1 N. B. Eq. Rep. 204.—CAN.

8. ———.]—BLACKBURN v. BLACKBURN (1907), 26 N. Z. L. R. 1163.—N.Z.

9. Conditional purchase in child's name.—The doctrines of advancement & resulting trust, do not apply to a conditional purchase by the father in the name of the infant.—STEPHEN v. STALLWORTHY (1881), 2 N. S. W. Eq. 55.—AUS.

g. Purchase by husband in wife's name.—*Re* HOBSON ESTATE (1901), 7 Terr. L. R. 182.—CAN.

h. ———.]—DUDGEON v. DUDGEON & PARSONS (1907), 6 W. L. R. 316 ; 13 B. C. R. 179.—CAN.

k. ———.]—HENDERSON v. HENDERSON (P. E. I.) (1909), 7 E. L. R. 218.—CAN.

(1865), 2 Hem. & M. 515. *Mentd*. Sharpe v. Sharpe (1841), 10 L. J. Ex. Eq. 2.

856. ———.]—DAVIES v. OTTY, No. 73, *ante*.

857. ———.]—In the case often referred to in the law of resulting trusts, where a man purchases land with the money of another, although there is no written evidence of the trust, a trust results to the owner of the money by operation of law (*per* CUR.).—BARTON v. MUIR (1874), L. R. 6 P. C. 184 ; 44 L. J. P. C. 19 ; 31 L. T. 593 ; 23 W. R. 427, P. C.

*Annotations*:—*Consd*. Tooth v. Power, [1891] A. C. 284 ; *Mentd*. *Re* Article X. of Articles of Agreement for Treaty between Great Britain & Ireland (1828), 45 T. L. R. 57.

858. ———.]—Testatrix placed a sum of £500 on deposit at a bank in the name of her niece, towards whom she was not *in loco parentis*. She retained the deposit note in her own possession, & did not inform her niece of the fact of the deposit having been made. Testatrix subsequently made a codicil to her will purporting to dispose of the money:—*Held* : there was a presumption of a resulting trust in favour of testatrix, & no evidence to rebut the presumption.—*Re* HOWES, HOWES v. PLATT (1905), 21 T. L. R. 501.

859. Proof of payment of purchase-money—Must be clear.—A. purchases in the name of B. & pays the purchase-money. B. claims the estate, there being no declaration of trust. A. may be admitted to read proofs, that he paid the purchase-money, but then those proofs must be very clear to make it a trust arising by implication of law.—GASCOIGNE v. THWING (1685), 1 Vern. 366 ; 23 E. R. 526.

*Annotations*:—*Folld*. GROVES v. GROVES (1829), 3 Y. & J. 163. *Reid*. Wilkins v. Stevens (1812), 1 Y. & C. Ch. Cas. 431.

860. ———.]—WILLIS v. WILLIS, No. 68, *ante*.

861. Covenant by father to settle after-acquired property—Purchase in name of youngest son—Resulting trust to person entitled under covenant.—A. by marriage articles covenanted, that all the lands which he should afterwards purchase in the parish of K. should be to the uses of the articles. He purchased lands in K. & took a conveyance in fee in the name of his youngest son, but there was no declaration of trust:—*Held* : the son was a trustee for his eldest brother, who was entitled to these lands by virtue of the covenant.—BLAKE v. BLAKE (1721), 7 Bro. Parl. Cas. 241 ; 3 E. R. 157, H. L.

ii. Property in Joint Names of Donor and Donee.

*See, generally*, GIFTS, Vol. XXV., pp. 517, 518, Nos. 124–129.

862. General rule—Resulting trust for donor.—(1) Pltf., a widow, in 1880, caused £6,000 Consols to

1. Purchase in name of manager.]

—PUBLIC TRUSTEE v. RATHBON (1906), 26 N. Z. L. R. 805.—N.Z.

m. Conveyance to nominal purchaser.]—SCAHL v. WREN (1866), 6 N. S. W. S. C. R. (Eq.) 38.—AUS.

n. Purchase with trust funds.—In son's name.—Son trustee for beneficiaries.]—DANIELLE WALLACE (1881), 2 N. S. W. Eq. 20.—AUS.

o. Timber licence taken in name of servant.]—Action to recover price of a timber licence staked in the name of pltf. :—*Held* : the staking was done by pltf. for debts, who was a trustee for them & was directed to transfer the licence to them.—McPHEE v. BRIDGES (1908), 10 W. L. R. 520.—CAN.

PART I. SECT. 14. SUB-SECT. 2.—A. (c) ii.

p. Deposit account in joint names of husband & wife.]—*Held* : as the deposit accounts were put in their

*Sect. 14.—Constructive and implied trusts: Sub-sect. 2, A. (c) ii., iii. & iv.]*

be transferred into the joint names of herself & deft., who was her godson. She did so with the express intention that deft., in the event of his surviving her, should have the Consols for his own benefit, but that she should have the dividends during her life; & she had previously been warned that if she made the transfer she could not revoke it. The first notice deft. had of the transaction was a letter from pltf.'s solrs. about the end of 1882 claiming to have the fund retransferred to pltf.:—*Held*: pltf. could not claim a retransfer on equitable grounds, the evidence clearly showing that she did not, when she made the transfer, intend to make the deft. a mere trustee for her except as to the dividends.

The rule is well settled that where there is a transfer by a person into his own name jointly with that of a person who is not his child, or his adopted child, then there is *prima facie* a resulting trust for the transferor. But that is a presumption capable of being rebutted by showing that at the time the transferor intended a benefit to the transferee (COTTON, L.J.).

(2) Trusts are neither created nor implied by law to defeat the intentions of donors or settlors; they are created or implied or are held to result in favour of donors or settlors in order to carry out & give effect to their true intentions, expressed or implied (LINDLEY, L.J.).—*STANDING v. BOWRING* (1885), 31 Ch. D. 282; 55 L. J. Ch. 218; 54 L. T. 191; 34 W. R. 204; 2 T. L. R. 202, C. A.

*Annotations:—As to (1) Auld. Re Howes, Howes v. Platt* (1905), 21 T. L. R. 501. *Reid. London & County Banking Co. v. London & River Plate Bank* (1888), 21 Q. B. D. 535; *Re Weston, Davies v. Tagart*, [1900] 2 Ch. 161; *Mallot v. Wilson*, [1903] 2 Ch. 494. *Generally, Reid. Re Blake, Blake v. Power* (1889), 60 L. T. 663; *Re Arbib & Class's Contract*, [1891] 1 Ch. 601.

**863. Transfer to donor & child.]—**A father having provided for his eldest son, but not for the rest, takes a security for the proceeds of an estate sold in the name of himself & eldest son:—*Held*: a trust for the father's personal representatives.—*POLE v. POLE* (1748), 1 Ves. Sen. 76; 27 E. R. 901, L. C.

*Annotation:—Reid. Dyer v. Dyer* (1788), 2 Cox, Eq. Cas. 92.

**864. Transfer to donor & brother.]—**Testator, on renewal of a lease, takes it in the names of his brother & himself, paying the fine & receiving the profits himself:—*Held*: not to be assets, but vested in the brother beneficially, upon the ground of intention, though proved but by one witness.—*MADDISON v. ANDREW* (1747), 1 Ves. Sen. 57; 27 E. R. 889, L. C.

*Annotations:—Consd. Bartlett v. Hollister* (1757), Amb. 334; *Joe d. Nowell v. Roake* (1825), 2 Bing. 497. *Reid. Nicholson v. Mulligan* (1869), 17 W. R. 659. *Mentd. Horsley v. Chaloner* (1750), 2 Ves. Sen. 83; *Doe d. Devonshire v. Cavendish* (1782), 3 Doug. K. B. 48; *Madoc v. Jackson* (1789), 2 Bro. C. C. 588; *Wilson v. Piggett* (1794), 2 Ves. 351; *Kemp v. Kemp* (1801), 5 Ves. 849; *Reade v. Reade* (1801), 5 Ves. 744; *M'Ghie v. M'Ghie*

joint names as a matter of convenience & not with the intention of vesting the moneys in testator's wife, no presumption of advancement was to be raised.—*BRYLEYA v. FREDERICTON DIOCESAN SYND.* (N. B.) (1912), 10 E. L. R. 548.—*CAN.*

*q. —.]—Re CONDRIN, COLOHAN v. CONDRIN*, [1914] 1 L. R. 89.—*IRAN*

**PART I. SECT. 14, SUB-SECT. 2.—A. (c) iii.**

**866 i. Whether resulting trust implied.]—***WILSON v. OWENS* (1878), 26 Gr. 27.—*CAN.*

(1817), 2 Madd. 368; *Thornton v. Bright* (1836), 2 My. & Cr. 230; *Fordyce v. Bridges* (1848), 2 Coop. temp. Cott. 324; *Butler v. Gray* (1869), 5 Ch. App. 26

**865. Transfer to donor & godson.]—***STANDING v. BOWRING*, No. 862, *ante*.

**iii. Voluntary Conveyances.**

**866. Whether resulting trust implied.]—***VILLERS v. BEAMONT* (1556), 2 Dyer, 146 a; 73 E. R. 319.

*Annotati*

*Annotations:—Homer v. Ashford* (1825), 3 Bing. 322. *Mentd. Brown's Case* (1594), 3 Co. Rep. 45 a; *Buckhurst's Case* (1595), Moore, K. H. 488; *Fitzherbert's Case* (1595), 5 Co. Rep. 79 b; *Mackallay's Case* (1611), 9 Co. Rep. 65 b; *Clifford v. Turrell* (1845), 14 L. J. Ch. 390.

**867. —.]—***LLOYD & JOBSON v. SPILLET*, No. 885, *post*.

**868. —.]—***YOUNG v. PEACHY*, No. 851, *ante*.

**869. —.]—**Testator, with a view of placing certain property out of the control of liquidators, conveyed it to his stepdaughter, absolutely, & as she alleged by way of gift. The conveyance purported to be for valuable consideration, but was in fact voluntary. Subsequently the claims of the liquidators were satisfied out of other property belonging to testator:—*Held*: there was a resulting trust in favour of testator, & the property must be reconveyed for the benefit of his estate.—*COULTWAS v. SWAN* (1870), 22 L. T. 539; 18 W. R. 746; *on appeal* (1871), 19 W. R. 485, C. A.

**870. —.]—***Resp.* conveyed an undivided moiety of real estate to T. A. S. upon the terms embodied in a letter that she should receive one half of the net rents during her life, & that T. A. S. should leave the moiety to her & her heirs by his will. He paid her a sum amounting substantially to one half of the net rents during his life, & left her a pecuniary legacy by his will equivalent to half the value of the real estate:—*Held*: the letter did not create a trust in favour of resp. & there was no resulting trust in her favour, & resp. was put to her election & could not have specific performance of the contract to settle the moiety of the real estate on her without abandoning her claim to the pecuniary legacy under the will.

When once the conclusion is arrived at that a grantor intends to part with his whole legal & beneficial interest in favour of another, & there can be no resulting trust, unless, in the view of a ct. of equity there be no consideration to support the transaction, or the consideration, if any, entirely fails (*LORD PARKER*).—*CENTRAL TRUST & SAFE DEPOSIT CO. v. SNIDER*, [1916] 1 A. C. 266; 85 L. J. P. C. 87; 114 L. T. 250, P. C.

**871. —. Gratuitous lease.]—**Construction of a limitation, in trust for A. during his natural life, after whose death the trustees were directed to assign over all their right, title & interest to the issue of the said A., & for default of such issue to B. Trust resulting:—*Held*: if a lease for years be

(1921), 64 D. L. R. 684; 51 O. L. R. 68.—*CAN.*

**866 vi. —.]—**Although, in the case of a voluntary transfer of property *inter vivos* without any declaration or other intimation of a trust, the legal rights pass to the transferee, the general presumption, except in the case of a wife or child, is that a trust results for the transferor.—*Hudson's Bay Co. v. Hosie* (Sask.), [1926] 4 D. L. R. 489; [1926] 2 W. W. R. 730.—*CAN.*

**866 vii. —.]—***MOFFETT v. SQUIRES* (1913), 32 N. Z. L. R. 607.—*N.Z.*  
*r. — "Natural love & affection"*

**866 ii. —.]—**Where a man executes a voluntary conveyance of lands to his wife, there is no presumption of a resulting trust in his favour, but it is open to the grantor or his representatives to show that under the circumstances there was such resulting trust.—*FONSECA v. JONES* (1911), 21 Man. L. R. 168.—*CAN.*

**866 iii. —.]—***HOUGHTON v. FOSTER* (Alta.) (1916), 33 W. L. R. 584; 9 W. W. R. 1150.—*CAN.*

**866 iv. —.]—***Re LANG ESTATE, WESTERN TRUST CO. v. LANG* (Sask.), [1919] 1 W. W. R. 651.—*CAN.*

**866 v. —.]—***McLEOD v. CURRY*

made without any consideration, there will be a resulting trust to the lessor; but if there be any consideration, there can be no resulting trust.—**SEAMAN v. WARMAN** (1875), *Freem. K. B.* 308; 89 *E. R.* 224; *sub nom.* **WARMAN v. SEAMAN**, *Freem. Ch.* 306; *subsequent proceedings* (1877), *Cas. temp. Finch*, 279.

*Annotation*:—**Mentd.** **Lyon v. Mitchell** (1816), 1 *Madd.* 467.

**872.** ———.]—**J. S.** grants a lease to **A.**, which is intended to be in trust for the lessor, & **A.** declares the trust in writing accordingly. This lease is afterwards surrendered, & **J. S.** grants a new lease to **B.** without any trust being declared:—**Held**: **B.** was entitled to the whole benefit of the new lease, & there was no resulting trust for the representative of **J. S.**—**PILKINGTON v. BAYLEY** (1778), 7 *Bro. Parl. Cas.* 383; 3 *E. R.* 248, *H. L.*

**873.** ———.]—**Property results unless trust declared.**—In the case of voluntary settlements & wills, if there is no declaration of the trust of a term it results to the donor, otherwise where it is a settlement for a valuable consideration, & in the nature of a contract for the benefit of a wife, & of the issue.—**BROWN v. JONES** (1744), 1 *Atk.* 188; 26 *E. R.* 122, *L. C.*

**874.** ———.]—In 1857 **R.**, being seised of freeholds, & being also a holder of shares in joint stock cos., which he then feared would involve him in heavy liabilities, conveyed the property to one **C. H.** The deeds conveying the property were in the form of purchase deeds, & **C. H.** purported to give valuable consideration for it, though, in fact, no money really passed. **R.** received the rents till his death intestate. **C. H.**, after **R.**'s death, executed a deed of trust, declaring that the property had been conveyed to him in trust for **R.**'s wife. **R.**'s wife received the rents till her death, when she purported to dispose of the property by her will in favour of her daughters. *Pltf.*, as **R.**'s heir-at-law, claimed the property, & a reconveyance from **C. H.**:—**Held**: *Stat. Frauds* was not satisfied, & as no declaration of trust had been executed in the lifetime of **R.**, there was a resulting trust in favour of **R.** at the time, & consequently *pltf.* was beneficially entitled to the property, & to have a reconveyance from **C. H.**, & an account of rents & profits.—**RUDKIN v. DOLMAN** (1876), 35 *L. T.* 791.

**875.** ———.]—**Transfer of shares—By mortgagee to servant.**—By the direction of **P.** certain shares in a co., of which he was *mtgee.*, were transferred into the name of **E.**, one of his servants.

The co. was ordered to be wound up & a return of capital had been made to the shareholders. **E.** duly accounted to **P.** for the moneys received by her in the winding up.

Notice of a further return of capital had been given, & **E.** now claimed to be absolutely entitled to the shares, on the grounds that the transfer to her was made in fraud of the co., in order that **P.** might escape all liability in respect of the shares:—**Held**: the transfer was not fraudulent, & **E.** was a trustee of the shares for **P.**—**COLQUHOUN v. COURTENAY** (1874), 43 *L. J. Ch.* 338; 20 *L. T.* 877; 22 *W. R.* 435.

**876.** ———.]—**Transfer of stock—Distinguished from conveyance of land.**—I will assume . . . that the implication of a resulting trust does arise as much in the case of a transfer as in that of a

purchase of stock, although that certainly is not the case with regard to a conveyance of land (**JAMES, L.J.**).—**FOWKES v. PASCOE** (1875), 10 *Ch. App.* 343; 44 *L. J. Ch.* 367; 32 *L. T.* 545; 23 *W. R.* 538, *C. A.*

*Annotations*:—**Consd.** **Marshall v. Crutwell** (1875), *L. R.* 20 *Eq.* 328. **Refd.** **Batstone v. Salter** (1874), 44 *L. J. Ch.* 209; **Re Eykyn's Trusts** (1877), 6 *Ch. D.* 115; **Re Howes, Howes v. Platt** (1905), 21 *T. L. R.* 501; **Hatley v. Liverpool Victoria Legal Friendly Soc.** (1918), 88 *L. J. K. B.* 237. **Mentd.** **Re Orme, Evans v. Maxwell** (1883), 50 *L. T.* 51; **Re Scott, Langton v. Scott**, [1903] 1 *Ch.* 1; **Re Heather, Pumphrey v. Fryer**, [1906] 2 *Ch.* 230; **Re Shields, Corbould-Ellis v. Dales**, [1912] 1 *Ch.* 591.

**Voluntary settlements.**—*See, generally*, **SETTLEMENTS**, Vol. XL., pp. 531–538, Nos. 750–811.

#### iv. Assignment to Secure Qualification.

**877. Whether assignor can recover property—Assignment to secure colourable qualification—To kill game.**—Where a deed of conveyance of an estate from one brother to another was executed to give the latter a colourable qualification to kill game:—**Held**: as against the parties to the deed, it was valid, & was sufficient to appoint an ejectment for the premises.—**DOE d. ROBERTS v. ROBERTS** (1810), 2 *B. & Ald.* 367; 106 *E. R.* 401; *previous proceedings* (1818), *Dan.* 143.

*Annotations*:—**Consd.** **Cecil v. Butcher** (1821), 2 *Jac. & W.* 565. **Appld.** **Philpotts v. Philpotts** (1850), 10 *C. B.* 85. **Refd.** **Doe d. Garnons v. Knight** (1826), 5 *B. & C.* 671; **Doe d. Williams v. Lloyd** (1839), 5 *Blng. N. C.* 741; **Bossey v. Windham** (1844), 6 *Q. B.* 166; **Bowes v. Foster** (1858), 2 *H. & N.* 779. **Mentd.** **Prole v. Wiggins** (1836), 3 *Blng. N. C.* 230.

**878.** ———.]—**A conveyance executed for the purpose of giving the grantee a colourable qualification to kill game remains, without being made use of, in the custody of the grantor, & after his death, of his son. The grantee afterwards obtaining the possession of it, by representing that he intended by means of it to impose upon a third person, claims the estate. A ct. of equity will not grant relief to either party.**—**BRACKENBURY v. BRACKENBURY** (1820), 2 *Jac. & W.* 391; 37 *E. R.* 677, *L. C.*

*Annotations*:—**Consd.** **Cecil v. Butcher** (1821), 2 *Jac. & W.* 565; **Groves v. Groves** (1829), 3 *Y. & J.* 163. **Refd.** **Barnard v. Sutton** (1813), 7 *Jur.* 685; **Fletcher v. Fletcher** (1844), 4 *Hare*, 67; **Crichton v. Crichton** (1895), 65 *L. J. Ch.* 13. **Mentd.** **Bell v. Hull & Selby Ry.** (1840), 2 *Ry. & Can. Cas.* 279.

**879.** ———.]—**Bill seeking relief upon the loss of a conveyance, executed to give a colourable qualification to kill game, retained for a year, with liberty to bring an action. A conveyance executed by a father, to give a colourable qualification to his son, is kept in his possession during his life without being used, or made known to the son.**

The party cannot be heard to allege his own fraudulent purpose, it being a fraud upon the law to attempt to give another a qualification without making him owner of the estate; he is estopped from confirming the operation of his deed, by avowing that he had such a purpose (**PLUMER, M.R.**).—**CECIL v. BUTCHER** (1821), 2 *Jac. & W.* 565; 37 *E. R.* 744.

*Annotations*:—**Expld.** **Groves v. Groves** (1829), 3 *Y. & J.* 163. **Consd.** **Fletcher v. Fletcher** (1814), 4 *Hare*, 67; **Childers v. Childers** (1857), 3 *K. & J.* 310. **Refd.** **Roberts v. Williams** (1841), 11 *L. J. Ch.* 65; **Re Way's Trusts** (1864), 2 *De G. J. & Sm.* 365; **Crichton v. Crichton** (1895), 65 *L. J. Ch.* 13.

**880.** ———.]—**To sit in Parliament.**—**Bill for the conveyance of an estate, alleged by pltf.**

*gift is intended.*—**GARNETT v. GARNETT** (1918), 45 *N. B. R.* 466.—**CAN.**

**PART I. SECT. 14, SUB-SECT. 2.**—**A. (a) iv.**

*d. Assignment to perfect son's title.*—**JONSTONE v. WHITE** (1877), 40 *U. C. R.* 309.—**CAN.**

*as consideration.*—**Re LUBY'S ESTATE** (1909), 43 *I. L. T.* 141.—**IR.**

*t. Conveyance by husband to wife.*—**DAVISON v. SAGE** (1873), 20 *Gr.* 115.—**CAN.**

*a.* ———.]—**GORDON v. WARREN** (1897), 24 *A. R.* 44.—**CAN.**

*b.* ———.]—**BREITENSTEIN v. MUNSON & SHAW** (1914), 27 *W. L. R.* 303; 6 *W. W. R.* 188; 16 *D. L. R.* 758; 19 *B. C. R.* 795.—**CAN.**

*c.* ———.]—**Where a husband deeds property to his wife without consideration, no presumption of trust arises, but the presumption is that a**

g. ———.]—McKENZIE v. McKENZIE

the conveyance to avoid being Sheriff of London, by putting the legal interest out of himself, & thinking by that means he might swear to his want of qualification; but it appeared he did not take the oath, but paid the fine for not serving the office.

His intention was, to put the legal estate out of himself, which he thought would enable him to take the oath & so get excused from serving the office of sheriff; & yet he meant to reserve to himself the beneficial interest. . . . The conveyance ought not to take effect against his intention (LORD HARDWICKE, C.).—*BIRCH v. BLAGRAVE* (1755), Amb. 264; 27 E. R. 170, L. C.

*Annotations* :—*Distd.* Doe d. Roberts v. Roberts (1819), 2 B. & Ald. 367. *Consd.* Cecil v. Butcher (1821), 2 Jac. & W. 565. *Distd.* Groves v. Groves (1829), 3 Y. & J. 163. *Refd.* Childers v. Childers (1857), 26 L. J. Ch. 643; *Re* Way's Trusts (1864), 2 De G. J. & Sm. 365.

**888. — Conveyance to evade statute.**—A., after depositing in his own name in a savings bank to the full extent allowed, made further deposits to another account in the name of himself & sister, but nominally as trustee for her. By the terms of the Act of Parliament he retained a control over the fund :—*Held* : the sister was not entitled, the ct. thinking that the object was to evade the Act, & not to create a trust in favour of the sister.—*FIELD v. LONSDALE* (1850), 13 Beav. 78; 19 L. J. Ch. 500; 15 L. T. O. S. 452; 14 Jur. 995; 51 E. R. 30.

*Annotation* :—*Mentd.* London Corpn. v. Cox (1867), L. R. 2 H. L. 239.

**889. — Payments in hands of lottery promoter.**—Deft., who was the proprietor of a newspaper, carried on in connection therewith a competition under the following conditions. He published in his paper a paragraph omitting the last word. In the same paper he printed a coupon with a direction that persons wishing to enter the competition must cut out the coupon, fill in the word missing from the paragraph, together with their names & addresses, & send it, with a postal order for 1s. to the office of the paper. It was further stated in the paper that the missing word was in the hands of a chartered accountant, inclosed in a sealed envelope; that his statement with regard to it would appear, with the result of the competition, in a subsequent issue of the paper; & that the whole of the money received in the entrance fees would be divided equally amongst those competitors who filled in the missing word correctly. In an action by the successful competitors against deft. & the unsuccessful competitors, seeking administration of the trusts of the moneys in the hands of deft. for the purposes of the competition, & distribution among the persons entitled thereto :—*Held* : (1) so far as the money in the hands of deft. was impressed with any trust, it was one which had arisen out of an illegal transaction, & the ct. would not render any assistance in its administration; (2) notwithstanding the illegality of the competition the competitors had a legal right, enforceable by action at law, to the return of their contributions, at all

events, provided that they gave notice of their claim before the money had been distributed by deft.—*BARCLAY v. PEARSON*, [1893] 2 Ch. 154; 62 L. J. Ch. 630; 42 W. R. 74; 3 R. 388; *sub nom.* *BARCLAY v. PEARSON*, *OPPLER v. PEARSON*, 68 L. T. 709; 9 T. L. R. 269; 37 Sol. Jo. 268.

*Annotations* :—*As to* (1) *Consd.* Greenberg v. Cooperstein, [1926] Ch. 657. *Refd.* Hermann v. Charlesworth, [1905] 2 K. B. 123. *Generally, Refd.* Blyth v. Hulton (1908), 72 J. P. 401; *Re* International Securities Corp'n. (1908), 99 L. T. 581; Smith's Advertising Agency v. Leeds Laboratory Co. (1910), 26 T. L. R. 335; Scott v. Public Prosecutions Director, [1914] 2 K. B. 888. *Mentd.* Hall v. Cox (1898), 47 W. R. 161.

**890. Whether property recoverable—When not used for illegal purpose.**—*GROVES v. GROVES*, No. 880, *ante*.

**891. — — — — —**—*BARCLAY v. PEARSON*, No. 889, *ante*.

**Recovery of money paid under illegal contract.**—*See, generally*, CONTRACT, Vol. XII., pp. 281–288, Nos. 2307–2369.

**Equitable relief.**—*See, generally*, CONTRACT, Vol. XII., pp. 296, 297, Nos. 2434–2446.

**Where plaintiff particeps fraudis.**—*See* EQUITY, Vol. XX., pp. 248–251, Nos. 130–152.

**Estoppel against party guilty of fraud.**—*See* ESTOPPEL, Vol. XXI., pp. 276, 277, Nos. 931–944.

**Fraudulent & voidable conveyances generally, see FRAUDULENT & VOIDABLE CONVEYANCES**, Vol. XXV., pp. 145 *et seq.*

#### vi. Joint Transactions.

**892. Whether resulting trust implied.**—It is indeed true that, where a purchase is made of a freehold estate in the name of one man, & the purchase-money is paid by another, there shall be a resulting trust for the benefit of him who pays the purchase-money. But that is where the whole of the consideration for making the conveyance passed from him who paid the purchase-money (LORD HARDWICKE, C.).—*CROP v. NORTON* (1740), Barn. Ch. 179; 2 Atk. 74; 9 Mod. Rep. 233; 27 E. R. 603, L. C.

*Annotation* :—*Consd.* Wray v. Steele (1814), 2 Ves. & B. 388.

**893. — Joint advance—Purchase in name of one.**—Resulting trust by a joint advance upon a purchase in the name of one.—*WRAY v. STEELE* (1814), 2 Ves. & B. 388; 35 E. R. 366.

**894. — — — — — Advance in fixed shares.**—Where on the sale of a vessel the price is paid by two persons in certain shares & the vessel is registered in the sole name of one of them, a rebuttable presumption arises that a trust results in favour of the other of a share of the vessel proportionate to the part of the price paid by him.—*THE VENTURE*, [1908] P. 218; 77 L. J. P. 105; 99 L. T. 385; 11 Asp. M. L. C. 93, C. A.

**Co-ownership generally—Of personal property.**—*See* PERSONAL PROPERTY, Vol. XXXVII., pp. 165–168, Nos. 79–105.

**Of real property.**—*See* REAL PROPERTY, Vol. XXXVIII., pp. 685–699, Nos. 257–442.

**Advance by several mortgagees.**—*See* MORTGAGE, Vol. XXXV., p. 302, Nos. 512–515.

(1896), 29 N. S. R. (17 R. & G.) 231.—*CAN.*

**h. — — — — —**—*MERCHANTS BANK OF CANADA v. HOOVER* (N. W. T.) (1907), 5 W. L. R. 516.—*CAN.*

**k. — — — — —**—*FORE STREET WAREHOUSE CO. v. VANDELINDER* (Alta.), [1924] 3 D. L. R. 907.—*CAN.*

**PART I. SECT. 14, SUB-SECT. 2. —**  
A. (a) vi.

**892 i. Whether resulting trust implied.**—*HUTCHINSON v. HUTCHINSON*

(1856), 6 Gr. 117.—*CAN.*

**892 ii. — — — — —**—*WILLIAMS v. JENKINS* (1871), 18 Gr. 536.—*CAN.*

**892 iii. — — — — —**—*SANDERSON v. MCKERCHER* (1886), 13 A. R. 561; *reversd.* (1887), 15 S. C. R. 296.—*CAN.*

**892 iv. — — — — —**—*CHRISHOLM v. ARMSTRONG* (1908), 9 W. L. R. 154, 455, 461.—*CAN.*

**892 v. — — — — —**—*LESLIE v. HILL* (1911), 20 O. W. R. 490; 3 O. W. N. 303; 25 O. L. R. 144.—*CAN.*

**892 vi. — — — — —**—*VASELENAK v. VASELENAK*, [1921] 1 W. W. R. 889; 67

D. L. R. 370; 16 Alta. L. T. 256.—*CAN.*

**892 vii. — — — — —**—*MASON v. HAYES* (1924), 51 N. B. R. 137.—*CAN.*

**892 viii. — — — — —**—*MUHAMMAD HABIBULLAH KHAN v. SADDAR HUSAIN KHAN* (1884), 1 L. R. 7 Ali. 25.—*IND.*

**893 i. — Joint advance—Purchase in name of one.**—*MCKERCHER v. SANDERSON* (Ont.) (1887), 15 S. C. R. 296.—*CAN.*

**1. Onus of proof.**—*HORSMAN v. BURKE* (1887), 4 Man. L. R. 245.—*CAN.*



*Sect. 14.—Constructive and implied trusts: Sub-sect. 2, A. (c) vi., vii. & viii., & (d) i., ii. & iii.]*  
**Survivorship between joint shareholders.]—See COMPANIES, Vol. IX., p. 410, Nos. 2633–2635.**

vii. *Policy of Insurance.*

**Policy effected on life of another, generally.]—See INSURANCE, Vol. XXIX., pp. 378–383, Nos. 3032–3064.**

**Policy for benefit of assignee—Death of assignee before insured.]—See INSURANCE, Vol. XXIX., p. 375, No. 3007.**

viii. *Rebuttal of Presumption.*

*See Sub-sect. 2, B. (b), post.*

(d) *Failure on Termination of Purpose.*

i. *In General.*

**895. General rule.]—COOK v. HUTCHINSON, No. 918, post.**

**896. —.]—**Testatrix being entitled to the sum of £2,000, secured by a promissory note which had two years to run, endorsed the note to Sarah Sargon, & sent it to her, with a letter in the following terms: "The enclosed note of £2,000 I have given to Mrs. Sarah Sargon for her sole use & benefit, independent of her husband, for the express purpose of enabling Mrs. Sargon to present to either branch of my family any principal or interest thereon, as Mrs. Sarah Sargon may consider the most prudent; & in the event of the death of Mrs. Sarah Sargon, by this bequest I empower her to dispose of the sum of £2,000 & the interest, by will or deed, to those or either branch of the family she may consider most deserving thereof. To enable Mrs. Sarah Sargon, my niece, to have the sole use & power of the sum of £2,000 due to me by the above note of hand, I have specially indorsed the same in her favour." It being admitted that if this was a gift upon trust, the trust could not be executed:—*Held*: it was a gift upon trust, & as the trust failed, the sum secured by the note constituted part of testatrix's estate.—**STUBBS v. SARGON (1838)**, 3 My. & Cr. 507; 7 L. J. Ch. 95; 2 Jur. 150; 40 E. R. 1022, L. C.

*Annotation:—Reid. Buckle v. Bristow (1864)*, 10 Jur. N. S. 1095.

**897. —.]—**It is a well established principle of the English common law that when money has been received by one person which in justice & equity belongs to another, under circumstances which under the receipt of it a receipt by debt. to the use of pltf. the latter may recover as for money had & received to his use. The principle extends to cases where the money has been paid for a consideration that has failed (*per cur.*).—**ROYAL BANK OF CANADA v. R.**, [1913] A. C. 283; 82 L. J. P. C. 33; 108 L. T. 129; 20 T. L. R. 239, P. C.

*Annotations:—Mentd. Sinclair v. Brougham*, [1914] A. C. 398; *Workmen's Compensation Board v. Canadian Pacific Ry.*, [1920] A. C. 184.

**898. Whether resulting trust implied—Trust to purchase promotion of officer—Resignation of beneficiary from army.]—**A sum of money was paid by A. to B. for the purpose of purchasing C. promotion in the army & it remained unapplied in the hands of B. at the death of A. C. having been compelled from the bad state of his health to quit

the army, & having no prospect of being able to enter into the service again, filed a bill for the money, & it was decreed to be paid to him.—**LECHE v. KILMOREY (LORD) (1823)**, Turn. & R. 207; 37 E. R. 1076.

*Annotations:—Reid. Lawrie v. Bankes (1858)*, 4 K. & J. 142; *Parsons v. Coke (1858)*, 27 L. J. Ch. 828.

**899. — Failure of prescribed modes of enjoying legacy.]—LASSENCE v. TIERNEY, No. 790, ante.**

**900. — Failure of trust for maintenance.]—**Funds were vested in trustees, & it was declared by deed that they should pay "the whole or so much as they should think fit" of the dividends towards the maintenance of an infant, & that on the infant attaining twenty-one they should pay the dividends to her for life to her separate use & after her decease that they should divide the trust funds amongst her children with a further trust in default of children for the next of kin of the settlor. The trustees were empowered, if they should think proper so to do, during the minority of the infant, in case any sum less than the dividends to which she should be entitled should be advanced for maintenance, to invest the surplus dividends & to transfer the same to the infant on her attaining twenty-one. The trustees invested certain unapplied dividends, & the infant died under twenty-one. Upon claims made by the next of kin of the settlor & his personal representatives, & the personal representatives of the infant:—*Held*: the personal representatives of the settlor were entitled to the invested accumulations as a resulting trust.—**BAKER v. PUGH (1857)**, 28 L. T. O. S. 317; 5 W. R. 239.

**901. — Conveyance to uses of ancestor's will—Partial intestacy of ancestor.]—**Where an heir-at-law conveyed Scottish heritable property to the uses of his ancestor's will, & it turned out that such ancestor died intestate as to one-fourth of his estate:—*Held*: there was a resulting trust of one-fourth of the Scottish property in favour of the heir-at-law.—**RAMSAY v. SHELMEKDINE (1865)**, L. R. 1 Eq. 129; 13 L. T. 393; 11 Jur. N. S. 903; 14 W. R. 46.

*Annotations:—Mentd. Re Radcliffe, Young v. Beale (1903)*, 51 W. R. 409; *Re Whitehorne, Whitehorne v. Best*, [1906] 2 Ch. 121; *Re Dunster, Brown v. Heywood*, (1909) 1 Ch. 103.

**902. — Agreement for transfer of goods—Resulting trust until execution of hire-purchase agreement.]—**Pltf., being desirous of borrowing money, applied to debts. for a loan of £30, on a bill of sale, of his household furniture. It was arranged that in lieu of a bill of sale pltf.'s landlord, to whom rent was owing, should put in a friendly distress, & that the distress should include the tools of pltf.'s trade, that debts. should purchase the goods from the broker, & that pltf. should then enter into an engagement for hire & repurchase from debts. A distress for a quarter's rent, £25, was accordingly put in, & goods, which by agreement of the parties included the tools of pltf.'s trade were seized. The goods were worth £63, but were appraised at £29 5s. Pltf. signed a memorandum requesting the broker to sell the goods to debts. at the condemned price, & they thereupon paid the broker £29 5s., & got a receipt from him. The next day pltf. signed a hiring & purchase agreement for the goods, by which he agreed to pay debts. monthly instalments until

persons unborn at the date of the settlement:—*Held*: there was a resulting trust in favour of the settlor.—**DWARKADAS DAMODAR v. DWARKADAS SHAMJI (1916)**, I. L. R. 40 Bom. 341.—*IND.*

**PART I. SECT. 14, SUB-SECT. 2.—**  
 A. (d) i.

*m. Whether resulting trust implied.]—POWELL v. VANCOUVER CITY (1912)*, 23 W. L. R. 104; 1 W. W. R. 1022; 17 B. C. R. 379; 49 C. L. J. N. S. 77;

**8 D. L. R. 24.—CAN.**

*n. —.]—*Where by a deed of settlement a Hindu woman conveyed an immovable property to trustees on certain trusts, some of which failed after her death, as being in favour of



the total amount of £50 was paid, & that in case of default in performance of any of the stipulations of the agreement, defts. should be entitled to enter & seize the goods. *Pltf.* having made default, defts. entered & seized under the bill of sale:—*Held*: the true conclusion of fact from all the circumstances was that the intention of the parties was that there should be an absolute sale to defts. in form, but the beneficial property should not pass until a hiring & purchase agreement was executed; therefore, though the legal estate passed to defts., it was subject to a resulting trust in favour of *pltf.* until this agreement was executed, so that defts. had no complete legal & equitable title to the goods independently of the hiring & purchase agreement.—*BECKETT v. TOWER ASSETS Co.*, [1891] 1 Q. B. 638; 60 L. J. Q. B. 493; 64 L. T. 497; 55 J. P. 438; 39 W. R. 438; 7 T. L. R. 400, C. A.

*Annotations*:—*Apld.* *Mellor's Trustee v. Maas*, [1903] 1 K. B. 226. *Refd.* *Re Eastern & Midlands Ry.* (1891), 65 L. T. 668. *Mentd.* *Saunders v. White*, [1902] 1 K. B. 472; *Johnson v. Rees* (1915), 84 L. J. K. B. 1276.

**903. — Policy on life of husband for benefit of wife—Failure of trust for wife—Conviction for murder of husband.**—A husband insured his life for the benefit of his wife under the provisions of Married Women's Property Act, 1882 (c. 75), s. 88. He died, & his wife was tried for & convicted of his murder:—*Held*: the effect of sect. 11 was to create a trust in favour of the wife in respect of the sum insured, but inasmuch as it was against public policy for the wife to benefit by her own criminal act, the trust in her favour failed, & a resulting trust arose in favour of deceased husband's estate, in respect of which his exors. were entitled to recover the sum insured from the insurance co.—*CLEAVER v. MUTUAL RESERVE FUND LIFE ASSOCN.*, [1892] 1 Q. B. 147; 61 L. J. Q. B. 128; 66 L. T. 220; 56 J. P. 180; 40 W. R. 230; 8 T. L. R. 139; 36 Sol. Jo. 106, C. A.

*Annotations*:—*Consd.* *Yates v. Kyffin-Taylor & Wark*, [1899] W. N. 141. *Fold.* *In the Estate of Hall*, Hall v. Knight & Baxter, [1914] 2 Ch. 1. *Apld.* *Re Burgess's Policy* (1915), 85 L. J. Ch. 273; *Re Engelbach's Estate*, *Tibbets v. Engelbach*, [1924] 2 Ch. 348. *Consd.* *James v. British General Insec.*, [1927] 2 K. B. 311. *Refd.* *Gordon v. Metropolitan Police Chief Comr.*, [1910] 2 K. B. 1080; *In the Goods of Crippen* (1911), 80 L. J. P. 47; *Royal Exchange Assoc. v. Hope*, [1928] Ch. 179.

— **Failure of charitable purposes—Application of cy-près doctrine.**—*See* CHARITIES, Vol. VIII., pp. 344–351, Nos. 1365–1460.

— **Failure of consideration of marriage settlement.**—*See, generally*, SETTLEMENTS, Vol. XL., pp. 529–531, Nos. 732–748; BONDS, Vol. VII., p. 234, No. 767.

### ii. Dissolution of Society.

**Distribution of funds on dissolution—Of friendly societies.**—*See, generally*, FRIENDLY SOCIETIES, Vol. XXV., pp. 342, 343, Nos. 422–431.

— **Of literary or scientific institutions.**—*See, generally*, LITERARY & SCIENTIFIC INSTITUTIONS, Vol. XXXII., p. 553, Nos. 23–25.

— **Of trade unions.**—*See, generally*, TRADE & TRADE UNIONS, p. 109, *ante*.

### iii. Termination of Purpose of Subscribed Fund.

**904. Whether resulting trust implied—Abandonment of purpose.**—Where money has been subscribed by bondholders for a particular purpose, such as the construction of a railroad, & part of that money has been placed in the hands of trustees for the bondholders, the duty of such trustees being to pay portions of the money as portions of the intended railroad are constructed, if no such railroad nor any portion of it is constructed, & its construction becomes impracticable, the bond-

holders are entitled to demand from the trustees repayment of what remains in their hands.—*NATIONAL BOLIVIAN NAVIGATION Co. v. WILSON* (1880), 5 App. Cas. 176; 43 L. T. 60, H. L.; *affg.* *S. C. sub nom. WILSON v. CHURCH* (1879), 13 Ch. D. 1, C. A.

*Annotations*:—*Apld.* *Collingham v. Sloper, Foreign American & General Investments Trust Co. v. Sloper*, [1893] 2 Ch. 96; *Royal Bank of Canada v. L.*, [1913] A. C. 283. *Refd.* *Smith v. Anderson* (1880), 15 Ch. D. 247; *Wilson v. Church* (1911), 106 L. T. 31. *Mentd.* *Sinclair v. Brougham*, [1914] A. C. 398.

**905. — — — — —**—A foreign railway co. issued bonds charged on their railway. Owing to litigation & consequent delay in realising the bonds it became impossible with the present or prospective resources of the co. to carry out the undertaking. At the suit of a minority of bondholders the ct. administered the unspent part of the proceeds of such bonds in the hands of the English trustees on the footing that such funds ought to be applied in the first place in saving & realising the property charged & then be distributed *pro rata* among the bondholders & that interest on & amortisation of the bonds should cease from the date of the judgment.—*COLLINGHAM v. SLOPER, FOREIGN AMERICAN & GENERAL INVESTMENTS TRUST Co. v. SLOPER*, [1893] 2 Ch. 96; 62 L. J. Ch. 416; 69 L. T. 39; 41 W. R. 550; 37 Sol. Jo. 230; 3 R. 272; *on appeal*, [1894] 3 Ch. 716, C. A.

*Annotation*:—*Refd.* *Collingham v. Sloper* (1901), 70 L. J. Ch. 361.

**906. — Unapplied surplus.**—A fund was raised by subscription for the assistance of the sick & wounded in the Balkan war.

Subscriptions came in from time to time & the fund was duly applied by the trustees from time to time during the war.

At the close of the war there was an unexpended balance in the trustees' hands which admittedly belonged to some or all of the subscribers by way of resulting trust:—*Held*: the balance belonged to all the subscribers rateably in proportion to their subscriptions, irrespective of date.—*Re BRITISH RED CROSS BALKAN FUND, BRITISH RED CROSS SOCIETY v. JOHNSON*, [1914] 2 Ch. 419; 84 L. J. Ch. 79; 111 L. T. 1069; 30 T. L. R. 662; 58 Sol. Jo. 755.

*Annotation*:—*Distd.* *Re Welsh Hospital (Netley) Fund, Thomas v. A.-G.*, [1921] 1 Ch. 655.

**907. — — — — —**—On the outbreak of the war a hospital was erected at Netley & equipped & run during the war for the benefit of sick & wounded Welsh soldiers by means of large voluntary subscriptions raised in Wales. In 1919 the hospital was closed, the staff disbanded & the property sold to the War Office, & after winding up the affairs of the hospital there was a surplus of some £9,000:—*Held*: there was not a resulting trust of the surplus for the subscribers to the hospital but a general charitable intention for sick & wounded Welshmen which enabled the ct. to apply the fund *cy-près*.—*Re WELSH HOSPITAL (NETLEY) FUND, THOMAS v. A.-G.*, [1921] 1 Ch. 655; 90 L. J. Ch. 276; 124 L. T. 787; 65 Sol. Jo. 417.

**908. — — — — —**—Where a fluctuating body of persons contribute to a fund vested in trustees & intended to be permanent for the purpose of performing a particular service for the contributors for the time being, & the need for that service comes to an end the surplus of the contributed fund, after all the services provided by the trust have been performed, belongs to the class of contributors ascertained at the date when the purpose of the fund comes to an end, in proportion to their contributions, & neither past contributors nor the

*Sect. 14.—Constructive and implied trusts: Sub-sect. 2, A. (d) iii. & iv., (e), & B. (a) & (b); sub-sect. 3, A.]*

Crown have any interest.—*Re CUSTOMS & EXCISE OFFICERS' MUTUAL GUARANTEE FUND, ROBSON v. A.-G.*, [1917] 2 Ch. 18; 86 L. J. Ch. 457; 117 L. T. 86; 33 T. L. R. 311.

—*See, also*, CHARITIES, Vol. VIII., p. 334, Nos. 1202, 1203.

**909. Ascertainment of persons entitled.]—***Re BRITISH RED CROSS BALKAN FUND, BRITISH RED CROSS SOCIETY v. JOHNSON*, No. 906, *ante*.

**910. —.]—***Re CUSTOMS & EXCISE OFFICERS' MUTUAL GUARANTEE FUND, ROBSON v. A.-G.*, No. 908, *ante*.

#### iv. Trusts for Conversion.

**Failure of purpose of conversion, generally.]—***See EQUITY*, Vol. XX., pp. 378–386, Nos. 1153–1236.

**Surplus after satisfaction of purpose of conversion.]—***See EQUITY*, Vol. XX., pp. 386–388, Nos. 1237–1255.

#### (c) Charitable Trusts.

*See CHARITIES*, Vol. VIII., pp. 332–334, Nos. 1178–1204.

**Possession or interest retained by grantor.]—***See CHARITIES*, Vol. VIII., p. 279, Nos. 515, 516.

**Right to surplus income, generally.]—***See CHARITIES*, Vol. VIII., pp. 329–332, Nos. 1117–1177.

**Effectuation of charitable trusts by schemes & cy-près doctrine.]—***See, generally*, CHARITIES, Vol. VIII., pp. 336 *et seq.*

#### B. Rebuttal of Presumption.

##### (a) In General.

**911. How presumption rebutted.—**Indication of intention by settlor.]—A. jointly seised with two others conveys his third part to the use of himself for life, remainder to his wife for life, remainder to his son in fee, & at the same time he makes his will & gives the same lands to his son in tail, charged with his debts. The son not a trustee for the father in the settlement; otherwise it would have been, if the entire fee had been conveyed to the son.—*BAYLIS v. NEWTON* (1687), 2 Vern. 28; 23 E. R. 628, L. C.

**912. —.]—***COOK v. HUTCHINSON*, No. 918, *post*.

**913. —.]—**Under a settlement real estate was limited to such uses as A. & B. should by deed, jointly appoint, & subject thereto to the use of A. for life, with remainder to the use of B. for life, with remainder to the first & other sons of B. in tail, with divers remainders over; & there was a power of sale vested in four trustees & exercisable at the request of A. & B., & the survivor of them. By a deed, which contained a recital that A. & B. were desirous of selling part of the settled property, & with a view to facilitate the sale & conveyance thereof to the respective purchasers, had agreed to execute the deed, A. & B., in exercise of the joint power of appointment, appointed part of the settled property to trustees

upon trust for sale; & it was declared that the trustees should stand possessed of the proceeds upon the trusts intended to be declared by a deed of even date. No deed declaring the trusts was ever executed, & there was evidence to show that the deed of appointment was executed with the view of avoiding the trouble & expense of an application to the trustees to exercise the power of sale:—*Held*: the disposition of the proceeds of sale was a question of intention; & both on the terms of the deed of appointment, independently of the evidence & also having regard to the evidence, the proceeds of sale remained subject to the trusts of the settlement.—*BIDDULPH v. WILLIAMS* (1875), 1 Ch. D. 203.

**914. —.]—**Testator gave & bequeathed the residue of his estate & effects to trustees on certain trusts. There was no express trust for sale & conversion of real estate, & *prima facie* the trusts were applicable to personal estate:—*Held*: inasmuch as testator had shown an intention to dispose of all his property, & the succeeding trusts did not show an intention only to deal with his personal estate, there was no resulting trust of the real estate.—*KIRBY-SMITH v. PARNELL*, [1903] 1 Ch. 483; 72 L. J. Ch. 468; 51 W. R. 493; 47 Sol. Jo. 279.

**915. —.** *Parol evidence.*]—A father purchases lands in his son's name, his son being then eighteen years of age, the father continued in possession till his death; this shall be considered as an advancement for the son, & not a trust for the father.

*Parol evidence* though improper, when offered against the legal operation of a will or an implied trust, admitted in this case because here it was in support of law & equity too.—*TAYLOR v. TAYLOR* (1737), 1 Atk. 380; West temp. Hard. 111; 26 E. R. 247, L. C.

*Annotations:—**Reid*, Gopeckrist Gosain v. Gungapersaud Gosain (1854), 6 Moo. Ind. App. 53. *Mentd*, Chapman v. Gibson (1791), 4 Bro. C. C. 229; Crabb v. Crabb (1834), 1 My. & K. 511.

**916. —.]—**Where a resulting trust is insisted on in opposition to the legal operation of a will, *parol evidence* may be admitted to rebut that equity.—*LAKE v. LAKE* (1751), Amb. 126; 1 Wils. 313; 1 Dick. 236; 95 E. R. 636.

*Annotations:—**Consd*, Clennell v. Lewthwaite, Thornton v. Tracy (1794), 2 Ves. 465; Walton v. Walton (1807), 14 Ves. 318. *Refd*, Brady v. Cubitt (1778), 1 Doug. K. B. 31.

**917. —.]—**When no uses are declared, *parol evidence* may rebut the resulting use to the conusor in favour of the conusee, without any written declaration of the uses in his favour.—*ROE v. POPHAM* (1778), 1 Doug. K. B. 25; 99 E. R. 21.

**918. —.]—**By a deed between a father & son, reciting that the father was desirous of settling the property therein comprised, so as to make the same a provision for himself during his life, & for his wife & her children by him after his decease, he released & assigned the same & every part thereof to the son, upon the trusts therein-after mentioned concerning the same. The father proceeded to declare the trusts as to part of his property in favour of his wife, a daughter, &

#### PART I. SECT. 14, SUB-SECT. 2.—B. (a).

**911. How presumption rebutted.—**Indication of intention by settlor.]—*Re LOSCOMBE* (1917), 39 O. L. R. 521.—*CAN.*

*Money subscribed for public object.—Consideration.*]—*LUKE v. WAITE* (1905), 2 C. L. R. 258.—*AUS.*

p. — *Surrounding circumstances.*]

—*MACINTOSH v. MACINTOSH* (1916), 17 S. R. N. S. W. 11; 34 N. S. W. N. 124.—*AUS.*

q. —.]—*GILPIN v. SAWYER* (1865), 5 N. S. R. (1 Old.) 534.—*CAN.*

r. —.]—*SUTHERLAND v. MEEHAN* (1876), 16 N. B. R. (3 Pug.) 239.—*CAN.*

t. — *Adverse possession.*]—*MURCHISON v. MURCHISON* (1889), 17 O. R.

264.—*CAN.*

a. — *Intention of parties.*]—*KING v. THOMPSON* (1905), 6 Terr. L. R. 204.—*CAN.*

b. —.]—*THOMPSON v. WRIGHT*, 24 C. L. T. 97.—*CAN.*

c. —.]—*POWELL v. VAN-COUVER CORPN.* (1912), 17 B. C. R. 379.—*CAN.*

d. —.]—*MUSSUMAT AMEE-*

a niece, but no trust was declared as to the surplus :—*Held* : the surplus did not result to the grantor, but belonged to the son ; & the father having been maintained by the son for fifteen years, a bill filed after the son's death by the father, & revived upon the father's death by his representative, was dismissed with costs as to that part of it which sought an account of interest.

In general, where an estate or fund is given in trust for a particular purpose, the remainder, after that purpose is satisfied will result to the grantor ; but that resulting trust may be rebutted even by parol evidence, & certainly cannot take effect where a contrary intention, to be collected from the whole instrument, is indicated by the grantor (LORD LANGDALE, M.R.).—*COOK v. HUTCHINSON* (1836), 1 Keen, 42 ; 48 E. R. 222.

919. — Where trust presumed for persons entitled on intestacy—Acts of executor.]—Testator, having a claim upon the estate of B., by will gave a third part of "the amount of whatever sum or sums of money might arise & be received from his claim in respect of B.'s estate" to his son T. ; another third to trustees in trust for his daughter M., who died in his lifetime, for life, remainder to her husband for life, & in default of issue, which happened, to his son S. absolutely ; the remaining third in trust for his wife R. for life, & after her death in moieties in the same manner as the two former shares were given. He appointed his wife, R., residuary legatee. After the date of the will, & during testator's life, the greater part of the money due in respect of the claim upon B.'s estate was paid to & invested by testator. This fund, slightly varied, was standing in his name at his death. After his death R., who was also extrix., transferred one-third of the fund to S. ; & the remaining two-thirds to the trustees of her husband's will, upon certain trusts, as it was alleged, for the benefit of herself & the husband of M. for their lives, which trusts were never declared. The proceeds of the two-thirds were paid for thirty-two years in moieties to R. & the husband of M., who survived R. Upon the death of the survivor, *pltf.*, representing the estate of R., claimed the fund, on the ground that the bequest to trustees was specific, & was ademed in testator's lifetime, & fell into the residuary estate ; & that after the life-estates of R. & the husband of M. there was a resulting trust in favour of the estate of R. :—*Held* : the acts of the extrix., the situation of the fund, & the lapse of time, were circumstances that rebutted the presumption of a resulting trust.—*CLARK v. BROWNE* (1854), 2 Sm. & G. 524 ; 24 L. T. O. S. 3 ; 18 Jur. 903 ; 2 W. R. 665 ; 65 E. R. 510.

Annotations :—*Mentd.* *Harrison v. Jackson* (1877), 7 Ch. D. 339 ; *Manton v. Tabois* (1885), 30 Ch. D. 92 ; *Re Role, Slade v. Walpole* (1889), 61 L. T. 497.

920. — Situation of fund.]—*CLARK v. BROWNE*, No. 919, *ante*.

921. — Lapse of time.]—*CLARK v. BROWNE*, No. 919, *ante*.

ROONISSA KHANUM & MUSSUMAT PARBUTTY v. MUSSUMAT ASHRUFFOON-NISSA (1872), 14 Moo. Ind. App. 433 ; 17 W. R. 259.—IND.

e. — SETHNA v. HEMINGWAY (1914), 1 L. R. 38 Bom. 618.—IND.

i. — —.—CONTAT v. CONTAT, [1912] E. D. L. 63.—S. AF.

g. Advance of money for purchase of land—Lender having nothing to do with purchase—Rights of lender's assignee.]—*MCKENZIE v. ROSS* (1900), 33 N. S. R. (21 R. & G.) 262.—CAN.

#### PART I. SECT. 14, SUB-SECT. 2.—B. (b).

922 i. Whether rebuttable.]—*NICHOLSON v. MULLIGAN* (1869), 17 W. R. 659.—IR.

922 ii. —.—M'ENEANEY v. SHEVLIN, [1912] 1 I. R. 278 ; 46 I. L. T. 137.—IR.

h. Sufficiency of evidence.]—*SCOTT v. PAULY* (1917), 24 C. L. R. 274.—AUS.

922 i. Presumption in favour of gift.]—*Re HAMILTON* (DECEASED), [1913] V. L. R. 460, 463.—AUS.

#### (b) Property Put in Name of Another.

922. Whether rebuttable.]—*RIDER v. KIDDER*, No. 854, *ante*.

923. —.—FINCH v. FINCH, No. 855, *ante*.

924. — As to part of land—Or part of interest in land.]—Where land is purchased with the money of A. in the name of B., the resulting trust to A. may be rebutted as to part of the land, or part of the interest in the land.

Where A. took a mtge. in the name of B., declaring that the principal sum should be for the benefit of B., & received the interest during his life, this being personal estate is not within the clause in Stat. Frauds relating to resulting trusts, or the doctrine of resulting trusts under that statute ; but the property after the death of A. will belong to B. by force of the parol declaration.—*BENBOW v. TOWNSEND* (1833), 1 My. & K. 506 ; 2 L. J. Ch. 215 ; 39 E. R. 772.

Annotation :—*Refd.* *Coningham v. Plunkett* (1843), 2 Y. & C. Ch. Cas. 245.

925. Sufficiency of evidence—Slight circumstances insufficient.]—*FINCH v. FINCH*, No. 855, *ante*.

926. Presumption in favour of gift.]—*STANDING v. BOWRING*, No. 862, *ante*.

927. —.—CENTRAL TRUST & SAFE DEPOSIT CO. v. SNIDER, No. 870, *ante*.

— Advancement.]—*See GIFTS*, Vol. XXV., pp. 510-517, Nos. 67-123.

— As to copyholds.]—*See COPYHOLDS*, Vol. XIII., pp. 64, 65, Nos. 795-802.

— Gifts between husband & wife.]—*See, generally*, *HUSBAND & WIFE*, Vol. XXVII., pp. 158-175, Nos. 1283-1432.

#### SUB-SECT. 3.—PARTICULAR RELATIONSHIPS.

##### A. Banker and Customer.

928. Whether banker trustee—Short bills.]—A banker is a trustee for the owner of short bills, which have been placed in his hands ; & the fact of his having dealt with the bills, & placed them as cash to the credit of the proprietor, is not sufficient to raise a presumption, that the ownership of the bills was transferred to the banker.—*Re FORSTER, Ex p. BOND* (1840), 1 Mont. D. & De G. 10 ; 4 Jur. 224 ; *sub nom. Re FORSTER, Ex p. BOND*, 9 L. J. Bey. 18, Ct. of R. Annotation :—*Refd.* *Re Hall* (1863), 9 L. T. 122.

— —.—*See, generally*, *BANKERS*, Vol. III., pp. 210-212.

929. — Particular notes & coins.]—A mere banker who takes charge of his customer's money is not in any fiduciary relation whatever to him with respect to the particular coins or notes deposited, because it is the ordinary course of trade to make use of them for his own profit (LORD HATHERLEY, C.).—*BURDICK v. GARRICK* (1870), 5 Ch. App. 233 ; 39 L. J. Ch. 369 ; 18 W. R. 387, L. C. & L. J.

Annotations :—*Mentd.* *Gray v. Bateman* (1872), 21 W. R. 137 ; *Boatwright v. Boatwright* (1873), 43 L. J. Ch. 12 ; *Watson v. Woodman* (1875), L. It. 20 Eq. 721 ; *Banner v.*

k. Advance by woman to supposed husband.]—A woman while living with a man to whom she believed herself to have been lawfully married, but who, it was afterwards discovered, was at the time of the pretended marriage with her a married man, advanced money for the purpose of buying certain real estate, the bond for the conveyance whereof was taken, with her knowledge, in his name :—*Held* : there was not any resulting trust in favour of the woman.—*STREY v. HALLETT* (1874), 21 Gr. 255.—CAN.

**Sect. 14.—Constructive and implied trusts : Sub-sect. 8, A., B. & C.]**

Berridge (1881), 18 Ch. D. 254; *Re Exchange Banking Co., Filtcroft's Case* (1882), 21 Ch. D. 519; *Gilroy v. Stephens* (1882), 51 L. J. Ch. 834; *Re Bell, Lake v. Bell* (1886), 34 Ch. D. 462; *Charles v. Jones* (1887), 35 W. R. 645; *Dooby v. Watson* (1888), 39 Ch. D. 178; *Lyell v. Kennedy, Kennedy v. Lyell* (1889), 14 App. Cas. 437; *Phillips v. Homfray* (1890), 44 Ch. D. 694; *Re Sharpe, Re Bennett, Masonic & General Life Assce. v. Sharpe*, [1892] 1 Ch. 154; *Soar v. Ashwell*, [1893] 2 Q. B. 390; *Fried v. Young*, [1897] 2 Ch. 421; *Silkstone & Haigh Moor Coal Co. v. Edey*, [1900] 1 Ch. 167; *North American Land & Timber Co. v. Watkins*, [1904] 1 Ch. 242; *Reid-Newfoundland Co. v. Anglo-American Telegraph Co.*, [1912] A. C. 555; *Henry v. Hammond*, [1913] 2 K. B. 515; *Re Allsop, Whittaker v. Bamford*, [1914] 1 Ch. 1; *Nocton v. Ashburton*, [1914] A. C. 932; *Re Richardson, Pole v. Patten*, [1920] 1 Ch. 423; *Taylor v. Davies*, [1920] A. C. 636; *Dominion Coal Co. v. Maskinonge S.S. Co.*, [1922] 2 K. B. 132.

**930. — Moneys entrusted "for collection."]**—Where moneys are entrusted to a banker to collect & remit, a trust is created, & in the event of the bkpcy. of the banker before the moneys are remitted, payment may be demanded out of estate.—*Re Brown, Ex p. PLITT* (1889), 60 L. T. 397; 37 W. R. 463; 6 Morr. 81.

**931. Bearer bonds deposited as security—Delivered in exchange for cheque—Cheque dishonoured—Bonds not impressed with trust.]**—A firm of bill brokers borrowed money from pltf. banks on the security of certain bearer bonds, the loans were called in by pltf. banks, & in accordance with the practice in such cases, the bill brokers on the morning of the day on which the loans were repayable, gave the banks each a cheque for the amount of the loans respectively, receiving in exchange the bonds which had been deposited as security. These bonds were in the course of the same day transferred by the bill brokers to deft. bank. The cheques which pltf. banks received from the bill brokers having been dishonoured they sued deft. bank for delivery up of the securities or their value, alleging that by the practice or usage of bankers in such cases the securities were impressed with a trust in the banker's favour, & remained constructively in their possession until the cheques were honoured.—*Held*: it was inconsistent with the nature of negotiable securities that they should be impressed with an implied trust, & they were not impressed with any such trust.

To trust a man with goods by delivering them on credit is not to create a trust affecting the goods so delivered (*ALVERSTONE, C.J.*).—*LLOYDS BANK, LTD. v. SWISS BANKVEREIN, UNION OF LONDON & SMITHS BANK, LTD. v. SWISS BANKVEREIN* (1913), 108 L. T. 143; 29 T. L. R. 219; 57 Sol. Jo. 243; 18 Com. Cas. 79, C. A.

**Trust accounts.]—See BANKERS, Vol. III., pp. 181-186, Nos. 343-365.**

**Relation of banker & customer generally.]—See BANKERS, Vol. III., pp. 168-173.**

**B. Companies and their officers.**

**932. Directors—Fiduciary position.]**—The directors of these cos. are in a sense trustees. They have authority to bind the cos. to the extent of the powers given to them by the deeds under which the cos. are constituted; but in the absence of previous authority or subsequent concurrence on the part of all the shareholders, of which there is no sufficient proof in the present case, they have

not as I apprehend any authority to bind the cos. in any matter of substance beyond the extent of the powers which the deeds may give them (*TURNER, L.J.*).—*Re CAMERON'S COALBROOK STEAM COAL & SWANSEA & LOUGHER RY. CO., BENNETT'S CASE* (1854), 5 De G. M. & G. 284; 2 Eq. Rep. 973; 24 L. J. Ch. 130; 23 L. T. O. S. 122; 2 W. R. 448; 43 E. R. 879, L. JJ.

**Annotations.]—Mentid.** *Re London & County Assce., Jessopp's Case* (1858), 2 De G. & J. 638; *Re Agriculturist's Insce. Brotherhood's Case* (1862), 31 Beav. 365.

**933. —.]—H., a director of the co., made advances of money to extend its business, & agreed with the manager to claim no interest on those advances, but stipulated that he should be employed as agent, & should receive a fixed bonus or commission on the value of the goods sold.**

The ct., in the first instance, directed a preliminary account of these transactions, without prejudice to any question; but upon the case coming on again.

Their lordships disallowed the whole of the commission claimed, on the ground that between the director & the co. the relation of trustee & *cestui que trust* existed.—*Re CARDIFF PRESERVED COAL & COKE CO., LTD., HILL'S CASE* (1862), 1 New Rep. 148; 32 L. J. Ch. 154; 7 L. T. 656, L. JJ.

**.]—See COMPANIES, Vol. IX., pp. 466-468, Nos. 3030-3055; LIMITATION OF ACTIONS, Vol. XXXII., pp. 493, 494, Nos. 1547-1551.**

**— Holding shares as trustee.]—See COMPANIES, Vol. IX., p. 464, Nos. 3013, 3014.**

**— Forfeiture of shares.]—See COMPANIES, Vol. X., p. 1146, No. 8104.**

**— Statutory companies for public purposes.]—See COMPANIES, Vol. X., pp. 1149, 1150, Nos. 8131-8134.**

**Promoter.]—See COMPANIES, Vol. IX., pp. 39-43, Nos. 37-53; Vol. X., p. 1214, No. 8592; LIMITATION OF ACTIONS, Vol. XXXII., pp. 494, No. 1552.**

**934. Managing committee—Projected railway.]**—Pltfs. were two shareholders of fifty shares each, on which deposits of £2 12s. 6d. were paid, in a projected railway co., which failed to pass their bill through Parliament in the session of 1846, & was abandoned. Pltfs. filed this bill in 1853, on behalf of themselves & all other shareholders except defts., who were the provisional committee, for an account. A suit for a similar object, & instituted by other shareholders, was compromised in 1851. The same solrs. acted for pltfs. in the present & in the former suit.—*Held*: the managing committee of a projected railway are not merely agents of the co., but trustees.—*WILLIAMS v. PAGE* (1858), 24 Beav. 654; 27 L. J. Ch. 425; 30 L. T. O. S. 360; 4 Jur. N. S. 102; 53 E. R. 510.

**935. Company—Money of company.]**—The money of the co. is a trust fund, because it is applicable only to the special purposes of the co. in the hands of the agents of the co., & it is in that sense a trust fund applicable by them to those special purposes; & a person taking it from them with notice that it is being applied to other purposes cannot . . . say that he is not a constructive trustee (*JESSEL, M.R.*).—*RUSSELL v. WAKEFIELD WATERWORKS CO.* (1875), L. R. 20

**PART I. SECT. 14, SUB-SECT. 3.—A.**

**9301 Whether banker trustee—Moneys entrusted "for collection"]**—A trust will exist when the banker is to collect & remit but not where he is to use & repay.—*MADRAS OFFICIAL ASSIGNEE*

*v. SMITH* (1908), I. L. R. 32 Mad. 68.—*IND.*

**1. —.]—MADRAS OFFICIAL ASSIGNEE v. KRISHNASWAMI NAIDU** (1909), I. L. R. 33 Mad. 154.—*IND.*

**m. —.]—MADRAS OFFICIAL AS-**

*SIGNEE v. MILAPPARANGAVUR SARVAJANA SAHAYA NIDHI* (1910), I. L. R. 34 Mad. 125.—*IND.*

**n. —.]—MADRAS OFFICIAL ASSIGNEE v. LUPPRIAN (1910), I. L. R. 33 Mad. 145.—*IND.***

938 v. —.]—An exor. who has under the terms of the will, active duties as a trustee to perform in respect to the raising & investment of a legacy bequeathed upon trust for a minor by assenting to it becomes an express trustee. O'REILLY v. WALSH (1872), 8 I. R. Eq. 555.—IR.

*Sect. 14.—Constructive and implied trusts: Sub-sect. 3, C., D., E. & F.]*

daughter's infancy she, in her character of extrix., advanced all testator's estate to her second husband upon the security of a mortgage which proved insufficient. She survived her second husband, & died in 1885, having left all her property away from her daughter. The daughter, as sole surviving beneficiary under her father's will, claimed the whole of her mother's estate upon the ground that it represented moneys retained by her mother under an order of the ct. in part satisfaction of the mtge., & in 1903 she commenced an action against her mother's exors. for an account on this footing:—*Held*: the mother was not an express trustee of these moneys for pltf.

In the first place, it is said that when the duties of an exor. in the strict sense of the word are performed, & the exor. retains moneys on behalf of those claiming the estate, & the argument must also be good as regards an administrator, then he becomes an express trustee for the legatees, or, if it is an administrator, for the next of kin. No authority is cited for that, & in my opinion the proposition is unsound. I see no reason for converting an exor. into a trustee by anything like a performance of his duties *qua* exor. The argument must go to this length, that once the debts & funeral & testamentary expenses are paid, then the residue is held upon an express trust (KEKEWICH, J.).—*Re* MACKAY, MACKAY v. GOULD [1906] 1 Ch. 25; 75 L. J. Ch. 47; 93 L. T. 694; 54 W. R. 88; 50 Sol. Jo. 43.

951. — *All debts paid.*—Testator gave the residue of his estate to his two exors. upon certain trusts. Part of his estate consisted of a bond given by the trustees of a minor who came of age within a year after the death of testator, & the exors. then accepted his bond to them jointly in the place of the bond given by the trustees. Ten years afterwards a part of the money was paid by the obligor to one of the obligees, who embezzled the money so paid, & gave a receipt purporting to be signed by both the obligees, but in fact signed by one only, the signature of the other being a forgery. In a suit by the other exor. & *cestui que trust* under the will against the obligor:—*Held*: though the obligor intended to have the receipt of both obligees, the receipt of one was sufficient to discharge the obligor as the obligees were exors. Debtors to the estate of a testator will not, merely on account of the lapse of time, be held to have notice of the fact that all the debts are paid, & that the exors. have become trustees.—CHARLTON v. DURHAM (EARL) (1869), 4 Ch. App. 433; 20 L. T. 467; 17 W. R. 995, L. C. *Annotations*:—*Distd.* Lee v. Sankey (1873), L. R. 15 Eq. 204. *Refd.* Macbryde v. Eykyn (1871), 24 L. T. 461.

952. — *Administration of Estates Act, 1925 (c. 23), s. 33.*—*Re* YERBURGH, YERBURGH v. YERBURGH, [1928] W. N. 208.

*Effect of Probate—Executor taking as trustee.*—*See* EXECUTORS, Vol. XXIII., p. 51, No. 296.

*Effect of assent to legacy.*—*See* EXECUTORS, Vol. XXIII., pp. 392, 393, Nos. 4630–4632.

*Right of executor to residue.*—*See* EXECUTORS, Vol. XXIII., pp. 468–473, Nos. 5377–5424.

*Trustee for purpose of limitation of actions.*—*See* LIMITATION OF ACTIONS, Vol. XXXII., pp. 500, 501, Nos. 1612–1622.

**PART I. SECT. 14, SUB-SECT. 3.—F.**

*o. Whether relationship exists.*—*SIMPSON v. CORBETT* (1883), 5 O. R. 377; *affd.* (1884), 10 A. R. 32.—*CAN.*  
p. —.—*KAMINI DEBI v. RAM-*

LOCHAN SIKKAR (1870), 5 B. L. R. 450.—*IND.*

q. —.—*A mtgee. who goes into possession is a trustee for the mtgor. of all that is not required to pay*

*Liability as trustee.*—*See* EXECUTORS, Vol. XXIV., p. 666, Nos. 6923–6933.

*D. Insurers and Insured.*

*Insured person & underwriter.*—*See* INSURANCE, Vol. XXIX., pp. 291, 292, Nos. 2373–2377.

*Payment of insurance moneys into court.*—*See* INSURANCE, Vol. XXIX., pp. 390, 391, Nos. 3111–3118.

*Fiduciary relationship of assured & reinsured.*—*See* INSURANCE, Vol. XXIX., p. 409, Nos. 3221, 3222.

*E. Limited Owner under Settlement.*

*See, generally, SETTLEMENTS, Vol. XL., pp. 440 et seq.*

*Rights & liabilities as between tenant for life & remainderman.*—*See* SETTLEMENTS, Vol. XL., pp. 641 et seq.

*Discharge of incumbrances by tenant for life.*—*See* SETTLEMENTS, Vol. XL., pp. 694–696, Nos. 2298–2309.

*Exercise of powers under Settled Land Acts.*—*See* SETTLEMENTS, Vol. XL., pp. 741, 742, Nos. 2704–2718.

*F. Mortgagor and Mortgagee.*

*See, generally, MORTGAGE, Vol. XXXV., pp. 221 et seq.*

953. *Whether relationship exists—Continuance of mortgage.*—During the continuance of a mtge. there is no relationship of trustee & *cestui que trust* between mtgor. & mtgee. . . . If lands in mtge. are sold by the mtgee. there may be surplus proceeds, of which the mtgee. becomes trustee; or after the money has been paid off, if the land had not been reconveyed, there might be a trust of it in the mtgee. (NORTH, J.).—LONDON & COUNTY BANKING CO. v. GODDARD, [1897] 1 Ch. 642; 68 L. J. Ch. 261; 76 L. T. 277; 45 W. R. 310; 13 T. L. R. 223; 41 Sol. Jo. 295.

*Annotations*:—*Refd.* *Re* James' Mortgage Trusts, [1919] 1 Ch. 61. *Mentd.* Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon, [1901] 2 Ch. 231; *Re* Chafer & Randall's Contract, [1916] 2 Ch. 8; London County & Westminster Bank v. Tompkins, [1918] 1 K. B. 515.

954. — *Mortgagor as trustee.*—BURGH v. FRANCIS (1873), Cas. temp. Finch, 28; 3 Swan. 536, n.; 23 E. R. 16.

*Annotations*:—*Refd.* Whitworth v. Gaugain (1846), 1 Ph. 728. *Mentd.* Pigott v. Nower (1877), 3 Swan. 531, n.; Bugden v. Bignold (1843), 2 Y. & C. Ch. Cas. 377; *Ross v. Army & Navy Hotel Co.* (1886), 34 Ch. D. 43.

955. — *Bill of sale.*—A bill of sale assigned (*inter alia*) all the book debts due & owing or which might during the continuance of the security become due & owing to the mtgor.:—*Held*: the assignment of future book debts, though not limited to book debts in any particular business, was sufficiently defined & passed the equitable interest in book debts incurred after the assignment, whether in the business carried on by the mtgor. at the time of the assignment or in any other business.

I pause for a moment to point out the nature & effect of the security created by the bill of sale. . . . It belongs to a class of securities of which perhaps the most familiar example is to be found in the debenture of trading cos. It is a floating security reaching over all the trade assets of the mtgor. for the time being, & intended to fasten upon & bind the assets in existence at the time when the

his own charge & he cannot retain commission for himself.—KAVANAUGH v. WORKINGMAN'S BENEFIT BUILDING SOCIETY, [1896] 1 I. R. 56.—*IR.*

r. — *Absence of consideration.*—



mtgee. intervenes. In other words, the mtgor. makes himself trustee of his business for the purposes of security. But the trust is to remain dormant until the mtgee. calls it into operation (LORD MACNAGHTEN).—*TAILBY v. OFFICIAL RECEIVER* (1888), 13 App. Cas. 523; 58 L. J. Q. B. 75; 60 L. T. 162; 37 W. R. 513; 4 T. L. R. 726, H. L.; *revg. S. C. sub nom. OFFICIAL RECEIVER v. TAILBY* (1886), 18 Q. B. D. 25, C. A.

**Annotations:—***Reid, Re Smith, Franklin v. Smith*, [1928] 1 Ch. 10. **Mentd.** *Re Clarke, Coombe v. Carter* (1887), 36 Ch. D. 348; *Re Turcan* (1888), 40 Ch. D. 5; *Re Pyle Works* (1890), 44 Ch. D. 534; *Western Wagon & Property Co. v. West*, [1892] 1 Ch. 271; *Re Kelcey, Tyson v. Kelcey*, [1899] 2 Ch. 530; *Re Ellenborough, Towry Law v. Burne*, [1903] 1 Ch. 697; *Nelson v. Faber*, [1903] 2 K. B. 367; *Re Yorkshire Woolcombers Asscn., Houldsworth v. Yorkshire Woolcombers Asscn.*, [1903] 2 Ch. 284; *Re Dallas*, [1904] 2 Ch. 385; *Re Fitzgerald, Surman v. Fitzgerald*, [1904] 1 Ch. 673; *Re Reid, Re v. Clough*, [1904] 2 K. B. 769; *Ward, Lock v. Long*, [1906] 2 Ch. 550; *Glegg v. Bromley*, [1912] 3 K. B. 474; *Imperial Paper Mills of Canada v. Quebec Bank* (1913), 83 L. J. P. C. 67; *Re Cope, Marshall v. Cope* (1914), 110 L. T. 905; *Re Lind, Industrials Finance Syndicate v. Lind*, [1915] 2 Ch. 345; *British Union & National Insee. v. Rawson*, [1916] 2 Ch. 476; *National Provincial Bank of England v. United Electric Theatres*, [1916] 1 Ch. 132; *Horwood v. Millar's Timber & Trading Co.*, [1917] 1 K. B. 305; *London County & Westminster Bank v. Tompkins* (1918), 87 L. J. K. B. 662; *Performing Right Soc. v. London Theatre of Varieties*, [1924] A. C. 1; *Kursell v. Timber Operators & Contractors*, [1927] 1 K. B. 298; *Re Wait*, [1927] 1 Ch. 606.

**956. — Mortgagee as trustee.**—A mtgee. is not, subject to his security, a trustee of the legal estate for the mtgor.—*TAYLOR v. RUSSELL*, [1892] A. C. 244; 61 L. J. Ch. 657; 66 L. T. 505; 41 W. R. 43; 8 T. L. R. 463; 36 Sol. Jo. 379, II. L.

**Annotations:—***Reid, Powell v. London & Provincial Bank*, [1893] 1 Ch. 610; *London & County Banking Co. v. Goddard*, [1897] 1 Ch. 642; *Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon*, [1901] 2 Ch. 231. **Mentd.** *Crosbie-Hull v. Sayer*, [1908] 1 Ch. 866.

**957. — After taking possession.**—The mtgee., by taking possession, changes the relation in which he stands to the estate; he becomes quasi owner. He is in some sort likened to a trustee; not that he can with any correction of speech be called a trustee. . . . In truth, till the debt is paid off, the mtgee. in possession cannot be considered at all as a trustee. Nevertheless, all the authorities place him in the same predicament with a trustee as far as incapacity to charge for trouble is concerned (LORD BROUGHAM, C.).—*LEITH v. IRVINE* (1833), 1 My. & K. 277; 39 E. R. 686, L. C.

**Annotations:—***Reid, Faulkner v. Daniel* (1813), 3 Hare, 199; *Arnold v. Garner* (1847), 9 L. T. O. S. 289; *Irvine (or Douglas) v. Kirkpatrick* (1850), 17 L. T. O. S. 32; *Bertrand v. Davies* (1862), 31 Beav. 429.

**958. — — — — —**—No doubt a mere mtgee., as such, is not an actual trustee; but if he is in possession, then with respect to all the rents & profits received after satisfying the debt, & if he should exercise his power of sale & raise sufficient to pay himself in full, then for the surplus, he is a trustee, because he sold under a trust to account for such surplus. It appears to me, therefore, that C., having this power of sale, & having exercised it, has placed himself in the position of a trustee (KINDERLEY, V. C.).—*MATTHISON (CLARKE)* (1854), 3 Drew. 3; 61 E. R. 801; *sub nom. MATTHISON v. CLARKE*, 3 Eq. Rep. 127; 24 L. J. Ch. 202; 24 L. T. O. S. 105; 18 Jur. 1020; 3 W. R. 2.

**Annotations:—***Consd. Re Doody, Fisher v. Doody, Hibbert v. Lloyd*, [1893] 1 Ch. 129. **Reid.** *Thorne v. Heard*, [1894] 1 Ch. 599; *The Bonwell Tower* (1895), 72 L. T. 664; *Bath v. Standard Land Co.*, [1911] 1 Ch. 618. **Mentd.** *Furber v. Cobb* (1887), 18 Q. B. D. 494.

*SMART v. SORENSON* (1885), 9 O. R. 640.—CAN.

*t. Mortgagee with power of sale.*  
—A mtgee. with power of sale is a

trustee, & cannot, without the express consent of his *cestui que trust*, purchase an estate of which he is the mtgee.—*Re WHITE, Ex p. Goggs* (1866), 1

**959. — — — — — Payment or discharge of mortgage debt.**—A mtgee., when his money is paid, is but a trustee for the mtgor. (*per CUR.*).—*BROTHERTON v. HATT* (1706), 2 Vern. 574; 23 E. R. 973.

**Annotations:—***Reid, Le Neve v. Le Neve* (1748), 3 Atk. 646. **Mentd.** *Fuller v. Benett* (1843), 2 Hare, 394; *Bulpett v. Sturges* (1870), 22 L. T. 739; *Kettlowell v. Watson* (1882), 21 Ch. D. 685.

**960. — — — — —**—G., stockbroker, who was one of three trustees & acted as broker to the trust, proposed to his co-trustees to sell B. stock belonging to the trust & re-invest in N. E. stock. The three trustees then, on Jan. 27, 1882, executed a transfer of the B. stock for a nominal consideration to two persons who were officers of a bank of which G. was a customer. G. gave the transfer to the bank as security for a loan by them to him, & the transfer was registered. G., in Feb. 1882, paid off the loan, & on Feb. 15, the bank transferred the stock to purchasers from G., & without giving any notice to G.'s co-trustees, allowed him to receive the purchase-money. He invested it in N. E. stock in his own name. In 1883 he sold the N. E. stock & misappropriated the proceeds. Shortly after the sale of the B. stock G. had given an account to his co-trustees showing the sale of B. stock & a re-investment in N. E. stock, & in 1884 he rendered another account in which he represented the N. E. stock as still forming part of the trust funds. In 1885 he absconded. The co-trustees remembered hardly anything about the transaction, but admitted the genuineness of their signatures to the deed of transfer:—*Held*: the bank had occasioned the loss to the trust estate by allowing the purchase-money to come to the hands of G. who had no authority to receive it, & whom had no sufficient reason for believing to have authority to receive it, & the bank must therefore make it good at the suit of the co-trustees, although the co-trustees had been negligent in not seeing that the N. E. stock was registered in the joint names of the trustees.—*MAGNUS v. QUEENSLAND NATIONAL BANK* (1888), 37 Ch. D. 406; 57 L. J. Ch. 413; 58 L. T. 248; 52 J. P. 246; 36 W. R. 577; 4 T. L. R. 248, C. A. **Annotations:—***Reid, Thorne v. Heard*, [1894] 1 Ch. 599. **Mentd.** *Magnus v. National Bank of Scotland* (1888), 57 L. J. Ch. 302.

**961. — — — — — Tender of amount.**—The case of a mtgee. is different, he being at liberty to hold possession; & not becoming strictly a trustee till the money is tendered to him (LORD ELDON, C.).—*CHOLMONDELEY (MARQUIS) v. CLINTON (LORD)* (1821), 2 Jac. & W. 189, n.; 4 Bl. 1; 37 E. R. 598.

**Annotations:—***Consd. Leith v. Irvine* (1833), 1 My. & K. 277; *Robertson v. Norris* (1858), 1 Giff. 421. **Apud.** *Magnus v. Queensland National Bank* (1887), 36 Ch. D. 25. **Reid.** *Dillon v. Parker* (1822), Jac. 505; *Pearce v. Morris* (1869), 5 Ch. App. 227; *Warner v. Jacob* (1882), 20 Ch. D. 220; *Charles v. Jones* (1887), 35 W. L. R. 645; *Sour v. Ashwell*, [1893] 2 Q. B. 390; *Turner v. Walsh*, [1909] 2 K. B. 481. **Mentd.** *Outthbert v. Croasay* (1823), 4 Bl. 125; *Bennett v. Colley* (1832), 5 Sin. 181; *Ashton v. Milne* (1833), 6 Sin. 369; *Doe d. Pilkington v. Spratt* (1833), 5 B. & Ad. 731; *Parrott v. Palmer* (1834), 3 My. & K. 632; *Grenfell v. Girdlestone* (1837), 2 V. & C. Ex. 662; *Bent v. Young* (1838), 2 Jur. 202; *Sturges v. Chauncy* (1839), 5 My. & Cr. 97; *Davies v. Quarterman* (1840), 4 Y. & C. Ex. 237; *Anderson v. Wallis* (1842), 12 L. J. Ch. 291; *Boydell v. Golithly* (1842), 12 L. J. Ch. 187; *Griffiths v. Griffiths* (1843), 2 Hare, 587; *Sayer v. Wagstaff* (1843), 2 Y. & C. Ch. Cas. 230; *Farr v. Sheriffe, Dykes v. Farr* (1845), 4 Hare, 512; *Fulham v. McCarthy* (1848), 1 H. L. Cas. 703; *Christ's Hospital v. Grainger* (1849), 1 H. & Tw. 533; *Baboo Kasi Persad Narain v. Musumatt Kavalabai Koer* (1851), 5 Moo. Ind. App. 140; A.-G. v. Murdoch

Q. S. C. R. 149.—AUS.

*a. Assignee of mortgage.*—*TORONTO SYNOD v. DE BLAQUIERE*, Cass. Dig. 2nd ed. 537.—CAN.



**Sect. 14.—Constructive and implied trusts: Sub-sect. 3, F., G., H., I., J., K., L. & M.]**

(1852), 1 De G. M. & G. 86; *Stone v. Godfrey* (1854), 5 De G. M. & G. 78; *Cottrell v. Hughes* (1855), 3 C. L. R. 496; *Penny v. Allen* (1857), 7 De G. M. & G. 409; *Hornby v. Toxteth Park Burial Board* (1862), 31 Beav. 52; *Marshall v. Smith* (1865), 5 Giff. 37; *Re Holmes, Re Electric Power Co.* (1877), 25 W. L. 603; *Farrar v. Farrars* (1888), 40 Ch. D. 395; *Boiton v. Salmon*, [1891] 2 Ch. 48.

**962.** ——— **First mortgagee with notice of second mortgage.]**—Where there are first & second mtgees., & the first mtgee. has notice of the second, when he is paid off he becomes a trustee of the legal estate for him (*JESSEL, M.R.*).—*TEEVAN v. SMITH* (1882), 20 Ch. D. 724; 51 L. J. Ch. 621; 47 L. T. 208; 30 W. R. 716, C. A.

**Annotations:—***Reid. Kinnaid v. Trollope* (1888), 39 Ch. D. 636; *Corbett v. National Provident Institution* (1900), 17 T. L. R. 5; *Rice v. Noakes*, [1900] 1 Ch. 213. **Mentd.** *Alderson v. Elzey* (1884), 26 Ch. D. 567; *Biggs v. Hoddinott*, *Hoddinott v. Biggs*, [1898] 2 Ch. 307; *Bradley v. Carrilt*, [1903] A. C. 253; *Morgan v. Jeffreys*, [1910] 1 Ch. 620.

**963.** ——— **Lands not reconveyed.]**—*LONDON & COUNTY BANKING CO. v. GODDARD*, No. 953, *ante*.

—[*See* MORTGAGE, Vol. XXXV., p. 600, Nos. 3440-3443.

**964.** ——— **Mortgage by deposit of title deeds.]**—*Re SHAW, Ex p. WHITEHEAD* (1812), 1 Rose, 299; 19 Ves. 209; 34 E. R. 490, L. C.

**965.** ——— **Surplus proceeds.]**—*LONDON & COUNTY BANKING CO. v. GODDARD*, No. 953, *ante*.

—[*See* MORTGAGE, Vol. XXXV., pp. 513, 514, 693, 694, Nos. 2434-2440, 4369-4371.

—[*See* Shares of company.]—*See* COMPANIES, Vol. IX., p. 415, No. 2675.

—[*See, also*, MORTGAGE, Vol. XXXV., pp. 401, 408, 502, 503, 642-655, Nos. 1425, 1425a, 1481-1483, 2331-2336, 3730-3888.

—[*For purpose of limitation of actions.]*—*See* LIMITATION OF ACTIONS, Vol. XXXII., pp. 481, 482, Nos. 1448-1454.

**G. Parent or Guardian and Infant.**

**Parent entering into possession of infant's property.]**—*See* INFANTS, Vol. XXVIII., pp. 192, 193, Nos. 499-512.

**Guardian of infant.]**—*See* INFANTS, Vol. XVIII., p. 282, Nos. 1330-1335.

**H. Partners.**

**966. Fiduciary relationship—Surviving partner & representatives of deceased partner.]**—There is no fiduciary relation between a surviving partner & the representatives of his deceased partner; there are legal obligations between them equally binding on both.—*KNOX v. GYE* (1872), L. R. 5 H. L. 656; 42 L. J. Ch. 234, H. L.

**Annotations:—***Apld. Taylor v. Taylor* (1873), 28 L. T. 189; *Henry v. Hammond* (1913), 108 L. T. 729. **Refd.** *Charles v. Jones* (1887), 35 Ch. D. 544; *Piddocke v. Burt* (1893), 63 L. J. Ch. 246; *Gordon v. Holland*, *Holland v. Gordon* (1913), 82 L. J. P. C. 81; *Bank of Scotland v. Macleod*, [1914] A. C. 311; *Stevens v. Akt. Für Carton Nagen-Industrie*, [1918] A. C. 239; *Rodriguez v. Speyer*, [1919] A. C. 59; *Gopala Chetty v. Vijayaraghavachariar*, [1922]

1 A. C. 488. **Mentd.** *Parker v. Lewis* (1873), 21 W. R. 928; *Edwards v. Warden* (1874), 9 Ch. App. 495; *Noyes v. Crawley* (1878), 10 Ch. D. 31; *Barton v. North Staffordshire Ry.* (1888), 38 Ch. D. 458; *Re Sharpe, Re Bennett, Masonic & General Life Assoc. v. Sharpe*, [1892] 1 Ch. 154; *Botjeman v. Botjeman*, [1893] 2 Ch. 474; *The Pongola* (1895), 73 L. T. 512; *How v. Winterton*, [1896] 2 Ch. 626; *Friend v. Young*, [1897] 2 Ch. 421; *Bull Coal Mining Co. v. Osborne*, [1899] A. C. 351; *Stamp Duties Commr. v. Salting*, [1907] A. C. 449; *Meyappa Chetty v. Supramanian Chetty*, [1916] 1 A. C. 603; *Jay v. Jay*, [1924] 1 K. B. 826.

**967.** ———[*The right of a surviving partner to the partnership assets is absolute. There is no fiduciary relation between him & the representatives of his deceased partner.*—*TAYLOR v. TAYLOR* (1873), 28 L. T. 189.

**Annotation:—***Reid. Stamp Duties Commrs. v. Salting*, [1907] A. C. 449.

—[*See* PARTNERSHIP, Vol. XXXVI., p. 500, Nos. 1659-1670.

—[*See* PARTNERSHIP, Vol. XXXVI., pp. 318, 420, Nos. 12, 899, 900.

**Relations of partners inter se.]**—*See, generally*, PARTNERSHIP, Vol. XXXVI., pp. 419-497.

**I. Principal and Agent.**

**Relations between principal & agent generally.]**—*See* AGENCY, Vol. I., pp. 424 *et seq.*

**Fiduciary character of agency.]**—*See* AGENCY, Vol. I., p. 268, Nos. 7-11.

—**Agent purchasing land for himself.]**—*See* AGENCY, Vol. I., pp. 458-460, Nos. 1464-1469.

—**Confidential agents for purposes of limitation of actions.]**—*See* LIMITATION OF ACTIONS, Vol. XXXII., pp. 503, 504, Nos. 1643-1649.

**J. Solicitor and Client.**

*See* SOLICITORS, Vol. XLII., pp. 117-124.

**Solicitor of company.]**—*See* COMPANIES, Vol. IX., pp. 547, 548, Nos. 3613-3623.

**Fiduciary position for purpose of limitation of action.]**—*See* LIMITATION OF ACTIONS, Vol. XXXII., pp. 505, 506, Nos. 1656-1662.

**K. Trustee in Bankruptcy.**

*See* BANKRUPTCY, Vol. IV., pp. 214-229, Nos. 1909-2150.

**L. Vendor and Purchaser.**

**Sale of land.]**—*See* SALE OF LAND, Vol. XL., pp. 178-182, Nos. 1472-1514.

—**Death of vendor.]**—*See* SALE OF LAND, Vol. XL., pp. 209, 210, Nos. 1751-1759.

—**Vesting order for purpose of conveyance.]**—*See* SALE OF LAND, Vol. XL., p. 288, Nos. 2484-2487.

**Transfer of shares.]**—*See, generally*, COMPANIES, Vol. IX., pp. 350-358.

**Sale of goods.]**—*See, generally*, SALE OF GOODS, Vol. XXXIX., pp. 349 *et seq.*

**M. Other Cases.**

**968. Corporation.]**—General right of corpsn., of whatever nature, at law to alienate their lands, held in fee, subject as to Ecclesiastical Corpsns. to the restraining statutes; & no instance of a

**PART I. SECT. 14, SUB-SECT. 3.—H.**

**966 i. Fiduciary relationship—Surviving partner & representatives of deceased partner.]**—A bill was filed by a surviving partner against the representatives of the deceased partner, praying an account of certain partnership dealings to which a demurrer for want of equity was allowed. Leave was given to amend with a view of showing that certain land held by the deceased partner, which had descended to his heir-at-law, had been purchased

with partnership assets, & that therefore there was a resulting trust in favour of pltf.—*McFADGEN v. STEWART* (1863), 11 Gr. 272.—CAN.

**966 ii. —.]**—*Re* MOUNT DAVID GOLD MINING CO. (1898), 19 N. S. W. Eq. 95.—AUS.

**PART I. SECT. 14, SUB-SECT. 3.—L.**

**b. General rule.]**—The vendor may be a trustee for others of the money payable by the purchaser, but his beneficiaries have no rights but those

given by the contract & if, in carrying out the sale, the purchaser incurs a loss for which the vendor is liable, it may be deducted from the purchase-money.—*BEATTY v. BEST & ASH, BEATTY v. CALVERT & ASH* (Ont.) (1921), 61 S. C. R. 576; 58 D. L. R. 552.—CAN.

**PART I. SECT. 14, SUB-SECT. 3.—M.**

**c. Conveyance of land to rectify error—Party interested—Trustee for others.]**—*GRACE v. MACDERMOTT* (1867), 13 Gr. 247.—CAN.

trust attached upon the ground of misapplication, as not to corporate purposes, except the case of corps., holding to charitable uses.—COLCHESTER CORPN. v. LOWTEN (1813), 1 Ves. & B. 226; 35 E. R. 89, L. C.

*Annotations:—***Reid.** A. G. v. Wilson (1840), Cr. & Ph. 1. **Mentd.** Clifton Dartmouth Hardness Corp. v. Holdsworth (1844), 13 L. J. Ch. 178; Luke v. South Kensington Hotel Co. (1879), 27 W. L. 514; Davis v. Leicester Corp., [1894] 2 Ch. 208.

**969. Consignee—Consignments from abroad to answer annuity—Notice by consignee to annuitant—Payments made in respect of annuity.]—**

(1) Where consignments have been made from abroad to answer an annuity which the owner of the property consigned is liable to pay, & the consignee in this country gives notice of the arrangement to the annuitant, & makes payments in pursuance of it, the consignee is not afterwards at liberty to discontinue such payments, so long as he has any proceeds of the consignment in his hands.

The circumstances of such a transaction constitute an implied trust, which the ct. will enforce against the consignee, for the benefit of the annuitant.

(2) As to this being an express trust, by which I understand a trust created, not by facts & circumstances, but by express words, there is no such trust here; the ct. is left to raise it by implication of law from the dealing & conduct of the parties (LORD BROUGHAM, C.).—FITZGERALD v. STEWART (1831), 2 Russ. & M. 457; 39 E. R. 407, L. C.

*Annotations:—***Generally.** **Mentd.** Burn v. Carvalho (1839), 4 My. & Cr. 690; Kirwan v. Daniel (1847), 5 Hare, 493; Rodick v. Gandell (1852), 1 De G. M. & G. 763.

**970. Person placed in charge of relative—Entitled to annuity—Annuity received by person in charge.]—**A. placed his son, who was much addicted to intemperance, under the care of B., a relation by marriage, & at his death, left his son an annuity of £500. The son resided with B. for several years after his father's death, & until a few months before his own death. B. always accompanied him when he went to receive his annuity from his father's exors., & he, as soon as he had received it, handed it over to B. to keep for him; & B., from time to time, gave him small sums, & paid his bills:—**Held:** B. was accountable, in a ct. of equity, for what he had received from the son.—TERRY v. WACHER (1846), 15 Sim. 447; 00 E. R. 692.

**971. Annuitant—Exercise of power of sale.]—**Where the sale of property takes place under a power contained in an annuity deed, the annuitant is a trustee for the purpose of the sale, & neither he nor his attorney or agent is qualified to become the purchaser.

An annuitant with a power of sale sold property charged with the annuity, by auction. An objection to the title was afterwards taken, & the contract abandoned. The solr. for the vendor afterwards took an assignment to a trustee, for himself, from the personal representative of the grantor, who did not employ any other solr., at the price which it brought at the auction, but without communicating the circumstances as to the title:—**Held:** such a purchase could not be sustained.—**Re BLOYE'S TRUST** (1849), 1 Mac. & G. 488; 2 H. & Tw. 140; 15 L. T. O. S. 517; 14 Jur. 49; 47 E. R. 1630; *sub nom.* **Re BLOYE'S TRUST, Ex p. LEWIS**, 19 L. J. Ch. 89, L. C.; *affd.* *sub nom.* **LEWIS v. HILLMAN** (1852), 3 H. L. Cas. 607, H. L.

*Annotations:—***Apld.** Luddy's Trustee v. Peard (1886), 33 Ch. D. 500. **Consd.** Bath v. Standard Land Co., [1911]

**d. Money paid to sheriff on arrest for debt.]—**Money paid to sheriff by deft. upon arrest for debt is held by

the sheriff as a statutory trustee.—**McKANE v. O'BRIEN** (1911), 40 N. B. R. 392; 10 E. L. R. 19.—**CAN.**

1 Ch. 618. **Refd.** **De Preeda v. De Mancha** (1881), 19 Ch. D. 451; **Re Postlethwaite, Postlethwaite v. Rickman** (1888), 59 L. T. 58. **Mentd.** **Re Hodge's Settlement** (1857), 3 K. & J. 213; **Re Barber's Trusts** (1863), 2 New Rep. 571; **Guest v. Smythe** (1870), 5 Ch. App. 553, n.; **Re Bird's Trusts** (1876), 3 Ch. D. 214; **McPherson v. Watt** (1877), 3 App. Cas. 254; **Re Parker's Will** (1888), 39 Ch. D. 303; **Nutt v. Easton** (1899), 68 L. J. Ch. 367; **Re Hoffe's Estate Act**, 1885 (1900), 82 L. T. 550; **Hodson v. Deans**, [1903] 2 Ch. 647.

**972. Church organist & local board—Construction of local Act.]—**By a local Act comrs. were appointed as trustees to carry out the purposes of the Act. By sect. 91 it was directed that, after paying the expenses of obtaining the Act, the remainder of the money in the hands of the trustees "shall be applied at the discretion of the trustees" in payment of various things, amongst others, "in paying the salary of the organist of B. church, & in reducing, paying off & discharging the several principal sums of money & interest" borrowed on mtge. by virtue of the Act. By a provisional order of the General Board of Health, confirmed by 13 & 14 Vict. c. 108, the powers & duties of the trustees were vested in the Local Board of Health for B. In an action on the case by the organist of B. church against the Local Board of Health, for a breach of duty in not paying his salary, alleging that they had sufficient funds for the purpose, it appeared at the trial that the Board had funds applicable to the payment of the salary, though the mtge. debt not yet paid exceeded the cash balance in hand:—**Held:** the Board & the organist stood in the relation of trustee & *cestui que trust*; & in the absence of a specific appropriation of a part of the fund to the pltf., no action at law lay: the remedy being in equity.—**EDWARDS v. LOWNDES** (1852), 1 E. & B. 81; 22 L. J. Q. B. 104; 20 L. T. O. S. 154; 17 J. P. 213; 17 Jur. 412; 118 E. R. 307.

*Annotations:—***Refd.** **Sansom v. St. Leonard Shoreditch Vestry** (1869), L. R. 4 C. P. 651. **Mentd.** **Re Bawby & Workson Turnpike Roads Trustees** (1853), 20 L. T. O. S. 252.

**973. Builder making estimate for repairs—On behalf of intending purchaser—Negotiations for purchase broken off—Builder purchasing for himself.]—**Pltf., who was in treaty for the purchase of a house, drew up a plan of certain alterations which he intended to make if the purchase was carried into effect, & laid it before deft. in order to obtain an estimate from him of the probable cost of making the alterations. Pltf. had employed deft. in a similar manner on former occasions. Dft. went over the house, & gave to pltf. an estimate of the alterations. The agreement with pltf. having gone off, deft., on the same day, & without the knowledge of pltf., bought the house for himself:—**Held:** there was not created between pltf. & deft. the relation of trustee & *cestui que trust*, so as to entitle pltf. to the benefit of the purchase.—**SHAW v. DAVIS** (1860), 3 L. T. 135.

**974. Board entitled to levy rate—Deficiency made up from profits of company.]—**Where a board are entitled to levy rates & duties, & if their income falls below a specified amount, to have the deficiency made up out of the profits of a co., the board are sufficiently impressed with the character of trustees to enable the co. to maintain a suit for an account against them. Consequently, where such a suit has been instituted, the board will be restrained, until the hearing of the cause, from prosecuting an action at law, commenced by them against the co. for arrears in respect of alleged deficiencies in past years.—**SOUTHAMPTON DOCK CO. v. SOUTHAMPTON HARBOUR & PIER BOARD**

**e. Stockbroker & client.]—****McMAHON v. FETTERBROOK** (1895) 1 I. R. 83.—**IR.**

**Sect. 14.—Constructive and implied trusts: Sub-sect. 3, M. Part II. Sect. 1.]**

(1870), L. R. 11 Eq. 254; 40 L. J. Ch. 82; 23 L. T. 698; 19 W. R. 201.

**975. Agreement to postpone debt—Receipt of dividend—Postponed creditor trustee of dividend.]**—In order to induce plffs., bankers, to allow to W., one of their customers, an overdraft not exceeding £800, deft., who was himself a creditor of W. for £1,000 secured by promissory note, signed an agreement by which he undertook that "the amount due to me shall not be recoverable until the amount due to you on the overdraft shall have been paid." Plffs. thereupon allowed W. the overdraft. W. executed a deed of assignment of all his property to trustees for the benefit of his creditors, & plffs. & defts. both sent in their claims, which were admitted to the full amount. The trustees having announced a first dividend of 3s. 4d. in the pound, plffs. claimed under the agreement to be paid the amount of dividend otherwise due to deft.:—*Held*: plffs. were entitled to the money under the agreement, which had the effect of making deft. a trustee for plffs. of any money received by him out of W.'s estate, & plffs. had not lost their rights under the agreement by having come in under the deed of assignment.—*BERWICK v. MATTHEWS* (1892), 66 L. T. 564; 40 W. R. 527; 36 Sol. Jo. 463, D. C.

**976. Surety taking indemnity from principal debtor.]**—Testator gave guarantees to a bank to secure the overdraft of two partners, & to secure him against liability on these guarantees, the wife of one of the partners gave him two equitable mtges.

The partnership firm went into liquidation. Testator died & his affairs were administered by the ct., & the estate was found to be insolvent. It was accordingly unable to make good the amount due under the guarantees.

The bank claimed to be entitled to the benefit of the equitable mtges.:—*Held*: there was no authority either in the cases or in principle that a surety who takes from the principal debtor a bond or indemnity at once becomes a trustee of that for the principal creditor, & the claim of the bank could not be maintained.—*Re WALKER, SHEFFIELD BANKING CO. v. CLAYTON*, [1892] 1 Ch. 621; 61 L. J. Ch. 234; 66 L. T. 315; 40 W. R. 327; 8 T. L. R. 224; 36 Sol. Jo. 201.

**977. Co-owners of property—One collecting rents of whole.]**—There is no relationship of trust or agency in one co-owner of a property towards the other; & where one collects the rents of the whole he does so not in the capacity of agent but in that of owner.—*KENNEDY v. DE TRAFFORD*, [1897] A. C. 180; 66 L. J. Ch. 413; 76 L. T. 427; 45 W. R. 671, H. L.

*Annotations*:—*Reid*, *Field v. Debenture Corp.* (1896), 12 T. L. R. 469; *Re Bliss*, *Bliss v. Bliss*, [1903] 2 Ch. 40; *Birklin v. Smith*, [1909] 2 K. B. 112. *Mentd.* *Nutt v. Easton*, [1899] 1 Ch. 873; *Griffith v. Owen*, [1907] 1 Ch. 195; *Flower v. Pritchard* (1908), 53 Sol. Jo. 178.

**978. Trade Union official—Money received on behalf of fellow workmen.]**—*M'MASTER v. BENSON* (1903), 47 Sol. Jo. 256.

**979. Members of rating authority—Trustees for ratepayers.]**—A tramway co. appealed against a poor rate to middlesex quarter sessions. Some of the justices who were members of the ct. of quarter sessions were also members of the Middlesex county council, who were the owners of the tramways & had leased them to the tramway co. on the terms that the council were to receive (*inter alia*) 45 per cent. of the net revenue of the tramway co.:—*Held*: the justices who were members of the county council, being mere trustees for the ratepayers, were not disqualified from adjudicating by interest.—*R. v. MIDDLESEX JJ.*, *Ex p. HENDON UNION* (1908), 72 J. P. 251; 6 L. G. R. 739; 2 Konst. Rat. App. 754; *sub nom. R. v. MIDDLESEX JJ.*, *Ex p. HENDON UNION, R. v. MIDDLESEX COUNTY COUNCIL (MIDDLESEX JJ.)*, 52 Sol. Jo. 458, D. C.

**Auctioneers.]**—*See AUCTION*, Vol. III., p. 28, Nos. 207–209.

**Obligation of bailee to account.]**—*See BAILMENT*, Vol. III., pp. 105, 106, Nos. 309–313.

**Person in fiduciary capacity for purpose of Debtors' Acts.]**—*See BANKRUPTCY*, Vol. V., pp. 1026–1028, Nos. 8385–8400.

**Contract made by deceased person in fiduciary position.]**—*See EXECUTORS*, Vol. XXIV., pp. 628, 629, Nos. 6561–6564.

**Persons in fiduciary position for purpose of limitation of actions.]**—*See LIMITATION OF ACTIONS*, Vol. XXXII., pp. 493, 494, 502–506, Nos. 1547–1553, 1632–1662.

**Master & servant in respect of patent.]**—*See PATENTS*, Vol. XXXVI., pp. 538, 539, Nos. 40–50.

**Guardians receiving annuity of pauper lunatic.]**—*See POOR LAW*, Vol. XXXVII., p. 231, No. 228.

## Part II.—Trustees.

### SECT. 1.—IN GENERAL.

**980. Interest must be vested.]**—No person can be a trustee in law unless he has a vested interest in the thing given.—*OWEN v. OWEN* (1738), 1 Atk. 494; *West temp. Hard.* 593; 26 E. R. 313, L. C. *Annotations*:—*Mentd.* *Lake v. Cook* (1753), 3 Keny. 54; *Knight v. Gould* (1833), 2 My. & K. 295; *Barber v. Barber* (1838), 3 My. & Cr. 688.

**981. Whether trustee & beneficiary may be same person.]**—A man cannot be a trustee for himself (*LORD MANSFIELD*).—*GOODRIGHT v. WELLS* (1781), 2 Doug. K. B. 771; 99 E. R. 491.

*Annotations*:—*Follid.* *Selby v. Alston* (1797), 3 Ves. 339. *Apld.* *Conolly v. Conolly* (1867), 15 W. R. 944. *Reid.* *Phillips v. Brydges* (1796), 3 Ves. 120.

### PART II. SECT. 1.

**981.1. Whether trustee & beneficiary may be same person.]**—A *cestui que trust* is not disqualified from being appointed a trustee, though it is

generally objectionable; & where such an appointment was asked, notice of the application was ordered to be given to the persons interested under the will.—*Re SMITH'S TRUSTEES*

(1869), N. B. Dig. 647.—*CAN.*

**981 II.** —[There is no provision in Trusts Act, 1882, that a *cestui que trust* shall not be appointed a trustee. He is not as such incapacitated from

**983.** ———.]—Another position was maintained, in a latitude that would create infinite confusion: that where there is in the same person a legal & equitable interest the former absorbs the latter. I admit, that where he has the same interest in both, he ceases to have the equitable estate, & has the legal estate. . . . But it must be understood always with this restriction: that it holds only where the legal & equitable estates are co-extensive & commensurate (ARDEN, M.R.).—*BRYDGES v. BRYDGES, PHILIPS v. BRYDGES* (1796), 3 Ves. 120; 30 E. R. 926.

*Annotations:—*Consd. *Selby v. Alston* (1797), 3 Ves. 339. *Apld.* *Conolly v. Conolly* (1867), 15 W. R. 944. *Refd.* *Wykham v. Wykham* (1811), 18 Ves. 395; *Chelmondeley v. Clinton* (1820), 2 Jac. & W. 1; *Re Douglas, Wood v. Douglas* (1884), 28 Ch. D. 327.

**984.** ———.]—Where the equitable & legal estates, equal & co-extensive, unite in the same person, the former merges: therefore, where the former descends *ex parte paterna*, the latter *ex parte materna*, upon their union the paternal heir has no equity.

In *Brydges v. Brydges, Philips v. Brydges*, No. 983, *ante*, I stated as a universal proposition, that wherever the legal & equitable estates uniting in the same person are co-extensive & commensurate, the latter is absorbed in the former (ARDEN, M.R.).—*SELBY v. ALSTON* (1797), 3 Ves. 339; 30 E. R. 1042.

*Annotations:—*Consd. *Re Douglas, Wood v. Douglas* (1884), 28 Ch. D. 327. *Fold.* *Re Selous, Thomson v. Selous*, [1901] 1 Ch. 921. *Refd.* *Fung Ping Shan v. Tong Shun*, [1918] A. C. 403.

**985.** ———.]—Testator, who died in 1853, devised as his own an estate which had devolved on his late wife in fee as heiress-at-law of her mother. The devise was to trustees in fee, on trust to pay the rents to testator's only son & to his two daughters in equal shares, & to the survivors or survivor of them, with remainder on trust for the children of the son & the daughters respectively in fee, with an ultimate remainder unto & to the use of testator's own right heirs. The son & both the daughters survived testator, but they all died without issue. The son survived the daughters, & died intestate. He was the heir-at-law of his father, & also of his mother. Testator had also devised real estate of his own to the son, who elected to confirm the will:—*Held*: the equitable estate, which the son took under the will & by virtue of his election, merged in the legal estate which descended to him from his mother, & the descent was regulated by the legal estate, & consequently, on his death intestate & without issue, the property descended to the heir of his maternal grandmother, who was the last purchaser of the legal estate, & not to his own heir.—*Re DOUGLAS, WOOD v. DOUGLAS* (1884), 28 Ch. D. 327; 54 L. J. Ch. 421; 33 W. R. 390; *sub nom.* *Re DOUGLAS, DOUGLAS v. WOOD*, 52 L. T. 131.

*Annotation:—*Refd. *Fung Ping Shan v. Tang Shun*, [1918] A. C. 403.

**986.** ———.]—Two or more absolute owners.]—The rule that one person cannot be trustee for himself, *Selby v. Alston*, No. 984, *ante*, applies also to a case of two or more absolute owners.—*Re SELOUS, THOMSON v. SELOUS*, [1901] 1 Ch. 921; 70 L. J. Ch. 402; 84 L. T. 318; 49 W. R. 440; 45 Sol. Jo. 380.

*Annotation:—*Refd. *Fung Ping Shan v. Tong Shun*, [1918] A. C. 403.

being trustee for himself & others, but as a general rule he is not altogether a fit person for the office in consequence of the probability of a conflict between his interest & his duty.—

*ASHDIBAI v. ABDULLA* (1906), 1 L. R. 31 Bom. 271.—IND.

1. *Whether trustee & creator of trust may be same person.*—There is nothing anomalous, nor is there any incom-

**987.** ———.]—Legal & equitable estate not commensurate.]—It has been said, that it is impossible for a man to be a trustee for himself; but that is not the point here, for as the legal estate & use is wholly in C. by virtue of the first part of the devise, the remainder cannot be in him, for that is part of the estate he had before, & unless testator had given C. the remainder of the trust, it would have resulted to his heirs-at-law; he has therefore given him an interest distinct from either the legal estate or the use, which is the remainder of the trust (LORD HARDWICKE).—*ROBINSON v. CUMING* (1739), 1 Atk. 473; *West temp Hard.* 635; 26 E. R. 302, L. C.; *previous proceedings, sub nom.* *ROBINSON v. COMYNS* (1736), *Cas. temp. Talb.* 164, L. C.

*Annotations:—*Apld. *Brydges v. Brydges* (1796), 3 Ves. 120. *Refd.* *Walker v. Inge* (1767), *Rom.* 95.

**988.** ———.]—(1) To make a retiring trustee liable for a breach of trust committed by his successor, it must be proved that the very breach of trust which was in fact committed was not merely the outcome of or rendered easy by the retirement & new appointment, but was contemplated by the former trustee when the retirement & appointment took place.

(2) They ought to have avoided the appointment of Miss Head if possible, not merely because she was a beneficiary, but because she was known to be under the influence of her mother . . . but I cannot hold Miss Head to have been an incompetent trustee when linked with another whose professional position was of itself a security that the trust funds would be properly administered (KEKEWICH, J.).—*HEAD v. GOULD*, [1898] 2 Ch. 250; 67 L. J. Ch. 480; 78 L. T. 739; 46 W. R. 597; 14 T. L. R. 444; 42 Sol. Jo. 553.

**989.** ———.]—Effect on conversion.]—Testator by his will appointed his wife & daughter trustees & extrices. & gave his real & personal estate to his trustees upon trust to sell the real estate as & when they thought proper, & to pay the net income of his real & personal estate to his wife for her life, & after her death he gave his real & personal estate & the proceeds of sale of such of his real estate as should have been sold to his daughter absolutely. The daughter survived testator, but predeceased the widow, & at her death no part of the real estate had been sold. On the death of the widow:—*Held*: the will did not create an imperative trust for sale, but gave to the trustees a discretionary power of sale, & inasmuch as they had not exercised that power, the real estate was not converted & passed to the heir-at-law of the daughter.—*Re NEWBOULD, CARTER v. NEWBOULD* (1913), 110 L. T. 6, C. A.

*Annotation:—*Mentd. *Gresham Life Assce. Soc. v. Crowther* (1914), 111 L. T. 887.

**990.** Trustee distinguished from executor.]—The case of trustees who take a transfer of shares in their names differs in principle from that of exors., who merely intimate their title as exors. to a co., in order to claim & exercise the rights which belong to them as the legal representatives of their testator. . . . Trustees have not, in any proper sense of the word, a representative character, but exors. have (LORD SELBORNE).—*Re CITY OF GLASGOW BANK, BUCHAN'S CASE* (1879), 4 App. Cas. 549.

*Annotations:—*Mentd. *Re Cheshire Banking Co., Duff's Exors.*, Case (1886), 32 Ch. D. 301; *Barton v. L. & N. W. Ry.* (1889), 24 Q. B. D. 77.

patibility, in the creator of a trust being a trustee thereof & seeing to the due execution of the trust.—*Re HELLWELL'S TRUSTS* (1874), 21 Gr. 346.—CAN.

*Sec. 1.—In general.* *Sec. 2: Sub-sect. 1. A. & B.; sub-sect. 2. A.]*

**Trustees under Settled Land Acts.**—*See SETTLEMENTS*, Vol. XL., pp. 777, 778, Nos. 3080-3094.

**Trustees of charities.**—*See CHARITIES*, Vol. VIII., pp. 369 *et seq.*

**Trustees of friendly society.**—*See FRIENDLY SOCIETIES*, Vol. XXV., p. 302, Nos. 94-102.

**Trustees of chapel.**—*See ECCLESIASTICAL LAW*, Vol. XIX., pp. 543-544, Nos. 4035-4040.

## SECT. 2.—APPOINTMENT OF TRUSTEES.

### SUB-SECT. 1.—ORIGINAL TRUSTEES.

#### A. Who may be Appointed.

**991. Allen.**—*Re HILL'S TRUSTS*, [1874] W. N. 228.

—*See, now*, British Nationality & Status of Aliens Act, 1914 (c. 17), s. 17.

**992. Allen enemy.**—*Re SICHEL'S SETTLEMENTS*, SICHEL v. SICHEL, No. 1005, *post*.

**Beneficiary.**—*See* Nos. 981-989, *ante*.

**Corporation.**—*See CHARITIES*, Vol. VIII., pp. 369, 370, Nos. 1746-1759; *CORPORATIONS*, Vol. XIII., pp. 354, 370, Nos. 920, 1022.

**993. Infant.**—An infant may be a trustee.—*JEVON v. BUSH* (1885), 1 Vern. 342; 23 E. R. 508, L. C.

*Annotation:—Mentd. Goodright d. Hoole v. Sales* (1767), 2 Wils. 329.

**994.** —*—*—*Cujus est dare, ejus est disponere*, & an infant is to be bound by it as well as one of full age, & may be a trustee (*per Cur.*).—*SCOT v. HAUGHTON & FULLER* (1706), 2 Vern. 500; 23 E. R. 963.

—*See, now*, Law of Property Act, 1925 (c. 20), ss. 19, 20; Administration of Estates Act, 1925 (c. 23), s. 42.

**Married woman.**—*See* Law of Property Act, 1925 (c. 20), s. 170.

**995. Officer of corporation—Corporation not party to trust.**—A trust may be so constituted in individuals, in their individual capacity, although they may also fill the principal public offices of a corp., & such a trust may be in them quasi trustees for fulfilling the duties, & may vest in them the powers, & subject them to the duties of such trustees in their capacity of public officers of the corp., without making the corp. of which they are the head in another capacity a party to that trust, & without involving the funds of the corp., or the funds which the individuals administer, not

in the capacity of trustees under the particular limited & restricted trust.

A trust may be constituted in the persons of A., B. & C. in their individual capacities, or of A., B. & C. magistrates & town council of a burgh, & that trust may be in them quasi trustees for the purpose of fulfilling the obligations imposed upon them in executing that trust, & may vest them with the powers of such trustees, & subject them to the duties of such trustees, in their capacity of A., B. & C. magistrates & town council, without making the corp., of which they are the head in another capacity & without making the city, whose affairs they administer as the magistrates of that city, a party to that trust; & consequently without involving the funds of that city, or the funds which those parties administer, not in the capacity of trustees under this particular trust, but in their other capacity of governors, administering the funds as magistrates of that corporate town. The two things may be kept separate; the two capacities may be severed; & they may be trustees, not as representing the town generally, not as dealing with the town's funds generally, but trustees, under that particular limited & restricted trust, with which the town has no concern (*LORD BROUGHAM*).—*BRUNTON v. FORREST, EDINBURGH CITY MINISTERS v. EDINBURGH LORD PROVOST* (1849), 14 L. T. O. S. 121, II. L.

**Appointment of new trustees.**—*See* Sub-sect. 2, *post*.

#### B. Who may Appoint.

*See* Trustee Act, 1925 (c. 19), s. 36.

**996. Inherent jurisdiction of court—Appointment by testator of holder of office—Office abolished by statute.**—Testator, who gave a legacy for charitable purposes to be executed in a foreign country, named as one of the trustees of the charity an officer created by Act of Parliament, describing him by his office, & not by his name. The Act of Parliament, having been repealed, & the office abolished, the ct. referred it to the master to approve of a proper person to be a trustee in his stead.—*A.-G. v. STEPHENS* (1834), 3 My. & K. 347; 40 E. R. 132.

*Annotation:—Consd. Lyons Corp. v. East India Co.* (1836), 1 Moo. P. C. 175.

**997. — No trustee appointed.**—The ct. has inherent jurisdiction in a cause to appoint trustees of a will in a case where no trustees were originally appointed by testator.—*DODKIN v. BRUNT* (1868), L. R. 6 Eq. 580.

## PART II. SECT. 2, SUB-SECT. 1.—A.

**g. Guardian of infant—Trustee of infant's share of insurance money.**

The mother of an infant to whom insurance moneys were payable, having been appointed guardian & having given security, was appointed trustee under R. S. O. 1887, c. 136, s. 11.—*SCOTT v. SCOTT* (1890), 20 O. R. 313.—*CAN.*

**h. — Guardian & infant resident abroad—Necessity for security.**

—A foreigner was appointed trustee for infants under 47 Vict. c. 20 (O.), to receive insurance moneys, without being required to give security in this Province, on his being shown that he had given security upon his appointment as guardian, to the satisfaction of a ct. in the state where he & the infants resided.—*Re ANDREWS* (1885), 11 P. R. 199.—*CAN.*

**k. — — — — —**—An infant entitled to share in certain insurance moneys lived with her mother in a foreign state, & the mother had there been appointed guardian of the infant, & had given security to

the satisfaction of the ct.:—*Held*: the security given by petitioner in the foreign ct. would not attach to her appointment as trustee under R. S. O. 1887, c. 136, s. 12; & the ct. declined to appoint her unless she furnished the necessary security here.—*Re SLOSSON* (1893), 15 P. R. 156.—*CAN.*

**l. — — — — —**—A tutrix of infants duly appointed in the Province of Quebec is not entitled *qua* tutrix to moneys of the infants paid into ct. under 60 Vict. c. 36, s. 157 (O.); but she may, under sect. 155 (2), be appointed a trustee of the fund & receive it upon giving proper security.—*Re BERRYMAN* (1897), 17 P. R. 573.—*CAN.*

**m. — — — — —**—Certificate of foreign court admitted in support of application.—*Re DANIEL* (1894), 16 P. R. 304.—*CAN.*

**n. — — — — —**—Necessity for security.—An order having been made under 47 Vict. c. 20, s. 12 (O.), for the appointment of a trustee to receive insurance moneys, to which infants were entitled:—*Held*: it would be

contrary to the uniform practice of the ct. to appoint any one as the custodian of infants' money, whether as trustee or guardian, without requiring security for the proper discharge of his duties.—*Re THIN* (1884), 10 P. R. 490.—*CAN.*

**o. — — — — —**—Undertaking to apply money for maintenance & benefit of infant.—Two infants were entitled to a sum of \$500, their deceased father's share of the moneys arising from an insurance on the life of their grandfather; & upon their mother's application, she was appointed by the High Ct. Div. trustee of this sum, & it was ordered that the whole of it should be paid to her, on her undertaking to apply it for their maintenance & benefit.—*Re HAVY* (1913), 29 O. L. R. 336; 5 O. W. N. 61.—*CAN.*

## PART II. SECT. 2, SUB-SECT. 1.—B.

**p. Power of court—Appointment of trustee to make good title.**—*WYMERS v. HILTON* (1908), 43 N. S. R. 161; 6 E. L. R. 326.—*CAN.*

998. ———.]—(1) Where all the trustees of real estate named in a will have predeceased testator new trustees may be appointed if the heir of testator is before the ct.

(2) The ct. may appoint trustees under Trustee Act, 1850 (c. 60), where there never have been any trustees.—*Re SMITHWAITE'S TRUSTS* (1871), L. R. 11 Eq. 251; 40 L. J. Ch. 176; 23 L. T. 726; 19 W. R. 381.

999. ———.]—The ct. has jurisdiction, under Trustee Act, 1850 (c. 60), & Trustee Act, 1852 (c. 55), to recognise a constructive trusteeship of stock within the meaning of that term as used in the Acts, & to appoint trustees of a will, so far as regards that stock, in place of the constructive trustees, notwithstanding that no trustees were originally appointed by testatrix.—*Re DAVIS' TRUSTS* (1871), L. R. 12 Eq. 214; 40 L. J. Ch. 566; 19 W. R. 944.

1000. ———.]—The ct. will appoint trustees of a will by which property is limited in such a manner as contemplates the intervention of trustees, although none may have been appointed by testator.—*Re GILLET'S TRUSTS* (1876), 25 W. R. 23.

1001. — Disclaimers by trustee named.]—A settlor made a voluntary settlement of real estate, but did not communicate the fact of the settlement to the sole trustee during his lifetime. After the settlor's death the trustee refused to undertake the trusts of the settlement. The settlement contained a covenant for further assurance, & a power to appoint new trustees.—*Held*: this was a case in which the ct. would appoint new trustees.—*JONES v. JONES* (1874), 31 L. T. 535; 23 W. R. 1. Annotation:—*Consd. Mallott v. Wilson*, [1903] 2 Ch. 494.

1002. Discretion of court as to appointment.—Proposed trustee distasteful to beneficiary.]—A gentleman having in wilful defiance of an order of the ct. married an infant ward of ct., the usual directions were given for a settlement of her property & a settlement was prepared which provided that the power of testamentary appointment given to her in default of issue should not be exercised in favour of the husband. The wife objected to this exclusion of the husband & to the proposed trustees with whom she was not on friendly terms & she refused to execute the settlement unless it was altered in these particulars. There was no objection to the trustees except her personal dislike to them. On an application in the matter of the infant & under 18 & 19 Vict. c. 43, the judge made an order for the husband & wife to execute the settlement as it stood. The wife appealed:—*Held*: the wife ought not to be prevented from exercising in favour of her husband the power of testamentary appointment in default of issue & it was desirable not to appoint trustees with whom she was on unpleasant terms & the settlement ought to be modified in these respects.—*Re SAMPSON & WALL (INFANTS)* (1884), 25 Ch. D. 482; 53 L. J. Ch. 457; 32 W. R. 617; *sub nom. Re WALL*, 50 L. T. 435, C. A.

Annotations:—*Mentl. Buckmaster v. Buckmaster* (1887), 35 Ch. D. 21; *Re Phillips* (1887), 34 Ch. D. 467; *Re Leigh, Leigh v. Leigh* (1888), 40 Ch. D. 290; *Seaton v. Seaton* (1888), 13 App. Cas. 61; *Scott v. Scott*, [1921] P. 107.

1003. Appointment by tenant for life—No provision made by instrument.]—A lady being entitled to £2,000 charged on her father's estates & payable

after the decease of her surviving parent, it was agreed by her marriage articles that, in the settlement to be made in pursuance thereof, there should be contained a power enabling her father, in his lifetime, or his exors., within six months after the £2,000 should become payable, to invest that sum in the usual securities, in the names of trustees to be for that purpose appointed, & for the trustees or the survivor of them, from time to time, with the consent of the husband & wife or the survivor, or of their own proper authority, as the case should happen, to change the securities, & to pay the interest to the husband for life, to the wife for life, for her separate use, & to pay the principal to their children, & in default of children, to the wife's next of kin or personal representatives. The husband died leaving his wife & four infant children surviving. No trustees of the £2,000 having been appointed, the wife, after her husband's death, appointed two persons to be such trustees:—*Held*: the appointment ought to have been made by the husband & wife jointly, & the appointment made by the wife was invalid.—*BRASIER v. HUDSON* (1837), 9 Sim. 1; 59 E. R. 250.

Appointment of new trustees.]—*See* Sub-sect. 2, *post*.

## SUB-SECT. 2.—NEW TRUSTEES.

### A. In General.

1004. Appointment must be completed—Before transfer of trust property.]—(1) In 1830 A. & B. were appointed trustees of a part of a sum vested in other trustees. The deed contained a power for the settlors to appoint new trustees, in case any trustee should wish to be discharged from, or should decline to act in, the trusts. B. did not execute. In 1848 B., alleging he had never acted, disclaimed, & A. retired, & thereupon two new trustees were appointed, & the fund assigned to them by A. only:—*Held*: whether B. had acted or not, the new trustees had been duly appointed, & the *cestuis que trust* were not necessary parties to a suit by such new trustees against the persons, who held the fund, to compel payment to the new trustees.

The appointment of new trustees & the conveyance of the trust property to them constitute two distinct & separate matters, & the second, the transfer, can only properly take place where the first or the appointment is complete (*ROMILLY, M.R.*).

(2) The validity of the appointment is not affected by the circumstance of whether B. really acted or not, but that assuming that he had acted, the validity of it depends upon whether when he executed the disclaimer & made or offered the statutory declaration, these acts were sufficient evidence to prove that he then declined to act any further & I think that they are (*ROMILLY, M.R.*).—*NOBLE v. MEYMOTT* (1851), 14 Beav. 471; 20 L. J. Ch. 612; 51 E. R. 367.

1005. Power of appointment—Imported by reference from previous instrument.]—(1) A marriage settlement contained a clause providing that if any of the trustees or any future trustees should die or go to reside abroad or should desire to retire from or refuse to or become incapable to act in the trusts, it should be lawful for plffs., the husband

one of themselves P. as manager, & paid him a salary for so acting. On objection that this was wrong P. pointed S. to act as trustee in his place, & continued to act as manager, & received

PART II. SECT. 2, SUB-SECT. 2.—A.  
1005. 1. Power of appointment—Imported by reference from previous instrument.]—*LUCAS v. HAMILTON REAL ESTATE ASSOCN.* (1879), 26 Gr. 384.—*CAN.*

q. — Trustee retiring to become salaried manager.]—Two trustees N. & P. who were carrying on their testator's business under a direction contained in the will, with power to appoint a salaried manager employed



**Sect. 2.—Appointment of trustees: Sub-sect. 2, A. & B. (a) & (b).]**

& wife, to appoint new trustees in their place. In 1914 O., who was one of the trustees of the settlement, committed serious breaches of trust, & C., the other trustee, being a German subject, became an alien enemy upon the outbreak of war between the United Kingdom & Germany. In Oct. 1914, plffs. executed a deed reciting that O. was unfit to act as trustee, & that C., being an alien enemy, was incapable of so acting, & purporting thereby, in exercise of their powers under the settlement & of all other powers, to appoint defts. as trustees in the place of O. & C.

Trustee Act, 1893 (c. 53), s. 10 (1), provides that where a trustee (*inter alia*) is "unfit to act," the persons nominated for the purpose of appointing new trustees by the instrument creating the trust may appoint a trustee in his place:—*Held*: as the trust instrument gave no power to the "persons nominated" to appoint a new trustee in the event of a trustee becoming unfit to act, the joint appointment of the deed of Oct. 1914, was invalid, & was not saved by Trustee Act, 1893 (c. 53), s. 10 (1).

(2) An alien enemy is clearly incapable to act as a trustee because he cannot sue (NEVILLE, J.).—*Re SICHEL'S SETTLEMENTS*, SICHEL v. SICHEL, [1916] 1 Ch. 358; 85 L. J. Ch. 285; 114 L. T. 540.

**1006. —Of retiring judicial trustee.]**—When a judicial trustee retires he has no overriding power to appoint his successor, but the ct. has jurisdiction to appoint the Public Trustee in his place & in a proper case will do so.—*Re JOHNSTON, MILLS v. JOHNSTON* (1911), 105 L. T. 701.

**Under marriage settlement—Effect of divorce.]**—See HUSBAND & WIFE, Vol. XXVII. p. 526, Nos. 5081–5084.

**Vested in lunatic.]**—See LUNATICS, Vol. XXXIII., pp. 226, 227, Nos. 1360–1371.

**Settled Land Act trustees.]**—See SETTLEMENTS, Vol. XL., p. 782, Nos. 3130, 3131.

**Trustees of charities.]**—See CHARITIES, Vol. VIII., pp. 370–374, 404, Nos. 1760–1842, 2361–2364.

**Trustees of copyholds.]**—See COPYHOLDS, Vol. XIII., p. 78, No. 993.

**B. Under Trust Instrument.**

**(a) In General.**

**1007. Directions of donor must be obeyed—Concurrence of beneficiary required.]**—A trustee of a will who had formally renounced that character by a deed which purported, but ineffectually, to appoint a successor, being applied to eleven years afterwards to join with his original co-trustee in a deed purporting to be an exercise of a discretionary power which could only be exercised by the two trustees of the will for the time being, refused to do so, without an indemnity, but ultimately, on being indemnified, executed the deed:—*Held*: he could not resume his position as trustee for such a purpose, & even if he could, his execution of the deed under the circumstances stated, could be regarded only as a mere formal act, not as an

exercise of that discretion which was essential to a due execution of such a power.

H., one of the original trustees, by a deed of 1831, recites his desire of no longer acting in the trust & an attempt is made to substitute O. in his place; but it is not pretended that O. was duly appointed, the concurrence of the party beneficially interested being wanting (LORD COTTERHAM, C.).—*LANCASHIRE v. LANCASHIRE* (1848), 2 Ph. 657; 17 L. J. Ch. 270; 12 L. T. O. S. 21; 12 Jur. 363; 41 E. R. 1097, L. C.

*Annotations*.—*Mentd.* Umpleby v. Waveney Valley Ry. (1860), 1 John. & H. 254; Taylor v. Dowlen (1869), 4 Ch. App. 697.

**1008. Duty of trustee to consult beneficiaries.]**—Circumstances in which it is improper for a retiring trustee to appoint a new trustee without communication with the *cestuis que trust*.—*MARSHALL v. SLADDEN* (1849), 7 Hare, 428; 19 L. J. Ch. 57; 14 Jur. 106; 68 E. R. 177.

*Annotations*.—*Mentd.* Reynell v. Sprye (1849), 8 Hare, 222; A. G. v. Chesterild (1854), 18 Beav. 596; Baker v. Loader (1872), L. R. 16 Eq. 49; Barnes v. Addy (1873), 28 L. T. 398; Weiss v. Wardle (1874), 1 R. 19 Eq. 171; Tabor v. Cunningham (1875), 24 W. R. 153.

**1009. —**—(1) Under a power enabling a surviving or continuing trustee to appoint a new trustee in the place of a trustee dying, going to reside abroad, becoming incapable of acting, etc., the surviving trustee, although himself residing abroad, may appoint another trustee in the place of the one deceased.

Although taking up his permanent residence abroad in such a case does not *ipso facto* deprive a trustee of his office, yet it is such a disqualification as entitles the *cestuis que trust* to have a new trustee appointed in his place.

(2) It is the duty of trustees, having power to appoint new trustees, to make such appointment impartially, as between their *cestuis que trust*, & not without communication with them.—*O'REILLY v. ALDERSON* (1849), 8 Hare, 101; 68 E. R. 289.

*Annotation*.—*As to* (1) *Reid. Re Stamford, Payne v. Stamford*, [1896] 1 Ch. 288.

**1010. How made—Donees executing separate instruments.]**—Testator devised his real estates to A., B., C. & D., & their heirs, on certain trusts which required the legal estate to be vested in them, & gave a power of sale to them or the survivors or survivor of them, or the heirs of the survivor, & declared that their or his receipts or receipt should be a good discharge to the purchaser, & if any of them should die or decline to act, that it should be lawful & he thereby willed & directed that the survivors of them should, immediately or within two months afterwards, by any deed, nominate some fit person to be a trustee in his place. D. died; & A. & B. by one deed, & C. by another, both of which were executed more than two lunar months, but less than two calendar months after D.'s death, nominated a new trustee, but did not convey the legal estate to him. A., B., C., & the new trustee agreed to sell the estates to M., who objected to complete his purchase, (a) because the appointment of the new trustee

a salary as before:—*Held*: S.'s appointment was not improper, & he should not be removed.—*NISSEN v. GOUNDEN* (1912), 14 C. L. R. 297.—*AUS.*

r. — *Death of surviving trustee*—*Personal trust*.—*LYON v. RADENHURST* (1856), 6 Gr. 644.—*CAN.*

t. — *Failure of original trustees.*—*GLENTANAR v. SCOTTISH INDUSTRIAL MEDICAL ASSOCN.*, [1925] S. C. 226.—*SCOT.*

a. *Appointment by two trustees form-*

*ing quorum*—*Absence of notice to co-trustee.*—Two trustees, as a quorum, executed a deed of assumption of two additional trustees without giving any notice to their co-trustee:—*Held*: the deed of assumption was invalid.—*WYSE v. ABBOTT* (1881), 8 R. (Ct. of Sess.) 983.—*SCOT.*

**PART II. SECT. 2, SUB-SECT. 2.—B. (a).**

**1010 i. How made—Donees executing separate instruments.]**—A testamentary

trust deed conferred power upon the "trustees or survivors to appoint name & assume such other person or persons as they may think proper to act with them or after them"—*Held*: two deeds of assumption, the first by one trustee erroneously designating the sole surviving accepting trustee resident in Scotland & the second being a supplementary deed of assumption executed after his death by two others who were said to be resident abroad, were null & ineffectual in respect that it did not appear that



had not been made within two lunar months, (b) because it had not been made by one single deed, & (c) because the power of sale was suspended during the vacancy in the trust.

The ct. overruled the objections; but held that the new trustee had not been duly appointed, because no conveyance had been executed to him; notwithstanding which, that A., B. & C. could make a good title & give an effectual discharge for the purchase-money.

The testator has not said anything about the appointment of a new trustee being made by one deed; he merely says, "by any deed or writing," & in my opinion, it would have been good if it had been done by twenty deeds (SHADWELL, V.-C.).—*WARBURTON v. SANDYS* (1845), 14 Sim. 622; 14 L. J. Ch. 431; 5 L. T. O. S. 262; 9 Jur. 503; 60 E. R. 499.

*Annotations:—*Consd. *Weistead v. Colville* (1860), 28 Beav. 537. *Reid v. Bacon, Toovey v. Turner*, [1907] 1 Ch. 475; *Re Bayley-Worthington & Cohen's Contract*, [1908] 1 Ch. 26.

**1011. — Recital of appointment in deed transferring property.**—A settlement contained a proviso that in case either of the trustees should die or become unwilling to act in the trusts, it should be lawful for the acting trustees or trustee for the time being, or the exors. or administrators of any surviving trustee, to nominate any fit person to supply the place or places of the trustee or trustees respectively so dying or becoming unwilling to act. On the death of one trustee the survivor executed a deed, reciting that he was desirous of retiring from the trust, & that he had appointed another person to be a trustee in his place, & conveying the trust property to such new trustee:—*Held*: the surviving trustee had power to nominate a sole trustee to act in his place, & the appointment by recital was good.—*MILLER v. PRIDDON* (1852), 1 De G. M. & G. 335; 21 L. J. Ch. 421; 18 L. T. O. S. 323; 42 E. R. 581, L. J. J.

*Annotations:—*Distd. *A. G. v. Blackburn* (1853), 21 L. T. O. S. 261; *Stones v. Rowton* (1853), 17 Beav. 308.

**1012. — Recital of names of "present trustees" in deed to which donee a party.**—A will contained a power for the trustees or trustee thereof to appoint new trustees. The trust property comprised a renewable lease. After the death of testator a renewal of the lease was granted to four persons who had not been appointed trustees of the will, but who in the lease granted to them were described as "the present trustees" of the will. The surviving trustee & exor. of the will was a party to this deed, & the demise was expressed to be made by his direction:—*Held*: this statement in the renewed lease operated as an appointment of the four lessees to be trustees of the will.—*Re FARNELL'S SETTLED ESTATES* (1886), 33 Ch. D. 599; 35 W. R. 250.

(b) *When Appointment may be Made.*

**1013. Death of trustee—Before trust takes effect.**—Testator, after appointing three trustees

of his will, provided that if they or any of them, or any trustee or trustees to be appointed under that proviso, should die or be desirous to be discharged, or go to reside beyond sea, or neglect or refuse or become incapable to act, before the trusts should be performed, it should be lawful for the surviving, continuing or acting trustees or trustee for the time being or the last acting trustee, to nominate a new trustee or trustees; & that the trust property which should be or have been vested in the trustee or trustees so dying, desiring to be discharged, etc., & should then be subject to the trusts of the will, should be vested in the new trustee or trustees jointly with the surviving or continuing trustee or trustees, or solely, as the case might require. Two of the trustees died in testator's lifetime. *Qu.*: whether new trustees could be appointed under the power.—*WALSH v. GLADSTONE* (1844), 14 Sim. 2; 8 J. P. 70; 8 Jur. 51; 60 E. R. 256.

**1014. —**—*Testator empowered his wife, who was a cestui que trust under his will, during her life, & after her death, the then surviving or continuing trustee of his will, to appoint any new trustee or trustees, as often as any of his first or future trustees should die, etc. One of the trustees named in the will died before testator:—Held*: the power did not authorise the widow to appoint a new trustee in the place of deceased.—*WINTER v. RUDGE* (1847), 15 Sim. 596; 60 E. R. 751.

*Annotations:—*N.F. *Re Hadley, Ex p. Hadley* (1851), 5 De G. & Sm. 67. *Consd. Noble v. Meymott* (1851), 14 Beav. 471.

**1015. —**—*Testatrix gave real & personal property to trustees, with a proviso that, if the trustees thereby appointed or to be appointed should die or decline to act, it should be lawful for the then surviving or continuing trustee, or if there should be no surviving or continuing trustee then for the trustee so declining to act, by deed to substitute or appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying or declining to act. One of the two trustees died in the lifetime of testatrix, the other survived her, & by deed disclaimed the trusts, except the power of nominating other persons to be trustees; & by the same deed, he appointed two persons to be trustees in the place of the trustee who had died before testatrix, & of himself:—Held*: (1) the power had been properly executed; (2) this ct. has no power under Trustee Act, 1850 (c. 60), to appoint trustees, where there are trustees *de facto* acting as such.—*Re HADLEY, Ex p. HADLEY* (1851), 5 De G. & Sm. 67; 21 L. J. Ch. 109; 18 L. T. O. S. 118; 16 Jur. 98; 64 E. R. 1021.

*Annotations:—*As to (1) *Distd. Stones v. Rowton* (1853), 17 Beav. 308. *Appld. Nicholson v. Smith* (1857), 3 Jur. N. S. 313.

**1016. Trustee abroad—Meaning of "abroad"—Occasional visits to England.**—Under a will containing a settlement of real & personal estate the

2 Macph. (Ct. of Sess.) 1304; 36 Sc. Jur. 653.—*SCOT.*

**PART II. SECT. 2, SUB-SECT. 2.—B. (b).**

*e. Trustee abroad.*—*IFFLA v. BEANY* (1861), 1 W. & W. 110.—*AUS.*

*f. —*—*TRIPP v. MARTIN* (1862), 9 Gr. 20.—*CAN.*

*g. —*—*MALCOLM v. GOLDIE* (1896), 22 R. (Ct. of Sess.) 968; 32 Sc. L. R. 711; 3 S. L. T. 101.—*SCOT.*

*h. Trustee incapable—Meaning of "incapable"—Not bankruptcy.*—*Testator by his will appointed seven*

the other two had been consulted or that there were any special circumstances which could enable the others to act without them.—*KELLAND v. DOUGLAS* (1863), 2 Macph. (Ct. of Sess.) 150; 36 Sc. Jur. 58.—*SCOT.*

*b. Invalid appointment under instrument—Valid under statute—Retrospectively.*—*MOLACHLIN v. USBORNE, MAGEE v. USBORNE* (1884), 7 O. R. 297.—*CAN.*

*c. Power to surviving brothers & sisters of testator—Time for exercise of power.*—*BRADLEY v. SAUNDERS* (1906), Cout. 380.—*CAN.*

*d. When power exhausted.*—A mar-

riage contract contained a conveyance to certain trustees named, & to such other person or persons as the wife might hereafter nominate by a writing under her hand. The trustees refused to act. Three others were afterwards appointed, who also refused to act. All those nominated, with one exception, died.—*Held*: the power to nominate trustees had not been exhausted, & trustees appointed by a new deed were authorised to receive money conveyed to the marriage contract trustees. *Qu.*: whether such a power of nomination is capable of being exhausted by complete & effective exercise.—*Re WILSON* (1864),



trustee is appointed by the ct. in his place under Trustee Act, 1850 (c. 60), an order vesting the trust estate in the new & continuing trustees will, under sect. 10 of that Act, have the effect of severing the joint tenancy.—*Re WATTS'S SETTLEMENT* (1851), 9 Hare, 106; 20 L. J. Ch. 337; 17 L. T. O. S. 139; 68 E. R. 434; *sub nom. Re WATTS'S SETTLEMENT, Ex p. WATTS*, 15 Jur. 459.

*Annotations*.—As to (1) *Apld. Re Harrison's Trusts* (1852), 1 W. R. 58. As to (2) *N.F. Smith v. Smith* (1854), 3 Drew. 12.

**1026.** ————*Re BIGNOLD'S SETTLEMENT TRUSTS*, No. 1019, *ante*.

**1027. Trustee unwilling to act**—Meaning of "unwilling"—Residence abroad.—*Re HARRISON'S TRUSTS*, No. 1018, *ante*.

**1028. Trustee unable to act**—Meaning of "unable"—Residence abroad.—*Re HARRISON'S TRUSTS*, No. 1018, *ante*.

**1029. Trustee refusing or declining to act**—Meaning of "refusing or declining"—Trustee paying money into court.—A trustee who had paid money into ct. under Trustee Relief Act, 1847 (c. 96), held to have retired from his trust, & a new trustee held to have been duly appointed in his stead under a power for that purpose, to arise in the event of a trustee "refusing or declining to act in the trusts of the settlement."—*Re WILLIAMS'S SETTLEMENT* (1858), 4 K. & J. 87; 32 L. T. O. S. 9; 6 W. R. 218; 70 E. R. 37.

*Annotations*.—*Consd. Re Nettelfolds Trusts* (1888), 59 L. T. 315. *Reid. Thompson v. Tomkins* (1862), 2 Drew. & Sm. 8.

**Removal of trustees generally.**—*See* Sect. 9, subsect. 2, *post*.

#### (c) Control by Court.

**1030. Whether court will interfere**—Intention to exercise power corruptly.—*Re HODSON'S SETTLEMENT*, No. 1141, *post*.

**1031.** ————*Appointment pendente lite.*—An action was brought by a remainderman to obtain an injunction to restrain the tenant for life & the trustees of a settled estate containing coal mines from selling it in such a manner as would be prejudicial to the interests of the remaindermen. Pltfs. alleged that a sale at the present time would be disadvantageous, as the development of the minerals had only recently commenced. The will by which the estate was settled gave the trustees a power to sell at the request of the tenant for life; & Settled Land Act, 1882 (c. 38), had come into operation since the commencement of the suit. A new trustee, who consented to an immediate sale, had been appointed by pltfs. during the pendency of the suit without asking the consent of ct.:—*Held*: it was not here necessary for defts. to have obtained the consent of the ct. to their appointment of a new trustee *pendente lite*.—*THOMAS v. WILLIAMS* (1883), 24 Ch. D. 558; 52 L. J. Ch. 603; 49 L. T. 111; 31 W. R. 943.

*Annotation*.—*Mend. Re Ray's S. E.* (1884), 53 L. J. Ch. 205. *Re Llewellyn, Llewellyn v. Williams* (1887), 37 Ch. D. 317.

**1032.** ————*Appointment undesirable.*—(1) When a power of appointing new trustees authorises the continuing trustee or trustees to appoint a new trustee or trustees in the place of a trustee or trustees becoming unwilling to act, an appointment by a sole continuing trustee, in the place of a trustee who desires to retire, is valid; it is not necessary that the retiring trustee should join in making the appointment.

(2) On the retirement of one of two trustees of a will, the continuing trustee, who was the solr. to the trustees, appointed his son, who was his partner in his business, to be a new trustee. The trusts of the will were being administered by the ct.:—*Held*: without any reference to the personal

fitness of the son, by reason of his position the appointment was one which the ct. ought not to approve, though it would not have been invalid if the ct. had not been administering the trusts.

(3) According to the ordinary rule of the ct., the solr. of a trustee is not a person who should be appointed a trustee (PEARSON, J.).—*Re NORRIS, ALLEN v. NORRIS* (1884), 27 Ch. D. 333; 53 L. J. Ch. 913; 51 L. T. 593; 32 W. R. 955.

*Annotations*.—As to (1) *Consd. Re Coates to Parsons* (1886), 34 Ch. D. 370. As to (2) *Consd. Re Stamford, Payne v. Stamford*, [1896] 1 Ch. 285.

**1033.** ————*The donee of the power of appointing new trustees of a will appointed the husband of a tenant for life entitled for her separate use without power of anticipation to be a trustee of the will together with a continuing trustee:—Held*: the appointment, if undesirable, was not invalid.—*Re COODE, COODE v. FOSTER* (1913), 108 L. T. 94.

**1034.** ————*Refusal by sole surviving trustee to exercise power—Instrument contemplating possibility of sole trustee.*—A sole continuing trustee under a will which contained a power to appoint new trustees so worded as to contemplate the possibility of there being a sole trustee:—*Held*: justified in refusing to appoint a co-trustee with himself although required to do so by a *cestui que trust*.—*PEACOCK v. COLLING* (1885), 54 L. J. Ch. 743; 53 L. T. 620; 33 W. R. 528, C. A.

**1035.** ————*Administration action pending.*—The ct. controls a trustee in the exercise of a power to appoint new trustees, though given in very large words.—*WEBB v. SHAFESBURY (EARL)*, *SHAFESBURY (EARL) v. ARROWSMITH* (1802), 7 Ves. 480; 32 E. R. 194, L. C.

*Annotations*.—*Consd. Cafe v. Bent* (1813), 3 Hare, 245; *Re Skeats's Settlement, Skeats v. Evans* (1889), 42 Ch. D. 522. *Reid. Bethell v. Abraham* (1873), L. R. 17 Eq. 24.

**1036.** ————*The institution of a suit against trustees, for the administration of the trust estate under the direction of the ct., does not preclude the exercise of the discretion given to the trustees by the will of testator, as to the appointment of new trustees or the management of the trust; but the trustees are required, after the institution of the suit, to act under the control of the ct.*—*CAFE v. BENT* (1843), 3 Hare, 245; 13 L. J. Ch. 169; 8 Jur. 141; 67 E. R. 374; *subsequent proceedings* (1845), 5 Hare, 24.

*Annotation*.—*Reid. Costobadie v. Costobadie* (1847), 16 L. J. Ch. 259.

**1037.** ————*The appointment of a new trustee under a power, pending a suit for administration, is not necessarily invalid.*—*GRAHAM v. GRAHAM* (1853), 16 Beav. 550; 22 L. J. Ch. 937; 21 L. T. O. S. 30; 17 Jur. 569; 51 E. R. 892.

**1038.** ————*Reference to master—Consideration of wishes of donees.*—Upon a reference to the master to appoint new trustees in a case where the power of appointment is vested by the author of the trust in a party to the cause the master will have regard to such power in selecting the trustees from the persons proposed by that party & by others, but the master is not bound to approve of the persons nominated by such party in preference to other persons whom he may consider more eligible; & his decision is not open to exception merely because he has not chosen the persons nominated by the party to whom the power was given.—*MIDDLETON v. REAY* (1849), 7 Hare, 106; 18 L. J. Ch. 153; 13 Jur. 116; 68 E. R. 43. *Annotations*.—*Distd. Re Gadd, Eastwood v. Clark* (1883), 23 Ch. D. 134. *Consd. Re Sales, Sales v. Sales* (1911), 55 Sol. Jo. 838.

**1039.** ————*An order directing a reference to chambers to appoint new trustees*

**Sect. 2.—Appointment of trustees: Sub-sect. 2, B.**  
**(c) & (d) i., ii., iii. & iv.]**

of a will suspends the power given by the will to appoint new trustees, but it does not disqualify the donee of the power from nominating fit & proper persons to be new trustees, & in the absence of misconduct the ct. will appoint the persons nominated by the donee of the power in preference to those nominated by other parties.—*Re SALES, SALES v. SALES* (1911), 55 Sol. Jo. 838.

**1040. — After decree in administration action—Court must be satisfied as to fitness.]**—“Even after a decree in a suit for administering the trusts has been made they [i.e. persons having power to appoint new trustees] may still exercise the power, but the ct. will see that they do not appoint improper persons (JESSEL, M.R.).—*TEMPEST v. CAMOYS (LORD)* (1882), 21 Ch. D. 571; 51 L. J. Ch. 785; 48 L. T. 13; 31 W. R. 326, C. A.

**Annotations:—***Consd. Re Gadd, Eastwood v. Clark* (1883), 23 Ch. D. 134. *Apld. Re Hall, Hall v. Hall* (1885), 54 L. J. Ch. 527. *Consd. Re Higginbottom*, [1892] 3 Ch. 132. *Reid. Re Lofthouse* (1885), 29 Ch. D. 921; *Re Courtier, Coles v. Courtier*, *Courtier v. Coles* (1886), 54 Ch. D. 136; *Re Burrage, Burningham v. Burrage* (1890), 62 L. T. 752; *Re Bryant, Bryant v. Hickley*, [1894] 1 Ch. 324; *Re Charteris, Charteris v. Biddulph*, [1917] 2 Ch. 379. *Mentd. Re Radnor's Will Trusts* (1890), 45 Ch. D. 402; *Re Poor's Lands Charity, Bethnal-Green* (1891), 7 T. L. R. 705.

**1041. — — — —.]**—A decree for the administration of the trusts of a will directed “that some proper person be appointed” a trustee of the will in the place of a deceased trustee. The power of appointing new trustees was given by the will to the surviving trustee, who was deft. Plff. took out a summons to have A. B. appointed trustee, & deft. a summons to have C. D. appointed. The summonses were adjourned into ct.:—*Held*: the decree did not take away from deft. the power of appointing new trustees, though after decree he could only exercise it subject to the supervision of the ct.; if he nominated a fit & proper person such person must be appointed, & the ct. would not appoint some one else on the ground that such other person was in the opinion of the ct. more eligible, & if he nominated a person whom the ct. did not approve the ct. would not itself make the choice, but would call on him to make a fresh nomination.—*Re GADD, EASTWOOD v. CLARK* (1883), 23 Ch. D. 134; 52 L. J. Ch. 396; 48 L. T. 395; 31 W. R. 417, C. A.

**Annotations:—***Consd. Thomas v. Williams* (1883), 24 Ch. D. 558. *Reid. Re Sales, Sales v. Sales* (1911), 55 Sol. Jo. 838. *Reid. Re Norris, Allen v. Norris* (1884), 27 Ch. D. 333; *Re Hall, Hall v. Hall* (1885), 54 L. J. Ch. 527; *Re Lofthouse* (1885), 29 Ch. D. 921; *Re Higginbottom*, [1892] 3 Ch. 132; *Re Imprisoned Debtor & Discharge Society's Act, 1856, Re Soc. for Discharge & Relief of Persons Imprisoned for Small Debts throughout England & Wales* (1912), 56 Sol. Jo. 596. *Mentd. Re Brown, Brown v. Brown* (1885), 29 Ch. D. 889.

**1042. — — — —.]—Re NORRIS, ALLEN v. NORRIS, No. 1032, ante.**

**PART II. SECT. 2, SUB-SECT. 2.—**  
**B. (c).**

**1040 i. Whether court will interfere—After decree in administration action—Court must be satisfied as to fitness.]**—Where a suit has been instituted for the administration of a trust & a decree has been made, that attracts the jurisdiction of the ct. & the trustee cannot afterwards exercise the power given to him by the settlor to appoint new trustees without the concurrent sanction of the ct. His power in such a case is merely one of nomination to be confirmed by the ct. on consideration of the fitness of the nominee to be a trustee.—*AMRITA BIBER v. KANHAI LAL AGARWALA* (1905), 1 L. R. 32 Cal. 448; 9 C. W. N.

**239.—IND.**

**n. — Donee of power appointing unfit person.]—KENNEDY v. TURNLEY** (1844), Drury temp. Sug. 415; 6 L. Eq. R. 399.—*IR.*

**o. — Representatives of surviving trustee failing to appear—Power given to guardian of infant cestui que trust.]**—A marriage settlement of personal estate contained a power for the surviving or continuing trustee, or his representative, to appoint a new trustee. The exors. & legatees of the last surviving trustee not appearing, the ct. gave liberty to the guardian of the infant cestui que trust to apply for & obtain letters of administration of the goods of the last surviving trustee, without his will annexed,

**1043. — — — —.]**—After judgment in an action for the administration of the trusts of a will, the person having by the terms of the will or by statute the power of appointing new trustees retains such power so far as it does not conflict with the order which has been made, but subject to the control of the ct.; & the proper course is for such person, before exercising the power to submit the name of the proposed new trustee to the chief clerk in chambers for approval.—*Re HALL, HALL v. HALL* (1885), 54 L. J. Ch. 527; 51 L. T. 901; 33 W. R. 608.

**Annotation:—***Distd. Re Cotter, Jennings v. Nye*, [1915] 1 Ch. 307.

**1044. — — — — Partial administration.]—Re COTTER, JENNINGS v. NYE, No. 1089, post.**

**1045. Instrument providing for approval of Lord Chancellor.]**—Appointment of new trustees to be made “with the consent of the Lord Chancellor.” The ct. disclaiming the liability, made the order with a declaration that it was to be drawn into a precedent.—*Re NORTON'S WILL* (1852), 19 L. T. O. S. 238, L. C.

**(d) Who may Appoint.**  
**i. Beneficiaries.**

**1046. Power given to tenant for life—Exercise after alienation of interest.]**—A tenant for life with power to appoint new trustees, parted with the whole of his interest in the settled property. He afterwards appointed two improper persons to be trustees. Upon a bill to remove such trustees & also to administer the trusts & to make the tenant for life pay the costs. On demurrer by the tenant for life:—*Held*: he had properly been made a party.

I am of opinion that, if he claims . . . a right to appoint new trustees this is a claim which must be determined by the ct. (*ROMILLY, M.R.*).—*RAIKES v. RAIKES* (1863), 32 Beav. 403; 55 E. R. 158.

**1047. — — — —.]**—A power to appoint new trustees may be exercised by a tenant for life, after alienating his interest. By a settlement, property partly real & partly personal was conveyed to trustees upon trust to provide an annuity for A. a widow, for life, & subject thereto for B., her son, absolutely. The settlement provided that B., during his life, & after his death the trustees or trustee for the time being, or the exors. or administrators of the last acting trustee, should have power to appoint new trustees if necessary. B. mortgaged his whole interest under the settlement, & the real estate (subject to A.'s annuity) was sold by the mtgees. to C. The personal estate was not sold by the mtgees.:—*Held*: B. could still exercise the power to appoint new trustees, without the consent of C.—*HARDAKER v. MOORHOUSE* (1884), 26 Ch. D. 417; 53 L. J. Ch. 713; 50 L. T. 554; 32 W. R. 638.

**Annotation:—***Mentd. Re Bedingfield & Herring's Contract*, [1893] 2 Ch. 382.

limited to the appointment of the guardian & one other person as new trustees of the settlement, & to the obtaining a transfer of the trust funds.—*Re JACKSON* (1881), 7 L. R. Ir. 318.—*IR.*

**p. — Power to appoint with consent of spouses—Insanity of wife.]**—A marriage contract contained a clause empowering the trustees to appoint new trustees with the consent of the spouses. The wife having become insane, the ct., in the exercise of its *nobile officium*, authorised the trustees to assume new trustees without her consent.—*Re ADAMSON'S TRUSTEES*, [1917] B. C. 400; 54 Sc. L. R. 513; [1917] 1 S. L. R. 300.—**SCOT.**

**1048. Power to beneficiary with concurrence of surviving trustee—Exercise after death of trustee.]**—A provision, in case of the death of a trustee, for the substitution of another, & a conveyance by the survivor so that he & the new trustee should be jointly interested in the trust, satisfied by the substitution of two trustees after the death of both the former & a conveyance by the heir of the survivor.—*MORRIS v. PRESTON* (1802), 7 Ves. 547; 32 E. R. 220, L. C.

### ii. Surviving Trustee.

**1049. When power may be exercised—Appointment in hands of corporation—Corporation subsequently dissolved.]**—Testator by his will appointed three trustees & requested that the Council of University College, London, should exercise the power of appointing a new trustee in case of a vacancy. After testator's death all the rights, powers & duties of the corp'n. of the college were by a private Act transferred to the University of London & the corp'n. of the college was dissolved. Two of the trustees having died:—*Held*: the power of appointing new trustees was not transferred to the University of London, but was vested in the surviving trustee.—*Re SPENCER, DUNCAN v. ROYAL GEOLOGICAL SOCIETY* (1916), 33 T. L. R. 16.

**1050. — Disclaimer by one trustee—Whether remaining trustee surviving.]**—Testator appointed A., B. & C. exors. & trustees of his will, providing that, if either of them, or any succeeding trustee or trustees should die, or refuse or neglect, or become incapable to act in the trust, it should be lawful to & for the survivor of them, A., B. & C., & such new trustee or trustees to be nominated in their or either of their stead, to appoint a new trustee or new trustees instead of A., B. & C., or either of them, or any future trustee or trustees so dying, or desiring to be discharged, or refusing or neglecting, or becoming incapable to act as aforesaid. A. having disclaimed the trust, & B. having died, C. alone, though not the survivor of A., B. & C., appointed new trustees under the power:—*Held*: the new trustees were well appointed.

If the three trustees had not been mentioned by name in the introductory part of the clause, it would have been clear to demonstration that the power was annexed to the office of trustee, in which case the disclaimer of one would have vested the office of trustee in the remaining two, & the power would in fact have been exercised by the surviving trustee (*WIGRAM, V.-C.*).—*CAFE v. BENT* (1845), 5 Hare, 24; 67 E. R. 812; *sub nom. CAPE v. BENT*, 9 Jur. 653

*Annotations*:—*Mentd. Morgan v. Morgan* (1851), 14 Beav. 72; *Re Nicholson, Eade v. Nicholson*, [1909] 2 Ch. 111.

**1051. — Power given to three surviving trustees—Appointment by two surviving trustees.]**—W., by his will, gave certain estates for the purposes of a charity, & appointed six trustees, with a proviso that, as often as that number should be reduced down to three by death, the three survivors should immediately afterwards appoint three other persons as trustees, conjointly with the three surviving ones; so that there should always be three trustees at least for the house, hospital, & premises. The trustees having been reduced to three, one of whom died, the remaining two appointed four more, & one of these having died, & two others desiring to be discharged. Upon a

petition to appoint new trustees:—*Held*: the appointment of the four trustees by the two surviving ones was valid.—*Re GOOSNAGH'S HOSPITAL* (1849), 13 L. T. O. S. 87.

**1052. — Surviving trustee residing abroad.]**—*O'REILLY v. ALDERSON*, No. 1009, *ante*.

**1053. — Surviving trustee declining to act.]**—*Re HADLEY, Ex p. HADLEY*, No. 1015, *ante*.

**1054. — —.]**—*NICHOLSON v. WRIGHT*, No. 1104, *post*.

**1055. — Sole surviving trustee desirous of retiring.]**—*MILLER v. PRIDDON*, No. 1011, *ante*.

**1056. — —.]**—*CAMOYS (LORD) v. BEST*, No. 1065, *post*.

### iii. Continuing Trustee.

**1057. Who are continuing trustees—Whether retiring trustee.]**—*STONES v. ROWTON*, No. 1064, *post*.

**1058. — —.]**—*CAMOYS (LORD) v. BEST*, No. 1065, *post*.

**1059. — —.]**—*TRAVIS v. ILLINGWORTH*, No. 1066, *post*.

**1060. — —.]**—Trustee who has made up his mind to retire may be a "continuing" trustee until he has executed a deed appointing new trustees. By a settlement in 1867, Lord Cranworth's Act, having been passed in 1860, it was declared that it should be lawful for "the surviving or continuing trustees" in the event of any trustees declining to act to discharge such trustees & to appoint any new trustees; & it was provided that nothing should authorise the discharge of the only continuing trustees without the substitution of others. Of three original trustees one having died, the other two by deed in 1874 after reciting that they themselves "declined to act" & "desired to be discharged" & had "determined to appoint" three other persons to be trustees "in exercise of the power for this purpose vested in them" by the settlement appointed the three persons "to be trustees in the place of" themselves & deceased trustee respectively:—*Held*: the appointment was good.—*Re GLENNY & HARTLEY* (1884), 25 Ch. D. 611; 53 L. J. Ch. 417; 50 L. T. 79; 32 W. R. 457.

*Annotations*:—*N.F. Re Norris, Allen v. Norris* (1884), 27 Ch. D. 333; *Re Coates to Parsons* (1886), 34 Ch. D. 370.

**1061. Power given to "continuing trustee"—On retirement of another—Retiring trustee need not concur.]**—*Re NORRIS, ALLEN v. NORRIS*, No. 1032, *ante*.

**1062. — — —.]**—*Re COATES TO PARSONS*, No. 1119, *post*.

**1063. — Three continuing trustees—One of unsound mind—Exercise of power by others.]**—A power, in case any trustee or trustees should die, or become unwilling or unable to act, for the trustees for the time being, whether continuing or declining, to appoint new trustees:—*Held*: well exercised by two trustees out of three, the third being of unsound mind.—*Re EAST* (1873), 42 L. J. Ch. 480, L. J. J.

**For purpose of Settled Land Acts.]**—*See SETTLEMENTS*, Vol. XI., p. 782, No. 3130.

### iv. Retiring Trustee.

**1064. Power given to "surviving or continuing" trustees—Whether retiring trustee can exercise.]**—Two retiring trustees held not authorised to appoint two new trustees, under a power given to surviving or continuing trustees.

## PART II. SECT. 2, SUB-SECT. 2.— B. (d) ii.

*g. When power may be exercised.]*  
—*STEVENSON v. EWING* (1849), 12 Durl. (Ch. of Sess.) 340; 22 So. Jur. 83.—*SCOT*.

## PART II. SECT. 2, SUB-SECT. 2.— B. (d) iv.

*r. Appointment of trustee company with usual statutory powers.]*—Where the instrument creating a trust appoints two or more trustees who

accept the trust, such trustees may nevertheless retire from the trust & appoint a trustee co., with the usual statutory powers, to be sole trustee in place of themselves.—*Re RITCHIE, MURRAY v. RITCHIE* (1902), 28 V. L. R. 255.—*AUS*.

*Sect. 2.—Appointment of trustees: Sub-sect. 2, B. (d) iv., v., vi. & vii., & (e).]*

Two trustees were originally appointed by a settlement, which contained a power that if the trustees or either of them should be desirous of being discharged, the tenant for life, " & after his decease, the surviving or continuing trustees or trustee " might appoint any other person or persons to be a trustee or trustees, in the stead of the trustee or trustees so desiring to be discharged:—*Held*: this did not authorise the two original trustees, after the death of the tenant for life, to retire together & appoint two new trustees in their stead.—*STONES v. ROWTON* (1853), 17 Beav. 308; 1 Eq. Rep. 427; 22 L. J. Ch. 975; 22 L. T. O. S. 9; 17 Jur. 750; 1 W. R. 499; 51 E. R. 1052.

*Annotations:—Distd. Camoys v. Best* (1854), 19 Beav. 414. *Refd. Re Norris, Allen v. Norris* (1884), 27 Ch. D. 333.

1065. ————]—A power " for the surviving or continuing or other trustee or trustees " to appoint new trustees, in the place of a trustee or trustees dying or desiring to be discharged or refusing or declining to act:—*Held*: to authorise the appointment, by the survivor of four trustees, who was desirous of being discharged, of four new trustees.—*CAMOYS (LORD) v. BEST* (1854), 19 Beav. 414; 52 E. R. 410.

1066. ————]—Where testator appointed three trustees, & empowered the surviving or continuing trustee or trustees his exors., administrators or assigns, upon the trustees appointed by his will declining or becoming incapable to act, to appoint new trustees; & two of the trustees had died, & the third, by deed, reciting that he now declined to act, appointed two new trustees:—*Held*: the contingency contemplated by the power had arisen; but the appointment was invalid, the retiring trustee not being a surviving or continuing trustee within the meaning of the power.—*TRAVIS v. ILLINGWORTH* (1865), 2 Drew. & Sm. 344; 5 New Rep. 427; 34 L. J. Ch. 665; 12 L. T. 135; 11 Jur. N. S. 215; 13 W. R. 489; 62 E. R. 653.

*Annotations:—N.F. Re Glenny & Hartley* (1884), 25 Ch. D. 611. *Fold. Re Norris, Allen v. Norris* (1884), 27 Ch. D. 333. *Consd. Re Coates to Parsons* (1886), 34 Ch. D. 370. *Refd. Farnum v. British Guiana Administrator-General, Williams v. British Guiana Administrator-General* (1889), 14 App. Cas. 651.

1067. ————]—*Re GLENNY & HARTLEY*, No. 1060, *ante*.

1068. ————]—*Or retiring trustee.*—By a marriage settlement a power was given to the husband & wife, & after the decease of the survivor of them, for the surviving & continuing or other trustees, or for the retiring trustee, in case the trustees or either of them should die or be desirous to be discharged, etc., to appoint any other person or persons to be a trustee or trustees, in the place or stead of the trustee so dying, etc., & that the trust estate should be thereupon conveyed & assigned in such manner as that the same might be vested, etc., as therein mentioned, " & in case there should be no former continuing trustee, then in such new trustee or trustees only," upon & for the trusts therein declared. Of the four original trustees, two died; & two being desirous to retire, three new trustees were nominated, & the estate was assigned to them. Of these one became desirous to retire, & a new third trustee was nominated in his place, & the trust-estate was assigned to the new trustee, in trust for the two continuing trustees & himself; thus making three trustees in place of the original four:—*Held*: upon the construction of the power, the appointment of the three trustees was

a valid appointment; & the whole estate being vested in them they could give a valid discharge.—*EMMET v. CLARK* (1861), 3 Giff. 32; 30 L. J. Ch. 472; 4 L. T. 319; 7 Jur. N. S. 404; 9 W. R. 515; 66 E. R. 310.

#### v. Personal Representatives.

*See Administration of Estates Act, 1925 (c. 23), s. 1 (2); Trustee Act, 1925 (c. 19), s. 18 (2).*

1069. *Representatives of last surviving trustee.*—Who are the " trustees & trustee " who are to appoint if both the trustees die? Some are; & I cannot find any one except the heir of the survivor, or the person or persons having the personal estate (*JESSEL, M.R.*).—*Re MORTON & HALLETT* (1880), 15 Ch. D. 143; 49 L. J. Ch. 559; 42 L. T. 602; 28 W. R. 895; *on appeal*, 15 Ch. D. 147, C. A.

*Annotations:—Apld. Re Cunningham & Frayling*, [1891] 2 Ch. 567. *Mentd. Re Pixton & Tong's Contract* (1897), 46 W. R. 187; *Re Ruunney & Smith*, [1897] 2 Ch. 351; *Re Crunden & Meux's Contract*, [1909] 1 Ch. 690.

1070. ————]—*Provision for appointment by surviving trustee—Or executors, administrators & assigns.*—*CHAMBRE v. BARNABUS* (1850), 15 L. T. O. S. 341.

1071. ————]—*Appointment by two surviving executors.*—Testator devised & bequeathed to the trustee of his will his real estate, & the residue of his personal estate upon trust for sale & conversion, & " to pay out of the income thereof or out of the income of any real & leasehold estates until the same shall be sold " three annuities, " & subject to the annuities," testator gave his residuary trust estate to his brother with a gift " subject to the annuities " to the issue of his brother in the event of his death in testator's lifetime. Testator declared that the power of appointing new trustees should be vested in the competent trustee or trustees for the time being, if any, or, if none, in the acting exors. or exor. for the time being, or the administrators or administrator for the time being of the last surviving trustee. The trustee of the will died shortly after testator, having by his will appointed three exors. who acted as trustees of the will of testator. The income of testator's estate having become insufficient to pay the annuities in full, & one of the three exors. having died:—*Held*: in the events that had happened the exors. of the sole trustee of testator's will were trustees of that will, & the two surviving exors. were competent to exercise the power of appointing a new trustee in the place of deceased exor.—*Re HOWARTH, HOWARTH v. MAKINSON* (1909) as reported in 100 L. T. 263; *on appeal*, [1909] 2 Ch. 19, C. A.

*Annotations:—Mentd. Re Boulcott's Settltm.*, *Wood v. Boulcott* (1911), 104 L. T. 205; *Re Watkin's Settltm.*, *Wills v. Spence*, [1911] 1 Ch. 1; *Re Young, Brown v. Hodgson*, [1912] 2 Ch. 479; *Re Jordison, Itaine v. Jordison*, [1922] 1 Ch. 440.

1072. ————]—*Acting in trust.*—" Trustees for time being."—By an indenture dated Nov. 23, 1836, freehold hereditaments were conveyed to D. & P. upon trust for sale, & in the event of the death of any of the trustees thereby appointed or to be appointed as thereafter mentioned, a power of appointing new trustees was limited to certain named persons, & after the decease of the survivor of them, to " the acting trustees or trustee for the time being, or the exors. or administrators of the last acting trustee." D. died in 1849. P. died in 1855 intestate as to trust estates, leaving T. his heir-at-law. T. died intestate in 1857, leaving S. his heir-at-law. S. died intestate in 1876, leaving



three daughters his co-heiresses-at-law. None of the persons named in the deed exercised the power of appointing new trustees, & the last survivor of them died in 1889. By a deed dated June 7, 1890, the three co-heiresses of S. appointed new trustees, who contracted to sell the property under the trust for sale. The co-heiresses did not otherwise act as trustees of the indenture of 1836: On a vendor's summons under Vendor & Purchaser Act, 1874 (c. 78):—*Held*: (1) S. having active duties to perform was not a "bare trustee" within Land Transfer Act, 1875 (c. 87), s. 48; (2) the legal estate developed upon the co-heiresses; they were acting trustees for the time being, & consequently their appointment of new trustees was a valid exercise of the power.

(3) There are conflicting opinions of JESSEL, M.R., & HALL, V.-C., as to the meaning of the term "bare trustee" . . . I think the view of HALL, V.-C., is to be preferred. I understand him to say that a trustee who has active duties to perform, although he has no beneficial interest in the trust property, is not a "bare trustee" (STIRLING, J.).—*Re CUNNINGHAM & FRAYLING*, [1891] 2 Ch. 507; 60 L. J. Ch. 591; 64 L. T. 558; 39 W. R. 469.

*Annotation*.—As to (3) *Refd. Re Blandy Jenkins' Estate*, Blandy Jenkins v. Walker, [1917] 1 Ch. 46.

**1073.** — *Overriding power in hands of donee.*—*Re ROUTLEDGE'S TRUSTS*, ROUTLEDGE v. SAUL, No. 1417, *post*.

**1074.** — *Executors not proving—Appointment by sole proving executor—During life of others.*—*Re BOUCHERETT, BARNE v. ERSKINE*, No. 1118, *post*.

**1075.** *Representatives of donee of power—Three executors appointed by will—Appointment by two only.*—A power contained in a settlement of real estate on trust for sale enabled one of the parties, his exors., administrators & assigns, on a vacancy to appoint a new trustee. The party so empowered died, having by his will named three exors., one of whom renounced probate; & the vacancy in the trust having occurred, it was held that the two acting exors. had power to appoint the new trustee.—*GRANVILLE (EARL) v. McNEILE* (1849), 7 Hare, 156; 18 L. J. Ch. 164; 13 Jur. 252; 68 E. R. 64.

#### vi. Acting Trustee.

**1076.** *Trustees declining to act.*—A. by his will bequeathed to R. S. & R. L. R. a sum of money upon trust; & to M. S., R. S., & G. A. D., certain personal property upon trust; & then devised his real property to R. S. & G. A. D., also upon trust; & then directed that if either of his said trustees, the said R. S. & R. L. R. so far as applied to the trusts reposed in them respectively, or the said M. S., R. S., & G. A. D., so far as applied to the trusts reposed in them respectively as aforesaid, should decline to act, etc., it should be lawful for the survivor of the trustees so acting in the trusts wherein such vacancy should happen, or the exors. or administrators of the last surviving trustee, to appoint other trustees:—*Held*: this power was not well executed by the two trustees, both of whom had wholly declined to act in the trust.—*SHARP v. SHARP* (1819), 2 B. & Ald. 405; 106 E. R. 414.

*Annotations*.—*Distd. Re Hadley* (1851), 5 De G. & Sm. 67. *Refd. Brouell v. Reid* (1842), 6 Jur. 530; *Re Tylor's Trust* (1851), 15 Jur. 1120.

**1077.** *Trustee of unsound mind—Appointment by remaining trustees.*—*Re EAST*, No. 1063, *ante*.

*See, generally*, Sub-sect. 4, B. (d) v., *ante*.

#### vii. Committee of Lunatic.

*See LUNATICS*, Vol. XXXIII., p. 226, Nos. 1360–1364.

#### (e) Who may be Appointed.

*See, generally*, Sub-sect. 1, *ante*.

**1078.** *Persons contemplated by instrument—As construed by court.*—Testator devised real & personal estate, on certain trusts, which, as the ct. considered, testator intended to be performed by his trustees named, & the survivors & survivor, & by the heirs & assigns, or by the exors. or administrators, of the survivor. The will contained no power to appoint new trustees. The surviving trustee devised & bequeathed the trust estates & powers to A., B., & C., upon the trusts of the first will. *Held*: this devise & the appointment of A., B. & C. as trustees, were valid.—*TITLEY v. WOLSTENHOLME* (1844), 7 Beav. 425; 13 L. J. Ch. 410; 3 L. T. O. S. 279; 49 E. R. 1130.

*Annotations*.—*Consd. Macdonald v. Walker* (1851), 14 Beav. 556. *Apld. Hall v. May* (1857), 3 K. & J. 585. *Consd. Re Morton & Hallett* (1880), 15 Ch. D. 143; *Osborne v. Rowlett* (1880), 13 Ch. D. 774; *Re Waidanis, Rivers v. Waidanis*, [1908] 1 Ch. 123. *Distd. Re Crundon & Meux's Contract*, [1909] 1 Ch. 690. *Refd. Ockleston v. Heap* (1847), 1 De G. & Sm. 640; *Stevens v. Austen* (1861), 3 E. & B. 685. *Mentd. Saloway v. Strawbridge* (1855), 1 K. & J. 371.

**1079.** *Person appointed trustee by will—Appointment revoked by codicil.*—Testator by his will appointed S. & C. trustees of certain property therein comprised, which appointment he afterwards revoked by codicil, substituting H. & B. in their room. The will contained the ordinary clauses authorising the appointment by the continuing trustees or trustee of a new trustee or new trustees in the place of any dying or desiring to be discharged. Shortly after the death of testator, C., one of the excluded trustees, paid £75 to H. upon the understanding that H. should retire, & that he, C., should be appointed a new trustee in his place. This arrangement was assumed to be carried into effect by indenture made between H., B., & C., in which the pecuniary consideration was was disclosed:—*Held*: this attempted execution of the power of appointment was fraudulent & void. The deed was directed to be cancelled, & the sum of £75 to be paid over by H. to the *cestui que trust*.—*SUGDEN v. CROSSLAND* (1856), 3 Sm. & G. 192; 25 L. J. Ch. 563; 26 L. T. O. S. 307; 2 Jur. N. S. 318; 4 W. R. 343; 65 E. R. 620.

*Annotation*.—*Refd. Re Thorpe, Vipont v. Radcliffe*, [1891] 2 Ch. 360.

**1080.** *Tenant for life.*—Testator devised his real estate to trustees in trust for his wife for life, with remainder to F. for life, with remainders over, & with a power of sale, at the discretion of the trustees or trustee for the time being, & with the usual power for the surviving or acting trustee or trustees, with the consent of the tenant for life, to appoint new trustees. The sole acting trustee appointed testator's widow & F. new trustees jointly with himself. F. being sole surviving trustee contracted for the sale of part of the property:—*Held*: the power to appoint new trustees had been well exercised, there being nothing in the will to prevent the appointment of a tenant for life as trustee.—*FORSTER v. ABRAHAM* (1874), L. R. 17 Eq. 351; 43 L. J. Ch. 199; 22 W. R. 386.

*Annotations*.—*Expld. Re Kemp's S. E.* (1883), 24 Ch. D. 485. *Refd. Re Stamford, Payne v. Stamford*, (1896) 1 Ch. 288; *Montefiore v. Huddell* (No. 2) (1903), 73 L. J. Ch. 13. *Mentd. Hickley v. Hickley* (1876), 2 Ch. D. 190.

**1081.** — *Also donee of power.*—*TEMPEST v. CAMOYS (LORD)*, No. 1083, *post*.

**1082.** *Solicitors in partnership.*—*Re NORRIS, ALLEN v. NORRIS*, No. 1032, *ante*.



*Sect. 2.—Appointment of trustees: Sub-sect. 2, B. (e) & (f).]*

**1083. Donee of power.]**—On a petition for the appointment of a new trustee of a will in substitution for one who had died, the ct., declining to lay down any hard and fast rule that under no circumstances will a *cestui que trust* & one of the donees of a power to appoint new trustees be appointed as trustee, directed the appointment as trustee of one of several persons beneficially interested in the estate of testator, who had nominated as trustees of his will persons to whom he had given beneficial interests, & on their death or retirement had empowered the persons beneficially entitled for the time being "to appoint one or more persons to supply the vacancy."

I certainly do not desire to say anything which would one way or other affect the question of whether the donee of a power, or as in the case I put some time ago a sole tenant for life, could appoint himself a trustee, & whether that would be a valid appointment. There is no limitation, as I here said, in the language of this power, the words being "one or more persons" without any limitation. There is nothing to show in the terms of testator's will that it is to be some persons other than the donees of the power (*CHITTY, J.*).—*TEMPEST v. CAMOYS (LORD)* (1888), 58 L. T. 221; 52 J. P. 532.

*Annotation:—Apld. Montefiore v. Guedalla, [1903] 2 Ch. 723.*

**1084. —.]**—By a marriage settlement property belonging to the wife was settled on trusts in favour of the wife, her children, appointees, & next of kin, & if any trustee should die, or go to reside abroad, or desire to retire from, or refuse or become incapable to act in, the trusts, the husband & wife, or the survivor, & after the decease of such survivor, the continuing trustees or trustee, or, if no continuing trustee, the retiring or refusing trustees or trustee, or the exors., or administrators of the last acting trustee, were empowered to appoint any "other" person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, or going to reside abroad, or desiring to retire, or refusing, or becoming incapable, to act. The husband & wife, in exercise of the power, purported to appoint the husband & another person to be trustees in the place of retiring trustees. Upon a summons raising the question whether the retiring trustees might transfer the trust property to the persons so appointed:—*Held*: (1) a power of appointing new trustees being fiduciary, the donee of such a power cannot appoint himself; (2) the terms of the power required that the trustee or trustees to be appointed should be some person or persons "other" than the person or persons making the appointment, therefore, upon both these grounds the appointment was invalid.—*Re SKEATS' SETTLEMENT, SKEATS v. EVANS* (1889), 42 Ch. D. 522; 58 L. J. Ch. 656; 61 L. T. 500; *sub nom. SKEATS v. ALLEN*, 37 W. R. 778.

*Annotations:—As to (1) Apld. Re Newen, Newen v. Barnes, [1894] 2 Ch. 297. Consd. Re Shortridge, [1895] 1 Ch. 278. Expld. Montefiore v. Guedalla, [1903] 2 Ch. 723. Distd. Re Cotter, Jennings v. Nye (1914), 84 L. J. Ch. 337. Refd. Re A., [1904] 2 Ch. 328; Re Sampson, Sampson v. Sampson, [1906] 1 Ch. 435.*

**1085. —.]**—The donee of a power of appointing new trustees cannot appoint himself either

solely or jointly with other trustees.—*Re NEWEN, NEWEN v. BARNES*, [1894] 2 Ch. 297; 63 L. J. Ch. 763; 70 L. T. 653; 58 J. P. 767; 43 W. R. 58; 8 R. 309.

*Annotations:—Expld. Montefiore v. Guedalla, [1903] 2 Ch. 723. Consd. Re Sampson, Sampson v. Sampson, [1906] 1 Ch. 435. Mentd. Re Hunt, Pollard v. Geake (1900), 44 Sol. Jo. 314; Re Stamford & Warrington, Payne v. Grey, [1925] 1 Ch. 162.*

**1086. —.]**—There is no rule that a donee of a power to appoint new trustees is unable to appoint self. The ct. will sanction such an appointment in special circumstances.—*MONTEFIORE v. GUE-DALLA*, [1903] 2 Ch. 723; 73 L. J. Ch. 13; 89 L. T. 472; 52 W. R. 151; 47 Sol. Jo. 877.

*Annotation:—Distd. Re Sampson, Sampson v. Sampson, [1906] 1 Ch. 435.*

*Sec. now, Trustee Act, 1925 (c. 19), s. 36 (1).*

**1087. Person subject to condition—"Return to England"—Six months visit sufficient.]**—Testator appointed B., then residing in Australia, one of his exors., & trustees, "if & when he shall return to England," & devised his real estates to his trustees upon the trusts of his will. B. returned to England eight years after testator's death, for his health, & remained in this country six months, & then went back to Australia, without having proved the will or taken any part in the execution of the trusts:—*Held*: B. had fulfilled the condition by his residence for a substantial period in England; &, in the absence of evidence that he had dissented from or disclaimed the trusteeship before his return, the trusteeship & the estates vested in him on his coming to England.—*Re ARBIB & CLASS'S CONTRACT*, [1891] 1 Ch. 601; 60 L. J. Ch. 263; 64 L. T. 217; 39 W. R. 305, C. A. *Annotation:—Mentd. Re Spindler & Mear's Contract* (1901), 81 L. T. 295.

**1088. Solicitor of donee of power.]**—*Re STAMFORD (EARL), PAYNE v. STAMFORD*, No. 1016, *ante*.

**1089. —.]**—(1) Though the ct. will not itself appoint a solr. of one of the parties to be a new trustee, an appointment of his own solr. by the donee of a power to appoint is not invalid, even when the appointment is made without notice to the *cestuis que trust*, & the trustee appointed is objectionable to some of them.

(2) The rule that the donee of a power to appoint new trustees cannot exercise it after the ct. has made an order for administration without the approval of the ct. applies only when there is a general administration order. It does not apply to an order for partial administration under R. S. C., Ord. 55, unless an inquiry is ordered as to the appointment of new trustees, or the proceedings are taken for the purpose of having new trustees appointed.—*Re COTTER, JENNINGS v. NYE*, [1915] 1 Ch. 307; 84 L. J. Ch. 337; 112 L. T. 340; 59 Sol. Jo. 177.

**1090. Person residing out of jurisdiction—Cestui que trust out of jurisdiction.]**—(1) An American citizen, resident in England, married an English lady, & her property "was assigned to trustees upon trusts for the benefit of herself & her children," & a power was contained in the settlement for investment of the property in American funds or realty. The husband & wife remove to America, & the property is invested in American funds, & three new trustees, who are American citizens, are appointed:—*Held*: the appointment of new trustees was valid.

**PART II. SECT. 2, SUB-SECT. 2.—B. (e).**

**1083 i. Donee of power.]—Semble**: donees of a power of appointment of new trustees, whether statutory or arising under the trust instrument, cannot appoint themselves.—*Re HAM'S*

*SETTLEMENT, HAM v. HAM*, [1919] V. L. R. 187.—*AUS.*

**1090 i. Person residing out of jurisdiction—Cestui que trust out of jurisdiction.]**—*Re KAY, MACKINNON v. STRINGER*, [1927] V. L. R. 66; [1927] *Argus* L. R. 27.—*AUS.*

*t. —.]—GREEN v. NICHOLSON* (1899), 6 W. W. & A.B. 147.—*AUS.*

**a. Trustee company.]**—Where a vacancy occurs in a body of individual trustees the remaining trustees may appoint a trustee co. to fill the vacancy & act jointly with them.—*CROWLEY v.*

(2) *Semble*: the original number of trustees should be adhered to in any new appointment of trustees.

In the abstract there is nothing materially inconvenient or improper in the appointment of a different number (KNIGHT BRUCE, V.-C.).—MEINERTZHAGEN v. DAVIS (1844), 1 Coll. 335; 13 L. J. Ch. 457; 3 L. T. O. S. 452; 8 Jur. 973; 63 E. R. 444.

*Annotations*:—As to (1) *Distd.* *Re* Guilbert's Trust Estate (1852), 16 Jur. 852. As to (2) *Distd.* *Stones v. Rowton* (1853), 1 Eq. Rep. 427. *Folld.* *Hillman v. Westwood* (1854), 3 Eq. Rep. 142.

1091. ———.]—Testator bequeathed a share of a fund in trust for his daughter & her children, power being given to the trustees to invest the same in the public funds of any colony or dependency of the United Kingdom. The daughter married a domiciled citizen of the Canadian dominion & was permanently resident in Canada. It was proposed to appoint two persons, citizens of Canada, trustees, & to transfer the share of the trust fund to them for the purpose of investment in securities in Canada.—*Re* SMITH'S TRUSTS (1872), 20 L. T. 820; 20 W. R. 695.

(f) *Number of Trustees.*

*See, now*, Trustee Act, 1925 (c. 19), s. 37.

1092. *Whether original number must be maintained.*—Where a deed contains a power for the appointment of eight new trustees for a chapel the ct. held that eight & neither more nor less than that ought to be the number.—A.-G. v. BLACKBURN (1853), 21 L. T. O. S. 261.

1093. ———.]—Appointment of greater number than original.]—By an instrument of a testamentary nature, estates were limited to two trustees, with power to each of them who should accept the trusts, to name & appoint any other person be pleased to succeed to himself in the trusts thereby created, after his own decease. One only of the two persons named as trustees accepted the trusts, & he, by his will, appointed three other persons to succeed him:—*Held*: such an appointment was authorised by the power.—SANDS v. NUGEE (1836), 8 Sim. 130; Donnelly, 106; 5 L. J. Ch. 329; 47 E. R. 257.

*Annotation*:—*Distd.* *Re* Clark, *Ex p.* Davis (1843), 2 Y. & C. Ch. Cas. 468.

1094. ———.]—D'ALMAINE v. ANDERSON (1841), Lewin on Trusts, 12th ed. 820.

*Annotation*:—*Distd.* *Re* Clark, *Ex p.* Davis (1843), 2 Y. & C. Ch. Cas. 468.

1095. ———.]—Where by a settlement a certain number of persons are appointed trustees, & power is given, upon the death or retirement of a trustee or trustees, to appoint any other person or persons to be a trustee or trustees in his or their room, the appointment of a greater than the original number of trustees is not a valid exercise of the power.—*Re* CLARK, *Ex p.* DAVIS (1843), 2 Y. & C. Ch. Cas. 468; 3 Mont. D. & De. G. 304; 12 L. J. Bey. 38; 1 L. T. O. S. 143; 7 Jur. 430; 63 E. R. 209, Ct. of R.

1096. ———.]—MEINERTZHAGEN v. DAVIS, No. 1090, *ante*.

1097. ———.]—Appointment of lesser number than original.]—Where three trustees were named in a settlement with a power to the *cestuis que trust* to

nominate, substitute or appoint any person or persons in the place of the said present or other trustee or trustees, who should die," etc.:—*Held*: an appointment of two persons only in the room of the three original trustees was a valid appointment.—*Re* POOLE BATHURST'S ESTATE (1854), 2 Sm. & G. 169; 65 E. R. 351; *sub nom.* *Re* POOLE BATHURST'S ESTATE, *Re* SOUTH WALES RAILWAY ACT, 1845 & SOUTH WALES AMENDMENT ACT, 1846, *Ex p.* BATHURST, 23 L. T. O. S. 218; 18 Jur. 505.

1098. ———.]—The trustees of a deed had a discretionary power of distribution over a fund amongst a class of children, who in default took equally. There were originally five trustees, one of whom was a member of the class. After the death of the surviving trustee, three new trustees were appointed under a power, one of whom, A., was a member of the class. These three apportioned the fund, except a minute portion, amongst the three survivors of the children equally, including A.:—*Held*: the appointment of three trustees, instead of five, was not void.—REID v. REID (1862), 30 Beav. 388; 8 Jur. N. S. 499; 10 W. R. 225; 54 E. R. 939.

*Annotation*:—*Re*ld. Tempest v. Camoys (1888), 58 L. T. 221.

1099. ———.]—*Re* CUNNINGHAM & BRADLEY & WILSON (1877), 12 L. J. N. O. 214.

*Annotation*:—*Re*ld. West of England & South Wales District Bank v. Murch (1883), 23 Ch. D. 138.

1100. ———.]—*Re* COATES TO PARSONS, No. 1119, *ante*.

1101. ———.]—*Re* MERCER, BELL v. WITTS (1894), 38 Sol. Jo. 338.

1102. ———.]—By a will three trustees were appointed; & in the power of appointing new trustees, it was provided that, if the trustees thereby appointed, or to be appointed under the power, or any of them, should die or be desirous of being discharged, etc., it should be lawful for the surviving & continuing trustees or trustee, or the exors. or administrators of the last surviving or continuing trustee, to appoint any other person or persons in the stead of the trustee or trustees so dying, etc., either solely or jointly with the other trustee or trustees; & that thereupon the trust estates should be conveyed so as to vest in the surviving or continuing trustees or trustee & the new trustee or trustees, or, if there should be no such surviving or continuing trustee, in such new trustees only. One of the persons named trustees died in testator's lifetime. The survivor of the two trustees, being desirous of retiring, appointed one new trustee in his own place:—*Held*: the appointment was invalid; & the ct. would not, under the power, appoint two trustees only, without being satisfied that such a course was for the benefit of the *cestuis que trust*.—LONSDALE (EARL) v. BECKETT (1850), 4 De G. & Sm. 73; 19 L. J. Ch. 342; 16 L. T. O. S. 229; 64 E. R. 740.

*Annotation*:—*Folld.* Nicholson v. Smith (1857), 3 Jur. N. S. 313.

1103. ———.]—Three trustees appointed in a will, with power for the surviving trustee, his exors., administrators or assigns, with the consent of A., to appoint one or more person or persons to be a trustee or trustees in the room, etc., &

three in place of the two who declined:—*Held*: *ultra vires*, & the assumption of all the three was void.—FERRIE v. BAIRD (1834), 12 Sh. (Ct. of Sess.) 672; 9 Fac. Coll. 350.—SCOT.

1098 II. ———.]—DAVIDSON v. MACKENZIE (1835), 13 Sh. (Ct. of Sess.) 1082; 10 Fac. Coll. 880.—SCOT.

SANDHURST & NORTHERN DISTRICT TRUSTEES CO., LTD. (1898), 2 V. L. R. 661.—AUS.

PART II. SECT. 2, SUB-SECT. 2.—B. (f).

1093 I. *Whether original number must be maintained*—Appointment of greater

number than original.]—A party, by trust deed of settlement, conveyed his property to four trustees, & acceptors or survivors whereof a majority to be a quorum, with power, in the event of any declining to act, or dying, to "add & assume other proper persons in their place"; two only accepted, & they by deed of assumption, assumed

*Sect. 2.—Appointment of trustees: Sub-sect. 2, B. (f), & C. (a), (b) & (c).]*

thereupon the trust estates to be vested in such trustee or trustees solely or jointly with the continuing trustee or trustees:—*Held*: to authorise the appointment by the surviving trustee of two trustees to act with him without specifying in whose place.—*HILLMAN v. WESTWOOD* (1854), 3 Eq. Rep. 142; 24 L. J. Ch. 57; 24 L. T. O. S. 154; 3 W. R. 41.

**1104.** ———.]—Devise in 1832 to three trustees A., B. & C. & their heirs, with a power that if any of the trustees should die, or be desirous to be discharged, etc., then it should be lawful for the surviving or continuing trustees or trustee, or the exors., etc., of the last surviving or continuing trustee, by deed to appoint any person in the place of the trustee or trustees so dying or desirous to be discharged, etc., & testator appointed A., B. & C. his exors. A. died in testator's lifetime. B. & C. renounced probate, & administration was granted to the widow of testator: & immediately afterwards, in 1845, B. & C. by deed duly executed, reciting that they were desirous of retiring from the trusts, & referring to the power aforesaid, appointed two other persons to be trustees in their own room. The widow died, B. died, & one of the persons so last appointed died. The survivor of the persons so last appointed then sold, in execution of the trusts:—*Held*: (1) the appointment of 1845 was bad; (2) C. might now appoint two other persons in the room of B. & A. who had died in testator's lifetime; & C. & such two new trustees, or if C. should still decline to act, such two new trustees together with a third new trustee to be by them appointed in the room of C., could make a good title.

A. having died in testator's lifetime, the devise was treated as a devise originally to three trustees, & the number was required to be raised to three.—*NICHOLSON v. WRIGHT* (1857), 26 L. J. Ch. 312; 29 L. T. O. S. 52; 5 W. R. 431; *sub nom.* *NICHOLSON v. SMITH*, 3 Jur. N. S. 313.

*Annotations*:—*Reld*, Pell v. De Winton (1857), 2 De G. & J. 13; *Re Glenny & Hartley* (1884), 25 Ch. D. 611; *Re Norris*, Allen v. Norris (1881), 27 Ch. D. 333.

**1105.** ———.]—*EMMET v. CLARK*, No. 1068, *ante*.

**Trustees of settlement of land.**—*See* Trustee Act, 1925 (c. 19), s. 34.

*C. Under Statute.*

*(a) In General.*

*See, now*, Trustee Act, 1925 (c. 19), s. 30.

**1106. Personal representatives of deceased sole trustee—Cannot be required to exercise statutory powers—At request of beneficiaries.**—[The exors. of the sole exor. of a deceased sole trustee whose sole exor. had never acted in the trust, were applied to in Apr. 1883, to take steps to enable the tenant for life of a small sum of stock standing in the name of deceased trustee to receive the dividends. In May, 1883, the exors. handed to the solr. of the tenant for life the probate of their testator's will, that he might produce it at the Bank of England, which he did. After some correspondence, in the course of which the exors. asked for evidence of the title of the *cestuis que trust*, which did not appear to have been produced, the solr. of the tenant for life about the end of May sent a power of attorney to be executed by the exors. to enable her to receive the dividends. The exors. did not execute or return the power. In July the solr. of the tenant for life applied to the exors. to appoint new trustees under Conveyancing and Law of Property Act, 1881 (c. 41), to which the exors.

replied, stating their ignorance of the title of the *cestuis que trust*. Ultimately, in Nov. 1883, the *cestuis que trust* presented a petition for the appointment of new trustees & a vesting order:—*Held*: (1) the representative of a deceased trustee is not bound at the request of the *cestuis que trust* to exercise the power of appointing new trustees given by Conveyancing & Law of Property Act, 1881 (c. 41); & the refusal to do so was not a sufficient reason for ordering the exors. to pay the costs of a petition for the appointment of new trustees. (2) If the representatives of a deceased trustee allow a transfer into their own names of the trust fund, they will be taken to have accepted the trust.—*Re KNIGHT'S WILL* (1883), 20 Ch. D. 82; 53 L. J. Ch. 223; 49 L. T. 774; 32 W. R. 336; *on appeal* (1884), 26 Ch. D. at p. 90, C. A.

*Annotations*:—*Mentid*, *Re Carthew*, *Re Paull* (1884), 51 L. T. 435; *In the Estate of Plant*, *Wild v. Plant*, [1926] P. 139.

**1107. Exercise of statutory power—Overrides provision in instrument for consent of beneficiary.**

—A settlement of real estate of which there were four trustees, provided that if the trustees thereby appointed "or any future trustee or trustees to be appointed in the place of them or any of them as hereinafter mentioned" should die or be desirous of being discharged, etc., it should be lawful for the "surviving or continuing trustee or trustees for the time being," with the consent of the tenant for life, or in tail for the time being entitled in possession, to appoint a new trustee or new trustees in the place of the trustee or trustees so dying, etc. In 1872, four new trustees were appointed under Trustee Act, 1850 (c. 60), in the place of two deceased & two retiring trustees. After this a decree was made for carrying the trusts of the settlement into execution. Two of the trustees of 1872 being dead, & another desiring to retire, *pltf.*, who was an infant tenant in tail in possession, took out a summons to appoint new trustees. W., the continuing trustee, took out a summons asking that he might be at liberty to appoint new trustees. A reference to chambers being directed, W. proposed new trustees whom the ct. considered to be proper persons, but to whom all the persons beneficially interested objected:—*Held*: the persons nominated by W. must be appointed, though the tenant in tail in possession did not consent, for as the power in the settlement only applied to filling up vacancies in the number of original trustees, or trustees appointed under the power, it had come to an end when new trustees were appointed by the ct. in 1872, & the fetter imposed by the settlement on the exercise of that power did not apply to the new power given to the continuing trustee by Conveyancing & Law of Property Act, 1881 (c. 41), which enabled him to fill up vacancies in a body of trustees not coming within the scope of the power in the settlement.—*CECIL v. LANGDON* (1884), 28 Ch. D. 1; 54 L. J. Ch. 313; 51 L. T. 618; 33 W. R. 1, C. A.

*Annotation*:—*Consd.* *Re Wheeler & De Rochow* [1896] 1 Ch. 315.

**1108. — Supersedes special provision in private Act.**—[A private Act, passed in 1869, enacted that Lord Cranworth's Act, 1860 (c. 145), s. 27, should be deemed & taken to apply to the trusteeship of the "Manchester estates" comprised therein; "provided that every new trustee of estate shall be appointed with the approbation of the Ct. of Ch." In 1886, a deed was executed by the continuing trustees appointing new trustees under the power "vested in them by statute." This deed contained the usual declaration vesting the estates in the new trustees; but the appointment was not made with the approbation of the ct.:—*Held*: the deed

must be construed as if the special provision contained in the private Act had formed part of Lord Cranworth's Act, 1860 (c. 145); as Lord Cranworth's Act, 1860 (c. 145), had been repealed, the ct. could not add that special provision to the general power of appointment given by Conveyancing & Law of Property Act, 1881 (c. 41); & the new trustees were well appointed.—*Re LLOYD'S TRUSTEES* (1888), 57 L. J. Ch. 246.

**1109. — Court cannot control.**—The ct. has no jurisdiction under Trustee Acts to appoint new trustees of a will against the wishes of an existing sole trustee desirous of exercising his statutory powers of appointing new trustees under Conveyancing & Real Property Act, 1881 (c. 41), s. 31, even though the application to the ct. is made by a majority of the beneficiaries, & the existing trustee has himself no beneficial interest.—*Re HUGGINBOTTOM*, [1892] 3 Ch. 132; 62 L. J. Ch. 74; 67 L. T. 190; 3 R. 23.

**1110. — Donee cannot appoint himself.**—Under the statutory power of appointing new trustees conferred by the Trustee Act, 1893 (c. 53), s. 10 (1), the person making the appointment cannot validly appoint himself, either alone or jointly with any other person.—*Re SAMPSON, SAMPSON v. SAMPSON*, [1906] 1 Ch. 435; 75 L. J. Ch. 302; 94 L. T. 241; 54 W. R. 342; 50 Sol. Jo. 239.

(b) *When Appointment may be made.*

*See Trustee Act, 1925 (c. 19), s. 36.*

**1111. Absence abroad for more than twelve months—Settlement executed prior to Act.**—A settlement executed in 1878 contained no express power to appoint new trustees, but there was a declaration that the husband & wife during their joint lives, & the survivor of them during his or her life, "shall have power to appoint new trustees or a new trustee for this settlement." There was no express reference to the power of appointing new trustees conferred by Lord Cranworth's Act, 1860 (c. 145), s. 27, which was then in force:—*Held*: after the commencement of Conveyancing Act, 1881 (c. 41), the husband & wife were the proper persons to exercise the power conferred by sect. 31 of that Act, of appointing a new trustee in place of one of the trustees who had remained out of the United Kingdom for more than twelve months, though sect. 27 of Lord Cranworth's Act did not provide for, & the parties when they executed the settlement probably did not contemplate, the occurrence of a vacancy in that event.—*Re WALKER & HUGHES' CONTRACT* (1883), 24 Ch. D. 698; 53 L. J. Ch. 135; 49 L. T. 597.

*Annotations:—Consd. Re Boucherett, Barne v. Erskine*, [1898] 1 Ch. 180. *Reid. Re Wheeler & De Rochow*, [1896] 1 Ch. 315.

**1112. — Trustee returning to England for one week.**—One of two trustees purported to appoint a new trustee in the place of his co-trustee under the power in that behalf conferred by Trustee Act, 1893 (c. 53), s. 10 (1), on the ground that the co-trustee had resided abroad for more than twelve months. The co-trustee had remained out of the United Kingdom for more than twelve months, except for one week when he was in London:—*Held*: the event upon which the power arose had

not happened & the appointment was bad.—*Re WALKER, SUMMERS v. BARROW*, [1901] 1 Ch. 259; 70 L. J. Ch. 229; 49 W. R. 107; 45 Sol. Jo. 119.

(c) *Who may Appoint.*

*See Trustee Act, 1925 (c. 19), s. 36.*

**1113. Personal representative of last surviving or continuing trustee—Executor of sole trustee.**—The power of appointing new trustees given by Conveyancing Act, 1881 (c. 41), s. 31, to "the personal representatives of the last surviving or continuing trustee" includes the case of an exor. of a sole trustee.—*Re SHAFTO'S TRUSTS* (1885), 29 Ch. D. 247; 54 L. J. Ch. 885; 53 L. T. 261; 33 W. R. 728.

**1114. — No person able or willing to act—Donees of power unable to agree.**—*Re SHEPPARD'S SETTLEMENT TRUSTS*, [1888] W. N. 234.

**1115. — Donee of power unascertainable.**—*CRADOCK v. WITHAM*, [1895] W. N. 75.

**1116. — Trustees dying in lifetime of testator.**—Conveyancing Act, 1881 (c. 41), s. 31, does not enable the personal representative of the survivor of two trustees nominated by a will, but dying before testator, to appoint new trustees of the will.—*NICHOLSON v. FIELD*, [1893] 2 Ch. 511; 62 L. J. Ch. 1015; 69 L. T. 299; 42 W. R. 48; 3 R. 528.

—*See, now, Trustee Act, 1925 (c. 19), s. 36 (8).*

**1117. — Execution with general grant of probate—Though trustees named in will of sole surviving trustee.**—Conveyancing Act, 1881 (c. 41), s. 31, does not enable a sole surviving trustee of a will to appoint by his will, in continuation to himself, trustees of the will of original testator.

The sole surviving trustee of a will by his will appointed general exors., & also purported to appoint special exors., for the purpose of executing, in continuation to himself, the trusts of the will of original testator. The general exors., obtained a grant of probate of the will of the trustee to themselves as "general exors.," without any reservation of power to the special exors. to come in & prove, & proceeded by deed to appoint two persons to be trustees of the will of original testator. Subsequently probate of the will of the trustee, limited to the trust estates of original testator, was granted to the persons named as special exors.:—*Held*: the will of the trustee did not operate as an exercise of the power of appointing new trustees conferred by Conveyancing Act, 1881 (c. 41), s. 31, but as the general exors. were, at the time when the deed of appointment was executed, in possession of a general grant of probate, which was the only probate then in existence, they were "personal representatives" of a last surviving trustee within the meaning of the sect., & therefore the deed was a valid appointment of trustees.

There would be manifest inconvenience in vesting the power of appointment in persons about whom there is a doubt whether they will prove or not, & who in the meantime may be inaccessible, & I cannot but think that those who can for the time being produce the only evidence of office & authority were intended by the legislature to be

## PART II. SECT. 2, SUB-SECT. 2.— C. (b).

**b. Trust property in colony & abroad—Vacancy in trustees in colony.**—Where there is trust property in this colony as well as in England, & a vacancy occurs in the trustees thereof in this colony, a new trustee may be appointed to fill such vacancy, under 44 & 45 Vict. c. 41, s. 32 (1).—*WILMOT*

*v. THORPE* (1890), 16 V. L. R. 85.—*AUS.*

## PART II. SECT. 2, SUB-SECT. 2.— C. (c).

**c. Surviving or continuing trustee.**—Under Trustee Act, s. 4 (1), an appointment may be made by the surviving or continuing trustee in the place of the trustee desiring to be

discharged; but the sect. does not contemplate the appointment by the surviving trustee of some one in his own stead.—*Re NATIONAL TRUST CO. & McLAUGHLIN* (1925), 57 O. L. R. 319.—*CAN.*

**d. Donees of power—No person beneficially entitled in possession.**—The power of appointing trustees given by Conveyancing Ordinance,

*Sect. 2.—Appointment of trustees: Sub-sect. 2, C. (c) & (d), & D. (a) & (b) i.]*

the personal representatives of the testator for the purpose of appointing his successor as trustee (KEKEWICH, J.).—*Re PARKER'S TRUSTS*, [1894] 1 Ch. 707; 63 L. J. Ch. 310; 70 L. T. 165.

**1118. — Acting executor—Only proving executor.**—H., by his will dated in 1875, devised his real estate to trustees to certain uses. The will contained no power of appointing new trustees, but in effect referred to the powers given by Lord Cranworth's Act, 1860 (c. 145). H. died in 1877. The last surviving trustee died in 1888, having by his will appointed three exors. Probate was granted to one only, power to prove being reserved to the other two. In 1894 the proving exor., in exercise of the power given to him by Trustee Act, 1893 (c. 53), & of every other power enabling him, appointed new trustees of H.'s will. The other two exors. were alive at the date of this appointment, but died without having taken probate:—*Held*: having regard to the saving clause in Conveyancing Act, 1881 (c. 41), s. 71, the appointment was good as having been made by the "acting exor." of the last surviving trustee within Lord Cranworth's Act (c. 145), s. 27.—*Re BOUCHERETT, BARNE v. ERSKINE*, [1908] 1 Ch. 180; 77 L. J. Ch. 205; 98 L. T. 32; 52 Sol. Jo. 77.

**1119. Continuing trustees—One trustee abroad for more than twelve months.**—Land was conveyed to eleven trustees upon trusts for the benefit of the Wesleyan Methodists. The deed of conveyance contained a power of appointing new trustees if the trustees for the time being should, by death, incapacity, or refusal to act in the trusts, be reduced to five. The power was to be exercised by vote at a general meeting, & the original number of trustees was to be filled up. It was further provided that the power might be exercised even if the number of trustees were not reduced to five. One of the original eleven trustees died, & another had remained more than twelve months out of the United Kingdom. The nine remaining trustees, by deed purporting to be in pursuance of Conveyancing Act, 1881 (c. 41), s. 31, appointed a new trustee in the place of the trustee who was abroad:—*Held*: (1) the appointment was a good one under the Conveyancing Act, s. 31, although the trustee who was abroad did not join with the remaining trustees in making it, it not being shown that he was willing & competent to do so; (2) it was not necessary to fill up the original number of trustees, inasmuch as the appointment was made in an event not contemplated by the deed, which therefore could not be said to show any "contrary intention" so as to exclude the provisions of sect. 31 of the Act.—

s. 28, re-enacted by Trustee Act, 1883, s. 79, is not restricted to cases in which there is some ascertained person who is beneficially entitled in possession. Where there is no such person the donees of the power may act at their own discretion.—*EDWARDS v. OWEN* (1881), 3 N. Z. L. R. C. A. 225.—N.Z.

**PART II. SECT. 2, SUB-SECT. 2.—D. (a).**

**e. Jurisdiction of court to appoint**—*Donee of power resident abroad.*—The ct. has jurisdiction to appoint new trustees where the power of appointment under the document creating the trust cannot be exercised without reference to England.—*Re ORLEBAR* (1889), 15 V. L. R. 567.—AUS.

**f. —**—Where an application for the appointment of a new trustee in the place of one incapacitated is, in

the opinion of the ct., duly made & served, the ct. has power, under 16 Vict. No. 19, s. 30, 32, to appoint as prayed, & also to make a vesting order. According to the rule & practice in the Colony, it can direct the master to appoint, & the vesting follows the appointment without any subsequent order.—*PLIMLEY v. RICHARDSON & WRENCH, LTD.*, [1894] A. C. 632, P. C.—AUS.

**g. — Vacancy created by resignation.**—The ct. has no power under Trustee Act, 1898, to fill a vacancy created by resignation.—*Re JOHNSTON'S TRUSTS* (1900), 31 N. S. W. Eq. 6.—AUS.

**h. —**—*Re HAM'S SETTLEMENT*, *HAM v. HAM*, [1919] V. L. R. 187.—AUS.

**k. —**—*PROUDFOOT v. TIFFANY* (1865), 11 Gr. 461.—CAN.

*Re COATES TO PARSONS* (1886), 34 Ch. D. 370; 56 L. J. Ch. 242; 56 L. T. 16; 35 W. R. 375.

**1120. Retiring trustee.**—*Re OUTLER, Re STEPHENS' TRUSTS* (1895), 39 Sol. Jo. 484, C. A.

**(d) Number of Trustees.**

*See Trustee Act, 1925 (c. 19), ss. 34, 36, 37.*

**1121. Appointment of one trustee in place of two.**—The power of appointing new trustees given by Lord Cranworth's Act, 1860 (c. 145), s. 27, authorises a retiring trustee, one of two originally appointed, to appoint a single trustee in place of himself, the other original trustee having previously disclaimed without acting.—*WEST OF ENGLAND & SOUTH WALES DISTRICT BANK v. MURCH* (1883), 23 Ch. D. 138; 31 W. R. 467; *sub nom.* *WEST OF ENGLAND BANK v. MURCH, Re BOOKER & Co.*, 52 L. J. Ch. 784; 48 L. T. 417.

*Annotations:—Reid. Re Leon*, [1892] 1 Ch. 348; *Re Morrison, Morrison v. Morrison*, [1901] 1 Ch. 701; *Re Tollemache*, [1903] 1 Ch. 457. *Mend. Niemann* .. *Niemann* (1889), 43 Ch. D. 198.

*See, now, Trustee Act, 1925 (c. 19), s. 37 (1) (c).*

**1122. When increase can be made—On appointment to supply vacancy.**—(1) The ct. has jurisdiction, under Trustee Act, 1850 (c. 60), s. 32, to appoint an additional trustee, although there is no vacancy in the existing number of trustees.

(2) *Scemle*: under Conveyancing Act, 1881 (c. 41), s. 3 (2), an additional trustee can only be appointed when an appointment is being made to fill up a vacancy in the trusteeship.—*Re GREGSON'S TRUSTS* (1886), 34 Ch. D. 209; 56 L. J. Ch. 286; 35 W. R. 286.

*See, now, Trustee Act, 1925 (c. 19), s. 36 (6).*

**1123. Power to appoint additional trustees—For separate part of property.**—Conveyancing Act, 1882 (c. 39), s. 5 (1), authorises the appointment of a separate set of trustees for a part of the trust property held on distinct trusts only when an appointment is being made of new trustees of the whole property. It does not enable the existing trustees of the whole property to retire from the trusts as to part by means of an appointment of new trustees of that part.—*SAVILLE v. COOPER* (1887), 36 Ch. D. 520; 56 L. J. Ch. 980; 56 L. T. 907; 35 W. R. 829; 3 T. L. R. 817.

*Annotation:—Didd. Re Moss's Trusts* (1888), 37 Ch. D. 513.

**D. Appointment by Court.**

**(a) In General.**

*See, now, Trustee Act, 1925 (c. 19), ss. 41–43.*

**1124. Jurisdiction of court to appoint—To appoint trustees of land in Ireland—Cestuis que trust in England.**—*Re HEWITT'S ESTATE*, No. 1735, *post*.

**1125. — Where no property vested in existing trustee.**—The power of appointing new

**l. — When sanctioning scheme under Code of Civil Procedure, s. 539.**—Under above sect. the ct. in sanctioning a scheme may provide for the appointment of additional or new trustees, though such appointment may not be in conformity with the original constitution of the trust or with the rules in force in respect to it.—*PRAYAG DOSS JI VARU MAHANT v. TIRUMALA SHIRANGACHARIAYAR* (1905), 1 L. R. 28 Mad. 319.—IND.

**m. — Executor functus officio—No trustee appointed by will.**—Testatrix by her will gave certain pecuniary legacies & devised & bequeathed the residue of her property to A. for life, with remainder to certain named persons. No trustees were appointed by the will. No debts were due by testatrix at the date of her death. The exor., having paid all funeral &

trustees conferred by Trustee Act, 1850 (c. 60), s. 32, applies to the simple office of trustee, & it is not necessary to the exercise thereof that any estate or property should be vested in the trustee.—*Re BOYCE, Re BLACKWOOD'S TRUSTS* (1864), 4 De G. J. & Sm. 205; 3 New Rep. 396; 33 L. J. Ch. 890; 9 L. T. 670; 10 Jur. N. S. 138; 12 W. R. 359; 46 E. R. 896, L. C.

*Annotations*:—*Reid. Re Phelps's Settlement. Trusts* (1885), 53 L. T. 27; *Re M.*, [1899] 1 Ch. 79; *Re A.*, [1904] 2 Ch. 328.

(b) When Appointment will be Made.

i. In General.

See, *now*, Trustee Act, 1925 (c. 19), ss. 41–43.

**1126. Discretion of court.**—*Re MORGAN'S MARRIAGE SETTLEMENT TRUSTS* (1888), 4 T. L. R. 325.

**1127. Whether court will appoint—Trust estate devised by surviving trustee—On same trusts as originally.**—Where testator devised estates to trustees, their heirs & assigns, on certain trusts, & the surviving trustees devised the trust estates upon the same trusts on which he held the same:—*Held*: the *cestuis que trust* were entitled to have new trustees appointed of the original will.—*Ockleston v. HEAP* (1847), 1 De G. & Sm. 640; 63 E. R. 1231.

*Annotations*:—*Consol. Hall v. May* (1857), 3 K. & J. 585; *Re Morton & Hallett* (1880), 15 Ch. D. 143; *Re Waldanis, Jivers v. Waldanis*, [1908] 1 Ch. 123.

**1128. — One trustee disclaiming.**—One of three trustees under a will had disclaimed & another had become lunatic. Upon petition of the sole acting trustee & the *cestuis que trust* in the matter of the lunacy:—*Held*: the ct. had no jurisdiction to appoint a new trustee in place of the disclaiming trustee; but the ct. appointed two persons trustees in the place of the lunatic.—*Re SMITH* (1848), 17 L. J. Ch. 415; 11 L. T. O. S. 409, L. C.

**1129. — De facto trustee acting as such.**—*Re HADLEY, Ex p. HADLEY*, No. 1015, *ante*.

**1130. — Power vested in husband & wife—Husband refusing to concur in appointment—Application by husband.**—Where a power of appointing trustees in a settlement is vested in husband & wife & the husband refuses either to concur with the wife in the appointment or to approve of a person nominated by her, a claim filed by him for the appointment of trustees under the direction

of the ct., was dismissed with costs.—*FRY v. WATSON* (1853), 21 L. T. O. S. 84; 1 W. R. 282.

**1131. — Judicial separation—Husband abroad.**—*Re SOMERSET*, [1887] W. N. 122.

**1132. — Three trustees disclaiming—Only two appointed—Appointors abroad.**—*Re HUMPHRY'S ESTATE* (1855), 1 Jur. N. S. 921.

**1133. — Trustees desirous of retiring.**—New trustee appointed by the ct. where the power to appoint new trustees only contained the words "die, or decline, or become incapable to act," & where a trustee who had acted was anxious to retire.—*Re ARMSTRONG'S SETTLEMENT* (1857), 5 W. R. 448.

**1134. — — — — —**—New trustee appointed by the ct. where the power to appoint new trustees only contained the words "shall die, or become incapable, or be unwilling to act," & where two trustees who had acted, desired to be discharged from the trusts.—*Re WOODGATE'S SETTLEMENT* (1857), 5 W. R. 448.

**1135. — Existing trustee desirous of continuing in trust.**—*Re BLANCHARD*, No. 1297, *post*.

**1136. — Trustee having interest in neglecting duties—No present danger.**—(1) A person who has a contingent interest in a trust fund has a *locus standi* to present a petition for the appointment of new trustees.

(2) Though no case of present danger to such contingent right be shown, it is sufficient ground for an appointment of new trustees, that the person who holds the office of trustee might have an interest in neglecting it.

(3) In a case where the tenant for life was in possession, & considered the appointment unnecessary, each party was ordered to bear his own costs.—*Re SHEPPARD'S TRUSTS* (1862), 4 De G. F. & J. 423; 1 New Rep. 70; 32 L. J. Ch. 23; 7 L. T. 377; 9 Jur. N. S. 711; 11 W. R. 60; 45 E. R. 1247, L. J.

**1137. — Trustee falling to act.**—Where a trustee & exor. has proved the will only, & done no other act, & taken no notice of applications, nor appeared on a petition served upon him, the ct. will appoint another trustee in his room, & make a vesting order under Trustee Act, 1850 (c. 60).—*Re BYRNE'S TRUST* (1808), 18 L. T. 631.

**1138. — Trustee refusing to act.**—*TARLTON v. TITLEY* (1850), 15 L. T. O. S. 325; 14 Jur. 848.

testamentary expenses, hold certain shares, representing the residue of the estate. On an application by the tenant for life & the remaindermen for the appointment of trustees of the will:—*Held*: the ct. had jurisdiction to appoint trustees.—*POLLOCK v. EVNS*, [1921] 1 I. R. 181.—*IR.*

n. — *Extent of.*—The power of the ct. to appoint an additional trustee is not confined to cases where more than one trustee was originally appointed.—*Re HIVES* (1913), 32 N. Z. L. R. 719.—*N.Z.*

o. *Necessity for security.*—Where the ct. appoints new trustees under a will, the former ones being dead or insolvent, it has no authority to require the new trustees to give security.—*O'HARA v. CUTHBERT* (1859), 1 Ch. Ch. 304.—*CAN.*

p. — — — — — A new trustee appointed by the ct. in the place of one appointed by will is not required to give security for the due performance of the trusts.—*Re HELP'S ESTATE* (1892), 15 P. R. 7.—*CAN.*

q. *Discretion of master—Interference by court.*—Where the ct. has referred to the master to appoint a new trustee, & the master in his discretion has made such appointment,

the ct. will not interfere unless the master has exercised his discretion upon wrong principles.—*JOHNSTONE v. JOHNSTONE* (1902), 2 S. R. N. S. W. 90.—*AUS.*

PART II. SECT. 2, SUB-SECT. 2.—

D. (b) i.

**1126 i. Discretion of court.**—The appointment of a fit & proper person to be a new trustee is a matter largely within the discretion of the judge who hears & decides upon the petition, & if, after a full consideration of the circumstances, it does not appear that the discretion has been wrongly exercised, or that the rules governing the making of such appointments have been infringed, the appointment made will not be disturbed.—*Re CROXAN'S ESTATE* (1899), 31 N. S. R. (19 R. & G.) 477.—*CAN.*

**1138 i. Whether court will appoint—Trustee refusing to act.**—*Re MOLONY* (1845), 2 Jo. & Lat. 391.—*IR.*

**1138 ii. — — — — —**—*PLUNKET v. SMITH* (1844), 8 I. Eq. R. 523.—*IR.*

**1138 iii. — — — — —**—*PRESTON v. MELVILLE* (VISCOUNT) (No. 2) (1840), 8 Cl. & Fin. 16; 8 E. R. 7.—*SCOT.*

r. — *Refusal of surviving trustee to convey realty jointly to himself & new trustee—Death intestate.*—*Re BOSSA'S*

(DECEASED) ESTATE (1896), 4 B. C. R. 584.—*CAN.*

t. — *No trustees appointed by will—One of two executors dying.*—*Re PHILPOTT* (1878), 4 V. L. R. 20.—*AUS.*

a. — *Trustee resident out of province.*—*Re JONES' TRUSTS* (1910), 15 O. W. R. 554; 20 O. L. R. 457; 1 O. W. N. 532.—*CAN.*

b. — *Original nominee not accepting.*—*Re QUINLAN* (1835), 1 Jo. Ex. R. 519.—*IR.*

c. — *Property in England & in New Zealand—Separation of trusts.*—*Re SCOTT'S WILL* (1874), 2 C. A. 441; 1 J. R. 162.—*N.Z.*

d. — *Objection by beneficiaries to person nominated by trustees.*—*ESKDALE v. SCUDLAR* (1908), 28 N. Z. L. R. 102.—*N.Z.*

e. — *Ambiguity in statute.*—*Re MCGREGOR*, [1919] N. Z. L. R. 551.—*N.Z.*

f. — *English trust—Part of trust estate heritable property in Scotland.*—The ct. will not appoint new trustees under an English trust, even where part of the trust estate consists of heritable property in Scotland.—*BROCKIE* (1875), 2 R. (Cl. of Sess.) 923; 12 Sc. L. R. 604.—*SCOT.*



SECT. 2.—*Appointment of trustees: Sub-sect. 2, D.*  
(b) i., ii., iii., iv. & v.]

1139. ———.]—JONES v. JONES, No. 1001, ante.

1140. ——— Trustee convicted of felony.]—Re DANSON, No. 1998, post.

——— To discharge duties of executor.]—See EXECUTORS, Vol. XXIII., p. 51, Nos. 292-294.

——— Although no vacancy.]—See Nos. 1244-1250, post.

Trustee for purposes of Settled Land Act—Trustee appointed by court desirous of retiring—Necessity for application to court.]—See SETTLEMENTS, Vol. XI., p. 782, No. 3130.

## ii. Where Alternative Method Available.

1141. Donee of power willing to appoint.]—Trustee Act, 1850 (c. 60), does not give jurisdiction to the Ct. of Ch. to exercise a power of appointing new trustees vested in a donee, who is willing to execute the power, however, irregularly the donee may have previously intended to exercise it; nor jurisdiction to remove a trustee willing to act, although previously desirous of retiring.

On petition under Trustee Act, 1850 (c. 60), for appointment of new trustees, where a continuing trustee was at first desirous of retiring, but afterwards was willing to remain, & the donee of the power of appointment at first refused to exercise the power without a consideration being paid to him, but afterwards consented to execute it, the petition was dismissed, but without costs.—Re HODGSON'S SETTLEMENT (1851), 9 Hare, 118; 68 E. R. 439; sub nom. Re HODGSON'S SETTLEMENT, 20 L. J. Ch. 551; 17 L. T. O. S. 241; 15 Jur. 552.

Annotations:—*Reid*, Re Blanchard (1861), 3 De G. F. & J. 131; Re Combs (1884), 51 L. T. 45; Re Higginbottom, [1892] 3 Ch. 132.

1142. ———.]—Re SUTTON, [1885] W. N. 122, L. J.

1143. Person with statutory power.]—Where an express power contained in a will for the appointment of new trustees by the surviving or continuing trustees had not been acted on, the ct. refused to compel the legatees to acquiesce in an appointment by the exor. of the last surviving trustees, under Lord Cranworth's Act, 1860 (c. 145), s. 27.—Re JACKSON'S TRUSTS (1868), 18 L. T. 80; 16 W. R. 572.

1144. ———.]—One of the trustees of a deed of separation which contained no power of appointment of new trustees having died:—*Held*: the power was vested in the surviving trustee by Lord Cranworth's Act, 1860 (c. 145), & petition by the husband claiming the right of selection dismissed.—Re SOULBY'S TRUSTS (1873), 21 W. R. 256.

1145. ———.]—Conveyancing Act, 1881 (c. 41), s. 31, having given a power to appoint new trustees in every case where a trust is subsisting, it is now improper to apply to the ct. for the appointment of new trustees under Trustee Act, 1850 (c. 60), s. 32, unless there is some reason making it "difficult, inexpedient, or impracticable to appoint them without the assistance of the ct." other than the mere absence of a power to do so in the instrument creating the trust.—Re GIBBON'S TRUSTS (1882), 45 L. T. 756; 30 W. R. 287.

Annotations:—*Reid*, Re Higginbottom, [1892] 3 Ch. 132; Re Whitaker, Denison-Pender v. Evans (1910), 103 L. T. 657.

1146. ———.]—Re HIGGINBOTTOM, No. 1109, ante.

1147. ——— surviving trustee refusing to appoint.]—Re RENDELL'S TRUSTS (1915), 139 L. T. Jo. 249.

## iii. Bankruptcy of Trustee.

See, now, Trustee Act, 1925 (c. 19), s. 41 (1).

1148. Discretion of court.]—Re BETTS, MACLEAN v. BETTS (1897), 41 Sol. Jo. 209; *affd.* (1899), cited in 48 W. R. 73, C. A.

Annotation:—*Apld.* Re Danson (1899), 48 W. R. 73.

1149. Whether court will appoint new trustee.]—Re HOLLINGSWORTH, *Ex p.* WILKINSON (1837), 3 Mont. & A. 145, Ct. of R.

1150. ———.]—Testator bequeathed his residuary estate to two trustees, whom he appointed exors.; one of them renounced; & after the death of the other, the trust funds came into the possession of his legal personal representative, who became bkpt. The *cestuis que trust* presented a petition for the appointment of a new trustee. On it appearing that the original testator had been dead for twenty years, & that the interest of the trust fund had ever since been applied according to the trusts, & on petitioners' deposing that to the best of their belief all the original testator's debts, etc., had been paid:—*Held*: a new trustee might be appointed, without it appearing that any personal representative of the original testator was before the ct.—Re MOLYNEUX, *Ex p.* HARDMAN (1844), 3 Mont. D. & De G. 559, Ct. of R.

1151. ———.]—A., B., & C. were trustees under a will. A died; B. & C. became bkpt. Three new trustees were appointed by the ct. in the place of A., B., & C.—Re CLARKE, *Ex p.* VAUGHAN (1844), 13 L. J. Bcy. 22.

1152. ———.]—Testator by his will devised real estate to A. upon certain trusts. A suit was instituted against A. for the administration of the estate of his testator, & to establish & perform the trusts. A. became bkpt. & absconded. The ct., upon a petition entitled in the cause, & in the matter of bankruptcy Law Consolidation Act, 1849 (c. 100), & in the matter of Trustee Act, 1850 (c. 60), appointed a new trustee in the place of A., & ordered the assignees to convey to such new trustee the real estate of testator.—BREED v. CAFFALL (1855), 24 L. T. O. S. 308; 3 W. R. 258.

1153. ———.]—A new trustee appointed in the place of a trustee who had become bkpt. had never surrendered, & had not been heard of for several years.—Re RENSHAW'S TRUSTS (1869), 4 Ch. App. 783; 17 W. R. 1035, L. J.

1154. ——— Without reference to master.]—If a trustee become bankrupt the ct. will appoint a new trustee without a reference, if there be an affidavit of solvency, fitness, etc.—Re TOULMINSON, *Ex p.* WALTON (1835), 2 Mont. & A. 242; sub nom. Re TOMLINSON, *Ex p.* WALTON, 4 L. J. Bcy. 57, Ct. of R.

1155. ——— Trust property small.]—The ct. will appoint new trustees in the room of the bkpt. without a reference to the master, where the trust property is small, & the petition is supported by an affidavit as to the fitness & solvency of the proposed trustees.—Re COLLIS, *Ex p.* LAMPRELL (1842), 6 Jur. 956, Ct. of R.

1156. ——— Though bankrupt discharged.]—A new trustee will be appointed in the place of a bkpt. trustee, although such bkpt. has obtained his certificate; neither will the bkpt. trustee be per-

## PART II. SECT. 2, SUB-SECT. 2.—D. (b) iii.

1149 i. Whether court will appoint new trustee.]—Re SMITH'S TRUSTEES (1869), N. B. Dig. 647.—CAN.

1149 ii. ———.]—Where a trustee was insolvent, the ct. ordered his removal, & a new trustee was appointed.—Re HOOD (1892), 40 N. S. R. 33.—CAN.



mitted to propose himself as new trustee before the master.—*Re DRY, Ex p. SMITH* (1839), 4 Deac. 214; 3 Jur. 1129, Ct. of R.

**1157.** —[—]—One of the two trustees of a will had been adjudicated bkpt., but had obtained his discharge. The other trustee, who was beneficially entitled also to one-third of the trust estate, petitioned for the removal of the trustee who had been bkpt., & the appointment of a new trustee. The application was opposed by beneficiaries entitled to greater shares than petitioner:—*Held*: the bkpcy. being a recent one, the trustee must be entirely impecunious; & it was expedient under Bankruptcy Act, 1883 (c. 52), s. 147, to appoint a new trustee in the place of the one who had been bkpt., notwithstanding that he had obtained his discharge.—*Re FOSTER'S TRUSTS* (1886), 55 L. T. 479; 2 T. L. R. 803.

#### iv. Death of Sole or Surviving Trustee.

**1158. Surviving trustee having bequeathed trust property.**—Testator gave legacies to certain persons for life, with remainders over, & directed the sums to be invested in the names of two persons as trustees. The survivor of the trustees died, having bequeathed all property held by him in trust to A:—*Held*: A. was not a trustee under the will of the original testator, & new trustees were appointed by the ct.—*MORTIMER v. IRELAND* (1847), 6 Hare, 196; 16 L. J. Ch. 416; 11 Jur. 721; 67 E. R. 1138, L. C.

*Annotations*:—*Consd.* Osborne v. Rowlett (1880), 13 Ch. D. 774; *Re Crunden & Meux's Contract*, [1909] 1 Ch. 690. *Reid.* Hall v. May (1857), 3 K. & J. 585; *Re Morton & Hallett* (1880), 15 Ch. D. 143.

**1159. No representation taken out to surviving trustee.**—Where leasehold estates were vested in trustees, all of whom were dead, & the survivor had died intestate, & no administration had been taken out, & there being no clause in the lease whereby the property was held to prevent assignment the ct. appointed a new trustee & made a vesting order without the lessor being served with the petition.—*Re MATTHEW'S SETTLEMENT* (1853), 22 L. T. O. S. 211; 2 W. R. 85.

*Annotation*:—*Reid.* *Re Robinson's Will* (1863), 2 New Rep. 501.

**1160.** —[—]—Where a surviving trustee has been dead for many years, & no administration has been taken out to him, & there is therefore no existing trustee, the ct. will appoint a new trustee upon petition, under Trustee Act, 1850 (c. 60), s. 32. In such a case it is expedient to appoint a new trustee, but it cannot be done without the aid of the ct.—*DAVIS v. CHANTER* (1858), 27 L. J. Ch. 577; 31 L. T. O. S. 70; 4 Jur. N. S. 272; 6 W. R. 416.

**1161. No other person with power to appoint.**—Upon a separation between husband & wife a deed was executed, in which a trustee covenanted that in the event of the husband allowing the wife to live separate & have the custody of their children, the trustee would indemnify the husband against the debts, etc., of the wife. Upon the decease of the trustee:—*Held*: as the deed contained no power to appoint new trustees, the ct., under the Trustee Acts, had jurisdiction to appoint new trustees of the property.—*Re MATTHEWS* (1859), 26 Beav. 463; 7 W. R. 224; 28 L. J. Ch. 295; 53 E. R. 976;

*sub nom. Re MATHEW'S SETTLEMENT TRUSTS*, 32 L. T. O. S. 289; 5 Jur. N. S. 184.

**1162. Doubt as to where legal estate vested.**—Where the trustees of a will are dead, & it appears that there is a question as to the party in whom the legal estate is vested, the ct. will appoint new trustees, notwithstanding that a receiver has been appointed in the suit, & continue the receiver.—*REEVES v. NEVILLE* (1862), 10 W. R. 335.

**1163. Death of trustees in lifetime of testator.**—Where a sole trustee in a will, to whom a term of 2,000 years was devised, die in testator's lifetime, the ct. will refer it to the master to appoint a new trustee, & to settle & approve of a demise for the like term.—*DEVEX v. PEACE* (1829), Taml. 77; 48 E. R. 32.

**1164.** —[—]—*Re SMIRTHWAITE'S TRUSTS*, No. 908, *ante*.

**1165.** —[—]—(1) The ct. sitting in Lunacy has power under Trustee Extension Act, 1852 (c. 55), s. 9, to appoint new trustees of the will of a deceased lunatic, where the trustees appointed by the lunatic have died in his lifetime, for the purpose of getting rid of the funds standing in ct. to the credit of the lunacy.

(2) We will therefore make an order according to the prayer of the petition, except that as one of the trustees named is a member of the firm of solrs. acting for petitioners, it will not be regular to appoint him a trustee (*BAGGALLAY, L.J.*).—*Re ORDE* (1883), 24 Ch. D. 271; 52 L. J. Ch. 832; 49 L. T. 430; 31 W. R. 801, L. J.J.

*Annotations*:—*Follid.* *Re Ambler's Trusts* (1888), 59 L. T. 210. *Mentid.* *Re Dodsworth, Spence v. Dodsworth*, [1891] 1 Ch. 657.

**1166.** —[—]—Where a sole trustee for sale of a will had died in the lifetime of testator, a petition was presented by the administrator of testator, & the exors. & trustees of the trustee of the will who had died, asking for the appointment of two new trustees & for a vesting order:—*Held*: Conveyancing Act, 1881 (c. 41), s. 31, did not apply, & therefore the petition was necessary.—*Re AMBLER'S TRUSTS* (1888), 59 L. T. 210.

#### v. Infancy of Trustee.

*See, now, Law of Property Act, 1925 (c. 20), s. 20.*

**1167. Whether court will appoint new trustee.**—The ct. will on petition appoint a new trustee in the room of an infant appointed trustee by testator together with two other persons, & who has himself a beneficial interest.—*Re GARTSIDE'S ESTATE* (1853), 1 W. R. 196.

**1168.** —[—]—Where a power of sale is given by will to two trustees, one of whom is an infant, the ct., under Trustee Act, 1850 (c. 60), s. 32, will appoint a new trustee in the place of the infant.—*Re PORTER'S TRUSTS* (1856), 25 L. J. Ch. 482; 27 L. T. O. S. 26; 2 Jur. N. S. 349; 4 W. R. 417.

**1169.** —[—]—*Liberty to apply for restoration on coming of age.*—Testator had appointed a trustee who was an infant; on application to appoint a new trustee in his place to carry out the trusts of the will.

The ct. made the order upon a statement that same was to be without prejudice to any application by the infant to be restored to the trusteeship on his coming of age.—*Re SHELMEKDINE* (1864), 33 L. J. Ch. 474; 11 L. T. 106.

#### PART II. SECT. 2, SUB-SECT. 2.— D. (b) iv.

**1163 i. Death of trustee in lifetime of testator.**—*RAJ KRISHNA DEY v. BIPIN BEHARY DEY* (1912), 1 L. R. 40 Calo. 251.—*IND.*

#### PART II. SECT. 2, SUB-SECT. 2.— D. (b) v.

**1167 i. Whether court will appoint new trustee.**—Testator appointed his wife & his son A. trustees of his estate, the latter only until his son F. should attain 21, when F. was to be trustee,

& empowered them to carry on his business. A. renounced probate:—*Held*: the ct. had power to appoint an additional trustee, & the appointment should not be limited until F. attained 21.—*Re HAMILTON (DECEASED)*, [1914] S. A. L. R. 279.—*AUS.*

*Sect. 2.—Appointment of trustees: Sub-sect. 2, D. (b) v., vi., vii. & viii., & (c) i., ii. & iii.]*

1170. ————]—*Re BRUNT*, [1883] W. N. 220. *Annotation:—Apld. Re Tallatire*, [1885] W. N. 191.

1171. ————]—*Re TALLATIRE*, [1885] W. N. 191.

vi. *Lunacy of Trustee or of Donee of Power.*

*See LUNATICS*, Vol. XXXIII., pp. 222, 223, 226, Nos. 1322-1335, 1365-1370.

vii. *Physical or Mental Incapacity of Trustee.*

1172. *Ill health.*]—Where a trustee, from ill health, was unequal to the exertion of signing the necessary papers for effecting a transfer into ct. of a sum of stock, the ct. appointed new trustees of such sum of stock, they undertaking within a given time, to transfer such sum of stock into the name & with the privy, of the Accountant-General of this ct., pursuant to the provisions of Trustee Relief Act.—*Re DAWSON'S TRUSTS*, *Re BROOME* (1864), 3 New Rep. 397, L. JJ.

1173. *Old age.*]—The ct. has jurisdiction, under Trustee Act, 1850 (c. 60), s. 32, to appoint a new trustee in the place of a trustee who has become incapable as, for instance, through age & infirmity, of acting in the trusts. A will contained a power for the trustees or the survivors of them to appoint a new trustee in the place of any trustee who should be "incapable to act." One of the surviving trustees, testator's widow, having become, through age & infirmity, incapable of acting in the trusts, or of concurring in the appointment of a new trustee, or in a transfer of the trust estate; the ct. appointed a new trustee in her place & made a vesting order.—*Re LEMANN'S TRUSTS* (1883), 22 Ch. D. 633; 52 L. J. Ch. 560; 48 L. T. 389; 31 W. R. 520.

1174. ————]—*Re WESTON'S TRUSTS*, [1898] W. N. 151; 43 Sol. Jo. 29.

1175. *Infirmity.*]—*Re LEMANN'S TRUSTS*, No. 1173, *ante*.

1176. *Paralysis.*]—A person who is paralytic & deprived of the power of speech & unable to read & write, but is not suffering from any mental disease, is not a person of unsound mind within Trustee Act, 1850 (c. 60), s. 2. Therefore in such a case the petition should not be presented in Lunacy, but in the Ch. Div.—*Re BARBER* (1888), 39 Ch. D. 187; 57 L. J. Ch. 756; 58 L. T. 756; 37 W. R. 182, C. A.

*Annotation:—Apld. Re Weston* (1898), 43 Sol. Jo. 29.

1177. *Mental incapacity—Distinguished from physical.*]—*Re BARBER*, No. 1176, *ante*.

1178. ————]—*Re WESTON'S TRUSTS*, [1898] W. N. 151; 43 Sol. Jo. 29.

viii. *Trustee Corporation Ceasing to Exist.*

1179. *Court will appoint new trustees—To transfer fund.*]—A suit having been instituted for the purpose of obtaining an order for the transfer, with the consent of all parties, of a fund standing in the books of the Bank of England in the name of an incorporate body which had ceased to exist, the ct. having ordered the decree to be intitled in the matter of Trustee Act, 1850 (c. 60), appointed two trustees, & empowered & directed them to transfer the fund.—*HANOVER (KING) v. BANK OF ENGLAND* (1869), L. R. 8 Eq. 350; 21 L. T. 106.

*Annotation:—Apld. Re No. 9, Bomore Road*, [1906] 2 Ch. 359.

1180. ————]—*To assign leaseholds.*]—By an assignment of Sept. 1890, leaseholds became vested in a limited co. for the residue of a term of ninety-nine years. In 1896 this co. went into voluntary liquidation, & its assets were transferred to a new

co.; the purchase-money was paid, the new co. was let into possession, but by inadvertence no assignment of the leaseholds was executed. The old co. having become automatically dissolved under 25 & 26 Vict. c. 89, s. 143, a petition was now presented by the new co. under Trustee Act, 1893 (c. 53), asking for the appointment of a named person, pursuant to sect. 25, to be a trustee of the leaseholds in the place of the old co., & for a vesting order:—*Held*: as it was clearly expedient to appoint a new trustee, the ct. was justified in making the order asked for by the petition.—*Re No. 9, BOMORE ROAD*, [1906] 1 Ch. 359; 75 L. J. Ch. 157; 94 L. T. 403; 54 W. R. 312; 13 Mans. 69.

1181. ————]—*In compliance with foreclosure order.*]—In 1912 premises were demised for a term of ninety-nine years to a limited co. & its assigns at a yearly rent of £7 10s. The co. became dissolved in July, 1915, under Companies (Consolidation) Act, 1908 (c. 69), s. 195, without having assigned the premises in compliance with a foreclosure order obtained by the equitable mtgee. of the co. Upon the petition of the mtgee. for (a) a declaration that the co. at the date of its dissolution was a trustee of the premises for him within Trustee Act, 1893 (c. 53), (b) the appointment of a new trustee, (c) a vesting order, the ct. ordered the petition to be served on the reversioner, & subsequently, upon his appearing & consenting made the declaration as asked, appointed a new trustee in the place of the co. & the reversioner, & made a consequential vesting order.—*Re ALBERT ROAD, NORWOOD* (Nos. 56 & 58), [1916] 1 Ch. 289; 85 L. J. Ch. 187; 114 L. T. 357.

*Annotation:—Refd. Morris v. Harris*, [1927] A. C. 252.

1182. ————]—*In place of provident society—Crown not claiming property as bona vacantia.*]—The property of an incorporated industrial or provident society dissolved by instrument of dissolution under Industrial & Provident Societies Act, 1893 (c. 39), ss. 58, 61, is subject to a trust for appropriation & division, after providing for the claims of creditors, in accordance either with the provisions of the instrument or with the award of the chief registrar. Where dissolution took place before the society had handed over some of its property to the person nominated by the instrument of dissolution to realise its assets, the ct., the Crown not claiming the property as *bona vacantia*, appointed him a trustee in the place of the society, & made an order vesting the property in him on the trusts applicable thereto under the instrument.—*Re RUDDINGTON LAND*, [1909] 1 Ch. 701; 78 L. J. Ch. 378; 100 L. T. 648.

1183. ————]—*In place of rector as corporation sole.*]—A rector contracted to sell the rectory house, but died before completion of the purchase. No successor to the living had been appointed, & none was likely to be appointed. The purchasers had accepted the title:—*Held*: the ct. had power to declare that the late rector was at the time of his death a trustee & to make a vesting order.—*Re PEEK'S CONTRACT* (1920), 65 Sol. Jo. 220.

1184. *Corporation trustees of letters patent—Court will not appoint new trustees to assign.*]—The liquidators of a co. had agreed to sell to a purchaser letters patent of which the co. was the registered owner, but the co., was dissolved without any assignment having been executed. The purchaser, who was unable to get himself registered as proprietor of the letters patent, presented a petition asking for an order under Trustee Act, 1893 (c. 53), s. 35, vesting them in him:—*Held*: when the co. was dissolved the legal interest in the letters patent, if it vested anywhere, vested in the

Crown, & in that case, although the Crown did not act as trustee, it could not be said within Trustee Act, 1893 (c. 53), s. 35, that the trustee "could not be found"; if the legal interest did not vest in the Crown there was no trustee, & again it could not be said that the trustee "could not be found": because there being no trustee it could not be predicated of him that he "could not be found"; therefore a vesting order could not be made under sect. 35, & a new trustee could not be appointed under Trustee Act, 1893 (c. 53), s. 25.—*Re TAYLOR'S AGREEMENT TRUSTS*, [1904] 2 Ch. 737; 73 L. J. Ch. 557; 52 W. R. 602; 48 Sol. Jo. 500.

*Annotations*.—*Distd. Re No. 9, Bomore Road*, [1906] 1 Ch. 359. *N.F. Re Dutton's Patents* (1923), 67 Sol. Jo. 403. *Refd. Hastings Corp'n. v. Letton*, [1908] 1 K. B. 378.

**Vesting orders.**—*See* Sect. 8, sub-sect. 4, *post*.

(c) *Who will be Appointed.*  
*In General.*

**1185. Matters for consideration of court—Expressed wishes of creator of trust—Impartiality between beneficiaries—Efficient execution of trust.**—The discretion which the ct. exercises in appointing new trustees is not a mere arbitrary discretion, but is to be exercised in accordance with certain principles. Among them are the following:—(a) In selecting a person for the office, the ct. will have regard to the wishes of the author of the trust, expressed in, or plainly deduced from the instrument creating it. (b) The ct. will not appoint a person with a view to the interest of some of the *cestuis que trust*, in opposition to the interest of others. (c) The ct. will have regard to the question whether the appointment will promote or impede the execution of the trust. *Semble*, the mere fact of the continuing trustee refusing to act with the proposed new trustee, would not be sufficient to induce the ct. to refrain from appointing him.

It is of the essence of the duty of every trustee to hold an even hand between the parties interested under the trust (TURNER, L.J.).—*Re TEMPEST* (1866), 1 Ch. App. 485; 35 L. J. Ch. 632; 14 L. T. 688; 12 Jur. N. S. 539; 14 W. R. 850, L. J.

*Annotation*.—*Consd. Forster v. Abraham* (1874), L. R. 17 Eq. 351.

ii. *Aliens or Persons out of Jurisdiction.*

**1186. Whether court will appoint.**—By a deed poll declaring the trusts of certain sums of stock, power was reserved to the trustees to invest the trust moneys in the French Funds. The trustees, although applied to by the tenant for life to make such investment, refused to do so, & paid the trust funds into ct. under Trustee Relief Act. Upon a petition presented by the tenant for life, praying for the appointment of three foreigners resident in Paris as trustees in the room of the old ones, & the transfer of the trust funds to them accordingly, the ct. refused to make the order.—*Re GUIBERT'S TRUST ESTATE* (1852), 16 Jur. 852.

**1187. Beneficiaries proceeding abroad.**—Where trustees of a settlement have power to

advance the presumptive shares of children, with the consent of their parents, or the survivor in writing, for their preferment or benefit as they think fit, that warrants the payment of passage money & travelling expenses to a foreign country, on medical evidence of the necessity of it for the health of the children, & to defray the expenses of their parents to accompany them; but it does not include money for the purchase of land or the appointment of trustees in that country.—*Re LONG'S SETTLEMENT* (1868), 38 L. J. Ch. 125; 19 L. T. 672; 17 W. R. 218.

**1188. Beneficiaries abroad—Appointment expedient.**—*Re HILL'S TRUSTS*, [1874] W. N. 228.

**1189. ————**—*Re DREWES'S SETTLEMENT TRUSTS*, [1876] W. N. 168.

**1190. ————**—*Testator gave six separate sums in trust for six daughters respectively for life with remainder for the benefit of their children respectively at twenty-one or marriage, with ultimate gifts over for the benefit of all his children in certain contingencies. He gave a general power of appointment of new trustees.*

P., one of the six daughters, married a Canadian, her children were Canadians & had attained twenty-one or married, & the investments of the sum of money for her benefit were mostly Canadian. One of the trustees of the will retiring as far as regarded that sum, the ct. appointed a Canadian trustee of the same jointly with the other trustee of the will.—*Re CUNARD'S TRUSTS* (1878), 48 L. J. Ch. 192; 27 W. R. 52.

*Annotations*.—*Refd. Re Liddiard's Trusts* (1880), 49 L. J. Ch. 373; *Re Moss's Trusts* (1888), 57 L. J. Ch. 423.

**1191. ————**—*A sum of Consols stood settled upon trust for a married woman for life to her separate use, without power of anticipation, with remainder as she should by will appoint, with remainder to her exors. or administrators. The married woman & all her family resided in Ireland:—Held: upon a petition to appoint new trustees, the ct. would appoint two persons residing in Ireland, though out of the jurisdiction.*—*Re AUSTEN'S SETTLEMENT* (1878), 38 L. T. 601.

**1192. ————**—*Where all the cestuis que trust are resident out of the jurisdiction, the ct. will appoint new trustees resident out of the jurisdiction.*—*Re LIDDIAIRD* (1880), 14 Ch. D. 310; 49 L. J. Ch. 373; 42 L. T. 621; 28 W. R. 574.

*Annotation*.—*Refd. Re Freeman's Settled Trusts* (1887), 37 Ch. D. 148.

**Trustees of settlements.**—*See* SETTLEMENTS, Vol. XL., p. 780, Nos. 3110, 3111.

iii. *Beneficiaries and their Relations.*

**1193. Whether court will appoint—Tenant for life.**—As a general rule the ct. will not appoint a tenant for life a trustee.—*Re CORK'S TRUST* (1852), 19 L. T. O. S. 243.

**For purposes of Settled Land Acts.**—*See* SETTLEMENTS, Vol. XL., p. 779, Nos. 3101, 3102.

N. S. R. 36, n.—CAN.

**1186 ii. ————**—*The ct. may, in a special case, appoint as a trustee a person who is not within the jurisdiction.*—*Re KENNAW'S TRUST DEED*, [1928] N. Z. L. R. 460.—N.Z.

**1188 i. Beneficiaries abroad—Appointment expedient.**—*SIMPSON'S TRUSTEES*, [1907] S. C. 87; 44 So. L. R. 62; 14 S. L. T. 447.—SCOT.

**1188 ii. ————**—*STEWART'S TRUSTEES*, [1913] S. C. 647; 50 So. L. R. 430; [1913] I. S. L. T. 243.—SCOT.

**1188 iii. ————**—*COATS'S TRUSTEES*, [1925] S. C. 104.—SCOT.

PART II. SECT. 2, SUB-SECT. 2.—  
D. (a) i.

**g. Matters for consideration of court—Well known & defined rules.**—The appointment of a fit & proper person to be a new trustee is not a matter of arbitrary discretion of the ct. The appointment must be made subject to well known & defined rules.—*RAJ KRISHNA DEY v. BIPIN BEHARY DEY* (1912), 1 L. R. 40 Calo. 251.—IND.

**h. Married woman.**—Under Trustee Act, 1897, a married woman was appointed a trustee to fill a vacancy.—*Re GOWDER ESTATE* (1901), 22 C. L. T. 112; 3 O. L. R. 806.—CAN.

**k. Resignation of trust co. as trustee**

—*Appointment of well qualified private person.*—*HARRISBURG TRUST CO. & POWELL v. TRUSTS & GUARANTY CO.* (1914), 26 O. W. R. 158; 6 O. W. N. 110; 16 W. L. R. 876.—CAN.

**i. Woman.**—*SHAHAR BANOO v. AGA MAHOMED JAFFER BINDAMEEN* (1906), 23 T. L. R. 186, P. C.—IND.

PART II. SECT. 2, SUB-SECT. 2.—D.  
(a) ii.

**1186 i. Whether court will appoint.**—*The ct. refused to appoint a foreigner resident out of the jurisdiction a new trustee. Qu.: whether the ct. has power to make such an appointment.*—*Re DUDLEY'S TRUSTS* (1891), 40

*Sect. 2.—Appointment of trustees: Sub-sect. 2, D. (c) iii., iv. & v.]*

**1194.** — *Cestui que trust*—In special circumstances.]—Under special circumstances the ct. will appoint one of the *cestuis que trust* as trustee of an estate.—*Ex p. CONYBEARE'S SETTLEMENT* (1853), 1 W. R. 458, L. J.J.

**1195.** — *No other person willing to act*—Trust onerous.]—Where the trusts are onerous, & other persons cannot be found to undertake them, the ct. will appoint one of the *cestuis que trust* to be trustee.—*Ex p. CLUTTON* (1853), 17 Jur. 988.

**1196.** — — — — —.]—Where the trusts of a settlement were of a complicated nature & no stranger could be found willing to accept the office of trustee, the ct. departing from its usual rule, appointed as trustees two of the parties beneficially interested.—*Re CLISSOLD'S SETTLEMENT* (1864), 10 L. T. 642.

**1197.** — *Provision against becoming sole trustee*.]—*Re BURGESS' TRUSTS*, [1877] W. N. 87. *Annotation* :—*Fold. Re Lightbody's Trusts* (1884), 52 L. T. 40.

**1198.** — — — — —.] — *Re LIGHTBODY'S TRUSTS*, No. 1304, *post*.

**1199.** — — — — —.]—Where the surviving trustee of a fund standing in the names of trustees in the books of the Bank of England died leaving no personal representative the ct., upon a petition by the person beneficially entitled, appointed him trustee of the fund, & ordered it to be transferred into his name.—*Re DICKSON'S SETTLEMENT TRUSTS* (1872), 27 L. T. 671; *sub nom. Re DIXON'S TRUSTS*, 21 W. R. 220.

**1200.** — *Relation of cestui que trust*.]—The Master of the Rolls, except in cases of absolute necessity, will not appoint a near relative of the parties interested to be a trustee.—*WILDING v. BOLDER* (1855), 21 Beav. 222; 52 E. R. 845.

**1201.** — *No other person willing to act*.]—The ct. appointed an unmarried lady, aged twenty-seven, who was a relation of the *cestuis que trust* under a will, to be a trustee, there being a difficulty in finding any other suitable person to accept the office.—*Re BERKLEY, BERKLEY v. BERKLEY* (1874), 9 Ch. App. 720; 43 L. J. Ch. 703; 31 L. T. 365, L. J.J.

**1202.** — *Provision against becoming sole trustee*.]—The husband of a *cestui que trust* being appointed a trustee by the ct., was required to undertake to apply for the appointment of an additional trustee as soon as he become a sole trustee.—*Re HATTATT'S WILL* (1870), 21 L. T. 781; 18 W. R. 416.

*Annotation* :—*Fold. Re Lightbody's Trusts* (1884), 52 L. T. 40.

**1203.** — — — — —.]—Where it was not possible to get another person, the ct., with the consent of a lady who was interested under a will for her separate & inalienable use, appointed her husband one of two new trustees of a will, the order containing a direction that if & upon his becoming sole trustee there should be a new trustee appointed.—*Re PARROTT* (1881), 30 W. R. 97.

*Annotation* :—*Apld. Re Coode, Coode v. Foster* (1913), 108 L. T. 94.

## PART II. SECT. 2, SUB-SECT. 2.— D. (c) iii.

**1194 i.** *Whether court will appoint—Cestui que trust—In special circumstances*.]—*Cestuis que trust* residing out of the jurisdiction of the ct. appointed trustees of real estate under peculiar circumstances.—*Re CURTIS'S TRUSTS & TRUSTEE ACTS*, 1850, 1852 (1871), 5 L. R. Eq. 429.—*IR.*

**1200 i.** — *Relation of cestui que*

*trust*.]—The appointment of relatives as new trustees should be avoided whenever another competent party can be had.—*Re CRONAN'S ESTATE* (1899), 31 N. S. R. (19 R. & G.) 477.—*CAN.*

## PART II. SECT. 2, SUB-SECT. 2.— D. (c) iv.

m. *Effect of director appearing as*

**1204.** — — — — —.] — *Re LIGHTBODY'S TRUSTS*, No. 1304, *post*.

### iv. *Corporations.*

*See, now, Trustee Act, 1925 (c. 19), s. 42.*

**1205.** *Whether court will appoint*.]—*Re BROGDEN, BILLING v. BROGDEN*, [1888] W. N. 238.

### v. *Re-Appointment of Existing Trustees.*

**1206.** *For purpose of making vesting order*.]—Where a trustee, in whom leasehold property was vested, died in Australia, & new trustees had been appointed under a power in the instrument creating the trust, but owing to the difficulty of ascertaining who were the representatives of deceased trustee, the trust property could not be assigned to such new trustees, the ct., under Trustee Act, 1850 (c. 60), s. 32, re-appointed such new trustees, & under sect. 34, directed that the trust property should vest in them.—*Re MUNDEL'S TRUST* (1860), 2 L. T. 653; 6 Jur. N. S. 880; 8 W. R. 683.

*Annotation* :—*N.F. Re Driver's Settltmt.* (1875), L. R. 19 Eq. 352.

**1207.** — — — — —.]—Upon an appointment of A., as a trustee under a settlement jointly with B., certain leaseholds were assigned to a provisional trustee upon trust to re-assign the same to A. & B. No reassignment was executed. The provisional trustee died intestate & no legal representative could be found. Under Trustee Act, 1850 (c. 60), s. 32, A. was re-appointed a trustee of the settlement: & under sect. 34 the leaseholds were vested in A. & B. jointly.—*Re MORRIS'S SETTLEMENT* (1864), New Rep. 480.

**1208.** — — — — —.]—(1) Where a trustee of leaseholds has died intestate & has no legal personal representative, & a new trustee has been duly appointed in his place, the ct. will not reappoint him trustee under Trustee Act, 1850 (c. 60), s. 32, merely for the sake of making a vesting order under sect. 34. (2) The ct. will, however, appoint an additional trustee under sect. 32, & will thereupon make a vesting order under sect. 34.—*Re DRIVER'S SETTLEMENT* (1875), L. R. 19 Eq. 352; 23 W. R. 587.

*Annotation* :—*As to (2) Exld. Re Dalgleish's Settltmt.* (1875), 1 Ch. D. 46. (*See* 4 Ch. D. 143.)

**1209.** — — — — —.]—Where a sole trustee of leaseholds had died intestate, & had no legal personal representative, & new trustees had been duly appointed under the settlement, the ct. reappointed the same two persons trustees, & made an order vesting the leaseholds in them.—*Re DALGLEISH'S SETTLEMENT* (1876), 4 Ch. D. 143; 35 L. T. 829; *sub nom. Re DALGLEISH'S TRUSTS*, 25 W. R. 122, C. A.

*Annotations* :—*Apld. Re Crowe's Trusts* (1880), 14 Ch. D. 304. *Overd. Re Bewhrst's Trusts* (1886), 33 Ch. D. 416.

**1210.** — — — — —.]—Where one of several trustees is a lunatic & it is desired to appoint a new trustee in his place, the petition must be intituled in the Ch. Div. as well as in Lunacy, otherwise the vesting order will sever the joint tenancy.

The order must also formally reappoint the new trustee (JAMES, L.J.).—*Re PEARSON* (1877), 5 Ch. D. 982; 37 L. T. 299, C. A.

*Annotation* :—*N.F. Re Vicat* (1886), 33 Ch. D. 103.

**1211.** — — — — —.]—The survivor of two trustees of stock under a will died without leaving any legal

*counsel in action for removal of original trustee*.]—The fact that one of the directors of a trustee co. was counsel for pltf. in an action which resulted in the removal of such trustee, & the substitution of a trustee co. in his place, does not necessarily prevent such co. from being chosen as trustee upon the ground of unconscious bias.—*WALLACE v. WALLACE* (No. 2) (1899), 24 V. L. R. 893.—*AUS.*

personal representative, & the *cestuis que trust* & two new trustees who had been appointed under a power in the will presented a petition asking that the right to transfer the stock which was then standing in the names of deceased trustees might vest in the new trustees under Trustee Act, 1850 (c. 60), s. 25.

The ct. made the order, following *Re Dalgelish's Settlement*, No. 1209, *ante*, & stated that the proper course was for trustees to be reappointed.—*Re CROWE'S TRUSTS* (1880), 14 Ch. D. 304, 610; 42 L. T. 822; 28 W. R. 885.

*Annotations*.—*Follid. Re Northrop*, Taylor v. Northrop (1880), 29 W. R. 134. *Consd. Re Stocken's Settlement*, [1893] W. N. 203.

**1212.** —[.]—A new trustee was appointed under a power, in place of a trustee who had become incapable:—*Held*: there was no jurisdiction under the Trustee Acts to reappoint the new trustee & vest the trust estate in the continuing trustees & the new trustee.—*Re DEWHIRST'S TRUSTS* (1886), 33 Ch. D. 416; 55 L. J. Ch. 842; 55 L. T. 427; 35 W. R. 147, C. A.

*Annotations*.—*Consd. Re Gardiner's Trusts* (1886), 33 Ch. D. 590; *Re Martin's Trusts* (1887), 56 L. J. Ch. 229. *Apld. Re Hulme's Trusts* (1887), 57 L. T. 13. *Reid. Re Stocken's Settlement*, [1893] W. N. 203.

**1213.** —[.]—*Re STOCKEN'S SETTLEMENT TRUSTS*, [1893] W. N. 203.

**1214.** —*Doubt as to validity of original appointment.*—Where there is no doubt that existing trustees of an instrument have been duly constituted, the ct. will not reappoint them, with a view to making, under Trustee Act, 1850 (c. 60), s. 34, a vesting order which will not sever the joint tenancy. A., B., & C. were named trustees in a will, A. died, B. became of unsound mind, & C. appointed E. & F. trustees in the place of A. & B. Part of the trust estate consisted of a mtge. of freeholds. The appointment of E. & F. being unquestionably valid, the ct. refused to reappoint them & make an order vesting the mtge. estate in C., E., & F., but made an order appointing C. in the place of B. to convey the mtged. property for the estate of himself & B. to himself, E., & F. upon the trusts of the will.—*Re VICAT* (1886), 33 Ch. D. 103; 55 L. J. Ch. 843, n.; 54 L. T. 891; 34 W. R. 645, C. A.

*Annotations*.—*Apld. Re Dewhurst's Trusts* (1886), 33 Ch. D. 416. *Reid. Re Gardiner's Trusts* (1886), 33 Ch. D. 590.

*Vesting orders generally.*—*See* Sect. 8, subsect. 4, *post*.

**1215.** *Continuing trustees—As sole trustees.*—When a trustee wishes to retire, & a successor cannot be found, the ct. can appoint the continuing trustees to be sole trustees in the place of the continuing & retiring trustees.—*Re STOKES' TRUSTS* (1872), L. R. 13 Eq. 333; 41 L. J. Ch. 290; 26 L. T. 181; 20 W. R. 396.

*Annotations*.—*Follid. Re Tatham's Trusts*, [1877] W. N. 259; *Re Harford's Trusts* (1879), 13 Ch. D. 135. *N.F. Re Colyer* (1880), 50 L. J. Ch. 79; *Re Gardiner's Trusts* (1886), 33 Ch. D. 590.

**1216.** —[.]—*Re TATHAM'S TRUSTS*, [1877] W. N. 259.

*Annotation*.—*N.F. Re Gardiner's Trusts* (1886), 55 L. J. Ch. 714.

**1217.** —[.]—One of the four trustees of a will having absconded:—*Held*: the ct. had jurisdiction under Trustee Act, 1850 (c. 60), s. 32, to appoint the remaining three as sole trustees in place of themselves & the fourth.—*Re HARFORD'S TRUSTS* (1879), 13 Ch. D. 135; 41 L. T. 382; 28 W. R. 239.

*Annotations*.—*N.F. Re Colyer* (1880), 50 L. J. Ch. 79; *Re Aston* (1883), 23 Ch. D. 217; *Re Gardiner's Trusts* (1886), 33 Ch. D. 590. *Consd. Re Chetwynd's Settlement*, *Scarbrick v. Nevinsan*, [1902] 1 Ch. 492.

**1218.** —[.]—*Re NORTHROP, TAYLOR v. NORTHROP* (1880), 29 W. R. 134.

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**1219.** —[.]—It is the settled practice of the ct. under Trustee Act, 1850 (c. 60), when there is a continuing trust, not simply to remove or discharge a trustee, without appointing a new trustee in his place, by appointing the remaining trustees to be sole trustees in place of themselves & him, & though the ct. will deviate from this rule & make such an appointment if the trustees have no duty to perform but to distribute a fund which is immediately divisible, it will adhere to the ordinary rule if there is a continuing trust as regards even a relatively small part of the trust fund.—*Re LAMB'S TRUSTS* (1884), 28 Ch. D. 77; 54 L. J. Ch. 107; 33 W. R. 163.

*Annotation*.—*Consd. Re Gardiner's Trusts* (1886), 33 Ch. D. 590.

**1220.** —[.]—One of the four trustees of a settlement having been adjudicated a bkpt. & having absconded, an action was brought by one of the *cestuis que trust* against the other three trustees, claiming to have the trusts carried into execution, & to have it declared that defts. were bound to make good any loss which might accrue on three mtges. on which part of the trust funds had been invested, & which pltf. alleged to be insufficient securities. He also alleged that the fourth trustee had acted fraudulently. The legal estate in the mtged. properties was vested in all the four trustees, & the stocks, in which the remainder of the trust funds had been invested, stood in the names of the four trustees. Before issue was joined in the action, defts., in pursuance of an order of the ct., gave notice to call in two of the mtges., & one of the notices had expired. Owing to the pendency of the action no one could be found willing to accept the trusts in place of the bkpt.:—*Held*: under these circumstances, the ct. could properly appoint defts. trustees in the place of themselves & the bkpt. An order was accordingly made appointing defts. & vesting in them the mtged. properties, & the right to sue for & receive the mtge. debts, & to call for a transfer of, & to transfer, the stocks into their own names, & to receive the dividends thereon, defts. to pay into ct. the mtge. money when received.—*DAVIES v. HODGSON* (1886), 32 Ch. D. 225.

*Annotation*.—*Expld. Re Gardiner's Trusts* (1886), 33 Ch. D. 590.

**1221.** —[.]—Where one of three trustees was an absconding bkpt., the ct. refused, notwithstanding evidence of great difficulty in getting a third person to act as trustee, to appoint the solvent trustees in place of themselves & the bkpt. & to make an order vesting the trust estate in the solvent trustees alone; on the ground that the ct. will not reduce the number of trustees of a continuing trust; & also that there is no power to appoint existing trustees to be new trustees.—*Re GARDINER'S TRUSTS* (1886), 33 Ch. D. 590; 55 L. J. Ch. 714; 55 L. T. 201; 35 W. R. 28.

*Annotation*.—*Consd. Re Fowler's Trusts* (1886), 55 L. T. 546.

*See, also*, LUNATICS, Vol. XXXIII., p. 223, Nos. 1329-1335.

**1222.** —[.]—*Re PRICE* (1894), 8 R. 621.

**1223.** —[.]—Where one of four trustees was an absconding bkpt. the ct. made an order vesting the trust estate in the other three trustees, although the number of trustees was thereby diminished.—*Re LEE'S SETTLEMENT TRUSTS*, [1896] 2 Ch. 508; 65 L. J. Ch. 770; 75 L. T. 178; 44 W. R. 680.

**1224.** —[.]—*DUGMORE v. SUFFIELD*, [1896] W. N. 50.

**1225.** —[.]—*Re FITZHERBERT'S SETTLEMENT TRUSTS*, [1898] W. N. 58.

—*To exclude lunatic trustee.*—*See* LUNATICS, Vol. XXXIII., p. 223, Nos. 1329-1335.

*Sect. 2.—Appointment of trustees: Sub-sect. 2, D. (c) vi. & vii., (d), (e) & (f).]*

vi. *Feme Sole.*

**1226. Whether court will appoint.]—***Re* DICKINSON'S TRUSTS, [1902] W. N. 104.

vii. *Solicitors to Parties Interested.*

**1227. Whether court will appoint—Member of firm acting for petitioners—Difficulty in procuring other person.]—***Re* BRENTNAIL'S TRUSTS, [1872] W. N. 77.

**1228. ———.]—***Re* ORDE, No. 1165, *ante*.

**1229. ——— Solicitor to trustee.]—***Re* NORRIS, ALLEN v. NORRIS, No. 1032, *ante*.

**1230. ———.]—***Re* COTTER, JENNINGS v. NYE, No. 1089, *ante*.

——— *Solicitor to tenant for life.]—*See SETTLEMENTS, Vol. XL., pp. 779, 780, Nos. 3106–3109.

(d) *Appointment to Part of Property.*

*See, now, Trustee Act, 1925 (c. 19), s. 37 (1).*

**1231. Whether court will appoint—Part lost by negligence of former trustees—Appointment to whole.]—**In a suit to appoint new trustees of a settlement where a part of the trust property had been lost by previous negligence or breach of trust, the ct. refused to confine the trust to the remaining property, but appointed the new trustees to be trustees of the whole of the property comprised in the settlement, directing, for the protection of the new trustees, a reference to inquire whether it would be proper to take proceedings for the recovery of the property which had been lost.—*RENNETT v. BURGIS* (1846), 5 Hare, 295; 15 L. J. Ch. 231; 10 Jur. 153; 67 E. R. 925.

**1232. — With consent of representatives of surviving trustee.]—**By the same will different hereditaments were devised to trustees to secure a rentcharge & subject thereto, the hereditaments were devised in strict settlement the trustees to support contingent remainders, various other trusts relating to the same property were to be executed by the same trustees; the will contained the usual single power of appointment of new trustees. All the trustees had died, & the trusts had devolved on the two co-heiresses of the last surviving trustee:—*Held:* on petition for the appointment of new trustees, the ct. could, with the assent of the two co-heiresses appoint new trustees of the rentcharge only.—*Re DENNIS' TRUSTS* (1864), 3 New Rep. 636; 10 L. T. 689; 12 W. R. 575.  
*Annotation:—**Re* Grange, Cooper v. Todd (1881), 44 L. T. 469.

**1233. — On application by beneficiary of part.]—***Re* COTTERILL'S TRUSTS, [1869] W. N. 183.  
*Annotation:—**Appl. Re* Moss's Trusts (1888), 57 L. J. Ch. 423.

**1234. — Trustee desirous of retiring from part.]—***Re* CUNARD'S TRUSTS, No. 1190, *ante*.

**1235. ———.]—**Independently of Conveyancing Act, 1882 (c. 39), s. 5, the ct. has power under the Trustee Acts to allow trustees to retire from the trusts of a part of the trust property, held upon trust distinct from those affecting the remainder, & to appoint a separate set of trustees of such part.—*Re* Moss's TRUSTS (1888), 37 Ch. D. 513; 57 L. J. Ch. 423; 58 L. T. 468; 36 W. R. 316.

**1236. — Trusts for different classes of persons**

**—Consent of beneficiaries sui juris—& of trustees.]**

—Testator gave different parts of his property, consisting of freeholds & leaseholds, on substantially similar trusts for different families, with cross-remainders in each case. Many of the *cestuis que trust* were not *sui juris*:—*Held:* the present trustees of the will, & all the *cestuis que trust* who were *sui juris* consenting, separate sets of trustees might be appointed for the different divisions of the property.—*Re* GRANGE, COOPER v. TODD (1881), 44 L. T. 469; 29 W. R. 502.

**1237. — To act with sole continuing trustee—In relation to distinct part.]—**Appointment made of new trustees to act in conjunction with a sole continuing trustee of a will in relation to a distinct part of the trust property.—*Re* PAINE'S TRUSTS (1885), 28 Ch. D. 725; 54 L. J. Ch. 735; 52 L. T. 323; 33 W. R. 564.

**1238. — Part subject to distinct trusts—Possibility of trusts coalescing.]—**Under the trusts of a will different parts of testator's property were subject to distinct trusts, but in a certain event the trusts would coalesce:—*Held:* there was power to appoint separate sets of trustees for the different parts of the property.—*Re* HETHERINGTON'S TRUSTS (1886), 34 Ch. D. 211; 56 L. J. Ch. 174; 55 L. T. 806; 35 W. R. 285.

*Annotations:—**Re*id. Saville v. Couper (1887), 36 Ch. D. 520; *Re* Moss's Trusts (1888), 37 Ch. D. 513.

(e) *Number of Trustees.*

*See, now, Trustee Act, 1925 (c. 19), ss. 34–36, 41.*

**1239. Whether court can vary number—Appointment of greater number than originally appointed.]—**Several trustees appointed on petition, under 11 Geo. 4 & 1 Will. 4, c. 60, in the stead of a sole surviving lunatic trustee.—*Re* WELCH (1838), 3 My. & Cr. 292; 7 L. J. Ch. 169; 11 L. T. O. S. 409, n.; 40 E. R. 937, J. C.

*Annotations:—**Appl. Re* Smith (1848), 17 L. J. Ch. 415. *Re*id. *Re* Tweedie (1845), 5 L. T. O. S. 33.

**1240. ———.]—***Re* SMITH, No. 1128, *ante*.

**1241. ———.]—**It is not contrary to the practice of the ct. to appoint three trustees in the place of two nominated in a will containing no power to appoint new trustees.—*BIRCH v. CROPPER* (1848), 2 De G. & Sm. 255; 64 E. R. 115.

**1242. ———.]—**Two trustees of real estate were appointed by the ct. in the place of one on petition under Trustee Act, 1850 (c. 60); & the property being small, without a reference, on an affidavit of the fitness of the two persons proposed as trustees.—*Re* TUNSTALL'S WILL, *Ex p. TUNSTALL* (1851), 4 De G. & Sm. 421; 17 L. T. O. S. 251; 15 Jur. 645; 64 E. R. 806.

**1243. ———.]—**In appointing new trustees, the ct. is not limited to the number originally nominated.—*PLENTY v. WEST* (1853), 16 Beav. 356; 51 E. R. 816.

**1244. ——— Although no vacancy—Trust property greatly increased.]—**Two trustees appointed, in addition to two existing trustees, in a case where only two trustees were originally appointed, but where the trust property had been very much increased.—*Re* BOYCOTT'S SETTLEMENT (1856), 28 L. T. O. S. 120; 5 W. R. 15.

**1245. ———.]—***Re* GREGSON'S TRUSTS, No. 1122, *ante*.

**1246. ——— Only one trustee originally appointed.]—**Testator appointed A. the tenant for life, & C. trustees. The will contained no power to

## PART II. SECT. 2, SUB-SECT. 2.— D. (e).

**1239 i. Whether court can vary number—Appointment of greater number than originally appointed.]—**Under Trustee Act, 1908, s. 41, the ct. has power to

appoint a new trustee of a will even though such an appointment involves an increase in the number of the trustees appointed by the testator.—*Re* DURRANT, [1919] N. Z. L. R. 303.—*N.Z.*

**1246 i. ——— Although no vacancy—Only one trustee originally appointed.]—**A Maori settler had settled certain lands, she being herself sole trustee. She died leaving a will by which she appointed a solr. sole trustee of her



appoint new trustees. C. having disclaimed, A., under the powers of 23 & 24 Vict. c. 145, s. 27, appointed a single trustee in his place:—*Held*: the other *cestuis que trust* were entitled to have a third trustee appointed, & the Act did not take away the jurisdiction of the ct. to increase the original number of trustees.—*D'ADHEMAR (Viscountess) v. BERTRAND* (1865), 35 Beav. 19; 55 E. R. 801.

1247. ————.]—In a case where testator had bequeathed a large fund to a single trustee the ct., at the instance of the tenant for life of the fund, appointed an additional trustee at the cost of the corpus of the trust property.—*GRANT v. GRANT* (1865), as reported in 6 New Rep. 347; 34 L. J. Ch. 641.

*Annotations*:—*Reid. Moore v. Moore* (1874), L. R. 13 Eq. 474; *Baddley v. Baddley* (1878), 9 Ch. D. 113; *Re Breton's Estate, Breton v. Woolven* (1881), 17 Ch. D. 416. *Mentid. Browne v. Collins* (1872), 21 W. R. 222; *Williams v. Mercer* (1882), 51 L. J. Q. B. 594.

1248. ————.]—Where testatrix bequeathed a fund to a single trustee in trust for A. for life, with remainder over, on the petition of the parties interested in remainder, the ct. allowed additional trustees to be appointed; the costs to be paid by petitioners.—*Re BRACKENBURY'S TRUSTS* (1870), L. R. 10 Eq. 45; 39 L. J. Ch. 635; 22 L. T. 469.

*Annotations*:—*Folld. Re Gregson's Trusts* (1886), 34 Ch. D. 209. *Reid. Fane v. Fane* (1879), 28 W. R. 348.

1249. ————.]—Where a sole trustee is originally appointed by a settlor or testator there is no absolute right in the beneficiaries to the appointment of a second trustee. Although in many cases the ct. would desire to secure for the beneficiaries the protection afforded by a second trustee, there are cases in which the settlor or testator has deliberately elected to commit to a single individual the execution of the trust, & in such cases the ct. ought to give effect to the intention of the settlor or testator.—*Re BADGER, BADGER v. WOOLLEY* (1915), 84 L. J. Ch. 567; 113 L. T. 150.

1250. ————.]—*Re PONDER, PONDER v. PONDER*, No. 1338, *post*.

1251. ————.]—Appointment of smaller number than originally appointed.—Appointment of sole trustee.]—The ct. will never place a trust fund belonging to persons not *sui juris* in the power of a sole trustee.—*Re DICKINSON'S TRUSTS* (1855), 1 Jur. N. S. 724.

1252. ————.]—(1) The ct. will not appoint one new trustee to supply the place of more than one originally constituted.

(2) *Semble*: disclaimer in ct. on petition not sufficient to divest an estate; disclaimer should be by deed or of record.—*Re ELLISON'S TRUST* (1856), 2 Jur. N. S. 62.

*Annotation*:—*As to* (2) *Reid. Foster v. Dawber* (1860), 8 W. R. 646.

1253. ————.]—Beneficial to parties interested.]—The master may have liberty to appoint one instead of two trustees if he finds it to be beneficial to the parties interested (*KNIGHT BRUCE, V.-C.*).—*SIRWELL v. HERON* (1850), 15 L. T. O. S. 296; 14 Jur. 848.

1254. ————.]—Although prohibited by instrument.]—*Semble*: under Trustee Act, 1893 (c. 53), s. 25, the ct. can appoint two trustees or

even a sole trustee of a settlement, notwithstanding the settlor's direction as to the minimum number being three.—*Re LESLIE'S HASSOP ESTATES*, [1911] 1 Ch. 611; 80 L. J. Ch. 480; 27 T. L. R. 352; 55 Sol. Jo. 384; *sub nom. Re HASSOP SETTLED ESTATES, Re LESLIE'S WILL*, 104 L. T. 563.

*Annotation*:—*Expld. Re Moxon*, [1916] 2 Ch. 595.

1255. ————.]—Special circumstances.]—

(1) Under special circumstances two trustees will be appointed where the original number was three.

(2) A trustee disclaiming at the bar has costs only as between party & party.—*BULKELEY v. EGLINTON (EARL)* (1855), 1 Jur. N. S. 994.

1256. ————.]—By a settlement made in 1859 four trustees were appointed, one of whom disclaimed. The existing three trustees desired to retire, & in the events that had happened the power to appoint new trustees contained in the settlement was not exercisable. A petition was accordingly presented for the appointment of three new trustees in place of the three who had acted & now wished to retire. Great difficulty was found in obtaining the consent of other persons to act as trustees & this was alleged as a ground for the application that three new trustees should be appointed in the room of the original four:—*Held*: on an appointment of new trustees by the ct., assuming it was necessary to prove special circumstances to enable the ct. to appoint three new trustees when there had originally been four trustees, the disclaimer by one & the difficulty of obtaining new trustees constituted special circumstances.—*Re FOWLER'S TRUSTS* (1886), 55 L. T. 646.

1257. ————.]—Where there are three trustees, & one dies, another disappears, & the third is desirous of retiring, the ct. will, on petition under Trustee Act, appoint two in the place of the three.—*Re MARIOTT'S SETTLEMENT* (1868), 18 L. T. 749.

—Re-appointment of existing trustees.]—*See Sub-sect. 2, D. (c) v., ante*.

1258. ————.]—Appointment of sole trustee.—Only one trustee originally.—Trust about to be wound up.]—One sole trustee appointed in the place of a lunatic trustee, where the trust was shortly to be wound up, & where there had been but one trustee originally.—*Re REYNALD* (1852), 19 L. T. O. S. 25; 16 Jur. 233, L. C.

*Annotation*:—*Reid. Leigh v. Pantin*, [1914] 2 Ch. 701.

#### (f) Terms of Appointment.

1259. Whether power given to appoint successors.]—*SOUTHWELL v. WARD* (1820), Tam. 314; 48 E. R. 125.

1260. ————.]—In a suit for the appointment of new trustees, the ct. refused to insert a clause in the will, authorising the new trustees to appoint others in their room.—*BROWN v. BROWN* (1839), 3 Y. & C. Ex. 395.

1261. ————.]—Trustees appointed by the ct. in the place of others whose appointments had fallen by their deaths in the lifetime of testator, authorised to appoint future trustees in the manner & under the circumstances mentioned in the will.—*WHITE v. WHITE* (1842), 5 Beav. 221; 6 Jur. 160; 49 E. R. 502.

*Annotations*:—*Dbtd. Oglander v. Oglander* (1848), 17 L. J. Ch. 439. *N.F. Holder v. Durbin* (1849), 11 Beav. 594.

property:—*Held*: there should be two trustees of the settlement, as caution was even more necessary than in England, & especially so in cases where Maoris were interested, & the trustee might be a Maori with an insufficient sense of responsibility.—*Re RORA POTAKA*, [1921] N. Z. L. R. 435.—N.Z.

1251 i. ————.]—Appointment of smaller number than originally appointed.—Appointment of sole trustee.]—*PROUD-FOOT v. TIFFANY* (1865), 11 Gr. 461.—CAN.

1251 ii. ————.]—It is contrary to the course of the ct., without some very special reason, to sanction the appointment of one trustee in

place of three.—*KINGSMILL v. MILLER* (1868), 15 Gr. 171.—CAN.

#### PART II. SECT. 2, SUB-SECT. 2.—D. (f).

1259 i. Whether power given to appoint successors.]—*JOYCE v. JOYCE* (1828), 2 Mol. 276.—IR.



*Sect. 2.—Appointment of trustees: Sub-sect, 2, D.  
(f) & (g) i., ii., iii. & iv.]*

**1262.** —.]—The ct. in decreeing the appointment of new trustees will not direct a power to be inserted in the deed for appointing new trustees *toties quoties*.—*BOWLES v. WEEKS* (1845), 14 Sim. 591; 60 E. R. 487.

**1263.** —[A. & B. were named as trustees in a marriage settlement but both of them died without having executed it & without having had any of the trust property vested in them. The settlement contained the usual power for the appointment of new trustees. In a suit for the appointment of new trustees:—*Held*: it was not competent to the ct. to direct that the new trustees should have the power of naming their successors in the same manner as if they had been the original trustees.—*OGLANDER v. OGLANDER* (1848), 2 De G. & Sm. 381; 17 L. J. Ch. 439; 12 Jur. 786; 64 E. R. 171.]

1264. —.]—Power was given to trustees & their successors to appoint new trustees. The ct. being called on to appoint new trustees declined to enable such new trustees to appoint successors.—*HOLDER v. DURBIN* (1849), 11 Beav. 594; 18 L. J. (Ch. 479; 14 L. T. O. S. 305; 50 E. R. 946.

(g) *The Application.*  
i. *In General.*

*See, now, R. S. C., Ord. 55, r. 14B.*

**1265. How made.—In action for rectification of settlement.]—**Where a bill is filed seeking to rectify an instrument & for the appointment of new trustees, the ct., though it may not be able to rectify the instrument, will grant relief so far as to appoint new trustees.—*BARBER v. BARBER* (1859), 4 Drew. 606; 20 L. J. Ch. 49; 1 L. T. 21; 5 Jur. N. S. 1197; 8 W. R. 16; 62 E. R. 255.

**1266.** — **Petition**—**In Lunacy & Chancery.**—Appointment under one petition in Lunacy & Chancery of new trustees in the place of a person of unsound mind, not so found by inquisition, & of a deceased trustee & a trustee resident abroad.—*Re STEWART* (1860), 8 W. R. 297, L. J.J.

*Annotation:—Reid. Re Bignold's Settltmt. Trusts (1872),*  
26 L. T. 176.

1267. — — — —.]—*Re* ARDEN, [1887]  
W. N. 166, 14. JJ.

**1288.** ——— **Complicated case.**]—Under R. S. C., 1883, Ord. 55, r. 13 (*a*), a vesting order may be obtained by summons in chambers upon the appointment of new trustees; but in a complicated case a petition for the appointment of new trustees & a vesting order may be presented, & the costs thereof will be allowed.—*Re MORRIS'S SETTLEMENT TRUSTS* (1889), 60 L. T. 96; 37 W. R. 317.

**1269. — Partition action.]**—Where real estate was held by a complicated title under which the parties interested were very numerous, & unborn issue might become entitled to legal estates:—*Held*: all persons in existence who were interested in the estate being parties to a suit for partition, & the title being proved at the hearing, an immediate

decree for sale might be made without any preliminary inquiry; a declaration might be made that the parties to the suit were, & that unborn issue upon coming into existence would be, trustees of their shares & interests within Trustee Act, 1850 (c. 60); but the appointment of a new trustee, & consequent vesting order, ought to be the subject of a subsequent application, & ought not to be made by the decree.—*LEES v. COULTON, LEES v. CLUTTON* (1875), L. R. 20 Eq. 20; 44 L. J. Ch. 556; 23 W. R. 544.

1270. — [Originating summons.]—The ct. has no jurisdiction to make an order upon an originating summons in chambers for the appointment of new trustees.—*Re GILL, SMITH v. GILL* (1885), 53 L. T. 623; 34 W. R. 134; 2 T. L. R. 109.

*Annotation* :—**Distd.** *Re Allen, Simmes v. Simmes* (1887), 56 L. J. Ch. 779.

1271. ———.]—Upon an originating summons asking for general administration & for the appointment of new trustees, all the persons interested being parties to the application, the ct. has power in the exercise of its general jurisdiction to order such appointment.—*Re ALLEN, SIMES v. SIMES* (1887), 56 L. J. Ch. 779; 56 L. T. 611.

1272. What must be proved—Grounds for application—Trustee out of the jurisdiction.]—*— v. —* (1839), 3 Jur. 501.

1273. [1851, 17 L. T. O. S. 49.] **Unwillingness of trustee to act—Reason for unwillingness.**—*Semble*: the affidavit or certificate, under Trustee Act, 1850 (c. 60), for the appointment of a new trustee, on the ground of the unwillingness of the existing trustee to act, ought not merely to state generally the fact of such unwillingness, but to disclose circumstances showing whether such unwillingness was or was not justifiable.—*Re NICHOLSON* (1851), 17 L. T. O. S. 49.

1274. — Consent of new trustee to act.]—  
*Re BROGDEN, BILLING v. BROGDEN*, [1888] W. N.  
238.

*Sec, now, R. S. C., Ord. 38, r. 19A.*

— **Affidavit of fitness.**]—*See* Sub-sect. 2,  
D. (g) v., *post*.

ii. *Who may Apply.*

*See* Trustee Act, 1925 (c. 19), s. 58 (1).

**1275. Person beneficially entitled to part of dividends of stock.]**—A person beneficially entitled to part of the dividends of a sum of stock has a sufficient interest to support a petition under 11 Geo. 4 & 1 Will. 4, c. 60, for the appointment of a new trustee of the stock.—*Re King* (1840), 10 Sim. 605; 9 L. J. Ch. 257; 59 E. R. 750.

*Annotation* :—**Reid.** Mackenzie v. Mackenzie (1851), 10 Jur.  
723

**1276. Annuitants.**—Petition presented for the purpose of obtaining the appointment of a new trustee, in the place of one who had become bkpt. By the will creating the trust, the residue of testator's property was given upon trust to pay two annuities of £30 each, & subject thereto upon trusts for the benefit of testator's four daughters. New trustees had been twice appointed, & one of

PART II. SECT. 2, SUB-SECT. 2.—  
D. (g) i.

n. *How made*—*Petition*—*What must be included*.]—The petition for the appointment of a new trustee must include a prayer for the vesting in the new trustee jointly with the existing trustees of the estate & the rights mentioned in Trustee Act, 1908, ss. 43, 44.—*Re DURRANT*, [1919] N. Z. L. R. 303.—N.Z.

o. What must be proved—Grounds for application—Impracticability without assistance of court—Evidence in support.]—The ct. will not exercise

its discretion under Trusts Act, 1890, s. 34, to appoint a new trustee of property, where the alleged trustee is dead, if the only evidence of the existence of the trust consists of *ex p.* statements, uncorroborated by any document signed by the person alleged to have been trustee of the property.—*Re* EXTHIELL, [1903] V. L. R. 271.—AUS.

p. ———.]— A petition under Trustee Act, 1908, s. 41, for the appointment of a new trustee in addition to an existing trustee should be supported by evidence that it is

inexpedient, difficult, or impracticable to make the appointment without the assistance of the ct.—*Re* SISTERSON, [1918] N. Z. L. R. 311.—N.Z.

**q. Forum.**—An application by petition, without suit, for the appointment of a new trustee under 13 & 14 Vict. c. 60 (Imp.), should be made in ct. & not in chambers.—*Re LASH* (1853). 1 Ch. Ch. 226.—**CAN.**

**PART II. SECT. 2, SUB-SECT. 2.—**  
**D. (g) ii.**

r. *Cestui que trust.*—*Re O'DELL*  
(1831), Hayes, 257.—**IR.**

the trustees appointed on the latter occasion having become bkpt., the present application was rendered necessary. The four daughters of testator were the only petitioners:—*Held*: that under Bankrupt Law Consolidation Act, 1849 (c. 106), s. 106, the annuitants were persons entitled in possession to the income of the trust funds, & ought therefore to be petitioners, that if the petition were amended in that respect the order might be taken, & that it would be sufficient simply to serve the other parties.—*Re LONSDALE'S TRUST* (1850), 15 L. T. O. S. 201; 14 Jur. 1101.

**1277. Married woman—Necessity for concurrence of husband.**—*GRAY v. DICKENSON* (1850), 15 L. T. O. S. 342; 14 Jur. 846.

**1278.** ———.]—The presentation by a married woman of a petition for the appointment of new trustees of a fund in which she is interested in reversion is a "suing" within Married Women's Property Act, 1882 (c. 75), s. 1 (2), & her husband need accordingly not be made a co-petitioner.—*Re OUTWIN'S TRUSTS* (1883), 48 L. T. 410; 31 W. R. 374.

**1279. Persons representing Wesleyan Conference—Trust to allow person appointed by conference to preach.**—When a chapel was conveyed to trustees upon trust among other things to allow such person to preach as the Wesleyan Conference should appoint:—*Held*: the persons representing the Conference might join in a petition for the appointment of new trustees.—*Re HARDEN WESLEYAN CHAPEL* (1853), 1 W. R. 212.

**1280. Person with contingent interest.**—*Re SHEPPARD'S TRUSTS*, No. 1136, *ante*.

### iii. Parties.

*See, now*, R. S. C., Ord. 55, r. 14A.

**1281. Who are necessary parties—Mortgagor—Property conveyed to trustee for mortgagee—Bankruptcy of trustee.**—Where a conveyance by way of mtge. is made to a trustee for the mtgee. in trust to sell, & the trustee becomes bkpt., the mtgor. should join in the application for the appointment of another trustee.—*Re BINGLEY, Ex p. ORGILL* (1832), 2 Deac. & Ch. 413.

**1282. — Persons interested in remainder.**—In a suit for the appointment of new trustees, where the trust fund was settled to A. for life, with remainder to the persons who might be his next-of-kin at his death, the persons who would be his next-of-kin, if he were then dead, are necessary parties.—*WARDELL v. TAYLOR* (1842), 1 Y. & C. Ch. Cas. 265; 62 E. R. 883; *sub nom. WARDLE v. HARGREAVES*, 11 L. J. Ch. 126; 6 Jur. 478.

*Annotation*:—*Overd. Fowler v. James* (1846), 1 Coop. temp. Cott. 290.

**1283.** ———.]—*FOWLER v. JAMES* (1847), 1 Ph. 803; 1 Coop. temp. Cott. 290; 16 L. J. Ch. 266; 47 E. R. 862.

*Annotations*:—*Expld. Roberts v. Roberts* (1848), 2 De G. & Stu. 29. *Refd. Paul v. Paul* (1880), 43 L. T. 239.

**1284. — Trustees of term for raising portions.**—Trustees of a term for raising portions under a marriage settlement held to be necessary parties to a bill for appointing new trustees in the room of the trustees for preserving contingent remainders, with a power of sale & exchange.—*ELLISON v. COOKSON* (1845), 2 Coll. 52; 63 E. R. 633.

**1285. — Original beneficiaries & trustees of settlements of shares.**—On a petition, under Trustee Act, 1850 (c. 60), for the appointment of new trustees of a settlement, the beneficial interests under which had been made the subjects of marriage settlements:—*Held*: the original *cestuis que trust*, their husbands & wives, & the trustees of their settlements, sufficiently represented all

the parties beneficially interested.—*Re SMYTH'S SETTLEMENT* (1851), 2 De G. & Sm. 781; 64 E. R. 350.

**1286. — All persons beneficially interested.**—Persons entitled to six-seventh parts of a trust fund applied to have a new trustee of the fund appointed:—*Held*: *prima facie*, all the persons beneficially interested must be before the ct., & though circumstances might render such an application impossible, yet no such impossibility being suggested, these persons were not entitled to apply, & the ct. declined to make the order asked, without service on the person entitled to the remaining one-seventh part.—*Re RICHARD'S TRUST* (1852), 4 De G. & Sm. 636; 19 L. T. O. S. 244; 64 E. R. 1277.

**1287.** ———.]—A claim for the appointment of new trustees of certain real estate was filed by the mtgee. of a portion of the beneficial interest against the heir-at-law of the surviving trustee, without making any of the other *cestuis que trust* parties; & it was proposed to take an inquiry as to the parties beneficially interested. The ct. declined to order such an inquiry, & directed the claim to stand over, with leave to amend.—*WEATHERILL v. GARBETT* (1852), 20 L. T. O. S. 178.

**1288.** ———.]—*Re FELLOWS' SETTLEMENT*, No. 1332, *post*.

**1289.** ———.]—*Re ALLEN, SIMES v. SIMES*, No. 1271, *ante*.

**1290. — Personal representative of person with contingent interest.**—A claim for the appointment of new trustees allowed to proceed in the absence of a personal representative of a deceased person, where such person had an interest in the trust funds in the event of the death of his child, the infant pltf., under twenty-one, but had died indebted, & without any other property.—*MAGNAY v. DAVIDSON* (1853), 9 Hare, App. II., lxxxii; 1 W. R. 212; 68 E. R. 804.

**1291. — Public trustee—On appointment of new trustee in his place.**—PRACTICE NOTE (1927), 163 L. T. Jo. 182.

—Husbands of married women making application.]—*See* Sub-sect. 3, D. (f) ii., *ante*.

**1292. Whether appearance necessary—Persons interested—When consent already given before master.**—*THOMAS' TRUST* (1851), 15 Jur. 187.

**1293. — Old trustees.**—On a petition to appoint new trustees, under the Trustee Act, all the *cestuis que trust* & the old trustees were required to appear.—*Re SLOPER* (1854), 18 Beav. 596; 52 E. R. 234.

### iv. Service of Application.

*See* Trustee Act, 1925 (c. 19), s. 50.

**1294. Who should be served—Assignees of bankrupt trustee.**—Where a fund was standing in the name of three trustees, one of whom became bkpt., & the *cestuis que trust* petitioned for the appointment of a trustee in the place of bkpt.:—*Held*: the petition should be served upon the assignees.—*Re DUTTON, Ex p. CARDEN* (1848), 11 L. T. O. S. 111; 12 Jur. 391.

**1295. — Reversioner.**—Demise of lands to trustees for one thousand years on certain trusts. Petition for the appointment of new trustees:—*Held*: the reversioner ought to be served with the petition.—*Re FARRANT'S TRUST* (1851), 20 L. J. Ch. 532; 17 L. T. O. S. 309.

**1296. — Remainderman.**—Before an order will be made, vesting property in a new trustee, who had been appointed in the place of a trustee residing in New York, the remaindermen must be served, & it must be proved that the appointment

*Sect. 2.—Appointment of trustees: Sub-sect. 2, D.*  
*(g) iv., v. & vi., & E.]*

was necessary, & that the person proposed to be appointed was a proper person.—*Re MAYNARD'S SETTLEMENT TRUSTS* (1852), 20 L. T. O. S. 61; 16 Jur. 1084; 1 W. R. 15.

**1297.** — *Persons interested.*—The *cestui que trust* under a deed, the trustee of which was a solr., presented a petition in the matter of the solr. & in the matter of Trustee Act, 1850 (c. 60), alleging that the trustee had taken the benefit of Insolvent Act, had repudiated the trusts, refused to discharge his duties as trustee & otherwise misconducted himself in the trusts, & praying the appointment of a new trustee in his place & a vesting order. The trustee denied or offered explanations of the various imputations against him, claimed a balance to be due to him, & objected to being removed from the trusteeship:—*Held*: (1) Trustee Act, 1850 (c. 60), s. 32, does not give the ct. jurisdiction under the Act to displace a trustee who is desirous of continuing in the trust; (2) the trustee could not, under the summary jurisdiction of the ct. over solrs., be removed from the trust for acts done by him, not in the character of solr. or in any relation immediately arising out of that character, but in the character of trustee, & the order could not be sustained.

(3) Although it is, I believe, usual, & certainly it has been our practice in lunacy, upon application for the appointment of new trustees by persons having partial interests, to require the other persons interested to be served, the Act does not in terms so require, & it has not been unusual to dispense with service on all parties (TURNER, L.J.).—*Re BLANCHARD* (1861), 3 De G. F. & J. 131; 30 L. J. Ch. 516; 4 L. T. 426; 25 J. P. 661; 7 Jur. N. S. 505; 9 W. R. 647; 45 E. R. 828, L. J.J. *Annotations*:—As to (1) *Reid v. Byrnes's Trust* (1868), 18 L. T. 631; *Bristowe v. Booth* (1869), L. R. 5 C. P. 80; *Coombes v. Brookes* (1871), L. R. 12 Eq. 61. As to (2) *Folld. re Lightbody's Trusts* (1884), 52 L. T. 40. As to (3) *Folld. re Bignold's Settmt. Trusts* (1872), 7 Ch. App. 223.

**1298.** — — — — —] — MEMORANDUM AS TO PRACTICE, [1901] W. N. 85.

**1299.** — *Infant cestui que trust.*—Service of a petition for the appointment of a new trustee on infant *cestui que trust* dispensed with.—*Re YOUNG'S TRUST* (1869), 21 L. T. 556.

**1300.** — *Trustees abroad.*—*Re BIGNOLD'S SETTLEMENT TRUSTS*, No. 1019, *ante*.

**1301.** — — — — —]—An appointment of a new trustee in place of one permanently residing out of the jurisdiction will be made without service of the petition on the trustee so residing out of the jurisdiction.—*Re PYE'S TRUSTS* (1880), 42 L. T. 247.

**1302.** — *Lunatic trustee.*—Of three trustees of a settlement, two died, & the third became of unsound mind, but was not so found by inquisition. On a petition presented by persons beneficially interested under the settlement, praying for the appointment of three new trustees in the place of the two deceased trustees & of the trustee of unsound mind:—*Held*: service on the trustee of unsound mind was not necessary.—*Re GREEN, Re MURTON'S TRUSTS* (1875), 10 Ch. App. 272; 32 L. T. 446; 23 W. R. 804, L. J.J. *Annotation*.—*Apld. re Weston* (1898), 43 Sol. Jo. 29.

**1303.** — *Absconding trustee.*—*HYDE v. BENBOW*, [1884] W. N. 117.

**1304.** — *Cestui que trust abroad.*—The original trustees of a will being dead, a petition was presented for the appointment of new trustees, & for a vesting order. The persons proposed to be appointed were both beneficially interested under the will, but it was found impossible to

obtain the services of independent persons. All the beneficiaries, except one who was abroad, were co-petitioners, & were desirous that the persons proposed as trustees should be appointed. The ct. made the order, subject to an undertaking by the new trustees that if either became sole trustee he would use every endeavour to obtain the appointment of a co-trustee; & dispensed with service on the absent beneficiary.—*Re LIGHTBODY'S TRUSTS* (1884), 52 L. T. 40; 33 W. R. 452.

**1305.** — — — — —]—The persons entitled to the residuary estate of testator, presented a petition for appointment of new trustees of his will in the place of the original trustees, one of whom had died, & the other was a lunatic. The petition was served on three of the four persons who were entitled to the proceeds of sale of a real estate devised on trusts for persons who took no interest in the residue, but the fourth was resident in Australia, & was not served:—*Held*: service on the *cestui que trust* in Australia might be dispensed with.—*Re WILSON* (1886), 31 Ch. D. 522; 55 L. J. Ch. 632; *sub nom. re WILSON, re NEEDHAM*, 54 L. T. 203, L. J.J. *Annotation*.—*Reid. re Hume* (1887), 35 Ch. D. 457.

**1306.** — *Public trustee—On appointment of new trustee in his place.*—PRACTICE NOTE (1927), 163 L. T. Jo. 182.

**1307.** — *Appointment in suit for enforcing trusts—Service of decree.*—Decree for the appointment of new trustees & conveyance of the trust estate, in a suit by some *cestui que trust* against the devisees of the last survivor of the former trustees, & a direction to serve the other *cestui que trust* with notice of the decree.—*JONES v. JAMES* (1853), 9 Hare, App. II. lxxx; 68 E. R. 803.

*v. Affidavit of Fitness.*

**1308. Necessity for.**—A suit was instituted against a trustee for an account, the administration of the trusts of the will, & the appointment of new trustees. At the hearing all relief was waived, except the appointment of new trustees, & all parties agreeing that all the persons interested were before the ct., the ct. was willing, upon the production of proper affidavits as to fitness, to appoint new trustees, but required a petition to be presented for that purpose.—*BUCKLEY v. BUCKLEY* (1849), 14 L. T. O. S. 64; 14 Jur. 189.

**1309.** — — — — —]—A new trustee will be appointed by the ct. without a reference, on proof of his fitness, & on his consent.—*Re ROBINSON'S TRUST* (1851), 15 Jur. 187.

**1310. Sufficiency of—Affidavit of solicitor in cause.**—The ct. will not, as a general rule, receive the evidence of the solr. in the matter, as to the fitness of persons proposed to be appointed new trustees.—*GRUNDY v. BUCKERIDGE* (1853), 22 L. J. Ch. 1007; 17 Jur. 731.

**1311.** — *One enough.*—*Re ARDEN*, [1887] W. N. 166, L. J.J.

**1312. Contents of—Evidence of pecuniary position.**—*Re CASTLE STERRY'S TRUSTS*, [1888] W. N. 179.

**1313.** — — — — —]—*Re SMITH'S POLICY TRUSTS, SMITH v. SMITH*, [1894] W. N. 68.

— — — — —]—*See EVIDENCE*, Vol. XXII., p. 537, Nos. 5763–5765

*vi. Costs.*

*See Sub-sect. 2, E., post.*

*E. Costs.*

*See Trustee Act*, 1925 (c. 19), s. 60.

**1314. Liability for costs—Misappropriation of trust fund by bankrupt trustee—Assignees—Only out of general estate.**—On petition to have a new

trustee appointed in the place of bkpt., who had misappropriated the trust fund, the ct. will give the assignees their costs only out of the general estate.—*Re ATKINSON, Ex p. HEELIS* (1843), 7 Jur. 684, Ct. of R.

**1315.** — Donee of power refusing to exercise it — Subsequently consenting to exercise power — Trustee formerly desirous of retiring willing to continue.]—*Re HODSON'S SETTLEMENT*, No. 1141, *ante*.

**1316.** — Incorrect mode of appointment — Applicant liable for all costs.]—Pitt. having filed a bill for the appointment of new trustees, in a case in which it might be done by petition, was ordered to pay all the costs.—*THOMAS v. WALKER* (1854), 18 Beav. 521; 52 E. R. 205.

**1317.** — Petitioner's costs disallowed — Respondent costs in cause.]—*BUND v. GREEN*, [1875] W. N. 213.

**1318.** — Appointment for benefit of all parties — Costs paid out of corpus.]—The costs . . . must come out of the corpus. When an application by a tenant for life is clearly for his own sole benefit I have been in the habit of making him pay the costs of it. But here the appointment of new trustees of the settlement is for the benefit of all parties interested under it in the fund (*KINDERSLEY, V.-C.*).—*Re PARBY'S MARRIAGE SETTLEMENT TRUSTS* (1857), 29 L. T. O. S. 72.

**1319.** — Appointment for benefit of tenant for life—Costs paid by tenant for life.]—*Re PARBY'S MARRIAGE SETTLEMENT TRUSTS*, No. 1318, *ante*.

**1320.** — Person cited to appear as respondent — Power of court.]—(1) Parties are not justified, by remaining passive, to prevent the rightful owners obtaining possession of their property, but if called on to do an act, involving no risk or responsibility, which is necessary to enable the trust owner to obtain his property, they are bound to do it. If therefore their refusal renders an application to the ct. necessary, they will be made to pay the costs.

(2) The ct. has no jurisdiction to award costs adversely against third parties cited to appear as resps. upon a petition to appoint new trustees under Trustee Act, 1850 (c. 60).—*Re PRIMROSE* (1857), 23 Beav. 590; 29 L. T. O. S. 103; 3 Jur. N. S. 899; 5 W. R. 508; 53 E. R. 232; *sub nom. Ex p. PRIMROSE*, 26 L. J. Ch. 666.

*Annotation:—Reffd. Re Woodburn's Will* (1857), 1 De G. & J. 333.

**1321.** — Person rendering application necessary—May be ordered to pay costs.]—*Re PRIMROSE*, No. 1320, *ante*.

**1322.** — Tenant for life considering appointment unnecessary—Each party to bear own costs.]—*Re SHEPPARD'S TRUSTS*, No. 1136, *ante*.

**1323.** — Appointment to two funds—Costs borne rateably.]—On a petition for appointment of new trustees of two trust funds the costs ordered to be paid out of the two funds rateably.—*Re GRANT'S TRUSTS* (1862), 2 John. & H. 764; 70 E. R. 1267.

**1324.** — Introduction of irrelevant charges against respondent—Petition to pay costs thus occasioned.]—Where a married woman, having by her next friend petitioned for the appointment of new trustees of property to which she was entitled for her separate use, made in the affidavits filed in support statements & charges irrelevant to the subject of the petition, & where the resp., in answering those affidavits, made further charges of a still further irrelevant character. The ct. ordered that all the costs incurred by resp. in answering the irrelevant charges made against him be paid by the next friend; & that all the costs incurred by

the irrelevant matter introduced by resp. into the case, other than that rebutting the statements made against him, should be paid by him.—*Re WILLS' TRUSTS* (1863), 3 New Rep. 107; 9 L. T. 570; 9 Jur. N. S. 1225; 12 W. R. 97.

**1325.** — Appointment of additional trustee—Petition by tenant for life—Costs paid out of corpus.]—*GRANT v. GRANT*, No. 1247, *ante*.

**1326.** — Petition by reversioners—Costs paid by petitioners.]—*Re BRACKENBURY'S TRUSTS*, No. 1248, *ante*.

**1327.** — Improper conduct of trustee—Whether trustee must pay costs.]—A trustee who makes an improper opposition to a petition for the appointment of new trustees will have to bear his own costs of the opposition, & will have the costs occasioned to the other parties by his opposition deducted from the costs properly payable to him.—*Re WISEMAN'S TRUSTS* (1870), 18 W. R. 574.

**1328.** — — — — —.]—(1) A trustee may appeal from an order depriving him of costs on the ground of misconduct, notwithstanding R. S. C., Ord. 65, r. 1.

(2) *Qu.*: whether the ct. can now order resp. to a petition under Trustee Act, 1850 (c. 60), to pay costs.—*Re KNIGHT'S WILL* (1884), 26 Ch. D. 82; 50 L. T. 550; 32 W. R. 417, C. A.

*Annotations:—As to (1) Reffd. In the Estate of Plant. Wild v. Plant.* (1926) P. 139. *Generally, Mentd. Re Carthew, Re Paull* (1884), 51 L. T. 435.

**1329.** — — — — —.]—*Re KENSIT*, [1908] W. N. 235.

**1330.** — — — — —.]—*Re RENDELL'S TRUSTS* (1915), 139 L. T. Jo. 249.

**1331.** — Appointment under power—Costs paid out of estate.]—I often have occasion to regret the great costs that are imposed on trust estates when it is necessary to appoint new trustees. . . . But I never heard it disputed that, where new trustees were appointed under a power in an instrument, the costs of effecting the change, including the costs of the donee of the power, were paid out of the estate (*KAY, J.*).—*HARVEY v. OLIVER* (1887), 57 L. T. 239.

**1332.** What costs allowed—Incidental costs.]—(1) All the *cestuis que trust* ought ordinarily to be parties to a petition for the appointment of new trustees, infants by their next friends, as well as adults.

(2) Costs "incidental," etc., to inquiry: the words "incidental," etc., ordered to be struck out.—*Re FELLOWS' SETTLEMENT* (1856), 2 Jur. N. S. 62.

**1333.** — Two petitions presented on same day—Second petition more perfect—Costs allowed only of second.]—Where two petitions were presented on the same day for the same purpose, the ct. directed the costs of the second one only, as it was the more perfect, to come out of the estate.—*Re PRING'S TRUSTS* (1873), 42 L. J. Ch. 473; 28 L. T. 467.

**1334.** — Costs on higher scale—"Special circumstances"—Not size of trust fund.]—*Re SPETTIGUE'S TRUSTS* (1884), 32 W. R. 385.

**1335.** — — — — —.]—*Re SCARRE* (1920), 149 L. T. Jo. 176.

**Bankruptcy of representative.]—See EXECUTION**, Vol. XXIV., pp. 832, 833, Nos. 8640-8655.

**1336.** How raised—Trusts estate entirely realty—By mortgage.]—Where an order had been made for the appointment of new trustees under Trustee Act, 1850 (c. 60), & for the payment of the costs out of the trust estate; & it was subsequently shown that the trust estate consisted entirely of realty; the order was amended by the insertion

*Sect. 2.—Appointment of trustees: Sub-sect. 2, E.; sub-sect. 3. Sect. 3: Sub-sect. 1, A. & B.]*

of words authorising the trustees to raise the costs out of the realty by way of mtge., the mtge. deed to be approved by the judge at chambers.—*Re CRABTREE* (1866), 14 W. R. 497.

**1337. Trustee deprived of costs—Right to appeal.]**—*Re KNIGHT'S WILL*, No. 1328, *ante*.

**Copyholds—Admission of new trustees.]—See COPYHOLDS**, Vol. XIII., p. 92, Nos. 1146–1148.

#### SUB-SECT. 3.—EXECUTOR-ADMINISTRATOR.

*See, now, Administration of Estates Act, 1925 (c. 23), ss. 33, 39.*

**1338. Administrator functus officio.]—An administrator who has paid all expenses & debts & cleared intestate's estate stands in the same position towards the next of kin as that which an exor. who has cleared the estate stands in towards the residuary legatees. He ceases to be an administrator & becomes a trustee, & the ct. can appoint a new trustee to act jointly with him.—*Re PONDER, PONDER v. PONDER*, [1921] 2 Ch. 59; 90 L. J. Ch. 426; 125 L. T. 568; 65 Sol. Jo. 455.**

**1339. —Power to appoint trustees.]—**Administratrix with the will annexed, having paid all the debts & cleared the estate, executed a deed appointing two trustees of the will in her place & asked the ct. to confirm the appointment:—*Held*: the new trustees had been properly appointed by the deed.—*Re PITT, PITT v. MANN* (1928), 44 T. L. R. 371.

**1340. Administration of Estates Act, 1925 (c. 23), s. 33—Effect of on legal personal representative.]—**The expression "personal representatives" in above Act, s. 39, does not include trustees in the ordinary sense even when the personal representatives themselves become trustees upon an assent. The introductory words of s. 39 conferring powers on personal representatives "during a minority of any beneficiary or the subsistence of any life interest, or until the period of distribution arrives" are explained by the fact that under the new law of intestate succession the existence of an infant beneficiary or of a beneficiary, such as a widow, entitled to a life interest only may postpone distribution, & that in these cases s. 33 places the personal representatives substantially in the position of trustees.

The provision in s. 39 (1) (ii), conferring on personal representatives "all the powers, discretions & duties conferred or imposed by law on trustees holding land upon an effectual trust for sale" does not operate referentially to make the Law of Property Act, 1925 (c. 20), s. 28 (2), applicable to pure personality.

Accordingly, where under the will of a testator unauthorised investments are retained under a power to postpone conversion, the rule laid down in *Hove v. Lord Dartmouth* (1802), 7 Ves. 137a, still remains applicable in regard to the income payable to a tenant for life.—*Re TROLLOPE'S WILL TRUSTS, PUBLIC TRUSTEE v. TROLLOPE*, [1927]

1 Ch. 596; 96 L. J. Ch. 340; 137 L. T. 375; 71 Sol. Jo. 310.

**1341. ———.]—*Re YERBURGH, YERBURGH v. YERBURGH*, [1928] W. N. 208.**

#### SECT. 3.—ACCEPTANCE AND DISCLAIMER OF OFFICE.

##### SUB-SECT. 1.—ACCEPTANCE.

###### A. In General.

**1342. Necessity for.]—(1)** The disclaimer need not be either by matter of record or by deed (*HOLROYD, J.*).

(2) It seems to be contrary to common sense to say, that an estate should vest in a man not assenting to it. There must be the assent of the party before any interest in the property can pass to him (*BEST, J.*).—*TOWNSON v. TICKELL* (1819), 3 B. & Ald. 31; 106 E. R. 575.

*Annotations:—As to (1) Apld. Begbie v. Crook* (1835), 2 Scott. 128. *Reid. Doe d. Winder v. Lawes* (1837), 7 Ad. & El. 195; *Doe d. Chidrey v. Harris* (1847), 16 M. & W. 517. *As to (2) Apld. Xenos v. Wickham* (1862), 13 C. B. N. S. 381; *Peacock v. Eastland* (1870), L. R. 10 Eq. 17. *Reid. Doe d. Palmer v. Andrews* (1827), 4 Bing. 348. *Generally, Reid. Browell v. Reed* (1842), 1 Hare, 434; *Siggers v. Evans* (1855), 5 E. & B. 367.

**1343. —M., tenant in tail in possession of an estate, executed a disentailing deed purporting to be a grant of the estate to A. & B. & their heirs free from all estates tail of the grantor to the use of A. & B. & their heirs upon trust for the grantor. The deed was enrolled but not executed by A. & B., who subsequently executed a deed of disclaimer:—*Held*: the disentailing deed operated as a grant & not by the Statute of Uses, it was rendered inoperative by the subsequent disclaimer by the grantees & the estate tail of M. was not barred under Fine & Recoveries Act, 1834 (c. 74).—*PEACOCK v. EASTLAND* (1870), L. R. 10 Eq. 17; 39 L. J. Ch. 534; 22 L. T. 706; 18 W. R. 856.**

*Annotation:—Reid. Savill v. Bethell*, [1902] 2 Ch. 523.

**1344. When property vests—Whether before assent.]—DOE d. CHIDGEY v. HARRIS**, No. 1355, *post*.

**1345. ———.]—I** take the rule of law to be that where there is a transfer of property to a person, even although it carries with it some obligations which are onerous, it vests in him at once before he knows of the transfer, subject to his right when informed of it to say, if he pleases, "I will not take it" (*COTTON, L.J.*).—*STANDING v. BOWRING* (1885), 31 Ch. D. 282; 55 L. J. Ch. 218; 54 L. T. 191; 34 W. R. 204; 2 T. L. R. 202, C. A.

*Annotations:—Apld. Re Arbib & Class's Contract*, [1891] 1 Ch. 601. *Reid. London & County Banking Co. v. London & River Plate Bank* (1888), 21 Q. B. D. 535; *Re Blake, Blake v. Blake* (1889), 60 L. T. 663; *Re Weston, Davies v. Tagart*, [1900] 2 Ch. 164; *Mallott v. Wilson*, [1903] 2 Ch. 494. *Mentd. Re Howes, Howes v. Platt* (1905), 21 T. L. R. 501.

**1346. Proof of acceptance—Affidavit of third person.]—**The consent of proposed trustees cannot be evidenced by an affidavit of a third party.—*Re PARKE'S TRUST* (1853), 21 L. T. O. S. 218; 1 W. R. 477.

#### PART II. SECT. 3, SUB-SECT. 1.—A.

**k. Presumption of acceptance.]—**The ct. will not direct a jury to presume the acceptance of a trust created by devise when there has been fifty years' adverse possession as against the trustees, there being no evidence of such acceptance, & all the facts being opposed to such presumption.—*ARCHIBALD v. BLOIS* (1854), James, 307.—*CAN.*

**1. ———.]—A** person was named as

a trustee in a marriage settlement of the year 1821, but did not execute or act in the trusts of it. After the death of his co-trustees, he, in 1844, refused to act in the trusts. The ct., upon the petition of the tenant for life under the 1 Will. 4, c. 60, s. 22, refused to appoint a new trustee in his place. After such a lapse of time, it must, in a petition matter, be presumed that the trustee has accepted the trust.—*Re UNLACK* (1844), 1 Jo. &

Lat. 1.—*IR.*

**m. ———.]—A** person, to whom with others, a term of years had, in 1810, been bequeathed in trust, & who was appointed, with the other trustees, an executor of the will, was presumed to have accepted the trust, though he had never acted in it, the will having been proved by the other executors, saving his right, & he not having ever disclaimed.—*Re NEEDHAM* (1844), 1 Jo. & Lat. 34.—*IR.*

**1347. — Assent signified to petitioner.]—**An intended trustee should not appear to consent by counsel, but should merely signify his assent to petitioner.—*Re DRAPER'S SETTLEMENT* (1854), 2 W. R. 440.

See R. S. C., Ord. 38, r. 19A

#### *B. What Amounts to Acceptance.*

**1348. Interference with trust property.]—**A trustee, with notice of his appointment as such, interfering with the subject matter, cannot repudiate the trust, & say he acted merely as factor or agent.—*CONYNGHAM v. CONYNGHAM* (1750), 1 Ves. Sen. 522; 27 E. R. 1181.

*Annotations:—***Reid.** *Stacey v. Elph* (1833), 1 My. & K. 195; *Lowry v. Fulton* (1839), 9 Sim. 104.

**1349. Undertaking to execute trusts—Deed not signed.]—**It is said, the trustees are not under covenant; & they are not bound under hand & seal: but they have in equity undertaken to execute the trusts exactly as if they had so executed the instrument; & the general words, "it is declared & agreed," etc., amount to a covenant. The obligation upon them is to permit Lord Montford to receive & enjoy the rents & profits, provided that was consistent with the trust & obligation. imposed upon them, to apply, so much of the rents & profits as should be necessary to the expense of renewal, in order to make his enjoyment consistent with the other objects of the settlement, under which all the subsequent takers are to be considered purchasers: but it does not rest upon reasoning; as upon the answers it is clear, they understood the import; expressly stating, that they put him in possession; & assigning, as their reason, motives of civility & humanity. It is hard, if they are to suffer by that: but the subsequent takers unless deprived by acquiescence of their remedy, are not to suffer by the charity of the trustees. It is clear, therefore, that they did take upon them these trusts (LORD ELDON, C.).—*MONTFORD (LORD) v. CADOGAN (LORD)* (1816), 2 Mer. 3; 19 Ves. 635; 34 E. R. 651, L. C.

*Annotations:—***Consd.** *Richardson v. Jenkins* (1853), 1 Drew. 477; *Holland v. Holland* (1869), 4 Ch. App. 450, n. **Reid.** *Jenkins v. Robertson* (1853), 1 Eq. Rep. 123; *Re Parker, Ex p. Sheppard* (1857), 19 Q. B. 1. D. 84. **Mentd.** *Shaftesbury v. Marlborough* (1833), 2 My. & K. 111; *Jones v. Jones* (1846), 7 L. T. O. S. 157; *Adey v. Arnold* (1852), 2 De G. M. & G. 432; *Hughes v. Wells* (1852), 9 Hare, 749; *Isaac v. Wall* (1877), 46 L. J. Ch. 576.

**1350. Acting as agent.]—**If one of two persons named trustees & exors. disclaims & renounces & afterwards possesses himself of assets as the agent of the other, who has accepted the trust & proved the will, he does not thereby become accountable as a trustee & exor., & ought not to be made a party to a suit for the administration of the estate.—*DOVE v. EVERARD* (1830), 1 Russ. & M. 231; *Taml.* 376; 39 E. R. 89.

*Annotations:—***Apld.** *A. G. v. Chesterfield* (1854), 18 Beav. 596. **Consd.** *Bartlett v. Wood* (1860), 2 L. T. 144.

**1351. —.]—**An exor. not proving the will of testator, & not receiving any part of the fund, in respect of which there was a breach of trust, & not receiving any other part of the property of testator, except in the capacity of agent to the exor. who proved & acted:—**Held:** not to be

answerable for such breach of trust.—*LOWRY v. FULTON* (1839), 9 Sim. 115; 8 L. J. Ch. 314; 3 Jur. 454; 59 E. R. 208.

*Annotation:—***Mentd.** *Re Stevens, Cooke v. Stevens*, [1898] 1 Ch. 162.

**1352. —.]—***STACEY v. ELPH*, No. 1375, *post*.

**1353. Conveyance of trust property.]—**Testator bequeathed £1,100 to two trustees upon certain trusts; & he also bequeathed to the same trustees a house held under a bishop's lease, upon trust to pay the rents, etc., to his wife for life, & after her decease, to apply the rents, etc., in the maintenance of Z., till he attained twenty-one, when the trustees were to convey the property to him absolutely. Z. attained twenty-one in the lifetime of testator's widow, & on her decease a deed was executed by the trustees, which recited the will, & that it had become unnecessary for the trustees to act in the trusts thereof, & that, in fact, they never intermeddled therein; & the trustees then released the property to Z. who, by another deed, gave them a general release:—**Held:** the deed executed by the trustees amounted to an acceptance by them of the trusts of the will, & imposed on them the duty of seeing that the trusts of the £1,100 were duly performed.—*URCH v. WALKER* (1838), 3 My. & Cr. 702; 7 L. J. Ch. 292; 2 Jur. 487; 40 E. R. 1097.

*Annotations:—***Consd.** *Malzy v. Edge* (1856), 27 L. T. O. S. 12. **Apld.** *Re Lord v. Fullerton* (1895), 65 L. J. Ch. 184. **Reid.** *Lowry v. Fulton* (1839), 9 Sim. 104. **Mentd.** *Grayburn v. Clarkson* (1868), 37 L. J. Ch. 550.

**1354. Retaining deed for safe custody.]—**As to J., I think there is not enough to charge him as with a breach of trust. Looking at the deed which was in his possession, he could hardly fail to see that he was named a trustee; but, on the other hand, he says he never acted; & it is expressly shown that he received the deed for safe custody only, until someone else could be found to undertake the trust. I think there is not enough to charge him (LORD LANGDALE, M.R.).—*EVANS v. JOHN* (1841), 4 Beav. 35; 49 E. R. 250.

**1355. Verbal statement.]—**(1) By law the estate devised vests in the devisee before assent (PARKE, B.).

(2) Though it has been held that a disclaimer of an estate in fee need not be by matter of record as was formerly held in *Townson v. Tickell*, No. 1342, *ante*, it has never been settled that such disclaimer must be by deed, & in the case mentioned HOLROYD, J., was of opinion that it need not (ROFFE, B.).

(3) Unless there was unequivocal evidence of assent, the subsequent disagreement by deed of disclaimer would avoid the estate *quoad hunc*. The consequence would be to avoid the will, as to him, *ab initio* & vest the legal estate in R., so that, as his heirs have disclaimed, it would revert to the heir-at-law of testator (PARKE, B.).

(4) There is no authority, but *Butler & Baker's Case* (1541), 3 Co. Rep. 25a, for saying that a verbal assent to a devise is insufficient (PARKE, B.).—*DOE d. CHIDGEY v. HARRIS* (1847), 16 M. & W. 517; 16 L. J. Ex. 190; 8 L. T. O. S. 414; 153 E. R. 1204.

*Annotations:—***Generally.** **Reid.** *Young v. Grove* (1847), 4 C. B. 688; *Wright v. Wilkin* (1860), 2 B. & S. 232; *Re*

*incur responsibility.*—Acceptance of the office of a trustee will not be inferred nor liability for loss of trust funds incurred, by mere knowledge of the existence of the trust deed, attending the first meeting of trustees, & writing the minutes, but declining to give any opinion or vote, or incur any responsibility.—*MITCHELL v. DAVIDSON* (1855), 18 Dunl. (Ct. of Sess.) 284; 28 So. Jur. 119.—**SCOT.**

#### PART II. SECT. 3, SUB-SECT. 1.—B.

**1350 I. Acting as agent.]—***MONTGOMERY v. JOHNSON* (1848), 11 I. Eq. R. 476.—**IR.**

**n. Submitting to account.]—***Deft.*, by answer, having submitted to account as trustee, the ct. decreed an account & partition, although without such submission in the answer there was no evidence of *deft.* holding the property in trust.—*CUTHBERT v. CUTHBERT*

(1864), 11 Gr. 88.—**CAN.**

**o. Executor also trustee—Acting as executor—Taking out probate.]—**Where the exor. is also trustee of the real estate, by acting as exor. he is liable in both characters. The taking probate is an acceptance of the whole trust.—*WARD v. BUTLER* (1824), 2 Mol. 533.—**IR.**  
**p. Knowledge of existence of trust deed—Attending first meeting of trustees & writing minutes—Declining to vote or**



**Sect. 3.—Acceptance and disclaimer of office: Sub-sect. 1, B.; sub-sect. 2, A. & B.]**

*Lacy, Royal General Theatrical Fund Assocn. v. Kydd, [1899] 2 Ch. 149. Mentd. Venables v. East India Co. (1848), 18 L. J. Ex. 266.*

**1356. Acting in trust—Paying debts.]—A. & B.** were appointed trustees, & A., B. & C. exors. of a will. A. & C. alone proved. B., in his answer, said he declined to act in the trusts; but it appeared that B. & his partner were indebted to testatrix at her death, that her exor. had lent them part of the assets, & that they had paid some of her debts. The ct., on motion, ordered B. to pay into ct. the balance due from him & his partner, who was not a party to the suit.

He (deft.) is one of the exors., he has never proved, but he has never renounced, & he says he has never acted in the trusts; but the ct. must look at his actions, & see to what character they are attributable. I think he has acted in the character which testatrix had given him (ROMILLY, M.R.).—*WHITE v. BARTON* (1854), 18 Beav. 192; 52 E. R. 76.

**1357. Signing memorandum—Partial acceptance.]—**In 1823 E., by his consent, was with X. & Z. named as a trustee of a marriage settlement, which comprised various sums. The deed was executed by the co-trustees of, but not by, E. X. died in 1826 insolvent. In 1829 an account was rendered which showed the sums subject to the trusts of the settlement & that Z. had received a large sum belonging to the trusts. Z. afterwards, as the administrator of his father, became possessed of a large sum of residue, not administered by the extrix., & trust funds, part of this residue, he applied to his own use; but in 1830 he, by request, invested a portion of the residue in the names of himself & E. upon the trusts of the settlement as such trustees thereof, & indorsed a memorandum thereon to the effect that it was so much of the within-mentioned & assigned sums as were subject to the trusts thereof. This memorandum Z. signed previously to 1842. In 1845 E. made inquiries of one of the *cestui que trust* relating to the trusts vested in him, & required to be satisfied as to the property comprised in the settlement. He was then informed that he was a trustee thereof, & a receipt of the stock bought in his & Z.'s names was inclosed. This receipt E. retained; & in Mar. 1847, he for the first time saw the settlement, & on that occasion he signed the memorandum indorsed thereon. Z. died in 1852 insolvent. E. received the dividends on the stock, & regularly paid them over to the tenant for life. In 1854 inquiries were made which resulted in this bill being filed, praying that an account might be taken of all sums which had been received by E. either alone or jointly with his co-trustees, or which, without his wilful neglect & default, might have been received; & that E. might be decreed to make good all losses which had been sustained, particularly so much of the property as was subject to the trusts of the settlement.—*Held*: E.'s liability must be confined to the amount comprised in the memorandum signed by him; & so far as the bill sought to make him liable for more than that amount, it must be dismissed.—*MAIZY v. EDGE* (1856), 2 Jur. N. S. 80; 4 W. R. 213; *sub nom. MAIZY v. EDGE*, 27 L. T. O. S. 12.

**1358. Executing trust deed.]—**A trustee who has

duly executed a trust deed must, in the absence of special circumstances, be bound by that indication of his acceptance of the trust, & will not afterwards be heard to say that he thought he was merely signing as a witness.—*JONES v. HIGGINS* (1866), L. R. 2 Eq. 538; 35 L. J. Ch. 403; 14 L. T. 126; 14 W. R. 448.

**1359. Letter confirming verbal arrangement.]—**W., having entrusted P., his solr., with a sum of £7,700 for investment on mtge. on his behalf, was informed by P.'s clerk, in conversation, that "P. proposed to invest the money on mtge. of leasehold property at Camden Town at 5 per cent.," & subsequently received a letter from P. stating that "the money was put on 5 per cent. mtge. as arranged by my clerk with you." On P.'s death it was found that no mtge. existed in favour of W., but that P. had advanced £100,000 to a firm of builders on a mtge. of their leasehold property at Camden Town:—*Held*: P. & those claiming under him were bound by the representation made by him, & were estopped from denying that the £7,700 formed part of the £100,000 so invested.—*MIDDLETON v. POLLOCK, Ex p. WETHERALL* (1876), 4 Ch. D. 49; 46 L. J. Ch. 39; 35 L. T. 608; 25 W. R. 94.

*Annotations:—Consd. Bradley v. Riches* (1878), 9 Ch. D. 189. *Refd. Itc Mawson, Ex p. Hardcastle* (1881), 44 L. T. 523; *London & Westminster Bank v. Turquand* (1886), 4 T. L. R. 454; *Re Cozens, Green v. Brisley* (1913), 109 L. T. 306. *Mentd. Montagu v. Sandwich* (1886), 54 L. T. 502; *Re Jones, Christmas v. Jones* (1897), 66 L. J. Ch. 439.

**1360. Permitting transfer of fund into name of trustee.]—***Re KNIGHT'S WILL*, No. 1106, *ante*.

**1361. Signing legacy duty receipt.]—***JAGO v. JAGO*, No. 1370, *post*.

**Proving will.]—***See EXECUTORS*, Vol. XXIII., pp. 51–53, Nos. 295–313.

**SUB-SECT. 2.—DISCLAIMER.**

*A. In General.*

**1362. Disclaimer distinguished from release.]—***CREWE v. DICKEN*, No. 1398, *post*.

**1363. —.]—**(1) The more one examines the distinction between a disclaimer & release, the less one sees the worth of it.

A release is the instrument of a person who thinks that he has something to part with; it is not a mere dissent or refusal to concur. If a person, who is appointed co-trustee by any instrument, executes no other act than a conveyance to his co-trustees, where the meaning & intent of that conveyance is disclaimer, the distinction is not sufficiently broad for the ct. to act upon (*LORD ELDON, C.*).

(2) It seems to have been taken for law . . . that if an estate is conveyed to two persons in trust, & one will not act as trustee the estate vests in the other (*LORD ELDON, C.*).—*NICOLSON v. WORDSWORTH* (1818), 2 Swan. 365; 36 E. R. 655, L. C.

*Annotations:—As to* (1) *Consd. Uroh v. Walker* (1838), 3 My. & Cr. 702. *As to* (2) *Refd. Small v. Marwood* (1829), 9 B. & C. 300; *Begbie v. Crook* (1835), 2 Scott, 128; *Lane v. Debonham* (1853), 11 Hare, 188; *Wellesley v. Withers* (1855), 25 L. T. O. S. 79. *Generally, Mentd. Xenos v. Wickham* (1862), 13 C. B. N. S. 381.

**1364. Right to disclaim—Partial disclaimer.]—**Two of the devisees have not disclaimed, & being trustees they cannot disclaim, unless they had divested themselves of all the trusts, which they have not done (*COCKBURN, C.J.*).—*R. v. GARLAND*

**PART II. SECT. 3, SUB-SECT. 2.—A.**

*q. Time for.]—*Testator named certain trustees, of whom any two were to be a quorum; on the death of testator, two of the trustees accepted,

& proceeded to take the necessary steps for administering the trust; thereafter a third trustee intimated that he should act as trustee, but having differed, *in limine*, with the other trustees as to the conduct of

the trust, he afterwards declined to act.—*Held*: he had timeously & competently so declined to act under the trust.—*BANNERMAN v. BANNERMAN* (1842), 5 Dunt. (Ct. of Sess.) 229; 15 Sc. Jur. 67.—*SCOTT*.



## PART II.—TRUSTEES.

(1870), L. R. 5 Q. B. 269; 39 L. J. Q. B. 86; 22 L. T. 160; 18 W. R. 429.

*Annotations*.—*Mentz, Garland v. Mead* (1871), L. R. 6 Q. B. 441; *Exors. for England v. Parr* (1894), 71 L. T. 65; *A. G. v. Sandover* (1904), 73 L. J. K. B. 478; *Re Heathcote & Rawson's Contract* (1913), 108 L. T. 185; *Re Sarum* (Bp.), [1916] 1 K. B. 466; *Sissons v. Chichester-Constable*, [1916] 2 Ch. 75.

**1365.** — **Property partly abroad.**—Testator having real & personal property in England & abroad left his residuary estate to trustees upon trust for sale. One of the trustees disclaimed the trusts of the will except as to the property abroad. The remaining trustees sold land of testator in England:—*Held*: the disclaimer had no effect, & the disclaiming trustee was a necessary party to the conveyance.—*Re LORD & FULLERTON'S CONTRACT*, [1896] 1 Ch. 228; 65 L. J. Ch. 184; 73 L. T. 689; 44 W. R. 195; 40 Sol. Jo. 113, C. A.

**1366.** — **Trustees of copyholds.—Right to renounce legal estate.**—The cases as to trustees being liable to the trusts of a will, by accepting the trusts as to some of the property, do not seem at all to affect the question of whether they may not renounce the legal estate, taking upon themselves any risk of a breach of trust, more particularly where, as in this case, there was no legal estate *prima facie* vested in them, but where they had a mere right to admittance, which, according to a well known & proper practice, they give up in favour of one of their number, for the purposes of the estate, & to effect a saving (*per Cur.*).—*WELLESLEY (LORD) v. WITHERS* (1855), 4 E. & B. 750; 3 C. L. R. 1187; 24 L. J. Q. B. 134; 25 L. T. O. S. 79; 1 Jur. N. S. 706; 119 E. R. 277.

*Annotations*.—*Distd. R. v. Garland* (1870), L. R. 5 Q. B. 269. *Re Bence v. Gilpin* (1868), L. R. 3 Exch. 76.

— **Trustee by devolution.**—*See Sect. 4, post.*

**1367. Right to take opinion of counsel.**—As to obligation to execute disclaimer.—*Re TRYON*, No. 1413, *post*.

**1368. Proof of disclaimer.—Must be clear & distinct.**—Where the position in which parties stand to each other is such as to establish *prima facie* the relation of trustee & *cestui que trust*, the ct. will not permit the trusteeship to be disclaimed without clear & distinct evidence.

A. & B. cohabited together. A. having a considerable sum of money of her own placed the same in the hands of B., as she alleged, upon trust to invest it in her behalf. They continued to live together for upwards of ten years, using the interest arising from the money for their common benefit. B. then put an end to the connection between them. A. filed her bill seeking to charge B. as a trustee with the moneys received by him on her account. B. admitted the advance of the money, but denied the trust, alleging that it was a loan to him, & that *pltf.*'s claim was now barred by Stat. Limitations. The existence of the trust was supported only by the evidence of *pltf.*:—*Held*: the position of the parties established the relation of trustee & *cestui que trust*, which *deft.* had not disproved, & he was bound to account to *pltf.* for what he had received in connection with the trust, with interest at 5 per cent.—*JAMES v. HOLMES* (1862), 31 L. J. Ch. 567; 8 Jur. N. S. 553; 10 W. R. 487; *affd.*, 4 De G. F. & J. 470; 31 L. J. Ch. p. 568; 6 L. T. 589; 10 W. R. 634, L. C.

**1369. Time for disclaimer.—Before dealing with estate.**—A disclaimer by two out of three joint tenants, surrenderees of certain copyhold lands belonging to a manor, executed before the

admittance of the remaining joint tenant, but after the exercise by all the three of various acts of ownership over the estate, is void, & the lord is entitled to a fine as upon the admittance of all.

A disclaimer, to be worth anything, must be an act whereby one entitled to an estate immediately & before dealing with it renounces it; whereby, in effect, he says, "I will not be the owner of this property" (*KELLY, C.B.*).—*BENCE v. GILPIN* (1868), L. R. 3 Exch. 76; 37 L. J. Ex. 36; 16 W. R. 705; *sub nom.* *BENCE v. GILPIN, REEVE v. GILPIN*, 17 L. T. 655.

*Annotation*.—*Re B. v. Garland* (1870), L. R. 5 Q. B. 269.

**1370.** — **Without delay.**—By her will testatrix, who died in 1866, directed her exors. to pay to A. & B. a certain sum of money to be held in trust for *pltf.*, who was at that time an infant. A. & B. gave to the exors. of the will a receipt for the legacy on an Inland Revenue form for presentation to the Inland Revenue authorities. The legacy was paid to A. & B. by a crossed cheque drawn in favour of both of them, but whether payable "to order" or "to bearer" was not in evidence, nor was there any evidence that either of them had indorsed the cheque. In 1870, A., who was the father of *pltf.*, died in insolvent circumstances. In 1881 B. executed a deed poll purporting to disclaim the trusts of the will. In 1892 *pltf.* for the first time became aware of the legacy, & called upon B. to account for the same. B. alleged that he had never accepted the trusts of the will, & that the receipt given by him was not intended to operate as an acceptance of the trusts, & that he had never received nor in any way dealt with the legacy:—*Held*: although the rule was that a trustee ought to execute a disclaimer without delay, yet there was no rule that a disclaimer must be executed within any particular time; the evidence showed that B. did not mean to accept the trust, notwithstanding the fact that he signed the legacy duty receipt as well as A.; & although it was not necessary for B. to have done that if he were not a trustee, yet the ct. would be straining matters too far if it were to hold that that act alone constituted B. a trustee.—*JAGO v. JAGO* (1893), 68 L. T. 654; 9 T. L. R. 351.

**1371. Takes effect ab initio.**—A power in a will in the following form, viz. "I direct that A., B., & C., the exors. of this my will, or the survivors or survivor of them, or the exors. or administrators of such survivor, shall sell my copyhold messuages:"

—*Held*: a disclaimer, executed by C. some time after a sale, reciting that he had, from testator's decease, declined to act, & had never acted, in the exorship. or the trusts of the will, was a refusal *ab initio*, there being nothing to impeach the *bona fides* of the transaction.—*PEPPERCORN v. WAYMAN* (1852), 5 De G. & Sm. 230; 21 L. J. Ch. 827; 16 Jur. 794; 64 E. R. 1091.

**1372. Avoidance of effect of disclaimer.—Necessity for distinct application.**—In order to get rid of the effect of a disclaimer, a distinct application, supported by affidavits establishing a special case, is necessary.—*SIDDEN v. LEDIARD* (1820), 1 Russ. & M. 110; 39 E. R. 42, L. C.

**1373. How far evidence of refusal to act.**—*NOBLE v. MEYMOTT*, No. 1004, *ante*.

### B. Form of Disclaimer.

**1374. Necessity for deed.**—*TOWNSON v. TICKELL*, No. 1342, *ante*.

**1375.** —*J.*—A person, named as exor. & trustee under a will, did not formally renounce

## PART II. SECT. 3, SUB-SECT. 2.—B.

*r. Disclaimer by parol.*—Trustee named may disclaim by parol.—*BINGHAM v. CLANMORRIS (LORD)* (1828), 2 Mol. 253.—*IR.*

*Sect. 3.—Acceptance and disclaimer of office: Subsect. 2, B., C. & D.]*

probate until after the death of the acting exor., nor did he ever disclaim by deed the trust of the real estate; but he purchased a part of the real estate, & took the conveyance from the widow, who was tenant for life, & the heir, to whom the estate must have descended upon the disclaimer of the trust. During the life of the acting exor., however, he interfered in the disposition of testator's property, as her friend or agent:—*Held*: he was not, under the circumstances, chargeable as exor. or trustee.

A deed of disclaimer is the best evidence of the renunciation of a trust, but the conduct of the party desirous of renouncing a trust may amount to a disclaimer.

It is most prudent that a deed of disclaimer should be executed by a person named trustee, who refuses to accept the trust, because such deed is clear evidence of the disclaimer, & admits of no ambiguity; but there may be conduct which amounts to a clear disclaimer, & such appears to be the case here (*LEACH, M.R.*).—*STACEY v. ELPH* (1833), 1 My. & K. 195; 2 L. J. Ch. 50; 39 E. R. 655.

**1376.** — Where previous verbal assent.]—*DOE d. CHIDGAY v. HARRIS*, No. 1355, *ante*.

**1377.** Necessity for record.—*Sufficiency of deed.* — *TOWNSON v. TICKELL*, No. 1342, *ante*.

**1378.** — — — — —.]—(1) A devisee in fee may by deed under his hand & seal disclaim an estate devised to him, without a formal disclaimer in a ct. of record.

(2) Where testator seised in fee devised to three trustees for certain trusts, one disclaimed by deed:—*Held*: such disclaimer was, without matter of record, sufficient to vest a complete title in the two others & enable them to support a distress for rent upon the premises devised.—*BEGBIE v. CROOK* (1835), 2 Bing. N. C. 70; 2 Scott, 128; 4 L. J. C. P. 264; 132 E. R. 28.

**1379.** Whether implied by conduct.]—*STACEY v. ELPH*, No. 1375, *ante*.

**1380.** — Failure to act.—After renunciation of probate of will.]—Where there is a general direction in a will that real estate shall be converted & form with the personal estate a mixed fund for payment of debts & other purposes, & the exor. & trustee renounces probate, but does not disclaim the trusts of the will, with which notwithstanding he does not interfere, such conduct amounts to a disclaimer, & the legal estate must be held to have been divested out of such trustee.—*Re GORDON, ROBERTS v. GORDON* (1877), 6 Ch. D. 531; 46 L. J. Ch. 794; 37 L. T. 627.

*Annotations*:—*Apld. Re Clout & Frewer's Contract*, [1924] 2 Ch. 230. *Held. Hyett v. Mekin* (1884), 50 L. T. 54; *Re Lewis, Foxwell v. Lewis* (1885), 30 Ch. D. 654; *Potter v. Dudeney* (1887), 56 L. T. 395; *Re Lord v. Fullerton* (1893), 65 L. J. Ch. 184.

**1381.** — — — — —.]—Where land is devised to a trustee, conduct which amounts to a disclaimer of the office of trustee will also amount to a disclaimer of the legal estate.—*Re BIRCHALL, BIRCHALL v. ASHTON* (1889), 40 Ch. D. 436; 60 L. T. 369; 37 W. R. 387, C. A.

*Annotation*:—*Apld. Re Clout & Frewer's Contract*, [1924] 2 Ch. 230.

**1382.** — — — — —.]—An exor. trustee survived his testator for nearly thirty years without proving or acting or applying for or receiving a legacy given him in his official capacity. He had not, however, formally renounced or disclaimed:—*Held*: his conduct amounted to a disclaimer.—*Re CLOUT & FREWER'S CONTRACT*, [1924] 2 Ch. 230; 93 L. J. Ch. 624; 132 L. T. 483; 68 Sol. Jo. 738.

**1383.** Sufficiency of disclaimer in court.]—It is not necessary for a debt. who disclaims to make an affidavit of that fact; if he appears at the hearing & disclaims, the claim will be dismissed as against him.—*LADBROKE v. BLEADEN* (1852), 16 Jur. 630.

**1384.** — — — — —.]—*Re ELLISON'S TRUST*, No. 1252, *ante*.

**1385.** — — — — —.]—Upon a petition for the appointment of new trustees by the ct., it is not necessary that a disclaiming trustee, who has never acted, should disclaim by deed, but a disclaimer by his counsel at the Bar is sufficient.—*FOSTER v. DAWBER* (1860), 1 Drew. & Sm. 172; 8 W. R. 646; 62 E. R. 343.

*C. Effect of Disclaimer.*

**1386.** Trust not destroyed.]—*MALLOTT v. WILSON*, No. 1465, *post*.

**1387.** Loss of personal benefit.]—Exor. refusing to execute the trust shall not have a legacy given to him in that character.—*ANDREW v. TRINITY HALL, CAMBRIDGE* (1804), 9 Ves. 525; 32 E. R. 706.

*Annotations*:—*Mentd. A.-G v. Fishmongers' Co. (Hulberts' Charity)* (1837), 1 Coop. Pr. Cas. 85; *Warren v. Rudall, Ex p. Godfrey* (1860), 1 John. & H. 1.

— — — — —.]—*See EXECUTORS*, Vol. XXIII., pp. 444, 445, Nos. 5138–5160.

**1388.** Trustee must disclaim estate.]—(1) Where three exors. & trustees of the will of a naturalised British subject renounced probate & declined to act, the ct., on the petition of the administrator, & of the persons who would but for the fact of their being aliens, be coheirs-at-law, made an order, the Crown not opposing, for the appointment of new trustees, & vesting the real estate in such new trustees.

(2) I cannot allow resps. to disclaim the trusteeship without also disclaiming the estate (*JAMES, V.-C.*).—*Re MARTINEZ' TRUSTS* (1870), 22 L. T. 403.

**1389.** — — — — —.]—*Re BIRCHALL, BIRCHALL v. ASHTON*, No. 1381, *ante*.

**1390.** In whom property vests.—Devisee.]—A devise to trustees to the use of A., for life with remainders over. The trustees disclaimed. Under a mistaken idea that the trustees had the legal estate an order of the ct. was obtained to appoint new trustees & the heir conveyed to them. A. then conveyed his life estate to a mtgee., & afterwards took a reconveyance from him:—*Held*: A. was in by the devise within 1 Will. c. 47, & an order was made for him to convey to a purchaser.—*Re CUMMINS, BEALE v. TENNENT* (1852), 1 Drew. 65; 61 E. R. 376.

**1391.** — Heir-at-law.]—Real estate was devised to A., in trust to sell, with power to the trustees to give discharges. A. was to pay the debts & hold the surplus on certain trusts, & he was appointed sole exor. A. having renounced & disclaimed:—*Held*: the heir-at-law, who had taken out administration, could sell the estate & give valid receipts.—*AUSTIN v. MARTIN* (1861), 29 Beav. 523; 4 L. T. 817; 7 Jur. N. S. 871; 9 W. R. 674; 54 E. R. 730.

**1392.** — — — — —.]—*Settlor.*—*MALLOTT v. WILSON*, No. 1465, *post*.

**1393.** — Consenting trustees.]—C. is a good lessor, for the other trustee's disagreement made the estate wholly his (*HALE, C.J.*).—*SMITH v. WHEELER* (1671), as reported in 1 Vent. 128; 80 E. R. 88; *sub nom. SMYTH v. WHEELER*, 2 Keb. 772.

*Annotations*:—*Consd. Nicolson v. Wordsworth* (1818), 2 Swan. 360. *Apld. Small v. Marwood* (1829), 9 B. & C. 300. *Refd. Siggers v. Evans* (1855), 5 E. & B. 367; *Standing v.*

1394. ———.]—*NICLOSON v. WORDSWORTH*, No. 1363, *ante*.

1395. ———.]—Where a conveyance is made to several trustees it is not necessary that all of them should execute the deed or accept the trust, but the property will vest in those who do execute or accept (*BAYLEY, J.*).—*SMALL v. MARWOOD* (1829), 9 B. & C. 300; 4 Man. & Ry. K. B. 181; 7 L. J. O. S. K. B. 197; 109 E. R. 112.

*Annotations*:—*Consd. Browell v. Reed* (1842), 1 Hare, 434. *Refd. Siggers v. Evans* (1855), 5 E. & B. 367; *Standing v. Bowring* (1885), 31 Ch. D. 282; *London & County Banking Co. v. London & River Plate Bank* (1888), 21 Q. B. D. 535; *Mallott v. Wilson*, [1903] 2 Ch. 494.

1396. ———.]—*BEGGIE v. CROOK*, No. 1378, *ante*.

1397. ———.]—*DOE d. CHIDGEE v. HARRIS*, No. 1355, *ante*.

1398. Conveyance of trust property—Whether disclaiming trustee necessary party.]—One trustee for the sale of an estate having released & conveyed to his co-trustee refused to join in the receipt of the purchase-money: upon the special expression of the deed the purchaser was not held to the agreement with the remaining trustee: it would have been otherwise, if one had merely renounced.—*CREWE v. DICKEN* (1798), 4 Ves. 97; 31 E. R. 50, L. C.

*Annotations*:—*Expld. Nicolson v. Wordsworth* (1818), 2 Swan, 365. *Apld. Small v. Marwood* (1829), 9 B. & C. 300. *Consd. Urch v. Walker* (1838), 3 My. & Cr. 702. *Refd. Doe d. Chidgey v. Harris* (1847), 16 M. & W. 517; *Lane v. Debenham* (1853), 11 Hare, 188; *Re Young, Fraser v. Young*, [1913] 1 Ch. 272. *Mentd. Pyrke v. Waddingham* (1852), 10 Hare, 1.

1399. ———.]—A trustee of real estate for sale, who has renounced his trust, & released & conveyed to his co-trustee, is not a necessary party in a conveyance to a purchaser, nor is it necessary he should join in a receipt for the purchase-money.—*ADAMS v. TAUNTON* (1820), 5 Madd. 435; 56 E. R. 961.

*Annotation*:—*Consd. Browell v. Reed* (1842), 1 Hare, 434.

Co-executors.]—*See* EXECUTORS, Vol. XXIV., p. 576, Nos. 6123, 6124.

1400. Right of consenting trustee to sue—On covenant in deed creating trust.]—A., by indenture, covenanted with B. & C., their exors., administrators & assigns to pay a sum of money, to be held by them on certain trusts. C. did not assent to or execute the deed, & subsequently by an indenture, to which neither A. nor B. were parties, disclaimed all the trusts of the first indenture:—*Held*: B. could not alone sue A. upon the covenant during the lifetime of C.—*WETHERELL v. JANGSTON* (1847), 1 Exch. 634; 17 L. J. Ex. 338; 154 E. R. 269, Ex. Ch.

*Annotations*:—*Refd. Linwood v. Squire* (1850), 5 Exch. 234; *Salmon v. Webb & Franklin* (1852), 3 H. L. Cas. 510. *Mentd. Cannan v. Hartley* (1850), 15 L. T. O. S. 184. *Beer v. Beer* (1852), 12 C. B. 60; *British Empire Mutual Life Assoc. v. Browne* (1852), 12 C. B. 723; *Sickel v. Borch* (1864), 3 New Rep. 438.

1401. Right of court to exercise discretion of trustees—Power of sale.]—Where trustees, having a power of sale, disclaim, the ct. can exercise the discretion of the trustees, & sell if necessary.—*BROWNE v. PAULL* (1852), 19 L. T. O. S. 269; 16 Jur. 707.

## PART II. SECT. 3, SUB-SECT. 2.—C.

1398 i. Conveyance of trust property—Whether disclaiming trustee necessary party.]—A trustee who has disclaimed need not be a party to any conveyance of the legal estate, but it should be recited in the conveyance that the trustee had never acted.—*BINGHAM v. CLANMORRIS (LORD)* (1828), 2 Mol. 253.—*IR.*

t. Action for rent—Whether disclaiming trustee necessary party.]—One of

1402. Action against trustees—Whether disclaiming trustees necessary parties.]—No general rule can be laid down defining multifariousness, but the ct. will exercise its discretion in each particular case. Trustee who have not acted, though they have not disclaimed, not necessary parties.—*DAWES v. RIDGWAY* (1854), 2 W. R. 404.

Charitable trusts.]—*See* CHARITIES, Vol. VIII., pp. 337, 338, Nos. 1248, 1249, 1277.

## D. Costs and Expenses.

1403. Right of disclaiming trustee to costs—Action against trustees—Costs between solicitor & client.]—A person named a trustee without his knowledge & in that character a party to the suit, having never accepted the trusts, is entitled to his costs as between solr. & client.—*SHERATT v. BENTLEY* (1830), 1 Russ. & M. 655; 39 E. R. 251.

*Annotations*:—*N.F. Milward v. Milward* (1834), 3 L. J. Ch. 141. *Dbid. Norway v. Norway* (1834), 3 L. J. Ch. 111. *Consd. Legg v. Mackrell* (1859), 1 Giff. 165.

1404. ———.]—Costs between party & party.]—A person named a trustee in a deed, who declines to accept the office, is in the situation of any other deft. against whom a bill is dismissed, & can only have his costs as between party & party.—*NORWAY v. NORWAY* (1834), 2 My. & K. 278; 3 L. J. Ch. 111, 163; 39 E. R. 950.

*Annotation*:—*Folld. Milward v. Milward* (1834), 3 L. J. Ch. 141.

1405. ———.]—*MILWARD v. MILWARD* (1834), 3 My. & K. 311; 3 L. J. Ch. 141; 40 E. R. 119.

1406. ———.]—A trustee disclaimed by his answer, but was continued as a party until the hearing:—*Held*: nevertheless, he was entitled to costs as between party & party only.—*BRAY v. WEST* (1838), 9 Sim. 429; 59 E. R. 423.

1407. ———.]—Where the name of a party appears upon documents as a trustee, & he is therefore made deft., but asserts by his answer that he never accepted the trust not acted, he is entitled to his costs as between party & party.—*HEAP v. JONES* (1856), 5 W. R. 106.

1408. ———.]—The representative of deceased trustee refused to act in the trusts, & to receive certain dividends which had become payable. A bill was filed to remove her & appoint other trustees. The judge refused to allow her the costs of the suit. On appeal the decision was reversed.—*LEGG v. MACKRELL* (1860), 2 De G. F. & J. 551; 4 L. T. 568; 45 E. R. 735, L. C.

*Annotations*:—*Distd. Re Abbot's Trusts* (1878), 38 L. T. 442. *Refd. Re Hildley, Ridley v. Hildley*, [1904] 2 Ch. 774; *Re Bennett, Ward v. Bennett*, [1906] 1 Ch. 216.

1409. ———.]—Disclaim at the bar.]—*BULKELEY v. EGLINTON (EARL)*, No. 1255, *ante*.

1410. ———.]—Costs of express disclaimer.]—A trustee put in a disclaimer to a bill of foreclosure, & set out a correspondence to show that he had always refused to act:—*Held*: he was entitled to the whole costs, for pltf. might have shown by the bill that a simple disclaimer was sufficient.—*BENBOW v. DAVIES* (1848), 11 Beav. 369; 50 E. R. 859.

1411. ———.]—Suit for appointment of new trustee—Trustee declining to perform trusts.]—The ct. will

534.—*SCOT.*

## PART II. SECT. 3, SUB-SECT. 2.—D.

b. Right of disclaiming trustee to costs—Confined to those necessarily & properly incurred.]—Trustee who had not acted putting in a fine answer, disallowed the costs of such vexatious answer, & order made at the hearing to tax him the costs only of such answer as would have been necessary & proper.—*MARTIN v. PERSSE* (1828), 1 Mol. 146.—*IR.*

the devisees in trust under a will refused to accept the trust:—*Held*: he was not a necessary party pltf. in an action for rent of the premises devised, although his formal renunciation in writing was not made until after the rent had accrued due.—*HUGHES v. BROOKE* (1878), 43 U. C. R. 609.—*CAN.*

a. Appointment of judicial factor—Exercise of power by judicial factor.]—*WOODARDS JUDICIAL FACTOR v. WOODARDS EXECUTRIX*, [1926] S. C.

**Sect. 3.—Acceptance and disclaimer of office: Sub-sect. 2, D. Sects. 4, 5 & 6: Sub-sect. 1.]**

not allow costs to a trustee who, after having acted, declines to perform the trusts reposed in him, & thereby renders a suit for the appointment of a new trustee necessary.—*HOWARD v. RHODES* (1837), 1 Keen, 581; 6 L. J. Ch. 196; 48 E. R. 431.

*Annotation:—Distd. Coventry v. Coventry* (1837), 1 Keen 758.

**1412. — Representative of deceased trustee refusing to act.]—***LEGG v. MACKRELL*, No. 1408, *ante*.

**1413. Right to expenses—Taking opinion of counsel—As to obligation to execute disclaimer.]—**A party named trustee without his sanction, & called on to disclaim, is authorised in taking the opinion of counsel as to his obligation to execute a disclaimer.—*Re TRYON* (1844), 7 Beav. 496; 2 L. T. O. S. 516; 8 J. P. 408; 49 E. R. 1158.

*Annotations:—Reid. Re Johnson & Weatherall* (1888), 37 Ch. D. 433. *Mentd. Re Stephen*, *Ex p. Bass* (1848), 2 Ph. 562; *Re Browne* (1851), 15 Beav. 61; *Re Cheesman*, [1891] 2 Ch. 289.

**SECT. 4.—TRUSTEES BY DEVOLUTION.**

*See Administration of Estates Act, 1925 (c. 23), ss. 1 (2), 3 (1), (ii).*

**1414. Upon whom trust devolves—Heir of surviving trustee.]—***Re MORTON & HALLETT*, No. 1009, *ante*.

**1415. — Personal representative of surviving trustee.]—**An action for breach of trust was brought by a beneficiary under a settlement against, as sole defts., the exors. of one of the two trustees, but not the surviving trustee, of the settlement. The surviving trustee was also dead, & no new trustees of the settlement had been appointed, although the person in whom the power to appoint was vested was prepared to exercise it:—*Held*: the representatives of the surviving trustee must be added as defts., or new trustees of the settlement must be appointed & added as defts.

It may be that there is no present trustee, as there may be no representative of the last surviving trustee, or if there be one that he has refused to accept the trusts of this settlement; but in the present case there is a person entitled to appoint new trustees of the settlement, & if there be no trustees, such an appointment ought to be made, & there is no reason why the existing trustees, if any, or such new trustees, should not be brought before the ct. (*BYRNE, J.*).—*Re JORDAN, HAYWARD v. HAMILTON*, [1904] 1 Ch. 260; 73 L. J. Ch. 128; 90 L. T. 223; 52 W. R. 150; 48 Sol. Jo. 142.

**1416. —**—*W.* by her will devised & bequeathed property to the person or persons who should at her death be trustees of her father's will. At her death all the trustees of her father's will & all the trustees appointed in their place were dead. The exors. of the last survivor of the trustees so appointed had acted in the trusts of her father's will:—*Held*: these were at her death trustees of her father's will, & were duly appointed trustees of her own.—*Re WAIDANIS, RIVERS v. WAIDANIS*, [1908] 1 Ch. 123; 77 L. J. Ch. 12; 97 L. T. 707, C. A.

*Annotations:—Reid. Re Routledge, Saul v. Routledge* (1908), 78 L. J. Ch. 136; *Re Crunden & Meux's Contract*, [1909] 1 Ch. 690.

**1417. — Until appointment of new trustees.]—**By a settlement real estate was in 1874 conveyed to A. & B. in fee upon trust that they & the survivor of them & the heirs & assigns of such survivor should hold the trust estate upon certain trusts under which C. was the first tenant for life; & by the same settlement a power to appoint new

trustees was vested in C. & D. during their joint lives. B. survived A. & died in 1905, & the exors. of his will acted as the trustees of the settlement. In 1908 C. & D. in exercise of the power by deed appointed two persons to be new trustees of the settlement & made the usual vesting declaration. The exors. of B. objected that the appointment of new trustees was a nullity because they were, by Conveyancing Act, 1881 (c. 41), s. 30, the existing trustees of the settlement, & though willing to retire, they could not be displaced except by the ct. or by a deed to which they were made parties & retired:—*Held*: although the exors. were trustees of the settlement until the new trustees were appointed, the deed was a valid exercise of the power to appoint new trustees & operated forthwith to oust the exors. for all purposes from the trust.—*Re ROUTLEDGE'S TRUSTS, ROUTLEDGE v. SAUL*, [1909] 1 Ch. 280; 90 L. T. 919; *sub nom. Re ROUTLEDGE, SAUL v. ROUTLEDGE*, 78 L. J. Ch. 136.

**1418. Right to decline trust.]—**The sole trustee of a fund misappropriated it & died insolvent. His exor. had never acted in the trust, & desired to be discharged therefrom:—*Held*: he was entitled to decline to act in the trust.—*Re RIDLEY, RIDLEY v. RIDLEY*, [1904] 2 Ch. 774; 73 L. J. Ch. 696; 91 L. T. 189; 48 Sol. Jo. 641.

*Annotation:—Reid. Re Bennett, Ward v. Bennett*, [1906] 1 Ch. 216.

**1419. —**—*A* personal representative of a deceased trustee has an absolute right to decline to accept the position & duties of trustee if he chooses so to do (*VAUGHAN WILLIAMS, J.*).—*Re BENNETT, WARD v. BENNETT*, [1906] 1 Ch. 216; 75 L. J. Ch. 122; 94 L. T. 72; 54 W. R. 237; 50 Sol. Jo. 125, C. A.

*Annotation:—Mentd. Re Harris, Davis v. Harris*, [1914] 2 Ch. 395.

**1420. Right to exercise power of sale.]—**The person who is to execute a trust or exercise a power must be a person who is in some way pointed out by the creator of the trust or power as a proper person to execute or exercise it.

*A.*, who died in 1883, devised his residuary estate to B., C., D., & E. (the words " & their heirs " being omitted) upon trust, after B.'s death, for sale as if they were absolute owners. The will gave the trustees powers to postpone the sales, & demise & manage during postponement, & enabled the original number of trustees to be reduced, but not below two, on any appointment of new trustees.

All the trustees, who were also exors. of the will, proved it, & in 1908 D., the surviving trustee, died, having appointed exors. by his will:—*Held*: D.'s exors. could not make a good title to a freehold house forming part of the residuary estate of A.

*Semble*: if in the will of A. the devise had been to the four trustees & their heirs, the heir of the surviving trustee could, apart from Conveyancing Act, 1881 (c. 41), s. 36, have executed the trust for sale & by virtue of that sect. his legal personal representatives would have been substituted for his heir.—*Re CRUNDEN & MEUX'S CONTRACT*, [1909] 1 Ch. 690; 78 L. J. Ch. 396; 100 L. T. 472.

*See, now, Trustee Act, 1925 (c. 19), s. 18 (2).*

**Right of retainer.]—***See* EXECUTORS, Vol. XXIII., pp. 380, 381, Nos. 4503–4511.

**SECT. 5.—CUSTODIAN TRUSTEES.**

*See* Public Trustee Act, 1906 (c. 55), s. 4; Public Trustee Rules, 1912, rr. 8–11; Public Trustee (Custodian Trustee) Rules, 1926, r. 30.

**1421. Who may appoint—Persons with power to appoint new trustees—On vacancy.]—**(1) Under

Public Trustee Act, 1906 (c. 55), s. 4 (3), a corporate body empowered to undertake trusts within r. 30 of the Public Trustee Rules, 1912, can be appointed & has power to act as custodian trustee of real, leasehold, or personal estate devised or bequeathed upon charitable trusts. The prohibition against the Public Trustee himself accepting such a trust imposed by sect. 2 (5) of the same Act is personal to the Public Trustee; & there is nothing in the appointment of such a corporate body as custodian trustee which abridges or affects the powers or duties of the Official Trustee of Charity Lands or the Official Trustees of Charitable Funds within the meaning of sect. 2 (5).

(2) The persons having power to appoint new trustees by statute or otherwise in case a vacancy arises, can properly appoint a custodian trustee under Public Trustee Act, 1906 (c. 55), s. 4.—*Re CHERRY'S TRUSTS, ROBINSON v. WESLEYAN METHODIST CHAPEL PURPOSES TRUSTEES*, [1914] 1 Ch. 83; 83 L. J. Ch. 142; 110 L. T. 16; 30 T. L. R. 30; 58 Sol. Jo. 48.

**1422. Who may be appointed—Corporate body empowered to undertake trusts—Charitable trust.**—*Re CHERRY'S TRUSTS, ROBINSON v. WESLEYAN METHODIST CHAPEL PURPOSES TRUSTEES*, No. 1421, *ante*.

#### SECT. 6.—BARE TRUSTEES.

SUB-SECT. 1.—WHO IS A BARE TRUSTEE.

**1423. Trustee having no duties to perform.**—*Semble*, a person to whose fiduciary office no duties were originally attached, or who, although such duties were originally attached to his office, would, on the requisition of his *cestuis que trust*, be compellable in equity to convey the estate to them, or by their direction, is a bare trustee within the meaning of Land Transfer Act, 1875 (c. 87).—*CHRISTIE v. OVINGTON* (1875), 1 Ch. D. 279; 24 W. R. 204.

*Annotations*:—*Consd. Morgan v. Swansea Urban S. A.* (1878), 9 Ch. D. 582. *Apld. Re Cunningham & Frayling*, [1891] 2 Ch. 567. *Re Blandy Jenkins' Estate, Blandy Jenkins v. Walker*, [1917] 1 Ch. 46.

**1424. —**—*J.*—Testator devised his real estate to trustees for sale, who were married women, one of them having married before & the other after Married Women's Property Act, 1882 (c. 75). Both of them also took beneficial interests in the proceeds of sale. Under the judgment in an action for the administration of testator's estate, part of the real estate was sold by the trustees, the purchaser paying his purchase-money into ct.:—*Held*: the married women were "bare trustees" within Vendor & Purchaser Act, 1874 (c. 78), s. 6.—*Re Docwra, Docwra v. FAITH* (1885), 29 Ch. D. 693; 54 L. J. Ch. 1121; 53 L. T. 288; 33 W. R. 574.

*Annotation*:—*Consd. Re Blandy Jenkins' Estate, Blandy Jenkins v. Walker*, [1917] 1 Ch. 46.

**1425. —**—*J.*—P. devised all his real estate to trustees upon trust as to a certain freehold house for certain persons during their respective lives, & then for C. in fee simple. P. died in 1859, & the last tenant for life under his will died in 1889. C., who died in 1868, by his will devised & bequeathed all his real & personal estate to trustees upon trust to pay unto his wife, or permit her to receive during her life or widowhood, the annual produce thereof, & after her decease or second marriage, whichever should first happen,

upon trust for G., the illegitimate son of C., his heirs, exors., administrators, & assigns, according to the respective natures thereof. The will of C. contained a power for his trustees, during the life of his widow & the minority of G., to change the investment of any stocks, shares, & securities in which any of his estate might be invested, & to sell & convey the real or personal estate or any part thereof, & a direction to invest the proceeds of sale. G. died in 1880, intestate & without issue, & C.'s widow died in 1886. Upon the death of the last tenant for life under P.'s will, all the trusts as to the house under both wills having come to an end, the question arose whether the surviving trustee of P.'s will or the surviving trustee of C.'s will was entitled to the house:—*Held*: as the trustees of C.'s will had no active duties to perform except during the life of C.'s widow & the minority of G., he was a bare trustee only, & had no right to call for a conveyance of the legal estate.

Testator devised & bequeathed the whole of his real & personal estate to trustees upon trust to pay to his wife or permit her to receive during her lifetime the annual produce of the property. Now, undoubtedly, according to the decision in *Doe d. Leicester v. Biggs*, No. 1584, *post*, that would not give the legal estate to the trustees, but would vest it in the wife (FRY, L.J.).—*Re LAMITMAR, MOODY v. PENFOLD*, [1891] 1 Ch. 258; 60 L. J. Ch. 143; 64 L. T. 333, C. A.

**1426. Trustee compelled to convey estate.—To or by direction of cestui que trust.**—*CHRISTIE v. OVINGTON*, No. 1423, *ante*.

**1427. —**—*Covenant with trustees for creditors.*—*R.* being lessee of certain oil works, executed an assignment for the benefit of his creditors, but the lease was excepted, & instead of indorsing it, R. covenanted to demise it to such person as the trustees of the deed should direct. It became bkpt., & the trustees of the assignment having sold the lease, R. refused to perform his covenant. On bill filed to compel him:—*Held*: he was a bare trustee, & a decree made with costs.—*FRAZER v. RADLOFF* (1868), 19 L. T. 275.

**1428. —**—*On repayment of mortgage money—Married woman.*—In a mtge. deed of freehold property executed only by the mtgees. the Christian name of one of the mtgees. was incorrect. After execution the incorrect name was erased, & the correct names substituted therefor. The consideration for the mtge., being moneys advanced by trustees, was, subsequently to 1893, repaid to the sole surviving trustee, a married woman, who reconveyed the property to the mtgors. Upon a vendor & purchaser summons for a declaration that a good title had been shown to the property in question:—*Held*: the married woman on payment of the mtge. money became a bare trustee for the mtgors.—*Re HOWGATE & OSBORN'S CONTRACT*, [1902] 1 Ch. 451; 71 L. J. Ch. 279; 86 L. T. 180.

*Annotation*:—*Re West & Hardy's Contract* (1903), 52 W. R. 188.

**1429. Trustee having no beneficial interest.**—A. having an estate of his own in the county of B. & another in C., & having also the legal but no beneficial interest in an estate in D., with power of appointing it to either of his sons, by will devised "all his estates, of what nature or kind soever, in the county of B. & at , in the

#### PART II. SECT. 6, SUB-SECT. 1.

**1429 I. Trustee having no beneficial interest.**—*ENTWISLE v. LENZ* (1908), 14 B. C. R. 51; 9 W. L. R. 17,

#### 317.—CAN.

**1429 II. —**—*GREGORY v. PRINCE-TON COLLIERIES*, [1918] 1 W. W. R. 265; 25 B. C. R. 180; 40 D. L. R.

#### 739.—CAN.

**1429 III. —**—*McKENZIE v. McKENZIE*, [1925] 1 D. L. R. 373; 56 O. L. R. 247.—CAN.

**Sect. 6.—Bare trustees: Sub-sects. 1 & 2. Sect. 7: Sub-sect. 1, A.]**

county of C., or elsewhere in the kingdom of England, after payment of his debts," etc., to a younger son.

In this case the trustee, the deviser, had no beneficial interest in himself; he was a mere naked trustee (LORD KENYON, C.).—ROE d. READE v. READE (1799), 8 Term Rep. 118; 101 E. R. 1298.

**Annotations:—***Reid*, Braybrooke Lord v. Inskip (1803), 8 Ves. 417; Doe d. Roylance v. Lightfoot (1841), 8 M. & W. 553; *Lysaght v. Edwards* (1876), 2 Ch. D. 499; *Re Bell's Trusts* (1877), 5 Ch. D. 504; *Re Blandy Jenkins' Estate*, Blandy Jenkins v. Walker, [1917] 1 Ch. 46. *Mentd.* Galliers v. Moss (1829), 9 B. & C. 267; Doe d. Howell v. Thomas (1840), 1 Man. & G. 335; Doe d. Jacobs v. Phillips (1847), 16 L. J. Q. B. 269; R. v. Champneys (1871), L. R. 6 C. P. 384.

**1430. —**—[In 1874 plffs. entered into a contract for the purchase of real estate. After the title had been accepted, & before completion, the vendor died, having by his will in 1873, given his personal estate to B., whom he appointed exor., & devised all his real estate to H. & M. upon trust for sale, & having also devised to H. alone all the real estate which at his death might be vested in him as trustee.

The position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is, a personal without beneficial interest) & a mtgee. who is not, in equity (any more than a vendor), the owner of the estate (JESSEL, M.R.).—*LYSAGHT v. EDWARDS* (1876), 2 Ch. D. 499; 45 L. J. Ch. 554; 34 L. T. 787; 24 W. R. 778; 3 Char. Pr. Cas. 243.

**Annotations:—***Consd.* *Re Thomas*, Thomas v. Howell (1886), 34 Ch. D. 166. *Apd.* Allen v. I. R. Comrs., [1914] 1 K. B. 327. *Reid.* *Re Colling* (1886), 32 Ch. D. 333; *Leppington v. Freeman* (1891), 65 L. T. 145; *Hodger v. Harrison*, [1893] 1 Q. B. 161; *Plews v. Samuel*, [1904] 1 Ch. 464; *St. Thomas' Hospital v. Richardson* (1909), 101 L. T. 771; *Re Marlay*, Rutland v. Bury, [1915] 2 Ch. 264; *Dale v. Hatfield Chase Corpn.*, [1922] 2 K. B. 282.

**1431. — Having active duties to perform.]—**A trustee with a beneficial interest in the trust estate is not a "bare trustee" within Land Transfer Act, 1875 (c. 87), s. 48. A vendor of freeholds who let the purchaser into possession before payment of the purchase-money & execution of the conveyance was, by reason of his having a lien on the property for his purchase-money & not being bound to convey until payment, held not to be a "bare trustee" within the Act. *Qu.*: whether a trustee without a beneficial interest in the trust estate, but having active duties to perform in relation thereto, is a "bare trustee" within the Act.

When a trustee has active duties to perform, & the *cestuis que trust* are more than one & have not requested, then he is not a bare trustee; but if they are all competent & have requested, then he is, because he has then kept the estate, so to speak, by wrong; that is, upon request he ought to have conveyed, & he is thus a bare trustee (JESSEL, M.R.).—MORGAN v. SWANSEA URBAN SANITARY AUTHORITY (1878), 9 Ch. D. 582; 27 W. R. 283.

**Annotations:—***Consd.* *Re Cunningham & Frayling*, [1891] 2 Ch. 566. *Reid.* *Tendring Hundred Waterworks Co. v. Jones*, [1903] 2 Ch. 615; *St. Thomas' Hospital v. Richardson*, [1910] 1 K. B. 271; *Re Blandy Jenkins' Estate*, Blandy Jenkins v. Walker, [1917] 1 Ch. 46; *Re Catne's Mortgage Trusts*, [1919] B. & C. R. 297.

**1432. —**—[*Re CUNNINGHAM & FRAYLING*, No. 1072, ante.

**1433. —**—[A trustee who has no beneficial interest, whether or not he has duties to

perform, is a "bare trustee" under Fines & Recoveries Act, 1833 (c. 74), s. 27.—*Re BLANDY JENKINS' ESTATE*, BLANDY JENKINS v. WALKER, [1917] 1 Ch. 46; *sub nom.* *Re BLANDY JENKINS*, JENKINS v. WALTER, 86 L. J. Ch. 76; 115 L. T. 483.

**1434. Trustee having beneficial interest—Lien on trust estate.]—**MORGAN v. SWANSEA URBAN SANITARY AUTHORITY, No. 1431, ante.

**SUB-SECT. 2.—RIGHTS AND DUTIES.**

**1435. Right to settle account—Against direction of cestui que trust.]—**FELL v. LUTWIDGE (1740), Barn. Ch. 319; 27 E. R. 662, L. C.

**1436. Right to claim priority—Trustee of outstanding term.]—**A mere trustee of an outstanding term cannot avail himself of it for the purpose of establishing a priority.—*SHAW v. NEALE* (1858), 6 H. L. Cas. 581; 31 L. T. O. S. 190; 4 Jur. N. S. 695; 10 E. R. 1422, H. L.; *reusq.* (1855), 20 Beav. 157.

**Annotations:—***Mentd.* *Beavan v. Oxford* (1855), 6 De G. M. & G. 492; *Turner v. Letts* (1855), 20 Beav. 185; *Hopkinson v. Rolt* (1861), 9 H. L. Cas. 514; *Monzie v. Lightfoot* (1871), L. R. 11 Eq. 459; *North v. Stewart* (1890), 15 App. Cas. 452; *Briscoe v. Briscoe*, [1892] 3 Ch. 543; *Re Knight*, Knight v. Gardner, [1892] 2 Ch. 368; *Meguerditchian v. Lightbound*, [1917] 2 K. B. 298.

**1437. Right to part with legal estate.]—**When it is said that a bare trustee cannot part with the legal estate so as to confer any benefit thereby, that must mean a legal estate vested in a trustee without any beneficial interest or duty (NORTH, J.).—*GARNHAM v. SKIPPER* (1885), as reported in 53 L. T. 940; 2 T. L. R. 64.

**Right to present bankruptcy petition.]—**See *BANKRUPTCY*, Vol. IV., p. 113, Nos. 1020–1024.

**1438. Effect of bankruptcy of trustee—Whether estate passes to assignee.]—**An estate of which a bkpt. is seised as a bare trustee does not pass to his assignees (SHADWELL, V.-C.).—*Re ELFORD*, *Ex p. GENNYS* (1829), Mont. & M. 258.

**Annotation:—***Consd.* *Re Bridgman* (1860), 1 Drew. & Sm. 164.

**1439. Duty to convey legal estate—On demand of mortgagor.]—**The mtgor. has power to convey even if the legal estate is outstanding in a bare trustee. He can compel the trustee to come in & grant the estate, & in that way has the power to convey. He has power to call on the trustee to convey to him, & to convey in manner aforesaid, or he has power in another way; he has power to call upon him to convey if he has the whole beneficial interest (JESSEL, M.R.).—*GENERAL FINANCE MORTGAGE & DISCOUNT CO. v. LIBERATOR PERMANENT BENEFIT BUILDING SOCIETY* (1878), 10 Ch. D. 15; 39 L. T. 600; 27 W. R. 210.

**Annotations:—***Reid.* *Low v. Bouverie*, [1891] 3 Ch. 82; *Onward Bldg. Soc. v. Smithson*, [1893] 1 Ch. 1. *Mentd.* *Williams v. Pinckney* (1897), 77 L. T. 700; *Matthews v. Usher* (1899), 68 L. J. Q. B. 988; *Poulton v. Moore* (1913), 83 L. J. K. B. 875.

**SECT. 7.—CONSTRUCTIVE TRUSTEES.**

**SUB-SECT. 1.—HOW CONSTITUTED.**

**A. In General.**

**1440. Purchase of land in name of another.]—**Where a man buys land in another's name & pays money, it will be in trust for him that pays the money, though no deed declaring the trust.—*ANON.* (1683), 2 Vent. 361; 86 E. R. 486.

**PART II. SECT. 7, SUB-SECT. 1.—A. c. Purchase or sale of land—Sale of wife's property—Retention of proceeds**

**by husband.]—**Where a house & land, the separate property of a married woman, were sold, & the proceeds

taken & retained by her husband, who had never accounted for them. In an action on a promissory note of the



**1441.** —[Plff. parish council resolved in June, 1911, to purchase 12 acres of land, partly for allotments & partly for a recreation ground. According to plffs., deft. suggested that a private person could probably effect the purchase on better terms than the council, & that thereupon it was arranged that deft. should attend the sale & purchase the land at a price not exceeding £800. Deft. purchased the land for £400, & it was conveyed to him, but as he refused to convey it to the council, plffs. now claimed a declaration that he held the land as trustee for them:—*Held*: plffs. were entitled to the declaration asked for, but plffs. must undertake with all convenient speed to get the necessary consent to pay deft. the purchase price & expenses.—**LONGFIELD PARISH COUNCIL v. ROBSON** (1913), 29 T. L. R. 357.

**1442. Purchase of land by executor in own name.**—**ALLEYN v. ALLEYN** (1730), Mos. 262; 25 E. R. 385.

**1443. Money obtained by fraud—Sale by tenant for life—Consent to bar of entail obtained by fraud.**—A., tenant for life, with remainder to B. in tail, by fraud gets B.'s authority to levy a fine. He sells the land & invests the purchase-money in the funds, where it is clearly identified.

The ct. held clearly, that as testator had obtained their signatures to the fine fraudulently, he should be considered as a trustee to the amount.—**NEWCOMB v. BURDON** (1793), 2 Anst. 343; 145 E. R. 897.

**1444. — Appointment by tenant for life.**—J. being entitled to the dividends of £4,300 for life, with a power to appoint by any deed or writing the principal after his death, & in default of appointment, to his next of kin, & being in prison for debt & in great distress, is prevailed upon by H. to enter into an agreement for sale of the principal after his death, in consideration of £1,000 & other sums therein stated to have been previously lent & advanced to him by H.

By a subsequent deed, in consideration of £1,854 therein stated to be due from J. to H., & of £1,000 paid by L. & others, J. by the direction of H. appointed that the principal should on his death be transferred to L. & others, with a proviso that they should assign the same to H. on payment of £1,000 & interest, & all further advances.

The £1,854 or any part of it had not in fact been advanced by H.:—*Held*: the appointment was well executed. H. was a trustee for the personal representatives of J. for the excess beyond the money received by J.—**MELLER v. MINET** (1830), Taml. 481; 48 E. R. 191.

**1445. Appointment by bankrupt—Appointee trustee for creditors.**—A bkpt. having a power of

appointment over money, to be executed only by will, made his will, disposing of the property, & then became bkpt.; & afterwards obtained his certificate, & died without revoking his will:—*Held*: the appointee by the will was a trustee for the creditors of the bkpt., who became such after he had obtained his certificate.

Where there is a general power of appointment by will & an appointment is made the appointee is a trustee for creditors (**LEACH, V.-C.**).—**JENNEY v. ANDREWS** (1822), 6 Madd. 264; 56 E. R. 1091. *Annotations*:—**Consd.** **Williams v. Lomas** (1852), 16 Beav. 1; **Vaughan v. Vanderstegen** (1854), 2 Eq. Rep. 1229; **Re Guedalla, Lee v. Guedalla's Trustee**, [1905] 2 Ch. 331. *Reff.* **Re Hadley, Johnson v. Hadley**, [1909] 1 Ch. 20; **O'Grady v. Willmot**, [1916] 2 A. C. 231. *Mentd.* **Hobday v. Peters** (No. 2) (1860), 28 Beav. 354; **Shattock v. Shattock** (1866), L. R. 2 Eq. 182; **Re Benzon, Bower v. Chetwynd**, [1914] 2 Ch. 68.

**1446. Trafficking with another's money.**—So it is also where one not expressly a trustee has bought or trafficked with another's money. The law raises a trust by implication, clothing him, though a stranger, with the fiduciary character, for the purpose of making him accountable (**LORD BROUGHAM, C.**).—**DOCKER v. SOMES** (1834), 2 My. & K. 655; 3 L. J. Ch. 200; 39 E. R. 1095, L. C.

*Annotations*:—*Reff.* **Wedderburn v. Wedderburn** (1838), 4 My. & Cr. 41; **Vyoe v. Foster** (1874), L. R. 7 H. L. 318. *Mentd.* **Macdonald v. Richardson, Richardson v. Marten** (1858), 1 Giff. 81; **Costa Rica Ry. v. Forwood**, [1900] 1 Ch. 756.

**1447. Agreement to carry on trust.**—W. being indebted to C., agreed by deed to convey his estate to C., upon trust to sell the same, & to pay off certain debts of W. due to other persons, & then the debt due from W. to C., & to pay over the surplus, if any, to W. No conveyance was executed. C. being afterwards in possession of the estate under a *fi. fa.* issued on a judgment upon a warrant of attorney given by W., agreed with W.'s agent to purchase the estate. W. ratified the contract, but subsequently impeached it as one made by a trustee for his own benefit & against the interest of the *cestui que trust*:—*Held*: C. was not a trustee for W., but was a creditor holding a security for his debt.—**WATERS v. GROOM** (1844), 11 Cl. & Fin. 684; 8 E. R. 1262, H. L.; *affg.* **S. C. sub nom. CHAMBERS v. WATERS** (1833), Coop. temp. Brough. 91, L. C.

*Annotation*:—*Mentd.* **Helling v. Lumley** (1858), 28 L. J. Ch. 249.

**1448. Dealing with property of testator—Surviving partners.**—The surviving partners of testator dealing with the property of testator, with the knowledge that it belongs to his estate, are bound to inquire into the trusts on which it is held, & are liable as if they had actual notice of those trusts.—**TRAVIS v. MILNE, MILNE v.**

wife, 26 years after:—*Held*: the husband remained a trustee for his wife of the proceeds, & the wife's claim constituted separate estate.—**BRUGGS v. WILLSON** (1897), 24 A. R. 521.—**CAN.**

**d. — Joint purchase.**—**PHILLION v. DOUGLAS** (Man.) (1906), 2 W. L. R. 572.—**CAN.**

**e. —**—**AUSTIN v. McCASKILL** (1922), 49 N. B. R. 236; 70 D. L. R. 819.—**CAN.**

**f. — Sale by person entitled to moiety of land.**—B. & D., father & son, were jointly entitled to a moiety of certain property, B.'s brother E. & K., E.'s son, being jointly entitled to the other moiety. B. & D. were transported for life. Thirty years afterwards (B. having meantime died), D. returned from transportation, & asserted his right to a moiety against a person deriving his title from E. & K.,

who had taken possession of the whole:—*Held*: E. & K. had taken possession subject to a constructive trust in favour of B. & D., & accordingly D. was entitled to assert this right, & no limitation could affect it.—**DURGA PRASAD v. ASA RAM** (1879), L. R. 2 All. 361.—**IND.**

**g. —**—Where lands are deemed to be sold in a mtgo. suit, the infant heir-at-law of mtgor. is not a trustee within 11 Geo. 4, & 1 Will. 4, c. 60.—**GODDARD v. MACAULAY** (1844), 6 I. Eq. R. 221.—**IR.**

**h. —**—Plff.'s judgment debtor, before judgment, entered into an agreement to purchase lands & was put in possession. He paid one-half the purchase-money & then left the province, placing deft. in possession as his agent before doing so. Deft. paid the balance of the purchase-money & took a deed in his own name:

*Held*: the judgment debtor had an interest in the land to the extent of the amount paid by him, & deft. must be declared to hold this in trust for the judgment creditor.—**RAISTON v. GOODWIN** (1888), 21 N. S. R. (9 R. & G.) 177.—**CAN.**

**k. — Holding purchased under Land Purchase Acts by limited owner—Sale by Irish Land Commission to recover arrears of annuity—Collusion between owner of holding & purchaser at sale—Purchaser declared a trustee for persons entitled in remainder.**—**HATHELY v. GUIRY**, [1918] 1 I. R. 135.—**IR.**

**j. —**—Certain vendors were willing to sell part of an estate to plffs., but were not willing to sell another part to defts. unless plffs. bought their portion. Deft. for his own convenience & advantage, requested plff. not to buy, but to allow



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MILNE (1851), 9 Hare, 141; 20 L. J. Ch. 665; 68 E. R. 449.

*Annotations.*—*Apld.* *Flockton v. Bunning* (1868), 8 Ch. App. 323, n. *Reid*, *Stainton v. Carron Co.* (1854), 18 Beav. 146; *Meldrum v. Scorer* (1887), 56 L. T. 471. *Mentd.* *Brett v. Beckwith* (1856), 26 L. J. Ch. 130; *Yeatman v. Yeatman* (1877), 7 Ch. D. 210; *Benningfield v. Baxter* (1886), 12 App. Cas. 167; *Alcock & Gaudin Ity. & Harbour Co. v. Greenhill* (1897), 76 L. T. 542.

**1449. Employing trust property for use in trade.]**  
—*FLOCKTON v. BUNNING* (1868), 8 Ch. App. 323, n., L. J.J.

**1450. Receiving money for particular purposes.—For settling with creditors.]**—A solr. in whose hands a sum of money had been placed for the purpose of making such arrangements with a person's creditors by negotiating, compounding, arranging, & settling with such creditors as he might be able to do, does not thereby become a trustee for such creditors.—*APPLEYARD v. HOLT* (1852), 18 L. T. O. S. 316.

**1451.** —.]—*BUTT v. MONTEAUX* (1854), 1 K. & J. 98; 3 Eq. Rep. 190; 24 L. J. Ch. 99; 24 L. T. O. S. 106; 3 W. R. 82; 69 E. R. 385.

**1452. Sale of pledged shares.—Pledgor trustee for purchaser.]**—A debtor resident in India pledged shares, held by him in a joint stock banking co. in England, with a creditor in England, with an authority by letter to sell, which was communicated to & recognised by the banking co. The creditor, in exercise of the authority, sold the shares to a purchaser. Upon the petition of the purchaser:—*Held*: the shares were "stock," & debtor in India, being constructively a trustee, was a trustee for the purchaser within the Trustee Act, 1850 (c. 60).—*Re ANGELO, Ex p. FRITH* (1852), 5 De G. & Sm. 278; 18 L. T. O. S. 316; 16 Jur. 831; 64 E. R. 1116.

*Annotation.*—*Reid.* *Re New Zealand Trust & Loan Co.*, [1893] 1 Ch. 403.

**1453. Insurance policy taken out in name of insurance company.—Company trustees for assured.]**—M., having obtained from the W. Insurance co. one loan on the security of a policy effected with them on his own life, & a charge on certain funds in which he had an interest contingent on his surviving S., applied to the W. co. for a further advance, proposed to be secured by a further charge on the premises comprised in the first transaction, & also, further, by an insurance to be effected by M. on his own life against the life of S. for the amount of the new advance; no *distringas* to be placed on the trust fund. The directors of the W. co., by resolution, communicated to M., "entertained" the proposal, with the alteration that there was to be a *distringas* for both loans, & the new policy was to be for £500 more than the amount of the proposed fresh advance. The deed for securing the fresh advance was accordingly prepared, both the draft & the engrossment, on the footing that the new policy was to be taken out in M.'s name, & assigning & dealing with it accordingly. M. appeared before the medical officers of the K. co., with whom this counter insurance was effected, & the *distringas* was placed upon the stock for the amount of both loans; but it was found impossible to serve the

trustee of the fund with notice of the transaction, or ascertain from her whether M.'s title was clear, & the loan was never actually advanced, M. dying very unexpectedly in the lifetime of the tenant for life. It then turned out that the secretary of the W. co., who had undertaken to complete the policy with the K. co., had taken it out, not in M.'s name, but in the name of the trustees of the W. co., who accordingly received the whole amount:—*Held*: the W. co. were trustees of the amount so received for the benefit of M.'s estate.—*MARTIN v. WEST OF ENGLAND LIFE & FIRE INSURANCE CO.* (1858), 4 Jur. N. S. 158; 6 W. R. 377.

**1454. Person having obligation with respect to property.—Acquisition of greater interest.—By neglect of duty.]**—An obligation to do an act with respect to property creates a trust; & if the party who is subject to the obligation acquires or retains by means of his neglect of duty, a greater interest than he would otherwise have had, he becomes a trustee of such excess for the benefit of those who would have been entitled to it if the obligation had been duly fulfilled.—*FLEEMING v. HOWDEN* (1868), L. R. 1 Sc. & Div. 372, H. L.

*Annotations.*—*Consd.* *Bank of Scotland v. Macleod*, [1914] A. C. 311. *Reid.* *Heritable Reversionary Co. v. Millar*, [1892] A. C. 598.

**1455. Notice to vendor of assignment by purchaser.]**—F. entered into a contract with P. to sell him some leasehold property. P. paid part of the purchase-money, & obtained from F. a lease of the premises for a short term of years, in favour of a nominee of P. P. had dealings with bankers, to whom he became much indebted. Being called on to give the bankers some security, he handed to them the title deeds of a freehold estate, which he charged with the debt, & at the same time he deposited with them his contract for the purchase of the leasehold property. He accompanied this deposit with a written memorandum, in which he agreed to make to the bankers "a valid assignment of my contract with F. for the purchase of" the leasehold premises, "by way of mtge. for further securing," etc. The bankers, by their solr., some time afterwards gave to F. notice, in the above words, of this agreement, & the solr.'s letter called it "a charge by P. on his purchase." F. acknowledged the receipt of this notice. He heard nothing more of the matter. P. did not complete his purchase at the stipulated time, but did so afterwards, & then F. according to the terms of the original contract, executed to him a conveyance of the leasehold premises, without any notice being taken in the conveyance of the claims of the bankers:—*Held*: the rule of equity that a vendor of an estate is, after the making of the contract of sale, a trustee for the purchaser, did not apply to this case, & F. was in no way liable to the bankers.—*SHAW v. FOSTER* (1872), L. R. 5 H. L. 321; 42 L. J. Ch. 49; 27 L. T. 281; 20 W. R. 907, H. L.; *affg.* S. C. sub nom. *McCREIGHT v. FOSTER* (1870), 5 Ch. App. 604, L. C.

*Annotations.*—*Consd.* *Raffety v. Schofield*, [1897] 1 Ch. 937; *Riddout v. Fowler*, [1904] 1 Ch. 658; *Re Stucley, Stucley v. Kekewich*, [1906] 1 Ch. 67; *Golden Bread Co. v. Hemmings*, [1922] 1 Ch. 162. *Reid.* *Lysaght v. Edwards* (1876), 2 Ch. D. 499; *Egmont v. Smith*, *Smith v. Egmont* (1877), 6 Ch. D. 469; *London & County Banking Co. v. Ratcliffe*

him to buy the whole in his own name, on behalf of himself & the plts. Pltfs. agreed to this & refrained from buying, & deft. bought the land with his own money, but afterwards refused to convey any part of it to the plts. —*Held*: the action was barred by Stat. Frauds, the alleged agreement not being in writing, & the facts alleged were insufficient to support a

constructive trust, as they showed nothing more than the alleged unenforceable agreement.—*HENDERSON v. MCKENZIE*, 1 J. R. N. S. 47.—N.Z.

1. —*Agent purchasing for self with principal's money.*—Where an agent is directed to purchase land for

in his own name, in trust of and for principal, a constructive trust arises, which

is not within the purview of Stat. Frauds, s. 7, & which may therefore be established by parol evidence.—*MORRIN v. KISSLING*, 4 J. R. N. S. 1.—N.Z.

m. *Persons who obtain certificate of transfer without any right.*—Persons who obtain a certificate of title to land, without any right, under the Act or otherwise, are trustees for the persons entitled, & can be compelled to transfer

(1881), 6 App. Cas. 722; *Baddington v. Atlee* (1887), 35 Ch. D. 317. *Mentd.* *Crabtree v. Poole* (1871), L. R. 12 Eq. 13; *Cave v. Mackenzie* (1877), 46 L. J. Ch. 564; *Glyn Mills v. East & West India Dock Co.* (1882), 7 App. Cas. 591; *Re Thackway & Young's Contract* (1888), 40 Ch. D. 34; *Levy v. Stogdon* (1898), 68 L. J. Ch. 19; *United Realization Co. v. I. R. Comrs.*, [1899] 1 Q. B. 361.

**1456. Money in hands of receiver.**—Money not accounted for & due from a receiver under the ct. is, by his recognisance, made a debt of record, although the balance due has not been ascertained. The receiver is a trustee of such money for the persons entitled thereto, & cannot, as against them, avail himself of Stat. Limitations, although his final accounts have been passed & the recognisances vacated.—*SEAGRAM v. TUCK* (1881), 18 Ch. D. 296; 50 L. J. Ch. 572; 44 L. T. 800; 29 W. R. 784.

**1457. Damages recovered by committee of freemen.**—Under local Acts of 1774 & 1870, the soil of the Town Moor a common within the city of Newcastle-on-Tyne, was vested in the corpn., & the herbage rights in the freemen & widows of freemen, each being entitled to depasture two milch cows thereon. A certain portion of the moor was set aside for the holding of fairs & horse-races, & the corpn. & committee of stewards representing the freemen were, by the Act of 1870, empowered jointly to make agreements for the appropriation of parts of the moor for agricultural shows, reviews & other public purposes. In 1882, the races hitherto held on the moor were removed elsewhere, & the corpn. & the committee of freemen jointly gave a licence for the holding of a temperance festival on the race ground, which had since been held annually. Owing to great damage having been caused, in 1918, to the herbage by the use of heavy traction engines to bring roundabouts, etc., to the festival, the committee of freemen refused to concur in granting a licence to defts. to attend with their roundabouts, but such licence was granted by the corpn. alone, & the festival was held as usual. On the committee suing defts. for an injunction & damages:—*Held*: (1) the temperance festival was not a "fair" within the meaning of the local Acts; (2) the corpn. was not entitled to grant a licence to defts. without the concurrence of plffs.; (3) defts. were trespassers & plffs. were entitled to an injunction against them & damages; (4) plffs. would hold the damages recovered as trustees, & defts. were not concerned with the application thereof.—*WALKER v. MURPHY*, [1915] 1 Ch. 71; 83 L. J. Ch. 917; 112 L. T. 189; 79 J. P. 137; 59 Sol. Jo. 88; 13 L. G. R. 109, C. A.

**Vendors & purchasers of land.**—See *SALE OF LAND*, Vol. XL., pp. 178, 179, 181, Nos. 1472–1491, 1507–1509.

**Heir of vendor of land.**—See *SALE OF LAND*, Vol. XL., pp. 209, 210, Nos. 1751–1759.

**Constructive trusts generally.**—See Part I., Sect. 14, *ante*.

### B. By Failure of Trustees.

See Trustee Act, 1925 (c. 19), s. 41 (1).

**1458. General rule.**—In general cases trusts will not fail by the failure of the trustee.—*ELLISON v. ELLISON* (1802), 6 Ves. 656; 31 E. R. 1243, L. C.

*Annotations*:—*Reid*, *Kekewich v. Manning* (1851), 1 De G. M. & G. 176. *Mentd.* *Alexander v. Wellington* (1830), 2 Russ. & M. 35; *Garrard v. Lauderdale* (1830), 3 Sim. 1;

such land to them.—*SOLICITOR GENERAL v. MERE TINI, SOLICITOR GENERAL v. RENATA HIRINI* (1899), 17 N. Z. L. R. 773.—N.Z.

**n. Sale of lease in perpetuity by vendor**—*No assignment made.*—*Re JOHNSTON* (1906), 25 N. Z. L. R. 564.—N.Z.

**o. Executor obtaining patent for pre-emption lands devised.**—*ROBERTS v. NATIONAL TRUST CO.* (1915), 32 W. L. R. 55; 23 D. L. R. 890.—CAN.

**p. Holder of missing person's estate.**—The possession by the widow, or some other member of the family,

*Bill v. Curreton* (1835), 2 My. & K. 503; *Edwards v. Jones* (1836), 1 My. & Cr. 226; *Dillon v. Coppin* (1839), 4 My. & Cr. 647; *Hughes v. Stubbs* (1842), 1 Harc. 476; *M'Fadden v. Jonkyns* (1842), 1 Harc. 458; *Meek v. Kettlewell* (1842), 1 Harc. 464; *Walker v. Jeffreys* (1842), 1 Harc. 341; *Griffith v. Ricketts, Griffith v. Lunell* (1849), 7 Harc. 299; *Bridge v. Bridge* (1852), 16 Beav. 315; *Beech v. Keep* (1854), 18 Beav. 285; *Donaldson v. Donaldson* (1854), Kay, 711; *Burton v. Jackson* (1856), 26 L. T. O. S. 321; *Forbes v. Forbes* (1857), 3 Jur. N. S. 1204; *Dilrow v. Bone* (1862), 3 Giff. 538; *Gilbert v. Overton* (1864), 2 Hem. & M. 110; *Paul v. Paul* (1880), 15 Ch. D. 580; *Macedo v. Stroud*, [1922] 2 A. C. 330.

**1459.**—*Equity will find a trustee* (*CROMPTON, J.*).—*SIGGERS v. EVANS* (1855), 5 E. & B. 367; 3 C. L. R. 1209; 24 L. J. Q. B. 305; 25 L. T. O. S. 213; 1 Jur. N. S. 851; 119 E. R. 518.

*Annotations*:—*Consd.* *Hobson v. Thelluson* (1867), L. R. 2 Q. B. 642; *Johns v. James* (1878), 8 Ch. D. 744. *Reid*. *Biron v. Mount* (1857), 24 Beav. 612; *Re Sanders' Trusts* (1878), 47 L. J. Ch. 667; *Standing v. Bowring* (1885), 31 Ch. D. 282; *Roberts v. Jones, Rice Roberts Garnishes* (1892), 61 L. J. Q. B. 523; *Runtz v. Longbourne* (1892), 8 T. L. R. 568; *Mallott v. Wilson*, [1903] 2 Ch. 494; *Ellis v. Cross*, [1915] 2 K. B. 654. *Mentd.* *Graham v. Van Diemen's Land Co.* (1856), 26 L. J. Ex. 73; *London & County Banking Co. v. London & River Plate Bank* (1888), 21 Q. B. D. 535; *Muller's Margarine v. I. R. Comrs.* (1899), 69 L. J. Q. B. 291.

**1460. No person appointed trustee—Heir constructive trustee.**—*LOCTON v. LOCTON* (1637), *Freem. Ch.* 136; 22 E. R. 1111; *sub nom.* *LOCKTON v. LOCKTON*, 1 Cas. in Ch. 179.

**1461.**—*Devise that lands shall be sold, & not said by whom.*

When no person is appointed to sell, it ought to be intended that he shall sell who has the estate, which is the heir (*per CUR.*).—*PITS v. PELHAM* (1670), 1 Lev. 304; T. Jo. 25; 1 Rep. Ch. 283; 83 E. R. 419; *sub nom.* *PITT v. PELHAM*, *Freem. Ch.* 134, H. L.; *revers.*, 1 Cas. in Ch. 176.

*Annotations*:—*Consd.* *Cook v. Fountain* (1672), 3 Swan. 585; *Bath & Mountague's Case* (1693), 3 Cas. in Ch. 55; *Burgess v. Wheat* (1759), 1 Eden, 177. *Reid*. *Holl v. Roll* (1689), 2 Vern. 99; *Clarke v. Smith* (1698), 1 Lut. 793. *Mentd.* *Newton v. Bonnet* (1782), 1 Bro. C. C. 135; *Marston v. Fox*, 100 d. Fox v. Fox v. Marston (1838), 8 Ad. & El. 14.

**1462.**—*Re DAVIS' TRUSTS*, No. 999, *ante*.

**1463. Disclaimer by trustees.**—(1) The trust follows the legal estate wherever it goes, except it comes into the hands of a purchaser for a valuable consideration without notice (*WILMOT, C.J.*).

(2) The person who creates a trust means it should at all events be created. The individuals named as trustees are only the nominal instruments to execute that intention, & if they fail, either by death or being under disability to act, or refusing to act, the constitution has provided a trustee (*WILMOT, C.J.*).—*A-G. v. DOWNING (LADY)* (1767), *Wilm.* 1; 97 E. R. 1; *subsequent proceedings* (1769), *Amb.* 571, L. C.

*Annotations*:—*As to* *Consd.* *Mogridge v. Thackwell* (1803), 7 Ves. 36. *Reid*. *Robson v. Light* (1864), 34 Beav. 110. *Generally*. *Mentd.* *White v. White* (1778), 1 Bro. C. C. 12; *Henshaw v. Atkinson* (1818), 3 Madd. 306; *A-G. v. Brodie* (1846), 11 Jur. 137.

**1464.**—*Heir constructive trustee.*—Where lands are devised to trustees in fee upon trusts, or with powers requiring the exercise of judgment & discretion, & they disclaim, the heir-at-law cannot exercise such powers or trusts, although he may hold the estate subject to the trusts of the will.

Testator devised real estate to trustees, & directed that they should & might grant leases thereof, for the term of twenty-one years. The

of a missing person's estate may, in the absence of an indication of its being adverse, be considered to be that of a trustee until the expiry of the term fixed for his return.—*NARAIN SAHAI v. POSOO* (1867), 2 Agra 78.—IND

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trustees disclaimed the trusts, & the heir-at-law, who was tenant for life of a moiety, granted a lease:—*Held*: the lease was invalid.—**ROBSON v. FLIGHT** (1865), 4 De G. J. & Sm. 608; 5 New Rep. 344; 34 L. J. Ch. 226; 11 L. T. 725; 11 Jur. N. S. 147; 13 W. R. 393; 46 E. R. 1054, L. C. *Annotation*:—**Reid**, *Gainsborough v. Watcombe Terra Cotta Clay Co.*, *Dunning v. Gainsborough* (1885), 54 L. J. Ch. 991.

**1465. — Settlor constructive trustee.**—By a voluntary settlement of 1866, real estate was granted unto & to the use of a trustee upon certain trusts; the settlement contained the usual covenant for further assurance, but no power of revocation by the settlor. In 1867, the trustee executed a deed of disclaimer, & the settlor also purported to put an end to the settlement:—*Held*: the settlement was not thereby rendered inoperative, but the trust was imposed on the settlor, in whom, by operation of law the estate had reverted after the creation of the trust.

Under these circumstances, I think that the trust was really created, & that the fact that the trustee subsequently disclaimed did not destroy the trust, but that upon the revesting the settlor himself held in trust (BYRNE, J.).—**MALLOTT v. WILSON**, [1903] 2 Ch. 494; 72 L. J. Ch. 664; 89 L. T. 522.

**1466. Trustees not validly appointed.—Heir constructive trustee.**—Bequest of annuity out of land to churchwardens, to keep a family vault in repair, is void at law; but the heir-at-law shall be subject to the trust.—**GRAVENOR v. ILLIUM** (1767), Amb. 643; 27 E. R. 417; *sub nom.* **GROSVENOR v. ILLIUM**, 1 Bro. C. C. 61, n., L. C.

*Annotations*:—**Reid**, *Turner v. Ogden* (1787), 1 Cox, Eq. Cas. 316; *Tregonwell v. Sydenham* (1815), 3 Dow. 194; *Cooke v. Stationer's Co.* (1831), 3 My. & K. 262; *Henchman v. A.-G.* (1834), 3 My. & K. 485; *Doe d. Chidgey v. Harris* (1847), 16 M. & W. 617; *Re Cooper's Trusts* (1853), 23 L. J. Ch. 27, n.; *Lainson v. Lainson* (1854), 24 L. J. Ch. 46; *Smith v. Lomas* (1864), 4 New Rep. 318.

**1467. Original trustees incapable.**—**A.-G. v. DOWNING (LADY)**, No. 1463, *ante*.

**1468. — Heir constructive trustee.**—Estate devised to a body corporate, which cannot take by the Statute of Mortmain, in trust, the uses are not defeated by this deficiency of the trustee, but attach upon the estate, the law raises, & the heir-at-law becomes a trustee to the uses of the will.—**SONLEY v. CLOCKMAKERS' Co.** (1780), 1 Bro. C. C. 81; 28 E. R. 998.

**1469. Death of trustee.**—**A.-G. v. DOWNING (LADY)**, No. 1463, *ante*.

**1470. Residuary legatee constructive trustee.**—Where legacy is given only to erect a charity, legatee is a trustee at all events, & can have no

pretensions for himself.—**MOGGRIDGE v. THACKWELL** (1792), 1 Ves. 464; 3 Bro. C. C. 517; 30 E. R. 440, L. C.; *reheard* (1803), 7 Ves. 36, L. C.; *affd.* (1807), 13 Ves. 416, H. L.

*Annotations*:—**Consd.** *Mills v. Farmer* (1815), 1 Mer. 55; *Ommanney v. Butcher* (1823), Turn. & R. 260; *Re Pyne, Lilley v. A.-G.* (1903) 1 Ch. 83. **Reid**, *Corbyn v. French* (1799), 4 Ves. 418; *Morice v. Durham (Bp.)* (1804), 9 Ves. 399; *Palce v. Canterbury (Archbp.)* (1807), 14 Ves. 364; *A.-G. v. Ironmongers Co.* (1833), 3 L. J. Ch. 11; *Reeve v. A.-G.* (1843), 3 Hare, 191; *Lee v. Palm* (1844), 4 Hare, 201; *Pocock v. A.-G.* (1876), 3 Ch. D. 342; *Re Slevin, Slevin v. Hepburn*, [1891] 1 Ch. 373; *Re Rymer, Rymer v. Stanfield*, [1895] 1 Ch. 19; *Re Davis, Hannen v. Hilmyer*, [1902] 1 Ch. 876; *Re Eades, Eades v. Eades*, [1920] 2 Ch. 353; *Re Willis, Shaw v. Willis*, [1921] 1 Ch. 44. **Mentd.** *Cary v. Abbot* (1802), 7 Ves. 490; *Benyon v. Benyon* (1810), 17 Ves. 34; *Ellis v. Selby* (1836), 5 L. J. Ch. 214; *Martin v. Margham* (1844), 14 Sim. 230; *Nightingale v. Goulbourn* (1848), 2 Ph. 594; *Marsh v. Means* (1857), 30 L. T. O. S. 89; *Tatham v. Drummond* (1864), 3 New Rep. 706; *Wilson v. O'Leary* (1871), L. R. 12 Eq. 525; *Lyons Corp'n. v. Bengal Advocate-General* (1876), 1 App. Cas. 91; *Biscoe v. Jackson* (1887), 56 L. T. 753; *Bourne v. Keane*, [1919] A. C. 815.

**1471. Defective limitation of legal estate.—Heir constructive trustee.**—A. & his wife, in exercise of a general power of appointment, reserved to them in a voluntary settlement executed after their marriage, appointed certain lands after the death of the survivor of them to trustees, their exors., administrators & assigns, upon trusts, for sale, & to divide the proceeds of such sale among the seven children of A. & B. A. & B. both died. Upon a bill by six of their children against the heir-at-law of A., who was entitled in default of appointment:—*Held*: such heir-at-law was a trustee for the benefit of the parties interested under the appointment.—**DILLOW v. BONE** (1862), 3 Giff. 538; 31 L. J. Ch. 417; 6 L. T. 71; 8 Jur. N. S. 276; 10 W. R. 437; 66 E. R. 521.

**C. By Acquisition of Trust Property.**

(a) *In General.*

**1472. General rule.—Trust follows legal estate.**—**A.-G. v. DOWNING (LADY)**, No. 1463, *ante*.

**1473. Receipt by executor of tenant for life.**—**ANON.** (1860), Freem. Ch. 137; 22 E. R. 1112.

**Receipt by personal representative of married woman.**—*See* **EXECUTORS**, Vol. XXIII., pp. 238, 305, Nos. 2900, 3699-3703.

(b) *With Notice of Trust.*

i. *In General.*

*See, generally*, **EQUITY**, Vol. XX., pp. 300-304, Nos. 548-580.

**1474. General rule.—Person acquiring trust property held trustee.**—**ANON.** (1465), Y. B. 5 Edw. 4 fo. 7, pl. 16.

*Annotations*:—**Mentd.** *Ratcliff's Case* (1592), 3 Co. Rep. 37 a; *Sammes's Case* (1609), 13 Co. Rep. 54; *Pilfold's Case* (1612), 10 Co. Rep. 115 b.

**CHETTIAR** (1913), I. L. R. 38 Mad. 321.—**IND.**

**PART II. SECT. 7, SUB-SECT. 1.—C. (b) i.**

**1474 i. General rule.—Person acquiring trust property held trustee.**—**HARDING v. STARR** (1888), 21 N. S. R. (9 R. & G.) 121.—**CAN.**

**1474 ii. —.**—**HAMILTON v. YORK & BALDY (Alta.)** (1913), 24 W. L. R. 579; 4 W. W. R. 859.—**CAN.**

**1474 iii. —.**—**LOKE YEW v. PORT SWEETENHAM RUBBER Co., LTD.**, [1913] A. C. 491, P. C.—**MALAY STATES.**

**1474 iv. —.**—**A purchaser, with notice implied or constructive, from a trustee, will be bound by the trust.**—**THOMPSON v. SIMPSON** (1841), 1 Dr. & War. 459, 486.—**IR.**

**PART II. SECT. 7, SUB-SECT. 1.—C. (a).**

**q. Invalid conveyance.—Second valid conveyance to one party.—Whether grantee of second deed trustee.**—**GRACE v. MACDERMOTT** (1867), 13 Gr. 247.—**CAN.**

**r. Transfer of estate.—Whether amounting to transfer of trusts.**—A transfer of the estate does not necessarily involve the transfer of trusts or powers as inseparable incidents of the estate.—**Re GILCHRIST & ISLAND** (1886), 11 O. R. 537.—**CAN.**

**t. Property given into possession of defendant for sale & accounting.**—Where immovable property was given into the possession of deft. under an order of a Revenue officer, which directed deft. to sell the crops, &, after payment of Govt. dues, to account for the profits to pltf. on

his claiming it:—*Held*: deft. was not a depository, but a trustee of the property.—**VITHAL VISHWANATH PRABHU v. RAM-CHANDRA SADASHIV KIRKIRE** (1870), 7 Bom. A. C. 149.—**IND.**

**a. Purchaser of equity of redemption from mortgagor.—Not when he purchases the lands at a revenue sale & constructive trustee under Trusts Act.**—**RANGA SRINIVASA CHARI v. GNANAPRAKASA MUDALIAR** (1906), I. L. R. 30 Mad. 67.—**IND.**

**b. Necessity for declaration of trust.—Before property becomes property of trustee.**—Property in the hands of a mere constructive trustee does not become the property of the beneficiary under the constructive trust so as to enable him to treat it as such without a judicial declaration of trust.—**RAJA RAJESWARA DORAI v. ARUNACHELLAN**

1475. ———.]—**ROOKE v. STAPLES** (1579), Cary, 76; 21 E. R. 40.

1476. ———.]—**SYDNAM v. COURTNEY** (1598), Moore, K. B. 567; 72 E. R. 763.

1477. ———.]—**SMITH v. ATTERBY** (1649), 3 Rep. Ch. 93; Freem. Ch. 136; 21 E. R. 739.

1478. ———.]—**RODNOR (COUNTS) v. VANDEBENDY** (1697), Show. Parl. Cas. 69; 1 E. R. 48; *sub nom.* **RADNOR (LADY) v. ROTHERHAM**, Freem. Ch. 211; Prec. Ch. 65, H. L.; *affg.* S. C. *sub nom.* **BODMIN v. VANDEBENDEN** (1855), 2 Cas. in Ch. 172, L. C.

*Annotations* :—**Distd. Dudley v. Dudley** (1705), Prec. Ch. 241. **Refd.** **Brown v. Gibbs** (1699), Prec. Ch. 97; **Hitchins v. Hitchins** (1700), 2 Freem. Ch. 241; **Palmer v. Danby** (1700), Prec. Ch. 137; **Hamilton v. Mohun** (1710), 1 P. Wms. 118; **Webb v. Webb** (1710), 1 P. Wms. 132; **Squire v. Compton** (1724), 2 Eq. Cas. Abr. 387; **Banks v. Sutton** (1732), 2 P. Wms. 700; **A. G. v. Scott** (1735), Cas. temp. Tail. 138; **Hill v. Adams** (1741), 2 Atk. 208; **Swannock v. Lyford** (1741), Amb. 6; **Basset v. Basset** (1744), 3 Atk. 203; **Smith v. Adams** (1854), 5 De G. M. & G. 712; **Senhouse v. Earle** (1755), Amb. 285; **Burgess v. Wheate** (1759), 1 Wm. Bl. 123; **Maundrell v. Maundrell** (1805), 10 Ves. 246; **Mole v. Smith** (1822), Jac. 490.

1479. ———.]—Though a purchaser may buy in an incumbrance, or lay hold on any plank to protect himself, yet he shall not protect himself by the taking a conveyance from a trustee after he had notice of the trust, for by taking a conveyance with notice of the trust, he himself becomes the trustee, & must not, to get a plank to save himself, be guilty of a breach of trust.—**SAUNDERS v. DEHEW** (1692), 2 Vern. 271; 23 E. R. 775; *sub nom.* **SANDERS v. DELIGNE**, Freem. Ch. 123.

*Annotations* :—**Apld.** **Allen v. Knight** (1840), 5 Hare, 272. **Consd.** **Carter v. Carter** (1857), 3 K. & J. 617. **Refd.** **Bates v. Johnson** (1859), John. 304; **Mumford v. Stohwasser** (1874), L. It. 18 Eq. 556; **Taylor v. Russell** (1890), 62 L. T. 922; **Bailey v. Barnes**, [1894] 1 Ch. 25; **Taylor v. London & County Banking Co.**, London & County Banking Co. v. Nixon, [1901] 2 Ch. 231.

1480. ———.]—**ANON.** (1704), Freem. Ch. 278; 22 E. R. 1209.

1481. ———.]—Trustee in a will, to support contingent remainders, join with the tenant for life in a conveyance, whereby the contingent remainders are destroyed before they come *in esse*; this is a plain breach of trust, & whoever claims under such conveyance, having notice of the trust, shall be liable to make good the estates.—**GORGES v. PYE** (1712), 7 Bro. Parl. Cas. 221; 3 E. R. 144, H. L.; *affg.* S. C. *sub nom.* **PYE v. GORGE** (1710), 1 P. Wms. 128.

*Annotations* :—**Consd.** **Mansell v. Mansell** (1732), 2 P. Wms. 678; **Moody v. Walters** (1809), 16 Ves. 283. **Refd.** **Thornby v. Fleetwood** (1720), 1 Stra. 318; **Garth v. Cotton** (1753), 3 Atk. 751; **Barnard v. Large** (1781), 1 Bro. C. C. 534.

1482. ———.]—**SKIRME v. MEYRICK** (1739), 2 Com. 700; 92 E. R. 1275.

1483. ———.]—An exor. taking a transfer of stock during his testator's life, with the knowledge that it was a trust fund, in his capacity of exor., held liable to the *cestuis que trust*.—**BENTHAM v. NOBLE** (1833), 2 L. J. Ch. 93.

1484. ———.]—(1) Where a party obtains the possession of, & exercises dominion over, trust property, knowing it to be so, he is responsible to the *cestuis que trust*, in the same manner as if he had been duly appointed trustee.

(2) Where a solr. to a trustee after the death of the trustee exercises any acts of control over the trust property, the ct. will permit the *cestuis que trust* to prove against his estate for the trust money in his hands at the time of his bkpcy. &

Stat. Limitations is no bar.—*Re SEABER, Ex p. GOWERS* (1837), 2 Deac. 207; 3 Mont. & A. 172; 6 L. J. Bcy. 49, Ct. of R.

*Annotation* :—*As to* (1) **Refd.** *Re Clendenning* (1859), 33 L. T. O. S. 291.

1485. ———.]—A provisionally registered railway co. entered into an agreement with two canal cos., established by Acts of Parliament, for the purchase of their shares & property; & in the document it was provided that certain members of the provisional committee of the railway co. should pay down, or procure to be paid down, the sum of £10,000, to be held upon trust, until the railway Act should be obtained, in taking transfers of the bonds or mtges. of the canal cos., & the remaining amount of the purchase-money, within certain stated times, amounting altogether to £50,000; it was also further declared, that the purchase-money should be provided by the thereunder signed six members of the provisional committee out of their own moneys, or they should procure the same to be paid as aforesaid, so that the canal cos. should not be affected by any special trusts or liabilities which might attach to the paid-up capital of the railway co. This agreement was executed by the six, on behalf of the railway co., & by persons specially appointed by the canal cos. Three of the six provisional committeemen signed a cheque for the £10,000, & with the concurrence of the other three handed it to a trustee for the canal cos., & the money was paid by the trustees of the railway co., which co. was ordered to be wound up, & the master authorised one of the shareholders to file a bill against the canal cos. for the recovery of the £10,000.—*Held*: the £10,000 was trust money of the railway co., & not the private moneys of the six provisional committeemen; the canal cos., receiving the cheque as they did, & receiving the money for the cheque from the bankers of the railway co., took the £10,000 impressed with a trust, & with notice of its being trust money, & were therefore bound to refund it.—**BRYSON v. WARWICK & BIRMINGHAM CANAL CO.** (1853), 4 De G. M. & G. 711; 2 Eq. Rep. 29; 23 L. J. Ch. 133; 22 L. T. O. S. 200; 18 Jur. 47; 43 E. R. 686, C. A.

*Annotations* :—**Refd.** **Macbryde v. Eykyn** (1871), 24 L. T. 461. **Mentd.** *Re* **Landon & Birmingham Extension & Northampton, Daventry, Leamington & Warwick Rty., Ex p. Gay** (1855), 25 L. T. O. S. 9; *Re* **Saxon Life Assoc., Ex p. Life & Fire Assoc. Co.'s Case** (1862), 1 De G. J. & Sm. 29; **Whitwam v. Watkin** (1898), 78 L. T. 888.

1486. ———.]—Trustee *de facto* held liable to account as a trustee *de jure*.

Deft. has not been properly & regularly appointed a trustee, but this ct. cannot regard that, because the property has been conveyed to him, & he has accepted it upon the trusts of the will, & therefore he is *de facto* a trustee. He must be held answerable for all the rents and profits of the estate which he has received (**ROMILLY, M.R.**).—**HENNESSEY v. BRAY** (1863), 33 Beav. 96; 9 L. T. 41; 9 Jur. N. S. 1065; 11 W. R. 1053; 55 E. R. 302.

1487. ———.]—**DRAKE v. PYWELL** (1865), 4 Il. & C. 78; 13 L. T. 714.

1488. ———.]—If a person intermeddle with the estate by order of another who is entitled to take out administration, but who fails to do so, both are liable as exors. *de son tort*. *Secus*, where administration is subsequently duly taken out, as it has relation back, & renders the agency valid. *Semble*: however, in the latter case the agent

1474 v. ———.]—**LAMBERT v. LAMBERT, MOORE & NIXON** (1843), 5 L. Eq. R. 339.—**IR.**

1474 v. ———.]—**SHERIDAN v.**

**JOYCE** (1844), 7 I. Eq. R. 115; 1 Jo. & Lat. 401.—**IR.**

1474 v. ———.]—**JUSTICE v. WYNNE** (1860), 12 I. Ch. R. 289.—**IR.**

*o. Necessity for proof of trust.*—**MUZHUR HOSAIN v. DINOBUNDO SEN** (1864), Bourke 8; Cor. 94.—**IND.**

*Sect. 7.—Constructive trustees: Sub-sect. 1, C. (b) i. & ii.]*

might be sued as having received trust property with notice of the trust.—*HILL v. CURRIS* (1865), L. R. 1 Eq. 90; 35 L. J. Ch. 133; 13 L. T. 584; 12 Jur. N. S. 4; 14 W. R. 125.

*Annotations:—Mentd.* Sykes v. Sykes (1870), L. R. 5 C. P. 113; Cooto v. Whittington (1873), L. R. 16 Eq. 534; Ollerenshaw v. Harrop (1874), 9 Ch. App. 480; Williams v. Heales (1874), L. R. 9 C. P. 177; Hursell v. Bird (1891), 65 L. T. 709; A.-G. v. New York Breweries Co., [1898] 1 Q. B. 205.

**1489.** ———.]—A., one of three trustees, executed an assignment of leasehold property held jointly by them, to a purchaser, & forged the signatures of his two co-trustees, & also the requisite assent of the *cœtui que trust* to the sale. A. was a solr., & acted as such on behalf of the purchaser:—*Held*: the circumstances attending the transaction were sufficient to affect the purchaser with notice of some trust, if not the actual nature of it; & he had constructive notice of the trust through the knowledge of A., his solr.—*BOURSOT v. SAVAGE* (1866), L. R. 2 Eq. 134; 35 L. J. Ch. 627; 14 L. T. 299; 30 J. P. 484; 14 W. R. 565.

*Annotations:—Refd.* Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon, [1901] 2 Ch. 231; Berwick v. Price, [1905] 1 Ch. 632. *Mentd.* *Re* Halifax Sugar Refining Co. (1890), 7 T. L. R. 163.

**1490.** ———.]—The money of the co. is a trust fund, because it is applicable only to the special purposes of the co. in the hands of the agents of the co.; & it is in that sense a trust fund applicable by them to those special purposes; & a person taking it from them with notice that it is being applied to other purposes cannot . . . say that he is not a constructive trustee (JESSEL, M.R.).—*RUSSELL v. WAKEFIELD WATERWORKS CO.* (1875), L. R. 20 Eq. 474; 44 L. J. Ch. 496; 32 L. T. 685; 23 W. R. 187.

*Annotations:—Refd.* Whitman v. Watkin (1898), 78 L. T. 188; Moxham v. Grant, [1900] 1 Q. B. 88. *Mentd.* Duckett v. Gover (1877), 25 W. R. 554; Towers v. African Tug Co., [1904] 1 Ch. 558; Russell v. Amalgamated Soc. of Carpenters & Joiners, [1912] A. C. 421.

**1491.** ———.]—A stockbroker who is instructed to sell trust funds, & to re-invest the purchase-money, with actual notice of the trust, is a trustee of the proceeds of sale & the customer employing him is entitled, as against his trustee in bkpy., to so much of the proceeds of sale as can be identified.—*Re STRACHAN, Ex p. COOKE* (1870), 4 Ch. D. 123; 46 L. J. Bcy. 52; 35 L. T. 649; 41 J. P. 180; 25 W. R. 171, C. A.

*Annotations:—Consd.* Birt v. Birt (1877), 38 L. T. 943; R. v. Hutton (1900), 69 L. J. Q. B. 786. *Refd.* Pearson v. Scott (1878), 9 Ch. D. 198; *Re* Polard, *Ex p. Dixon* (1878), 8 Ch. D. 377; *Re* Smith, Fleming, *Ex p. Kelly* (1879), 48 L. J. Bcy. 65; *Re* Hallett's Estate, Knatchbull v. Hallett (1880), 13 Ch. D. 696; Marten v. Rocks, Eytton (1885), 53 L. T. 946; *Re* Hallett, *Ex p. Trustee* (1894), 70 L. T. 361; King v. Hutton, [1899] 2 Q. B. 555; Willsons & Furness-Leyland Line v. British & Continental Shipping Co. (1907), 23 T. L. R. 397; Sinclair v. Brougham, [1914] A. C. 398; Banque Belge v. Hambroek, [1921] 1 K. B. 321. *Mentd.* *Re* Neck, *Ex p. Broad* (1884), 32 W. R. 912.

**1492.** ———.]—A trust fund was held by trustees under a will in trust for two persons in equal shares for their respective lives &, after the death of each, in trust as to his share for his children. The fund was entrusted by the trustees to a solr. employed by them as solr. to the trust, & was by him invested, together with other moneys belonging to different trusts, on an equitable mtge. by deposit of title deeds, in his own name. The mtge. being paid off in Jan. 1879, the solr. received the money so invested from the mtgor., & distributed one moiety of it, the tenant for life having died, among his children, who by his death had become absolutely entitled

to the same. He did not account for the other moiety to the trustees, but retained the same in his own hands.

On Feb. 21, 1891, an action was brought by the surviving trustee under the will against the personal representative of the solr., who had died in Nov. 1879, claiming an account of the money so retained by him:—*Held*: he must be considered as having been in the position of an express trustee of such money, & therefore the lapse of time did not act as a bar to the action.

A stranger to the trust, who receives the trust money with notice of the trust, or knowingly assists the actual trustee in a fraudulent & dishonest disposition of the trust property, is a constructive trustee (KAY, L.J.).—*SOAR v. ASHWELL*, [1893] 2 Q. B. 390; 69 L. J. 585; 42 W. R. 165; 4 R. 602, C. A.

*Annotations:—Consd.* Price v. Phillips (1894), 11 T. L. R. 86. *Apld.* *Re* Gallard, *Ex p. Gallard*, [1897] 2 Q. B. 8. *Consd.* *Re* Dixon, Heynes v. Dixon, [1900] 2 Ch. 561. *Apld.* *North American Land & Timber Co. v. Watkins*, [1904] 1 Ch. 242; *Re* Eyre-Williams, Williams v. Williams, [1923] 2 Ch. 533. *Refd.* *Re* Lands Allotment Co. (1894), 63 L. J. Ch. 291; Mara v. Browne, [1895] 2 Ch. 69; Friend v. Young, [1897] 2 Ch. 421; Rochefoucauld v. Boustead, [1897] 1 Ch. 196; Trevor v. Hutchinson (1897), 76 L. T. 183; *Re* Robinson, McLaren v. Public Trustees, [1911] 1 Ch. 602; Henry v. Hammond, [1913] 2 K. B. 515; Taylor v. Davies, [1920] A. C. 636; *Re* Mason, [1928] Ch. 385.

**1493.** ———.]—In 1876 a husband took from his wife by force a legacy bequeathed to her separate use, which she had, to his knowledge, just received on her separate receipt. The wife repeatedly demanded the money from her husband until his death in 1894, but did not obtain it. In 1895 she brought an action against her husband's exors. for the amount:—*Held*: the husband knew or was affected with notice that the legacy was his wife's separate property, and had, by taking possession of it, made himself a trustee for her; as he had retained the money & not accounted for it, his exors. could not under Trustee Act, 1888 (c. 59), s. 8, claim the benefit of Stat. of Limitations, & his estate was liable to refund the amount.—*WASSELL v. LEGGATT*, [1896] 1 Ch. 554; 65 L. J. Ch. 240; *sub nom.* *Re WASSELL, WASSELL v. LEGGATT*, 74 L. T. 99; 44 W. R. 298; 12 T. L. R. 208; 40 Sol. Jo. 276.

**1494.** ———.]—In 1882 deft. went to the United States as agent of the plff. co. to buy timber lands for the co.; but finding that the timber lands had been already acquired by third person, deft. in 1883 proposed to the co. as an investment certain prairie lands of which he had secured the refusal. The co. instructed deft. to buy the lands, & from time to time in 1883 on his request remitted him moneys for that purpose. Defendant purchased the lands & paid for them out of these moneys, & conveyed the lands to the co. In 1901 the co., having then for the first time discovered that deft. had charged the co. more than he had paid for the lands, brought an action to recover from deft. the balance of the moneys remitted to him & not accounted for:—*Held*: The moneys having been remitted by the co. to deft. as their agent for investment in a specified manner, deft. was an express trustee for the co. of those moneys, & Stat. Limitations was not a bar to the action.—*NORTH AMERICAN LAND & TIMBER CO., LTD. v. WATKINS*, [1904] 1 Ch. 242; 73 L. J. Ch. 117; 89 L. T. 602; 52 W. R. 360; 20 T. L. R. 80; 48 Sol. Jo. 100; *affd.* on other grounds, [1904] 2 Ch. 233, C. A.

**1495.** ———.]—Testator, who was entitled to a mtge. debt vested in a trustee for him, assigned the same to the trustees of his marriage settlement in 1886 upon trusts under which he took the first life interest, & his wife a life interest after

his death, subject to a restraint upon anticipation, with an ultimate trust in default of children, as happened, for testator absolutely. The trustee of the mtge. debt was neither a party to, nor informed of, the settlement. In 1887 the mtge. money was paid to testator who never accounted for it to the settlement trustees. He died in 1916, & the trustees & widow now claimed the mtge. moneys:—*Held*: testator was a constructive trustee who had constituted himself such by receiving trust property with the knowledge that it was trust property & the persons representing his estate were not entitled to avail themselves, by analogy, of Stat. Limitations, but must make good the mtge. money to the trustees of the settlement.—*Re EYRE-WILLIAMS, WILLIAMS v. WILLIAMS*, [1923] 2 Ch. 533; 92 L. J. Ch. 582; 129 L. T. 218; 67 Sol. Jo. 500.

*Annotation*:—*Reid. Re Mason*, [1928] Ch. 385.

**1496. Fraudulent acquisition.**—*BONNEY v. RIDGARD* (1784), 1 Cox, Eq. Cas. 145; 29 E. R. 1101.

*Annotations*:—*Consd. Hill v. Simpson* (1802), 7 Ves. 152; *Beckford v. Wado* (1805), 17 Ves. 87. *Reid. Andrew v. Wright* (1792), 4 Bro. C. C. 125; *McLeod v. Drummond* (1810), 17 Ves. 152; *Gregory v. Gregory* (1815), Coop. G. 201; *Chalmer v. Bradley* (1819), 1 Jac. & W. 51; *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1; *Wilson v. Moore* (1834), 1 My. & K. 337; *Shaw v. Borrer* (1836), 1 Keen, 559; *Clegg v. Edmondson* (1857), 29 L. T. O. S. 131; *Ridgway v. Newstead* (1861), 3 De G. F. & J. 474; *Soar v. Ashwell*, [1893] 2 Q. B. 390.

**1497.** —[—]—When it is said that a person who fraudulently receives or possesses himself of trust property is converted by the ct. into a trustee, the expression is used for the purpose of describing the nature & extent of the remedy against him. But as the remedy is given on the ground of fraud, it is governed by the principle, that the right of the party defrauded is not affected by lapse of time, nor, generally speaking, by anything done or omitted to be done, so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed.—*ROLFE v. GREGORY* (1865), 4 De G. J. & Sm. 576; 5 New Rep. 257; 34 L. J. Ch. 274; 12 L. T. 162; 11 Jur. N. S. 98; 13 W. R. 355; 46 E. R. 1042, L. C.

*Annotations*:—*Reid. Stone v. Stone* (1869), 5 Ch. App. 74; *Bull Coal Mining Co. v. Osborne*, [1899] A. C. 351; *Oelkers v. Ellis*, [1914] 2 K. B. 139; *Armstrong v. Jackson*, [1917] 2 K. B. 822.

**1498. Transfer into joint names.**—With surviving executrix.—A person who is requested, & agrees to permit a transfer of trust stock, from the name of the surviving extrix., under a will, into their joint names, & at the same time obtains a copy of the will, is thereby constituted a trustee of the stock, & is not merely an agent for the extrix. So, where the co-transferee acts with the privity of all parties, in the execution of the trusts of the will, though no declaration of trust has been executed, he is a trustee, & not removable at the pleasure of the persons interested in the trust property.—*COCKS v. SMITH* (1833), 2 L. J. Ch. 205.

**1499. Money borrowed by husband of cestui que trust.**—A marriage settlement gave the trustees power to invest the trust funds, with the consent of the husband & wife, in real or personal security. The income was payable to the wife for life for her separate use, & after her death to her husband.

In 1852 the trustees, at the written request of the wife, advanced trust funds to the husband on the security of his bond for double the amount advanced, the condition of the bond being that if

he repaid the sum advanced six months after the date of the advance with interest at 4 per cent. then the obligation should be void.

The husband & wife lived together in amity until the death of the latter in 1876. The husband died in 1896 without ever having paid any interest on the bond to the trustees or given them any acknowledgment of the debt:—*Held*: the husband had borrowed the money with the knowledge that it was trust money, & the rules binding trustees with reference to pleading Stat. Limitations as a defence applied.—*Re DIXON, HEYNES v. DIXON*, [1900] 2 Ch. 561; 69 L. J. Ch. 609; 83 L. T. 129; 48 W. R. 605; 44 Sol. Jo. 515, C. A.

*Annotations*:—*Reid. Re Drax, Savile v. Drax*, [1903] 1 Ch. 781; *Re Eyre-Williams, Williams v. Williams*, [1923] 2 Ch. 533.

**What amounts to notice.**—*See, generally, EQUITY*, Vol. XX., pp. 310–333, Nos. 615–766.

**Recital in deed.**—*See SALE OF LAND*, Vol. XL., pp. 102, 163, Nos. 1319–1321.

## ii. Acquisition by Agent.

**1500. General rule.**—Agent not liable as trustee.]—It is well settled that, as a general rule, the solr. or agent of a personal representative or trustee is accountable only to his principal; that as a general rule the *cestui que trust* cannot call on the agent to account as trustee, unless fraud can be made out against him personally, or unless he, knowing the fraud of the trustee, has derived direct personal benefit therefrom, or unless some other special equity is established against him (*ROLT, L.J.*).—*HARRIES v. REES* (1867), 37 L. J. Ch. 102; 17 L. T. 418; 16 W. R. 91, L. J. L.

*Annotation*:—*Apld. Re Blundell, Blundell v. Blundell* (1888), 40 Ch. D. 370.

**1501.** —[—]—A mere agent of trustees is answerable only to his principal & not to *cestuis que trust* in respect of trust moneys coming to his hands merely in his character of agent. . . . But . . . a person who receives into his hands trust moneys, & who deals with them in a manner inconsistent with the performance of trusts of which he is cognisant, is personally liable for the consequences which may ensue upon his so dealing (*BACON, V.-C.*).—*LEE v. SANKEY* (1873), L. R. 15 Eq. 204; 21 W. R. 286; *sub nom. LEE v. SANKEY, GINDER v. SANKEY*, 27 L. T. 809.

*Annotations*:—*Consd. Wilson v. Bury* (1880), 5 Q. B. D. 518. *Apld. Re Barney, Barney v. Barney*, [1892] 2 Ch. 265. *Consd. Soar v. Ashwell*, [1893] 2 Q. B. 390. *Reid. Mara v. Browne* (1895), 72 L. T. 765; *Re Eyre-Williams, Williams v. Williams*, [1923] 2 Ch. 533.

**1502.** —[—]—*BARNES v. ADDY*, No. 1538, *post*.

**1503. Receipt by solicitor.**—Proceeds of sale of trust property.]—Pltf. gave a written authority to deft. his solr. to sell the life interest which pltf.'s wife had in certain stock, standing in the name of trustees to her former marriage settlement, & out of the proceeds to pay to W. C. B. the sum of £169. Pltf. also directed deft. to prepare a settlement of other property belonging to pltf., with power to dispose of it in a certain specified manner. Deft. & others were to be trustees. Deft. had applied £169 in the manner directed by pltf., & had also disposed of other sums. Pltf. having been non-suited in an action for money had & received, brought against deft. for the balance of money remaining in his hands:—*Held*: deft. was trustee of the proceeds.—*MILEHAM v. EICKE* (1838), 3 M. & W. 407; 1 Horn & H. 102; 7 L. J. Ex. 151.

## PART II. SECT. 7, SUB-SECT. 1.—

### C. (b) ii.

#### d. Purchase of annuity by solicitor.]

—The purchase of an annuity by the

solr. & agent of the vendor, declared to be in trust for the latter, upon the grounds of the relation which existed at the time between the

parties.—*LAWLESS v. MANSFIELD, MANSFIELD v. LAWLESS* (1841), 4 L. Eq. R. 113; 1 Dr. & War. 556.—*IR.*



*Sect. 7.—Constructive trustees: Sub-sect. 1, C. (b) ii., & (c) i. & ii.]*

**1504.** ————]—A solr. who wrongfully, but *bonâ fide*, sold settled property:—*Held*: not to have such notice of the settlement as to render him, as a constructive trustee, personally liable for the proceeds.—*WILLIAMS v. WILLIAMS* (1881), 17 Ch. D. 437; 44 L. T. 573.

**1505.** ————]—*Payment on account of costs.*—To a bill against a trustee & his solr., alleging that trust moneys had been improperly paid to the solr. for costs, a demurrer of the solr. was allowed, he being a mere agent, & the matter complained of being one merely of account as between the trustee & *cestui que trust*.—*MAW v. PEARSON* (1860), 28 Beav. 196; 54 E. R. 340; *subsequent proceedings* (1863), 3 New Rep. 99.

*Annotations:—Distd. Hardy v. Caley* (1864), 33 Beav. 365; *Cowper v. Stoneham* (1893), 68 L. T. 18. *Refd. Re Spencer, Spencer v. Hart* (1881), 51 L. J. Ch. 271.

**1506.** ————]—In order that a solr. of a trustee may be debarred from accepting payments out of the estate in respect of costs properly incurred notice must be brought home to him that at the time when he accepted them the trustee had been guilty of a breach of trust such as would preclude him from resorting to the trust estate for payment of costs. A trustee allowed his solrs. to retain costs, out of the trust estate. At the time the solrs. had notice that the trustee had committed a breach of trust in secretly buying for himself part of the trust estate. In an administration action the trustee made default in payment into ct. of the balance found to have come to his hands:—*Held*: the solrs. could not be compelled to pay in the sums received by them out of the estate.

Solrs. cannot be made liable as constructive trustees unless they are brought within the doctrine of the ct. with reference to other strangers, who are not themselves trustees, but are liable in certain cases to be made to account as if they were trustees (*STIRLING, J.*).—*Re BLUNDELL, BLUNDELL v. BLUNDELL* (1888), 40 Ch. D. 370; 57 L. J. Ch. 730; 58 L. T. 933; 36 W. R. 779; 4 T. L. R. 506. *Annotation:—Refd. St. Thomas' Hospital v. Richardson*, [1910] 1 K. B. 271.

**1507.** ————]—The administratrix with the will annexed testatrix who was also tenant for life under the will, employed a solr. in relation to the administration of the estate & as was alleged paid his bill of costs out of moneys forming part of the capital of the estate. More than twelve months after the payment of the bill some of the beneficiaries as plffs. took out an originating summons against the administratrix as deft. The summons was intitled in the matter of the estate of testatrix & also in the matter of the solr. & it was served on him, but he was not named as deft. The summons asked for a reference of the bill to taxation & that in taxing the costs the master might certify what amount was properly chargeable against the capital of the trust estate & what amount was properly payable by deft. personally as tenant for life; & that, if it should appear that the bill was overpaid the solr. might be ordered to repay the amount certified to be overpaid to deft. It was suggested that the bill contained items which were not properly chargeable against the capital of the trust estate & that the solr. knew that he was being paid out of the capital of the trust estate & had notice of the breach of trust at the time when he received payment:—*Held*: even if the solr. had been made deft. to the summons the relief asked against him could not have been obtained.—*Re JACKSON, Re COTTRELL, BOUGHTON-LEIGH v. BOUGHTON-LEIGH*

(1889), 40 Ch. D. 495; 58 L. J. Ch. 387; 60 L. T. 589; 37 W. R. 282.

**1508.** ————]—*As trustee for creditors.*—Creditors of debtor who had filed a liquidation petition resolved to accept a composition, payable in two instalments, the second instalment being secured by the joint and several promissory note of two sureties. No trustee was appointed. Debtor's solr. registered the resolution, & he, by means of money supplied to him by debtor paid creditors the first instalment. A sum sufficient to provide for the payment of the second instalment was placed in the solr.'s hands, partly by debtor, but mainly by one of the sureties. Debtor gave the surety a bill of sale as security for the amount which he advanced. The solr. sent a circular to creditors, stating that he should be prepared on a specified day to pay them the second instalment at his office. He after this paid some of creditors, but most of them were left unpaid. One of the latter applied to the ct. for an order that the solr. should pay him. The solr. claimed a lien on the moneys in his hands for costs due to him by debtor, who had absconded:—*Held*: the solr. had constituted himself a trustee of the money for creditors, & the ct. had jurisdiction to order him to pay appct. his proportion of the second instalment, which he was accordingly ordered to pay, with appct.'s costs.—*Re CLARK, Ex p. NEWLAND* (1876), 4 Ch. D. 515; 35 L. T. 916; 25 W. R. 275. *Annotation:—Distd. Mackenzie v. Mackintosh* (1891) 64 L. T. 318.

**1509.** ————]—*Default in payment of interest.*—An order was made on a trustee to pay into ct. interest found due from him, & the balance beyond his costs to be taxed of capital money certified to have come to his hands. The capital money had been received by the trustee's solrs. as part of the trust estate. The order was made on statements implying that the trustee, who was totally unable to pay, was solvent. The trustee having made default in payment of the interest, the ct. made an order notwithstanding the former order that the solrs. should pay into ct. the capital come to their hands with interest.—*STANAR v. EVANS, EVANS v. STANAR* (1886), 34 Ch. D. 470; 56 L. J. Ch. 581; 56 L. T. 87; 35 W. R. 286; 3 T. L. R. 215.

*Annotations:—Expld. Re Blundell, Blundell v. Blundell* (1888), 40 Ch. D. 370. *Refd. Preston Banking Co. v. Allsup*, [1895] 1 Ch. 111; *Re Humphreys, Ex p. Lloyd-George & George*, [1898] 1 Q. B. 520; *Re Calgary & Medicine Hat Land Co., Pigeon v. The Co.*, [1908] 2 Ch. 652.

**1510.** ————]—*Repayment of mortgage money.*—*SOAR v. ASHWELL*, No. 1492, *ante*.

*Receipt by banker.*—*See BANKERS*, Vol. III., pp. 181–187, 290, Nos. 343–369, 900, 901.

*Application of rule in Clayton's Case.*—*See CONTRACT*, Vol. XII., pp. 483–491, Nos. 3961–4012.

(c) *Without Notice of Trust.*

i. *In General.*

**1511.** Assignor having notice of trust—Assignee without notice.]—*PITTS v. EDELPH* (1631), Toth. 186; 21 E. R. 163.

**1512.** Sufficiency of denial of notice—No notice at time of purchase.]—In a plea of a purchase it is a sufficient denial of notice to say, that at the time of the purchase he had no notice, without saying, or at any time before.—*JONES v. THOMAS* (1733), 3 P. Wms. 243; 24 E. R. 1046, L. C.

ii. *Acquisition of Legal Estate.*

*See, generally, EQUITY*, Vol. XX., pp. 256–263, 296–300, Nos. 191–251, 509–547.

**1513.** Whether property discharged from trust—General rule.]—*MORE v. MAYHOW* (1663), 1 Cas. in Ch. 34; *Freem. Ch.* 175; 22 E. R. 680, L. C.



1514. ———.]—A.-G. v. DOWNING (LADY), No. 1403, *ante*.

1515. ——— When assignor has notice.]—One affected with notice conveys to another without notice: the assignee, having legal estate, shall not be affected with the notice to assignor: & so *vice versa*.—MERTINS v. JOLLIFFE (1756), Amb. 311; 27 E. R. 211.

1516. ———.]—The authorities establish that a purchaser from a person in possession, purchasing without notice of any prior charge or trust, & obtaining a conveyance of the legal estate from a trustee of a satisfied term, or a mtgee. whose mtge. is satisfied, will be protected in this ct. against a prior incumbrancer or *cestui que trust*, provided that the party so conveying the legal estate have no notice of the prior trust or incumbrance. But it has never yet been decided, that, where the party so conveying has notice of an express prior trust or incumbrance, the purchaser can protect himself therefrom by means of the legal estate. *Semble*: such a decision would be contrary to the principles of this ct.—CARTER v. CARTER (1857), 3 K. & J. 617; 27 L. J. Ch. 74; 30 L. T. O. S. 349; 4 Jur. N. S. 63.

*Annotations*:—*Dbtd*. Pilcher v. Rawlins (1872), 7 Ch. App. 259. *Consd*. Mumford v. Stohwasser (1871), 22 W. R. 833; Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon, [1901] 2 Ch. 231. *Refd*. Bates v. Johnson (1859), John. 304; Prosser v. Rice (1859), 28 Beav. 68; Wilkinson v. Castle (1868), 37 L. J. Ch. 467; *Je* Palmer, Clarke v. Palmer (1882), 51 L. J. Ch. 634; Bailey v. Barnes, [1894] 1 Ch. 25; Williams v. Blackney (1897), 67 L. J. Ch. 31. *Mentd*. Young v. Young (1867), L. R. 3 Eq. 801; Blackwood v. London Chartered Bank of Australia (1874), L. R. 5 P. C. 92; Heath v. Creaklock (1874), 31 L. T. 650; Clarke v. Palmer (1882), 48 L. T. 857.

1517. ———.]—The defence of purchase for value without notice may be sustained although deft. in order to make out his title to the legal estate must rely on an instrument which discloses the title of pltf., deft. not having had notice of such instrument at the time of his purchase.—PILCHER v. RAWLINS (1872), 7 Ch. App. 259; *sub nom*. PILCHER v. RAWLINS, JOYCE v. RAWLINS, 41 L. J. Ch. 485; 25 L. T. 921; 20 W. R. 281, L. C. & L. J.

*Annotations*:—*Refd*. Gray v. Fowler (1873), L. R. 8 Exch. 249; Mumford v. Stohwasser (1874), L. R. 18 Eq. 656; Garnham v. Skipper (1885), 53 L. T. 910; Bailey v. Barnes, [1894] 1 Ch. 25; Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon, [1901] 2 Ch. 231; Lloyd v. Grace, Smith, [1911] 2 K. B. 489.

1518. ——— Conveyance to mortgagee.]—A. covenanted to convey property immediately after his marriage upon certain trusts for the benefit of the children of the marriage, & in the meantime, & until such conveyance, to stand possessed of the property upon the same trusts. No conveyance was ever executed, & A. mortgaged the property to B., C., & D., successively, suppressing all notice of the trusts contained in the deed of covenant. The legal estate of the mtged. property became vested by successive transfers in D.:—*Held*: D. who had obtained the legal estate without notice of the trust in favour of the children of the marriage, was entitled to hold the legal estate as against those *cestuis que trust*, until the whole of his debt was satisfied.—BATES v. JOHNSON (1859), John. 304; 28 L. J. Ch. 509; 5 Jur. N. S. 842; 70 E. R. 439; *sub nom*. BATES v. JOHNSON, HOOKE v. JOHNSON, 33 L. T. O. S. 233; 7 W. R. 512.

*Annotations*:—*Refd*. West London Commercial Bank v. Reliance Permanent Bldg. Soc. (1884), 53 L. J. Ch. 860; Taylor v. Russell, [1891] 1 Ch. 8; Bailey v. Barnes, [1894] 1 Ch. 25.

— — —.]—See MORTGAGE, Vol. XXXV., p. 449, Nos. 1896–1898.

1519. ——— Conveyance of stock.]—The trustee of a sum of stock for T., was ordered, in a suit instituted by his *cestui que trust*, to transfer it into ct. The trustee had previously sold out the fund & appropriated it to his own use, & in order to supply its place, he transferred into ct. a fund of which he was possessed as trustee for B. B. afterwards filed a bill against the trustee for the purpose of securing this trust fund, & presented a petition in both suits, praying that he might be allowed to follow the fund in ct., & that it might be transferred to the credit of the second suit:—*Held*: the legal title to the fund being in the Accountant-General in trust for T. in the first suit, & T. having no notice of the fraud, he was a purchaser of it for valuable consideration, & was entitled to retain it against B.—THORNDIKE v. HUNT, BROWNE v. BUTTER (1859), 3 De G. & J. 563; 28 L. J. Ch. 417; 32 L. T. O. S. 346; 5 Jur. N. S. 879; 7 W. R. 240; 44 E. R. 1386, L. J.

*Annotations*:—*Apld*. Case v. James (1861), 29 Beav. 512. *Consd*. Taylor v. Blakelock (1886), 32 Ch. D. 560. *Refd*. Thompson v. Tomkins (1862), 2 Drew. & Sm. 8; Harpham v. Shacklock (1881), 30 W. R. 49; Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon, [1901] 2 Ch. 231; Cloutte v. Storey, [1911] 1 Ch. 18.

1520. ——— Transfer not registered until after notice.]—A sole trustee of shares executed a transfer & delivered it with the certificate of the shares to a mtgee. who had no notice of the trust. The mtgee. did not register his transfer until after notice of the trust:—*Held*: the transfer could not be impeached.—DODDS v. HILLS (1865), 2 Hem. & M. 424; 12 L. T. 139; 71 P. R. 528.

*Annotations*:—*Consd*. R. v. Shropshire Union Co. (1873), L. R. 8 Q. B. 420. *Distd*. Roots v. Williamson (1888), 38 Ch. D. 485. *Refd*. Ortigosa v. Brown (1878), 47 L. J. Ch. 168; Powell v. London & Provincial Bank, [1893] 1 Ch. 610.

1521. ——— Assignment of bond.]—On the occasion of the sale of a freehold estate it was agreed that the purchase-money should be paid in railway bonds, & the purchaser deposited with & assigned to A., who alleged himself to be the solr. of the vendor, one of such bonds in part payment of the purchase-money. The contract turned out to be a fraud on the purchaser & went off, & on the purchaser applying to A. for the return of the deposited bond, he was informed that A. had placed it in the hands of B., to secure a debt due from himself to B. B. had no notice of the terms upon which A. held the bond. In a suit by the purchaser against B. to restrain him from dealing with the bond:—*Held*: the deposit & assignment of the bond by the purchaser to A. for the purpose above-mentioned did not make A. in the events which happened, a constructive trustee for pltf., & as B. was a *bona fide* purchaser of the bond for value without notice, he could not be restrained from dealing with it.—ASHWIN v. BURTON (1862), 32 L. J. Ch. 106; 7 L. T. 589; 9 Jur. N. S. 319; 11 W. R. 103.

1522. ——— Assignment taken without inquiry.]—ROBSON v. FLIGHT, No. 1464, *ante*.

1523. ——— Property obtained by fraud.]—Two trustees, one of whom was a solr., advanced money on mtge. The mtgor., with the concurrence of the solr. trustee, sold part of the mtged. property without disclosing the mtge. Regular conveyances in fee to the purchasers were executed by the mtgor., containing a recital that he was seised or otherwise well & sufficiently entitled in fee simple. The solr. trustee received the purchase-money, & retained it. Eleven years afterwards both trustees executed a reconveyance of the property so sold, the other trustee believing, on the representation

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of the solr. trustee, that the property was then about to be sold by the mtgor. Soon afterwards the solr. trustee absconded, & the other trustee then filed a bill against the mtgor. & the purchasers, praying for foreclosure against them:—*Held*: though the purchasers were purchasers for valuable consideration without notice, they could not avail themselves of any legal estate acquired by means of the reconveyance, which having been obtained by fraud, must be cancelled.—*HEATH v. CREALOCK* (1874), 10 Ch. App. 22; 44 L. J. Ch. 157; 31 L. T. 650; 23 W. R. 95, L. C. & L. JJ.

*Annotations*:—*Consd.* The Horlock (1877), 2 P. D. 243; *Manners v. Mow* (1885), 29 Ch. D. 725. *Reid*. *Waldy v. Gray* (1875), L. R. 20 Eq. 238; *Ortigosa v. Brown* (1878), 47 L. J. Ch. 168; *Re Morgan, Pillgrem v. Pillgrem* (1881), 18 Ch. D. 193; *Fugh v. Heath* (1883), 30 W. R. 553; *Re Horton, Horton v. Foke, Horton v. Clark* (1884), 51 L. T. 420; *Low v. Bouverie*, [1891] 3 Ch. 82; *Re Ingham, Jones v. Ingham*, [1893] 1 Ch. 352; *Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon*, [1901] 2 Ch. 231. *Mentd.* *General Finance Mortgage & Discount Co. v. Liberator Permanent Benefit Bldg. Soc.* (1878), 10 Ch. D. 15; *Onward Bldg. Soc. v. Smithson*, [1893] 1 Ch. 1; *Brigg v. Thornton*, [1904] 1 Ch. 386; *Poulton v. Moore* (1913), 83 L. J. K. B. 875.

**1524.** — *Conveyance to trustee.*—C., trustee with plff. of a will, & also trustee with deft. of a settlement, having misappropriated a portion of the settlement fund, applied an equal portion of the will fund in the purchase of stock, which he transferred into the names of himself & deft. Pltf. & deft. were both innocent of C.'s fraud, & deft. & the *cestuis que trust* under the settlement had no notice that the stock was purchased with part of the will fund. C. died insolvent. In an action by pltf. to compel deft. to transfer the stock to him:—*Held*: deft. having by accepting the transfer of the stock given up his right to sue C. for his debt to the trust, was entitled to be treated as a purchaser for value without notice, & consequently to retain the stock as part of the settlement fund.

If deft. held it simply as a transferee without any consideration, of course he would stand in no better position than the transferor; that is to say, as the fund in the hands of C. would have been subject to the trusts of the will, any one who took it from him simply as a volunteer could not say that he had any better title, & would still be bound by the trusts of the will (*COTTON, L.J.*).—*TAYLOR v. BLAKELOCK* (1886), 32 Ch. D. 560; 56 L. J. Ch. 390; 55 L. T. 8, C. A.

*Annotations*:—*Reid*. *Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon*, [1901] 2 Ch. 231; *Cloutte v. Storey* (1910), 79 L. J. Ch. 640.

**1525.** — *—*.—In 1882 T., a solr., advanced money of his own upon the security of leaseholds mortgaged to him by sub-demise. In 1889, being then one of the two trustees of the B. settlement, he received a sum of money belonging to the settlement, &, without the knowledge of his co-trustee, fraudulently applied it to his own use. By entries in his books, under the heading of the trust, he purported to appropriate his own mtge. debt to answer the sum of which he had defrauded the trust estate, but he never communicated the purported appropriation either to his co-trustee or to his *cestuis que trust*, all of whom were *sui juris*.

In 1896 the appropriation became known to one of the *cestuis que trust*, who was a solr. & acted as such for the others, but although they had all become absolutely entitled in possession to the trust funds they never called upon the trustees to transfer them & no inquiry was made respecting the mtge.

In 1889 T. was also a trustee of the T. settlement. In 1895, T. having then become sole trustee of that settlement, N. was appointed co-trustee, & at N.'s request, on T.'s representation that the trust funds included the above-mentioned mtge. debt & securities, the representation being supported by his production to N. of the deeds, T. executed a legal transfer thereof into the joint names of himself & N., N. being then totally ignorant of the existence of the B. settlement & of T.'s secret appropriation thereto. The deed of transfer had been prepared by T. as solr. to the T. trust, & the mtge. & other title-deeds remained in his custody as such solr.

In 1897 T., without N.'s knowledge, deposited the deeds with his bankers as security for a debt due from him to them, at the same time executing to them a deed poll by which he charged the debt upon all his estate & interest in the property comprised in the deeds, & undertook to execute, on request, a legal mtge.; & he thereby declared that during the continuance of the security he would hold all his interest thereby charged in trust for the bank as mtgees.; & he appointed three officers of the bank his attorneys for him & on his behalf, & as his act & deed, to execute any such legal mtge. as aforesaid. At that time the bank had no notice of either of the two settlements.

In Mar. 1898, T. absconded, & in Apr. 1898, notice was given to the bank of the T. settlement, but they had no notice of the B. settlement. Notwithstanding the notice, the bank purported to execute to themselves by their three officers as T.'s attorneys under the deed poll a legal mtge. of the leaseholds comprised in the deposited deeds.

In actions to ascertain the priorities of the B. settlement, the T. settlement, & the bank to the benefit of the mtge. debt & securities:—*Held*: (1) there was a good appropriation in 1889 in favour of the B. settlement, though not communicated by T. either to his co-trustee or to his *cestuis que trust*; (2) assuming there was a good appropriation in favour of the B. settlement, N., as trustee of the T. settlement, & having no notice of the appropriation, could not be deprived of the advantage acquired by him as against the B. settlement by the possession of the legal estate in one moiety of the mtge. debt & securities & of the better right to the legal estate in the other moiety which had become vested in the bank through T.'s mtge. to them operating as a severance of the joint tenancy between himself & N.; & N. must be treated as an innocent purchaser for value without notice, on the ground that by accepting the transfer of the mtge. debt & securities he gave up his right to sue T. for the debt due to the T. settlement.—*TAYLOR v. LONDON & COUNTY BANKING CO., LONDON & COUNTY BANKING CO. v. NIXON*, [1901] 2 Ch. 231; 70 L. J. Ch. 477; 84 L. T. 397; 49 W. R. 451; 17 T. L. R. 413; 45 Sol. Jo. 394, C. A.

*Annotations*:—As to (1) *Reid*. *Re Cozens, Green v. Brislav*, [1913] 2 Ch. 478. As to (2) *Reid*. *Re Pidcock, Penny v. Pidcock* (1907), 51 Sol. Jo. 514; *Walker v. Linom*, [1907] 2 Ch. 104; *Itadcliffe v. Abbey Road & St. Johns Wood Permanent Bldg. Soc.*, [1919] B. & C. R. 84.

**1526.** — *Property acquired as volunteer.*—*TAYLOR v. BLAKELOCK*, No. 1524, *ante*.

**1527.** — *Sale of mortgaged property.*—Two trustees, one of whom was an unmarried woman, sold freehold hereditaments & next day took a mtge. of the same property to themselves. The mtge. contained a recital that the mtge. money belonged to the two trustees on a joint account. Subsequently the woman trustee married, & later on, together with her co-trustee, transferred the

mtge. by a deed in which her husband did not join & which was not acknowledged by her.

On a subsequent sale of the property a purchaser made a requisition that this woman's husband should join in the conveyance, & that the deed should be separately acknowledged by her:—*Held*: it not appearing on the title that the transferees of the mtge. were trustees, the purchaser took from them as beneficial owners.—*Re WEST & HARDY'S CONTRACT*, [1904] 1 Ch. 145; 73 L. J. Ch. 91; 89 L. T. 579; 52 W. R. 188; 48 Sol. Jo. 100.

**1528. — Purchase from beneficiary trustee.**—If the trustees under a will convey the property to the beneficiary, who is also a trustee, on terms which imply that the trust is at an end, a *bond fide* purchaser getting the legal estate from the beneficiary is unaffected by prior equities of which he had no notice.—*PEARCE v. BULTEEL*, [1916] 2 Ch. 544; 85 L. J. Ch. 677; 115 L. T. 291; 32 T. L. R. 723; [1916] H. B. R. 147.

### iii. Acquisition of Equitable Estate.

See, generally, *EQUITY*, Vol. XX., pp. 305-310, Nos. 586-614.

**1529. General rule—Person taking equitable interest takes subject to trust.**—A trustee of funds, invested on a mtge. in his name, deposited the deeds, without notice of the trust to secure advance to himself:—*Held*: *cestuis que trust* were entitled to priority over the equitable mtgee. & to delivery up of the deeds.—*NEWTON v. NEWTON* (1868), L. R. 6 Eq. 135; 37 L. J. Ch. 705; 19 L. T. 588; 17 W. R. 239, n.; *reversd.* on other grounds, 4 Ch. App. 143; 38 L. J. Ch. 145; 17 W. R. 238, L. C. & L. J.

*Annotations*:—*Consd.* *Heath v. Crealock* (1873), L. R. 18 Eq. 215. *Reid*, *Perrin v. Burboy*, [1899] W. R. 160; *Taylor v. Russell*, [1891] 1 Ch. 8.

**1530. Effect of subsequent acquisition of legal estate—After notice of trust.**—A, in whom a lease was vested, deposited it with his bankers by way of equitable mtge. The bankers afterwards received notice, as the fact was, that A. was a mere trustee for the leasehold but they subsequently obtained from him a formal mtge. of the legal estate:—*Held*: the *cestuis que trust* had priority over the bankers.—*BAILLIE v. M'KEWAN* (1865), 35 Beav. 177; 55 E. R. 862.

*Annotation*:—*Distd.* *R. v. Shropshire Union Co.* (1873), L. R. 8 Q. B. 420.

**1531. —**—Where a purchaser for value without notice of an equitable title acquires an inchoate title, but after notice, completes it by getting in the legal estate, he will not, as an ordinary rule, be deprived, in favour of a person having only an equitable title of the advantage he has thereby obtained (*STIRLING, J.*).—*ROOTS v. WILLIAMSON* (1888), 38 Ch. D. 485; 57 L. J. Ch. 995; 58 L. T. 802; 36 W. R. 758.

*Annotations*:—*Reid*, *Moore v. North Western Bank*, [1891] 2 Ch. 599; *Ireland v. Hart*, [1902] 1 Ch. 522.

**1532. —**—The doctrine that where equities are equal the legal title prevails is not confined to tacking mtges., but applies in favour of all equitable owners or incumbrancers for value without notice of prior equitable interests, who get in the legal estate from persons who commit no breach of trust in parting with it to them.—*BAILEY v. BARNES*, [1894] 1 Ch. 25; 63 L. J. Ch. 73; 69 L. T. 542; 42 W. R. 60; 38 Sol. Jo. 9; 7 R. 9, C. A.

*Annotations*:—*Reid*, *Re Scott & Alvarez's Contract*, *Scott v. Alvarez*, [1895] 1 Ch. 596; *Taylor v. London & County Banking Co.*, *London & County Banking Co. v. Nixon*, [1901] 2 Ch. 231. *Mentd.* *Re White & Smith's Contract*,

[1896] 1 Ch. 637; *Life Interest & Reversionary Securities Corp. v. Hand in Hand & Life Insco. Soc.*, [1898] 2 Ch. 230; *Freeman v. Laing*, [1899] 2 Ch. 355; *Re Alma Corn Charity, Charity Comrs. v. Bode* (1801), 71 L. J. Ch. 76; *Re Handman & Wilcox's Contract*, [1902] 1 Ch. 599; *Hunt v. Luck*, [1902] 1 Ch. 428; *Re Child & Hodgson's Contract* (1905), 54 W. R. 234.

### D. By Intermeddling with Trust.

#### (a) In General.

**1533. General rule.**—In a case in which the will gave no specific directions as to the payment of debts, the exor., who was also the ultimate residuary legatee, having taken on himself, after the trustees named in the will had renounced, to administer the estate, did not ascertain & secure the residue at the end of the year, but worked part of the property, a coal mine, to a profit for several years, when it ceased to be of any value. On a bill, at the suit of the person having the charge on the residue, praying that the will might be established & accounts taken:—*Held*: the exor. was not, after assuming to act as a trustee, entitled to postpone the sale of the property to the prejudice of the person having the charge on the residue; having postponed it, he was chargeable with the value of the mine at the end of a year from testator's death, with interest thereon, & that value must be calculated as constituted of the aggregate of the annual profits derived from the mine in all the subsequent years, till it became unproductive, such annual profits to be treated as deferred payments.—*WIGHTWICK v. LORD* (1857), 6 H. L. Cas. 217; 26 L. J. Ch. 825; 29 L. T. O. S. 303; 3 Jur. N. S. 699; 5 W. R. 713; 10 E. R. 1278, H. L.; *affg.* *S. C. sub nom. LORD v. WIGHTWICK* (1854), 4 De G. M. & G. 803, L. J.

**1534. —**—If one, not being a trustee & not having authority from a trustee, takes upon himself to intermeddle with trust matters or to do acts characteristic of the office of trustee, he may thereby make himself what is called in law a trustee of his own wrong, *i.e.* a trustee *de son tort*, or, as it is also termed, a constructive trustee (*A. L. SMITH, L.J.*).—*MARA v. BROWNE*, [1896] 1 Ch. 199; 65 L. J. Ch. 225; 73 L. T. 638; 44 W. R. 330; 12 T. L. R. 111; 40 Sol. Jo. 131, C. A. *Annotations*:—*Reid*, *Plaskitt v. Eddis* (1898), 79 L. T. 136; *Re Taylor, Atkinson v. Lord* (1900), 81 L. T. 812. *Mentd.* *Re Stanley's Settlement*, *Maddocks v. Andrews*, [1916] 2 Ch. 50.

**1535. Sale of trust property.**—*RACKHAM v. SIDDALL*, No. 1676, *post*.

**1536. Surviving partner dealing with property of deceased partner.**—*TRAVIS v. MILNE, MILNE v. MILNE*, No. 1448, *ante*.

**1537. Permitting breach of trust—Proposed trustee in possession of trust funds.**—Where a retiring trustee, in the expectation that a new trustee would be duly appointed, but such appointment was never made, executed a transfer of the trust funds into the name of the new trustee, who allowed a breach of trust to be committed:—*Held*: (1) the retiring trustee was liable for the breach of trust; (2) the proposed trustee was liable as trustee *de son tort* in respect of trust funds which actually came into his hands.—*PEARCE v. PEARCE* (1856), 22 Beav. 248; 25 L. J. Ch. 893; 28 L. T. O. S. 34; 2 Jur. N. S. 843; 52 E. R. 1103.

**1538. Participating in fraudulent conduct of trustee.**—(1) Those who create a trust clothe the trustee with a legal power & control over the trust property, imposing upon him a corresponding responsibility, which responsibility may be extended in equity to others who are not properly

### PART II. SECT. 7, SUB-SECT. 1, D. (a).

**1533 1. General rule.**—*JUGALKISHORE v. LAKSHMANDAS RAGHUNATH-DAS* (1899), I. L. R. 23 Bom. 659.—*IND.*

*Sect. 7.—Constructive trustees: Sub-sect. 1, D. (a) & (b); sub-sect. 2. Sect. 8: Sub-sect. 1, A. & B.]* trustees if they are found either making themselves trustees *de son tort*, or actively participating in any fraudulent conduct of the trustee to the injury of the *cestuis que trust*.

(2) But strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, even transactions of which a ct. of equity may disapprove, unless those agents receive & become chargeable with some part of the trust property, or unless they assist with knowledge in what they know to be a dishonest & fraudulent design on the part of the trustees.—*BARNES v. ADDY* (1874), 9 Ch. App. 244; 43 L. J. Ch. 513; 30 L. T. 4; 22 W. R. 505, L. C. & L. J.J.

*Annotations:—As to (1) Consd. Re Barney, Barney v. Barney, [1892] 2 Ch. 265. As to (2) Consd. Wilson v. Bury (1880), 5 Q. B. D. 518. Apd. Re Blundell, Blundell v. Blundell (1880), 40 Ch. D. 370; Re Spencer, Spencer v. Hart (1881), 51 L. J. Ch. 271; Stanlar v. Evans, Evans v. Stanlar (1886), 51 Ch. D. 470; Soar v. Ashwell, [1893] 2 Q. B. 390. Consd. Mara v. Browne, [1896] 1 Ch. 199. Refd. King v. Anderson (1874), 23 W. R. 196; Stokes v. France, [1898] 1 Ch. 212. Generally, Refd. Kingdon v. Castleman (1877), 25 W. R. 345. Mentd. Tabor v. Cunningham (1875), 24 W. R. 153; Burstall v. Beyfus (1884), 25 Ch. D. 35; Amos v. Herno Bay Pavilion Promenade & Pier Co. (1886), 54 L. T. 264; Midgley v. Midgley, [1893] 3 Ch. 282.*

1539. —[—]—*SOAR v. ASHWELL*, No. 1492, *ante*.

(b) *Agent of Trustee.*

1540. *Whether constructive trustee.*—A mere agent of the trustee may not be accountable to the *cestui que trust*; but otherwise with respect to a substituted trustee who accounts to nobody.—*MYLER v. FITZPATRICK* (1822), 6 Madd. 360; 56 E. R. 1128.

*Annotations:—Distd. Morgan v. Stephens (1861), 3 Giff. 226. Apd. Re Barney, Barney v. Barney, [1892] 2 Ch. 265. Refd. Wilson v. Bury (1880), 5 Q. B. D. 518.*

1541. —[—]—It is to be noticed that there is no trust or confidence of the land in the agent. . . . It is not a case of "trust or confidence" of land. . . . The man was simply what is called a conduit pipe & nothing more, a mere agent, who never had any interest in the lands, & consequently could not have any "trust or confidence" of them (*JESSE, M.R.*).—*CAVE v. MACKENZIE* (1877), 46 L. J. Ch. 564; 37 L. T. 218.

*Annotations:—Refd. James v. Smith, [1891] 1 Ch. 384. Mentd. Chattock v. Muller (1878), 8 Ch. D. 177.*

1542. — *Exercising control over trust property.*—*Re SEABER, Ex p. GOWERS*, No. 1484, *ante*.

1543. —[—]—In general *cestuis que trust* may proceed against an agent of their trustee where he has not confined himself to the duties of an agent, but by accepting a delegation of the trust, or by fraudulently mixing himself up with a breach of trust has himself become a trustee by construction of law *i.e.*, a trustee *de son tort*. But it is essential to the character of a trustee that he should have trust property either actually vested in him, or so far under his control that he is in a position to require that it should be vested in him. A man ought not to be held responsible as a trustee for money under his control unless he can, if he will, put the money into his own pocket, or pay it away as he pleases to some one else.—*Re*

*BARNEY, BARNEY v. BARNEY*, [1892] 2 Ch. 265; 61 L. J. Ch. 585; 67 L. T. 23; 40 W. R. 637.

*Annotation:—Refd. Cowper v. Stoneham (1893), 3 R. 242.*

1544. — *When party to breach of trust.*—T. was originally nothing more than an agent of the exor. in administering the estate. At the same time it may be observed that, if the conduct of G. amounted to a breach of trust, & T., being aware of that breach of trust, became a party to it, the ct. would probably have dealt with him as with an actual trustee, to the extent of his participation; on the other hand, if there were no actual or concerted breach of trust, T. would, at the most, be regarded as only a constructive trustee (*WIGRAM, V.-C.*).—*PORTLOCK v. GARDNER* (1842), 1 Harc. 594; 11 L. J. Ch. 313; 6 Jur. 795; 66 E. R. 1168.

1545. —[—]—An agent assisting in a breach of trust is personally responsible.—*A.-G. v. LEICESTER CORPN.* (1844), 7 Beav. 176; 49 E. R. 1031.

1546. —[—]—Testator, having by will bequeathed his furniture & farming-stock to his wife absolutely, gave the residue of his personal estate upon trust to invest & apply the interest & proceeds of one moiety to the maintenance & education of pltf., his son T., until twenty-one, & then in trust for him absolutely. Testator's widow became his sole acting trustee & extrix.

Deft., who was admitted as a solr. two years after testator's death in 1833, was employed by the extrix. as her solr. He received moneys from her & invested them at interest at her request, & in her name. He also called in other moneys owing to testator's estate & invested them. He received the proceeds of the investments & paid the debts & legacies; & the surplus remained invested on the same securities at the request of the extrix. Deft. made in respect of the moneys placed by the extrix. in his hands certain alleged payments, both of principal & interest, & continued to do during her life. She died in 1844. Subsequently in 1846, when £800 became payable on the securities, deft. alleged that, upon an account being taken between him & the estate of the extrix., there was no balance in her favour, or a small balance in his favour. He thereupon renewed the securities in his own name. Deft. admitted knowledge of the trusts, but submitted that, during the lifetime of extrix., he acted under her instructions as solr., & was not called upon to take cognisance or notice of any breach of trust committed by her in respect of pltf., or any other *cestui que trust*.—*Held*: the acts of deft. were more than the acts of a mere agent; he had assumed the character of trustee, & a breach of trust having been apparently committed, he must be held accountable on that footing.—*MORGAN v. STEPHENS* (1861), 3 Giff. 226; 4 L. T. 614; 7 Jur. N. S. 701; 66 E. R. 392.

*Annotations:—Consd. Re Barney, Barney v. Barney, [1892] 2 Ch. 265. Refd. Mara v. Browne, [1895] 2 Ch. 69.*

1547. —[—]—*BARNES v. ADDY*, No. 1538, *ante*.

1548. —[—]—*Re BARNEY, BARNEY v. BARNEY*, No. 1543, *ante*.

1549. — *Solicitors acting under instructions of trustees.*—In a mtge. transaction in which the same firm of solrs. acted for both parties, but in which the mtgees., who were trustees, acted on

the trust property & retain the residue, amounting to £130, annually, for himself. No fraud was proved against the agent, & he denied any knowledge of the existence of the trust, but no explanation was given of the transaction. In a suit by one of the *cestui que trust* after the

an account:—*Held*: notwithstanding the general rule that a trustee's agent is accountable to the trustee only, an inquiry be had of the circumstances attending the agent's appointment & his knowledge of the trusts affecting the property.—*ARCHER v. LAVENDER* (1875), 9 I. R. Eq. 220.—*IR.*

PART II. SECT. 7, SUB-SECT. 1.—*D. (b).*

1540i. *Whether constructive trustee.*—A trustee, without any authority from the *cestui que trust*, arranged with his agent that the latter should pay him £100 annually out of the proceeds of

their own responsibility, with full knowledge of the value of the security, a member of the firm received the money intended to be advanced, which he paid into the firm's banking account. Two days later he presented a cheque of his firm to the same amount at a bank at which the title deeds were deposited as security for the mtgor.'s overdraft, & received the deeds. The security having proved insufficient, it was sought to make the solr., who was then the sole surviving member of his firm, responsible, on the ground that he had advised the mtge., & the money had passed through his firm's bank:—*Held*: the trustees having acted on their responsibility, the solrs. were not responsible; & the fact of the solr. being employed as agent, & the money having been paid through his firm, did not make him liable to make up the deficiency.—*BRINDEN v. WILLIAMS*, [1894] 3 Ch. 185; 63 L. J. Ch. 713; 71 L. T. 177; 42 W. R. 700; 10 T. L. R. 571; 38 Sol. Jo. 603; 8 R. 574.

1550. — — — — —]—*PLASKITT v. EDDIS* (1898), 79 L. T. 136; 42 Sol. Jo. 702.

1551. — — — — —]—*Acting outside duties as agent.*—*MORGAN v. STEPHENS*, No. 1546, *ante*.

1552. — — — — —]—*Re BARNEY, BARNEY v. BARNEY*, No. 1543, *ante*.

1553. — — — — —]—*Intermeddling with performance of trust.*—Though the solr. or agent of a trustee is not generally a proper party to suit to recover the trust funds, yet the case is different where he has received the trust moneys, & has intermeddled with the performance of the trust.—*HARDY v. CALEY* (1864), 33 Beav. 305; 55 E. R. 408.

1554. — — — — —]—*Acts inconsistent with performance of trust.*—*LEE v. SANKEY*, No. 1501, *ante*.

#### SUB-SECT. 2.—RIGHTS AND LIABILITIES.

*Rights of trustees.*—See Part III., Sect. 3, *post*.  
*Liabilities of trustees.*—See Part IV., *post*.

### SECT. 8.—TENURE AND TRANSMISSION OF TRUST PROPERTY.

#### SUB-SECT. 1.—ESTATE OF TRUSTEES.

##### A. In General.

1555. *Whether entitled to claim beneficial interest—Resulting trust created.*—A trustee cannot claim to hold for his own benefit, where the instrument which creates his estate expressly says that he is to hold as a trustee merely, if there be any person to whom by operation of law the beneficial interest results.—*RITSON v. STORDY* (1855), 3 Sm. & G. 230; 3 Eq. Rep. 1039; 25 L. T. O. S. 315; 1 Jur. N. S. 771; 3 W. R. 627; 65 E. R. 637; *on appeal* (1856), 2 Jur. N. S. 410, C. A.

*Annotations*:—*Mentd.* *Barrow v. Wadkin* (1857), 24 Beav. 1; *Sharp v. St. Sauveur* (1871), 7 Ch. App. 343.

1556. — — — — —]—*CLARKE v. HILTON*, No. 1563, *post*.

1557. — — — — —]—*Limitation to trustee.*—*COVENTRY (EARL) v. COVENTRY* (1742), 2 Atk. 366; 26 E. R. 621, L. C.

*Annotations*:—*Refd.* *Sleech v. Thorington* (1754), 2 Ves. Sen. 560; *Drinkwater v. Falconer* (1755), 2 Ves. Sen. 623; *Whittaker v. Whittaker* (1792), 4 Bro. C. C. 31; *Brooms v. Monck* (1805), 10 Ves. 597.

#### PART II. SECT. 8, SUB-SECT. 1.—A.

1557 I. *Whether entitled to claim beneficial interest—Limitation to trustee.*—*COOPER v. ALLCHIN* (1913), 13 S. R. N. S. W. 422; 80 N. S. W. N. 105.

—AUS.

1557 II. — — — — —]—*GOLDIE v. TAYLOR* (1856), 13 U. C. R. 603.—CAN.

1557 III. — — — — —]—*LUNDY v. MARTIN* (1874), 21 Gr. 452.—CAN.

1557 IV. — — — — —]—*SHERWIN v. KENNY* (1864), 16 I. Ch. R. 138.—IR.

c. *Effect of appointment of new trustee.*—A legal chose in action which is part of the trust property, vests as by operation of law in a new

*Failure of trust—Allen cestui que trust.*—*ALIENS*, Vol. II., p. 137, No. 120.

—]—*See, also, EXECUTORS*, Vol. XXIII., pp. 468–473, Nos. 5377–5424.

#### B. Gift Subject to Specified Objects.

1558. *Whether beneficial interest in surplus.*—

(1) A gift to A. to enable him to do something which is to depend on his own choice is a beneficial gift (*PAGE WOOD*, V.-C.).

(2) Where the performance of a trust is the general purpose of the gift, the trustee cannot take the surplus beneficially (*PAGE WOOD*, V.-C.).

(3) Where nothing more than a charge is created by the will, the donee does take the surplus for his own benefit (*PAGE WOOD*, V.-C.).—*BARRS v. FEWKES* (1864), 2 Hem. & M. 60; 3 New Rep. 704; 33 L. J. Ch. 484; 10 L. T. 232; 10 Jur. N. S. 466; 12 W. R. 606; 71 E. R. 382.

*Annotation*:—*Generally, Mentd.* *Kettlewell v. Barstow* (1869), 17 W. R. 276.

1559. — — — — —]—*After performance of specified objects—Payment of debts & legacies.*—*ASPINWALL v. CASE* (1688), 1 Vern. 433; 23 E. R. 568, L. C.

1560. — — — — —]—*Devise of lands to his cousin A. & his heirs in trust, to be sold for payment of his debts & legacies, & makes A. exor.; the surplus after debts & legacies no resulting trust for the heir, as it would have been on a like case, on a conveyance executed.*—*CONNINGHAM v. MELLISH* (1691), Prec. Ch. 31; 24 E. R. 16; *sub nom.* *CONNINGHAM v. MELLISH*, 1 Eq. Cas. Abr. 273, pl. 8.

*Annotations*:—*Refd.* *Dawson v. Clark* (1809), 15 Ves. 409; *King v. Denison* (1813), 1 Ves. & B. 260; *Hill v. London (Bp.)* (1838), 1 Atk. 618; *Clarke v. Hilton* (1866), L. R. 2 Eq. 810.

1561. — — — — —]—*A. devised the residue of his real & personal estate to his exor., in trust to sell same, or so much thereof as should be needful, for the payment of his debts & legacies:—Held: this was intended as a beneficial devise to the exor.*—*DOCKSEY v. DOCKSEY* (1710), 3 Bro. Parl. Cas. 39; 1 E. R. 1163.

*Annotations*:—*Mentd.* *Amphlett v. Parke* (1831), 9 L. J. Q. S. Ch. 161; *Barrs v. Fewkes* (1865), 6 New Rep. 355.

1562. — — — — —]—*It is not universally true that the expression of a purpose, for which even a devise of land is made limits the devise to the purpose expressed: where for instance there is a devise of land for payment of debts, it does not necessarily follow that there is a trust for the heir after the debts paid.*—*WALTON v. WALTON* (1807), 14 Ves. 318; 33 E. R. 543.

*Annotations*:—*Consd.* *Stewart v. Stewart* (1880), 15 Ch. D. 539; *Re Ford, Ford v. Ford*, [1902] 1 Ch. 218. *Refd.* *Wilkinson v. Atkinson & Alcock* (1823), Turn. & R. 255; *Fitzgerald v. Field* (1826), 1 Russ. 416; *Wood v. Cox* (1837), 2 My. & Cr. 684; *Pickford v. Brown, Brown v. Brown* (1856), 4 W. R. 473; *Re Roby, Howlett v. Newton*, [1908] 1 Ch. 71.

1563. — — — — —]—*Gift by testator of "all my personal estate to my grandson, his exors., administrators, & assigns, subject to the payment of debts, legacies, & personal expenses, & to the trusts hereinafter contained, upon trust to convert & to stand possessed of the trust moneys, "upon trusts which did not exhaust the funds." Testator then appointed his grandson,*

*trustee either solely or jointly with the continuing trustee as the case may require.*—*LOXTON v. MOIR* (1914), 18 C. L. R. 360; 15 S. R. N. S. W. 1; 31 N. S. W. N. 108.—AUS.

f. — — — — —]—*Where an appointment of new trustees is duly made under R. S. O., 1887, c. 110, the legal estate,*

**Sec. 8.—Tenure and transmission of trust property :**  
**Sub-sect. 1, B. & C. (a) & (b).]**

with three others, exors.—*Held*: the grandson took the residue beneficially.

Where property is given to a man subject to certain defined trusts there remains no right in any one but the donee when those trusts are exhausted. Where, however, an estate is given to a man in the character of a trustee, without anything to indicate that a beneficial interest is intended, then there is a resulting trust (*STUART, V.-C.*).—*CLARKE v. HILTON* (1866), L. R. 2 Eq. 810; 15 L. T. 64; 12 Jur. N. S. 721; 14 W. R. 827.

*Annotation*:—*Appl. Re Baillie, Fitzgerald v. Noad* (1886), 2 T. L. R. 660.

1564. ————]—Testator by will, dated 1864, directed his debts, etc., to be paid by his "exors. in trust," D. & J. He then gave several legacies, & amongst them a sum of money to his "trustees" to be placed out at interest, & the interest to be applied for the benefit of the poor of a certain parish. He also gave his "trustees" another sum to be expended on a window in a church; & directed them out of his residuary estate to palisade & keep in repair the graves of his family. He then gave certain real & leasehold hereditaments to his "friends, D. & J.," upon certain durable trusts. The will then contained the usual trustees' receipt clause. After giving some other legacies, testator gave the residue of his real & personal estate, money, securities for money, etc., unto his "two friends, D. & J.," share & share alike, as tenants in common, to hold to their heirs & assigns for ever. He then gave his trust & mtge. estates to D. & J., subject to the trusts & equities, & so far as he was interested as mtgee. to be disposed of for the purposes of that his will. The will then contained a power of appointment of new trustees, which provided for the vesting of "all & singular the trust estate, moneys, & securities" in the new trustees upon the same trusts, etc. Testator then appointed his "two friends, D. & J., exors. in trust" of that his will. Trustees' receipt, indemnity, & reimbursement clauses followed; & the will concluded with a direction to the trustees to employ a certain solr., he winding up the whole of testator's affairs after his decease at his request:—*Held*: the trustees took the residue beneficially.—*ROMANS v. MITCHELL* (1866), 15 W. R. 552.

1565. ————]—Testator made his will as follows: "I give & bequeath to my brother E. whatsoever real estate I may die possessed of wheresoever situate, on trust nevertheless to pay thereout" certain specified debts which were in fact discharged in testator's lifetime, "and also in trust to pay to each of my sisters M. & C. & to my brother A. as long as they respectively live the sum of £50 every year, by two equal half-yearly payments." The will contained a bequest of the personality to the brothers E. & A. & the sisters, & appointed E. sole exor. In an action by the heir-at-law:—*Held*: E. was not a bare trustee, but took a beneficial interest & the residue of the real estate after satisfying the express trusts, did not pass to the heir-at-law by a resulting trust.—

by virtue of sect. 4, vests in the new trustees so appointed, even though it was not vested in the parties making the appointment.—*Re HUNTER v. PATTERSON* (1892), 22 O. R. 571.—*CAN.*

*g. Effect of incapacity of one trustee.*—Where lands are devised to A., B., & C., as trustees, & C. is incapable of taking, the estate may nevertheless vest in A. & B.—*DOE d. VANCOTT v.*

*READ* (1847), 3 U. C. R. 244.—*CAN.*  
*h. Statute vesting lands in trustee*—*Effect on title.*—*DOE d. BALDWIN v. STONE* (1849), 5 U. C. R. 388.—*CAN.*

**PART II. SECT. 8, SUB-SECT. 1.—**  
**C. (a).**

1568 i. *Whether beneficial interest.*—Trustees of a will take the legal estate by implication where such estate is

*CROOME v. CROOME* (1889), 61 L. T. 814, H. L.; *affg.* (1888), 59 L. T. 582, C. A.  
*Annotations*:—*Distd. Re West, George v. Grose*, [1900] 1 Ch. 84. *Appl. Re Foord, Foord v. Conder*, [1922] 2 Ch. 519.

1566. ————]—Testator by his will made the following bequest: "All my effects including rubber & all other shares I leave absolutely to my sister M. on trust to pay my wife *per annum* £300. . . ." The bequest was more than sufficient to satisfy the annuity:—*Held*: testator's sister was entitled to the beneficial interest of the balance & was not a trustee thereof for the next of kin.—*Re FOORD, FOORD v. CONDER*, [1922] 2 Ch. 519; 128 L. T. 501; *sub nom. Re FOORD, FOORD v. FOORD*, 92 L. J. Ch. 46.

1567. ————]—**Indemnity & reimbursement clause.**—*Re WEST, GEORGE v. GROSE*, No. 1574, *post*.

**C. Gift for Specified Objects.**

**(a) In General.**

1568. **Whether beneficial interest.**—*BARRS v. FEWKES*, No. 1558, *ante*.

1569. ————]—**Right of trustee of equitable estate—As against trustee of legal estate.**—A trustee under a deed held freehold premises in trust for L., her heirs & assigns, for her & their own use & benefit. L. by her will, devised these premises, among others, to trustees, in trust to sell, & out of the proceeds to pay debts & legacies, the legacies being specified in a certain paper marked A. This paper not being forthcoming, the trustee of the deed, offering to pay the debts, claimed to be entitled to retain the trust premises for his own benefit. On a bill filed, however, by the trustees of the will, a conveyance to them was directed, the Lord Chancellor holding that the will gave them a title as against the trustee of the deed, who had nothing to do with the question how the premises would be disposed of in consequence of the trustees of the will not being able to carry the trusts into full effect.—*ONSLOW v. WALLIS* (1849), 1 Mac. & G. 506; 1 H. & Tw. 513; 19 L. J. Ch. 27; 16 L. T. O. S. 1; 13 Jur. 1085; 41 E. R. 1361, L. C.

*Annotations*:—*Distd. Re Lashmar, Moody v. Penfold*, [1891] 1 Ch. 258. *Refd. Re Van Hagan, Sperling v. Roehfort* (1889), 16 Ch. D. 18. *Mentd. Senhouse v. Hall* (1854), 2 Eq. Rep. 483.

1570. ————]—**Mode of application of property at discretion of trustee.**—Where an annuity was given to A. in trust to apply the same at his discretion for the benefit of B. during his life, & for his advancement, maintenance, support, or otherwise for his benefit, without being answerable for any of the moneys so laid out, or the exercise of the discretion so vested in the trustee as to the mode & extent of expending & laying out the same:—*Held*: A. could not apply any portion of the annuity for his own benefit, but was bound to account for all sums not shown to be applied for the advancement, maintenance, support, or benefit of B.—*WAINFORD v. HEYL* (1875), L. R. 20 Eq. 321; 33 L. T. 155; 39 J. P. 709; *sub nom.* *WAYNFORD v. HEYL*, 44 L. J. Ch. 567; *sub nom.* *WAYNFORD v. HEYL*, 23 W. R. 849.  
*Annotations*:—*Mentd. Collett v. Dickinson* (1878), 26 W. R. 403; *Re Turnbull, Turnbull v. Nicholas*, [1900] 1 Ch. 180; *Edwards v. Porter*, [1925] A. C. 1.

necessary for the duties imposed on them by the trust. The circumstance of a gift of the estate to the person beneficially entitled is not sufficient to prevent this implication arising.—*RITCHIE v. PRICE* (1863), 3 N. S. W. S. C. R. (Eq.) 14.—*AUS.*

1568 ii. ————]—*MURPHY v. MCGIBBON* (N. S.) (1913), 13 E. L. R. 160; 12 D. L. R. 748.—*CAN.*



1571. — [J.—]—Testatrix, after appointing four exors., made over to them by her will "as such" all her property & effects, "but in trust always for the purposes hereinafter mentioned"; & after directing them to preserve certain houses as a family house, & giving certain specific bequests, disposed to the residue of her estate as follows: "As regards the remainder of my real & personal property of what kind soever, not already disposed of, I direct that my exors. shall receive & collect the same from all persons whatever, & in such manner as to them may seem proper, & I direct that they, their heirs, successors, representatives, or descendants, may apply & distribute the same, all circumstances duly considered, in such manner & to such parties as to them may appear just":—*Held*: according to the true construction of the above clause, there was no absolute gift to the exors. as individuals. The residue was not severed from the trust with which testatrix had clothed all her property in the hands of her exors., but although a trust was intended to be created, it failed for want of adequate expression of it.—*YEAP CHEAH NEO v. ONG CHENG NEO* (1875), L. R. 6 P. C. 381, P. C.

*Annotations*:—*Reid*, *Re Howell*, *Re Buckingham*, *Liggins v. Buckingham* (1914), 84 L. J. Ch. 209. *Mentd. Elliott v. Totnes Union* (1892), 57 J. P. 151; *Re Manser*, A.-G. v. *Lucas* (1904), 74 L. J. Ch. 95; *Bourne v. Keane*, [1919] A. C. 815.

1572. — [J.—]—Where testator gives the ultimate remainder of a fund, after the termination of a life interest, to be disposed of at the discretion of the trustees of his will, & makes a general gift of all his residue, a trustee by representation of the last surviving trustee named in the will is not entitled to take the fund beneficially, & it will pass under the general gift of residue.—*Re BOOTH, HATTERSLEY v. COWGILL* (1917), 80 L. J. Ch. 270; 116 L. T. 465.

1573. — **Property not exhausted by trust.**—[J.—]—Testatrix, by will made in 1837, bequeathed residue of real & personal property to trustees, "their heirs, exors., administrators & assigns," upon trust to sell & convert such parts of her estate as should not consist of money or stock in the public funds, & to stand possessed thereof upon trust to pay thereout two life annuities, & subject thereto, upon such trusts as she should thereafter by any codicil or codicils direct. Testatrix died without making any further bequest. By an order made in an administration suit, the trustees were declared entitled to the residue of the real estate, & the Crown to the personality. One of the trustees & an annuitant had since died. A petition was presented by the surviving trustees for the payment of the sum arising from the real estate which had been set apart to answer the annuity:—*Held*: the trustees took as joint tenants, & the surviving trustees were therefore entitled.—*TAYLOR v. HAYGARTH* (1862), 6 L. T. 95, L. C.

1574. — **Indemnity & reimbursement clause.**—[J.—]—A gift of property to trustees on trust for sale, followed by the declaration of a particular trust which does not exhaust the whole of the property thus given, will be treated as creating a primary general trust of the whole of such property, so that there will be a resulting trust of the unexhausted residue in favour of testator's heir & next of kin. The insertion of a trustee's indemnity & reimbursement clause will further strengthen the conclusion thus drawn from the presence of the trust for sale.—*Re WEST, GEORGE v. GROSE*, [1900] 1 Ch. 84; 69 L. J. Ch. 71; 81 L. T. 720; 48 W. R. 138; 44 Sol. Jo. 80.

1575. — **Declaration against heir.**—[J.—]—Testator gave & devised all his freehold & lease-

hold estates to E. his nephew, his heirs & assigns for ever, "upon the trusts & for the uses following": The trusts declared were of a very limited nature, consisting merely of a life interest in a small part of the estate to M., a joint interest to E. & M. in a leasehold house & furniture, together with a direction to pay a trifling annuity & some small legacies. There was no further declaration of the trust or use:—*Held*: upon the construction of the entire will, there was no resulting trust for testator's son & heir-at-law; there being a declaration in the will that his son was not to enjoy an acre of his property, & other circumstances to show the intention of testator that E. should take the undisposed of property beneficially.—*HUGHES v. EVANS* (1843), 13 Sim. 496; 7 Jur. 523; 60 E. R. 192.

*Annotation*:—*Reid*, *Barrs v. Fewkes* (1864), 2 Hem. & M. 60.

1576. — **Failure of trust.**—[J.—]—Testatrix devised real estate to her trustee & his heirs, in trust out of the rents to maintain her son W. until he attained twenty-one, "and when & so soon as" he should attain twenty-one, testatrix devised it to him in fee. But in case he should die before attaining twenty-one, to his children, if any, or if none, then to debts. The son did attain twenty-one, & died without issue in the lifetime of testatrix. There being no heir or next of kin of the testatrix:—*Held*: the trustee was entitled to hold the real estate beneficially.—*COX v. PARKER* (1850), 22 Beav. 168; 25 L. J. Ch. 873; 27 L. T. O. S. 179; 2 Jur. N. S. 842; 4 W. R. 453; 52 E. R. 1072.

[J.—]—*See CHARITIES*, Vol. VIII., p. 325, No. 1077.

#### (b) Performance at Option of Trustees.

1577. **Whether beneficial interest.**—[J.—]—If the will had given the dividend to the father for the maintenance of the children, it would have amounted to a legacy of the dividends to the father, which he would have been entitled to, though he had not spent half of it in the children's maintenance (LORD THURLOW, C.).—*ANDREWS v. PARTINGTON* (1790), 2 Cox, Eq. Cas. 223; 3 Bro. C. C. 60; 30 E. R. 103, L. C.

*Annotations*:—*Consd.* *Hamley v. Gilbert* (1821), Jac. 354; *Camden v. Benson* (1835), 4 L. J. Ch. 256; *Thorp v. Owen* (1843), 2 Hare, 607. *Reid*, *Pulford v. Hunter*, *Jennings v. Hunter* (1792), 3 Bro. C. C. 416; *Hoste v. Pratt* (1798), 3 Ves. 730; *Sisson v. Shaw* (1804), 9 Ves. 285; *Maberly v. Turton* (1808), 14 Ves. 499.

1578. — [J.—]—Legacy to a father the better to enable him to provide for his younger children: he consented to secure the capital; but was held entitled to the interest.—*BROWN v. CASAMAJOR* (1799), 4 Ves. 498; 31 E. R. 255, L. C.

*Annotations*:—*Consd.* *Benson v. Whitam* (1831), 5 Sim. 22; *Camden v. Benson* (1835), 4 L. J. Ch. 256; *Ralke v. Ward* (1842), 1 Hare, 445. *Reid*, *Crockett v. Crockett* (1842), 1 Hare, 451; *Thorp v. Owen* (1843), 2 Hare, 607.

1579. — [J.—]—Testator gave annuities out on any money arising from whatever dividends he might die possessed of in the Bank of England, & the residue of the said dividends to his brother A. to enable him to assist such of the children of his brother F. as he should find deserving of encouragement, & upon the demise of the annuitants or any of them, testator gave each annuitant's proportion of the before mentioned dividends, to his brother A., to be at his disposal, but the principal to remain in the bank:—*Held*: no trust was created for the children of F., but A. took, absolutely, the capital of the testator's stock, subject to the annuities.—*BENSON v. WHITAM, HEMMING v. WHITAM* (1831), 5 Sim. 22; 1 L. J. Ch. 94; 58 E. R. 246.

*Annotations*:—*Consd.* *Gloucester Corp. v. Wood* (1843), 3 Hare, 131. *Apld.* *Thorp v. Owen* (1843), 2 Hare, 607. *Reid*, *Hodgson v. Green* (1842), 11 L. J. Ch. 312.



*Sect. 8.—Tenure and transmission of trust property : Sub-sect. 1, C. (b), & (c) i., ii. & iii.]*

1580. —.]—*BARRS v. FEWKES*, No. 1558, *ante*.

1581. —.]—*Re THISTLETHWAYTE*, CLINTON *v. NANGLE* (1895), 11 T. L. R. 206.

**Mode of application of property in discretion of trustee.**—*See* Nos. 1570–1572, *ante*.

*(c) Trust for Application of Rents and Profits.*

*i. Trusts to Pay Over.*

1582. **Trustees take legal estate.**—*GRIFFITH v. SMITH* (1804), Moore, K. B. 753; 72 E. R. 884.

*Annotation*:—*Apld.* *Bush v. Allen* (1695), 5 Mod. Rep. 63.

1583. —.]—If testator devise the issues & profits of certain lands to his wife, to be paid to her by his exors., the exors. shall take the lands in trust to receive the rents & profits to the use of the wife.—*BUSH v. ALLEN* (1695), 5 Mod. Rep. 63; 87 E. R. 520.

1584. —.]—(1) Devise in trust to pay unto, or else to permit & suffer testator's niece to receive the rents:—*Held*: the legal estate was executed in the niece, because the words "to permit" came last, & in a deed the first, in a will the last words prevail.

(2) A devise in trust to pay unto gives the legal estate to the trustee.—*DOE d. LEICESTER v. BIGGS* (1809), 2 Taunt. 109; 127 E. R. 1017.

*Annotations*:—*As to* (1) *Distd.* *Tenny d. Gibbs v. Moody* (1825), 3 Bing. 3. *Consd.* *Sherratt v. Bentley* (1834), 2 My. & K. 149. *Distd.* *White v. Parker* (1835), 1 Bing. N. C. 573. *Consd.* *Morrall v. Sutton* (1845), 1 Ph. 533. *Apld.* *Baker v. White* (1875), L. R. 20 Eq. 166. *Distd.* *Re Tanqueray-Williams & Landau* (1882), 20 Ch. D. 466. *Apld.* *Re Allsop & Joy's Contract* (1889), 61 L. T. 213. *Distd.* *Re Lashmar, Moody v. Penfold*, [1891] 1 Ch. 258. *Consd.* *Re Brooke, Brooke v. Brooke*, [1894] 1 Ch. 43. *Apld.* *Re Adams & Perry's Contract*, [1899] 1 Ch. 554. *As to* (2) *Consd.* *Doe d. Gratrux v. Homfray* (1837), 6 Ad. & El. 206.

1585. —.]—Devisor, being seised in fee of land, devised it "to the uses hereinafter declared; that is to say, to the use & intent that D. shall receive & take the rents, etc., & pay the same to J. for the term of his natural life; & after J.'s decease, I give & devise the same premises to the heirs of the body of J.; & in default of such issue, I give & devise the same premises to C. & the heirs of her body; & in default of such heirs, I give & devise the same" to K. in fee:—*Held*: a legal estate passed to D. the trustee, though there was no direct devise to him, & though there were no trustees to preserve contingent remainders.—*DOE d. GRATREX v. HOMFRAY* (1837), 6 Ad. & El. 206; 1 Nev. & P. K. B. 401; Will. Woll. & Dav. 18; 6 L. J. K. B. 132; 112 E. R. 78; *sub nom.* *DOE d. JONES v. PUMPHREY*, 1 Jur. 38.

*Annotation*:—*Mentd.* *Hamilton v. Buckmaster* (1866), 15 L. T. 177.

1586. —.]—(1) Testator devised all his real estate to three persons & their heirs on trust to permit & suffer his wife to take the net rents & profits for life, subject to a certain rentcharge secured to testator's daughter by her marriage settlement. Remainder to that daughter for life, for her sole & separate use independent of her husband, remainder to the husband for life, with several contingent remainders over:—*Held*: the legal estate in fee remained in the trustees, & was not divested by the declaration of trust to permit the wife to take the net rents & profits. If, however, the devise had been on trust to permit the wife to take the rents & profits simply, then the use would have been executed by the statute.

(2) When an estate of inheritance is devised on certain trusts, the rule of construction is to hold so much of the legal estate to be vested in the trustees, & no more, as is requisite for carrying the testator's intention into execution.

(3) It is now clearly settled that, whenever a conveyance is made to trustees on trust to pay over to a specified person the rents & profits arising from the land, they take the legal estate in the premises; but that, if the terms of the trust be, that they are to permit & suffer the tenant for life to receive the profits, then the use is executed in that person, & the legal estate is divested out of them. It is clear, also, that, whenever testator shows his meaning to be that the trustees are to have anything to do in executing the trusts of his will; if he order, for example, that they are to receive the rents, etc., the legal estate must remain vested in them; & in the case of *Gregory v. Henderson*, No. 1806, *post*, where there was a devise to trustees to permit & suffer testator's widow to receive & take all the rents & profits & that her receipts for all rents, with the approbation of the trustees, should be good & valid, the Ct. held that the legal estate remained in them, on the ground that there was some duty for them to perform (*PARKE, B.*).—*BARKER v. GREENWOOD* (1838), 4 M. & W. 421; 1 Horn & II. 389; 8 L. J. Ex. 5; 3 Jur. 25; 150 E. R. 1494.

*Annotations*:—*As to* (2) *Apld.* *Adams v. Adams* (1845), 6 Q. B. 860. *Consd.* *Lewis v. Rees* (1856), 3 K. & J. 132. *As to* (3) *Apld.* *Re Brooke, Brooke v. Dickson*, [1923] 2 Ch. 265.

1587. —.]—Testator made the following will: "Subject to my debts, I bequeath to my wife the clear rentals of my two leasehold houses, Nos. 17 & 19, P. Street, for her life, to be paid to her every month; & after her decease I leave No. 17 (& other property) to my son R.; & I direct that the rents shall be received & the property be under the management of my exors. After R.'s decease I direct his share of the property be equally divided between his children; but, should he die without leaving lawful issue, I direct the same to be equally divided amongst the surviving children of my daughter M. I appoint my son-in-law J. & his wife M. my exors."

The exors. proved the will, & collected the rents of the property, & paid the rents of No. 17 to the widow during her life, & after her death, to R., who died without leaving issue:—*Held*: though there was no direct bequest, the exors. took the legal estate in No. 17 as trustees, but only to the extent of the trust; & after the death of R. the legal estate became vested in the surviving children of M.

The rule of construction in such cases is that the trustees take estates co-extensive with the trusts they have to perform; & that if the performance of the trust require only that the legal estate shall be vested in them for a limited time, they take it only for that period (*QUAIN, J.*).—*STEVENSON v. LIVERPOOL CORPN.* (1874), L. R. 10 Q. B. 81; 44 L. J. Q. B. 34; 31 L. T. 673; 23 W. R. 346.

*Annotation*:—*Consd.* *Baker v. White* (1875), L. R. 20 Eq. 166.

1588. —.]—*BAKER v. WHITE*, No. 1648, *post*.

*ii. Trust to Permit Beneficiary to Take.*

1589. **Beneficiary takes legal estate.**—(1) Under a limitation to two & their heirs in trust to permit J. to take the rents, issues & profits of the estate, the use is executed in J.

PART II. SECT. 8, SUB-SECT. 1.—C. (c) i.

1582 i. **Trustees take legal estate.**—*PERPETUAL TRUSTEE CO., LTD. v. TASKER* (1913), 13 S. R. N. S. W. 322; 30 N. S. W. W. N. 177.—*AUS.*

(2) Under a devise of the rents, issues & profits of an estate to a *feme covert* for life to be paid by the exors. of the deviser, so as the husbands should not intermeddle with them. *Qu.*: whether the legal estate vests in the *feme*, or the exors.—*BROUGHTON v. LANGLEY* (1703), 2 Ld. Raym. 873; 1 Eq. Cas. Abr. 383; Holt, K. B. 708; 1 Lut. 814; 2 Salk. 679; 92 E. R. 84.

*Annotations*:—*As to* (1) *Consd.* *Garth v. Baldwin* (1755), 2 Ves. Sen. 646; *Right d. Phillips v. Smith* (1810), 12 East, 455. *Generally, Refd.* *Legard v. Hodges* (1792), 3 Bro. C. C. 531.

1590. —[—]—*DOE d. LEICESTER v. BIGGS*, No. 1584, *ante*.

1591. —[—]—Under a devise to trustees, their heirs, etc., of freehold & leasehold estate, on trust to permit & suffer testator's wife to receive & take the rents & profits until his son should attain twenty-one, & then to the use of his son in fee:—*Held*: the devise to the trustees, upon trust to permit & suffer testator's wife to receive & take the rents & profits of the lands there described until his son attained twenty-one, vested the legal estate of those lands in her.—*RIGHT d. PHILLIPS v. SMITH* (1810), 12 East, 455; 104 E. R. 178.

1592. —[—]—Testator devised the manor of A. & also a mansion house, to trustees, in trust to permit & suffer his wife, in case she should wish so to do, to occupy same, & to receive the rents & profits thereof, until his son was of age, provided she remained unmarried, & on the son attaining twenty-one, then in trust to release, convey & assure the manor & mansion to the son in fee; provided that in case the wife married again or should not wish to reside in the mansion the trustees should let the mansion until the son attained twenty-one:—*Held*: although the trustees must take the legal estate in order to convey to the son when of age, that alone would not prevent the widow from taking the legal estate in the meantime.—*DOE d. NOBLE v. BOLTON* (1839), 11 Ad. & El. 188; 3 Per. & Dav. 135; 113 E. R. 386.

*Annotation*:—*Apld.* *Re Adams & Perry's Contract*, [1899] 1 Ch. 554.

1593. —[—]—*BARKER v. GREENWOOD*, No. 1586, *ante*.

1594. —[—]—*BAKER v. WHITE*, No. 1648, *post*.

1595. *Trustees take legal estate.*—[Devise of land to trustees, in trust to permit testator's wife & daughters to receive the clear rents of three parts to their sole & separate use, & testator's son the clear rent of the fourth part; the trustees to pay all outgoing, to repair, & to let the premises:—*Held*: the legal estate as to all the four parts vested in the trustees.—*WHITE v. PARKER* (1835), 1 Bing. N. C. 573; 1 Hodg. 112; 1 Scott, 542; 4 L. J. C. P. 178; 131 E. R. 1237.

*Annotations*:—*Apld.* *Barker v. Greenwood* (1838), 4 M. & W. 421. *Consd.* *Re Brooke, Brooke v. Dickson*, [1923] 1 Ch. 360. *Refd.* *Adams v. Adams* (1845), 9 Jur. 300.

### iii. *Alternative Trust to Pay or Permit.*

1596. *In deed*—*Trustee takes legal estate.*—[*DOE d. LEICESTER v. BIGGS*, No. 1584, *ante*.

1597. *In will*—*Beneficiary takes legal estate.*—[*DOE d. LEICESTER v. BIGGS*, No. 1584, *ante*.

1598. —[—]—*BAKER v. WHITE*, No. 1648, *post*.

1599. —[—]—Testator, who died in 1844, by his will dated in that year devised his freehold & copyhold estates to trustees upon trust during the life of his son J. to receive the rents & profits thereof & to pay the same unto J. & his assigns "during his life or otherwise to permit him or them to receive the same," & from & after the decease of J. testator devised "the same to the

sole use & behoof of the heirs of his body lawfully begotten" & in case J. should die without leaving any issue of his body lawfully begotten the testator devised the same unto his daughter E., her heirs & assigns for ever. By a disentailing assurance dated in 1845 J. granted all the freehold estates comprised in the residuary devise to R., discharged from all estates tail to the use of J. in fee. In Nov. 1888, A., who claimed under J., agreed to sell to B. certain freeholds which were included in & passed under the devise of freeholds contained in the will:—*Held*: under the will J. took a legal estate tail in the freeholds.—*RE ALLSOP & JOY'S CONTRACT* (1889), 61 L. T. 213.

*Annotation*:—*Mentd.* *Ord v. Ord*, [1923] 2 K. B. 432.

1600. —[—]—*Re LASHMAR, MOODY v. PENFOLD*, No. 1425, *ante*.

1601. —[—]—It must be taken as settled law—at any rate in a court of first instance—that a devise to trustees upon trust to receive for a beneficiary or permit him to receive rents & profits gives him the legal estate, however illogical such a result may be, having regard to the fact that an option appears to be given to the trustees whether to receive the rents themselves or not (*SARGANT, L.J.*).—*Re HOBBS, HOBBS v. HOBBS*, [1917] 1 Ch. 569; 80 L. J. Ch. 409; 116 L. T. 270, C. A.

*Annotation*:—*Mentd.* *Re Elton, Elton v. Elton*, [1917] 2 Ch. 413.

1602. —[—]—Unless both alternatives can be followed—*Beneficiary also joint trustee.*—[Testator directed that his debts should be paid by his extri. & exor. thereafter named. He then devised all his freehold & copyhold estates to his wife & son, & bequeathed to them his leaseholds & other personal estate & declared that his real & personal estates were devised & bequeathed to them "upon trust to pay the rents, issues, & profits, & the interest, dividends, & income of my real & personal estates unto or permit the same to be received by my said wife during her life, " & after her decease to raise & pay certain legacies to other persons which were to be treated as vested from his decease, & as to all the rest, residue & remainder of his real & personal estate after the death of his wife he devised & bequeathed the same to his said son, his heirs, exors., administrators, & assigns, according to the natures & qualities thereof, & empowered him to postpone payment of the legacies for two years from the widow's death, the legacies to carry interest from her death. The widow & son were appointed exors. Testator died in May, 1871, & the will was proved by the exors. In June, 1881, the widow & son put up for sale part of the freehold estate, under conditions of sale providing that requisitions must be delivered within ten days from the delivery of the abstract; time to be of the essence of the contract. The purchaser made a requisition that the legacies must release the estate from their legacies. The vendors refused to procure their concurrence, on the ground that the real estates were charged with debts, & that the vendors could sell discharged from the legacies. The purchaser then asked whether any debts remained unpaid. The vendors declined to answer the question, & the point was then raised, after the time for sending in requisitions had expired, whether any charge of debts was created. The vendors persisting in their refusal to answer the question whether any debts remained unpaid, the purchaser took out a summons to have it declared that no charge of debts was created by the will, & if it was, then that the vendors were bound to answer the inquiry as to debts:—*Held*: as the exors. took the whole

**Secl. 8.—Tenure and transmission of trust property :****Sub-sect. 1, C. (c) iii., iv. & v.]**

legal fee as joint tenants, the direction to them to pay debts charged the real estate with debts, though they took unequal beneficial interests in it.—*Re TANGUERAY-WILLAUME & LANDAU* (1882), 20 Ch. D. 405 ; 51 L. J. Ch. 434 ; 46 L. T. 542 ; 30 W. R. 801, C. A.

**Annotations :—***Apld. Re De Burgh Lawson, De Burgh Lawson v. De Burgh Lawson* (1889), 41 Ch. D. 568. *Reid. Marshall v. Gingell* (1882), 21 Ch. D. 790 ; *Re Lashmar, Moody v. Penfold* (1890), 60 L. J. Ch. 143 ; *Re Brooke, Brooke v. Brooke* (1893), 63 L. J. Ch. 159 ; *Re Venn & Furze's Contract*, [1894] 2 Ch. 101 ; *Re Adams & Perry's Contract* (1899), 80 L. T. 149 ; *Re Verrell's Contract*, [1903] 1 Ch. 65. **Mentd.** *Re Whistler* (1887), 35 Ch. D. 551 ; *Re Stokes, Parsons v. Miller* (1892), 67 L. T. 223 ; *Solomon v. Attenborough*, [1912] 1 Ch. 451.

**1603. — Trustees take legal estate.]—**Devise after 1837 of copyholds & freeholds to trustees to hold unto them & their heirs on trust to pay unto or permit A. to receive the rents during his life & after his death to the use of the heirs of his body with a gift over in case he died without leaving issue :—**Held :** A. took an equitable estate for life with a legal remainder to the heirs of his body in both the freeholds & copyholds.—*BAKER v. PARSON* (1872), 42 L. J. Ch. 228.

**Annotations :—***Dtd.* *Baker v. White* (1875), L. R. 20 Eq. 166. *Reid. Re Allsop & Joy's Contract* (1889), 61 L. T. 213.

**Trust to pay over.]—**See Sub-sect. 1, C. (c) i., ante.  
**Trust to permit beneficiary to take.]—**See Sub-sect. 1, C. (c) ii., ante.

**iv. Trust to do Further Act.**

**1604. Trustee takes legal estate.]—**Devise to trustees to pay out of rents & profits, after deducting rates, taxes, & repairs, the residue to C. & his assigns for life, & after his decease, to the use of the heirs male of the body of C. & in default of such issue, remainder over, not an estate tail in C., the use not being executed in him.—*SHAPLAND v. SMITH* (1780), 1 Bro. C. C. 75 ; 28 E. R. 994, L. C.

**Annotations :—***Consd.* *White v. Parker* (1835), 1 Bing. N. C. 573. *Reid.* *Silvester d. Law v. Wilson* (1788), 2 Term Rep. 444 ; *Gale v. Gale* (1789), 2 Cox, Eq. Cas. 136 ; *Cooper v. Denne* (1792), 4 Bro. C. C. 80 ; *Kenrick v. Beauchlerk* (1802), 3 Bos. & P. 175 ; *Doe d. White v. Simpson* (1804), 5 East, 162 ; *Vancouver v. Bliss* (1805), 1 Ves. 458 ; *Doe d. Leicester v. Biggs* (1809), 2 Taunt. 109 ; *Tenny d. Gibbs v. Moody* (1825), 3 Bing. 3 ; *Colmore v. Tyndall* (1828), 2 Y. & J. 605. **Mentd.** *Slaylton v. Scott* (1809), 16 Ves. 272 ; *R. v. Holm East Waver Quarter* (1812), 16 East, 127 ; *Jervoise v. Northumberland* (1820), 1 Jac. & W. 559 ; *Elliot v. Pott* (1821), 3 Bl. 134 ; *Ireson v. Pearman* (1825), 3 B. & C. 799 ; *Lincoln v. Arcedeckne* (1844), 1 Coll. 98 ; *R. v. Burgate* (1854), 23 L. T. O. S. 155.

**1605. —**—*A* devise to trustees, in trust to receive rents & profits during the life of A. ; & that such rents & profits shall be applied for the subsistence & maintenance of A. during his life, is not an use executed in A. & cannot unite with a subsequent legal limitation to the liens of the body of A.—*SILVESTER d. LAW v. WILSON* (1788), 2 Term Rep. 444 ; 100 E. R. 239.

**Annotations :—***Reid.* *Kenrick v. Beauchlerk* (1802), 3 Bos. & P. 175 ; *Doe d. White v. Simpson* (1804), 5 East, 162 ; *Tenny d. Gibbs v. Moody* (1825), 3 Bing. 3. **Mentd.** *R. v. Burgate* (1854), 23 L. T. O. S. 155.

**1606. —**—*A* devise to A. in trust to permit & suffer testator's widow to have, hold, use, occupy, possess, & enjoy in full, free, & uninterrupted possession & use of all interests of moneys in the funds & rents & profits arising from testator's houses for her natural life, if she should remain unmarried ; & that her receipts for all rents, etc., with the approbation of any one of his trustees, should be good & valid, she providing for & educating properly testator's children, & also paying two annuities thereby bequeathed to M.

& I. of £20 for their lives, besides board & lodging to I., & that his children should be solely under their mother's direction until marriage, or properly provided for :—**Held :** the use was executed in the devise in trust.—*GREGORY v. HENDERSON* (1813), 4 Taunt. 772 ; 128 E. R. 534. **Annotation :—***Reid.* *Barker v. Greenwood* (1838), 4 M. & W. 421.

**1607. —**—*A* declaration by a vicar against his predecessor for dilapidations he averred that he was seised in right of his vicarage. It appeared that part of the premises were copyhold, & devised to the Master & senior Fellows of a College, in trust to permit the vicar to receive the profits arising therefrom after deducting certain charges which might accrue to the lord of the manor, or the expenses attending the repairs of the premises :—**Held :** the legal estate was vested in the trustees.—*BROWNE v. RAMSDEN* (1818), 8 Taunt. 559 ; 2 Moore, C. P. 612 ; 129 E. R. 501.

**Annotation :—***Reid.* *Mason v. Lambert* (1848), 12 Q. B. 795.

**1608. —**—*C.* devised lands to a *feme covert* for her life, & then to the intent that she or her husband should not be entitled to receive the rents of the tenant, appointed trustees to receive them, pay them over to the wife, & attend to repairs ; with power to distrain, lease, etc. By a codicil *C.* revoked the devise in the will, the trustees, named therein having died, & devised the land to other trustees, to the same intents, & in the same manner in all respects, as if the new trustees had originally been named trustees in the will :—**Held :** the new trustees took the legal estate in the land.

If there be anything for the trustees to do, beyond merely paying money over, they take the legal estate (*GASELEE, J.*).—*TENNY d. GIBBS v. MOODY* (1825), 3 Bing. 3 ; 10 Moore, C. P. 252 ; 3 L. J. O. S. C. P. 122 ; 130 E. R. 414.

**1609. —**—*J.*—*BARKER v. GREENWOOD*, No. 1586, ante.

**1610. —**—*J.*—Testator by his will, after providing for his elder son, R., by giving him an annuity of £400 "issuing out of my estate," gave, devised & appointed his freeholds, copyholds, & leaseholds to his trustees, their heirs & assigns, to hold the same unto those trustees, their heirs & assigns for ever, but nevertheless to the uses, upon the trusts, & for the ends intents, & purposes & with, under, & subject to the powers, provisos, declarations, & dispositions thereafter declared & contained of & concerning the same, that was to say, to the use of the trustees, their exors., administrators, & assigns for a term of ninety-nine years & from & immediately after the expiration or other sooner determination of the term & in the meantime subject thereto & the trusts thereof, to the use of his younger son, E., for life, & from & after his decease to the use of his first & other sons successively in tail male, & in default or on failure of such issue to the use of R.'s first & other sons successively in tail male, & in default or on failure of such issue to the use of the trustees, their exors., administrators, & assigns during the life of his daughter, C., upon trusts for her benefit during her life. The will contained a management clause which empowered the trustees, so long as the rules of law & equity permitted, to manage the real estate & to receive the rents & profits thereof, & thereout to pay & discharge the expenses of management & repairs, & to pay the balance of the rents to the persons for the time being entitled thereto. Testator died in 1888. E. died in 1921, a bachelor. R. was living, but had no son. On an application by C. for payment to her of the balance of the rents & profits :—**Held :** on con-

struction of the will as a whole, the trustees took the legal estate in fee.—*Re BROOKE, BROOKE v. DICKSON*, [1923] 2 Ch. 265; 92 L. J. Ch. 504; 129 L. T. 379; 67 Sol. Jo. 594, C. A.

*v. Trusts for Separate Use.*

**1611. Trustee takes legal estate.]**—Lands are devised to trustees & their heirs, in trust to pay several legacies & annuities, & then to pay the surplus of the rents & profits to A. during her life, for her separate use, or as she should direct; & after her death, the trustees were to stand seised to the use of the heirs of her body, with other remainders over:—*Held*: this was a use executed in the trustees & their heirs during the life of A. & she had only a trust in the surplus rents & profits during her life; & the subsequent limitation to the trustees, to the use of the heirs of her body, was a use executed in the persons entitled to take by virtue thereof; & therefore, there being only a trust estate in the ancestor, & a use executed in the heirs of her body, their different interests could not unite so as to create an estate tail by operation of law in the ancestor.—*SAY & SEAL (LORD) v. JONES (LADY)* (1729), 3 Bro. Parl. Cas. 113; 1 E. R. 1212, H. L.; *affy. S. C. sub nom. JONES (LADY) v. SAY & SEAL (LORD)* (1728), 8 Vin. Abr. 262, L. C.

*Annotations*:—*Distd. Bagshaw v. Spencer* (1748), 1 Ves. Sen. 142; *Venables v. Morris* (1797), 7 Term Rep. 312. *Horton v. Horton* (1798), 7 Term Rep. 652. *Kenrick v. Beaunolock* (1802), 3 Bos. & P. 175; *Wykham v. Wykham* (1810), 3 Taunt. 316. *Apld. Doe d. Stevens v. Scott* (1828), 4 Bing. 505. *Consd. White v. Parker* (1835), 1 Bing. N. C. 573; *Doe d. Muller v. Claridge* (1848), 6 C. B. 641. *Apld. Collier v. McBean* (1865), 31 Beav. 426. *Refd. Sayer v. Masterman* (1757), Amb. 344; *Doe d. White v. Simpson* (1804), 5 East, 162; *Doe d. Leicester v. Biggs* (1800), 2 Taunt. 109; *Heather v. Winder* (1835), 5 L. J. Ch. 41.

**1612. —.]**—*HARTON v. HARTON*, No. 1700, *post*.

**1613. —.]**—Testatrix devised lands to C. & his heirs, in trust, to & for the sole & separate use of her daughter, S., & to convey, assign & assure the same to S., her heirs & assigns, for ever, free from & independent of the debts, etc., of any present or any future husband, & to empower & permit her to take & receive the rents, etc., & to give receipts for the same, or to appoint any person to receive them, as if she were sole & unmarried. S. afterwards made a will, whereby she devised the lands to her husband, for life, with remainder over, & died:—*Held*: the legal estate vested in the trustee during her life, & the devise by S., during her coverture, was void.

It is admitted that at the time of the devise by S., the legal estate & the premises in question was in her trustees for the purpose of securing her against the rights of her husband (PARK, J.).—*DOE d. STEVENS v. SCOTT* (1828), 4 Bing. 505; 1 Moo. & P. 317; 6 L. J. O. S. C. P. 84; 130 E. R. 862.

**1614. —.]**—Testatrix devised estates to N. in fee, in trust to receive & apply the proceeds to the use of S., the sister of testatrix, for her life, & from & immediately after the decease of S., to convey the same to such uses as S. should by deed or will appoint. There was no devise over. S. died in the lifetime of testatrix:—*Held*: the estate devised to N. did not lapse by reason of S.'s death, but vested in N. at the death of testatrix. The estate so vested in N. was an absolute legal fee.

A devise like the present, to a trustee to receive the rents & profits, & pay them over to a married woman for her separate use, & afterwards to convey them as she shall direct, vests the legal

estate in the trustee. . . . I admit that, for a great number of years past, the ct. have held that trustees take that quantity of interest which the purposes of the trust require, & the question is not whether the maker of the instrument has used words of limitation or expressions adequate to convey an inheritance, but whether the exigencies of the trust require a fee or can be satisfied by a less estate (*per CUR.*).—*DOE d. SHELLEY v. EDLIN* (1836), 4 Ad. & El. 582; 5 L. J. K. B. 137; 111 E. R. 906.

*Annotations*:—*Apld. Doe d. Cadogan v. Ewart* (1838), 7 Ad. & El. 636. *Consd. Doe d. Davies v. Davies* (1841), 1 Q. B. 430. *Refd. Ackland v. Pring* (1841), 2 Man. & G. 937.

**1615. —.]**—Testator, by his will, directed his trustees to pay & discharge his debts, etc., & subject thereto gave & devised a freehold messuage, etc., to them, in trust to permit & suffer his wife to live & reside therein during her life free from rent, & after her decease he gave & devised the same unto his exors. & trustees, & the survivor of them, his exors. & administrators, in trust to permit & suffer his daughter to receive & take the rents thereof for & during the term of her natural life, free from the debts, control, or engagements of her then or any future husband; & after her decease he gave & devised the same unto his exors. & trustees, etc., upon trust to pay & apply the rents thereof to & for the use & benefit of his grandson M., the eldest son of his daughter, in the event of his not having attained the age of twenty-one at the time of her decease, & from & immediately after his attaining that age he gave & devised the same unto M. for & during the term of his natural life. Then, after certain contingent devises to the trustees which never took effect, he devised & bequeathed the residue of his property unto & between his wife & his daughter "in equal shares & proportions, share & share alike, the share of my daughter also independent of the debts, control or engagements of her present or any future husband in manner aforesaid:—*Held*: the co-heirs of testator's daughter took a legal estate under the residuary devise.

We think, however, that the words "in manner aforesaid" are satisfied by supposing that testator intended to give her the residue, as well as the particular estate, to her separate use; & that they cannot have the effect of giving the estate, by implication, to the trustees. If they could, still the estate to them would only be co-extensive with the object to be attained, viz. the protection of her interest during her life. It would, therefore, determine on her death, & the co-heirs-at-law would still take the legal estate (CRESSWELL, J.).—*DOE d. MÜLLER v. CLARIDGE* (1848), 6 C. B. 641; 18 L. J. C. P. 105; 12 L. T. O. S. 400; 13 Jur. 173; 136 E. R. 1399.

**1616. —.]**—Testator devised real estate unto & to the use of three trustees, their heirs & assigns, upon trust, to pay the rents to a married woman, for her separate use for her life, & after her death, in trust for all her children, who, being sons, should attain twenty-one, or being daughters should attain that age or marry, & their heirs & assigns for ever:—*Held*: the trustees took the whole legal fee.

My opinion is that, although there is authority, & quite as much principle as authority, for saying that a devise unto & to the use of trustees & their heirs, without any restrictive words, may, by the context, be restricted to an estate *pur autre vie*, yet that mode of interpretation cannot be here adopted (KNIGHT-BRUCE, V.-C.).—*RILEY v. GAR-*

1618 Il. — — — — — } — CRAWFORD v.  
LUNAY (1876), 23 Gr. 244. — CAN.

equal shares, if more than one, & to their respective heirs & assigns, with remainders over. After making other specific devises & bequests, Testator devised & bequeathed the residue of his estate & effects, subject to & charged with the payment of his debts, to one of his trustees absolutely, for his own use & benefit. The daughter D. survived testator, & she afterwards married & had three children, but she died before any of them had attained twenty-one:—*Held*: by reason of the direction that testator's debts should be paid, the trustees took the whole legal estate in fee simple in the specifically devised estate.—*MARSHALL v. GINGELL* (1882), 21 Ch. D. 790; 51 L. J. Ch. 818; 47 L. T. 159; 31 W. R. 63.

*Annotations*:—*Apld. Re Brooke, Brooke v. Brooke*, [1894] 1 Ch. 43. *Reid. Re Bourne, Rymer v. Harpley* (1887), 35 W. R. 359; *Re Lashmar, Moody v. Penfold*, [1891] 1 Ch. 258. *Mentd. Blackman v. Fysh* (1891), 60 L. J. Ch. 666.

1627. ———.—]—Testatrix, who died in 1875, after directing her debts to be paid by her exors. thereafter named, specially devised a freehold messuage to her sons H. & W. & their heirs, upon trust to allow H. to use & enjoy same for his life, & after his decease upon trust for all & every one or more of the children of H. as he should by deed or will appoint, & in default of appointment in trust for all & every one or more of the children of H. who being sons should attain twenty-one, or being daughters should attain that age or marry, & appointed her said sons H. & W. her exors. H. having died in 1892, without having exercised the power of appointment, leaving two children, infants & unmarried, the question arose whether the remainder to the children was a legal contingent remainder which had failed for want of a freehold to support it, or whether the legal estate in fee was vested in the devisees & exors.:—*Held*: the direction to pay debts was sufficient to show that testatrix did not mean to avail herself of the machinery of Statute of Uses in the specific devise to her sons & their heirs, or to make them mere conduit pipes of the legal estate, but she intended that the legal estate should pass to, & not through, them "in trust" according to the modern signification of the term.—*Re BROOKE, BROOKE v. BROOKE*, [1894] 1 Ch. 43; 63 L. J. Ch. 159; 70 L. T. 71; 42 W. R. 186; 10 T. L. R. 64; 38 Sol. Jo. 42; 8 R. 24.

1628. ———.—]—*Re ADAMS & PERRY'S CONTRACT No. 1886, post.*

1629. ———.—]—*Charge—Debts.*—A. devised thus, "As to my real & personal estate, subject to my debts & funeral expenses, I give & devise same as follows, viz. my real estates, & also my personal estate, unto J. & O. & their heirs on the following trusts, viz. to the intent that they dispose of my personal estate in discharge of my debts, funeral expenses, & such legacies as I may direct & as to my real estates, subject to my debts & such charges as I may make, I give & devise the same to R. for life:—*Held*: under this devise the legal estate in the realty vested in R. for his life, & J. & O. took no estate therein.—*KENRICK v. BEAUCLERCK* (LORD W.) (1802), 3 Bos. & P. 175; 127 E. R. 96. *Annotations*:—*Distd. White v. Parker* (1835), 1 Bing. N. C. 573. *Consd. Doe d. Cadogan v. Ewart* (1838), 7 Ad. & El. 636. *Reid. Marshall v. Gingle* (1852), 21 Ch. D. 790.

1630. ———.—]—*WALTON v. SHALCROSS* (1853), 21 L. T. O. S. 154.

1631. ———.—]—*Re ADAMS & PERRY'S CONTRACT, No. 1886, post.*

1632. ———.—]—*Jointure.*—Testator devised certain lands, part mortgaged in fee, & part unincumbered, to trustees & their heirs, to pay debts in aid of the personal estate, & devised the surplus, & all his other lands, etc., to his first & other sons successively for life, with successive remainders to trustees & their heirs, to preserve subsequent estates during the lives of the several tenants for life, with several remainders successively to the first & other sons of the bodies of testator's several sons, in tail male, with like remainders to his daughter for life, to trustees, etc. & to her first & other sons successively in tail male: with a proviso that each of testator's sons, as he came into possession, might from time to time grant or appoint all or any part of the lands whereof he should be so seised & possessed, to trustees, on trust by the rents & profits to pay a jointure to any wife, etc. for the term of each such wife's natural life only. There were also powers by deeds to charge the lands with younger children's portions, & to lease for twenty-one years. While the mtges. remained outstanding, & the trusts for payment of debts unperformed, the eldest son, by deed, reciting the will & power, conveyed lands to trustees & their heirs, on trust by the rents & profits to raise & pay a jointure to his wife, during her natural life only; & charged the lands with portions for younger children, if any; which deed also contained a covenant for quiet enjoyment against the settlor & testator, during the wife's life:—*Held*: by such deed the trustees of the jointure took no legal estate.—*WYKHAM v. WYKHAM* (1810), 3 Taunt. 316; 128 E. R. 126; *subsequent proceedings* (1811), 18 Ves. 395, L. C.

(c) *Trust to Convey.*

1633. *Trustee takes legal estate.*—Devise to trustees, their heirs & assigns for ever, upon trust to pay the rents to a married woman for her life, notwithstanding her coverture; & after her decease to convey to the use of such persons as she should appoint:—*Held*: this passed the whole legal estate in fee to the trustees.—*DOE d. BOOTH v. FIELD* (1831), 2 B. & Ad. 564; 9 L. J. O. S. K. B. 274; 109 E. R. 1252.

1634. ———.—]—*VAN GRUTTEN v. FOXWELL, FOXWELL v. VAN GRUTTEN*, No. 1704, *post.*

1635. ———.—]—*Postponement of estate where previous trust—Trust to permit beneficiary to take rents & profits.*—*DOE d. NOBLE v. BOLTON*, No. 1592, *ante.*

(f) *Power of Sale, etc.*

1636. *Whether trustees take legal estate—Power of sale.*—Part of the trust is to sell the whole or a sufficient part for the payment of debts & legacies which would carry a fee by construction (LORD HARDWICKE, C.).—*BAGSHAW v. SPENCER* (1748), as reported in 1 Ves. Sen. 142; 27 E. R. 944, L. C.

*Annotations*:—*Mentd. Excl. v. Wallace* (1751), 2 Ves. Sen. 318; *Theobridge v. Kilburne* (1751), 2 Ves. Sen. 233; *Garth v. Baldwin* (1755), 2 Ves. Sen. 646; *Sayer v. Masterman* (1757), Wilm. 386; *Wright v. Pearson* (1758), Amb. 358; *King v. Burchell* (1759), 1 Eden, 424; *Doe d. Long v. Laming* (1760), 2 Burr. 1100; *Le Roussau v. Rede* (1761), 2 Eden, 1; *Rooke v. Rooke* (1761), 2 Eden, 8; *Strong v. Teatt* (1769), 2 Burr. 912; *Hodgson v. Ambrose* (1780), 1 Doug. K. B. 337; *Jonos v. Morgan* (1783), 1

PART II. SECT. 8, SUB-SECT. 1.—  
C. (e).

1633 i. *Trustee takes legal estate.*—A devise to trustees to convey gives a fee simple in joint tenancy without words of inheritance.—*DOE d. BERKINGER v. HISCOTT* (1839), 4 Ont. Dig. 7645.—CAN.

1633 ii. ———.—]—*Re ROMANES & SMITH* (1880), 8 P. R. 323.—CAN.

PART II. SECT. 8, SUB-SECT. 1.—  
C. (f).

1636 i. *Whether trustees take legal estate—Power of sale.*—*PATULO v. BOYINGTON* (1854), 4 C. P. 125.—CAN.

1636 ii. ———.—]—*YOUNG v. ELLOTT* (1864), 23 U. C. R. 420.—CAN.

1636 iii. ———.—]—A devise of land in trust for the purpose of selling the lands passes the legal estate & the beneficiaries take an equitable interest.—*TOOMEY v. BHUPENDRA NATH BOSH* (1928), 1 L. R. 7 Pat. 520.—IND.



**Sect. 8.—Tenure and transmission of trust property :**  
**Sub-sect. 1, C. (f), & D. (a) i.]**

Bro. C. C. 206; Thong v. Bedford (1783), 1 Bro. C. O. 313; Goodright v. Herring (1785), 4 Doug. K. B. 298; Phillips v. Brydes (1796), 3 Ves. 120; Harton v. Harton (1798), 7 Term Rep. 652; Goodtitle v. Herring (1801), 1 East, 264; Kenrick v. Beauchere (1802), 3 Bos. & P. 175; Roe d. Thong v. Bedford (1813), 4 M. & S. 362; Jervoise v. Northumberland (1820), 1 Jac. & W. 559; Huntington v. Cannon (1853), 12 C. B. 18; Scarsdale v. Curzon (1860), 1 John. & H. 40; *Re Brooke*, Brooke v. Dickson, [1923] 2 Ch. 265.

**1637.** ———.]—One devised a rentcharge to his wife for life together with the interest in £1,200; & after her decease devised the rentcharge to trustees & their heirs to sell & dispose of same & distribute the purchase-money amongst certain persons; & after giving a few small legacies directed his household goods, etc., to be sold; & the money arising from the sale of the rentcharge & from his household goods, etc., & from all other his estate & effects of what nature or kind soever & whosoever, he directed should be first liable to the payment of legacies, & the residue to be divided into certain parts which he bequeathed to certain persons; with a proviso that the receipt of the trustees to a purchaser of the rentcharge should be sufficient without seeing to the application of the purchase-money; & then he appointed the trustees & his wife his exors. —*Held*: the trustees did not take the legal estate in the real property of the deviser.

A power of sale does not of itself give the legal property. Where a man directs his exors. to sell, till sale the land descends to the heir-at-law (LAWRENCE, J.).—HILTON v. KENWORTHY (1803), 3 East, 553; 102 E. R. 708.

**1638.** ———.]—(1) Testator, by his will, dated July 26, 1825, devised as follows:—"I give & devise unto my wife E., to W. & J., their heirs, exors., & administrators, all my real & personal estates whatsoever, upon trust to pay the rents, interest, & produce thereof unto my wife during her lifetime, & after her decease to pay & apply the rents, issues, & profits thereof for & towards the maintenance of my children during their lives, with benefit of survivorship; & after their several deceases, I give & devise the share of her so dying unto her children & unto his or their heirs, as tenants in common. I give, direct, ordain, & appoint unto my wife E., to W. & J., their heirs, exors., & administrators, power & authority to sell, dispose of, mortgage, lease & otherwise in all manners manage my estate, both real & personal, as if I were living. I appoint my wife E., & W. & J., the exors. of this my will, & also guardians of my children." Testator died in 1825, leaving his widow E., one of plffs., & three infant daughters unmarried, the youngest of whom died in 1844; & the eldest in 1832 married, & had several children living at the date of the hereinafter-mentioned contract of sale. J. never acted under the will, & in 1833, executed a deed disclaiming all interest under the will. The other party, W., died in 1840. In 1845, E., testator's widow, entered into a contract to sell certain land of which testator was seised in fee simple at the time of his death. In an action by E. against the vendee for the recovery of the purchase-money:—*Held*: she took an estate in fee simple in the land in question.

(2) The general rule is, that where an estate is given to trustees, all the trusts which they are to perform must, *primâ facie* at least, be performed by them by virtue & in respect of the estate vested in them (PARKE, J.).—WATSON v. PEARSON (1848), 2 Exch. 581; 18 L. J. Ex. 46; 12 L. T. O. S. 65; 164 E. R. 623.

**Annotations:**—*As to* (1) *Reid*. Doe d. Blagrove v. Stephens (1860), 15 L. T. O. S. 541; Pitt v. Daore (1876), 3 Ch. D.

295. *As to* (2) *Consol. Blagrove v. Blagrove* (1840), 4 Exch. 550; Baker v. White (1875), L. R. 20 Eq. 166. *Reid*. Smith v. Smith (1861), 11 C. B. N. S. 121. *Generally*, *Reid*. Poad v. Watson (1855), 6 E. & B. 608.

**1639.** ———.]—A will contained the following words—viz.: "as it may probably happen that the arrangements made by this will cannot be carried into effect without a sale of the whole or at least a great portion of my real & personal estates, I recommend great caution in the sale thereof, for I believe that my landed property is daily increasing in value," followed by a nomination of exors. & trustees, "for duly carrying the disposition of all the property, thereby given or alluded to, into effect":—*Held*: this was not sufficient to divest a legal estate previously devised to children & to vest it in the trustees.—LONDON & SOUTH WESTERN RY. CO. v. BRIDGER (1864), 4 New Rep. 261; 10 L. T. 689; 10 Jur. N. S. 650; 12 W. R. 948.

**1640.** ———.]—Testator, without expressly devising his real estate, empowered his trustees & exors. to manage & to sell & invest the proceeds. He directed them, under the management of his wife, to carry on his farm for the maintenance of his family, & subject to that trust directed his real & personal estate to be held on trust for his children equally, some of whom were to bring into hotchpot property of their own:—*Held*: the trustees had the legal estate in the realty, on the death of the wife, though the children were all of age, could sell & convey.—COOKE v. SIMPSON (1877), 46 L. J. Ch. 463.

**1641.** ——— **Construction of private Act.**—J. devised lands by will to trustees. The will contained no power of sale. In 1873 a private Act of Parliament was passed, reciting that it was desirable that the lands should be sold, & enacting "from & after the passing of this Act the legal estate in the lands and hereditaments devised by the will of J. shall, for the purposes of this Act, vest in W., J., & R." The Act went on to give the trustees power to sell all or any part of the lands:—*Held*: the legal estate was vested in the trustees for all purposes.—UNDERWOOD v. PENNINGTON (1877), 37 L. T. 320, P. C.

**1642.** ——— **Power of leasing.**—Devise to trustees, their heirs, exors., administrators, & assigns, in trust, to let the freehold estates for any term they thought proper, at the best improved yearly rent, to pay one-third of the rents of the freehold estates to his wife for life, & one-third of the personalty to her absolutely, & then to lay out the other two-thirds of the personalty in the funds; & to pay the dividends & the rents of two-thirds of the freehold estates, & after the death of the wife, the other third of the rent of the freehold estate to his daughter for her own separate use, & after her death the freehold estates & two-thirds of the personal estate to the daughter's children, to be equally divided amongst them, & to be paid them at the respective ages of twenty-one years; & if his daughter died without leaving issue, then his freehold estates to his wife for life, & after her death to his heir at law, as if he had died intestate:—*Held*: the trustees took an estate in fee.

If these leases were to be made out of their estate, they must have the fee (ABBOTT, J.).—DOE d. TOMKYNs v. WILLAN (1818), 2 B. & Ald. 84; 106 E. R. 298.

**Annotations:**—*Apud*. Houston v. Hughes (1827), 6 B. & C. 403. *Fold*. Doe d. Keen v. Walbank (1831), 2 B. & C. 554. *Distd.* Ackland v. Lutley (1839), 9 Ad. & El. 879; Doe d. Kimber v. Cafe (1852), 7 Exch. 675. *Apud*. Collier v. Walters (1873), L. R. 17 Eq. 252. *Reid*. Ackland v. Pring (1841), 2 Man. & G. 937; Baker v. White (1875), L. R. 20 Eq. 166; Cunliffe v. Brancker (1876), 3 Ch. D. 393.



**1643.** ———.]—Testator devised to trustees & their heirs, certain premises described in his will, upon trust to permit his daughter to enjoy the same, & take the rents during her life exclusively of her husband; & from & after her decease, upon trust to the use of such child or children, & for such estate as she, notwithstanding her coverture, should by any deed or will appoint; & for want of such appointment, then to the use of the heirs of her body; & for default of such issue, to his own right heirs for ever. Then, after devising several other lands to the trustees in the like terms, he concluded thus: "I hereby will, etc., that the trustees, & each of them, shall, may & do, in every respect give receipts, pay money, & demise the aforesaid premises, or any part thereof, as shall be consistent with their duty & trust, or otherwise."—*Held*: the trustees took a fee simple in the lands devised to them.

If leases made in pursuance of this direction would take effect out of the estate of the trustees, they must take the fee (LORD TENTERDEN, C.J.).—DOE d. KEEN v. WALBANK (1831), 2 B. & Ad. 554; 9 L. J. O. S. K. B. 276; 109 E. R. 1248.

*Annotations*:—*Reid*, Auckland v. Pring (1811), 2 Man. & G. 937; Doe d. Kimber v. Cafe (1852), 7 Exch. 675; Collier v. Walters (1873), L. R. 17 Eq. 252.

**1644.** ——— Power of management.]—COOKE v. SIMPSON, No. 1640, *ante*.

**1645.** ——— Trustees having several powers—Only one requiring legal estate.]—Testator devised four estates, three of which he settled to uses in strict settlement under which an infant was now tenant in tail of the C. estate. The fourth estate he limited to trustees for a term of one thousand years upon trust out of the rents & profits to discharge the incumbrances upon all the estates in a certain order, & subject thereto he settled the estate to the uses of the two estates other than the C. estate. The will contained a provision as to each estate that if any person who, if the provision had not been inserted therein, would for the time being be entitled to the possession or receipt of the rents & profits of such estate as tenant for life or in tail should be under the age of twenty-one years, then & in such case & as often as same should happen the trustees of the will should enter into possession or receipt of the rents & profits of the estate, & should during the minority of such person keep up the mansion house & manage the property with power (*inter alia*) to hold manorial cts. & accept surrenders of leases; & should maintain the infant, & apply the surplus rents & profits in the same way as those of the fourth estate. Upon an originating summons to determine the validity of the minority clause:—*Held*: there was no necessity for implying any estate at all in the trustees for that without any such estate they could enter & take possession & exercise the powers entrusted to them, & the mere inclusion in those powers of one, that of holding manorial cts., which could not be exercised without their having the legal estate did not operate so as to change the whole character of the settlement. At most it was only a power, & not a trust, to do something which the law would not allow. The minority clause was therefore valid.—*Re* STAMFORD & WARRINGTON (EARL), PAYNE v. GREY, [1912] 1 Ch. 343; 81 L. J. Ch. 302; 105 L. T. 913; 28 T. L. R. 159; 50 Sol. Jo. 204, C. A.

#### D. Extent of Estate.

##### (a) What May be Considered.

##### 1. Terms of Limitation.

**1646.** Indefinite devise to trustees followed by gift over—Estate of trustees limited to life of first

beneficiary.]—DOE d. WOODCOCK v. BARTHROP, No. 1666, *post*.

**1647.** ———.]—To trespass for breaking & entering *pltf.*'s close, *def.* pleaded, (a) the user of a right of way for twenty years; (b) a user of the way for forty years. Replication to the former plea, that the *corp.* of L., being seised in fee of the *locus in quo*, by indenture of feoffment demised it to H. for three lives & twenty-one years; that the *corp.* delivered seisin to H., who became & was seised of the close during the period of twenty years in the plea mentioned, & the term so demised was existing in full force, & not expired, surrendered, or otherwise become void. The replication to the other plea stated, in similar terms, the demise of the *locus in quo* by the *corp.* of L. to H., & then alleged that H., being so seised of the *locus in quo*, by indenture between C. of the first part, H. of the second part, & M. & W. of the third part, granted to M. & W. a right of way over the *locus in quo*, Rejoinder to replication to first plea, that the term so demised was not existing during the period of twenty years in that plea mentioned, *modo et formd.* Rejoinder to replication to second plea, that H. did not grant to M. & W. the right of way, *modo et formd.* At the trial, it appeared that the *corp.* of L., being seised in fee of the *locus in quo*, by indenture of Feb. 17, 1800, demised it to H. for three lives & twenty-one years. By indenture of July 23, 1803, after reciting the above indenture, H. assigned to C. the demised premises for securing payment of £1,200, lent by C. to H. By indenture of Feb. 9, 1804, after reciting the demise to H. by the *corp.*, the assignment by H. to C., & also reciting that H. had agreed to sell part of the land to M. & W. for a sum out of which the sum due from H. should be paid to C.; C., at the request of H., bargained, sold, assigned, & transferred, & H. granted, bargained, sold, assigned, & transferred to M. & W. part of the demised premises, together with the right of way in question. In 1812, H. died, having made his will, whereby, after bequeathing his estates to his wife for life, he devised the same, after her death, to J. & M., in manner following, "upon trust to pay & apply the rents, issues, & profits of the same to & for the life & benefit of my daughter M., & her assigns, during her life, & independent of her present or any future husband; & from & after the decease of my daughter, I give, devise, & bequeath my real & leasehold estates as aforesaid unto & equally among all & every the children of my daughter M., share & share alike, as tenants in common; & if M. shall die without leaving lawful issue her surviving, then I give, etc., the same to my granddaughter A." In 1816 the wife of H. died, & by indenture of Dec. 11, 1817, the *corp.* of L. assigned to the trustees the reversion in fee simple of the *locus in quo*:—*Held*: *pltf.* was entitled to a verdict on the rejoinder to the replication to the first plea, since the trustees under the will of H. took only an estate during the life of testator's daughter, & therefore the lease for lives did not merge in the grant of the reversion.

The gift over is by words as strong as those by which the property is given to the trustees. It is as if testator had said, "I direct that the estates of the trustees shall cease on the death of M., & I then give the corpus of the property to my children" (PARKE, B.).—COOKE v. BLAKE (1847), 1 Exch. 220; 17 L. J. Ex. 370; 9 L. T. O. S. 357; 154 E. R. 93.

*Annotations*:—*Reid*, R. v. Dendy (1853), 1 E. & B. 829; Phelps v. Prew (1854), 18 Jur. 245. *Mend.* Wills v. Murray (1860), 4 Exch. 843; Buchanan v. Kinning (1851), 2 L. M. & P. 526; Platt v. Elze (1853), 8 Exch. 364.

**1648.** ———.]—(1) What was to happen

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where testator made a gift in this form :—" I give to A. upon trust to pay to or permit C. to receive the rents ? " . . . there is an old decision, which has always been recognised as good law—*Doe d. Leicester v. Biggs*, No. 1584, *ante*—which has decided that under a will so framed the legal estate passes, not to the trustee, but to the person who takes the life interest (JESSEL, M.R.).

(2) It being admitted that where law is given to a trustee upon trust to pay the rents over to anybody, the trustee must take the legal estate, because otherwise he could not pay at all, as he could not receive the rents (JESSEL, M.R.).

(3) Where there is an indefinite devise to trustees & their heirs upon trust to pay or allow somebody to receive the rents during life, followed either by a simple remainder to another person in fee simple, or in fee tail, or as another person shall appoint, but giving an absolute interest; or followed by a new devise to a person in fee simple, or in fee tail, or giving an absolute interest—in either of those cases the estate of the trustees by implication is to be limited to the life of the person who takes the first life interest (JESSEL, M.R.).—*BAKER v. WHITE* (1875), L. R. 20 Eq. 166; 44 L. J. Ch. 651; 33 L. T. 347; 25 W. R. 670.

**Annotations :—***Apld. Allen v. Bewsey* (1877), 7 Ch. D. 453. *Consd. Re Townsend's Contract*, [1895] 1 Ch. 716; *Re Brooke, Brooke v. Dickson*, [1923] 2 Ch. 265. *Reid. Re Allsop & Joy's Contract* (1889), 61 L. T. 213; *Re Brooke, Brooke v. Brooke*, [1894] 1 Ch. 43.

**ii. Intention of Settlor.**

**1649. General rule—Estate dependent on intention of settlor.]**—Whereafter a devise to one for life devisor limited the estate to trustees & their heirs in trust to preserve, contingent remainders, & to permit the tenant for life to take the profits with remainder over on his decease; & he afterwards gave other estates for lives with several remainders over, & after each estate for life he interposed the same estate to trustees & their heirs :—*Held* : this showed his intent to be, that the estates to the trustees should be confined to the lives of the several tenants for lives, & consequently those in remainder took legal estates, there being no other circumstances in the will to show a contrary intent.

We are to collect this the devisor's intention from the whole will (LORD KENYON).—*DOE d. COMPERE v. HICKS* (1797), 7 Term Rep. 433; 101 E. R. 1061.

**Annotations :—***Reid. Curtis v. Price* (1805), 12 Ves. 89; *Doe d. Leach v. Micklethorn* (1805), 6 East, 486; *Hughes v. Thomas* (1811), 13 East, 474; *Wykham v. Wykham* (1811), 18 Ves. 395; *Colmore v. Gregoe* (1828), 2 Y. & J. 605; *Losh v. Townley* (1834), *Coop. temp. Brough*. 372; *Lewis v. Rees* (1856), 3 K. & J. 132.

**1650. ———.]**—Under a devise to testator's widow of "£200 *per annum* for life in addition to her jointure," which jointure it appeared was secured by a term out of his real estates, "his debts being previously paid; & to his younger children £8,000 each, to be paid respectively at twenty-one"; after which testator "appointed A., B. & C. as trustees of inheritance for the execution thereof" :—*Held* : the trustees thereby took a fee in the testator's lands.—*TRENT v. HANNING* (1806), 7 East, 97; 3 Smith K. B. 69; 103 E. R. 37.

**1651. ———.]**—Devise to trustees & their heirs, during the life of M., in trust, to lay out the rents etc., on govt. securities, to accumulate until she shall attain twenty-one, & from & after she shall attain that age, to suffer her to receive & take the rents, issues, & profits during her life, not

subject to the control of any husband with whom she may intermarry; her receipt to be a sufficient discharge for the same; & from & after the decease of M., to the heirs of M. for ever :—*Semble* : the legal estate is vested in the trustees during the life of M.—*PLAYFORD v. HOARE* (1829), 3 Y. & J. 175; 148 E. R. 1141, Ex. Ch.

**1652. ———.]**—*BLAGRAVE v. BLAGRAVE*, No. 1875, *post*.

**1653. ———.]**—Estate, limited by deed, to trustees, their heirs, to preserve, etc., construed an estate *pur autre vie*, to effect the general intention of the deed.

An estate was limited to trustees " & their heirs," to preserve contingent remainders, & it was subsequently, & after another life estate, limited to the same trustees for five hundred years to raise portions :—*Held* : having regard to the clear intention, the estate to the trustees " & their heirs " must be controlled, & they took an estate *pur autre vie*, so as to give effect to the term of five hundred years.—*BEAUMONT v. SALISBURY (MARQUIS)* (1854), 19 Beav. 198; 3 Eq. Rep. 369; 24 L. J. Ch. 94; 24 L. T. O. S. 166; 1 Jur. N. S. 458; 52 E. R. 325.

**Annotation :—***Reid. Lewis v. Rees* (1856), 3 K. & J. 132.

**1654. ———.]**—Devise to trustees & their heirs to preserve contingent remainders, held to pass an estate during the life of the tenant for life only & not in fee.—*HADDELEY v. ADAMS* (1850), 22 Beav. 266; 25 L. J. Ch. 826; 27 L. T. O. S. 148; 2 Jur. N. S. 724; 52 E. R. 1110.

**Annotation :—***Mentl. Taaffe v. Connee* (1862), 10 H. L. Cas. 64.

**1655. ———.]**—Testator devised a moiety of his real estate to A. & B. & their heirs, to the uses & upon & for the trusts & purposes thereafter mentioned, namely, to the use of A. & B., their exors., administrators & assigns, for one hundred & twenty years, if S., the wife of J., should so long live, & subject thereto, to the use of J. for life, with remainder to A. & B. & their heirs during his life, upon trust to preserve contingent remainders, with remainder to the use of all the children of J. & S. who should be living at the decease of the survivor of them, & the issue then living of such of the children as should be then dead, & the respective heirs & assigns of such children & issue as tenants in common, the issue taking only their parent's share, with divers remainders over. The will contained a power authorising A. & B. & the survivor of them, & the heirs & assigns of such survivor, to "convey in exchange" any parts of the property, & to "convey upon partition" any of testator's undivided shares, with a direction that for those purposes it should be lawful for them by deed to revoke the uses, estates, trusts, & limitations of the property in shares so exchanged or conveyed in partition, & by the same or any other deed to "grant & convey" them to the requisite uses, "or for the purposes aforesaid to limit, appoint, or declare such use or uses," etc., as should be necessary. J. died in the lifetime of S. :—*Held* : the intention of testator clearly was to create a succession of legal limitations in settlement, & the ct. could not hold the legal fee to be in A. & B. merely because if it was not in them the contingent remainder to the children had in the events which had happened failed for want of an estate of freehold to support it.—*CUNLIFFE v. BRANCKER* (1876), 3 Ch. D. 393; 46 L. J. Ch. 128; 35 L. T. 578, C. A.

**Annotations :—***Disid. Richardson v. Harrison* (1885), 16 Q. B. D. 85. *Reid. Patching v. Barnett* (1880), 49 L. J. Ch. 665; *Tudball v. Medlicott* (1888), 36 W. R. 886; *Re Brooke, Brooke v. Brooke*, [1894] 1 Ch. 43; *Re Hollis' Hospital Trustees & Hague's Contract* (1899), 47 W. R. 691; *Re Brooke, Brooke v. Dickson*, [1923] 2 Ch. 265.

1656. ———.]—*Re HART'S ESTATE, OXFORD v. HART*, [1883] W. N. 104; 18 L. J. N. C. 111.  
*Annotation* :—*Distd. Richardson v. Harrison* (1885), 16 Q. B. D. 85.

1657. ———.]—By a will made in the year 1833 testatrix devised a freehold messuage unto trustees, their heirs & assigns, upon trust for her daughter during her life, & after her decease upon such trusts for the lawful child or children of the daughter as she should by deed or will appoint, & "in default of such appointment" in trust for the daughter's right heirs. Testatrix directed that the receipts of her daughter should be a discharge to the trustees, that the messuage should be enjoyed by her daughter free from the debts, control, or engagements, of any husband with whom she might intermarry, & that the trustees might reimburse themselves. Testatrix authorised the trustees, their heirs or assigns, also to sell the messuage with the consent of her daughter "or other the persons or person who shall be beneficially interested under the trusts." The daughter after her mother's death granted the messuage to debts, in fee simple, & died without having been married. Plff., her heir-at-law, having brought an action to recover the messuage :—*Held* : the messuage was devised to the trustees in fee simple at law, the limitation to the right heirs of the daughter in default of an appointment to her children was a remainder & not an executory devise, both the estate for life devised to the daughter & the remainder to her right heirs were equitable estates, consequently the estate for life & the remainder to the right heirs coalesced pursuant to the rule in *Shelley's Case* (1581), 1 Co. Rep. 93, the daughter could make a valid disposition of the fee simple, & debts, were entitled to the messuage.—*RICHARDSON v. HARRISON* (1885), 16 Q. B. D. 85; 55 L. J. Q. B. 58; 54 L. T. 456, C. A.

*Annotations* :—*Consd. Re Brooke & Brooke v. Dickson*, [1923] 2 Ch. 265. *Reid. Evans v. Evans*, [1892] 2 Ch. 173.

1658. ———.]—Where a settlor by deed conveys an equitable estate in fee simple to trustees without words of limitation, in order that the equitable fee simple may pass to them, it is necessary that the settlor should either refer to other words in that or some other deed which show an intention that the absolute interest is to pass to them, or that he should use words which show that the trustees are to take all the estate & interest that the settlor had.—*Re IRWIN, IRWIN v. PARKES*, [1904] 2 Ch. 752; 73 L. J. Ch. 832; 53 W. R. 200; 48 Sol. Jo. 640.

*Annotations* :—*Consd. Re Monckton's Settlement, Monckton v. Monckton*, [1913] 2 Ch. 636; *Re Nutt's Settlement, McLaughlin v. McLaughlin*, [1915] 2 Ch. 431. *Reid. Re Bostock's Settlement, Norrish v. Bostock*, [1921] 2 Ch. 469.

1659. ———.]—By a settlement made in 1908 the settlor, being then entitled for a contingent reversionary equitable estate in fee simple to freehold hereditaments & for a corresponding estate to copyhold hereditaments & investments in personality directed to be held upon the same trusts as capital money arising under Settled Land Act, 1882 (c. 38), from the freehold hereditaments granted unto a trustee, first, the freehold & copyhold hereditaments, & secondly the investments, to hold the same as to the freehold hereditaments & the investments "to the use of the trustee according to the customs of the several manors of which they are respectively held"; & it was thereby agreed that the trustee, his exors. or administrators, or other the trustee or trustees for the time being should stand possessed of the freehold hereditaments upon trust for the settlor during his life, & after his death upon such trusts in favour of his widow, children, or remoter issue,

or the respective husbands or wives of such children as he should appoint, & subject thereto, in trust for his sons and daughters in tail as therein mentioned, with an ultimate trust for the settlor, his heirs & assigns. The copyhold hereditaments were to be held on corresponding trusts, & the investments were to be applied, first, in discharging an incumbrance created by the settlor, & as to the residue, if any, in the purchase of freehold hereditaments to be assured to the trustee or trustees in fee simple upon the same trusts as were thereby declared of the freehold hereditaments thereby assured. On the death of the trustee in 1913 :—*Held* : as to the freehold & copyhold hereditaments the trustee took a life interest only, & that the trusts of the settlement came to an end on the death of the trustee; as to the investments no words of limitation appropriate to real estate were necessary to pass an absolute interest to the trustee, s. 22 (5) of Settled Land Act, 1882 (c. 38), having made no alteration in the law in this respect, & the trusts of the settlement did not come to an end on the death of the trustee.

It is perfectly clear that the intention of the settlor was to transfer his whole estate & interest in the property to the trustee to be held by him for the benefit of the beneficiaries under that settlement : & the question is whether, having regard to that intention, I can give effect to it notwithstanding the fact that in the conveyance to the trustees there are no words of limitation such as "heirs" or "in fee simple" (*SARGANT, J.*).  
*—Re MONCKTON'S SETTLEMENT, MONCKTON v. MONCKTON*, [1913] 2 Ch. 636; 83 L. J. Ch. 34; 109 L. T. 624; 57 Sol. Jo. 836.

*Annotations* :—*Consd. Re Nutt's Settlement, McLaughlin v. McLaughlin*, [1915] 2 Ch. 431; *Re Bostock's Settlement, Norrish v. Bostock*, [1921] 2 Ch. 469; *Re Dickson's S. E.*, [1921] 2 Ch. 108.

### iii. Objects of Trust.

1660. General rule.—Estate dependent on requirements of trust.]—The first question in this case is what estate the trustees took in the premises, because the devise is to them three, & the survivor & survivors of them, & no words of limitation are annexed to their estate; nor is it said to the heirs of the survivor, but it is given them "upon the trusts hereinafter-mentioned." Now if they did not take a fee, then their estate would not be sufficient to answer the trusts thereafter-mentioned, & so all such subsequent trusts would be void. But upon this point we are all of opinion that the trustees take fee simple by implication, for the intent of testator plainly appears, viz. that they should have an estate sufficient to satisfy & answer all the trusts in the will which must be an estate of inheritance (*per CUR.*).—*SHAW v. WEIGH* (1727), Fitz. G. 7; 2 Stra. 798; 8 Mod. Rep. 253, 382; Fortes Rep. 58; 94 E. R. 628; *sub nom. SHAW v. WRIGHT*, 1 Eq. Cas. Abr. 176; *on appeal, sub nom. SPARROW v. SHAW* (1729), 3 Bro. Parl. Cas. 120, H. L.

*Annotations* :—*Consd. Haysman v. Moon* (1741), 7 Mod. Rep. 430. *Reid. Bagshaw v. Spencer* (1748), 1 Ves. Sen. 142; *Gibson v. Montfort, Rogers v. Gibson* (1750), 1 Ves. Sen. 485; *Goodtitle d. Richardson v. Edmonds* (1798), 7 Term Rep. 835. *Mentd. Godolphin v. Godolphin* (1727), 1 Ves. Sen. 21; *Papillon v. Voice* (1728), Kel. W. 27, 34; *Glenorchy v. Bosville* (1733), Cas. temp. Talb. 3; *Wryd v. Lewis* (1738), 1 Atk. 432; *Strode v. Seymour* (1741), 2 Coop. temp. Cott. 536; *Ginger d. White v. White* (1742), Willes, 348; *Vaughan v. Farrer* (1751), 2 Ves. Sen. 182; *Goodtitle d. Pearson v. Otway* (1753), 2 Wils. 6; *Lethbridge v. Tracey* (1754), Amb. 220; *Southby v. Stonehouse* (1755), 2 Ves. Sen. 610; *Sayer v. Masterman* (1757), Wilm. 386; *King v. Burchell* (1759), 1 Eden, 424; *Baddeley v. Leppingwell* (1764), 3 Burr. 1533; *Murthwaite v. Jenkinson* (1823), 2 B. & C. 367.

1661. ———.]—Trustees have a fee when the purposes of the trust cannot be answered other-

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wise.—**GIBSON v. MONTFORT (LORD), ROGERS v. GIBSON** (1750), 1 Ves. Sen. 485 ; 27 E. R. 1157 ; *sub nom.* **GIBSON v. ROGERS**, Amb. 93, L. C.

*Annotations :—***Refd.** **Ackers v. Phipps** (1835), 9 Bl. N. S. 430 ; **Torre v. Browne** (1855), 5 H. L. Cas. 556 ; **Collier v. Walters** (1873), L. R. 17 Eq. 252. **Mentd.** **Heeling v. Heeling** (1774), Lofft. 604 ; **Hawkins v. Combe** (1783), 1 Bro. C. C. 335 ; **Barnes v. Crowe** (1782), 1 Ves. 436 ; **Thellusson v. Woodford** (1788), 4 Ves. 227 ; **Pigott v. Waller** (1802), 7 Ves. 98 ; **Groene v. Potter** (1843), 2 Y. & C. Ch. Cas. 517 ; **Elborne v. Goode** (1844), 14 Sim. 165 ; **Tily v. Smith** (1844), 1 Coll. 434 ; **Hodgson v. Beattie** (1863), 1 Hem. & M. 376 ; *Re* **Adams, Adams v. Adams**, [1893] 1 Ch. 329.

**1662.** ————**J**.—By deed & fine an estate was limited to the use of the husband for life, remainder to trustees & their heirs during his life to preserve contingent remainders, remainder to the wife for life, remainder to the trustees & their heirs, not saying "during her life," in trust to support the contingent uses & estates therein—after limited, remainder to the first & other sons in tail, remainder to the wife in tail, remainder in default of issue to such persons & for such estates as she should appoint, etc.:—**Held**: the trustees took a legal estate in fee after the determination of the wife's life estate, & all the subsequent limitations were trust estates.—**VENABLES v. MORRIS** (1797), 7 Term Rep. 342, 438 ; 101 E. R. 1009, 1064.

*Annotations :—***Distd.** **Doe d. Compere v. Hicks** (1797), 7 Term Rep. 433. **Consd.** **Curtis v. Price** (1805), 12 Ves. 89 ; **Wykham v. Wykham** (1811), 18 Ves. 395. **Distd.** **Doe d. Woodcock v. Barthrop** (1814), 5 Taunt. 382. **Consd.** **Lewis v. Rees** (1856), 3 K. & J. 132. **Refd.** **Doe d. Nicholson v. Welford** (1840), 12 Ad. & El. 61.

**1663.** ————**J**.—Where the purposes of a trust may be answered by giving the trustees a less estate than a fee, no greater estate shall pass to them by implication.—**DOE d. WHITE v. SIMPSON** (1804), 5 East, 102, 1 Smith, K. B. 383 ; 102 E. R. 1031.

*Annotations :—***Consd.** **Wykham v. Wykham** (1809), 11 East, 458. **Appld.** **Ackland v. Pring** (1841), 2 Man. & G. 937. **Distd.** **Doe d. Davies v. Davies** (1841), 1 Gal. & Day. 33. **Distd.** **Peard v. Watson** (1858), 25 L. J. Q. B. 396. **Distd.** **Collier v. Walters** (1873), L. R. 17 Eq. 252. **Refd.** **Doe d. Player v. Nicholls** (1823), 1 B. & C. 336 ; **Doe d. Gord v. Needs** (1836), 2 M. & W. 129 ; **Doe d. Shelley v. Edlin** (1836), 4 Ad. & El. 582 ; **Fenwick v. Potts** (1856), 8 De G. M. & G. 506. **Mentd.** *Re* **Stroud** (1849), 8 C. B. 502.

**1664.** ————**J**.—A remainder in fee by settlement to trustees, limited to the life of the tenant for life, though not so expressed ; the object of the trust terminating with that life.—**CURTIS v. PRICE** (1805), 12 Ves. 89 ; 33 E. R. 35.

*Annotations :—***Distd.** **Colmore v. Tyndall** (1828), 2 Y. & J. 605. **Appld.** **Beaumont v. Salisbury** (1854), 19 Beav. 198. **Expld.** **Lewis v. Rees** (1856), 3 K. & J. 132. **Consd.** **Cooper v. Kynock** (1872), 7 Ch. App. 398. **Refd.** **Wykham v. Wykham** (1811), 18 Ves. 395. **Mentd.** **Baker v. Sowter** (1847), 10 Beav. 843 ; **Kavanagh v. Morland** (1853), 18 Jur. 185 ; **Denman v. Jones** (1867), 16 L. T. 737 ; **Beoley v. Carter** (1869), 4 Ch. App. 230.

**1665.** ————**J**.—Devise to trustees, & their heirs, etc., for the life of the devisor's son, to support contingent remainders, in trust to permit him to receive the rents for life, & after his decease to his first & other sons in tail:—**Held**: an equitable estate in the son ; the legal estate in the trustees.

The purpose for which an estate is in terms at least given to the exors. & their heirs, being to preserve the contingent remainder after limited, the consequence is necessary, that for that purpose they must have some estate in them. This is a devise to the exors. & their heirs during the life of the eldest son upon trust to permit him to receive the rent & profits for his life : a devise of the legal estate to those trustees with a legal remainder to the first son of his body (**LORD ELDON, C.**)—

**BISCOE v. PERKINS** (1813), 1 Ves. & B. 485 ; 35 E. R. 188, L. C.

*Annotations :—***Mentd.** **Pyrke v. Waddingham** (1852), 10 Hare, 1 ; **Collard v. Sampson** (1853), 4 De G. M. & G. 224.

**1666.** ————**J**.—Devise of a copyhold to two & their heirs, in trust to permit M. to enjoy the same or to pay to, or permit & suffer her to receive the rents during her life, for her separate use ; & subject to such estate to M. to such persons, etc., as M. should by her will appoint, & in default of appointment to the right heirs of M. ; the appointee by will of M. takes a legal estate, although the trustees had never surrendered to the use of the will of M., nor had M. been admitted tenant.

It is a general rule that the legal estate in the trustees shall be carried only so far as it is necessary to effectuate the several intentions of the will. In this case the trust is sufficiently executed by limiting to the trustees a base fee determinable with the life of M. (**HEATH, J.**)—**DOE d. WOODCOCK v. BARTHROP** (1814), 5 Taunt. 382 ; 1 Marsh. 90 ; 128 E. R. 737.

*Annotations :—***Consd.** **Creaton v. Creaton** (1856), 3 Sm. & G. 386. **Appld.** **Baker v. White** (1875), L. R. 20 Eq. 166. **Consd.** **Allon v. Bewsey** (1877), 7 Ch. D. 453. **Distd.** *Re* **Townsend's Contract**, [1895] 1 Ch. 716. **Refd.** **Player v. Nicholls** (1823), 2 Dow. & Ry. K. B. 480 ; **Williams v. Waters** (1845), 14 M. & W. 166.

**1667.** ————**J**.—Where an estate is given to trustees & their heirs indefinitely, the trustees will take the fee if the purposes of the trust require that they should have the absolute property in them or that they should take it for an indefinite period of time, unless a contrary intent is manifested on the face of the will (**BAXLEY, J.**)—**HOUSTON v. HUGHES** (1827), 6 B. & C. 403 ; 9 Dow. & Ry. K. B. 464 ; 108 E. R. 500 ; *subsequent proceedings* (1828), 5 Russ. 116, L. C. ; (1831), 5 Russ. 141, H. L.

*Annotations :—***Consd.** **Baker v. White** (1875), L. R. 20 Eq. 166 ; **Cunliffe v. Branker** (1876), 3 Ch. D. 393. **Refd.** **Allen v. Bewsey** (1877), 7 Ch. D. 453 ; **Re Brooke, Brooke v. Dickson**, [1923] 1 Ch. 360.

**1668.** ————**J**.—It is not a sufficient ground for restricting an estate limited in a deed to a trustee & his heirs, to an estate for life, that the estate given to the trustee seems to be larger than was essential to its purpose, or that the limitation has been unnecessarily repeated.—**COLMORE v. TYNDALL** (1828), 2 Y. & J. 605 ; 148 E. R. 1060.

*Annotations :—***Consd.** **Beaumont v. Salisbury** (1854), 19 Beav. 198. **Appld.** **Lewis v. Rees** (1856), 3 K. & J. 132.

**1669.** ————**J**.—**DOE d. SHELLEY v. EDLIN**, No. 1614, *ante*.

**1670.** ————**J**.—**BARKER v. GREENWOOD**, No. 1586, *ante*.

**1671.** ————**J**.—We are of opinion that, in order to carry into effect the trusts of this will, it was not necessary that the trustees should take more than a chattel interest (**TINDAL, C.J.**)—**ACKLAND v. PRING** (1841), 2 Man. & G. 937 ; 3 Scott, N. R. 297 ; **Drinkwater**, 189 ; 10 L. J. C. P. 231 ; 133 E. R. 1024.

**1672.** ————**J**.—Lands were devised, before Wills Act, 1837 (c. 26), to L. & his heirs, in trust to permit & suffer A. to take the rents & profits during A.'s life, "with this proviso, to pay" W., out of same, an annuity for her life, & if A. died before W. to permit W. to enjoy the lands for her life ; & after the deaths of A. & W., devisor gave & devised the lands to the heirs male of A., remainder over.

A. & W. both survived the devisor. A. survived W. :—**Held**: assuming L. to have had a legal estate during W.'s life, A. was legal tenant in tail male after W.'s death.—**ADAMS v. ADAMS** (1845), 6 Q. B. 860 ; 14 L. J. Q. B. 171 ; 4 L. T. O. S. 395 ; 9 Jur. 300 ; 115 E. R. 324.

1673. ———.]—Testator has imposed on his trustees a great variety of duties, which required for their performance the whole legal estate. I am of opinion that they took the legal estate & the fee (LORD LANGDALE, M.R.).—**REYNELL v. REYNELL** (1840), 10 Beav. 21; 50 E. R. 489.

1674. ———.]—**WATSON v. PEARSON**, No. 1638, *ante*.

1675. ———.]—Testator devised as follows: I give to B. & S., their heirs, exors., etc., my freehold estates at R., & I give full power & authority to B. & S. & their heirs, to accept surrenders of all present & future leases & grant new leases. I give to B. & S. all my other real estate, in trust, out of the rents & profits thereof, to pay my wife the jointure of £700 settled by me on her; & also to pay out of the rents & profits of my freehold estate unto F. during her life, an annuity of £100; & thereout also to pay C., during the joint lives of her & F. an annuity of £400; & after the decease of F. if C. should survive her to pay C. an annuity of £400; & after the decease of C. in case she shall have only one child then in trust to pay out of the rents & profits of my estates, the yearly sum of £200 for the maintenance of such child, until he or she shall attain the age of twenty-five years, & after that, in trust to raise the sum of £1,000 to pay to him or her at that age; & my will is, that so much as my residuary personal estate shall fall short of paying my debts & legacies hereby given, shall be by my trustees raised & paid out of the rents & profits of my several estates, & by mtgo. of all or any part thereof; & after payment of the interest of the money so to be part borrowed & the expenses of keeping my estates in repair, & all such costs as my trustees shall expend by means of the trusts, in trust to pay out of the overplus rents & profits thereof, £60 yearly, for the maintenance of the eldest son of B., until he shall have attained the age of twenty-three years; & I hereby give full power to my trustees, & I do order & direct that they shall settle a jointure on any woman such eldest son shall marry, of £60 *per annum*; & in trust to apply the overplus rents & profits of my estates in paying off the money so to be borrowed on mtgo.; & after payment thereof, to pay the rents & profits of my estates to B. during his life, to his own use; & after his decease, then my trustees shall stand seised of my real estates to, for, & upon the uses following (that is to say): to the use of J., the eldest son of B. during his life, & after the determination of that estate, to the use of M. & his heirs during the life of J. upon trust to preserve contingent remainders; & after his decease to the use of the first son of J. & the heirs male of his body; & in default of such issue to the use of the second, third, fourth, & all other sons of J. successively in remainder, & the several heirs male of the bodies of such sons. There were similar limitations over in default of issue, each life estate being followed by a gift to trustees to support contingent remainders:—**Held**: the trustees took an estate in fee simple.

Those cases, however, in which it is laid down that the cts. look solely to the trusts to be performed, even where there are words of inheritance, must be read with this qualification that due effect is to be given to the language of the will, unless we can collect from the contest an intention to give a more limited estate (PARKE, B.).—**BLAGRAVE v. BLAGRAVE** (1849), 4 Exch. 550; 19 L. J. Ex. 414; 154 E. R. 1332; *previous proceedings* (1847), 1 De G. & Sm. 252.

*Annotations*:—**Apprd.** Doe d. Blagrove v. Stephens (1850), 15 L. T. O. S. 541. **Refd.** Doe d. Jones v. Hughes (1851), 8 Exch. 223; **Powys v. Blagrove** (1854), 2 Eq. Rep. 395; **Poad v. Watson** (1855), 25 L. T. O. S. 142; **Haddesley v.**

**Adams** (1856), 22 Beav. 266; **Lewis v. Rees** (1856), 5 W. R. 96; **Smith v. Smith** (1861), 11 C. B. N. S. 121; **Spence v. Spence** (1862), 12 C. B. N. S. 199; **Baker v. White** (1875), L. R. 20 Eq. 166.

1676. ———.]—(1) A will devising real estate to a trustee in language which in some of the limitations would vest the legal fee in the trustee, & in others in the beneficial devisee, & containing a power to sell was held, the intention being manifest, to contain words large enough to vest the legal fee in the trustee.

(2) Devisee of a trustee cannot relieve himself from breach of trust by alleging that he did not act as trustee.

If a party takes on himself to act as trustee, & to sell a trust estate & receives the purchase-money it will not do for that party, whether the purchase-money remains in his pocket or he hands it over to somebody else, under circumstances that leave him liable to say "I do not think that, under the circumstances I was strictly speaking a trustee; somebody else was, & therefore you, the party who is *cestui que trust* cannot call on me for the payment of the purchase-money" (LORD COTTENHAM, C.).—**RACKHAM v. SIDDALL** (1849), 1 Mac. & G. 607; 2 H. & Tw. 44; 16 L. T. O. S. 21; 41 E. R. 1400, L. C.

*Annotations*:—**As to** (1) **Distd.** Cunliffe v. Branker (1870), 3 Ch. D. 393. **As to** (2) **Consd.** Lyell v. Kennedy, Kennedy v. Lyell (1889), 14 App. Cas. 437. **Refd.** Life Assoon. of Scotland v. Siddall, Cooper v. Greene (1861), 3 De G. F. & J. 58. **Generally.** **Mentd.** Hope v. Liddell (No. 1), Liddell v. Norton (1855), 21 Beav. 183; **Itc** Dunning, Hathorley v. Dunning (1885), 54 L. J. Ch. 900.

1677. ———.]—A direct devise, however, may by the context be shown not to give the legal estate to the devisee named, & the legal estate may, if the purposes of the will require it, continue in the trustees (POLLOCK, C.B.).—**DOE d. KIMBER v. CAFE** (1852), 7 Exch. 675; 21 L. J. Ex. 210; 19 L. T. O. S. 144; 155 E. R. 1119.

*Annotations*:—**Apld.** Smith v. Smith (1861), 11 C. B. N. S. 121. **Refd.** Poad v. Watson (1855), 25 L. T. O. S. 142; **Collier v. M'Bean** (1865), 34 Beav. 426; **Collier v. Walters** (1873), L. R. 17 Eq. 252; **Maden v. Taylor** (1876), 45 L. J. Ch. 569.

1678. ———.]—A devise to trustees & their heirs:—**Held**: to confer an estate co-extensive only with the trusts they had to perform.—**WARD v. BURBURY** (1854), 18 Beav. 190; 52 E. R. 75. *Annotation*:—**Refd.** Collier v. Walters (1873), L. R. 17 Eq. 252.

1679. ———.]—Limitation in a deed to trustees " & their heirs," without words restricting it to the lives of preceding tenants for life, upon trust to preserve contingent remainders:—**Held**: although the omission of such words was probably an oversight, yet, the instrument being a deed, the ct. could not construe the limitation as restricted, notwithstanding an estate in fee was a larger estate than was required for the purposes of the trust.

To justify the ct. in restricting such a limitation by deed to an estate *pur autre vie*, it must be shown that the intention of the parties, as manifested by the deed, cannot be carried into effect, unless the limitation be so restricted.—**LEWIS v. REES** (1856), 3 K. & J. 132; 26 L. J. Ch. 101; 28 L. T. O. S. 229; 3 Jur. N. S. 12; 5 W. R. 96; 69 E. R. 1052. *Annotation*:—**Refd.** Cooper v. Kynock (1872), 7 Ch. App. 398.

1680. ———.]—**CREATON v. CREATON**, No. 1624, *ante*.

1681. ———.]—If a less estate would certainly enable the trustees to fulfil all the trusts, the fee simple would be cut down to that estate (ERLE, J.).—**POAD v. WATSON** (1855), 6 E. & B. 606; 25 L. T. O. S. 142; 3 W. R. 488; 119 E. R. 990; *on appeal* (1856), 6 E. & B. 618, Ex. Ch.

*Annotations*:—**Apld.** Collier v. Walters (1873), L. R. 17 Eq. 252; **Re** Townsend's Contract, (1895) 1 Ch. 716.

**Sect. 8.—Tenure and transmission of trust property :  
Sub-sect. 1, D. (a) iii., (b), & E. (a) & (b) i. & ii.]**

**1682.** ———.]—Testator, after Apportionment Act, 1834 (c. 22), devised freehold lands to two trustees, their heirs & assigns, upon trust to pay thereout to his widow an annuity for her life, & after her decease, then upon trust for A. & B. their heirs & assigns, as tenants in common:—*Held*: the legal estate in the trustees was not restricted to the life of the widow.—*FENWICK v. PORTS* (1856), 8 De G. M. & G. 506; 44 E. R. 485, L. J.J. *Annotations*:—*Mentd.* *Re Beetham, Ex p. Broderick* (1886), 18 Q. B. D. 380; *Swanley Coal Co. v. Denton* (1906), 95 L. T. 659.

**1683.** ———.]—Testator, in 1827, devised land to trustees, their heirs & assigns, upon trust to stand seised of the land during the life of W., & until testator's debts & legacies should be satisfied, upon trust to let the land, & to apply the rents in discharge of the debts & legacies until the same should be fully paid, & thenceforth to pay the rents to W. for life; & after the death of W., & the payment of the debts & legacies & the expenses of the trust, testator devised the land to the heirs of the body of W., with remainder to his own right heirs. The trustees, after paying the debts & legacies, conveyed the legal estate to W. for his life, & W. suffered a recovery to the use of himself in fee.

In a suit for specific performance by W. against a purchaser from him:—*Held*: the trustees took under the will an estate determinable on the death of W. & payment of the debts & legacies.—*COLLIER v. MCBEAN* (1865), 34 Beav. 426; 6 New Rep. 192; 34 L. J. Ch. 555; 12 L. T. 790; 11 Jur. N. S. 592; 13 W. R. 766; 55 E. R. 700; *affd.*, 1 Ch. App. 81, L. J.J.

*Annotations*:—*N.F. Collier v. Walters* (1873), L. R. 17 Eq. 252. *Mentd.* *Beileoy v. Carter* (1869), 4 Ch. App. 230.

**1684.** ———.]—A general devise to trustees & their heirs under a will, the purposes of which require them to have some legal estate of freehold *prima facie* gives the fee, & it lies on the parties alleging that they take a less estate to show what less estate will serve the purpose.—*COLLIER v. WALTERS* (1873), L. R. 17 Eq. 252; 43 L. J. Ch. 216; 29 L. T. 868; 22 W. R. 209.

*Annotations*:—*Apld.* *Re Townsend's Contract*, [1895] 1 Ch. 716. *Refd.* *Palmer v. Locke* (1881), 45 L. T. 229; *Re Adams & Perry's Contract* (1899), 47 W. L. 326. *Mentd.* *Re Green, Baldoek v. Green* (1888), 40 Ch. D. 610.

**1685.** ———.]—*STEVENSON v. LIVERPOOL CORPN.*, No. 1587, *ante*.

**1686.** ———.]—Testator by his will dated in 1868 appointed his wife extriix. thereof, & directed payment of his debts without saying by whom, & after bequeathing certain pecuniary legacies, he gave the residue of his real & personal estate to two other persons upon trust as to his real estate to pay to or permit & suffer his wife to receive the rents & profits for her life, & after her death upon trust to pay to or permit & suffer his niece to receive the rents & profits for her life for her separate use; & after declaring certain trusts with regard to his personal estate, he directed his trustees after the death of the survivor of his wife & niece to pay two pecuniary legacies, & after payment thereof to stand possessed of his real estate & the residue of his personal estate upon certain other trusts:—*Held*: there was a charge upon the real estate of the debts & immediate legacies, & also of the two future legacies, the charge of the debts & immediate legacies being unaccompanied by any express direction to the trustees to pay, did not vest the legal estate in them, the form of the gift to the widow, in the absence of any trust for her separate use, vested the legal estate in her for her life, the purposes of the will not requiring

that the legal estate should vest in the trustees during her lifetime.

Although testator here purports to devise all the residue & remainder of his estate to the trustees, their heirs, exors., administrators & assigns it does not follow necessarily that the trustees take the whole legal estate. It is established by a long series of decisions that they only take such legal estate as enables them to carry out the trusts imposed upon them. . . . It was admitted in the argument that the statement given in *Jarman on Wills* 5th ed. p. 1145, was a correct statement of the law. That statement is in these words: "The mere fact, that the devised property is charged with debts or legacies, will not vest the legal estate in the trustees, unless they are directed to pay them or the will contains some other indication of an intention to create a trust for the purpose." Now, the trustees are not exors. & are not expressly directed to pay the debts or the legacies payable on testator's death, & it seems to me that under these circumstances it cannot be inferred that the existence of the charge operates to give them the legal estate. . . . There is here no direction that the beneficial estate for life taken by the widow is to be for her separate use. The language is upon trust that "they my trustees & the survivor of them & the heirs, exors., administrators & assigns of the survivor do, & shall pay to or permit & suffer my wife to receive & take the rents & profits thereof during her life." According to the decision in *Doe d. Leicester v. Biggs*, No. 1584, *ante*, *prima facie*, unless there is some context to the contrary to take away the effect of the words that would give her the legal estate during her life. . . . The rule which is established in that case [*Harton v. Harton*, No. 1700, *post*] is . . . most accurately & briefly stated by LORD DAVEY in *Van Grullen v. Foxwell*, No. 1704, *post*, where he says: "It is a convenient rule that where there are recurring occasions for the exercise of active duties by the trustees & no repeated devises to them to enable them to perform their duties, the legal estate, if once in the trustees, is to be deemed to be vested in them throughout, notwithstanding the duration in the meantime of what would but for the recurring duties be construed as uses executed in the beneficiaries" (STIRLING, J.).—*Re ADAMS & PERRY'S CONTRACT*, [1899] 1 Ch. 554; 68 L. J. Ch. 259; 80 L. T. 149; 47 W. R. 326; 43 Sol. Jo. 278.

**1687. Exception to rule—Gift of life estate & remainder without change of words.**—The rule that trustees take only so much of the legal estate as is sufficient to enable them to perform the duties imposed on them does not apply where the gifts of the life interest & the remainder are made without any change of words, as where there is a devise to trustees, their heirs & assigns, "in trust for A. for life," & after his death, "in trust for his children."—*TUDBALL v. MEDLICOTT* (1888), 59 L. T. 370; 52 J. P. 659; 36 W. R. 886; 4 T. L. R. 701. *Annotation*:—*Mentd.* *Williams, Torrey v. Knight*, The Lord of the Isles, [1894] P. 342.

(b) *Effect of Statute.*

*See Statute of Uses*, 1535 (c. 10); *Wills Act*, 1837 (c. 26), ss. 30, 31; *Law of Property Act*, 1925 (c. 20), ss. 1 (9) (10), 60, 207.

**E. Commencement and Duration.**

(a) *In General.*

**1688. Death of surviving trustee—Without proving or acting in will—Legal estate vests in trustee.**—The fact of a surviving trustee under a will dying without proving or acting in the will,



will not prevent the legal estate in the trust property devised to him from vesting in him, unless he has actually renounced probate of the will or disclaimed the trusts by deed, & the devisees of the trust estates of such trustee, acting under his will, cannot, by disclaiming the trusts of the original testator's will, divest themselves of the legal estate in the trust property thereby devised by their testator.—*KING v. PHILLIPS* (1852), 22 L. J. Ch. 422; 20 L. T. O. S. 203; 16 Jur. 1080; 1 W. R. 45.

(b) *Failure or Accomplishment of Purpose.*  
i. *In General.*

**1689. When trustees' estate does not come into being—Purpose dependent on contingency—Contingency not arising.]**—Devise of particular lands in aid of testator's personal estate, to trustees, for the payment of debts, legacies, & funeral expenses, "All the rest, residue, & remainder of his real & personal estate to his wife, her heirs, exors. & administrators." The personal estate is sufficient. The lands devised in aid, pass to the wife under the residuary clause. So if the personal estate had proved deficient in part only, the wife would have been entitled to the remainder.—*GOODTITLE d. HART v. KNOT* (1774), 1 Cowp. 43; 98 E. R. 958.

**1690. ———.]**—*DOE d. CADOGAN v. EWART*, No. 1699, *post*.

**1691. ——— Failure for illegality.]**—Testatrix after charging her estate with the payment of an annuity, devised the same to G., his heirs & assigns, for ever; but her wish & desire was, that G. in his lifetime, should convey the estate to some charitable uses, the choice of which was left entirely to his discretion; & subject to this, G. was to enjoy the estate to his own use for his life:—*Held*: this was a devise void by Charitable Uses Act, 1735 (c. 36), by which Act, the estate given, & not merely the trust, was made void; & the legal estate, upon the death of the devisee for life, descended on the heir at law.—*DOE d. BURDETT v. WRIGHT* (1819), 2 B. & Ald. 710; 106 E. R. 524.

*Annotations:—**Reid. Doe d. Hammond v. Cooke* (1829), 6 Bing. 174; *Doe d. Blacknell v. Ploymann* (1831), 2 B. & Ald. 573; *Doe d. Chidgey v. Harris* (1847), 16 M. & W. 517; *Young v. Grove* (1847), 4 C. B. 668; *Doe d. Egmont (Lord) v. Langdon* (1848), 12 Q. B. 711; *Garrard v. Tuck* (1849), 8 C. B. 231; *Cottrell v. Hughes* (1855), 15 C. B. 532; *Wright v. Wilkin* (1860), 2 B. & S. 232; *Bolton v. Bolton* (1870), L. R. 5 Exch. 145; *Churcher v. Martin* (1889), 42 Ch. D. 312; *Re Lacy, Royal General Theatrical Fund Assocn. v. Kydd*, [1899] 2 Ch. 149.

**1692. ———.]**—Real estate was by deed expressed to be conveyed to trustees upon charitable trusts. The deed was not enrolled, & the grantor died within a year after the execution of the deed. On his death the trustees named in the deed entered into possession, & applied the rents & profits according to the trusts of the deed:—*Held*: the deed was not voidable only, but was absolutely void under Charitable Uses Act, 1735 (c. 36), s. 3, & was not valid as conveying the legal estate, & void only as creating charitable trusts.—*CHURCHER v. MARTIN* (1889), 42 Ch. D. 312; 58 L. J. Ch. 586; 61 L. T. 113; 37 W. R. 682.

*Annotations:—**Reid. Patrick v. Simpson* (1889), 24 Q. B. D. 128; *Re Lacy, Royal General Theatrical Fund Assocn. v. Kydd*, [1899] 2 Ch. 149.

**1693. Determination of trustee's estate—Occurrence of event specified by settlement.]**—A. de-

vised to trustees, their heirs & assigns, all his freehold & copyhold estates, upon trust to pay the rents thereof to C. for life for her separate use; & after her death he directed them to stand seised of such estates in trust for such persons & purposes as she should by will appoint; & in default of appointment, he devised the estates to her in fee.

After A.'s death, the trustees were admitted tenants of the copyholds; & they all died during the lifetime of C.

By her will C. appointed certain persons her trustees, & directed them to sell the copyholds & assure them to the purchaser, his heirs & assigns. After C.'s death, her trustees sold the copyholds by auction, & declined to show the purchaser the devolution of the copyhold title from A.'s surviving trustee, on the ground that under A.'s will his trustees only took an estate for the life of C., & that there was an executory devise to her in default of appointment, which had taken effect:—*Held*: (1) under A.'s will his trustees took an estate of inheritance in quasi fee simple; (2) the legal estate in the copyholds remained vested in the surviving trustee of A.'s will, & the title thereto must be deduced accordingly.

When you find words of devise to trustees & their heirs, then those words are to have their full natural effect, as giving an estate of inheritance to the trustees, unless something is found on the face of the will which cuts that estate down to some determinate event (*STIRLING, J.*).—*Re TOWNSEND'S CONTRACT*, [1895] 1 Ch. 716; 61 L. J. Ch. 334; 72 L. T. 321; 43 W. R. 392; 30 Sol. Jo. 315; 13 R. 328.

*Annotation:—**Generally, Reid. Re Brooke, Brooke v. Dickson*, [1923] 1 Ch. 360.

**Accomplishment of purpose.]**—*See* Sect. 8, sub-sect. 1, E. (b) ii., *post*.

ii. *Accomplishment of Purpose.*

**1694. Estate of trustees determines.]**—If a man devises to trustees to do something for a given person when that purpose is at an end, the estate ceases (*BAXLEY, J.*).—*MORRANT v. GOUGH* (1827), 7 B. & C. 206; 1 Man. & Ry. K. B. 41; 6 L. J. O. S. K. B. 14; 108 E. R. 700.

**1695. ———.]**—By a marriage settlement Whiteacre is limited to A. for life; remainder to trustees during the life of A. to preserve contingent remainders; remainder to B. for life; remainder to the trustees during the life of B. to preserve, etc., remainder to the sons of B. by D. successively in tail male; remainder to the right heirs male of B. for ever. By the same deed Blackacre is limited to B. for life; remainder to trustees, during the life of B. to preserve, etc., remainder to D. for life, for raising out of the rents, etc., an annuity, & subject thereto to the sons of B. by D. successively in tail male, remainder to the trustees to the issue female of B. by D. for raising portions & maintenance until twenty-one; & after raising such sums or in default of issue female, to the use of the right heirs male of B. for ever:—*Held*: the trustees took at most a limited fee, determinable on the portions being raised, & after twenty years' adverse possession as against them, their right must be presumed to have been satisfied or released.—

—*LIVINGSTONE v. POWELL* (1837), 2 N. B. R. (Ber.) 361.—*CAN.*

**1694 II. ———.]**—*BUCHANAN v. OAKES* (Man.) (1914), 26 W. L. R. 549; 15 D. L. R. 582.—*CAN.*

**1694 III. ———.]**—*NICOLSON'S TRUSTEES v. NICOLSON* (1850), 13 Durl. (Ct. of Sess.) 240, 23 Sc. Jur. 94.—*SCOT.*

PART II. SECT. 8, SUB-SECT. 1.—  
E. (a).

k. *Devise in trust for daughter—In case of her death to her children—Marriage of daughter.]*—*NEALIS v. JACK* (1890), N. B. Dig. 313.—*CAN.*

PART II. SECT. 8, SUB-SECT. 1.—  
E. (b) i.

1. *Discretionary power to trustees to*

*continue trust till estate cleared of debt—No reasonable prospect of debt being paid—Right of far to terminate trust.]*—*SINCLAIR'S TRUSTEES v. SINCLAIR*, [1913] S. C. 178.—*SCOT.*

PART II. SECT. 8, SUB-SECT. 1.—  
E. (b) ii.

1694 I. *Estate of trustees determines.]*



**Secl. 8.—Tenure and transmission of trust property :  
Sub-sect. 1, E. (b) ii. & (c), & F.]**

DOE d. BRUNE v. MARTYN (1828), 8 B. & C. 497 ; 2 Man. & Ry. K. B. 485 ; 7 L. J. O. S. K. B. 60 ; 108 E. R. 1127.

**Annotations :—***Refd.* Doe d. Christmas v. Oliver (1829), 10 B. & C. 181 ; Doe d. Shelley v. Edlin (1836), 4 Ad. & El. 582.

**1696.** —.]—Where an estate is devised, without any limitation of the quantity of interest, to trustees in trust for a limited purpose, with remainder to persons to whom the beneficial interest is given, the legal estate given to the trustees will cease on the satisfaction of the limited purpose, & will vest in the persons beneficially entitled in remainder.—*HEARDSON v. WILLIAMSON* (1836), 1 Keen. 33 ; 5 L. J. Ch. 165 ; 48 E. R. 218.

**Annotation :—***Refd.* Doe d. Davies v. Davies (1841), 1 Gal. & Dav. 33.

**1697.** —.]—Devise of freehold premises to trustees to set & let the premises, & out of the rents and profits thereof to pay a debt, & in the next place to pay certain legacies, as soon as the rents & profits would permit, & after the debt & legacies were paid off, to R. in fee.—*Held* : the trustees took only a chattel interest, for the power of leasing was expressly confined to the purpose of paying off the debt & legacies.—*ACKLAND v. LUTLEY* (1839), 9 Ad. & El. 879 ; 1 Per. & Dav. 636 ; 8 L. J. Q. B. 164 ; 112 E. R. 1446.

**Annotations :—***Refd.* Collier v. McBean (1865), 34 L. J. Ch. 555 ; Collier v. Walters (1873), 43 L. J. Ch. 216. *Mand.* R. v. St. Mary, Warwick (1853), 22 L. J. M. C. 109 ; Isaac v. Royal Insce. (1870), L. R. 5 Exch. 296 ; Sidebotham v. Holland, (1895) 1 Q. B. 378 ; Meggeson v. Groves, [1917] 1 Ch. 158 ; Italkes v. Ogile, [1921] 1 K. B. 576 ; Brakspear v. Barton, [1924] 2 K. B. 88.

**1698.** —.]—Devise of real estate, etc., to trustees, their heirs & assigns, in trust, that D. may hold, & occupy, to him and his assigns for life, subject to the payment of an annuity, with power to cut timber for the use of the premises ; & after D.'s decease, to the trustees " & their assigns," in trust, & I give the same to M., his heirs & assigns ; & for want of such issue, to the trustees & their assigns, in trust, to preserve remainders ; & for want of such issue to the use of D., the eldest, & of the other sons, etc., according to seniority, & their respective heirs ; & furthermore, upon trust, that the trustees, their heirs or assigns, shall, by mtge. or demise, or from the rents & profits, or by such other ways & means as they shall think fit, raise or take up at interest £80 & apply the same to payment of debts :—*Held* : the trustees took the legal estate in fee.

If the devise to the trustees is for the purposes which are to last only a certain time, the gift, being to their " heirs," will not extend their estate. I is for a limited time only. But, when words of inheritance are used, & the estate is given for an indefinite time, the estate is not cut down by performance (*PATTERSON, J.*).—*DOE d. DAVIES v. DAVIES* (1841), 1 Q. B. 430 ; 1 Gal. & Dav. 33 ; 10 L. J. Q. B. 169 ; 6 Jur. 12 ; 113 E. R. 1197.

**Annotations :—***Consd.* Collier v. Walters (1873), L. R. 17 Eq. 252. *Refd.* Poad v. Watson (1856), 6 E. & B. 618 ; *Re* Townsend's Contract, [1895] 1 Ch. 716.

**1699.** —.]—Trust to sell & pay debts—Debts paid by sale of part of property—Estate in residue continues.]—Testator devised personally to trustees, to pay debts, & invest the surplus, & to receive the interest, & pay it to his wife during her life & widowhood, & afterwards to apply the interest, or a sufficient part, to the maintenance of his daughter I., until she should attain the age of twenty-five, & then to pay & assign the principal & unapplied interest to her ; but, in case she should happen to die before attaining that age, leaving lawful issue,

then in trust to pay the same to such issue, share & share alike, if more than one, as soon as they should respectively attain twenty-one, & to pay the interest towards their maintenance in the meantime ; but, in case I. should happen to die under twenty-five & without leaving lawful issue, testator bequeathed the whole surplus of the personality to W. & D. share and share alike. By the same will, he devised to D. an annuity of £200 for life, charged on his land, to be paid by the above-mentioned trustees ; & he devised to the same trustees (one of whom was W.) & the survivors & survivor, & the heirs of the survivor, all his lands, charged with the annuity, & with so much of his debts, legacies, & funeral expenses, as the residue of the personality would not extend to, in trust to receive the rents, issues, etc., & apply them to the use of testator's wife, during her life & widowhood, & afterwards to apply the rents, etc., to the maintenance of I. until she should attain the age of twenty-five, & afterwards in trust for I. & her heirs ; but, in case it should happen that I. died without leaving lawful issue, then testator devised the lands to W. & D. in fee, as tenants in common. The will also empowered the trustees, in order to pay debts, etc., in case the residue of the personality should be insufficient, to sell any part of the lands, & to grant, alien, & convey the same lands, or any part thereof, in fee simple. Testator's wife died in his lifetime ; I. survived testator, & attained the age of twenty-one, but died under twenty-five, leaving no issue. The personality not being sufficient to pay the debts, the trustees sold part of the land :—*Held* : (1) the trustees took a legal fee simple in all the land, such estate being requisite for the purposes of the trusts ; (2) on testator's death, I. took a vested equitable estate tail & W. & D. took equitable remainders, & therefore, I. by suffering a recovery in which the trustees did not join, created no legal estate ; but the equitable remainders of W. & D. were barred.

(3) Another trust, imposed upon the trustees by the will, is to pay the rents & profits of the estate to the wife of the testator for life, or during her widowhood ; that would give them a freehold interest in the estate ; but as she died in the lifetime of the testator, it never took effect (*LORD DENMAN*).—*DOE d. CADOGAN v. EWART* (1838), 7 Ad. & El. 638 ; 3 Nev. & P. K. B. 197 ; 1 Will. Woll. & H. 246 ; 7 L. J. Q. B. 177 ; 112 E. R. 609.

**Annotations :—***As to* (1) *Apld.* Watson v. Pearson (1848), 2 Exch. 581. *Refd.* Doe d. Davies v. Davies (1841), 1 Q. B. 430. *As to* (2) *Distd.* Gee v. Manchester Corpn. (1852), 17 Q. B. 737. *Generally, Refd.* Doe d. Blesard v. Simpson (1842), 3 Man. & G. 929 ; Bamford v. Lord (1854), 14 C. B. 708 ; Ward v. Burbury (1854), 18 Beav. 190 ; Collier v. McBean (1865), 34 Beav. 426.

**(c) Where Trustees have Recurring Duties.**

**1700. Legal estate remains in trustees until all purposes of trust satisfied.]**—A devise of lands to trustees & their heirs, upon trust to permit a *feme covert* to receive & take the rents & profits during her life, for her sole & separate use & after her decease to the use of the first & other sons of her body, then to the daughters as tenants in common with other like limitations to other *femes covert* vests the legal estate in the trustees.—*HARTON v. HARTON* (1798), 7 Term Rep. 652 ; 101 E. R. 1181.

**Annotations :—***Consd.* Kenrick v. Beauclerc (1802), 3 Bos. & P. 175 ; Hawkins v. Luscombe (1818), 2 Swan. 375. *Apld.* Brown v. Whitway (1846), 8 Hare, 145 ; Blagrove v. Blagrove (1849), 4 Exch. 550 ; Toller v. Atwood (1850), 15 Q. B. 929. *Apprvd.* Van Grutten v. Foxwell, Foxwell v. Van Grutten, [1897] A. C. 658. *Distd.* *Re* Adams & Perry's Contract, [1899] 1 Ch. 554. *Refd.* King v. Denison (1813), 1 Ves. & B. 280 ; Doe d. Davies v. Davies (1841), 1 Gal. & Dav. 33 ; Doe d. Müller v. Claridge (1848), 6 C. B. 641 ; *Re* Finch, Abbliss v. Burney (1880), 28 W. R. 903.

**1701.** —[—]—An estate created for the performance of certain trusts, remains vested in the trustee, so long as any object of the trust may spring up, though, for the present, all the purposes of the trust have been satisfied.—*DARKER v. DARKER* (1833), 1 Cr. & M. 850; 3 Tyr. 941; 2 L. J. Ex. Eq. 22; 149 E. R. 642.

**1702.** —[—]—Devise to trustees & their heirs upon divers trusts in succession, some requiring the legal estate to remain in the trustees, & others which in themselves would not do so, the whole legal fee remains in the trustees.—*BROWN v. WHITEWAY* (1846), 8 Hare, 145; 6 L. T. O. S. 520; 68 E. R. 308.

*Annotation.*—*Apprvd.* Van Grutten v. Foxwell, Foxwell v. Van Grutten, [1897] A. C. 658.

**1703.** —[—]—A. devised an estate to his wife for life, & upon the determination of that estate by forfeiture or otherwise, to E., to preserve contingent remainders, nevertheless to permit the wife to take the rents, etc., & after the decease of the wife he gave, devised, & bequeathed the rents, etc., to two daughters, in equal parts for life, & in case of the death of either without leaving any child or children, then the whole thereof was to be received by the survivor; but if such deceased daughter left children, such children to be entitled to deceased mother's share of the rents, etc., & after the death of both daughters he devised one moiety to the children of each daughter, or the whole to the children of one if the other died without children.—*Held*: the trustee held the legal estate until the death of both daughters.—*SAUNDERS v. EPPE* (1860), 3 L. T. 291; 9 W. R. 69.

**1704.** —[—]—(1) Testator devised lands to trustees in trust to receive the rents & profits for the use & benefit of such of his child or children as should be living at his death, & to apply such rents & profits or so much thereof as the trustees should deem right & proper in the maintenance & education of such child or children until majority or marriage, & from & after majority or marriage in trust to permit & suffer such child or children, as they should severally attain the age of twenty-one or be married, to take the rents & profits, if more than one, in equal shares for her, his, & their own use & benefit for her, his, or their lives; & if he left only one child, then to permit & suffer such one child to take the rents & profits for her or his sole use & benefit for her life; & he declared that from & after the death of such child or children, the trustees should stand seised of the lands in trust unto & to the use of the heirs of the body & bodies of such child or children, if more than one to be equally divided between them, such lands to be legally conveyed to such heirs of any child or children in equal shares as they should respectively attain the age of twenty-one or be married, & to their respective heirs & assigns for ever, with power in the meantime to apply the rents & profits in the maintenance & education of such heirs of his child or children; & if he should die leaving no child or children, or issue of any child or children, or if such child or children as he should leave & the issue of such child or children should die before he or they should attain the age of twenty-one or be married, then a gift over. Testator died leaving only one child surviving him; that child married & left a son who reached twenty-one.—*Held*: the legal estate vested in the trustees throughout.

(2) Where there are recurring occasions for the exercise of active duties by the trustees, & no repeated devises to them to enable them to perform their duties, the legal estate, if once in the trustees, is to be deemed to be vested in them

throughout, notwithstanding the duration in the meantime of what would, but for the recurring duties, be construed as uses executed in the beneficiaries (LORD DAVEY).—*VAN GRUTTEN v. FOXWELL, FOXWELL v. VAN GRUTTEN*, [1897] A. C. 658; 66 L. J. Q. B. 745; 77 L. T. 170; 46 W. R. 426, H. L.

*Annotations.*—*As to* (1) *Distd.* *Re Adams & Perry's Contract*, [1899] 1 Ch. 554. *As to* (2) *Consd.* *Re Adams & Perry's Contract*, [1899] 1 Ch. 554. *Generally.* *Mentd.* *Foxwell v. Van Grutten* (1898), 78 L. T. 231; *Pelham, Clinton v. Newcastle*, [1902] 1 Ch. 34; *Re Buckton, Buckton v. Buckton*, [1907] 2 Ch. 408; *Hill v. Clifford, Clifford v. Timms, Clifford v. Phillips*, [1907] 2 Ch. 236; *Re Simcoe, Vowler-Simcoe v. Vowler*, [1913] 1 Ch. 552; *Re Lawrence, Lawrence v. Lawrence*, [1915] 1 Ch. 129; *Re Hobbs, Hobbs v. Hobbs*, [1917] 1 Ch. 569; *Re Hussey & Green's Contract, Re Hussey, Hussey v. Simper*, [1921] 1 Ch. 566.

**1705.** —[—]—*RE ADAMS & PERRY'S CONTRACT*, No. 1686, *post*.

### F. Incidents.

**1706. Trustee invested with all burdens & privileges incident to estate.**—[—]The transmutation of possession to a trustee conveys to him the legal burdens, & invests him with the legal privileges.—*BURGESS v. WHEATE, A.-G. v. WHEATE* (1759), as reported in 1 Eden, 177; 28 E. R. 652.

*Annotations.*—*Consd.* *Onslow v. Wallis* (1849), 1 Mac. & G. 506. *Reid.* *Middleton v. Spicer* (1780), 1 Bro. C. C. 201; *Barclay v. Russell* (1797), 3 Ves. 424; *Craufurd v. Hunter* (1798), 8 Term Rep. 13; *Williams v. Lonsdale* (1798), 3 Ves. 752; *Dolder v. Bank of England* (1805), 10 Ves. 352; *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1; *Doe d. Shelley v. Edlin* (1836), 4 Ad. & El. 582; *Downe v. Morris* (1844), 3 Hare, 394; *Taylor v. Haygarth* (1844), 14 Sim. 8; *Davall v. New River Co.* (1849), 3 De G. & Sm. 394; *Beale v. Symonds* (1853), 15 Beav. 406; *Cox v. Parker* (1850), 25 L. J. Ch. 373; *Barrow v. Wadkin* (1857), 24 Beav. 1; *Masulpatam Collector v. Cavalry Venkata Narrainapah* (1861), 8 Moo. Ind. App. 529; *Sweeting v. Sweeting* (1863), 3 New Rep. 240; *Delacherois v. Delacherois* (1864), 4 New Rep. 501; *Re Gosman* (1880), 15 Ch. D. 67; *Re Van Hagan, Sperling v. Rochford* (1880), 16 Ch. D. 18; *Gallard v. Hawkins* (1884), 27 Ch. D. 298; *Re Bond, Panes v. A.-G.* (1900), 82 L. T. 612; *Talbot v. Jevors*, [1917] 2 Ch. 363. *Mentd.* *Macrobert v. Symmons* (1808), 15 Ves. 329; *Gordon v. Gordon* (1821), 3 Swan. 400; *Langley v. Sneyd* (1822), 1 L. J. O. S. Ch. 14; *A.-G. v. Leeds* (1833), 2 My. & K. 313; *Wythes v. Lee* (1853), 3 Drew. 395; *Hayward v. Cope* (1858), 25 Beav. 140; *Brookman v. Smith* (1871), L. R. 6 Exch. 291; *Bradlaugh v. Clarke* (1883), 8 App. Cas. 334.

**1707. Creation of easement—Conveyance of land by trustee—Land surrounded by land belonging to trustee.**—[—]Where one as a trustee conveys land to another, to which there is no access but over the trustee's land, a right of way passes of necessity, as incidental to the grant.—*HOWTON v. FREARSON* (1798), 8 Term Rep. 50; 101 E. R. 1261.

*Annotations.*—*Mentd.* *Holmes v. Goring, Holmes v. Elliott* (1824), 9 Moore, C. P. 166; *Pinnington v. Gallard* (1853), 1 C. L. R. 819.

**1708. Right to possession of title deeds.**—[—]The right to the title deeds belongs to those in whom the legal estate vests as trustees, although the trusts are of so uncertain a nature as to render it difficult to say how or in what manner they shall be executed, & so complicated as to render an application to a ct. of equity necessary for the purpose of carrying them into effect.—*BARCLAY v. COLLETT* (1838), 4 Bing. N. C. 658; 1 Arn. 287; 6 Scott, 408; 7 L. J. C. P. 235; 132 E. R. 942.

—[—]*See, further, SETTLEMENTS*, Vol. XL., pp. 702, 703, Nos. 2366-2372, 2375-2379.

—**Right to deposit deeds at bank.**—[—]*See Trustee Act*, 1925 (c. 19), s. 21.

**1709. Trustee engaged on business—Personal liability for debts.**—[—]Under the bkpcy. of an exor. & trustee, directed by the will to carry on a trade, & a limited sum to be paid to him by the trustees for that purpose, the general assets beyond that fund not liable.

The case of the exor. is very hard. He becomes liable, as personally responsible, to the extent of



those trustees; & therefore the possession of Lord & Lady Windsor after the marriage, & of her before the marriage, was the very possession, in consideration of law, of the trustees (LORD HARDWICKE, C.).—**POMFRET (EARL) v. WINDSOR (LORD)** (1752), 2 Ves. Sen. 472; 28 E. R. 302, L. C.

**Annotations** :—**Mentd.** Doo d. Atkyns v. Horde (1777), 2 Cowp. 689; Heroy v. Dinwoody (1793), 4 Bro. C. C. 257; Stackhouse v. Barnston (1805), 10 Ves. 453; Goodright d. Fowler v. Forrester (1807), 8 East, 552; Hughes v. Thomas (1811), 13 East, 474; Chalmers v. Bradley (1819), 1 Jac. & W. 51; Lako v. Skinner (1819), 1 Jac. & W. 9; Cholmondeley v. Clinton (1820), 2 Jac. & W. 1; Brown v. Claxton (1829), 3 Shm. 225; Peacock v. Burt (1834), 4 L. J. Ch. 33; Hugden v. Bignold (1843), 2 Y. & C. Ch. Cas. 377.

**1716.** —[—]—A. tenant for life, remainder to his son B. in tail, reversion to himself in fee, agreed with B. in order to relieve themselves from their debts, to bar the entail; & in 1733, they conveyed estates in N. & L. to the use of trustees & their heirs, in trust to sell the N. estates & pay the debts, etc., & as to the L. estate, the only one in question, in trust that the trustees should, with the consent of A. & his wife, & B. or the survivor, sell the inheritance in fee, & apply the purchase-money on the trusts after-mentioned with a proviso, that the rents, issues & profits, should until sale of the inheritance, be received by such person & for such uses as they would have been if the deed had not been made & no fines levied; & as to the money arising from the sale of L. estate, in trust to invest same, with the like consent, in the purchase of other lands in fee to be settled, subject to certain charges, on A. for life, remainder to B. in fee :—**Held** : A.'s possession & receipt of the rents, issues, & profits of the L. estate, though for above twenty years after the creation of the trust without any interference of the trustees, did not show his possession to be adverse to their title, so as to bar their ejectment against his grantees; such possession & receipt being consistent with & secured to him by the deed of trust.—**KEENE d. BYRON (LORD) v. DEARDON** (1807), 8 East, 248; 103 E. R. 336.

**Annotations** :—**Refd.** Doe d. Jacobs v. Phillips (1847), 16 L. J. Q. B. 269. **Mentd.** Scott v. Scott (1854), 23 L. T. O. S. 27.

**1717.** —[—]—In case for an injury to his reversion, pltf. declared that the premises in question were in the occupation of S. as tenant to him :—**Held** : the allegation was sufficiently proved by showing that S. had been let into possession by, & paid rent to, a *cestui que trust*, to whom pltf. was trustee.—**VALLANCE v. SAVAGE** (1831), 7 Bing. 595; 5 Moo. & P. 576; 9 L. J. O. S. C. P. 181; 131 E. R. 230.

**Annotations** :—**Refd.** Howe v. Scarrott, Sharp v. Scarrott (1859), 4 H. & N. 723; Jolly v. Arbutnot (1859), 4 De G. & J. 224. **Mentd.** Higham v. Rabett (1839), 7 Scott, 827.

**1718.** —[—]—The possession of the *cestui que trust*, under the trusts of a settlement, is the possession of the trustee, & gives the trustee a seisin of the estate, which is not interrupted by the death of the *cestui que trust*, but immediately enures for the benefit of the person next entitled to the equitable interest; & notwithstanding the adverse possession of another party soon afterwards commenced, the ct. cannot presume such adverse possession to have commenced so instantaneously on the death of the first *cestui que trust*, as wholly to exclude the equitable seisin of the parties next entitled to the beneficial

interest.—**PARKER v. CARTER** (1845), 4 Hare, 400; 67 E. R. 704.

**Annotations** :—**Mentd.** Olive v. Smith (1813), 5 Taunt. 56; Wilkinson v. Powkes (1851), 9 Hare, 193; Doe d. Newman v. Kisham (1852), 17 Q. B. 723; Doe d. Richards v. Lewis, Richards v. Lewis (1852), 11 C. B. 1035; Crofts v. Middleton (1855), 2 K. & J. 194.

**1719.** —[—]—Where goods are assigned as security for an advance of money, upon trust to permit the assignor to remain in possession of them until default in payment at the time stipulated, & upon further trust to sell them upon such default being made, the assignee has a sufficient possession to enable him to maintain trespass against a wrongdoer.—**WHITE v. MORRIS** (1852), 11 C. B. 1015; 21 L. J. C. P. 185; 18 L. T. O. S. 256; 16 Jur. 500; 138 E. R. 778.

**Annotations** :—**Apid.** Barker v. Furlong, [1891] 2 Ch. 172. **Mentd.** Haylock v. Sparke (1853), 1 E. & J. 171; Bowes v. Foster (1858), 2 H. & N. 779; Bullock v. Hanley (1858), 3 H. & N. 271; McMahon v. Lennard (1858), 6 H. L. Cas. 970.

**1720.** —[—]—Although a *cestui que trust* who is in possession with the consent or acquiescence of the trustees may be regarded as their tenant at will, yet, if he is only allowed to receive the rents or otherwise deal with the property in the hands of the occupying tenants, he stands in the relation merely of an agent or bailiff of the trustees who choose to allow him to act for them in the management of the estate.—**MELLING v. LEAK** (1855), 16 C. B. 652; 3 C. L. R. 1017; 24 L. J. C. P. 187; 1 Jur. N. S. 750; 3 W. R. 595; 139 E. R. 915.

**Annotations** :—**Consd.** Christchurch Cathedral, Oxford v. Buckingham & Chandos (1864), 17 C. B. N. S. 391. **Refd.** Drummond v. Sant (1871), L. R. 6 Q. B. 763; Spencer v. Harrison (1879), 5 C. P. D. 97.

**1721.** —[—]—The possession of chattels by a *cestui que trust* in accordance with the provisions of the trust instrument is in law the possession of the trustees.—**BARKER v. FURLONG**, [1891] 2 Ch. 172; 60 L. J. Ch. 368; 64 L. T. 411; 39 W. R. 621; 7 L. L. R. 406.

**Annotations** :—**Refd.** *Re Magnus, Ex p. Salaman* (1910), 80 L. J. K. B. 71. **Mentd.** Consolidated Co. v. Curtis, [1892] 1 Q. B. 195.

**1722. Right to possession.—On determination of trustee's legal estate.**—[—]—Possession obtained in the character of trustee cannot be retained as one adverse to the *cestui que trust*, after the legal estate under which the possession was taken has determined.—**STONE v. GODFREY** (1851), 5 De G. M. & G. 76; 2 Eq. Rep. 860; 23 L. J. Ch. 769; 23 L. T. O. S. 289; 18 Jur. 524; 43 E. R. 798, L. J. J.

**Annotations** :—**Refd.** Bill v. Richards (1857), 2 H. & N. 311. **Mentd.** *Re Saxon Life Assce. Soc.* (1862), 2 John. & H. 408; Rogers v. Ingham (1876), 3 Ch. D. 351; *Re Bowman, Re Lay, Whythead v. Boulton* (1889), 60 L. T. 888; Gas, Light & Coke Co. v. McI. Ky. (1892), 9 T. L. R. 98; Allcard v. Walker, [1896] 2 Ch. 369; Carnell v. Harrison [1916] 1 Ch. 328; *Re Musgrave, Machell v. Parry*, [1916] 2 Ch. 417; Burroughs v. Abbott, [1922] 1 Ch. 86.

**1723. —Refusal of trustees to account.**—[—]—J. devised certain estates in trust to pay the rents, issues, & profits unto, or permit same to be received & taken by, his daughter S., the wife of T. during her life, for her sole & separate use, free from the control of her husband, her receipt alone being a sufficient discharge for same; & after the decease of S., to convert the estates into money, & to pay & divide such money unto & equally amongst her children as she should appoint. The trustees having, as alleged, refused to account for the rents & profits received, a bill was filed for the adminis-

by the ct. as the condition of giving possession; but the ct. will not give possession to the *cestui que trust* where it sees that doing so would do violence to the intention of testator.—**WHITESIDE v. MILLER** (1868), 14 Gr.

393.—CAN.

—[—]—When property is

where other persons have also a claim, it rests in the discretion of the ct. whether the actual possession shall remain with the *cestui que trust* or the trustee.—**ORFORD v. ORFORD** (1889), 6 O. R. 6.—CAN

**Sec. 8.—Tenure and transmission of trust property :**  
*Sub-sects. 2, A., B. & C. ; sub-sects. 3 & 4, A., B. & C. (a).]*

tration of J.'s estate. The ct. on motion for that purpose by S. ordered that she should be permitted to enter into the possession of the receipt of the rents & profits of the estates devised in trust for her separate use.—*HORNER v. WHEELWRIGHT* (1857), 28 L. T. O. S. 7 ; 2 Jur. N. S. 367.

**1724. — Subject to execution of terms of trust.**—Testatrix by her will directed her trustees to stand possessed of the net rents of her real estate, upon trust to pay same to W., a married woman, for life, for her separate use, her receipt alone to be a sufficient discharge to the trustees ; & testatrix directed her trustees, out of the rents of her real estate, to keep in repair all the buildings on the estate during the period of their trust, & also the chancel of P. Church. No power of sale or leasing was contained in the will :—*Held* : notwithstanding the direction to the trustees with respect to repairs, W. was equitable tenant for life of the settled land, & as such, was entitled to be let into the possession & management of the estate, upon her undertaking to see to the repairs.—*Re BENTLEY, WADE v. WILSON* (1885), 54 L. J. Ch. 782 ; 33 W. R. 610.

*Annotation* :—*Consd. Re Wythes, West v. Wythes*, [1893] 2 Ch. 369.

*B. Possession by Trustee.*

**1725. Equivalent to possession by cestui que trust.**—The possession was wholly referable to the trust of the settlement . . . & therefore in effect in the contemplation of this ct. it was the possession of those entitled under the limitations of that settlement (*GRANT, M.R.*).—*GRENVILLE (LORD) v. BRYTH* (1809), 16 Ves. 224 ; 33 E. R. 969.

*Annotations* :—*Consd. Parker v. Carter* (1845), 4 Hare, 400. *Mentd. Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1.

*C. Possession by Third Party.*

**1726. Right to possession—Subject to execution of trust—Tenant for life.]**—Tenant for life subject to a trust term not let into possession before account ; nor till the trust is executed, unless on paying into ct. a sum sufficient to answer it ; or where the best way of performing the trust appears to be by letting him into possession.—*BLAKE v. BUNBURY* (1790), 1 Ves. 194 ; 30 E. R. 297, L. C.

*Annotations* :—*Distd. Tidd v. Lister* (1820), 5 Madd. 429. *Reid. Re Richardson, Richardson v. Richardson*, [1900] 2 Ch. 778.

**1727. — — — — —.]**—Tenant for life let into possession on consent & giving security to pay charges payable out of rents & profits & to keep down interest of the fund to answer contingent charges.—*BLAKE v. BUNBURY* (1792), 1 Ves. 514 ; 4 Bro. C. C. 21 ; 30 E. R. 404.

*Annotations* :—*Reid. Bayliss v. Bayliss* (1844), 1 Coll. 537. *Mentd. Ranciliffe v. Parkyns* (1818), 6 Dow, 149 ; *Gretton v. Haward* (1819), 1 Swan. 409 ; *Wintour v. Clifton* (1850), 21 Beav. 447 ; *Stephens v. Stephens* (1857), 1 De G. & J. 62 ; *Re Vardon's Trusts* (1884), 28 Ch. D. 124.

**1728. — — — — —.]**—Upon the construction of a devise of real property :—*Held* : that an equitable tenant for life was entitled to the personal enjoyment of the property, upon giving security for the due fulfilment of the objects of testator's will.

In order to give effect to the claim of the tenant for life, the ct., in contravention of a previous letting by the trustees of the will to a person who had notice of the trusts, granted a receiver of the property, with a direction to let it to the tenant for life upon the terms of giving such security.—*BAYLIES v. BAYLIES* (1844), 1 Coll. 537 ; 63 E. R. 533.

**1729. — — — — — Grantor.]**—Where a trustee of a term of years, upon the usual trusts for securing annuities, has taken possession of the estates under the trusts, the ct., although all arrears of the annuities may afterwards be paid, will not order possession to be given up to the grantor, except upon such terms as will enable the trustee to resume it, & to receive the rents, the moment the annuities are again in arrear.—*JENKINS v. MILFORD* (1820), 1 Jac. & W. 629 ; 37 E. R. 508, L. C.  
*Annotations* :—*Reid. Bayliss v. Bayliss* (1844), 1 Coll. 537 ; *Knight v. Bowyer* (1858), 2 De G. & J. 421.

SUB-SECT. 3.—TRANSMISSION OF ESTATE.

**1730. Change of trustee—Vesting declaration—Declaration of trust of legal estate in equitable mortgage—Vesting declaration on new appointment by equitable mortgagee.]**—A declaration in an equitable mtge. that the mtgor., in whom the legal estate is vested, will hold all his estate & interest in trust for the equitable mtgee., followed by an authority to the equitable mtgee. to remove the mtgor. from being a trustee, appoint new trustees, & vest all the mtgor.'s estate & interest in them by declaration, enables the equitable mtgee., by virtue of Trustee Act, 1893 (c. 83), s. 12, to divest the legal estate out of a subsequent legal mtgee. with notice of the trust, & to set it up against a prior incumbrancer of whose charge the equitable mtgee. has only received notice since the date of his own equitable mtgee.—*LONDON & COUNTY BANKING CO. v. GODDARD*, [1897] 1 Ch. 642 ; 66 L. J. Ch. 261 ; 76 L. T. 277 ; 45 W. R. 310 ; 13 T. L. R. 223 ; 41 Sol. Jo. 295.

*Annotations* :—*Reid. Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon*, [1901] 2 Ch. 231 ; *Re Chafer & Randall's Contract*, [1916] 2 Ch. 8 ; *London County & Westminster Bank v. Tompkins*, [1918] 1 K. B. 515 ; *Re James' Mortgage Trusts*, [1919] 1 Ch. 61.

— — — — —.]—*See, now, Trustee Act, 1925 (c. 19), s. 40.*

**1731. — — — — — Deed of transfer—Effect of general words.]**—The effect to be given to general words in a conveyance will be the same, whether it is a conveyance for value, or of trust property only.

Upon the retirement of one of several trustees, in whom the property of a banking co. was vested, a deed was executed which recited that part of the business of the bank was the making of advances on securities which were vested in trustees, & then recited several such securities ; & that the retiring trustee had been requested " to transfer the trust property vested in him in the manner thereafter contained." Then followed three witnessing parts, whereby he assigned or released to the other trustees of the bank the securities previously mentioned, " & all other moneys, securities, property, & effects " then vested in him, solely or jointly with the other trustees named, in trust for the bank. At the date of the deed some leaseholds belonging absolutely to the bank vested in the retiring trustee, jointly with others, but they were not specifically mentioned in the deed :—*Held* : these leaseholds did not pass by the general words.—*HOPKINSON v. LUSK* (1864), 34 Beav. 215 ; 3 New Rep. 357 ; 10 L. T. 122 ; 10 Jur. N. S. 288 ; 12 W. R. 392 ; 55 E. R. 617.

*Annotations* :—*Reid. Howard v. Shrewsbury* (1874), L. R. 17 Eq. 378 ; *Crompton v. Jarratt* (1885), 30 Ch. D. 298 ; *Re Durham, Grey v. Durham* (1887), 57 L. T. 164 ; *Williams v. Pinckney* (1897), 67 L. J. Ch. 34.

**Death of trustee.]—See DESCENT, Vol. XVIII., p. 4, Nos. 13–15 ; Administration of Estates Act, 1925 (c. 23), s. 3 (1) ii.**

**Trustee by devolution.]—See Part II., Sect. 4, ante.**

**Disposition by persons under disability—Bankrupts.]—***See* Bankruptcy Act, 1914 (c. 50), ss. 38 (1), 53.

**Convicts.]—***See* Trustee Act, 1925 (c. 19), s. 65.

**Married women.]—***See* Law of Property Act, 1925 (c. 20), s. 170 (2).

#### SUB-SECT. 4.—VESTING ORDERS.

##### A. In General.

*See* Trustee Act, 1925 (c. 19), ss. 41–56.

**1732. Meaning of “stock.”—***Re* NEW ZEALAND TRUST & LOAN CO., No. 1895, *post*.

**—***See, now,* Trustee Act, 1925 (c. 19), s. 68 (14).

**Mortgages.]—***See* MORTGAGE, Vol. XXXV., pp. 615–617.

**Copolyholds.]—***See* COPHYOLDS, Vol. XIII., pp. 78, 79, 113, 115–117, Nos. 989–1002, 1430–1432, 1435–1437, 1459, 1472, 1473, 1477.

##### B. Property Subject to Jurisdiction.

*See* Trustee Act, 1925 (c. 19), s. 56.

**1733. Land in Dominions—Canada.]—**Where the trustees of a will of real estates in Canada are dead, & the heir-at-law of the survivor is out of the jurisdiction, this ct. will, under Trustee Act, 1850 (c. 60), s. 54, make an order vesting the legal estate of the lands in Canada in a party beneficially entitled.—*Re* SCHOFIELD (1855), 24 L. T. O. S. 322.

**1734. ———.]—**A vesting order in the owner of lands in Canada may be made under Trustee Act, 1850 (c. 60), s. 54.

A. purchased an estate in Canada, & his conveyance was duly registered there. A mtge. thereon, made in 1837, had also been registered. The conveyance to A. was confirmed by the personal representative of the mtgee., the mtge. having been satisfied in his lifetime. It subsequently turned out that the mtge. was a mtge. in fee, & the legal estate was outstanding in the grandchild of the mtgee., an infant.

On proof of these facts the ct. made the order, vesting the estate in A.—*Re* GROOM'S TRUST ESTATE (1864), 11 L. T. 336.

**1735. ———.]—**Ireland.]—Where land held in trust is situated in Ireland, the *cestui que trust* in England, & a surviving trustee in Ireland, the ct. has jurisdiction under Trustee Act, 1850 (c. 60), s. 54, to appoint new trustees & make a vesting order.—*Re* HEWITT'S ESTATE (1858), 6 W. R. 537.

**1736. ———.]—***Re* TAITT'S TRUSTS, [1870] W. N. 257.

**1737. ———.]—***Re* LAMOTTE, No. 1844, *post*.

**1738. ———.]—***Re* STEELE, GOLD v. BRENNAN, No. 1841, *post*.

**1739. ———.]—**Where a trustee of land in Ireland becomes a lunatic, the judges of the Ct. of Appeal in England can, on a petition intitled in the Ch. Div. & in Lunacy, appoint a new trustee under their jurisdiction in Lunacy & make a vesting order under their jurisdiction as additional judges of the Ch. Div.—*Re* SMYTH (1886), 55 L. T. 37; 34 W. R. 493, C. A.

**1740. Property vested in Crown.]—**Where the Crown has become entitled to the legal estate in

the entirety of a trust estate of testator, & also to a beneficial interest in a moiety thereof, the ct. cannot, upon an application under the Trustee Acts for the appointment of new trustees of the will & a vesting order, make a vesting order against the Crown; but an application must be made to the ct. under Intestates' Estates Act, 1884 (c. 71), s. 5.—*Re* PRATT'S TRUSTS (1886), 55 L. T. 313; 34 W. R. 757.

**1741. ———.]—**In 1884 two leases were granted to a co. from which the present vendors derived title. In the same year the co. went into liquidation for the purposes of reconstruction, & sold all its assets, including the leases, to a new co. of the same name; but there was no formal assignment of the leases, & the old co. was shortly afterwards dissolved. In 1901 these leases were sold by order of the ct., subject to conditions which limited the time for sending in requisitions & objections to title. After the prescribed period the purchaser objected that the vendors had shown no legal title to the leases. The lessor had received rent from the new co. & its successors in title from 1884 until the present time, & the vendors offered to procure the consent of the lessor to the assignment of the leases to the purchaser:—*Held*: the purchaser was precluded by the conditions from insisting upon his objection as to the outstanding legal estate, which had become vested in the Crown as *bona vacantia*, inasmuch as the objection related, not to the root of the title, but to the subsequent devolution thereof.

I admit the Crown could not be compelled to assign the legal estate (JOYCE, J.).—*PRYCE-JONES v. WILLIAMS*, [1902] 2 Ch. 517; 71 L. J. Ch. 762; 87 L. T. 260; 50 W. R. 586; 46 Sol. Jo. 602.

*Annotation:—Reid. Hastings Corpn. v. Letton*, [1908] 1 K. B. 378.

**1742. ———.]—***Re* TAYLOR'S AGREEMENT TRUSTS, No. 1184, *ante*.

#### C. Application for Order.

##### (a) In General.

*See* R. S. C., Ord. 54B; Ord. 55, rr. 14A, 15A.

**1743. Form of application—Whether by petition—Trustee out of jurisdiction.]—**Where a bill is filed merely to obtain a transfer of stock, standing in the name of a trustee who is out of the jurisdiction of the ct., the order must be made at the hearing of the cause, & cannot be obtained by petition.—*BURR v. MASON* (1824), 2 Sim. & St. 11; 57 E. R. 248.

**1744. ———.]—***Re* MUGGLETON'S SETTLEMENT TRUSTS (1924), 68 Sol. Jo. 519.

**1745. ———.]—**Property vested in infant heir.]—A. contracted to sell real estate to C., & after receiving the purchase-money, died intestate, leaving an infant heir-at-law. No conveyance by A. having been executed, C. presented a petition to have a conveyance made on behalf of the infant on a vesting order:—*Held*: the order could not be made on petition.—*Re* DICKINSON (1851), 17 L. T. O. S. 231.

**1746. ———.]—**Whether on motion—In proceedings for appointment of new trustees.]—Proceedings instituted by originating summons under the R. S. C., Ord. 55, r. 13A, for the appointment of a new trustee, constitute a “matter” within the

the benefit of the trust so to do.—*Re* KENNING'S WILL (1899), 20 N. S. W. Eq. 139; 16 N. S. W. W. N. 31.—*AUS.*

**q. Insurance policies—Appointment of new trustee—Vesting in original & new trustee.]—***DOUGALL v. STEVENS* (1912), 31 N. Z. L. R. 838.—*N. Z.*

B B B 2

#### PART II. SECT. 8, SUB-SECT. 4.—A.

**o. Jurisdiction of court—Where trustees appointed.]—**The jurisdiction of the ct. to make a vesting order under Trustee Act, 1893, ss. 26 & 35, embraces a case where the trustees in whom the property is to be vested have been already appointed.—*Re* KENNY'S

#### TRUSTS, [1906] 1 I. R. 531.—IR.

**p. Divesting from one trustee—Vesting in others.]—**Where trust property is vested in three or more trustees, the Equity Ct. has jurisdiction to divest the trust property from one of the trustees & vest it in the others, if it considers it will be for



*Sect. 8.—Tenure and transmission of trust property : Sub-sect. 4, C. (a), (b) & (c), & D. (a) i. & ii.]* meaning of Trustee Act, 1850 (c. 60), s. 43, & the ct. obtained under that rule jurisdiction to make a vesting order upon a motion in such matter.—*Re JONES* (1889), 59 L. J. Ch. 157; 61 L. T. 554; 38 W. R. 203; 6 T. L. R. 49.

**1747.** — *Title of petition.*—The title of the petition ought to state the particular matter or trust respecting which it is presented, as well as the Act of Parliament authorising it.—*Re LAW* (1842), 4 Beav. 509; 11 L. J. Ch. 118; 6 Jur. 615; 49 E. R. 436.

**1748.** — *Contents of petition—Section of statute must be stated.*—In all petitions under Trustee Acts, the last paragraph should state the sects. of the Act under which it is proposed the order asked for should be made.—*ANON.* (1887), 84 L. T. Jo. 23, C. A.

*Annotation :—Fold. Re Hall's Settlement Trusts* (1888), 58 L. T. 76.

**1749.** — *—*—*—*—*—*—A petition presented under Trustee Acts should mention the sects. under which it is proposed that the order asked for should be made.—*Re HALL'S SETTLEMENT TRUSTS* (1887), 58 L. T. 70.

**1750. Whether order made in chambers.**—An action for the administration of the estate of F. was commenced by writ, & an order for accounts was made in chambers under R. S. C., Ord. 15. Subsequently an order was made in chambers that plff. & deft. should transfer into ct. a sum of stock. By a further order made in chambers, after stating that deft. could not be found, the right to transfer the stock was vested in plff., & he was directed to transfer it into ct. The Bank of England being dissatisfied with this order by reason of its being made in chambers, it was arranged that a motion should be made to the ct. for an order directing the bank to act in accordance therewith :—*Held* : taking all the Acts of Parliament together, & considering the effect of R. S. C., Ord. 35, r. 1, & the course of practice ever since, there was so much doubt as to the jurisdiction as to render it unsafe to make such a vesting order in chambers, & the order directing the bank to act in accordance with it ought to be discharged.—*FRODSHAM v. FRODSHAM* (1880), 15 Ch. D. 317; 50 L. J. Ch. 233; *sub nom. Re FRODSHAM, FRODSHAM v. FRODSHAM*, 43 L. T. 558; 29 W. R. 165, C. A.

*Annotations :—Reid. Re Moate's Trust* (1883), 22 Ch. D. 635; *Re Tweedy* (1885), 28 Ch. D. 529; *Re Jones* (1889), 59 L. J. Ch. 157.

**1751.** — *—*—*—*—Where a petition has been presented under Trustee Act, 1850 (c. 60), the judge has power to direct particular portions of the matters before him to be disposed of in chambers.

An order was made on petition to appoint new trustees, with liberty to apply at chambers for an order to vest the trust estate in the new trustees when appointed, & a subsequent order was made in chambers appointing the new trustees, & declaring that the right to call for a transfer of, & to transfer into their own names, a sum of India 4 per cent. stock vested in the new trustees :—*Held* : that the proceedings, having been properly commenced by petition under Trustee Act, 1850 (c. 60), the judge had jurisdiction to make the order on summons in chambers, & the Bank of England ought to be ordered to act upon it.—*Re TWEEDY* (1885), 28 Ch. D. 529; 54 L. J. Ch. 331; 52 L. T. 65; 33 W. R. 313, C. A.

**1752.** — *—*—*Re GILL, SMITH v. GILL*, No. 1270, ante.

**1753.** — *—*—*Re MORRIS'S SETTLEMENT TRUSTS*, No. 1268, ante.

**1754. Amendment of petition—Infant heir of trustee not appearing.**—Trust estate had descended on an infant, on whom a petition for a vesting order had been served. He did not appear, & no guardian had been appointed. The ct. made a vesting order on the petition being amended by striking out the note of intended service.—*Re TWEEDY* (1861), 9 W. R. 398.

**1755. Proof of appointment of new trustees—Deed executed abroad—Necessity for proof of handwriting of witness.**—An appointment of new trustees, not required to be, by deed or to be attested, was made by deed executed abroad by the donee of the power, who was resident abroad, & his execution of it was attested by a witness also resident abroad. A vesting order was then applied for, one of the old trustees being of unsound mind, & was supported by proof of the handwriting of the signature of the appointor to the deed :—*Held* : petitioners must prove the handwriting of the attesting witness, or, failing that, must show that they had endeavoured to find a witness in England who could speak to his handwriting, & failed in doing so, in which case the order might be drawn up on proof of the handwriting of the appointor.—*Re RICE* (1886), 32 Ch. D. 35; 55 L. J. Ch. 799; 54 L. T. 589; 34 W. R. 717, L. J.J.

*Annotation :—Distd. Worthington v. Moore* (1891), 64 L. T. 338.

**1756. Affidavit of no incumbrances—Legal estate in married women.**—*Re GRAVES*, [1925] W. N. 205.

#### (b) Parties.

**1757. Who may make application—Property sold to different purchasers.**—*AYLES v. COX, Ex p. ATTWOOD*, No. 1915, post.

**1758. — Creditors of deceased debtor—Land sold in administration action.**—Creditors of deceased testator, who have obtained a decree for the administration of his estate with a direction for the sale of the real estate are "persons beneficially interested" in such real estate within the meaning of Trustee Act, 1850 (c. 60), s. 37, even after the sale & payment of the purchase money into ct.—*Re WRAGG, Re MOUSLEY'S ESTATE, GREGORY v. MOUSLEY* (1863), 1 De G. J. & Sm. 356; 2 New Rep. 49; 46 E. R. 143, L. J.J.

**1759. — Trustee in bankruptcy—Property in hands of alien.**—The trustee in bkpy. of a firm for whom an alien enemy was in the habit of accepting bills for their accommodation applied, under Trading with the Enemy Amendment Act, 1914 (c. 12), s. 4, for an order that certain policies of assurance, some of which had matured, & which the alien enemy alleged he held as security, & which he claimed, but which were, in fact, the property of the firm, might be vested in the custodian under the Act :—*Held* : apptd. had no *locus standi* to make the application.—*Re RUBEN*, [1915] 2 Ch. 313; 84 L. J. Ch. 789; 113 L. T. 647; 31 T. L. R. 563; 59 Sol. Jo. 704; [1915] II. B. R. 235.

**1760. Who must be party—Cestui que trust.**—Where a tenant for life petitions under Trustee Act, 1850 (c. 60), for a vesting order, the *cestui que trust* interested in the fund should be before the ct.—*Re PRESCOTT'S TRUST* (1852), 19 L. T. O. S. 371.

**1761. —**—*—*—A mtgor. devised his real estate to a trustee on trust for sale, the proceeds to be divided amongst certain persons named in the will. The original mtgee. having died, & her heir not being found, a petition was presented by the trustee & one of the *cestui que trust* for a vesting order under Trustee Act, 1850 (c. 60), s. 19 :—*Held* : the trustee sufficiently represented the other *cestui que trust*, whose appearance



was therefore dispensed with.—*Re BLANCHARD'S ESTATE* (1863), 2 New Rep. 386; 8 L. T. 603.

**1762. —Annuitant.]**—Where land is vested in a trustee in trust for a party in fee simple, but subject to an annuity charged on the rents thereof, a petition is presented under the Trustee Act, 1852 (c. 55), s. 2, for vesting the estate in the party entitled, the trustee having refused to convey, the annuitant is not a necessary party.—*Re WINTERINGHAM'S TRUST* (1855), 25 L. T. O. S. 252; 3 W. R. 578.

**1763. —Tenants in tail in remainder.]**—In a suit for partition where the tenant in tail in possession is a lunatic; inasmuch as a conveyance which will bind the estates in remainder can be obtained only by means of Trustee Act, 1850 (c. 60), under which the power of the Chancellor is discretionary:—*Semble*: the tenants in tail in remainder are not unnecessary parties to the suit.—*SINGLETON v. HOPKINS* (1855), 25 L. J. Ch. 50; 26 L. T. O. S. 146; 1 Jur. N. S. 1199; 4 W. R. 107.

*Annotation*:—*Mentd.* Cox v. Cox (1857), 3 K. & J. 554.

(c) Service of Application.

**1764. On whom service necessary—Remainderman.]**—*Re MAYNARD'S SETTLEMENT TRUSTS*, No. 1296, *ante*.

**1765. —Infant heir.]**—A petition for vesting a legal estate outstanding in the infant heir of deceased mtgee. must be served upon the infant.—*Re JONES' MORTGAGE* (1874), 22 W. R. 837.

**1766. —**—*J*—Where land was vested in the infant heir of the last survivor of trustees, the beneficiaries presented a petition for an order vesting the land in them; the infant heir was not served:—*Held*: the infant heir must be served.—*Re ADAMS* (1887), 57 L. T. 337; 35 W. R. 770.

**1767. —Guardian of infant heir.]**—Service of a petition for vesting in newly appointed trustees lands which had descended to the infant heir of the former sole trustee, upon the guardian of the infant heir, is not necessary.—*Re LITTLE* (1869), L. R. 7 Eq. 323.

*Annotation*:—*Follid.* *Re Davies' Trust*, [1889] W. N. 215.

**1768. —**—*J*—*Re DAVIES' TRUST*, [1889] W. N. 215.

**1769. —Heir of testator.]**—*Re SMIRTHWAITE'S TRUSTS*, No. 998, *ante*.

**1770. —Heir abroad.]**—*Re STANLEY*, No. 1818, *post*.

**1771. —Reversioner.]**—*Re ALBERT ROAD, NORWOOD* (Nos. 56 & 58), No. 1181, *ante*.

**1772. —Beneficiaries.]**—PRACTICE NOTE, [1920] W. N. 116.

**Where trustee lunatic.]**—*See LUNATICS*, Vol. XXXIII., p. 226, Nos. 1357–1358.

D. When Order Made.

(a) As to Land.

i. In General.

**1773. Sale ordered by court.]**—Where a sale has been ordered, by decree, of property in which infants & possible unborn children are interested, though such decree was made before the passing of Trustee Act, 1852 (c. 55), & though the purpose of the sale is not confined to the payment of

debts, the ct. has authority under both Trustee Acts of 1850 (c. 60) & 1852 (c. 55), taken together, to make a vesting Order.—*WAKE v. WAKE* (1853), 21 L. T. O. S. 57; 17 Jur. 545; 1 W. R. 283.

**1774. Trust created without legal estate.]**—A., without devising lands to his exors., L. & G., directs them to sell the lands, & to apply the money. A., after date of his will, contracts to sell the lands to X., who objects to the title of the exors., & requires the heirs of A. to join in the conveyance. The ct. made an order vesting the estate which was in A.'s heirs in the exors. of his will. *Semble*: where two exors. are appointed, & only one proves, the ct. will not make a vesting order in favour of the one who proves, unless the other disclaims.—*Re BADCOCK'S TRUSTS* (1854), 2 W. R. 386.

**1775. —**—*J*—Testator gave all his real & personal estate to his wife, & after her death he desired the same to be sold by his exors., the proceeds to be divided amongst legatees as directed by his will. He appointed his wife & S., his daughter, exors. After the death of the wife S. became lunatic, but was not found so by inquisition. Upon a petition being presented by the legatees praying for the appointment of new trustees under the Trustee Acts:—*Held*: S., as surviving exor., had no power to convey or assign, the interest having descended to the heir subject to her power; & therefore the ct. could not make a vesting order under Trustee Act, 1850 (c. 60), s. 3.—*Re FRANKLIN* (1855), 3 Eq. Rep. 719; *sub nom.* *Re PORTER'S TRUST, Ex p. FRANKLIN*, 25 L. T. O. S. 262; 3 W. R. 583, L. C.

**1776. —**—*J*—*Re FRANKLYN'S MORTGAGES*, [1888] W. N. 217.

**1777. Will proved by one of two executors—Necessity for disclaimer of other.]**—*Re BADCOCK'S TRUSTS*, No. 1774, *ante*.

**1778. Death of trustee—Identity of heir of testatrix doubtful.]**—Testatrix devised realty to a trustee upon trust for sale. The trustee died before testatrix, & in a suit for administration the realty was ordered to be sold. There was some difficulty in ascertaining who was the heir of testatrix:—*Held*: the ct. could not vest the real estate in a new trustee in the absence of the heir, & the petition for a vesting order was directed to stand over to see whether any evidence could be produced to bring the case within Trustee Act, 1850 (c. 60), s. 11.—*GUNSON v. SIMPSON* (1868), L. R. 5 Eq. 332; 18 L. T. 78; 16 W. R. 782.

*Annotation*:—*Refd.* *Re Smirthwaite's Trusts* (1871), L. R. 11 Eq. 251.

**1779. Contract for sale of rectory—Death of rector before completion—No successor appointed.]**—*Re PEEK'S CONTRACT*, No. 1183, *ante*.

**Vesting order in place of conveyance by infant mortgagee.]**—*See MORTGAGE*, Vol. XXXV., p. 615, Nos. 3522–3524.

ii. On Appointment of Trustee by Court.

*See, now*, Trustee Act, 1925 (c. 19), s. 44 (i).

**1780. Where granted.]**—In cases where new trustees are appointed under Trustee Act, 1850 (c. 60), the real estates subject to the trust ought to be conveyed to them by deed, & the vesting order ought only to be resorted to when it is

PART II. SECT. 8, SUB-SECT. 4.—  
C. (c).

r. On whom service necessary.—*Trustee resident out of jurisdiction.]*—*A petition to*

to be served on the absent trustee.—*Re SPINKS' TRUSTS* (1899), 6 B. C. L. 375.—*CAN.*

PART II. SECT. 8, SUB-SECT. 4.—  
D. (a) i.

t. Title deeds lost.]—The ct. will not make a vesting order under Trustee Act, 1856, merely by way of getting over a difficulty arising from the loss of title deeds.—*Re WESTON* (1863), 2 W. & W. 55.—*AUS.*

PART II. SECT. 8, SUB-SECT. 4.—  
D. (a) ii.

a. Whether granted.]—*Re VAUGHN* (1893), 14 N. S. W. L. R. (Eq.) 166; 9 N. S. W. N. 167.—*AUS.*

b. —.]—The Ct. of Equity has justification under Trustee Act, 1898, to appoint & make the usual order vesting the estate in a new trustee,

**Sect. 8.—Tenure and transmission of trust property :  
Sub-sect. 4, D. (a) *iv.*, *iii.* & *v.*]**

inconvenient to obtain a conveyance.—**LANGHORN v. LANGHORN** (1852), 21 L. J. Ch. 860; 20 L. T. O. S. 153.

**1781.** —[—]—**Re MATTHEW'S SETTLEMENT**, No. 1159, *ante*.

**1782.** —[—]—**M. & C.**, being trustees & exors. under a will, C. simply renounces, & M. then dies, having left devisees in trust. A petition is presented to appoint new trustees, & for a direction that such devisees might convey. C., by affidavits on the petition disclaimed; & on the doubt whether the devisees in trust of M. had the legal estate:—**Held**: a vesting order would obviate the difficulty.—**Re SKINNER'S TRUSTS** (1853), 2 W. R. 130.

**1783.** —[—]—The ct. has authority to make a vesting order under Trustee Act, 1850 (c. 60), in cases where there is nothing to prevent a conveyance of the trust property to the trustees appointed by the ct.—**Re MANNING'S TRUSTS** (1854), Kay, App. xxviii; 2 Eq. Rep. 221; 60 E. R. 327.

**1784.** —[—]—New trustees of a charity having been appointed under Charitable Trusts Act, 1853 (c. 137), by the Vice-Chancellor, & the surviving trustee being lunatic, it is competent for the Vice-Chancellor in chambers to make the vesting order under Trustee Acts, 1850 (c. 60), & 1852 (c. 55).—**Re DAVENPORT'S CHARITY** (1855), 4 De G. M. & G. 839; 43 E. R. 736; *sub nom. Re DEVONPORT EDUCATION FUND*, 3 W. R. 355, L. C. Annotation:—**Mentd.**, **Re** Norwich Town Close Estate Charity (1888), 40 Ch. D. 298.

**1785.** —[—]—**Re MUNDEL'S TRUST**, No. 1206, *ante*.

**1786.** —[—]—**Re MORRIS'S SETTLEMENT**, No. 1207, *ante*.

**1787.** —[—]—**Re BYRNE'S TRUST**, No. 1137, *ante*.

**1788.** —[—]—**Re MARTINEZ' TRUSTS**, No. 1388, *ante*.

**1789.** —[—]—**Re DRIVER'S SETTLEMENT**, No. 1208, *ante*.

**1790.** —[—]—Where the proving exors. of the last surviving trustee & executor of a will were dead, the ct., having appointed new trustees of the will, made an order vesting in the new trustees the leaseholds of original testator for all the estate therein of the last surviving trustee & exor.—**Re RATHBONE** (1876), 2 Ch. D. 483; 45 L. J. Ch. 531; 24 W. R. 500, C. A.

Annotations:—**Refd.**, **Re Dalgleish's Settlement** (1876), 35 L. T. 829; **Re Crowe's Trusts** (1880), 42 L. T. 822.

**1791.** —[—]—**Re LEMANN'S TRUSTS**, No. 1173, *ante*.

**1792.** —[—]—**DAVIES v. HODGSON**, No. 1220, *ante*.

**1793.** —[—]—**Re WESTON'S TRUSTS**, [1898] W. N. 151; 43 Sol. Jo. 29.

**1794.** —[—]—**New trustee to act with continuing trustee.**—A vesting order under Trustee Act, 1850 (c. 60), is not applicable where a new trustee of real estate is appointed by the ct. to act jointly with a continuing trustee, the effect of such an order being to sever their joint tenancy; therefore, in such cases a conveyance of the real estate to the use of the new & continuing trustee is

requisite.—**Re PLYER'S TRUST** (1851), 9 Hare, 220; 20 L. J. Ch. 529; 18 L. T. O. S. 38; 15 Jur. 766; 68 E. R. 482.

Annotation:—**Refd.**, **Smith v. Smith** (1854), 3 Drew. 72.

**1795.** —[—]—**Re WATTS'S SETTLEMENT**, No. 1025, *ante*.

**1796.** —[—]—Order vesting leaseholds in continuing & new trustees as joint tenants.—**Re FISHER'S WILL (TRUSTEES)** (1853), 1 W. R. 505.

**1797.** —[—]—Under Trustee Act, 1850 (c. 60), s. 10, the ct. will now make an order vesting lands in a new trustee jointly with continuing trustees, notwithstanding the doubts suggested in **Re Watts' Settlement**, No. 1025, *ante*, & in **Re Pleyer's Trust**, No. 1794, *ante*.—**Re BUTE'S (MARQUIS) WILL** (1859), John. 15; 33 L. T. O. S. 178; 5 Jur. N. S. 487; 70 E. R. 321.

**1798.** —[—]—**Previous order vesting part of trust property—Subsequent order vesting remainder.**—**Re HOPPER'S TRUSTS**, No. 1914, *post*.

**iii. Trustee under Disability.**

*See, now*, Trustee Act, 1925 (c. 19), s. 44, ii (a).

**1799. Whether order made—Infancy.**—A mtgee. in fee of lands of gavelkind tenure gave & devised all the residue of his estate personal, & real property, moneys, & securities, & all other effects, which should remain after paying his just debts, funeral & testamentary expenses, to his wife for her own use & benefit:—**Held**: in consequence of the devise by the will, no estate in the mtgee. premises remained vested in the infant co-heirs in gavelkind of the mtgee.; & an order was therefore refused, upon a petition presented under Trustee Act, 1850 (c. 60), praying an order vesting the infants' estate in petitioner.—**Re FRIEDL'S MORTGAGE** (1851), 9 Hare, 414; 21 L. J. Ch. 175; 15 Jur. 1004; 68 E. R. 570.

**1800.** —[—]—**Re LUSH'S ESTATE, Ex p. GREIVE** (1852), 5 De G. & Sm. 436, n.; 64 E. R. 1187, n.

Annotation:—**Folld.**, **Davey v. Miller** (1853), 17 Jur. 908.

**1801.** —[—]—Vesting order as to the equity of redemption in an infant, against whom, in a foreclosure suit, a decree for sale had been made, refused, on the ground that the mtgee. had the legal estate, & that all equities were bound by the order for sale.—**Re WILLIAMS' ESTATE** (1852), 5 De G. & Sm. 515; 21 L. J. Ch. 437; 19 L. T. O. S. 152; 64 E. R. 1222.

**1802.** —[—]—Upon a petition presented under the Trustee Act, 1850 (c. 60), s. 7, the ct. declined, without further consideration, to make an order to vest the legal estate in a purchaser to uses in bar of dower.—**Re HOWARD'S ESTATE** (1852), 5 De G. & Sm. 435; 21 L. J. Ch. 437; 19 L. T. O. S. 152; 64 E. R. 1187.

Annotation:—**Folld.**, **Davey v. Miller** (1853), 1 Sm. & G. App. XIX.

**1803.** —[—]—Application to obtain an order vesting a freehold estate outstanding in an infant trustee, in purchasers to uses to bar dower, granted by the ct.—**DAVEY v. MILLER** (1853), 1 Sm. & G. App. XIX; 1 Eq. Rep. 236; 22 L. J. Ch. 1054; 21 L. T. O. S. 102; 17 Jur. 908; 1 W. R. 405; 67 E. R. 1326.

**1804.** —[—]—A mtgee. in fee of real estate having died intestate as to the mtged.

in the place of a trustee under a will, who is also exor., but is desirous of retiring, where no part of the estate is vested in the retiring trustee as exor. *virtute officii* although portions of the realty are under mtgee., & although the estate of testator is subject to a contingent liability on a guarantee.—**MARTIN v. MARTIN** (1903),

3 S. R. N. S. W. 156; 20 N. S. W. W. N. 62.—**AUS.**

**PART II. SECT. 8, SUB-SECT. 4.—  
D. (a) *iii.***

**c. Whether order made—Infirmity & illness.**—Where one of two trustees of land under Transfer of Land Act, 1890, has become incapable of trans-

acting business from infirmity & illness, & the continuing trustee has duly appointed a new trustee in her stead pursuant to power in that behalf, the ct. has power under Trusts Act, 1890, s. 4, to make an order vesting such lands in the continuing & new trustees.—**Re HOPE'S TRUSTS**, [1910] V. L. R. 492.—**AUS.**

premises, which descended on his death to his infant heir, the ct., upon petition by his exors., one of whom was a married woman, made an order under Trustee Act, 1850 (c. 60), vesting the legal estate in petitioners, to such uses as they should appoint, & in default, to the use of petitioners in fee, subject to the equity of redemption: in order to enable them to reconvey to the mtgor. without the necessity of having the deed acknowledged by the married woman under Fines & Recoveries Act, 1833 (c. 74).—*Re POWELL* (1857), 4 K. & J. 338; 6 W. R. 136; 70 E. R. 141.

**1805.** ———.—[—]—Real estate had descended to the infant heir-at-law of a surviving trustee. On petition for appointment of new trustees & a vesting order the ct. made an order as prayed, subject to the appointment of a guardian *ad litem*, to be dated prior to the order.—*Re COOPER'S SETTLEMENT* (1861), 9 W. R. 531.

**1806.** ———.—[—]—Where the owner of lands agrees to sell to a railway co. land which they have power to take for the purposes of their undertaking, & afterwards dies, having devised his real estate to an infant, the infant devised is a trustee within the meaning of Trustee Act, 1850 (c. 60), & a vesting order may be made on a petition under that Act.—*Re LOWRY'S WILL* (1872), L. R. 15 Eq. 78; 42 L. J. Ch. 509; 21 W. R. 428.

*Annotations:—***Reid.** *Re Colling* (1886), 55 L. J. Ch. 486; *Re Elementary Education Acts, 1870 & 1873* (1908), 78 L. J. Ch. 281.

**1807.** ———.—[—]—*Re BREARY*, [1873] W. N. 18.

**1808.** ———.—[—]—By a marriage settlement, dated in 1863, the husband & wife covenanted with the trustee thereof to surrender certain copyholds, to which the wife was entitled, to the uses of the settlement. The marriage was duly solemnised, but the wife died without ever having surrendered the copyholds. Upon her death the copyholds became vested in the youngest child of the marriage, as her customary heir. A petition was presented by the eldest child, who was of age, & the other children of the marriage, infants, by their father & next friend, & the trustee of the settlement, asking for an order vesting, without any surrender or admittance, the copyholds in the trustee of the settlement, upon the trusts of the settlement, for all the estate of the customary heir:—*Held*: the case being one of an executed contract, the ct. had power to make the order asked for.—*Re BRADLEY'S SETTLED ESTATE* (1885), 54 L. T. 43; 34 W. R. 148.

**1809.** ———.—[—]—An equitable mtge. was created in 1886 by a deposit of title deeds accompanied by a memorandum, whereby it was agreed that the mtgor. would, when required, execute a legal mtge. to the mtgees. The mtgor. died intestate & his heir-at-law was an infant:—*Held*: a vesting order might be made under Trustee Act, 1850 (c. 60), s. 7, vesting the legal estate in the mtged. premises in the mtgees. subject to the heir-at-law's right to redeem.—*Re JONES (D.) & Co.'s MORTGAGE* (1888), 59 L. T. 859.

**1810.** ———.—**Allen.**—[—]—By an order of the ct., made on a petition under the Trustee Act, 1850 (c. 60), lands were vested in a person who was afterwards discovered to be an alien. The order not having been followed by inquisition & office found, on a petition of rehearing the original order was discharged, & a new order made vesting the lands in a fit & proper trustee.—*Re GIRAUD* (1863),

32 Beav. 385; 2 New Rep. 9; 9 Jur. N. S. 862; 11 W. R. 607; 55 E. R. 151.

*Annotation:—Mentd.* *In the Estate of Walsh, MacBirnle* (1867), 15 W. R. 1115.

**1811.** ———.—[—]—An irrevocable power of attorney to sell land & give receipts for the purchase-money is not avoided by the donor of the power subsequently becoming an alien enemy.

*Deft.*, a German by birth but for many years resident in England, although never naturalised, being about to proceed to Germany, executed a power of attorney on May 20, 1915, by which he appointed his solr. his attorney to sell his leasehold house & to execute such transfers & deeds as were necessary. The power of attorney was made irrevocable for twelve months. On May 26, *deft.* obtained a Govt. permit from the police to travel to Tilbury with the object of embarking for Germany by way of Flushing, & started on that day. On June 2, 1915, the leasehold premises were sold to the *pltf.* by public auction, & a deposit was paid & an agreement signed by him. There was no evidence as to the date when *deft.* reached Germany, but it was some time between May 26 & June 11, 1915. In an action brought by the *pltf.* for a declaration that the agreement for sale had been dissolved by the act of the *deft.* in becoming an alien enemy:—*Held*: the power of attorney having been given by *deft.* at a time when he was not an alien enemy, & being irrevocable for a year was not avoided by his subsequently becoming an alien enemy; the agreement entered into by the attorney in execution of the power did not involve any intercourse with the enemy, & was not therefore within the mischief of the common law or of the Trading with the Enemy Proclamation of Sept. 9, 1914, or of the Trading with the Enemy Acts, & was accordingly valid; the sale could therefore legally be carried out by the attorney & if necessary be completed by a vesting order under Trustee Act, 1893 (c. 53).—*TINGLEY v. MÜLLER*, [1917] 2 Ch. 144; 86 L. J. Ch. 625; 116 L. T. 482; 33 T. L. R. 360, C. A.

*Annotations:—Mentd.* *Naylor, Benzon v. Kralnische Industrie Gesellschaft*, [1918] 1 K. B. 331; *Rodriguez v. Speyer*, [1919] A. C. 59; *Re Sutherland, Bechoff v. Bubna* (1921), 65 Sol. Jo. 513.

#### iv. Trustee out of Jurisdiction.

*See, now, Trustee Act, 1925 (c. 19), s. 44 (ii) (b).*

**1812. Whether order made.**—[—]—In a case where the master had found that one of three trustees under a will had become embarrassed in his circumstances, had been declared bkpt., & had gone, & then was, out of the jurisdiction of the ct. the judge made an order, under the Trustee Act, 1850 (c. 60), s. 10, vesting the estate in the two continuing trustees.—*Re ELLIOTT'S TRUST ESTATE* (1851), 17 L. T. O. S. 102.

**1813.** ———.—[—]—Vesting order made in the exors. of a deceased mtgee. in fee, whose heir-at-law was residing out of the jurisdiction.—*Re LEA'S TRUST* (1858), 6 W. R. 482.

**1814.** ———.—[—]—A legal estate vested in a mtgee. having descended on two co-parceners one of whom was out of the jurisdiction, an order was made vesting it in the other alone.—*Re TEMPLER'S TRUSTS* (1864), 4 New Rep. 494.

**1815.** ———.—[—]—There being a direction in a will to sell real estate without naming the persons to sell, & no devise of the real estate, & it not being clear that there was a sufficient legal power of sale, implied, in the exor., or a sufficient charge of

#### PART II. SECT. 8, SUB-SECT. 4.— D. (a) iv.

**1812 i. Whether order made.**—[—]—Where

one trustee is resident out of the jurisdiction the ct. will not vest the estate in the trustees within the jurisdiction

on the ground that it will not reduce their number.—*Re SPINKS' TRUSTS* (1899), 6 B. C. R. 375.—**CAN.**

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debts to enable him to convey the legal estate to a purchaser, the ct. at the hearing, directed a sale, declaring the heir-at-law, who was out of the jurisdiction, a trustee within the meaning of Trustee Act, 1850 (c. 60), & made a vesting order under sect. 9 of that Act.—*HOOPER v. STRUTTON* (1864), 12 W. R. 367.

**1816.** —.—.]—The persons having power to appoint new trustees of a marriage settlement, viz. the husband & wife, appointed a new trustee in the place of one who had absconded abroad, & jointly with the continuing trustee. The trustee who had absconded declined to join in the appointment, & to execute the necessary transfers. The property subject to the trusts of the settlement consisted of policies of insurance, & mtges. It became therefore, impracticable, having regard to Conveyancing & Law of Property Act, 1881 (c. 41), s. 34 (3), to vest such property in the trustees without the assistance of the ct. A petition for a vesting order was accordingly presented, under the Trustee Acts 1850 (c. 60), & 1852 (c. 55), by the husband & wife & the continuing trustee:—*Held*: the order asked for might be made; but the petition must be amended by adding the name of the proposed new trustee as co-petitioner.—*Re KEELEY'S TRUSTS* (1885), 53 L. T. 487.

**1817.** —.—.]—On July 1, 1881, a house was mortgaged to B. for £350. On July 15, 1887, this mtge. was transferred to D. in consideration of £385. This money was in fact found by S. & T. & the transfer was taken to D. as trustee for them, but there was no declaration of trust. Soon after the transfer D. was adjudicated bkpt., & absconded. At the date of the petition he was out of the jurisdiction, & could not be found. The mtgor. & S. & T. presented a petition under Trustee Act, 1850 (c. 60), for an order vesting D.'s estate in S. & T. D.'s trustee in bkpcy. admitted he took no beneficial interest:—*Held*: the ct. had jurisdiction to make the vesting order.—*Re BARBER'S MORTGAGE TRUSTS* (1888), 58 L. T. 303.

**1818.** —.—.]—In 1858 freeholds were conveyed to a trustee for S., subject to a lease thereof, to S. The trustee died in 1870, & the legal estate vested in J., who went abroad in 1873. In 1892 the beneficial interest in the property was sold. A petition being presented that the legal estate might vest in the purchaser. The ct. made the order, without requiring service of the petition on J.—*Re STANLEY* (1893), 62 L. J. Ch. 469; 68 L. T. 197; 41 W. R. 343; 37 Sol. Jo. 285; 3 R. 368.

**1819.** —.—.]—*Re FITZHERBERT'S SETTLEMENT TRUSTS*, [1898] W. N. 58.

**Mortgages.**—*See MORTGAGE*, Vol. XXXV., pp. 584, 616, Nos. 3205, 3527, 3528, 3530–3534.

#### v. When Trustee Cannot be Found.

*See, now*, Trustee Act, 1925 (c. 19), s. 44 (ii) (c).

**1820. Whether order made.**—On a petition under Trustee Act, 1850 (c. 60), of the personal representative of a mtgee. in fee, stating that the heir of the latter after diligent search could not be found, the ct. refused to make an order vesting the legal estate of the mtged. premises in petitioner.

—*Re MEYRICK'S ESTATE* (1850), 9 Hare, 116, 820; 15 Jur. 505; 68 E. R. 438, 749; *sub nom. Re MEYRICK, Ex p. PAINE*, 20 L. J. Ch. 336.

**1821.** —.—.]—Where a mtgee. in fee, who has never been in possession or in receipt of the rents & profits, has died intestate as to the mtged. hereditaments & his heir cannot be found, the ct. may under Trustee Act, 1850 (c. 60), make an order vesting the legal estate in his exors.—*Re BODEN'S TRUST* (1851), 1 De G. M. & G. 57; 21 L. J. Ch. 316; 19 L. T. O. S. 150; 16 Jur. 279; 42 E. R. 473, L. J.J.; *subsequent proceedings*, 9 Hare, 820.

*Annotation*:—*Folld. Re Lea's Trust* (1858), 6 W. R. 482.

**1822.** —.—.]—One of two trustees was convicted of felony & sentenced to penal servitude, & upon an application to the palatine ct. a new trustee was appointed jointly with the remaining trustee. The trust property consisted of land partly within & partly without the jurisdiction of the palatine ct. On the appointment of the new trustee, the palatine ct. made an order vesting such part of the land as lay within that ct.'s jurisdiction in the new trustee & the remaining trustee. A petition was then presented to this ct. asking for an order vesting the remaining land in the new trustee & the remaining trustee. The evidence showed that the convict trustee could not be found:—*Held*: as there was sufficient evidence that the convict trustee could not be found, the ct. had jurisdiction, under Trustee Act 1850 (c. 60), s. 10, to make a vesting order, & would accordingly make such an order.—*Re HULME'S TRUSTS* (1887), 57 L. T. 13.

**1823.** —.—.]—*Re BARBER'S MORTGAGE TRUSTS*, No. 1817, *ante*.

**Mortgagor.**—*See MORTGAGE*, Vol. XXXV., p. 584, Nos. 3206, 3207.

#### vi. On Dissolution of Corporation.

*See, now*, Trustee Act, 1925 (c. 19), s. 44 (ii) (c).

**1824. Whether order made.**—When a limited liability co. goes into voluntary liquidation for the purpose of carrying out a sale of its property & receives the full purchase consideration, & afterwards becomes automatically dissolved by virtue of Companies Act, 1862 (c. 89), s. 143, before the property has been legally conveyed to the purchaser, the ct. will in a proper case make an order under Trustee Act, 1893 (c. 53), vesting the property in the purchaser for all the estate of the co. therein at the date of its dissolution.—*Re GENERAL ACCIDENT ASSURANCE CORPN., LTD.*, [1904] 1 Ch. 147; 73 L. J. Ch. 84; 89 L. T. 699; 52 W. R. 332.

*Annotations*:—*N.F. Re Taylor's Agreement Trusts*, [1904] 2 Ch. 737. *Folld. Re Mills (Briery Hill) Ltd., Smith v. The Co.*, [1905] W. N. 36; *Re No. 9, Bomore Road*, [1906] 1 Ch. 359. *Menid. Hastings Corpn. v. Letton*, [1908] 1 K. B. 378.

**1825.** —.—.]—*Re MILLS (RICHARD) & CO. (BRIERY HILL) LTD., SMITH v. THE CO.*, [1905] W. N. 36.

*Annotation*:—*Folld. Re No. 9, Bomore Road*, [1906] 1 Ch. 359.

**1826.** —.—.]—*Re No. 9, BOMORE ROAD*, No. 1180, *ante*.

**1827.** —.—.]—*Re RUDDINGTON LAND*, No. 1182, *ante*.

**1828.** —.—.]—*Re ALBERT ROAD, NORWOOD* (Nos. 56 & 58), No. 1181, *ante*.

#### PART II. SECT. 8, SUB-SECT. 4.—D. (a) v.

**1820 i. Whether order made.**—*Re CRAIG'S CONTRACT*, [1928] N. Z. L. R. 303.—N.Z.

#### PART II. SECT. 8, SUB-SECT. 4.—D. (a) vi.

**1824 i. Whether order made.**—*Re CLARK & SOLOMONS' AGREEMENTS TRUSTS* (1905), 5 S. R. N. S. W. 498; 22 N. S. W. W. N. 165.—AUS.

## vii. Trustee Dead Intestate.

See, now, Trustee Act, 1925 (c. 19), s. 44 (v).

**1829. Whether order made—Where heir cannot be found.**—Under a power in a settlement of real estate, a new trustee was duly appointed in the place of a sole trustee, deceased. The heir of deceased trustee could not be found, & on petition, an order was made to vest the estate in the new trustee, & that upon consent he might pay the costs of the proceedings, & that such costs, with interest at 4 per cent. might form a charge on the inheritance.—*Ex p. DAVIES* (1852), 16 Jur. 882.

**1830.** ———.—In consideration of a sum of £350 advanced by U. to L. certain freehold property was conveyed to U. upon trust "in case the £350 should be paid to U., his exors., etc., within six months, then in trust for L., his heirs or assigns, & at his or their request to reconvey the premises as he or they should direct; but in case of default, upon trust that U., his heirs, etc., might without concurrence of L., his heirs, etc., sell & retain the £350 & interest; & upon further trust to pay over the residue & surplus to L., his exors., etc." U. died intestate as to this property, & his heir-at-law could not be discovered:—*Held*: this was a case within Trustee Act, 1850 (c. 60), & not a mere security for money, but one coupled with a trust.—*Re UNDERWOOD* (1857), 3 K. & J. 745; 30 L. T. O. S. 90; 5 W. R. 866; 69 E. R. 1310.

*Annotations*:—*Foll.*, *Re Keeler's Mortgage Trust* (1862), 1 New Rep. 44. *Mentd.* *Re Grange, Chadwick v. Grange*, [1907] 1 Ch. 313.

**1831.** ———.—*Re KEELER'S MORTGAGE TRUST* (1862), 1 New Rep. 44; 32 L. J. Ch. 101; 9 Jur. N. S. 95; 11 W. R. 62.

**1832. — Heir out of jurisdiction.**—The ct. may, under Trustee Act, 1850 (c. 60), s. 9, make an order vesting in the exors. of deceased mtgee. in fee, who has died intestate as to trust estate, the legal estate outstanding in the heir-at-law out of the jurisdiction of the ct., though the mtgee. had before her death been in the receipt of the rents & profits of the mtgd. property.—*Re SKITTER'S MORTGAGE TRUST* (1856), 4 W. R. 791.

**1833. — No administration taken out—Leasehold property.**—*Seem*: the ct. has no jurisdiction under Trustee Acts to make a vesting order as to leaseholds, where the last surviving trustee has died intestate, & no administration to his estate has been taken out, although such trustee never acted in the trusts of the will.—*Re ROBINSON'S WILL* (1863), 2 New Rep. 504; 9 L. T. 12; 9 Jur. N. S. 885; 11 W. R. 1035.

**1834.** ———.—*Re DALGLEISH'S SETTLEMENT*, No. 1209, ante.

**1835. — Death without heirs.**—Where a person absolutely conveyed to a purchaser for value his reversionary interest in freehold property then vested in trustees under a will, & he afterwards obtained from the trustees a conveyance to himself of the legal estate, & died without heirs, still having the outstanding legal estate, the ct., upon petition by the purchaser, made an order under Trustee Act, 1850 (c. 60), vesting the legal estate in petitioner & his heirs.—*Re WILKINSON'S WILL* (1864), 10 L. T. 89; 10 Jur. N. S. 716; 12 W. R. 522.

## viii. Trustee Refusing or Neglecting to Transfer.

See, now, Trustee Act, 1925 (c. 19), s. 44 (vi).

**1836. Whether order made—Refusal to comply with order of court.**—On the refusal of a trustee to comply with an order directing the assignment of trust property, the ct., after a lapse of twenty-eight days, & on an *ex p.* application, made an order vesting the property in the person entitled to it.—*KNIGHT v. KNIGHT* (1866), 14 L. T. 161.

**1837.** ———.—*"Solely seised."*—Pltf. being, at the date of the contract, only equitably entitled under an agreement for sale from the beneficial owners, stipulated by parol that he should only be bound to show such title as he was himself entitled to require from his vendors; it was also agreed that all the property, part of which was then copyhold, should be sold as freehold. The copyholds had as to a moiety been devised by testator to his daughter B. in fee, but were not surrendered to the uses of the will. After his death his two daughters A. & B. were admitted as coparceners, & the subsequent enfranchisement was made to them, their heirs, & assigns. After the enfranchisement, A. being out of the jurisdiction, an order was obtained upon petition, under Trustee Act, 1850 (c. 60), s. 9, vesting her outstanding legal estate in trustees for B.

Negotiations in respect of the title were carried on between the parties for three years, in the course of which the purchaser objected to the above order on the ground that it was ineffectual, & that a fresh order should be obtained under sect. 10 of the Act.

This was the principal requisition, & the only one with which pltf. refused to comply. In Dec. 1861, the purchaser gave notice that unless, within one week, pltf. would comply, or consent to comply, with the requisitions sent therewith, he should require a good & marketable title to the whole property, & in default of such title being shown within five weeks, he should treat the contract as rescinded. After some further negotiation pltf., in Aug. 1865, filed his bill for specific performance:—*Held*: the notice to rescind was a waiver of all delay up to that time, & an admission that the contract was then in force; the vesting order had been properly made under Trustee Act, 1850 (c. 60), s. 9. A. being "solely seised upon trust" for B. both under the admission & under the enfranchisement; consequently, the notice to rescind was bad, being also unreasonable in point of time.—*McMURRAY v. SPICER* (1868), L. R. 5 Eq. 527; 37 L. J. Ch. 505; 18 L. T. 116; 16 W. R. 332.

*Annotations*:—*Refd.* *Webb v. Hughes* (1870), L. R. 10 Eq. 281; *McGrory v. Alderdale Estate Co.*, [1918] A. C. 503.

**1838. — Attempt to extort money.**—The ct. will make a vesting order under Trustee Act, 1852 (c. 55), s. 2, to defeat an attempt at extortion on the part of a trustee.—*Re O'DONNELL'S TRUSTS* (1871), 19 W. R. 522.

**1839.** ———.—One of three joint mtgees., who were trustees, went abroad, & in his absence the mtge. was paid off, & by a deed, to which he, with the other trustees, was named a party, but which he never executed, the debt & security, except the legal estate outstanding in him, were vested in the transferee of the mtge. Afterwards a new

PART II. SECT. 8, SUB-SECT. 6.—  
D. (a) vii.

**18321. Whether order made—Heir out of jurisdiction.**—The survivor of two trustees under a will in his lifetime refused to convey the realty into the joint names of himself & a new trustee

resident outside the jurisdiction who was duly appointed by the widow in place of the deceased trustee under power contained in the will, & died intestate as to the trust estate, leaving heirs, many of whom were resident in distant places outside the jurisdiction. Upon petition by the beneficiaries &

the new trustee, an order was made appointing a second trustee who was resident within the jurisdiction, & vesting the realty in him & the trustee appointed by the widow.—*Re BOSSI'S (DECEASED) ESTATE* (1896), 4 B. C. R. 584.—CAN.

**Sect. 8.—Tenure and transmission of trust property :  
Sub-sect. 4, D. (a) viii. & ix., & (b) i., ii. & iii.]**

trustee was by deed appointed a trustee in his place:—*Held*: the neglect or refusal of the old trustee to convey the outstanding legal estate brought the case within the Trustee Acts, & the ct. had jurisdiction under those Acts to vest in the transferee the outstanding legal estate.—*Re WALKER'S MORTGAGE TRUSTS* (1876), 3 Ch. D. 209.

**1840.** —[.]—Testator devised real estate to trustees in trust to permit A. to receive the rents during his life; & upon his decease, to permit the eldest son of A. to receive the rents during his life; & “upon the decease of such eldest son,” in trust to convey the estate “to the right heir male of A. & his heirs.” A. survived testator, & died in the year 1857, leaving B. his eldest son him surviving. The trustees refusing to convey the legal estate, B. presented a petition asking for a vesting order:—*Held*: the general rule that the heir of a person named in a will must be ascertained as soon as possible applied; B. was ascertained to be “the right heir male of A.” upon A.’s death in 1857; & he was therefore entitled to a vesting order.—*Re GRAYSON* (1879), 48 L. J. Ch. 354; 40 L. T. 98; 27 W. R. 534.

*Annotation*:—*Re* Lucas-Tooth v. Lucas-Tooth, [1921] 1 A. C. 591.

**1841.** —[.]—**Willful refusal.**—The ct. has jurisdiction, under Trustee Act, 1852 (c. 55), s. 2, to vest land in the beneficiaries absolutely entitled thereto, where the trustee thereof wilfully refuses to convey to them, although the land & the trustee are both in Ireland, & the trusts were created by an Irish settlement.—*Re STEELE, GOLD v. BRENNAN* (1885), 53 L. T. 716; 2 T. L. R. 180.

**1842.** —[.]—**Title in doubt.**—A refusal by a trustee to convey is not wilful within the meaning of the Trustee Act, 1852 (c. 55), s. 2, if the title of the person asking for the conveyance is disputed & the trustee entertains a *bonâ fide* doubt as to it. A copyhold was vested in a trustee under the will of M. The beneficial interest was vested as follows: A., B., & C. one-sixth each, D. one-fourth. As to the remaining fourth, it was questionable whether under the will of E. it had passed to A., B., C., & D., in equal shares, or to S., since deceased, of whose will A. & F. were the trustees. The copyhold was sold to X. & A., B., C., & D. as beneficial owners, & according to their respective shares & interests, & A. & F., as trustees, conveyed it by deed to X., the purchase-money being paid thus: to A., B., & C. one-sixth each, to D. one-fourth, & the remaining fourth to A. & F. C. shortly afterwards brought his action against the trustee under M.’s will, & A. & F., as trustees of S.’s will, to establish that no share had passed under S.’s will, & that the purchase-money ought to have been differently apportioned. The judge held that the fourth share had passed under the will of S., & that the purchase-money had been rightly apportioned, & he accordingly dismissed the action. After this X. applied to the trustee to surrender to him, which the trustee declined to do. X. then petitioned for a vesting order. Before the petition was heard, A. gave notice that she reserved all her right under the will of E.:—*Held*: the refusal of the trustee was not

wilful within Trustee Act, 1852 (c. 55), s. 2, & a vesting order could not be made.—*Re MILLS' TRUSTS* (1888), 40 Ch. D. 14; 60 L. T. 442; 37 W. R. 81, C. A.

**ix. Trustee Lunatic.**

**1843. Whether order made—To vest property in mortgagee.**—The legal estate of a married woman, in customary freeholds, was vested in a lunatic trustee, in trust for the married woman, during the joint lives of herself & her husband, for her separate use, without restriction as to alienation or anticipation, with remainder in case she survived her husband, to her absolutely; but in case she died in his lifetime, to such uses as she should appoint; no trusts were declared in default of appointment. She mortgaged the estate by deed enrolled under Fines & Recoveries Act, 1833 (c. 74). The ct., on a petition under Trustee Act, vested the legal estate in the mortgagee.—*TORBUCK v. HEWITSON, Re HEWITSON* (1852), 19 L. T. O. S. 342, L. C.

**1844.** —[.]—**Land in Ireland.**—The surviving trustee of property, consisting partly of land in Ireland, having become lunatic, an order was made upon a petition instituted both in Lunacy & in the Ch. Div., appointing new trustees & vesting the Irish land in them.—*Re LAMOTTE* (1870), 4 Ch. D. 325; 36 L. T. 231; 25 W. R. 149, C. A.

**1845.** —[.]—*Re SMYTH*, No. 1739, *ante*.

**1846.** —[.]—The Abbeydale Freehold Land Society, an unregistered society, was constituted by a deed of trust for the purchase & improvement of an estate which had been laid out in allotments, & for the resale of it in those allotments at the prices also therein specified to the individual members of the society, who exceeded twenty. The land was vested in two trustees. The trust deed provided that the society was not intended to form a partnership, & that no individual member or members should have power to contract on behalf of or to bind the other members, but that all contracts to be binding on the society should be by the committee or trustees. The surviving trustee having become of unsound mind, the ct. made an order vesting so much of the estate as still remained in him in new trustees appointed by the members of the society under the provisions of their rules.—*Re SIDDALL* (1885), 20 Ch. D. 1; 51 L. J. Ch. 682; 52 L. T. 114; 33 W. R. 509; 1 T. L. R. 209, C. A.

*Annotations*:—*Mentd. Re Jones, Clegg v. Ellison*, [1898] 2 Ch. 83; *Re Russell Institution, Figgins v. Baghino*, [1898] 2 Ch. 72.

—[.]—*See LUNATICS*, Vol. XXXIII., pp. 222–226, Nos. 1316–1318, 1327, 1328, 1330–1335, 1346–1359.

**(b) As to Stock and Choses in Action.**

**i. In General.**

**1847. Whether order made—In case of constructive trust.**—*Re ANGELO, Ex p. FRITH*, No. 1452, *ante*.

**1848.** —[.]—**To vest property in cestui que trust—Trustees within jurisdiction.**—Where a chose in action is vested in two trustees within the jurisdiction, the ct. will not make an order vesting it in the *cestuis que trust* only.—*Re BRASS'S TRUSTS* (1856), 4 W. R. 764.

Shares in a joint stock mining co. are “shares” within Statute of Trusts, 1864 (No. 234), s. 25, & where the surviving representative of a person in whose name they stand, is out of the jurisdiction, an order under that sect. may be made, vesting the

**PART II. SECT. 8, SUB-SECT. 4.—  
D. (a) viii.**

**1840 I. Whether order made.**—*Re BOSSIN'S (DECEASED) ESTATE* (1896), 4 B. C. R. 584.—CAN.

**1840 II.** —[.]—*Re HALE v. BRAGO*, [1902] 1 L. R. 99.—IR.

**1840 III.** —[.]—*Re RUTHVEN'S TRUSTS*, [1906] 1 L. R. 236.—IR.

**PART II. SECT. 8, SUB-SECT. 4.—  
D. (b) i.**

**d. Whether order made—Surviving representative out of jurisdiction.**—



**1849.** — To effect variation of settlements.]—Where a vesting order was required to carry into effect an order for variation of settlements, the ct., exercised jurisdiction under Trustee Act, 1893 (c. 53), s. 35, & made a vesting order.—*STORER v. STORER* (1894), 11 R. 618.

### ii. On Appointment of Trustee by Court.

*See, now, Trustee Act, 1925 (c. 19), s. 51 (1) (i).*

**1850. Whether order made—No representation taken out to surviving trustee.]**—Petition for the appointment of new trustees & a vesting order under Trustee Act, 1850 (c. 60). The trust fund was a sum of stock, & no representation had been taken out to the surviving trustee. The ct. refused to make the order.—*Re FROST'S TRUST* (1851), 20 L. J. Ch. 112; 16 L. T. O. S. 481; 15 Jur. 644.

**1851.** — — —.]—*Re RYAN'S SETTLEMENT* (1861), 7 Jur. N. S. 1121.

**1852.** — — —.]—Where the legal personal representative of the last surviving trustee of a settlement was dead, the ct. made an order vesting stock standing in the name of the last surviving trustee in the persons entitled thereto.—*Re HILLIARD'S SETTLEMENT TRUST* (1880), 42 L. T. 79.

**1853.** — — —.]—A married woman who was surviving legal personal representative of testator, in exercise of a power reserved to her by her marriage settlement, made her will, & appointed her husband sole exor. The husband proved the will, & also obtained letters of administration to all other his wife's personal estate. He also applied for supplemental letters of administration, to enable him to continue the chain of representation to testator; but they were refused by the Ct. of Probate.

The ct. made an order, appointing the husband trustee of the trust, funds which were standing in testator's name, & vesting in him the right to transfer them.—*Re HERBERT'S WILL* (1860), 8 W. R. 272.

**1854.** — — —.]—*De SOYRES v. De SOYRES* (1880), 87 L. T. Jo. 93.

**1855.** — — —.]—*Re STOKEN'S SETTLEMENT TRUSTS*, [1893] W. N. 203.

### iii. Trustee under Disability.

*See, now, Trustee Act, 1925 (c. 19), s. 51 (1) (ii) (a).*

**1856. Whether order made—Infancy.]**—The sole trustee of money for A. & B. invested it in stock, in the joint names of himself & B., an infant. After the deaths of the trustee & A., the infant was held to be a trustee within the Trustee Acts, & a vesting order was made.—*SANDERS v. HOMER* (1858), 25 Beav. 467; 31 L. T. O. S. 94; 6 W. R. 476; 53 E. R. 715.

**1857.** — — —.]—Where an investment in Consols had been made by exors., by mistake, in the names of infants:—*Held*: for the purposes of reinvestment, the infants must be considered as trustees for the exors., & a declaration made to that effect.—*RIVES v. RIVES*, (1866), 14 L. T. 351.

**1858.** — — —.]—Testator bequeathed a legacy to each child & directed his exors. to stand possessed of his residuary estate in trust for all his children, the shares of those under age to be

invested in Consols, & paid to them at twenty-one or marriage. There were trusts for maintenance, education, & accumulation for the benefit of the infants. Two exors. invested the legacies & shares of two of the infants in Consols in their own & the infants' names, & died leaving the infants surviving:—*Held*: the definition of "trustee" in Trustee Act, 1850 (c. 60), s. 2, included the case of Consols which had been transferred into the name of an infant who was the sole beneficial owner of them, but subject to a direction in regard to maintenance or otherwise, vested in somebody else, & which direction could not in this case be practically performed so long as the Consols remained in the name of the infant; & the infants should be treated as trustees of the Consols; & the legal personal representative of the last surviving trustee under the will was appointed to transfer the Consols into ct.—*GARDNER v. COWLES* (1876), 3 Ch. D. 304; 24 W. R. 920.

*Annotation:—Folld. Re Findlay* (1886), 32 Ch. D. 221.

**1859.** — — —.]—Where stock to which an infant was beneficially entitled had been invested in the joint names of himself & another person:—*Held*: the ct. had jurisdiction under Trustee Act, 1852 (c. 55), s. 3, to make an order vesting in such other person the right to transfer such stock.—*Re HARWOOD (INFANTS)* (1882), 20 Ch. D. 536; 51 L. J. Ch. 578; 30 W. R. 595.

*Annotations:—Folld. Re Barnett, Foster v. Barnett* (1889), 61 L. T. 676; *Re Dehaynin*, [1910] 1 Ch. 223.

**1860.** — — —.]—Under the will of her father, a domiciled Scotsman, who made his will in the Scottish form, an infant was entitled to a legacy. The will contained no express trust for maintenance. The Ct. of Session in Scotland appointed a *curator bonis* to the infant, who received the legacy, & invested it in the purchase of some New Zealand stock, in the sole name of the infant. This stock was transferable at the Bank of England. It was the only property of the infant, & the income derived from it was not sufficient to provide for her maintenance & education. The Ct. of Session authorised the *curator bonis* to advance from time to time sums out of capital, not exceeding in all £100, for the purpose of supplementing the income of the infant, & enabling her to be placed at a suitable school. The *curator bonis*, as next friend, presented a petition, asking that the right to transfer £100 of the New Zealand stock might vest in him, & that he might be at liberty to sell & transfer the same, & to apply the proceeds in or towards the maintenance or education of the infant; that the dividends which had accrued, & which might, during the minority of the infant, accrue on the stock, or on the residue thereof after the transfer, might be paid to him, he undertaking to apply them in or towards the maintenance or education of the infant; & that he might be appointed guardian:—*Held*: the infant was a "trustee" of the stock, within the meaning of Trustee Acts & an order was made vesting the right to transfer £100 of the stock in the next friend, who was appointed guardian to the infant, & liberty was given to him to sell & transfer the same, & to apply the proceeds in or towards the maintenance or education of the infant; & the dividends accrued & to accrue during the minority of the infant, should be paid to the guardian, he undertaking to

right to transfer them.—*Re SAUNDERS, BRYANT v. SAUNDERS* (1878), 4 V. L. R. (Eq.) 215.—*AUS.*

•. — No personal representative of last surviving trustee.]—Trustees, in whose name a sum of English railway stock stood, died, & there was no personal representative of the survivor.

New trustees were appointed under a power in the settlement:—*Held*: in the absence of a personal representative, there was no jurisdiction under Trustee Act, 1893, to make an order vesting in the trustees so appointed the right to call for the transfer of the stock.—*Re CANE'S TRUSTS*, [1895] 1

I. R. 172.—*IR.*

PART II. SECT. 8, SUB-SECT. 4.—*D. (b) ii.*

1. Whether order made—No representation taken out to surviving trustee.]—*Re MCCARRY'S TRUSTS* (1878), 1 L. R. 16.—*IR.*



*Sect. 8.—Tenure and transmission of trust property :—*  
*Sub-sect. 4, D. (b) iii., iv., v., vi., vii. & viii., & E. (a) & (b).]*

apply them in or towards her maintenance or education.—*Re FINDLAY (AN INFANT)* (1886), 32 Ch. D. 221, 641; 55 L. J. Ch. 395.

*Annotation :—Refd. Re Dehaynin, [1910] 1 Ch. 223.*

**1861.** ———.]—Infants were entitled under a will to certain legacies, which had been invested in Consols in the names of the exor. & extrix., & of the infant in each case entitled thereto:—*Held*: the ct. would, under Trustee Act, 1852 (c. 55), s. 3, make an order vesting in the exor. & extrix. the right to transfer the stock & receive the dividends accrued prior to the transfer.—*Re BARNETT, FOSTER v. BARNETT*, (1889), 61 L. T. 676.

*Annotation :—Fold. Re Dehaynin, [1910] 1 Ch. 223.*

**1862.** ———.]—**Stock in name of infant & another.**—Where stock to which an infant was beneficially entitled had been invested in the joint names of himself & another person:—*Held*: the ct. had jurisdiction under Trustee Act, 1893 (c. 53), s. 35 (1) (ii) (a), notwithstanding some slight difference in the language of this sect. & sub-sects. as compared with Trustee Act, 1852 (c. 55), s. 3, to make an order vesting the right to transfer such stock in the infant's guardian.—*Re DEHAYNIN*, [1910] 1 Ch. 223; 79 L. J. Ch. 131; 101 L. T. 703, C. A.

#### iv. Trustee Out of Jurisdiction.

*See, now, Trustee Act, 1925 (c. 19), s. 51 (1) (ii) (b).*

**1863. Whether order made.**—Testator gave an annuity to his widow, & the residue of his estate to his children. The exors. paid testator's debts & legacies, & purchased stock in their names, to answer the annuity, & paid the dividends to the widow. One of the exors. went to reside abroad, & the other died:—*Held*: they were trustees of the stock within 11 Geo. 4 & 1 Will. 4, c. 60.—*Ex p. DOVER* (1834), 5 Sim. 500; 58 E. R. 425.

**1864.** ———.]—Trustee Act, 1850 (c. 60), s. 22, authorises an order vesting the right to receive future dividends.

One of four trustees of a sum of stock being out of the jurisdiction, an order was made under the above sect. vesting the right to receive the dividends in the other three, but was, on the appeal by the bank, varied by restricting it to the dividends to accrue due during the joint lives of the three.—*Re PEYTON'S SETTLEMENT* (1858), 2 De G. & J. 290; 25 Beav. 317; 31 L. T. O. S. 127; 4 Jur. N. S. 469; 6 W. R. 453; 41 E. R. 1000, L. J.

**1865.** ———.]—*Re TRUBEE'S TRUSTS*, No. 1880, *post*.

#### When Trustee Cannot be Found.

*See, now, Trustee Act, 1925 (c. 19), s. 51 (1) (ii) (c).*

**1866. Whether order made—Appointment of new liquidator.**—After an order had been made for the compulsory winding up of a co. A. was appointed official liquidator. A. afterwards absconded, & he was removed from the post of official liquidator, & in his place C. was appointed official liquidator. It was then found that a sum of Consols, part of the assets of the co., was standing in A.'s name as official liquidator. An application, under Trustee Act 1850 (c. 60), ss. 22, 43, was

therefore made by motion *ex parte* for an order to vest such sum of Consols in C. as official liquidator. A. had become bkpt. & could not be found:—*Held*: the ct. had jurisdiction to make the order asked for upon motion; but, except in simple cases like the present, the application should be made by petition.—*Re CAPITAL FIRE INSURANCE ASSOCN., LTD.* (1886), 55 L. T. 633.

**1867.** ———.]—*DUGMORE v. SUFFIELD*, [1896] W. N. 50.

**1868.** ———.]—*Re VAREY'S WILL TRUSTS* (1898), 42 Sol. Jo. 781.

**1869.** ———.]—**Vesting of patent rights.**—*Re HEATH'S PATENT* (1912), 56 Sol. Jo. 538; 20 R. P. C. 389.

#### vi. On Dissolution of Corporation.

*See, now, Trustee Act, 1925 (c. 19), s. 51 (1) (ii) (c).*

**1870. Whether order made.**—*Re TAYLOR'S AGREEMENT TRUSTS*, No. 1184, *ante*.

**1871.** ———.]—A dissolved co. is a "trustee who cannot be found," & a patent inadvertently overlooked & not assigned, & of which the dissolved co. still appeared on the register of patents as the proprietor, can be dealt with by a vesting order made on petition under Trustee Act, 1893 (c. 53), ss. 25, 35, 36, & Patents & Designs Act, 1907 (c. 29), s. 72, & does not merge in the Crown.—*Re DUTTON'S PATENTS* (1923), 67 Sol. Jo. 403; 40 R. P. C. 84.

#### vii. Trustee Refusing or Neglecting to Transfer.

*See, now, Trustee Act, 1925 (c. 19), s. 51 (1) (ii) (d), (e).*

**1872. Whether order made.**—The surviving trustee of a sum of stock neglected for twenty-eight days, after a request in writing had been made to him by persons who had been duly appointed new trustees, to transfer the stock to them. The ct. held that they were persons absolutely entitled to the stock within the meaning of Trustee Act, 1850 (c. 60), & ordered the stock to be transferred to them.—*Re RUSSELL'S TRUST* (1851), 1 Sim. N. S. 404; 20 L. J. Ch. 196; 15 Jur. 100; 61 E. R. 156.

**1873.** ———.]—Where a trustee neglects or refuses to receive the dividends on a sum of stock, the ct. can vest in another person only the right to receive the dividends in respect of which there has been such neglect or refusal.—*Re HARTNALL, Ex p. HODGES* (1852), 5 De G. & Sm. 111; 21 L. J. Ch. 384; 18 L. T. O. S. 315; 64 E. R. 1041.

*Annotations :—Distd. Re Peyton's Settlement. (1858), 27 L. J. Ch. 476. Fold. Re Hyatt's Trusts (1882), 21 Ch. D. 846.*

**1874.** ———.]—A trustee having refused to convey certain shares to new trustees duly appointed, a notice was served upon him under Trustee Act, 1850 (c. 60), s. 24; &, on a petition being afterwards presented, which was not served on the recusant trustee, the ct. made a vesting order.—*Re BAXTER'S WILL TRUSTS* (1854), 2 Sm. & G., App. V.

**1875.** ———.]—The Trustee Act held to apply to a case in which the exor. of a surviving trustee had not proved the will & had neglected to transfer stock on the requisition of new trustees appointed out of ct.

The ct. directed the circumstances bringing a case within the Trustee Act to be inserted in an

#### PART II. SECT. 8, SUB-SECT. 4.— D. (b) iv.

**1863 i. Whether order made.**—Where shares in a railway co. stood in the names of two trustees, one of whom

was dead, & the other had left the colony & had not been heard of for many years, the ct., upon the petition of the person claiming to be beneficially entitled, made an order vesting

in her the right to deal with the shares.—*Re MITCHELL'S (LADY) TRUST ESTATE* (1879), 5 V. L. R. (Eq.) 42.—**AUS.**

**1863 ii.** ———.]—*Re O'GHORMAN'S TRUST* (1890), 25 L. R. Ir. 93.—**IR.**



*Sect. 8.—Tenure and transmission of trust property :  
Sub-sect. 4, E. (b) & (c), F. & G. ; sub-sect. 5.]*

Ch. 403 ; 62 L. J. Ch. 262 ; 68 L. T. 593 ; 41 W. R. 457 ; 37 Sol. Jo. 46 ; 2 R. 151, C. A.

*Annotations :—As to (1) Expld. Re GREGSON, [1893] 3 Ch. 233. N.F. Re Joliffe's Trusts (1893), 68 L. T. 747.*

**1896.** —[—]—The common form of vesting order as to stock or shares upon the appointment of new trustees by the ct. need not be departed from where it is intended to be to the effect that the trustees shall hold the stock or shares themselves, & it is not affected by the order made in *Re The New Zealand Trust & Loan Co.*, No. 1895, *ante*. But that order is applicable to a case where the trustees do not desire to become shareholders & expose themselves to liability in respect of shares not fully paid.

It is, however, perfectly competent for a judge to make an order in either form.—*Re GREGSON*, [1893] 3 Ch. 233 ; 62 L. J. Ch. 764 ; 69 L. T. 73 ; 41 W. R. 641 ; 37 Sol. Jo. 542 ; 2 R. 513, C. A.

*Annotation : Apled. Re C. M. G.*, [1898] 2 Ch. 324.

**1897.** —[—]—This was a petition for the appointment of new trustees of a will, & for an order vesting in the new trustees a sum of Consols :—*Held* : the proper form of order should, after appointing the new trustees, go on to direct the trustees to transfer the stock into their own names.—*Re JOLIFFE'S TRUSTS* (1893), 68 L. T. 747 ; 3 R. 718.

**1898.** —[—]—An order under Trustee Act, 1893 (c. 53), s. 35, vesting stock in trustees should direct the trustees to transfer the stock into their own names.—*Re PRICE* (1894), 8 R. 621.

—[—] *In lunacy proceedings.*—*See LUNATICS*, Vol. XXXIII., p. 220, No. 1294.

**1899. Trust funds invested on unauthorised securities.**—[—]—Form of order on appointment of new trustees where the trust funds are invested on unauthorized securities & it is desired not to transfer them into the names of the new trustees, but to sell them & reinvest the funds in accordance with the trusts of the settlement.—*Re PEACOCK* (1880), 14 Ch. D. 212 ; 49 L. J. Ch. 228 ; 50 L. J. Ch. 380 ; 43 L. T. 99 ; 28 W. R. 801, C. A.

*Annotation :—Expld. Re New Zealand Trust & Loan Co.*, [1893] 1 Ch. 403.

*(c) The Estate Vested.*

*See, now, Trustee Act (c. 19), s. 44.*

**1900. Such estate as was vested in former trustees.**—[—]—On a suit to appoint new trustees, it appeared that of two remaining trustees of a marriage settlement, one had gone out of the jurisdiction, & the other was willing to act :—*Held* : a vesting order could be made to vest the estate in the new trustees to be appointed, for such estate as was vested in the continuing & absent trustee.—*SMITH v. SMITH* (1854), 3 Drew. 72 ; 3 Eq. Rep. 126 ; 24 L. J. Ch. 229 ; 24 L. T. O. S. 180 ; 18 Jur. 1047 ; 3 W. R. 95 ; 61 E. R. 829.

*Annotation :—Apled. Re Bute's Will* (1859), John. 15.

**1901.** —[—]—*Re RATHBONE*, No. 1790, *ante*.

**1902.** —[—]—Upon the death of a sole surviving trustee intestate, the ct. made an order for the appointment of new trustees, & ordered certain lands forming part of the estate to vest in the new trustees "for the estate therein now vested in the heir-at-law of deceased trustee." After the order had been passed & entered administration was taken out of the estate of deceased trustee. Upon motion that the order of the ct. might be altered by substituting the legal personal representative for the heir-at-law of intestate trustee in accordance with Conveyancing Act, 1881 (c. 41), s. 30, the ct. made a new order, that notwithstanding

ing the previous order, the land should vest in the new trustees "for all the estate therein now vested in the legal personal representative" of deceased trustee.—*Re PILLING'S TRUSTS* (1884), 26 Ch. D. 432 ; 53 L. J. Ch. 1052 ; 32 W. R. 853.

**1903.** —[—]—The last survivor of three trustees of real estate died, & no legal personal representative of his estate had been appointed. Upon a petition for the appointment of new trustees, & a vesting order of the trust property, an order was made vesting the estate in the new trustees for all the estate & interest which deceased trustee had in him immediately before his death.—*Re RACKSTRAW'S TRUSTS* (1885), 52 L. T. 612 ; 33 W. R. 559 ; 1 T. L. R. 388.

*Annotation :—Fold. Re Williams' Trust* (1887), 56 L. T. 884.

**1904.** —[—]—In 1833 a lease for three lives of a certain manor was granted to A., B., & C., subject to the trusts declared by the will of testator. C. survived his co-trustees A. & B., but afterwards died intestate as to the trust property. C. left a brother D., who also died intestate, leaving co-heiresses. A petition was presented for the appointment of new trustees of the lease & a vesting order. A question then arose as to the persons in whom the lease would be legally vested & the proper wording of the vesting order. It was sought to amend the petition by varying the proposed vesting order so as to vest the manor in the new trustees "for the same estate as C. would have had if he had been alive," & reference was made to the form in *Seton*, Vol. I., p. 539 :—*Held* : no form ought to be adopted in which the heir was not named, except in cases where it was in fact inconvenient or impossible to identify the heir ; & the ct., on a broad view, ought to regard the fact that the estate might have been dealt with, since the death of the last surviving trustee, in such a way that parties not before the ct. might be prejudiced by a vesting order in the form proposed, but under the circumstances of the case, & the ct. being satisfied that no parties could be prejudiced, the vesting order might be made in the form proposed.—*Re SARUM (BP.)* (1886), 55 L. T. 313.

**1905.** —[—]—The sole trustee of land appointed by a will died in the lifetime of testator. Testator's heiress-at-law died intestate, after the Conveyancing Act, 1881 (c. 41), had come into operation, & there was no representative of her estate :—*Held* : on a petition for the appointment of new trustees of the will, which was served on testator's heir, an order could be made vesting the property in the new trustees for such estate as was vested in the heiress-at-law at the time of her death.—*Re WILLIAMS' TRUSTS* (1887), 36 Ch. D. 231 ; 56 L. J. Ch. 1088 ; 56 L. T. 884 ; 36 W. R. 100.

**1906.** —[—]—(1) Where under Trustee Act, 1893 (c. 53), an order is made vesting, or appointing a person to convey, the estate of an infant tenant in tail in possession, the effect is to bar the estate tail & remainders over.

(2) The order in such a case should not, as in *Seton on Judgments*, 5th ed. Vol. ii, p. 1007, Form No. 21, contain a reference to the mode of conveyance under the Fines & Recoveries Act, 1833 (c. 74), but should simply vest the land for such estate as the infant, if of full age, could convey.—*Re MONTAGU, FABER v. MONTAGU*, [1898] 1 Ch. 549 ; 65 L. J. Ch. 372 ; 74 L. T. 346 ; 44 W. R. 583.

*Annotation :—As to (1) Distd. Re Hambrough's Estate, Hambrough v. Hambrough, [1909] 2 Ch. 620.*

**1907.** —[—]—*Re HOCKLEY HALL & WHATELEY COLLIERIES & BRICKWORKS, LTD.* (1898), 42 Sol. Jo. 449.

**1908. Whether estate freed from claims of unborn persons—Settled property.]—HARGREAVES v. WRIGHT (1853), 10 Hare, App. II. LVI.; 1 W. R. 408; 68 E. R. 1147.**

#### F. Effect of Order.

**1909. General rule.]—Re PLYER'S TRUST, No. 1794, ante.**

**1910. Estates in remainder barred—Where consent of protector of settlement.]—A vesting order, under Trustee Act, 1850 (c. 60), will if consented to by the protector of the settlement, bar all estates in remainder, & not pass a base fee only under Fines & Recoveries Act, 1833 (c. 74).—POWELL v. MATTHEWS (1855), 1 Jur. N. S. 973.**

*Annotation:—Folld. Re Montagu, Faber v. Montagu, [1896] 1 Ch. 549.*

**1911. — Estate tall.]—Re MONTAGU, FABER v. MONTAGU, No. 1906, ante.**

**1912. Order made in respect of lease—Right to benefit of covenant for quiet enjoyment.]—COWPER v. HARMER (1887), 57 L. J. Ch. 460; 57 L. T. 714; 4 T. L. R. 16.**

#### G. Costs.

*See, now, Trustee Act, 1925 (c. 19), s. 60.*

**1913. Paid out of trust estate.]—Ex p. DAVIES, No. 1829, ante.**

**1914. — Second petition necessary owing to mistake in previous order.]—An order was made upon a petition appointing new trustees of the will of testator, & vesting in them the property mentioned in the petition as subject to the trusts of the will. After the order had been drawn up, passed, & entered, it was discovered that one part of the trust property had been omitted from the order, & another part, by an accident, had not been mentioned in the petition. A second petition was then presented by the same persons who were petitioners on the first petition, & the ct. made an order vesting all the property omitted in the new trustees, & directing the costs of the application to be paid out of the trust estate.—Re HOPPER'S TRUSTS (1886), 54 L. T. 267; 34 W. R. 302.**

**1915. Paid out of parts of property vested.]—After a decree for the sale of intestate's copyhold estate, in lots, but before the sale, the infant heir of the intestate was admitted.—Held: a petition for a vesting order was properly presented by the purchaser, whose money was in ct., & the costs of the order were to be borne by the vendors, & to be paid out of the purchase-money of the particular lot, & not out of the fund in ct. generally.—AYLES v. COX, Ex p. ATTWOOD (1853), 17 Beav. 584; 51 E. R. 1161; sub nom. AYLES v. COX, Ex p. COX, 22 L. T. O. S. 232.**

**1916. Order consequent on refusal by trustee to transfer stock—Costs paid by refusing trustee.]—A petition founded on the refusal for twenty-eight days to transfer stock under Trustee Act, 1893 (c. 53), s. 35 (ii) (d), must not be presented or served before the expiration of the twenty-eight days. On petition for such an order there is jurisdiction to order the recusant trustee to pay the costs.**

Trustees who held a residuary estate upon trust, in events which had happened, to divide the same amongst three sets of beneficiaries, were requested

in writing by all such beneficiaries to transfer to them the various funds of which the residue consisted according to an arrangement which they had entered into. It appeared that there was sufficient cash in the hands of the trustees to pay any outstanding costs which they might have to pay, but one of the two trustees refused to transfer for twenty-eight days after the request:—*Held: the ct. has jurisdiction to make the vesting order, & to order the recusant trustee to pay the costs of the application.—Re KNOX'S TRUSTS, [1895] 2 Ch. 483; 64 L. J. Ch. 860; 72 L. T. 761, C. A.*

**1917. Order consequent on absconding trustee—Mortgagee—Costs paid by mortgagor.]—As a general rule, the costs of reconveyance fall on the mtgor., & the costs of obtaining a vesting order of land where the legal estate is in an absconding trustee are no exception to the general rule.—WEBB v. CROSSE, [1912] 1 Ch. 323; 81 L. J. Ch. 259; 105 L. T. 867; 56 Sol. Jo. 177.**

*Annotation:—Mentd. Graham v. Seal (1918), 88 L. J. Ch. 31.*

#### SUB-SECT. 5.—APPOINTMENT OF PERSON TO CONVEY OR TRANSFER.

*See, now, Trustee Act, 1925 (c. 19), ss. 50, 51 (2); Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 47.*

**1918. Where sale under order of court—One party refusing to execute deed.]—An estate was devised to A., subject to a charge of £5,000 payable to the exors. In a suit to which A. was a party, the estate was sold, & all proper parties were ordered to join in the conveyance. A., refusing to execute the deed, was declared a trustee for the purchaser, under 11 Geo. 4 & 1 Will. 4, c. 60, & another person was directed to convey in his stead.—ROBINSON v. WOOD (1842), 5 Beav. 246; 49 E. R. 572.**

**1919. — Party out of the jurisdiction.]—In a suit by the personal representatives of an equitable mtgee. of leaseholds for payment of the mtgd. debt & in default for a sale; the mtgor., after decree, made default, & the premises were then sold under the decree.—Held: the mtgor., who was out of the jurisdiction, was not a trustee, under 11 Geo. 4 & 1 Will. 4, c. 60, for the purchaser, but he was a trustee under that Act for plffs., who were consequently entitled to an order appointing a proper person in the place of the mtgor. to execute the assignment.—KING v. LEACH (1842), 2 Hare, 57; 7 Jur. 845; 67 E. R. 24.**

*Annotations:—Folld. Re Milfield (1847), 2 Ph. 254. Reid. Rowley v. Adams (1851), 14 Beav. 130.*

**1920. — — —.]—Tenant for life of estates decreed in a creditors suit to be sold for payment of debts is a trustee for the purchaser within the meaning of 1 Will. 4, c. 60.—Re MILFIELD (1847), 2 Ph. 254; 41 E. R. 940.**

**1921. — Heir-at-law not ascertainable.]—Testator devised lands in trust to sell for the payment of debts; the trustees disclaimed, & the heir-at-law could not be found; the lands were sold under a decree in a suit for administration, & an order was obtained under Trustee Act, 1850 (c. 60), appointing the vendor's solr. to convey**

#### PART II. SECT. 8, SUB-SECT. 5.

**1918. Where sale under order of court—One party refusing to execute deed.]—Where the ct. orders a sale of land, & a person entitled, being a party to the proceedings, refuses to execute the deed, the person having carriage of the proceedings, & not the purchaser, is the proper person to take out a**

summons to have a person appointed under Trustee Act, 1893, s. 33.—MOORHEAD v. KIRKWOOD, [1919] 1 I. R. 225.—IR.

**g. To execute lease.]—Where deft. had been declared a trustee for plff. under Trustee Acts, 1850, 1852, for the purpose of executing to plff. a lease for certain premises, & had**

refused, or neglected to do so for 28 days after formal demand, the ct. made an order that, on the consideration money being brought into ct., the chief clerk should execute the lease including a memorial thereof, on behalf, & in deft.'s name.—DURHAM v. KERNAN (1871), 5 I. R. Eq. 217.—IR.

*Sect. 8.—Tenure and transmission of trust property : Sub-sect. 5. Sect. 9: Sub-sect. 1, A., B. & C.]*

to the respective purchasers. On the question being raised by one of the purchasers:—*Held*: the provisions of Trustee Act, 1850 (c. 60), ss. 9, 10, applied to the case & the order which had been made was correct.—*WILKS v. GROOM* (1856), 6 De G. M. & G. 205; 27 L. T. O. S. 295; 2 Jur. N. S. 1077; 4 W. R. 828; 43 E. R. 1211, L. C.

*Annotation:—Refd. Gunson v. Simpson* (1868), L. R. 5 Eq. 332.

**1922. — Sale in administration action.]—**Real estates devised to married women & infants having been sold under a decree in a creditor's suit in several lots. Upon petition under the Trustees Acts the ct. appointed pltf.'s solr. to convey their own shares to the several purchasers.—*HANCOX v. SPITTLE* (1857), 3 Sm. & G. 478; 65 E. R. 745.

**1923. — —.]—**A devisee of real estate, subject to payment of debts, became of unsound mind, & was so found by inquisition. A committee was appointed, & an actr for the administration of testator's real & personal estate was commenced with the sanction of the master in lunacy, in the Ch. Div., by the lunatic & his committee, & testator's personal estate proving to be insufficient for payment of his debts, an order was made for sale of all testator's real estate upon payment of the purchase-money into ct. Under this order the real estate was sold, & the purchaser paid the purchase-money into ct. He, however, raised an objection to the title of the vendors, on the ground that they could not convey without an order in lunacy:—*Held*: the administration action, in which the order for sale was made, having been properly commenced with the sanction of the master in Lunacy, lunatic pltf. was entitled to carry on the action, & was, therefore, also bound by the order for sale made in it; the lunatic was, therefore, a trustee within Trustee Act, 1852 (c. 55), s. 1, of the real estate, & his committee should be appointed to convey.—*Re STAMPER, STAMPER v. STAMPER* (1882), 46 L. T. 372.

**1924. To carry out decree for specific performance—Refusal to carry out decree.]—**A donee of a power of jointuring under a settlement was ordered, in a specific performance suit instituted by his wife, to execute the power by a deed to be approved of by the master, whereby £1,000 *per annum* was to be appointed as pltf.'s jointure. On his refusal to obey the decree:—*Held*: under Trustee Acts, 1850 (c. 60) & 1852 (c. 55), he might be declared a trustee of all the rights, interests, estates & property acquired by him under the settlement, & the ct. appointed a person to execute the requisite deed in his place under Trustee Act, 1850 (c. 60).—*WELLESLEY v. WELLESLEY, MORNINGTON v. MORNINGTON, Ex p. MORNINGTON* (1853), 4 De G. M. & G. 537; 1 Eq. Rep. 369; 22 L. J. Ch. 966; 43 E. R. 617, L. J.

**1925. — —.]—**A decree was made for specific performance of an agreement to grant a new lease of certain premises, & deft. was ordered to execute such new lease to pltf.

Deft. having refused to obey the order, pltf. moved for leave to issue a writ of attachment against her:—*Held*: there having been a decree for specific performance, the ct. had jurisdiction, under Trustee Act, 1850 (c. 60), s. 30, to appoint a person to execute the lease in place of deft., & the motion was directed to be amended accordingly.

The motion having been amended, an order was

made declaring deft. a trustee of the premises within the meaning of the Trustee Act, & a person was appointed in place of the deft. to execute the lease to pltf.—*HALL v. HALE* (1884), 51 L. T. 226.

**1926. Legal estate in infant trustee.]—**A will, attested by two witnesses, contained a devise of freeholds in England to A., testator's son & heir, for life, with remainder to trustees, & a devise to them of estates in St. Kitts upon trust to sell & to invest the proceeds in estates in England, to be held upon the same trusts. A. was in possession of the English, & he received the rents of the St. Kitts estates during his life; & with his concurrence, the trustees made efforts, though ineffectual, to sell the latter. After the death of A., intestate, the trustees contracted to sell one of the St. Kitts estates, but the purchaser refused to complete, on the ground that the will was inoperative in the island, & that the estates descended upon the heir:—*Held*: A. had elected to take under the will, & his infant heir was bound by his acts, & was a trustee under Trustee Act, 1850 (c. 60), for the person claiming under the will.—*DEWAR v. MAITLAND* (1866), L. R. 2 Eq. 834; 14 L. T. 853; 12 Jur. N. S. 699; 14 W. R. 958.

**1927. — —.]—**A person seised in fee of land which a railway co. were empowered to take compulsorily entered into a voluntary agreement for sale to the co. After the purchase-money had been paid, & the co. had taken possession & had accepted the title, the vendor died intestate, leaving an infant heir-at-law:—*Held*: the heir-at-law was a trustee within Trustee Act, 1850 (c. 60).—*Re RUSSELL'S ESTATE* (1866), 35 L. J. Ch. 461; 12 Jur. N. S. 224.

**1928. To transfer stock—One trustee out of jurisdiction.]—**One of two exors. appearing, from the proceedings in the cause, to be a trustee within the meaning of 11 Geo. 4 & 1 Will. 4, c. 60, of a fund standing in testator's name, & it being proved by affidavit that he was living out of the jurisdiction, the ct., without a reference to the master, made an order under this Act for the transfer of the fund by his co-exor.—*PARKER v. BURNLEY* (1839), 1 Beav. 492; 48 E. R. 1031.

**1929. To transfer stock into court—Petition by committee of lunatic cestui que trust.]—***Re BOURKE* (1864), 2 De G. J. & Sm. 426; 46 E. R. 440, L. J.

**1930. To carry out agreement by testator—On behalf of infant devisee.]—***Re TAYLOR*, [1866] W. N. 5.

**1931. Estate vested in infant mortgagor—Decree in foreclosure action.]—**In a foreclosure action, where the estate of the mtgor. was devised in trust for sale & had become vested in an infant, who was also one of the persons beneficially interested:—*Held*: the decree should contain a direction that, in case the mtgees. were not redeemed within six months, the infant should be a trustee for them within the meaning of Trustee Act, & the extrix. of the mtgor. be ordered to convey the estate to the mtgees. on his behalf.—*FOSTER v. PARKER* (1878), 8 Ch. D. 147.

*Annotation:—Refd. Mellor v. Porter* (1883), 25 Ch. D. 158.

**1932. Service of petition—Or infant heir.]—**A petition under Trustee Act, 1850 (c. 60), for the appointment of a person to convey in the place of an infant heir of deceased mtgee. need not to be served upon the infant.—*Re WILLAN* (1861), 9 W. R. 689.

**In cases of lunacy.]—***See* LUNACY, Vol. XXXIII., p. 165, Nos. 499, 500.

## SECT. 9.—VACATION OF OFFICE.

## SUB-SECT. 1.—RETIREMENT.

*A. Right to Retire.*

**1933. Right of trustee to retire.]**—A trustee cannot withdraw from his trust unless under a provision to that effect.—*MANSON v. BAILLIE* (1855), 26 L. T. O. S. 24; 2 Macq. 80, H. L.

*Annotations:*—*Mentd.* *Broughton v. White*, *Broughton v. Broughton* (1855), 26 L. T. O. S. 54; *Re Barber*, *Burgess v. Vinicombe* (1886), 34 Ch. D. 77; *Re Corsellis*, *Lawton v. Elwes* (1886), 33 Ch. D. 160.

**1934.** —.]—*FORSHAW v. HIGGINSON*, No. 1964, *post*.

**1935.** —.]—*Re BEVERIDGE'S TRUSTS* (1899), 43 Sol. Jo. 509.

*B. Grounds of Retirement.*

*See, now*, Trustee Act, 1925 (c. 19), ss. 37–39.

**1936. Special circumstances—Numerous incumbencies by tenant for life.]**—The trustees of a marriage settlement, being desirous of retiring from the trusts in consequence of the responsibility to which they were exposed by the acts of the tenant for life, in repeatedly charging the trust estates & funds with annuities & other incumbencies, filed a bill to be discharged from the trusts, & for the appointment of new trustees under the direction of the ct. The ct. granted the relief sought by the bill, & ordered the costs to be paid out of the interest of the tenant for life.—*COVENTRY v. COVENTRY* (1837), 1 Keen, 758; 6 L. J. Ch. 275; 48 E. R. 499.

**1937.** —.]—**Subsequent complications—Not contemplated when trust undertaken.]**—Trustees are not entitled, as against the trust estate, capriciously to refuse to continue; but if they find the trust estate involved in complicated questions not in contemplation when they undertook the trust, they have a right to come to this ct. to be relieved from it.—*GREENWOOD v. WAKEFORD* (1839), 1 Beav. 576; 8 L. J. Ch. 333; 48 E. R. 1064.

*Annotation:*—*Apld.* *Re Leake's Trusts* (1863), 9 Jur. N. S. 153.

**1938.** —.]—**Want of confidence in co-trustee—Appointment of new trustee by co-trustee.]**—*FORSHAW v. HIGGINSON*, No. 1961, *post*.

**1939.** —.]—**Alteration of nature of duties.]**—*FORSHAW v. HIGGINSON*, No. 1961, *post*.

**1940.** —.]—**Difference of opinion—Ecclesiastical trust.]**—*A.-G. v. MURDOCH*, No. 1966, *post*.

**1941. Capricious reason.]**—(*GREENWOOD v. WAKEFORD*, No. 1937, *supra*.)

**Grounds for retirement as affecting right to or liability for costs.]**—*See* Sub-sect. 1, 1<sup>o</sup>, *post*.

*C. How Effected.*

*See, now*, Trustee Act, 1925 (c. 19), ss. 36–39.

**1942. Appointment of substitute trustee.]**—Where a settlement requires that a retiring trustee should assign the trust property to the continuing trustee, & that a new trustee should be chosen in the place of the retiring trustee, & there is no power to appoint a sole trustee; then, if a retiring trustee assign the trust property to the continuing trustee alone, & he, in abuse of his trust, dispose of it,

the retiring trustee is answerable.—*WILKINSON v. PARRY* (1828), 4 Russ. 272; 38 E. R. 808.

*Annotations:*—*Refd.* *Munch v. Cockerell* (1836), 8 Sim. 219. *Mentd.* *Davies v. Quartermian* (1841), 4 Y. & C. Ex. 257; *Anderson v. Wallis* (1842), 12 L. J. Ch. 291.

**1943.** —.]—Where a marriage settlement contained the usual power to appoint new trustees, & one of the trustees relinquished his trust, & a memorandum to that effect was indorsed on the settlement, but no new trustee was appointed in his room, & after his retirement the remaining trustee lent out the trust money on mtge.:—*Held*: the retired trustee was a necessary party to a bill of foreclosure of the mtged. estate.—*ADAMS v. PAYNTER* (1844), as reported in 1 Coll. 530; 14 L. J. Ch. 53; 63 E. R. 530.

*Annotation:*—*Refd.* *Luke v. South Kensington Hotel Co.* (1879), 11 Ch. D. 121.

**1944.** —.]—**Reference to master—To determine amount & nature of property.]**—*ARMSTRONG v. FOSTER* (1850), 15 L. T. O. S. 342.

**1945.** —.]—**Only if substitute a proper person.]**—The ct. will only allow trustees to release themselves from responsibility by transferring trust funds into the hands of new trustees, if they have reasonable grounds for believing that the trust funds will be secure in the hands of those to whom they commit them; & in the event of a breach of trust being committed by such new trustees the ct. will protect the retiring trustees from liability, unless they are clearly shown by incontrovertible evidence to have been guilty of negligence, misconduct, or fraud in relation to the transfer to the new trustees.—*WEBSTER v. LE HUNT, LE HUNT v. WEBSTER* (1861), 4 L. T. 723; 8 Jur. N. S. 345; 9 W. R. 918, L. C.

*Annotation:*—*Refd.* *Head v. Gould*, [1898] 2 Ch. 250.

**1946. Appointment of remaining trustees as new trustees.]**—One of four trustees of a will desiring to retire:—*Held*: the ct. had jurisdiction under Trustee Act, 1850 (c. 60), s. 32, to appoint the remaining three as trustees in the place of themselves & the fourth.—*Re SHIPPERDSON'S TRUSTS* (1880), 49 L. J. Ch. 619.

**1947. Action for administration of trust.]**—(1) Where a trustee of a settlement of an ascertained fund, as to which much litigation had taken place, filed a bill praying to be discharged, & that the trusts might be administered by the ct.:—*Held*: 10 & 11 Vict. c. 96, did not take away the trustee's right to file a bill for the purpose of being discharged; & he was entitled to his full costs of suit.

(2) Under 10 & 11 Vict. c. 96, if he paid the money into ct. under that Act, he would be discharged from liability. But in fact the trustee is not in that way discharged from being a trustee (*KINDERSLEY, V.-C.*).—*BARKER v. PEILE* (1865), 2 Drew. & Sm. 340; 5 New Rep. 425; 34 L. J. Ch. 497; 12 L. T. 550; 11 Jur. N. S. 436; 13 W. R. 573; 62 E. R. 651.

**1948.** —.]—**Necessity for order appointing substitute.]**—(1) In an action to administer a trust the ct. has jurisdiction to discharge a trustee without appointing a new trustee in his place.

This cannot be done under Trustee Act, 1893

## PART II. SECT. 9, SUB-SECT. 1.—A.

**1933 i. Right of trustee to retire.]**—*ARDILL v. SAVAGE* (1838), 1 I. Eq. R. 79.—*IR.*

**1933 ii.** —.]—A trustee who is entitled to be discharged from his trust is not bound to show that there is some other person ready to accept the trust. If no person will accept the trust, the ct. may be obliged to keep the trustee before it, & not discharge him; but it will take care

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that the trustee shall not suffer thereby.—*COURTENAY v. COURTENAY* (1846), 3 Jo. & Lat. 519.—*IR.*

**1933 iii.** —.]—*BUNTEN v. MUIR* (1894), 21 It. (Ct. of Sess.) 370; 31 Sc. L. R. 395; 1 S. L. T. 460.—*SCOT.*

*h. Whether necessary to show some person ready to accept trust.]*—*COURTENAY v. COURTENAY* (1846), 3 Jo. & Lat. 519.—*IR.*

## PART II. SECT. 9, SUB-SECT. 1.—B.

**k. Special circumstances—Death of one co-trustee—Removal of remaining co-trustee for misconduct.]**—When one of the trustees was dead & another was removed for misconduct, the remaining trustee was held entitled to be discharged from the trust.—*MITCHELL v. RICHEY* (1867), 13 Gr. 445.—*CAN.*

**l. Pressure of personal business affairs.]**—*Re THOMSON* (N. B.) (1910), 9 E. L. R. 147.—*CAN.*



*Secl. 9.—Vacation of office: Sub-sect. 1, C., D., E. & F.; sub-sect. 2, A. & B. (a).]*

(c. 53), s. 25, as it is not the practice to reappoint continuing trustees in place of themselves & a retiring trustee.—*Re CHETWYND'S SETTLEMENT, SCARISBRICK v. NEVINSON*, [1902] 1 Ch. 692; 71 L. J. Ch. 352; 86 L. T. 216; 50 W. R. 361; 18 T. L. R. 348; 46 Sol. Jo. 296.

1949. Whether by payment into court.]—*Re WILLIAMS' SETTLEMENT*, No. 1029, *ante*.

1950. — Only discharge from liability—Not from office of trustee.]—*BARKER v. PELLE*, No. 1917, *ante*.

1951. Order under Trustee Act, 1893 (c. 53), s. 25.]—*Re CHETWYND'S SETTLEMENT, SCARISBRICK v. NEVINSON*, No. 1948, *ante*.

*See, now, Trustee Act, 1925 (c. 19), s. 41.*

#### *D. Corrupt Retirement.*

1952. Retirement in consideration of payment—By person appointed in substitution.]—*SUGDEN v. CROSSLAND*, No. 1079, *ante*.

1953. Retirement in contemplation of breach of trust.]—*WEBSTER v. LE HUNT, LE HUNT v. WEBSTER*, No. 1945, *ante*.

1954. —.]—Deft. was one of two trustees for sale of an estate, the produce of which was divisible amongst persons *sui juris*. He refused to concur in a sale agreed upon by his *cestuis que trust*, until he had been furnished with deeds, etc., relating to another & an independent trust, & to which the ct. held he was not entitled. He also refused to retire from the trusts to facilitate the sale. Upon a bill by the other trustees & the persons beneficially interested, he was removed from the trusts & ordered to pay the costs of the suit.

(2) If a trustee be called upon to commit a breach of trust & refuses, & his *cestuis que trust* say, "There is A. B. who will; will you resign & surrender your trust to him?" & the old trustee accede to that proposal & transfers the property to the new trustee, for the purpose of enabling him to commit a breach of trust, in that case the old trustee would probably be visited very severely by the ct. (*ROMILLY, M.R.*).—*PALANET v. CAREW* (1863), 32 Beav. 564; 32 L. J. Ch. 508; 8 L. T. 130; 9 Jur. N. S. 426; 11 W. R. 449; 55 E. R. 222.

*Annotation:—As to (2) Reftd. Head v. Gould, [1898] 2 Ch. 250.*

1955. — Purchase by trustee from *cestui que trust*.]—A trustee cannot retire from the trust for the purpose of such a purchase.—*SPRING v. PRIDE* (1864), 4 De G. J. & Sm. 395; 10 L. T. 473; 10 Jur. N. S. 646; 12 W. R. 892; 46 E. R. 971, L. J.J.

*Annotations:—Mentd. Re Gaskell's Trusts* (1865), 12 L. T. 763; *Re Clinton's Trust, Hollway's Fund, The Same, Weare's Fund* (1871), L. R. 13 Eq. 295; *Re Ellis' Trusts* (1874), L. R. 17 Eq. 409; *Harrison v. Harrison* (1888), 13 P. D. 180.

1956. — Actual breach contemplated must be committed.]—In order to fix a trustee with the consequences of a breach of trust on the ground that, though himself refusing to be a party to it, he has retired in order to enable it to be committed, the particular improper act which was in contemplation at the date of his retirement must be com-

mitted, & he will not be held liable for another analogous breach of trust, which the parties in whose favour he retires may immediately on his retirement commit or sanction.

Where trustees of a settlement which contained a power to raise money on the security of the settled estates for repairs, etc., refused a request of the tenant for life to exercise the power on the ground that the money was wanted, not for the repairs, but for the general purposes of the tenant for life, but retired in favour of more accommodating trustees, who did not raise any money under the settlement, but delivered the title deeds to the tenant for life in order that she might deal with the estate as her own, & suppress the settlement, & she borrowed money accordingly of pltf. :—*Held*: the retiring trustees were not liable to make good the advances of pltf's.—*CLARK v. HOSKINS* (1868), 37 L. J. Ch. 561; 19 L. T. 331; 16 W. R. 1159, C. A. *Annotation:—Consd. Head v. Gould, [1898] 2 Ch. 250.*

1957. —.]—*HEAD v. GOULD*, No. 988, *ante*.

#### *E. Effect of Retirement.*

1958. Whether right to resume office.]—*LANCASHIRE v. LANCASHIRE*, No. 1007, *ante*.

1959. When liabilities discharged—Incomplete appointment of new trustee.]—*PEARCE v. PEARCE*, No. 1537, *ante*.

1960. — Mere retirement insufficient—Liability in respect of shares.]—Before the commencement of the winding up, but after the stoppage, & after the publishing of a notice by the directors calling a special general meeting of the shareholders of the City of Glasgow Bank, for the purpose of passing a resolution to have the bank wound up by reason of its irretrievable insolvency; & after a resolution by the directors that they would not record any future transfers, one of four trustees whose names appeared as such on the bank register resigned his office of trusteeship under 24 & 25 Vict. c. 84, s. 1, with the consent of his co-trustees & beneficiaries. A notarial copy of the resignation was sent the next day to the bank, but the directors refused to alter the register by affixing a note, or in any other way :—*Held*: the resignation was too late to exempt the trustee from personal liability.—*Re CITY OF GLASGOW BANK, MITCHELL'S CASE* (1879), 4 App. Cas. 548, 567; *sub nom. MITCHELL v. CITY OF GLASGOW BANK & LIQUIDATORS*, 40 L. T. 758; 27 W. R. 873, H. L.

#### *F. Costs.*

1961. Whether entitled to costs—No sufficient reason for retirement.]—*HOWARD v. RHODES*, No. 1411, *ante*.

1962. —.]—A trustee desiring to be discharged from his trust, without any changes as to the position of the trust property, or the persons with whom he was associated, & seeking the aid of the ct. for that purpose, will not be allowed any costs, but will not be compelled to pay any.—*PORTER v. WATTS* (1852), 21 L. J. Ch. 211; 18 L. T. O. S. 315; 16 Jur. 757.

1963. — Justifiable reason for retirement.]—*COVENTRY v. COVENTRY*, No. 1936, *ante*.

1964. —.]—(1) A trustee cannot, from

execution of the trusts :—*Held*: petitioner was entitled to be discharged, but failing health alone, where the trusts were of a formal character, was not a sufficient reason for his seeking to resign so as to entitle him to costs, & he must pay the costs of being released from his trusteeship, & of the petition.—*RICHARDSON v. GRUBB* (1867), 16 W. R. 176.—*IR.*

#### **PART II. SECT. 9, SUB-SECT. 1.—F.**

1963. Whether entitled to costs—Justifiable reason for retirement.]—Trustees applying to be removed on a ground satisfactory to the ct., & not from mere desire or caprice, will be allowed the costs of their application out of the trust estate.—*Re MERRITT'S TRUSTS* (1897), 1 N. B. Eq. Rep. 425.—*CAN.*

1963 H. —.]—A trustee of a marriage settlement, which contained the usual power for the appointment of new trustees in place of any desiring to be discharged, etc., applied, on account of his failing health, to the donee of the power, to appoint a new trustee in his place. He neglected to do so for 16 months, alleging that no person willing to act could be found. No embarrassment had arisen in the



mere caprice, retire from the performance of his trust, without paying the costs occasioned.

(2) But circumstances arising in the administration of a trust which have altered the nature of his duties, justify him in leaving it & entitle him to his costs.

(3) A trustee was desirous of retiring, & was justified in so doing, though from private circumstances; his *cestuis que trust* having prevented him retiring, he instituted a suit to administer the trusts. He was allowed his costs.

(4) A trustee desirous of retiring, by reason of his want of confidence in his co-trustee, cannot safely effect his object by getting such co-trustee to appoint a new trustee in his place, under a power vested in him for that purpose.

(5) No person can be compelled to remain a trustee & act in execution of the trust (ROMILLY, M.R.).—*FORSHAW v. HIGGINSON* (1855), 20 Beav. 485; 26 L. J. Ch. 170; 52 E. R. 690.

*Annotation:—As to (1) Distd. Gardner v. Downes* (1856), 25 L. J. Ch. 881.

1965. ———.]—A trustee held justified, under the circumstances, in retiring from the trust, & to be entitled to his costs of suit to have a new trustee appointed.—*GARDINER v. DOWNES* (1856), 22 Beav. 395; 25 L. J. Ch. 881; 27 L. T. O. S. 280; 2 Jur. N. S. 847; 4 W. R. 621; 52 E. R. 1160.

1966. ———.]—(1) Trustees of a congregation, which, by the terms of its trust, was to be in connection with the Established Church of Scotland, adopted the opinions of the Free Church of Scotland, & refused to retire from the trust. They were ordered to pay the costs of the appointment of new trustees.

(2) If a trustee voluntarily retires from a trust like the present on account of difference of opinion, he pays no costs—whether he will receive costs is a question for the discretion of the ct. & may depend upon the circumstances of his retirement (*PAGE WOOD, V.-C.*).—*A.-G. v. MURDOCH* (1856), 2 K. & J. 571; 27 L. T. O. S. 118; 20 J. P. 643; 60 E. R. 910.

1967. ———.]—*Re BEVERIDGE'S TRUSTS* (1899), 43 Sol. Jo. 509.

1968. ———.]—Action brought to administer trust.]—*BARKER v. PELLE*, No. 1947, *ante*.

1969. Liability for costs.—No sufficient reason for retirement.]—*PORTER v. WATTS*, No. 1962, *ante*.

1970. ———.]—Retirement from caprice.]—*FORSHAW v. HIGGINSON*, No. 1964, *ante*.

1971. ———.]—*Re BEVERIDGE'S TRUSTS* (1899), 43 Sol. Jo. 509.

1972. ———.]—Ecclesiastical trust—Retirement through difference of opinion.]—*A.-G. v. MURDOCH*, No. 1966, *ante*.

## PART II. SECT. 9, SUB-SECT. 2.—A.

1971 i. Jurisdiction of court to remove.]—The ct., in the exercise of its discretion, may remove trustees who unreasonably decline to bring an action for the benefit of the trust estate upon request of the beneficiaries.—*GARESCHE v. GARESCHE* (1895), 4 B. C. R. 310.—CAN.

1977 ii. ———.]—The ct. will not upon a summary petition, or otherwise than in an action, remove a trustee *in invitum*.—*Re DAVIS'S TRUST* (1896), 17 P. R. 187.—CAN.

1977 iii. ———.]—The ct. will not, upon petition, remove a trustee who has accepted the trust, but refuses to continue to act. A bill must be filed for the purpose.—*ANON.* (1842), 4 I. Eq. R. 700.—IR.

1977 iv. ———.]—The ct. has no jurisdiction on a petition under Trustee Act, 1925, s. 41, to try charges against a trustee or to remove him. To effect

these purposes an action must be instituted.—*Re TANGIANGA NO. 1A BLOCK*, [1918] N. Z. L. R. 51.—N.Z.

m. How effected.—By *ex parte* order—Absconding trustee.]—Order made on petition for the removal of a trustee who had absconded from the Province, & for the appointment of a new trustee, without service of the petition on the absconding trustee.—*Re MARTIN'S TRUST*, 8 C. L. T. Occ. N. 303.—CAN.

n. Parties to action.]—*STOART v. BRADFORD*, 11 C. L. T. Occ. N. 207.—CAN.

## PART II. SECT. 9, SUB-SECT. 2.—B. (a).

1961 i. General rule—Welfare of beneficiaries.]—The jurisdiction of the ct. to remove a trustee should be exercised if the welfare of the beneficiaries demand it, even though no dishonesty or incompetence has been alleged or

## SUB-SECT. 2.—Removal.

### A. In General.

See Trustee Act, 1925 (c. 19), s. 41).

1973. Jurisdiction of the court to remove—Equitable jurisdiction.]—*LETTERSTEDT v. BROERS*, No. 1981, *post*.

1974. ———.]—*Re BLANCHARD*, No. 1297, *ante*.

1975. ———.]—Trustee solicitor—Under general jurisdiction over solicitors.]—*Re BLANCHARD*, No. 1297, *ante*.

1976. ———.]—Removal not asked for in pleadings.]—In an administration action the ct. has jurisdiction at any time during the proceedings to remove trustees if it considers such removal necessary for the preservation of the trust estate or the welfare of the *cestuis que trust* & that notwithstanding such removal has not been expressly asked for by the pleadings.—*Re WRIGHTSON, WRIGHTSON v. COOKE*, [1908] 1 Ch. 789; 77 L. J. Ch. 422; 98 L. T. 799.

1977. ———.]—*ODDY v. HARDCASTLE* (1894), 30 Sol. Jo. 134.

1978. Bar to removal—Trustee also executor—All estate administered.]—*Re STAMFORD (EARL), PAYNE v. STAMFORD*, No. 1016, *ante*.

1979. How effected—By order under Trustees Acts—Where trustee willing to serve.]—*Re HODSON'S SETTLEMENT*, No. 1141, *ante*.

1980. ———.]—The ct. will not, on a petition under Trustee Act 1850 (c. 60), remove a trustee against his wish.—*Re COMBS* (1884), 51 L. T. 45, L. J.

### B. Grounds of Removal.

#### (a) In General.

See Trustee Act, 1925 (c. 19), s. 41.

1981. General rule—Welfare of beneficiaries.]—(1) Cts. of equity have jurisdiction to remove trustees & to substitute others, not only in cases of misconduct, but whenever it appears that the continuance of the trustees would prevent the trusts being properly executed.

(2) The main guide to the ct. in exercising such a jurisdiction as that of removing trustees must be the welfare of the beneficiaries.

(3) Mere friction & hostility between trustees & persons beneficially entitled will not of itself be a sufficient reason for the removal of a trustee.—*LETTERSTEDT v. BROERS* (1884), 9 App. Cas. 371; 53 L. J. P. C. 44; 51 L. T. 169, P. C.

*Annotations:—As to (2) Reid, Ewing v. Orr Ewing* (1885), 10 App. Cas. 453; *Re Wrightson, Wrightson v. Cooke*, [1908] 1 Ch. 789; *Re Cotter, Jennings v. Nye*, [1915] 1 Ch. 307. *Generally, Reid, De Montmort v. Broers* (1887), 13 App. Cas. 149; *Re Shurey, Savory v. Shurey*, [1918] 1 Ch. 263.

proved against the trustee whom it is sought to have removed.—*ARNOTT v. ARNOTT* (1924), 58 I. L. T. 145.—IR.

1981 ii. ———.]—*HACHETT v. HACHETT*, [1922] N. Z. L. R. 242.—N.Z.

o. Failure of duty—Payment of claim without satisfactory proof—No averment of bad faith.]—In a petition for removal of a trustee petitioner averred that the trustee had paid out of the trust funds a claim on the trust estate, without satisfying himself that it was properly vouched. It was not averred that in doing so he had acted in bad faith. The ct. refused the prayer of the petition, on the ground that no malversation of office had been averred.—*HARRIS v. HOWIE'S TRUSTEES* (1893), 21 R. (Cl. of Sess.) 10; 31 Sc. L. R. 33; 1 S. L. T. 257.—SCOT.

p. Duty inconsistent with interest.—Trustee purchasing stock on own account.]

*Sect. 9.—Vacation of office: Sub-sect. 2, B. (a), (b) & (c).]*

**1982.** ———.]—Deft. corpn. was the trustee of a debenture trust deed. A large majority of debenture-holders brought an action to have the corpn. removed from being trustee. The corpn. had suggested that their salary should be increased, but had withdrawn the suggestion on the objection of the co. Petitions had been presented to wind up the corpn., who had been in financial difficulties, but their difficulties had been surmounted & the petitions withdrawn, and they were now solvent & working efficiently, and it did not appear that the interest of the debenture-holders had suffered or been in danger:—*Held*: no sufficient cause had been shown for removing the corpn. from being trustee.—*ASSETS REALISATION CO. v. TRUSTEES, EXECUTORS & SECURITIES INSURANCE CORPN.* (1895), 65 L. J. Ch. 74; 44 W. R. 126.

**1983.** ———.]—*Re* WRIGHTSON, WRIGHTSON v. COOKE, No. 1976, *ante*.

**1984. Necessity for substantial grounds.]**—Petition praying for accounts of, & removal of, trustees, & appointment of new ones, dismissed as frivolous on the ground of the insignificance of the subject-matter.—*MITCHELL'S CHARITY* (1838), 2 J. P. 104; 2 Jur. 837.

**1985. Duty inconsistent with interest—Trustee becoming lessee of trust property.]**—Testator gave power to his trustees, to become lessees of the trust property. One of them availed himself of it, & the other trustee did not actively interfere in the management of the trust. The trustee lessee was removed by the Master of the Rolls, at the instance of the *cestuis que trust*, on the ground of the inconsistency of his duties of lessee & trustee, & upon appeal on that & other grounds.—*PASSINGHAM v. SHERBORN* (1840), 9 Beav. 424; 50 E. R. 107.

*Annotations:—*Consd. *Re* Coode, Coode v. Foster (1913), 108 L. T. 91. *Mentd.* Powys v. Blagrave (1851), 2 W. R. 359.

**1986. Want of sympathy with objects of trust.]**—The only conduct complained of as an alleged breach of trust, is the fact of the trustees having more or less, assisted H. & H. in enforcing their mtge. . . . I do not find any other breach of trust . . . rendering summary interference necessary; & therefore though . . . it may . . . be very expedient to appoint new trustees in the place of persons whose conduct, though not, as I think, amounting to a breach of trust, clearly indicates a total want of sympathy with the feelings & interests of those of whose rights they are the guardians, yet I do not see any ground warranting me in interfering on motion (LORD CRANWORTH, V.-C.).—*A.-G. v. HARDY* (1851), 1 Sim. N. S. 338; 20 L. J. Ch. 450; 15 Jur. 441; 61 E. R. 131.

*Annotations:—**Ibid.* A.-G. v. Clapham (1855), 4 De G. M. & G. 591. *Reid*, Kirkwood v. Thompson (1865), 2 Hem. & M. 392; *Re* Mason's Orphanage & L. & N. W. Ry., [1896] 1 Ch. 61.

**1987.** ———.]—My attention has been drawn to some observations which fell from me in the case of *A.-G. v. Hardy*, No. 1986, *ante*, as to what the ct. would do in the case of appointing new trustees & as to whether it would dismiss trustees who although they had not misconducted themselves

had nevertheless shown themselves not to sympathise with the body for whom they were trustees. I extremely doubt whether I did not there go too far, what I said was merely an *obitu dictum*, & I wish not to let this case pass over without noticing it, so that if ever the question should arise, I may not have that dictum of mine quoted without having this quoted at the same time, that I wish to withdraw it (LORD CRANWORTH, C.).—*A.-G. v. CLAPHAM* (1855), 4 De G. M. & G. 591; 3 Eq. Rep. 702; 24 L. J. Ch. 177; 24 L. T. O. S. 245; 1 Jur. N. S. 505; 43 E. R. 638, L. C.

*Annotation:—**Mentd.* G. W. Ry. & Mid. Ry. v. Bristol Corpn. (1918), 87 L. J. Ch. 414.

**1988. Vexatious conduct.]—***Re* BRIDGMAN, No. 2003, *post*.

**1989. Hostility or disagreement between trustee & cestui que trust.]**—Disagreement between a trustee & a *cestui que trust*.—*Held*: not a ground for removing the trustee.—*FORSTER v. DAVIES* (1861), 4 De G. F. & J. 133; 31 L. J. Ch. 276; 5 L. T. 532; 8 Jur. N. S. 65; 10 W. R. 180; 45 E. R. 1131, L. J.

*Annotation:—*Consd. *Re* Wightson, Wightson v. Cooke, [1908] 1 Ch. 789.

**1990.** ———.]—*LETTERSTEDT v. BROERS*, No. 1981, *ante*.

**1991. Refusal to carry out sale—Effected by cestui que trust.]**—*PALAIRET v. CAREW*, No. 1951, *ante*.

**1992. Refusal to concur in appointment of new trustee—Except on unreasonable conditions.]**—*PALAIRET v. CAREW*, No. 1954, *ante*.

**1993. Refusal to enforce proper remedies.]**—If two out of three trustees should decline to foreclose or to agree to any other remedy, it might be a reason for removing them from being trustees (*JESSEL, M.R.*).—*LUKE v. SOUTH KENSINGTON HOTEL CO.* (1879), 11 Ch. D. 121; 48 L. J. Ch. 361; 40 L. T. 638, C. A.

*Annotations:—**Mentd.* Palmer v. Mallett (1887), 36 Ch. D. 411; Webb v. Jonas (1888), 39 Ch. D. 660; *Re* Continental Oxygen Co., *Edus v. Continental Oxygen Co.*, [1897] 1 Ch. 511.

**1994. — To get in purchase-money.]**—Property in Germany, belonging to a limited co., was vested in certain persons as trustees for securing the payment of debentures. The trustees, professing to act under a power of sale in the trust instrument, the terms of which the ct. held were not complied with, caused certain proceedings to be instituted in a German ct., the result of which was that the trust property was sold at an undervalue by the officer of the ct., part of the property being purchased by a person who was manager of the property to the co. & was held by the ct. to be an agent & holding a fiduciary position. The trustees took no steps, notwithstanding a long period had elapsed, to get in any of the purchase-moneys:—*Held*: the breach of trust thus committed justified the removal of the trustees from office, & the purchase by the agent must be declared to be for the benefit of the trust for the debenture-holders.—*REID v. HADLEY* (1885), 2 T. L. R. 12.

**1995. Misconduct.]**—*LETTERSTEDT v. BROERS*, No. 1981, *ante*.

—If it be shown that a trustee's interest & his duty conflict because of a purchase of stock on his own account that will be a ground for removing him from his office as trustee.—*ROSE v. ROSE* (1915), 32 O. L. R. 481; 22 D. L. R. 572; 7 O. W. N. 416.—*CAN.*

**1995.1. Misconduct.]**—*PENTZ v. BUCE* (1919), 52 N. S. R. 151.—*CAN.*  
**2. Committing breach of trust—In good faith—Benefit to trust estate.]**—

Where a trustee had invested the trust funds in business, & had kept no sederunt book or trust accounts but had acted in good faith, & with the result of producing a benefit to the trust estate, the ct., notwithstanding the illegal conduct of the trustee, in the circumstances refused a petition for his removal.—*GILCHRIST'S TRUSTEES v. DICK* (1883), 11 R. (Ch. of Sess.) 22; 21 Sc. L. R. 17.—*SCOT.*

**3. — Interference with enjoyment of property.]**—The ct. removed a trustee on the ground that he had unjustifiably interfered with the liferentrix in her enjoyment of the liferent, & restricted her use of the subjects liferented by her, & had thereby committed a breach of trust.—*McWHIRTER v. LATTIE* (1889), 17 R. (Ch. of Sess.) 68; 27 Sc. L. R. 61.—*SCOT.*

**4. Trustee placing himself in a position**

1996. —[—]—*Re* WRIGHTSON, WRIGHTSON v. COOKE, No. 1976, *ante*.

1997. Committing breach of trust—Sale at undervalue.]—*REID v. HADLEY*, No. 1994, *ante*.

1998. Conviction for felony.]—The ct. has jurisdiction on an application by originating summons to make an order for the removal from the trust of a trustee who has been convicted of felony, but who is unwilling to retire.—*Re* DANSON (1899), 48 W. R. 73; 43 Sol. Jo. 706.

Lunacy.]—*See* Sect. 2, sub-sect. 2, D. (b) vii., *ante*.

#### (b) Absence out of Jurisdiction.

*See* Trustee Act, 1925 (c. 19), ss. 36, 41.

1999. Absconding trustee.]—Testator directed a new trustee to be appointed, if either should die, or become incapable of acting; one absconded, charged with forgery; but was not outlawed: referred to the master to appoint a new trustee.—*MILLARD v. EYRE* (1793), 2 Ves. 94; 30 E. R. 540, L. C.

2000. Trustee permanently residing abroad.]—*O'REILLY v. ALDERSON*, No. 1009, *ante*.

2001. Not of itself ground for removal.]—The ct. will not, under Trustee Act, 1850 (c. 60), order the removal of a trustee merely on the ground of his having gone out of the jurisdiction.—*Re* MAIS (1852), 21 L. J. Ch. 875; 19 L. T. O. S. 324; 16 Jur. 608.

#### (c) Bankruptcy.

*See* Trustee Act, 1925 (c. 19), s. 41.

2002. Whether sufficient ground.]—The bkpcy. of a trustee is a sufficient ground for his removal from that office, although he has obtained his certificate, & the trust property is in the hands of a receiver.—*BAINBRIDGE v. BLAIR* (1830), 1 Beav.

*antagonistic to interests of trust.*]—Where a trustee places himself in a position antagonistic to his duty as trustee, he will be removed from his office.—*OFFICER v. HAYNES* (1877), 3 V. L. R. 11. (Eq.) 115.—**AUS.**

a. Objection to appointment of new trustee.—New trustee corporation out of jurisdiction.]—The facts that a majority of the *cestui que trust* objected to the appointment, that the new trustee was out of the jurisdiction, that it was a corp., & that it was able to charge a high commission for its services as trustee:—*Held*: not to constitute sufficient reason for the compulsory removal of the trustee.—*Re* McPHILLAMY'S TRUSTS (1909), 10 S. R. N. S. W. 42.—**AUS.**

b. Threats of disclosures.]—A letter written by a trustee under a will to the *cestui que trust* threatening in case proceedings were taken against him to make disclosures as to malpractices by testator, which might result in heavy penalties being exacted from the estate, is such an improper act as to call for his immediate removal from the trusteeship.—(*GRANT v. MACLAREN* (N. B.) (1894), 23 S. C. R. 310.—**CAN.**)

c. Setting up in similar line of business.]—A trustee of a will carrying on the business of his testator is not guilty of a breach of trust in setting up for himself in a similar line of business in the neighbourhood, provided he does not resort to deception or solicitation of custom from persons dealing at the old shop. A trustee & manager of a business removed, however, in such circumstances, from being such trustee & manager.—*MOORE v. M'GLYNN*, [1894] 1 I. R. 71.—**IR.**

d. Borrowing trust funds for own purposes.—With assent of co-trustees.]—

495; 48 E. R. 1032; *subsequent proceedings* (1841), 3 Beav. 421.

*Annotation*:—*Mentd.* Alsop v. Bell (1857), 24 Beav. 451.

2003. —[—]—(1) The mere fact of a trustee having been bkpt., & nothing more is not sufficient ground to remove him from the trust, under Bankruptcy Act, 1849 (c. 106), s. 130, & vexatious conduct is perfectly irrelevant upon an application made under that sect.

(2) A charge of vexatious conduct, as a ground of removing a trustee, must be made by bill & not by petition.—*Re* BRIDGMAN (1860), 1 Drew. & Sm. 164; 29 L. J. Ch. 844; 2 L. T. 560; 6 Jur. N. S. 1065; 8 W. R. 598; 62 E. R. 340.

*Annotation*:—*As to* (1) *Distd.* *Re* Adams' Trust (1879), 12 Ch. D. 634.

2004. —[—]—Where a trustee becomes insolvent, the *cestui que trust* is entitled to ask that he be removed from the trust.—*HARRIS v. HARRIS* (No. 1) (1861), 29 Beav. 107; 7 Jur. N. S. 955; 9 W. R. 444; 54 E. R. 567.

2005. —[—]—*Re* BETTS, MACLEAN v. BETTS (1897), 41 Sol. Jo. 209; *affd.* (1899), cited in 48 W. R. 73, C. A.

*Annotation*:—*Apld.* *Re* Danson (1899), 48 W. R. 73.

2006. Where trustee has to receive trust fund.]—A bkpt. trustee ought to be removed from his trusteeship whenever the nature of the trust is such that he has to receive or deal with trust funds so that he can misappropriate them.—*Re* BARKER'S TRUSTS (1875), 1 Ch. D. 43; 45 L. J. Ch. 52; 24 W. R. 264.

2007. —[—]—Where a trustee having, either solely or jointly with others, control over the trust property has recently become bkpt., & it is not shown that he has since become possessed of means, the ct. will, as a general rule, order his removal on the petition of the *cestui que trust*, under Bankruptcy Act, 1869 (c. 71), s. 117.—*Re* ADAMS' TRUST

Where a trustee with the assent of his co-trustees borrows trust funds for his own purposes, the ct. will remove him from his trusteeship.—*BRAMLEY v. WILSON & MULCOCK* (1884), 3 N. Z. L. R. 239 (S. C.).—**N.Z.**

e. Refusal to concur in investment suggested by co-trustee.]—*Re* appointment of new trustee.]—*SEWART v. CHALMERS* (1901), 7 F. (Ct. of Sess.) 163; 42 Sc. L. R. 135; 12 S. L. T. 486.—**SCOT.**

f. Charging testator with fraud—& refusing to resign.]—A trustee who had brought an action against the trust estate concluding for payment to himself of a certain sum on grounds which involved a charge of fraud against deceased trustee, refused to resign office. The ct. removed him from the office of trustee.—*CHERRY v. PATRICK*, [1910] S. C. 32.—**SCOT.**

#### PART II. SECT. 9, SUB-SECT. 2.—B. (b).

2000 i. Trustee permanently residing abroad.]—Permanent absence from the colony resulting in injury to the trust estate is a sufficient ground for the removal of a trustee although testator may have known of such permanent absence when appointing him a trustee.—*KNOX v. POSTLETHWAITE* (1864), 2 W. W. & A. B. 62.—**AUS.**

2000 ii. —[—]—The ct. has jurisdiction under Trustee Act, 1908, s. 41, to remove, without his consent, a trustee who is residing permanently out of the Dominion, & to appoint a new trustee in his place.—*Re* JACKSON (DECEASED), [1926] N. Z. L. R. 499.—**N.Z.**

2001 i. Not of itself ground for removal.]—An application for the removal of one of two trustees appointed by a will, & the appointment of

another in his place, refused where the only ground of the application was that the trustee had left the colony, & that it was uncertain when & whether he would return, & that it was necessary in the interests of the estate that a new trustee should be appointed at once, it appearing that the trustee in question had left the colony without any intention of permanently residing abroad, & had had no opportunity of considering whether or not he would administer the trusts.—*Re* WATSON (DECEASED) (1899), 18 N. Z. L. R. 368.—**N.Z.**

g. Leaving country in debt to reside in foreign country.]—Leaving the country in debt to reside in a foreign country, is a sufficient ground to remove a trustee from the trust.—*GRAY v. HATCH* (1871), 18 Gr. 72.—**CAN.**

#### PART II. SECT. 9, SUB-SECT. 2.—B. (c).

2002 i. Whether sufficient ground.]—The ct. will, at the instance of a *cestui que trust* always remove or require a trustee, who has been recently bkpt., to retire from the trusteeship unless the trustee can show that his bkpcy. was due to misfortune & not imprudence, & that he is possessed of sufficient capital to ensure the estate against loss from possible breaches of trust.—*CHAMBERS v. JONES* (1902), 2 S. R. N. S. W. 177; 19 N. S. W. W. N. 248.—**AUS.**

2002 ii. —[—]—The insolvency of a trustee is a sufficient ground to remove him from the trust.—*GRAY v. HATCH* (1871), 18 Gr. 72.—**CAN.**

2002 iii. —[—]—Upon petition to remove a trustee, where it appeared that the trustee was insolvent, the ct. ordered his removal & a new trustee was appointed.—*Re* HODG (1892), 40 N. S. R. 33.—**CAN.**



life, & to provide for her funeral expenses, remainder to her two children, & the tenant for life & remainder-men called for payment:—*Held*: the trustee might lawfully insist on a release under seal.—*KING v. MULLINS* (1852), 1 Drew. 308; 61 E. R. 469; *sub nom.* *KING v. MALLINGS*, 20 L. T. O. S. 178.

**2021. — Instrument creating trust under seal.]**—Trustees have a right to some sort of discharge from their *cestuis que trust*, not, perhaps, a release, unless the instrument creating the trust was under seal; & trustees, between whom & their several *cestuis que trust* disputes have arisen as to the amounts actually due to them respectively, are justified in paying into ct., to the separate account of each *cestui que trust*, the sum to which they believe him to be entitled, & may have their costs of making such payment out of the respective funds.—*Re WRIGHT'S TRUSTS* (1857), 3 K. & J. 419; 69 E. R. 1173.

*Annotations*:—*Consd.* *Re Nettelfold's Trusts* (1888), 59 L. T. 315. *Distd.* *Re Ruddock, Newberry v. Mansfield* (1910), 102 L. T. 89. *Reid.* *Re The Pride of Wales & The Annie Lisle Mortgagees* (1867), 15 L. T. 606.

**2022. — Cestui que trust having settled his share.]**—Trustees, on receipt from other trustees of trust moneys, are not bound to execute a release, all that can be required from them is a written acknowledgment of the receipt of the money.

Where money is due to *cestuis que trust* who have settled it, the trustee is entitled to a release from the *cestuis que trust*, but to a receipt only from the persons to whom they devise it to be paid (*ROMILLY, M.R.*).—*Re CATER'S TRUSTS* (No. 2) (1858), 25 Beav. 366; 53 E. R. 676.

*Annotation*:—*Mentd.* *Re Wylly's Trusts* (1860), 25 J. P. 81.

**2023. — Conclusiveness of release.]**—Degree of weight to be attached to deeds of release executed by *cestuis que trust* within a few days of their respectively coming of age, when such releases profess to proceed upon the examination of complicated accounts.

The bill stated that an account had been made out, showing that a certain sum was due to pltf., & it alleged that debts set up that account & the payment of the balance, as a final settlement. The bill charged the contrary, & that much more was due to pltf., as would appear if certain accounts were rendered. A deed of release had, in fact, been executed by pltf., at the time of the payment of the balance in question; but the bill made no mention of it. As this deed of release acknowledged the receipt of certain sums, it could not be wholly set aside; but the ct. was of opinion, under the circumstances of the case, that it did not deprive pltf. of his right to the accounts which he sought.—*WEDDERBURN v. WEDDERBURN* (1838), 1 My. & Cr. 41; 8 L. J. Ch. 177; 3 Jur. 596; 41 E. R. 16, L. C.

*Annotations*:—*Mentd.* *Portlock v. Gardner* (1812), 1 Hare, 591; *Willett v. Blanford* (1842), 1 Hare, 253; *Egg v.*

*Devey* (1847), 10 Beav. 444; *Allfrey v. Allfrey* (1849), 1 H. & Tw. 179; *Travis v. Milne*, *Milne v. Milne* (1851), 9 Hare, 141; *Simpson v. Chapman* (1853), 4 De G. M. & G. 154; *Hart v. Clarke* (1854), 19 Beav. 349; *Wedderburn v. Wedderburn* (1856), 22 Beav. 84; *Clements v. Hall* (1857), 24 Beav. 333; *Bright v. Legerton* (1861), 2 De G. F. & J. 606; *Vyse v. Foster* (1872), 8 Ch. App. 315, n.; *Edinburgh Corp'n. v. Lord Advocate* (1879), 4 App. Cas. 823.

**2024. — —.]**—Right of pltf. to accounts referred to in the deed of release set up as a bar to the suit.

Where a bill is filed to set aside a deed of release as having been improperly obtained, pltf. alleging that he, as a *cestui que trust*, had had no opportunity of examining the accounts of the estate of testator, & that the deed contained untrue recitals, & a plea, accompanied by an answer, is pleaded to the bill, setting forth the deed of release, denying that the deed had been improperly obtained, & averring that the accounts therein referred to were accurate, but not setting forth the accounts themselves:—*Held*: such plea was bad, for not setting forth the accounts. *Semble*: a deed of release cannot in any case be successfully pleaded without setting forth the accounts upon which it is founded.—*BROOKS v. SUTTON* (1868), L. R. 5 Eq. 361; 37 L. J. Ch. 311; 18 L. T. 224; 16 W. R. 570.

**2025. Whether entitled to receipt or acknowledgment—Effect of cestui que trust refusing acknowledgment.]**—*CHADWICK v. HEATLEY*, No. 2018, *ante*.

**2026. — Payment of trust funds to other trustees.]**—*Re CATER'S TRUSTS* (No. 2), No. 2022, *ante*.

**2027. — Payment of trust funds to executors.]**—If you have money belonging to A., & you pay it to him & take his receipt for it, that is the best release you can have; & in this case, if the trustees had paid the fund over to the exors. & had taken a receipt for it, that would have been the most complete discharge they could have required (*MALINS, V.-C.*).—*Re HOSKIN'S TRUSTS* (1877), 5 Ch. D. 229; 46 L. J. Ch. 274; 35 L. T. 935; *on appeal*, 6 Ch. D. 281, C. A.

*Annotations*:—*Reid.* *Re Treasure, Wild v. Stanham*, [1900] 2 Ch. 648; *Re Power, Re Stone, Acworth v. Stone*, [1901] 2 Ch. 659; *Re Peacock's Settlement, Kelcey v. Harrison*, [1902] 1 Ch. 552; *Re Pryce, Lawford v. Pryce*, [1911] 2 Ch. 286; *Re Wernher, Wernher v. Bolt*, [1918] 2 Ch. 82. *Mentd.* *Turner v. Hancock* (1882), 20 Ch. D. 303; *Re Bradford* (1883), 11 Q. B. D. 373; *Re Moore, Mootie v. Moore*, [1901] 1 Ch. 691; *Re Dixon, Penfold v. Dixon*, [1902] 1 Ch. 248; *Re Lawley, Zalscr v. Lawley*, [1902] 2 Ch. 799; *Re Marten, Shaw v. Marten*, [1902] 1 Ch. 311; *Re Fearnslides, Baines v. Chadwick*, [1903] 1 Ch. 250; *Stamp Duties Comr. v. Stephen*, [1904] A. C. 137; *Re Dodson, Re Dodson, Gibson v. Dodson*, [1907] 1 Ch. 281; *Re Hadley, Johnson v. Hadley*, [1909] 1 Ch. 20; *O'Grady v. Wilmot*, [1916] 2 A. C. 231.

#### SUB-SECT. 5.—DEATH.

See Sect. 8, *ante*.

## Part III.—Administration of Trusts.

### SECT. 1.—DUTIES OF TRUSTEES.

See Part IV., *post*.

### SECT. 2.—POWERS AND DISCRETIONS OF TRUSTEES.

See Part V., *post*.

### SECT. 3.—RIGHTS OF TRUSTEES.

#### SUB-SECT. 1.—REIMBURSEMENT AND INDEMNITY.

##### A. In General.

See Trustee Act, 1925 (c. 19), s. 30.

Indemnity, generally, see GUARANTEE & INDEMNITY, Vol. XXVI., pp. 221 *et seq*.

**2028. Right to be indemnified—Where no direction in will.**—Trustees indemnified without a direction in the will.

As to the clause of indemnity to the trustees, . . . it must be recollected, that in effect this ct. infuses such a clause into every will, though not directed (JORD ELDON, C.).—DAWSON v. CLARKE (1811), 18 Ves. 247; 34 E. R. 311, L. C.

*Annotations* :—**Mentid**. Southouse v. Bate (1814), 2 Ves. & B. 390; Parsons v. Saffery (1821), 9 Price, 578; Woollett v. Harris (1821), 5 Madd. 452; Madgin v. Lumley (1823), 1 L. J. O. S. Ch. 236; Rhodes v. Rudge (1826), 1 Sim. 79; Sale v. Moore (1827), 1 Sim. 534; Wood v. Cox (1837), 2 My. & Cr. 684; Mullen v. Bowman (1844), 1 Coll. 197; Andrew v. Andrew (1845), 1 Coll. 686; Russell v. Clowes (1846), 2 Coll. 648; Mapp v. Elcock (1849), 2 Ph. 793; Road v. Stedman (1859), 26 Beav. 495; Barra v. Fewkes (1864), 2 Hem. & M. 60; Clarke v. Hilton (1866), L. R. 2 Eq. 810; Merchant Taylors' Co. v. A.-G. (1871), 6 Ch. App. 512.

**2029.** — **Rests on implied contract.**—DARKE v. WILLIAMSON, No. 2124, *post*.

**2030.** — **Under express indemnity—Where neglect to secure trust fund.**—The ordinary trustee indemnity clause affords no security to a trustee who neglects to take the necessary steps to secure the trust fund.—DIX v. BURFORD (1854), 10 Beav. 409; 52 E. R. 408.

*Annotations* :—**Reid**. Lester v. Lester (1857), 30 L. T. O. S. 23; Macnamara v. Carey (1867), 15 W. R. 374; *Re* Smith, Henderson-Roe v. Hitchins (1889), 42 Ch. D. 302; *Re* City Equitable Fire Insce., [1925] Ch. 407.

**2031. Form of indemnity—Lease to commence in future.**—POLLARD v. GREENVIL (LADY) (1660), 1 Rep. Ch. 184; 1 Cas. in Ch. 10; 21 E. R. 544.

*Annotation* :—**Mentid**. Dowell v. Dew (1842), 1 Y. & C. Ch. Cas. 345.

**2032. Recovery of documents deposited as indemnity—Parties to action—Representative of deceased trustee.**—Trustees fearing lest they had committed a breach of trust, obtained, as an indemnity against the consequences, a deposit of tobacco warrants. One of them subsequently died. The depositor filed a bill against the survivor for the recovery of the warrants.—**Held** : the representative of deceased trustee was a

necessary party to the suit.—MEINERTZHAGEN v. DAVIS (1843), 2 L. T. O. S. 95; 7 Jur. 1103.

**2033. Loss of right—Failure to render accounts.**—Exors. & trustees, in pursuance of a power contained in a will, carried on the business of a licensed victualler after the death of testator, & incurred debts to trade creditors. An action was commenced for the administration of the estate of testator. The trade creditors took out a summons in the action asking for an order declaring that they were entitled to the trustees' right of indemnity against the estate so as to get payment out of the estate. The trustees had made default in rendering proper accounts, but not in payment of money. There was a sufficient fund in ct. to pay all the debts :—**Held** : in order to deprive the trustees of their indemnity, there must be a default in payment of money & not merely a default in the rendering of accounts.—*Re* KIDD, KIDD v. KIDD (1894), 70 L. T. 648; 42 W. R. 571; 8 R. 261.

**Indemnity of personal representatives.**—See EXECUTORS, Vol. XXIV., pp. 605–610, Nos. 6359–6411.

**Indemnity of trustee in bankruptcy.**—See BANKRUPTCY, Vol. IV., pp. 228, 229, Nos. 2131–2150; Vol. V., p. 673, Nos. 5957, 5958.

##### B. Who may Claim.

**2034. Executor of surviving trustee.**—Testator, by his will, gave certain leasehold premises to trustees to sell, & appointed them also exors. They all proved the will, and a bill was filed, by parties interested under the will, against them for an account, & the master made his report, approving of purchasers of the leaseholds in lots; pending the suit all three trustees died, & the last survivor made a will, & appointed an executor, who being applied to, as representative of the original testator, to concur in the necessary assignments of the leaseholds, refused to do so without an indemnity; it was referred to the master to inquire whether he was entitled to such indemnity, & the master being of opinion that he was not, plffs. presented their petition to confirm that report, & order the exor. to concur in the assignments. The ct. refused the application, & held that he was entitled to an indemnity, & referred it to the master to approve of the terms.—COCHRANE v. ROBINSON (1840), 11 Sim. 378; 10 L. J. Ch. 109; 5 Jur. 4; 59 E. R. 919.

*Annotation* :—**Reid**. Hickling v. Boyer (1851), 3 Mac. & G. 635.

**2035.** — **An action having been brought in the names of the exors. of the surviving trustee under a deed of separation, to recover from the husband arrears of certain weekly payments alleged to be due to the wife thereunder, the exors. obtained a judge's order to stay the proceedings, on the ground that the action was brought without**

#### PART III. SECT. 3, SUB-SECT. 1.—A.

**2029 i. Right to be indemnified—Rests on implied contract.**—It is incident to the office of a trustee that the trust property shall reimburse him for his expenses in administering the trust; & a clause so indemnifying a trustee is infused into every trust deed.—HUGHES v. REES (1885), 10 P. R. 301; 9 O. R. 198.—**CAN.**

**2029 II.** — **The general rule is that a trustee paying over the trust money to the cestui que trust is entitled to have the fullest receipt, but neither a**

release nor an indemnity. There is an exception to the general rule where the trustee is, for the benefit of the cestui que trust, departing from the trust, as where he is paying over the trust money before it is legally due. In such a case the trustee is entitled to an indemnity.—MOODY v. SIMPSON (1895), 21 V. L. R. 244.—**AUS.**

**2029 III.** — **The general rule is that a trustee paying over the trust money to the cestui que trust is entitled to have the fullest receipt, but neither a**

**2029 IV.** — **SMITH v. BELLEVILLE SCHOOL TRUSTEES (1869), 16 Gr.**

**130.—CAN.**

**2029 v.** — **CONNOR v. VROOM (N. B.) (1895), 24 S. C. R. 701.—CAN.**

**2029 vi.** — **BRUCE (LADY) v. MOIR (1833), 11 Sh. (Cl. of Sess.) 799.—SCOT.**

**h.** — **Under express indemnity.**—DUMONCEL v. DUMONCEL (1848), 13 I. K. R. 92.—**IR.**

**k. By agreement between trustee & beneficiary.**—THOMPSON v. NORTHERN TRUSTS Co. (Sask.), [1925] 4 D. L. R. 184.—**CAN.**



their sanction. The ct. directed that the action might proceed, upon an indemnity against costs being given to the exors., to the satisfaction of the master, it appearing from the affidavit of the wife, unanswered, that testator, though he had not executed the deed, had consented to become a trustee, & had acted in the trust.

*Spicer v. Tod*, No. 2048, *post*, is an authority in point & shows that where trustees have accepted the trust, the ct. will interfere & compel them to allow their names to be used as plffs. in an action on the deed upon an indemnity being given to them (TINDAL, C.J.).—*ARCHARD v. COULSTING* (1843), 6 Man. & G. 75; 134 E. R. 815; *sub nom.* *ORCHARD v. COULSTING*, 6 Scott, N. R. 843; 1 L. T. O. S. 230.

**2036. Manager appointed by trustee.**—A manager appointed by a trustee stands in the place of the trustee who employs him, & is entitled to be reimbursed his advances out of the trust estate.—*FRASER v. BURGESS* (1860), 13 Moo. P. C. C. 314; 2 L. T. 446; 6 Jur. N. S. 327; 8 W. R. 376; 15 E. R. 118, P. C.

*Annotations*:—*Consd.* *Bertrand v. Davies* (1862), 31 Beav. 429. *Apld.* *Re Harriott, Ex p. Pengeley* (1863), 8 L. T. 874.

### C. Liability for.

**2037. Liability of creator of trust.**—(1) It is a general rule of equity that when a person accepts a trust at the request of another, & that other is a *cestui que trust*, the *cestui que trust* is liable personally to indemnify the trustee against all losses accruing in the due execution of the trust.

(2) Where the loss in respect of which such indemnity is sought occurs after the death of the *cestui que trust* the trustee is in the position of a creditor of the *cestui que trust*, & entitled to recover as a creditor from legatees to whom his estate has been paid.

J. & P. at the request of a settlor, accepted transfers of shares in an unlimited co. upon trust for a tenant for life & remaindermen. J. & P. were exors. of the will of the settlor, & distributed the residue of his estate. Subsequently in the lifetime of the tenant for life large calls were made on the shares, & the remaindermen under the settlement disclaimed:—*Held*: J. & P. as trustees were entitled to be indemnified against the liability of settlor's residuary estate, & to recover the capital which they had distributed among the residuary legatees.—*JERVIS v. WOLFEERSTAN* (1874), L. R. 18 Eq. 18; 43 L. J. Ch. 809; 30 L. T. 452.

*Annotations*:—*As to* (1) *Distd.* *Fraser v. Murdoch* (1881), 6 App. Cas. 855. *Apld.* *Hobbs v. Wayet* (1887), 36 Ch. D. 256; *Matthews v. Ruggles-Brise*, [1911] 1 Ch. 194. *As to* (2) *Distd.* *Hosgood v. Pedler* (1896), 66 L. J. Q. B. 18. *Generally, Reftd.* *Re Knott v. Bax v. Palmer* (1887), 56 L. J. Ch. 318; *Whittaker v. Kershaw* (1890), 45 Ch. D. 320; *A. G. v. Smith* (1892), 66 L. T. 857; *Re Nixon*, *Gray v. Bell* (1904), 73 L. J. Ch. 446. *Mentd.* *Re Kershaw*, *Whittaker v. Kershaw* (1890), 60 L. J. Ch. 9.

**2038.**—*FRASER v. MURDOCH*, No. 2089, *post*.

**2039. Liability of trust estate.**—*FRASER v. MURDOCH*, No. 2089, *post*.

**2040.**—*FRASER v. MURDOCH*, No. 2089, *post*.—The right of a trustee to be indemnified out of his trust fund for money expended by him in its preservation, is strictly limited to the trust fund.

Under the provisions of a private estate Act the trustee of a term of years in certain settled estates, of which W. had been tenant for life, was bound to apply the rents of the estates, first, in the payment from time to time of the interest upon certain incumbrances existing before the passing of the Act, & subject thereto in the payment from time to time of the interest on sums to be raised by W.

by mtges. created under the powers conferred by the Act, & of the premiums on policies of life assurance, constituting the collateral security for the repayment of those sums, the equity of redemption being reserved to W. The rents having become insufficient, the trustee, in order to save one of the policies from lapsing, paid a premium out of his own moneys. He did this without any request from the mtgee. or from the owner of the equity of redemption of the policy. The life insured having dropped, & the proceeds of the policy having been received by the mtgee.:—*Held*: the trustee was not entitled to any lien on the proceeds in respect of the premiums which he had paid, he not being a trustee of the policy.—*Re WINCHILSEA'S (EARL) POLICY TRUSTS* (1888), 39 Ch. D. 108; 58 L. J. Ch. 20; 59 L. T. 167; 37 W. R. 77.

*Annotation*:—*Reftd.* *Strutt v. Tippet* (1889), 61 L. T. 460.

**2041.**—*Personal estate—Trustee acting under will invalid as to real estate.*—A trustee, acting *bonâ fide* & with the concurrence of the heir-at-law, under a will which was supposed to be valid as to real estate, but which afterwards turns out to be invalid, is entitled to be indemnified out of the personal estate.—*EDGECUMBE v. CARPENTIER* (1839) 1 Beav. 171; 48 E. R. 904.

*Annotation*:—*Mentd.* *Russell v. L. C. & D. Ry.* (1863), 9 Jur. N. S. 1007.

**2042. Liability of cestui que trust.**—Lands settled in trust for raising portions for daughters, payable upon their marriage with the consent of the trustees, etc., but if they marry without such consent, then to remain over to another, etc. The daughters were old & never intended to marry, but to lay out their portions in a purchase of annuities for their lives; decreed, that they should have their portions without being married.—*NEEDHAM v. VERNON* (1673), *Cas. temp. Finch*, 62; 23 E. R. 33.

*Annotations*:—*Reftd.* *Hervey v. Aston* (1740), 2 Com. 726. *Reynish v. Martin* (1716), 3 Atk. 330.

**2043.**—*BALSH v. ILYHAM*, No. 2078, *post*.

**2044.**—*Losses in execution of trust—Cestui que trust creator of trust.*—*JERVIS v. WOLFEERSTAN*, No. 2037, *ante*.

**2045.**—*Sole cestui que trust—Whether limited to amount of trust property.*—Where the sole *cestui que trust* is a person *sui juris*, the right of the trustee to indemnify by him against liabilities incurred in connection with the trust property is not limited to that property.—*HARDON v. BELLIOS*, [1901] A. C. 118; 70 L. J. P. C. 9; 83 L. T. 573; 19 W. R. 209; 17 T. L. R. 126, P. C.

*Annotations*:—*Consd.* *Dodson v. Downey* (1901), 50 W. R. 57. *Distd.* *Wise v. Perpetual Trustee Co.*, [1903] A. C. 139. *Apld.* *Matthews v. Ruggles-Brise*, [1911] 1 Ch. 194; *Buchan v. Ayre*, [1915] 2 Ch. 474. *Consd.* *Adams v. Morgan*, [1923] 2 K. B. 234. *Reftd.* *Re National Bank of Wales, Massey & Giffin's Case*, [1907] 1 Ch. 582; *Re Turner, Wood v. Turner*, [1907] 2 Ch. 126; *Eastern Shipping Co. v. Quah Beng Kee*, [1924] A. C. 177; *Spencer v. Ashworth, Partington* (1925), 94 L. J. K. B. 447.

**2046.**—*Beneficial interest assigned to new cestui que trust.*—Although the assignment by a *cestui que trust* of his absolute beneficial interest to a new *cestui que trust* terminates the trust relationship between the trustee & the old *cestui que trust*, it does not terminate the personal liability of the old *cestui que trust* to indemnify the trustee against contingent claims that may arise under existing contractual liabilities, & the mere fact that the trustee concurs & takes an indemnity from the new *cestui que trust* against those liabilities does not in itself amount to novation.

In 1870 two partners in a firm took an onerous lease on behalf of & as trustees for the partner-



**Sect. 3.—Rights of trustees: Sub-sect. 1, C. & D. (a) & (b).]**

ship & entered into joint covenants with the lessors.

On Nov. 15, 1886, all the original partners, including the two trustees, entered into an agreement to transfer the assets & liabilities to a limited co. The co. agreed to indemnify them against the partnership liabilities & to take all reasonable steps in their power to bring about a novation to the co. of all liabilities of the partnership & the several partners. On Nov. 27, 1886, one trustee died. On Nov. 4, 1887, the surviving trustee in pursuance of the agreement assigned the lease to the co. on the usual covenant for indemnity. About the same time he also conveyed other freehold & leasehold partnership property to the co. in pursuance of the agreement, without reserving any part to cover the indemnity. On Feb. 18, 1891, the surviving trustee died. In 1909, the co. having made default, the surviving trustee's exors. were compelled to pay £5,874 for arrears of rent, breach of covenants of the lease, & costs:—*Held*: neither the agreement, nor the assignment & conveyances in pursuance thereof, nor the change of the trust relationship thereby effected amounted to any novation of the surviving trustee's original right to indemnity & contribution against the partners, & his exors. were therefore entitled to enforce this right against the partners or their estates.—*MATTHEWS v. RUGGLES-BRISSE*, [1911] 1 Ch. 104; 80 L. J. Ch. 42; 103 L. T. 491.

**2047. Liability of assignee of cestui que trust.]**—A. is a trustee for B. as to an estate, & lays out money in relation thereto, after which B. the *cestui que trust*, assigns his interest to C. A. brought a bill against C. to be reimbursed, & C. brought a cross bill for a conveyance of the estate. Lord Chancellor Maclesfield held that C. should have no conveyance until A. was paid all the money expended by him about the premises. But this decree was reversed in the House of Lords, there being no contract between A. & C. relative to the money so expended; & the credit being given by A. to B. personally.—*DANSON v. TROTT* (1729), 7 Bro. Parl. Cas. 266; 3 E. R. 173, H. L.; *reversg. S. C. sub nom. TROTT v. DAWSON* (1721), 1 P. Wms. 780, L. C.

**2048. — Action brought in name of trustees.]**—The assignee of an insolvent debtor sued in the names of trustees for the insolvent, after having offered an indemnity to them, but without their consent. A judge at chambers set aside the proceedings & the ct. stayed the order & the proceedings until the trustees were indemnified.—*SPIGHER v. TODD* (1831), 2 Cr. & J. 165; 1 Dowl. 306; 2 Tyr. 172; 1 L. J. Ex. 59; 149 E. R. 60.

*Annotations*:—*Apld.* *Archard v. Coulsting* (1843), 6 Man. & G. 75. *Mentd.* *Laws v. Bott* (1847), 16 M. & W. 362.

**2049. —**—*J*—*ARCHARD v. COULSTING*, No. 2035, *ante*.

**2050. Liability of real owner.]**—A trustee of a *damnosa hereditas* is entitled to indemnity from the person who is the real owner of it, whether any privity of contract exists between them or not.—

*CASTELLAN v. HORSON* (1870), L. R. 10 Eq. 47; 39 L. J. Ch. 490; 22 L. T. 575; 18 W. R. 731.

*Annotations*:—*Apld.* *Maynard v. Eaton* (1873), 9 Ch. App. 416, n. (*See* 9 Ch. App. 414.). *Distd.* *Ramage v. Womack*, [1900] 1 Q. B. 116. *Refd.* *Martox v. Paine* (1871), L. R. 6 Exch. 132; *Brown v. Black* (1873), 29 L. T. 302; *Nickalls v. Merry* (1875), L. R. 7 H. L. 530; *Hardoon v. Bellios*, [1901] A. C. 118. *Mentd.* *Tolhurst v. Associated Portland Cement Manufacturers* (1900), *Tolhurst v. Associated Portland Cement Manufacturers* (1900) & *Imperial Portland Cement Co.*, [1903] A. C. 414.

**Liability in particular instances.]**—*See* Sub-sect. 1, D. (c), *post*.

**D. In respect of What Matters.**

**(a) Expenses Incurred.**

**2051. Expenses incurred in execution of trust.]**—Trustees shall have their costs & charges, & all just allowances but not any thing for their care & pains in managing the trust.—*How v. GODFREY & WHITE* (1078), *Cas. temp. Finch*, 361; 23 E. R. 198, L. C.

**2052. —**—*J*—*HETHERSELL v. HALES* (1679), 2 Rep. (Ch. 158; 21 E. R. 645.

**2053. —**—(1) The indemnity of the trustees under a deed of trust does not give the persons employed by them a right as creditors against the trust fund.

(2) It is in the nature of the office of a trustee, whether expressed in the instrument, or not, that the trust property shall reimburse him all the charges & expenses incurred in the execution of the trust (*LORD ELDON, C.*).—*WORRELL v. HARFORD* (1802), 8 Ves. 4; 32 E. R. 250, L. C.

*Annotations*:—*As to* (1) *Apld.* *Hall v. Laver* (1842), 1 Hare, 571. *Refd.* *McGregor v. Derbyshire, Staffordshire & Worcestershire Junction Ry.* (1849), 13 L. T. O. S. 445; *Synnot v. Simpson* (1854), 5 H. L. Cas. 121.

**2054. —**—*J*—All trustees are entitled to be indemnified against expenses *bona fide* incurred by them in the due execution of their trust (*TURNER, L.J.*).—*Re GERMAN MINING CO., Ex p. CHIPPENDALE* (1854), 4 De G. M. & G. 19; 2 Eq. Rep. 983; 24 L. J. Ch. 41; 23 L. T. O. S. 200; 18 Jur. 710; 2 W. R. 543; 43 E. R. 415, L. J.

*Annotations*:—*Refd.* *Re Norwich Yarn Co., Ex p. Bignold* (1856), 22 Beav. 143; *Darke v. Williamson* (1858), 22 J. P. 705; *Re Electric Telegraph Co. of Ireland, Troup's Case* (1860), 29 Beav. 553; *Re Magdalena Steam Navigation Co.* (1860), *John. 690*; *Selwyn v. Harrison* (1862), 2 John. & H. 334; *Re Catholic Publishing & Bookselling Co.* (1861), 3 New Rep. 551; *Lowndes v. Garnett & Moseley Gold Mining Co. of America* (1864), 3 New Rep. 601; *Marlin v. Powning* (1869), 4 Ch. App. 356; *Re Pumpfrey, Worcester City & County Banking Co. v. Bick* (1882), 22 Ch. D. 255; *Strickland v. Symons* (1884), 26 Ch. D. 245; *Re Norwich Equitable Fire Insce., Brasnett's Case* (1885), 53 L. T. 509; *Re Wrexham, Mold & Connah's Quay Ry.*, [1899] 1 Ch. 440; *Hardoon v. Bellios*, [1901] A. C. 118. *Mentd.* *Re Saxon Life Assco. Soc., Anchor Assco. Co.'s Case, Era Assco. Soc.'s Case, Re Era Assco. Soc., Williams's Case* (1883), 32 L. J. Ch. 206; *Re Cork & Youghal Ry.* (1889), 4 Ch. App. 748, n.; *Re National Permanent Benefit Bldg. Soc., Ex p. Williamson* (1869), 5 Ch. App. 309; *Re Durham County Permanent Investment Land & Bldg. Soc., Davis's Case, Wilson's Case* (1871), L. R. 12 Eq. 516; *Crampton v. Varna Ry.* (1872), 41 L. J. Ch. 817; *Yorkshire Ry. Wagon Co. v. Maclure* (1881), 19 Ch. D. 478; *Blackburn Bldg. Soc. v. Cunliffe, Brooks* (1882), 22 Ch. D. 64, n.; *Ex p. Watson* (1888), 21 Q. B. D. 301.

**2055. — Must be properly incurred.]**—*PARSONS v. SPOONER*, No. 2060, *post*.

**2056. —**—*J*—The trustee on the other hand has a right to be indemnified out of the trust

**PART III. SECT. 3, SUB-SECT. 1.—**  
**D. (a).**

**2051 i. Expenses incurred in execution of trust.]**—A solt. trustee acting on behalf of himself & his co-trustee is entitled to profit costs for preparing the accounts of the trustees & attending the audit thereof before the surrogate judge.—*Re McNAN*, 19 C. L. T. Occ. N. 71.—*CAN.*

**2051 ii. —**—*J*—*ROWSLEY v. HAYDEN* (1851), 2 Gr. 557.—*CAN.*

**2051 iii. —**—*J*—*NARAYANAN v. LAKSHMANAN* (1916), 1 L. R. 39 Mad. 456.—*IND.*

**2051 iv. —**—*J*—*FEGAN v. THOMSON* (1855), 17 Duul. (Ct. of Sess.) 1146; 27 Sc. Jur. 589.—*SCOT.*

**2051 v. —**—*J*—*GRAY (LORD) v.*

*DUNDAS & WILSON* (1856), 19 Duul. (Ct. of Sess.); 28 Sc. Jur. 522.—*SCOT.*

**2051 vi. —**—*J*—*AITKEN v. HUNTER* (1871), 9 Macph. (Ct. of Sess.) 756; 43 Sc. Jur. 413.—*SCOT.*

**2055 i. — Must be properly incurred.]**—*DIXON v. RUTHERFORD* (1863), 36 Sc. Jur. 30.—*SCOT.*

estate with respect to expenses properly incurred by him on behalf of that trust estate, including among other things costs properly incurred by him in employing a solr. (NORTH, J.).—*STANIER v. EVANS, EVANS v. STANIER* (1886), 34 Ch. D. 470; 56 L. J. Ch. 581; 56 L. T. 87; 35 W. R. 286; 3 T. L. R. 215.

*Annotations*:—*Consd. Re Blundell, Blundell v. Blundell* (1888), 40 Ch. D. 370. *Mentd. Preston Banking Co. v. Allsup*, [1895] 1 Ch. 141; *Re Humphreys, Ex p. Lloyd-George & George*, [1898] 1 Q. B. 520; *Re Calgary & Medicine Hat Land Co., Pigeon v. The Co.*, [1908] 2 Ch. 652.

**2057.** ———.]—Costs incurred by a trustee in an action respecting the trust estate are not costs in the discretion of a judge who did not try the action, within R. S. C., Ord. 65, r. 1, but are charges & expenses incurred in the execution of the trusts; & if such a judge acting in the administration of the estate makes an order as to such costs, his decision is subject to appeal.

Real estates were devised to trustees in trust for S. during her life, in such terms as gave her the legal estate, & after her death in trust to sell. S. desired to sell the estates under Settled Land Act, & applied to the surviving trustee for the title deeds. The trustee, acting under the advice of his solr., refused to give them up, & S. brought an action of detinue in the Q. B. Div., & recovered judgment against him with costs. The trustee took out an originating summons in the Ch. Div., & obtained an order for payment of the costs incurred in the action out of the trust estate:—*Held*: (1) the costs of the action of detinue were not costs in the discretion of the judge of the Ch. Div. within R. S. C., Ord. 6, r. 1, & his decision was subject to appeal; (2) the trustee, not having shown reasonable cause for defending the action, was not entitled to retain out of the trust estate the costs of the action beyond the amount which he would have incurred by applying for leave to defend it.

A trustee is entitled as of right to full indemnity out of his trust estate against all his costs, charges, & expenses properly incurred; such an indemnity is the price paid by *cestuis que trust* for the gratuitous & onerous services of trustees; & in all cases of doubt, costs incurred by a trustee ought to be borne by the trust estate & not by him personally. The words "properly incurred" in the ordinary form of order are equivalent to "not improperly incurred" (LINDLEY, L.J.).

If a trustee brings or defends an action unsuccessfully & without leave, it is for him to show that the costs so incurred were properly incurred. The fact that the trustee acted on counsel's opinion is in all cases a circumstance which ought to weigh with the ct. in favour of the trustee; but counsel's opinion is no indemnity to him even on a question of costs (LINDLEY, L.J.).

While I agree that trustees ought not to be visited with personal loss on account of mere errors in judgment which fall short of negligence or unreasonableness, it is on the other hand essential to recollect that mere *bona fides* is not the test, & that it is no answer in the mouth of a trustee who has embarked in idle litigation to say that he honestly believed what his solr. told him, if his solr. has been wrong-headed & perverse (BOWEN, L.J.).—*Re BEDDOE, DOWNES v. COTTAM*, [1893] 1 Ch. 547; 62 L. J. Ch. 233; 68 L. T. 595; 41 W. R. 177; 37 Sol. Jo. 99; 2 R. 223, C. A.

*Annotations*:—*As to (2) Follid. Re England's Settlement Trusts, Dobb v. England*, [1918] 1 Ch. 24. *Apld. In the Estate of*

*Plant, Wild v. Plant*, [1926] P. 139. *Reffd. Re Jones Christmas v. Jones* (1897), 45 W. R. 598; *Thomas v. Jones*, [1928] P. 162.

**2058.** ———.]—*Expenses applicable to several trusts.*—As to what expenses relating to real estate are properly payable out of a fund set apart to pay, amongst other things, the expenses of executing the trusts of the will.

Testator declared trusts relating to his real & personal estate, & gave his personal estate to trustees, in trust to set apart & invest a sufficient fund to pay his debts, legacies, funeral expenses, expenses of proving his will " & the execution of the trusts thereof ":—*Held*: the "expenses in the execution of the trusts of the will" were limited to those properly payable by the exors. in their character of exors. alone, & therefore the costs of executing the trusts of the various real estates fell on the *cestuis que trust*.—*BROUGHAM (LORD) v. POULETT (LORD)* (1855), 19 Beav. 119; 24 L. J. Ch. 233; 24 L. T. O. S. 248; 1 Jur. N. S. 151; 52 E. R. 294.

**2059.** ———.]—*But not so as to destroy trust.*—*DARKE v. WILLIAMSON*, No. 2124, *post*.

#### (b) Future Liabilities.

**2060. Right to indemnity.**—A trustee has a right to be indemnified from any liability he incurred on behalf of his *cestui que trust*; generally he had funds in his hands to do so, & the ct. never deprived him of that security without making him every allowance for expenses properly incurred; his conduct is always liable to investigation at the instance of his *cestui que trust* (WIGHAM, V.-C.).—*PARSONS v. SPOONER* (1846), 5 Hare, 102; 4 Ry. & Can. Cas. 163; 15 L. J. Ch. 155; 6 L. T. O. S. 344; 10 Jur. 423; 67 E. R. 845.

*Annotation*:—*Reffd. Melhado v. Porto Alegre Ry.* (1874), L. R. 9 C. P. 503.

**2061.** ———.]—*HUTTON v. SEALY*, No. 2168, *post*.

**2062.** ———.]—*JERVIS v. WOLFERSTAN*, No. 2037, *ante*.

**2063.** ———.]—The right of a trustee to be indemnified out of the trust estate covers, not only payments actually made by him, but also his liability to pay; & by virtue of this right of indemnity a trustee is entitled to resort in the first instance to the trust estate for necessary expenses.—*Re BLUNDELL, BLUNDELL v. BLUNDELL* (1888), 40 Ch. D. 370; 57 L. J. Ch. 730; 58 L. T. 933; 36 W. R. 779; 4 T. L. R. 506.

*Annotation*:—*Reffd. St. Thomas's Hospital v. Richardson*, [1910] 1 K. B. 271.

**2064.** ———.]—The trustees are indemnified against all liabilities incurred by them in the execution of the trusts (KEKEWICH, J.).—*BATTEN, PROFFITT & SCOTT v. DARTMOUTH HARBOUR COMRS.* (1890), 45 Ch. D. 612; 59 L. J. Ch. 700; 62 L. T. 861; 38 W. R. 603.

**2065.** ———.]—*Depends on nature of transaction.*—Trustees of a club who have incurred liability under onerous covenants contained in a lease, accepted by them on its behalf, are entitled to indemnity out of any property of the club to which their lien as trustees extends. Its members are not, by reason only of being *cestuis que trust*, personally liable to indemnify them, where there is no rule imposing such liability upon them.—*WISE v. PERPETUAL TRUSTEE CO.*, [1903] A. C. 139; 72 L. J. P. C. 31; 87 L. T. 569; 51 W. R. 241; 19 T. L. R. 125, P. C.

**2066. Trustee appropriating investments to meet legacy—Depreciation of investments.**—Where

#### PART III. SECT. 3, SUB-SECT. 1.—D. (b).

**20601. Right to indemnity.**—*LAIRO & CO'S ASSIGNEES v. MURRAY'S TRUSTEES* (1836), 15 Sh. (Cl. of Sess.) 120; 12 Fac. Coll. 149.—*SCOT*.

**Sect. 3.—Rights of trustees: Sub-sect. 1, D. (b) & (c) 2, ii. & iii.]**

trustees were directed to sell, & after paying funeral & testamentary expenses & debts & legacies, & subject to the payment of the legacies out of the residue, to stand possessed of a sum not exceeding £1,700 in trust for A. on his attaining the age of twenty-one years, & they in fact on the death of testator appropriated certain investments & purchased others to make up at the prices of the day the sum of £1,700, A. being at that time sixteen years of age, & the investments had since depreciated:—*Held*: under the terms of the will there was a discretion to appropriate £1,700, & A., who had now attained twenty-one years of age, was only entitled to the investments so set aside, & not to have the full £1,700 paid to him.—*Re OSWALD, OSWALD v. OSWALD* (1919), 64 Sol. Jo. 242.

**(c) Particular Instances.**

**i. Costs in Connection with Appointment.**

**2067. Costs of former trustees—Paid to personal representatives of survivor.]**—In a partition action an order was made directing the taxation of the costs of the parties, including in the costs of defendants, the trustees, "one moiety of any costs, charges, & expenses properly incurred by them as trustees of the will of testator beyond their costs" of the action. The taxing master disallowed the costs of former trustees, who were dead, paid to the exor. of the survivor in consideration of his transferring the trust property, also costs of examining into the state of the trust property, & the validity of the power, before the appointment, also costs of the donee of the power in appointing. On summons to review taxation:—*Held*: (1) the trustees were bound to pay the costs of the old trustees properly incurred; (2) it was not only the right, but the duty, of the new trustees to see what the estate consisted of & that the power was properly exercised; also they were entitled to the costs of the donee of the power which they had paid. The trustees were therefore on principle entitled to the costs disallowed, subject to the discretion of the taxing master as to items; but having failed on another objection, no costs of the summons were allowed.—*HARVEY v. OLLIVER* (1887), 57 L. T. 239.

**2068. Costs of statement of trust property.]**—*HARVEY v. OLLIVER*, No. 2067, *ante*.

**2069. Costs of ascertaining validity of appointment.]**—*HARVEY v. OLLIVER*, No. 2067, *ante*.

**2070. Costs of donee of power of appointment.]**—*HARVEY v. OLLIVER*, No. 2067, *ante*.

**Costs of admission to copyholds.]**—*See COPYHOLDS*, Vol. XIII., p. 92, Nos. 1146, 1147.

**ii. Amounts Expended in Preservation of Trust Property.**

**2071. General rule.]**—*Re WINCHIESEA'S (EARL) POLICY TRUSTS*, No. 2040, *ante*.

**2072. Cost of repairs of house—Contract entered into by trustee.]**—Under a will A. was tenant for life of a copyhold house & two leasehold houses.

The latter having been taken under Lands Clauses Consolidation Act, 1845 (c. 18), the purchase-money was paid into ct. under sect. 69. The trustee of the will having entered into a contract for putting the copyhold house into permanent repair & there being no trust funds in hand out of which the expense could be defrayed the ct. upon a petition for reinvestment presented by the tenant for life & the trustee & without requiring service on the remaindermen ordered the contract price of the repairs to be paid to the trustee out of the fund in ct. & the remainder to be invested in Consols & the dividends paid to the trustee.—*Re ALDRED'S ESTATE* (1882), 21 Ch. D. 228; 51 L. J. Ch. 942; 46 L. T. 379; 30 W. R. 777.

**2073. — Damage by air raids.]**—Certain trust premises were damaged by bombs dropped by hostile aircraft. The premises were insured, but there was a dispute as to whether the policy had lapsed by non-payment of premiums. The trustee claimed to be indemnified for the repairs rendered necessary by the damage:—*Held*: the trustee had not committed a breach of trust so as to lose his right to an indemnity.—*Re MCGAW, MCINTYRE v. MCGAW* (1919), 64 Sol. Jo. 100, 209.

**2074. Cost of rebuilding house—Destruction by fire—Reimbursement limited to funds in court.]**—Testator devised his mansion house & other real estate to trustees for the term of one thousand years, upon certain trusts, & subject thereto, he devised same upon legal limitations, under which plff. was tenant for life. Shortly after testator's death the mansion house was burnt down. The sole acting trustee had expended, in addition to insurance moneys, a sum of £2,000 in rebuilding the mansion house, which amount he had borrowed on his own personal security & on a charge of the estate. It was admitted that this expenditure was very beneficial to the estate & that the value thereof was increased. There were in ct. sums of Consols, arising from the sale of part of the estate, & such funds were liable to be reinvested in land:—*Held*: it appearing that the estate had been benefited by the outlay of the trustee to the full amount of the funds in ct., & that the outlay had been *bonâ fide* made under the impression that it would be repaid out of the estate, the ct. would, although considering the conduct of the trustee irregular, order that he should be recouped his outlay to the extent of the funds in ct., but no further.—*JESSE v. LLOYD* (1883), 48 L. T. 656.

**2075. Costs of managing estate.]**—Testator devised West Indian property in trust for sale. A suit was instituted for administration of his estate, in which A. was appointed receiver & consignee. A. was discharged in 1830, on which occasion his accounts were passed in the presence of persons who were tenants for life under settlements of the property made after testator's death. In 1837 a sum of money was paid into ct. as compensation money for the slaves on the estates. Shortly after this B. was appointed receiver & consignee. The estates having been managed at a heavy loss, & large balances being due to A. & B. in respect of their disbursements sanctioned by

**PART III. SECT. 3, SUB-SECT. 1.—D. (c) i.**

**1. Investment & reinvestment.]**—Trustees are not entitled to a commission for the investment or reinvestment of the funds of the estate.—*Re BERKELEY'S TRUSTS* (1879), 8 P. L. 193.—*CAN.*

**PART III. SECT. 3, SUB-SECT. 1.—D. (c) ii.**

**m. Cost of permanent improve-**

**ments.]**—The principle that when a trustee expends his money upon the estate, & thereby increases its value, the property will not be wrested from him without repaying him the expenditure by which the estate has been substantially improved, acted upon in the case of an infant *cestui que trust*.—*HEVIS v. BOULTON* (1858), 7 Gr. 39.—*CAN.*

**n. Cost of preserving estate.]**—If a trustee of mortgaged lands has in

order to save the estate, paid off the mtgc. out of his own moneys he is entitled to be indemnified out of the trust property.—*DALY v. UNION TRUSTEE CO. OF AUSTRALIA, LTD.* (1898), 24 V. L. R. 460.—*AUS.*

**o. —.]**—*Re HART* (Ont.), [1925] 2 D. L. R. 316.—*CAN.*

**p. —.]**—*ELLIS v. ELLIS'S TRUSTEES* (1895), 22 R. (Ct. of Sess.) 764; 32 Sc. L. R. 611; 3 S. L. T. 64.—*SCOT.*

the ct., they applied for payment out of the capital of the slave compensation moneys:—*Held*: (independently of any rule peculiarly applicable to consignees of West Indian estates) they were entitled to such payment, for the disbursements made by them must be treated as expenses properly incurred by the trustees of a money fund for its protection & preservation until it was realised, & which he is entitled to be repaid out of the trust fund.—*MORISON v. MORISON* (1855), 7 De G. M. & G. 214; 3 Eq. Rep. 557; 25 L. T. O. S. 110; 1 J. Jur. N. S. 1100; 3 W. R. 383; 44 E. R. 84, 1. J. J.

*Annotations*:—*Reid*, *Fraser v. Burgess* (1860), 13 Moo. P. C. C. 314; *Re Harriott*, *Ex p. Pencilley* (1863), 8 L. T. 854. *Mentd.* Twynam v. Hudson (1862), 31 L. J. Ch. 577; *Re Oriental Hotels Co.*, *Perry v. Oriental Hotels Co.* (1871), L. R. 12 Eq. 126; *Re Glasdir Copper Mines*, *English Electro Metallurgic Co. v. Glasdir Copper Mines*, [1906] 1 Ch. 365.

**2076. Costs of carrying on business.**—Testator's business was carried on for about three years by his exors. after his death in accordance with the provisions of the will & with the assent of testator's creditors, in the interest of creditors as well as of the beneficiaries, & was properly carried on:—*Held*: the exors. were entitled to be indemnified out of testator's estate against the liabilities which they had properly incurred.—*DOWSE v. GORTON*, [1891] A. C. 190; 60 L. J. Ch. 745; 64 L. T. 809; 40 W. R. 17, 11. L.; *varying S. C. sub nom. Re GORTON*, *DOWSE v. GORTON* (1889), 40 Ch. D. 536, C. A.

*Annotations*:—*Apld.* *Re Owen*, *Frishy, Dyke v. Owen* (1892), 66 L. T. 718; *Re Brooke*, *Brooke v. Brooke*, [1891] 2 Ch. 600. *Distd.* *Re Millard*, *Ex p. Yates* (1895), 72 L. T. 823. *Consd.* *Re Raybould*, *Raybould v. Turner*, [1900] 1 Ch. 199; *Jenning v. Mather*, [1901] 1 K. B. 108; *Re Erth*, *Newton v. Rolfe*, [1902] 1 Ch. 342; *Re Salmen*, *Salmen v. Bernstein* (1912), 107 L. T. 108; *Re East London County & Westminster Banking Co. v. East* (1914), 111 L. T. 101. *Distd.* *Re Oxley*, *Hornby v. Oxley*, [1914] 1 Ch. 604. *Reid*, *Re Blundell*, *Blundell v. Blundell* (1890), 59 L. J. Ch. 269; *Re Bach*, *Walker v. Bach*, *Lloyds Bank v. Bach*, [1892] W. N. 108; *Re Kidd*, *Kidd v. Kidd* (1894), 42 W. R. 571; *Watling v. Lewis*, [1911] 1 Ch. 414; *Re Reynolds*, *Ex p. White*, [1915] 2 K. B. 186. *Mentd.* *Nutter v. Holland* (1891), 71 L. T. 508; *Re Newland*, *Bush v. Summers*, [1901] W. N. 181.

—*J*—*Sec. also*, EXECUTORS, Vol. XXIV., pp. 609, 610, Nos. 6398–6411.

**2077. Cost of permanent improvements.—Expenditure by constructive trustee—Himself tenant for life.**—Where a constructive trustee of property has expended money thereon in permanent improvements, he is *prima facie* entitled to be recouped his expenditure to the extent of the improved value; & the fact that he is beneficially entitled as tenant for life under the constructive trust does not displace his right to recoupment.—*ROWLEY v. GINNEVER*, [1897] 2 Ch. 503; 66 L. J. Ch. 669; 77 L. T. 302.

*Annotation*:—*Reid*, *Re Coulson's Trusts*, *Pritchard v. Coulson* (1907), 97 L. T. 754.

### iii. Money Advanced by Trustee.

**2078. Money advanced by trustee personally.**—A. who is a trustee for B. of £1,000 South Sea stock, at the desire of B. borrows £4,000 on this stock of the co., & B. receives the money, A. pays the 10 per cent. upon the late act to be discharged of the loan; though B. forbade the payment, yet he is liable.

It is a rule that the *cestui que trust* ought to save

the trustee harmless, as to all damages relating to the trust, so within the reason of that rule, where plff. the trustee has honestly & fairly, without any possibility of being a gainer, laid down money, by which deft. the *cestui que trust* is discharged from being liable for the whole money lent, or from a plain & great hazard of being so, plff. ought to be repaid (LORD KING, C.).—*BALSH v. HYHAM* (1728), 2 P. Wms. 453; 2 Eq. Cas. Abr. 741; 24 E. R. 810, L. C.

*Annotations*:—*Consd.* *Fraser v. Murdoch* (1881), 6 App. Cas. 855; *Hardoon v. Bellilos*, [1901] A. C. 118. *Reid.* *Re German Mining Co.*, *Ex p. Chippendale* (1854), 4 De G. M. & G. 19.

**2079. — For benefit of trust estate.**—I. consignee of a West India estate was appointed trustee thereof by B., the tenant for life, for the purpose of keeping down incumbrances. I. was also private agent & banker for B., with the understanding that B. was not, nor were his funds to be liable for advances made by I. for the estate; I. becoming embarrassed, was declared bkpt. & assignees were appointed:—*Held*: a sum found due from I. to B., on their private dealings, might be set off against a sum found due to I. in respect of his advances & payments for the estate.—*BAILLIE v. EDWARDS* (1848), 2 H. L. Cas. 74; 9 E. R. 1020, 11. L.; *reversg. S. C. sub nom. BAILLIE v. INNES* (1845), 14 L. J. Ch. 341, L. C.

**2080. — Exceeding amount agreed in deed of trust.**—A., a married woman, entitled, in respect of a former marriage, to dower, which was settled to her separate use, conveyed the same to C. on trust to sell, & pay thereout advances made, & to be made, by C. to A., not exceeding a given amount, & to pay the surplus to A. Advances were made beyond the amount by C., who received the dower & the sums received fell short of the sums advanced:—*Held*: this receipt of dower could not be considered as indefinite payments, but only for the purpose of paying off the charge, & afterwards for the separate use of A.; & the dower so received ought to have been applied in satisfaction of the charge, & the surplus, after such satisfaction, could only be applied as A. directed, & was subject to no lien except such as might be acquired by lending money to A., independently of the deed of conveyance.

C. was nevertheless permitted to make a new claim for payment of what was due to him out of the surplus of the income of the dower in his hands, after satisfaction of the charge.—*SMITH v. SMITH* (1845), 9 Beav. 80; 7 L. T. O. S. 507; 50 E. R. 273; *subsequent proceedings* (1846), 7 L. T. O. S. at p. 508.

**2081. — For carrying on business.**—*STRICKLAND v. SYMONS*, No. 2109, *post*.

**2082. — To pay off mortgage debt.**—*Re BURTON*, *SCOTT v. HACKNEY* 172ND STARR BOWKETT BUILDING SOCIETY (1897), 13 T. L. R. 275.

**2083. Money advanced out of trust funds.—To husband of cestui que trust—Without her consent.**—By a marriage settlement the interest of a trust fund was limited to a wife for life, for her separate use, with power to the trustees, upon her consent in writing, to advance the trust fund to her husband, upon the security of his bond; if the trustees, with consent of the wife, advance the fund to the husband, but without her written consent, &

## PART III. SECT. 3, SUB-SECT. 1.—D. (a) iii.

**2079i. Money advanced by trustee personally.—For benefit of trust estate.**—An express trustee, who has improved the trust estate by the expenditure of his own money, is, on the ground of fair dealing between parties, entitled

to be recouped his expenditure to the extent of the improved value, although he is also tenant for life of the trust estate.—*Re WALDELL*, *TOWNSEND v. WALDELL* (1903), 3 E. R. N. S. W. 375; 20 N. S. W. N. 144.—*AUS.*

*a.* —*J*—*ROTHWELL v. STUART'S TRUSTEES* (1898), 1 F. (Ct. of Sess.) 81;

36 Sc. L. R. 97; 6 S. L. T. 215.—*SCOT.* *r. Money wrongly paid to beneficiary.*—The right of a trustee to recoup himself for sums erroneously paid to a beneficiary out of a fund belonging to the beneficiary is subject to the control of the ct.—*IRID v. DEANE*, [1906] V. L. R. 138.—*AUS.*

*Sect. 3.—Rights of trustees: Sub-sect. 1, D. (c) iii., iv., v., vi., vii. & viii.]*

without the husband's bond, & if the trust fund be lost by his subsequent bkpcy., the trustees are not entitled to be indemnified to the extent of the wife's interest.—*COCKER v. QUAYLE* (1830), 1 Russ. & M. 535; 39 E. R. 206.

*Annotation:—**Reid, Hughes v. Wells* (1852), 9 Hare, 749.

**2084. — At her request.]—**A. a married woman, who was absolutely entitled to stock in ct., being separately examined, desired it to be transferred into the names of trustees, "upon trust for her absolutely, & that the dividends should be held & applied for her separate use for her life." This was accordingly done:—*Held*: during coverture she could dispose of her life interest, held for her separate use, but not of her reversionary interest, & the trustee having, at her request, advanced the fund to her husband, whereby it was lost, was held liable to replace it, but her life interest was made answerable for the trustee's indemnity.—*HANCHETT v. BRISCOE* (1856), 22 Beav. 496; 52 E. R. 1199.

*Annotations:—**Reid, Shute v. Hogge* (1888), 58 L. T. 546; *Re Davenport, Turner v. King*, [1895] 1 Ch. 361.

**2085. — To married cestui que trust.—Where clause against anticipation.]—**Where there is a clause against anticipation, & trustees pay the income to a married woman in advance, they are liable to pay it over again, & are not entitled to be reimbursed out of the subsequent interest.—*LEACH v. WAY* (1835), 5 L. J. Ch. 100.

**2086. — Whether discretion to purchase annuity.]—**Direction in a will that it should be lawful for the trustees or trustee, if they or he thought it desirable so to do, out of a certain share of the trust funds to purchase, in the name or for the benefit of A., an annuity not to be redeemable, & the will gave the trustees a discretion to purchase the annuity from Govt. or any public co., or upon any private security. The trustees did not purchase an annuity, but paid A. various sums, which he applied to his own purposes:—*Held*: the trustees were entitled to be allowed the sum so paid on account of the share.—*MESSENA v. CARR* (1870), L. R. 9 Eq. 260; 39 L. J. Ch. 216; 22 L. T. 3; *sub nom. MASSENA v. CARR*, 18 W. R. 415.

**Money advanced for maintenance of infant.]—***See INFANTS*, Vol. XXVIII., pp. 254, 255, Nos. 1105 1110.

#### iv. Calls on Shares.

**2087. Right to indemnity.]—**In 1841 pltf. advanced to deft. a sum of money upon the security of his promissory note, & an undertaking, when required, to transfer certain shares in a trading co. as a further security, deft. agreeing to indemnify pltf. against all calls or other payments which thereafter might be required in respect of the shares. In 1842, in pursuance of the undertaking, the shares were regularly transferred into pltf.'s name, & such transfer was duly registered in the transfer register of the co. In 1843 the mtge. debt was paid off, & pltf., at the requisition of deft., applied to the directors of the co. to transfer the shares into the name of deft., & took all the necessary steps on his part to obtain such transfer. Deft. concurred in the application, & signed the requisite notices to the co. The directors were bound, under the terms of their settlement deed, either to permit a transfer or to

purchase the shares. Some delay in the transfer was occasioned by the act of the directors; & during the pendency of the negotiation, a creditor of the co., which in the meantime had become insolvent, recovered judgment to a large amount against the public officer of the co., & proceeded to make the judgment available against pltf. as a registered shareholder. Upon bill by pltf. against deft. for an indemnity, etc.:—*Held*: deft. after payment of the mtge. debt, & the requisition to pltf. to procure a re-transfer, was equitable owner of the shares, & pltf. was a trustee for deft. of such shares, & as such entitled to an indemnity from his *cestui que trust* against the claims made in respect of the trust property.—*PHENE v. GILLAN* (1845), 5 Hare, 1; 15 L. J. Ch. 65; 5 L. T. O. S. 389; 9 Jur. 1086; 67 E. R. 803.

*Annotations:—**Reid, Hardoon v. Bellios*, [1901] A. C. 118; *St. Thomas's Hospital v. Richardson*, [1910] 1 K. B. 271. *Mentid, Newry, etc. Ry. v. Moss* (1851), 14 Beav. 64; *Walker v. Bartlett* (1856), 17 C. B. 416; *Spencer v. Ashworth* [Artington, 1925] 1 K. B. 589.

**2088. — Trustee receiving allotment of new share.—At request of cestui que trust.]—**A portion of certain property, settled upon trust for a wife for life, without power of anticipation, with remainder over, consisted of bank shares, standing in the name of one of the trustees of the settlement. The trustee, upon being invited by the bank to have certain new shares allotted to him, at the request of his *cestui que trust*, the wife, applied for & received an allotment:—*Held*: the trustee could not be indemnified out of the trust estate for a call made in respect of these new shares.—*SHERIFF v. BUTLER* (1866), 14 L. T. 510; 12 Jur. N. S. 329; 14 W. R. 629.

**2089. — Trustee retaining shares.—With consent of cestui que trust.]—**A., by trust disposition, & settlement, directed her trustees, after paying debts & certain legacies, to pay the interest of £2,000 to her daughter B. for life, & after B.'s death to pay the capital sum to her child or children. There were similar trusts as to another sum of £2,000 in favour of her daughter C., & C.'s child or children. Power was given to the trustees to "continue to hold" all shares or stocks in cos. which might belong to A. at the time of her death, "should they consider it advisable or expedient to do so," without any personal responsibility for loss thereby sustained. The property included £850 stock in an unlimited Scottish bank. The trustees sold £650, part of the bank stock, to satisfy claims on the estate, & at the request of B., though against their own opinion, they appropriated the remaining £200 in part satisfaction of the £2,000 to which she was entitled. The bank was afterwards wound up, & the trustees became personally liable to the payment of calls on the £200 stock:—*Held*: (1) the retention by the trustees, with the consent of the *cestui que trust*, though contrary to their own opinion, of the £200, part of the bank stock, was not a breach of trust; but they were not entitled to an indemnity against the calls out of the corpus of the estate.

(2) It was argued that the maker of a trust is personally bound to indemnify the trustees for all costs & liabilities properly incurred in the execution of the trust, but I do not think this is the law. No doubt any one who requests another to incur a liability which would otherwise have fallen on himself is, in general, bound, at law as well as in equity, to indemnify him; & this principle applies to many cases, & where a trust is for the benefit

#### PART III. SECT. 3, SUB-SECT. 1.—D. (c) iv.

**2087 i. Right to indemnity.]—***DAY v. DAY* (1903), 4 S. R. N. S. W. 21; 21 N. S. W. W. N. 1.—**AUS.**

**2087 ii. —.]—***KRULL v. STUDHOLME* (1895), 14 N. Z. L. R. 398.—**N.Z.**

of the maker of the trust it may apply to a trustee (LORD BLACKBURN).

(3) Unless there be an express or implied bargain for indemnity from the maker of the trust, he must be taken to accept the trust relying on the trust funds. He has, no doubt, a right to charge the trust funds with all just allowances (LORD BLACKBURN).—FRASER *v.* MURDOCH (1881), 6 App. Cas. 855; *sub nom.* ROBINSON *v.* MURDOCH, 45 L. T. 417; 30 W. R. 162, H. L.

*Annotations*.—As to (1) *Apld.* *Re Hobbs v. Wayet* (1887), 36 Ch. D. 256. *Consd.* *Re Craven, Watson v. Craven*, [1914] 1 Ch. 358. *Reid.* *Re Brooks, Coles v. Davis* (1897), 76 L. T. 771; *Re Hall, Foster v. Metcalfe* (1902), 72 L. J. Ch. 74; *Re Richardson, Ex p. St. Thomas's Hospital*, [1911] 2 K. B. 705; *Re Wrang, Wrang v. Palmer*, [1919] 2 Ch. 58. As to (2) *Apld.* *Matthews v. Ruggles-Brise*, [1911] 1 Ch. 194. *Generally, Consd.* *Hardoon v. Bellios*, [1901] A. C. 118. *Reid.* *Re Kidd, Kidd v. Kidd* (1894), 42 W. R. 571; *Re Towndrow, Gratton v. Machen*, [1911] 1 Ch. 602.

2090. — **Executor of trustee.**—('Certain moneys belonging to A. were invested in shares in a banking co. in the joint names of A. & B. the ultimate trust being for the estate of A. who predeceased B. The co. went into liquidation & calls would be made upon the shareholders, on the list of whom the exor. of B. would be put:—*Held*: the exor. of B. was entitled to be indemnified by the estate of A. & might bring an action for & obtain a declaration of indemnity before he was on the list & before any call was made on him.—*HOBBS v. WAYET* (1887), 36 Ch. D. 256; 56 L. J. Ch. 819; 57 L. T. 225; 36 W. R. 73.

*Annotations*.—*Reid.* *Wolmershausen v. Gullick*, [1893] 2 Ch. 514; *St. Thomas's Hospital v. Richardson*, [1910] 1 K. B. 271.

—[*J.*—*See COMPANIES*, Vol. IX., pp. 204, 205, 401, Nos. 1263–1272, 2570a.

#### v. Damages Recovered against Trustee.

2091. **Damages for personal injury—Negligence of servant.**—[A trustee in the due execution of his trust directed the bailiff employed on the settled estate to have certain trees felled. The bailiff ordered the woodcutters usually employed on the estate to fell the trees. In doing so they allowed a bough to fall on a passer by, who brought an action against the trustee, & recovered heavy damages:—*Held*: the trustee was entitled to indemnity out of the true estate.

The trustee in this case appears to have meant well, to have acted with due diligence, & to have employed a proper agent to do an act the directing which to be done was within the due discharge of his duty. The agent makes a mistake, the consequences of which subject the trustee to legal liability to a third party. I am of opinion that this liability ought, as between the trustee & the estate, to be borne by the estate (KNIGHT BRUCE, L.J.).—*BENETT v. WYNDHAM* (1862), 4 De G. F. & J. 259; 45 E. R. 1183.

*Annotations*.—*Foll.* *Re Raybould, Raybould v. Turner*, [1900] 1 Ch. 199. *Apld.* *Re Tyrell, Tyrell v. Woodhouse* (1900), 82 L. T. 675. *Mentd.* *Re Allan, Havelock v. Havelock* (1881), 17 Ch. D. 807.

2092. **Damage to buildings by letting down surface—Trustee carrying on colliery business.**—[A trustee carried on his testator's colliery business, & in so doing let down the surface of the land & injured the buildings of an adjoining owner, who recovered damages against the trustee personally for £1,092 & costs. The adjoining owner then claimed to be entitled to be paid direct out of

testator's estate the amount so recovered:—*Held*: as the injury had been occasioned by the trustee in the reasonable management and working of his testator's estate, he was entitled to be indemnified out of the assets, &, consequently, the adjoining owner was entitled to stand in the place of the trustee & to claim the benefit of this right to indemnity so as to obtain payment of the damages & costs so recovered direct out of testator's estate.—*Re RAYBOULD, RAYBOULD v. TURNER*, [1900] 1 Ch. 199; 69 L. J. Ch. 249; 82 L. T. 46; 45 W. R. 301.

*Annotation*.—*Reid.* *Re Tyrell, Tyrell v. Woodhouse* (1900), 82 L. T. 675.

#### vi. Costs of Legal Proceedings.

*See Sub-sect. 3, post.*

#### vii. Breaches of Trust.

**Indemnity from co-trustee.**—[*See Part VII., Sect. 4, sub-sect. 8, post.*

**Indemnity from beneficiary.**—[*See Part VII., Sect. 4, sub-sect. 9, post.*

#### viii. Other Cases.

2093. **Payment of legacy—Under order of court.**—[Legacy decreed to be paid to an infant but without interest.—*BULLEN v. ALLEN* (1876), Cas. temp. Finch, 264; 23 E. R. 145, L. C.

2094. — **Condition against bankruptcy.**—[Legacy in trust for testator's son for his own use & benefit, provided no misfortune in business shall in the mean time have happened to him, so as to deprive him or his family of the benefit of it; testator declaring his intention, his son's fortune being amply sufficient, by this fund to form a certain & permanent provision for him or his family; but in case he fail in business at any time before the age of thirty-two, then in trust for the support of him, his wife & children, as the trustees think proper, so long as he shall labour under the effects of any misfortune in trade; but as soon as he shall be freed & absolutely discharged from the effects of any misfortune or failure in trade, then, but not before, to be paid to him: otherwise the interest to be continued to be paid for the support of him, his wife & children, for his life; & if at his death he shall be under any difficulty from misfortune or failure in business, in trust for his wife & children according to his appointment by will; & if he shall leave no widow or child, according to his disposition. There was a considerable settlement. The son in the twenty-eighth year of his age being discharged under a deed of composition, the legacy was decreed to him; the trustees & his children not opposing it; but the ct. observed, that if he should not be discharged, as in case it should end in a bkrcpy., the trustees would not be indemnified.—*DE MIERKE v. TURNER* (1800), 5 Ves. 306; 31 E. R. 601, L. C.

2095. **Payment of legacy duty.**—[A trustee under a will, who pays the legacy duty upon an annuity after the expiration of four years from the death of testator, may recover the amount of the duty from the legatee, notwithstanding a previous assignment of the annuity by such legatee.—*HALES v. FREEMAN* (1819), 1 Brod. & Bing. 391; 4 Moore, C. P. 21; 129 E. R. 773.

*Annotations*.—*Reid.* *Smith v. Alsop* (1824), M'Cle. 622; *Smith v. Anderson* (1828), 4 Russ. 352; *Stow v. Davenport* (1835), 5 B. & Ad. 359; *Gude v. Mumford* (1837), 2 Y. & C. Ex. 445.

#### PART III. SECT. 3, SUB-SECT. 1.— D. (c) viii.

1. **Liability for breach of trust—Improper investment.**—[Where a trustee with the assent of the *cestui que trust*

having a life interest in the trust fund, lends the trust money upon a security which being insufficient, the trust fund is wholly lost, the trustee being compelled to refund the trust moneys,

cannot maintain a suit against the assenting *cestui que trust* to compel him to indemnify the trustee.—*BROWNE v. MAUNSELL* (1856), 27 L. T. O. S. 45.—*IR.*



*Sect. 3.—Rights of trustees: Sub-sect. 1, D. (c) viii.]*

**2096. Cost of board of cestui que trust.]**—In an account no allowance for diet, where plff. came as a guest at def't's invitation.—*ARUNDEL v. ROLL* (1681), 1 Vern. 19; 23 E. R. 274, L. C.

**2097. Expenses of occupying mansion house.]**—Testator devised his estate upon trust, that his mansion house, park, garden, etc., pictures, plate, furniture, etc., to go as heirlooms, should by the trustee "be kept in hand, & in good order " & repair," till all incumbrances paid: upon farther trust to permit testator's daughter "to have, hold, occupy, use, & enjoy" his mansion house, park, garden, etc., pictures, plate, furniture, etc., for life: upon farther trust to lay out from rents & profits all he should think necessary to keep the mansion house, etc., in repair: then to pay the daughter an annuity of £600 for life, for whom he also charged the estate with £10,000, & to apply the surplus in discharging the incumbrances, from which he excepted the mansion house, etc. He gave the trustee £200 a year above all charges; & after charges paid limited the estate over. The daughter occupied the house till her death: afterwards the trustee lived in it. The daughter held to have had an equitable life estate in the house, etc., as excepted from the general devise to the trustee, who therefore upon account was not allowed for rates & taxes paid, & expense of the garden defrayed by him during her life: but allowed for them afterwards, because under this will necessary for him to occupy either himself or by a servant.—*FOUNTAIN v. BELLET* (1791), 1 Ves. 337; 30 E. R. 374.

**2098. Costs of counsel's opinion.]**—*POOLE v. PASS*, No. 2709, *post*.

**2099. Expenses occasioned by wrongful devise of trust estate.—Liability of estate of deceased trustee.]**—Trustee for sale devising the estate upon the same trust not good. Testator devised all his real & personal estate to three trustees, upon trust that they or the survivors or survivor of them, or the heirs of such survivor, should, as soon as conveniently might be after his decease, but at their discretion, sell all the real estates for such price or prices as they should consider the value, etc., & he authorised the trustees & their heirs to enter into contracts, & conveyances, etc., & he declared that the receipt or receipts of the trustees or of their heirs, exors., or administrators or survivor of them, should be good discharges to the purchasers, etc.; & he directed his trustees, their heirs, exors., administrators, & assigns, to stand possessed of the proceeds of the sale of the real estate & the conversion of his personal estate, which he thereby directed upon certain trusts.

Two of the trustees declined the trust, & the other, who was also heir-at-law of the testator, accepted the trust, but died before selling any part of the estate, having made his will, whereby he devised & bequeathed all estates vested in him as a trustee unto A. & S., their heirs, exors., administrators, & assigns, upon the trusts affecting the same respectively, & appointed them exors. of his will. A. & S. entered into a contract to sell part of the trust estate, & the question now argued was, whether they as devisee & exors. of the original trustee could make a title to the estate in question:—*Held*: they could not, & the trustee was wrong in devising the estate.

*Qu.*: whether the estate of the trustee should not bear the expense which the trust estate is put to by reason of such devise.—*COOKE v. CRAWFORD*

(1842), 13 Sim. 91; 11 L. J. Ch. 406; 6 Jur. 723; 60 E. R. 36.

*Annotations*:—*Conad. Hall v. May* (1857), 3 K. & J. 585; *Re Morton & Hallett* (1880), 15 Ch. D. 145. *Reid, Titley v. Wolstenholme* (1844), 3 L. T. O. S. 279; *Macdonald v. Walker* (1851), 14 Beav. 556; *Lane v. Debenham* (1853), 11 Hare, 188. *Mentid. Wilson v. Bennett* (1852), 5 De G. & Sm. 475; *Salway v. Strawbridge* (1855), 1 K. & J. 371; *Ashton v. Wood* (1857), 3 Sm. & G. 436; *Stevens v. Austen* (1861), 3 E. & E. 685; *Osborne v. Rowlett* (1880), 13 Ch. D. 774; *Re Rumney & Smith*, [1897] 2 Ch. 351; *Re Crunden & Meux's Contract*, [1909] 1 Ch. 690.

**2100. Costs of conveyance.]**—A conveyance of freehold estates, & a covenant to surrender copyhold estates, were made to a person who was surety in some bonds for the party conveying, upon trusts for sale, & the satisfaction of mtges. affecting the estates & the bond debts. No notice of the conveyance was given to the creditors, the trustee was admitted to some of the copyholds, but proceeded no further in the execution of the trusts of the deed. Three years afterwards, the person conveying died, & it was held, that the conveyance was void, but that the trustee could not be called upon to part with the estate, if any, conveyed to him, or give up the deeds, without being discharged from the bonds of which he was surety, & having the costs expended by him as trustee repaid to him.—*WILDING v. RICHARDS* (1845), 1 Coll. 655; 4 L. T. O. S. 411; 63 E. R. 584; *subsequent proceedings*, 5 L. T. O. S. 20.

*Annotations*:—*Reid, Griffith v. Ricketts, Griffith v. Lunell* (1849), 7 Hare, 299; *Jones v. James* (1878), 39 L. T. 54.

**2101.**—*J.*—On the hearing on further consideration of an administration action, an order was made by which all the questions raised were practically disposed of, but liberty to apply was reserved. Subsequently the trustees of the will of testator in the action, in exercise of their powers under the will, & with the consent of the tenant for life, sold land forming part of the estate, & carried out other transactions without applying for, or obtaining any sanction of the ct.:—*Held*: the trustees were entitled to their proper costs of carrying out such transactions.—*Re MANSEI, RHODES v. JENKIN* (1885), 54 L. J. Ch. 883; 52 L. T. 806; 33 W. R. 727.

**2102. — Compulsory purchase by railway company.]**—Trustees not allowed, as against a railway co., the costs of a duplicate conveyance rendered necessary by reason of the price of the purchased estate exceeding the amount paid into ct. by the co.; nor the costs of exceptions allowed to the master's report against the purchase. The trustees, having no other fund, were allowed to take these extra costs out of the principal money in ct., though some of those entitled in remainder were infants.—*Re MANCHESTER & BIRMINGHAM RAILWAY ACT, Ex p. NEWTON* (1841), 4 Y. & C. Ex. 518; 10 L. J. Ex. Eq. 49; 100 E. R. 1112.

**2103. Costs of maintaining lunatic cestui que trust.]**—If a trustee be sued in Chancery for an account, & it appears that he has properly expended sums of money for the protection & safety, or for the maintenance & support, of his cestui que trust, at a time when he, though adult, was incapable of taking care of himself, the ct. will allow him credit, in account, for such sums of money.—*NELSON v. DUNCOMBE, DUNCOMBE v. NELSON* (1846), 9 Beav. 211; 15 L. J. Ch. 296; 7 L. T. O. S. 447; 10 Jur. 399; 50 E. R. 323.

*Annotations*:—*Reid, Vane v. Vane* (1876), 45 L. J. Ch. 381; *Re Rhodes, Rhodes v. Rhodes* (1890), 44 Ch. D. 94. *Mentid. Russell v. Walker* (1851), 17 L. T. O. S. 241.

**2104. Amount overpaid to tenant for life.]**—Trustees who had improperly allowed perishable property to remain *in specie* & to be enjoyed by the tenant for life, being made liable, were allowed, by means of an inquiry, in the same suit, to recover



back against the estate of the tenant for life the amount overpaid to him.—*HOOD v. CLAPHAM* (1854), 19 Beav. 90; 24 L. J. Ch. 193; 24 L. T. O. S. 206; 1 Jur. N. S. 78; 3 W. R. 78; 52 E. R. 282.

*Annotation*.—*Mentd. Re* Warcham, *Warcham v. Brewin* (1912), 81 L. J. Ch. 578.

**2105. Liability for breach of trust—Payment under order of court.**—Testator directed his estate to be accumulated until the death of the survivor of certain persons, & then to be divided among the children of his sister. By an order of the ct., £100 a year out of the income of the estate, was directed to be paid to one of those children, a lady, until the further order of the ct. By a marriage settlement the lady assigned to the trustees the whole of her share under the will of testator, together with the accumulations, upon trust for herself for life, with remainder to her children. The £100 a year was continued to be paid after marriage to her trustees, & by them allowed to be received and expended by the mother. The mother was still living; & the estate had not yet become divisible under the will. Upon bill by the children:—*Held*: notwithstanding the order of the ct. the £100 a year payable thereunder formed part of the capital funds comprised in the settlement, & ought to have been invested by the trustees, & they were ordered to make good the amount, subject to the right, as against the mother, to be recouped the amount out of her life interest in the fund.—*BARRATT v. WYATT* (1862), 30 Beav. 442; 31 L. J. Ch. 652; 6 L. T. 801; 8 Jur. N. S. 1045; 10 W. R. 456; 54 E. R. 960.

**2106. Assignment of leaseholds to beneficiary—Under order of court—Right to indemnity.**—Where leaseholds were devised to three trustees & one of them having died, the two surviving trustees & exors., one of whom had never acted as exor., under an order of the ct. assigned the leasehold in trust for themselves & a newly appointed trustee:—*Held*: by such assignment the leaseholds vested in them *qua* trustees & not *qua* exors., & they were not entitled to an indemnity upon assigning them to the person entitled under the will.—*SMITH v. SMITH* (1861), 1 Drew. & Sm. 384; 4 L. T. 44; 25 J. P. 516; 7 Jur. N. S. 652; 9 W. R. 406; 62 E. R. 426.

*Annotations*.—*Consd. Re* Kink, *Mellor v. South Australian Land Mortgage & Agency Co.*, [1907] 1 Ch. 73. *Reid. Dodson v. Sammell* (1961), 30 L. J. Ch. 799. *Mentd. Lys v. Lys* (1869), 17 W. R. 394.

**2107. Payment for benefit of estate—Erection of houses on trust land.**—Testator devised (*inter alia*) a field of land to trustees, in trust for his wife for life, with remainder to his three daughters for their lives, & then in trust to sell & divide the proceeds amongst his grandchildren. A portion of this field was taken by a railway co., who subsequently paid the money into ct. The trustees built houses on the remainder of the land, & now petitioned for payment of the purchase-money out of ct., to defray the expenses of the erections. On an affidavit being produced showing that the *cestuis que trust* agreed, previous to the erection of the buildings, to concur in the petition, & that the investment of the purchase-money in that manner was greatly for the benefit of the estate, the order for payment was made.—*Re PARTING-*

*TON'S ESTATE* (1862), 1 New Rep. 177; *sub nom. Re PARTINGTON'S TRUST, Re LONDON & NORTH WESTERN RY. CO.* 7 L. T. 522; 11 W. R. 180.

*Annotation*.—*Apld. Ex p. Dummer* (1865), 6 New Rep. 326.

**2108. Payment by lessee in trust for company—Agreement to accept assignment—Right to prove in winding up.**—After the commencement of the winding up the lessee in trust for a co. paid a person a sum of money in consideration of his agreeing to accept an assignment of the lease & indemnify him against further liability:—*Held*: the trustee was entitled to prove in the winding up for the sum so paid.—*Re SOUTHAMPTON IMPERIAL HOTEL CO., LTD., HUNT'S CLAIM* (1872), 26 L. T. 384; 20 W. R. 435.

**2109. Expenses of carrying on trade.**—On the marriage of S. a lunatic asylum was assigned to trustees, on trust, at the request of S. & his wife, during their joint lives, to sell the asylum & the goodwill thereof, & stand possessed of the proceeds of sale upon certain trusts declared by the settlement; but the trustees might allow S. to carry on the business for his own benefit until the sale. S. carried on the business for some time, & then became bkpt. The surviving trustee entered into possession & carried on the business of the asylum until it was sold at a large price. During this period A. supplied the trustee with goods for the purposes of the asylum. He afterwards recovered judgment against the trustee for the price of the goods, & then brought an action claiming payment of the judgment debt out of the proceeds of sale:—*Held*: as by the settlement there was no dedication of the trust premises for any trade purpose, & no specific part of the trust estate was directed to be employed in the carrying on of the trade, the trustee had no right to charge the trust estates with moneys expended by him in carrying on the trade, & A. could not be in a better position than the trustee.

*Qu.*: whether the trustee, if he had advanced moneys for carrying on the business, would have been entitled to be recouped out of the trustee estate.—*STRICKLAND v. SYMONS* (1884), 20 Ch. D. 245; 53 L. J. Ch. 582; 51 L. T. 406; 32 W. R. 889, C. A.

*Annotation*.—*Reid. Eccl. Comrs. v. Pinney* (1899), 81 L. T. 536.

**Rights of creditors.**—*See EXECUTORS*, Vol. XXIV., pp. 562–564, Nos. 6016–6025.

**2110. Costs of employing solicitor.**—An exor. or trustee is not entitled to be allowed without question the amount of bills of costs which he has paid *bonâ fide* to the solr. to the trust, & the master, without regularly taxing the bills, will moderate their amount.—*JOHNSON v. TELFORD* (1827), 3 Russ. 477; 38 E. R. 654.

*Annotations*.—*Reid. Brown v. Burdett* (1888), 40 Ch. D. 244; *Ayleford v. Poulett* (1890), 63 L. T. 519; *Goodchild v. Roberts*, [1925] Ch. 592.

**2111.**—*STANIAN v. EVANS, EVANS v. STANIAN*, No. 2056, ante.

**Taxation of costs.**—*See SOLICITORS*, Vol. XII., pp. 173–175, 186, Nos. 1806–1818, 1826, 2001–2003.

**2112. Purchase of land—Where no money available for investment.**—A contract for sale of glebe lands under the Ecclesiastical Leasing Acts, 1842 & 1858 having been entered into by a vicar with

**21101. Costs of employing solicitor.**—*STAFORD v. HUTT PARK COMMITTEE* (1909), 28 N. Z. L. R. 318.—N.Z.

**a. Solicitor trustee's charges.**—*SWANSON v. EMMERTON*, [1909] V. L. R. 387.—AUS.

**b.**—*MEIGHEN v. BUELL* (1878), 25 Gr. 604.—CAN.

**j.**—VOL. XLIII.

**c.**—*TRACHAN v. RUTTAN* (1892), 15 P. R. 109.—CAN.

**d.**—*GOMLEY v. WOOD* (1846), 3 Jo. & Lat. 678.—IR.

**e.**—*MACARTNEY v. DICKEY* (1865), 16 I. Ch. R. 409.—IR.

**f.**—*Re DE COURCENAY'S ESTATE*, [1912] 1 I. R. 341.—IR.

**g.**—*SCOTT v. HANDYSIDE'S TRUSTEES* (1868), 6 Macph. (Ct. of Sess.) 753.—SCOT.

**h. Insurance premiums.**—A trustee, unlike a mtgee., is entitled to insure the trust property, & charge the premiums paid against it, without any express stipulation to that effect

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**Sect. 3.—Rights of trustees: Sub-sect. 1, D. (c) viii., & E. & F.; sub-sect. 2.]**

the trustee of a settled estate, with the consent of the patron of the living & the Ecclesiastical Comrs., & the tenant for life having entered, with the approval of the trustee, into possession & paid the interest on the unpaid purchase-money to the vicar, & this payment having been continued to be made by subsequent life tenants to the vicar for the time being, the purchase-money never having been paid, *plffs.* brought this action to obtain specific performance of the contract, or, in the alternative the enforcement of a vendor's lien.

The trustee had power to invest the trust funds in the purchase of land, but, when the contract was entered into, he had no money belonging to the estate under his control for the purpose of being invested, as the personal estate had been advanced on the security of some policies of insurance on the life of the third tenant for life of the settled estates, whose death did not occur until some time afterwards:—*Held*: as at the date of the contract the trustee had no trust funds under his control available for the payment of the purchase-money, there never was any contract which was valid against the settled estates, the trustee therefore had no right to an indemnity out of the settled estates, & *plffs.* had no right by subrogation; & *plffs.* were only entitled to a lien upon the land sold for the unpaid purchase-money.—*ECCELESIASTICAL COMRS. v. PINNEY*, [1900] 2 Ch. 736; 69 L. J. Ch. 844; 83 L. T. 384; 49 W. R. 82; 16 T. L. R. 556; 44 Sol. Jo. 673, C. A.

**2113. Voluntary subscription.—Payment of school rate.]**—A payment of a mere voluntary subscription by a trustee cannot be allowed in his account, but where such payment, although in one sense voluntary, is made reasonably & in the honest belief that it will benefit the estate, either as saving a future compulsory payment of larger amount or as being fairly & reasonably necessary under the circumstances of the estate, it may be allowed.—*How v. WINTERTON (EARL)* (1902), 51 W. R. 262; 47 Sol. Jo. 146.

**2114. Liabilities in leases.—Right to indemnity.]**—*ST. THOMAS'S HOSPITAL (GOVERNORS) v. RICHARDSON*, No. 2127, *post*.

**Costs of disclaimer.]**—*See* Part II., Sect. 3, sub-sect. 2, D., *ante*.

**Costs of computing compensation under London Bridge Acts.]**—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 255, Nos. 1613, 1614.

**E. Priority of Right.**

**2115. Priority over general creditors.]**—After testator's death, the exor. of the trustee, who had become liable to the trust estate by reason of the default of his co-trustee, advanced out of his own moneys considerable sums for the benefit of the estate, & he now claims to be allowed these sums of which the parties interested under the will have had the benefit. What is contended is, that he may be paid only *pari passu* with other creditors; but this would be quite contrary to the practice of the ct. in dealing with trustees. I think, before any of the creditors are paid, the trustee must be recouped the amount he has advanced to the estate, & the residue will then become available for the general creditors (*per* CUR.).—*SPACKMAN v. HOL-*

*BROOK* (1860), 2 Giff. 193; 2 L. T. 367; 6 Jur. N. S. 881; 66 E. R. 83.

**2116. Priority over charge created by cestui que trust—Trustee of public company.]**—The right of a trustee to be indemnified out of the trust property is the first charge thereon, & it has priority to any charge created upon it by the *cestuis que trust*; & consequently, the right of a trustee of a public co. to be indemnified out of the property has priority over the debenture creditors.—*Re EXHALL COAL CO., LTD., Re BLECKLEY* (1866), 35 Beav. 449; 14 L. T. 280; 14 W. R. 599; 55 E. R. 970; *sub nom. Re EXHALL COAL CO., LTD., Ex p. BLECHLY*, 12 Jur. N. S. 757.

**Annotations.]**—*Fold*, *Re Pooley Hall Colliery Co. (1869)*, 21 L. T. 690. *Re St. Thomas's Hospital v. Richardson*, [1910] 1 K. B. 271; *Re Pain, Gustavson v. Haviland* [1919] 1 Ch. 38.

**2117. ———.]**—Three directors, in whom the lease of a co.'s premises was vested in trust for the co., had expended their own moneys in payment of rent, workmen's wages, etc.:—*Held*: they were entitled to be repaid in priority to all other claimants all sums which they could have been compelled to pay, but that they were not entitled to priority in respect of any moneys voluntarily paid by them on behalf of the co.—*Re POOLEY HALL COLLIERY CO. (1869)*, 21 L. T. 690; 18 W. R. 201.

**Annotation.]**—*Re*, *English Channel S.S. Co. v. Rolt* (1881), 17 Ch. D. 715.

**2118. Priority over costs of other parties.—Action for administration of trusts.]**—If, in an action by *cestuis que trust* under a creditors' trust deed against their trustees for accounts, & to have the rights of the parties ascertained, the costs of all parties are ordered to be paid out of the trust fund, & it appears probable that the fund will not be sufficient for payment of all the costs in full, the trustees are entitled to a direction for payment of their costs, charges & expenses in priority to the costs of all other parties.—*DODDS v. TUKE* (1884), 25 Ch. D. 617; 53 L. J. Ch. 598; 50 L. T. 320; 32 W. R. 424.

**2119. First charge on income & corpus.]**—*STOTT v. MILNE*, No. 2714, *post*.

**F. Right to Lien.**

*See, generally*, LIEN, Vol. XXXII., pp. 215 *et seq*

**2120. No right to delay transfer of trust fund.—To new trustees.]**—A trustee of a co. claiming a lien on account of sums due to him from the co., on a fund standing in his name, is not justified in interposing delay in the transfer of the fund to new trustees, although he may be entitled to recover the sums he claims against the co.—*WILSON v. PARKER* (1846), 8 L. T. O. S. 154; 10 Jur. 979.

**Annotation.]**—*Mentd. Re Arigna Iron Mining Co. (1853)*, 1 Eq. Rep. 269.

**2121. Expenses properly incurred.—Expenses of consignees of West Indian estates.]**—*MORISON v. MORISON*, No. 2075, *ante*.

**2122. ———. Right as against trustee in bankruptcy of settlor.]**—Trustees of a settlement, originally valid, but which becomes void on the bkpcy. of the settlor, are entitled as against the trustee in bkpcy. to a lien on the trust property for expenses properly incurred in the performance of their duty as trustees.

In the instrument creating the trust.—*HERON v. MOFFATT* (1875), 22 Gr. 370.—*CAN.*

**k. Costs incurred by trustee in individual capacity.]**—A trustee cannot charge the trust estate with costs incurred by him in his individual capacity

in endeavouring to secure a fund for himself, even although the fund afterwards becomes available to the trust estate, & that partly through the exertions of the trustee on his own behalf.—*WHITTINGHAM v. PROUDFOOT* (1870), Mac. 457.—*N.Z.*

**PART III. SECT. 3, SUB-SECT. 1.—F. 1. Expenses properly incurred.]**—*HENDERSON v. NORRIE* (1866), 4 Macph. (Ct. of Sess.) 691; 38 Sc. Jur. 355.—*SCOT.*

**m. Trustee entitled to compensation.]**—A person to whom municipal de-

The settlor of a post nuptial settlement brought an action to set it aside. The trustees of the settlement defended the action which was dismissed with costs but the costs were not paid. The settlor became bkpt. within two years after the date of the settlement, which accordingly became void under Bankruptcy Act, 1883 (c. 52), s. 47:—*Held*: as the settlement was originally valid, & as the costs of the action had been incurred by the trustees in the performance of their duty as trustees, they were entitled as against the official receiver to a lien on the trust fund for such costs.—*Re HOLDEN, Ex p. OFFICIAL RECEIVER* (1887), 20 Q. B. D. 43; 57 L. J. Q. B. 47; 58 L. T. 118; 36 W. R. 189, D. C.

*Annotations*:—*Mentd. Re Brall, Ex p. Norton v. Brall & London & Westminster Bank* (1893), 62 L. J. Q. B. 457; *Re Carter & Kenderdine's Contract*, [1897] 1 Ch. 776; *Re Hobbs, Ex p. Official Receiver* (1899), 6 Mans. 212; *Re Tankard, Ex p. Official Receiver*, [1899] 2 Q. B. 57; *Re Hart, Ex p. Green*, [1912] 3 K. B. 6; *Re Gunsbourg*, [1920] 2 K. B. 426.

**2123. Costs of abortive sale.—Before decease of tenant for life.**—Trustees for sale on decease of tenant for life having a prior legal estate:—*Held*: not to have any lien upon the property in respect of the costs of an abortive sale attempted by them during the tenancy for life, or of proceedings against them at law & in equity in reference thereto, notwithstanding such sale was attempted upon the solicitation of the tenant for life, & with the consent & approbation & by the direction of the *cestui que trust*, one of whom was *sui juris*, the shares of the others, who were married women, being settled to their separate use without power of anticipation.—*LEEDIAM v. CHAWNER* (1858), 4 K. & J. 458; 32 L. T. O. S. 221; 70 E. R. 191.

**2124. Amount borrowed by trustees.—For rebuilding chapel.—Right to lien on title deeds.**—Land was conveyed to trustees upon trust to rebuild a chapel with funds supplied by the congregation; but these being exhausted, they borrowed the amount necessary to complete it on their own security, with a deposit of the title deeds of the land. The trustees had no authority to pledge the deeds. They were afterwards compelled to pay the amount. Upon a bill filed by them that they might be reimbursed by a sale:—*Held*: they had a lien on the deeds, but were not entitled to a sale of the property to reimburse their outlay.

The right of the trustee to reimbursements rests on an implied contract. But if I held such an implied contract to exist . . . I should destroy the whole trust (ROMILLY, M.R.).—*DARKE v. WILLIAMSON* (1858), 25 Beav. 622; 32 L. T. O. S. 99; 22 J. P. 705; 4 Jur. N. S. 1009; 6 W. R. 824; 53 E. R. 774.

*Annotation*:—*Consd. Grissell v. Money* (1869), 38 L. J. Ch. 312.

**2125. — For purchase of real estate.—Right to lien on purchased property.**—Under a power in a settlement trustees purchased real estate at a price greater than the whole amount of the trust funds, & in order to supply the deficiency part of the purchase-money was borrowed by P., one of the trustees. On the death of P.:—*Held*: his estate was entitled to a lien upon the purchased property for the amount advanced by him, subject, however, to the first charge of the trust estate for the full amount of the trust fund; & liberty was given to the trustee to apply to realise such lien.—*Re PUMFREY, WORCESTER CITY & COUNTY BANKING CO., LTD. v. BLICK* (1882), 22 Ch. D.

255; 52 L. J. Ch. 228; 48 L. T. 516; 31 W. R. 195.

*Annotation*:—*Consd. St. Thomas's Hospital v. Richardson*, [1910] 1 K. B. 271.

**2126. Amount advanced at request of trustees.**—A tenant for life under a settlement comprising shares has a lien on the shares for repayment with interest of advances made at the request of the trustees for the purpose of paying calls on the shares, even though the trustees might, by exercising powers vested in them, have raised the necessary money otherwise.—*TODD v. MOORHOUSE* (1874), L. R. 19 Eq. 69; 32 L. T. 8; 23 W. R. 155.

*Annotation*:—*Reid. Re Leslie, Leslie v. French* (1883), 23 Ch. D. 552.

**2127. In respect of right of indemnity.—Against liabilities under lease.—Whether right passes to trustee in bankruptcy.**—Where a trustee who holds property to secure his own right of indemnity in priority to all claims of his *cestui que trust* becomes bkpt., & the retention of such property, e.g., leaseholds with onerous covenants, is necessary to give full effect to such right, the legal estate in the property & right to possession vest in the trustee in bkpcy. to the extent to which they were vested in the bkpt.

In 1894, R. was the assignee of leaseholds with onerous covenants as trustee for his wife; in 1895, R. was adjudicated bkpt; in 1896 the trustee in bkpcy. assigned the leaseholds back again to R. as trustee for his wife, & R. obtained his discharge. In 1908 the lessors, who had had no notice of the fact that R. was a trustee, or of his bkpcy., brought an action against R. for arrears of rent, & for damages for breach of covenant to repair. R. pleaded the bkpcy. proceedings as a defence:—*Held*: the leaseholds vested in the trustee in bkpcy., who held them subject to satisfying his own lien & right of indemnity, for R.'s wife; the leaseholds passed back again to R. by the assignment of 1896; & the bkpcy. was no defence to the action, & R. was liable as assignee.

The trustee would have been bound to admit a proof by plffs. If so, it seems to me impossible to doubt that the trustee, as representing the bkpt.'s estate, had a charge or lien upon the leasehold property precisely similar to that which deft. before his bkpcy. would have had in respect of liabilities presently enforceable (COZENS-HARDY, M.R.).—*ST. THOMAS'S HOSPITAL (GOVERNORS) v. RICHARDSON*, [1910] 1 K. B. 271; 79 L. J. K. B. 488; 101 L. T. 771; 17 Mans. 129, C. A.

*Annotations*:—*Reid. Re Calne's Mortgage Trusts*, [1918-19] B. & C. R. 297. *Mentd. Re Law Guarantee Trust & Accident Soc., Liverpool Mortgage Insec. Co.'s Case*, [1914] 2 Ch. 617.

**Insurance premiums paid by trustee.**—*See INSURANCE*, Vol. XXIX., pp. 383, 384, Nos. 3066, 3070, 3071.

**Costs of action against trustees.**—*See Sub-sect. 3, K., post.*

#### SUB-SECT. 2.—SET-OFF.

*See, generally, SET-OFF*, Vol. XL., pp. 367 *et seq.*

**2128. Against cestui que trust.—Costs of action against cestui que trust.**—Where testatrix devised a freehold estate to trustees upon trust to sell & to pay £140 part of the proceeds to A. & the residue of the proceeds to B., & appointed the devisees in trust her exors.:—*Held*: in a suit by A. & her husband against the trustees for payment of the

ventures in aid of a railway co. are delivered in trust to be handed over to the co. upon the completion of the rail-

way is a trustee & entitled to compensation, & is also entitled to a lien on the debentures until that compensation is

paid.—*Re TILSONBURG LAKE ERIE & PACIFIC RY. CO.* (1897), 24 A. R. 378. —CAN.

**Sec. 3.—Rights of trustees: Sub-sects. 2, 3 & 4, A.]**

£140, the latter were not entitled to set off the damages or costs of an action brought by them as exors. against the husband, to recover a deposit note in the hands of the wife forming part of testatrix's estate.—*REEVE v. RICHER* (1847), 1 De G. & Sm. 624; 17 L. J. Ch. 86; 10 L. T. O. S. 128; 11 Jur. 960; 63 E. R. 1224.

**2129.** —[Where a person, at the time of an order being made for the payment of his costs by trustees on a petition in the matter of a trust, is indebted to the trust estate, although the amount is not then ascertained, he cannot get any of such costs until he has paid the amount due from him to the trust, & the trustees, therefore, can set off the costs payable by them against the amount due from him. His solr. cannot be in a better position than he is himself. *Secus*, as to the costs of the trustees incurred in recovering such amount.—*Re HARRALD, WILDE v. WALFORD* (1884), 53 L. J. Ch. 505; 51 L. T. 441, C. A.

*Annotations.*—*Consd.* *Blakey v. Latham* (1889), 41 Ch. D. 518. *Reid.* *Bake v. French*, [1907] 1 Ch. 428; *Puddephatt v. Leith* (No. 2) (1916), 85 L. J. Ch. 543.

**2130.** — **Cost of support of lunatic cestui que trust.**—The trustee placed the *cestui que trust* under the care of the keeper of a lunatic asylum, & paid him his bill for her support, etc. In an action afterwards brought by the *cestui que trust* to recover from her trustee the money payable to her:—*Held*: upon the evidence given, the trustee was not entitled to deduct the amount so paid by him to the keeper of the asylum as for money paid to her use.

*Pltf.* is clearly entitled to recover, unless there be some answer to the action. The answer proposed on the part of deft. was that the money had been expended by deft. for the use of the lunatic, & therefore he was entitled in an action for money had & received, to set it off against the claim that the lunatic may have upon him. But, considering the evidence given in the first case, especially the evidence of the mother herself, there can be very little doubt that she took the lunatic to the asylum; that she directed deft. to go down & bring the lunatic up; that she interfered continually; that she managed; that she gave directions; that she prevented communication with the rest of the family. The tendency of all the evidence is to show that the contract with the keeper of the asylum was with the mother. Under these circumstances the case on the part of *pltf.* is perfectly clear, & in reality no answer is given in point of fact (*POLLOCK, C.B.*).—*NOTTIDGE v. RIPLEY* (1850), 14 L. T. O. S. 445.

**2131.** — **Amount due for mesne profits.—Cestui que trust in wrongful possession of trust property.**—*Re HARRALD, WILDE v. WALFORD*, No. 2129, *ante*.

**2132. Against heir of cestui que trust.**—Trustee of the estate of a lunatic obtains a devise from the lunatic for his own benefit, & upon the death of the lunatic brings ejectment against the heir-at-law of the lunatic, who took possession of the land, who defends the action, & is nonsuited. The heir-at-law then files a bill to set aside the will & stay execution in the action of ejectment, which the Vice-Chancellor granted, on the ground of seeing the result of the bill; & if *pltf.* succeeded in setting aside the will, then, as deft. in equity would have been guilty of a breach of trust in disputing the title of the *cestui que trust*, the ct. would avail itself of the power of setting off one set of costs against the other:—*Held*: to be inequitable.—*MURLEY v. GREENHAM* (1839), 3 Jur. 576, L. C.

**2133. Against creditor of cestui que trust.]—**

Where A. has a money demand against B., & B., through a trustee, has a money demand against A. which but for the intervention of the trust would have constituted a good legal set-off against A.'s demand, the latter may be pleaded by way of equitable set-off.—*COCHRANE v. GREEN* (1860), 9 C. B. N. S. 448; 7 Jur. N. S. 548; 9 W. R. 124; 142 E. R. 176; *sub nom.* *COCKRANE v. GREEN*, 30 L. J. C. P. 97; 3 L. T. 475.

*Annotations.*—*Apld.* *Agra & Masterman's Bank v. Leighton* (1866), L. R. 2 Exch. 56; *Thornton v. Maynard* (1875), L. R. 10 C. P. 695. *N.F.* *Middleton v. Pollock, Ex p. Nugee* (1875), L. R. 20 Eq. 29. *Disd.* *Re Willis, Percival, Ex p. Morier* (1879), 12 Ch. D. 491. *Apld.* *Manley v. Berkett*, [1912] 2 K. B. 329. *Reid.* *Bennett v. White*, [1910] 2 K. B. 643.

**2134. Against agent of trustee.]—N. & C.** were exors. of a will & trustees of the residuary real & personal estate of testator who died in 1859. N. & F. were tenants for life of the residuary estate in equal shares. In Jan. 1873, C. was residing abroad, & N., being about also to go abroad, gave to P., the solr. of the exors. & trustees, an authority on behalf of both trustees to receive the rents of the real estate & pay the outgoing. Under this authority P. received the rents, & at his death a considerable sum was due from him in respect thereof. P.'s estate proved insolvent, & the usual creditor's decree was made for administration. Subsequently to the decree F. assigned to N. all F.'s interest in the sum due from P. N. was indebted to A. & B. as trustees for P. in a sum the repayment of which was secured by a mtge. of real estate belonging to N., & this sum was paid into ct. in the suit to a separate account, under an order made without prejudice to any question as to set-off. N. afterwards presented a petition claiming to be entitled to set off the debt due from P. against the mtge. debt, & seeking to have the amount of the debt due from P. paid out of the fund standing to the separate account:—*Held*: (1) as regards F.'s interest there could be no set-off, inasmuch as it was not assigned to N. until after the decree; (2) the debt due from P. being either due to both trustees & exors., or if due to N. alone, due to him in his character of trustee & exor., could not be set off against a debt due from him individually.—*MIDDLETON v. POLLOCK, Ex p. NUGEE* (1875), L. R. 20 Eq. 29; 44 L. J. Ch. 584; 33 L. T. 240; 23 W. R. 766.

*Annotation.*—*Reid.* *Re Jones, Christmas v. Jones*, [1897] 2 Ch. 190.

**2135. Against amount due out of trust estate—**

**On bankruptcy of one trustee.]—**In an administration action, where a sum is found to be due from the estate to two trustees jointly, one of whom is insolvent & a debtor to the estate, the sum due to the two will not be set off against the sum due from the one; but the persons beneficially interested in the estate are entitled as a matter of right, to an inquiry whether any & what part of the sum due to the two is, as between the two, due to the insolvent trustee, & to have the sum so found to be due set off against the sum due from him.

In such a case, the insolvent trustee is not, since Bankruptcy Act, 1889 (c. 71), entitled to receive his costs of the action out of the estate until he has made good the debt which he owes.

If in such a case the trustees' costs consist in part of separate costs of the solvent trustee, in part of separate costs of the insolvent trustee, & in part of costs common to the two, the solvent trustee is not entitled to the whole of such costs, but only to his own separate costs, & to so much of the common costs as the taxing master apportions to him.—*McEWAN v. CROMBIE* (1883), 25 Ch. D. 175; *sub nom.* *McEWAN v. CROMBIE, PORTER v.*

GRANT, 53 L. J. Ch. 24; 49 L. T. 499; 32 W. R. 115.

*Annotation*.—*Fould*. Stanlar v. Evans, Evans v. Stanlar (1886), 56 L. J. Ch. 581.

**Retainer against beneficiaries.**—See Part V., Sect. 17, *post*.

### SUB-SECT. 3.—COSTS OF LEGAL PROCEEDINGS.

See Sect. 10, *post*.

### SUB-SECT. 4.—REMUNERATION.

*A. In General.*

See Trustee Act, 1925 (c. 19), s. 42.

**2136. Whether entitled to remuneration.**—The rule that a trustee shall not be allowed to make a profit of his trusteeship is a rule of common sense, based upon principles of human nature, & applies to every trustee.—*BROUGHTON v. BROUGHTON* (1855), 5 De G. M. & G. 160; 25 L. J. Ch. 250; 1 Jur. N. S. 965; 43 E. R. 831; *sub nom.* *BROUGHTON v. WHITE*, *BROUGHTON v. BROUGHTON*, 26 L. T. O. S. 54; 3 W. R. 602.

*Annotations*.—*Apld.* *Nicholson v. Tutin* (1857), 3 Jur. N. S. 235; *Crosskill v. Bower*, *Bower v. Turner* (1863), 32 Beav. 86. *Consd.* *Re Doody*, *Fisher v. Doody*, *Hibbert v. Lloyd*, [1893] 1 Ch. 129. *Reid*, *Field v. Hopkins* (1890), 44 Ch. D. 524. *Mentd.* *Pollard v. Doyle* (1860), 3 L. T. 432; *Re Barbor*, *Burgess v. Vinicombe* (1886), 34 Ch. D. 77; *Re Corsellis*, *Lawton v. Elwes* (1887), 34 Ch. D. 875; *Re Andrew*, *Mellor v. Smith* (1895), 39 Sol. Jo. 363; *Bath v. Standard Land Co.*, [1911] 1 Ch. 618.

**2137.**—]—There is no relation between the parties except the fiduciary relation of trustee & *cestui que trust*, which of itself precludes the possibility of P. making a profit by any part of the transactions in which, since the period of the sale, he has been engaged. . . .

You cannot give salary to a trustee who is made liable for his irregularity. I do not like to use a harsher expression, for I do not think that there is a suspicion of any improper dealing on the part of anybody in any one of these transactions. But salary he cannot have (*BACON, V.-C.*).—*Re NORRINGTON, BRINDLEY v. PARTRIDGE* (1879), as reported in 13 Ch. D. 654.

*Annotations*.—*Mentd.* *Re Crowther*, *Midgley v. Crowther* (1895), 64 L. J. Ch. 537; *Re Irwin*, *Barton v. Irwin* (1895), 39 Sol. Jo. 233.

**2138.**—Express provision for payment.]—A trustee has no right to exact or charge any remuneration or bonus in respect of great advantages accrued to the *cestui que trust* from services incident to the performance of the duties imposed by the deed of trust. A settled account by a *cestui que trust*, allowing a bonus to the trustee, set aside.

A trustee who accepts the office without any stipulation on the subject . . . has no right to say, at any moment when he chooses to do so, that he will exact a certain sum for his past services (*STUART, V.-C.*).—*BARRETT v. HARTLEY* (1860), L. R. 2 Eq. 780; 14 L. T. 471; 12 Jur. N. S. 426; 14 W. R. 684.

*Annotations*.—*Mentd.* *James v. Ker* (1889), 40 Ch. D. 449; *Mainland v. Upjohn* (1889), 41 Ch. D. 126; *Wheeler v. Sargeant* (1893), 3 R. 663; *Barnes v. Richards* (1902), 71 L. J. K. R. 311.

**2139.**—Agreement with *cestui que trust*.]—There may be cases where the ct. will establish an agreement, made with a trustee for an extraordinary allowance, beyond the terms of the trust.

Whether upon general grounds a trustee may make an agreement with a *cestui que trust* for an extraordinary allowance, over & above what he is

### PART III. SECT. 3, SUB-SECT. 4.—A.

*n. Application of English rule.*—*MEAGHER v. POWER* (N. S.) (1890), 17 S. C. R. 287.—CAN.

**2136 i.** *Whether entitled to remuneration.*—*Re COX'S WILL* (1890), 11 N. S. W. Eq. 124; 6 N. S. W. W. N. 155.—AUS.

**2136 ii.**—]—Upon the passing of their accounts by exors., administrators or trustees the chief clerk may allow them commission not exceeding 5 per cent. upon the income investments of the accumulated rents of real estate, the principal of which has already been the subject of commission.—*CROWLEY v. CRANE* (1895), 21 V. L. R. 258.—AUS.

**2136 iii.**—]—A trustee will not be entitled to commission where he does not show that he has done his duty in respect of the trust, & that his conduct has been above board & not in any way reprehensible.—*Re SHERRINGHAM'S WILL* (1901), 1 S. R. N. S. W. 48; 18 N. S. W. W. N. 121.—AUS.

**2136 iv.**—]—*Re MCINTOSH, PERPETUAL TRUSTEE CO., LTD. v. MCINTOSH* (1903), 4 S. R. N. S. W. 59.—AUS.

**2136 v.**—]—*MACARTNEY v. MACARTNEY*, [1909] V. L. R. 183.—AUS.

**2136 vi.**—]—Exors. who have committed a breach of trust in an important particular will be deprived of commission to which they would otherwise have been entitled.—*In the Will of GREEN* (1911), 11 S. R. N. S. W. 21.—AUS.

**2136 vii.**—]—*MACBEAN v. TRUSTEES, EXECUTORS & AGENCY CO., LTD.*, [1916] V. L. R. 425.—AUS.

**2136 viii.**—]—*Re SMITH* (1916), 16 S. R. N. S. W. 422; 33 N. S. W. W. N. 134.—AUS.

**2136 ix.**—]—*Re DARLING*, [1925] S. A. S. R. 262.—AUS.

**2136 x.**—]—Where trustees have merely retained investments in their

original condition & there had been no notional conversion or setting apart of specific securities, commission is not allowable on the amount retained.—*Re BARKER*, [1927] S. A. S. R. 65.—AUS.

**2136 xi.**—]—*WILSON v. PROUD-LOOF* (1868), 15 Gr. 103.—CAN.

**2136 xii.**—]—*BALD v. THOMPSON* (1870), 17 Gr. 154.—CAN.

**2136 xiii.**—]—A trustee appointed by a deed is, without express agreement, entitled to compensation for his services as such trustee.—*DEEDS v. GRAHAM* (1873), 20 Gr. 258.—CAN.

**2136 xiv.**—]—*Re BERKELEY'S TRUSTS* (1879), 8 P. R. 193.—CAN.

**2136 xv.**—]—*Re WILLIAMS* (1884), 22 C. L. T. 323; 4 O. L. R. 501; 1 O. W. R. 501.—CAN.

**2136 xvi.**—]—*Re PRITTEE'S TRUSTS* (1889), 13 P. R. 19.—CAN.

**2136 xvii.**—]—Where there has been nothing special in the management or winding up of an estate, a percentage on the gross amount come to the hands of the exors. or trustees will generally be allowed to them as remuneration.—*Re CROSBY* (1894), 9 Man. L. R. 433.—CAN.

**2136 xviii.**—]—*Re KATON'S ESTATE* (1898), 1 N. B. Eq. Rep. 527.—CAN.

**2136 xix.**—]—*Re PATTERSON ESTATE (Man.)* (1914), 28 W. L. R. 177.—CAN.

**2136 xx.**—]—*Re HUGHES* (1918), 42 O. L. R. 345; 14 O. W. N. 5.—CAN.

**2136 xxi.**—]—*JETHABAI v. CHOTALAL* (1909), 1 L. R. 34 Bom. 209.—IND.

**2136 xxii.**—]—*Re PROCTOR* (1837), 3 N. Z. L. R. 126 (S. C.).—N.Z.

**2136 xxiii.**—]—*HOME v. PRINGLE* (1841), 16 Sh. (Ct. of Sess.) 142.—SCOT.

**2136 xxiv.**—]—*ORR'S TRUSTEES v. AULD* (1851), 14 Dunl. (Ct. of Sess.)

### 181.—SCOT.

**2136 xxv.**—]—*AITKEN v. HUNTER* (1871), 9 Macph. (Ct. of Sess.) 756; 43 Sc. Jur. 413.—SCOT.

**2136 i.**—]—*Express provision for payment.*—*Re MITCHELL* (1862), 1 W. & W. 167.—AUS.

**2136 ii.**—]—*Re MCGAW, MCGAW v. MCGAW* (1904), 4 S. R. N. S. W. 591; 21 N. S. W. W. N. 171.—AUS.

**2136 iii.**—]—*Re BAKER* (1925), 27 W. A. L. R. 1.—AUS.

**2136 iv.**—]—*Re Sembie*, the limitation in a will as to the amount to be paid for the services of the original trustees under it, does not apply to a trustee afterwards appointed by the ct., at the instance of the *cestui que trust*.—*FREIBORN v. VANDUREN* (1893), 15 P. L. 264.—CAN.

**2136 v.**—]—*O'HIGGINS v. WALSH*, [1918] 1 I. R. 126.—IR.

**2136 vi.**—]—*Re WADE* (1901), 20 N. Z. L. R. 514.—N.Z.

**2136 vii.**—]—*DIXON v. RUTHERFORD* (1863), 2 Macph. (Ct. of Sess.) 61.—SCOT.

**2136 viii.**—]—*KIRKWOOD v. KIRKWOOD'S TRUSTEES*, [1912] S. C. 613.—SCOT.

**2136 ix.**—]—*NICHOLSON EXECUTOR'S ESTATE v. MASTER OF THE SUPREME COURT* (1921), 42 N. L. R. 347.—S. AF.

**2139 i.**—]—*Agreement with cestui que trust.*—*THOMPSON v. NORTHERN TRUSTS CO. (Sask.)*, [1925] 4 D. L. R. 184.—CAN.

**2139 ii.**—]—*FITZ-GIBBON v. SCANLAN* (1813), 1 Dow, 261.—IR.

**2139 iii.**—]—*GRAHAM v. HARRIS* (1883), 2 N. Z. L. R. 90 (S. C.).—N.Z.

*o.*—*Discretion of court.*—]

**Sect. 3.—Rights of trustees: Sub-sect. 4, A. & B.]**

allowed by the terms of the trust, I think there may be cases where this ct. would establish such agreements, but at the same time would be extremely cautious & wary in doing it.

In general this ct. looks upon trusts as honorary, & a burden upon the honour & conscience of the person entrusted, & not undertaken upon mercenary views; & there is a strong reason too against allowing anything beyond the terms of the trust, because it gives an undue advantage to a trustee, to distress a *cestui que trust*, & therefore this ct. have always held a strict hand upon trustees in this particular. If a trustee comes in a fair & open manner, & tells the *cestui que trust* that he will not act in such a troublesome & burdensome office, unless the *cestui que trust* will give him a further compensation, over & above the terms of the trust, & it is contracted for between them, I will not say this ct. will set it aside, though there is no instance where they have confirmed such a bargain (LORD HARDWICKE, C.).—AYLIFFE v. MURRAY (1740), 2 Atk. 58; 26 E. R. 433.

—See, also, COMPANIES, Vol. X., pp. 748, 749, Nos. 4679-4684.

—See, also, SOLICITORS, Vol. XLII., pp. 119-122, Nos. 1162-1182.

**2140. — Constructive trustee.]**—Captain of a ship dies leaving money on board, the mate becomes captain & improves the money, he shall, on allowance made him for his care in the management of such money, account for the profits, & not the interest only.—BROWN v. LITTON (1711), 10 Mod. Rep. 20; 1 P. Wms. 140; 2 Eq. Cas. Abr. 722; 24 E. R. 329.

**Annotation.]—**Reid, *Crawshaw v. Collins* (1826), 2 Russ. 325.

**2141. —**—[On the death of one partner, the survivor retaining his capital & employing it in the trade, decreed to account for the profits derived from it, making him proper allowances for the management of the business.—BROWN v. DE TASTET (1819), Jac. 284; 37 E. R. 858.

**Annotations.]—**Reid, *Cook v. Collingridge* (1823), Jac. 607; *Lovegrove v. Nelson* (1834), 3 My. & Cr. 1; *Wedderburn v. Wedderburn* (1838), 4 My. & Cr. 41; *Portlock v. Gardner* (1842), 6 Jur. 795; *Willett v. Blanford* (1842), 1 Hare, 253; *Stocken v. Dawson* (1848), 17 L. J. Ch. 282; *Clegg v. Fishwick* (1849), 1 H. & Tw. 390; *Lodge v. Pritchard* (1853), 3 De G. M. & G. 906; *Wedderburn v. Wedderburn* (1856), 22 Beav. 84; *Vyse v. Foster* (1874), L. R. 7 H. L. 318; *Edinburgh (Lord Provost) v. Lord Advocate* (1879), 4 App. Cas. 823; *Re Norrington, Brindley v. Partridge* (1879), 13 Ch. D. 654; *Cassels v. Stewart* (1881), 6 App. Cas. 64; *Re Aldridge, Aldridge v. Aldridge* (1894), 63 L. J. Ch. 465. **Mentd.** *Crosley v. Derby Gas Light Co.* (1838), 3 My. & Cr. 428; *Wilkes v. Saunton* (1877), 7 Ch. D. 188.

**2142. — Trustee of share of firm—Employed by firm as salaried employee.]**—L. was a trustee of his father's will. His father had been one of the managing directors of a partnership firm, & by the will L. was nominated to be a partner in the firm in the place of his father, but he was to hold the share in the partnership to which he thus succeeded upon the trusts of the will. L. had, prior to his father's death, acted as salesman of the firm at a salary. He continued so to act after his father's death, & after his admission as a partner, under an agreement with the other members of

the firm. The agreement to employ L. was made *bond fide*, & was for the interest of the firm, & thus of the trust estate:—**Held:** L. received his salary as salesman by virtue of his agreement with the firm, & not by reason of the trusts of the will, & consequently, he was entitled to retain the salary in addition to certain remuneration which he obtained under the will for acting as managing partner, & he need not account for the salary to the trust estate.—*Re LEWIS, LEWIS v. LEWIS* (1910), 103 L. T. 495; 55 Sol. Jo. 29.

**2143. — Death of trustee before trust executed—Claim by executors of trustee.]**—GOULD v. FLEETWOOD (1732), 2 Eq. Cas. Abr. 453; 22 E. R. 386.

**2144. — Professional business—Transacted by firm—Member of firm trustee.]**—Trustees can only be allowed costs out of pocket, for professional business transacted by a firm, one of whom is a trustee, though the business be done by one of the partners who is not a trustee.—CHRISTOPHERS v. WHITE (1847), 10 Beav. 523; 50 E. R. 683.

**Annotations.]—**Consd. *Lincoln v. Windsor* (1851), 9 Hare, 158. **Reid.** *Broughton v. Broughton* (1855), 1 Jur. N. S. 965; *Re Doody, Fisher v. Doody, Hibbert v. Lloyd*, [1893] 1 Ch. 129.

**2145. —**—[Can a trustee charge for professional trouble? He cannot do so (LORD LANGDALE, M.R.).—*Re FOLKES & PARKER* (1847), 2 New Pract. Cas. 491; 10 L. T. O. S. 221.

**2146. —**—[Testator, who died possessed of a valuable collection of works of art, by his will bequeathed £1,000 to each exor. proving & accepting the trusts, & recommended his trustees, without imposing any obligation on them, to employ the firm of C. to sell his collection, & to be advised by that firm as to prices. The will contained the usual clause empowering any exor. or trustee engaged in any profession or business to charge & be paid all usual professional or other charges for any business done by him, whether in the ordinary course of his profession or business or not.

R., one of the exors. & trustees, was keeper of certain antiquities at the British Museum, & was employed professionally to report on works of art, but had no other professional place of business:—**Held:** he was entitled to charge  $\frac{1}{2}$  per cent. commission for services rendered in connection with sales by private treaty of testator's works of art.—*Re WERTHEIMER, GROVES v. READ* (1912), 106 L. T. 590; 28 T. L. R. 337.

—**Solicitor as trustee.]**—See SOLICITORS, Vol. XLII., pp. 117-124, Nos. 1136-1197.

—**Company director as trustee.]**—See COMPANIES, Vol. IX., p. 464, Nos. 3013, 3014; Vol. X., pp. 748, 749, Nos. 4679-4683.

—**Trustee in bankruptcy.]**—See BANKRUPTCY, Vol. IV., pp. 226, 227, Nos. 2125-2130.

—**Trustee acting as auctioneer—Sale of trust property.]**—See AUCTION & AUCTIONEERS, Vol. III., p. 32, Nos. 231, 232.

—**Broker acting as trustee.]**—See AGENCY, Vol. I., p. 491, No. 1678.

**2147. Effect of payment of remuneration—Whether liability increased.]**—A trustee for remuneration is not, in the absence of negligence on his

McDONALD v. DAVIDSON (1881), 6 A. R. 320.—CAN.

p. —[—]—STINSON v. STINSON (1881), 8 P. R. 560.—CAN.

q. —[—]—Re WIGGIN'S ESTATE, 20 C. L. T. 462.—CAN.

r. —[—]—Re BORTHWICK (Man.), [1919] 1 W. W. R. 59.—CAN.

t. —[—]—Re LEVIN (1904), 24 N. Z. L. R. 768.—N.Z.

a. —[—]—When trustee has delayed.]—Re BENSON-HINES LONDON HOTEL CO., LTD., *Ex p.* WEIR (Ont.), [1926] 4 D. L. R. 776.—CAN.

b. —[—]—Out of what property.]—ARKAN SAHIB v. SORAN, *Bivi Saiba Annal* (1913), 1 L. R. 38 Mad. 260.—IND.

c. —[—]—Re SHARLAND'S WILL (1899), 17 N. Z. L. R. 729.—N.Z.

d. No fixed rule as to scale.]—There is no fixed or rigid rule governing the scale of remuneration.—FRENCH v. TORONTO GENERAL TRUSTS CORPN., [1924] 1 D. L. R. 288; 53 O. L. R. 336.—CAN.

e. When more than one trustee.]—Re MacDONALD (Alta.), [1925] 4 D. L. R. 743.—CAN.

f. —[—]—Re MONAGHAN (1906), 26 N. Z. L. R. 60.—N.Z.



part, liable for losses of the trust property sustained through the felonious acts of his servant, but is, in this respect, upon the same footing as an unpaid trustee.—*JOBSON v. PALMER*, [1895] 1 Ch. 71; 62 L. J. Ch. 180; 67 L. T. 797; 41 W. R. 264; 9 T. L. R. 106; 3 R. 173.

*Annotation*.—*Apld.* *Shepherd v. Harris*, [1905] 2 Ch. 310.

**Remuneration of executors.**—*See* EXECUTORS, Vol. XXIV., pp. 597-604, Nos. 6303-6358.

### B. Compensation for Personal Trouble and Loss of Time.

**2148. Whether allowed.**—*How v. GODFREY & WHITE*, No. 2051, *ante*.

**2149.** —*J.*—*PALMER v. JONES* (1682), 1 Vern. 144; 23 E. R. 376.

**2150.** —*J.*—Where a mtgee. or trustee manage the estate themselves, there is no allowance to be made them for their care & pains (*per* 'CUR.).—*BONTHON v. HICKMORE* (1685), 1 Vern. 316; 1 Eq. Cas. Abr. 7; 23 E. R. 492.

*Annotation*.—*Refd.* *Leith v. Irvine* (1833), 1 My. & K. 277.

**2151.** —*J.*—The ct. never allows an exor. or trustee for his time & trouble especially where there is an express legacy for his pains, etc.—*ROBINSON v. PIETT* (1731), 3 P. Wms. 249; 2 Eq. Cas. Abr. 454; 21 E. R. 1049; *sub nom.* *ROBINSON v. LORKIN*, 2 Barn. K. B. 435, L. C.

*Annotations*.—*Apld.* *New v. Jones* (1833), 1 Mac. & G. 668, n.; *Re Barber, Burgess v. Vulcume* (1886), 34 Ch. D. 77. *Refd.* *Moore v. Frowd* (1837), 3 My. & Cr. 15; *Creswick v. Woodhead* (1842), 1 Man. & G. 811. *Mentd.* *Harrison v. Harrison* (1846), 1 Rob. Eccl. 406.

**2152.** —*J.*—Exor. & trustee cannot claim compensation for personal trouble & loss of time in the performance of trusts under a will but should have made a special case for compensation before he entered on the performance of the trusts.—*BROCKSOPP v. BARNES* (1820), 5 Madd. 90; 56 E. R. 829.

**2153.** —*J.*—The assignee of a mtgee., who was one of a firm of auctioneers, took possession of the mtgd. property on account of non-payment of the money, & sold the property by auction under a power of sale. The expenses of the sale were charged by the firm of auctioneers.—*Held*: the vendor was in the position of a trustee from the time of taking possession, & was not at liberty to charge for personal trouble.—*MATTHISON v. CLARKE* (1854), 3 Drew. 3; 61 E. R. 801; *sub nom.* *MATTHISON v. CLARK*, 3 Eq. Rep. 127; 24 L. J. Ch. 202; 24 L. T. O. S. 105; 18 Jur. 1020; 3 W. R. 2. *Annotations*.—*Refd.* *Furber v. Cobb* (1887), 18 Q. B. D. 494; *Re Doody, Fisher v. Doody, Hibbert v. Lloyd*, [1893] 1 Ch. 129; *Thorne v. Heard*, [1894] 1 Ch. 699; *The Benwell Tower* (1896), 72 L. T. 664; *Bath v. Standard Land Co.*, [1911] 1 Ch. 618.

**2154.** —*J.*—In refunding profits improperly made by a trustee nothing can be retained as remuneration for services.—*IMPERIAL MERCANTILE CREDIT ASSOCN. (LIQUIDATORS) v. COLEMAN* (1873),

L. R. 6 H. L. 189; 42 L. J. Ch. 644; 29 L. T. 1; 21 W. R. 696, H. L.

*Annotations*.—*Consd.* *Transvaal Lands Co. v. New Belgium (Transvaal) Land & Development Co.*, [1914] 2 Ch. 488. *Mentd.* *Dunne v. English* (1874), L. R. 18 Eq. 524; *Re Coal Economising Gas Co., Gover's Case* (1875), 1 Ch. D. 182; *Panama & South Pacific Telegraph Co. v. India Rubber, Gutta Percha & Telegraph Works Co.*, (1875), 10 Ch. App. 520, n.; *Bagnall v. Carlton* (1877), 6 Ch. D. 371; *Chesterfield & Boythorpe Colliery Co. v. Black Erlanger* (1877), 5 Ch. D. 73; *Emma Silver Mining Co. v. Grant* (1879), 11 Ch. D. 918; *Boston Deep Sea Fishing & Ice Co. v. Ansell* (1888), 59 L. T. 345; *Turnbull v. West Riding Athletic Club, Leeds* (1894), 70 L. T. 92; *Silkstone & Haigh Moor Coal Co. v. Edey* (1899), 69 L. J. Ch. 73; *Costa Rica Ry. v. Forwood*, [1901] 1 Ch. 746; *Cockett v. Keswick*, [1902] 2 Ch. 456.

**2155.** — **Order of court—Prospective & retrospective allowance.**—*Prospective & retrospective allowance to trustee for trouble.*—*MARSHALL v. HOLLOWAY* (1820), 2 Swan. 432; 36 E. R. 681, L. C.

*Annotations*.—*Consd.* *Bainbridge v. Blair* (1845), 8 Beav. 588. *Mentd.* *Morison v. Morison* (1838), 4 My. & Cr. 215; *Ibbetson v. Ibbetson* (1840), 10 Sim. 495; *Ferrand v. Wilson* (1845), 4 Hare, 344; *Brown v. Stoughton* (1846), 14 Sim. 369; *Lungannon v. Smith* (1846), 12 Cl. & F. 546; *Turpin v. Newcome* (1856), 3 K. & J. 16; *Christie v. Gosling* (1866), L. R. 1 H. L. 279; *Martelli v. Holloway* (1872), L. R. 5 H. L. 532; *Tewart v. Lawson* (1874), L. R. 18 Eq. 190; *Re Stamford & Warrington, Payne v. Grey*, [1911] 1 Ch. 255; *Re Lewis, Busk v. Lewes*, [1918] 2 Ch. 308.

**2156.** —*J.*—*FORSTER v. RIDLEY* (1864), 4 De G. J. & Sm. 452; 4 New Rep. 417; 46 E. R. 993; *sub nom.* *FORSTER v. RIDLEY*, 11 L. T. 200, L. J.

*Annotation*.—*Refd.* *Re Salmen, Salmen v. Bernstein* (1912), 107 L. T. 108.

**2157.** — **Provision in trust instrument.**—*ELLISON v. AIREY* (1748), 1 Ves. Sen. 111; 27 E. R. 924, L. C.

*Annotations*.—*Mentd.* *Baldwin v. Karver* (1775), 1 Cowp. 309; *Congrove v. Congrove* (1781), 1 Bro. C. C. 530; *Pierson v. Pierson* (1786), 2 Bro. C. C. 38; *Ayton v. Ayton* (1787), 1 Cox, Eq. Cas. 327; *Jee v. Audley* (1787), 1 Cox, Eq. Cas. 324; *Hill v. Chapman* (1791), 3 Bro. C. C. 391; *Routledge v. Borrell* (1794), 2 Ves. 357; *Leake v. Robinson* (1817), 2 Mer. 363; *Stone v. Harrison* (1846), 2 Coll. 715.

**2158.** —*J.*—A trustee & exor., though taking under the will a commission as a satisfaction for his trouble, entitled to allowances under a general trust to set & manage, as he should think proper, & out of the rents & profits to pay all rates & taxes, charges of repairs, stewards', bailiffs', & gamekeepers' salaries & expenses, & all other charges & expenses he should think proper.—*WEBB v. SHAPTESBURY (EARL), SHAPTESBURY (EARL) v. ARROWSMITH* (1802), 7 Ves. 480; 32 E. R. 191, L. C.

*Annotations*.—*Refd.* *Re Skeat's Settlement, Skeats v. Evans* (1889), 42 Ch. D. 522. *Mentd.* *Cafe v. Bent* (1843), 3 Hare, 245; *Bethell v. Abraham* (1873), L. R. 17 Eq. 21.

**2159.** —*J.*—Testator devised & bequeathed his freehold & leasehold estate to trustees for sale, & he "declared that his trustees respec-

### PART III. SECT. 3, SUB-SECT. 4.—B.

**2148 I. Whether allowed.**—Trustees are not entitled by any practice of the colony to deduct anything from the trust estate by way of commission for their pains or trouble.—*WILKHAM v. KING* (1879), 1 Q. L. J. 13.—**AUS.**

**2148 II.** —*J.*—*PLYMLEY v. SHEPHERD* (1896), 17 N. S. W. Eq. 215.—**AUS.**

**2148 III.** —*J.*—Trustees of a municipality are entitled to a commission on moneys passing through their hands as compensation for their care & trouble in the management of the trust.—*Re COROUBA TOWN TRUST COMRS.* (1875), 22 Gr. 377.—**CAN.**

**2148 IV.** —*J.*—*LIFE ASSOCN. OF SCOTLAND v. WALKER* (1876), 24 Gr. 293.—**CAN.**

**2148 V.** —*J.*—*STEPHEN v. MILLER*

(B. C.), [1918] 2 W. W. R. 1042; *affd.* (1919), 59 S. C. R. 690; 17 D. L. R. 698.—**CAN.**

**2148 VI.** —*J.*—*Re HUGHES* (1919), 43 O. L. R. 394.—**CAN.**

**2148 VII.** —*J.*—*Re ORMSBY* (1809), 1 Ball & B. 189.—**IR.**

**2148 VIII.** —*J.*—*TAYLOR v. TAYLOR* (1843), 4 Dr. & War. 124.—**IR.**

**2148 IX.** —*J.*—*Re WHITE, INGRAM v. WHITE*, [1918] 1 I. R. 512.—**IR.**

**2148 X.** —*J.*—*CLARKE, ETC. (WELL-WOOD'S TRUSTEES) v. HOSWELL (OR HILL)* (1856), 19 Duml. (Ct. of Sess.) 187; 29 Sc. Jur. 86.—**SCOT.**

**2148 XI.** —*J.*—*PEDDIE v. BEVERIDGE* (1860), 23 Duml. (Ct. of Sess.) 707; 32 Sc. Jur. 269.—**SCOT.**

**2157 I.** — *Provision in trust instrument.*—*Re BURDEKIN'S ESTATE* (1901),

1 S. R. N. S. W. 1; 15 N. S. W. W. N. 156.—**AUS.**

**2157 II.** —*J.*—*Re MEDWIN* (1919), 15 Tan. L. R. 75.—**AUS.**

**2157 III.** —*J.*—*Re ANDERSON*, [1925] 1 D. L. R. 371; 56 O. L. R. 228.—**CAN.**

**I.** — *What must be considered.*—In fixing the amount of compensation to trustees, there should be taken into consideration the magnitude of the trust, the care & responsibility springing therefrom, the time occupied in performing its duties, the skill & ability displayed, & the success which had attended its administration.—*Re SANFORD* (1909), 18 Man. L. R. 413; 10 W. L. R. 82.—**CAN.**

**2.** —*J.*—*CALDWELL v. FLEMING*, [1927] N. Z. L. R. 145.—**N.Z.**



*Sect. 3.—Rights of trustees: Sub-sect. 4, B.; sub-sect. 5, A., B. & C. Sect. 4: Sub-sect. 1.]*

tively should be entitled to have & receive, out of the trust moneys, all costs, charges & expenses, fees to counsel & for advice, & for professional assistance, & loss of time, paid, incurred, sustained or occasioned in or about the execution of the trusts or in anywise relating thereto." One of the trustees was a land surveyor, & he superintended the management & sale of the estates:—*Held*: he was entitled to a compensation for loss of time.—*WILLIS v. KIBBLE* (1839), 1 Beav. 559; 48 E. R. 1057.

**2160.** ———.]—The common form clause authorising a trustee to charge & be paid for work done by him "whether in the ordinary course of his profession or business or not" does not justify a charge for time & trouble in matters altogether outside the scope of his profession or business.—*CLARKSON v. ROBINSON*, [1900] 2 Ch. 722; 69 L. J. Ch. 859; *sub nom. Re ROBINSON*, *CLARKSON v. DIXON*, 83 L. T. 164; 48 W. R. 698.

*Annotations:—**Conad. Re Devereux, Re Garrood* (1902), 46 Sol. Jo. 320. *Mentd. Re St. Albans, Loder v. St. Albans* (1900), 49 W. R. 74.

———.]—*See, also*, EXECUTORS, Vol. XXIV., pp. 597–599, Nos. 6303–6312

#### SUB-SECT. 5.—PROTECTION OF THE COURT.

##### A. In General.

*See R. S. C., Ord. 54A, 55, r. 3; EXECUTORS, Vol. XXIV., pp. 767–770, Nos. 7974–7800.*

**2161. Right to protection & direction.]**—A trustee is entitled to his costs, unless he acts from motives of obstinacy & caprice.

Trustees are entitled to the protection & direction of the ct. in the exercise of their trusts & can never be called upon to pay costs unless they refuse to act without suit merely from obstinacy & caprice (*LEACH, V.-C.*).—*TAYLOR v. GLANVILLE* (1818), 3 Madd. 170; 56 E. R. 475.

*Annotations:—**Conad. Goodson v. Ellisson* (1827), 3 Russ. 583. *Apld. Angier v. Stannard* (1834), 3 L. J. Ch. 216. *Reid. Re Swan* (1864), 2 Hem. & M. 34.

**2162.** ———.]—*GOODSON v. ELLISSON* (1827), 3 Russ. 583; 38 E. R. 694, L. C.

**2163.** ———.]—Upon a bill filed by trustees for the directions of the ct. in execution of the trusts of a will, if the trustees have notice of any doubt as to the title of testator to a part of the estate devised, the person who may be benefited by that doubt is properly made a deft. to the suit, & the ct. will not proceed to the execution of the trusts of the will until that doubt is removed, either by a proceeding at law, or by such other course of inquiry as the ct. may think proper to direct.

The trustees, having notice of the doubt as to the validity of the recovery, could not safely proceed in the execution of the trusts of the will as to that particular estate until that doubt was removed; & it is the duty of the ct., by its decree, to adopt such course for the protection of the trustees as shall have the effect of removing the doubt before it proceeds to deal with the estate as a part of the subject of the trust (*LEACH, M.R.*).—*TALBOT v. RADNOR (EARL)* (1834), 3 My. & K. 252; 40 E. R. 96.

*Annotations:—**Conad. A.-G. v. Avon* (otherwise *Aberavon*) *Corp.* (1863), 3 De G. J. & Sm. 637. I do not think that persons claiming a title purely adverse to a trust can be made parties to a suit for the execution of the trust. The

case of *Talbot v. Radnor (Earl)* is the only case of which I am aware at all bearing upon this point; & that case has been constantly disapproved of & never followed (*TURNER, L.J.*). *Mentd. Warren v. Rudall, Ex p. Godfrey* (1860), 1 John. & H. 1; *Long v. Kent* (1865), 12 L. T. 794; *Pitt v. Pitt* (1872), 26 L. T. 827; *Re Kensington, Longford v. Kensington*, [1902] 1 Ch. 203.

**2164.** ———.]—*DUNKIN v. WARD*, No. 2610, *post*.

**2165.** ———.]—*FROSTE v. HAMILTON*, No. 2718, *post*.

**2166.** ———.]—Testator bequeathed funds standing in the name of A., her trustee, to B., C., & D., her exors. upon certain trusts, & she directed A., within six months after her death, to execute a deed, declaring that he, his exors., etc., would "thenceforth stand & be possessed" of the funds upon the trusts declared by her will:—*Held*: A. was a co-trustee of the funds under the will, & could not safely transfer them to B., C., & D. without the sanction of the ct. . . . there was so serious a doubt, that no one would have advised him to act without the sanction of the ct. (*ROMILLY, M.R.*).—*IREDELL v. IREDELL* (1854), 18 Beav. 202; 52 E. R. 80.

**2167.** ———.]—A fund was settled on A. for life, with remainder to such of his children or remoter issue by his deceased wife as he should appoint. Shortly before his son, the only child of the marriage, attained twenty-one A. requested the trustees to prepare for a transfer of the fund to himself & his son, such transfer as to the greater part of the fund to be into A.'s own name. Not long before this A. had complained to one of the trustees of his son's extravagance, & had said to the solrs. of the trustees that a son ought to be dependent on his father. On the son's coming of age, A. made an appointment of the fund to him, & they then applied to the trustees to transfer it into their joint names. The son was living with the father's solr.:—*Held*: the trustees had been rightly allowed their costs of a suit to obtain such transfer; for that they were justified in declining to make it without the sanction of the ct., though the son was represented by a separate solr., & declarations were made that there was no bargain between him & the father for the father's benefit.—*KING v. KING* (1857), 1 De G. & J. 663; 27 L. J. Ch. 29; 30 L. T. O. S. 177; 4 Jur. N. S. 721; 6 W. R. 85; 44 E. R. 881, L. J.J.

*Annotation:—**Reid. Bradby v. Whitechurch*, [1868] W. N. 81.

**2168.** ———.]—Where a trust is to be executed the trustee is entitled to apply for the direction & indemnity of the ct.—*HUTTON v. SEALY* (1858), 27 L. J. Ch. 263; 4 Jur. N. S. 450; 6 W. R. 350. *Annotation:—**Reid. Macrae v. Ellerton* (1858), 27 L. J. Ch. 777.

**2169.** ———.]—Wherever a trustee comes & asks the ct. for a declaration of its opinion, upon a difficulty created by the document which constitutes him a trustee, it is the duty of the ct. to hold, that if there be a reasonable question or doubt, the trustee is entitled to come to the ct. to have that question determined (*ROMILLY, M.R.*).—*MERLIN v. BLAGRAVE* (1858), 25 Beav. 125; 53 E. R. 584.

**2170.** ———.]—There could be no doubt that trustees who had executed their duty must have a right to file a bill to ascertain whether any moneys were due from them to their *cestuis que trust* or, *vice versa*, from the *cestui que trust* to them (*WOOD, V.-C.*).—*SINGLETON v. SELWYN* (1863), 3 New Rep. 27; 9 L. T. 408; 9 Jur. N. S. 1149; 12 W. R. 98.

**2171.** ———.]—*Question of construction.]*—The ct.

against trustees.—*LIDDELL v. DEACON* (1873), 20 Gr. 70.—*CAN.*

**2161 III.** ———.]—*FOSTER v. M'MAHON* (1847), 11 I. Eq. R. 287.—*IR.*

#### PART III. SECT. 3, SUB-SECT. 5.

##### —A.

**2161 I. Right to protection & direction.]**

—*OUTHOUSE v. HICKMAN* (1850), 12 N. B. R. (1 Han.) 38.—*CAN.*

**2161 II.** ———.]—The ct. discountenances unnecessary or useless suits

will not, under Law of Property (Amendment) Act, 1859 (c. 35), s. 30, give its opinion for the guidance of trustees on the effect of a limitation contained in an instrument.—*Re HOOPER* (1861), 29 Beav. 656; 30 L. J. Ch. 795; 25 J. P. 692; 7 Jur. N. S. 595; 9 W. R. 729; 54 E. R. 782.

**2172. — Exercise of discretionary power.]—**Did any one ever hear of a trustee invested with such a discretion that he could not exercise it in such manner as he pleases, namely, if he thinks fit, by obtaining the direction of the ct. as to the particular mode in which he shall exercise it (*WARRINGTON, J.*).—*LAW GUARANTEE TRUST & ACCIDENT SOCIETY v. MUNICH RE-INSURANCE CO.*, [1912] 1 Ch. 138; 81 L. J. Ch. 188; 105 L. T. 987.

**Trustee in bankruptcy.]—***See* BANKRUPTCY, Vol. IV., pp. 211, 212, Nos. 1962–1971.

—*See, also*, SOLICITORS, Vol. XLII., p. 117, No. 1130.

### B. Practice.

*See* R. S. C., Ords., 54A, 55.

**2173. When summons taken out.]—**R. S. C., Ord. 55, r. 3 (e), only relates to the doing or the abstaining from doing by trustees of some act within the scope of their trusts, & an originating summons ought not to be taken out under that rule for the purpose of obtaining a direction to trustees to do or to abstain from doing an act which is outside the scope of their trusts.—*SUFFOLK v. LAWRENCE* (1884), 32 W. R. 899.

**2174. Who may be defendant.]—**TALBOT v. RADNOR (EARL), No. 2163, *ante*.

**2175. Ascertainment of trust fund.]—**Where trustees of a will refuse to exercise their discretion as to the appropriation or investment of a capital sum to produce a certain yearly income, & apply to the ct. for directions there is an established rule that the ct. will order the amount of the trust fund to be ascertained by reference to the sum required to be invested in Consols, as the recognised permanent Govt. security, in order to produce the yearly income, & not by reference to the sum required to be invested in any other Govt. security such as 4 per cent. (tax free) War Loan.—*Re HOLLINS, HOLLINS v. HOLLINS*, [1918] 1 Ch. 503; 87 L. J. Ch. 326; 118 L. T. 672; 34 T. L. R. 310; 62 Sol. Jo. 403, C. A.; *revisg.* (1917), 87 L. J. Ch. 135.

*Annotation.—**Reid. Re Marsh, Rhys v. Needham* (1917), 63 Sol. Jo. 141.

**2176. Special case stated.]—**By the combined effect of R. S. C., Ord. 34, r. 8, & the saving clause in Statute Law Revision Act, 1883 (c. 40), the protection given to trustees & others acting on the declaration of the ct. on a special case is preserved, notwithstanding the repeal of the Act.—*FORSTER v. SCHLESINGER* (1886), 54 L. T. 51.

### C. Costs.

*See, generally*, Part III., Sect. 3, sub-sect. 3, *ante*, Sect. 10, *post*.

**2177. Whether trustees liable.]—**TAYLOR v. GLANVILLE, No. 2161, *ante*.

**2178. —**]—A trustee seeking the direction & indemnity of the ct. as to the execution of his trust is whether *pltf.* or *deft.* entitled to his costs; unless the act required to be done leads to no

responsibility, & the motive of the trustee is obviously vexatious.—*CURTEIS v. CANDLER* (1821), 6 Madd. 123; 56 E. R. 1039.

**2179. —**]—*GOODSON v. ELLISSON* (1827), 3 Russ. 583; 38 E. R. 694, L. C.

**2180. — Appeal from direction of court.]—**The right of trustees & exors. to obtain the direction of the ct., without being liable to costs, does not apply to an appeal.

I have never considered this [right to obtain direction of the ct.] as applying to the appeal. It does apply to taking the direction of the ct. in the first instance, but when they have got that, then their own indemnity is obtained. If their view of their own interest makes them think it expedient to have it heard again, then it can be heard at their own expense (*LORD COTTENHAM, C.*).—*ROWLAND v. MORGAN* (1848), as reported in 18 L. J. Ch. 78; 13 Jur. 23.

*Annotations.—**Mentd.* *Andley v. Horn* (1859), 1 De G. F. & J. 225; *Scarsdale v. Curzon* (1860), 1 John. & H. 40; *Holmesdale v. West* (1866), L. R. 3 Eq. 474; *Shelley v. Shelley* (1868), L. R. 6 Eq. 540; *Harrington v. Harrington* (1871), L. R. 5 II. L. 87; *Re Johnston, Cockrell v. Essex* (1884), 26 Ch. D. 538; *Re Harcourt, Portman v. Portman*, [1921] 2 Ch. 491.

**2181. — — —.]—**One of *appls.* was the surviving trustee of the will; he & the other *applt.* were perfectly entitled to take the opinion of Mr. Justice Chitty as to what was right to be done; but when they appeal to this ct. from him, being absolutely protected as trustees by his decision—I do not say they are wrong in appealing, but they appeal to this ct. under the ordinary conditions of *appls.* & they fail in the appeal; therefore this appeal must be dismissed with costs (*LORD ESHER, M.R.*).—*Re RADNOR'S (EARL) WILL TRUSTS* (1890), 45 Ch. D. 402; 59 L. J. Ch. 782; 6 T. L. R. 480.

*Annotations.—**Mentd.* *Re Allesbury's S. E.*, [1892] 1 Ch. 506; *Mordidge v. Clapp*, [1892] 3 Ch. 382; *Hampden v. Buckinghamshire*, [1893] 2 Ch. 531; *Re Fetherstonhaugh's Estate* (1898), 14 T. L. R. 167; *Re Hope, De Cetto v. Hope*, [1899] 2 Ch. 679; *Re Townshend's Settlement*, [1903], 89 L. T. 691; *Re Hope's S. E.* (1910), 26 T. L. R. 413.

**2182. Costs of person made party to suit.]—**A person made party to a suit for protection of trustees, entitled to his costs out of trust fund.—*HICKS v. WRENCH* (1821), 6 Madd. 93; 56 E. R. 1026.

## SECT. 4.—DEALINGS WITH BENEFICIARIES AND THEIR INTERESTS.

### SUB-SECT. 1.—IN GENERAL.

**2183. Whether valid.—Dealings unconnected with trust.]—**(1) The circumstance that two parties stand to each other in the relation of trustee & *cestui que trust* does not affect any dealing between them unconnected with the subject of the trust.

(2) The trustee selling is bound to procure the best price he can for the property & the law will not permit him to put himself in a situation where his interest would be inconsistent with his duty (*LORD COTTENHAM, C.*).—*KNIGHT v. MARJORI-RANKS* (1840), 2 Mac. & G. 10; 2 H. & Tw. 308; 42 E. R. 4, L. C.

*Annotations.—**Generally.* *Mentd.* *Kirkwood v. Thompson* (1865), 2 Hon. & M. 392; *Rushbrook v. Lawrence* (1869), L. J. 8 Eq. 25; *Melbourne Banking Corp. v. Brougham* (1882), 7 App. Cas. 307.

*Er. p.* *BUSTEFD* (1861), 13 I. Ch. R. 239; 13 Ir. Jur. 330.—*IR.*

1. —.]—*CANE v. ALLEN* (1814), 2 Dow, 289.—*IR.*

*m. Where interest conflicts with duty.]—**LARNACH v. ALLEYNE* (1862), 1 W. & W. 342.—*AUS.*

*n. —.]—*A trustee must not

**21721. — Exercise of discretionary power.]—***Re STEEN'S TRUSTS, STEEN v. PEARLES* (1890), 25 L. R. Ir. 544.—*IR.*

## PART III. SECT. 4, SUB-SECT. 1.

**h. Whether valid.]—**The relationship of trustee & *cestui que trust* does

not prevent contracts between them being valid, but they are closely scrutinised by the ct.—*Re HUTTON ESTATE, Re FLYNN ESTATE, SWIT CANADIAN CO., LTD. v. BULL & PATRICK (Alta.)*, [1926] 4 D. L. R. 1080; [1926] 3 W. W. R. 609.—*CAN.*

*k. —.]—**Re M'KENNA'S ESTATE,*

*Sect. 4.—Dealings with beneficiaries and their interests: Sub-sects. 1, 2 & 3, A.]*

**2184.** ——— *Delay in setting aside transaction.]—*Testatrix gave a share in her residuary estate in trust for her daughter for life, with remainder to the daughter's children, & if none attained twenty-one, which happened, as she should appoint generally. In 1821 the daughter, without any legal advice except that of the acting trustee, who was a solr., & was under the will interested in the residuary estate, appointed that certain debts due from her husband to testatrix should be accepted as part of the daughter's share. Her husband became soon afterwards bkpt., & died in 1853, & she died in 1858, having, in settlements of accounts with the trustees, from time to time proceeded on the footing of the deed:—*Held*: a bill filed by her representatives in 1859, to set aside the deed, on the ground of the appointment being a dealing between trustee & *cestui que trust* to the advantage of the former & prejudice of the latter, under undue influence & without independent advice, was too late.—*SKOTTOWE v. WILLIAMS, WILLIAMS v. SKOTTOWE* (1861), 3 De G. F. & J. 535; 4 L. T. 719; 7 Jur. N. S. 665; 45 E. R. 986, L. C. & L. J.J.

#### SUB-SECT. 2.—GIFTS TO TRUSTEES.

*See, generally, FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 253–266, Nos. 802–902; GIFTS, Vol. XXV., pp. 503–505, Nos. 14–24.*

**2185.** *Gift by cestui que trust.—Whether approved.]—*This case proves the wisdom of the ct. in saying, it is almost impossible in the course of the connection of guardian & ward, attorney & client, trustee & *cestui que trust*, that a transaction shall stand, purporting to be bounty for the execution of antecedent duty. There may not be a more moral act, one that would do more credit to a young man beginning the world, or afford a better omen for the future, than if, a trustee having done his duty, the *cestui que trust*, taking it into his fair, serious, & well-informed consideration, were to be an act of bounty like this. But the ct. cannot permit it (LORD ELDON, C.).—*HATCH v. HATCH* (1804), 9 Ves. 292; 1 Smith, K. B. 226; 32 E. R. 615.

*Annotations:—*Consd. Davies v. Davies (1863), 4 Giff. 417; Lyon v. Home (1868), L. R. 6 Eq. 655; Liles v. Terry, [1895] 2 Q. B. 679. *Appl.* Wright v. Carter, [1903] 1 Ch. 27. *Refd.* Wood v. Downes (1811), 18 Ves. 120; Hunter v. Atkins (1834), 3 My. & K. 113; Cheslyn v. Dalby (1836), 2 Y. & C. Ex. 170; Edwards v. Meyrick (1842), 2 Hare, 60; Archer v. Hudson (1846), 15 L. J. Ch. 211; Hindson v. Weatherill (1853), 1 Sm. & G. 604; Tomeson v. Fudge (1855), 3 Drew. 306; Wright v. Vandorplank (1858), 8 De G. M. & G. 133; Turner v. Collins (1871), 7 Ch. App. 329.

**2186.** ——— *—If it is a gift, it is equally*

impossible that it can stand, because a *cestui que trust* cannot give a benefit to a trustee (ROMILLY, M.R.).—*VAUGHTON v. NOBLE* (1861), 30 Beav. 34; 54 E. R. 801.

——— *—See, also, FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 263, 265, Nos. 876, 894–896.*

**2187.** ——— *Relationship of husband & wife.]—*A gift from a *cestui que trust* to a trustee, even where the parties are in the relation of wife & husband, can only be supported by very strong & clear evidence (KAY, J.).—*Re BLAKE, BLAKE v. POWER* (1889), 60 L. T. 663; 37 W. R. 441.

**2188.** ——— *Trustee receiving gift as stranger.]—*For I take the rule to be this: there are certain relations known to the law, as attorney, guardian, trustee; if a person, standing in these relations to client, ward, or *cestui que trust*, takes a gift or makes a bargain, the proof lies upon him, that he has dealt with the other party, the client, ward, etc., exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, bringing everything to his knowledge which he himself knew. In short, the rule rightly considered is, that the person standing in such relation, must, before he can take a gift, or even enter into a transaction, place himself in exactly the same position as a stranger would have been in, so that he may gain no advantage whatever from his relation to the other party, beyond what may be the natural & unavoidable consequence of kindness arising out of that relation (LORD BROUGHAM, C.).—*HUNTER v. ATKINS* (1834), 3 My. & K. 113; *Coop. temp.* Brough. 464; 40 E. R. 43, L. C.

*Annotations:—*Refd. Edwards v. Meyrick (1842), 2 Hare, 60; Cooke v. Lamotte (1851), 15 Beav. 234; Hobday v. Peters (No. 1) (1860), 28 Beav. 349; Coutts v. Acworth (1869), L. R. 8 Eq. 558; Morgan v. Minett (1877), 6 Ch. D. 638.

#### SUB-SECT. 3.—PURCHASE BY TRUSTEES.

##### A. In General.

**2189.** *Whether right to purchase.]—*Trustees, or persons acting under them, cannot be purchasers.—*WHITACKRE v. WHITACKRE* (1725), *Cas. temp.* King, 13; 25 E. R. 195, L. C.

**2190.** ——— *—Trustee having engaged trust property in an adventure cannot sell either to himself or another.—*WILKINSON v. STAFFORD (1789), 1 Ves. 32; 30 E. R. 216, L. C.

**2191.** ——— *—Property devised to B. upon trust for sale was purchased by C. at his full value & subsequently conveyed to B. Upon a bill by the cestui que trust to set aside the purchase upon the ground of B.'s fiduciary relationship & alleging that C. acted as B.'s agent in the transaction:—Held: B. was not entitled to retain the property.*

place himself in a position where his personal interest may be in conflict with his duty to his *cestui que trust*.—*MACARTNEY v. MACARTNEY*, [1909] V. L. R. 183.—**AUS.**

#### PART III. SECT. 4, SUB-SECT. 2.

**2185 i.** *Gift by cestui que trust.—Whether approved.]—*WRIGHT v. KAYE (1906), 2 E. L. R. 47.—**CAN.**

**2185 ii.** ——— *—*RAGHUNATH v. VARJIVANDAS (1906), I. L. R. 30 Bom. 578.—**IND.**

#### PART III. SECT. 4, SUB-SECT. 3.—A.

**2189 i.** *Whether right to purchase.]—*CROW v. CAMPBELL (1884), 10 V. L. R. 186.—**AUS.**

**2189 ii.** ——— *—A trustee having merely a dry trust of the legal estate in the property without any fiduciary relation in respect of it, is not pre-*

cluded from purchasing such property.—*SINNETT v. DARBY* (1887), 13 V. L. R. 97.—**AUS.**

**2189 iii.** ——— *—The rule prohibiting trustees from purchasing the trust property for themselves applies with equal force to the case of a trustee selling his own property to himself & his co-trustees.—*Re WHITE, WHITE v. McLAHLAN (1910), 10 S. R. N. S. W. 295; 27 N. S. W. W. N. 88.—**AUS.**

**2189 iv.** ——— *—*WRIGHT v. MORGAN, [1926] A. C. 788.—**AUS.**

**2189 v.** ——— *—*KING v. KEATING (1865), 12 Gr. 20.—**CAN.**

**2189 vi.** ——— *—The rule in equity is, that the trustee buying the trust estate will be compelled to complete the purchase if considered for the advantage of those beneficially interested.—*HERON v. MOFFATT (1875), 22 Gr.

370.—**CAN.**

**2189 vii.** ——— *—*PARKER v. THOMAS (1893), 25 N. S. R. 398.—**CAN.**

**2189 viii.** ——— *—*HUTTON v. JUSTIN (1901), 22 C. L. T. 23; 2 O. L. R. 713; 1 O. W. R. 64.—**CAN.**

**2189 ix.** ——— *—*ROYAL TRUST CO. v. BAIE DE CHALEURS RY. CO. (1907), 13 Exch. C. R. 1.—**CAN.**

**2189 x.** ——— *—*Re LAND REGISTRY ACT & SHAW (1915), 32 W. L. R. 85; 9 W. W. R. 676; 24 D. L. R. 429; 22 B. C. R. 116.—**CAN.**

**2189 xi.** ——— *—In a ct. of equity there is no rule directly forbidding transactions of purchase & sale between trustee & cestui que trust.—*KILBECK v. SNEYD (1866), 2 Mol. 128.—**IR.**

**2189 xii.** ——— *—*KING v. ANDERSON (1874), 8 I. R. Eq. 626.—**IR.**

The ct. will not uphold a purchase by a trustee, even although it appears that there has been no insufficiency in the purchase-money.—*DYSON v. LUM* (1866), 14 L. T. 588; 14 W. R. 788.

**2192.** ———— [Where no advantage to trustee.]—Trustee not to derive advantage from a purchase of trust property.—*WHELPDALE v. COOKSON* (1747), 1 Ves. Sen. 9; 27 E. R. 856, L. C.

*Annotations*.—*Apld.* York Buildings Co. v. Mackenzie (1795), 8 Bro. Parl. Cas. 42. *Consd.* *Ex p.* Bennett (1805), 10 Ves. 381. *Apld.* Aberdeen Ry. v. Blaikie (1854), 2 Eq. Rep. 1281. *Refd.* *Ex p.* Lacey (1802), 6 Ves. 625; *Ex p.* James (1803), 8 Ves. 337.

**2193.** ———— [To set aside a purchase by a trustee of the trust property, it is not necessary to show that he has made an advantage.]

This doctrine as to purchases by trustees . . . rests upon this: that the purchase is not permitted in any case, however honest the circumstances; the general interests of justice requiring to be destroyed in every instance (LORD ELDON, C.).—*Ex p.* JAMES (1803), 8 Ves. 337; 32 E. R. 385, L. C.

*Annotations*.—*Apprvd.* Austin v. Chambers (1838), 6 Cl. & Fin. 1. *Consd.* Aberdeen Ry. v. Blaikie (1854), 2 Eq. Rep. 1281. *Apld.* Panama & South Pacific Telegraph Co. v. India Rubber, Gutta Percha & Telegraph Works Co. (1875), 10 Ch. App. 515. *Consd.* Luddy's Trustee v. Peard (1886), 33 Ch. D. 500. *Refd.* Oliver v. Court (1820), Dan. 301; Carter v. Palmer (1842), 8 Cl. & Fin. 657; Imperial Mercantile Credit Assocn. v. Coleman (1871), 6 Ch. App. 562, n.; Hickley v. Same v. Same (1876), 2 Ch. D. 190; *Re* Boles & British Land Co.'s Contract (1901) 71 L. J. Ch. 130; Nugent v. Nugent, [1908] 1 Ch. 546; Christoforides v. Terry, [1924] A. C. 566.

**2194.** ———— [—(1) It is now settled, that it is not necessary, in order to undo a sale to a trustee, to show, that he has made any advantage in the article of the purchase (LORD ELDON, C.).]

(2) The ground is, that his duty requires him, while he remains in that situation to carry to the sale even at the expense of the *cestui que trust*, all the information that is necessary to enable him to bring the estate to sale as advantageously for the *cestuis que trust*, as if he were selling that estate, his own for his own benefit. If that be the principle, with reference to the duty, a ct. of equity supposes to be imposed upon him, the inevitable consequence is, that, until by contract he shall do, what all the cases admit he may, but what it may be difficult to determine he has done effectually, shake off the character of trustee, & put himself in circumstances, in which he shall be no longer the person intrusted to sell, he shall not buy for himself (LORD ELDON, C.).—*Ex p.* BENNETT (1805), 10 Ves. 381; 32 E. R. 893, L. C.

*Annotations*.—*Generally, Consd.* *Re* Grundy, *Ex p.* Badoock (1829), Mont. & M. 231. *Refd.* Sanderson v. Walker, Campbell v. Walker (1807), 13 Ves. 601; *Re* Gundry. *Ex p.* Grylls, *Ex p.* Batten (1832), 2 Deac. & C. 290; *Re* Goren, *Ex p.* Cutts (1838), 3 Deac. 242; Greenlaw v. King (1840), 4 Jur. 622; Hesse v. Briant (1850), 6 De G. M. & G. 623; Deives v. Deives (1875), L. R. 20 Eq. 77; Transvaal Land Co. v. New Belgium Transvaal Land & Development Co., [1914] 2 Ch. 488. *Mentd.* *Re* Brettell, *Ex p.* Goren (1838), 7 L. J. Ch. 187.

**2195.** ———— [—Purchase by trustees of the trust property set aside; not being within the exception to the rule: viz. full information to the *cestui que trust*; & no advantage taken by the trustee of his situation to produce a beneficial bargain to himself.]

It is clearly then the case of a purchase by a trustee; & upon the ordinary rule it cannot stand; admitting, that a trustee may purchase from the *cestui que trust*, under the limitations, & with the restrictions laid down in *Coles v. Trecothick*, No. 2196, *post*; provided it is distinctly & fully understood by the *cestui que trust*, that he is selling to the trustee, & the trustee takes no advantage of his situation, to produce a beneficial bargain

to himself . . . acquiescence may have the same effect as original agreement; & may bar such a remedy as this (GRANT, M.R.).—*RANDALL v. ERRINGTON* (1805), 10 Ves. 423; 32 E. R. 909.

*Annotation*.—*Refd.* Panama & South Pacific Telegraph Co. v. India Rubber, Gutta Percha & Telegraph Works Co. (1875), 10 Ch. App. 520, n.

**2196.** ———— [—Purchase under a trust for payment of debts, by the trustee, as agent for his father, both creditors in partnership, established under the circumstances; particularly, that the *cestui que trust* had full information, & the sole management; making surveys, settling the particulars, fixing the prices, etc.]

A trustee may buy from the *cestui que trust*, provided there is a distinct & clear contract, ascertained to be such after a jealous & scrupulous examination of all the circumstances, that the *cestui que trust* intended, the trustee should buy; & there is no fraud, no concealment, no advantage taken by the trustee of information, acquired by him in the character of trustee (LORD ELDON, C.).—*COLES v. TRECOTHICK* (1804), 9 Ves. 234; 1 Smith, K. B. 233; 32 E. R. 592, L. C.

*Annotations*.—*Apld.* Randall v. Errington (1805), 10 Ves. 423. *Consd.* Morse v. Royal (1806), 12 Ves. 355; Plowright v. Lambert (1885), 52 L. T. 646. *Refd.* Peacock v. Evans, Evans v. Peacock (1809), 16 Ves. 512; Cople v. Middleton (1817), 2 Madd. 410; Carter v. Palmer (1842), 8 Cl. & Fin. 657; Tottenham v. Green (1863), 32 L. J. Ch. 201; Luddy's Trustee v. Peard (1886), 33 Ch. D. 500; *Re* Boles & British Land Co.'s Contract (1901), 71 L. J. Ch. 130. *Mentd.* Blagden v. Bradburn (1806), 12 Ves. 466; Buckmaster v. Harrop (1807), 13 Ves. 466; Emmerson v. Heells (1809), 2 Taunt. 38; Kemeys v. Proctor (1813), 3 Ves. & B. 57; Kenney v. Wexham (1822), 6 Madd. 355; Henderson v. Barnewall (1827), 1 Y. & J. 387; Gosbell v. Archer (1835), 2 Ad. & El. 500; Graham v. Musson (1839), 7 Scott, 769; *Re* Robinson & Farrand, *Ex p.* Holdsworth (1841), 1 Mont. D. & De G. 475; Strickland v. Turner (1852), 7 Exch. 208; *Coles v. Bristowe* (1868), L. R. 6 Eq. 149; Seal v. Claridge (1881), 7 Q. B. D. 516; Potter v. Peters (1895), 64 L. J. Ch. 357.

**2197.** ———— [With consent of *cestui que trust*.]—

*COLES v. TRECOTHICK*, No. 2196, *ante*.

**2198.** ———— [—*RANDALL v. ERRINGTON*, No. 2195, *ante*.]

**2199.** ———— [—*MORSE v. ROYAL* (1806), 12 Ves. 355; 33 E. R. 134, L. C.]

*Annotations*.—*Consd.* Tomson v. Judge (1855), 3 Drew 306; Plowright v. Lambert (1885), 52 L. T. 646. *Refd.* Trevelyan v. Charter (1875), 4 L. J. Ch. 209; Bartram v. Lloyd (1904), 90 L. T. 357.

**2200.** ———— [—The rule in equity which invalidates a sale made by a trustee to himself is one which admits of some qualification; & if it can be shown that the trustee has acted fairly & openly & with the concurrence of all parties having a primary interest, the ct. will not set aside the transaction.—*DOVER v. BUCK* (1805), 5 Giff. 57; 5 New Rep. 444; 12 L. T. 136; 11 Jur. N. S. 580; 66 E. R. 921.]

**2201.** ———— [—*Dissolution of fiduciary relationship.*—A trustee also may deal with his *cestui que trust*; but the relation must be in some way dissolved, or, if not, the parties must be put so much at arm's length, that they agree to take the characters of purchaser & vendor; & you must examine, whether all the duties of these characters have been performed (LORD ELDON, C.).—*GIBSON v. JEVES* (1801), 6 Ves. 266; 31 E. R. 1044, L. C.]

*Annotations*.—*Consd.* Morse v. Royal (1806), 12 Ves. 355. *Expld.* Hunter v. Atkins (1834), Coop. temp. Brough. 484. *Apld.* Barnard v. Hunter (1856), 28 L. T. O. S. 162. *Consd.* Pisan v. A.-G. for Gibraltar (1874), L. R. 5 P. C. 516; Plowright v. Lambert (1885), 52 L. T. 646; Moody v. Cox & Hatt, [1917] 2 Ch. 71. *Refd.* Adamson v. Evitt (1830), 9 L. J. O. S. Ch. 1; Dent v. Bennett (1838), 4 My. & Cr. 269; Edwards v. Meyrick (1842), 2 Har. 60; Cooke v. Lamotte (1851), 15 Beav. 234; Hoghton v. Hoghton (1852), 15 Beav. 278; Holman v. Loynes (1854),

**Sect. 4.—Dealings with beneficiaries and their interests: Sub-sect. 3, A., B. & C.]**

4 De G. M. & G. 270; Savary v. King (1856), 5 H. L. Cas. 627; Waters v. Thorn (1856), 22 Beav. 547; Johnson v. Fesemeyer (1858), 3 De G. & J. 13; Gresley v. Mousley (1859), 4 De G. & J. 78; Smith v. Kay (1859), 7 H. L. Cas. 751; King v. Anderson (1874), 23 W. R. 196; Widgory v. Tepper (1877), 38 L. T. 434; Erlanger v. New Sombbrero Phosphate Co. (1878), 3 App. Cas. 1218; Lovesy v. Smith (1880), 49 L. J. Ch. 809; Ward v. Sharp (1884), 53 L. J. Ch. 313; Luddy's Trustee v. Beard (1884), 33 Ch. D. 600; Readly v. Prendergast (1886), 55 L. T. 767; Liles v. Terry (1895), 12 T. L. R. 26; Lagunas Nitrate Co. v. Lagunas Syndicate, [1899] 2 Ch. 392; Bischoff's Trustee v. Frank (1903), 89 L. T. 188; Re Rogerstone Brick & Stone Co., Southall v. Wescomb, [1919] 1 Ch. 110.

**2202.** ———.]—As to a purchase by a trustee of the trust property the rule is that it shall not prevail under any circumstances unless the connection appears satisfactorily to have been dissolved, a transaction to be viewed with great jealousy from the opportunity of acquiring knowledge as trustee, or by universal consent.—

*Ex p. LACEY* (1802), 6 Ves. 625; 31 E. R. 1228, L. C.

**Annotations:—***Consd. Morse v. Royal* (1806), 12 Ves. 355; *Hamilton v. Wright* (1842), 9 Cl. & Fin. 111; *Baker v. Peck* (1860), 3 L. T. 656; *De Cordova v. De Cordova* (1879), 4 App. Cas. 692. *Appld. Re Worsam, Hemery v. Worsam* (1882), 46 L. T. 584; *Re Postlethwaite, Postlethwaite v. Hickman* (1888), 59 L. T. 58. *Expld. Farrar v. Farrars* (1888), 40 Ch. D. 395. *Consd. Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392; *Rowland v. Chapman, Rowland v. Corrie, Rowland v. Brandreth* (1901), 17 T. L. R. 669. *Reid, Ex p. James* (1803), 8 Ves. 337; *A. G. v. Dudley* (1815), Coop. G. 146; *Greenlaw v. King* (1841), 10 L. J. Ch. 129; *Benson v. Heathorn* (1842), 1 Y. & C. Ch. Cas. 326; *Aberdeen Ry. v. Blaikie* (1854), 23 L. T. O. S. 315; *Plowright v. Lambert* (1885), 52 L. T. 646; *Re Boles & British Land Co.'s Contract* (1901), 71 L. J. Ch. 130; *Christoforides v. Terry*, [1924] A. C. 566.

**2203.** ———.]—*Ex p. BENNETT*, No. 2194, ante.

**2204.** ——— **Purchase conflicting with fiduciary duty.]**—The rule of equity, which prohibits purchases by parties placed in a situation of trust or confidence with reference to the subject of purchase, is not confined to a particular class of persons, such as guardians, trustees or solrs., but applies universally to all who come within its principle; which is, that no party can be permitted to purchase an interest, where he has a duty to perform, which is inconsistent with the character of purchaser.—*GREENLAW v. KING* (1841), 3 Beav. 49; 10 L. J. Ch. 129; 5 Jur. 18; 49 E. R. 10, L. C.

**Annotations:—***Distd. Beaden v. King* (1852), 9 Hare. 499. *Reid, Guest v. Smythe* (1870), 5 Ch. App. 553, n. *Mentd. Boyd v. Barker* (1859), 28 L. J. Ch. 445.

**2205.** ———.]—*KNIGHT v. MARJORIBANKS*, No. 2183, ante.

**Sub-sect. 3, D., post.**

**— Purchase by barrister from client.]—See BARRISTERS**, Vol. III., p. 334, No. 237.

**— Purchase by trustee in bankruptcy.]—See BANKRUPTCY**, Vol. IV., pp. 221-223, 224, 238, Nos. 2064-2095, 2101, 2102, 2256, 2259.

**— Purchase by executors.]—See EXECUTORS**, Vol. XXIV., pp. 567-568, 689, Nos. 6054-6061, 7151-7156.

**2204 i.** ——— **Purchase conflicting with fiduciary duty.]—McDONALD v. SMYTH** (1894), 26 N. S. R. (14 R. & G.) 259. **CAN.**

**o. — Where objection by beneficiaries.]—SCOTT v. MURRAY** (1888), 14 V. L. R. 708. **AUS.**

**p. — Necessity for full disclosure.]—A trustee dealing with his cestui que trust is bound to communicate all facts at all material in the transaction.—HOPE v. BEARD** (1860), 8 Gr. 380. **CAN.**

**q. Purchase by wife of trustee.]—**

There is no absolute rule of law that the purchase of trust property by the wife of a trustee is illegal.—*BURRELL v. BURRELL'S TRUSTEES*, [1915] S. C. 333. **SCOT.**

**PART III. SECT. 4, SUB-SECT. 3.—B.**

**2206 i. Whether right to purchase.]—A trustee for sale is no more competent to purchase the trust property as agent for a stranger to the trust than he is to buy it himself.—STAHL v. MILLER & KILDALL** (B. C.), [1918] 2 W. W. R. 199; 40 D. L. R. 388; 56 S. C. R.

**Purchase by mortgagor.]—See MORTGAGE**, Vol. XXXV., pp. 499-502, Nos. 2300-2330.

**— Purchase by solicitor from client.]—See SOLICITORS**, Vol. XLII., pp. 79-86, Nos. 710-772.

**B. Trusts for Sale.**

**2206. Whether right to purchase.]—A trustee for the sale of estates for payment of debts who purchased them himself by taking undue advantage of the confidence reposed in him by plff. & previous to the completion of the contract sold them at a highly advanced price decreed to be a trustee as to the sums produced by such second sale for the original vendor.—FOX v. MACKRETH** (1791), 2 Cox, Eq. Cas. 320; 30 E. R. 148; *sub nom. MACKRETH v. Fox*, 4 Bro. Parl. Cas. 258, H. L.

**Annotations:—***Consd. Gibson v. Jerey* (1801), 6 Ves. 266;

(1805), 10 Ves. 423. *Reid. Hardwicke v. Vernon* (1799), 4 Ves. 411; *A. G. v. Dudley* (1815), Coop. G. 146; *Baker v. Peck* (1860), 3 L. T. 656; *Walters v. Morgan* (1861), 3 De G. F. & J. 718; *Emma Silver Mining Co. v. Lewis* (1879), 4 C. P. D. 396; *Re Boles & British Land Co.'s Contract* (1901), 71 L. J. Ch. 130. *Mentd. Pell v. Midland Counties & South Wales Ry.* (1869), 20 L. T. 288.

**2207.** ———.]—A trustee who is a trustee to sell for the benefit of other people cannot sell to himself. It is contrary to the policy of the law (FIELD, J.).—*PLAWRIGHT v. LAMBERT* (1885), 52 L. T. 646.

**2208.** ——— **Where no advantage to trustee.]—**There is no general rule, that a trustee to sell shall not be himself the purchaser; but he shall not thereby gain profit to himself.

One of several trustees to sell having purchased, & afterwards sold at a profit, was therefore decreed to account for that profit with costs.—*WHITCHCOTE v. LAWRENCE* (1798), 3 Ves. 740; 30 E. R. 1248, L. C.

**Annotations:—***Consd. Campbell v. Walker* (1800), 5 Ves. 678. *Extd. Ex p. Lacey* (1802), 6 Ves. 625. *Reid. A. G. v. Dudley* (1815), Coop. G. 146; *Hamilton v. Wright* (1842), 9 Cl. & Fin. 111; *Baker v. Peck* (1860), 3 L. T. 656.

**2209.** ——— **Right to beneficiary to resale.]—**There is no rule, that a trustee to sell cannot be the purchaser; but, however fair the transaction, it must be subject to an option in the *cestui que trust*, if he comes in a reasonable time, to have a resale; unless the trustee, to prevent that, purchases under an application to the ct.—*CAMPBELL v. WALKER* (1800), 5 Ves. 678; 31 E. R. 801; *subsequent proceedings, sub nom. SANDERSON v. WALKER* (1807), 13 Ves. 601, L. C.

**Annotations:—***Consd. Boswell v. Coaks* (1883), 23 Ch. D. 302. *Reid. Parkes v. White* (1805), 11 Ves. 209; *Sander son v. Walker* (1807), 13 Ves. 601; *Chalmers v. Bradley* (1819), 1 Jac. & W. 51; *Roberts v. Tunstall* (1845), 4 Hare. 257; *Aberdeen Ry. v. Blaikie* (1854), 2 Eq. Rep. 1281; *Baker v. Peck* (1860), 3 L. T. 656.

**2210.** ——— **Dissolution of fiduciary relationship.]—**The principle has often been laid down, that a trustee for sale may be the purchaser in this sense; that he may contract with his *cestui que trust*, that with reference to the contract of purchase they shall no longer stand in the relative situation of trustee & *cestui que trust*; & the trustee, having

**312.—CAN.**

**2206 ii.** ———.]—The rule that a trustee for sale is incapable of purchasing the trust property applies to a person to whom under the terms of the trust agreement the trustee was required to, & did, give the sole charge & general management of the trust property.—*MCLENNAN v. NEWTON* (Man.), [1921] 1 D. L. R. 189; [1927] 3 W. R. 684. **CAN.**

**2206 iii.** ———.]—*HENDERSON v. WOODROOPE, WILSHER & WILSHER*, [1921] N. Z. L. R. 411.—**N.Z.**

through the medium of that sort of bargain evidently, distinctly, & honestly, proved that he had removed himself from the character of trustee, his purchase may be sustained (LORD ELDON, C.).—**SANDERSON v. WALKER** (1807), 13 Ves. 601; 33 E. R. 410, L. C.

**2211.** ———.]—Conveyance of an estate to D. by way of security for the reinvestment of a specific sum of stock, & for payment of the dividends in the mean time, with a power of sale in case of default. Under this deed, D. is a trustee for the party making the conveyance, & as such, disabled from purchasing for himself so long as he continues to be a trustee without the consent of his *cestui que trust*.—**DOWNES v. GRAZEBROOK** (1817), 3 Mer. 200; 36 E. R. 77, L. C.

**Annotations.**—**Consd.** *Re Bloye's Trust* (1849), 1 Mac. & G. 488. **Reid.** *Orme v. Wright* (1839), 3 Jur. 972; *Robertson v. Norris* (1857), 1 Giff. 421; *Warner v. Jacob* (1882), 20 Ch. D. 220; *Farrar v. Farrars* (1888), 40 Ch. D. 395; *Nutt v. Easton* (1899), 47 W. R. 430; *Hodson v. Deans*, [1903] 2 Ch. 647.

**2212.** ———.]—Authority to purchase.—Where attempt to sell ineffectual.]—After an ineffectual attempt to sell by auction an estate devised in trust for sale, liberty was given to one of the trustees to purchase it at the price at which it had been bought in, upon its appearing beneficial to the parties interested.—**FARMER v. DEAN** (1803), 32 Beav. 327; 55 E. R. 128.

**2213.** ———.]—If any of the *cestui que trust* object, a trustee of an estate, though also a mtgee., will not be allowed to bid at a sale of the estate directed by the ct.; but, *semble*, if the estate is not sold at the sale, the trustee may be allowed to become the purchaser under proposals to the ct.—**TENNANT v. TRENCHARD** (1869), 4 Ch. App. 537; 38 L. J. Ch. 661, L. C.; *subsequent proceedings* (1872), 41 L. J. Ch. 779, L. C.

**Annotations.**—**Reid.** *Bennett v. Gaslight & Coke Co.* (1882), 52 L. J. Ch. 98. **Mentd.** *Parker v. McKenna* (1874), 10 Ch. App. 107, n.; *Re Owen*, [1894] 3 Ch. 220; *Sadler v. Worley*, [1894] 2 Ch. 170.

**2214.** ———.]—Purchase by retired trustee.—**Bonâ fide purchase.**]—Apart from any circumstances of doubt or suspicion, there is no rule of the ct. that a person who has ceased for twelve years to be a trustee of an instrument which contains a trust for sale, cannot become a purchaser of property subject to the trust.—**Re BOLES & BRITISH LAND CO.'S CONTRACT**, [1902] 1 Ch. 244; 71 L. J. Ch. 130; 85 L. T. 607; 50 W. R. 185; 46 Sol. Jo. 123.

**Purchase through agent of trustee.**]—**See AGENCY**, Vol. I., p. 470, No. 1544.

**2215.** ———.]—A trustee acting under a deed in which is contained a power of sale, cannot be the purchaser under such power of sale.—**LEWIS v. HILLMAN** (1852), 3 H. L. Cas. 607; 19 L. T. O. S. 329; 10 E. R. 239, H. L.; *affg.* S. C. *sub nom.* **Re BLOYE'S TRUST** (1849), 1 Mac. & G. 488, L. C.

**Annotations.**—**Consd.** *Bath v. Standard Land Co.*, [1911] 1 Ch. 618. **Reid.** *Guest v. Smythe* (1870), 5 Ch. App. 553, n.; *McPherson v. Watt* (1877), 3 App. Cas. 254; *Luddy's Trustee v. Peard* (1886), 33 Ch. D. 500; *Re Postlethwaite, Postlethwaite v. Rickman* (1888), 59 L. T. 58; *Nutt v. Easton* (1899), 68 L. J. Ch. 367; *Hodson v. Deans*, [1903] 2 Ch. 647. **Mentd.** *Re Hodge's Settlement*, (1857), 3 K. & J. 213; *Re Barber's Trusts* (1863), 2 New Rep. 571; *Re Bird's Trusts* (1876), 3 Ch. D. 214; *De Pereda v. De Mancha* (1881), 19 Ch. D. 451; *Re Parker's Will* (1888), 39 Ch. D. 303; *Re Hoffe's Estate Act*, 1885 (1900), 82 L. T. 556.

**2216.** ———.]—No doubt where a person is a trustee for sale, & he sells the estate to himself, the transaction is absolutely & *ipso facto* void; but if a trustee purchases from his *cestui que trust*

his reversionary interest which he is liable to pay, I do not assert it is absolutely void, but certainly the burden of proof lies on the trustee to show that every possible security & advantage were given to the *cestui que trust*, & that as much as possible was gained for him in the transaction, & as could have been gained under any other circumstances (ROMILLY, M.R.).—**DENTON v. DONNER** (1856), 23 Beav. 285; 53 E. R. 112.

**Annotations.**—**Consd.** *Plowright v. Lambert* (1885), 52 L. T. 646. **Reid.** *Readdy v. Prendergast* (1880), 55 L. T. 767.

**2217.** ———.]—Deft. being a trustee for sale could not acquire the beneficial ownership of the property except by a gift or sale from the *cestui que trust*; he was under an absolute disability to acquire it otherwise (PAGE WOOD, L.J.).—**FRANKS v. BOILLANS** (1868), 3 Ch. App. 717; 18 L. T. 623; 16 W. R. 1158, L. J.

**Annotation.**—**Mentd.** *Spencer v. Harrison* (1879), 5 C. P. D. 97.

**2218.** ———.]—The owner of two estates in New Zealand, known as Surrey Hills & Windermere, provided by his will that they should be offered at valuations, made as therein directed, to testator's son, who was one of the trustees under the will. After the death of testator, H. sold & conveyed his rights under the will, including his right to purchase the estates, to D., another son of testator, also one of the trustees. In 1907 the trustees sold Surrey Hills at a valuation, made as provided, to D., as being entitled to exercise the option. In 1908 Windermere, including land known as Chapman's Block, which had been bought by the trustees without authority, was similarly sold to D. The farming stock on each estate was separately valued & included in the sale, though not referred to in the will. At the date of sale of Windermere D. had ceased to be a trustee, but he had arranged the sale before retiring from the trust. In 1922 an action was brought to set aside the sales to D., for an account of profits & payment to the trust:—**Held:** the sales must be set aside, as the trustees could not sell to one of themselves without a conflict of duty & interest arising.—**WRIGHT v. MORGAN**, [1926] A. C. 788; 95 L. J. P. C. 171; 135 L. T. 713, P. C.

—.]—*See, also*, **FRAUDULENT & VOIDABLE CONVEYANCES**, Vol. XXV., p. 265, No. 890.

#### C. Repurchase.

**2219. Right to repurchase.**]—Trustee sells the land to one who had no notice of the trust, & after a fine & five years non-claim repurchases the land. Deceased he should stand seised in trust, as before the sale.—**BOVY v. SMITH** (1882), 2 Cas. in Ch. 124; 1 Vern. 60, 84; 1 Bq. Cas. Abr. 256; 22 E. R. 877, L. C.

**Annotations.**—**Reid.** *Re Bank of Syria, Owen & Ashworth's Claim, Whitworth's Claim* (1900), 49 W. R. 100. **Mentd.** *Frogmorton d. Wright v. Wright* (1773), 2 Wm. Bl. 889; *Glumdalclitch d. Naunton v. Leman* (1775), 2 Wm. Bl. 993.

**2220.** ———.]—**Prior contract for sale executory.**]—As long as a contract for sale remains executory, & the trustee or agent for sale has power either to enforce it or rescind or alter it, he cannot repurchase the property from his own purchaser except for the benefit of his principal.—**PARKER v. MCKENNA** (1874), 10 Ch. App. 96; 44 L. J. Ch. 425; 31 L. T. 739; 23 W. R. 271, C. A.

**Annotations.**—**Appld.** *Delves v. Gray*, [1902] 2 Ch. 606. **Reid.** *Re Canadian Oil Works Corp'n, Hay's Case* (1876), 10 Ch. App. 593; *Nant-y-glo & Blaena Ironworks Co. v. Tamplin* (1876), 35 L. T. 125; *Bagnall v. Carlton* (1877), 6 Ch. D. 371; *Re West Jewell Tin Mining Co., Weston's*

r. ———.]—**Purchase through agent of trustee.**—**Re FOLLIS, KILBOURN v. COULTER** (1874), 6 P. R. 160.—**CAN.**

**2212 i.** ———.]—**Authority to purchase.—Where attempt to sell ineffectual.**]—**HUTTON v. JUSTIN** (1901), 22 C. L. T. 23; 2 O. L. R. 713; 1 O. W. R. 64.—

**CAN.**

**2212 ii.** ———.]—**Re COATS TRUSTEES** (1914), 51 Sc. L. R. 642.—**SCOT.**



**SECT. 4.—Dealings with beneficiaries and their interests: Sub-sect. 3, C., D. & E.]**

Case (1879), 48 L. J. Ch. 425; *Re Postlethwaite*, *Postlethwaite v. Rickman* (1888), 59 L. T. 58; *Williams v. Scott*, [1900] A. C. 499; *Percival v. Wright*, [1902] 2 Ch. 421; *Wright v. Morgan* [1926] A. C. 788. **Mentd.** *National Bank of Australasia v. United Hand-in-Hand & Band of Hope Co.* (1879), 4 App. Cas. 391; *Hopkinson v. Lovering* (1883), 11 Q. B. D. 92; *Re Fitzroy Bessemer Steel, etc. Co.* (1884), 50 L. T. 144; *Guy v. Churchill & Sim* (1886), 2 T. L. J. R. 855; *Municipal Freehold Land Co. v. Pollington* (1890), 2 Meg. 307; *Salford Corp'n. v. Lever* (1890), 25 Q. B. D. 363; *Armstrong v. Jackson*, [1917] 2 K. B. 822.

**2221.** ———.]—A trustee cannot adopt for his own benefit an executory contract to purchase to which he is a party as vendor.—**WILLIAMS v. SCOTT**, [1900] A. C. 499; 69 L. J. P. C. 77; 82 L. T. 727; 49 W. R. 33; 16 T. L. R. 450, P. C.

**Annotation:—***Apld. Deives v. Gray*, [1902] 2 Ch. 606.

**2222.** ———.]—Trustees contracted to sell real estate to deft. for £800. Before the date fixed for completion, deft. contracted to resell the same property to D., one of the trustees, at the same price, & required the conveyance to be made to D. as sub-purchaser, or as his nominee. D. subsequently declined to complete. In an action by the trustees for specific performance by deft. of the first contract, the only defence was a counterclaim by deft. for specific performance by D. of the second contract, or damages for the breach thereof:—**Held:** so long as the first contract was executory only, deft. having neither paid his purchase-money nor taken up his conveyance, the trustee, D., could not repurchase the property from his own purchaser, & the counterclaim could not be enforced; neither was deft. entitled to damages, as he must be deemed to have known that D. was incapable of purchasing under the circumstances.—**DELVES v. GRAY**, [1902] 2 Ch. 606; 71 L. J. Ch. 808; 87 L. T. 425; 51 W. R. 56.

**2223.** ———. **Prior sale bonâ fide—& for adequate price.]**—Testator, who died in 1815, bequeathed two legacies of £400 one to E. for life, with remainder to her children, & another of £200 to her children at her decease; & he devised his real estate in trust, charged with the payment of his debts & legacies, to G. & P., & he directed that if the personal estate should be insufficient to pay the debts & legacies, his trustees should raise the deficiency by a sale or mtge. of his real estate; & he appointed G. & P. to be his exors. He died soon after, & G., who was a person of weak intellect, alone proved the will. In 1816 the real estate was sold for £1,000, being about the estimated value, to two brothers of P. & G., & P. joined in conveying it to them. In 1822 the brothers of P. sold the same estate to P. for £990; P. survived G., & he continued seised thereof until his death in 1848, soon after which event it was sold by defts. in this suit, who were his devisees in trust, for £1,440. Testator's personal estate proved insufficient to discharge his debts & legacies, & £360 only was set aside to meet the legacies to F. & her children. This sum was invested, & the interest was regularly received by E. till her death in 1855. In 1859 her children instituted the present suit against the devisees of P. for an account, & to have his estate charged with the deficiency:—**Held:** the bill must be dismissed with costs, inasmuch as it could only have been supported on the ground that the sale in 1816, though nominally to P.'s brothers, was really to himself, that it had been made at an under-value, & that it had taken place under

circumstances of suspicion, & in this respect the evidence failed.—**BAKER v. PECK** (1861), 4 L. T. 3; 9 W. R. 472, C. A.

**Annotation:—****Consd.** *Re Postlethwaite*, *Postlethwaite v. Rickman* (1888), 59 L. T. 58.

**2224.** ———.]—The fact that a trustee has sold trust property in the hope of being able to re-purchase it for himself at a future time is not of itself a sufficient ground for setting aside the sale, where the price was not inadequate or the sale improper in other respects.

Trustees sold & conveyed trust property to W., a purchaser for value. Three months afterwards the same property was conveyed by W. for the same price to one of the trustees, who sold it twenty years later at a very large profit:—**Held:** in the absence of proof of any agreement or understanding existing at the time of the first sale that W. should sell or reconvey the property to the trustee, & the price being the full value at the time, the transaction ought not to be set aside.—**Re POSTLETHWAITE**, *Postlethwaite v. Rickman* (1888), 60 L. T. 514; 53 J. P. 357; 37 W. R. 200; 5 T. L. R. 76, C. A.

**Annotation:—****Refd.** *Vatcher v. Paull*, [1915] A. C. 372.

**D. Evidence of Propriety of Transaction.**

**2225. Onus of proof on trustee.]**—Where a person holding a fiduciary character purchases from his *cestui que trust*, & the sale is complained of, this ct. imposes the burden of proof upon the purchaser to show that all due protection has been afforded to the vendor; *aliter*, where no such fiduciary relation subsists.—**HARRISON v. GUEST** (1855), 6 De G. M. & G. 424; 25 L. J. Ch. 544; 27 J. T. O. S. 208; 2 Jur. N. S. 911; 4 W. R. 585; 43 E. R. 1298, L. C.; *affd.* (1860), 8 H. L. Cas. 481, H. L.

**Annotations:—****Consd.** *Rosher v. Williams* (1875), L. R. 20 Eq. 210. **Refd.** *Denton v. Donner* (1856), 23 Beav. 285; *Clark v. Malpass* (1862), 31 Beav. 80; *Baker v. Monk* (1861), 4 De G. J. & Sm. 388; *Summers v. Griffiths* (1866), 35 Beav. 27; *Baker v. Loader* (1872), L. R. 16 Eq. 49; *Hillard v. Eiffe* (1874), L. R. 7 H. 39; *Fry v. Lane*, *Re Fry*, *Whittet v. Bush* (1888), 40 Ch. D. 312.

**2226.** ———.]—A trustee for sale cannot purchase the trust property, but an ordinary trustee may purchase the trust property from his *cestui que trust*, though the burden of proving the propriety of the transaction lies on the trustee.—**LUFF v. LORD** (1864), 34 Beav. 220; 11 L. T. 656; 10 Jur. N. S. 1248; 55 E. R. 619; *on appeal* (1865), 11 L. T. 695, L. C.

**Annotations:—****Fold.** *Re Brierly's Estate*, *Gray v. Warner* (1873), L. R. 16 Eq. 577. **Refd.** *Plowright v. Lambert* (1885), 52 L. T. 616. **Mentd.** *Lord v. Lord* (1867), 2 Ch. App. 784, n.

**2227.** ———.]—The rule that in a purchase by a trustee from his *cestui que trust*, the onus of proving the fairness of the transaction rests with the trustee, applies equally to a case where the parties are co-exors.—**Re BIEL'S ESTATE**, *GRAY v. WARNER* (1873), L. R. 16 Eq. 577; 42 L. J. Ch. 556; 28 J. T. 835; 21 W. R. 808.

**Annotation:—****Mentd.** *Harloe v. Harloe* (1875), 44 L. J. Ch. 512.

**2228.** ———.]—There is no rule of law which says that a trustee shall not buy trust property from a *cestui que trust*, but it is a well known doctrine of equity that if a transaction of that kind is challenged in proper time, a ct. of equity will examine into it, will ascertain the value that was paid by the trustee, & will throw upon the trustee the onus of proving that he gave full value, & that all information was laid before the *cestui que trust*

**BERRY** (1865), 11 Gr. 286.—**CAN.**

**PART III. SECT. 4, SUB-SECT. 3.—D.**

**2225 I. Onus of proof on trustee.]**—Where a trustee deals with his *cestui que*

trust for the trust property, it rests with the trustee to show that everything in connection with the transfer was fair & just.—**BLAIN v. TERRY-**

**2225 II.** ———.]—**CAMUSA v. COIG-DARRIPE** (1904), 11 B. C. R. 177.—**CAN.**



when it was sold (LORD CAIRNS, C.).—THOMSON v. EASTWOOD (1877), 2 App. Cas. 215, H. L.

*Annotations*:—*Apprvd.* Dougan v. Macpherson, [1902] A. C. 197. *Mentd.* Cunningham v. Foot (1878), 3 App. Cas. 974; The Kong Magnus, [1891] P. 223; *Re* Lloyd, Lloyd v. Lloyd, [1903] 1 Ch. 385; Lewis v. McKay, Algate v. Vugler, Clark v. Potter (1924), 93 L. J. K. B. 840.

**2229.** —. —. —.]—Defender, who was one of the trustees & also a beneficiary under his parents' marriage contract, purchased the interest in the trust estate of his brother, who was not a trustee. At the date of the purchase the interest of the beneficiaries had vested absolutely, but the trust estate had not been realised, & its ultimate value was uncertain; but it was capable of being realised in the ordinary course of administration. Before purchasing his brother's share the trustee had in his possession a valuation of the trust estate made for the purpose of a loan on his own share. If the valuation turned out to be any where near correct, the trustee would make a profit of some hundred pounds on the purchase. The trustee never informed his brother of the valuation. On the brother being made bkpt., the trustee in bkpcy. brought this action for reduction of the sale:—*Held*: the non-disclosure of the valuation rendered the sale null & void.—DOUGAN v. MACPHERSON, [1902] A. C. 197; 71 L. J. P. C. 62; 86 L. T. 361; 50 W. R. 689, H. L.

#### *E. Avoidance of Purchase.*

**2230. General rule - Sale set aside.**—DYSON v. LUM, No. 2191, *ante*.

**2231. Parties to action.**—(1) The tenant for life of an estate, who was also devisee in trust in remainder for the children of testator, with a power of appointment by will amongst them, purchased & obtained from the objects of the power, a release of their reversion at an undervalue, & devised the estate to her son in fee charged with debts & legacies. The son took possession of the estate, & paid off the legacies & charges. Fourteen years & a half after the death of the tenant for life, & seventeen years after the purchase of the reversion, the assignee of one of the vendors, an object of the power, who had become insolvent, filed his bill to set aside the sale:—*Held*: the lapse of time was a bar to the relief; & the mere circumstance of the poverty of the *cestui que trust* was not sufficient to excuse the delay.

(2) Bill by one of several *cestuis que trust* against the devisee of the trustee to set aside the sale of an estate, which was made to the trustee by all the *cestui que trust* for one sum, & conveyed by one instrument:—*Held*: all the *cestuis que trust* were necessary parties to the suit.—ROBERTS v. TUNSTALL (1845), 4 Hare, 257; 14 L. J. Ch. 184; 9 Jur. 292; 67 E. R. 645.

*Annotations*:—*As to* (1) *Refd.* Smith v. Bakes (1855), 20 Beav. 568; Harcourt v. White (1860), 28 Beav. 303; *Clarke v. V. Henning* (1861), 30 Beav. 175; *Re Agriculturists' Insee., Brotherhood's Case* (1862), 31 Beav. 365; *Agriculturist Cattle Insee., Spackman's Case* (1865), 34 L. J. Ch. 323, n.; *Browne v. McClintock* (1873), L. R. 6 H. L. 456. *Generally.* *Mentd.* Carey v. Cuthbert (1873), 22 W. R. 249.

**2232. Resale of property**—At option of *cestui que trust*.—General rule upon a purchase of trust property by the trustees on their own account, that at the option of the *cestui que trust* it shall be resold; being put up at the price, at which the trustees purchased: who, if there is no advance, shall be held to their purchase.—LISTER v. LISTER (1802), 6 Ves. 631; 31 E. R. 1231.

*Annotation*:—*Refd.* Guest v. Smythe (1870), 39 L. J. Ch. 385.

**2233. Effect of lapse of time—Before action to set aside.**—HALL v. NOYES (*circa* 1796), cited in 3 Ves. at p. 748; 80 E. R. 1252, L. C.

**2234.** —. —. —.]—Bill to set aside a purchase by a trustee for himself & his children; after a lapse of eighteen years, dismissed upon the length of time only.—GREGORY v. GREGORY (1815), Coop. G. 201; 35 E. R. 530; *affd.* (1821), Jac. 631, L. C. *Annotations*:—*Consd.* Roberts v. Tunstall (1845), 4 Hare, 257. *Appld.* Baker v. Read (1854), 18 Beav. 398. *Distd.* Baker v. Pook (1860), 3 L. T. 556. *Consd.* Claricarde v. Henning (1861), 30 Beav. 175. *Refd.* Chalmers v. Bradley (1819), 1 Jac. & W. 51; Cholmondeley v. Clinton (1820), 2 Jac. & W. 1; Wedderburn v. Wedderburn (1838), 4 My. & Cr. 41; Harcourt v. White (1860), 28 Beav. 303; Ridgway v. Newstead (1861), 3 De G. F. & J. 474; *Re Agriculturists' Insee., Brotherhood's Case* (1862), 31 Beav. 365; *Re Agriculturist Cattle Insee., Spackman's Case* (1865), 34 L. J. Ch. 323, n.; Gwynne v. Gell (1869), 20 L. T. 508. *Mentd.* Robertson v. Norris (1857), 30 L. T. O. S. 253; Carey v. Cuthbert (1873), 22 W. R. 249.

**2235.** —. —. —.]—An exor., to whom his testator, having been his partner in trade, had given liberty to purchase his share in the business at a valuation, had been left by his co-exors. to take the whole execution of the trusts of the will; & the valuation appearing to have been made under his direction, & without due regard to his character as a trustee, the purchase set aside several years after his death.—STOCKEN v. STOCKEN (1835), 4 L. J. Ch. 278.

**2236.** —. —. —.]—ROBERTS v. TUNSTALL, No. 2231, *ante*.

**2237.** —. —. —.]—Bill, filed after seventeen years, to set aside a purchase of testator's estate by his exor., at an undervalue, dismissed, on the ground of delay; although the sale, if recent, would have been set aside.—BAKER v. READ (1854), 18 Beav. 398; 52 E. R. 157; *affd.*, 3 W. R. 118, L. J.

**2238.** —. —. —.]—On the death of an intestate, leaving four sons & one daughter, the two eldest sons took out administration to his estate.

By deed of family arrangement the five children, of whom the youngest son was an infant, mortgaged to trustees their respective interests in their father's estate for £1,084, that being the amount of the two-fifth shares therein of the daughter & the infant son, as shown by an account set out in a schedule, & based on a valuation made a year previously, in which the figures had been altered to correspond with the increase or decrease in the various items since the valuation, & which showed a balance giving £542 to each child. Subject to the mtge., in respect of which specified sums were to be paid by the three eldest brothers, the trustees were to hold the property in trust for the three eldest brothers. The sums to be paid by the latter were to form a sinking fund for the reduction of the principal of the shares.

By her subsequent marriage settlement the daughter recited that she was entitled to the £542 under the former deed, & settled that on trust for herself for life, then for her husband for life, then for children as she should appoint by deed or will; in default of appointment, for sons at twenty-one, & daughters at twenty-one or marriage; if no children, & she survived her husband, for herself absolutely; or if she were not the survivor, then as she should appoint by will, or, in default of such appointment, for her next of kin.

In an action commenced, more than nine years after the deed of arrangement, by the daughter, her husband & infant children, against her brothers & the trustees of the deed of settlement, to have



chapels contained powers of raising money, by mtg., for the purposes of the trusts:—*Held*: any of the trustees of the chapels might be mtgees. under this power, & if they were such mtgees., they might exercise all the rights of mtgees., although in opposition to the trusts.—*A.-G. v. HARDY* (1851), 1 Sim. N. S. 338; 20 L. J. Ch. 450; 15 Jur. 441; 61 E. R. 131.

*Annotations*:—*Consd.* Kirkwood v. Thompson (1865), 2 Hem. & M. 392; *Re Mason's Orphanage & L. & N. W. Ry.* [1896] 1 Ch. 54. *Mentd.* *A.-G. v. Clapham* (1855), 4 De G. M. & G. 591.

2247. ———.]—Trustees who have got a legal estate, or an estate of any kind, either money or land, may lend money to the *cestui que trust* & get a beneficial interest in the trust property if they have no notice that there have been any prior incumbrancers (JAMES, L.J.).—*PHIPPS v. LOVEGROVE, PROSSER v. PHIPPS* (1873), L. R. 16 Eq. 80; 42 L. J. Ch. 892; 28 L. T. 584; 21 W. R. 590, L. J.

*Annotations*:—*Apld.* Newman v. Newman (1885), 28 Ch. D. 674. *Reid.* Low v. Bouverie, [1891] 3 Ch. 82.

2248. ———.]—A trustee who has the legal estate & takes from his *cestui que trust* an assignment of the equitable interest by way of security for money advanced to the *cestui que trust*, can avail himself of the legal estate as a protection against a prior incumbrance of which he had no notice.—*NEWMAN v. NEWMAN* (1885), 28 Ch. D. 674; 54 L. J. Ch. 598; 52 L. T. 422; 33 W. R. 505; *sub nom.* *NEWMAN v. NEWMAN, BROWN v. NEWMAN*, 1 T. L. R. 211.

2249. ———.]—A sale, lease, or mtg. made in accordance with an express power was good. On this I may refer to the judgment of LORD CRANWORTH (then Vice-Chancellor) in *A.-G. v. Hardy*, No. 2246, *ante*, where it was held that a trustee of a Wesleyan chapel under a deed which contained a power of raising money by mtg. might become himself a mtge., & if he did so become, might exercise all the rights of a mtge., although in opposition to the trusts (STURLING, J.).—*Re MASON'S ORPHANAGE & LONDON & NORTH WESTERN RY. CO.*, [1896] 1 Ch. 54; 65 L. J. Ch. 32; 73 L. T. 465; 44 W. R. 61; 12 T. L. R. 18; 40 Sol. Jo. 34; *on appeal*, [1896] 1 Ch. 506, C. A. *Annotations*:—*Reid.* Power v. Banks (1901), 70 L. J. Ch. 700; *Re Howard Street Congregational Chapel*, Sheffield [1931] 2 Ch. 690. *Mentd.* *Ogilvie v. Littleboy* (1897), 13 T. L. R. 399; *A.-G. v. National Hospital for Relief & Cure of the Paralytic & Epileptic*, [1904] 2 Ch. 252; *A.-G. v. Foundling Hospital*, [1914] 2 Ch. 154.

**Lease of trust property.—To trustee in bankruptcy.]**  
—*See* BANKRUPTCY, Vol. IV., p. 222, No. 2083.

2250. **Security obtained from cestui que trust.]**  
A security obtained by a trustee from his *cestui que trust* by pressure through her husband, & without independent advice, & obtained by a husband from his wife by pressure & concealment of material facts, cannot be upheld.—*TURNBULL & CO. v. DUVAL*, [1902] A. C. 429; 71 L. J. P. C. 84; 87 L. T. 154; 18 T. L. R. 521, P. C.

*Annotations*:—*Consd.* Bischoff's Trustee v. Frank (1903), 89 L. T. 188; *Chaplin v. Brammall*, [1908] 1 K. B. 233; *Howes v. Bishop* (1909) 2 K. B. 390. *Reid.* Shears v. Jones (1922), 128 L. T. 218.

## SECT. 5.—MAINTENANCE AND ADVANCEMENT.

### SUB-SECT. 1.—MAINTENANCE.

*See, now*, Trustee Act, 1925 (c. 19), ss. 31, 32.

2251. **Provision for maintenance until portion payable—Maintenance payable half-yearly—Portion**

**payable at intermediate date—Claim for maintenance for period pro rata.]**—By a marriage settlement maintenance for daughters is made payable half-yearly, at Lady Day & Michaelmas, until the portions become payable, which was at eighteen or marriage; a daughter attained her age of eighteen Aug. 16; decreed to have her maintenance *pro rata* from the last Lady Day to the time of her attaining her age of eighteen.—*ILAY v. PALMER* (1728), 2 P. Wms. 501; 24 E. R. 835.

*Annotation*:—*Apld.* Reynish v. Martin (1746), 3 Atk. 330.

2252. **Sum given for maintenance—Donee not barred from sharing surplus profits.]**—A particular sum being given for maintenance will not bar the party from being entitled to the surplus profits.—*STAFFORD (EARL) v. BUCKLEY* (1750), 2 Ves. Sen. 170; 28 E. R. 111, L. C.

*Annotations*:—*Mentd.* Turner v. Turner (1783), 1 Bro. C. C. 315; *Buckeridge v. Ingram* (1795), 2 Ves. 652; *Doe d. Chattaway v. Smith* (1816), 5 M. & S. 126; *Kadburn v. Jarvis* (1841), 3 Beav. 450; *Taylor v. Marlindale* (1841), 5 Jur. 648; *Re Wynch's Trusts*, 12 p. Wynch (1854), 3 De G. M. & G. 188; *Re Rivett-Carnac's Will* (1885), 30 Ch. D. 136.

2253. **Interest not given on arrears of maintenance.]**—Interest not given upon arrears of maintenance any more than upon arrears of a jointure.—*MELLISH v. MELLISH* (1808), 14 Ves. 516; 33 E. R. 619.

2254. **Direction for money to be applied for maintenance—No direction as to amount—Whether money may be raised.]**—A term of years having been limited to trustees for the purpose of raising a sum of money for the maintenance & education of the younger children of A., in such shares & proportions, & such manner & form, as A. should direct, & in default of any direction, to be applied for the benefit of such children equally, the same to be paid to or for them respectively until their respective portions, provided for them out of other property, should be payable & paid.

A., by his will appointed a certain portion for pltf., to be vested in her at the age of twenty-one years, or on marriage, & directed that a certain part of the interest & dividends thereof should be applied towards her maintenance & education, but did not make any appointment, or give any directions relative to the sum of money raiseable for that purpose under the said term:—*Held*: upon the construction of the settlements, pltf. was entitled to have her share of the money provided by the term, raised for her benefit, until the period when her portion should become payable; it was not improbable that it should be the intention of parents to provide a larger fund for the education of children than the mere income of their future portions, the portions of younger children of great families being seldom large, although they have universally the same expensive education as the eldest child.—*POULETT v. POULETT* (1821), 6 Madd. 167; 56 E. R. 1055.

2255. — **On death of wife—Wife surviving but having no estate—Trustees cannot pay money during lifetime of wife.]**—By the settlement on the marriage of J. with C. portions were to be raised for the younger children of J. by C. or any future wife, but not to be paid until after the decease of J., C. or such future wife, though no estate was given to such future wife; & power was given to J. to appoint the interest of the portions to be raised for the children's maintenance; & on his default the same power was given to the trustees, & the maintenance was

### PART III. SECT. 5, SUB-SECT. 1.

a. *Direction to invest & accumulate income not required for maintenance.]—Re ROBERTSON'S TRUSTEES*, [1909] S. C. 236; 46 Sc. L. R. 139; [1909] 1 S. L. T. 173.—SCOT.

b. ———.]—*SINCLAIR'S TRUSTEES*, [1921] S. C. 484.—SCOT.

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**Sect. 5.—Maintenance and advancement: Subsect. 1.]**

directed to be paid on the first quarter day after the decease of the survivor of J., C. or such future wife. J. died, leaving his second wife surviving, & by his will, which was not duly attested, directed the maintenance to be raised from the time of his death, & gave other benefits to his eldest son:—*Held*: the trustees had no power to allow maintenance during the second wife's lifetime; but the eldest son should be put to his election, as he had other benefits under the will, & was the only party that could be benefited by withholding the maintenance.—*HUME v. RUNDELL* (1824), 2 Sim. & St. 174; 57 E. R. 311.

*Annotation*:—*Refd. Morse v. Martin* (1865), 34 Beav. 500.

**2256. Direction to invest & accumulate income not required for maintenance—Power of trustees to retain for contingencies.]—***CANTWELL v. ILLIGINS* (1837), 1 Jur. 791.

**2257. Loss of right to maintenance—On marriage.]—**Testator directed his residue to be converted into money, & his wife to receive the interest of it, for the maintenance of herself & children; &, at her death, he bequeathed the whole, share & share alike, to all the children she might have by him. Testator left a son & a daughter. Some years after his death, the daughter married:—*Held*: thereupon her right to maintenance ceased.—*BOWDEN v. LAING* (1844), 14 Sim. 113; 60 E. R. 300.

*Annotation*:—*Distd. Frewen v. Hamilton* (1877), 47 L. J. Ch. 391.

**2258. — On attaining twenty-one.]—**By a marriage settlement property was vested in trustees upon trust after the death of the wife to pay the rents & profits to the husband for life or until he married again, & in case he married again & there was issue of the intended marriage then to pay him one half of the rents & profits & out of the other half to levy & raise for the maintenance & education of one child one fourth, of two or three children one third, & of four or more children the whole income of such other half & subject thereto to pay the whole income thereof to the husband for his life & if there should be no issue then to pay the whole of the rents & profits to the husband. The husband married again & at the date of the decree there were four children of the first marriage, two daughters & one son who had attained twenty-one, one son under age & a child of a deceased daughter:—*Held*: the trust for maintenance & education did not cease upon the children attaining twenty-one.—*FREWEN v. HAMILTON* (1877), 47 L. J. Ch. 391.

**2259. Direction to accumulate for twenty-one years for benefit of heir at the time—Application for maintenance of infant—Infant probable heir at expiration of period—Direction by court to pay sum for maintenance.]—***KING v. JARMAN* (circa 1855), cited in 31 Ch. D. at p. 295; 55 L. J. Ch. at p. 285; 53 L. T. at p. 841; *sub nom.* *RING v. JARMAN*, cited in L. R. 14 Eq. at p. 252; 20 W. R. at p. 858.

*Annotations*:—*Distd. Re Hamilton* (1885), 31 Ch. D. 291. *Refd. De Witte v. Palin* (1872), L. R. 14 Eq. 251.

**2260. Settlement with power to appoint fund to children—Provisions as to maintenance during minority—Appointment exercised with direction to pay income to parent for maintenance of children—Inquiry directed by court as to proper amount to be paid as maintenance.]—**By a settlement made on the marriage of the father & mother of plffs., certain personal property was settled upon trust for the wife for life, & after her death for her children for such interests & in such manner as she

should appoint, & in default upon trust for all the children equally. The settlement contained a power to the trustees to apply the income of the presumptive shares of the children in their maintenance during their minorities, notwithstanding their father might be of ability to maintain them. The wife died, having executed an appointment whereby she appointed the property among the children equally, & directed the income to be paid to her husband during his life for the maintenance of the children:—*Held*: the direction to pay the income to the husband was not justified by the power; & the ct. directed inquiries as to the proper amount of maintenance to be allowed under the power in the original settlement.—*WHITE v. GRANE* (1854), 18 Beav. 571; 23 L. J. Ch. 863; 2 W. R. 320, 328; 52 E. R. 224.

*Annotations*:—*Apld. Re Greenslade, Greenslade v. McCowen*, [1915] 1 Ch. 155. *Refd. Re Joicey, Joicey v. Elliot*, [1915] 2 Ch. 115.

**2261. Settlement on wife for life—No power of anticipation—Effect of provision for maintenance.]—**

By an antenuptial settlement a fund was declared to be held by the trustees upon trust for the intended wife for life, for her separate use, without power of anticipation, & after her death in trust for the intended husband for life, & after the decease of the survivor, in trust for the children of the marriage as the intended husband & wife should jointly appoint, & subject thereto & to a separate power of appointment in the survivor, in trust for the children equally, to be vested in sons at twenty-one & in daughters at twenty-one or marriage. There was also a power for the trustees, at the request of the husband & wife, during their joint lives, to advance, for the benefit of any child whose portion should not be vested, any part of his or her presumptive portion, & to apply for or towards the maintenance or education of any such child or children all or any part of the income of such his or her presumptive portions. The only children of the marriage were two sons & a daughter. The husband & wife appointed the trust fund to the three children equally, to be vested in sons at twenty-one & in the daughter at twenty-one or marriage, with trusts for accruer in the event of any child dying before attaining a vested interest. By the same deed the husband & wife requested the trustees to pay for five years after the date of the deed certain sums for the maintenance of the three children, & after the expiration of that period, to pay £150 towards the maintenance & education of the children during the residue of the life of the wife:—*Held*: the maintenance clause did not enable the wife to affect her life interest by such a prospective provision, at all events as regarded any period beyond the minority of the sons, or the minority or marriage of the daughter.—*HORLOCK v. HORLOCK* (1852), 2 De G. M. & G. 644; 42 E. R. 1023, L. J.

**2262. Discretionary power to apply money towards maintenance of child—Bill filed for administration of estate—Power not lost.]—**Testator empowered trustees at their discretion to pay during the life of his wife a moiety of the income of the trust funds for or towards the maintenance or education of his daughter or otherwise for her benefit:—*Held*: the trustees had not deprived themselves of this discretionary power by filing a bill to administer their testator's estate.—*SILLBOURNE v. NEWPORT* (1855), 1 K. & J. 602; 1 Jur. N. S. 608; 3 W. R. 653; 69 E. R. 600.

*Annotation*:—*Refd. Bethel v. Abraham* (1873), 43 L. J. Ch. 180.

**2263. Trust for maintenance of lunatic—Whether lunatic can be maintained out of own property—**

**While income of trust in hands of trustees—Liability of trustees to personal representatives of lunatic.]—**Testator, by his will, gave all his real & personal estate to trustees, upon trust, during the life of J., a person *non compos*, but not found so by inquisition, to apply the whole or any part of the income of the real & personal estate for his "maintenance, attendance, & comfort." Testator then directed a sale of his real estate after the decease of J. the sales moneys to be deemed part of his personal estate, & the rents & profits of his real estate until a sale to be deemed part of the income of his personal estate, & then made a disposition of all his personal estate to certain residuary legatees. During the life of J. the trustees maintained him wholly out of the income of the real & personal estate of testator, without trenching on his private property, & accumulated the savings to a considerable sum. After the decease of J. the trustees sold the real estate, & then, doubts arising as to the rights of parties to the savings, & also to the sales moneys, the produce of the real estate, paid the whole into ct.:—*Held*: (1) the expression "comfort" in the trust for J. was so wide as to justify the application by the trustees of all the income devoted to that purpose, however large; (2) the whole not having been so applied, the gift was not such a gift for the benefit of J. as that the savings belonged to J. or his personal representative, as part of his personal estate; (3) *semble*: no bill will lie against the trustees after the decease of J. for neglect of their duty, even if they had inadequately looked to his comfort during his life; (4) *semble*: if the trustees had suffered any recourse to be had to the private property of J. for his "maintenance, attendance, & comfort," while any of the income of their testator's estate was in their hands & unapplied, the personal representative of J. could have maintained a bill to be recouped the amount out of testator's estate.—*Re SANDERSON'S TRUST* (1857), 3 K. & J. 497; 26 L. J. Ch. 804; 30 L. T. O. S. 140; 3 Jur. N. S. 658; 5 W. R. 864; 69 E. R. 1206.

**Annotations:—***As to* (1) *Apld.*, *Bullock v. Bullock* (1864), 11 L. T. 561. *Consd.*, *Re Peek's Trusts* (1873), 42 L. J. Ch. 422. *Distd.*, *Re Nell, Hemming v. Nell* (1890), 62 L. T. 649. *Consd.*, *Re Winkle, Tucker v. Winkle*, [1896] 2 Ch. 711. *As to* (2) *Distd.*, *Henderson v. Cross* (1861), 29 Beav. 216. *Follg.*, *Re Stanger, Moorson v. Tate* (1891), 60 L. J. Ch. 326. *As to* (4) *Expld.*, *Re Andrews' Trust, Carter v. Andrew*, [1905] 2 Ch. 48. *Generally*, *Consd.*, *Re Ussher Foster v. Ussher*, [1922] 2 Ch. 321. *Mentd.*, *Re Unite Edwards v. Smith* (1906), 75 L. J. Ch. 163.

**2264. Discretion to apply sum for maintenance—To make up fixed sum—**Discretion refers to mode of application.—Not to amount to maintenance.]—Testator, whose wife was of unsound mind, gave his estate to trustees, in trust "to apply from time to time at their uncontrolled discretion such annual sum "for the maintenance etc." of his wife, as, together with her own income, "shall not exceed £500 per annum":—*Held*: the discretion referred to the application & not to the amount, & the widow

who had recovered was entitled to have her income made up to £500 a year out of testator's estate.—*BULLOCK v. BULLOCK* (1864), 34 Beav. 85; 11 L. T. 561; 11 Jur. N. S. 29; 13 W. R. 212; 55 E. R. 565.

**2265. Maintenance to widow during minority of infant—Abandonment of child by widow—Right of trustees to refuse payment.]—**A widow who was by the terms of the will to be allowed money by the trustees during the minority of an infant, her son, abandoned the child, for whom other guardians were appointed by the ct., & afterwards having cohabited with a married man, & by him had several illegitimate children, lived with them in a house to the use of which she was entitled under the will. The trustees under these circumstances refused to make her any allowance out of the trust moneys:—*Held*: she could not compel the trustees so to do, but was disqualified from making any claim by her abandonment of the child independently of other misconduct.—*MELLOR v. MELLOR* (1871), 20 W. R. 51.

**2266. Discretion of trustees as to payment—To fulfil intention of testator.]—**Testator gave his property to trustees on trust during the life of his son to pay, apply, & dispose of the annual produce of a certain portion of it for the maintenance & support of his son & his present or any future wife, & the maintenance, education & support of their children, or any or either of them his son & his wife & children in such manner & such proportions as the trustees should in their discretion think fit & proper, without being answerable or accountable to any person for the way in which they should apply the same; & after the decease of his son, to pay & apply the annual proceeds in like manner unto & for the benefit of any widow for life, & any children, until they should attain twenty-one or marry, & subject to those trusts in trust for the children. The son died in 1849, leaving a wife & six children, the youngest of whom attained twenty-one in 1870. In 1851 the widow married again. The settlement made on the marriage did not comprise the above annual proceeds, & the trustees continued to pay them to the wife as part of her separate estate & on her separate receipt. The second husband, who was living apart from his wife, claimed to be entitled to the income during her life:—*Held*: the trustees had a discretion to pay the wife the income for her separate use.—*AUSTIN v. AUSTIN, AUSTIN v. BOYCE* (1870), 4 Ch. D. 233; 46 L. J. Ch. 92; 36 L. T. 96; 25 W. R. 346.

**2267. — Trust for maintenance arising on cesser of life interest—Trustees may pay whole income to cestui que trust.]—**A discretionary trust to apply income for the benefit of a *cestui que trust*, arising upon cesser of his life interest by assignment or bkpey. may be exercised by the trustees, notwithstanding that the *cestui que trust* is the only object of the discretionary trust.

**2266 i. Discretion of trustees as to payment—To fulfil intention of testator.]—***PERKINS v. DYSON* (1891), 17 V. L. R. 451.—*AUS.*

**2266 ii. —**—*Re WALLWORK'S WILL, CRICHTON & WATSON v. SIDWELL & BALDREY*, [1920] V. L. R. 365.—*AUS.*

**2266 iii. —**—*Re REILLY, FARMERS' CO-OPERATIVE EXECUTORS & TRUSTEES, LTD. v. REILLY*, [1925] S. A. R. 164.—*AUS.*

**e. —**—*TRUSTEES, EXECUTORS & AGENCY CO., LTD. v. SOMERSET* (1895), 21 V. L. R. 610.—*AUS.*

**d. —**—*Re HALLOWES* (1913), 9 Tas. L. R. 79.—*AUS.*

**e. —**—*Re AITKEN* (1915), 15 S. R. N. S. W. 216.—*AUS.*

**f. —**—*MACDONALD v. MCLENNAN* (1881), 8 O. R. 176.—*CAN.*

**g. —**—*Re O'SHEA* (1903), 23 C. L. T. 283; 6 O. L. R. 315; 2 O. W. R. 749.—*CAN.*

**h. —**—*Re RITCHIE v. DAVIDSON'S TRUSTEES* (1890), 17 R. (Ct. of Sess.) 673; 27 Sc. L. R. 530.—*SCOT.*

**k. Legacy to vest on attaining twenty-one.]—**Testamentary trustees holding a fund for children to be paid on them attaining majority were bound to pay to the children's father out of the income the sum necessary for their maintenance & education.—*MACKIN-*

*TOSH v. WOOD* (1872), 10 Macph. (Ct. of Sess.) 933; 44 Sc. Jur. 512.—*SCOT.*

**l. —**—*MARTIN, PETITIONER* (1904), 6 F. (Ct. of Sess.) 592; 41 Sc. L. R. 400; 11 S. L. T. 741.—*SCOT.*

**m. Legacy to vest on attaining twenty-five.]—***DUNCAN'S TRUSTEES, ETC.* (1877), 4 R. (Ct. of Sess.) 1093; 14 Sc. L. T. 650.—*SCOT.*

**n. Direction to accumulate—Whether past accumulations may be resorted to for maintenance.]—***PERPETUAL TRUSTEE CO. v. HASELTON* (1916), 16 S. L. N. S. W. 153; 33 N. S. W. N. 136.—*AUS.*

**o. —**—*COLQUHOUN, PETITIONER* (1894), 21 R. (Ct. of Sess.)

**Sect. 5.—Maintenance and advancement: Sub-sects. 1 & 2.]**

**Testatrix directed trustees to stand possession of a fund upon trust to pay the income to T. during his life, or until he should become a bkpt. or liquidating debtor, or should cease to be entitled to receive such income for his own benefit; & in case any of those events happened, then "to pay to him or apply for his benefit during the remainder of his life" either the whole or so much only of the income as the trustees should, in their uncontrolled discretion, think fit, & "subject to the aforesaid interest," upon trust for other beneficiaries.** T. assigned his interest, & subsequently became bankrupt:—**Held:** the trustees might, in the exercise of their discretion, expend the whole or any part of the income for the maintenance of T., & any part not so applied by them went to the persons entitled under the gift over. *Semble:* payment of the debts of T. might be an application of the income for his maintenance.—**Re BULLOCK, GOOD v. LICKORISH** (1891), 60 L. J. Ch. 341; 64 L. T. 736; 39 W. R. 472; 7 T. L. R. 402.

**2268. Discretionary trust of residue—After death of tenant for life—Prior death of legatee.]—**Testator devised a share of his residuary estate, after the determination of a life tenancy therein, to trustees, upon trust "to pay or apply all or any portion of the income or corpus of the same in or towards the support or maintenance, or otherwise for the benefit of, their brother R. in such manner & proportions in every respect & at such times as they shall deem most conducive to his welfare." R. died during the continuance of the interest of the tenant for life. On the share subsequently falling into possession, the legal personal representative of R. claimed it as part of R.'s estate. The trustees had not attempted to deal with the share while reversionary:—**Held:** the effect of the gift was to empower the trustees to apply so much of the share as might be required for the personal benefit of R.; the trustees had not waived that discretion or been guilty of default, or refused to exercise it; but no trust was to be implied in R.'s favour as to the whole of the share, therefore under the circumstances, the share did not pass to the legal personal representative of R., no transmissible interest in the fund having ever vested in him.—**Re STANGER, MOORSOM v. TATE** (1891), 60 L. J. Ch. 326; 64 L. T. 693; 39 W. R. 454.

**2269. Legacy to vest on attaining twenty-one—Power to pay share for advancement or benefit of beneficiary—Trustees may apply interest on legacy for maintenance.]—**Testatrix directed trustees to pay a legacy, part of the proceeds of sale of her estate, to an infant to vest in him at twenty-one years of age, & empowered the trustees to apply the whole or part of the share to which any beneficiary might be contingently entitled towards the advancement or otherwise for the benefit of such beneficiary. Testatrix did not stand *in loco parentis* towards the infant legatee:—**Held:** under this power the trustee might apply interest on the legacy as from the death of testatrix for the

maintenance of the infant.—**Re CHURCHILL, HISCOCK v. LODDER**, [1909] 2 Ch. 431; 79 L. J. Ch. 10; 101 L. T. 380; 53 Sol. Jo. 697.

**Annotation.]—Distd. Re West, Westhead v. Appland**, [1913] 2 Ch. 345.

**2270. Annuity given "for maintenance"—Death of annuitant.]—**A "further annuity" of £300 given by testator to his widow, for the maintenance & education of his infant daughter, does not cease to be payable by reason of the death of the widow during the minority of the daughter.—**Re YATES, YATES v. WYATT**, [1901] 2 Ch. 438; 70 L. J. Ch. 725; 85 L. T. 398; 49 W. R. 646; 45 Sol. Jo. 652.

**2271. Separate trusts for maintenance—No right of contribution.]—**Discretionary power was given to applts. as trustees under a will to pay to testator's daughter £800 a year, the unpaid portion thereof to fall into the residue of his estate. A like power was given to one of applts. & a resp. as trustees under the will of her sister to pay such sums as they might think fit in & towards her maintenance, the residue of the income of testatrix's estate to be paid to her nephew, the corpus to go in equal shares to his children on his death. The trustees under the first will paid £400 a year to the daughter, but on the death of testatrix they reduced the allowance to £100 a year, while the trustees of the second will paid from £700 to £800 a year.

In a suit by the nephew & the trustee of his insolvent estate for an order that the daughter's maintenance should be provided for by a proportionate contribution from the two estates:—**Held:** there was no common obligation & no right to contribution. The trusts were different in their terms to be exercised at the discretion of different trustees, & the resulting obligations were separate & independent.—**SMITH v. COCK**, [1911] A. C. 317; 80 L. J. P. C. 98; 104 L. T. 1, P. C.

**2272. Direction to accumulate—One child attaining twenty-one—No interest in subsequent accumulations.]—**Testator bequeathed the residue to trustees, for the maintenance of his five children during their respective minorities, & he directed them to accumulate the surplus income, "for the benefit of the residuary legatees, & form part of the residue of his estate," & subject as aforesaid, on trust to pay, etc., the residue to his five children at twenty-five in certain shares, but their shares to be vested at twenty-one, etc.; & at that age, they were entitled to receive all the interest, upon what should then appear to be their "respective shares." He authorised advancements to be made to his sons, to be deducted out of their shares before any "final division." One child having attained her proper age received her share of the then aggregate fund:—**Held:** she retained no interest in the subsequent accumulations accruing during the minorities of the other children.—**ROUTH v. HUTCHINSON** (1845), 8 Beav. 581; 6 L. T. O. S. 254; 9 Jur. 1051; 50 E. R. 228.

**2273. Direction to accumulate—Whether past accumulations may be resorted to for maintenance.]—****Re TOD, BRADSHAW v. TOD** (1913), 134 L. T. Jo. 386.

671; 31 Sc. L. R. 557; 1 S. L. T. 591.—**SCOT.**

**p. —.]—MUIR v. MUIR'S TRUSTEES** (1887), 15 R. (Ct. of Sess.) 170; 25 Sc. L. R. 119.—**SCOT.**

**q. Past maintenance.]—MITCHELL v. TUCKETT** (1897), 5 V. L. R. (Eq.) 31.—**AUS.**

**r. —.]—DONALD v. DONALD** (1884), 7 O. R. 669.—**CAN.**

**t. Payment out of capital.]—**

**KERFERD v. PERPETUAL EXECUTORS & TRUSTEES ASSOC. OF AUSTRALASIA, LTD.** (1893), 19 V. L. R. 700.—**AUS.**

**a. —.]—Re ASCOTT'S WILL**, [1915] V. L. R. 227.—**AUS.**

**b. —.]—**Trustees may be allowed payments made for maintenance & education out of their capital.—**STEWART v. FLETCHER** (1869), 16 Gr. 235.—**CAN.**

**c. —.]—BARCLAY v. ZAVITZ** (1884),

8 O. R. 663.—**CAN.**

**d. —.]—THOMSON v. MILLER'S TRUSTEES** (1883), 11 R. (Ct. of Sess.) 401; 21 Sc. L. R. 269.—**SCOT.**

**e. Doctor's fees & funeral expenses Covered by maintenance clause.]—HOWE v. CARLAW** (1888), 15 O. R. 697.—**CAN.**

**f. Discretion of court.]—EDMISTON v. MILLER'S TRUSTEES** (1871), 9 Macph. (Ct. of Sess.) 987; 43 Sc. Jur. 545.—**SCOT.**



**Maintenance of infants—Out of what fund maintained.**—See EXECUTORS, Vol. XXIII., pp. 449–459, Nos. 5207–5326.

See, generally, INFANTS, Vol. XXVIII., pp. 222–250, Nos. 812–1062.

**Maintenance of lunatics.]**—See LUNATICS, Vol. XXXIII., pp. 193, 194, 219, Nos. 935–961, 1281–1285.

**Maintenance out of property of lunatics.]**—See LUNATICS, Vol. XXXIII., pp. 165, 166, 194–201, Nos. 507–525, 902–1050.

**Directions as to maintenance—Effect of delegation of powers.]**—See POWERS, Vol. XXXVII., p. 408, Nos. 184, 185.

**Effect of bankruptcy—On trust for maintenance.]**—See BANKRUPTCY, Vol. V., pp. 652, 653, Nos. 5827–5838.

**Effect of rule against perpetuities.]**—See PERPETUITIES, Vol. XXXVII., pp. 78, 79, Nos. 191, 192.

**Practice as to maintenance.]**—See INFANTS, Vol. XXVIII., p. 255, Nos. 1111–1117.

#### SUB-SECT. 2.—ADVANCEMENT.

See, now, Trustee Act, 1925 (c. 18), ss. 31, 32.

**2274. Power to advance to beneficiary at any time before a certain age—Whether beneficiary may claim whole or part of sum before attaining that age.]**—LEWIS v. LEWIS (1785), 1 Cox, Eq. Cas. 162; 29 E. R. 1109, L. C.

**Annotations.**—Folld. Robinson v. Cleator (1808), 15 Ves. 526. **Refd.** Cowper v. Mantell (No. 2), Cooper v. Mantell (No. 2) (1856), 22 Beav. 231.

**2275. ———.]**—Trust by will as to the residue of real & personal estate for a nephew & his heirs, to pay him the interest for life, with power to the trustees, in case they should see it would be for his benefit to advance him, when it may be in their power, any part of the principal for his advancement in life, that they will not withhold such assistance as they may deem necessary; but, in case no part should be advanced, the residue to be divided among the nephew's issue; with a limitation over, if he should leave no issue.

The nephew is entitled, not to the absolute property, but for life only; & no advancement having been made, an inquiry was directed, whether his circumstances required advancement. —ROBINSON v. CLEATOR (1808), 15 Ves. 526; 33 E. R. 854.

**Annotation.**—**Consd.** Cowper v. Mantell (No. 2), Cooper v. Mantell (No. 2) (1856), 22 Beav. 231.

**2276. Power of advancement in tenant for life—Assignment of interest as security for annuity—Tenant for life cannot exercise power.]**—A tenant for life of trust moneys, with a power for appointing, & raising in his lifetime a part of the fund for the advancement of his children, assigned the interest & dividends of the whole fund as a security for an annuity granted by him: he afterwards, in exercise of the power, appointed a part of the fund to be raised for the advancement of one of his children:—**Held:** by the assignment of the dividends, he had precluded himself from exercising the power for advancement, as it would tend to diminish the security for the annuity, notwithstanding the dividends were of much greater amount than the annuity.—NOEL v. HENLEY

(LORD), *Ex p.* SCHWENCH & MANN (1825), M'Cle. & Yo. 302; 148 E. R. 427, Ex. Ch.

**2277. Power of advancement in two trustees—Direction for appointment of new trustee on failure of one—Advancement by sole acting trustee.]**—Testator appointed two trustees, & gave them a power of making advancements to his children; & he directed if either declined to act, a new trustee should be appointed. One alone, the mother of the children, acted, & made, as was alleged, advancements without the concurrence of the other trustee, or the appointment of a new trustee:—**Held:** the proper discretion had not been exercised, & no inquiries could be directed as to the alleged advancements with a view to their being allowed.—PALMER v. WAREFIELD (1840), 3 Beav. 227; 40 E. R. 88.

**2278. Sum actually advanced exceeds sum authorised—Whole interest not required for maintenance—Power to advance whole interest—Guardians permitted to receive excess of interest.]**—Where the sum required for the advancement of an infant was a reasonable sum, but exceeded the sum authorised to be advanced, & the whole amount of the interest was not required for the infant's maintenance, but there was a power to advance the whole of the interest towards the maintenance of the infant, the ct. permitted the infant's guardians to receive the excess of interest, until the difference between the amount required & the sum authorised to be advanced should be made up.—TERRY v. HENDERSON, COSGRAVE v. HENDERSON (1850), 15 L. T. O. S. 452.

**2279. Power to advance for "preferment, advancement, or establishment in the world"—Beneficiary in embarrassed circumstances—Trustees not authorised to advance in such a case.]**—Testatrix gave £1,000 to trustees to pay the interest to petitioner for life, & afterwards the capital to be divided between his children. There was also a power to the trustees, if they should think fit, to advance all or any portion of the £1,000 for the "preferment, advancement, or establishment in the world" of petitioner. A portion of the £1,000 had been advanced under this power. Petitioner had had twelve children, five of whom were alive: & being in embarrassed circumstances, now asked, with the consent of the children & of the trustees, that the remaining portion of the money might be paid over to him under the power in the will:—**Held:** this was not such a case as was contemplated by the power.—LUARD v. PEASE (1853), 22 L. J. Ch. 1069; 1 W. R. 527.

**2280. ——— "Or otherwise for his benefit"—Power to advance to pay debts—Interest on debts absorbing beneficiary's income.]**—Testator bequeathed a fund upon trust for L. during his life, & after his decease for his children as he should by will appoint, & in default of appointment for his children, who being sons should attain twenty-one, or being daughters should attain that age or marry, in equal shares. Testator empowered the trustees, at any time or times during the life of L., to apply any part of the fund not exceeding one moiety in or towards the preferment or advancement of L. or otherwise for his benefit as the trustees should in their discretion think fit. At the date of the will L. was thirty years of age, & had been married

of share.]—BUDGE v. DODSON (1886), 4 N. Z. L. R. 160.—N.Z.

1. ———.]—**Re** HALE'S SETTLEMENT (1909), 28 N. Z. L. R. 769.—N.Z.

m. ———.]—ALEXANDER'S TRUSTEES (1873), 45 So. JUR. 515; 10 So. L. R. 635.—SCOT.

#### PART III. SECT. 5, SUB-SECT. 2.

**g. Whether interest payable on advance.]**—Where the will gave to the trustees a power of advancement in favour of testator's sons the power was exercisable during the continuance of the life estate, but any son in whose favour an advancement was made

was chargeable with interest thereon at the rate of 5 per cent.—**Re** FINDLAYSON, FINDLAYSON v. KEITH (1897), 5 B. C. L. 517.—CAN.

h. ———.]—**"Advance"—May mean "give."**—**Re** JOST'S ESTATE, CROWE v. BELL (1897), 40 N. S. R. 121.—CAN.

k. Power to advance up to fraction



*Sect. 5.—Maintenance and advancement: Sub-sect. 2. Sects. 6 & 7: Sub-sect. 1, A.]*

for nearly three years:—*Held*: the trustees might apply one moiety of the trust fund in payment of debts incurred by L., the interest on which absorbed nearly the whole of L.'s income, & the principal of which he was unable to pay out of his own resources.—*LOWTHER v. BENTINCK* (1874), L. R. 19 Eq. 166; 44 L. J. Ch. 197; 31 L. T. 719; 23 W. R. 156.

*Annotations*:—*Consd. Re Broed's Will* (1875), 1 Ch. D. 226; *Molyneux v. Fletcher*, [1898] 1 Q. B. 648. *Reid. Re Brittlebank*, *Coates v. Brittlebank* (1881), 30 W. R. 99; *Re Price* (1887), 34 Ch. D. 603; *Re Stanger, Moorsom v. Tate* (1891), 60 L. J. Ch. 326.

**2281. Settlement containing power of advancement, power of appointment & hotchpot clause.—Part of fund paid to infant—*Prima facie* attributable to advancement clause.]**—A settlement contained a power of advancement, a power of appointment, & a hotchpot clause, applicable to the former & not to the latter. Part of the trust fund having been taken out of the settlement & paid over to a child without stating under which power:—*Held*: it was *prima facie* attributable to the advancement clause, & this was confirmed by subsequent memoranda in the handwriting of the donee of the power.—*Re GOSSET'S SETTLEMENT* (1854), 19 Beav. 529; 52 E. R. 456.

*Annotation*:—*Consd. Re Fox, Wodehouse v. Fox*, [1901] 1 Ch. 480.

**2282. Power of advancement during minority.—Cannot be exercised in favour of person over twenty-one.]**—Under a will a mother was tenant for life of a fund, to her separate use, without power of anticipation. After her death the fund was to go to her children as she should appoint by deed or will, & in default of appointment, among her children equally, the shares of sons being vested at twenty-one, & the shares of daughters at twenty-one or marriage. The trustees had power to advance the whole or any part of the share to which each of the children "being a minor" was actually or presumptively entitled:—*Held*: there was no power, even with the consent of the mother, to make an advancement to a son who had attained twenty-one.—*CLARKE v. HOGG* (1871), 19 W. R. 617, L. J.J.

**2283. Consent of tenant for life to exercise of power.—Tenant for life assigning interest by mortgage.—Tenant for life unable to consent.—Trustees cannot exercise power.]**—A. being tenant for life of a fund under a settlement which empowered the trustees with his consent to advance part of the presumptive share of a child, assigned his life interest in the fund by way of mtge. to pltf.:—*Held*: the trustees might be restrained from making any advancement to a son of A. during A.'s life, he having by executing the mtge. lost his power to consent.—*NOTTIDGE v. GREEN* (1875), 33 L. T. 220.

**2284. Interest paid on sum advanced in testator's lifetime.—Right of testator's widow to receive interest.]**—Testator had advanced by way of loan to deft., one of his children, a sum of £2,000, upon which sum interest was paid during testator's lifetime. Testator, by his will, devised & bequeathed all his property, both real & personal, to trustees on trust to permit his widow to receive the income actually produced by such property, howsoever constituted or invested, during widowhood, & subject thereto on trust for his child, if only one, or all his children equally if more than one, who being a son or sons should attain the age of

twenty-one years, or being a daughter or daughters should attain that age or marry. The will contained a proviso that any advances made by testator to any child or to the husband of any child in his lifetime, together with interest on such advances, as charged against such child or her husband in his private memorandum book in his own handwriting, should, according to the amount thereof, be taken in full or in part satisfaction of his or her share in testator's property, unless testator should otherwise declare by writing under his hand. The sum advanced to deft. was charged against him in the testator's memorandum book, & such book contained an entry as follows: "This is the memorandum book named in my will as containing the advances made by me to my children or their husbands to be taken in satisfaction of their respective shares in my estate":—*Held*: testator's widow was entitled to receive from deft. during her life, as part of the annual income given to her by the will, interest on the sum of £2,000.—*LIMPUS v. ARNOLD* (1884), 15 Q. B. D. 300; 51 L. J. Q. B. 85; 33 W. R. 537, C. A.

*Annotations*:—*Consd. Re Warde, Warde v. Ridgway* (1914), 111 L. T. 35; *Re Trollope, Game v. Trollope*, [1915] 1 Ch. 853.

**2285. Advancement on account of expectant interest.—Interest in the event of issue.—Presumption in favour of possibility of issue.]**—If property is given to a person in the event of another having children, the ct. will treat the first person as having an interest in the property during the life of the other, even although such other is a woman past the natural age for child-bearing.

Under a will the children of L. were entitled to shares in certain trust funds in the event of H. having children, & in the event of H. having no children the funds were undisposed of. The will gave the trustee power to make advances to the children of L. on account of their "then expectant presumptive or then vested" shares. H. was a widow of fifty-four years of age & had never had a child:—*Held*: the power of advancement was exercisable during the life of H.—*Re HOCKING, MICHELL v. LOE*, [1898] 2 Ch. 507; 67 L. J. Ch. 662; 70 L. T. 164; 47 W. R. 114, C. A.

*Annotations*:—*Consd. Re Cazenove, Perkin v. Bland* (1919), 122 L. T. 181. *Reid. Re White, White v. Edmond*, [1901] 1 Ch. 570.

**Advancement to infants generally.]**—*See EQUITY*, Vol. XX., pp. 457–463, Nos. 1821–1889; *INFANTS*, Vol. XXVIII., pp. 250–255, Nos. 1003–1110.

**Hotchpot of advances.]**—*See WILLS*.

**Directions as to advancement.—Delegation of powers.]**—*See POWERS*, Vol. XXXVII., pp. 408, 409, Nos. 186, 187.

## SECT. 6.—ACCUMULATIONS.

*See, generally*, *INFANTS*, Vol. XXVIII., pp. 223–226, 249, 250, Nos. 822–838, 1056–1061.

**2286. Discretion of trustees as to accumulation.—Trustees unable to agree.—Determination of question by court.]**—Under a settlement, discretionary power over a fund of £500 a year was given to two trustees upon trust, to apply it to the maintenance of an infant, or else in their discretion to accumulate it, & if the trustees did not apply the fund to either of these objects, it was to be paid to W. They both agreed the fund was not required for maintenance, but differed in the question of accumulation:—*Held*: as the maintenance was

**PART III. SECT. 6.**  
n. *Accumulations of unapplied income—Income of residuary estate.]*—

*DIBBS v. BARRINGTON* (1894), 15 N. S. W. L. R. (Eq.) 149.—*AUS.*  
o. —.].—*GRAHAM v. GRAHAM'S*

*TRUSTEES* (1863), 1 Macph. (Ct. of Sess.) 392; 35 Sc. Jur. 240.—*SCOT.*  
p. —.].—*LOGAN'S TRUSTEES v.*

amply provided for, & the et. in the exercise of its discretion on the point, when the trustees differed, thought the accumulation unnecessary, W. was entitled until further order.—*WINDHAM v. COOPER* (1871), 24 L. T. 793.

**2287. Accumulation for fixed period—For person then entitled to real estate in strict settlement—Disentailing deed by tenant for life.]**—Testator devised his real estate to trustees to the use of his wife for life, & after her decease to the use of the first & every other son of his son H. successively in tail male with divers remainders over, & he directed that during a certain period the trustees should accumulate the rents & profits of his real estate & hold the same & the accumulations thereof upon trust for the person or persons who at the expiration of the period should “under the trusts & limitations of this my will be entitled to the use & enjoyment” of his real estate. Upon the death of testator’s widow the first tenant in tail executed a disentailing assurance, & although the period of accumulation had not expired, claimed to be entitled to the receipt of the rents & profits of the estate & to the accumulations:—*Held*: before the disentailing deed *pltf.* was in possession & enjoyment of his estate tail under the limitations of the will subject to the trust for accumulation, & notwithstanding the disentailing deed he was still in possession under the limitations of the will although he had become owner in fee; upon the cesser of the period of accumulation he, his heirs or assigns, would be entitled under the limitations of the will, & no one else could be so entitled; & consequently the trust for accumulation could no longer be enforced, & he was entitled to be let into possession.—*RE TREVANION, TREVANION v. LENNOX*, [1910] 2 Ch. 538; 80 L. J. Ch. 93; 103 L. T. 212; 54 Sol. Jo. 749.

*Annotation*:—*Refd. Re Fowler, Fowler v. Fowler*, [1917] 2 Ch. 307.

**2288. Accumulations of unapplied income—Income of residuary estate—Part of capital of residuary estate.]**—By her will, testatrix who died in 1915 gave her residuary estate upon trust to pay or apply or any part of the income thereof towards the maintenance & education or otherwise for the benefit of her granddaughter F. until she attained twenty-one or married, & if she attained twenty-one without having previously married, to pay the income to F. during her life, & if she married before or after attaining twenty-one, to pay the income of one moiety of the residuary estate to F. during the remainder of her life, & to pay or apply the income of the other moiety towards the maintenance of J., & after the deaths of F. & J. respectively, to hold the respective moieties upon trust for their children respectively. F. married in 1917 & attained twenty-one in 1918:—*Held*: accumulations of unapplied income of the residuary estate existing at the date of the marriage formed part of the capital of the residuary estate, & did not pass to F.—*Re WOLF, PUBLIC TRUSTEE v. LAZARUS*, [1920] 1 Ch. 184; 89 L. J. Ch. 11; 122 L. T. 457.

*Annotation*:—*Refd. Re Ussher, Foster v. Ussher*, [1922] 2 Ch. 321.

**2289. ———.]**—Testatrix by her will gave, devised & bequeathed all her real & personal estate not thereby otherwise disposed of to trustees upon trust to sell, call in & convert the same, &

after paying her funeral & testamentary expenses & debts, & the legacies bequeathed by her will or any codicil thereto, to invest the residue of the moneys, with power from time to time to vary such investments & to stand possessed of the residuary trust moneys & the investments for the time being representing the same, thereafter called the residuary trust fund, upon trust to pay certain annuities, & subject thereto in trust as to two-thirds thereof for the children of her niece living at her, testatrix’s, death, who being males attained the age of twenty-five years, or being females attained that age or married in equal shares. Then after providing that the share of any child dying under the age of twenty-five years without having been married should accrue to the other children’s shares, testatrix declared that the share or shares original or accruing to which each of such children acquiring a vested interest should be entitled in the residuary trust funds should be settled upon trusts under which each child took a life interest only.

*Pltf.* was a daughter of testatrix’s niece who had married, & she took out this summons to have it determined whether or not she was absolutely entitled to the accumulations of the income of her share between the date of testatrix’s death & of her attaining a vested interest:—*Held*: *pltf.’s* share in the residuary trust funds directed to be settled included not only the corpus but also the accumulation of income of the share, & *pltf.* was therefore not entitled to the accumulation but only to income produced from her investment.—*RE MELLOR, ALVAREZ v. DODGSON*, [1922] 1 Ch. 312; 91 L. J. Ch. 393; 126 L. T. 562; 66 Sol. Jo. 219, C. A.

## SECT. 7. - LITIGATION WITH THIRD PARTIES.

### SUB-SECT. 1.—PROCEEDINGS BY AND AGAINST TRUSTEES.

#### A. In General.

**2290. Right of trustee to sue—General rule.]**—If A. is trustee for B., A. can sue on behalf of B. (*JAMES, L.J.*)—*LLOYD v. HARPER* (1880), 10 Ch. D. 290; 50 L. J. Ch. 110; 13 L. T. 481; 20 W. R. 452, C. A.

*Annotations*:—*Refd. Re Flavell, Murray v. Flavell* (1885), 25 Ch. D. 89; *Shepherd v. Bray*, [1906] 2 Ch. 235; *Re Cavendish Browne’s Settlement, Trusts, Horner v. Rawle* (1916), 81 Sol. Jo. 27; *Barker v. Stickney*, [1918] 2 K. B. 356. *Mentd. Re Grace, Balfour v. Grace*, [1902] 1 Ch. 733.

**2291. ——— Action on bond.]**—*LAMB v. VICE*, No. 2344, *post*.

**2292. ——— Trustee not having executed settlement.]**—In the drafts of the articles founded on the proposals, & also in the second articles, *pltf.* was named as a trustee, & had accepted the trust, & was recognised in that character before & after the marriage:—*Held*: he had sufficient interest to sustain the suit, though he had not executed any of the deeds.—*COOK v. FRYER* (1842), 1 Hare, 498; 11 L. J. Ch. 284; 6 Jur. 479; 66 R. R. 1128. *Annotation*:—*Mentd. Hobson v. Ferraby* (1846), 2 Coll. 412.

**2293. ——— In respect of goods in possession of cestui que trust—Trespass.]**—Where goods are assigned as security for an advance of money, upon trust to permit the assignor to remain in possession of them until default in payment at the time stipulated, & upon further trust to sell them

*LOGAN* (1896), 23 R. (Ct. of Sess.) 848; 33 Sc. L. R. 638; 4 S. L. T. 57.—*SCOT*.

*Q.* ———.]—*Ex p. ZIMAN’S TRUST (TRUSTEE)*, [1914] W. L. D. 125.—*S. AF. v. Accumulated profits.*—*TORRIE v. MUNSIE* (1832), 10 Sh. (Ct. of Sess.)

597; 7 Fac. Coll. 462.—*SCOT*.

### PART III. SECT. 7, SUB-SECT. 1.—A.

*2. Right of trustee to sue.]*—*HUMPHREYS v. HUNTER* (1870), 20 C. P. 456.—*CAN.*

*a.* ———.]—*ELLIOTT v. HATZIO PRAIRIE, LTD.* (R. C.) (1913), 24 W. L. R. 974.—*CAN.*

*b.* ———.]—*SRINANT YARLAGADDA MALLIKARJUNA PRASADA NATUDU BAHADUR GARU (RAJAH) v. MAKERLA*

**Sect. 7.—Litigation with third parties: Sub-sect. 1, A. & B.]**

upon such default being made—the assignee has a sufficient possession to enable him to maintain trespass against a wrongdoer.—**WHITE v. MORRIS** (1852), 11 C. B. 1015; 21 L. J. C. P. 185; 18 L. T. O. S. 256; 16 Jur. 500; 138 E. R. 778.

**Annotations:—****Apld.** **Barker v. Furlong**, [1891] 2 Ch. 172. **Mend.** **Haylock v. Sparke** (1853), 1 L. & B. 471; **Bowling v. Foster** (1858), 2 H. & N. 779; **Burling v. Harley** (1858), 3 H. & N. 271; **McMahon v. Lennard** (1858), 6 H. L. Cas. 970.

**2294. ——— Conversion.]**—The possession of chattels by a *cestui que trust* in accordance with the provisions of the trust instrument is in law the possession of the trustees, who can maintain an action against a wrongdoer for the conversion of the chattels.—**BARKER v. FURLONG**, [1891] 2 Ch. 172; 60 L. J. Ch. 368; 64 L. T. 411; 39 W. R. 621; 7 T. L. R. 406.

**Annotations:—****Mend.** **Consolidated Co. v. Curtis**, [1892] 1 Q. B. 495; **Re Magnus, Ex p. Salaman** (1910), 80 L. J. K. B. 71.

**2295. ——— On promissory note—Application of Statute of Limitations.]**—Testator bequeathed to his two daughters £250 each, to be paid when they arrived at the age of twenty-one; & till that period the expenses of board, clothes, & education to be borne & paid by his exors. He appointed exors. & also trustees, & with all necessary powers to fulfil the will. At a meeting of the trustees & exors., for the purpose of settling testator's affairs, the exors. paid over to the trustees (*inter alia*) the sum of £500, to be set apart for the payment of the legacies to the daughters when they attained the age of twenty-one. This sum was afterwards lent by the trustees to the pltf. on a promissory note which described them as "trustees acting under the will of the late W.," testator:—**Held**: a payment of principal & interest to one of the legatees within six years was sufficient to take the case out of the above Act, & the trustees had a right to maintain an action on the note.—**MEGGINSON v. HARPER** (1834), 2 Cr. & M. 322; 4 Tyr. 94; 3 L. J. Ex. 50; 149 E. R. 781.

**2295a. ——— Action contrary to interests of trust estate.]**—**TWIGG & FRANKS v. MASON** (1916), 50 L. L. T. 173, H. L.

**2296. Liability to be sued—Personal liability—Contract by trustees.]**—It is competent for a trustee to contract by apt words in such a manner as to bind only his trust estate; but whether in any particular case the contract of a trustee is one which binds himself personally, or is to be satisfied only out of the trust estate, is a question of construction to be decided with reference to the circumstances of the case.—**MUIR v. CITY OF GLASGOW BANK** (1879), 4 App. Cas. 337; 40 L. T. 339; 27 W. R. 603, H. L.

**Annotations:—****Refd.** **Re City of Glasgow Bank, Bell's Case** (1879), 4 App. Cas. 550; **Re City of Glasgow Bank,**

**Buchan's Case** (1879), 4 App. Cas. 583; **Re City of Glasgow Bank, Mitchell's Case** (1879), 4 App. Cas. 567; **Cree v. Somervall** (1879), 4 App. Cas. 648; **Gillespie v. City of Glasgow Bank** (1879), 4 App. Cas. 632; **Re C. M. G.**, [1898] 2 Ch. 324; **Re Robinson's Settlement, Gant v. Hobbs**, [1912] 1 Ch. 717.

**2297. ——— Covenant "as such trustees."]**—A covenant, by the trustees of deceased mtgor., "as such trustees, but not so as to create any personal liability," to pay the mtge. debt & indemnify the estate of deceased co-mtgor., involves the personal liability of the covenantors.—**WATLING v. LEWIS**, [1911] 1 Ch. 414; 80 L. J. Ch. 242; 104 L. T. 132.

**Annotations:—****Re Robinson's Settlement, Grant v. Hobbs** (1911), 28 T. L. R. 121; **Re Tewkesbury Gas Co., Tysoe v. The Co.**, [1911] 2 Ch. 279.

**2298. ———]**—By his marriage settlement R. assigned funds to trustees upon trusts under which he took a protected life interest, & the trustees were empowered to pay his debts & for that purpose to raise money upon his request in writing. In Nov. 1906, he committed an act of bkpcy., on which he was adjudicated bkpt. in Apr. 1907. In Dec. 1906, he signed a request to the trustees to raise £800 for payment of his debts. They borrowed the money from G. & executed a mtge., in which they covenanted "as such trustees but not otherwise" to repay the money with interest at 6 per cent. G. brought this action to enforce his security:—**Held**: the covenant did not bind the trustees personally.—**Re ROBINSON'S SETTLEMENT, GANT v. HOBBS**, [1912] 1 Ch. 717; 81 L. J. Ch. 393; 106 L. T. 443; 28 T. L. R. 298, C. A.

**Annotations:—****Mend.** **Edgelow v. MacElwee**, [1918] 1 K. B. 205; **Lipton v. Powell**, [1921] 2 K. B. 51; **Pirie v. Richardson**, [1927] 1 K. B. 448.

**2299. Service of summons on trustees—Service on cestui que trust dispensed with.]**—Service of the summons on the children of the tenant for life was dispensed with, their interests being sufficiently represented by the trustees, who had been served.—**Re BROWN'S WILL** (1884), 27 Ch. D. 179; 53 L. J. Ch. 921; 51 L. T. 156; 32 W. R. 894.

**See, also, EXECUTORS, Vol. XXIV., pp. 716–750, Nos. 7434–7780.**

**B. When cestuis que trust must be Parties.**

**2300. General rule.]**—A *cestui que trust* must in all cases be a party, but the trustee need not, especially if *cestui que trust* undertakes for him.—**KIRK v. CLARK** (1708), Prec. Ch. 275; 2 Eq. Cas. Abr. 165; 24 E. R. 133, L. C.

**Annotation:—****Mend.** **Brown v. Carter** (1801), 5 Ves. 862.

**2301. Action for specific performance.]**—A person who makes a contract as trustee for others, cannot sustain a suit for specific performance, without joining them along with him. If his *cestuis que trust* are the members of a numerous company, some of them, suing on behalf

**SRIDEVAMMA** (1897), 1 L. R. 20 Mad. 182; 1 L. R. 24 Ind. App. 73; 1 C. W. N. 497.—**IND.**

**o. ———.]**—**HILL v. O'CONNOR** (1852), 4 Ir. Jur. 185.—**IR.**

**d. ———.]**—**DAWSON v. LEPPER** (1892), 29 L. R. Ir. 211.—**IR.**

**o. ———.]**—**MURRAY & M'MASTER (THOMPSON'S TRUSTEES) v. MUIR** (1867), 40 Sc. Jur. 83.—**SCOT.**

**f. ———.]**—**BROWN v. M'DOUGALL** (1901), 4 F. (Ct. of Sess.) 297; 30 Sc. L. R. 219; 9 S. L. T. 295.—**SCOT.**

**g. ———.]**—**LEE'S TRUSTEES v. DUNN**, [1913] S. C. (H. L.) 12.—**SCOT.**

**2296 l. Liability to be sued—Personal liability—Contract by trustees.]**—**LIVINGSTONE v. BOULARDARIE SCHOOL TRUSTEES** (1880), 13 N. S. Il. (1 R. &

**G.) 335.—CAN.**

**2296 II. ———.]**—**FRASER v. FAIRBANKS** (1893), 23 S. C. R. 79.—**CAN.**

**2296 III. ———.]**—**GORDON v. CAMPBELL** (1842), 1 Bell. Sc. App. 428.—**SCOT.**

**2296 IV. ———.]**—At common law trustees, by duly exercising their powers, do not render themselves liable personally to third persons.—**ERLICH v. RAND COLD STORAGE & SUPPLY CO., LTD.**, [1911] T. P. D. 170.—**S. AF.**

**h. ——— Money had & received.]**—When money is received in the execution of a trust, money had & received cannot be maintained against the trustees so long as such trust remains open.

—**MCPHERSON v. PROUDFOOT** (1854), 2 C. P. 57.—**CAN.**

**k. ———.]**—**ASSETS CO. v. BAIN'S TRUSTEES** (1904), 41 Sc. L. R. 517.—**SCOT.**

**l. Irregularity waived by trustee in proceedings at law—Beneficiary unable to intervene.]**—A *cestui que trust* cannot either in an application at law or by proceedings in equity, intervene to prevent the effect of a waiver by his trustee of an irregularity in proceedings at law to which the trustee is a party.—**GERRIE v. RUTHERFORD** (1855), 3 Man. L. R. 291.—**CAN.**

**PART III. SECT. 7, SUB-SECT. 1.—B.**

**2300 l. General rule.]**—**BIFIELD v. TAYLOR** (1828), 1 Mol. 193.—**IR.**

of themselves & all the other members, ought to join with him as co-pltfs.—*ANON.* (1825), 3 L. J. O. S. Ch. 99.

**2302. Action for redemption of mortgage.]**—To a bill for the redemption of a mtge. term all the *cestuis que trust* interested in the produce of the term, as residuary legatees under the mtgee.'s will, are necessary parties; although they are numerous & the property small, & although the trustees have power to give a discharge to purchasers.—*OSBOURN v. FALLOWS* (1830), 1 Russ. & M. 741; 39 E. R. 284, L. C.

*Annotation* :—*Mentd.* Davis v. Chanter (1848), 2 Ph. 545.

**2303. —.]**—The mtgor. of one property assigned the equity of redemption & afterwards mortgaged another property to the mtgee. of the first. The assignee of the equity of redemption having brought an action to redeem the first property, the mtgee. claimed to consolidate the mtges.:—*Held*: under R. S. C., Ord. 16, r. 7, trustees of an equity of redemption sufficiently represent their *cestuis que trust* in a redemption suit, no direction to the contrary having been made by the ct.—*JENNINGS v. JORDAN* (1881), 6 App. Cas. 698; 51 L. J. Ch. 129; 45 L. T. 593; 30 W. R. 369, H. L.; *affg.* S. C. *sub nom.* *MILLS v. JENNINGS* (1880), 13 Ch. D. 639, C. A.

*Annotations* :—*Apld.* Doble v. Manley (1885), 54 L. J. Ch. 636. *Distd.* Francis v. Harrison (1889), 43 Ch. D. 183. *Mentd.* Andrews v. City Permanent Benefit Bldg. Soc. (1881), 44 L. T. 641; Harter v. Colman (1882), 19 Ch. D. 630; Atherley v. Barnett (1885), 52 L. T. 736; Bird v. Wenn (1886), 33 Ch. D. 215; Mutual Life Assce. Soc. v. Langley (1886), 32 Ch. D. 460; Harris v. Tubb (1889), 60 L. T. 699; Griffith v. Pound (1890), 45 Ch. D. 553; Wavell v. Mitchell (1891), 64 L. T. 560; Minter v. Carr, [1894] 3 Ch. 498; Biddulph v. Billiter-Street Offices Co. (1895), 72 L. T. 834; Pledge v. White, [1896] A. C. 187; Riley v. Hall (1898), 79 L. T. 244; Hughes v. Britannia Permanent Benefit Bldg. Soc., [1906] 2 Ch. 607.

**2304. Action to foreclose mortgage.]**—In a foreclosure action a mtgor. having conveyed the equity of redemption together with other property to a trustee in trust for scheduled creditors:—*Held*: the trustee sufficiently represented the creditors.—*DOBLE v. MANLEY* (1885), as reported in, 54 L. J. Ch. 636.

*Annotations* :—*Mentd.* Tufnell v. Nicholls (1887), 56 L. T. 152; Smithett v. Hosketh (1890), 44 Ch. D. 161.

**2305. —.]**—A mtgee. who is trustee of his mtge. for the beneficial owners of the mtge. money, & who has become bkpt., cannot, as deft. to a foreclosure action by a prior mtgee., properly represent his *cestui que trust*, but, notwithstanding R. S. C., Ord. 16, r. 8, the *cestuis que trust* are necessary parties to the action.—*FRANCIS v. HARRISON* (1889), 43 Ch. D. 183; 59 L. J. Ch. 248; 61 L. T. 667; 38 W. R. 329.

*Annotations* :—*Consd.* Griffith v. Pound (1890), 45 Ch. D. 553; *Re De Loeuw, Jakens v. Central Advance & Discount Corpn.*, [1922] 2 Ch. 540. *Refd.* Aylward v. Lewis (1891), 64 L. T. 550; Wavell v. Mitchell (1891), 64 L. T. 560.

**2306. Action to set aside trust deed.]**—A father being indebted to his children, assigned property to a trustee to pay them; the children were not parties to the deed, but were cognisant thereof:—*Held*: in a suit by the creditors to set aside the deed, the children were necessary parties, & the cause could not proceed without them.—*TRENCHARD v. FINCH* (1835), 1 Coop. temp. Cott. 370; 4 L. J. Ch. 177; 47 E. R. 901.

**2307. —.]**—Bill to set aside a settlement as

having been obtained from pltf. fraudulently & by means of misrepresentation & undue influence acquired over her by the trustees. One of the trustees was entitled to one-twelfth of the trust fund, subject to the life interest of pltf. The trustees were the only defts. to this bill. On an objection for want of parties:—*Held*: (1) notwithstanding 15 & 16 Vict. c. 86, s. 42, r. 9, & s. 51, the question at issue in the cause could not be tried in the presence of the trustees only, without any of the absent persons beneficially interested under the settlement; (2) it was not necessary that all such persons should be made parties, although some of them, not being next of kin of the settlor, must be so; & cause ordered to stand over, that one of the infants, not being next of kin, might appear by counsel at the hearing.—*READ v. PREST* (1854), 1 K. & J. 183; 69 E. R. 421; *sub nom.* *REED v. PREST*, 24 L. T. O. S. 106; 3 W. R. 30.

**2308. —.** *Cestuis que trust* not improper parties.]—(1) The trustees of a settlement who are defts. to an action successfully brought against them to set aside the settlement are entitled, if they have acted properly in the discharge of their duties as trustees & not put pltf. to unnecessary expense, to retain their costs of the action, as between solr. & client, out of the trust fund before handing it over under the judgment.

(2) An action having been brought by a settlor's trustee in bkpcy. against the trustees of the settlement of the settlor's own property to set aside limitations cutting down his life interest in the event of his bkpcy., the beneficiaries taking under the limitations over were subsequently added by pltf. as defts. at the suggestion of defts. the trustees, & at the trial appeared to defend separately from their co-defts. the trustees. The action being successful, the trustees were allowed to retain their costs as between solr. & client out of income in their hands, but the beneficiaries, having chosen to defend, although they had been unnecessarily, but not improperly, made parties, were not allowed any costs.

These beneficiaries are, in my opinion, unnecessary parties, but it does not follow that they are improper parties (*KEKEWICH, J.*).—*MERRY v. POWNALL*, [1898] 1 Ch. 306; 67 L. J. Ch. 162; 78 L. T. 146; 46 W. R. 487; 42 Sol. Jo. 213.

*Annotation* :—*As to* (2) *Refd.* Ideal Bedding Co. v. Holland, [1907] 2 Ch. 157.

**2309. Action by creditors of testator.]**—In a suit since the 30th Order of Aug. 1841, to establish the claims of creditors of testator against his real estate devised, legatees, whose legacies are charged on such real estate, are not necessary parties, where there are devisees in trust, having the powers specified in the Order.—*WARD v. BASSETT* (1846), 5 Hare, 179; 67 E. R. 877.

**2310. Action for recovery of trust funds.]**—*HORSLEY v. FAWCETT*, No. 2324, *post*

**2311. —.]**—A trustee may sue to recover the fund for the benefit of all persons interested in the trust without making his *cestuis que trust* parties.—*GLEGG v. REES* (1871), 7 Ch. App. 71; 41 L. J. Ch. 243; 25 L. T. 612; 20 W. R. 193, C. A.; *revg.* S. C. *sub nom.* *REES v. GLEGG*, 19 W. R. 1020.

*Annotation* :—*Refd.* *Re Sanders' Trusts* (1878), 47 L. J. Ch. 667.

**23021. Action for redemption of mortgage.]**—*KERR v. MURRAY* (1857), 6 Gr. 343.—*CAN.*

**23061. Action to set aside trust deed.]**—Where the tenant for life was trustee, & after the ceaser of other estates, was to hold the estate for the benefit of the children of C.:—*Held*: the trustee

sufficiently represented their interests, & they need not be parties to a bill impeaching the trust deed as fraudulent against creditors.—*THOMPSON v. DODD* (1879), 26 Gr. 381.—*CAN.*

*m. Action for account.]*—*WENTWORTH v. TOMPSON* (1859), 2 Legge, 1238.—*AUS.*

*n. —.]*—*PHILAN v. MACBOY* (1870), 1 V. R. 85.—*AUS.*

*a. Action attacking trust estate.]*—In a suit by trustees to reduce into possession the trust estate, & in which the existence of the trust estate is called in question by defts., the *cestuis que trust* are necessary parties.—

*Sect. 7.—Litigation with third parties: Sub-sect. 1, B., C. & D.]*

**2312. —[By new trustee against old trustee.]—**A newly appointed trustee of a will brought an action against an old trustee & the representatives of two deceased trustees to compel them to make good losses arising from investments negligently made on insufficient security more than six years before the action. R. the exor. of D. one of deceased trustees, had after D.'s death issued the proper statutory advertisements & administered the estate, retaining in hand two legacies which had been bequeathed to him on trust. By leave of the ct. at the trial the statement of claim was amended to make it a claim against R. as trustee of the legacies & to follow the legacies into his hands. R. to be at liberty to claim the benefit of any statutes of limitation:—*Held*: having regard to R. S. C., Ord. 16, r. 8, the *cestuis que trust* of the legacies were not necessary parties to the action.—*Re BOWDEN, ANDREW v. COOPER* (1890), 45 Ch. D. 444; 59 L. J. Ch. 815; 39 W. R. 219, 14 J.

*Annotations:—Reid. How v. Winterton, [1896] 2 Ch. 626. Mentd. Re Somerset, Somerset v. Poulett, [1894] 1 Ch. 231; Mara v. Browne, [1895] 2 Ch. 69; Re Allsop, Whitaker v. Bamford, [1914] 1 Ch. 1.*

**2313. Action for foreclosure of mortgage.]—**Upon a claim by a mtgee. against mtgors., & against the trustees under an assignment of the equity of redemption for the benefit of the mtgors., creditors whose names appeared in a schedule to the deed which they executed:—*Held*: although the deed gave the trustees a power of sale, with a clause making their receipts good discharges; the scheduled creditors were necessary parties to the suit.—*THOMAS v. DUNNING* (1852), 5 De G. & Sm. 618; 20 L. T. O. S. 60; 64 E. R. 1269.

**2314. —.]—SHAW v. HARDINGHAM** (1855), 2 W. R. 657.

**2315. —.]—In a foreclosure suit against the devisee in trust of the mtgor. :—Held**: the devisee in trust sufficiently represented the persons beneficially interested.—*WILKINS v. REEVES* (1855), 3 Eq. Rep. 494; 24 L. T. O. S. 337; 3 W. R. 305.

**2316. —.]—In a foreclosure action, the trustees & exors. of the will of a deceased mtgor. sufficiently represent the estate of the mtgor. for all the purposes of the action; & it is not necessary to bring the *cestui que trust* before the ct.—*Re MITCHELL, WAVELL v. MITCHELL* (1892), 65 L. T. 851.**

**2317. —.]—L. by a memorandum dated Mar. 25, 1879, made an equitable mtge. of certain property to B. & J. L. died in 1886, having by his will given all his real & personal estate to trustees upon trust for sale & conversion, & in the events which happened to set aside the sum of £700, & stand possessed thereof upon trust to pay the income to his son S., until the youngest child of his son should attain twenty-one, & then, if his son's children should not receive £700, to which they would then be entitled under a certain settlement, upon trust for the children, & subject thereto he gave all his real & personal estate in trust for his son S. He appointed S. & other trustees & exors. of his will; but, owing to their death or disclaimer, S. became the sole trustee of, & alone proved the will. In 1890 the equitable mtgees. B. & J., commenced a foreclosure action**

making S. & his eldest daughter, the only one of his children who had attained twenty-one, & a second mtgee. defts. An order for foreclosure absolute was made on Mar. 20, 1891, & on Aug. 1, 1891, B. & J. entered into a contract for sale of the mortgaged property as absolute owners. The purchaser objected that the infant children of S., ought to have been parties to the foreclosure action; that they were not foreclosed, & must join in the conveyance. The vendor declined to make them parties:—*Held*: as S. was exor. as well as trustee of L.'s will, his infant children were sufficiently represented by him, & the requisition was sufficiently answered.—*Re BOOTH & KETTLEWELL'S CONTRACT* (1892), 62 L. J. Ch. 40; 67 L. T. 550; 3 R. 93.

**2318. Action for sale & partition.]—In an action for sale & partition, plffs. were trustees for sale of two-thirds of certain leasehold property, & defts. were trustees for sale of the remaining third part after the death of a tenant for life. The *cestuis que trust* not being parties:—Held**: the trustees for sale sufficiently represented their *cestuis que trust*, & a sale & partition were directed without notice to the parties beneficially interested.—*STACE v. GAGE* (1878), 8 Ch. D. 451; 47 L. J. Ch. 608; 38 L. T. 843; 26 W. R. 605.

*Annotation:—Reid. Re Kennal & Still's Contract, [1923] 1 Ch. 293.*

**2319. Action for recovery of title deeds—Trust estate fraudulently mortgaged.]—A son who was heir-at-law to his father, who was one of the exors. & trustees of his father's will, though he had not proved the will, & whose Christian names & description were identical with those of his father, after his father's death, executed mtges. of freehold & leasehold property of the father & applied the mtge. money to his own purposes. He handed over the title deeds to the mtgees. The transaction took place without the knowledge of his mother & sister, who were co-trustees & co-extrices. with him, & who had proved the will. The will had not been registered in the Middlesex Registry, though the property was situate in that county. The mtge. deeds were registered. They purported to be executed by the absolute owner of the property, & the solr. who acted for both parties believed the son to be the absolute owner. The son told him nothing about the father's will. The solr. searched the Middlesex Registry. The son took a beneficial interest under the trusts of the father's will. After the son's death the fraud was discovered, & the mother & sister, as trustees of the father's will, brought an action against the mtgees., claiming a declaration that the mtges. were void against them, & delivery up of the title deeds. The other beneficiaries under the will were made defts.:—*Held*: inasmuch as, by virtue of R. S. C., Ord. 16, r. 7, trustees may sue on behalf of their *cestuis que trust*, beneficiaries ought not to have been made parties to the action.—*Re COOPER, COOPER v. VESEY* (1882), 20 Ch. D. 611; 51 L. J. Ch. 862; 47 L. T. 89; 30 W. R. 648, C. A.**

*Annotations:—Mentd. Manners v. Mew* (1885), 29 Ch. D. 725; *Brocklesby v. Temperance Permanent Bldg. Soc.*, [1893] 3 Ch. 130; *Re Ingham, Jones v. Ingham*, [1893] 1 Ch. 352; *Re De Leeuw, Jakens v. Central Advance & Discount Corpn.*, [1922] 2 Ch. 540.

**2320. Summons to determine construction of settlement.]—On a summons raising a question on**

**HOULDING v. POOLE** (1850), 1 Gr. 206.—**CAN.**

**P. —.]—Where a bill seeks the destruction of a trust estate, some or one of the *cestuis que trust* are necessary parties.—*BAKER v. TRAINOR* (1868), 15 Gr. 352.—**CAN.****

**q. Claim adverse to cestuis que trust.]—CLEVELAND v. McDONALD** (1850), 1 Gr. 415.—**CAN.**

**r. Bill to raise arrears of annuity.]—BINFELD v. TAYLOR** (1828), Beat. 91.—**IR.**

**t. Action to enforce sale of land—**

**Made without consent of beneficiaries.]—**Trustees of land without power of sale made a contract of sale without the consent of the beneficiaries. No ratification was alleged, but at the trial a ratification was attempted to be set up, an action being brought against

the construction of a settlement the trustees of the settlement sufficiently represent the interests of children otherwise unrepresented, whether in existence or not, who may be entitled under the trusts of the settlement.—*Re WHITING'S SETTLEMENT, WHITING v. DE RUTZEN*, [1905] 1 Ch. 96; 74 L. J. Ch. 207; *subsequent proceedings*, [1905] 1 Ch. at p. 101, C. A.

*Annotation*.—*Mentd. Re Hewett, Eldridge v. Iles*, [1918] 1 Ch. 458.

**2321. Petition for payment out of money in Court.**—On a petition by the three trustees of a will who were also trustees for the purposes of the Settled Land Acts, & one of them a tenant for life of one moiety as well of the settled estate, for payment out of money paid into ct. in respect of the purchase-money of land forming part of the settled estate taken by a railway co. under its compulsory powers, the tenant for life of the other moiety & the two remaindermen who appeared by one counsel were held to be properly made resps. & their costs were ordered to be paid by the railway co. under Lands Clauses Consolidation Act, 1845 (c. 18), s. 80.—*Re PIGGIN, Ex p. MANSFIELD RY. CO.*, [1913] 2 Ch. 326; 82 L. J. Ch. 431; 108 L. T. 1014.

#### C. Effect of Refusal or Inability of One Trustee to Join.

**2322. Whether all trustees must join—Trustee not signing deed.**—In a marriage settlement the husband covenanted with three persons, that if his wife survived him, his heirs or exors. should pay her an annuity for her life. Two of the trustees did not sign the deed. The other trustee brought an action on the covenant alleging in his declaration that the other two had not signed the deed:—*Held*: the declaration was bad, & the three trustees should have joined.—*PETRIE v. BURY* (1824), 3 B. & C. 353; 5 Dow. & Ry. K. B. 152; 3 L. J. O. S. K. B. 29; 107 E. R. 764.

*Annotations*.—*Reid. Wetherell v. Langston* (1817), 1 Exch. 634. *Mentd. Foley v. Addenbrooke* (1843), 4 Q. B. 197; *Dowlist v. Jones* (1864), 4 New Rep. 343.

**2323. Retired trustee—Whether necessary party—Action for foreclosure by co-trustee.**—Where a marriage settlement contained the usual power to appoint new trustees, & one of the trustees relinquished his trust, & a memorandum to that effect was indorsed on the settlement, but no new trustee was appointed in his room, & after his retirement the remaining trustees lent out the trust money on mtge.:—*Held*: the retired trustee was a necessary party to a bill of foreclosure of the mtged. estate.—*ADAMS v. PAYNTER* (1844), 1 Coll. 530; 14 L. J. Ch. 53; 4 L. T. O. S. 193; 63 E. R. 530; *sub nom. ADAMS v. PAYNTER, ADAMS v. LLOYD*, 8 Jur. 1003.

*Annotation*.—*Reid. Luke v. South Kensington Hotel Co* (1879), 11 Ch. D. 121.

**2324. Death of trustee—Right of surviving trustee to sue in own right—Action for use & occupation.**—Deft. being in possession of certain premises under a lease from two trustees for a term which had expired, a new lease was granted for a further term, but was executed by one of the trustees only. Deft. paid rent to both trustees until one of them died; & for the rent due after

his death the other trustee brought an action for use & occupation:—*Held*: he might maintain the action in his own right, & was not bound to sue as surviving trustee.—*WHEATLEY v. BOYD* (1851), 7 Exch. 20; 21 L. J. Ex. 39; 18 L. T. O. S. 65; 155 E. R. 838.

**2325. Trustee implicated in loss of trust estate—Trustee made defendant.**—It is quite familiar to us in equity for two trustees to file a bill to recover the trust estate, & if the third trustee has been implicated at all in the loss of it, to make that one trustee a deft., although you order the trust fund to be restored to all for the benefit of the *cestuis que trust* (*JESSEL, M.R.*).—*LUKE v. SOUTH KENSINGTON HOTEL CO.* (1879), 11 Ch. D. 121; 48 L. J. Ch. 361; 40 L. T. 638; 27 W. R. 514, C. A.

*Annotations*.—*Mentd. Palmer v. Mallett* (1887), 38 Ch. D. 411; *Webb v. Jonas* (1888), 39 Ch. D. 660; *Re Continental Oxygen Co., Elias v. Continental Oxygen Co.*, [1897] 1 Ch. 511.

#### D. Defences Available to and against Trustees.

**2326. What defence available against trustees—Action on covenant in lease—Performance of covenants with assignees of cestui que trust.**—It is no defence at law to an action on an indenture of lease by the trustee of a party who has become bkpt., that defts., the lessors, have performed their covenants with the assignees of the *cestui que trust*.—*BRITTEN v. BRITTEN* (1834), 4 Tyr. 473; 3 L. J. Ex. 181; *sub nom. BRITTEN v. PERROTT*, 2 Cr. & M. 597; 149 E. R. 898.

**2327. — Bankruptcy of trustee.**—*LAMB v. VICE*, No. 2344, *post*.

**2328. — Admissibility of statements of cestui que trust.**—In an action by trustees, plffs. are not bound by the statements of a party admitted to be *cestui que trust*, unless the nature of the interest of such party in the trust estate be shown. *Semble*: if it distinctly appear that such party alone is entitled to the benefit resulting from the action, his statements will be admissible in evidence for deft.—*MAY v. TAYLOR* (1843), 6 Man. & G. 261; 6 Scott, N. R. 974; 12 L. J. C. P. 314; 1 L. T. O. S. 256; 7 J. P. 690; 7 Jur. 515; 134 E. R. 891.

**2329. — Fraud of trustee—Cestui que trust not party to fraud.**—In covenant upon a separation deed, by which B. the husband, covenanted to pay to A. as trustee for the wife, certain quarterly payments. B. pleaded, that he was induced to make the indenture, & to covenant as in the declaration mentioned, through & by means of certain false & fraudulent misrepresentations of A. by him made to B., that is to say, by A., before & at the time of the making of the indenture by B. falsely & fraudulently representing that E. the wife of B., was a virtuous & moral person, & that he, A., was a virtuous & moral person, & fit to be trustee for her for the purposes of the indenture, whereas in truth E. was not, nor was A. a virtuous & moral person, etc.; that A. had treacherously, etc., seduced E. then being the wife of A. & subsequently to the marriage—which last-mentioned facts A. before & at the time of the making of the indenture suppressed & concealed from B.; that A. so fraudulently procured B. to make the indenture, in order that

the trustees alone:—*Held*: the proper parties were not before the ct.—*GARFORTH v. MACKAY* (1888), 6 N. Z. L. R. 534.—N.Z.

#### PART III. SECT. 7, SUB-SECT. 1.

##### —D.

**a. What defence available against trustees—Delay.**—Pursuers suing as trustees

for behoof of beneficiaries whom they represent, a plea of bar on account of *mora* against them is unavailing.—*LEE'S TRUSTEES v. DUNN*, [1913] S. C. (H. L.) 12.—SCOT.

**b. What defence available to trustees.**—*SMITH v. TRUST & LOAN CO. OF UPPER CANADA* (1863), 22 U. C. R. 525.—CAN.

**c. — Action for accounting.**—*HAMELIN v. NEWTON* (Man.), [1919] 1 W. W. L. 14.—CAN.

**d. — — — — —**—*LEITCH v. LEITCH*, [1927] S. C. 823.—SCOT.

**e. — Statute of Limitations.**—*HARTFORD v. POWER* (1868), 16 W. R. 822.—IR.



**Sect. 7.—Litigation with third parties: Sub-sect. 1, D. & E.; sub-sect. 2, A.]**

he, A., might seduce away E. from B., & might harbour & have access to her for the purpose of continuing the adulterous intercourse; & that B. was induced to make the indenture in the declaration mentioned, & to covenant as therein alleged, through & by means of the false & fraudulent misrepresentations of pltf., & by reason of the suppression & concealment as aforesaid of the premises so suppressed & concealed as in the plea mentioned, & in ignorance thereof, & not otherwise. The jury having found this plea proved. On motion for judgment *non obstante veredicto*:—**Held**: plea sufficiently showed the deed to be so tainted with fraud as to be incapable of being enforced in a ct. of law; & the plea might be sustained as a general plea of fraud, notwithstanding the absence of a direct averment that A. knew, at the time he seduced E., that she was the wife of B., & it was no answer to this defence, that pltf. was suing as a trustee, whose *cestui qui trust* was not shown to have been party to the fraud alleged on the record.—**EVANS v. EDMONDS** (1853), 13 C. B. 777; 1 C. L. R. 653; 22 L. J. C. P. 211; 21 L. T. O. S. 155; 17 Jur. 883; 1 W. R. 412; 138 E. R. 1407.

**Annotations**:—**Mentd.** *Forêt v. Hill* (1854), 15 C. B. 207; *Canham v. Barry* (1855), 15 C. B. 597; *Evans v. Carrington* (1860), 2 De G. & J. 481; *Higgins v. Samels* (1862), 2 John. & H. 460; *Harb. v. Swales* (1877), 7 Ch. D. 42; *Mathias v. Yetts* (1882), 46 L. T. 497; *Jolliffe v. Baker* (1883), 11 Q. B. D. 255; *Dempster v. Dempster* (1887), 3 T. L. R. 299; *Derry v. Peck* (1889), 14 App. Cas. 337; *Hulton v. Hulton*, [1916] 2 K. B. 642.

**2330. —Intended breach of trust.]—**A debtor to a trust estate is justified in refusing to pay his debt where an intended breach of trust, in the application of the money when paid, has been brought to his knowledge.—**IFONE v. ABERCROMBIE** (1882), 46 J. P. 487, D. C.

—**Set-off.**—*See* Sub-sect. 1, E., *post*.

**2331. What defence available to trustees—Action to set aside mortgage.]—**Trustees of a marriage settlement, whereby a mtge. debt was settled substantially for the benefit of A., cannot set up the defence of purchasers for valuable consideration without notice, independently of A. when the mtge. is attempted to be set aside on the ground of fraud.—**SPAIGHT v. COWNE, EDWARDS v. SPAIGHT** (1863), 1 Hem. & M. 359; 1 New Rep. 550; 71 E. R. 156.

*E. Set-Off.*

*See, generally, SET-OFF & COUNTERCLAIM, Vol. XL., pp. 367 et seq.*

**2332. Action by trustee against debtor—Whether debtor may set off debt due from cestui que trust.]—****BOTTOMLEY v. BROOKE** (1781), cited 1 Term Rep. at p. 621.

**Annotations**:—**Folld.** *Rudge v. Birch* (1785), cited in 1 Term Rep. at p. 622. **Consd.** *Winch v. Keeley* (1787), 1 Term Rep. 619; *Scholey v. Page* (1806), 3 Smith, K. B. 145; *Wake v. Tinkler* (1812), 16 East, 36. **Dtd.** *Tucker v. Tucker* (1833), 4 B. & Ad. 745. **Consd.** *Bedford v. Brunton* (1834), 1 Bing. N. C. 399. **Overd.** *Isberg v. Bowden* (1853), 8 Exch. 852. **Refd.** *Master v. Miller* (1791), 4 Term Rep. 320; *Thompson v. Thompson* (1821), 9 Price, 484; *Gleadow v. Atkin* (1832), 2 Cr. & J. 648; *Westoby v. Day* (1853), 2 E. & B. 605; *Bailey v. Finch* (1871), L. R. 7 Q. B. 34. **Mentd.** *Morrison v. Parsons* (1810), 2 Taunt. 407.

**2333. —.**—**RUDGE v. BIRCH** (1785), cited in 1 Term Rep. at p. 622; 99 E. R. 1286.

**Annotations**:—**Consd.** *Wake v. Tinkler* (1812), 16 East, 36. **Dtd.** *Tucker v. Tucker* (1833), 4 B. & Ad. 745. **Consd.**

*Bedford v. Brunton* (1834), 1 Bing. N. C. 399; *Isberg v. Bowden* (1853), 8 Exch. 852. **Refd.** *Master v. Miller* (1791), 4 Term Rep. 320.

**2334. —.**—**In an action by a trustee to recover a debt for the benefit of the cestui que trust, a debt due from the cestui que trust cannot be set off.**—**TUCKER v. TUCKER** (1833), 4 B. & Ad. 745; 1 Nev. & M. K. B. 477; 2 L. J. K. B. 143; 110 E. R. 636.

**Annotations**:—**Consd.** *Oulds v. Harrison* (1854), 10 Exch. 572. **Refd.** *Isberg v. Bowden* (1853), 8 Exch. 852; *Watkins v. Clark* (1862), 12 C. B. N. S. 277.

**2335. —.**—**The statutes of set-off are confined to legal debts between the parties, their sole object being to prevent cross-actions between the same parties.**—**ISBERG v. BOWDEN** (1853), 8 Exch. 852; 1 C. L. R. 722; 22 L. J. Ex. 322; 155 E. R. 1599; *sub nom.* *DOWDEN v. ISBY*, 1 W. R. 392.

**Annotations**:—**Refd.** *Oulds v. Harrison* (1854), 10 Exch. 572; *Watkins v. Clark* (1862), 12 C. B. N. S. 277; *Wilson v. Gabriel* (1863), 4 B. & S. 243; *Stanger v. Miller* (1865), L. R. 1 Exch. 58; *Christie v. Taunton, Delmard, Lane, & Co. Taunton, Delmard, Lane*, [1893] 2 Ch. 175; *Manley v. Berkett*, [1912] 2 K. B. 329.

**2336. —.**—**AGRA & MASTERMAN'S BANK v. LEIGHTON** (1866), L. R. 2 Exch. 56; 4 H. & C. 656; 36 L. J. Ex. 33.

**Annotations**:—**Folld.** *Banks v. Jarvis*, [1903] 1 K. B. 549. **Refd.** *Thornton v. Maynard* (1875), L. R. 10 C. P. 695; *Alloway v. Steere* (1882), 47 J. P. 55. **Mentd.** *Girvin v. Grepe* (1879), 13 Ch. D. 174; *Solomon v. Davis* (1883), Cab. & El. 83; *Robinson v. Marsh*, [1921] 2 K. B. 640.

**2337. —.**—**Where pltf. is suing merely as trustee, & debt. has a claim against the cestui que trust, which, but for the intervention of the trust, would have been a legal set-off, such claim can be set off in equity, & therefore, in an action at law, can be set off by an equitable plea.**—**THORNTON v. MAYNARD** (1875), L. R. 10 C. P. 695; 44 L. J. C. P. 382; 33 L. T. 433.

**Annotations**:—**Refd.** *Alcoy & Gandia Ry. & Harbour Co. v. Greenhill* (1897), 76 L. T. 542. **Mentd.** *Solomon v. Davis* (1883), Cab. & El. 83; *Galula v. Pintus* (1911), 104 L. T. 574.

**2338. —.**—**Where an action to recover a sum of money is brought by a person as agent or trustee for a third person, debt. can set up by way of set-off & defence to the trustee's claim, but only to the extent of such claim, a counter-claim for damages for a larger sum admitted to be due to debt. from the third person for whom the action is brought, & such counter-claim is a good answer to pltf.'s claim.**—**BANKES v. JARVIS**, [1903] 1 K. B. 549; 72 L. J. K. B. 267; 88 L. T. 20; 51 W. R. 412; 19 T. L. R. 190, D. C.

**Annotations**:—**Distd.** *McCreagh v. Judd*, [1923] W. N. 174. **Refd.** *Baker v. Adams* (1910), 102 L. T. 248.

**Right of trustees to set-off.]—***See* Part III., Sect. 3, sub-sect. 2, *ante*.

**Trustee's right of retainer against beneficiaries.]—***See* Part V., Sect. 17, *post*.

**SUB-SECT. 2.—PROCEEDINGS BY AND AGAINST CESTUI QUE TRUST.**

*A. In General.*

**2339. Action by cestui que trust—Whether trustee must be made party—Action to recover trust property—Realty & personalty distinguished.]**—**HARRISON v. PRYSE** (1740), Barn. Ch. 524; 27 E. R. 664; *sub nom.* *HARRISON v. HARRISON*, 2 Atk. 121, L. C.

**Annotation**:—**Refd.** *Davis v. Bank of England* (1824), 2 Bing. 393.

**2340. —.**—**Action to recover deed—Trustee not charged with breach of trust.]—****KNYE v.**

**PART III. SECT. 7, SUB-SECT. 2.—A.**

**1. Action by cestui que trust—Whether trustee must be made party—**

**Action for trespass.]—**The owner of an equitable estate cannot, notwithstanding the Judicature Act, proceed against a trespasser in his own name. He is

still bound to sue in the name of his trustee.—**ADAMSON v. ADAMSON** (1885), 7 A. R. 592; *affd.* (1886), 12 S. C. R. 563.—**CAN.**



MOORE (1822), 1 Sim. & St. 61; 57 E. R. 24; *sub nom.* — *Moseley*, 1 L. J. O. S. Ch. 18.

*Annotations*:—*Mentd.* Dunn v. Dunn (1828), 2 Sim. 329; Campbell v. Mackay (1836), 1 My. & Cr. 603.

**2341.** — *Action for specific performance—Purchase of land.*—A party having purchased land, & signified at the time, that he made the purchase on behalf of the trustee in his marriage settlement, who had money vested in him to be laid out in land, & a bill being filed against him for specific performance the ct. would not allow the cause to proceed until the trustee were made a party; & the cause stood over for that purpose.—*WYNNIAT v. LINDO* (1830), Tam. 512; 48 E. R. 204.

**2342.** — *Action against joint stock company—Misappropriation of profits.*—Although a clause in a co.'s deed of settlement provided that the co. should not be affected by notice of any trust, & that the receipt of the person standing in its books as the shareholder should, notwithstanding such notice, be a good discharge, it did not preclude a *cestui que trust* from requesting the co. to pay money due in respect of those shares to himself, or from suing the co. in respect of misappropriation of profits to which the owner of those shares would be entitled.—*BINNEY v. INCE HALL COAL & CANNEL CO.* (1866), 35 L. J. Ch. 363; 14 L. T. 392.

*Annotation*:—*Consd.* New London & Brazilian Bank v. Brookbank (1882), 21 Ch. D. 302.

**2343.** — *Right to bring action in name of trustees—Liability to give security for costs.*—*Cestui que trust*, bringing action in trustee's name, ordered to give security for costs.—*ANNESLEY v. SIMEON* (1819), 4 Madd. 390; 56 E. R. 749.

**2344.** — *Action on bond.*—An officer of the Palace Ct. entered into a bond, with sureties, to the knight marshal of that ct., conditioned for the due performance of the duties of his office; & (*inter alia*) that he should take sufficient bail from all defts. arrested, & should obey the lawful orders of the ct. Having taken insufficient bail from deft. arrested in an action in that ct., an order was made requiring him to pay the amount of debt & costs in the action, which he disobeyed:—*Held*: the knight marshal was entitled, as a trustee for pltf. in the action, to recover, in an action on the bond, the full amount of the debt & costs.

Pltf. clearly was a trustee for M.; he might sue on the bond in pltf.'s name, or pltf. might sue for the benefit of M. Nothing is more common than for a *cestui que trust* to sue on a bond in the name of his trustee. If deft. had pleaded the bkpcy. of pltf., it would have been a good replication that he was suing merely as trustee (*LORD ABINGER, C.B.*).—*LAMB v. VICE* (1840), 6 M. & W. 467; 8 Dow. 360; 9 L. J. Ex. 177; 4 Jur. 341; 151 E. R. 495.

*Annotations*:—*Apld.* Lloyd's v. Harper (1880), 16 Ch. D. 290. *Refd.* Pugh v. Stringfield (1858), 4 C. B. N. S. 364; Wright v. Chappell (1869), 20 L. T. 369; *Re* Flavell. Murray v. Flavell (1883), 25 Ch. D. 89.

**2345.** — *Trustee becoming bankrupt.*—*ABERDEEN v. GIBBS* (1845), 5 L. T. O. S. 191; *subsequent proceedings*, 5 L. T. O. S. 343.

— *Trustee unwilling to sue.*—*See* Subsect. 2, B., *post*.

— *Creditors of bankrupt.*—*See* BANKRUPTCY, Vol. V., pp. 1018, 1019, Nos. 8310–8319.

**2346.** — *Right to add trustee as co-plaintiff.*—*Necessity for consent in writing.*—The case of trustee & *cestui que trust* is not excepted from the

general rule of R. S. C. 1883, Ord. 16, r. 11, so as to enable the ct. or a judge, upon the application of a *cestui que trust*, to amend by adding his trustee as co-pltf. in an action in respect of the trust property, to dispense with the consent in writing of the trustee.—*BESLEY v. BESLEY* (1888), 37 Ch. D. 648; 57 L. J. Ch. 464; 58 L. T. 610; 36 W. R. 604, C. A.

**2347.** — *Defences available against cestui que trust—Any defence available against trustee.*—A trustee suing as pltf. in a ct. of law, must be treated in all respects as a party to the cause, & any defence against him is a defence in that action against the *cestui que trust*, who uses his name.—*GIBSON v. WINTER* (1833), 5 B. & Ad. 96; 2 Nev. & M. K. B. 737; 2 L. J. K. B. 130; 110 E. R. 728.

*Annotations*:—*Apld.* Evans v. Edmonds (1853), 13 C. B. 777. *Refd.* Wilkinson v. Lindo (1810), 7 M. & W. 81; De Potholier v. De Mattos (1858), E. B. & E. 461; Griffiths v. Perry (1859), 1 E. & E. 680.

**2348.** — *Injunction obtained against trustee.*—*Qu.*: whether injunction, which was obtained against trustee alone would prevent *cestui que trust* from prosecuting the action.—*ABERDEEN v. GIBBS* (1845), 5 L. T. O. S. 191; *subsequent proceedings*, 5 L. T. O. S. 343.

**2349.** — *Rights of trustees barred—Previous action by trustees.*—Decree made in favour of *cestui que trust*, upon an original bill, & without a bill of review, upon the discovery of fresh evidence, although a decree had previously been made, as to the same matter, against their trustees, but in a suit to which the *cestui que trust* were not parties.—*PIERCE v. BRADY* (1856), 23 Beav. 64; 53 E. R. 25; *sub nom.* *PIERCE v. BRADY*, 26 L. J. Ch. 257; 2 Jur. N. S. 772; 4 W. R. 736; *sub nom.* *PEARCE v. BRADY*, 27 L. T. O. S. 280.

**2350.** — *Where rights independent of trustees.*—Where the estate out of which the rent-charge issued passed to bkpt.'s assignee under a certificate of title negligently granted to bkpt. free of incumbrance. In an action brought by the beneficiaries against the Registrar General for compensation out of the assurance fund created by the Act (New South Wales Real Property Act, 1862):—*Held*: their rights, being under the Act independent of the trustees & being saved by the provisions of the Act in regard to persons under disability, could be enforced notwithstanding that their trustees' rights were barred.—*WILLIAMS v. PAPWORTH*, [1900] A. C. 563; 69 L. J. P. C. 129; 83 L. T. 184, P. C.

— *See* CONTRACT, Vol. XII., pp. 47, 48, Nos. 254–259.

**2351.** *Action against settlor—Failure to fulfil covenant.*—*Deflt.*, by a settlement made on his marriage, conveyed estates upon certain trusts, & covenanted with the trustees to pay off incumbrances on the estates, to the amount of £19,000 within a year:—*Held*: on his failing to do so, the trustees were entitled to recover the whole £19,000, in an action of covenant, though no special damage was laid or proved; & an inquiry, on which nominal damages had been given, was set aside, & a new writ of inquiry awarded.—*LETHBRIDGE v. MYRTON* (1831), 2 B. & Ad. 772; 9 L. J. O. S. K. B. 330; 109 E. R. 1332.

*Annotations*:—*Refd.* Carr v. Roberts (1833), 5 B. & Ad. 78. *Mentd.* Wigzell v. School for Indigent Blind (1882), 8 Q. B. D. 357.

**2352.** *Action against cestui que trust—Whether*

**2343 1.** — *Right to bring action in name of trustees—Liability to give security for costs.*—A *cestui que trust* about to file a bill should apply to his trustee

to become a co-pltf. indemnifying him against costs. If he refuses, he must abide his own costs, as a deft. If he is

not applied to, pltf. must pay his costs.—*READE v. SPARKES* (1827), 1 Mol. 8.—*IR.*

*Sec. 7.—Litigation with third parties: Sub-sect. 2, A. & B. Sect. 8: Sub-sect. 1.]*

other cestuis que trust necessary parties.]—A. purchased a leasehold of B., & paid the purchase-money, but no conveyance was executed. A. bequeathed it to B. for life, with remainders over. A.'s exor. filed a bill against B. alone, for a conveyance of the property upon the trusts of the will, not, however, seeking to recover it as assets for the purposes of the exorship. —*Held*: the other cestuis que trust were necessary parties; *Semle*: such a suit might be maintained.—*JOSLING v. KARR* (1840), 3 Beav. 494; 49 E. R. 194.

**2353. — Right to serve trustee with third party notice.—Trustee refusing to join in conveyance.—Specific performance.**—A purchaser filed a bill for specific performance. Deft. by his answer stated that he was desirous of completing the contract, but that he was only equitable owner, the legal estate being outstanding in a trustee for him, who refused to join in conveying to pltf. Deft. moved *ex parte* for leave to serve the trustee with a notice under R. S. C., Ord. 16, r. 18, stating the nature of the suit, & that he claimed indemnity against the trustee, & also to compel him to join in the conveyance:—*Held*: with the consent of pltf., leave might be given to serve the notice.—*TRELEVEN v. BRAY* (1875), 1 Ch. D. 176; 45 L. J. Ch. 113; 33 L. T. 827; 24 W. R. 108, C. A.

*Annotations*:—*Consd.* Padwick v. Scott, *Re Scott's Estate*, Scott v. Padwick (1876), 2 Ch. D. 736. *Refd.* *Re Collicie*, *Ex p. Smith* (1876), 34 L. T. 603; *Turner v. Hednesford Gas Co.*, *Hednesford Gas Co. v. Turner & Round* (1878), 47 L. J. Q. B. 296. *Mentd.* *Bencecke v. Frost* (1876), 34 L. T. 728; *Swansea Shipping Co. v. Duncane*, *Fox* (1876), 45 L. J. Q. B. 423; *Central African Trading Co. v. Grove* (1879), 40 L. T. 540.

**2354. Special case.—Where all persons interested are parties.—Whether trustee must be made party.**—Where all persons beneficially interested are parties to a special case, the trustees ought to be omitted.—*DARBY v. DARBY* (1854), 18 Beav. 412; 52 E. R. 162.

*Annotation*:—*N.F.* *Vorley v. Richardson* (1856), 25 L. J. Ch. 335.

**2355. — — — — —.]—Where there are trustees of a fund to ascertain the rights of parties on which a special case is filed they ought, under 13 & 14 Vict. c. 35, s. 1, to be made parties.**—*VORLEY v. RICHARDSON* (1856), 8 De G. M. & G. 126; 25 L. J. Ch. 335; 2 Jur. N. S. 362; 4 W. R. 397; 44 E. R. 337, L. J.

*Annotation*:—*Mentd.* *Perry v. Briant* (1862), 2 Drew. & Sm. 1.

*B. Trustees Unwilling to Sue.*

**2356. Whether trustees can be compelled to sue.**—*BAT v. —* (1462), Y. B. 2 Edw. 4, fo. 2, pl. 6.

*Annotations*:—*Mentd.* *Manser's Case* (1584), 2 Co. Rep. 3 a; *Chudleigh's Case* (1595), 1 Co. Rep. 120 a; *Lamb's Case* (1599), 5 Co. Rep. 23 b; *Cromwell's Case* (1601), 2 Co. Rep. 69 b; *Eaton v. Butler* (1629), Palm. 553; *James v. Hayward* (1630), Cro. Car. 184; *Tovey v. Pitcher* (1692), Carth. 177.

**2357. — — — — —.]—To entitle a third person, not named as a party to a contract, to sue either of the contracting parties, the third person must possess an actual beneficial right which places him in the position of cestui que trust under the contract.** By a deed of separation between husband & wife, the husband covenanted with the trustees to pay to them an annuity for the use of the wife & two eldest daughters, & also to pay to the trustees all the expenses of the maintenance & education of the two youngest daughters, provided that the

trustees permitted them to go to such school as the husband should direct, & provided also that the covenants by the trustees were duly observed & performed: provided, also, that the two youngest daughters should live at such place, being reasonable & proper for the purpose, as the husband should direct, & should be maintained and educated at his expense, the husband & wife to have all reasonable access to them; & the trustees covenanted with the husband that they would, during the continuance of the separation, keep him indemnified against all liability for the maintenance of the wife & the two eldest daughters, & against all molestation by them, & the wife would not take any proceedings against the husband for alimony, except as aforesaid; & that they, the trustees, would, on the husband defraying all the expenses connected therewith, carry out his desires as to the school at which the two youngest daughters should be educated, & the place at which they should live, & would permit them, if they so desired, & without any interference on the part of the wife, to accept any invitation of the husband to reside with him. On one of the two youngest daughters subsequently attaining sixteen, the husband refused any longer to maintain her, whereupon she brought an action, by her next friend, against the husband & the trustees of the separation deed to enforce the husband's covenant, the trustees having refused to allow their names to be used as pltf's., & the judge gave a judgment for enforcing the covenant:—*Held*: upon the construction of the deed, pltf. was not in the position of cestui que trust under the covenant so as to entitle her to maintain the action, but liberty was given to her, under R. S. C., 1883, Ord. 16, r. 2, to amend the writ, by adding the trustees, the wife, & the other daughters, or any of them, as pltf's. They [the trustees] cannot be compelled to sue; but they may be willing, when they know that the covenant cannot be enforced without their being pltf's., to allow their names to be used, on receiving a proper indemnity (COLTON, J.).—*GANDY v. GANDY* (1885), 30 Ch. D. 57; 54 L. J. Ch. 1154; 53 L. T. 306; 33 W. R. 803; 1 T. L. R. 520, C. A.

*Annotations*:—*Mentd.* *Clarke v. Birley* (1889), 41 Ch. D. 422; *Bishop v. Bishop* (1897), 41 Sol. Jo. 559; *Juddins v. Juddins* (1897), 66 L. J. P. 76; *Davis v. Marrable*, [1913] 2 Ch. 421; *R. v. Taylor*, *R. v. Amendt*, [1915] 2 K. B. 593.

**2358. Right to sue in own name.—Assignee of debt.**—(1) In a bill to carry into effect the trusts of a creditors' deed a simple allegation by pltf. that he is the assignee of the debt of one of the creditors is not sufficient to give him a right to sue.

(2) In a bill to carry into effect the trusts of a creditors' deed relief was sought in respect of a fraud alleged to have been committed by deceased debtor, & a purchaser in reference to a sale of the trust property, it being averred that the trustee had refused to sue in respect of such alleged fraud.

A mere allegation that the trustee in such a case has refused to sue, without stating any application to him for that purpose, or by whom, is insufficient.—*JERDEIN v. BRIGHT* (1861), 2 John. & H. 325; 30 L. J. Ch. 336; 4 L. T. 12; 9 W. R. 267; 70 E. R. 1081; *subsequent proceedings* (1862), 6 L. T. 270.

*Annotations*:—*As to* (2) *Refd.* *Bouck v. Bouck* (1866), L. R. 2 Eq. 19; *Townsend v. Parton* (1882), 45 L. T. 755.

**2359. — Cestui que trust.]—One of several cestuis que trust cannot, on an allegation that the**

trustees refused to take proceedings, maintain a suit against a debtor to the trust estate.

I came to the conclusion, very clearly, that a person interested in an estate or a trust fund could not sue a debtor to that trust fund, or sue for that trust fund, merely on the allegation that the trustee would not sue; but that if there was any difficulty of that kind, if the trustee would not take the proper steps to enforce the claim, the remedy of the *cestui que trust* was to file his bill against the trustee for the execution of the trust, or for the realisation of the trust fund, & then to obtain the proper order for using the trustee's name, or for obtaining a receiver to use the trustee's name, who would, on behalf of the whole estate, institute the proper action or the proper suit in this ct. (JAMES, L.J.).—*SHARPE v. SAN PAULO RY. CO.* (1873), 8 Ch. App. 597; 39 L. T. 9, L. JJ.

*Annotations*:—*Consd.* Meldrum v. Scorer (1887), 56 L. T. 471. *Mentd.* *Re* Hohenzollern Act. Fur Locomotivhan & City of London Contract Corp'n (1886), 54 L. T. 596; *Re* Ford & Bemrose (1902), 18 T. L. R. 443, *Re* Nott & Cardiff Corp'n., [1918] 2 K. B. 146.

2360. ———. ]—*GANDY v. GANDY*, No. 2357, *ante*.

2361. — Special circumstances.—Other *cestuis que trust* must be made defendants.]—By his will Testator appointed exors., & bequeathed, amongst other legacies, the sum of £10,000 to J. J. settled £8,000, part of such legacy, upon his children, & E. & H. were appointed trustees of the settlement. The £8,000 was paid by the exors. of testator's will to E., one of the trustees of the settlement, upon his sole receipt, & the same was subsequently converted by him to his own use. He absconded & was made bkpt., & a trustee in bkpcy. was appointed. An action was then commenced by C., one of the children of J., against the exors. of testator's will, & also against the trustee in bkpcy. of E. & H. (*inter alia*), to recover the £8,000. Pltf. by his statement of claim alleged that, although he had requested deft. H. so to do, such deft. had refused to take or concur in any proceedings for the recovery of the £8,000 from the estate of testator, or from his exors. A summons was taken out on behalf of defts., the exors. of testator, asking that the action might be dismissed with costs as against them, on the ground that the statement of claim disclosed no reasonable cause of action against them:—*Held*: (1) although a mere refusal to sue on the part of a trustee did not entitle a *cestui que trust* to sue in his own name, yet the circumstances of this case were special enough to render it proper that he should so sue; (2) in order to guard against a multitude of actions, all the other *cestuis que trust* must be made defts. to this action.—*MELDRUM v. SCORER* (1887), 56 L. T. 471.

*Annotation*:—*As to* (1) *Consd.* Alcock & Gandia Ry. & Harbour Co. v. Greenhill (1897), 76 L. T. 542.

2362. — Trade union.—Trustees parties to misappropriation of funds.]—Where the trustees of a union refused to take legal proceedings to restrain the union from a proposed misapplication of its funds, a single member of the union was held entitled to sue in his own name, the trustees being added as defts.—*HOWDEN v. YORKSHIRE MINERS' ASSOCN.*, [1903] 1 K. B. 308; 72 L. J. K. B. 176; 88 L. T. 134; 19 T. L. R. 193; 47 Sol. Jo. 237. C. A.; *on appeal*, *sub nom.* YORKSHIRE MINERS' ASSOCN. v. HOWDEN, [1905] A. C. 256, H. L.

*Annotations*:—*Reid*. Mullett v. United French Pollishers' London Soc. (1904), 91 L. T. 133; *Steele* v. South Wales Miners' Federation, [1907] 1 K. B. 361; *Cope* v. Crossing-

ham, [1909] 2 Ch. 148; *Osborne v. Amalgamated Soc. of Ry. Servants*, [1911] 1 Ch. 540; *Oram v. Hutt*, [1913] 1 Ch. 259; *Kelly v. National Soc. of Operative Printers' Assistants* (1914), 84 L. J. K. B. 557; *Sansom v. London & Provincial Union of Licensed Vehicle Workers* (1920), 36 T. L. R. 668; *Amalgamated Soc. of Carpenters, Cabinet Makers & Joiners v. Braithwaite, General Union of Operative Carpenters & Joiners v. Ashley*, [1922] 2 A. C. 440. *Mentd.* *Giblan v. National Amalgamated Labourers' Union of Great Britain & Ireland*, [1903] 2 K. B. 600; A.-G. v. De Winton, [1906] 2 Ch. 106; *Denaby & Cadeby Main Collieries v. Yorkshire Miners' Asscn.*, [1906] A. C. 384; *Baker v. Ingall*, [1912] 3 K. B. 106; *Fraser v. Fear* (1912), 107 L. T. 423; *Valentine v. Hyde*, [1919] 2 Ch. 129.

2363. Right to use name of trustee.]—If there is a dispute as to the inheritance, the ct. will not compel the trustee of an outstanding term attending the inheritance to lend his name to either party in an action of ejectment.—*DOE d. PROSSER v. KING* (1834), 2 Dowl. 580.

2364. ———.]—If . . . the trustee will not sue without the sanction of the ct., I think it is right to allow the *cestui que trust* to sue for himself, in the name of the trustee (WIGRAM, V.-C.).—*FLETCHER v. FLETCHER* (1844), 4 Hare, 67; 14 L. J. Ch. 66; 8 Jur. 1040; 67 P. R. 564.

*Annotations*:—*Consd.* *Re* Baker, Collins v. Rhodes, *Re* Seaman, Rhodes v. Wish (1881), 44 L. T. 414. *Reid*. *Bridge v. Bridge* (1852), 16 Beav. 315; *Alexander v. Braine* (1854), 19 Beav. 436; *Beech v. Keop* (1854), 23 L. J. Ch. 539; *Scales v. Maydie* (1855), 6 De G. M. & G. 43; *Woodford v. Charnley* (1860), 23 Beav. 96; *Patch v. Shore* (1869), 2 Drew. & Sm. 589; *Bonfield v. Hassell* (1863), 32 Beav. 217; *Phillips v. Edwards* (1864), 33 Beav. 440; *Re Patrick, Bills v. Tatham*, [1891] 1 Ch. 82; *Re Plumpton's Marriage Settlement, Underhill v. Plumpton*, [1910] 1 Ch. 609; *Re Cavendish Browne's Settlement, Trusts, Horner v. Rawley* (1910), 61 Sol. Jo. 27.

2365. — On giving proper indemnity.]—*GANDY v. GANDY*, No. 2357, *ante*.

2366. Duty to take proceedings against trustees.]—*SHARPE v. SAN PAULO RY. CO.*, No. 2359, *ante*.

## SECT. 8.—APPOINTMENT OF RECEIVER.

### SUB-SECT. 1.—IN GENERAL.

*See, generally*, RECEIVERS, Vol. XXXIX., pp. 1 *et seq.*; EXECUTORS, Vol. XXIII., pp. 44, 45, Nos. 202-227.

2367. Jurisdiction of court.—All parties not before court.]—*HAMP v. ROBINSON* (1865), 3 De G. J. & Sm. 97; 40 E. R. 574, L. JJ.

2368. — Fund in absolute discretion of trustees.—Trustees not parties to suit.]—By a will trustees were directed to set apart & invest a certain sum, & were authorised at their absolute discretion from time to time, & at such times as they should think proper, to pay the whole or part of the interest of such sum to deft. in the action, in such manner & in all respects as they should think proper. A judgment having been recovered against deft. in a county ct., the judge ordered the registrar of the ct. to be appointed to receive the interest of the sum in the hands of the trustees, & ordered the trustees to pay every half-year, as it became due, part of the interest of the sum to the receiver until the judgment in the action should be satisfied:—*Held*: a receiver could not be appointed to receive the interest of a fund which was in the absolute discretion of trustees, & the county ct. judge had exceeded his jurisdiction in making an order against the trustees, who were not parties to the suit.—*L. v. LINCOLNSHIRE COUNTY COURT JUDGE* (1887), 20 Q. B. D. 167; 57 L. J. Q. B. 136; 58 L. T. 54; 36 W. R. 174, D. C.

2369. Who may apply.—*Cestui que trust*—With consent of trustee.]—If plifs. desire a receiver,

### PART III. SECT. 8, SUB-SECT. 1.

1. Jurisdiction of court.—Constructive trust.]—*CASSIDY v. HOPKINS* (1847), 10 I. Eq. R. 208.—*IR. m.* — Trust not in writing.]—*D'ALBREDHYLL v. D'ALBREDHYLL* (1885), 3 N. Z. L. R. 391 (S. C.).—*N.Z.*

**Sect. 8.—Appointment of receiver : Sub-sects. 1 & 2, A., B. & C.]**

they are entitled to it, upon this consent of the trustee (LEACH, V.-C.).—TIDD v. LISTER (1820), 5 Madd. 429; 58 E. R. 959.

**Annotations :—**Consd. Browell v. Reed (1842), 1 Hare, 434. **Mentd.** Taylor v. Taylor, *Ex p.* Taylor (1875), 44 L. J. Ch. 727; *Re Wythes, West v. Wythes*, [1893] 2 Ch. 369; *Re Richardson, Richardson v. Richardson*, [1900] 2 Ch. 778.

**2370.** ———.]—There being some disagreement between three trustees, the majority acted alone & took securities in their own names, omitting the name of the dissentient trustee.—**Held :** p<sup>l</sup>t<sup>l</sup>., who was interested in the trust property, was entitled to a receiver.—SWALE v. SWALE (1856), 22 Beav. 584; 52 E. R. 1233.

**2371.** ———.]—Incumbrancer of cestui que trust's interest.—Creditors must be represented.]—Lands being devised to a trustee, upon trust to apply a certain sum annually in payment of A.'s debts; & as to the surplus, upon trust for A., an incumbrancer of A.'s interest files a bill against A. & the trustee, to have his security made available; creditor of A. ought to be made a party.

Till A.'s creditors are represented before the ct., a receiver will not be appointed, even though the trustee, in his answer, desires to be relieved from the trusts.—CLOVES v. WILDMORE (1823), as reported in 1 L. J. O. S. Ch. 177.

**2372.** ———.]—Trustee.]—When a tenant for life of leasehold houses is allowed by the trustees to receive the rents, & the houses are not kept in a proper state of repair according to the covenants of the lease, the ct. will, at the instance of one of the trustees, appoint a receiver of the rents, for the purpose of enforcing the proper repair of the houses.—*Re FOWLER, FOWLER v. ODELL* (1881), 16 Ch. D. 723; 44 L. T. 99; 29 W. R. 891.

**Annotations :—****Mentd.** *Re Courtier, Coles v. Courtier*, *Coates v. Coles* (1886), 34 Ch. D. 136; *Re Baring, Jeune v. Baring*, [1893] 1 Ch. 61; *Re Giers, Cooper v. Giers*, [1899] 2 Ch. 54.

**2373.** Whether appointed ex parte.—Risk of immediate loss to trust fund.]—Circumstances being alleged which involved the risk of immediate loss of a trust fund a receiver was appointed *ex parte* before service of the writ.—*Re H.'s ESTATE, H. v. H.* (1875), 1 Ch. D. 276; 45 L. J. Ch. 749; 24 W. R. 317; 2 Char. Pr. Cas. 80.

**2374.** Discharge of receiver.—On appointment of new trustees.]—A receiver who had been appointed in consequence of the misconduct & incapacity of trustees under a will, discharged, upon the appointment of new trustees by the ct.—BAINBRIDGE v. BLAIR (1841), 3 Beav. 421; 10 L. J. Ch. 193; 49 E. R. 105.

Who may be appointed.]—See RECEIVERS, Vol. XXXIX., pp. 16–21, Nos. 135–232.

**SUB-SECT. 2.—WHEN APPOINTMENT MADE.**

**A. In General.**

See, generally, RECEIVERS, Vol. XXXIX., pp. 24–41, Nos. 290–483.

**2375.** Necessity for strong grounds.]—DYOT v. MORGAN (1806), cited in 13 Ves. at p. 266; 33 E. R. 294.

**Annotation :—**Consd. Middleton v. Dodswell (1806), 13 Ves. 266.

**2376.** Trustee with power of entry & distress.]—Receiver ought not to be appointed where there is a trustee with power of entry & distress.—BUXTON & PARNHAM v. MONKHOUSE (1810), Coop. G. 41; 35 E. R. 470, L. C.

**Annotations :—****Apld.** Sollory v. Leaver (1869), L. R. 9 Eq. 22. **Consd.** Kelsey v. Kelsey (1874), L. R. 17 Eq. 495.

**2377.** Trustee willing to act.]—BAINBRIDGE v. BLAIR, No. 2399, *post*.

**2378.** Breach of condition by cestui que trust.—Claim of forfeiture by remainderman.]—Estates being devised to trustees and their heirs, upon trust, to permit M. M., M. C., & J. J., to reside in a mansion house, & receive part of the rents, in recompense of the maintenance of J. L. M., eldest son of M. M., till he attained twenty-one, or died, & subject thereto, to the use of the trustees & their heirs, in trust for J. L. M., until he should attain twenty-one, or die, & to the intent that the rents might be accumulated, & after he attained twenty-one, to the use of him & his assigns, during his life, he taking testator's surname of L.; remainder to the use of the trustees, & their heirs, during his life, to support contingent remainders; remainder to the use of his first & other sons, taking the surname of L., in tail male; remainder to the use of the second & every other son of M. M. by her present husband; remainder to her first & every other son by any future husband, in tail male, taking the surname of L.; remainder to the use of the trustees & their heirs, during the life of M. M. upon trust for her separate use; remainder to the use of the trustees, & their heirs, during the life of M. C. upon trust for her separate use; remainder to her first & other sons taking the surname of L. in tail male, with ulterior remainders, & a proviso, that the heirs male of the bodies of M. M. & M. C. claiming under the will, should, on taking possession of the estates, assume the surname of L., & within three years, procure their name to be altered by Act of Parliament, or some other effectual way; & in case they should neglect to obtain an Act of Parliament, or some other authority as effectual, for three years after being in possession, then the use & estate limited to the person so neglecting should cease & become void, & the estates should vest in the persons next in remainder, as if the person so neglecting were dead without issue; J. L. M., in 1794, having attained twenty-one, taken possession of the estates & assumed the name of L., but neglected to obtain an Act of Parliament, or any other authority for the use of that name, & having had a son born in 1806, & M. M. having died without other sons; on a bill by M. C., insisting that J. L. M. had forfeited the estates the ct. refused to appoint a receiver.—HAWKINS v. LUSCOMBE (1818), 2 Swan. 375; 36 E. R. 659, L. C.

**Annotations :—****Mentd.** Doe d. Müller v. Claridge (1848), 6 C. B. 641; Toller v. Attwood (1850), 15 Q. B. 929.

**2379.** Depreciation of estate.—Disrepair.]—GLOVER v. BARLOW (1831), 21 Ch. D. 788, n.

**Annotations :—****Mentd.** *Re Jackson, Jackson v. Talbot* (1882), 21 Ch. D. 786; *Conway v. Fenton* (1888), 40 Ch. D. 612; *Re Montagu, Derbishire v. Montagu*, [1897] 1 Ch. 685.

**2380.** ———.]—*Re FOWLER, FOWLER v. ODELL*, No. 2372, *ante*.

**2381.** ———.]—Management of trustees not improper.]—Receiver of a West India estate applied for by one of the parties entitled to a charge thereon, against the trustee, refused, notwithstanding the estate was depreciated in value, & incumbrances thereon were increasing, the management of the trustee not appearing to be improper.—BARKLEY v. REAY (LORD) (1843), 2 Hare, 306; 67 E. R. 127.

**2382.** Expense of appointment falling solely on applicant.]—BAINBRIDGE v. BLAIR, No. 2399, *post*.

**2383.** Disagreement between trustees.]—WILSON v. WILSON, No. 2401, *post*.

**2384.** ———.]—DAY v. CROFT (1839), Lewin on Trusts, 13th ed. 1309.

**2385.** ———.]—SWALE v. SWALE, No. 2370, *ante*.  
———.]—HART v. DENHAM, [1871] W. N. 2.

**2387. Misconduct or incapacity of trustee—Trustee purchasing trust estate.]**—Receiver refused though as between parties who had stood in the relative situation of *cestui que trust* & trustee, & though the latter, against whom the receiver was prayed, admitted that he had purchased the trust property. The ground of the decision being though the case was one of suspicion, that the ct. could not interfere till the purchase deed was actually set aside.—*GEORGE v. EVANS* (1840), 4 Y. & C. Ex. 211; 160 E. R. 982.

**2388** —.—*BAINBRIDGE v. BLAIR*, No. 2374, ante.

**2389. Receiver already appointed—Exercise of discretion of trustees.]**—Defts. who had outstanding judgments against plff., had, as parties to an administration suit, agreed to a compromise under which his life interest, which in the discretion of the trustees was to be forfeited in a certain event, which had happened, was by an order of a judge to be continued to be paid to him, & they applied for the appointment of a receiver of the money so payable to him. The application was refused by a judge at chambers, whose decision was upheld by a Div. Ct., on the ground that the discretion of the trustees had been exercised at their request by the judge in directing the receiver appointed in the administration suit to pay plff. the moneys to which he was entitled under the life interest given to him by his wife:—*Held*: the decision of the Div. Ct. was right, as the order of the judge had not altered the nature of the trust, which was one for the personal benefit of the husband, & a mere allowance which would not pass to creditors.—*PICKEN v. SANDER* (1886), 2 T. L. R. 287, C. A.

#### B. Trustee Unwilling to Sue.

**2390. Trustee refusing to act.]**—*BEAUMONT v. BEAUMONT* (1811), cited 3 Mer. at p. 696; 30 E. R. 267.

*Annotations*:—*Fold*, *Brodie v. Barry* (1811), 3 Mer. 695. *Refd.* *Browell v. Reed* (1842), 1 Hare, 434.

**2391.** —.— *All parties consenting.]*—Receiver appointed, before answer, in a case of a devise to four trustees, of whom two declined to act; all parties being before the ct., & consenting.—*BRODIE v. BARRY* (1811), 3 Mer. 695; 30 E. R. 267, L. C.

*Annotation*:—*Refd.* *Browell v. Reid* (1842), 6 Jur. 530.

**2392.** —.— *Disclaimer.]*—Where there are several trustees the disclaimer of some of them is not alone a sufficient ground for the appointment of a receiver, without the consent of those who remain.

It had never been the practice to appoint a receiver solely because one of several trustees had disclaimed, or was inactive, or had gone abroad (*SHADWELL, V.-C.*).—*BROWELL v. REED* (1842), 1 Hare, 434; 11 L. J. Ch. 272; 6 Jur. 530; 66 E. R. 1102.

**2393.** —.— *Infant cestui que trust.]*—Where one of two trustees of real estate declines to act, the ct. will appoint a receiver on behalf of infant *cestuis que trust*; but with liberty to either of the trustees to offer himself.—*TAIT v. JENKINS* (1842), 1 Y. & C. Ch. Cas. 492; 62 E. R. 985.

**2394.** —.— *Refusal to bring ejectment—Against claimant to trust estate.]*—*HAMP v. ROBINSON* (1865), 3 De G. J. & Sm. 97; 46 E. R. 574, L. J.

**2395. Trustee out of jurisdiction.]**—*BROWELL v. REED*, No. 2392, ante.

**2396.** —.—*Receiver appointed of a Govt. pension, the trustee being out of the jurisdiction.]*—*NOAD v. BACKHOUSE* (1843), 2 Y. & C. Ch. Cas. 529; 63 E. R. 237; *sub nom.* *NODE v. BACKHOUSE*, 12 L. J. Ch. 446; 7 Jur. 808.

**2397.** —.—*A receiver appointed of real & personal estate where the devisee in trust & personal representatives were in Jersey, & therefore out of the jurisdiction.]*—*SMITH v. SMITH* (1853), 10 Hare, App. 11, lxxi; 68 E. R. 1156.

*Annotation*:—*Refd.* *Re Maudslay & Field, Maudslay v. Maudslay & Field*, [1900] 1 Ch. 602.

**2398.** —.—*Re CONEY, CONEY v. BENNETT*, No. 2405, post.

#### C. Breach of Trust by Trustee.

**2399. Neglect to furnish satisfactory accounts.]**—(1) It is not of course to appoint a receiver against a trustee of real estates, when the trustee is willing to act.

(2) Where none but the party applying for a receiver can be affected by the expense of such an appointment, it forms a strong ground for making the appointment.

(3) In such case, & where the trustee had neglected to furnish satisfactory accounts, a receiver was appointed on petition after decree.—*BAINBRIDGE v. BLAIR* (1835), 4 L. J. Ch. 207.

**2400. Omission to get in personal estate—Injury to infant legatees.]**—Testator devised his real & personal estates to trustees, who were also exors. upon trust, to raise thereout, by sale or otherwise, £4,500, & invest the same in govt. or mtge. securities, & pay so much of the annual proceeds as should be necessary for the maintenance of his granddaughter, M. until her age of twenty-five years, & then to pay the annual proceeds to her for her life, & upon her death to divide the principal among her children, & if she died without children, among testator's other grandchildren, B., C., & D., & as to the residue of testator's real & personal estate, he directed his trustees to pay the rents, interest, & annual proceeds of it to B., C., & D. equally till the eldest should attain twenty-five, & upon that event happening, to convert so much of the residue as should not consist of money into money, & divide the same equally among B., C., & D.; & power was given to the trustees to advance to B. & D. part of their expectant portions before they attained twenty-five:—*Held*: it was the duty of the trustees to set apart & invest as soon as possible the sum of £4,500, & for that purpose, to sell testator's real estates, notwithstanding that none of the grandchildren might have attained twenty-five; & in consequence of the non-performance of this duty by the acting trustee & exor., & other acts of misconduct on his part, a receiver was appointed.

It is a good ground for the appointment of a receiver, that an exor. & trustee has, by omitting to get in testator's personal estate, deprived infant legatees of the maintenance or means of advancement provided for them by the will.—*RICHARDS v. PERKINS* (1838), 8 L. J. Ex. Eq. 57; 3 Y. & C. Ex. 290; 3 Jur. 168; 160 E. R. 716.

**2401. Permitting rents to fall in arrear—Application by tenant for life.]**—Where the payment of

#### PART III. SECT. 8, SUB-SECT. 2.—A.

**2388 i. Misconduct or incapacity of trustee.]**—The ct. will grant an order for an injunction to restrain a trustee from interfering with the trust estate where fraud is charged, & by the same order

direct the appointment of a receiver.—*VERNON v. KINZIE* (1845), 2 O. S. 40.—*CAN.*

—*Trustee removed by court—Trust almost at an end.]*—The ct. having removed trustees, & it appear-

ing that the period of the trust had almost expired, & that nothing remained but to wind up the estate, a receiver was appointed instead of new trustees.—*GARESCHE v. GARESCHE* (1895), 4 B. C. R. 310.—*CAN.*

*Sect. 8.—Appointment of receiver: Sub-sect. 2, C.*

*Sect. 9: Sub-sect. 1, A., B., C. & D. (a) & (b).]*

rents in consequence of disputes among the trustees, had been permitted to fall into arrear, on a bill filed by *pltf.*, who was entitled to the rents & profits for her life, against the trustees, the ct. ordered a receiver to be appointed, & the costs of the suit to be paid by the trustees.—*WILSON v. WILSON* (1838), 2 Keen, 249; 48 E. R. 624.

**2402. Committing waste—Farm lands converted into racecourse.**—*S.*, by his will, appointed B. together with certain other persons his exors. & trustees, who all, with the exception of B., disclaimed; in consequence of which B. acted alone in the trusts of the will. It having appeared that B. had, during his acting in the trust, been guilty of improvident expenditure, & among other things, had converted farming lands into a racecourse: *Held*: although no corrupt intention appeared to have prompted B. in committing wilful waste, but he had acted solely under a mistaken notion of his duties of a trustee, yet his conduct was quite sufficient to justify the ct. in appointing a receiver.—*WHITEHEAD v. BENNETT* (1845), 6 L. T. O. S. 185; 10 Jur. 3.

**2403. Deposit of title deeds of trust estate—As security for personal loan.**—*Testatrix* bequeathed a leasehold estate to trustees & exors., in trust for sale, & gave one of such exors. a beneficial interest for his life in one-fourth part of the estate. The latter exor., being at the time indebted to the estate of testatrix, made an assignment of his beneficial interest by way of mtge., to secure a private debt which he owed to a creditor, & deposited the title deeds with the creditor.

Surely it is clear that, on a bill filed by *pltf.* [exors.] against T. [the depositor of the title deeds] stating such a case, a receiver would be appointed (*TURNER, V.-C.*).—*COLE v. MUDDLE* (1852), 10 Hare, 186; 22 L. J. Ch. 401; 20 L. T. O. S. 107; 16 Jur. 853; 68 E. R. 892.

*Annotation:—Mentd. Re Whistler & Richardson* (1887), 57 L. T. 77.

**2404. Loss of portion of trust fund—Trustee of benefit society.**—Where a portion of a trust fund has been lost that is *prima facie* a breach of trust & a sufficient ground for the appointment of a receiver on an interlocutory application.

On a bill filed by *pltf.* insured in a society, whose funds were liable to pay the insurance money, on behalf of himself & other persons so insured, charging a loss of the fund through the negligence of the directors & on the answer & affidavits showing that the secretary had absconded with part of the funds, & that some of the directors were in needy circumstances:—*Held*: *pltf.* was entitled to the appointment of a receiver & to an injunction.

It is admitted that funds have been lost of which it was the duty of *defts.* to take care. That loss is *prima facie* evidence of a breach of the duty of *defts.*, sufficient to authorise the interference of the ct. by the appointment of a receiver (*KNIGHT BRUCE, L.J.*).—*EVANS v. COVENTRY* (1854), 5 De G. M. & G. 911; 3 Eq. Rep. 515; 24 L. T. O. S. 186; 19 J. P. 37; 3 W. R. 149; 43 E. R. 1125, L. J.

*Annotations:—Consd. Re State Fire Insee.* (1863), 1 De G. J. & Sin. 634. *Mentd. Re English & Irish Church & University Assoc. Soc.* (1862), 1 Hem. & M. 79; *Kearns v. Leaf, Aldebert v. Kearns* (1864), 1 Hem. & M. 681; *Bell's Case, Korr's & Stubbs' Cases, Bleckley's Case, Craig's Executors' Case, Wilson's Case* (1870), L. R. 9 Eq. 706.

**2405. Failure to comply with order for payment into court.**—Under the general power to appoint receivers given by Jud. Act, 1873 (c. 60), s. 25 (8), & having regard to R. S. C. 1883, Ord. 42, rr. 4, 8 the ct. has jurisdiction to enforce a judgment for

payment of money into ct. by a defaulting trustee by the appointment of a receiver of his equitable interest in property in this country; & order accordingly where from the debtor being out of the jurisdiction service of a writ of attachment could not be effected.—*Re CONEY, CONEY v. BENNETT* (1885), 29 Ch. D. 993; 54 L. J. Ch. 1130; 52 L. T. 961; 33 W. R. 701.

*Annotations:—Fold, Re Pemberton, Pemberton v. Royal Hospital for Incurables*, [1907] W. N. 118. *Reid, Holmes v. Millage*, [1893] 1 Q. B. 551. *Mentd. Archer v. Archer*, [1886] W. N. 66.

**2406.** —.]—*Re PEMBERTON, PEMBERTON v. ROYAL HOSPITAL FOR INCURABLES*, [1907] W. N. 118.

## SECT. 9.—LODGMET OF TRUST FUND IN COURT.

### SUB-SECT. 1.—PAYMENT IN.

#### A. In General.

See Trustee Act, 1925 (c. 19), s. 63; Funds Rules, 1927, rr. 29–42.

**2407. Necessity for order of court.**—*Ex p. HAMILTON*, No. 2516, *post*.

**2408. Trustee's right to pay in.**—(1) A surviving trustee of a settlement paid into ct. under Trustee Act, 1847 (c. 96), a sum of £160 19s. 11d. which was the produce of one-eighth part of a sum of stock, which stock, on the death of A. was divisible amongst certain parties, to one-eighth of which *pltf.*'s wife was entitled.

*Semble*: this would have been a breach of trust on the part of the trustee if the parties had not given him an authority, express or implied, to sell the stock. The trustee had not paid into ct. a small sum of £1 7s. 0d. being the one-eighth of a dividend in the stock to which *pltf.* was also entitled:—*Held*: although trustees were bound to pay into ct. the whole of the trust fund, yet, as the retention of this small sum was not made the ground of complaint against the trustee, nor was the question raised by the bill, *pltf.*'s bill must be dismissed.

(2) The question whether there was or was not any difficulty in the execution of the trust, was not a point open to any *cestui que trust* to take, & a trustee having funds in his hands was at liberty to pay them into ct. if he were so minded. . . . A trustee paying funds into ct. was bound to pay in the whole, & not retain a small sum which the parties might have no means of recovering (*LORD CRANWORTH, V.-C.*).—*MITCHELL v. COBB* (1851), 17 L. T. O. S. 25.

**2409. Refusal to pay in — Justification.**—*Semble*: trustees are always justified in not paying money into ct., as it may turn out there was no occasion for so doing.—*MOUNTAIN v. YOUNG* (1854), 18 Jur. 769.

**2410. Quantum to be paid in.**—*MITCHELL v. COBB*, No. 2408, *ante*.

**2411.** — Failure to comply with direction to accumulate residue—Order to pay in interest thereon.]—Where there is a direction in the will to accumulate a residue, with which the exor. & trustee does not comply he will not be allowed to pay the bare residue into ct., but must pay also interest from the expiration of one year after testator's decease up to the date of filing the answer.—*AMISS v. HALL* (1857), 3 Jur. N. S. 584.

*Annotation:—Dhtd. Re Emmet's Estate, Emmet v. Emmet* (1881), 17 Ch. D. 142.

**Breach of trust generally.**—See Part VII., *post*. **Charging orders & stop orders on funds in court.**—See, generally, EXECUTION, Vol. XXI., pp. 647–662.



**Compulsory purchase.**—See COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 233, 234, Nos. 1216-1235.

*B. Who may Pay in.*

See Trustee Act, 1925 (c. 19), s. 63.

**2412. Foreign government—Necessity for Attorney-General as party.**—The ct. refused to order dividends received before the bill filed, of stock purchased by the old govt. of Switzerland, to be paid into ct. by the trustees on the application of the present govt., without having the A.-G. a party.—*DOLDER v. BANK OF ENGLAND* (1805), 10 Ves. 352; 32 E. R. 881, L. C.

**2413. Surviving trustees.**—Stock standing in the joint names of surviving & deceased trustees may be transferred by the survivors to the Accountant-General under Trustee Relief Act, 1847 (c. 96).—*Re PARRY* (1848), 6 Hare, 306; 12 Jur. 721; 67 E. R. 1183; *subsequent proceedings*, 11 L. T. O. S. 532.

**2414. Purchaser of property subject to pecuniary charge.**—A. purchased an estate, subject to a pecuniary charge:—*Held*: he was not entitled to pay the amount of the charge into ct. under Trustee Relief Act, 1850 (c. 60).—*Re BUCKLEY'S TRUST* (1853), 17 Beav. 110; 1 Eq. Rep. 18; 22 L. J. Ch. 934; 21 L. T. O. S. 71; 17 Jur. 478; 51 E. R. 974.

**2415. Stakeholder.**—A mere stakeholder may pay a fund into ct. under Trustee Relief Act, 1847 (c. 96).—*Re UNITED KINGDOM LIFE ASSURANCE CO.* (1865), 34 Beav. 493; 6 New Rep. 59; 34 L. J. Ch. 554; 12 L. T. 411; 11 Jur. N. S. 424; 13 W. R. 645; 55 E. R. 726.

*Annotations*:—*Reid*, *Re Haycock's Policy* (1876), 1 Ch. D. 611. *Mentid*, *Re Webb's Policy* (1866), L. R. 2 Eq. 456; *Re Pettit's Estate* (1876), 1 Ch. D. 478; *Matthew v. Northern Assco.* (1878), 8 Ch. D. 80.

**2416. Bankers.**—*Re SUTTON'S TRUSTS*, No. 2179, *post*.

**Insurance company—Disputed title to life assurance.**—See INSURANCE, Vol. XXIX., pp. 389, 390, Nos. 3103, 3111-3118.

**Charity trustees.**—See CHARITIES, Vol. VIII., p. 395, No. 2178.

*C. In Administration of Trust by Court.*

See Sect. 10, sub-sect. 9, B., *post*.

*D. Grounds for Paying In.*

(a) *In General.*

See Trustee Act, 1925 (c. 19), s. 63.

**2417. Bequest of grandchildren—Dispute between parent of children & trustee—As to investment during minority.**—Testator bequeathed to each of his six grandchildren £200 & in case any of them should not have attained twenty-one at the death of testator, he directed his trustees, who were also his exors. & residuary legatees, to pay interest for the legacies of such children, after the rate of 5 per cent. towards their maintenance & education. Upon differences arising between the father of the children & the trustees as to the investment of the money pending minorities, the trustees file their bill to obtain the direction of the ct., & for leave to pay the amount into ct.:—*Held*:

the trustees might pay the principal money into ct.—*ABRAHAM v. HOLLDERNESS* (1842), 6 Jur. 200.

**2418. To enable trustee to get rid of trust.**—The intention of the Trustee Act is not that money paid into ct. should remain there but for the present relief of trustees (KINDERSLEY, V.-C.).—*Re LLOYD'S TRUST* (1854), 2 W. R. 371.

**2419.**—*Re KNIGHT'S TRUSTS*, No. 2711, *post*.

**2420. One of several trustees invalidated.**—*Re BROADWOOD'S TRUSTS* (1863), 8 L. T. 632.

**2421. Mere lodging claim to trust fund—Claim unfounded.**—It is not because a man brings forward a claim to a trust fund that the trustee of that fund, should the claim be unfounded, is justified in paying the trust fund into the Ct. of Ch. (JESSEL, M.R.).—*Re MACLEAN'S TRUSTS* (1874), L. R. 19 Eq. 271.

*Annotations*:—*Mentid*, *Re Phillips' Insec.* (1883), 48 L. T. 81; *Urquhart v. Butterfield* (1837), 37 Ch. D. 357.

(b) *Bonâ fide Doubt as to Persons Entitled.*

See Trustee Act, 1925 (c. 19), s. 63.

**2422. Whether trustee entitled to pay in.**

(1) Trustees not entitled as of course to their costs of paying a fund into ct. under Trustee Relief Act, where such payment has been vexatious, & not justified by the possibility as to the title to the fund.

(2) Where, however, the person entitled to the fund, & objecting to its being paid in, claims by representation, trustees will have their costs, as the possibility of a disposition by deceased person through whom the claim is made is not excluded.—*Re LANE'S TRUST* (1854), 24 L. T. O. S. 181; 3 W. R. 134.

**2423.**—Trustees have a right to some sort of discharge from their *cestui que trust* not, perhaps, a release, unless the instrument creating the trust was under seal; & trustees, between whom & their several *cestuis que trust* disputes have arisen as to the amounts actually due to them respectively, are justified in paying into ct., to the separate account of each *cestui que trust*, the sum to which they believe him to be entitled & may have their costs of making such payment out of the respective funds.—*Re WRIGHT'S TRUSTS* (1857), 3 K. & J. 419; 69 E. R. 1173.

*Annotations*:—*Dbid*, *Re Rudbeck*, *Newberry v. Mansfield* (1910), 102 L. T. 89. *Reid*, *Re Pridg of Wales & Annlo Lisle, Mortgagees* (1867), 15 L. T. 606; *Re Nettlefold's Trusts* (1888), 59 L. T. 315.

**2424.**—A trustee will be allowed his costs of paying money into ct. under Trustee Relief Act where there is a case of *bonâ fide* responsibility. He is not bound to take upon himself the responsibility of deciding between adverse claimants.—*Re HEADINGTON'S TRUST* (1857), 27 L. J. Ch. 175; 6 W. R. 7.

**2425.**—Trustees, having *bonâ fide* doubts, are justified in paying funds into ct. under Trustee Relief Act, 1847 (c. 96), & will receive their costs. The ct. considering it important not to make the rule too stringent as to their costs in such cases.—*Re WYLLY'S TRUST* (1860), 28 Beav. 458; 2 L. T. 788; 25 J. P. 81; 6 Jur. N. S. 906; 8 W. R. 645; 54 E. R. 442.

*Annotation*:—*Expid*, *Re Cull's Trusts* (1875), L. R. 20 Eq. 561.

**PART III. SECT. 9, SUB-SECT. 1.—B.**

**o. Trustee de son tort.**—A trustee *de son tort* is, as such, either an express or a constructive trustee, & liable to account to his infant *cestui que trust*, & so entitled to come to the ct., under Trustee Relief Act, R. S. O. 1897 (c. 336), s. 4 & obtain an order allowing him to pay the moneys into ct.—

*Re PRESTON* (1906), 8 O. W. R. 828; 13 O. L. R. 110.—**CAN.**

**p. Surety of administrator.**—The surety in the Probate Ct. of an administrator who has got money assets of the intestate in his hands may lodge it in ct. under the Trustee Relief Act.—*Re MONAHAN'S TRUSTS* (1874), 8 I. R. Eq. 353.—**IR.**

**PART III. SECT. 9, SUB-SECT. 1 —D. (b).**

**2422 i. Whether trustee entitled to pay in.**—*Re BAJUS* (1893), 24 O. R. 397.—**CAN.**

**2422 ii.**—*Re MATHERS* (1897), 18 P. R. 13.—**CAN.**



Sect. 9.—*Lodgment of trust fund in court: Sub-sect.*

## 1, D. (b) &amp; (c), E. &amp; F.]

**2426.** —[—]—Trustees paid the ascertained share of a residue of a married woman into ct., under Trustee Relief Act, 1847 (c. 96). The ct. refused to make the trustees pay the costs, observing that it was not desirable to act too strictly in such cases.—*Re BROCKLESBY* (1861), 20 Beav. 652; 54 E. R. 781.

**2427.** —[—]—A trustee is not justified in paying a fund into ct. under Trustee Relief Act, 1847 (c. 96), merely because, acting *bona fide*, he entertains a doubt as to the right of claimant. There must be a reasonable case of uncertainty, or he may be ordered to pay the costs of the petition for payment out.—*Re ELGAR* (1864), 11 L. T. 415.

**2428.** —[—]—Where a lady who had assumed the black veil & was a professed nun, but otherwise *sui juris*, became entitled to a share of residue paid into ct. by the trustees of the will bequeathing it, & petitioned for payment of it to herself, or to trustees nominated by her to whom she had assigned the fund upon trust for the superior priest or ecclesiastic of the Oratory of St. Philip Neri at Brompton. Under the circumstances the trustees of the will:—*Held*: not to have been justified in bringing the fund into ct., & all costs were refused to them.—*Re METCALFE'S TRUSTS* (1864), 2 De G. J. & Sm. 122; 3 New Rep. 657; 33 L. J. Ch. 308; 10 L. T. 78; 28 J. P. 260; 10 Jur. N. S. 287; 12 W. R. 538; 46 E. R. 321, L. J.

*Annotation.*—*MentD. Didsheim v. London & Westminster Bank*, [1900] 2 Ch. 15.

**2429.** —[—]—Where trustees have *bona fide* doubts as to whether a mtged. is entitled to be paid the whole or any part of a mtged. fund in their hands, or have notice that there is something suspicious, or where there are any circumstances which make it reasonable for them to decline to be satisfied, they are not bound to pay over the fund on the receipt of the mtged. under Conveyancing Act, 1881 (c. 41), s. 22 (1), but may seek the protection of the ct. & pay the money into ct.—*HOCKEY v. WESTERN*, [1898] 1 Ch. 350; 67 L. J. Ch. 166; 78 L. T. 1; 46 W. R. 312; 14 T. L. R. 201; 42 Sol. Jo. 232, C. A.

**2430.** —[—]—Where trustees paid a fund into ct. to which a certain testator was entitled who had left it to H. absolutely, & H. was described in the probate of testator's will as H. the widow of testator, when, in fact although testator had gone through a form of marriage with H., his wife was still alive, & his wife & child both made claims to the fund & the trustees paid it into ct. On a summons for payment out:—*Held*: they were to be allowed their costs of the summons.—*Re DAVIES' TRUSTS* (1914), 59 Sol. Jo. 234.

(c) *Trustee Unable Otherwise to obtain Effectual Discharge.*

See Trustee Act, 1925 (c. 19), s. 63.

**Beneficiary an Infant.—Investment proving insufficient.—Payment into court by executor.**—See EXECUTORS, Vol. XXIV., pp. 447, 448, Nos. 5174–5180.

**2431. Beneficiary incapable of managing own affairs.**—*Re PARKER'S WILL*, No. 2586, *post*.

**2432. Beneficiary deaf, dumb & blind.**—*Re BIDDULPH'S TRUSTS, Re POOLE'S TRUSTS*, No. 2497, *post*.

E. *Procedure.*

See R. S. C., Ord. 54, B., r. 3, Supreme Court Fund Rules, 1927, r. 41, C. C. R., 1903–1928, Ord. 38.

**2433. Notice of motion to pay in.—Service.—Who**

**must be served.**—Where all the *cestuis que trust* were served with the copy of a bill for appointment of new trustees, & transfer to them of the trust fund, there being nothing asked in the bill as to the transfer of the fund into ct.:—*Held*: all the *cestuis que trust* must be served with notice of motion to transfer the fund into ct., as there was nothing in the bill to indicate that it was intended so to deal with the trust fund.—*LEWELLIN v. COBBOLD* (1853), 1 Sm. & G. 572; 22 L. T. O. S. 131; 17 Jur. 1111; 1 W. R. 211; 65 E. R. 251.

**2434. Notice of lodgment.—Whether court will dispense with notice.**—Upon payment into ct. by trustees of a reversionary fund, which had fallen into possession since the death of a married woman who was entitled thereto:—*Held*: upon production of a full affidavit as to unsuccessful inquiries for the husband, who had gone to Australia in 1850, & had not since been heard of, the ct. would dispense with notice to the husband.—*Re HANSFORD* (1859), 7 W. R. 199; *subsequent proceedings*, 7 W. R. 254.

**2435.** —[—]—Where the only person entitled to a trust fund paid into ct. under Trustee Relief Act, 1850 (c. 60), had gone to America, & had not been heard of since 1868, service of the notice of the payment into ct. required to be given by the trustees under Consolidated Order 41, r. 4, was dispensed with.—*Re WALTERS* (1869), 22 L. T. 120.

**2436.** —[—]—When, on payment into ct. under Trustee Relief Act, 1850 (c. 60), the address of the person entitled to the fund is not known, the ct. has no jurisdiction to dispense with the notice required to be given by the Chancery Funds Amendment Orders, 1874, r. 4, nor to direct how such notice should be given. The party paying in the fund must take that responsibility upon himself.—*Re HARDLEY'S TRUSTS* (1879), 10 Ch. D. 664; 48 L. J. Ch. 335; 40 L. T. 409; 27 W. R. 587, C. A.

**2437.** —[—]—A trustee, on paying money into ct. under Trustee Relief Act, 1847 (c. 90), named in his affidavit, as one of the parties interested in the fund, a person whose interest was contingent on his having returned to England within seven years from the death of the donor of the fund. The person in question had been last heard of in Australia, about three years after the death of the donor of the fund, & four years before the payment into ct., & it had since been impossible to ascertain where he was to be found:—*Held*: the notice required to be given by Chancery Consolidated Ord. 41, r. 4, might properly be dispensed with in his case.—*Re WHITAKER* (1882), 47 L. T. 507; 31 W. R. 114.

**2438.** —[—]—A trustee who pays a fund into ct. under Trustee Relief Act, not being required since the repeal of the Chancery Funds Consolidated Rules, 1874, to set forth in his affidavit the names of the persons entitled to the fund, is no longer bound to give notice to such persons under Order 5 of the Chancery Funds (Amended) Order, 1874, that order having been rendered of no effect by such repeal.—*Re GRAHAM'S TRUSTS*, [1891] 1 Ch. 151; 60 L. J. Ch. 98; 63 L. T. 664; 39 W. R. 157.

**2439.** —[—]—Whether court will direct how to be given.—Address of person entitled unknown.—*Re HARDLEY'S TRUSTS*, No. 2436, *ante*.

**2440. Title of account to which fund paid.—Fund in aliquot parts on distinct trusts.**—A fund bequeathed in aliquot parts, on distinct trusts, ought not to be paid in by the trustees to the joint account of the several trusts, but ought to be

carried to separate accounts.—*Re TILSTONE'S TRUST* (1852), 9 Hare, App. I., lix; 68 E. R. 792.

*Annotation:—***Held.** *Re Hodgson's Trusts* (1854), 2 Eq. Rep. 1083.

**2441. — Infant beneficiary.**—Where a fund is paid into ct. under the Trustee Act to the general account of a will, the ct. will order it to be carried to the separate account of the person, an infant, named in the trustee's affidavit, as the only person entitled to such fund, & it is not necessary previously to change the title of the account.—*Re COULSON'S TRUST* (1857), 4 Jur. N. S. 6.

**2442. — Trusts of will generally.—Application to transfer to particular account.**—Where, under Trustee Relief Acts, 1847 (c. 96); 1849 (c. 74), money is paid into ct., "upon the trusts of a will," it involves the general administration of the estate, & the ct. will not order it to be transferred to a particular account, except at the request, & on the responsibility, of the trustee.—*Re WRIGHT'S TRUSTS* (1852), 15 Beav. 367; 18 L. T. O. S. 268; 51 E. R. 580.

**2443. Cash & stock not admitting of division below one pound.—Transfer to separate account.—Form of order.**—Form of order where cash & stock not admitting of division below £1 are paid & transferred into ct. to separate accounts.—*Re PERRY'S TRUSTS* (1874), 22 W. R. 433.

**2444. Affidavit.—Specification of moneys paid in.—Precise specification.**—(1) Trustee Relief Act, 1847 (c. 96), is a very useful Act, but great care must be taken in the application of it, for whatever is done under it in paying out the money, etc., is in effect the same as a decree or final judgment in a cause.

(2) The affidavit of the trustee paying in money must be very precise in stating the legacy, & showing the claim to it, & identifying it with the sum so paid in; & it is not enough merely to pay it in, nor does a trustee thereby discharge himself of his duty.—*Re CAWTHORNE* (1849), 12 Beav. 50; 50 E. R. 981; *sub nom. Re CAWTHORNE'S TRUSTS, Re HARWOOD*, 18 L. J. Ch. 116; *sub nom. Re HAREWOOD*, 12 L. T. O. S. 529.

*Annotation:—Generally.* **Mentd.** *Martineau v. Rogers* (1856), 25 L. J. Ch. 398.

**2445. — Sums to be written in words not figures.**—An affidavit under Trustee Relief Act, 1850 (c. 60), must have such sums of money as are mentioned in it printed in words.—*Re WATTS' TRUST* (1876), 34 L. T. 647; 24 W. R. 701; 3 Char. Pr. Cas. 61.

**2446. — Statement of claims to fund.**—*Re CAWTHORNE*, No. 2444, *ante*.

**2447. — Of which notice received.**—It is the duty of a trustee paying money into ct. under Trustee Relief Act, 1847 (c. 96), to mention in the affidavit on which the money is paid in, or, if that has been already filed by a supplemental affidavit, all claims on the fund of which he receives notice.

Where a trustee who had filed an affidavit before transferring funds into ct. subsequently, but before the money was paid in, became aware that an assignee of some of the funds had placed a *distringas* thereon, omitted to mention the claim of such assignee in his subsequent affidavit, & the assignee, on order to prevent the funds being transferred out, obtained a stop order:—**Held:** the trustee was personally liable for the costs thereof.—*Re ALLEN'S SETTLEMENT* (1879), 40 L. T. 456; 27 W. R. 529.

**2448. — On whom to be served.**—The affidavit to be made on a lodgment of funds in ct. under Trustee Relief Act, 1847 (c. 46), should be served forthwith on "the persons interested

in or entitled to them"; i.e. in the same way & upon the same parties as if the Chancery Fund Rules, 1874, remained in force, & had not been repealed by the Supreme Court Funds Rules, 1884.

—*Re STENING'S TRUSTS* (1884), 50 L. T. 586.

*Annotation:—***Expld.** *Re Graham's Trusts*, [1891] 1 Ch. 151.

**Consent of Charity Commissioners to payment in.**—*See* CHARITIES, Vol. VIII., pp. 394, 395, Nos. 2165, 2166, 2178.

#### F. Effect of Payment in.

**2449. No discharge from office of trustee.**—*Re CAWTHORNE*, No. 2444, *ante*.

**2450. —**—*J.*—*BARKER v. PEILE*, No. 2832, *post*.

**2451. — Notice by court to trustee of dealings with fund.**—So little does the payment into ct. by a trustee under the Trustee Relief Act, 1850 (c. 60), operate to put an end to the character of trustee, that the ct. will not deal with the fund without notice being given to him, because he is still the trustee of the fund (*KINDERSLEY, V. C.*).—*THOMPSON v. TOMKINS* (1862), 2 Drew. & Sm. 8; 31 L. J. Ch. 633; 6 L. T. 305; 8 Jur. N. S. 185; 10 W. R. 310; 62 E. R. 524.

*Annotations:—***Held.** *Mutual Life Assoc. Soc. v. Langley* (1886), 32 Ch. D. 460; *Re Nettleford's Trusts* (1888), 59 L. T. 315.

**2452. How far discharged from liability.—Discharge in proportion to sum paid in.**—A trustee paying into ct. a sum of money under Trustee Relief Act, 1847 (c. 96), although such sum may be less than the amount of the trust fund in his hands, is discharged as to the money so paid in; & after such payment the parties beneficially interested can proceed only under the Act to recover the money so paid in; & the ordinary jurisdiction of the ct., as against the trustee, is confined to the balance which may remain due from the trustee in respect of the trust fund after such payment.—*GOODE v. WEST* (1851), 9 Hare, 378; 21 L. J. Ch. 127; 18 L. T. O. S. 87; 15 Jur. 1025; 68 E. R. 554.

*Annotations:—***Held.** *Re Harris's Trusts* (1854), 2 Eq. Rep. 1110; *Re Hodgson's Trusts* (1854), 2 Eq. Rep. 1083; *Thorp v. Thorp* (1855), 1 K. & J. 438.

**2453. —**—*J.*—Trustee Relief Act, 1850 (c. 60), takes away the jurisdiction of the ct. by bill against the trustee, in respect of the money which he has paid into ct.—*THORP v. THORP* (1855), 1 K. & J. 438; 24 L. T. O. S. 336; 69 B. R. 530.

**2454. —**—*J.*—The payment of a trust fund into ct. under Trustee Relief Act, 1850 (c. 60), does not give the ct. jurisdiction over the rest of the estate, but upon the question of costs, or the paying in the fund, or of the petition for payment out, or how the money is to be disposed of, the ct. has jurisdiction. The Act operates as a complete discharge to the trustee as to the fund paid in, & no further, & where a trustee retains a part of a trust fund in his hands, to answer the costs of payment into ct.: the ct. has no jurisdiction over that portion.—*Re BARBER'S TRUSTS* (1863), 2 New Rep. 571; 32 L. J. Ch. 709; 8 L. T. 825; 9 Jur. N. S. 1098; 11 W. R. 1056.

*Annotation:—***Held.** *Re Parker's Will* (1888), 39 Ch. D. 303.

**2455. —**—*J.*—A trustee who pays money into ct. under Trustee Relief Act, 1847 (c. 96), is thereby discharged as against the claims of all the world.

Where therefore a party claims to be entitled to a share of such a fund, although not included in the usual affidavit made on the fund being paid in, he must obtain the leave of the ct. to file a bill in respect of such claim, & his right will not be declared on petition.—*Re JEPHSON* (1859), 1 L. T. 5.

*Annotation:—***N.F.** *Re Puttrel's Trusts* (1877), 7 Ch. D. 647.

*Sect. 9.—Lodgment of trust fund in court: Sub-sect. 1, F. & G. (a).]*

**2456.** —[—]—*BARKER v. PEILE*, No. 2832, *ante*.  
**2457. Whether indicating retirement from office.]**  
 —There being a question whether a fund should be paid to *cestuis que trust*, infants being interested, the trustee pays it into ct. under Trustee Relief Act, 1850 (c. 60), & the *cestuis que trust* appoint new trustees:—*Held*: they could do so, as the payment into ct. specified a “desire to be discharged,” & therefore it was competent for them to appoint other trustees under their power in that case to nominate & appoint any other persons etc.—*Re BAILEY’S TRUST* (1854), 3 W. R. 31.

**2458.** —[—]—*Re WILLIAMS’ SETTLEMENT*, No. 2584, *post*.

**2459. Payment in of moneys over which trustees have discretionary power—Whether court will exercise power.]**—Testator by his will declared it should be in trustees’ discretion to advance all or any part of the principal of a fund to his son, or to his children, if he should be dead, in or towards his or their maintenance or advancement in the world, it being his wish that his son, if living, should have the whole benefit of such moneys if he should conduct himself steadily & to the satisfaction of his trustees, with gifts over, in the event of the whole of such moneys not having been advanced by the trustees. The son having assigned his interest under the will, the trustees, after the widow’s death, paid the fund into ct. under Trustee Relief Act, 1850 (c. 60), but did not suggest that the son had conducted himself otherwise than steadily & to their satisfaction:—*Held*: upon the construction of the will, this was, in effect, a trust for the son with a power for the trustees to deprive him of the fund if he should not conduct himself steadily & to their satisfaction, the trustees having declined to exercise that power, it was not competent to this ct. to exercise it, & the fund was ordered to be transferred to the assignee.—*Re COB’S TRUST* (1858), 4 K. & J. 199; 32 L. T. O. S. 239; 4 Jur. N. S. 158; 70 E. R. 83.

*Annotations:—Ald. Re Tegg’s Trusts* (1866), 15 L. T. 236; *Re Nettlefold’s Trusts* (1888), 59 L. T. 315. *Re Eyre, Eyre v. Eyre* (1883), 49 L. T. 259.

**2460.** ——— **Maintenance & education of beneficiaries.]**—Where money vested by a deed poll in trustees upon trust to apply it in such manner in every respect as they in their uncontrolled discretion should think fit for or towards the maintenance, education, advancement, or benefit in any way of all or any one or more exclusively of the other or others of the children of a certain person, & as to all or any part of the sum which should not have been applied as hereinbefore mentioned previously to the youngest attaining the age of twenty-one years, in trust for all the children in equal shares, is paid into ct. under Trustee Relief Acts, it is competent for the ct. to exercise the discretion as to advances for maintenance, education, advancement, or benefit originally given to the trustees.—*Re ASHBURNHAM’S TRUST* (1885), 54 L. T. 84, D. C.

**2461.** ——— **Discretion personal.]**—Testator by his will devised & bequeathed his residuary

estate to trustees, & gave thereout a legacy of £10,000 to each of his five daughters, & directed that the legacies should be held upon certain trusts for the benefit of his daughters, their husbands & children respectively, & he provided that, on the request of any of his daughters, it should be lawful for the trustees, if they should think fit, to advance to the husband or husbands of any one or more of his daughters part of her legacy, not exceeding £5,000, for the purpose of setting up the husband in business, or otherwise promoting the advancement or benefit of his daughter & her husband & family. The trustees paid the legacy of one of the daughters into ct. under Trustee Relief Act, 1847 (c. 46). Application was now made for the advance of a sum of £3,000 to the husband of the daughter whose share had been so paid in, for the purpose of furnishing him with a professional residence. The surviving trustee of the will consented to the advance being made:—*Held*: the trustees, by paying into ct., had terminated their discretion, & the discretion being a personal one could not be exercised by the ct., & the advance could not therefore be made to the husband.—*Re NETTLEFOLD’S TRUSTS* (1888), 59 L. T. 315.

**2462.** ——— **Whether power thereby relinquished.]**  
 —Case in which trustees were held to have relinquished their discretionary power over a fund by having paid it into ct. under Trustee Relief Act, 1847 (c. 96).—*Re TEGG’S TRUSTS* (1866), 15 L. T. 236; 15 W. R. 52.

*Annotation:—Re Nettlefold’s Trusts* (1888), 59 L. T. 315.

**2463.** ——— [—]—A trustee having a discretionary power as to the application of a trust fund, does not necessarily abandon it by paying the trust fund into ct. under Trustee Relief Act.—*Re LANDON’S TRUSTS* (1871), 40 L. J. Ch. 370.

*Annotation:—N.F. Re Nettlefold’s Trusts* (1888), 59 L. T. 315.

**2464.** ——— [—]—*Re NETTLEFOLD’S TRUSTS*, No. 2461, *ante*.

**2465. Jurisdiction of court over remainder of estate.]**—*Re BARBER’S TRUSTS*, No. 2454, *ante*.

**Payment in of infant’s property—Infant made ward of court.]**—*See INFANTS*, Vol. XXVIII., p. 337, Nos. 2041–2043.

*G. Costs.*

*(a) Right of Trustees to Costs.*

**2466. Whether [trustees entitled to costs.]**—Trustees, after being warned by J. & W., their *cestuis que trust*, that if they paid the trust fund into ct. under the ‘Trustees’ Relief Act, they, the *cestuis que trust*, should object to the trustees being allowed the costs of paying the fund into & taking it out of ct., nevertheless paid the fund into ct. under the Act, stating by their affidavit, not that they had any doubts as to the title of their *cestuis que trust*, but that, “to the best of their knowledge & belief J. & W. were the only persons interested in or entitled to the trust fund, & that the facts mentioned in that affidavit were stated upon their own knowledge, & they had acquired such knowledge as trustees of the trust fund.” The *cestuis que trust* then presented their petition

appearing by counsel at the argument are not allowed to a trustee who has brought in the fund under Trustee Relief Act, when all the beneficiaries are free from disability, & the case has been fully argued on their behalf, although the contrary practice prevails in England.

Costs of lodgment, & of the motion for costs, will be given.—*Re LOCKHART’S TRUST, Ex p. LOCKHART* (1866), 18 Ir. Jur. 245.—IR.

**PART III. SECT. 9, SUB-SECT. 1.—F.**

**2462 i. Payment in of moneys over which trustees have discretionary power—Whether power thereby relinquished.]**  
 —Exors. paid a sum, which they had discretion to expend, into ct. under Trustee Relief Act:—*Held*: the payment into ct. terminated their discretionary power of applying the fund.—*Re MULQUEEN’S TRUSTS, Ex p. MULQUEEN* (1881), 7 L. R. Ir. 127.—IR.

**2462 ii.** ——— [—]—*Re MURPHY’S TRUSTS*, [1900] 1 I. R. 145.—IR.

**g. Whether trustees entitled to costs.]**  
 —In future the sum allowed to trustees for the costs of lodging money under Trustee Relief Act in ordinary cases will be £8.—*Re BOYD’S TRUSTS* (1867), 1 I. R. Eq. 489.—IR.

**f.** ——— [—]—*Re BLAYNEY’S TRUSTS* (1875), 9 I. R. Eq. 413.—IR.

**t. What costs allowed.]**—Costs of

for the payment of the fund out of ct., & praying that the costs of the petition & of paying the fund into ct. might be paid by the trustees personally:—*Held*: the trustees who had been served with & appeared upon the petition were not entitled to the costs of such appearance, but only to their costs of paying the money into ct.—*Re COVINGTON'S TRUSTS* (1855), 25 L. J. Ch. 238; 26 L. T. O. S. 135; 1 Jur. N. S. 1157.

**2467.** ——— *Payment in reasonable or justifiable.*—A sum of money having been left by will to a married woman, it was agreed by the husband & wife that a settlement should be made. Difficulties subsequently arose, & the parties altered their views, & called upon the trustee of the will to hand over the money to the husband. The trustee declined to do so, & paid the fund into ct. under the Trustees' Relief Act. Upon a petition by the husband & wife, that the money might be paid out to the husband, & that the trustee might pay the costs occasioned by his conduct, it was held, that no binding agreement for a settlement had been shown, but that the trustee was justified in the course he had pursued, & his costs must be paid.—*Re BENDYSHE* (1857), 26 L. J. Ch. 814; 29 L. T. O. S. 341; 3 Jur. N. S. 727; 5 W. R. 816.

**2468.** ——— *Re WYLLY'S TRUSTS*, No. 2425, *ante*.

**2469.** ——— *Re METCALFE'S TRUSTS*, No. 2428, *ante*.

**2470.** ——— *Re A.*, the surviving exor. of the last surviving trustee of a will, whereby a fund was settled upon B. for life, with remainder to the children, who survived her, paid the dividends to B. during her life, & then paid the fund into ct.:—*Held*: A. had accepted the trust, & there being no difficulty in ascertaining what children B. left, the payment into ct. was unnecessary, & he could not be allowed his costs.—*Re ARBOT'S TRUSTS* (1878), 38 L. T. 442.

**2471.** ——— *Re Trustees who pay money into ct. under the provisions of the Trustee Relief Act*, when the question arising might be decided upon an originating summons under R. S. C., 1883, Ord. 55, will in future not be allowed the costs occasioned by such payment into ct.—*Re GILES* (1886), 55 L. J. Ch. 695; 55 L. T. 51; 34 W. R. 712.

*Annotation:—Refd. Re Hall-Dare, Le Marchant v. Lee Warner*, [1916] 1 Ch. 272.

**2472.** ——— *Doubt as to persons entitled.*—Trustees are not bound to take any trouble in ascertaining the validity of claims upon the trust fund, but may discharge themselves of all responsibility whenever they please by paying the fund into ct. under Trustee Act, & they will be entitled to their costs.—*Re CROYDEN'S TRUST* (1850), 19 L. J. Ch. 172; 14 Jur. 54.

*Annotation:—Distd. Re Heming's Trust* (1856), 3 K. & J. 40.

**2473.** ——— *Re LANE'S TRUST*, No. 2422, *ante*.

**2474.** ——— *Neglect or refusal to pay in.*—Any trustee who entertains a reasonable doubt or difficulty as to the title of the person who claims to be his *cestui que trust*, should pay the funds into ct. under Trustee Relief Act. A trustee, who, entertaining such doubt, did not pay the funds into ct., but by his conduct caused the institution of a suit, was allowed out of the funds only the costs that he would have been entitled to if he had paid the funds into ct. under the Act, & the costs of appearing on the petition.—*GUNNELL v. WHITEAR* (1870), L. R. 10 Eq. 664; 39 L. J. Ch. 869; 22 L. T. 645; 18 W. R. 883.

**2475.** ——— *On the sale of certain real estate part of the purchase-money was invested in the names of trustees, who were to hold the fund until sufficient evidence should be produced of the death of a certain person & on such evidence being produced were to pay the fund to the vendors. The vendors in the following year, thinking that they had sufficient evidence of the death, called upon the trustees either to pay the fund to them, or to pay it into ct. under Trustee Relief Act. The trustees having refused to do so, a bill was filed to compel them to pay over the fund:—Held*: the trustees, having caused unnecessary expense by their refusal to pay the fund into ct., were only entitled to such costs as they would have got if they had paid the fund into ct. under Trustee Relief Act, & the vendors had presented a petition for the payment of the fund to them.—*WELLER v. FITZHUGH* (1870), 22 L. T. 567.

**2476.** ——— *Reasonable doubt as to performance of trust.*—Trustees will not be allowed the costs occasioned by paying money into ct. under Trustee Relief Act, when they do so for the mere purpose of escaping liability, & when there is no reasonable doubt as to the performance of their trust.—*Re ELLIOT'S TRUSTS* (1873), L. R. 15 Eq. 194; 42 L. J. Ch. 289; 21 W. R. 455.

**2477.** ——— *Lodgment after claim by cestui que trust.*—*Re CULL'S TRUSTS*, No. 2487, *post*.

**2478.** ——— *Payment not capricious or vexatious—Solicitor & client costs.*—Where a trustee has paid into ct. a fund to which a married woman is absolutely entitled, he is entitled as of course to his costs between solr. & client, unless his conduct has been simply capricious or vexatious.—*Re SWAN* (1861), 2 Hem. & M. 34; 4 New Rep. 53; 10 L. T. 334; 12 W. R. 738; 71 E. R. 371.

*Annotation:—N.F. Re Roberts' Trusts* (1869), 38 L. J. Ch. 708.

**2479.** ——— *Payment in by banker.*—A banking co. having received notice in writing of conflicting claims to moneys placed with them on deposit, paid such moneys into ct. under Trustee Relief Act, 1850 (c. 60), after first deducting therefrom their costs of payment in. Upon petition by one of the claimants for payment out:—*Held*: (1) the proviso in Judicature Act, 1873 (c. 60), s. 25 (6), only applied to debts of which there had been an absolute assignment in writing, & the banking co., not being trustees within Trustee Relief Act, 1850 (c. 60), were not entitled to pay the deposit moneys into ct. thereunder; (2) petitioner must be taken to have submitted to the jurisdiction under Trustee Relief Act, 1850 (c. 60), by petitioning the ct., & the bank were entitled to their taxed costs of payment in & of the petition, & such costs were directed to be taxed accordingly.—*Re SUTTON'S TRUSTS* (1879), 12 Ch. D. 175; 48 L. J. Ch. 350; 27 W. R. 420.

**2480.** *What costs allowed—Costs of copies of affidavits—Affidavits of parties claiming beneficial interest.*—Trustees who have paid trust funds into ct. under Trustee Relief Act, & take copies of affidavits of parties claiming to be beneficially interested in the fund, will not be allowed their costs of the copies of affidavits so taken by them.—*Re LAZARUS* (1857), 3 K. & J. 555; 69 E. R. 1230.

**2481.** ——— *Taxed costs.*—*Re HUE'S TRUSTS*, No. 2585, *post*.

*Solicitor & client costs.*—*See* No. 2478, *ante*.

**2482.** *Trustee retaining sum for costs.*—Where trustees who pay money into ct. under the Act, deduct a sum for their costs, the propriety of that

**Sect. 9.—Lodgment of trust fund in court: Sub-sect.**

1, G. (a), (b) & (c); *sub-sect. 2, A., B. & C. (a) i.*] course can only be questioned by filing a bill.—*Re BLOYE'S TRUST* (1849), 1 Mac. & G. 488; 2 H. & Tw. 140; 15 L. T. O. S. 517; 47 E. R. 1630; *sub nom. Re BLOYE'S TRUST, Ex p. LEWIS*, 19 L. J. Ch. 89; 14 Jur. 49, L. C.; *on appeal sub nom. LEWIS v. HILLMAN* (1852), 3 H. L. Cas. 607, H. L. *Annotations*:—*Apld. Re Barber's Trusts* (1863), 2 New Rep. 571; *Re Parker's Will* (1888), 39 Ch. D. 303. *Reid, Re Bird's Trusts* (1900), 82 L. T. 214; *Re Hodge's Estate Act*, 1885 (1900), 82 L. T. 556. *Mentd. Re Hodge's Settlement* (1857), 3 K. & J. 213; *Guest v. Smythe* (1870), 5 Ch. App. 553, n.; *McPherson v. Watt* (1877), 3 App. Cas. 254; *De Pereda v. De Mancha* (1881), 19 Ch. D. 451; *Luddy's Trustee v. Peard* (1886), 33 Ch. D. 500; *Re Postlethwaite, Postlethwaite v. Rickman* (1888), 59 L. T. 58; *Nutt v. Easton* (1899), 68 L. J. Ch. 367; *Hodson v. Deans*, [1903] 2 Ch. 647; *Bath v. Standard Land Co.*, [1911] 1 Ch. 618.

**2483. — Liability for costs of suit to pay in whole fund—Allowance for costs properly incurred.]**

—Where a trustee pays money into ct. under Trustee Relief Act, & has incurred costs which he claims to deduct from the fund, but which are disputed, his proper course is to pay the whole fund into ct. without deducting such costs, leaving the ct. to decide the amount of costs to which he is entitled. Therefore, where a trustee paid money into ct. after deducting a sum for costs & expenses which the ct. deemed excessive, the ct., on bill by the *cestuis que trust*, ordered him to make good the whole of the trust fund in ct., & to pay the costs of the suit; the trustee to be allowed such costs as he was properly entitled to when the fund in ct. came to be dealt with.—*BEATY v. CURSON* (1808), L. R. 7 Eq. 194; 38 L. J. Ch. 161; 20 L. T. 61; 17 W. R. 132.

**2484. — Taxation of costs.]**—Where trustees on paying a fund into ct. under Trustee Relief Act, have retained a sum for their costs an order will be made on petition for the taxation of the trustees' costs of paying the fund into ct. as well as of their costs of appearing on the petition, & the trustees will be charged with the sum retained by them in satisfaction, as far as it will extend, of all their taxed costs.—*Re SWEEPER'S TRUSTS* (1871), 24 L. T. 413; 19 W. R. 793.

**Payment in of insurance money.]—See INSURANCE**, Vol. XXIX., p. 390, Nos. 3113–3117.

**Right of personal representatives to costs.]—See EXECUTORS**, Vol. XXIV., p. 590, Nos. 6242, 6243.

**(b) Liability of Trustees to Pay costs.**

**2485. Payment in unjustified.]**—By an indenture of settlement three trustees were appointed. The settlement contained a power for the *cestuis que trust* in case the trustees therein named, or either of them, should die, or be desirous of being discharged from the trusts, to appoint any other person or persons to be a trustee or trustees in the place of any such trustee or trustees so dying or being desirous to be discharged. One trustee died, & the other two were desirous of being discharged, upon which two new trustees only were substituted. The two continuing trustees refused to transfer the fund to the new trustees, upon the ground that the appointment was not properly executed, & paid the trust fund into ct. under the Trustee Act. Upon petition for payment of the money out of ct.:—*Held*: it was competent for the *cestui que trust* to appoint two trustees only & the old trustees were not justified in paying the money into ct., & they were ordered to pay the costs thereby occasioned, & their costs of the petition.—*Re FAGG'S TRUST* (1850), 19 L. J. Ch. 175.

*Annotation*:—*Reid. Re Poole Bathurst's Estate* (1854), 2 Sm. & G. 169.

**2486. Payment vexatious or unnecessary.]**—Trustees are not justified as a matter of course in paying a married woman's legacy into ct.; but will be liable for costs if such payment appear vexatious & unnecessary.—*Re ROBERTS' TRUST* (1869), 38 L. J. Ch. 708; 17 W. R. 639.

**2487. —**—The trustees of a trust fund to which their *cestui que trust* has become entitled in default of appointment by a tenant for life are justified in paying it over to him on being informed in writing by the solr. to the parties that he has reason to believe that no appointment has been made; & would be free from liability in doing so. Trustees who under such circumstances pay the trust fund into ct. under Trustee Relief Act will not, as a rule, be entitled to their costs.

I do not think that I shall make these trustees, who have acted with such over-caution, in this, the first case of the kind that has come before me, pay the costs of the transfer into ct.; but I wish it to be understood that the next set of trustees who come before me having so acted must pay the costs.—*JESSEL, M.R.*—*Re CUL'S TRUSTS* (1875), L. R. 20 Eq. 561; 44 L. J. Ch. 664; 32 L. T. 853; 23 W. R. 850.

**2488. —**—Where the donee of a general testamentary power of appointment over a fund comprised in a settlement exercises the power, & at the same time appoints an exor., such exor. is the proper party to receive & distribute the fund. If, therefore, the trustees of the settlement pay the money into ct. under Trustee Relief Acts, they will be liable for all costs improperly occasioned by their so doing.—*Re HOSKIN'S TRUSTS* (1877), 5 Ch. D. 229; 46 L. J. Ch. 274; 35 L. T. 935; *on appeal*, 6 Ch. D. 281, C. A.

*Annotations*:—*Consd. Turner v. Hancock* (1882), 20 Ch. D. 303; *O'Grady v. Wilmot*, [1916] 2 A. C. 231. *Mentd. Re Bradford, Thursby & Farists* (1883), 11 Q. B. D. 373; *Re Treasure, Wild v. Stanham*, [1900] 2 Ch. 648; *Re Moore, Moore v. Moore*, [1901] 1 Ch. 691; *Re Power, Re Stone, Acworth v. Stone*, [1901] 2 Ch. 659; *Re Dixon, Penfold v. Dixon*, [1902] 1 Ch. 248; *Re Lawley, Zaiser v. Lawley*, [1902] 2 Ch. 799; *Re Marten, Shaw v. Marten*, [1902] 1 Ch. 314; *Re Peacock's Settlement, Kecey v. Harrison*, [1902] 1 Ch. 552; *Re Fearnside, Raines v. Chadwick*, [1903] 1 Ch. 250; *Stamp Duties Comrs. v. Stephen*, [1904] A. C. 137; *Re Dodson, Re Dodson, Gibson v. Dodson*, [1907] 1 Ch. 284; *Re Hadley, Johnson v. Hadley*, [1909] 1 Ch. 20; *Re Pryce, Lawford v. Pryce*, [1911] 2 Ch. 286; *Re Wernher, Wernher v. Belt*, [1918] 2 Ch. 82.

**— Liability of personal representatives.]—See EXECUTORS**, Vol. XXIV., p. 590, Nos. 6245, 6246.

**(c) Out of What Fund Payable.**

*See SETTLEMENTS*, Vol. XL., p. 688, Nos. 2241, 2242.

**2489. Trust for maintenance—Costs payable out of corpus.]**—Costs occasioned by the fund being paid into ct. in the case of a trust for maintenance to come out of the corpus.—*Re REID'S TRUSTS* (1852), 1 W. R. 13.

**2490. Payment of legacy—Costs payable out of residue.]**—Where the trustees of a legacy, given for the benefit of a lady for life, with limitations over, one of such trustees being also the residuary legatee under the will, refused to comply with the request of the tenant for life, that they would pay the legacy into court under Trustee Relief Act, 1847 (c. 96), although she offered to pay the costs of the proceedings for that purpose, & she consequently instituted a suit & obtained an order for payment of the fund into ct., the costs of the suit were directed to be paid out of the residue.—*HANDLEY v. DAVIS* (1859), 28 L. J. Ch. 873; 32 L. T. O. S. 330; 5 Jur. N. S. 190.

**Costs of personal representatives.]—See EXECUTORS**, Vol. XXIV., pp. 590, 591, Nos. 6247–6252.

## SUB-SECT. 2.—PAYMENT OUT.

## A. In General.

**2491. Care to be exercised.]—***Re CAWTHORNE, No. 2444, ante.*

**2492. Effect of payment out—Equivalen to decree or final judgment.]—***Re CAWTHORNE, No. 2444, ante.*

**2493. Postponement of order for payment out—Claimants residing abroad.]—**Upon a written & reasonable application from claimants residing abroad, the ct. will postpone the drawing up of an order for payment out of ct. of money paid in under Trustee Relief Act.—*Re HODSON'S WILL TRUSTS* (1853), 22 L. J. Ch. 1055; 17 Jur. 826.

**2494. Fund distributable in shares—First application for payment of one or more shares—Request to carry remaining shares to separate accounts.]—**Where a sum of money distributable in shares, has been paid into ct., on the first application which is made for payment out of one or more share or shares, petitioner should ask that the remaining shares may be carried to the separate accounts of the parties entitled thereto.—*Re HAWKE'S TRUST* (1854), 2 Eq. Rep. 3; 18 Jur. 33.

**2495. How order entitled—Where no petition.]—***DIXON v. MORLEY*, [1869] W. N. 49.  
*Annotation:—Folld. Pullen v. Isaacs* (1895), 72 L. T. 834.

**2496. Whether court will require security to refund.]—**Where an application is made for the payment out of ct. of funds by persons claiming as upon the presumption of death by reason of seven years' absence of the person to whose credit the funds stand, & the ct. is satisfied with the evidence, it is not in accordance with modern practice for the ct. to require security to refund before making the order for payment out.—*Re B.'s TRUSTS* (1905), 53 W. R. 491.

**Compulsory purchase.]—***See COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 244, 245, 249–252, Nos. 1427–1440, 1515–1581.*

## B. Who may Apply.

**2497. Deaf, dumb & blind person—Without next friend.]—**A deaf, dumb, & blind person petitioned for payment to herself of £7,000, carried to her separate account:—*Held*: she might be a petitioner without a next friend; but the ct. declined, without special reasons assigned, to make an order for payment of more than the income for her benefit.—*Re BIDDULPH'S TRUSTS, Re POOLE'S TRUSTS* (1852), 5 De G. & Sm. 469; 64 E. R. 1202.

**2498. Person not mentioned in trustee's affidavit.]—***Re JEPHSON, No. 2455, ante.*

**2499. —.]—**A person not mentioned in the trustee's affidavit may apply by petition for the payment out of ct. of moneys paid in under Trustee Relief Act.—*Re PUTTRELL'S TRUSTS* (1877), 7 Ch. D. 647; 47 L. J. Ch. 11; 37 L. T. 374.

**2500. —.]—***PELLING v. GODDARD, No. 2501, post.*

## C. Procedure.

## (a) By Petition.

## i. In General.

*See R. S. C., Ord. 54B., r. 3 (2) (b); Ord. 55, r. 2 (1); C. C. R., 1903, Ord. 38.*

**2501. When petition proper mode of procedure.]**

—(1) A fund paid into ct. under Trustee Relief Act, can be dealt with only on petition. Such

petition may be presented by a beneficiary not named in the trustees' affidavit.

(2) A person claimed by action a fund paid into ct. by trustees who had not named him in their affidavit. The judge declared pltf. entitled to the fund, & directed a petition to be presented asking for payment to him.—*PELLING v. GODDARD* (1878), 9 Ch. D. 185; 47 L. J. Ch. 646; 38 L. T. 811; 26 W. R. 476.

**2502. — Sum over one thousand pounds—Title of applicant depending only on proof of birth.]**

—The generality of R. S. C., Ord. 55, r. 2 (1), is not qualified by sub-sect. 5; therefore, an application under Trustee Relief Acts for payment out of a fund to an appct. whose title depends merely upon proof of his birth should be made by summons & not by petition, although the fund exceeds £1,000.—*Re BROADWOOD* (1886), 55 L. J. Ch. 646; 55 L. T. 312.

**2503. — — — —.]—**Where the title to a fund in ct. depends only upon proof of identity on the birth, marriage or death of any person the mere fact that the fund exceeds £1,000 will not justify the making of an application for payment or transfer of the fund out of ct. by petition instead of by summons in chambers.—*BATES v. MOORE* (1888), 38 Ch. D. 381; 57 L. J. Ch. 789; 58 L. T. 513; 36 W. R. 586.

**2504. — — — —.]—**Money had been paid into ct. by exors. under Trustee Relief Act to the credit of an account entitled "In the matter of the trusts of the sale moneys of certain real estate formerly belonging to E., deceased, & subject to the trusts of a certain Royal warrant dated Aug. 6, 1861." The fund had originally been about £1,500. On an application by summons under R. S. C., Ord. 55, £600, part of the fund, was ordered to be paid out but as to the remainder the summons stood over for further evidence as to the death of an annuitant. The further evidence having been obtained the application was renewed, the summons asking for payment out of the balance to appct. :—*Held*: the case was not within R. S. C., Ord. 55, at all, & the application ought to be made by petition & not by summons.—*Re EVANS* (1886), 54 L. T. 527.

**2505. — — — —.]—**Where a sum paid into ct. under Trustee Relief Acts exceeded £1,000, the ct. refused to order payment out on summons.—*Re RHODES* (1886), 31 Ch. D. 499; 55 L. J. Ch. 477; 54 L. T. 294; 34 W. R. 270, 501.

*Annotations:—Apld. Re Broadwood* (1886), 55 L. J. Ch. 646. *Expld. Bates v. Moore* (1888), 38 Ch. D. 381.

**2506. Amendment of petition.]—**A petition, praying the payment out of ct., under the above Act, of a small sum to petitioners, in certain shares, to which they were held not entitled on the true construction of a will, was allowed to be amended by the addition of a prayer for a declaration of the rights of all parties, & payment accordingly; &, subject to such amendment, an order was made containing such a declaration, & for payment in conformity therewith. Costs of all parties out of the fund.—*Re WALKER'S TRUSTS* (1852), 16 Jur. 1154; 1 W. R. 33.

**2507. Affidavits in support—How intitled—Variation between affidavits of paying in & paying out.]—***Re HARRIS* (1862), 8 Jur. N. S. 166.

**2508. — Affidavit of no incumbrances—Not required for payment out of personalty.]—***EDWARDS v. GROVE* (1906), 51 Sol. Jo. 27.

## PART III. SECT. 9, SUB-SECT. 2.—A.

a. Trustee company.]—*Re SMITH'S TRUSTS* (No. 2) (1889), 18 O. R. 327.—CAN.

## PART III. SECT. 9, SUB-SECT. 2.—B.

b. One of several beneficiaries—On becoming entitled.]—*Re TRACEY'S TRUSTS* (1872), 6 I. R. Eq. 271.—IR.



*Sect. 9.—Lodgment of trust fund in court: Sub-sect. 2, C. (a) i., ii., iii. & iv.]*

**2509. Title of account—Carrying over share to separate account.]**—Where it is proposed, upon a petition for payment out of part of a fund in ct., to carry over a share in such fund to the separate account of the person entitled, the account should be in the name of such person & not in the name of such person or his incumbrancers—*e.g.* “the account of A. B.” not “the account of A. B. or his incumbrancers.”—*HARGRAVE v. KITTLEWELL* (1880), 55 L. T. 674, 35 W. R. 130.

**2510. Necessity for petition.]**—Where money has been paid into ct. under Trustee Relief Act, a party claiming part of the fund will not be allowed, to save expense or for his convenience merely, to file a bill instead of a petition in the usual course.—*Re HATHIS' TRUSTS* (1854), 2 Eq. Rep. 1110; 23 L. T. O. S. 344; 18 Jur. 721; 2 W. R. 442.

**2511. —.]**—*DIXON v. MORLEY*, [1869] W. N.

*Annotation:—Folld. Pullen v. Isaacs* (1895), 72 L. T. 834.

**2512. — Further consideration of creditor's action.]**—Upon the further consideration of a creditor's action for inquiries as to incumbrances upon, & for distribution of, funds paid into ct. under Trustee Relief Act, an order will be made for payment out of the funds to the persons found entitled thereto, without a petition being presented for that purpose.—*PULLEN v. ISAACS* (1895), 72 L. T. 834.

**2513. Infant entitled to share of fund—Necessity for guardian ad litem.]**—Upon a petition for the payment out of ct. of two-thirds of a sum of stock & cash, standing to the account of the trusts of a will, where the person entitled to the remaining one-third was an infant:—*Held*: the appointment of a guardian ad litem on behalf of the infant was necessary.—*Re WARD'S WILL TRUSTS* (1860), 2 Giff. 122; 2 L. T. 82; 6 Jur. N. S. 441; 60 E. R. 62.

**2514. Necessity for attendance of trustee.]**—R. S. C., Ord. 65, r. 27 (19), as to a tender for costs on the service of a petition, does not apply to a trustee whose duty it is to appear & protect the fund of which he is the trustee & which is the subject-matter of the petition.—*LOWE v. MOORE* (1906), 22 T. L. R. 640.

#### ii. Jurisdiction of Court on Petition.

**2515. Whether over all questions concerning the fund.]**—Under Trustee Relief Act, 1847 (c. 96), the ct. has power to decide all questions that may arise concerning the fund in ct., just as in a suit, & may, if necessary, direct any issue to determine the sanity of any person, or for like purposes.—*Re ALLEN'S TRUSTS* (1854), Kay, App. ii.; 69 E. R. 940.

**2516. — Fund paid in by mistake.]**—(1) Where a marriage settlement had been prepared, containing clauses not contemplated by parties on the other side, & the money which was to form part of the settled fund actually vested in the trustees for the purpose of the intended marriage, the trustees, in consequence of a misunderstanding between the parties, paid the money into ct., under Trustee Relief Act, 1847 (c. 96). Upon a petition of the settlor & his daughter to have the fund repaid to them:—*Held*: as the whole affair had proceeded under a mistake, & was incom-

plete, the ct. had jurisdiction over the fund, & accordingly directed it to be paid out to petitioner, the father.

(2) Trustee Relief Act, 1847 (c. 96), enacts, that where trustees, exors., etc., having in their hands any money belonging to any trust whatever, or the major part of them, shall be at liberty, on filing an affidavit shortly describing the trust, to pay the same, with the privity of the Accountant-General of the Ct. of Ch., into the Bank of England to the account of such Accountant-General, in the matter of the particular trust, in trust to attend the orders of the ct.; & the Accountant-General is empowered, without any order of the ct., to receive such trust moneys paid into the bank in his name by trustees, without any order of the Ct. of Ch.—*Ex p. HAMILTON* (1849), 13 L. T. O. S. 184.

**2517. — Questions of distribution.]**—*Re HOFFE'S ESTATE ACT*, 1855 (1900), 82 L. T. 556; 48 W. R. 507; 44 Sol. Jo. 481.

*Annotations:—Apld. Re Bridgewater's Settlement*, Partridge v. Ward, [1910] 2 Ch. 342. *Consd. Re Harper's Settlement*, Williams v. Harper, [1919] 1 Ch. 270. *Reid. Gresham Life Assoc. Soc. v. Crowther* (1914), 111 L. T. 887.

**2518. —.]**—*Re BARBER'S TRUSTS*, No.

2454, *ante*.

**2519. — Declaration of rights of petitioners.]**—Some portion of a trust fund, payable by instalments, was paid by the trustee into ct. under Trustee Relief Act, 1847 (c. 96). Upon a petition seeking payment of the fund so paid in the trustee was ordered to pay the future instalments from time to time, as he should receive them, to the *cestui que trust*, whose title was clear.

I have jurisdiction to declare the rights of petitioners (STUART, V.-C.).—*Re WRIGHT'S SETTLEMENT* (1853), 1 Sm. & G. App. v.; 67 E. R. 1319.

**2520. — Establishment of adverse title.]**—When a trustee of a marriage settlement paid money into ct. under Trustee Relief Act, & a petition was presented claiming the fund under the title adverse to the settlement:—*Held*: the ct. had no jurisdiction in this proceeding to establish a title adverse to the trust, & a suit must be regularly instituted for this purpose.—*Re FOZARD'S TRUSTS* (1855), 3 Eq. Rep. 759; 24 L. J. Ch. 441; 25 L. T. O. S. 5; 3 W. R. 341, L. JJ.

**2521. —.]**—The ct. has no jurisdiction on a petition presented under Trustee Acts to decide on a disputed question of title.

*Seemle*: it may order the fund to be paid out to a trustee & order him to pay it into ct. under Trustee Relief Act, & then deal with it.—*Re DRAPER'S SETTLEMENT* (1861), 9 W. R. 805.

**2522. — Rescission of charge on fund.]**—A married woman & her brothers, persons in a humble position, being entitled in reversion expectant on the death of a tenant for life, to a sum of £1,500 charged on land, purported to mortgage this interest to B. as security for £500 with interest at 5 per cent. though £250 only was actually advanced. B. subsequently advanced £150 more, for which a further charge for £300 on the same reversionary interest was taken as security. This deed of further charge contained recitals & clauses to the effect that the nature of the transaction was perfectly understood by the borrowers, & that the difference between the sums actually advanced & the sums expressed to be secured was considered reasonable remuneration for the delay that must occur before repayment,

#### PART III. SECT. 9, SUB-SECT. 2.—C. (a) i.

**2510 i. Necessity for petition.]**—The ct. has no jurisdiction on motion, without a petition, to pay out funds lodged under Trustee Relief Act.—*Ex p.*

STOCK (1856), 5 I. Ch. R. 341.—IR.

#### PART III. SECT. 9, SUB-SECT. 2.—C. (a) ii.

*e. To declare rights of parties.]*—On a motion for the payment out of

ct. of a fund paid in under Trustee Relief Act, the ct. has jurisdiction to declare the rights of all parties.—*Re LYON'S ESTATE* (1900), 21 N. S. W. L. R. (Eq.) 262; 17 N. S. W. N. 148.—AUS.



on account of the age of the tenant for life. The securities were prepared by B.'s solr., acting for all parties & the borrowers had no independent advice. Only one year's interest was ever paid. On the death of the tenant for life, the £1,500 was paid into ct., & upon a petition by the reversioners to set aside these securities on the ground of fraud, & for payment out of the fund. *Semble*: the ct. will, upon petition for payment out of ct. hear & decide questions of this nature without directing the issue of a writ.—*Re SLATER'S TRUSTS* (1879), 11 Ch. D. 227; 48 L. J. Ch. 473; 40 L. T. 184; 27 W. R. 448.

*Annotations*:—*Mentd. Re Marshfield, Marshfield v. Hutchings* (1887), 34 Ch. D. 721; *Re Lloyd, Lloyd v. Lloyd*, [1903] 1 Ch. 385.

**2523 Whether confined to questions as to fund in court.]**—In 1887 a sum of India stock representing the proceeds of a policy on a life that had dropped was held in trust for A., the widow of the assured, for life & after her death for his three children by her, one of whom was a daughter who was married before the Married Women's Property Act, 1882 (c. 75), came into operation.

In 1890 A. as to her life interest, & the daughter & one of the sons as to their respective reversions in one-third of the trust funds, mortgaged the same for £400, & the daughter, who did not acknowledge the mtge. under Malin's Act, received one-third of the money. Her husband was no party to this transaction & subsequently died. In 1893 the trustee, at the request of all the beneficiaries & on a covenant of indemnity from the two sons, paid off the mtge. out of the trust funds; & after his death, & on the appointment of a new trustee, the balance of the India stock was under an order transferred into ct. A. died in 1917, & on a petition by the daughter for payment out of the fund in ct. she claimed that the mtge. did not bind her or operate to charge her share in the trust funds, & that, as between herself & her brothers, she was entitled to be paid out of the fund in ct. an amount equal to one-third of the original trust funds:—*Held*: the fund in ct. was divisible into equal thirds, for the ct. was not administering the trust estate & petitioner, whatever her claim might be against deceased trustee's estate, had no personal right or claim against the other *cestui que trust*.—*Re BARROW'S POLICY TRUSTS*, [1918] 1 Ch. 452; 87 L. J. Ch. 310; 118 L. T. 590.

**2524 Adjournment of petition to chambers.]**—A trust fund having been paid into ct. under Trustee Relief Act, 1847 (c. 96), by the trustee of a will, a petition was presented by parties interested for an inquiry as to the persons entitled & for payment out to the persons found entitled under that inquiry. Upon the petition coming on for hearing an order was made directing the inquiry, & adjourning the further hearing of the petition into chambers:—*Held*: the proceeding having been properly commenced by petition under Trustee Relief Act, 1847 (c. 76), s. 2, the ct. had jurisdiction under Masters Abolition Act, 1852 (c. 80), s. 27, to adjourn the petition into chambers.—*Re MOATE'S TRUST* (1883), 22 Ch. D. 635; 31 W. R. 497.

### iii. Contents.

**2525. Statements in affidavits made on payment in.]**—On a petition presented under Trustee Relief Act, for payment of trust funds out of ct., the statements in the affidavits made on payment of the trust money into ct. should be set out in the petition, as these statements form the only declaration of trust under which the ct. can act.—*Re LEVETT'S TRUST* (1852), 5 De G. & Sm. 619; 19 L. T. O. S. 244; 16 Jur. 1063; 64 E. R. 1270.

**2526. —.]**—Petitions for the payment out of ct. of money which has been paid in under Trustee Relief Act must state the affidavit upon which the payment into ct. was made.—*Re FLACK'S TRUST* (1853), 10 Hare, App. I, xxx; 68 E. R. 1131.

*Annotation*:—*Reid. Re Curlois' Will Trusts* (1853), 22 L. J. Ch. 1045.

**2527. — How much to be set out.]**—Petitions for the payment out of ct. of money which has been paid in under Trustee Relief Act must set out enough of the affidavit, on which the payment was made, to show the difficulty which occasioned the payment into ct., & who are the parties that claim, or are interested in the fund, but not necessarily all the details contained in that affidavit.—*Re COURTOIS' TRUST* (1853), 10 Hare, App. II, lxiv; 22 L. J. Ch. 1045; 17 Jur. 852; 68 E. R. 1152.

### iv. Service.

*See R. S. C., Ord. 54B, r. 3 (2) C.; County Court Rules, 1903, Ord. 38, rr. 24, 28.*

**2528. On whom to be made—Previous order for payment out of part of fund—Petition for payment out of remainder.]**—*DALLIMORE v. OGILBY* (1852), 20 L. T. O. S. 9; 16 Jur. 443.

**2529. — Trustee—Trustee not able to be found—Service at address given on payment into court.]**—Where the trustee, who has paid a trust fund into ct. under Trustee Relief Act, cannot be found, service on him of the petition for payment out of the fund, at the address given by him in his affidavit on the occasion of his paying in the money, will be deemed good service.—*Ex p. BAUGHAM* (1852), 16 Jur. 325.

*Annotation*:—*Reid. Re Lawrence's Trusts* (1865), 13 L. T. 580.

**2530. — — — — —.]**—Where a trustee, having paid money into ct., names in his affidavit a place where he may be served, & it is found that personal service cannot be effected upon him at such place, the ct. will consider such service good, provided that all diligence has been used to effect personal service upon him elsewhere.—*Re LAWRENCE'S TRUSTS* (1865), 13 L. T. 580; 14 W. R. 93.

**2531. — — — — — Part of fund carried to separate account of lunatic—Petition in lunacy for transfer.]**—A fund having been paid into ct. by the trustees, under Trustee Relief Act, one-third was carried to the separate account of one of the *cestui que trust*, who was a lunatic. Afterwards a petition was presented in lunacy for a transfer of the one-third belonging to the lunatic:—*Held*: the trustees need not be served with notice of the petition.—*Re YOUNG (A LUNATIC)* (1857), 5 W. R. 400, L. J.J.

**2532. — — — — — When service dispensed with—Decision of court upon will.]**—Where the ct. has decided a question under a will upon a fund being paid into ct. under Trustee Relief Act, & a petition is presented for payment out of ct. of such fund, the ct. will dispense with service upon the trustee.—*Re THOMAS'S WILL* (1863), 11 W. R. 276.

**2533. — — — — — Address for service demollshed.]**—Where the house named by trustees on payment into ct. as their address for service had been pulled down & the trustees had not been heard of for ten years. Service of petition for payment out of ct. dispensed with, & an inquiry directed to ascertain who were entitled to the fund.—*Re BOLTON'S WILL* (1869), 21 L. T. 413; 18 W. R. 50.

**2534. — — — — — Fund lodged to account of party "with remainder over."]**—PRACTICE NOTE, [1907] W. N. 44.

**2535. — — — — — Parties claiming interest in aggregate**

*Sect. 9.—Lodgment of trust fund in court: Sub-sect. 2, C. (a) iv., (b), & D.]*

**fund.—Claim to payment of annuity.]—Qu.:** whether the parties beneficially interested in a fund which has been paid into ct. under Trustee Relief Act should be served with petition for payment of an annuity out of the dividends thereof, when the petition prays costs out of the corpus of the fund.—*Re GREENLAND'S TRUSTS* (1852), 1 W. R. 46.

**2538. — Claim to particular share.]—A** person claiming a particular share of an aggregate fund brought into ct. under Trustee Relief Act, presenting a petition to get that share out of ct., ought to serve with the petition all the other persons whom the trustees have stated to be in their belief interested in the fund.—*Re MANNING'S TRUSTS* (1855), 3 W. R. 379.

**2537. — Not where rights declared against by court.]—Where** money has been paid into ct. under Trustee Relief Act, 1847 (c. 96), & the ct., in an action brought for the fund, has declared the rights of the persons interested; on an application made by the trustee & the person so interested for payment out, it is unnecessary to serve notice of the application on persons who, although stated in the trustee's affidavit as being interested in the fund, have not been declared to be so by the ct.—*Re FOSBURY'S TRUSTS* (1878), 39 L. T. 422.

**2538. — Administrator—Petition by next of kin.]—Re BEAUCLERK** (1862), 11 W. R. 203.

**2539. — Numerous parties interested—Service on representatives of each class.]—Testator** devised real estate in strict settlement, & prohibited the cutting of timber for any purpose, & in lieu thereof gave a sum of stock to trustees on trust, to apply the dividends to the repairs of the estate for a term of years, & to pay the surplus to the persons in possession of the estate under the will; & at the expiration of the term to transfer the stock to the person in possession of the estate, if a son or descendant of any of his sons, otherwise to the descendants of his brothers & sisters. Before the expiration of the term the estate tail was barred. The trustees paid the fund into ct., & the persons entitled to the estate presented a petition for immediate transfer of the fund. Resps. to the petition, the descendants of the sons, & the brothers & sisters, were extremely numerous:—*Held:* the question might be decided on petition, two of the descendants of each son, & of each brother & sister, being served with the petition.—*Re COLSON'S TRUSTS* (1853), 2 Eq. Rep. 257; 22 L. T. O. S. 183; 2 W. R. 111.

**2540. — All parties not before the court.]—On** a petition under Trustee Relief Act for payment out of ct of a fund to which numerous parties were entitled, most of whom were not before the ct., a former order having been made directing class inquiries, & the Chief Clerk having made his certificate, it was ordered that petitioner be at liberty to serve a copy of the petition, the former order, & the Chief's Clerk's certificate, together with the present order, upon the several persons named in the certificate, & that the petition stand over till such persons had been served.—*Re BATTERSBY'S TRUSTS* (1878), 10 Ch. D. 228.

### PART III. SECT. 9, SUB-SECT. 2.—C. (b).

**2541 i. Whether proper mode of application.]—Re CAMPBELL'S TRUSTS** (1893), 31 L. R. Ir. 434.—*IR.*

**2541 ii. —.]—FERGUSON v. FER-**

**GUSON**, [1920] 1 I. R. 81.—*IR.*

### PART III. SECT. 9, SUB-SECT. 2.—D.

**d. Trustee—Sole trustee.]—The** residue of the purchase-money, after payment of incumbrances upon lands

(b) *By Summons.*

*See R. S. C., Ord. 55, r. 2 (1).*

**2541. Whether proper mode of application.]—PELLING v. GODDARD**, No. 2501, *ante*.

**2542. — Title of applicant defending only on proof of birth.]—Re BROADWOOD**, No. 2502, *ante*.

**2543. — Previous order declaring rights.]—Freehold** hereditaments in the city of London, to a moiety of which A. was entitled after the death of a tenant for life, subject to four life annuities of £50 payable from the death of the tenant for life, were taken by the Metropolitan Board of Works, & the money paid into ct. under the Lands Clauses Act, 1845 (c. 18). In 1866 an order was made on petition, whereby a sum of £7,000 was ordered to be invested to provide for the annuities when they should become payable, & the balance of a moiety of the fund, after providing for the tenant for life's interest, was directed to be paid to A. In 1868 one of the expectant annuitants died; in 1869 the tenant for life died; & in 1870 another order was made on petition, whereby a sum of stock which would have been sufficient to pay an annuity of £50, was ordered to be transferred to A.

A second annuitant having died in May, 1883, A. claimed a sum of £1,000 13s. 4d. Consols, being so much of the residue of the investment of £7,000 as had sufficed to provide for the second annuity of £50.—*Held:* the orders of the ct. in 1866 & 1870, amounted to "an order declaring the rights of" A. within the meaning of R. S. C., 1883, Ord. 55, r. 2 (1); & the application ought to be by summons.

The generality of R. S. C., Ord. 55, r. 2 (1), is not cut down or qualified by sub-sect. 7 or any of the sub-sects. of r. 2 following sub-sect. 1.—*Re BRANDRAM* (1883), 25 Ch. D. 366; 53 L. J. Ch. 331; 49 L. T. 558; 32 W. R. 180.

*Annotations.—Ald. Re Madgwick* (1883), 53 L. J. Ch. 333. *N.F. Re Rhodes* (1886), 31 Ch. D. 499.

**2544. — Sum over one thousand pounds—Part paid out.]—Re EVANS**, No. 2504, *ante*.

**2545. —.]—Re RHODES**, No. 2505, *ante*.

### D. To Whom Payment Made.

**2546. Administrator of cestui que trust.]—Where** a person had at his death, & when letters of administration were granted, *bona notabilia* in one diocese only, the subsequent payment of a portion of them into the Ct. of Ch. does not render a prerogative probate necessary to obtain payment out of ct.

Where therefore an intestate was, at his death, entitled to legacies under two wills which had been proved in the Consistory Court of Chester, in which diocese the exors. & trustees of both wills were also living at the death of intestate, & letters of administration to intestate, who died abroad, were granted by the same ct., & afterwards the trustees of one of the wills paid the money into the Ct. of Ch. under the Trustees' Relief Act, it was held that the diocesan letters of administration were sufficient to authorise the administrator to receive the money out of ct.—*Re KNOWLE'S TRUSTS* (1851), 1 De G. M. & G. 80; 21 L. J. Ch. 142; 18 L. T. O. S. 104; 15 Jur. 1163; 42 E. R. 474, L. J.J. *Annotation:—Reid. Re Spencer* (1852), 1 De G. M. & G. 311.

**2547. —.]—The personal estate of an intestate**

sold in the Landed Estates Ct., will not be paid over to a sole trustee of such lands, although the instrument by which they were put in settlement appointed only one such trustee.—*Re DICKSON'S ESTATE* (1869), 3 I. R. Eq. 344.—*IR.*

consisted of a reversionary share in the proceeds of trust property, which at her death was unsold, & situate within the jurisdiction of an archdeaconry ct. Administration was not taken out to her till after the reversion had fallen into possession; the trust property had been sold, & intestate's share had been paid in to the Ct. of Ch. under Trustees' Relief Act. Letters of administration were then granted by the archdeaconry ct.:—*Held*: they were sufficient to entitle the administrator to payment of the share out of ct.—*Re SPENCER* (1852), 1 De G. M. & G. 311; 21 L. J. Ch. 314; 18 L. T. O. S. 266; 16 Jur. 233; 42 E. R. 572, L. J.J.

**2548. Party entitled to share of fund—In absence of parties entitled to other shares.]—**A share of funds in ct. may be paid out to a party entitled to it, in absence of parties entitled to the other shares.—*Re BEFFORD'S WILL* (1853), 21 L. T. O. S. 164.

**2549. Fund in court for children—Birth of illegitimate child—Payment out to one of legitimate children—After service on illegitimate child.]—**A fund in ct., was held in trust for the children of A. A. had been separated from his wife, who during the separation had given birth to a child. The ct., considering the evidence of non-access sufficient, allowed a share in the fund to be paid to one of the legitimate children on petition, the petition having been served on the bastard, who was still an infant.—*SINCLAIR v. SINCLAIR* (1853), 2 W. R. 69.

**2550. Solicitor of infant—Undertaking to apply for infant's benefit.]—**The whole of a small legacy & its accumulations, were paid out of ct. to the solr. of an infant who had no other property, upon his undertaking to apply in discharging a sum claimed for past maintenance & for a prospective outfit, & after deducting the costs, to pay any remaining balance to the infant at majority.—*Re WELCH* (1854), 23 L. J. Ch. 344; 2 W. R. 310.

**2551. Residuary legatees—Title of account showing only general trust—Amendment of title.]—***Re ROBINSON'S TRUST* (1855), 1 Jur. N. S. 750.

**2552. Married woman deserted by husband.]—**A married woman entitled to a reversionary legacy, is deserted by her husband, who goes abroad, & has not been heard of, when such legacy falls into possession. She then obtains a protection order from a magistrate, under Matrimonial Causes Act, 1857 (c. 85), & the trustee of the will having paid the legacy into ct., under Trustee Relief Act, 1847 (c. 96), she petitions for payment out:—*Held*: she is entitled to the order. *Re SHICKLE'S TRUST* (1859), 7 W. R. 280.

**2553. Distribution as in administration action.]—**A trustee who has paid a sum of money into ct. under Trustee Relief Act, 1847 (c. 96), may afterwards apply by petition that the fund may be dealt with as in an administration suit.—*Re TROWER'S TRUSTS* (1859), 1 L. T. 54.

**2554. Successive life-tenants—Without fresh petition on death of first.]—**When a fund which has been paid into ct. is settled on two successive tenants for life, an order may be made for payment of the dividends to the first tenant for life, & on proof of his death, to the second, without any further petition.—*Re BRENT'S TRUSTS* (1860), 8 W. R. 270.

**2555. Single trustee—Undertaking to remit fund to beneficiaries—Beneficiaries abroad.]—**A fund paid into ct. ordered to be restored to a trustee, he undertaking to remit it to legatees residing in America.—*IBERSON v. WARTH* (1855), 25 L. T. O. S. 43; 1 Jur. N. S. 440; 3 W. R. 230.

**2556. — All parties must be present.]—**The ct. will never order payment out of a fund in ct. to a

sole trustee in the absence of any parties interested in the estate, unless such estate is substantially represented.—*Re ROBERTS* (1861), 7 Jur. N. S. 818; 9 W. R. 758.

**2557. Fund in court included in settlement—Settlement prepared but not executed—Payment to intending settlors.]—***Re BENDYSHE*, No. 2467, *ante*.

**2558. — Sum included in error—Settlement not rectified.]—**A fund in ct., which has, contrary to the intention of the parties, clearly proved, been included in a settlement, will only be paid out to the parties entitled under that settlement, until it has been reformed; & this ct. has no jurisdiction, upon petition, to reform an instrument.—*Re MALET* (1862), 30 Beav. 407; 31 L. J. Ch. 455; 8 Jur. N. S. 226; 10 W. R. 332; 54 E. R. 947.

**2559. Person to whose account fund credited—Court not advised as to adverse claims.]—**When there are conflicting claims to a trust fund, & the trustees have paid it into ct. to the account of one of claimants, without giving, at the same time, notice to the ct. of the adverse claims, payment of the fund to the person in whose name it stands ordered by the ct., but without prejudice to any question as between the trustees & the adverse claimants.—*Re JENKINS' TRUSTS* (1864), 3 New Rep. 408; 10 L. T. 58; 10 Jur. N. S. 332.

**2560. Settlement according to foreign law—Husband taking no interest—Payment to husband as guardian of infant.]—**A sum of stock paid into ct. under Trustee Relief Act, & forming the subject of a settlement according to the law of Prussia, under which the husband took no interest, ordered, after the death of the wife, to be paid out to him in his capacity of guardian of the infant child of the marriage, who was entitled to the fund upon the death of her mother.—*Re BROWN'S TRUST* (1865), 12 L. T. 488; 13 W. R. 677.

*Annotation*:—*Consd. Re Chatard's Settltm.*, [1899] 1 Ch. 712.

**2561. Female beneficiary—Presumption against birth of issue.]—**Where a spinster was fifty-three years of age, the ct. allowed payment out of ct. of a fund to parties entitled thereto in the event of the lady's having no children.—*HAYNES v. HAYNES* (1866), 35 L. J. Ch. 303; 14 L. T. 47; 14 W. R. 361.

*Annotation*:—*Reid. Re White, White v. Edmond*, [1901] 1 Ch. 570.

**2562. — — —.]—**Money ordered to be paid out of ct. on the presumption that a widow aged fifty-five years & four months, who had never had any children, & a spinster aged fifty-three years & nine months, would not have any children.—*Re WIDOW'S TRUSTS* (1871), L. R. 11 Eq. 408; 40 L. J. Ch. 380; 24 L. T. 87; 19 W. R. 468.

*Annotations*:—*Apld. Re White, White v. Edmond*, [1901] 1 Ch. 570. *Reid. Croxton v. May* (1878), 9 Ch. D. 388.

**2563. — — —.]—**When a woman having been married twenty-six years to her present husband, & being now aged forty-nine years & nine months, had no children, the ct. sanctioned payment out of a fund on the assumption that she would have no children by her present husband.—*Re MILLNER'S ESTATE* (1872), L. R. 14 Eq. 245; 42 L. J. Ch. 44; 26 L. T. 825; 20 W. R. 823.

*Annotations*:—*Apld. Re Summer's Trusts* (1874), 22 W. R. 639. *Reid. Croxton v. May* (1878), 9 Ch. D. 388; *Re White, White v. Edmond*, [1901] 1 Ch. 570.

**2564. — — —.]—**Circumstances under which the ct. presumed that a married woman aged forty-seven years & upwards who had had six children by her husband who was still living would not have another child.—*Re SUMMERS' TRUSTS* (1874), 30 L. T. 377; 22 W. R. 639.

**2565. — — —.]—***Re THORNHILL, THORNHILL v. NIXON*, [1904] W. N. 112.

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**2566. Several petitioners—Affidavit verifying title of all.]**—The ct. will order a fund in ct. to be paid to several petitioners on an affidavit by one of them sufficiently verifying the title of all of petitioners to such fund.—*JERSEY v. JERSEY* (1866), 14 L. T. 13.

**2567. Trustee—Settlement of share of fund established by private Act—Settlement without consent of directors of fund.]**—A fund was established under a special Act as a provision, upon the principle of a life insurance, by officers of the Customs for their widows, children & relatives. Under the Act, directors of the fund were appointed, with power to frame rules for the management of the fund, & with discretion to admit nominees of the subscribers, other than relatives, to the benefit arising out of any subscriptions. By the Act a restriction was placed on alienation by widows, children & other claimants without consent of the directors. By the rules, each subscriber had power to direct how his portion of the fund should be applied for the benefit of his widow, children or relatives, or his nominees, who should have been duly admitted by the directors. A subscriber, a widower, made, on the occasion of his daughter's marriage, an appointment of his share of the fund to the trustees of his daughter's settlement, the trusts being for his daughter for her life, remainder to her husband for life, remainder to the children of the marriage. The trustees were never formally admitted under the rules, though their names were sent in for that purpose by the settlor. The daughter predeceased her father. On his death, the directors paid his share into ct. under Trustee Relief Act, one moiety of it being claimed by the surviving son of the subscriber:—*Held*: the settlement on the daughter's marriage was such a settlement for the benefit of his daughter as the subscriber had a right to make, & the formal admission by the directors of the trustees as the nominees of the settlor was unnecessary, & the fund must be paid to them.—*Re POCOCK'S POLICY* (1871), 6 Ch. App. 445; 40 L. J. Ch. 681; 25 L. T. 233; 19 W. R. 801, L. J.J.

*Annotations:—*Consd. *Scotney v. Lomer* (1885), 20 Ch. D. 335. *Re Phillips' Insce.* (1883), 31 W. R. 511; *Urquhart v. Butterfield* (1887), 37 Ch. D. 357.

**2568. Trustee in bankruptcy—Insolvency abroad—Death of insolvent intestate in England.]**—W. went to reside in the colony of Queensland, where, upon his own petition he was adjudicated an insolvent, & obtained his certificate of discharge. He returned to England, where he died intestate. His official assignee presented a petition for the payment of money out of ct., which had been paid in under Trustee Relief Act:—*Held*: he was entitled to the fund in ct., & the insolvent having submitted to the jurisdiction of the colonial court, his legal personal representative could not raise a question of domicile.—*Re DAVIDSON'S SETTLEMENT TRUSTS* (1873), L. R. 15 Eq. 383; 42 L. J. Ch. 347; 37 J. P. 484; 21 W. R. 454.

*Annotations:—**Apld. Re Lawson's Trusts*, [1896] 1 Ch. 175. *Fold. Re Anderson*, [1911] 1 K. B. 896. *Re Hayward*, *Hayward v. Hayward*, [1897] 1 Ch. 905; *Re Craig*, *Catling v. Esson*, [1917] H. B. R. 1.

**2569. Death of insolvent intestate abroad.]**—A fund in ct. which stood to the credit of a person who had become insolvent at Bombay & had afterwards died there intestate was ordered to be paid out to the official assignee of the Insolvent Ct. at Bombay in whom all the property of insolvent had been vested by an order of that ct. without requiring administration in England to

be taken out, administration having been granted to his estate in India & there being evidence that the debts proved in the insolvency were still unpaid & that insolvent had not obtained his discharge.—*Re LAWSON'S TRUST*, [1896] 1 Ch. 175; 65 L. J. Ch. 95; 73 L. T. 571; 44 W. R. 280.

*Annotations:—**Apld. Re Anderson* [1911] 1 K. B. 896. *Re Hayward*, *Hayward v. Hayward*, [1897] 1 Ch. 905; *Re Craig*, *Catling v. Esson* (1916), 86 L. J. Ch. 62.

**2570. Sole trustee.]**—*CHAPMAN v. LOFTUS* (1895), 39 Sol. Jo. 217.

**2571. ———.]**—The rule that a trust fund in ct. will not be ordered to be paid out to a sole trustee except on the consent of all parties beneficially interested is not an inflexible rule; under special circumstances payment to a sole trustee will be ordered.

A lady, on her marriage in 1890, settled a fund of her own to be held by G., her brother, in trust for herself for life, then for U., her husband, for his life & on the death of the survivor upon trust for the children of the marriage, & in default of children in trust for the settlor absolutely. G. was empowered, while sole trustee, to invest the fund as he thought fit, but if he ceased to be sole trustee, the fund was to be invested on trust securities. U. deserted the settlor in 1890, & they had not since come together. There were no children of the marriage. The fund being in ct., G., & the settlor petitioned for payment out to G., as sole trustee. U. was not a party to the proceedings. G. undertook that if a child of the marriage was born he would have a second trustee appointed:—*Held*: in these circumstances the fund must be ordered to be paid out to G., the sole trustee.—*LEIGH v. PANTIN*, [1914] 2 Ch. 701; 84 L. J. Ch. 345; 112 L. T. 20.

**2572. Undertaking to remit to infant legatees—Legacies payable notwithstanding infancy.]**—Testator gave a sum of money to be paid to the legatees when they attained the age of eighteen, & directed that their receipts should be a sufficient discharge, notwithstanding infancy. The fund was in ct.:—*Held*: the money might be paid out to the trustees on their undertaking to remit it forthwith to the legatees, who were still infants, but had attained the age of eighteen.—*Re DENEKIN*, *PETERS v. TANCHEREAU* (1895), 72 L. T. 220; 13 R. 294.

**2573. One of several trustees abroad—Sum payable to other trustees.]**—In the absence abroad of one of several trustees the ct. may order a sum of money under its control to be paid to the other trustees, without requiring the absent trustee to join in giving the receipt by power of attorney.—*CLARK v. FENWICK* (1873), 42 L. J. Ch. 320; 21 W. R. 320.

**2574. Beneficiaries—Advances not brought into hotchpot.]**—Where a fund had been settled with power to trustees to make advances for the maintenance of the beneficiaries, & they had not done so before paying the fund into the county ct. under Trustee Relief Act, but advances had been made to some of the beneficiaries by order of the ct., such beneficiaries, on a petition for the distribution of the fund, being ordered to bring such amounts into hotchpot:—*Held*: the judge had been wrong as to introducing a hotchpot clause into the deed.—*Re MITFORD* (1885), 2 T. L. R. 102, D. C.

**2575. Foreign guardians of infant foreign beneficiaries.]**—The ct. will not order payment out of a fund paid into ct. under Trustee Relief Act to the French guardian of infant French subjects as a matter of right on mere proof of the guardian's title to give a legal discharge on the infants'

behalf, but will exercise its discretion & consider whether payment out is properly required for the infants' benefit.—*Re CHATARD'S SETTLEMENT*, [1899] 1 Ch. 712; 68 L. J. Ch. 350; 80 L. T. 645; 47 W. R. 515.

*Annotation*.—*Reid*. *Thiery v. Chalmers, Guthrie*, [1900] 1 Ch. 80.

**2576. Nominee of person entitled.]**—*Re BRETTINGHAM, MELIADO v. WOODCOCK*, [1904] W. N. 108.

**Lunatic resident out of jurisdiction.]**—*See LUNATICS*, Vol. XXXIII., pp. 199, 200, Nos. 1030–1034.

### *E. Costs.*

#### (a) *Costs of Trustees.*

##### i. *Right to Costs.*

**2577. Grounds for payment in unreasonable.]**—*A cestui que trust* of moneys in the hands of his trustees offered them any discharge or acquittance they might require for the balance actually paid to him, but without waiving his right to an account against them. The trustees declined to accede to those terms, & paid all the money in their hands into ct., under Trustee Relief Act, 1847 (c. 96). The *cestui que trust* now presented a petition for payment out of ct. of the money so paid in:—*Held*: although (1) the ct. could not compel the trustees to pay costs; (2) they could in this case be allowed only the costs of paying the money into ct., & none on the petition.—*Re HEMING'S TRUST* (1850), 3 K. & J. 40; 26 L. J. Ch. 106; 28 L. T. O. S. 99; 5 W. R. 33; 69 E. R. 1013; *sub nom. Ex p. HEMMING*, 2 Jur. N. S. 1186.

*Annotation*.—*As to* (1) *N.F. Re Woodburn's Will* (1857), 1 De G. & J. 333.

**2578. —.]**—Trustees who, after accepting the trust had paid the trust fund into ct., without sufficient reason refused their costs of an application to pay the income to the tenant for life.

A fund was held in trust for A., an unmarried lady for life but to cease if “by any means whatever” it should vest or become payable to any other person. A., afterwards married, & her life interest was settled to her separate use without power of anticipation, by a settlement to which the trustees purported to be parties but to which they never assented. The trustees thereupon paid the trust fund into ct. under Trustee Relief Act:—*Held*: as the trusts which they had accepted had not been varied either by the marriage or the settlement, they were not justified in paying the money into ct. & they were refused their costs of appearing on a petition for payment of the income to the tenant for life.—*Re LEAKE'S TRUSTS* (1863), 32 Beav. 135; 1 New Rep. 417; 7 L. T. 816; 9 Jur. N. S. 453; 11 W. R. 352; 55 E. R. 53.

*Annotations*.—*Distd. Eady v. Watson* (1864), 10 L. T. 235. *Reid. Re Turnley's Trusts* (1866), 35 L. J. Ch. 313.

**2579. —.]**—Where trustees paid trust money into ct., under Trustee Relief Act, upon grounds which appeared to the ct. unreasonable, they were not allowed their costs of appearing on a petition presented by the *cestui que trust* for payment of the money out of ct.—*Re PEARSON* (1869), 20 L. T. 8; 17 W. R. 365.

**2580. Payment on information of intended action —For breach of trust.]**—Exors., being informed that a bill was about to be filed against them by a person entitled to a share of residue, charging them with breaches of trust, paid a sum of money into ct., under Trustee Relief Act, as the share of that person. The bill was afterwards filed, & on an application for payment out of ct. by the person entitled, the trustees were not allowed their

costs.—*Re WARING* (1852), 21 L. J. Ch. 784; 16 Jur. 652.

*Annotation*.—*Reid. Ex p. Hemming* (1856), 2 Jur. N. S. 1186.

**2581. Petition by trustees—Respondents' costs—Petition without consent of beneficiaries.]**—But where a petition was presented by trustees without consent of the parties claiming beneficial interests in the fund, & no cause was shown by the trustees for taking upon themselves to be the movers in the matter, the ct., to discourage such applications, allowed them only resps.' costs.—*Re CAZNEAU'S LEGACY UNDER HOUSMAN'S WILL* (1856), 2 K. & J. 249; 2 Jur. N. S. 157; 69 E. R. 772; *sub nom. Re HOUSMAN'S TRUSTS*, 4 W. R. 274.

*Annotation*.—*Folld. Re Hutchinson's Trusts* (1860), 1 Drew. & Sm. 27.

**2582. — Petition at request of one beneficiary.]**—Although a trustee may, under R. S. C., June 10, 1848, Ord. 4, present a petition under Trustee Relief Act, as to moneys paid in by himself, the ct., in making an order on such petition, gave him resps.' costs only, even where his petition was presented at the request of one of the parties beneficially interested in the fund.—*Re HUTCHINSON'S TRUSTS* (1860), 1 Drew. & Sm. 27; 29 L. J. Ch. 356; 1 L. T. 428; 6 Jur. N. S. 136; 8 W. R. 253; 62 E. R. 288.

**2583. Payment in to account of deceased person —Administration necessary for payment out.]**—A fund paid into ct. under Trustee Relief Acts to the credit of a matter, entitled the account of deceased person, will not be ordered to be paid out without the presence of his personal representative, & an admission of assets by him. Administration having been taken out to obviate the difficulty, the costs were given out of the fund, & the trustees, by whom the money was paid in, were allowed their costs.—*Re EDWARDS' TRUSTS* (1856), 28 L. T. O. S. 57; 4 W. R. 801.

**2584. Petition by cestui que trust—Payment on appointment of new trustee.]**—(1) A trust fund was paid into ct. by a trustee upon being informed that a new trustee, to whose proposed appointment he had previously objected on the ground that he was unknown to him & believed not to be a fit & proper person, had been appointed joint trustee with him over the fund:—*Held*: the trustee was entitled to receive his costs upon the petition of the *cestui que trust* for a transfer of the fund to new trustees.

(2) A trustee who pays a trust fund into ct. under Trustee Relief Act, 1850 (c. 60):—*Held*: to have thereby retired from the trust.—*Re WILLIAMS' SETTLEMENT* (1858), 4 K. & J. 87; 32 L. T. O. S. 9; 6 W. R. 218; 70 E. R. 37.

*Annotations*.—*As to* (2) *Consd. Thompson v. Tomkins* (1862), 2 Drew & Sm. 8. *Apld. Re Nettelfold's Trusts* (1888), 59 L. T. 315.

**2585. Sum retained for costs on payment in—Costs taxed.]**—Trustees, on paying a fund into ct., under Trustee Relief Act, retained a sum for their costs. On a petition to obtain the fund out of ct., the trustees obtained the costs of their appearance, but all their costs were ordered to be taxed.—*Re HUE'S TRUSTS* (1859), 27 Beav. 337; 28 L. J. Ch. 893; 33 L. T. O. S. 254; 5 Jur. N. S. 1235; 7 W. R. 562; 54 E. R. 132.

**2586. — Jurisdiction to order repayment on petition—Separate proceedings necessary.]**—(1) On applications for payment out of a fund which has been paid into ct. under Trustee Relief Act, 1850 (c. 60), the jurisdiction of the ct. is limited to the fund which has been actually brought into ct.; & repayment by the trustees of costs & expenses deducted by them from the fund before payment in cannot be ordered. If it can be shown that in

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such a case the costs & expenses have been improperly retained, separate proceedings must be taken against the trustees to recover the amount.

(2) There is nothing unreasonable on the part of trustees in paying into ct., under Trustee Relief Act, 1850 (c. 60), money in their hands belonging to a person whom they honestly believe to be in such a mental state as to be incapable of managing his own affairs.—*Re PARKER'S WILL* (1888), 39 Ch. D. 303; 58 L. J. Ch. 23; 60 L. T. 83; 37 W. R. 313; 4 T. L. R. 740, C. A.

**2587. Separate appearances by trustees & cestuis que trust—Separate costs allowed.**—Upon a petition for payment out of ct. of a portion of a trust fund standing to the credit of the cause, the ct. made the order as prayed, & also reserved liberty to apply in chambers as to the corpus or income of the residue of the fund. The trustees & some infant *cestuis que trust* of the fund appeared as resps. to the petition, & were allowed their separate costs of appearance.—*WINKWORTH v. WINKWORTH* (1862), 32 Beav. 233; 1 New Rep. 6; 32 L. J. Ch. 40; 7 L. T. 303; 9 Jur. N. S. 61; 11 W. R. 15; 65 E. R. 92.

**2588. Payment in by bankers.**—*Re SUTTON'S TRUSTS*, No. 2479, *ante*.

**2589. Trustee appearing as respondent—Tender of costs.**—Trustees who are resps. to a petition under Trustee Relief Act, 1847 (c. 96), for payment of a fund out of ct., & have been tendered & have accepted 42s. for their costs under R. S. C., 1875 (Costs), Sched. r. 17, are not, as a general rule, entitled to their costs of appearance on the petition.—*Re SUTTON* (1882), 21 Ch. D. 555; 46 L. T. 740; 30 W. R. 657.

*See, now, R. S. C., Ord. 65, r. 27 (19).*

*ii. Liability to Pay Costs.*

**2590. Grounds for payment in unreasonable.**—*Re HEMING'S TRUST*, No. 2577, *ante*.

**2591.**—[The ct. has jurisdiction to order trustee to pay the costs of an application for payment out of ct. of a fund paid in by him under Trustee Relief Act, 1847 (c. 96).]

A trustee of a small trust fund which had become divisible, called upon claimants for proof of their title. They procured evidence which, though not technically complete, was tolerably satisfactory, & he declared himself ready to pay the fund to them. Afterwards, without assigning any reason, he receded from this determination, & the matter, which had been conducted on his behalf by his country solrs., was placed in the hands of his London agents, who made various objections to the sufficiency of the evidence. Claimants produced additional evidence, & requested to know what more the trustee required, & offered to produce it. The trustee, however, without waiting for its production, paid the money into ct. Appcts. petitioned for payment of the fund to them, & made out their title to the satisfaction of the ct.:—*Held*: under the circumstances, the trustee had been properly ordered to pay the costs of the petition.—*Re WOODBURN'S WILL* (1857), 1 De G. & J. 333; 26 L. J. Ch. 522; 29 L. T. O. S. 206, 222; 3 Jur. N. S. 799; 5 W. R. 642; 44 E. R. 752, L. C. & N. J.

*Annotations*.—*Distd. Re Headington's Trust* (1857), 27 L. J. Ch. 175. *Consd. King v. King* (1857), 27 L. J. Ch. 29. *Distd. Re Wylly's Trust* (1860), 28 Beav. 458. *Reid*.

*Re Bendyshe* (1857), 26 L. J. Ch. 814; *Re Knight's Trusts* (1859), 27 Beav. 45; *Re Barbers Trusts* (1863), 2 New Rep. 571; *Re Parker's Will* (1888), 39 Ch. D. 303.

**2592.**—[A trustee paid trust funds into ct., under Trustee Relief Act, merely because other trustees to whom it was payable declined to give a release. He was ordered to pay the costs of getting the money out of ct.—*Re CATER'S TRUSTS* (No. 2) (1858), 25 Beav. 366; 53 E. R. 676.

*Annotation*.—*Distd. Re Wylly's Trusts* (1860), 28 Beav. 458.

**2593.**—[*Re WYLLY'S TRUSTS*, No. 2425, *ante*.

**2594.**—[Trustees who had, without sufficient reason, paid a trust fund into ct. under Trustee Relief Act, were ordered to pay the costs of a petition for its payment to the party entitled.

A. & B., being each entitled to one-fifth of a reversionary fund, mortgaged their shares with a power of sale. B. was a mere surety for A., & A. afterwards assigned his share to B. for his indemnity, with a power to sell and to give receipts for the share & the produce of the sale. The mtgees. sold the reversionary interest, & refused to pay the surplus to B. without the concurrence & release of A., & they paid the fund into ct. under Trustee Relief Act:—*Held*: this was improper, & they were ordered to pay the costs of a petition to get the money out of ct.—*Re FOLIGNO'S MORTGAGE* (1863), 32 Beav. 134; 55 E. R. 51.

**2595.**—[*Re GLENDENNING*, [1867] W. N. 191.

**2596.**—[Testatrix left a fund upon trust to pay the income to E. for life, & after her death for "all & every the child & children of E." E. left one legitimate & two illegitimate children, all living at the date of the will & of testatrix's death. The trustee after the death of E., was about to pay the fund to the three children, but on his solr.'s advice paid the fund into ct., as there were "adverse claims." The eldest illegitimate child offered to send the certificates of birth of all the children, but the trustee did not accept the offer, & made no inquiries:—*Held*: the fund was improperly paid into ct., & the trustee ordered to pay costs of the petition, for which he had his remedy against the solr. for improper advice.—*Re M'NAUGHTAN'S TRUSTS* (1876), 33 L. T. 774.

**2597.**—[*Re CULL'S TRUSTS*, No. 2487, *ante*.

**2598.**—[*Re DICKINSON* (1886), 2 T. L. R. 650.

*(b) Costs of Other Persons.*

**2599. Right to costs—Person served with petition—Person sending notice of claim—Subsequently disclaiming.**—A petition for payment out of ct. was served on a party who did not appear on the petition to have any claim, but had sent notice of a claim. She now disclaimed, & was not allowed her costs.—*Re PARRY'S TRUSTS* (1848), 11 L. T. O. S. 532; 12 Jur. 615.

**2600.**—**Respondent unnecessarily served.**—(1) Petitioner, claiming a fund under Trustee Relief Act, 1847 (c. 96), allowed his costs although his claim failed.

(2) According to the present practice resp., unnecessarily served, is not, as a matter of course, entitled to his costs of appearing.—*Re BIRCH'S LEGACY UNDER BISSELL'S WILL* (1856), 2 K. & J. 369; 60 E. R. 824.

**2601.**—**Petition by assignee of fund—Assignor opposing on ground of restraint of anticipation.**—Testator's widow had married a second husband, & had assigned her life interest in the fund. Upon



her second husband's death, the trustees paid the money into ct. under Trustee Act, & her assignee presented a petition to have the dividends paid to him during her life. The petition was opposed on behalf of the widow, on the ground that she had no power of anticipation under the will:—*Held*: the widow was not entitled to her costs, but her assignee's costs must be paid out of the fund in ct.—*Re ROSS'S TRUST, Ex p. COLLINS* (1851), 1 Sim. N. S. 196; 20 L. J. Ch. 293; 15 Jur. 241; 61 E. R. 76.

*Annotations*:—*Folld. Re Field's Trust* (1852), 16 Beav. 146. *Apld. Re Turnley's Trusts* (1866), 35 L. J. Ch. 313. *Re Bangley's Trust* (1852), 19 L. T. O. S. 269. *Mentd. Hood Barrs v. Heriot*, [1896] A. C. 174.

**2602.** — *Unsuccessful petitioner.*] — *Re BIRCH'S LEGACY UNDER BISSELL'S WILL, No. 2600, ante.*

**2603.** — *Unsuccessful respondent.*] — The fund having been paid into ct. under Trustee Relief Act, the assignee in insolvency had presented his petition claiming the fund, which he had served on the overseers; & the latter appeared & argued their claim:—*Held*: they were not entitled to costs.—*Re TYLER'S TRUSTS* (1856), 2 Jur. N. S. 927; 4 W. R. 524.

**2604.** — *Two separate petitions—Both raising same issue.*]—When two petitions are *bond fide* separately prepared for obtaining payment out of ct. of a sum paid in under Trustee Relief Acts, & both raise the same issue, the ct. will in general allow the costs of the preparation of the second petition, but where solrs. had been informed that a petition was presented, & they persisted in presenting another for the same object the costs of the preparation & presentation of the second petition were disallowed.—*Re CHAPLIN'S TRUSTS* (2) (1863), 3 New Rep. 289; 33 L. J. Ch. 183; 9 L. T. 677.

**2605.** *Liability for costs—Respondent unsuccessfully claiming fund—Claim occasioning payment into court.*]—When money in the hands of a third person is claimed by two claimants, & is therefore paid into ct. by the holder, under Trustee Relief Act, unsuccessful claimant will have to pay the costs of the application for payment out of ct.—*Re ARMSTRON'S TRUSTS* (1864), 4 De G. J. & Sm. 454; 4 New Rep. 450; 10 Jur. N. S. 715; 46 E. R. 994, L. J.J.

*Annotation*:—*Refd. Re Pettit's Estate* (1876), 1 Ch. D. 478.

**2606.** — [—]—*Resps. who make an unfounded claim to a fund, & so occasion the payment of it into ct. under Trustee Relief Acts, will be ordered to pay the costs of getting the fund out of ct.*—*Re BENTON'S POLICY TRUSTS* (1874), 43 L. J. Ch. 715.

**2607.** — *Money paid out by mistake.*]—A fund was paid into ct. under the Trustee Relief Act to the credit of the trusts of the will of M., deceased. A different person, also named M., who was a lunatic, was entitled under the will of her sister S., whose estate was being administered in the Ct. of Ch., to a life interest in the residue of her estate, to which H. was entitled in remainder. There was a fund in ct. to the credit of the estate of S., & also a fund to the credit of the lunacy of M., the lunatic. By a mistake, which appeared to have first originated in the office of the Accountant-General, the fund in ct. on the trusts of the will of M., testatrix, was included in the account of the property of M., the lunatic, which was filed in the Lunacy Office by her committee & was there treated as forming a part of the residue of the estate of S.

After the death of M., the lunatic, upon a petition in Lunacy, presented by the committee & the heir-at-law & administrator of M., the lunatic,

& served only upon H., which contained an allegation that the fund in ct. standing to the credit of the trusts of the will of M., deceased, had been by mistake placed to a wrong account, & that it really formed part of the residue of the estate of S., an order was made by the Lords Justices that a sum of cash, which had arisen from the income of the fund, should be carried over to the credit of the lunacy of M., & that the capital of the fund should be paid to H. This was done. Afterwards, when the persons really entitled under the will of M., the testatrix, to the fund came to claim it, the mistake was discovered. Those persons then presented a petition of re-hearing to the Lords Justices which was entitled in Lunacy, in the matter of M., the lunatic; in Chancery, in the suit to administer the estate of S.; in the matter of Trustee Relief Act, & in the matter of the trusts of the will of M., the testatrix; & also in the matter of the solrs., & their London agents, who acted for petitioners & resp. upon the petition on which the wrong order was made.

The petition of rehearing asked that the original petition might be reheard, & that the order made thereon might be reversed or varied so far as it dealt with the funds wrongly paid away, & that resps.—viz., the persons who had respectively received those moneys, & their respective solrs. & London agents, might be ordered to replace the moneys, & to pay all the costs, charges, & expenses of the petitioners properly incurred in the matter, as between solr. & client:—*Held*: resps. were jointly & severally liable to make good to petitioners the sums which had been paid to the wrong parties, with interest, & to pay all the costs, charges, & expenses of petitioners properly incurred, as between solr. & client; the persons who had respectively received the moneys being respectively primarily liable to make them good, with interest; & the solr. who presented the petition on which the wrong order was made being primarily liable to pay the costs, charges, & expenses.—*Re SPENCER* (1869), 30 L. J. Ch. 811; 21 L. T. 808; 18 W. R. 240, L. J.

*Annotations*:—*Apld. Re Dangar's Trusts* (1889), 41 Ch. D. 178. *Refd. Marsh v. Joseph*, [1897] 1 Ch. 213.

— *Liability of solicitor.*]—*See SOLICITORS, Vol. XLII., p. 368, Nos. 4185–4187.*

**2608.** — *Costs of unsuccessful appeal—Usually borne by unsuccessful appellant.*]—Where a fund is the subject of an action, the costs of an unsuccessful appeal ought not, except on rare occasions, to come out of the fund, but ought to be borne by unsuccessful applt.—*Re BARLOW'S WILL TRUSTS, Re BARLOW, BARTON v. SPENCER* (1887), as reported in 56 L. J. Ch. 795; 57 L. T. 95; 35 W. R. 737, C. A.

*Annotations*:—*Mentd. Re Brown*, [1895] 2 Ch. 666; *Re De Linden, Re Spurrier's Settlement, De Hayn v. Garland*, [1897] 1 Ch. 453; *Re Chatard's Settlement*, [1899] 1 Ch. 712; *Didisheim v. London & Westminster Bank*, [1900] 2 Ch. 15; *Thiery v. Chalmers, Guthrie*, [1900] 1 Ch. 80; *Re Solot's Trust*, [1902] 1 Ch. 488; *Re Carr's Trusts, Carr v. Carr*, [1904] 1 Ch. 792.

#### (c) Out of What Fund Payable.

**2609.** *Whether payable out of income or capital.*]—Testator bequeathed stock for the benefit of A. for life, with a direction, that after her death the stock should fall into the residue. A. married C. & they both assigned the life interest of A. to E. The stock was transferred into ct. under Trustee Relief Act, 1847 (c. 96). On a petition by E. for the payment of the dividends during the life of A., not served on the residuary legatees:—*Held*: the ct. could not allow the costs of the petition out of the capital.—*Ex p. PEART* (1848),



*Sect. 9.—Lodgment of trust fund in court: Sub-sect. 2, E. (c). Sect. 10: Sub-sects. 1 & 2, A.]*

17 L. J. Ch. 168; *sub nom. Re MAYA'S WILL TRUSTS*, 11 L. T. O. S. 218; 12 Jur. 620.

**2610.** —. —. —. *Re ROSS'S TRUST, Ex p. COLLINS*, No. 2601, *ante*.

**2611.** —. —. —. Trust moneys being paid into ct. under Trustee Relief Act, 1847 (c. 96):—*Held*: the costs of an application for payment of the income to the tenant for life ought to be paid out of the corpus.—*Re FIELD'S TRUST* (1852), 16 Bear. 146; 19 L. T. O. S. 253; 10 Jur. 770; 51 E. R. 733.

*Annotation:—Reid. Re Turnley's Trusts* (1860), 35 L. J. Ch. 313.

**2612.** —. —. —. Where there is a gift by will to a person "for the maintenance or support of himself & his family," such gift is not clothed with any trust; but the legacy having been paid into ct. under Trustee Relief Act, the ct. will order payment to the legatee in the words of the bequest. Costs out of the fund.—*Re ROBERTSON'S TRUST* (1858), 6 W. R. 405.

—.*—See SETTLEMENTS*, Vol. XL, pp. 686, 687, 709, Nos. 2208–2227, 3005–3007.

**Costs of personal representatives.**—*See EXECUTORS*, Vol. XXIV., p. 591, Nos. 6253–6257.

## SECT. 10.—COSTS OF LEGAL PROCEEDINGS.

### SUB-SECT. 1.—IN GENERAL.

**2613. Priority of trustees' costs.**—[Trustees' costs have priority over the claims of a mtgee. claiming under their *cestui que trust*.—*ROSE v. SHARROCK* (1863), 1 New Rep. 419; 11 W. R. 356.

**2614.** —. —. —. *DODDS v. TUKE*, No. 2118, *ante*.

**2615.** —. —. —. In an action by beneficiaries under a will against the trustees for (*inter alia*), execution of the trusts of the will, an account of testator's business, which had been carried on by the trustees under a power in that behalf, & administration a receiver & manager of the business was appointed on motion, & the action was ultimately compromised at the trial, one of the terms of compromise being that the costs of all parties should be paid out of the estate including in the costs of the trustees all costs, charges, & expenses incurred by them as exors. & trustees of the will. In the result the action proved disastrous to the trust estate the business which previously had been profitable, having to be closed down for want of capital, & the assets of the estate being insufficient to pay the costs of all parties. On an application by pltf.'s solrs. for a charging order for their costs under Solicitors Act, 1860 (c. 127), s. 28, & by the trustees for a declaration of priority in respect of their costs, charges & expenses:—*Held*: having regard to the long established practice of the Ch. Div. indemnifying trustees for all expenditure properly incurred in relation to their trust estate, & also to the express terms of the compromise, deft. trustees were entitled to payment of all their costs, charges & expenses in priority to the charging order obtained by pltf.'s solrs.—*Re TURNER, WOOD v. TURNER*, [1907] 2 Ch. 126, 539; 76 L. J. Ch. 492; 96 L. T. 798; 23 T. L. R. 524; 51 Sol. Jo. 485, C. A.

**2616.** —. —. —. The claim of an assignee under an assignment by a beneficiary of an interest in a

trust fund, the assignor not being a trustee of the fund & the assignment being duly notified to the trustee, has priority over a claim by the trustee against the assigned interest for a debt incurred by the assignor to the trustee since the assignment.

But the assignee will lose his priority if he stands by, e.g. in an action by the assignor against the trustee for an account, & allows the debt, e.g. costs payable by the assignor to the trustee, which he could have prevented, to be incurred.

Before action brought pltf. had assigned, by way of mtge., her interest under a will, & the assignment had been duly notified to the trustees. In the action she claimed against the trustees as account, their removal, & cancellation of a receipt given by one of them not in his character of trustee. The claim to cancel the receipt was struck out, & the claim to remove the trustees was dropped. An account was delivered, but pltf. was not satisfied. The ct. refused to proceed till the mtgees. were brought before the ct., & pltf. added them as defts. They intimated that they would not file evidence. It appearing that any account was unlikely to result in any advantage to pltf., the ct. made an order at her peril as to costs, the mtgees. not objecting or remonstrating & attending the subsequent proceedings. The account was taken, the master certifying that nothing whatever was due from the trustees:—*Held*: but for their standing by, the mtgees. would have been entitled to have the trustees' costs, so far as pltf. was personally liable, charged upon her interest under the will subject & not in priority, to their mtge. But, having been silent throughout, their security became subject to the suit, & whatever sum was charged upon pltf. in respect of costs incurred subsequent to the order for an account was chargeable on her interest under the will in priority, & not subject, to their claim.—*Re PAIN, GUSTAVSON v. HAVILAND*, [1919] 1 Ch. 38; 87 L. J. Ch. 550; 119 L. T. 647; 63 Sol. Jo. 178.

*Annotation:—Reid. Re Jewell's Settltm., Watts v. Public Trustee*, [1919] 2 Ch. 161.

**2617. Rights of persons not trustees—Parties made trustees without their knowledge.**—[Agreement for a lease of a farm, referring to a paper containing the terms: Bill for specific performance according to such clauses, as had been read to pltf.: parol evidence to prove that was refused, & the bill dismissed. Bill being dismissed without costs, as a hard case, parties, made trustees without their knowledge, & as such being necessary parties to the bill cannot have costs against pltf., but left to their remedy against their principal: otherwise perhaps, if pltf. had prevailed; because then those costs might have been given over against other defts.—*BRODIE v. ST. PAUL* (1791), 1 Ves. 326; 30 E. R. 368.

*Annotations:—Mentl. Rich v. Jackson* (1794), 4 Bro. C. C. 514; *Cooth v. Jackson* (1801), 6 Ves. 12; *Higginson v. Clowes* (1808), 15 Ves. 516; *Ogilvie v. Foljame* (1817), 3 Mer. 53; *Andrew v. Andrew* (1855), 3 Sm. & G. 130; *Ridgway v. Wharton* (1855), 2 Eq. Rep. 839; *Lee v. Dawson* (1861), 4 L. T. 464.

**2618.** —. —. —. Name permitted to be used.—[Trustees, who are empowered to use a person's name in their legal proceedings, may be called on to indemnify him against the costs.—*PHILPOT v. BADHAM* (1823), 2 L. J. O. S. K. B. 41.

**2619.** —. —. —. Name used by mistake.—[A party to whose name a trust fund has been transferred by

*ECCLES v. MILLS* (1895), 14 N. Z. L. R. 395.—N.Z.

*g. Interpretation of obscure trust deed.*—*KENNEDY v. CRAWFORD* (1841), 3 Duml. (Ct. of Sess.) 1266; 16 Fac. Coll. 1367.—SCOT.

## PART III. SECT. 10, SUB-SECT. 1.

**a. Trustee wrongly parting with legal estate—Costs of proceedings to restrain.**—[A trustee who, under a mistaken idea of his right, attempts to part with the

legal estate in land to a person not entitled to it will not be allowed his costs of proceedings to restrain him.

—*MILLER v. STEWART* (1887), 5 N. Z. L. R. 330 (S. C.).—N.Z.

**1. Security for costs of appeal.**—

mistake, is entitled to the sanction of the ct. before he joins in any transfer; & to his costs.—**DUNKIN v. WARD** (1837), 1 Jur. 735.

**2620.** ———.]—Where a person had permitted his name to be used as a trustee, for the purpose of obtaining a lease, from a married woman in favour of her husband, of property which she was restrained from anticipating, he was not allowed his costs in a suit instituted for the purpose of setting aside the lease.—**BAGGETT v. MEUX** (1844), 1 Coll. 138; 13 L. J. Ch. 228; 3 L. T. O. S. 122; 8 Jur. 391; 63 E. R. 355; *affd.* on other grounds (1846), 1 Ph. 627, L. C.

*Annotations* :—**Mentd.** *Re Yalden* (1851), 1 De G. M. & G. 53; *Lechmere v. Brothelidge* (1863), 32 Beav. 353; *Re Gaskell's Trusts* (1865), 12 L. T. 763; *Taylor v. Meads* (1865), 4 De G. J. & Sm. 597; *Re Ellis' Trusts* (1874), L. R. 17 Eq. 409; *Thomas v. Price* (1877), 46 L. J. Ch. 761; *Re Bown, O'Halloran v. King* (1884), 27 Ch. D. 411; *Re Currey, Gibson v. Way* (No. 2) (1887), 56 L. T. 80; *Re Grey's Settlements*, *Acason v. Greenwood* (1887), 34 Ch. D. 712; *Re Hutchings to Burt* (1887), 58 L. T. 6; *Stogdon v. Lee*, [1891] 1 Q. B. 661; *Hood Barra v. Calheart*, [1894] 2 Q. B. 559; *Loftus v. Herlor*, [1895] 2 Q. B. 212; *Re Wheeler's Settlement*, *Trusts*, *Briggs v. Ryan*, [1899] 2 Ch. 717; *Studley v. Studley*, [1913] P. 119.

**2621. Liability of trustee for sale.—Failure to make good title.**—Vendor not making a good title ordered to pay costs, though he was only a trustee to sell.—**EDWARDS v. HARVEY** (1809), *Coop. G.* 39; 35 E. R. 469.

**2622. Right of trustees' personal representatives.—After discharge & death of trustee.**—Where a trustee has a claim for his costs out of a specific fund, in case of his death, after an order has been made for his discharge, & before the hearing on further directions, his representatives will be entitled to them.—**ANCONA v. ANCONA** (1839), 3 Jur. 768.

**2623. Appearance of trustees without service.**—Where an infant defd. had married without obtaining the consent of the ct., funds in ct. in her name were ordered to be paid to her husband with her consent, no settlement having been made. The trustees of the fund, who appeared without having been served, were not allowed their costs.—**BENNETT v. BIDDLES** (1846), 10 Jur. 534.

*Annotation* :—**Mentd.** *Re Cooke* (1851), 21 L. J. Ch. 115.

**2624. Costs of appearing on appeal.—Construction of annuity.**—*Re BARRY'S TRUSTS*, **BARRY v. SMART**, [1906] 2 Ch. 358; 75 L. J. Ch. 676; 95 L. T. 165, C. A.

*Annotations* :—**Mentd.** *Shrewsbury v. Shrewsbury* (1906), 22 T. L. R. 598; *Blount v. Blount*, [1916] 1 K. R. 230; *Brooke v. Price*, [1916] 2 Ch. 345; *Re Hatch, Hatch v. Hatch*, [1919] 1 Ch. 351; *Bayley v. Bayley*, [1922] 2 K. B. 227; *Smith v. Smith*, [1923] P. 191.

#### SUB-SECT. 2.—PROCEEDINGS PROPERLY INSTITUTED OR DEFENDED.

##### A. In General.

*See Trustee Act*, 1925 (c. 19), ss. 30 (2), 60; *R. S. C.*, Ord. 65, r. 1.

**2625. Right of trustee to costs.**—Trustee of the next friend of an infant entitled to fair expenses, beyond taxed costs, under the head of just allowances.—**FEARNS v. YOUNG** (1804), 10 Ves. 184; 32 E. R. 815, L. C.

*Annotations* :—**Reid.** *Graham v. Wickham* (1865), 2 De G. J. & Sm. 497; *Wilkes v. Saunton* (1877), 7 Ch. D. 188.

**2626.** ———.]—Decree for the arrears & growing

payments upon a bond for an annuity upon separation between husband & wife: the trustee refusing to enforce the bond without indemnity. An appropriation to answer the growing payments was refused.—**COOKE v. WIGGINS** (1804), 10 Ves. 191; 32 E. R. 818.

*Annotations* :—**Reid.** *Frampton v. Frampton* (1841), 4 Beav. 287; *Wilson v. Wilson* (1845), 14 Sim. 405. **Mentd.** *Walrond v. Walrond* (1858), 28 L. J. Ch. 97.

**2627.** ———.]—**AGAR v. BLETHYN**, No. 2753, *post*.

**2628.** ———.]—Trustees who unsuccessfully resisted the claim of the assignee from the *cestui que trust*, to have a term merged :—**Held** : entitled to trustees' costs.—**HOLFORD v. PHIPPS** (1841), 4 Beav. 475; 49 E. R. 422.

**2629.** ———.]—Trustees who file a bill for the administration of testator's estate are entitled to their costs, however small the estate may be, & however small the risk in administering the estate.—**HODGKINSON v. GILBERT** (1850), 19 L. J. Ch. 424.

**2630.** ———.]—The two trustees of a joint stock trading co., at the request of the directors, gave a bond for £1,000, borrowed for & applied to the use of the co. In an action against one of these two trustees the bond creditor recovered the £1,000 & interest & costs against him personally; & the trustee paid the debt, interest & costs. The trustee ineffectually gave notice of the proceeding to the directors of the co. twice, the second time under 11 & 12 Vict. c. 45, s. 5 (5). On a claim by the trustee to be admitted as a creditor of the company under Winding-up Acts, the ct. directed an action which established the borrowing to have been an authorised act :—**Held** : the trustee was entitled to stand as creditor for £1,000 & interest, & his costs, charges & expenses properly incurred as a trustee in defence of the action & of the motion.—*Re OUNDLE INDUSTRIAL BREWERY CO.*, **CROXTON'S CASE** (1852), 5 De G. & Sm. 432; 19 L. T. O. S. 57; 18 Jur. 932; 61 E. R. 1185.

**2631.** ———.]—**IBBERSON v. WARTH**, No. 2555, *ante*.

**2632.** ———.]—A *cestui que trust* will have to pay his own costs if he institutes proceedings against his trustee for payment of a sum due, unless every feasible means be adopted by him to obtain payment without suit.—**AYLMER v. WINTERBOTTOM** (1857), 4 Jur. N. S. 19.

**2633.** ———.]—**COOK v. HARVEY**, [1874] W. N. 69.

**2634.** ———.]—*Re IRWIN, BARTON v. IRWIN* (1895), 30 Sol. Jo. 233.

**2635.** ———.]—The grantee of a bill of sale & the trustee in bkpy., of the grantor were in concurrent possession of the property comprised in it. The grantee had taken possession first. The trustee impeached the validity of the bill of sale. Before the question of its validity had been decided, the grantee forcibly removed part of the property :—**Held** : the grantee must pay the trustee's costs of a motion, to compel the restoration into the joint possession of the property which had been removed.—*Re FELS, Ex p. ANDREWS* (1876), 4 Ch. D. 509; 46 L. J. Bcy. 23; 36 L. T. 38; 25 W. R. 382.

**2636.** ———.]—One of two tenants for life under a settlement brought an action, claiming to have the trusts executed by the ct. The statement of claim alleged that the surviving trustee had com-

#### PART III. SECT. 10, SUB-SECT. 2.—A.

**2625 i. Right of trustee to costs.**—**MCDONALD v. CONNELL** (1924), 28 W. A. L. R. 140.—**AUS.**

**2625 ii.** ———.]—**WORTHINGTON v. ELLIOTT, ELLIOTT v. WORTHINGTON**

(1860), 8 Gr. 231.—**CAN.**

**2625 iii.** ———.]—**HATZ v. TYLEE** (1865), 11 Gr. 312.—**CAN.**

**2625 iv.** ———.]—A trustee stands in the same position as any other litigant with respect to costs.—**SMITH v. WILLIAMSON** (1889), 13 P. R. 126.—**CAN.**

**2625 v.** ———.]—**BOSCOWITZ v. BELYEA** (1896), 4 R. C. R. 527.—**CAN.**

**2625 vi.** ———.]—**DOYLE v. DUMONCEL** (1847), 11 I. Eq. R. 517.—**IR.**

**2625 vii.** ———.]—**WHALES' TRUSTEE v. EARLY** (1909), 3 BUCH. A. C. 474.—**S. AF.**

*Sect. 10.—Costs of legal proceedings: Sub-sect. 2, A. & B.]*

mitted a breach of trust, & asked to have new trustees appointed in the place of him & a deceased trustee. The settlement contained a power to appoint new trustees, exercisable by the tenants for life. Pltf.'s income had always been regularly paid to him. At the trial the charges against the trustee were abandoned, & it was admitted that there was no ground for his removal.—*Held*: pltf. was entitled to judgment for the execution of the trusts, but the action being unnecessary, he must pay the costs of it up to & including the trial.—*FANE v. FANE* (1879), 13 Ch. D. 228; 49 L. J. Ch. 200; 41 L. T. 551; 28 W. R. 348.

**2637.** ———.]—*BURNAY v. AMBACA RAILWAY CONSTRUCTION CO.* (1891), 7 T. L. R. 545.

**2638.** ———.]—*Whether solicitor & client or party & party costs.*—Trustees who had declined to transfer a fund to an assignee on the ground of an alleged fraud in the assignment.—*Held*: entitled to their costs as between solr. & client.—*WHITMARSH v. ROBERTSON* (1842), 1 Y. & C. Ch. Cas. 715; 6 Jur. 921; 62 E. R. 1085.

**2639.** ———.]—*Solicitor trustee.*—The costs of deft. trustee, notwithstanding he was a solr., ordered to be taxed as between solr. & client.—*YORK v. BROWN* (1844), 1 Coll. 260; 3 L. T. O. S. 240; 8 Jur. 567; 63 E. R. 410.

*Annotation.*—*Reid. Cradock v. Piper* (1850), 1 Mac. & G. 664.

**2640.** ———.]—Testator by his will gives the rents of his real property to his wife for life, & bequeaths the bulk of his personal property to her absolutely, constituting her sole extrix: & directs that certain trustees shall, as soon as conveniently may be after his decease, convert all the convertible residuum of his personal estate into money, & invest it in Govt. or real securities, & pay the dividends to his wife for life. The ultimate trusts both of the real & residuary personal property are in favour of persons who are not *in esse*, or not ascertained. Twenty years elapse, during which the trustees leave the widow in the possession & management of the whole property, & then the surviving trustee files a bill against her for an account. It appears in the suit that she has paid all testator's debts to an amount exceeding the amount of personalty not specifically bequeathed, but that she has left some of the assets outstanding, & claims to be a purchaser of those assets, in part satisfaction of the moneys which she has overpaid:—*Held*: (1) the bill being filed on reasonable grounds, the surviving trustee is entitled to the costs of the suit; (2) under the circumstances of the case, he is not entitled to costs as between solr. & client.—*HEARN v. WELLS* (1844), 1 Coll. 323; 63 E. R. 439.

*Annotation.*—*Generally, Mentid. Re Gilbert, Ex p. Gilbert* (1897), 67 L. J. Q. B. 229.

**2641.** ———.]—(1) A trustee thirty years after his appointment, when one of his colleagues, the acting trustee, had died, upon a bill filed by him:—*Held*: he was as trustee entitled to the costs of the suit, as between solr. & client, & also to his costs, charges & expenses.

(2) A trustee, if difficulties are thrown in his way, is entitled to file a bill to have the trusts of a settlement administered, & to have the trust funds paid into ct., & that although the real object of the suit is to be relieved from the trusts (*ROMILLY, M.R.*).—*GARDINER v. DOWNES* (1856),

22 Beav. 395; 25 L. J. Ch. 881; 27 L. T. O. S. 280; 2 Jur. N. S. 847; 4 W. R. 621; 52 E. R. 1100.

**2642.** ———.]—In an administration action, a trustee who has not been guilty of any misconduct, is entitled to his costs as between solr. & client, although it may result that two sets of cost as between solr. & client are allowed in the action.—*Re LOVE, HILL v. SPURGEON* (1885), 29 Ch. D. 348; 54 L. J. Ch. 816; 52 L. T. 398; 33 W. R. 449, C. A.; *subsequent proceedings* (1889), 40 Ch. D. 637.

*Annotations.*—*Consd. In the Estate of Plant, Wild v. Plant*, [1926] P. 139. *Reid. Re Jones, Christmas v. Jones* (1897), 45 W. R. 598.

**2643.** ———.]—*No estate to be administered.*—Where there is no estate to be administered, trustees can only have costs as between party & party.—*SAUNDERS v. SAUNDERS* (1857), 29 L. T. O. S. 340; 3 Jur. N. S. 727; 5 W. R. 479.

**2644.** ———.]—*Improper proceedings against trustees.*—But where trustees are improperly brought before the ct. they will be entitled, as against pltf. personally, to their costs as between solr. & client, & will not be left to take the difference between party & party costs & solr. & client costs out of the trust fund.—*TURNER v. COLLINS* (1871), L. R. 12 Eq. 438; 40 L. J. Ch. 614; 25 L. T. 264; *subsequent proceedings*, 7 Ch. App. 329; 20 W. R. 305, L. C.

**2645.** ———.]—*Trustees ceasing to be trustees—Retained as parties.*—*Re ALLEN, WHEELER v. FOSTER*, [1880] W. N. 132.

**2646.** ———.]—Where a puisne incumbrancer brought an action against other incumbrancers & the trustees of a will for administration of the estate, on further consideration:—*Held*: (1) so far as the administration proceedings were proper, & also for the benefit of the prior mtgees., pltf. was entitled to his costs of such proceedings out of the estate in priority to the prior mtgees., but must add the rest of the costs to his security; (2) the trustees' costs of the action, so far as such costs were costs of administration of which the prior mtgees. had had the benefit, must come out of the fund as between solr. & client.—*Re BARNE, LEE v. BARNE* (1890), 62 L. T. 922.

**2647.** ———.]—A married woman, restrained from anticipating her property, brought an action charging wilful default against the trustees of instruments under which she was beneficially interested but at the trial withdrew the charges & submitted to dismissal of the action:—*Held*: debts were entitled to judgment for costs as between solr. & client.—*Re GODFREY, THORNE-GEORGE v. GODFREY* (1894), 63 L. J. Ch. 854; 71 L. T. 86; 13 R. 36; *subsequent proceedings* (1895), 72 L. T. 8, C. A.

**2648.** ———.]—(1) Where trustees apply by originating summons to the ct. to construe an instrument for their guidance, & in order to ascertain the interests of the beneficiaries or to have determined some question arising in the administration of the trust, the costs are incurred for the benefit of the estate, & the ct. will, as a general rule, direct them to be taxed as between solr. & client & paid out of the estate.

(2) Where the application is of the same character, but is made by some of the beneficiaries, & not by the trustees, because such a course is considered more convenient, the same rule as to costs applies.

**2638 i.** ———.]—*Whether solicitor & client or party & party costs.*—*FORREST v. SUTHERLAND* (N. S.) (1906), 2 E. L. R. 17.—*CAN.*

**2638 ii.** ———.]—*A. G. v. DRUMMOND* (1842), 3 Dr. & War. 162; 2 Con. & Law. 98.—*IR.*

**2638 iii.** ———.]—*RUDDENKLAU v. RUDDENKLAU* (1898), 16 N. Z. L. R. 404.—*N.Z.*

(3) Where the application is made by a beneficiary in respect of a claim which is adverse to other beneficiaries, & appt. takes advantage of the procedure by originating summons to get determined a question which, but for that procedure, would properly form the subject of an action & fall within the term litigation, the ct. will order the unsuccessful party to pay the costs.—*Re BUCKTON, BUCKTON v. BUCKTON*, [1907] 2 Ch. 406; 76 L. J. Ch. 584; 97 L. T. 332; 23 T. L. R. 692.  
*Annotations*.—As to (2) *Apld. Re Flecher, King v. King* (1918), 62 Sol. Jo. 740. As to (3) *Apld. Re Halston, Ewen v. Halston*, [1912] 1 Ch. 435.

**2649.** — *Proceedings must be for benefit of estate.*—If a trustee, merely to have a point relating to his private interest determined, brings the *cestui que trust* before the ct., he shall pay the whole costs of the suit.—*HENLEY v. PHILLIPS* (1740), 2 Atk. 48; 26 E. R. 426.

*Annotation*.—*Mentd. Tatnall v. Hankey* (1838), 2 Moo. P. C. C. 342.

**2650.** — *—*—*WALTERS v. WOODBRIDGE*, No. 2066, *post*.

**2651.** — *—*—Though a receiver while acting in the discharge of his duty is entitled to be indemnified against all loss, including the costs of actions brought against him as receiver, still the guiding principle laid down by *Walters v. Woodbridge*, No. 2066, *post*, is that the defence to the action was for the benefit of the trust estate.—*Re DUNN, BRINKLOW v. SINGLETON*, [1904] 1 Ch. 648; 73 L. J. Ch. 425; 91 L. T. 135; 52 W. R. 345; 48 Sol. Jo. 261.

**2652.** — *Costs must be incurred in course of duty.*—Costs incurred by an exor. who, to meet a possible charge of *devastavit*, separately defends an action brought jointly against residuary legatees & himself, are not "an outlay in the strict line of his duty" towards his *cestuis que trust*; & he cannot call upon them to indemnify him in respect of his expenditure.—*HOSGOOD v. PEDLER* (1896), 66 L. J. Q. B. 18; 13 T. L. R. 6.

*Annotation*.—*Distd. Re Dunn, Brinklow v. Singleton*, [1904] 1 Ch. 648.

**2653.** — *Notwithstanding absence of co-trustee.*—Where there were five beneficiaries who might become entitled in a remote contingency to share in the settled fund, four of them consented to an order upon the trustees to repay the corpus of the fund to petitioner, but the fifth was somewhere in the interior of Africa, & could not be communicated with. The ct. made the order, extinguishing the interests of all five; & as it further appeared that one of the trustees of the settlements had left this country, & his whereabouts could not be ascertained, the costs of the two trustees who had appeared upon these proceedings were allowed out of the settled fund, in his absence, as if he had joined with them.—*STORER v. STORER* (1894), 71 L. T. 704; 6 R. 653.

**2654.** — *No order as to costs.*—A summons having been taken out by a beneficiary for the

administration of a testator's estate under which several questions arose with respect to the accounts of the trustee & his management of the property, the judge made an order as to the questions in dispute & ordered the accounts to be taken & declared that "he did not think fit to make any order as to the costs of the action":—*Held*: this declaration was a judicial decision that the trustee was not entitled to costs in the action & he had no right to retain them out of the estate.—*Re HODGKINSON, HODGKINSON v. HODGKINSON*, [1895] 2 Ch. 190; 64 L. J. Ch. 663; 72 L. T. 617; 43 W. R. 594; 39 Sol. Jo. 468; 12 R. 297, C. A.

— *Trustees of charities.*—*See CHARITIES*, Vol. VIII., pp. 410, 411, Nos. 2478–2491.

### B. Liability of Trust Property.

*See Trustee Act*, 1925 (c. 19), ss. 30 (2), 60; R. S. C., Ord. 65, r. 1.

*See EXECUTORS*, Vol. XXIV., pp. 840–842, No. 8732–8757.

**2655.** *General rule—Trustee entitled to costs out of trust property.*—Where a question arises, upon the interest in a trust fund, separated from the general residue, the costs must come out of the particular fund; & having been given by the decree, as specifically prayed by the bill, out of the general personal estate, the decree, though affirmed in other respects, was corrected in that particular; being considered as relief prayed; & therefore not within the rule against appealing for costs only.—*JENOUR v. JENOUR* (1803), 10 Ves. 562; 32 E. R. 962, L. C.

*Annotations*.—*Apld. Woodmeston v. Walker* (1831), 2 Russ. & M. 197; *Angell v. Davis* (1839), 4 My. & Cr. 360. *Distd. Re Hall-Dare, Le Marchant v. Lee Warner*, [1916] 1 Ch. 272. *Reid. Lowton v. Colchester Corp.* (1817), 2 Mer. 113; *Willis v. Yates* (1834), *Coop. temp. Brough*, 498; *Pennington v. Buckley* (1848), 6 Hare, 451. *Mentd. Cripps v. Wolcott* (1819), 4 Madd. 11; *Andrews v. Lockwood* (1846), 15 Sim. 153; *Martineau v. Rogers* (1856), 25 L. J. Ch. 398.

**2656.** — *—*—Where pltf. is suing as a trustee, & there are circumstances of suspicion in the case, the ct. will stay proceedings on payment of the debt into ct., & on payment of costs; leaving pltf. to apply to the ct. to have his extra costs out of the fund in ct.—*JONES v. BRAMWELL* (1835), 3 Dowl. 488.

**2657.** — *—*—Testator devised his real estates to a trustee for a term, in trust to raise the sum of money which he directed to be distributed amongst such of his next of kin, both maternal & paternal, as should be living at the time of his death. A bill was filed by the trustee to ascertain the parties entitled to the bequest, & while inquiries were being made in the master's office, the money was raised, & afterwards the master found the next of kin *ex parte paterna*, & that C. was one of the next of kin *ex parte materna*. By a subsequent inquiry he found C. the only next of kin *ex parte materna*. Testator's estate was held liable for

**2649 i.** — *Proceedings must be for benefit of estate.*—*HAMILTON v. TIGHE*, [1898] 1 I. R. 123.—*IR.*

**2649 ii.** — *—*—If an individual trustee, without authority from his co-trustees, take upon himself the defence of an action directed against the trust, he cannot recover his expenditure from the trust estate, unless he shows that his intervention has resulted in benefit to the trust estate.—*STEWART v. DOBIE'S TRUSTEES* (1899), 1 F. (Ct. of Sess.) 1183; 36 Sc. L. R. 917; 75 L. T. 125.—*SCOT.*

**h.** — *Costs of appeal.*—It is only in most exceptional cases that a trustee who appeals unsuccessfully

against a decree is allowed his costs of the appeal.—*FOGARTY v. O'DONOGHUE*, [1926] 1 I. R. 531.—*IR.*

### PART III. SECT. 10, SUB-SECT. 2.—B.

**2655 i.** *General rule—Trustee entitled to costs out of trust property.*—*Re HAWKINS* (1894), 16 F. R. 136.—*CAN.*

**2655 ii.** — *—*—*Re WILLIAMS* (1895), 22 A. R. 196.—*CAN.*

**2655 iii.** — *—*—*Re WATKINS* (1909), 15 O. W. R. 123; 20 O. L. R. 262.—*CAN.*

**2655 iv.** — *—*—*DILL v. BROWN* (1852), 3 I. Ch. R. 127; 4 Ir. Jur. 355.—*IR.*

**2655 v.** — *—*—*Re ROBERTSON, PERPETUAL TRUSTEES & AGENCY CO. OF NEW ZEALAND, LTD. v. ROBERTSON* (1898), 16 N. Z. L. R. 439.—*N.Z.*

**2655 vi.** — *—*—*MILLS v. ISAAC* (1901), 20 N. Z. L. R. 752.—*N.Z.*

**2655 vii.** — *—*—*FOULIS v. FOULIS* (1857), 19 Dunl. (Ct. of Sess.) 362; 29 Sc. Jur. 166.—*SCOT.*

**k.** — *—*—*Prima facie* a trustee or other person suing in a representative capacity should be held personally liable for the costs of an unsuccessful action.—*STANDARD BANK v. JACOBSON'S TRUSTEE* (1899), 16 S. C. 352; 9 C. T. R. 365.—*S. AF.*

Sect. 10.—Costs of legal proceedings: Sub-sect. 2, B.]

the costs incurred in all the proceedings from first to last, though the bequest was raised & set apart before the next of kin were ascertained.—*DUGDALE v. DUGDALE* (1849), 12 Beav. 247; 19 L. J. Ch. 42; 15 L. T. O. S. 178; 14 Jur. 234; 50 E. R. 1058.

—[An equity of redemption was granted by deed to trustees, upon trust for certain parties, some of whom were infants. The mtgee. filed a bill for foreclosure against the trustees of the settlement & the adult *cestuis que trust* only, as defts. One of the latter died after the filing of the bill. The ct., upon a motion for a decree for sale, made the decree in the absence of the infant *cestuis que trust*, & of the representative of deceased deft., upon an affidavit by the trustee of the settlement, that it would be for the benefit of the infants; & ordered the proceeds to be paid into ct.

The costs of the trustee, as he would be a necessary party to reconvey, were ordered to be paid out of the mtge. debt.—*SIFFKEN v. DAVIS* (1863), Kay, App. xxi; 69 E. R. 323.

**2659.** —[—]—*FORBES v. FORBES* (1851), as reported in 2 Eq. Rep. 178; 18 Jur. 612.

*Annotations.*—*Mentl. Hoskins v. Matthews* (1855), 24 L. T. O. S. 231; *Cockrell v. Cockrell* (1856), 25 L. J. Ch. 730; *Hodgson v. De Beauchene* (1858), 12 Moo. P. C. C. 286; *Maxwell v. Maclure* (1860), 2 L. T. 65; *Jopp v. Wood* (1864), 34 Beav. 88; *United States President v. Drummond* (1864), 10 Jur. N. S. 633; *Haldane v. Eckford* (1869), 1 R. 8 Eq. 631; *Altchison v. Dixon* (1870), L. R. 10 Eq. 589; *Douglas v. Douglas*, *Douglas v. Webster* (1871), L. R. 12 Eq. 617; *Re Jorral's Trusts* (1883), 23 Ch. D. 532; *Re Mitchell, Ex p. Cunningham* (1884), 13 Q. B. D. 418; *Re Bullen-Smith, Berners v. Bullen-Smith* (1888), 58 L. T. 578; *Casadagli v. Casadagli*, (1919) A. C. 145.

**2660.** —[—]—A father by his will settled stock upon his daughter for life, remainder to her issue, subject to a life interest in any husband who might survive her. She married & had one only child, a son, & her husband died. When she had attained eighty years of age she married a gentleman, a member of the Irish & English bar, of about fifty-four years of age. She had accumulated much personal property, the savings of her income. Before the marriage, which it was agreed should be kept secret from the son, a very voluminous & long-continued correspondence took place between the lady & gentleman, in which she insisted that her property should be settled so that she should have the command of it "as if still unmarried," he being entitled, as husband, to a life interest, if surviving, in the stock bequeathed by the father's will. The intended husband drew two documents, in very obscure language, in one of which he bound himself to consent to her "disposition of a sum of £2,000 out of whatever funds or dividends she 'should be' entitled to, be possessed of, or have legally acquired at the time of her decease." The marriage took place, & was kept secret from the son until the wife's decease, she continuing the use of her virtual name, which took place in about six months, without her having made any disposition of her savings, leaving her son sole next of kin. After her decease the husband filed a bill against the trustee of the fund settled by the father of the lady for payment of the life interest, & the son filed a bill against the husband praying, amongst other things, a declaration that, as next of kin, he was entitled to the savings of his mother's income.

In the suit against the trustee, the trustee was allowed his costs out of the fund.—*CORLEY v. STAFFORD* (LORD), *CAMPBELL v. CORLEY* (1857), 1 De G. & J. 238; 26 L. J. Ch. 865; 30 L. T. O. S.

77; 3 Jur. N. S. 1225; 5 W. R. 646; 44 E. R. 714, L. JJ.

*Annotations.*—*Eld. Hastie v. Hastie* (1875), 24 W. R. 242; *Clark v. Gidwood* (1877), 7 Ch. D. 9.

**2661.** —[—]—Trustees have, as a general rule, a right to their costs out of the estate; but this depends upon their conduct, & a strict observance by them of the duties of their trust. Therefore, when an annuity was given to be paid by the trustees of a will, & a legacy to be received & accumulated by them for the benefit of an infant, & the trustees, being in possession of the whole estate, applied the whole of the rents & profits in payment of the annuity without making any provision for the legacy; & in a suit for payment of the legacy & administration, it appeared that the estate was insufficient to pay the costs of pltf. & defts., the trustees, the latter were allowed only part of their costs out of the estate, & pltf.'s costs were ordered to be paid out of the moneys remaining.—*BEER v. TAIR* (1862), 31 L. J. Ch. 513; 6 L. T. 269; 10 W. R. 277, L. JJ.

**2662.** —[—]—Two persons were, under a deed of settlement after a marriage, made assignees of a life policy upon trusts stated in the settlement for the benefit of the younger children of the marriage. The husband died intestate. The widow took out letters of administration, & instituted an administration suit, to which the trustees were not made parties, but in which the Ct. of Ch. in Ireland was asked to grant, & did grant, an order for the payment of the policy money into ct. The insurance office knowing of the assignment of the policy, refused to obey the order, & the trustees, on being informed of it, protested against it, & refused to sign receipts for the money. The solrs. for pltf. in the administration suit wrote to them, asking them to give up the trust. They refused, & they again refused to sign the receipts for the payment of the money under the administration suit. A petition in the names of the younger children was then presented to the Lord Chancellor of Ireland, representing that the trustees had declined to act in the trust, & it was prayed that they might be removed, & other persons be appointed in their stead. An order to this effect was made:—*Held*: these proceedings were altogether irregular; & the cause was remitted, with special instructions. The costs of the trustees were ordered to come out of the funds of the trust.—*MUSKERRY (LORD) v. SKEFFINGTON* (1868), L. R. 3 H. L. 144.

**2663.** —[—]—Personal estate was given by will to a large number of legatees. The exors. & trustees, after deducting £10 from each share to form an indemnity fund against certain possible claims paid off the adult legatees, & invested the shares of each infant legatee in his name & theirs jointly. A general release, to which the accounts were scheduled, was they executed by all the adult legatees. Some years after this a bill for the administration of the estate was filed by six of the infant legatees, their next friend being the managing clerk of their solr., acting at the request of their father, who had executed the release. The result of the accounts was to show that the suit was not for their benefit:—*Held*: that the next friend was entitled to his costs; the fund for payment of costs consisted of the indemnity fund & the undistributed shares of all the infant legatees; but any residuary legatees who had been paid, including the trustees, asking for costs, should bring in the shares which they had received; & the trustees taking large shares, & being therefore unwilling to bring them in, any surplus remaining should be paid to the trustees towards their costs.—

*Re TANN, TANN v. TANN, GRAVATT v. TANN* (2) (1809), L. R. 7 Eq. 436; 38 L. J. Ch. 459.  
*Annotation:—Consd. Hilliard v. Fulford* (1876), 25 W. R. 161.

**2664.** ———. ———.]—*Re LEE'S TRUSTS*, No. 2863, *post*.

**2665.** ———. ———.]—The costs of the trustees were ordered to be paid out of the estate.—*MINORS v. BATTISON* (1876), as reported in 1 App. Cas. 428; 25 W. R. 27, H. L.

*Annotations:—Mentd. Kirkpatrick v. Bedford, Bedford v. Kirkpatrick* (1878), 4 App. Cas. 90; *Re Collison, Collison v. Barber* (1879), 12 Ch. D. 834; *Johnson v. Crook* (1879), 12 Ch. D. 639; *Bubb v. Padwick* (1880), 13 Ch. D. 617; *Roberts v. Youle* (1880), 49 L. J. Ch. 744; *Re Chaston, Chaston v. Seago* (1881), 18 Ch. D. 218; *Money v. Money* (1881), 44 L. T. 639; *Re Wilkins, Spencer v. Duckworth* (1881), 18 Ch. D. 634; *Re Teale, Teale v. Teale* (1885), 53 L. T. 936; *Re Hotchkys, Freke v. Calmady* (1886), 34 W. R. 569; *Re Sampson, Sampson v. Sampson*, [1896] 1 Ch. 630; *Re Goulder, Goulder v. Goulder*, [1905] 2 Ch. 100.

**2666.** ———. ———.]—The trustees of a will agreed to settle disputes with the surviving partner in a firm of which testator had been a member by selling testator's share to him at a certain price. They then filed a bill to have this agreement sanctioned; a decree was made accordingly, & the sale carried out. Some years afterwards some of the residuary legatees, who were infants, filed a bill by their next friend to set aside the decree on the ground that the compromise was an improper one, & that it had been entered into, & the decree sanctioning it obtained, by the personal fraud of one of the trustees. This trustee answered separately & at the hearing Lord Romilly dismissed the bill with costs, being of opinion that the compromise had been beneficial & the decree sanctioning it properly obtained. The next friend could not pay the costs, & the trustee applied by summons in a suit for the administration of testator's estate to have them taxed as between solr. & client & paid out of the estate:—*Held*: the trustee was entitled to be paid his costs out of the estate as he had defended the suit for the benefit of the estate, though he had at the same time defended his own character.—*WALTERS v. WOODBRIDGE* (1878), 7 Ch. D. 504; 47 L. J. Ch. 516; 38 L. T. 83; 26 W. R. 469; *revg. S. C. sub nom. WALTERS v. WOODBRIDGE, Ex p. TEESDALE* (1872), 20 W. R. 520.

*Annotations:—Consd. Re Llewellyn, Llewellyn v. Williams* (1887), 37 Ch. D. 317. *Distd. Re Dunn, Brinklow v. Singleton*, [1904] 1 Ch. 648; *Bruty v. Edmundson*, [1917] 2 Ch. 285.

**2667.** ———. ———.]—*Re NICOLL'S ESTATES*, [1878] W. N. 154.

**2668.** ———. ———.]—*NUNNELLEY v. NUNNELLEY* (1883), cited in Underhill's Law of Trusts & Trustees, 8th. ed. p. 333.

**2669.** ———. ———.]—A married woman who, under a will, was entitled to income for her separate use, with a restraint on anticipation, instituted, without a next friend, against the trustees proceedings in the course of which she took out a summons which was refused:—*Held*: the restraint on anticipation did not prevent the ct. from giving the trustees liberty to retain their costs of the proceedings out of the married woman's income.—*Re ANDREWS, EDWARDS v. DEWAR* (1885), 30 Ch. D. 159; 54 L. J. Ch. 1049; 53 L. T. 422; 34 W. R. 62.

*Annotations:—Distd. Re Glanville, Ellis v. Johnson* (1886), 31 Ch. D. 532. *Consd. Hood Barrs v. Cathcart*, [1894] 2 Q. B. 559. *Reid. Re Pryne* (1885), 53 L. T. 465; *Michell v. Michell*, [1891] P. 166.

**2670.** ———. ———.]—A married woman, by her next friend, having brought in 1882 an action for administration of a trust fund, to the income of which she was entitled for her separate use without power of anticipation, the ct., on further considera-

tion in 1884, held the action to have been unnecessary & improper, & the next friend was ordered to pay debts' costs. Defts. being unable to find the next friend, an order was made giving the trustees liberty to retain the costs out of the income of the trust fund already due & to become due to the married woman:—*Held*: no such order could be made, for the ct. had no jurisdiction to disregard the restraint on anticipation on the ground that it appeared to the ct. to be just to do so; & no income which did not accrue due till after the act on which the claim against the separate estate depended, viz., the improper institution of the suit, could be attached to meet the costs.—*Re GLANVILLE, ELLIS v. JOHNSON* (1886), 31 Ch. D. 532; 55 L. J. Ch. 325; 54 L. T. 411; 50 J. P. 662; 34 W. R. 309; 2 T. L. R. 305, O. A.

*Annotations:—Distd. Cox v. Bennett*, [1891] 1 Ch. 617. *Consd. Hood Barrs v. Cathcart*, [1894] 2 Q. B. 559. *Reid. Hyde v. Hyde* (1888), 13 P. D. 166; *Michell v. Michell*, [1891] P. 208.

**2671.** ———. ———.]—A tenant for life of an estate in strict settlement had power to cut certain timber & other trees, to sell the same & to apply the produce to his own use. In 1881 he contemplated a sale of the estate, but he was restrained from selling, either under the power in the will or under that contained in the Settled Land Act, by an injunction granted in an action brought by persons entitled in remainder. In 1884 the action was dismissed with costs, & in 1885 the tenant for life sold the estate under conditions of sale which stated that the purchaser should in addition to the purchase-money pay for the timber according to a valuation. The tenant for life claimed, under the provisions of the settlement & under Settled Land Act, 1882 (c. 38), s. 35, to be paid out of the purchase-money the value of the timber; & he also claimed to be paid the difference of his costs, as between party & party & solr. & client, in the action which was dismissed:—*Held*: the tenant for life was entitled, in defending the action which was dismissed with costs, to be paid his extra costs of so much of the action as related to the exercise of the powers contained in the Settled Land Act as incidental to the exercise of his power of sale under the provisions of Settled Land Act, 1882 (c. 38).

A trustee is entitled in an ordinary case to recover out of the trust estate, as charges & expenses properly incurred, all his costs of an action which he has properly defended (*STIRLING, J.*).—*Re LLEWELLIN, LLEWELLIN v. WILLIAMS* (1887), 37 Ch. D. 317; 57 L. J. Ch. 316; 58 L. T. 152; 36 W. R. 347; 4 T. L. R. 170.  
*Annotation:—Fold. Re Smith's S. E.*, [1891] 3 Ch. 65.

**2672.** ———. ———.]—*Re BARNIE, LEE v. BARNIE*, No. 2646, *ante*.

**2673.** ———. ———.]—*Re BEDDOE, DOWNES v. COTTAM*, No. 2057, *ante*.

**2674.** ———. ———.]—A man who fulfils the difficult duties of an administrator, exor. or trustee is, in common sense & common justice entitled to be recouped to the very last penny every thing that he has expended properly—that is to say without impropriety—in his character of administrator, exor., or trustee (*KEKEWICH, J.*).—*Re JONES, CHRISTMAS v. JONES*, [1897] 2 Ch. 190; 66 L. J. Ch. 439; 76 L. T. 454; 45 W. R. 598.

*Annotation:—Distd. Re England's Settlt. Trusts, Dobb v. England*, [1918] 1 Ch. 24.

**2675.** ———. ———.]—*MERRY v. POWNALL*, No. 2308, *post*.

**2676.** ———. ———.]—*Re BUCKTON, BUCKTON v. BUCKTON*, No. 2648, *ante*.

**2677.** ———. ———.]—*Statute-barred costs.*—Trustees are entitled to pay & retain out of the



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trust estate costs properly incurred, notwithstanding that they might have refused to pay such costs on the ground of Stat. Limitations.—*BUDGETT v. BUDGETT*, [1895] 1 Ch. 202; 64 L. J. Ch. 209; 71 L. T. 632; 43 W. R. 167; 39 Sol. Jo. 61; 13 R. 1.

*Annotations:—*Consd. *Re Margotta*, [1896] 2 Ch. 263. *Reid. Re Brockman*, [1905] 2 Ch. 170. *Mentd. Oliver v. Robbins* (1894), 13 R. 63.

**2678.** ———— *Where no order as to costs.*—*Re HODGKINSON, HODGKINSON v. HODGKINSON*, No. 2654, *ante*.

**2679. Apportionment.**—By the exercise of the usual power of appointment in a marriage settlement the shares of children were appointed unequally, but were equalised, or nearly so, by a division of the unappointed property under a hotchpot clause:—*Held*: the costs of an action to administer the trusts of the settlement must be paid rateably out of the appointed & unappointed shares.—*MOORE v. DIXON* (1880), 15 Ch. D. 566; 49 L. J. Ch. 807; 29 W. R. 12.

*Annotations:—**Apld. Re Orford, Neville v. Cartwright. Cartwright v. Duc del Balzo* (1895), 73 L. T. 681. *Consd. Re Christolm, Goddard v. Brodie*, [1902] 1 Ch. 457.

**2680.** ———— *Re ALLEN, WHEELER v. FOSTER*, [1889] W. N. 132.

**2681.** ———— *As to costs I think the rule is now established that in the case of an appointed fund the costs must be paid rateably out of the appointed shares & not out of residue (NORTH, J.).—Re ORFORD (COUNTRESS), CARTWRIGHT v. DUC DEL BALZO*, [1896] 1 Ch. 257; 44 W. R. 383; *sub nom. Re ORFORD* (FART), *NEVILLE v. CARTWRIGHT, CARTWRIGHT v. DUC DEL BALZO*, 73 L. T. 681.

*Annotations:—**Follid. Re Hill's Settlement Trusts, Hill v. Equitable Reversionary Interest Soc.* (1896), 75 L. T. 477. *Reid. Re Chisholm, Goddard v. Brodie*, [1902] 1 Ch. 457. *Mentd. Berry v. Gaukroger*, [1903] 2 Ch. 116; *De Quetteville v. De Quetteville* (1905), 92 L. T. 758.

**2682.** ———— *By a marriage settlement certain funds were settled upon trust to invest & pay the annual produce during the joint lives of the husband & wife as therein mentioned, & after the death of one of them to the survivor for life, & after the death of the survivor to distribute among the children of the marriage as the husband & wife should jointly appoint, & in default thereof as the survivor should by deed or will appoint. The husband died without exercising the joint power of appointment, & the wife made several successive appointments in favour of certain of her children, & appointed the residue in favour of another child. The wife having died, & an action having been brought for the administration of the trusts of the settlement, & it appearing that the appointees had assigned (in some cases to two or three persons) & incumbered their shares:—Held: the costs must be borne rateably by the appointed shares, one set of costs to be allowed to each child in respect of the several appointments to him, the several assignees of such appointments to stand on the same footing, & to divide the costs allowed in respect of such child's share rateably between them.—Re HILL'S SETTLEMENT TRUSTS, HILL v. EQUITABLE REVERSIONARY INTEREST SOCIETY, LTD.* (1896), 75 L. T. 477; 41 Sol. Jo. 142.

**2683. Costs of beneficiaries.—Summons for construction of instrument.**—*Re BUCKTON, BUCKTON v. BUCKTON*, No. 2648, *ante*.

**2684.** ———— *By his will made in 1891 testator devised all his freehold property to his wife for life, & after her death "unto & to the use*

*of John William Halston (otherwise Alston) the son of Israel Halston (otherwise Alston)" in fee simple. Testator died in 1899, & his widow, the tenant for life, in 1911. Israel Alston, testator's brother, had a son called John William Alston, who was born in Mar., 1874, & whose existence was known to testator, but who died ten days afterwards, seventeen years before the date of the will. This son's death was well known to testator. Israel Alston had other sons, of whom one, deft. John Robert Halston (otherwise Alston), claimed the property. There was evidence that the son who died had received his names at the request of testator, & that testator desired that J. R. Halston should bear the name of John. Further, that testator had told J. R. Halston that the land would be his some day. There was no evidence that testator knew that the boy had been given the name of John Robert. Upon a summons by the legal personal representatives of the testator to decide who was entitled, deft. John Robert Halston & the three co-heiresses-at-law of testator were made resps., but only one of the co-heiresses asserted a claim & appeared to support it:—Held: the costs of successful resp. must be paid by unsuccessful resp. according to *Re Buckton, Buckton v. Buckton*, No. 2648, *ante*.—Re HALSTON, EWEN v. HALSTON, [1912] 1 Ch. 435; 81 L. J. Ch. 265; 106 L. T. 182; 56 Sol. Jo. 311.*

**2685.** ———— *Testatrix devised property A. to one exor. X. & property B. to another exor. Y. & owing to her ambiguous language it was doubtful whether Blackacre was included in property A. or property B. & also doubtful whether any part of property B. passed under the specific devise thereof at all. There being no means of using an ordinary exor.'s summons owing to each exor. being a specific devisee exor. X. took out a summons against exor. Y. & the residuary devisees to determine the point of contraction & at the hearing the residuary devisees while approving the summons as the proper method of deciding the matter disclaimed all interest in the realty leaving exor. X. & exor. Y. to decide about that between them:—Held: the point of construction had to be decided *in limine* before the estate could be administered & the costs must come out of the residuary estate.—Re FLECHER, KING v. KING (1918), 62 Sol. Jo. 740.*

#### *C. Settlement Set Aside.*

*See, now, Trustee Act, 1925 (c. 19), ss. 30 (2) & 60; & R. S. C., Ord. 65, r. 1.*

**2686. Costs in discretion of court.**—*COLMAN v. SARREL* (1789), 1 Ves. 50; 30 E. R. 225; *sub nom. COLMAN v. SAREL, SAREL v. COLMAN*, 3 Bro. C. C. 12, L. C.; *subsequent proceedings*, 2 Cox, Eq. Cas. 206, L. C.

*Annotations:—**Mentd. Ellison v. Ellison* (1802), 6 Ves. 656; *Pulvertoft v. Pulvertoft* (1811), 18 Ves. 84; *Alexander v. Wellington* (1831), 2 State Tr. N. S. 764; *Garrard v. Lauderdale* (1831), 2 Russ. & M. 451; *Edwards v. Jones* (1836), 1 My. & Cr. 226; *Slumpson v. Howden* (1837), 3 My. & Cr. 97; *Hughes v. Stubbs* (1842), 1 Har. 476; *McFadden v. Jenkins* (1842), 1 Har. 458; *Meek v. Ketwell* (1842), 1 Har. 464; *Kecwick v. Manning* (1851), 1 De G. M. & G. 176; *Price v. Price* (1851), 14 Beav. 598.

**2687.** ———— *Persons nominated trustees by an instrument which, being void, passes no trust fund, not allowed costs, as between solr. & client.—MOHUN v. MOHUN* (1818), 1 Swan. 201; 1 Wils. Ch. 151; 36 E. R. 357.

*Annotation:—**Mentd. Richardson v. Watson* (1833), 4 B. & Ad. 787.

#### PART III. SECT. 10, SUB-SECT. 2.—C.

**2686 I. Costs in discretion of court.**—*MERCHANTS BANK OF CANADA v. MACDONALD* (1872), 19 Gr. 476.—CAN.



**2688.** —.]—Trustee of a voluntary settlement was made a party to a bill to set it aside. The decree setting it aside was made without costs as against the trustee.—**TOWNSEND v. WESTACOTT** (1841), 4 Beav. 58; 5 Jur. 743; 49 E. R. 259.

*Annotations.*—**Reid**, *Christy v. Courtenay* (1849), 13 Beav. 96; *Mackay v. Douglas* (1872), L. R. 14 Eq. 106.

**2689.** —.]—**ELSEY v. LUTYENS** (1850), 8 Hare, 159; 68 E. R. 314.

**2690.** —.]—A party becoming trustee under a deed creating interests adverse to interests already existing may be liable to costs in a suit instituted to enforce such pre-existing interests in the trust property.—**HEAP v. TONGE** (1851), 9 Hare, 90; 20 L. J. Ch. 661; 68 E. R. 427.

*Annotations.*—**Mentd.** *Ford v. Stuart* (1852), 15 Beav. 493; *Clarke v. Wright* (1861), 6 H. & N. 849; *Wright v. Dickinson* (1861), 4 L. T. 21; *Salt v. Standish* (1863), 2 Now Rep. 673.

**2691.** —.]—An insolvent debtor, by a deed made under Bkpcy. Act, 1816 (c. 134), s. 102, & registered under that Act, assigned all his estate & effects to trustees for the benefit of his creditors. The deed was not in fact executed by the requisite number of creditors, & therefore was invalid, but the trustees had received assets:—**Held**: a trustee could not be allowed to retain his costs of acting under the deed.—**SMITH v. DRESSER** (1866), L. R. 1 Eq. 651; 35 Beav. 378; 35 L. J. Ch. 385; 14 L. T. 120; 14 W. R. 409; 55 E. R. 942.

*Annotation.*—**Distd.** *Re Holden, Ex p. Official Receiver* (1887), 20 Q. B. D. 43.

**2692.** —.]—By a settlement executed by an unmarried lady a few months after she attained twenty-one, it was declared that a sum of money to which she was entitled absolutely should be held by the trustees, who were her stepfather & uncle, upon trust to invest the same in certain specified classes of securities & vary the same at the trustees' discretion, & pay the income to the settlor for life, for her separate use, with restraint on anticipation if & when married, & after her death, to hold the fund in trust for the settlor's children, as she should by will appoint: in default of appointment, for the children absolutely; & in default of children as the settlor should by will appoint, & in default for her next of kin. The trustees were empowered, at the settlor's request, to raise £700 out of the fund & pay the same to her for her separate use. Power of appointing new trustees was reserved to the surviving or continuing trustees, or to the exors. or administrators of the last surviving trustee. The deed was prepared under the advice of a solr., who was the solr. & friend of the stepfather, & known to pltf. Upon bill nine years afterwards, by the settlor, who had remained unmarried, to have the settlement set aside:—**Held**: the deed was void, & must be set aside on the ground of improvidence, & having regard to the age of the settlor; but, owing to the absence of all improper motive, the trustees were allowed their costs, charges, & expenses properly incurred.—**EVERITT v. EVERITT** (1870), L. R. 10 Eq. 405; 39 L. J. Ch. 777; 23 L. T. 136; 18 W. R. 1020.

*Annotations.*—**Apld.** *James v. Couchman* (1885), 29 Ch. D. 212. **Refd.** *Phillips v. Mullings* (1871), 7 Ch. App. 244; *Hall v. Hall* (1873), 28 L. T. 383.

**2693.** —.]—**MACKAY v. DOUGLAS** (1872), L. R. 14 Eq. 106; 41 L. J. Ch. 539; 26 L. T. 721; 20 W. R. 652.

*Annotations.*—**Refd.** *Re Butterworth, Ex p. Russell* (1882), 19 Ch. D. 588; *Re Tolley, Ex p. Jeffrey* (1896), 66 L. J. Q. B. 111. **Mentd.** *Taylor v. Coenen* (1876), 34 L. T. 18.

**2694.** —.]—**DUTTON v. THOMPSON**, No. 2810, *post*.

**2695.** —.]—**MERRY v. POWNALL**, No. 2308, *ante*.

**2696.** —.]—Voluntary settlement by a young lady just of age set aside with costs against the relation in whose favour it was made & by whose undue influence it had been executed; trustee, being the solr. who had drawn the settlement, disallowed his costs of the action in which the settlement was set aside.—**POWELL v. POWELL**, [1900] 1 Ch. 243.

*Annotations.*—**Refd.** *Cavendish v. Strutt* (1903), 19 T. L. R. 483. **Mentd.** *Wright v. Carter*, [1903] 1 Ch. 27; *Howes v. Bishop*, [1909] 2 K. B. 390; *Inche Noriah Binte Mohamed Tahr v. Shalk Allie Bin Omar Bin Abdullah Bahashuan* (1928), 45 T. L. R. 1.

**2697.** —.]—The trustee, who, with knowledge of the settlor's destitution prepared the settlement in question but who acted in good faith & afterwards appeared at the trial to defend the settlement:—**Held**: entitled to his costs out of the settled property.—**IDEAL BEDDING CO., LTD. v. HOLLAND**, [1907] 2 Ch. 157; 76 L. J. Ch. 441; 96 L. T. 774; 23 T. L. R. 467; 14 Mans. 113.

**2698.** —.]—The ct. provided for the costs of the trustees of the settlement although they had unsuccessfully resisted the motion [to set aside the settlement].—**Re DENT, Ex p. THE TRUSTEE**, [1923] 1 Ch. 113; 92 L. J. Ch. 106; [1922] B. & C. R. 137.

—.]—*See, also*, **FRAUDULENT & VOIDABLE CONVEYANCES**, Vol. XXV., p. 223, Nos. 522-525.

#### SUB-SECT. 3.—UNNECESSARY PROCEEDINGS.

##### A. In General.

*See* **Trustee Act**, 1925 (c. 19), ss. 30 (2), 60; **R. S. C.**, Ord. 65, r. 1; **EXECUTORS**, Vol. XXIV., pp. 828-832, Nos. 8605-8634.

**2699. Liability of trustees for costs.**—Trustees for infants, persisting in unnecessary litigation, ordered to pay the costs personally.—**CAMPBELL v. CAMPBELL, CAMPBELL v. MACKAY** (1837), 2 My. & Cr. 25; 40 E. R. 550, L. C.

*Annotation.*—**Consd.** *Steeden v. Walden*, [1910] 2 Ch. 393.

**2700.** —.]—A trustee unreasonably resisting the claims of his *cestui que trust* ordered to pay the costs of the suit.—**PRICE v. LOADEN** (1856), 21 Beav. 508; 52 E. R. 955.

**2701.** —.]—If trustees, by wilful neglect of their duty render a suit for the administration of the estate under their charge necessary, they will be ordered to pay the costs of it.—**JEFFERYS v. MARSHALL** (1870), 23 L. T. 548; 19 W. R. 94.

**2702.** —.]—**Pltf.**, a trustee & exor. under a will, brought an action for the administration of a small estate, on the ground that it was in the interest of all parties, as there were doubts as to the true construction of the will, & difficulties & disagreements with regard to the interpretation of the trusts, & that he needed the protection of the ct. Defts., the beneficiaries, who, after the commencement of the action, had suggested that the quickest & least expensive mode would be to state a special case for the opinion of the ct., denied that it was in the interest of all parties that the estate should be administered under the direction of the ct., & contended that the question of construction was in no respect doubtful. They submitted that the action should be dismissed, as being unnecessary, harassing, & destructive of the trust property:—**Held**: the action must be dismissed with costs to be paid by the trustee

#### PART III. SECT. 10, SUB-SECT. 3.—A.

**26991. Liability of trustees for costs.**—Where trustees filed a bill to have the

trusts of the deed appointing them executed, without suggesting any difficulty in the way of their winding up

the affairs of the estate, the ct. refused them their costs of the suit.—**CUMMINGS v. MCFARLANE** (1850), 2 Gr. 151.—**CAN.**

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personally.—*Re CABBURN, GAGE v. RUTLAND* (1882), 46 L. T. 848.

**2703.** —[—]*Re HICKS, LINDON v. HEMERY*, [1893] W. N. 138.

**2704.** —[—]*Re CHAPMAN, FREEMAN v. PARKER* (1894), 72 L. T. 66; 11 T. L. R. 177; 39 Sol. Jo. 217, C. A.

**2705.** —[—]*A trustee who without the sanction of the ct. commences an unsuccessful action on behalf of the trust does so at his own risk, & will not be allowed his costs, out of the estate except under very exceptional circumstances. A fortiori, such costs, will not be allowed where the trustee commences an action not only without the sanction of the ct., but also without the knowledge of his co-trustee & of his beneficiaries.—Re ENGLAND'S SETTLEMENT TRUSTS, DOBB v. ENGLAND*, [1918] 1 Ch. 24; 87 L. J. Ch. 73; 117 L. T. 460.

**2706.** — *Recognition of unfounded claim.*—[—] M., previously to her marriage with W., was entitled to certain real estates on which a quantity of timber was afterwards felled, producing the clear balance of £942 £3 per cent. Consols. By the settlement on her marriage, those estates were covenanted to be settled to the use of four trustees, of whom E. & R. were two, & the settlement was for a term of ninety-nine years, if M. & W. should so long live, without impeachment of waste, in trust to receive the rents, issues, & profits, & after discharging the outgoings, to pay the residue to such persons & for such uses as M. should alone, & from time to time, & without her husband, as if she were sole, but not by way of anticipation, by any drafts, notes, orders, or writings, signed by her own proper hand, appoint; & in default thereof, to pay same to M., for her separate use, exclusive of her husband, who was not to intermeddle therewith, nor were the rents, etc. to be subject to his debts or control; with remainder to W. for his life; with remainders over. The trustees in 1836 appointed W. receiver of the settled estates, & M. signed a paper writing, dated Dec. 16, 1836, authorising the trustees to pay £200 *per annum* only of the rents to herself, & the remainder to W. The then trustees presented the paper writing to M. for her signature. M. afterwards signed another paper, dated Apr. 15, 1837, by which she revoked the former paper writing, & directed the payment of the rents to her separate use, according to the provisions of the settlement. This was afterwards communicated to the trustees, two of whom endeavoured to keep M. bound by the terms of the paper of Dec. 16, 1836, which obliged M. in Jan. 1838, to give notice to the then manager of the estates not to pay the rents to W. On one of the other two trustees, (B.), who was friendly to M. intimating his intention to receive the rents, a notice was served on the tenants & the manager, in the name of W. not to pay any rents except to some one authorised by all the trustees. The ct. afterwards, on motion, appointed the trustee B., the receiver, without salary. W. claimed the sum of £942 Consols. on the ground, that if he survived M., he would be tenant for life, without impeachment of waste; & the two hostile trustees insisted that M. had parted with her interest in that sum, by agreeing that the timber should be cut down, & the proceeds applied in payment of W.'s debts. The same trustees throughout the transactions endeavoured to aid the husband, W., in defeating the wife's enjoyment of her separate estate:—*Held*: the decree was right in ordering

those trustees & W. to pay the costs of the suit, same having been rendered necessary by the unfounded claims of the husband, W., improperly recognised & supported by those two trustees.—*BAGOT v. BAGOT* (1841), 10 L. J. Ch. 116, L. C. *Annotation*:—*Refd.* *Taylor v. Dowlen* (1869), 4 Ch. App. 697.

**2707.** — *Effect of counsel's advice.*—[—] As to costs, a person acting wrongfully, is not to allege the advice of counsel, as an excuse to screen him from costs. But inasmuch as this was a trustee acting honestly & *bona fide*, costs should not be given against him.—*ANGIER v. STANNARD* (1834), 3 My. & K. 566; 3 L. J. Ch. 216; 40 E. R. 216.

**2708.** —[—]*If counsel undertake to say they consider trustees would not have acted safely without taking the opinion of the ct., semble, the ct. will not give costs against them.—Re GOWEN & SHANKS, Ex p. YOUNG* (1839), as reported in 4 Deac. 185, Ct. of R.

**2709.** —[—]*Seemle*: where a trustee, on a doubtful point, has taken the opinion of counsel, which is directly opposed to that of counsel taken by the opposite party, but the trustee offers to be guided by the opinion of a third counsel, on a case stated on instructions approved by both parties, he is entitled to his costs of a suit under which a decree is made against him, directing him to do an act which his counsel advised him he was not bound to do, & especially where the trustee was not permitted to inspect the case & opinion of counsel taken by the other party.

A trustee is entitled to the costs of taking the opinion of counsel for his guidance.—*POOLE v. PASS* (1839), 1 Beav. 600; 8 L. J. Ch. 325; 48 E. R. 1074.

*Annotation*:—*Refd.* *Turner v. Collins* (1871), L. R. 12 Eq. 438.

**2710.** —[—]*If trustees take upon themselves to inquire into matters which do not concern them, & to raise questions of the title of their cestuis que trust, they must bear their own expenses of proceedings resulting from their own conduct. The fact of their acting under the advice of counsel will not, in all cases, entitle them to the costs of a suit.—DEVY v. THORNTON* (1851), 9 Hare, 222; 22 L. J. Ch. 163; 68 E. R. 483.

**2711.** —[—]*(1) It is said that the trustee acted upon the advice of counsel. I regret it, but that does not make any difference (ROMILLY, M.R.).*

*(2) A trustee cannot pay money into ct. to get rid of a trust he has undertaken to perform (ROMILLY, M.R.).—Re KNIGHT'S TRUSTS* (1859), 27 Beav. 45; 28 L. J. Ch. 625; 33 L. T. O. S. 54; 5 Jur. N. S. 326; 54 E. R. 18.

*Annotations*:—*Generally, Refd.* *Re Wylly's Trust* (1860), 2 L. T. 788; *Re Brocklesby* (1861), 29 Beav. 652.

**2712.** —[—]*RYAN v. NESBITT*, [1879] W. N. 100.

**2713.** — *Erroneous exercise of discretion.*—[—] Where a committee & trustee wrongly takes upon himself to decide to which of his two titles preference is to be given, he must, on appeal, bear all the costs of the whole suit, except so far as they may have been increased by a claim which failed in the ct. below.—*WRIGHT v. CHARD* (1860), 1 De G. F. & J. 567; 29 L. J. Ch. 415; 2 L. T. 104; 6 Jur. N. S. 476; 8 W. R. 334; 45 E. R. 481, L. J. *Annotations*:—*Distd.* *Kewan v. Crawford* (1877), 6 Ch. D. 29. *Mentd.* *Johnson v. Gallagher* (1881), 3 De G. F. & J. 494; *London Chartered Bank of Australia v. Lemprière* (1873), L. R. 4 P. C. 572.

**2714.** —[—]*The trustees of a freehold estate of which plff. was equitable tenant for life under a will, brought actions under the advice of counsel against two persons for interfering with the property, & compromised them before trial. Plff. had no notice of the proceedings, but had some*

time previously warned the trustees, on the occasion of an injury done by persons other than debtors. to these actions, that he should hold them liable if they did not take all necessary steps to protect the property. In Dec. 1881, *plff.* applied to the trustees for the rents accrued since May, 1880. The trustees' solr. answered stating the amount of the rents received, & saying that it was less than the costs incurred by the trustees in the action, & that they were out of pocket. A correspondence ensued, in the course of which the trustees expressed their willingness to concur in any arrangement for raising the costs out of the estate, but *plff.* insisted on having the rents paid to him irrespective of any arrangement for raising the costs, & brought his action to enforce payment: *Held*: (1) the direction to raise the costs of the trustees of the old actions out of the estate ought to be affirmed, for the actions appeared to have been brought *bona fide* & to have been beneficial to the estate, but the reason given in the decree for allowing them ought to be varied, as that result did not necessarily follow from their having been commenced under the advice of the counsel. (2) the order on the trustees to pay costs must be reversed, & directions given for raising their costs of this action out of the estate, for the costs of trustees properly incurred in the administration of the trust are a first charge on both the capital & income of the trust estate, & the trustees were not bound to part with the income till their costs had been otherwise provided for, & they therefore had been guilty of no misconduct.—*STOTT v. MILNE* (1884), 25 Ch. D. 710; 50 L. T. 742, C. A.

*Annotations*:—As to (1) *Reid*, *Re Beddoe*, *Downes v. Cottam*, [1893] 1 Ch. 547. As to (2) *Apld*, *Re Owen*, *Frisby, Dyke & Co. v. Owen* (1892), 66 L. T. 718; *St. Thomas's Hospital v. Richardson*, [1910] 1 K. B. 271. *Reid*, *Re Weall*, *Andrews v. Weall* (1889), 42 Ch. D. 674; *Leeds Corp'n. v. Sugden* (1911), 105 L. T. 489; *Baker v. Archer-Shee*, [1927] A. C. 841.

**2715.** ———.—*Re BEDDOE, DOWNES v. COTTAM*, No. 2057, *ante*.

#### B. Withholding Fund.

See Trustee Act, 1925 (c. 19), ss. 30 (2), 60, R. S. C., Ord. 65, r. 1.

**2716. Trustee deprived of or liable for costs.**—A trust refusing to pay a legacy without the direction of the ct., in a case which admitted of no doubt, was refused his costs, but was not made to pay the costs of the suit, because he might have acted from ignorance, & not from any improper motive.—*KNIGHT v. MARTIN* (1829), 1 Russ. & M. 70; Tambl. 237; 39 E. R. 27.

**2717** ———.—*Testator*, by his will, gave his real estates to his wife for life, & after her death, he directed them to be sold, & one moiety of the proceeds to be paid to his wife's relations as she should appoint, & in default of appointment, to her next of kin, & the other moiety to his own next of kin. By a codicil he expressed his will that his real estate should be sold at any time, either before or after his wife's death. The interest of the share bequeathed to his own relations after his wife's death to be paid to her, & the other moiety devised by his will to be paid to his wife for her own use.

The wife of testator having disposed of the above moiety by her will, purporting to be in exercise of the power given her by his will, her exor. claimed to be entitled to receive a moiety of the proceeds of testator's real estate from the trustees of his will; which claim they refused, on the ground that

the codicil did not revoke the power given by the will, although they were previously advised, by the opinions of two counsel, which they concealed from the exor. of the wife, that it did:—*Held*: they were liable to pay the costs of a suit instituted by the exor. of the wife to recover a moiety of the proceeds of testator's real estate, so far as it was rendered necessary by their conduct.—*ANKERS v. SANDFORD* (1840), 4 Jur. 817.

**2718.** ———.—It is the duty of the ct. to protect trustees to the utmost in exercising every reasonable caution, & requiring full proof; yet, if a trustee, after having received full evidence of the title, perseveringly persist in withholding the fund from the party entitled to it, upon grounds which wholly fail, & especially where part of those grounds is a claim, in which that trustee is himself interested, the ct. will not allow him so to conduct himself without paying the costs of such a mode of proceeding.—*FROST v. HAMILTON* (1842), 6 Jur. 525.

**2719.** ———.—A fund was settled by deed upon certain trusts under such circumstances that it was doubtful whether it was not improperly withdrawn from the trusts declared by another instrument. Debtors were appointed new trustees of the deed by an indenture which was executed by them, & contained a declaration that they would hold the fund upon the trusts of the deed. Debtors, before they became trustees, were fully aware of the doubt as to the validity of the settlement. Upon a bill filed by some of the *cestuis que trust* for transfer of their share of the settled fund. The judge held that such transfer could not be ordered except in a suit so constituted as to parties that the question of the validity of the settlement could be decided:—*Held*: this decision was right; for a trustee who, after accepting the trusts, becomes aware of an adverse equitable claim, cannot safely proceed as if no such claim existed; & the fact of his being aware of the claim when he accepted the trust cannot make any difference except as to his costs.—*NEALE v. DAVIES* (1854), 5 De G. M. & G. 258; 2 Eq. Rep. 530; 23 L. J. Ch. 744; 2 W. R. 358; 43 E. R. 889, L. J.

*Annotation*:—*Mentd.* *Gent v. Harrison* (1859), 29 L. J. Ch. 68.

**2720.** ———.—By settlement, dated in 1846, executed on the marriage of S. a debt of £1,200, due to her from the firm of Q. H. & co., was assigned to N. & H., H. being a member of the firm of Q. H. & co., as trustees, upon trusts for the benefit of S. & her family. It was provided that the money should be left with Q. H. & co. until S. gave notice to the trustees to withdraw it, when they were within three months to recover it, & invest elsewhere: but so long as it should remain in the hands of Q. H. & co., with the permission of S. the trustees, nor either of them, were not to be responsible for the sufficiency of the security. There was no power in the deed to change trustees. The husband died soon after. In Nov. 1851, Q. H. & co., stopped payment. In Jan. 1852, S. gave notice to the trustees to recover the money. N. thereupon demanded the money, but was informed of the stoppage, & offered a compromise. The bill was brought to enable the trustee to act, he having no express power to accept a compromise. The *cestuis que trust* refused to accept it, & the money being ordered to be paid into ct., it was ultimately paid in:—*Held*: H. was not entitled to receive any costs of the suit out of the

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**2716 i.** *Trustee deprived of or liable for costs.*—*FISHER v. WILSON* (1851), 2 Gr. 280.—CAN.

**2716 ii.** ———.—*DE BURGH v. MCCLINTOCK* (1883), 11 L. R. Ir. 220.—IR.

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fund, but under the circumstances he was not ordered to pay any costs.—*NORTON v. STEINKOPF* (1854), 18 Jur. 720.

**2721.** —[Costs of the trustees of the charities, who by their conduct had caused the litigation, refused.—*WHEELER v. SMITH* (1860), 1 Giff. 300; 29 L. J. Ch. 194; 1 L. T. 430; 6 Jur. N. S. 62; 8 W. R. 173; 65 E. R. 928.

**Annotation:—***Mentd.* *Roe v. Russell*, [1928] 2 K. B. 117.

**2722.** —[A trustee of a fund belonging to a deceased person refused to pay it over to his legal personal representative, on the ground that there was a question under the will of the deceased, whether it was not specifically bequeathed & requiring the assent of the alleged specific legatees. He was ordered to pay it to the legal personal representative, together with the costs of suit, to which suit it was held that such specific legatees were not necessary parties.—*SMITH v. GOLDEN* (1863), 33 Beav. 262; 55 E. R. 368.

**2723.** —[G., being entitled to a share of an estate, went abroad leaving a power of attorney to receive such share. The estate was sold, but the purchaser requiring G.'s confirmation, his share was deposited in the names of E. & P. in the bank on a declaration of trust. On the confirmation arriving, E. was repeatedly applied to for more than four months but neglected to hand the fund over, alleging a difficulty in making out the account; the bank failed, & the money was lost. On bill filed:—*Held*: E. was liable to restore the money with interest & pay the costs, P. being always ready to hand over.—*GOUGH v. ETTY* (1869), 20 L. T. 358.

**2724.** —[*GUNNELL v. WHITEAR*, No. 2474, *post*.

**2725.** —[Although there may be cases in which there are such difficulties that trustees ought not to be called upon to exercise their power of apportionment of trust funds among the beneficiaries entitled thereto except with the sanction of the ct., yet unless that state of circumstances exists trustees are not justified in refusing to sell or appropriate the same & will be held to have acted unreasonably & improperly in so refusing & be ordered to pay the costs under R. S. C., Ord. 65, r. 1, of an application to the ct. on behalf of the beneficiaries to obtain such apportionment.—*Re RUDDOCK, NEWBERRY v. MANSFIELD* (1910), 102 L. T. 89, C. A.

**2726. Costs only allowed as between party & party.]**—As the trustees ought to have paid *pltf.* at least the one moiety of the appointed fund to which she was in any case entitled, & might have paid the other moiety into ct., under Trustee Relief Acts they were only allowed their costs of the suit as between party & party.—*DE SERRE v. CLARKE* (1874), L. R. 18 Eq. 587; 43 L. J. Ch. 821; 31 L. T. 161; 23 W. R. 3.

**Annotation:—***Mentd.* *Sweetapple v. Horlock* (1879), 11 Ch. D. 745.

**C. Raising Groundless Objections.**

*See* Trustee Act, 1925 (c. 19), ss. 30 (2), 60; R. S. C., Ord. 65, r. 1.

**2727. Liability of trustee for costs.]**—Trustees decreed to pay the costs of a suit occasioned by their legal doubts in a plain case.—*BURROWS v. GREENWOOD* (1841), 5 Jur. 384.

**2728.** —[The ct. will compel trustees to pay the costs of a suit rendered necessary by their raising groundless objections to the performance of their trust.—*THORBY v. YEATS* (1842), 1 Y. & C. Ch. Cas. 488; 6 Jur. 939; 62 E. R. 960.

**2729.** —[*LLOYD v. WILLINGS* (1843), 1 L. T. O. S. 358.

**2730.** —[Trustees raising a charge of fraud, & taking no steps to satisfy themselves when they might easily do so, will not be allowed their costs of the discussion in ct. if upon the evidence the ct. considers there was no reasonable ground of suspicion.—*COCKCROFT v. SUTCLIFFE* (1856), 25 L. J. Ch. 313; 27 L. T. O. S. 34; 2 Jur. N. S. 323; 4 W. R. 339.

**Annotations:—***Mentd.* *Re Hulsh's Charity* (1870), L. R. 10 Eq. 5; *Re Turner's Settlement* (1884), 52 L. T. 70.

**D. Failure to Transfer Property.**

*See* Trustee Act, 1925 (c. 19), ss. 30 (2), 60; R. S. C., Ord. 65, r. 1.

**2731. Liability of trustee for costs.]**—An unmarried lady transferred a sum of stock to trustees for herself. The letter supposed to contain the terms of the trust was lost, & no evidence was given of its contents. After the marriage of the lady the husband & wife demanded a transfer of the fund, which the trustees refused to make without the direction of the ct., unless the fund should be settled for the benefit of the wife & her issue:—*Held*: the trustees ought to have transferred the fund without suit, & must therefore pay the costs.—*PENFOLD v. BOUCH* (1844), 4 Ilare, 271; 67 E. R. 650.

**Annotations:—***Expld.* *Re Bendyshe* (1857), 26 L. J. Ch. 814. *Distd.* *Re Swan* (1864), 2 Hem. & M. 34.

**2732.** —[Trustees of a term in trust for securing to a mtgee. in fee (with a power of sale) his mtge. money & subject thereto in trust for the mtgor., his heirs, etc., decreed in a plain case, to pay the costs of a suit brought against him to compel him to execute a deed for surrendering the term to a purchaser from the mtgee.—*HAMPSHIRE v. BRADLEY* (1845), 2 Coll. 34; 63 E. R. 624.

**2733.** —[The relation of father & daughter does not of itself render the validity of an arrangement between persons thus related respecting a reversionary interest of the daughter so doubtful as to justify a trustee in refusing to transfer a fund, in pursuance of the arrangement, without the indemnity of the ct. A trustee so refusing, & who did not show that he had endeavoured to ascertain the real nature of the transaction, was decreed to pay costs.—*FIRMIN v. PULMAN* (1848), 2 De G. & Sm. 99; 11 L. T. O. S. 43; 12 Jur. 410; 64 E. R. 45.

**Annotations:—***Apld.* *Cockcroft v. Sutcliffe* (1856), 25 L. J. Ch. 313. *Mentd.* *De Witte v. Addison* (1899), 80 L. T. 207.

**E. Failure to Account.**

*See* Trustee Act, 1925 (c. 19), ss. 30 (2), 60; R. S. C., Ord. 65, r. 1.

**2734. Liability of trustee for costs.]**—An estate was represented to a legatee by the personal representatives as barely sufficient to pay the debts, but the accounts were not shown. A bill was filed, & afterwards an offer was made to produce the accounts, which was declined. Ultimately, a small surplus was ascertained to exist, & to be due from the representatives, but which was totally insufficient to pay the legacies, which were

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**27271. Liability of trustee for costs.]**—*TAYLOR v. McLEOD* (1909), 4 N. B. Eq. Rep. 262; 7 E. L. R. 450.—*CAN.*

**PART III. SECT. 10, SUB-SECT. 3.—D.**

**27311. Liability of trustee for costs.]**—*KELLY v. HOLLEY (Man.)* (1912), 22 W. L. R. 587; 8 D. L. R. 176; 3 W. W. R. 412.—*CAN.*

**PART III. SECT. 10, SUB-SECT. 3.—E.**

**27341. Liability of trustee or costs.]**—*MORTON v. MILLER (N. S.)* (1906), 1 E. L. R. 91.—*CAN.*

of a very considerable amount. The ct. disapproved of the litigation, & gave *pltf.* no costs; but directed the representatives to retain their balance in discharge of their costs.—*OTTLEY v. GILBY* (1845), 8 Beav. 602; 14 L. J. Ch. 177; 4 L. T. O. S. 411; 50 E. R. 237.

*Annotation*.—*Relf*, *Springett v. Dashwood* (1860), 7 Jur. N. S. 93.

**2735.** —[—]Where, after applications to see the trusteeship accounts were refused, a bill was filed for the administration of real & personal estate, & the trustees by their answer denied that there was anything due from, but that a balance was due to them, & said that the prosecution of the suit could lead to no useful result, as there was no estate of testator remaining unapplied, but that they were ready to account on being paid their costs, & the chief clerk certified that a balance was due from the trustees, the ct. considered the conduct of the trustees, who had had the management of the trust estate, unsatisfactory; ordered them to pay the balance due, with interest at 4 per cent. from the year 1838; & directed them to pay all the costs of the suit, excepting the costs of the proceedings in reference to the real estate, the charge in the bill that testator had real estate not having been proved by *pltf.*—*EGLIN v. SANDERSON* (1862), 3 Giff. 434; 6 L. T. 151; 8 Jur. N. S. 329; 66 E. R. 479.

**2736.** —[—]A trustee refused to render sufficient accounts of a legacy bequeathed to a married woman for life with remainder to her children, on the ground that the legatees wished to deal with the legacy in a manner inconsistent with the terms of the will, & stated her intention of retiring from the trusts by payment of the legacy into ct. under Trustee Relief Act. On a suit by the legatees:—*Held*: the trustee was not justified in such refusal, & must pay the costs of the suit.—*HENRY v. MACDONALD* (1866), 15 W. R. 165.

**2737.** —[—]Where exors. & trustees had, prior to an administration action, distributed three-fourths of their testator's residuary property, but had been irregular in paying the income of the other one-fourth, which was held by them in trust for a person during her life, & afterwards for her children, & had persistently neglected to furnish accounts in respect of this share, on an administration action being brought by the persons entitled to the one-fourth share:—*Held*: the costs of the action, including those of the hearing, but excepting those of the accounts & inquiries, must be paid by the trustees personally, & the remainder of the costs must in the first instance be thrown on the whole of testator's residuary property, the proportion of them, which would have been payable out of the three-fourths, if such parts had not been distributed, being borne by the trustees personally, & the remainder being paid out of the one-fourth share actually administered in the action.—*Re BELL'S ESTATE, BATH v. BELL* (1878), 39 L. T. 422.

**2738.** —[—]Where a trustee had taken a wrong view of his position towards his *cestui que trust*, & had put him to expense & delay by an indefensible course of conduct in the taking of an account, & the result of the taking of the account was unfavourable to the trustee:—*Held*: the ct. must not only deprive the trustee of the costs of taking the account, but must order him to pay them.—*Re HOLTON'S SETTLEMENT TRUSTS, HOLTON v. HOLTON* (1918), 88 L. J. Ch. 444; 119 L. T. 304; 62 Sol. Jo. 403.

—[—]*Compare* *EXECUTORS*, Vol. XXIV., pp. 826–828, Nos. 8590–8604.

#### F. Refusing Information.

*See* Trustee Act, 1925 (c. 19), ss. 30 (2), 60; R. S. C., Ord. 65, r. 1.

**2739. Liability of trustee for costs.**—[Repeated applications were made to a trustee requiring to know in what way certain legacies given by the will of a testator, & in which certain parties had life interests, had been invested. To these applications the trustee gave evasive answers:—*Held*: he must individually pay the costs of a suit to secure these legacies.—*GUERSON v. ASTLE* (1860), 3 L. T. 288.

**2740.** —[—]Where a solr., acting for a body of creditors under a deed of assignment, has made personal & written applications to the trustee for information respecting the trust estate, & the trustee has disregarded such applications & several summonses have been issued for his attendance, & ultimately his arrest has been effected, the ct. will order him to pay the costs of the proceedings personally.—*Re EDIS* (1865), 13 W. R. 1068.

**2741. Unreasonable proceedings by beneficiary—No order as to costs.**—*Pltf.* was entitled under a will to the sum of £100, subject to the life interest therein of testator's widow, who was eighty-four years of age. Testator died in July, 1894, & probate of his will was granted in Aug. In Nov. *pltf.*, being desirous of raising money on the security of her reversionary interest, asked the trustees for the particulars of the securities in which the estate was invested. Some correspondence took place, & in a letter of Dec. 11 the trustees said that at the date of the proof of the will the securities consisted of a variety of foreign railway & Govt. bonds, & also a considerable quantity of English railway stock; that the net amount of the personal estate was £12,286 2s. 11d., & that they could not add to these particulars, which they trusted would be considered satisfactory. On Dec. 14, without any further communication with the trustees, an originating summons was taken out on behalf of *pltf.* against the trustees, asking that they might be ordered to furnish *pltf.* with particulars of the trust estate & the investments, & to pay the costs of the summons. It appeared that *pltf.* had in fact obtained a very small loan on the security of the reversion:—*Held*: *pltf.* was strictly entitled to the particulars of the investments of the trust estate, & the trustees must furnish them; but the summons had been taken out with unreasonable haste, & both sides being in the wrong, there would be no order as to the costs, either of the appeal or in the ct. below, except that *pltf.*'s solr. should be disallowed all costs as against her.—*Re DARTNALL, SAWYER v. GODDARD*, [1895] 1 Ch. 474; 64 L. J. Ch. 341; 72 L. T. 404; 43 W. R. 644; 12 R. 237, C. A.

#### G. Unnecessary Expenses in Proceedings.

*See* Trustee Act, 1925 (c. 19), ss. 30 (2), 60; R. S. C., Ord. 65, r. 1.

**2742. Liability of trustee for costs—Unnecessary evidence.**—*COCKCROFT v. SUTCLIFFE*, No. 2730, ante.

**2743.** —[—] *Evidence by affidavit.*—A motion was made to the ct. for leave to take evidence in a suit by affidavit. It was opposed by defts. who were trustees, & the ct. held that defts. were entitled to have the evidence taken *viva voce*, but reserved the costs of the motion. On the cause coming on for hearing no witnesses were called, & no reason was given for insisting upon the evidence being taken *viva voce*:—*Held*: the costs of the motion must be paid by defts.,

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the trustees, who had perversely, unreasonably & unjustly refused to adopt the cheaper & more familiar mode of taking evidence. Trustees disallowed the costs of an answer held to be unnecessarily long.—*PATTERSON v. WOOLER* (1876), 2 Ch. D. 588; 45 L. J. Ch. 274; 34 L. T. 415; 24 W. R. 455; 3 Char. Fr. Cas. 318.

**2744.** — *Case better stated by reason of such evidence.*—Where trustees, by their answer to the bill of their *cestui que trusts*, have greatly increased the cost of the litigation by opposing the granting of the decree prayed for & necessitating the going into evidence at great length, they may nevertheless get all their costs of the suit out of the trust estate if the ct. shall be of opinion that plffs.' case has by reason of such evidence been better & more advantageously placed before the ct.—*COLLISS v. HECTOR* (1875), L. R. 19 Eq. 334; 44 L. J. Ch. 267; 39 J. P. 295.

*Annotation.*—*Mentd.* Rudd v. Rudd, [1924] 1 P. 72.

**2745.** — *Filing bill instead of paying into court.*—A trustee filed a bill in a case in which he ought to have paid the fund into ct. under Trustee Relief Act, 1850 (c. 60). He was allowed only such costs as he would have been entitled to under Trustee Relief Act, 1850 (c. 60).—*WELLS v. MALBON* (1862), 31 Beav. 48; 31 L. J. Ch. 344; 0 L. T. 39; 8 Jur. N. S. 249; 10 W. R. 304; 54 E. R. 1055.

*Annotations.*—*Refd.* Barker v. Pette (1865), 2 Drew. & Sm. 340. *Mentd.* Heath v. Lewis (1864), 5 New Rep. 32; Fitzgerald v. Chapman (1875), 1 Ch. D. 563.

**2746.** — *Unnecessary appeal.*—The judge of the county ct. set aside the settlement. He gave the trustee in the liquidation his costs out of debtor's estate, but made no order as to the costs of the trustees of the settlement. The trustees of the settlement appealed to the chief judge, who discharged the order of the county ct. The Ct. of Appeal restored the order of the county ct.:—*Held*: the trustees of the settlement ought to have been satisfied with the decision of the county ct., & they must bear their own costs of both appeals, & must pay the costs of the trustee in the liquidation of both appeals.—*Re BUTTERWORTH, Ex'p.* *RUSSELL* (1882), 19 Ch. D. 588; 51 L. J. Ch. 521; 46 L. T. 113; 30 W. R. 584, C. A.

*Annotations.*—*Refd.* *Re* Holden, *Ex'p.* Official Receiver (1887), 20 Q. B. D. 43; *Re* Briggs & Sploor, [1891] 2 Ch. 127; *In the Estate of* Plant, *Will v. Plant*, [1920] P. 139.

*Mentd.* *Re* Ridler, *Ridler v. Ridler* (1882), 52 L. J. Ch. 343.

**2747.** *Negligent conduct of action.*—An administration action was commenced in May, 1875, & in Nov. 1887, was heard on second further consideration. It then appeared that the costs would probably amount to a sum almost equal to the value of the estate. The judge thereupon referred the matter to the taxing master under R. S. O., Ord. 65, r. 11, for inquiry & report as to the delay & the costs occasioned thereby, which order was affirmed on appeal. The taxing master reported that there had been great delay in the suit, which was caused by the conduct of the solr. for pltf., & he disallowed considerable sums of the costs as between the various solrs. & their clients:—*Held*: the ct. will not permit the costs occasioned by improper litigation, or by the negligent conduct of administration proceedings, to be

paid out of an estate under its care; the amount of costs allowed by a taxing master as between the client & his solr. was not conclusive of the amount which the ct. would allow out of the estate; & therefore the ct. had jurisdiction to refuse to allow pltf., a trustee, to have the full amount of the costs allowed him in taxation paid out of the estate.—*BROWN v. BURDETT* (1888), 40 Ch. D. 244; 60 L. T. 520; 37 W. R. 533; 5 T. L. R. 88, C. A.

*Annotations.*—*Refd.* Formby v. Barker (1903), 89 L. T. 249. *Mentd.* *Re* Burn & Berridge (1908), 99 L. T. 606.

**2748.** — *Unnecessary inquiries.*—This case came before the ct. for further consideration, & defts. asked that pltf. might be ordered to pay the costs of the action. Pltf. was the sole exor. & trustee of the will of G., a grocer. The property had been realised in the action, & the total amount of the proceeds was about £370. Testator died in 1878, having by his will left all his property upon trust for his wife during widowhood, with power to carry on the business, & on her death or marriage, upon trust for sale, the residue to be divided among his children & the issue then living of any deceased. On May 30, 1879, the writ was issued in this action. In Apr. 1880, the statement of claim was delivered in which the number & names of the testator's children were stated, the only reason given for the action being that difficulties had arisen in the administration of the trust. The widow & J., an adult son, were defts. On Nov. 17, 1880, pltf. applied for & obtained an order for accounts & inquiries. The certificate was not made until June 5, 1889:—*Held*: the suit being instituted, & the order for accounts & inquiries made before the General Orders of 1883 came into operation, the trustee under the old practice, was not so much to blame as to be ordered to pay the costs.—*Re DALE, SUBBS v. DALE* (1889), 62 L. T. 28.

**SUB-SECT. 4.—MISCONDUCT OF TRUSTEE.**

*See* Trustee Act, 1925 (c. 19), ss. 30 (2), 60; R. S. C., Ord. 65, r. 1; EXECUTORS, Vol. XXIV., pp. 825, 826, Nos. 8580–8583.

**2749.** *Trustee deprived of or liable for costs.*—Trustee ordered to pay costs, on misconduct.—*DAWSON v. PARROT* (1791), 3 Bro. C. C. 236; 29 E. R. 510, L. C.

**2750.** — *Costs refused to a trustee, setting up a trust different from what it really was: but general misconduct, etc., is not a sufficient ground.*—*BALL v. MONTGOMERY* (1793), 4 Bro. C. C. 339; 2 Ves. 191; 29 E. R. 924, L. C.

*Annotations.*—*Refd.* *Duncan v. Campbell* (1842), 12 Sim. 616. *Mentd.* *Oswell v. Probert* (1795), 2 Ves. 680; *Duncan v. Duncan* (1815), 19 Ves. 394; *Goddard v. Snow* (1820), 1 Russ. 485; *St. George v. Wake* (1833), *Coop. temp. Brough*, 129; *Sturges v. Champneys* (1839), 5 My. & Cr. 97; *Wilkinson v. Charlesworth* (1847), 16 L. J. Ch. 387; *Barrow v. Barrow* (1854), 5 De G. M. & G. 782.

**2751.** — *One of the trustees in a marriage settlement declined to join with his co-trustees, in calling upon the husband to perform his covenant therein contained, & also declined to join as pltf. in a bill to compel him: such trustee was consequently made deft. The ct. refused to allow him costs out of the fund, by reason of misconduct in refusing to concur.*—*HOLCOMBE v. JONES* (1831), 1 L. J. Ch. 46.

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**2749 I.** *Trustee deprived of or liable for costs.*—Costs will not be given against trustees except where they have been guilty of improper conduct.—*A. G. v. M'PHERSON* (1878), 4 V. L. R. (Eq.)

51.—*AUS.*

**2749 II.** — *KNIGHT v. BELL* (1887), 13 V. L. R. 878.—*AUS.*

**2749 III.** — *ELLIS v. ELLIS* (1859), 7 Gr. 102.—*CAN.*

**2749 IV.** — *BROWN v. BROWN* (1901), 20 N. Z. L. R. 40.—*N.Z.*

**2749 V.** — *MCGREGOR v. MCGREGOR* (No. 2.), [1919] N. Z. L. R. 286.—*N.Z.*



**2752.** —J.—An exor. or trustee will be fixed with costs of a suit, where the suit has been occasioned by fraud in his conduct.—*FOSBROOKE v. BALGUY* (1833), as reported in 2 L. J. Ch. 135.

**2753.** —J.—A married woman, living apart from her husband in adultery, acquired moneys, which she deposited with bankers. She then married again, her first husband being still alive, & on such marriage settled the money so deposited for the benefit of herself & second husband & two illegitimate children. Shortly afterwards she was convicted of murder, & executed. Previous to her trial, she & her trustees applied to the bankers for the fund, in order to employ it in her defence, which the trustees conducted in an extravagant manner, but the bankers refused to pay it over. After her execution, the trustees & the first husband severally brought actions against the bankers to recover the money, which were stayed under an interpleader rule, & an issue was directed to try the question between the first husband & the trustees, under which a verdict was found for the first husband:—*Held*: the trustees, not having acted *bonâ fide*, should repay the costs of the bankers to *plff.*, & also pay all the costs incurred by him in the course of the proceedings.

*Sensib.*: if the trustees had acted *bonâ fide*, they would not only have been charged with such costs, but possibly might have been allowed their own costs out of the fund.—*AGAR v. BLETHYN* (1835), 2 Cr. M. & R. 699; Tyr. & Gr. 160; 5 L. J. Ex. 36; 150 F. R. 296.

*Annotation*:—*Mentd.* *Shingler v. Holt* (1861), 7 H. & N. 65.

**2754.** —J.—Where there has been a fraudulent conveyance, the trustee of such conveyance must pay his own costs, notwithstanding he may have been ignorant of the fraud at the time of the conveyance, & afterwards gave notice of it to the parties interested, he being a party to the deed itself which stated the receipt of the trust money by him, & also the payment of it by him, when in reality no money ever passed in the transaction at all, & of which he must be presumed to have been aware.—*TUNGUAND v. KNIGHT* (1845), 14 Sim. 643; 5 L. T. O. S. 341; 9 Jur. 546; 60 E. R. 508.

**2755.** —J.—On a mtgee. of settled estates requiring to be paid off, or to have the interest increased, the tenant for life proposed a new mtgee. at the same rate. The trustees insisted on being the proper persons to carry the transaction into effect, & procured another mtgee., but at a higher rate; & in order to raise the expenses thereby incurred, they proceeded to sell the estate under the ordinary powers of sale & exchange in the settlement, whereupon the tenant for life filed a bill to restrain the sale:—*Held*: the conduct of the trustees was unjustifiable, & they ought to pay all the costs of the suit.—*MARSHALL v. SLADDEN* (1851), 4 De. G. & Sm. 468; 64 E. R. 916.

**2756.** —J.—Trustees refused the costs of a suit occasioned by a blank in a deed executed by them.—*FYFE v. ARBUTHNOT* (1857), as reported in 26 L. J. Ch. 646; 29 L. T. O. S. 300; 3 Jur. N. S. 651, L. C.

*Annotation*:—*Mentd.* *Carroll v. Graham* (1865), 11 Jur. N. S. 1012; *Re Clarke, Coombe v. Carter* (1887), 35 Ch. D. 109.

**2757.** —J.—*BEER v. TAPP*, No. 2661, *ante*.

**2758.** —J.—Husband & wife endeavoured to establish a case of improper conduct as to the trust funds on the part of the trustee. The trustee, on the other hand, adduced evidence tending to prove the existence of matrimonial differences between them, & put in a long voluntary answer

to a cross bill filed against him. Although the ct. was, at first, disposed to make the trustee to pay the costs incurred by his evidence & answer, it ultimately held, that each party must pay their own costs of the suits.—*BEAUMONT v. CARTER, CARTER v. BEAUMONT* (1863) as reported in 8 L. T. 685.

**2759.** —J.—The court never gives costs to a defaulting trustee (*ROMILLY, M.R.*).—*BIRKS v. MICKLETHWAIT* (1864), 33 Beav. 409; 33 L. J. Ch. 510; 10 L. T. 85; 10 Jur. N. S. 302; 12 W. R. 505; 55 E. R. 426; *on appeal*, 34 L. J. Ch. 362, L. C.

*Annotation*:—*Mentd.* *Micklethwaite v. Winstanley* (1864), 34 L. J. Ch. 281.

**2760.** —J.—The trustee . . . has . . . taken upon himself to be a partisan of the wife . . . & has refused production of the deeds, which, as trustee, he was bound to produce to all persons interested in the trust . . . He has, however, put himself in such a position that I cannot give him his costs; but in the absence of any proof of improper motive I do not make him pay any (*LORD HATHIERLEY, C.*).—*SIMPSON v. BATHURST, SHEPHERD v. BATHURST* (1869), 5 Ch. App. 193; 23 L. T. 29; 18 W. R. 772, L. C.

*Annotations*:—*Reid, Re Cowin, Cowin v. Gravett* (1866), 33 Ch. D. 179. *Mentd.* *Re Beddingfield & Herring's Contract*, [1893] 2 Ch. 332.

**2761.** —J.—Where, by reason of the neglect or refusal of a trustee to do his duty, a *cestui que trust* is compelled to resort to a foreign ct. for enforcing his right against the trustee, though the trustee should not be served with a notice of such proceedings, the Ct. of Ch. will, on application by the *cestui que trust*, order the trustee to pay the costs of such proceedings, as being costs necessarily incurred in consequence of the refusal of the trustee to do his duty.—*GRIFFIN v. BRADY* (1869), 39 L. J. Ch. 136; 18 W. R. 130.

**2762.** —J.—The estate of testator who died in 1832 was distributed in 1847, as the evidence showed, at the written request of the persons beneficially entitled. Another part of the estate which fell in in 1852 was distributed also at the request, but not in writing, of the beneficiaries & in 1871 the acting trustee died. No accounts or vouchers were forthcoming from the trustees bill filed in 1872 by one of the beneficiaries & her husband against the surviving trustee for administration, dismissed; but owing to the negligence of the trustees in not keeping accounts & vouchers, without costs.—*PAYNE v. EVENS* (1874), L. R. 18 Eq. 356.

**2763.** —J.—(1) The right of a trustee to his costs, like that of a mtgee., is a matter of contract, & is not in the discretion of the judge; although he may be deprived of them for misconduct.

(2) The costs of a trustee are not within Jud. Act, 1873 (c. 66), s. 49, & an appeal may be brought from a decision in respect of them.—*TURNER v. HANCOCK* (1882), 20 Ch. D. 303; 51 L. J. Ch. 517; 46 L. T. 750; 30 W. R. 480, C. A.

*Annotation*:—*Mentd.* *Dutton v. Thompson* (1883),

*Mansfield (1890)* . . . Plant, Wild v. Plant, [1926] P. 139; *Campden v. Jones*, [1927] A. C. 732. *Reid, Re Jones, Christmas v. Jones* (1897), 45 W. R. 598; *Re England's Settlt. Trusts*, *Dobb v. England*, [1918] 1 Ch. 24; *Thomas v. Jones*, [1928] P. 162. *As to* (2) *Follid. Re Beddoe, Downes v. Cottam*, [1893] 1 Ch. 547.

**2764.** —Liability for acts of agent.]—Trustees employed a solr. in the matters of the trust, & allowed him to collect the rents at a commission. The solr. charged & deducted out of the rents certain costs which the ct. held were, as to part improperly charged, & as to the balance



**Sect. 10.—Costs of legal proceedings: Sub-sects. 4, 5 & 6.]**

were chargeable against capital, & not against income. The tenant for life having, in an action against the trustees, established the impropriety of those charges:—*Held*: the trustees must bear the costs of the action.—*Re WEALL, ANDREWS v. WEALL* (1889), 42 Ch. D. 674; 58 L. J. Ch. 713; 61 L. T. 238; 37 W. R. 779; 5 T. L. R. 681.

*Annotations*.—*Refd.* *Nutter v. Holland* (1894), 7 R. 491; *Re Shilson, Cooche*, [1904] 1 Ch. 837; *Re Allsop, Whittaker v. Bamford*, [1914] 1 Ch. 1.

**2765.** —[—]—The ct. will go as far as it can to give trustees their costs, charges, & expenses properly incurred. But where a trustee's own misconduct has occasioned the proceedings through which costs subsequent to judgment have been incurred the costs are in the discretion of the ct., & will not ordinarily be allowed to him.—*EASTON v. LANDOR* (1892), 62 L. J. Ch. 164; 67 L. T. 833; 37 Sol. Jo. 64; 2 R. 176, C. A.

*Annotation*.—*Refd.* *Re Skinner, Cooper v. Skinner*, [1904] 1 Ch. 289.

**2766.** —[—]—Testator provided that in case any action or other proceedings for the administration of his estate should be commenced by any beneficiary as pltf., the costs of all parties should be retained & paid out of pltf.'s share:—*Held*: this provision did not apply to an action based on wilful default, this being *probabilis causa litigandi*.—*Re WILLIAMS, WILLIAMS v. WILLIAMS*, [1912] 1 Ch. 399; 81 L. J. Ch. 290; 106 L. T. 584; 56 Sol. Jo. 325.

**2767. Trustee entitled to costs.—On failure of charges of misconduct.**—A bill contained allegations of great fraud against trustees, which all failed. The trustees were removed, but not, however, on the ground of misconduct:—*Held*: they were entitled to the costs of the whole suit.—*PASSINGHAM v. SHERBORN* (1840), 9 Beav. 424; 50 E. R. 407.

*Annotations*.—*Refd.* *Re Cooche, Cooche v. Foster* (1913), 108 L. T. 94. *Mentd.* *Powys v. Blagrave* (1854), 2 W. R. 359.

**2768.** —[—]—Pltf. who fails to substantiate charges of misconduct against a trustee deft. cannot escape from liability to pay the costs reasonably incurred by that deft. in defending himself against these charges, by abstaining from claiming any relief against that deft. & by insisting in the pleadings that he is sued only as a trustee. Upon taxation, the costs of briefing two counsel for such deft. may be allowed.—*BRUTY v. EDMUNDSON*, [1918] 1 Ch. 112; 87 L. J. Ch. 108; 118 L. T. 1, C. A.

**Misconduct amounting to breach of trust.**—*See* Part VII., Sect. 3, sub-sect. 2, D. (b), *post*.

**SUB-SECT. 5.—PROCEEDINGS ARISING OUT OF BREACH OF TRUST.**

*See* Part VII., Sect. 3, sub-sect. 2, D., *post*.

**SUB-SECT. 6.—SEPARATE APPEARANCE BY SEVERAL TRUSTEES.**

**2769. Whether more than one set of costs al-**

respect of a joint fiduciary character only, or if any beneficial interest which they may have does not conflict with their duty, they ought not to sever in their defences, otherwise one set of costs only will be allowed them.—*GAUNT v. TAYLOR* (1840), 2 Beav. 346; 4 Jur. 166; 48 E. R. 1215.

*Annotation*.—*Consd.* *Re Morgan, Brown v. Jones* (1927), 71 Sol. Jo. 650.

**2770.** —[—]—By a marriage settlement, a fund belonging to the wife was settled on the husband & wife for their respective lives, with remainder to the children of the marriage, to be vested at twenty-one or marriage; & in case no children should attain vested interests, which happened, then as the wife should appoint; & in default unto the exors. or administrators of the wife. The wife predeceased the husband, & made no appointment. There was one child only of the marriage, who survived her mother, but died without attaining a vested interest:—*Held*: the ultimate limitation was in favour of the wife's administrator, & not of her next of kin, & one of two trustees having declined to transfer the fund to the surviving husband, who was his wife's administrator, & having severed in his defence in a suit to obtain a transfer was allowed no costs.—*ALLEN v. THORP* (1843), 7 Beav. 72; 13 L. J. Ch. 5; 49 E. R. 990.

*Annotations*.—*Mentd.* *Long v. Watkinson* (1852), 17 Beav. 471; *Re Seymour's Trusts* (1859), 28 L. J. Ch. 763; *Re Clay, Clay v. Clay* (1885), 54 L. J. Ch. 648.

**2771.** —[—]—Trustees & their *cestuis que trust* & next of kin in the same interest, severing in their defences, entitled only to one set of costs, although stated (at the Bar, but not by the answers) to reside in parts of the country remote from each other.—*FARR v. SHERIFFE, DYKES v. FARR* (1845), 4 Hare, 512; 15 L. J. Ch. 89; 10 Jur. 630; 67 E. R. 750.

*Annotations*.—*Refd.* *Woods v. Woods* (1846), 5 Hare, 229. *Mentd.* *Litchcock v. Carew* (1853), Kay, App. xiv.

**2772.** —[—]—Separate costs as between solr. & client allowed to trustees appearing by different solrs., will in future be refused, unless good cause is shown that they could not appear by the same solr.—*MERRYWEATHER v. BARBER* (1846), 6 L. T. O. S. 430.

**2773.** —[—]—*WOODS v. WOODS* (1846), 5 Hare, 229; 67 E. R. 898.

**2774.** —[—]—Two trustees severed in their defence: one was charged with misconduct, but not the other. The ct. allowed only one set of costs, & gave the whole of them to the innocent trustee.—*WEBB v. WEBB* (1847), 16 Sim. 55; 17 L. J. Ch. 13; 10 L. T. O. S. 154; 60 E. R. 793.

**2775.** —[—]—A trust fund settled on husband, wife & children in succession, was received by the husband, & lent by him to his brother. A bill by one trustee against the other trustee, the husband & wife, & omitting the brother & the children, held sustainable, & a decree was made against the husband, reserving all rights against the brother & the trustees. The co-trustee who, had not joined as co-pltf., refused his costs.—*HUGHES v. KEY* (1855), 20 Beav. 395; 52 E. R. 655.

**2776.** —[—]—Where one of two trustees, not the acting trustee, took a power of attorney from

**PART III. SECT. 10, SUB-SECT. 6.**

**2769 i. Whether more than one set of costs allowed.**—Where trustees sever in their defence, only one set of costs will be allowed except on special grounds, & those where they exist ought to be set up in their answers.—*LAVIN v. O'NEILL* (1867), 13 Gr. 179.—*CAN.*

**2769 ii.** —[—]—A surviving trustee, & the representatives of a deceased trustee, are not within the rule which prevents trustees severing in their

defence at the risk of having but one set of costs between them.—*REED v. STEPHENS* (1871), 3 Ch. Ch. 372.—*CAN.*

**2769 iii.** —[—]—*NICHOLSON v. FALKNER* (1830), 1 Mol. 556.—*IR.*

**2769 iv.** —[—]—Trustees in the same interest will be allowed the costs of separate answers, if the master finds that the circumstances were such as to justify them in so answering.—*DUNGEON v. CORMLEY* (1843), 2 Con. & Law. 422.—*IR.*

**2769 v.** —[—]—*COOKE & OWENS v. COURTOWN (LORD)* (1844), 6 L. Eq. R. 268.—*IR.*

**1. Trustee refusing to join.**—*BELYEA (TRUSTEE OF PATTON'S ESTATE) v. CONROY* (1895), 1 N. B. Eq. Rep. 227.—*CAN.*

**m.** —[—]—A trustee who refuses to join in the answer of his co-trustee, & does not put in an answer differing from that of his co-trustee, is not entitled to his costs.—*YOUNG v. SCOTT* (1834), 1 Jo. Ex. Ir. 71.—*IR.*

one of the *cestuis que trust* & acted on her behalf & claimed a payment in her right; & afterwards on a suit being instituted by another *cestui que trust* severed in his defence from the acting trustee alleging that he knew nothing of the accounts:—*Held*: only one set of costs could be allowed.—*HODSON v. CASH* (1855), 1 Jur. N. S. 864.

**2777.** —[—]—One set of costs being allowed to trustees who had severed in their defences, the division of it was left to the taxing master.—*A.-G. v. WYVILLE* (1860), 28 Beav. 464; 54 E. R. 444.

**2778.** —[—]—Costs disallowed to a trustee severing in proceedings from his co-trustee.—*GOMPERTZ v. KENSIT* (1872), L. R. 13 Eq. 309; 41 L. J. Ch. 382; 36 J. P. 548.

**2779.** —[—]—(1) An order giving one set of costs between two trustees who have severed in their defence to an action &, directing such costs to be certified as payable to one only of the trustees, is, as regards the other, an order depriving him of costs within the meaning of R. S. C., Ord. 65, r. 1, & an appeal from such an order will lie.

(2) The mere fact of a trustee severing in his defence from his co-trustee is not, in the absence of evidence that the severance was improper, ground for depriving him of costs.

(3) When two trustees sever in their defence to an administration action, & it appears that the trustee who has separated himself from his co-trustee has separately done work in the administration of the trust estate, the proper order is to allow one set of costs only to the trustees, & to direct that such costs should be apportioned by the taxing master between the trustees, but so as only to give to the severing trustee the costs of work actually done by him.—*Re ISAAC, CRONHACH v. ISAAC*, [1897] 1 Ch. 251; 66 L. J. Ch. 160; 75 L. T. 638; 45 W. R. 262; 41 Sol. Jo. 224, C. A.

*Annotation*.—*Reid. Re Jones, Christmas v. Jones*, [1897] 2 Ch. 190.

**2780.** — *Appearance by separate counsel.*—Although it is the settled practice that trustees served with notice of an appeal upon the construction of a will are entitled to their costs of appearance by counsel, yet, in taxing their costs of appearance, the taxing master should have regard to the position of the trustees, & especially whether it was such that, at the hearing of the appeal, their assistance would probably be required by the ct.—*CARROLL v. GRAHAM*, [1905] 1 Ch. 478; 74 L. J. Ch. 398; 92 L. T. 66; 53 W. R. 549, C. A.

**2781.** —[—]—Where the trustees of a will had been duly served in the ordinary course with notice of appeal in an action relating to the construction of the will, no intimation having at the same time been given to them that their appearance at the hearing would not be expected, & they accordingly appeared by separate counsel thereat, who was not, however, in the events which happened, called upon to take any part in the proceedings or to assist the ct. in any way, they were held to be entitled to have their costs of appearance, notwithstanding the decision of the Ct. of Appeal in the case of *Carroll v. Graham*, No. 2780, *ante*.—*CATTERSON v. CLARK* (1906), 95 L. T. 42, C. A.

**2782.** — *Special grounds for severance.*—*KAMPE v. JONES* (1837), Coop. Pr. Cas. 13; 1 Jur. 814; 47 E. R. 378.

**2783.** —[—]— *Question for taxing master.*—Two trustees, who severed in their defences, were allowed one set of costs only. One of them, by his answer, imputed misconduct to the other, which rendered it necessary for him to sever, & he asked for the whole costs. The ct. being unable, on the answers, to determine the question, left

the division to the taxing master.—*COURSE v. HUMPHREY* (1859), 26 Beav. 402; 28 L. J. Ch. 327; 32 L. T. O. S. 329; 5 Jur. N. S. 615; 53 E. R. 953.

**2784.** —[—]— *Trustees resident at a distance from each other.*—The two co-heiresses of a trustee, who lived at a distance from each other, were made parties to a suit for enforcing the performance of marriage articles. They submitted to act as the ct. might direct, & defended separately:—*Held*: they were entitled to two sets of costs.—*ALDRIDGE v. WESTBROOK* (1841), 4 Beav. 212; 10 L. J. Ch. 363; 49 E. R. 320.

**2785.** —[—]—[—]—*WILES v. COOPER* (1846), 9 Beav. 294; 15 L. J. Ch. 129; 50 E. R. 357. *Annotation*.—*Mentd. Wiles v. Gresham* (1853), 1 Eq. Rep. 348.

**2786.** —[—]—[—]—A hostile claim was filed for an account & administration against three trustees, only one having ever acted, & the acting trustee resided in a different part of England from the other two. No unreasonable conduct was proved against the acting trustee:—*Held*: he was justified in appearing separately from his two co-trustees; & a double set of costs was allowed.—*CUMMINS v. BROMFIELD* (1857), 3 Jur. N. S. 657.

[—]—[—]—*Compare* No. 2771, *ante*.

**2787.** —[—]— *Dissenting trustees.*—A power was given in a marriage settlement to trustees, & they were authorised & required, "with the consent & direction in writing of the tenant for life, to sell all or any part of the trust funds, & with the like consent & direction, to lay out & invest the moneys to arise from such sale in one or more purchases or purchasers of freehold or copyhold hereditaments, or leaseholds hereditaments for a term of years whereof not less than sixty years should, at the time of such purchase, be unexpired & either with or without requiring production of, or inquiring into the title of the lessor of such leasehold hereditaments to or to demise the same, in some convenient place or places in England or Wales":—*Held*: the two dissenting trustees, who had incurred separate sets of costs, & appeared by distinct counsel, were entitled to such costs, as between solr. & client, out of the trust funds.—*BEAULIER v. ASHURNHAM* (1845), 8 Beav. 322; 14 L. J. Ch. 211; 4 L. T. O. S. 490; 50 E. R. 126.

*Annotation*.—*Mentd. Cadogan v. Essex* (1854), 2 Drow. 227.

**2788.** —[—]— *Differences between trustees.*—As in my opinion *defts. K. & H.* were justified in severing from their co. trustee & he from them there being serious differences between them there will be a double set of costs allowed to them the separate representation to continue so long as the causes of difference subsist (*WICKENS, V.-C.*).—*BROWNE v. COLLINS* (1872), 21 W. R. 222.

**2789.** —[—]— *Request of beneficiary.*—On the marriage between *pltf. & deft. M.* the whole of *pltf.'s* property, except thirty-five shares in the Crystal Palace co., was settled. The shares were taken possession of by the husband in his marital right, & were transferred into his name. A separation afterwards took place, & by the separation deed, which contained a covenant by the trustee under it to indemnify the husband against the wife's debts, the husband agreed to transfer the shares in question to a trustee for the separate use of the wife, & this was done. A re-cohabitation afterwards took place between the husband & wife.

The costs of all parties were ordered to be paid out of certain funds held in trust for the separate use of the wife absolutely. The trustees of the settlement had, at the express request of the wife,

*Sect. 10.—Costs of legal proceedings: Sub-sects. 6, 7, 8, 9, 10, 11, 12 & 13.]*

entered separate appearances:—*Held*: they were entitled to separate sets of costs.—*O'MALLEY v. BLEASE* (1869), as reported in 17 W. R. 952.

**2790. — Hostile attack on one trustee—Costs of two counsel allowed.]**—On further consideration in an administration action a hostile order was sought against one of deft. trustees. Thereupon defts. severed, the trustee attacked appearing by two counsel & his co-trustee by one counsel. The attack failed, & the trustees were given their costs of the action as between solr. & client, & also their costs of appearing separately. In taxing their costs the taxing master disallowed the costs of a leading counsel to the trustee attacked, being of opinion that one counsel for each trustee was sufficient. On summons to review:—*Held*: the trustee attacked was entitled to the costs of appearing by two counsel.—*RE MADDOCK, BUTT v. WRIGHT*, [1899] 2 Ch. 588; 68 L. J. Ch. 655; 81 L. T. 320; 47 W. R. 684; 43 Sol. Jo. 676.

—*J.*—*See, also*, EXECUTORS, Vol. XXIV., p. 832, Nos. 8635–8639.

**2791. Apportionment—Powers of taxing master.]**—Two trustees, A. & B., were ordered to pay a sum of money into ct.; this was paid by A. alone. They had severed in their defences & obtained but one set of costs. B.'s share of the costs was ordered to be paid to A. by way of contribution.—*PRINCE v. HINE* (No. 2) (1859), 27 Beav. 345; 54 E. R. 135.

**2792. — .]**—A.-G. v. WYVILLE, No. 2777, *ante*.

**2793. — .]**—*Re* ISAAC, *CRONBACH v. ISAAC*, No. 2779, *ante*.

#### SUB-SECT. 7.—COSTS OF APPOINTMENT AND RETIREMENT.

**Appointment.]**—*See* Part II., Sect. 2, sub-sect. 3, E., *ante*.

**Retirement.]**—*See* Part II., Sect. 9, sub-sect. 1, F., *ante*.

#### SUB-SECT. 8.—COSTS OF APPLICATION FOR DIRECTION OF COURT.

*See* Sect. 3, sub-sect. 5, C., *ante*.

#### SUB-SECT. 9.—WHERE TRUST FUND PAID INTO COURT.

*See* Sect. 9, sub-sect. 1, C., *post*.

#### SUB-SECT. 10.—ADJUSTMENT BETWEEN CAPITAL AND INCOME OF SETTLED PROPERTY.

*See* SETTLEMENTS, Vol. XL., pp. 687–689, Nos. 2234–2243, 2246.

#### SUB-SECT. 11.—LIEN FOR COSTS.

**2794. Right of trustees to lien on trust fund—Separate appearance—Death of one trustee before hearing.]**—A trust fund, consisting of a debt from

the estate of testator, was recovered in a creditor's suit by the *cestui que trust*; in which suit the two trustees of the fund were defts. The two trustees, for reasons which were not denied to be sufficient, appeared separately; & one of them dying before the cause was heard on further directions, it was held that he had acquired no lien for his costs on the trust fund in ct.; & the petition of his personal representative, that his costs might be taxed & provided for out of the fund, was refused with costs.—*MALINS v. GREENWAY* (1849), 7 Hare, 391; 48 E. R. 161; *sub nom.* *MALINS v. GREENWAY, CRADDOCK v. GREENWAY*, 18 L. J. Ch. 154.

**2795. — Breach of trust.]**—*LEEDHAM v. CHAWNER*, No. 2123, *ante*.

**2796. — Effect of charging order.]**—A charging order under Judgments Act, 1838 (c. 110), s. 14, will be made absolute, notwithstanding proceedings against the trustees of the fund, & there being no other fund for the payment of costs.—*SMITH v. YOUNDE* (1861), 2 F. & F. 376.

**2797. — .]**—Rectification was claimed of a settlement, whereby pltf., shortly after he attained twenty-one, settled certain reversionary property belonging to him on trusts for himself for life, then for his wife & issue, & in default of issue for his paternal next of kin. It was proved that pltf. was at the time of the execution of the deed of extravagant habits; that he expressed a desire to preserve his property in the family; & that the settlement was, before execution, read over & its provisions carefully explained to him, & that he fully understood & assented to them. The trustees of the settlement were made defts. to the action for rectification:—*Held*: as the trustees of the settlement had in all respects acted properly, & were bound to come before the ct. to uphold the settlement, they were entitled to a charge on the funds settled for their costs.—*JAMES v. COUCHMAN* (1885), 29 Ch. D. 212; 54 L. J. Ch. 838; 52 L. T. 344; 33 W. R. 452; 1 T. L. R. 305.

*Annotation*:—*Reid, Rake v. Hooper* (1900), 83 L. T. 669.

**2798. — .]**—*Re* HOLDEN, *Ex p. OFFICIAL RECEIVER*, No. 2122, *ante*.

**2799. — .]**—*Re* ALLEN, *WHEELER v. FOSTER*, [1889] W. N. 132.

#### SUB-SECT. 12.—PRACTICE.

**2800. Time for application for costs.]**—A trustee not appearing at the hearing of the cause, a decree was made against him, with liberty to show cause against it. Under this order he set down the cause again, & prayed his costs, which were given him on paying the costs of the day on the former hearing.—*NORRIS v. NORRIS* (1785), 1 Cox, Eq. Cas. 183; 29 E. R. 1119.

**2801. — .]**—After a decree passed, the ct. will not on a petition give the costs of the suit to a deft., although a mere trustee, & as such, entitled to them, if asked for on the hearing.—*COLMAN v. SARELL* (1780), 2 Cox, Eq. Cas. 206; 30 E. R. 95, L. C.

**2802. Security for costs—When required by trustee.]**—It is impossible to avoid seeing that this is a case of trustee, a solr., who has got all his client's property into his own hands, & then asks that pltf. should give security for costs, having been deprived by that assignment of the means of paying costs. I shall refused the appeal motion with costs (*LORD COTTENHAM, C.*)—*HURST v.*

**PART III. SECT. 10, SUB-SECT. 12.**  
n. *Trustee answering interrogatories & disclaiming.]*—A trustee, who was

required by the bill to answer certain interrogatories, answered them & disclaimed:—*Held*: he was only entitled

to the costs of the disclaimer.—*MURRAY v. O'SHEA* (1845), 8 L. Eq. R. 329; 2 Jon. & Lat. 422.—*IR.*

PADWICK (1848), 17 L. J. Ch. 169; 10 L. T. O. S. 409; 12 Jur. 21, L. C.

**Annotations:—***Reid*, Knight v. Cory (1863), 1 New Rep. 229. *Mentd.*, Lumley v. Hughes (1853), 22 L. T. O. S. 197; *Wild v. Murray* (1854), 24 L. T. O. S. 52; *Manby v. Bervioke* (1855), 24 L. J. Ch. 664.

**2803. —Whether trustees must give security.]**

—Where trustees, to whom, by a covenant in a separation deed, a husband had covenanted to pay an annuity in trust for his wife, sued for arrears under that covenant:—*Held*: plffs. were not mere “nominal plffs.” within the rule as to giving security for costs, & therefore, an order for security for costs could not be made against them on the ground that they were, if unsuccessful, without means of paying costs.—*WHITE v. BUTT*, [1909] 1 K. B. 50; 78 L. J. K. B. 65; 99 L. T. 823; 25 T. L. R. 25; 53 Sol. Jo. 12, C. A.

**Annotation:—***Consd.*, Rainbow v. Kittice, [1916] 1 Ch. 313.

**What costs allowable.]—***See* PRACTICE.

SUB-SECT. 13.—APPEAL AS TO COSTS.

*See, now*, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 31 (1) (h); R. S. C., Ord. 65, r. 1.

**2804. Whether permissible.]—***BAGOT v. BAGOT* (1841), cited in 2 Daniell's Chancery Practice, 4th ed. 1349; 10 L. J. Ch. 116, L. C.

**Annotation:—***Expld.*, Taylor v. Dowlen (1869), 4 Ch. App. 697.

**2805. —.**—*J*.—A bill was filed against a trustee seeking a general trust account, & charging him with a breach of trust, in not properly investing the trust moneys; & the bill prayed payment by the trustee of the costs of the suit: the breach of trust was established against him, but the ct. below ordered all his costs of the suit to be paid him, as between solr. & client, out of the trust moneys generally:—*Held*: such order was wrong; the trustee must personally pay the costs of the suit relative to the breach of trust established against him; & the case was an exception to the general rule, that an appeal will not lie for costs.—*ANGELL v. DAVIS* (1839), 4 My. & Cr. 360; 9 L. J. Ch. 3; 3 Jur. 838; 41 E. R. 110, L. C.

**Annotations:—***Consd.*, Menzies v. Connor (1851), 3 Mac. & G. 648. *Expld.*, Taylor v. Dowlen (1869), 4 Ch. App. 697. *Consd.*, Campbell v. Pollak, [1927] A. C. 732. *Reid.*, Chappell v. Purday (1847), 16 L. J. Ch. 261; *Umpleby v. Wavney Valley Rty.* (1860), 1 John. & H. 254; *Hope v. Hope*, *Hope v. Carnegie* (1869), 20 L. T. 5; *Re Chennell, Jones v. Chennell* (1878), 8 Ch. D. 492.

**2806. —.**—*J*.—The ct. is not disposed to extend the exceptions to the general rule, that there can be no appeal for costs alone.

Trustees, having been ordered personally to pay the costs of the suit, were not allowed to appeal on the ground that the costs ought to have been ordered to be paid out of the trust fund.—*TAYLOR v. DOWLEN* (1869), 4 Ch. App. 697; 38 L. J. Ch. 680; 21 L. T. 70; 17 W. R. 779, L. J.

**Annotations:—***Foll.*, *Re Hoskins's Trusts* (1877), 6 Ch. D. 281. *Consd.*, *Re Bradford* (1883), 11 Q. B. D. 373. *Reid.*, *Re Chennell, Jones v. Chennell* (1878), 8 Ch. D. 492.

**2807. —.**—*J*.—The case of a trustee ordered to pay costs personally forms in general no exception to the rule that an appeal will not be allowed for costs only.—*Re Hoskins's Trusts* (1877), 6 Ch. D. 281; 46 L. J. Ch. 817; 25 W. R. 779, C. A.

**Annotations:—***Dtd.*, *Turner v. Hancock* (1882), 20 Ch. D. 303. I must take the decision in that case to have been founded on a mistaken view of the law (*JENSEN, M.R.*). *Reid.*, *Re Chennell, Jones v. Chennell* (1878), 8 Ch. D. 492; *Re Bradford* (1883), 11 Q. B. D. 373. *Mentd.*, *Re Treasure*,

*Wild v. Stanham*, [1900] 2 Ch. 648; *Re Moore, Moore v. Moore*, [1901] 1 Ch. 691; *Re Power, Re Stone, Acworth v. Stone*, [1901] 2 Ch. 659; *Re Dixon, Penfold v. Dixon*, [1902] 1 Ch. 248; *Re Jawley, Zalsen v. Lawley*, [1902] 2 Ch. 799; *Re Marten, Shaw v. Marten*, [1902] 1 Ch. 314; *Re Peacock's Settlement, Kelcey v. Harrison*, [1902] 1 Ch. 552; *Re Feairnsides, Baines v. Chadwick*, [1903] 1 Ch. 250; *Stamp Duties Comr. v. Stephen*, [1904] A. C. 137; *Re Dodson, Gibson v. Dodson*, [1907] 1 Ch. 284; *Re Hadley, Johnson v. Hadley*, [1909] 1 Ch. 20; *Re Pryce, Lawford v. Pryce*, [1911] 2 Ch. 286; *O'Grady v. Wilmot*, [1916] 2 A. C. 231; *Re Wernher, Wernher v. Belt*, [1918] 2 Ch. 82.

**2808. —.**—*J*.—An order directing payment to a trustee of his “costs, charges, & expenses” of action, properly incurred, is not an order as to “costs only,” which are “left to the discretion of the ct.,” within the meaning of Jud. Act, 1873 (c. 66), s. 49. Therefore an appeal from such an order will lie without the leave of the ct.

*Semble*: the fact that costs have been ordered to be paid out of a particular fund or by a particular person will not render an appeal from the order the less an appeal for costs, such a direction being a mere incident of the order as to the mode of payment.—*Re CHANNELL, JONES v. CHANNELL* (1878), 8 Ch. D. 492; 47 L. J. Ch. 583; 26 W. R. 595; *sub nom. Re CHANNELL, JONES v. CHANNELL*, 38 L. T. 491, C. A.

**Annotations:—***Consd.*, *Butcher v. Pooler* (1883), 52 L. J. Ch. 930. *Apld.*, *Re Beddoe, Downes v. Cottam*, [1893] 1 Ch. 547. *Consd.*, *Pain v. Bowden*, [1896] 2 Q. B. 301. *N.F.*, *Bew v. Bew*, [1899] 2 Ch. 467.

**2809. —.**—*J*.—*TURNER v. HANCOCK*, No. 2763, *ante*.

**2810. —.**—*J*.—Where a settlement is set aside the trustee has no claim to his costs as a matter of right, there being no contract in existence; & therefore, if costs are given against him he has no right of appeal.—*DUITON v. THOMPSON* (1883), 23 Ch. D. 278; 52 L. J. Ch. 661; 49 L. T. 109; 31 W. R. 596, C. A.

**Annotations:—***Reid.*, *Merry v. Pownall*, [1898] 1 Ch. 306. *Mentd.*, *Hoblyn v. Hoblyn* (1889), 41 Ch. D. 200; *Idcal Bedding Co. v. Holland*, [1907] 2 Ch. 157.

**2811. —.**—*J*.—R. S. C., 1883, Ord. 65, r. 1, has not deprived a trustee, who has been visited by a ct. of first instance with costs on the ground of misconduct, of his right to appeal against such order.—*Re KNIGHT'S WILL* (1884), 26 Ch. D. 82; 50 L. T. 550; 32 W. R. 117, C. A.

**Annotations:—***Consd.*, *In the Estate of Plant, Wild v. Plant*, [1926] P. 139. *Reid.*, *Re Cartwright, Re Paul* (1884), 51 L. T. 435.

**2812. —.**—*J*.—In an action brought by beneficiaries against a trustee & exor., asking for administration of the trusts of a will & settlement, & for accounts of the trust capital & income plffs. made charges of misconduct against deft. & sought to charge him with the costs of the action. The judge made an order at the trial for administering the trusts, & directed special inquiries as to the alleged acts of misconduct. On taking the accounts deft. was found to have given before action a correct account of the capital, but in the accounts he had rendered of the income he had not accounted for so much as he ought. The misconduct alleged was not substantiated. The judge ordered plff's costs relating to the income account, & deft's costs of the rest of the action, to be taxed & set off against the other. Plffs. on appeal asked that their costs, or those incurred before the R. S. C., 1883, except those ordered to be paid by deft., might be paid out of the trust property:—*Held*: the order was not appealable.—*WILLIAMS v. JONES* (1886), 34 Ch. D. 120; 56 L. J. Ch. 1014; 56 L. T. 68, C. A.

PART III. SECT. 10, SUB-SECT. 13.

**2804 ii. Whether permissible.]—**An order refusing a trustee his costs is

subject to appeal, as is also the question as to whether the trustee has been guilty of such misconduct as to disentitle him to costs.—*AMOS v. FRASER*

(1906), 1 C. L. R. 78.—*AUS.*

**2804 ii. —.**—*J*.—*SCARRY v. WILSON* (1898), 12 Man. L. R. 216.—*CAN.*

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*Sect. 10.—Costs of legal proceedings: Sub-sect. 13.*  
*Sect. 11: Sub-sects. 1, 2, 3 & 4, A. & B.]*

**2813.** —[—*Re* BEDDOE, DOWNES *v.* COTTAM, No. 2057, *ante*.

**2814.** —[—*Re* ISAAC, CRONBACH *v.* ISAAC, No. 2779, *ante*.

**2815.** —[—Where costs are in the discretion of the judge, the Ct. of Appeal will assume that he has exercised his discretion as to them & will not entertain an appeal, unless it is satisfied that he has not exercised his discretion but has applied some rule which he considered as excluding it. appeal from an order for payment of "costs, charges & expenses" will not lie as to "costs" only, if the order is right as to "charges & expenses."—*BEW v. BEW*, [1899] 2 Ch. 467; 68 L. J. Ch. 657; 81 L. T. 284; 48 W. R. 124, C. A. *Annotations*.—*Apld. Re* HUNT, POLLARD *v.* GREAKE (No. 2) (1901), 45 Sol. Jo. 652. *Follid. Rotch v. Crosbie* (No. 2) (1909), 54 Sol. Jo. 30. *Refd. Lever v. Masbro' Equitable Pioneer Soc.* (1912), 106 L. T. 472; *Campbell v. Pollak*, [1927] A. C. 732.

**2816** —[—*Re* HUNT, POLLARD *v.* GREAKE (1901), 45 Sol. Jo. 652, C. A.

**2817.** —[—*ROTCH v. CROSBIE* (1909), 54 Sol. Jo. 30, C. A.

*Annotation*.—*Consd. Lever v. Masbro' Equitable Pioneer Soc.* (1912), 106 L. T. 472.

## SECT. 11.—ADMINISTRATION BY COURT.

### SUB-SECT. 1.—IN GENERAL.

*See, generally*, EXECUTORS, Vol. XXIV., pp. 750 *et seq.*

### SUB-SECT. 2.—JURISDICTION.

*See* Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 56 (1) (b).

**Jurisdiction of county courts.**—[*See* COUNTY COURTS, Vol. XIII., pp. 473, 475, Nos. 223-228, 241, 242.

**Whether spiritual courts have jurisdiction.**—[*See* ECCLESIASTICAL LAW, Vol. XIX., p. 318, No. 1168.

### SUB-SECT. 3.—HOW INTERVENTION OF COURT OBTAINED.

*See* R. S. C., Ord. 55, r. 3.

**2818. By summons—As to questions at issue in the action.**—[Except to the extent to which special provisions are made by the rules, as, for instance, by R. S. C., Ord. 15, *pltf.* in an action is not entitled to take out a summons for the determination of the questions which are at issue in the action & which will properly be decided at the trial.—*BORTHWICK v. RANSFORD* (1884), 28 Ch. D. 79; 54 L. J. Ch. 569; 33 W. R. 161.

**2819.** —[**General administration of trusts constituted by deed.**—R. S. C., Ord. 55, r. 15.]—The proviso in above rule that no judgment or order for general administration shall be made under r. 4 of that Ord., by the chief clerk extends to orders for general administration of trusts constituted by deed.—*DAVIDSON v. YOUNG* (1885), 54 L. J. Ch. 747.

## PART III. SECT. 11, SUB-SECT. 2.

**a. Jurisdiction of county courts.**—[The administration of trusts is excluded from the jurisdiction of the county cts. & assigned to the Ct. of K. B.—*DALGLEISH v. DUNSEATH*, [1927] 3 D. L. R. 471; [1927] 2 W. W. R. 193; 36 Man. L. R. 577.—*CAN.*

**p. Power of court to declare powers of trustees.**—[*Re* MANTERTON & GREY-TOWN LANDS MANAGEMENT ACT, 1871

(1906), 25 N. Z. L. R. 967.—*N.Z.*

## PART III. SECT. 11, SUB-SECT. 3.

**q. By action.**—[*LAMBERT v. LAMBERT* (1860), 10 I. Ch. R. 500.—*IR.*

**r. Important questions of law.**—[A petition for directions under Trustee Act, 1883, s. 76, will not be entertained where a difficult & important question of law is involved. The proper course is to institute an action.—

**2820.** —[**Beneficiaries asking for account—Release by trustees.**—This was an originating summons taken out by two beneficiaries asking that trustees might be ordered to deliver an account notwithstanding a release. The objection was taken that *pltf.*s. should have brought an action to set aside the release, as the case was not one to be heard on affidavit evidence.—*Held*: the case was not one to be tried on originating summons, but a writ should issue.—*Re* ELLIS, KELSON *v.* ELLIS (1888), 59 L. T. 924.

**2821.** —[**Where no question of construction raised.**—Where the trust declared by an instrument is void for illegality, the settlor claiming by way of resulting trust is not a "*cestui que trust* under the trust of" that instrument & cannot therefore enforce the resulting trust by an originating summons under R. S. C., Ord. 55, r. 3.

*Semble*: if no question of construction arises under the instrument, the *ct.*, even if it has jurisdiction, will not give partial relief by making "a declaration of the rights of the persons interested" under the discretionary Ord. 54A, rr. 1, 4, but will leave the whole matter to be dealt with in an action to enforce the resulting trust.—*Re* AMALGAMATED SOCIETY OF RAILWAY SERVANTS, ADDISON *v.* PILCHER, [1910] 2 Ch. 547; 80 L. J. Ch. 19; 103 L. T. 627; 27 T. L. R. 12; 54 Sol. Jo. 874.

**2822.** —[**Application by settlor—Claiming by virtue of resulting trust.**—*Re* AMALGAMATED SOCIETY OF RAILWAY SERVANTS, ADDISON *v.* PILCHER, No. 2821, *ante*.

**Trustees applying for directions.**—[*See* Sect. 3, sub-sect. 5, *ante*.

—[*See, also*, EXECUTORS, Vol. XXIV., pp. 767-770, Nos. 7974-8000.

**2823. By action—Enforcement of resulting trust.**—[*Re* AMALGAMATED SOCIETY OF RAILWAY SERVANTS, ADDISON *v.* PILCHER, No. 2821, *ante*.

—[*See, also*, EXECUTORS, Vol. XXIV., pp. 766, 767, Nos. 7966-7973.

### SUB-SECT. 4.—PARTIES.

#### A. In General.

**2824. Who are proper parties—Beneficiaries.**—[Seven persons belonging to a friendly society were appointed trustees for winding up the affairs of the society, & distributing the surplus funds among the living members & the representatives of deceased. The trustees appointed their *solr.* to draw the necessary cheques on their bankers, which were to be countersigned by two of their number. The money was apportioned & the greater part paid, & there remained £700 in the banker's hands, which was irregularly drawn out & invested in the names of the *solr.* & the trustees appointed to countersign the cheques. The two trustees having died, the *solr.*, as was alleged, applied the money to his own use. The only surviving trustee of the seven filed his bill to recover the trust fund merely, as it appeared though not altogether clearly, but not to administer it, & the *solr.* objected for want of parties:—*Held*: the objection was not sustainable.

*Re* SINKING FUND OF CITY OF DUNEDIN TRUSTEES (1885), 4 N. Z. L. R. 225 (S. C.).—*N.Z.*

## PART III. SECT. 11, SUB-SECT. 4.—A.

**2824 i. Who are proper parties—Beneficiaries.**—[*Re* SMITH'S TRUSTS (1902), 2 S. R. N. S. W. 13; 19 N. S. W. W. N. 43.—*AUS.*

**2824 ii.** —[—*BARRY v. STEEL* (1877), 1 C. L. R. 80.—*IND.*

If the object of the bill was to administer the trust money, it would be necessary to have the *cestui que trusts* represented here, but as it is only for recovering the trust money in the hands of a stranger, for the purpose of having it administered afterwards, I think it may be recovered in the way in which it is proposed (LORD LANGDALE, M.R.).—*HORSLEY v. FAWCETT* (1847), 11 Beav. 565; 16 L. J. Ch. 457; 9 L. T. O. S. 332; 50 E. R. 935; *subsequent proceedings* (1849), 11 Beav. 570.

**2825. — On order for sale.**—Where testator directed his real estates to be sold for certain purposes, & the residue of the moneys to be held on the trusts of the unsold estates, which he directed his trustees to convey to uses in strict settlement:—*Held*: the first tenant for life under the settlement to be made, & unless there were special circumstances, all persons entitled down to & including the first vested estate of inheritance must be before the ct. on an order for sale in a suit to administer the real estate.—*PIGOTT v. PIGOTT* (1863), 2 New Rep. 14; 8 L. T. 268.

**2826. — Agents of trustees.**—Testator having directed his business to be carried on by his trustees for the benefit of his family, his widow & one of the trustees carried it on with the permission of the other; but the acting trustee having become bkpt., two other persons were successively appointed to assist the widow to carry on the business, the other trustee consenting but taking no part in the business. Bkpt. had, with the concurrence of the widow, withdrawn money from testator's estate, & applied it to his own use. The parties interested under the will filed a bill against the other trustee for the general administration of testator's estate, & an account. An objection was taken to the frame of the bill for want of parties, because the representatives of the persons who had acted in the management of the business were not made parties:—*Held*: they were only agents of the trustee with whose consent they were appointed, & were not, necessary parties.—*LING v. COLMAN* (1847), 10 Beav. 370; 9 L. T. O. S. 120; 50 E. R. 624.

*Annotations*:—*Consd.* A.-G. v. Chesterfield (1854), 18 Beav. 596. *Refd.* Coppard v. Allen (1864), 2 De G. J. & Sm. 173.

**2827. — Trustees—Of derivative settlement—Claim for execution of original trusts.**—On a bill for the execution of the trusts of a will, directing the sale & distribution of the proceeds of real estate, framed according to the old practice, & bringing all the residuary devisees and legatees before the ct.:—*Held*: the trustees of a settlement of the share of one of the residuary legatees, made on her marriage, ought to be parties; but the children of the marriage would be sufficiently represented by such trustees.—*DENSEM v. ELWORTHY* (1852), 9 Hare, App. I., xlii; 20 L. T. O. S. 217; 68 E. R. 780.

**2828. — New trustees of fund in court—Property not actually assigned to new trustees.**—New trustees of a fund in ct., to whom no actual assignment of the property has been made, are necessary parties to a suit for the administration of the fund.—*NELSON v. SEAMAN* (1860), 1 De G. F. & J. 368; 1 L. T. 393; 6 Jur. N. S. 258; 8 W. R. 167; 45 E. R. 401, L. J.

*Annotation*:—*Consd.* Hardaker v. Moorhouse (1881), 26 Ch. D. 417.

**2829. — Persons claiming adversely to trust.**—In cases under Trustee Relief Act, the ct. requires that parties having an adverse interest be served, or that the trustees support their interest.—

*Re DOMVILLE'S WILL* (1853), 21 L. T. O. S. 98; 17 Jur. 361.

**2830. —**—[In a suit for the execution of a trust persons claiming adversely to the trust ought not to be made parties.—A.-G. v. AVON (OR ABERAVON) CORPN. (1863), 3 De G. J. & Sm. 637; 2 New Rep. 564; 33 L. J. Ch. 172; 9 L. T. 187; 11 W. R. 1050; 46 E. R. 783, L. J.]

*Annotation*:—*Mentd.* Evans v. Bagshaw (1870), 39 L. J. Ch. 145.

**2831. Application by debtors creating trust for creditors—How creditors made parties—Service of copies of application.**—*DUNCOMBE v. LEVY*, No. 2856. *post*.

#### B. Who May Apply for Administration.

**2832. Trustees.**—(1) Where a trustee of a settlement of an ascertained fund, as to which much litigation had taken place, filed a bill praying to be discharged & that the trusts might be administered by the ct.:—*Held*: Trustee Relief Act, 1850 (c. 60), did not take away the trustee's right to file a bill for the purpose of being discharged; & that he was entitled to his full costs of suit.

(2) Under Trustee Relief Act, 1850 (c. 60), if he paid the money into ct. under that Act, he would be discharged from liability. But in fact the trustee is not in that way discharged from being a trustee (KINDERSLEY, V.-C.).—*BARKEN v. PETTE* (1865), 2 Drew. & Sm. 340; 5 New Rep. 425; 34 L. J. Ch. 497; 12 L. T. 50; 11 Jur. N. S. 436; 13 W. R. 573; 62 E. R. 651.

**2833. — Accounting parties.**—*ALLEN v. NORRIS*, [1884] W. N. 118.

**On application for directions.**—*See* Sect. 3, sub-sect. 5, *ante*.

**2834. Residuary legatee. Subject to prior life estate.**—It is not an absolute rule that the residuary legatee of personal estate consisting of money or stocks subject to a prior life estate, is entitled to have it brought into ct. to be administered; & where the fund is invested in the names of proper trustees & in proper securities, the ct. will decline to make an order for its being brought into ct.—*Re BRAITHWAITE, BRAITHWAITE v. WALLIS* (1882), 21 Ch. D. 121; 52 L. J. Ch. 15; 48 L. T. 857; 31 W. R. 180.

*Annotations*:—*Refd.* De Quetteville v. De Quetteville (1902), 19 T. L. J. 109. *Mentd.* *Re Wragg, Wragg v. Palmer*, [1919] 2 Ch. 58.

**2835. Beneficiaries — Under voluntary settlement.**—Articles of partnership between two solrs. provided that the partnership should be for the term of ten years from May 1, 1875, if both the partners should so long live. The partnership was also made determinable by notice. There was a further provision that from the determination of the partnership the retiring partner his exors. or administrators or the exors. or administrators of deceased partner should be entitled to receive out of the net profits of the partnership business during so much, if any, of the term of five years from May 1, 1880, as should remain after the determination of the partnership the yearly sum of £350, & during so much, if any, of the term of five years from May 1, 1885, as either the retiring partner or a widow of the retiring or deceased partner should be living, the yearly sum of £250 any sum which might under this provision for the time being become payable to the exors. or administrators of deceased partner to be applied in such manner as such partner should by deed or will direct for the benefit of his widow & children

#### PART III. SECT. 11, SUB-SECT. 4.—B.

**2832 i. Trustees.**—*COULSON v. MURISON'S TRUSTEE*, [1920] S. C. 322; 57 Sc. L. R. 293; [1920] 1 S. L. T. 208.—*SCOT*.



*Secd. 11.—Administration by court: Sub-sect. 4, B. & C.; sub-sects. 5, 6 & 7, A.]*

& in default of such direction to be paid to such widow if living, for her own benefit. It was further provided that the annuity should, so far as legally might be constituted a charge on the net profits of the business. One of the partners died in 1883 leaving a widow but without having given any direction as to the application of the annuity. By his will he appointed his widow his universal legatee & sole extrix. He died insolvent & an action was brought by creditor to administer his estate:—*Held*: the annuity did not form part of testator's estate but that by the articles a trust of it was created in favour of the widow, & she was entitled to it free from the claims of testator's creditors.

I never heard that a *cestui que trust* is precluded from suing his trustee by being a volunteer (COTTON, L. J.).—*Re FLAVELL, MURRAY v. FLAVELL*. (1883), 25 Ch. D. 89; 53 L. J. Ch. 185; 49 L. T. 690; 32 W. R. 102, C. A.  
*Annotations*:—*Refd. Ehrmann v. Ehrmann* (1894), 72 L. T. 17. *Mentd. Re Davies, Davies v. Davies*, [1892] 3 Ch. 63.

**Who may apply for order for payment into court.**—*See* Sub-sect. 9, B., *post*.

#### *C. Proceedings against Last Surviving Trustee.*

**2836. Whether representative of deceased trustee necessary party.**—*WILSON v. BROUGHTON* (1838), 7 L. J. Ch. 120.

**2837.** —.]—Where one of several trustees dies pending a suit which does not seek to charge them personally in that character, his representatives are not necessary parties; for the trusteeship survives.—*LONDON GAS LIGHT CO. v. SPOTTISWOODE* (1851), 14 Beav. 264; 51 E. R. 288.

*Annotations*:—*Refd. Gray v. Lewis* (1869), L. R. 8 Eq. 526. *Mentd. Williams v. Page* (1858), 24 Beav. 654.

**2838.** —.]—Consolidated Orders 7, r. 2 does not apply to suits in which a general account is sought against a trustee; in such suits, therefore, all the trustees liable to account are necessary parties.—*COPPARD v. ALLEN* (1864), 2 De G. J. & Sm. 173; 4 New Rep. 202; 33 L. J. Ch. 475; 10 L. T. 515; 10 Jur. N. S. 622; 12 W. R. 943; 46 E. R. 341, L. J.

*Annotation*:—*Refd. Re Harrison, Smith v. Allen*, [1891] 2 Ch. 349.

**2839.** —.]—In an action for a general account against a surviving exor. & trustee it is not, in the absence of special circumstances, necessary for pltf. to make the representative of a deceased trustee or exor. a party. If deft. requires such representative to be added, & the circumstances of the case render it advisable that he should be so added, R. S. C., 1883, provide by Ord. 16, rr. 11, 48, the machinery for that purpose.—*Re HARRISON, SMITH v. ALLEN*, [1891] 2 Ch. 349; 60 L. J. Ch. 287; *sub nom. Re HARRISON, SMITH v. ALLEN, ALLEN v. COURT*, 64 L. T. 442.

*Annotation*:—*Consd. Re Jordon, Hayward v. Hamilton*, [1904] 1 Ch. 260.

**2840. Joinder of representative of deceased trustee.**—R. S. C., Ord. 16, rr. 11, 48.—*Re HARRISON, SMITH v. ALLEN*, No. 2839, *ante*.

#### SUB-SECT. 5.—IN WHAT CIRCUMSTANCES ADMINISTRATION GRANTED.

*See, generally, EXECUTORS, Vol. XXIV., pp. 766–770, Nos. 7966–8000.*

**2841. Trustee failing to perform duty.**—Where a trustee fails in performing his duty, it is the office

of a ct. of equity to interpose & guide him; where such ct. is bound in conscience to set aside the act of a trustee, it will at the same time decree the proper act to be done; not by referring the matter to his discretion, which is forfeited, but by directing him, as a mere instrument, to perform the thing decreed.—*RICHARDSON v. CHAPMAN* (1760), 7 Bro. Parl. Cas. 318; 3 E. R. 206, H. L.

*Annotations*:—*Apld. Brown v. Higgs* (1803), 8 Ves. 561. *Mentd. Pierson v. Garnet* (1780), 2 Bro. C. C. 38.

**2842. No misconduct on part of trustees.**—A. having an estate in fee of £8,000 a year, & being tenant for life without impeachment of waste of other estate of £5,000 a year with the reversion in fee after an estate in tail male in B. his only son by a former marriage, became indebted by mtge. annuities, & otherwise, to the amount of near £100,000. A. & B. joined in conveying both estates to trustees, upon trust by sale or mtge., sale of timber, or by rents & profits, to pay debts, & to apply so much of the rents & profits of what should remain unsold as should seem meet to them, as a sinking fund, & to pay the residue to A. & to settle the remaining trust estates, subject to an annuity of £1,000 to B. for the joint lives of him & A., upon A. for life without impeachment of waste, with power to lease for twenty-one years only; remainder to trustees to reserve, etc., remainder, subject to a jointure to the wife of A. & portions for children by her, to the joint appointment of A. & B.; in default thereof to the appointment of B. surviving; in default thereof to B. in tail male; remainder to the other sons of A. in tail male; remainder to B. in tail; remainder to the daughters of A. in tail, with cross-remainders; remainder to B. in fee; with powers of leasing & full powers of management in the trustees, & a provision for the appointment of new trustees, as vacancies should happen. The trustees raised £50,000 by mtge. of the settled estate, which they applied to the debts; & they paid £2,500 a year to A. & £1,000 a year to B. from the date of the settlement. Upon the bill of A. to set aside the deed, except the trust for the debts, upon a general charge of fraud, misapprehension, & misrepresentation, or to control the management of the trust, & for an account against the trustees:—*Held*: the ct. would not interfere with the trustees, there being no misbehaviour; & the payment of the annuity to B. was good.—*MYDDLETON v. KENYON* (LORD) (1794), 2 Ves. 391; 30 E. R. 689, L. C.

*Annotations*:—*Mentd. Towart v. Sellars* (1817), 5 Dow. 231. *Ford v. Stuart* (1852), 15 Beav. 493; *Foulkes v. Davies* (1868), L. R. 7 Eq. 42.

**2843. Trustee failing to execute power.**—Where a power is by will given to a trustee, which he neglects to execute, the execution of the trust devolves upon the ct.; but if, in the events which happen, the intended trustee dies before the time arrives for the execution of the trust, & the trust therefore fails, testator is to be considered as having so far died intestate.—*RAY v. ADAMS* (1834), 3 My. & K. 237; 40 E. R. 90.

**2844. Trusts capable of effective administration elsewhere.**—In place intended by parties.—*HARTWELL v. COLVIN*, No. 2868, *post*.

**2845. Proceedings instituted to determine separate matter.**—Discharge of trustee.—*GARDINER v. DOWNES*, No. 2041, *ante*.

**2846.** — *Legitimacy of child.*—(1) The ct. will not refuse to entertain a suit for the execution of the trusts of a settlement, where the settled fund actually exists, merely on the ground that the settled fund is so small as to be of no importance to the *cestui que trust*, & that the settlement



was really made to raise a different question [the legitimacy of a child], which the ct. would not have directly determined, by a side wind. Nor will the ct. allow such a question to be evaded by a counter settlement.

(2) *Semble* : the ct. would not entertain such a suit at the instance of a stranger, not if it appeared to have been instituted with a malicious motive.—*GURNEY v. GURNEY* (1863), 1 Hem. & M. 413; 2 New Rep. 106; 32 L. J. Ch. 456; 8 L. T. 380; 9 Jur. N. S. 514; 11 W. R. 659; 71 E. R. 180.

*Annotations* :—As to (1) *Dbdd.* *Cooke v. Cooke* (1865), 4 De G. J. & Sm. 704. *Generally, Rejd.* *Anon.* (1864), 2 Hem. & M. 121. *Mentd.* *Slingsby v. Slingsby*, [1912] 2 Ch. 21.

**2847.** —[The ct. will not administer the trusts of a settlement made for the purpose of obtaining a declaration that an infant is illegitimate.—*COOKE v. COOKE* (1865), 4 De G. J. & Sm. 704; 6 New Rep. 134; 31 L. J. Ch. 459; 29 J. P. 692; 11 Jur. N. S. 533; 13 W. R. 697; 46 E. R. 1093; *sub nom.* *COOKE v. ELMSALT*, 12 L. T. 408, L. C.

**2848.** —Instituted by stranger to settlement.]—*GURNEY v. GURNEY*, No. 2846, *ante*.

**2849.** Settled fund of no importance to beneficiary.]—*GURNEY v. GURNEY*, No. 2846, *ante*.

**2850.** Where interests of infants concerned.]—This ct. has power to compromise the rights & claims of infants, & persons under disabilities, where those rights & claims are merely equitable. It is a power which has been continually exercised by the ct., & results almost necessarily from the jurisdiction which the ct. exercises over trustees. In the exercise of that jurisdiction the ct. may in general order the trustees to deal with the trust property in whatever mode it may consider to be for the benefit of *cestuis que trust* who are infants, or under disabilities; & to say that *cestuis que trust* can, except under very special circumstances, undo what the ct. has ordered to be done, would be to cut away the root of the jurisdiction (*TURNER L.J.*).—*BROOKE v. MOSTYN* (LORD) (1864), 2 De G. J. & Sm. 373; 5 New Rep. 206; 34 L. J. Ch. 65; 11 L. T. 392; 10 Jur. N. S. 1114; 13 W. R. 115; 46 E. R. 419, L. J.J.; *on appeal, sub nom.* *MOSTYN v. BROOKE* (1866), L. R. 4 H. L. 301, H. L. *Annotations* :—*Consd.* *Jo Wells, Boyer v. Maclean*, [1903] 1 Ch. 848. *Rejd.* *Micholls v. Corbett* (1865), 3 De G. J. & Sm. 18; *Fadelle v. Bernard* (1871), 19 W. R. 555; *Coaks v. Boswell* (1886), 11 App. Cas. 232.

**2851.** —[Where infants are interested, subject to certain life interests, in a large portion of a trust estate, the ct. will make an administration order, although the other beneficiaries wish the matter to be unfettered by such an order of the ct.—*Re WILSON'S TRUST, ALEXANDER v. CALDER* (1885), 1 T. L. R. 262.

**2852.** —[Testator gave a fund to trustees upon trust for his wife for life or during widowhood, she "maintaining, educating, & bringing up" his unmarried sons under twenty-one & his unmarried daughters of any age. The widow maintained & educated the children, but lived in adultery with a married man in the home she provided for them;—*Held* : this was not a proper performance of the trust imposed upon her, & the ct. could administer the fund.—*Re G. (INFANTS)*, [1899] 1 Ch. 719; 68 L. J. Ch. 374; 80 L. T. 470; 47 W. R. 491.

**2853.** Administration of trusts of registered deed of arrangement.]—The ct. will not under ordinary

circumstances entertain a suit for the administration of the trusts of a deed registered under Bankruptcy Act, 1861 (c. 139).

The bill alleged, & it appeared from the evidence in the suit, that the trustees had sold the goodwill, business & stock-in-trade of debtor to one of themselves at a slight under value :—*Held* : the circumstance did not take the case out of the general rule, the Ct. of Bkpcy. having sufficient power to deal with such questions.—*STONE v. THOMAS* (1870), 5 Ch. App. 219; 39 L. J. Ch. 168; 22 L. T. 359; 18 W. R. 385, L. C.

*Annotations* :—*Apld.* *Hood v. N. E. Ry.* (1870), L. R. 11 Eq. 116. *Consd.* *Jenny v. Bell* (1876), 2 Ch. D. 547. *Rejd.* *Phillips v. Furber* (1870), 22 L. T. 288; *Pike v. Dickinson* (1871), 7 Ch. App. 61; *Ellis's Trustee v. Dixon-Johnson*, [1925] A. C. 489. *Mentd.* *Graham v. Winterson* (1873), L. R. 16 Eq. 243.

**2854.** Complications due to legal system of another country.]—*DE QUETTEVILLE v. DE QUETTEVILLE, Re DE QUETTEVILLE* (1903), 19 T. L. R. 383, C. A.

**2855.** Solution of doubtful questions.—Persons to administer fund.]—*Re PURDIE'S SETTLEMENT, ROSE v. HILL* (1904), 48 Sol. Jo. 524.

—On application by trustee for directions.]—*See* Sect. 3, sub-sect. 5, *ante*.

Interference with discretion of trustees.]—*See, generally*, Part V., Sect. 5, sub-sect. 2, *post*.

After admission of lunatic's will to probate.]—*See* LUNATICS, Vol. XXXIII., p. 118, No. 271.

#### SUB-SECT. 6.—CONDITIONS FOR FORFEITURE OF BENEFICIARY'S INTEREST.

**2856.** General rule.]—(1) Bill by debtor, who had conveyed property to a trustee for the benefit of his creditors, to have the trusts of the deed administered by the ct., charging that one of such creditors had forfeited his debt by a breach of his covenant not to sue or molest debtor :—*Held* : creditors, parties to the deed, other than the trustee & creditor charged with the breach of covenant, were sufficiently made parties by being served with copies of the bill under the R. S. C., Aug. 1841, Ord. 23.

(2) A ct. of equity will declare & give effect to a forfeiture, where such forfeiture is incidental to the administration of a trust.—*DUNCOMBE v. LEVY* (1846), 5 Hare, 232; 11 Jur. 262; 67 E. R. 809.

Condition against litigation about will.] *See* WILLS.

Condition against interference with management.]—*See* WILLS.

#### SUB-SECT. 7.—DEPARTURE FROM TERMS OF TRUST.

##### A. In General.

**2857.** General rule.]—*Re NEW, Re LEAVERS, Re MORLEY*, No. 2866, *post*.

**2858.** —[*Re TOULEMACHE*, No. 2867, *post*.

**2859.** —[In the exercise of its jurisdiction for the administration of trusts this ct., I apprehend, has no power to make or authorise any leases or other dispositions of the trust property which the trustee could not have made himself. The ct., in such a case, whether it assumes the place of the trustee, or guides him in the discharge of his

#### PART III. SECT. 11, SUB-SECT. 5.

**2850.1.** *Where interests of infants concerned.*]—*Re CRISP, Ex p. GUNN & Co., LTD.* (1908), 4 Tas. L. R. 38.—*AUS.*

t. *Trust property in foreign country.*]—Where a trustee of lands situated in

a foreign country is resident here, the ct. will decree an execution of the trust.

—*SMITH v. HENDERSON* (1870), 17 Gr. 6.

—*CAN.*

a. *Death of trustee.*]—*CHARTERIS v. CHARTERIS* (1885), 10 O. R. 738.—*CAN.*

b. *To vary investment.*] *COSTELLO v. O'RORKE* (1869), 3 I. R. Eq. 172.—*IR.*

c. *Preservation of infant's property.*]—*Re HURST, HURST v. HURST* (1891), 29 L. R. Ir. 219.—*IR.*

*Sect. 11.—Administration by court: Sub-sect. 7, A., B. & C.; sub-sect. 8, A., B. & C.]*

duties, is still confined within the limits of the trust as constituted by its author, & has no authority to go beyond these limits. Its business is to execute the trusts, not to alter them (*FARWELL, L.J.*).—*Re HAZELDINE'S TRUSTS*, [1908] 1 Ch. 34; 77 L. J. Ch. 97; 97 L. T. 818; 52 Sol. Jo. 29, C. A.

*Annotations:—Mentd. Re Fox, Brooks v. Marston*, [1913] 2 Ch. 75; *Re Witham, Chadburn v. Winfield*, [1922] 2 Ch. 413.

**2860. When allowed.—To dispense with consent required by trust deed.**—Where money is on marriage to be laid out in a purchase, & settled to the common uses in a marriage settlement, adding the clause that the purchase shall be made with the consent of the husband & wife, it makes no diversity, though no consent was given to any purchase made during the life of the husband & wife; for still the money shall be taken as land.

In this last case, I observe, it was admitted, that if there had not been the clause in the articles, that the purchase should be made with the consent of the husband & wife, it must have been taken as land: now such clause makes no manner of difference; for, upon a convenient purchase being proposed, the ct. would have taken on themselves to judge thereof; &, without some reasonable objection made, would have ordered the money to be laid out in it, so that such clause seems to have been immaterial in the marriage articles, & as if omitted (*JEKYLL, M.R.*).—*LECHMERE v. CARLISLE (EARL)* (1733), 3 P. Wms. 211; 24 E. R. 1033; *affd. sub nom. LECHMERE v. LECHMERE (LADY)* (1735), *Chs. temp.* Talb. 80; 3 P. Wms. p. 224, L. C.

*Annotations:—Refd. Russell v. Smythies* (1766), 1 Cox. Eq. Cas. 215; *Tubbs v. Broadwood* (1831), 2 Russ. & M. 187; *Wrightson v. Macaulay* (1845), 4 Hare, 487; *Barham v. Clarendon* (1852), 10 Hare, 126; *Re De Lancey* (1869), L. R. 4 Exch. 345; *Re Fennell's Settlement, Re Fennell's Estate, Wright v. Holton*, [1918] 1 Ch. 91. **Mentd.** *Brown Dawson* (1705), *Pres. Ch.* 210; *Wrightson v. A.-G.* (1737), *West temp. Hard.* 187; *Sanders v. Sanders* (1739), *West temp. Hard.* 686; *Deacon v. Smith* (1743), 3 Atk. 323; *Ellinor v. Garton* (1745), 9 Mod. Rep. 480; *Pulteney v. Darlington* (1782), 1 Bro. C. C. 223; *Devese v. Pontet* (1785), 1 Cox. Eq. Cas. 188; *Sowden v. Sowden* (1785), 1 Bro. C. C. 582; *Wilson v. Pigott* (1794), 2 Ves. 351; *Garthshore v. Challe* (1804), 10 Ves. 1; *Perry v. Phelps* (1810), 17 Ves. 173; *Cogan v. Stephens* (1835), 5 L. J. Ch. 17; *Mathias v. Mathias* (1858), 3 Sm. & G. 552.

**2861. — Where departure would involve breach of trust.**—The ct. has no jurisdiction to authorise an act, which, if done by trustees, would be a breach of trust.—*Re MORRISON, MORRISON v. MORRISON*, [1901] 1 Ch. 701; 70 L. J. Ch. 399; 84 L. T. 383; 49 W. R. 441; 17 T. L. R. 330; 45 Sol. Jo. 341; 8 Mans. 210.

*Annotations:—Distd. Re New, Re Leavers, Re Morley*, [1901] 2 Ch. 534. **Apld.** *Re Toullemache*, [1903] 1 Ch. 457.

— **Exchange & retention of shares.**—*See COMPANIES, Vol. X., pp. 1029, 1030, Nos. 7138, 7139.*

**To carry on testator's business.**—*See EXECUTORS, Vol. XXIV., p. 559, Nos. 5986–5988.*

— **Transfer of business to limited company.**—*See EXECUTORS, Vol. XXIV., p. 767, Nos. 7972, 7973.*

**Preservation of property.**—*See, generally, LAND IMPROVEMENT, Vol. XXX., pp. 274 et seq.*

**B. Departure Beneficial to Estate or Beneficiaries.**

**Doctrine of salvage.**—*See LAND IMPROVEMENT, Vol. XXX., pp. 279, 280, Nos. 41–61.*

**2862. Whether allowed.**—Testator devised his advowson to trustees, to sell on the death of A. & divide the produce amongst certain persons. A. was the incumbent, so that on his death no sale could be made until the vacancy was filled up:—*Held*: the ct. had no jurisdiction to authorise a sale in the lifetime of A. on the ground that it would be beneficial to the parties.—*JOHNSTONE v. BABER* (1845), 8 Beav. 233; 4 L. T. O. S. 392; 50 E. R. 91; *subsequent proceedings* (1856), 22 Beav. 562.

*Annotation:—Apld. Want v. Stallbrass* (1873), L. R. 8 Exch. 175

**2863. —**—Part of the property of testator consisted of a cotton mill which he directed his trustees not to sell, nor to work themselves, but to let. The will also contained a direction to the trustees not to lend any of the personal estate on mtg., & prescribed certain strict modes of investment.

The cotton mill being out of repair could not be let as it then stood; the trustees, therefore, entered into a provisional agreement with a firm of cotton spinners by which the latter agreed to take a lease of the mill for twenty-one years, & to spend large sums of money in machinery & repairs, provided the trustees advanced to them, on the security of the machinery, rather more than half the sum required for such machinery & repairs, & also a considerable sum in the erection of steam boilers, & other landlords' fixtures.

Under the terms of the will the trustees could not comply with such proposals; but, upon it being clearly proved that such an arrangement would be highly beneficial to the trust estate, & was one which it was not unusual for lessors in similar cases to enter into, the ct. sanctioned the agreement, & directed the costs of all parties to the application to come out of testator's residuary personal estate.—*Re LEE'S TRUSTS* (1875), 32 L. T. 298.

**2864. —**—*Re NEW, Re LEAVERS, Re MORLEY, No. 2866, post.*

**2865. —**—*Re TOLLEMACHE, No. 2867, post.*

**C. Departure in Cases of Necessity or Emergency.**

**2866. Whether allowed.**—Where in the administration or management of a trust estate by the trustees, especially where the estate consists of a business or of shares in a mercantile co., there arises an emergency or state of circumstances which it may reasonably be supposed was not foreseen or anticipated by the author of the trust & is unprovided for by the trust instrument, & which renders it desirable & perhaps even essential, in the interests of the beneficiaries, that certain acts should be done by the trustees, which they themselves have no power to do, & to which the consent of all the beneficiaries cannot be obtained by reason of some not being *sui juris* or not yet in existence, the ct. will exercise its general administrative jurisdiction by sanctioning, on behalf of all parties interested, those acts being done by the trustees.—*Re NEW, Re LEAVERS, Re MORLEY*, [1901] 2 Ch. 534; *sub nom. Re NEW'S*

#### PART III. SECT. 11, SUB-SECT. 7. —B.

**2862 i. Whether allowed.**—*Re BENDER* (1880), 8 P. R. 399.—**CAN.**

**2862 ii. —**—*Re INDIAN TRUSTS ACT, Re SHRIDAI MERWANJI DALAL* (1918), L. L. R. 43 Bom. 519.—**IND.**

**2862 iii. —**—*FERGUSON v. FERGUSON* (1880), 17 L. R. Ir. 552.—**IR.**

**2862 iv. —**—*NEILL v. NEILL*, [1904] 1 I. R. 513.—**IR.**

**2862 v. —**—*Re LEES, MELVILLE v. LEES* (1915), 34 N. Z. L. R. 1054.—**N.Z.**

#### PART III. SECT. 11, SUB-SECT. 7.—C.

**2866 i. Whether allowed.**—*Re TOOHEY, FREEHILL v. TOOHEY* (1906), 6 S. R. N. S. W. 538; 23 N. S. W. W. N. 111.—**AUS.**

**2866 ii. —**—*CHALMERS HOSPITAL (BANFF) TRUSTEES*, [1923] S. C. 220.—**SCOT.**

**SETTLEMENT, LANGHAM v. LANGHAM, Re LEAVERS, LEAVERS v. HALL, Re MORLEY, FRASER v. LEAVERS,** 70 L. J. Ch. 710; 85 L. T. 174; 50 W. R. 17; 45 Sol. Jo. 706, C. A.

**Annotations:—Distd.** *Re Tollemache*, [1903] 1 Ch. 955. **Consd.** *Re Wells, Royer v. Maclean*, [1903] 1 Ch. 818. **Refd.** *Re Willis, Willis v. Willis* (1901), 71 L. J. Ch. 73. **Mentd.** *Re Houghton, Hawley v. Blake*, [1904] 1 Ch. 622.

**2867.** —[The rule laid down in *Re New, Re Leavers, Re Morley*, No. 2866, *ante*, as to the exercise by the ct. of its extraordinary jurisdiction in relation to the administration of trusts, in sanctioning acts by trustees going beyond the express provisions of the trust instrument, is limited to cases of emergency, & does not cover every case in which a particular act is desired to be done merely because it appears beneficial to the estate. For instance, the ct. will not sanction an unauthorised change of investment proposed on the mere ground that it will be to the advantage of the beneficiaries. *Re TOLLEMACHE*, [1903] 1 Ch. 955; 72 L. J. Ch. 539; 88 L. T. 670; 51 W. R. 597, C. A.; *affg.* S. C. *sub nom. Re T.*, 72 L. J. Ch. 225.

#### SUB-SECT. 8.—PRACTICE.

##### A. In General.

*Sec. generally*, EXECUTORS, Vol. XXIV., pp. 770–782, Nos. 8001–8134.

**2868. Trust created abroad—Administration proving more convenient in England—Whether portion of funds transferred for distribution abroad.]**

—(1) Where a trust for the benefit of creditors was created in India, but subsequent events made it more convenient that it should be administered in England, the ct. refused to allow a portion of the trust fund in its hands to be transferred to the trustees for the purpose of distribution in India; & overruled a demurrer to a suit for its administration here.

(2) Where trusts can be conveniently & effectually administered in the place intended by the parties, this ct. will not entertain a suit for their administration, but will drive the parties to that place (LORD LANGDALE, M.R.).—*HARRWELL v. COLVIN* (1838), 2 Jur. 984.

**2869. Evidence—As to respective rights of beneficiaries—Whether admissible by trustee plaintiffs—Where interested beneficiaries appear.]**—In a suit for the administration of a trust, where the parties beneficially interested are before the ct., the trustees, although plffs., ought not to enter into evidence as to facts relating to or showing the respective rights of the *cestui que trust*.—*GIRDLESTONE v. CREED* (1849), 8 Hare, 208; 68 E. R. 334.

**Annotation:—Mentd.** *Sinnett v. Herbert* (1872), 7 Ch. App. 232.

**2870. Action by trustee against beneficiary—To avoid being sued for account—Carriage of decree given to beneficiary.]**—A trustee filing an administration bill against his *cestui que trust* in order to avoid a bill against himself for an account which he had neglected to render, was not made to pay costs, but the carriage of the decree was given to the *cestui que trust*.—*NAYLOR v. SMITH* (1867), 15 W. R. 528.

**2871. Application for joinder of actions—With claim for recovery of land—Application after service of writ—Whether too late.]**—Pltf. indorsed his writ with a claim to administer the trusts of a will, & also to recover possession of certain land comprised in the will; & served the writ on deft. Pltf. then took out a summons, under R. S. C., Ord. 17, r. 2, for leave to continue the action in

its present form:—*Held*: the application was made too late.—*Re PILCHER, PILCHER v. HINDS* (1879), 11 Ch. D. 905; 48 L. J. Ch. 512; 40 L. T. 422; 27 W. R. 619; *affd.*, 11 Ch. D. p. 906, C. A.

**Annotations:—Mentd.** *Musgrave v. Stevens*, [1881] W. N. 163; *Kendrick v. Roberts* (1882), 46 L. T. 59; *Rushbrooke v. Farley* (1885), 52 L. T. 572; *Lloyd v. Great Western Dairies Co.*, [1907] 2 K. B. 727.

**2872. Action by several trustees—Whether one trustee alone may appeal.]**—Two of the three trustees of a settlement brought an action to have the trusts administered under the direction of the ct. The judge dismissed the action with costs. One of plffs. having declined to concur in an appeal, the other appealed alone. The Ct. of Appeal held that such an appeal was regular, & must be allowed to proceed; & being of opinion that a sufficient ground had been shown for asking the direction of the ct., a decree for administration of the trusts was made.—*BECKETT v. ATTWOOD* (1881), 18 Ch. D. 54; 50 L. J. Ch. 687; 44 L. T. 660; 29 W. R. 796, C. A.

##### B. Service.

*Sec. generally*, EXECUTORS, Vol. XXIV., pp. 771–773, Nos. 8008–8019.

**2873. Service out of jurisdiction—When leave given—Property must be actually situate within jurisdiction—When leave asked for.]**—(1) In order to bring a case within R. S. C., Ord. XI., r. 1 (d), which provides for service out of the jurisdiction of the writ in an action for the execution of the trusts of a written instrument of which the person to be served is a trustee, there must be, at the time when leave to effect such service is asked for, property subject to the trusts of the instrument actually situate within the jurisdiction, & not merely property which ought to be, or, if the trusts were duly executed, would be, so situate.

(2) On an application to set aside service in such an action on the ground that when leave to serve out of the jurisdiction was obtained there was no property within the jurisdiction. *Semble*: the service may possibly be held good if it be shown that property has subsequently come within the jurisdiction.—*WINTER v. WINTER*, [1894] 1 Ch. 421; 63 L. J. Ch. 165; 69 L. T. 759; 8 R. 614.

**2874. —Whether service good—Property situate within jurisdiction—At time of application to set aside service.]**—*WINTER v. WINTER*, No. 2873, *ante*.

##### C. Proceedings against Absent Trustee.

*See* Trustee Act, 1925 (c. 19), ss. 59, 67.

**2875. Whether permitted—No representative of deceased trustee—Considerable balances due from trustee—One of parties entitled to take out administration.]**—Where one of two trustees of an estate which was being administered in ct., died intestate, & as was alleged, insolvent, after a decree for an account against himself & his co-trustee, & after the certificate made in pursuance thereof had been settled by the Chief Clerk, except in some formal particulars:—*Held*: the proceedings ought to be carried on in the absence of a representative of his estate, although considerable balances were proved to be due from the trustees, & although one of the parties having the conduct of the cause was entitled to take out representation to deceased trustee.—*MOORE v. MORRIS* (1871), L. R. 13 Eq. 139; 41 L. J. Ch. 161.

**2876. —On proof of service of notice of order—Order made on originating summons.]**—The ct. has no power under R. S. C., Ords. 11 & 16, r. 40, to give leave to serve out of the jurisdiction notice of an order for administration made upon

*Sect. 11.—Administration by court: Sub-sect. 8, C. & D.; sub-sect. 9, A. & B. (a).]*

originating summons. In such a case the person having the conduct of the proceedings can, without leave, give to the person interested who is out of the jurisdiction notice in writing of the making of the order, & that, if he does not appear & object, administration will be proceeded with in his absence: & then, if he does not appear, the ct. can, upon proof of the service of such notice, proceed under the order in his absence. *Semble*: the ct. has no power to give leave to serve out of the jurisdiction a petition under Trustee Relief Act, 1850 (c. 60).—*Re CLIFF, EDWARDS v. BROWN*, [1895] 2 Ch. 21; 64 L. J. Ch. 423; 72 L. T. 440; 43 W. R. 436; 11 T. L. R. 312; 39 Sol. Jo. 362, C. A. *Annotations*:—*Mentd.* Deutsche National Bank v. Paul, [1898] 1 Ch. 283; Doulton v. Madras Corp., [1920] W. N. 91; Hunter v. Stadtliche Hochseefischerei Gesellschaft, [1925] 2 K. B. 493.

**2877.** ———.]—*Re BAMFORD, TOMLINSON v. BAMFORD* (1904), 48 Sol. Jo. 698.

#### *D. Representation of Conflicting Interests.*

**2878. Whether separate counsel must be employed—One of several trustees having beneficial interest—Interest not conflicting with duty.]—***GAUNT v. TAYLOR*, No. 2769, *ante*.

**2879.** ———.]—Where trustees are represented by the same firm of solrs. & one of them is interested in the trust fund beneficially, it is *prima facie* the solrs.' duty to employ separate counsel to represent the independent trustee in order that the ct. may have the assistance of such separate counsel.—*Re MORGAN, BROWN v. JONES* (1927), 71 Sol. Jo. 650.

**2880.** ———.]—*For trustee & beneficiary.*—*Re RICHARDS, UGLOW v. RICHARDS* (1901), as reported in 50 W. R. 90.

*Annotation*:—*Mentd.* *Re Ryder, Barton v. Kearsley*, [1914] 1 Ch. 865.

**2881.** ———.]—*Re BURTON, DANBY v. BURTON*, [1901] W. N. 202.

*Annotation*:—*Apld.* *Re Morgan, Brown v. Jones* (1927), 71 Sol. Jo. 650.

#### SUB-SECT. 9.—WHAT ORDERS MADE.

##### *A. Account.*

**2882. From what time ordered—Discretion of court—Account of rents & profits paid to person not entitled.]—**Trustees entered into possession of rent & profits, & paid them over under a trust deed to a married woman to her separate use; it afterwards appeared that she was not entitled to receive them, but that upon the true construction of a will they ought to have gone to another person. That person filed a bill & a decree was made in his favour, but an account of the rents & profits was only ordered from the date of the filing of the bill:—*Held*: whether an account should be directed from the filing of the bill, or from an anterior time, is a matter of discretion, & in this case the discretion had been rightly exercised.—*VERNON v. WRIGHT* (1858), 7 H. L. Cas. 35; 28 L. J. Ch. 198; 32 L. T. O. S. 11; 4 Jur. N. S. 1113; 11 E. R. 15, H. L.; *affg.* S. C. *sub nom.* *WRIGHT v. VERNON* (1854), 2 Drew. 439.

*Annotations*:—*Mentd.* *Wright v. Chard* (1859), 4 Drew. 673; *Lynch v. Knight* (1861), 5 L. T. 291; *Allgood v. Blake* (1872), L. R. 7 Exch. 339; *Moore v. Simkin* (1885), 31 Ch. D. 95.

**2883. Whether ordered on footing of wilful default—After decree for common account—Allegation of default.]—***CARY v. KNOWLES* (1868), 19 L. T. 482.

**2884.** ———.]—*No allegation of default.]—*Where on bill, against a firm of solrs., who were the trustees of a settlement, for an account, but in which there was no charge of wilful neglect or default, & no relief prayed as against it, *pltf.* succeeded in establishing his case. The ct., in ordering an account, directed an inquiry as to *deft.*'s dealings with the trust fund, & if on taking the accounts it should appear that they had been guilty of wilful neglect or default in the discharge of their duty, they should be charged, in taking the accounts, with such wilful neglect or default.—*NASH v. HOWELL* (1869), 21 L. T. 743.

**2885. Form of decree—Account of moneys received by infant trustee.]—**By articles of settlement on the marriage of Mr. & Mrs. G. in 1874, it was agreed that the wife's property should be vested in a trustee or trustees to be approved of by G. & his wife, upon the usual trusts of a marriage settlement with power to purchase a leasehold house. In 1875, G. & wife purchased a leasehold house which was assigned to A. who agreed to hold it on the trusts of the articles. In 1883, a settlement was executed by which after reciting that the property consisted of the house, & certain other particulars, G. & wife appointed R. to be trustee and assigned to him part of the property, & agreed that the rest should be transferred to him. In Feb. 1884, A. assigned the leasehold to R. who did not attain twenty-one until Nov. 1884. One of the children of the marriage took out in 1885 an originating summons against A. & R. to have their accounts taken:—*Held*: the proper course was to direct an account in the usual form against A., with an inquiry whether all or any & what part of the trust property had come to the hands of R. & what had been his dealings & transactions in respect of the same, & as to the dates of & circumstances attending such receipts, dealings, & transactions.—*Re GARNES, GARNES v. APPLIN* (1885), 31 Ch. D. 147; 55 L. J. Ch. 303; 54 L. T. 141; 34 W. R. 127, C. A.

*Liability of personal representatives.]—See, generally, EXECUTORS, Vol. XXIV., pp. 681–705, Nos. 7071–7311.*

##### *B. Order for Payment into Court.*

###### *(a) In General.*

*See EXECUTORS, Vol. XXIV., p. 785, Nos. 8159–8163; Trustee Act, 1925 (c. 19), s. 63.*

**2886. Whether granted ex debito iustitiæ—Discretionary trusts still to be performed.]—**Although the mere existence of a discretionary power in trustees over a fund affords no reason why the ct. should not order payment of the fund into ct., unless such payment into ct. would interfere with the exercise by the trustee of such discretion; yet where it appeared that trustees were about in the due exercise of a discretionary power to deal with a fund, the ct. refused to order payment into ct., although the trustees had not actually parted with the fund.—*TALBOT v. MARSHFIELD* (1864), 2 Drew & Sm. 285; 12 L. T. 761; 62 E. R. 630.

**2887.** ———.]—(1) The general rule, that where stock is standing in the names of trustees any party interested may have an order, *ex*

#### PART III. SECT. 11, SUB-SECT. 9. —A.

*d. Whether ordered on footing of wilful default.]—COLLMAN v. DRUITT* (1881), 2 N. S. W. Eq. 74.—**AUS.**

#### PART III. SECT. 11, SUB-SECT. 9.— B. (a).

*e. Trustee resident outside jurisdiction.]—*Where the trustee for infants resided out of the jurisdiction, & a

person resident within it had a contingent interest in the trust fund, the fund was ordered to be secured in ct. instead of being paid over to the trustee.—*STILEMAN v. CAMPBELL* (1867), 13 Gr. 454.—**CAN.**

*debito justitie*, to have it transferred into ct., does not apply to a case where there are discretionary trusts still to be performed.

(2) Under the statutory power to vary securities, a stock mtge. is an improper investment. But where trust funds had been lent on stock mtge. & retransferred before the institution of the suit:—*Held*: this, though a mistake on the part of the trustees, was no reason for depriving them of the control of the fund.—*BROMLEY v. KELLY* (1870), 39 L. J. Ch. 274; 18 W. R. 374.

**2888. Trust fund in danger.**—Trust fund, which under a power in marriage settlement had been lent, decreed to be paid into ct. the trustees representing it to be in danger.—*PAYNE v. COLLIER* (1790), 1 Ves. 170; 30 E. R. 285, L. C.

**2889.** —.—]—*FOSTER v. HEWITT* (1837), 1 Jur. 839.

**2890.** —.—]—Where trust money appears to have been invested on an improper security, it will, on motion, be ordered to be brought into ct. within a given time; but if the case be proper, the period will be extended from time to time, to enable deft. to realise the security.

Where part of a residuary estate has been invested on an improper security, & deft. has an interest therein, the ct., on being satisfied that there is no existing claim on the estate, sometimes confines the amount to be paid into ct. to the share of plff.

An intestate died in 1826, leaving a widow & two infant children. The widow administered, & in 1840 executed a deed which stated that the assets actually realised amounted to £4,000, of which she had appropriated to herself £700, & that the remainder had been invested on mtges., which were specified. In her answer to a bill filed by one of the children in 1843, she stated that this was wholly erroneous, that the residue amounted to £1,600 only, & that plff. had received £390 on account of her one-third. The answer stated that the debts had been paid, but the statements were most unsatisfactory. A sum of £700 appeared to have been lent on an improper security. The ct. on motion, ordered the whole £700 to be brought into ct.—*SCORE v. FORD* (1844), 7 Beav. 333; 49 E. R. 1093.

**2891.** —.—]—A party having a contingent interest in a trust fund may, in a proper case, have it brought into ct. for his protection; but he must show some sufficient ground for it.

Motion to pay trust fund into ct. refused, on the ground that there was no allegation of danger, & that the fund might, if necessary, be sufficiently protected by a *distringas*.—*ROSS v. ROSS* (1849), 12 Beav. 89; 50 E. R. 994.

*Annotations*:—*Distd. Governors' Benevolent Institution v. Rusbridger* (1854), 13 Eas. 467. *Consd. Re Shoppard's Trusts* (1862), 31 L. J. Ch. 788. *N.F. Robertson v. Scott* (1866), 14 L. T. 187.

**2892. No allegation of misconduct against trustees.**—A residuary sum of stock, standing in the names of trustees, the dividends of which were paid by them to the parties entitled thereto, ordered to be transferred into ct. to the credit of the cause, on the application of a party entitled to a mere contingent interest in the fund, & not withstanding that all the parties entitled to vested interests therein were satisfied with the conduct & custody of the trustees, & opposed the application.—*BARTLETT v. BARTLETT* (1845), 4 Hare, 631; 67 E. R. 800.

*Annotations*:—*Fold. Marryatt v. Marryatt* (1854), 2 Eq. Rep. 1138. *Distd. Bromley v. Kelly* (1870), 39 L. J. Ch. 274.

**2893.** —.—]—*MARRYATT v. MARRYATT*, No. 2930, *post*.

**2894.** —.—]—In a suit for the administration of trust property the ct., on an application by the parties beneficially interested, & where there was no imputation against the trustees, ordered the trust money to be paid into ct.—*ROBERTSON v. SCOTT* (1866), 14 L. T. 187.

**2895.** —.—]—*BROMLEY v. KELLY*, No. 2887, *ante*.

**2896. Party in possession without *prima facie* right.**—When a ct. of equity traces out trust money in the hands of a person who has not *prima facie* a right to hold it, that money must be paid into ct.

The foreign agent of a mercantile house in London, dealing in African produce, was appointed exor. of A., a merchant at Sierra Leone, with directions to sell testator's property, & invest the proceeds in the Bank of England. The agent accordingly wrote to his principals in London, advising them of consignments which he should make to them of some of A.'s property, & directing them to place the proceeds to his credit as exor. of A. The consignments were made, & the merchants placed the proceeds to a separate account, namely, that of A.'s estate:—*Held*: the goods were specifically & not generally consigned, & the produce of the consignments was trust money in the hands of the merchants, which, upon a motion in a suit filed against them by the representative of A. for an account, they were bound to pay into ct.—*LEIGH v. MACAULAY* (1835), 1 Y. & C. Ex. 260; 4 L. J. Ex. Eq. 37; 160 E. R. 106.

**2897. Denial by trustee of plaintiff's right.**—When plff. claims to be entitled, in a particular character, to a fund in the hands of a trustee, & the trustee, by his answer, says he does not know whether plff. fills that character or not, plff. cannot have the fund brought into ct. in the suit.—*DUBLESS v. PLINT* (1839), 4 My. & Cr. 502; 41 E. R. 193, L. C.

*Annotations*:—*Reid. Green v. Pledger* (1841), 3 Hare, 165; *Edwards v. Edwards* (1853), 10 Hare, App. II, 63; *Symonds v. Jenkins* (1876), 24 W. R. 512. *Mentd. A.-G. v. Thompson* (1819), 8 Hare, 106.

**2898. Trustee neither denying nor admitting plaintiff's right.**—Motion by infant *cestuis que trust* that deft., their trustee, might bring a fund into ct., allowed where, although deft. had not by his answer admitted plffs.' title, he had not denied it.—*SYMONDS v. JENKINS* (1876), 34 L. T. 277; 24 W. R. 512; 3 Char. Pr. Cas. 78.

**2899. Party trustee & sole beneficiary.**—Party ordered to pay money into ct., in which he claimed the sole beneficial interest, he being also a trustee of the fund.—*INMAN v. WHITLEY* (1841), 5 Jur. 287.

**2900. Benefit of infants.**—What has been the conduct of the father in this case . . . He is separated from his wife, not apparently from any misconduct or imputation of misconduct, but in consequence of his pecuniary difficulties. He applied to a solr., by whom he is told, that the only mode in which the property can be protected is by the institution of a suit in the ct.

It is said that this protection would have been given to the infants, either by filing a claim, or by the trustees being required to pay the fund into ct. under Trustee Relief Act. It is true, that under the particular circumstances of the case, as they are suggested in the bill, either of these processes might have afforded adequate protection; but it is in the power of the ct., at the hearing of the cause, to judge of this question (*TURNER, V.-C.*).—*SMALLWOOD v. RUTTER* (1851), 9 Hare, 24; 20 L. J. Ch. 332; 17 L. T. O. S. 118; 15 Jur. 370; 68 E. R. 399.

*Annotation*:—*Mentd. Steeden v. Walden*, [1910] 2 Ch. 393.

**2901. Trustee alleged to be withholding payment vexatiously.**—*KELL v. WALKER* (1892), 36 Sol. Jo. 830.

*Sect. 11.—Administration by court: Sub-sect. 9, B. (a) & (b).]*

**2902. Property must be in actual possession.]—**

An originating summons was taken out under R. S. C., 1883, Ord. 55, by one of the residuary legatees under the will of testator, against the exors. & trustees thereof, asking that certain questions or matters arising in the administration of the estate of testator might be determined & relief given in respect thereof.

The summons asked that a sum of stock standing in the names of the trustees might be transferred into ct.; that a mtge. deed for securing the payment of a sum forming part of testator's estate might be deposited in ct.; that the trustees might be ordered to pay into ct. a sum forming part of the estate & improperly used by them in their respective businesses; for proper accounts; a declaration of the rights & interests of the persons beneficially entitled; that so far as might be necessary for the purposes aforesaid the estate might be administered by the ct.; & that the trustees might be ordered to pay the costs. It was objected that the case ought to have been commenced by a writ in an action, inasmuch as trustees could not properly be charged with wilful default by an originating summons:—*Held*: the ct. had jurisdiction, upon an originating summons, to order payment into ct. of moneys which had been received by trustees & improperly applied by them; & therefore, to grant the relief asked for in the present case.—*Re* CHAPMAN, FARDELL v. CHAPMAN (1886), 51 L. T. 13.

*Annotation*:—*Overd*, Nutter v. Holland, [1891] 3 Ch. 108.

**2903. —**—Money will not be ordered to be paid into ct. by exors., administrators, or trustees under R. S. C., Ord. 55, r. 3 (d), unless it is actually in their hands. It is not sufficient that it has been in their hands & that they are responsible for it.—*NUTTER v. HOLLAND*, [1894] 3 Ch. 408; 73 L. J. Ch. 932; 71 L. T. 508; 43 W. R. 18; 38 Sol. Jo. 707; 7 R. 491, C. A.

*Annotations*:—*Apld*, Crompton & Evans' Union Bank v. Burton, [1895] 2 Ch. 711. *Refd*, Pullinger v. Barnato, Barnato-Pullinger Pool (1896), 12 T. L. R. 280.

**2904. —**—*Sufficiency of denial of possession.]—*

In answer to an interlocutory motion that deft. should pay into ct. money which arose from the sale of shares, of which he had been a trustee for pltf., but which he alleged though pltf. denied it, that pltf. had given to him, deft. admitted that he had received the proceeds of sale, & had transferred the shares to the purchasers. But he deposed: "Before any question was raised as to the transfers I in good faith paid away & disposed of all the purchase-money in the belief that I was entitled thereto, & no part thereof is now in my hands, & I have no power over the shares or any of them"—*Held*: it was not shown that the purchase-money was not under deft.'s control, & he must be ordered to pay the amount into ct.—*Re* BENSON, ELLETSON v. PILLERS, [1899] 1 Ch. 39; 68 L. J. Ch. 5; 47 W. R. 264; *sub nom.* *Re* BENSON, ELLETSON v. PILLERS, 79 L. T. 590.

(b) *Where Possession of Trust Funds Admitted.*

See EXECUTORS, Vol. XXIV., pp. 713-715, Nos. 7397-7425.

**2905. Discretion of court.]—**(1) A motion under R. S. C., Ord. 32, r. 6, for an order against deft.

on admissions of fact must be made by all pltf's. in the action, & not merely by some of them. Where, in an action by a tenant for life & the reversioners under a settlement against the trustees to make good a breach of trust, the reversioners alone moved under the above rule for an order on one of defts. to pay capital moneys into ct., on admissions, the ct. refused to entertain the motion in the absence of the tenant for life.

(2) An order on admissions is not a matter of right, but is in the discretion of the ct.—*Re* WRIGHT, KIRKE v. NORTH, [1895] 2 Ch. 747; 65 L. J. Ch. 37; 73 L. T. 396; 44 W. R. 125; 13 R. 849.

**2906. Assertion of claim of right.]—**Deft., who admits in his answer the possession of property upon a trust, will be ordered to pay it into ct., although he sets up a claim to it; if, upon the facts disclosed in the answer, the ct. is satisfied that this claim is not well founded.—*DEL PONT v. DE TASTET* (1824), 2 L. J. O. S. Ch. 140.

**2907. Whether order made upon interlocutory application.]—**A deft. who had covenanted to pay a sum of money to the trustees of his marriage settlement, but had omitted to do so, ordered, upon motion in a suit for the performance of the trusts of the settlement, to pay the money into ct.

Where the answer contains a clear admission that there is trust money in the hands of deft., the ct. will always, on an interlocutory application, order is to be paid into ct.—*ROTHWELL v. ROTHWELL* (1825), 2 Sim. & St. 217; 57 E. R. 328.

*Annotations*:—*Consd*, Richardson v. Bank of England (1838), 4 My. & Cr. 165. *Refd*, Lodwick v. Day (1814), 3 L. J. O. S. 4; *Re* Wright, Kirke v. North (1895), 13 R. 849.

**2908. —**—The ct. refused upon an interlocutory application by a party claiming as *cestui que trust*, to order money, alleged to be trust money, & admitted to be in the hands of deft., to be paid into ct., where deft. under circumstances stated on the record, claimed a title to the money for his own benefit, & did not, by his answer, admit his liability to pay it.—*KNIGHT v. HAYTHORNE* (1840), 4 Jur. 360.

**2909. —**—The practice of ordering payment of money into ct. by deft. upon interlocutory motion, on the ground of admissions made by him, ought not to be extended any further than it was extended in *Freeman v. Cox* (1878), 8 Ch. D. 148.—*NEVILLE v. MATTHEWMAN*, [1891] 3 Ch. 345; 63 L. J. Ch. 734; 71 L. T. 282; 42 W. R. 675; 38 Sol. Jo. 691; 7 R. 511, C. A.

*Annotations*:—*Consd*, Crompton & Evans' Union Bank v. Burton, [1895] 2 Ch. 711. *Disd*, Pullinger v. Barnato, Barnato-Pullinger Pool (1896), 12 T. L. R. 280. *Refd*, *Re* Wright, Kirke v. North (1895), 13 R. 849.

**2910. Admission made by joint trustees—Amount specified by one.]—**Three trustees admitted that trust money was standing in their joint names, but one only specified the amount:—*Held*: this was insufficient to found an order for its payment into ct.—*BOSCHETTI v. POWER* (1844), 8 Beav. 98; 14 L. J. Ch. 63; 4 L. T. O. S. 231; 8 Jur. 1085; 50 E. R. 39.

*Annotations*:—*Refd*, Freeman v. Cox (1878), 8 Ch. D. 148; Hollis v. Burton, [1892] 3 Ch. 226; Neville v. Matthewman (1894), 63 L. J. Ch. 734.

**2911. Admission as to part of funds.]—**A trustee charged with misapplication of trust money admitted by his answer that he had misapplied three sums, & set forth a debtor & creditor account,

**PART III. SECT. 11, SUB-SECT. 9.**

—B. (b).

**2905A. Discretion of court.]—**DUNPHY v. WALLACE (1863), 5 N. S. R. (1 Old.) 383.—*CAN.*

**2905 H. —**—*LOASBY v. EGAN* (1894), 10 Man. L. R. 150.—*CAN.*

(1895), 40 N. S. R. 74.—*CAN.*

**2907I. Whether order made upon interlocutory application.]—**BOLT v. MAHON

**2907 H. —**—*WHITEWOOD v. WHITEWOOD* (1900), 20 C. L. T. 254; 19 P. R. 183.—*CAN.*



in which he credited himself with, amongst others, those three sums, & also with a fourth sum which was equally inadmissible, but which turned the balance of the account in his favour. On a motion for payment of the three sums into ct. :—*Held*: pltf., not having in his motion challenged the fourth sum, the motion could only be granted to the extent to which the answer admitted a balance after striking those three items out of the discharge.—*NOKES v. SEPPINGS* (1846), 1 *Coop. temp. Cott.* 194; 2 *Ph.* 19; 41 *E. R.* 848, *L. C.*

**2912. Ambiguous admission by one trustee.**—Where one of two trustees admits by his answer that a certain fund is in the hands of himself & his co-trustee, but uses such language as is admitted to import that he dealt with it, although the expression is ambiguous the ct. will, on motion on the answer, order payment into ct. of such fund.—*PINCE v. BEATTIE* (1857), 5 *W. R.* 616.

**2913. Application by one of several beneficiaries—Amount paid in.**—*HAMOND v. WALKER*, No. 2931, *post*.

**2914. Title *prima facie* in plaintiff.**—In order to justify an order for payment into ct. of a trust fund it is sufficient that the trustee's answer contains an admission of such a *prima facie* title in pltf. as to afford a reasonable expectation of pltf. succeeding at the hearing in making out his title.—*WHITMORE v. TURQUAND* (1860), 1 *John. & H.* 296; 70 *E. R.* 759.

**2915. Effect of formal denial.**—Money will not be ordered to be brought into ct. upon motion before decree, unless it appears clearly upon the answer to belong to pltf. Where the admissions made by the answer show deft. to be a trustee of money, a mere formal denial of the fact will not prevent him from being ordered upon motion to bring the money into ct.—*HAGELL v. CURRIE* (1867), 2 *Ch. App.* 449; 36 *L. J. Ch.* 448; 16 *L. T.* 307; 15 *W. R.* 605, *L. J.*

*Annotation*:—*Mentid. Ogilvie v. Currie* (1868), 37 *L. J. Ch.* 541.

**2916. Separate property of married woman—Restraint on anticipation—Application for sequestration by husband.**—By marriage settlement in 1856 certain property was settled to the separate use of the wife for life, without power of anticipation, with divers remainders over. In 1866 the wife left her husband, & in 1868 he instituted a suit against her in the Divorce Ct. for restitution of conjugal rights. Judgment was given against the wife with costs. The wife withdrew from the jurisdiction, & declined in any way to obey the judgment. In Mar. 1870, the husband procured from the Divorce Ct. a writ of sequestration against the separate property of the wife for the costs of the suit. In Oct. 1869, certain instalments of dividends & interest on the settled property fell due, & were received by one of the trustees, who retained it in his hands. In Dec. 1869, a hostile suit was instituted by the wife against the trustee to compel the payment of the dividends & interest in question, & for the removal of the trustee, but not asking for the general administration of the trust fund. The trustee, by his answer, admitted that he had in his hands the sum of £5,105 *ls.* 9d. being the greater part of the entire fund. A few days after filing his answer the trustee filed a bill in the Rolls Ct. for the administration of the trusts of the settlement. On motion by the wife, in the first of the two suits, that the trustee might be ordered to pay into ct. the entire sum admitted by him to be in his hands :—*Held*: regard being had principally to the restraint on anticipation contained in the settlement, the money ought to

be paid into ct., notwithstanding the writ of sequestration, & notwithstanding that the wife's bill had not prayed the general administration of the trust fund.—*MILLER v. MILLER* (1870), 18 *W. R.* 750.

**2917. Admissions contained in letters—Before action brought.**—Trust funds may be ordered to be brought into ct. by the trustee, an accounting party, upon admissions contained in letters written before action brought that he has received the money, & a recital to that effect contained in the settlement, his execution of which as trustee has been proved, although there is no formal admission in his pleadings or affidavits that he has received & holds the money.—*HAMPDEN v. WALLIS* (1884), 27 *Ch. D.* 251; 54 *L. J. Ch.* 1175; 51 *L. T.* 357; 32 *W. R.* 977.

*Annotations*:—*Apld. Wanklyn v. Wilson* (1887), 35 *Ch. D.* 180; *Re Boenly, French v. Sproston* (1891), 42 *W. R.* 377.

**2918. ———.**—*Def.*, one of the trustees of a settlement, in letters written to pltf., his co-trustee, before the commencement of this action for the administration of the trusts, admitted having received £300, part of the trust funds, & invested it in an unauthorised way. Pltf., after deft. had appeared in the action, took out a summons to have the £300 brought into ct., & made an affidavit deposing that he had paid the money to deft., & stating the admissions contained in deft.'s letters as to its application. Deft. did not answer this affidavit or adduce any evidence. The judge ordered the money into ct. on the ground that the letters were a sufficient admission within *R. S. C.*, Ord. 32, r. 6 :—*Held*: as deft. had not met the affidavit, there was a sufficient admission that the money was in his hands.—*Freeman v. Cox* (8 *Ch. D.* 148) approved & followed. *Qu.*: whether the letters were not a sufficient admission within *R. S. C.*, Ord. 32, r. 6.—*PORRETT v. WHITE* (1885), 31 *Ch. D.* 52; 55 *L. J. Ch.* 79; 53 *L. T.* 514; 34 *W. R.* 65, *Ch. D.* *Annotations*:—*Apld. Wanklyn v. Wilson* (1887), 35 *Ch. D.* 180; *Re Boenly, French v. Sproston*, [1891] 1 *Ch.* 499. *Reid. Re Wright, Kirke v. North*, [1895] 2 *Ch.* 747.

**2919. Admission made by mistake.**—Under a settlement II. was absolutely entitled to a trust fund which had been invested on mtge., but which was called in by J., the surviving trustee of the settlement, in Aug. 1863. At that date J. was in partnership with B. in the business of solrs. The trust fund was, as II. alleged, paid by J. to & was received by J. & B.'s firm, & was paid into their banking account. In Dec. 1890 the partnership between J. & B. was dissolved by mutual consent, it being arranged that all debts due to & owing by that firm would be received & paid by B. Application having been made by II. to B. to produce a security showing the proper investment of the trust fund, but without any satisfactory result, an action was brought by II. against J. & B. claiming that the trust fund should be paid into ct.; & consequential relief. There being an admission in B.'s statement of defence & answer to interrogatories to the effect that the trust fund had been paid by J. into the banking account of the firm, thereby making the firm responsible for it, the judge made the usual order at chambers upon B. to pay the trust fund into ct. A motion having subsequently been made before the judge in ct. to discharge that order, upon the ground that the admission was inserted by mistake & was not in accordance with the fact, the judge gave B. leave to amend his statement of defence & to put in a further answer to the interrogatories, the indulgence being allowed on the terms of B. paying the costs :—*Held*: the discharge of the



*Sect. 11.—Administration by court: Sub-sect. 9, B. (b) & (c), C., D. & E.; sub-sects. 10 & 11. Part IV. Sect. 1.]*

order made in chambers ought not to be granted except on the terms of B. paying the money into ct.—*HOLLIS v. BURTON*, [1892] 3 Ch. 226; 67 L. T. 146; 40 W. R. 610; 36 Sol. Jo. 625, ('A. Annotations:—*Conad, Re Beeny, French v. Sproston*, [1894] 1 Ch. 499. *Reid, Nutter v. Holland* (1891), 71 L. T. 508.

**2920. Admission made orally.**—The ct. has power to order money to be paid into ct., under R. S. C., Ord. 32, r. 6, upon an admission of defendant, even though made orally & not contained in any written document.—*Re BEENY, FRENCH v. SPROSTON*, [1894] 1 Ch. 499; 63 L. J. Ch. 312; 70 L. T. 160; 42 W. R. 377; 38 Sol. Jo. 235.

*Annotation:—Reid, Ellis v. Allen*, [1914] 1 Ch. 904.

(c) *On whose Application Order Made.*

**2921. General rule.**—General rule as to payment of money into ct. is that plffs. must be solely entitled, & have such an interest jointly with others as to entitle them, on behalf of themselves & of those others to have the fund secured.—*FREEMAN v. FAIRLIE* (1812), 3 Mer. 29; 36 E. R. 12, L. C.

*Annotations:—Apld, Symonds v. Jenkins* (1876), 34 L. T. 277. *Reid, Wood v. Downes* (1812), 1 Ves. & B. 49; *Roy v. Gibbon* (1844), 4 Haro. 65. *Mentd, Alloy v. Hall* (1848), 2 De G. & Sm. 489; *Goodechap v. Weaving* (1852), 16 Jur. 586; *Macdonald v. Richardson, Richardson v. Marton* (1858), 1 Liff. 81; *Lazarus v. Mozley* (1859), 1 L. T. 3.

**2922. Trustee.**—*PAYNE v. COLLIER*, No. 2888, *ante*.

**2923. — Against co-trustee.**—*FOSTER v. HEWITT* (1837), 1 Jur. 839.

**2924. Cestui que trust.**—Where a trustee of a residue had transferred a sum of Consols into his own name, & had permitted his *cestui que trust* to receive & appropriate the dividends for a long series of years under a power of attorney, & had died without further earmarking the fund, & his next of kin refused to meddle in the matter:—*Held*: there was sufficient evidence to entitle the *cestui que trust* to have the money paid into ct.—*Re THORNTON'S TRUSTS* (1861), 9 W. R. 475.

**2925. Person having contingent interest.**—*BARTLETT v. BARTLETT*, No. 2892, *ante*.

**2926. — In proper case.**—*ROSS v. ROSS*, No. 2891, *ante*.

**2927. — Where no imputation against trustees.**—Right of a party, entitled contingently in remainder, to have the trust fund brought into court at the hearing, though there be no imputation against the trustees.—*GOVERNESSES' BENEVOLENT INSTITUTION v. RUSBRIDGE* (1854), 18 Beav. 467; 52 E. R. 184.

**2928. Whether all persons interested in fund must apply.**—On an application for payment of money into ct., it was objected that persons having an interest were not before the ct. The order was made, on the undertaking of plff. to make them parties.—*WHITMARSH v. ROBERTSON* (1840), 4 Beav. 26; 49 E. R. 240.

**2929. —**—An order may be made for payment of money into ct., although some of the persons interested in the money are not before the ct.—*WILTON v. HILL* (1852), 2 De G. M. & G. 807; 42 E. R. 1088, L. J.J.

*Annotations:—Mentd, Hind v. Whitmore* (1856), 2 K. & J. 458; *McCann v. Borradaile* (1867), 37 L. J. Ch. 124.

**2930. —**—In a suit instituted by one of the

*cestui que trust* against the trustees to administer the trusts of a will, a motion was made by plff. that the trustees might be ordered to bring into ct. certain sums of stock admitted to form part of the trust funds:—*Held*: (1) the stock must be paid into ct., although there was no allegation of misconduct or want of confidence in the trustees; (2) the remaining *cestui que trust* were not necessary parties to the suit, & it was not requisite to serve them with notice of this motion.—*MARRYATT v. MARRYATT* (1854), 2 Eq. Rep. 1138; 23 L. J. Ch. 876; 23 L. T. O. S. 218; 2 W. R. 576.

*Annotation:—As to (1) Reid, Bromley v. Kelly* (1870), 18 W. R. 374.

**2931. — Effect of application by single beneficiary.—Order made only as to beneficiary's share.—Where conduct of trustee proper.**—A trustee admitted the whole of a trust fund, to a considerable amount, to be in his hands. The conduct of the trustee being proper, the ct. will not, on an application by one of several *cestui que trust*, order payment into ct. of more than the *aliquot* share of the particular *cestui que trust* making the application.

*Semble*: the ct. has, on such an application by any single *cestui que trust*, authority to order the whole fund to be brought into ct., if the ct. shall so think fit.—*DAMOND v. WALKER* (1857), 3 Jur. N. S. 686.

**2932. — Whether order made as to whole fund.**—*DAMOND v. WALKER*, No. 2931, *ante*.

**2933. — Motion under R. S. C., Ord. 32, r. 6.—Admission of assets by trustee.**—*Re WRIGHT KIRKE v. NORTH*, No. 2905, *ante*.

*C. Order for Payment Out of Court.*

**2934. To trustees.—When estate completely administered.**—Where an estate has been completely administered the ct. will, in general, order the funds to be paid out to the trustees, & will not interfere with their discretion where they are agreed.—*BUTLER v. WITHERS* (1800), 1 John. & H. 332; 4 L. T. 736; 70 E. R. 774.

**2935. — With directions as to division.**—The ct. will, in certain circumstances, direct transfer of funds in ct. in an administration action out of ct. to the trustees of the settlement made by the will, & will direct them to divide the same & the trust estate in their hands, together representing the residue of the estate by appropriating the investments to & amongst separate sets of trustees of the settled shares of testator's children in the proportions to which they were entitled under the will.—*Re SCOTT, SCOTT v. SCOTT* (1926), 71 Sol. Jo. 430.

*D. Orders as to Payment of Income.*

**2936. Order for payment to cestui que vie.—Surviving trustee absconding.**—A surviving trustee of funds absconds: the ct. directs the dividends of those funds to be paid to *cestui que vie*.—*WHARTON v. MASSEY* (1770), Dick. 429; 21 E. R. 336, L. C.

**2937. Whether order made for payment to some trustees only.**—Order under circumstances to pay dividends to trustees, or one of them.—*SHORTBRIDGE'S CASE* (1806), 12 Ves. 28; 33 E. R. 11, L. C.

**2938. —**—Upon an investment of money paid into ct. in respect of lands taken by a railway co. Ordered, that payment of the dividends might be made to the trustees "or either of them."

PART III. SECT. 11, SUB-SECT. 9.

B. (6).

**2923 i. Trustee.—Against co-trustee.**—An exor. & trustee who has by his plea

admitted that he has funds of testator's estate, in his hands, may be compelled at the suit of his co-exor. & co-trustee, on sufficient grounds shown, to pay such

funds into ct., & also to lodge in ct. all securities representing such funds.—*DUNPHY v. WALLACE* (1863), 6 N. S. R. (1 Old.) 383.—CAN.

—*Re CLINTON* (1860), 6 Jur. N. S. 601; 8 W. R. 492.

*Annotation*:—*N.F. Re Carr, Carr v. Carr* (1888), 36 W. R. 688.

2939. —[—]The ct. may, if it see fit, make the dividends arising from an investment of a fund in ct. payable to one of several trustees.—*Re COULSON'S SETTLEMENT* (1867), 17 L. T. 27.

2940. —[—]*MILNE v. GILBART*, [1875] W. N. 128.

2941. —[—]It is not desirable as a general rule to order income to be paid to trustees, "or either of them," according to the form in *Selon on Decrees*, p. 88, Sect. 4, No. 2.—*Re CARR, CARR v. CARR* (1888), 36 W. R. 688.

#### E. Sale.

See, generally, *SALE OF LAND*, Vol. XL., pp. 52-69.

#### SUB-SECT. 10.—EFFECT OF ORDER FOR ADMINISTRATION.

See, generally, *EXECUTORS*, Vol. XXIV., pp. 799-804, Nos. 8287-8330.

2942. *Power of trustees determined.*—In this action for the administration of the trusts of a settlement, estates were directed to be sold, & the proceeds being paid into ct., the chief clerk certified that the fund in ct. was divisible among

three persons A., B., & C. The shares of both B. & C. were at different times mortgaged to two persons. The second mtgee. in June, 1875, gave notice of his mtgc. to the trustees of the settlement.

In Jan. 1877, the first mtgee. obtained a stop order on the fund in ct. The chief clerk certified that the second mtgee. was entitled to priority over the first mtgee. on the ground of prior notice. On summons to vary the chief clerk's certificate:—*Held*: when the ct. took upon itself the administration of the fund, the trustees ceased to have any power over it, & the stop order must prevail over the notice to the trustees.—*PINNOCK v. BAILEY* (1883), 23 Ch. D. 497; 52 L. J. Ch. 880; 48 L. T. 811; 31 W. R. 912.

*Annotation*:—*Refd. Stephens v. Green, Green, v. Knight* [1895] 2 Ch. 148.

#### SUB-SECT. 11.—COSTS.

See, generally, *EXECUTORS*, Vol. XXIV., pp. 823-863, Nos. 8559-9017.

*Costs of legal proceedings generally.*—See Sect. 3, sub-sect. 3, *ante*.

*Costs of application for directions.*—See Sect. 3, sub-sect. 5, C., *ante*.

*Adjustment as between capital & income.*—See, generally, *SETTLEMENTS*, Vol. XL., pp. 686-689, Nos. 2208-2247.

## Part IV.—Duties of Trustees.

### SECT. 1. IN GENERAL.

2943. *Duty to act in trust—& concur in all necessary acts.*—O. was appointed, with five other trustees, under a deed which provided that every act done under the trust should be with the concurrence of at least three of the trustees. Three of the trustees advanced part of the trust fund to K., one of the parties interested, upon the security of an insurance upon his life, in which act O. refused to concur. Upon the death of K. the insurance office, before payment of the money, required a discharge from all the trustees, of whom only three remained alive, in which discharge O. having refused to concur:—*Held*: he should execute the discharge, & concur in all lawful & necessary acts to give effect to the trust.—*OUCHTERLONY v. LYNEDUCH (LORD)* (1830), 7 Bli. N. S. 448; 5 E. R. 839, 11 L.

2944. —[—] *While remaining trustee.*—(1) Trustees & exors. who, for upwards of a year after their testator's death, allowed a considerable portion of the assets to lie unproductive in the hands of a banker who failed, were, under the circumstances, charged with the loss.

(2) A man may renounce a trust or he may refuse to undertake it, but having once accepted it, . . . he must discharge its duties, so long as his character of trustee subsists (*LORD BROUGHAM, C.*)—*MOYLE v. MOYLE* (1831), 2 Russ. & M. 710; 39 E. R. 565, L. C.

*Annotations*:—As to (1) *Distd. Johnson v. Newton* (1853), 11 Hare, 160; *Wilks v. Groom* (1856), 25 L. J. Ch. 724.

2945. *Duty not to dispute possession of cestui que trust.*—Trustees not to dispute the possession of their *cestui que trust*.—*ARMSTRONG d. TINKER v. PERRIE* (1766), 3 Burr. 1898; 97 E. R. 1159.

2946. —[—] *Ejection of tenant for life—Liability of trustees for accidental deficiency in rent.*—Trustees, who joined with remainderman to eject *cestui que trust* for life, not excused from making good the whole rent reserved by subsequent accidental deficiencies.—*KAYE v. POWELL* (1791), 1 Ves. 408; 30 E. R. 410, L. C.

2947. *Duty not to dispute title of cestui que trust.*—It is not competent for a trustee to dispute the title of his *cestui que trust*.—*PEARSON v. SMEDLEY* (1838), 2 Jur. 758.

2948. *Duty to disclose bias or interest—Before*

#### PART III. SECT. 11, SUB-SECT. 9.—E.

1. *Whether order made upon interlocutory application.*—*TOWNSHEND v. BROWN* (1890), 22 N. S. R. 423.—*CAN.*

*G. Petition by trustees of English trust—To sell land in Scotland.*—Trustees under an English trust having obtained the sanction of the High Ct. of Justice in England, petitioned the ct. in the exercise of its *nobile officium* to authorise the sale of certain heritable subjects belonging to the trust estate which were situated in Scotland. The ct. granted the petition.—*ALLAN'S TRUSTEES* (1897), 24 R. (Cl. of Sess.) 718; 34 Sc. L. R. 532; 4 S. L. T. 361.—*SCOT.*

#### PART III. SECT. 11, SUB-SECT. 10.

b. *Trustees directed to bring necessary properties into possession.*—*GHAZAFAR HUSAIN KHAN v. YAWAR HUSAIN* (1905), 1 L. R. 28 All 112.—*IND.*

#### PART IV. SECT. 1.

2947 i. *Duty not to dispute title of cestui que trust.*—Equity will not permit a trustee to evict his *cestui que trust*.—*SHINE v. GOUGH* (1811), 1 Bull. & B. 436.—*IR.*

2947 ii. —[—]—This ct. looks upon the equitable right as if it were the estate: & if the person who has the legal title thinks proper to desert his duty, & abandon the party whom it

was his business to protect, this ct. will not only compel him to perform his duty, but in the meantime will give to the *cestui que trust* all the benefit he would have regularly obtained if his trustee had acted properly.—*MAJONE v. GERAGHTY* (1843), 5 I. Eq. R. 549; 3 Dr. & War. 263; 2 Con. & Law. 235; *affd.* (1847), 1 H. L. Cas. 81.—*IR.*

2947 iii. —[—]—A person who has accepted property as a trustee & held it as such is not at liberty to dispute the title of his *cestui que trust*, though that title be doubtful.—*NELIGAN v. ROOPE* (1873), 7 I. R. Eq. 332.—*IR.*

k. *Duties as to management of station properties.*—It is impossible to lay

## Sect. 1.—In general. Sect. 2.]

**accepting trust with discretionary power.]**—A person, before he accepts a trusteeship, to which a discretionary power is annexed, is bound to disclose any circumstances in his situation, which give him a bias or an interest against the due exercise of that discretionary power.

If he accepts the trusteeship, without disclosing such circumstances in his situation, he cannot afterwards exercise the discretionary authority for his own benefit.—*PEYTON v. ROBINSON* (1823), 1 L. J. O. S. Ch. 191.

**2949. Duty to convey—To cestui que trust.]**

Where a trust estate descended to one who refused to execute a conveyance to the *cestui que trust*, after it had been approved by his solr., unless he were paid a sum of money, the ct. ordered the conveyance, with costs against deft.—*WATTS v. TURNER* (1830), 1 Russ. & M. 634; 39 E. R. 244.

**2950.** ———.]—*LLOYD v. WILLINGS* (1843), 1 L. T. O. S. 358.

**2951.** ———.]—**To person equitably entitled.]**—The owner of an equitable estate conveyed it to trustees upon trust for sale, & by a deed of even date declared the trusts upon which the produce of the sale were to be applied. The party, who had the more legal estate & no beneficial interest, refused to convey it to the equitable trustee, unless the persons interested as *cestuis que trust* under the deed of even date were made parties to the conveyance. He was not justified in that refusal, but as he had acted *bona fide* under the advice of a conveyancer of character, the ct. made the decree against him, without costs.—*ANGIER v. STANNARD* (1834), 3 My. & K. 566; 3 L. J. Ch. 216; 40 E. R. 216.

**2952.** ———.]—**Trustee refusing to act.]**—*JEFFERSON v. TYLER* (1845), 6 L. T. O. S. 343; 9 Jur. 1083.

**2953. Duty to produce title deeds—Draft & deed paid for by cestui que trust—Trustees ordered to deliver draft to cestui que trust.]**—The ct. ordered an attorney, who held a deed as trustee, to deliver the draft of it to the *cestui que trust*, who had paid for the deed & draft.—*Ex p. HOLDSWORTH* (1838), 4 Bing. N. C. 386; 1 Arn. 189; 6 Scott, 170; 7 L. J. C. P. 225; 132 E. R. 836.

**2954.** ———.]—*SIMPSON v. BATHURST, SHEPHERD v. BATHURST*, No. 3058, *post*.

**2955. Duty to administer trust strictly—Whether deviation permitted—In interests of cestuis que trust—Necessity to satisfy court that deviation beneficial.]**—A trustee is not in all cases, to be made liable upon the mere ground of having deviated from the strict letter of his trust; for such deviation may be necessary or beneficial to the interests of the *cestuis que trust*; but when a trustee ventures to deviate from the letter of his trust, he does so under the obligation & at the peril of afterwards satisfying the ct. that the deviation was necessary or beneficial.—*HARRISON v. RANDALL* (1851), 9 Hare, 397; 21 L. J. Ch. 204; 16 Jur. 72; 68 E. R. 562.

*Annotation:—Mentd. Rowley v. Rowley* (1854), 23 L. T. O. S. 55.

**2956.** ———.]—**Variation of investment—Onus of proof that investment proper.]**—*NORRIS v. WRIGHT*, No. 3781, *post*.

**2957.** ———.]—**Trust for sale—Sale postponed where property increasing in value.]**—*MORRIS v. MORRIS*, No. 3130, *post*.

**2958.** ———.]—**Direction requiring annual accounts—Trustees liable for failure to call for accounts.]**—Where testator gives power to his trustees to appoint a factor to the estate who may be one of themselves, but directs them to require annual accounts, the trustees are guilty of *culpa lata* if they fail to call for annual accounts.—*CARRUTHERS v. CARRUTHERS*, [1896] A. C. 659, H. L.

**2959. Duty of trustee to devise estate—To prevent vesting in lunatic or person out of jurisdiction.]**

—*Semble*: a trustee can, & it may often be his duty to devise a trust estate to prevent the legal estate from vesting in a lunatic or a person out of the jurisdiction or in any other person who ought not to be a trustee.—*WILSON v. BENNETT* (1852), 5 De G. & Sm. 475; 21 L. J. Ch. 741; 19 L. T. O. S. 243; 16 Jur. 966; 64 E. R. 1205.

*Annotations:—Refd. Hall v. May* (1857), 3 K. & J. 685; *Stevens v. Austen* (1861), 3 E. & E. 685; *Osborne v. Rowlett* (1880), 13 Ch. D. 774.

**2960. Duty where clear legal title shown.]**

A trustee is bound to act with reference to the trust fund, whenever a clear legal title to it is shown (*PAGE WOOD, V.-C.*).—*WARTER v. ANDERSON* (1853), 11 Hare, 301; 1 Eq. Rep. 266; 21 L. T. O. S. 219; 1 W. R. 493; 68 E. R. 1289.

**2961. Duty to explain rights to cestuis que trust.]**

—Testator, by his will, gave the residue of his property to three trustees, whom he appointed exors., upon trust to sell & invest same & to pay the income thereof to his widow for life, & after her decease, to his children, who were all infants at the time of his death. The eldest child attained twenty-one in 1839, & the youngest in 1846. The three exors. proved the will, but one of them almost exclusively acted. The money which was the proceeds of the estate was suffered by two of the exors. to remain in the hands of the third, who ultimately became insolvent. On the youngest child attaining twenty-one, he, on behalf of himself & his brothers & sisters, attempted to obtain payment from the acting exor., & in 1848 wrote to him a letter consenting to receive payment of the amount then admitted to be due by annual instalments. In 1849, & shortly before the insolvency of the acting trustee, a bill was filed by all the children against the three trustees for the purpose of making them each responsible:—*Held*: inasmuch as it was the duty of the three trustees to have explained to their *cestuis que trust* what their rights were, & as they had not done so, there was nothing in the conduct of the children to deprive them of their remedy against the three trustees, who were accordingly declared to be jointly & severally liable to make good the deficiency.—*BURROWS v. WALLS* (1855), 5 De G. M. & G. 233; 3 Eq. Rep. 960; 25 L. T. O. S. 18; 3 W. R. 327; 43 E. R. 859, L. C.

**2962. Duty to give name to action on behalf of cestui que trust—Although of opinion that action unreasonable.]**—A trustee cannot, upon receiving a proper indemnity, refuse the use of his name to his *cestui que trust*, for the purpose of prosecuting an appeal in the House of Lords, on the ground that he thinks such appeal unreasonable, & that he is the solr. of the party in whose favour the decree appealed from was made.—*PAKINGTON v. BENBOW* (1857), 29 L. T. O. S. 194; 5 W. R. 670.

**2963. Duty to do nothing inconsistent with position—Acceptance of inconsistent trusts.]**—

down any general principle by which station properties in Australia in the hands of trustees should be managed, or by which the share of profits which would belong to the tenant for life

as against remaindermen should be ascertained as to how capital should be preserved, or as to what are to be regarded as profits or what as capital in any given instance but these things

must depend upon the wise & prudent discretion of those who have the management of the station for the time being.—*Re MOORE'S WILL, FANNING v. FANNING*, [1907] V. L. R. 639.—*AUS.*

Where by Act of Parliament lands were vested in trustees upon trust for sale, & subject thereto upon trusts annexing the rents inalienably to the earldom of Shrewsbury, & the last earl attempted to disentail & devise the property annexed to the earldom to the same trustees upon trust for a particular claimant, & the trustees accepted that trust, & claimed to receive the rents in that character, pending proceedings by pltf. to establish his claim to the earldom, a receiver was ordered of the estates, if any, vested in the trustees, of which the tenants were not paying rent to them; & defts. were put upon an undertaking as to the rest, upon the ground that the trusts they had accepted under the will were in conflict with the prior trusts upon which they held the estates.—*TALBOT (EARL) v. HOPE SCOTT* (1858), 4 K. & J. 139; 27 L. J. Ch. 273; 31 L. T. O. S. 392; 4 Jur. N. S. 1172; 6 W. R. 269; 70 E. R. 58.

*Annotations*:—*Reid*, *Carrow v. Ferriol*, *Dunn v. Ferriol* (1868), 3 Ch. App. 719; *Berry v. Keen* (1882), 51 L. J. Ch. 912; *Foxwell v. Van Grutten*, [1897] 1 Ch. 61.

2964. —[No fiduciary agent shall, under pain of consequences, thoroughly well-known . . . intentionally place himself in a position in which his interest may conflict with his duty (*RIGBY, L.J.*).—*LAGUNAS NITRATE Co. v. LAGUNAS SYNDICATE*, [1899] 2 Ch. 392; 68 L. J. Ch. 699; 81 L. T. 334; 48 W. R. 74; 15 T. L. R. 436; 7 Mans. 165, C. A.]

*Annotations*:—*Reid*, *Merchants' Fire Office v. Armstrong* (1901), 17 T. L. R. 709; *Exploring Land & Minerals Co. v. Kolkmann* (1905), 94 L. T. 231; *Piercy v. Mills*, [1920] 1 Ch. 77. *Mend*, *Re National Bank of Wales*, [1899] 2 Ch. 622; *Amundson Soda Co. v. Chamberlain*, [1918] 1 Ch. 266; *Re City Equitable Fire Insce.*, [1925] 1 Ch. 407.

Obtaining personal advantage.]—*See* Sect. 10, *post*.

2965. Duty not to oppose wishes of testator -- With regard to cestuis que trust.]—Testator by his will desired his trustee to give up his farm to his nephew, pltf., if the landlord would accept him as tenant; & in that case he bequeathed to him the farming stock. He also gave some real property to pltf., & gave legacies & annuities to pltf.'s father, mother, & sisters, & other persons, including the trustees. One of the trustees of the will was steward to the landlord. There were hardly any assets to pay the legacies & annuities if pltf. took the farming stock, upon which the trustees represented the case to the landlord, who left it to their decision whether pltf. should be accepted as tenant. They accordingly refused to let him be accepted, unless he executed a deed making over the devised real estate to pay the legacies & annuities:—*Held*: it was a breach of trust on the part of the trustees to endeavour to induce the landlord to refuse his consent to pltf. having the tenancy, which testator had by his will expressed his wish for him to have; & the deed having been obtained by means of that breach of trust, must be set aside.—*ELLIS v. BARKER* (1871), 7 Ch. App. 104; 41 L. J. Ch. 64; 25 L. T. 688; 20 W. R. 160.

2966. Duty to protect estate.]—An estate was sold under the ct., the auctioneer & surveyor being appointed in chambers. The solrs. sent in a bill for taxation, claiming the fees they had paid to the auctioneer & the surveyor, & also the scale charges for conducting the sale, under the Solicitors Remuneration Act, 1881 (c. 44), General Order, r. 4, sched. 1, Part 1, r. 11, & subsequently withdrew the charge in respect of the auctioneer. The taxing master disallowed the scale charges, & eventually the trustees of the estate took out a summons to review the taxation, seeking to have the scale charges allowed against the estate. The solrs. did not appear:—*Held*: the application

being made by the trustees, whose duty it was to protect the estate not to seek to charge it, made the application too objectionable to be entertained.—*WOOD v. CALVERT* (1886), 55 L. T. 53; 34 W. R. 732.

2967. Duty to act reasonably.]—A trustee is bound to act reasonably (*LORD HERSCHIEL, C.*):—*Re CHAPMAN, FREEMAN v. PARKER* (1894), 72 L. T. 66; 11 T. L. R. 177; 39 Sol. Jo. 217, C. A.

Duties of representatives.]—*See* EXECUTORS, Vol. XXIII., pp. 318 *et seq.*

Trustees as members of companies.]—*See* COMPANIES, Vol. IX., pp. 199–206.

## SECT. 2.—ACQUAINTANCE WITH MATTERS CONCERNING TRUSTS.

2968. Trustee stranger to cestui que trust—Duty to communicate with cestui que trust—Before acceptance of office.]—A party accepting the office of trustee, though the form of appointment is legally followed, does so at his peril. If he is a stranger to the *cestui que trust*, it is his duty to communicate with them before accepting the office.—*PEATFIELD v. BENN* (1853), 17 Beav. 522; 23 L. J. Ch. 497; 2 W. R. 68; 51 E. R. 1137.

2969. What trustee should ascertain—Whether fund got in—Covenant to settle after-acquired property.]—*Re STRAHAN, Ex p. CEAVES*, No. 3757, *post*.

2970. — Notice of Incumbrances—Duty to inquire of old trustees.]—It would introduce a new liability very hard indeed upon trustees, if they are to be fixed with any consequences for the want of making that inquiry [inquiry whether the old trustees had received notice of incumbrances] (*JAMES, L.J.*).—*PHIPPS v. LOVEGROVE, PROSSER v. PHIPPS* (1873), L. R. 16 Eq. 80; 42 L. J. Ch. 892; 28 L. T. 584; 21 W. R. 590.

*Annotations*:—*Reid*, *Newman v. Newman* (1885), 28 Ch. D. 674; *Low v. Bouverie*, [1891] 3 Ch. 82.

2971. — — — — —]—New trustees are not fixed with notice through retiring trustees of incumbrances affecting the trust estate, of which no notice appears amongst the trust documents, & the existence of which, though known to the retiring trustees, is not disclosed to them.

When persons are asked to become new trustees, they are bound to inquire of what the property consists that is proposed to be handed over to them, & what are the trusts. They ought also to look into the trust documents & papers to ascertain what notices appear among them of incumbrances & other matters affecting the trust (*KEKEWICH, J.*).—*HALLOWS v. LLOYD* (1888), 39 Ch. D. 686; 58 L. J. Ch. 105; 59 L. T. 603; 37 W. R. 12.

2972. — — — — — Duty to examine trust documents.]—*HALLOWS v. LLOYD*, No. 2971, *ante*.

2973. — — — — — Extent of trust property.]—In a partition action an order was made directing the taxation of the costs of the parties, including in the costs of defts., the trustees, "one moiety of any costs, charges, & expenses properly incurred by them as trustees of the will of testator beyond their costs" of the action. The taxing master disallowed the costs of former trustees, who were dead, paid to the exor. of the survivor in consideration of his transferring the trust property, also costs of examining into the state of the trust property, & the validity of the donee of the power in appointing. On summons to review taxation:—*Held*: it was not only the right, but the duty, of the new trustees to see what the estate consisted of & that the power was properly exercised.—*HARVEY v. OLIVER* (1887), 57 L. T. 239.

*Sect. 2.—Acquittance with matters concerning trusts. Sect. 3: Sub-sects. 1 & 2.]*

2974. ———.]—HALLOWS v. LLOYD, No. 2971, *ante*.

2975. ——— Terms of trust.] HALLOWS v. LLOYD, No. 2971, *ante*.

### SECT. 3.—POSSESSION AND PRESERVATION OF TRUST PROPERTY.

#### SUB-SECT. 1.—POSSESSION.

2976. Trustees must obtain possession of property.]—Trustees charged with a loss occasioned by their negligence, though without any corrupt motive. The property would not have been in a situation to sustain that loss, if it had not been for their negligence.

If they had taken possession of the property, it would not have been in his possession (GRANT, M.R.).—CAFFEY v. DARBY (1801), 6 Ves. 488; 31 E. R. 1159.

*Annotations*—*Mentd.* Jones v. Dwyer (1812), 15 East, 21; Smith v. Topping (1833), 2 Nev. & M. K. B. 421; Thompson v. Hopper (1858), L. B. & L. 1038.

2977. ———.]—Trustees are liable for not taking proper steps to get the trust fund transferred into their names.—M'GACHEN v. DEW, DEW v. M'GACHEN (1851), 15 Beav. 84; 51 E. R. 468.

2978. ———.]—By a marriage settlement, a debt due from A. was assigned to A. & B., upon trust, "with all convenient speed," to get in & invest in Consols. For two & a half years B. took no steps to get in the money, & A. then became bkpt.

*Held*: B. was responsible for the loss.—GROVE v. PRICE (1858), 26 Beav. 103; 53 E. R. 836.

2979. ——— Person having possession unable to pay.—No proof of bankruptcy.]—A marriage settlement made in 1811, recited that the husband was entitled to 20,000 rupees secured by a note of the East India Co.; & 10,000 rupees, part thereof, were thereby assigned, with certain property of the wife, to the trustees of the settlement, upon trust, for the husband & wife for their lives, with remainder for the children of the marriage. One of the trustees died six weeks after the settlement was made. The husband died in 1819 & the wife in 1822. The trustees did not, nor did the survivor, take any step during the lifetime of the husband to recover the 10,000 rupees. After they had attained their ages of twenty-one years, the children filed a bill against the surviving trustee & the representatives of deceased trustee, for an account of the trust funds, charging them with the 10,000 rupees. Under a reference to the master, to inquire whether debt, might, due by diligence, have received or got in the 10,000 sicca rupees, debt, produced evidence showing it to have been the common belief of persons who knew the husband, that he was not possessed of any such property, but no proof was given that the husband was insolvent; & the ct. charged the surviving trustee with the fund, & interest from the death of the wife, & directed a reference to inquire the value of the 10,000 rupees at the time of the settlement. The representative of the trustee who died six weeks after the making of the settlement was not a necessary party, such trustee not having possessed any part of the trust funds, & not being chargeable with the default.—SIMES v. EYNE (1847), 6 Hare, 137; 67 E. R. 1113.

2980. ——— Power to leave outstanding with

consent of beneficiary.—Consent not retrospective.]

—By a marriage settlement in 1834 the husband gave a bond for £2,000 to the trustees, to be paid within six months of the marriage; to be left outstanding with the consent in writing of the wife & husband; & to be called in with the like consent. Another debt of £4,000 was included in the settlement. The £2,000 was never got in. The husband became bkpt. in 1836; the trustee proved for the debt, but afterwards joined in a *supersedeas*, on the bkpt. guaranteeing to his creditors 10s. 6d. in the pound. The other creditors were so paid; the trustees never took their compensation. In 1838 the wife & husband gave a written consent that the debt should remain out on the husband's bond. No other consent was ever given. The husband was again bkpt. in 1847. In 1834 the trustees, had at the instance of the husband, having no power to invest in the purchase of lands, purchased copyhold land & buildings with part of the £4,000. The husband erected new & valuable buildings on the land at his own expense, increasing its value far more than £2,000. There was no evidence to connect this outlay with the discharge of the bond debt:—*Held*: the trustees were liable for not getting in the money before 1836 if there was no consent; (2) the wife's consent in 1838 was not retrospective.

—WILES v. GRESHAM (1854), 2 Drew. 258; 2 Eq. Rep. 560; 23 L. J. Ch. 607; 2 W. R. 355; 61 E. R. 718; on appeal, 5 De G. M. & G. 770, L. J.J.

*Annotations*—*As to* (1) *Apld.* Re Deare, Deare v. Deare (1895), 11 T. L. R. 183. *Generally, Reid.* Andrews v. M'Guffog (1886), 11 App. Cas. 313.

2981. ——— Recital of transfer in marriage settlement.—Transfer not effected.]—A marriage settlement of 1807, executed by all parties, contained a recital of the transfer of a sum of stock into the name of trustees. The stock never was transferred. The trustees died, one in 1827, the other in 1840. The person who ought to have transferred the stock became bkpt. in 1848, & died in 1851, only a fourth part dividend being got in under his bkpcy. — *Held*: a bill filed in 1855 by a child of the marriage, who had attained twenty-one years in 1839, was not too late; & the estates of the two trustees were declared to be jointly & severally liable.—STORY v. GAFF (1856), 2 Jur. N. S. 706.

*Annotation*—*Apld.* Bittlebank v. Goodwin (1868), L. R. 5 Eq. 545.

2982. ——— Unless injurious to beneficiaries.—Discretion of trustee.]—Now, the next question is, was there improper neglect? Was there neglect in realising the trust fund? I have read the evidence of [the witnesses] & they all satisfy me of one thing that it would have been impossible to have drawn out & realised the whole of this fund without creating the immediate bkpcy. of W. It clearly, therefore, was not his duty to do that, because by doing that he would have ruined W., who was one of the objects of the trust, & would have ruined & done great injury to W.'s children, who were also objects of the trust. No man can say he did not exercise a sound discretion in not attempting to draw out the whole of the fund, when drawing it out, or attempting to draw it out, would have been attended with consequences such as I have stated (LORD LYNCHURST, C.).—WARD v. WARD (1843), 2 H. L. Cas. 777, n.; 9 E. R. 1287, H. L.

*Annotation*—*Reid.* Paddon v. Richardson (1855), 7 Do G. M. & G. 563.

PART IV. SECT. 3, SUB-SECT. 1.  
29761. Trustees must obtain possession of property.]—Under the Mahomedan law possession is as necessary in the

case of trusts as in the case of gifts— not necessarily direct possession of the premises, but the best possession of which the property is capable at the

time, either actual, symbolical or constructive.—MOOSABHAI v. YACOO-BHAI (1905), I. L. R. 29 Bom. 267.—IND.

**2983.** — Debt due from one trustee left outstanding.—Indemnity clause does not exonerate trustee.]—The usual indemnity clause does not exonerate one of two trustees from a loss occasioned by debt due from the other, having been suffered to remain outstanding.—*MUCKLOW v. FULLER* (1821), Jac. 198; 37 E. R. 824, L. C.

*Annotations:*—*Expld.* *Re City Equitable Fire Insce.*, [1825] 1 Ch. 407. *Reid.* *Bayley v. Rees* (1845), Holt, Eq. 80; *Paddon v. Richardson* (1855), 7 De G. M. & G. 563; *Re Lord & Fullerton* (1865), 65 L. J. Ch. 184. *Mentd.* *Silves v. Guy* (1849), 1 H. & Tw. 523.

**Power to leave money in business.]—See** sect. 11, *post*.

**Duty to bring action to obtain possession.]—**See Nos. 3005–3013, *post*.

#### SUB-SECT. 2.—PRESERVATION.

**2984.** Duty of trustee as to preservation.—Mortgagor trustee.]—*BURGH v. FRANCIS* (1673), Cas. temp. Finch, 28; 3 Swan. 536, n.; 23 E. R. 16, L. C.

*Annotations:*—*Consd.* *Whitworth v. Gauguin* (1846), 1 Ph. 728. *Reid.* *Ross v. Army & Navy Hotel Co.* (1886), 34 Ch. D. 43. *Mentd.* *Pigott v. Nowor* (1877), 3 Swan. 534, n.; *Ray v. Sherwood & Ray* (1836), 1 Curt. 173; *Bugden v. Bignold* (1843), 2 Y. & C. Ch. Cas. 377.

**2985.** — Liability for breach of duty.—Trustee releasing security without consideration.]—A trustee in a recognisance releases it without any consideration. Decreed to pay the principal & interest not exceeding the penalty.—*JEVON v. BUSH* (1685), 1 Vern. 342; 23 E. R. 508, L. C.

*Annotation:*—*Reid.* *Goodright d. Hoole v. Sales* (1767), 2 Wils. 320.

**2986.** — Money left with banker.—Absence of security.]—Trustee for children under a marriage settlement, who was to take the best security, takes personal security, & lodges the money in the hands of a banker without taking bond; for money of his own he took bond: The banker fails. This is gross negligence in trustee & shall make him liable, & it is no excuse to say he could get no good mortgage security; for then he should have placed it on public security.—*ANON.* (1774), Lofft, 493; 98 E. R. 764.

**2987.** — Trustee leaving country after depositing.]—Breach of trust by allowing moneys appropriated by trustee for a particular purpose, to remain in hands of bankers in India after trustee had quitted that country. *BROWN v. CLARK* (1837), 1 Jur. 838, L. C.

**2988.** — Retiring trustee.—Transfer of property to trustee incompletely appointed.]—A retiring trustee transferred stock into the name of a proposed new trustee, whose appointment was, however, never completed. The latter subsequently sold out the stock, & allowed the *cestui que trust* to misapply the proceeds:—*Held:* the retiring trustee was chargeable with a breach of trust in transferring the stock.—*PEARCE v. PEARCE* (1856), 22 Beav. 248; 25 L. J. Ch. 893; 28 L. T. O. S. 34; 2 Jur. N. S. 843; 52 E. R. 1103.

**2989.** — Trustee removed by court.—Failure to pay fund to new trustees within reasonable time.]—A trustee was removed by decree of the ct., & ordered to pay the balance of the trust fund in his hands to the new trustees appointed by such decree; but no time was fixed by the decree for the payment. The retiring trustee, having omitted for some weeks to make the payment ordered, a correspondence took place between his solr. & the solrs. of the new trustees, who in

their last letter fixed a day by which they said the payment must be made. Shortly before the day so fixed, the bank in which the trust balance had been deposited by the retiring trustee failed:—*Held:* the retiring trustee was personally liable to make good the fund to the trust estate.—*LUNHAM v. BLUNDELL* (1857), 27 L. J. Ch. 179; 4 Jur. N. S. 3; 6 W. R. 49.

**2990.** — Information of intended breach given to *cestui que trust*.]—It is the duty of a trustee to observe the trust & to preserve the property for the benefit of those entitled in remainder, & he cannot be permitted to escape from the liability incident to that duty simply by informing his *cestui que trust* that he has committed, or intends to commit, a breach of it.—*LIFE ASSOCN. OF SCOTLAND v. SIDDAL, COOPER v. GREENE* (1861), 3 De G. F. & J. 58; 4 L. T. 311; 7 Jur. N. S. 785; 0 W. R. 541; 45 E. R. 800, L. C. & L. J.

*Annotations:*—*Reid.* *Buckmaster v. Buckmaster* (1886), 55 L. T. 279; *Evans v. Benyon* (1887), 37 Ch. D. 329; *Lvell v. Kennedy*, *Kennedy v. Lvell* (1889), 14 App. Cas. 437; *Boar v. Ashwell*, [1893] 2 Q. B. 390; *Price v. Phillips* (1891), 11 T. L. R. 86. *Mentd.* *Re Carr's Trust* (1871), 19 W. R. 675; *Evans v. Davis* (1878), 10 Ch. D. 717.

**2991.** — Trustee delaying payment of money when requested.]—(1., being entitled to a share of an estate, went abroad leaving a power of attorney to receive such share. The estate was sold, but the purchaser requiring G.'s confirmation, his share was deposited in the names of E. & P. in the bank on a declaration of trust. On the confirmation arriving, E. was repeatedly applied to for more than four months but neglected to hand the fund over, alleging a difficulty in making out the account; the bank failed, & the money was lost:—*Held:* E. was liable to restore the money with interest & pay the costs, P. being always ready to hand over.—*GOUGH v. ETTY* (1860), 20 L. T. 358.

**2992.** — Fraud of trustee's solicitor.]—(1) *Scmble:* a trustee is liable for the loss of a trust fund caused by his solr. having committed a fraud on the occasion of the investment of the fund on mtge.

(2) Upon the occasion of the investment of a trust fund on mtge., the trustee employed the same solr. as the mtgor. Subsequently he had reason to suspect the sufficiency of the security, but took no steps to inquire into the matter. It afterwards turned out that the solr. had practised a fraud on the trustee, & that the security was insufficient:—*Held:* the trustee was liable for the loss occasioned to the trust estate.—*SUTTON v. WILBERS* (1871), L. R. 12 Eq. 373; 41 L. J. Ch. 30; 25 L. T. 202; 19 W. R. 1021.

**2993.** — Assignment of insurance policy to sole new trustee.]—By a marriage settlement the husband assigned a policy of assurance on his life to the two trustees of the settlement, & covenanted to pay the premiums. One trustee disclaimed; & the other, by assigning the policy to a single new trustee, enabled the husband to mortgage & dispose of the policy & a bonus thereon:—*Held:* such breach of trust being an act of commission & not of omission only, the trustee so assigning to the new trustee was liable to pay to the trust estate the money actually received for the policy.—*KINGDON v. CASTLEMAN* (1877), 46 L. J. Ch. 448; 36 L. T. 141; 25 W. R. 345.

**2994.** — Money left with solicitors.]—Trustees held liable for breaches of trust in leaving money in the hands of a solr. who made away

testator's daughter, without impeachment of waste:—*Held:* not to exonerate the trustee from responsibility for wasting the trust property, but simply to empower him to do such

**PART IV. SECT. 3, SUB-SECT. 2.**  
1. Duty of trustee as to preservation.]—Trustees have no duty to perform as to land except to guard it from waste.—*Re DURBRIDGE* (1877),

3 V. L. R. (Eq.) 21.—*AUS.*  
m. —.]—Provision in a will that deft. should hold land, etc., in trust to cultivate, demise, let & manage the same to the best advantage for



**Sect. 3.—Possession and preservation of trust property: Sub-sects. 2 & 3.]**

with it, & the ct. refused to grant them relief under Judicial Trustees Act, 1896 (c. 35), s. 3, on the ground that, though they had acted honestly, they had not acted reasonably.—**WILLIAMS v. BYRON** (1901), 18 T. L. R. 172.

**2995. — Trustees of underlease—Duty to obtain compensation clause for right of renewal—In Act before Parliament to make new street.]**—Trustees of an underlease of church property authorised to take steps to obtain a clause for compensation for their tenant right of renewal inserted in an Act pending in Parliament, to make a new street, which would require part of the property.—**JONES v. POWELL** (1841), 4 Beav. 96; 49 E. R. 274.

**2996. — Prevention of improper charges.]**—A person creating a trust has a right to expect of his trustee that he will be vigilant in seeing that no improper charges are made, & in the case of a solr.'s bill of costs, although the taxing master aids a trustee in scrutinising the bill, yet he does not alter the duty of the trustee to do so himself. The rule above stated is applicable to cases where there are more than one trustee, also to those where one trustee acts as solr. at the request of the others, & at the request & with the sanction of the *cestui que trust*.—**BROUGHTON v. BROUGHTON** (1855), 5 De G. M. & G. 160; 25 L. J. Ch. 250; 1 Jur. N. S. 965; 43 E. R. 831; *sub nom.* **BROUGHTON v. WHITE, BROUGHTON v. BROUGHTON**, 20 L. T. O. S. 54; 3 W. R. 602, L. C.

**Annotations:—Mentd.** *Nicholson v. Tutin* (1857), 3 Jur. N. S. 235; *Pollard v. Doyle* (1860), 3 L. T. 432; *Crosskill v. Bower, Bower v. Turner* (1863), 32 Beav. 86; *Re Barber, Burgess v. Vinfome* (1886), 34 Ch. D. 77; *Re Corselle, Lawton v. Elwes* (1887), 34 Ch. D. 675; *Fild v. Hopkins* (1890), 44 Ch. D. 524; *Re Doody, Fisher v. Doody, Hilbert v. Lloyd*, [1893] 1 Ch. 129; *Re Andrew, Mellor & Smith* (1895), 39 Sol. Jo. 363; *Bath v. Standard Land Co.*, [1911] 1 Ch. 618.

**2997. — Assignor of insurance policy unable to pay premiums—Trustees authorised to sell.]**—A husband, on his marriage, assigned a policy on his life to trustees as a provision for his wife, but he afterwards became unable to pay the premiums. The ct. authorised the trustees to sell the policy & accumulate the produce.—**HILL v. TRENERV** (1856), 23 Beav. 16; 53 E. R. 7.

**Annotation:—Refd.** *Re Wells, Boyer v. Maclean*, [1903] 1 Ch. 848.

**2998. — Trustees having no fund to pay premiums.]**—By a marriage settlement, the husband assigned a policy on his life to trustees & covenanted to keep it up. The trustees neglected either to obtain possession of the policy or to give notice to the office, & the policy was mortgaged by the husband & afterwards sold & surrendered. The husband appearing to have been in insolvent circumstances, & unable to keep up the policy, & the trustees having no available funds for the purpose: *Held*: the trustees were not liable for the loss.

The only thing which they could have done would have been to sue J., but if he was unable to pay that would have been a useless proceeding. . . I cannot therefore charge the trustees (**ROMILLY, M.R.**).—**HOBDAV v. PETERS** (No. 3) (1860), 28 Beav. 603; 54 E. R. 498.

**Annotations:—Distd.** *Kingdon v. Castleman* (1877), 48 L. J. Ch. 448. **Conad.** *Re Brogden, Billing v. Brogden* (1888), 38 Ch. D. 546.

acts as he could do if a tenant who was not accountable for waste.—**VERNON v. SEAMAN** (1876), 11 E. D. 190.—**CAN.**

**n. —**—[A trustee for sale having made several agreements for sales, which were rendered abortive by the

refusal of the widow of settlor to bar her dower:—*Held*: the trustee was not liable for deterioration of the property, the decrease in value not having occurred through any default of his. — **EDINBURGH LIFE ASSURANCE**

**2999. — Use by tenant for life of settled chattels—Upon undertaking not to pledge.]**

Jewellery & other articles were given 'by deed to trustees in trust, after the death of a person who had the use of them for life, for sale, & the proceeds of the sale to be held in trust for an infant, with a gift over in the event of the infant dying under twenty-one. The tenant for life threatened to pledge them, & the trustees refused to deliver them to her:—*Held*: they were bound to deliver them to her, she undertaking not to pledge them.—**KAY v. WATKINS** (1869), 17 W. R. 983.

**3000. — Cultivation of property.]—EGMONT (EARL) v. SMITH, SMITH v. EGMONT (EARL), No. 3358, post.**

**3001. — Primary duty to protect.]**—(1) The primary duty of trustees is to protect the trust fund, & before they can claim the benefit of any charge or right of retainer against the interest of a married woman in the fund, they must show that such charge or right of retainer was created by her with a full knowledge of all the circumstances.

(2) *Seemle*: the separate estate of married women is only affected by breaches of trust where they have actually been actors in the transaction; not where they have merely acquiesced in or approved of the breaches of trust.—**SAWYER v. SAWYER** (1885), 28 Ch. D. 595; 54 L. J. Ch. 444; 52 L. T. 292; 33 W. R. 403; 1 T. L. R. 265. C. A.

**Annotations:—Consd.** *Re Holt, Re Rollason, Holt v. Holt*, [1897] 2 Ch. 525. **Refd.** *Re Somerset, Somerset v. Poulett*, [1894] 1 Ch. 231; *Mara v. Browne*, [1895] 2 Ch. 69; *Moxham v. Grant*, [1899] 1 Q. B. 480; *Fletcher v. Collis*, [1905] 2 Ch. 24.

**3002. — — — — —.]**—The duty of a trustee is properly to preserve the trust fund, to pay the income & the corpus to those who are entitled to them respectively, & to give all his *cestuis que trust*, on demand, information with respect to the mode in which the trust fund has been dealt with, & where it is (**LINDLEY, L.J.**).

It is no part of the duty of a trustee to assist his *cestui que trust* in selling or mortgaging his beneficial interest & in squandering or anticipating his fortune & it is clear that a person who proposes to buy or lend money on it has no greater rights than the *cestui que trust* himself. There is no trust or other relation between a trustee & a stranger about to deal with a *cestui que trust* & although probably such a person in making inquiries may be regarded as authorised by the *cestui que trust* to make them, this view of the stranger's position will not give him a right to information which the *cestui que trust* himself is not entitled to demand (**LINDLEY, L.J.**).—**Low v. BOUVERIE**, [1891] 3 Ch. 82; 60 L. J. Ch. 594; 65 L. T. 533; 40 W. R. 50; 7 T. L. R. 582, C. A.

**Annotations:—Refd.** *Elkington v. Hüter*, [1892] 2 Ch. 452; *Re Tillott, Lee v. Wilson*, [1892] 1 Ch. 86; *Re Wyatt, White v. Ellis*, [1892] 1 Ch. 188; *Le Lievre & Dennes v. Gould*, [1893] 1 Q. B. 491; *Ward v. Duncombe* (1893), 69 L. T. 121; *Oliver v. Bank of England*, [1902] 1 Ch. 610; *Porter v. Moore*, [1904] 2 Ch. 367; *Fry v. Smellie*, [1912] 3 K. R. 282; *Noeton v. Ashburton*, [1914] A. C. 932; *Banbury v. Bank of Montreal*, [1917] 1 K. B. 409; *Pierson v. Altrincham U. C.* (1917), 86 L. J. K. B. 969; *Everett v. Griffiths*, [1920] 3 K. B. 163. **Mentd.** *Balkis Consolidated Co. v. Tomkinson* (1893), 42 W. R. 204; *Williams v. Pinckney* (1897), 67 L. J. Ch. 34; *Whittington v. Seale-Hayne* (1900), 82 L. T. 49; *Whitechurch v. Cavanagh*, [1902] A. C. 117; *Exploring Land & Minerals Co. v. Kolckmann* (1905), 94 L. T. 234; *H. v. H.*, [1928] P. 206.

*Co. v. ALLEN* (1876), 23 Gr. 230.—**CAN.**

**o. — Right to raise money to preserve property.]—STRANRAER ORIGINAL SECESSION CONGREGATION**, [1923] S. C. 722.—**SCOT.**



**3003.** — Care of title deeds—Duty to deposit in safe place.—Deeds frequently referred to left with solicitor.]—(1) It is the duty of trustees to keep trust deeds under their own control, & to see that they are deposited in a place of safety so that no one else can take them away. But to this obligation there must be reasonable limits & where the deeds have to be frequently referred to, e.g. for the purpose of realising the trust estate, it is proper for them to be in the custody of the solr. to the trustees.

(2) In the case of bonds & certificates payable to bearer the trustees alone are responsible for their safe custody, & are not justified in leaving them under the control of a solr. or any other agent, but must deposit them in some safe place where they cannot be got at without the consent of the whole body of the trustees.—*FIELD v. FIELD*, [1894] 1 Ch. 425; 63 L. J. Ch. 233; 69 L. T. 826; 42 W. R. 346; 10 T. L. R. 131; 8 R. 201.

*Annotation:—As to (2) Distd. Re De Potholier, Dent v. De Potholier*, [1900] 2 Ch. 529.

**3004.** — Care of bonds & bearer certificates.]—*FIELD v. FIELD*, No. 3003, *ante*.

— Duty to insure.]—*See SETTLEMENTS*, Vol. XL., pp. 680, 681, Nos. 2158 2171.

#### SUB-SECT. 3.—INSTITUTION OF LEGAL PROCEEDINGS.

**3005.** Duty of trustees to take legal proceedings.—To obtain money due on covenant in marriage settlement—Money left outstanding with consent of cestuis que trust.—Application by cestuis que trust to call in money.]—Where by the terms of a marriage settlement a trustee was to compel payment of a sum of money due on covenant, but by consent of the *cestui que trusts* the money was left outstanding on that security. Upon their subsequent application to have the money called in & invested:—*Held*: the trustee was bound, if necessary, to enforce payment by an action on the covenant, without requiring any indemnity from the *cestuis que trust*; & in default of so doing he was compelled to pay the costs of a suit brought against him to enforce the execution of the covenant.—*KIRBY v. MASH* (1839), 3 Y. & C. Ex. 295; 8 L. J. Ex. Eq. 33; 3 Jur. 221; 160 E. R. 714.

**3006.** — — — — — Covenantor unable to pay whole sum—Trustee liable for amount which might have been obtained.]—A., on his marriage with B. by his marriage settlement covenanted with a trustee, that he would on Martinmas day 1824 pay £10,000, the trusts of which were to be for A. for life, with remainder to B. for life, with remainder to the children of the marriage, & in default of children, for the persons therein mentioned. A. died in 1836, without having performed the covenant. After A.'s death a suit was instituted by B. against the trustee, to make him personally liable for the non-performance of the covenant. A reference was made to the master to inquire whether A. was of ability, after 1824, to pay the £10,000, or any part of it. It appeared that A. had for seven years after 1824 an income of £1,800 a year, but that he had no other property than this income, & that he had always lived up to or exceeded his income. The master found that A.

was of ability during these seven years to have paid £4,200 in part performance of the covenant. No exceptions were taken to the report. On the hearing of the cause on further directions:—*Held*: the trustee was liable to pay £4,200, & had the report been excepted to, it would have been confirmed.—*MITLAND v. BATEMAN* (1844), 13 L. J. Ch. 273; 8 Jur. 926.

*Annotation:—Reid. Fenwick v. Greenwell* (1847), 10 Beav. 412.

**3007.** — — — — — All cestuis que trust of age—Duty to consider wishes of cestuis que trust.]—*BRADBY v. WHITCHURCH*, [1868] W. N. 81.

**3008.** — — — — —]—Trustees made personally responsible for the consequences of their neglect to enforce a covenant contained in a marriage settlement.

By a marriage settlement it was covenanted & agreed, that £5,000 Consols, part of the wife's property, should be transferred to trustees, upon certain trusts for the husband, wife, & children. At the time of the settlement, a sum of £1,946 was standing in the name of the wife; but the trustees took no steps to enforce a transfer, & it was sold out & misapplied by the husband:—*Held*: the trustees were personally responsible for the loss.

Where trustees are sought to be charged with a breach of trust by reason of their omission, the ct. takes care to see, before the trustee is charged, that it was within his power to perform the act which it was intended he should do (*LORD LANGDALE, M.R.*).—*FENWICK v. GREENWELL* (1847), 10 Beav. 412; 11 Jur. 620; 50 E. R. 610.

*Annotation:—Reid. Macnamara v. Carey* (1867), 15 W. R. 374.

**3009.** — — — — —]—A marriage settlement, executed in 1816, contained covenants by the husband to pay £3,000 within three years to the trustee, or, in default, to secure this sum by mtge. of certain real estate. This sum was to be held on trust for husband & wife successively for life, with remainder to their issue. No steps were taken by the trustee to enforce the covenants, & in 1846 he acted as solr. on a sale by the husband of the real estate bound by the covenant. In 1848 the trustee died. His extri. & devisees had notice of the breach of trust. In 1852 the husband became bkpt. The extri. of the trustee refused to prove for the trust sum under the bkpty., though requested so to do by the bkpt. In 1865 new trustees of the settlement were appointed by the ct., but their claim against the bkpt.'s estate was rejected as barred by lapse of time.

The husband died in 1866. Twenty years after the death of the trustee the bkpt.'s widow & children filed a bill against the representatives of the trustee to make his assets liable for the loss of the trust fund:—*Held*: the omission of the trustee to enforce the covenants was a clear breach of trust, & lapse of time was no bar to the rights of the *cestuis que trust* against his assets, as his representatives had, upon his death, notice of the breach of trust.—*WOODHOUSE v. WOODHOUSE* (1869), L. R. 8 Eq. 514; 38 L. J. Ch. 481; 20 L. T. 209; 17 W. R. 583.

*Annotation:—Reid. British Mutual Investment Co. v. Smart* (1875), 10 Ch. App. 569, n.

**3010.** — — — — — To obtain possession of trust funds—Unless well founded belief that action fruitless.]—*HOBDAV v. PETERS* (No. 3), No. 2908, *ante*.

**3011.** — — — — — Onus of proof on trustees.]

*Fitzgerald v. Smith* (1889), 15 V. L. R. 467.—**AUS.**

*q.* — — — — — To recover trust property.]—*MILLAR'S TRUSTEES v. POLSON* (1897), 36 Sc. L. R. 798.—**SCOT.**

#### PART IV. SECT. 3, SUB-SECT. 3.

*p. Duty of trustee to take legal proceedings—To test validity of lease.]—Where the beneficiaries consented, the ct., upon an originating summons,*

gave the trustees leave to bring an action to test the validity of a lease of a portion of the trust property, but carefully abstained from going into the question of its invalidity, or the chance of success in impeaching it.—

**Sect. 3.—Possession and preservation of trust property: Sub-sect. 3. Sects. 4 & 5.]**

—It is the duty of trustees to press for the payment of the trust funds to them, & if they are not paid within a reasonable time to enforce payment by legal proceedings; & it is especially their duty to take action promptly if by the terms of the trust payment has been deferred to the expiration of a specified time.

The only excuse for not taking action to enforce payment is a well-founded belief on the part of the trustees that such action would be fruitless; & the burden of proving the grounds of such belief is on the trustees.—*Re BROGDEN, BILLING v. BROGDEN* (1888), 38 Ch. D. 546; 59 L. T. 650; 37 W. R. 84; 4 T. L. R. 521, C. A.

**Annotations:—***Consd. Re Hurst, Addison v. Topp* (1890), 63 L. T. 603. *Reid. Re Chapman, Cocks v. Chapp* (1896), 45 W. R. 67; *Re Stevens, Cooke v. Stevens*, [1898] 1 Ch. 162; *Re Greenwood, Greenwood v. Firth* (1911), 105 L. T. 509.

**3012. — — — Payment deferred to specified time.]—***Re BROGDEN, BILLING v. BROGDEN*, No. 3011, *ante*.

**3013. — — — To recover trust property—Property not lost through fault of trustee—No necessity to institute proceedings at own expense.]—**A trustee is not bound to commence proceedings, at his own expense, to recover trust property when it has not been lost through any misconduct or negligence of his own.—*TUDBAL, v. MEDLICOTT* (1888), 59 L. T. 370; 52 J. P. 659; 36 W. R. 886; 4 T. L. R. 701. **Annotation:—***Reid. Williams Torrey v. Knight, The Land of the Isles*, [1891] P. 342.

**3014. Duty of trustee to prove debt—On bankruptcy of debtor to the trust.]—**Where a trustee indebted to the trust becomes bkpt., it is his duty to prove the debt, & if he neglect so to do, he is liable for the loss, notwithstanding his certificate.

Suppose a person, owing money to a trust estate, becomes bkpt., & the trustee is a distinct & separate person; knowing of the bkpcy., he is bound to prove the debt; if he does not, he commits a breach of trust (*ROMILLY, M.R.*).—*ORRETT v. CORSER, CORSER v. ORRETT* (1855), 21 Beav. 52; 25 L. T. O. S. 278; 1 Jur. N. S. 882; 3 W. R. 604; 52 E. R. 778.

**Costs of legal proceedings—Right of trustee to indemnity.]—***See* Part III., Sect. 3, sub-sect. 3, *post*.

**SECT. 4.—PAYMENT OF INCOME AND CORPUS.**

**3015. Duty to pay corpus—Liability for payment to wrong person—Forged authority to pay.]—**A trustee, whether a private person or body corporate, must see to the reality of the authority empowering him to dispose of the trust money; for, if forged, it is in consideration of law & equity a nullity & the right remains as before.—*ASHBY v. BLACKWELL* (1765), Amb. 503; 2 Eden, 299; 28 E. R. 913, L. C.

**Annotations:—***Mentd. Duncan v. Luntley* (1849), 2 H. & Tw. 78; *Simm v. Anglo-American Telegraph Co., Anglo-American Telegraph Co. v. Spurling* (1879), 5 Q. B. D. 188.

**3016. — — — Qu.: whether a trustee having prepared a deed of appointment under a power, but not knowing of the execution of it, shall be held to have such notice as to affect him in respect of his payment of the money to the legatee of the person who had the power under a**

subsequent will.—*COTHAY v. SYDENHAM* (1788), 2 Bro. C. C. 391; 29 E. R. 218, L. C.

**Annotations:—***Consd. Williams v. Williams* (1881), 17 Ch. D. 437. *Reid. Jones v. Smith* (1843), 1 Ph. 244; *West v. Reid* (1843), 2 Harc. 249; *Ware v. Egmont* (1854), 3 Eq. Rep. 3, n.; *Shaw v. Foster* (1872), L. R. 6 H. L. 321.

**3017. — — — (1) Testatrix bequeathed her residuary estate upon trust for her sister for life, & after the sister's death, to pay divide & apply the trust fund in manner following, that is to say, one-tenth to or for the use of R., & another one-tenth to or for the use of C. for their respective lives & in case either of them should die in the lifetime of the tenant for life or afterwards leaving lawful issue then testatrix directed that the part of him or her so dying leaving lawful issue should go to & be equally divided among his or her children as they should attain twenty-one:—***Held:* a child of C., who survived the tenant for life & attained twenty-one but died in the lifetime of C. took a vested interest.

The trustee of the will, who acting on the opinions of counsel had distributed the whole estate according to a view different to that taken by the ct., was ordered to pay to the representatives of the child the amount of the child's share & the costs of the suit.—*BOULTON v. BEARD* (1853), 3 De G. M. & G. 608; 43 E. R. 239, L. J.J.

**Annotations:—***Reid. Re Reeve's Trusts* (1877), 4 Ch. D. 841; *Re Silver Valley Mines* (1882), 47 L. T. 597. *Mentd. Re Watson's Trusts* (1870), L. R. 10 Eq. 86; *Re Orlebar's Settlement, Trusts* (1875), L. R. 20 Eq. 711; *Selby v. Whitaker* (1877), 6 Ch. D. 239; *Hickling v. Fair*, [1899] A. C. 15; *Re Walker, Dunkley v. Heuerdine*, [1917] 1 Ch. 38; *Re Stephens, Tomalin v. Tomalin's Trustee*, [1927] 1 Ch. 1.

**3018. — — — To person entitled.]—***MAY v. ARMSTRONG*, [1866] W. N. 233.

**3019. — — — ]—***Low v. BOUVERIE*, No. 3002, *ante*.

**3020. — — — Duty to make inquiries.]—**Where a trustee has trust moneys in his hands, it is his duty to make inquiries as to the parties entitled, & upon sufficient evidence, to pay over the moneys to his *cestuis que trust*.—*Re KNIGHT'S TRUSTS* (1859), 27 Beav. 45; 28 L. J. Ch. 625; 33 L. T. O. S. 54; 5 Jur. N. S. 326; 54 E. R. 18.

**Annotations:—***Mentd. Re Wylly's Trust* (1860), 2 L. T. 788; *Re Brocklesby* (1861), 29 Beav. 652.

**3021. — — — Assignee.]—**By the will of testator a share of his estate was given to trustees upon trust during the life of one of his sons to pay & apply the whole or any part of the income or accumulations of income of the share for the support, maintenance, or education, or otherwise for the benefit of that son, his wife, or children, in such manner in all respects as the trustees should in their uncontrolled discretion think fit. The son assigned his interest by way of mtgc. to pltf. Notice of the assignment was duly given to the trustees of the will; but, after receiving such notice, they made payments out of the income of the share to or on behalf of the sum.

Pltf. took out an originating summons seeking to make the trustees liable in respect of the payments so made. Objection was waived to the decision of a question of breach of trust upon an originating summons:—*Held:* the beneficial interest of the son under the will was that which he was entitled to assign; money paid to him or to any person on his behalf was necessarily part of his beneficial interest; & it must be assumed

[1921] S. C. 474; 58 Sc. L. R. 367.—*SCOT*.

**R. Duty to pay income—Lease made at rent & premium.]—***BEGG v. BROWN* (1902), 2 S. R. N. S. W. 87; 19 N. S. W. W. N. 121.—*AUS.*

**PART IV. SECT. 4.**

**3018i. Duty to pay corpus.—To person entitled.]—***ALVES' TRUSTEES v. GRANT* (1874), 1 R. (Ct. of Sess.) 969; 11 Sc. L. R. 559.—*SCOT*.

**3018 II. — — — ]—***M'PHERSON'S TRUSTEES v. HILL* (1904), 4 F. (Ct. of Sess.) 921; 39 Sc. L. R. 657.—*SCOT*.

**3018 III. — — — ]—***HOME'S TRUSTEES v. FERGUSON'S EXECUTORS*,

that money paid by the trustees to him or to any person on his behalf was his in their irrevocable determination immediately before the payment, at which period of time the trustees were affected with notice of assignment, therefore, the trustees were liable for all sums paid to or on behalf of the son after they had received notice of assignment.—*Re NEIL, HEMMING v. NEIL* (1890), 62 L. T. 649.  
*Annotation* :—*Reid*, *Re Bullock*, *Good v. Lickorish* (1891), 60 L. J. Ch. 341.

**3022. Duty to pay income.—To persons entitled.]**  
 —*Low v. BOUVERIE*, No. 3002, *ante*.

**3023. — Duty to deduct income tax—Liability for omission to deduct—Refund to trust estate.]**—A trustee paying annuities given by will out of income which has paid income tax before it came to his hands must deduct from each payment of annuity the tax thereon at the current rate, unless the will otherwise directs. Not to make such deduction is a breach of trust, & the trustee is liable to refund to the estate the sum thus overpaid; but Trustee Act, 1888 (c. 59), s. 8, bars all claims against him beyond six years, except in the case of an annuity given to himself.—*Re SHARP, RICKETT v. RICKETT*, [1906] 1 Ch. 793; 75 L. J. Ch. 458; 95 L. T. 522; 22 T. L. R. 368; 50 Sol. Jo. 390.

**3024. — — — — —.]**—By the will testator gave several annuities to his sons & others & directed that all annuities should be paid free of deduction. The trustees had paid the annuities for some years without deducting income tax :—*Held* : the annuities were not given free of income tax, but the trustees were entitled to deduct the income tax they had paid out of residue from future payments of the annuities, on the ground that the ct. will always in the administration of an estate, where possible, correct error of account between trustees & *cestui que trust*. The rule that a man cannot recover moneys paid under a mistake in law does not apply to such a case.—*Re MUSGRAVE, MACHELL v. PARRY*, [1916] 2 Ch. 417; 85 L. J. Ch. 639; 115 L. T. 149; 60 Sol. Jo. 694.  
*Annotation* :—*Apld. Re Woolldridge*, *Woolldridge v. Coe*, [1920] W. N. 78.

**3025. — — — — —.]**—*Re HATCH, HATCH v. HATCH*, No. 3620, *post*.

**3026. — — — — —.]**—*Re WOOLDRIDGE, WOOLDRIDGE v. COE*, [1920] W. N. 78.

## SECT. 5.—DUTY TO USE DILIGENCE AND PRUDENCE.

**3027. General rule.]**—She was bound to act prudently & reasonably as trustee (KEKEWICH, J.).—*Re SMITH, SMITH v. THOMPSON, SMITH v. SMITH* (1902), 71 L. J. Ch. 411; 86 L. T. 401; 18 T. L. R. 432; 46 Sol. Jo. 358.

**3028. Test of diligence & prudence—Activity in interest of beneficiary.]**—(1) Trustees have an important duty cast upon them by the acceptance of a trust & ought to exercise due diligence in the

execution of it, & to attend with some degree of vigilance to the interest of their *cestui que trust*. In this case where no culpable acts were expressly charged against them by the bill but the circumstances of the case disclosed to the ct. that they had neglected their duty by remaining passive & supine where the interest of the *cestui que trust* was invaded, & did not appear to have been attempted to be protected by them the ct. reprobated their want of attention & activity as a gross breach of duty, & refused to give them, although necessarily made nominal debts. to the bill, their costs of suit.

(2) [The trustees] sold for £500 the property which this distressed man had entrusted to them & which they knew to be worth £577 (RICHARDS, C.B.).—*OLIVER v. COURT* (1820), 8 Price, 127; Dan. 301; 146 E. R. 1152, Ex. Ch.

*Annotation* :—*Generally, Reid, Armstrong v. Jackson*, [1917] 2 K. B. 822.

**3029. — That of prudent man in conduct of own affairs.]**—Trustees, agents, etc., are expected to take the same care of the trust funds, as a reasonable attention to their own affairs would dictate to them to take of their own property.

The ct. does not expect trustees to take more care of the property entrusted to them than they would do of their own; but it is material to ascertain what is the meaning of this (LORD ELDON, C.).—*MASSEY v. BANNER* (1820), 1 Jac. & W. 241; 37 E. R. 367.

*Annotations* :—*Reid, Cocks v. Gray* (1857), 5 W. R. 749. *Mentd. Macdonnell v. Harding* (1831), 7 Sim. 178; Pennell v. Deffell (1853), 4 De G. M. & G. 372; Owen v. Cronk (1894), 2 Mans. 115.

**3030. — — — — —.]**—Trustees of real estate for a term of one thousand years from the day of the death of the settlor, had powers, during a period of certain lives in being & twenty-one years, to manage the estates, & out of the income to keep down charges & incumbrances, & subject thereto to repair, erect new or additional buildings, & generally to "make such outlay for the improvement of" the estates as they should "think fit or conducive to the general benefit of" the estates "or the tenants thereof," & hold the surplus as capital, which was to be laid out in the purchase of lands to be settled to the like uses.

The settlor having died in 1870, the first tenant for life being in possession, & the income being insufficient, after keeping down charges & incumbrances, to pay for repairs, for the cost of new buildings, & generally for improvement of the property, out of capital, the ct. allowed payments in draining upon which the tenants paid 5 per cent., & in erecting new buildings.

These trustees, whose duty it was to act on behalf of the estates as prudent owners would have acted, have acted conformably to their duty, & they are entitled to be recouped their expenditure out of the capital moneys (BACON, V.-C.).—*Re LESLIE'S SETTLEMENT TRUSTS* (1876), 2 Ch. D. 185; 45 L. J. Ch. 608; 31 L. T. 239; 24 W. R. 546.

YEOmans (1871), 18 Gr. 238.—**CAN.**

**3029 v. — — — — —.]**—*CRAMPTON v. WALKER* (1893), 31 L. R. Ir. 437.—**IR.**

**3029 vi. — — — — —.]**—*ROBERTSON v. HOWDEN* (No. 2) (1892), 10 N. Z. L. R. 609.—**N.Z.**

**3029 vii. — — — — —.]**—Gratuitous trustees are personally liable only for losses occasioned by the want of such diligence on their part as a man of ordinary prudence uses in his own affairs.

—*KENNEDY, ETC. v. KENNEDY, ETC.* (1884), 12 R. (Ct. of Sess.) 275; 22 Sc. L. R. 181.—**SCOT.**

## PART IV. SECT. 5.

**3029 i. Test of diligence & prudence — That of prudent man in conduct of own affairs.]**—It is the duty of a trustee, in managing the trust affairs, to take those precautions which an ordinary man of business would take in managing similar affairs of his own.—*AUSTIN v. AUSTIN* (1906), 3 C. L. R. 518.—**AUS.**

**3029 ii. — — — — —.]**—Trustees are bound, in the interval required to ascertain the recipients, to act, as regard to the funds as an ordinary

prudent man would if he were acting for the benefit of other people for whom he felt morally bound to provide.—*LONGHURST v. WATK*, [1920] S. A. L. R. 407.—**AUS.**

**3029 iii. — — — — —.]**—The ct. will not exact from trustees more careful conduct than a prudent man would bestow in the management of his property.—*CHISHOLM v. BARNARD* (1864), 10 Gr. 479.—**CAN.**

**3029 iv. — — — — —.]**—It is the duty of a trustee for sale to use all diligence to obtain the best price.—*GRAHAM v.*

Sect. 5.—Duty to use diligence and prudence. Sect. 6.]

**3031.** ———.]—*Re ROBERSON, CAMPKIN v. BARTON*, [1883] W. N. 110.

**3032.** ———.]—*SPEIGHT v. GAUNT*, No. 3273, post.

**3033.** ———.]—Trustees are bound to conduct the business of their trust in the same way in which an ordinary prudent man of business would conduct his own.

Trustees advanced money on the security of freehold land, which had lately been purchased by the mtgor. They did not have any fresh valuation made for the purposes of the mtge., but accepted the valuation put upon it at the sale. They were, however, both men of business, & made a personal inspection of the property, & otherwise appeared to have satisfied themselves that the security was sufficient.

The money advanced exceeded by a comparatively small amount two-thirds of the amount of the valuation of the property at the sale. The mtge. was made in 1870. Interest was regularly paid down to 1877, since when it had been in arrear, & owing to the agricultural depression, the mtgor. had become bkpt., & the property so depreciated in value that the mtge. debt & interest could not be raised.

The *cestui que trust* commenced this action against the surviving trustee, & the exors. of the deceased trustee, for the purpose of obtaining a declaration that they were liable to make good the loss, on the ground that the lending without a separate valuation, & to more than two-thirds of the value, were breaches of trust:—*Held*: the trustees had acted to the best of their ability, & in no way otherwise than a prudent man would have acted in the conduct of his own affairs, & the mere fact of not having the property revalued would not make them liable.—*Re GODFREY, GODFREY v. FAULKNER* (1883), 23 Ch. D. 483; 52 L. J. (Ch. 821; 48 L. T. 853; 47 J. P. 676; 32 W. R. 23.

*Annotation*:—*Apld. Re Pearson, Oxley v. Scarth* (1884), 51 L. T. 692.

**3034.** ———.]—Trustee advanced trust moneys to a brickbuilding firm upon the security of a first mtge. of their premises freehold & leasehold & some of the plant. In so doing he acted upon the advice of his solr. & upon a favourable report & valuation made by a respectable firm of architects & surveyors. A bank of good standing moreover consented to postpone a charge of theirs to his mtge. The mtgors. failed three years afterwards, whereby this lease of that part of the property whereon was most of the clay & shale necessary for the carrying on of the business became forfeited. The remainder of the property proved unsaleable & rapidly went to ruin. An action was subsequently brought by the *cestuis que trust* to make the trustee liable for the loss sustained by them, & it appeared that the report & valuation proceeded *ex facie* in some respects upon faulty principles:—*Held*: applying the rule in *Re Godfrey, Godfrey v. Faulkner*, No. 3033, *ante*, that the trustee had acted as a prudent man would have acted in dealing with his own property & was therefore not liable.—*Re PEARSON, OXLEY v. SCARTH* (1884), 51 L. T. 692.

*Annotation*:—*Refd. Re Whiteley, Whiteley v. Learoyd* (1886), 32 Ch. D. 196.

**3035.** ———.]—Trustees lent trust moneys to a builder upon leasehold houses which had never been occupied, & to the extent of two-thirds of their estimated value. The borrower became bkpt., & no interest had been received from him or rent from any tenants. The houses were sold

under the direction of the ct., & realised £1,100 less than the sum lent upon them:—*Held*: the trustees had not acted with a circumspection that a prudent owner would act with in dealing with his own property, & the trustees must account for the £1,100 which had been lost, with interest.—*HOEY v. GREEN* (1884), 1 T. L. R. 116.

**3036.** ———.]—A trustee is bound to act in the execution of his trust as a prudent man would in dealing with his own property.—*SMETHURST v. HASTINGS* (1885), 30 Ch. D. 490; 55 L. J. Ch. 173; 52 L. T. 567; 33 W. R. 496; 1 T. L. R. 335.

*Annotation*:—*Refd. Maia v. Browne*, [1895] 2 Ch. 69.

**3037.** ———.]—A trustee must, in order to escape liability for a loss of the trust property, show that in connection with the transaction in which the loss occurred he acted, not only in the ordinary mode of business, but also in the mode in which a prudent man of business would act in such a transaction.

B., one of the trustees of a marriage settlement, was employed by his acting co-trustee to make a change of investment of part of the trust property; but although he sent to his acting co-trustee contract notes for the new investments, the latter were never completed, & the moneys were misappropriated by a third party. B.'s co-trustees made no inquiries at all for the securities to which the contract notes related for over eighteen months, & made no efficient inquiries until three years after the transaction had taken place; & when the loss was discovered B. had shortly before become bkpt., having up to within a few months of that time been in good credit:—*Held*: B.'s co-trustees were liable for the loss, having been guilty of negligence in not prosecuting early inquiries, which would have resulted in information upon which they might have recovered the trust moneys from B.—*BULLOCK v. BULLOCK* (1886), 56 L. J. Ch. 221; 55 L. T. 703; 3 T. L. R. 131.

**3038.** ———.]—(1) Trustees invested trust money on the security of a 5 per cent. mtge. of a freehold brickfield, with buildings, machinery & plant affixed to the soil, being advised by competent valuers that the property was a good security for the amount invested. The valuers' report was in fact based upon a valuation of more than double the amount invested & upon the supposition that the concern was going, but the report did not state this, nor distinguish between the value of the land & that of the buildings, machinery, etc. The trustees acted *bonâ fide* but acted upon the report without making any further inquiries. The security having failed:—*Held*: the trustees had not acted with ordinary prudence, & were liable to make good the money, with interest at 4 per cent. from the date of the last payment; & the tenant for life was not liable to return to the trustees 1 per cent., which was claimed on the ground that the higher interest was due to its being a hazardous security.

(2) I think it is quite clear that a trustee is entitled to rely upon skilled persons in matters in which he cannot be expected to be experienced (LORD HALSBURY, C.).

(3) The ordinary course of business does not justify the employment of a valuator for any other purpose than obtaining the data necessary in order to enable the trustees to judge of the sufficiency of the security offered. They are not in safety to rely upon his bare assurance that the security is sufficient, in the absence of detailed information which would enable them to form, & without forming, an opinion for themselves (LORD WATSON).

c. Duty to preserve capital intact  
—d. obtain for life tenant as large an income as consistent with safety.]—  
Where a fund is held upon trust for investment, the income to be paid to

*Sect. 6.—Duty to protect interest of beneficiaries.*  
*Sect. 7.]*

**3048. Instrument authorising payment of money to parent of beneficiaries—Duty to regard interest of beneficiaries—Before paying money.]—**(1) A trust for the benefit of the children of A., with an authority to pay the trust funds over to their parent or guardian does not empower the trustees to hand over the trust funds to A., without exercising any discretion in respect of his children's interests.

(2) Where there has been a loss to the trust estate by reason of a non-conversion of a security forming part of the trust property, but the trustees allege that they could at no time have realised the full value of the security, they will be allowed the benefit of an enquiry to show the actual amount which would have been realised by a conversion at the proper time, & their liability will be limited accordingly.—*GAINSBOROUGH (EARL) v. WATCOMBE TERRA COTTA (LAY CO., LTD., DUNNING v. GAINSBOROUGH (EARL))* (1885), 54 L. J. Ch. 991; 53 L. T. 116; 1 T. L. R. 486.

**3049. Cestuis que trust petitioning Parliament—Risk of forfeiture under will—Duty to request cestui que trust to stay proceedings.]—***Re ALLAN, HAVELOCK v. HAVELOCK-ALLAN* (1896), 12 T. L. R. 299.

*Necessity for diligence & prudence.]—See Sect. 4, ante.*

## SECT. 7.—DUTY TOWARDS BENEFICIARIES INTER SE.

**3050. Duty to act impartially between cestuis que trust—Tenant for life & remainderman—Trustee tenant for life.]—**Testator has given the residue of his personal estate to two trustees, T. the first tenant for life of the real estates, & B. the second tenant for life; upon trust to lay it out in estates of inheritance, to be settled to the same uses; & if that is to be understood, with the same incidents & powers, it imposed upon them the trust, holding an even hand as between themselves & those in remainder (LORD ELDON, C.).—*BURGES v. LAMB* (1809), 16 Ves. 174; 33 E. R. 950, L. C.

*Annotations:—**Reid. Cholmeley v. Paxton* (1825), 3 Bing. 207; *Londesborough v. Somerville* (1854), 19 Beav. 295. *Mend. Davenport v. Davenport* (1863), 33 L. J. Ch. 33; *Dashwood v. Magniac*, [1891] 3 Ch. 306.

**3051. ———.]—**An application under the 4 & 5 Will. 4, c. 29, to invest trust funds on Irish security refused, for though for the benefit of the tenant for life, as increasing his income, it was otherwise as to those in remainder, as affording a less secure investment.—*STUART v. STUART* (1841), 3 Beav. 430; 10 L. J. Ch. 148; 5 Jur. 3; 49 E. R. 169.

**3052. ———.]—**Testator gave his leasehold to trustees for legates in succession & upon trust, if the trustees "should think it proper or advantageous, as to those which were customarily or might be renewed," to endeavour to renew; & in order thereto, should, "if they in their discretion should think fit or expedient, but not

necessarily or peremptorily," insure the lives of the *cestuis que vie* & apply the insurance money in renewing, & out of the rents & profits raise sufficient money to renew so often as a renewal should be advisable, & he gave a power to mortgage for the same purpose:—*Held*: (1) the trustees were bound to renew, if they could do so on reasonable terms; (2) if the trustees refused, the ct. would exercise it; & (3) they were bound to raise the necessary funds in such a mode as would be most beneficial to all parties interested.

The trustees are not to sacrifice the tenants for life to the persons interested in remainder, but they are to exercise their discretion & act in such a manner as they consider most advantageous for keeping the estate in its present condition, for the benefit of all persons interested under the will (ROMILLY, M.R.).

(4) There is a clear distinction between a mere discretionary power in trustees & a trust which they are bound to execute. . . . Where there is a mere discretionary power in trustees, to be executed simply as they think fit, the ct. will not interfere with their discretion or execute it for them (ROMILLY, M.R.).—*MORTIMER v. WATTS* (1852), 14 Beav. 616; 21 L. J. Ch. 169; 10 L. T. O. S. 3; 51 E. R. 421.

**3053. ———.]—**Testator gave his personal estate & the whole of his real estate to trustees upon trust "for sale & conversion at their absolute & unfettered discretion, & to invest the proceeds & pay the net income" equally between his two sisters during their lives for their separate use without power of anticipation, & after the decease of either of them upon trust for her children equally or only child, in case of a son at twenty-one or of a daughter at twenty-one or marriage, with a proviso that if either sister should die after his decease without issue then the whole trust premises should go to the survivor & her descendants. The will contained no provisions for the management of testator's real estate. One of testator's sisters was married & had two infant children, & their only means of support was the half share of income given by the will. The other sister remained unmarried. The only real estate of testator was in Ireland, let in one hundred & fourteen holdings, for the most part at judicial rents fixed under Land Law (Ireland) Act, 1881 (c. 49). It was charged with the payment of annuities; but the net annual income after satisfying all outgoings amounted to about £571 3s. 8d. The annual income of testator's personal estate amounted only to about £38. Up to 1898 the trustees had found, after inquiries, that a sale of the real estate was impracticable; but in that year the surviving trustee obtained a report from an Irish land agent that it might with some difficulty be sold at a price which in Guaranteed Land Stock would produce a net annual income of about £200 available for division between the tenants for life, who urged him to postpone the sale. On a summons by the surviving trustee against the tenants for life & the husband & children of the married one, as defts., asking for liberty to postpone the sale of the Irish estate until order:—*Held*: a direction to trustees to sell

one & upon his death the fund to go to others, the duty of the trustees is to preserve the capital intact & to obtain for the life-tenant as large an interest yield as is consistent with safety & the observance of the law under the instrument of trust as to the class of investments made.—*Re ARMSTRONG* (1924), 55 O. L. R. 639.—*CAN.*

*d. To insure property.]—KINGHAM*

*v. KINGHAM*, [1897] 1 I. R. 170.—*IR.*

*e. ———.]—Re KINAHAN'S TRUSTS, HAMILTON & BOWLES v. HUDSON-KINAHAN*, [1921], 1 I. R. 210.—*IR.*

*f. ———.]—BROWN v. SOUTAR & MEACHER* (1870), 8 Macph. (Ct. of Sess.) 702; 42 Sc. Jur. 359.—*SCOT.*

*g. Duty to see that security sound.]—*Where the primary purpose of a trust is to secure an alimentary provision, the trustee is bound to be specially

careful that the security is sufficient to ensure payment of the interest on the loan.—*MACLEAN v. SOADY'S TRUSTEE* (1888), 15 R. (Ct. of Sess.) 966; 25 Sc. L. R. 696.—*SCOT.*

## PART IV. SECT. 7.

*h. Duty to make final apportionment of trust fund.]—SMITH'S TRUSTEES v. SMITH* (1900), 2 F. (Ct. of Sess.) 713.—*SCOT.*



at their absolute discretion, was not equivalent to a direction that they may sell or not at their absolute discretion; & in the first case the time & mode of sale were in their discretion, but they were not entitled to abstain from following the directions of the will because the tenants for life would then receive a better income; & in consequence of the difficulty of deciding whether a sale would be beneficial in the interest of the tenants for life & those entitled in remainder regarded as one, the summons was ordered to stand over for three years, with liberty to the trustee to abstain, if he thought fit, from selling during that period, & with liberty for all parties to apply, but so as not to prevent the trustee from selling without application to the ct. if he considered a sale advisable.—*Re ATKINS, NEWMAN v. SINCLAIR* (1899), 81 L. T. 421.

**3054. — Dispute between cestuis que trust.]**—In a contest between *cestuis que trust* it is the duty of trustees to abstain from taking part with either side.—*RICHARDSON v. BANK OF ENGLAND* (1838), 4 My. & Cr. 165; 8 L. J. Ch. 1; 2 Jur. 911; 41 E. R. 65, L. C.

*Annotations:—***Reid.** Knight v. Haythorne (1840), 4 Jur. 360. **Mentid.** London Syndicate v. Lord (1878), 8 Ch. D. 84; *Rodriguez v. Speyer*, [1919] A. C. 59.

**3055. — Investment of trust fund.]**—Personalty was bequeathed upon trust for tenants for life, with executory trusts in remainder, but without directions as to investment. The trustees at the instance of the tenants for life abandoned their original intention of investing in the funds, & invested on mtge. so as to obtain an increased income, but it did not appear that the tenants for life approved of the particular securities which were taken & which proved insufficient. On the trustees being decreed to make good the loss:—*Held*: the tenants for life & their interests in the trust funds were liable to recoup to the trustees the amount ordered to be paid by them to the extent of the income received by the tenants for life respectively from the mtges.

I am not disposed to hold out any encouragement whatever to the notion that a trustee, in the absence of any power for that purpose, is entitled to lay out the trust fund upon mtge. . . . Assuming that an exor. or trustee, acting in the ordinary exercise of the discretion belonging to him in that character, could properly make such an investment of the trust fund without any power expressly given to him so to do, it is clear that, in making such an investment, it is his bounden duty to have regard to the rights & interests of all parties concerned, & if it appears that he has made the investment at the instance & for the benefit of one or more of *cestuis que trust*, without having regard to the interests of the others, & loss has resulted from the investment, that is a breach of trust (*TURNER, L.J.*).—*RABY v. RIDENHALGH* (1855), 7 De G. M. & G. 104; 3 Eq. Rep. 901; 24 L. J. Ch. 528; 25 L. T. O. S. 10; 1 Jur. N. S. 363; 3 W. R. 344; 44 E. R. 41, L. J.

*Annotations:—***Consd.** Sawyer v. Sawyer (1885), 28 Ch. D. 595; Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth, [1891] 1 Ch. 337. **Appl.** Bolton v. Currie (1894), 70 L. T. 759. **Distd.** Re Somerset, Somerset v. Poulett, [1894] 1 Ch. 231. **Consd.** Chillingworth v. Chambers, [1896] 1 Ch. 685; Moxham v. Grant, [1899] 1 Q. B. 480. **Reid.** Baud v. Fardell (1855), 26 L. T. O. S. 83; Griffiths v. Porter (1858), 25 Beav. 236; Butler v. Butler (1877), 5 Ch. D. 554; Re Alexandra Palace Co. (1883), 23 Ch. D. 297; Mara v. Browne, [1895] 2 Ch. 69.

**3056. — Not to prejudice rights of remainderman.]**—Testator bequeathed £50,000 to trustees upon trust to invest same in the purchase of lands, & to settle & convey the same to his nephew M. for life, remainder to his eldest son for life, remainder to his first son in tail. M. was also

made residuary legatee, & the exors., who were also trustees, having renounced probate, letters of administration of testator's estate were granted to M. M., with moneys which were part of testator's personal estate, purchased for £40,700 estates of which he took conveyances to himself in fee. One of these, the L. estate he devised by will to his eldest son L. absolutely subject to the payments, liabilities & demands of the original testator's will & in exoneration of his, M.'s, other estates, which he devised to his younger children. The L. estate afterwards became much improved in value. The master having found that the L. estate was purchased by M. in exoneration or discharge of the trust for investment of the sum of £50,000 exceptions to the master's report were taken by the devisees of M.'s will:—*Held*: the trustee had no right to deal with estates so purchased so as to alter or prejudice the rights of the remaindermen & exceptions overruled.—*MATHIAS v. MATHIAS* (1858), 3 Sm. & G. 552; 29 L. T. O. S. 73; 3 Jur. N. S. 429; 65 E. R. 777.

*Annotation:—***Reid.** *Re* Dunfry, Worcester City & County Banking Co. v. Bilek (1882), 52 L. J. Ch. 228.

**3057. —**—It is of the essence of the duty of every trustee to hold an even hand between the parties interested under the trust (*TURNER, L.J.*).—*Re TEMPEST* (1866), 1 Ch. App. 485; 35 L. J. Ch. 632; 14 L. T. 688; 12 Jur. N. S. 539; 14 W. R. 850, L. J.

**3058. —**—(1) Pltf. executed a post-nuptial settlement whereby he conveyed certain freehold hereditaments, the legal estate in which were outstanding, to a trustee upon trust to pay the rents, issues, & profits to pltf.'s wife during her life, & after her death to pltf. during his life, & after the death of the survivor for the benefit of their children. The settlement contained a power to pltf. during his life, & after his death to the wife during her life, & after the death of the survivor to the trustee, to renew leases for lives, & take fines on renewals, but so that the usual rents were still reserved; & it was declared that the trustee should hold all fines which he might take in trust for the child or children who should be then entitled to the inheritance of the premises. Pltf. subsequently assigned his interest under the settlement to B. by way of mtge. The trustee of the settlement disputed the right of pltf. to take the fines for his own benefit, claiming them on behalf of the wife. Pltf. accordingly filed a bill against the trustee, & B., praying that he might be declared entitled to take the fines on renewals of leases for his own benefit. After the filing of the bill pltf. became bkpt., & his assignee obtained a supplemental order to carry on the suit:—*Held*: inasmuch as the legal estate was outstanding & beyond pltf.'s control, & the trustee had interfered with his power of granting leases, he was entitled to bring a suit in equity for declaration of his rights.

(2) The trustee . . . has . . . taken upon himself to be a partisan of the wife . . . & has refused production of the deeds, which, as trustee, he was bound to produce to all persons interested in the trust (*LORD HATHERLEY, C.*).—*SIMPSON v. BATHURST, SHEPHERD v. BATHURST* (1869), 5 Ch. App. 193; 23 L. T. 29; 18 W. R. 772, L. C.

*Annotations:—***As to** (1) **Reid.** *Re* Beddingfield & Herring's Contract, [1893] 2 Ch. 332. **As to** (2) **Appl.** *Re* Cowin, Cowin v. Gravelle (1886), 33 Ch. D. 179.

**3059. —**—Trustees sold a tenement, the property of the trust, to one of seven beneficiaries under the trust deed, the price in terms of the contract being payable in May, 1874. In Nov. 1874, the purchaser being unable to pay £12,000 of the price, was allowed to retain it on loan. As security for



*Sect. 7.—Duty towards beneficiaries inter se. Sects. 8 & 9.]*

the loan, he conveyed to the trustees three houses, including his purchase from the trust, upon each of which there were prior incumbrances to an amount exceeding two-thirds of the estimated value as stated by the borrower. Besides these securities the trustees held the personal obligation of the borrower & his father-in-law; both of whom were engaged in trade. Some of the other beneficiaries remonstrated in 1874, & again in 1880; but the money was allowed to remain on these securities until 1884, when the borrower & his father-in-law became bkpts., & about £10,000 was lost to the trust. The trust deed contained (a) a clause empowering the trustees to lend out the proceeds & other funds of the trust on "such securities heritable or personal" as they might think proper; & (b) an immunity clause declaring that the trustees should not be liable for "omissions, errors, or neglect of management." The same law agent acted for the trustees & the borrower:—*Held*: the trustees had not acted with perfect impartiality between the beneficiaries, nor had they brought to the management the same care & diligence which a man of ordinary prudence would have exercised in his own concerns, in these circumstances neither the immunity clause nor the authority to lend on personal security were sufficient to protect them, & they were personally liable to make good the deficiency in the trust funds.—*KNOX v. MACKINNON* (1888), 13 App. Cas. 753, H. L.

*Annotations*:—*Consd.* *Rae v. Meek* (1889), 14 App. Cas. 558. *Reid.* *Wyman v. Paterson*, [1900] A. C. 271.

**SECT. 8.—DUTY TOWARDS ASSIGNS AND INCUMBRANCERS.**

**3060. Trustee with notice of charge—Liability for payments to beneficiary—Though charge disputed.]**—A trustee for a married woman, having received notice of a charge executed by her, was held personally liable for payments afterwards made to her; & that, notwithstanding the validity of the charge was disputed by her, & no application had been made for an injunction.—*HODGSON v. HODGSON* (1837), 2 Keen, 704; 7 L. J. Ch. 5; 48 E. R. 800.

*Annotation*:—*Mentd.* *Bolton v. Salmon*, [1891] 2 Ch. 48.

**3061. Person entitled to charge upon trust property—Trustees of property become trustees for the incumbrancer—To the extent of the charge.]**—The moment the ct. declares such right in pltf. (incumbrancer), these defts. (the trustees) will, at all events, become trustees for pltf. to that extent (*LORD COTTERHAM*).—*WELLESLEY v. WELLESLEY* (1839), 4 My. & Cr. 561; 9 L. J. Ch. 21; 4 Jur. 2; 41 E. R. 216, L. C.

*Annotations*:—*Reid.* *Langton v. Horton* (1842), 11 L. J. Ch. 299; *Trevor v. Hutches* (1897), 76 L. T. 183. *Mentd.* *Hoare v. Dresser* (1859), 7 H. L. Cas. 290.

**3062. Assignment of trust property—Liability of trustee for making false representation to assignee.]**—*BURROWS v. LOCK* (1805), 10 Ves. 470; 40 W. R. 51, n.; 32 E. R. 927.

*Annotations*:—*Consd.* *Slim v. Croucher* (1860), 1 De G. F. & J. 518; *Re Ward* (1862), 31 Beav. 1; *Re Titchener* (1865), 35 Beav. 317; *Re Overend, Gurney, Ex p. Oakes & Peck* (1867), L. R. 3 Eq. 576; *Low v. Bouverie*, [1891] 3 Ch. 82; *Exploring Land & Minerals Co. v. Kolckmann* (1905), 94 L. T. 234; *Nocton v. Ashburton*, [1914] A. C. 932. *Reid.* *Pulsford v. Richards* (1853), 17 Beav. 87; *Stephens*

*v. Venables* (No. 2) (1862), 31 Beav. 124; *Lloyd v. Banks* (1867), L. R. 4 Eq. 222; *Ramshire v. Bolton* (1869), L. R. 8 Eq. 294; *Peek v. Gurney* (1873), L. R. 6 H. L. 377; *Eaglesfield v. Londonderry* (1876), 4 Ch. D. 693; *Brownlie v. Campbell* (1880), 5 App. Cas. 925; *Re Dangars's Trusts* (1889), 58 L. J. Ch. 315; *Derry v. Peek* (1889), 14 App. Cas. 337; *Baldie Consolidated Co. v. Tomkinson* (1893), 42 W. R. 204; *Whittington v. Seale-Hayne* (1900), 82 L. T. 49. *Mentd.* *Gibson v. D'Este* (1843), 2 Y. & C. Ch. Cas. 542; *Ingram v. Thory* (1848), 7 Haro. 67; *Price v. Macaulay* (1852), 2 De G. M. & G. 339; *Lake v. Bruton* (1856), 8 De G. M. & G. 440; *Robson v. Devon* (1857), 5 W. R. 724; *Hill v. Lane* (1870), L. R. 11 Eq. 215; *Mathias v. Yett* (1882), 46 L. T. 497; *L. & N. W. Ry. v. Boulton* (1890), 63 L. T. 727; *Thisdon v. Tindall* (1891), 40 W. R. 141; *Williams v. Pinckney* (1897), 67 L. J. Ch. 34.

**3063.** ———.]—If a trustee of a fund makes a false representation to an assignee, he is personally responsible.—*BROWNE v. SAVAGE* (1859), 4 Drew. 635; 5 Jur. N. S. 1020; 7 W. R. 571; 62 E. R. 244.

*Annotations*:—*Reid.* *Willes v. Greenhill* (No. 2) (1860), 29 Beav. 387; *Newman v. Newman* (1885), 28 Ch. D. 674; *Low v. Bouverie*, [1891] 3 Ch. 82; *Lloyd's Bank v. Pearson*, [1901] 1 Ch. 865. *Mentd.* *Forward v. Edginton* (1860), 8 W. R. 206; *Re Dallas*, [1904] 2 Ch. 385.

**3064. Mortgage of trust property—Duty of trustees to pay mortgagee—Extent of duty.]**—W., being entitled in reversion to one-eighth of a sum of £8,000 bequeathed to trustees, assigned it by way of mtge. to G., with power to give receipts in the name of W. or otherwise, with a proviso for redemption. On the death of the tenant for life of the fund, J., to whom the mtge. had been transferred, claimed to receive from the trustees £1,000, the whole amount of the share, the sum due on the mtge. being only about £400. The trustees of the will, who had received notice of subsequent incumbrances, expressed themselves willing to pay to J. what was due on his mtge., but declined to pay over to him the whole share. J. took out an originating summons to compel payment:—*Held*: the trustees were not bound to pay over the whole share to J., & the summons must be dismissed.—*Re BELL, JEFFERY v. SAYLES*, [1896] 1 Ch. 1; 65 L. J. Ch. 188; 73 L. T. 391; 44 W. R. 99; 40 Sol. Jo. 50, C. A.

*Annotations*:—*Apld.* *Hockey v. Western*, [1898] 1 Ch. 350. *Reid.* *Re Lloyd, Lloyd v. Lloyd*, [1903] 1 Ch. 385.

**3065.** ———.]—A member of a land society mortgaged his share in the society to pltf., another member of the same society, by a deed to which the powers conferred by Conveyancing Act, 1881 (c. 41), Part IV., were incident. The mtgor. died intestate, & there was no legal personal representative of his estate. A sum of money having become due to the mtgor.'s estate from the society, pltf. relying upon his power to give a receipt under s. 22 (1) of the Act, claimed to have the whole amount paid to him as mtgee. The trustees, however, not being furnished with an account & having reason to believe it questionable how much was due on the mtge. offered to pay pltf. so much of the money as upon taking an account should be found due to him, but declined to pay him without such an account.

In an action by pltf. to recover the money from the trustees, it was held that the trustees were entitled to act as they had done; & upon their undertaking to pay the money into court under Trustee Act, 1893 (c. 53), the action was dismissed.—*HOCKEY v. WESTERN*, [1898] 1 Ch. 350; 67 L. J. Ch. 166; 78 L. T. 1; 46 W. R. 312; 14 T. L. R. 201; 42 Sol. Jo. 232, C. A.

**3066. Assignee of share of trust property—Duty of trustee to pay share to assignee—Right of assignee**

**PART IV. SECT. 8.**  
**1. Mortgage of trust property—**  
*Mortgagors must not be prejudiced.]*—

The trustee of a mtge. holds it in trust, to the extent of the mtge., for the mtgee.; subject thereto for the mtgors,

& he cannot do anything to prejudice the mtgors.—*BLENNERHASSETT v. DAY* (1812), 2 Ball. & B. 133.—*IR.*

to refuse to deliver documents of title before payment.]—On the distribution of a trust fund, a share in which has been previously assigned, the trustee has no right to require the delivery to him of the assignment & other documents of title before payment of the share to the assignee. —*Re PALMER, LANCASHIRE & YORKSHIRE REVERSIONARY INTEREST CO. v. BURKE*, [1907] 1 Ch. 486; 76 L. J. Ch. 406; 96 L. T. 816.

#### SECT. 9.—DUTY TO ACCOUNT AND GIVE INFORMATION.

**3067. Duty to account.]**—No difference between the implied contract of trustees, assignees, & exors., & of a receiver or agent; bound to account faithfully, at least when called upon, & not to suppress, conceal, or overcharge; liable therefore to interest, as a receiver.—*HARDWICKE (EARL) v. VERNON* (1808), 14 Ves. 504; 33 E. R. 611, L. C.

*Annotations:—***Re**ld. *Ormond v. Hutchinson* (1809), 16 Ves. 94; *Pearse v. Green* (1819), 1 Jac. & W. 135; *Oddy v. Seeker* (1854), 2 Sm. & G. 193; *Teece v. Beere* (1859), 28 L. J. Ch. 782; *Springett v. Dashwood* (1860), 2 Giff. 521; *Makepeace v. Rogers* (1865), 5 New Rep. 399; *Turner v. Burkinshaw* (1867), 2 Ch. App. 488; *Harsant v. Blaine, Macdonald* (1887), 56 L. J. Q. B. 511. **Ment**d. *Ridston v. Grissell* (1870), L. R. 10 Eq. 393.

**3068. —**].—Under the new rules, if an administration action be rendered necessary solely by the neglect of a trustee to furnish accounts, the decree should be so framed as to enable the ct. to throw the whole costs of action on the party in default.—*Re HAYTER, Re WALLETT, HAYTER v. WELLS* (1883), 32 W. R. 26.

**3069. —** **Trustee of infant's estate.]**—Lands were devised in trust, to maintain the infant till he came to twenty-three, & then to account, & pay him the rents, & reconvey the estate to him, but if he died before, to reconvey it to another; the infant is not entitled to an account till he come to twenty-three, for that is a condition precedent, but the surplus profits, if he die before, go to the heir of testator, not being devised over, but the infant & the heir, on suggestion of insolvency in the trustees, may bring a bill for an account.—*TILLY v. SIMPSON* (1729), Mos. 244, 25 E. R. 374.

**3070. —**].—Testator gave his residue, on trust to apply the income for the maintenance, education & support of his children until the youngest attained twenty-one. The children having been maintained, etc., the ct. declined directing an account of the application of the income during the minority of the youngest child, without a special case being made out.—*HORA v. HORA* (1863), 33 Beav. 88; 55 E. R. 300.

**3071. —** **To cestuis que trust—& persons claiming under them.]**—Tenant in fee simple would have a right to say to the trustees, what estates have you sold? What debts have you

paid? & those who claim under him have the same right.

*Prima facie*, the Marquis of Ormonde, & all claiming under him, have a right to ask what was the value of the estates, the amount of the moneys raised by sales & from the rents & of the debts & incumbrances paid, & of those remaining unpaid.

If there was a settlement of all the matters relating to this trust, the trustees would be entitled to the possession of the vouchers, as their discharge to the Marquis; but he would have a right to the inspection of them as his documents, to be used by him against all who might be making demands upon him, in relation to these debts (*LORD ELDON, C.*).—*CLARKE v. ORMONDE (EARL)* (1821), Jac. 108; 37 E. R. 791, L. C.

*Annotations:—***Cons**d. *Springett v. Dashwood* (1860), 2 Giff. 521. **Ment**d. *Lee v. Park* (1836), 1 Keen, 714; *Ranken v. Harwood, Ranken v. Boulton* (1840), 5 Hare, 215; *Rowland v. Morgan* (1848), 17 L. J. Ch. 339; *Vincent v. Godson* (1850), 3 De G. & Sm. 717; *Macrae v. Smith, Panton v. Smith* (1856), 2 K. & J. 411; *Re Skiggs, Marriage v. Skiggs* (1859), 3 De G. & J. 4; *Seale v. Hayne* (1863), 9 L. T. 570; *Haly v. Barry* (1868), 3 Ch. App. 452; *Re Womersley, Etheridge v. Womersley* (1885), 29 Ch. D. 557.

**3072. —**].—To a bill by *cestuis que trust* against the representatives of the trustees, charging breaches of trust & asking, as consequential to other relief, that debts might admit assets or set out accounts, one of debts put in an answer denying the breaches of trust, & alleging that the accounts had been settled & a release given in the lifetime of the trustee, & refusing to admit assets or set out accounts. Exceptions to such answer were allowed, & the ct. refused to let them stand over till the hearing, on the ground that plffs. were entitled, before going to the expense of establishing their case, to know whether there would be assets to satisfy their claim in case of success.—*BROOKES v. BOUCHER* (1862), 31 L. J. Ch. 821; 8 Jur. N. S. 639; 10 W. R. 708; *subsequent proceedings* (1863), 3 New Rep. 279.

*Annotations:—***Re**ld. *Cull v. Ingles* (1868), 37 L. J. Ch. 385. **Ment**d. *West of England & South Wales Bank v. Nickolls* (1877), 6 Ch. D. 613.

**3073. —** **To persons interested in estate.]**—Where trustees had refused information & an account of the property to plffs., who had an interest in the estate, & other proceedings had subsequently been taken whereby the costs of the suit were greatly increased, the trustees were directed to pay the costs of the suit up to the hearing, as if it had been an ordinary administration suit, & as to the rest of the costs, each party to bear his own.—*TALBOT v. MARSHFIELD* (1868), 3 Ch. App. 622; 19 L. T. 223; 32 J. P. 725, L. J.J.

*Annotation:—***Re**ld. *Molyneux v. Fletcher*, [1898] 1 Q. B. 618.

**3074. —** **Right to be guaranteed against expense.]**—Trustees are entitled, on being required by a person claiming to be a *cestui que trust* to furnish accounts & information in respect of the

*FORD v. PORTER* (1889), 16 A. R. 565.—**CAN.**

**3067 vii. —**].—*MORAN v. MORAN* [1910] 1 L. R. 316.—**IR.**

**3067 viii. —**].—*LAIRD v. LAIRD* (1858), 20 Duml. (Cl. of Soss.) 972; 30 Sc. Jur. 582.—**SCOT.**

**3037 ix. —**].—*SOMMERVILLE'S TRUSTEES v. WEMESS* (1854), 17 Duml. (Cl. of Soss.) 151; 27 Sc. Jur. 49.—**SCOT.**

**3067 x. —**].—*DENHOLM'S TRUSTEES v. DENHOLM'S TRUSTEES*, [1908] S. C. 255; 45 Sc. L. R. 154; 15 S. L. T. 89.—**SCOT.**

#### PART IV. SECT. 9.

**3067 i. Duty to account.]**—Where one of two co-trustees has died, the beneficiaries are entitled to accounts against the surviving trustee only, unless there has been some misapplication of the trust estate, in which case accounts against the exors. of deceased trustee may be ordered.—*SMITH v. PERROTT* (1890), 16 V. L. R. 754.—**AUS.**

**3067 ii. —**].—*McMAHON v. HERMANN* (1893), 14 N. S. W. Eq. 77.—**AUS.**

**3067 iii. —**].—*NORMAN v. CORRIGAN* (1916), 16 S. R. N. S. W. 225; 33 N. S. W. W. N. 71.—**AUS.**

**3087 iv. —**].—It is the duty of a trustee to use reasonable diligence to have the accounts of the trust ready, & to render them within a reasonable time after they are asked for on behalf of the *cestuis que trust*.—*RANDALL v. BURROWS* (1865), 11 Gr. 361.—**CAN.**

**3067 v. —**].—*HENDRICKS v. HALLETT* (1867), 12 N. B. R. (1 Han.) 185.—**CAN.**

**3067 vi. —**].—It is the duty of a trustee, or other accounting party, at all times to have his accounts ready, to afford all facilities for their inspection & examination, & to give full information whenever required.—*SAND-*

## Sect. 9.—Duty to account and give information.

## Sect. 10.]

trust estate, to demand that they should be guaranteed against the expense of complying with the requisition; & this rule is not affected by the circumstance that one of the trustees happens to be a solr.—*Re BOSWORTH, MARTIN v. LAMB* (1889), 58 L. J. Ch. 432.

**3075.** ———. [Duty to keep accounts.]—If a testator appoints a person to discharge the duties of an exor., inasmuch as he is sworn to discharge his duties as exor., his first duty plainly is, if he cannot keep accounts, to provide some one who can, because in this ct. the first & primary duty of every exor., or trustee having money in his hands to be received & to be paid is, that an account should be kept, to be produced to those interested in the account when it is properly demanded (STUART, V.-C.).—*WROE v. SEED* (1863), 4 Giff. 425; 9 L. T. 254; 9 Jur. N. S. 1122; 66 E. R. 773.

**3076.** ———. [An exor. or trustee is bound, in the absence of very strong reasons to the contrary, to render the accounts of his testator's estate to the solr. of the residuary legatee, & if he pertinaciously refuse to do so, will be ordered to pay the costs up to the hearing of a suit to have the accounts taken, although such suit may embrace other matters.—*KEMP v. BURN* (1863), 4 Giff. 348; 1 New Rep. 257; 7 L. T. 666; 9 Jur. N. S. 375; 11 W. R. 278; 66 E. R. 740.

Annotation:—*Apld. Jefferys v. Marshall* (1870), 23 L. T. 518.

**3077.** ———. [The duty of a trustee is threefold: there is the duty to keep accounts, the duty to deliver accounts, & the duty to vouch accounts; but the considerations which apply to them are not the same. The duty of a trustee to keep accounts is an essential duty, he must keep such accounts so as to be able to deliver a proper account within a reasonable time showing what he has received & paid. As to the duty of delivering accounts, different considerations apply. In the case of very long accounts the trustee may incur considerable expense, & he cannot be called upon to deliver accounts until his expenses have been guaranteed. As to the duty of vouching accounts, that cannot arise till after the accounts have been delivered (KEKEWICH, J.).—*Re WATSON* (1904), 49 Sol. Jo. 54.

**3078.** ———. [Duty to vouch accounts.]—*Re WATSON*, No. 3077, *ante*.

**3079.** ———. [Duty to deliver accounts.]—*Re WATSON*, No. 3077, *ante*.

**3080.** ———. [What amounts to a refusal to account.]—(1) Where a trustee, under a power in a marriage settlement to invest in freehold, copyhold, or leasehold security, invests in leaseholds having only fourteen years to run with a very small margin of value, the ct. will direct the investment to be called in.

(2) Where a trustee, in answer to an application by a solr., on behalf of the *cestui que trust*, replies that had the *cestui que trust* himself applied he should not have answered the application, but, in courtesy to him, the solr., begged to state so & so, that is not a refusal to account.—*PINCE v. BEATTIE* (1863), as reported in 9 L. T. 315; 9 Jur. N. S. 1119; 11 W. R. 979.

**3081.** ———. [Liability for breach of duty.]—In Apr. 1856, by two deeds J. conveyed & assigned his real & personal estate to three trustees, upon trust to sell & convert for the benefit of his creditors. The trustees did not sell, but permitted J. to remain in possession of his property, & to carry on his business of brewer. One of the

trustees died, & the other two paid the creditors two dividends, amounting to 10s. in the pound. Shortly after payment of the second dividend pltf. S., a creditor, wrote to the trustees' solrs. asking for an account of the trust estate, but no answer was returned to his letter. S. then filed this bill, on behalf of himself, & all other creditors, for an account. The acting trustee, by his answer, admitted that J. was still in possession of the trust property, & set forth an account of the personal estate which had come to his hands, of how it had been dealt with & employed in the brewery business & of such parts of the same as were still outstanding. S. then amended his bill, charging wilful neglect & default. The accounts were then taken by the chief clerk but no material difference was found between his certificate & the statement scheduled to the answer:—*Held*: up to the filing of the amended bill the acting trustee having omitted to furnish a statement of the accounts when called upon to do so, must pay pltf.'s costs, the other trustee bearing his own costs; & as the result of taking the accounts showed no gross misconduct on the part of the trustees, they were entitled out of the estate to their costs of the subsequent proceedings.

One of the duties of a trustee to his *cestui que trust* is to afford him all reasonable & proper information in reference to the matters of the trust (STUART, V.-C.).—*SPRINGETT v. DASHWOOD* (1860), 2 Giff. 521; 3 L. T. 542; 7 Jur. N. S. 93; 66 E. R. 218.

**3082.** ———. [Costs.]—Testator devised realty to trustees on trust, with consent of his three daughters to sell & apply proceeds for benefit of his daughters for life, with remainder to their issue. Testator died in 1840. Payments were made to tenants for life up to 1864, when one daughter died, leaving issue. After 1864, payments were made to the surviving tenants for life alone. Letters were written on behalf of the *cestuis que trust* in 1867 & 1869 asking for accounts, which were not given. A bill was then filed to administer the trusts of the will:—*Held*: the trustee must pay the costs of the suit.—*JEFFERYS v. MARSHALL* (1870), 23 L. T. 548; 19 W. R. 94.

**3083.** ———. [The estate of testator who died in 1832 was distributed in 1847, as the evidence showed, at the written request of the persons beneficially entitled. Another part of the estate which fell in 1852 was distributed also at the request, but not in writing, of the beneficiaries, & in 1871 the acting trustee died. No accounts or vouchers were forthcoming from the trustees. Bill filed in 1872 by one of the beneficiaries & her husband against the surviving trustee & the representative of deceased trustee for administration, dismissed; but owing to the negligence of the trustees in not keeping accounts & vouchers, without costs.

I cannot say that it was not the duty of the trustees to preserve evidence of that distribution in 1855 (BACON, V.-C.).—*PAYNE v. EVENS* (1874), L. R. 18 Eq. 356.

**3084.** ———. [Where a trustee had taken a wrong view of his position towards his *cestui que trust*, & had put him to expense & delay by an indefensible course of conduct in the taking of an account:—*Held*: the ct. must not only deprive the trustee of the costs of taking the account, but must order him to pay them.—*Re HOLTON'S SETTLEMENT TRUSTS, HOLTON v. HOLTON* (1918), 88 L. J. Ch. 444; 119 L. T. 304; 62 Sol. Jo. 403.

**3085. Duty to give information.]—**(1) *Primâ facie* there is this distinction between exors. & trustees; that one exor. can, & one trustee cannot, give a discharge (LORD ELDON, C.).

(2) It is the duty of trustees to afford to their *cestui que trust* accurate information of the disposition of the trust fund (LORD ELDON, C.).

(3) The investment of trust money on personal security is a breach of trust.—WALKER v. SYMONDS (1818), 3 Swan. 1; 36 E. R. 751, L. C.

*Annotations:—Generally, Reid.* Tarleton v. Hornby (1835), 1 Y. & C. Ex. 333; Munch v. Cockrell (1836), 8 Sim. 219; Perry v. Knott (1841), 4 Beav. 179; Shipton v. Rawlins (1845), 4 Hare, 619; Burrows v. Walls (1855), 5 De G. M. & G. 233; Thompson v. Finch (1856), 25 Beav. 316; Lloyd v. Atwood, Atwood v. Lloyd (1859), 3 De G. & J. 614; Farrant v. Blanchford (1863), 1 De G. J. & Sm. 107; Re Brodgen, Billing v. Brodgen (1888), 38 Ch. D. 546; Chillingworth v. Chambers, [1896] 1 Ch. 685; Fletcher v. Collins, [1905] 2 Ch. 21. *Mentid.* E. p. James (1853), 3 De G. M. & G. 493; London General Omnibus Co. v. Holloway, [1912] 2 K. B. 72.

**3086. — To cestuis que trust & persons claiming under them.]—**(Larke v. Ormonde (Earl), No. 3071, ante.

**3087. — Reasonable & proper information.]—**SPRINGETT v. DASHWOOD, No. 3081, ante.

**3088. — Mode of dealing with trust fund.]—**Low v. BOUVERIE, No. 3002, ante.

**3089. — Information as to where trust fund is.]—**Low v. BOUVERIE, No. 3002, ante.

**3090. — Information as regards incumbrances.]—**A *cestui que trust* who is contingently entitled in remainder to a share of Consols standing in the name of a trustee, is entitled to obtain from such trustee an authority to the Bank of England, enabling him to ascertain whether there are any charging orders, stop orders, or *distringas* upon the trust fund.—Re TILLOT, LEE v. WILSON, [1892] 1 Ch. 86; 61 L. J. Ch. 38; 65 L. T. 781; 40 W. R. 204.

**3091. — — — — —.]—***Primâ facie* & in the absence of any special circumstances a *cestui que trust*, even though he be only interested in the proceeds of sale of land is entitled to the production & inspection of all title deeds & other documents relating to the trust estate which are in the possession of the trustees.—Re COWIN, COWIN v. GRAVETT (1886), 33 Ch. D. 179; 56 L. J. Ch. 78; 34 W. R. 735.

**3092. — Duty to permit inspection of documents—Relating to trust estate.]—**A settled property on trust for pltf. & others, but he reserved a power of defeating it. Pltf. alleged that the trusts had been partially defeated by a subsequent deed, & called upon the trustee to produce the trust deed. The trustee in his answer stated that pltf.'s interest had been totally defeated by the subsequent deed, which he did not object to

produce, but he said that A., who was not a party to the suit, objected to the production:—*Held:* pltf. was entitled to inspect it, but the order could not be made in the absence of A.—BUGDEN v. TYLEE (1856), 21 Beav. 545; 52 E. R. 970; *subsequent proceedings, sub nom.* BUGDEN v. SOUTH, 26 L. J. Ch. 425.

*Annotation:—*Apld. Re Cowin, Cowin v. Gravett (1886), 33 Ch. D. 179.

**3093. — — — — Cases laid before counsel.]—**A trustee is not bound to produce to his *cestuis que trust* cases laid before counsel with the view of resisting a claim by such *cestuis que trust*, although the trustee is not personally interested.—THOMAS v. SECRETARY OF STATE FOR INDIA IN COUNCIL (1870), 18 W. R. 312.

**3094. — To person with reversionary interest in trust funds—As to investment of fund.]—**Pltf. being beneficially entitled under a will to a one-ninth share of a sum of £900 expectant on the death of a tenant for life, demanded from the trustees of the will particulars of the investments of testator's estate. The estate was amply sufficient for payment of the legacy:—*Held:* the trustees were bound to furnish such particulars.—Re DARTNALL, SAWYER v. GODDARD, [1895] 1 Ch. 474; 61 L. J. Ch. 341; 72 L. T. 404; 42 W. R. 644; 12 R. 237, C. A.

**3095. — Information to intending mortgagee.]—**Low v. BOUVERIE, No. 3002, ante.

**3096. — — — — —.]—**There would be much force in the argument if it were the law . . . that a trustee applied to for information by an intending mtgee. incurred liability by merely abstaining from answering. . . . But in truth there is no duty of that kind cast upon trustees (LORD MACNAUGHTEN).—WARD v. DUNCOMBE, [1893] A. C. 369; 62 L. J. Ch. 881; 69 L. T. 121; 42 W. R. 59; 1 R. 221, H. L.; *affg.* 8. C. *sub nom.* Re WYATT, WHITE v. ELLIS, [1892] 1 Ch. 188; C. A.

*Annotations:—Mentid.* Mack v. Postle, [1894] 2 Ch. 449; Stephens v. Green, Green v. Knight, [1895] 2 Ch. 148; Freeman v. Laing (1899), 68 L. J. Ch. 586; Re Wasdale, Britton v. Partridge, [1899] 1 Ch. 163; Lloyd's Bank v. Pearson, [1901] 1 Ch. 865; Marchant v. Morton, Down, [1901] 2 K. B. 829; Taylor v. London & County Banking Co., London & County Banking Co. v. Niven, [1901] 2 Ch. 251; Montefiore v. Guedalla, [1903] 2 Ch. 26; Re Dallas, [1904] 2 Ch. 385; Re Dawson's Settlement, Higgins v. Dawson, [1917] 1 Ch. 541; Hill v. Peters, [1918] 2 Ch. 273; Ipswich Permanent Money Club v. Anthy, [1920] 2 Ch. 277.

#### SECT. 10.—DUTY NOT TO OBTAIN PERSONAL ADVANTAGE FROM POSITION.

**3097. Trustee cannot retain advantage gained.]—**Trustee buying in debt for less than is due, shall not be allowed for the whole. If a trustee or exor.

**3085 i. Duty to give information.]—**When a trustee enters into a transaction with beneficiary for the purchase of his interest in the trust, it is his duty to give the beneficiary all the information he possesses as to its value.—DOUGAN v. MACPHERSON (1901), 4 F. (Cl. of Sess.) (H. L.) 7; 39 Sc. L. R. 383; 9 S. L. T. 439.—SCOT.

**3097 iv. .]** The rule that a trustee must not have a personal interest in conflict with his duty as such trustee, applies as well to public as to private trusts.—Re TORONTO HARBOUR COMRS. (1881), 28 Gr. 195.—CAN.

**3097 v. .]** Although a director of a public co. is always clothed with a fiduciary character in regard to any dealings with property of the co. in his capacity of director, the rule that a trustee is not allowed to make a profit of his trust does not apply to such a director, *qua* director only.—Re PORT CANNING CO., LTD. (1871), 6 B. L. R. 278.—IND.

**3097 vi. .]**—No person who has accepted the position of a trustee & has acquired property in that capacity can be permitted to assert an adverse title on his own behalf until he has obtained a proper discharge from the

trust with which he has clothed himself.—SUNIVAS MOOTHY v. VENKATA VARADA AYYANGAR (1911), 1 L. L. 34 Mad. 237.—IND.

**3097 vii. .]**—The rule that "a trustee shall gain no benefit for himself," shall not entitle a *cestui que trust* to compel a party who knew nothing of the trust, to execute an agreement made with the trustee, & on credit of his solvency.—O'HEARNY v. HENCKES (1803), 1 Sch. & Lef. 123.—IR.

**3097 viii. — .]**—If a trustee has obtained a deed contrary to his character as trustee, the ot. may refuse to enforce the deed without a cross bill.—RICHARDS v. BAYLY (1844), 6 L. Eq. R. 545; 1 Jo. & Lat. 120.—IR.

**3097 ix. .]**—If a solr. or trustee secretly purchases, in the name of another, at a sale under the ct., the

#### PART IV. SECT. 10.

**3097 i. Trustee cannot retain advantage gained.]—**A constructive trustee cannot while clothed with the original trusts make a profit by buying up an encumbrance.—PERPETUAL TRUST CO., LTD. v. COWAN (No. 2) (1900), 21 N. S. W. Eq. 278; 17 N. S. W. N. N. 70.—AUS.

**3097 ii. .]**—CHRISTIE v. SAUNDERS (1851), 2 Gr. 670.—CAN.

**3097 iii. .]**—HEWSON v. SMITH (1870), 17 Gr. 407.—CAN.

*Sect. 10.—Duty not to obtain personal advantage from position.]*

compound debts or mtges., and buy them in for less than is due upon them, he shall not take the benefit of it himself, but other creditors & legatees shall have the advantage of it (LORD COWPER, C.).—ANON. (1707), 1 Salk. 155; 91 E. R. 143.

*Annotation:—*Refd. Anon. (1679), 2 Cas. in Ch. 4.

**3098.** —[—]It is a universal proposition, & of great moment to the safety & property of mankind, that a trustee ought strictly to pursue the tenor of his trust, without perverting it directly or indirectly to his own personal advantage.—RICHARDSON v. CHAPMAN (1780), 7 Bro. Parl. Cas. 318; 3 E. R. 206, H. J.

*Annotations:—*Refd. Brown v. Higgs (1803), 8 Ves. 561. *Mentd.* Pierson v. Garnet (1786), 2 Bro. C. C. 38.

**3099.** —[—]A trustee in a will, which directed money to be lent at the best interest, by consent of his co-trustee keeps it at 4 per cent.; ordered to pay 5 per cent.

A trustee cannot bargain for himself, so as to gain an advantage (LORD THURLOW, C.).—FORBES v. ROSS (1788), 2 Bro. C. C. 430; 2 Cox, Eq. Cas. 113; 29 E. R. 240, L. C.

*Annotation:—*Refd. Tebbis v. Carpenter (1816), 1 Madd. 290.

**3100.** —[—]A trustee who is intrusted to sell & manage for others undertakes in the same moment in which he becomes a trustee not to manage for the benefit & advantage of himself (LORD ELDON, C.).—*Ex p. LACEY* (1802), 6 Ves. 925; 31 E. R. 1228, L. C.

*Annotations:—**Apld.* Greenlaw v. King (1811), 10 L. J. Ch. 129. *Consd.* Hamilton v. Wright (1842), 9 Cl. & Fin. 111; Baker v. Peck (1860), 3 L. T. 656; *Re* Worssam, Henery v. Worssam (1882), 46 L. T. 584; *Re* Postlethwaite, Postlethwaite v. Rickman (1888), 59 L. T. 58; Lagunas Nitrate Co. v. Lagunas Syndicate, (1899) 2 Ch. 392; Rowland v. Chapman, Rowland v. Corrie, Rowland v. Brandreth (1901), 17 T. L. R. 669. *Refd.* *Ex p. James* (1903), 8 Ves. 337; Morse v. Royal (1806), 12 Ves. 355; A.-G. v. Dudley (1815), Coop. G. 116; Benson v. Heathorn (1842), 1 Y. & C. Ch. Cas. 326; Aberdeen Ry. v. Blackie (1854), 23 L. T. O. S. 315; *De Cordova v. De Cordova* (1879), 4 App. Cas. 692; Plowright v. Lambert (1885), 52 L. T. 646; Farrar v. Farrars (1888), 40 Ch. D. 395; *Re* Boles & British Land Co.'s Contract (1901), 71 L. J. Ch. 130; Christoforides v. Terry, [1924] A. C. 566.

**3101.** —[—]A trust fund of £15,000 created under a marriage settlement by which certain lands were limited to the husband for life, remainder to the first & other sons in tail, with a power to the husband of leasing for forty-one years, or three lives at the best rent, was directed by the deed to be laid out with all convenient speed, in the purchase of lands in fee simple, to be conveyed and limited to the same uses as the other lands mentioned in the settlement, & in the meantime the trustees were empowered with the consent of P. to lend out the money on any public or private security. The husband purchased a leasehold interest for £8,911, to which he took the assignment for himself alone, & obtained from the trustees, out of the trust fund, money to complete the purchase, & for other purposes, to the amount in all of £11,696, as a security for which they took a mtge. of the leasehold interest & a collateral security for £1,310, amounting with the purchase-money to £10,221, being upwards of £1,400 less than the sum advanced out of the trust fund. The husband granted a lease at a great undervalue for his own term, of part of the purchased lands,

to the attorney who managed the purchase for him, which purchase turned out a very beneficial one:—*Held:* the first son of the marriage was entitled to follow that part of the trust fund which had been misapplied, & to have the benefit of the purchase, & to have the lands sold discharged of the lease to the attorney, whose equity against him, the son, as personal representative of his father, was barred by notice of the settlement & breach of trust.

It is quite clear that if the trustees had purchased this interest, or taken this lease, for themselves, all the benefit would have belonged to the trust fund; for it is perfectly settled that trustees can never deal with the trust fund for their own benefit (LORD REDESDALE).—*PHAYRE v. PEREE* (1815), 3 Dow, 116; 3 E. R. 1008, H. J.

*Annotations:—**Apld.* Mathias v. Mathias (1858), 3 Sm. & G. 552. *Refd.* *Re* Pumfrey, Worcester City & County Banking Co. v. Birk (1882), 22 Ch. D. 255.

**3102.** —[—]Sale of testator's share in a partnership trade, & the property belonging to it, by his exors., to his partners, for the purpose of being resold to one of his exors., set aside, & his estate held entitled to his *aliquot* proportion of the subsequent profits, as if the partnership had continued.

Persons dealing as trustees & exors. must put their own interest entirely out of the question.—(LORD ELDON, L.C.).—*COOK v. COLLINGRIDGE* (1823), Jac. 607; 1 L. J. O. S. Ch. 74; 37 E. R. 979, L. C.

*Annotations:—**Consd.* *De Cordova v. De Cordova* (1879), 4 App. Cas. 692. *Refd.* *Crawshaw v. Collins* (1826), 2 Russ. 325; *Wedderburn v. Wedderburn* (1838), 4 My. & Cr. 41; *Portlock v. Gardner* (1842), 6 Jur. 796; *Davies v. Hodgson* (1858), 25 Beav. 177; *McDonald v. Richardson*, *Richardson v. Marten* (1864), 10 L. T. 166; *Vyse v. Foster* (1874), L. R. 7 H. L. 318; *Re* Norrington, Brindley v. Partridge (1879), 13 Ch. D. 654. *Mentd.* *Cookson v. Cookson* (1837), 8 Sm. 529; *Willett v. Blanford* (1842), 1 Hare, 253; *Travis v. Milne*, *Milne v. Milne* (1851), 9 Hare, 141; *Wedderburn v. Wedderburn* (1856), 22 Beav. 84; *Cooper v. Hood* (1858), 26 Beav. 293; *Mellersh v. Keen* (1859), 27 Beav. 236; *Smith v. Everett* (1859), 27 Beav. 446; *Parsons v. Hayward* (1862), 31 Beav. 199; *Johnson v. Helleley* (1864), 2 De G. J. & Sm. 446; *Wilkes v. Staunton* (1877), 7 Ch. D. 188; *Walker v. Mottram* (1881), 19 Ch. D. 355; *Pearson v. Pearson* (1881), 27 Ch. D. 145.

**3103.** —[—]The rule is, that the trustee shall not deal with the *cestui que trust*, where the relation between them gives the former any possible advantage over the latter.—*NAYLOR v. WYNCH* (1828), 7 L. J. O. S. Ch. 6, L. C.

*Annotations:—**Mentd.* *Brent v. Brent* (1840), 10 L. J. Ch. 84; *Stone v. Godfrey* (1853), 1 Sm. & G. 590; *Houghton v. Lees* (1854), 24 L. T. O. S. 201; *Lawton v. Campton* (1854), 18 Beav. 87; *Re Wynch's Trusts*, *Ex p. Wynch* (1851), 5 De G. M. & G. 188.

**3104.** —[—]A party who is intrusted to sell & manage for others, undertakes in the moment in which he becomes a trustee, not to manage for the benefit & advantage of himself.—*GREENLAW v. KING* (1841), 10 L. J. Ch. 129; 5 Jur. 18, L. C.

*Annotations:—**Mentd.* *Beaden v. King* (1852), 9 Hare, 499; *Boyd v. Barker* (1859), 28 L. J. Ch. 445; *Guest v. Smyth* (1870), 5 Ch. App. 553, n.

**3105.** —[—]A trustee is bound not to do anything which can place him in a position inconsistent with the interests of the trust, or which can have a tendency to interfere with his duty in discharging it. Neither the trustee nor his representative can be allowed to retain an advantage acquired in violation of this rule.

sale is void.—*POPHAM v. EXHAM* (1860), 10 L. Ch. R. 440. —IR.

**3097 x.** —[—]Where the terms of a correspondence between the beneficiaries under a trust & a trustee who also acted as professional agent of the trust showed, that it was their under-

standing that he was to receive professional remuneration for the work done by him as agent:—*Held:* such a case did not fall within the rule of law that a trustee is not entitled to make profit from his management of the estate, or of business or affairs connected with it.—*OMMANEY v. SMITH*

(1854), 19 Dunl. (Ct. of Sess.) 721; 26 Sc. Jur. 314.—SCOT.

k. *Right to apply to court for directions—Duty conflicting with interest.* —*CAMERON'S TRUSTEES v. CAMERON* (1864), 3 Macph. (Ct. of Sess.) 200; 37 Sc. Jur. 97.—SCOT.

A trust was created by debtor for the benefit of creditors, & the trustee had the power to bind debtor personally & heritably for the benefit of the trust. By the terms of the trust deed, the trustee was likewise required to do all in his power to keep the residue of the trust estate as large as possible for debtor. The trustee purchased an annuity granted by debtor, after the date of the trust deed. The trustee died. His representatives sought to enforce the annuity against the grantor :—*Held* : they could not do so.—*HAMILTON v. WRIGHT* (1842), 9 Cl. & Fin. 111 ; 8 E. R. 357, H. L.

*Annotations* :—*Consd.* Tennant v. Trenchard (1869), 4 Ch. App. 537. *Apld.* Bennett v. Gaslight & Coke Co. (1882), 52 L. J. Ch. 98. *Refd.* *Re* McKenna's Estate, *Ex p.* Busted (1861), 5 L. T. 241 ; Parker v. McKenna (1874), 10 Ch. App. 107, *Mentd.* Irvine v. Kirkpatrick (1850), 16 L. T. O. S. 529.

**3106.** —[.]—A trustee can never make a benefit to himself by any dealing with the trust property (*WIGRAM, V.-C.*).—*DOBSON v. LAND* (1850), 8 Hare, 216 ; 19 L. J. Ch. 484 ; 14 Jur. 288 ; 68 E. R. 337.

*Annotations* :—*Refd.* Kirkwood v. Thompson (1865), 2 Hem. & M. 392. *Banner v. Herldgo* (1881), 18 Ch. D. 254 ; *Charles v. Jones* (1887), 56 L. J. Ch. 745 ; *White v. City of London Brewery Co.* (1888), 39 Ch. D. 559. *Mentd.* Bellamy v. Brickenden (1861), 2 John. & H. 137.

**3107.** —[.]—It is a well settled principle that if a trustee make a profit of his trusteeship it shall enure to the benefit of his *cestuis que trust* (*STUART, V.-C.*).—*SUGDEN v. CROSSLAND* (1856), 3 Sim. & G. 102 ; 25 L. J. Ch. 503 ; 26 L. T. O. S. 307 ; 2 Jur. N. S. 318 ; 4 W. R. 343 ; 65 E. R. 620.

*Annotation* :—*Refd.* *Re* Thorpe, Vipont v. Radcliffe, [1891] 2 Ch. 360.

**3108.** —[.]—A testator who was seised & possessed of real & leasehold estate & of personal property, part of the leasehold being a colliery, specifically devised part of his real estate to his son, & then devised & bequeathed all the residue of the real & the whole of the personal estate to trustees, upon trust at some convenient time, with the approbation of his son, to sell & convert same, & raise & invest & apply £1,000 upon certain trusts, & to pay two life annuities, & then to pay his testator's daughter an annuity of £200 a year for her life over & above half the income of the real & personal estate given to the trustees. Testator directed that the daughter's annuity should not exceed £600 a year, & that the profits of the mine should not be deemed income until £10 per cent. was set apart for expenses : & he gave all his property, subject to the legacy & annuities, to his son, & empowered his trustees to let his son into possession of all the property upon his securing the legacy and annuities. He appointed his two trustees & his son exors. At the death of testator his debts exceeded the amount of the pure personality exclusive of the colliery. The son alone proved the will, the trustees having disclaimed the trusts & renounced probate. The son entered into possession of the whole property. The colliery was worked out, & yielded a profit of altogether £27,000. The daughter filed a bill against her brother & other parties for the administration of testator's estate :—*Held* : the son, having acted as sole exor. & trustee, could not be allowed to make a profit of the trust ; that the clear income of the colliery formed part of the capital of the testator's personal estate.—*WIGHTWICK v. LORD* (1857), 6 H. L. Cas. 217 ; 26 L. J. Ch. 825 ; 29 L. T. O. S. 303 ; 3 Jur. N. S. 699 ; 5 W. R. 713 ; 10 E. R. 1278, H. L. ; *affg.* S. C. *sub nom.* *LORD v. WIGHTWICK* (1853), 4 De G. M. & G. 803, L. J.J.

**3109.** —[.]—The rule of the ct. is imperative, that, in the absence of any contract for that

purpose, no person can, by acting as trustees, derive any pecuniary benefit to himself.—*CROSSKILL v. BOWER, BOWER v. TURNER* (1863), 32 Beav. 86 ; 1 New Rep. 379 ; 32 L. J. Ch. 540 ; 8 L. T. 135 ; 9 Jur. N. S. 207 ; 11 W. R. 411 ; 55 E. R. 34.

*Annotations* :—*Mentd.* Barfield v. Loughborough (1872), 8 Ch. App. 1 ; *Yourell v. Hibernian Bank*, [1918] A. C. 372.

**3110.** —[.]—Where trustees acquire a benefit as ostensible owners of trust property, that benefit cannot be retained by them, but must be surrendered to those who are beneficially interested.—*ABERDEEN TOWN COUNCIL v. ABERDEEN UNIVERSITY* (1877), 2 App. Cas. 544, H. L.

*Annotation* :—*Refd.* Briggs v. Massey (1881), 29 W. R. 926.

**3111.** —[.]—A trustee will not be permitted to place himself in a position in which his personal interests will conflict with those of the trust ; & if he does place himself in such a position & acquires benefits from so doing, those benefits will be transferred to the trust estate.

On the insolvency of a person who had a lucrative agency agreement with a gas co. for the sale by him, at a commission, of their sulphate of ammonia, the co. renewed the agency agreement for a limited period to two of the trustees of the insolvent's estate appointed by creditors' trust deed for the benefit of the estate. Before the expiration of that agreement & the winding up of the trust, one of those two trustees obtained for his firm from the co. a fresh agency agreement, to commence from the expiration of that agreement, & to be on less lucrative, though still beneficial, terms :—*Held* : the trustee was not at liberty, by obtaining a fresh agreement for the benefit of his own firm, to render it contrary to his own interest to press for a renewal of the old agreement or a grant of a new one for the benefit of the trust estate, & the interest of the trustee under the fresh agreement must be transferred to the trust estate.—*BENNETT v. GAS LIGHT & COKE Co.* (1882), 52 L. J. Ch. 98 ; 48 L. T. 156.

**3112.** —[.]—It is an inflexible rule of a ct. of equity that a person in a fiduciary position . . . is not unless otherwise expressly provided, entitled to make a profit ; he is not allowed to put himself in a position where his interest & duty conflict (*LORD HERSCHEL*).—*BRAY v. FORD*, [1896] A. C. 44 ; 65 L. J. Q. B. 213 ; 73 L. T. 609 ; 12 T. L. R. 119, H. L. ; *revsg.* S. C. *sub nom.* *FORD v. BRAY* (1894), 11 T. L. R. 32, C. A.

*Annotations* :—*Consd.* Williams v. Barton, [1927] 2 Ch. 9. *Refd.* Bath v. Standard Land Co., [1911] 1 Ch. 618. *Mentd.* Hamilton v. Seal, [1904] 2 K. B. 262 ; *Floyd v. Gibson* (1909), 100 L. T. 761 ; *Greenlands v. Wilmshurst & London Assn. for Protection of Trade*, [1913] 3 K. B. 507 ; *Banbury v. Bank of Montreal*, [1918] A. C. 626 ; *Hill v. Showell* (1918), 87 L. J. K. B. 1106 ; *Barber v. Deutsche Bank (Berlin) London Agency*, [1919] A. C. 304.

**3113.** —[.]—The equitable principle upon which a man in a fiduciary relation who makes what are called "secret profits" is bound to give them up to the principal for whom he is acting in a most salutary one (*RIGBY, L.J.*).—*COSTA RICA RY. CO., LTD. v. FORDWOOD*, [1901] 1 Ch. 746 ; 70 L. J. Ch. 385 ; 84 L. T. 279 ; 49 W. R. 337 ; 17 T. L. R. 297 ; 45 Sol. Jo. 424 ; 8 Mans. 374, C. A.

*Annotation* :—*Refd.* Transvaal Lands Co. v. New Belgium (Transvaal) Land & Development Co., [1914] 2 Ch. 488.

**3114.** —[.]—*Re* CLARK, (CLARK v. MOORE & MOORES (CHEMISTS), LTD. (1920), 150 L. T. Jo. 94.

**3115.** — Except in special circumstances. — Testator carried on the business of a licensed victualler & also, in partnership with a brother, the business of a wine & spirit merchant, & in connection with his business of licensed victualler



*Sect. 10.—Duty not to obtain personal advantage from position. Sect. 11: Sub-sect. 1, A., B. & C.]*

he purchased from the partnership business wines & spirits at prices below the market value of the goods. By his will he appointed his two brothers & his sister exors. & trustees thereof & devised & bequeathed his residuary estate to his trustees upon trust to carry on his business of licensed victualler for a period not exceeding ten years from his death with all the powers in that behalf of absolute owners, & he declared that his trustees might exercise all powers & discretions thereby or by law given to them notwithstanding that they or any of them might have a personal interest in the mode or result of exercising such power or discretion. The trustees carried on testator's business of a licensed victualler under the terms of the will, & the wine & spirit business was continued by the two brothers, who supplied testator's licensed houses with wines & spirits at a profit but at less than current market prices:—*Held*: the brothers were entitled to retain the profit arising from such supply by virtue of the special clause at the end of the will.—*Re SYKES, SYKES v. SYKES*, [1909] 2 Ch. 241; 78 L. J. Ch. 609; 101 L. T. 1, C. A.

*See, also, EXECUTORS, Vol. XXIV., pp. 688–693. Compare PARTNERSHIP, Vol. XXXVI., pp. 420–423.*

**3116. Trustee with right in personal capacity—Conflict of right with position as trustee—Right cannot be enforced to detriment of cestui que trust.**—No trustee of property having a right, the exercise of which conflicts with his duties as trustee, can, even with the consent of his *cestui que trust*, enforce his own right to their detriment.—*COOK v. ADDISON* (1869), L. R. 7 Eq. 466; 38 L. J. Ch. 322; 20 L. T. 212; 17 W. R. 480.

**Costs of trustee solicitor.**—*See SOLICITORS, Vol. XLII., pp. 117, 124, Nos. 1137–1197.*

**3117. Trustee employed by firm as clerk on commission basis—Introducing business of trust to firm—Liable for commission to trust estate.**—Deft., one of two trustees of a will, was employed as a clerk by a firm of stockbrokers on the terms that his salary should consist of half the commission earned by the firm on business introduced by him. At the recommendation of deft. the firm was employed to value his testator's securities. The firm's charges were paid out of testator's estate &, in accordance with their contract with deft., they paid to him half the fees so earned. Deft. took no part in making the valuations or in fixing the fees to be charged. In an action by his co-trustee claiming that deft. was bound to treat the fees so paid to him as part of testator's estate:—*Held*: it was deft.'s duty as a trustee to give the estate the benefit of his unfettered advice in choosing stockbrokers to act for the estate, but, as the recipient of half the fees earned by the firm on business introduced by him, it was to his interest to choose his firm to act. The services rendered to the firm by deft. remained un-

changed but his remuneration for them was increased, & increased by virtue of his trusteeship. That increase was a profit which deft. would not have made but for his position as trustee, & he was bound to treat it as part of the estate of his testator.—*WILLIAMS v. BARTON*, [1927] 2 Ch. 9; 96 L. J. Ch. 355; 137 L. T. 294; 43 T. L. R. 446; 71 Sol. Jo. 370.

## SECT. 11.—CONVERSION OF TRUST PROPERTY.

### SUB-SECT. 1.—DIRECTION TO CONVERT IN TRUST INSTRUMENT.

#### A. In General.

*See, generally, EQUITY, Vol. XX., pp. 340–353, Nos. 819–924.*

**3118. Duty to convert.**—*BATE v. HOOPER*, No. 3134, *post*.

**3119.** —.]—*SCULTHORPE v. TIPPER*, No. 3123, *post*.

**3120. — Discretion as to mode & time.**—*Re ATKINS, NEWMAN v. SINCLAIR*, No. 3053, *ante*.

—.]—*See, also, EXECUTORS, Vol. XXIII., pp. 325, 326, Nos. 3919–3926.*

#### B. Time for Conversion.

##### 3121. Within reasonable time—Twelve months.]

—Where testator directs a purchase with all convenient speed, & interest in the meantime to accumulate, & trustees neglect the purchase, twelve months is to be considered as a reasonable time within which the purchase might have been made.—*PARRY v. WARRINGTON* (1820), 6 Madd. 155; 56 E. R. 1051.

**3122.** —.]—Where testator directs a sale with all convenient speed after his death, & directs the produce to be invested & the dividends to be paid to one for life, & the land remains unsold, the ct. considers twelve months as a reasonable time within which the estates ought to have been sold & the produce invested, & will give to the tenant for life the rents of the unsold estate from that time.—*VICKERS v. SCOTT* (1834), 3 My. & K. 500; 3 L. J. Ch. 223; 40 E. R. 190.

**3123.** —.]—Testator, by will dated in Aug. 1862, bequeathed his shares in a public co. & the rest of his estate to his trustees upon trust, to convert, “immediately after his decease, or so soon thereafter as they might see fit to do so.” Part of the estate consisted of thirty-six shares in the Birmingham Bank, an unlimited co. At testator's death the shares were at a premium, & considered a good & safe investment. Soon after testator's death the bank issued new shares, offering them to the original shareholders at par. Nine were offered to the trustees in respect of testator's shares, & being at a premium were purchased by them, though the trust for investment did not authorise investment in shares. The old & new shares were held together by the trustees until July, 1866, when the bank broke:—*Held*: the trustees should not have purchased

### PART IV. SECT. 11, SUB-SECT. 1.—A.

**3118 i. Duty to convert.**—Where there was a gift of both real & personal property to trustees with power to convert, followed by a discretionary direction to invest the proceeds of such conversion into personal securities followed by an imperative direction to invest the same in land & to hold the same on trusts applicable only to realty:—*Held*: there was a trust for conversion into realty of the real & personal property affecting it with the character of realty from the commencement.—*Re SANGER, RANKIN v. LESTER*

(1903), 3 S. R. N. S. W. 284; 20 N. S. W. N. 132.—*AUS.*

**1. Right of trustees to keep in specie.**—Pictures were left by testator to the National Gallery as residue, to be sold, the proceeds to be invested, & income from the investments to be devoted to the purchase of the works of deceased painters of established merit. The pictures in question were all works of deceased painters of established merits, &, consequently, the Governors might keep them, instead of being obliged to sell them, & buy others.—*Re LANE, NATIONAL GALLERY*

OF IRELAND (GOVERNORS) v. A.-G. (1918), 52 I. L. T. 60.—*IR.*

### PART IV. SECT. 11, SUB-SECT. 1.—B.

**3121 i. Within reasonable time—Twelve months.**—Where testator fixes no period for the distribution of his estate, the rights of parties are to be ascertained on the footing that the period of distribution is one year from testator's death.—*CHURCH v. TALBOT* (1901), 1 S. R. N. S. W. 13; 18 N. S. W. N. 33.—*AUS.*

m. —.]—A trust to sell with all convenient speed is inconsistent with



the new shares, & should have sold the old shares in reasonable time after testator's death; that reasonable time, in such case, if no cause is shown for delay, is a year after testator's death; & the trustees must replace not only the amount of the calls made upon all the forty-six shares & the purchase-money of the shares purchased, but also the loss to testator's estate in respect of the shares having become valueless.—*SCULTHORPE v. TIPPER* (1871), L. R. 13 Eq. 232; 41 L. J. Ch. 206; 26 L. T. 119; 20 W. R. 276.

*Annotations*:—*Consd. Anderson v. Read* (1874), 22 W. R. 527. *Distd. Edwards v. Edmunds* (1876), 34 L. T. 522; *Brindley v. Partridge* (1880), 44 J. P. 474. *Refd. Redman v. Rymer* (1889), 60 L. T. 385.

### C. Postponement of Conversion.

See *EQUITY*, Vol. XX., pp. 347, 348, Nos. 865–873; *SETTLEMENTS*, Vol. XL., pp. 670, 671, Nos. 2072–2076.

**3124. Discretion to postpone.**—[Testator being possessed of Mexican Mint shares, on which bonuses were paid out of profits as well as dividends, by his will gave all his property to trustees, upon trust to sell & convert into money, but with power to postpone such sale & conversion as long as they should think reasonable; & in the meantime to pay the annual produce to the tenant for life:—*Held*: the tenant for life was entitled to the bonuses as well as the dividends until conversion, but was not entitled to have the conversion of the shares delayed contrary to the wishes of the trustees.—*MURRAY v. GLASSE* (1853), 1 Eq. Rep. 541; 23 L. J. Ch. 126; 22 L. T. O. S. 35; 17 Jur. 816.

**3125.**—[Testator by his will & codicils gave his residuary real & personal estate to trustees upon trust in their discretion, or at the direction of his wife, for sale & to invest the proceeds & pay the income to his wife for life or during widowhood, with certain remainders over. The will contained a wide power to postpone conversion. At his death he was possessed (*inter alia*), of an estate *pur autre vie* of the annual value of about £244 in property held on the trusts of a will & of two policies of assurance on the life of the *cestui que vie*, the annual premiums on which amounted to about £60. There was a difficulty in selling the life interest:—*Held*: the trustees had power to postpone realisation of the policies & the premiums thereon were payable out of capital & not out of income.—*Re SHERRY, SHERRY v. SHERRY*, [1913] 2 Ch. 508; 83 L. J. Ch. 126; 109 L. T. 471.

**3126.**—[Testator by will devised & bequeathed all his residuary real & personal estate to trustees upon trust for sale & conversion, with power to the trustees in their absolute & uncontrolled discretion to postpone the sale or conversion. The will contained a provision that until sale or conversion the rents, profits, & income arising from such part of the residuary estate as should for the time being remain unsold or unconverted should be paid or applied to the persons to whom & in the manner in which the dividends, interest, & income arising from the investment of the proceeds of sale of the residuary estate would have been payable or applicable under the trusts declared concerning the same;

& the trustees were to stand possessed of the proceeds of sale of the residuary estate in trust for testator's children who should attain the age of twenty-one years in equal shares as tenants in common.

Testator left seven children who were under twenty-one years of age; one of them on attaining twenty-one claimed that he was entitled to be paid his one-seventh share of the residuary estate or to have his share appropriated to him:—*Held*: he was not so entitled so long as the trustees in the *bona fide* exercise of their discretion determined to postpone the sale.—*Re KIPPING, KIPPING v. KIPPING*, [1914] 1 Ch. 62; 83 L. J. Ch. 218; 109 L. T. 919.

*Annotation*:—*Refd. Re Jordison, Raine v. Jordison*, [1922] 1 Ch. 440.

**3127.**—[Testatrix by her will devised & bequeathed her residuary real & personal property to her trustees upon trust to sell & convert & out of the money to arise from such sale & conversion to raise the clear sum of £230,000 & to invest the same in manner thereby authorised; & she declared that "all or any part" of the sum of £230,000 which should not for the time being have been raised or appropriated should bear interest from her death at the rate of 3½ per cent. *per annum*, & such interest should be deemed "part of the income of the investments representing" the £230,000, & she declared that the trustees should stand possessed of the £230,000 & the investments for the time being representing the same, thereafter designated "the trust fund" upon trust to pay "as from the day of my death" the income of the trust fund to C. during his life & after his death to hold the same on the trusts therein mentioned. Subject & without prejudice to the raising of the £230,000 testatrix directed that her trustees should hold the residue upon certain trusts therein mentioned. She empowered her trustees at any time or times in their "uncontrolled discretion" to appropriate unconverted investments in or towards satisfaction of the trust fund or any legacy or share in the premises, & "at their discretion" to postpone the sale or conversion "of any part or parts" of the residue, & directed that the income of the unsold residue should "from the period of my death" go as the income of the proceeds of sale would go "if such sale or conversion into money were then actually made." The trustees refused to raise or appropriate to, the legacy or any part thereof on the ground, as the Ct. of Appeal held in fact, that in the interests of all parties concerned in the management of the estate the present time was most inopportune for realisation. They, however, stated that it was possible that they might in the exercise of their discretion appropriate some of the investments which had a fixed value towards such satisfaction. The *bona fides* of the trustees were not questioned:—*Held*: the trustees were entitled to postpone & delay the conversion of the residuary estate beyond one year from the death, & in postponing or delaying the sale & conversion of the residuary estate the trustees had not improperly exercised the discretion vested in them.—*Re CHARTERIS*,

a power to postpone the sale. The trustees are not bound to immediately sell at a sacrifice, but they are bound to sell at the first favourable opportunity.—*CAIN v. WATSON*, [1910] V. L. R. 256.—*AUS*.

**PART IV. SECT. 11, SUB-SECT. 1.—C.**

**3124 i. Discretion to postpone.**—*WIGLEY v. CROZIER* (1909), 9 C. L. R.

**425.—AUS.**

*n. Whether power to retain implied.*—A power to retain is implied in a power to postpone.—*PERPETUAL TRUSTEE CO., LTD. v. NOYES* (1925), 25 S. R. N. S. W. 226; 42 N. S. W. N. N. 56.—*AUS*.

*o. Trust to sell "with all convenient speed"—Whether court can authorise*

*postponement.*—[Testator declared that upon the happening of certain events the trustees for the time being of his will should with all convenient speed absolutely sell his real estate or such part thereof as should be then unsold:—*Held*: the ct. had no jurisdiction to confer upon the trustees power to postpone the sale.—*KING v. BERNDT* (1902), 27 V. L. R. 519.—*AUS*.

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*Sect. 11.—Conversion of trust property: Sub-sect. 1, C. & D.; sub-sects. 2 & 3. Sect. 12.]*

*CHARTERS v. BIDDULPH*, [1917] 2 Ch. 379; 86 L. J. Ch. 658; 117 L. T. 391; 61 Sol. Jo. 591, C. A.

**3128.** — *For reasonable time.*—Testator by his will devised & bequeathed his residuary real & personal estate, which included a large number of shares in a limited co., to trustees upon trust to convert, & he empowered them to postpone the conversion of the whole or any part of his residuary estate during so long as his trustees in their uncontrolled discretion should deem proper, & in particular to retain any shares, stocks, & securities of the co., or any other investments held by him at his death, during any period without being liable for any loss arising thereby. He then divided his estate into certain shares, some of which he settled.

Several of the trustees were directors of the co., & had large holdings; & it was stated that if these shares were all kept together the trustees would have a preponderating influence in the co.

In the events which happened a son & two grandsons of testator were absolutely entitled to certain shares of the residuary estate & claimed to have transferred to them their proportion of the shares in the co.:—*Held*: the co. was a public company; the trustees had not shown that it was necessary or desirable in the circumstances to retain all the shares; the power to postpone was for a reasonable time only; & in the absence of special circumstances the right of the absolute owners to have a transfer of their shares ought to prevail over the discretion of the trustees.—*Re MARSHALL, MARSHALL v. MARSHALL*, [1914] 1 Ch. 192; 83 L. J. Ch. 307; 109 L. T. 835; 58 Sol. Jo. 118, C. A.

— *See, also, EXECUTORS*, Vol. XXIV., p. 558, Nos. 5980–5982.

**3129.** — *Unanimous concurrence of trustees.*—*Re HILTON, GIBBES v. HALE-HINTON*, No. 3743, *post*.

**3130.** *Where probability of increase in value of property.*—An infant, *cestui que trust*, aged ten years, who was entitled upon marriage or attaining twenty-one, to the proceeds of certain real estate which was directed to be sold so soon as conveniently might be after the death of a tenant for life, filed her bill, upon the death of such tenant for life, praying that the trustees might be at liberty to postpone the sale, upon the ground that the property was likely to increase materially in value. Ordered, that the sale should be postponed until the further order of the ct.—*MORRIS v. MORRIS* (1858), 32 L. T. O. S. 14; 4 Jur. N. S. 802; 6 W. R. 493.

**3131.** — *Re ATKINS, NEWMAN v. SINCLAIR*, No. 3053, *ante*.

**3132.** *Liability for irregular postponement.*—It is a matter of indifference whether an exor. or trustee observes the order of sale enjoined in the will or not, provided that no depreciation takes place in the property whose sale is thus irregularly postponed.—*OLLIVER v. KING* (1855), 1 Jur. N. S. 1066; *on appeal* (1856), 8 De G. M. & G. 110, L. J.J.

*D. Failure to Convert.*

**3133.** *Liability of trustee.*—W., by his will, after giving some specific legacies, left the remainder of his property to his wife for life, to be invested in the public funds, & at her demise to be divided equally between his three daughters,

free from the control of their husbands, or to the heirs of their bodies, should they be taken away before the time of "our demise." The estates were retained unsold:—*Held*: there was a direction to convert, but as loss was not charged by non-sale, the trustee was not liable.—*PATTENDEN v. HOBSON* (1853), 1 Eq. Rep. 28; 21 L. T. O. S. 84; 17 Jur. 406; 1 W. R. 282; *sub nom. PATTENDEN v. HOBSON, PATTENDEN v. CHURCH*, 22 L. J. Ch. 697.

*Annotation*:—*Mentd. Re Jeaffreson's Trusts* (1866), L. R. 2 Eq. 276.

**3134.** — *Testator gave the residue of his estate to trustees, who were also his exors., desiring them, immediately after his decease, to convert all his personal estate into money, & to invest the amount "in the Bank of England," & to permit his daughter to receive the rents & profits, dividends or "other annual produce" of his personal estate for her life, for her own use, & after her death the property was to go to her children equally. Testator died in 1825, possessed of, among other things, £24 long annuities, which the exors. did not convert, but permitted the tenant for life to enjoy in specie. On the death of the survivor of the exors., his exors. also neglected to convert the long annuities. The tenant for life had represented, both to the original exors. & to the exors. of the survivor, the propriety of a conversion. She had mortgaged her interest, & two of the children had mortgaged their shares in the residue. Upon bill filed by all the children against the exors. of the surviving exors. & their mother:—*Held*: the non-conversion was a breach of trust, & the exors. must account for the difference between the value of the long annuities at the end of one year from the date of testator's death, & their value when paid into ct.; the tenant for life was not liable to refund the over-payments voluntarily made to her, & the facts disclosed no case of acquiescence either on the part of the tenant for life or those in remainder.*

(2) I think the trustees are entitled to all costs, except as to so much of the costs of suit as relates to the breach of trust . . . those costs I cannot give them, but I will not make them pay costs, for it was not a breach of trust by which they were to benefit themselves (LORD CRANWORTH, C.).—*BATE v. HOOPER* (1855), 5 De G. M. & G. 338; 3 W. R. 639; 43 E. R. 901, L. C.

*Annotations*:—*Distd. Hughes v. Empson* (1856), 22 Beav. 181. *Consd. Bell v. Turner* (1877), 47 L. J. Ch. 75.

**3135.** — *SCULTHORPE v. TIPPER*, No. 3123, *ante*.

**3136.** — *Where testator gives an absolute discretion to his exors., to postpone the sale & conversion of his estate, they are not bound by the ordinary rule to convert the property within a year, even though some of the property consists of shares in an unlimited company. Nor will they be liable in the absence of mala fides for loss arising to the estate from the non-conversion.*

In the course of this discussion the word "discretion" has been very frequently used . . . What does it mean? In honest plain language it means "Do as you like" (BACON, V.-C.).—*Re NORRINGTON, BRINDLEY v. PARTRIDGE* (1879), 13 Ch. D. 654; *on appeal*, 28 W. R. 711, C. A.

*Annotations*:—*As to* (1) *Refd. Re Crowther, Midgley v. Crowther* (1895), 64 L. J. Ch. 537; *Re Irwin, Barton v. Irwin* (1895), 39 Sol. Jo. 233.

**3137.** — *GAINSBOROUGH (EARL) v. WATCOMBE TERRA COTTA CLAY CO., LTD., DUNNING v. GAINSBOROUGH (EARL)*, No. 3048, *ante*.

#### PART IV. SECT. 11, SUB-SECT. 1.—D.

**31381.** *Liability of trustee.*—*HICKS v. TRUSTEES, EXECUTORS & AGENCY CO.* (1900), 26 V. L. R. 339.—*AUS.*

## SUB-SECT. 2.—HAZARDOUS AND UNAUTHORISED INVESTMENTS.

**3138. Duty to convert—Greek bonds.]**—Testator directed all his property, except ready money or money in the funds, to be converted into money, & the clear moneys arising from such conversion to be invested, in the names of the exors., in 3 per cent. Consols, or other govt. securities in England:—*Held*: Greek bonds, though guaranteed by this country, were not comprehended in the word “funds,” & they were a proper subject of conversion under the terms of the will.—*BURNIE v. GETTING* (1845), 2 Coll. 324; 6 L. T. O. S. 97; 9 Jur. 937; 63 E. R. 754.

**3139. — Bearer bonds & scrip.]**—Testator possessed of divers securities of foreign states gave all his real & personal estate to trustees for his wife for life, & after her decease for his sons & their children. He gave his trustees a discretion to postpone the conversion of his residuary estate, which he had directed to be sold, & he directed that his stocks in the foreign funds, should not be sold out during the widowhood of his wife without her consent, his object being that she might enjoy the larger income derivable from such foreign funds:—*Held*: (1) all the foreign investments should be retained; (2) the certificates for Boston Water scrip & bonds of the Pennsylvania Railroad co. were not within the meaning of the will, & they must be sold.—*MILLS v. EDEN* (1857), 23 Beav. 543; 26 L. J. Ch. 533; 30 L. T. O. S. 60; 3 Jur. N. S. 950; 53 E. R. 213.

**3140. —**—*Re MORRIS, BUCKNILL v. MORRIS*, No. 3693, *post*.

**3141. —**—*Re PUGH, BANTING v. PUGH*, [1887] W. N. 143.

*Annotation*:—*Distd. Re Whitfield* (1920), 125 L. T. 61

—, *See, also*, *SETTLEMENTS*, Vol. XL. p. 672, Nos. 2090–2093.

**Power to retain.]**—*See* Part VI., Sect. 3, *post*; *EXECUTORS*, Vol. XXIII., p. 325, No. 3916.

## SUB-SECT. 3.—PROPERTY OF WASTING NATURE AND REVERSIONS.

**3142. Necessity for conversion into permanent securities—Settlement by will.]**—General rule, that where personal property is bequeathed for life with remainders over, & not specifically, it is to be converted into the 3 per cents. subject in the case of a real security to an inquiry, whether it will be for the benefit of all parties; & a tenant for life is entitled only upon that principle.

It is given as all his personal estate, & the mode, in which he says it is to be enjoyed, is to one for life, & to the others afterwards. Then the ct. says, it is to be construed as to the perishable part, so that one shall take for life, & the others afterwards; & unless testator directs (the mode so) that it is to continue, as it was, the ct. understands, that it shall be put in such a state that the others may enjoy it after the decease of the first; & the thing is quite equal; for it might consist of a vast number of particulars; for instance, a personal annuity, not to commence in enjoyment till the expiration of twenty years from the death of testator, payable upon a contingency, perhaps. If in this case it is equitable, that long or short annuities should be sold, to give every one an equal chance, the ct. acts equally in the other case; for those future interests are for the sake of the

tenant for life to be converted into a present interest; being sold immediately, in order to yield an immediate interest to the tenant for life. As in the one case that, in which the tenant for life has too great an interest, is melted for the benefit of the rest, in the other that, of which, if it remained in *specie*, he might never receive anything, is brought in; & he has immediately the interest of its present worth (LORD ELDON, C.).—*HOWE v. DARTMOUTH (EARL)*, *HOWE v. AYLESBURY (COUNTS)* (1802), 7 Ves. 137; 32 E. R. 50, L. C.

*Annotations*:—*Distd. Holland v. Hughes* (1809), 16 Ves. 111. *Consd. Spong v. Spong* (1827), 1 Y. & J. 300. *Apld. Dimes v. Scott* (1828), 1 Russ. 195; *Alcock v. Slopier* (1833), 2 My. & K. 699. *Expld. Mills v. Mills* (1835), 7 Sim. 501. *Distd. Pickering v. Pickering* (1839), 4 My. & Cr. 289. *Apld. Sutherland v. Cooke* (1844), 1 Coll. 498. *Expld. Hinx v. Hinx* (1844), 3 Hare, 609; *Cafe v. Bent* (1845), 5 Hare, 24. *Apld. Chambers v. Chambers* (1846), 15 Sim. 183. *Consd. Pickup v. Atkinson* (1846), 4 Hare, 624. *Distd. House v. Way* (1848), 13 L. J. Ch. 22. *Consd. Cotton v. Cotton* (1850), 14 Jur. 950; *Prendergast v. Prendergast* (1850), 3 H. L. Cas. 95; *Morgan v. Morgan* (1851), 14 Beav. 72. *Apld. Blann v. Bell* (1852), 2 De G. M. & G. 775; *Meyer v. Simonsen* (1852), 5 De G. & Sm. 723. *Expld. Baud v. Fardell* (1855), 7 De G. M. & G. 628. *Distd. Bate v. Hooper* (1855), 5 De G. M. & G. 338; *Gurney v. Gurney* (1855), 3 W. R. 353; *Hope v. Hope* (1855), 1 Jur. N. S. 771; *Simpson v. Lester* (1858), 33 L. T. O. S. 6. *Apld. Craig v. Wheeler* (1860), 29 L. J. Ch. 374. *Expld. Stoud v. Gwyer* (1860), 28 Beav. 320. *Distd. Bulkeley v. Stephens* (1863), 10 L. T. 225. *Apld. Pidgeon v. Spencer* (1867), 16 L. T. 3. *Distd. Craven v. Coadock* (1869), 20 L. T. 638; *Gleaves v. Smith* (1874), 29 L. T. 798. *Apld. Pickner v. Old* (1874), L. R. 18 Eq. 422. *Distd. Lean v. Lean* (1875), 32 L. T. 305; *Thursby v. Thursby* (1875), L. R. 19 Eq. 395; *Waters v. Waters* (1875), 32 L. T. 306, n.; *Re Bagshaw's Trusts* (1877), 46 L. J. Ch. 567. *Apld. Macdonald v. Irvine* (1878), 8 Ch. D. 101; *Re Smith's Estate*, *Clifford v. Washington* (1879), 48 L. J. Ch. 205. *Distd. Gray v. Siggers* (1880), 15 Ch. D. 74. *Re Leonard, Theobald v. King* (1880), 43 L. T. 664. *Apld. Re Nicholson, Nicholson v. Nicholson*, [1895] W. N. 106. *Distd. Re Pitcairn, Brandreth v. Colvin*, [1896] 2 Ch. 199. *Apld. Re Game, Game v. Young*, [1897] 1 Ch. 881. *Distd. Re Bland, Miller v. Bland*, [1899] 2 Ch. 336; *Re Hammersley, Heasman v. Hammersley* (1899), 81 L. T. 150. *Apld. Pardoe v. Pardoe* (1900), 82 L. T. 547; *Rowls v. Bobb* (1900), 44 Sol. Jo. 448. *Consd. Rowls v. Bobb, Re Rowls, Walters v. Treasurer Solr.*, [1900] 2 Ch. 107. *Distd. Re Van Straubenzee, Bonstedt v. Cooper*, [1901] 2 Ch. 779; *Stanier v. Hodgkinson* (1903), 73 L. J. Ch. 179. *Consd. Re Woods, Gabellini v. Woods*, [1904] 2 Ch. 4. *Distd. Re Bentham, Pearce v. Bentham* (1906), 94 L. T. 307; *Re Bates, Hodgson v. Bates*, [1907] 1 Ch. 22; *Slade v. Chaine*, [1908] 1 Ch. 522. *Consd. Re Nicholson, Eade v. Nicholson*, [1909] 2 Ch. 111. *Apld. Re Wareham, Wareham v. Brewhin*, [1912] 2 Ch. 312. *Distd. Re Charteris, Charteris v. Bliddulph*, [1917] 2 Ch. 379. *Apld. Re Evans' Will Trusts, Pickering v. Evans*, [1921] 2 Ch. 309. *Consd. I. R. Comrs. v. Blott, I. R. Comrs. v. Greenwood*, [1921] 2 A. C. 171. *Distd. Re Corelli* (1925), 69 Sol. Jo. 525. *N.E. Re Brooker, Brooker v. Brooker* (1926), 70 Sol. Jo. 526. *Apld. Re Trollope's Will Trusts, Public Trustee v. Trollope*, [1927] 1 Ch. 596. *Reid. Clough v. Bond* (1838), 3 My. & Cr. 490; *Simpson v. Earles* (1847), 11 Jur. 921; *Milne v. Parker* (1848), 17 L. J. Ch. 194; *Cranley v. Dixon* (1857), 23 Beav. 512; *Johnston v. Moore* (1858), 27 L. J. Ch. 453; *Morris v. Hodges* (1860), 27 Beav. 625; *Thobson v. Elam* (1865), L. R. 1 Eq. 188; *Re Sewell's Estate* (1870), L. R. 11 Eq. 80; *Robertson v. Broadbent* (1883), 8 App. Cas. 812; *Re Chancellor, Chancellor v. Brown* (1884), 53 L. J. Ch. 443; *Re Thomas, Wood v. Thomas*, [1891] 3 Ch. 482; *Re Arncliffe, Arncliffe v. Garnett*, [1893] 3 Ch. 337; *Re Gasquoigne, Gasquoigne v. Gasquoigne*, [1894] 1 Ch. 470; *Re Whitehead, Peacock v. Lucas*, [1891] 1 Ch. 678; *Re Hubbuck, Hart v. Stone*, [1896] 1 Ch. 754; *Re Chaytor, Chaytor v. Horn*, [1905] 1 Ch. 233; *Re Teddie, Holt v. Croker* (1922), 91 L. J. Ch. 346; *Re Barratt, National Provincial Bank v. Barratt*, [1925] 1 Ch. 550.

—, *See* *WILLS*.

— *Settlement by deed.]*—*See* *SETTLEMENTS*, Vol. XL., pp. 672–675.

## SECT. 12.—INVESTMENT OF TRUST FUNDS.

*See* Part VI., *post*.

## PART IV. SECT. 11, SUB-SECT. 2.

p. *Duty to convert—Shares in company with unlimited liability.]*—*BROWNIE v. BROWNIE'S TRUSTEES* (1879), 6 R. (Ct. of Sess.) 1233; 10 Sc. L. R. 731.—*SCOT*.

## Part V.—Powers and Discretions of Trustees.

### SECT. 1.—IN GENERAL.

**3143. Enforcement of exercise—Power coupled with trust.**—*TEMPEST v. CAMOYS* (LORD), No. 3232, *post*.

**3144.** ———. ]—Where a power is coupled with a trust or duty, the ct. will enforce the proper & timely exercise of the power, but will not interfere with the discretion of the trustees as to the particular time or manner of their *bona fide* exercise of it.—*Re BURRAGE, BURNINGHAM v. BURRAGE* (1890), 62 L. T. 752.

**3145. Inherent powers—Any act of which court would approve.**—It would be strange to say, that trustees would be censured in this ct. for doing what the ct. would have ordered to be done (LORD HENLEY, C.).—*INWOOD v. TWYNE* (1762), 2 Eden, 148; *Amb.* 417; 28 E. R. 853, L. C.

*Annotation* :—*Reid. Re Wells, Boyer v. Maclean*, [1903] 1 Ch. 848.

**3146.** ———. ]—If an exor. without application to the ct. does what the ct. would have approved, it shall stand. — *LEE v. BROWN* (1795), 4 Ves. 302; 31 E. R. 184.

*Annotation* :—*Mentd. Cory v. Gerteken* (1816), 2 Madd. 40.

**3147.** ———. ]—*WALDO v. WALDO* (1835), 7 Sim. 261; 58 E. R. 837.

*Annotation* :—*Reid. Ferrand v. Wilson* (1845), 4 Hare, 314.

**3148.** ———. ]—There can be no doubt . . . that what a trustee would be ordered by the ct. to do is valid if done by him without the previous authority of the ct. (LORD CHELMSFORD, C.).—*SEAGRAM v. KNIGHT* (1867), 2 Ch. App. 628; 36 L. J. Ch. 918; 17 L. T. 47; 15 W. R. 1152, L. C. *Annotations* :—*Mentd. Dashwood v. Magniac*, [1891] 3 Ch. 658; *Re Benzon, Bower v. Chetwynd* (1914), 83 L. J. Ch. 658.

**3149.** ———. ]—Acts believed to be necessary to execute trust.]—Where there was a reasonable ground for contending that a legacy was a charge upon an estate vested in trustees for sale, & they, in the exercise of a *bona fide* discretion, for the purpose of satisfying a purchaser who refused to complete unless the legacy was discharged, paid it:—*Held*: whether the objection would have been tenable or not, the payment ought to be allowed to the trustees as between them & the persons beneficially interested.

I have always understood the law of this ct. to be that where trustees are acting *bona fide* in the exercise of their discretion, they may, though they incur some risk in doing so, make payments which are in their judgment necessary for the due execution of the trusts, & that such payments ought to be allowed to them (TURNER, L.J.).—*FORSHAW v. HIGGINSON* (1857), 8 De G. M. & G. 827; 26 L. J. Ch. 342; 29 L. T. O. S. 43; 3 Jur. N. S. 476; 5 W. R. 424; 44 E. R. 609, L. J.

**Powers of trustees of charities.**—*See CHARITIES, Vol. VIII.*, pp. 376, 377, Nos. 1869–1885.

**Discretion.**—*See Sect. 5, post.*

### PART V. SECT. 2.

**3150 i. Presumption of good faith.**—In a case which involves the exercise of an "uncontrolled" discretion on the part of trustees of a will in regard to the maintenance of infants, the ct. will not interfere on the suggestion that the trustees, though acting in good faith & after consideration of the circumstances, have acted in a wrong headed way in refusing maintenance; dishonesty must be shown before the ct. will interfere.—*CRAIG v. NATIONAL TRUSTEES, EXECUTORS & AGENCY CO. OF AUSTRALASIA, LTD.*, [1920] V. L. R.

569.—**AUS.**

**3151 i. Necessity for concurrence of all trustees.**—Execution by all the trustees is not absolutely necessary for the validity of an assignment.—*HAIGHT v. MUNRO* (1860), 9 C. P. 462.—**CAN.**

**3151 ii.** ———. ]—One of two trustees of a public trust cannot grant a mtge. or effect any similar transaction in respect of the trust properties so as to bind the trust without the consent of the other trustee even though the latter, on consultation, wrongfully refuses his consent.—*CHEERN v. NARAYANAN NAM-*

### SECT. 2.—EXERCISE OF POWERS.

**3150. Presumption of good faith.**—It must be presumed that persons dealing with a trust fund are dealing with it honestly (WOOD, V.-C.).—*TAYLAR v. MILLINGTON* (1858), 4 Jur. N. S. 204.

**3151. Necessity for concurrence of all trustees.**—*ROTHWELL v. HUSSEY* (1874), 2 Cas. in Ch. 202; 22 E. R. 911.

**3152.** ———. ]—If one of two trustees order a broker to purchase stock, standing in their joint names, & undertake to procure his co-trustee to join in the transfer:—*Held*: the broker was not warranted in making the sale, unless such co-trustee authorised or concurred with the other in making the transfer.—*LEYTON v. SNEYD* (1818), 8 Taunt. 532; 2 Moore, C. P. 583; 129 E. R. 489.

**3153.** ———. ]—I take it to be a general rule of law that where a public trust is to be executed by a definite number of persons, it must be executed at a meeting where a majority of that number is present, unless there be a usage or custom to the contrary. It is different from a trust or power of a private nature, for that must be executed by all the persons to whom it is given (BAYLEY, J.).—*BLACKETT v. BLIZARD* (1829), 9 B. & C. 851; 4 Man. & Ry. K. B. 641; 2 Man. & Ry. M. C. 369; 109 E. R. 317; *sub nom.* FREEMAN v. MEYMOTT, *BLACKETT v. BLIZARD*, 8 L. J. O. S. K. B. 85.

*Annotations* :—*Reid. R. v. Fenton* (1841), 1 Gal. & Dav. 17. *Mentd. Hall v. Maule* (1838), 7 Ad. & El. 721; *R. v. Christchurch Overseers* (1857), 26 L. J. M. C. 68; *Attenborough v. Kemp & Page* (1860), 6 Jur. N. S. 1354; *R. v. Chester (Rp.)* (1901), 17 T. L. R. 533; *R. v. Leeds JJ.*, *Ex p. Binns* (1906), 95 L. T. 916.

**3154.** ———. ]—*Avowry for rent due from ptff., as tenant of premises to avowant, under a demise before then made, at the yearly rent of £170*:—*Held*: not supported by proof of a conveyance to avowant, to which three trustees, the lessors, were parties, but which was executed by only two of them.—*PHILPOTT v. DOBBINSON* (1829), 6 Bing. 104; 3 Moo. & P. 320; 7 L. J. O. S. C. P. 248; 130 E. R. 1219.

*Annotation* :—*Mentd. Roberts v. Snell* (1840), 1 Man. & G. 577.

**3155.** ———. ]—The act of the majority of trustees cannot bind a dissenting minority nor the trust estate. In order to bind the trust estate the act must be the act of all the trustees.

There is no law . . . which enables the majority of trustees to bind the minority. The only power to bind is the act of the three, & consequently the act of the two, even if it could bind them by reason of delay or acquiescence, could not bind the trust estate, & therefore in no way was the trust estate bound or the mtge. released (JESSEL, M.R.).—*LUKE v. SOUTH KENSINGTON HOTEL CO.* (1879), 11 Ch. D. 121; 48 L. J. Ch. 361; 40 L. T. 638; 27 W. R. 514, C. A.

*Annotations* :—*Reid. Webb v. Jonas* (1888), 30 Ch. D. 660; *Re Continental Oxygen Co., Elias v. Continental Oxygen*

*RUBINI* (1919), 1 L. R. 42, Mad. 335.—**IND.**

**3151 iii.** ———. ]—Where two or more persons are appointed trustees, & one or more renounce & disclaim the trust, the trust may be executed by the others.—*BAYLY v. CUMMING* (1817), 10 L. J. Eq. R. 405.—**IR.**

**3151 iv.** ———. ]—*Re ARNOTT (DECEASED), ARNOTT v. ARNOTT*, [1899] 1 I. R. 201.—**IR.**

**3151 v.** ———. ]—*FREEMAN v. BEVERIDGE* (1832), 7 Fac. Coll. 553.—**SCOT.**

q. *Ratification of contract by co-*

Co., [1897] 1 Ch. 511. **Mentd.** *Palmer v. Mallett* (1887), 38 Ch. D. 411.

**3158.** —[.]—R. by will gave his residuary estate to trustees upon trust to convert & to invest in their or his names upon the public stocks, funds, or securities of Great Britain or of any foreign or colonial Govt., & he gave them power to postpone for such time as should seem expedient the sale, conversion, or getting in of any part of the trust estate. Testator's estate consisted chiefly of foreign stocks & bonds, some of which were payable to bearer. The trustees retained these securities for some years; then one trustee wished to realise; the other three thought it best to further postpone the sale. On a summons taken out by the trustees who wished to realise:—**Held:** under the power to invest in their names the trustees had not power to purchase foreign Govt. bonds payable to bearer; they had power to postpone the sale of such bonds possessed by testator at his death, but this power to postpone could only be exercised by the trustees unanimously, & if one trustee objected the bond or other unauthorised securities must be converted.—**Re** ROTH, *GOLDBERGER v. ROTH* (1896), 74 L. T. 50.

**3157.** —[.]—An acknowledgment by one of two exors. & devisees in trust of real estate against the wishes of the other that more than six years' interest is due on a mtge. created by their testator cannot be treated as the valid act of the two in their capacity of trustees, & is not a good acknowledgment within Real Property Limitation Act, 1833 (c. 27), s. 42.

All trustees must concur in the exercise of powers conferred on them with reference to the trust estate (*STIRLING, J.*).—**ASTBURY v. ASTBURY**, [1898] 2 Ch. 111; 67 L. J. Ch. 471; 78 L. T. 494; 46 W. R. 536.

**Annotation.**—**Reid.** *Re Lacey, Howard v. Lightfoot*, [1907] 1 Ch. 330.

**3158.** —[.]—**Re** HILTON, *GIBBES v. HALE-HINTON*, No. 3743, *post*.

**3159.** —Discretion to be exercised by two trustees—Properly exercised by one acting & one approving.]—I had some doubts at first whether, as the discretion was to be exercised by the two trustees, & one only had acted the discretion had been properly exercised; but I have come to the conclusion that as the other trustee approved & sanctioned what was done by the one who made the payments, no breach of trust was committed (*LORD ROMILLY, M.R.*).—**MESSEENA v. CARR** (1870), L. R. 9 Eq. 260; 39 L. J. Ch. 216; 22 L. T. 3; *sub nom.* *MASSEENA v. CARR*, 18 W. R. 415.

—Trustees of charity—Power of majority to bind minority.]—**See** CHARITIES, Vol. VIII., p. 376, Nos. 1880–1885.

**3160.** Trustees cannot change nature of estate.]—Trustee cannot change the nature of the estate by turning money into land, or a lease for years into a freehold, & *e converso*.—**WITTER v. WITTER** (1730), 3 P. Wms. 99; 24 E. R. 985, L. C.

**Annotations.**—**Reid.** *Inwood v. Twyne* (1762), Amb. 417; *Rawe v. Chichester* (1773), Amb. 715; *Whittaker v. Whittaker* (1792), 4 Bro. C. C. 31; *A.-G. v. Allesbury* (1887), 12 App. Cas. 672.

**3161.** Acts done by trustees—In exercise of trust—Liability of property of cestui que trust.]—Trustees may render the property of their beneficiaries liable to third persons for an act done by

them in the exercise of their trust.—**MERSEY DOCKS & HARBOUR BOARD TRUSTEES v. GIBBS, MERSEY DOCKS & HARBOUR BOARD TRUSTEES v. PENHALLOW** (1866), L. R. 1 H. L. 93; 11 H. L. Cas. 686; 35 L. J. Ex. 225; 14 L. T. 877; 30 J. P. 467; 12 Jur. N. S. 571; 14 W. R. 872; 2 Mar. L. C. 353; 11 E. R. 1500, H. L.; *affg.* S. C. *sub nom.* *GIBBS v. LIVERPOOL DOCKS TRUSTEES* (1858), 3 H. & N. 164, Ex. Ch.

**Annotations.**—**Reid.** *Southampton & Itchen Bridge Co. v. Southampton L. B.* (1858), 8 E. & B. 801. **Mentd.** *Ruck v. Williams* (1858), 3 H. & N. 308; *Walker v. Goe* (1859), 4 H. & N. 350; *Metcalf v. Hetherington* (1860), 5 H. & N. 719; *Holliday v. St. Leonard Shoreditch Vestry* (1861), 11 C. B. N. S. 192; *Whitchouse v. Follows* (1861), 10 C. B. N. S. 765; *Thompson v. N. E. Ry.* (1862), 2 B. & S. 119; *Brownlow v. Metropolitan Board of Works & Aldr* (1863), 13 C. B. N. S. 768; *Waller v. S. E. Ry.* (1863), 32 L. J. Ex. 205; *Ohryby v. Itye Conservancy* (1864), 5 B. & S. 743; *Coe v. Wise* (1866), L. R. 1 Q. B. 711; *Worral Waterworks Co. v. Lloyd* (1866), L. R. 1 C. P. 719; *A.-G. v. Colney Hatch Lunatic Asylum* (1868), 4 Ch. App. 146; *Birch v. Marylebone Vestry* (1869), 17 W. R. 1014; *Foreman v. Canterbury Corpn.* (1871), L. R. 6 Q. B. 218; *Clowes v. Staffordshire Potteries Waterworks Co.* (1872), 8 Ch. App. 129, n.; *Winch v. Thames Conservators* (1871), L. R. 9 C. P. 378; *White v. Hindley L. B.* (1875), L. R. 10 Q. B. 219; *A.-G. & Dommes v. Basingstoke Corpn.* (1876), 24 W. L. R. 817; *Goslin v. Agricultural Hall Co.* (1876), 1 C. P. D. 482; *Harris v. G. W. Ry.* (1876), 1 Q. B. D. 515; *Holborn Union Grdns. v. St. Leonard Shoreditch Vestry* (1876), 2 Q. B. D. 145; *Weir v. Barnet* (1877), 3 Ex. D. 32; *Forbes v. Liverpool Conservancy Board* (1879), 4 Ex. D. 116; *Hill v. Metropolitan Asylum District Managers* (1879), 4 Q. B. D. 433; *Elcnam v. Manchester Corpn.* (1881), 43 L. T. 517; *Dormont v. Furness Ry.* (1883), 11 Q. B. D. 496; *R. v. Williams* (1884), 9 App. Cas. 418; *Lowther v. Curwen* (1887), 58 L. T. 168; *Tucker v. Axbridge Highway Board* (1888), 53 J. P. 87; *The Moorcock* (1889), 14 P. D. 64; *Gibraltar Sanitary Comrs. v. Orilla* (1890), 15 App. Cas. 100; *Jersey v. Uxbridge R. S. A.*, [1891] 3 Ch. 183; *R. v. Selby Dam Drainage Comrs.*, [1892] 1 Q. B. 318; *Tail Vale Ity. v. Amalgamated Soc. of Ry. Servants*, [1901] C. C. 420; *Crossfield v. Manchester Ship Canal Co.* (1903), 19 T. L. R. 398; *Hackney Corpn. v. Lc Conservancy Board*, [1904] 2 K. B. 541; *The Bearn*, [1906] P. 48; *Rede S.S. Co. v. River Wear Comrs.*, [1907] 1 K. B. 310; *Queens of the River S.S. Co. v. Easton, Gibb & River Thames Conservators* (1907), 96 L. T. 901; *Tozeland v. West Ham Union*, [1907] 1 K. B. 920; *Hillyer v. St. Bartholomew's Hospital*, [1909] 2 K. B. 820; *McClelland v. Manchester Corpn.*, [1912] 1 K. B. 118; *Papworth v. Battersea Corpn.*, [1911] 2 K. B. 89; *Pyman S.S. Co. v. Hull & Burnley Ry.*, [1914] 2 K. B. 758; *The Elia*, [1915] P. 111; *Hayward v. Drury Lane Theatre & Music Empires*, [1917] 2 K. B. 899; *Liobig's Extract of Meat Co. v. Mersey Docks & Harbour Board & Nelson*, [1918] 2 K. B. 381; *Baker v. James*, [1921] 2 K. B. 674; *Boynston v. Ancholme Drainage & Navigation Comrs.*, [1921] 2 K. B. 213; *The Devon* (1923), 130 L. T. 448; *Sutcliffe v. Clients Investment Co.*, [1924] 2 K. B. 746; *British Petroleum Co. v. A.-G. for Ceylon*, [1926] A. C. 117; *Silverman v. Imperial London Hotels* (1927), 137 L. T. 57.

**3162.** Trustees of appointed fund—Who should administer—Trustees of appointor's will themselves objects of power.]—A woman having power to appoint generally £500 out of a certain trust fund of which she was tenant for life, & a power to appoint the remainder amongst certain persons, gave, devised, & bequeathed all her property, & all property which she had any power to appoint, to trustees, in trust to convert & pay her debts, etc., & then on trusts for persons, objects of the particular power. Her property other than the settled fund was of trifling value. Her debts, etc., were less than £500 in amount:—**Held:** her trustees, who were themselves objects of the power, were the proper persons to administer the trusts of the appointed fund.—**FERRIER v. JAY** (1870), L. R. 10 Eq. 550; 39 L. J. Ch. 686; 23 L. T. 302; 18 W. R. 1130.

**Annotations.**—**Consd.** *Seotney v. Lomer* (1885), 29 Ch. D. 535. **Reid.** *Busk v. Aldam* (1874), L. R. 19 Eq. 10. **Mentd.** *Re Teape's Trusts* (1873), L. R. 16 Eq. 442; *Thornion v.*

*trustee.*]—Contract made by one of two trustees, acting for himself alone, is not capable of ratification by his co-trustee. — **CHISHOLM v. CHISHOLM** (1915), 49 N. S. R. 174.—**CAN.**

*r. Whether trustee may change personnel of beneficiaries.*]—**Re** TRUSTEES OF 66TH BATTALION (Alta.), [1921] 1 W. W. R. 598; 61 D. L. R. 167.—**CAN.**

*t. Presumption that trustees acted according to power conferred on them.*]—**WHITE'S TRUSTEES v. WHITE** (1890), 23 R. (Ct. of Sess.) 836; 33 Sc. L. R. 660; 4 S. L. T. 59.—**SCOT.**

*Secl. 2.—Exercise of powers. Sects. 3 & 4: Sub-sects. 1 & 2.]*

Thornton (1875), L. R. 20 Eq. 599; *Re Denton*, *Bannerman v. Toosey* (1890), 63 L. T. 105; *Re Milner*, *Bray v. Milner*, [1899] 1 Ch. 563; *Re Rickman*, *Stokos v. Rickman* (1899), 80 L. T. 518; *Re Ackerley*, *Chapman v. Andrew*, [1913] 1 Ch. 510.

**Grant of letters of administration—To trustees.]—***See* EXECUTORS, Vol. XXIII., pp. 172, 173, Nos. 1910–1914.

### SECT. 3.—DISCLAIMER OF POWERS.

*See* Law of Property Act, 1925 (c. 20), ss. 155, 156.

**Disclaimer of office.]—***See* Part II., Sect. 3, sub-sect. 2, *ante*.

### SECT. 4.—SURVIVORSHIP AND DEVOLUTION OF POWERS.

#### SUB-SECT. 1.—SURVIVORSHIP.

*See* Trustee Act, 1925 (c. 19), s. 18.

**3163. Whether power exercisable by surviving trustees.]—***GWILLIAMS v. ROWEL* (1661), *Hard.* 204; 145 E. R. 454.

*Annotation:—Mentd.* *Clerk v. Smith* (1698), 1 *Salk.* 241.

**3164. —.]—***MANSELL (LADY) v. MANSELL* (1757), *Wilm.* 36; 97 E. R. 14.

**3165. —.]—**Testator having directed his two trustees to apply a moiety of rents or such part as they or he should in their or his discretion see fit in the maintenance & education or advancement in life of his younger children during the life of his wife; & one of the trustees having died, the ct. would not interfere with the discretion to be exercised by the surviving trustee.—*LIVESEY v. HARDING*, *LIVESEY v. BECKETT* (1830), as reported in *Tam.* 460; 48 E. R. 183.

**3166. —.]—**Testator appointed three persons & their respective heirs & assigns his exors., & gave to them & to their respective heirs & assigns all his real & personal estates, in trust for the purposes after set forth; & first, that they & their respective heirs & assigns should sell his real estates; & he empowered them & their respective heirs & assigns to convey his estates & to give receipts for the consideration money. He then requested the exors. of his will to sell his farming stock, furniture, etc., & out of the moneys so arising & all other portions of his personal estate, he required them & their respective heirs & assigns to pay all his debts, etc. One of the trustees & exors. died. The two survivors agreed to sell the real estate.

The ct., in a suit for a specific performance of the agreement, rejected the word "respective," & held that the two surviving trustees & exors. could sell & convey the estates to the purchaser.—*JONES v. PRICE* (1841), 11 *Sim.* 557; 10 L. J. Ch. 195; 5 *Jur.* 719; 59 E. R. 988.

**3167. —.]—**Testator devised his real estates to A., B., C. & D., & their heirs, on certain trusts which required the legal estate to be vested in them, & gave a power of sale to them or the survivors or survivor of them, or the heirs of the survivor, & declared that their or his receipts or receipt should be a good discharge to the purchaser, & if any of them should die or decline to act, that it should be lawful, & he thereby willed & directed that the survivors of them should, immediately or within two months afterwards, by any

deed, nominate some fit person to be a trustee in his place. D. died; & A. & B. by one deed, & C. by another, both of which were executed more than two lunar months, but less than two calendar months after D.'s death, nominated a new trustee, but did not convey the legal estate to him. A., B., C., & the new trustee agreed to sell the estates to M., who objected to complete his purchase, (a) because the appointment of the new trustee had not been made within two lunar months, (b) because it had not been made by one single deed, & (c) because the power of sale was suspended during the vacancy in the trust. The ct. overruled the objections; but held that the new trustee had not been duly appointed, because no conveyance had been executed to him; notwithstanding which, A., B. & C. could make a good title & give an effectual discharge for the purchase-money.—*WARBURTON v. SANDYS* (1845), 14 *Sim.* 622; 14 L. J. Ch. 431; 5 L. T. O. S. 262; 9 *Jur.* 503; 60 E. R. 499.

*Annotations:—Apld.* *Welstead v. Colville* (1860), 28 *Beav.* 537; *Re Bayley-Worthington & Cohen's Contract*, [1908] 1 Ch. 26. *Refd.* *Re Bacon*, *Toovey v. Turner*, [1907] 1 Ch. 475.

**3168. —.]—**Where there was a devise & bequest of freehold & other property, & all other testator's real & personal estate to two persons, their exors. & administrators, upon trust by sale or otherwise, at their discretion, to raise & invest a certain sum of money, & apply the interest in the maintenance & education of testator's daughter, until her age of twenty-one, & then to pay same to her for her separate use; one of the devisees in trust after the death of the other, but during the lifetime of the daughter, & whilst, therefore, it was necessary that the charge should be raised, proceeded to sell the estate. On an objection to the title:—*Held*: the surviving devisee in trust might exercise the option of selling, & the power of sale; & an application in such a case for the direction of a ct. of equity was unnecessary.

Where it is a naked power given to two persons, that will not survive to one of them, unless there be express words, or a necessary implication upon the whole will, showing it to be the intention that it should do so (*PAGE WOOD, V.-C.*).—*LANE v. DEBENHAM* (1853), 11 *Ilare*, 188; 22 L. T. O. S. 143; 17 *Jur.* 1005; 1 W. R. 405; 68 E. R. 1241. *Annotation:—Consd.* *Re Bacon*, *Toovey v. Turner*, [1907] 1 Ch. 475.

**3169. —.]—**Trustees had a power of sale over a real estate vested in them, & to give good discharges for the purchase-money. The tenant for life had a power to appoint new trustees, & "thereupon" the trust estate was to be conveyed to the old & new trustees. In 1857 B. was appointed a new trustee, but before any conveyance had been made to him the estate was sold & conveyed to a purchaser, & the purchase-money was paid to the old & new trustees:—*Held*: the purchaser had obtained a good discharge for the purchase-money.—*WELSTEAD v. COLVILLE* (1860), 28 *Beav.* 537; 54 E. R. 472.

**3170. —.]—**Testator, after stating that he was desirous that a farm which he occupied should be carried on during the life of his wife for the maintenance, support, & benefit of herself & all his children, & that upon her death all his property, both real & personal, should be "fairly & equally divided" among "all" his children, & that the property which his three children by a former

#### PART V. SECT. 4, SUB-SECT. 1.

**3163 i. Whether power exercisable by surviving trustees.]—***PEGLEY v. ATKINSON* (1873), 20 *Gr.* 383.—*CAN.*

**3163 ii. —.]—***MUIR v. MACDONALD'S TRUSTEES* (1861), 14 *Dunl. (Ct. of Sess.)* 152; 24 *Sc. Jur.* 70; 1 *Stuart*, 132.—*SCOT.*



marriage had derived should be brought into hotchpot from the time of his decease, "so as to form one common fund," appointed his wife " & her two brothers, W. & R., trustees & exors." of that his will; & for the purpose of management authorised & empowered them to sell & convert into money all or any part of the real & personal estates, or to mortgage or let same or any part thereof, & invest the proceeds as therein mentioned. Testator directed & empowered his "trustees & exors." to carry on the farm "by & out of" his assets "for the maintenance, support, & benefit of" his wife & children; & subject thereto declared that his real & personal estate, " & the proceeds thereof " should be held in trust for all his aforesaid children, in equal shares; the personal property to which the children by his first marriage had become entitled being brought into hotchpot, to be vested interests at twenty-one, or on death under that age leaving lawful issue:—*Held*: upon the death of the widow the surviving trustees & exors. had power to sell & convey the real estate without the concurrence of the children.—*Re COOKE'S CONTRACT* (1877), 4 Ch. D. 454.

**3171.** ———.]—In a will executed before any of the Acts giving statutory power to trustees, when a power of sale is given to trustees by name or under the description "my trustees," to whom the legal estate is devised, the power can be exercised by the surviving trustees or the sole surviving trustee.—*Re BACON, TOOVEY v. TURNER*, [1907] 1 Ch. 475; 76 L. J. Ch. 213; 96 L. T. 690.

#### SUB-SECT. 2.—DEVOLUTION.

See Conveyancing Act, 1881 (c. 41), s. 30; Trustee Act, 1925 (c. 19), ss. 18, 36 (7), 43, 69 (2).

**3172.** By whom powers exercisable—Executor of surviving trustee.]—*ANON.* (1504), Moore, K. B. 61; 72 E. R. 441.

*Annotations*:—*Consd.* *Mansell v. Mansell* (1757), Wilms. 36; *Cole v. Wade* (1807), 16 Ves. 27.

**3173.** ———.]—Exor. of a surviving trustee decreed to perform the trust.—*HARVEY v. HARVEY* (1878), Cas. temp. Finch, 363; 23 E. R. 198.

**3174.** ———.]—In this case the power not only implies personal confidence, but that is the declared ground, upon which it is given; & therefore, if there was nothing else in the case, I should not feel myself entitled to construe this power to belong to any trustees & exors. but the two individuals who were originally so appointed (*GRANT, M.R.*).—*COLE v. WADE* (1807), 16 Ves. 27; 33 E. R. 894; *on appeal*, *sub nom.* *WALTER v. MAUNDE* (1815), 19 Ves. 424, L. C.

*Annotations*:—*Distd.* *Re Smith, Eastick v. Smith*, [1904] 1 Ch. 139. *Reid.* *Fordyce v. Bridges* (1818), 2 Coop. temp. Cott. 324. *Mentd.* *Piper v. Piper* (1834), 3 My. & K. 159; *Christian v. Foster, Bunnett v. Foster* (1846), 2 Ph. 161; *Re Sinclair's Settlement, Crump v. Leicester* (1886), 56 L. T. 83; *Re Perkins, Brown v. Perkins* (1909), 101 L. T. 345.

**3175.** ———.]—Testator devised his real estate to certain trustees, their heirs & assigns, upon certain trusts, & the will contained a power of sale of real estate exercisable "by the trustees for the time being" under the will:—*Held*: the power of sale was exercisable by the exors. of the last surviving trustee.—*Re PAXTON & TONG'S CONTRACT* (1897), 46 W. R. 187; 42 Sol. Jo. 201.

*Annotation*:—*Distd.* *Re Crunden & Meux's Contract*, [1909] 1 Ch. 690.

**3176.** ———.]—W. by her will devised &

bequeathed property to the person or persons who should at her death be trustees of her father's will. At her death all the trustees of her father's will & all the trustees appointed in their place were dead. The exors. of the last survivor of the trustees so appointed had acted in the trusts of her father's will:—*Held*: these were at her death trustees of her father's will, & were duly appointed trustees of her own.—*Re WADANIS, RIVERS v. WADANIS*, [1908] 1 Ch. 123; 77 L. J. Ch. 12; 97 L. T. 707.

*Annotations*:—*Consd.* *Re Routledge, Saul v. Routledge* (1908), 78 L. J. Ch. 136. *Expld.* *Re Crunden & Meux's Contract*, [1909] 1 Ch. 690.

**3177.** ———.]—A., who died in 1883, devised his residuary estate to B., C., D., & E. (the words " & their heirs" being omitted), upon trust, after B.'s death, for sale as if they were absolute owners. The will gave the trustees powers to postpone the sales, & demise & manage during postponement, & enabled the original number of trustees to be reduced, but not below two, on any appointment of new trustees. All the trustees, who were also exors. of the will, proved it, & in 1908 D., the surviving trustee, died, having appointed exors. by his will:—*Held*: D.'s exors. could not make a good title to a freehold house forming part of the residuary estate of A.

*Scmble*: if in the will of A. the devise had been to the four trustees & their heirs, the heir of the surviving trustee could, apart from Conveyancing Act, 1881 (c. 41), s. 30, have executed the trust for sale.—*Re CRUNDEN & MEUX'S CONTRACT*, [1909] 1 Ch. 690; 78 L. J. Ch. 306; 100 L. T. 472.

**3178.** ———.]—*Ouster on appointment of new trustees—Under power of appointment.*—The exors. of the last surviving trustee of a settlement of real estate are displaced by the appointment of new trustees of the settlement under a power of appointment contained in the deed of settlement, which has been duly exercised by the donees of the power.—*Re ROUTLEDGE'S TRUSTS, ROUTLEDGE v. SAUL*, [1909] 1 Ch. 280; 99 L. T. 919; *sub nom.* *Re ROUTLEDGE, SAUL v. ROUTLEDGE*, 78 L. J. Ch. 136.

— *Compare* EXECUTORS, Vol. XXIV., pp. 612, 613, Nos. 6438–6444.

**3179.** ———.]—*New trustees.*—Power of sale to be exercised with consent of three trustees, their heirs or assigns, & the trustees or the survivor, his exors. or administrators, to give receipts. A new trustee is appointed in the place of one who retires; another trustee dies. *Qu.*: whether the power can be exercised with the consent of the continuing & the new trustee.—*HALL v. DEWEES* (1821), Jac. 189; 37 E. R. 821, L. C.

*Annotations*:—*Consd.* *Bradford v. Bellfield* (1828), 2 Sim. 264. *Distd.* *Jones v. Price* (1841), 11 Sim. 557; *Re Bacon, Toovey v. Turner*, [1907] 1 Ch. 475. *Reid.* *Hind v. Poole* (1855), 1 Jur. N. S. 371.

**3180.** ———.]—Testator devised his real & personal estate to trustees, to be sold for the benefit of his children, & directed that their receipts should be sufficient discharges. The children filed a bill to have the will established & the trusts performed. At the hearing, the bill was dismissed against the heir, & the ct. did not establish the will, but made a decree affecting the personal estate only. The suit afterwards became abated, & was not revived. On the death of the surviving trustee, another suit was instituted for the appointment of new trustees: which was done.

#### PART V. SECT. 4, SUB-SECT. 2.

**3172 I.** By whom powers exercisable—Executor of surviving trustee.]—*Re INGLEBY & BOAK & NORWICH UNION*

*INSURANCE CO.* (1883), 13 L. R. Ir. 326.—*IR.*

**3179 I.** ———.]—*New trustees.*—*Re GILMOUR & WHITE* (1887), 14 O. R.

691.—*CAN.*

**3179 II.** ———.]—*Re BOUKYDIS*, [1927] 3 D. L. R. 558; 60 O. L. R. 561.—*CAN.*



*Sect. 4.—Survivorship and devolution of powers :  
Sub-sect. 2. Sect. 5: Sub-sect. 1.]*

The new trustees then sold, part of testator's real estates, to pltf., who filed a bill for a specific performance:—*Held*: the former suit having been dismissed as against the heir, without the will being established, no suit was pending for the administration of testator's real estates; & the new trustees had the same power of giving receipts as the original trustees had.—*DRAYSON v. POCOCC* (1831), 4 Sim. 283; 58 E. R. 100.

*Annotation*:—*Distd.* *Newman v. Warner* (1851), 1 Sim. N. S. 457.

**3181.** ———. ]—A discretion, to be exercised by "the aforesaid & undersigned trustees," one of whom alone executed the articles, is not personal to the individuals, but is attached to the office; & it may be exercised by new trustees.—*BYAM v. BYAM* (1854), 19 Beav. 58; 34 L. J. Ch. 209; 1 Jur. N. S. 79; 3 W. R. 95; 52 E. R. 270.

*Annotation*:—*Consd.* *Re Smith, Eastick v. Smith*, [1904] 1 Ch. 139.

**3182.** ———. ]—*Devisee of surviving trustee.*—Testator devised his real estates to A., B., & C., in trust that they, or the survivors or survivor of them, or the heirs of the survivor, should, as soon as conveniently might be after his decease, but at their discretion, sell same: & he empowered them & their heirs to make contracts with & conveyances to the purchasers; & declared that the receipts of them or the survivors or survivor of them, or the heirs, exors., or administrators of such survivor, should be good discharges to the purchasers; & he directed that they, their heirs, administrators & assigns, should hold the proceeds of the sale upon certain trusts. A. & B. disclaimed, & C. alone acted. He devised the estates to M. & N. upon the trusts affecting same. After his death, M. & N. agreed to sell the estates to P.:—*Held*: M. & N. were not entitled to execute the trust for sale, as they were the devisees & not the heirs of C.—*COOKE v. CRAWFORD* (1842), 13 Sim. 91; 11 L. J. Ch. 406; 6 Jur. 723; 60 E. R. 36.

*Annotations*:—*Consd.* *Macdonald v. Walker* (1851), 14 Beav. 556. *Expld.* *Wilson v. Bennett* (1852), 5 De G. & Sm. 475. *Distd.* *Lane v. Debenham* (1853), 11 Hare, 188; *Salway v. Strawbridge* (1855), 1 K. & J. 371; *Ashton v. Wood* (1857), 3 Sm. & G. 436. *Consd.* *Hall v. May* (1857), 3 K. & J. 585. *Stevens v. Austen* (1861), 3 E. & E. 685; *Re Morton & Hallett* (1880), 15 Ch. D. 143. *Re Osborne to Rowlett* (1880), 13 Ch. D. 774. *Consd.* *Re Rumney & Smith*, [1897] 2 Ch. 351; *Re Crunden & Meux's Contract*, [1909] 1 Ch. 690. *Reft.* *Titley v. Wolstenholme* (1844), 3 L. T. O. S. 279.

**3183.** ———. ]—The devisee of trust estates under the will of the surviving trustee, to whom & to two others, & the survivor, & the heirs, exors., administrators, & assigns of such survivor, they had been devised by the original testator, is, there being no power to appoint new trustees, a trustee qualified to act in the trusts of the original will.—*TITLEY v. WOLSTENHOLME* (1844), 7 Beav. 425; 13 L. J. Ch. 410; 3 L. T. O. S. 279; 49 E. R. 1130.

*Annotations*:—*Consd.* *Macdonald v. Walker* (1851), 14 Beav. 556. *Distd.* *Salway v. Strawbridge* (1855), 1 K. & J. 371. *Appld.* *Hall v. May* (1857), 3 K. & J. 585. *Distd.* *Stevens v. Austen* (1861), 3 E. & E. 685. *Consd.* *Re Morton & Hallett* (1880), 15 Ch. D. 143; *Osborne to Rowlett* (1880), 13 Ch. D. 774. *Reft.* *Ockleston v. Heap* (1847), 1 De G. & Sm. 640; *Re Waidanis, Rivers v. Waidanis*, [1908] 1 Ch. 123; *Re Crunden & Meux's Contract*, [1909] 1 Ch. 690.

**3184.** ———. ]—Devise upon trust that the trustees, & the survivors & survivor of them, his heirs & assigns, should, at such time as they should think most advisable, sell, & give receipts, which should be good discharges; with a power for the trustees or the survivor to appoint new trustees in the usual form. The surviving trustee devised his trust estate:—*Held*: his devisees could make

a good title.—*HALL v. MAY* (1857), 3 K. & J. 585; 28 L. J. Ch. 791; 30 L. T. O. S. 64; 3 Jur. N. S. 907; 5 W. R. 869; 69 E. R. 1242.

*Annotations*:—*Consd.* *Osborne to Rowlett* (1880), 13 Ch. D. 774. *Reft.* *Re Waidanis, Rivers v. Waidanis*, [1908] 1 Ch. 123.

**3185.** ———. ]—Devise to trustees & the survivor of them & the heirs & assigns of such survivor upon trust to sell, the surviving trustee having devised the trust estate to persons who sold & who filed a bill to enforce specific performance of the contract to sell. *Semble*: the legal estate & trust to sell passed by the devise. But held there was sufficient doubt upon the point to prevent the ct. from forcing the title upon the purchaser.—*ASHTON v. WOOD* (1857), 3 Sm. & G. 436; 30 L. T. O. S. 85; 3 Jur. N. S. 1164; 65 E. R. 727.

*Annotations*:—*Consd.* *Stevens v. Austen* (1861), 3 E. & E. 685; *Osborne to Rowlett* (1880), 13 Ch. D. 774.

**3186.** ———. ]—Where real estate is devised to trustees & "their heirs," omitting "assigns," in trust for sale, the trust must be considered as annexed, not to the person, but to the fee simple estate taken by the trustees, so that the trust can be executed by the devisees of trust estates of the surviving trustee.

Testator by his will, dated in 1845, devised & bequeathed his real & personal estate to his wife for life, subject to the payment of his debts, & from & after her decease to A. & B., "their heirs, exors., & administrators, upon trust to sell & dispose thereof at such times & in such manner as they my trustees shall deem expedient." A. & B. both predeceased the tenant for life, B., the surviving trustee, having devised his trust estates. Upon the death of the tenant for life, B.'s devisees contracted to sell part of the real estate of the original testator. Upon a summons under Vendor & Purchaser Act, 1874 (c. 78):—*Held*: B.'s devisees could make a good title.—*OSBORNE TO ROWLETT* (1880), 13 Ch. D. 774; 49 L. J. Ch. 310; 42 L. T. 650; 28 W. R. 365.

*Annotations*:—*Dbtd.* *Re Morton & Hallett* (1880), 15 Ch. D. 143; *Re Crunden & Meux's Contract*, [1909] 1 Ch. 690. *Reft.* *Re Patten & Tong's Contract* (1881), 46 W. R. 187; *Re Rumney & Smith*, [1897] 2 Ch. 351. *Mentd.* *Re Ravensworth, Ravensworth v. Tindale*, [1905] 2 Ch. 1; *John-on v. Clarke*, [1923] 1 Ch. 847.

**3187.** ———. ]—Trustee for time being.—It is quite clear that if [the power] was a power to the two trustees originally named, or to those who might be substituted in their place. It was to the trustees, in the plural, for the time being. At all events it was not a power in one (LORD COTTENHAM, C.).—*LANCASHIRE v. LANCASHIRE* (1848), 2 Ph. 657; 17 L. J. Ch. 270; 12 L. T. O. S. 21; 12 Jur. 363; 41 E. R. 1097, L. C.

*Annotations*:—*Mentd.* *Umpleby v. Waveney Valley Ry.* (1860), 1 John. & H. 254; *Taylor v. Dowlen* (1860), 4 Ch. App. 697.

**3188.** ———. ]—Testator appointed his wife M., his brother C., & his friend R. exors. & trustees of his will, & gave to "my trustees" all his estate upon trust for his wife for life, "with full power to my trustees" to sell the whole or any part of his estate & apply the proceeds for the benefit of his wife during her life:—*Held*: the power was not personal to the trustees originally named, but was annexed to the office & could be exercised by the trustees or trustee for the time being.—*Re SMITH, EASTICK v. SMITH*, [1904] 1 Ch. 139; 73 L. J. Ch. 74; 89 L. T. 604; 52 W. R. 104; 20 L. T. R. 66.

*Annotations*:—*Appld.* *Re Bacon, Re Turner, Toovey v. Turner* (1907), 76 L. J. Ch. 213; *Re De Sommers Coelen-bier v. De Sommers*, [1912] 2 Ch. 662; *Re Hampton, Public Trustee v. Hampton* (1918), 88 L. J. Ch. 103. *Reft.* *Kennedy v. Kennedy*, [1914] A. C. 215. *Mentd.* *Harper v. Hedges*, [1923] 2 K. B. 314.

**3189.** — Power limited to A. & B. or other the trustees for the time being.—Whether distinct powers.]—Although a power vested in the Minister for the time being of a settlement has, so far as I can discover, been uniformly looked on as a single & indivisible power, it may be otherwise if the power be limited to A. & B. or other the trustees of the settlement for the time being. In this case the ct. may treat the settlor as having created one power vested in A. & B. while trustees, & a distinct power vested in their successors (PARKE, J.).—*Re DE SOMMERY, COELENBIER v. DE SOMMERY*, [1912] 2 Ch. 622; 82 L. J. Ch. 17; 107 L. T. 823; 57 Sol. Jo. 78.

*Annotations*.—*Reid*, Kennedy v. Kennedy, [1914] A. C. 215; *Re Allott, Hamor v. Allott*, [1924] 2 Ch. 498; *Re Cassel, Public Trustee v. Mountbatten*, [1926] Ch. 358. *Mentz*, *Re Grosvenor, Grosvenor v. Grosvenor*, [1916] 2 Ch. 375; *Re Scott, Scott v. Scott*, [1916] 2 Ch. 268; *Re Howett, Eldridge v. Howett* (1920), 90 L. J. Ch. 126.

**3190.** — Heir of surviving trustee.]—Where real estate is devised to trustees & their heirs upon trust that, after death of a tenant for life, "the trustees or trustee, or the trustees for the time being," shall sell, the trust may be exercised by the heir of the surviving trustee, although there is a power given in the will to appoint new trustees.—*Re MORTON & HALLETT* (1880), 15 Ch. D. 143; 49 L. J. Ch. 559; 42 L. T. 602; 28 W. R. 895, C. A. *Annotations*.—*Apld. Re Cunningham & Fraying*, [1891] 2 Ch. 567. *Consd. Re Crunden & Meux's Contract*, [1909] 1 Ch. 690. *Reid*, *Re Pixon & Tong's Contract* (1897), 46 W. R. 187; *Re Rumney & Smith*, [1897] 2 Ch. 351.

**3191.** — Trustees appointed by court.]—A power of sale on a settlement was given to A. & B. the trustees to preserve contingent remainders & the survivor of them & the exors. administrators of the survivor:—*Held*: trustees appointed by the ct. in the place of A. & B. could not exercise the power.—*NEWMAN v. WARNER* (1851), 1 Sim. N. S. 457; 20 L. J. Ch. 654; 61 E. R. 177.

**Appointment of new trustees.**—*See* Part II., Sect. 2, sub-sect. 2, *ante*.

## SECT. 5.—DISCRETION.

### SUB-SECT. 1.—IN GENERAL.

**3192.** Meaning of discretion.]—*Re NORRINGTON, BRINDLEY v. PARTRIDGE*, No. 3136, *ante*.

**3193.** Exercise of discretion.—Protection to trustee.—If bona fide.]—The fair exercise of their judgment by trustees, is a protection, whether the consequence be good or bad.—*GARRITT v. NOBLE* (1834), 6 Sim. 504; 3 L. J. Ch. 159; 58 E. R. 683. *Annotation*.—*Reid*, *Bullock v. Wheatley* (1844), 1 Coll. 130.

**3194.** — Right to consider wishes of testator.—Expressed in unattested codicil.]—Devise & bequest of freehold, copyhold & personal estate, upon trust for sale at the discretion of the trustee, & that the rents, interest & proceeds should be divided amongst a class, either equally or in other proportions, as the trustee, having regard to their circumstances, should appoint; followed by an unattested codicil, directing the application of such rents, interest & proceeds for the benefit of such of the class as were unmarried or unsettled, & particularly for the comfortable support of P. (one of the class) who was of weak mind; & in case the trustee should not live to perform the whole trust, the rest to be executed by any persons he might appoint having regard to the intentions. The trustee by deed directed the manner in which the estates should be sold, & the proportions of the proceeds applied, & directed the division thereof amongst the other objects to be postponed until

after the death of P., & nominated other persons to execute the trusts, which might remain unexecuted at his, the trustee's, death, & directed them to distribute the surplus proceeds of the estates amongst other objects according to their exigencies:—*Held*: the trustee, for the government of his own discretion, might properly have regard to the directions of the unattested codicil, even as to the proceeds of the real estate, so far as he was not restrained by the effect of the will; the prospective directions in the deed of appointment were not necessarily invalid, especially those which related to the future maintenance of P., & the attempt to delegate powers which the trustee could not transfer did not invalidate the directions in the same deed which he had power to give.—*HITCH v. LEWORTHY* (1842), 2 Ilare, 200; 15 L. J. Ch. 235; 67 E. R. 83.

**3195.** Enforcement of exercise.]—*Re COURTIER, COLES v. COURTIER, COURTIER v. COLES*, No. 3216, *post*.

**3196.** — Disagreement between trustees.]—Under a will, & in the events which happened, one third of testator's residuary estate was held in trust for his daughter, a married woman, for her life without power of anticipation, & after her death for her issue, with a gift over in default of her issue for his sons & their issue respectively. The will empowered the trustees to raise not more than a moiety of the vested share for the time being of any of testator's children & to apply the same for the advancement or benefit of such children in such manner as his trustees should think fit.

Owing to the circumstances of her birth & to the increased cost of living caused by the war, the daughter was unable to pay the legacy duty, which was at the rate of 10 per cent. on her settled share out of her income, & applied to the trustees for assistance. On a summons by the trustees the ct. was of opinion that the trustees could, in the exercise of their discretion under the power of advancement, raise & pay the duty out of the corpus of the settled share, & left them to decide whether they would so exercise their discretion. One of the trustees was willing to exercise the discretion in aid of the daughter, but the other trustee, testator's widow, declined to exercise it because her daughter had married without her consent:—*Held*: the ct. in the exercise of its control over the discretion of the trustees, could direct the trustees to raise out of the corpus of the settled share a sum sufficient to pay the duty.—*KLUG v. KLUG*, [1918] 2 Ch. 67; 62 Sol. Jo. 471; *sub nom. Re KLUG, KLUG v. KLUG*, 87 L. J. Ch. 569; 118 L. T. 696.

**3197.** Trustees not bound to give reasons for decision.]—Where trustees are appointed to execute a trust according to discretion, they are not bound to state reasons for any conclusion at which they may arrive in fulfilling the duty imposed on them; their discretion must, however, be exercised with an absence of indirect motives, with honesty of intention, & with a fair consideration of the subject; & the duty of the ct. generally is to see that the discretion of the trustees has been thus exercised, & not to deal with the accuracy of the conclusion at which they may have arrived.

If, however, in such cases trustees think fit to state a reason for their conclusion, the ct. may consider the validity of the reason thus stated, & if it sees that the reason does not justify the decision, it may correct the decision accordingly.—

Sec. 5.—Discretion: Sub-sects. 1 & 2, A.]

*Re WILKES's (BELOVED) CHARITY* (1851), 3 Mac. & G. 440; 20 L. J. Ch. 588; 17 L. T. O. S. 101; 42 E. R. 330, L. C.

*Annotations:—***Reid.** Hayman v. Rugby School (1874), L. R. 18 Eq. 28; Tabor v. Brooks (1878), 10 Ch. D. 273; *Cassell v. Inglis*, [1916] 2 Ch. 211; *Weinberger v. Inglis*, [1919] A. C. 606.

**3198. Essentials to proper exercise.]—***Re WILKES's (BELOVED) CHARITY*, No. 3197, *ante*.

**3199. Exercise by old trustees—Appointment of new trustees—Right of new trustees to question exercise.]—**A. by deed, in 1844, settled certain profits & moneys upon such trusts as he should by will appoint, & in default upon other trusts, with a proviso that the trustees might lay out all or part of the trust moneys in effecting a policy on the life of the settlor. This was accordingly done. In 1851 the trustees having, as it was alleged, no funds wherewith to meet the premiums, with the assent of A., assigned the policy to E. in satisfaction of a debt due from A. to E., who thereupon held the policy & paid the premiums upon it. Subsequently to this assignment L. & B. were appointed new trustees of the deed of 1844, & the trust fund was assigned to them in general terms, without any mention of the policy. A. died, having appointed the fund by will, & the trustees L. & B. claimed the proceeds of the policy:—**Held:** as the trustees had, in the exercise of their discretion, parted with the policy to E., they were answerable to the *cestui que trust*, but it was not competent to L. & B., the new trustees, to question their conduct.—*JOHNSON v. SWINE* (1861), 3 Giff. 194; 4 L. T. 677; 7 Jur. N. S. 670; 60 E. R. 379.

**3200. Right to consultation with beneficiaries.]—**I am satisfied that the trustees acted in good faith, & that their decision to retain this stock was an honest exercise of the discretion given to them by the will. It would be extremely dangerous to hold that trustees, having such a discretion to exercise, might not freely discuss with the beneficiaries the reasons for & against a particular decision, without running the risk of being held to act against their own judgment, if they should disregard, in the end, objections to which they had thought it right to direct attention (LORD SELBORNE, C.).—*FRASER v. MURDOCH* (1881), 6 App. Cas. 855; *sub nom.* ROBINSON v. MURDOCH, 45 L. T. 417; 30 W. R. 162, H. L.

*Annotations:—***Reid.** Hobbs v. Wayet (1887), 36 Ch. D. 256; *Re Kidd*, Kidd v. Kidd (1894), 42 W. R. 571; *Re Brooks*, Coles v. Davis (1897), 76 L. T. 771; *Hardoon v. Belliell*, [1901] A. C. 118; *Re Hull*, Foster v. Metcalfe (1902), 72 L. J. Ch. 74; *Matthews v. Ruggles-Brose*, [1911] 1 Ch. 194; *Re Richardson*, *Ex p.* St. Thomas's Hospital, [1911] 2 K. B. 705; *Re Towndrow*, Gratton v. Machen, [1911] 1 Ch. 662; *Re Craven*, Watson v. Craven, [1914] 1 Ch. 358; *Re Wrang*, Wrang v. Palmer, [1919] 2 Ch. 58.

**3201. Right to consider co-trustee—Co-trustee having personal interest.]—**Testator by will gave his property to trustees upon trust for sale & conversion, with power to the trustees to postpone

conversion so long as they should in their uncontrolled discretion deem proper, & testator declared that without limiting the general operation of that power he specially intended that it should be made applicable to his shares in a named co. After his death the trustees, in the *bonâ fide* exercise of their discretion, held the shares for some years in a generally falling market:—**Held:** (1) having exercised their discretion *bonâ fide*, they were not liable for loss incurred thereby; (2) the fact that some of the trustees, in exercising their discretion honestly, modified their opinion as to a sale in deference to the views of a co-trustee who had a personal interest in the matter did not amount to a failure to exercise a discretion & was not a breach of trust.—*Re SCHNEIDER, KIRBY v. SCHNEIDER* (1906), 22 T. L. R. 223.

**Interference by court.]—***See* Sub-sect. 2, A., *post*.

## SUB-SECT. 2.—INTERFERENCE WITH DISCRETION.

## A. In General.

**3202. Whether controlled by court.]—**THOMAS v. THOMAS (1705), 2 Vern. 513; 1 Eq. Cas. Abr. 344, pl. 11; 23 E. R. 928.

*Annotations:—***Reid.** Menzey v. Walker (1735), Cas. temp. Talb. 72; *Kemp v. Kemp* (1801), 5 Ves. 849.

**3203. —.]—**By a settlement, it was declared that it should be lawful for the trustees, at the request & by the direction of the tenant for life, to sell the property:—**Held:** the trustees had a discretion, over which the ct. had no control.—*THOMAS v. DERING* (1837), 1 Keen, 729; 6 L. J. Ch. 267; 1 Jur. 427; 48 E. R. 488.

*Annotations:—***Mentd.** *Graham v. Oliver* (1810), 3 Beav. 124; *Bell v. Barchard* (1852), 16 Beav. 8; *Wythes v. Lee* (1855), 26 L. T. O. S. 192; *Iddgway v. Wharton* (1857), 6 H. L. Cas. 238; *Wilson v. Williams* (1857), 3 Jur. N. S. 810; *Chinnock v. Ely* (1865), 4 De G. J. & Sm. 638; *Barnes v. Wood* (1869), L. R. 8 Eq. 424; *Rossiter v. Miller* (1878), 3 App. Cas. 1124; *Hawkesworth v. Chaffey* (1886), 54 L. T. 72; *Stewart v. Kennedy* (1890), 15 App. Cas. 75; *Lumley v. Ravenscroft*, [1895] 1 Q. B. 683; *Rudd v. Lascelles*, [1900] 1 Ch. 815; *Chillingworth v. Esche* (1923), 129 L. T. 808.

**3204. —.]—**In the absence of special circumstances, equity will not interfere to control or limit the exercise of a discretionary power.

A. granted lands to the use of trustees for a term sans waste, & subject thereto, to the use of herself for life sans waste, with remainder to the use of B. for life sans waste with remainder over, with remainder to B. in fee. The trusts of the term were, by cutting & selling timber, or by demising, mortgaging, & selling the premises, to raise three sums, the first of which was to be raised forthwith & paid to A. A. died before any money had been raised. Six years after the date of the grant, B., as tenant for life in possession, advertised a sale of timber. On a bill by the trustees for an injunction against B.:—**Held:** by the terms of the grant the trustees had, as to the

## PART V. SECT. 5, SUB-SECT. 1.

**3198 I. Essentials to proper exercise.]—***Re JENNICK & KIRGRAM'S CONTRACT*, [1923] V. L. R. 283; 46 A. L. T. 194.—**AUS.**

a. *Trustees given power of advancement—Right to raise money to pay beneficiary's debts.]—*Trustees having power to raise money on the vested interest of an adult beneficiary & apply the same for his advancement or benefit:—**Held:** justified in so doing for the purpose of paying his debts where in the *bonâ fide* exercise of their discretion they thought it for the benefit of that beneficiary so to do, although the interest of the beneficiary was liable

to be divested on bankruptcy prior to the period of distribution.—*PERPETUAL TRUSTEE CO., LTD. v. SMITH* (1906), 6 S. R. N. S. W. 542; 23 N. S. W. N. 112.—**AUS.**

b. *Division of whole estate made after death of testatrix.]—*HOSPITAL FOR SICK CHILDREN v. CHUTE (1902), 22 C. L. T. 173; 3 C. O. L. R. 590; 1 O. W. R. 321.—**CAN.**

c. *Limitation on trustees' discretion—Construction of clause in will.]—**Re MACLEOD, WEST AUSTRALIAN TRUSTEE, EXECUTOR & AGENCY CO., LTD. v. MACLEOD* (1925), 23 W. A. L. R. 18.—**AUS.**

d. *Trustees bound to exercise discretion*

*—Power to trustees to reassess to settlor freed from trusts.]—*TOXWARI v. OGG (1895), 14 N. Z. L. R. 302.—**N.Z.**

e. *Retention of residue of trust estate & accumulating interest—Intention of testator kept in mind.]—*MONCHIEFF v. USHER (1861), 24 Dunl. (Ct. of Sess.) 49; 34 Sc. Jur. 22.—**SCOT.**

## PART V. SECT. 5, SUB-SECT. 2.—A.

1. *Not controlled by court.]—*Where, under the terms of a will exors. & trustees are required to retain in their hands a sufficient sum to provide for the support of a lunatic, the ct. will not interfere with the exercise of the discretion given to the trustees

mode of raising the moneys, a discretion with which the ct. could not interfere, & therefore a right to enter & cut timber, to which right B.'s estate, though sans waste, was subordinate; & B. was restrained from cutting or selling the timber while the moneys remained to be raised.—*KEKEWICH v. MARKER* (1851), 3 Mac. & G. 311; 21 L. J. Ch. 182; 17 L. T. O. S. 193; 15 Jur. 687; 42 E. R. 280; *reusg.* S. C. *sub nom.* *MARKER v. KEKEWICH* (1850), 8 Hare, 291.

*Annotations*:—*Refd.* *Briggs v. Oxford* (1851), 5 De G. & Sm. 136; *Dashwood v. Magniac* (1891), 60 L. J. Ch. 809.

**3205.** —[.]—*MORTIMER v. WATTS*, No. 3052, *ante*.

**3206.** —[.]—If a testator, when he makes his will, is aware of the circumstances & position of his exors. & trustees, the ct. will not lightly interfere with their discretion.—*STAINTON v. CARRON Co.* (1854), 18 Beav. 146; 2 Eq. Rep. 466; 23 L. J. Ch. 299; 22 L. T. O. S. 299; 18 Jur. 137; 2 W. R. 176; 52 E. R. 58.

*Annotation*:—*Refd.* *Yeatman v. Yeatman* (1877), 7 Ch. D. 210.

**3207.** —[.]—As to part of the funds, the trustees had a discretion as to their application in case of forfeiture. The ct. refused to relieve them of their discretion.—*OLDHAM v. OLDHAM* (1867), as reported in 36 L. J. Ch. 205; 15 W. R. 300.

*Annotation*:—*Mentd.* *Re Swannell, Morice v. Swannell* (1909), 101 L. T. 76.

**3208.** —[.]—Testator, after a specific bequest, gave all his residuary estate, both real & personal, to trustees, whom he also appointed exors., upon trust, as soon as conveniently might be after his death, to sell so much & such part thereof as they might think necessary for paying all his mtge. & other just debts & funeral & testamentary expenses; & he directed the trustees out of the moneys to arise from such sale & other his residuary estate, to pay all such sums of money as might at the time of his decease be charged on his freehold or leasehold estates by way of mtge. & all other his just debts & funeral & testamentary expenses, & to invest so much of the moneys as might remain after such payments; & to stand possessed of such investments & all other his residuary estate & the income thereof upon trust for several persons successively for their respective lives, with remainders over. Part of testator's residuary estate consisted of a leasehold, which was at the time of his death subject to a mtge. Shortly after testator's death, the trustees paid off the mtge. out of testator's estate:—*Held*: upon the construction of the will, the trustees had a discretion as to what part of testator's estate should be converted; the ct. could not interfere with such discretion, at all events if a considerable time had elapsed since it had been exercised; & the tenants for life were entitled to enjoy the leaseholds *in specie*.—*Re SEWELL'S ESTATE* (1870), L. R. 11 Eq. 80; *sub nom.* *Re LONDON & NORTH WESTERN RY. CO. (SEWELL'S ESTATE)*, 40 L. J. Ch. 135; 23 L. T. 835; *sub nom.* *Re NORTH WESTERN RY. Co.*, 19 W. R. 220.

*Annotation*:—*Apld.* *Re Pitcairn, Brandreth v. Colvin*, [1896] 2 Ch. 199.

**3209.** —[.]—Where a residue comprising leaseholds, freeholds, & other property, is devised in strict settlement, & a direction is given to the trustees to sell so much & such part thereof as,

in their sole discretion, they may think necessary for the purpose of paying all the testator's debts, a presumption is raised against the conversion of such parts as the trustees may not think necessary to sell for the purpose mentioned, & the ct. will not interfere with the discretion of the trustees.—*Re SEWELL'S ESTATE* (1870), L. R. 11 Eq. 80; *sub nom.* *Re LONDON & NORTH WESTERN RY. CO. (SEWELL'S ESTATE)*, 40 L. J. Ch. 135; 23 L. T. 835; *sub nom.* *Re NORTH WESTERN RY. Co.*, 19 W. R. 220.

*Annotation*:—*Refd.* *Re Pitcairn, Brandreth v. Colvin*, [1896] 2 Ch. 199.

**3210.** —[.]—Trustees were by will authorised, if they thought fit, to apply the income of shares to which children were presumptively entitled towards the maintenance of the children, notwithstanding the father of the children might be of sufficient ability to maintain them. A suit was instituted for the administration of the estate of testator:—*Held*: the ct. would not control the discretion of the trustees, & if they thought it fit that the income should be paid to the father for the maintenance of the children, an order would be made for payment accordingly.—*BROPHY v. BELLAMY* (1873), 8 Ch. App. 798; 43 L. J. Ch. 183; 29 L. T. 380, L. C. & L. JJ.

*Annotations*:—*Consd.* *Tempest v. Camoys* (1882), 21 Ch. D. 571. *Refd.* *Re Bryant, Bryant v. Hickley* (1893), 42 W. R. 183.

**3211.** —[.]—Where there are two funds, both of them applicable to the maintenance of a lunatic, under the management of the Ct. of Ch., to one of which the lunatic would be absolutely entitled as her own property, the other of which, so far as she might not benefit by it, would pass away to different persons, the ct. might direct her maintenance to be provided for out of the latter fund. But where such latter fund is provided by a will which vests the fund in trustees, & gives them an absolute discretion & "uncontrollable authority" over its application, the ct. will not exercise its ordinary power. The fund so specially provided will be left to the exercise *bonâ fide* of the discretion of the trustees.

Testator, whose wife had, in her own right, property which was not referred to in his will, devised his real & personal estates to trustees upon various trusts, one of which was that "my trustees in their discretion, & of their uncontrollable authority, pay & apply the whole, or such portion only, of the annual income, of my real & personal estate & investments, etc., as they shall think expedient to or for the clothing, board, etc., for the personal & peculiar benefit & comfort of my dear wife." One of the trustees was testator's brother, & he was made the residuary legatee:—*Held*: the trustees were entitled to exercise an absolute discretion in the application of the fund thus provided by the will.—*GISBORNE v. GISBORNE* (1877), 2 App. Cas. 300; 46 L. J. Ch. 550; 36 L. T. 564; 25 W. R. 516, H. L.

*Annotations*:—*Fold.* *Tabor v. Brooks* (1878), 10 Ch. D. 273; *Tempest v. Camoys* (1882), 21 Ch. D. 571. *Consd.* *Re Weaver* (1882), 21 Ch. D. 615. *Fold.* *Re Boys, Boys v. Hardy* (1896), 41 Sol. Jo. 111. *Apld.* *Re Wakley, Vachell v. Wakley* (1920), 123 L. T. 150. *Refd.* *Re Loffthouse* (1885), 29 Ch. D. 921; *Tempest v. Camoys* (1888), 58 L. T. 221; *Re Sanson, Sanson v. Turner* (1896), 12 T. L. R. 142; *Re Schneider, Kirby v. Schneider* (1906), 22 T. L. R. 223; *Re Iaten, Spencer v. National Assocn. for the prevention of Consumption & other forms of Tuberculosis*, [1915] 1 Ch. 673; *Re Charteris, Charteris v. Biddulph*, [1917] 2 Ch. 379.

as to the appropriation of the moneys for such purpose.—*Re SARGENT* (1901), 24 C. L. T. 357; 8 O. L. R. 260; 3 O. W. R. 769.—*CAN.*

*g.* —[.]—*CHIVAS' TRUSTEES v. STEWART*, [1907] S. C. 701; 44 Sc. L. R.

15; 14 S. L. T. 357.—*SCOT.*

*h.* —[.]—*Unless improperly exercised.*

—*TAYLOR v. TAYLOR* (1890), 17

N. S. W. L. R. (Eq.) 43.—*AUS.*

*k.* —[.]—*Coy v. Coy* (1877),

25 Gr. 267.—*CAN.*

1. —[.]—*CLARK v. KERFER* (1898), 29 O. R. 557.—*CAN.*

*m.* —[.]—*EARLE v. LAWTON*

(1909), 4 N. B. Eq. Rep. 86; 5 E. L. R.

472.—*CAN.*

*n.* —[.]—Where a discre-

Sect. 5.—Discretion : Sub-sect. 2, A.]

**3212.** —[—Where in a marriage settlement the trustees had power to apply the income of the settled fund for the benefit of the husband & wife & their children as they should "in their uncontrolled & irresponsible discretion think proper," the ct., while expressing an opinion that the trustees were not acting judiciously, declined to interfere with their discretion, there being no proof of *mala fides*.—*TABOR v. BROOKS* (1878), 10 Ch. D. 273; 48 L. J. Ch. 130; 39 L. T. 528.

*Annotations* :—*Consd.* *Camden v. Murray* (1880), 16 Ch. D. 161. *Reid.* *Re Raven, Spencer v. National Assocn. for the prevention of Consumption & other forms of Tuberculosis*, [1915] 1 Ch. 673.

**3213.** —[—Where trustees have an unlimited discretionary power to postpone, as long as they think fit, the payments of shares of a residuary fund; & where of the time & manner of exercising the power they are to be the sole & final judges, arresting creditors of the fund will be defeated by the trustees executing, even after action raised, a deed applying the fund as an alimentary provision for the behoof of the beneficiaries. No proceedings resorted to by creditors of the beneficiaries can in such a case abridge the powers of the trustees.

Testator directed his trustees to hold the residue of his estate for the behoof of his children, "with & under the modifications to be afterwards stated." The shares of residue were to vest at testator's death, & be payable six months after his decease; but powers were given, "notwithstanding the period above appointed for payment of the shares of the residue," to the trustees "to postpone as long as they should think it expedient to do so, the payment of the provisions or shares of residue in the case of all or any of the children or grandchildren . . . & to apply the interest or annual produce of the same during the period of the postponement, to or for behoof of such children or grandchildren, or, by a deed under their hands, to retain the provisions, or any of them, vested in their own persons, or to vest the same in the persons of other trustees . . . so that the children & grandchildren, or any of them, as the case might be, might draw & receive only the interest or other annual proceeds of their respective provisions during their lives, or for such time as the trustees might fix, & that the capital might be settled on or for behoof of such children or grandchildren, & their lawful issue, on such conditions & under such restrictions & limitations, & for such uses as the trustees in their discretion might deem most expedient, of which expediency, & the time & manner of exercising the powers & option hereby given, they should be the sole & final judges."

The trustees during a period of five years after testator's death paid the whole of the interest, & a part of the capital of his share to J., a son of testator. Subsequently judgment creditors of J. used arrestment in the hands of the trustees against the balance of the residue of his share still due to J., & raised an action of forthcoming. Thereupon the trustees executed a deed restricting the right of J. to a life rent, & settled the fee on his children; & again by another deed they resolved to hold the balance, & apply the interest as an alimentary fund for J.'s behoof :—*Held* : the arrestment could not in any way abridge the ample discretionary powers of the trustees, & the trustees were at

liberty to withhold from J., or any one claiming under him, the payment of either principal or interest as they might think occasion required.—*CHAMBERS v. SMITH* (1878), 3 App. Cas. 795, H. L. *Annotation* :—*Apld.* *Re Bullock, Good v. Lickorish* (1891) 60 L. J. Ch. 341.

**3214.** —[—Two trustees having power to sell the freehold property of an infant at the request of the guardians, & one trustee having declined upon such request to exercise the power of sale, the ct. refused to control the discretion of the trustees by ordering them to sell the estate, there being no absolute necessity for raising money & the existing income being sufficient to keep down the charges upon the estate, notwithstanding that the effect of the sale would be to increase very considerably the income of the property.—*CAMDEN (MARQUIS) v. MURRAY* (1880), 16 Ch. D. 161; 50 L. J. Ch. 282; 43 L. T. 661; 29 W. R. 190.

*Annotation* :—*Reid.* *Tempest v. Camoys* (1882), 21 Ch. D. 571.

**3215.** —[—Where real estate is devised to trustees in trust for sale, with a discretionary power to postpone the sale, the ct. will not interfere with a *bonâ fide* exercise of their discretion as to the time & mode of sale.—*Re BLAKE, JONES v. BLAKE* (1885), 29 Ch. D. 913; 54 L. J. Ch. 880; *sub nom.* *Re BLAKE, PUGHE-JONES v. BLAKE*, 53 L. T. 302, C. A.

*Annotations* :—*Mentd.* *Re Pugh, Lewis v. Pritchard* (1888), 57 L. T. 858; *Re Richardson, Pole v. Pattenden*, [1920] 1 Ch. 423.

**3216.** —[—Testator gave leaseholds, some of which were held on short terms, to two trustees, one of whom was his wife, upon trust for his wife for life, & after her death upon trust that the whole should be sold, & the proceeds divided between four persons; & he authorised his trustees, provided they should deem it advisable, to sell his short leaseholds & invest the proceeds & allow his wife to receive the income during her life. The leaseholds were in a bad state of repair at the death of testator; the widow kept them up in the same state of repair, but declined to do more than this. The remaindermen applied for an order to oblige the tenant for life to maintain the leaseholds in such a state of repair as to satisfy the covenants in the leases so as to avoid a forfeiture, or else to concur in selling the short leaseholds :—*Held* : the ct. had no jurisdiction to interfere with the discretion of the widow, who had then become surviving trustee, & to order her to exercise her power of selling the leaseholds.—*Re COURTIER, COLES v. COURTIER, COURTIER v. COLES* (1886), 34 Ch. D. 136; 56 L. J. Ch. 350; 55 L. T. 574; 51 J. P. 117; 35 W. R. 85, C. A.

*Annotations* :—*Mentd.* *Re Baring, Jeune v. Baring*, [1893] 1 Ch. 61; *Debnay v. Eckett* (1894), 71 L. T. 859; *Re Redding, Thompson v. Redding*, [1897] 1 Ch. 876; *Re Tomlinson, Tomlinson v. Andrew*, [1898] 1 Ch. 232; *Re Bettv. Betty v. A.-G.*, [1899] 1 Ch. 821; *Re Gyers, Cooper v. Gyers*, [1899] 2 Ch. 54; *Re Thomas, Weatherall v. Thomas*, [1900] 1 Ch. 319.

**3217.** —[—*Re WAINWRIGHT, WAINWRIGHT v. MARTINEAU* (1889), 5 T. L. R. 301.

**3218.** —[—Testator gave all his residuary estate to trustees upon trust to pay the income thereof to his widow for life until remarriage, & in the event of her remarrying to pay to her thereout a life annuity of £4,000 for her separate use without power of anticipation; & subject to these trusts testator gave all his residuary estate, both capital & income, to his children in certain shares,

tionary trust is vested in trustees, the ct. will not interfere with the exercise of the discretion, if it be not capricious or improper, though a suit be instituted for the administration of

the trust funds.—*GRAY v. GRAY* (1862), 13 L. Ch. R. 404.—*IR.*

o. —[—Where a trustee, to whom property is given by a will, is invested with an unlimited discretion

as to the quantity of estate he may give the *cestui que trust*, & he gives but a nominal share to one, the ct. will not inquire into his reasons for so doing unless there be an allega-

& directed that "after the death or remarriage of my widow my trustees shall apply the whole, or such part as they shall think fit, of the income" of the share of any child "for or towards the maintenance & education or otherwise for the benefit of such child." Testator appointed his widow & four other persons trustees of his will. Testator's widow remarried, & having applied to her co-trustees to exercise the trust for maintenance in favour of her children, they, in the exercise of their discretion, declined to do so:—*Held*: the ct. had no jurisdiction to overrule the discretion of the trustees in declining maintenance.—*Re BRYANT, BRYANT v. HICKLEY*, [1894] 1 Ch. 324; 63 L. J. Ch. 197; 70 L. T. 301; 42 W. R. 183; 38 Sol. Jo. 79; 8 R. 32.

**3219.** —.]—*Re BOYS, BOYS v. HARDY* (1896), 41 Sol. Jo. 111.

**3220.** —.]—Testator bequeathed all his furniture & effects & articles of household or personal use & ornament at his residence, except such articles as his trustees should not consider suitable to be retained as heirlooms upon trust, to allow the same to be used by the person entitled to the possession of the settled land:—*Held*: the ct. ought not to interfere with the decision of the trustees as to what articles were suitable to be retained as heirlooms.—*Re SMITH-BOSANQUET'S TRUSTS* (1909), 53 Sol. Jo. 430.

**3221.** —.]—Under a will certain property, consisting of freehold land divided into numerous plots on which houses had been built & now let on leases for long terms, stood limited to trustees upon trust for E. for life with remainder to S. in base fee. A number of provisional valuations had been made by the district surveyor under the Finance (1909-1910) Act, 1910 (c. 8), for the purpose of assessing the increment value duty under the Act. S. applied to the trustees to take measures to check the provisional valuations & for that purpose to have valuations made. E. opposed this on the ground of expense. S. then applied to the Comrs. as a person interested under s. 27 (5) of the Act that he might be supplied with copies of the provisional valuations, & this was promised. He then took out this summons for an order directing the trustees to have valuations made for the purpose of checking the valuations of the district surveyor. The only evidence in support of the application was an affidavit by a surveyor of standing & experience that the valuations under the Act were usually too low.

The judge held that on the true construction of the Act the duty of protecting the estate in the matter of these valuations was thrown on the owner (i.e. in the case of settled land, the tenant for life) & not on the trustees. Under s. 39 the trustees if they did interfere could charge their costs on the estate, but the ct. would not direct the trustees to take proceedings except in a case where serious injury was threatened to the estate, & in this case there was no sufficient evidence of any such threatened injury:—*Held*: in the course of their ordinary duty trustees had to exercise their discretion in such cases; the trustees in the present case had honestly exercised that discretion; & there was no reason why the ct. should interfere with it.—*Re KNOLLYS' TRUSTS, SAUNDERS v. HASLAM*, [1912] 2 Ch. 357; 81 L. J. Ch. 572; 107 L. T. 335; 56 Sol. Jo. 632, C. A.

**3222.** —.]—*Re CHARTERIS, CHARTERIS v. BIDDULPH*, No. 3127, *ante*.

**3223.** —.]—Upon an application for an order for permanent alimony by a wife who has obtained a decree for judicial separation, the ct., in assessing the amount to be paid by the husband, will take into consideration a voluntary allowance made to him by trustees under a discretionary trust to apply the income of a fund for the maintenance & support or otherwise for the benefit of all or such one or more exclusively of the other or others of the husband, wife, & their issue. But if in such a case the trustees should subsequently formulate a scheme for the application of the income of the fund for the maintenance of the husband & his wife & issue, the ct. will have jurisdiction under r. 92 of the Divorce Rules & Regulations to review the order, & discharge or suspend it.—*MARTIN v. MARTIN*, [1919] P. 283; 88 L. J. P. 163; 121 L. T. 337; 35 T. L. R. 602; 63 Sol. Jo. 641, C. A.

**3224.** —.]—By a codicil to his will testator directed his exors., on the death of his wife, to pay from his estate to the trustees of a masonic temple erected by him to the memory of his son, £10,000, to be invested & the interest applied by the trustees, in their full & sole discretion, to the maintenance & upkeep of the masonic temple, & the balance, if any, to be applied in favour of any masonic charities which the trustees might select.

The masonic temple was to be used for masonic ceremonies, & smaller rooms for lodge meetings, business, & meetings of a social but not political character. Upon a summons by the widow of testator, who was also one of the exors., to ascertain whether the legacy was valid or not:—*Held*: the whole income of the fund being charged with a trust, at the discretion of the trustees, for a primary object which was invalid, the ct. was not entitled to control this discretion, & institute an inquiry at chambers as to the amount of income necessary to be applied for maintenance & upkeep of the temple, so that the gift of the balance would be valid.—*Re PORTER, PORTER v. PORTER*, [1925] Ch. 746; 95 L. J. Ch. 46; 133 L. T. 812.

**3225. Discretion—Unless improperly exercised.**—Discretion of trustees, having power to change securities, but not without consent, not controlled, unless mischievously & ruinously exercised.—*DE MANNEVILLE v. CROMPTON* (1813), 1 Ves. & B. 354; 35 E. R. 138, L. C.

*Annotations*:—*Reid*, *Re Brittlebank, Coates v. Brittlebank* (1881), 30 W. R. 99. *Mentd*, *St. George v. Wake* (1833), *Coop. temp. Brough*, 129; *Taylor v. Pugh* (1842), 1 Hare, 608.

**3226.** —.]—A direction by a testator, that his exors. shall pay an annuity unless circumstances render it unnecessary inexpedient & impracticable, means, unless "in the opinion of his exors." circumstances shall so render it. The judgment of the exors. in this respect, not controllable by a ct. of equity, unless they act *malâ fide*.—*FRENCH v. DAVIDSON* (1818), 3 Madd. 396; 50 E. R. 550.

**3227.** —.]—*COLLINS v. VINING* (1837), *Coop. Pr. Cas.* 472; 47 E. R. 602.

**3228.** —.]—Where a testator has given a discretionary power to trustees to apply the income of his estate for the maintenance of an infant, the ct. will not interfere unless the trustees

tion that he has been actuated by corrupt or dishonest motives in the distribution made by him.—*BOULGER v. SMITH* (1861), 17 L. T. O. S. 217.—*IR.*

p. —.]—*Re SCOTT, ATKINSON v. FOURISTER* (1900), 19 N. Z. L. R. 172.—*N.Z.*

q. —.]—The ct. cannot, upon an originating summons, or in

any other procedure, give any direction to trustees controlling their discretion in the administration of the trusts of a will, where an absolute discretion has been given to them, & where it is



Sec. 5.—Discretion: Sub-sect. 2, A. & B.]

have been guilty of extravagance.—*DOUGLAS v. ANDREWS* (1839), 3 Jur. 949.

**3229.** ———.—*—[Balls v. Strutt, No. 3249, post.*

**3230.** ———.—*—[A direction by will that testator's widow shall receive all the income of his real & personal estate, & pay & apply the same to & for the use of herself & the children of their marriage, agreeable & according to her own discretion during her life, confers upon the wife a discretionary power, which the ct. will not disturb so long as it is reasonably & honestly exercised.*

Where the disposition of a trust estate amongst certain objects is made by the author of the trust to depend upon the discretion of the trustee, the ct. will, in a proper suit, inquire into the manner in which the trust has been administered & require that such discretion shall be fairly & honestly exercised; & so long as it appears to be so exercised, the ct. will not deprive the trustee of the discretionary power which he possesses, or assume itself the exercise of that power; but to avoid a repetition of suits, where there is reason to apprehend that the conduct of the trustee may be liable to question, the ct. may require the discretion of the trustee to be exercised under its view.—*COSTABADIE v. COSTABADIE* (1847), 6 Hare, 410; 16 L. J. Ch. 259; 9 L. T. O. S. 20; 11 Jur. 345; 67 E. R. 1225.

*Annotations:—Appl. Re Hodges, Davey v. Ward* (1878), 7 Ch. D. 754. *Refd. Talbot v. Marshfield* (1867), L. R. 4 Eq. 661; *Tabor v. Brooks* (1878), 10 Ch. D. 273. *Mentd. Godfrey v. Godfrey* (1863), 2 New Rep. 16.

**3231.** ———.—*—[The ct. will control the discretion reposed in trustees by the provisions of a will when such discretion is dishonestly or improperly exercised.—Re Hodges, Davey v. Ward* (1878), 7 Ch. D. 754; 47 L. J. Ch. 335; 26 W. R. 390.

*Annotation:—Consd. Tabor v. Brooks* (1878), 10 Ch. D. 273.

**3232.** ———.—*—[Where absolute discretion has been given to trustees as to the exercise of a power the ct. will not compel them to exercise it, but if they propose to exercise it, the ct. will see that they do not exercise it improperly or unreasonably. Where the power is coupled with a trust or duty the ct. will enforce the proper & timely exercise of the power, but will not interfere with the discretion of the trustees as to the particular time or manner of their *bond fide* exercise of it. A testator gave his trustees a power to be exercised at their absolute discretion of selling real estates, with a declaration that the proceeds should be applied at the like discretion, in the purchase of other real estates. He also gave them power at their absolute discretion to raise money by mtge. for the purchase of real estates. A suit having been instituted for the execution of the trusts of the will, & a sum of money, the proceeds of the sale of real estate, having been paid into ct., one of the trustees proposed to purchase a large estate & to apply the fund in ct. in part payment of the purchase-money, & to raise the remainder of the purchase-money by mtge. of the purchased estate. The other trustee refused to concur in the purchase.—*Held*: the ct. could not control the dissentient trustee in the exercise of his discretion in refusing to make the purchase, or in refusing to exercise his power of raising money by mtge. for the proposed purpose.—*

*TEMPEST v. CAMOYS* (LORD) (1882), 21 Ch. D. 571; 51 L. J. Ch. 785; 48 L. T. 13; 31 W. R. 326, C. A.

*Annotations:—Distd. Re Courtier, Coles v. Courtier, Courtier v. Coles* (1886), 34 Ch. D. 136. *Follid. Re Burrage, Burningham v. Burrage* (1890), 62 L. T. 752. *Consd. Re Bryant, Bryant v. Hickey*, [1894] 1 Ch. 324. *Refd. Re Gadd, Eastwood v. Clark* (1883), 23 Ch. D. 134; *Re Hall, Hall v. Hall* (1885), 54 L. J. Ch. 527; *Re Radnor's Will Trusts* (1890), 45 Ch. D. 402; *Re Higginbottom* (1892) 3 Ch. 132; *Montefiore v. Guadalla*, [1903] 2 Ch. 723; *Re Charteris, Charteris v. Biddulph*, [1917] 2 Ch. 379. *Mentd. Re Poor's Lands Charity, Bethnal-Green* (1891), 7 T. L. R. 705.

**3233.** ———.—*—[It is now the settled practice of the ct. not to interfere, even after an administration decree, with trustees in the *bond fide* exercise of their discretionary powers; but the ct. must be satisfied that the power is being properly exercised.—Re GADD, EASTWOOD v. CLARK* (1883), 23 Ch. D. 134; 52 L. J. Ch. 396; 48 L. T. 395; 31 W. R. 417, C. A.

*Annotations:—Follid. Re Sales, Sales v. Sales* (1911), 55 Sol. Jo. 838. *Refd. Thomas v. Williams* (1883), 24 Ch. D. 658; *Re Norris, Allen v. Norris* (1884), 27 Ch. D. 333; *Re Brown, Brown v. Brown* (1885), 29 Ch. D. 889; *Re Hall, Hall v. Hall* (1885), 54 L. J. Ch. 527; *Re Lofthouse* (1885), 29 Ch. D. 824; *Re Higginbottom*, [1892] 3 Ch. 132; *Re Soc. for Discharge & Relief of Persons Imprisoned for Small Debts throughout England & Wales* (1912), 56 Sol. Jo. 596.

**3234.** ———.—*—[In the exercise of a discretionary power by a trustee, the ct. in its ordinary jurisdiction will see that the power is not exercised improperly or unreasonably.—(CHITTY, J.).—Re RADNOR'S (EARL) WILL TRUSTS* (1890), 45 Ch. D. 402; 59 L. J. Ch. 782; 63 L. T. 191; 6 T. L. R. 480; *on appeal*, 45 Ch. D. 413, C. A.

*Annotations:—Consd. Re Allesbury's S. R.*, [1892] 1 Ch. 506. *Refd. Mogridge v. Clapp*, [1892] 3 Ch. 382; *Re Hope, De Cetto v. Hope*, [1899] 2 Ch. 679. *Mentd. Hampden v. Buckinghamshire*, [1893] 2 Ch. 531; *Re Fetherstonhaugh's Estate* (1898), 14 T. L. R. 167; *Re Townshend's Settlement*, [1903], 89 L. T. 691; *Re Hope S. E.* (1910), 26 T. L. R. 413.

**3235.** ———.—*—[Testator directed his trustees to pay to his brother "either the whole or only a portion of the annual revenue" of a sum of £5,000, " & that subject to such conditions, all as my trustees in their sole & absolute discretion think fit." The trustees paid various sums, the estate being a difficult one to administer, & the assignee of the legatee brought an action against the trustees claiming the whole income in the trustees' hands.—*Held*: the pursuer was not entitled to succeed, as the trustees had exercised a discretion & it had not been shown that it was not a sound & reasonable discretion.—TRAIN v. CLAPPERTON, [1908] A. C. 342; 77 L. J. P. C. 124, H. L.*

**3236.** ———.—*—[It is said & said truly that the husband has no legal right to insist upon payment to him of any part of the income of this fund; he has, however, a right in common with his wife & child to insist upon the exercise by the trustees of their discretion to apply the income of this fund, but so long as the trustees *bond fide* & properly exercise their discretion, it is not the practice of the ct. to interfere with them.—(WARINGTON, J.).—MARTIN v. MARTIN, [1919] P. 283; L. J. P. 163; 121 L. T. 337; 35 T. L. R. 602; 63 Sol. Jo. 641, C. A.*

**3237.** ———.—*—[Trustees stating reasons for exercise.]—Re WILKES'S (BELOVED) CHARITY, No. 3197, ante.*

**3238.** ———.—*—[Onus of proof.]—Testator gave to his son the option of purchasing an estate, at what to his trustees "should seem a fair & reason-*

*not suggested that they are exercising or proposing to exercise that discretion improperly.—Re LAERY, LEVY v. MENTRATH* (1903), 23 N. Z. L. R. 557.—N.Z.

*r. ———.—[TRAIN v. CLAPPERTON, [1908] S. C. (H. L.) 26; 45 Sol. L. R. 682; 16 S. L. T. 45.—SCOT. t. Application by trustees for advice—Circumstances under which advice*

*may be given.]—The ct. will not, as a rule, under Supreme Ct. in Equity Act, 1890 (c. 4), s. 212, determine the rights of competing parties to a fund in the hands of trustees. The sect. 14*



able value." The trustees had a valuation made, which amounted to £1,500, the valuation made at the instance of the parties interested in the produce exceeded that by one-third:—*Held*: the trustees having fixed what they considered "a fair & reasonable value," having authority to do so, it was incumbent on pltf. to show that it was fraudulent, in order to prevent the son's purchasing at £1,500.—*EDMONDS v. MILLETT* (1855), 20 Beav. 54; 52 E. R. 522.

**3239.** ———.—[1] Where a trustee has a discretionary power, the ct. will not interfere with the exercise of it, except where it is mischievously, or ruinously, or fraudulently exercised.

(2) The *onus* of showing that it has been so exercised rests on those who impeach the acts of the trustee.—*Re BRITTLEBANK, COATES v. BRITTLEBANK* (1881), 30 W. R. 99.

**Discretion as to maintenance & advancement.**—*See INFANTS*, Vol. XXVIII, pp. 231, 232, Nos. 881–891.

### B. Administration by Court.

*See, generally*, Sect. 5, sub-sect. 2, B., *post*.

**3240. Discretionary powers.—Extension of—Where previously limited by trust instrument.**—

A settlement of real estate of which there were four trustees, provided that if the trustees thereby appointed "or any future trustee or trustees to be appointed in the place of them or any of them as hereinafter mentioned" should die or be desirous of being discharged, etc., it should be lawful for "the surviving or continuing trustee or trustees for the time being," with the consent of the tenant for life or in tail for the time being entitled in possession, to appoint a new trustee or new trustees in the place of the trustee or trustees so dying, etc. In 1872, four new trustees were appointed under Trustee Act, 1850 (c. 60), in the place of two deceased & two retiring trustees. After this a decree was made for carrying the trusts of the settlement into execution. Two of the trustees of 1872 being dead, & another desiring to retire, pltf. who was an infant tenant in tail in possession, took out a summons to appoint new trustees: W., the continuing trustee took out a summons asking that he might be at liberty to appoint new trustees. A reference to chambers being directed, W. proposed new trustees whom the ct. considered to be proper persons, but to whom all the persons beneficially interested objected:—*Held*: the persons nominated by W. must be appointed, though the tenant in tail in possession did not consent, for as the power in the settlement only applied to filling up vacancies in the number of original trustees, or trustees appointed under the power, it had come to an end when new trustees were appointed by the ct. in 1872, & the fetter imposed by the settlement on the exercise of that power did not apply to the new power given to the continuing trustee by Conveyancing Act, 1881 (c. 41), which enabled him to fill up vacancies in a body of trustees not coming within the scope of the power in the settlement.—*CECIL v. LANGDON*

intended to enable the ct. to advise exors. & trustees in matters of discretion vested in them.—*Re FOXWELL'S ESTATE* (1895), 1 N. B. Eq. Rep. 195.—**CAN.**

### PART V. SECT. 5, SUB-SECT. 2.—B.

**3241. Discretionary powers.—Control by court.**—[In cases where a gift is bestowed upon persons on condition that they shall not marry without the consent of others, the giving or withholding of that consent should be determined solely by considerations for the

welfare of the donee. If trustees allow themselves to be influenced by other motives, if they act from mere caprice, if they refuse to act at all, or if they are governed by reasons that could not influence any reasonable man, the ct. will infer fraud & has jurisdiction to interpose in order to protect the beneficiary from such improper exercise of the discretionary power so created.—*WATSON v. CAIN* (1890), 16 V. L. R. 766.—**AUS.**

**3241 II.** ———.—[*WHITEWOOD v. WHITEWOOD* (1900), 19 P. R.

(1884), 28 Ch. D. 1; 54 L. J. Ch. 313; 51 L. T. 618; 53 W. R. 1, C. A.

*Annotation*:—*Reid, Re Wheeler & De Rochoy*, [1896] 1 Ch. 315.

**3241.** ———.—**Control by court.**—[*BETHELL v. ABRAHAM*, No. 3675, *post*.

**3242.** ———.—[*Re GADD, EASTWOOD v. CLARK*, No. 3233, *ante*.

**3243.** ———.—**Exercise by court.**—If the trustee is called upon in this ct., it takes the execution of the trust out of the hands of the trustee, to be executed by the ct. (LORD CAMDEN, C.).—*WALKER v. SMALWOOD* (1768), Amb. 676; 27 E. R. 439, L. C.

*Annotations*:—*Mentd. Metcalfe v. Pulvertoft* (1813), 2 Ves. & B. 200; *Shaw v. Borrer* (1836), Donnelly, 150; *Price v. Price* (1887), 35 Ch. D. 297.

**3244.** ———.—**Matters of fact.**—Where the discretion of a trustee is to be exercised upon matter of fact, the ct. will substitute the master, but not where the discretion is to be exercised upon matter of opinion & judgment.—*WALKER v. WALKER* (1820), 5 Madd. 424; 56 E. R. 957.

*Annotation*:—*Reid, Fordyce v. Bridges* (1848), 2 Coop. temp. Cott. 324.

**3245.** ———.—**Matters of opinion.**—[*WALKER v. WALKER*, No. 3244, *ante*.

**3246.** ———.—**Exercise with sanction of court.**—(1) H., by his will, gave to three trustees, one of whom was his eldest son W., all his real & personal property, which included the proprietorship of a newspaper, on trust to carry on the newspaper during the life of his wife, & they were annually to set apart & invest one-fourth of the profits of the paper as a reserve fund to meet emergencies, & to divide the remaining three-fourth parts of the profits of same, & the income from his real & personal estate, into six equal parts for his wife & five children, all specially named, & in case of the death of any such child during the life of the wife, to pay the share of that child to the lawful issue of that child, or if none such, equally among the survivors of his children: & after the decease of his wife, "or during her life if she & the majority of my children & my trustees shall deem it proper & expedient so to do, at the sole discretion of my trustees," to sell the real & personal estate & the newspaper, & divide the proceeds among the wife & children, bringing in the amount of the reserve fund as part; the shares to be for their absolute use & benefit immediately after such division. He declared that "in case, under the above clause, it shall be agreed, or my trustees shall decide to sell" the paper, & if any of his sons should wish to carry on same, such one should be entitled to purchase it at £500 less than the market price. Till all the property was sold, the trustees were to apply the income of the part unsold in the manner before expressed as to the income of the real & personal estate:—*Held*: the will created not a mere power but a trust, to sell, with a discretion in the trustees as to the manner & particular time of selling; (2) after trustees have invoked the aid of the ct. in administering an estate, & a decree has been made, they cannot act in the matter of

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**3241 III.** ———.—[L., on his marriage, gave a bond & warrant to the trustees of his settlement upon trust "when the trustees should think fit & expedient so to do," to levy the amount & hold it for the uses of his settlement. No judgment on the bond was ever entered; & the amount of the bond was lost:—*Held*: the discretion conferred upon the trustees was not absolute but to be controlled by the ct.—*LUTHER v. BRANCONI* (1860), 10 I. Ch. R. 194.—**IR.**

*Sect. 5. — Discretion: Sub-sect. 2, B. & C. Sect. 6: Sub-sects. 1 & 2, A. & B.]*

the administration except under the sanction of the ct.—*MINORS v. BATTISON* (1876), 1 App. Cas. 428; 46 L. J. Ch. 2; 35 L. T. 1; 25 W. R. 27, H. L.

*Annotations:—As to (1) Reifd. Re Hotchkys, Freke v. Calmady* (1886), 31 W. R. 569. *Generally, Mentd. Kirkpatrick v. Bedford, Bedford v. Kirkpatrick* (1878), 4 App. Cas. 96; *Re Collison, Collison v. Barber* (1879), 12 Ch. D. 834; *Johnson v. Crook* (1879), 12 Ch. D. 639; *Bubb v. Padwick* (1880), 13 Ch. D. 517; *Roberts v. Youle* (1880), 49 L. J. Ch. 744; *Re Chaston, Chaston v. Sengo* (1881), 18 Ch. D. 218; *Money v. Money* (1881), 44 L. T. 639; *Re Wilkins, Spencer v. Duckworth* (1881), 18 Ch. D. 634; *Re Teale, Teale v. Teale* (1885), 53 L. T. 936; *Re Sampson, Sampson v. Sampson*, [1896] 1 Ch. 630; *Re Goulder, Goulder v. Goulder*, [1905] 2 Ch. 100.

**3247.** ———.]—A. by her will appointed three trustees, one of whom was B., the tenant for life, & directed that any vacancy in the number of trustees should be filled up within one year after it occurred. One trustee disclaimed, the other died after some years, leaving B. surviving. An action was commenced, asking for the general execution of the trusts of the will. The ct., under R. S. C., Ord. 55, r. 3 (10), ordered only certain special inquiries, among which was an inquiry whether new trustees had been appointed, & whether any & what steps ought to be taken for their appointment. Pending this inquiry B. appointed a new trustee. Pltfs. now moved to restrain the funds being handed to him & his acting as trustee:—*Held*: the special inquiry made it the duty of B. not to fill up the appointment without the approval of the ct., but the power was not destroyed; all that was necessary was for B. to appoint a person whom the ct. would approve, & it not being alleged that the new trustee was an improper person, the ct. would not interfere with his appointment, & it was not necessary formally to sanction it.—*Re HALL, HALL v. HALL*, (1885), 54 L. J. Ch. 527; 51 L. T. 901; 33 W. R. 508.

*Annotation:—Distd. Re Cotter, Jennings v. Nye*, [1915] 1 Ch. 307.

**Effect of payment into court.]—**See Part III., Sect. 9, sub-sect. 1, *F.*, *ante*.

*C. Remedy for Improper Exercise of Discretion.*

**3248. By Injunction.]—**Injunction not granted to restrain a mtgee. from selling under power in a mtge. deed; otherwise, where trustee for sale, if he proceeds precipitately, without notice to both parties.—*ANON.* (1821), 6 Madd. 10; 50 E. R. 992.

**3249.** ———.]—A trustee will be restrained by this ct. from using the legal powers that have been conferred upon him otherwise than for the legitimate purposes of his trust, & therefore a demurrer for want of equity cannot be sustained to a bill seeking such relief, although pltf. may have a remedy at law.—*BALLS v. STRUTT* (1841), 1 Hare, 146; 66 E. R. 984.

**3250.** ———.]—The tenant for life applied to the

ct. for an injunction, & the ct. accepted the undertaking of the trustees that the sale should not proceed. If they had not given that undertaking, they would have been restrained by injunction (*KNIGHT BRUCE, V.-C.*)—*MARSHALL v. SLADDEN* (1851), 4 De G. & Sm. 468; 64 E. R. 916.

See, also, INJUNCTION, Vol. XXVIII., p. 463, Nos. 760, 761.

See, also, Part VII., Sect. 6, sub-sect. 1, *post*.

**SECT. 6.—DELEGATION OF POWERS.**

**SUB-SECT. 1.—DELEGATION TO CO-TRUSTEES.**

See Trustee Act, 1925 (c. 19), ss. 23–25.

**3251 General rule.]—**Trustees of real estate sold parts of it to the Metropolitan Board of Works, & they sent in a requisition that the vendors should attend personally to receive the purchase-moneys or direct the moneys to be paid to their joint account at a bank. One or more of the trustees resided in the country. On summonses taken out under Vendor & Purchaser Act, 1874 (c. 78), by the board:—*Held*: the requisition must be complied with by the trustees.

The theory of every trust is that the trustees shall not allow the trust moneys to get into the hands of any one of them, but that all shall exercise control over them. . . . If by their acts they enable one of themselves to receive the moneys, they are liable for the receipt of them just as much as if they all received them, because they enabled the one trustee to do that which but for their special authority he would not have been enabled to do (*KAY, J.*)—*Re FLOWER (C.) & METROPOLITAN BOARD OF WORKS, Re FLOWER (M.) & SAME* (1884), 27 Ch. D. 592; 53 L. J. Ch. 955; 51 L. T. 257; 32 W. R. 1011.

**Power to delegate during absence abroad.]—**See Trustee Act, 1925 (c. 19), s. 25.

**Liability for acts of co-trustee.]—**See Part VII., Sect. 3, sub-sect. 4, *post*.

**SUB-SECT. 2.—EMPLOYMENT OF AGENT.**

*A. In General.*

See, now, Trustee Act, 1925 (c. 19), s. 23.

**3252. Employment must be of necessity or conformable to common usage.]—***Re PARSONS, Ex p. BELCHIER, Ex p. PARSONS*, No. 3295, *post*.

**3253.** ———.]—*SPEIGHT v. GAUNT*, No. 3273, *post*.

**3254.** ———.]—*FRY v. TAPSON*, No. 3316, *post*.

**3255.** ———.]—*LEARROYD v. WHITELEY*, No. 3038, *ante*.

**3256.** ———.]—(1) Pltf., who was trustee of a marriage settlement, allowed the trust fund to be in the hands of deft., his co-trustee, for investment. Deft. entrusted the whole fund to an "outside" stockbroker, who applied a portion of it to his own uses. In an action by pltf. & infant

**PART V. SECT. 6, SUB-SECT. 1.**

**3251 I. General rule.]—**The circumstance that one trustee resides in a foreign country justifies his delegating to his co-trustee the right to receive payment of mtge. moneys due to the trust, & this notwithstanding that the instrument creating the trust directs that none of the powers given thereby shall be exercised while there is only one trustee.—*Re HUNTLEY*, 7 C. L. T. Occ. N. 251.—*CAN.*

**3251 II.** ———.]—A trustee cannot delegate his trust or throw his responsibility upon another person, not even to a co-trustee.—*CROWE v. CRAIG* (1897),

29 N. S. R. (17 R. & G.) 394.—*CAN.*

**3251 III.** ———.]—*FINDLAY'S TRUSTEES v. M'COMIE* (1852), 14 Dunl. (Ct. of Sess.) 621; 24 Sc. Jur. 311; 1 Stuart, 585.—*SCOT.*

**PART V. SECT. 6, SUB-SECT. 2.—A.**

**a. General rule.]—**A trustee may not give a general delegation of his powers so as to transfer to an agent the whole management of the estate in matters of discretion as well as in purely ministerial acts.—*ALLAN v. ERLANK'S TRUSTEE*, [1908] T. S. 1187.—*S. AF.*

**3252 I.** *Employment must be of necessity or conformable to common usage.]—*

A trustee is appointed by reason of the confidence reposed in him & cannot delegate the confidence or trust by allowing other persons to receive the trust moneys except where there is any moral necessity or any sufficient practical reason from the usage of mankind or otherwise for so doing.—*McMILLAN v. McMILLAN* (1891), 17 V. L. R. 33.—*AUS.*

**3252 II.** ———.]—*Re LLOYD v. WEL-LINGTON (MAYOR, ETC.)* (1901), 19 N. Z. L. R. 733.—*N.Z.*

**3252 III.** ———.]—*RAMSAY'S TRUSTEES v. SOUTER* (1863), 2 Macph. (Ct. of Sess.) 343; 36 Sc. Jur. 165.—*SCOT.*

*cestuis que trust* under the settlement:—*Held*: deft., not having exercised proper care in the selection of a broker, & having improperly left the whole amount of the trust fund in the broker's hands, was liable for the loss which occurred.

(2) Neither Law of Property (Amendment) Act, 1859 (c. 35), nor the doctrine of *Re Parsons*, No. 3295, *post*, authorises a trustee to delegate at his own mere will & pleasure, the execution of his trust, & the care & custody of the trust moneys, to strangers, in any case in which (to use Lord Hardwicke's words) there is "no moral necessity from the usage of mankind," for the employment of such an agency (*STIRLING, J.*)—*ROBINSON v. HARKIN*, [1806] 2 Ch. 415; 65 L. J. Ch. 773; 74 L. T. 777; 44 W. R. 702; 12 T. L. R. 475; 40 Sol. Jo. 600.

**3257. Must not amount to handing over trust.**—If trustees employ an agent they remain subject to responsibility towards their *cestuis que trust*, for whom they have undertaken the duty (*LORD LANGDALE, M.R.*)—*TURNER v. CORNEY* (1841), 5 Beav. 515; 49 E. R. 677.

**3258.** —[*1*].—(1) A trustee, being empowered to invest trust money in Govt. Funds or on real securities, agreed to lend it on mtge. security, & pending the delay which took place in completing the securities, he directed his brokers to invest the money in Exchequer Bills. The Bills so purchased were left in the hands of the brokers, who acted to some extent as bankers, & occasionally for the trustee. The brokers misapplied the Bills, & became bkpt. —*Held*: the trustee was personally liable to make good the loss occasioned by such misapplication.

(2) *Semble*: a trustee under such circumstances is justified in making a temporary investment in Exchequer Bills, in order that the trust money may not remain unproductive.—*MATHEW v. BRISE* (1845), 15 L. J. Ch. 39; 7 L. T. O. S. 1; *sub nom.* *MATTHEWS v. BRISE*, 10 Jur. 105, L. C.

*Annotation*:—*Generally*, *Reid*, *Macnamara v. Carey* (1867), 15 W. R. 374.

**3259.** —[*1*].—*ROBINSON v. HARKIN*, No. 3256, *ante*.

**3260. Party conveying to trustees—Continuing to manage property—Assent of trustee.**—A party conveying to trustees an estate in land, connected with an intricate establishment, which, after the conveyance, he continues to manage without their interference:—*Held*: to have authority from the trustees to bind them & the land by all acts in the ordinary management of the establishment.—*TAYLER v. WATERS* (1816), 7 Taunt. 374; 2 Marsh. 551; 129 E. R. 150.

*Annotations*:—*Mentd.* *Hewllins v. Shippam* (1826), 5 B. & C. 221; *Jaggins v. Inge* (1831), 7 Bing. 682; *Wood v. Manley* (1839), 11 Ad. & El. 34; *Williams v. Morris* (1841), 8 M. & W. 488; *Wood v. Leadbitter* (1845), 13 M. & W. 838; *Wells v. Kingston-upon-Hull Corp.* (1875), 44 L. J. C. P. 257; *Webber v. Lee* (1882), 9 Q. B. D. 315; *McManus v. Cooke* (1887), 35 Ch. D. 681; *Met. Ry. v. Fowler*, [1892] 1 Q. B. 165; *Hurst v. Picture Theatres*, [1915] 1 K. B. 1.

**3261. Employment must be within scope of agent's business.**—*FRY v. TAPSON*, No. 3316, *post*.

**3262. Agents must be properly qualified.**—*Re WEALL, ANDREWS v. WEALL*, No. 3301, *post*.

**3263. Employment of agent appointed by testator—Right of trustees to dismiss.**—Testator devised

his estates to trustees in trust to apply the rents in paying off incumbrances, & directed them to employ A. to audit their accounts, & to allow him a proper salary:—*Held*: the trustees could not, arbitrarily, remove A. from his office; but he was entitled to hold it as long as he was willing & able, & to receive an adequate salary.—*WILLIAMS v. CORBET* (1837), 8 Sim. 349; 6 L. J. Ch. 182; 59 E. R. 138.

*Annotation*:—*Reid*, *Finden v. Stephens* (1846), 1 Coop. temp. Cott. 318.

**3264.** —[*1*].—Trustees may dismiss an agent for misconduct committed by him anterior to their own appointment.—*BELANEY v. KELLY* (1871), 24 L. T. 738; 19 W. R. 1171.

**3265.** — **Whether binding on trustees.**—A declaration by testator in his will that a particular person is to act as solr. to his trustee in the management of his estate & the carrying out of the trusts of his will is not binding on his trustees, & does not constitute any trust in favour of the solr.—*FOSTER v. ELSLEY* (1881), 19 Ch. D. 518; 51 L. J. Ch. 275; 30 W. R. 596.

*Annotation*:—*Reid*, *Re Cleveland's S. E.*, [1902] 2 Ch. 350.

### B. Powers of Attorney.

**3266. General rule—Trustee may give power of attorney.**—It is true that a trustee who has a legal estate vested in him, may make an attorney to do legal acts (*LORD HARDWICKE, C.*)—*A.-G. v. SCOTT* (1750), 1 Ves. Sen. 413; 27 E. R. 1113; *sub nom.* *WILSON v. DENNISON*, Amb. 82, L. C.

*Annotations*:—*Reid*, *Lang v. Purves* (1862), 15 Moo. P. C. C. 389. *Mentd.* *A.-G. v. Vivian* (1826), 1 Russ. 226; *Re St. Stephen, Coleman Street*, *Re St. Mary the Virgin, Aldermanbury* (1888), 39 Ch. D. 492; *Re Church Patronage Trust, Laurie v. A.-G.*, [1904] 2 Ch. 613.

**3267.** —[*1*].—A trustee can execute a deed by an attorney, & can empower the attorney to receive or join in receiving trust money, & Trustee Act, 1888 (c. 59), s. 2, will protect a purchaser paying money to a person so authorised to act; but the solr. to receive the money under that sect., must be a solr. appointed by the trustee himself, & permitted by the trustee himself to produce the deed with a proper receipt clause.

A trustee can execute a deed by an attorney, & can empower that attorney to receive or join in receiving trust money (*LINDLEY, L.J.*)—*Re HETLING & MERTON'S CONTRACT*, [1893] 3 Ch. 269; 62 L. J. Ch. 783; 69 L. T. 266; 42 W. R. 19; 9 T. L. R. 553; 37 Sol. Jo. 617; 2 R. 543, C. A.

*Annotations*:—*Reid*, *Re Bayley-Worthington & Cohen's Contract*, [1909] 1 Ch. 648. *Mentd.* *Re London Corp. & Tubbs's Contract*, [1894] 2 Ch. 521; *Re Wilson's & Stevens's Contract*, [1894] 3 Ch. 546; *Re Stratford & Maples*, [1896] 1 Ch. 235; *Re Woods & Lewis's Contract*, [1898] 1 Ch. 433; *Re Pelly & Jacob's Contract* (1899), 80 L. T. 45; *Bennett v. Stone*, [1903] 1 Ch. 509.

**3268. Trustee of English will resident in England**

to act in matters of discretion connected with a trust in an English colony or foreign country.—*STUART v. NORTON* (1860), 14 Moo. P. C. C. 17; 3 L. T. 602; 9 W. R. 320; 15 E. R. 212, P. C.

**3269. Whether amounting to breach of trust—Co-trustee using power to misappropriate funds.**—Shortly after the appointment of a new trustee in

**PART V. SECT. 6, SUB-SECT. 2.—B.**  
b. Necessity to conform to Trustees Delegation of Powers Act, 1915, s. 4.]—*Re ATKINSON* (1919), 19 N. S. W. L. R. 78.—*AUS.*

c. Trustees resident in Ireland—Property in New South Wales.]—*Re*

*DUNLOP, MCCLINTOCK v. PERPETUAL TRUSTEE CO., LTD.* (1926), 26 S. R. N. S. W. 126; 43 N. S. W. N. 6.—*AUS.*

d. Trustees resident in England—Property in Canada.]—*STICKNEY v. TYLEE* (1867), 13 Gr. 193.—*CAN.*

e. Validity of lease.]—A lease is invalid if it is granted by a person as attorney, for one who is either a trustee or manager of the property leased, & who did not negotiate or consider the lease or know of it until its execution; that is so whether

*Sect. 6.—Delegation of powers: Sub-sect. 2, B. & C. (a).]*

place of a retiring trustee of a sum of War Stock inscribed in the names of the old trustees, the retiring trustee, with the advice of her own independent solrs., joined with her two co-trustees, one of whom was a solr. acting for the trust, in executing a joint power of attorney authorising named brokers to sell & transfer all or any part of the stock & to receive the consideration money. This sale & transfer power was signed in lieu of an ordinary transfer power in order that certain trust costs might be raised & paid before the fund was transferred to the new & continuing trustees. The power of attorney was, with the solrs.' approval, handed to the solicitor trustee, who lodged it with the brokers. By his instructions they sold the whole fund, & without any authority from the retiring trustee, handed him the proceeds in cash & bearer bonds, which he forthwith misappropriated. Neither the retiring trustee nor her solrs., though fully aware that the solicitor trustee was a dilatory & incompetent muddler, had the remotest suspicion that he was dishonest:—*Held*: in the circumstances the retiring trustee committed no breach of trust in signing the power of attorney, & that being so & the power of attorney containing no authority to the attorneys to pay the money to the solicitor trustee the retiring trustee was not responsible for the loss resulting from his fraudulent misappropriation of the trust fund.—*Re MUNTON, MUNTON v. WEST*, [1927] 1 Ch. 202; 96 L. J. Ch. 151; 136 L. T. 661, C. A.

*C. Who May be Employed and for What Purpose. (a) In General.*

*See, now*, Trustee Act, 1925 (c. 19), s. 23; Law of Property Act, 1925 (c. 20), s. 69.

**3270. Collection of rents—Rent collector.]**—Testator gave annuities to his trustees for their trouble in the execution of his will, & died possessed of several houses, let at weekly rents. The trustees are justified in paying a person to collect these rents, & do not, therefore, lose their annuities.—*WILKINSON v. WILKINSON* (1825), 2 Sim. & St. 237; 57 E. R. 337.

*Annotation*:—*Consd. Re Muffet, Jones v. Mason* (1887), 56 L. J. Ch. 600.

**3271. — Trustees receiving commission upon rental.]**—Trustees who have been appointed by the ct. to receive the rents of, & to manage a trust estate, receiving a commission upon the rental, will not be allowed to charge additional payments made by them to a collector of rents.—*Cox v. BENNETT*, [1891] 39 W. R. 308; 7 T. L. R. 316, C. A.

**3272. Investment of trust funds—Solicitor.]**—Trustees of stock sold it out & committed the proceeds to their solr. for investment, by whom it was misapplied & lost:—*Held*: the trustees were liable for a breach of trust, & the *cestui que trust* were entitled to relief against both the trustees & the solr., & they might sue either the trustees alone or the trustees jointly with the solr. The short result of the case is, that the trustees, instead of themselves seeing to the investment of the trust fund, delegated that duty to their solicitor, who misapplied the money.

The trustees were bound to satisfy themselves

in some other way than by the mere assurances of their solr., & by payments made by him as for interest, that the money was really advanced on mtge. (*LORD TRURO, C.*)—*ROWLAND v. WITHERDEN* (1851), 3 Mac. & G. 568; 21 L. J. Ch. 480; 42 E. R. 379, L. C.

*Annotations*:—*Apld. Speight v. Gaunt* (1883), 9 App. Cas. 1. *Reid, Robinson v. Harkin*, [1896] 2 Ch. 415. *Mentd. Ford v. White* (1852), 16 Beav. 120; *Harford v. Rees* (1853), 9 Hare, App. 11, lxx.; *Robinson v. Briggs* (1853), 22 L. J. Ch. 1056; *Stokes v. Trumper* (1855), 3 W. R. 503.

**3273. — Broker—Usual course of business followed.]**—(1) A trustee investing trust funds is justified in employing a broker to procure securities authorised by the trust & in paying the purchase-money to the broker, if he follows the usual & regular course of business adopted by ordinary prudent men in making such investments. A broker employed by a trustee to buy securities of municipal corps. authorised by the trust, gave the trustee a bought-note which purported to be subject to the rules of the London Stock Exchange & obtained the purchase-money from the trustee upon the representation that it was payable the next day, which was the next account day on the London Exchange. The broker never procured the securities but appropriated the money to his own use & finally became insolvent. Some of the securities were procurable only from the corps. direct & were not bought & sold in the market, & there was evidence that the form of the bought-note would have suggested to some experts that the loans were to be direct to the corps.; but (as the House held on the facts) there was nothing calculated to excite suspicion in the mind of the trustee or of an ordinary prudent man of business; & such payment to a broker was in accordance with the usual course of business in purchases on the London Exchange:—*Held*: the trustee was not liable to the *cestui que trust* for the loss of the trust funds.

As a general rule, a trustee sufficiently discharges his duty if he takes in managing trust affairs all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own. There is one exception to this: a trustee must not choose investments other than those which the terms of his trust permit, though they may be such as an ordinary prudent man of business would select for his own money (*LORD BLACKBURN*).

(2) A trustee cannot delegate to others the execution of his trust.—*SPEIGHT v. GAUNT* (1883), 9 App. Cas. 1; 53 L. J. Ch. 419; 50 L. T. 330; 48 J. P. 84; 32 W. R. 435, H. L.; *affg. S. C. sub nom. Re SPEIGHT, SPEIGHT v. GAUNT*, 22 Ch. D. 727, C. A.

*Annotations*:—*As to* (1) *Distd. Re Bellamy & Metropolitan Board of Works* (1883), 24 Ch. D. 387; *Re Dewar, Dewar v. Brooke* (1885), 54 L. J. Ch. 830; *Bullock v. Bullock* (1886), 56 L. J. Ch. 221. *Apld. Re Brogden, Billing v. Brogden* (1888), 38 Ch. D. 546; *Colchester Union Grains v. Moy* (1893), 68 L. T. 564; *Re Gasquoine, Gasquoine v. Gasquoine*, [1894] 1 Ch. 470; *Robinson v. Harkin*, [1896] 2 Ch. 415; *Shepherd v. Harris*, [1905] 2 Ch. 310. *Distd. National Trustees Co. of Australasia v. General Finance Co. of Australasia*, [1905] A. C. 373. *Apld. Re Munton, Munton v. West*, [1927] 1 Ch. 262. *Reid. Re Godfrey, Godfrey v. Faulkner* (1883), 23 Ch. D. 483; *Smith v. Stoneham* (1886), 3 T. L. R. 77; *Re Hurst, Addison v. Topp* (1890), 63 L. T. 665; *Re Somerset, Somerset v. Poulett*, [1894] 1 Ch. 231; *Re De Pothonier, Dent v. De Pothonier*, [1900] 2 Ch. 529; *Evans Williams v. Byron*

executant acted under a general power of attorney, or under a power specially relating to the management of the property.—*BONNERI v. SHANATH DAS* (1921), 49 L. R. Ind. App. 46.—*IND.*

**PART V. SECT. 6, SUB-SECT. 2.—C. (a).**

**3272 i. Investment of trust funds—Solicitor.]**—A trustee is not justified in handing a large sum of money to a solr. for the purpose of the purchase of

debentures, allowing the solr. to receive the debentures & to retain them in his custody.—*EQUITY-TRUSTEES, ETC. CO. FENWICK*, [1905] V. L. R. 154.—*AUS.*

(1901), 18 T. L. R. 172; *Eaton v. Buchanan*, [1911] A. C. 253; *Re Greenwood, Greenwood v. Birch* (1911), 105 L. T. 509; *Re Allsop, Whittaker v. Bamford*, [1914] 1 Ch. 1. As to (2) *Reid*, *Re Sheppard, De Brimont v. Harvey*, [1911] 1 Ch. 50. *Generally, Reid*, *Fry v. Tapson* (1884), 28 Ch. D. 268; *Leahey v. Whiteley* (1887), 12 App. Cas. 727; *Magnus v. Queensland National Bank* (1887), 36 Ch. D. 25; *Re Partington, Partington v. Allen* (1887), 37 L. T. 654; *Re Weall, Andrews v. Weall* (1889), 42 Ch. D. 674; *Jobson v. Palmer*, [1893] 1 Ch. 71; *Re Chapman, Cocks v. Chapman*, [1896] 2 Ch. 763; *Re MacKay, Griesse-mann v. Carr*, [1901] 1 Ch. 300; *Re Solemon, Nore v. Meyer*, [1912] 1 Ch. 261.

**3274.** — — — — — **Co-trustee employed as broker.**—*SHEPHERD v. HARRIS*, No. 3043, *ante*.

**3275.** — — — — — **Exercise of care in choice.**—*ROBINSON v. HARKIN*, No. 3256, *ante*.

**3276.** — — — — — **Discretion of choice of broker.—Right of tenant for life to nominate.**—Upon an investment of capital moneys arising under Settled Land Acts, the tenant for life is not entitled to dictate to the trustees of the settlement as to what broker they shall employ in the matter. The trustees may select their broker as well as their solr.—*Re CLEVELAND'S (DUKE) SETTLED ESTATES*, [1902] 2 Ch. 350; 71 L. J. Ch. 763; 86 L. T. 678; 50 W. R. 508; 18 T. L. R. 610; 46 Sol. Jo. 514.

*Annotation.*—*Reid*, *Re Theobald* (1903), 19 T. L. R. 536.

**3277. Permitting agent to receive & hold trust moneys or securities.—Solicitor.**—Except in special cases trustees have no right to authorise their solr. to receive purchase-money, & will be liable for its loss if they do so.—*Re BELLAMY & METROPOLITAN BOARD OF WORKS* (1883), 24 Ch. D. 387; 52 L. J. Ch. 870; 48 L. T. 801; 47 J. P. 550; 31 W. R. 900, C. A.

*Annotations.*—*Apld.* *Re Flower & Metropolitan Board of Works, Re Flower & Same* (1884), 27 Ch. D. 592. *Consd.* *Re Hotting & Merton's Contract*, [1893] 3 Ch. 269. *Reid.* *Day v. Woolwich Equitable Bldg. Soc.* (1888), 40 Ch. D. 491. *Mentd.* *Re Eyre, Eyre v. Eyre* (1883), 49 L. T. 259.

**3278.** — — — — — **Trust administered by court.**—Trustees are not justified, in the absence of extraordinary circumstances, in allowing a solr. to receive any part of the trust moneys, & the fact that the trust estate is being administered by the ct. is immaterial, or to retain the securities upon which the trust moneys are invested.

Trustees of an estate which was being administered by the ct., under the impression that they were protected by the administration, allowed a solr. to receive the whole of the trust funds, & authorised him to make investments from time to time. The solr. on several occasions purported to invest the trust moneys upon mtge., & the trustees made no inquiries as to the proposed investments, & did not ask to see the deeds. The solr. misappropriated some parts of the trust funds, & advanced the rest upon fictitious or worthless securities:—*Held*: the trustees were liable to make good the whole of the loss arising from the default of their solr.—*Re DEWAR, DEWAR v. BROOKE* (1885), 54 L. J. Ch. 830; 52 L. T. 489; 33 W. R. 497; 1 T. L. R. 263.

**3279.** — — — — — **Permission to hold longer than necessary.**—(1) Three persons were trustees of a fund set apart to answer a life annuity, & divisible on the decease of the annuitant among the persons entitled in remainder. The sum of £3,700, part of this fund, was invested on a heritable bond. On July 15, 1887, the bond was paid off. The trustees allowed their law agent to receive the money & to retain it in his hands uninvested for rather over six months. At the end of that time the law agent became bkpt., & the greater part of the fund was lost:—*Held*: the trustees were guilty of a plain & positive breach of trust, & were liable to replace the money lost.

The trustees might properly employ their law agent to receive the money from the mtgees.,

but it was their duty to see that the money, when received, was immediately reinvested or placed on deposit in their own names & under their own control (*LORD DAVEY*).

(2) The immunity clause only applies to the intromissions of a factor or agent within the legitimate scope of his agency, which does not authorise him to retain the money in his own control.

(3) The proviso to sect. 2 (1) of Trustee Act, 1888 (c. 59), reproduced in sect. 17 of Trustee Act, 1893 (c. 63), that a trustee is to enjoy no exemption from liability if he allows money to remain longer than is necessary in the hands of a banker or solr. is declaratory of the law of England, & must by analogy be treated as applicable in the case of Scottish trustees.—*WYMAN v. PATERSON*, [1900] A. C. 271; 69 L. J. P. C. 32; 82 L. T. 473; 16 T. L. R. 270, H. L.

*Annotations.*—*Generally, Reid*, *Williams v. Byron* (1901), 18 T. L. R. 172. *Mentd.* *McAllinden v. Nimmo*, [1920] A. C. 39.

**3280.** — — — — — **Actual or constructive knowledge of trustee as to receipt.**—In order to bring into operation Trustee Act, 1893 (c. 53), s. 17 (3), which provides that nothing in the sect. is to exempt a trustee from any liability which he would have incurred if the Act had not been passed, in case he permits money, received by a solr. under a deed containing a receipt for the money, to remain in the latter's hands or under his control for a period longer than is reasonably necessary to enable him to pay the same to the trustee, the circumstances must be such that the trustee either knew or ought to have known of the receipt of the money.

X. & Y., who were trustees, were in July, 1902, told by B., their solr., that a mtge. forming part of the trust property would shortly be paid off & that the mtge. money would be placed to the joint account of the trustees at a bank, & they accordingly sent to B. a reconveyance of the mtged. property, which contained in the body of it a receipt for the mtge. money, executed by them. B. then proceeded, on the mtgors.' behalf, to sell the property in lots, & he from time to time received the purchase-money for the lots, which money he ultimately misappropriated; but before any of the money had been received by B., X. died. Y. trusted in B.'s honesty & *bona fide* believed him to be a proper person to be entrusted with the mtge. money, & did not before Dec. 4, 1902, know that B. had received any of the money. In the meantime Y. frequently inquired of B. whether he had received the money & was told by him that he had not received it. By Dec. 4, 1902, it had become impossible to recover the money which B. had received.

The case was argued on the footing that the authority conferred by the reconveyance justified the receipt by B. by instalments & that the death of X. before any money was received by B. did not affect the question of Y.'s liability:—*Held*: Y. was not liable to replace the misappropriated trust funds.

*Qu.*: whether the death of X. revoked the authority conferred on the solr. by the delivery to him of the reconveyance.

*Qu.*: the delivery justified the receipt of the mtge. money by instalments.—*Re SHEPPARD, DE BRIMONT v. HARVEY*, [1911] 1 Ch. 50; 80 L. J. Ch. 52; 103 L. T. 424; 55 Sol. Jo. 13.

**3281.** — — — — — **Whether death of co-trustee revocation of authority.**—*Re SHEPPARD, DE BRIMONT v. HARVEY*, No. 3280, *ante*.

**3282.** — — — — — **Receipt of mortgage debt.**—

*Sect. 6.—Delegation of powers: Sub-sect. 2, C. (a) & (b), & D.]*

**Receipt by instalments.]—***Re* SHEPPARD, DE BRIMONT v. HARVEY, No. 3280, ante.

**3283. — Banker—Permission to hold longer than necessary.]—**CANN v. CANN, No. 3641, post.

**3284. —**—]—WYMAN v. PATERSON, No. 3279, ante.

**3285. Valuation & share of partnership—Accountants & valuers.]—**A partner, on retiring from his firm, left his capital, £15,000, in the business under an agreement with the continuing partners that it should be a debt due from them to him & bearing interest until repayment. The agreement contained a stipulation that the outgoing partner should have free access to the books at all times, & various provisions intended to satisfy the outgoing partner from time to time of the solvency of the business; upon breach of any one of these provisions he was to be at liberty to call in his capital. The outgoing partner subsequently died, having by his will bequeathed his residuary estate, which included his capital in the business, to a trustee upon trusts for one for life & for other in remainder:—*Held*: (1) the trustee was at liberty to employ accountants & valuers for an audit & stocktaking once a year if desired, or oftener if special circumstances so required; & (2) the expenses thereof were costs, charges, & expenses properly incurred by the trustee in the execution of the trusts of the will & for the benefit of the whole estate, & were therefore payable out of capital & not out of income.—*Re* BENNETT, JONES v. BENNETT, [1896] 1 Ch. 778; 65 L. J. Ch. 422; 74 L. T. 157; 44 W. R. 419; 40 Sol. Jo. 335, C. A.

*Annotation:—As to (2) Fidd. Re Sherry, Sherry v. Sherry, [1913] 2 Ch. 508.*

**Investment of trust property on mortgage.]—***See* MORTGAGE, Vol. XXXV., pp. 293–295, Nos. 464–477.

**Liability for acts of agent.]—***See* Sub-sect. 2, D., post.

#### (b) Co-Trustees.

**3286. Whether employment of co-trustee a breach of trust.]—**It is no breach of trust, to permit one of the trustees to receive all or the most part of the profits, it falling out many times that some of the trustees live far from the lands, & are put in trust out of other respects than to be troubled with the receipt of the profits.—TOWNLEY v. SHERBORN (1634), J. Bridg. 35; Toth. 88; 123 E. R. 1181; *sub nom.* TOWNLEY v. CHALENOR, Cro. Car. 312.

*Annotations:—Consed.* Fellows v. Mitchell (1705), 2 Vern. 515; Sadler v. Hobbs (1786), 2 Bro. C. C. 114. *Dbtd.* Scudford v. Howes (1790), 3 Bro. C. C. 90. *Dbtd.* Thompson v. Finch (1856), 22 Beav. 316. *Refd.* Champneys v. Browne (1735), Barnes, 440.

**3287. —**—]—Estates in Scotland were conveyed by trust-disposition to three trustees, to collect & apply the rents as therein mentioned, with £100 a year for their trouble, besides all the necessary expenses of managing the estates; & with power to appoint & remove factors, pay their salaries, & settle their accounts annually; & within six months after clearance with the factors, to get their own accounts approved by an accountant,

whose approbation would be a discharge of them; each liable only for his own actual intromissions, & no farther liable for the factors than that they should be reputed responsible at the time of their appointment. The trustees appointed one of themselves to be factor, with a salary, & he, though of undoubted responsibility at that time, afterwards retained large balances at the annual settlements of accounts; whereon one of the trustees, who was cashier, urged him to pay up; but the balances against him increasing, both trustees, after failing in their exertions to obtain payment, revoked his appointment as factor, & he became bkpt., owing a large debt to the trust estate:—*Held*: (1) the appointment of one of the trustees to be factor was not of itself such a breach of trust as subjected the other trustees to all the consequences resulting from it; (2) there was not such gross negligence, in the two trustees permitting the factor to retain balances, as to subject them to liability for the ultimate balance due from him to the trust estate.—HOME v. PRINGLE & HUNTER (1841), 8 Cl. & Fin. 264; 8 E. R. 103, H. L.

*Annotations:—As to (1) Consd.* Topliss v. Hurrell (1854), 19 Beav. 423. *Refd.* Carruthers v. Carruthers, [1896] A. C. 659. *Generally, Mentd.* Skeddington v. Budd (1842), 9 Cl. & Fin. 219; Campbell v. Pollak, [1927] A. C. 732.

**3288. Permission to retain trust moneys.]—**HOME v. PRINGLE & HUNTER, No. 3287, ante.

**3289. Employment to sell by auction—Sale by private treaty.]—**C., a solr., & one of three exors. & trustees for sale, acted professionally in the management of the personal estate, & also by the authority of his co-trustees conducted an attempted sale by auction of the real estate. A., another of the trustees, hearing that his son was in treaty for the purchase of the estate, wrote to C. to say that he, A., would not take any interest either directly or indirectly in the matter, C. then, with the concurrence of the co-trustee, contracted to sell the estate by private contract to another person. On a bill filed by the purchaser to compel performance of this contract:—*Held*: C. had not derived any general authority to sell by private contract, by reason of his employment as solr. to the trust estate or as agent to sell by public auction; & he had derived no special authority from A.'s letter to sell to any one but to A.'s son. *Semble*: under the circumstances, A. could not have delegated to his co-trustees an authority to sell to his son without reserving to himself a veto upon the contract.—BULTEEL v. ABINGER (LORD) (1842), 6 Jur. 410.

**3290. Employment as manager.]—**Three exors. & trustees, A., B. & C., were authorised to carry on testator's farm. A. with the concurrence of B. & C., managed the whole affairs relating thereto:—*Held*: in taking the accounts against B. & C., A. was to be considered their agent.—TOPPIS v. HURRELL (1854), 19 Beav. 423; 52 E. R. 1414.

**3291. Employment to purchase on behalf of trust—Trustees carrying on business.]—**Where trustees who are carrying on a business permit one of their number to go into the market & purchase the goods required for carrying on the business, the trustee who is armed with authority to purchase the goods for the purpose of carrying on the business is also armed with authority to

#### PART V. SECT. 6, SUB-SECT. 2.—C. (b).

**1. Employment as trustee of trust deed on behalf of creditors.]—**LAUDER v. MILLARS (1859), 21 Dunl. (Ct. of Sess.) 1353; 31 Sc. Jur. 740.—SCOT.

**g. Employment as factor—Or cashier.]—**Testator empowered his trustees

“to appoint one of their own number to be their factor or cashier, & to allow him a reasonable remuneration for his trouble”:—*Held*: this power did not authorise the trustees to appoint & pay one of their own number, he continuing a trustee as a salaried manager of a manufacturing business

which testator had empowered the trustees to continue.—MILLS v. BROWN'S TRUSTEES (1900), 2 F. (Ct. of Sess.) 1035; 37 Sc. L. R. 810; 8 S. L. T. 94.—SCOT.

**h. —**—]—LEWIS'S TRUSTEES v. PRIE, [1912] S. C. 574; 49 Sc. L. R. 439; [1912] 1 S. L. T. 208.—SCOT.



pledge the credit of the other trustees for that purpose.—*BRAZIER v. CAMP* (1894), 63 L. J. Q. B. 257; 9 R. 852, C. A.

**3292. Employment as broker—To invest.]—***SHEPHERD v. HARRIS*, No. 3043, *ante*.

**3293. Liability for default of agent trustee.]—***HOME v. PRINGLE & HUNTER*, No. 3287, *ante*.

**3294. —.]—***SHEPHERD v. HARRIS*, No. 3043, *ante*.

#### *D. Liability of Trustee for Default of Agent.*

See Trustee Act, 1925 (c. 19), s. 23.

**Limitation of liability of trustee generally.]—**See Part VII., Sect. 4, *post*.

**3295. Trustee acting of necessity or conformable to common usage.]—**Where trustees act by other hands, either from necessity or conformable to the common usage of mankind, they are not answerable for losses (*LORD HARWICKIE, C.*).—*RE PARSONS, Ex p. BELCHIER, Ex p. PARSONS* (1754), Amb. 218; 27 E. R. 144; *sub nom. BELCHIER v. PARSONS*, 1 Keny. 38, L. C.

**Annotations:—***Consd. Raw v. Cutten* (1832), 9 Bing. 96. **Apprvd.** *Speight v. Gaunt* (1883), 9 App. Cas. 1. **Consd.** *Fry v. Tapon* (1884), 28 Ch. D. 208; *Magnus v. Queensland National Bank* (1887), 36 Ch. D. 25. **Refd.** *Scurliff v. Howes* (1790), 3 Bro. C. C. 90; *The Prima Vera* (1808), Edw. 23; *Colchester Union Grdns. v. Moy* (1893), 68 L. T. 564; *Robinson v. Harkin*, [1896] 1 Ch. 415.

**3296. —.]—***SPEIGHT v. GAUNT*, No. 3273, *ante*.

**3297. Trustee acting reasonably or with due diligence.]—**In charging trustees with loss, from the misconduct of their agents, it is not sufficient to prove it might have been prevented with extraordinary care & caution & a trustee is not held liable if acting strictly within the line of his duty, he exercises reasonable care & diligence.—*MUNCH v. COCKPRELL* (1840), 5 My. & Cr. 178; 9 L. J. Ch. 153; 4 Jur. 140; 41 E. R. 338, L. C.

**Annotation:—***Mentd.* *Shipton v. Howes* (1845), 4 Hare, 619.

**3298. —.]—**The trustee in this case appears to have meant well, to have acted with due diligence, & to have employed a proper agent to do an act the directing which to be done was within the due discharge of his duty. The agent makes a mistake, the consequences of which subject the trustee to legal liability to a third party. . . . This liability ought, as between the trustee & the estate, to be borne by the estate (*KNIGHT BRUCE, L.J.*).—*BENETT v. WYNTHAM* (1862), 4 De G. F. & J. 259; 45 E. R. 1183, L. J.

**Annotations:—***Apld.* *Re Raybould, Raybould v. Turner*, [1900] 1 Ch. 199; *Re Tyrell, Tyrell v. Woodhouse* (1900), 82 L. T. 675. **Mentd.** *Re Allan, Havelock v. Havelock* (1881), 17 Ch. D. 807.

**3299. —.]—***RE SHEPPARD, DE BRIMONT v. HARVEY*, No. 3280, *ante*.

**3300. — Not responsible for agent's intelligence or honesty—Or solvency.]—**If trustees are justified by the ordinary course of business in employing agents & they do employ agents in good repute & whose fitness they have no reason to doubt, & employ those agents to do that which is in the ordinary course of business, I protest against the motion that the trustees guarantee the solvency or honesty of the agents employed (*LINDLEY, L.J.*).—*RE SPEIGHT, SPEIGHT v. GAUNT* (1883), 22 Ch. D. 727; 52 L. J. Ch. 503; 48

L. R. 279; 31 W. R. 401, C. A.; *affd.*, 9 App. Cas. 1, H. L.

**Annotations:—***Consd.* *Re Bellamy & Metropolitan Board of Works* (1883), 24 Ch. D. 387. **Exfld.** *Fry v. Tapon* (1884), 28 Ch. D. 208. **Consd.** *Re Dewar, Dewar v. Brooke* (1885), 54 L. J. Ch. 830; *Bullock v. Bullock* (1886), 56 L. J. Ch. 221; *Leahey v. Whiteley* (1887), 12 App. Cas. 727; *Re Partington, Partington v. Allen* (1887), 57 L. T. 654; *Re Brogden, Billing v. Brogden* (1888), 38 Ch. D. 546; *Re Weall, Andrews v. Weall* (1889), 42 Ch. D. 674; *Colchester Union Grdns. v. Moy* (1893), 68 L. T. 564; *Jobson v. Palmer*, [1893] 1 Ch. 71. **Apld.** *Robinson v. Harkin*, [1896] 2 Ch. 415. **Consd.** *Re Mackay, Griesemann v. Carr*, [1911] 1 Ch. 300. **Apld.** *Re Munton, Munton v. West*, [1927] 1 Ch. 262. **Refd.** *Re Godfrey, Godfrey v. Faulkner* (1883), 23 Ch. D. 483; *Smith v. Stoneham* (1886), 3 T. L. R. 77; *Magnus v. Queensland National Bank* (1887), 36 Ch. D. 25; *Re Hurst, Addison v. Topp* (1890), 63 L. T. 605; *Re Gasquolne, Gasquolne v. Gasquolne*, [1894] 1 Ch. 470; *Re Somerset, Somerset v. Poulett*, [1894] 1 Ch. 231; *Re Chapman, Cocks v. Chapman*, [1896] 2 Ch. 763; *Re De Potholier, Dent v. De Potholier*, [1900] 2 Ch. 529; *Evans Williams v. Byron* (1901), 18 T. L. R. 172; *National Trustees Co. of Australasia v. General Finance Co. of Australasia*, [1905] A. C. 373; *Shepherd v. Harris*, [1905] 2 Ch. 310; *Eaton v. Buchanan*, [1911] A. C. 253; *Re Greenwood, Greenwood v. Firth* (1911), 105 L. T. 509; *Re Sheppard, De Brimont v. Harvey*, [1911] 1 Ch. 50; *Re Solomon, Nore v. Meyer*, [1912] 1 Ch. 261; *Re Allsop, Whittaker v. Bamford*, [1914] 1 Ch. 1.

**3301. —.]—**A trustee may select solrs. & agents; & so long as he selects persons properly qualified, he cannot be made responsible for their intelligence or their honesty; but he cannot entrust them with any duties which they may be willing to undertake, or pay them any remuneration which they may demand; & he is bound to exercise his discretion in the matter.—*RE WEALL, ANDREWS v. WEALL* (1889), 42 Ch. D. 674; 58 L. J. Ch. 713; 61 L. T. 238; 37 W. R. 779; 5 T. L. R. 681.

**Annotations:—***Refd.* *Re Shilson, Coode*, [1904] 1 Ch. 837; *Re Allsop, Whittaker v. Bamford*, [1914] 1 Ch. 1. **Mentd.** *Nutter v. Holland* (1894), 7 R. 491.

**3302. Trustee acting negligently.]—***MOYLE v. MOYLE*, No. 2944, *ante*.

**3303. —.]—**Trustee depositing a trust fund with his bankers, accompanied by an order in writing to invest the money in Consols, answerable for the omission of the bankers to make the investment, where he made no subsequent inquiry respecting it, until about five months afterwards, when the bankers became bkpt.—*CHALLEN v. SHIPPAM* (1845), 4 Hare, 555; 67 E. R. 708.

**Annotations:—***Distd.* *Johnson v. Newton* (1853), 11 Hare, 160. **Refd.** *Macnamara v. Carey* (1867), 15 W. R. 374.

**3304. —.]—**Where trustees for sale sell the trust property, & place the conveyance, executed by them & having their receipt indorsed, in the hands of a solr., who receives & misapplies the purchase-money, they are liable for a breach of trust.—*GHOST v. WALLER* (1846), 9 Beav. 497; 50 E. R. 435.

**Annotations:—***Distd.* *Waugh v. Wycho* (1854), 2 Drew. 318. **Refd.** *Re Bellamy & Metropolitan Board of Works* (1883), 21 Ch. D. 387.

**3305. —.]—***ROWLAND v. WITHERDEN*, No. 3272, *ante*.

**3306. —.]—***CLARK v. DAWBER* (1891), 7 T. L. R. 602, C. A.

**3307. —.]—***ROBINSON v. HARKIN*, No. 3256, *ante*.

**3308. —.]—***WYNNE v. TEMPEST* (1897), 13 T. L. R. 360.

#### PART V. SECT. 6, SUB-SECT. 2.—D.

**k. General rule.]—**A trustee is bound to exercise a prudent supervision over the actions of an agent, or a co-trustee appointed or acting as agent or manager, for his co-trustee; & where he neglects this duty, he makes himself liable for losses occurring through the acts of such agent or manager.—*CITY*

*BANK v. MAULSON* (1871), 3 Ch. Ch. 334. **CAN.**

**1. —.]—**No one can be required, at least in ordinary circumstances, to examine into the capabilities of the person whom he employs.—*ROCHFORD v. SEATON*, [1896] 1 L. R. 18.—**IR.**

**32971. Trustee acting reasonably or with due diligence.]—***THOMSON v.*

*CAMPBELL* (1832), 16 Sh. (Cl. of Sess. 560.—**SCOT.**

**33021. Trustee acting negligently.]—***CARRUTHERS v. CARRUTHERS* (1896), 23 R. (Cl. of Sess.) (H. L.) 55; 33 Sc. L. R. 809; 4 S. L. T. 98.—**SCOT.**

**330211. —.]—***FERGUSON v. PATTERSON* (1900), 2 F. (Cl. of Sess.) (H. L.) 37; 37 Sc. L. R. 635.—**SCOT.**



*Sect. 6.—Delegation of powers: Sub-sect. 2, D. & E.]*

**3309.** —.]—WYMAN v. PATERSON, No. 3270, *ante*.

**3310. Trustee not acting prudently.]—**MATHEW v. BRUSE, No. 3258, *ante*.

**3311.** —.]—SUTTON v. WILDERS, No. 2992, *ante*.

**3312.** —.]—CANN v. CANN, No. 3641, *post*.

**3313.** —.]—Re DEWAR, DEWAR v. BROOKE, No. 3278, *ante*.

**3314.** —.]—WILLIAMS v. BYRON, No. 2994, *ante*.

**3315. Default must be in capacity as agents.]—**Lands devised to three trustees, upon trust for sale, were sold, & the purchase-money paid to one of them, who was a solr., & acted in the matter of the sale as solr. for himself & the other trustees. The money having been retained by him & lost:—*Held*: after his decease, it must be taken to have been received by him not in his capacity of solr., it being no part of his duty in that capacity to receive it, but in his capacity of trustee; & the survivor of the three could not, upon a common decree for an account, be held liable for its loss.—*Re FRYER, MARTINDALE v. PICQUOT* (1857), 3 K. & J. 317; 26 L. J. Ch. 398; 29 L. T. O. S. 86; 3 Jur. N. S. 485; 5 W. R. 552; 69 E. R. 1120.

*Annotations:—***Reid**, St. Aubyn v. Smart (1867), L. R. 5 Eq. 183; Hale v. Adams (1873), 21 W. R. 400.

**3316.** —.]—The rule that trustees, acting according to the ordinary course of business, & employing agents as prudent men of business would do on their own behalf, are not liable for the default of the agent so employed, is subject to the limitation that the agent must be employed out of the ordinary scope of his business.—*FRY v. TAPSON* (1884), 28 Ch. D. 268; 54 L. J. Ch. 224; 51 L. T. 326; 33 W. R. 113.

*Annotations:—***Consd.**, *Re Partington*, Partington v. Allen (1887), 57 L. T. 654. **Reid**, Dewar v. Brooke (1885), 52 L. T. 489; *Re Whiteley*, Whiteley v. Learoyd (1886), 33 Ch. D. 347; *Re Somerset*, Somerset v. Poulett, [1894] 1 Ch. 231. **Mentd.**, Sheffield & South Yorkshire Permanent Bldg. Soc. v. Aislewood (1889), 44 Ch. D. 412.

**3317.** —.]—WYMAN v. PATERSON, No. 3279, *ante*.

**3318. Joint liability with agents.]—**ROWLAND v. WITHERDEN, No. 3272, *ante*.

**3319. Loss arising after order for payment into court.]—**Trustees were ordered to pay into ct. the amount of certain sums included in their account, & which stood in their names in a bank. They ultimately did so, partly out of moneys subsequently received, leaving in the bank a portion of the sum found due on the account. The bank afterwards failed:—*Held*: the trustees were liable for the loss of the sums included in the account, but not for sums subsequently paid in.—*WILKINSON v. BEWICK* (1858), 4 Jur. N. S. 1010; 6 W. R. 849.

**3320. Trustee acting against directions in will.]—**Trustees made personally liable for a loss arising from placing trust moneys with bankers on a deposit account, which was not authorised by the will, & that notwithstanding a trustee indemnity clause against losses by a banker of moneys deposited for safe custody.—*REHEND v. WESLEY* (1861), 29 Beav. 213; 54 E. R. 609.

**3321. Criminal fraudulent act of agent.]—**A trustee is liable for the loss of a trust fund caused by the fraudulent act of his solr., although in employing such solr. he may have exercised ordinary care & discretion.—*BOSTOCK v. FLOYER* (1865), L. R. 1 Eq. 20; 35 Beav. 603; 35 L. J. Ch. 23; 13 L. T. 489; 11 Jur. N. S. 962; 14 W. R. 120; 55 E. R. 1030.

*Annotations:—***Consd.**, *Speight v. Gaunt* (1883), 9 App. Cas. 1; *Jobson v. Palmer* (1892), 62 L. J. Ch. 180. **Reid**, *Robinson v. Harkin*, [1896] 2 Ch. 415.

**3322. Onus of proof of liability of trustee—Party seeking to make him liable.]—**Where an exor. or a trustee properly employs an agent to collect money belonging to the estate, & such money is lost by the insolvency of the agent, the *onus* of proving that the loss has occurred by the default of the trustees or exor. lies on the person who seeks to make him liable for the loss.—*Re BRIER, BRIER v. EYSON* (1884), 26 Ch. D. 238; 51 L. T. 133; 33 W. R. 20, C. A.

*Annotation:—***Consd.**, *Re City Equitable Fire Incoe.*, [1925] Ch. 407.

**Default of agent co-trustee.]—***See* Nos. 3043, 3287, *ante*.

**Liability of trustee in bankruptcy for acts of agent.]—***See* BANKRUPTCY, Vol. IV., p. 226, Nos. 2115–2118.

### *E. Liability of Agent.*

**3323. Liability of solicitors—Joining with one cestui que trust in misapplication of trust property.]—**A party executed a settlement in favour of certain trustees, who accepted & chose an agent to act for them: the agent in conjunction with one of the trustees, the husband of a *cestui que trust*, who was also heir-at-law of the trustor, procured said *cestui que trust* to make up a title to part of the trust estate passing over the trust, & thereupon to execute a disposition in his favour, on the ground that it was in security of advances for the trust. The agent thereupon took infetment, & executed a conveyance in favour of third parties:—*Held*: the agent was bound in the first instance, without awaiting the result of an accounting, to restore the estate *in integrum* against the real security created by the disposition & infetment.—*FRASER v. STEVENS'S TRUSTEES* (1839), MacL. & Rob. 171; 9 E. R. 61, II. L.

*Annotation:—***Reid**, *Stuart v. Carnegie* (1839), MacL. & Rob. 192.

**3324.** — **Misappropriation of money for investment.]—**ROWLAND v. WITHERDEN, No. 3272, *ante*.

**3325.** — **Countenancing dealings with trust money at variance with order of court—Order in administration action.]—**In 1855 a bill was filed for the administration of the estate of H., & in Feb. 1857, a decree was made which, among other things, directed the personal representative V. to get in the outstanding estate, & to pay the moneys so received into ct. from time to time within two months after their receipt respectively. After this decree was made, an estate, which was mortgaged to testator, was sold, & the purchase-money was received by the solrs. of V., who, instead of paying it into ct., retained a part of it in payment of some costs due to themselves, & allowed V. to receive the rest. V. having become a defaulter, a bill was filed by the beneficiaries against the solrs.:—*Held*: the solrs. were liable

### PART V. SECT. 6, SUB-SECT. 2.—E.

**m. Liability of solicitors.]—**It is the duty of a solr. to inform his client, when a trustee, as to the advisability of taking proceedings & incurring costs, when it may become a question whether the costs will have to be paid out of his private funds or out of the trust fund

or estate.—*BUTTERFIELD v. WELLS* (1883), 4 O. R. 168.—**CAN.**

**n. Giving gratuitous advice.]—**It was no part of the duty of a law agent appointed to be factor & law agent to the trustees under a trust-disposition & settlement to volunteer his advice to the trustees that a loan

made by testator on personal security was not such an investment of the trust funds as they were entitled to retain, & therefore he was not liable for loss resulting from their retaining the investment.—*CURROUS v. WALKER'S TRUSTEES* (1889), 16 L. (Cl. of Sess.) 355; 26 Sc. L. R. 215.—**SCOT.**

to make good the whole sum thus received by them, less the costs of actually realising it, together with interest.

It was equally impossible for the solrs. to admit any application of the money of that kind. It was their duty to see at all events that nothing was done which should be counter to the order of the ct., & above all, not themselves to receive any part of the money or appropriate any part of the money in any way which would be at variance with the order which the ct. had made (CAIRNS, L.J.).—HARRIES v. REES (1867), 37 L. J. Ch. 102; 17 L. T. 418; 16 W. R. 91, L. J.J.

*Annotation*:—*Refd.* *Re* Blundell, Blundell v. Blundell (1888), 40 Ch. D. 370.

**3326.** — Receipt of moneys from trustee—Knowledge of source—Notice of breach of trust.]—*Re* BLUNDELL, BLUNDELL v. BLUNDELL, No. 3330 *post*.

**3327.** — Negligence in conduct of petition.]—Trustees paid into ct., under Trustee Relief Act, a legacy of £500 bequeathed to D. an infant, to the credit of an account in the matter of the trusts of the will of testator. Two years afterwards they transferred into ct. to the same account a sum of Consols, representing a legacy of £7,000 bequeathed to M., & after her death to her children, & on both occasions the trustees in the petitions stated that the office of N., their solr., was to be the place for the service of any notice in reference to the funds. A year after the transfer of the Consols a petition was presented by M., by her next friend, a solr., & by the trustees, for the purpose of dealing with the Consols, & the solrs. on the record for petitioners were the firm of whom N. was a member, & the office of N. was to be the place where any notice was to be served relating to the trust fund. The petition set forth what had been done in respect of the Consols & other matters. An order was made in reference to the Consols & dividends; but in drawing it up an error occurred by including in it the whole of the fund standing to the credit of the account, & the future dividends were, as ordered, paid to M. during her life. D. had suffered loss by payments wrongly made to M., now deceased, & she, on attaining majority, presented a petition asking that the estate of M. might be made primarily liable for the loss which she had suffered, & that N. might be made liable for any deficiency:—*Held*: N., as officer of the ct., had been guilty of negligence in not seeing that all the facts relating to the funds were brought before the ct. when the order was made, & he must, after D. had exhausted the estate of M., make good any deficiency, & pay the costs of the petition.—*Re* DANGAR'S TRUSTS (1889), 41 Ch. D. 178; 58 L. J. Ch. 315; 60 L. T. 491; 37 W. R. 651; 5 T. L. R. 266.

*Annotations*:—*Apld.* *Marsh v. Joseph*, [1897] 1 Ch. 213. *Consd.* *Re* Williams' S. E., [1910] 2 Ch. 481.

**3328.** — As constructive trustees.]—Where a trustee has delegated his trust, there is no question of primary & secondary liability in respect of a breach of trust, but all are equally liable.

In an action by *cestui que trust* against their trustees, it was alleged that they had delegated their trusteeship to their solrs., who had improperly mixed the trust funds with their own moneys:—*Held*: if the allegations were well founded, they were amply sufficient to charge the solrs. as constructive trustees, & they & the

trustees were equally liable for breaches of trust.—*COWPER v. STONEHAM* (1893), 68 L. T. 18; 3 R. 242.

**3329.** — — —.]—It is not within the scope of the implied authority of a solr. carrying on business in partnership to constitute himself a constructive trustee, & thereby to subject his partner to liability in that character, the partner being ignorant of the dealings by which the constructive trust is established.

It having been held by the judge that a solr. had constituted himself a constructive trustee, & that both he & his partner in business were liable to make good a loss which had resulted from improper investments of the trust funds:—*Held*: upon the evidence, in the matters in question the solr. had acted only in the character of solr. to the trustees, & consequently neither he nor his partner were liable as constructive trustees.—*MARA v. BROWNE*, [1896] 1 Ch. 199; 65 L. J. Ch. 225; 73 L. T. 638; 44 W. R. 330; 12 T. L. R. 111; 40 Sol. Jo. 131, C. A.

*Annotations*:—*Refd.* *Pla-kitt v. Eddis* (1898), 79 L. T. 136; *Re* Taylor, Atkinson v. Lord (1900), 81 L. T. 812. *Mentd.* *Re* Stanley's Settlement, Maddocks v. Andrews, [1916] 2 Ch. 50.

**3330.** Liability of accountants—Acceptance of trustees' statements as correct—Intended application of trust funds.]—Accountants employed by trustees, through whose hands the accounts of the trust estate passed, are in the nature of servants, & bound to accept as correct statements made by one or other of the trustees with regard to the intended application of the trust fund, & are not liable for the misapplication of the trust fund by their employers on the ground of negligence, by not seeing that the fund was applied properly.—*RODBARD v. COOKE* (1877), 36 L. T. 504; 25 W. R. 535.

**3331.** Liability to beneficiaries.]—*POLLARD v. DOWNES* (1682), 2 Cas. in Ch. 121; 22 E. R. 876, L. C.

**3332.** — — —.]—(1) Where an agent is authorised by trustees to receive trust money & receives it accordingly, the receipt of that money by the agent binds the trustees & discharges the person who paid it.

(2) Trustees authorised their solrs. to receive trust money. The solrs. received it & handed it over to the tenant for life, whereby it was lost:

*Held*: a bill by a *cestui que trust*, seeking to charge the solrs. only & not the trustees, could not be maintained, for that it was only through the trustees that the solrs. could be made liable.—*ROBERTSON v. ARMSTRONG* (1860), 28 Beav. 123; 51 E. R. 313.

*Annotations*:—*As to* (1) *Consd.* *Re* Bellamy & Metropolitan Board of Works (1883), 21 Ch. D. 387. *As to* (2) *Consd.* *Soar v. Ashwell*, [1893] 2 Q. B. 390.

**3333.** — — —.]—In an action by a *cestui que trust* against his trustees for administration, the solrs. of the trustees were joined as defts. It was alleged that grossly exorbitant sums had been allowed in the accounts as costs to the trustees' solrs., & the relief asked for against them was that their bills might be taxed. The solrs. demurred:—*Held*: such an action could not be maintained by a third party, *cestui que trust*, against solrs., & the proper remedy was by petition under Solicitors Act, 1843 (c. 73), s. 39.—*Re* SPENCER, SPENCER v. HART (1881), 51 L. J. Ch. 271; 45 L. T. 645; 30 W. R. 296, C. A.

*Annotations*:—*Apld.* *Re* Blundell, Blundell v. Blundell (1888), 40 Ch. D. 370; *Re* Jackson, *Re* Cottrell, Boughton-

**3331 f.** *Liability to beneficiaries.*]—A mere agent is answerable only to his principal & not to *cestui que trust* in respect of trust moneys coming to his

hands merely in his character of agent, unless he deals with such moneys in a manner inconsistent with the performance of trusts of which he is cognizant.

—*GRIFFIN v. RICH* (1921), 21 S. L. N. S. W. 712; 38 N. S. W. W. N. 208.—**AUS.**

*Sect. 6.—Delegation of powers: Sub-sect. 2, E. & F. Sect. 7: Sub-sect. 1, A.]*

*Leigh v. Boughton-Leigh* (1889), 40 Ch. D. 495. *Refd.* *Cowper v. Stoneham* (1893), 68 L. T. 18. *Mentd.* *Midgley v. Midgley*, [1893] 3 Ch. 282.

**3334.** —[—]—Trustees acting under the advice of their solrs. invested £3,000, part of the trust fund, upon the security of a contributory mtge. for £6,000, the remaining £3,000 being advanced by the solrs. themselves. The legal estate in the mtgd. property was not vested in the trustees, the mtge. being taken in the names of one of them & of a stranger to the trust. The mtgees. executed a contemporaneous declaration of trust declaring that their names should stand in the mtge. as to the sum of £3,000, part of the sum of £6,000, & the interest thereof in trust for the trustees, & as to the further sum of £3,000, "residue of the sum of £6,000, & the residue of the interest to become due & payable" under the mtge. in trust for the solrs. By another contemporaneous document the solrs. guaranteed to the trustees the sufficiency of the security for the sum of £3,000 & interest, & further guaranteed to the trustees the repayment of the £3,000 & interest. The solrs. assigned their portion of the security to other persons, & were afterwards adjudicated bkpts. The mtgd. property having failed to realise the whole of the £6,000:—*Held*: the trustees were not entitled to priority for their £3,000 as against the assignees of the solrs.

In my opinion the investment was . . . a breach of trust. I also think that in omitting to advise the trustees that this was so, Messrs. N. P. & G. were guilty of a neglect of duty to the S. trustees, their clients . . . but under ordinary circumstances they would not have been responsible to the *cestui que trust* as for a breach of trust (*STIRLING, J.*).—*STOKES v. PRANCE*, [1898] 1 Ch. 212; 67 L. J. Ch. 69; 77 L. T. 595; 46 W. R. 183; 42 Sol. Jo. 68.

*F. Remuneration of Agents.*

*See* Trustee Act, 1925 (c. 19), s. 23.

**3335. Direct liability of trust estate.**—[—]—Where a mtgee. or trustee manage the estate themselves, there is no allowance to be made them for their care & pains; but if they employ a skilful bailiff, & give him £20 *per annum*, that must be allowed, for a man is not bound to be his own bailiff (*per Cur.*).—*BONFITHON v. HOCKMORE* (1685), 1 Vern. 316; 1 Eq. Cas. Abr. 7, pl. 1; 23 B. R. 492.

*Annotations:—Refd.* *Leith v. Irvine* (1833), 1 My. & K. 277; *Barrett v. Hartley* (1866), 14 W. R. 684.

**3336. Direct liability of trustee—With Indemnity from trust estate.**—[—]—If an exor. employs a solr. to do business for him in the management of his testator's affairs, he shall be allowed what he pays the solr. for such business.—*MACNAMARA v. JONES* (1781), 2 Dick. 587; 21 E. R. 309, L. C.

**3337.** —[—]—(1) As a general rule, solrs. employed by trustees in matters relating to the trust estate are retained by the trustees personally, & have no claim against, or lien upon, the trust estate for their costs.

(2) The trustee has a right to be indemnified out of the trust estate with respect to expenses properly incurred by him on behalf of that trust estate, including among other things costs properly

incurred by him in employing a solr. (*NORTH, J.*).—*STANTAR v. EVANS, EVANS v. STANTAR* (1886), 34 Ch. D. 470; 56 L. J. Ch. 581; 56 L. T. 87; 35 W. R. 286; 3 T. L. R. 215.

*Annotations:—As to* (2) *Consd.* *Re Blundell, Blundell v. Blundell* (1888), 40 Ch. D. 370. *Refd.* *Re Humphreys, Ex p. Lloyd-George & George*, [1898] 1 Q. B. 520. *Generally, Mentd.* *Preston Banking Co. v. Allsup*, [1895] 1 Ch. 141; *Re Calgary & Medicine Hat Land Co., Pigeon v. The Co.*, [1908] 2 Ch. 652.

**3338.** —[—]—Trustees having employed a solr. in the distribution of a trust estate, certain beneficiaries obtained an order for the taxation of the solr.'s bill of costs under Solicitors Act, 1843 (c. 73), s. 39:—*Held*: the costs must be taxed as between the trustees & their solr., & if properly chargeable against the trustees as such, must be allowed out of the estate irrespective of their ultimate incidence amongst the beneficiaries, which was a question outside the scope of such a taxation.—*Re MILES*, [1903] 2 Ch. 518; 72 L. J. Ch. 704; 88 L. T. 863; 52 W. R. 47; 47 Sol. Jo. 655.

**3339.** —[—]—*Indemnity not dependent on actual prior payment—Resort to estate as liability arises.*—[—]—In order that a solr. of a trustee may be debarred from accepting payments out of the estate in respect of costs properly incurred, notice must be brought home to him that at the time when he accepted them the trustee had been guilty of a breach of trust, such as would preclude him from resorting to the trust estate for payment of costs. A trustee allowed his solrs. to retain costs out of the trust estate. At the time the solrs. had notice that the trustee had committed a breach of trust in secretly buying for himself part of the trust estate. In an administration action the trustee made default in payment into ct. of the balance fund to have come to his hands:—*Held*: the solrs. could not be compelled to pay in the sums received by them out of the estate.

What is the position of a trustee or exor. who has to employ a solr., an auctioneer, or a stockbroker? He enters, unquestionably, into a contract, with reference to the employment of a solr.; or an auctioneer, or a stockbroker, on which he is personally liable, but by law he is entitled to be indemnified out of the trust estate. What is the right of indemnity? I apprehend that in equity at all events it is not a right of the trustee to be indemnified only after he has made the necessary payments . . . but that he is entitled to be indemnified not merely against payments actually made but against his liability . . . he is not bound in the first instance to pay those persons out of his own pocket & then recoup himself out of the trust estate, but he can properly in the first instance resort to the trust estate & pay those persons whom he has properly employed proper remuneration out of the trust estate (*STIRLING, J.*).—*Re BLUNDELL, BLUNDELL v. BLUNDELL* (1888), 40 Ch. D. 370; 57 L. J. Ch. 730; 58 L. T. 933; 36 W. R. 779; 4 T. L. R. 506.

*Annotation.—Refd.* *St. Thomas's Hospital v. Richardson*, [1910] 1 K. B. 271.

**3340.** —[—]—*Charges not strictly necessary for administration of estate.*—[—]—The rule that the taxation of a bill under the third party clause, Solicitors Act, 1843 (c. 73), s. 38, is as between solr. & client, is subject to this limitation, that a solr.

**PART V. SECT. 6, SUB-SECT. 2.—F.**

*o. Scottish probate sealed in Victoria by attorneys of Scottish trustees—Attorneys in Victoria not trustees of the will whether entitled to more than the commission allowed them by the Scottish*

*trustees.*—[—]—*CATTANACH v. MACPHERSON*, [1908] V. L. R. 390.—**AUS.**

*p. Right to agent's charges for collection of mortgage interest.*—[—]—Where trustees are allowed five per cent. of the value of an estate as their remunera-

tion for managing it they should not be allowed as disbursements, agent's charges for collecting the interest on mtges. in which some of the moneys of the estate are invested.—*STEPHEN v. MILLER* (B. C.), [1918] 2 W. W. R. 1042.—**CAN.**

cannot charge against a trust estate anything not necessary for the administration thereof, though expressly directed by the trustee; but must look for payment of such charges to the trustee personally.—*Re BROWN* (1867), 1 L. R. 4 Eq. 464; 36 L. J. Ch. 842; 16 L. T. 729; 15 W. R. 1030.

*Annotations*:—*Consd.* *Re Negus*, [1895] 1 Ch. 73; *Re Gray*, [1901] 1 Ch. 239; *Re Cohen & Cohen*, [1905] 1 Ch. 345. *Refd.* *Brown v. Burdett* (1888), 40 Ch. D. 244; *Re Robertson* (1889), 42 Ch. D. 553; *Re Longbotham*, [1904] 2 Ch. 152; *Re Cohen & Cohen* (1905), 92 L. T. 782.

**3341. Whether agent has lien in trust estate—For charges.**—*STANUAR v. EVANS, EVANS v. STANUAR*, No. 3337, *ante*.

**3342. Propriety of agents acceptance from trust estate—Effect of notice of breach of trust.**—*Re BLUNDELL, BLUNDELL v. BLUNDELL*, No. 3339, *ante*.

**3343. Payment of amount demanded by agent—Discretion of trustee.**—*Re WEALL, ANDREWS v. WEALL*, No. 3301, *ante*.

**3344. Whether payable out of capital or income—Valuation of share of deceased partner.**—*Re BENNETT, JONES v. BENNETT*, No. 3285, *ante*.

**3345. Fee to valuator—Proposed mortgage—Fee dependent on success of mortgage negotiations.**—*SALISBURY (MARQUIS) v. KEYMER* (1900), 25 T. L. R. 278.

## SECT. 7.—POWERS AS TO REAL ESTATE AND CHATTELS REAL

### SUB-SECT. 1.—LEASES.

#### A. In General.

**3346. Power & trust for leasing distinguished.**—The distinction between powers of leasing & trusts for leasing is a very thin one; but where a power & a trust are united, & the trust can only be performed by an exercise of the power, this ct. treats the power as imperative, & will exercise it if the trustee disclaims.—*RONSON v. FLIGHT* (1864), 34 Beav. 110; 5 New Rep. 154; 34 L. J. Ch. 101; 11 L. T. 558; 10 Jur. N. S. 1228; 13 W. R. 195; 55 E. R. 575; *on appeal* (1865), 4 De G. J. & Sm. 608, L. C.

*Annotation*:—*Mentd.* *Gainsborough v. Watcombe Terra Cotta Clay Co.*, *Dunning v. Gainsborough* (1885), 54 L. J. Ch. 991.

**3347. Grant contrary to terms of trust—Lease void against lessee.**—A. made a voluntary surrender of copyholds to a trustee upon trust for F., during her life, & if at her death she left children who attained twenty-one, upon trust to sell & divide the money among them; but if that event did not take place, upon trust for A. in fee: afterwards, by a deed, reciting that the trustee was seised of the premises upon trust for F., & her husband & A., the trustee, & F. & her husband, & A. concurred in demising the premises, for a valuable consideration, to G. for a long term of years:—*Held*: the lessee was to be considered as having notice of the trust for the benefit of the children of F., & the lease was void as against them.—*MALPAS v. ACKLAND* (1827), 3 Russ. 273; 38 E. R. 578.

*Annotations*:—*Refd.* *Jones v. Smith* (1841), 1 Har. 43; *Re Chafer & Randall's Contract*, [1916] 2 Ch. 8.

## PART V. SECT. 7. SUB-SECT. 1.—A.

**3348 i. Implied power.**—Pltfs. were trustees under a will, holding the legal estate in the property devised & bequeathed, in trust to maintain themselves & their children, with remainder over to the children upon the death of themselves; with power to absolutely convey the property & to exclude any child from participating in the remainder:—*Held*: pltfs. had implied power to make all reasonable leases.—*BROOKE v. BROWN* (1889), 19 O. R.

## 121.—CAN.

**3348 ii.**—[A trustee in whom the legal estate is vested, & who has active duties to perform, may, without any express leasing power, make a yearly or other reasonable letting of tenantable lands.—*FITZPATRICK v. WARING* (1882), 11 L. R. 13.—*IR.*

**q. Whether court may grant lease—Lease with premium sanctioned where no leasing power in will.**—Where a will contained a trust for sale, but no power of leasing, the ct., under special circum-

**stances, authorised a lease with a premium.**—*Re HIGGINS, HIGGINS v. HIGGINS* (1911), 11 S. R. N. S. W. 276; 28 N. S. W. N. 51.—*AUS.*

**r.**—Power to sell land given to trustees.—*Re KEATING'S WILL* (1905), 26 N. Z. L. L. 640.—*N.Z.*

**t. Necessity for concurrence of all trustees.**—Where two of four trustees entered into an agreement for the lease of certain trust property to pltf., without the knowledge or assent of the other two, to whom under the circum-

*Annotations*:—*N.F.* *Re Shaw's Trusts* (1871), L. R. 12 Eq. 124. *Refd.* *Wood v. Patterson* (1847), 10 Beav. 541.

**3349.**—[The ct. on a special case under Law of Property Amendment Acts, 1859 & 1860 (c. 35) & (c. 38), for its opinion declined to give power to trustees to grant leases of real estate for a term not exceeding ten years.—*Re SHAW'S TRUSTS* (1871), L. R. 12 Eq. 124; 25 L. T. 22; 19 W. R. 1025.

**3350.**—[Testator, part of whose property consisted of land with brick earth upon it which was being worked under a lease granted by him at a royalty gave his real estate to trustees upon trust "to pay the rents, issues & profits" to certain persons for their lives with remainders over. The will contained a trust for sale after the death of the last surviving tenant for life & a direction that until sale the trustees should cause the real estate to be kept "in good & tenantable order & repair":—*Held*: the trustees had an implied power to let the brickfield from year to year & the whole of the rents & royalties must be paid to the tenants for life for the time being.—*Re NORTH, GARTON v. CUMBERLAND*, [1909] 1 Ch. 625; 78 L. J. Ch. 344.

**3351. Lease from year to year.**—Authority of trustees to let from year to year.—*MONSON v. ESSIX (LORD)* (1830), 8 L. J. O. S. Ch. 169.

**3352. Confirmation of lease by beneficiary—Right of beneficiary to re-enter.**—W. bequeathed certain leasehold premises to trustees, on trust to permit & suffer his wife to receive the rents, etc., during her life. Afterwards the surviving trustee & the widow granted a lease of the premises, the rent to be paid to the widow & the lessors to have a power of re-entry upon non-payment of rent; the lease disclosed the title of the widow, who, after the death of the trustee, entered on the premises:—*Held*: being a stranger to the legal estate, the power of re-entry could not be reserved to her, & the lease operated as a lease by the trustee & a confirmation by the widow.—*DOE d. BARKER v. GOLDSMITH* (1832), 2 Cr. & J. 674; 2 Tyr. 710; 1 L. J. Ex. 256; 149 E. R. 293.

*Annotation*:—*Refd.* *Greenaway v. Hart* (1854), 14 C. B. 340.

**3353. Agreement to grant underlease—Prima facie inconsistent with trust for sale.**—An agreement by trustees of a will, to grant an underlease of (their testator's) leasehold property is, *prima facie*, inconsistent with a trust for sale of it. There may be, however, circumstances to justify the agreement; but the ct. cannot enter into the consideration of those circumstances in a suit for specific performance between the trustees & the underlessee, the *cestuis que trust* not being parties to it.—

*stances, authorised a lease with a premium.*—*Re HIGGINS, HIGGINS v. HIGGINS* (1911), 11 S. R. N. S. W. 276; 28 N. S. W. N. 51.—*AUS.*

**r.**—Power to sell land given to trustees.—*Re KEATING'S WILL* (1905), 26 N. Z. L. L. 640.—*N.Z.*

**t. Necessity for concurrence of all trustees.**—Where two of four trustees entered into an agreement for the lease of certain trust property to pltf., without the knowledge or assent of the other two, to whom under the circum-

*Sect. 7.—Powers as to real estate and chattels real :  
Sub-sect. 1, A. & B.]*

EVANS v. JACKSON (1836), 8 Sim. 217; Donnelly, 147; 6 L. J. Ch. 8; 59 E. R. 87.

*Annotations:—***Refd.** *Re* Walker & Oakshott's Contract, [1901] 2 Ch. 383; *Re* Judd & Poland & Skelcher's Contract, [1906] 1 Ch. 684; *Re* Chaplin & Staffordshire Potteries Waterworks Co.'s Contract, [1922] 2 Ch. 824. **Mentd.** *Re* Kemnal & Still's Contract, [1923] 1 Ch. 293.

**3354. Refusal to sanction lease made by life tenant—Evidence of authority by trustees—Specific performance.**—A. having a life interest in premises vested in trustees who had a power of leasing, agreed to grant a lease for twenty-one years to B. The trustees refused to grant a lease to B., on the ground that he was in insolvent circumstances, & that the grant of such lease would be a breach of trust against their *cestui que trust*.

The ct. being of opinion that B. was entitled to specific performance, & that the trustees had given A. some authority to act, ordered the trustees to execute a lease to B. to the extent of A.'s interest.—*NEALE v. MACKENZIE* (1837), 1 Keen, 474; 1 Jur. 149; 48 E. R. 389.

*Annotation:—***Mentd.** *Bell v. Barchard* (1852), 16 Beav. 8.

**3355. Whether power of sale included.**—Power to lease does not authorise a sale of leaseholds.—*GURNEY v. GURNEY* (1855), as reported in 3 W. R. 353.

*Annotations:—***Mentd.** *Tempest v. Tempest* (1856), 2 K. & J. 635; *Gaskin v. Rogers* (1866), 1 L. R. 2 Eq. 284; *Re* Marcus, *Marcus v. Marcus* (1887), 57 L. T. 399; *Re* Trotter, *Trotter v. Trotter*, [1899] 1 Ch. 764.

**3356. Application to court for power—Limitation of length of lease.**—The ct. on a special case under 22 & 23 Vict. c. 35, & 23 & 24 Vict. c. 38, for its opinion, declined to give power to trustees to grant leases of real estate for a term not exceeding ten years.—*Re SHAW'S TRUSTS* (1871), L. R. 12 Eq. 124; 25 L. T. 22; 19 W. R. 1025.

**3357. — Benefit to estate.**—Testator gave his real estate to trustees for a term of one hundred years on trust to raise annuities, & to accumulate the rents & profits for twenty-one years, or until some devisee entitled in possession should attain twenty-five; the accumulations to be laid out in real estate to be conveyed to the uses of the will. Subject to the term of one hundred years, he gave his real estate to A. for life, remainder to his first & other sons in tail male, with divers remainders over. He gave power to any tenant for life in possession who should have attained twenty-one & to trustees during minorities, to grant building leases.

A. had attained twenty-one, but not twenty-five. The first tenant in tail in existence was an infant. The trustees having purchased a building estate, a petition was presented by the trustees & A., & the first tenant in tail, asking that power to grant building leases might be vested in the trustees so long as there should be no tenant for life in possession who should have attained twenty-five:—**Held:** as all parties interested concurred, & the exercise of a power of leasing would be beneficial to the estate, the ct. would give the power.—*Re HARRIS'S SETTLED ESTATES* (1880), 42 L. T. 583; 28 W. R. 721.

**3358. Duty to lease—Agricultural land.**—As a

stances notice of the agreement could not be imputed, specific performance of the agreement was refused.—*McKELVEY v. HURKE* (1868), 15 Gr. 380.—**CAN.**

**a. —.**—*DAVIS v. LEWIS* (1885), 8 O. R. 1.—**CAN.**

**b. —.**—*DALTON v. BARRY* (1860), 12 Ir. Jur. 271.—**IR.**

**c. Effect of Trustees Acts Amendment Act, 1894, s. 5.**—The effect of the

above sect. is to extend the powers of trustees having power to lease land for a term of not less than fourteen years, so as to enable them to covenant to re demise to the lessee, his exors., administrators, or assigns, the same premises, for the same period, & on the same terms, as those of the original lease.—*ITE DILWORTH* (1900), 18 N. Z. L. R. 770.—**N.Z.**

**d. Power to trustees to sell or lease**

trustee it is his duty to keep the property in a proper state of cultivation. . . . The duty of a trustee is to let the farms from year to year in order to obtain sufficient rent & to keep the farms in a good state of cultivation (*JESSEL, M.R.*).—*EGMONT (EARL) v. SMITH, SMITH v. EGMONT (EARL)* (1877), 6 Ch. D. 469; 46 L. J. Ch. 350.

*Annotations:—***Mentd.** *Royal Bristol Permanent Bldg. Soc. v. Bomash* (1887), 35 Ch. D. 390; *Bolton Partners v. Lambert* (1889), 41 Ch. D. 295; *Clarke v. Hamuz*, [1891] 2 Q. B. 456; *Leppington v. Freeman* (1891), 65 L. T. 145; *Re Read*, [1894] 3 Ch. 238; *Re London School Board & Foster* (1903), 87 L. T. 700.

**3359. Power as against tenant for life—Under Settled Land Acts.**—*Re MANSEL'S SETTLED ESTATES*, [1884] W. N. 209.

**3360. Fraudulent lease by one of two trustees—Recovery of possession by innocent trustee.**—*ISAAC v. WORSTENCROFT* (1892), 67 L. T. 351; 56 J. P. 393; 8 T. L. R. 627.

**Charities.**—*See* CHARITIES, Vol. VIII., pp. 360-363, Nos. 1667-1657.

**Settlements—Express power.**—*See* SETTLEMENTS, Vol. XL., pp. 700-723, Nos. 2402-2553.

**Property of infant.**—*See* INFANTS, Vol. XXVIII., pp. 201, 202-205, Nos. 602, 621-651.

*B. Validity of Exercise of Power.*

**3361. Power "to let to best advantage"—Renewable lease.**—A renewable lease not inconsistent with a covenant to let & manage to the best advantage; with reference to the subject a trust for creditors.—*KIRKHAM v. CHADWICK* (1807), 13 Ves. 547; 33 E. R. 390.

**3362. Power to lease in possession—Grant of lease in reversion—Whether receipt of rent by cestui que trust cures defects.**—Devises in trust, having the legal estate, with a power of leasing in possessions until the *cestui que trusts* attained twenty-one; leases not conformable to the power held void in equity, & not confirmed by acceptance of rent.—*BOWES v. EAST LONDON WATER WORKS CO.* (1820), Jac. 324; 37 E. R. 873, L. C.

*Annotation:—***Consd.** *Hicks v. Salitt* (1854), 3 De G. M. & G. 782.

**3363. —.**—*Under a power to trustees "to lease premises for a term not exceeding twenty-one years, & determinable as a former term of ninety-nine years was determinable, as they should think proper":—Held: such a power authorised only a lease in possession, & not *in futuro*.—*SHAW v. SUMMERS* (1819), 3 Moore, C. P. 196.*

**3364. Power to lease with written consent of third party—Attestation of consent—Whether consent testified by being party to indenture.**—A power was given to trustees to demise certain premises, "with the consent of A. in writing, duly attested": **Held:** the consent of A. ought to be attested by a witness, & that a demise by the trustees by indenture, "with the consent & approbation of A., testified by her being a party to the indenture," was not an execution of the power.—*FRESHFIELD v. REED* (1842), 9 M. & W. 404; 11 L. J. Ex. 193; 152 E. R. 171.

*Annotations:—***Refd.** *Seal v. Claridge* (1881), 7 Q. B. D. 516; *Re Parrott*, *Ex p. Cullen*, [1891] 2 Q. B. 151.

**3365. — Parol consent—Subsequently with-**

**& to postpone sale—Whether power to grant option to purchase.**—*HORNE v. HORNE* (1906), 26 N. Z. L. R. 1208.—**N.Z.**

**PART V. SECT. 7, SUB-SECT. 1.—B.**

**e. Necessity for sanction of tenant for life—Whether lease set aside if sanction not obtained.**—*HEFFERMAN v. TAYLOR* (1888), 15 O. R. 670.—**CAN.**

**drawn—Enforceability of contract.]**—The doctrine of part performance of a parol agreement is not to be extended by the ct., & it is inapplicable to a case where a trustee has a power to lease, at the request in writing of a married woman which has not been made.

Land was vested in a trustee for the separate use of Mrs. E. a married woman, & the deed gave the trustee a power to lease at the request in writing of Mrs. E. The trustee & Mrs. E. agreed by parol to let the property to ptfs., & a lease was prepared approved of & executed by the trustee & by Mrs. E. but before their solr. had parted with it & before ptfs. had executed it, Mrs. E. recalled her assent to it. She had made no request to the trustee "in writing."—*Held*: there was no contract binding on Mrs. E. & no part performance, & ptfs. could not enforce the agreement.—*PHILLIPS v. EDWARDS* (1864), 33 Beav. 440; 3 New Rep. 658; 55 E. R. 438.

**3366. Lease not conformable to power—Whether void in toto—Trustees of undivided moiety.]**—Testator, seised in fee of an undivided moiety in certain real estates, devised all his real & personal estate to two persons, their heirs, exors. & administrators, in trust, to receive the rents & profits, & pay thereout various annuities, which they were authorised to raise by mtge. of all or any part of the estates. The will also contained a power to the trustees to accept surrenders of old leases & to grant new ones, with certain specified conditions.—*Held*: as the trustees took an estate in fee in the freehold & an absolute estate in the leasehold property, leases executed by the surviving trustee, though not conformable to the power, were valid at law, as to testator's moiety.—*DOE d. BLAgrave v. STEPHENS* (1850), 15 L. T. O. S. 541.

**3367. — Whether void or voidable.]**—Where a lease is made by trustees in exercise of a power, which is accompanied by a proviso that no such lease shall be valid unless the lessee shall execute a counterpart containing certain covenants; *Qu.*: is the lease void. *Scmble*: it is only voidable at the option of the party entitled to take advantage.—*DORRETT v. MEUX* (1851), as reported in 2 C. L. R. 807; 23 L. T. O. S. 144; 2 W. R. 480.

**3368. Time within which power to be exercised—During continuance of estate limited to trustees.]**—The estate of the trustees & their heirs is to continue only for such time as the objects of the trust require it; & the power to lease is a power only, to be exercised during the continuance of this estate so limited to them.—*DOE d. KIMBER v. CAPE* (1852), 7 Exch. 675; 21 L. J. Ex. 219; 19 L. T. O. S. 144; 155 E. R. 1119.

*Annotations*:—*Consd.* Smith v. Smith (1862), 31 L. J. C. P. 25. *Refd.* Poad v. Watson (1856), 2 Jur. N. S. 1136, n.; Collier v. McBean (1865), 34 Beav. 426; Collier v. Walters (1873), L. R. 17 Eq. 252. *Mentd.* Madden v. Taylor (1876), 45 L. J. Ch. 569.

**3369. Exercise amounting to breach of trust.]**—M. by his will devised estates to trustees, in trust for his daughter, an infant, with power to the trustees to demise & lease the same for any term not exceeding twenty-one years "at the best yearly rent that could be gotten for same respectively, without taking any fine or premium for the making thereof"; with power to appoint new trustees. In pursuance of this power the trustees some time afterwards, appointed R. sole trustee,

& conveyed to him the estate so devised, upon the trusts, & subject to the powers expressed & declared by the will of M., & for "no other trust, intent, or purpose whatsoever." By an indenture of lease between R. & B., certain part of the premises said to be described in & devised by the will of M. were demise by R. to B. for twenty-one years, in consideration of the yearly rent of £1,100, the first five years of which rent was to be paid in advance, in manner therein provided, & the remainder, after the expiration of such five years by equal quarterly payments:—*Held*: as the granting of such a lease was a breach of the trusts of the will of M., same ought to be declared void & set aside, & the premises assigned to the persons to be appointed trustees of the will of M.—*BOOTH v. A'BECKETT* (1863), 1 Moo. P. C. C. N. S. 201; 9 L. T. 68; 15 E. R. 676, P. C.

**3370. — One demise of two estates—Held on distinct trusts.]**—(1) *Qu.*: whether in any case a lease by trustees by one demise of two estates held upon distinct trusts would not be a breach of trust.

The question whether two or more sets of trustees for different properties, with different *cestuis que trust*, having separate powers of sale, can exercise the powers of sale by selling the property, in one lot, must depend upon the particular circumstances of the case for the time being under consideration (BAGGALLAY, J.).—*TOLSON v. SHEARD* (1877), 5 Ch. D. 19; 46 L. J. Ch. 815; 36 L. T. 756; 41 J. P. 423; 25 W. R. 667, C. A.

*Annotation*:—*Refd.* Brown v. Peto, [1900] 1 Q. B. 346.

**3371. Necessity for consent of court—Where action pending.]**—Pending a suit, & although no decree has been made, it is proper that trustees should obtain the sanction of the ct. to their exercise of powers of sale & leasing.—*TURNER v. TURNER* (1862), 30 Beav. 414; 54 E. R. 949.

**3372. Power to lease to "any person or persons"—Lease to limited company.]**—Trustees of a will had power to grant leases to any "person or persons" they should think fit:—*Held*: this authorised them to grant a lease to a limited co.—*Re JEFFCOCK'S TRUSTS* (1882), 51 L. J. Ch. 507.

*Annotation*:—*Refd.* Willmott v. London Road Car Co. [1910] 2 Ch. 525.

**3373. Powers exercisable by trustees as if absolute owners.]**—*Re JACKSON, JACKSON v. JACKSON* (1900), 44 Sol. Jo. 573.

**3374. Exercise offending perpetuity rule.]**—Testator by his will directed his trustees to stand possessed of all the mines & minerals beneath the surface of his residuary real estate, & of the rents & profits thereof on trust to pay perpetual annuities to his daughters. The daughters were parties to a deed of family arrangement under which power was given to trustees to manage or lease the mines & minerals in order to provide the moneys necessary to pay the annuities. Under the will, the trusts of which were to be treated as incorporated in the deed, the surviving husband of any daughter was entitled for his life to the annuity given to his wife by the will, & the deed contemplated the exercise of the power of leasing during the life of the surviving husband, who was not necessarily a person who was alive at the date of the execution of the deed:—*Held*: as the trustees might have exercised their power of leasing so as to create for the first time a new interest in land after the perpetuity period had expired, the power of leasing was void.

1. Lease not conformable to power  
—Lease good in equity—Excess term  
being separable.—*COVERLID v. JOEL*,  
O. B. & F. 138.—N.Z.  
g. Duration of term—Until youngest

beneficiary attains 21 years.]—*Re*  
*BOURKE (DECEASED)* (1909), 29 N. Z.  
L. R. 501.—N.Z.  
h. — Three years—Necessity to  
conform to statute.]—*GLEBE SUGAR*

*REFINING CO., LTD. v. GREENOCK PORT*  
*& HARBOURS TRUSTEES*, [1921] 2  
A. C. 66, H. L.; [1921] S. C. (H. L.)  
72; 58 Sc. L. R. 435; [1921] 2 S. L. T.  
26.—SCOT.



*Sect. 7.—Powers as to real estate and chattels real :  
Sub-sect. 1, B., C., D. & E.]*

—*Re* ALLOTT, *HANMER v. ALLOTT*, [1924] 2 Ch. 498; 94 L. J. Ch. 91; 132 L. T. 141, C. A.

**Building leases.**—*See* Sub-sect. 1, C., *post*.

**Mining leases.**—*See* MINES, Vol. XXXIV., pp. 639–646, Nos. 371–435.

**Renewal.**—*See* Sub-sect. 1, E., *post*.

### C. Building Leases.

*See* Law of Property Act, 1925 (c. 20), s. 205 (1) (iii), & generally, LANDLORD & TENANT, Vol. XXXI., pp. 88–95.

**3375. Power conferred by Act of Parliament.**—

An Act of Parliament declared that certain hereditaments should be vested in trustees, their heirs, & assigns, for the purpose of granting building leases, to contain specified covenants; & went on to authorise the trustees to pay the costs incurred out of the rents, & declared the same to be a charge on the premises:—*Held*: (1) the legal estate was vested in the trustees; (2) the costs were a charge on the estate; & the ct. had power to direct a sale of the corpus for payment of the costs; a purchaser under the ct. could not object that the leases were invalid.—*DIXON v. WILKINSON* (1853), 1 Eq. Rep. 556; 22 L. J. Ch. 981; 21 L. T. O. S. 297; 1 W. R. 513.

**3376. Power during minority of tenant in tail—**

**Execution of contract entered into by late tenant for life.**—By a will devising real estate in strict settlement, powers of granting building leases were given to any tenant for life & to trustees during the minority of any tenant in tail. The tenant for life, in pursuance of his power, entered into a contract to grant a building lease, but died without having executed a lease, & was succeeded by an infant tenant in tail:—*Held*: the trustees had power to effectuate the contract of the tenant for life by executing a lease.—*DAVIS v. HANFORD* (1882), 22 Ch. D. 128; 52 L. J. Ch. 61; 47 L. T. 540; 31 W. R. 61.

**3377. Validity of lease granted—Where no covenant to build.**—Testator by his will devised & bequeathed freehold & leasehold lands upon trusts, & empowered the trustees to contract for leases thereof with or without optional powers of purchase on the lessees, & to grant leases thereof either for building or other purposes, so that no lease of the site of a building should be made for more than ninety-nine years, & no lease for any other purpose for more than twenty-one years & so that while leases for twenty-one years were to be at the best rents which could be obtained, building leases might be at a rent to increase progressively. After testator's death the trustees granted to A. a lease of part of the freehold & leasehold lands of testator for thirty-five years, with an option to purchase during the first twenty-one years of the term, & at an increasing rent as to the freehold part, by an indenture which recited that they had power to grant building leases, but contained no covenant to build, though it contained covenants to repair, amend, & keep, & to insure all messuages erected or to be erected on the land demised. A. exercised his option to purchase as to a leasehold portion of the demised property, which was duly assigned to him, & he afterwards sold & assigned part of those leaseholds to C. C. contracted to sell to a purchaser, & in order to avoid any question as to the validity of the lease by the trustees, a memorandum was indorsed upon it signed by A. & the trustees declaring that pursuant to Leases Act, 1849 (c. 26),

the lease should be considered in equity as a contract for the grant of a valid lease for twenty-one years. The purchaser, however, took the objection that the lease was invalid. Upon a summons taken out under Vendor Purchaser Act, 1874 (c. 78):

—*Held*: (1) the lease though intended to be a building lease was invalid as such owing to the absence of any covenant to build, & being bad as a building lease under the power it could not by the operation of Leases Act, 1849 (c. 26), be turned into a contract for the grant of a valid lease of a kind different from that which it was originally intended to be; moreover, even if it could by this means be turned into an ordinary lease, it would be bad as such, inasmuch as the rent reserved on the freehold part was an increasing rent, which was not authorised by the power to grant ordinary leases; (2) as there was no power to grant an option to purchase otherwise than in a valid lease under the power, & the lease granted was invalid, the option to purchase must fall with the lease.—*HALLETT TO MARTIN* (1883), 24 Ch. D. 624; 52 L. J. Ch. 804; 48 L. T. 894; 32 W. R. 112.

**3378. — Rent not reserved in accordance with power.**—*HALLETT TO MARTIN*, No. 3377, *ante*.

**3379. — Effect of validity of option to purchase.**—*HALLETT TO MARTIN*, No. 3377, *ante*.

**3380. Power included in unrestricted power to lease.**—An unrestricted power of leasing includes a building lease.—*Re JAMES, JAMES v. GREGORY* (1895), 64 L. J. Ch. 686; 73 L. T. 1, C. A.

**Settlements.**—*See* SETTLEMENTS, Vol. XL, p. 762, Nos. 2912–2916.

### D. Mining Leases.

*See* MINES, Vol. XXXIV., pp. 639–646, Nos. 371–435.

### E. Renewal of Leases.

*See*, generally, LANDLORD & TENANT, Vol. XXXI., pp. 68–87; SETTLEMENTS, Vol. XL, pp. 790–794, Nos. 3185–3230.

**3381. Exercise of discretion—Power discretionary—Exercise for benefit of cestui que trust.**—On demurrer:—*Held*: trustees to whom a discretionary power was given of renewing leases, had not an arbitrary power of renewal, but must renew when most for the benefit of the *cestui que trust*.—*MILINGTON (LORD) v. MULGRAVE (EARL)* (1818), 3 Madd. 491; 56 E. R. 585.

**3382. — Trust to renew on reasonable terms.**—*MORTIMER v. WATTS*, No. 3052, *ante*.

**3383. Form of lease to be granted by trustee—Covenant for perpetual renewal by testator.**—Testator covenanted for a perpetual renewal of a lease:—*Held*: the proper form of lease to be granted by trustees was a demise for the new term, reciting the original covenant by testator.—*COPPER MINING CO. v. BEACH* (1823), 13 Beav. 478; 1 L. J. O. S. Ch. 84; 51 E. R. 184.

*Annotations*:—*Fold. Hodges v. Blagrave* (1854), 18 Beav. 404. *Expid. Hare v. Burges* (1857), 4 K. & J. 45.

**3384. — — — — —**—Form of lease to be granted by trustees, under a covenant by a testator for perpetual renewal.

Under such a covenant trustees are not bound to enter into a covenant to renew, but the original covenant, together with the decision of the ct. of the lessee's right to a perpetual renewal, should be recited in the lease granted by the trustees, & the trustees should purport to demise in obedience

### PART V. SECT. 7, SUB-SECT. 1.—C.

k. *Devises of land with directions to build—Leave to let on building lease refused.*—*Re HALL* (1876), 2 V. L. R. 156.—**AUS.**



thereto.—*HODGES v. BLAGRAVE* (1854), 18 Beav. 404; 52 E. R. 160.

**3385. Fines & expenses of renewal—Direction to pay—Leaseholds part of general fund—No apportionment.]**—A. having given his real, leasehold, & personal property, which leasehold was bishop's leases, renewable, as a general fund, charged with annuities to trustees, to pay rents & profits to B. for life, with remainder to pltf.; the fines for renewing the leases, which he directed should be renewed, are to be paid out of the whole fund, not apportioned between the tenant for life & the remainderwoman.—*STONE v. THEED* (1787), 2 Bro. C. C. 243; 20 E. R. 135, L. C.

*Annotations:—*Consd. *White v. White* (1801), 9 Ves. 551. *Ex'ptd.* *Allan v. Backhouse* (1813), 2 Ves. & B. 65. *Consd.* *Shaftsbury v. Marlborough* (1833), 2 My. & K. 111. *Re'fd.* *Bradford v. Brownjohn* (1868), 37 L. J. Ch. 198.

**3386. ——— Power to pay fines & expenses—Sale of lease not authorised.]**—A gift by will to trustees of leaseholds for lives in trust during the life of A. by & out of the rents & profits or otherwise, to keep the premises in repair & full lived, & to pay the fines & expenses attending any renewals & repairs thereof, does not authorise the sale of the whole lease in order to meet the expenses of renewal.—*GARMSTONE v. GAUNT* (1845), 1 Coll. 577; 14 L. J. Ch. 102; 4 L. T. O. S. 310; 9 Jur. 78; 63 E. R. 550.

**3387. ——— Bankruptcy of tenant for life.]**—T., by his will, devised certain freehold & leasehold property to a trustee, upon trust, to permit his son H. to receive the rents during his life, subject to the payment of rents & performance of the covenants reserved & contained by & in the present or future leases, whereby the leasehold premises were or should be held; & also all taxes, fines, & expenses attending the same; remainder upon trust for the sons of H. in fee, as tenants in common. The tenant for life became bkpt. & afterwards died. His assignees received a sum of £2,000 subsequent to the bkpy. for rents:—*Held:* these rents were liable to the fines for renewal.—*HULKES v. BARROW* (1829), Tam. 264; 48 E. R. 105.

**3388. ——— Reference to determine method of contribution.]**—Leaseholds for lives being devised in trust for parties in succession, with a direction to renew out of the rents or by mtge. The ct. sanctioned a reference to the master to inquire whether it could be for the benefit of all parties that the future fines for renewal should be provided by an insurance on the lives of the *cestui que vies*.

Difficulties in arranging the proportions of the fines which the parties in succession ought to bear in such cases.—*GREENWOOD v. EVANS* (1811), 4 Beav. 44; 49 E. R. 254.

*Annotations:—*Consd. *Jones v. Jones* (1816), 5 Hare, 440; *Hayward v. Pile* (1870), 22 L. T. 893. *Re'fd.* *Hudleston v. Whelpdale* (1856), 9 Hare, 775; *Bute v. Ryder* (1884), 53 L. J. Ch. 1090.

**3389. ——— Liability of tenant for life—Right to receive fines for renewal of underlease.]**—A leasehold estate renewable being bequeathed with limitations in the nature of a strict settlement, the habit being to renew annually & to underlet, the decree declared, that the fines upon renewal ought to be paid out of the rents & profits; & that the person entitled for life undertaking to pay those fines out of the rents & profits was entitled to the fines on renewal of the underleases; & a renewal to such of the undertenants as should be desirous of it was directed.—*MILLES v. MILLES* (1802), 6 Ves. 761; 31 E. R. 1295.

**3390. ——— Leaseholds part of general fund—Contribution by remainderman.]**—Real estate,

consisting of freehold, copyhold, & renewable leaseholds, devised upon trust for sale; the proceeds to go to A. for life, with remainder to her children. The children decreed to contribute to the renewal of the leasehold previous to sale.—*KEIR v. ROBINS* (1838), 2 Jur. 773.

—[See *EXECUTORS*, Vol. XXIV., p. 639, No. 6646; & *generally*, *LANDLORD & TENANT*, Vol. XXXI., pp. 84-87; *SETTLEMENTS*, Vol. XL., pp. 791-793, Nos. 3193-3226.

**3391. Power to renew—Equivalent to trust.]**—Testator being possessed of leaseholds for lives insured each of the lives, & by his will directed the insurances to be kept up & the leases renewed from time to time. He then gave his real & personal estate upon trust, subject to a life interest, for A. in tail:—*Held:* the trust for renewal was valid, but, subject to such trust, the moneys received by virtue of the policies were part of the personal estate of testator, & vested absolutely in the tenant in tail.

A power which, from the nature of the case, is one which trustees ought to exercise, will be treated by the ct. as a trust.—*MELLER v. STANLEY* (1804), 2 De G. J. & Sin. 183; 4 New Rep. 124; 10 L. T. 512; 12 W. R. 780; 46 E. R. 345, L. J.

**3392. ——— Power to purchase reversion.]**—Trustees with power to renew have power to purchase the reversion in leaseholds, under Ecclesiastical Commissioner's Act, 1866 (c. 124); & that Act applies to the estates of corps. both aggregate & sole.—*HAYWARD v. PILE* (1870), 5 Ch. App. 214; 22 L. T. 893; 18 W. R. 556, L. C.

*Annotation:—*Re'fd. *Maddy v. Hale* (1876), 3 Ch. D. 327.

**3393. Renewal impossible—Expiry of time for renewal—Failure of trust.]**—Testator made his will in 1851, & thereby gave renewable leaseholds to his wife for life & then over, & gave his personal estate to trustees upon trust to repair & insure & renew his leaseholds at the accustomed times, & then to pay the annual proceeds to his wife for life, & after her death to pay the corpus to charities. Testator died in 1873. The time for renewing the leaseholds had expired at the time of his death, & renewal had become impossible:—*Held:* the trust for renewal had failed altogether.—*PINFOLD v. SHILLINGFORD* (1877), 46 L. J. Ch. 491; 25 W. R. 425.

—[See, *generally*, *SETTLEMENTS*, Vol. XL., pp. 793, 794, Nos. 3227-3230.

**3394. Renewal impossible—Sale of leaseholds—Proceeds invested.]**—Testator gave to his trustees a tithe rentcharge held under an ecclesiastical lease for twenty-one years which was in practice renewed every seven years on payment of a fine, upon trust to renew out of the proceeds, & to apply the surplus in a certain way during the life of his wife, & directed that after her death it should form part of his residuary estate. He gave his trustees power at any time to sell the leasehold interest. The lease having ceased to be renewable:—*Held:* the leasehold interest ought to be sold & the proceeds invested, & only the income of this fund & of the renewal fund applied as income.—*MADDY v. HALE* (1876), 3 Ch. D. 327; 45 L. J. Ch. 791; 35 L. T. 134; 24 W. R. 1005, C. A.

*Annotations:—*Apld. *Re Barber's S. E.* (1881), 18 Ch. D. 624. *Re'fd.* *Re Rancagh's Will* (1884), 26 Ch. D. 590.

**3395. Trustees of renewable leaseholds—Power to accept smaller share of rents—Co-owners bearing burden of improvements.]**—*BATHURST v. THISTLETHWAYTE* (1893), 37 Sol. Jo. 212.

*Sect. 7.—Powers as to real estate and chattels real:*  
*Sub-sect. 2, A. & B.]*

**SUB-SECT. 2.—POWER OF SALE.**

**A. In General.**

*See, generally, Law of Property Act, 1925 (c. 20), ss. 23 33; Law of Property (Amendment) Act, 1926 (c. 11), sched.; Trustee Act, 1925 (c. 19), ss. 12–16.*

**3398. Trustees postponing or accelerating sale—Cannot alter interest of cestui que trust.]**—Trustees postponing, or accelerating the sale of estates devised to them, will make no alteration in favour of the heir to the prejudice of *cestui que trust*.—*HAWKINS v. CHAPPEL* (1739), 1 Atk. 621; 26 E. R. 391.

*Annotations:—Mentd. Martin v. Martin* (1842), 12 Sim. 579; *Welch v. Peterborough (Bp.)* (1885), 15 Q. B. D. 432.

**3397. Trustee unable to show good title—Court will not restrain sale by trustee.]**—The ct. will not restrain trustees for sale from completing a sale, on the ground that they cannot show a good title.—*ROBERTS v. BOZON* (1825), 3 L. J. O. S. Ch. 113.

**3398. Trustee with discretionary power—Submitting to decree for sale—Court not bound to execute sale.]**—A trustee having discretion to sell the trust property submitted to a decree for sale in a suit instituted in relation to the trust:—*Held*: the ct. was not therefore bound to carry the sale into execution.—*POLLEY v. SEYMOUR* (1837), 2 Y & C. Ex. 708; 7 L. J. Ex. Eq. 12; 1 Jur. 958.

*Annotation:—Refd. Harding v. Trotter* (1853), 21 L. T. O. S. 279.

**3399. — Postponement of sale—Right of tenant for life to income.]**—Testator devised a brickfield on trust for sale when the trustees should think it desirable. They deferred the sale in the exercise of their discretion:—*Held*: the tenant for life was entitled to the royalties as income.—*MILLER v. MILLER* (1872), L. R. 13 Eq. 263; 41 L. J. Ch. 291; 20 W. R. 324.

*Annotations:—Follid. Re North, Garton v. Cumberland, [1909] 1 Ch. 625. Refd. Leppington v. Freeman* (1891), 65 L. T. 145.

**3400. Trustees of settlement with power of sale—Devise by tenant for life to other trustees—Whether powers over devised estate in trustees of settlement or trustees of will.]**—The trustees of a settlement had vested in them a power of leasing during the minority of the beneficial owners, a power of sale & exchange at the request of the tenants for life, & a power to cut timber, but they had no legal estate, except to preserve contingent remainders.

The first tenant for life devised his own estates to other trustees in fee, to the same uses & subject to life powers as the settled estates stood limited:—*Held*: the powers over the devised estates were exercisable by the trustees of the settlement, & not by the trustees of the will.—*TAYLOR v. MILES* (1860), 28 Beav. 411; 3 L. T. 115; 6 Jur. N. S. 1063; 54 E. R. 424.

**3401. — — — — —.]**—By a marriage settlement real estate was conveyed to trustees upon trust after the death of the survivor of the husband & wife "to pay & transfer the hereditaments & premises" to the children of the marriage as the survivor of the husband & wife should appoint. The settlement contained powers for the trustees to sell the property during the lives of the husband & wife & the survivor & during the lifetime of any child. The husband survived his wife & by his will appointed the property to trustees on trust for sale & conversion & directed them to stand possessed of the proceeds upon a series of complicated trusts for the benefit of his children. The trustees of the will purporting to act under the trust for sale therein contained contracted to sell the property. The purchaser took the objection that the proper persons to sell were the representatives of the last surviving trustee of the settlement:—*Held*: inasmuch as the trustees of the settlement were directed to "pay & transfer" the property to the appointees the trust for sale by the trustees of the will was expressly authorised by the terms of the power & overrode the powers of sale contained in the settlement; the trustees of the will were the proper persons to sell the property & could call for a conveyance of the legal estate.—*Re ADAMS' TRUSTEES & FROST'S CONTRACT*, [1907] 1 Ch. 695; 76 L. J. Ch. 408; 96 L. T. 833; 51 Sol. Jo. 427.

*Annotation:—Distd. Re Mackenzie, Bain v. Mackenzie, [1916] 1 Ch. 125.*

**3402. Power of sale must be exercised for benefit of cestui que trust—Not for benefit of trustees.]**—Certain persons who were seised in fee of a rentcharge of £120 a year, subdivided it into fifty-four parts, & sold thirty-four of such parts, & by a deed in consideration of £52 5s., paid by each of the purchasers, therein called "beneficiaries," the vendors, therein called "trustees," declared that they stood seised of one fifty-fourth part of the rentcharge "in trust for each of the beneficiaries, his heirs & assigns absolutely," & that they stood seised of the remaining parts in trust for

**PART V. SECT. 7, SUB-SECT. 2.—A.**

**1. Trust to divide real estate—Whether power of sale implied.]**—A trust to divide real estate may confer an implied power of sale upon the trustees, where, from the nature of the property & the number of shares into which it is to be divided a sale is necessary to carry out the provisions of the will.—*GRANT v. GRANT* (1914), 14 S. L. N. S. W. 271; 31 N. S. W. W. N. 103.—**AUS.**

**m. Who may convey—Person having legal estate.]**—A person having the legal estate in land may by conveyance at law pass such estate, though it was given him in trust.—*DOED, FERRIS v. GILBERT* (1849), 6 N. B. R. 1 (All.) 520.—**CAN.**

**n. Whether power of sale transferable to new trustees.]**—*RIDOUT v. HOWLAND* (1864), 10 Gr. 547.—**CAN.**

**o. — — — — —.]**—*Re GILMOYER & WHITE* (1887), 14 O. R. 694.—**CAN.**

**p. Right to convey—Congregation ceasing to exist.]**—An application under Vendor & Purchaser Act, R. S. O. 1887, c. 112, in which the surviving trustee of a congregation, which had separated & ceased to exist, was making title to land belonging to the said

congregation, but useless for its original purpose:—*Held*: the trust had not come to an end.—*Re WANSLEY & BROWN* (1891), 21 O. R. 31.—**CAN.**

**q. Trustees unsuccessfully attempting to sell whole trust estate—Whether court will sanction sale of part of estate.]**

—Trustees, having unsuccessfully offered for sale *in bloc* property of the trust estate, consisting of a hotel & stores & a dock, & subsequently the hotel & stores without the dock, received an offer for the hotel by itself:—*Held*: the ct. had jurisdiction to express its approval, & in the circumstances it was a case in which the jurisdiction ought to be exercised.—*Re CRAWFORD, NELSON v. BELL* (1900), 20 C. L. T. 380; 32 O. R. 118.—**CAN.**

**r. Whether sale may be made by grant—Sub-fee-farm grants.]**—A trustee for sale under a will, with an unlimited power of leasing, is entitled to carry out the sale by granting sub-fee-farm grants or sub-leases in consideration of fines & reserving rents exceeding in the aggregate the head-rent.—*ALEXANDER v. CLARKE*, [1920] 1 L. R. 47.—**IR.**

**t. Power to postpone sale of farming**

*property—Whether implied power given to carry on farming business.]*—Power in a will given to trustees to postpone a sale of farming property does not give them an implied power to carry on a farming business, & still less an implied power to spend money in improving land which at testator's death was in a state of nature.—*BOWLER v. STRICKER* (1890), 8 N. Z. L. R. 669.—**N.Z.**

**a. Duty to comply with provisions of road statute.]** Where trustees under a will are empowered to sell the property in parts, it is not only lawful for but compulsory on them when selling a part of the said property to comply with Public Works Act, 1905, as to dedication & formation of roads.—*Re DOUGLAS* (1907), 27 N. Z. L. R. 63.—**N.Z.**

**b. Sale must be for cash.]**—Trustees with a bare power of sale must generally sell for cash.—*QUILL v. HALL* (1908), 27 N. Z. L. R. 545.—**N.Z.**

**c. Power of court to grant leave to sell—Where land vested in trustees for leasing purposes.]**—Where land is vested in trustees for the purpose of letting the same so that the rents may be used as an endowment for an

themselves, the said trustees in fee. There was a covenant by each of the beneficiaries that in the event of his wishing to sell his share, he should first offer it to the trustees at a price to be ascertained, in case of dispute, by arb'n., & there was a clause declaring that the trustees, or other the trustees or trustee for the time being of the said deed, should "respectively have absolute power of sale over the said rent & premises, exercisable at their or his discretion, without any further consent on the part of any person":—*Held*: the power of sale vested in the trustees by this deed was not one which they could exercise for their own benefit so as to enable them to forfeit the shares of the beneficiaries.—*ASHWORTH v. HOPPER* (1875), 2 IlOp. & Colt. 283; 1 C. P. D. 178; 45 L. J. Q. B. 99; 33 L. T. 667; 40 J. P. 231; 24 W. R. 187.

*Annotation*:—*Refd.* *Spencer v. Harrison* (1879), Colt. 61.

**Power to vary investments.]—See Part VI., Sect. 5, post.**

**Power to give receipts.]—See Sect. 10, post.**

**Power of sale to raise charges.]—See Sect. 7, sub-sect. 7, post.**

**Parties to conveyance.]—See SALE OF LAND, Vol. XL., pp. 271, 272, Nos. 2371-2380.**

**Statutory power of sale.]—See SETTLEMENTS, Vol. XL., pp. 753-755, Nos. 2823-2838.**

**Settled land.—Immediate binding trust for sale.]—See SETTLEMENTS, Vol. XL., p. 729, No. 2602.**

**Compound settlements.—Effect of trust for sale.—Under Law of Property Act, 1925 (c. 20), sched. 1.]—See SETTLEMENTS, Vol. XL., pp. 773, 774, Nos. 3046, 3047.**

**Power of sale in settlements generally.]—See SETTLEMENTS, Vol. XL., pp. 705, 706, Nos. 2394-2401.**

### B. Creation of Power.

*See, now*, Trustee Act, 1925 (c. 19), s. 16.

**3403. Whether power of sale given.—By direction to dispose of real estate.]—The directing the trustees to dispose of all his real & personal estate, does not import to sell, but to manage it to the best advantage for the family.—*SHEFFIELD v. ORRERY* (LORD) (1745), 3 Atk. 282; 26 E. R. 965, L. C.**

*Annotations*:—*Refd.* *Doe d. Cadogan v. Ewart* (1838), 7 Ad. & El. 636. *Mentd.* *Lethbriker v. Tracey* (1754), 3 Atk. 774; *Thellusson v. Woodford* (1805), 1 Bos. & P. N. R. 357; *Doe d. Chatterway v. Smith* (1816), 5 M. & S. 126; *Graco v. Webb* (1848), 18 L. J. Ch. 13; *Moods v. Wood* (1854), 19 Beav. 215; *Browne v. Hammond* (1858), John. 210; *Walpole v. Laslett* (1862), 1 New Rep. 180; *Underhill v. Roden* (1876), 45 L. J. Ch. 266; *Re Hewett, Eldridge v. Ilcs*, [1918] 1 Ch. 458.

**3404. — By power of exchange.]—Power of exchange does not include a power of sale.—*MCQUEEN v. FARQUHAR* (1805), 11 Ves. 407; 32 E. R. 1168, L. C.**

*Annotations*:—*Refd.* *A.-G. v. Hamilton* (1816), 1 Madd. 214; *Doe d. Knight v. Spencer, Doe d. Knight v. Sansum* (1848), 2 Exch. 752; *Brassey v. Chalmers* (1852), 16 Beav. 223; *Bradshaw v. Kane* (1856), 25 L. J. Ch. 413; *Re Fifth & Oxford* (1876), 3 Ch. D. 638. *Mentd.* *Wright v. Wakeford* (1811), 17 Ves. 454; *Moodie v. Reid* (1816), 1 Madd. 516; *Hougham v. Sandys* (1827), 2 Sim. 95; *Hall v. Montague* (1830), 8 L. J. O. S. Ch. 167; *Allen v. Bradshaw* (1835), 1 Curt. 110; *Green v. Pulsford* (1839), 2 Beav. 70; *Campbell v. Home* (1842), 1 Y. & C. Ch. Cas. 664; *Burdett v. Spilsbury* (1843), 10 Cl. & Fin. 340; *Butcher v. Jackson* (1845), 14 Sim. 44; *Warren v. Postlethwaite* (1845), 2 Coll. 108; *Vincent v. Sodor &*

*Man* (Bp.) (1849), 8 C. B. 905; *Domville v. Lamb* (1853), 1 W. R. 246; *Baker v. Bradley* (1856), 2 Jur. N. S. 98; *Cockcroft v. Sutcliffe* (1856), 25 L. J. Ch. 313; *Ward v. Dixon* (1858), 28 L. J. Ch. 315; *Re Rickett's Trust* (1860), 2 L. T. 320; *Re Hulsh's Charity* (1870), L. R. 10 Eq. 5; *Henty v. Wrey* (1882), 21 Ch. D. 332; *Toss v. Tyser Line, The Celtic King* (1894), 10 T. L. R. 222; *Cloutte v. Storey*, [1911] 1 Ch. 18.

**3405. — By power to sell personally.—Investment in real estate.—Direction that real estate be treated as personally.]—A settlement of personally upon the usual trusts contained a power for the trustees to sell the trust funds, & invest in the purchase of real estate, to be held upon such trusts as would best correspond with the subsisting trusts, & that such real estate should be considered as personal estate for the purposes of the settlement. There was no express power of sale over the real estate so purchased:—*Held*: the trustees had a power of sale over purchased real estate.—*TAIT v. LATHBURY* (1865), L. R. 1 Eq. 174; 35 Beav. 112; 11 Jur. N. S. 991; 14 W. R. 216; 55 E. R. 837.**

*Annotation*:—*Refd.* *Re Gent & Eason's Contract*, [1905] 1 Ch. 386.

**3406. — By power to invest & lend.]—Testator devised & bequeathed his residuary estate to trustees, & empowered them to continue the investment of the whole or any part of his estate in the business of the firm in which he was a partner at the time of his death, or to invest, reinvest, & lend any part of his estate to the firm upon such terms as the trustees should think fit:—*Held*: there was no power to the trustees to sell the real estate implied by the power given to invest & lend.—*Re HOLLOWAY, HOLLOWAY v. HOLLOWAY* (1888), 60 L. T. 46; 37 W. R. 77.**

**3407. — By direction that money for sale accumulate.]—*Re GEORGES, BUCKLE v. CARTER* (1921), 127 L. T. 117; 65 Sol. Jo. 311.**

**— By power to raise charge.]—See Sect. 7, sub-sect. 7, post.**

**By direction to pay debts & legacies.]—See EXECUTORS, Vol. XXIII., pp. 313 et seq.**

**3408. Power of sale for particular purpose.—Payment of debts.—Restriction as to order in which property to be sold.—No general power of sale created.]—Testator devises lands in trust for the payment of his debts generally, & desires that his estate at A. shall be sold first, & if the produce of that estate be insufficient, then his estate at B. A purchaser will not be compelled to accept the title to B., unless the ct. is satisfied beyond suspicion that the debts have not been paid.—*PIERCE v. SCOTT* (1835), 1 Y. & C. Ex. 257; 4 L. J. Ex. Eq. 36.**

**3409. — — — Debts satisfied.—General power of sale created.]—Testatrix gave, devised & bequeathed all the rest, residue & remainder of her estate real & personal not specifically disposed of by her will, after payment of her debts, etc., to trustees, upon trust to invest same in the funds or on real security, or, at their discretion, to keep same in their then state of investment: &, in a subsequent part of her will, she declared that the receipts of the trustees for the purchase-money of any trust property sold by them under her will, should be good discharges to the purchasers of such property:—*Held*: the trustees were**

**QUESTIONS CURATOR BONIS, [1927] S. C. 579.—SCOT.**

**e. Whether beneficiary may purchase.]—When trust-property in which several beneficiaries are interested is exposed for sale by public roup one of the beneficiaries may lawfully purchase.—*SHILL v. GUTHRIE'S TRUSTEES* (1874), 1 R. (Ct. of Sess.) 1083.—SCOT.**

orphanage, & the deed of settlement gives the trustees no power to sell, the ct. has power under its general jurisdiction to grant leave to sell the trust property.—*See SETTLED LAND ACT, 1908, [1908] N. Z. L. R. 218.—N.Z.*

**d. —**—In virtue of Trusts (Scotland) Act, 1921, s. 4, it is unnecessary for judicial factors to apply to the ct. for special powers in every case in

which they desire to sell or feu part of their wards' estates. It is for them to decide whether the proposed sale or feu is or is not at variance with the terms or purposes of their appointments, & it is only in cases in which they think that it is at variance, or in which they are in doubt, that it is necessary for them to apply to the ct. for special powers.—*LOTHIAN'S (MAR-*

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authorised to sell a real estate comprised in the residuary devise, although all testatrix's debts, etc., had been paid.—*AFFLECK v. JAMES* (1849), 17 Sim. 121; 14 L. T. O. S. 2; 13 Jur. 759; 60 E. R. 1074.

*Annotation :—Distd. Re Holloway, Holloway v. Holloway* (1888), 60 L. T. 46.

**3410.** — “Any other purpose” — *Sale of part of property for improvement of rest—Whether general power created.*—*Re NORRIS*, [1883] W. N. 65, C. A.

*C. When Power Arises.*

**3411. Power of sale on death of tenant for life—If mortgagee will not wait for money—Power only arises on refusal of mortgagee to wait.**—*A.*, being possessed of a copyhold estate at F., subject to a life estate of B., & also subject to a mtge. devised his freehold & copyhold estates to trustees for his two daughters, in equal moieties, as tenants in common, & they provided, that in case the mtgee. of the estate at F. would not wait & take his principal & interest out of the rents & profits of that estate, after the death of B., then his trustees should have power to sell the estate, after the death of B., he then directed that the money arising from the sale should be first applied to the discharge of the mtgee., & his other debts, & the residue equally divided between his daughters. By subsequent codicils he directed the residue of his personal estate together with the money arising from the sale of the estate at F., to be equally divided between his daughters:—*Held*: this does not constitute a fixed trust to be executed on the death of the tenant for life; but only gives a power to the trustees to sell, on the mtgee. refusing to wait for his money.—*BOWMAN v. MATTHEWS* (1801), 1 For. 163; 145 E. R. 1146.

**3412.** — *Whether power can be exercised in lifetime of tenant for life.*—*MEYRICK v. COUTTS* (1806), Sugden on Powers, 8th ed. 266.

**3413.** — *Where an estate was directed by testator to be sold after the death of a certain person, & the sale was made during the life of that person, under a decree, some of the persons interested in the proceeds being infants or not sui juris, the ct. would not compel the purchaser to accept the title.*—*BLACKLOW v. LAWS* (1842), 2 Harc. 40; 67 E. R. 17.

*Annotations :—Folld. Want v. Stallibrass* (1873), L. R. 8 Exch. 175. *Mentd. Gouldor v. Camm* (1859), 29 L. J. Ch. 135.

**3414.** — *Deft., with A., since deceased, sold a farm to plff. under conditions of sale; by the third condition it was stipulated that the vendors should deliver an abstract of title within seven days, & “all objections & requisitions not stated in writing & delivered to the vendor’s solr. within fourteen days from the delivery of the abstract shall be considered as waived, & in this respect time shall be of the essence of the contract”; & by the fourteenth condition,*

“if the purchaser shall fail to comply with these conditions, his or her deposit shall be thereupon actually forfeited to the vendors,” who were to be at liberty to resell, & recover any deficiency & the cost of resale from the purchaser. Plff. paid a deposit of £300. An abstract of title was delivered within seven days; & from the abstract it appeared that the vendors sold as trustees under a will which devised the estate to them on trust to pay the income to F., testator’s son in law for life, or to permit him to receive same, & after his decease, on trust to sell the estate & hold the produce” upon the trusts for the children of the said F. as therein mentioned”; it was further stated in the abstract that F. would join in conveying the property. It was objected by the purchaser, but not till after the expiration of fourteen days from the delivery of the abstract, that F. being still alive, the vendor’s power of sale had not arisen. In an action brought by the purchaser to recover his deposit:—*Held*: he was entitled to succeed.—*WANT v. STALLIBRASS* (1873), L. R. 8 Exch. 175; 42 L. J. Ex. 108; 29 L. T. 293; 21 W. R. 685.

*Annotations :—Reid. Soper v. Arnold* (1887), 37 Ch. D. 96; *Saxby v. Thomas* (1890), 64 L. T. 65.

**3415.** — *Testator by his will dated in 1858, gave all his real & personal estate to trustees upon trust out of the proceeds of his personal estate, or if & so far as same should be insufficient, then out of the proceeds of his real estate, to pay his debts; & as to a certain house belonging to him, to permit his widow to occupy it during widowhood, & on her second marriage or death to sell the same. The usual decree for administration was made by the ct., & the Chief Clerk found that all the debts had been paid out of the personal estate. By an order subsequently made on further consideration of the cause, it was ordered, with the consent of the widow, who was still living, that the house should be sold; & a contract for sale was entered into. The purchaser having objected that a good title could not be made:—Held*: the trustees had no power of sale, & the objection was valid.—*CARLYON v. TRUSCOTT* (1875), L. R. 20 Eq. 348; 44 L. J. Ch. 186; 32 L. T. 50; 23 W. R. 302.

*Annotation :—Reid. Re Tanqueray-Willaine & Landau* (1881), 45 L. T. 281.

**3416.** — *Vendors contracted to sell land as trustees for sale & the purchaser paid a deposit. Upon investigation of the title it appeared that the vendors had no power of sale until the death of an existing tenant for life. The purchaser objected to the title, & the vendors thereupon offered to procure a conveyance from the tenant for life under the powers of Settled Land Acts. The purchaser declined to enter into a new contract with the tenant for life, & took out a summons under Vendor & Purchaser Act, 1874 (c. 78), for the return of the deposit:—Held*: the vendors were not entitled to compel the purchaser to enter into a new contract with the tenant for life.—*Re BRYANT & BARNINGHAM’S*

**PART V. SECT. 7, SUB-SECT. 2.—C.**

**1. Sale in default of payment of sum in excess of sum due.**—*To secure advances plffs. assigned to deft. B. all their interest in a coal-mine on trust to carry on the same & in certain events to sue B. made a demand on plffs. for an amount largely in excess of what was due to him under the deed & in default of payment sold the property to the other deft. S. & S.:—Held*: B. did not stand in the same position as a mtgee. but that he was a trustee, & consequently he was not

justified in selling the property on plffs. failing to tender the amount due to him.—*HARPER v. BROWN* (1887), 8 N. S. W. Eq. 86.—*AUS.*

**g. Power to sell whole of property**—*For payment of debts left unpaid by personal estate.*—*Lands were devised to trustees to carry out the will of testator, who reserved six lots, which he desired should be sold for payment of debts, not charged on lands; the residue to his grandchildren:—Held*: the trustees had a right to sell the whole of such property for payment

of debts left unpaid by the personal estate & the lots specially appointed to be sold for that purpose; & a purchaser who had not notice that all the debts not charged on lands were paid, would be justified in assuming that the trustees were properly proceeding to a sale.—*DUFF v. MEWBURN* (1859), 7 Gr. 73.—*CAN.*

**h. For purpose of carrying out intention of parties.**—*ORLAND v. MCNEIL* (1901), 34 N. S. R. 453.—*CAN.*

**k. Power of sale for payment of legacies.**—*Where testator gave all his*

CONTRACT (1890), 44 Ch. D. 218; 59 L. J. Ch. 636; 63 L. T. 20; 38 W. R. 469, C. A.

*Annotations*.—*Conad. Re Head's Trustees & Macdonald* (1890), 45 Ch. D. 310; *Re Cooke & Holland's Contract* (1893), 73 L. T. 106. *Distd. Re Baker & Selmon's Contract*, [1907] 1 Ch. 238. *Reid. London & Scottish Issue Co. v. Adams* (1893), 9 T. L. R. 396.

**3417.** ———.]—Testator devised & bequeathed his real & personal estate to trustees upon trust to pay the rents of the real estate, & the income of the personal estate to his wife for life, & after her death to sell & convert & to divide the proceeds among his children. He then proceeded to "authorise" his trustees or trustee to "adjust & pay all claims made upon my estate, & generally to act in the premises as my trustees or trustee shall in their or his discretion think fit." He appointed his trustees exors. of his will:—*Held*: this authority did not like a direction to pay debts, make it the duty of the trustees to pay debts out of whatever property of testator was vested in them, & did not charge the debts on the real estate, & the trustees had not during the life of the widow any power to sell the real estate.—*Re HEAD'S TRUSTEES & MACDONALD* (1890), 45 Ch. D. 310; 59 L. J. Ch. 604; 63 L. T. 21; 38 W. R. 657, C. A.

*Annotations*.—*Distd. Re Baker & Selmon's Contract*, 19071 1 Ch. 238. *Conad. Bricks v. Spall*, [1916] 2 A. C. 599; *Re Hailes & Hutchinson's Contract*, [1920] 1 Ch. 233. *Reid. Bellamy v. Debenham*, [1891] 1 Ch. 412; *London & Scottish Issue Co. v. Adams* (1893), 9 T. L. R. 396.

**3418.** ———. *Advowson*—Court has no power to order sale even though beneficial.]—Testator devised his advowson to trustees, to sell on the death of A. & divide the produce amongst certain persons. A. was the incumbent, so that on his death no sale could be made until the vacancy was filled up:—*Held*: the ct. had no jurisdiction to authorise a sale in the lifetime of A. on the ground that it would be beneficial to the parties.—*JOHNSTONE v. BAKER* (1845), 8 Beav. 233; 4 L. T. O. S. 392; 50 E. R. 91.

*Annotation*.—*Apld. Want v. Stallibrass* (1873), L. R. 8 Exch. 175.

**3419.** ———. *Resettlement of share on infants in remainder.*]—Conditions of sale, after stating that the estate was by settlement limited to Mrs. C. for life, with remainder to trustees in trust to sell for the benefit of her children, proceeded as follows: " & there being three such children only, all of whom have attained the age of twenty-one, such children or their trustees shall if required, join in the conveyance to the purchaser; but no objection to the title of the vendors shall be made on account of the sale taking place during the life of Mrs. C." Two of the children of Mrs. C. were married women, having children, who were minors, & they had settled their portion of the money to arise from the sale of the estate in trust for themselves for life, with remainder to their children:—*Held*: neither the children of Mrs. C. nor the trustees had legal capacity to join in a conveyance.—*MOSLEY v. HIDE* (1851), 17 Q. B. 91; 20 L. J. Q. B. 539; 17 L. T. O. S. 106; 15 Jur. 899; 117 E. R. 1216.

*Annotation*.—*Apld. Want v. Stallibrass* (1873), L. R. 8 Exch. 175.

**3420.** ———. *Revocation of life estates by codicil*—Power taking effect immediately on death of testator.]—Testator devised a house to G. for life, & after his death to E. for life, & after the death of the survivor to a trustee upon trust to sell & hold

the proceeds in trust for his children then living, & issue then living of any deceased child or children, in substitution for their parent or parents, in equal proportions. Testator revoked the devise to G. & E. for life. G. & E. survived testator:—*Held*: the devise to the trustee took effect immediately upon the death of testator, & thereupon the trust for sale arose.—*Re JOHNSON, DANILY v. JOHNSON* (1893), 68 L. T. 20; 3 R. 308.

**3421.** Power of sale with consent of tenant for life—Estate in remainder on existing life tenancy—Surrender of existing life tenancy to accelerate sale.]—Testator being seized of an estate in remainder, subject to the life estate of A., devised it to C. for life, with remainder in strict settlement, & empowered the trustees to sell it, with the consent of the tenant for life "entitled in possession" under his will. A. surrendered his life estate to C. to enable the trustees, with C.'s consent, to sell:—*Held*: they could make a good title.—*TRUETT v. TYSSON* (1856), 21 Beav. 437; 25 L. J. Ch. 801; 27 L. T. O. S. 24; 2 Jur. N. S. 630; 4 W. R. 409; 52 E. R. 928.

*Annotation*.—*Mentd. Re Petro's Settltmt. Trusts, Lough v. Petro*, [1910] 1 Ch. 290.

**3422.** Power to sell reversion—"Or exchange for other lands in fee in possession"—Trustees may sell before reversion in possession.]—*CLARK v. SEYMOUR*, No. 3520, *post*.

**3423.** Power to sell one estate when necessary to pay off mortgage—Two estates subject to same mortgage—Trustees may sell when second estate liable for charge on first.]—Two estates, A. & B., were subject to the same mtge. The owner, on the marriage of his son, settled A. in strict settlement, & the trustees were empowered "from time to time, when & as occasion should require," to sell any part of A., & pay off the mtge., so as to exonerate B. The owner afterwards mortgaged B., to plff., but without any express mention of the exoneration clause. Plff. having filed a bill to enforce the exoneration clause, without making the trustees of the settlement parties, it was dismissed, with costs.

The time for exercising the trust for sale would seem to be, when the B. estate would be made liable to pay the charge on the A. estate.—*ROOKE v. KENSINGTON (LORD)* (1856), 21 Beav. 470; 25 L. J. Ch. 366; 27 L. T. O. S. 32; 2 Jur. N. S. 755; 4 W. R. 409; 52 E. R. 940; *on appeal*, 25 L. J. Ch. 567; 27 L. T. O. S. 163; 4 W. R. 582, L. J.

**3424.** Power of sale "as soon as conveniently might be"—Trustees may sell in lifetime of tenant for life.]—Testator devised freeholds & copyholds to his wife for life, with remainder to trustees in fee, in trust to sell the freeholds "as soon as conveniently might be," & the copyholds "as soon as conveniently might be after his decease":—*Held*: the absolute interest in the estate might be sold by the trustees in the life of the widow, with her consent.—*MILLS v. DUGMORE* (1861), 30 Beav. 104; 51 E. R. 828.

**3425.** Power to convert residuary estate—Premises to form part of residuary estate under certain circumstances—Circumstances not arising—Trustees cannot sell premises.]—Testator gave to his wife the personal use of a leasehold messuage for her life, she discharging the ground rent, etc., & paying a yearly rent of £50 to his trustees; &

real & personal estate to trustees upon trust, that all his property or the profits arising therefrom should go to pay off his debts & legacies, they to be paid in rotation, & as soon as debts & legacies were paid, the trustees were to make

over the entire of his property to his son.—*Held*: the trustees had no power to sell for payment of the legacies, but they might sell for payment of the debts only.—*M'NEALE v. CLARKE* (1838), 6 Ir. L. Rec. N. S. 164.—*IR.*

*1. Opportunity to make profit.*]—Trustees—authorised by a settlement to lend the trust fund upon such security as they should think advantageous—laid out a portion of the trust fund in the purchase of lands in

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he declared that if she should not think fit to reside therein then the premises should form part of his residuary estate. He then directed the conversion of his real, & the residue of his personal estate, & gave a power to postpone such conversion, directing the rents & profits, in the meantime to be deemed annual income. Under the trusts of the residue the widow took one-fourth of the income thereof. A railway co. having taken the premises under their compulsory powers, while the widow was in occupation, made an agreement with her as to her interest, & a separate agreement with the trustees. The latter declined to assign on the ground that the trust for sale had not arisen, & required the consideration money to be paid into ct. On a special case:—*Held*: their contention was right, for though the house, subject to the interest of the widow, was part of the residuary estate, it would not be a proper exercise of the trust to sell during the continuance of the occupation of the widow.—*SMITH v. GREAT NORTHERN RY. CO.* (1874), 23 W. R. 126.

**D. Duration of Power.**

*See, now, Law of Property Act, 1925 (c. 20), s. 23.*

**3426. Depends on intention of donor of power.]**—A devise of real estate to the use of trustees & their heirs upon trust, as to two undivided fifths, for two persons in fee, & as to the other three-fifths, upon trust for certain persons for life, with remainder to their children in fee. A power of sale was given to the trustees. Testator died in 1830. All the trusts were exhausted except those of one share. It was the intention of testator, to be gathered from the whole will, that the power of sale should extend to all the shares:—*Held*: a good title could be made to the whole property under the power.

A general power of sale will be supported, if it be restricted, although not in express terms, yet by unavoidable inference, to the duration of the trusts which are within the legal limit of time: in other words, the intent of the power of sale is to be gathered from the language of testator (*ROMILLY, M.R.*).—*TAITE v. SWINSTEAD* (1859), 26 Beav. 525; 33 L. T. O. S. 312; 5 Jur. N. S. 1019; 7 W. R. 373; 53 E. R. 1001.

*Annotation:—Apld. Re Horsnail, Womersley v. Horsnail, [1909] 1 Ch. 631.*

—*See Nos. 3446–3448, post.*

**3427. Express power of sale—Exercise twenty-eight years after testator's death.]**—Where there is an express charge in a will for the payment of debts, the lapse of twenty-eight years from testator's death will not be a sufficient period to rebut the presumption that the debts have not been paid, although the *cestuis que trusts* have been in receipt of the rents & profits of the estate. *Semble*: at the expiration of twenty-eight years, trustees can make out a good title under an express power of sale, or exors. under an implied power of sale created by the charge for the payment of debts.—*SABIN v. HEEPE* (1859), 27 Beav. 553; 29 L. J. Ch. 79; 1 L. T. 51; 5 Jur. N. S. 1146; 8 W. R. 120; 54 E. R. 218.

*Annotations:—Consd. Re Tanqueray-Williaume & Landau (1882), 20 Ch. D. 465. Rejd. Hodgkinson v. Quinn (1860), 30 L. J. Ch. 118: Re Whistler (1887), 35 Ch. D. 561; Re Venn & Furze's Contract, [1894] 2 Ch. 101.*

fee simple; an offer having been made to purchase the lands at a profit, the ct. directed the purchase to be completed, & the purchase-money to be brought into ct. to the credit of the trust.—*ROBINSON v. ROBINSON* (1876),

10 I. R. Eq. 189.—*IR.*

**PART V. SECT. 7, SUB-SECT. 2.**

—*D.*

**m. Where power of sale in trust deed repugnant to all other provisions—**

**3428. Time mentioned in trust instrument—Power may be exercised though time expired.]**—The time of sale of lands by trustees elapsed, yet decreed to proceed in the sale.—*WITCHCOT v. SOUCH* (1660), 1 Rep. Ch. 183; 21 E. R. 544.

*Annotation:—Apld. Pearce v. Gardner* (1852), 10 Hare, 287.

**3429. ———.]**—A devise of real & personal estate to trustees, with a direction for sale with all convenient speed & within five years, & to apply the proceeds in payment of debts & legacies, & invest the residue upon trusts for the widow & widow & children of testator:—*Held*: to empower the trustees to sell after the five years had elapsed.—*PEARCE v. GARDNER* (1852), 10 Hare, 287; 1 W. R. 98; 68 E. R. 935.

*Annotation:—Mentd. Re Tunno's Estate, Ralikes v. Ralikes (1890), 63 L. T. 23.*

**3430. ———.]**—Course adopted where a literal compliance with the terms of the power would be mischievous to the estate, so as to save the trustees from responsibility.—*CUFF v. HALL* (1855), 1 Jur. N. S. 972.

**3431. Power subsists as long as trust unperformed—Although some of beneficiaries sui juris.]**—Where an estate is devised in trust for two daughters for life, with remainders in each moiety for their children at twenty-one, & a power of sale is given to the trustees, the power of sale subsists, though one daughter is dead, & her children have attained twenty-one.—*TROWER v. KNIGHTLEY* (1821), 6 Madd. 134; 56 E. R. 1043.

*Annotations:—Apld. Taite v. Swinstead (1859), 26 Beav. 525; Re Horsnail, Womersley v. Horsnail, [1909] 1 Ch. 631. Rejd. Wood v. White (1839), 4 My. & Cr. 460.*

**3432. ——— All persons presumptively entitled sui juris.]**—Real estate was given by will to trustees upon trust to sell at their discretion at any time before the youngest or youngest surviving child or grandchild of testator should attain twenty-one: & such parts as should not be sold were given to testator's wife for life, & after her death, on the arrival of the youngest or youngest surviving child or grandchild at the age of twenty-one, to such of his children as should be then living, & the issue of such of them as should be dead, as tenants in common:—*Held*: though all the persons presumptively entitled had attained twenty-one, the power of sale was exercisable.—*CHAPMAN v. HARRIS* (1863), 2 New Rep. 56; 8 L. T. 306.

**3433. ——— Share of one beneficiary vested in possession.]**—Where land is devised to trustees in trust for sale with a discretionary power of postponement, & the proceeds are settled in trust for various beneficiaries, the vesting in possession of the share of one of the beneficiaries does not put an end to the power of postponement, or entitle that beneficiary to call either for an immediate sale of the entirety or for a conveyance of an undivided share in the land.—*Re HORSNAILL, WOMERSLEY v. HORSNAILL, [1909] 1 Ch. 631; 78 L. J. Ch. 331; 100 L. T. 603.*

*Annotations:—Apprvd. Re Kipping, Kipping v. Kipping, [1914] 1 Ch. 62. Mentd. Re Jordison, Itaine v. Jordison, [1922] 1 Ch. 440.*

**3434. ——— Marriage of one beneficiary—Other beneficiaries infants.]**—Testator devised his real estate to trustees in trust as to one-fifth part thereof, to pay the income to his son W. for life & after W.'s death to convey that part to his children & if any of his children died under twenty-one without issue, then to the surviving children; & if W.

*Power must be construed reasonably.]—Re FORD & HARDY (Ont.), [1926] 2 D. L. R. 749.—CAN.*

**n. Whether power of sale extinguished—Death of trustee.]—BEARNS v. NOAD** (1854), 4 Nfld. L. R. 33.—*NFLD.*



should have no children or if all his children died under twenty-one without issue, then their testator gave that one-fifth to three other sons, & his daughter E., equally, the share of E. to be settled in the same manner as one-fifth, originally devised for her benefit & as to another fifth share testator directed his trustees to apply the income for the maintenance of E. till she attained twenty-five or married, & if she married before she attained twenty-five, in trust to settle it, & testator then gave the trustees a power of sale "during the continuance of the trusts." W. died, leaving three infant children. E. married under twenty-five & by her marriage settlement after reciting that the real estate devised by the will had not been sold but it was intended that it should be sold under the power contained in the will, she assigned to trustees all her share in the moneys which should be produced by the sale of such real estates. The surviving trustee of the will contracted to sell the real estate of testator :—*Held* : as to W.'s share the trusts were still continuing, his children being infants, & as to E.'s share, the trustee took a power of sale by implication, from the mode in which that share was treated in the settlement, & the contract for sale was therefore, enforced against the purchaser.—*WOOD v. WHITE* (1839), 4 My. & Cr. 460; 8 L. J. Ch. 209; 3 Jur. 117; 41 E. R. 178, L. C.

*Annotation* :—*Reid. Ferrand v. Wilson* (1845), 15 L. J. Ch. 41.

**3435.** — *Effect of exercise changing devolution of property.*—A father, on the marriage of his daughter in 1806, settled real estate upon trusts for the separate use of his daughter for life, with remainder in case she survived her husband, which event happened, to her children, as tenants in common in tail, & limited the reversion to himself in fee. The settlement contained a collateral power of sale not in terms restricted as to time. In 1850, the daughter's issue being spent, & the daughter being a widow & more than seventy years of age, the trustee executed a deed purporting to be made in exercise of the power, & to be a conveyance of the fee simple :—*Held* : (1) the power was valid & subsisting at the date of the deed of 1850; (2) it was well exercised by that deed, although, under the trusts of the settlement, the effect of its exercise was to change the devolution of the property, passing it, in the events which had happened, to the daughter absolutely.—*LANTSBERY v. COLLIER* (1856), 2 K. & J. 709; 25 L. J. Ch. 672; 28 L. T. O. S. 35; 4 W. R. 826; 69 E. R. 967.

*Annotations* :—*As to* (1) *Apld. Taite v. Swinstead* (1859), 26 Beav. 525. *Consd. Re Sudley & Baines*, [1894] 1 Ch. 334. *Apld. Re Horsnall, Womersley v. Horsnall*, [1909] 1 Ch. 631. *Reid. Peters v. Lewes & East Grinstead Ry.* (1881), 18 Ch. D. 429; *Re Stamford & Warrington, Payne v. Grey*, [1911] 1 Ch. 255; *Re Allott, Hanmer v. Allott*, [1924] 2 Ch. 498.

**3436.** — *Annuities charged upon real estate—In aid of personal estate.*—A power of sale of real estate given to trustees is not extinguished until all the purposes for which it was originally created have ceased to exist, & those purposes may include the payment of annuities charged upon the real estate in aid of the personal estate.—*Re KAYE & HOYLE'S CONTRACT* (1909), 53 Sol. Jo. 520.

**3437.** — *Although reversioners acquire vested interests—In lifetime of tenant for life.*—Testator directed the trustees of his will at such times & in such manner as they should think fit to sell his copyhold estate, & to hold the proceeds in trust for his widow for life, & after his death for his children. He left six children, all of whom attained a vested interest & were *sui juris*. The widow & three children brought an action for partition of the estate;

the other children, who were depts., demurred :—*Held* : the trustees had a trust for sale, not a mere power; & it was not put an end to by all the reversioners attaining a vested interest; & therefore the ct. had no jurisdiction to decree a partition under the Partition Act.—*BIGGS v. PEACOCK* (1882), 22 Ch. D. 284; 52 L. J. Ch. 1; 47 L. T. 341; 31 W. R. 148, C. A.

*Annotations* :—*Distd. Re Tweedie & Miles* (1884), 27 Ch. D. 315. *Reid. Dodd v. Cattell*, [1914] 2 Ch. 1; *Re Goswell's Trusts*, [1915] 2 Ch. 106. *Mentd. Vanneck v. Benham* (1916), 86 L. J. Ch. 7.

**3438.** — *—*—*TAITE v. SWINSTEAD*, No. 3426, *ante*.

**3439.** — *—*—A power of sale in a settlement is not restricted so as to be exercisable only within the limits which a beneficial interest must vest, but it may be exercised as long as the beneficial interests continue, so as to constitute the estate a settled estate.—*Re BROWN'S SETTLEMENT* (1870), L. R. 10 Eq. 349; 39 L. J. Ch. 845; 18 W. R. 945.

**3440.** *Whether power of sale extinguished—By subsequent appointment to trustees by will—Power may still be exercised by trustees.*—In 1814 estates were limited to such uses, etc. as A. should appoint, & in default of appointment, to him for life, remainder to his son for life, remainder to the son's first & other sons in tail male; & those limitations were followed by powers of leasing, & selling & exchanging, the latter of which was to be exercised during the life of A. & his son, & with their consent. In 1830, A. being desirous of relinquishing his life interest, appointed the estates to his son for life, remainder to the uses, upon the trusts & subject to the powers expressed & contained in the deed of 1814, ulterior to the limitations therein for the lives of A. & his son :—*Held* : though the power of sale & exchange was to operate in derogation of the life estates, it was not destroyed by the deed of 1830.—*MORGAN v. RUTSON* (1848), 16 Sim. 234; 17 L. J. Ch. 419; 11 L. T. O. S. 238; 12 Jur. 813; 60 E. R. 863.

**3441.** — *Power given to two trustees—Death of one trustee.*—*LANE v. DEBENHAM*, No. 3168, *ante*.

**3442.** — *By death of tenant for life—Continues for reasonable time for purpose of division.*—The power of sale given to the trustees by the will did not determine on the death of the tenant for life, but might have been exercised within a reasonable time afterwards for the purpose of dividing the property.—*PETERS v. LEWES & EAST GRINSTEAD RY. CO.* (1881), 18 Ch. D. 429; 50 L. J. Ch. 839; 45 L. T. 234; 29 W. R. 874, C. A.

*Annotations* :—*Consd. Re Cotton's Trustees & School Board for London* (1882), 19 Ch. D. 624. *Apld. Re Henzell, Holgate v. Humphris*, [1887] W. N. 240; *Re Sudley & Baines*, [1894] 1 Ch. 334. *Consd. Re Dwyson & Powke*, [1896] 2 Ch. 720. *Reid. Biggs v. Peacock* (1882), 31 W. R. 148; *Goodier v. Edwards*, [1893] 3 Ch. 455; *Re Kaye & Hoyle's Contract* (1909), 53 Sol. Jo. 520; *Re Allott, Hanmer v. Allott*, [1924] 2 Ch. 498. *Mentd. Re Wilton's S. E.*, [1907] 1 Ch. 50.

**3443.** — *—*—*—*—A trust for sale is not put an end to by the beneficiaries attaining vested interests in the settled property, where there has been no unreasonable delay in the exercise of the trust.

Property was vested in trustees upon trust for sale with the consent of H., & his wife & the survivor during their lives, & after their death at the discretion of the trustees, & to hold the proceeds upon trust for the wife & H., successively for life, with remainder to the children on attaining twenty-one or marriage equally. H. died in 1878, having survived his wife, & there were three children, all of whom were adult. The property was sold in 1884 :—*Held* : the trust for sale was exercisable without the concurrence of the bene-



*Sect. 7.—Powers as to real estate and chattels real :  
Sub-sect. 2, D., E. & F. (a).]*

ficiaries.—*Re TWEEDIE & MILES* (1884), 27 Ch. D. 315; 54 L. J. Ch. 71; 33 W. R. 133.

*Annotations:—Distd. Re Sudeley & Baines*, [1894] 1 Ch. 334. *Consd. Re Douglas & Powell's Contract*, [1902] 2 Ch. 296. *Apld. Re Horsnall, Womersley v. Horsnall*, [1909] 1 Ch. 631. *Reid. Dodd v. Cattell*, [1914] 2 Ch. 1.

**3444.** ————.]—*Re HENZELL, HOLGATE v. HUMPHRIS*, [1887] W. N. 240.

**3445.** ————.]—*Re POWELL, BODVEL-ROBERTS v. POOLE*, [1918] 1 Ch. 407; 87 L. J. Ch. 237; 118 L. T. 567; 62 Sol. Jo. 330.

**3446.** ———— *Interest of all beneficiaries absolutely vested—Question of intention.*—A power given to the trustees of a settlement or will to sell land comprised in it can be exercised by them after the property has, under the trusts, become absolutely vested in persons who are *sui juris*, if on the construction of the instrument it appears to be the intention of the settlor or testator that it should be then exercised, provided that the power in its creation was not obnoxious to the rule against perpetuities, & that the *cestuis que trust* have not put an end to the trusts by electing to take the property as it stands.—*Re COTTON'S TRUSTEES & LONDON SCHOOL BOARD* (1882), 19 Ch. D. 624; 51 L. J. Ch. 514; 46 L. T. 813; *sub nom. COTTON v. LONDON SCHOOL BOARD*, 30 W. R. 610.

*Annotations:—Apld. Re Sudeley & Baines*, [1894] 1 Ch. 334. *Distd. Re Dyson & Fowke*, [1896] 2 Ch. 720. *Apld. Re Jump, Galloway v. Hope*, [1903] 1 Ch. 129; *Re Horsnall, Womersley v. Horsnall*, [1909] 1 Ch. 631.

**3447.** ————.]—It is a question of intention whether a power of sale of real estate given to trustees of a deed or will can be exercised by them after the beneficial interest in fee has vested absolutely; & the ct. has to look through the instrument to ascertain whether such an intention is manifested.

Where an intention is shown that the power should be exercised for the purposes of division of the estate among the persons absolutely entitled, the power does not determine on the death of the last tenant for life, but remains exercisable for a reasonable time afterwards for that purpose, & being so exercisable, does not infringe the rule against perpetuities.—*Re SUDELEY (LORD) & BAINES & CO.*, [1894] 1 Ch. 334; 63 L. J. Ch. 194; 70 L. T. 549; 42 W. R. 231; 38 Sol. Jo. 128; 8 R. 79.

*Annotations:—Distd. Re Dyson & Fowke*, [1896] 2 Ch. 720. *Apld. Re Horsnall, Womersley v. Horsnall*, [1909] 1 Ch. 631. *Reid. Re Jump, Galloway v. Hope*, [1903] 1 Ch. 129.

**3448.** ————.]—The question as to when a power of sale given to trustees becomes extinguished is a question of the intention of the donor of the power. Accordingly, where the beneficial interest in trust property has vested absolutely, but a conveyance of the property from the trustees has not been called for, the trustees' power of sale continues to exist in every case where this appears to have been the intention.—*Re JUMP, GALLOWAY v. HOPE*, [1903] 1 Ch. 129; 72 L. J. Ch. 16; 87 L. T. 502; 51 W. R. 266.

**3449.** ————.]—*Re DOUGLAS & POWELL'S CONTRACT*, No. 3586, *post*.

**3450.** ———— *Trustees of will having powers of tenant for life—Fee simple in trustees—Law of Property Act, 1925 (c. 20), Sched. 1, Part II. Paras. 5, 6 (c).*—Under the will of Lord S., immediately before the coming into operation of above

Act, the entirety of his Lancashire estates was limited to trustees for a term of one thousand years, with power to sell or exchange. In the meantime, & subject thereto, H. & G. were each entitled to a life interest in an undivided moiety of the estate. During the existence of the term the trustees were entitled to the rents & profits of the estate, which were to be applied in paying off incumbrances.—*Held*: (1) para 1 of Part IV. of the First Schedule to above Act, applied to land held in undivided shares vested in possession only when two elements were present, namely, the absence of any antecedent freehold estate, & present immediate beneficial enjoyment by possession, physical or notional, & therefore did not apply to this case; H. & G. were not "a person entitled to the income of 'land'" who had the powers of a tenant for life under s. 20, (1) (viii), of Settled Land Act, 1925 (c. 18) because, undivided shares in land being excluded from the definition of "land" in that Act, it was impossible for two undivided moieties of land to constitute "land" within the sect.; & as the entirety of the estate was settled by the will, & there was no tenant for life, or person having the powers of a tenant for life, the trustees of the will had the powers of a tenant for life, & the fee simple was vested in them under above paras. & Settled Land Act, 1925 (c. 18), s. 23 (b); (2) the powers of sale & exchange & other powers given to the trustees by the will remained exercisable by them.—*Re STAMFORD & WARRINGTON (EARL), PAYNE v. GREY*, [1927] 2 Ch. 217; 96 L. J. Ch. 461; 137 L. T. 633; 71 Sol. Jo. 620.

— *Effect of rule against perpetuities.*—*See PERPETUITIES*, Vol. XXXVII., pp. 91, 92, 115–117, Nos. 283, 284, 464–480.

— *Byresettlement of estate.*—*See SETTLEMENTS*, Vol. XL., pp. 774, 785, 786, Nos. 3050, 3157–3161.

— *Sale with consent of tenant for life—Bankruptcy of tenant for life.*—*See SETTLEMENTS*, Vol. XI., p. 706, Nos. 2397, 2399.

— *Tenant for life parting with interest.*—*See SETTLEMENTS*, Vol. XI., pp. 705, 706, Nos. 2394–2397.

*E. What Power of Sale Includes.*

*See, now, Trustee Act, 1925 (c. 19), s. 12.*

**3451.** *Trust to raise money by sale or mortgage—Money raised by mortgage—Whether sale to pay off mortgage allowed.*—*Qu.*: under a trust to raise money by sale or sales, mtgc. or mtges., whether the trustees, having raised the money by mtgc., can afterwards sell to pay off that mtgc.—*PALK v. CLINTON (LORD)* (1805), 12 Ves. 48; 33 E. R. 19.

*Annotations:—Reid. Milligan v. Mitchell* (1835), 4 L. J. Ch. 281; *Rainsbottom v. Wallis* (1835), 5 L. J. Ch. 92; *Thornycroft v. Crockett* (1848), 2 H. L. Cas. 239; *Page v. Cooper* (1853), 16 Beav. 396; *Jennings v. Jordan* (1881), 6 App. Cas. 698. *Mentd. Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1; *Watts v. Hyde* (1847), 2 Ph. 406; *Kensington v. Bouverie* (1854), 19 Beav. 39; *Darley v. L. C. & D. Ry.* (1863), 1 De G. J. & Sm. 204.

**3452.** *Power to sell & exchange—Payment for owelty of exchange authorised.*—The donees of a power of sale & exchange, may pay money for owelty of exchange, although they are not expressly authorised so to do.—*BARTRAM v. WHITCHOTE* (1833), 6 Sim. 86; 58 E. R. 527.

**3453.** ———— *Whether sale permissible when no exchange contemplated.*—(1) Construction of a power of sale & exchange in a settlement. Circum-

stances in which the exercise of a power of sale, although not inconsistent with the terms in which the power is created, would notwithstanding be a breach of trust.

(2) Reciprocal duties of trustees & *cetui que trust* where it becomes necessary to raise money to discharge incumbrances on or otherwise deal with the trust property.—MARSHALL v. SLADDEN (1849), 7 Hare, 428; 19 L. J. Ch. 57; 14 Jur. 106; 68 E. R. 177.

*Annotations* :—*Mentd.* *Reynell v. Sprye* (1849), 8 Hare, 222; *A. G. v. Chesterfield* (1854), 18 Beav. 596; *Baker v. Loader* (1872), L. R. 16 Eq. 49; *Barnes v. Addy* (1873), 23 L. T. 398; *Weise v. Wardle* (1874), L. R. 19 Eq. 171; *Tabor v. Cunningham* (1875), 24 W. R. 153.

**3454.** — *Not sale with reservation of minerals.* — A power of sale & exchange does not authorise trustees to sell the lands with a reservation of the minerals.—BUCKLEY v. HOWELL (1861), 20 Beav. 546; 30 L. J. Ch. 524; 4 L. T. 172; 7 Jur. N. S. 536; 9 W. R. 544; 54 E. R. 739.

*Annotations* :—*Consd.* *Re Gladstone, Gladstone v. Gladstone* [1900] 2 Ch. 101. *Reid.* *Re Nevill & Newells' Contract* (1899), 68 L. J. Ch. 94; *Re Rutland's S. E.*, *Rutland v. Bristol*, [1906] 2 Ch. 206; *Re Chaplin & Staffordshire Potteries Waterworks Co.'s Contract*, [1922] 2 Ch. 824.

— *Whether partition permissible.* — See PARTITION, Vol. XXXVI., pp. 305, 306, Nos. 32–38.

**3455.** *Power to sell—Option to purchase cannot be given.* — Under a simple trust or power for sale . . . the trustee cannot enter into a contract of this kind [option to purchase] binding those who may succeed him in the trust, to sell at a future time, at a price now fixed, without exercising any judgment whether the thing is beneficial or not at the time (PARKER, V.-C.).—CLAY v. RUFFORD (1852), 5 De G. & Sm. 768; 64 E. R. 1337.

*Annotations* :—*Apld.* *Oceanic Steam Navigation Co. v. Sutherland* (1880), 16 Ch. D. 239, n. *Reid.* *Re Female Orphan Asylum* (1867), 17 L. T. 59. *Mentd.* *Grant v. United Kingdom Switchback Ry.* (1888), 40 Ch. D. 135.

**3456.** — — — It would be most dangerous if a trustee could enter into a contract for sale binding the estate for some years afterwards whatever might be the alteration in the value of the property (JAMES, L.J.).—OCEANIC STEAM NAVIGATION CO. v. SUTHERBERRY (1880), 16 Ch. D. 236; 50 L. J. Ch. 308; 43 L. T. 743; 45 J. P. 238; 29 W. R. 113, C. A.

*Annotations* :—*Consd.* *Johnson v. Clarke*, [1928] Ch. 847. *Reid.* *Re Judd & Poland & Skelcher's Contract*, [1900] 1 Ch. 684; *Re Chaplin & Staffordshire Potteries Waterworks Co.'s Contract*, [1922] 2 Ch. 824. *Mentd.* *Re Cooper, Cooper v. Vesey* (1882), 20 Ch. D. 611; *New Windsor Corp. v. Stovell* (1884), 27 Ch. D. 665; *Hewson v. Shelley* (1913), 82 L. J. Ch. 551; *Re Kennal & Still's Contract*, [1923] 1 Ch. 293.

**3457.** — *To pay off mortgage on property—Property may be sold subject to mortgage.* — Under a trust to sell property which was subject to a mtge., & out of the proceeds to pay off the mtge. & pay the surplus to the mtgor.:—*Held*: a sale subject to the mtge. was valid.—MANSEIR v.

DIX (1857), 8 De G. M. & G. 703; 3 Jur. N. S. 252; 44 E. R. 561, L. J.J.

**3458.** — *Grant of lease without power—Sale subject to lease.* — Trustees who had a power of sale, but no power of leasing, first granted leases & afterwards sold subject to them. Infants being interested the ct. afterwards sanctioned the sale on their behalf:—*Held*: the purchaser was bound to complete.—MICHOELS v. CORBETT (1805), 34 Beav. 376; 55 E. R. 680; *affd.*, 3 De G. J. & Sm. 18, L. J.J.

— *Whether mortgage authorised.* — See MORTGAGE, Vol. XXXV., pp. 281, 282, Nos. 349–355.

*Power of sale to pay debts—Lands subject to mortgage—Debts satisfied—No power to redeem.* — See MORTGAGE, Vol. XXXV., p. 351, No. 941.

#### F. Exercise of Power.

##### (a) In General.

**3459.** *Necessity for all trustees to concur.* — ANON. (1363), Jenk. 43; 145 E. R. 33.

**3460.** *Cannot be exercised by assign.* — A trust for sale vested in A. & his heirs cannot be executed by an assign of A.—BRADFORD v. BELFIELD (1828), 2 Sim. 264; 57 E. R. 788.

*Annotations* :—*Consd.* *Jones v. Price* (1841), 11 Sim. 557. *Apld.* *Cooke v. Crawford* (1842), 13 Sim. 91. *Apprvd.* *Re Rumney & Smith*, [1897] 2 Ch. 331. *Mentd.* *Shepherd v. Harrison* (1871), J. R. 5 H. L. 116.

**3461.** *Power for particular purpose—Payment of debts—Amount to be sold left to discretion of trustees—Whether trustees can sell more than necessary.* — Lands settled in fee on trust, to sell so much as the trustees should think fit for payment of debts & legacies, & the overplus to his daughter & her exors. *Qu.*: whether the trustees can sell more than is sufficient.—POPIHAM v. HOBERT (1876), 1 C. as. in Ch. 280; 22 E. R. 801, L. C.

**3462.** — *Power to sell if personal estate insufficient—Trustees may sell without showing personal estate insufficient.* — Where testator devised his estate at B. & C. to a trustee; said that in case his personal estate should be insufficient for the payment of his debts, he charged them upon his estate at B. and C. & gave his trustee a power of sale & of giving receipts for the purchase-money of the real estate:—*Held*: the concurrence of the parties beneficially interested in the real estate was not necessary to a sale thereof by the trustee.—GREETHAM v. COLTON (1805), 34 Beav. 615; 6 New Rep. 311; 13 L. T. 34; 11 Jur. N. S. 848; 13 W. R. 1009; 55 E. R. 773.

*Annotations* :—*Reid.* *Bank of Ireland v. McCarthy*, [1898] A. C. 181; *Re Richards, Uglow v. Richards*, [1902] 1 Ch. 76.

**3463.** — *Subsequent devise to beneficiaries absolutely—Trustees may exercise power if necessary.* — Testator, after directing payment of his debts, funeral & testamentary expenses & bequeathing several legacies gave his residuary real

32 S. C. R. 23; 22 C. L. T. 197.—CAN

1. — *To cestui que trust.* —

McMILLAN v. GUNN (Man.) (1907), 5 W. L. R. 479.—CAN.

g. *Whether implied power in trustee to sell property.* —

SMITH v. HOBERTSON (1909), 6 E. L. R. 483; 7 E. L. R. 312.—CAN.

h. *When power may be exercised.* — In *Blackwood v. Borrowes* (4 Tru. & War. 468) Sir E. Sugden says, "It is settled by the authorities, that unless there be a restriction against an immediate sale, the power may be exercised at once, so as to increase, or rather advance, the interest of the tenant for life at the expense of the remainder-man; for if, instead of waiting for the expiration of the particular estate, the reversionary interest

premise.—EDINBURGH LIFE ASSURANCE CO. v. ALLEN (1871), 18 G. 125.—CAN.

r. *Power to sell residue of estate.* —

Trustees were empowered by settlement to lay out & invest the whole or any part or parts of the residue & remainder of the fortune of H., settlor, so limited in trust as aforesaid, in the purchase or purchases of land in fee (free from incumbrances) or such other good security as they shall think fit, in England or elsewhere, & a power of sale was given to sell lands so purchased:—*Held*: to give a sufficient power to the trustees to sell lands of the residue of the estate generally.—*Re EVANS* (1872), 4 Ch. Ch. 83.—CAN.

t. *Trust to sell.* — CLARK v. KEEFER (1898), 29 O. R. 567.—CAN.

a. *Duty to account for value of expectancy.* — *Re JONES' TRUSTS* (N. S.) (1909), 7 E. L. R. 496.—CAN.

b. *Whether power to sell excepted lands.* — *WHYTE'S FACTOR v. WHYTE* (1891), 18 L. (Ch. of Sess.) 376; 28 Sc. L. R. 78.—SCOT.

#### PART V. SECT. 7, SUB-SECT. 2.—F. (a).

c. *Power of court to postpone sale—Where power directory.* — *BENJAMIN v. SAUNDERS* (1891), 17 V. L. R. 68.—AUS.

d. *Duty to give notice of sale—To congregation on sale of church lands.* — *Re METHODIST CHURCH, MANITOU* (1892), 8 Man. L. R. 136.—CAN.

e. — *To equitable owners.* — *OLAND v. MCNEIL & WALLACE* (N. S.) (1902),

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**Sub-sect. 2, F. (a), (b) & (c).]**

& personal estate to trustees as to certain parts of his real estate upon trusts by way of settlement; & as to the residue of his real & personal estate he gave same to four persons all *sui juris* absolutely; & he declared that his trustees should have power to sell his real estate at such times as they should deem expedient, & should hold the proceeds upon the trusts of his will. The trustees, purporting to exercise their power of sale, sold part of the real estate comprised in the latter residuary gift:—*Held*: as between the vendors & the purchaser, the power of sale was valid not on the ground that testator showed any intention that it should be exercised for the purpose of division among the beneficiaries, but on the ground that the debts & legacies were charged on the real estate.—*Re DYSON & FOWKE*, [1896] 2 Ch. 720; 65 L. J. Ch. 791; 74 L. T. 759; 45 W. R. 28.

**3464. — To raise fixed sum—Discretionary provision for valuation to ascertain amount—Trustees may sell whole of real estate in spite of provision.**—A direction by testator that his trustees shall stand seised & possessed of his real & personal estate upon trust to raise & pay an annuity, & subject thereto to raise out of his real & personal estate a sufficient sum to make up, with what his daughter A. had received on her marriage, an amount equal to the property his other children would be entitled to under his will; & a devise of all his real estate & the residue of his personal estate to his other six children as tenants in common, & until a sale of all his real & personal estate should be made; & in order that no such sale should be required to ascertain the amount of the share of his daughter A., he authorised his trustees, if they should think fit, to cause a valuation to be made of his real & personal estate, & according to its amount, after deducting debts, etc., to fix the share of his daughter A., which should be accepted by her; with a further direction that she should not be entitled to any interest on her share, until each of his other children had received interest on a sum equal to the amount previously advanced to her; & that no valuation should be required to be made until each of the other children had received such equal sum; & a clause declaring that the receipts of the trustees shall be sufficient discharges for any money payable to them under his will, & that the person paying it shall not be liable to ascertain the necessity or regularity of any mtge., sale or disposition under the trusts of the will:—*Held*: the trustees had a power of sale of the whole real estate of testator, which it was at their discretion to exercise in case they did not think fit to proceed by way of valuation.—*BIRD v. FOX* (1853), 11 Hare, 40; 68 E. R. 1178.

**3465. — To discharge incumbrances—Proceeds applied in paying inclosure expenses—Proceeds properly applied.**—Trustees under a settlement had power to sell & exchange the estates, & were to apply the proceeds of a sale in discharging sub-

sisting incumbrances, or in the purchase of other land. In 1852, they sold part of the estates, & paid the proceeds to the tenant for life, who applied the money in payment of the expenses of inclosures. By Inclosure Act, 1845 (c. 118), the person in possession or receipt of the rents & profits, in this case the tenant for life, & not the trustees, may charge the allotments with the expenses of inclosure to the extent of £5 per acre by executing a mtge., & by Inclosure Act, 1848 (c. 99), the sum so raised is to be paid to the comrs. The tenant for life died without having executed such a mtge.:—*Held*: the sums expended were nevertheless to the extent aforesaid a charge on the allotments, & were to be allowed as a proper application of the money produced by the sale.—*VERNON v. MANVERS (EARL)* (1862), 31 Beav. 617; 1 New Rep. 117; 32 L. J. Ch. 244; 7 L. T. 553; 9 Jur. N. S. 9; 11 W. R. 133; 54 E. R. 1278.

**3466. Sale decreed by court—To save expense.**—A., by his will devises, that trustees shall sell his real estate, & what arises by such sale shall go to his daughter & her issue, & if she die without issue, then to two other daughters. Pltfs. preferred their bill to have the real estate sold, & to have the money arising by such sale; but the two daughters defts. opposed it because of the contingent interest they had by the will, in case pltf. died without issue; but pltf. insisted there could be no such limitation of a chattel, as this would be, if the land was sold; & the ct. accordingly did decree a sale to be made; for it would be preposterous to oblige the trustees to sell lands in order to lay the money arising out again on lands; & being pltf. was of age, she could bar her two sisters by a recovery, which this ct. might save the trouble & expense of, by decreeing this sale, & converting the land into money.—*RIDGE v. HUDSON* (1717), Bumb. 12; 145 E. R. 577.

**3467. Duty to receive purchase-money personally.**—There is no absolute rule that in all cases a purchaser can require the vendor to receive the purchase-money personally; but the vendor cannot refuse, where circumstances justify the purchaser in requiring him to do so. *Semble*: where the vendor is a trustee, such a request is reasonable.—*VINEY v. CHAPLIN* (1858), 2 De G. & J. 468; 27 L. J. Ch. 434; 31 L. T. O. S. 142; 4 Jur. N. S. 619; 6 W. R. 562; 44 E. R. 1071, L. C. & L. J.J.

**Annotations:—***Consd. Re Bellamy & Metropolitan Board of Works* (1883), 21 Ch. D. 387. *Redd. Bourdillon v. Rocho* (1858), 27 L. J. Ch. 681; *Plumer v. Gregory* (1874), L. R. 18 Eq. 621; *Essex v. Daniell*, *Daniell v. Essex* (1875), L. R. 10 C. P. 538; *Re Shanks, Ex p. Swinbanks* (1879), 11 Ch. D. 525; *Gordon v. James* (1885), 53 L. T. 641; *Re Hething & Merton's Contract*, [1893] 3 Ch. D. 269. *Mentd. St. Aubyns v. Smart* (1867), L. R. 5 Eq. 183; *Dundonald v. Masterman* (1869), L. R. 7 Eq. 504; *A.-G. v. Odell* (1905), 92 L. T. 621.

(b) *Consents.*

*See, now, Law of Property Act, 1925 (c. 20), s. 26; Settled Land Act, 1925 (c. 18), s. 108.*

**3468. Power of sale with consent of three trustees—Death of one trustee—Appointment of new**

be sold, it must of course be sold at a much less price than the estate in possession would have produced. The authorities have, however, settled the question, & wisely I think established, that if there be no intention expressed, the power may be exercised immediately.—*BLACKWOOD v. BORROWES* (1843), 21 Beav. 441; 52 E. R. 930.—*IR.*

**k. Trustees described as "my said executors"**—Whether power of sale can be exercised by trustee for time being.—*Re ROBINSON, SPROULE v. SPROULE*, [1912] 1 L. R. 410.—*IR.*

**1. Power for particular purposes.—Brickmaking on premises for twenty-one years, then sale.**—Where testator by will left property to two persons for life, & directed his trustees after the death of the survivor to hold the property & to carry on the business of brickmaking thereon for the benefit of the children of such persons for a period of 21 years, & then to sell the property:—*Held*: there was no power to sell contrary to the express provisions of the will, except perhaps in a case of emergency, & if this were

merely a question of the consent of the ct. such consent should not be given in the circumstances.—*DORREL v. LOUDON*, [1920] N. Z. L. R. 131.—*N.Z.*  
**m. Validity of sale to wife of trustee—Trustees selling under trust for sale.**—*ROBERTSON v. ROBERTSON*, [1924] N. Z. L. R. 552.—*N.Z.*

**PART V. SECT. 7, SUB-SECT. 2.—F. (b).**

**n. Power of sale with consent of tenant for life.**—*Re TRELEVEN & HORNER* (1881), 28 Gr. 624.—*CAN.*

trustee in place of retiring trustee—Whether consent of new & continuing trustees sufficient.]—*HALL v. DEWES*, No. 3179, *ante*.

**3469. Power of sale with consent of tenant for life—Judgment entered against tenant for life—Necessity for concurrence of judgment creditors.]—**A power of sale & exchange was given to trustees, with the consent of the tenant for life. Judgments were entered up against the tenant for life. *Qu.*: whether the trustees could sell without the concurrence of the judgment creditors.—*LEIGH (LORD) v. ASHBURTON (LORD)* (1848), 11 Beav. 470; 50 E. R. 899.

**3470. Power of sale with consent of beneficiaries free from disability—If no such beneficiaries at discretion of trustees—Death of beneficiary & assignment of share to infant.]—**Power of sale under will to trustees, with consent of such of the beneficiaries as should be free from disability other than coverture; & if there were none, then at the discretion of the trustees. None of the persons who took under the will were under such disability, but one had died & devised his share to infants:—*Held*: the trustees might exercise the power.—*ARKELL v. HENLEY* (1855), 3 W. R. 259.

**3471. Power of sale with consent of seven tenants for life—Death of one tenant for life.]—**Testator devised his real estate to trustees upon trust to sell & to hold the proceeds upon trusts for his children & their issue, subject to a proviso that no sale should be made without the consent of his sons & daughters. Testator left seven children, one of whom, a daughter, afterwards died, & her husband had become absolutely entitled to her share. The trustees, with the consent of the surviving children & of the husband of deceased daughter, put up the estate for sale:—*Held*: the question, whether an effectual sale could be made without consent of all the seven sons & daughters, was too doubtful for the title to be forced upon a purchaser.—*SYKES v. SHEARD* (1863), 2 De G. J. & Sm. 6; 3 New Rep. 144; 33 L. J. Ch. 181; 9 L. T. 430; 9 Jur. N. S. 1262; 12 W. R. 117; 40 E. R. 276, L. JJ.

*Annotations*:—*Consd. Jefferys v. Marshall* (1870), 23 L. T. 549; *Re Goswell's Trusts*, [1915] 2 Ch. 106.

**3472. Power of sale with consent of tenant for life entitled to possession—Life estate subject to annuity—Rents & profits substituted by codicil for annuity—Necessity for consent of both tenant for life & former annuitant.]—**Testator by his will devised his real estates to trustees for a thousand years, & subject thereto in strict settlement. The trusts of the term were to pay testator's wife a life annuity of £200, & subject thereto, for the persons entitled under the prior limitations. He also gave the trustees a power to sell the property, the power to be exercised during the life of any tenant for life, who should be for the time being entitled to the possession, or to the receipt of the rents of the estates, with his consent. The sale moneys were to be reinvested in land. By a codicil testator directed his trustees to stand possessed of the term, & of the like term to arise in the real estates which might be purchased under the trusts of the will, on trust to pay the surplus of the rents of all the estates, after paying the interest on his mtge. & other debts, to his wife, during her widowhood, in lieu of the annuity. In case she should marry again, the trust for payment of the annuity was to take the place of the trust for payment of the surplus rents. Testator's

debts having been all paid:—*Held*: the trustees could exercise the power of sale with the consent of the tenant for life, the widow also consenting.—*ROBERTSON v. WALKER* (1875), 44 L. J. Ch. 220; 31 L. T. 817; 23 W. R. 224, L. C. & L. JJ.

**3473. Power of sale with consent of beneficial tenant for life—Death of tenants for life—Tenant in tall an infant.]—**N. devised his estates to trustees, in trust for A. for life, then for B. for life, & then for C. in tail, with a power of sale & enfranchisement with the consent of the person for the time being entitled as beneficial tenant for life; & directed that no repurchase or re-investment should be made while there should be any person entitled as beneficial tenant for life or tenant in tail in possession, & of the age of twenty-one years, without the previous consent of such person. A. & B. were both dead, & C. was an infant:—*Held*: the trustees could during the minority of C. exercise the power of sale & enfranchisement without consent, & make a good title.—*Re NEAVE & CHAPMAN & WREN* (1880), 49 L. J. Ch. 642; 43 L. T. 152; 28 W. R. 976.

**3474. Necessity for consent of court—Administration action pending.]—***TURNER v. TURNER*, No. 3371, *ante*.

**3475. ———.]—**Testator devised his real estate in strict settlement. The will contained a common law power for the trustees, during the lifetime of the tenant for life with his consent, to sell the settled property. A legatee, who was also entitled in remainder to a share of the settled property subject to a life estate & estates tail, brought an action against the trustees to administer the estate. By the order made on the further consideration of the action the costs were directed to be taxed & various directions were given. Further consideration was not adjourned, but general liberty to apply was reserved. After the making of this order the trustees, with the consent of the tenant for life, but without the sanction of the ct. sold part of the settled estate. The trustees applied to the taxing master to have their costs incurred in relation to the sale taxed. The taxing master refused to tax them, on the ground that the trustees were not entitled to exercise the power of sale without first obtaining the sanction of the ct., having regard to the administration action. No proceedings had been taken to impeach the sale:—*Held*: the trustees were entitled to exercise the power of sale, & to have the costs incurred in relation thereto taxed.—*Re MANSER, RHODES v. JENKIN* (1885), 54 L. J. Ch. 883; 52 L. T. 806; 33 W. R. 727.

*Annotations*:—*Mentd. Re Nelson & Hastings* (1885), 30 Ch. D. 1; *Re Johnson & Weatherall* (1888), 37 Ch. D. 433.

#### (c) Requests.

**3476. Trust for sale—Elaborate provisions as to consent—Trustees not bound to sell at request.]—***DEARDEN v. BYRON (LORD)* (1820), 8 Price, 417; 146 E. R. 1249.

**3477. ——— Trustees with discretion not to sell—Unless requested by tenant for life—Remainderman cannot compel trustees to sell.]—**Testator devised & bequeathed all his real & leasehold estates to trustees upon trust for sale, & after providing for investment of the proceeds & payment of the income thereof to his widow for life, & afterwards for distribution among certain persons, he declared "that it shall be lawful for my trustees or trustee, with the consent of my wife, during her life, to allow any part or parts of my residuary estate to

o. ———.]—*Re HOLLOWE'S TRUSTS*, [1906] 1 I. R. 526.—*IR.*

p. *Necessity for consent of widow of testator.*]—*EASTERN TRUST CO. v.*

*DWYER*, [1927] 1 D. L. R. 386; 59 N. S. R. 158.—*CAN.*

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remain in their actual state of investment at the time of my decease; & that it shall not be necessary for them to sell my real or leasehold estates, or any part thereof, during the life of my said wife, unless she shall in writing request them so to do." The trustees were not agreed as to the expediency of a sale; but the remaindermen desired it. Testator's widow had not made any request in writing to the trustees:—*Held*: it was not obligatory on the trustees to sell the real & leasehold estates during the life of testator's widow, unless she should in writing request them so to do, or unless the trustees were both of opinion that a sale ought to take place; but if they did not so agree that a sale was desirable, & there was no such request in writing, then they could not be compelled to sell.—*Re LEVER, CORDWELL v. LEVER* (1897), 76 L. T. 71, C. A.

*Annotations*:—*Mentd.* *Re* Thomas, Weatherall v. Thomas, [1900] 1 Ch. 319; *Re* Farnham's Settlement, Law Union & Crown Insee. v. Hartopp, [1904] 2 Ch. 561.

**3478. — Direction against exercise save with consent or on request—Person required to consent may keep property unsold.**—A trust for sale, with a direction that it shall not be exercised unless a particular person shall in writing consent to or request a sale, is not an absolute & imperative trust to sell, but gives to the person required to consent a right to have the property retained unsold.

Where by a deed of family arrangement certain freehold, messuages, lands, & hereditaments were conveyed to trustees to be held by them in fee simple upon the trusts in the deed declared, & the deed provided that the trustees should, "upon the request in writing of the parties hereto of the first, second & third parts respectively," sell the freehold hereditaments thereby conveyed, & hold the proceeds of sale upon certain trusts, & where no request had been made to the trustees to sell the properties:—*Held*: the real estate comprised in the deed remaining unsold had not been converted in equity into money, but still retained its character of real estate.—*Re GOSWELL'S TRUSTS*, [1915] 2 Ch. 106; 84 L. J. Ch. 719; 113 L. T. 319; 59 Sol. Jo. 579.

**3479. Power of sale at request of person selsed of freehold & inheritance—Tenant for life with ultimate remainder—Subject to intervening limitations—Request of tenant for life insufficient.**—A power of sale & exchange was given to the trustees of a settlement, at the request of the person for the time being "seised of the freehold & inheritance of the manors," etc.:—*Held*: (1) reading the word "and" conjunctively, the power could not be exercised at the request of a tenant for life, who, subject to intervening limitations, had the ultimate remainder in fee; (2) the word "and" could not be read disjunctively as "or."—*MALMESBURY v. MALMESBURY, PHILLIPSON v. TURNER* (1862), 31 Beav. 407; 54 E. R. 1196.

**3480. Power of sale at request of persons entitled to actual freehold—Request of tenant for life—Speculative evidence by remainderman of future increase in value—Power may be exercised in spite of such evidence.**—Independently of the cumulative powers of sale given to tenants for life by

Settled Land Act, 1882 (c. 38), the tenant for life & the trustees under a will which gives them power to sell the estate at the request & by the direction of the person or persons for the time being entitled to the actual freehold of the devised property, will not be restrained from selling the estate at the request & for the benefit of the tenant for life on merely speculative evidence adduced by the remainderman objecting to an immediate sale, of an expected future increase in the value of the property from the development of coal mines, & the construction of a railway through the estate.—*THOMAS v. WILLIAMS* (1883), 24 Ch. D. 558; 52 L. J. Ch. 603; 49 L. T. 111; 31 W. R. 943.

*Annotations*:—*Re* Ray's S. E. (1884), 53 L. J. Ch. 205. *Mentd.* *Re* Llewellyn, Llewellyn v. Williams (1887), 37 Ch. D. 317.

**3481. Power to sell at request of tenant for life—Trustees must sell when requested.**—Money which the trustees of a settlement are empowered to invest, at the request of the tenant for life, in the purchase of particular land is money which is "liable to be laid out in the purchase of land" within the meaning of Settled Land Act, 1882 (c. 38), s. 33.

Where by a settlement, which comprised a moiety of certain freeholds, the trustees were empowered, at the request of the tenant for life, to invest money comprised in the settlement in the purchase of the other or unsettled moiety of the freeholds:—*Held*: the case came within Settled Land Act, 1882 (c. 38), s. 33, & money in the hands of the trustees might be invested, as capital money, in the purchase by them, jointly with the owner of the unsettled moiety, of land convenient to be held together with the freeholds.

Where there is a direction or power to trustees to sell or purchase at the request of the tenant for life, that means that if the tenant for life makes the request the trustees must sell or purchase & not merely that they may do so (*KEKEWICH, J.*).—*Re HILL, HILL v. PITCHER*, [1896] 1 Ch. 962; 65 L. J. Ch. 511; 74 L. T. 460; 44 W. R. 573.

*(d) Discretion of Trustees.*

*See, now*, Law of Property Act, 1925 (c. 20), s. 26; Law of Property (Amendment) Act, 1926 (c. 11), sched.

**3482. Power of sale "as soon as conveniently might be"—Trustees have discretion to postpone—Test of exercise of discretion.**—Testator directed his trustees, "as soon as conveniently might be after his decease to sell his real estates," & invest the produce in Govt. or real securities. The trustees postponed the sales for eleven & thirteen years. The value of the estates at testator's death, was £1,580, which would then have produced £2,030 Consols. The estimate, however, realised £2,122, but which only produced £2,300 Consols:—*Held*: (1) under the terms of the will, the trustees had a discretionary power of postponing the sales; (2) such discretion had been discreetly exercised; (3) where trustees have a discretion, the test of a negligent breach of trust is, what would have been the course of the ct. under similar circumstances.—*WARNER v. TORKINGTON* (1835), 4 L. J. Ch. 193.

**3483. — — — — —**—*EDWARDS v. EDMUNDS, No. 3832, post.*

**PART V. SECT. 7, SUB-SECT. 2.—**  
**F. (d).**

**q. Power of sale at discretion of trustees—No time being limited—Court will not interfere with their discretion.**—Where a power of sale is given to trustees & their survivor, unlimited as to the time of exercising it, the ct. will

not interfere by injunction with the exercise of it by the surviving trustees, upon the grounds:—(1) that the property would realise a higher price if the sale were postponed, there being conflict of evidence on this point, or (2) that the trustee had entertained an offer of money to refrain from selling,

such offer having been eventually refused.—*JAMES v. EVANS* (1877), 3 V. L. R. 132.—**AUS.**

**r. — — — — —**—*ROWE v. WINSTANLEY* (1859), 7 Gr. 141.—**CAN.**

**t. — — — — —**—If under a will a trustee has a discretion to sell or not to sell real estate, the ct. will not interfere by

**3484. Power of sale at discretion of trustees—Coupled with direction as to moneys arising from sale—Power nevertheless discretionary.]—**Testator after devising his real estates in strict settlement subject to the payment of his debts & legacies, declared that it should be lawful for his trustees, & he authorised & empowered them, if they in their discretion should think fit, absolutely to sell his estate at 'C'; & after giving them full powers in regard to the conduct of the sale, he directed & declared that they should stand possessed of the moneys arising from the sale upon trust, after payment of all costs, to apply & dispose of the remainder in such manner as therein-before had been directed concerning the residue of his testator's personal estate. One of the trustees was afterwards removed from his office by a codicil. The sale of the estate was not required for the payment of debts or legacies:—*Held*: the power of sale vested in the trustees was discretionary, & the residuary legatee of the personality could not compel a sale.—*SHIPPERDSON v. TOWER* (1842), 1 Y. & C. Ch. Cas. 441; 6 Jur. 658; 62 E. R. 961.

*Annotations:—Mentd.* *Newman v. Lade* (1842), 1 Y. & C. Ch. Cas. 680; *Re Trenchard, Trenchard v. Trenchard*, [1905] 1 Ch. 82.

**3485. — Annuity charged on personal estate—Personal estate insufficient—Trustees not compelled to sell real estate.]—**Testator gave his real & personal estate to trustees, in trust to convert his personal estate, except his leaseholds, & out of the produce "to appropriate a sufficient portion" to pay an annuity which he had agreed to pay on the marriage of his daughter. He gave his trustees a discretionary power to sell his real & leasehold estates, & they were to hold the produce in the manner directed concerning the money arising from his residuary personal estate. The debts exhausted the personal estate, but the realty & leaseholds were sufficient to pay the annuity. A bill having been filed before the annuity was in arrear, to have a fund set apart to secure it:—*Held*: the trustees were not bound to sell, & c. only made a declaration that the annuity constituted a charge on the whole estate.—*BURRELL v. DELEVANTE* (1862), 30 Beav. 550; 31 L. J. Ch. 365; 8 Jur. N. S. 204; 10 W. R. 362; 51 E. R. 1003.

*Annotations:—Mentd.* *Woolston v. Woolston* (1877), 37 L. T. 631; *Fano v. Fano* (1879), 13 Ch. D. 228.

**3486. Power of sale to raise money for charges if necessary—Considerably more than required raised by sale—Sale valid.]—**Testator devised his real estates to trustees, in trust, during the first fifteen years after his death, to apply the rents in discharge of the charges & incumbrances on his estates, & also of the debts which he should owe at his decease; & if, by any reason whatever, in the opinion of his trustees, a sale should become necessary of any of the estates, for the purpose of raising any sums of money charged on his estates, before the expiration of the fifteen years, then he authorised the trustees to make such sale, & to

apply the produce in discharge of such incumbrances; & he declared that their receipts for any money payable to them under his will, should discharge the persons paying the same from being answerable for the application thereof, or from being bound to inquire as to the necessity or expediency of any sale which might be made by the trustees. Testator's personal estate being insufficient to pay his debts, & the rents of his real estates being insufficient to pay the interest of the incumbrances thereon, the trustees sold the whole of the estates; & thereby raised considerably more than the amount of the incumbrances. The ct. in a suit for specific performance held that the power of sale depended on the opinion of the trustees that a sale was necessary; & decreed the purchaser to complete his purchase.—*RENDLESHAM (LORD) v. MEUX* (1844), 14 Sim. 240; 60 E. R. 353.

**3487. Power in terms discretionary—Sale necessary to raise legacies—Trustees must sell.]—**Testator gave all his property to trustees upon trust, as to the real estate, to manage & receive the rents, with power to grant leases, & with power also, if they should consider it advisable, but not otherwise, to sell in such manner, at such time, & for such price as they should think proper, & to invest the proceeds, together with his residuary personal estate, in the securities therein mentioned. The income of the realty, until sale, & of the produce, if & when sold, together with the income of the securities arising from his residuary personalty, were given to testator's widow for life, & after her death, the trustees were directed to sell so much of the securities as would pay certain legacies; & the income of the remainder of the securities, & of his real estate, if not then sold, & until sale, & of the produce thereof, if & when sold, were given to A. for life, with remainders over:—*Held*: the power of sale, though in terms discretionary, was conferred upon the trustees for the purposes of the will, & inasmuch as the proceeds of sale were applicable to the payment of the legacies, it was the duty of the trustees to exercise the power for the purpose of raising the legacies, the personal estate having proved insufficient.—*NICKISSON v. COCKILL* (1863), 3 De G. J. & Sm. 622; 2 New Rep. 557; 32 L. J. Ch. 753; 8 L. T. 778; 9 Jur. N. S. 975; 11 W. R. 1082; 46 E. R. 778, L. C.

*Annotation:—Distd.* *Re Courtier, Coles v. Courtier, Courtier v. Coles* (1886), 34 Ch. D. 136.

**3488. — Absolute trust for sale created—Discretion of trustees as to time & mode of sale.]—***MINORS v. BATTISON*, No. 3246, *ante*.

**3489. — — — —.]—**Testator devised & bequeathed his real & personal estate to trustees upon trust "either" to retain it in the same state as at his death "or" at such times as the trustees thought fit to sell & convert it into money & to invest the proceeds in certain securities & to hold the trust estate in trust to pay the income to plaintiff for life & subject thereto in trust for other

its advice or direction, but will leave the trustee to the exercise of his discretion.—*Re PARKER* (1873), 20 Gr. 389.—**CAN.**

**a. — —.]—***LEWIS v. MOORE* (1896), 24 A. R. 393.—**CAN.**

**b. — —.]—**Testator directed his trustees, "as soon as conveniently may be" after the happening of a certain event, to sell the B. Estate. He also declared that the convenience of the period of sale should be in the uncontrolled discretion of the trustees, who might postpone the sale for any time, & in the meantime manage or let the estate:—*Held*: the trustees were

entitled to indefinitely postpone the sale, & an order could be made under *Trustees Act*, 1883, Amendment Act, 1891, s. 16, sanctioning the carrying-on indefinitely by the trustees of the business of sheep-farmers on the estate.—*Re LEVIN'S WILL, McLEAN v. LEVIN* (1905), 26 N. Z. L. R. 62.—**N.Z.**

**c. — —.]—**A tenant for life is bound to keep the premises in repair; & the ct. will not apply the undisposed of personality in effecting such repairs. The fact that the tenant for life (the widow) has not the means of making the repairs, & that the premises are deteriorating in consequence of non-

repair, are proper matters for trustees with power of sale to take into consideration in determining whether or not they will sell.—*HOLMES v. WOLFE* (1879), 26 Gr. 228.—**CAN.**

**d. Trust for conversion—Power of postponement—Share of one beneficiary becoming vested in possession—Right to demand sale.]—**Where testator has created a trust for sale & conversion with a power of postponing the sale & conversion, & the proceeds are to be held in trust for various beneficiaries who may attain 21 years or marry, the fact that a share of one of the beneficiaries has become vested in



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beneficiaries. The will contained a common form power of postponement & the trusts were such as are ordinarily applicable to personal estate:—*Held*: the will created an immediate trust for sale with a mere power of postponement which was a trust for sale within Settled Land Act, 1882 (c. 38), s. 63.—*Re JOHNSON, COWLEY v. PUBLIC TRUSTEE*, [1915] 1 Ch. 435; 84 L. J. Ch. 393; 112 L. T. 935; 59 Sol. Jo. 333.

**3490. Trust to sell at discretion of trustees—Trust for immediate sale not created—Discretionary power.]**—General devise & bequest to trustees upon trust to sell at discretion such parts as should not consist of money & out of the produce to pay debts, & to invest the residue, & to stand possessed of the real & personal estate, & securities upon trust to pay the rents, interest, & dividends, & annual produce thereof to one for life, followed by a devise & bequest of the real & personal estate & the securities on which same might be invested, to another, his heirs, exors., administrators, & assigns according to the nature & quality thereof respectively:—*Held*: this did not create a trust for the immediate sale & conversion of the real estate, but amounted only to a power of sale in the trustees.—*Re HOTCHKYS, FREKE v. CALMADY* (1886), 32 Ch. D. 408; 55 L. J. Ch. 546; 55 L. T. 110; 34 W. R. 569, C. A.

*Annotations*:—*Consd.* *Re Wagstaff's S. E.*, [1909] 2 Ch. 201. *Distd.* *Re Johnson, Cowley v. Public Trustee*, [1915] 1 Ch. 435. *Refd.* *Re Douglas & Powell's Contract*, [1902] 2 Ch. 296; *Re Willis, Willis v. Willis*, [1902] 1 Ch. 15; *Gresham Life Assce. Soc. v. Crowther* (1914), 111 L. T. 887. *Mentd.* *Conway v. Fenton* (1888), 40 Ch. D. 512; *Frewen v. Law Life Assce. Soc.*, [1896] 2 Ch. 511; *Re Montagu, Derbshire v. Montagu*, [1897] 1 Ch. 685; *Re Freeman, Dimond v. Newburn*, [1898] 1 Ch. 28; *Re Tomlinson, Tomlinson v. Andrew*, [1898] 1 Ch. 232; *Honywood v. Honywood*, [1902] 1 Ch. 347; *Re Kensington, Longford v. Kensington*, [1902] 1 Ch. 203; *Re Farnham's Settlement, Law Union & Crown Insce. v. Harrop*, [1904] 2 Ch. 561; *Re McClure's Trusts, Carr v. Commercial Union Insce.* (1906), 76 L. J. Ch. 52; *Re Lyons, Beck v. Lyons* (1912), 107 L. T. 146; *Re Gray, Public Trustee v. Woodhouse*, [1927] 1 Ch. 242; *Re Robins, Holland v. Gilling*, [1928] 1 Ch. 721.

**3491. Power to postpone sale at discretion of trustees—Unless sale required by tenant for life—Trustees unable to agree—Remainderman has no power to compel sale.]**—*Re LEVER, CORDWELL v. LEVER*, No. 3477, *ante*.

**Duty of trustees to sell when requested.]**—*See* Sub-sect. 2, F. (c), *ante*.

**(c) Sale of Property Purchased in Breach of Trust.**

**3492. Power of trustee to sell—With concurrence of one of persons interested.]**—Trustees under a will which contained a power to sell real estate, but no power of investing the trust funds in real estate, bought real estate & had it conveyed to the trusts of the will:—*Held*: they could sell & make a good title to the real estate wrongfully purchased with the trust funds, on obtaining the concurrence in the sale of one of the persons beneficially interested in the trust funds.

If all of them had elected to take their shares of the land after it had been purchased, as land,

possession does not entitle the beneficiary whose share has vested to call upon the trustees to sell or to ask for a conveyance of his undivided share.—*Re TOOMEY, COUGHLIN v. TOOMEY* (1911), 30 N. Z. L. R. 738.—N.Z.

**PART V. SECT. 7, SUB-SECT. 2.—F. (e).**

• **Power of trustee to sell—Objection by purchaser—Right of surviving executors & trustee to convey.]**—*Re JACKSON*

& SNAITH (1920), 46 O. L. R. 550; 17 O. W. N. 282.—CAN.

**PART V. SECT. 7, SUB-SECT. 2.—G. (a).**

**3495 i. Trustees must follow mode prescribed.]**—To effect a sale by trustees under the Act respecting the property of religious institutions in Upper Canada, it is essential that all the requirements of the statute should be complied with, & therefore that the

they would have been entitled to do so (PEARSON, J.).—*Re PATTEN & EDMONTON UNION* (1883), 52 L. J. Ch. 787; *sub nom.* PATTEN to EDMONTON GUARDIANS, 48 L. T. 870; 31 W. R. 785.

*Annotations*:—*Apld.* *Power v. Banks*, [1901] 2 Ch. 487. *Extd.* *Re Jenkins & Randall's Contract*, [1903] 2 Ch. 362.

**3493. —Unless all beneficiaries sui juris & desire to take land.]**—In the case of an unauthorised purchase of land by a trustee, a good title can be made by the trustee to a purchaser with notice provided that all the beneficiaries are not competent & desirous to take the land *in specie*.—*POWER v. BANKS*, [1901] 2 Ch. 487; 70 L. J. Ch. 700; 85 L. T. 376; 66 J. P. 21; 49 W. R. 679; 17 T. L. R. 621.

*Annotations*:—*Refd.* *Re Jenkins & Randall's Contract*, [1903] 2 Ch. 362; *Re Bourne, Bourne v. Bourne*, [1906] 1 Ch. 113.

**3494. —**—Where trust funds have been wrongfully invested in an unauthorised purchase of leaseholds, & some one or more of the beneficiaries are incapable, through infancy, of electing whether to take the property *in specie* or not, the trustees can make a good title to a purchaser with notice without joining a beneficiary in the conveyance.—*Re JENKINS & RANDALL (H. E.) & CO.'S CONTRACT*, [1903] 2 Ch. 362; 72 L. J. Ch. 693; 88 L. T. 628.

**G. Duties of Trustees as to Sale.**

**(a) Mode of Sale.**

*See, now*, Trustee Act, 1925 (c. 19), s. 16.

**3495. Trustees must follow mode prescribed.]**—Trustee may not vary the mode of sale prescribed.—*RAYMOND v. WEBB* (1772), 10iff, 66; 98 E. R. 536, L. C.

**3496. Duty to give adequate notice of sale.]**—On a trust to sell, a suggestion in the bill of improper conduct of the trustees, in not giving sufficient notice of the sale, is not a ground for an injunction to stop the intended sale.—*PRICHEL v. FOWLER* (1795), 2 Anst. 549; 145 E. R. 963.

*Annotation*:—*N.F. A.-G. v. Liverpool Corp.* (1835), 1 My. & Cr. 171. [*Pichel v. Fowler*], I believe, has been overruled as often as it has been considered (TRYS, M.R.).

**3497. —**—*ANON.* (1821), No. 3248, *ante*.

**3498. Whether sale may be made to tenant for life.]**—A power of sale & exchange vested in the trustees of a settlement, may be exercised by the trustees upon a sale to or an exchange with the tenant for life of the settled estates. Where upon the exercise of such a power it is declared that the estate shall be vested in the purchaser, the purchase being made in the name of a trustee, an appointment to the trustee, in trust for the purchaser, is a valid execution of the power.—*HOWARD v. DUCANE* (1823), *Turn. & R.* 81; 1 L. J. O. S. Ch. 85; 37 E. R. 1025, L. C.

*Annotations*:—*Expld.* *Grover v. Huggell* (1827), 3 Russ. 428. *Distd.* *Greenlaw v. King* (1841), 10 L. J. Ch. 129. *Consd.*

*Beaden v. King* (1852), 9 Haro. 499. *Distd.* *Eland v. Baker* (1861), 29 Beav. 137. *Apld.* *Diceonson v. Talbot* (1870), 6 Ch. App. 32. *Refd.* *Devan v. Habgood* (1860), 1 John. & H. 222. *Mentd.* *Cooper v. Emery* (1840), 10 Sim. 609.

**3499. —Consent of tenant for life necessary for exercise of power.]**—It is well established by

public notice should state the terms of the intended sale.—*Re SECOND CONGREGATIONAL CHURCH PROPERTY, TORONTO* (1860), 1 Ch. Ch. 349.—CAN.

**3495 ii. —**—The rule of law which requires a mtgee. selling under a power of sale in his mtge. to observe the terms of such power, is also applicable to sale by a trustee or *quasi* trustee acting under a power.—*Re JARVIS v. COOK* (1881), 29 Gr. 303.—CAN.

**1. Duty to give adequate notice of sale.]**



the law of this et., that where there is a power of sale & exchange given to trustees to be exercised at the request, or with the consent of the tenant for life, they may sell to the tenant for life just as they may sell to any other person. The meaning and only ground of the rule is that the request or consent of the tenant for life is made necessary for his benefit, & it does not in any respect whatever create a fiduciary character as between him & the tenants in remainder.

It is utterly immaterial what the motive of the tenant for life in requesting the trustees to exercise their power of sale may be, if the trustees obtain full value for the estate, & contemplate no personal benefit to themselves.—*DICCONSON v. TALBOT* (1870), 6 Ch. App. 32; 24 L. T. 49; 19 W. R. 138, L. J.J.

*Annotation*.—*Refd. Re Laing's Settlement, Laing v. Radcliffe*, [1899] 1 Ch. 593.

**3500. Sale of land by trustee—Sale of timber by tenant for life sans waste—Power of sale not well executed.**—An estate, comprising a manor & tenements, with the appurtenances, was demised to trustees to the use of the eldest son of H. for life, without impeachment of waste, with remainders to trustees to preserve contingent remainders, with remainder to the first & other sons of his eldest son in tail male, etc., with a power to the trustees at the request of the person, who for the time being should be in possession of or entitled to the rents & profits of the manor & tenements, with the appurtenances, by virtue of the limitations therein contained, by any deed or writing, to make sale & dispose of the same or of any part or parts of the manor & tenements aforesaid with the appurtenances, to any person, either together or in parcels; & to that end the trustees were also empowered, by any deed or deeds, writing or writings, to revoke, determine, or make void all & every or any of the use & uses, trusts, estates, powers, provisos, & limitations thereinbefore limited, created, provided, & declared of & concerning the manor & tenements aforesaid; with the appurtenances, sold, to be sold, disposed of, or exchanged; & by the same or any other deed or deeds, writing or writings to limit & appoint the manor & tenements aforesaid, with the appurtenances, whereof the uses should be so revoked, unto the purchaser.

The trustees sold the estate, exclusive of the timber growing upon it, for £13,400, & the tenant for life by the same deed sold the timber, wood, & underwood for £2,448.—*Held*: the power was not well executed.—*COCKERELL v. CHOLMELEY* (1830), 10 B. & C. 564; 5 Man. & Ry. K. B. 509; 109 E. R. 560; *sub nom.* *CHOLMELEY v. PAXTON*, 8 L. J. O. S. K. B. 197.

*Annotations*.—*Distd.* *Doe d. Strickland v. Woodward* (1847), 1 Exch. 273. *Consd.* *Kekewich v. Marker* (1851), 3 Mac. & G. 311. *Apld.* *Buckley v. Howell* (1861), 29 Beav. 546. *Consd.* *Re Rutland's S. E. Rutland v. Bristol*, [1900] 2 Ch. 206. *Refd.* *Doe d. Blewitt v. Phillips* (1841), 1 Q. B. 84; *Re Chaplin & Staffordshire Potteries Waterworks Co.'s Contract*, [1922] 2 Ch. 824.

**3501. Sale with concurrence of person interested—Where no power of sale in instrument.**—Testator devised the lands to be purchased with the proceeds of certain estates sold in his lifetime, to the use of trustees & their heirs, upon trust, to pay the rents & profits to his daughter, whether married or unmarried, for her separate use, & not subject to the debts or control of any husband; & after her decease, upon further trust, to convey

the lands to such persons & for such uses, estates, & interests as his daughter should by will, attested by three credible witnesses, & whether married or single, appoint; & for want of such, upon trust, to convey the freehold & inheritance of the lands to the right heirs of his daughter: & testator further directed, that as to so much of such proceeds as should not have been laid out in lands, the trustees should invest the same in the public funds, & pay the dividends into the proper hands of his daughter, during her life, for her sole use & benefit, whether married or unmarried, & not subject to the debts or control of any husband; & after her decease, upon further trust, to pay & transfer the same to such persons, & for such intents & purposes, & in such manner as she should, by her last will & testament, & whether sole or covert, appoint; & in default thereof, in trust, to pay, transfer, & assign the same to the exors. or administrators of his daughter. After testator's death lands were purchased, & were conveyed to the trustees of his will, upon the trusts & for the purposes expressed & declared in the will. A contract having been subsequently entered into by the trustees for the sale of those lands:—*Held*: the trustees, with the concurrence of testator's daughter, could make a good title to the purchaser.—*WEBB v. SHAKESBURY (EARL)* (1834), 3 My. & K. 599; 40 E. R. 228.

**3502. Power of sale on failure to perform covenants—Provision for three months' notice of intention to sell—Notice given on breach but right waived—Necessity for further notice before sale.**—Debtor assigned his house & business, in trust for payment of his debts, retaining to himself the management of the business, under the superintendence of the trustees, who, on his failing to perform his covenants in the trust deed, were thereby empowered, after having given him three months' notice, to sell the house & business. Such notice was given, but waived by consent of the creditors & trustees, assembled at a general meeting:—*Held*: a sale afterwards made by the trustees, without further notice, was unauthorised & unlawful.—*TOMMEY v. WHITE* (1850), 3 If. L. Cas. 49; 10 E. R. 19, If. L.

*Annotation*.—*Mentd.* *Wilson v. Wilson* (1854), 5 If. L. Cas. 40.

**3503. Sale to raise fixed sum & expenses—Sale in two lots—Sale of first lot raising sum—Sale of second lot valid.**—A trustee, having power to sell land in order to raise £600, & the expenses, put it up to sale in two lots, & sold the first for £600, & the second for £510. The second lot consisted of more than three acres of land, & was described in the particulars of sale as readily convertible into building ground:—*Held*: the sale of the second lot was not improper, & the purchasers must pay the costs of a suit for specific performance brought against them by the trustee.—*THOMAS v. TOWNSEND* (1852), 16 Jur. 736.

**3504. Sale to family solicitor—Necessity for caution & inquiry as to value.**—The duties of trustees selling under a trust or power to sell are not properly discharged by selling to the family solr. without proper caution & previous inquiry as to the value, the sale being a contrivance to raise money to lend to one of the *cestui que trusts*, to whom the trustees had power to lend it.—*ROBINSON v. BRIGGS* (1853), 1 Sm. & G. 188; 21 L. T. O. S. 30; 1 W. R. 223; 65 E. R. 81.

*Annotation*.—*Refd.* *Gainsborough v. Watcombe Terra Cotta Clay Co., Dunning v. Gainsborough* (1883), 54 L. J. Ch. 991.

—*TAYLOR v. MAGRATH* (1885), 10 O. R. 669.—*CAN.*

*g. Court will prevent sale without reserve.*—Where it appeared, that,

although *cestui que trust* representing five-sixths of the property desired a sale without reserve, the interests of the remainder would be prejudiced

by so selling, an injunction was granted to restrain such trustees from selling without a reserve bid.—*DOWNEY v. DENNIS* (1887), 14 O. R. 219.—*CAN.*



upon trust for sale with a power of postponement, & upon trust out of the proceeds to pay his debts, an annuity to his widow, & a yearly sum for the maintenance & education of his children. Part of testator's estate was a freehold house, let to a tenant for twenty-one years from Sept. 29, 1898, at a yearly rent of £225, the lease being determinable at the tenant's option at the expiration of seven years. The house, which was subject to a mtge. for £3,500, was valued for probate at £4,100, the trustees having accepted that valuation from the beneficiaries' solr., who had some knowledge of property in the district. In Jan. 1905, the trustees, on the advice of a firm of auctioneers & estate agents, whose manager, though not a qualified valuer, had viewed & reported on the house, offered to sell the house to the tenant for £4,000, but this offer, as well as another to sell for £3,700, was refused by the tenant, who, however, offered to purchase it for £3,000. The trustees, who had heard that the tenant was likely to exercise his option to determine the lease & had obtained a further report that the property had considerably deteriorated in value since the date of the lease, agreed, after taking the advice of counsel, to accept the tenant's offer, & a contract was entered into in Feb. 1905. In an action by the beneficiaries, who impeached the contract on the ground that the price was grossly inadequate, & that the trustees had not taken steps to ascertain the best price obtainable for the property, & that the trustees had not informed them of the existence of the negotiations:—*Held*: there was no obligation to consult the beneficiaries' solr., & the trustees having acted on the advice of a firm of high reputation, & there being no evidence that there was any market for such a house at a higher price or at any price, the contract could not be impeached.—*GROVE v. SEARCI, GRIFFIN v. SEARCH* (1906), 22 T. L. R. 290.

**3517. Trustees with absolute power of sale—Trustees may fix reserved price.]**—Trustees of an absolute power for the sale of property may fix a reserved price for it.—*Re PEYTON'S SETTLEMENT* (1862), 30 Beav. 252; 31 L. J. Ch. 440; 6 L. T. 883; 8 Jur. N. S. 453; 10 W. R. 515; 54 E. R. 885.

**3518. Preference of cestui que trust—Cannot outweigh judgment of trustees.]**—Defts. were exors. & trustees, with a direction to them to dispose of a business with all convenient speed. Two offers, nearly the same in terms, were made to them for its purchase; the one by Z., a person who had assisted testatrix in the management of the trade; the other by a stranger. Pltf., who was the sole cestui que trust under the will, was strongly in favour of the latter, & urged its acceptance upon defts., who, however, within three weeks of the death of testatrix, & without making further inquiries, or other attempts to find a purchaser, agreed to sell it to Z. Pltf. filed his bill, alleging inadequacy of price, & overhaste, & imprudence, with some general allegations of bad management; but not imputing mala fides or dishonest intentions:—*Held*: the trustees could not be made liable, but must have their full costs out of the estate.

The judgment of the cestui que trust cannot be set up against that of the trustees, for it is in them that testator has reposed confidence.—*SELBY v. BOWIE* (1863), 2 New Rep. 2; 8 L. T. 372; 9 Jur. N. S. 425; 11 W. R. 608, L. J.

**3519. Sale in consideration of fee-farm rent.]**—*Re JACKSON, JACKSON v. JACKSON* (1900), 44 Sol. Jo. 573.

**Sale at inadequate price as breach of trust.]**—*See Part VII., Sect. 1, sub-sect. 7, post.*

(c) Joint Sale.

*See, now, Trustee Act, 1925 (c. 19), ss. 12, 24.*

**3520. Validity of joint sale—Depends on particular circumstances—Life estate & settled reversion.]**—A reversion in fee expectant on a life estate, was settled in strict settlement, & the trustees were empowered, at any time thereafter, with the consent of the tenant for life under the settlement, to sell or exchange the lands for other lands, in fee in possession. The tenant for life in possession, together with the tenant for life under the settlement & the trustees, by their agent, sold the estate for one entire sum. The purchaser objected that the power of sale could not be exercised until the reversion came into possession, but waived all other objections:—*Held*: the power was well exercised, & the purchaser, having waived all other objections, must agree, with the vendors, as to the apportionment of the purchase money between the life estate in possession & the reversion, or that the apportionment must be made by the master.—(*LARK v. SEYMOUR* (1834), 7 Sim. 67; 58 E. R. 702.

*Annotations*:—*Apld. Rede v. Oakes* (1863), 32 Beav. 555. (*See 4 De G. J. & Sm. 505.*) *Refd. Re Poddar's Settlement*. (1854), 3 Eq. Rep. 157.

**3521. — — — — — Must be beneficial—Sale of trust property with property not subject to trust.]**—There is no general rule positively forbidding trustees to sell trust property conjointly with other property not subject to the trust, where the conjunction is beneficial & the proportion of the purchase-money attributable to the trust property admits of satisfactory ascertainment.—*REDE v. OAKES* (1864), 4 De G. J. & Sm. 505; 5 New Rep. 209; 34 L. J. Ch. 145; 11 L. T. 549; 10 Jur. N. S. 1246; 13 W. R. 303; 46 E. L. 1015, L. J.

*Annotations*:—*Consd. Hiatt v. Hillman* (1871), 25 L. T. 55; *Re Cooper & Allen's Contract for Sale to Harlech* (1876), 4 Ch. D. 802; *Morris v. Debenham* (1876), 2 Ch. D. 540. *Refd. DANCE v. Goldingham* (1873), 8 Ch. App. 902; *Tolson v. Sheard* (1877), 5 Ch. D. 19; *Dunn v. Flood* (1885), 23 Ch. D. 586. *Mentd. Barclay v. Messenger* (1874), 43 L. J. Ch. 419.

**3522. — — — — — ]**—It is the duty of trustees who, having a trust or power to sell the trust property, join with the owner of another property in selling both properties together, (1) to see that such a mode of sale is beneficial to their cestuis que trust; (2) to see that their share of the purchase-money is apportioned before the completion of the purchase, & to obtain payment of such apportioned share; (3) to apportion the share themselves, taking care to act under proper advice.

(4) In all cases you must see that there are not conditions of sale applicable to other property not subject to the trusts, which damage the value of the trust property for the purpose of sale (*JESSEL, M.R.*).—*Re COOPER & ALLEN'S CONTRACT FOR SALE TO HARLECH* (1876), 4 Ch. D. 802; 46 L. J. Ch. 133; 35 L. T. 890; 25 W. R. 301.

*Annotations*:—*Generally, Mentd. Wolverton v. A.-G.* [1898] A. C. 535; *Northumberland v. A.-G.* [1905] A. C. 406; *A.-G. v. Assheton-Smith*, [1924] 2 K. B. 25.

**3523. — — — — — Sale of properties subject to distinct trusts.]**—(1) A messuage belonged to testator, who devised his real estate in trust for sale. An adjoining messuage was vested in the trustees of his settlement upon trust for sale, & the purchase-money, subject to the payment of definite sums, belonged to testator's estate. Under a decree for administering testator's estate the two messuages were put up for sale together in one lot, & it was provided that the purchase-money should be paid into ct. to the credit of the cause,

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*Sub-sect. 2, G. (c) & (d); sub-sects. 3, 4, 5, 6 & 7.*

"The proceeds of the sale of testator's real estate." The trustees of the settlement had obtained liberty to attend the proceedings as to the sale. The purchaser objected to the title on the ground that the two properties were sold together for one lump sum, without any provision for apportioning it, & that it was to be paid into ct. in a suit unconnected with the settlement:—*Held*: this objection was not sustainable, for the ct., having the money in its custody, would see it properly applied.

(2) The ct., for the satisfaction of the purchaser, ordered that the purchase-money should be apportioned, & the part apportioned to the settled messuage paid into ct. to a separate account.—*CAVENDISH v. CAVENDISH* (1875), 10 Ch. App. 319; 33 L. T. 219; 23 W. R. 313, L. J.J.

*Annotations*:—*As to* (1) *Apld. Re Cooper & Allen's Contract for Sale to Harlech* (1876), 4 Ch. D. 802; *Morris v. Debenham* (1876), 2 Ch. D. 540. *Refd. Tolson v. Sheard* (1877), 5 Ch. D. 19. *As to* (2) *Apld. Morris v. Debenham* (1876), 2 Ch. D. 540. *Generally, Refd. Itawilinson v. Miller* (1875), 1 Ch. D. 52.

**3524.** —————.]—*TOLSON v. SHEARD*, No. 3370, *ante*.

**3525.** —————. **Sale by trustee & lessee of trust property.**—A trustee having a discretionary trust for sale of real estate under a will at such price as he should think reasonable, with power to postpone the sale, leased the property for thirty years with the concurrence of the beneficiaries. Before the lease expired the property was put up for sale by the lessee & the trustee conjointly, the facts being disclosed by the particulars of sale, & a sale having been effected, the purchase-money was apportioned between the two interests according to the valuation of a skilled valuer:—*Held*: the purchaser was not entitled to insist on the concurrence of the beneficiaries on account of the valuation not having been made before the sale.—*MORRIS v. DEBENHAM* (1876), 2 Ch. D. 540; 34 L. T. 205; 40 J. P. 596; 24 W. R. 636.

*Annotations*:—*Apld. Re Cooper & Allen's Contract for Sale to Harlech* (1876), 4 Ch. D. 802. *Refd. Tolson v. Sheard* (1877), 5 Ch. D. 19.

**3526. Apportionment of purchase-money—Apportionment by court.**—*CLARK v. SEYMOUR*, No. 3520, *ante*.

**3527.** —————.]—*CAVENDISH v. CAVENDISH*, No. 3523, *ante*.

**3528.** —————. **Proper apportionment must be clearly ascertainable.**—*REDE v. OAKES*, No. 3521, *ante*.

**3529.** —————. **Duty to trustees to see to proper apportionment.**—*Re COOPER & ALLEN'S CONTRACT FOR SALE TO HARLECH*, No. 3522, *ante*.

**3530.** —————. **Whether purchaser entitled to insist upon apportionment.**—By a mtge. dated in 1800, certain lands were granted to A. & B. to secure a sum of money declared by the mtge. deed to have been advanced by them on a joint account. A power of sale was given to the mtgees. in default of payment of the money at the time appointed, & it was declared that, upon any sale, the receipt or receipts in writing of A. & B., or the survivor of them, or the executors or administrators, of such survivor, their, her, or his assigns, should be sufficient discharges to the purchasers, & it was further declared that the power of sale might be exercised by any person or persons who for the time being should be entitled to receive & give discharge for the moneys for the time being due and owing on the security of the mtge. By a memorandum of even date it was declared by A. & B. that the mtge. money belonged to them in certain specified proportions. Subsequently A.

& B. respectively assigned their respective shares in the mtge. money to separate sets of trustees on different trusts, & these trustees collectively sold part of the property under the power of sale in the mtge. On a summons taken out under Vendor & Purchaser Act, 1874 (c. 78), by the purchaser, who contended that he was entitled to have the purchase-money apportioned & to separate receipts from the two sets of trustees:—*Held*: the money paid by the purchaser did not represent mtge. money, but was the price to be paid to persons who had the power of sale, & the joint receipt of all the trustees would be a good discharge to the purchaser.—*Re PARKER & BEECH'S CONTRACT* (1887), 56 L. J. Ch. 358; 56 L. T. 95; 35 W. R. 353, C. A.

(d) *Depreciatory Conditions.*

*Sec, now, Trustee Act, 1925 (c. 19), s. 13.*

**3531. Sale must not be prejudiced by conditions.—As to root of title.**—By a deed of the year 1858, lands were conveyed to trustees on the usual trusts for sale. The trustees were unable to find a deed of 1819, through which the conveying parties to the deed of 1858 derived their title; & put up the lands for sale by auction under a condition that the title should commence with the deed of 1858, & that no earlier title should be called for except at the purchaser's expense. The lands were sold at the auction, the object of the condition being explained in the auction room. A suit to restrain completion was instituted by one of the *cestuis que trust* against the trustees & the purchaser. Some time after the institution of the suit, the deed of 1819 was found:—*Held*: this condition was calculated to depreciate the property at the auction, & was inserted without any reasonable ground; the ct. would, at the suit of a *cestui que trust*, restrain the purchaser from completing the sale.—*DANCE v. GOLDINGHAM* (1873), 8 Ch. App. 902; 42 L. J. Ch. 777; 29 L. T. 166; 38 J. P. 164; 21 W. R. 761, L. J.J.

*Annotations*:—*Consd. Dunn v. Flood* (1885), 28 Ch. D. 586. *Refd. Grove v. Search, Griffin v. Search* (1906), 22 T. L. R. 290. *Mentd. Melbourne Banking Corp. v. Brougham* (1882), 7 App. Cas. 307.

**3532.** —————. **Conditions attached to property sold jointly with trust property.**—*Re COOPER & ALLEN'S CONTRACT FOR SALE TO HARLECH*, No. 3522, *ante*.

**3533.** —————. **As to underleases.**—Trustees for sale sold by auction certain leasehold properties. One of the conditions of sale stipulated that no objection should be made if any lease was an underlease, or that the premises were held on the same lease with other property, or that the same were liable to superior rents or covenants. A purchaser objected to this condition as depreciatory:—*Held*: the solr. who prepared the conditions should have ascertained whether the leases were underleases or not; there should have been a statement of fact as to each lot, & not, as this was, a statement which might apply to any of the lots; & this was a depreciatory condition, & ought not to have been inserted by trustees.—*Re RAYNER'S TRUSTEES & GREENAWAY* (1885), 53 L. T. 495.

**3534.** —————. **As to existing tenancies & restrictive covenants.**—Trustees for sale under a will put up for sale by auction certain lands in numerous small lots, with conditions providing (*inter alia*) that the title should commence with the conveyance to testator ten years before; that every recital in any abstracted document should be conclusive evidence of the fact stated; & that the lots were sold "subject to the existing tenancies, restrictive covenants, & all easements &

*Annotation* :—**Mentd.** *Re* Hollis' Hospital & Hague's Contract, [1899] 2 Ch. 540.

*See* EXECUTORS, Vol. XXIV., pp. 577, 578,  
Nos. 6136-6138; MINES, Vol. XXXIV., pp. 630,  
637. Nos. 328-349.

*See RENTCHARGES & ANNUITIES, Vol. XXXIX., pp. 145-153, Nos. 398-457.*

*See* MORTGAGE, Vol. XXXV., pp. 280-285,  
Nos. 343-381.

N N N

*Sect. 7.—Powers as to real estate and chattels real :  
Sub-sect. 7, 8 & 9.]*

LONDESBOROUGH (LORD) v. SOMERVILLE (1854), 19 Beav. 295; 23 L. J. Ch. 646; 52 E. R. 363.

*Annotations:—Mentd.* Scholefield v. Redfern (1883), 2 Drew. & Sm. 173; Freeman v. Whitbread (1885), L. R. 1 Eq. 266; Bulkeley v. Stephens, [1896] 2 Ch. 241.

**3541.** ———. *Whether sale or mortgage authorised.*—LINGTON v. FOLEY (1674), 2 Cas. in Ch. 205; 22 E. R. 912.

*Annotations:—Apld.* Allan v. Backhouse (1813), 2 Ves. & B. 65. *Refd.* Metcalfe v. Hutchinson (1875), 1 Ch. D. 591.

**3542.** ———. *—*—*BRISCO v. BANBURY (LADY)* (1670). Freem. Ch. 309; 1 Freem. K. B. 309; 22 E. R. 1231; *sub nom.* BISCO v. BANBURY (EARL), 1 Cas. in Ch. 287, L. C.

*Annotations:—Mentd.* Mertins v. Jolliffe (1756), Amb. 311; Jones v. Smith (1841), 1 Haro, 43.

**3543.** ———. *—*—*Trustees to pay debts may fairly raise by sale or mtge. without waiting for a decree, no suit being instituted.*—BATH (EARL) v. BRADFORD (EARL) (1754), 2 Ves. Sen. 587; 28 E. R. 374, L. C.

*Annotations:—Refd.* Morse v. Tucker (1846), 5 Haro, 79. *Mentd.* Armstrong v. Storer (1846), 9 Beav. 277.

**3544.** ———. *—*—*Under a trust for sale of real estate in a settlement by which a trustee was directed to apply the proceeds in paying off certain incumbrances upon the settled estate, as well as upon other family estates, the ct. held that the trustee might raise such sums as might be necessary by mtge. of the estates.*—ORFORD (EARL) v. ALBEMARLE (EARL) (1848), 17 L. J. Ch. 396; 12 Jur. 811.

**3545.** ———. *—*—*A., the devisee in fee of real estates, subject to a trust to raise £0,000 for B., which testator directed, in the event of B.'s death without children, to sink into the residue of his personal estate & to go to A., on his marriage conveyed the estate to the trustees of his marriage settlement, subject to the trust to raise the £0,000, & died, living B. On B.'s death without children, the representatives of A. filed a bill to establish the charge:—Held: under the circumstances it had merged in the inheritance.*—JOHNSON v. WEBSTER (1854), 4 De G. M. & G. 474; 3 Eq. Rep. 99; 24 L. J. Ch. 300; 24 L. T. O. S. 178; 1 Jur. N. S. 145; 3 W. R. 84; 43 E. R. 592, L. C.

*Annotations:—Follid.* Re Somerset, Thynne v. St. Maur (1886), 55 L. T. 753. *Refd.* Pears v. Weightman (1856), 2 Jur. N. S. 586; Williams v. Pincney (1897), 67 L. J. Ch. 34; Price v. John, [1905] 1 Ch. 744; Derry v. Sanders (1919), 88 L. J. K. B. 410. *Mentd.* Re Tasker, Hoare v. Tasker, [1905] 2 Ch. 587.

**3546.** ———. *—*—*Testator devised real estate to trustees upon trust (inter alia), to lease the same, & pay the rents thereof to his daughter for her life, for her separate use, without power of anticipation, & after her decease to the use of her appointees by will, & in default of such appointment, to the use of her right heirs. He also charged the estate with £700, to be paid to his granddaughter when she should attain twenty-one. The trustees sold the estate under an order of the ct.: the purchaser objected to the title, on the grounds that they had no authority under the will to sell, & that they could not bind the contingent equitable interests in the property. On a motion for payment by the purchaser of his purchase-*

*money into ct.:—Held: the trustees had power to bind the contingent interests, & the purchaser must pay in his purchase-money accordingly.*—FIDSFORTH v. ARMSTEAD (1856), 2 K. & J. 333; 25 L. J. Ch. 237; 26 L. T. O. S. 323; 60 E. R. 809; *sub nom.* ETESFORD v. ARMSTEAD, 4 W. R. 279.

**3547.** ———. *—*—*A prohibition against raising a charge by sale:—Held: also to prevent its being done by mtge.*

*Devise of real estates to trustees in fee, upon trust, "out of the rents, issues, & profits" thereof, to pay two annuities "& by the same ways & means, or by such other ways & means, except a sale or sales as they may think proper, to levy & raise" sufficient to pay off the charges on the estate, & subject to the trusts aforesaid, to A. for life, with remainders over:—Held: the trustees could not raise the charges either by sale, by mtge., or by leases on fines, but they must be raised out of the rents & the profits of timber & mines, the trustees exercising a discretion, so as not to exhaust the whole income, & leave nothing for the tenant for life.*—BENNETT v. WYNDHAM (1857), 23 Beav. 521; 53 E. R. 205; *sub nom.* BENNETT v. WYNDHAM, 29 L. T. O. S. 138; 3 Jur. N. S. 1143; 5 W. R. 410; *subsequent proceedings* (1862), 4 De G. F. & J. 259, L. J. J.

*Annotation:—Refd.* Re Allan, Havelock v. Havelock (1881), 17 Ch. D. 807.

**3548.** ———. *Discretion of trustees.*—*By an indenture of settlement, certain estates consisting of a mansion house & other premises were limited to the use of trustees for a term of one thousand years without impeachment of waste save only the cutting of ornamental timber, & subject to the term to the use of the settlor for life without impeachment of waste save as aforesaid, then to the use of B. & his assigns for life without impeachment of waste save as aforesaid, with divers limitations over. The trusts of the term were in the first place by cutting & felling & selling & converting into money all or any part or parts of the timber standing & growing on the said lands which should be of full & ripe growth & not ornamental to the mansion or pleasure grounds attached thereto or any of the views or prospects of the same, of which timber it was declared that enough of the most ornamental should always remain to preserve the beauty of the place unimpaired, or by demising, mortgaging or selling the premises comprised in the term or any part or parts thereof save & except the mansion house & certain other premises therein mentioned or by all or any of the ways & means to levy & raise the sum of £10,000 for the settlor, & after the death of the settlor in like manner to levy & raise two sums of £10,000 each for other parties:—Held: upon the equitable construction of the trust of the term, the trustees had a discretionary power to enter on the estates & cut fit & proper timber & apply the proceeds in discharge of the sums directed to be raised, & the ct. would protect them in the exercise of that power, there being an absence of all *mala fides* or of any wanton or unreasonable exercise of their discretion.*—KEKEWICH v. MARKER (1851), 3 Mac. & G. 311; 21 L. J. Ch. 182; 17 L. T. O. S. 193; 15 Jur. 687;

—SPROATT v. ROBERTSON (1879), 26 Gr. 333.—CAN.

*t.* ———. *—*—*GORDON v. GORDON* (1885), 11 O. R. 611; *affd.* (1886), 12 O. R. 593.—CAN.

*a.* ———. *—*—*Trustees of real estate, with a power of sale, had power to mtge. for the purpose of paying a*

part of a prior incumbrance thereon with a view to saving the property from foreclosure.—*Re* VANICKLE & MOORE (1892), 22 O. R. 560.—CAN.

*b.* ———. *To authorise raising money* —*To defray cost of improvements.*—*Re* MACKAY (DECEASED), MACKAY v. MACKAY, [1928] N. Z. L. R. 185.—N.Z.

*c. Liability of estate.*—*Where a will does not, either expressly or impliedly, give power to the exors. to borrow money the estate is not legally liable to a person who has lent money to the exors. for the purpose of paying off debts of the estate.*—*Re* BRECKENRIDGE ESTATE (Alta.), [1918] 3 W. W. R. 803.—CAN.



42 E. R. 280, L. C.; *reversé*. S. C. *sub nom.* MARKER v. KEKEWICH (1850), 8 Hare, 291.

*Annotations*.—*Distd.* Briggs v. Oxford (1851), 5 De G. & Sm. 156. *Reid.* *Re* Bute, Bute v. Ryder (1884), 27 Ch. D. 196; *Dashwood v. Magniac* (1891), 60 L. J. Ch. 809.

**3549.** ———. ———. ———. *Re* COCK, PALMER v. ANDERSON (1896), 40 Sol. Jo. 210.

**3550. Reciprocal duties of trustees & cestuis que trust.—Where necessity to raise money arises.**—MARSHALL v. STADDEN, No. 3453, *ante*.

**3551. Power to pay annuity out of "rents or any other moneys".—Construction of "other moneys".—Annuity payable out of income.**—By a trust deed the trustees were empowered, by sale or mtge. of the trust estates, to pay specified debts, & secondly, the mtges. on the trust estates, with a direction, "out of the rents or any other moneys held by them upon the trusts of the deed," to pay an annuity to A. until the mtges. should be paid off.—*Held*: upon the import of the whole instrument, that "other moneys" had reference to those *ejusdem generis*, & the annuity was payable out of income only.—CLIFFORD v. ARUNDELL (1860), 1 De G. F. & J. 307; 45 E. R. 378, L. C.

**3552. Trust to pay debts or gross sum out of rents & profits.—Prima facie a charge on corpus.**—A trust to pay debts or a gross sum out of rents & profits is *prima facie* a charge on the corpus.

Testator, by will dated Feb. 26, 1865, gave real & personal estate to a trustee to receive the "rents & profits," & retain out of the "rents & profits" £10 yearly while acting as trustee, & then directed his debts to be paid out of his "rents & profits," & after his debts had been paid he directed him to pay out of his "rents & profits" £500 to a legatee by five yearly payments, & that the "remainder of the rents & profits" should be divided between A., B., C. & D. for life, with remainder to the children of A., B., & C., & in default of children he directed his trustee to pay to E. the yearly income of his aforesaid real & personal estates for his life, with remainder to his children, & in default of E.'s issue, gave "the whole of his real & personal estate" to X. Testator died in 1871. The personality proved insufficient.—*Held*: the debts were charged on the corpus of the real estate.—METCALFE v. HUTCHINSON (1875), 1 Ch. D. 591; 45 L. J. Ch. 210.

*Annotations*.—*Consd.* *Re* Green, Baldock v. Green (1888), 40 Ch. D. 610. *Apld.* *Re* Bailey, Bailey v. Dale (1899), 43 Sol. Jo. 549.

**3553.** ———. ———. ———. *Re* BAILEY, BAILEY v. DALE (1899), 43 Sol. Jo. 549.

**Power to raise money for payment of portions.**—*See, generally*, SETTLEMENTS, Vol. XL., pp. 597-634.

#### SUB-SECT. 8.—INSURANCE.

**Settled property.**—*See* SETTLEMENTS, Vol. XL., pp. 680-681, Nos. 2158-2171.

**Heirlooms.**—*See* SETTLEMENTS, Vol. XL., p. 795, No. 3241.

#### SUB-SECT. 9.—REPAIRS AND IMPROVEMENTS.

*See, generally*, LAND IMPROVEMENT, Vol. XXX., pp. 275-296.

**3554. Exercise of express power.—Expenditure must be necessary.**—[Charges by trustees for money laid out in luxuries under colour of maintenance & for money unnecessarily expended in

pulling down & rebuilding a house disallowed.—BRIDGE v. BROWN (1843), 2 Y. & C. Ch. Cas. 181; 63 E. R. 79.

*Annotation*.—*Mentd.* Goldstein v. Salvation Army Assoc. Soc., [1917] 2 K. B. 291.

**3555. ———. Draining & fencing.**—Trustees under a will of real estates, the surplus rents & profits of which, during minority, etc., were to be invested in the purchase of other real estates, to go as the devised estates, expended very large sums of the surplus rents & profits in repairing houses, building houses, draining & fencing farms, & other similar improvements.—*Held*: they were entitled to be allowed those sums in their discharge; the will containing this general direction, during minority, etc., "that the trustees or trustee, for the time being, of the same term, do & shall, generally, superintend the management of the same manors, hereditaments, & premises, & appoint such stewards, bailiffs, agents, & collectors, & with such salaries as they shall think proper," etc.—BOWES v. STRATHMORE (1843), 8 Jur. 92.

**3556.** ———. ———. ———. Testator devised his estates, in trust, after deducting out of the rents, taxes, repairs, "improvements," etc., & "all other necessary outgoings," to divide the surplus between A. & other persons for life.—*Held*: an expenditure for new farm buildings, etc., not stated to be with a view of improving the rents or to secure the continuance of the old tenants, was not within the term improvements. WALPOLE v. BOUGHTON (1850), 12 Beav. 622; 50 E. R. 1198.

*Annotation*.—*Apld.* *Re* Stamford & Warrington, Payne v. Grey, [1916] 1 Ch. 401.

**3557.** ———. ———. ———. *Re* LESLIE'S SETTLEMENT TRUSTS, No. 3030, *ante*.

**3558. ———. Repairing houses.**—BOWES v. STRATHMORE, No. 3555, *ante*.

**3559. ———. Right to borrow money therefor.**—Testatrix devised all her real estate to trustees upon certain trusts, & empowered them to lay out the rents thereof in repairing a certain dwelling-house, part of the real estate, & in erecting & making such alterations & additions thereto as they might think fit.—*Held*: the trustees had no power to borrow money for repairing the house.—FAZAKERLEY v. CULSHAW (1871), 24 L. T. 773; 19 W. R. 793.

**3560. ———. Building houses.**—BOWES v. STRATHMORE, No. 3555, *ante*.

**3561. ———. ———.**—Under a trust to expend money in the improvement of estates by the erection of farmhouses & outbuildings, the ct. made a declaration that the erection of cottages required for agricultural labourers employed upon the farms would be a due execution of the trust.—RIVERS (LORD) v. FOX (1853), 2 Eq. Rep. 776.

**3562.** ———. ———. ———. *Re* LESLIE'S SETTLEMENT TRUSTS, No. 3030, *ante*.

**3563. ———. Mansion house.**—Testator directed his trustees to erect a mansion house & suitable offices fit for the residence of the owner of his estates, which were worth about £15,000 *per annum*, on some convenient spot.—*Held*: under this direction the trustees were empowered to lay out a garden & pleasure grounds around the mansion, in addition to the house & offices, in such manner as the master should direct.—LOMBE v. STOUGHTON (1849), 17 Sim. 84; 18 L. J. Ch. 400; 13 L. T. O. S. 398; 60 E. R. 1059.

**3564. ———. Rebuilding.**—BRIDGE v. BROWN, No. 3554, *ante*.

#### PART V. SECT. 7. SUB-SECT. 9.

**3564.1. Exercise of express power.—**  
*Rebuilding.*—Testator, by his will,

devised hotel premises at H. & other lands to trustees for the benefit of one of his children; but before his

death he pulled down the greater portion of the hotel with the intention of rebuilding a dwelling house for





damaged by bombs dropped by hostile aircraft. The premises were insured, but there was a dispute as to whether the policy had lapsed by non-payment of the premiums. The trustee claimed to be indemnified for the repairs rendered necessary by the damage:—*Held*: the trustee had not committed a breach of trust so as to lose his right of an indemnity.—*Re MCGAW, MCINTYRE v. MCGAW* (1919), 64 Sol. Jo. 100.

**3574. Application to court—When necessary.]—***Re COLYER, MILLIKIN v. SNELLING*, No. 3572, *ante*.

**3575. — Proposals not covered by power.]—**Part of the property of testator consisted of a cotton mill which he directed his trustees not to sell, nor to work themselves, but to let. The will also contained a direction to the trustees not to lend any of the personal estate on mtge., & prescribed certain strict modes of investment. The cotton mill being out of repair could not be let as it then stood, the trustees, therefore, entered into a provisional agreement with a firm of cotton spinners by which the latter agreed to take a lease of the mill for twenty-one years, & to spend large sums of money in machinery & repairs, provided the trustees advanced to them, on the security of the machinery, rather more than half the sum required for such machinery & repairs, & also spent a considerable sum in the erection of steam boilers, & other landlord's fixtures. Under the terms of the will the trustees could not comply with such proposals; but, upon it being clearly proved that such an arrangement would be highly beneficial to the trust estate, & was one which it was not unusual for lessors in similar cases to enter into, the ct. sanctioned the agreement, & directed the costs of all parties to the application to come out of testator's residuary personal estate.—*Re LEE'S TRUSTS* (1875), 32 L. T. 298.

**3576. — — —.]—**Trustees of a will who had unsuccessfully applied by originating summons presented a petition, under Settled Estates Act, 1877 (c. 18), for leave to make certain improvements not exactly covered by the will, & without presenting any definite scheme to the ct.—*Held*: the order asked could be made on a petition presented by trustees, & under the circumstances, & on the evidence produced, the ct. might dispense with a formal scheme; but that the last point was not free from doubt.—*Re CHRISTY'S SETTLED ESTATE* (1894), 42 W. R. 613; 38 Sol. Jo. 530; 8 R. 439.

**3577. — — —.]—**In Mar. 1853, J. being owner of buildings subject to mtges., executed a deed declaring that he held the property upon trust for sale, & for division, after certain payments, of the surplus proceeds into three equal parts, of which he should retain one, & should pay the other two to other persons.—In Aug. 1853, J. assigned his one-third share to a purchaser, reserving to himself, in the event of the sale moneys exceeding £65,000, one-tenth of the difference between the actual amount of the one-third share & the amount it would have been if the sale moneys had been

£65,000 only. The property was sold in 1898 by the then trustees of the deed of Mar. 1853, for much more than £65,000, & £4,500 was set aside by them to answer the claim of the representative of J., who had died. It was alleged by the parties interested, other than the representative of J., that the persons for the time being entitled to the rents & profits of the buildings had before the sale spent large sums in lasting improvements thereof, & they claimed that certain India Stock, then representing the sum of £4,500, should contribute a proportionate part of the expenditure on these improvements. The trustees brought an action asking for a declaration of the ct. upon the validity of the reservation & of the claim for contribution:—*Held*: the ct. could not direct the trustees to pay any part of the expenditure on the alleged improvements out of the India Stock, as there was nothing in the deed of Aug. 1853, providing for this, & as the ct. was not exercising its jurisdiction in partition nor dealing with the entire fund.—*Re COULSON'S TRUSTS, PRICHARD v. COULSON* (1907), 97 L. T. 754.

**3578. — Necessity for formal scheme.]—***Re CHRISTY'S SETTLED ESTATE*, No. 3576, *ante*.

**3579. — — —.]—***Re GREY'S COURT ESTATE* (1901), 45 Sol. Jo. 344.

**3580. — By petition.]—***Re CHRISTY'S SETTLED ESTATE*, No. 3576, *ante*.

**Settled property.]—**See LAND IMPROVEMENT, Vol. XXX., pp. 282-294, Nos. 68 208; SETTLEMENTS, Vol. XL., pp. 647-652, 682-685, Nos. 1861-1912, 2188, 2190, 2191, 2196, 2198-2201.

**Compulsory purchase—Application of purchase-money.]—**See COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 239-241, Nos. 1328-1356.

#### SECT. 8.—POWER OF SALE OF PERSONALTY.

**3581. Sale of personality—Resulting in loss—Discretion of trustees.]—**Under the circumstances, the sale by trustees of a policy of insurance, for a price, which at the time seemed to be beneficial for the *cestui que trust*:—*Held*: to be a discreet exercise of their power, although it eventually turned out, that the sale was prejudicial to the interest of the *cestui que trust*.—*HANCHETT v. SMITH* (1832), 1 L. J. Ch. 218.

**3582. — Time for sale—Right to exercise power postponed for specified period.]—**A., a widow, having a life interest in money in the funds, & also in a leasehold house, with a contingent reversionary interest to such of her children as should be living at the time of her death; she & all her children joined in an assignment to a trustee of all the money in the funds, & the house, to hold, receive, & to take the leaseholds, moneys, funds, & other premises, to the trustee, upon trust, to receive & convert same into money; & that, for this purpose, he might, at his own discretion, sell & dispose of the leasehold house, & of any reversionary interest in the funds; & it was further provided, that the

lands the ct., under its general jurisdiction, permitted them to apply a sum of money out of the trust funds in & towards making the land income producing, upon the ground that such expenditure was for the benefit of the remainderman.—*LE PATOUREL v. AITKEN* (1896), 22 V. L. R. 475.—**AUS.**

**m. — — —.]—***KNOX v. ROBERTS* (1900), 21 N. S. W. L. R. (Eq.) 231; 17 S. N. W. N. 165.—**AUS.**

**n. — Increasing value of land.]—****TRUSTEES, EXECUTORS & AGENCY**

*CO., LTD. v. LOGAN* (1900), 25 V. L. R. 659.—**AUS.**

**o. — — —.]—**Trustees, having a discretionary power to manage & carry on an orchard business, expended a portion of the capital of the trust funds in increasing the extent of the business. No loss was in fact caused to the estate by such expenditure:—*Held*: the trustees were entitled to be allowed the amount of such expenditure in their accounts as first allowances.—*FARRAN v. TRAVERS* (1902), 2 S. R. N.

S. W. 63; 19 N. S. W. N. 104.—**AUS.**

**p. — Completion of buildings.]—***GILLILAND v. CRAWFORD* (1869), 4 I. R. Eq. 35.—**IR.**

#### PART V. SECT. 8.

**q. Shares in company—Dividends to be paid to life tenants—Offer to purchase by another company the company's shares at specified price per share—Price including amounts which would ordinarily have been paid as dividends**

**Sect. 8.—Power of sale of personally. Sect. 9.]**

trustee, should not, during the term of five years, exercise or put in force the trusts declared so as to deprive A. of her life-interest during that period:—*Held*: after the expiration of the five years, the trustee had a power to sell A.'s property in the funds.—**BOYMAN v. GUTCH** (1831), 7 Bing. 379; 5 Moo. & P. 222; 9 L. J. O. S. C. P. 63; 131 E. R. 147.

*Annotations*.—**Reid**, *Stevens v. Austen* (1861), 3 E. & E. 885. **Mentz**, *Neeves v. Burrage* (1849), 14 L. T. O. S. 394; **Brumit v. Morton** (1857), 3 Jur. N. S. 1198; *Simmons v. Heseltine* (1858), 5 C. B. N. S. 554.

**3583. — Whether court will accelerate.]**

—*Testatrix*, after giving certain specific chattels, bequeathed her residuary estate to R. in trust to sell all the estate, except the leasehold house in which she had carried on business. She declared it to be her will & mind that R. should employ W., then in her service, to carry on & conduct the business until the expiration of the lease, allowing him a reasonable salary. After the expiration of the lease *testatrix* directed R. to sell the business, goodwill, etc. *Testatrix* then gave certain pecuniary legacies, & bequeathed the residue to S.:—*Held*: S. was not entitled to have an immediate sale.—**SAUNDERS v. ROTHERHAM** (1862), 3 Giff. 556; 7 L. T. 185; 10 W. R. 505; 66 E. R. 529; *sub nom. Re GRAYDON'S ESTATE*, **SAUNDERS v. ROTHERHAM**, 9 Jur. N. S. 66.

**3584. — Direction to raise specific sum—Part of sum raised—Power of trustees to raise residue.]**—Under a settlement dated in May 1860 the trustees were directed "by sale of a competent part" of stock "forthwith to raise a sum not exceeding £2,000 & pay same to E. or his assigns," & also other sums as should be required for certain purposes. In July 1860 E. requested the trustees to raise for his benefit the sum of £1,391 17s. 7d. & he subsequently applied to them to raise the sum of £808 2s. 5d. The ct. held the request to the trustees to raise £1,391 17s. 7d. only did not limit their power or diminish the amount of the fund impressed with a trust for E.'s benefit, & declared the trustees were at liberty to raise the residue.—**HARROLD v. HARROLD** (1861), 3 Giff. 192; 4 L. T. 699; 7 Jur. N. S. 1274; 66 E. R. 378.

**Years of reality.]—See Sect. 7, sub-sect. 2, ante.**

**SECT. 9.—POWER TO APPROPRIATE.**

**3585. Validity of appropriation—Must be confined to authorised securities.]—***Testator* by his will, dated Oct. 13, 1886, gave his real & personal estate to trustees upon trust for sale & conversion, & to invest the proceeds of sale in any of the Parliamentary stocks or funds of Great Britain, or on Govt. or real or long leasehold securities in England & Wales, & to hold the same upon trust, in the first place, to pay an annuity of £100 to his son during his life or until he should assign the same, & he thereby directed & authorised his trustees to set apart, & invest in any of the investments in which the proceeds of sale & conversion of his estate was thereby authorised to be invested such a sum of money as should be sufficient at the

time of such investment to pay the same annuity, & to pay the same accordingly, with power to resort to the capital of the appropriated fund whenever the income of the same should be insufficient. By a codicil dated June 1, 1887 *testator* increased the amount of the annuity to £250. He died in 1887. The Trust Investment Act, 1889 (c. 32), s. 3, authorises trustees to invest among other securities in India 3½ per cent. Stock on summons:—*Held*: the trustees were not entitled to appropriate such a sum as would, when invested in India 3½ per cent. Stock, be sufficient to answer the annuity, but they were limited to the securities authorised by the will.—*Re OWTWHAITE OWTWHAITE v. TAYLOR*, [1891] 3 Ch. 494; 60 L. J. Ch. 854; 65 L. T. 144; 40 W. R. 38; 7 T. L. R. 693.

**3586. —**—*On a contract for sale of leaseholds the purchaser objected that the vendor at the time when he bought the property was himself a trustee for sale. M. by his will gave all his real & leasehold estate, including the property in question, to his son R., & C. upon trust for sale, & to stand possessed of the proceeds upon trust to appropriate investments to answer annuities for his wife, his daughter B. & his son H. Testator gave his residue to his son R., & died in 1843. H. was at this time incapable of managing his own affairs, & so continued down to the time of his death. In 1843 Lady M. was appointed an additional trustee, & the property was vested in R., C., & her, subject to the provisions of the will. In 1847, a new trustee was appointed in place of C. by deeds which recited that the property subject to the trusts included the leaseholds, & conveyed them specially to the new trustees upon the trusts of the will. R. executed a power of attorney in favour of Lady M., & she let the property on several occasions. R. died in Oct. 1849, leaving all his property equally to Lady M., B. & H.; & in 1850 Lady M. was appointed administratrix of his estate with the will annexed. In 1853 she became the sole trustee; & in 1859 & 1860 she let the leaseholds for terms of years. She died in 1873, leaving all her property to B., & appointing her sole extrix. B. died in 1877, leaving her property to D., & appointing him & another exors. All the property remaining subject to the trusts of the will of M. thus became vested in D., & he paid into court to the account of H. certain funds on an affidavit which stated that after the death of M., his trustees got in all his real & personal estate, & appropriated £40,000 Bank Annuities, & the leaseholds in question to answer the annuities, & transferred the residue to R. In 1878 H. was found of unsound mind by inquisition, & the Master reported that the leaseholds in question belonged half to H. & half to D. absolutely, subject to H.'s annuity of £500. In 1887 D. died, & his will was proved by G., one of his exors. In 1888 H., acting by his committee, & G., by a deed which recited that they were absolutely entitled in moieties to the property, & that the Master had approved of the deed, let the property for twenty-one years. H. died in 1892, & letters of administration to his estate were granted to A., one of his next of kin. By a deed of May 19, 1893, which recited*

**PART V. SECT. 9.**

**a. — Business left by testator.]—**Where the trustees of a will have no power to invest the trust moneys in the purchase of shares in a company, the ct. has no power to sanction a sale by the trustees to a co. of a business left by testator, the trustees taking shares in the co. as payment or part-payment of the purchase-money.—*Re SCOLLAR, ATKEN v. SCOLLAR* (1901), 21 N. Z. L. R. 89.—N.Z.

**b. Validity of appropriation—Power of court to sanction.]—****PUGH & QUEENSLAND TRUSTEES, LTD. v. BRODRIBB**, [1921] St. R. Qd. 163.—AUS.

**c. — Appropriation in payment of debt due to firm.]—****BISSETT v. TAYLOR** (1897), 35 N. S. R. 440.—CAN.

**d. — Charges in equal priority—Proposed immediate payment of one**

*d. bonus—Whether trustees could accept offer—(compensation to life tenants).—***Re SICHIAU**, [1927] V. L. R. 355; 49 A. L. T. 9.—AUS.

**f. —**—**J.—GALLOWAY v. CAMPBELL'S TRUSTEES** (1905), 7 F. (Cl. of Sess.) 931; 42 So. L. R. 712; 13 S. L. T. 256.—SCOT.

**g. Sale of personally—Trustees given discretion.]—****HEENAN v. HEENAN** (1893), 12 N. Z. L. R. 111.—N.Z.

that G. was surviving trustee of the will of M., G. as trustee at the request of A., & in consideration of £3,000 paid by G. to her, & being himself entitled as beneficial owner to the other half of the property, assigned the leaseholds to P. By an indenture of May 20, 1893, P. as trustee, & at the request of G., assigned the premises to him. On Sept. 10, 1901, G. agreed to sell the property to E. for £12,200 & the purchaser took the objection that in 1893 G. was a trustee for sale of the property, & could not purchase the half of it which was then conveyed to him:—*Held*: if any appropriation had taken place, it was an appropriation of unauthorised securities, & was not effectual to destroy the trust for sale; until H. was found a lunatic there could be no election by the beneficiaries; there had been no election to take *in specie* by the ct. on behalf of the lunatic; it was not proved that there had been an election by all the persons interested; the trust for sale did not come to an end when the annuities ceased, was not void for perpetuity & was operative in 1893; & the title ought not to be forced on the purchaser.

A trust for sale does not come to an end simply because the persons to take are ascertained & *sui juris* at the time of distribution (BYRNE, J.).—*Re DOUGLAS & POWELL'S CONTRACT*, [1902] 2 Ch. 296; 71 L. J. Ch. 850.

*Annotations*.—*Mentd.* *Re Grimthorpe, Beckett v. Grimthorpe*, [1908] 1 Ch. 668; *Re Sturt, De Bunsen v. Hardinge*, [1922] 1 Ch. 416.

**3587.** ———.]—Testator, who described himself as a general broker, by his will dated Dec. 11, 1895, gave a sum of money upon certain trusts, & he declared that “the moneys liable to be invested under this my will may be invested in such securities as my trustees in their absolute discretion shall think fit; & I authorise my trustees to continue or leave any moneys invested at my death in or upon the same securities”:—*Held*: there was sufficient in the context of the will to show that testator was using “securities” as equivalent to “investments” in both sentences; & the trustees were authorised to appropriate to the trust legacy out of investments belonging to testator at his death ordinary stock of the Midland Railway, & to purchase with money belonging to the trust legacy ordinary stock of the London & North-Western Railway.—*Re RAYNER, RAYNER v. RAYNER*, [1904] 1 Ch. 176; 73 L. J. Ch. 111; 89 L. T. 681; 52 W. R. 273; 48 Sol. Jo. 178, C. A. *Annotations*:—*Reid*, *Re Gent & Eason's Contract*, [1905] 1 Ch. 386. *Mentd.* *Re Johnson, Greenwood v. Greenwood & Robinson* (1903), 89 L. T. 520; *Wilmott v. London Road Car Co.* (1910), 103 L. T. 447; *Re Hutchinson, Crispin v. Hadden* (1919), 88 L. J. Ch. 352; *Singer v. Williams*, [1921] 1 A. C. 41; *Re Neville, Neville v. First Garden City*, [1925] 1 Ch. 44.

**3588.** ———. Or investments sanctioned by court.]—Where property is settled on trust for sale as & when the trustees in their absolute discretion think fit, & there is great difficulty in realisation, the ct. has jurisdiction to sanction an appropriation of the original investments to the shares of the various beneficiaries, including a settled share, although some of the investments appropriated to the settled share are not authorised by the investment clause.—*Re COOKE'S SETTLEMENT, TARRY v. COOKE*, [1913] 2 Ch. 661; 83 L. J. Ch. 76; 109 L. T. 705; 58 Sol. Jo. 67.

*Annotation*.—*Consd.* *Re Wragg, Wragg v. Palmer*, [1919] 2 Ch. 58.

**3589.** ———. Appropriation of mortgage—Pro-

charge & appropriation to provide for others.].—*LAMB v. FRENCH*, [1918] 1 I. R. 420.—*IR.*

*e.* ———. Implied power.].—*VAN DUNLOP TRUSTEES v. POLLOK*, [1912] S. C.

10.—*SCOT.*

*i.* ———. Appropriation of investments to legacy.].—*COLVILLE'S TRUSTEES v. COLVILLE*, [1914] S. C. 255; 51 Sc. L. R. 204; [1914] 1 S. L. T.

party worthless.].—*Re BROOKES, BROOKES v. TAYLOR*, No. 3696, *post*.

**3590.** ———. Appropriation of shares in business.]

—Testator by his will devised & bequeathed his residuary real & personal estate to three trustees, two of whom were his sons, upon trust to sell & convert & to stand possessed of the proceeds upon trust for all his children, except his son J., in equal shares, & he directed that all properties & investments acquired by him in the names of any of his children or advances to or for the benefit of his children should be treated as absolute gifts to such children of the properties, investments, & advances which might be taken in their names individually or given to or for their benefit, & that such children should not be liable to repay to him or his estate the consideration which he had paid for the properties or the amounts that might have been advanced or invested on such securities or otherwise. He further directed that in the division of his estate his trustees should equalise his children's shares as far as possible by treating all gifts to them as having been made in satisfaction or part satisfaction of their shares. Testator then settled the shares of his daughters, & declared that his trustees might postpone the sale & conversion of his real & personal estate so long as they should think fit, the income of the unconverted property to go to the persons to whom the income produced by the sale & conversion would for the time being be payable if the sale & conversion had been actually made. The investment clause did not authorise the investment in the shares of private cos. Testator died in Dec. 1892, leaving six children other than J., who took no interest in the residue, namely two sons & four daughters. A considerable part of testator's estate consisted of shares in a private co. called (Cravens Limited, the arts. of which contained restrictive provisions with reference to the transfer of shares. There was no market for these shares, & the trustees, although they had advertised, had been unable to obtain an offer for them. During his lifetime testator had made advances to certain of his children, & subsequently to his death the trustees had made further advances to two of his sons. The trustees had, for the purpose of dividing the income, pending the distribution of the estate, added to the income of the actual estate interest at 4 per cent. *per annum* on the advances to the children, & had then divided the total thus ascertained into six equal shares, & had paid one of such shares to each of the children, deducting in the case of an advanced child 4 per cent. on the amount of the advances to that child:—*Held*: (1) having regard to the difficulty of realising the Craven shares the principal adopted by the trustees with regard to the advances made both before & after the death of testator was the correct one; (2) the power to postpone conversion applied to the Craven shares only so long as the estate was retained by the trustees as a whole, & did not extend to authorise them to appropriate those shares to the settled shares of the daughters when the estate was divided.—*Re CRAVEN, WATSON v. CRAVEN*, [1914] 1 Ch. 358; 83 L. J. Ch. 403; 109 L. T. 846; 58 Sol. Jo. 138.

*Annotations*:—*As to* (1) *Apld.* *Re Forster-Brown, Barry v. Forster-Brown*, [1914] 2 Ch. 584; *Re Cooke, Randall v. Cooke*, [1916] 1 Ch. 480. *Consd.* *Re Tod, Bradshaw v. Turner*, [1916] 1 Ch. 569. *Reid.* *Re Foster, Hunt v. Foster*, [1920] 1 Ch. 391. *As to* (2) *Consd.* *Re Wragg, Wragg v. Palmer*, [1919] 2 Ch. 58.

62.—*SCOT.*

*g.* ———.].—*GROSSET v. BIRRELL'S TRUSTEES*, [1920] S. C. 231; 57 Sc. L. R. 187; [1920] 1 S. L. T. 123.—*SCOT.*

*Sect. 9.—Power to appropriate. Sects. 10, 11, 12, 13, 14, 15, 16 & 17: Sub-sects. 1 & 2.]*

**3591.** ———.]—*Re WRAGG, WRAGG v. PALMER*, No. 3602, *post*.

**3592.** ———.]—*Settled legacy.*]—*Re WRAGG, WRAGG v. PALMER*, No. 3602, *post*.

—————.]—*Compare EXECUTORS*, Vol. XXIV., p. 595, Nos. 6281–6285.

**Appropriation by executors.**]—*See EXECUTORS*, Vol. XXIV., pp. 591–597, Nos. 6258–6302.

#### SECT. 10.—POWER OF APPOINTMENT.

**Powers of appointment.**]—*See, generally, POWERS*, Vol. XXXVII., pp. 384 *et seq*.

—————.]—**New trustees.**]—*See Part II., Sect. 2, sub-sect. 2, B. (d), ante.*

#### SECT. 11.—POWER TO GIVE RECEIPTS.

*See Settled Land Act, 1925 (c. 18), s. 95; Trustee Act, 1925 (c. 19), s. 14; SALE OF LAND*, Vol. XL., pp. 295–297, Nos. 2545–2561.

**3593. Question of title.**]—The question whether an exor. or trustee who sells an estate can give a good receipt for the purchase-money is not a question of conveyance but of title.—*FORBES v. PEACOCK* (1843), 12 Sim. 528; 13 L. J. Ch. 46; 1 L. T. O. S. 384; 7 Jur. 688; 59 E. R. 1235; *on appeal* (1846), 1 Ph. 717; 15 L. J. Ch. 371, 1 L. C.

*Annotations:—***Refd.** Doe d. Jones v. Hughes (1831), 6 Exch. 223; Stroughill v. Anstey (1852), 1 De G. M. & G. 635; Sabin v. Heape (1859), 27 Beav. 553; Carlyon v. Truscott (1875), L. R. 20 Eq. 348. **Mentd.** Curtis v. Fulbrook (1849), 19 L. J. Ch. 65; Robinson v. Lowater (1854), 23 L. J. Ch. 641; *Re Tanqueray-Willaine & Landau* (1882), 20 Ch. D. 465; *Re Venn & Furze's Contract*, [1894] 2 Ch. 101; *Re Henson*, Chester v. Henson, [1908] 2 Ch. 356.

**3594. Whether all trustees must join.**]—One trustee for the sale of an estate having released & conveyed to his co-trustee refused to join in the receipt of the purchase-money upon the special expression of the deed the purchaser was not held to the agreement with the remaining trustee: it would have been otherwise, if one had merely renounced.—*CREWE v. DICKEN* (1798), 4 Ves. 97; 31 E. R. 50, L. C.

*Annotations:—***Consd.** Small v. Marwood (1829), 9 B. & C. 300. **Refd.** Nicolson v. Wordsworth (1818), 2 Swan. 365. **Mentd.** Urch v. Walker (1838), 3 My. & Cr. 702; Pyke v. Waddingham (1852), 10 Hare, 1; Lane v. Debenham (1853), 11 Hare, 188; *Re Young*, Fraser v. Young, [1913] 1 Ch. 272.

**3595.** ———.]—*WALKER v. SYMONDS*, No. 3085, *ante*.

**3596.** ———.]—A sum of money having been given to four trustees, one of them lent a part on mtge., & there was notice of the trust on the mtge., which was made to that one trustee only; he subsequently called in the money, which the mtgor. procured from another person, to whom the mtge. was then assigned, & who paid the money to the single trustee alone. The mtgor. afterwards sold the property, & the purchaser objected that the payment of the mtge.-money to the one trustee alone was not a good discharge: but the ct. was of opinion that that payment was a good discharge; the true principle being, that no person could be allowed to deal with trust-money to the prejudice of the *cestui que trust*, & the ct. being of opinion that there had not been any such dealing by the vendor in this case.—*HANSON v. BEVELEY* (1832), 1 L. J. Ch. 132.

**3597.** ———.]—Stock standing in the names of trustees was mortgaged to secure £1,200 & interest,

& notice of the mtge. was given to the trustees by both the mtgor. & mtgee. Upon his marriage the mtgee. assigned the £1,200 to H. & H., & it was declared that the receipt or receipts of them, or the survivor of them, should be a sufficient discharge; & one of them, being the solr. of the mtgee., was allowed to retain all the deeds in both transactions. The trustees, at the request of the mtgors., sold a portion of the £3,000 & paid off the £1,200 & interest, which was received by the mtgor.'s solr., & trustee of the settlement, without the authority of his co-trustee. He gave up the deeds relating to the mtge., & signed a receipt "for self & co-trustee," but he never invested the money upon the trusts of the settlement; but he survived his co-trustee & died insolvent. Upon a bill filed by the new trustees of the mtgee.'s marriage settlement against the trustees of the £3,000.—*Held*: the receipt of one trustee was no discharge; the being entrusted with the deeds for safe custody did not authorise one trustee to receive the trust money; & the trustees of the £3,000 must repay the £1,200 with interest & costs.—*HALL v. FRANK* (1849), 11 Beav. 519; 18 L. J. Ch. 362; 13 L. T. O. S. 338; 13 Jur. 222; 50 E. R. 918.

**3598.** ———.]—A firm of solrs. having been employed by the trustees of a will to receive the proceeds of testator's real estate, which had been taken by a railway co., paid over the money to one of such trustees without the receipt of authority of the other. The money having been lost to the estate by the insolvency & death of the trustee to whom it was paid:—*Held*: the receipt of one trustee only, though also an exor., was not a sufficient discharge to the solrs. for the money which they had received by the authority of the two, & they were personally liable to make good the loss which had resulted to the trust estate from such improper payment.

A mere agent of trustees is answerable only to his principal & not to *cestuis que trust* in respect of trust moneys coming to his hands merely in his character of agent. . . . But . . . a person who receives into his hands trust moneys, & who deals with them in a manner inconsistent with the performance of trusts of which he is cognisant, is personally liable for the consequences which may ensue upon his so dealing (*BACON, V.-C.*).—*LEE v. SANKEY* (1873), L. R. 15 Eq. 204; 21 W. R. 286; *sub nom.* *LEE v. SANKEY, GINDER v. SANKEY*, 27 L. T. 809.

*Annotations:—***Consd.** *Re Barney*, Barney v. Barney, [1892] 2 Ch. 265. **Refd.** Wilson v. Barry (1880), 5 Q. B. D. 518; *Sour v. Ashwell*, [1893] 2 Q. B. 390; *Mara v. Brown* (1895), 72 L. T. 765; *Re Eyre-Williams*, Williams v. Williams, [1923] 2 Ch. 533.

**3599.** ———.]—*Re FLOWER (C.) & METROPOLITAN BOARD OF WORKS, Re FLOWER (M.) & SAME*, No. 3251, *ante*.

**3600. Authority inferred—From power to invest.**]—An authority given by testator to his trustee to lay out money on security, includes in it, an authority to give sufficient discharges to the borrowers.—*WOOD v. HARMAN* (1820), 5 Madd. 368; 56 E. R. 935.

*Annotation:—***Apld.** Locke v. Lomas (1852), 5 De G. & Sm. 326.

**3601.** ———.]—Testator devised real estate to A. & B., their exors., administrators & assigns, for the term of five hundred years, upon trust to raise by sale or mtge. the sum of £2,400 & directed them to put out the same on Govt. or real securities & call in & replace out the same from time to time, & to pay the income to C. for life, & after her death to pay the principal to such persons as C. should appoint by will, & in default of appointment to C.'s children. The will did not contain a power

3612 i. *Right to retain.*—TILLIE v. SPRINGER (1892), 21 O. R. 585.—CAN.



*Sect. 17.—Retainer against beneficiaries: Sub-sects. 2 & 3.]*

of the Navy out of a certain fund, during the life of the grantee.

A. subsequently absconds, being largely indebted to the Crown, & not having paid the £4,000 according to the covenant in his settlement; &, upon his departure, the pension is withdrawn by Order of Council, & the trustees, of the settlement stop the payment of the dividends of the other funds to which he was entitled for life under the settlement.

A. having granted annuities secured by assignment of his pension & of these dividends, on a bill by the annuitants against the Treasurer of the Navy & the A.-G., for recovery of what was in the hands of the former on account of the pension, & against the trustee of the settlement for dividends accrued since A.'s departure:—*Held*: the trustees, who had no notice of the assignment, were entitled to retain the dividends in satisfaction of the covenant.—*PRIDDY v. ROSE* (1817), 3 Mer. 86; 36 E. R. 33.

*Annotations:—Apld.* *Smith v. Smith* (1835), 1 Y. & C. Ex. 338. *Consd.* *Houlditch v. Wallace* (1838), 5 Cl. & Fin. 629; *Re Weston, Davies v. Taggart*, [1900] 2 Ch. 164. *Reid.* *Re Brown, Ex p. Turpin* (1832), Mont. 443; *Re Prior, Ex p. Young* (1835), 2 Mont. & A. 228; *Burridge v. Row* (1842), 1 Y. & C. Ch. Cas. 183; *Courtenay v. Williams* (1844), 3 Haro, 539; *Jones v. Mossop* (1844), 3 Haro, 568; *Cole v. Muddle* (1852), 10 Haro, 186; *Re Tonnies* (1873), 28 L. T. 567; *Ballard v. Marsden* (1880), 14 Ch. D. 371; *Dingle v. Coppen* (1898), 68 L. J. Ch. 337; *Re Jewell's Settlement*, *Watts v. Public Trustee*, [1919] 2 Ch. 161.

**3613.** —[—]—On the marriage of N. & G. two settlements were executed; by one, a sum of stock & estates in W., the lady's property, were conveyed to trustees in trust for her for life, with remainder in trust for the children of the marriage, & by the other, N. granted, out of his estates, a rentcharge to G. for life. She, after her husband's death, fraudulently obtained a transfer of the stock, & sold it out; &, afterwards, she assigned her life interest in the estates in W., & the rentcharge, to A., for valuable consideration, but with notice of the fraud:—*Held*: the rents of the estates in W., & the rentcharge, were liable to be applied to replace the stock; & a receiver of the same was granted before answer.—*WOODYATT v. GRESLEY* (1836), 8 Sim. 180; 3 Mont. & A. 169, n.; *Donnelly*, 135; 59 E. R. 72.

*Annotations:—Apld.* *Hastie v. Hastie* (1875), 21 W. R. 242. *Reid.* *Burridge v. Row* (1842), 1 Y. & C. Ch. Cas. 183; *Irbly v. Irbly* (No. 3) (1858), 25 Beav. 632; *Fox v. Buckley* (1876), 3 Ch. D. 508; *Re Weston, Davies v. Taggart*, [1900] 2 Ch. 164.

**3614.** —[—]—W., the father of S., the intended wife, on the marriage of S., gave a bond to the trustees of the marriage settlement, conditioned for the payment of £5,000 at his death. R., the intended husband of S., covenanted with the trustees to pay to them £5,000 after his death, & assigned to them policies of assurance for £5,000, with a declaration that the sums received in respect of the policies, if they amounted to £5,000, were to be considered as a satisfaction of the covenant. The trusts of this £5,000, the subject of the covenant, were, in the events that happened, for S. for life, with remainder to R. R., after the marriage, became bkpt., & the trustees proved, as a debt against his estate for the value of his covenant, & the sum received in respect thereof produced £431 stock, which was invested in their names. The assignees of R. assigned to W. all the interest of R. under the settlement, whether in the £431 or the policy fund. R. died, & £5,991 stock, the produce of the policies, was invested in the names of trustees. W. became bkpt. & died:—*Held*: the trustees of the settlement were entitled

to hold the two sums of £431 & £5,991 against the assignees of W. towards satisfaction of the bond of W.—*BURRIDGE v. ROW* (1844), 13 L. J. Ch. 173; 3 L. T. O. S. 1; 8 Jur. 299, L. C.

*Annotations:—Reid.* *West v. Reed* (1843), 7 Jur. 147; *Clack v. Holland* (1854), 19 Beav. 262; *Re McKenna's Estate, Ex p. Busted* (1861), 5 L. T. 241; *Re Leslie, Leslie v. French* (1883), 23 Ch. D. 552; *Falcke v. Scottish Imperial Insce.* (1886), 34 Ch. D. 234; *Re Weston, Davies v. Taggart*, [1900] 2 Ch. 164; *Re Jewell's Settlement, Watts v. Public Trustee*, [1919] 2 Ch. 161.

**3615.** —[—]—A., upon his marriage executed to the trustees of his marriage settlement a bond, & also a mtge. of his estates at S., for securing to them a sum of £15,000, the trusts of which were declared to be for A. for life, & afterwards for the benefit of his wife & children. A. not having paid this sum at the time specified in the bond, without notice to the trustees, assigned his life interest therein to B., as a security for the repayment of a debt due from A. to B. A. having afterwards become bkpt., B. filed his bill against the trustees & the assignees under the bkpcy. to obtain the benefit of his security; & a decree was made in that suit, directing the life interest of A. in the £15,000 to be sold, & the produce to be paid to B. In the course of the proceedings in the bkpcy., the assignees sold the S. estates, but the proceeds of the sale did not amount to £15,000:—*Held*: the trustees were entitled, as against B., to retain the annual produce of the sum for which the S. estates were actually sold, until the whole of the £15,000 should be reinstated.—*SMITH v. SMITH* (1835), 1 Y. & C. Ex. 338; 160 E. R. 137.

*Annotations:—Apld.* *Burridge v. Row* (1844), 13 L. J. Ch. 173. *Reid.* *Houlditch v. Wallace* (1838), 5 Cl. & Fin. 629; *Courtenay v. Williams* (1844), 3 Haro, 539; *Jones v. Mossop* (1844), 3 Haro, 568; *Re Weston, Davies v. Taggart*, [1900] 2 Ch. 164; *Re Jewell's Settlement, Watts v. Public Trustee*, [1919] 2 Ch. 161.

**3616.** —[—]—*Semble*: the right of trustees to retain trust property as against a beneficiary who owes money to them as trustees under the instrument creating the trust exists in favour of trustees of a voluntary settlement which has been so completed as to be enforceable by the ct.—*Re WESTON, DAVIES v. TAGGART*, [1900] 2 Ch. 164; 69 L. J. Ch. 555; 82 L. T. 591; 48 W. R. 467.

*Annotation:—Reid.* *Re Jewell's Settlement, Watts v. Public Trustee*, [1919] 2 Ch. 161.

**3617.** —[—]—Where a trust fund is being distributed by the ct. a trustee beneficiary, against whom proceedings are pending for moneys alleged to belong to the fund, cannot take any share until the amount, if any, due from him has been ascertained & made good.—*Re RHODESIA GOLDFIELDS, LTD., PARTRIDGE v. RHODESIA GOLDFIELDS, LTD.*, [1910] 1 Ch. 239; 79 L. J. Ch. 133; 102 L. T. 126; 54 Sol. Jo. 135; 17 Mans. 23.

*Annotations:—Consd.* *Re Smelting Corp'n., Scaver v. The Co.*, [1915] 1 Ch. 472. *Reid.* *Re Peruvian Ry. Construction Co.* (1915), 85 L. J. Ch. 129; *Re National Live Stock Insce., Re National General Insce.*, [1917] 1 Ch. 628; *Re Matton, Mills v. Towers*, [1918] 1 Ch. 37; *Re Jewell's Settlement, Watts v. Public Trustee*, [1919] 2 Ch. 161. *Mentd.* *Re Pain, Gustavson v. Haviland*, [1919] 1 Ch. 38.

**3618.** —[—]—By marriage settlement made in 1895 a policy of assurance on the husband's life was assigned by him to pltf. trustees upon trust on the husband's death to receive the moneys thereby assured, & to pay the income thereof to the wife during her life & after her death to hold the same in trust for the issue of the marriage as the husband & wife should jointly appoint, or in default then as the survivor should by deed or will appoint, & in default of appointment then in trust for the children of the marriage who being sons should attain twenty-one or being daughters attain that age or marry; & the wife thereby assigned certain reversionary property, described as the wife's fund, to the trustees upon trust to



receive the same when it should fall into possession & to pay the income thereof to the wife during her life & after her death to the husband during his life & after the death of the survivor to hold the same upon the same trusts as were declared concerning the policy moneys after the death of such survivor in favour of the issue of the marriage; & the husband thereby covenanted with the trustees that he would not suffer anything whereby the policy should become void or voidable, & would duly pay the premiums for keeping on foot the policy or any policy effected as thereafter provided or for restoring the same respectively if the same respectively should have become voidable; & if the policy or policies should become void would effect a new policy or policies for the amount which would have become payable under the policy so becoming void if the husband had then died; & after a declaration that it should not be obligatory on the trustees to enforce the covenants by the husband, it was expressly provided that the trustees might in their discretion apply the income of the wife's fund towards payment of the premiums or other sums necessary "for keeping on foot or restoring" the policies or any of them. In 1897 owing to the husband's default in paying the premiums the policy lapsed & became void. The wife died in 1904. There was issue of the marriage one infant son. The husband married again, & in 1905 his life interest in the wife's fund was assigned to deft. trustees upon trusts in favour of his second wife. In 1917 the wife's fund fell into possession & pltf. trustees now claimed the right to effect a policy on the husband's life for the amount of the lapsed policy out of the income of the wife's fund:—*Held*: (1) as a matter of construction the express power conferred on pltf. trustees to apply the income of the wife's fund in keeping on foot or restoring the policies did not extend to a lapsed policy; (2) on general principles of equity neither the husband nor his assignees could take anything out of the wife's fund without first making good to the trust estate the loss occasioned by the husband's default in allowing the original policy to lapse, & pltf. trustees were therefore entitled to retain the income of the wife's fund during the husband's life until a policy upon his life for the amount covered by his covenant had been effected in their names or until there had been retained thereout a sum equal to the surrender value for the time being of the original lapsed policy.—*Re JEWELL'S SETTLEMENT, WATTS v. PUBLIC TRUSTEE*, [1919] 2 Ch. 161; 88 L. J. Ch. 357; 121 L. T. 207.

**3619. — Beneficiary executor of settlor.**—The personal interests of a trustee in a trust fund in ct. will be made applicable to the discharge of all claims against him as trustee.

A. was entitled to a share of funds held upon the trusts of his father's marriage settlement, & for which his father's estate was liable. He was one of his father's exors. In a suit to administer the trusts of the settlement & his father's estate, a large balance was found due from A. as exor.:—*Held*: the trustees of the settlement was entitled to retain such balance out of A.'s share, & purchasers from A., pending the suit, with notice of the proceedings, were bound by the same equity.—*IRBY v. IRBY* (No. 3) (1858), 25 Beav. 632; 32 L. T. O. S. 141; 4 Jur. N. S. 989; 6 W. R. 853; 53 E. R. 778.

*Annotations*:—*Refd.* *Re Carew, Carew v. Carew*, [1896] 1 Ch. 527; *Re Sewell, White v. Sewell*, [1909] 1 Ch. 806; *Re Pain, Gustavson v. Haviland*, [1919] 1 Ch. 38.

**3620. — In respect of over-payments—Recovery of Income tax paid on annuities.**—By

indenture made in 1885, after reciting a decree for judicial separation & an order of the Divorce Ct. directing the husband to pay to the wife permanent alimony at the rate of £200 *per annum*, the husband covenanted with the wife that he should in substitution for the permanent alimony directed by the order pay to her during her life the sum of £200 *per annum* subject to a provision that if he should make default in so doing the wife should be at liberty to enforce payment by process under the order as well as by action on the covenant, the intention being that the order should be a collateral & additional security for the covenant thereinbefore contained. The husband died in 1907, having by his will bequeathed his residuary estate to his exors. & trustees upon certain trusts in favour of his four sons, one of whom subsequently died, having bequeathed his one-fourth share to his wife absolutely. The husband during his lifetime, & his exors. & trustees after his death, had paid the wife's annuity in full without deducting income tax:—*Held*: (1) on true construction of the deed the wife's annuity was payable subject to, & not free from, income tax; (2) past overpayments in respect of income tax having been made under a mistake of law were not recoverable as a debt from the wife & could not be deducted either from future payments of the annuity or from the wife's share in the residuary estate of the husband.—*Re HATCH, HATCH v. HATCH*, [1919] 1 Ch. 351; 88 L. J. Ch. 147; 120 L. T. 694; 63 Sol. Jo. 389.

*Annotation*:—*Refd.* *Re Wooldridge, Wooldridge v. Coe*, [1920] W. N. 78.

**3621. — — — — —**—*Re WOOLDRIDGE, WOOLDRIDGE v. COE*, [1920] W. N. 78.

**Retention by executors.**—*See* EXECUTORS, Vol. XXIII., pp. 435-441, Nos. 5050-5109.

#### SUB-SECT. 3.—PERSONS CLAIMING THROUGH OR ON BEHALF OF BENEFICIARIES.

**3622. General rule.**—A share of a trust fund can be retained against a liability to the fund of the party entitled to it, though he is entitled to it by way of derivative title only.

Testator bequeathed a legacy to the wife of D., a trustee of his will, & D. subsequently became entitled to the legacy as his wife's sole exor. & legatee. D. died without having taken out probate to his wife's estate, & at his death he was found to have died insolvent. The legacy had never been paid over, but during his lifetime D. had misappropriated a sum of money belonging to testator's estate:—*Held*: the legacy could be retained by the surviving exor. of testator's estate to the full extent necessary to make good the misappropriation, although D. had never proved his wife's will.—*Re DACRE, WHITAKER v. DACRE*, [1916] 1 Ch. 344; 85 L. J. Ch. 274; 114 L. T. 387; 60 Sol. Jo. 308, C. A.

*Annotations*:—*Refd.* *Re Melton, Milk v. Towers* (1917), 117 L. T. 679; *Re Savage, Cull v. Howard*, [1918] 2 Ch. 146; *Re Jewell's Settlement, Watts v. Public Trustee*, [1919] 2 Ch. 161; *Re Pain, Gustavson v. Haviland*, [1919] 1 Ch. 38.

**3623. Right to retain.**—As against personal representatives.]—A policy of assurance on the life of H. was taken in the names of trustees & a settlement was executed by virtue of which the bonuses payable on the policy were to be held upon trust for H., & the money assured, on the trusts of the settlement. H. obtained possession of & misappropriated a portion of the trust funds:—*Held*: the trustees were not entitled as against H.'s extrix. to impound or retain the bonuses to make

*Sect. 17.—Retainer against beneficiaries: Sub-sects. 3 & 4. Sect. 18.]*

good the trust funds misappropriated by H., not as being settled property, because there was a prior resulting trust of them for H.; not by way of set-off, because they were not payable till after H.'s death.—*HALLETT v. HALLETT* (1879), 13 Ch. D. 232; 49 L. J. Ch. 61; 41 L. T. 723; 28 W. R. 321.

*Annotations:—Apd. Re Gregson, Christison v. Bolam* (1887), 36 Ch. D. 223. *Distd. Re Weston, Davies v. Tagart*, [1900] 2 Ch. 184.

**3624.** ————.]—*Re DACRE, WHITAKER v. DACRE*, No. 3622, *ante*.

**3625.** ————.]—*As against trustees in bankruptcy—Bankrupt beneficiary.*—A father deposited with a bank a sum of £2,400, money of his own, as a continuing security for any amount which might from time to time be owing to the bank by a firm in which two of his sons were the only partners. Interest on the deposit was from time to time paid by the bank to the father. By his will the father gave legacies & shares of residue to the two sons. At the date of his death the sons owed £3,858 to the bank, & the sons were afterwards adjudicated bkpts. The bank proved in the bkpcy. for the whole £3,858. No dividend having yet been paid in the bkpcy., but it being admitted to be improbable that the estate would realise enough to pay the bank in full, & that the bank would ultimately appropriate the deposit of £2,400 towards the payment of the firm's debt:—*Held*: the trustees of the father's will were not entitled to retain the legacies & shares thereby bequeathed to the sons against the liability of the father's estate as surety to the bank, but the trustee in the bkpcy. was entitled to receive those legacies & shares.—*Re BINNS, LEE v. BINNS*, [1896] 2 Ch. 584; 65 L. J. Ch. 830; 75 L. T. 99; 40 Sol. Jo. 654.

*Annotations:—Overd. Re Melton, Milk v. Towers*, [1918] 1 Ch. 37. *Reid. Re Mitchell, Freelove v. Mitchell*, [1913] 1 Ch. 201.

**3626.** ————.]—After testator's death, a legatee of a one-fourth reversionary share in a residuary fund, on whose behalf testator had given a continuing guarantee fully securing his banking account, but limiting testator's liability to a specified amount, mortgaged his reversionary share to the bank to secure his account & subsequently became bkpt. The bank as principal creditors valued their security & proved for the whole balance of their overdraft, on which they received under 10s. in the pound, & had no chance of obtaining full payment. The exors. as sureties were then compelled to pay the sum of £313, the full amount for which they were liable under the guarantee. The bank, with the concurrence of the legatee's trustee in bkpcy., subsequently sold the reversionary share to an assignee. On the reversion falling in & the estate becoming divisible:—*Held*: the £313 must be brought into hotchpot by the assignee on the ground that it did not form part of the assignor's estate at the time of his bkpcy.—*Re MELTON, MILK v. TOWERS*, [1918] 1 Ch. 37; 87 L. J. Ch. 18; 117 L. T. 679; 34 T. L. R. 20; [1917] H. B. R. 246, C. A.

—————.]—*See, also, EXECUTORS*, Vol. XXIII., p. 439, Nos. 5082, 5083.

**SUB-SECT. 4.—BENEFICIARIES DISENTITLED TO MONEYS PAID.**

**3627. Right to retain.]**—Trustees had a power of advancing part of a contingent share of the benefit of a legatee. The trustees sold out £1,000, & advanced the funds partly according to the power, & partly to the legatee personally. With a view to indemnity the trustees insured the legatee's life. He died before the legacy was vested:—*Held*: the indemnity fund belonged to the widow of the legatee, excepting so much as would repay to the estate the money paid to him personally, & the costs of the special case.—*NEWMAN v. CLUTTON* (1851), 17 L. T. O. S. 294.  
—————.]—*See, also, EXECUTORS*, Vol. XXIII., p. 430, No. 5017.

**SECT. 18.—OTHER POWERS.**

**3628. Power to raise sum to start beneficiary in business—Whether amounting to power of discretion exercisable by court.]**—A trust "to levy & raise any sum or sums not exceeding £2,500, as the trustees shall think fit, for the purpose of forming a capital to enable B. to commence business" is a discretion which the ct. cannot exercise, & which cannot be taken advantage of by creditors on the insolvency of B.—*BELLIS v. TOOTH* (1833), 2 L. J. Ch. 76.

**3629. — Two beneficiaries—Power exercisable for benefit of survivor.]**—(1) A power in a settlement to withdraw funds & lay them out in the purchase of a trade for the benefit of the husband & wife may be exercised after the death of one of them for the benefit of the survivor alone.

(2) In exercising it the trustees ought to see that a purchase is *bona fide* made, but they need not inquire into the value of the property or expediency of the purchase.—*DOORLY v. ARNOLD* (1870), 18 W. R. 540.

**3630. — What must be considered by trustees.]**—*DOORLY v. ARNOLD*, No. 3629, *ante*.

**3631. Trust to pay sum at twenty-one—Discretion as to mode of payment—Right to settle or pay over sum.]**—Testator gave money in the funds to be paid or transferred to or settled upon pltf. at twenty-one, by his trustees & exors., in such manner as they in their judgment should think most prudent & proper:—*Held*: the trustees might pay the money to the separate use or into the hands of pltf.—*LAING v. LAING* (1839), 10 Sim. 315; 9 L. J. Ch. 48; 3 Jur. 1119; 59 E. R. 636.

**3632. — Or on prior marriage with consent—Discretion to settle—Effect of marriage under twenty-one without consent.]**—Testator gave property to his trustees, upon trust to pay, distribute & divide equally between his daughters, naming them, to be paid & assured to them as they should attain the ages of twenty-one, or be married under that age with the consent of his trustees. Proviso, that if they should marry with the consent of his trustees, he empowered the trustees to pay the shares at the times of such marriages, or at their discretion to settle the same.

There was a power of maintenance & gifts over as between the daughters on dying unmarried under twenty-one & if all the daughters should die

**PART V. SECT. 17, SUB-SECT. 4.**

**3627.1. Right to retain.]**—*MERRIMAN v. PERPETUAL TRUSTEE CO.* (1896), 17 N. S. W. Eq. 325.—**AUS.**

**PART V. SECT. 18.**

**h. Power to effect partition—Consent of beneficiaries necessary.]**—*SHEP-*

*HERD v. SHEPHERD* (1881), 2 N. S. W. Eq. 4.—**AUS.**

**k. Power to carry on business.]**—*SOUTHWELL v. MARTIN* (1901), 1 S. R. N. S. W. 32.—**AUS.**

**l. —.]**—*Re HAMMOND, HAMMOND v. HAMMOND* (1903), 3 S. R. N. S. W. 270; 20 N. S. W. W. N.

**123.—AUS.**

**m. — & convert business into private company.]**—Trustees having power under a will to carry on a business with limits of capital, which proved inadequate, & having no power of sale, were authorised to convert the business into a limited co. in order that it might

under twenty-one unmarried & without leaving issue, then over:—*Held*: the trustees had no power to direct a settlement where one of the daughters married under twenty-one without consent.—*TAYLOR v. AUSTEN* (1853), 1 Drew. 459; 1 W. R. 252; 61 E. R. 527.

**3633. Power to take legal advice.**—A party named trustee without his sanction & called on to disclaim is authorised in taking the opinion of counsel as to his obligation to execute a disclaimer.—*Re TRYON* (1844), 7 Beav. 496; 2 L. T. O. S. 516; 8 J. P. 408; 49 E. R. 1158.

*Annotations*:—*Mentid. Re Stephen, Ex p. Bass* (1848), 2 Ph. 562; *Re Browne* (1851), 15 Beav. 61; *Re Johnson & Weatherall* (1888), 37 Ch. D. 433; *Re Cheesman*, [1891] 2 Ch. 289.

**3634. Power to lend sum to beneficiary—Not confined to one loan.**—Under a power to lend £2,500 of the trust funds to the tenant for life:—*Held*: it was not exhausted by one loan, but, after repayment, the power might be exercised a second time.—*VERSTURME v. GARDINER* (1853), 17 Beav. 338; 51 E. R. 1064.

**3635. Power to pay annuity—Annuity increased on payment off of incumbrances—Payment of larger sum though incumbrances still subsisting.**—Testator devised his real estate to trustees in trust to pay an annuity of £0,000 a year to his daughter, & subject thereto upon trust to accumulate the rents for twenty-one years, & out of the accumulated fund from time to time to pay his debts, legacies, & the incumbrances on the estates, & invest the residue in the purchase of lands to be held on the same trusts; & he directed the estates, on the expiration of the trust for accumulation, to be settled in strict settlement. He directed that as soon as the incumbrances were paid off, the annuity of £0,000 should be increased to £8,000. He gave his residuary personal estate to his trustees upon trust to pay off the incumbrances, & apply the surplus in the same way as the accumulated rents & profits. He died leaving personalty which, within a month after his death, was ascertained to be amply sufficient to pay off his debts, legacies, & incumbrances. The trustees, however, retained a considerable part of the personal estate, as it was producing a high rate of interest; & they did not for several years pay off all the incumbrances:—*Held*: the trustees were right in paying the annuity at the rate of £8,000 a year from testator's death, & must be allowed it in their accounts.—*ASTLEY v. ESSEX* (EARL) (1871), 6 Ch. App. 898; 25 L. T. 470, L. J.J.

**3636. Covenant in settlement to pay sum of money—Discretion as to time of payment.**—A deed, after reciting that A. was desirous of securing the payment after his decease of the several annuities & the gross sum thereafter respectively specified, to the several persons thereafter named, contained a covenant by A. with trustees that if B. should attain the age of twenty-one years, either in the lifetime or after the decease of A., then the heirs, exors. or administrators of A. should at such time after his death,

or after the day on which B. should attain the age of twenty-one years, whichever should last happen, as the trustees or the survivors or survivor of them should in their or his uncontrolled discretion think fit, & either in one sum or from time to time in various sums, pay to B. or for his use or benefit, any sum not exceeding £300, without any deduction or abatement whatever. The covenant, as originally drawn, was an absolute covenant for the payment of £300, but was altered by the direction of the covenantor at the time when he executed the deed. The sum of £300 was the only gross sum mentioned. The trustees proposed to exercise their discretion by paying B. £5, & expressed their intention of not exercising it further for his benefit:—*Held*: the discretion of the trustees was confined to the time at which the sum or sums were to be paid to B., & he was entitled to the full sum of £300.—*PALMER v. NEWELL* (1872), 25 L. T. 892.

**3637. Trust to pay sum to parent or guardian—Discretion as to children's interests to be exercised.**—*GAINSBOROUGH* (EARL) *v. WATCOMBE TERRA COTTA CLAY CO., LTD., DUNNING v. GAINSBOROUGH* (EARL), No. 3048, ante.

**3638. Power to carry on business—On bequest of business on trust for sale—With power to postpone.**—Testator devised & bequeathed his real & personal estate, which included his business, upon trusts for sale & conversion, the proceeds to be invested & to be held upon trust for his wife for life, & afterwards for his children. The will contained a power to postpone the sale, with the usual direction that the income until sale should be paid to the same persons & in the same manner as the income of the trust estate. The trustees carried on testator's business for twenty-two years, not with a view to a sale, but for the benefit of the widow, to whom the whole of the profits were paid as income:—*Held*: the absolute discretion given to the trustees to postpone the sale involved a power to carry on the business during the period of postponement; the trustees were justified in carrying on the business as they had done, & the whole of the profits of the business had been properly paid to the tenant for life.—*Re CROWTHER, MIDGLEY v. CROWTHER*, [1895] 2 Ch. 56; 64 L. J. Ch. 537; 72 L. T. 762; 43 W. R. 571; 11 T. L. R. 380; 13 R. 406.

*Annotations*:—*Consd. Re Smith, Arnold v. Smith*, [1896] 1 Ch. 171; *Stanley v. Hodgkinson* (1903), 73 L. J. Ch. 179. *Fold. Re Elford, Elford v. Elford*, [1910] 1 Ch. 814.

—*See, generally*, EXECUTORS, Vol. XXIV., pp. 557–564.

**3639. Power to present during infancy—No power to give consent to sale of glebe.**—Where an advowson is settled to the use of an infant as tenant in tail, with a power for the trustees of the settlement to present during his infancy, the trustees are not patrons, & cannot give the consent of the patron required by a private Act of Parliament to the sale of glebe.—*LEIGH v. LEIGH*, [1902] 1 Ch. 400; 71 L. J. Ch. 195; 86 L. T. 219; 50 W. R. 380.

—PERPETUAL EXECUTORS & TRUSTEES ASSOCN. *v. JOHNSON*, [1907] V. L. R. 596.—AUS.

q. *Power to vary & revoke trust.*—*Re RINDOCH, BAKER v. WHITE*, [1925] S. A. S. R. 72.—AUS.

be carried on more conveniently & effectively.—*MCCARTHY v. MCCARTHY* (1919), 19 N. S. W. L. R. 122; 36 N. S. W. W. N. 45.—AUS.

n. —*J. —Re BARBER, BARBER v. BARBER* (1902), 21 N. Z. L. R.

527.—N.Z.

o. *Whether statutory body has power to dedicate bridge to public use.*—

CLARK *v. MELBOURNE HARBOUR TRUST COMRS.* (1903), 29 V. L. R. 467.—AUS.

p. *Power to modify testator's direction.*—

## Part VI.—Investment of Trust Funds.

### SECT. 1.—IN GENERAL.

See, now, Trustee Act, 1925 (c. 19), ss. 1–11.

**3640. Duty to invest.**—Distinction between a trustee undertaking to make good a debt due to the estate, & actually receiving payment, in the one case being bound to invest it, i.e. if the money be received; but *secus* where the trustee merely undertakes to make it good, the debtor not being discharged.—*BIRD v. JOHNSON* (1854), 23 L. T. O. S. 320; 18 Jur. 976; 2 W. R. 692.

**3641.**—[A will appointing trustees only authorised them to invest in Parliamentary stocks or funds, or in freehold, copyhold, or leasehold hereditaments.

The will contained a provision that no trustee should be answerable for any banker, broker, or other person in whose hands any moneys might be deposited for safe custody or otherwise.

The trustees left the sum of £500 on deposit at a bank, by way of *interim* investment, whilst they looked for a mtge., for fourteen months, when the bank failed. Upon the question whether the trustees were liable for the loss thereby occasioned:—*Held*: fourteen months was too long for the trustees to leave trust money on deposit at a bank; if after six months they could not get a mtge. they ought to have invested the money in Consols; from the moment they left it too long on deposit, they became responsible for the consequences of their default, & were therefore liable for the sum lost to the trust estate.—*CANN v. CANN* (1884), 51 L. T. 770; 33 W. R. 40.

*Annotation*.—*Reid. Re Davis, Davis v. Davis* (1902), 71 L. J. Ch. 539.

**3642. Whether investments in names of all trustees.**—There being some disagreement between three trustees, the majority acted alone & took securities in their own names, omitting the name of the dissentient trustee:—*Held*: *pltf.* who was interested in the trust property, was entitled to a receiver.—*SWALE v. SWALE* (1856), 22 Beav. 584; 52 E. R. 1233.

**3643.**—[Residue was bequeathed to two trustees on trust to invest in the Parliamentary stocks or funds or upon real securities at interest in the names of the trustees, with a proviso for change of investment to “any other funds or securities whatsoever.” The property having been invested in bank annuities, the two acting trustees sold these & purchased Russian railway bonds transferable by delivery, half of which were kept in the custody of one trustee, & half of the other. One trustee absconded, having converted the bonds in his hands:—*Held*: the investment was, on the terms of the will, authorised, but, the innocent trustee having on the construction of the trust committed a breach of trust in leaving the securities in his co-trustee’s hands, was liable at the option of the *cestuis que trust* to replace the bonds or to pay the amount for which they were sold, or, if that could not be ascertained, the market value at the date when they were left in the hands of the defaulter.—*LEWIS v. NOBBS* (1878), 8 Ch. D. 591; 47 L. J. Ch. 602; 26 W. R. 631.

*Annotations*.—*Consd. Re Smith, Smith v. Thompson*, [1896] 1 Ch. 71. *Reid. Re Roth, Goldberger v. Roth* (1896),

**PART VI. SECT. 1.**  
*r. What must be taken into account in lending or borrowing.*—In lending or borrowing on landed security there must be always two leading topics of

inquiry—first, the title of the borrower; & secondly, the sufficiency of the value of the estate.—*WARING v. WARING* (1852), 3 L. Ch. R. 331.—*IR.*

*t. Duty of trustees to fortify position*

74 L. T. 50; *Re Sisson’s Settltmt., Jones v. Trappes*, [1903] 1 Ch. 262; *Re Wragg, Wragg v. Palmer*, [1919] 2 Ch. 68.

**3644.**—Condition of investment to be held in name of one.]—(1) Testator gave his real & personal estate to three trustees, with power, in their “absolute discretion,” when they should think fit, but not otherwise, to sell & convert & invest upon certain securities or “upon the stocks, shares, securities” of any incorporated co. paying a dividend:—*Held*: the trustees were authorised to invest in railway stock bearing a fixed rate of interest, but they ought not to allow part of testator’s assets to remain on shares, as invested by testator himself, which, by the rules of the co., could only stand in the name of a single trustee.

(2) Shares, which, by the rules of a co., could only be held in the name of a single person, were bequeathed specifically to three trustees for A. for life with remainder over:—*Held*: they might lawfully be held in the name of a single trustee.—*CONSTERDINE v. CONSTERDINE* (1802), 31 Beav. 330; 31 L. J. Ch. 807; 7 L. T. 122; 8 Jur. N. S. 906; 10 W. R. 727; 54 E. R. 1165.

**3645. Propriety of investment as between tenant for life & remainderman—Neither to be benefited at expense of other.**—Where the question as to the propriety of an investment by trustees for a tenant for life & remainderman arises between the two latter parties, while the ct. will not, on the one hand, sanction a collusive & fraudulent investment that would have the effect of diminishing the capital sum to which the remainderman will be entitled on the death of the tenant for life; yet, on the other hand, it is not in the power of the remainderman to require the investment to be made at the lowest rate of interest, in order that the capital sum may be increased.—*VICKERY v. EVANS* (1863), 33 Beav. 376; 3 New Rep. 286; 33 L. J. Ch. 261; 9 L. T. 822; 10 Jur. N. S. 30; 12 W. R. 237; 55 E. R. 413.

**3646. What are “trust funds”**—Within Trustee Acts—Funds of benefit building society—Invested in names of trustees under direction of board.]—Funds of a benefit building society invested in the names of trustees for the society under the direction of the board are not trust funds subject to the powers conferred by Trust Investment Act, 1889 (c. 32).—*Re NATIONAL PERMANENT MUTUAL BENEFIT BUILDING SOCIETY* (1889), 43 Ch. D. 431; 59 L. J. Ch. 403; 62 L. T. 596; 38 W. R. 475; *sub nom. MANCHESTER ROYAL INFIRMARY DISPENSARY & LUNATIC HOSPITAL v. A.-G., Re NATIONAL PERMANENT MUTUAL BENEFIT BUILDING SOCIETY*, 6 T. L. R. 120.

*Annotation*.—*Reid. Sun Bldg. Soc. v. Western Suburban & Harrow Rd. Bldg. Soc.*, [1921] 2 Ch. 438.

**3647.**—“Trust funds in his hands” —Whether confined to trust moneys awaiting investment.]—*HUME v. LOPES*, No. 3791, *post*.

**Discretion of trustee.**—See Trustee Act, 1925 (c. 19), s. 3.

**Duty of executors as to investment of funds.**—See EXECUTORS, Vol. XXIII., pp. 324–330, Nos. 3909–3962.

**Powers under Settled Land Acts—Application of capital money & land acquired.**—See, generally,

of beneficiaries.—To prevent defeat of rights accruing to beneficiary under Scottish decree.]—*BROWER’S EXECUTOR v. HAMRAY’S TRUSTEES* (1912), S. C. 1374.—*SCOT.*

SETTLEMENTS, Vol. XL., pp. 748-752, Nos. 2778-2822.

## SECT. 2.—WHERE DIRECTIONS GIVEN IN TRUST INSTRUMENT.

### SUB-SECT. 1.—IN GENERAL.

**3648. General rule—Directions must be followed.]**—BEAULIERK v. ASHBURNHAM, No. 3666, *post*.  
**3649.** ———. ———.]—CADOGAN v. ESSEX (EARL), No. 3667, *post*.

**3650.** ———. ———.]—A bequest to trustees of the sum of £20 *per annum* Bank Long Annuities, or an annual sum equal thereto, upon trust to pay same to E. for life; & after her decease, to pay assign, transfer & make over the principal stock or money which should be set apart for the payment of the yearly sum to E.'s children, share & share alike. Testatrix, at the date of her will, & thence till her death, had £50 a year Bank Long Annuities, which would terminate in 1860:—*Held*: testatrix intended to give a perpetual annuity of £20, & the trustees of the will had not an option to make either a permanent investment, or set apart £20 a year long annuities, at their discretion; but were bound to take the course which was most for the advantage of the children of E., by investing in Consols such a sum as would produce £20 a year, to answer the legacy.—HAGGAR v. NEATBY (1854), Kay, 379; 2 Eq. Rep. 176; 23 L. J. Ch. 455; 23 L. T. O. S. 49; 2 W. R. 287; 69 E. R. 160.

**3651.** ———. ———.]—SPEIGHT v. GAUNT, No. 3273, *ante*.

**3652.** ———. ———.]—LEAROYD v. WHITELLY, No. 3038, *ante*.

**3653. Whether court will extend powers Where extension beneficial to trust estate.]**—There does not reside in this ct. any power to authorise trustees to take, on the ground that it is beneficial, an investment which testator has not authorised (BUCKLEY, J.).—*Re MORRISON*, MORRISON v. MORRISON, [1901] 1 Ch. 701; 70 L. J. Ch. 399; 84 L. T. 383; 49 W. R. 441; 17 T. L. R. 330; 45 Sol. Jo. 344; 8 Mans. 210.

*Annotations:—*Consd. & Apld. *Re Tollemache*, [1903] 1 Ch. 457. *Reid. Re New, Re Leavers, Re Morley*, [1901] 2 Ch. 534.

**3654.** ———. ———.]—Where in the administration or management of a trust estate by the trustees, especially where the estate consists of a business or of shares in a mercantile co., there arises an emergency or a state or circumstances which it may reasonably be supposed was not foreseen or anticipated by the author of the trust & is unprovided for by the trust instrument, & which renders it desirable & perhaps even essential, in the

interests of the beneficiaries, that certain acts should be done by the trustees which they themselves have no power to do, & to which the consent of all the beneficiaries cannot be obtained by reason of some not being *sui juris* or not yet in existence, the ct. will exercise its general administrative jurisdiction by sanctioning, on behalf of all parties interested, those acts being done by the trustees.—*Re NEW, Re LEAVERS, Re MORLEY*, [1901] 2 Ch. 534; *sub nom. Re NEW'S SETTLEMENT, LANGHAM v. LANGHAM, Re LEAVERS, LEAVERS v. HALL, Re MORLEY, FRASER v. LEAVERS*, 70 L. J. Ch. 710; 85 L. T. 174; 50 W. R. 17; 45 Sol. Jo. 706, C. A.

*Annotations:—*Distd. *Re Tollemache*, [1903] 1 Ch. 955. *Consd. Re Wells, Boyer v. Maclean*, [1903] 1 Ch. 848. *Mentd. Re Willis, Willis v. Willis* (1901), 71 L. J. Ch. 73. *Re Houghton, Hawley v. Blake*, [1904] 1 Ch. 622.

**3655.** ———. ———.]—The rule laid down in *Re New, Re Leavers, Re Morley*, No. 3654, *ante*, as to the exercise by the ct. of its extraordinary jurisdiction in relation to the administration of trusts, in sanctioning acts by trustees going beyond the express provisions of the trust instrument, is limited to cases of emergency, & does not cover every case in which a particular act is desired to be done merely because it appears beneficial to the estate. For instance, the ct. will not sanction an unauthorised change of investment proposed on the mere ground that it will be to the advantage of the beneficiaries. — *Re TOLLEMACHE*, [1903] 1 Ch. 955; 72 L. J. Ch. 539; 88 L. T. 670; 51 W. R. 597, C. A.

— — — — — **Power to accept new shares on reconstruction of company.]**—*See COMPANIES*, Vol. X., pp. 1029, 1030, Nos. 7138, 7139.

**3656. Power to purchase copyholds of inheritance —With consent of husband & wife—Effect of purchase by husband of copyholds for lives—Without consent of wife.]**—The trustees of a marriage settlement, being empowered by it to invest the trust funds in freeholds or copyholds of inheritance, with the consent of the husband & wife, authorised the husband to purchase a certain estate, as an investment of part of the trust funds; & afterwards they sold out a sufficient part of those funds to pay for the estate, & the husband received the proceeds. The estate was copyhold for lives, & the purchase was made without the wife's consent:—*Held*: nevertheless, as between the husband & the trustees, he must be considered to have purchased the estate for them. *TRENCH v. HARRISON* (1849), 17 Sim. 111; 60 E. R. 1070.

*Annotation:—*Reid. *Pennell v. Duffell* (1853), 1 W. R. 239.

**3657. Power extending beyond statutory range of investment—Construed strictly.]** *Re MARYON-WILSON'S ESTATE*, No. 3729, *post*.

## PART VI. SECT. 2, SUB-SECT. 1.

**3648 I. General rule—Directions must be followed.]**—*HOLMES v. MOORE* (1819), 2 Mol. 328.—IR.

**3648 II.** ———. ———.]—Under a contract of marriage a sum of money was conveyed to trustees, who were directed to invest it on "heritable or good personal security." The trustees invested a portion of the sum in the purchase of bank stock, which afterwards rose greatly in value. The husband & wife then raised an action of declarator that the increased value belonged to them:—*Held*: the trustees were bound immediately to realise the bank stock, & to invest the money according to the provisions of the marriage contract.—*GRANT v. BAILLIE* (1869), 8 Macph. (Ct. of Sess.) 77; 42 So. Jur. 38.—SCOT.

**3648 III.** ———. ———.]—*HUTCHINSON'S*

*TRUSTEES v. YOUNG* (1903), 6 F. (Ct. of Sess.) 26; 41 Sc. L. R. 14; 11 S. L. T. 395.—SCOT.

**395. Construction of statute "Expressly forbid."]**—A direction in a will that during suspense of absolute vesting the trustees shall invest all moneys coming to their hands upon first mtge. of real estate in the Provincial District of Auckland does not "expressly forbid" trustees to invest trust funds under *Trustees Act*, 1883, Amendment Act, 1891, s. 14.—*HANNAY v. ROBINSON* (1898), 16 N. Z. L. R. 325.—N.Z.

**a.** ———. ———.]—A direction to invest moneys in a particular specified form of investment does not make other lawful investments "expressly forbidden" within *Trustee Act*, 1908.—*NEW ZEALAND INSURANCE Co. v. ACTON*, [1924] N. Z. L. R. 193.—N.Z.

**b. Winding up of one company—**

*Right to invest in new company.]*—Authority given by testator to his trustees to continue investments made by him did not authorise them, on the reconstruction of an undertaking by the winding up of an old co. & the formation of a new one, to take up shares in the new co. in lieu of shares belonging to testator in the old one.—*THOMSON'S TRUSTEES v. THOMSON* (1889), 16 Ir. (Ct. of Sess.) 517; 26 Sc. L. R. 368.—SCOT.

**c. Power to continue loan or retirement of partner.]**—A power given by testator to lend part of his funds to a firm of which he was a partner applied only to the firm as existing at the date of his death & did not authorise the trustees to continue the loan to the firm after a partner had retired.—*SMITH v. PATRICK* (1901), 3 F. (Ct. of Sess.) (H. L.) 14; 38 Sc. L. R. 613.—SCOT.

*Sect. 2.—Where directions given in trust instrument : Sub-sects. 2, 3 & 4.]*

**SUB-SECT. 2.—MEANING OF TERMS.**

*See Trustee Act, 1925 (c. 19), s. 68 (1), (13), (14).*

**3658. "Securities"—Interpreted as "Investments."**—*Re RAYNER, RAYNER v. RAYNER, No. 3587, ante.*

**3659.** ————].—Under a marriage settlement the trustees were directed to stand possessed of certain scheduled shares, stock, & securities upon trust at any time, with the usual consents, to sell the same & invest the proceeds in various investments, including "the purchase of freehold ground rents," with power from time to time "to vary or transfer such stocks, funds, shares or securities into or for others of the same or a like nature." The trustees purchased freehold ground rents, & in 1901 the tenant for life under the settlement agreed to sell the same. The purchasers objected to the title on the ground that the trustees were not trustees for the purposes of the Settled Land Acts:—*Held*: the word "securities" in this settlement meant anything to be purchased under the power, & having regard to the power to vary & transfer the "securities" the trustees had power to sell the ground rents, & were consequently trustees for the purposes of the Settled Land Acts.—*Re TAPP & LONDON & INDIA DOCKS Co.'s CONTRACT (1905)*, 74 L. J. Ch. 523; 92 L. T. 829.

**3660.** ————].—Testator, who died in 1895, by his will devised & bequeathed his real estate & the residue of his personal estate upon trusts for his wife & children; & testator, after giving his trustees a discretionary power of sale over his real estate, authorised them to invest any trust moneys in their hands "in the purchase or upon mtg. of freehold or leasehold properties in England . . . or in or upon the preferential stocks" of certain railway cos., "or in any other investment in or upon which trustees are authorised by law to invest trust funds, with full power to vary & transpose such securities for others of the description hereinbefore authorised." The will contained no express trust or power for reconversion of purchased real estate. In 1896 the trustees out of trust moneys in their hands purchased real estate, & in 1903 contracted to resell the same. The purchaser objected that the trustees had no power under the will to resell the purchased real estate:—*Held*: testator had used the word "securities" in its wider sense as a synonym for "investments"; & the power to transpose & vary "securities," so read, enabled the trustees to resell the purchased real estate & to give a good discharge for the purchase-money.—*Re GENT & EASON'S CONTRACT, [1905] 1 Ch. 386*; 74 L. J. Ch. 333; 92 L. T. 356; 53 W. R. 330.

*Annotations.—Consd. Re WRAGG, WRAGG v. PALMER, [1919] 2 Ch. 58. Re H. Hutchinson, Crispin v. Hadden (1919),*

88 L. J. Ch. 352. *Mentd. Singer v. Williams, [1921] 1 A. C. 41.*

**3661. "Invested"—Money deposited with employer.**—Testator by his will declared that "any moneys liable to be invested under this my will may remain invested as at my death." Testator's estate included a sum of £2,900 on deposit with an industrial firm in whose employment testator had been for many years:—*Held*: the money could not be treated as "invested," & consequently the trustees could not allow the same to remain on such deposit.—*Re SUDLOW, SMITH v. SUDLOW (1914)*, 59 Sol. Jo. 162.

**3662. "Invest"—Application of money in purchase of property yielding income.**—Testator devised & bequeathed the remainder of his personal estate & all his real estate to his exors. upon trusts for sale & conversion, & to stand possessed of the proceeds after payment of debts, etc., upon trust for all his children equally, & testator settled the share of each daughter upon usual trusts. Clauses 5 & 6 of the will gave the trustees a discretionary power to postpone the sale & conversion of the residuary estate during such period as they should think fit, & to manage & let the real estate until sold as if they were the absolute beneficial owners thereof. Clause 8 authorised the trustees in their discretion to continue any investments testator might have at his death, notwithstanding that they might not be of the nature of trust investments, & Clause 10 authorised the trustees to invest any money forming part of his trust estate upon such stocks, funds, shares & securities or other investments of whatsoever nature & where-soever as his trustees should in their absolute & uncontrolled discretion think fit with the like power of varying such investments to the intent that his trustees should have the same full & unrestricted powers of investing & transposing investments as if they were absolutely entitled thereto beneficially. There was no express power to retain real estate unconverted during the trust & no express power of appropriation. All the debts, etc., had been paid, & the exors. held the clear residue of the estate as trustees, & desired to appropriate parts of the residuary real estate towards satisfaction of the settled shares of the married daughters:—*Held*: upon the true construction of Clause 10 the trustees had power to invest in the purchase of real estate, & could therefore validly appropriate parts of the unsold real estate in or towards satisfaction of the settled shares of the married daughters. *Qu.*: whether Clauses 5 to 8 conferred on the trustees power to retain the residuary real estate unconverted during the continuance of the trusts.—*Re WRAGG, WRAGG v. PALMER, [1919] 2 Ch. 58*; 88 L. J. Ch. 269; 121 L. T. 78; 63 Sol. Jo. 535.

**3663. "Investment"—Whether purchase of real estate included.**—*Re WRAGG, WRAGG v. PALMER, No. 3662, ante.*

**PART VI. SECT. 2. SUB-SECT. 2.**

**3658 i. "Securities"—Interpreted as "investments."**—*Re MORT, PERPETUAL TRUSTEE CO. LTD. v. DUNDEE (1904)*, 18 R. N. S. W. 760; 21 N. S. W. N. 259.—*AUS.*

**d. "Investing in" means "Actual purchase."**—*Re BARWICK (1884)*, 5 O. R. 710.—*CAN.*

**e. Meaning of security—Whether lending money to bank on deposit receipts.**—*SKINNER v. TRUSTEES EXECUTORS & AGENCY CO., LTD. (1901)*, 26 V. L. R. 670; *affd.*, 27 V. L. R. 218.—*AUS.*

**f. — "Investment."**—*"Investment"* is not a proper term as

to moneys in trade; & "security" means such security as binds lands or something to be answerable for it.—*WORTS v. WORTS (1889)*, 18 O. R. 332.—*CAN.*

**g. Meaning of "permanent."**—A testator gave his trustees power to invest funds (*inter alia*) in or upon "permanent public stocks, funds or securities of any of the Australian Colonies":—*Held*: the term "permanent" did not mean interminable, but the trustees had power to invest in N. S. Wales Govt. Stock, which were payable at dates ranging from 10 to 25 years hence, & which were ordinarily regarded as permanent as opposed to those which were merely

temporary.—*JOHNSTON v. JOHNSTON (1903)*, 4 S. R. N. S. W. 8; 20 N. S. W. N. 271.—*AUS.*

**h. "Bank stock."**—Trustees under a Scottish marriage contract were empowered to invest the trust-funds "on such heritable security, or in such public or Govt. stock of Great Britain, in bank stock, railway debentures, or in such other security as they may consider eligible or expedient":—*Held*: the words "bank stock" must be held to include stock in any of the Scottish banks in good repute at the time of investment.—*CUNNINGHAM, ETC. v. MONTGOMERIE, ETC. (1879)*, 6 R. (Ct. of Sess.) 1333; 16 Sc. L. R. 801.—*SCOT.*



## SUB-SECT. 3.—POWER SUBJECT TO CONSENT.

*See, now, Trustee Act, 1925 (c. 19), s. 3.*

**3664. Consent to be given by deed.—Condition must be followed.**—Where a will directed money to be raised by the sale of an estate & to be invested by the trustees in real or govt. securities, with the consent by deed of the party interested:—*Held*: such direction was not complied with by an investment without a consent by deed.—*CHOLMELLY v. PAXTON* (1828), 5 Bing. 48; 2 Moo. & P. 127; 6 L. J. O. S. C. P. 218; 130 E. R. 978.

**3665. Whether investment imperative.—On application of person whose consent necessary.**—Under the provisions of a marriage settlement trustees had power with the consent of the husband & wife or the survivor, to vary the securities by selling out the settled stock & investing it in land, & it was provided that it should be lawful for the trustees with the consent of the husband & wife or the survivor to lay out the whole of the moneys to be produced by the sale of the stock in the purchase of freehold or copyhold estate of inheritance, or leasehold for a term of not less than sixty years. The husband died & the wife married again:—*Held*: the trustees were not bound on the application of the wife & her second husband to invest any of the stock on leaseholds although the security might be eligible & for a longer term than sixty years.—*LIE v. YOUNG* (1843), 2 Y. & C. Ch. Cas. 532; 12 L. J. Ch. 478; 7 Jur. 761; 63 E. R. 238.

**3666. ———.**—Trustees were “authorised & empowered” with the “consent & direction” of the tenant for life, to lay out the trust moneys on “leasehold hereditaments” “in some convenient place”:—*Held*: (1) it was imperative on the trustees, on the requisition of the tenant for life, to invest in leaseholds, & they could not refuse to do so, on the ground of the liabilities to be incurred by them on the covenants, they having expressly contracted on the subject, but they had a discretion to exercise as to value, title, & locality; (2) leasehold houses were within the power.—*BEAUCLERK v. ASHBURNHAM* (1845), 8 Beav. 322; 14 L. J. Ch. 241; 4 L. T. O. S. 431; 9 Jur. 146; 50 E. R. 126.

*Annotation*.—As to (1) *Folld. Cadogan v. Essex* (1851), 2 Drew. 227.

**3667. ———.**—By a deed power was given to trustees, & they were required, with the approbation of the tenants for life, to invest in the purchase of leaseholds:—*Held*: it was compulsory on them to invest when called upon to do so by the tenants for life.—*CADOGAN v. ESSEX (EARL)* (1854), 2 Drew. 227; 2 Eq. Rep. 551; 23 L. J. Ch. 487; 18 Jur. 782; 2 W. R. 313; 61 E. R. 706.

**3668. Investment improperly made although with consent.—Whether altered by court.**—An investment of trust moneys in Bank Stock, by trustees under a proviso in a marriage settlement, authorising them to invest in any security with the consent of the husband & wife, will not, even with such consent, be considered an ordinary or proper investment; but if the husband & wife insist, the ct. will not alter an investment so made, but will protect the interests of the issue in the settlement moneys.—*FRYER v. ROGERS* (1853), 21 L. T. O. S. 238.

**3669. When consent may be given.—After investment.**—Power to trustees, with consent of A., under her hand, with two witnesses, to advance £1,500 to her husband. They advance the money, without the consent of A. Afterwards A., by an instrument under her hand, attested by two witnesses, testifies that the money was advanced with her consent. On a bill filed by A.:—*Held*: the trustees must refund the £1,500.—*BATEMAN v. DAVIS* (1818), 3 Madd. 98; 56 E. R. 446.

*Annotations*.—*Distd. Stevens v. Robertson* (1868), 37 L. J. Ch. 499. *Mentd. Carver v. Richards* (1860), 2 L. T. 161.

**3670. ——— Receipt for income of Investments.**—By a settlement, the trustees were authorised to invest the trust money in the debentures, preference shares or other securities, issued or guaranteed by any incorporated public co. paying a dividend, or guaranteed income; & with the consent in writing of the tenant for life, notwithstanding her coverture, to alter, vary & transpose the trust funds & securities from time to time. The trustees, without any consent, invested the trust money in debentures of a railway, which were afterwards paid off, & the money then received, was in like manner, reinvested in debentures of another line. The dividends on that line were guaranteed by the contractors of it. The tenant for life & her husband, *pltf.*, joined in signing the receipts for the dividends from the latter investment, till the contractors failed, when the line ceased to pay anything. *Pltf.'s wife* died; but after her death *pltf.* received a dividend from the subsequent investment. On a bill filed by him against the trustees of the settlement, to make them liable for a breach of trust:—*Held*: the previous consent in writing of *pltf.'s wife* was not required to an investment by the trustees; & he could not now make them liable for a breach of trust.—*STEVENS v. ROBERTSON* (1868), 37 L. J. Ch. 499; 18 L. T. 427; 16 W. R. 724.

**3671. ——— Whether prospectively.**—*CHILD v. CHILD*, No. 3761, *post*.

## SUB-SECT. 4.—POWER SUBJECT TO DISCRETION.

*See Trustee Act, 1925 (c. 19), s. 3.*

**3672. General discretion.—Whether class of investments restricted.—To permanent investments.**—Testator directed a particular fund to be invested at interest; the residue of his personality to be employed in any manner his exors. should think proper. The exors. lent the residue to testator's son, who succeeded to the business, at 5 per cent.:—*Held*: they were not answerable for not investing immediately in the stocks.—*DICKINSON v. PRAYER* (1838), Coop. Pr. Cas. 178; 2 Jur. 870; 47 E. R. 455.

**3673. ——— Investment in railway stock bearing high rate of interest.**—Testator directed his trustees to lay out & invest £15,000 upon Govt. real or personal security, or in such stocks, funds, or shares as they might, in their absolute discretion, think fit, & pay the interest to his wife for life; the capital to be for his children. The trustees, with the sanction of the widow, invested a portion of the money upon railway stock bearing

the coming of age of testator's children, to divide the money among the children & the widow, in specified proportions. The exor., with the consent & acquiescence of the widow, loaned a part of the trust funds to merchants engaged in ship-building, who afterwards became insolvent & unable to repay the money:—*Held*: the trustees were

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## PART VI. SECT. 2, SUB-SECT. 3.

**k. Consent to be given in writing.—Writing necessary.**—Where a marriage settlement allows investment of the fund in certain modes with the consent in writing of a party beneficially interested, no acquiescence or actual assent not in writing is sufficient to protect the trustee.—*MIRCHISON v.*

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*BULLOCK* (1886), 12 V. L. R. 512.—AUS.

## PART VI. SECT. 2, SUB-SECT. 4.

**1. Personal security.**—Testator, by his will, devised & bequeathed his real & personal estate to his wife & another, as exor. & exor. in trust to sell the same & invest the proceeds in the best securities they could obtain, & upon



*Sect. 2.—Where directions given in trust instrument :  
Sub-sect. 4. Sect. 3.]*

a high rate of interest. Upon her death the securities were greatly reduced in value :—*Held* : the trustees were bound to invest upon securities of a permanent nature ; in the absence of evidence to the contrary, it must be assumed from the rate of interest that these investments were not permanent, & the £15,000 must now be invested for the benefit of the children of testator.—*STEWART v. SANDERSON* (1870), L. R. 10 Eq. 26 ; 39 L. J. Ch. 337 ; 22 L. T. 10 ; 18 W. R. 278.

**3674.** ——— *To prevent investment in foreign securities.*—*Qu.* : whether a power to A. & B., or other, the trustees of a will for the time being, to make such investments of the funds subject thereto as they may in their discretion think fit, authorises the survivor of A. & B. to invest in foreign securities.—*ZAMBACO v. CASSAVETTI* (1871), L. R. 11 Eq. 439 ; 24 L. T. 770.

*Annotations :—Mentid.* *Dowbiggen v. Trotter* (1872), 20 W. R. 794 ; *Thomson v. S. E. Ry., S. E. Ry. v. Thomson* (1882), 30 W. R. 537.

**3675.** ——— *Where infants interested.]*

—After an administration decree has been made all powers of management of the estate which may be vested in trustees are subject to the control of the ct. ; & the judge who exercises such control must be personally satisfied of the propriety of the course proposed to be adopted by the trustees.

Trustees having power to invest certain moneys belonging to testator's estate at their discretion, & having also power to continue or change securities from time to time as to the majority should seem meet, applied to the ct. in a suit for the administration of the trust estate for liberty to invest the moneys in & to convert securities into American funds or railway stocks. Infants were interested in the trust estate :—*Held* : that if the trustees had the discretion they claimed, which was doubtful, the ct. ought not, in a case where infants were interested, to permit them to exercise that discretion in the way they proposed.—*BETHELL v. ABRAHAM* (1873), L. R. 17 Eq. 24 ; 43 L. J. Ch. 180 ; 29 L. T. 715 ; 22 W. R. 179 ; *affd.* (1874), 3 Ch. D. 590, n., L. J.J.

*Annotations :—Refd.* *Mayd v. Field* (1876), 3 Ch. D. 587 ; *Tempest v. Camoys* (1882), 21 Ch. D. 571.

**3676.** ——— *Testator directed that his trustees should invest the moneys coming to their hands in respect of his estate in their names or under their control in such modes of investment as they "in their uncontrolled discretion" should think proper. Before the commencement of an action to administer the estate, the trustees had invested part of these moneys in the purchase of bonds of a foreign govt. & bonds of a colonial railway co. The chief clerk, in taking the accounts directed by the judgment, disallowed the trustees the sums which they had invested in the purchase of these bonds :—Held* : though the investments ought not to be retained, yet, as the trustees had acted *bonâ fide*, & there had been no loss to the trust estate, these sums ought not to be disallowed.—*Re BROWN, BROWN v. BROWN* (1885), 29 Ch. D. 889 ; 54 L. J. Ch. 1134 ; 52 L. T. 853 ; 33 W. R. 692 ; 1 T. L. R. 471.

*Annotation :—Consd.* *Re Smith, Smith v. Thompson*, [1896] 1 Ch. 71.

**3677. Exercise of trustee's discretion by court—Whether exercised as matter of course.]—Where**

trustees are directed to pay a certain sum to a person for life, & are empowered according to their discretion to invest the trust funds out of which that sum is to arise, but decline or neglect to act, & the assistance of a ct. of equity is sought in order to carry into effect the purposes of the will, the ct. will not, as a matter of course, exercise that discretion, but will only act on its established & known rules, unless the intention of testator plainly appears to exclude such a mode of proceeding.

If a gift be to one for life, with remainder to another, the ct. considering that there is a clear intention of giving to the remainderman that which the first taker was to have for his life, will prevent perishable & temporary interests from being wholly enjoyed by the tenant for life, & the remainderman disappointed. . . . This just purpose can only be effected by a conversion in some cases of the perishable property, & giving the party entitled for life only the enjoyment of the parts of that into which the corpus has been converted. . . . But as this proceeds wholly upon a regard for testator's manifest intention, a like regard must be paid to whatever indicates a design on his part that, notwithstanding the form of the gift, the first taker should enjoy the subject-matter *in specie* (*LORD BROUGHAM*).—*PRENDERGAST v. PRENDERGAST* (1850), 3 H. L. Cas. 105 ; 14 Jur. 989 ; 10 E. L. R. 75, H. L. ; *affg.* S. C. *sub nom.* *PRENDERGAST v. LUSHINGTON* (1846), 5 Hare, 171, L. C.

*Annotations :—Refd.* *Thornton v. Ellis* (1852), 15 Beav. 193 ; *Re Elmore Trusts* (1860), 3 L. T. 359 ; *Harbin v. Masterman* (1895), 44 W. R. 421. *Mentid.* *Scawen v. Nicholson* (1853), 21 L. T. O. S. 334 ; *Re McMahon, Wells v. Tyrer* (1911), 55 Sol. Jo. 552 ; *Re Marsh, Rhys v. Needham* (1917), 62 Sol. Jo. 141 ; *Re Hollins, Hollins v. Hollins*, [1918] 1 Ch. 503.

**3678. How discretion must be exercised—Bonâ fide.]—Re BROWN, BROWN v. BROWN**, No. 3676, *ante*.

**3679.** ——— *—*—*Re WAINWRIGHT, WAINWRIGHT v. MARTINEAU* (1889), 5 T. L. R. 301.

**3680.** ——— *—*—*Re SMITH, SMITH v. THOMPSON*, No. 3749, *post*.

**3681.** ——— *With care & prudence.]—It may be taken to be settled that trustees must exercise in the discharge of their duties ordinary care & prudence, by which is meant such care & prudence as a reasonable man would exercise in the management of his own private affairs, & that so long as they do this & act within the limits of their legal powers they cannot be made liable for loss, even though incurred by what turns out to be a failure in discretion* (*KEKEWICH, J.*).—*SOMERSET v. POULETT* (1893), 62 L. J. Ch. 720 ; 68 L. T. 613 ; 41 W. R. 536 ; 9 T. L. R. 384 ; 37 Sol. Jo. 424 ; 3 R. 517 ; *on appeal, sub nom.* *Re SOMERSET, SOMERSET v. POULETT* (*EARI.*), [1894] 1 Ch. 231, C. A.

*Annotations :—Refd.* *Mara v. Browne*, [1895] 2 Ch. 69 ; *Fletcher v. Collis*, [1905] 2 Ch. 24 ; *Re Dive, Dive v. Roebuck*, [1909] 1 Ch. 328 ; *Re Fountaine, Re Dowler, Fountaine v. Amherst*, [1909] 2 Ch. 382.

—*See, generally, Part V., Sect. 5, ante.*

**3682. Discretion restricted to variation of investments.]—Re HAZELDINE, PUBLIC TRUSTEE v. HAZELDINE**, No. 3699, *post*.

**Appropriation to meet annuities.]—See RENT-CHARGES**, Vol. XXXIX., pp. 125, 126, Nos. 187–193.

not justified in investing the money on personal security.—*PERLEY v. SNOW* (1879), R. E. D. 373.—*CAN.*

*m. Exclusion of British Funds—Right to invest in English realty.]—A will contained the following investment*

clause, "My trustees being at liberty to sell all my ships, etc., & invest same as they think most desirable but not in the British funds, my trustees to be free from all liability in investing any of the money received for the sale of

any of my property"—*Held* : the above clause authorised the trustees to invest the proceeds of sale in the purchase of freehold lands in England & Ireland.—*Re O'CONNOR, GRACE v. WALSH*, [1913] 1 I. R. 69.—*IR.*

## SECT. 3.—RETAINER OF INVESTMENTS.

See, now, Trustee Act, 1925 (c. 19), s. 4.

**3683. When allowed—Express power to retain.]**

—If shares in a foreign adventure are bequeathed to trustees, [with power to continue the investment] the ct., unless asked to change the investment, will make no order as to the continuance of the shares as an investment.—**BATES v. MACKINLEY** (1862), as reported in 31 L. J. Ch. 389.

*Annotation* :—**Mentd.** *Browne v. Collins* (1871), L. R. 12 Eq. 586.

**3684.** ———.]—Testatrix by her will bequeathed £4,000 to resps. upon trust to pay the annual income of £2,000 to S. and the annual income of £2,000 to the appellant. The will empowered the trustees “to continue to hold” particular investments should “they consider it advisable or expedient to do so.” The trustees appropriated certain securities of testatrix to each of the sums of £2,000, & at the request of S., but contrary to their own wishes, continued to hold shares in a joint stock bank with unlimited liability as part of the fund appropriated to the legacy to S. The bank became insolvent, & the trustees were made personally liable for calls to the amount of more than £2,000 :—*Held* : they had not been guilty of a breach of trust in retaining the investment.—**FRASER v. MURDOCH** (1881), 6 App. Cas. 855 ; *sub nom.* *ROBINSON v. MURDOCH*, 45 L. T. 417 ; 30 W. R. 162, II. L.

*Annotations* :—**Consd.** *Re Brooks, Coles v. Davis* (1897), 76 L. T. 771. **Distd.** *Re Craven, Watson v. Craven*, [1914] 1 Ch. 258. **Consd.** *Re Wragge, Wragge v. Palmer*, [1919] 2 Ch. 58. **Reid.** *Hobbs v. Wayet* (1887), 36 Ch. D. 256 ; *Re Kidd, Kidd v. Kidd* (1894), 42 W. R. 571 ; *Haroon v. Beilios*, [1901] A. C. 118 ; *Re Hall, Foster v. Metcalfe* (1902), 72 L. J. Ch. 74 ; *Matthews v. Luggles-Brise*, [1911] 1 Ch. 184 ; *Re Richardson, Ex p. St. Thomas Hospital*, [1911] 2 K. B. 705 ; *Re Townsend, Gratton v. Machen*, [1911] 1 Ch. 662.

**3685.** ———.]—**Promissory note—Death of promisor before payment of amount due.]—Re GODWIN'S SETTLEMENT, GODWIN v. GODWIN**, No. 3891, *post*.

**3686.** ———.]—**Power implied from terms of instrument.]—Re IRWIN, BARTON v. IRWIN** (1895), 39 Sol. Jo. 233.

**3687.** ———.]—J., by his will, in effect gave the sum of £2,000 to trustees upon trust to invest in real estate : & he then gave certain cottages & hereditaments to the same trustees on the same trusts as he had declared as to the estate to be purchased with the £2,000. He then gave his thirty shares in the Leeds Banking co. to the same trustees upon the same or the like trusts as were declared concerning the sum of £2,000 & the cottages. The banking co. failed, & the trustees had paid large sums out of testator's estate on account of these thirty shares. A suit was instituted for the administration of testator's estate, & the Master of the Rolls considered the trustees of the will liable for not having converted the shares :—*Held* : the directions for investment contained in the will could not be taken to apply equally to the £2,000 & the cottages, & must be read *reddendo singula singulis*. The bequest of the bank shares was specific, & the shares need not be converted unless the direction to convert was

clear. The ct. was of opinion it was not clear.—**GRAVEN v. CRADDOCK** (1869), 20 L. T. 638, L. C.

**3688.** ———.]—**Authorised investments.]—Trustees under a will had an option to invest testators estate either in 3 per cents., or on real security, but neglected to do so, leaving the fund in some other state of investment :—Held : the *cestui que trust* had not the option of charging them with the money & interest, as to claim the amount of 3 per cents., because the *cestui que trust* never had the right to compel the purchase of 3 per cents., & the trustees were chargeable only with the money & interest.—**ROBINSON v. ROBINSON** (1851), 1 De G. M. & G. 247 ; 21 L. J. Ch. 111 ; 18 L. T. O. S. 293 ; 16 Jur. 255 ; 42 E. R. 547, L. J.**

*Annotations* :—**Apld.** *Knott v. Cottee* (1852), 16 Beav. 77. **Distd.** *Aspland v. Watte* (1855), 20 Beav. 47. **Apld.** *Fisher v. Gilpin* (1869), 38 L. J. Ch. 230. **Distd.** *Re Massingberd's Settlement, Re Clark's Settlement, Clark v. Trelawny* (1889), 59 L. J. Ch. 107. **Apld.** *Re Campbell, Campbell v. Campbell*, [1893] 3 Ch. 468 ; *Re Godwin's Settlement, Godwin v. Godwin* (1918), 87 L. J. Ch. 645. **Reid.** *Morgan v. Morgan* (1851), 14 Beav. 72 ; *Mortimore v. Mortimore* (1859), 4 De G. & J. 472. **Mentd.** *Bradley v. Cartwright* (1867), L. R. 2 C. P. 511 ; *De Cordova v. De Cordova* (1879), 4 App. Cas. 692 ; *Cavendish v. Cavendish* (1885), 30 Ch. D. 227 ; *Re Christmas, Martin v. Lecon* (1885), 30 Ch. D. 544 ; *McIlquham v. Taylor*, [1895] 1 Ch. 53.

**3689.** ———.]—**HUME v. RICHARDSON**, No. 3767, *post*.

**3690.** ———.]—**Whether trustee must inquire as to sufficiency of security.]—(1)** In retaining authorised securities, whether they are authorised in the sense of being investments which the trustees may make, or whether they are specified investments transferred to the trustees & authorised to be retained by them, there is no duty or obligation on the trustees to make further investigation as to the title of the security or the solvency of mtgor., assuming that the trustee acts honestly & that there are no circumstances to give rise to suspicion.

(2) The liability of trustees in dealing with authorised securities must proceed upon the footing of wilful default in not calling in the security.—**RAWSTHORNE v. ROWLEY** (1907), [1909] 1 Ch. 409, n. ; 78 L. J. Ch. 235 n. ; 100 L. T. 154 n. ; 24 T. L. R. 51, C. A.

*Annotations* :—**As to (1)** **Consd.** *Shaw v. Cates*, [1909] 1 Ch. 389. **Distd.** *Re Brooks, Brookes v. Taylor*, [1914] 1 Ch. 558.

**3691.** ———.]—**Interference by court.]—Re D'EPINOX'S SETTLEMENT, D'EPINOX v. FIETTES**, No. 3780, *post*.

**3692.** ———.]—**Investments becoming unauthorised.]—Where testator invested money on mtgs., & his trustees, after his death, on discovering that the mtgors. had exceeded their borrowing powers, & that there was a considerable decrease in the original value of the securities, & finding, upon sale of some of the mtgs. at the reduced price, that the income of the beneficiaries was diminished, petitioned the court under Law of Property (Amendment) Act, 1859 (c. 35), for its opinion as to the remaining mtgs. : the ct. gave its opinion that the trustees were justified in retaining the remaining mtgs. in their hands, & in not changing the original investment.—Re FANING'S WILL TRUSTS** (1864), 10 L. T. 61 ; 10 Jur. N. S. 307.

is an uncalled liability, but only so long as they are satisfied of the safety of the shares as a trust-investment, & in the exercise of the power the trustees must act with prudence.—**BOYD'S TRUSTEES v. BOYD**, [1908] S. C. 1147 ; 45 S. L. R. 835 ; 16 S. L. T. 264.—**SCOT.**

**n.** ———.]—**Investments becoming unauthorised—Change in personnel of**

## PART VI. SECT. 3.

**3693 i.** *When allowed—Express power to retain.]—DONALDSON v. DONALDSON'S TRUSTEES* (1851), 14 Dunl. (Ct. of Sess.), 165 ; 24 Sc. Jur. 173 ; 1 Stuart, 147.—**SCOT.**

**3693 ii.** ———.]—**FRASER (OR ROBINSON) v. MURDOCH** (FRASER'S TRUSTEES) (1881), 8 R. (Ct. of Sess.) (H. L.) 127.—**SCOT.**

**3693 iii.** ———.]—**THOMSON'S TRUSTEES v. HENDERSON** (1890), 18 R. (Ct. of Sess.) 24 ; 28 Sc. L. R. 2.—**SCOT.**

**3693 iv.** ———.]—**A power given by testator to his trustees to hold any investments he may die possessed of for such time as they may think fit, entitles the trustees to retain shares in public cos. upon which there**

*Sect. 3.—Retainer of investments. Sect. 4: Sub-sect. 1.]*

**3693.** ———.]—Where fully paid-up shares in a banking co. were bequeathed to trustees, with power to retain the investment, & the shares after testator's death were altered in amount & became liable to calls:—*Held*: by reason of the changes which had taken place, the shares were no longer in the same state of investment as at testator's death, but were in a state of investment unauthorised by the will, & the trustees must convert them.—*Re MORRIS, BUCKNILL v. MORRIS* (1885), 54 L. J. Ch. 388; 52 L. T. 462; 33 W. R. 445.

**3694.** ———.]—*Re TUCKER, TUCKER v. TUCKER*, No. 3764, *post*.

**3695.** ———.]—**Whether trustee must inquire as to sufficiency of security.**—When mtged. freehold property, on the security of which trust money has been invested, has fallen in value, so that the mtge. debt has come to exceed two-thirds of the actual value of the mtged. property, it is not the absolute duty of the trustees at once to call in the mtge., but they have a discretion which they must exercise as practical men with a due regard to all the circumstances of the case, such as the position & solvency of the mtgor.—*Re MEDLAND, ELAND v. MEDLAND* (1889), 41 Ch. D. 476; 60 L. T. 781; 5 T. L. R. 354; *on appeal*, 41 Ch. D. p. 483, C. A. *Annotation*:—*Refd. Re Chapman, Cocks v. Chapman*, [1896] 2 Ch. 763.

**3696.** ———.]—While the interest on a trust mtge. was being regularly paid, & before anything had occurred to suggest that the security was in jeopardy & not properly retainable by the trustee, the trustee distributed the estate, & without inspecting the mtged. premises, which were ten miles off, or making any inquiry as to their actual value as a security, appropriated the mtge. at par to a settled share.

At the time of this appropriation the premises were in fact derelict, unoccupied & in a dilapidated condition & practically worthless as a security, though the mtgor. still continued to pay the interest regularly; & when about two years later the mtge. was called in the money was found to be irrecoverable:—*Held*: in the circumstances the appropriation was a breach of trust, & the trustee was not entitled to relief under Judicial Trustees Act, 1896 (c. 35), s. 3.—*Re BROOKES, BROOKES v. TAYLOR*, [1914] 1 Ch. 558; 83 L. J. Ch. 424; 110 L. T. 691; 58 Sol. Jo. 280.

———.]—*See, now*, Trustee Act, 1925 (c. 19), s. 4.

**3697.** ———.]—**Unauthorised investments.**—*Re BROWN, BROWN v. BROWN*, No. 3676, *ante*.

**3698.** ———.]—*GAINSBOROUGH (EARL) v. WATCOMBE TERRA COTTA CLAY CO., LTD., DUNNING v. GAINSBOROUGH (EARL)*, No. 3048, *ante*.

**3699.** ———.]—**Investments unrealisable—Owing to war conditions.**—Testator who died on July 21, 1910, by his will dated Jan. 14, 1914, appointed pltf. & two others trustees & gave all his real & personal estate to them upon trust to sell, call in, & convert same into money, & after paying debts, invest the residue of the moneys with power from time to time to vary "such investments" as "the trustees may think fit,"

provided that, if any differences should arise between his trustees as to making or varying any investment under his will, a named trustee should have the sole power of deciding. Testator directed his trustees to stand possessed of the residuary moneys & investments for the time being, representing same in trust to pay the income to his wife during her life, & after her decease to her infant daughter for life, & after her death to hold the corpus in trust for her children in equal shares, with trusts in default of children attaining vested interests for testator's widow & his brother F. A number of testator's investments were unauthorised by law, but, owing to war conditions, were either unrealisable or could only be realised at inadequate prices. Questions, having been asked as to whether the trustees' power to invest extended only to investments authorised by Trustee Act, 1893 (c. 53), & their power to retain unauthorised investments:—*Held*: the words "as they may think fit" extending to the trustees' power to vary & not to the trust to invest, no modes of investment being indicated, there were sufficient indications on the construction of the will that the trustees must invest in investments authorised by law for the investment of trust funds only, but they could be authorised to retain the investments for the duration of the war & six months afterwards unless they should become realisable at a reasonable price.—*Re HAZEI DINE, PUBLIC TRUSTEE v. HAZEI DINE*, [1918] 1 Ch. 433; 87 L. J. Ch. 303; 118 L. T. 437; 62 Sol. Jo. 350. *Annotation*:—*Refd. Re Wragg, Wragg v. Palmer*, [1919] 2 Ch. 58.

———.]—**Duty to convert.**—*See Part IV., Sect. 11, ante*.

**3700.** **Whether trustee may accept new securities in company—Alteration in amount of shares.**—*Re MORRIS, BUCKNILL v. MORRIS*, No. 3693, *ante*.

**3701.** ———.]—**Capitalisation of profits.**—*Re PUGH, BANTING v. PUGH*, [1887] W. N. 143.

*Annotation*:—*Distd. Re Whitfield* (1920), 125 L. T. 61.

**3702.** ———.]—Where a co. capitalised certain undivided profits by issuing new shares *pro rata* among existing shareholders & trustees received the quota of new shares due to the estate of two testators in respect of original shares retained by them:—*Held*: the new shares formed part of testator's residue & were held upon the same trusts as the original shares, with the same power to postpone sale thereof, & need not be sold at once.—*Re WHITFIELD* (1920), 125 L. T. 61.

**3703.** ———.]—**Reconstruction of company.**—By a marriage settlement made in 1902 it was declared that the trustees thereof should hold certain investments, which had been transferred by the husband into their joint names, upon trust either to allow same "to remain in the present state of investment thereof" or with specified consents to sell same & invest the proceeds in investments therein mentioned & pay the annual income thereof to the husband for life, & after his death to his wife for life, & after the death of both to hold the investments upon the usual trusts for the children of the marriage with an ultimate trust, in the event of there being no children in favour of the husband absolutely. By clause 11 of the settlement, the trustees were authorised to

*firm.*—Though the settlor should authorise the trustees to continue the trust funds upon the personal security of a trading firm, in which he had invested them, yet the trustees are guilty of a breach of trust, if, upon a change taking place in the firm, they permit the fund to remain upon the personal security of the new firm.—

*CUMMINS v. CUMMINS* (1845), 3 Jo. & Lat. 64.—**IR.**

**o. Whether trustee may apply for shares in new company—Reconstruction of company.**—Trustees who are empowered to hold shares in a co. had obtained an order authorising them to take up new shares in the co. when it increased its capital. The co. was

subsequently reconstructed, & the trustees were entitled to paid up shares in the reconstructed co. by virtue of their holding in the present co.:—*Held*: on the consent of the tenant for life & remainderman being filed the trustees should be authorised to take up the shares in the reconstructed co., but must apply for leave

exercise any preferential right that might be offered to them to subscribe for new or other shares in any co., in which they held shares or stock & to dispose of same, & every premium or profit arising therefrom was to be applied by them as if the same were income. One of the investments so transferred to the trustees consisted of one hundred & nine shares in an American financial co., called the Northern Securities co., which was formed to acquire & hold shares in other corps. & held a large number of shares in & controlled the policy of two American railway cos., the Great Northern Ry. Co., & the Northern Pacific Ry. co. In 1904 the capital stock of the Northern Securities co. was cancelled to the extent of 99 per cent., & in lieu of their one hundred & nine shares in that co., the trustees of the settlement received thirty-two fully paid up shares & a fractional share in the capital stock of the Great Northern Ry. co., forty-two fully paid up shares & a fractional share in the capital stock of the Northern Pacific Ry. co., & one fully paid up share & a fractional share in the Northern Securities co.

In 1905 & 1906 the trustees received three options to take up new stock in respect of the thirty-two shares in the Great Northern Ry. co., & of the forty-two shares in the Northern Pacific Ry. co., & in exercise of these options they paid certain instalments & in one instance sold the right of option. The husband having died & there being no children of the marriage the wife claimed the proceeds of the options as income under clause 11 of the settlement subject to repaying the trustees what had been paid in respect of the new shares:—*Held*: the shares in the two railway cos. were not the same shares which were transferred to the trustees at the date of the settlement, & the trustees were not authorised by the terms of the settlement to retain them.—*Re ANSON'S SETTLEMENT, LOVEFACE (EARL) v. ANSON*, [1907] 2 Ch. 424; 76 L. J. Ch. 641; 97 L. T. 472; 51 Sol. Jo. 686.

*Annotation*:—*Distd. Re Whitfield* (1920), 125 L. T. 61.

—*See, also, COMPANIES, Vol. X*, pp. 1029, 1030, Nos. 7138, 7139.

**Duty of personal representatives to realise investments.**—*See EXECUTORS, Vol. XXIII*, pp. 324–327, Nos. 3909–3934.

#### SECT. 4.—WHAT INVESTMENTS PERMITTED.

##### SUB-SECT. 1.—IN GENERAL.

*See, now, Trustee Act, 1925 (c. 19), s. 1.*

**3704. Whether trustees may invest in trustee securities—When not authorised by trust instrument.**—A jointress was entitled to an annuity of £500, originally charged upon hereditaments which had been sold & were now represented by a sum of Consols., the dividends of which were insufficient to pay the annuity; & the trustees of the fund were empowered to invest the same in some or one of the Parliamentary stocks or public funds of Great Britain, or at interest upon Govt. or real securities in England or Wales, & to vary securities. One of the trustees refusing to consent to any change of security being made, with the view of obtaining a larger income. The ct. ordered the fund standing in Consols to be sold & invested in East India stock.

The powers of investment conferred upon trustees by the statutes & general order, are, in the absence of provisions to the contrary, to be read into settlements as if they had been expressly contained therein.—*MORTIMER v. PICTON* (1864), 4 De G. J. & Sm. 166; 3 New Rep. 338; 33 L. J. Ch. 337; 9 L. T. 591, 795; 10 Jur. N. S. 83; 12 W. R. 292; 46 E. R. 880, L. C.

**3705.** —*Re* OWTHWAITE, OWTHWAITE v. TAYLOR, No. 3585, *ante*.

**3706.** —*Power to retain East India Railway stock—Investment in class B. annuities of East Indian railways.*—Where trustees were at liberty, under the will of their testator, to retain a sum of £22,000 East Indian Railway Stock in that state of investment, but were not empowered to invest in such stock:—*Held*: they might accept, in lieu of the stock held by them, the annuities offered by 42 & 43 Vict. c. cxxvi, but they must accept Class B.—*Re CHAPLIN'S TRUSTS* (1879), 28 W. R. 132.

**3707.** —*Where prohibition in trust instrument.*—The ct. will not invest trust funds in securities prohibited by the settlor.—*OVEY v. OVEY*, [1900] 2 Ch. 524; *sub nom. Re OVEY, OVEY v. OVEY*, 69 L. J. Ch. 804; 83 L. T. 311; 49 W. R. 45.

**3708.** —*Specific securities authorised.*—Trustees having power to invest in Govt. or Parliamentary securities may, notwithstanding prohibition upon other investments in the instrument creating the trust, invest their trust funds in any securities upon which cash under the control of the ct. may be invested.—*Re WEDDERBURN'S TRUSTS* (1878), 9 Ch. D. 112; 47 L. J. Ch. 713; 38 L. T. 904; 27 W. R. 53.

*Annotation*:—*N.F. Ovey v. Ovey*, [1900] 2 Ch. 524.

**3709.** —*Re MAIRE, MAIRE v. DE LA BATUT* (1905), 49 Sol. Jo. 383.

*Annotation*:—*Foldd. Re Burke, Burke v. Burke*, [1908] 2 Ch. 248.

**3710.** —*Whether express prohibition.*—A direction to keep trust funds & invest them in one particular way does not “expressly forbid” investment in any of the investments authorised by Trustee Act, 1893 (c. 53).—*Re BURKE, BURKE v. BURKE*, [1908] 2 Ch. 248; 77 L. J. Ch. 597; 99 L. T. 86.

**3711.** —*Power to invest in guaranteed Indian Railway securities—Investment in class B. annuities of East Indian railways.*—Where testator gave his trustees power to invest (*inter alia*), in the debentures or the debenture guaranteed or preference stock or shares of any railway co. in India upon which a fixed or minimum rate of interest should be secured or guaranteed by the same or any other co., or by the Govt. of India; the ct., at the request of the tenant for life of a part of the estate, ordered her share to be invested in East India Railway Stock, Annuity B., & Scinde, Punjab, & Delhi Railway 5 per cent. Guaranteed Stock.—*Re MANSEL, RHODES v. JENKIN* (1881), 45 L. T. 741; 30 W. R. 133.

**3712.** —*Corporation holding funds for charitable purposes.*—A corp. incorporated by a special Act held funds for charitable purposes:—*Held*: (1) the corp. were trustees within Trust Investment Act, 1889 (c. 32) & were entitled to invest any trust moneys in their hands on any of the

to retain them more than one year from the time the reconstruction was carried out.—*Re WALKER* (1913), 9 Tas. L. R. 66.—*AUS.*

*p.* —*Re SICHIAU'S WILL, TRUSTEES, EXECUTORS & AGENCY CO., LTD. v. SICHIAU*, [1918] V. L. R.

431.—*AUS.*

#### PART VI. SECT. 4, SUB-SECT. 1.

*q. What are trustee securities—Whether building society deposits.*—Trustees having power to invest trust funds on real or personal securities,

have power to invest by placing money on fixed deposit with a building society.—*LOGAN v. RAPER* (1898), 19 N. S. W. L. R. (Eq.) 173; 15 N. S. W. W. N. 117.—*AUS.*

*r.* —*Whether bank fixed deposits.*—*MATTHEWS v. TYSON* (1900),

**Sect. 4.—What investments permitted: Sub-sects. 1, 2 & 3.]**

securities mentioned or referred to in sect. 3 of that Act unless they were expressly forbidden to do so by the instrument creating the trust; (2) if a trustee had not, under the instrument creating his trust power to vary the investments of the trust funds, sect. 3, did not authorise him to sell existing investments for the purpose of re-investing the proceeds on securities mentioned therein.—*Re MANCHESTER ROYAL INFIRMARY, MANCHESTER ROYAL INFIRMARY v. A.-G.* (1889), 43 Ch. D. 420; 59 L. J. Ch. 370; 62 L. T. 419; 38 W. R. 460; *sub nom.* *MANCHESTER ROYAL INFIRMARY DISPENSARY & LUNATIC HOSPITAL v. A.-G., Re NATIONAL PERMANENT MUTUAL BENEFIT BUILDING SOCIETY*, 6 T. L. R. 129.

*Annotation.—As to (2) Dtd. Re Dick, Lopes v. Hume-Dick, [1891] 1 Ch. 423.*

**3713. — Restriction on amount of investment—Unlimited investment in War Loan—Effect of Finance Act, 1917 (c. 31).—**Above Act, 1917, s. 35, empowers trustees to invest funds in hand, & not merely borrowed money, in war stocks, & as regards those stocks, abrogates a provision in the trust instrument against investing more than a specified amount in any one security.—*Re HEAD, HEAD v. HEAD*, (1919), 88 L. J. Ch. 236; 35 T. L. R. 352; 63 Sol. Jo. 464.

**3714. What are trustee securities—Municipal stock—Population over fifty thousand owing to borough extension.]—**In the returns of the census, made in Apr., 1901, it is stated that the population of the borough of Bournemouth was 47,003. But in a note at the foot of the page it is stated that by an order of the Local Government Board, which came into operation on Nov. 9, 1901, the borough was extended so as to embrace two specified urban districts & parts of two other parishes, & that the figures at the date of the census were for Bournemouth 59,762.—*Held:* under Trustee Act, 1893 (c. 53), s. 1 (m), trustees were authorised to invest in stock issued by the corpn.—*Re DRUITT, DRUITT v. DEHLER*, [1903] 1 Ch. 446; 72 L. J. Ch. 441; 88 L. T. 483; 67 J. P. 99; 19 T. L. R. 269; 1 L. G. R. 353, C. A.

**3715. — Railway debentures issued under Local Loans Act, 1875 (c. 83).—**The general statutory power of a trustee to invest in the debenture stock of a certain class of railways under Trustee Act, 1893 (c. 53), s. 1 (g), is not enlarged by s. 5, (3) so as to enable him to invest in nominal debentures issued under the Local Loans Act, 1875 (c. 83), as the latter sub-sect. is impliedly confined to the enlargement of express powers of investment.—*Re TATTERSALL, TOPHAM v. ARMITAGE*, [1906] 2 Ch. 399; 75 L. J. Ch. 680; 95 L. T. 353; 70 J. P. 537; 54 W. R. 603; 4 L. G. R. 1083.

**— Government securities.]—See Sect. 4, sub-sect. 2, post.**

**SUB-SECT. 2.—GOVERNMENT AND PUBLIC SECURITIES.**

*See, now, Trustee Act, 1925 (c. 19), s. 1.*

**3716. Investment in Government securities protected.]—***FRANKLIN v. FRITH* (1792), 3 Bro. C. C. 433; 29 E. R. 627, L. C.

*Annotation.—Mentd. Tebbis v. Carpenter* (1816), 1 Madd 290.

21 N. S. W. Eq. 268; 17 N. S. W. W. N. 182.—**AUS.**

t. ———.]—*SIDEY v. HUNTLY* (1900), 21 N. S. W. Eq. 104; 17 N. S. W. W. N. 98.—**AUS.**

a. *Duty to invest in trustee securities.]—*Trustees were empowered to invest trust funds in "such securities as they think best"—*Held:* they were bound to invest in invest-

**3717. What investments included in power to invest—On "Government securities"—Exchequer bills.]—**The words "Govt. security or securities" held not to apply to Exchequer Bills.—*Re PUBLIC UNDERTAKING MONIES CUSTODY ACT, Ex p. CHAPLIN* (1839), 3 Y. & C. Ex. 397; 3 Jur. 750; 160 E. R. 756.

*Annotation.—Reid. Baud v. Fardell* (1855), 7 De G. M. & G. 628.

**3718. ———.]—***MATHEW v. BRISE*, No. 3258, *ante*.

**3719. ——— Government funds other than Consols.]—**A trust to invest in Govt. securities sanctions investments in other Govt. funds as well as Consols.—*BAUD v. FARDELL* (1855), 7 De G. M. & G. 628; 25 L. J. Ch. 21; 26 L. T. O. S. 83; 1 Jur. N. S. 1214; 4 W. R. 40; 44 E. R. 245, L. J.

**3720. — On "public stocks of the Bank of England"—Public stocks forming part of National Debt.]—**Testator, by his will dated in 1868, directed his trustees to invest the trust funds, in "some or one of the public stocks of the Bank of England & on no other investment whatsoever"—*Held:* the trustees could only invest in public stocks & the expression "public stocks" was confined to public stocks forming part of the National Debt of this country.—*Re HILL, FETTES v. HILL* (1914), 58 Sol. Jo. 399.

**3721. — On "Government or other approved securities"—East India stock.]—**Upon an application under Law of Property Amendment Act, 1859 (c. 35), for the opinion of the ct., whether under a trust for investment in Govt. or other approved securities, trustees would be justified in investing a trust fund in East India stock or railway debentures, or on mtge. of freehold, copyhold or leasehold hereditaments, the ct. approved of an investment on freeholds in England or Wales, but declined to give any answer sanctioning investments in the other securities mentioned.—*Re SIMSON'S TRUSTS* (1860), 1 John. & H. 89; 70 E. R. 674; *sub nom. Re TIMSON'S TRUST*, 2 L. T. 170; *sub nom. Re TIMPSON'S WILL*, 8 W. R. 388.

**3722. ——— Railway debentures.]—Re SIMSON'S TRUSTS, No. 3721, *ante*.**

**3723. ——— Freehold estates in England or Wales.]—Re SIMSON'S TRUSTS, No. 3721, *ante*.**

**3724. ——— Mortgages.]—Re SIMSON'S TRUSTS, No. 3721, *ante*.**

**3725. — "Government or other securities in bonds or shares"—Railway stocks.]—**Testator directed that "all my personal property invested in Govt. or other securities in bonds or shares of whatever nature or kind be held in the same or the like investments by & in the names of my trustees"—*Held:* Victoria, Russian, & Brazilian Govt. bonds, which passed by delivery & were lodged for safety with a bank, & also railway stocks, were investments within the meaning of the will.—*ARNOULD v. GRINSTEAD* (1872), 21 W. R. 155.

**3726. ——— Victorian, Russian & Brazilian Government bonds.]—ARNOULD v. GRINSTEAD, No. 3725, *ante*.**

**3727. — On securities of "any colony or foreign country"—Bonds of French railway company.]—**Under a settlement the trustees were empowered to invest the trust funds in the "bonds, debentures, or other securities, or the stocks or funds of any colony or foreign country." The question arose whether they could properly invest

ments upon which trustees can, by law, properly invest trust funds.—*BRIDGES v. SHEPHERD* (1921), 21 S. R. N. S. W. 220; 33 N. S. W. W. N. 45.—**AUS.**

in the bonds of a French railway co. the payment of the capital on which within fifty years was secured by a sinking fund guaranteed, together with interest in the meantime, by the Imperial Govt. :—*Held*: these bonds were not “securities of a foreign country” within the meaning of the trust for investment.—*Re LANGDALE'S SETTLEMENT TRUSTS* (1870), L. R. 10 Eq. 39.

**3728.** — On “stocks or funds of Government of United States”—Funds or bonds of separate States.]—Trustees under a will were authorised to invest in the Government stocks or funds of the United Kingdom, or the stocks or funds of the Government of the “United States of America or of the Government of France or any other foreign govt.” :—*Held*: to authorise an investment in the funds or bonds of the separate States of America.—*CADETT v. EARLE* (1877), 5 Ch. D. 710; 46 L. J. Ch. 798.

**3729.** — On “securities of any British colony or dependency”—Stock of provinces of Canada.—Provinces must comply with requirements of Colonial Stock Act, 1900, c. 62.]—(1) Trustees cannot, under a power to invest in stocks or securities of any “British colony or dependency,” invest in the stocks of any province of the Dominion of Canada, unless that province has complied with the requirements of above Act, at any rate if the stock was issued after the province was merged in the Dominion of Canada.

(2) Clauses in trust instruments enlarging the power of investment beyond what the general law sanctions ought to be construed strictly.—*Re MARYON-WILSON'S ESTATE*, [1912] 1 Ch. 55; 81 L. J. Ch. 73; 105 L. T. 692; 28 T. L. R. 49, C. A.

#### SUB-SECT. 3.—SECURITIES OF PUBLIC COMPANIES.

*See, now*, Trustee Act, 1925 (c. 19), s. 1.

**3730.** In what companies investment allowed—Registration in more than one name prohibited.]—*CONSTERDINE v. CONSTERDINE*, No. 3644, *ante*.

**3731.** — “Any established railway”—Railway in United Kingdom established by Act of Parliament.]—A will authorised investments in “shares of any established railway in full operation” :—*Held*: investment in shares in railways within the United Kingdom, established by Act of Parliament, were authorised.—*EDWARDS v. THOMPSON* (1868), 38 L. J. Ch. 65.

**3732.** — “Public company”—Characteristics of public company—Incorporation by public statute.]—Testator directed his trustees to invest the residue of his estate (*inter alia*) “upon the debentures or securities of any railway or other public co. carrying on business in any part of the United Kingdom.” The trustees proposed to invest in the securities of certain cos., incorporated under the cos. Acts :—*Held*: the cos. having been incorporated by public statute, the instruments forming their constitution being accessible to the public, & their shares being transferable to the public, they were public cos. within the investment clause; & the references to railway cos. in the same clause did not restrict the meaning of the words “public cos.”—*Re SHARP, RICKETT v. SHARP* (1890), 45 Ch. D. 286; 60 L. J. Ch. 38; 62 L. T. 777, C. A.

*Annotation*:—*Mentd.* *Ponsford v. Financial Times & Hart* (1900), 16 T. L. R. 248.

**3733.** — — — — Instruments of constitution accessible to public.]—*Re SHARP, RICKETT v. SHARP*, No. 3732, *ante*.

**3734.** — — — — Shares transferable to public.]—*Re SHARP, RICKETT v. SHARP*, No. 3732, *ante*.

**3735.** — — — — “Railway or other public company”—Whether meaning of “public company” restricted.]—*Re SHARP, RICKETT v. SHARP*, No. 3732, *ante*.

**3736.** — Any company incorporated by Act of Parliament—Charter granted by Crown under Act of Parliament.]—By an Act of Parliament the Crown was empowered to grant a charter of incorporation to a marine insurance co., with certain special privileges & limitations. In pursuance of this Act the Crown granted a charter to the London Assurance. By a subsequent Act the capital stocks of the London Assurance & another corp. were amalgamated, & the name & seal of the London Assurance were to be used for both corps. & the London Assurance was to exercise the powers of both corps.

A trustee of a will, who had power to invest in shares of “any co. incorporated by Act of Parliament,” invested in shares of the London Assurance :—*Held*: the London Assurance was a co. incorporated by Act of Parliament within the meaning of the investment clause. *Seem*: if the London Assurance had not been originally within the terms of the investment clause, it would not have come within the terms by virtue of the subsequent Act amalgamating its stock with that of another corp. & enlarging its powers.—*ELVE v. BOXTON*, [1891] 1 Ch. 501; 60 L. J. Ch. 383; 64 L. T. 482, C. A.

*Annotations*:—*Distd.* *Re Smith, Davidson v. Myrtle*, [1896] 2 Ch. 590. *Reffd.* *Wakefield & District Light Rys. v. Wakefield Corp.*, [1907] 2 K. B. 256.

**3737.** — — — — Company not originally within meaning—Effect of subsequent statute enlarging powers.]—*ELVE v. BOXTON*, No. 3736, *ante*.

**3738.** — — — — Company registered under Companies Acts.]—Where testator had empowered the trustees of his will to invest “in or upon the bonds, debentures, or debenture stock of any co. incorporated by Act of Parliament” :—*Held*: the trustees were not empowered to invest on the bonds or debenture securities of a co. incorporated by registration under Companies Act, 1862 (c. 89).—*Re SMITH, DAVIDSON v. MYRTLE*, [1896] 2 Ch. 590; 65 L. J. Ch. 761; 74 L. T. 810; 45 W. R. 29; 40 Sol. Jo. 621.

*Annotation*:—*Mentd.* *Re Craven, Watson v. Craven*, [1914] 1 Ch. 358.

**3739.** — — — — “Any public company or body corporate, municipal, commercial or otherwise”—Harbour trustees.]—A power to invest trust moneys in “bonds, mortgage, debentures, debenture stock, preference or other shares of any public co., or body corporate, municipal, commercial or otherwise,” is confined to such investments in public cos. & bodies duly incorporated.

A trustee invested trust funds subject to such a power in the bond or debenture of a body called “The Trustees for the Town & Harbour of Whitehaven,” which at the time of investment were unincorporated :—*Held*: the word “corporate” was attached to the word “body,” so that the clause should read “any public co. or body corporate, whether municipal, commercial or

an order granting leave to purchase shares in a limited liability co. with the proceeds of a dividend declared by the co. out of the reserve fund on shares already belonging to the estate :—

*Held*: the ct. had inherent equitable jurisdiction to make the order, it being for the benefit of the estate.—*ATKEN & JONES v. SECULAR* (1913), 32 N. Z. L. R. 765.—N.Z.

#### PART VI. SECT. 4, SUB-SECT. 3.

**b.** Whether court may authorise further investment in public company.]—The trustees of a will, with the consent of the beneficiaries, applied to the ct. for



*Sect. 4.—What investments permitted: Sub-sects. 3, 4, 5 & 6.]*

otherwise," & consequently such an investment was a breach of trust.—*WOOD v. MIDDLETON* (1898), 79 L. T. 155.

**3740.** — *Confined to public companies & bodies duly incorporated.*—*WOOD v. MIDDLETON*, No. 3739, *ante*.

**3741.** — *Whether confined to companies in United Kingdom—"Any public company."*—Testatrix after empowering her trustees to postpone the sale or conversion of any part of her estate declared that any money by her will directed to be invested should be invested in "any of the public funds, or in Govt. or real or leasehold securities, or upon the stocks, shares or securities of any railway or other public co." Some time after her death two shares which she had held in an English steamship co. were exchanged for preference & ordinary stock in an American steamship co. which had taken over the business of the English co.:—*Held*: the words "public company," when read in connection with the preceding words of the clause, must be confined to public cos. in the United Kingdom, & consequently that the trustees were not authorised to retain the American preference & ordinary stock as an investment.—*Re CASTLEHOW, LAMONBY v. CARTER*, [1903] 1 Ch. 352; 72 L. J. Ch. 211; 88 L. T. 455.

**3742.** — *"Any corporation or company municipal, commercial or otherwise."*—The will of an English testator authorised investment of the trust fund in the public funds of Great Britain or India or any British colony or foreign country or upon freehold, copyhold, leasehold, or chattel real securities in Great Britain, or on life interests in real or personal property, or in Bank of England stock, or in the stocks, funds, or securities of "any corpn. or co., municipal, commercial or otherwise," or in Indian annuities, or in any trustee securities authorised by English law:—*Held*: the trustees had power to invest in the stocks, funds, or securities of cos., incorporated & unincorporated, formed or registered within the United Kingdom, but carrying on business abroad, & also of cos. formed or registered outside the United Kingdom.—*Re STANLEY, TIGNANT v. STANLEY*, [1906] 1 Ch. 131; 75 L. J. Ch. 56; 93 L. T. 661; 51 W. R. 103; 50 Sol. Jo. 26.

**3743.** — *"Any company in United Kingdom"—"Company registered & having head office in England."*—(1) Where a will contains a trust for conversion with a power to retain investments existing at the date of the will, & the trustees are not unanimous as to the retention of some of the investments made by testator, the trust for sale prevails & the investments must be sold, although such investments are within the investment clauses in the will.

(2) Testator authorised his trustees to invest in the stocks, shares, or securities of "any co. in the United Kingdom":—*Held*: a limited co. registered in England & having its head office in England, where its directors met to manage the affairs of the co., was a "co. in the United Kingdom" within the meaning of the investment clause, although its property was situate abroad & its operations were abroad.—*Re HILTON*,

*GIBBES v. HALE-HINTON*, [1909] 2 Ch. 548; 79 L. J. Ch. 7; 101 L. T. 229; 17 Mans. 19.

**3744.** *In what securities investment may be made—"Upon security of funds of any company incorporated by Act of Parliament"—Preference railway shares.*—A power to invest trust funds "upon the security of the funds of any co. incorporated by Act of Parliament" does not warrant their investment in preference railway shares.—*HARRIS v. HARRIS* (No 1) (1861), 29 Beav. 107; 7 Jur. N. S. 955; 9 W. R. 444; 54 E. R. 567.

**3745.** — *Shares bearing fixed rate of interest.*—(*CONSTERDINE v. CONSTERDINE*, No. 3644, *ante*.)

**3746.** — *"Mortgages or bonds of any municipal corporation"—Wakefield Corporation stock.*—*Re HAMSHAW, HAMSHAW v. STEAD* (1905), 50 Sol. Jo. 27.

**3747.** — *"Preference stock"—Whether fully paid preference shares included.*—By his will testator also empowered his trustees to invest any part of the trust estate upon "the debentures or debenture stock, or preference stock of any railway or other co. in the United Kingdom":—*Held*: inasmuch as there was a distinction, although a minute one, between the two classes of investments described as preference stock & preference shares, it was not within the power of the trustees to invest any part of the trust estate in the fully paid preference shares of any joint stock co.—*Re WILLIS, SPENCER v. WILLIS*, [1911] 2 Ch. 563; 81 L. J. Ch. 8; 105 L. T. 295; 55 Sol. Jo. 598.

*Acceptance of new securities.*—*See* Nos. 3700–3703, *ante*.

#### SUB-SECT. 4.—REAL SECURITIES.

**3748.** *Whether railway debentures included.*—*MANT v. LEITH*, No. 3921, *post*.

*Purchase of land.*—*See* Sub-sect. 8, *post*.  
*Leaseholds.*—*See* Sub-sect. 9, *post*.

#### SUB-SECT. 5.—BEARER SECURITIES.

*See, now, Trustee Act 1925 (c. 19), s. 7.*

**3749.** *Whether permitted—Debentures to bearer.*—(1) A power to trustees to invest in such securities as they "think fit" means as they "honestly think fit."

Two trustees, A. & B., having power to invest in such securities as they thought fit, invested £3,000 in debentures to bearer, issued by a limited co. in the form of a floating security. A. received a commission of £300 for procuring the trustees' application for these debentures. B., who was also tenant for life under the will, concurred in making the investment, but knew nothing of the commission paid to A.:—*Held*: (2) A. was liable for a breach of trust in making the investment, but B. was not liable; (3) that in addition to making good any loss arising on the investment, A. must account to the trust for the £300 commission.—*Re SMITH, SMITH v. THOMPSON*, [1896] 1 Ch. 71; 65 L. J. Ch. 159; 73 L. T. 604; 44 W. R. 270.

*Annotations:—As to (2) Refd. Re Roth, Goldberger v. Roth* (1896), 74 L. T. 50; *Re Wragg, Wragg v. Palmer*, [1919] 2 Ch. 58.

**3750.** — *Foreign government bonds.*—*Re ROTH, GOLDBERGER v. ROTH*, No. 3156, *ante*.

#### PART VI. SECT. 4, SUB-SECT. 4.

*c. Erection of new building.*—Trustees being empowered to invest the moneys of the trust in the purchase of real estate, may in their discretion do

so in the erection of a new building, when an increased income can be obtained thereby.—*Re HENDERSON'S TRUSTS* (1876), 23 Gr. 45.—*CAN.*

*d. Railway mortgage.*—English will

authorising investments on "real security" authorised investment on a railway mortgage.—*BREATOLIFF, ETC. v. BRANSBY'S TRUSTEES* (1887), 14 R. (Cl. of Sess.) 307; 24 Sc. L. R. 233.—*SCOT.*



## SUB-SECT. 6.—LOANS ON PERSONAL SECURITY.

**3751. Whether breach of trust.]**—Trustees lending money on personal security, is not of itself such gross neglect as to amount to a breach of trust, & the legatee & afterwards his assignee, having acquiesced in such loan, a bill to charge the trustees was dismissed.—*HARDEN v. PARSONS* (1758), 1 Eden, 145; 28 E. R. 639.

*Annotation:—*Consd. *Walker v. Symonds* (1818), 3 Swan. 1.

**3752. —.]**—Trustees taking upon themselves to lend an infant's money on a private security must in all cases be responsible in case of the failure of the security.—*HOLMES v. DRING* (1788), 2 Cox, Eq. Cas. 1; 30 E. R. 1.

*Annotation:—*Refd. *Grimwade v. Mutual Soc.* (1884), 52 L. T. 499.

**3753. —.]**—*WALKER v. SYMONDS*, No 3085, ante.

**3754. —.]**—A marriage settlement recites that it had been agreed that a debt should be assigned to the trustees, upon trust, after calling it in, to invest the money upon such security as should be approved of by the husband & his father, either on Govt. real or personal security; & by the witnessing part, the debt is assigned upon trust, on calling in & investing same on Govt. real or personal security, or in the purchase of lands, at the sole order, & by the sole direction, consent & approbation of the husband & his father or the survivor, to stand possessed thereof on the trusts therein mentioned. Then followed the trusts, & a power, in the usual form, for the trustees, with the consent of the husband & his father, or the survivor, in writing, to invest the trust money in the funds, or on real security, or in the purchase of freehold or leasehold estates.—*Held*: a loan of the trust fund to a bank, in which one of the trustees was a partner, on an interest note, without a written consent, was a breach of trust, constituting a provable debt against the separate estate of the trustee.—*Re WISE, Ex p. HLAKEWILL* (1842), 2 Mont. D. & De. G. 607; 6 Jur. 787, Ct. of R.

**3755. Money lent on promissory note—Whether put out on security.]**—Trustee charged with breach of trust, for not putting out money at interest, nor on the best security, according to the trust in a deed. Money lent on a promissory note is not put out on a security. Trustee not protected by acquiescence of the *cestui que trust*, not duly informed.—*RYDER v. BICKERTON* (1743), 3 Swan. 80, n.; 1 Eden, 149, n.; 36 E. R. 782, L. C.

*Annotations:—*Consd. *Walker v. Symonds* (1818), 3 Swan. 1; *Sawyer v. Sawyer* (1885), 28 Ch. D. 595. Refd. *Harden v. Parsons* (1758), 1 Eden, 145; *Hughes v. Wells* (1852), 9 Haro, 749.

**3756. Money lent on bond—Power to invest on Government or real security.]**—Moneys directed by a settlement to be laid out in Govt. or real securities, were lent, by the trustees, to the husband, on bond; & the trustees were ordered, on motion, to pay the sums into ct.—*COLLIS v. COLLIS* (1828), 2 Sim. 365; 57 E. R. 825.

*Annotations:—*Consd. *Meyer v. Montrion* (1811), 4 Beav. 343. Refd. *Savage v. Lane* (1847), 6 Haro, 32.

**3757. —.]**—(1) Trustees of a settlement only authorising investments in Govt. or real securities, advanced part of the trust moneys to a banking firm, in which one of the trustees was a partner, on the security of a mtg. of bonds in which some of the bankers were obligees. Afterwards another partner in the bank was appointed

a new trustee of the settlement. The trust moneys were not called in. On the bankers becoming bkpt.:—*Held*: there was a breach of trust on the part of the new trustee, constituting a provable debt against his separate estate.

(2) Other part of the trust moneys was paid with other moneys indiscriminately into the bank of the firm, to the private account of one of the partners, & an amount equal to the interest on these trust moneys was credited regularly by his direction to one of the persons interested under the settlement, but no other circumstance was in evidence to affect the other partners with notice that the money thus paid in was subject to the trusts:—*Held*: the payment of interest was not sufficient for that purpose, & the money paid in did not constitute a provable debt against the separate estates of the other partners.

(3) The new trustee did not inquire whether the old trustees had received further trust moneys under a covenant in the settlement to settle future property:—*Held*: this was not sufficient ground for charging him for wilful default in respect of sums which ought to have been got in by the old trustees, or in respect of sums received by the covenantor after the appointment of the new trustee & not settled, there having been nothing to lead to a suspicion that any default had been made by the old trustees or the covenantor in those respects.—*Re STRAHAN, Ex p. GEAVER* (1856), 8 De G. M. & G. 291; 25 L. J. Bcy. 53; 27 L. T. O. S. 129; 4 W. R. 536; 44 E. R. 402; *sub nom. Re STRAHAN, Ex p. GEAVER*, 2 Jur. N. S. 65, L. J. J.

*Annotations:—*Generally, Refd. *Cavendish v. Geaves* (1857), 24 Beav. 163. *Mentd.* *Re Bankhead's Trust* (1856), 2 K. & J. 560.

**3758. Power given in trust instrument—Whether loan on bond authorised.]**—Power to lend trust money upon real or personal security, does not enable trustees to accommodate a trader with a loan upon his bond.—*LANGSTON v. OLLIVANT* (1807), Coop. G. 33; 35 E. R. 407.

*Annotation:—*Refd. *Stickney v. Sewell* (1835), 1 My. & Cr. 8.

**3759. —.]**—*Testator* directed the trustees at the expiration of three years after his death to pay £10,000, which he charged on an estate devised to his son, one of the trustees, to his daughter's husband, on condition that he should, to the satisfaction of the trustees, give to them the best & most sufficient security in his power, so that the £10,000 might be effectually secured to them upon certain trusts for testator's daughter & her children. The son paid the money to the husband, before the expiration of the three years, & the trustees took a bond for securing it:—*Held*: were justified in anticipating the time of payment, but not in taking the bond.—*MILLS v. OSBORNE* (1834), 7 Sim. 30; 58 E. R. 748.

**3760. — Effect of subsequent bankruptcy.]**—By a marriage settlement, trustees were empowered, & were thereby required at any time or times, & from time to time after the marriage, & during the life of B., the intended wife, at her request, to lend A., the intended husband, any sum not exceeding £200, part of the trust funds, on the security of his bond. After the marriage, A. took the benefit of Insolvent Debtors Act, & afterwards B. made an application to the trustees to lend a sum of £87 to A., on the security of his bond:—*Held*: the taking of the benefit of the Act had produced such a

## PART VI. SECT. 4, SUB-SECT. 6.

**3751 l. Whether breach of trust.]**—It is illegal for trustees to lend trust funds to one of their number even on heritable security.—*PERSTON v. PERSTON'S TRUSTEES* (1863), 1 Macph. (Ct.

of Sess.) 245; 35 Sc. Jur. 166.—*SCOT.*

**o. Bonds.]**—The trustees, under an antenuptial contract had power "to invest the trust funds on heritable or good personal security":—*Held*:

"personal security" includes bonds, etc., depending only on personal obligation.—*SIM v. MUIR'S TRUSTEES* (1906), 8 F. (Ct. of Sess) 1091; 43 Sc. L. R. 795; 14 S. L. T. 291.—*SCOT.*

**Sect. 4.—What investments permitted: Sub-sects. 6, 7 & 8.]**

change in the circumstances of A., that the trustees would not be authorised in making the advance.—*BOSS v. GODSALL* (1842), 1 Y. & C. Ch. Cas. 617; 11 L. J. Ch. 391; 7 Jur. 146; 62 E. R. 1042.

*Annotation:—Reid, Wiles v. Gresham* (1854), 3 Eq. Rep. 116.

**3761. — To lend with consent—When loan should be called in—Covenant by borrower to repay in six months.]**—Trustees were empowered, with the consent of the wife, to lend the trust moneys to the husband. The wife authorised an immediate loan of part, & of the remainder at such times as the husband might require, & the husband covenanted to pay it in six months. The money was not called in, & was lost by the insolvency of the husband:—*Held*: (1) the wife's consent could not be given prospectively; (2) the trustees were not bound to call in the money at the end of six months.—*CHILD v. CHILD* (1855), 20 Beav. 50; 52 E. R. 521.

**3762. — Investment continued on execution of bond.]**—Trustees of a marriage settlement were empowered, with consent of the husband & wife, to invest the funds on such security, "either real or personal," as they with such consent, should think proper. At the date of the marriage a sum of £2,500, part of the trust funds, was outstanding on the note of the husband, having been advanced to him by the intended wife prior to the marriage. A separation having taken place, but the wife, nevertheless, desiring that the fund should remain in the husband's hands:—*Held*: this investment might be continued until further order on the husband executing a bond to the trustees for the £2,500.—*PICKARD v. ANDERSON* (1872), L. R. 13 Eq. 608; 26 L. T. 725.

**3763. — Loan to person whose consent necessary.]**—Trustees having a power with the consent of the tenant for life to lend the trust funds on personal security may, if satisfied that there is a reasonable prospect of repayment, lend them on personal security to the tenant for life.—*RE LAING'S SETTLEMENT, LAING v. RADCLIFFE*, [1899] 1 Ch. 593; 68 L. J. Ch. 230; 80 L. T. 228; 47 W. R. 311; 43 Sol. Jo. 315.

**3764. Loan to firm—Effect of change in constitution of firm.]**—Testator who died in 1870 by his will authorised his trustees to invest his personal estate "either by placing same on deposit in the hands of the firm of B. T. & co., should they be willing to receive it at interest," but if not, then upon usual securities with liberty "to call in, vary, & transpose investments." At the time of his death testator had a sum of money on deposit with the firm, which his trustees continued after his death:—*Held*: it was a breach of trust to continue the loan after a change took place in the members constituting the firm.—*RE TUCKER, TUCKER v. TUCKER*, [1894] 1 Ch. 724; 63 L. J. Ch. 223; 70 L. T. 127; 42 W. R. 266; 38 Sol. Jo. 218; 8 R. 113; *on appeal*, [1894] 3 Ch. 429.

**3765. — [A power to lend trust money to a firm consisting of certain individuals does not authorise a loan to a firm differently constituted, whether including more individuals or less.**

Testator who had been a partner in the firm of A. & co. nominated his wife & two of the three remaining partners in the firm as his trustees, &

he specially authorised his trustees to allow his share of the capital to remain as a loan to the firm so long as his trustees should think it safe to allow it to remain. The wife died. The amount of the capital was ascertained & continued as a loan to the firm, but without any bond or other obligation being given for it. The third partner, not a trustee, was dissatisfied with the conduct of the firm's business, the result being that he agreed to retire under an agreement by which the two trustee partners paid him a sum of £9,000 for his interest in the firm & by which the trustee partners undertook to meet all the liabilities of the firm, take over all the assets, & relieve the third partner of all debts. The new firm was carried on by the two trustee partners under the old name, & it paid a half-year's interest on the debt due to the trust estate. A year after the retirement of the third partner, the trustee partners, as trustees, granted to the old firm & the third partner a discharge of the debt due to the trust, & about a month afterwards the new firm became insolvent & the two partners bkpt. The trustee partners resigned their trusteeship & new trustees were appointed, who acted as creditors on the new firm & received a dividend out of the new firm's assets. They then raised against the retired third partner this action, claiming reduction of the discharge & payment of the balance of the trust debt:—*Held*: the discharge was a breach of trust on the part of the trustee partners from which the third partner could not profit, the discharge being gratuitous; the actings of the new trustees in ranking as creditors on the new firm's assets did not discharge the liability of the old firm; & the third partner was liable to make good the loss to the trust estate.—*SMITH v. PATRICK*, [1901] A. C. 282; 70 L. J. P. C. 19; 84 L. T. 740; 17 T. L. R. 477, 11. L.

**SUB-SECT. 7.—MORTGAGES.**

*See, generally, EXECUTORS, Vol. XXIII., pp. 328, 329, Nos. 3940–3948: MORTGAGE, Vol. XXXV., pp. 285–296, Nos. 382–482.*

**Security on which building society may make advances.]**—*See BUILDING SOCIETIES, Vol. VII., pp. 472, 473, Nos. 112–116.*

**SUB-SECT. 8.—PURCHASE OF LAND.**

**3766. Interim investment pending purchase—On personal security.]**—Trustees may lend trust money upon good personal security till a proper purchase of lands can be had, but are not justified in placing it in a fluctuating or precarious public fund.—*EMELIE v. EMELIE* (1724), 7 Bro. Parl. Cas. 259; 3 E. R. 168, H. L.

**3767. — Retainer of investment—English & Irish Bank stock.]**—Q., by his will, dated Aug. 30, 1844, gave all his real & personal estate to trustees, upon trust to convert such part thereof as should not consist of money, or securities for money in Govt. securities, into money, & to invest the same in the public stocks or funds of Great Britain, & to stand possessed thereof, & to lay out & invest the same in the purchase of freehold lands of inheritance in Ireland, either in one purchase or from time to time, as eligible purchases might offer; the estates, when purchased, to be vested

was invested upon mtgo. of an incumbered estate which had been twice set up for sale in the Landed Estates Ct. when the sale was adjourned for want of bidders. The interest on

**PART VI. SECT. 4, SUB-SECT. 7.**  
1. Trustees not lend on mortgage—Without a personal covenant for repayment.]—*Re SMITH'S TRUSTS* (1905), 5 S. R. N. S. W. 500; 22

N. S. W. W. N. 161.—AUS.

**PART VI. SECT. 4, SUB-SECT. 8.**  
g. What may be purchased—Mortgaged lands.]—Part of a trust fund

in the trustees, to the use of C. for life, & after her death to W. for life, with limitations over in favour of the sons of W. in tail; & testator directed that until such time as his residuary estate should be laid out in the purchase of lands as aforesaid, his trustees should pay & apply the dividends, interest, & annual produce thereof, or of such part thereof as should remain so uninvested in the purchase of lands, to & for the use of such persons, & for such estates & interest, as he or they would be entitled to in the hereditaments directed to be purchased, or as near thereto as the law would permit. Testator died in 1858 & at the time of his death a considerable portion of his estate was invested in English & Irish Bank stock, & in East India stock. Upon a special case submitted for the opinion of the ct., whether the trustees were justified in retaining such part of the estate as was so invested in the English & Irish Bank stock & East India stock until eligible purchases of land could be obtained, & also for the direction of the ct. as to the proper mode of paying the income & accumulations of it, & as to future investments, & the costs of the special case:—*Held*: (1) the trustees were justified in retaining the English & Irish Bank stock & East India stock by way of *interim* investment until proper purchases of land could be effected.—*IJUME v. RICHARDSON* (1862), 4 De G. F. & J. 29; 31 L. J. Ch. 713; 6 L. T. 624; 8 Jur. N. S. 686; 10 W. R. 528; 45 E. R. 1093, 1. J. J.

*Annotation*.—*Reid*. *Re* Wainwright, Wainwright v. Martineau (1889), 5 T. L. R. 301.

**3768. Deviation from terms of trust—When permitted—Land not obtainable in district designated.]**—*MAYNWARING v. MAYNWARING* (1740), 3 Atk. 413; 26 W. R. 1038, 1. C.

**3769. What may be purchased—Fixed rent-charge.]**—By a private Act, money was directed to be laid out in the purchase of freehold lands, tenements, or hereditaments, & the fee simple & inheritance thereof, which might be approved by this ct.:—*Held*: (1) the purchase of a fixed rentcharge was not a proper investment; (2) the purchase of a freehold estate, subject to a term of one thousand years, at a fixed rent, was equally objectionable.—*Ex p. GARTSIDE* (1837), 6 L. J. Ch. 268, 1. C.

**3770. — Land subject to term at fixed rent.]**—*Ex p. GARTSIDE*, No. 3769, *ante*.

**3771. — Ground rents.]**—Trustees having power to invest money in the purchase of lands or hereditaments in fee simple in possession, may invest in the purchase of freehold ground rents.—*Re PEYTON'S SETTLEMENT TRUST* (1869), L. R. 7 Eq. 463; 38 L. J. Ch. 477; 20 L. T. 728.

**3772. —**—*Testator gave his estate & effects upon trust for conversion & to invest, amongst other things, "upon freehold ground rents or upon leasehold ground rents not having less than sixty years unexpired & held direct from the freeholder." The will contained no trust or power for conversion of freehold or leasehold property purchased by the trustees:—Held*: the investment clause authorised not mtgs. upon the security of, but purchases of, freehold & leasehold ground rents.—*Re MORDAN, LEGG v. MORDAN*, [1905] 1 Ch. 515; 74 L. J. Ch. 319; 92 L. T. 488; 53 W. R. 599, C. A.

**3773. — Power to buy land near settled estate—Minerals under settled estate.]**—Testator devised real estate in strict settlement, & directed his trustees to invest the residue of his personal estate in the purchase of manors, lands, & here-

ditaments adjoining, or convenient or desirable to be held therewith:—*Held*: the trustees might purchase the minerals under the settled estate.—*BELLOT v. LITTLER* (1874), 30 L. T. 861; 22 W. R. 836.

**3774. — Equity of redemption.]**—In 1874 A. settled certain funds upon trust for himself for life, & after his death upon trust, as to one-fifth, for W. & his children. By the settlement A. reserved to himself for life the power to direct the investments of the trust funds as though he were absolute owner; & after his death, the trustees were empowered to invest the trust funds upon freehold, leasehold, or chattel real securities "including equitable mtges by a deposit," with the usual power to vary investments. The settlement also contained the usual power to invest in the purchase of freeholds or long leaseholds. In 1877 A. died, & at that time £6,400, part of the trust funds, stood invested on second mtge. of certain freeholds & leaseholds, S. being the mtgor. In 1878 S. became financially embarrassed, foreclosure or sale by the first mtgees. was imminent, which would have resulted in the total loss of the £6,400, & thereupon the trustees, acting *bona fide* & with a view to save the trust estate, purchased of S. his equity of redemption for £2,000. In 1879 L., a beneficiary, commenced an action against the trustees & W., alleging improper investments, & claiming administration & accounts on the footing of wilful default. The trustees, in their answers to interrogatories, set out clearly the circumstances attending the purchase of the equity of redemption. In 1880 the usual judgment for administration was obtained, including an inquiry as to the improper investments. In 1881, before the Chief Clerk made his certificate, a compromise of the action was sanctioned by the ct. on petition, to which all parties interested, including W.'s children, were parties, under which L.'s share of the trust estate was raised & paid out to her, & all further proceedings in the action were stayed. The petition did not refer to the alleged breaches of trust. In Apr. 1888, W.'s children commenced an action against the same trustees alleging that the purchase of the equity of redemption was a breach of trust & claiming usual relief. Defts. denied the breach of trust & asserted that under the circumstances the purchase was prudent & proper. They also pleaded the order of compromise in the first action in bar of pltf.'s claim:—*Held*: (1) the purchase of the equity of redemption was an unauthorised investment & a breach of trust; (2) the compromise was not a bar to pltf.'s claim, the breach of trust not having been by negligence, inadvertence, or accident, omitted to be brought before the ct. on the hearing of the petition.—*WORMAN v. WORMAN* (1889), 43 Ch. D. 296; 61 L. T. 637; 38 W. R. 412.

**3775. Power implied—Trust for investment until purchase—Application to rents & profits of lands purchased—Implied power to invest rents & profits in land.]**—Testator directed a general accumulation of his real & personal estates during the lives of his three sons, grandsons, & the issue of such grandsons who should be living at his death: & he directed that his personal estate should be laid out in the purchase of real estates, & that his trustees should stand seised thereof, & of all other his real estate, upon trust, during the lives aforesaid, to receive the rents & profits, & from time to time "to lay out & invest the money to arise from

the mtgo. was largely in arrear. The trustees had no power under their trust deed to invest in the purchase of

real estate. The trustees applied under 22 & 23 Vict. c. 35, s. 30, for the opinion & advice of the judge whether

they should invest part of the trust funds in purchasing the fees of the mtgd. lands with a view of reselling

*Sect. 4.—What investments permitted: Sub-sects. 8 & 9. Sect. 5: Sub-sects. 1 & 2.]*

such rents & profits in such purchases as he had thereinbefore directed to be made with his personal estate, & should from time to time collect & receive, & lay out & invest, the rents & profits" of such real estate "in the manner hereinbefore directed with respect to the rents & profits of the hereditaments originally purchased." He also directed that the trustees should from time to time cut down such timber as should be upon the lands devised & directed to be purchased as should be fit to be cut down, & to sell & dispose of the same, & to lay out & invest the money arising by such sales in such purchases as thereinbefore directed to be made with regard to his personal estate, & the rents & profits of his real estate. He further empowered his trustees, "until a convenient purchase or convenient purchases could be made, to permit such part of his personal estate as was then invested in the funds, or consisted of securities, & to invest or place out the money to arise from such part of his personal estate as should not at his decease consist of money, & from the rents & profits of no hereditaments to be purchased as aforesaid, or for the sale of the timber, in the Govt. funds or real security, & from time to time to sell & call in the same, & again invest the same as his trustees should think proper, until a convenient purchase could be found, or until a sufficient sum should be accumulated to make a proper purchase"; & after the death of the survivor of the persons during whose lives the accumulations were to be made, testator directed a partition to be made by his trustees of his estates, & the whole thereof to be divided into three lots of equal value, or as near thereto as possible, & that the premises contained in one of such allotments should be conveyed to the use of "the eldest male lineal descendant then living" of each of his three sons, with remainders over.

The trust for investment in the funds until a proper purchase was made applied to the rents & profits of all lands that might thereafter be purchased, & that trust impliedly authorised the investment in land of the rents & profits of all the estates.—*THELLUSSON v. RENDLESHAM (LORD)* (1859), as reported in 7 H. L. Cas. 429; 11 E. R. 172; *sub nom.* *THELLUSSON v. ROBERTS, HARE v. SAME*, 5 Jur. N. S. 1031, H. L.; *affg. S. C. sub nom.* *RENDLESHAM (LORD) v. ROBERTS* (1856), 23 Beav. 321.

*Annotations:—Mentd.* *Richards v. Davies* (1862), 13 C. R. N. S. 69; *Di Sora v. Phillips* (1863), 2 New Rep. 553; *Rhodes v. Rhodes* (1882), 7 App. Cas. 192; *Re Northern's Estate, Salt v. Pym* (1884), 28 Ch. D. 153; *R. v. Sunderland JJ.* (1901), 85 L. T. 183.

—From use of "invest" or "investment."—*See* No. 3662, *ante*.

**3776. Power to sell with direction to reinvest in land—Duty to reinvest at once.**—A power was given, with the consent of the trustees of a settlement, to the husband & wife to sell the settled estates; & there was a direction that the sale money should be paid to the trustees, & that they, as soon as such should be received by them, should, with all convenient speed, with the consent of the husband & wife, lay out the same in the purchase of freehold lands; but in the meantime the trustees were authorised, with the consent of the husband & wife, to lay out the sale moneys in the public funds, or on govt. or real security at interest.

The settled lands were sold, & the sale moneys lent by the trustees to the husband, on personal security some years after the sale took place:—*Held*: the trustees were answerable for so much 3 per cent. Consols as the sale moneys would have purchased at the time the sale moneys were lent by them to the husband.—*WATTS v. GIRDLESTONE* (1843), 6 Beav. 188; 12 L. J. Ch. 363; 7 Jur. 501; 49 E. R. 797.

*Annotations:—Apld.* *Ames v. Parkinson* (1844), 7 Beav. 379; *Consd.* *Shepherd v. Moulis* (1845), 4 Hare, 500; *Robinson v. Robinson* (1851), 1 Do G. M. & G. 247.

**3777. —Whether reinvestment imperative.**—A power to sell in a deed with a direction to reinvest in lands does not make it compulsory upon the trustees to reinvest, & if they retain the fund as personality it is to be so regarded.—*ATWELL v. ATWELL* (1871), L. R. 13 Eq. 23; 41 L. J. Ch. 23; 25 L. T. 526; 20 W. R. 108.

*Annotation:—Reid.* *Re Sinclair's Settlement, Crump v. Leicester* (1886), 56 L. T. 83.

**3778. Trustees must not purchase on speculation—No money in hand at time of purchase.**—In 1873 the vicar of a parish, with the consent of the patron of the living & the approval of the Ecclesiastical Comrs., contracted under the powers of Ecclesiastical Leasing Acts, 1842 & 1858, to sell the glebe land of the vicarage for £24,963, to the trustee of a will by which estates were devised in strict settlement. The then tenant for life & the Comrs. were parties to the contract. Under the will the trustees held testator's personal estate upon trust for investment in the purchase of land to be settled to the same uses as the settled estates. The title was accepted, & the tenant for life, with the approval of the trustee, entered into possession of the glebe land & paid the vicar interest on the purchase-money, & this payment was continued by successive tenants for life to the vicar & his successor until 1896, the purchase-money not having been paid. At the date of the contract the trustee had no trust funds under his control available for the payment of the purchase-money, the whole or nearly the whole of testator's personal estate remaining after investments in land having been advanced upon the security of policies of insurance upon the life of the third tenant for life of the estates, who did not die till many years afterwards. In 1896, the purchase-money not having been paid, the Comrs. brought an action, against the then tenant for life, the personal representatives of the trustee who had entered into the contract, & the then trustees of the settled estates, for the specific performance of the contract, or for an account & a declaration that plffs. were entitled to a vendor's lien on the land sold & the enforcement of the lien. The then vicar was made a deft. & the then tenant in tail was afterwards added as a deft. The glebe land had become of much less value than the price agreed to be given for it. The estate of the trustee who had entered into the contract had been distributed after proper statutory advertisements. The estates had been disentailed & resettled & the money secured by the policies had been also disentailed, & had been distributed by the trustees of the resettlement among the persons entitled thereto:—*Held*: the contract for the purchase of the glebe land having been made at a time when the trustee had no funds under his control available for the payment of the price, & it being uncertain what the value of the land might be at the time when he would be in a position to pay

them on favourable terms:—*Held*: the case was not within the Act.—*Re TYRRELL'S TRUSTS* (1889), 23 L. R.

Ir. 263.—**IR.**

*h. Trustees taking reversionary interest in land instead of money.*—

*GEORGE v. AUSTRALIAN MUTUAL PROVIDENT SOCIETY* (1885), 4 N. Z. L. R. 165 (S. C.).—**N.Z.**

**Power to purchase under Settled Land Acts.]—**  
See SETTLEMENTS, Vol. XL., p. 751, Nos. 2811–2814.

(2) While a power to invest on leasehold securities may in some cases authorise trustees to advance money on underleases, trustees proposing to make such an advance ought to consider very seriously whether the investment is a prudent one, in view of their inability to control the acts & defaults of the original lessee. — *Re D'EPINOX'S SETTLEMENT*, D'EPINOX v. FETTES, [1914] 1 Ch. 890; 83 L. J. Ch. 650; 110 L. T. 808; 48 Sol. Jo. 454.

**PART VI. SECT. 5, SUB-SECT. 2.**  
**3786** *l. Power implied from power of investment.*—**MACKEONNIE'S TRUSTEES** v. **MACADAM**, [1912] S. C. 1059; 49 Sc. L. R. 766; [1912] 2 S. L. T. 44.—**SCOT.**

**Sect. 5.—Variation of investments: Sub-sects. 2, 3 & 4. Sect. 6.]**

nevertheless, sell the property & invest the proceeds on any of the statutory investments, & vary such investment from time to time, provided that they never buy any redeemable security at a premium.—*WAITE v. LITTLEWOOD* (1872), 41 L. J. Ch. 636;

**3787.** ———.]—*Re COOPER'S TRUSTS*, [1873] W. N. 87.

**Annotations:—***Folld. Re Pope's Contract*, [1911] 2 Ch. 442. *Reid. Re Dick, Lopes v. Dick* (1891), 60 L. J. Ch. 177.

**3788.** ———.]—In an ordinary case a direction to trustees to invest in particular investments implies a power to vary investments, & this implied power gives the trustees a power to sell real estate in which they have power to invest for the occupation of a tenant for life.—*Re POPE'S CONTRACT*, [1911] 2 Ch. 442; 80 L. J. Ch. 692; 105 L. T. 370. **Annotation:—***Reid. Re Wragg, Wragg v. Palmer*, [1919] 2 Ch. 58.

**SUB-SECT. 3.—VARIATION AUTHORISED BY STATUTE.**

*See, now, Trustee Act, 1925 (c. 19), s. 1 (1).*

**3789. National Debt, Conversion Act, 1888 (c. 2).]**—Trustees of a will containing a direction to invest in Consols, but no direction to change or vary the investment, may, under above Act, sell original stock & invest the proceeds in authorised securities.—*Re TUCKETT'S TRUSTS* (1888), 57 L. J. Ch. 760; 58 L. T. 719; 36 W. R. 542.

**3790. Whether authorised by provisions of Trustee Acts—For purpose of reinvestment in trustee securities.]—***Re MANCHESTER ROYAL INFIRMARY, MANCHESTER ROYAL INFIRMARY v. A.-G.*, No. 3712, *ante*.

**3791.** ———.]—(1) The power to vary investments in Trust Investment Act, 1889 (c. 32), s. 3, applies to all investments authorised by the Act, whether made under the Act or not. Therefore, where trust funds were invested in securities authorised by the Act, under an instrument which contained no power to vary:—*Held*: the trustees had power to sell out such securities for the purpose of investing the proceeds in other securities authorised by the Act.

(2) The expression "trust funds" in sect. 3 of the Act includes money invested on security as well as uninvested cash.—*HUME v. LOPES*, [1892] A. C. 112; 61 L. J. Ch. 423; 8 T. L. R. 406: *sub nom. DICK-HUME v. LOPES*, 66 L. T. 425; 40 W. R. 593, H. L.; *affa. S. C. sub nom. Re DICK, LOPES v. HUME-DICK*, [1891] 1 Ch. 423, C. A.

**Annotations:—***As to (1) Reid. Re Othwaite, Othwaite v. Taylor*, [1891] 3 Ch. 494; *Re Hamilton, Cadogan v. Fitzroy* (1896), 65 L. J. Ch. 815; *Re Maire, Maire v. De La Batut* (1905), 49 Sol. Jo. 383.

**SUB-SECT. 4.—VARIATION BY ORDER OF COURT.**

**3792. When order made—For reinvestment in securities yielding higher income—Necessity for special circumstances.]—**The ct. will not, in the absence of special circumstances making the increase of the income of a tenant for life beneficial to those entitled in remainder, authorise the

transfer of a fund from Consols into another investment authorised by Law of Property Amendment Act, 1860 (c. 38), & producing a larger income, where such transfer is likely to cause a loss to those entitled in remainder.

Where therefore the tenant for life of a fund in ct. petitioned to have it transferred from Consols into East India stock, being a redeemable stock, the market price of which was at the time considerably above par, & no special circumstances were alleged to show that the consequent increase of petitioner's income would be beneficial to her children, who were entitled in remainder:—*Held*: such change of investment ought not to be ordered.—*COCKBURN v. PEEL* (1861), 3 De G. F. & J. 170; 30 L. J. Ch. 575; 4 L. T. 571; 25 J. P. 692; 7 Jur. N. S. 810; 9 W. R. 725; 45 E. R. 843, L. C. & L. J.

**Annotations:—***Distd. Hume v. Richardson* (1862), 4 De G. F. & J. 29. *Reid. Equitable Assoc. v. Fuller* (1861), 30 L. J. Ch. 848.

**3793.** ———.]—**For benefit of infants.]—**The ct. ordered a fund invested in Consols, out of which maintenance had been allowed by an order of the ct. for infants in a suit, & which had become diminished, to be sold out & invested in East India Stock, the infants having nearly attained their majority.—*FLUID v. FLUID* (1862), 7 L. T. 500.

**3794.** ———.]—Where trust funds are settled upon husband & wife for life, with remainder to children, the ct. will look to the interests of the children, & will not sanction an investment in East India Stock, unless the funds be so small as to warrant such an investment for the benefit & education of the children. But where, in default of children, the husband & wife are absolutely entitled, & the probability of their having any children is very remote, there the ct. will sanction the change of investment.—*KIDLER v. PARROTT* (1864), 28 J. P. 612.

**3795.** ———.]—*MONTEFIORE v. GUE-DALLA*, [1868] W. N. 87.

**3796.** ———.]—**Order for inquiry whether investment beneficial.]—**Under 4 & 5 Will. 4, c. 29, a trust to invest money in real securities in England or Wales or Great Britain will authorise an investment on real securities in Ireland also: & though the money be already invested in Great Britain, the ct. will, on the application of the tenant for life of the fund, direct a reference to the master to inquire whether it will be for the benefit of all parties interested that that investment should be changed for one at a higher rate of interest in Ireland.—*Ex p. PAWLETT (LORD)* (1845), 1 Ph. 570; 14 L. J. Ch. 321; 41 E. R. 749; *sub nom. Re PAWLETT (LORD)*, 5 L. T. O. S. 121, L. C. **Annotation:—***Folld. Re Kirkpatrick's Trust* (1850), 15 Jur. 941.

**3797.** ———.]—*Re KIRKPATRICK'S TRUST* (1851), 15 Jur. 941.

**3798.** ———.]—**Where no infants interested.]—***Ex p. PAWLETT (LORD)*, No. 3796, *ante*.

**3799.** ———.]—**For benefit of parents—Although risk of loss to children.]—***COCKBURN v. PEEL*, No. 3792, *ante*.

**3800.** ———.]—**Petitioner very poor.]—***PEILLON v. BROOKING* (1861), 4 L. T. 731.

**3801.** ———.]—Where a party is very poor the ct. will not only sanction the exchange

**PART VI. SECT. 5, SUB-SECT. 4.**

**m. When order made—Proceeds of part of land devoted to building church—On land being taken for railway, ordered to be expended in building parsonage.]—***Re RAILWAYS COMR. & TRUSTEES OF ST. BARNABAS' CHURCH, BATHURST* (1887), 8 N. S. W. Eq. 22.—**AUS.**

**n. — Private business—Changed into limited company—Right to shares in new company.]—**M. directed her trustees to pay legacies out of her residuary estate (personalty) which was invested in the business of J., but directed that J. should not be liable to pay the amount until he should be in a position to do so. J. died

three years after M. insolvent, without having paid any of the money. His business was floated into a limited co., which was very successful, & in which the estate of M. was given shares in discharge of the debt due by J. On the trustees of A.'s estate applying for sanction to their accepting the shares:—*Held*: in the special circumstances



from Consols to Bank Stock, but dispense with any provision in the order disenabling the party from receiving three dividends in one year.—*Re INGRAM'S TRUST* (1863), 8 L. T. 758; 11 W. R. 980.

**3802.** ———. [Petitioner unlikely to have children—& absolutely entitled.]—*KIDLER v. PARROTT*, No. 3794, *ante*.

**3803.** ———. [—]—*MONTEFIORE v. GUE-DALLA*, [1868] W. N. 87.

**3804.** ———. [For reinvestment in trustee securities.]—Trustees, under a power in their testator's will, invested the residuary estate in London & Westminster Bank shares. An administration decree having been made, plffs., who were remaindermen under the will, applied to have the fund invested in Consols; & it appearing that one of the trustees desired the change of investment, but was willing to retire from the trust: Ordered, that the fund be invested in Consols, with liberty to apply with reference to any appointment of new trustees.—*BUTLER v. WITHERS* (1860), 1 John. & H. 332; 4 L. T. 736; 70 E. R. 774.

**3805.** ———. [—]—*Re KURTZ'S SETTLEMENT*, *HENDERSON v. LAYTON* (1921), 152 L. T. Jo. 344.

**3806.** ———. [Investment on authorised security but with insufficient margin.]—*PINCE v. BEATTIE*, No. 3080, *ante*.

#### SECT. 6.—FUNDS IN COURT.

See R. S. C., Ord. 22, rr. 17, 18.

**3807.** What investments directed—Real estate.]—Lands were vested in trustees in trust, out of the receipts & profits, to make certain payments, & lay out the surplus upon mtge. of Govt. security with a view to accumulation; with a bequest of such accumulations. On a petition a real estate, contiguous to the real estate of testator, was permitted, under the circumstances, to be purchased, same to be considered as personal property.—*WEBB v. SHAFTSBURY (LORD)* (1821), 6 Madd. 100; 56 E. R. 1029.

*Annotation:—*Reid. A.-G. v. Allisbury (1885), 16 Q. B. D. 408.

**3808.** ———. [Freehold houses.]—An investment of a fund in ct. in freehold houses will not be sanctioned by the ct.—*MOORE v. WALTER* (1863), 8 L. T. 448.

**3809.** ———. [Government securities.]—Where a private Act of Parliament directed that moneys arising from certain trust estate, & paid into ct., should be invested in Navy Victualling or Exchequer Bills, the ct., upon the petition of the trustees, directed the investment of such moneys in Consols.—*Re BIRMINGHAM BLUECOAT SCHOOL* (1866), L. R. 1 Eq. 632; 55 E. R. 929; *sub nom. Ex p. BIRMINGHAM BLUECOAT SCHOOL TRUSTEES*, 35 Beav. 345; 35 L. J. Ch. 837.

*Annotation:—*Folld. *Re Wilkinson's Estate* (1870), L. R. 9 Eq. 343.

**3810.** ———. [—]—A sum of money deposited in the Bank of England pursuant to 9 & 10 Vict. c. 20, is not "cash under the control of the ct." within the meaning of the Order of Feb. 1, 1861, & can only be invested in Consolidated or Reduced Bank Annuities, or in Govt. securities, as provided by sect. 4 of the Act.

An application for an order for investment of such a fund in Bank Stock of New East India

Stock, in which trustees are authorised to invest by 30 & 31 Vict. (c. 132), refused.—*Ex p. GREAT NORTHERN RY. CO.* (1870), L. R. 9 Eq. 274.

*Annotation:—*Reid. *Re Wilkinson's Estate* (1870), L. R. 9 Eq. 343.

**3811.** ———. [Reduced Bank Annuities.]—*Ex p. GREAT NORTHERN RY. CO.*, No. 3810, *ante*.

**3812.** ———. [Bank Stock.]—*Ex p. GREAT NORTHERN RY. CO.*, No. 3810, *ante*.

**3813.** ———. [East India Stock.]—In the administration of trust funds in ct. no direction will be made for the investment in East India Stock, though the ct. gave the tenants for life permission to apply in chambers for leave to invest the funds on real security in England.—*UNGLESS v. TURF* (1861), 30 L. J. Ch. 784; 9 W. R. 729.

**3814.** ———. [—]—Where a woman, who had been married thirty-four years, without having had a child, had a life interest &, in the event of her not having any children who should attain twenty-one years of age, an absolute interest in a fund in ct. asked that the fund should be invested in East India Stock. The ct. made the order, notwithstanding the opposition of petitioner's husband.—*VIDLER v. LARRATT* (1864), 4 New Rep. 302; 10 L. T. 686; 12 W. R. 976.

*Annotation:—*Expld. *Haynes v. Haynes* (1866), 35 L. J. Ch. 303.

**3815.** ———. [—]—The ct. may, under Law of Property Amendment Act, 1860 (c. 38), s. 10, & the General Order of Feb. 1861, r. 1, order the investment in East India Stock of a fund paid into ct. under the provisions of a special Act anterior to the above Act although such special Act directs the investment to be in Consols or 3 per cent. reduced bank annuities.—*Re WILKINSON'S ESTATE* (1870), L. R. 9 Eq. 343.

**3816.** ———. [New East India Stock.]—*Ex p. GREAT NORTHERN RY. CO.*, No. 3810, *ante*.

**3817.** ———. [Foreign securities.—Bearer securities.]—The ct. will sanction the investment of a fund in ct. on foreign securities where the dividends are payable to bearer by coupons passing from hand to hand.—*Re BRACKENBURY'S TRUSTS* (1874), 31 L. T. 79; 22 W. R. 682.

**3818.** ———. [Any securities sanctioned by court—Money paid into court under private Act—Direction for investment in Exchequer Bills.]—Money paid into ct. under a private Act, & invested in Exchequer Bills, is "cash under the control of the ct." within the meaning of 23 & 24 Vict. (c. 38), & the General Order of Feb. 1, 1861; & may be invested in any of the securities sanctioned by the ct., although such private Act directs the investment to be in Exchequer Bills.—*JACKSON v. TYAS* (1883), 52 L. J. Ch. 830.

**3819.** Variation of investments—From Consols to Bank Stock.]—Under Law of Property Amendment Act, 1859 (c. 35), s. 32, the ct. has jurisdiction, upon the petition of a tenant for life, to order a fund standing in ct. in Consols to be invested in Bank Stock.—*COHEN v. WALEY* (1860), 3 L. T. 436; 9 W. R. 137; *sub nom. COHEN v. WALEY*, *NEWTON v. WALEY*, 7 Jur. N. S. 937.

**3820.** ———. [—& to East India Stock.]—A trust fund ordered to be invested in Bank Stock & East India Stock, on the application of a tenant for life, herself the settlor, the reversioners who opposed being volunteers.—*EQUITABLE REVERSIONARY INTEREST SOCIETY v. FULLER* (1861), 1

it should be given.—*Re MILLER* (1913), 9 Tas. L. R. 83.—AUS.

**o.** ———. [Estate benefited.]—An order was made authorising an extric. to convert certain shares in a co. bequeathed to her for life with remainder to her children into shares of a new

co. (in which the old one was about to be merged), such shares not being an investment authorised by Trustee Investment Act, but it appearing that the arrangement would be for the benefit of the estate.—*Re STRATHY TRUSTS* (1901), 21 C. L. T. 339.—CAN.

**p.** ———. [—]—*Re BOYCES' MINORS* (1867), 15 W. R. 827.—IR.

**q.** ———. [Directions in trust deed limiting power of investment to land—Application to noble officers for enlarged powers.]—*M'CRIE'S TRUSTEES*, [1927] S. C. 556.—SCOT.



**Sect. 6.—Funds in court. Sect. 7: Sub-sects. 1 & 2, A. & B.]**

John. & H. 379; 30 L. J. Ch. 497; 4 L. T. 50; 7 Jur. N. S. 307; 9 W. R. 400; 70 E. R. 794; *affd.*, 30 L. J. Ch. 848, L. J.

*Annotation:—*Folld. Bishop v. Bishop (1861), 30 L. J. Ch. 624.

**3821.** ————.]—Where there was a power to invest trust funds in Govt. or real securities the ct. sanctioned an investment in Bank Stock & in East India Stock.—BISHOP v. BISHOP (1861), 30 L. J. Ch. 624; 4 L. T. 350; 9 W. R. 549.

**3822.** When funds under control of court—Money paid into court under private Act—& invested in Exchequer Bills.—JACKSON v. TYAS, No. 3818, *ante*.

**SECT. 7.—IMPROPER INVESTMENT, FAILURE TO INVEST, ETC.**

**SUB-SECT. 1.—IN GENERAL.**

*Sec. now, Trustee Act, 1925 (c. 19), s. 8.*

**Breach of trust, generally.]—**See Part VII., *post*.

**3823.** Failure to take due caution in making authorised investment—Distinguished from unauthorised investment.]—U., a trustee, who had power to invest on real security, invested on a mtge. of freehold houses, with power of sale, a larger sum of trust money than was justifiable. He afterwards retired from the trust, & transferred the mtge. to the new trustees. The security proving unproductive, the new trustees, with the privity of pltf., who was a purchaser of a share in the trust funds, but without any notice to U., sold the mtged. property at a considerable loss, but it was not established that the sale was unfair or improvident. Pltf. then sued U. for the loss:—*Held*: an investment on a security of a description authorised by the trust, where the breach of trust consisted only in not exercising due caution in taking it, stood on an entirely different footing from an investment of an unauthorised description, which the *cestui que trust* must either accept or reject.—*Re SALMON, PRIEST v. UPFLEBY* (1889), 42 Ch. D. 351; 62 L. T. 270; 38 W. R. 150; 5 T. L. R. 583, C. A.

*Annotations:—*Consid. Re Turner, Barker v. Ivimey, [1897] 1 Ch. 536; Head v. Gould, [1898] 2 Ch. 250. *Refd.* Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth, [1891] 1 Ch. 337; Re Lake, Ex p. Howe Trustees, [1903] 1 K. B. 439. *Mentd.* Exploring Land & Minerals Co. v. Kolekman (1905), 94 L. T. 234.

**3824.** ————.]—Liability on footing of wilful default.]—RAWSTHORNE v. ROWLEY, No. 3690, *ante*.

**SUB-SECT. 2.—LIABILITIES OF TRUSTEES.**

**A. Restoration of Property.**

*See, now, Trustee Act, 1925 (c. 19), s. 9.*

*See, generally, Part VII., Sect. 3, sub-sect. 2, A., post.*

**3825.** When liability exists—Improper or unauthorised investment.]—Trustees of an infant

having saved £3,000 out of the profits of his estate lay it out in a purchase of lands lying near the infant's estate, with the consent of his grandmother; declaring the trust for the benefit of the infant, if he when at age shall agree to it. Infant dies within age; the trustees shall account to the infant's exors. for the £3,000, but the profits of the land set against the interest.—WINCHELSEA (EARL) v. NORCLIFFE (1866), 1 Vern. 435; 2 Rep. Ch. 367; 23 E. R. 569, L. C.

*Annotation:—*Consid. Inwood v. Twyne (1762), Amb. 417.

**3826.** ————.]—HOOKER v. PLATTS (1837), 1 Jur. 473.

**3827.** ————.]—Trustee, who was directed by the will of testator to invest the residue in Consols, & to accumulate the dividends, invested it on mtge. of real estate; he was held liable to make good the amount of stock which would have been purchased in Consols, together with the amount of accumulation which would have been produced by a proper investment of the dividends of such stock.—PRIDE v. FOOKS (1840), 2 Beav. 430; 9 L. J. Ch. 234; 4 Jur. 213; 48 E. R. 1248.

*Annotations:—*Mentd. Thorp v. Owen (1843), 2 Harc. 607; Conolly v. Farrell (1845), 5 Beav. 347; Gardner v. Barber (1854), 2 Eq. Rep. 888.

**3828.** ————.]—Two trustees were authorised to invest trust money in their names "on good security," one trustee improperly invested £1,500 on mtge. of leaseholds, in his own name, the other had declined to act any longer. The security realised £215 only. The trustee was, on motion, ordered to pay the difference into ct.—BOURNE v. MOLE (1845), 5 Beav. 177; 50 E. R. 70.

**3829.** ————.]—Two trustees of a marriage settlement sold out £1,818 Consols, which produced £1,115, & this sum was lent to the husband upon a mtge. of his life estate in certain property, his bond for the repayment of the money, & an assignment of a policy of assurance upon his life. One trustee died; & the £1,115 having been paid to the survivor, was again lent by him to the husband without sufficient security. The husband & the surviving trustee became insolvent; & upon a bill filed by the children of the marriage:—*Held*: the estate of the deceased trustee was liable to make good the original sum lent to the husband.—LANDER v. WESTON (1855), 3 Drew. 389; 25 L. J. Ch. 235; 26 L. T. O. S. 254; 2 Jur. N. S. 58; 4 W. R. 158; 61 E. R. 951.

**3830.** ————.]—(1) The trustees of a settlement invested part of the settled funds on a mtge. security which turned out insufficient, & it not appearing that they took due precaution to ascertain the sufficiency of the security:—*Held*: they were bound to pay the amount so invested into ct. & to take upon themselves the burden of the security.

(2) The other part of the settled funds was invested, by an acting trustee, on a security, which turned out sufficient, but which was diminished in an improper manner:—*Held*: the representatives of such acting trustee were bound, out

**3825 ix.** ————.]—Trustees advanced part of the trust funds to the liferenter—one of their number—on the security of a house which he was erecting for his occupation:—*Held*: the transaction was *ultra vires*, & the trustees were bound to replace the funds so lent.—RITCHIE v. RITCHIE'S TRUSTEES (1888), 15 R. (Cl. of Sess.) 1086; 25 Sc. L. R. 514.—SCOT.

**3825 x.** ————.]—HUTTON v. ANNAN, [1898] A. C. 289.—SCOT.

**3825 xi.** ————.]—West v. NOUISE (1924), 45 N. L. R. 418.—S. AF.

**PART VI. SECT. 7, SUB-SECT. 1.**

**r. Unauthorised investment—Liability on footing of wilful default.]—**SAWYERS v. KYTE (1869), 6 W. W. & A.B. 61.—AUS.

**PART VI. SECT. 7, SUB-SECT. 2.—A.**

**3825 i.** When liability exists—Improper or unauthorised investment.]—CARTER v. HATCH (1880), 31 C. P. 293.—CAN.

**3825 ii.** ————.]—*Re* ONTARIO EXPRESS CO., Ex p. SPENCE (1894), 30 C. L. T. 352.—CAN.

**3825 iii.** ————.]—O'BRIEN v.

O'BRIEN (1828), 1 Mol. 533.—IR.

**3825 iv.** ————.]—WALLER v. FOWLER (1837), Sau. & Sc. 274.—IR.

**3825 v.** ————.]—JOHNSTON v. LLOYD (1844), 7 I. Eq. R. 252.—IR.

**3825 vi.** ————.]—COIJINGS v. WADE, [1896] 1 I. R. 340.—IR.

**3825 vii.** ————.]—BON ACCORD MARINE INSURANCE CO. v. SOUTER'S TRUSTEES (1850), 13 Dunl. (Cl. of Sess.) 295; 43 Sc. Jur. 129.—SCOT.

**3825 viii.** ————.]—SANDERS v. SANDERS' TRUSTEES (1879), 7 R. (Cl. of Sess.) 157; 17 Sc. L. R. 75.—SCOT.

of his assets, to make good the trust so far as it was diminished.—*LOCKHART v. REILLY, REILLY v. LOCKHART* (1855), 24 L. T. O. S. 316; 3 W. R. 227, L. C.; *subsequent proceedings* (1857), 1 De G. & J. 464, L. C.

**3831.** ———.]—*REHDEH v. WESLEY*, No. 3320, *ante*.

**3832.** ———.]—(1) Testator had, at the time of his death, one hundred shares in a joint stock with unlimited liability. By his will he directed his trustees & exors. to convert his personal estate at their sole discretion, & at such time or times as they should think fit, & to invest the proceeds in, amongst other things, shares in any public co. incorporated by Act of Parliament & paying a dividend. The shares, which were very profitable, were retained by the sole trustee who, subsequently, accepted twenty-five additional new shares allotted in respect of the old ones. The trustee then retired, & appointed two new trustees. Ultimately, the bank stopped payment:—*Held*: the original trustee had not committed a breach of trust in retaining the old shares, but had done so in accepting the new ones, & was liable to indemnify testator's estate for losses incurred thereby.

(2) The trust for sale here was not . . . a trust to sell "with all convenient speed" or to sell "immediately." Where the trust is in such words, there is no doubt that after the lapse of twelve months from testator's death the trustees, unless they have converted the estate, have on them the *onus* of proving that the assets were properly retained in their existing state. But even in such cases trustees are justified in using a reasonable discretion in the matter (*HALL, V.-C.*).—*EDWARDS v. EDMUNDS* (1876), 34 L. T. 522.

*Annotations*:—*Consd.* *Re Smith, Davidson v. Myrtle*, [1896] 2 Ch. 590. *Reid.* *Bell v. Turner* (1877), 47 L. J. Ch. 75.

**3833.** ———.]—*SMITH v. STONEHAM* (1886), 3 T. L. R. 77.

*Annotation*:—*Reid.* *Re Partington, Partington v. Allen* (1887), 57 L. T. 654.

**3834.** ———.]—Trustees, who were empowered to invest on *mtge.*, advanced the sum of £8,300 upon the security of certain leasehold property consisting of small cottages some of which were let to weekly tenants. The *mtgr.* having made default, the trustees took possession of the property which would not realise the sum advanced, the value of the property having greatly depreciated. Evidence was adduced to show that, at the date of the *mtge.*, the sum advanced was equal to about two-thirds of the value of the property. But there was other evidence to the effect that the property was then even less valuable; & that the trustees had not obtained any formal valuation thereof:—*Held*: the trustees had made a most improvident investment & had disregarded the rule as to the limit to be observed when investing trust funds upon the security of house property; they ought to have made a more careful examination of the security, &, under the circumstances,

they were liable to replace the sum advanced.—*Re OLIVE, OLIVE v. WESTERMAN* (1880), 34 Ch. D. 70; 56 L. J. Ch. 75; 55 L. T. 83; 51 J. P. 38.

*Annotation*:—*Consd.* *Re Partington, Partington v. Allen* (1887), 57 L. T. 654.

**3835.** ———.]—*LEAROYD v. WHITELEY*, No. 3038, *ante*.

**3836.** ———.]—*Re PAINE, PAINE v. PAINE* (1888), 4 T. L. R. 300.

**3837.** ———.]—*Re SMITH, SMITH v. THOMPSON*, No. 3749, *ante*.

**3838.** ———.]—*Improper retention of funds.*—*CHALLEN v. SHIPPAM*, No. 3303, *ante*.

**3839.** ———.]—Trustee of certain estates received the proceeds & paid them into a bank where they were left for many years. A suit was instituted & a receiver appointed of the rents & interest. The bank having failed, it was held that the *cestuis que trust*, who were infants, must not be prejudiced by the neglect of the trustee to place the fund in safety & that the trustee was liable to refund the money lost.—*DREVER v. MAWDESLEY* (1849), as reported in 18 L. J. Ch. 273; 13 Jur. 330.

**3840.** ———.]—*ROBINSON v. ROBINSON*, No. 3088, *ante*.

**3841.** ———.]—Testator directed his trustees to invest a sufficient sum on Govt. or real securities or railway stock to produce an annuity of £100 a year, & after the death of the annuitant to call in & divide the principal among his brothers then living, or the children of such as should be then dead. Testator left three brothers; & the trustees, of whom the annuitant was one, provided for the annuity in part by appropriating a railway debenture for £1,500, which bore interest at first at 5 per cent., & afterwards at 4 per cent., & in part by interest paid by one of the brothers upon a loan to him of moneys of testator. A child of another brother who was dead, having filed his bill, during the annuitant's life, against the surviving trustees, to have a sufficient fund properly invested:—*Held*: he was entitled to an inquiry as to what sum should have been invested at the end of a year from testator's death to meet the annuity, & to a declaration that the trustees were liable to make good the sum so ascertained.—*STARKEY v. DYSON* (1875), 24 W. R. 37.

**3842.** ———.]—(*CANN v. CANN*, No. 3641, *ante*.

### B. Interest.

*Sec. generally*, Part VII., Sect. 3, sub-sect. 2, B., *post*.

**3843.** When liability exists—*Improper or unauthorised investment.*—*WINCHELSEA (EARL) v. NORCLIFFE*, No. 3825, *ante*.

**3844.** ———.]—*PRIDE v. FOOKS*, No. 3827, *ante*.

**3845.** ———.]—*SMITH v. STONEHAM* (1886), 3 T. L. R. 77.

*Annotation*:—*Reid.* *Re Partington, Partington v. Allen* (1887), 57 L. T. 654.

### PART VI. SECT. 7, SUB-SECT. 2.—B.

**3843 i.** When liability exists—*Improper or unauthorised investment.*—Where moneys are left by will to be invested at the discretion of the exor. or trustee, the discretion so given cannot be exercised otherwise than according to law, & does not warrant an investment in personal securities or securities not sanctioned by the cl.—*Held*: an exor. & trustee who deposited funds so left in trust for infants, at 3½ per cent. or 4 per cent. interest, in a savings bank, did not conform to his duty; & his failure to do so exposed

him to pay the legal rate of interest for the money, although he acted innocently & honestly.—*SPRATT v. WILSON* (1890), 19 O. R. 28.—*CAN.*

**3843 ii.** ———.]—It is the duty of trustees to make balances in their hands productive; & a trustee allowing trust money to remain in a bank will be charged interest thereon; but a *cestuis que trust* cannot make a trustee liable for losses occasioned by a breach of trust which he has authorised & consented to.—*Re MCNEILL, ESTATE (B. C.)*, (1911), 19 W. L. R. 691.—*CAN.*

**3843 iii.** ———.]—*TIRUPATIRA-*

*YUDU NAIDU v. IAKSHIMINARASAMMA* (1912), 1. L. R. 38 Mad. 71.—*IND.*

**3843 iv.** ———.]—*DAWSON v. MASSEY* (1809), 1 Ball. & B. 219, 231.—*IR.*

**3843 v.** ———.]—*POLLEXFEN v. STEWART* (1811), 4 Dunl. (Cl. of Sess.) 224; 14 Sc. Jur. 90.—*SCOT.*

**3843 vi.** ———.]—*COCHRANE v. BLACK* (1855), 17 Dunl. (Cl. of Sess.) 321; 27 Sc. Jur. 139.—*SCOT.*

**3843 vii.** ———.]—*MELVILLE v. NOBLE'S TRUSTEES* (1896), 21 IL. (Cl. of Sess.) 243; 34 Sc. L. R. 210; 4 S. L. T. 198.—*SCOT.*

*Sect. 7.—Improper investment, failure to invest, etc. : Sub-sect. 2, B., C., D., E. & F. (a).]*

**3846.** ———.]—*LEAHYD v. WHITELEY*, No. 3038, *ante*.

**Liability of executors.**—*See* EXECUTORS, Vol. XXIV., p. 699, No. 7237.

**3847.** ———.]—*Improper retention of funds.*—Where a corpn. shall be charged with interest for a sum of money, which they are made trustees of.—*A.-G. v. STAFFORD CORPN.* (1740), Barn. Ch. 33; 27 E. R. 543.

**3848.** ———.]—*BONI v. COOK* (1824), 13 Price, 332; 14 E. R. 108; 147 E. R. 1008.

*Annotations:—Mentd.* *Humphreys v. Howes* (1830), 1 Russ. & M. 639; *Re Porter's Trust* (1857), 4 K. & J. 188.

**3849.** ———.]—Bequest of personal estate in trust, to invest it in govt. or real securities, & to permit the interest to accumulate until it amounted to £500, & from time to time, when it amounted to that sum, to lay out or invest such interest in govt. or real securities, to be applied in the same manner as the principal; the trustees retaining the trust moneys in their business, an inquiry was directed what would have been the amount of the personal estate, & the interest thereof, if it had been invested, & accumulated in the manner directed by the will, & the trustees were decreed to pay the amount, & were charged with interest at 5 per cent. on a balance in their hands.—*BROWN v. SANSOME* (1825), M'Cle. & Yo. 427; 148 E. R. 480.

**3850.** ———.]—*GALE v. PITT* (1830), cited in 1 De G. M. & G. at p. 255; 21 L. J. Ch. at p. 115; 18 L. T. O. S. at p. 294; 16 Jur. at p. 257; 42 E. R. 550.

*Annotation:—Consd.* *Robinson v. Robinson* (1851), 1 De G. M. & G. 247.

**3851.** ———.]—*CHALLENGE v. SHIPPAM*, No. 3303, *ante*.

**3852.** ———.]—*SHEPHERD v. MOULS*, No. 3897, *post*.

**3853.** ———.]—*ROBINSON v. ROBINSON*, No. 3688, *ante*.

**3854.** ———.]—*CHUGG v. CHUGG*, [1874] W. N. 185.

**Liability of executors.**—*See* EXECUTORS, Vol. XXIV., pp. 699, 700, Nos. 7238–7260.

**3847 i.** ———.]—*Improper retention of funds.*—There is an obligation on trustees to invest moneys in their hands, even where there is no direction in the will for investment. Trustees having retained a sum of money in their hands for six months without sufficient excuse:—*Held:* they were liable to pay interest thereon.—*ADAMSON v. REID* (1880), 6 V. L. R. 161.—*AUS.*

**3847 ii.** ———.]—An executor or trustee who has been guilty of negligence merely, in omitting to invest moneys, will be charged with interest at six per cent.—*WATKIN v. GABLE* (1860), 8 Gr. 458.—*CAN.*

**3847 iii.** ———.]—Where deft., a trustee, had retained moneys, & did not show that he had deposited them for safe keeping or kept them in his hands unemployed:—*Held:* he was to be charged properly with interest.—*WATSON v. BOOMER* (1866), 2 Ch. Ch. 89.—*CAN.*

**3847 iv.** ———.]—*FIELDER v. O'HARA* (1868), 14 Gr. 223.—*CAN.*

**3847 v.** ———.]—M'gcs., receiving six per cent. interest, were taken by trustees before the abolition of the usury laws, & were not called in for several years after the change of the law, but, as it did not appear that they were aware of an opportunity of invest-

ment at a higher rate, the ct. refused to charge them with more than was reserved by the m'gcs.—*CAMERON v. BETHUNE* (1868), 15 Gr. 486.—*CAN.*

**3847 vi.** ———.]—Where a trustee is authorised to invest in either of two specified modes, & by mistake invests in neither, the measure of his liability is the loss arising from his not having invested in the less beneficial of the two modes.—*PATERSON v. LAILEY* (1871), 18 Gr. 13.—*CAN.*

**3847 vii.** ———.]—If a trustee is guilty of unreasonable delay in investing the fund or in transferring it, he will be answerable to the *cestui que trust* for interest during the period of his laches.—*McKENZIE v. McKENZIE* (1897), 40 N. S. R. 246.—*CAN.*

**3847 viii.** ———.]—*FORTUNE'S TRUSTEES v. GIBSON-GRAIGS, WATKIN & DAZIEL* (1839), 2 Duml. (Ct. of Sess.) 50.—*SCOT.*

**3847 ix.** ———.]—*CLARKE, ETC. (WELLMOOD'S TRUSTEES) v. BOWWELL (OR HILL)* (1856), 19 Duml. (Ct. of Sess.) 187; 29 Sc. Jur. 86.—*SCOT.*

**3847 x.** ———.]—*MORRISON v. DRYDEN* (1890), 17 R. (Ct. of Sess.) 704; 27 Sc. L. R. 588.—*SCOT.*

**t. Funds held in trust by Dominion for Ontario—Rate of interest—Right to pay over funds & extinguish liability—Sufficiency of tender.**—*PROVINCE OF*

**Securities improperly realised—Liability of executors.**—*See* EXECUTORS, Vol. XXIV., p. 698, Nos. 7222–7225.

### C. Liability for Fluctuation of Securities.

**3855. Whether trustee liable—Fluctuation of authorised investment.**—*PEAT v. CRANE* (circa 1785), 2 Dick. 499, n.; 21 E. R. 363, L. C.

*Annotations:—Consd.* *Clough v. Bond* (1838), 3 My. & Cr. 490. *Refd.* *Re Gasquoine, Gasquoine v. Gasquoine*, [1894] 1 Ch. 470.

**3856. Fluctuation of unauthorised investment.**—If a trustee lay out trust money in a fund which the ct. does not adopt, & such fund afterwards sinks in its value, this ct., though there were no *mala fides*, will throw the loss upon the trustee; otherwise if laid out in the fund which the ct. adopts.—*HANCON v. ALLEN* (1774), 2 Dick. 498; 21 E. R. 363, L. C.; *revid. sub nom. ALLEN v. HANCON* (1775), 7 Bro. Parl. Cas. 375, H. L.

*Annotations:—Consd.* *Clough v. Bond* (1838), 3 My. & Cr. 490. *Refd.* *Re Gasquoine, Gasquoine v. Gasquoine*, [1894] 1 Ch. 470.

**3857.** ———.]—Trustees investing trust money on an unauthorised security, are responsible for any future loss traceable to that first error.—*FYLER v. FYLER* (1841), 3 Beav. 550; 5 Jur. 187; 49 E. R. 216.

*Annotations:—Refd.* *Harries v. Rees* (1867), 37 L. J. Ch. 102; *Butler v. Butler* (1877), 26 W. R. 85; *Chillingworth v. Chambers*, [1896] 1 Ch. 685; *Mars v. Browne*, [1896] 1 Ch. 199. *Mentd.* *A.-G. v. Chesterfield* (1854), 18 Beav. 596.

### D. Liability for Acts of Others.

**3858. Improper retention of funds—Misappropriation by agent.**—(*LARK v. DAWBER* (1801), 7 T. L. R. 602, C. A.

**3859.** ———.]—*WYMAN v. PATERSON*, No. 3279, *ante*.

**3860. Liability for act of co-trustee—Improper investment—Made with knowledge of trustee—Liability to contribution.**—A trustee, or his estate, is liable to contribute a rateable proportion of any loss suffered upon an unauthorised investment made with his knowledge by his co-trustee.—*JACKSON v. DICKINSON*, [1903] 1 Ch. 947; 72 L. J. Ch. 761; 88 L. T. 507; 19 T. L. R. 350.

*ONTARIO v. DOMINION OF CANADA* (1906), 10 Exch. C. R. 292.—*CAN.*

### PART VI. SECT. 7, SUB-SECT. 2.—C.

**3855 i. Whether trustee liable—Fluctuation of authorised investment.**—Trustees are liable for loss of trust funds if, in investing them in lands of permanent value, they lend more than two-thirds of the value, or more than one-half on buildings of a fluctuating value. Considering the fluctuating character of colonial property, the ct. is inclined rather to narrow than enlarge this rule.—*YEO v. RORTON* (1865), 4 N. S. W. S. C. R. (Eq.) 110.—*AUS.*

### PART VI. SECT. 7, SUB-SECT. 2.—D.

**a. Unauthorised investments.**—Testator who, by his will, expressed the fullest confidence in C. (one of his trustees), directed his trustees to be guided entirely by the judgment of C. as to the sale, disposal, & reinvestment of his American securities, & declared that his trustees should not be responsible for any loss occasioned thereby. C. having made unauthorised investments of these moneys which proved worthless, the master charged his co-trustee B. with the amount thereof:—*Held:* even if at the suit of creditors B. might have been chargeable, yet as against legatees he was exonerated.—*BURRITT v. BURRITT* (1879), 29 Gr. 321.—*CAN.*

**Liability for costs of agent.**—See Part V., Sect. 6, sub-sect. 2, D., *ante*.

**Liability of representative—Permitting co-representative to retain assets.**—See EXECUTORS, Vol. XXIV., pp. 676, 677, Nos. 7022–7036.

### E. Extent of Liability.

See, generally, Part VII., Sect. 3, sub-sect. 2, *post*.

**3861. Whether liable for whole interest of improper investments—Improper retention—Payment of high rate of interest to tenant for life—Interest from retained investments.**—Testator gave the residue of his personal estate to trustees, directing them to convert it into money, & invest the proceeds in Govt. or real securities, of which they were to stand possessed, upon trust for A. during her life, & after her death, for B. The trustees permitted a share, which testator had in an Indian loan, bearing interest at 10 per cent., to remain for several years on that security, during which time they paid to A. the interest at 10 per cent., which it yielded annually; & the loan being afterwards paid off, they invested the money in the 3 per cents. at a time when the funds were so low that the amount of stock purchased was considerably greater than if the conversion had taken place at the end of a year from testator's death:—*Held*: the trustees ought to be charged with the whole of the stock actually purchased, & all the sums actually received in respect of the Indian rate of interest; & that they ought to be allowed in their discharge, as payments to the tenant for life, not the sums which they had in fact paid her, but only a sum equal to what she would have received for dividends, if the money had been transferred from the Indian security & invested in the 3 per cent. stock at the end of a year from testator's death.—*DIMES v. SCOTT* (1828), 4 Russ. 195; 38 E. R. 778.

**Annotations:**—*Consd.* Wastell v. Leslie, Carter v. Leslie (1844), 13 L. J. Ch. 205; Bulkeley v. Stephens (1863), 3 New Rep. 105. *Reid.* Douglas v. Congreve (1836), 1 Keen, 410; Taylor v. Clark (1811), 1 Hare, 161; Caldwell v. Caldwell (1842), 1 Y. & C. Ch. Cas. 312; Sutherland v. Cooke (1844), 1 Coll. 498; Morgan v. Morgan (1851), 14 Beav. 72; Macpherson v. Macpherson (1852), 19 L. T. O. S. 221; Band v. Furdell (1855), 7 De G. M. & G. 628; Morley v. Mendham (1856), 2 Jur. N. S. 998; Holgate v. Jennings (1857), 24 Beav. 623; Stroud v. Gwyer (1860), 28 Beav. 130; Yates v. Yates (1860), 28 Beav. 637; *Re* Llewellyn's Trust (1861), 29 Beav. 171; Scholefield v. Redfern (1863), 32 L. J. Ch. 627; Brown v. Gallahy (1867), 2 Ch. App. 751; Anderson v. Road (1874), 22 W. R. 527; *Re* Chayton; Chayton v. Horn (1904), 92 L. T. 290; Slade v. Chaine, [1908] 1 Ch. 522; *Re* McEuen, McEuen v. Phelps, [1913] 2 Ch. 704.

**3862.** ————]—*FLETCHER v. GREEN*, No. 3871, *post*.

———]—*See, also, SETTLEMENTS*, Vol. XL., p. 673, Nos. 2094–2097.

**3863. Investment when securities at low price—**

**After improper retention—Liability for whole of securities.**—*DIMES v. SCOTT*, No. 3861, *ante*.

**Allowances in discharge.**—See Sub-sect. 2, F. (b), *post*.

### F. Relief from Liability.

#### (a) In General.

See, now, Trustee Act, 1925 (c. 19), ss. 8, 9.

See, generally, Part VII., Sect. 4, *post*.

**3864. Whether trustee relieved—Security proving insufficient—Investment must be proper in other respects.**—A trustee is not entitled to the protection afforded by Trustee Act, 1888 (c. 59), s. 5, unless the investment which has proved deficient was a proper investment at the time in all respects other than value.—*Re* WALKER, WALKER v. WALKER (1890), 59 L. J. Ch. 386; 62 L. T. 449. *Annotation:*—*Reid.* *Re* Somerset, Somerset v. Poulett, [1894] 1 Ch. 331.

———]—*See, generally, MORTGAGE*, Vol. XXXV., pp. 285–292, 295, 296, Nos. 382–452, 478–482.

**3865. ———— Depreciation of security—Trustee not negligent.**—Where there is a falling of stock, without the neglect of the trustee, he is not liable to make good the deficiency, but is answerable only as far as the value, especially where it was specific stock.—*JACKSON v. JACKSON* (1737), 1 Atk. 513; West temp. Hard. 31; 26 E. R. 324, L. C.

**3866.** ———— ————]—There is no rule of law which compels the ct. to hold that an honest trustee is liable to make good loss sustained by retaining an authorised security in a falling market, if he did so honestly & prudently in the belief that it was the best course to take in the interest of all parties.

Trustees acting honestly with ordinary prudence, & within the limits of their trust are not liable for mere errors of judgment. Any loss sustained by the trust estate under such circumstances falls upon & must be borne by the owners of the property, *i.e.*, the *cestuis que trust*, & cannot be thrown by them on the trustees, who have done no wrong, though the result may prove that they possibly might have done better.—*Re* CHAPMAN, COCKS v. CHAPMAN, [1896] 2 Ch. 763; 65 L. J. Ch. 892; 75 L. T. 196; 45 W. R. 67; 12 T. L. R. 625; 40 Sol. Jo. 715, C. A.

**Annotations:**—*Consd.* Rawsthorne v. Rowley (1907), 78 L. J. Ch. 235, n. *Reid.* *Re* Roberts, Knight v. Roberts (1897), 76 L. T. 479; Jackson v. Dickinson [1903] 1 Ch. 947; Shaw v. Cates, [1909] 1 Ch. 389.

**3867. ———— Absence of mala fides.**—Suppose a trustee, having in his hands a considerable sum of money, places it out in the funds, which afterwards sink in their value; or on a security at the time apparently good, which afterwards turns out not to be so, for the benefit of the *cestui que*

### PART VI. SECT. 7, SUB-SECT. 2.—E.

**b. Whether liable for whole loss.**

—WILLS v. TRUSTEES, EXECUTORS & AGENCY CO., LTD. (1900), 25 V. L. R. 391.—*AUS.*

c. ————]—*Re* FARMERS LOAN CO., *Ex p.* DICKIE (1891), 30 C. L. T. 348.—*CAN.*

d. ————]—*KNOX v. MACKINNON* (1888), 15 R. (Cl. of Sess.) (II. L.) 83; 25 Sc. L. R. 752.—*SCOT.*

e. ————]—*HENDERSON v. HENDERSON'S TRUSTEES* (1900), 2 F. (Cl. of Sess.) 1285; 37 Sc. L. R. 976; 8 S. L. T. 164.—*SCOT.*

f. ————]—*BEVERIDGE'S TRUSTEE v. BEVERIDGE*, [1908] S. C. 791; 45 Sc. L. R. 585; 15 S. L. T. 1008.—*SCOT.*

g. ————]—*SACKVILLE v. WEST v. NOURSE*, [1925] App. D. 516.—*S. AF.*

### PART VI. SECT. 7, SUB-SECT. 2.—F.

**a. ————**

**h. Whether trustee relieved.**—The ct. will not exercise its power under Trusts Act, 1903, s. 3, to relieve trustees from personal liability for a breach of trust which consists in their having done that which they were not authorised to do, without having taken any steps to ascertain whether they were so authorised.—*WILKIE v. MCCALLA* (No. 3), [1905] V. L. R. 278.—*AUS.*

**k. ———— Security proving insufficient.**—*Re* CHRIST CHURCH, DARTMOUTH (1881), 11 E. D. 463.—*CAN.*

l. ————]—A settlement in which the trustee was authorised to invest the funds in "Dominion, provincial, & municipal bonds & debentures, or first intges. upon real estate," contained a

power of revocation by deed in favour of the settlor, with the consent of the trustee. The latter invested some of the trust moneys in the stock of a loan co., under instructions by letter from the settlor:—*Held*: there was no breach of trust, & what was done amounted to a defective execution of the power, which the ct. would aid.—*Re* MACKENZIE TRUSTS (1897), 28 O. R. 312.—*CAN.*

m. ————]—*TROST v. COOK* (1920), 48 O. L. R. 278; 56 D. L. R. 305; 19 O. W. N. 103.—*CAN.*

n. ————]—*JONES v. JULIAN* (1890), 25 L. R. Ir. 45.—*IR.*

o. ————]—*CRAMPTON v. WALKER* (1893), 31 L. R. Ir. 437.—*IR.*

p. ————]—Circumstances in which it was held that the trustee acting

*Secl. 7.—Improper investment, failure to invest, etc. : Sub-sect. 2, F. (a) & (b); sub-sect. 3, A. & B.]*

*trust*, was there ever an instance of the trustee being made to answer the actual sum so placed out? I answer, no. If there is no *mala fides*, nothing wilful in the conduct of the trustee, the ct. will always favour him (LORD HARDWICKE, C.). —KNIGHT v. PLYMOUTH (1747), Dick. 120; 3 Atk. 480; 21 E. R. 214, L. C.

*Annotations:—*Consd. Salway v. Salway (1831), 2 Russ. & M. 215. *Reid*. *Re* Parsons, *Ex p.* Belchier (1754), Amb. 218; *Roth v. Howell* (1797), 3 Ves. 565; *Wren v. Kinton* (1805), 11 Ves. 377; *The Prima Vera* (1808), Edw. 23; *Raw v. Cutten* (1832), 9 Bing. 96.

**3868. — Failure to invest—Employment of solicitor to procure proper investment.]—**Testator directed his trustees & exors. to invest the residue of his estate on good freehold security; the trustee retained in his hands a balance of between £300 & £400 for a period of more than two years, part of which money was in the hands of his bankers:—*Held*: under the circumstances, he was not responsible for interest during that time, although he had been informed of certain persons who were desirous of borrowing money on freehold security, he having employed a solr. to procure a proper investment.—WYATT v. WALLACE (1843), 1 Coop. temp. Cott. 155; 2 L. T. O. S. 146; 8 Jur. 117; 47 E. R. 792.

**3869. — Deposit at bank on solicitor's advice—Loss of small value.]—**Testator, who died in 1872, had by his will bequeathed a legacy of £1,000 in trust for G., & by a codicil, which recited that he desired his widow after his death to enter into the business then carried on by him in partnership with D., & that the bulk of his property was invested as capital in the business, the testator had empowered his trustees to invest or continue invested, moneys in their hands as trustees, in the business, or any other business in which they, in their uncontrolled discretion, might think fit, without being liable for loss. D. & M. were appointed exors. & trustees. The widow entered into partnership with D. in the business for ten years from Jan. 1, 1873. The £1,000 was left in the business during & after the term of ten years. In June, 1883, the widow having then left the business, D. filed a petition for liquidation of his affairs, & a composition of 10s. in the pound was agreed to, payable by three instalments, on Jan. 2, 1884, Apr. 2, 1884, & Oct. 2, 1884. Only one instalment was received by the trustee M., & it was not invested, but placed on deposit at a bank. No pressure was made for payment of the unpaid instalments. G., having come of age, brought an action against the trustee M. & others seeking relief on the ground of breaches of trust:—*Held*: as regards M., (1) the not calling in the £1,000 on the widow's retirement from the partnership was not a breach of trust, but, on the true construction of the codicil, the power was not restricted to lending to any particular partners in the business; (2) the not calling in or pressing for payment of the two instalments unpaid was not a breach of trust, the trustee M., not having been guilty of negligence, but having acted honestly in the belief that pressure would not have resulted in benefit to the estate, & with a reason-

able ground for acting as he did; (3) having regard to the fact that the loss of income, if any, through non-investment of the first instalment was very small, coupled with the probability, then existing, of another instalment being shortly received, when both might be invested together, it would be going too far to make an order on that head against the trustee M., who acted on his solr.'s advice in placing the money on deposit at a bank instead of investing it.—*Re* EARL, JOHNSON v. DAVIES (1890), 39 W. R. 107.

*(b) Allowances in Discharge.*

**3870. Right to set off profit against loss.]—**WINCHELSEA (EARL) v. NORCLIFFE, No. 3825, ante.

**3871. — Fund paid into court & invested—In action to realise deficient security—Sale of investment at profit.]—**(1) A fund was settled in trust for a married woman for life for her separate use without power of anticipation, & she had a power of appointment by deed or will over the reversion. Her consent in writing was required to any change of the investments. Part of the fund was at her request improperly advanced upon a security which proved deficient. She concurred in the mtge. deed, & her execution of it was attested as required by the power:—*Held*: she could maintain a suit to have the deficiency in the fund made good, & the trustees had no claim to be indemnified out of the reversion subject to the power of appointment.

(2) In a suit to realise the deficient security, a fund was paid into ct. & invested, & then sold out at a profit:—*Held*: the trustees were answerable only for the deficiency, after taking into account this profit.—FLETCHER v. GREEN (1864), 33 Beav. 426; 3 New Rep. 626; 55 E. R. 433.

*Annotation:—*Reid. Marler v. Tommas (1873), L. R. 17 Eq. 8.

**3872. — Acceptance of new shares in company—Right to set off calls paid.]—**The trustee of a wife's settlement of gas shares allowed the husband to get them into his hands. He accepted allotments of new shares in place of the original shares & paid calls. Afterwards he became bkpt.:—*Held*: the trustee was liable to make good only the value of the shares less the amount paid for calls.—BRIGGS v. MASSEY (1882), 51 L. J. Ch. 447; 46 L. T. 354; 30 W. R. 325, C. A.

**3873. — Profit of one breach of trust—Against loss resulting from another.]—**A trustee cannot set off the profit from one breach of trust against the loss resulting from another.—*Re* DEARE, DEARE v. DEARE (1895), 11 T. L. R. 183.

**3874. Right to credit for income of improper investment—Receipt by beneficiary with knowledge of breach of trust.]—**A *cestui que trust* having, with knowledge, received the income from an improper investment:—*Held*: bound to give credit for the difference between it & the income which would have arisen from a proper investment of the trust fund.—DAVIES v. HODGSON (1858), 25 Beav. 177; 27 L. J. Ch. 449; 31 L. T. O. S. 49; 4 Jur. N. S. 252; 6 W. R. 355; 53 E. R. 604.

*Annotations:—*Reid. *Re* Hill, Hill v. Hill (1881), 50 L. J. Ch. 551; Slade v. Chaine, [1908] 1 Ch. 522.

under a trust settlement was not personally liable for loss on an investment of trust funds made by him, in respect that the terms of the power of investment in the trust deed were such that the trustee might *bona fide* have believed that the investment was within his powers, although the ct., on a construction of the deed, might have held the investment to be *ultra vires*.—WARREN'S

JUDICIAL FACTOR v. WARREN'S EXECUTRIX (1903), 5 F. (Ct. of Sess.) 890; 40 Sc. L. R. 653; 11 S. L. T. 95.—SCOT.

PART VI. SECT. 7, SUB-SECT. 2.—F. (b)

*g. Right to credit for value of land.]—*Trustees, with a power of investing in real estate, purchased, at

the instance of one of their number, a lot of land for £1,200, which was found to be worth not more than £900. The master by his report charged the trustees with the full sum of £1,200, refusing to give them credit for the £900, on the ground of collusion on the part of the trustees:—*Held*: credit should be given for the value of the land.—LARKIN v. ARMSTRONG (1862), 9 Gr. 390.—CAN.

**3875. Improper retention—What amount allowed—Only amount equal to dividends of proper investments.**—*DIMES v. SCOTT*, No. 3861, *ante*.

**3876. Right to recoupment—From interest of tenant for life.**—A lady under an order of this Ct. was in receipt of £100 a year, part of the income arising from an estate which testator had ordered to be accumulated, & after the death of her mother, divided among herself & her brothers & sisters, who were numerous. By a settlement made upon her marriage, the lady assigned to trustees the whole of her share in the estate, & its accumulations for the benefit of herself for life, with remainder for her children; but she continued for eleven years to receive the £100 a year under the order. The mother was still living. Upon a bill filed by the children of the marriage:—*Held*: the order of the Ct. did not justify the trustees in not investing the £100 a year paid to the lady; it formed a part of the principal vested in them, & they must replace the amount.

They are, however, entitled to be repaid by the new trustees of the settlement, what they have to replace, out of the income of the tenant for life in the fund (*ROMILLY, M.R.*).—*BARRATT v. WYATT* (1862), 30 Beav. 442; 31 L. J. Ch. 652; 6 L. T. 801; 8 Jur. N. S. 1045; 10 W. R. 451; 54 E. R. 960.

**3877. Right to unauthorised securities—On replacing trust fund.**—What is the position of a trustee who has made an improper investment? . . . Assuming he had not made an investment at all, the estate was short of so much money, & the trustee is liable to make that good; but he is entitled to any property standing in his name, & to say, "If you make me liable, I claim the property purchased with my money." On the other hand, the Ct. could say, "Yes; but you shall not put your finger on the property till you have recouped that of which the trust estate is short"—in other words, such property is subject to a lien in favour of the beneficiaries for the amount of the deficiency (*KEKEWICH, J.*).—*RE SALMON, PRIEST v. UPPLEBY* (1889), 42 Ch. D. 351; 62 L. T. 270; 5 T. L. R. 315; *on appeal*, 42 Ch. D. 359, C. A.

*Annotations*:—*Apld. Re Lake, Ex p. Howe Trustees*, [1903] 1 K. B. 439. *Mentd. Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth*, [1891] 1 Ch. 337; *Re Turner, Barker v. Iymey*, [1897] 1 Ch. 536; *Head v. Gould*, [1898] 2 Ch. 250; *Exploring Land & Minerals Co. v. Kolekman* (1905), 94 L. T. 234.

**3878.** ———.—(1) *L.*, a trustee, advanced trust funds on a contributory mtge., which was an unauthorised investment. He afterwards became bkpt. The mtgor. commenced an action against *L.*, & all others claiming through or under him, to set aside the mtge. on the ground of fraud. *L.*'s *cestuis que trust* compromised their claims in the action without the concurrence of *L.*'s trustee in bkpey.:—*Held*: as *L.*'s *cestuis que trust* had adopted the improper investment, they could not under the circumstances prove in *L.*'s bkpey. for the whole amount of the trust fund, but their remedy was a proof for the damages the trust estate had sustained by reason of the improper investment, & the measure of damages was the difference between the total sum invested & the assessed value of the amount receivable under the compromise.

(2) There is a general rule in equity that where trust funds have been invested on a security, which is not merely insufficient but of a description not authorised by the trust, the trustee should have the opportunity or option of taking to the improper security on replacing the trust fund (*WRIGHT, J.*).—*Re LAKE, Ex p. HOWE*, [1903]

1 K. B. 439; 72 L. J. K. B. 213; 88 L. T. 31; 51 W. R. 496; 47 Sol. Jo. 205.

**3879.** ———.—**Value of securities allowed—Where no loss to trust estate—& trustees acting bona fide.**—*Re BROWN, BROWN v. BROWN*, No. 3676, *ante*.

#### SUB-SECT. 3.—RIGHTS OF BENEFICIARIES.

##### A. In General.

**3880. Effect of acquiescence.**—*HARDEN v. PARSONS*, No. 3751, *ante*.

**3881.** ———.—Where a trustee mixes his own money with the trust fund, & takes security for the whole fund, if the security fail, the trust fund is entitled to priority of payment. But if the *cestuis que trust* have elected to adopt the loan, they cannot compel the trustee to make good the deficiency.—*LAMBE v. ORTON* (1863), 2 New Rep. 435; 33 L. J. Ch. 81; 11 W. R. 1043.

**3882.** ———.—*Re PAINE, PAINE v. PAINE* (1888), 4 T. L. R. 300.

**3883. Right to order for investment.**—*BOLD v. POWELL* (1850), 15 L. T. O. S. 295; 14 Jur. 682.

**3884. Right to retain excess of interest—On improper or unauthorised investment.**—*LEAROYD v. WHITELEY*, No. 3038, *ante*.

##### B. Option between Replacement of Securities and Proceeds of Sale.

**3885. Whether option arises—Failure to invest in security specified.**—Exor. & trustee having been guilty of a breach of trust by selling out stock & dealing improperly with the money, the *cestuis que trust* have an option to have the stock replaced, or the money produced by the sales with interest at 5 per cent., or more, if more has been made by it, & the costs occasioned by his misconduct.

The rule is . . . that, when an exor. or trustee, instead of executing the trust, as he ought, by laying out the property either in well secured real estates or upon Govt. securities, takes upon him to dispose of it in another manner, the *cestuis que trust* may call him to an account either way: having an option to make him replace it, or if it is for their benefit to affirm his conduct, & take what he has sold it for, they may take that & charge him with 5 per cent. interest; or if he has made more, they may charge him with that (*GRANT, M.R.*).—*POCOCK v. REDDINGTON* (1801), 5 Ves. 794; 31 E. R. 862.

*Annotations*:—*Consd. Docker v. Somes* (1834), 2 My. & K. 655. *Refd. Tebbis v. Carpenter* (1816), 1 Madd. 290; *Law v. Hunter* (1826), 1 Russ. 100.

**3886.** ———.—A sum of £2,000 was bequeathed to an exor., who was also a trustee under the will, upon trust, for investment in the public funds. He retained it in his own hands, paying interest to the *cestuis que trust* for many years, under a representation that the legacy had been invested according to the trusts:—*Held*: this was such a breach of trust, as entitled the *cestuis que trust* to have purchased by the exor. so much stock as the sum of £2,000 would have purchased at the time he first had assets sufficient for investment.

When an exor., who happens also to be named a trustee, of a legacy to be laid out in stock, has fully administered the estate, & assented to the legacy, & retains the legacy in his hands, not as assets of testator, but as trustee of the legacy, then the principles which would apply to another trustee must apply to him. He is no longer clothed with the character of exor., but is, as to the legacy, a mere trustee (*LEACH, V.-C.*).—*BYRCHALL v. BRADFORD* (1822), 6 Madd. 235; 56 E. R. 1081.

*Annotation*:—*Consd. Newman v. Williams* (1840), 4 Jur. 1123.



*Sect. 7.—Improper investment, failure to invest, etc. : Sub-sect. 3, B. & C.]*

**3887.** ———.]—Trustees authorised to lay out trust money in the public funds or on mtge., invested it on a mtge. The mtge. was paid off, & the amount was received by the tenant for life, who, contrary to the trusts, invested it in real estate:—*Held*: the *cestui que trust* had the option of charging the tenant for life, either with the sum sterling received, or with the amount of 3 per cents. which might have been purchased therewith at the time the breach of trust was committed.—*OUSELEY v. ANSTRUTHER* (1847), 10 Beav. 453; 50 E. R. 656.

*Annotations* :—*Consd.* *Robinson v. Robinson* (1851), 1 De G. M. & G. 247. *Mentd.* *Hutchinson v. Smith* (1863), 1 New Rep. 513; *Robertson v. Broadbent* (1883), 8 App. Cas. 812.

**3888.** ———.]—*ROBINSON v. ROBINSON*, No. 3688, *ante*.

**3889.** ———.]—Where a trustee states in writing to his *cestui que trust* that part of the trust moneys are laid out in a certain property, although not an investment warranted by the terms of the trust, & although the *cestui que trust* goes on receiving interest & not the rents:—*Held*: the *cestui que trust* might at his option take the property in which the trust funds had been laid out, as representing the whole trust fund, or might have it sold & prove, if necessary, against the trustee's estate for the deficiency, if any. But the *cestui que trust* was not allowed to take the property as representing the actual portion of the trust fund laid out by the trustee, & prove for the balance.—*THORNTON v. STOKILL* (1855), 20 L. T. O. S. 26; 1 Jur. N. S. 751.

*Annotation* :—*Distd.* *Re Salmon, Priest v. Uppley* (1889), 42 Ch. D. 351.

**3890.** ———.]—The trustees of a settlement had power to invest the trust funds "in their names" in Govt. or real securities, & to vary investments with the consent in writing of the tenant for life. In 1875 they sold a sum of Consols & other stock forming part of the trust fund, & with the consent of the tenant for life invested the proceeds of sale in a contributory mtge. of real estate, which was effected in the names of themselves & the persons advancing the remainder of the money. In 1879 a mtge. in the names of the trustees only was substituted for the contributory mortgage, but the consent in writing of the tenant for life was not previously obtained, although upon hearing of the change of investment he did not make any objection thereto. Upon the death of the tenant for life the money on mtge. was called in. The whole of the principal invested was forthcoming, but the remaindermen, who were entitled to the capital, claimed that the trustees ought to replace the sums of stock sold in 1875, which at that time stood at a lower price than in 1887 when the proceedings were commenced:—*Held*: that the sale in 1875 was improper, as having been made for the purpose of effecting another investment which was a breach of trust as not being in the names of the trustees solely, & the investment of 1879 was also a breach of trust, as the previous consent of the tenant for life after the facts were fully laid before him was not obtained, & consequently the trustees were liable either to replace the stock sold, or to pay the difference in price of the stock sold in 1875 & of the same amount of stock at the time of the commencement of the proceedings.—*Re MASSINGHEID'S SETTLEMENT, CLARK v. TRELAWNY* (1890), 63 L. T. 296, C. A.

*Annotations* :—*Refd.* *Stokes v. Prance*, [1898] 1 Ch. 212; *Re Dive, Dive v. Roebuck*, [1909] 1 Ch. 328.

**3891.** ———.]—In an action by a beneficiary under a settlement against trustees alleging breaches of trust in respect of their not having recovered from the maker of a promissory note for £2,000 or, after his death from his estate the amount he had thereby promised to pay or to obtain a fully-paid policy or the surrender value in respect of a policy for £1,000 both the promissory note & the policy being subject to the trusts of the settlement, & the promissory note being authorised under it, debts. claimed that as regarded the policy, which, owing to the renewal premiums not having been paid, had lapsed in the year 1902, they had satisfied their liability to the trust estate by the purchase of the largest sum of Consols which, during the period in which under the conditions of the policy the insurance co. would have issued a substituted policy, could have been bought with its surrender value:—*Held*: (1) the investment on the promissory note did not cease to be authorised simply by reason of the promisor's death, but even if the amount payable as the surrender value of the policy was never in the hands of the trustees, they were, under the rule laid down in *Robinson v. Robinson*, No. 3688, *ante*, liable for the difference between the amount actually spent in their purchase of Consols & the surrender value of the policy.—*Re GODWIN'S SETTLEMENT, GODWIN v. GODWIN* (1918), 87 L. J. Ch. 645; 119 L. T. 643; 62 Sol. Jo. 729.

**3892.** ———.]—Trustee with option to invest in stock or real security.]—Where trustees may invest in stock, or on real security & they lend on personal security, they shall be answerable for the principal money only, & not for the value of the stock which might have been purchased.—*MARCH v. HUNTER* (1822), 6 Madd. 295; 56 E. R. 1103.

*Annotations* :—*Fold.* *Shepherd v. Moulis* (1845), 4 Hare, 500. *Consd.* *Robinson v. Robinson* (1851), 1 De G. M. & G. 247.

**3893.** ———.]—Trustees & exors. under the will of testator, who had directed them to invest a share of his residuary estate either in the public funds or on mtge. at 5 per cent., having admitted by their answer that they had, from time to time, balances in their hands, & it being proved that, many years after the death of testator, they had not invested the share either in the funds or on mtge.; inquiries will be directed at the original hearing concerning the balances retained by them, & the prices of 3 per cent. stock at the several times when such balances were in their hands.—*HOCKLEY v. BANTOCK* (1826), 1 Russ. 141; 38 E. R. 55.

*Annotations* :—*N.F.* *Shepherd v. Moulis* (1845), 4 Hare, 500. *Consd.* *Robinson v. Robinson* (1851), 1 De G. M. & G. 247. *Refd.* *Dickinson v. Player* (1838), Coop. Pr. Cas. 178. *Mentd.* *Turner v. Deane* (1849), 3 Exch. 836.

**3894.** ———.]—*GALE v. PITT* (1830), cited in 1 De G. M. & G. at p. 255; 21 L. J. Ch. at p. 115; 18 L. T. O. S. at p. 294; 16 Jur. at p. 257; 42 E. R. 550.

*Annotation* :—*Refd.* *Robinson v. Robinson* (1851), 1 De G. M. & G. 247.

**3895.** ———.]—*WATTS v. GIRDLESTONE*, No. 3776, *ante*.

**3896.** ———.]—Where a trustee neglects to invest on real or Govt. securities according to the trust, the *cestui que trust* has the right of selecting whether the trustee shall be answerable for the money or for the stock.

A trustee having the option of investing on mtge. or Govt. security, improperly took an insufficient mtge. security. Being held answerable, the ct. decided, that having exercised his discretion, though improperly, he was answerable for the money lost, & not for the stock it might



have produced.—**AMES v. PARKINSON** (1844), 7 Beav. 379; 3 L. T. O. S. 199; 49 E. R. 1111.

**Annotations** :—**Consd.** **Robinson v. Robinson** (1851), 1 Do G. M. & G. 247. **Expld.** **Re Chapman, Cocks v. Chapman**, [1898] 2 Ch. 763.

**3897.** ———.]—Testator directed his trustees to invest the residue of his personal estates in Govt. or real securities. Some of the *cestuis que trust* & one of the trustees permitted the trust moneys to remain in the hands of the other trustee at interest:—**Held**: inasmuch as no investment was made, the trustees were chargeable with the whole amount of the trust funds possessed by them, with interest; but were not answerable for the amount of Consols, or any other particular security, in which they might, according to the directions of the will, have invested the trust moneys.—**SHEPHERD v. MOULS** (1845), 4 Hare, 500; 14 L. J. Ch. 366; 9 Jur. 506; 67 E. R. 746.

**Annotation** :—**Refd.** **Robinson v. Robinson** (1851), 1 Do G. M. & G. 247.

**3898.** ———.]—A trustee having, under a settlement a power of sale with a trust for *interim* investment in the funds or on real security concurred in a sale & permitted the tenant for life to receive the purchase-money which was not invested according to the trust:—**Held**: the *cestui que trust* has not the option of requiring the trustee to replace the purchase-money with interest or to buy such a sum of stock as the proceeds of the sale would have purchased if invested at the time.—**REES v. WILLIAMS** (1847), 1 De G. & Sm. 314; 63 E. R. 1083.

**Annotation** :—**Refd.** **Robinson v. Robinson** (1851), 1 Do G. M. & G. 247.

**3899.** ———.]—**ROBINSON v. ROBINSON**, No. 3088, *ante*.

**3900.** ———.]—A trustee, with power to invest in Consols or on real security, who makes an improper investment, has the option of replacing either the actual sum misapplied with interest at 4 per cent. *per annum*, or the sum which would have been produced by an investment in Consols.—**FISHER v. GILPIN** (1869), 38 L. J. Ch. 230.

### C. Following Trust Funds.

See, generally, Part VII., Sect. 5, *post*.

**3901. When right exists—Money laid out in purchase of land.**—**KENDAL v. MILWARD** (1702), 2 Vern. 440; 23 E. R. 882.

**3902.** ———.]—Remedy for a breach of trust is personal, & money produced thereby laid out on an estate in Ireland, cannot be specifically followed. The party's assets were, however, marshalled in favour of the claim.—**COX v. BATEMAN** (1715), 2 Ves. Sen. 19; 28 E. R. 13, L. C.

**Annotations** :—**Refd.** **Atley v. Arnold** (1852), 2 De G. M. & G. 432; **Holland v. Holland** (1869), 4 Ch. App. 449, n.

**3903.** ———.]—Money has no earmark, & if invested in land or other things it cannot be pursued; therefore if a receiver of rents or if an exor. in trust lays out the rents or the assets in a purchase of lands in fee, & dies insolvent, the purchaser will not be liable.—**DEG v. DEG** (1727), 2 P. Wms. 412; 24 E. R. 791, L. C.

**Annotations** :—**Mentd.** **Bally v. Ploughman** (1729), Mos. 95; **Hall v. Kendall** (1736), Mos. 328.

**3904.** ———.]—Trust money followed into land, upon evidence.—**LANE v. DIGHTON** (1762), Amb. 409; 27 E. R. 274, L. C.

**Annotations** :—**Consd.** **Lench v. Lench** (1805), 10 Ves. 511. **Appld.** **Taylor v. Plumer** (1815), 3 M. & S. 662. **Refd.**

**Lewis v. Madocks** (1810), 17 Ves. 48; **Wilkins v. Stevens** (1842), 1 Y. & C. Ch. Cas. 431. **Mentd.** **Benbow v. Townsend** (1833), 1 My. & K. 506.

**3905.** ———.]—Trust money . . . may . . . be followed into the land in which it is invested (**GRANT, M.R.**).—**LENCH v. LENCH** (1805), 10 Ves. 511; 32 E. R. 943.

**3906.** ———.]—A trustee advanced to A., one of his *cestuis que trust*, a part of the trust funds, to enable him to purchase a real estate. A. died without having repaid the money, having devised the estate, & his personal estate was insufficient to pay his debts & legacies:—**Held**: (1) there was a lien on the estate for the trust funds; (2) the pecuniary legatees had, as against the devisees, a right of marshalling, so as to have the lien satisfied, primarily, out of the purchased estate.—**BIRDS v. ASKEY** (No. 2) (1858), 21 Beav. 618; 53 E. R. 497.

**Annotation** :—**As to** (2) **Appld.** **Lilford v. Powys Keck** (1865), L. R. 1 Eq. 347.

**3907.** ———.]—As a general principle, where the trustee has without the concurrence of the *cestui que trust*, laid out trust moneys in the purchase of land or any other investment not authorised by the trust, if the trust money can be traced, the *cestui que trust* has a right to have the money so laid out made good out of the property or to take the property itself (**KINDERSLEY, V.-C.**).—**WILLIAMS v. THOMAS** (1862), 2 Drew. & Sm. 29; 31 L. J. Ch. 674; 7 L. T. 184; 8 Jur. N. S. 250; 10 W. R. 417; 62 E. R. 532.

**Annotation** :—**Mentd.** **Walker v. Wilsner** (1889), 23 Q. B. D. 335.

**3908.** ———.]—**Re PATTEN & EDMONTON UNION**, No. 3492, *ante*.

**3909.** ———.]—**Purchase in name of trustee—No proof of appropriation of trust fund.**—An exor. by the very will empowered to purchase lands for the heir; yet the purchase being in his own name, & he died insolvent, as to the other assets the heir could not follow the land to make it a trust for him, though the exor. had told the mother of the purchase he was about to make, & had her consent; & so the exor.'s heirs went away with the land for want of express proof of the application of the trust money.—**HALCOTT v. MARKANT** (1701), Prec. Ch. 168; 2 Eq. Cas. Abr. 741, pl. 3; 24 E. R. 81.

**Annotation** :—**Refd.** **Lane v. Dighton** (1762), Amb. 409.

**3910.** ———.]—**By borrower from trustees.**—Trustees in plff.'s marriage settlement, lent part of the trust moneys in their hands to the husband, when in full trade & in credit, upon his bond. He purchased an estate, & took the conveyance to himself in fee simple. He afterwards became bkpt., & the estate so purchased, with other estates & effects, were conveyed & assigned to his assignees. The estate so purchased was held to be purchased with the trust money, & ordered to be conveyed to new trustees upon the trusts in the settlement, in part of the bond debt, & the trustees to prove the remainder of the debt under the commission.—**WILSON v. FOREMAN** (1782), 2 Dick. 593; 21 E. R. 402, L. C.

**Annotation** :—**Expld.** **Lench v. Lench** (1805), 10 Ves. 511.

**3911.** ———.]—**Change of investment.**—If an exor., for the benefit of testator's estate, should invest part of it in the funds, or transfer money from one stock to another, this is not a conversion, but you may still follow it, as much as if it had continued in the same condition as at testator's

### PART VI. SECT. 7, SUB-SECT. 3.—C.

**r. When right exists—Money laid out in purchase of leaseholds.**—**PHAYRE v. PERRE** (1815), 3 Dow, 116.—**IR.**

**l. Conditions precedent to exercise of right.**—Every step by which trust property assumes its new form must be traced before it can be followed

& recovered.—**BRITISH CANADIAN SECURITIES, LTD. v. MARTIN**, [1917] 1 W. W. R. 1315; 27 Man. L. R. 423.—**CAN.**



**3921. Lien for amount of deficiency—On Improper securities into which funds traced.]—**(1) Under a power to invest trust money "on real securities," a trustee lent it to a railway co., on the usual assignment of the "undertaking," tolls, etc.—the principal not payable till seven years:—*Held*: whether real security or not, the investment was improper.

(2) When trust funds are invested on an improper security, the parties interested have a lien on the securities into which it is traced.—*MANT v. LEITH* (1852), 15 Beav. 524; 21 L. J. Ch. 719; 16 Jur. 302; 51 E. R. 641.

**3922. ———.]—**Where trust money has been invested on an insufficient security & the trustees are ordered to replace the fund, the *cestuis que trust* are entitled to a lien on the security until the fund is replaced.—*Re WHITELEY, WHITELEY v. LEAROYD* (1886), 33 Ch. D. 347; 55 L. J. Ch. 864; 55 L. T. 564; 51 J. P. 100; 2 T. L. R. 864, C. A.; *affd. sub nom. LEAROYD v. WHITELEY* (1887), 12 App. Cas. 727, H. L.

*Annotations:—Consd. Re Turner, Barker v. Ivimey*, [1897] 1 Ch. 336. *Reid v. Jones* (1888), 36 W. R. 666. *Mentd. Re Partington, Partington v. Allen* (1887), 57 L. T. 654; *Re Brogden, Billing v. Brogden* (1888), 38 Ch. D. 546; *Knox v. Mackinnon* (1888), 13 App. Cas. 753; *Jac v. Meek* (1889), 14 App. Cas. 558; *Re Salmon, Priest v. Uppleby* (1889), 42 Ch. D. 351; *Sheffield & South Yorkshire Permanent Bldg. Soc. v. Aizlewood* (1889), 44 Ch. D. 412; *Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth* [1891] 1 Ch. 337; *Brinsden v. Williams*, [1894] 3 Ch. 185; *Re Somerset, Somerset v. Poulett*, [1894] 1 Ch. 231; *Mara v. Browne*, [1895] 2 Ch. 69; *Re Chapman, Cocks v. Chapman*, [1896] 2 Ch. 763; *Re Hunt's S. E., Bulteel v. Lawdeshayne*, [1905] 2 Ch. 418; *Eaton v. Buchanan*, [1911] A. C. 253.

**3923. ———.]—***Re SALMON, PRIEST v. UPPELBY*, No. 3877, *ante*.

**3924. ———.]—***Waiver of lien—What amounts to—Obtaining order against trustee for payment into court.]—*A trustee under a will committed a breach of trust by lending trust moneys to his co-trustee upon a mtge. for a term of years. An administration suit was instituted, & he was ordered to pay the money into ct. He sold part of the mtgd. property under a power of sale in the mtge., &, on the application of two of the *cestuis que trust*, the proceeds were paid into ct., subject to an order that they were not to be paid out without the consent of the purchaser. The trustee's solrs. refused to give up the mtge. deeds unless upon payment of their bill of costs:—*Held*: by instituting an administration suit, & obtaining an order against the trustee personally for payment of the trust moneys into ct., which order had not been obeyed, the *cestuis que trust* had not waived their right to pursue the trust money into the unauthorised investment.—*FRANCIS v. FRANCIS* (1854), 5 De G. M. & G. 108; 43 E. R. 811, L. J.J.

#### *E. Proof in Bankruptcy.*

**3925. When beneficiary may prove—Improper investment.]—***Re STRAHAN, Ex p. GEAVES*, No. 3757, *ante*.

**3926. ———.]—***After adoption of improper investment—For whole amount of trust fund.]—**Re LAKE, Ex p. HOWE*, No. 3878, *ante*.

**3927. ———.]—***For damages for improper investment—Measure of damages.]—**Re LAKE, Ex p. HOWE*, No. 3878, *ante*.

## Part VII.—Breaches of Trust.

### SECT. 1.—WHAT CONSTITUTES.

#### SUB-SECT. 1.—IN GENERAL.

**3928. Deviation from terms of trust.]—**Legacy of £1,000 laid out by one who had the care of the legatee, being an infant, otherwise than appointed by the will must be answered by him who so laid it out.—*CORBETT v. FRANKLYN* (1670), Cas. temp. Finch, 250; 23 E. R. 137.

**3929. ———.]—**Whatever a trustee does to prevent the intention of his testator is a breach of trust & ought to be set aside.—*A.-G. v. YOUNG* (1733), 2 Com. 423; 92 E. R. 1142.

**3930. ———.]—**Testator devised his real estate to his nephew, & authorised the trustees of his will to give up the tenancy of a farm of which he was tenant in favour of the nephew, provided the landlord would accept him as tenant, & in that event he bequeathed to the nephew the stock upon the farm. After testator's death it appeared that if the nephew was accepted by the landlord as tenant & so took the stock on the farm, there would be scarcely anything left for the other legatees under the will, some of whom were the sisters of the nephew. One of the trustees, who was also the landlord's agent, informed the landlord of the circumstances. The landlord said that unless the nephew acted fairly & honourably he would not let him have the farm. The trustee told the nephew of what the landlord had said, & offered to let him into possession of the farm, & to pay him £200 out of testator's estate, if he would give up the real estate of testator in favour

of the other legatees. The nephew thereupon executed a deed whereby he released testator's real estate to the trustees, upon trust to sell & to pay £200 to the nephew, & to divide the residue of the proceeds among the other legatees. He had no independent professional advice in the matter. He was afterwards accepted as tenant of the farm. On a bill to set aside the deed:—*Held*: the trustees had been guilty of a breach of trust, & the deed ought to be set aside, with costs as against them.—*ELLIS v. BARKER* (1871), 7 Ch. App. 104; 41 L. J. Ch. 64; 25 L. T. 688; 20 W. R. 160, L. J.J.

**3931. ———.]—***Unless necessary in interests of beneficiaries.]—*A trustee is not in all cases, to be made liable upon the mere ground of having deviated from the strict letter of his trust; for such deviation may be necessary or beneficial to the interests of the *cestuis que trust*; but when a trustee ventures to deviate from the letter of his trust, he does so under the obligation & at the peril of afterwards satisfying the ct. that the deviation was necessary or beneficial.—*HARRISON v. RANDALL* (1851), 9 Hare, 397; 21 L. J. Ch. 294; 16 Jur. 72; 68 E. R. 502.

*Annotation:—Mentd. Rowley v. Rowley* (1854), 23 L. T. O. S. 55.

**3932. Loss of trust fund.]—**Where a portion of a trust fund has been lost, that is *prima facie* a breach of trust & a sufficient ground for the appointment of a receiver on an interlocutory application.—*EVANS v. COVENTRY* (1854), 5 De G. M. & G. 911;

### PART VII. SECT. 1, SUB-SECT. 1.

**3928 1. Deviation from terms of trust.]—***REID v. THOMPSON & M'NAMARA* (1851), 2 I. Ch. R. 26.—*IR.*

**Sect. 1.—What constitutes: Sub-sects. 1, 2, 3, 4, 5 & 6.]**

3 Eq. Rep. 545; 24 L. T. O. S. 186; 19 J. P. 37; 3 W. R. 149; 43 E. R. 1125, L. J.

**Annotations:—***Reid, Kearns v. Leaf, Aldebert v. Kearns* (1864), 1 Hcn. & M. 681; *Re State Fire Insco.* (1865), 2 New Rep. 565. **Mentd.** *Re English & Irish Church & University Assoc. Soc.* (1862), 1 Hcn. & M. 79; *Re Albert Life Assoc., Bell's Case, Kerr's & Stubb's Cases, Blackley's Case, Craig's Exors.' Case, Wilson's Case* (1870), L. R. 9 Eq. 706.

**3933. Assignment of trust.]—**BRADWELL v. CATCHPOLE (1700), 3 Swan. 78, n.; 36 E. R. 781. **Annotation:—***Reid, Munch v. Cockerell* (1836), 8 Sim. 219.

**3934. —.]—**A. being impropiator of a parish, demised part of the tithes to certain parishioners as trustees for one thousand years, who redemised the same to him for nine hundred & ninety-nine years, under a yearly rent of £50 payable to the trustees as a provision for a preacher to be nominated by the trustees. The heir of A. afterwards sold the rectory to B. & the representative of the surviving trustee was prevailed upon to assign B. the right of nominating the preacher. From the date of the original demise & for forty years & upwards after the latter transaction, the preacher was constantly nominated by the parishioners; but upon a contest between them & B. it was held that the right of nomination was absolutely in the trustees, & that the assignment of that right was a breach of trust.—*FOLEY v. A.-G.* (1721), 7 Bro. Parl. Cas. 249; 3 E. R. 162, H. L.

**Annotations:—***Apld. A.-G. v. Scott* (1750), 1 Ves. Sen. 413. **Reid.** *Re St. Stephen, Coleman Street, Re St. Mary the Virgin, Aldermanbury* (1888), 39 Ch. D. 492.

#### SUB-SECT. 2.—FAILURE TO CONTROL TRUST PROPERTY.

**3935. Whether amounting to breach of trust.]—**SIMPSON v. RAWLINGS, No. 4675, *post*.

**3936. —.]—**A debt secured on mtge. of a trust fund was assigned to two trustees on the trusts of a marriage settlement, whereby it was declared that the receipt of the two trustees should be a sufficient discharge for the money. The trustees of the mtgd. fund sold out a sum sufficient to discharge the debt, & paid it to one of the trustees of the marriage settlement without the knowledge of the other, or of the *cestuis que trust*, taking the receipt of the former only. The money being misapplied & lost:—**Held:** the money must be paid over again, & that with costs of suit.—*HALL v. FRANCK* (1849), 11 Beav. 519; 18 L. J. Ch. 362; 13 L. T. O. S. 338; 13 Jur. 718; 50 E. R. 918.

**3937. —.]—**II., by a voluntary deed, assigned (*inter alia*) moneys secured on mtge., notes of hand, furniture, & other effects, to W., upon trust for himself, the settlor, for life, & after his death upon trust, among other payments, to pay £40 to pltf. He afterwards devised & bequeathed all his property, real & personal, upon trusts in which pltf. took no interest. Upon a bill filed by her to have the general trusts of the previous voluntary settlement carried into execution:—**Held:** the trustee, who was himself the principal *cestui que trust*, having concurred in allowing the settlor to receive moneys thereunder, & having joined with him in committing a breach of trust, was liable to pltf.—*PARNELL v. HINGSTON* (1856), 3 Sm. & G.

#### PART VII. SECT. 1, SUB-SECT. 2.

**3935 I. Whether amounting to breach of trust.]—**ANDERSON v. SMALL (1833), 11 Sh. (Cl. of Sess.) 382.—**SCOT.**

**3935 II. —.]—**M'NICOL'S EXECU-

TOR v. M'NICOL (1893), 20 R. (Cl. of Sess.) 386; 30 Ec. L. R. 428.—**SCOT.**

#### PART VII. SECT. 1, SUB-SECT. 3.

**a. When amounting to breach of**

337; 28 L. T. O. S. 217; 2 Jur. N. S. 854; 4 W. R. 794; 65 E. R. 684.

**3938. —.]—**Negligence cannot be imputed to trustees for leaving documents of title in the hands of one of their number & allowing him to receive the income, & no authority to deal with the property can be implied, even in favour of a *bond fide* purchaser from such trustee.—*COTTAM v. EASTERN COUNTIES Ry. Co.* (1860), 1 John. & H. 243; 30 L. J. Ch. 217; 3 L. T. 465; 6 Jur. N. S. 1367; 9 W. R. 94; 70 E. R. 737.

**Annotations:—***Consd. Johnston v. Renton, Johnston v. Parsey* (1870), L. R. 9 Eq. 181. **Reid.** *Stackhouse v. Jersey* (1861), 30 L. J. Ch. 421. **Mentd.** *Carshore v. N. E. Ry.* (1885), 54 L. J. Ch. 760; *Barton v. L. & N. W. Ry.* (1888), 38 Ch. D. 144; *Sheffield Corp'n. v. Barclay*, [1903] 2 K. B. 580.

**— Trust property left with agent.]—***See Part V., Sect. 6, sub-sect. 2, D., ante.*

**—.]—***Compare* EXECUTORS, Vol. XXIV., pp. 676–679, Nos. 7022–7047.

**Liability for acts of co-trustee.]—***See Sect. 3, sub-sect. 4, post.*

#### SUB-SECT. 3.—NEGLIGENCE.

**3939. Test of negligence—Course of court under similar circumstances.]—**Where trustees have a discretion, the test of a negligent breach of trust is, what would have been the course of the ct. under similar circumstances?—*WARNER v. TORKINGTON* (1835), 4 L. J. Ch. 193.

**3940. When amounting to breach of trust—Gross negligence amounting to fraud.]—**A trustee is only answerable for fraud, or a gross neglect, which is equal to fraud; & therefore where trust money is suffered by a trustee to remain in the hands of A. with the privy & approbation of the parties beneficially interested, instead of laying it out in a purchase pursuant to marriage articles, & A. becomes insolvent; the trustee is not in this case answerable.—*ALLEN v. HANCORN* (1775), 7 Bro. Parl. Cas. 375; 3 E. R. 243, H. L.

**3941. Particular Instances—Settlement of accounts—Allowing balance to remain against factor.]—**The mere fact of trustees allowing balances to remain against their factor at the annual settlement of his accounts, where it is impossible to include his whole receipts & payments for the year, is not a breach of trust, or such culpable negligence as would make them liable for the ultimate balances due from him to the trust; *secus*, if they assented to his contrivances to retain larger balances than were necessary for the management of the trust.—*HOME v. PRINGLE & HUNTER* (1841), 8 Cl. & Fin. 264; 2 Robin. App. 384; 8 E. R. 103, H. L.

**Annotations:—***Reid.* *Tophis v. Hurrell* (1854), 19 Beav. 423; *Carruthers v. Carruthers*, [1896] A. C. 659. **Mentd.** *Skeffington v. Budd* (1842), 9 Cl. & Fin. 219; *Campbell v. Pollak*, [1927] A. C. 732.

**3942. — Failure to get in trust moneys.]—**A., a woman, being entitled to a bond debt due to her from B., by a settlement made on her marriage, & dated in 1820, assigned it to a trustee upon trust for A. for her life, for her separate use, with remainders over. In 1836, a part of the debt was paid to A. & her husband. In 1842, C. was appointed sole trustee of the settlement. In 1843, A. charged her life interest in the bond debt in favour of D., by way of collateral security for a

*trust—Gross negligence amounting to wilful default.]—*CARRUTHERS v. CAIRNS (1890), 17 It. (Cl. of Sess.) 769; 27 So. L. R. 640.—**SCOT.**

**b. Degree of care required.]—**The

debt due from her husband to D. In 1843, B. died, & A. took out administration to B. Bill by D. against C. to enforce the security, charging him with wilful default for omitting to get in the part of the debt paid to A. & her husband, & the residue of the debt due from the estate of B. :—*Held*: C. was not liable.—**THACKWELL v. GARDINER** (1851), 5 De G. & Sm. 58; 21 L. J. Ch. 777; 19 L. T. O. S. 101; 16 Jur. 588; 64 E. R. 1017.

**3943.** ———.—**WESTMORELAND v. HOLLAND**, No. 4416, *post*.

**3944.** ———.—**Mortgage—Absence of clause precluding power of leasing.**—A trustee is not guilty of negligence merely because he does not insist on having in the mtge., either (a) a clause precluding the mtgor. from granting occupation leases under Conveyancing Act, 1881 (c. 41), s. 18, or (b) a covenant by the mtgor. to keep the mtged. hereditament in repair.—**SHAW v. CATES**, [1909] 1 Ch. 389; 78 L. J. Ch. 226; 100 L. T. 146.

*Annotations*:—**Reid**, *Re Solomon*, *Noro v. Meyer*, [1912] 1 Ch. 261; *Re Brookes*, *Brookes v. Taylor* (1914), 58 Sol. Jo. 286.

**3945.** ———.—**Absence of covenant to repair.**—**SHAW v. CATES**, No. 3944, *ante*.

**3946.** ———.—**By sub-demise—Failure to inquire whether consent of lessor necessary.**—Property held under a lease which contained a covenant against underletting without the consent of the lessor, & a clause of forfeiture in case of any breach of covenant, was mortgaged by sub-demise to the trustees of a co.'s debenture stock deed. The deed comprised a number of other properties. The trustees made no inquiry as to whether the lessor's consent was necessary to the sub-demise :—*Held*: the trustees had been guilty of negligence, & the ct. was precluded from giving them, under Conveyancing Act, 1892 (c. 13), s. 4, relief against the forfeiture.—**MATTHEWS v. SMALLWOOD**, [1910] 1 Ch. 777; 79 L. J. Ch. 322; *sub nom.* **MATTHEWS v. SMALLWOOD**, **SMALLWOOD v. MATTHEWS**, 102 L. T. 228.

*Annotations*:—**Reid**, *Hurd v. Whaley*, [1918] 1 K. B. 448; *Davenport v. Smith*, [1921] 2 Ch. 270; *Atkin v. Rose*, [1923] 1 Ch. 522; *Fulker's Theatre & Vaudeville Co. v. Rofe*, [1923] A. C. 435. **Mentid**, *Samuel v. Dumas*, [1924] A. C. 431.

#### SUB-SECT. 4.—INVESTMENTS.

See Part VI., Sect. 7, *ante*.

#### SUB-SECT. 5.—LEASING.

**Power of leasing generally.**—See Part V., Sect. 7, sub-sect. 1, *ante*.

**3947. Lease by some trustees.**—**ROTHWELL v. HUSSEY** (1874), 2 Cas. in Ch. 202; 22 E. R. 911.

**3948. Renewal for benefit of trustee.**—If the trustee of a lunatic renew a lease for his own benefit, it is a breach of the trust.—*Ex p. PHELPS* (1742), 9 Mod. Rep. 357; 88 E. R. 505, L. C.

**3949. Failure to renew.**—Settlement of a renewable lease in trust out of the rent & profits to pay the charges of renewal, & subject thereto for husband & wife successively for life, remainder to

the first son at twenty-one. The trustees having neglected to renew, are answerable as for a breach of trust & liable to pay the son the amount of what he had laid out in procuring a renewal.—**MONTFORD (LORD) v. CADOGAN (LORD)** (1810), 2 Mer. 3; 19 Ves. 635; 34 E. R. 651, L. C.

*Annotations*:—**Consd.** *Richardson v. Jenkins* (1853), 1 Drew. 477; *Reid*, *Shaftesbury v. Marlborough* (1833), 2 My. & K. 111; *Jones v. Jones* (1846), 7 L. T. O. S. 157; *Adey v. Arnold* (1852), 2 De G. M. & G. 432; *Hughes v. Wells* (1852), 9 Hare, 749; *Holland v. Holland* (1869), 4 Ch. App. 450, n.; *Isaac v. Wall* (1877), 46 L. J. Ch. 576; *Re Parkers*, *Ex p. Shippard* (1887), 19 Q. B. D. 84.

**3950. Sub-lease in breach of trust.**—P. being lessee of two houses, underlet one to S. & covenanted to indemnify her against the rent reserved by the original lease. S. bequeathed that house, which was numbered four, to P., in trust for L., & appointed P. her exor. P., as the exor. & trustee of S.'s will, executed a deed which purported to be an assignment, by him to L., of number four, for the residue of the term granted to S. After that P. bequeathed the two houses to his exors, upon certain trusts.

After his death, his exors. & trustees demised the house number four to L., for the then remainder of the term granted to S. :—*Held*: L. could not make a good title to that house, because the legal estate was merged by the bequest made by S. to P., the immediate reversioner, & therefore, the assignment executed by P. was inoperative; & because the demise made by the exors. & trustees of his will was a breach of trust.—**LAW v. URTWIN** (1848), 16 Sim. 377; 12 Jur. 1012; 60 E. R. 919.

#### SUB-SECT. 6.—MORTGAGES.

**Power of mortgaging generally.**—See Part IV., Sect. 7, sub-sect. 6, *ante*.

**3951. Sale before day of redemption.**—**By trustee for mortgagor & mortgagee.**—**PHILPOT v. HEIBERT** (1722), 2 Rq. Cas. Abr. 746; 22 E. R. 633.

**3952. Release of mortgaged property.—To enable tenant for life to lease.**—Pltf. was tenant for life in possession with power of leasing of certain premises, subject to a mtge. charge in trustees. The trusts of the mtge. were for pltf. & wife for their respective lives, with remainder to their unborn children. To enable pltf. to grant a lease of a portion of the property in mtge., the trustees & pltf. & wife, as *cestuis que trust*, joined in releasing that portion from the mtge.; & pltf. thereupon agreed to grant a beneficial lease under the power of such portion to deft. Upon an objection taken, in a suit for specific performance, to the title to grant the lease, on the ground that the release of the mtge. would be inoperative as against the wife & ulterior *cestuis que trust* :—*Held*: whether this was or was not a breach of trust on the part of the trustees, there being no legal title by which the position of the lessee could be affected, a ct. of equity would under no circumstances interfere with the title of the lessee, & therefore, the objection could not be supported.—**DAVES v. BETTS** (1848), 17 L. J. Ch. 315, 322; 13 L. T. O. S. 481; 12 Jur. 709, L. C.

ct. will not exact from trustees more careful conduct than a prudent man would bestow in the management of his property.—**CHISHOLM v. BARNARD** (1864), 10 Gr. 479.—**CAN.**

#### PART VII. SECT. 1, SUB-SECT. 5.

**3949. Failure to renew.**—When a renewable lease is vested in trustees, upon trust to pay rent & renewal fines,

they are guilty of a flagrant breach of trust, if they permit the tenant for life to take & use the rents, & neglect to take out renewals.—**TOWNLEY v. BOND** (1843), 4 Dr. & War. 240; 2 Con. & Law. 393.—**IR.**

#### PART VII. SECT. 1, SUB-SECT. 6.

**a. Mortgage to raise money to bring land on register.**—It is a breach of

trust for trustees, there being no available income, to mortgage the trust estate for the purpose of raising money to pay the expenses incurred by them in bringing land forming part of the trust estate under Transfer of Land Act, 1896.—**CHOUT v. BRISSEL**, [1909] V. L. T. 207.—**AUS.**

**d. Taking & assigning mortgages in own name.**—**CUMMING v. LANDED**

**Sect. 1.—What constitutes: Sub-sects. 6, 7, & 9.]**

**3953. Assignment of mortgage for value.]—**CORY v. EYRE (1803), 1 De G. J. & Sm. 149; 46 E. R. 58, L. J.

*Annotations:—*Apprvd. Shropshire Union Rys. & Canal Co. v. R. (1875), L. R. 7 H. L. 498. *Consd.* Bradley v. Hughes (1878), 9 Ch. D. 189; *Re* Vernon, Ewens (1886), 33 Ch. D. 402. *Apld.* Carritt v. Real & Personal Advance Co. (1889), 58 L. J. Ch. 688. *Consd.* Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon, [1901] 2 Ch. 231; Walker v. Linom, [1907] 2 Ch. 104. *Apld.* Hill v. Poters, [1918] 2 Ch. 273. *Refd.* Allan v. Scott (1865), 12 L. T. 449; Perrin v. Burbey, [1869] W. N. 160; Hunter v. Walters, Curling v. Walters, Darnell v. Hunter (1870), L. J. 11 Eq. 292; Dixon v. Muckleston (1872), 8 Ch. App. 153; Taylor v. Russell, [1891] 1 Ch. 8.

**3954. Omission of power of sale.]—**FARRAR v. BARRACLOUGH, No. 4440, *post*.

**3955. —.]—**The absence of a power of sale in a mtge. deed of trust funds, does not show a breach of trust.—LOCKHART v. REILLY, REILLY v. LOCKHART (1855), 24 L. T. O. S. 316; 3 W. R. 227, L. C.; *subsequent proceedings* (1857), 1 De G. & J. 404, L. C.

**3956. Acceptance of lower rate of interest after default.]—**The rate of interest on the mtge. was to be 5 per cent., but, if paid within two months, 4 per cent.; the exor., in settling accounts with the mtgee., only charged 4 per cent., though the payment was not within the two months; the legatees under the will objected that this was a breach of trust:—*Held:* not to be a breach of trust, but a proceeding according to the usual course of dealing between mtgor. & mtgee.—BOOTH v. ALINGTON, ALINGTON v. BOOTH (1856), as reported in 20 L. J. Ch. 138; 28 L. T. O. S. 211; 3 Jur. N. S. 49, L. C.

*Annotations:—**Mentd.* Miller v. Huddleston (1868), 16 W. R. 478; De Lisle v. Hodges (1874), L. R. 17 Eq. 410; Gilbert v. Whitfield (1882), 52 L. J. Ch. 210; Wilson v. Kenrick (1885), 31 Ch. D. 658; *Re* Saunders-Davies, Saunders-Davies v. Saunders-Davies (1887), 34 Ch. D. 482; *Re* Cruddas, *Re* Smith, Cruddas v. Smith (1900), 69 L. J. Ch. 355.

**3957. Neglect to enforce payment of debt & interest.]—**A wife was entitled to an annuity for her separate use, which was payable out of a mtge. on her husband's estate. The wife lived with her husband & was maintained by him. The wife's trustee neglected to enforce payment of the mtge. & interest:—*Held:* liable for the breach of trust.—PAYNE v. LITTLE (1858), 26 Beav. 1; 53 E. R. 796.

*Annotation:—**Consd.* Dixon v. Dixon (1878), 9 Ch. D. 587.

**Negligence in mortgaging.]—***See* Nos. 3944, 3946, *ante*.

**SUB-SECT. 7.—SALE.**

**Power of sale, generally.]—***See* Part V., Sect. 7, sub-sect. 2, *ante*.

**3958. Sale at undervalue—Test of adequate price.]—**Upon a bill filed against trustees, charging breaches of trust in selling at an undervalue:—*Held:* the marketable value, & not a valuation, was the test of adequate price.—WILTON v. HILL (1855), as reported in 20 L. T. O. S. 253; 4 W. R. 66.

*BANKING & LOAN Co. (Ont.)* (1893), 22 S. C. R. 216.—*CAN.*

**e. Mortgage for erection of suitable building on trust property—Property not saleable.]—**Trustees, under trust for sale, made every effort to sell the trust property, but it was found not to be saleable as it stood, & they were advised to erect a suitable building upon the property & then offer it for sale. This they did, raising the money by a mtge. upon the property, & a sale was effected at a reasonable price:—*Held:* although the trust for sale did not authorise the execution

of a mtge. by the trustees, debt having acted as prudent vendors in the best interests of the estate, were not guilty of a breach of trust.—BANNESMAN v. BINKS (1925), 57 O. L. R. 265.—*CAN.*

**f. Loan on second mortgage.]—**Loan of trust funds on a second mtg is not, of itself, & in the absence of other circumstances, a breach of trust.—SMITHWICK v. SMITHWICK (1861), 1 Ch. R. 181; 13 Ir. Jur. 282.—*IR.*

**g. Payment to solicitor of proposed mortgage.]—**CAMPBELL v. SCARDE (1895), 13 N. Z. L. R. 757.—*N.Z.*

**3959. —.]—**S. in 1810 bought the message in fee for £402. The price paid to A. & B. by C., upon the sale of it to him in 1855, was only £73 4s., & the contract price between C. & ptfs., in 1859, was £350:—*Held:* the inadequacy of the price at which A. & B. sold constituted a breach of trust.—STEVENS v. AUSTEN (1861), 3 E. & E. 685; 30 L. J. Q. B. 212; 3 L. T. 810; 7 Jur. N. S. 873; 121 E. R. 600.

*Annotation:—**Refd.* Osborne to Rowlett (1880), 13 Ch. D. 774.

**3960. —.]—***Re* MILLICHAMP, GOODALE v. BULLOCK (1887), 3 T. L. R. 619.

**3961. —Sale by trustee in bankruptcy.]—**Where a sale of a bkpt.'s estate has been fraudulently made at an undervalue by the trustee the ct. may in lieu of setting aside the sale, give damages against the persons liable for the breach of trust.—*Re* GAILLARD, *Ex p.* GAILLARD, [1897] 2 Q. B. 8; 66 L. J. Q. B. 484; 76 L. T. 327; 45 W. R. 556; 13 T. L. R. 316; 41 Sol. Jo. 407; 4 Mans. 52.

**Depreciatory conditions.]—***See* Part V., Sect. 7, sub-sect. 2, G. (d), *ante*.

**3962. Sale in accordance with terms of power—But prejudicial to beneficiaries.]—**Circumstances in which the exercise of a power of sale, although not inconsistent with the terms in which the power is created, would notwithstanding be a breach of trust.

The trustees cannot justify the sale which it is the object of this suit to prevent unless the sale was determined upon as the cause most for the benefit of the [*cestuis que trust*] (WIGRAM, V.-C.).—MARSHALL v. SLADDEN (1849), 7 Harc. 428; 19 L. J. Ch. 57; 14 Jur. 106; 68 E. R. 177.

*Annotations:—**Refd.* Barnes v. Addy (1873), 28 L. T. 398. *Mentd.* Revnell v. Sprye (1849), 8 Harc. 222; A.-G. v. Chesterfield (1854), 18 Beav. 596; Barker v. Loader (1872), L. R. 16 Eq. 49; Welse v. Wardle (1874), L. R. 19 Eq. 171; Tabor v. Cunningham (1875), 24 W. R. 153.

**3963. Condition for personal benefit of trustee.]—**In July, 1884, P., who was entitled in fee to a beerhouse at B., as trustee, agreed to sell the same to ptfs., but he declined to complete the purchase, & ptfs. threatened him with legal proceedings. Subsequently fresh negotiations were entered into for the purchase of the property, & on Dec. 20 P. authorised his solr. to sell to ptfs. for £1,000 on condition that they relinquished any right of action they might have against him. At that time £1,000 was the best price obtainable for the property. Ptfs.' solrs. were authorised to make a contract for ptfs. On Dec. 21, P.'s solr. wrote to ptfs.' solrs., "I now send you for approval draft contract containing the terms on which P. is willing to sell this property to your clients. My client declines to produce an earlier title than that stated in the commencement of the title in the draft contract." The draft contract contained stipulations as to payment of price & commencement of title, but it contained no provision as to the relinquishment of any right of action. The contract was shortly after returned by ptfs.'

**PART VII. SECT. 1, SUB-SECT. 7.**

**3960 i. Sale at undervalue.]—**COUCH v. WESTERN TRUST CO., [1925] 3 D. L. R. 1117; [1925] 2 W. W. R. 678.—*CAN.*

**3960 ii. —.]—**Negligence by trustees in relation to a sale resulting in a sale of trust property at a greatly less price than otherwise would have been obtained is a breach of trust.—TOKO IREHANA v. MOORE (1890), 8 N. Z. L. R. 315.—*N.Z.*

**h. Contracting to sell trust estate at future date.]—**It is a breach of trust for trustees with a power of sale to enter into a contract binding them or



sols. approved. Upon P.'s refusal to complete, plffs. brought an action against him for specific performance:—*Held*: there was no concluded agreement between the parties; the draft contract was not in accordance with the authority given to P.'s solr. *Qu.*: whether an agreement in accordance with such authority would have been a breach of trust.—*BUSHELL v. POCKOCK* (1885), 53 L. T. 860.

**3964. Sale of annuity.**—*IVIE v. IVIE* (1738), 1 Atk. 429; 26 E. R. 274, L. C.

#### SUB-SECT. 8.—RELEASES AND COMPROMISES.

**3965. When amounting to breach of trust—Release—Securities.**—Joint exors. in trust for an infant; one of them broke his trust in sealing a release, by which the infant lost £600. Deceased that the release should be set aside & that the £600 should be made good to the estate of the infant, either by him to whom the release was given or by the trustee.—*JENNINGS v. GORGES* (1679), *Cas. temp.* Finch, 428; 23 E. R. 233.

**3966.** ————*]*—A trustee in a recognisance releases it without any consideration. Deceased to pay the principal & interest not exceeding the penalty.—*JEVON v. BUSH* (1685), 1 Vern. 342; 23 E. R. 508, L. C.  
*Annotation*:—*Reid*. *Goodright d. Hoole v. Sales* (1767), 2 Wils. 329.

**3967.** ————*]*—A general release, given by a trustee in fraud of his trust, is void.—*MANNING v. COX* (1823), 7 Moore, C. P. 617; 1 L. J. O. S. C. P. 36.

**3968. ———— Compromise.**—An exor. cannot compromise a debt due from himself to the estate. Such a transaction will be treated as a breach of trust, without inquiring whether or not it is beneficial to the estate.—*DE CORDOVA v. DE CORDOVA* (1879), 4 App. Cas. 692; 41 L. T. 43; 28 W. R. 105, P. C.

**3969. ———— Necessity for negligence.**—Testator whose assets consisted of heritable & personal property used in his business by trust disposition & settlement disinherited the children on his first marriage & his daughter by his second marriage, leaving them nothing whatever, & directed his trustees to pay to his wife an annuity of £300 *per annum* during her life, & an annuity of £200 to his son J. & H. his wife during their lives, & to convey to his son G. the whole residue of his estate, "but always with & under the burden of the liferent to my wife of my properties in Glasgow & Girvan & also under burden of the payment of the annuities to my wife & to my son & his wife." The disinherited children, upon the death of testator, threatened to take legal proceedings to set aside his disposition on the ground of want of capacity & undue influence, & also claimed to recover their *legitim* share of his assets. The trustees, one of whom was applt., acting on the advice of a law agent of high standing & acknowledged character in the profession, compromised the claims, & borrowed the sum required to carry out the compromise on the security of the heritable estate. They also allowed the son G. to take possession of the business without making the annuities to the son J. & his wife primary real burdens on the heritable subjects. After a few years the business failed, & there was not sufficient to pay the annuitants:—

*Held*: applt. was not liable for breach of trust, for there was no proof that he & his co-trustees in agreeing to & carrying out the compromise had been guilty of negligence.—*EATON v. BUCHANAN*, [1911] A. C. 253.

#### SUB-SECT. 9.—DESTRUCTION OF REMAINDERS.

**3970. When amounting to breach of trust.**—*COLE v. MOORE* (1607), *Moore*, K. B. 806; 72 E. R. 917, L. C.

*Annotation*:—*Reid*. *Re Sheppard's Trusts* (1862), 31 L. J. Ch. 788.

**3971.** ————*]*—*DAVIS v. WELD* (1683), 2 *Cas. in Ch.* 144; 22 E. R. 886; *sub nom.* *DAVIES v. WELD*, 1 Vern. 181; 1 Eq. Cas. Abr. 386.

*Annotation*:—*Consd.* *Moody v. Walters* (1809), 16 Ves. 283.

**3972.** ————*]*—*TIPPING v. PRIGGOT* (1711), *Gilb. Ch.* 34; 1 Eq. Cas. Abr. 385; 25 E. R. 25, L. C.

*Annotations*:—*Reid*. *Mansell v. Mansell* (1732), *Cas. temp.* Talb. 252; *Garth v. Cotton* (1753), *Dick.* 183; *Barnard v. Largo* (1781), 1 Bro. C. C. 534; *Moody v. Walters* (1809), 16 Ves. 283.

**3973.** ————*]*—Trustees in a will, to support contingent remainders, join with the tenant for life in a conveyance, whereby the contingent remainders are destroyed before they come *in esse*; this is a plain breach of trust, & whoever claims under such conveyance, having notice of the trust, shall be liable to make good the estates.—*GORGES v. PYE* (1712), 7 Bro. Parl. Cas. 221; 3 E. R. 144, II. L.; *affy.* *S. C. sub nom.* *PYE v. GORGE* (1710), 1 P. Wms. 128.

*Annotations*:—*Reid*. *Thornby v. Fleetwood* (1720), 1 *Stra.* 318; *Mansell v. Mansell* (1732), 2 P. Wms. 678; *Garth v. Cotton* (1753), 3 Atk. 751; *Barnard v. Largo* (1781), 1 Bro. C. C. 534; *Moody v. Walters* (1809), 16 Ves. 283.

**3974.** ————*]*—Marriage settlement on the husband for ninety-nine years, if he so long lived, remainder to trustees to preserve contingent remainders, remainder to the heirs of the body of the husband by the wife, remainder to the heirs of the husband. There is issue two sons & a daughter. Husband & trustees with the eldest son, join in a fine; it is a good bar & no breach of trust, the eldest son joining. Tenant in tail joining with the trustees for preserving contingent remainders prevents any breach of trust.—*ELLI v. OSBORNE* (1717), 2 Vern. 754; 23 E. R. 1093; *sub nom.* *ELSE v. OSBORN*, 1 P. Wms. 387, L. C.

*Annotations*:—*Consd.* *Mansell v. Mansell* (1732), 2 P. Wms. 678; *Parkhurst v. Smith* (1741), *Willes.* 327; *Moody v. Walters* (1809), 16 Ves. 283. *Reid*. *Smith d. Dormer v. Parkhouse* (1740), 7 *Mod. Rep.* 366; *Barnard v. Largo* (1781), 1 Bro. C. C. 534; *Doe d. Comberbach v. Perratt* (1789), 3 *Forin Rep.* 484; *Doe d. Winter v. Perratt*, *Doe d. Viney v. Perratt*, *Goodtitle d. Slade v. Perratt* (1826), 5 B. & C. 48.

**3975.** ————*]*—Trustees for supporting contingent remainders joining to destroy them, guilty of a breach of trust, & no diversity whether the settlement be voluntary, or for a valuable consideration, or by will only.—*MANSELL v. MANSELL* (1732), *Cas. temp.* Talbot, 252; 2 P. Wms. 678; 2 *Barn. K. B.* 187; 2 Eq. Cas. Abr. 748; 24 E. R. 913, L. C.

*Annotations*:—*Consd.* *Savage v. Taylor* (1736), *Cas. temp.* Talb. 234. *Reid*. *Symance v. Tattam* (1737), 1 Atk. 613; *Garth v. Cotton* (1753), 3 Atk. 751; *Lanfelde d. Banton v. Hodges* (1773), *Lofft.* 230; *Barnard v. Largo* (1780), *Amb.* 773; *Moody v. Walters* (1809), 16 Ves. 283.

**3976.** ————*]*—This ct. will not compel trustees to join in a sale, which will not only destroy contingent remainders, but all the uses in a marriage

their successors to sell the trust property at a future date at a price presently fixed without exercising any judgment at that date whether the sale would then be beneficial to the

*cestuis que trust.*—*Re STEPHENSON'S SETTLED ESTATES* (1906), 6 S. R. N. S. W. 420; 23 N. S. W. W. N. 153.—**AUS.**

**k. Sale to cestui que trust—Im-**

*provements by cestui que trust—Allowance for.*—*PEGLEY v. WOODS* (1867), 11 Gr. 47.—**CAN.**

**1. Sale without authority.**—*ADAMS v. ADAMS* (1907), 2 E. L. R. 280.—**CAN.**



**Sec. 1.—What constitutes: Sub-sects. 9 & 10. Sect. 2: Sub-sect. 1.]**

settlement, for they are guilty of a breach of trust, in joining to destroy contingent remainders, whether the settlement be voluntary, for a valuable consideration, or by will.—*SYMANCE v. TATTAM* (1737), 1 Atk. 613; 26 E. R. 385, L. C.

*Annotation:—Dbsd. Moody v. Walters* (1809), 16 Ves. 283.

**3977.** —[Trustees to preserve contingent remainders joining in a recovery held with reference to the circumstances & occasion no breach of trust.—*MOODY v. WALTERS* (1809), 16 Ves. 283; 33 E. R. 902, L. C.

*Annotations:—Refd. Bloor v. Perkins* (1813), 1 Ves. & B. 485; Doe d. Lees v. Ford (1853), 2 E. & B. 970. *Mentd. Pyke v. Waddingham* (1852), 10 Hare, 1; Collard v. Sampson (1853), 4 De G. M. & G. 224; Bull v. Hutchins (1863), 8 L. T. 716.

**3978.** —[Testator devised real estates to trustees & their heirs, during the life of his brother & until payment of his debts & legacies to apply the rents in payment of such debts & legacies, & then to pay them to his brother for life, & after the decease of his brother & such payment he devised the estate to the heirs of the body of his brother, & in default to his own right heirs:—*Held*: the trustees having conveyed to the brother the legal estate for his life & he having suffered a recovery, the heirs of the body were not barred, because the legal estate to the brother for life & the legal remainder to the heirs of his body had become vested by different instruments, & also because it was the duty of the trustees to preserve the contingent estates, & that it was therefore a breach of trust in them to convey the legal estate to the brother.—*COLLIER v. McBEAN* (1865), 34 Beav. 426; 6 New Rep. 192; 34 L. J. Ch. 555; 12 L. T. 790; 11 Jur. N. S. 592; 13 W. R. 766; 55 E. R. 700; *affd.* on other grounds, 1 Ch. App. 81, L. J.

*Annotations:—Refd. Collier v. Walters* (1873), L. R. 17 Eq. 232. *Mentd. Boleley v. Carter* (1869), 4 Ch. App. 230.

**SUB-SECT. 10.—OTHER PARTICULAR BREACHES.**

**3979. Whether equitable waste.]**—Equitable waste is a breach of trust, & the assets of testator are answerable for such breach of trust.—*ORMONDE (MARQUIS) v. KYNERSLEY* (1820), 5 Madd. 369; 56 E. R. 936.

*Annotations:—N.F. Kingham v. Lee* (1846), 15 Sim. 396. *Consd. Powys v. Blagrave* (1854), Kay, 495.

**3980.** —[A lady, tenant for life of an estate, subject to a condition not to commit waste, married; & during the coverture, her husband cut & sold timber on the estate:—*Held*: the condition was not in the nature of a trust, & consequently, neither the wife nor her estate, but the husband alone, was answerable for the waste.—*KINGHAM v. LEE* (1846), 15 Sim. 396; 16 L. J. Ch. 49; 8 L. T. O. S. 359; 11 Jur. 4; 60 E. R. 673.

*Annotation:—Consd. Powys v. Blagrave* (1854), Kay, 495.

**3981. Appointment of sole trustee—Two trustees required by settlement.]**—Where by the terms of a settlement it appears to be the intention of the parties that there should at all times be two trustees of the property comprised in the settlement, the

appointment of a single trustee in the place of two original trustees, & the transfer by them of the trust property to such single trustee, is a breach of trust, & the original trustees are responsible accordingly.—*HULME v. HULME* (1833), 2 My. & K. 682; 39 E. R. 1105.

**3982. Unnecessary deposit with bankers.]**—Testator died in Mar. 1823, & in Jan. 1824 & Jan. 1825, the exors. & trustees deposited part of the assets in the hands of bankers, on their notes carrying interest; the bankers failed in Nov. 1825, & no necessity having been shown for such deposit, the trustees were held personally responsible for the loss.—*DARKE v. MAINTYN* (1839), 1 Beav. 525; 48 E. R. 1044.

*Annotation:—Distd. Wilks v. Groom* (1856), 25 L. J. Ch. 724.

**3983. Advance of trust fund by one trustee to another.]**—Advance by one trustee to another of trust fund. Bond void at law in what manner available in equity. Release of surety where conditions have not been complied with.

M. being suddenly called upon to pay a sum of money, applies to W., an aged female, by letter, to join him in a bond to secure that amount, promising to save her harmless. A few days afterwards M. with his son, C., called upon W. & prevailed upon her to execute a bond for £10,000, leaving blanks for the obligee's name & rate of interest; which was done without the knowledge of her solr. M. & S. were trustees of the marriage settlement of B. & his wife, & it was proposed by S. to B. that a sufficient quantity of stock standing in the names of M. & S. forming part of the settled property, should be sold out to meet the demand; B. consented, on condition that S. should secure the amount by obtaining a mtge. in the names of S. & M. The stock was sold out with the consent of B. & wife, & the blanks of the bond were then filled up by inserting the name of B. as obligee, & the rate of interest, but no mtge. was taken by S. B. died in 1841, having appointed S. with two others, his exors., who proved his will, & conceiving B.'s estate bound to M. & S. as trustees of the settlement, paid the debt which they supposed due, & then filed their bill against W. as surety to the bond, & M. as the principal:—*Held*: the trustees had committed a breach of trust in advancing the money to one of themselves without taking proper security.—*SQUIRE v. WHITTON* (1844), 1 H. L. Cas. 342, n.; 3 L. T. O. S. 238; 9 E. R. 789; *affd.* on other grounds (1848), 1 H. L. Cas. 333, H. L.

*Annotation:—Mentd. Hambro v. Hull & London Fire Insec.* (1858), 28 L. J. Ex. 62.

**3984. Assignment of wife's property subject to restraint on anticipation.]**—R., by deed, assigned property in Scotland to B., as trustee, with a direction to pay to his sister R., a married woman, during her life, the nett income of the property, or such part of it as he might deem necessary for the support of her & her family; & he thereby declared the provision for R. to be purely alimentary, & exclusive of the marital right of her then or any future husband, & that it should not be assignable, or subject to any deed which either she or such husband might grant in relation thereto,

**PART VII. SECT. 1, SUB-SECT. 10.**

*m. Bringing property under Real Property Act.]*—Where trustees under a will sell land which they have no power to sell & on discovering their disability obtain a reconveyance, they cannot be charged with wilful default, although the land so improperly sold & obtained back again has in the meantime been brought under Real Property Act.—*ST. GEORGE v. BUR-*

*NEIT* (1871), 5 S. A. L. R. 77.—**AUS.**

*n. Arrangement with lessee to enter into possession.]*—Trustees of a will who lease a property to a lessee, who, while the lease is still subsisting, they think may not be able to pay his rent, cannot be said to act in breach of trust by entering into possession of the property by agreement with the lessee, if they have an honest belief that it is for the benefit of the trust,

although there may be no express power under the will to make arrangements with lessees or to accept surrenders of leases.—*UMPHREY v. GREY* (1898), 24 V. L. R. 979.—**AUS.**

*o. Investing trust moneys outside State.]*—It is not per se a breach of trust for Victorian trustees to invest trust moneys out of Victoria, there being nothing in the instrument creating the trust to forbid their

or debts which they might contract. Advances were made by A. to the husband of R. for the support of his family, & on other accounts, to secure the repayment of which B., with R.'s consent, executed to A. a deed of assignation of her interest in the trust property, reserving £30 *per annum* for aliment to R. & her family:—*Held*: the execution of the deed of assignation was *ultra vires* of B., & a breach of trust on his part, & the deed was wholly invalid as against R.—*RENNIE v. RITCHIE* (1845), 12 Cl. & Fin. 204; 8 E. R. 1379; *sub nom.* *RITCHIE v. RENNIE*, 9 Jur. 435, H. L.

*Annotations*:—*Refd.* *Hood Barrs v. Herlot*, [1896] A. C. 174; *Re Rush, Warre v. Rush*, [1922] 1 Ch. 302.

**3985. Denial of status of cestui que trust.**—Where trustees, upon some doubts entertained by themselves as to the *status* of a person claiming a sum, part of the fund in their hands, refused to pay him, & the *status* was afterwards satisfactorily established, the trustees were ordered to pay the sum, with 5 per cent. thereon, the account to be taken with rests, & all the costs of the suit.

A breach of trust, of the grossest description, has been established against all the parties (*Knight Bruce, V.-C.*).—*HUTCHINS v. HUTCHINS* (1851), 17 L. T. O. S. 196; 15 Jur. 869.

**3986. Refusal to pay sum due to cestui que trust—No specific appropriation.**—An action on the case for breach of duty is not maintainable by a *cestui que trust* against his trustee, where the only breach complained of is the non-payment of money which the trustee holds, as such, to be paid by him to the *cestui que trust*, but which he has not specifically appropriated for that purpose.—*EDWARDS v. LOWNDES* (1852), 1 E. & B. 81; 22 L. J. Q. B. 104; 20 L. T. O. S. 154; 17 J. P. 213; 17 Jur. 412; 118 E. R. 367.

*Annotations*:—*Refd.* *R. v. Balby & Workson Turnpike Road Trustees* (1853), 22 L. J. Q. B. 164; *Sansom v. St. Leonard, Shoreditch* (1869), L. R. 4 C. P. 654.

**3987. Payment of money to cestui que trust—Settlement made in anticipation of marriage—Marriage not celebrated.**—A *feme sole*, in contemplation of a marriage with T., vested personal property in trustees, upon trust for the sole benefit of herself, her exors., etc., until her marriage, if any, with subsequent trusts for her issue. She never married T., but before her marriage with M. the trustees handed over to her a part of the fund:—*Held*: the trusts were to arise on any marriage; & the trustees had committed a breach of trust for which they were answerable.—*M'DONNELL v. HESLIDGE* (1852), 16 Beav. 316; 22 L. J. Ch. 342; 20 L. T. O. S. 164; 16 Jur. 1148; 51 E. R. 812; *sub nom.* *MACDONELL v. HESLIDGE*, 1 W. R. 71.

**3988. Assignment of trust fund arising from irrevocable voluntary settlement.**—A. by a voluntary deed assigned a mtge. debt & securities to E. upon trust for A. for life, remainder upon trusts in favour of L. & her children. She afterwards assumed to cancel & revoke this deed, & to assign the property therein comprised upon trust for the sole use & benefit of E. Previously to

the marriage of E. with her present husband P. the property in question was made the subject of settlement. Upon a bill filed by L. & her children to have the trusts of the voluntary settlement carried into execution:—*Held*: P. was liable to make good the trust fund under the voluntary deed, in assigning which E. had been guilty of a breach of trust.—*LANHAM v. PURIE* (1857), 29 L. T. O. S. 171; 3 Jur. N. S. 704; 5 W. R. 540, L. C. & L. J.J.

**3989. Improper exercise of discretion—Discretionary power of advancement.**—Testator by his will left all his property to trustees to stand possessed of the income thereof in trust for his two daughters in equal shares, & upon certain other trusts after their death. There were trusts for their maintenance up to the age of twenty-one, & after attaining that age they were to be paid the income for their separate use & not by way of anticipation. The trustees were further empowered "to apply in or towards the advancement in life of each daughter a sum not exceeding £500 of her presumptive share," & they were to be "the sole judges of the advisability of such payment & of what the term 'advancement in life' might signify." After the daughters had each attained the age of twenty-one, their respective shares having in consequence become vested, & the younger daughter had married, the trustees, at their request, paid to them two sums of money, under the power of advancement above set out, which they handed to the husband of the married daughter, to be used by him for the purposes of his business, & he, with their consent, paid these two sums over to one of the trustees to whom he owed money in respect of his business:—*Held*: even assuming the trustees to be empowered to make such a payment at a time when the shares were actually vested, notwithstanding the use of the words "presumptive share" in the advancement clause, the payment was not made *bonâ fide* for the advancement in life of the daughters, & the trustees in making it were guilty of a breach of trust.—*MOLYNEUX v. FLETCHER*, [1898] 1 Q. B. 648; 67 L. J. Q. B. 392; 78 L. T. 111; 46 W. R. 576; 14 T. L. R. 211; 42 Sol. Jo. 254.

**3990. Bringing up children in immoral home—Trust to maintain, educate, & bring up.**—A trustee who, in pursuance of a trust to maintain, educate, & bring up infants, brings them up in an immoral home, commits a breach of trust.—*Re G.*, [1899] 1 Ch. 719; 68 L. J. Ch. 374; 80 L. T. 470; 47 W. R. 491.

**3991. Failure to deduct income tax from annuity.**—*Re SHARP, RICKETT v. RICKETT*, No. 4081, *post*.

## SECT. 2.—LIABILITY FOR BREACH OF TRUST.

### SUB-SECT. 1.—IN GENERAL.

**3992. General rule—All parties to breach of trust equally liable.**—Every person who acquires personal assets by a breach of trust . . . is responsible to those who are entitled under the

doing so.—*Re GIBSON*, [1922] V. L. R. 715.—**AUS.**

**p. Inducing co-trustees to commit technical breach of trust.**—*SCOTTELLIOTT v. HATZIO PRAIRIE CO., LTD.* (1913), 18 B. C. R. 668.—**CAN.**

**q. Lending without security.**—*MAGUIRE v. MAGUIRE & TORONTO GENERAL TRUSTS CORPN.* (1921), 50 O. L. R. 162.—**CAN.**

**r. Mixing trust property with own property.**—*Re COWIE'S PETITION* (1880), 1 L. R. 6 Cal. 70; 7 C. L. R.

19.—**IND.**

t. —. —.]—*ACHILSON v. FAIR* (1813), 3 Dr. & War. 512.—**IR.**

**a. Failure to register trust deed.**—A trustee may, in special circumstances, be held responsible for the non-registration of the deed creating the trust.—*MACNAMARA v. CAREY* (1867), 1 L. R. Eq. 9; 18 Ir. Jur. 293.—**IR.**

**b. Fund left under control of solicitor.**—Where a solr., in whose hands moneys have been placed by trustees for investment at his discretion,

misappropriates part of the fund, the trustees are guilty of a breach of trust, & must replace the fund.—*BAYLEY & TATE v. MARSHALL* (1884), 2 N. Z. L. R. C. A. 277.—**N.Z.**

**c. Authority to one trustee to draw cheques.**—An authority given to a bank by trustees to honour the cheques of any one of them on the trust funds is a breach of trust, & is not the less so where the countersignature of a clerk is required.—*THIRAGAN v. MARSON* (1887), 5 N. Z. L. R. 386 (S. C.).—**N.Z.**

*Sect. 2.—Liability for breach of trust : Sub-sects. 1, 2 & 3, A. & B. ; sub-sects. 4, 5, 6, 7 & 8.]*

will, if he is a party to the breach of trust (*LEACH, V.-C.*).—*KEANE v. ROBERTS* (1819), 4 Madd. 332; 56 E. R. 728.

**Annotations.**—**Consd.** *Re* Blundell, Blundell v. Blundell (1888), 40 Ch. D. 370. **Redf.** Wilson v. Moore (1834), 1 My. & K. 337; *Fyler v. Fyler* (1841), 5 Jur. 187; A.-G. v. Chesterfield (1854), 18 Beav. 596; Gray v. Johnston (1868), L. R. 3 H. L. 1; Coleman v. Bucks & Oxon Union Bank, [1897] 2 Ch. 243. **Mentd.** Russell v. Plance (1854), 18 Beav. 21.

**3993.** —.]—There is no primary liability in respect of breaches of trust, all parties to a breach of trust being equally liable; and it is no objection to a suit brought by parties seeking relief against a breach of trust, that one of defts. against whom no relief is prayed, may have been a party to such breach of trust.—*WILSON v. MOORE* (1833), 1 My. & K. 126; 39 E. R. 629; *affd.* (1834), 1 My. & K. 337. L. C.

*Annotations.*—Apld, Gray v. Lewis (1860), L. R. 8 Eq. 526.  
 Consd. Child p. Thorley (1880), 16 Ch. D. 151. Apld.  
 Cowper v. Stoneham (1893), 68 L. T. 18. **Refd.** Fairlie v.  
 Hartwell (1839), 3 Jur. 791; Fyler v. Fyler (1841), 3 Beav.  
 550; Pannell v. Hurley (1845), 2 Coll. 241; Collinson v.  
 Lister (1855), 20 Beav. 358; Rolfe v. Gregory (1863), 9  
 L. T. 250; Macbryde v. Eykyn (1871), 21 L. T. 461;  
 Foxton v. Manchester & Liverpool District Banking Co.  
 (1874), 44 Ch. D. 101. **Refd.** Gladge, Morgan v. Blyth,  
 Smith v. Blyth, [1891] 1 Ch. 33; 69 Ch. D. 189.  
 Blyth v. Blyth, [1891] 1 Ch. 33. **Refd.** 1891, 1892,  
 2 Q. B. 390; Mara v. Browne (1895), 73 L. T. 638. **Mentd.**  
 Bank of Bengal v. Fagan (1849), 5 Moo. Ind. App. 27;  
 Percy v. Kyneay (1871), L. R. 12 Eq. 69.

**3994.** ———.]—The rules of this ct. are perfectly well settled & are the rules of honesty & fair dealing that no party to an illegal or fraudulent contract can derive any benefit from it, & that all persons who obtain possession of trust funds with a knowledge that their title is derived from a breach of trust will be compelled to restore such trust funds (*MALINS, V.-C.*).—*GRAY v. LEWIS* (1869), L. R. 8 Eq. 526; 20 L. T. 282; 17 W. R. 431; *on appeal, sub nom. GRAY v. LEWIS, PARKER v. LEWIS* (1873), 8 Ch. App. 1035. L. J.J.

**Annotations.**—**Mentid.** Robson v. Dodds, (1869), 38 L. J. Ch. 547; *Re Disderi* (1870), L. R. 11 Eq. 242; *Hardy v. Metropolitan Land & Finance Co.* (1871), L. R. 12 Eq. 386; *British & American Telegraph Co. v. Albion Bank* (1872), L. R. 7 Exch. 119; *Laffitte v. Laffitte* (1873), 42 L. J. Ch. 710; *Mentid v. Hooper's Telegraph Works* (1873), L. R. 8 Ch. 63; *MacDougall v. Gardiner* (1875), L. R. 18 Eq. 621; *MacDougall v. Gardiner* (1875), L. R. 20 Eq. 383; *Russell v. Wakefield Waterworks Co.* (1875), L. R. 20 Eq. 474; *Lloyd v. Dimmack* (1877), 38 L. T. 173; *New Sombrero Phosphate Co. v. Erlanger* (1877), 40 L. T. Ch. 425; *Mercantile Investment & General Trust Co. v. River Plate Trust Loan & Agency Co.*, [1894] 1 Ch. 678.

**3995. Effect of remuneration on liability].—***Semble*: the liability of a trustee is not increased by the fact of his being remunerated for his services.—*JOBSON v. PALMER*, [1893] 1 Ch. 71; 62 L. J. Ch. 180; 68 L. T. 797; 41 W. R. 264; 9 T. L. R. 106; 3 R. 173.

**3996.** —.]—**NATIONAL TRUSTEES CO. OF AUSTRALASIA v. GENERAL FINANCE CO. OF AUSTRALASIA**, No. 4360, *post*.

**3997. Nature of trust immaterial.]**—Trustees lent trust moneys on a second mtge. of house property greatly out of repair, & the principal part was lost:—*Held*: they were liable as for a breach of trust, notwithstanding a trustee indemnity clause declaring they should not be liable for the insufficiency or deficiency in value of any securities, except through their wilful default.

In charging trustees for breaches of trust & the costs of suit, it is immaterial how the trust was created, & whether for valuable consideration, or by the voluntary gift of the trustees themselves.—*DROSER v. BRERETON* (1851), 15 Beav. 221; 51 E. R. 521.

SUB-SECT. 2.—TRUSTEES.

*See Sect. 3, post.*

### SUB-SECT. 3.—BENEFICIARIES.

### A. In General.

**3998. Liability to refund—Action against defaulting cestui que trust.**—Where one *cestui que trust* procures the trust money to be laid out improperly, & part of it is consequently lost, the other *cestuis que trust* are entitled, as against him, in a suit properly constituted for that purpose, to have their shares of the trust money made good out of his share of that which is ultimately recovered. But if the bill prays relief against the trustees only, the liability of the share of that *cestui que trust* cannot be enforced against him.—**PHILLIPSON v. GATTY, GATTY v. PHILLIPSON** (1850), 2 H. & Tw. 459; 47 E. R. 1763. L. C.

*Annotations*.—**Consd.** *Re* Massingberd's Settlement, Clark v. Trelawney (1890), 63 L. T. 296. **Refd.** *Norris v. Wright* (1851), 11 Beav. 291.

**3999. — Action against trustee.]—**PHILLIPSON *v.* GATTY, GATTY *v.* PHILLIPSON, No. 4495, *post*.  
**Liability to indemnify trustee.]—***See* Part VII., Sect. 4, sub-sect. 9, *post*.

### B. Overpayment.

**4000. Whether beneficiary liable to refund.**—Where trustees, under an erroneous view of the effect of a will, pay to parties money to which they are not entitled, this ct., in administering the estate, will compel a restitution & repayment, & will give a lien on the other interests of such parties under the will, even as against an assignee for valuable consideration.—*DIBBS v. GOREN* (1849). 11 Beav. 483; 50 E. R. 904.

*Annotations*.—**Distd.** *Re Horne, Wilson v. Cox Sinclair*, [1905] 1 Ch. 76. **Consd.** *Re Robinson, McLaren v. Public Trustee*, [1911] 1 Ch. 502.

4001. —.]—BAYNARD v. WOOLLEY, WEARING  
v. BAYNARD, No. 4662, *post*.

4002. — *—*. — An action brought in the Ch. Div. by one *cestui que trust* against another *cestui que trust* to recover money wrongly paid by the trustee to the latter under a common mistake of fact is in the nature of a common law action for money had & received, & the ct., acting on the analogy of Stat. Limitations, will hold the claim to be barred after the lapse of six years.

The case would be different if the claim were made in an action in which the ct. was administering the trust estate. There, if there were assets to which the overpaid *cestui que trust* was entitled, the ct. would adjust the accounts as between the parties entitled, & lapse of time would be no bar.

Where the ct. is administering the funds & adjusting the rights of the parties between themselves in the ordinary course, if there are funds belonging to the person who has been overpaid, the ct. may so adjust the rights as to rectify the overpayment (WARRINGTON, J.).—*Re* ROBINSON, *McLAREN v. PUBLIC TRUSTEE*, [1911] 1 Ch. 502; 104 L. T. 331; 55 Sol. Jo. 271; *sub nom.* *Re* ROBINSON, *McLAREN v. ROBINSON*, 80 L. J. Ch. 381.

*Annotations* :—**Refd.** *Re Croyden, Hincks v. Roberts* (1911), 55 Sol. Jo. 632; *Re Rivers, Pullen v. Rivers*, [1920] 1 Ch. 320; *Re Mason* (1928), 97 L. J. Ch. 321.

**4003.**—]—Where the extrix. of the last surviving exor. of deceased testator had purported to appoint herself & others trustees of his will, which appointment was bad as to herself, but she had nevertheless acted as trustee & stipulated that she should have the sole control of the income & in effect her hand made the improper distribu-

tion whereby she benefited:—*Held*: one of the other trustees so appointed was not debarred, merely by being a party to the overpayment of the income which had constituted the improper distribution, from having a proper adjustment made in respect of such overpayment.—*Re READING, EDMONDS v. READING* (1916), 60 Sol. Jo. 655.

**4004. — Overpayment retained out of future income.**—The exors. of a will wrongly paid the legacy duty payable in respect of the life interest in a settled legacy, bequeathed to special trustees, out of the capital of the settled legacy which, subject to the life interest, was to fall into residue & be held in trust for testator's widow for life & after her death for his brother absolutely. The widow & brother were two of the exors., the remaining exor. being also one of the special trustees, both of whom were solrs. In accordance with the provisions of Legacy Duty Act, 1796 (c. 52), the duty payable in respect of the life interest should have been retained & paid by the special trustees in equal yearly instalments out of the income during the first four years of the life tenancy.

The amount of the settled legacy less settlement estate duty & legacy duty was paid to the special trustees, & after the lapse of seven years the special trustee who made the wrong payment of duty sought to make the tenant for life recoup out of the income of the settled legacy the legacy duty so paid out of capital:—*Held*: the error must be rectified, & what had been overpaid to the tenant for life must, upon all proper adjustments being made, be retained out of future payments of her income.—*Re AINSWORTH, FINCH v. SMITH*, [1915] 2 Ch. 96; 84 L. J. Ch. 701; 113 L. T. 368; 31 T. L. R. 392.

*Annotation*:—*Apld. Re Musgrave, Machell v. Parry*, [1916] 2 Ch. 417.

**4005. — Trustee—beneficiary.**—Where a trustee, who was himself one of the beneficiaries, had inadvertently overpaid the other beneficiaries their shares of income, & died before any adjustment had been made:—*Held*: the exors. of deceased trustee were not entitled to recover from the other beneficiaries the amounts so overpaid, or to have accrued or future income impounded till the shares were equalised, by reason of the fact that their testator himself was the person responsible for the mistake that had been made.—*Re HORNE, WILSON v. COX SINCLAIR*, [1905] 1 Ch. 76; 74 L. J. Ch. 25; 92 L. T. 263; 53 W. R. 317.

*Annotations*:—*Distd. Re Ainsworth, Finch v. Smith*, [1915] 2 Ch. 96; *Re Reading, Edmonds v. Reading* (1916), 60 Sol. Jo. 655. *Consd. Re Musgrave, Machell v. Parry*, [1916] 2 Ch. 417. *Refd. Re Sharp, Rickett v. Rickett* (1906), 75 L. J. Ch. 458.

**4006. — Bankruptcy—Liability of trustee in bankruptcy to refund.**—Testator devised real estate to his nine children *nominalim* as tenants in common, giving a power to three of them to sell the whole to avoid the difficulties of partition. W., one of the three, conducted certain sales under the power, retained more than his share of the purchase-moneys, & went into liquidation. Further sales were effected, & out of the proceeds a further sum was paid to W.'s trustee in liquidation in respect of, & in excess of, his share:—*Held*: all purchase-moneys received by the trustees were impressed with a trust under the will, & W.'s equitable interest therein was liable to recoup the other beneficiaries; & this being so, the payment

to his trustee in liquidation was made in mistake of law.—*Re BROWN, DIXON v. BROWN* (1886), 32 Ch. D. 597; 55 L. J. Ch. 556; 54 L. T. 789.

*Annotations*:—*Mentd. Re Griffiths Cycle Corp., Dunlop Pneumatic Tyre Co. v. Griffiths Cycle Corp.* (1901), 85 L. T. 675; *Wells v. Wells*, [1914] P. 157.

**4007. — Payment to guardian as maintenance.**—Trustee having, by mistake, paid to the mother of a child, interest on a legacy to the child, which was contingent, the ct. held it to have been paid to the mother as guardian of the child, for maintenance, & would not permit the trustee to recover back the moneys so expended.—*WEBB v. BROOKES* (1832), 1 L. J. Ch. 191.

#### SUB-SECT. 4.—AGENTS.

*See* Part V., Sect. 6, sub-sect. 2, D., *ante*.

#### SUB-SECT. 5.—BANKERS.

*See* BANKERS, Vol. III., pp. 123, 124, 125, 178, 179, 181–187, 273, Nos. 8, 18–21, 327, 329, 343–369, 853.

#### SUB-SECT. 6.—HUSBAND AND WIFE.

*See* EXECUTORS, Vol. XXIV., pp. 668, 669, Nos. 6953–6962; HUSBAND & WIFE, Vol. XXVII., p. 218, Nos. 1894–1899.

#### SUB-SECT. 7.—PARTNERS.

**Liability for acts of partners.**—*See* PARTNERSHIP, Vol. XXXVI., pp. 376, 377, Nos. 533–539.

**After dissolution.**—*See* PARTNERSHIP, Vol. XXXVI., p. 514, No. 1826.

**Partnership between solicitors.**—*See* SOLICITORS, Vol. XLII., pp. 374, 375, 378, 380, Nos. 4236–4238, 4260, 4261, 4276.

**Liability of firm for acts of partners.**—*See* PARTNERSHIP, Vol. XXXVI., pp. 370, 371, Nos. 470–476.

**Liability of estate of deceased partner.**—*See* PARTNERSHIP, Vol. XXXVI., pp. 386, 387, Nos. 609–612.

**Liability of retired partner.**—*See* PARTNERSHIP, Vol. XXXVI., p. 380, Nos. 567–570.

#### SUB-SECT. 8.—OTHER PERSONS.

**4008. Assignee.**—Both the trustee & the assignee are responsible to the *cestui que trust* for profits subsequent to an assignment in breach of trust.—*VANDEBENDE v. LEVINGSTON* (1874), 3 Swan. 625; 36 E. R. 999.

**4009. — Trust for sale—Embezzlement of proceeds.**—Devise of real estate to trustees to sell, & pay debts & legacies generally. Trustees sell, & embezzle part of the money. The purchasers not liable to the debts.—*ROGERS v. SKILLICORNE* (1753), Amb. 188; 27 E. R. 127, L. C.

*Annotation*:—*Refd. Robinson v. Lowater* (1854), 17 Beav. 592.

**4010. — — — Part of purchase-money unpaid.**—Trustees with a power to sell, & to

PART VII. SECT. 2, SUB-SECT. 8.  
d. *Executor separating trust fund from general assets.*—*Re MORRIS'S ESTATE* (1908), 31 N. S. R. (19 R. & G.) 416.—CAN.

e. *Purchaser of trust property with notice of breach of trust.*—Where a purchaser of trust property, when he acquires the estate, has notice of a breach of trust, he becomes a

trustee & liable & must account in the same manner as the person from whom he purchased.—*MILLER v. DRYSDALE* (1900), 40 N. S. R. 256.—CAN.

*Sect. 2.—Liability for breach of trust: Sub-sect. 8.*  
*Sect. 3: Sub-sect. 1, A. (a) & (b) i. & ii.]*

invest the proceeds in Govt. or real securities, sold the estate, & received only part of the purchase-money, but executed a conveyance to the purchaser, on the back of which was indorsed a receipt for the whole sum, which was signed by them all. This deed & the other title deeds, they retained as a security for the unpaid purchase-money with interest, & they entered into a written agreement with the purchaser that the deeds should remain with them as such security, & that he should, if required, execute a proper mtge. This agreement was signed by the purchaser, & by the trustee in whose custody the deeds were placed. Eight years afterwards the purchaser paid the principal & interest of his debt to this trustee, & received from him the deeds, including the conveyance with the receipt indorsed:—*Held*: by such payment the purchaser did not discharge himself of his liability incurred by participation in the breach of trust, & the trustee who received the money having misapplied it & absconded, the purchaser was made to pay it over again.—*WEBB v. LEDSAM* (1855), 1 K. & J. 385; 1 Jur. N. S. 775; 60 E. R. 508.

*Annotations*:—*Consd. Re Bellamy & Metropolitan Board of Works* (1883), 24 Ch. D. 387. *Reid. Re Flower & Metropolitan Board of Works, Re Flower & Same* (1884), 27 Ch. D. 592.

**4011. Person procuring breach of trust—Loan.]**—*TYLER v. TYLER*, No. 4467, *post*.

**4012. — Payment to wrong person—By production of forged marriage certificate.]**—Trustees who paid over the trust fund to wrong persons, trusting to a marriage certificate which turned out to be a forgery, made responsible for so much of the trust fund as could not be recovered from those who had wrongfully received it. The father of the recipients, who had sent the forged certificate of his marriage to the trustees, was also made responsible for the money.—*EAVES v. HICKSON* (1861), 30 Beav. 136; 5 L. T. 598; 7 Jur. N. S. 1297; 10 W. R. 29; 54 E. R. 840.

*Annotations*:—*Reid. Hopgood v. Parkin* (1870), L. R. 11 Eq. 74; *Sutton v. Wilders* (1871), 25 L. T. 292.

**4013. Person conniving at breach of trust—Suppression of second marriage by wife—Knowledge of husband.]**—A., a widow, was entitled for life to certain property, under a will which contained a condition that, should she marry again without consent of the trustees, the property should go over to her children. She did marry again, & until her death concealed her marriage from the trustees. On bill filed by the trustees after her death:—*Held*: her second husband, who knew of the condition in the will, was bound to refund that which the trustees had in ignorance of her marriage paid to her.—*CHARLTON v. COOMBS* (1863), 4 Giff. 382; 8 L. T. 653; 9 Jur. N. S. 904; 11 W. R. 1038; 66 E. R. 754.

**4014. Debtor to trust estate—Payment to party other than trustees.]**—A., on her marriage, assigned a debt due to her from B. to three trustees, upon trust, when requested by her to call it in & invest it, & hold it in trust for A., her husband, & children. B., with full notice but without such request, paid part of the money to the husband by order of the trustees, & other part to the trustees for the express purpose of being advanced to the husband in breach of trust. The money was lost:—*Held*: B., as well as the trustees, was

responsible for the breach of trust.—*ANDREWS v. BOUSFIELD* (1847), 10 Beav. 511; 9 L. T. O. S. 350; 50 E. R. 678.

### SECT. 3.—LIABILITY OF TRUSTEES.

#### SUB-SECT. 1.—NATURE OF LIABILITY.

##### A. Civil Liability.

##### (a) In General.

**4015. Personal liability of trustee.]**—Remedy for a breach of trust is personal, & money produced thereby laid out on an estate in Ireland, cannot be specifically followed. The party's assets were, however, marshalled in favour of the claim.—*COX v. BATEMAN* (1715), 2 Ves. Sen. 19; 28 E. R. 13, L. C.

*Annotations*:—*Reid. Adey v. Arnold* (1852), 2 De G. M. & G. 432; *Holland v. Holland* (1869), 4 Ch. App. 450, n.

**4016. —.]**—Breach of trust can fall only on the personal estate of a trustee.—*VERNON v. VAUDRY* (1740), as reported in 2 Atk. 119; 26 E. R. 474.

*Annotations*:—*Reid. Adey v. Arnold* (1852), 2 De G. M. & G. 432; *Holland v. Holland* (1869), 4 Ch. App. 450, n. *Mentd. Alfrey v. Alfrey* (1849), 1 H. & Tw. 179.

**4017. —.]**—R. advanced money to B. on the security of a memorandum by which B. declared himself to be a trustee for R. of the moneys to be received on a bill of exchange of which B. was the holder. B. represented that both the drawer & the acceptor were men of property, knowing at the time that they were insolvent & the bill was worthless:—*Held*: R. could maintain a suit in equity to make B. personally liable for the amount of the advance.—*RAMSHIRE v. BOLTON* (1869), L. R. 8 Eq. 294; 38 L. J. Ch. 594; 21 L. T. 50; 17 W. R. 986.

*Annotations*:—*Mentd. Hill v. Lane* (1870), L. R. 11 Eq. 215; *Fennelly v. Hancocet* (1871), 19 W. R. 966.

**4018. — Public trust.]**—Certain of the trustees under an Act of Parliament for making a road, the fund provided by the Act being neither sufficient nor available for the object until the completion of the road, raise money on their personal credit to carry on the work, & afterwards bring an action against the other trustees who had attended any of the meetings for payment of an equal proportion each of the whole expense of the road, or at least for a proportion of the expense authorised at the meeting or meetings which they attended:—*Held*: the mere fact of presence at meetings did not constitute a *prima facie* ground of personal liability.—*HIGGINS v. LIVINGSTONE* (1816), 4 Dow. 341; 3 E. R. 1186, H. L.

*Annotations*:—*Reid. Spratt v. Powell* (1826), 3 Bing. 478; *Parrott v. Eyre* (1833), 3 L. J. C. P. 3; *Wilson v. Goodman* (1844), 4 Hare, 54.

**4019. Liability at common law.]**—*MEGOD'S CASE* (1586), Godb. 64; 78 E. R. 40.

**4020. —.]**—*JEVON v. BUSH* (1685), 1 Vern. 342; 23 E. R. 508, L. C.

*Annotation*:—*Reid. Goodright d. Hoole v. Sales* (1767), 2 Wils. 329.

**4021. —.]**—A trust is where there is such a confidence between parties that no action will lie, but is a case merely for the consideration of equity.—*STURT v. MELLISH* (1743), 2 Atk. 610; 26 E. R. 765, L. C.

*Annotation*:—*Reid. Wilson v. Bury* (1880), 5 Q. B. D. 618.

**4022. —.]**—No action at law will lie against trustees, either by their *cestui que trust*, or, in case of his bankruptcy, by the assignees of such *cestui que*

#### PART VII. SECT. 3, SUB-SECT. 1.—A. (a)

**4015 i. Personal liability of trustee.]**—*ZWICKER v. ZINK* (1871), 8 N. S. R. (2 G. & O.) 291.—*CAN.*

**4015 ii. —.]**—*ORR'S TRUSTEES v. ORR* (1851), 1 Stuart, 159.—*SCOT.*

trust.—ALLEN v. IMLETT (1817), Holt, N. P. 641 ; 171 E. R. 370, N. P.

4023. —.]—How is a trustee a debtor? Can he be sued at common law? I do not see how he can be a "debtor" for the money he is fraudulently dealing with is, at law, his own money. . . . Notwithstanding the high authority of the statement that has been referred to, *Sharp v. Jackson*, No. 4030, *post*, I confess I do not understand it (RIGBY, L.J.).—*Re LAKE, Ex p. DYER*, as reported in, [1901] 1 K. B. 710, C. A.

—Money had & received.]—See CONTRACT, Vol. XII., pp. 540–542, 553, Nos. 4492–4500, 4593.

—Action by assignees of bankrupt.]—See BANKRUPTCY, Vol. V., p. 687, No. 6077.

4024. Liability in equity.]—STURT v. MELLISH, No. 4021, *ante*.

4025. —.]—RAMSHIRE v. BOLTON, No. 4017, *ante*.

(b) Relation between Trustee and cestui que trust.

i. In General.

4026. Whether debtor & creditor.]—BRIDGES v. HINCKSMAN (*circa* 1854), cited in 5 W. R. at p. 34.

Annotation:—N.F. Alexander v. Foster (1856), 5 W. R. 33.

4027. —.]—ALEXANDER v. FOSTER, No. 4040, *post*.

4028. —.]—A cestui que trust is not a creditor of his trustee, nor is a trustee a creditor of his co-trustee (LINDLEY, L.J.).—*Re GOLDSMID, Ex p. TAYLOR* (1886), 18 Q. B. D. 295; 56 L. J. Q. B. 195; 35 W. R. 148, C. A.

Annotations:—*Fold, Re Hutchinson, Ex p. Ball* (1887), 35 W. R. 264. *Apld. Pratt v. Inman* (1889), 6 T. L. R. 91; *New, Prance & Garrard's Trustee v. Hunting*, [1897] 2 Q. B. 19. *Dtd. Re Lake, Ex p. Dyer*, [1901] 1 K. B. 710. (See [1901] 1 K. B. p. 715.) *Refd. Sharp v. Jackson*, [1899] A. C. 419; *Re Warren, Ex p. Trustee*, [1900] 2 Q. B. 138; *Re Blackpool Motor Car Co., Hamilton v. Blackpool Motor Car Co.*, [1901] 1 Ch. 77. *Mentd. Re Mills, Ex p. Official Receiver* (1888), 58 L. T. 371; *Re Lake, Ex p. Gaze* (1889), 23 Q. B. D. 74; *Re Blackburn, Buckley's Case*, [1899] 2 Ch. 725; *Re Cohen, Ex p. Trustee*, [1924] 2 Ch. 515.

4029. —.]—Payments made previous to bkpy. in restitution of a breach of trust by a person "unable to pay his debts as they become due" cannot be recovered by the trustee on the ground of fraudulent preference, since the relation of debtor & creditor has been held not to be created between co-trustees, or between a trustee & his cestui que trust, within the meaning of Bpky. Act, 1883 (c. 52), s. 48.—*Re HUTCHINSON, Ex p. BALL* (1887), 35 W. R. 264; 3 T. L. R. 324, C. A.

Annotations:—*Apld. New, Prance & Garrard's Trustee v. Hunting*, [1897] 1 Q. B. 607. *Refd. Re Lake, Ex p. Dyer*, [1901] 1 K. B. 710.

4030. —.]—The relation of debtor & creditor exists between a trustee & his cestui que trust.—*SHARP v. JACKSON*, [1899] A. C. 419; 68 L. J. Q. B. 866; 80 L. T. 841; 15 T. L. R. 418; 6 Mans. 264, H. L.; *affg. S. C. sub nom. NEW, PRANCE & GARRARD'S TRUSTEE v. HUNTING*, [1897] 2 Q. B. 19, C. A.

Annotations:—*Distd. Re Blackpool Motor Car Co., Hamilton v. Blackpool Motor Car Co.*, [1901] 1 Ch. 77. *Consd. Re Lake, Ex p. Dyer*, [1901] 1 K. B. 710. *Mentd. Hermoux v. Harbord* (1898), 14 T. L. R. 243; *Re Blackburn*,

*Buckley's Case*, [1899] 2 Ch. 725; *Re Vautin, Ex p. Saffery*, [1900] 2 Q. B. 325; *Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon*, [1901] 2 Ch. 231; *Re Pidcock, Penny v. Pidcock* (1907), 51 Sol. Jo. 514; *Wigan v. English & Scottish Law Life Assn. Asson.*, [1909] 1 Ch. 291; *Re Cozens, Green v. Brisley*, [1913] 2 Ch. 478; *Radcliffe v. Abbey Road & St. John's Wood Permanent Bldg. Soc.*, [1919] B. & C. R. 84; *Re Cohen, Ex p. Trustee*, [1924] 2 Ch. 515; *Re Hoyle, Ex p. Trustee*, [1924] B. & C. R. 22; *Re Drage, Palmer & Roberts v. Knight* (1926), 134 L. T. 765.

4031. —.]—It must now be taken, after what LORD HALSBURY said in the House of Lords in *Sharp v. Jackson*, No. 4030, *ante*, that as between trustee & cestui que trust there does exist the relation of debtor & creditor (BUCKLEY, J.).—*Re BLACKPOOL MOTOR CAR CO., LTD., HAMILTON v. BLACKPOOL MOTOR CAR CO., LTD.*, [1901] 1 Ch. 77; 70 L. J. Ch. 61; 8 Mans. 193.

Annotation:—*Apld. Re Lake, Ex p. Dyer*, [1901] 1 K. B. 710. (See [1901] 1 K. B. p. 715.)

4032. —.]—*Re LAKE, Ex p. DYER*, No. 4023, *ante*.

ii. Nature of Debt Created.

4033. Whether simple contract debt or specialty debt.—General rule.]—(1) As a general proposition, it is clear that a breach of trust does not constitute a specialty debt (LORD ST. LEONARDS, C.).

(2) Where there has been a deed declaring the trusts amounting to a covenant . . . & where there has been a debt by means of the trustee having money in his possession & applying it contrary to the manner in which under his hand he has covenanted to apply it, in such a case the liability has been held to be a specialty debt (LORD ST. LEONARDS, C.).—*ADEY v. ARNOLD* (1852), 2 De G. M. & G. 432; 20 L. T. O. S. 17; 16 Jur. 1123; 42 E. R. 940, L. C.

Annotations:—*As to* (1) *Refd. Brew v. Cox* (1855), 3 W. R. 276. *As to* (2) *Apld. Richardson v. Jenkins* (1853), 1 Drew. 477; *Wynch v. Grant* (1854), 2 Drew. 312; *Isaacson v. Harwood, Brooke v. Harwood* (1868), 3 Ch. App. 225; *Holland v. Holland* (1869), 4 Ch. App. 449.

4034. —Acknowledgment of trust money in deed.]—A. & B. are trustees under a deed, by which neither of them is to answer for the other. A. receives a sum of money under the trust, & gives a writing under hand & seal acknowledging it, & that B. had received no part of it; A. never placed out the money, & dies; this writing is a specialty & good against the exor., but not against the heir of A. he not being mentioned in it.—*GIFFORD v. MANLEY* (1735), Chas. temp. Talb. 109; 25 E. R. 689, L. C.

Annotations:—*Apld. Brook v. Harwood, Isaacson v. Harwood* (1868), 37 L. J. Ch. 209. *Consd. Holland v. Holland* (1869), 4 Ch. App. 450, n. *Refd. Stone v. Van Hoythuyse* (1854), Kay, 721.

4035. —Deed poll.]—Testator bequeathed his personal estate to A., B. & C. his exors., in trust to invest two sums of £600 in their names for his daughters for life, & after their deaths, for their children. A. & B. alone acted. A. paid the interest of the two sums to the daughters, but did not invest the principal. B. executed a mtge. to A. & C. for securing £1,300, part of testator's estate possessed by him, & died. His exors. paid off the £1,300, & A. & C. joined in assigning the mtge. to them & in signing a receipt for the money. A. died having executed a deed poll, reciting that testator gave all his personal

4024 i. Liability in equity.]—Trustees & their representatives chargeable in equity for a breach of trust, though no benefit derived from it.—*ADAIR v. SHAW* (1803), 1 Sch. & Lef. 243.—IR.

1. Trustee barrister or solicitor.—Whether liability increased.]—No increased liability attaches to a trustee from the fact of his being a barrister or

solicitor.—*BENNETT v. BENNETT* (1875), 1 V. L. R. 280.—AUS.

PART VII. SECT. 3, SUB-SECT. 1.—A. (b) ii.

4033 i. Whether simple contract debt or specialty debt.—General rule.]—A cestui que trust claiming compensation for a breach of trust against the representative of the trustee, can only come in as

a simple contract creditor.—*KEARNAN v. FITZ-SIMON* (1793), 3 Ridg. Parl. Rep. 1.—IR.

4033 ii. —.]—A claim founded on a breach of a trust created without a specialty executed by the trustee is a simple contract debt.—*BRERETON v. HUTCHINSON* (1854), 3 L. Ch. R. 361.—IR.



**Sect. 3.—Liability of trustees: Sub-sect. 1, A. (b) ii., (c) & (d), B. & C.]**

estate to A., B. & C. upon certain trusts mentioned in his will, & acknowledging that A. had received the whole £1,300, & that C. joined in the assignment & receipt for conformity only:—*Held*: under the deed poll, the *cestuis que trust* of the two sums of £600 were specialty creditors of A.—*TURNER v. WARDLE, BARKER v. WARDLE* (1834), 7 Sim. 80; 58 E. R. 767.

*Annotations*:—*Refd. Re* Hawksworth, Lovell v. Sherwin (1853), 2 W. R. 34; Richardson v. Jenkins (1853), 17 Jur. 446; Holland v. Holland (1869), 4 Ch. App. 450, n.

**4036. — Mortgage to cestui que trust.]—**

A defaulting trustee, under a will, executed a deed under seal, whereby, after reciting that he held in his hands trust moneys to a certain amount, which he proposed to secure by a mtge. on his own estate, he conveyed certain property to the *cestuis que trust* by way of mtge. The deed contained a proviso for redemption & a power of sale, but no covenant to pay the mtge. debt or interest. The mtgd. estate was insufficient to cover the debt:—*Held*: the deed did not convert the debt into a specialty debt.—*ISAACSON v. HARWOOD, BROOK v. HARWOOD* (1868), 3 Ch. App. 225; 37 L. J. Ch. 209; 18 L. T. 622; 32 J. P. 279; 10 W. R. 410, L. J.

*Annotations*:—*Refd. Holland v. Holland* (1869), 4 Ch. App. 449; Kidd v. Boone (1871), L. R. 12 Eq. 89. *Mentid.* Firth v. Slingsby (1888), 58 L. T. 481.

**4037. — Clause of indemnity in settlement—**

**Trustees only accountable for money received.]—**A clause in a marriage settlement, "that the trustees should not be chargeable with or accountable for any money arising in execution of the trusts, but what the person or persons so to be accountable should actually receive," does not bind the trustees as a covenant; but is a clause of indemnity, to take away that responsibility which each would be subject to for the acts of the others, were it not for this clause; & only leaves each of them accountable for what he actually receives as for a simple contract debt.—*BARTLETT v. HOBSON* (1785), 1 Term Rep. 42; 99 E. R. 902.

*Annotations*:—*Refd. Wood v. Hardisty* (1846), 2 Coll. 542; Adey v. Arnold (1852), 2 De G. M. & G. 432; Wynch v. Grant (1854), 23 L. J. Ch. 834; Holland v. Holland (1869), 38 L. J. Ch. 252.

**4038. — Declaration by trustee.]—ADEY v.**

**ARNOLD, No. 4033, ante.**

**4039. — —.]—(1) A trustee under a deed,**

the terms of which would amount to the creation of a contract, is not a specialty debtor if he has not executed the deed, although he has acted under it.

(2) The words "covenant or agree" are not necessary in a trust deed to constitute a specialty contract. A declaration by the trustee that he will stand possessed on certain trusts, etc., is sufficient.—*RICHARDSON v. JENKINS* (1853), 1 Drew. 477; 17 Jur. 446; 61 E. R. 534; *sub nom.* *JENKINS v. ROBERTSON*, 1 Eq. Rep. 123; 22 L. J. Ch. 874; 23 L. T. O. S. 203; 1 W. R. 298.

*Annotation*:—*Refd. Holland v. Holland* (1869), 4 Ch. App. 450, n.

**4040. — —.]—Trust property being vested**

in three trustees, a part of which is outstanding

upon mtge., the mtge. is called in, the money received by one, & applied to his own use. He lives many years, & his exors., after his death, continue to pay the interest. His estate is insufficient even to pay specialty debts; & the master, in a suit in which his estate is administered, finds that the money so misapplied is a specialty debt due to the representatives of the surviving co-trustee. The trust deed, which was executed by the trustees, contained the words " & it is hereby declared & agreed between & by all the parties hereto " that the property should be held upon certain trusts. Exceptions are taken to the master's finding, for that he should have found that there was no debt, or if there was that it was not a specialty debt:—*Held*: the trust deed constituted a covenant, being under hand & seal, & a contract between all the parties to it; & there being a clear right to sue at law, this ct. in declaring that there was a covenant, could also allow such money so received & misapplied as a specialty debt due from the estate of the deceased trustee, who received the money, to the estate of his surviving co-trustee. The breach of trust, if any, was not in allowing the receipt of the money, but the misapplication of it.—*ALEXANDER v. FOSTER* (1856), 5 W. R. 33.

**4041. — — Of acceptance of office.]—**

Where a trustee had executed a deed containing merely an appointment of him as trustee, & a declaration by him that he accepted the office:—*Held*: no covenant by him would be implied, & a claim for trust money received & misapplied by him would not constitute a specialty debt against his estate.—*HOLLAND v. HOLLAND* (1869), 4 Ch. App. 449; 38 L. J. Ch. 398; 21 L. T. 129; 17 W. R. 657, L. J.

*Annotation*:—*Refd. Kidd v. Boone* (1871), L. R. 12 Eq. 89.

**4042. — Trust created by deed.]—By deed**

between A. & B., it was agreed that a sum in the hands of A., but belonging to B., should be laid out in the funds, in A.'s name, in trust for B.; A. died, never having invested the money:—*Held*: B. was a specialty creditor of A. for the amount.—*MAVOR v. DAVENPORT* (1828), 2 Sim. 227; 57 E. R. 774.

*Annotations*:—*Refd. Re* Hawksworth, Lovell v. Sherwin (1853), 2 W. R. 34; Holland v. Holland (1869), 4 Ch. App. 450, n.

**4043. — —.]—The money due in respect**

of a breach of trust, where the trust is created by instrument under seal, is a specialty debt.—*WOOD v. HARDISTY* (1846), 2 Coll. 542; 15 L. J. Ch. 328; 7 L. T. O. S. 279; 10 Jur. 486; 63 E. R. 853.

*Annotations*:—*Consid. Richardson v. Jenkins* (1853), 1 Drew. 477. *Refd. Re* Hawksworth, Lovell v. Sherwin (1853), 2 W. R. 34; Holland v. Holland (1869), 4 Ch. App. 450, n.

**4044. — — No covenant by trustee.]—A**

breach of trust, where the trustees have executed the trust deed, but have not covenanted to perform the trusts, only creates a simple contract debt against the trustees' assets in respect of such breach.—*WYNCH v. GRANT* (1854), 2 Drew. 312; 2 Eq. Rep. 1135; 23 L. J. Ch. 834; 23 L. T. O. S. 153; 2 W. R. 486; 61 E. R. 739.

*Annotations*:—*Consid. Holland v. Holland* (1869), 4 Ch. App. 449. *Refd. Kidd v. Boone* (1871), L. R. 12 Eq. 89.

**4042 I. — Trust created by deed.]—JAMESON v. FARRER** (1841), 3 I. Eq. R. 346.—*IR.*

**4042 II. — —.]—N.,** reciting that he was entitled to a simple contract debt due to him by his sons, A., B., C., & D., who were partners in trade, assigned it to A. & B., upon trust, if they should think fit, to call in the same, invest it on good & solvent security, & hold same upon certain

trusts. A. & B. sealed & delivered the deed, & afterwards misapplied the trust moneys:—*Held*: the breach of trust was a debt of A. & B. by specialty, not binding their heirs.—*CUMMINS v. CUMMINS* (1845), 3 Jo. & Lat. 64.—*IR.*

**4044 I. — — No covenant by trustee.]—**Mere omission to perform a duty arising out of a deed does not create a liability in the nature of a

specialty debt, unless there be in the deed words from which a covenant to perform that duty may be implied.—*NEWPORT v. BYRAN* (1856), 5 I. Ch. R. 119.—*IR.*

**5. — — Cestui que trust not a covenantor.]—**The liability of trustees to a *cestui que trust* for breach of trust under a trust deed executed by the trustees & containing words of agreement by them, is not a specialty



**4045.** ——— **Deed not executed by trustee.]—**JENKINS v. ROBERTSON, No. 4327, *post*.

**4046.** ——— **Covenant for further assurance.]—**A., being indebted to B., made & executed an indenture between himself & C., to which B. was no party; & thereby, after reciting that A. stated that he was indebted to B. in a certain specified sum, A. conveyed & assigned all his real & personal property to C. upon trust to sell, & out of the proceeds to pay the debt, & to pay the surplus to A.; & the deed contained a covenant for further assurance:—*Held*: the debt to B. was not converted into a specialty.—STONE v. VAN HEYTHUYSEN (1854), Kay, 721; 69 E. R. 307.

**4047.** ——— **Recital of transfer of fund to trustees—Fund not transferred.]—**STORY v. GAPE, No. 4051, *post*.

(c) *Relation between Trustees inter se.*

**4048. Whether debtor & creditor.]—**Re GOLD-SMID, *Ex p.* TAYLOR, No. 4028, *ante*.

**4049.** ———.]—*Re* HUTCHINSON, *Ex p.* BALL, No. 4029, *ante*.

(d) *Joint and Several Liability.*

**4050. General rule—Liability joint & several.]—**The liability of trustees in respect of a breach of trust is joint & several.—EDWARDS v. HOOD-BARRS, [1905] 1 Ch. 20; 74 L. J. Ch. 167; 91 L. T. 766; 21 T. L. R. 89.

**4051.** ——— **Failure to get in trust money.]—**(1) A marriage settlement of 1807, executed by all parties, contained a recital of the transfer of a sum of stock into the name of trustees. The stock never was transferred. The trustees died, one in 1827, the other in 1840. The person who ought to have transferred the stock became bkpt. in 1848, & died in 1851, only a fourth part dividend being got in under his bkpy.:—*Held*: a bill filed in 1855 by a child of the marriage, who had attained twenty-one years in 1839, was not too late; & the estates of the two trustees were declared to be jointly & severally liable.

(2) The recital of the transfer bound the trustees as much as an actual transfer, as in *Knatchbull v. Fearnhead*, No. 4325, *post*, & also rendered it unnecessary in the *cestuis que trust* to make any further inquiry as to whether the fund had been transferred or not.

(3) *Qu.*: whether the liability of the trustees to make good the lost fund was a specialty obligation, or only on simple contract.

(4) *Qu.*: as to the effect of the laches on the *cestuis que trust* other than pltf.—STORY v. GAPE (1856), 2 Jur. N. S. 706.

*Annotation*:—As to (1) *Re*ld. Brittlebank v. Goodwin (1868), L. R. 5 Eq. 545.

**4052.** ——— **Improper investment.]—**Trustees advanced trust money upon mtge. of

properties consisting of an hotel & stables, & cottages & houses which were principally let at weekly rents. Valuers were employed, & the particulars of the several properties as furnished by the mtgors. were submitted to them, but the trustees did not make inquiries for the purpose of verifying the statements made by the mtgors. as to the value or nature of the properties, or whether they were all let, or what was the amount of the outgoings payable. In their instructions to the valuers, they told them that the mtgees. were trustees, but they did not tell them, according to the rule laid down for trustees in lending on the security or house property, by KAY, J., in *Re Olive, Olive v. Westerman*, No. 3834, *ante*, that they did not desire to lend more than one-half the value. Neither did they call the attention of the valuers to circumstances which might affect the value. They also omitted to instruct the valuers to ascertain whether the particulars were correct, or what were the outgoings or average amount of repairs. In each case the valuers gave it as their opinion that a sum more than one-half of the value might be advanced on the security, & such a sum was in each case advanced. Shortly afterwards the mtgors. became insolvent. The several properties were put up for sale, but failed to realise the amounts advanced:—*Held*: the investments were improper; the trustees had been guilty of negligence in not making inquiries as to the particulars & in not giving proper instructions to the valuers, & in acting upon valuations which under the circumstances they ought not to have acted upon, & they were jointly & severally liable for the money lost.—*Re* PARTINGTON, PARTINGTON v. ALLEN (1887), 57 L. T. 654; 3 T. L. R. 828; 4 T. L. R. 4.

*Annotation*:—*Re*ld. Shaw v. Cates, [1909] 1 Ch. 389.

**4053.** ———.]—*Re* SOMERSET, SOMERSET v. POULETT (EARL), No. 4542, *post*.

**Liability of partners.]—**See PARTNERSHIP, Vol. XXXVI., pp. 376, 377, Nos. 533-539.

**Liability of directors of companies.]—**See, generally, COMPANIES, Vol. IX., pp. 483-516.

**Liability for acts of co-trustee.]—**See Subsect. 4, *post*.

*B. Criminal Liability.*

**Liability for fraudulent conversion.]—**See CRIMINAL LAW, Vol. XV., pp. 937-939, Nos. 10,334-10,330, 10,342.

**Liability for acts of servant.]—**See MASTER & SERVANT, Vol. XXXIV., p. 151, No. 1211.

*C. Attachment.*

See BANKRUPTCY, Vol. V., pp. 1023-1029, Nos. 8352-8413; CONTEMPT OF COURT, Vol. XVI., pp. 9, 10, 35, 36, 39, 40, 43, 50, 74, Nos. 21, 302, 404-412, 440, 534, 537, 890.

liability where the *cestui que trust* is not a covenantor, & does not claim through a covenantor.—McDONALD v. McFARLANE & GORE (1900), 29 N. Z. L. R. 427.—N.Z.

**PART VII. SECT. 3, SUB-SECT. 1.—**  
**A. (d).**

**h. Trustee guilty of negligence—Failure to register judgment.]—**LESTER v. LESTER (1857), 30 L. T. O. S. 23.—IR.

**k. ——— Insufficient investigation of title.]—**D., the tenant for life of the settlement, lent the trust funds on a security which totally failed. G. was a solr. & in the transaction of the loan no other solr. was employed for the lenders & no sufficient investigation

of title was made:—*Held*: the trustees were compellable to replace the trust fund.—FRENCH v. GRAHAM (1860), 10 L. Ch. R. 522.—IR.

**l. Loss, surrender or disappearance of trust property.]—**When trust property has apparently been lost or surrendered, or has disappeared, the trustee in whom it was vested must either explain its loss, surrender, or disappearance, so as to exonerate himself, or must make it good.—TAVARES v. HOLLAND (1880), 5 Q. S. C. R. 172.—AUS.

**m. Borrowing money from trust estate on security—Sums previously borrowed not charged on security.]—**A trustee in breach of trust borrowed trust funds & paid them into his over-

drawn account with a bank, on which the trustee was paying 7 per cent. interest; the account remained overdrawn in varying amounts up till the hearing of the suit:—*Held*: the trustee must repay the trust funds, with 7 per cent. interest.—FARNELL v. COX (1898), 19 N. S. W. L. R. (Eq.) 172; 15 N. S. W. W. N. 77.—AUS.

**n. Assignment of mortgage in trust—Discharge by trustee—Liability for moneys not actually received.]—**HowLAND v. McLEAN (1875), 22 Gr. 231.—CAN.

**o. Moneys in joint names—Misappropriation by trustee.]—**VOGLER v. CAMPBELL (1913), 24 O. W. R. 680, 681; 4 O. W. N. 1389; 11 D. L. R. 605.—CAN.

Sect. 3.—Liability of trustees : Sub-sect. 2, A. (a).]

## SUB-SECT. 2.—EXTENT OF LIABILITY.

## A. Replacement of Trust Funds.

## (a) In General.

**4054. General rule—Trustee must make satisfaction to cestui que trust.**—If a husband even after marriage conveys his wife's fortune to a trustee for her separate use, & the trustee is guilty of a breach of trust, this ct. will oblige him to make satisfaction to the *cestui que trust*.—SMITH v. FRENCH (1741), 2 Atk. 243; 26 E. R. 550, L. C.

*Annotation*:—*Reid*. Davies v. Hodgson (1858), 25 Beav. 177.

**4055. Trustee charged only with actual loss.**—Trustee not to be charged with imaginary values.—PALMER v. JONES (1682), 1 Vern. 144; 23 E. R. 370.

**4056. — Not with amount of stock able to be purchased.**—GALE v. PITT (1830), cited in 1 De G. M. & G. at p. 255; 42 E. R. 550.

*Annotation*:—*Reid*. Robinson v. Robinson (1851), 1 De G. M. & G. 247.

**4057. Set-off of gain against loss.—In computation of amount to be replaced.**—In 1834 a marriage settlement was made, comprising a sum of £2,000 secured by the bond of the husband, payable within six months, & also a sum of £4,000 upon another security. It was declared by the settlement that the trustees might, with the consent of the husband & wife, allow the £2,000 to remain upon the security of the bond, or might with the like consent call the money in. No step was taken by the trustees with regard to the £2,000 until 1836, when the husband became bkpt. The trustees then proved for their debt against the husband's assets, but did not compel payment. In 1838 a written consent was obtained by the trustees from the husband & wife to the £2,000 remaining on the security of the bond. In 1847 the husband again became bkpt., & a bill was filed against the trustees to replace the £2,000. Part of the sum of £4,000 was laid out by the trustees upon copyhold property, for which there was no power under the settlement. This property was improved by the husband to the amount of £2,000:—*Held*: (1) the wife's consent in 1838 was not retrospective, & having been given while her husband was under difficulties did not exonerate the trustees from their obligation to obtain payment of the money; (2) the profit arising from the improvement of one portion of the trust property could not be set off against the loss upon the other property & the trustees were bound to replace the £2,000.

(3) Where the trustees of a marriage settlement have been guilty of a breach of trust, an indemnity given to them by the husband against liability for losses:—*Held*: not to extend to lands purchased with the trust moneys, although the original value of such lands has been much enhanced by moneys laid out by the husband.—WILES v. GRESHAM (1854), 2 Drew. 258; 2 Eq. Rep. 560; 23 L. J. Ch. 607; 2 W. R. 355; 61 E. R. 718; *aff'd*, 5 De G. M. & G. 770, L. J.J.

*Annotations*:—As to (2) *Distd.* Andrews v. M'Guffog (1886), 11 App. Cas. 313. *Apld.* *Re* Deare, Deare v. Deare (1895), 11 T. L. R. 183.

**4058. —**—(1) A widow who was tenant for life, extrix., & trustee of the will of her husband, who died in 1882, converted part of his residuary personal estate; but, acting on the advice of a commission agent who had been the friend & adviser of her husband, postponed the sale of eight other investments left by testator, which consisted principally of shares only partly paid up in banking & other cos., & were not securities on which trust

funds could properly be invested in the expectation that the price of the shares would rise. An action was commenced against her by beneficiaries under the will, for the purpose of having her liability in respect of any loss or misapplication of the trust funds determined; & the ct. directed a sale of the shares, which took place about fourteen years after testator's death. Upon a summons taken out by plffs. in the action, the ct. made a declaration that the shares ought to have been sold at the expiration of twelve calendar months from his death, & directed inquiries for the purpose of ascertaining the amount of loss or gain resulting from the postponement of the sale. From the Chief Clerk's certificate, in answer to the inquiries, it appeared that while the postponement of the sale of some of the shares had resulted in a gain, the loss from the postponement of the sale of the rest amounted to £1,593 10s. 6d., & exceeded the gain by £349 6s. Upon a summons by plffs. for the determination of the questions whether or not the extrix. was liable to make good to testator's estate the loss which had resulted from the postponement of the sale of the shares in respect of which there had been a loss; whether she was entitled to deduct from such loss, or to be allowed, the gain which had resulted from the postponement of the sale of the shares in respect of which there had been a gain:—*Held*: she was liable to make good to the estate the sum of £1,593 10s. 6d. being the amount of the loss without deducting or allowing for the gain which had resulted from the postponement of the sale of the shares in respect of which there had been a gain.

(2) A trustee, to be entitled to relief under Judicial Trustee Act, 1896 (c. 35), s. 3, must act both honestly & reasonably; the mere fact that he acted honestly is not sufficient.—*Re* BARKER, RAVENSHAW v. BARKER (1898), 77 L. T. 712; 46 W. R. 296.

**4059. Liability takes effect immediately.**—*Re* NEWEN, SMILES v. CARRUTHERS (1912), 133 L. T. Jo. 589.

**4060. Legacy expended otherwise than in accordance with will.—Expended for benefit of legatee.—Liability to pay legacy again.**—CORBETT v. FRANKLYN, No. 3928, *ante*.

**4061. Trust to raise portions.—Payment of one.—Decay of estate.—Estate insufficient to pay others.**—A trust to pay several portions to several children at their respective ages: the trustee pays one; the estate decays, so that there is not sufficient to pay the others; in that case the person trusted paid in his own wrong, for he shall make it good to the rest, abating proportionably out of each party's share, according to the loss; & he should have taken security in case of loss happening.—TILSLY v. THROCKMORTON (1682), 2 Cas. in Ch. 132; 22 E. R. 881.

**4062. Sale of trust property.—To purchaser without notice of trust.**—VERNON v. VAUDREY (1740), as reported in Barn. Ch. 280; 27 E. R. 646, L. C. *Annotations*:—*Reid*. Adey v. Arnold (1852), 2 De G. M. & G. 432; Holland v. Holland (1869), 4 Ch. App. 450, n. *Mentd.* Allfrey v. Allfrey (1849), 1 H. & Tw. 179.

**4063. Trustee guilty of negligence.—No allegation of corruption or fraud.**—Trustees charged with a loss occasioned by their negligence, though without any corrupt motive. The costs followed of course.—CAFFREY v. DARBY (1801), 6 Ves. 488; 31 E. R. 1159.

*Annotation*:—*Reid*. Thompson v. Hopper (1858), E. B. & E. 1038.

**4064. —**—[Under a power contained in a will, to apply for A.'s advancement in life a portion of his reversionary share, B., the trustee,

raised money by mtge. of the share, in order to pay A.'s apprentice premium to an apothecary. It was intended to apprentice A. to X., but it being discovered that X. was not a licenced apothecary, it was arranged by the solr. acting in the matter that A. should be nominally apprenticed to Y., a licenced apothecary, but actually serve his time with X. The receipt for the whole amount was signed by Y.; but only half was paid, & that to X., the remaining half being handed over to A.'s father, who gave Y. his promissory note for the amount, but never discharged the obligation. The purpose for which the money was raised having failed:—*Held*: B., although not shown to have been guilty of more than negligence, in following his solr.'s advice, was bound to bear the consequences of the mistake, & to replace the money borrowed on security of A.'s reversionary share.—*SIMPSON v. BROWN* (1865), 11 L. T. 593; 13 W. R. 312.

**4065. — Permitting sale by husband of beneficiary.**—(1) By a marriage settlement it was declared & agreed & the husband covenanted that in case at any time during the intended coverture any real, personal or mixed estate & effects to the value of £500 should come to or vest in his wife, or in him in her right at law or in equity, by devise, descent, gift, or otherwise, that same should be conveyed or assigned by him & her to the trustees of the settlement upon the trusts thereof. After the marriage, a legacy of £5,000 was bequeathed to the wife for her separate use, & this sum was at the request of the husband & wife invested in their joint names in stock, etc., by the exors., who were also the trustees of the settlement. Subsequently the stock was sold out by the husband, & the purchase money lost:—*Held*: the legacy formed part of the trust estate of the settlement, & the trustees were bound to make good the loss.

(2) The trustees to have their costs of administering the trusts of the settlement, but to pay the costs occasioned by their breach of trust (*STUART, V.-C.*).—*CAMPBELL v. BAINBRIDGE* (1868), L. R. 6 Eq. 269; 37 L. J. Ch. 634; 19 L. T. 254; 17 W. R. 5.

*Annotations*:—*Generally*, *Mentd.* Dawes v. Tredwell (1881), 18 Ch. D. 354; *Re D'Estampes Settlement*, D'Estampes v. Crowe (1884), 53 L. J. Ch. 1117.

**4066. Trustees of fund subject to power of appointment—Defective appointment.**—Where, on marriage, a settlement is made of the wife's property to herself for life, to her separate use, with remainder as she should appoint, by any writing signed by her, & attested by two witnesses, & for default of appointment to the children of the marriage, & the trustees part with the trust fund upon the joint application of the husband & wife, by letter not attested by any witness, the trustees, after the death of the wife, must make good the trust fund for the children.—*HOPKINS v. MYALL* (1830), 2 Russ. & M. 86; 39 E. R. 327.

*Annotations*:—*Refd.* Thackwell v. Gardiner (1851), 5 De G. & Sm. 58; Fletcher v. Green (1864), 3 New Rep. 626.

**4067. — Fraudulent appointment.**—*WADE v. COX*, No. 4486, *post*.

**4068. Trustee acting in administration of trust—Trust funds not passing through his hands—Funds wasted by third party.**—Where trustees execute a deed for the purpose of "granting & releasing" to a *cestui que trust* part of the trust estate, & take a release from him, although the deed contain a recital that it "became unnecessary for them to act in the trusts, & that they had, in fact, never acted" :—*Held*: they have thereby acted & taken upon themselves the *onus* of trustees; & are liable to make good the loss of

funds wasted by a third party, although same never passed through their hands.—*URCH v. WALKER* (1838), 3 My. & Cr. 702; 7 L. J. Ch. 292; 40 E. R. 1097; *sub nom.* *URCH v. WALKER*, BLACKBURN & BROWN, 2 Jur. 487, L. C.

*Annotations*:—*Distd.* Lowry v. Fulton (1839), 9 Sim. 104; *Maisy v. Edge* (1856), 27 L. T. O. S. 12. *Refd.* Grayburn v. Clarkson (1868), 37 L. J. Ch. 560; *Re Lord & Fullerton* (1895), 65 L. J. Ch. 184.

**4069. Trustee allowing tenant for life to enjoy leaseholds in specie—Title to leaseholds bad—No advantage taken of bad title—Liability of trustees based on actual value of lease.**—Exors. who, contrary to the trusts of the will, had permitted the tenant for life to enjoy leasehold property *in specie*, the title to which was bad, but of which no advantage was taken by the owners of the property, being responsible for the value of the lease at testator's death:—*Held*: such value should be ascertained, having regard to the enjoyment actually had thereunder.—*MEHTENS v. ANDREWS* (1839), 3 Beav. 72; 49 E. R. 28.

*Annotation*:—*Refd.* Morgan v. Morgan (1851), 14 Beav. 72.

**4070. Payment of income to person not entitled—Marriage settlement—Wife ceasing to be entitled.**—A married lady was entitled in expectancy to a sum of £3,000 upon the death of an aunt. An agreement was entered into between the aunt, the husband & the wife, whereby the aunt agreed to give up her life interest in £2,000, part of the £3,000, & the husband agreed to release his right in the remaining sum of £1,000, his wife's chose in action, & it to remain for her sole & separate use after the death of her aunt; & also agreed to advance a sum of £2,000 his own moneys; both sums of £2,000 to be settled for the purposes of making permanent provision for themselves, the husband & wife, & the survivor of them. The money was paid to the trustees to be invested, & the dividends, etc., to be paid to them during their joint lives, & the principal sum to be at the disposal of the survivor:—*Held*: the trustee who took upon himself to pay part of the dividends to the wife for her support, should refund.—*DUNCAN v. CAMPBELL* (1842), 12 Sim. 616; 6 Jur. 677; 59 E. R. 1269.

*Annotation*:—*Mentd.* *Re Barnard*, *Barnard v. Whitto* (1887), 56 L. T. 9.

**4071. Trustee selling funds under power to vary—Failure to show how produce invested.**—A trustee, having power to vary trust funds, admitted he had sold out trust funds, but did not show how the produce had been invested:—*Held*: on such an admission, he was liable to make good the fund.—*MEYER v. MONTRIOU* (1842), 5 Beav. 146; 11 L. J. Ch. 398; 49 E. R. 532.

**4072. Claim by incumbrancer of tenant for life—Liability limited to interest of incumbrancer.**—*RACKHAM v. SIDDALL*, No. 4309, *post*.

**4073. Trustees of bond debt concurring in acceptance of composition—No evidence that debt not recoverable in full—Liability for full amount of debt.**—Trustees of a bond debt, on the bkpcy. of the obligor, concurred with his other creditors in consenting to the fiat being annulled on the payment of a composition. On the transaction being impeached some years afterwards by *cestuis que trust*, who were under disabilities:—*Held*: the trustees were liable to make good the full amount of the debt; it being impossible to show that bkpt. would have obtained his certificate or that the debt might not have been recovered in full.—*WILES v. GRESHAM* (1854), 5 De G. M. & G. 770; 3 Eq. Rep. 116; 24 L. J. Ch. 264; 3 W. R. 87; 43 E. R. 1069, L. J.

*Annotations*:—*Consd.* *Re Deare*, *Deare v. Deare* (1895), 11 T. L. R. 183. *Refd.* *Andrews v. M'Guffog* (1886), 11 App. Cas. 313.

*Sect. 3.—Liability of trustees: Sub-sect. 2, A. (a), (b), (c) & (d).]*

**4074. Reversionary interest payable to husband on coming into possession—Other property settled on wife—Settled property obtained by husband through breach of trust—Liability for difference between settled fund & reversionary interest.]—**Upon a marriage it was agreed that a reversionary interest of the intended wife should be paid to the husband when it fell into possession, & other property of the wife was settled to her separate use; the settled funds, by reason of breaches of trust, came to the hands of the husband, who afterwards became insolvent. When the reversionary interest fell into possession, it was paid into ct., & in a suit to make the trustee liable, or to have payment out of the fund in ct. of the amount of the settled property which had been lost, the ct. declared that the wife had a lien on the fund to that amount, & that the trustee was liable to make good the rest.—*THORP v. THORP* (1855), as reported in 24 L. T. O. S. 336.

**4075. Trustee only acting as to part of trust—Liability for breach limited to part.]—MALZY v. EDGE, No. 4287, *post*.**

**4076. Retention of money after order to pay to new trustees—Money retained in bank—Failure of bank.]—**J., a trustee, was, in July, 1857, ordered to pay the balance of moneys in his hands belonging to his testator's estate to new trustees, & was discharged from his trusteeship. He kept the trust money in his name at a bank, but to a separate account, for some time after the costs had been taxed & the balance ascertained. The bank failed on Sept. 24, 1857:—*Held*: J. was personally liable to make good the loss which had accrued to the trust estate by reason of the failure of the bank.—*LUNHAM v. BLUNDELL* (1857), 27 L. J. Ch. 179; 4 Jur. N. S. 3; 6 W. R. 49.

**4077. Payment to wrong person.]—**On the death of the tenant for life of an estate in 1849, the estate, according to one view of the construction of a will disposing of it, devolved upon C. as trustee for Mrs. V., according to another view it devolved upon W., a lunatic, the committee of whose estate C. was. Mr. & Mrs. V. entered into occupation of part of the estate, & C. received the rents of the remainder & paid them over to Mrs. V. with full notice that the persons who would, according to the second view of the construction, become entitled on the death of W. intended to assert their title. W. died in 1851. A bill was afterwards filed in 1856 by W.'s personal representative to compel C. to account for the rents received by him:—*Held*: whether C., if he had not been committee of the lunatic, would have been liable so to account or not, his having filled that position made him clearly liable so to account.—*WRIGHT v. CHARD* (1860), 1 De G. F. & J. 567; 29 L. J. Ch. 415; 2 L. T. 104; 6 Jur. N. S. 476; 8 W. R. 334; 45 E. R. 481, L. J. J.

*Annotations:—Mentl. Johnson v. Gallagher* (1861), 3 De G. F. & J. 494; *London Chartered Bank of Australia v. Lempiere* (1873), L. R. 4 P. C. 372.

**4078. —.]—**A married woman, entitled in reversion to a fund vested in a trustee, quitted her husband & resided with another man as his wife. The trustee, before the fund fell into possession, paid sums on account to the married woman, with the assent of the man with whom she was living, & believing such man to be her husband. On the interest of the wife becoming an interest in possession, her husband filed his bill against the trustee for payment of the fund:—*Held*: the trustee must make good the payments made to the

wife.—*SPORLE v. BARNABY* (1864), 11 L. T. 412; 10 Jur. N. S. 1142; 13 W. R. 151.

**4079. Policy of insurance allowed to fall into hands of settlor—Settlor receiving bonus & mortgaging policy—Surrender by mortgagee & subsequent insolvency of settlor—Trustee liable for surrender value & amount of bonus.]—***KINGDON v. CASTLEMAN, No. 4114, post*.

**4080. Trustees with notice of assignment of interest of beneficiary—Money paid to or on behalf of beneficiary.]—**By the will of testator a share of his estate was given to trustees upon trust during the life of one of his sons to pay & apply the whole or any part of the income or accumulations of income of the share for the support, maintenance, or education, or otherwise for the benefit of that son, his wife, or children, in such manner in all respects as the trustees should in their uncontrolled discretion think fit. The son assigned his interest by way of mtge. to pltf. Notice of the assignment was duly given to the trustees of the will; but, after receiving such notice, they made payments out of the income of the share to or on behalf of the sum. Pltf. took out an originating summons seeking to make the trustees liable in respect of the payments so made. Objection was waived to the decision of a question of breach of trust upon an originating summons:—*Held*: the trustees were liable for all sums paid to or on behalf of the son after they had received notice of assignment.—*Re NEIL, HEMMING v. NEIL* (1890), 62 L. T. 649.

*Annotation:—Refd. Re Bullock, Good v. Lickorish* (1891), 60 L. J. Ch. 341.

**4081. Payment of annuities out of trust estate—Failure to deduct income tax—Liability to refund tax.]—**S. by will gave his real & personal estate to trustees upon trust to convert & invest, to pay certain annuities out of the income & accumulate the residue of the income until the capital became devisable, or for twenty-one years, & subject thereto to hold capital & income in trust for his grandchildren in equal shares. The trustees invested the funds in such a manner that the income tax was always deducted before the income was paid to them. The successive trustees for over twenty years paid all the annuities in full without deducting income tax. Some of the trustees were also annuitants:—*Held*: the trustees were liable to make good to the trust estate the amounts of income tax so overpaid to the annuitants.—*Re SHARP, RICKETT v. RICKETT*, [1906] 1 Ch. 793; 75 L. J. Ch. 458; 95 L. T. 522; 22 T. L. R. 368; 50 Sol. Jo. 390.

*Following trust property.]—See Sect. 5, post.*

**Trustee mixing trust funds with own money.]—See Sect. 5, post.**

**Liability to pay interest.]—See Sub-sect. 2, B., post.**

**Liability for acts of co-trustees.]—See Sub-sect. 4, A., ante.**

**Liability of charity trustees.]—See CHARITIES, Vol. VIII., pp. 379–382, 413, Nos. 1919–1962, 2548.**

*See, also, EXECUTORS, Vol. XXIV., pp. 626–629, Nos. 6550–6564.*

(b) *Improper Investments.*

**Liability of trustees to replace.]—See Part VI., Sect. 7, sub-sect. 2, A., ante.**

(c) *Improper Sale of Stock.*

**4082. Liability of trustees to replace stock—Or hand over proceeds—Option of cestui que trust.]—**Where a trustee of stock or annuities takes upon him to transfer, it is a breach of trust, & the

*cestui que trust* in this ct. will be entitled to an election, either to have the individual stock or annuities restored to him, which stood in the name of the trustee, or else to have the money it produced, when it was sold by the trustee.—*HARRISON v. HARRISON* (1740), 2 Atk. 121; 26 E. R. 476; *sub nom. HARRISON v. PRYSE*, Barn. Ch. 524, L. C.

*Annotation*.—*Reid. Davis v. Bank of England* (1824), 2 Bing. 393.

**4083.** ———.]—Trustee of stock sells it: the *cestui que trust* has an option to have the stock or the produce with interest.—*FORREST v. ELWES* (1799), 4 Ves. 492; 31 E. R. 252.

*Annotation*.—*Mentd. Barnard v. Young* (1810), 17 Ves. 44.

————— **Investment amounting to trust.**—See Part VI., Sect. 7, sub-sect. 3, B., *ante*.

**4084.** ——— **Stock at less price—Surplus to be invested in same stock.**—Trustee mistaking his power sold stock without authority; decreed to replace it immediately; if at a less price, to invest the surplus in the same stock to the same uses. Costs given.—*POWLET (EARL) v. HERBERT* (1791), 1 Ves. 297; 30 E. R. 352, L. C.

**4085.** ——— **& pay into court—Power of court to order payment.**—A trustee admitted he had sold out trust stock, but he stated that he had invested the produce in other securities. A motion was made before decree, that he might repurchase the stock & transfer it into ct.:—*Held*: the ct. could make no such order.—*FUTTER v. JACKSON* (1843), 6 Beav. 424; 49 E. R. 889.

**4086.** ——— **& account for possible amount of dividends.**—Trustee, at the request of his *cestui que trust*, a married woman, who was entitled for her life to the dividends of a sum of £4,000 Consols, sold out the trust fund, & invested it upon a railway debenture. Upon a suit by her to have the fund reinvested in stock:—*Held*: railway debentures were not real securities contemplated by the deed, & he must replace the stock & account for the dividends as if it had not been sold; no costs ought to be given on either side, as he had acted only as requested by pltf.; & the costs of the parties entitled in remainder must be paid by pltf.—*MANT v. LEITH* (1852), 15 Beav. 524; 21 L. J. Ch. 719; 16 Jur. 302; 51 E. R. 641.

(d) *Neglect in Realising Security.*

**4087. Trustees liable to make up loss—Trustees selling & buying in—Subsequent sale at lower price.**—*TAYLOR v. TABURN*, No. 4209, *post*.

**4088.** ——— **Failure to call in trust fund—Debt due from partnership—One trustee a partner.**—A. was entitled to a debt due from C. D., & E., trading partners. She made a settlement of this fund, on her marriage, by assigning it to C., one of the partners, & F., to be held upon certain trusts, one of which was to permit it to remain in the hands of the firm until she should, in writing, request them to call it in, & then to do so, & invest the produce; & it was declared that, so long as the money should remain with the consent of A., the trustees should not be liable for any loss. By reason of the difficulties of the firm of C. D., & E. a composition was made, after which A. requested the trustees to call in the money. F. required his co-trustee, the partner, to pay; but he did not do so on account of alleged inability; & A. having refused to institute a suit, for the direction of the ct., F. filed a bill against her & the

infants interested under the settlement, & against his co-trustee, praying that the trusts might be performed:—*Held*: F. was liable to make good the whole sum.—*NORTON v. STEINKOPF* (1853), Kay, 45; 2 Eq. Rep. 777; 23 L. J. Ch. 35; 22 L. T. O. S. 169; 2 W. R. 34; 69 E. R. 20.

**4089.** ——— **Securities held inadequate.**—*Re BROGDEN, BILLING v. BROGDEN* (1888), 38 Ch. D. 546; 59 L. T. 650; 37 W. R. 84; 4 T. L. R. 521, C. A.

*Annotations*.—*Consd. Re Hurst, Addison v. Topp* (1890), 63 L. T. 665. *Reid. Re Chapman, Cocks v. Chapman* (1896), 45 W. R. 67; *Re Stevens, Cooke v. Stevens*, [1898] 1 Ch. 162; *Re Greenwood, Greenwood v. Firth* (1911), 105 L. T. 509.

**4090.** ——— **Failure to accept offer—Subsequent depreciation in value—Sale decreed by court.**—Testator died in 1834, having directed his exors. & trustees, "so soon as convenient after his decease, to sell" his freehold inn. They attempted to sell in 1836, & were offered £900, which they refused. The property became greatly depreciated by a railway opened in 1843, & it still remained unsold in 1859:—*Held*: the trustees were liable for the difference between £900 & the produce of a present sale.—*FRY v. FRY* (1859), 27 Beav. 144; 28 L. J. Ch. 591; 34 L. T. O. S. 51; 5 Jur. N. S. 1047; 54 E. R. 56.

*Annotation*.—*Mentd. Re McEacharn, Gambles v. McEacharn* (1911), 103 L. T. 900.

**4091.** ——— **Failure to convert—Whether inquiry directed to determine actual loss—No reason given for delay.**—Testator entitled to shares in a co. with unlimited liability, directed his exors. to convert his estate with all convenient speed. P. one of the three exors. died a year & five weeks after testator. The shares were not converted, & about fifteen years afterwards the co. was wound up, & the surviving exors. being placed on the list of contributors paid a large sum out of the estate for calls. A bill was filed against the surviving exors., & the exors. of P. to make them liable for the loss. P.'s exors. did not answer, nor did they in evidence give any reason why conversion had not taken place within twelve months from testator's death:—*Held*: P.'s estate was liable for all loss occasioned to testator's estate by the omission to sell the shares within twelve months; & as P.'s exors. had not suggested by answer or evidence any reason for the delay, no inquiry could be directed on the subject.

*Qu.*: whether the calls were a loss thus occasioned to testator's estate.—*GRAYBURN v. CLARKSON* (1868), 3 Ch. App. 605; 37 L. J. Ch. 550; 18 L. T. 494; 16 W. R. 716, L. J.

*Annotations*.—*Reid. Sculthorpe v. Tipper* (1871), L. R. 13 Eq. 232; *Gainsborough v. Watcombe Terra Cotta Clay Co., Dunning v. Gainsborough* (1885), 54 L. J. Ch. 991.

**4092.** ——— **Trustees claiming that full value could not have been realised.**—Where there has been a loss to the trust estate by reason of a non-conversion of a security forming part of the trust property, but the trustees allege that they could at no time have realised the full value of the security, they will be allowed the benefit of an inquiry to show the actual amount which would have been realised by a conversion at the proper time, & their liability will be limited accordingly.—*GAINSBOROUGH (EARL) v. WATCOMBE TERRA COTTA CLAY CO., LTD., DUNNING v. GAINSBOROUGH (EARL)* (1885), 54 L. J. Ch. 991; 53 L. T. 116; 1 T. L. R. 486.

*See, also. Part III., Sect. 3, ante.*

PART VII. SECT. 3, SUB-SECT. 2.—A. (d).

**p. Trustees liable to make up loss—Failure to call in trust fund—Allowing debt to remain outstanding.**—*Re GABOURIE, CASEY v. GABOURIE* (1887), 13 O. R. 635.—CAN.

**Sect. 3.—Liability of trustees: Sub-sect. 2, B. (a) & (b).**

**B. Payment of Interest.**

**(a) In General.**

See, also, EXECUTORS, Vol. XXIII., p. 330, No. 3959; Vol. XXIV., pp. 696-702, Nos. 7208-7275; MONEY & MONEY LENDING, Vol. XXV., pp. 177-201.

**4093. Liability of trustees to pay interest.]—**PARROT v. TREBY, No. 4167, *post*.

**4094. —.]—**Under what circumstances an exor. or trustee shall be chargeable with interest for the money in his hands.—LINCOLN (EARL) v. ALLEN (1768), 4 Bro. Parl. Cas. 553; 2 E. R. 377, II. L.

*Annotation:—*Refd. Bromfield v. Wytherley (1718), Prec. Ch. 505.

**4095. —.]—**(1) Trustee charged with interest for wilful misconduct, as not paying money into ct. pursuant to an order; but slight difference in the sums admitted & reported in his hands is not sufficient; & further inquiry whether he made interest not to be directed unless a strong case.

(2) Trustee not deprived of costs for slight misconduct, in respect of which he is charged with interest.—SAMMES v. RICKMAN (1792), 2 Ves. 36; 30 E. R. 511.

*Annotation:—*As to (1) Refd. Hollingsworth v. Shakeshaft, Andrews v. Shakeshaft (1851), 14 Beav. 492.

**4096. —.]—**GALE v. PITT (1830), cited in 1 De G. M. & G. at p. 255; 42 E. R. 550.

*Annotation:—*Refd. Robinson v. Robinson (1851), 1 De G. M. & G. 247.

**4097. —.]—**BARLEE v. MURIETTA (*circa* 1870), cited in 4 Ch. D. at p. 428.

*Annotation:—*Refd. Crossley v. City of Glasgow Life Assco. (1876), 4 Ch. D. 421.

**4098. —.]—**Testatrix, who died in 1848, by her will, dated the day before her death, bequeathed one-fourth of her personal estate upon trust for her married daughter, A., for life, for her separate, inalienable use, with remainder to A.'s children, & the other three-fourths upon trust for her, testatrix's, three sons. In 1850 a family arrangement was entered into by two deeds, one a declaration of trust, the other a release, for the division of testatrix's property among her children. The release was executed by A. but not by her husband, & it contained a recital that the testatrix, during her lifetime, advanced to A., with her husband's privity & consent, the sum of £400, "in part of & to be deducted out of any money which testatrix might leave by will to A. or her issue." The division of the property was made on the footing of that recital being true. On the death of A., in 1870, her children filed a bill against the representatives of testatrix's trustees, to compel them to pay the whole of the share of the property bequeathed to their mother:—*Held*: plffs. were not bound by the deeds of 1850, & were entitled to have the £400 deducted from their mother's share, with interest from her death made good.—TAYLOR v. CARTWRIGHT (1872), L. R. 14 Eq. 167; 41 L. J. Ch. 529; 26 L. T. 571; 20 W. R. 603.

**4099. —.]—**Trustee not ready with accounts.]—The first duty of an agent, receiver, trustee, or

exor., is to be constantly ready with his accounts, & neglect in this, is a ground for charging him with interest.—PEARSE v. GREEN (1819), 1 Jac. & W. 135; 37 E. R. 327.

*Annotations:—*Consd. Springett v. Dashwood (1860), 2 Giff. 521. *Apld.* Fry v. Fry (1864), 10 Jur. N. S. 983; Harrant v. Blaine Macdonald (1887), 56 L. J. Q. B. 511. *Refd.* Blogg v. Johnson (1867), 2 Ch. App. 225; Turner v. Burkinshaw (1867), 2 Ch. App. 488.

**4100. —.]—**Trustee paying money to wrong person.—Payment to father of *cestui que trust*.]—Lands directed by a will to be sold & the produce divided. The lands were not sold, but were divided, & the share of A. remained vested in the trustees, one of whom was her father. Subsequently, this share was sold, & the money was not given over to the *cestui que trust*, nor invested for her benefit, but was paid to the father. On a bill filed for recovery of the money, the ct. held, that both the trustees were liable, although one of them signed the receipt for the sake of conformity only, & refused to make any allowance to the father for maintenance: & decreed that the trustees should repay the amount of the purchase-money with interest at 5 per cent.—ENGLISH v. WILLATS (1831), 1 L. J. Ch. 84.

**4101. —.]—**Trustee doubting identity of *cestui que trust*.]—HUTCHINS v. HUTCHINS, No. 3985, *ante*.

**4102. —.]—**Trustee acting on forged marriage certificate.]—EAVES v. HICKSON, No. 4012, *ante*.

**4103. —.]—**Trustee wrongly refusing to pay over money.]—D. claimed a fund as next of kin to J., who had sailed from England in 1814, & had never since been heard of. The fund came into possession of a trustee in 1844, who retained it in his own hands, & refused to pay it over to D. without direct & positive proof of the death of J.:—*Held*: the trustee must pay over the whole fund, together with interest at 5 per cent. from the time when he ought to have invested it.—DORSON v. LATTINSON (1857), 3 Jur. N. S. 1202; 5 W. R. 771.

**4104. —.]—**Trustee failing to pay over money when requested.—Loss through failure of bank.]—G., being entitled to a share of an estate, went abroad leaving a power of attorney to receive such share. The estate was sold, but the purchaser requiring G.'s confirmation, his share was deposited in the names of E. & P. in the bank on a declaration of trust. On the confirmation arriving, E. was repeatedly applied to for more than four months but neglected to hand the fund over, alleging a difficulty in making out the account; the bank failed, & the money was lost. On bill filed:—*Held*: E. was liable to restore the money with interest & pay the costs, P. being always ready to hand over.—GOUGH v. ETTY (1869), 20 L. T. 358.

**4105. —.]—**Interest not charged on income.]—*Re* MAGHERAMORNE'S ESTATE, HOGG v. HOGG, [1901] W. N. 152.

**Improper investment.]—**See Part VI., Sect. 7, sub-sect. 2, B., *ante*.

**Trustee in bankruptcy.]—**See BANKRUPTCY, Vol. IV., pp. 219, 220, Nos. 2045-2063.

**Charity trustees.]—**See CHARITIES, Vol. VIII., pp. 382, 413, Nos. 1963-1965, 2548.

**PART VII. SECT. 3, SUB-SECT. 2.—**  
**B. (a).**

**4093 i. Liability of trustees to pay interest.]—**Trustee retaining funds ordered to pay interest on amount due.—PLOMLEY v. SHIRPREED (1897), 18 N. S. W. L. R. (Eq.) 5; 13 N. S. W. W. N. 179.—*AUS.*

**4093 ii. —.]—**Although the ct. will order trustees to make good moneys

lost by neglect or default, it will not also charge them interest on those sums.—VANSTON v. THOMPSON (1864), 10 Gr. 542.—*CAN.*

**4093 iii. —.]—**Trustee bound to pay interest on money retained a length of time.—TRIMBLESTON v. HAMILL (1810), 1 Ball. & B. 385.—*IR.*

**4105 i. —.]—**Interest not charged on income.]—MACARTNEY'S EXECUTORS v.

BLACKWOOD'S EXECUTORS (1795), Ridg. L. & S. 602.—*IR.*

**q. —.]—**Trustee refusing to sign discharge to assurance company.]—LYNEDECH (LORD) v. OUCHTERLODY (1832), 11 Sh. (Ct. of Sess.) 60.—*SCOT.*

**r. —.]—**Benefit to trust.]—MILLS v. BROWN'S TRUSTEES (1901), 3 F. (Ct. of Sess.) 1012; 3 Sc. L. R. 741; 9 S. L. T. 121.—*SCOT.*



**Arrears of interest on legacies.]—**See LIMITATION OF ACTIONS, Vol. XXXII., p. 421, Nos. 979-981.

**Right of tenant for life to interest—Until conversion.]—**See SETTLEMENTS, Vol. XL., pp. 674-677, Nos. 2101-2131.

(b) *Rate of Interest.*

**Interest, generally, see MONEY & MONEY LENDING, Vol. XXXV., pp. 191-199.**

**4106. Normal rate charged.]—**YOUNGE v. COMBE (1798), 4 Ves. 101; 31 E. R. 52.

**4107. —.]—**HOOKE v. PLATTS (1837), 1 Jur. 473.

**4108. —.]—**Where testator directs his trustees to invest trust moneys in Parliamentary stocks or funds, or on real securities, & they omit so to invest it, the *cestuis que trust* have not the option of charging them with the moneys which would have been produced if the moneys had been invested in the funds, but are only entitled to have the trust moneys replaced, with interest at 4 per cent.—ROBINSON v. ROBINSON (1851), 1 De G. M. & G. 247; 21 L. J. Ch. 111; 18 L. T. O. S. 293; 16 Jur. 255; 42 E. R. 547, L. J.

**Annotations:—***Apld.* Knott v. Cottee (1852), 16 Beav. 77; Fisher v. Gilpin (1869), 38 L. J. Ch. 230. *Distd.* De Cordova v. De Cordova (1879), 4 App. Cas. 692. *Consd.* Re Massingberd's Settlement, *Re* Clark's Settlement, Clark v. Trevelyan (1889), 59 L. J. Ch. 107. *Apld.* *Re* Campbell, Campbell v. Campbell, [1893] 3 Ch. 443. *Reid.* Aspland v. Watte (1855), 20 Beav. 474; *Re* Godwin's Settlement, Godwin v. Godwin (1918), 87 L. J. Ch. 645. *Mentd.* Morgan v. Morgan (1851), 14 Beav. 72; Mortimore v. Mortimore (1859), 4 De G. & J. 472; Bradley v. Cartwright (1867), L. R. 2 C. P. 611; Cavendish v. Cavendish (1885), 30 Ch. D. 227; *Re* Christmas, Martin v. Lacon (1885), 30 Ch. D. 544; Molquham v. Taylor, [1895] 1 Ch. 53.

**4109. —.]—**An exor. & trustee having for several years retained funds in his hands uninvested which he ought to have invested:—*Held*: not to be chargeable with interest at 5 per cent. or upon the principle of annual rents but with simple interest only at 4 per cent., there being no circumstances to lead to the conclusion that he had made any profit by his misconduct.—A-G v. ALFORD (1855), 4 De G. M. & G. 843; 3 Eq. Rep. 952; 24 L. T. O. S. 265; 1 Jur. N. S. 361; 3 W. R. 200; 43 E. R. 737, L. C.

**Annotations:—***Consd.* Penny v. Avison (1856), 28 L. T. O. S. 142. *Expld.* Berwick-upon-Tweed Corp. v. Murray (1857), 7 De G. M. & G. 497. *Distd.* Townend v. Townend (1859), 1 Giff. 201. *Apld.* Burdick v. Garrick (1870), 5 Ch. App. 233. *Consd.* Vyse v. Foster (1872), 8 Ch. App. 309; Price v. Price (1880), 42 L. T. 626. *Apld.* Gilroy v. Stephens (1882), 51 L. J. Ch. 834. *Consd.* *Re* Hulkes, Powell v. Hulkes (1886), 33 Ch. D. 552. *Distd.* *Re* Barclay, Barclay v. Andrew, [1899] 1 Ch. 674; Silkstone & Haigh Moor Coal Co. v. Edey, [1900] 1 Ch. 167. *Reid.* Blogg v. Johnson (1867), 2 Ch. App. 225; Phillips v. Homfray (1890), 44 Ch. D. 694.

**4110. —.]—**By will, dated in 1825, testatrix gave "£500 to be laid out at interest: & if my sister B. survive her husband, she to have the interest, both what may have accumulated, & during her life. If B. die before her husband, the principal & accumulated interest to be divided equally between her daughters. My remaining property I will have made the most of till B.'s youngest daughter attain twenty-five years, when the daughters of B. are to take it: & if but one, she to take it all." Testatrix died in 1831. B. died in 1855, in the lifetime of her husband. B. had one daughter, who attained twenty-five in 1832, & married plaintiff. On attaining twenty-

five she had signed a settlement of accounts with the acting trustee, deft. P., by which only simple interest at 4 per cent. was charged on the residuary estate. P. had retained all the moneys in his own hands:—*Held*: (1) there was an express trust for accumulating the legacy of £500 at compound interest; (2) the memorandum of 1832, regulating the mode of calculating interest on the residuary estate, did not bind pltf., in right of his wife, to calculate the interest of the £500 legacy in the same manner. Deft. the acting trustee was therefore charged with interest after the rate of 4 per cent. on the £500 legacy, compound interest for twenty-one years from the decease of testatrix, & simple interest after the twenty-one years.—WILSON v. PEAKE (1856), 3 Jur. N. S. 155.

**Annotation:—***As to* (2) *Distd.* *Re* Emmet's Estate, Emmet v. Emmet (1881), 17 Ch. D. 142.

**4111. —.]—**In 1845 the directors of a railway co., now represented by pltf., made an authorised advance to another railway co., now represented by deft., the members of the finance committees of the two cos. being the same. The object of this loan was to enable deft.'s co. to purchase a canal; & to effect this the money so advanced was paid by deft.'s co. to a canal co. The greater part of the money was recovered from the canal co. by deft.'s co. under a decree made in 1855, on a bill filed on behalf of the shareholders. The two cos. were wound up in 1849.

A bill was now filed by pltf., the official manager of the co. that made the loan, against deft., the official manager of the borrowing co., to recover out of the money refunded by the canal co. the balance due to pltf.'s co. in respect of the advance:—*Held*: the loan having been a breach of trust, of which deft.'s co. had notice, pltf.'s claim was not barred by Stat. Limitations, & he was entitled to recover the amount claimed with interest at 4 per cent. from the time when the money was received from the canal co.—ERNEST v. CROYSBILL (1860), 2 De G. M. & J. 175; 29 L. J. Ch. 580; 2 L. T. 616; 6 Jur. N. S. 740; 8 W. R. 736; 45 E. R. 589, L. J.

**Annotations:—***Reid.* Hardy v. Metropolitan Land & Finance Co. (1872), 41 L. J. Ch. 257; *Re* Eyre-Williams, Williams v. Williams (1923), 129 L. T. 218. *Mentd.* Ernest v. Weiss (1862), 2 Drew. & Sm. 561.

**4112. —.]—**(1) Trustees, in breach of trust, lent trust money to one of them, H. & his partners in trade. H. & his partners gave their bond to H. & his co-trustees for the amount, payable with interest at 5 per cent. No action at law could be maintained on the bond. In a suit to make the trustees liable for a breach of trust:—*Held*: H. was only liable to pay 4 per cent. on the loss which had occurred to the trust funds.

(2) If any one of the trustees should pay the whole he may come against the others for contribution (ROMILLY, M.R.).—FLETCHER v. GREEN (1864), 33 Beav. 426; 55 E. R. 433; *subsequent proceedings*, 33 Beav. 513.

**Annotation:—***Mentd.* Marler v. Tommas (1873), L. R. 17 Eq. 8.

**4113. —.]—**Applts. were a joint stock co., registered under Co. Act, 1862, (c. 89), the objects of the assocn. including the negotiation of loans, & the transaction generally of the business of a capitalist. A clause in the arts. of assocn. was, so far as is material, in the following terms:—"Disqualification of directors. The office of a director

PART VII. SECT. 3, SUB-SECT. 2.—

B. (b).

**4106 i. Normal rate charged.]—**DARLING v. ADAMSON (1834), 12 Sh. (Gt. of Sess.) 598.—SCOT.

**4106 ii. —.]—**Trustees had im-

properly paid away trust funds, but had not made, or attempted to make, any profit for themselves:—*Held*: they were liable in interest on the sums so paid away at 3 per cent. as being the average rate of trust interest.—

HERITABLE SECURITIES INVESTMENT ASSOCN. v. MILLER'S TRUSTEES (1893), 20 R. (Gt. of Sess.) 675; 30 Sc. L. R. 354.—SCOT.

**t. Higher rate charged—Improper retention of trust money.]—**The estate



Sect. 3.—Liability of trustees : Sub-sect. 2, B. (b). ]

shall be vacated : . . . 3rd. If he contracts with the co., or is concerned in, or participates in, the profits of any contract with the co., or participates in the profit of any work done for the co., without declaring his interest at the meeting of directors at which such contract is determined on, or work ordered, if his interest then exists, or in any other case at the first meeting of the directors after the acquisition of his interest, & no director so interested shall vote at any meeting, or on any committee of the directors, on any question relating to such contract or work."

Resps., K. & C., were stockbrokers, carrying on business in partnership as K. C. & co. C. was a director of applt. co., & he was also a member of a temporary board, by which the business of the co. was for a time conducted. C. agreed with contractors for a railway to place certain debentures of that railway at a commission of 5 per cent.

The firm of K. C. & co. then made a proposal to applt. co. to place these shares at  $1\frac{1}{2}$  per cent. This proposal was submitted to a committee, of which C. was not a member, who recommended its acceptance, & subsequently the recommendation of the committee was adopted by the temporary board. C. was present at the meeting of the temporary board, & at the time stated that he was interested in the sale of the debentures, & offered to leave the room while the proposal was discussed. The chairman told him that this was unnecessary, & C. accordingly remained in the room. On a bill filed by applt. co., praying the repayment by K. & C. of the profits made by them, viz.  $3\frac{1}{2}$  per cent. on the amount of the debentures placed :—*Held* : resps. were bound to refund, the fiduciary position of C. forbidding him to make a profit out of the funds of the assocn. ; the transaction was not protected by the clause in the arts. of assocn., since C. did not "declare his interest" within the meaning of that clause, i.e. the nature, as well as the existence, of his interest ; & K. & C. were jointly & severally liable for the whole amount claimed ; no fraud having been intended, & C. having acted on the honest belief that he had brought himself within the terms of the clause in the arts. of assocn., interest should be ordered at the rate of 4, & not of 5 per cent.—*IMPERIAL MERCANTILE CREDIT ASSOCN. (LIQUIDATORS) v. COLEMAN* (1873), L. R. 6 H. L. 189 ; 42 L. J. Ch. 644 ; 29 L. T. 1 ; 21 W. R. 696, H. L.

*Annotations* :—*Consd.* *Silkstone & Haigh Moor Coal v. Edey* (1899), 69 L. J. Ch. 73. *Refd.* *Panama & South Pacific Telegraph Co. v. Indiarubber Gutta Percha & Telegraph Co.* (1875), 10 Ch. App. 520, n. ; *Chesterfield & Boythorpe Colliery Co. v. Black* (1877), 26 W. R. 207 ; *Bagnall v. Carlton* (1877), 6 Ch. D. 371 ; *New Sombroero Phosphate Co. v. Erlanger* (1877), 5 Ch. D. 73 ; *Emma Silver Mining Co. v. Grant* (1879), 11 Ch. D. 918 ; *Costa Rica Ry. v. Forwood*, [1901] 1 Ch. 746 ; *Transvaal Land Co. v. New Belgium (Transvaal) Land & Developing Co.*, [1914] 2 Ch. 488. *Mentd.* *Dunne v. English* (1874), L. R. 18 Eq. 524 ; *Re Coal Economising Gas Co. Gover's Case* (1875), 1 Ch. D. 182 ; *Boston Deep Sea Fishing & Ice Co. v. Ansell* (1888), 59 L. T. 345 ; *Turnbull v. West Riding Athletic Club Leeds* (1894), 70 L. T. 92 ; *Cackett v. Kewick*, [1902] 2 Ch. 456.

**4114.** —[—]—By a marriage settlement, made in 1846, a policy of assurance on the life of K., the husband, was assigned to two trustees, C. & J., the husband covenanting to keep up the policy. J. was unaware of his having been appointed a trustee, & on becoming aware of it, in 1872,

disclaimed. C. gave no notice of the settlement to the assurance society, & did not indorse on the policy any memorandum of the settlement. In 1854 C. purported to appoint W. sole trustee of the settlement, & handed over the policy to him. W. allowed K. to get possession of the policy, & K., after receiving a bonus on it, mortgaged it, & the mtgee. subsequently surrendered it to the assurance society. There were no funds available for keeping up the policy, & K. had been in straitened circumstances for some time previous to the mtge. He died in 1869. In the view of the ct., C. was aware when he handed over the policy to W. that a breach of trust was contemplated :—*Held* : C. & W. were jointly & severally liable, W. primarily as between themselves, for the sum received on the surrender of the policy, & for that received by K. on account of the bonus, with compound interest at 4 per cent. from the dates when these sums were respectively received, until the date of K.'s death, & simple interest thenceforward up to the date of the account.—*KINGDON v. CASTLEMAN* (1877), 46 L. J. Ch. 448 ; 36 L. T. 141 ; 25 W. R. 345.

**4115.** —[—]—A woman who was married in 1854 received in 1876 a legacy of £300 given for her separate use, but was forcibly deprived of the money by her husband, who knew that it was a legacy. During the husband's lifetime the wife frequently asked him for the money ; but no proceedings to recover it were taken until after his death, which occurred in 1891 :—*Held* : the husband was affected with notice of the separate use, & was a trustee of the money for his wife ; Stat. Limitations was no defence to proceedings by her against his exors. ; & the wife was entitled to be paid the amount of the legacy, with interest at 4 per cent. from the date of her husband's death.—*WASSELL v. LEGGATT*, [1890] 1 Ch. 554 ; 65 L. J. Ch. 240 ; *sub nom. Re WASSELL, WASSELL v. LEGGATT*, 74 L. T. 99 ; 44 W. R. 298 ; 12 T. L. R. 208 ; 40 Sol. Jo. 276.

**4116.** *Higher rate charged—Trustee guilty of direct breach of trust.*—[The rule is . . . that, when an exor. or trustee, instead of executing the trust, as he ought, by laying out the property either in well secured real estates or upon Govt. securities, takes upon him to dispose of it in another manner, the *cestuis que trust* may call him to an account either way ; having an option to make him replace it, or if it is for their benefit to affirm his conduct, & take what he has sold it for, they may take that & charge him with 5 per cent. interest ; or if he has made more, they may charge him with that (GRANT, M.R.).—*POCOCK v. REDDINGTON* (1801), 5 Ves. 794 ; 31 E. R. 862.

*Annotations* :—*Consd.* *Tobbs v. Carpenter* (1816), 1 Madd. 290 ; *Docker v. Somes* (1834), 2 My. & K. 655. *Refd.* *Law v. Hunter* (1826), 1 Russ. 100.

**4117.** —[—]—*ENGLISH v. WILLATS*, No. 4100, *ante*.

**4118.** —[—]—A. being a partner in a mercantile house in India was entitled to the interest of a sum of money which was limited to his sons on his dying within a given period. The firm in India, at A.'s death, within that period, was greatly indebted to their agents in England of which firm B., the administrator, was a partner. After A.'s death notice was given to the firm in England of there being male issue of A. but not stating their names. B. subsequently received the dividends

of a trustee who had retained money in his hands for 6 years after he should have paid it over, & had rendered an account claiming a balance in his favour :—*Held* : chargeable with inter-

est at 6 per cent. with annual rests.—*SMALL v. ECCLES* (1865), 12 Gr. 37.—*CAN.*

**a.** —[—]—*& mixing with own money.*—Where a trustee had retained

moneys instead of paying off debts, & had improperly mixed these moneys with his own at his bank, the ct. charged him with interest at 8 per cent. on all balances in his hands.—*WIGHTMAN v.*

& credited the Indian firm with the amount in the books of the English firm:—*Held*: the partners of the English firm were liable to repay such dividends with interest at 5 per cent.—*AGABEG v. HARTWELL* (1835), 4 L. J. Ch. 190; *subsequent proceedings* (1842), 5 Beav. 271.

**4119.** ———.]—*MOUSLEY v. CARR*, No. 4202, *post*.

**4120.** ———.]—*HUTCHINS v. HUTCHINS*, No. 3985, *ante*.

**4121.** ———.]—(1) Generally an exor. improperly retaining balances is charged with interest at 4 per cent. but if in addition he commits a breach of trust or changes money from a proper to an improper state of investment he is charged 5 per cent.

(2) If he employ the trust money in trade he will be charged either with the profits or 5 per cent. compound interest.—*JONES v. FOXALL* (1852), 15 Beav. 388; 21 L. J. Ch. 725; 51 E. R. 588.

*Annotations*:—*As to* (2) *Dbdd*. *Vyse v. Foster* (1874), L. R. 7 H. L. 318. *Reid*. *Re Wilcoxon, Ex p. Andrews* (1884), 25 Ch. D. 505.

**4122.** ———.]—*DOBSON v. PATTINSON*, No. 4103, *ante*.

**4123.** ———.]—Where a defaulting trustee has misapplied trust money the ct. will charge him with 5 per cent. interest unless it be shown that he has made more by the uses of it.

If it is supposed that in *A.-G. v. Alford*, No. 4109, *ante*, I laid it down that a defaulting trustee could never be charged with more than 4 per cent. that is quite a mistaken assumption of my meaning. In that case I thought that though the trustee was chargeable with impropriety of conduct yet that the circumstances of the case showed that it was impossible to impute to him an intention to appropriate the moneys to his own use. In such a case I expressed myself as clearly of opinion that the ct. would be justified in dealing most rigorously & charging the trustee with 5 per cent. whether he had made it or not (*LORD CRANWORTH, C.*).—*BERWICK-UPON-TWEED CORPN. v. MURRAY* (1857), 7 De G. M. & G. 497; 26 L. J. Ch. 201; 3 Jur. N. S. 847; 44 E. R. 194, L. C.

**4124.** ———.]—Where default has been made in performance of covenant to pay a sum of money the ct. will allow interest at 5 per cent.—*KNAPP v. BURNABY* (1861), 30 L. J. Ch. 844; 5 L. T. 52; 9 W. R. 765.

*Annotation*:—*Apld*. *Re Horner, Fooks v. Horner*, [1896] 2 Ch. 188.

**4125.** ———.]—*Trustee obtaining advantage from position.*—(1) T., a solr., had a private arrangement with R., by which he was to receive from R. a share in certain property then belonging to R., & to share the profit to be obtained from the sale of that property. In his character of solr., T. acted for clients, a banking co., in the purchase of the larger portion of that property, never communicating to his clients the fact of his having an interest in it:—*Held*: T. was to be treated as a trustee for his clients in respect of his share of so much of the property as they had actually purchased.

(2) T., having made a large profit on the sale, was ordered to pay back the amount of this profit with the full amount of interest given in cases of a breach of trust, namely, 5 per cent.—*TYRRELL v. BANK OF LONDON* (1862), 10 H. L. Cas. 26; 31 L. J. Ch. 369; 6 L. T. 1; 8 Jur. N. S. 849; 10 W. R. 349; 11 E. R. 934, H. L.; *varging* S. C.

*sub nom.* *BANK OF LONDON v. TYRRELL* (1859), 27 Beav. 273.

*Annotations*:—*As to* (1) *Consd*. *Re Masons' Hall Tavern Co., Origl's Case* (1869), 21 L. T. 221. *Distd*. *Masons' Hall Tavern Co. v. Nokes* (1870), 22 L. T. 503; *Re Cape Breton Co.* (1885), 29 Ch. D. 705. *Reid*. *Imperial Mercantile Credit Asscn. v. Coleman* (1871), 6 Ch. App. 562, n.; *Kimber v. Barber* (1872), 8 Ch. App. 56; *Lindsay Petroleum Co. v. Hurd* (1874), L. R. 5 P. C. 221; *Albion Steel & Wire Co. v. Martin* (1875), 24 W. R. 134; *New Sombrero Phosphate Co. v. Erlanger* (1877), 5 Ch. D. 73; *Omnium Electric Palaces v. Baines*, (1914) 1 Ch. 332. *Generally*. *Mentd*. *Re Western of Canada Oil, Lands & Works, Carlings Case* (1875), L. R. 20 Eq. 580; *Re Haslam & Hier-Evans* (1902), 46 Sol. Jo. 233.

**4126.** ———.]—*Failure to get in trust estate.*—The trustee allowed wine & spirits of the amount of £130 to remain in debtor's possession, which was eventually lost to the estate:—*Held*: the trustee must personally make good the loss, with interest at 5 per cent.—*Re PILLING, Ex p. OGLE, Ex p. SMITH* (1873), 8 Ch. App. 711; 42 L. J. Bcy. 99, L. JJ.

**4127.** ———.]—*Investing on insufficient security.*—(1) A deceased trustee had invested money on mtge. at 5 per cent. on an insufficient security, & for some years, both before & after his decease, interest was paid at that rate to the *cestui que trust*; but some years after his decease the payments of interest ceased:—*Held*: his estate was chargeable with interest at the rate of 5 per cent. from the time of the last payment.

(2) Where two co-exors. of a trustee, one of them a solr., were jointly liable in respect of a breach of trust committed by their testator, the solr. having had the sole management of the trust estate, & having resorted to vexatious means to evade legal proceedings, an order was made, as between him & his co-trustee, that the latter was entitled to recover from him the whole costs of the action.—*PRICE v. PRICE* (1880), 42 L. T. 626.

**4128.** ———.]—Where trustees & exors. after payment of testator's debts kept the balance of the personal estate at their bankers the ct. charged them with interest on the balance at 5 per cent. from the date of the payment of the debts but allowed them their costs.—*Re JONES, JONES v. SEARLE* (1883), 49 L. T. 91.

**4129.** ———.]—*Misrepresentation by trustee that money invested in stock.*—*BATE v. SCALES*, No. 4150, *post*.

**4130.** ———.]—*Trustee using trust money in business.*—*HEATHCOTE v. HULME*, No. 4152, *post*.

**4131.** ———.]—*Bequest of personal estate in trust, to invest it in govt. or real securities, & to permit the interest to accumulate until it amounted to £500, & from time to time, when it amounted to that sum, to lay out or invest such interest in govt. or real securities, to be applied in the same manner as the principal; the trustees retaining the trust moneys in their business, an inquiry was directed that would have been the amount of the personal estate, & the interest thereof, if it had been invested, & accumulated in the manner directed by the will, & the trustees were decreed to pay the amount, & were charged with interest at 5 per cent., on a balance in their hands.*—*BROWN v. SANSOME* (1825), M'Cle. & Yo. 427; 148 E. R. 480.

**4132.** ———.]—*COTHAM v. WEST* (1837), Donnelly, 199; 47 E. R. 319.

**4133.** ———.]—*JONES v. FOXALL*, No. 4121, *ante*.

**4134.** ———.]—It is still the rule of the ct. that a trustee who employs trust moneys in trade

*HELLIWELL* (1867), 13 Gr. 330.—*CAN.*

*b.* ———.]—*SINCLAIR v. STUART* (1887), 5 N. Z. L. R. C. A.

191.—*N.Z.*

*c.* ———.]—*Conversion of trust fund to own use.*—Where a trustee has converted a trust fund to his own use,

simple interest at 7 per cent. was allowed on the converted fund.—*MACKENZIE v. MACKENZIE* (1894), 12 N. Z. L. R. 590.—*N.Z.*

**Sec. 3.—Liability of trustees: Sub-sect. 2, B. (b), & C.]**

or speculative transactions must account for the profit he makes by such employment or, at the option of the *cestuis que trust*, be charged with interest at the rate of 5 per cent.—*Re DAVIS, DAVIS v. DAVIS*, [1902] 2 Ch. 314; 71 L. J. Ch. 539; 86 L. T. 523; 51 W. R. 8.

**4135. — Trustee obtaining advantage from position.]**—The order to take an account with rests, is always a matter entirely discretionary with the ct., on a consideration of the circumstances. Where A. held funds, part of the estate of B., but held them as security to cover liabilities into which he had entered on account of B., the estate itself being otherwise clearly answerable for such liabilities, & where the creditors of B. had not required him to invest the balance which might probably exist after his liabilities had been indemnified:—*Held*: in the absence of any positive stipulation, he was not, on the final settlement of accounts with the creditors, bound to pay a larger interest than 5 per cent. on the money he had so retained; & the account was not to be taken with rests.

Under such circumstances, if the fund had been paid into ct., it would have realised 4 per cent. with yearly or half-yearly rests, which being equal to 5 per cent. without rests, A. was held liable to that interest, on the equitable principle of putting the creditors into the same situation as if he had paid the fund into ct. in the ordinary manner.—*COURT v. ROBERTS* (1839), 6 Cl. & Fin. 65; 7 E. R. 622, H. L.

**4136. — Trustees using money for own benefit.]**—When a trustee has employed trust funds for his own benefit, he will be charged as of course with simple interest at 5 per cent. But compound interest will only be given when it is proved that the money has been used in trade, & the payment by a solr. of it into his bank to the general account of his firm is not such an employment of the money in trade as to make him liable to be charged with compound interest. *Qu.*: whether it can under any circumstances be given unless a case is made out for it on the bill.—*BURDICK v. GARRICK* (1870), 5 Ch. App. 233; 39 L. J. Ch. 369; 18 W. R. 387, L. C. & L. J.

*Annotations*:—*Consd.* *Gilroy v. Stephens* (1882), 51 L. J. Ch. 834. *Distd.* *Phillips v. Homfray* (1890), 44 Ch. D. 694; *Silkstone & Haigh Moor Coal Co. v. Edey*, [1900] 1 Ch. 167. *Reid.* *Banner v. Berridge* (1881), 18 Ch. D. 254; *Re Exchange Banking Co., Filmeroff's Case* (1882), 21 Ch. D. 519; *Re Bell, Lake v. Bell* (1886), 34 Ch. D. 462; *Charles v. Jones* (1887), 35 W. R. 645; *Sonn v. Ashwell*, [1893] 2 Q. B. 390; *Dominion Coal Co. v. Maskinonge S.S. Co.*, [1922] 2 K. B. 132. *Mentd.* *Gray v. Bateman* (1872), 21 W. R. 137; *Boatwright v. Boatwright* (1873), 43 L. J. Ch. 12; *Merry v. Nickalls* (1873), 42 L. J. Ch. 479; *Watson v. Woodman* (1875), L. R. 20 Eq. 721; *Dooby v. Watson* (1888), 39 Ch. D. 178; *Lyell v. Kennedy, Kennedy v. Lyell* (1889), 14 App. Cas. 437; *Re Sharpe, Re Bennett, Masonic & General Life Assoc. v. Sharpe*, [1892] 1 Ch. 154; *Friend v. Young*, [1897] 2 Ch. 421; *North American Land & Timber Co. v. Watkins*, [1904] 1 Ch. 242; *Reid-Newfoundland Co. v. Anglo-American Telegraph Co.*, [1912] A. C. 655; *Henry v. Hammond*, [1913] 2 K. B. 515; *Re Allsop, Whitaker v. Bamford*, [1914] 1 Ch. 1; *Nocton v. Ashburton*, [1914] A. C. 932; *Re Richardson, Pole v. Pattenenden*, [1920] 1 Ch. 423; *Taylor v. Davies*, [1920] A. C. 636.

**4137. When compound interest charged.]**—*COTHAM v. WEST* (1837), Donnelly, 199; 47 E. R. 319.

**4138. —.]**—*HUTCHINS v. HUTCHINS*, No. 3985, *ante*.

**4139. —.]**—*KINGDON v. CASTLEMAN*, No. 4114, *ante*.

**4140 i. When compound interest charged—Direction for accumulation.]**—A trustee who fails to carry out a trust to invest a sum of money &

accumulate the interest must repay the principal with compound interest for the period allowed by law for the

**4140. — Direction for accumulation.]**—*WILSON v. PEAKE*, No. 4110, *ante*.

**4141. —.]**—Where there is an express direction to accumulate trust property, & the accumulation is not made, the trustees are liable to account upon the footing of yearly or half-yearly rests.—*FELTHAM v. TURNER* (1870), 23 L. T. 345.

**4142. —.]**—The trustee of a will held a fund upon trust, after the determination of a previous life interest, to transfer & pay same to a child when & as he should attain twenty-one, with a proviso that in case the child should be under age at the determination of the life interest the income of the fund or any part thereof should or might be applied for or towards his maintenance, education, & advancement, & the surplus, if any, should accumulate to & become part of the fund. After the child attained twenty-one, the life interest having previously determined, the trustee retained the fund without making any arrangement with the child or explaining to him his rights:—*Held*: the trustee must be taken to have continued to hold the fund after the child attained twenty-one, upon the same trusts & with the same obligations to accumulate as before, & he was liable to account for the fund with compound interest.—*Re EMMET'S ESTATE, EMMET v. EMMET* (1881), 17 Ch. D. 142; 50 L. J. Ch. 341; 44 L. T. 172; 29 W. R. 464.

*Annotation*:—*Consd.* *Re Barclay, Barclay v. Andrew*, [1899] 1 Ch. 674.

**4143. — Money used in trade.]**—*JONES v. FOXALL*, No. 4121, *ante*.

**4144. —.]**—*BURDICK v. GARRICK*, No. 4136, *ante*.

—*See* *EXECUTORS*, Vol. XXIV., pp. 699, 701, 702, 707, Nos. 7244, 7269-7275, 7322.

*C. Accounting for Profits.*

*See, also*, *EXECUTORS*, Vol. XXIV., pp. 688-696, Nos. 7145-7207.

**Duty of trustee not to obtain personal advantage.]**—*See* Part IV., Sect. 10, *ante*.

**4145. Duty of trustees to account.]**—If such trustee were to have the money, he would reap a benefit from his own wrong (*LORD HARCOURT, C.*).—*KENTISH v. NEWMAN* (1713), 1 P. Wms. 234; 24 E. R. 368, L. C.

*Annotations*:—*Mentd.* *Targus v. Parget* (1751), 2 Ves. Sen. 194; *Lloyd v. Lloyd* (1837), 2 My. & Cr. 102; *Abbott v. Middleton, Ricketts v. Carpenter* (1858), 7 H. L. Cas. 68.

**4146. —.]**—*LUDLOW CORPN. v. GREENHOUSE*, No. 4630, *post*.

**4147. —.]**—*Re GUNDRY, Ex p. BADCOCK* (1829), Mont. & M. 231, L. C.

*Annotations*:—*Distd.* *Farrar v. Farrars* (1888), 40 Ch. D. 395. *Mentd.* *Re Garbett, Ex p. Downes* (1847), De G. 390.

**4148. —.]**—Owners of shares in a mine in Cornwall became bkpts. in 1820, & their assignees, at a meeting of shareholders, signed a relinquishment of the shares of bkpt. Subsequently, the whole mine was sold to an order in a creditor's suit in the Stannaries Ct. in Cornwall. At this sale, in June, 1820, one of the assignees purchased the whole mine, & afterwards, in June, 1820, sold four forty-fifth shares to the trustees of deft., who was then a minor. New assignees of bkpt. were appointed in 1829, & they, in 1835, filed the present bill:—*Held*: deft. was a trustee, & must account for the whole of the profits to bkpt.'s estate.—

accumulation & thereafter at simple interest.—*MOSS v. MOSS* (1898), 19 N. S. W. Eq. 146.—**AUS.**

TURNER v. TRELAWNY (1841), 12 Sim. 49; 10 L. J. Ch. 249; 5 Jur. 698; 59 E. R. 1049.

Annotation:—*Distd.* Farrar v. Farrars (1888), 40 Ch. D. 395.

4149. —. —. —.]—A testator appointed two trustees & exors. of his will, but by a codicil he excluded them & appointed two other persons. One of these retired in consideration of £75, paid to him by one of the excluded trustees, & executed a deed appointing the excluded trustee to act as trustee in his room. The ct. directed the new trustee to be removed, & the deed to be cancelled, declared the conveyance to be void & directed the £75 to form part of the assets.

Profit derived by a trustee, either from the trust property or from his office of trustee, belongs to the *cestui que trust*.

It is a well-settled principle that if a trustee make a profit of his trusteeship, it shall enure to the benefit of his *cestuis que trust* (STUART, V.-C.).—SUGDEN v. CROSSLAND (1856), 3 Sm. & G. 192; 25 L. J. Ch. 563; 26 L. T. O. S. 307; 2 Jur. N. S. 318; 4 W. R. 343; 65 E. R. 620.

Annotation:—*Refd.* *Re* Thorpe, Vipont v. Radcliffe, [1891] 2 Ch. 360.

4150. —. —. —.]—BOWES v. TORONTO (CITY) (1858), 11 Moo. P. C. C. 463; 14 E. R. 770, P. C.

Annotation:—*Refd.* Vyse v. Foster (1872), 8 Ch. App. 309.

4151. —. —. —.]—Use of trust money in trade.—Option to *cestui que trust* to have profits or interest.—Where a trustee has an infant's money to lay out for his benefit, & employs it in his trade, the ct. will give an option for the benefit of the infant, either to have interest, or the profits of the trade.—ANON. (1755), 2 Ves. Sen. 629; 28 E. R. 401.

4152. —. —. —.]—(1) Where trust property is employed in trade without authority, *cestuis que trust* must elect to take either the profits for the whole period, or interest for the whole period. Circumstances may arise to entitle them to take profits for one, & interest for another part of the period; but a notice of dissolution of partnership, published for a particular purpose, & not accompanied by a settlement of accounts, or a transfer of the property, is not sufficient.

(2) Interest to be computed at 5 per cent. when the property has been employed in trade.—HEATHCOTE v. HULME (1819), 1 Jac. & W. 122; 37 E. R. 322.

Annotations:—As to (1) *Refd.* Docker v. Somes (1834), 2 My. & K. 655; Agabeg v. Hartwell (1835), 4 L. J. Ch. 190; Wightwick v. Lord (1857), 6 H. L. Cas. 217; Vyse v. Foster (1872), 8 Ch. App. 315, n.

4153. —. —. —.]—COTHAM v. WEST (1837), Donnelly, 199; 47 E. R. 319.

4154. —. —. —.]—If a person who takes upon himself the *onus* of a trust, will embark the property of the *cestuis que trust*, in the risks of trade, he is bound to account for the profits (WIGRAM, V.-C.).—WILLETT v. BLANFORD (1842), 1 Hare, 253; 11 L. J. Ch. 182; 6 Jur. 274; 66 E. R. 1027.

Annotations:—*Consd.* Simpson v. Chapman (1853), 4 De G. M. & G. 154. *Refd.* Portlock v. Gardner (1842), 1 Hare, 594; Wedderburn v. Wedderburn (No. 4) (1856), 22 Beav. 84; Vyse v. Foster (1874), L. R. 7 H. L. 318; Yates v. Finn (1880), 13 Ch. D. 839.

—.]—*See, also*, EXECUTORS, Vol. XXIV., pp. 690, 691, Nos. 7159-7170.

4155. —. —. —.]—Profit made by sale of trust property.—K. & S. being trustees of money in the funds, sell it for the benefit of S., who dies insolvent, & K. becomes bkpt., the person interested in the funds may prove against the estate of K. the value of the funds at the bkpcy. though S.'s

estate be first liable.—*Re* KEMPSON, *Ex p.* SHAKE-SHAFT (1791), 3 Bro. C. C. 197; 29 E. R. 487, L. C.

Annotation:—*Refd.* *Re* Fenwick, *Ex p.* Brown (1849), 13 L. T. O. S. 468.

4156. —. —. —.]—An agent, who was to have no emolument beyond his salary, decreed to account for profit made by a clandestine sale to his principal on his own account.—MASSEY v. DAVIES (1794), 2 Ves. 317; 30 E. R. 651.

Annotation:—*Refd.* Morison v. Thompson (1874), L. R. 9 Q. B. 480.

4157. —. —. —.]—TYRRELL v. BANK OF LONDON, No. 4125, *ante*.

4158. —. —. —.]—Profit made by use of trust property.—Option to *cestui que trust* to have profits or interest.—POCOCK v. RENDINGTON, No. 4116, *ante*.

4159. —. —. —.]—Misrepresentation by trustee that fund invested in stock.—Option to *cestui que trust* to have profits or interest.—Trustees under a misrepresentation, that the fund was invested in stock, charged with interest at 5 per cent. upon the same principle as if they had sold out stock, & used the money: viz. an option to the *cestui que trust* to have the actual profit, or 5 per cent.—BATE v. SCALES (1806), 12 Ves. 402; 33 E. R. 152.

Annotations:—*Refd.* Blair v. Bromley (1847), 2 Ph. 354; Moore v. Knight, [1891] 1 Ch. 547.

4160. —. —. —.]—Failure to receive profit through wilful default.—Mtgce. in possession & trustee guilty of a breach of trust, are the only cases where parties are charged with what they might have received but for their wilful default.—HOWELL v. HOWELL (1837), 2 My. & Cr. 478; 1 Jur. 402; 40 E. R. 722, L. C.

4161. —. —. —.]—Danger of loss no defence.—It is no answer to the rule, that persons standing in the situation of trustees or agents must account to their *cestuis que trust*, or principals, for all benefit which they themselves obtain by virtue of that character, that in the course of acquiring the benefit which has been derived by the trustee or agent he incurred a possibility of loss; it is sufficient if the transaction has resulted in gain obtained by virtue of the trusteeship or agency, to give the benefit to the *cestui que trust*.—WILLIAMS v. STEVENS (1866), L. R. 1 P. C. 352; 4 Moo. P. C. C. N. S. 235; 36 L. J. P. C. 21; 12 Jur. N. S. 952; 15 W. R. 409; 16 E. R. 305, P. C.

4162. —. —. —.]—Profit made by purchase of trust property.—The shareholders of a joint stock bank, in pursuance of a proposal of their directors, passed resolutions for the increase of their capital by the issue of twenty thousand new shares of £50 each, to be offered, in the first place, to the old shareholders in the proportion of one new share to each old share, each allottee paying £25 as a premium & £5 as a call per share, the shares unaccepted by the old shareholders to be sold by the directors to other persons at £30 premium per share, out of which each shareholder rejecting the allotment of new shares offered to him was to receive a cash bonus of £5 for each new share so rejected. The directors made an arrangement with S., by which he was to take all the unaccepted new shares at the premium of £30 per share, to be issued to him at the rate of one thousand a month. Under this arrangement nine thousand & seven hundred & seventy eight new shares were allotted to S., who paid thereon £5 per share, & procured the issued of them in batches as he found purchasers, the certificates in the meantime being retained by the bank until the £30 per share had been paid, when

#### PART VII. SECT. 3, SUB-SECT. 2.—C.

d. Whether trustee must account.—Profits made from own money.—Converting policy without profits into participating policy.—BAGNALL'S TRUSTS, FLYNN v. DALGLEISH, [1901] 1 I. R. 255.—IR.

*Sect. 3.—Liability of trustees: Sub-sect. 2, C. & D.*  
*(a) & (b).]*

the shares were registered in the names of the purchasers from S. Four of the directors, at the request of S., took over a large number of the new shares, at £30 per share, before they had been issued to S., & sold them at a considerable profit. Bonus shares in the co. were subsequently issued to the holders of the new shares, & a considerable number of these were allotted to the same four directors. The bank, by their public officer, subsequently filed a bill against the four directors, alleging that the issue of the new shares & the arrangement with S. was carried into effect in pursuance of a scheme & secret understanding between defts. & S., devised & entered into for their own profit. The bill, which was founded on the ground of fraud in reference to this alleged scheme & also on the ground of breach of trust arising out of the purchase by defts. as persons in a fiduciary position of trust property, sought to make defts. jointly & severally accountable for the profits made by them out of the transaction. The evidence in support of the allegations of fraud was extremely voluminous:—*Held*: so much of the bill as rested on fraud must be dismissed with costs, but defts. were trustees for the bank of the profits which they had made from the transaction, & must respectively account for the same.—*PARKER v. MCKENNA* (1874), 10 Ch. App. 96; 44 L. J. Ch. 425; 31 L. T. 739; 23 W. R. 271, L. C. & L. JJ.

*Annotations*:—*Distd.* Municipal Freehold Land Co. v. Pollington (1890), 2 Mor. 307. *Apld.* Delves v. Gray, [1902] 2 Ch. 606. *Refd.* Re Canadian Oil Works Corp'n., Hay's Case (1875), 10 Ch. App. 593; Nant-y-glo & Blaia Ironworks Co. v. Tamplin (1876), 35 L. T. 125; Bagnall v. Carlton (1877), 6 Ch. D. 371; Re West Jewell Tin Mining Co., Weston's Case (1879), 48 L. J. Ch. 425; Re Fitzroy Bessemer Steel, etc., Co. (1884), 50 L. T. 144; Re Postlethwaite, Postlethwaite v. Rickman (1888), 59 L. T. 58; Salford Corp'n. v. Lever (1890), 63 L. T. 658; Williams v. Scott, [1900] A. C. 499; Percival v. Wright, [1902] 2 Ch. 421; Armstrong v. Jackson, [1917] 2 K. B. 822; Wright v. Morgan, [1926] A. C. 788. *Mentd.* National Bank of Australasia v. United Hand-in-Hand & Band of Hope Co. (1879), 4 App. Cas. 391; Hopkinson v. Lovering (1883), 11 Q. B. D. 92; Guy v. Churchill & Sim (1886), 2 T. L. R. 855.

**4163.** — *Money received as bribe to neglect duty.*—Certain persons, who were owners of a concession from a foreign govt. combined together to form a co. to purchase the concession, knowing at the time that through their default it was voidable & liable to forfeiture. The owners & others who were promoters of the co. fraudulently sold the concession, being aware of the infirmity of the title, to trustees for the intended co., & it was transferred to the co. by the trustees, who were to be paid a portion of the purchase-money for their share in the transaction. The solrs. for the vendors, who were also solrs. for the co., concealed the invalidity of the title, & the trustees neglected to require evidence to establish the title. Upon a bill filed by the co. against the owners of the concession, the promoters, the trustees, the directors, & the solrs.:—*Held*: the owners & promoters must repay the whole purchase-money; the trustees who received money in the nature of a bribe for neglecting their duty must repay what they had so received; & all the defts., including the solrs. must pay the costs of the suit.—*PHOSPHATE SEWAGE Co. v. HARTMONT* (1877), 5 Ch. D. 394; 46 L. J. Ch. 661; 37 L. T. 9, C. A.; *affg.* (1876), 45 L. J. Ch. 465; *subsequent proceedings*,

*sub nom.* *PHOSPHATE SEWAGE Co. v. MOLLESON* (1879), 4 App. Cas. 801, H. L.

*Annotations*:—*Refd.* New Sombroero Phosphate Co. v. Erlanger (1876), 35 L. T. 309; Nant-y-glo & Blaia Ironworks Co. v. Grave (1878), 12 Ch. D. 738; Rees v. De Bernardy, [1896] 2 Ch. 437. *Mentd.* Metzler v. Wood (1875), 47 L. J. Ch. 139; Re Collie, *Ex p.* Adamson (1878), 8 Ch. D. 807.

**4164.** — *Profit made by illegal agreement.*—The E. Tramway Co.'s Act contained a sect. that the co. should pay the expenses of obtaining the Act. They contracted with the C. co. to lay the tramway, & pay such expenses of the Act. M., the solr., & B., the engineer, of the E. co. at the same time made a separate agreement with the C. co. to relieve the C. co. of these expenses for a sum of £17,000. The actual expenses did not amount to the latter sum:—*Held*: M. & B. were bound to account to the E. co. for the profit they made by their agreement with the C. co., their agreement being illegal & void; & even if the E. co. had adopted the agreement of M. & B., they would have acted *ultra vires*.—*MANN v. EDINBURGH NORTHERN TRAMWAYS Co.*, [1893] A. C. 69; 62 L. J. P. C. 74; 68 L. T. 96; 57 J. P. 245; 9 T. L. R. 102; 1 R. 86, H. L.

— *& pay interest—Rate of interest.*—*See* Sub-sect. 2, B. (b), *ante*.

— *Charity trustees.*—*See* CHARITIES, Vol. VIII., pp. 379–382, Nos. 1919–1966.

*D. Costs of Legal Proceedings.*

*(a) In General.*

*See* R. S. C., Ord. 65, r. 1.

**4165.** *General rule.*—Trustees who act contrary to their trust shall pay costs.—*HABERDASHERS Co. v. A.-G.* (1702), 2 Bro. Parl. Cas. 370; 2 Eq. Cas. Abr. 237; 1 E. R. 1003, H. L.

*Annotation*:—*Mentd.* A.-G. v. Smithies (1833), 2 L. J. Ch. 58.

**4166.** — *Generally*, where trustees are guilty of a breach of trust, they must pay the costs of a suit to repair it.—*BYRNE v. NORCOTT* (1851), 13 Beav. 336; 51 E. R. 130.

*Annotation*:—*Apld.* Bell v. Turner (1877), 47 L. J. Ch. 75.

*(b) Direct Breach of Trust.*

*See* R. S. C., Ord. 65, r. 1.

**4167.** *Trustee in debt to trust estate—Account controverted by trustee.*—Where on a bill to call a trustee to account, he by answer submits readily to it, though found in debt, shall pay interest for the balance only, from the time of the account liquidated, & no costs; *secus*, if he controverts the account there, if found in arrear, shall pay interest & costs.—*PARROT v. TREBY* (1705), Prec. Ch. 254; 1 Eq. Cas. Abr. 125; 24 E. R. 123.

**4168.** — *Insolvent co-trustee.*—C. & S. were two trustees of an estate administered by the ct. C. became bkpt. after 1869. A balance of £396 was found due from C. to the estate, & a balance of £745 was found due from the estate to the two trustees jointly. The insolvent trustee being indebted to the estate, & the solvent trustee not being responsible for that debt; & Bkpcy. Act, 1896 (c. 71), having made a debt arising from a breach of trust to continue notwithstanding the bkpcy.:—*Held*: a reference be directed to the taxing master to apportion the costs of the trustees appearing by the same solr., & the costs of the solvent trustee be paid out of the estate, & the costs apportioned as the costs of the insolvent trustee be set off against the amount found due

**PART VII. SECT. 3, SUB-SECT. 2.—**  
**D. (a).**

**41651.** *General rule.*—Where the sole object of an action brought against

a trustee is to make him answerable for a breach of trust, & the trustee is found guilty of breach of trust, he will be liable for the general costs of the

action, although his conduct which was mistaken, was perfectly honest.—*HARNETT v. ROGERS*, [1914] S. A. L. R. 138.—*AUS.*

from him to the estate. Whether under this direction the whole of the common costs of the two trustees would be allowed to the solvent trustee or divided, must depend on the settled practice of the taxing master's office.—*McEWAN v. CROMBIE* (1883), 25 Ch. D. 175; *sub nom. McEWAN v. CROMBIE, PORTER v. GRANT*, 53 L. J. Ch. 24; 40 L. T. 499; 32 W. R. 115.

*Annotation:—Reid. Stanlar v. Evans, Evans v. Stanlar* (1886), 56 L. J. Ch. 581.

**4169. Attempt to seize trust estate.]—BROWN v. HOW** (1740), Barn. Ch. 354; 27 E. R. 676, L. C.

**4170. Sale without authority—Mistake as to power.]—POWLET (EARL) v. HERBERT**, No. 4084, *ante*.

**4171. Trust property transferred to unauthorised person—Husband of beneficiary.]—Settlement upon marriage of stock, the property of the wife, in trust from time to time to receive the dividends, & pay them into the hands of the wife for her sole & separate use; her receipt to be a discharge; after her decease, if the husband should survive, for him for life, & after the decease of the survivor to transfer the principal among the children according to her appointment by will; in default thereof, equally; if no children, according to her appointment by will. The trustees with the privity of the wife sold the stock; & paid the money to the husband, taking his bond of indemnity: he died insolvent. Upon the bill of the widow & children the fund, having been replaced by the trustees, was transferred to the Accountant-General upon the trusts of the settlement; the trustees to pay the dividends to the widow from the death of the husband with costs.—*WHISTLER v. NEWMAN* (1798), 4 Ves. 129; 31 E. R. 67, L. C.**

*Annotations:—Mentd. Mores v. Hulsh* (1800), 5 Ves. 692; *Spelling v. Rochfort* (1803), 8 Ves. 164; *Jones v. Harris* (1804), 5 Ves. 486; *Parker v. White* (1805), 11 Ves. 209; *Digby v. Howard* (1831), 4 Sim. 588; *Johnson v. Gallagher* (1861), 3 De G. F. & J. 494.

**4172. ———.]—WELLS v. GIBBS** (1843), 1 L. T. O. S. 335.

**4173. ———.]—Testator bequeathed all his property to M. & R. upon trust to convert, & after a life interest to his wife in a part thereof, directed that they should pay the interest of two-thirds to his three sons for life, & of the remaining third to his three daughters for life for their separate use, with remainder to the children of all his children as therein mentioned, & if his trustees should in their discretion consider his sons & daughters, or any or either of them capable of managing, or that it would be conducive to his or her interest to embark in or carry on any trade or business, he authorised them to advance to any such son or daughter any part of the share in which he or she might have such life interest as aforesaid, & the receipt of any such son or daughter was to be a sufficient discharge to the trustees. Testator died in 1848, & his widow in 1851. The six children survived testator, as did also a seventh not mentioned in the will, & in 1863, inquiries respecting the estate were commenced on behalf of the children of that seventh child as to their interest in the estate, & after much correspondence a common administration suit was begun by them in June, 1864. In the course of the proceedings it appeared that the trustees had advanced to one of testator's daughters (Mrs. R.) & her husband, who had no children, her share, in order, as appeared by releases which they executed, to enlarge the capital of R. to carry on his farm, & after the institution of the suit they advanced the share of Mrs. C., another married daughter, to the son of**

one of the trustees, upon her entering into business as a farmer in partnership with him & two other of the testator's children, whose shares were in like manner advanced; but Mr. C. covenanted that the business should be for his wife's separate use.

The decree of the Vice-Chancellor directed debts to pay all costs of the suit except £200 taken as the amount of the costs of an ordinary administration suit, which his Honour ordered to be paid out of the estate; but the decree was varied by striking out that last direction as one improper to be given in the absence of the other parties entitled under the will; & as plffs. had succeeded in setting aside only one of the advances, debts were relieved from paying all the costs, although having regard to their improper conduct in refusing to account to plffs., in withholding information which they themselves possessed, & in other respects also, they were ordered to pay all costs as of an administration suit, & all additional costs were left to be borne by the parties themselves.—*TALBOT v. MARSHFIELD* (1808), 3 Ch. App. 622; 19 L. T. 223; 32 J. P. 725, L. J.J.

*Annotation:—Mentd. Molyneux v. Fletcher*, [1898] 1 Q. B. 648.

**4174. ——— Trustee acting on counsel's opinion.]—The trustee of the will, who acting on the opinions of counsel had distributed the whole estate according to a different view, was ordered to pay to the representatives of the child the amount of the child's share & the costs of the suit.—*BOULTON v. BEARD* (1853), 3 De G. M. & G. 608; 43 E. R. 239, L. J.J.**

*Annotations:—Reid. Re Reeve's Trusts* (1877), 4 Ch. D. 841; *Selby v. Whitaker* (1877), 6 Ch. D. 239; *Re Silver Valley Mines* (1882), 47 L. T. 597. *Mentd. Re Watson's Trusts* (1870), L. R. 10 Eq. 36; *Re Orlebar's Settlement Trusts* (1875), L. R. 20 Eq. 711; *Hickling v. Fair*, [1899] A. C. 15; *Re Walker, Dunkerly v. Howerdine*, [1917] 1 Ch. 38; *Re Stephens, Tomalin v. Tomalin's Trustee*, [1927] 1 Ch. 1.

**4175. ——— Liability subject to liability of transferees.]—EAVES v. HICKSON**, No. 4012, *ante*.

**4176. ———.]—The trustee of a legacy, which had been invested in stock, authorises the sale of the stock, & permits B. to receive the proceeds; B. retains the money in his hands, & during many years, the legatee, who was not aware that the legacy had ever been invested in stock, or that stock, in which it once was invested, had been sold, deals with B. as the only person accountable to her for the money; notwithstanding these dealings on the part of the legatee, the trustee continues to be accountable for the stock.**

The decree must be for an account of what is due to her for her share of the stock & of the dividends on it; & the decree must be with costs (*per Cur.*).—*ADAMS v. CLIFTON* (1826), 1 Russ. 297; 38 E. R. 115.

**4177. ———.]—Devise of real estate to trustees upon trust for testator's son W. for life, & after his decease, to the heir male of his body begotten of an European woman, & the heirs of such heir male; & in case his son should die without leaving such heir male of his body, the trustees to pay the rents equally between testator's daughters, M. & A., for their lives, & the whole to the survivor; & after the decease of the survivor, upon trust for the heir male of the body of M. & the heirs of such heir male, & in default of such heir male of her body, upon trust for the heir male of the body of A. & the heirs of such heir male. W. & M. both died without issue, & A. having a son, suffered a recovery of the devised estate, & resettled it to new uses, under which a remote interest was limited to the surviving trustee, & died, leaving her son surviving, who thereupon filed his bill**



*Sect. 3.—Liability of trustees: Sub-sect. 2, D. (b), (c) & (d).]*

against the surviving trustee of the will for a conveyance of the legal estate.

Decree made against the trustee with costs: the ct. holding clearly that, under the devise, A. took a life estate only, with remainder to her son in fee.—*WILLIS v. HISCOX* (1839), 4 My. & Cr. 197; 4 Jur. 738; 41 E. R. 78, L. C.

*Annotations:—Mentd. Chamberlayne v. Chamberlayne* (1856), 6 E. & B. 625; *Greaves v. Simpson* (1864), 10 Jur. N. S. 609; *Evans v. Evans*, [1892] 2 Ch. 173; *Pelham-Clinton v. Newcastle* (1900), 83 L. T. 627.

4178. —*J.*—A. & B., exors. & trustees of testator, set apart a fund to answer an annuity bequeathed to pltf. A. & B. committed a breach of trust by means whereof the fund came into the name of B. alone, who misappropriated it. A. died, & by his will gave a legacy to B. & J. on certain trusts. B. having become bkpt., in an action by the annuitant J. was ordered to refund the trust legacy in his hands, which was insufficient to answer the breach of trust committed by his testator:—*Held*: neither J. nor the trustee in bkpcy. of B. was entitled to have his costs out of the fund before it was paid into ct.—*Re KNOTT, BAX v. PALMER* (1887), 56 L. J. Ch. 318; 56 L. T. 161; 35 W. R. 302.

4179. *Purchase of trust property by trustee—Resale at profit.*—A trustee who has purchased the trust property & sold it at a profit, & who has been compelled by a suit in equity to refund that profit, will not, except under circumstances affecting him with moral fraud, be charged with the costs of the suit.

If he violates his trust, & is guilty of fraud, no doubt the ct. will oblige him to pay the costs which by his misconduct the *cestuis que trust* have been put to (LORD ABINGER, C.B.).—*BAKER v. CARTER* (1835), 1 Y. & C. Ex. 250; 4 L. J. Ex. Eq. 12; 160 E. R. 102.

*Annotation:—N.F. Plover v. Lambert* (1885), 52 L. T. 646.

4180. —*Inadequate price.*—Part of the estate of a testator consisted of two-thirds shares of the money to arise from the sale of certain messuages & hereditaments in Sydney, which during the life of testator had, by deed in 1846, been vested in trustees there upon trust for sale, with power to suspend the sale & to manage & lease the property. Testator, at the time of his death in 1868, was supposed by the trustees of his will in England, & the beneficiaries, to be seised in fee simple of the two-thirds shares. As the property was expected to increase in value, all the beneficiaries agreed that the sale should be postponed, & under the mistaken impression as to the nature of testator's interest they, by deed in 1869, requested the trustees of the will to postpone the sale. In 1870 the sum of £10,000 was offered for the entire property, but was refused. In 1875 one of the beneficiaries sold his one-fifth share of testator's two-thirds for £1,000. In Mar. 1880, A., another of the beneficiaries, being ill & in pecuniary difficulties, sold his one-fifth share to S., one of the trustees of the will, for £900. Shortly afterwards both A. & S. died. In Sept. 1881, the entire property was sold for £30,000, & consequently A.'s share therein proved to be worth over £4,000, eighteen months after the sale of it to S. for £900.

In an action by A.'s wife against L., the exor. of S., to set aside the sale of A.'s share to S. she did not aver that A. had been guilty of fraud in the transaction, or that A. was not fully aware of what he was doing at the time of the sale; but she prayed relief on the ground that S. stood in the position of trustee to A., who at the time of the sale was in very embarrassed circumstances, as S. knew; that the price was considerably below the real value of the share, as S. also knew; & that A. had no independent advice in the transaction:—*Held*: as the purchaser & vendor stood in the positions of trustee & *cestui que trust*, although the trustee was not the donee of a power of sale, his duty was to see that the property realised its full value; & the vendor being in embarrassed circumstances to the knowledge of the trustee, & the price given by the trustee for the property being greatly inadequate, the relief asked for must be granted. L. must pay the costs of the action, & was not entitled to deduct them from the share sold to S.—*PLOWRIGHT v. LAMBERT* (1885), 52 L. T. 646.

4181. *Wrongful payment of apprenticeship fee*—To person not within terms of trust.—*SIMPSON v. BROWN*, No. 4064, *ante*.

4182. *Improper investment.*—A trustee, with power to invest the trust property in leasehold or chattel personal securities, or upon the personal security of any person, advanced, at the request of his *cestuis que trust*, some of the trust property to two ladies on the security of mtges., with the usual covenants, of a leasehold house in which the ladies were living, & of the furniture in it. The trustee was also the lessor of the house. The mtgors. became insolvent, paid no rent, & no part of the principal or interest on the loan. The trustee, as lessor, determined the lease by entry, & then sold all his interest in the leasehold premises & the furniture; but he thereby so mixed up the trust property with his own that it was impossible to distinguish the one from the other, or to pronounce with certainty how much of the proceeds of the sale was his, & how much belonged to the *cestuis que trust*. The advance had been made at 5 per cent. After some delay, the trustee replaced the principal money of the loan, but invested it against the wishes of his *cestui que trust* in 3 per cent. Consolidated Bank Annuities, the dividends on which, however, were paid to them:—*Held*: the trustee was bound to make good to the trust estate the whole of the money advanced on the loan, with all interest due thereon, at the rate of 5 per cent. *per annum*, to be computed up to the date of the decree; & must pay the costs of the suit.—*COOK v. ADDISON* (1809), L. R. 7 Eq. 460; 38 L. J. Ch. 322; 20 L. T. 212; 17 W. R. 480.

4183. —*J.*—*Re ROBERSON, CAMPKIN v. BARTON*, [1883] W. N. 110.

4184. *Improper arrangement with beneficiaries—No independent advice.*—*ELLIS v. BARKER*, No. 3930, *ante*.

(c) *Neglect or Refusal to Act.*

*See R. S. C., Ord. 65, r. 1.*

4185. *Failure to compel payment of money owing.*—*CAFFEY v. DARBY* (1801), 6 Ves. 488; 31 E. R. 1159.

*Annotation:—Mentd. Thompson v. Hopper* (1858), E. B. & E. 1038

PART VII. SECT. 3, SUB-SECT. 2.—D. (b).

41821. *Improper investment.*—Where a trustee sold shares in a steam co. to the trust, such investment not being one which a ct. of equity would sanction, he was ordered to pay the costs

of a suit by the *cestuis que trust*, & of the necessary debts; a second trustee, having acquiesced in the sale, was ordered to pay his own costs.—*CROOK v. SMART* (1873), 10 N. S. W. S. C. R. (Eq.) 124; 11 N. S. W. S. C. R. (Eq.) 121.—*AUS.*

PART VII. SECT. 3, SUB-SECT. 2.—D. (c).

e. *Neglect in rendering accounts to cestui que trust.*—A trustee must use reasonable diligence to have the accounts of the trust ready, & to



**4186. — Rents.]**—Where the payment of rents, in consequence of disputes among the trustees, had been permitted to fall into arrear, on a bill filed by *pltf.*, who was entitled to the rents & profits for her life, against the trustees, the *ct.* ordered a receiver to be appointed, & the costs of the suit to be paid by the trustees.—*WILSON v. WILSON*, *GROSSLOB v. WILSON* (1838), 2 Keen, 249; 48 E. R. 624.

**4187. — Money secured by covenant in trust instrument.]**—Where, by the terms of a marriage settlement, a trustee was required, immediately after the marriage, to call in & compel payment of a sum of money forming part of the subject of the settlement, which was secured by a covenant in the deed, & he neglected to do so or to enforce payment when required to call it in, & allowed the interest to fall into arrear, & a suit was instituted to compel him to perform the trusts:—*Held*: having rendered such suit necessary, he must pay the costs.—*KIRBY v. MASIE* (1830), 3 Y. & C. Ex. 295; 8 L. J. Ex. Eq. 33; 3 Jur. 221.

**4188. — Discretion of court.]**—Where a bill is dismissed without costs so far as it seeks to charge trustees with wilful default, the *ct.* may by its order upon further consideration, give debts the whole of their costs. Also, a sum advanced by the trustees & disallowed by the Chief Clerk's certificate, may be allowed by the order on further consideration.—*MASSEY v. MASSEY* (1867), 17 L. T. 233, L. C.

**4189. Refusal to execute conveyance—Unless paid sum of money.]**—Where a trust estate descended to one who refused to execute a conveyance to the *cestui que trust*, after it had been approved by his *solr.*, unless he were paid a sum of money, the *ct.* ordered the conveyance, with costs against deft.—*WATTS v. TURNER* (1830), 1 Russ. & M. 634; 39 E. R. 244.

**4190. — Personal considerations.]**—Matters of personal or private feeling cannot be considered in a question either of merits or of costs, as between trustee & *cestui que trust*.

A trustee who deems himself to be or is assailed by imputations cast upon him by his *cestui que trust* is not justified in refusing to do an act which his trust requires until he receives an apology from the *cestui que trust*, & if he refuses, from want of such apology alone, to do an act which his duty as trustee requires, he will be liable to the costs of a suit brought to enforce the performance of such duty.—*MOORE v. PRANCE* (1851), 9 Hare, 299; 20 L. J. Ch. 468; 18 L. T. O. S. 51; 15 Jur. 1188; 68 E. R. 517.

**4191. Refusal to pay income—Trustees of marriage settlement—Misconduct of wife *cestui que trust*.]**—By a marriage settlement, the income of certain funds, part of which had previously been the property of the husband was settled on the wife for her separate use. She was also entitled to her separate use under the same settlement to an annuity covenanted by the husband's father to be paid to her during his life. After having been married some years the wife had eloped & now was living in adultery. No proceedings had been taken in the Divorce *ct.* The trustees of the settlement having refused to pay to the wife since her elopement the income accruing to her

from that part of the fund which was formerly her husband's & the proceeds of the annuity, upon a bill filed by the wife to enforce the trusts of the settlement. Ordered, that the trusts be performed; with costs to be paid by the husband & the trustees.—*GOLDSMID v. HEATHCOTE* (1864), 10 L. T. 811.

**4192. Refusal to pay over fund.]**—Exors. of trustees decreed to pay the costs of a suit rendered necessary by their having refused to pay over the trust fund on reasonable evidence of a person's death; but, inasmuch as the trustees had been guilty of a breach of trust in relation of the fund, such costs were decreed to be paid out of the assets of the trustees, & not personally by the exors.—*LYSE v. KINGDON* (1844), 1 Coll. 184; 3 L. T. O. S. 72; 8 Jur. 418; 63 E. R. 375.

**4193. — Identity of beneficiary doubtful.]**—Testator left all his property to trustees on trust for his wife for life & all the residue to A. II., daughter of his brother W. H. absolutely. Testator's brother W. had three daughters, E., M., & A., *pltf.*, who had long prior to the will been Mrs. S., & on the ground of the doubt of identity the trustees refused to pay over the residue:—*Held*: the refusal was not warranted by the circumstances; *pltf.*'s second name being A., & she being a daughter of testator's brother W., was sufficient, & on bill filed for payment, decree with costs.—*SOUTHWELL v. MARTIN* (1869), 21 L. T. 135.

**4194. — Power to apportion.]**—Although there may be cases in which there are such difficulties that trustees ought not to be called upon to exercise their power of apportionment of trust funds among the beneficiaries entitled thereto except with the sanction of the *ct.*, yet, unless that state of circumstances exists, trustees are not justified in refusing to sell or appropriate same, & will be held to have acted unreasonably & improperly in so refusing, & be ordered to pay the costs under R. S. C., Ord. 65, r. 1, of an application to the *ct.* on behalf of the beneficiaries to obtain such appointment.—*Re RUDDOCK*, *NEWHERRY v. MANSFIELD* (1910), 102 L. T. 89, C. A.

**4195. Failure to invest—Costs of inquiry into uninvested funds.]**—(*HUGG v. CHUGG*, [1874] W. N. 185.

(d) When Deprived of Costs.

See R. S. C., Ord. 65, r. 1.

**\* 4196. Negligence in execution of trust.]**—Trust term by will to raise out of real estate portions for daughters, to be paid on marriage, upon condition that they should be married with consent of their mother, or, after her death, of the trustees, & that the husband should previously make a settlement: the residue of the personal estate, subject to debts & legacies, to be applied in discharging the portions in case of the real estate or for any purpose the trustees might judge most beneficial for the devisee. A marriage having taken place with the consent of the mother & the privity of the trustee, but without any settlement by the neglect of the trustee, the husband having before & after the marriage offered all that was required of him, & been ready to execute a settlement within the condition, relief was given upon those circumstances by raising the portion upon

render them within a reasonable time after demand on behalf of the *cestui que trust*; & where a trustee wholly neglected this duty, though he offered his books for inspection by the parties interested, he was charged with the costs of the suit up to the hearing.—*RANDALL v. BURROWES* (1865), 11 Gr. 364.—CAN.

**1. Improperly refusing to act.]**—The *ct.* will not, upon petition, remove a trustee who has accepted the trust but refuses to continue to act. A bill must be filed for the purpose, the costs of which will be cast on the trustee, if it appear that he has improperly refused to act.—*ANON.* (1842), 4 I. Eq. R. 700.—IR.

**g. Refusal to transfer trust funds to new trustees.]**—A surviving trustee who, without sufficient reason, declined to transfer trust funds to new trustees, duly appointed under a power in the instrument creating the trust, ordered to pay the costs of an action to compel such transfer.—*COPPINGER v. SHEKLETON* (1885), 15 L. R. Ir. 461.—IR.

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executing the settlement. No costs to a trustee, whose neglect occasioned the suit.—*O'CALLAGHAN v. COOPER* (1799), 5 Ves. 117; 31 E. R. 501, L. C.

**4197.** —[Bill to charge a trustee, as having by delivering the title deeds to the tenant for life enabled him to make a mtge. of a settled estate as tenant in fee, dismissed: the fraudulent purpose of enabling him to mtge. resting upon the evidence of a single witness, & being positively denied by the answer, as far as the allegations of the bill gave an opportunity of answering; but without costs, on the ground of negligence; & without prejudice to an action; & with an option to pltf. to take an issue.—*EVANS v. BICKNELL* (1801), 6 Ves. 174; 31 E. R. 998, L. C.

*Annotations.*—*Reid. Allen v. Knight* (1846), 5 Harc. 272; *Colyer v. Finch* (1856), 5 H. L. Cas. 905; *Clark v. Hoskins* (1868), 37 L. J. Ch. 561. *Mentd. Burrows v. Lock* (1805), 10 Ves. 470; *Clifford v. Brooke* (1806), 13 Ves. 131; *Harrison v. Gardner* (1817), 2 Madd. 198; *Hall v. Malby* (1819), 6 Price, 240; *Low v. Cooper* (1823), 2 L. J. O. S. Ch. 75; *Martinez v. Cooper* (1826), 2 Russ. 198; *Wiseman & Benley v. Westland* (1826), 1 Y. & J. 117; *Horlock v. Priestley* (1827), 2 Sim. 75; *Dearle v. Hall* (1828), 3 Russ. 1; *Adamson v. Eyllt* (1830), 2 Russ. & M. 66; *Dryden v. Frost* (1837), 1 Jur. 330; *Aitwood v. Small* (1838), 6 Cl. & Fin. 232; *Jones v. Jones* (1838), 8 Sim. 633; *Farrow v. Roce* (1840), 4 Beav. 18; *Jones v. Smith* (1841), 1 Harc. 43; *Meux v. Bell* (1841), 1 Harc. 73; *Gibson v. D'Este* (1843), 2 Y. & C. Ch. Cas. 542; *West v. Reid* (1843), 2 Harc. 249; *Stevens v. Stevens* (1845), 2 Coll. 20; *Blair v. Bronley* (1847), 2 Ph. 354; *Ingram v. Thorp* (1848), 7 Harc. 67; *Phillips v. Gatty* (1848), 6 Harc. 366; *Hewitt v. Loesmore* (1851) 9 Harc. 449; *Finch v. Shaw, Colyer v. Finch* (1854), 19 Beav. 500; *Jorden v. Money* (1854), 5 H. L. Cas. 185; *Hutton v. Rosseter* (1855), 7 De G. M. & G. 9; *Hunt v. Elmes* (1860), 28 Beav. 631; *Slim v. Croucher* (1860), 1 De G. F. & J. 518; *Stackhouse v. Jersey* (1861), 1 John. & H. 721; *Sharples v. Adams* (1863), 32 Beav. 213; *Dowle v. Saunders* (1864), 2 Hem. & M. 242; *Re Tichenor* (1865), 35 Beav. 317; *Lloyd v. Banks* (1867), 15 W. R. 1066; *Re Overend, Gurney, Ex p. Oakes & Peek* (1867), L. R. 3 Eq. 476; *Newton v. Newton* (1868), L. R. 6 Eq. 135; *Hamshire v. Bolton* (1869), L. R. 8 Eq. 294; *Hill v. Lane* (1870), L. R. 11 Eq. 215; *Hunter v. Walters, Curling v. Walters, Darnell v. Hunter* (1871), 20 W. R. 218; *Keith v. Burrows* (1876), 1 C. P. D. 722; *Schroeder v. Mendi* (1877), 37 L. T. 452; *Northern Counties of England Fire Insco. v. Whipp* (1884), 20 Ch. D. 482; *Manners v. Mew* (1885), 29 Ch. D. 725; *Moore v. Knight* (1890), 63 L. T. 831; *Low v. Bouvier*, [1891] 3 Ch. 82; *Taylor v. Russell*, [1891] 1 Ch. 8; *Re Ingham, Jones v. Ingham* [1893] 1 Ch. 352; *Brocklesby v. Temperance Permanent Bldg. Soc.*, [1895] A. C. 173; *Exploring Land & Minerals Co. v. Kolekman* (1905), 94 L. T. 234; *Walker v. Lnom*, [1907] 2 Ch. 104; *Nocton v. Ashburton*, [1914] A. C. 932.

**4198.** —[With respect to the trustees, I do not think they are entitled to costs, because they have utterly neglected their trust (*LANGDALE, M.R.*).—*ENGLAND v. DOWNS* (1842), as reported in 6 Beav. 269; 49 E. R. 829.

*Annotation.*—*Mentd. Groves v. Wright* (1856), 2 K. & J. 347.

**4199.** —[—*YOUDE v. CLOUD*, No. 4573, *post*.

**4200.** —[It is no doubt settled that it requires a very strong case to deprive an ordinary gratuitous trustee of his costs. As a rule he can only be made to pay costs for misconduct, & he is only deprived of his costs for something which might properly be termed misconduct, though it sometimes is characterised by a milder term, such as neglect, or negligence, or carelessness. But there is no doubt that the Ct. of Ch. did occasionally deprive trustees of their costs for innocent mistakes (*JESSEL, M.R.*).—*Re SILVER VALLEY MINES* (1882), 21 Ch. D. 381; 47 L. T. 597; 31 W. R. 98, C. A.

*Annotation.*—*Reid. Dublin City Distillery v. Doherty*, [1914] A. C. 823.

**4201. Trustee charged with interest.—Not necessarily deprived of costs.**—Trustee or exor. charged with interest, yet he may have his costs.—*WOODHEAD v. MARRIOTT* (1837), Coop. Pr. Cas. 62; 47 E. R. 402.

**4202. Mistake.—Trusts of doubtful will.—Failure to invest.**—A trustee wilfully applying trust moneys to his own use is chargeable with interest at 5 per cent.; but where, under the trusts of a doubtful will, the tenant for life, who was also a trustee, neglected to make proper investments, she was held chargeable with interest at 4 per cent. only & the decree was made without costs.

If she had had no personal interest & had been a mere trustee or exor., I should have thought that she was not only not chargeable with costs, but entitled to them. That she committed a mistake is now beyond all doubt, . . . but, under these circumstances, I think that the decree must be made without costs (*LANGDALE, M.R.*).—*MOUSLEY v. CARR* (1841), 4 Beav. 49; 10 L. J. Ch. 260; 49 E. R. 256.

*Annotation.*—*Mentd. Cooper v. Laroche* (1869), 38 L. J. Ch. 591.

**4203. Bankrupt trustee.—Assets of trustee distributed.—Trustee in bankruptcy deprived of costs.**—The official assignee of a defaulting trustee whose assets had been distributed:—*Held*: not entitled to costs.—*WILLIAMS v. NIXON* (1840), as reported in 2 Beav. 472; 48 E. R. 1264.

*Annotations.*—*Apld. Massey v. Moss* (1842), 1 Harc. 319. *Mentd. Blakely v. Blakely* (1855), 24 L. T. O. S. 322.

—*Appearance on petition of cestui que trust.—For leave to prove against trustee's estate.*—*See* *BANKRUPTCY*, Vol. IV., p. 355, No. 3328.

**4204. Improper answer.**—Trustee disallowed the costs of an improper answer.—*EDDOWES v. EDDOWES* (1862), 30 Beav. 603; 54 E. R. 1024.

(c) *Relief in Extenuating Circumstances.*

*See* *R. S. C.*, Ord. 65, r. 1.

**4205. Readily submitting to account.**—*PARROT v. TREBY*, No. 4167, *ante*.

**4206. Misconduct only slight.—Though interest charged.**—*SAMMES v. RICKMAN*, No. 4095, *ante*.

**4207.** —[Unless circumstances of considerable misconduct are proved against an exor. or trustee, who retains a balance not considerable in his hands, he will not be compelled to pay the costs of a suit instituted against him; & if a suit be instituted with undue haste against an exor. or trustee, & no gross misconduct be established, he will be entitled to his costs.—*BENNETT v. ATKINS* (1835), 1 Y. & C. Ex. 247; 4 L. J. Ex. Eq. 35; 160 E. R. 101.

**4208. Acting bona fide.—Breach caused by ignorance.**—Trustee refusing to pay a legacy without the direction of the Ct. in a case which admitted of no doubt was refused his costs, but was not made to pay the costs of the suit because he might have acted from ignorance & not from any improper motive.—*KNIGHT v. MARTIN* (1829), 1 Russ. & M. 70; Taml. 237; 39 E. R. 27.

**4209.** —*Conduct not wilful or perverse.*—(1) A bill was filed against two trustees, alleging that one of them only had acted in the trusts, & seeking to charge that trustee only with a breach of trust. The trustees, in their answer, admitted that they had both acted in the trusts. Pltfs., however, did not amend their bill:—*Held*: that they were nevertheless entitled to charge both the

good loss incurred.]—Where improper application of a trust fund was of a small part, & promptly offered to be restored, & no imputation, trustee

not disentitled to costs, a suit being necessary for another purpose of the trust.—*FITZGERALD v. PRINGLE* (1825), 2 Mol. 534.—*IR.*

PART VII. SECT. 3, SUB-SECT. 2.—  
D. (e).

*b. Misconduct slight.—Offer to make*

trustees with the loss occasioned by the breach of trust.

(2) Trustees, who were directed to sell an estate as soon as conveniently might be after their testator's death, refused, by the desire of one of the parties interested, an offer of £6,600 for the estate; but they afterwards sold it for £3,600. The ct. charged them with the loss, but gave them their costs, as their conduct had not been wilful or perverse.—*TAYLOR v. TABRUM* (1833), 6 Sim. 281; 1 L. J. Ch. 189; 58 E. R. 599.

*Annotations*.—*Reid*. Bailey v. Gould (1840), 4 Y. & C. Ex. 221; Nelthorpe v. Holgate (1844), 1 Coll. 203; Watts v. Hyde (1846), 2 Coll. 368; Fry v. Fry (1859), 28 L. J. Ch. 591; Harper v. Hayes (1860), 2 De G. F. & J. 542.

**4210.** — **No moral fraud.**—*BAKER v. CARTER*, No. 4179, *ante*.

**4211.** — **No corrupt motive.**—Where there had been great errors & misapplications of the charitable funds committed by the trustees & their predecessors for two centuries, but no corrupt or improper motive was imputed to them, the ct. refused to appoint new trustees, & in consideration of the great accumulation of the charity property, the result of the care & economy of the trustees, & of other circumstances, the ct., notwithstanding the errors which had been committed, allowed to the trustees their costs of the suit out of the funds which had been so accumulated.—*A.-G. v. CARUS COLLEGE* (1837), 2 Keen, 150; 6 L. J. Ch. 282; 48 E. R. 585.

*Annotation*.—*Mentd.* Solicitor General v. Bath Corp., *A.-G. v. Blair* (1849), 18 L. J. Ch. 275.

**4212.** — **On advice of counsel.**—Testator allowed a satisfied mtgce. term to remain outstanding in the mtgce., & he devised the estate to a trustee in such a manner as, in the opinion of the ct., to entitle him to call for an assignment of the term without the concurrence of the parties beneficially entitled; the termor, under the advice of counsel, refused to assign without such concurrence, & a suit became necessary to compel him. The ct., though of opinion that the termor was not entitled to insist on his objection, gave him his costs, charges & expenses.—*POOLE v. PASS* (1839), 1 Beav. 600; 8 L. J. Ch. 325; 48 E. R. 1074.

*Annotation*.—*Refd.* Turner v. Collins (1871), L. R. 12 Eq. 438.

**4213.** — **Erroneous construction of trust instrument.**—Trustees who had acted *bond fide*, though upon an erroneous construction of the will, not ordered to pay costs.—*HARPER v. MUNDAY* (1856), 7 De G. M. & G. 369; 44 E. R. 144; *sub nom.* *HARPER v. MUNDAY*, *HORROCKS v. MUNDAY*, 28 L. T. O. S. 131; 2 Jur. N. S. 1197; 5 W. R. 62, L. C.

*Annotation*.—*Mentd.* Wragg v. Morley (1866), 14 W. R. 949.

**4214.** — **—**—*RYAN v. NESBITT*, [1879] W. N. 100.

**4215.** — **Honest exercise of discretion.**—Trustees will not be charged with loss to the trust estate, arising from acts done by them in the honest exercise of a discretion conferred upon them by the author of the trust, though in opposition to the judgment & wish of the *cestui que trust*.—*SELY v. BOWIE* (1803), 2 New Rep. 2;

8 L. T. 372; 9 Jur. N. S. 425; 11 W. R. 606, L. J.

**4216.** — **No actual misconduct.**—A trustee is in this position, unless he misconducts himself he is entitled to be paid his costs, & though, in my opinion, H. [trustee] did not behave in the best possible manner . . . I cannot say . . . he did anything which can be considered misconduct (*COTTON, L.J.*).—*Re EVANS, WELCH v. CHANNELL* (1884), 20 Ch. D. 58; 53 L. J. Ch. 709; 51 L. T. 175, C. A.

**4217.** — **—**—A trustee is not, in the absence of misconduct, to be deprived of costs by reason of his having invested in what is not, strictly speaking, an authorised security, if at the time of the judgment the fund has been replaced without loss.—*PEACOCK v. COLLING* (1885), 54 L. J. Ch. 743; 53 L. T. 620; 33 W. R. 528, C. A.

**4218.** **Breach at request of cestui que trust.**—*MANT v. LEITH*, No. 4086, *ante*.

**4219.** **Money recovered without loss—Where loaned on insufficient security.**—Trustees had lent money on a technically insufficient security. In the master's office, they entered into evidence to prove its sufficiency, but failed; & they afterwards presented a petition for calling in & investing the money. This was done, & no loss occurred:—*Held*: the trustees were entitled to their costs of both proceedings.—*ROYDS v. ROYDS* (1851), 14 Beav. 54; 51 E. R. 207.

**4220.** **Debt due from estate to trustee—Set-off of debt due to estate.**—*McEWAN v. CROMBIE*, No. 4168, *ante*.

**4221.** **Defaulting trustee's estate insolvent—Liability of executors of trustee—Estate reasonably & properly administered.**—Where a breach of trust had been committed by several persons, & one of them died insolvent, his exors., who had fully administered the assets come to their hands, being made parties to a suit with regard to the breach of trust without previous inquiry by plff. as to the solvency of the estate, were held under the circumstances to be entitled to their costs as between party & party, having conducted themselves reasonably & properly.—*NORTON v. PRITCHARD* (1815), 5 L. T. O. S. 2.

*Annotation*.—*Mentd.* Allen v. Williams (1854), 3 Eq. Rep. 67.

**4222.** **Bankruptcy of defaulting trustee—Action after bankruptcy.**—Where the trustee of a settlement became bkpt. shortly after the commencement of an action for the execution of the trusts & an order was made for payment by him into ct. of a sum of money certified to be due from him to the estate, he was held entitled to his costs of the action though he was not to receive them until he had made good his default.—*LEWIS v. TRASK* (1882), 21 Ch. D. 862.

*Annotations*.—*Follid.* Re Basham, Hannay v. Basham (1882), 23 Ch. D. 195. *Consd.* McEwan v. Crombie (1883), 25 Ch. D. 175. *Refd.* Clare v. Clare (1882), 21 Ch. D. 865.

**4223.** — **—**—Where after the commencement of an administration action against a defaulting exor. or trustee he becomes bkpt. & under Bankruptcy Repeal Act, 1869 (c. 83), s. 49,

**4211 i.** **Acting bond fide—No corrupt motive.**—The rule that a trustee not having acted regularly shall pay costs is subject to be qualified where though the conduct was irregular the motive was not corrupt.—*FITZGERALD v. O'FLAHERTY* (1828), 1 Mol. 347.—*IR.*

**4218 i.** — **No actual misconduct.**—If a trustee has not misconducted himself, even though the ct. punish him, as by making him pay interest

on funds in his hands, yet he shall get the costs of the suit; but if his account be greatly reduced in the office, he shall not get the costs of passing it.—*FOZLER v. ANDREWS* (1845), 2 Jo. & L. 199.—*IR.*

**k.** — **No loss to trust fund.**—When trustees, in good faith, invest on a security not in strictness justified by the instrument creating the trust, but which is practically secure, & from

which no loss to the trust fund occurs, they will not be decreed to pay the costs of a suit to compel them to bring in the fund so invested. The ct. refused the trustees their costs & directed petitioner's costs to be paid out of the fund.—*FITZGERALD v. FITZGERALD* (1856), 6 L. Ch. R. 145.—*IR.*

*l.* **Trust fund lost in hands of deceased co-trustee.**—*Re HAWKINS* (1894), 16 P. R. 136.—*CAN.*

*Sect. 3.—Liability of trustees: Sub-sect. 2, D. (e), (f), (g) & (h); sub-sects. 3 & 4, A.]*

his debt remains undischarged by the bkptcy., he is not entitled to be paid any of his costs of the action, whether incurred before or after the bkptcy., until he has made good his default.

Where the debt of the defaulting exor. or trustee has been discharged by his bkptcy., as where the bkptcy. has taken place prior to Bankruptcy Repeal Act, 1869 (c. 83), or where after the bkptcy. his debt remaining undischarged renders service in the action in his character of exor. or trustee, he is entitled to be paid his costs incurred subsequently to his bkptcy. though his prior costs must be set off against his debt.—*RE BASHAM, HANNAY v. BASHAM* (1883), 23 Ch. D. 195; 52 L. J. Ch. 408; 48 L. T. 476; 31 W. R. 743.

*Annotations:—Folld. McEwan v. Crombie* (1883), 25 Ch. D. 175. *Apud. Re Vowles, O'Donoghue v. Vowles* (1886), 32 Ch. D. 243.

].—*See, also, EXECUTORS, Vol. XXIV., p. 833, Nos. 8648, 8649.*

(f) *Charity Trustees.*

*See CHARITIES, Vol. VIII., p. 411, Nos. 2492–2506.*

(g) *Proceedings Partly Occasioned by Breach of Trust.*

*See R. S. C., Ord. 65, r. 1.*

**4224. Allowed costs not arising from breach—Compelled to pay costs arising from breach.]**—Trustees for sale purchased through a trustee, at an under value; though without fraud, & by auction; & the *cestuis que trust*, being infants, incapable of discharging the trustees. The purchase set aside with costs.

With regard to so much of the suit therefore as relates to calling upon the trustees to submit to a resale & the consequential directions, the relief must be given with costs. As to the other parts of the case, there is no ground for charging them with costs. . . . They must therefore have these costs (LORD ELDON, C.).—*SANDERSON v. WALKER* (1807), 13 Ves. 601; 33 E. R. 419, L. C.

**4225. ———.]**—The trustee held entitled out of the accumulated fund to have the general costs of the suit paid him as between solr. & client; but the trustee was directed to pay as between party & party the costs relating to the inquiry arising out of the breach of trust.—*PRIDE v. FOOKS* (1840), 2 Beav. 430; 9 L. J. Ch. 234; 4 Jur. 213; 48 E. R. 1248.

*Annotations:—Mentd. Thorp v. Owen* (1843), 2 Hare, 607; Conolly v. Farrell (1845), 8 Beav. 347; Gardiner v. Barber (1854), 2 Eq. Rep. 888.

**4226. ———.]**—**Set-off of costs unnecessarily caused by plaintiff.]**—Trustees decreed to pay the costs of an unnecessary inquiry directed before the master, as to the state of testator's family.—*WESTOVER v. CHAPMAN* (1844), 1 Coll. 177; 63 E. R. 372.

**4227. ———.]**—**Up to hearing.]**—A trustee was declared liable for a breach of trust, & was ordered to pay the costs up to the hearing. He complied with the decree:—*Held:* he was entitled to his costs of the subsequent proceedings for clearing & distributing the fund.—*HEWETT v. FOSTER* (1844), 7 Beav. 348; 8 Jur. 769; 49 E. R. 1099.

*Annotations:—Expld. Easton v. Landor* (1892), 62 L. J. Ch. 184. *N.F. Re Skinner, Cooper v. Skinner*, [1904] 1 Ch. 289.

**PART VII. SECT. 3, SUB-SECT. 2.—**  
**D. (g).**

*m. Trustee charged with costs in respect of breach.]*—In a suit against

trustees for breaches of trust, the suit was dismissed except as to one breach of trust, in respect of which an inquiry was directed & the trustees were

**4228. ———.]**—An exor. & trustee, who had acted but not proved, refused, & insisted that he was not bound, to account, & he placed every impediment in pltf.'s way. Having failed in his contention, the ct., on making a decree for an account, directed him to pay the costs of suit to the hearing.—*BOYNTON v. RICHARDSON* (1862), 31 Beav. 340; 54 E. R. 1170.

**4229. ———.]**—Mere neglect of duty in an exor., as, for instance, the omission to invest balances pursuant to a direction in the will, if unaccompanied by fraud, is not such misconduct as to disentitle him to the general costs of a suit for the administration of the estate, although it may subject him to the costs of so much of the suit as was occasioned by such neglect.—*HEIGHINGTON v. GRANT* (1845), 1 Ph. 600; 10 Jur. 21; 41 E. R. 761, L. C.

*Annotation:—Refd. Tickner v. Smith* (1855), 25 L. T. O. S. 41.

**4230. ———.]**—I think the trustees are entitled to all costs, except as to so much of the costs of suit as relates to the breach of trust. . . . Those I cannot give them, but I will not make them pay costs, for it was not a breach of trust by which they were to benefit themselves (LORD CRANWORTH, C.).—*BATE v. HOOPER* (1855), 5 De G. M. & G. 338; 3 W. R. 639; 43 E. R. 901, L. C.

*Annotations:—Refd. Bell v. Turner* (1877), 47 L. J. Ch. 75. *Mentd. Hughes v. Empson* (1856), 22 Beav. 181.

**4231. ———.]**—D., a brewer in 1856, conveyed & assigned his real & personal estate upon trust to sell & convert for the benefit of creditors. The trustees did not sell, but permitted D. to remain in possession. Two dividends amounting to 10s. in the pound were paid. Shortly after payment of the second dividend, pltf., a creditor, wrote to the solr. of the trustees, asking for an account. To this application no answer was returned. The bill was then filed by pltf. on behalf of himself & the other creditors. The acting trustee, by his answer, admitted that D. was still in possession & set forth an account of the personal estate come to his hands, of how it had been dealt with & employed in the brewery business, & of such parts of the same as were still outstanding. Pltf. then amended the bill, charging wilful neglect & default. Upon taking the account no material variation was made from the statement scheduled in the answer:—*Held:* up to the filing of the amended bill, the acting trustee, having omitted to furnish the account when called upon to do so, must pay pltf.'s costs; the other trustee bearing his own costs; but, as the result of taking the account showed no gross misconduct on the part of the trustees, they were entitled out of the estate to their costs of the subsequent proceedings.—*SPRINGETT v. DASHWOOD* (1860), 2 Giff. 521; 3 L. T. 512; 7 Jur. N. S. 93; 66 E. R. 218.

**4232. ———.]**—*TALBOT v. MARSHFIELD*, No. 4173, *ante*.

**4233. ———.]**—*CAMPBELL v. BAINBRIDGE*, No. 4065, *ante*.

**4234. ———.]**—Where in an action for administration of trusts, pltf. makes a special case of breach of trust in relation to the property, not depending upon a mere point of construction, the rule is that, the breach of trust being established, the trustee must bear the costs of the action so far as it relates thereto.—*BELL v. TURNER* (1877), 47 L. J. Ch. 75.

ordered to pay the costs relating to the claim in respect of that breach of trust.—*DOWLING v. BLYTH* (1917), 22 C. L. R. 486.—**AUS.**

4235. ———.—]—*Re* WATSON (1904), 49 Sol. Jo. 54.

4236. Accounts taken after decree—Further debt shown after payment into court—Liability for whole costs.]—A trustee, against whom a bill had been filed for breach of trust, after decree declaring him liable & ordering accounts to be taken, paid £4,000 into ct. On taking accounts it was found that £1,200 more was still owing from the trustee :—*Held* : he was liable for the costs of taking the accounts as well as for the costs up to decree.—*PAYNE v. PARKER* (1869), 17 W. R. 840.

4237. ———.—]—Action for breach dismissed—Executors of trustees appearing by separate solicitors.]—*WILLIAMS v. WIGHT*, [1890] W. N. 50.

4238. Action caused by trustee's misconduct—Costs before & after judgment at discretion of court.]—Where an action against a trustee has been occasioned by the trustee's own misconduct, his costs before & subsequent to judgment are in the discretion of the ct.—*EASTON v. LANDOR* (1892), 62 L. J. Ch. 164; 67 L. T. 833; 37 Sol. Jo. 61; 2 R. 176. C. A.

*Annotation* :—*Reid. Re Skinner, Cooper v. Skinner*, [1904] 1 Ch. 289.

4239. ———.—]—In a case where proceedings for administration are rendered necessary by the gross & indefensible neglect of trustees to deliver accounts, the defaulting trustees may be ordered to pay all the costs, including the costs of taking & vouching the accounts.—*Re SKINNER, COOPER v. SKINNER*, [1904] 1 Ch. 289; 73 L. J. Ch. 91; 89 L. T. 663; 52 W. R. 346.

*Annotation* :—*Reid. Re Holton's Settlt. Trusts, Holton v. Holton* (1918), 88 L. J. Ch. 444.

4240. Trustee charged with costs in respect of breach—Deprived of costs for matters on which relief given.]—*HARDROTTLE v. GLEW* (1900), 45 Sol. Jo. 151.

#### (h) Other Cases.

*See* R. S. C., Ord. 65, r. 1.

4241. Appeal as to costs—Trustee charged on appeal.]—A bill was filed against a trustee seeking a general trust account, & charging him with a breach of trust, in not properly investing the trust moneys; & the bill prayed payment by the trustee of the costs of the suit: the breach of trust was established against him, but the ct. below ordered all his costs of the suit to be paid him, as between solr. & client, out of the trust moneys generally :—*Held* : such order was wrong, the trustee must personally pay the costs of the suit relative to the breach of trust established against him; & the case was an exception to the general rule, that an appeal will not lie for costs.—*ANGELL v. DAVIS* (1839), 4 My. & Cr. 360; 9 L. J. Ch. 3; 3 Jur. 838; 41 E. R. 140. L. C.

*Annotations* :—*Distd. Taylor v. Dowlen* (1869), 4 Ch. App. 697. *Consd. Campbell v. Pollak*, [1927] A. C. 732. *Reid. Chappell v. Purday* (1847), 16 L. J. Ch. 261; *Menzies v. Connor* (1851), 3 Mac. & G. 648; *Umpleby v. Waveney Valley Ry.* (1860), 1 John. & H. 254; *Hope v. Hope*, *Hope v. Carnegie* (1869), 20 L. T. 5.

4242. ———.—]—Right of trustee deprived of costs.]—A trustee is entitled *ex debito justitiæ* to his costs out of the trust fund unless some special grounds are shown for depriving him of them.

Such costs are not costs in the discretion of the ct. within the meaning of Jud. Act, 1873 (c. 66), s. 49, & of Ord. 55, but are within the exception to that Order.

An appeal will lie from an order depriving a trustee of his costs out of the trust fund.—*TURNER*

*v. HANCOCK* (1882), 20 Ch. D. 303; 51 L. J. Ch. 517; 40 L. T. 750; 30 W. R. 480. C. A.

*Annotations* :—*Distd. Dutton v. Thompson* (1883), 52 L. J. Ch. 601. *Reid. Re Weall, Andrews v. Weall* (1889), 42 Ch. D. 674; *Re Reddoe, Downes v. Cottam*, [1893] 1 Ch. 547; *Re Jones, Christmas v. Jones* (1897), 45 W. R. 598; *Re Ruddock, Newberry v. Mansfield* (1910), 102 L. T. 89; *Re England's Settlt. Trusts, Dobb v. England*, [1918] 1 Ch. 24; *In the Estate of Plant, Wild v. Plant*, [1926] P. 139; *Campbell v. Pollak*, [1927] A. C. 732; *Thomas v. Jones*, [1928] P. 162.

4243. What costs charged against trustee—Costs of plaintiff only—No costs of infant co-defendant.]—

Where a bill was filed by one set of infant *cestuis que trusts* against a trustee, and another set of infant *cestuis que trusts*, in respect of a breach of trust committed by the trustee, the trustee was decreed to pay the costs of the plffs. only.—*HOSKING v. NICHOLLS* (1842), 1 Y. & C. Ch. Cas. 478; 11 L. J. Ch. 230; 6 Jur. 386; 62 E. R. 979. *Annotations* :—*Mentd. Davies v. Fowler* (1873), L. R. 10 Eq. 308; *Re Pratt, Pratt v. Pratt*, [1894] 1 Ch. 491.

4244. Against whom ordered—All defendants—No regard to relative degrees of guilt.]—Where several debts are involved in a breach of trust, the ct., in decreeing relief in respect of it, decrees the costs of the suit against them all, on the principle of giving plff. the greater security for the payment, & without regard to the relative degrees of culpability in debts.—*LAWRENCE v. BOWLE*, (1846), 2 Ph. 140; 1 Coop. temp. Cott. 243; 41 E. R. 894. L. C.

4245. Innocent co-trustee—Right to recover full costs against guilty trustee.]—*PRICE v. PRICE*, No. 4127. *ante*.

4246. ———.—]—A solr. trustee, to whom the management of the trust has been left as the acting trustee, is liable to indemnify his co-trustee against the costs of an action caused by his negligent conduct of the trust business, even where no actual loss has been thereby occasioned to the trust estate.—*Re LINSLEY, CATTLEY v. West*, [1904] 2 Ch. 785; 73 L. J. Ch. 841; 53 W. R. 172; 48 Sol. Jo. 606.

*Annotation* :—*Reid. The Millwall*, [1905] P. 155.

4247. Costs of criminal prosecution.]—Costs of a criminal prosecution of a defaulting trustee were allowed out of the trust estate.—*BAKER v. FARMER* (1867), as reported in 36 L. J. Ch. 819; 17 L. T. 46; 15 W. R. 917; *on appeal* (1868), 3 Ch. App. 537. L. JJ.

4248. Proceedings arising from breach by deceased trustee.]—Where a trustee commits a breach of trust & dies, & his heir incurs costs in unsuccessfully defending an action of trespass brought in consequence of steps taken by him to obtain possession of freeholds lost by reason of such breach, he was allowed such costs.—*MELLING v. MELLING* (1857), 6 W. R. 121.

#### SUB-SECT. 3.—LIMITATION OF LIABILITY.

*See* Sect. 4, *post*.

#### SUB-SECT. 4.—LIABILITY FOR ACTS OF CO-TRUSTEES.

##### A. In General.

Delegation of powers by trustee generally, *see* Part V., Sect. 6, *ante*.

4249. Whether liable—Managers of public trust.]—When there are several managers concerned in

Sect. 3.—Liability of trustees: Sub-sect. 4, A. & B.]

a public trust, & some of them die, how far the survivors shall alone be obliged to account for a mismanagement of the trust. How far a number of managers shall each of them be answerable one for the other.

These managers are to be considered as one body, & they are each of them answerable, one for the other (LORD HARDWICKE, C.).—*Ex p. ANGLE* (1740), Barn. Ch. 423; 27 E. R. 705; *sub nom. Ex p. ANGEL*, 2 Atk. 162, L. C.

*Annotation*:—*Consd. Munch v. Cockerell* (1836), 8 Sim. 219.

**4250. — Express agreement for liability.—Composition of debts.**—(1) If trustees will bind themselves to be liable for the acts of each other as they have done here, the ct. will not relieve them, especially in the case of composition of debts, as this was.

(2) If they all join in a receipt for money, the ct. will make that trustee liable only who received it.—*LEIGH v. BARRY* (1747), 3 Atk. 583; 26 E. R. 1136, L. C.

*Annotations*:—*As to* (2) *Reid. Sadler v. Hobbs* (1786), 2 Bro. C. C. 114. *Generally, Mentd. Shipton v. Casson* (1826), 4 L. J. O. S. K. B. 199.

**4251. — Allowing debt of co-trustee to remain outstanding.**—The usual indemnity clause does not exonerate one of two trustees from a loss occasioned by a debt due from the other having been suffered to remain outstanding.—*MUCKLOW v. FULLER* (1821), Jac. 108; 37 E. R. 824, L. C.

*Annotations*:—*Apid. Stiles v. Guy* (1819), 1 H. & Tw. 523; *Paddon v. Richardson* (1855), 7 De G. M. & G. 563. *Consd. Re City Equitable Fire Insco.* (1925) Ch. 407. *Reid. Bayley v. Ross* (1845), 1 Holt. Eq. 80; *Re Lord & Fullerton* (1895), 65 L. J. Ch. 184.

**4252. —**—Under a trust to lend trust money to one of the trustees on his personal security until the trustees should deem it advantageous to invest the money in the funds:—*Held*: the omission to call in the money which had accordingly been lent to the trustee & its consequent loss did not, in the absence of any proof of misconduct on the part of his co-trustee, create any liability on the part of such co-trustee.—*PADDON v. RICHARDSON* (1855), 7 De G. M. & G. 563; 3 Eq. Rep. 933; 26 L. T. O. S. 33; 1 Jur. N. S. 1192; 44 L. R. 219.

*Annotation*:—*Consd. Horton v. Brocklehurst* (No. 2) (1858), 29 Beav. 504.

**4253. — Trustee joining in taking mortgage.—Not acting further in trust.**—M. S. by her will bequeathed £1,600 to W. R. & J. upon trust to invest same in the funds or upon real securities, & as to £1,000 part thereof to pay the interest thereof to C. B. during his life with remainder to his children, & as to the remaining £600 to C. P. absolutely. W. R. never acted except to prove the will & join in a mtge. to D., who had given a bond for £1,000 on testator's life. J. became bkpt. Upon bill filed by C. B. on behalf of himself & other legatees against the trustees for an account:—*Held*: W. R. having joined in proving the will & in the mtge. deed had rendered himself liable for the default of his co-exor. & trustee.—*BAYLEY v. REES* (1845), 1 Holt, Eq. 80; 71 E. R. 678.

**4254. — Trustee holding himself out as responsible.**—Where a trustee has permitted himself to be regarded as ostensibly a responsible character, & has done nothing to negative his implied responsibility, he will be held liable for the transactions of his co-trustees as between

himself & others.—*BARNETT v. SHEFFIELD* (1850), 15 L. T. O. S. 323; *on appeal* (1852), 1 De G. M. & G. 371, L. JJ.

**4255. — Each trustee in possession of moiety of trust property.**—Each of two trustees retained possession of a moiety of bonds held in trust, & which passed by delivery, & one trustee committed a breach:—*Held*: the other trustee was liable to make good the loss sustained.—*LEWIS v. NOBBS* (1878), 8 Ch. D. 591; 47 L. J. Ch. 602.

*Annotations*:—*Reid. Re Smith, Smith v. Thompson*, [1896] 1 Ch. 71. *Mentd. Re Roth, Goldberger v. Roth* (1896), 74 L. T. 50; *Re Sisson's Settlement, Jones v. Trappes*, [1903] 1 Ch. 262; *Re Wragg, Wragg v. Palmer*, [1910] 2 Ch. 58.

**4256. — Act done in ordinary course of business.**—Testator up to his death was the registered holder of a large amount of American railway bonds. These bonds were issued payable to bearer, but the holder could register them, after which they could only be transferred by entry in the books of the co., but the owner could unregister them so as to make them again payable to bearer. Exors. who desired to sell bonds of which their testator was registered holder could either sell & transfer them as registered bonds, or unregister them & then sell. It was proved that the former course was extremely unusual. Testator appointed his wife & two stockbrokers, J. & C., his exors. & trustees, & authorised J. & C. to charge for business done by them as stockbrokers for his estate. J. had been testator's stockbroker. The exors. determined to sell the bonds, & for that purpose the three unregistered them & put them in the hands of J. to sell. J. sold them & from time to time paid considerable sums into a bank to the account of testator's estate, but ultimately absconded after misappropriating a considerable part of the proceeds. The dispositions of testator's will were such that the sale could not be treated as an unauthorised act, & the absconding of J. took place within eleven months after the death of testator. Testator's children brought this action to make all three executors liable for the loss:—*Held*: (1) the unregistering the bonds & handing them to J. to sell were not "unnecessary" acts, & the co-exors. were not liable for J.'s misappropriation; (2) as J. was trusted by testator, & his co-exors. had no reason to suspect him, there had been no such delay in calling upon J. for an account as to make them liable.—*Re GASQUOINE, GASQUOINE v. GASQUOINE*, [1894] 1 Ch. 470; 63 L. J. Ch. 377; 70 L. T. 196; 10 T. L. R. 220; 7 R. 449, C. A.

**4257. — Trustee acting bonâ fide.**—Testator gave the residue of his estate to trustees to invest in or upon such stocks, funds, & securities as they "shall think fit." The trustees invested £3,000, part of the trust estate, upon debentures at par of the New Travellers' Club, one of the trustees receiving, without the knowledge of his co-trustee, a bonus or commission of £300 on the transaction. The co-trustee assented to the investment, thinking it would benefit the trust estate. As a matter of fact the debentures were not, & never had been, of par value, & at the time the action was brought were of little or no market value:—*Held*: (1) "as they shall think fit" meant "as they shall honestly think fit"; (2) the commission or bonus of £300 received by one of the trustees was a bribe, & therefore that trustee did not "honestly think fit," & consequently he was liable to make good

a cheque on the estate bank account payable to the order of the alleged borrower. The solicitor-trustee indorsed the cheque by forging the payee's name, obtained the money, & absconded:—*Held*: L. was not charge-

able with the loss.—*Re McLATCHIE, PRESTON v. LESLIE* (1899), 30 O. R. 179.—CAN.

**o. — Gratuitous trustee.**—A gratuitous trustee under a deed of settlement found personally liable for

funds intromitted with by a co-trustee.—*KENNEDY v. WIGHTMAN* (1827), 5 Sh. (Ct. of Sess.) 852.—SCOT.

**p. — Misappropriation by co-trustee.**—*PHARAZYN v. MASON* (1887), 5 N. Z. L. R. 386 (S. C.).—N.Z.



the loss occasioned to the trust estate by the investment of the £3,000; (3) the co-trustee, on the facts acted *bond fide* & therefore did "honestly" think fit, & consequently his estate was not liable to make good the loss.—*Re SMITH, SMITH v. THOMPSON*, [1896] 1 Ch. 71; 65 L. J. Ch. 159; 73 L. T. 604; 44 W. R. 270.

*Annotations:—Generally, Re Roth, Goldberger v. Roth* (1896), 74 L. T. 50; *Re Wragg, Wragg v. Palmer*, [1919] 2 Ch. 58.

**4258. Right of gully trustee to sever.**—Where one deft., trustee, is charged in a matter with which his co-trustee has nothing to do, he may sever from him.—*PINCE v. BEATTIE* (1803), as reported in 9 L. T. 315; 11 W. R. 979.

**Trustees of charity.**—*See CHARITIES*, Vol. VIII., pp. 378, 379, Nos. 1908-1911.

**Trustees of bankrupt.**—*See BANKRUPTCY*, Vol. IV., p. 226, Nos. 2119-2124.

**Co-trustee appointed agent.**—*See Part V., Sect. 6, sub-sect. 2, C. (b), ante.*

### B. In respect of Moneys Received.

*See, also, EXECUTORS*, Vol. XXIV., pp. 675, 676, Nos. 7007-7015.

**4259. General rule—Trustee liable only for actual receipts.**—Trustees not answerable for each other.

If there be two trustees, one of them shall not answer for receipts by the other, but each is to answer for himself.—*ANON.* (1701), 12 Mod. Rep. 560; 88 E. R. 1518.

**4260.** ———.]—Trustee to be only charged for actual receipts.—*HARNARD v. WEBSTER* (1725), *Cas. temp. King*, 53; 25 E. R. 218, L. C.

**4261.** ———.]—Assignees are mere trustees & each separately answerable only for what they receive.—*PRIMROSE v. BROMLEY* (1739), 1 Atk. 89; 26 E. R. 58, L. C.

**4262.** ———.]—Trustees are mere stakeholders; & cannot be affected with more than they actually received without wilful default.—*PYBUS v. SMITH* (1790), 1 Ves. 189; 30 E. R. 294, L. C.

*Annotations:—Mentd. Socket v. Wray* (1794), 2 Atk. 68, n.; *Whistler v. Newman* (1793), 4 Ves. 129; *Mores v. Hulsh* (1800), 5 Ves. 692; *Nantes v. Corroek* (1803), 9 Ves. 182; *Sperling v. Rochfort* (1803), 8 Ves. 164; *Jones v. Harris* (1804), 9 Ves. 486; *Parkes v. White* (1805), 11 Ves. 209; *Witts v. Dawkins* (1806), 12 Ves. 501; *Jackson v. Hobhouse* (1817), 2 Mer. 483; *Hart v. Tulk* (1852), 2 De G. M. & G. 300; *Hood-Barrs v. Horiot*, [1896] A. C. 174; *Re Rush, Warre v. Rush*, [1922] 1 Ch. 302.

**4263. Money received by co-trustee.**—Where lands or leases were conveyed to two or more upon trust, & one of them receives all or the most part of the profits, & after dies or decays in his estate, his co-trustees shall not be charged, or be compelled in this ct., to answer for the receipts of him so dying or decayed, unless some purchase, fraud or evil dealing appear to have been in them to prejudice their trust; for they being by law joint tenants or tenants in common, every one by law may receive either all or as much of the profits as he can come by (*per CUR.*).—*TOWNLEY v. SHERBORNE* (1633), J. Bridg. 35; 123 E. R. 1181; *sub nom. TOWNLEY v. SHURBARNE*, Toth. 88; *sub nom. TOWNLEY v. CHALENOR*, Cro. Car. 312.

*Annotations:—Consd. Fellows v. Mitchell* (1705), 2 Vern. 515; *Sadler v. Hobbs* (1786), 2 Bro. C. C. 114. *Dtd. Scurfield v. Howes* (1790), 3 Bro. C. C. 90. *Dstd. Thompson v. Finch* (1856), 22 Beav. 316. *Reid. Champneys v. Browne* (1735), Barnes, 440.

**4264.** ———.]—Payment to one of two trustees binds both.—*HUSBAND v. DAVIS* (1851), 10 C. R. 645; 2 L. M. & P. 50; 20 L. J. C. P. 118; 138 E. R. 256.

**4265.** ———.]—Trustee joining in receipt.]—Each trustee shall be charged for no more than he actually receives. Otherwise if the trustees join in receipts.—*SPALDING v. SHALMER* (1684), 1 Vern. 301; 23 E. R. 483.

*Annotation:—Mentd. Thomas v. Townsend* (1852), 16 Jur. 736.

**4266.** ———.]—Two trustees in a mtge. join in an assignment of the term, & in a receipt for the whole, each receiving a moiety only of the mtge. money; to be answerable only for what they respectively receive.—*FELLOWS v. MITCHELL* (1705), 1 P. Wms. 81; 24 E. R. 302; *sub nom. FELLOWS v. OWEN*, Freeman. Ch. 286; 2 Vern. 504, 515.

*Annotations:—Consd. Marrell v. Cox* (1706), 2 Vern. 570; *R. v. Artillery Ground, Tower Division & Bray* (1754), Park. 167; *Sadler v. Hobbs* (1786), 2 Bro. C. C. 114. *Reid. Scurfield v. Howes* (1790), 3 Bro. C. C. 90; *Leeds v. Anlherst* (1850), 20 Beav. 239.

**4267.** ———.]—If exors. join in receiving money, both are answerable. Otherwise, where trustees join.—*MURRELL v. COX & PITT* (1706), 2 Vern. 570; 23 E. R. 971.

*Annotations:—Consd. Fellows v. Mitchell* (1705), 1 P. Wms. 81; *Scurfield v. Howes* (1790), 3 Bro. C. C. 90.

**4268.** ———.]—Two trustees join in a receipt, & one receives the money; only the receiving trustee shall be charged.—*CHURCHILL v. HOUSON (LADY)* (1713), 1 P. Wms. 211; 24 E. R. 370; *sub nom. CHURCHILL v. HOUSON*, 1 Salk. 318, L. C.

*Annotations:—Consd. Crosse v. Smith* (1806), 3 Smith, K. B. 203. *Reid. R. v. Artillery Ground, Tower Division & Bray* (1754), Park. 167; *Harden v. Parsons* (1758), J. Eden, 145; *Westley v. Clarke* (1759), 1 Eden, 357; *Sadler v. Hobbs* (1786), 2 Bro. C. C. 114; *Scurfield v. Howes* (1790), 3 Bro. C. C. 90; *Steen v. Mills* (1833), 2 L. J. K. B. 106.

**4269.** ———.]—*LEIGH v. BARRY*, No. 4250, *ante*.

**4270.** ———.]—If trustees join in giving a discharge, & one only receives, the other is not answerable (*JARD HARDWICKE, C.*).—*Re PARSONS, Ex p. BELCHER, Ex p. PARSONS* (1754), Amb. 218; 27 E. R. 144; *sub nom. BELCHER v. PARSONS*, 1 Keny. 38, L. C.

*Annotations:—Reid. Scurfield v. Howes* (1790), 3 Bro. C. C. 90; *The Prima Vera* (1808), Edw. 23; *Raw v. Cutton* (1832), 9 Bing. 96; *Speight v. Gaunt* (1883), 9 App. Cas. 1; *Colchester Union Grains v. Moy* (1893), 68 L. T. 564; *Robinson v. Harkin*, [1896] 2 Ch. 415. *Mentd. Fry v. Tapson* (1884), 28 Ch. D. 268; *Magnus v. Queensland National Bank* (1887), 36 Ch. D. 25.

**4271.** ———.]—A trustee, joining in a receipt & reconveyance of a mtged. estate, though he does not receive the money, is liable.—*SCURFIELD v. HOWES* (1790), 3 Bro. C. C. 90; 29 E. R. 425.

*Annotations:—Reid. Montford v. Cadogan* (1810) 17 Ves. 485. *Mentd. White v. Baker* (1860), 2 De G. F. & J. 55; *Maddison v. Chapman* (1861), 1 John. & H. 470; *Re Hill to Chapman* (1885), 51 L. J. Ch. 595; *Re Pickworth, Snaith v. Parkinson*, [1899] 1 Ch. 612; *Re Poultney, Poultney v. Poultney*, [1912] 1 Ch. 215.

**4272.** ———.]—(1) At law, where trustees join in a receipt, *prima facie* all are to be considered as having received the money. But it is competent to a trustee, & if he means to exonerate himself from that inference, it is necessary for him, to show, that the money, acknowledged to have been received by all, was in fact received by one; &

1142; 15 Sc. Jur. 456.—*SCOT.*

**4283 H.** ———.]—*MILLAR'S TRUSTEES v. POLSON* (1897), 24 R. (Cl. of Sess.) 1038; 34 Sc. L. R. 708; 5 S. L. T. 94.—*SCOT.*

### PART VII. SECT. 3, SUB-SECT. 4.—B.

**4283 I. Money received by co-trustee.**—*Held:* a trustee who concurred with his co-trustees in uplifting trust funds which had been heretofore secured, the period for their distribu-

tion having then arrived, was not personally liable for a deficiency thereafter arising in the hands of a co-trustee who had received the money into his possession.—*UNQUHART v. BROWN* (1843), 5 Dunl. (Cl. of Sess.)



*Sect. 3.—Liability of trustees: Sub-sect. 4, B. & C.]* the other joined only for conformity (LORD ELDON, C.).

A trustee charged, though he did not receive the money under the circumstances; having joined in the receipt; the sale unnecessary; & permitting his co-trustee to keep & act with the money contrary to the trust.

(2) Not charged in respect of the interest of one of the *cestuis que trust*, having notice of the breach of trust, & acquiescing.—BRICE v. STOKES (1805), 11 Ves. 319; 33 E. R. 1111, L. C.

*Annotations:—As to (1) Consd. Walker v. Symonds (1818), 3 Swan. 1. Apld. Hanbury v. Kirkland (1829), 3 Sim. 265; Re Fryer's Estate, Martindale v. Picquot (1857), 26 L. J. Ch. 398. Refd. Gregory v. Groogry (1836), 2 Y. & C. Ex. 313; Terrell v. Matthews (1841), 1 Mac. & G. 433, n.; Stiles v. Guy (1849), 14 L. T. O. S. 305. As to (2) Distd. Coppard v. Gates (1854), 23 L. T. O. S. 165. Consd. Thompson v. Finch (1856), 22 Beav. 316. Refd. Langford v. Gascoyne (1805), 11 Ves. 333; Broadhurst v. Balguy (1841), 1 Y. & C. Ch. Cas. 16. Generally, Refd. Symonds v. Jenkins (1876), 24 W. R. 512.*

4273. — — — — —]—ENGLISH v. WILLATS, No. 4100, *ante*.

4274. — — — — —]—Co-trustee solicitor acting in sale.]—One of three trustees for sale was also the solr. employed in the matter, & he alone received the purchase-money, & neglected to apply it. The conveyance was executed, & the receipt signed by all three of the trustees:—*Held*: the solr. was not the agent of the other trustees so as to make the receipt by him the receipt of all; & the other trustees, having joined merely for the sake of conformity, were not chargeable.—*Re FRYER MARTINDALE v. PICQUOT (1857)*, 3 K. & J. 317; 26 L. J. Ch. 398; 29 L. T. O. S. 86; 3 Jur. N. S. 485; 5 W. R. 552; 69 E. R. 1129.

*Annotations:—Distd. St. Aubyns v. Smart (1867), L. R. 5. Eq. 183. Refd. Hale v. Adams (1873), 21 W. R. 400.*

4275. — — — — —]—GRIFFITHS v. PORTER, No. 4414, *post*.

4276. — — — — —]—A., one of the two trustees & exors. of a will & resident in London, authorised a person to get in three mtgs., part of the estate. The solr. forwarded the deeds of reconveyance to C., the other trustee, in the country, who executed & returned them. The solr. received the money & paid it to A. alone, who misapplied it:—*Held*: C. was liable for the amount.—COWELL v. GATCOMBE (1859), 27 Beav. 568; 54 E. R. 225.

4277. — — — — —]—Trustee joining in sale.]—One exor. & trustee charged under the circumstances with a loss occasioned by joining in the sale of stock; & the other having received all the money & absconded.—CHAMBERS v. MINCHIN (1802), 7 Ves. 186; 32 E. R. 76, L. C.

*Annotations:—Refd. Clough v. Bond (1838), 8 L. J. Ch. 51; Terrell v. Matthews (1841), 1 Mac. & G. 433, n.; Stiles v. Guy (1849), 14 L. T. O. S. 305.*

4278. — — — — —]—Testatrix gave her personal estate to A. & B., subject to debts & legacies, upon certain trusts, & she appointed A. alone exor. A fund, over which testatrix had a power of appointment, was transferred into the names of A. & B. A., the exor., representing that a considerable part of the fund was wanting to pay debts & legacies, induced B. to join in selling out the fund, promising to give a mtge. security for what might not be wanted for debts, etc. A. received the whole, but applied a very inconsiderable sum in payment of debts, etc.:—*Held*: B. was liable to replace so much of the stock as had not been applied in payment of debts, etc., & to account for the dividends.—HEWETT v. POSTER (1843), 6 Beav. 259; 7 Jur. 228; 49 E. R. 825; *subsequent proceedings* (1844), 7 Beav. 348.

4279. — — — — —]—Trustee joining in power of attorney—For sale of trust property.]—Trustees of stock

signed a power of attorney to sell it out, & the proceeds were received from the broker by one of the trustees, who afterwards became insolvent. Decree, that the other trustees account for & pay the amount.—MARRIOTT v. KINNERSLEY (1830), Taml. 470; 48 E. R. 187.

4280. — — — — —]—For transfer of trust fund into court.]—A., B. & C. were by order of the ct. appointed trustees of a trust fund invested in Consols. The business of the trust, such as the receipt of the dividends accruing due on the trust fund & the like, had for some time prior to their appointment been conducted by the Union Bank. The new trustees continued the Union Bank as the bank of the trust, & authorised them, by power of attorney & memorandum of instruction, to receive the dividends due on the trust fund & otherwise to transact the business of the trust. An order being made by the ct. for the transfer of the trust fund into ct., the trustees authorised D. who was a partner of C. in a banking firm, to transfer the fund into ct., & for this purpose they signed & sent to him a power of attorney & a memorandum of instruction. The power of attorney & the letter of instruction accompanying it only authorised D. to transfer the fund, not to receive any dividend becoming due upon it. In Jan. 1866, a dividend became due on the fund. D. acting under the directions of C., received this dividend & paid it into the bank of C. & D. C. & D. shortly afterwards failed, & executed a deed of inspectorship under Bankruptcy Act, 1861 (c. 134):—*Held*: C. alone of the trustees was liable for the loss, & must replace the dividend.—NEWTON v. HALLIETT (1868), 19 L. T. 471.

4281. — — — — —]—Co-trustee obtaining possession by fraud.]—*Seem*: trustees are not liable to the *cestui que trust* for money belonging to the trust which their co-trustee gets into his possession without their consent or knowledge & by a fraud upon them.—*Re LAKE BATHURST AUSTRALASIAN GOLD MINING CO., BARNARD v. BAGSHAW (1862)*, 3 De G. J. & Sm. 355; 7 L. T. 544; 9 Jur. N. S. 220; 46 E. R. 672, L. C.

*Annotation:—Refd. Re Bennison, Cutler v. Boyd (1889), 60 L. T. 839.*

— — — — —]—Trustee negligent.]—*See* Sub-sect. 4, C., *post*.

Trustee entrusting trust property to co-trustee.]—*See* Sub-sect. 4, D., *post*.

#### C. Trustee Guilty of Negligence.

*See, also, EXECUTORS, Vol. XXIV., pp. 676, 677, Nos. 7016–7036.*

4282. Concealing sale of trust fund.]—One trustee knowing, & concealing, his co-trustee's having sold out the trust fund, equally liable with the trustee who actually sold.—BOARDMAN v. MOSMAN (1779), 1 Bro. C. C. 68; 28 E. R. 989, L. C.

*Annotation:—Refd. Lowry v. Fulton (1839), 9 Sim. 104.*

4283. Failure to inquire—On sale of trust property.]—On a marriage a sum of stock was settled for the separate use of the wife for life, remainder for the husband for life, remainder for their children, with power to change securities with consent of the wife. The dividends on the stock being reduced, one of the trustees in whom the husband & wife principally confided, & who, with his partners, was their solr., informed his co-trustees that he had an opportunity of investing the property in a mtge. at 5 per cent., & with the consent of the husband & wife, requested his co-trustees to execute a power of attorney to enable him to sell the stock. The co-trustees, without inquiring into the matter, complied, the trustee sold the

stock & absconded :—*Held* : the co-trustees were liable.—*HANBURY v. KIRKLAND* (1829), 3 Sim. 265 ; 57 E. R. 998.

*Annotations* :—*Distd. Re Munton, Munton v. West*, [1927] 1 Ch. 262. *Reid, Broadhurst v. Balguy* (1841), 1 Y. & C. Ch. Cas. 16 ; *Truteh v. Lamprell* (1855), 20 Beav. 116 ; *Re Gasquoine, Gasquoine v. Gasquoine* (1894), 70 L. T. 196.

4284. — — — — —.]—Where a trust fund standing in the names of two trustees had been sold out, & the money had been received by one of them, who was to pay it to the *cestuis que trust*, but failed to do so, & afterwards became insolvent, & the money was lost :—*Held* : the other trustee was not exonerated from personal liability to make good the fund, on the ground that all the acts which he had done were required for convenience or conformity.—*CURTIS v. MASON* (1843), 12 L. J. Ch. 442 ; 1 L. T. O. S. 383, L. C.

4285. — — — — —.]—An appointment of new trustees recited that certain sums of stock & shares had been transferred into the names of the new trustees, & that by an indenture of even date a certain mtge. debt & the premises subject thereto had been assigned & conveyed to the new trustees, the trust property having been sold & the proceeds received by one of the trustees & lost, the ct. on the hearing decided that the co-trustee, not having inquired what had been done with the proceeds, was liable for all sums actually received by him, jointly with his co-trustee, & which had been lost, & referred it to the Chief Clerk to find what had been jointly received. The Chief Clerk by his certificate found that all the above mentioned trust property had been jointly received. Upon a summons to vary the certificate :—*Held* : the Chief Clerk had rightly found by his certificate.—*HALE v. ADAMS* (1873), 21 W. R. 400.

4286. — — — — —.]—*BULLOCK v. BULLOCK*, No. 4363, *post*.

4287. — — — — —.]—Trustee having never acted.]—In 1823 deft. was, with his consent, named one of three trustees of a marriage settlement ; but he never executed the deed. His co-trustees, who were solrs. in partnership, executed the deed, & acted in the trusts. One of them died in 1826. W., the surviving co-trustee, neglected to call in & invest a part of the trust moneys, which was thereby lost to the estate. On May 18, 1830, a portion of the trust moneys was invested in stock, & a memorandum to that effect was indorsed upon the settlement, & signed by W. In Oct. 1845, deft., who had never acted, made inquiry as to the trust property & investments, when he was told that he was a trustee, & the stock receipt for the sum above mentioned was handed to him. On March 17, 1847, on being shown the deed, deft. signed the indorsement. In Feb. 1852, W. died insolvent. After W.'s death, deft. received the dividends of the sum of stock mentioned in the memorandum, & paid same to the *cestui que trust*. On a bill by the parties beneficially interested, praying for an account of all sums which had been received by deft. & his co-trustees, or of what, without his wilful neglect & default, might have been received, & that he might be decreed to make good such losses :—*Held* : deft.'s liability must be confined to the amount mentioned in the memorandum : & so far as the bill sought to make him liable for more than that amount, it must be dis-

missed with costs.—*MALZY v. EDGE* (1856), 27 L. T. O. S. 12 ; 2 Jur. N. S. 80 ; 4 W. R. 213.

4288. — — — — —.]—As to safety of securities.]—A box containing securities of the Spanish Govt., the property in which passed by delivery, was deposited at a bank in the names of three trustees. The Spanish Govt. having afterwards made proposals for a change in the securities, one of the three trustees, who was a stockbroker, was allowed to take the securities out of the box for the purpose of such conversion ; he effected the conversion but appropriated a part of the converted securities to his own use, & placed the rest in the box, which he returned to the bank. The fraud was not discovered for several years. The trustee kept the key of the box, being allowed to have access to the box for the purpose of from time to time tearing off coupons & obtaining the dividends, & from time to time took out others of the securities, which he converted to his own use, until at last the box was empty :—*Held* : the co-trustees were liable for the first breach of trust, it being their duty after the conversion to see that the securities were all deposited in the box ; but they were not liable in respect of the subsequent misappropriations.—*MENDES v. GUEDELLA* (1862), 2 John. & H. 259 ; 31 L. J. Ch. 561 ; 6 L. T. 746 ; 8 Jur. N. S. 878 ; 10 W. R. 482 ; 70 E. R. 1054.

*Annotations* :—*Reid, Re Speight, Speight v. Gaunt* (1883), 22 Ch. D. 727 ; *Re De Potholier, Dent v. De Potholier*, [1900] 2 Ch. 529 ; *Re Sisson's Settlement, Jones v. Trappes*, [1903] 1 Ch. 262.

4289. Failure to interfere—Standing by when breach committed.]—*BOOTH v. BOOTH*, No. 4537, *post*.

4290. Omission to notify appointment as trustee.]—*BARNETT v. SHIFFIELD* (1852), 1 De G. M. & G. 371 ; 21 L. J. Ch. 692 ; 16 Jur. 942 ; 42 E. R. 595, L. J.

4291. — — — — —.]—The ordinary trustee indemnity clause affords no security to a trustee who neglects to take the necessary steps to secure the trust fund.

The moment he was constituted a trustee, it became his duty, by notice or otherwise, to make it impossible for his co-trustee to receive & misapply the trust fund (*ROMILLY, M.R.*).—*DIX v. BURFORD* (1854), 19 Beav. 409 ; 52 E. R. 408.

*Annotations* :—*Consd. Re Smith, Henderson-Roe v. Hitchins* (1889), 42 Ch. D. 302 ; *Re City Equitable Fire Insce.*, [1925] Ch. 407. *Reid, Macnamara v. Carey* (1867), 15 W. R. 374.

4292. Omission to see trust money properly invested.]—*THOMPSON v. FINCH*, No. 4445, *post*.

4293. — — — — —.]—A man cannot take upon himself the character of trustee, & act partially as such, or deny his liability to replace trust property, if, through his negligence or want of attention, a sum of money, which he has told his *cestuis que trust*, or induced them to believe has been retained & invested by him, has, in fact, been squandered by his co-trustees.

A., one of two trustees, rendered accounts in the name of the two, which stated that one-third of the income had been retained & invested, but, in fact, no such investment had been made, & A. alone had received & misapplied these moneys, which were lost by his bkpy. The other trustee, however, having, at a meeting of the *cestuis que trust*, so acted as to sanction & adopt the accounts,

#### PART VII. SECT. 3, SUB-SECT. 4.—C.

4289 I. Failure to interfere—Standing by when breach committed.]—When one or more of several trustees acts or act in getting in & dealing with the trust funds, an inactive trustee is account-

able therefor equally with the others, if, having the means of knowledge by exercise of ordinary vigilance, he stands by & permits a breach of trust to go on.—*McCARTER v. McCARTER* (1884), 7 O. R. 243.—*CAN.*

4289 II. — — — — —.]—*BAI JADAV v. TRIBHUVANDAS JAGTIVANDAS* (1872), 9 Bom. 333.—*IND.*

4292 I. Omission to see trust money properly invested.]—*ALLAN v. LANE* (1864), 2 W. W. & A.T. 1.—*AUS.*

*Sect. 3.—Liability of trustees: Sub-sect. 4, C. & D.; sub-sects. 5 & 6.]*

he was held liable for A.'s default.—*HORTON v. BROCKLEHURST* (No. 2) (1858), 29 Beav. 504; 54 E. R. 723.

**4294.** —[—A. & B., the trustees of a will under which *pltf.* was entitled to a share of residue, which she had assigned to C. & D., the trustees of her marriage settlement, paid it to C. alone, without the knowledge of D. They afterwards transferred a legacy of stock settled upon similar trusts to C. & D., by whom it was subsequently sold out, & the proceeds were received by C. alone. It appeared that D. left to C. the general management of the trust estate, & the choice of investments. Both funds were partially misapplied & lost by C. *Pltf.* now sought to have both funds made good:—*Held*: the conduct of D. did not justify A. & B. in considering C. as his agent authorised to receive the money.—*MARGITTS v. PERKS* (1864), 34 L. J. Ch. 109; 10 L. T. 85; 12 W. R. 517.

**4295. Failure to get in trust money.]**—By a marriage settlement, a debt due from A. was assigned to A. & B., upon trust, "with all convenient speed," to get in & invest in Consols. For two & a half years B. took no steps to get in the money, & A. then became *bkpt.*:—*Held*: B. was responsible for the loss.—*GROVE v. PRICE* (1858), 26 Beav. 103; 53 E. R. 836.

**4296. Neglect to examine banker's book—Loss of priority—Deposit of deeds by co-trustee to secure private balance.]**—Trust money was so placed to a banking account that any of the trustees could draw out separately. One of them drew out money & bought a house as a residence for some of the *cestui que trust*, but took a conveyance to himself alone. He then deposited the deeds with another bank to secure his private balance, & afterwards became *bkpt.* The co-trustees neglected to examine the banker's book, for a long time after the purchase:—*Held*: by reason of their negligence they were not entitled to priority over the security by deposit.—*ATLAN v. SCOTT* (1865), 12 L. T. 419.

**4297. Failure to compel co-trustee to pay over money received.]**—Where an auctioneer trustee sold property of testator, & died thirteen months afterwards insolvent, with the purchase-money in his hands, his co-trustee not having in the meantime taken any proceedings to compel him to pay over or invest the money:—*Held*: there had been wilful default on the part of the surviving trustee, & he must be charged with the moneys which, but for such default, he might have received.—*WILLIAMS v. HIGGINS* (1868), 17 L. T. 525; 16 W. R. 390.

**4298.** —[—*GOUGH v. SMITH*, [1872] W. N. 18.

*D. Trustee Entrusting Trust Property to Co-Trustee. See, also, EXECUTORS, Vol. XXIV., pp. 677–679, Nos. 7037–7047.*

**4299. Whether liable.]**—One trustee suffering the other to have the trust money, under a note

of hand:—*Held*: liable.—*KEBLE v. THOMPSON* (1790), 3 Bro. C. C. 112; 29 E. R. 440, L. C.

*Annotation:—Refd. Re Turner, Ex p. Woodward* (1837), 3 Mont. & A. 232.

**4300.** —[—Trustees & exors. charged with a loss, occasioned by a breach of trust, by joining in a transfer and sale, & lending the produce to a partnership, in which one of them was engaged; the others not receiving any benefit. Decree against all to account for the funds.—*FRENCH v. HOBSON* (1803), 9 Ves. 103; 32 E. R. 540.

*Annotation:—Distd. Lowry v. Fulton* (1839), 9 Sim. 104.

**4301.** —[—If an exor. or trustee, without taking due means to learn from his co-exor. or co-trustee, whether it is necessary, in the due execution of the trust, to sell stock, concurs in the sale of stock, & leaves it in the disposition of his co-exor. or co-trustee, he is liable for the stock so sold (LEACH, V.C.).—*HARRINGTON v. HARRINGTON* (1822), 1 L. J. O. S. Ch. 41.

**4302.** —[—Trustees charged with a loss to the estate, & interest, occasioned by their voluntarily permitting a co-trustee to receive purchase-money, & retain it a considerable time, before calling for security, contrary to the trust; notwithstanding a provision in the will, that the trustees should not be answerable for any trust moneys, further than each person for what he or she should respectively actually receive.—*BONE v. COOK* (1824), M'Cle. 168; 13 Price, 332; 147 E. R. 1008, Ex. Ch.

*Annotations:—Mentd. Humphreys v. Howes* (1830), 1 Russ. & M. 639; *Re Porter's Trust* (1857), 4 K. & J. 188.

**4303.** —[—(1) Where a trustee permits trust money to remain in the hands of his co-trustee, he will be liable for it to the *cestui que trust*, though it appears they had notice of the circumstance, unless there be an express assent on their part.

(2) Where persons, entitled to have money invested in stock under a will, have long been receiving interest on the principal money instead they cannot afterwards elect to take the amount of stock, which would have been purchased, had it been so laid out at the proper time.—*CHILD v. GIBLETT* (1834), 3 My. & K. 71; 3 L. J. Ch. 124; 40 E. R. 27.

*Annotation:—Generally, Mentd. Edwards v. Edwards* (1852), 19 L. T. O. S. 133.

**4304.** —[—*BYASS v. GATES, COPPARD v. GATES*, No. 4442, *post*.

**4305.** —[—Two trustees having properly sold out trust money, one of them handed the cheque for the proceeds to the other, who misapplied it:—*Held*: they were both liable.—*TRUTCH v. LAMPRELL* (1855), 20 Beav. 116; 52 E. R. 546.

**4306.** —[—*MENDES v. GUEDALLA*, No. 4288, *ante*.

**4307.** —[—Three trustees sold out trust funds & the produce was paid to one alone. The other two were, on motion, ordered to pay the amount into ct.—*INGLE v. PARTRIDGE* (1863), 32 Beav. 661; 32 L. J. Ch. 813; 55 E. R. 260; *subsequent proceedings* (1865), 34 Beav. 411.

**4299 iv.** —[—Trustees under a deed of settlement, making an allowance to them for their trouble, but containing no special authority to appoint factors, appointed a co-trustee factor, but neglected to see that a legacy was invested in terms of the deed, & allowed the money to remain in the hands of the factor, who died insolvent:—*Held*: they were personally liable in the amount.—*SIM v. CHARLES* (1830), 8 Sh. (Cr. of Sess.) 741; 5 Fac. Coll. 589.—*SCOT*.

**PART VII. SECT. 3, SUB-SECT. 4.—D.**

**4299 i. Whether liable.]**—*MICKLEBURNH v. PARKER* (1870), 17 Gr. 503.—*CAN.*

**4299 ii.** —[—*Held*: a trustee was not liable for moneys received by an agent or co-trustee acting as manager, which were not entered on the books (to which the trustee charged had access) & which he could not have discovered by any vigilance he might have used.—*CITY BANK v. MAULSON*

(1871), 3 Ch. Ch. 334.—*CAN.*

**4299 iii.** —[—The duties & obligations which the law imposes upon a person undertaking the office of trustee, require him to participate actively in the management of the trust funds, & if he fails in that respect, & thereby enables his co-trustee to get possession of & misappropriate the trust funds, he is personally responsible therefor.—*CROWE v. CRAIG* (1897), 29 N. S. R. (17 R. & G.) 394.—*CAN.*

## SUB-SECT. 5.—BARE TRUSTEE.

**4308. Whether liable—Dealing with estate to prejudice of cestui que trust.]**—If he, who has the mere legal estate, so deals with it as to sanction any act done by the equitable trustee to the prejudice of the *cestui que trust*, he thereby becomes a party to the breach of trust, & is answerable accordingly; but where the equitable trust is for the purpose of sale, he who has the legal estate is, for the benefit of the *cestui que trust* bound, when required, to convey it to the equitable trustee to enable him to execute his trust. If, in parting with the legal estate, he goes beyond the mere purpose of conveying it to the equitable trustee, & so deals with it as to facilitate a breach of trust by the trustee, & a breach of trust be in consequence committed, he is deemed a party to such breach of trust & is responsible for it (LEACH, M.R.).—**ANGIER v. STANNARD** (1834), 3 My. & K. 506; 3 L. J. Ch. 216; 40 E. R. 216.

## SUB-SECT. 6.—CONSTRUCTIVE TRUSTEES.

**4309. Whether liable.]**—(1) A party assuming to act as heir or devisee of a trustee, & committing an act which, if done by the trustee, would have been a breach of trust, cannot relieve himself of liability by asserting that he was not acting as trustee.

(2) On a bill filed, by an incumbrancer of the interest of deceased tenant for life in a fund, against a party sought to be made accountable in respect of a breach of trust affecting the whole fund, to which suit the *cestui que trust* in remainder were also made parties, a decree directing the restitution of the whole fund was varied on appeal, by limiting the relief to the restitution of so much only of the interest of the fund as had accrued in the lifetime of the tenant for life.—**RACKHAM v. SIDDALL** (1850), 1 Mac. & G. 607; 2 H. & Tw. 44; 16 L. T. O. S. 21; 41 E. R. 1400, 1 L. C.

**Annotations:—***As to (1) Apprvd.* Lyell v. Kennedy, Kennedy v. Lyell (1889), 14 App. Cas. 437. *Reid.* Life Assn. of Scotland v. Siddall, Cooper v. Green (1861), 3 De G. F. & J. 58. *As to (2) Distd.* Re Dunning, Hatherley v. Dunning (1885), 54 L. J. Ch. 900. *Generally.* Mentd. Hope v. Liddell, Liddell v. Norton (1855), 21 Beav. 183; Cunliffe v. Branker (1876), 3 Ch. D. 393.

**4310. —.]**—A. & B. were trustees. A deed was prepared appointing C. a new trustee in the place of B. It was executed by C., but not by the other parties, so that the appointment was invalid. At the same time, the trust was transferred by A. & B. to A. & C. Afterwards A. & C. authorised the husband of the tenant for life to receive the fund, & it was lost:—**Held:** both C., who had not been appointed a trustee, though she had acted as such, & B. were liable for the loss.—**PEARCE v. PEARCE** (1856), 22 Beav. 248; 25 L. J. Ch. 803; 28 L. T. O. S. 34; 2 Jur. N. S. 843; 52 E. R. 1103.

**4311. —.]**—By a post-nuptial settlement executed in 1814, after reciting that J., the husband, had before marriage agreed to settle £1,000, & had paid that sum to R.; R. covenanted that he would stand possessed of the money upon trust with the approbation of J., to invest it in the names of J. & R. & trusts were declared of the fund for the benefit of the husband & wife successively for life, with remainder to the children of the marriage. By the same deed J. covenanted with R. to pay to him a further sum of £1,000, to be held upon the same trusts as the first-mentioned £1,000. Neither of the two sums of £1,000 was, in fact, ever paid. J. survived his wife, & died in 1868. In a suit instituted for the administration of the estate of J., the children of the marriage claimed to rank

as creditors for both sums of £1,000:—**Held:** as to the first-mentioned sum of £1,000, J. had constituted himself a trustee of the settlement, & his estate was liable for the amount; but the claim to the other £1,000 rested upon a mere legal obligation which was barred by Statute Limitations.—**STONE v. STONE** (1869), 5 Ch. App. 74; 39 L. J. Ch. 196; 22 L. T. 182; 18 W. R. 225, L. J.

**Annotations:—***Reid.* Metropolitan Bank v. Helron (1880), 5 Ex. D. 319; Trevor v. Hutchins (1897), 76 L. T. 183; *Re Plumpton's Marriage Settlement*, Underhill v. Plumpton, [1910] 1 Ch. 609. *Mentd.* *Re Dixon*, Heynes v. Dixon, [1899] 2 Ch. 561.

**4312. —.]**—A firm of solrs. having been employed by the trustees of a will to receive the proceeds of testator's real estate, which had been taken by a railway co., paid over the money to one of such trustees without the receipt or authority of the other. The money having been lost to the estate by the insolvency & death of the trustee to whom it was paid:—**Held:** the receipt of one trustee only, though also an exor., was not a sufficient discharge to the solrs. for the money which they had received by the authority of the two, & they were personally liable to make good the loss which had resulted to the trust estate from such improper payment.

A mere agent of trustees is answerable only to his principal & not to *cestui que trust* in respect of trust moneys coming to his hands merely in his character of agent. But . . . a person who receives into his hands trust moneys, & who deals with them in a manner inconsistent with the performance of trusts of which he is cognisant, is personally liable for the consequences, which may ensue upon his so dealing (BACON, V.-C.).—**LEE v. SANKEY** (1873), L. R. 15 Eq. 204; 21 W. R. 286; *sub nom.* LEE v. SANKEY, GINDER v. SANKEY, 27 L. T. 809.

**Annotations:—***Consd.* *Re Barney*, Barney v. Barney, [1892] 2 Ch. 265; *Sour c.* Ashwell, [1893] 2 Q. B. 390. *Reid.* Wilson v. Bury (1880), 5 Q. B. D. 518; Mara v. Browne (1890), 72 L. T. 765; *Re Eyre-Williams*, Williams v. Williams, [1923] 2 Ch. 333.

**4313. —.]**—During the life of D., owner in fee of land which was let to tenants from year to year & week to week, the property was managed by deft. as her agent, deft. receiving the rents & paying them into a separate ear-marked account at his own bank. D. having died intestate in 1807, deft. continued to receive the rents & pay them into the bank exactly as before, not informing the tenants of D.'s death, but stating to several persons that he was acting as agent & receiver for the true heir whoever he might be. Deft. thus acted till 1880, when, more than twelve years having elapsed after D.'s death, he claimed the property on his own account. The assignee of D.'s heir having in 1881 brought an action against deft. to recover possession of the land & for an account of the rents & profits:—**Held:** as to the land the acts of deft. in receiving the rents as agent for the heir could not dispossess the heir so as to put him to his action under Real Property Limitation Act, 1833 (c. 27), ss. 2, 3, or 8, the deft.'s acts as such agent though unauthorised might be ratified by the true owner, & were ratified by plff. bringing his action within a reasonable time after the heir was ascertained: as to the accumulated rents & profits deft. had made himself a trustee & plff. was entitled to judgment for the recovery of possession of the land & to an account of the rents & profits since D.'s death.—**LYELL v. KENNEDY, KENNEDY v. LYELL** (1889), 14 App. Cas. 437; 59 L. J. Q. B. 208; 62 L. T. 77; 38 W. R. 353, H. L.

**Annotations:—***Consd.* *Reid-Newfoundland Co. v. Anglo-American Telegraph Co.*, [1912] A. C. 555. *Distd.*

**Sect. 3.—Liability of trustees: Sub-sects. 6, 7, 8, 9, 10 & 11.]**

*Henry v. Hammond*, [1913] 2 K. B. 515. *Reid. Trevor v. Hutchins* (1897), 76 L. T. 188. *Mentid. Bolton Partners v. Lambert* (1889), 41 Ch. D. 295; *Keighley, Maxsted v. Durant*, [1901] A. C. 240; *Finn v. Shelton Iron, Steel & Coal Co.* (1924), 131 L. T. 213.

**4314.** —[As between persons appointed trustees & persons who have become constructive trustees of an estate, there is no primary & secondary liability in respect of a breach of trust, but all are equally liable.

In an action by *cestuis que trust* against their trustees in respect of certain alleged breaches of trust, the solrs. of the trustees were joined as defts. In the statement of claim it was alleged in substance that the solrs. had become constructive trustees. Upon motion to dismiss the action as against the solrs.:—*Held*: if the allegations were true, the solrs. & the trustees would be equally liable for breaches of trust, & the action must be allowed to proceed.—*COWPER v. STONEHAM* (1893), 68 L. T. 18; 3 R. 242.

**4315.** —[—*WASSELL v. LEGGATT*, No. 4115, ante.

**SUB-SECT. 7.—TRUSTEE-BENEFICIARY.**

**4316. Liability of interest in trust estate.]**—The personal interests of a trustee in a trust fund in ct. will be made applicable to the discharge of all claims against him as trustee.—*IRBY v. IRBY* (No. 3) (1858), 25 Beav. 632; 32 L. T. O. S. 141; 4 Jur. N. S. 989; 6 W. R. 853; 53 E. R. 778.

*Annotations:—Consd. Re Pain, Gustavson v. Haviland*, [1919] 1 Ch. 38. *Reid. Re Carow, Carow v. Carow*, [1896] 1 Ch. 527; *Re Sewell, White v. Sewell*, [1909] 1 Ch. 806.

**4317.** — *Though obtained derivatively.]* — A defaulting trustee cannot claim, as against his *cestuis que trust*, any beneficial interest in the trust estate, even although he may have become entitled thereto derivatively, for example, as being one of the next of kin of a *cestui que trust* who has died intestate.—*JACOBS v. RYLAND* (1874), L. R. 17 Eq. 341; 43 L. J. Ch. 280.

*Annotations:—Apld. Doering v. Doering* (1889), 42 Ch. D. 203. *Consd. Edgar v. Plomley*, [1900] A. C. 431. *Apld. Re Dacre, Whitaker v. Dacre*, [1916] 1 Ch. 344. *Reid. Re Carow, Carow v. Carow*, [1896] 1 Ch. 527.

**4318.** — *On bankruptcy of trustee—Life estate in realty.]*—A trustee & exor., who took a life interest in his testator's residuary real & personal estate, misappropriated & wasted portions of the estates specifically devised, & bequeathed, & subsequently became bkpt. :—*Held*: his estate in the residuary realty being legal could not be applied in making good his breaches of trust.—*FOX v. BUCKLEY* (1876), 3 Ch. D. 508; 25 W. R. 170, C. A. *Annotations:—Consd. Re Milnes, Milnes v. Sherwin* (1885), 53 L. T. 534. *Apld. Re Brown, Dixon v. Brown* (1886), 32 Ch. D. 597. *Reid. Re Moore, Moore v. Moore* (1881), 45 L. T. 466; *Doering v. Doering* (1889), 42 Ch. D. 203; *Re Weston, Davies v. Tagart*, [1900] 2 Ch. 164.

**4319.** — *Payment to trustees in bankruptcy under mistake.]*—*Re BROWN, DIXON v. BROWN*, No. 4006, ante.

**4320.** — *Where interest assigned—Derivative interests acquired in trust estate.]*—The rule that a defaulting trustee who is beneficially interested under the trust can claim nothing out of the estate as against his *cestui que trust* until he has made good his default applies to an interest which he acquires derivatively; & his assignee is in no better position.

Where a *cestui que trust* assigned a reversionary legacy to his trustee, & the trustee mortgaged it & was subsequently declared a defaulter, the mtgee. was postponed to the claim of the beneficiaries to have the default made good.—*DOERING v. DOERING* (1889), 42 Ch. D. 203; 58 L. J. Ch. 553; 37 W. R. 796.

*Annotations:—Distd. Re Towndrow, Gratton v. Machen*, [1911] 1 Ch. 662. *Apld. Re Dacre, Whitaker v. Dacre*, [1916] 1 Ch. 344.

**4321.** — *Interest in separate fund.]*—An exor. & trustee, who was absolutely entitled to a specific legacy subject only to prior life interests therein, was also trustee of the residuary personal estate, which was settled upon trusts under which he took no beneficial interest whatever. He settled part of the legacy while still reversionary & mortgaged the other part. Several years afterwards he misappropriated part of the residue. The legacy having fallen into possession & been transferred into ct. in the course of an action for the execution of the trusts of the will, the residuary legatees sought to attach the legacy to make good the default in respect of the residue :—*Held*: the rule that a defaulting trustee cannot claim any share in the trust estate until he has made good his default, inasmuch as he must be treated as having by anticipation received or retained payment of his share, did not apply to the present case, because the trustee was not entitled to any share or interest in the residue; & as the specific legacy & residue were held upon entirely distinct trusts, one fund was not liable to indemnify the other, & the trustee's assignees were, therefore, entitled to the whole legacy free from any lien or equity in respect of the default.—*Re TOWNDROW, GRATTON v. MACHEN*, [1911] 1 Ch. 662; 80 L. J. Ch. 378; 104 L. T. 534.

*Annotations:—Consd. Re Dacre, Whitaker v. Dacre*, [1916] 1 Ch. 344; *Re Jewell's Settlement, Watts v. Public Trustee*, [1919] 2 Ch. 161.

**4322.** — *Trust fund distributed by court.]*—Where a trust fund is being distributed by the ct., a trustee-beneficiary against whom proceedings are pending for moneys alleged to belong to the fund cannot take any share until the amount, if any, due from him has been ascertained & made good.—*Re RHODESIA GOLDFIELDS, LTD., PART-RIDGE v. RHODESIA GOLDFIELDS, LTD.*, [1910] 1 Ch. 239; 79 L. J. Ch. 133; 102 L. T. 126; 54 Sol. Jo. 135; 17 Mans. 23.

*Annotations:—Consd. Re Smelting Corp., Scaver v. The Co.*, [1915] 1 Ch. 472; *Re Melton, Milk v. Towers*, [1918] 1 Ch. 37. *Reid. Re National Live Stock Insee. Re National General Insee.*, [1917] 1 Ch. 628; *Re Pain, Gustavson v. Haviland* (1918), 87 L. J. Ch. 550; *Re Jewell's Settlement, Watts v. Public Trustee*, [1919] 2 Ch. 161. *Mentid. Re Peruvian Ry. Construction Co.* (1915), 85 L. J. Ch. 129.

**SUB-SECT. 8.—SOLICITOR TRUSTEES.**

*See SOLICITORS*, Vol. XLII, pp. 123, 124, 402, 403, Nos. 1184-1197, 4562-4567.

**SUB-SECT. 9.—TRUSTEES OF CHARITIES.**

*See CHARITIES*, Vol. VIII, pp. 377-379, Nos. 1886-1914.

**SUB-SECT. 10.—TRUSTEES OF FRIENDLY SOCIETIES.**

*See FRIENDLY SOCIETIES*, Vol. XXV., p. 302, Nos. 96-98.

**PART VII. SECT. 3, SUB-SECT. 7.**

*g. Liability of interest in trust estate—Where interest assigned.]*—A defaulting

trustee, who has a beneficial interest in the trust estate, cannot claim against it without making good his defaultations; & his assignee is in no better

position even when the default is committed after the assignment.—*CIMMINS v. AUSTIN* (1902), 28 V. L. R. 347, 622.—**AUS.**

4323 l. *General rule—Estate liable.*—FETHERSTON v. WEST (1871), 6 L. R. Eq. 86.—IR.







& power to employ collectors of debts & accountants. The will contained an indemnity clause that each trustee should be answerable only for losses arising from his own default, & that any trustee who should pay over to his co-trustee, or should concur in any act enabling him to receive any moneys for the purposes of the will, should not be obliged to see to the application thereof, nor should such trustee be rendered responsible by an express notice of the actual misapplication of the same moneys.

The business was carried on, with the consent of the beneficiaries, by one trustee, A. testator's son, & an account was opened at the bank, & a letter signed by both exors. & trustees, authorising the bank to honour the signature of the one trustee, viz. A. the son. Under this authority, the trustee, A. drew out, nominally for the business, large sums of money, which he misappropriated to his own purposes:—*Held*: in the absence of proof, or gross negligence or personal misconduct on the part of the trustee D. he was fully protected by the indemnity clause from liability in respect of the loss to the estate occasioned by the defalcations of his co-trustee A.—*PASS v. DUNDAS* (1880), 43 L. T. 665; 29 W. R. 332.

**4348. — Trustees acting without care & impartiality.**—Trustees sold a tenement, the property of the trust, to one of seven beneficiaries under the trust deed, the price in terms of the contract being payable in May, 1874. In Nov. 1874, the purchaser being unable to pay £12,000 of the price, was allowed to retain it on loan. As security for the loan, he conveyed to the trustees three houses, including his purchase from the trust, upon each of which there were prior incumbrances to an amount exceeding two-thirds of the estimated value as stated by the borrower. Besides these securities the trustees held the personal obligation of the borrower & his father-in-law: both of whom were engaged in trade. Some of the other beneficiaries remonstrated in 1874, & again in 1880; but the money was allowed to remain on these securities until 1884, when the borrower & his father-in-law became bkpt., & about £10,000 was lost to the trust. The trust deed contained (a) a clause empowering the trustees to lend out the proceeds & other funds of the trust on "such securities heritable or personal" as they might think proper; & (b) an immunity clause declaring that the trustees should not be liable for "omissions, errors, or neglect of management." The same law agent acted for the trustees & the borrower:—*Held*: the trustees had not acted with perfect impartiality between the beneficiaries, nor had they brought to the management the same care & diligence which a man of ordinary prudence would have exercised in his own concerns, in these circumstances neither the immunity clause nor the authority to lend on personal security were sufficient to protect them, & they were personally liable to make good the deficiency

in the trust funds.—*KNOX v. MACKINNON* (1888), 13 App. Cas. 753, H. L.

*Annotations*:—*Appl. Rae v. Meek* (1889), 14 App. Cas. 558. *Consd. Wyman v. Paterson*, [1900] A. C. 271.

**4349. —**—*J*.—Certain trust premises were damaged by bombs dropped by hostile aircraft. The premises were insured, but there was a dispute as to whether the policy had lapsed by non-payment of premiums. The trustee claimed to be indemnified for the repairs necessitated by the damage:—*Held*: the trustee had not committed a breach of trust so as to lose his right to an indemnity.—*Re McGAW, MCINTYRE v. McGAW* (1919), 64 Sol. Jo. 100, 209.

#### SUB-SECT. 3.—RELIEF FOR HONEST AND REASONABLE CONDUCT.

##### A. In General.

See Trustee Act, 1925 (c. 19), 61.

**4350. General rule.**—Suppose a trustee, having in his hands a considerable sum of money, places it out in the funds, which afterwards sink in their value; or on a security at the time apparently good, which afterwards turns out not to be so, for the benefit of the *cestui que trust*, was there ever an instance of the trustee's being made to answer the actual sum so placed out? I answer, no. If there is no *malâ fides*, nothing wilful in the conduct of the trustee, the ct. will always favour him (*LORD HARDWICKE, C.*)—*KNIGHT v. PLYMOUTH (EARL)* (1747), as reported in 1 Dick. 120; 21 E. R. 214, L. C.

*Annotations*:—*Consd. Rowth v. Howell* (1797), 3 Ves. 565. *Refd. Wren v. Kinton* (1805), 11 Ves. 377; *Salway v. Salway* (1831), 2 Russ. & M. 215. *Mentd. Re Parsons, Ex p. Belchier* (1754), Amb. 218; *The Prima Vera* (1808), Edw. 23; *Raw v. Cutten* (1832), 9 Bing. 90.

**4351. No general principles laid down—Each case dealt with according to circumstances.**—[The conduct of trustees ought to be regarded with reference to the facts & circumstances existing at the time when they had to act & which were known, or which ought to have been known, by them at that time.]

By his will testator gave his sons in succession an option to purchase his leasehold mill property at a valuation, payable by half yearly instalments with interest. In addition to giving a bond, the son purchasing was to execute a mtge. The sale moneys were to be invested upon some of the investments authorised by the will & to be disposed of as thereby directed. The investment clause gave the trustees absolute discretion to invest in the securities named therein, or in case either of the sons should elect to carry on testator's business, then upon security of the land, mill, & premises whereon the business should be carried on. Testator died in 1875. The eldest son exercised the option. The mill property was valued at £50,000. The trustees & the son agreed for payment of this sum by half yearly instalments of £2,000. In Mar. 1877, the son executed a mtge.

**4351.1. No general principles laid down—Each case dealt with according to circumstances.**—[A trustee who has committed a breach of trust, but who acted both honestly & reasonably, is not entitled as of right to relief under Trusts Act, 1901, s. 3. The ct. must then consider whether the trustee ought fairly to be excused for the breach looking at all the circumstances.—*NATIONAL TRUSTEE, EXECUTORS & AGENCY CO. OF AUSTRALASIA, LTD. v. GENERAL FINANCE AGENCY & GUARANTEE CO. OF AUSTRALASIA, LTD.* (1905), 21 T. L. R. 522, P. C.—*AUS.*]

#### PART VII. SECT. 4, SUB-SECT. 3.—A.

**4350.1. General rule.**—Where trustees omitted to sue for a breach of covenant where there was no evidence of any request having been made to them to so sue, or of there being any trust property to which they could have resorted for funds for that purpose, & certain of the *cestui que trust* desiring them not to sue:—*Held*: even if the trustees were technically liable for a breach of trust, they having acted honestly & reasonably ought fairly to be excused under the Trustee Act Amendment Act, 1902, s. 9.—*PARTRIDGE v. PRED-*

*DEY* (1903), 4 S. R. N. S. W. 36; 21 N. S. W. N. 11.—*AUS.*

**4350 II. —**—*J*.—*SIMPSON v. JOHNSTON* (1901), 2 N. B. Eq. Rep. 333; 22 C. L. T. 38.—*CAN.*

**4350 III. —**—*J*.—*DOVER v. DENNE* (1902), 22 C. L. T. 204; 3 O. L. R. 664; 1 O. W. R. 297.—*CAN.*

**4350 IV. —**—*J*.—*WHICHER v. NATIONAL TRUST CO.* (1910), 17 O. W. R. 788; 2 O. W. N. 383; 22 O. L. R. 460.—*CAN.*

**4350 V. —**—*J*.—*Re McNEILL ESTATE (B. C.)* (1911), 19 W. L. R. 691.—*CAN.*

**Sect. 4.—Limitations on liability of trustees: Subsect. 3, A. & B.]**

of the mill property to secure the \$50,000. It being necessary that the son should obtain some further capital, a limited liability co. was incorporated in Mar. 1877. It agreed to buy from the son the property comprised in the mtge. at a slight advance in price, & the equity of redemption was duly assigned to it. The co. having subsequently failed, it was sought to fix the trustees with liability, & to establish against them a case of wilful default. The default alleged was that they did not get from the son the instalments of £2,000 half yearly as they became due, & also in not compelling the payment of the instalments by the co. as the owners of the equity of redemption by means of a foreclosure action or the exercise of their power of sale:—*Held*: the trustees had done the best they could in the embarrassing position in which testator himself had placed them; no imputation could be made upon their honesty; & they were not liable to make good the loss.—*Re HURST, ADDISON v. TOPP* (1892), 67 L. T. 96; 8 T. L. R. 528, C. A.

*Annotation*.—*Consd. Re Greenwood, Greenwood v. Firth* (1911), 105 L. T. 509.

**4352.** —.—.—*]*—The power to relieve a trustee from personal liability for a breach of trust given by Judicial Trustee Act, 1896 (c. 35), s. 3, is meant to be acted on freely & fairly in the exercise of judicial discretion, but the court must, before exercising the power, be satisfied by sufficient evidence that the trustee acted reasonably as well as honestly.

No general rules or principles can be laid down as those to be acted upon in carrying out the section; each case depends on its own circumstances.—*Re TURNER, BARKER v. IVIMEY*, [1897] 1 Ch. 536; 66 L. J. Ch. 282; 70 L. T. 116; 45 W. R. 495; 13 T. L. R. 249; 41 Sol. Jo. 313.

*Annotations*.—*Appl. Re Roberts, Knight v. Roberts* (1897), 78 L. T. 479; *Re Stuart, Smith v. Stuart*, [1897] 2 Ch. 583; *Re Barker, Ravenshaw v. Barker* (1898), 46 W. R. 296. *Distd. Head v. Gould*, [1898] 2 Ch. 250. *Consd. Re Linsley, Cattley v. West*, [1904] 2 Ch. 785. *Expld. Re Mackay, Griesemann v. Carr*, [1911] 1 Ch. 300.

**4353.** —.—.—*]*—Each case must be dealt with according to its own circumstances (*ROMER, J.*).—*Re KAY, MOSLEY v. KAY*, [1897] 2 Ch. 518; 66 L. J. Ch. 759; 40 W. R. 74; 13 T. L. R. 582.

*Annotations*.—*Re Barker, Ravenshaw v. Barker* (1898), 46 W. R. 296; *Re De Clifford's Estate, De Clifford v. Qulter, De Clifford v. Lansdowne*, [1900] 2 Ch. 707; *Re Alsop, Whittaker v. Bamford*, [1914] 1 Ch. 1. *Mentd. Re Blow, St. Bartholomew's Hospital v. Camdden*, [1914] 1 Ch. 233.

**4354. Must act honestly & reasonably.—Honestly alone insufficient.]—Re TURNER, BARKER v. IVIMEY, No. 4352, ante.**

**4355.** —.—.—*]*—*Re BARKER, RAVENSHAW v. BARKER, No. 4058, ante.*

**4356.** —.—.—*]*—In the case of trustees there are certain definite & precise rules of law as to what a trustee may or may not do in the execution of his trust, & it is no answer for a trustee to say, if, for example, he invests the trust property in his hands in a security which the law regards as an unauthorised security: "I honestly believed that I was justified in doing that." No honest belief will justify him in committing that which is a breach of such a rule of law (*WARRINGTON, L.J.*).—

**4354.1. Must act honestly & reasonably**  
—*Honestly alone insufficient.]—Held*: trustees were not entitled to be relieved from personal liability for breaches of trust under Trusts (Scotland) Act, 1921, s. 32 (4), in respect that, while they had acted honestly, they had not acted reasonably, &

accordingly, were not fairly entitled to be excused, notwithstanding the fact that under their management the value of the trust estate had increased.—*CLARKE v. CLARKE*, [1925] S. C. 693.—*SCOT.*

**e. Right of trustee to relief.—Trustee allowing time for payment of debt.]—**

*Re CITY EQUITABLE FIRE INSURANCE CO.*, [1925] Ch. 407; 94 L. J. Ch. 445; 133 L. T. 520; 40 T. L. R. 853; [1925] B. & C. R. 109, C. A.

*Annotations*.—*Reid. Re City of London Insce.* (1925), 41 T. L. R. 521; *Re Munton, Munton v. West*, [1927] 1 Ch. 282; *Re Windsor Steam Coal Co.* (1901), [1928] Ch. 609.

**4357. Presumption of honesty.]—It must be presumed that persons dealing with a trust fund are dealing with it honestly (PAGE WOOD, V.-C.).—TAYLOR v. MILLINGTON** (1858), 4 Jur. N. S. 204.

**4358. Breach not excused in advance.]—The point made is that, inasmuch as the ct. has authority to excuse a trustee from liability for a breach of trust committed, or, in other words, to bind the beneficiaries to accept what was done as if it were no breach of trust at all, therefore the ct. must have power to exercise that authority by anticipation, & to excuse a trustee from liability for a breach of trust contemplated. I am not convinced. The statutory provision, though not a good example of clear & careful legislation, has undoubtedly proved useful; but to extend it as proposed by implication, & to say that the ct. can sanction any dealing with trust property, however discordant from the trusts declared, provided only it be honest, whatever that may mean, & reasonable, would be a subversion of principal.—(KEKEWICH, J.).—*Re TOLLEMACHE*, [1903] 1 Ch. 457; *sub nom. Re T.* (DECEASED), 72 L. J. Ch. 225; 88 L. T. 13; 51 W. R. 568; 47 Sol. Jo. 254; *affd.*, [1903] 1 Ch. 955; 72 L. J. Ch. 539; 88 L. T. 670; 51 W. R. 507, C. A.**

**4359. Right of trustee to relief.—Time for application.]—Re STUART, SMITH v. STUART, No. 4364, post.**

**4360.** —.—.—*No attempt to rectify breach.]—F.*, being entitled to the whole of his deceased wife's proportion of a fund of which appts. became trustees, assigned the same to resps. Under the erroneous advice of their solrs., in accordance with an Act which was not passed till after the wife's death, appts. paid two-thirds of the fund to the wife's children & one-third into ct. under the Act for relief of trustees without question by resps., who accepted appts.' statements as to their rights without verification.

In a suit by resps. to recover the said two-thirds:—*Held*: (1) the payment thereof to the children was a breach of trust, & it was no defence that it had been made upon erroneous advice of the solrs.; (2) resps. having accepted & acted upon appts.' statement as to their rights was no evidence of acquiescence; (3) although appts. had acted honestly & reasonably, they had shown no title to be excused. They had made no attempt to replace the fund in whole or in part nor explained the reason for their abstention. They were not gratuitous trustees, & could not throw upon resps., who were not in fault, the loss of a fund which they had misapplied in the course of their business.—*NATIONAL TRUSTEES CO. OF AUSTRALASIA v. GENERAL FINANCE CO. OF AUSTRALASIA*, [1905] A. C. 373; 74 L. J. P. C. 73; 92 L. T. 736; 54 W. R. 1; 21 T. L. R. 522, P. C.

*Annotations*.—*As to (3) Consd. Davis v. Hutchings*, [1907] 1 Ch. 556. *Appl. Re Alsop, Whittaker v. Bamford*, [1914] 1 Ch. 1. *Distd. Re Claridge's Patent Asphalte Co.*, [1921] 1 Ch. 543.

**4361.** —.—.—*Liability probable.]—It is not necessary for the ct. to decide that the trustee is under*

*COTTON v. DEMPSTER* (1918), 20 W. A. L. R. 14.—*AUS.*

**f.** —.—.—*]*—*McDONALD v. TRUSTS & GUARANTEE CO.* (1910), 10 O. W. R. 507.—*CAN.*

**g.** —.—.—*]*—*GUSHUE v. NORMAN & GUSHUE* (1862), 3 Nfld. L. R. 252.—*NFLD.*

any personal liability. It is enough, that in the opinion of the ct. he may be under some personal liability (PARKER, J.).—*Re MACKAY, GRIESSEMANN v. CARR*, [1911] 1 Ch. 300; 80 L. J. Ch. 237; 103 L. T. 755.

*Annotation*:—*Reid. Re Allsop, Whittaker v. Bamford*, [1914] 1 Ch. 1.

**4362.** — *Retaining part of trust estate.*—*Re CLARK, CLARK v. MOORE & MOORES (CHEMISTS), LTD.* (1920), 150 L. T. Jo. 94.

#### B. What Conduct Honest and Reasonable.

*See Trustee Act, 1925 (c. 19), s. 61.*

**4363. Reasonable—Prudent man in ordinary course of business.**—In considering whether trustees who are morally innocent are liable for a breach of trust, it does not follow that, because an act is usually done among persons carrying on a certain business, it is therefore such an act as a prudent man would do in the ordinary course of business, so as to absolve a trustee from liability for a breach of trust ensuing from such act.—*BULLOCK v. BULLOCK* (1886), 56 L. J. Ch. 221; 55 L. T. 703; 3 T. L. R. 131.

**4364.** — *As ordinary man of business in own affairs.*—(1) A summons for administration having been taken out by beneficiaries under a will against the trustees, in answer to an inquiry the master had certified that the trust estate had suffered a loss owing to improper investments for which the trustees were liable. No application was made to vary the certificate, but, upon the case coming on for further consideration, the trustees claimed relief under Judicial Trustees Act, 1896 (c. 35), s. 3. The inquiry was directed & the certificate made before the passing of the Act:—*Held*: under the circumstances the application for relief was not too late, & the ct. would hear evidence as to whether the trustees had “acted honestly & reasonably, & ought to be excused.”

(2) The *onus* is on a trustee who applies under Judicial Trustees Act, 1896 (c. 35), s. 3, to be relieved from the consequences of a breach of trust, to prove that he acted honestly & reasonably; & where the breach of trust consists in investing the trust funds upon sufficient securities, *prima facie* the requirements of Trustee Act, 1888 (c. 59), s. 4, & Trustee Act, 1893 (c. 53), s. 8, constitute a standard by which reasonable conduct is to be judged, although non-compliance with those requirements is not necessarily a fatal obstacle to an application for relief; it is also a matter for consideration whether the trustee would have acted in the same way if he had been lending money of his own.

(3) A trustee (a) acted on a valuation which stated merely the amount for which the property was a good security without stating the value of the property, & (b) advanced more than two-thirds of the value stated in the valuation. In each case the valuer was employed by a solr. who acted for the mtgor. also, & the trustee did not allege that he reasonably believed the valuer to be employed independently of any owner of the property:—*Held*: he was not entitled to relief.—*Re STUART, SMITH v. STUART*, [1897] 2 Ch. 583; 66 L. J. Ch. 780; 77 L. T. 128; 46 W. R. 41; 41 Sol. Jo. 714.

*Annotations*:—*As to (2) Reid. Re Barker, Ravenshaw v. Barker* (1898), 46 W. R. 296; *Re Solomon, Nore v. Meyer*, [1912] 1 Ch. 261.

**4365.** — ——.—*I am not prepared to say*

that a trustee has acted honestly & reasonably & ought fairly to be excused as a trustee merely on the ground that he has acted in exactly the same way with respect to his own money. The fact that he has acted with equal foolishness in both cases will not justify relief under this statute (FARWELL, J.).—*Re DE CLIFFORD'S (LORD) ESTATE, DE CLIFFORD (LORD) v. QUILTER, DE CLIFFORD (LORD) v. LANSLOWNE (MARQUIS)*, [1900] 2 Ch. 707; 69 L. J. Ch. 828; 83 L. T. 160; 16 T. L. R. 547; 44 Sol. Jo. 689.

*Annotation*:—*Mentd. London Bridge Buildings Co. v. Thomson* (1903), 89 L. T. 50.

**4366.** — ——.—The trustee of a will was directed to invest the trust funds “in his own name or under his legal control” in, amongst other modes of investment, freehold, copyhold, leasehold, or chattel real securities. He invested a sum of £2,000, part of the trust funds, on a contributory mtgo. of certain leasehold flats held under underleases at substantial rents. The security was introduced by a surveyor to the trustee's solr., who recommended it to the trustee & suggested the same surveyor as a suitable person to value the property on the trustee's behalf. The trustee appointed the surveyor & it was arranged that he should be paid a fee only in the event of the mtgo. going through. The surveyor made his report, from which it appeared that the property was of a speculative character, but the surveyor nevertheless advised that it formed a good security for the sum proposed to be advanced by the trustee & his co-mtgee. The trustee, relying on the advice of his solr. & on the report, advanced the £2,000. The mtgor. subsequently became insolvent, & the trustee & his co-mtgee. were compelled to sell the property under their power of sale, with the result that the greater part of the £2,000 advanced by the trustee was lost. In an action against the trustee for breach of trust:—*Held*: the investment was improper & a breach of trust; in making it the trustee, although he had acted honestly, had not acted “reasonably,” & he was therefore not entitled to be relieved or excused from personal liability under Judicial Trustees Act, 1896 (c. 35), s. 3.

He has not acted as he or any other ordinary man of business would have acted in his own affairs if he had been seeking, not a speculative investment, but a secure investment for his money (WARRINGTON, J.).—*Re DIVE, DIVE v. ROEBUCK*, [1909] 1 Ch. 328; 78 L. J. Ch. 248; 100 L. T. 190.

**4367.** — *Without negligence—Failure to inquire.*—Clearly it was the duty of a trustee to see that money when received by the solr. went into the proper account of the trustees. . . . The only statement of the trustee as to any step he took to ascertain what had become of the money was . . . that the money was at the bank. That is all. What bank was not specified, nor did, apparently, the trustee inquire. . . . The trustee never looked at his pass book nor made any inquiries at the bank & a whole year passed . . . & no inquiry whatever was made . . . & no step was taken by him to see what had become of this money, where it was, or whether it was safe.

The negligence, the breach of trust, was perfectly inexcusable. Under these circumstances I cannot say, within the words of sect. 3 of Judicial Trustees Act, 1896 (c. 35), that the trustee had acted reasonably or ought fairly to be excused for

#### PART VII. SECT. 4, SUB-SECT. 3.—B.

**4364.** *Reasonable—As ordinary man of business in own affairs.*—The test of

reasonableness relieving trustees from the consequences of technical breaches of trust is that exhibited by the ordinary business man, or the man of

ordinary sense, knowledge, & prudence in the conduct of his own affairs.—*SMITH v. MASON* (1891), 1 O. L. R. 594; 21 C. L. T. 260.—*CAN.*

*Sect. 4.—Limitations on liability of trustees: Sub-sect. 3, B., C., D. & E.; sub-sect. 4.]*

the breach of trust, & I do not see how I can relieve him from the personal liability, I must hold him liable; but refuse to order interest to be paid by the trustee (ROMER, J.).—WYNNE v. TEMPEST (1897), 13 T. L. R. 360.

**4368.** ——— ———.]—Defts., who were trustees, upon the distribution of their trust fund paid the share of a beneficiary to their solr. in reliance upon his statement that he was the assignee of the share & without calling upon him to prove his title. The share had been assigned to him by deed which recited the creation of a prior charge on the share, & assigned the share expressly subject to the charge. The solr. had acted for pltf. upon the transfer to her of this charge, but no notice of the charge or transfer had ever been given to the trustees. In an action for an account & payment of what was due under the charge:—*Held*: (1) defts. were liable, on the ground that the assignment of the share necessarily set them upon inquiry as to the title of the alleged assignee, & if they had done their duty & properly investigated his title they would have been affected with notice of pltf.'s charge, & having failed in their duty, they could not shelter themselves behind the fraud of their solr.; (2) defts. were not entitled to relief under the Judicial Trustees Act, 1896 (c. 35), s. 3 (1), the sect. not having been intended to apply to a case of this kind.

If a trustee has, without any default of his own, employed a defaulting agent, whom he believed to be a competent man, to do certain work &, whether competent or not, the agent turns out to be fraudulent & gets the trustee into a scrape, the trustee cannot shelter himself behind that (KIRKEWICH, J.).—DAVIS v. HUTCHINGS, [1907] 1 Ch. 356; 76 L. J. Ch. 272; 96 L. T. 293.

*Annotations*:—As to (2) *ibid.*, *Re Allsop, Whittaker v. Bamford*, [1914] 1 Ch. 1. The decision upon the facts of *Davis v. Hutchings*, may have been right, but the general principles thus laid down cannot, I think, be supported (COZENS-HARDY, M.R.).

**4369.** ——— ——— Carelessness or supineness.]—The concluding words of Trustee Act, 1893 (c. 53), s. 21 (2), involve the exercise of active discretion on the part of the trustee allowing time for payment & not the mere passive attitude of leaving matters alone. Loss which has arisen from carelessness or supineness of the trustee is altogether outside the sub-sect.

A beneficiary gave exors. a receipt for a share of estate "as shown by the exors.' books" & accounts:—*Held*: the receipt was not a release to them in respect of the balance of debts due to the testator's estate then remaining uncollected, in the circumstances, the trustees, having allowed the matter of calling in the debts to drift for six years, had not acted reasonably & were not entitled to be relieved under Judicial Trustees Act, 1896 (c. 35), s. 3.—*Re GREENWOOD, GREENWOOD v. FIRTH* (1911), 105 L. T. 509.

**4370.** ——— Wrong construction of will.—Acting under legal advice.]—A testatrix who died in 1887 bequeathed her residuary personal estate to trustees upon trust to pay the income in equal third parts to her two nephews & her niece during their respective lives & subject thereto to hold the capital & income of the whole in trust for the children of her nephews & niece who might be

living at the time of the failure of the trust there-inbefore contained. Upon the death in 1896 of one of the nephews leaving a widow & children, the trustees acting upon the erroneous advice of their solr. as to the effect of the will, paid the income of deceased nephew's share to his widow for the maintenance of his children. In 1910 it was declared by the ct. that the period of distribution was at the death of the survivor of testatrix's nephews & niece, that there was an implied trust for accumulation of the income until the period of distribution, but that under the Thellusson Act that trust came to an end in 1908, twenty-one years from the death of testatrix:—*Held*: the application of Judicial Trustees Act, 1896 (c. 35), s. 3, was not confined to cases where the breach of trust arose from some executive or administrative blunder, but might extend to cases where money was paid to a person not entitled according to the true construction of the instrument; in this case the trustees could not be said to have acted "unreasonably" merely because they had, under legal advice, taken a wrong view of the construction of the will, &, there being no question as to their having acted "honestly," they "ought fairly to be excused for the breach of trust," & were entitled under sect. 3, to be relieved from personal liability for the same.—*Re ALLSOP, WHITTAKER v. BAMFORD*, [1914] 1 Ch. 1; 83 L. J. Ch. 42; 109 L. T. 641; 30 T. L. R. 18; 58 Sol. Jo. 9, C. A.

*Annotation*:—*Apld. Re Claridge's Patent Asphalt Co.*, [1921] 1 Ch. 543.

**4371.** ——— Unauthorised investment.]—*Re STUART, SMITH v. STUART*, No. 4364, *ante*.

**4372.** ——— ——— *Re DIVE, DIVE v. ROEBUCK*, No. 4366, *ante*.

**4373.** ——— Reasonably as trustees.]—Testator by his will gave his real & personal estate to his exors. & trustees upon trust to maintain the same in the like mode of investment as at his death until one of his sons should attain the age of twenty-four. The estate comprised a debt of £168 due upon a promissory note payable upon demand; the exors., believing debtor to be a man of good credit, neither called in, nor applied to the ct. for directions as to this debt; debtor died insolvent eighteen months after testator, & the estate suffered a loss:—*Held*: having regard to the terms of the will & the amount of the debt, the exors. might reasonably have thought they were not bound either to call in the debt or to apply for directions, &, under the circumstances, having acted honestly & reasonably, they ought to be relieved under Judicial Trustees Act, 1896 (c. 35), s. 3, from their breach of trust & from personal liability for the same.

"Reasonably" must mean reasonably as trustees (CHITTY, L.J.).—*Re GRINDEY, CLEWS v. GRINDEY*, [1898] 2 Ch. 593; 67 L. J. Ch. 624; 79 L. T. 105; 47 W. R. 53; 14 T. L. R. 555, C. A.

*Annotations*:—*Consd. Re Mackay, Griesemann v. Carr*, [1911] 1 Ch. 300. *Refd. Re Allsop, Whittaker v. Bamford*, [1914] 1 Ch. 1.

**4374.** ——— Mistake as to power of sale.]—Trustees of a settlement, erroneously assuming that they had a power of sale, sold the leaseholds comprised in the settlement, & thereby diminished the income of pltf., who, as tenant for life of a moiety, was entitled to the rents & profits *in specie*, though the sale would have been a proper

**43711.** ——— Unauthorised investment.]—STEVENSON v. BRAND, [1917] N. Z. L. K. 902.—N.Z.

*h. Leaving gn. deposit money deposited by deceased with private bankers.*—

TROST v. COOK (1920), 48 O. L. R. 278; 56 D. L. R. 305; 19 O. W. N. 103.—CAN.

*k. Acting under legal advice.*]—Where loss has been occasioned to a trust

estate by a trustee acting *bona fide* on the advice of a solr. in a matter within the scope of a solr.'s business the trustee may be relieved from liability under Trustee Act Amendment Act,

one had the trustees in fact possessed a power of sale. An action having been brought by pltf. against the trustees to make them liable for the diminution of income:—*Held*: as, on the evidence, the trustee had acted honestly & reasonably, they were entitled under Judicial Trustees Act, 1896 (c. 35), s. 3, to be relieved from personal liability in respect of the breach of trust.—*PERRINS v. BELLAMY*, [1899] 1 Ch. 797; 68 L. J. Ch. 397; 80 L. T. 478; 47 W. R. 417; 43 Sol. Jo. 437, C. A.

**4375.** — *Money left in hands of solicitor.*—Trustees held liable for breaches of trust in leaving money in the hands of a solr. who made away with it, & the Ct. refused to grant them relief under Judicial Trustees Act, 1896 (c. 35), s. 3, on the ground that, though they had acted honestly, they had not acted reasonably.—*WILLIAMS v. BYRON* (1901), 18 T. L. R. 172.

**4376.** — —.—*]*—A lady who succeeded to the office of trustee on the death of her husband, & lived at a distance from London, employed the solrs. to the trust, as her agents, to do the business for her. The solrs. had the custody of the cheque book, & drew cheques when required, which they sent to the lady to sign with a letter of instructions. A clerk to the solrs., who was well known to the lady, obtained her signature to cheques to the amount of £129 upon a forged letter of instructions purporting to come from the solrs., requesting her to sign them, & to initial the alteration in two of the cheques from "order" to "bearer." The clerk cashed the cheques & absconded:—*Held*: under all the circumstances, the lady had not acted otherwise than reasonably, & could not be held liable to make good the loss to the estate.—*Re SMITH, SMITH v. THOMPSON, SMITH v. SMITH* (1902), 71 L. J. Ch. 411; 86 L. T. 401; 18 T. L. R. 432; 46 Sol. Jo. 358.

**4377.** — — *Employment of agent.*—*DAVIS v. HUTCHINGS*, No. 4368, *ante*.

**4378.** — — *Exercise of active discretion necessary.*—*Re GREENWOOD, GREENWOOD v. FIRTH*, No. 4369, *ante*.

**4379.** — — *Payment of income to mortgagor—After notice to trustees.*—*P.*, who was entitled to a life interest in the income of certain stocks & other personal estate vested in the trustees of a settlement, assigned all his interest under the settlement to pltf. by way of mtge. to secure a principal sum & interest. Shortly afterwards pltf. gave to the trustees the ordinary notice of the mtge., but did not require them to pay the income to himself, & they paid it to *P.* for about a year & a half, when pltf. brought an action against *P.* & the trustees claiming foreclosure of the mtge. & personal payment by the trustees of the income as from the date of the notice:—*Held*: (1) the giving of the notice was not equivalent to taking possession of the mtged. property, but had no further effect in depriving the mtgor. of the receipt of income than notice of a similar mtge. of real estate, & the claim against the trustees failed; (2) if the decision was wrong, the case was one in which the ct. would grant relief to the trustees under Judicial Trustees Act, 1896 (c. 35), s. 3, & it was not necessary to plead the Act as a defence.—*Re PAWSON'S SETTLEMENT, HIGGINS v. PAWSON*, [1917] 1 Ch. 541; 86 L. J. Ch. 380; 116 L. T. 559; 33 T. L. R. 233.

**4380.** *Negligence in supervision of co-trustee.*—The negligence of a trustee in not looking after his

co-trustee did not amount to a fraudulent breach of trust.—*Re SMITH, HANDS v. ANDREWS*, [1893] 2 Ch. 1; 62 L. J. Ch. 336; 68 L. T. 337; 57 J. P. 516; 41 W. R. 289; 9 T. L. R. 238; 37 Sol. Jo. 247; 2 R. 360, C. A.

*Annotations.*—*Reid*. *Re Berwick, Berwick v. Lane* (1899), 81 L. T. 722; *Church's Trustees v. Hibbard*, [1902] 2 Ch. 784; *Re Edgcome, Ex p. Edgcome*, [1902] 2 K. B. 403; *Re Bourne, Davey v. Bourne*, [1906] 1 Ch. 697.

**4381.** — — *Action left to co-trustees.*—A trustee who does nothing, accepts without inquiry what is said by his co-trustee, & is satisfied with any explanation given by him, does not act "honestly" within the meaning of Judicial Trustees Act, 1896 (c. 35), s. 3.—*Re SECOND EAST DULWICH 745TH STARR-BOWKETT BUILDING SOCIETY* (1899), 68 L. J. Ch. 196; *sub nom. Re SECOND EAST DULWICH 745TH STARR-BOWKETT BUILDING SOCIETY, MIAL v. PEARCE*, 79 L. T. 726; 47 W. R. 408; 43 Sol. Jo. 206.

**4382.** *Burden of proof—On trustee seeking relief.*—*Re STUART, SMITH v. STUART*, No. 4364, *ante*.

*C. Application to Personal Representatives.*

*See EXECUTORS*, Vol. XXIV., pp. 674, 675, Nos. 6999–7006.

*D. Investment of Trust Funds on Mortgage.*

*See MORTGAGE*, Vol. XXXV., pp. 285–296, Nos. 382–482.

*E. Pleading.*

*See Trustee Act*, 1925 (c. 19), s. 61.

**4383.** *Act need not be specially pleaded.*—*SINGLEHURST v. TAPSCOTT S.S. CO., LTD.* (No. 2) (1899), 43 Sol. Jo. 717, C. A.

**4384.** — — *]*—*Re PAWSON'S SETTLEMENT, HIGGINS v. PAWSON*, No. 4379, *ante*.

#### SUB-SECT. 4.—ERROR OF JUDGMENT.

**4385.** *Right to relief.*—Exors. who were directed by the will to call in testator's personal estate with all convenient speed, continued his trade for some years after his death, & ultimately a considerable loss was sustained. But the ct. refused to charge them with the loss, as they had acted *bonâ fide*, & according to the best of their judgment.—*GARRIETT v. NOBLE* (1834), 6 Sim. 504; 3 L. J. Ch. 159; 58 E. R. 683.

*Annotation.*—*Reid*. *Bullock v. Wheatley* (1844), 1 Coll. 130.

**4386.** — — *]*—*SELBY v. BOWIE*, No. 4215, *ante*.

**4387.** — — *]*—Testator, who died in 1872, had by his will bequeathed a legacy of £1,000 in trust for *G.*, & by a codicil, which recited that he desired his widow after his death to enter into the business then carried on by him in partnership with *D.*, & that the bulk of his property was invested as capital in the business, the testator had empowered his trustees to invest or continue invested, moneys in their hands as trustees, in the business, or any other business in which they, in their uncontrolled discretion, might think fit, without being liable for loss. *D.* & *J.* were appointed executors & trustees. The widow entered into partnership with *D.* in the business for ten years from Jan. 1, 1873. The £1,000 was left in the business during & after the term of ten years. In June, 1883, the widow having then left the business, *D.* filed a petition for liquidation of his affairs, & a composition of 10s. in the pound

1902, s. 9. Where, however, the statement of the solr. relates to matters outside the scope of a solr.'s business the trustee should check the solr.'s statement & refrain from doing so at his

own risk.—*McMAHON v. COOPER* (1904), 4 S. R. N. S. W. 433; 21 N. S. W. W. N. 156.—*AUS.*

1. ———. *]*—It is no answer to a

charge of breach of trust that the trustee acted under competent legal advice.—*SUBRAMANIAN CHETTIAR v. RAJESWARA DORAI* (1909), 1 L. R. 32 Mad. 490.—*IND.*

**Sect. 4.—Limitations on liability of trustees: Sub-sects. 4 & 5, A.]**

was agreed to, payable by three instalments, on Jan. 2, 1884, Apr. 2, 1884, & Oct. 2, 1884. Only one instalment was received by the trustee J., & it was not invested, but placed on deposit at a bank. No pressure was made for payment of the unpaid instalments. G., having come of age, brought an action against the trustee J. & others seeking relief on the ground of breaches of trust:—*Held*: as regards J., (1) the not calling in the £1,000 on the widow's retirement from the partnership was not a breach of trust, but, on the true construction of the codicil, the power was not restricted to lending to any particular partners in the business; (2) the not calling in or pressing for payment of the two instalments unpaid was not a breach of trust, the trustee, J., not having been guilty of negligence, but having acted honestly in the belief that pressure would not have resulted in benefit to the estate, & with a reasonable ground for acting as he did; (3) having regard to the fact that the loss of income, if any, through non-investment of the first instalment was very small, coupled with the probability, then existing, of another instalment being shortly received, when both might be invested together, it would be going too far to make an order on the head against the trustee J., who acted on his solr.'s advice in placing the money on deposit at a bank instead of investing it.—*Re EARL, JOHNSON v. DAVIES* (1890), 30 W. R. 107.

**4388.** —[—*Re HURST, ADDISON v. TOPP*, No. 4351, *ante*.

**4389.** —[—While I agree that trustees ought not to be visited with personal loss on account of mere errors in judgment which fall short of negligence or unreasonableness, it is on the other hand essential to recollect that mere *bona fides* is not the test & that it is no answer in the mouth of a trustee who has embarked in idle litigation to say that he honestly believed what his solr. told him, if his solr. has been wrongheaded & perverse (BOWEN, L.J.).—*Re BEDDOE, DOWNES v. COTTAM*, [1893] 1 Ch. 547; 62 L. J. Ch. 233; 68 L. T. 595; 41 W. R. 177; 37 Sol. Jo. 99; 2 R. 223, C. A.

**Annotations.** —*Consd.* *Re England's Settlt. Trusts*, Dobb v. England, [1918] 1 Ch. 24. *Reid.* *Re Jones, Christmas v. Jones* (1897), 45 W. R. 698; *In the Estate of Plant*, Wild v. Plant, [1926] P. 139; *Thomas v. Jones*, [1928] P. 162.

**4390.** —[—There is no rule that trustees commit a breach of trust if they retain authorised securities in a falling market when they honestly believe that that is the best course for all parties; nor that they must be held liable for so doing unless they prove absolutely that no proceedings on their part could have been effectual to recover the funds. The question is what was best to be done at the time, & they must show that they had reasonable grounds for their inaction.—*Re CHAPMAN, COCKS v. CHAPMAN*, [1896] 2 Ch. 763; 65 L. J. Ch. 892; 75 L. T. 196; 45 W. R. 67; 12 T. L. R. 625; 40 Sol. Jo. 715, C. A.

**Annotations.** —*Consd.* *Jackson v. Dickinson*, [1903] 1 Ch. 947. *Reid.* *Re Roberts, Knight v. Roberts* (1897), 76 L. T. 479. *Rawsthorne v. Rowley* (1907), 78 L. J. Ch. 235, n.; *Shaw v. Cates*, [1909] 1 Ch. 389.

**4391.** —[—*Re KENSIT*, [1908] W. N. 235.

**SUB-SECT. 5.—CONCURRENCE OR ACQUIESCENCE OF BENEFICIARIES.**

**A. In General.**

**4392.** How far trustee relieved of liability.]—*TRAFFORD v. BOEHM*, No. 4535, *post*.

**4393.** —[—Trustees lending money on personal security is not of itself such gross neglect as to amount to a breach of trust & the legatee & afterwards his assignee having acquiesced in such loan a bill to charge the trustees was dismissed.—*HARDEN v. PARSONS* (1758), 1 Eden, 145; 28 E. R. 639.

**Annotation.** —*N.F. Walker v. Symonds* (1818), 3 Swan. 1.

**4394.** —[—*Cestui que trust* concurring or acquiescing in a breach of trust not entitled to relief.—*WALKER v. SYMONDS* (1818), 3 Swan. 1; 36 E. R. 751, L. C.

**Annotations.** —*Consd.* *Burrows v. Walls* (1855), 5 De G. M. & G. 233. *Apd.* *Chillingworth v. Chambers*, [1896] 1 Ch. 685; *Fletcher v. Colls*, [1905] 2 Ch. 24. *Reid.* *Re Tratt, Ex p. James* (1853), 3 De G. M. & G. 493; *Lloyd v. Attwood* (1859), 3 De G. & J. 614; *Farrant v. Blanchford* (1863), 1 De G. J. & Sm. 107; *Re Brogden, Billing v. Brogden* (1888), 38 Ch. D. 546. *Mentd.* *Tarleton v. Hornby* (1835), 1 Y. & C. Ex. 333; *Munch v. Cookerell* (1836), 8 Sim. 219; *Perry v. Knott* (1841), 4 Beav. 179; *Shipton v. Rawlins* (1840), 4 Hare, 619; *Thompson v. Finch* (1856), 22 Beav. 316; *London General Omnibus Co. v. Holloway*, [1912] 2 K. B. 72.

**4395.** —[—(1) Inquiry refused as to concurrence of *cestui que trust*, where it was not alleged by the answer, & was unsatisfactorily proved by the evidence.

(2) If one party, having a partial interest in the trust fund, induces the trustee to depart from the direction of the trust for his own benefit, & enjoys that benefit, he shall not be permitted, personally, to enjoy the benefit of the trust, whilst the trustees are subjected to a serious liability which he has brought upon them. What the ct. does, in such a case, is to lay hold of the partial interest to which that person is entitled, & apply it, so far as it will extend, in exoneration of the trustees, who, by his request & desire or acquiescence, or by any other mode of concurrence, have been induced to do the improper act (LORD LANGDALE, M.R.).—*LINCOLN v. WRIGHT* (1841), 4 Beav. 427; 49 E. R. 404.

**Annotations.** —*As to* (2) *Consd.* *Chillingworth v. Chambers*, [1896] 1 Ch. 685. *Generally.* *Mentd.* *Stiles v. Guy* (1849), 1 Mac. & G. 422.

**4396.** —[—Early in 1818 *cestui que trust*, with power of directing the variation of the trust securities, requested B., who was one of his trustees, to sell out trust stock then standing in the 5 per cents., & invest it in the 3 per cents. In Apr. of the same year the trustees, B. & H., sold out the stock by power of attorney, & soon afterwards H., at the request of B., joined in a cheque on the bankers who acted in the sale, requesting them to pay the amount to themselves or bearer. In the letter of B. requesting H. to sign the cheque he stated, as a reason for expedition, that the money was to be paid on Thursday to the gentleman to whom it was engaged. B. afterwards applied the money to his own use. On a bill filed in 1838 by the *cestui que trust* to compel H. to replace the money:—*Held*: H. was *primâ facie* liable; for neither of the trustees contemplated an investment pursuant to the direction of pltf.; & even if H. had so contemplated, the course taken by him was not required by necessity or convenience. But, inasmuch as it was proved that pltf. knew before 1820 that the stock had been sold out, & that he, in several subsequent successive years, received accounts from B., who was his agent & also his debtor, in which were contained entries for interest on stock appearing clearly to be the fund in question, which entries were irregular in amount & dates; & inasmuch as, notwithstanding these circumstances, no communication on the



subject appeared to have been made from *pltf.* to H., who was his brother-in-law, from Apr. 1818, to Nov. 1837, which was shortly previous to B.'s bkpcy., the ct. directed inquiries to be made with a view to ascertain whether & when first *pltf.* had notice of the breach of trust.—*BROADHURST v. BALGUY* (1841), 1 Y. & C. Ch. Cas. 16; 62 E. R. 771.

4397. —.]—*FARRAR v. BARRACLOUGH*, No. 4440, *post*.

4398. —.]—*Exors.* had a balance in that character with bankers who, with the *exors.* consent, invested part of it on securities not of a proper description for an investment by *exors.* The bankers made no inquiry as to the power of the *exors.* to make the investment, but if they had made the inquiry all the information which they would probably have been able to obtain, would have shown that the *exors.* were residuary legatees, & that the balance was a part of the clear residue. The fact, however, was, that the investment was a breach of trust, there being a codicil which the *exors.* had kept back but afterwards proved, constituting them trustees only:—*Held*: on the bankers becoming bkpt. they had not so participated in the breach of trust as to entitle the *cestui que trust* to prove against their separate estates.

The trust seems to me to have been, for all material circumstances, one for the benefit of three persons, of whom two are proved to have concurred in the transaction, & the other must be presumed to have concurred in it (*TURNER, L.J.*).—*Re BIDDULPH, Ex p. BARNEWELL, DE FRONT'S EXECUTORS' CASE* (1855), 6 De G. M. & G. 801; 43 E. R. 1444, L. J.J.

4399. —.]—By a marriage settlement it was declared that a sum of money, then in the hands of the lady's brother, should be held by the three trustees, one of them being the brother, upon trust, at the request in writing of the lady, to pay to her the whole or any part absolutely; & until such request, upon trust, when & as same should come into their hands, to invest same, & pay the interest to the wife for life, for her separate use, & after her decease as she should by will appoint, & in default of appointment to the husband. The money was allowed to remain for thirteen years in the hands of the brother, who paid the interest to the husband, & also paid him part of the principal, with the knowledge of the wife. Upon the death of the husband, the wife filed a bill against the three trustees to compel them to replace the balance of the funds. The brother had become insolvent:—*Held*: the trustees were guilty of a breach of trust; but the wife was debarred by acquiescence, from claiming as against the two trustees, who had neglected to call in the money.—*JONES v. HIGGINS* (1866), L. R. 2 Eq. 538; 35 L. J. Ch. 403; 14 L. T. 126; 14 W. R. 448.

4400. —.]—Testator died in 1810 in India, having bequeathed his English property to two infants, whom he acknowledged as his natural children; & having appointed his nephew, D., to be their guardian. Part of his property consisted of a bond, dated in 1810, in which he was obligee, the obligor being seised of real estate in Ireland. In 1811 D. obtained possession of the bond from testator's *exor.*; but he did not register it, nor did he, as it was stated & admitted on demurrer, ever take any steps towards realising

the security. In 1821 the elder of the infants attained twenty-one; in 1832 she married; & in 1833, when, as alleged & admitted on demurrer, the bond had become irrecoverable, D., for the first time, informed the elder child & her husband, who were co-*pltf.*s, of the existence of the bond; & upon finding it was then too late to register it, he handed it to the male *pltf.*, directing him to see to it. No step was taken until D.'s death in 1870, after which, in 1871, the bill was filed, seeking to make D.'s estate liable as for a breach of trust. At this time the younger infant was dead, & had no legal personal representative; but his son, who was entitled to administer, was made *deft.* *Semle*: D. was not at any time liable for any breach of trust; but if he was:—*Held*: *pltf.*s, by acquiescing for thirty-eight years, & waiting till D.'s death, had lost their right to make any claim against his estate; & demurrer to the bill allowed.—*SLEEMAN v. WILSON* (1871), L. R. 13 Eq. 36; 25 L. T. 408; 20 W. R. 109.

4401. —.]—*FLETCHER v. COLLIS*, No. 4420, *post*.

4402. — — Long acquiescence—Sale to trustee.]—Long acquiescence under a sale to a trustee ought to be taken as evidence, that as between the trustee & the *cestui que trust* the relation had been abandoned in the transaction &, that in all other respects it was fair (*LORD ELDON, C.*).—*PARKES v. WHITE* (1805), 11 Ves. 209; 32 E. R. 1068, L. C.

*Annotations*: —*Reid*, Chalmers v. Bradley (1819), 1 Jac. & W. 51; Scott v. Davis (1838), 4 My. & Cr. 87. *Mentd.* Jackson v. Hobhouse (1817), 2 Mer. 483; Digby v. Howard (1831), 4 Sim. 588; Johnson v. Froeth (1836), Donnelly, 16; Baker v. Bradley (1855), 7 De G. M. & G. 597; Johnson v. Gallagher (1861), 3 De G. F. & J. 494; Taylor v. Meads (1865), 34 L. J. Ch. 203; Hood Barrs v. Horlot, [1896] A. C. 174.

4403. — —.]—*GRIFFITHS v. PORTER*, No. 4414, *post*.

4404. — — Express assent.]—*CHILD v. GIBLETT*, No. 4303, *ante*.

4405. — —.]—A. by will gave to his wife a life interest in real estate, with remainders over; & also a specific bequest of personality. After the death of testator in 1834, the residuary personal estate being deficient, the *exors.* with the privity of the wife, who was also an *extrix.*, applied the proceeds of the specific bequest in discharge of a mtge. upon the real estate, & the mtge. term was assigned to a trustee to attend the inheritance. In 1839 the wife filed her bill, claiming a lien upon the real estate for the proceeds of the specific bequest so applied in discharge of the mtge.:—*Held*: the bill not alleging ignorance or misrepresentation, she was not entitled to be relieved from her voluntary act. *Secus*, if ignorance, etc., had been alleged & proved. Under the circumstances, the bill was dismissed, without prejudice to *pltf.* filing another bill.—*TOPLIS v. VONDER HEYDE* (1840), 4 Y. & C. Ex. 173; 9 L. J. Ex. Eq. 27; 160 E. R. 967.

4406. — — Mistaken construction.]—A court of equity will not direct payments made under a mistaken construction of a doubtful clause in a settlement to be refunded, after many years of acquiescence by all parties, & after the death of one of the authors of the settlement, especially where subsequent family arrangements have proceeded on the footing of that construction.—*CLIFTON v. COCKBURN* (1834), 3 My. & K. 76; 40 E. R. 30, L. C.

*Annotation*: —*Reid*, Rogers v. Ingham (1876), 3 Ch. D. 351.

4403 i. — — Long acquiescence.]—In considering the dealings between a trustee & his *cestui que trust*, the length of time in which the acts of the former have been acquiesced in, with the

knowledge of the latter, is to be taken into account in favour of the trustee.—*Re M'KENNA'S ESTATE, Ex p. BUSTEED* (1861), 5 L. T. 241.—*IR.*

4404 i. — — Express assent.]—A

*cestui que trust* cannot make a trustee liable for losses occasioned by a breach of trust which he has authorised & consented to.—*Re McNEILL ESTATE* (B. C.) (1911), 19 W. L. R. 691.—*CAN.*



**Sect. 4.—Limitations on liability of trustees: Sub-sect. 5, A. & B.]**

**4407. — Lease.]—**Testator appointed an exor., with power to manage, conduct, carry on, & improve his estate. The property consisted of a moiety of an estate in Jamaica. The trustee took a lease of the other moiety, & managed the whole for the trust estate:—*Held*: although the taking of this lease was not authorised by the will, yet, under the circumstances of this case, the acquiescence of the *cestui que trust*, & otherwise, the trust estate was liable for arrears of rent & dilapidations.—*NEATE v. PINK* (1851), 3 Mac. & G. 476; 42 E. R. 344; *sub nom.* *NEATE v. PINK*, *Ex p. FLETCHER & YATES*, 21 L. J. Ch. 574; 16 Jur. 68; *sub nom.* *PINK v. NEATE*, 18 L. T. O. S. 57, L. C.

**Annotations:—***Consd.* *Hand v. Blow*, [1901] 2 Ch. 721. *Mentd.* *Brocklebank v. East London Ry.* (1879), 12 Ch. D. 839.

**4408. Extent of effect of acquiescence.—Right in respect to subsequent breaches of trust.]—**A tenant for life acquiesced in a breach of trust, by allowing a trustee to lend part of the trust property on a security which was at the time of the loan insufficient: the security, at the time of its being realised was almost enough to cover the amount lent, but the costs incurred by reason of such loan, & the subsequent neglect on the part of the trustee, materially diminished the trust fund:—*Held*: the trustee was accountable at the suit of the tenant for life for such loss, notwithstanding his original acquiescence in the breach of trust.—*LOCKHART v. REILLY*, *REILLY v. LOCKHART* (1856), 25 L. J. Ch. 697; 27 L. T. O. S. 49; 4 W. R. 438, L. C.

**Annotations:—***Refd.* *Chillingworth v. Chambers*, [1896] 1 Ch. 685. *Mentd.* *Wilson v. Thomson* (1875), L. R. 20 Eq. 459; *Rabin v. Hughes* (1886), 31 Ch. D. 390; *Re Partington*, *Partington v. Allen* (1887), 57 L. T. 654; *Blyth v. Fladgate*, *Morgan v. Blyth*, *Smith v. Blyth*, [1891] 1 Ch. 337; *Re Turner*, *Barker v. Ivinney*, [1897] 1 Ch. 536; *Head v. Gould*, [1898] 2 Ch. 250; *Re Linsley*, *Cattley v. West*, [1901] 2 Ch. 785; *The Millwall*, [1905] P. 155.

**4409. Action for indemnity between trustees.—Acquiescing cestui que trust necessary party.]—**Although one of two exors. or trustees may sue the other exor. or trustee for contribution in respect of a breach of trust without making the *cestuis que trust* parties to the suit yet where such *cestuis que trust* have participated in the breach of trust they are necessary parties.—*JESSE v. BENNETT* (1856), 6 De G. M. & G. 609; 26 L. J. Ch. 63; 28 L. T. O. S. 134; 2 Jur. N. S. 1125; 5 W. R. 56; 43 E. R. 1370, L. C.

**Annotation:—***Refd.* *Smithwick v. Smithwick* (1861), 5 L. T. 23.

—*J.*—*See, generally*, Sub-sect. 8, B., *post*.

**Condonation on release.]—***See* Sub-sect. 6, *post*. **Laches.]—***See* Sub-sect. 7, A., *post*.

*See, generally*, *ESTOPPEL*, Vol. XXI., pp. 333–345, Nos. 1260–1319.

**B. Necessity for Knowledge of Circumstances.**

**4410. General rule.]—***WALKER v. SYMONDS*, No. 4394, *ante*.

**4411. —.]—**Trustee charged with breach of trust, for not putting out money at interest, nor on the best security, according to the trust in a deed. Trustee not protected by acquiescence of the *cestui que trust*, not duly informed.—*RYDER v. BICKERTON*

(1743), 3 Swan. 80, n.; 1 Eden, 149, n.; 36 E. R. 782, L. C.

**Annotations:—***Consd.* *Sawyer v. Sawyer* (1885), 28 Ch. D. 595. *Refd.* *Harden v. Parsons* (1758), 1 Eden, 145; *Walker v. Symonds* (1818), 3 Swan. 1; *Hughes v. Wells* (1852), 9 Hare, 749.

**4412. —.]—**I next come to consider, whether there has been any acquiescence which binds plff. I apprehend that the ct. does not require distinct evidence in writing signed by plff. that she acquiesced, but there must be reasonable evidence that she understood what she was about, & that knowing she acquiesced in it (*ROMILLY, M.R.*).—*MACLEOD v. ANNESLEY* (1853), 16 Beav. 660; 22 L. J. Ch. 633; 21 L. T. O. S. 40; 17 Jur. 608; 1 W. R. 250; 51 E. R. 912.

**Annotation:—***Refd.* *Re Olive*, *Olive v. Westerman* (1886), 34 Ch. D. 70.

**4413. —.]—***STRETTON v. ASHMALL*, No. 4441, *post*.

**4414. —.]—**(1) The ct. will not visit a trustee with the consequences of a breach of trust committed with the sanction or by the desire of the *cestui que trust* or of one committed without such sanction or desire, if, when it comes to the knowledge of the *cestui que trust*, he has acquiesced in & obtained the benefit of it for a long period.

(2) Two trustees, A. & B., joined in the receipt of trust money. A. allowed B. to retain the cheque for the money, which, against the remonstrances of A., he placed in the hands of a solr. to invest on mtge., & it was lost:—*Held*: both were liable.

(3) Two trustees, A. & B., had allowed trust money to be received by their solicitors. The *cestui que trust* authorised its investment on a mtge. by B. alone. The money being in danger & the solrs. pressed, a mtge. was given, but as to which B. exercised no judgment, & it turned out insufficient:—*Held*: both trustees were liable for the loss.—*GRIFFITHS v. PORTER* (1858), 25 Beav. 236; 53 E. R. 627.

**Annotation:—***Generally*, *Mentd.* *Re Hill*, *Hill v. Hill* (1881), 50 L. J. Ch. 551.

**4415. —.]—***LIFE ASSOCN. OF SCOTLAND v. SIDDAL*, *COOPER v. GREENE*, No. 4447, *post*.

**4416. —.]—**Where trusts neglected to call in & invest trust moneys, which were recited in a marriage settlement to have been paid to them, & for which they had signed an indorsed receipt, & the moneys were lost, their estates were held liable, forty years afterwards, to make good to the *cestuis que trust* the loss sustained.

No man can be barred by acquiescence from his claims in respect of a breach of trust, unless his acquiescence was with a sufficient knowledge (*STUART, V.-C.*).—*WESTMORELAND v. HOLLAND* (1871), 23 L. T. 797; 19 W. R. 302.

**4417. —.]—***DIXON v. DIXON*, No. 4453, *post*.

**4418. —.]—***Re JACKSON*, *WILSON v. DONALD*, No. 4452, *post*.

**4419. —.]—***Re SOMERSET*, *SOMERSET v. POULETT (EARL)*, No. 4542, *post*.

**4420. —.]—**Independently of Trustee Act, 1893 (c. 53), s. 45, a beneficiary of full contracting age & capacity, who knowingly consents to a breach of trust, is not entitled to relief against the trustee for any loss occasioned to that beneficiary's interest in the trust estate by reason of the breach of trust, even though he has derived no benefit thereby; the consent to the breach of trust, if proved, need not be in writing.

**PART VII. SECT. 4, SUB-SECT. 5.**  
—B.

**4410 I. General rule.]—**To establish acquiescence by a *cestui que trust* in a breach of trust, the trustees must show

that the *cestui que trust* was acquainted not only with the nature of the act complained of, but also with his rights in respect thereof.—*TYSON v. TYSON* (1901), 1 S. R. N. S. W. 18; 18 N. S. W. W. N. 52.—**AUS.**

m. *Cestui que trust relying on judgment of trustees as to act being intra vires & prudent.]—**HENDERSON v. HENDERSON'S TRUSTEES* (1900), 2 F. (Ct. of Sess.) 1295; 37 Sc. L. R. 976; 8 S. L. T. 164.—**SCOT.**

Trustee Act, 1888 (c. 59), s. 6, & Trustee Act, 1893 (c. 53), s. 45, were intended to enlarge the power of the ct. as to indemnifying trustees, & to give greater relief to trustees, & do not operate to curtail or affect the previously existing rights & remedies of trustees, or to alter the law except by giving greater power to the ct.

In 1885, a trustee, with the consent of a husband tenant for life, sold out the whole of a trust fund, & handed it over to the wife of the tenant for life, who spent it for her own purposes. In 1891 an action was commenced by the remaindermen against the trustee to make him liable for the loss occasioned by this breach of trust, in which an order was eventually made staying proceedings on the trustee undertaking by mtes. of policies on his life & by a portion of his pension to replace the whole of the funds so lost; this order directed the money so paid in to be applied, in satisfaction of the trust fund, & then of interest thereon from 1891. At the time of the death of the trustee in 1902 the whole of the trust fund had thus been replaced, with a considerable surplus representing interest from 1891; this surplus was now claimed by the representative of the deceased trustee by way of indemnity, & by the trustee in bkpy. of the tenant for life:—*Held*: as the tenant for life who had concurred in the breach of trust could not require the trustee to make good his life interest in the trust estate, he had no right as against the trustee to anything that represented income of the fund replaced by the trustee, & his trustee in bkpy. was in no better position, & accordingly, the representative of deceased trustee was entitled to this surplus.—*FLETCHER v. COLLIS*, [1905] 2 C. 24; 74 L. J. Ch. 502; 92 L. T. 749; 53 W. R. 516; 40 Sol. Jo. 499, C. A.

4421. —.]—*Re JERVIS, TURNER v. JERVIS*  
(1919), 146 L. T. Jo. 215.

**4422. Legal effect of facts of position.]—** Acquiescence in a transaction cannot be maintained unless it be shown that the party whose interests are affected knew not only the facts which affected his interest, but the legal effect of those facts upon that interest.—**COCKERELL v. CHOLMFLEY** (1830), 1 Russ. & M. 418; Tam. 435; 48 E. R. 173; *on appeal* (1832), 6 Bli. N. S. 120, H. L.

*Annotations*.—*Mentd.* Doe d. Blewitt v. Phillips (1841), 1 Q. B. 84; Doe d. Strickland v. Woodward (1847), 1 Exch. 273; Kekewich v. Marker (1851), 3 Mac. & G. 311; Buckley v. Howell (1861), 29 Beav. 546; R. Chaplin & Staffordshire Potteries Waterworks Co.'s Contract, [1922] 2 Ch. 824.

**4423.** — **Duty of trustees.**—Testator by his will devised & bequeathed the residue of his property to his exors. A., B. & C., upon trust to invest & pay the income to his widow for life, & after her death, in the events which happened, to his five children. The eldest attained twenty-one in 1839, & the youngest in 1846. The three exors. proved the will, but C., a solr., was almost entirely the acting trustee, in whose hands a part of the trust funds was allowed to remain. On the youngest child attaining twenty-one, he, on behalf of himself & the other children, attempted to obtain payment from C., who was then in insolvent circumstances, & in 1848 addressed to him a letter, in which he offered to receive the amount so due in instalments of £50 each, with interest on the principal sum from time to time remaining due. In 1849 a bill was filed by the five children for the purpose of making A. & B. jointly & severally liable :—*Held* : it was the duty of A. & B., not only to have the money in their hands, but to explain to their *cœstui que trust* what their rights were : & being ignorant of those rights, there

was nothing in the conduct of pltfs., either by acquiescence or of giving time, to deprive them of their remedy against the trustees, who were held jointly & severally liable.—*BURROWS v. WALLS* (1855), 5 De G. M. & G. 233; 3 Eq. Rep. 960; 25 L. T. O. S. 18; 3 W. R. 327; 43 E. R. 859. L. C.

4424. —[—]— (1) *Cestui que trust* cannot be bound by releases given to their trustees, if given in ignorance of their rights, for it is the duty of the trustees to apprise them of those rights. They cannot of course be bound by instruments obtained from them by false representations, or under the exercise of undue influence (TURNER, L.J.).

(2) It is the duty of trustees to see that their *cestuis que trust* are properly advised as to their rights; & where trustees in order to support a release rely on the ground that their *cestuis que trust* were advised by an independent solr., it lies on them to show that the *cestuis que trust* did authorise an independent solr. to act for them.—**LOYD v. ATTWOOD, ATTWOOD v. LLOYD (1859),** 3 De G. & J. 614; 29 L. J. Ch. 97; 33 L. T. O. S. 209; 5 Jur. N. S. 1322; 44 E. R. 1405. L. J.J.

**Annotations:—***Mentd.* *Freeman v. Pope* (1870), 5 Ch. App. 538; *Re Johnson*, *Golden v. Gillam* (1881), 20 Ch. D. 389; *Re Beetham*, *Ex p. Broderick* (1886), 18 Q. B. D. 380.

**4425. Sale of investment by trustee—Beneficiary ignorant of existence of investment.]—ADAMS v. CLIFTON, No. 4176, ante.**

4426. Degree of knowledge necessary.—Distinction between acts of trustees—Direct breach & omission not amounting to breach.]—In charging trustees with loss, from the misconduct of their agents, it is not sufficient to prove it might have been prevented with extraordinary care & caution, & a trustee is not held liable if acting strictly within the line of his duty, he exercises reasonable care & diligence. There is a clear distinction between the degree of knowledge & sanction necessary to exonerate a trustee from that which was clearly a breach of trust, & that which is necessary to preclude the *cestui que trust* from complaining of that not being done, the omission to do which, with the concurrence of the *cestui que trust*, never constituted a breach of trust. In the first case, it is used to release a right, & to discharge an obligation already perfected by the breach of trust; & in the latter only to prevent a right from arising from the non-performance of a duty which it was competent to the *cestui que trust* to dispense with.—MUNCH v. COCKERELL (1840), 5 My. & Cr. 178; 9 L. J. Ch. 153; 4 Jur. 140; 41 E. R. 338. L. C.

4427. Acquisition obtained by misrepresentation.]—LLOYD v. ATTWOOD, ATTWOOD v. LLOYD, No. 4424, *ante*.

—LLOYD v. ATTWOOD, ATTWOOD v. LLOYD, No. 4424, *ante*.

4429. **Erroneous belief as to rights.**—A., after specific bequests to different members of his family, gave the residue to three persons, in trust to pay the dividends to his son for life, & after the son's decease to pay to any widow of the son, who was not then married, an annuity of £600 for life, & the residue to his son's children, & in case there should not be any child of the son "then to stand possessed of the same, in trust for such person or persons of the blood of me, as would by virtue of the Statutes of Distributions of Intestates' Effects have become, & been then entitled thereto, in case I had died intestate." At A.'s death, he left the son & four daughters him surviving. The son married, enjoyed the dividends of the residue



4445. Permitting one trustee to have possession of trust funds—Presumption that money in hands of trustee for purposes of trust.]—F. executed a settlement by which he was appointed joint trustee of a reversionary fund with H. a solr., & when the fund became payable F. & H. signed a joint receipt for it. F. did not otherwise act in

*Sect. 4.—Limitations on liability of trustees: Subsect. 5, C., D., E. & F.]*

the trust. H. received the fund & lent it upon insufficient security, & it was lost. H. afterwards obtained a discharge under the Insolvent Debtors Act, & inserted the amount of the trust fund as a debt in his schedule. In a suit by a *cestui que trust* against F. & H.:—*Held*: F. was bound to restore the trust fund.

She [pltf.] must be taken to have put the money in the hands of H. for the purposes of the trust, one of which was the investment of the money on proper security in the joint names of H. & F., & F. cannot therefore be absolved by the fact of her having allowed the fund to be received by H.; he must be taken to have known that the money was in H.'s hands, & it became his duty to take care that the money was invested according to the trust (TURNER, L.J.).—THOMPSON v. FINCH (1856), 8 De G. M. & G. 500; 25 L. J. Ch. 681; 27 L. T. O. S. 330; 44 E. R. 506, L. J.J.

*Annotations*:—*Consd.* Bahin v. Hughes (1886), 31 Ch. D. 390. *Refd.* *Re* Partington, Partington v. Allen (1887), 57 L. T. 654; Chillingworth v. Chambers, [1896] 1 Ch. 685; *Re* Turner, Barker v. Ivimey, [1897] 1 Ch. 536.

—*Sec.* further, Part VII., Sect. 3, subsect. 4, D., *ante*.

**4446. Casual suggestion—Investment to secure higher interest.**—(1) Trustees made personally liable for a loss arising from placing trust moneys with bankers on a deposit account, which was not authorised by the will, & that notwithstanding a trustee indemnity clause against losses by a banker of moneys deposited for safe custody.

(2) If in a casual conversation, the *cestui que trust* happened to say to the trustee, "I wish you would invest the trust money so as to get a higher rate of interest," that would not be sufficient to justify the trustees in committing a breach of trust (ROMILLY, M.R.).—REHDEEN v. WESLEY (1861), 29 Beav. 213; 54 E. R. 609.

**4447. Length of time—Evidence of acquiescence.]**

—(1) Length of time, where it does not operate as a statutory or positive bar, operates simply as evidence of assent or acquiescence.

(2) A *cestui que trust*, whose interest is reversionary, is not bound to assert his title until it comes into possession, but the mere circumstance that he is not bound to assert his title does not bear upon the question of his assent to a breach of trust. A *cestui que trust* is not less capable of giving such assent when his interest is in reversion than when it is in possession.

*Qu.*: If a *cestui que trust* knows of a breach of trust, he is bound, although his interest may be reversionary, to take proceedings to have the matter set right, & will be held barred by acquiescence if he does not promptly do so.

(3) Acquiescence imports full knowledge, & a *cestui que trust* cannot be bound by acquiescence unless he has been fully informed of his rights, & of all the material facts & circumstances of the case.—LIFE ASSOCN. OF SCOTLAND v. SIDDAL, COOPER v. GREENE (1861), 3 De G. F. & J. 58; 4 L. T. 311; 7 Jur. N. S. 785; 9 W. R. 541; 45 E. R. 800, L. C. & L. J.J.

*Annotations*:—*As to* (1) *Consd.* Lyell v. Kennedy, Kennedy v. Lyell (1889), 14 App. Cas. 437; Soar v. Ashwell, [1893] 2 Q. B. 390. *Refd.* Price v. Phillips (1894), 11 T. L. R. 86. *As to* (2) *Refd.* Evans v. Benyon (1887), 37 Ch. D. 329. *As to* (3) *Refd.* Buckmaster v. Buckmaster (1886), 55 L. T. 279. *Generally*, *Mentd.* Evans v. Davis (1878), 10 Ch. D. 747.

**4448. ——— Ten years.]**—FARRANT v. BLANCHFORD, No. 4475, *post*.

**4449. ——— Thirty-eight years.]**—SLEEMAN v. WILSON, No. 4400, *ante*.

*See, also*, No. 4440, *ante*.

**4450. Combined character of trustee & beneficiary.]**—By a marriage settlement made in 1821, stock belonging to the wife was assigned to B. & another, upon trust for the separate use of the wife for life, with remainder for the husband for life, with remainder in default of children of the marriage, for B. The trustees neglected to have the stock transferred to them, & it remained in the name of the wife, & in 1822 the husband sold it, & possessed himself of the proceeds. B. died in 1820, the husband in 1858, & the wife in 1864. There were no children. In 1866 B.'s exors. claimed the trust fund from the husband's estate:—*Held*: their claim was not barred by the Statute of Limitations, or by acquiescence, or by the fact that B. was one of the trustees whose negligence rendered the misapplication of the trust fund possible.

The combined character of trustee & *cestui que trust* does not, in my opinion, constitute such a case of acquiescence as to bar the representatives of B. from enforcing this claim (ROMILLY, M.R.).—BUTLER v. CARTER (1868), L. R. 5 Eq. 276; 37 L. J. Ch. 270; 18 L. T. 11; 16 W. R. 388.

*Annotation*:—*Refd.* Chillingworth v. Chambers, [1896] 1 Ch. 685.

**4451. Necessity for clear proof—Burden on trustees.]**—Where trustees have committed a breach of trust in order to discharge themselves, they must clearly show that their *cestui que trust*, on becoming beneficially entitled, adopted the transaction.—COPE v. CLARK (1870), 18 W. R. 279.

**4452. — — —]**—At the time when the conveyance was completed, the trustee, who was a solr., took counsel's opinion as to the person to whom the purchase-money was payable, & who ought to join in the conveyance, and the opinion was given in favour of the devisee. The trustee accordingly paid the money to her, & informed pltf. of the result, but no settlement of accounts was come to between pltf. & the trustee up to the time of the institution of the action, & pltf. had not executed any release or discharge to the trustee.

This action was brought to recover the moneys out of the trustee's estate, after his death, & nearly five years after the payment had been made:—*Held*: no case of acquiescence was made out against pltf., & he was entitled to recover from the trustee's estate the moneys received from the railway co., the amount to be recouped to the trustee's representative by his co-defct., the devisee.—*Re* JACKSON, WILSON v. DONALD (1881), 44 L. T. 467.

**4453. Presumption of acquiescence—Receipt of wife's property by husband.]**—The trustee of a sum of stock for the separate use of a married woman having improperly transferred it into the joint names of her husband & himself, the husband for six years received the dividends, after which the trustee died, & the husband, without his wife's knowledge, sold out the stock, & applied the proceeds to his own use. Some time afterwards he left her:—*Held*: though the wife might have been presumed to have assented to the husband's actual receipt of the dividends while the stock remained intact, yet no such assent could be presumed after it had been sold, & she was entitled to recover, as against her husband & the estate of deceased trustee, the arrears of dividends which had accrued since that time as well as to have the trust fund replaced.

The whole foundation of the doctrine depends upon her consent, either express, which is actual consent, or implied, which is sometimes called acquiescence, very properly so, if she knew of the

fact of his receiving the income & if she allowed him to retain it (JESSEL, M.R.).—*DIXON v. DIXON* (1878), 8 Ch. D. 587; 27 W. R. 282.

*Annotations*.—*Reid. Re Blake, Blake v. Power* (1889), 60 L. T. 663; *Aytoun v. Aytoun* (1892), 8 T. L. R. 586.

**What amounts to release.**—*See* Nos. 4470, 4471, *post*.

#### D. What Persons Bound.

**4454. Person cognisant of breach subsequently becoming entitled.**—Where a party at the time of the misapplication of a trust fund by the trustee was cognisant of the fact, but had then no right or interest whatever to the fund, & afterwards acquired such right as administrator to the *cestui que trust*.—*Held*: his rights as administrator were not affected by such, assumed, previous knowledge on the ground of acquiescence.—*Re CLARKE, Ex p. SMITH* (1841), 2 Mont. D. & De G. 113, Ct. of R.

**4455. Person claiming under cestui que trust—Appointees.**—A. was tenant for life of a trust fund, with a general power to appoint by will, & in default, it was settled on *pltf.* A. ordered the trustees to pay over the fund to her on an indemnity, & she afterwards appointed the fund to *pltf.*, & others, who filed a bill to make the trustees liable for a breach of trust.—*Held*: by the appointment, the fund became assets for answering A.'s liabilities, of which the indemnity was one, & the trustees were not liable.—*WILLIAMS v. LOMAS* (1852), 16 Beav. 1; 51 E. R. 675.

*Annotation*.—*Reid. O'Grady v. Wilmot*, [1916] 2 A. C. 231.

**4456. ———.**—A married woman, with an absolute power of appointment over property settled to her separate use, having, by her acts, induced the trustees to lend the fund on unauthorised security, so that it was lost, & conceiving herself unable to maintain a suit to charge the trustees for the loss, executed an appointment of the fund after it had been lost in favour of her infant children, to enable them to file a bill to charge the trustees; the ct. dismissed the bill.—*BREWER v. SWIRLES* (1854), 2 Sm. & G. 219; 2 Eq. Rep. 493; 23 L. J. (Ch. 542; 24 L. T. O. S. 57; 18 Jur. 1069; 2 W. R. 339; 65 E. R. 373.

*Annotation*.—*Reid. Hanchett v. Briscoe* (1856), 22 Beav. 496.

**4457. Cestui que trust with reversionary interest—Necessity for full information.**—*LIFE ASSOCN. OF SCOTLAND v. SIDDAL, COOPER v. GREENE*, No. 4447, *ante*.

**4458. Executor of person absolutely entitled.**—Property was assigned to trustees in trust for S. for life, & after her death to such of her issue as she should by will appoint. S. by her will appointed two-fifths of the property to two trustees, of whom N. was the survivor, in trust to pay the income to her son till he should attain the age of forty, & then in trust for her son, his exors., & administrators; provided that in case her son should assign his share in the property, then the appointment for his benefit should be void, & the two-fifths should be held in trust for the other objects of the power. The son died under the age of forty without having assigned his share, leaving a will of which B. was exor. After the death of S., L. & N. were appointed trustees of the original settlement. N. afterwards, with

the consent of the son's exor., obtained possession of the son's share. Subsequently N. misappropriated the fund. The persons beneficially interested under the son's will recovered judgment against B. for wilful default in allowing the property to remain in N.'s hands; & B. being dead, his exor. brought an action against L. to make him liable for the loss of the fund.—*Held*: inasmuch as the son of S. had the absolute interest in the fund, & B., his exor., had consented to its being paid to N., neither B. nor his personal representative could recover against L., the trustee of the settlement, on the ground of wilful default.—*SCOTNEY v. LOMER* (1886), 31 Ch. D. 380; 55 L. J. Ch. 443; 54 L. T. 194; 34 W. R. 407, C. A.

*Annotations*.—*Reid. Re Tyssen, Knight-Bruce v. Butterworth*, [1894] 1 Ch. 56; *Re Paget, Re Mellor, Mellor v. Mellor*, [1898] 1 Ch. 290; *Re Purdie's Settlement, Rose v. Hill* (1904), 48 Sol. Jo. 524; *Re Mackenzie, Bain v. Mackenzie*, [1916] 1 Ch. 125.

**4459. Cestui que trust deriving no benefit from breach.**—*CHILLINGWORTH v. CHAMBERS*, No. 4523, *post*.

**4460. ———.**—*FLETCHER v. COLLIS*, No. 4420, *ante*.

**4461. Cestui que trust under disability—Bankruptcy.**—*FLETCHER v. COLLIS*, No. 4420, *ante*.

—*Infants.*—*See* INFANTS, Vol. XXVIII., pp. 332-334, Nos. 2006-2016.

—*Married woman restrained from anticipation.*—*See* HUSBAND & WIFE, Vol. XXVII., pp. 112-113, Nos. 900-901.

**Persons giving condonation or release.**—*See* Sub-sect. 5, C., *post*.

#### E. Acquiescence by Some Beneficiaries Only.

**4462. Proportionate relief to trustees.**—*BRUCE v. STOKES*, No. 4272, *ante*.

**4463. ———.**—*LINCOLN v. WRIGHT*, No. 4395 *ante*.

**4464. Joinder of acquiescing beneficiary as co-defendant.**—The bill sought to charge trustees with mismanagement & misapplication of the trust estate. The answer insisted that one of the two co-*pltf.*s had acquiesced. The ct., upon motion, gave leave to amend by making such co-*pltf.* deft., upon payment of the costs of the application, & giving security for the costs already incurred.—*BATHUR v. KEARSELEY* (1844), 7 Beav. 545; 13 L. J. Ch. 321; 3 L. T. O. S. 121; 49 E. R. 1177.

*Annotation*.—*Reid. M'Leod v. Lytleton* (1852), 1 Drew. 36.

**4465. Action by remainderman—Acquiescence by tenant for life—Right of trustees against tenant for life.**—In a suit by children against trustees, to make them liable for a breach of trust, it was alleged by the trustees, that their co-deft., the tenant for life, had concurred; the decree was made against the trustees, without prejudice to any right or remedy they might have against the tenant for life.—*MEYER v. MONTRIOU* (1846), 9 Beav. 521; 50 E. R. 445.

#### F. Right to Inquiry.

**4466. On allegation of acquiescence—Whether inquiry directed.**—*BYRCHALL v. BRADFORD* (1821), 6 Madd. 13; 56 E. R. 993; *subsequent proceedings* (1822), 6 Madd. 235.

trust fund, lends the trust money upon a security which, being insufficient, the trust fund is wholly lost, the trustee being compelled to refund the trust moneys, cannot maintain a suit against the assenting *cestui que trust* to compel him to indemnify the trustee.—*BROWNE v. MAUNSELL* (1856), 27 L. T. 45.—*IR.*

#### PART VII. SECT. 4, SUB-SECT. 5.—D.

p. *Cestui que trust authorising breach.*—*ROTHERFOORD v. MAZIERE* (1862), 13 L. Ch. R. 204.—*IR.*

q. *Cestui que trust under disability—Married woman—Fund settled to husband until insolvency & then to separate use of wife.*—*MARA v. MAN-*

*NING* (1845), 8 I. Eq. R. 218; 2 Jo. & Lat. 311.—*IR.*

#### PART VII. SECT. 4, SUB-SECT. 5.—E.

4465 i. *Action by remainderman—Acquiescence by tenant for life—Right of trustees against tenant for life.*—Where a trustee, with the assent of the *cestui que trust* having a life interest in the



**SECT. 4.—Limitations on liability of trustees: Sub-sect. 5, F.; sub-sect. 6, A. & B.]**

**4467.** ———.—(1) A person knowingly inducing trustees to lend trust money to his debtor on a security not warranted by the trusts, in order that when advanced such person may obtain thereout payment of his debt, is accountable to the *cestuis que trust*.

(2) In the answer to a bill for relief in respect of a breach of trust, it was alleged that some of the *cestui que trust* had assented thereto:—*Held*: the parties sought to be charged were entitled to an inquiry.—*FYLER v. FYLER* (1841), 3 Beav. 550; 5 Jur. 187; 49 E. R. 216.

*Annotations*:—*Generally, Refd.* *Chillingworth v. Chambers*, [1896] 1 Ch. 685. *Mentz, A.-G. v. Chesterfield* (1864), 18 Beav. 596; *Harries v. Rees* (1867), 37 L. J. Ch. 102; *Butler v. Byler* (1877), 26 W. R. 85; *Mara v. Browne*, [1896] 1 Ch. 199.

**4468.** Acquiescence not alleged in defence—No satisfactory proof—Inquiry refused.]—*LINCOLN v. WRIGHT*, No. 4395, *ante*.

**SUB-SECT. 6.—CONDONATION OR RELEASE.**

**A. In General.**

**4469.** General rule—Trustee not chargeable.]—*AVELINE v. MELHUIST*, No. 4476, *post*.

**4470.** What amounts to release—Acceptance of conditional legacy—With condition against claim for breach of trust.]—*Pittf.*, deliberately & with full notice, accepted the benefits under his mother's will, which "prohibited" him from setting up any claim, on account of any "error, irregularity, or impropriety" in the execution of the trusts of her father's will:—*Held*: he could not maintain a suit against the exor. of the father's will, to make him accountable for the profits made by the employment of part of the trust funds in his business.—*EGG v. DEVEY* (1847), 10 Beav. 444; 16 L. J. Ch. 509; 10 L. T. O. S. 243; 11 Jur. 1023; 50 E. R. 653.

**4471.** ———. Obtaining part of trust property—Intention of obtaining rest not abandoned.]—A *cestui que trust* who with knowledge that his trustee has committed a breach of trust obtains from him a part only of that to which he is entitled, does not thereby waive his right to such further relief as he may be able to obtain unless an intention so to do can be clearly inferred from the surrounding circumstances. In Nov. 1860, an order was made in a suit for administering the trusts of the will of J., to which H., a former trustee, was deft., directing her to pay into ct. a sum of money in respect of breaches of trust committed in 1843 & 1845, the amount of which had been ascertained by the Chief Clerk in the suit. H. went abroad, & substituted service of the order was made upon her. By the order on further consideration in 1863, H. appearing by counsel, certain sums of money to which she was entitled, & her life interest under testator's will were ordered to be impounded & paid over to "the account of H. funds applicable

for the repayment of trust funds misappropriated," & an inquiry was directed as to what steps should be taken to obtain restitution of the funds. Certain other orders were made in the suit, but no personal order was made on H. for payment of the amount of her defalcation, nor any steps taken against her, although she returned to England in 1870, where she remained till her death in 1880, & her residence was known to the then trustees of the will & some of the *cestuis que trust*. On her death the surviving trustee of the will of J. brought this action against her exors., claiming the administration of her real & personal estate on behalf of himself & all other the creditors, alleging himself a creditor in respect of the unpaid balance of the sum representing the breach of trust. At the date of the institution of the action several beneficiaries under J.'s will were infants:—*Held*: (1) the action was not an attempt to enforce a stale demand, & the *cestui que trust* must not be taken to have elected to abandon their claim against her & to rest content with impounding her life interest; (2) there being a debt due from H. at her death to the estate of J. & the trusts of his will not being completed, the surviving trustee was the proper person to bring the action, & the *cestuis que trust* need not be parties; (3) although as between the *cestui que trust* & a stranger the claim of the *cestui que trust* is barred by lapse of time operating against his trustee, lapse of time is no bar as between *cestui que trust* & trustee.—*Re CROSS, HARSTON v. TENISON* (1882), 20 Ch. D. 109; 51 L. J. Ch. 645; 45 L. T. 777; 30 W. R. 376, C. A.

*Annotations*:—*As to* (3) *Refd.* *Rochevoucauld v. Boustead*, [1897] 1 Ch. 196. *Generally, Refd.* *Soar v. Ashwell*, [1893] 2 Q. B. 390.

What amounts to acquiescence.]—*See* Sub-sect. 5, *ante*.

Release as valuable consideration for settlement.]—*See* *BANKRUPTCY*, Vol. V., p. 845, No. 7121.

Acquiescence.]—*See* Sub-sect. 5, *ante*.

Laches.]—*See* Sub-sect. 7, *post*.

**B. Necessity for Knowledge of Circumstances.**

**4472.** General rule—Full information.]—A trustee who was a solr., came to a final settlement of accounts with his *cestuis que trust*, & thereupon a general release was executed. In the accounts, the trustee had taken credit for bills of costs for professional services, to which, under the general rule, he was not entitled. The *cestuis que trust* were assisted on the occasion by an independent solr., who perused the bills, & settled & attested the release:—*Held*: under the circumstances, the trustee was entitled to the benefit of the release.—*STANES v. PARKER* (1846), 9 Beav. 385; 10 Jur. 603; 50 E. R. 392; *sub nom.* *STAINES v. PARKER*, 1 New Pract. Cas. 459; 8 L. T. O. S. 86.

*Annotation*:—*Distd.* *Todd v. Wilson* (1846), 9 Beav. 486.

**4473.** ———.—Bequest to A. for life of an annuity of £100, "by interest arising out of money to be vested for that purpose by the exors." in

**PART VII. SECT. 4, SUB-SECT. 6.—A.**

**r.** What amounts to release—Obtaining part of trust property—Trustee insolvent.]—Where an insolvent is guilty of a breach of trust, & the parties defrauded enter into an arrangement with him whereby they are paid a portion of the debt, & receive the best security he can give for the remainder, this will be held to be a condonation of the original offence, & the creditor will not be allowed to oppose.—*Re LYNCH* (1860), 3 L. T. 482.—*IR.*

**t.** Release to one trustee—Whether operating as release to others.]—A release to one trustee in respect of a breach of trust committed in the investment of part of the trust funds held to be a release to the other trustee, the release operating as an acceptance of the securities upon which the funds had been invested.—*BLACKWOOD v. BURROWS* (1843), 2 Con. & Law. 459; 4 I. Eq. R. 609; 4 Dr. & War. 441.—*IR.*

**PART VII. SECT. 4, SUB-SECT. 6.—B.**

**4472 i.** General rule—Full informa-

tion.]—Concealment of a material fact sufficient to avoid a release obtained by the person whose duty it was to make the disclosure. If a trustee keeps his *cestui que trust* in ignorance of the facts which make his title, & the *cestui que trust* files his bill in ignorance, & then from not knowing how to put his questions, he gets no answer as to those facts, & in such a situation releases, such a release cannot stand: if the release had been executed after a full & fair disclosure, it might be different.—*BOWLES v. STEWART* (1803), 1 Sch. & Lef. 209.—*IR.*



public funds or other good security, & after his death, "the capital stocks so purchased" to A.'s children. By a codicil testator said, "What I mean in my will by securing money in the public funds, is to purchase a capital stock" in the Consols by my exors. In the above case A. died in 1843, & his children, on receiving £2,000, executed a release, which, after reciting that, according to the trust, £2,000 had been set apart to answer the annuity, they released the representative of testator from all claims & demands. In 1854 the children instituted a suit to recover the amount of Consols which would be required to produce £100:—*Held*: having regard to the situation in life of pltf., the inaccuracy of the recitals, & the absence of professional assistance, they were not barred by lapse of time.—*ASPLAND v. WATTE* (1855), 20 Beav. 474; 25 L. J. Ch. 53; 25 L. T. O. S. 231; 1 Jur. N. S. 968; 3 W. R. 526; 52 E. R. 686.

4474. ———. ———.]—*LOYD v. ATTWOOD*, *ATTWOOD v. LLOYD*, No. 4424, *ante*.

4475. ———.]—Where a breach of trust has been committed from which a trustee alleges that he has been released, it is incumbent on him to show that the release was given by the *cestui que trust* deliberately & advisedly, with full knowledge of all the circumstances & of his own rights & claims against the trustee, & without pressure or undue influence. But where a *cestui que trust*, shortly after attaining twenty-one, pressed for payment of a sum of money to which he was entitled, & four years afterwards accepted from one of his trustees a packet of deeds, which the co-trustee, the father of the *cestui que trust*, had deposited by way of security on the occasion of a misappropriation by him of the trust fund before the *cestui que trust* came of age, & at the request of his father signed & sent a release in writing, not under seal, to such trustee, & took no further steps till after his father's death, six years later, & ten years after he came of age, when, the security turning out insufficient, he filed a bill to have the deficiency made good by the surviving trustee:—*Held*: all the requisites for constituting a valid release had been complied with, & the *cestui que trust* must be taken to have had full knowledge of the value of the security, notwithstanding he had never opened the packet of deeds. *FARRANT v. BLANCHFORD* (1863), 1 De G. J. & Sm. 107; 32 L. J. Ch. 237; 7 L. T. 770; 9 Jur. N. S. 423; 11 W. R. 294; 46 E. R. 42, L. C.

*Annotation*:—*Reid*. *Chillingworth v. Chambers*, [1896] 1 Ch. 885.

4476. ———.]—A fund was given to one for life, with a direction that upon her death the dividends should be accumulated for her children, of whom pltf. was one, during their minorities. Upon the tenant for life's death the father assumed to act as a trustee & by sufferance of his co-trustee, deft., received & applied the dividends for the support of his children, he being otherwise incapable of maintaining them. The dividends were therefore not accumulated. He died leaving his children his universal legatees. Fourteen days after pltf. came of age she gave to deft. an acknowledgment upon his transferring her share of the fund to her, from which it appeared that the share was the capital only, & in which it was clearly stated how the dividends had been applied. Deft. was also sole exor. of the father & on winding-up his estate six months later, pltf. & her sisters joined in formally releasing all claims upon or in respect of that estate. Later she filed this bill

to make the trustee account for the accumulations:—*Held*: under these circumstances, as the acknowledgment showed that pltf. was well acquainted with the actual facts & as the trustee would be entitled to be recouped any sum for which he might be held accountable out of the estate of the father, of whom pltf. was one of the universal legatees, the bill must be dismissed for the release in effect operated as a discharge of the claim.—*AVELINE v. MELHUISE* (1864), 2 De G. J. & Sm. 288; 10 L. T. 830; 10 Jur. N. S. 788; 12 W. R. 1020; 46 E. R. 386, L. J.

*Annotations*:—*Reid*. *Culbertson v. Wood* (1870), 19 W. R. 260; *Havelock v. Havelock*, *Re Allan* (1881), 17 Ch. D. 807.

4477. Release made under misapprehension.—*Inoperative*.]—A. executed a bond to B. & C., conditioned for payment of an annuity of £100 to D. for life, & assigned an annuity of £120 for the life of one M. & a policy of insurance for £700 on M.'s life, to B. & C., upon certain trusts for further securing the annuity of £100. M. died, & A. died shortly afterwards, having, as was then believed, received the £700 & applied it to his own use. Shortly afterwards D., in consideration of £500, released A.'s personal representative & B. & C. from the annuity of £100 & the securities for it. Some years afterwards it was discovered that A. had placed the £700 in a bank, in the names of B. & C. where it still remained:—*Held*: the release, having been executed under a mistake, was inoperative, & the £700 remained impressed with the trusts for securing the annuity of £100.—*IORE v. BECHER* (1842), 12 Sim. 465; 11 L. J. Ch. 153; 6 Jur. 93; 50 E. R. 1211.

*Annotations*:—*Mentid*. *Rogers v. Acaster* (1851), 14 Beav. 445; *Fitzgerald v. Fitzgerald* (1868), L. R. 2 P. C. 83; *Widgery v. Tepper* (1877), 38 L. T. 131.

4478. ———.]—If on the footing of a supposed illegitimacy, the title of the *cestui que trust* to the legacy is disputed & denied by the trustee, & the former is thereby induced to accept from the trustee a smaller sum than that to which he is entitled under the will, & by deed to release the trustee from the payment of the legacy, equity will not permit such a transaction to stand. Even without any evidence of fraud, such a transaction is null & void.—*THOMSON v. EASTWOOD* (1877), 2 App. Cas. 215, H. L.

*Annotations*:—*Reid*. *Dougan v. Macpherson*, [1902] A. C. 197. *Mentid*. *Cunningham v. Foot* (1878), 3 App. Cas. 974; *The Kong Magnus*, [1901] P. 223; *Re Lloyd*, *Lloyd v. Lloyd*, [1903] 1 Ch. 385; *Lewis v. McKay*, *Algate v. Vugler*, *Clark v. Potter* (1924), 93 L. J. K. B. 810.

4479. ———.]—A release to a trustee set aside after the lapse of more than twenty years & after the death of a trustee, on evidence of pltf., corroborated by the tenor of the deed, that it was executed in error. Testator bequeathed one-half of his residuary personal estate to his sister, & one quarter thereof to each of his two nieces: he appointed his sister trustee & extrix. of his will, & died in the year 1855. The residuary personal estate consisted principally of railway shares & stocks, & at the time of passing the residuary account it was valued at £42,000. The nieces lived with their aunt, who had brought them up from childhood. In 1850 the nieces executed a release of all suits & causes of action, in favour of their aunt in consideration of the payment of £10,500 to each. At the time of the execution of the release, the railway shares & stocks had increased in value, & the share of each of the nieces was worth much more than £10,500. The release was drawn up by the aunt's solr., & the nieces had no independent advice, & executed it

*Sect. 4.—Limitations on liability of trustees: Sub-sect. 6, B. & C.; sub-sect. 7, A.]*

in error, but no fraud was imputed. In 1879, the aunt died. In 1883, an action was commenced by one of the nieces to set aside the release:—*Held*: the release was invalid, & must be set aside.—*Re GARNETT, GANDY v. MACAULAY* (1885), 31 Ch. D. 1, C. A.

*Annotations*:—*Mentd. Mason v. Mason* (1886), 2 T. L. R. 286; *Re Farman, Farman v. Smith* (1887), 57 L. J. Ch. 637; *Wildish v. Fowler* (1888), 5 T. L. R. 113.

**4480. Release obtained by fraud or undue influence.**—*LLOYD v. ATTWOOD, ATTWOOD v. LLOYD*, No. 4424, *ante*.

**4481. Release on advice of independent solicitor.**—*STANES v. PARKER*, No. 4472, *ante*.

**4482. —Onus of proof.**—*LLOYD v. ATTWOOD, ATTWOOD v. LLOYD*, No. 4424, *ante*.

**4483. Release without independent professional advice.**—On a settlement of account between a *cestui que trust* & a trustee (a solr.), the latter charged for professional services in the trust. A release was executed but the *cestui que trust* not having had any independent professional assistance on the occasion the ct. relieved him from the professional charges beyond costs out of pocket.—*TODD v. WILSON* (1846), 9 Beav. 486; 1 New Pract. Cas. 489; 15 L. J. Ch. 450; 10 Jur. 626; 50 E. R. 431.

**Necessity for knowledge on acquiescence.**—*See* Sub-sect. 5, B., *ante*.

*C. What Persons Bound.*

**4484. Release by some of beneficiaries—Misjoinder of plaintiffs not entitled to relief.**—*AYLWIN v. BRAY* (1822), cited in 2 Y. & J. 512 at pp. 517, 518.

*Annotation*:—*Reid, Raffety v. King* (1836), 6 L. J. Ch. 87.

**4485. —**—*MORLEY v. HAWKE* (LORD) (*circa* 1801), cited in 2 Y. & J. at p. 520.

*Annotation*:—*Reid, Davies v. Quarterman* (1840), 4 Y. & C. Ex. 257.

**Acquiescence by some of beneficiaries.**—*See* Nos. 4462–4464, *ante*.

**4486. Beneficiaries recently attaining majority—Validity of release.**—A., being tenant for life, with remainder to his children as he might appoint, & being indebted to one of the trustees of the fund, soon after his eldest son came of age, he executed the power in his eldest son's favour, & the whole fund was retained by the trustee in satisfaction of the debt. The son, who was twenty-three years of age, executed to the trustees a release of all claims in respect thereof; & eighteen years afterwards, he, in conjunction with a younger brother & sister, filed a bill against the trustees, to set aside the transaction. The ct. declared the whole transaction fraudulent & void. The trustees were ordered to restore the fund, & the father was also held responsible.—*WADE v. COX* (1835), 4 L. J. Ch. 105.

**4487. —**—*Degree of weight to be attached to deeds of release executed by cestuis que trust within a few days of their respectively coming of age, when such releases profess to proceed upon the examination of complicated accounts.*

The bill stated that an account had been made out, showing that a certain sum was due to pltf., & it alleged that defts. set up that account & the payment of the balance as a final settlement. The bill charged the contrary, & that much more was due to pltf., as would appear if certain accounts

were rendered. A deed of release had, in fact, been executed by pltf. at the time of the payment of the balance in question; but the bill made no mention of it. As this deed of release acknowledged the receipt of certain sums, it could not be wholly set aside; but the ct. was of opinion, under the circumstances of the case, that it did not deprive pltf. of his right to the accounts which he sought.—*WEDDERBURN v. WEDDERBURN* (1838), 4 My. & Cr. 41; 8 L. J. Ch. 177; 3 Jur. 596; 41 E. R. 10, L. C.

*Annotations*:—*Consd. Egg v. Devey* (1847), 10 Beav. 444. *Appl. Allfrey v. Allfrey* (1849), 1 H. & Tw. 179. *Reid, Portlock v. Gardner* (1842), 1 Hare, 594; Willett v. Blanford (1842), 1 Hare, 253; Clements v. Hall (1858), 27 L. J. Ch. 350, n.; Bright v. Legerton (1861), 2 De G. F. & J. 506; *Mentd. Travis v. Milne, Milne v. Milne* (1851), 9 Hare, 141; Simpson v. Chapman (1853), 4 De G. M. & G. 154; Swinborne v. Nelson (1853), 16 Beav. 416; Hart v. Clarke (1854), 24 L. T. O. S. 185; Wedderburn v. Wedderburn (1856), 23 Beav. 84; Vyse v. Foster (1872), 8 Ch. App. 315, n.; Edinburgh Corp. v. Lord Advocate (1879), 4 App. Cas. 823.

**4488. —**—*The ct. looks with considerable jealousy at a release, executed by a young lady, at or shortly after attaining twenty-one, upon a settlement of accounts between her & her trustees.*—*PARKER v. BLOXAM* (1855), 20 Beav. 295; 52 E. R. 616.

**Infants.**—*See* INFANTS, Vol. XXVIII., p. 151, Nos. 116–121.

**Persons acquiescing in breach.**—*See* Sub-sect. 5, D., *ante*.

SUB-SECT. 7.—LAPSE OF TIME AND LACHES.

*A. In General.*

*See* EQUITY, Vol. XX., pp. 524–541, Nos. 2488–2587; LIMITATION OF ACTIONS, Vol. XXXII., pp. 509–519.

**4489. Long delay—Impeachment of sale to trustee—Twenty years.**—*PRICE v. BYRN* (*circa* 1795), cited in 5 Ves. at p. 681; 31 E. R. 803.

*Annotations*:—*Consd. Campbell v. Walker* (1800), 5 Ves. 678. *Reid, Chalmers v. Bradley* (1819), 1 Jac. & W. 51. *Roberts v. Tunstall* (1845), 4 Hare, 257; *Harcourt v. White* (1860), 28 Beav. 303; *Carey v. Cuthbert* (1873), 22 W. R. 249.

**4490. —Effect of trustee being merely naked trustee—No rights or interests appertaining to owner.**—Where property has been administered & applied without complaint according to a uniform course of management for a long series of years, the ct. will not, by an interlocutory order, disturb the possession upon the ground that such application is a breach of trust, unless it is perfectly clear that the party in whom the property is vested is a mere naked trustee, & has not, even to a limited extent, any of the rights or interests of an owner.—*SKINNERS' Co. v. IRISH SOCIETY* (1836), 1 My. & Cr. 162; 40 E. R. 338; *subsequent proceedings* (1845), 12 Cl. & Fin. 425, H. L.

*Annotation*:—*Mentd. Skippers' Co. v. Irish Soc. (1837), Donnelly, 168.*

**4491. —Whether lapse of time alone ground for relief.**—W. gave all the rest & residue of his personal estate & effects whatsoever unto trustees, upon trust to permit & suffer his wife, to possess & enjoy same & every part thereof, for & during the term of her natural life; & after her decease, to pay such rest & residue unto his son & daughter equally. Testator's estate consisted of, amongst other things, certain household furniture & farming stock, which the trustee did not convert into money, but permitted the widow to take

**4480** 1. Release obtained by fraud or undue influence.—*BOWLES v. STEWART* (1803), 1 Sch. & Lef. 209.—*IR.*

**PART VII. SECT. 4, SUB-SECT. 7.—A.**  
a. Long delay—Beneficiary prevented by poverty from ascertaining his rights.—

*BECKIT v. WRAGG* (1859), 7 Gr. 220.—*CAN.*  
b. — Direct trust.—In all cases

possession of them, whereby same were ultimately lost:—*Held*: the estate of the trustee was bound to make good the loss, although the parties entitled in remainder did not file their bill for many years after the property had been lost, & not until the death of the tenant for life.—*SMITH v. PUGH* (1842), 6 Jur. 701.

**4492.** ———.—*A.*, a trustee, misapplied a trust fund of which he was tenant for life, & he died in 1834. *C.*, who then became entitled to it, died in 1858, having taken no proceeding to recover it. A bill, filed in 1863 by the representatives of *C.* against the representatives of the representative of *A.*, to recover the fund, was dismissed with costs, on the ground of the lapse of time.—*HODGSON v. BIBBY* (1863), 32 Beav. 221; 8 L. T. 266; 11 W. R. 529; 55 E. R. 87.

**4493.** ———.—*Re* CROSS, *HARSTON v. TENISON*, No. 4471, *ante*.

**4494.** ———.—*When no laches or acquiescence.*—Lapse of time is not, in itself, a bar to the claim of a *cestui que trust*, against a trustee in a ct. of equity, where no laches or acquiescence can be imputed to him.—*CAVOR v. CROYDON CANAL CO.* (1843), 4 Y. & C. Ex. 593; 13 L. J. Ch. 89; 2 L. T. O. S. 225; 8 Jur. 277; 160 E. R. 1149, L. C.

**4495.** ———.—*(1)* A *cestui que trust* discovering a breach of trust, but not receiving any benefit from it, or conniving in it for any purpose, & not recognising the transaction, is not precluded from complaining of it merely on the ground that he abstained from making such complaint until long after he first knew of it.

Where stock stood invested in trust for the mother for life, with remainder to her son & daughter & their children, the daughter knew of an application by the son for a loan from the trustees of part of the trust moneys upon his personal security, & that the trustees were willing to make the loan with the consent of her mother, the tenant for life, & that the loan was in fact afterwards made. The daughter objected to the loan in her communications with her mother, but did not otherwise oppose it, & had not any communication with the trustees on the subject:—*Held*: (1) this was not such acquiescence on the part of the daughter to the loan as to preclude her from charging the trustees with the breach of trust in a suit instituted seven years after the transaction took place; (2) the daughter was not precluded from so charging the trustees by the fact that she knew that the mother had (untruthfully) stated to her son that she, the daughter, had consented to the loan, such statement of the daughter's consent never having been communicated to the trustees or constituted any part of the sanction or authority under which they acted.—*PHILLIPSON v. GATTY, GATTY v. PHILLIPSON* (1848), 7 Harc. 516; 12 L. T. O. S. 445; 13 Jur. 318; 68 E. R. 213; *on appeal* (1850), 2 H. & Tw. 459, L. C.

*Annotations*:—*Generally*, *Mentd.*, *Norris v. Wright* (1851), 14 Beav. 291; *Re Massingberd's Settlement*, *Clark v. Trelawney* (1890), 63 L. T. 296.

**4496.** ———.—*(2)*—Where an express trust is established, mere lapse of time, if not coupled with other circumstances rendering it unjust to give relief, will not, apart from any Statute of Limitations, bar the claim of a *cestui que trust*.—*ROCHEFOUCAULD v. BOUSTEAD*, [1897] 1 Ch. 196; 66 L. J. Ch. 74; 75 L. T. 502; 45 W. R. 272; 13 T. L. R. 118; *sub nom.* *DE LA ROCHEFOUCAULD*

*v. BOUSTEAD*, 41 Sol. Jo. 156, C. A.; *subsequent proceedings*, [1898] 1 Ch. 550, C. A.

*Annotations*:—*Reid.* *Re* Gallard, *Ex p. Gallard*, [1897] 2 Q. B. 8; *Brooks v. Muckleston*, [1909] 2 Ch. 519; *Taylor v. Davies*, [1920] A. C. 636. *Mentd.* *Isaacs v. Evans* (1899), 16 T. L. R. 113.

**4497.** ———.—*Right of beneficiary coming into possession.*—*HAWKINS v. GARDINER*, No. 4328, *ante*.

**4498.** *Effect on other cestuis que trust.*—*STORY v. GAPE*, No. 4051, *ante*.

*Loss of right to account.*—*See* EQUITY, Vol. XX., pp. 278–279, Nos. 380–390.

**4499.** ———.—*Thirty years.*—The bill alleged a breach of trust by deceased tenant for life under a settlement, in the application to the liquidation of a charge on the settled estates of the proceeds of part of such settled estates, while there was in his hands, as personal representative of the settlor, personal estate of such settlor primarily applicable to the liquidation of the charge. The answer of the personal representative of deceased tenant for life asserted the trust to have been duly & regularly performed by such tenant for life, & as evidence thereof set forth references to the accounts rendered of the settlor's personal estate by his representative, deceased tenant for life, to the Stamp Office. *Pltfs.* did not amend their bill to meet the *prima facie* case thus set up by deft.:—*Held*: the alleged breach of trust having taken place, if at all, at least thirty years back, *pltfs.* were not, under the circumstances, entitled to an account of the settlor's personal estate.—*MORRIS v. MORRIS* (1858), 28 L. J. Ch. 329; 32 L. T. O. S. 84; 4 Jur. N. S. 964; 6 W. R. 427; *affd.* on other grounds, 2 De G. & J. 323, L. J.J.

**4500.** ———.—*Twenty years—Accounts settled & not challenged.*—(1) Even where Stat. Limitations does not apply, the ct. will not entertain a suit by a *cestui que trust*, instituted for the purpose of challenging the accounts settled by his trustees, when the accounts & matters had been investigated twenty years before, & he had every opportunity of going into them.

(2) Lapse of time alone will be a sufficient bar to such a suit.—*BRIGHT v. LEGERTON* (No. 1) (1860), 29 Beav. 60; 29 L. J. Ch. 852; 3 L. T. 205; 24 J. P. 772; 6 Jur. N. S. 1179; 8 W. R. 678; 54 E. R. 548; *affd.* (1861), 2 De G. F. & J. 606, L. C.

*Annotations*:—*Reid.* *Carey v. Cuthbert* (1873), 22 W. R. 219; *Re* Cross, *Harston v. Tenison* (1882), 20 Ch. D. 109; *Rochefoucauld v. Boustead*, [1897] 1 Ch. 196. *Mentd.* *Smith v. Blakey* (1867), L. R. 2 Q. B. 326; *Massey v. Allen* (1879), 13 Ch. D. 558.

**4501.** ———.—*Sufficiency of lapse of time alone.*—*BRIGHT v. LEGERTON* (No. 1), No. 4500, *ante*.

*Necessity for knowledge of facts.*—*See* EQUITY, Vol. XX., pp. 529–532, Nos. 2513–2534.

**4502.** *Failure to enforce regular payment—Annuity—No laches.*—An annuitant is not guilty of such laches as would disentitle her to recover arrears of her annuity merely on the ground that she has not actively enforced the performance of the duty of the trustees to pay her such annuity regularly.—*Re RIX, RIX v. RIX* (1912), 56 Sol. Jo. 573.

*Acquiescence.*—*See* Sub-sect. 5, A., *ante*.

*Condonation.*—*See* Sub-sect. 6, A., *ante*.

*Trusts affecting real property.*—*See* LIMITATION OF ACTIONS, Vol. XXXII., pp. 466–471, Nos. 1315–1349.

of direct trust length of time does not bar.—*SCOTT v. KNOX* (1841), 4 E. R. 397.—*IR.*

*a. c.* ———.—*SCHULZE v. TOD*, [1913] A. C. 213.—*SCOT.*

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*d. Necessity for knowledge of facts—Delay without knowledge no laches.*—*MAK v. MAK* (N. S.) (1894), 23 S. C. R. 146.—*CAN.*

*e.* ———.—*(3)*—Where there is a

continuing & subsisting trust, & the inheritor is ignorant of the facts constituting the fraud, he is not barred of relief by length of time.—*MEDLICOTT v. O'DONEL* (1809), 1 Ball & B. 156.—*IR.*

T T T

*Sect. 4.—Limitations on liability of trustees: Sub-sect. 7, A. & B.; sub-sect. 8, A. & B.]*

*Lapse of time as evidence of acquiescence.]—See Nos. 4447–4449, ante.*

*Lapse of time as bar to relief against personal representatives of trustee.]—See EXECUTORS, Vol. XXIV., pp. 629–631, Nos. 6565–6579.*

*Charities.]—See CHARITIES, Vol. VIII., pp. 353–355, Nos. 1498–1519.*

#### *B. Limitation of Actions.*

*See Trustee Act, 1888 (c. 59), s. 8.*

*Whether trustees entitled to plead statute.]—See LIMITATION OF ACTIONS, Vol. XXXII., pp. 491–508, Nos. 1526–1677.*

*Trustees for payment of debts.]—See LIMITATION OF ACTIONS, Vol. XXXII., pp. 508, 509, Nos. 1678–1686.*

*Purchasers from trustees.]—See LIMITATION OF ACTIONS, Vol. XXXII., pp. 470, 471, Nos. 1345–1349.*

*Mortgagees as trustees.]—See LIMITATION OF ACTIONS, Vol. XXXII., pp. 481, 482, Nos. 1448–1454.*

*Effect of fraud.]—See LIMITATION OF ACTIONS, Vol. XXXII., pp. 520–529, Nos. 1762–1836.*

*Effect of mistake.]—See LIMITATION OF ACTIONS, Vol. XXXII., p. 518, Nos. 1758–1761.*

*Application of statute to charities.]—See CHARITIES, Vol. VIII., pp. 253–255, Nos. 1498–1519.*

*Loss of right to account.]—See EQUITY, Vol. XX., pp. 278, 279, Nos. 380–390.*

#### *SUB-SECT. 8.—CONTRIBUTION OR INDEMNITY FROM CO-TRUSTEES.*

##### *A. Contribution.*

**4503. Liability of co-trustees to contribute.—Breach by all trustees—Action brought by representatives of deceased trustee.]—**The exors. of deceased trustee may file a bill against the surviving co-trustees of their testator for the purpose of making them contribute their share towards making good the loss occasioned to the trustees by a breach of trust committed by all the trustees, & it is not necessary to make the trustees parties.—*ROBINSON v. EVANS* (1843), 7 Jur. 738.

**4504. ———.]—***ELVIDGE v. BELLINGHAM* (1893), 37 Sol. Jo. 600.

**4505. ———.]—Action against representatives of deceased trustee.]—**Two trustees in breach of trust invested trust funds in partly paid shares of a co. Some years after the death of one trustee, the survivor, who had made every reasonable effort to dispose of the shares, but without success, paid a call of £800 as a contributory in the liquidation of the co.:—*Held*: deceased trustee's representatives, though not liable to the co. for the call, were liable to the surviving trustee for contribution.—*JACKSON v. DICKINSON*, [1903] 1 Ch. 947; 72 L. J. Ch. 761; 88 L. T. 507; 19 T. L. R. 350.

**4506. ———.]—Bankrupt trustee obtaining certificate—Not liable to contribute.]—***WILSON v. GOODMAN* (1845), 4 Hare, 54; 4 L. T. O. S. 311; 67 E. R. 558.

*Annotation.—Reid. Rashdall v. Ford* (1866), L. R. 2 Eq. 750.

**4507. ———.]—Trustee not interfering in execution of trusts—Inquiry ordered as to amount of**

**contribution.]—**Where trustees incur, by reason of their neglect of duty, a joint liability, & the liability is discharged by one of them, he is entitled to contribution from his co-trustee.

But when the trustee against whom it was sought to enforce the contribution had never interfered in the execution of the trusts, & there were circumstances to show that the other trustee had the entire management of the trusts, the ct. granted an inquiry as to the amount of contribution to be paid to petitioner.—*WORTHINGTON v. PAKENHAM* (1851), 17 L. T. O. S. 224, L. C.

**4508. ———.]—Defences severed—One set of costs only obtained.]—**Two trustees, A. & B., were ordered to pay a sum of money into ct.; this was paid by A. alone. They had severed in their defences & obtained but one set of costs. B.'s share of the costs was ordered to be paid to A. by way of contribution.—*PRINCE v. HINE* (No. 2) (1859), 27 Beav. 345; 54 E. R. 135.

**4509. ———.]—***PRIME v. SAVELL*, [1867] W. N. 227.

*Annotation.—Distd. Chillingworth v. Chambers* (1895), 13 R. 787.

**4510. ———.]—***CHILLINGWORTH v. CHAMBERS*, No. 4523, *post*.

**4511. ———.]—**Where a trustee, to whom his co-trustee had in 1885 handed over a sum of money to be invested in accordance with the terms of the settlement, leaving the management of the trust to him, gave the money to an outside broker for investment, who misappropriated a portion of the same so that it was irrevocably lost in 1888, both trustees were held liable for the lost trust money, & the active trustee was, on the authority of *Chillingworth v. Chambers*, No. 4523, *post*, declared to be entitled to contribution from the passive trustee.—*ROBINSON v. HARKIN*, [1896] 2 Ch. 415; 65 L. J. Ch. 773; 74 L. T. 777; 44 W. R. 702; 12 T. L. R. 475; 40 Sol. Jo. 600.

**4512. ———.]—Whether cestui que trust necessary parties to action.]—***JESSE v. BENNETT*, No. 4409, *ante*.

**4513. ———.]—Right to inquiry as to proportion.]—**In an action by A. against his trustees, B. & C., to make them jointly & severally liable for the loss occasioned by an investment on insufficient security, in breach of trust, of the trust fund, B. in his statement of defence & counterclaim, claimed contribution from C., as the trustee primarily liable for the alleged breach of trust, if established. The defence was delivered to C., but there was no order that that should be sufficient notice. A decree for an account & payment having been made against B. & C.:—*Held*: B. was entitled to an inquiry how & in what proportions, as between B. & C., the sums ordered to be paid to A. should be borne & paid.—*BUTLER v. BUTLER* (1880), 14 Ch. D. 329; 49 L. J. Ch. 742; 42 L. T. 728; 28 W. R. 825.

*Annotation.—Reid. Sawyer v. Sawyer* (1885), 28 Ch. D. 595.

**Trustees in bankruptcy.]—See BANKRUPTCY, Vol. IV., pp. 233, 234, Nos. 2188–2190.**

**4514. ———.]—**When two trustees are jointly & severally liable to make good a trust fund, pltf. may recover the whole from either of them, & the one who pays the whole is entitled to contribution as against the other (*ROMILLY, M.R.*).—*BIRKS v. MICKLETHWAIT* (1864), 33 Beav. 409; 83 L. J. Ch. 510; 10 L. T. 85; 10 Jur. N. S. 302;

his co-trustee.—*WORTHINGTON v. PAKENHAM* (1851), 3 Ir. Jur. 221.—*IR.*

**4514 i. ———.]—***CAMPBELL v. SCLANDERS* (1895), 13 N. Z. L. R. 757.—*N.Z.*

#### **PART VII. SECT. 4, SUB-SECT. 8.—A.**

**4505 i. Liability of co-trustees to contribute.—Breach by all trustees—Action against representatives of deceased trustee.]—***COLLINGS v. WADR*, [1903] 1 I. R.

#### **89.—IR.**

**4509 i. ———.]—**When trustees incur, by reason of their default, a joint liability, which is discharged by one of them, he is entitled to contribution from

12 W. R. 505; 55 E. R. 426; *on appeal*, 34 L. J. Ch. 382, L. C.  
*Annotation*.—*Reid*. Micklethwaite v. Winstanley (1864), 34 L. J. Ch. 281.

4515. —[.]—When a decree has been made against an exor., & the estate of deceased exor., to make good a breach of trust, payment by the surviving exor. of the whole amount due is a complete discharge of deceased exor.'s estate, & it is not competent for the ct. to enforce payment against deceased exor.'s estate in order to establish contribution.—*MICKLETHWAIT v. WINSTANLEY* (1864), 5 New Rep. 204; 34 L. J. Ch. 281; 11 L. T. 582; 13 W. R. 210, L. J.

4516. —[.]—In a suit relating to the validity of the removal of a pastor, the trustees were ordered to pay the costs. They paid them out of the charity funds; but, upon an information by the A.-G., they were ordered to replace the amount.

They must obtain such relief as they are entitled to against the representatives of those persons who ought to contribute towards the repayment of the fund (*ROMILEY, M.R.*).—*A.-G. v. DAUGARS* (1864), 33 Beav. 621; 28 J. P. 726; 10 Jur. N. S. 966; 12 W. R. 363; 55 E. R. 509.

4517. —[.]—*FLETCHER v. GREEN*, No. 4112, *ante*.

4518. —[.]—H. C. & T., trustees, invested a sum on mtge. The security turned out to be insufficient, & a loss was sustained. In a suit instituted by the beneficiaries it was declared that T., C. & her husband, & the estate of H. were jointly liable to make this loss good, & numerous orders were made directing C. & her husband & T. to pay certain sums into ct., & eventually plffs., who were the trustees of a settlement which comprised certain portions of H.'s estate, paid the whole sum into ct. Plffs. then sued T. for his one-third contribution, & obtained judgment, but by reason of his insolvency, recovered nothing. They then sued Mr. & Mrs. C. for half contribution. There was an arrangement between the trustees that Mr. & Mrs. C., who were resident abroad, should not be troubled about the trusts, & as a fact, they did nothing therein.—*Held*: this was no bar to contribution.—*BACON v. CAMPHAUSEN* (1888), 58 L. T. 851.

4519. —[.]—By an order made on further consideration, funds were carried over to "the account of the perpetual annuity of deft. & her issue," with a direction to pay the dividends thereon to deft. for life. Deft. charged her interest in this fund, & the incumbancers obtained stop orders thereon. Subsequently it was discovered that at the time the order was made deft. was jointly & severally liable with testator for breaches of trust which had been wholly made good out of testator's estate. The order was made in the presence of plff., who was not at the time aware of deft.'s liability in respect of the breach of trust. On a motion by plff. to obtain contribution from deft. to the extent of a moiety of this liability, & to have this claim satisfied out of the funds carried over to deft.'s separate account, notwithstanding the stop orders.—*Held*: though deft. was liable to contribute towards making good the loss occasioned by her breach of trust, & could take nothing beneficially from testator's estate until she had done so, still, as between plff. & the incumbancers, the matter was *res judicata*, & the incumbancers were entitled to priority over the claim now made for contribution for breach of

trust.—*Re EYTON, BARTLETT v. CHARLES* (1890), 45 Ch. D. 458; 59 L. J. Ch. 733; 63 L. T. 336; 39 W. R. 135.

*Annotations*.—*Consd*. *Edgar v. Plomley*, [1900] A. C. 431; *Thompson v. Thompson*, [1923] 2 Ch. 205. *Reid*. *Cloutte v. Storey*, [1911] 1 Ch. 18.

4520. Service of notice of contribution.—*On person out of jurisdiction*—*When R. S. C., Ord. 11, r. 1 (g) applicable*.—Where, in an action by a *cestui que trust* against the survivor of two trustees for breach of trust, deft. applied under R. S. C., Ord. 11, r. 1 (g), for leave to serve the legal personal representative, resident in Ireland, of deceased trustee, as being a "necessary or proper party" to the action, with a third party notice issue under R. S. C., Ord. 16, r. 48, & claiming contribution:—*Held*: R. S. C., Ord. 11, r. 1 (g), had no application to a third party notice for contribution, unless *semble*, there were at least two contributors one of whom was within the jurisdiction; & contribution from a single contributor was not one of the cases mentioned in that Ord. in which service of a writ out of the jurisdiction could be allowed.—*MCCHANE v. GYLES*, [1902] 1 Ch. 287; 71 L. J. Ch. 183; 80 L. T. 1; 50 W. R. 376; 46 Sol. Jo. 175, C. A.; *subsequent proceedings*, [1902] 1 Ch. 911.

*Annotations*.—*Mentd*. *Barclays Bank v. Tom*, [1923] 1 K. B. 221; *Akt*. *Ocean v. Harding*, [1928] 2 K. B. 371.

#### B. Indemnity.

4521. Trustee deriving benefit from breach—*Liability to indemnify co-trustees*—*Bond taken as indemnity*—*Right to sue on bond*.—A. being trustee with B. of a legacy of £10,000 applied to B. to be allowed to employ it in his private business; B. gave his consent, on receiving from A. a bond of indemnity with the following condition, that if A., his heirs, exors., etc., should, at all times, save, defend, & keep harmless & indemnified B., his heirs, etc., from all manner of actions, suits, causes of action & suit, proceedings, claims, demands, loss, costs, charges, damages & expenses whatsoever, which should or might be brought, commenced, prosecuted, or made against them, or which they should bear, pay, suffer, sustain, expend, or be put unto by reason of the legacy, or the interest thereof, or on account of A.'s being permitted to hold the same, the obligation was to be void. The legacy not having been accounted for or paid by A. to the *cestuis que trust*, the latter filed a bill against the exors. of A. & B., & obtained a decree, which declared that A. & B. had become jointly & severally liable to make good the legacy, & ordered them to do so. A charge had been carried in against the estate of B., but no sum had been paid with the exception of £10 for costs of suit:—*Held*: the bond was not illegal, the representative of B. was entitled to recover from the representative of A. £10,000 with interest & costs of suit.—*WARWICK v. RICHARDSON* (1842), 10 M. & W. 284; 11 L. J. Ex. 351.

*Annotations*.—*Reid*. *Smith v. Howell* (1851), 6 Exch. 730; *Gorsuch v. Cree* (1860), 8 C. B. N. S. 574; *Re British Provident Life & Fire Assoc. Soc.* (1862), 7 L. T. 234; *Re British Provident Life & Fire Assoc. Co., Anglo-Australian Assoc. Co.'s Case, Teete's Case, Rumney's Case* (1864), 4 New Rep. 48; *Taylor v. Chichester & Midhurst Ry. Co.* (1867), L. R. 2 Exch. 356.

4522. —[.]—*Promissory note & deposit of title deeds as indemnity*.—Where one of two co-trustees sold out £1,000 stock, part of the trust fund, & lent it to her co-trustee, receiving at the

#### PART VII. SECT. 4, SUB-SECT. 8.—B.

1. *New trustee ordered to refund money erroneously paid by co-trustee—Action against representatives of deceased trustee*.—*GILVY v. NOSWELL* (1850), 12 Dunl. (Ct. of Sess.) 940; 22 Sc. Jur. 412.—*SCOT*.

*Sect. 4.—Limitations on liability of trustees: Sub-sect. 8, B.; sub-sect. 9, A.]*

same time a promissory note, & a deposit of the title deeds of certain freeholds:—*Held*: the lands became, not a security for the trust moneys, but a personal indemnity to the holder of the deeds.—*GROOM v. BOOTH* (1853), 1 Drew. 548; 1 Eq. Rep. 182; 22 L. J. Ch. 961; 21 L. T. O. S. 253; 17 Jur. 927; 1 W. R. 423; 61 E. R. 561.

*Annotation*:—*Consd. Francis v. Francis* (1854), 5 De G. M. & G. 108.

**4523.** ——— *Trustee-beneficiary.*—(1) The rule as to the right of a trustee to contribution from his co-trustee for loss occasioned to the trust estate by a breach of trust for which both are equally to blame does not apply where one of the trustees is also a *cestui que trust* & has received, as between himself & his co-trustee, an exclusive benefit by the breach of trust: in that case the rule to be applied is that under which the share or interest of a *cestui que trust* who has assented to & profited by a breach of trust has to bear the whole loss; & the trustee who is a *cestui que trust* must therefore indemnify his co-trustee to the extent of his share or interest in the trust estate, & not merely to the extent of the benefit he has received.

*Pltf. & deft.*, the trustees of a will, invested certain trust funds, part of the trust estate, in securities of a description authorised by the will. *Pltf.* while a trustee, became also entitled as a beneficiary to a share of the trust estate. The investments, some of which were made before & others after *pltf.* became a beneficiary, turned out insufficient, & *pltf. & deft.* were declared jointly & severally liable to make good the loss to the trust estate. The whole of the loss was made good out of *pltf.'s* share of the trust estate, which share exceeded the amount of the loss:—*Held*: *pltf.* had no right of contribution from *deft.* in respect of any part of the loss.

(2) Suppose a *cestui que trust* in remainder to induce his trustees to commit a breach of trust for the benefit of the tenant for life—perhaps his own father or mother—can such a remainderman compel the trustees to make good the loss or resist their claim to have it made good out of his interest when it falls in, if some other *cestui que trust* compels them to make the loss good? I apprehend not; & yet, in the case supposed, the *cestui que trust* in remainder might not himself have derived any benefit at all from the breach of trust (*LINDLEY, L.J.*).—*CHILLINGWORTH v. CHAMBERS*, [1896] 1 Ch. 685; 65 L. J. Ch. 343; 74 L. T. 34; 44 W. R. 388; 12 T. L. R. 217; 40 Sol. Jo. 294, C. A.

*Annotations*:—*As to* (1) *Refd. Robinson v. Harkin*, [1896] 2 Ch. 415; *Moxham v. Grant*, [1900] 1 Q. B. 88. *As to* (2) *Refd. Fletcher v. Collis*, [1905] 2 Ch. 24; *Re Rhodesia Goldfields, Partridge v. Rhodesia Goldfields*, [1910] 1 Ch. 239. *Generally, Refd. Slade v. Chaine*, [1908] 1 Ch. 522.

**4524.** ——— *]* — *BAYNARD v. WOOLLEY, WEARING v. BAYNARD*, No. 4662, *post*.

**4525.** ——— *]* — *P.*, by his will, gave a legacy to Mrs. W., female *deft.*, which legacy was on her marriage settled in the usual way, being then still unpaid, testator's estate being very deficient. Afterwards Mrs. P., the widow of testator, by her will directed her trustees to pay & make good, out of her assets, all the legacies given by her late husband, "upon condition that all parties concerned should abstain from requiring any claim against her late husband's estate, etc., & should also execute any releases which her husband's exors. might require in respect thereof." Mrs. P.'s estate being ample, female *deft.'s* legacy was ready to be paid, but the exors. required the

discharge of three trustees of Mrs. W.'s settlement. There was at that time but one trustee. Mr. W. procured *deft. A.* & another person to be trustees; & the legacy having been paid to the solr. of all three trustees, he paid it over to *deft. A.*, who immediately misapplied it, by suffering W. to convert it to his own use. On the present bill filed by the other two trustees against A. & Mr. & Mrs. W. to have the fund brought back:—*Held*: they had a right to have the whole fund replaced by A., & not for contribution only.—*GRAY v. ADDISON* (1856), 2 Jur. N. S. 662.

**4526.** ——— *]* — Two trustees advanced to a builder money on mtge. of land & houses thereon. The land had belonged to *deft.*, one of the trustees, & part of the money advanced was applied by the builder in payment of the price of the land & of other money due from him to *deft.* The other trustee filed a bill against *deft.*, alleging that the security was insufficient, & asking that the security might be realised, & that *deft.* might make good any deficiency:—*Held*: *pltf.* had no equity to make his co-trustee primarily liable.—*BUTLER v. BUTLER* (1877), 7 Ch. D. 116; 47 L. J. Ch. 77; 37 L. T. 518; 26 W. R. 85, C. A.

*Annotations*:—*Refd. Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth*, [1891] 1 Ch. 337; *Chillingworth v. Chambers*, [1896] 1 Ch. 685; *Jackson v. Dickinson*, [1903] 1 Ch. 917.

**4527.** ——— *]* — A husband's liability for his wife's breaches of trust extends to breaches of trust arising from negligence, & is not confined to losses caused by her active misconduct. Where there are two trustees & the management of the trust is left in the hands of one, & the acting trustee commits a breach of trust, the passive trustee is not entitled to an indemnity from the acting trustee, unless there are some special circumstances, as where the acting trustee is the solr. for the trust, or has derived a personal benefit from the breach of trust.—*BAHIN v. HUGHES* (1886), 31 Ch. D. 390; 55 L. J. Ch. 472; 54 L. T. 188; 34 W. R. 311; 2 T. L. R. 276, C. A.

*Annotations*:—*Consd. Re Partington, Partington v. Allen* (1887), 57 L. T. 654. *Apld. Jacon v. Camphausen* (1888), 58 L. T. 851; *Elvidge v. Bellingham* (1893), 37 Sol. Jo. 600; *Robinson v. Harkin*, [1896] 2 Ch. 415; *Re Turner, Barker v. Ivimey*, [1897] 1 Ch. 536. *Refd. Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth*, [1891] 1 Ch. 337; *Chillingworth v. Chambers*, [1896] 1 Ch. 685; *Re Taylor, Atkinson v. Lord* (1900), 81 L. T. 812.

**4528.** ——— *]* — *Re BAIRD, BAIRD v. STAVELEY HILL*, No. 4554, *post*.

**4529.** ——— *Death of trustee—Independent right to recover lost fund—Against partners of trustee misapplying fund.*—*Deft. & A.* were joint trustees of a settled fund, A. being a member of the firm of solrs. acting in the management of the trust. A. received the proceeds of sale of part of the trust funds as solr. & misapplied them, & the moneys were lost. After the death of A. an action was commenced against *deft.* as the surviving trustee claiming a declaration that he was liable to pay *pltf.* the sum so misapplied.

*Deft.* obtained an order under R. S. C., Ord. 16, r. 48, for leave to serve a third party notice on the surviving partners of the firm of solrs. claiming to be indemnified against liability in the action. On motion to discharge the order:—*Held*: this was not a claim to indemnify *deft.* against *pltf.'s* claim in the action within R. S. C., Ord. 16, r. 48, the right of *deft.* to recover from the surviving partners a sum equal to the lost trust fund being an independent right & not one depending on the liability of *deft.* in the action.—*WYNNER v. TEMPEST* [1897] 1 Ch. 110; 66 L. J. Ch. 81; 75 L. T. 624; 45 W. R. 183; 13 T. L. R. 128; 41 Sol. Jo. 127; *subsequent proceedings*, 13 T. L. R. 360.



**4530. Trustee-beneficiary procuring breach—Liability to indemnify co-trustees.]—**CHILLINGWORTH v. CHAMBERS, No. 4523, *ante*.

**4531. Trustees ordered to replace fund—Trustee failing to perform decree—Right of trustee to sue co-trustees for indemnity.]—**In a suit, *C. v. T.*, instituted by two of three parties entitled to the corpus of a trust fund after the death of their mother, the tenant for life, one of plffs. being an infant, against the three trustees, who had been guilty of a breach of trust, *L.*, the mother, being one of defts., a decree was made, ordering the realisation & payment of the misapplied trust funds by the trustees. *J.*, one of the trustees, being in contempt of ct. for disobedience to the decree, filed his bill against his two co-trustees, & *L.* & her three children, stating the decree in *C. v. T.*, & insisting, as against *L.*, that she was in fact the author of all the breaches of trust complained of in that suit, & had, as extrix. of testator, retained & misapplied to her own use certain parts of testator's residuary estate, which ought to have come to the trust funds, & ought therefore to come in aid for the reimbursement of the trust estate, & that his co-trustees had imposed on him; & praying (*inter alia*) that he might be reimbursed, as far as might be, out of the interest coming to the tenant for life, from the consequences of the breach of trust of which he had been guilty through her co-operation; & generally, that he might be indemnified by defts.:—*Held*: the second suit arose out of the exigency of the first suit, & embraced objects not touched by the decree in the first suit, but consistent therewith, & was not in the nature of a bill of review, & ought not to be taken off the file by reason of the leave of the ct. not having been previously obtained for the purpose of filing the bill.—*TAYLOR v. TAYLOR* (1849), 1 Mac. & G. 307; 1 Il. & Tw. 437; 47 E. R. 1482, L. C.

*Annotation*:—*Mentd.* *Turner v. Topper* (1877), 46 L. J. Ch. 703.

**4532. Promise by trustee to indemnify co-trustees—Validity of promise.]—**A promise by one of several trustees to do his own duty & to absolve the others from performing their joint duty is a contract which cannot be relied upon by them against him, & even if such a contract is proved the law will take no notice of it.—*BLEMORE v. WATSON* (1885), 1 T. L. R. 241, C. A.

**4533. Liability for costs of co-trustees—Costs due to breach by trustee liable to indemnify.]—***B.* entered into partnership with *A.* under an agreement to take the estate & stock of *A.* at a valuation. The property was valued & the articles executed, but *C.*, who prepared the articles & gave the notes of the property to the valuer, concealed the fact of his having a mtge. on the estate for £850 previously advanced by *C.* to *A.* *A.* having become bkpt., his partner *B.* filed a bill praying that *C.*'s mtge. might be postponed to his own claim, & a decree was made to that effect. The £850 advanced by *C.* having been advanced by him out of trust moneys in the hands of himself & his co-trustee, the costs of the co-trustee were ordered

to be paid by pltf. & recovered against *C.*—*STERRY v. COMBS* (1871), 40 L. J. Ch. 595; 25 L. T. 10; 19 W. R. 964.

**4534. ———.]—**It is well established that the trustee who is primarily liable is not only bound to indemnify his co-trustee against the amount which he has to pay to the estate, but is also liable for the costs of his co-trustee (*COZENS-HARDY, J.*).—*THE MILLWALL*, [1905] P. 155; 74 L. J. P. 82; 53 W. R. 471; 21 T. L. R. 346; *sub nom.* *GASELEE v. DARLING, THE MILLWALL*, 93 L. T. 429; 10 Asp. M. L. C. 113, C. A.

*Annotations*:—*Mentd.* *The Seacombe, The Devonshire*, [1912] P. 21; *Colchester Corp. v. Gepp* (1913), 11 L. G. R. 349; *The Devonshire & the St. Winifred*, [1913] P. 13; *The Adriatic* (1915), 85 L. J. P. 12; *The Wellington* (1915), 32 T. L. R. 49.

**Liability of solicitor trustee.]—***See SOLICITORS*, Vol. XLII., pp. 123, 124, Nos. 1192-1197.

#### SUB-SECT. 9.—INDEMNITY FROM BENEFICIARIES.

##### *A. In General.*

*See Trustee Act, 1925 (c. 19), s. 62.*

**4535. Right against interest of beneficiary in trust estate—Beneficiary concurring in breach.]—**Where a trustee errs in the management of the trust, yet if he goes out of it with the approbation of the *cestui que trust*, it must be first made good out of the person's estate who consented.—*TRAFFORD v. BOEHM* (1740), 3 Atk. 440; 26 E. R. 1054, L. C.

*Annotations*:—*Reid.* *Chillingworth v. Chambers*, [1896] 1 Ch. 685; *Moxham v. Grant*, [1899] 1 Q. B. 480. *Mentd.* *Boehm v. Clarke* (1804), 9 Ves. 580; *Pearson v. Lane* (1809), 17 Ves. 101; *Barlow v. Salter* (1810), 17 Ves. 479; *Lepine v. Ferard* (1831), 2 Russ. & M. 378; *Greenwood v. Verdon* (1853), 1 K. & J. 74; *R. v. Harrop* (1856), 20 J. F. 627; *Fletcher v. Collis*, [1905] 2 Ch. 24.

**4536. ———.]—**Trustees, who, with the concurrence of the tenant for life, had committed a breach of trust, by lending the trust moneys on an improper security, were directed to replace the amount, & to reimburse themselves out of the life-interest of the tenant for life:—*Held*: they were not entitled to charge interest on the money replaced by them, from the time of replacing it to the time of the repayment, out of the life interest.—*MONK v. DRUCE* (1834), 4 L. J. Ex. Eq. 61.

**4537. ———.]—**(1) A trustee who stands by & sees a breach of trust committed by his co-trustee becomes responsible for that breach of trust.

Testator bequeathed to his partner & to *B.*, his personal estate, upon trust to invest the same, for the benefit of his wife & children. Both the exors. proved the will, & the surviving partner retained testator's moneys in the trade, which were lost. *B.* took no active part in the trusts, but was cognisant of the breach of trust, & took no proceedings to prevent it:—*Held*: *B.* was responsible for the consequences of the breach of trust.

(2) The interest of a *cestui que trust*, who concurs with a trustee in a breach of trust, is liable to indemnify the trustee.—*BOOTH v. BOOTH* (1838), 1

#### PART VII. SECT. 4, SUB-SECT. 9.—A.

**4535 i. Right against interest of beneficiary in trust estate—Beneficiary concurring in breach.]—**A bond was settled on *B.* for life, remainder to his wife *M.*, for life, remainder to their children. The trustees permitted *B.* to receive the produce of the fund, & invest it in the purchase of a leasehold interest, not justified by the trusts of the settlement. *B.* having died, *M.* with a knowledge of all the facts continued to receive the rents of the leasehold, which produced a larger

income than could have been derived from a proper investment. *M.* having died, & the leasehold having expired, a suit was instituted to compel the representative of the surviving trustee to pay to the children the amount misapplied:—*Held*: the trustee had not a right to be indemnified out of the assets of *M.* to any greater amount than the excess of the rents received by her over what would have been the produce of the fund if rightly invested.—*BENTLEY v. ROBINSON* (1859), 10 I. Ch. R. 287.—*IR.*

**4535 ii. ———.]—**Trustees under a marriage contract improperly invested funds of the trust in the purchase of stock in an unlimited joint stock banking co. The licentrix of the fund afterwards approved of the investment. The co. having gone into liquidation:—*Held*: a trustee had no claim of relief against the licentrix even to the extent of her interest in the trust funds.—*CITY OF GLASGOW BANK v. PARKHURST* (1880), 7 R. (Ct. of Sess.) 749; 17 So. L. R. 554.—*SCOT.*



**Sect. 4.—Limitations on liability of trustees: Subsect. 9, A. & B.]**

Beav. 125; 8 L. J. Ch. 39; 2 Jur. 938; 48 E. R. 886.

**Annotations:—***Reid, Stiles v. Guy* (1849), 1 H. & Tw. 523; *Blakely v. Blakely* (1855), 24 L. T. O. S. 322; *Chillingworth v. Chambers*, [1896] 1 Ch. 685.

**4538. ———.**—The trustee of a marriage settlement concurred in a breach of trust, by lending the fund to the husband on a security not warranted by the settlement:—*Held*: the representatives of such trustee could maintain a bill against the husband & other *cestui que trust*, for the restitution of the fund.—*GREENWOOD v. WAKEFORD* (1839), 1 Beav. 576; 8 L. J. Ch. 333; 48 E. R. 1064.

**Annotation:—***Reid, Re Leake's Trusts* (1863), 9 Jur. N. S. 453.

**4539. ———.**—*LINCOLN v. WRIGHT*, No. 4395, *ante*.

**4540. ———.**—**Right to retain income—As against creditors of beneficiary.**—(1) A trustee cannot, by contract, waive his right to resort to the life interest of a tenant for life, for the purpose of replacing a trust fund, which, in breach of trust, he has lent to the tenant for life.

(2) A trustee, in breach of trust, lent the trust fund to A., the tenant for life. The trustee afterwards concurred in a creditor's deed, by which A.'s life interest was to be applied in payment of his debts, & the trustee received thereunder a debt due to him from A. Before the other creditors had been paid, the trustee retained the income to make good the breach of trust. Upon a bill filed by the trustees of creditor's deed:—*Held*: this ct. would not prevent such an application.—*FULLER v. KNIGHT* (1843), 6 Beav. 205; 12 L. J. Ch. 182; 49 E. R. 804.

**Annotation:—***Distd. Butler v. Butler* (1877), 7 Ch. D. 116.

**4541. ———.**—**Married woman.**—*SAWYER v. SAWYER*, No. 4430, *ante*.

**4542. ———.**—**What amounts to consent—Constructive notice.**—(1) To enable trustees to obtain an order under Trustee Act, 1888 (c. 59), s. 5, impounding the interest of a beneficiary in a trust estate to indemnify them in respect of a breach of trust, the beneficiary must have instigated, requested or consented in writing to an act or omission which is itself a breach of trust & not to one which only becomes a breach of trust by reason of the want of care of the trustees, for example in the case of an investment authorised by the trust, but in making which the trustees commit a breach of trust they would have to show that the beneficiary instigated, requested or consented in writing to the non-performance by them of their duty.

(2) *Semle*: if a tenant for life consents to an investment of mtge., knowing facts which show the security to be insufficient in value he insures the liability under trustee Act, 1888 (c. 59), s. 6; but constructive notice by his acting by the same solr. as the trustees would not be sufficient.

(3) [Trustee Act, 1888 (c. 59), s. 6] does not impose on the ct. the duty in all events of impounding the interest of the beneficiary, but invests the ct. with a discretionary power, to be exercised judicially "if it shall think fit" to "make such order as to the ct. shall seem just" for the purpose (*DAVEY, L.J.*).—*Re SOMERSET, SOMERSET v.*

**4541 i. ———.**—**Married woman.**—The trustees of a fund settled on the husband for life or until insolvency, & then to his wife for life for her separate use, at her husband's solicitation & with the wife's concurrence, committed a breach of trust by lending part of the trust funds to the husband,

who afterwards became an insolvent:—*Held*: the ct. could make a declaration that the husband should recoup the trustees the amount which they were liable to make good to the trust funds; the husband not being in insolvent circumstances at the time of the loan, his wife's separate estate in the trust

*POULETT (EARL)*, [1894] 1 Ch. 231; 63 L. J. Ch. 41; 69 L. T. 744; 42 W. R. 145; 10 T. L. R. 46; 38 Sol. Jo. 39; 7 R. 34, C. A.

**Annotations:—***As to* (1) *Reid, Mara v. Browne*, [1895] 2

*Amherst*, [1909] 2 Ch. 382.

**4543. ———.**—**Breach at request of beneficiary.**—*LINCOLN v. WRIGHT*, No. 4395, *ante*.

**4544. ———.**—Testator bequeathed a fund to trustees upon trust for his sons for life, & then for their children, without giving any directions as to investment. The trustees were about to invest in the funds, but were prevailed upon by the tenants for life to invest on mtge. for the sake of obtaining an increased income, & they invested on insufficient mtges. It was not shown that the tenants for life concurred in the selection of those particular securities. The trustees being decreed to make good the loss arising from the deficiency of the securities:—*Held*: the tenants for life respectively, & their respective life interests in the trust funds, were respectively liable to make good to the trustees the amount paid by the trustees towards replacing such loss, to the extent of the income received by the tenants for life respectively from the improper investments, & of certain sums improperly received by the tenants for life respectively out of the capital.—*RABY v. RIDEHALGH* (1855), 7 De G. M. & G. 104; 3 Eq. Rep. 901; 24 L. J. Ch. 528; 25 L. T. O. S. 19; 1 Jur. N. S. 363; 3 W. R. 344; 44 E. R. 41, L. J.J.

**Annotations:—***Apld. Bolton v. Currie* (1894), 70 L. T. 759. *Consd. Chillingworth v. Chambers*, [1896] 1 Ch. 685. *Moxham v. Grant*, [1899] 1 Q. B. 480. *Reid, Baud v. Fardell* (1855), 26 L. T. O. S. 83; *Griffiths v. Porter* (1858), 25 Beav. 236; *Butler v. Butler* (1877), 3 Ch. D. 554; *Sawyer v. Sawyer* (1885), 23 Ch. D. 595; *Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth*, [1891] 1 Ch. 337; *Re Somerset, Somerset v. Poultott*, [1894] 1 Ch. 231; *Mara v. Browne*, [1895] 2 Ch. 69. *Mentd. Re Alexander Palace Co.* (1883), 23 Ch. D. 297.

**4545. ———.**—*R.* was entitled absolutely in remainder to the trust funds of his mother's marriage settlement, which she had appointed to him by deed, subject to her life interest. By his own marriage settlement *R.* covenanted to pay £10,000 to his trustees within six months after his mother's death, & in case of his death in his mother's lifetime, that his exors. should pay his trustees during his mother's life, £400 *per annum*, to be applied as if it were income of the £10,000. *R.* took the first life interest under his settlement, with remainder to his wife for life. *R.* assigned to his trustees, as security, the trust funds of his mother's settlement. The trustees of the mother's settlement had notice of the assignment. *R.* having become embarrassed, the trustees of the mother's settlement were induced, on the entreaty of *R.*, his mother, & his wife, to apply a large portion of the trust funds in discharge of *R.*'s debts. The trustees of *R.*'s settlement brought an action against the trustees of the mother's settlement for breach of trust, claiming that they might replace the funds. Defts. counterclaimed (*inter alia*) that the interest of *R.* & his wife in the funds might be impounded & declared liable to indemnify them:—*Held*: (1) there was no right of indemnity to defts. out of the interest of either *R.* or his wife under *R.*'s settlement, such interest not being an interest of a "beneficiary in the

fund was their reversionary, & therefore, as it could not then be bound by her, it was not available to recoup the trustees.—*KEAYS v. LANE* (1869), 3 I. R. Eq. 1.—*IR.*

**4543 i. ———.**—**Breach at request of beneficiary.**—*KEAYS v. LANE* (1869), 3 I. R. Eq. 1.—*IR.*

trust estate" of which defts. were trustees, so as to come within Trustee Act, 1888 (c. 59), s. 6; (2) even if the interest of R.'s wife had been such an interest, the ct. would not in its discretion under the Act have impounded it, there having been no misrepresentation on the part of R.'s wife, & as defts. must be taken to know that she could not validly deal with her reversionary interest.—*RICKETTS v. RICKETTS* (1891), 64 L. T. 263.

*Annotations:—As to (1) Dstd. Griffith v. Hughes, [1892] 3 Ch. 105. Consd. Bolton v. Currie, [1895] 1 Ch. 544.*

**4546. ——— Necessity for request in writing.]**

—*GRIFFITH v. HUGHES*, No. 4557, *post*.

**4547. ——— Married woman.]—BOLTON v. CURRIE**, No. 4561, *post*.

**4548. ——— Beneficiary obtaining benefit.]—**

(1) Tenant for life who had obtained the benefit of a breach of trust, made responsible, upon a bill for that purpose instituted by the trustees.

(2) Two classes of trustees had committed a breach of trust:—*Held: the cestuis que trust* might proceed against the one class, without making the other class parties.—*M'GACHEN v. DEW*, *DEW v. M'GACHEN* (1851), 15 Beav. 84; 51 E. R. 468.

**4549. ——— Priority over general creditors.]**

—A trustee has a primary charge, in priority of the general creditors, to be recouped, out of the life estate of deceased tenant for life, the amount of trust moneys wrongfully received by him & for the costs of suit.—*WILLIAMS v. ALLEN* (No. 2) (1863), 32 Beav. 650; 55 E. R. 255.

*Annotation:—Refd. Dowdeswell v. Dowdeswell* (1878), 9 Ch. D. 294.

**4550. Waiver of right—No right to waive by contract.]—FULLER v. KNIGHT** No. 4540, *ante*.

**4551. ——— What amounts to waiver—Refusal to take security.]—BOLTON v. CURRIE**, No. 4561, *post*.

**4552. Express indemnity—Whether bar to action against trustees.]—Pltf. & defts.** were members of a joint stock co.; pltf. agreed to demise land to defts. as trustees for the co.; defts. covenanted to pay him rent; & by a separate deed, pltf. & the other members of the co. covenanted to indemnify defts. for acts done by them as trustees:—*Held: pltf., notwithstanding he was a member of the co., might sue defts. on their covenant.*—*BEDFORD v. BRUTON* (1834), 1 Bing. N. C. 399; 1 Scott, 245; 4 L. J. C. P. 97; 131 E. R. 1171.

*Annotation:—Mentd. Wright v. Hickling* (1866), L. R. 2 C. P. 199.

**4553. ——— Extent of—Money laid out on lands by beneficiary.]—WILES v. GRESHAM**, No. 4073, *ante*.

**4554. ———.]—Where the life tenant, a married woman, of the income from investments of a settled fund of £30,000 having a power of appointment by will over the capital & income of the same, requested the trustees to sell so much as would realise the sum of £10,000 which she was desirous of handing to her husband, himself one of the trustees, & where, all parties understanding that the sale & payment were breaches of trust, the other trustee only consented on the life tenant & the co-trustee agreeing to enter into a covenant to indemnify him against all claims, & where the sum was not repaid to the life tenant prior to her death nor to her estate since her death upon the demand of the other trustee:—*Held: (1) the husband of the life tenant was the principal debtor to his wife's estate, & she was surety; (2) upon the true construction of the will of the life tenant, the £10,000 passed to the husband.*—*Re BAIRD, BAIRD v. STAVELEY HILL* (1898), 47 W. R. 277; 43 Sol. Jo. 171.**

**45471. ——— Married woman.]—**  
*Nowlan v. LOGIE* (1859), 7 Gr. 88.—  
**CAN.**

**g. Express indemnity—Whether bar to action against trustees—No full knowledge of facts & legal position.]—**

*STEVENSON v. BRAND*, [1917] N. Z. L. R. 902.—**N.Z.**

**4555. Right to serve third party notice—Claim against estate of deceased beneficiary.]—An action** was brought by beneficiaries against the trustees of a will to make them liable for an alleged breach of trust. The trustees claimed indemnity against the estate of deceased beneficiary whose exors. were one of pltf.s., one of deft. trustees, & a person who was not a party to the action:—*Held: R. S. C., Ord. 16, r. 48, did not apply, & leave ought not to be given to deft. trustees to serve a third party notice upon the other two exors. of deceased beneficiary.*—*Re GILSON, GILSON v. GILSON*, [1894] 2 Ch. 92; 63 L. J. Ch. 555; 70 L. T. 728; 42 W. R. 425; 38 Sol. Jo. 307; 8 R. 382.

**Indemnity in respect of shares in companies.]—**  
*See COMPANIES, Vol. IX., pp 204, 205, Nos. 1263-1272.*

### *B. Impounding Interest of Beneficiary.*

*See Trustee Act, 1925 (c. 19), s. 62.*

**4556. Discretion of court.]—RICKETTS v. RICKETTS**, No. 4545, *ante*.

**4557. ———.]—The trustee of a will, whereby a trust fund was settled upon trust for a married woman for life, for her separate use, without power of anticipation, at the verbal request of the married woman & her husband, & in ignorance of the legal effect of the restraint upon anticipation, advanced to her a sum of money out of the trust fund for the purpose of satisfying certain creditors of the married woman & her husband, who were threatening legal proceedings against them. By an arrangement made at the time of the advance the income accruing due to the married woman from time to time in respect of her life interest was applied by the trustee in replacing the amount advanced & interest thereon. The married woman commenced an action against the trustees for an account, & in taking the account the trustee claimed to be allowed as against income due to pltf. the sum advanced by him out of the trust fund":—*Held: (1) the ct. had power under Trustee Act, 1888 (c. 59), s. 6, to protect a trustee from loss when without moral blame or dishonesty he had committed a breach of trust for the benefit of the beneficiaries, who stood on an equality with him as regards knowledge of the circumstances, notwithstanding that the trustee knew, or must be taken to have known, that he was committing a breach of trust; (2) the words "in writing" in Trustee Act, 1888 (c. 59), s. 6, must be read with the word "consent" & not with the previous words "instigation" & "request": & accordingly it was sufficient to enable the ct. to exercise the discretionary power conferred by the sect. that there should be a verbal request by the beneficiary; (3) therefore, the ct. must under the circumstances exercise its discretion in favour of the trustee, & he was entitled to set off against the amount found due from him to the married woman the sum advanced to her & her husband out of the trust fund.*—*GRIFFITH v. HUGHES*, [1892] 3 Ch. 105; 62 L. J. Ch. 135; 66 L. T. 760; 40 W. R. 524; 36 Sol. Jo. 504.**

*Annotations:—As to (2) Refd. Re Somerset, Somerset v. Poulett, [1894] 1 Ch. 231; Mara v. Browne, [1895] 2 Ch. 69.*

**4558. ——— Act must be itself breach of trust.]—**  
*Re SOMERSET, SOMERSET v. POULETT (EARL)*, No. 4542, *ante*.

**4559. What may be impounded—Interest of married woman—Where no misrepresentation.]—**  
*RICKETTS v. RICKETTS*, No. 4545, *ante*.

*Sect. 4.—Limitations on liability of trustees: Sub-sect. 9, B.; sub-sect. 10. Sect. 5: Sub-sect. 1.]*

**4560.** ——— **Restrained from anticipation.]—**GRIFFITH v. HUGHES, No. 4557, *ante*.

**4561.** ——— **—.]—**(1) The equity of a trustee who commits a breach of trust at the request & for the benefit of a beneficiary is not merely statutory since the passing of Trustee Acts, 1888 (c. 59), & 1893 (c. 53), but is the same now as it was before those Acts, which in fact enlarge the judicial discretion of the ct. in such cases.

Consequently, the equities affecting an assignee of the interest of a beneficiary are the same now as they were before those Acts.

(2) A trustee, who, at the time a breach of trust is committed, merely declines an offer to take a mtge. of the beneficiary's interest, by way of security for the breach of trust, does not *per se* waive or abandon his equity.

(3) It is the duty of a trustee to protect a married woman, restrained from anticipation, against herself when she asks him to commit a breach of trust, & if he knowingly commits a breach of trust at her request the ct. will be slow to remove the restraint on anticipation in order that her life interest may be impounded to recoup him.

A married woman, restrained from anticipation, gave her written consent to a change of investment, but at the time was not informed by the trustees & did not know that such change was a breach of trust. The money was advanced to her husband, who to her knowledge was in difficulties, & she shared in the benefit arising from the breach of trust, which was instigated by her husband. The ct., in the exercise of its judicial discretion under Trustee Act, 1893 (c. 53), s. 45, refused to remove the restraint on anticipation in order that her life interest might be impounded to recoup the trustees.—**BOLTON v. CURRE**, [1895] 1 Ch. 544; 64 L. J. Ch. 164; 71 L. T. 752; 43 W. R. 521; 13 R. 174.

*Annotations:—As to (1) Reidd. Fletcher v. Collis, [1905] 2 Ch. 24. As to (3) Reidd. Mara v. Browne, [1895] 2 Ch. 69. Generally, Reidd. Ellis Pain, Gustavson v. Haviland, [1919] 1 Ch. 38.*

**4562.** ——— **—.]—**(1) In an action by beneficiaries of a settlement against the tenant for life & the exors. of deceased trustees of the settlement, the plffs. by their statement of claim alleged that deceased trustees had in breach of trust advanced the trust funds for the tenant for life & her husband. The exors. by their defences admitted the breach of trust, but alleged that it was committed at the instigation & request & consent in writing of the tenant for life, & claimed that her life interest ought to be impounded under Trustee Act, 1893 (c. 53), s. 45, by way of indemnity to the estates of deceased trustee. No notice was given by the exors. to the tenant for life under R. S. C., Ord. 16, r. 55, that they claimed contribution or indemnity against her. At the trial of the action leave was given to the exors., without going into evidence, to apply in chambers with reference to enforcing their rights, if any, to indemnity against the tenant for life.

(2) Under Trustee Act, 1893 (c. 53), s. 45, the ct. could make an order impounding the life interest of a married woman restrained from anticipation, by way of indemnity.—*Re HOLT, Re ROLLASON, HOLT v. HOLT*, [1897] 2 Ch. 525; 66 L. J. Ch. 734; 76 L. T. 776; 45 W. R. 650; 41 Sol. Jo. 642.

*Annotation:—As to (1) Reidd. Molyneux v. Fletcher, [1898] 1 Q. B. 648.*

**PART VII. SECT. 4, SUB-SECT. 10.**  
**H. Arrangement with settlor.]—At & before making a voluntary settle-**

**ment of real estate, the settlor stipulated orally with the trustee that the settlor's son should receive all moneys**

**—.]—See HUSBAND & WIFE, Vol. XXVII., p. 122, Nos. 983, 984.**

**4563.** ——— **Interest in hands of assignee.]—**BOLTON v. CURRE, No. 4561, *ante*.

**4564.** **Procedure to obtain order—When leave given to apply in chambers.]—Re HOLT, Re ROLLASON, HOLT v. HOLT, No. 4502, ante.**

#### SUB-SECT. 10.—OTHER CASES.

*See Trustee Act, 1925 (c. 19), ss. 8, 9, 30, 61.*

**4565.** **Relief by court without express exemption.]—**Trustees indemnified without a direction in the will.—**DAWSON v. CLARKE** (1811), 18 Ves. 247; 34 E. R. 311, L. C.

*Annotations:—Mentd. Southouse v. Bate (1814), 2 Ves. & B. 396; Parsons v. Saffery (1821), 9 Bro. 578; Woollett v. Harris (1821), 5 Madd. 452; Madgin v. Lumley (1823), 1 L. J. O. S. Ch. 236; Rhodes v. Rudge (1826), 1 Sim. 79; Sale v. Moore (1827), 1 Sim. 534; Wood v. Cox (1837), 2 My. & Cr. 684; Mullen v. Bowman (1844), 1 Coll. 197; Andrew v. Andrew (1845), 1 Coll. 686; Russell v. Clowes (1846), 2 Coll. 648; Mapp v. Elcock (1849), 2 Ph. 793; Read v. Stedman (1859), 26 Beav. 495; Barrs v. Fewkes (1864), 2 Ilern. & M. 60; Clarke v. Hilton (1866), L. R. 2 Eq. 810; Merchant Taylor's Co. v. A.-G. (1871), 6 Ch. App. 512.*

**4566.** **Mistake—Trustee acting bonâ fide.]—**A trustee shall not be answerable for a mistake committed innocently, & from which he derived no advantage: & a ct. of equity will grant a perpetual injunction to prevent any proceedings at law, grounded on such mistake.—**CROOKSHANKS v. TURNER** (1723), 7 Bro. Parl. Cas. 255; 3 E. R. 160, H. L.

*Annotation:—Mentd. Ekins v. Macklish (1753), Amb. 184.*

**4567.** ——— **—.]—**A trustee acting *bonâ fide* in the trust is not to suffer for mistake unless there has been very gross ignorance & miscarriage.—**MONTGOMERIE (LORD) v. WAUCHOPE** (1816), 4 Dow, 109; 3 E. R. 1106, H. L.

*Annotation:—Reidd. Home v. Pringle & Hunter (1841), 8 Cl. & Fin. 264.*

**4568.** **Reasonable exercise of discretion.]—**Where a trustee holding 5 per cent. stock dissents from the conversion of it to 4 per cents. under 3 Geo. 4, c. 9, thereby exercising a reasonable discretion, the ct. will protect him; but where it is charged by the bill that the dissent was under the circumstances injurious to the property, an inquiry will be directed as to how he ought to have acted.—**ANGELL v. DAWSON** (1839), 3 Y. & C. Ex. 308; 8 L. J. Ex. Eq. 50; 160 E. R. 719.

**4569.** ——— **Trustee in difficult circumstances.]—**HENDERSON v. HUNTER (1843), 1 L. T. O. S. 359, 385.

**4570.** **Ignorance—Of contents of trust deed.]—**This is one of those hard cases in which a trustee executes the trust deed without making himself aware of the contents of it. That cannot be admitted as a defence to a claim made against him for neglect of his duties defined by the settlement (**KNIGHT BRUCE, V.-C.**).—**BATEMAN v. MAITLAND** (1845), 14 L. J. Ch. 383.

**4571.** ——— **Of existence of fund—Failure to get in.]—**A trustee who comes in as a new trustee of a settlement in which there is a covenant to settle after-acquired property, will not be held liable for wilful default in not securing any property that may fall in, either before or after he has been appointed a trustee, unless he has notice, or reasonable ground for suspicion, that such property exists.—*Re STRAHAN, Ex p. GEAVES* (1856),

receivable under it, & should accumulate & dispose of the same by investment or otherwise, & that the trustee

8 De G. M. & G. 201; 25 L. J. Bey. 53; 27 L. T. O. S. 129; 4 W. R. 536; 44 E. R. 402; *sub nom.* *Re STRAHAN*, *Ex p.* GREAVES, 2 Jur. N. S. 651, L. J. J.

*Annotations*.—*Re*ld. *Re* Bankhead's Trust (1856), 2 K. & J. 500. *Mentd.* *Cavendish v. Geaves* (1857), 24 Beav. 163.

**4572.** — *Of facts.*—It may be that under certain circumstances ignorance of facts may excuse that which in itself is a breach of trust (GIFFARD, L.J.).—*Re* BIDDLEPH, *Ex p.* NORMIS (1869), 4 Ch. App. 280; 38 L. J. Bey. 5; 19 L. T. 755; 17 W. R. 452, L. J. J.

**4573.** — *Of right to real property.*—Adverse title acquired by lapse of time.—(1) A trustee, who had no actual knowledge of his right to real property, suffered an adverse title to be acquired by lapse of time. A bill to make him accountable was dismissed.

(2) A trustee was held not liable for the non-performance of a trust of which he was ignorant, but inasmuch as he had been guilty of negligence in not ascertaining the nature of certain deeds in his possession, or given his *cestuis que trust* an opportunity of doing so, the bill against him was dismissed without costs.—*YOUDE v. CLOUD* (1874), L. R. 18 Eq. 634; 44 L. J. Ch. 93; 22 W. R. 764.

**4574.** Failure to obtain higher rent—Notice to quit not given when prospects of increase apparent.—A trustee letting a farm originally at a proper rent will not be held personally liable for the difference between that rent & the rent which, at a subsequent period of the tenancy, might have been obtained, merely because he neglected to give notice to quit a few months after there appeared to be a probability that the price of agricultural produce would enable him, with propriety as between landlord & tenant, to obtain a higher rent.—*FERRARY v. HOBSON* (1817), 2 Ph. 255; 10 L. J. Ch. 499; 41 E. R. 940, L. C.

*Annotation*.—*Mentd.* *Price v. Berrington* (1851), 3 Mac. & G. 486.

**4575.** Trustee charged with breach—Authority to execute unperformed duty.—Necessity for inquiry.—Where trustees are sought to be charged with a breach of trust by reason of their omission, the ct. takes care to see, before the trustee is charged, that it was within his power to perform the act which it was intended he should do (LORD LANGDALE, M.R.).—*FENWICK v. GREENWELL* (1847), 10 Beav. 412; 11 Jur. 620; 50 E. R. 640.

*Annotation*.—*Re*ld. *Macnamara v. Carey* (1867), 15 W. R. 374.

**4576.** Alleged fraud by means of document—Document lost & unaccounted for—Formerly in possession of trustee.—A trustee cannot be charged for fraud upon the mere ground that the document, by which the alleged fraud was perpetrated, had been in his possession, but had been subsequently lost & was not accounted for.—*GRAND TRUNK RY. CO. v. BRODIE* (1852), 9 Hare, 823; 19 L. T. O. S. 335; 16 Jur. 678; 68 E. R. 750; *sub nom.* *GRAND TRUNK OR STAFFORD & PETERBOROUGH UNION RY. CO. v. BRODIE*, *SAME v. STUR-*

*GIS*, 22 L. J. Ch. 514; *on appeal* (1853), 3 De G. M. & G. 146, L. J. J.

*Annotations*.—*Mentd.* *Re* Direct Exeter, Plymouth & Devonport Ry. *Ex p.* Woolmer (1853), 22 L. J. Ch. 513; *Harford v. Rees* (1853), 9 Hare App. 11, lxviii; *Williams v. Salmond* (1855), 4 W. L. T. 64; *Williams v. Page* (1858), 24 Beav. 654; *Caldwell v. Ernest* (No. 2) (1859), 27 Beav. 42; *Ernest v. Welles* (1862), 2 Drew. & Sm. 561; *Consols Insee. Co.'s Official Managers v. Wood* (1865), 12 L. T. 170; *Re* Anglo-Moravian Hungarian Junction Ry., *Ex p.* Watkin (1875), 1 Ch. D. 130.

**4577.** Loss after trusts ended—Payment to executor of deceased beneficiary—Fund misapplied by executor.—The trustees of a marriage settlement sold part of the trust property, which was then mortgaged to them to secure the purchase-money. Upon the death of the husband & wife, one of their children became absolutely entitled to the property. That child died & appointed exors. The mtge. money was afterwards paid off, & thereupon the reconveyance was executed by the surviving trustee of the settlement, but the mtge. money was paid to one of the exors. of deceased child, who also acted as the solr. for the surviving trustee. This exor. misapplied the money, & it was lost:—*Held*: the surviving trustee was not liable for the loss, since the trusts were at an end; & the exor. of the child who was absolutely entitled was the proper person to receive the money.—*WAUGH v. WYCHE* (1854), 2 Drew. 318; 23 L. J. Ch. 833; 2 W. R. 485; 61 E. R. 742.

**4578.** Failure to keep up policy—No fund available for payment.—By a marriage settlement, the husband assigned a policy on his life to trustees, & covenanted to keep it up. The trustees neglected either to obtain possession of the policy or to give notice to the office, & the policy was mortgaged by the husband & afterwards sold & surrendered. The husband appearing to have been in insolvent circumstances & unable to keep up the policy, & the trustees having no available funds for the purpose:—*Held*: the trustees were not liable for the loss.—*HOBDAY v. PETERS* (No. 3) (1860), 28 Beav. 603; 54 E. R. 498.

*Annotations*.—*Distd.* *Kingdon v. Castleman* (1877), 46 L. J. Ch. 443. *Consd.* *Re Brogden, Billing v. Brogden* (1888), 38 Ch. D. 546.

**4579.** Breach after death of trustee—Improper investment—Trustee's estate not liable.—The estate of deceased trustee is not liable for a breach of trust committed after his death where he has left the trust funds in a proper state of investment at his death.—*Re PALK, Re DRAKE, CHAMBERLAIN v. DRAKE* (1892), 41 W. R. 28; 30 Sol. Jo. 626.

## SECT. 5.—FOLLOWING TRUST PROPERTY.

### SUB-SECT. 1.—IN GENERAL.

**4580.** General rule.—*BOGLE v. STEWART* (1801), cited in 1 Y. & C. Ex. at p. 265; 160 E. R. 108, II. L.

*Annotation*.—*Apld.* *Leigh v. Macaulay* (1835), 1 Y. & C. Ex. 260.

**4581.** —.—*Re* HALLETT'S ESTATE, *KNATCHBULL v. HALLETT*, No. 4614, *post*.

himself should have no trouble or concern in the matter. The son accordingly received the rents for several years, & without the knowledge of the trustee, misappropriated them:—*Held*: the trustee was not liable.—*MITCHELL v. RITCHIE* (1866), 12 Gr. 88.—*CAN.*

**k.** Technical breach of trust—Discretion of court to relieve.—Under 2 Edw. 7, c. 13 (N. S.) & Ord. 32, r. 3, a judge may exercise judicial discretion towards relieving a trustee from lia-

bility for technical breaches of trust, & for that purpose, may direct the admission of any evidence which he may deem proper for the taking of accounts.—*CAIRNS v. MURRAY* (N. S.) (1905), 37 S. C. R. 163.—*CAN.*

### PART VII. SECT. 5, SUB-SECT. 1.

**4580 i.** General rule.—Proceeds of property sold by a trustee without the consent of the owner can in equity, when traceable, be followed as fully as the property itself, if unconverted,

could have been; so long as such money can be definitely traced, it makes no difference that it has been mixed with other money; & this rule applies, not only in the case of a trustee in the narrow & technical sense, but to any person in any kind of a fiduciary relation to others.—*ROBLIN v. JACKSON* (1901), 13 Man. L. R. 328.—*CAN.*

**4580 ii.** —.—*McCULLOUGH v. MARSDEN* (Alta.), [1919] 1 W. W. R. 689; 45 D. L. R. 645.—*CAN.*

*Sect. 5.—Following trust property: Sub-sects. 1, 2 & 3, A.]*

**4582. Fund must be traceable.]**—On the whole I am satisfied that it was a mistake, of fact, & the bill is to retransfer the remainder of that original stock so transferred, the fund being clearly identified, & consequently the party having a special lien upon it (ALDERSON, B.).—BROOKS-BANK v. SMITH (1836), 2 Y. & C. Ex. 58; Donnelly, 11; 6 L. J. Ex. Eq. 34; 160 E. R. 311.

*Annotations:—*Consd. *Re* Robinson, McLaren v. Public Trustees, [1911] 1 Ch. 502. *Re*fd. *Dennis v. Shuckburgh* (1840), 4 Y. & C. Ex. 42; *Baker v. Courage*, [1910] 1 K. B. 56; *Re* Mason, [1928], Ch. 385. *Mentd.* *Ecol. Comrs. for England v. N. E. Ry.* (1877), 4 Ch. D. 845.

**4583. —.]**—FRITH v. CARTLAND, No. 4609, *post*.

**4584. —.]**—Trust moneys cannot be followed unless clearly identified.

Where, therefore, a solr., having trust moneys in his hands, paid certain sums part of such moneys into his banking account without distinguishing them as trust moneys, & subsequently filed a liquidation petition:—*Held*: the trustee in the liquidation was entitled to the balance of the moneys in the hands of the bank as against the persons claiming to be entitled as trustees of the alleged trust funds under the marriage settlement of the bkpt.—*Re* MAWSON, *Ex p.* HARDCASTLE (1881), 44 L. T. 523; 20 W. R. 615.

**4585. —.]**—NEW ZEALAND & AUSTRALIAN LAND CO. v. WATSON, No. 4590, *post*.

**4586. —.]**—PERSIAN INVESTMENT CORPN., LTD. v. KHAN (PRINCE MALCOLM) (1893), 37 Sol. Jo. 340.

**4587. —.]**—Trustees of a fund, part of which was invested in debentures of a public co. which were about to be paid off, authorised the bkpts., a firm of private bankers with whom they had an account for the purposes of the trust, & who knew that the debentures belonged to the trust, to receive the proceeds of the debentures when paid off. The bkpts. having at the same time to pay a larger sum of money for other customers to the same co., did not receive the amount of the debentures in cash from the co., but gave their own cheque to the co. for the amount due on balance, & credited the trust account with £1,600, the full amount of the debentures paid off. Subsequently the bkpts. suspended payment, having at that time a balance exceeding £1,600 standing to the credit of their account with their own bankers, into which account they paid their daily receipts in their business:—*Held*: the doctrine of following trust money did not apply, as the money secured by the debentures had not been paid by the co. to the bkpts. nor by the latter to their bankers & was incapable of identification, & the balance to the credit of the bkpts. with their bankers was therefore part of their estate & was subject to administration under Bkpcy. Act.—*Re* HALLETT & Co., *Ex p.* BLANE, [1894] 2 Q. B. 237; 63 L. J. Q. B. 573; 42 W. R. 305; 10 T. L. R. 287; 1 Mans. 25; 9 R. 278; *sub nom.* *Re* HALLETT, *Ex p.* THE TRUSTEE, 70 L. T. 361, C. A.

**4582 i. Fund must be traceable.]**—To entitle a cestui que trust to follow trust property it is necessary that there should be in the hands of the trustees or of some person representing such trustees, that which can be followed & identified as the trust property itself.—*Re* FARMERS PRODUCE CO., LTD., *Ex p.* BISHOP (1894), 20 V. L. R. 62.—*AUS.*

**4582 II. —.]**—MOFFATT v. CRAWFORD, [1924] St. R. Qd. 241.—*AUS.*

**4582 III. —.]**—ROBLIN v. JACKSON

(1901), 13 Man. L. R. 328.—*CAN.*

**1. Who may exercise right—Trustee actively concurring in breach of trust.]**

—A trustee may follow property in which a trust fund has been wrongly invested, though he has actively concurred in the breach of trust.—CARSON v. SLOANE (1884), 13 L. R. Ir. 139.—*IR.*

**PART VII. SECT. 5, SUB-SECT. 2.**

*m. Assignee of defaulting trustee.]*

**SUB-SECT. 2.—AGAINST WHOM RIGHT ENFORCEABLE.**

**4588. Necessity for notice of trust.]**—A trustee instructed his stockbroker to sell for him a sum of Consols, which he informed the broker he held as a trust fund, & to invest the proceeds of sale in the purchase of certain railway stock. The broker sold the Consols for cash, & received in payment a cheque which he paid to the credit of his current account with his bankers, & he bought the railway stock for the next settling day. On the settling day, the railway stock not having been paid for, the broker was declared a defaulter on the Stock Exchange, & soon afterwards he filed a liquidation petition. The principal claimed to have the balance which, at the time of the failure, was standing to the broker's credit at his banker's, appropriated to make good the proceeds of sale of the Consols:—*Held*: as the broker had notice of the trust, the proceeds of sale retained the character of trust money in his hands, & could be followed by the principal if they could be traced.—*Re* STRACHAN, *Ex p.* COOKE (1876), 4 Ch. D. 123; 46 L. J. Bcy. 52; 35 L. T. 649; 41 J. P. 180; 25 W. R. 171, C. A.

*Annotations:—**Apld.* *Birt v. Burt* (1877), 36 L. T. 943; *Re* Hallett's Estate, Knatchbull v. Hallett (1880), 13 Ch. D. 696. *Distd.* *Willsons & Furness-Leyland Line v. British & Continental Shipping Co.* (1907), 23 T. L. R. 397. *Re*fd. *Pearson v. Scott* (1878), 9 Ch. D. 198; *Re* Pollard, *Ex p.* DICKIN (1878), 8 Ch. D. 377; *Re* Smith, 69 L. J. Q. B. 786; *Sinclair v. Brougham*, [1914] A. C. 398. *Mentd.* *Re* Neck, *Ex p.* Broad (1884), 32 W. R. 912; *Banque Belge Pour L'Etranger v. Hambrouck*, [1921] 1 K. B. 321.

—Priority of legal estate purchased without notice.]—*See* Sub-sect. 3, *post*.

**4589. Trustee.]**—Part of a sum of money which had been raised by a husband upon the security of property comprised in his marriage settlement, by means of a suppression of the settlement, was lent by him to the trustee of the settlement upon his bond, the trustee being ignorant of the means by which the money had been raised. After the death of the husband, the wife, who was entitled to a life interest in the settled property, with remainder to her children, took out administration to her husband, & filed a bill in her own name & in the names of her children by herself as their next friend, against the trustee, who had in the meantime taken the benefit of Insolvent Debtors Act, praying that the sum due upon the bond, which the widow, as administratrix, offered to deliver up, might be replaced, with interest, upon the trusts of the settlement:—*Held*: the widow & children had a clear equity to follow the money in the hands of the trustee, & they would have had the same equity if, instead of being a trustee, he had been a stranger.—BUCKERIDGE v. GLASSE (1841), Cr. & Ph. 126; 10 L. J. Ch. 134; 5 Jur. 163; 41 E. R. 438, L. C.

*Annotation:—**Distd.* *Thompson v. Finch* (1856), 8 De G. M. & G. 560.

**4590. —.]**—There is no question as regards the

The rules as to following trust funds in the hands of a defaulting trustee apply against the assignee of a defaulting trustee as fully against the trustee himself.—SMITH v. FAULKNER (1905), 40 N. S. R. 528.—*CAN.*

**n. —.]**—Where trust money has, by a breach of trust, been paid by the trustee, the beneficiary is entitled to follow it as trust property in the hands of the payee.—SUBRAMANIAN CHETTIAR v. RAJESWARA DORAI (1909), 1 L. R. 32 Mad. 490.—*IND.*

doctrine well known in equity, . . . with respect to property disposed of by persons standing in a fiduciary position, namely, that such property, or the proceeds of it, can be followed if it can be identified, & it is also equally well known that there is no distinction as regards this doctrine between an express trustee or an agent or bailee standing in a similar fiduciary position (BAGGALLAY, L.J.).—*NEW ZEALAND & AUSTRALIAN LAND CO. v. WATSON* (1881), 7 Q. B. D. 374; 50 L. J. Q. B. 433; 44 L. T. 675; 20 W. R. 694, C. A.

*Annotations*.—*Reid*, *Maspons y Hermano v. Mildred* (1882), 9 Q. B. D. 530; *Anderson v. Sutherland* (1897), 13 T. L. R. 163; *Henny v. Hammond*, [1913] 2 K. B. 515. *Mentd.* *Kaltenbach, Fischer v. Lewis & Peat* (1886), 34 W. R. 477; *Muller* (London) *v. Letham*, *Same v. I. R. Comrs.*, [1927] 1 K. B. 780.

**4591. Stranger to settlement.**—*BUCKERIDGE v. GLASSER*, No. 4589, *ante*.

**4592. Person in fiduciary position.**—What is a fiduciary relationship? It is one in respect of which if a wrong arise, the same remedy exists against the wrongdoer on behalf of the principal as would exist against a trustee on behalf of the *cestui que trust*. If that be a just description of the relationship, it would follow that wherever fiduciary relationship exists, & money coming from the trust lies in the hands of the persons standing in that relationship, it can be followed & separated from any money of their own (*FRY, J.*).—*Re WEST OF ENGLAND & SOUTH WALES DISTRICT BANK, Ex p. DALE & Co.* (1879), 11 Ch. D. 772; 48 L. J. Ch. 600; 40 L. T. 712; 27 W. R. 815.

*Annotations*.—*Reid*, *Re Jallott's Estate, Knatchbull v. Hallett* (1880), 13 Ch. D. 696; *Crowther v. Elgood* (1887), 34 Ch. D. 691.

**4593.**—*NEW ZEALAND & AUSTRALIAN LAND CO. v. WATSON*, No. 4590, *ante*.

**4594.**—The question of following trust money only arises where a fiduciary relation exists (*LORD ESHER, M.R.*).—*ELLIS v. GOULTON*, [1893] 1 Q. B. 350; 62 L. J. Q. B. 232; 68 L. T. 144; 41 W. R. 411; 9 T. L. R. 223, 4 R. 267, C. A.

*Annotation*.—*Mentd.* *Archangel Saw Mills v. Baring & A.-G.*, *Steam Saw Mills v. Baring & A.-G.* (1921), 37 T. L. R. 857.

**4595.**—*Broker.*—*Re STRACHAN, Ex p. COOKE*, No. 4588, *ante*.

**4596.**—*Solicitor.*—There was money in the hands of the representatives of the solr. which could be identified as part of the money received by him from his client.—*Held*: the client could follow this money, & require it to be applied in payment of the money of which he had been defrauded.—*Re MURRAY, DICKSON v. MURRAY* (1887), 57 L. T. 223; 3 T. L. R. 637.

*Annotation*.—*Mentd.* *Molloy v. Mutual Reserve Life Inco.* (1906), 94 L. T. 756.

**Bankers**—Money received on current account.—*See, generally*, *BANKERS*, Vol. III., pp. 181–187, Nos. 343–369.

**Trustee in bankruptcy.**—*See BANKRUPTCY*, Vol. V., pp. 719–723, Nos. 6261–6281; *EXECUTORS*, Vol. XXIII., p. 307, Nos. 3716, 3717.

**Right of principal to follow into hands of third parties, generally.**—*See AGENCY*, Vol. I., pp. 562–566, Nos. 2094–2119.

### SUB-SECT. 3.—WHEN RIGHT ARISES.

#### A. In General.

**4597. Advances on security by banker trustee**—Money taken from bank—Assignment of security to bank after notice of misconduct—Right of bank to follow into proceeds of sale of security.—*L.*, who was exor. of H. & manager of the Y. Bank, agreed to take a security on the ship *E.*, belonging

to F., in lieu of a security given by F. to H. on another ship, & he abstracted money from the bank, which he advanced to F. to enable him to complete repairs on the ship *E.*, taking from F. a security on the ship to himself, as exor., for these advances, as well as for the sum advanced by H. The bank, having discovered L.'s improper abstraction of their money, required security for it, & J. assigned to them the securities on the ship. The ship was sold for a sum much less than the amount originally advanced by H. :—*Held*: the bank could not claim a lien on the proceeds of the sale of the ship on the ground of following trust moneys of theirs improperly disposed of by L., for they had, by taking the security from him, treated the transaction as a loan from them to him; & moreover, as he was their agent, they were affected by his acts in making the advances.—*COLLINSON v. LISTER* (1855), 7 De G. M. & G. 634; 25 L. J. Ch. 38; 26 L. T. O. S. 142; 2 Jur. N. S. 75; 4 W. R. 133; 44 E. R. 237, L. J.J.

**4598. Loan by one company to another**—Money recovered from third party by borrowing company—Right of lending company to follow money recovered.—*ERNEST v. CROYSBILI*, No. 4111, *ante*.

**4599. Land subject to charge**—Sale of land discharged from trust—Reservation of fund to answer charge—Whether property can be followed.—The trustee of a sum of money charged on real estate, who is also owner of the estate subject to the charge, is entitled to sell any portion of the estate discharged from the trust, provided he reserves a portion sufficient to answer the charge; & the estate so sold cannot be followed into the hands of a purchaser with notice of the trust.—*GRUNDY v. HEATHCOTE* (1863), 1 Hem. & M. 172; 71 E. R. 75.

**4600. Right of person paying off mortgage debt**—Payment out of trust moneys.—Pltfs., at the request of trustees of a marriage settlement & of the tenant for life under the settlement, paid off £600 part of a mtge. debt of £1,000 on a leasehold house comprised in the settlement. There was no transfer of the £600 of the mtge. debt to pltfs. but interest was paid to them. On the death of the tenant for life the appointees of the leasehold house obtained a transfer to themselves from the mtgee. of the remaining mtge. debt of £400, & of the premises, but subject to the equity of redemption, & they also obtained the title deeds. Pltfs. advanced the £600 out of trust money :—*Held*: as the money was to the knowledge of all concerned trust money, pltfs. had a right to follow it.—*PATTEN v. BOND* (1889), 60 L. T. 583; 37 W. R. 373.

*Annotations*.—*Reid*, *Chetwynd v. Allen*, [1899] 1 Ch. 353; *Butler v. Rico*, [1910] 2 Ch. 277.

**4601. Mortgage forming part of settlement**—Security proving deficient—Recovery of damages by settlor from solicitor—Right of trustees of settlement to follow.—*Re MACLEOD, MILLS v. MACLEOD* (1895), 11 T. L. R. 445; 39 Sol. Jo. 524.

**4602. Covenant to settle after-acquired property**—Right of trustees to follow—On behalf of persons within marriage consideration.—In Nov. 1879, a sum of money was given to a wife, which was bound by a covenant of herself & her husband in their marriage settlement to settle her after-acquired property. The money was paid into the husband's banking account, upon which the wife had power to draw, & a month later part of it was invested in two Cape of Good Hope Bonds, which remained at the bank, the interest on them being credited to the account. The husband died in 1909, & the bonds came into possession of his exors. It was admitted that part of the money was repre-



**Sect. 5.—Following trust property: Sub-sect. 3, A., B. & C. (a).]**

sented by the two bonds, that they were bought for & belonged to the wife, & that they were in the husband's possession at his death. The trusts of the settlement were still subsisting for the wife & children of the marriage. Upon action by the trustees of the settlement to recover the bonds against the exors., who pleaded Stat. Limitations:—**Held:** (1) the money the instant it was received became in equity subject to the trusts of the settlement, & the bonds were therefore trust property which could be claimed by the trustees; (2) trustees of a marriage settlement are entitled to specific performance of a covenant to create a trust which is for the benefit of persons within the marriage consideration.—**PULLAN v. KOE**, [1913] 1 Ch. 9; 82 L. J. Ch. 37; 107 L. T. 811; 57 Sol. Jo. 97.

**Annotations:—As to (1) *Consd. Re Pryce, Nevill v. Pryce*, [1917] 1 Ch. 234. *Generally, Mend. Re Lind, Industriale Finance Syndicate v. Lind*, [1915] 2 Ch. 345.**

**4603. Sale by trustee to company—Sale set aside.]**

—**Re CLARK, CLARK v. MOORE & MOORES (CHEMISTS), LTD.** (1920), 150 L. T. Jo. 94.

**Following into hands of bankers—Receipt of money on current account—Trust account.]—See BANKERS, Vol. III., pp. 185, 186, Nos. 360–365.**

—**Solicitor's account.]—See BANKERS, Vol. III., p. 189, No. 384.**

—**Sale of goods wrongfully obtained—Bill given against proceeds.]—See BANKERS, Vol. III., p. 181, No. 340.**

**Following into hands of trustee in bankruptcy.]—See BANKRUPTCY, Vol. V., pp. 719–723, Nos. 6261–6281; EXECUTORS, Vol. XXIII., p. 307, Nos. 3716, 3717.**

**Right of principal to follow into hands of third parties.]—See, generally, AGENCY, Vol. I., pp. 562–566, Nos. 2094–2119.**

**Property subject to charitable trust.]—See CHARITIES, Vol. VIII., pp. 351, 352, Nos. 1469–1487.**

**Refunding of legacies.]—See, generally, EXECUTORS, Vol. XXIII., pp. 427–434, Nos. 4982–5050.**

**B. Priority of Legal Estate.**

**See, generally, EQUITY, Vol. XX., pp. 296–305, Nos. 509–585.**

**4604. When legal estate has priority—Banker accepting security from trustee—No notice of trust.]—T. being under a will trustee of £800 for two persons, in moieties, leaves that sum outstanding on the promissory note of J. The note is payable to T. only, & not to T. or order. In 1839 T., becoming embarrassed, indorses the note to his banker M., who is also the banker of J., as a security for advances; M. having no notice of the trust. In 1840 T. becomes beneficially entitled to one moiety of the £800. In 1841 J. becomes a creditor of T. for goods sold, & claims set-off against the note. On Apr. 7, 1842, J. has notice, through his agent, of the indorsement of the note to M. In July 1842, T. becomes bkpt.:—**Held:** as to the moiety of the £800, which is held by T. in trust, the trust must prevail against the banker's security.—**MOORE v. JERVIS** (1845), 2 Coll. 60; 63 E. R. 637.**

**4605. —Best right to call for legal estate—Trustee ordered to transfer fund into court—No notice of trusts affecting fund.]—In a suit which was instituted by T. against A., his trustee, for the purpose of securing a trust fund, an order was made directing A. to pay the trust fund into court. A. had, prior to the institution of such suit, appropriated the trust fund to his own use, & in order to enable himself to obey the order of the ct., he transferred into ct. another fund, of which**

he was trustee for B. B. then filed a bill against A. for securing his trust fund, & he presented a petition, intitled in both suits, praying that the fund which had been paid into ct. by A. to the credit of the first-mentioned cause might be ordered to be transferred to the credit of the second suit:—**Held:** by the transfer the legal estate in the fund became vested in the Accountant-General in trust for T., & as T., when the transfer was made into ct. by A., had no notice that the fund which had been so transferred by A. was subject to any trust for B.'s benefit, T. must be considered as a purchaser for valuable consideration without notice of the fraud, & such transfer by A. could not be disturbed.—**THORNDIKE v. HUNT, BROWNE v. BUTTER** (1859), 3 De G. & J. 563; 28 L. J. Ch. 417; 32 L. T. O. S. 346; 5 Jur. N. S. 879; 7 W. R. 246; 44 E. R. 1386, L. J. J.

**Annotations:—Apld. Case v. James** (1861), 29 Beav. 512; **Taylor v. Blakelock** (1886), 32 Ch. D. 560; **Taylor v. London & County Banking Co.**, **London & County Banking Co. v. Nixon**, [1901] 2 Ch. 231. **Consd. Cloutte v. Storey**, [1911] 1 Ch. 18. **Refd. Thompson v. Tomkins** (1862), 2 Drew. & Sm. 8; **Harpham v. Shacklock** (1881), 30 W. R. 49.

**4606. —Where a fund in ct. in an administration suit is carried to a separate account, the persons specified in its heading are the owners of the fund so far as is consistent with its retention in ct. released from the general questions in the cause & free from claims by other sharers in the estate.**

Where a fund standing to a separate account is specifically assigned for value by a person entitled thereto according to the terms of the account:—**Held:** the assignor's general liability to other parties to the suit to make good defaults in his character of trustee of the estate cannot be enforced against the fund in the hands of its assignee for value without notice.—**EDGAR v. PROMLEY**, [1900] A. C. 431; 69 L. J. P. C. 95; 82 L. T. 573; 49 W. R. 142; 16 T. L. R. 395, P. C.

**Annotations:—Distd. Cloutte v. Storey**, [1911] 1 Ch. 18. **Consd. Thompson v. Thompson**, [1923] 2 Ch. 205.

—**J.—See, generally, EQUITY, Vol. XX., pp. 307–308, Nos. 599–604.**

**4607. —Fraudulent transfer of trust fund by trustee—Replacement of fund—Notice to beneficiaries whose interests affected.]—A trustee of a settlement, unknown to his *cestuis que trust*, sold the trust fund, & applied the proceeds to his own use. He represented that the money had been lent on mtge., & they pressed for its reinvestment. He afterwards induced his co-trustee of a second fund to join him in transferring it into his name, & take as security the transfer of a mtge., which in the result proved to be a forgery. He then made a small addition to the fund out of his own moneys, & gave notice to the *cestuis que trust* of the first fund that it had been replaced, & they immediately put a *distringas* upon the stock. He afterwards died insolvent, leaving the stock standing in his name. Upon a bill by the surviving trustee of the second fund, against the *cestuis que trust* of the first fund, asking that the stock might be restored to him:—**Held:** the notice of reinvestment to the *cestuis que trust* of the first fund amounted to a valid transfer, which made them as against pltf. purchasers for value without notice of the fraud; & pltf.'s bill must be dismissed, with costs.—**CASE v. JAMES** (1861), 3 De G. F. & J. 256; 30 L. J. Ch. 749; 4 L. T. 664; 7 Jur. N. S. 869; 9 W. R. 771; 45 E. R. 876, L. C. & L. J. J.**

**Annotations:—Distd. Taylor v. Blakelock** (1886), 32 Ch. D. 560. **Refd. Hooper v. Smart, Piper v. Piper, Bailey v. Piper** (1875), 45 L. J. Ch. 99.

**Right of purchaser for value without notice, generally.]—See EQUITY, Vol. XX., pp. 256–263, Nos. 191–251.**



**Purchaser with notice, generally.]—See EQUITY, Vol. XX., pp. 300–304, Nos. 548–580.**

**Breach of trust by representative—Title of alienee.]—See, generally, EXECUTORS, Vol. XXIV., pp. 578–575, Nos. 6102–6114.**

**Notice.]—See, generally, EQUITY, Vol. XX., pp. 310 et seq.**

**Of trust affecting money on current account.]—See BANKERS, Vol. III., pp. 182–184, Nos. 347–353.**

**Assignment of choses in action.]—See, generally, CHOSSES IN ACTION, Vol. VIII., pp. 459 et seq.**

**Priority in equity, generally.]—See EQUITY, Vol. XX., pp. 296 et seq.**

### C. Trustee Mixing Trust Moneys with His Own.

#### (a) In General.

**4608. Whether whole fund liable.]—Agent, or bailiff, confounding his principal's property with his own, charged with the whole; except what he can prove to be his own.—LUTTON v. WHITE, WHITE v. LUTTON (1808), 15 Ves. 432; 33 E. R. 817.**

**Annotations.]—Consd. Gray v. Haig, Haig v. Gray (1854), 20 Beav. 219; Walsh v. Secretary of State for India (1863), 10 H. L. Cas. 367. *Apld.* Cook v. Addison (1869), L. R. 7 Eq. 466. *Refd.* Skipworth v. Skipworth (1840), 9 L. J. Ch. 182; Spence v. Union Marine Insce. (1868), L. R. 3 C. P. 427; *Re* Oatway, Hertslet v. Oatway, [1903] 2 Ch. 356.**

**4609. —.]—(1) Where trust funds can be properly traced & identified, although they may have passed through various transformations, the ct. will fix them with the trust, & direct the proper application of the proceeds.**

**(2) Where a portion of a trust fund has been improperly mixed up with other moneys of his own by a fraudulent trustee, the whole fund becomes affected with the trust, whilst the least trace exists that part of it was trust property.—FRITH v. CARTLAND (1865), 2 Hem. & M. 417; 34 L. J. Ch. 301; 12 L. T. 175; 11 Jur. N. S. 238; 13 W. R. 493; 71 E. R. 525.**

**Annotations.]—As to (1) *Apld.* Birt v. Burt (1877), 36 L. T. 943. *Generally, Consd. Re* Hallett's Estate, Knatchbull v. Hallett (1880), 13 Ch. D. 696. *Generally, Refd.* Brown v. Adams (1869), 4 Ch. App. 764; *Harris v. Truman* (1881), 7 Q. B. D. 340.**

**4610. —.]—Cook v. ADDISON, No. 4182, ante.**

**4611. Funds mixed in bank account—Whether earlier drawings attributed to earlier payments in.]—COTHAM v. WEST (1837), Donnelly, 199; 47 E. R. 319.**

**4612. —.]—(1) When a trustee pays trust money into a bank to his credit to a simple account with himself, not distinguished in any other manner, the debt thus constituted from the bank to him is one which belongs as specifically to the trust as the money would have done had it specifically been placed by the trustee in a particular repository, & so remained; & the case would not be varied by the circumstance of the bank holding also for the trustee, or owing also to him money, in every sense his own.**

**(2) But cheques drawn by the trustee in a general manner upon the bank would for every purpose be ascribed & affect the account in the mode explained & laid down in Clayton's Case (1816), 1 Mer. 572.—PENNELL v. DEFFELL (1853), 4 De G. M. & G. 372; 1 Eq. Rep. 579; 23 L. J. Ch**

**115; 22 L. T. O. S. 126; 18 Jur. 273; 1 W. R. 499; 43 E. R. 551, L. J.**

**Annotations.]—As to (1) *Distd.* Collinson v. Lister (1855), 7 De G. M. & G. 634. *Consd.* Harford v. Lloyd (1855), 20 Beav. 310. *Apld.* Frith v. Cartland (1865), 2 Hem. & M. 417; G. E. Ry. v. Turner (1872), 8 Ch. App. 149. *Consd. Re* Scheibler, *Ex p.* Cooper (1874), 31 L. T. 417. *Apld.* Birt v. Burt (1877), 36 L. T. 943. *N.F. Re* West of England & South Wales District Bank, *Ex p.* Dale (1879), 11 Ch. D. 772. *Refd.* Ernest v. Croysdill (1860), 2 De G. M. & G. 175; *The* European Bank, *Ex p.* Oriental Commercial Bank (1870), 5 Ch. App. 358; Edinburgh Corp. v. Lord Advocate (1879), 4 App. Cas. 823; Lyell v. Kennedy, Kennedy v. Lyell (1889), 14 App. Cas. 437. *As to (2) Consd.* Merriman v. Ward (1860), 1 John. & H. 371. *Apld.* Brown v. Adams (1869), 4 Ch. App. 764. *N.F. Re* Hallett's Estate, Knatchbull v. Hallett (1880), 13 Ch. D. 696. *Refd.* Sinclair v. Brougham, [1914] A. C. 398. *Generally, Refd.* Allcard v. Skinner (1887), 36 Ch. D. 145.**

**4613. —.]—Where a trustee pays trust money into his banker's account, thereby mixing the money with his own; subsequent sums drawn out by him will be attributed to the earliest items on the credit side of his account for the time being & the trust money will in this way, in its turn, be considered as drawn out; whether or not the result be that a balance remains of his own moneys.**

**H. having a balance of £3,961 10s. 3d. at his bank, paid in a sum of £5,000 trust money. Between the time of doing so, & his death, he paid in various sums, together amounting to £12,533 11s. 6d. & in the same interval drew out £18,847 4s. 4d. No part of this sum was devoted to the purposes of the trust, & he was still liable for the £5,000 at the date of his death.—*Held:* the balance remaining at his bank formed part of his general estate & could not be appropriated by the beneficial owner of the £5,000.—BROWN v. ADAMS (1869), 4 Ch. App. 764; 39 L. J. Ch. 67; 21 L. T. 71; 17 W. R. 999, L. J.**

**Annotations.]—Consd. Re Hallett's Estate, Knatchbull v. Hallett (1880), 13 Ch. D. 696. *N.F. Re* Oatway, Hertslet v. Oatway, [1903] 2 Ch. 356.**

**4614. —.]—(1) If money held by a person in a fiduciary character, though not a trustee, has been paid by him to his account at his bankers, the person for whom he held the money can follow it, & has a charge on the balance in the bankers' hands.**

**(2) If a person who holds money as a trustee or in a fiduciary character pays it to his account at his bankers, & mixes it with his own money, & afterwards draws out sums by cheques in the ordinary manner:—*Held:* the rule in Clayton's Case (1816), 1 Mer. 572, attributing the first drawings out to the first payments in, does not apply & the drawer must be taken to have drawn out his own money in preference to the trust money.—*Re* HALLETT'S ESTATE, KNATCHBULL v. HALLETT (1880), 13 Ch. D. 696; *sub nom. Re* HALLETT'S ESTATE, KNATCHBULL v. HALLETT, COTTERELL v. HALLETT, 49 L. J. Ch. 415; 42 L. T. 421; 23 W. R. 732, C. A.**

**Annotations.]—As to (1) *Consd.* Harris v. Truman (1881), 7 Q. B. D. 340. *Apld. Re* Mawson, *Ex p.* Hardcastle (1881), 44 L. T. 523. *Distd.* New Zealand & Australian Land Co. v. Watson (1881), 7 Q. B. D. 374. *Apld.* Collins v. Stimson (1883), 11 Q. B. D. 142. *Consd.* Marten v. Rocke, Kyton (1885), 53 L. T. 946. *Apld. Re* Murray, Dickson v. Murray (1887), 57 L. T. 223. *Distd.* Ellis v. Goulton, [1893] 1 Q. B. 350. *Expld. Re* Hallett, *Ex p.* Blane, [1894] 1 Q. B. 237. *Apld.* Wilsons & Furness-Leyland Line v. British & Continental Shipping Co. (1907), 23 T. L. R. 397; Sinclair v. Brougham, [1914] A. C. 398; *Re* Dacre, Whitaker v. Dacre, [1915] 2 Ch. 480. *Consd.***

### PART VII. SECT. 5, SUB-SECT. 3.—C. (a).

**4608 1. Whether whole fund liable.]—On the sale, whether rightful or wrongful, of his trust property, the cestui que trust is not only entitled to the proceeds so long as they are identifiable, but, if the trust money is unidentifiable, owing to the trustee having mixed the**

**trust money with his own money, the cestui que trust has a charge to the extent of his trust property on mixed funds or on the property purchased therewith.—SHAW WALLACE & Co. v. AMERICAN NATIONAL BANK (IN LIQUIDATION) (1926), 1 L. R. 7 Lah. 155.—IND.**

**o. Funds deposited with trust com-**

**pany.]—Defts. deposited moneys with a trust co. for investment with the right from time to time to withdraw their moneys in whole or in part even after they had been invested, in which case the interest of the depositor in the trust securities would be reduced pro tanto.—*Held:* when defts. had drawn upon their accounts to such an extent**

*Sect. 5.—Following trust property: Sub-sect. 3, C. (a) & (b), & D. Sect. 6: Sub-sect. 1, A.]*

*Banque Belge Pour L'Étranger v. Hambrouck, [1921] 1 K. B. 321. Refd. Burdett v. Horne & Horne, [1911], 27 T. L. R. 402; Re Wait, [1927] 1 Ch. 606. As to (2) supra. Kirkham v. Peel (1880), 43 L. T. 171. Apud Hancock v. Smith (1889), 41 Ch. D. 456; Re Wreford, Carmichael v. Rudkin (1897), 13 T. L. R. 153. Consd. Cory v. Turkish S.S. Mecca, The Mecca, [1897] A. C. 286; Mutton v. Peat (1900), 82 L. T. 440. Distd. Roscoe (Bolton) v. Winder, [1915] 1 Ch. 62. Refd. Re Miller, Ex p. Official Receiver, [1903] 1 Q. B. 327. Re Oatway, Hertslet v. Oatway, [1903] 2 Ch. 356; Galula v. Patus (1911), 104 L. T. 574; Re Hodgson's Trusts, Public Trustees v. Milne, [1919] 2 Ch. 189. Generally, Consd. Davis v. Petrie, [1906] 2 K. B. 786. Refd. Lyell v. Kennedy (1887), 18 Q. B. D. 796; Re Stenning, Wood v. Stenning, [1895] 2 Ch. 433. Mentd. Moss v. Hancock, [1899] 2 Q. B. 111; Grunnell v. Welch, [1905] 2 K. B. 650; Re St. Marks, Wimbledon, Wimbledon (Vicar & Churchwardens) v. Eden, [1908] P. 167; Kreglinger v. New Patagonia Meat & Cold Storage Co., [1914] A. C. 25.*

**4615.** ———.]—A judgment creditor of a stockbroker obtained a garnishee order on a balance at a bank standing to the credit of the broker. All moneys in the bank to the broker's credit were moneys received for clients. Since money of a client had been paid in, drawings out in excess of the then balance had been made; & so in the case of another client. Except those two there was no client who claimed any part of the fund:—*Held*: as no part of the moneys in the bank was the debtor's own, the judgment creditor had no right against the balance; although the rule in *Clayton's Case* (1816), 1 Mer. 572, was applicable as between *cestuis que trust* it could not be applied unless there was a conflict between them in consequence of there not being enough to pay them all, & here, it being clearly shown that the balance in hand was equal in amount to the sums remaining due from the broker to these two clients in respect of moneys of theirs paid into the account, & that there was no claim on behalf of any other client, the money belonged to these two clients.—*HANCOCK v. SMITH* (1889), 41 Ch. D. 456; 58 L. J. Ch. 725; 61 L. T. 341; 5 T. L. R. 459, C. A.

*Annotations:—Distd. Re Stenning, Wood v. Stenning, [1895] 2 Ch. 433. Refd. Re Wreford, Carmichael v. Rudkin (1897), 13 T. L. R. 153; Wilsons & Furness-Leyland Line v. British & Continental Shipping Co. (1907), 23 T. L. R. 397.*

**4616.** ———.]—A solr. paid money which he had received for a client to his own banking account. From that time up to the death of the solr., there was always to the credit of the account a balance exceeding the sum so paid in. But on many days during that period the credit balance was less than the amount of other clients moneys which the solr. had paid in subsequently to his payment of the money of the first client & had not withdrawn:—*Held*: the rule in *Clayton's Case* (1816) (1 Mer. 572) applied, & the money of the first client must be taken to have been drawn out by the solr. & therefore not to have formed part of the balance to the credit of the account at the time of his death & consequently the first client was not entitled to be paid out of that balance specifically.—*Re STENNING, WOOD v. STENNING*, [1895] 2 Ch. 433; 73 L. T. 207; 13 R. 807.

*Annotations:—Consd. Roscoe (Bolton) v. Winder, [1915] 1 Ch. 62. Refd. Mutton v. Peat (1900), 82 L. T. 440.*

**4617.** ———.]—*Re WREFORD, CARMICHAEL v. RUDKIN* (1897), 13 T. L. R. 153.

**4618.** ———.]—Where a trustee paid trust money into his banking account whereby it became mixed with his own money, & out of moneys drawn from the account purchased an investment in his own name, but subsequently applied the balance to his own purposes, his representatives cannot successfully maintain that the investment was purchased out of the trustee's own money, & that what has been spent, & can no longer be traced & recovered, was the money belonging to the trust.—*Re OATWAY, HERTSLET v. OATWAY*, [1903] 2 Ch. 356; 72 L. J. Ch. 575; 88 L. T. 622.

*Annotation:—Consd. Roscoe (Bolton) v. Winder, [1915] 1 Ch. 62.*

**4619.** ———.]—Payments into a general account cannot, without proof of express intention, be appropriated to the replacement of trust money which has been improperly mixed with that account & drawn out.

A co. sold its business to W., who, by the agreement for sale, was to get in the book debts of the business then owing, & on or before Apr. 30, 1913, to pay over to the co. all moneys received by him on account of the book debts, "such amount to be equal to the gross amount of the debts owing on Mar. 1, 1913. Thereafter all debts then outstanding" were to "belong to the purchaser." The gross amount of the book debts so owing was £623 8s. 5d., & W. collected this sum & before or on May 19, 1913, paid £455 18s. 11d., part thereof, into his private general account at a bank. By May 21, 1913, he had drawn out all the money standing to his credit, except £25 18s., & applied it for his own purposes & not in paying the co. as agreed. Subsequently he paid in moneys of his own, & drew on the account for his own purposes, with the result that on his death there was a credit balance of £358 5s. 5d. In an action by the co. against the trustee of W.'s property under an administration order in bkcy. the co. claimed to have a charge on the £358 5s. 5d. for the £455 18s. 11d.:—*Held*: (1) W. was a trustee for the co. of the £455 18s. 11d.; (2) the co.'s charge extended only to the intermediate balance of £25 18s.—*ROSCOE (JAMES) (BOLTON), LTD. v. WINDER*, [1915] 1 Ch. 62; 84 L. J. Ch. 286; 112 L. T. 121; 59 Sol. Jo. 105; [1915] H. B. R. 61.

**4620.** ———.]—By agent of trustees—*Right of trustees to follow*.—*BIRT v. BURT* (1877), 11 Ch. D. 773, n.; 36 L. T. 943, C. A.

*Annotation:—Consd. Re Hallett's Estate, Knatchbull v. Hallett* (1880), 13 Ch. D. 696.

—].—*See, also, BANKERS*, Vol. III., p. 189, Nos. 382-385.

#### (b) Investment Made Wholly or in Part with Trust Funds.

**4621. Lien on land purchased.**—Trustees with the consent of A., the tenant for life, had a power to sell the trust estate, & invest the produce in other real estate. In 1810, A., with the concurrence of the trustees, sold the estate for £8,440, & received the purchase-money. About the same time, but whether with the concurrence of the trustees was not proved, A. purchased another estate for £17,400. Of the £8,440, £8,124 was paid by A. in part payment for the second estate; the remainder was paid partly out of A.'s moneys, & partly by money raised by a mtge. of the estate.

as to reduce their respective credit balances below the amounts which they had on deposit when the investment was made, their interest in the trust securities was not resuscitated upon a business deposit of more money.—*BRITISH CANADIAN SECURI-*

*TIES, LTD. v. MARTIN*, [1917] 1 W. W. R. 1315; 27 Man. L. R. 428.—*CAN.*

*p. Funds mixed in bank account.*—If a trustee pays trust money into a bank to the account of himself, not in any way earmarked to the trust, & also has private moneys of his own

in the same account, the ct. will disentangle the account & separate the trust moneys from the private moneys, & award the former specifically to the trust beneficiaries.—*JOHN v. JOHNSTON'S TRUSTEE* (1904), 6 F. (Ct. of Sess.) 1028.—*SCOT.*

The estate was conveyed to A. in fee. No acknowledgment or declaration of trust was ever made by A., & he retained possession of the estate till thirty years after, when he became bkpt. The ct. against A.'s assignees, presumed, under these circumstances, that the purchase had been made under the power for the benefit of the trust, & held that there had been no such adverse possession, & no such acquiescence on the part of the trustees, as to preclude the ct. making a declaration that they had a lien on the estate to the extent of the trust moneys invested in its purchase.—*PRICE v. BLAKEMORE* (1843), 6 Beav. 507; 49 E. R. 922.

*Annotation*.—*Distd. Mathias v. Mathias* (1858), 3 Sm. & G. 552.

**4622.** —[—]A solr. having in his possession the title deeds of an estate mtgd. to his client deposited the deeds with his banker as security for an advance which he applied in the purchase of an estate on his own behalf. When the mtge. was paid off he applied that money in repaying the loan from his banker & informed his client that he had reinvested the mtge. money upon other good security. His client thereupon executed a re-assignment of the mtge., but in fact the solr. never reinvested the money although he continued to pay interest upon it until his death:—*Held*: the client was entitled to a lien upon the estate so purchased by the solr.—*HOPPER v. CONYERS* (1866), L. R. 2 Eq. 549; 12 Jur. N. S. 328; 14 W. R. 628.

**4623. Stock impressed with trust.**—Testator, having moneys in his hands belonging to other parties, invested a portion, by their direction, together with his own moneys, in Consols, & informed the parties of such investment, & duly accounted to them for the dividends. He afterwards sold out nearly the whole of the stock, & then replaced a portion of it, & on his death, having directed his confidential clerk to buy stock to replace the rest, he expressed his wish, that the stock to be purchased by the clerk should be appropriated to replace the trust stock. The clerk purchased a sum of stock in testator's name; but the whole stock standing in testator's name at his death was not sufficient to replace the trust moneys:—*Held*: under the circumstances, the stock standing in testator's name at his death was impressed with a trust, & did not form part of his general assets.—*ROBERTSON v. MORRICE* (1845), 4 L. T. O. S. 430; 9 Jur. 122.

**4624. Trust fund entitled in priority.**—Where a trustee mixes his own money with the trust fund, & takes security for the whole fund, if the security fail, the trust fund is entitled to priority of payment. But if the *cestuis que trust* have elected to adopt the loan, they cannot compel the trustee to make good the deficiency.—*LAMBE v. ORTON* (1863), 2 New Rep. 435; 33 L. J. Ch. 81; 11 W. R. 1043.

#### D. Improper Investment.

See Part VI., Sect. 7, sub-sect. 3, C., ante.

### SECT. 6.—PROCEEDINGS IN RESPECT OF BREACH OF TRUST.

#### SUB-SECT. 1.—PROCEEDINGS TO PRESERVE TRUST PROPERTY.

##### A. Injunction.

**4625. General rule.**—When any act involving a breach of trust is intended to be done, though

not in its consequences irremediable, the ct. will prevent it by injunction.—A.-G. v. *ASPINALL* (1837), 2 My. & Cr. 613; 1 Jur. 812; 40 E. R. 773; *sub nom.* A.-G. v. *LIVERPOOL CORPN.*, A.-G. v. *ASPINALL*, 7 L. J. Ch. 51, L. C.

*Annotations*.—*Consd.* *Part v. A.-G.* (1842), 8 Cl. & Fin. 409. *Refd.* A.-G. v. *Newcastle-Tyne Corp.* & *N. E. Ry.* (1889), 23 Q. B. D. 492. *Mentd.* *R. v. Liverpool Corp.* (1839), 9 Ad. & El. 435; A.-G. v. *Wilson* (1840), Cr. & Ph. 1; *Holdsworth v. Dartmouth Corp.* (1840), 11 Ad. & El. 480; *Ex p. Hythe Corp.* (1840), 4 Y. & C. Ex. 55; *Armistead v. Durham* (1848), 11 Beav. 556; A.-G. v. *Wigan Corp.* (1854), 23 L. T. O. S. 43; *Arnold v. Gravesend Corp.* (1856), 2 K. & J. 574; A.-G. v. *Avon Corp.* (1863), 33 Beav. 67; *Mill v. Hawker* (1874), L. R. 9 Exch. 309; *Stevens v. Chown, Stevens v. Clark*, [1901] 1 Ch. 894; A.-G. v. *De Winton*, [1906] 2 Ch. 106.

**4626.** —[—]A trustee will be restrained by this ct. from using the legal powers that have been conferred upon him otherwise than for the legitimate purposes of his trust, & therefore a demurrer for want of equity cannot be sustained to a bill seeking such relief, although pltf. may have a remedy at law.—*BALLS v. STRUTT* (1841), 1 Hare, 146; 66 E. R. 984.

**4627.** —[—]If any persons are in such a relation as to constitute them trustees, or if, without being technically trustees, they have a fiduciary duty to others, those persons to whom they owe a fiduciary duty will have a title to sue to prevent the infringement of that duty (*LORD DUNEDIN*).—*DUNDEE HARBOUR TRUSTEES v. NICOL*, [1915] A. C. 550; 84 L. J. P. C. 74; 112 L. T. 697, H. L.

*Annotation*.—*Mentd.* *Kemp v. Glasgow City Corp.*, [1920] A. C. 836.

**4628. Whether injunction granted—Failure to give sufficient notice of sale—Suggestion of improper conduct.**—On a trust to sell, a suggestion in the bill of improper conduct of the trustees in not giving sufficient notice of the sale, is not a ground for an injunction to stop the intended sale.—*PECIPEL v. FOWLER* (1795), 2 Anst. 549; 145 E. R. 963.

*Annotation*.—*Consd.* A.-G. v. *Liverpool Corp.* (1835), 1 My. & Cr. 171.

**4629.** — *Demolition of building.*—If in consequence of the decayed state of an old market house built originally on ground given by the charter for the purpose, a new one be rebuilt by them, with such general consent, the trustees may remove it to any more convenient place *infra villam*.—*Re CHERTSEY MARKET, Ex p. WALTHER* (1819), 6 Price, 261; 146 E. R. 803.

**4630.** —[—](1) In cases of breach of trust, cts. of equity may decree an account of all the profits made; but *semble*, they cannot award damages, *i.e.* compensation for damage done to the trust property.

(2) If the proceeding had been in 1771, before they began to pull down this chapel, for an injunction to prevent their pulling it down, the ct. would have granted that injunction (*LORD ELDON, C.*).—*LUDLOW CORPN. v. GREENHOUSE* (1827), 1 Bli. N. S. 17; 4 E. R. 780, H. L.; *reversq.* S. C. *sub nom.* *Ex p. GREENHOUSE* (1815), 1 Madd. 92.

*Annotations*.—*As to* (1) *Refd.* A.-G. v. *Dublin Corp.* (1827), 1 Bli. N. S. 312. *Generally, Mentd.* *Re Upton Warren* (1833), 1 My. & Cr. 410; *Re Dean Clarke's Charity* (1836), 8 Sim. 34; A.-G. v. *Fishmongers' Co.* (1837), Coop. Pr. Cas. 85; *Re Newark Charities* (1837), Donnelly, 248; *Re Phillpotts Charity* (1837), 8 Sim. 381; *Re West Retford Church Lands* (1839), 10 Sim. 101; A.-G. v. *Devon, Tiverton School Case* (1840), 10 Jur. 1070, n.; A.-G. v. *Stamford, Re Blundell's Charity* (1841), 10 L. J. Ch. 172; A.-G. v. *Haberdashers' Co.* (1852), 15 Beav. 397; *Re Harden Wesleyan Chapel* (1853), 1 W. R. 212; A.-G. v. *Magdalen College, Oxford* (1854), 18 Beav. 223.

**PART VII. SECT. 6, SUB-SECT. 1.—A.**  
**4625. General rule.**—The ct. will grant an injunction to restrain a trustee

from interfering with the trust estate where fraud is charged.—*VERNON v. KINZLE* (1845), 2 O. S. 40.—*CAN.*

*q. Whether injunction granted.*—*LAMBERT v. LAMBERT, MOORE & NIXON* (1843), 5 I Eq. R. 339.—*IR.*

*Sect. 6.—Proceedings in respect of breach of trust :  
Sub-sect. 1, A., B., C. & D. ; sub-sect. 2, A.]*

**4631.** — **Beneficiary allowed to hold trust fund for investment—Proceeds of sale of investment impounded by trustee—Proceedings by beneficiary to get money out of court.]**—A trustee allowed one of his *cestuis que trust* to have the trust fund, with a view to its investment in the foreign funds. The *cestui que trust* went to America, & invested it in his own name; he afterwards sold out a part, & remitting the money to agents in London, came home. The trustee impounded the money so remitted, in the Lord Mayor's Ct., & this ct. granted an injunction, restraining proceedings on the part of the *cestui que trust* to get it out.—**HIPKINS v. NEWTON** (1831), 9 L. J. O. S. Ch. 227.

**4632.** — **Breach of trust for religious purposes.]**—Upon a bill filed by two persons, pewholders in a chapel, & members of the congregation, & in virtue of certain offices which they held, entitled to be trustees of the chapel, on behalf of themselves, & all other persons interested as such pewholders & members except defts., against the other persons entitled to be such trustees, & against the person in whom the legal interest in the lease was vested, alleging that the lease of the chapel was held upon an exclusive trust for religious service according to the doctrines & discipline of the Church of Scotland, charging defts. with introducing preachers into the pulpit who were not ministers of the Church of Scotland, & with other acts in violation of the trusts, & praying that defts. might be compelled to perform the trust, the ct. granted the relief prayed; holding, that, upon the evidence in the cause, the alleged trust was sufficiently made out; secondly, that the acts complained of amounted to a breach of trust.—**MILLIGAN v. MITCHELL** (1837), 3 My. & Cr. 72; 7 L. J. Ch. 37; 1 Jur. 888; 40 E. R. 852, L. C.; *previous proceedings* (1833), 1 My. & K. 416, L. C.

*Annotation:—***Refd.** Free Church of Scotland General Assembly v. Overton, Macalister v. Young, [1904] A. C. 515.

**4633.** — **To restrain trustees from assenting to bill in Parliament.]**—*Qu.*: whether a *cestui que trust* can have an injunction to restrain his trustees from assenting to a bill in Parliament.—**PARKER v. DUNN NAVIGATION CO.** (1847), 1 De G. & Sm. 192; 9 L. T. O. S. 292; 11 Jur. 624; 63 E. R. 1028.

*Annotations:—***Mentd.** Stevens v. South Devon Ry. (1851), 13 Beav. 48; Hare v. L. & N. W. Ry. (1861), 30 L. J. Ch. 817.

**4634.** — **Breach by mortgagee in trust—Mortgagees restrained from receiving money under decree of foreclosure.]**—*Mtgee.* in trust had been guilty of breaches of trust in respect of which a suit by his *cestuis que trust*, infants, was pending against him. He was restrained, on the petition of the *cestuis que trust*, from receiving the mtge. money under a decree which had been made in a prior foreclosure suit, & the solr. of the *cestuis que trust*, plffs. in the subsequent suit, was appointed in his stead to receive the same, without giving the usual security.—**SNARE v. BAKER, BEASLEY v. SNARE** (1849), 13 Jur. 203.

**4635.** — **Appropriation by director to recoup advances.]**—The ct. will interfere by injunction to secure the property of an assocn. from being appropriated by the trustee, who is also sole director, for the purpose of recouping himself the sums he has advanced, although questions are raised as to the legality of the assocn., & although relief might be refused at the hearing.—**SHEPPARD v. OXENFORD** (1855), 1 K. & J. 491, 501; 25

L. T. O. S. 90; 3 W. R. 397; 69 E. R. 552, 557, L. J.J.

*Annotation:—***Mentd.** Re Great Cambrian Mining & Quarrying Co., Bowen's Case (1856), 4 W. R. 800.

**4636.** — **Division of estate contrary to will.]**—Testator gave his residuary estate, after payment of debts, to trustees upon trust to divide it equally among his nine children; but if it should exceed £40,000 in value, his two sons were each to take one-twentieth more than each of his daughters, & he directed that the debt due to the trustees of a married daughter under his covenant contained in her marriage settlement should be taken as part of her share. The debt due under the covenant was £3,500 & the net residue of the estate, before this debt had been satisfied, was £43,000:—**Held:** the £3,500 ought to be considered as forming part of testator's residuary estate, which must, therefore, be taken to exceed £40,000.

An injunction was granted to restrain the trustees from dividing the estate except upon that footing.—**FOX v. FOX** (1870), L. R. 11 Eq. 142; 23 L. T. 584; 19 W. R. 151.

**4637.** — **Against innocent purchaser.]**—Trustees having power to sell under such special or other conditions or stipulations as they should think fit, sold by auction with a condition limiting the title to commence in 1858, fourteen years previously. The next convenient root of title was a deed of 1819, from which a good title could be deduced, but the trustees could not find this deed, & had only recitals of its contents. There was also a condition, that all recitals & statements in the deeds & particulars should be accepted as conclusive evidence:—**Held:** (1) the sale under such conditions was a breach of trust, & injunction granted at the suit of a *cestui que trust* to restrain completion; (2) such an injunction would be granted against an innocent purchaser.

(3) The fact that the interest of the individual pltf. is small is no sufficient reason for refusing to grant relief.—**DANCE v. GOLDINGHAM** (1873), 8 Ch. App. 902; 42 L. J. Ch. 777; 29 L. T. 166; 38 J. P. 164; 21 W. R. 761, L. J.J.

*Annotations:—***As to** (1) **Refd.** Dunn v. Flood (1885), 28 Ch. D. 586; Grovo v. Search, Griffin v. Search (1900), 22 T. L. R. 290. **Generally, Refd.** Melbourne Banking Corpn. v. Brougham (1882), 7 App. Cas. 307.

**4638.** — **Interest of plaintiff small.]**—**DANCE v. GOLDINGHAM**, No. 4637, *ante*.

**4639.** — **Trustee of married woman proposing to deal with corpus.]**—**HILL v. AILESBUURY (LADY)** (1891), 10 T. L. R. 487.

### *B. Securing Trust Property.*

**4640.** **Order to bring property into court.]**—By an ante-nuptial settlement the trustees were empowered, with consent of the parties, to sell out the trust fund, & invest the proceeds upon real securities. By a memorandum executed contemporaneously with & indorsed on the settlement, the parties requested the trustees to advance the trust moneys to the owners of Vauxhall Gardens upon mtge. as first, second, or third mtgees.:—**Held:** "the owners" meant owners at the date of the settlement & memorandum, & an advance to the three owners originally without security, & the subsequent acceptance of a mtge. with a joint & several covenant from two of the three owners, one having then retired, was a breach of trust, & the trustees were ordered to bring the fund into ct.—**FOWLER v. REYNAL** (1851), 3 Mac. & G. 500; 21 L. J. Ch. 121; 18 L. T. O. S. 113; 15 Jur. 1019; 42 E. R. 353, L. C.

*Annotation:—***Refd.** Lockhart v. Reilly, Reilly v. Lockhart (1856), 25 L. J. Ch. 697.

**4641.** —.]—Two trustees having power to alter & vary a trust fund, sold it out for that purpose, but allowed the produce to be received by one alone:—*Held*: the other, who failed to show that the fund was properly invested, was bound to pay the amount into ct.—*WIGLESWORTH v. WIGLESWORTH* (1852), 16 Beav. 269; 51 E. R. 782.

**4642.** — **Order against third party.** — Testatrix bequeathed a leasehold estate to trustees & exors., in trust for sale, & gave one of such exors. a beneficial interest for his life in one-fourth part of the estate. The latter exor., being at the time indebted to the estate of testatrix, made an assignment of his beneficial interest by way of mtge., to secure a private debt which he owed to a creditor, & deposited the title deeds with the creditor. On a bill by his co-exors. to recover the title deeds:—*Held*: the estate of testatrix was entitled to a lien on the interest of the defaulting exor. in the premises comprised in the deeds, in priority to the lien created by his assignment to the mtgee.; & the ct. decreed the title deeds to be delivered up, with a declaration that they belonged to the three trustees.—*COLE v. MUDDLE* (1852), 10 Hare, 186; 22 L. J. Ch. 401; 20 L. T. O. S. 107; 16 Jur. 853; 68 E. R. 892.

*Annotation*:—*Mentd.* *Re Whistler & Richardson* (1887), 57 L. T. 77.

**4643.** — —.]—(1) A solr. employed in trust business is the solr. of the trustees personally, & had no direct claim on the trust estate for costs.

(2) An order was made on a trustee to pay into ct. interest found due from him, & the balance beyond his costs to be taxed of capital money certified to have come to his hands. The capital money had been received by the trustee's solrs. as part of the trust estate. The order was made on statements implying that the trustee, who was totally unable to pay, was solvent. The trustee having made default in payment of the interest, the ct. made an order notwithstanding the former order that the solrs. should pay into ct. the capital come to their hands with interest.—*STANIAK v. EVANS, EVANS v. STANIAK* (1886), 34 Ch. D. 470; 50 L. J. Ch. 581; 56 L. T. 87; 35 W. R. 286; 3 T. L. R. 215.

*Annotations*:—*As to* (1) *Refd.* *Re Humphreys, Ex p. Lloyd George & George*, [1898] 1 Q. B. 520. *As to* (2) *Dist.* *Re Blundell, Blundell v. Blundell* (1888), 40 Ch. 13, 370. *Generally.* *Mentd.* *Preston Banking Co. v. Allsup*, [1895] 1 Ch. 141; *Re Calgary & Medicine Hat Land Co., Pigeon v. The Co.*, [1908] 2 Ch. 652.

**4644.** **Writ of assistance—Effect of R. S. C., Ord. 67.**—Although for the purpose of recovering and the old writ of assistance has been superseded by the writ of possession, above Ord., the writ may still be issued for the purpose of recovering possession of & preserving chattels which have been ordered to be delivered to a receiver.—*WYMAN v. KNIGHT* (1888), 39 Ch. D. 165; 57 L. J. Ch. 886; 59 L. T. 164; 37 W. R. 76.

*Annotation*:—*Refd.* *Re Maudslay & Field, Maudslay v. Maudslay & Field*, [1900] 1 Ch. 602.

**4645.** — —.]—*Re* TAYLOR, TAYLOR v. RAWSON, [1913] W. N. 212.

**Appointment of receiver.**—*See, generally*, Part III., Sect. 8, sub-sect. 2, C., *ante*.

#### C. Summary Jurisdiction over Solicitors.

*See, generally*, SOLICITORS, Vol. XLII., pp. 319–329, Nos. 3554–3709.

**4646.** **When exercised—Admission of possession of funds.**—Order made that a solr., who was also

a trustee of a will, should pay into ct. trust money which he had by affidavit admitted that he had in his hands, upon motion made by pltf. *cestui que trust*, in a suit to administer the estate of testator, the notice of motion being entitled in the suit & in the matter of the solr.—*Re CLERIHEW'S ESTATE, CLERIHEW v. CLERIHEW, Re HOWARD* (1871), 24 L. T. 860; 19 W. R. 939, L. J.

*Annotation*:—*Foll.* *Re Carroll, Brice v. Carroll*, [1902] 2 Ch. 175.

**4647.** — **Receipt of trust funds on loan—With notice of trust—Solicitor not solicitor to trust estate.**—A solr. who has received trust funds on loan as an investment with a knowledge that they are such, the investment being an improper one as between trustee & *cestui que trust*, may be ordered by the ct. to refund the money in the exercise of its summary jurisdiction over its own officers, notwithstanding the fact that he is not the solr. to the trust estate, & notwithstanding that he has not been made a party to the action.—*Re CARROLL, BRICE v. CARROLL*, [1902] 2 Ch. 175; 86 L. T. 862; 50 W. R. 650; *sub nom.* *Re CARROLL, BRICE v. CARROLL, Re DE MORTIMER-McINTOSH*, 71 L. J. Ch. 596.

**4648.** — **Declaration of trust by solicitor—Beneficiary induced to alter his position.**—The ct. will exercise its disciplinary jurisdiction to prevent a breach of trust where there has been a declaration of trust by a solr. in favour of a person even though not his client, which induces that person to alter his position.—*Re A SOLICITOR, Ex p. HALES*, [1907] 2 K. B. 539; 76 L. J. K. B. 931; 97 L. T. 212; 23 T. L. L. 573; 51 Sol. Jo. 626, D. C.

*Annotation*:—*Consd.* *United Mining & Finance Corp'n. v. Bocher*, [1919] 2 K. B. 296.

#### D. Refusal of Specific Performance of Contract Involving Breach.

*See* SPECIFIC PERFORMANCE, Vol. XLII., pp. 464, 465, Nos. 314–326.

### SUB-SECT. 2.—ACTION FOR BREACH.

#### A. In General.

**4649.** **Duty to proceed with due diligence—Against innocent trustee.**—Where the estate of a trustee is secondarily liable, in consequence of a breach of trust by a co-trustee, the *cestui que trust* is bound to pursue his demand against the former estate with due diligence.—*NEWHAM v. NEWHAM* (1822), 1 L. J. O. S. Ch. 23.

**4650.** **Application for leave to proceed—Necessity for service on other party.**—Motion for leave to file a bill on behalf of K. against trustees for an alleged breach of trust, a similar charge against them in a former suit still pending, but to which K. was not a party, having failed, & the decree in the suit having been acted upon for a year & a half, & acquiesced in by K.:—*Held*: notice of the application should be given to the other side.—*Ex p. KIDD* (1854), 2 Eq. Rep. 475; 2 W. R. 316; *sub nom.* *Ex p. KIDD, ECCLES v. CHEYNE*, 23 L. T. O. S. 20.

**4651.** **Form of proceeding.**—The proceeding by claim instead of by bill & answer, in a case alleging a breach of trust, is not the proper course of proceeding.—*JACKSON v. GRANT* (1850), 16 L. T. O. S. 230; 15 Jur. 72.

**4652.** —.]—In Dec. 1834, testator in the cause assigned by way of mtge. a debt of £5,260 then due

### PART VII. SECT. 6, SUB-SECT. 2.—A.

**r. Death of one defendant pending action—Absence of personal representa-**

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*live—Continuing proceedings.*—*HIBERNIAN JOINT STOCK CO. v. FOTTELL* (1884), 13 L. R. Ir. 335.—*IR.*

**t. Functions of judge & jury.**—It is not the function of a jury to determine whether a trustee has been

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to him, to secure £4,000 & interest, & by the same deed he covenanted to pay the same. In 1836 the debt of £5,260 was paid off without notice of the mtgee. In 1847 the debt of £4,000 was assigned in consideration of marriage. In 1835 testator settled his estates in consideration of marriage, charging them with two sums of £3,000 & £4,000, which sums, in certain events, were to revert to his personal estate. In pursuance of an order of the ct. in an administration suit, the two sums of £3,000 & £4,000 were, in 1854, raised & paid to the trustees thereof, & were now represented by two sums of stock standing in the bank in their names respectively.

In 1857 B., a solr., having received from petitioner, a married lady, a sum of £4,700 for investment, three days afterwards purchased the above debt of £4,000 from the trustees of the settlement of 1847. The debt was assigned by deed to B., the purchase-money being, as was alleged, the money of petitioner. B. continued to pay interest to petitioner as on £5,000 until Jan. 1858, & in 1859 he became bankrupt.

Petitioner claimed to be in equity a specialty creditor of testator, on the ground that B. had become assignee of the mtge.-debt as her trustee; & prayed that she might be allowed to come in & prove her debt, & that the reversionary interests in the two sums of stock, to which testator's estate was entitled under the settlement of 1835, might be sold in payment thereof:—**Held:** as the statements in the petition suggested fraud, as the trustees were not before the ct., & as the money was not in ct., petitioner could not obtain relief on petition; & petition dismissed, without costs, but without prejudice to the right of petitioner to file a bill.—**SEALE v. BULLER** (1860), 2 Giff. 312; 2 L. T. 659; 6 Jur. N. S. 989; 66 E. R. 131.

**4653. Pleading—Necessity for breach to be clearly shown.**—Pltf. seeking to charge a party with the consequences of a breach of trust is bound so to state his case upon the bill that the circumstances alleged, if proved, must necessarily & at all events constitute a breach of trust.—**A.-G. v. NORWICH CORPN.** (1837), 2 My. & Cr. 406; 1 J. P. 164; 1 Jur. 398; 40 E. R. 695, L. C.

**Annotations:—****Reid.** Foot v. Bessant (1839), 3 Y. & C. Ex. 320; Bennett v. Harrison (1843), 7 Jur. 436; Foss v. Harbottle (1843), 2 Hare, 461. **Mentd.** Holdsworth v. Dartmouth Corpn. (1843), 11 Ad. & El. 490; R. v. Leeds Corpn. (1843), 4 Q. B. 796; A.-G. v. Wigan Corpn. (1854), 23 L. T. O. S. 43; R. v. Sheffield Corpn. (1871), L. R. 6 Q. B. 652; Fraser v. Murdoch (1881), 6 App. Cas. 855; A.-G. v. Newcastle-on-Tyne Corpn. & N. E. Ry. (1889), 23 Q. B. D. 492.

**4654. Form of order for payment by trustees.**—As to the form of orders for payment against defaulting trustees when it is desired to register them as judgments.—**WAND v. DOCKER** (1859), 5 Jur. N. S. 1287.

**4655. Surcharge—On trustee not acting in trust—Power of court to make in suit instituted by summons.**—Two exors. & trustees under a will which directed a general conversion, sold & realised a large amount, which was received by one by the direction of both. The one who undertook the sole management of the estate became bkpt., & a great loss occurred. A suit was instituted by summons in chambers, & under the common decree

it was sought on summons to charge the non-acting exor. & trustee with two surcharges, on the ground of constructive receipt.

Summons dismissed, with costs, on the ground that such a surcharge could not be made in such a form of suit.—**PETERSON v. PETERSON** (1867), 16 L. T. 377.

**4656. Compromise—Jurisdiction of court to sanction—On behalf of married woman.**—The ct. has jurisdiction to sanction on behalf of a married woman a compromise of a suit to make a trustee liable for a breach of trust in relation to a fund in which the married woman has a reversionary interest.—**WALL v. ROGERS, WALL v. OGLE** (1869), L. R. 9 Eq. 58; 39 L. J. Ch. 381; 21 L. T. 654; 18 W. R. 203.

**Annotation:—****Mentd.** Harle v. Jarman (1895), 43 W. R. 618.

**4657. Transfer of action—To Chancery Division—Where administration action commenced.**—Where an administration suit had been commenced in the Ch. Div., an action in the Q. B. Div. by the widow of testator against a trustee of the will, to recover shares which were alleged to form part of testator's property, was transferred to the Ch. Div.—**DOERING v. LABOUCHERE** (1876), 2 Char. Pr. Cas. 93, D. C.

**4658. Substituted service of subpoena.**—**HAMILTON v. THOMAS**, [1883] W. N. 31.

**4659. Writ of sequestration—Against defaulting trustee—Effect of death of trustee.**—A writ of sequestration issued by beneficiaries against a defaulting trustee is not rendered inoperative by the subsequent death of the defaulter, but can be proceeded upon after reviving the action against the defaulter's legal personal representative, such representative being a necessary party to any proceedings, if for no other reason, at least because he had the right to get rid of the sequestration by satisfying the demand.—**PRATT v. INMAN** (1889), 43 Ch. D. 175; 59 L. J. Ch. 274; 61 L. T. 760; 38 W. R. 200; 6 T. L. R. 91.

**Annotations:—****Reid.** *Re Hastings, Ex p. Brown* (1892), 61 L. J. Q. B. 654. **Mentd.** *Re Long, Tarn v. Emmerson*, [1895] 1 Ch. 652; *Re Whitaker, Whitaker v. Palmer* (1900), 83 L. T. 342; *Re National United Investment Corpn.*, [1901] 1 Ch. 950.

**Payment into court—Administration by court.**—**See Part III., Sect. 10, sub-sect. 9, B., ante.**

### **B. Who May Bring Action.**

**4660. One of several cestuis que trust—Duty to take care of interests of others.**—When one of several cestuis que trust institutes a suit for relief in respect of a breach of trust, he is bound, in the conduct of the suit, to take care of the interests of the others as well as of his own.—**WILLIAMS v. POWELL**, (1847), 2 Ph. 329; 41 E. R. 970, L. C.

**4661. Legatee of cestui que trust.**—One of three trustees who was alleged to have participated in a breach of trust, clearly committed by the others, being also exor. of a cestui que trust:—**Held:** a legatee of the cestui que trust was entitled to maintain a bill against the three trustees to recover the funds lost by the breach of trust.—**SANDFORD v. JODRELL** (1854), 2 Sm. & G. 176; 65 E. R. 354.

**4662. Co-trustees.**—(1) There is no such general rule that a wrongdoer cannot file a bill. Thereupon, if A. & B., two trustees, have committed a breach of trust, & are equally liable, but B. received the produce, A. may sustain a bill against

guilty of any wilful neglect or default in the management of his trust, but, the jury, having ascertained any disputed questions of fact involved, the ct. will determine whether they amount to a breach of trust.—**BATLEY & TATE**

*v. MARSHALL* (1884), 2 N. Z. L. R. C. A. 277.—**N.Z.**

**a. Adding plaintiff & defendants.**—**NORTCOTE v. BENJAMIN, STANFORD & ADAMSON** (1890), 9 N. Z. L. R. 200.—**N.Z.**

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#### **—B.**

**b. Personal representative of cestui que trust.**—**ALLAN v. GAMBLE** (1870), 3 Ch. Ch. 105.—**CAN.**



B. alone to recover the amount, for the benefit of the trust.

(2) *Pltf.*, a tenant for life, having received 5 per cent. on an investment, which she knew to be & insisted was improper, was ordered to account for the excess beyond 4 per cent., for the benefit of the trust.—*BAYNARD v. WOOLLEY, WEARING v. BAYNARD* (1855), 20 Beav. 583; 52 E. R. 729.

*Annotations*.—*As to* (1) *Distd.* *Butler v. Butler* (1877), 7 Ch. D. 116. *Refd.* *Power v. Hoey* (1871), 19 W. R. 916. *Generally*, *Mentd.* *Swanley Coal Co. v. Denton* (1906), 75 L. J. K. B. 1009.

### C. Parties.

#### (a) In General.

**4663. Whether all parties to breach necessary parties.**—It is no objection to a suit brought by parties seeking relief against a breach of trust that one of defts. against whom no relief is prayed may have been a party to such a breach of trust.—*WILSON v. MOORE* (1833), 1 My. & K. 126; 39 E. R. 629; *affd.* (1834), 1 My. & K. 337, L. C.

*Annotations*.—*Apld.* *Gray v. Lewis* (1869), L. R. 8 Eq. 526; *Cowper v. Stoneham* (1893), 68 L. T. 18. *Refd.* *Fairlie v. Hartwell* (1839), 3 Jur. 791; *Pennell v. Hurley* (1845), 2 Coll. 241; *Macbryde v. Eykyn* (1871), 24 L. T. 461; *Child v. Thorley* (1880), 16 Ch. D. 151; *Foxton v. Manchester & Liverpool District Banking Co.* (1881), 44 L. T. 406; *Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth* (1891) 1 Ch. 337; *Soar v. Ashwell*, (1893) 2 Q. B. 390; *Mara v. Browne* (1895), 73 L. T. 638. *Mentd.* *Bank of Bengal v. Fagan* (1849), 5 Moo. Ind. App. 27; *Collinson v. Lister* (1855), 20 Beav. 356; *Rolfe v. Gregory* (1863), 9 L. T. 250; *Piercy v. Fynney* (1871), L. R. 12 Eq. 69.

**4664.** —[—] (1) Where several trustees are implicated in a breach of trust, the *cestui que trust* is not at liberty to file a bill to recover the trust fund amongst some of them only, but must make all the trustees who are living, & the representatives of such of them as are dead, parties.

A. being absolutely entitled to a trust fund under a settlement made by her father, assigned it, on her marriage, to trustees upon certain trusts, under which B., her only child, became absolutely entitled to the fund. The fund was never transferred to the trustees of the second settlement, but remained in a house of agency in India, in which the original trustees had deposited it. The house failed. B. filed a bill against the original trustees, to make them responsible for the loss of the fund:—*Held*: the trustees of the second settlement were not necessary parties.

(2) A. assigned a fund which was deposited in a house of agency in India to trustees, on certain trusts, under which his two daughters, B. & C., became entitled to the fund equally. A suit was afterwards instituted in which B.'s moiety of the fund was ordered to remain in ct., but C.'s moiety was ordered to be paid to her. The trustees, however, suffered the fund to continue in the house of agency until it failed. C. then filed a bill against the trustees, to make them responsible for her moiety of the fund:—*Held*: notwithstanding the decree in the prior suit, B. was a necessary party to the new suit.—*MUNCH v. COCKERELL* (1836), 8 Sim. 219; 6 L. J. Ch. 9; 59 E. R. 88.

*Annotation*.—*Refd.* *Shipton v. Howes* (1845), 4 Hare, 619.

**4665.** —[—] Certain members of the governing body of the Corp'n. of Leeds, immediately after the passing of the Municipal Corporation Act, procured funds belonging to the corp'n. to be applied by the trustees in whom they were vested to purposes not warranted by the Act. An information & bill, in which the corp'n. were relators & pliffs., was filed for the purpose of making five individuals, out of the several members concerned in the transaction, & the trustees, personally liable to make good the funds:—*Held*: the other members concerned in the transaction were not necessary

parties.—*A.-G. v. WILSON* (1840), Cr. & Ph. 1; 10 L. J. Ch. 53; 4 Jur. 1174; 41 E. R. 389, L. C.

*Annotations*.—*Distd.* *Foss v. Harbottle* (1843), 2 Hare, 461. *Consd.* *London Gas Light Co. v. Spottiswoode* (1851), 14 Beav. 264. *Distd.* *Re London & Birmingham Extension, etc. Ry. Carpenter & Wells's Case* (1852), 5 De G. & Sm. 402. *Refd.* *Shrewsbury & Birmingham Ry. v. L. & N. W. Ry.* (1853), 4 De G. M. & G. 115; *Hare v. N. W. Ry.* (1860), 3 L. T. 289. *Mentd.* *A.-G. v. Norwich Corp'n.* (1848), 12 Jur. 424; *Lee v. Angus* (1860), L. R. 2 Eq. 59; *Power v. Hoey* (1871), 19 W. R. 916; *Crowthor v. Appleby* (1873), L. R. 9 C. P. 23; *Forbes v. Samuel*, (1913) 3 K. B. 706.

**4666.** —[—] The 32nd Order of Aug. 1841, applies to a case of a breach of trust committed by several exors.; & a *cestui que trust* may, therefore, proceed against one in the absence of the others.—*PERRY v. KNOTT* (1842), 5 Beav. 203; 49 E. R. 590; *previous proceedings* (1841), 4 Beav. 179.

*Annotations*.—*Distd.* *Lenaghan v. Smith* (1847), 2 Ph. 301; *Penny v. Penny* (1851), 20 L. J. Ch. 339. *Refd.* *Higgs v. Penn* (1845), 14 L. J. Ch. 326; *Hunt v. Peacock* (1847), 16 L. J. Ch. 497; *Fowler v. Reynal* (1818), 13 Jur. 650, n.; *Wilson v. Ithodes* (1878), 8 Ch. D. 777.

**4667.** —[—] (1) Consols were settled to the separate use of the wife for life, with a power to appoint it by will, & the settlement contained a power for the trustees, with the consent in writing of the wife, to alter the securities. The trustees, without such consent, sold the Consols, & invested the produce in Long Annuities, which they afterwards sold & lent the money on bond, which was afterwards received by the husband, who invested it in leaseholds. The wife received the Long Annuities until sold, & afterwards joined her husband in executing a deed, reciting that the sale of the Long Annuities & the subsequent investments had been with her consent:—*Held*: the appointees of the fund under her will were entitled, as against the husband & trustees, to have the Consols replaced, & the interest over which the wife had a general power of appointment was not liable to make good the breach of trust.

(2) Since the Orders of Aug. 1841, it is not necessary to make all the persons committing a breach of trust parties to a suit for its restitution.—*KELLAWAY v. JOHNSON* (1842), 5 Beav. 319; 6 Jur. 751; 49 E. R. 601.

*Annotations*.—*As to* (1) *Refd.* *Hughes v. Wells* (1852), 9 Hare, 749. *As to* (2) *Refd.* *Fowler v. Reynal* (1818), 13 Jur. 650, n.; *Penny v. Penny* (1851), 20 L. J. Ch. 339. *Generally*, *Refd.* *Higgs v. Penn* (1845), 14 L. J. Ch. 326.

**4668.** —[—] In a suit to remedy a breach of trust, it is not, since the New Orders, necessary to make every party participating in the breach of trust party to the suit.—*A.-G. v. LEICESTER CORPN.* (1844), 7 Beav. 176; 49 E. R. 1031.

**4669.** —[—] *PENNY v. PENNY* (1851), 9 Hare, 39; 20 L. J. Ch. 339; 17 L. T. O. S. 120; 15 Jur. 445; 68 E. R. 405.

*Annotations*.—*Apld.* *Coppard v. Allen* (1864), 2 De G. J. & Sm. 173. *Refd.* *Eccles v. Cheyne* (1851), 9 Hare, 215.

**4670. Assignee of trust.**—Bill against a trustee who has assigned his trust, the assignee ought to be made a party; as the decree should be first against him, & the trustee to stand as security.—*BURT v. DENNET* (1787), 2 Bro. C. C. 225; 29 E. R. 126, L. C.

*Annotation*.—*Refd.* *Hardwick v. Mynd* (1794), 1 Anst. 109.

**4671. Sale under trust to sell.**—Action by one claimant for share of produce—Necessity for joinder of all claimants.—*FAITHFUL v. HUNT* (1796), 3 Anst. 751; 145 E. R. 1028.

**4672. Representatives of settlor.**—The residuary legatee of testator having assigned her residue to trustees upon certain trusts, & the trustees having possessed themselves of the property, the *cestuis que trust* file a bill for an account against the trustees:—*Held*: the personal representatives of testator are necessary parties



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to the suit.—**RACKSTROW v. BERNARD** (1825), 3 L. J. O. S. Ch. 194.

**4673.** —[Breach of trust in not calling in & investing money due on a note, the subject of a settlement. Suit may be sustained against the trustee to compel him to pay the money, without making the representatives of the settlor, the maker of the note, parties.—**PLATEL v. CRADDOCK** (1838), (Coop. Pr. Cas. 481 ; 47 E. R. 607.

**4674. Action by executor of trustee—Against tenant for life—Joinder of other cestuis que trust as co-plaintiffs.**—[A party, who was entitled under a will to the income of a trust fund for life, with remainder to his children, who were infants, obtained possession of the trust fund, & applied the produce of it to his own use. A bill was filed by the extrix. of the surviving trustee of the fund, & the children of the tenant for life, by the extrix. as their next friend, for the purpose of compelling the tenant for life to make good the fund which he had sold :—**Held** : as the extrix. of the surviving trustee would be liable to the *cestuis que trust*, to make good the trust fund, in the event of the tenant for life failing to do so, she & the infant *cestuis que trust* were improperly joined as co-pltfs.—**JACOB v. LUCAS** (1839), 1 Beav. 436 ; 8 L. J. Ch. 271 ; 48 E. R. 1009.

**Annotations :—****Apld.** *Griffith v. Vanheythuyssen* (1851), 9 Hare, 85. **Distd.** *Norris v. Wright* (1851), 14 Beav. 291.

**4675. Most guilty trustee—Action against non-acting trustee.**—[Although suits for breaches of trust are within the 32nd order of Aug. 1841, the most guilty trustee cannot be omitted from being a party to the bill.

Suppose one trustee only to act, receive the money, & only invest in his own name, that is a breach of trust in the non-acting trustee ; & if the trustee who had the money sold it out to his own use, in that case, although the non-acting trustee may be liable, yet the ct. would not allow the *cestui que trust* to go against the non-acting trustee without bringing the acting trustee before the ct. (**WIGRAM, V.-C.**).—**SHEPTON v. RAWLINGS** (1845), 4 Hare, 619 ; 5 L. T. O. S. 236 ; 67 E. R. 795.

**Annotations :—****Refd.** *Re Fryer's Estate, Martindale v. Piequot* (1837), 26 L. J. Ch. 398 ; *Coppard v. Allen* (1864), 2 De G. J. & Sm. 173. **Mentd.** *Vaughan v. Vangerstegen* (1853), 2 Drew. 363.

**4676. Person not a trustee—Party to breach.**—[A person, not a trustee, who is a party to a breach of trust committed by a trustee may or may not, at the option of pltf., a *cestui que trust*, be made deft. to a suit against the trustee in respect of such breach.—**BATEMAN v. MARGERISON** (1848), 6 Hare, 496 ; 67 E. R. 1260.

**Annotation :—****Refd.** *Knight v. Cawthron* (1847), 1 De G. & Sm. 714.

**4677. Whether all trustees necessary parties—Action against representatives of deceased trustee.**—

—Testator devised his residuary real & personal estate to A. & B., on trusts in which B. was beneficially interested. B. received part of the assets, & died :—**Held** : a bill could not be maintained by the surviving trustees against the representatives of B. alone, to recover the trust fund received by him, but the bill ought to seek the general administration of testator's estate.—**CHANCELLOR v. MORECRAFT** (1848), 11 Beav. 262 ; 17 L. J. Ch. 11 ; 10 L. T. O. S. 437 ; 50 E. R. 817.

**4678.** —[—]—Testator bequeathed the

residue of his personal estate to three trustees, R., L. & I., who were also his exors., upon trust to invest same, & to pay the income to his widow for her life, & after her death "to lay out & invest or retain invested" £850, & to pay the income of £500, part thereof, to his daughter M. for her life, with remainder to her children, & upon trust to pay the income of the remaining £350 to his daughter B. for her life, with remainder to her children ; & in the event of the death of his daughter, M., without issue, her share was to be divided among L., I. & B. Testator died in Dec. 1854, & his widow died in June, 1856. The daughter M. died in Jan. 1859, without issue. After the death of the widow, R. began to pay interest to B. on £350, & after the death of M., on £516 13s. 4d., i.e. on the £350 & one-third of the £500, & continued the payment half-yearly until his death, which took place in Sept. 1863. Part of the estate of the original testator consisted of a sum of £1,200 lent upon mtge. Before the death of R. £700, part of this sum, had been paid off by the mtgor. in instalments. For some of these instalments R. alone gave receipts, & he joined in the receipts for others. After R.'s death, J. one of his exors., continued to pay interest to B. on £516 13s. 4d. until June, 1874, when the payment ceased. He made these payments with the knowledge of his co-exors. & of the persons beneficially interested in R.'s estate, & the payments were admitted as proper deductions upon a half-yearly settlement of the accounts of the income of R.'s estate made between the exors. & the beneficiaries. The £500 remaining due on the mtge. was paid off by instalments after the death of R. the receipts for the instalments being signed by his exor. J. as "for the exors." or "for the trustees" of the original testator. J. paid one-third of the £500 to L. & another third to I. & retained the remaining one-third. In 1877 B. commenced an action against the exors. of R. alone, claiming to have the sum of £516 13s. 4d. & the arrears of income made good out of the estate of R. :—**Held** : B. was entitled to sue the exors. of R. alone, without making the other trustees of the original testator parties.—**WILSON v. RHODES** (1878), 8 Ch. D. 777, C. A.

**4679.** —[—]—By an ante-nuptial settlement the trustees of it were empowered to sell out the trust fund & invest the proceeds upon, among others, real securities. By a contemporaneous memorandum indorsed on the settlement the settlors requested the trustees to advance the trust moneys to the owners of a copyhold estate, called Vauxhall Gardens, upon mtge. as first, second or third mtgees. :—**Held** : in a suit by *cestuis que trust*, seeking to make one of the trustees liable in respect of the breach of trust, the 32nd Order of May, 1841, did not dispense with the necessity of making the co-trustees parties.—**FOWLER v. REYNAL** (1849), 2 De G. & Sm. 749 ; 13 L. T. O. S. 203 ; 13 Jur. 649 ; 64 E. R. 335 ; *affd.* (1851), 3 Mac. & G. 500, L. C.

**Annotation :—****Consd.** *Lockhart v. Reilly, Reilly v. Lockhart* (1858), 25 L. J. Ch. 697.

**4680. Assignees of bankrupt trustees.**—[In a suit to make trustees liable for a breach of trust :—**Held** : assignees of two bkpt. trustees were not indispensable parties, as the case fell within the 32nd General Order of Aug. 1841.—**NORRIS v. WRIGHT** (1851), 14 Beav. 291 ; 51 E. R. 298.

**Annotations :—****Mentd.** *Macleod v. Annesley* (1853), 17 Jur. 608 ; *Smithwick v. Smithwick* (1861), 5 L. T. 23.

**PART VII. SECT. 6, SUB-SECT. 2.—  
C. (a).**

**4676 l. Person not a trustee—Party to**

**breach.**—[In a cause petition by a *cestui que trust* against the personal representative of a trustee, for a breach of trust committed by the trustee in

paying the trust moneys to a third party, such third party is a necessary party to the suit.—**COPELAND v. WILLES** (1867), 15 W. R. 855.—**IR.**

**4681. Cestui que trust representative of deceased trustee—Right to join as co-plaintiff.]**—Where several plffs. beneficially interested in a trust fund sue the trustees in respect of a breach of trust, & one of such plffs. has, in addition to his character as a *cestui que trust*, become the personal representative of deceased trustee, who was primarily, or with the other trustees jointly, liable, the suit is improperly framed, & cannot be sustained, notwithstanding it be averred by the bill that plff. has received no assets of the estate of the deceased trustee, & that the trustee died insolvent.—**GRIFFITH v. VANHEYTHUSEN** (1851), 9 Hare, 85; 20 L. J. Ch. 337; 17 L. T. O. S. 119; 15 Jur. 421; 68 E. R. 425.

**Annotation:—***Distd. Maughan v. Blake* (1867), 3 Ch. App. 32.

**4682. Separate class of trustees.]**—**M'GACHEN v. DEW**, **DEW v. M'GACHEN**, No. 4548, *ante*.

**4683. Solicitor or agent of trustee—Intermeddling with trust.]**—Though the solr. or agent of a trustee is not generally a proper party to suit to recover the trust funds, yet the case is different where he has received the trust moneys, & has intermeddled with the performance of the trust.—**HARDY v. CALEY** (1864), 33 Beav. 365; 55 E. R. 108.

(b) *Cestui que trust.*

**4684. Action by beneficiaries—Whether all cestuis que trust must be parties.]**—A trustee for three persons is called to an account. All the *cestuis que trust* must be parties.—**HAMM v. STEVENS** (1862), 1 Vern. 110; 23 E. R. 351.

**4685. ———.]**—An ascertained fund was vested in a trustee, in trust for A. for life, with remainder in default of children of A., to A.'s brother & three sisters, or the children of such of them as should be then dead:—**Held**: on the decease of A. unmarried, the children of her deceased brother could file a bill against the trustees for their one-fourth, without making the *cestuis que trust* of the other three-fourths parties.—**HUTCHINSON v. TOWNSEND** (1836), 2 Keen, 675; 6 L. J. Ch. 13; 48 E. R. 789.

**4686. ———.]**—Twenty years ago, twenty-seven persons conveyed real & personal estate to trustees to sell, & to divide the produce:—**Held**: a bill might be filed by a few, on behalf, etc., against the trustees, to make them account & it was not necessary to make all the persons interested parties to the suit.—**SMART v. BRADSTOCK** (1844), 7 Beav. 500; 49 E. R. 1159.

**4687. ———.]**—A party entitled to a moiety of an ascertained fund cannot maintain a suit for payment of his share without making the person entitled to the other moiety a party, if, owing to a breach of trust, the whole fund is not forthcoming.—**LENAGHAN v. SMITH** (1847), 2 Ph. 301; 16 L. J. Ch. 376; 11 L. T. O. S. 121; 11 Jur. 503; 41 E. R. 958, L. C.

**Annotation:—****Reid. Hunt v. Peacock** (1847), 16 L. J. Ch. 497.

**4688. ———.]**—To a suit by one or more *cestuis que trust* against trustees, alleging that the trust fund had been invested on improper security, & seeking to have it restored, all the *cestuis que trust* of the fund must be parties; & if the fund be held in trust for a class of persons, there must, before the cause is heard on the question between plffs. & the trustees, be evidence that all the members of the class are before the ct.—**PHILIP-**

**SON v. GATTY** (1848), 6 Hare, 26; 17 L. J. Ch. 241; 11 L. T. O. S. 472; 12 Jur. 430; 67 E. R. 1067; *subsequent proceedings*, 7 Hare, 516.

**4689. ———. Beneficiary with separated interest.]**—A widow concurred in a breach of trust, but her interest in testator's estate had been separated:—**Held**: she was not a necessary party to a suit by a *cestui que trust* not seeking to charge her interest, & the trustees, seeking to charge her interest, must make their equity effective by some proceeding of their own.—**LING v. COLMAN** (1847), 10 Beav. 370; 9 L. T. O. S. 120; 50 E. R. 624.

**Annotations:—****Consd. Coppard v. Allen** (1864), 2 De G. J. & Sm. 173. **Mentd. A.-G. v. Chesterfield** (1854), 18 Beav. 596.

**4690. Action by trustee against co-trustee—Whether cestui que trust necessary party.]**—Bill by one trustee of stock against the other to compel him to replace it or give security according to his engagement, when plff. joined in transferring the stock into his name: demurrer, because the *cestuis que trust* were not parties, overruled.—**FRANCO v. FRANCO** (1796), 3 Ves. 75; 30 E. R. 902, L. C.

**Annotations:—****Expld. Fortescue v. Barnett** (1833), 2 L. J. Ch. 98. **Appld. May v. Selby** (1842), 1 Y. & C. Ch. Cas. 235. **Distd. Chancellor v. Morecraft** (1848), 11 Beav. 262; **Phillipson v. Gatty** (1848), 7 Hare, 516. **Appld. Groom v. Booth** (1853), 1 Drew. 548. **Distd. Jesse v. Bennett** (1856), 2 Jur. N. S. 964. **Consd. Case v. James** (1861), 3 De G. F. & J. 256. **Reid. Peake v. Ledger** (1850), 8 Hare, 313; **Butler v. Butler** (1877), 26 W. R. 85.

**4691. ———.]**—A trustee may file a bill against his co-trustee to recover the trust fund, without making the *cestuis que trust* parties.—**MAY v. SELBY** (1842), 1 Y. & C. Ch. Cas. 235; 6 Jur. 52; 62 E. R. 869.

**Annotations:—****Consd. Re Cross, Harston v. Tenison** (1882), 20 Ch. D. 109. **Reid. Jesse v. Bennett** (1856), 2 Jur. N. S. 964; **Case v. James** (1861), 3 De G. F. & J. 256. **Mentd. Ponsford v. Hartley** (1862), 2 John. & H. 736.

**4692. Action by trustee against one cestui que trust—Whether other cestuis que trust necessary parties.]**—Bill by trustee against one of several *cestuis que trust* to recover the trust securities. The other *cestuis que trust* are unnecessary parties.—**BRIDGET v. JAMES** (1844), 1 Coll. 72; 63 E. R. 326.

**Annotation:—****Reid. Case v. James** (1861), 3 De G. F. & J. 256.

**4693. Representative of deceased cestui que trust.]**—In a suit to make a trustee liable for a part of the trust fund which was not forthcoming, he stated that it had been received by the tenants for life, who were dead:—**Held**: their personal representatives were necessary parties.—**WILLIAMS v. ALLEN** (1861), 29 Beav. 292; 30 L. J. Ch. 810; 9 W. R. 227; 54 E. R. 639; *subsequent proceedings* (1862), 4 De G. F. & J. 71, L. J.

**4694. ———.]**—The judge gave the representatives of a *cestui que trust* whose income had not been fully paid & who died *pendente lite* the same benefit of a decree against a trustee for breach of trust as if they had been made parties under R. S. C., Ord. 50, r. 2.—**STONE v. BENNET** (1876), 3 Ch. Pr. Cas. 387.

(c) *Representatives of Deceased Trustee.*

**4695. Whether necessary parties.]**—**SELYARD (LADY) v. HARRIS' EXECUTORS** (1711), 1 Eq. Cas. Abr. 74; 21 E. R. 886.

**4696. ———.]**—**MUNCH v. COCKERELL**, No. 4426, *ante*.

PART VII. SECT. 6, SUB-SECT. 2.—  
C. (b).

**4690 i. Action by trustee against co-trustee—Whether cestui que trust necessary party.]**—In a suit by a trustee

against his co-trustee for an account it is not necessary to make the *cestuis que trust* parties, if plff. sue only in his capacity of trustee.—**DAVIES v. LYON** (1875), 1 N. Z. Jur. N. S. 86. —**N.Z.**

PART VII. SECT. 6, SUB-SECT. 2.—  
C. (c).

**4695 i. Whether necessary parties.]**—**ALLEN v. M'COMBIE'S TRUSTEES**, [1909] S. C. 710; 46 Sc. L. R. 485; [1909] 1 S. L. T. 296.—**SCOT\***

*Sect. 6.—Proceedings in respect of breach of trust : Sub-sect. 2, C. (c), D. & E.]*

**4697.** —[A primary point was made, that the personal representative of a person of the name of G. or some such name, one of the trustees, was not before the ct.; & as there was some argument upon it, the relator's counsel very properly agreed to undertake to bring that person before the ct. if it should be necessary. I have considered the point, & upon the whole, I think the suit cannot safely be proceeded with without having him here according to that undertaking, & therefore he must be made a party (LORD BROUGHAM, C.).—*A-G. v. NEWBURY CORPN.* (1838), Coop. Pr. Cas. 72; 47 E. R. 406, L. C.

**4698.** —[To a bill seeking to charge the survivor of two exors. with the loss occasioned by a breach of trust committed by both, & also praying for an account of the personal estate of testator, the personal representatives of deceased exor. are necessary parties.—*BIGGS v. PENN* (1845), 4 Hare, 469; 2 Holt, Eq. 3; 5 L. T. O. S. 89; 9 Jur. 368; 67 E. R. 733.

*Annotations :—***Apld.** *Coppard v. Allen* (1864), 2 De G. J. & Sm. 173. **Refd.** *Shipton v. Rawlins* (1845), 4 Hare, 619.

**4699.** —[Where three persons commit a breach of trust, & one dies, a person complaining of the breach of trust may, under Ord. 32 of Aug. 1841, sue the survivors without making the representatives of deceased trustee parties.—*HALL v. AUSTIN* (1846), 2 Coll. 570; 15 L. J. Ch. 384; 7 L. T. O. S. 279; 10 Jur. 452; 63 E. R. 865.

*Annotation :—***Consd.** *Coppard v. Allen* (1864), 2 De G. J. & Sm. 173.

**4700.** —[*Semble* : where one of several trustees has died the *cestui que trust* may generally sue the surviving trustees for an account, without making the representatives of deceased trustee a party, it being the duty of the surviving trustees to place the fund in a proper position, & recover from the estate of deceased any portion of the trust money that may have remained in his hands.—*BEATTIE v. JOHNSTONE* (1848), 8 Hare, 169; 68 E. R. 318.

**4701.** —[Where one of several trustees dies pending a suit which does not seek to charge them personally in that character, his representatives are not necessary parties; for the trusteeship survives.—*LONDON GAS LIGHT CO. v. SPOTTISWOODE* (1851), 14 Beav. 264; 51 E. R. 288.

*Annotations :—***Refd.** *Williams v. Page* (1858), 24 Beav. 654. **Mentd.** *Gray v. Lewis* (1860), L. R. 8 Eq. 526.

**4702.** —[Relief may be had, for a breach of trust committed by two trustees, against one, in the absence of the representatives of the other.—*STRONG v. STRONG* (1854), 18 Beav. 408; 52 E. R. 101.

*Annotation :—***Mentd.** *Re Fryer's Estate*, Martindale v. Piequot (1857), 26 L. J. Ch. 398.

**4703.** —[A trustee dying pending proceedings seeking to fix him & his co-trustee with a breach of trust, the suit was ordered to proceed in the absence of his representative, on an affidavit of ineffectual attempts to ascertain the address of his widow.—*BAND v. RANDLE* (1854), 2 Eq. Rep. 439; 23 L. T. O. S. 21; 2 W. R. 331.

*Annotation :—***Apld.** *Moore v. Morris* (1871), L. R. 13 Eq. 139.

**4704.** —[*ELWES v. BARNARD*, No. 4333, ante.

**4705.** —[In an action for a general account against a surviving exor. & trustee it is not, in the absence of special circumstances, necessary for pltf. to make the representative of deceased

trustee or exor. a party. If deft. requires such representative to be added, & the circumstances of the case render it advisable that he should be so added, R. S. C., 1883, provide by Ord. 10, rr. 11 & 48, the machinery for that purpose.—*Re HARRISON, SMITH v. ALLEN*, [1891] 2 Ch. 349; 60 L. J. Ch. 287; *sub nom. Re HARRISON, SMITH v. ALLEN, ALLEN v. COURT*, 64 L. T. 442. *Annotation :—***Distd.** *Re Jordan, Hayward v. Hamilton*, [1904] 1 Ch. 260.

**4706.** —[**Action against representative of deceased co-trustee.**]—Two deceased trustees having committed a breach of trust by mortgaging, instead of selling the testator's real estate, & accounts of the estate being necessary :—**Held** : notwithstanding the 32nd General Order of Aug. 1841, a suit could not be maintained to charge the estate of one trustee, & take the accounts, in the absence of the representative of the other.—*DEVAYNES v. ROBINSON* (1856), 24 Beav. 86, 97; 53 E. R. 289, 294.

*Annotation :—***Refd.** *Smurthwaite v. Hannay* (1894), 6 R. 299.

**4707.** —[An action for breach of trust was brought by a beneficiary under a settlement against, as sole defts., the exors. of one of the two trustees, but not the surviving trustee, of the settlement. The surviving trustee was also dead, & no new trustees of the settlement had been appointed, although the person in whom the power to appoint was vested was prepared to exercise it :—**Held** : the representatives of the surviving trustee must be added as defts., or new trustees of the settlement must be appointed & added as defts.—*Re JORDAN, HAYWARD v. HAMILTON*, [1904] 1 Ch. 260; 73 L. J. Ch. 128; 90 L. T. 223; 52 W. R. 150; 48 Sol. Jo. 142.

**4708.** —[**Application to add as defendant.**]—G. & C. were the trustees of a settlement. C. died, & X., his legal personal representative, lived in Ireland. M., the *cestui que trust*, brought an action against G., alleging a breach of trust by him & C., & claiming payment by G. of the amount lost by the breach. A third-party notice, by which G. claimed contribution from the estate of C., & the order giving leave to serve it on X. in Ireland, were set aside by the C. A. without prejudice to an application by G., under R. S. C., Order 16, r. 11, to add X. as deft. to the action. On the application to add X. being made, it was opposed by pltf. :—**Held** : X. ought not to be added as deft. against pltf.'s wish.—*MCCHEANE v. GYLES* (No. 2), [1902] 1 Ch. 911; 71 L. J. Ch. 446; 86 L. T. 217; 50 W. R. 387; 46 Sol. Jo. 359.

*Annotation :—***Refd.** *Re Jordan, Hayward v. Hamilton*, [1904] 1 Ch. 260.

*D. Evidence.*

*See, generally, EVIDENCE, Vol. XXII., pp. 1 et seq.*

**4709. Admission by one trustee—Whether binding on co-trustee.**—[An admission by one trustee will not bind his co-trustees : *aliter*, where parties are personally liable.—*DAVIES v. RIDGE* (1800), 3 Esp. 101; 170 E. R. 553, N. P.

*Annotation :—***Mentd.** *Doe d. Rowlandson v. Wainwright* (1838), 8 Ad. & El. 691.

**4710. Interrogatories—Against trustees—To discover breach of trust.**—[In a legatees' suit, where the bill contains no notice of an alleged breach of trust, & nothing is said about it in the decree, the ct. will not permit the executor to be examined on interrogatories before the master, touching the breach of trust, but the breach of trust must be established against the exor., by a distinct & independent suit.—*FORD v. BRANT* (1846), 9 Beav.

410; 15 L. J. Ch. 261; 7 L. T. O. S. 134; 10 Jur. 484; 50 E. R. 401.

**4711. — By purchase from trustees.]**—In an action for specific performance of an agreement to sell the remainder of an underlease of house property to plffs. who were trustees for a married woman, interrogatories by defts., who had notice that they were trustees, but no notice of the actual trusts, for the purpose of establishing that the proposed investment of the trust funds in the purchase was a breach of trust, were ordered to be struck out as irrelevant.—**MANSFIELD v. CHILDHOUSE** (1876), 4 Ch. D. 82; 46 L. J. Ch. 30; 35 L. T. 590; 25 W. R. 68.

**4712. — By trustees—Title of cestui que trust.]**—Testator gave real estates to trustees in trust for his son for life, with a gift over if he charged for encumbered them. One of the trustees filed a bill for the administration of the trusts of the will, & afterwards filed a supplemental bill against certain defts. who were in possession of part of the estates, alleging that they claimed under a charge made in their favour by the tenant for life which operated as a forfeiture. Defts. were interrogated as to the particulars of all charges in their favour, if any, of the property of testator. Defts. stated in their answer that they claimed under no charge made by the tenant for life, but under a lease at a rack rent which he had granted to a lessee, who had mortgaged the lease to them. Pltf. excepted to the answer because defts. did not set forth the date of the lease:—**Held**: pltf., being a trustee, was entitled to know the particulars of those who claimed to be *cestuis que trust*; & the exceptions must therefore be allowed.—**HURST v. HURST** (1874), 9 Ch. App. 762; 44 L. J. Ch. 111; 31 L. T. 264; 22 W. R. 939, L. J. J.

**4713. Discovery—By trustee—Bare trustee.]**—Where deft. appears to be a bare trustee for pltf. & offers no explanation to the contrary, the ct. will compel the production of deeds & documents admitted, by his answer, to be in his possession.—**SPARKE v. MONTRIOU** (1834), 1 Y. & C. Ex. 103; 160 E. R. 43.

**—Resisting production on ground of privilege.]**—See **DISCOVERY**, Vol. XVIII., pp. 146–148, Nos. 958–982.

**Discovery & interrogatories generally.]**—See **DISCOVERY**, Vol. XVIII., pp. 38 *et seq.*

#### *E. Accounts and Inquiries.*

See, also, **EXECUTORS**, Vol. XXIV., pp. 682–685, Nos. 7080–7112.

**4714. When inquiry ordered—Common accounts directed.]**—Where a bill was filed by the *cestui que trust* against the trustees & exors. named in a will, for an account of testator's personal estate, stating specific charges against them, in not having possessed themselves of parts of testators' estate, & praying, that they might be charged with such parts thereof as they might have received but for their wilful default, & on the hearing of the cause, no inquiry was directed by the ct., as to the default or neglect of the exors. & trustees in not possessing themselves of testator's estate:—**Held**: on the cause coming on for further directions, such an inquiry could not then be directed to the master.—

**GARLAND v. LITTLEWOOD** (1839), 1 Beav. 527; 8 L. J. Ch. 369; 48 E. R. 1045.

**Annotations:—****Reid, Terrell v. Matthews** (1841), 11 L. J. Ch. 31; **Re Brooker's Estate, Brooker v. Brooker** (1857), 26 L. J. Ch. 411.

**4715. —.]**—A case of breach of trust was alleged on the pleadings against trustees & exors. for not having sold an estate, but at the first hearing the common accounts only were directed:—**Held**: defts. could not be then charged with the breach of trust, & inquiries could not be then directed with that object.—**GREEN v. BADLEY** (1844), 7 Beav. 274; 49 E. R. 1070.

**4716. — Action for administration of trustee's estate.]**—An action was brought in 1884 for the administration of the estate of testator, who died in 1872, by an incumbrancer on three of the four shares of the residue, against the surviving trustee, & the extrix. of deceased trustee. The writ claimed only ordinary administration, but by the statement of claim various breaches of trust were alleged against the trustees, particularly deceased trustee, whose estate was then under administration by the ct. Pltf. applied under R. S. C., Ord. 15, r. 1, for an order for the ordinary administration accounts & inquiries & special inquiries pointing to the alleged breaches of trust:—**Held**: the application should be refused; having regard to the relief claimed by the writ., only the usual administration accounts & inquiries could be obtained under R. S. C., Ord. 15, r. 1; & as the substantial question at issue appeared to relate to the alleged breaches of trust, which would have to be determined at the hearing the usual accounts & inquiries might be unnecessary, & the ct. in the exercise of its discretion under R. S. C., Ord. 55, r. 10, ought to decline to order even the usual accounts at that stage of the action.—**Re GYHON, ALLEN v. TAYLOR** (1885), 29 Ch. D. 834; 54 L. J. Ch. 945; 53 L. T. 539; 33 W. R. 620, C. A.

**4717. — Breach of trust admitted—Loss made good before action heard.]**—In an action by some of the beneficiaries against the trustees of the will, the statement of claim alleged a specific breach of trust, consisting of an unauthorised investment, by defts. & claimed administration of the estate by the ct., & the proper accounts & inquiries. It also alleged certain conduct on the part of the trustees which was undefensible. Defts. admitted the breach of trust, but had made it good before the hearing of the action. At the hearing the common order for administration was made, but the accounts & inquiries were not to be proceeded with without the leave of the court. A summons was taken out by plffs. asking for the removal of the trustees, which had been claimed by the writ, though not by the statement of claim, & that the common accounts & inquiries, or, if necessary, additional ones, should be proceeded with. Before it came on, by the death of the widow of testator the estate became immediately divisible among the beneficiaries. The summons was opposed by certain beneficiaries on whom the judgment was served:—**Held**: as this was a charge of an active breach of trust, & not of wilful default, the ct. would not direct accounts or inquiries, either with a view to the discovery of further breaches of trust not alleged in the pleadings or proved at

#### **PART VII. SECT. 6, SUB-SECT. 2.—E.**

**d. When accounts ordered—On footing of wilful default.]**—**HARTIGAN v. O'SHANASSY** (1872), 3 V. R. 42.—**AUS.**

**e. —.]**—In order to obtain an account by trustees on the footing of wilful default, at least one act of not getting in moneys which they

ought to have got in must be shown.—**RUSSELL v. RUSSELL** (1891), 17 V. L. R. 729.—**AUS.**

**f. —.]**—**WARD v. GABLE** (1860), 8 Gr. 458.—**CAN.**

**g. — Effect of acquiescence of cestui que trust.]**—**WALMSLEY v. BULL** (1888), 15 Gr. 210.—**CAN.**

**h. — Lease by tenant in common**

**—Account as trustee—Rents & profits.]**—**NASH v. MCKAY** (1868), 15 Gr. 247.—**CAN.**

**k. — Abandonment of item by cestui que trust—Evidence of.]**—**JONES v. MCKEAN** (N. B.) (1897), 27 S. C. R. 249.—**CAN.**

**l. — Profits made by trustees not accounted for.]**—**HENDERSON v. WOOD-**

## Part VIII.—Judicial Trustees.

**P.** — *Powers*—Power to sell heri-  
tage.]—Under Trusts (Scotland) Act.

of s. 1 of the Judicial Trustee Act, 1896 (c. 35), 1 (3), to appoint only an official trustee.—*DOUGLAS v. BOLAM*, [1900] 2 Ch. 749; 70 L. J. Ch. 1; 83 L. T. 448; 49 W. R. 163; 17 T. L. R. 1; 45 Sol. Jo. 29, C. A.

**4730. — Bank—As sole judicial trustee.**—A bank may be appointed a sole judicial trustee, with remuneration, under the sect. dealing with the appointment of "a person" under Judicial Trustee Act, 1896 (c. 35).—*Re COHEN, COHEN v. COHEN* (1918), 62 Sol. Jo. 682.

**4731. Retirement of judicial trustee—No power to appoint successor.**—When a judicial trustee retires he has no overriding power to appoint his successor, but the ct. has jurisdiction to appoint the Public Trustee in his place & in a proper case will do so.—*Re JOHNSTON, MILLS v. JOHNSTON* (1911), 105 L. T. 701.

**4732. — Jurisdiction of court to appoint Public Trustee.**—*Re JOHNSTON, MILLS v. JOHNSTON*, No. 4731, *ante*.

## Part IX.—The Public Trustee.

### SECT. 1.—IN GENERAL.

See Public Trustee Act, 1906 (c. 55); Public Trustee Rules, 1912; Public Trustee (Custodian Trustee) Rules, 1926.

**Custodian of property of enemy alien.**—See *ALIENS*, Vol. II., pp. 151–153, Nos. 230–241.

**Grant of letters of administration to Public Trustee.**—See *EXECUTORS*, Vol. XXIII., p. 172, Nos. 1906–1909.

**Trustee for purpose of Settled Land Acts.**—See *SETTLEMENTS*, Vol. XL., p. 780, Nos. 3115, 3116.

**Public trustee as trust corporation.**—See *LAW of Property Act*, 1925 (c. 20), s. 205 (1) (xxviii); *Settled Land Act*, 1925 (c. 18), s. 117 (1) (xxx); *Trustee Act*, 1925 (c. 19), s. 68 (18); *Administration of Estates Act*, 1925 (c. 23), s. 55 (1) (xxvii).

### SECT. 2.—APPOINTMENT.

#### SUB-SECT. 1.—IN GENERAL.

See Public Trustee Act, 1906 (c. 55).

**4733. From what time appointment dates—Consent of Public Trustee.**—Three ladies, extrices, of a will, executed a deed on Nov. 29, 1912, appointing the Public Trustee to be sole trustee of the will in their place. The Public Trustee delayed giving his formal consent to act until the administration of the estate had been completed, & gave his consent under his hand & official seal in accordance with the rules made under Public Trustee Act, 1906 (c. 55), on Feb. 28, 1913, & executed the deed of appointment on Mar. 3, 1913. One of the ladies desired to withdraw the appointment, contending that, inasmuch as it was made before the consent of the Public Trustee had been formally given, it was invalid:—*Held*: the appointment of the Public Trustee dated as from Mar. 3, 1913, when the Public Trustee had executed the deed of appointment, which was after his consent had been formally given in accordance with the rules, so that the appointment so made was valid.—*Re SHAW, PUBLIC TRUSTEE v. LITTLE* (1914), 110 L. T. 924; 30 T. L. R. 418; 38 Sol. Jo. 414, C. A.

**4734. Appointment by executors before consent given—Deed of appointment executed after consent**

**given—Validity of appointment.**—*Re SHAW, PUBLIC TRUSTEE v. LITTLE*, No. 4733, *ante*.

#### SUB-SECT. 2.—AS CUSTODIAN TRUSTEE.

See Public Trustee Act, 1906 (c. 55), s. 4; Public Trustee (Custodian Trustee) Rules, 1926.

**4735. Who may appoint—As custodian trustee of charitable funds—Trustees having power of appointing new trustee.**—(1) The provisions of Public Trustee Act, 1906 (c. 55), s. 1 (4), (5), precluding the Public Trustee from accepting certain classes of trusts, including trusts exclusively for religious or charitable purposes, apply only to the Public Trustee, & not to a corpn. appointed custodian trustee of such a trust under sect. 4 (3).

(2) The appointment of a custodian trustee of charitable funds may be made by trustees having the power of appointing new trustees of the funds; & the "instrument" within the meaning of Public Trustee Rules, 1912, r. 30, empowering a body of trustees incorporated under the Charitable Trustees Incorporation Act, 1872 (c. 24), to undertake trusts is their deed of trust & the certificate of incorporation.—*Re CHERRY'S TRUSTS, ROBINSON v. WESLEYAN METHODIST CHAPEL PURPOSES TRUSTEES*, [1914] 1 Ch. 83; 83 L. J. Ch. 142; 110 L. T. 16; 30 T. L. R. 30; 58 Sol. Jo. 48.

**Custodian of property of enemy alien.**—See *ALIENS*, Vol. II., pp. 151–153, Nos. 230–241.

#### SUB-SECT. 3.—AS ORDINARY TRUSTEE.

##### A. In General.

See Public Trustee Act, 1906 (c. 55), ss. 5, 6.

**4736. Appointment as co-trustee—Opposition of sole private trustee.**—*Re KENSIT*, [1908] W. N. 235.

**4737. — Subsequently withdrawn.**—By a settlement on the marriage in 1899 of H. & C. stocks, securities, & cash amounting to £10,000 were vested by II. in resp., W., upon the trusts therein declared. The power of appointing new trustees was vested in H. during his life, & it was

1921, every judicial factor who has been appointed by the ct., & whose duties are supervised by the accountant of ct., is entitled to sell the estate on which he is factor without the sanction of the ct.—*MUNRO (LOWE'S JUDICIAL FACTOR), THOMPSON (M'KAY'S JUDICIAL FACTOR)*, [1925] S. C. 11.—**SCOT.**

**t. — Power to select objects of bequest conferred on nominated trustees.**—*WOODARD'S JUDICIAL FACTOR v. WOODARD'S EXECUTRIX*, [1926] S. C.

534.—**SCOT.**

#### PART IX. SECT. 2, SUB-SECT. 3.—A.

**a. Appointment of Public Trustee of England—Trust declared in England—Trust property in Victoria.**—The Public Trustee of England being a corpn. sole under Public Trustee Act, 1906, is empowered to accept the trusteeship of land in Victoria in the case of a trust declared in an English will, & is entitled to be registered as a joint proprietor under Transfer of Land

Act, 1915.—*Re TRANSFER OF LAND ACT, 1915 & Re TRANSFER FROM BALFOUR TO PUBLIC TRUSTEE (OF ENGLAND)*, [1916] V. L. R. 397.—**AUS.**

**b. Testator domiciled out of jurisdiction—Property within jurisdiction.**—Under rule 433 a judge of the Supreme Ct. has jurisdiction, on an application by way of originating notice, to appoint the Public Administrator a trustee to administer a trust under a will of a person domiciled outside Alberta whereby real estate in



*Sect. 2.—Appointment: Sub-sect. 3, A. & B. Sect. 3: Sub-sects. 1 & 2. Sect. 4.]*

declared that, although no case for the appointment should exist, H. might appoint any fit person or persons additional trustee or trustees. The youngest surviving child was born in Dec. 1905. The settlor died in Nov. 1905. His widow C., & the three surviving infant children by their next friend, were desirous that the Public Trustee should be appointed trustee or custodian trustee of the settlement additional to resp., but made no suggestion against his integrity:—*Held*: notwithstanding the refusal of the trustee to consent to the appointment, the beneficiaries had no absolute right to the appointment of a second trustee, but, as resp. now placed himself in the hands of the ct. & did not oppose the wishes of the beneficiaries, the Public Trustee would be appointed co-trustee with him of the settlement.—*Re BADGER, BADGER v. WOOLLEY* (1915), 84 L. J. Ch. 567; 113 L. T. 150.

**4738. Power of retiring trustees to appoint—Exercisable only as last resort.]—**Trustees who desire to retire ought only to resort to Public Trustee Act, 1906 (c. 55), & appoint the Public Trustee in their place, if there is no other way out of the difficulty. Before doing so they should try to obtain some member of the family to accept the trust.—*Re HOPE JOHNSTONE'S SETTLEMENT TRUSTS* (1909), 25 T. L. R. 369; 53 Sol. Jo. 321.

*Annotation:—Expld. Re Drake's Settltmt.* (1926), 42 T. L. R. 467.

**4739. — Opposition by tenant for life—& some remaindermen—Support of majority of beneficiaries.]—***Re FIRTH, FIRTH v. LOVERIDGE*, No. 4748, *post*.

**4740. — — On ground of expense.]—***Re DRAKE'S SETTLEMENT*, No. 4749, *post*.

**4741. Necessity for notice to beneficiaries—General rule.]—***Re CLAREMONT* (1910), cited in Halsbury's Laws of England, Vol. 28, at p. 214.

**4742. — Guardians of infant beneficiaries.]—***Re CLAREMONT* (1910), cited in Halsbury's Laws of England, Vol. 28, at p. 214.

**4743. Appointment as sole trustee—Instrument providing for not less than three trustees—Jurisdiction of court.]—**(1) The ct. has express jurisdiction under Public Trustee Act, 1906 (c. 55), s. 5, to appoint the Public Trustee sole trustee of a settlement, although it contained a provision that the trustees should not at any time be less than three. *Semble*: under the combined effect of s. 10 of Trustee Act, 1893 (c. 53), s. 10, & Public Trustee Act, 1906 (c. 55), s. 5, the donee of the power in a settlement containing such a provision could himself appoint the Public Trustee to be sole trustee.

(2) In cases where such an appointment has been made under the ct.'s statutory power of appointing new trustees, the settlement must be read as authorising the payment to a sole trustee of capital moneys under the Settled Land Acts.

(3) Notwithstanding the absence of any express statutory enactment enabling the Public Trustee to hold land or take possession of personal property except as provided in s. 3 of the Act of 1906, it must be implied that he has full power, when appointed, to possess himself of the trust property, whatever its nature.

*Semble*: under Trustee Act, 1893 (c. 53), s. 25, the ct. has jurisdiction to appoint two trustees,

or even a sole trustee, of a settlement, in disregard of the settlor's direction as to the minimum number being three.—*Re LESLIE'S HASSOP ESTATES*, [1911] 1 Ch. 611; 80 L. J. Ch. 486; 27 T. L. R. 352; 55 Sol. Jo. 384; *sub nom. Re HASSOP SETTLED ESTATES, Re LESLIE'S WILL*, 104 L. T. 563.

*Annotation:—Refd. Re Moxon*, [1916] 2 Ch. 595.

**4744. — — Appointment by persons having statutory powers.]—***Re LESLIE'S HASSOP ESTATES*, No. 4743, *ante*.

**4745. — — —.]—**Persons having the statutory power to appoint new trustees may appoint the Public Trustee to be sole trustee although the trust instrument expressly provides that upon any appointment of new trustees the number is not to be reduced below three.—*Re MOXON*, [1916] 2 Ch. 595; 86 L. J. Ch. 32; 115 L. T. 673; 61 Sol. Jo. 42.

**4746. Form of summons—Public Trustee Act, 1906 (c. 55), s. 6 (2).]**—*Re SYMES* (1918), 62 Sol. Jo. 403.

**Appointment on retirement of judicial trustee.]—***See* No. 4731, *ante*.

### *B. Prohibition of Appointment.*

*See* Public Trustee Act, 1906 (c. 55), s. 5 (4).

**4747. When granted—In interests of beneficiaries.]—***Re CLAREMONT* (1910), cited in Halsbury's Laws of England, Vol. 28, at p. 214.

**4748. — Objection on ground of expense.]—**

(1) Where a sole trustee, desiring to retire, proposed to exercise his statutory power by appointing the Public Trustee in his place, the estate being of the value of upwards of £38,000, part being building land, & all but one of the tenants for life & some of the remaindermen, a class likely to be largely increased, being in favour of the appointment, the ct. refused to make an order, under Public Trustee Act, 1906 (c. 55), s. 5 (4) prohibiting the appointment.

(2) *Qu.*: whether it is open to a beneficiary applying for an order under the sub-sect. to base his application solely on the ground of the expense which the appointment would involve.

But assuming that it is, the fact of that expense, provided that it is not exceptional or disproportionate, cannot in ordinary cases be treated as a material element in determining whether it is "expedient" or not to make the order.—*Re FIRTH, FIRTH v. LOVERIDGE*, [1912] 1 Ch. 806; 81 L. J. Ch. 539; 106 L. T. 865; 28 T. L. R. 378; 56 Sol. Jo. 467.

**4749. — — Prohibition not proved to be expedient for all beneficiaries.]—**The trustees of a settlement of heirlooms desired to retire & to appoint the Public Trustee under Public Trustee Act, 1906 (c. 55), s. 5. The tenant for life sought an injunction to restrain them from so doing in view of the fact that the duties of the trustees were light & that the appointment of the Public Trustee was undesirable on the ground of expense. It was, however, subsequently ascertained that the charges of the Public Trustee would be small, & the tenant for life, therefore, no longer relied on expense as a ground for objecting to the appointment:—*Held*: the application failed, there being no evidence that it was expedient in the interests of all the beneficiaries to restrain the trustees from appointing the Public Trustee.—*Re DRAKE'S SETTLEMENT* (1926), 42 T. L. R. 467; 70 Sol. Jo. 621.

Alberta is devised.—*Re LEONARD*, [1918] 2 W. W. R. 222; 13 Alta. L. R. 241.—CAN.

*o. Testator domiciled in Irish Free*

*State.*—A testator, domiciled in the Irish Free State, by his will appointed the Public Trustee to be his exor. & trustee:—*Held*: neither the

Irish Public Trustee nor the English Public Trustee could accept the appointment.—*In the Goods of LEONARD*, [1928] 1 I. R. 168.—IR.



**4750. Time for application—After receipt of notice of appointment.]—***Re CLAREMONT* (1910), cited in Halsbury's Laws of England, Vol. 28, at p. 214.

**4751. "Expediency" of making order—Whether expense material for consideration.]—***Re FIRTH, FIRTH v. LOVERIDGE*, No. 4748, *ante*.

### SECT. 3.—POWERS.

#### SUB-SECT. 1.—IN GENERAL.

*See Public Trustee Act, 1906 (c. 55), ss. 2–6.*

**4752. Power to hold land.]—***Re LESLIE'S HASSOP ESTATES*, No. 4743, *ante*.

**4753. Conflicting interests—No power to make bargain with himself—Duty to seek sanction of court.]—**The Public Trustee has no more power than a private trustee, where he is in the position of having conflicting interests, to make a bargain with himself, & must accordingly come to the ct. in the proper proceedings to sanction such a bargain.—*Re NEW HAW ESTATE TRUSTS* (1912), 107 L. T. 191; 56 Sol. Jo. 538.

**4754. Power to apply income for maintenance—Of infant beneficiary.]—***Re BASS, BASS v. PUBLIC TRUSTEE*, [1914] W. N. 368.

**4755. No power to accept trust for charitable or religious purposes—Public Trustee Act, 1906 (c. 55), s. 2 (5)—Whether provision applicable to corporation appointed as custodian trustee.]—***Re CHERRY'S TRUSTS, ROBINSON v. WESLEYAN METHODIST CHAPEL PURPOSES TRUSTEES*, No. 4735, *ante*.

**4756. ——— Selection of charitable objects.]—**A devise to the Public Trustee of mines & minerals under certain lands upon trust for sale & to hold the net proceeds in trust for such charitable institution or institutions or other charitable object or objects for the benefit of mankind in the county of Kent, as the Public Trustee might in his absolute discretion select, is a trust exclusively for charitable purposes which the Public Trustee is precluded from accepting by Public Trustee Act, 1906 (c. 55), s. 2 (5).

In such a case the power of selecting the charitable objects attaches to the office of the trustee so as to be exercisable by the persons appointed to act as trustees in place of the Public Trustee.—*Re HAMPTON, PUBLIC TRUSTEE v. HAMPTON* (1918), 88 L. J. Ch. 103; 63 Sol. Jo. 68.

**4757. Powers confined to English settlements.]—**It is not competent to the Public Trustee to accept the trusteeship of any settlement other than an English one.

Where the trustees of a marriage contract, which, when executed, was in form & substance a Scottish settlement, desired to appoint the Public Trustee to be sole trustee of the settlement, on the ground that the matrimonial domicile, the present trustees, the beneficiaries, & the trust investments were all English:—*Held*: the settlement still remained a Scottish settlement to be construed according to Scottish Law, & there was no statutory power enabling the Public Trustee to accept the trusteeship of what was a foreign settlement.—*Re HEWITT'S SETTLEMENT, HEWITT v. HEWITT*, [1915] 1 Ch. 228; 84 L. J. Ch. 358; 112 L. T. 287; 31 T. L. R. 81; 59 Sol. Jo. 177.

**Administration of small estates.]—***See* Sub-sect. 2, *post*.

#### SUB-SECT. 2.—ADMINISTRATION OF SMALL ESTATES.

*See Public Trustee Act, 1906 (c. 55), s. 3.*

**4758. Time for ascertaining value—Date of application to Public Trustee—Not date of deceased's death.]—**Public Trustee Act, 1906 (c. 55), s. 3, applies throughout to the estates of deceased persons, & not to trusts created by settlements.

In the administration of a small estate by the Public Trustee, under Public Trustee Act, 1906 (c. 55), s. 3, the date for ascertaining the gross capital value of such an estate, which must be proved to be less than £1000, is the date of the application to the Public Trustee to assume the administration, and not the date of the death of deceased:—*Held*: an estate which, at the death of deceased, was of the gross capital value of £128 10s. 2d., but at the date of the application to the Public Trustee had been reduced by partial distribution to £571 11s. 10d. Consols, was a small estate within the meaning of the Act.—*Re DEVEREUX, TOOVEY v. PUBLIC TRUSTEE*, [1911] 2 Ch. 545; 80 L. J. Ch. 705; 105 L. T. 407; 27 T. L. R. 574; 55 Sol. Jo. 715.

**4759. Power confined to estates of deceased persons—Not applicable to settlements.]—***Re DEVEREUX, TOOVEY v. PUBLIC TRUSTEE*, No. 4758, *ante*.

**4760. Form of order.]—***Re WELLS*, [1915] W. N. 12.

#### SECT. 4.—REMUNERATION AND COSTS.

*See Public Trustee Act, 1906 (c. 55), ss. 7–9, 11.*

**4761. Remuneration—Income fee for annuities—Payable from annuities—Not from residue.]—**The income fee payable to the Public Trustee in respect of life annuities bequeathed by a will is payable out of those annuities & not out of residue.—*Re BENTLEY, PUBLIC TRUSTEE v. BENTLEY*, [1914] 2 Ch. 456; 84 L. J. Ch. 54; 111 L. T. 1097.

**4762. ——— Withdrawal fee—Payable from residue.]—**The withdrawal fee payable to the Public Trustee on a final distribution of such a trust fund is a trust expense incurred in making that final distribution & must be borne by the residuary legatees of the fund.—*Re HICKLIN, PUBLIC TRUSTEE v. HOARE*, [1917] 2 Ch. 278; 86 L. J. Ch. 740; 117 L. T. 403; 33 T. L. R. 478; 61 Sol. Jo. 630.

**4763. Costs—Appearance under Trading with the Enemy Rules, 1915—Failure of summons.]—**S. & W., a firm of stockbrokers in London, creditors of W. of Berlin for the sum of £1,400, received from W. in payment of his debt a cheque drawn to his order drawn by a German bank upon the London & Liverpool Bank of Commerce, Ltd. of London, & indorsed by him to S. & W. On presentation the cheque was dishonoured & subsequently protested. On application for payment the Liverpool bank first pleaded the Moratorium Proclamation, then the state of war & the provisions of Trading with the Enemy Act, 1914 (c. 87); & lastly, that they had no funds available to meet the draft in question. The German bank had a current account with the Liverpool bank, & the position of this account was such that the Liverpool bank considered that they were entitled to assert their bankers' lien upon the assets coming to their hands in order to meet the liabilities arising on that account from drafts to a large amount for the debit of the German bank & also from unmatured acceptances. The Liverpool

#### PART IX. SECT. 3, SUB-SECT. 1.

**d. Power to borrow money on trust estate—Borrowing not prohibited by will.]—**The Public Trustee apparently has

power under Public Trust Office Consolidation Act, 1894, s. 27 (7), as amended, to borrow money on trust property, where the instrument creating the trust does

not expressly prohibit borrowing up to the sum of £2,000 without obtaining the leave of the ct.—*Re ARMSTRONG'S WILL* (1907), 26 N. Z. L. J. 1101.—N.Z.

**Sect. 4.—Remuneration and costs. Sects. 5, 6 & 7.]**

bank stated that having regard to those liabilities there was no credit available to meet the cheques in question. S. & W. thereupon took out an originating summons under Trading with the Enemy Amendment Act, 1914 (c. 12), s. 4, for an order vesting the property held by the Liverpool bank in the Public Trustee as custodian:—*Held*: the Public Trustee appeared in accordance with the above rules (2), (3) & the summons having failed appcts. must pay his costs.—*Re BANK FÜR HANDEL UND INDUSTRIE*, [1915] 1 Ch. 848; 84 L. J. Ch. 435; 113 L. T. 228; 31 T. L. R. 311.

**SECT. 5.—AUDIT OF TRUST ACCOUNTS.**

*See* Public Trustee Act, 1906 (c. 55), s. 13.

**4764. Not confined to capital matters.]—**An auditor having been appointed by the Public Trustee to investigate the condition & accounts of a trust estate, the acting trustee declined to produce to the auditor the necessary books & documents except on the terms that the costs of the audit should be borne by those beneficiaries who had asked for it:—*Held*: (1) the trustee had not right to refuse access to the books & documents by the auditor; (2) there was no ground for limiting the audit to capital matters.—*Re WILLIAMS* (1910), 26 T. L. R. 604.

**4765. Auditor appointed by Public Trustee—Right to production of books & documents—Duty of acting trustee to produce.]—***Re WILLIAMS*, No. 4764, *ante*.

**4766. Costs—Direction for payment otherwise than out of trust estate—Duty of Public Trustee to hear parties.]—**(1) Where the Public Trustee directs that the costs of an audit of trust accounts under Public Trustee Act, 1906 (c. 55), s. 13, shall be paid otherwise than out of the trust estate, the person ordered to pay the costs can appeal to the ct. under sect. 10 of the Act, from his decision.

(2) Sect. 10 of the Act applies to all decisions of the Public Trustee in discharge of his judicial functions under the Act.

(3) Before making an order for payment of the costs of an audit under sect. 13 of the Act otherwise than out of the trust estate the Public Trustee should hear the parties if they desire to be heard.

(4) The Public Trustee ought not to be made a party to an appeal, though the ct. which hears, & may in matter of doubt ask him to state his reasons for his decision.

(5) *Qu.*: whether an appeal does not lie from every act or omission of the Public Trustee in the performance of his administrative functions under the Act.—*Re ODDY*, [1911] 1 Ch. 532; 80 L. J. Ch. 404; 104 L. T. 338; 27 T. L. R. 312; 55 Sol. Jo. 348.

*Annotation*:—*As to* (1) *Consd. Re Utley, Russell v. Cubitt* (1912), 106 L. T. 858.

**4767. ——— Right of appeal.]—***Re ODDY*, No. 4766, *ante*.

**4768. ——— Unreasonable application for audit.]—**Testator died in 1876. In the events that had happened certain shares of residue had been paid away, three remaining in trust. These shares were represented by £3,000 Consols. Appct. was entitled for life to one-third share, & applied in 1908 for an audit and investigation of the accounts from testator's death. The Public Trustee directed an audit of the account. The result was that it was shown some former trustee sold Consols & bought ground rents; these ground rents were sold, & the proceeds reinvested in Consols, a larger sum being obtained than if the Consols had never been sold owing to the depreciation of Consols. Appct. consulted a solr. in 1906, independent accountants furnished accounts from 1899 to 1906, & her solrs. stated they were satisfied. With all this information appct. applied to the Public Trustee for an investigation & audit of the trust account under Public Trustee Act 1906 (c. 55), s. 13. Having regard to all the circumstances, the Public Trustee came to the conclusion that appct. acted unreasonably, & he directed that she should bear the costs of the audit and investigation:—*Held*: the Public Trustee was right.—*Re UTLEY, RUSSELL v. CUBITT* (1912), 106 L. T. 858; 56 Sol. Jo. 518.

**SECT. 6.—APPEAL AGAINST DECISIONS.**

*See* Public Trustee Act, 1906 (c. 55), s. 10.

**4769. Whether appeal confined to acts & omissions in administration.]—***Re ODDY*, No. 4766, *ante*.

**4770. Public Trustee not to be made party—Appeal from decision in discharge of judicial function.]—***Re ODDY*, No. 4766, *ante*.

**4771. Public Trustee may be asked to state reasons for decision—In matters of doubt.]—***Re ODDY*, No. 4766, *ante*.

**SECT. 7.—APPOINTMENT OF TRUSTEES IN PLACE OF PUBLIC TRUSTEE.**

*See* Law of Property Act, 1925 (c. 20), sched. I, Part IV., s. 1 (4).

**4772. By persons interested—Trustees for sale.]—**Where land was held in four equal undivided shares, the owner of one share & the trustees for sale of the three remaining shares appointed new trustees in the place of the Public Trustee:—*Held*: the trustees for sale were "persons interested in more than an undivided half of the land or the income thereof," & the appointment of new trustees was valid.—*Re CLIFF CONTRACT*, [1927] 2 Ch. 94; 96 L. J. Ch. 278; 137 L. T. 372; 71 Sol. Jo. 389. *Annotation*:—*Apld. Re Hayward, Merson v. Hayward*, [1928] Ch. 387.

**4773. ———.]—**Trustees for sale of an aliquot part of the land held in undivided shares are "persons interested" within the meaning of Law of Property Act, 1925 (c. 20), s. 35.—*Re HAYWARD, MERSON v. HAYWARD*, [1928] Ch. 387; 97 L. J. Ch. 197; 138 L. T. 735; 71 Sol. Jo. 845.

**PART IX. SECT. 5.**

*e. Costs.]—Re McKAY* (N. W. T.) (1906), 5 W. L. R. 79.—**CAN.**

## TUBERCULOSIS.

*See* WORK AND LABOUR.

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## TUG AND TOW.

*See* ADMIRALTY ; SHIPPING AND NAVIGATION.

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## TUNNELS.

*See* HIGHWAYS, STREETS, AND BRIDGES ; RAILWAYS AND CANALS ; SEWERS AND DRAINS.

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## TURBARY.

*See* COMMONS AND RIGHTS OF COMMON ; EASEMENTS AND PROFITS À PRENDRE.

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## TURNPIKES.

*See* HIGHWAYS, STREETS, AND BRIDGES.

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## UBERRIMA FIDES.

*See* AGENCY ; CONTRACT ; EQUITY ; FAMILY ARRANGEMENTS ; GUARANTEE AND INDEMNITY ;  
INSURANCE ; PARTNERSHIP ; SOLICITORS ; TRUSTS AND TRUSTEES.

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## ULTRA VIRES.

*See* COMPANIES ; CORPORATIONS.

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## UMPIRE.

*See* ARBITRATION ; BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS ; RAILWAYS AND  
CANALS.

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## UNCONSCIONABLE BARGAINS.

*See* EQUITY ; FRAUDULENT AND VOIDABLE CONVEYANCES ; MONEY AND MONEY-LENDING.

## UNDERLEASE.

*See* LANDLORD AND TENANT.

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## UNDER-SHERIFF.

*See* SHERIFFS AND BAILIFFS.

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## UNDERTAKERS.

*See* BURIAL AND CREMATION ; COMPULSORY PURCHASE OF LAND AND COMPENSATION ; ELECTRIC LIGHTING AND POWER ; GAS ; RAILWAYS AND CANALS ; TELEGRAPHS AND TELEPHONES ; WATER SUPPLY.

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## UNDERWOOD.

*See* AGRICULTURE ; COMMONS AND RIGHTS OF COMMON ; LANDLORD AND TENANT ; SETTLEMENTS.

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## UNDERWRITERS.

*See* INSURANCE.

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## UNDEVELOPED LAND DUTY.

*See* REVENUE.

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## UNDUE INFLUENCE.

*See* CONTRACT ; EQUITY ; FRAUDULENT AND VOIDABLE CONVEYANCES ; GIFTS ; INFANTS AND CHILDREN ; LUNATICS AND PERSONS OF UNSOUND MIND ; MISREPRESENTATION AND FRAUD ; WILLS.

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## UNDUE PREFERENCE.

*See* BANKRUPTCY AND INSOLVENCY ; CARRIERS.

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## UNEMPLOYMENT INSURANCE.

*See* WORK AND LABOUR.

## UNINCORPORATED ASSOCIATIONS.

*See* BUILDING SOCIETIES ; CLUBS ; FRIENDLY SOCIETIES ; INDUSTRIAL, PROVIDENT AND SIMILAR SOCIETIES ; LOAN SOCIETIES.

## UNION OF BENEFICES.

*See* ECCLESIASTICAL LAW.

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## UNION OF PARISHES.

*See* ECCLESIASTICAL LAW ; POOR LAW.

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## UNION OF SOUTH AFRICA.

*See* DEPENDENCIES.

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## UNIONS.

*See* POOR LAW.

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## UNITARIANS.

*See* ECCLESIASTICAL LAW.

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## UNIVERSITIES.

*See* COURTS ; EDUCATION.

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## UNLAWFUL ASSEMBLY.

*See* CRIMINAL LAW AND PROCEDURE.

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## UN SOUND FOOD.

*See* FOOD AND DRUGS.

## URBAN DISTRICT COUNCIL.

*See* LOCAL GOVERNMENT.

## URBAN SANITARY DISTRICT.

*See* LOCAL GOVERNMENT ; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

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## URINALS.

*See* PUBLIC HEALTH AND LOCAL ADMINISTRATION.

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## USAGE.

*See* CUSTOM AND USAGES ; SHIPPING AND NAVIGATION ; THEATRES AND OTHER PLACES OF ENTERTAINMENT ; TRADE AND TRADE UNIONS.

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## USE AND OCCUPATION.

*See* LANDLORD AND TENANT.

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## USES.

*See* REAL PROPERTY AND CHATTELS REAL ; TRUSTS AND TRUSTEES.

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## USURY.

*See* MONEY AND MONEY-LENDING.

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## VACANT POSSESSION.

*See* LANDLORD AND TENANT ; PRACTICE AND PROCEDURE.

## VACATION.

*See* JUDGMENTS AND ORDERS ; TIME.

## VACCINATION.

*See* PUBLIC HEALTH AND LOCAL ADMINISTRATION.

## VAGABOND.

*See* CRIMINAL LAW AND PROCEDURE ; POOR LAW.

## VAGRANCY.

*See* POOR LAW.

## VALUABLE CONSIDERATION.

*See* CONTRACT ; FRAUDULENT AND VOIDABLE CONVEYANCES ; SETTLEMENTS.

## VALUATION LIST.

*See* RATES AND RATING.

## VALUATIONS.

*See* REVENUE ; VALUERS AND APPRAISERS.

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## VALUED POLICY.

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# VALUERS AND APPRAISERS.

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*Arbitrators* . . . . . See ARBITRATION.  
*Auctioneers* . . . . . „ AUCTION AND AUCTIONEERS.  
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*Excise Licences* . . . . . „ REVENUE.  
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## Part I. In General.

See Appraisers Licences Act, 1806 (c. 43), ss. 4-7; Revenue (No. 1) Act, 1801 (c. 21), ss. 11, 13; Revenue (No. 2) Act, 1804 (c. 50), s. 6; County Courts Act, 1888 (c. 43), s. 159.

**Valuation & arbitration distinguished.**—See ARBITRATION, Vol. II., pp. 319-322, Nos. 51-71.

**1. Position inter se of parties concerned with valuation.**—Valuer to be appointed by both parties.—**Duty to nominate.**—The parties to an agreement for the sale of the cropping of a garden agreed to nominate & appoint on a day certain each his own valuer, that the valuation should take place on another day fixed, & that on some day between the day of nomination & the day for valuation, the valuers should appoint an umpire:—*Held*: each was bound, on the day fixed for the nomination,

to communicate to the other the name of the valuer nominated by him, as well as to nominate him.—*TEW v. HARRIS* (1847), 11 Q. B. 7; 17 L. J. Q. B. 1; 11 Jur. 947; 116 E. R. 376; *sub nom.* *DEW v. HARRIS*, 10 L. T. O. S. 87.

**2. — Duty to communicate name of nominee to other party.**—*TEW v. HARRIS*, No. 1, *ante*.

**3. — Valuer to be appointed by one party.—Whether amounting to undertaking.—That valuer shall act.**—An agreement to settle disputes between two parties as to the amount to be paid by one of them, in respect of the value of goods belonging to, or work done by the other of them, by a reference to two valuers, one to be appointed by each party, does not import any undertaking

### PART I.

**a. Appraiser to be appointed by both parties.**—*Umpire chosen after disagreement.*—A statute directed that each party should choose an appraiser, & that the two appraisers so chosen should select a third, & that the three so selected should determine the matter in controversy, the decision agreed on by two of them to be binding.

The two appraisers attempted, without appointing a third, to make the appraisal; but, disagreeing, finally, appointed a third. An appraisement agreed upon by this third & one of the others was sustained.—*Re KENNY* (1856), 3 N. S. L. (2 Thom.) 14.—**CAN.**  
**b. Whether valuation or arbitration intended.**—*Re LAIDLAW & CAMPBELL*, FORD, LAKE ONTARIO & WESTERN

Ry. Co. (1914), 25 O. W. R. 431; 31 O. L. R. 209; 19 D. L. R. 481; 6 O. W. N. 196.—**CAN.**

**c. Abortive reference.**—Two leases of adjoining lots were by assignment vested in C. Each lease provided that if, on its expiration, the lessor refused to renew, he should give notice thereof to the lessee & that valuers should be appointed

by the former that the valuer whom he may appoint shall act in the valuation, nor any liability for his not acting. The party is only bound to appoint a valuer on his part, & if the person appointed does not act, the other party is remitted to his original cause of action, & may revoke his submission; or may possibly, if the valuer has undertaken to act & failed in his duty, have a right of action against him; but has no right of action against the party who appointed him.—*COOPER v. SHUTTLEWORTH* (1856), 25 L. J. Ex. 114.

*Annotation*:—*Relf. Clarke v. Westrope* (1856), 18 C. B. 785.

#### Failure of valuer to act—

**Liability for failure.**—*COOPER v. SHUTTLEWORTH*, No. 3, *ante*.

**5. — Mistaken valuation—Clerical error—Party not entitled to advantage therefrom.**—In the sale of a grocery & malt business the valuers, by a slip, valued 542 sacks of malt as 542 grs. The purchaser, having accepted bills for the amount of the purchase-money, refused to pay so much thereof as represented the excess caused by the over valuation of the malt. In an action by the vendor to recover this amount:—*Held*: this was a mere clerical error, & not an erroneous exercise of judgment, & pltf. was not entitled to recover.—*GORDEN v. FUNNELL* (1899), 15 T. L. R. 547.

**6. Option to purchase at valuation—Option to be declared before valuation.**—*EDWARDS v. EDWARDS* (1837), 1 Jur. 654.

*Annotation*:—*Mentd. West London Syndicate v. I. R. Comrs.*, [1898] 2 Q. B. 507.

**7 Work done by unlicensed valuer—Whether remuneration recoverable.**—To a declaration for work & labour deft. pleaded that the work, etc., consisted of an appraisement of personal property, which pltf. appraised in expectation of reward to be therefore paid by deft. to him, without being duly licensed according to 46 Geo. 3, c. 43:—*Held*: the plea was sufficient, without stating that pltf. did the work as an appraiser, as it followed the words of the Act.—*PALK v. FORCE* (1848), 12 Q. B. 666; 17 L. J. Q. B. 299; 12 L. T. O. S. 104; 12 Jur. 797; 110 E. R. 1020.

**8. Evidence of valuation—Sufficiency.**—By agreement between A. & B. it was agreed that B. should buy of A. certain plant, materials & tools "at a valuation to be made by A. & a person to be appointed by B." & that B. should pay for same by a bill for £150 at two months from the valuation & by another bill for the balance of the valuation at three months after date. Under this agreement B. was let into possession & A., & J., who represented B., met & proceeded to value having a list of the articles to be valued, as to all of which except certain timber the prices were finally agreed upon; but, as to the timber the price per foot & the superficial measurement only were agreed upon, the calculation of the cubical contents & the carrying out the amount being left

to be filled in by B.'s foreman. A. & J. never met again, & did not agree upon the sum total; but B., after action brought for it, paid the £150:—*Held*: sufficient evidence to warrant the jury in finding that a valuation had been made by A. & J.—*GORDON v. WHITEHOUSE* (1856), 18 C. B. 747; 25 L. J. C. P. 300; 139 E. R. 1504.

*Annotation*:—*Mentd. Collins v. Collins* (1858), 26 Beav. 306.

**9. Property affected by nuisance—Action to restrain nuisance—Consent order for purchase by defendant of property affected—Declaration by court as to basis of valuation.**—Pltf. filed a bill to restrain deft. from injuring his farms by copper smoke, & also brought an action for damages. Before trial of the action an order was made by consent in the suit that deft. should purchase pltf.'s interest in the farms at a price to be ascertained & certified by a surveyor, & that pltf. should be at liberty to claim damages in the action down to the date of the surveyor's certificate. A dispute took place before the surveyor whether the valuation ought to be according to the existing state of the farms or according to their state before they were injured by the copper smoke. The parties being unable to agree, the surveyor stated that he would hear arguments & decide the question of principle. The Vice-Chancellor then made an order, declaring that the valuation ought to be according to the existing state of the farms:—*Held*: such declaration ought not to have been made, & it was discharged without prejudice to any question.—*POUGHTON v. BANKART* (1801), 3 De G. F. & J. 16; 30 L. J. Ch. 182; 3 L. T. 606; 7 Jur. N. S. 57; 9 W. R. 215; 45 E. R. 783, L. J.J.

**10. Acceptance of valuation "under protest"—Delay in disputing valuation—Right to dispute barred.**—Pltf. disputed an award of valuers for the price of growing crops, on the ground that it was made upon a wrong principle. On settlement he took the sum awarded, & signed a receipt for it, writing the words "under protest" at the top. He afterwards waited nine months, & then filed his bill:—*Held*: he was precluded by delay & what amounted to acquiescence from disputing the valuation.—*PARROTT v. SHELLARD* (1868), 16 W. R. 928.

**11. Applications by valuer appointed by Tithe Commissioners—Jurisdiction of county court to entertain.**—A county ct. judge has jurisdiction under Tithe Act, 1891 (c. 8), s. 10 (4), to hear applications by a valuer duly appointed by the comrs. under Tithe Acts for the recovery of sums due in respect of redemption money.—*R. v. PATERSON*, [1895] 1 Q. B. 31; 64 L. J. Q. B. 20; 71 L. T. 671; 43 W. R. 127; 11 T. L. R. 11; 39 Sol. Jo. 28; *sub nom.* *R. v. ESSEX COUNTY COURT JUDGE*, 15 R. 79, D. C.

**Abortive reference to arbitration—Failure regarding valuation.**—*See ARBITRATION*, Vol. II., pp. 385-386, Nos. 459-471.

to value the buildings on the land. Notice was given under each lease & valuers were appointed who without objection valued the buildings on the two lots as a whole. In an action by the lessee to recover the amount so awarded:—*Held*: the valuation of the buildings on the lots should have been ascertained separately & the action should not be dismissed but the same or other valuers should be appointed

to ascertain the value in a proper manner.—*IRWIN v. CAMPBELL* (1915), 51 S. C. R. 358; 23 D. L. R. 279.—*CAN.*

**d. Method of appraisal.**—On an appraisal the umpire & appraisers are within their jurisdiction, having applied their minds to the "right thing" to form their own opinions, from their own knowledge, inspection or examination or from such other source as they

may deem proper, as to the fair value & proper charge or allowance to be made in respect of the matter submitted to them. It is not incumbent on them to state how they acted, & it is impossible for the ct. to ascertain what considerations have affected their judgment.—*SEARLE v. ALLIANCE INSURANCE CO.* (No. 3), [1926] 4 D. L. R. 1173; [1926] 3 W. W. R. 563; 36 Man. L. R. 110.—*CAN.*

## Part II.—Duties, Rights and Liabilities.

### SECT. 1.—IN GENERAL.

**12. Valuer must act in person—Valuation by valuer's clerk—Parties not bound.]**—In an action on an agreement for the sale of goods, at a valuation to be made by A., the issue was, whether a valuation was made by A. It appeared that the goods were in fact valued by B., A.'s clerk:—*Held*: debt. was not bound by it, unless it were shown that it was agreed between the parties that B.'s valuation should be taken as A.'s; & the fact of debt.'s seeing B. valuing, & making no objection until B. told him the amount, was not evidence of such agreement.—*ESS v. TRUSCOTT* (1837), 2 M. & W. 385; *MURP. & H. 75*; 6 L. J. Ex. 144; 1 Jur. 358; 150 E. R. 800.

**13. Knowledge of law of valuation—Necessity for precise & accurate knowledge.]**—(1) One who holds himself out as a valuer of ecclesiastical property, though he is not bound to possess a precise & accurate knowledge of the law respecting the valuation of dilapidations as between outgoing & incoming incumbent, is bound to bring to the performance of the duty he undertakes a knowledge of the general rules applicable to the subject, & of the broad distinction which exists between the cases of a valuation as between incoming & outgoing tenant, & a valuation as between incoming & outgoing incumbent.

(2) If debts., in consideration of pltf.'s retainer, had entered into a written engagement that they were gratified to all & understood the subject, there is no rule of law which would have protected them from liability for a loss caused by a breach of that engagement (*per CUR.*).—*JENKINS v. BETHAM* (1855), 15 C. B. 168; 3 C. L. R. 373; 24 L. J. C. P. 94; 24 L. T. O. S. 272; 1 Jur. N. S. 237; 3 W. R. 283; 139 E. R. 384.

*Annotations*:—As to (1) *Distd.* *Pappa v. Rose* (1871), L. R. 7 C. P. 32. *Reid.* *Harmer v. Cornelius* (1858), 32 L. T. O. S. 62; *Pappa v. Rose* (1872), L. R. 7 C. P. 525; *Turner v. Goulden* (1873), L. R. 9 C. P. 57. As to (2) *Consd.* *Chambers v. Goldthorpe, Restell v. Nye*, [1901] 1 K. B. 624. *Generally.* *Reid.* *Cooper v. Shuttleworth* (1856), 25 L. J. Ex. 114.

**14. — Knowledge of rules of general application.]**—*JENKINS v. BETHAM*, No. 13, *ante*.

**15. Failure to act—Liability to action.]**—*COOPER v. SHUTTLEWORTH*, No. 3, *ante*.

**16. Entry on land for purpose of valuation—Allotment under Inclosure Acts.]**—A valuer appointed under Inclosure Act, 1845 (c. 118), is entitled to enter upon the land of the owner of the land which is subject to the right of common for the purpose of making a survey & map as directed by the Act.—*GRUBB v. BROWN* (1858), 32 L. T. O. S. 89; 7 W. R. 8.

*Annotation*:—*Reid.* *Grubb v. Inclosure Comrs. for England & Wales* (1861), 9 C. B. N. S. 612.

**17. Right to set out private roads—Land allotted under Inclosure Acts by Inclosure Commissioners.]**—It is competent to the Inclosure Comrs., under Inclosure Act, 1845 (c. 118), to order the valuer to set a private or occupation road over land directed by the provisional order to be allotted to an individual in lieu of his rights in the lands to be inclosed, unless the provisional order expressly declares that his allotment shall be exempt from such a burden.—*GRUBB v. INCLOSURE COMRS. FOR ENGLAND & WALES* (1861), 13 C. B. N. S. 805; 31

L. J. C. P. 221; 5 L. T. 590; 10 W. R. 92; 143 E. R. 317, Ex. Ch.

**18. —.]**—A valuer who makes an award under Inclosure Act, 1845 (c. 118), has a discretion in each case as to the amount of formation & completion of private or occupation roads & ways set out by him in his award. The liability under sect. 68 of the Act to maintain & keep repaired the private or occupation roads & ways arises after they have been formed & completed, & is confined to the extent to which they have been formed & made up.

The valuer may, where it is necessary, set out footways to accommodate inclosed lands or adjoining owners.—*REYNOLDS v. BARNES*, [1900] 2 Ch. 361; 78 L. J. Ch. 641; 101 L. T. 71; 73 J. P. 330.

**19. Duty to use care & skill.]**—*CANN v. WILLSON*, No. 28, *post*.

**20. —.]**—*BECK v. SMIRKE* (1894), *Hudson's Building Contracts*, 4th ed., Vol. II., p. 259.

**21. Duty to inquire into financial position of borrower—Valuer for mortgage.]**—*BECK v. SMIRKE* (1894), *Hudson's Building Contracts*, 4th ed., Vol. II., p. 259.

### SECT. 2.—CARELESS OR UNSKILFUL VALUATION.

**22. Liability for negligence.]**—*JENKINS v. BETHAM*, No. 13, *ante*.

**23. — Whether valuer acting as quasi-arbitrator.]**—Pltf. purchased the goodwill, stock & effects of a business at a valuation, the amount of which was to be fixed by valuers, one to be appointed on each side for that purpose, & in case of difference by an umpire to be chosen by the valuers. Pltf. employed debt. as his valuer, & debt. & the valuer appointed by the vendor fixed between them the amount of valuation. In an action for negligence in making such valuation, by which the value of the goodwill was fixed too high, pltf. applied to administer interrogatories to debt. to ascertain the basis on which he had agreed with the valuer of the vendor to calculate the valuation:—*Held*: debt. had not acted in the matter as an arbitrator, but as a valuer only, & was therefore liable to his employer for negligence, & pltf. accordingly was allowed to administer the interrogatories.—*TURNER v. GOULDEN* (1873), L. R. 9 C. P. 57; 43 L. J. C. P. 60.

*Annotation*:—*Reid.* *Re Hammond & Waterton* (1890), 62 L. T. 808.

**24. —.]**—A firm of surveyors was appointed jointly by the parties to a contract for the sale of certain growing timber, to value the timber. The vendor subsequently commenced proceedings against the surveyors for damages for negligence in respect of their valuation of the timber:—*Held*: the surveyors were in the position of quasi-arbitrators, & the action failed.—*BOYNTON v. RICHARDSON* (1924), 69 Sol. Jo. 107.

**25. — Proof of employment as valuer.]**—*CRABB v. BRINSLEY*, *CRABB v. SAME* (1888), 5 T. L. R. 14.

**26. —.]**—A firm of valuers were employed to value certain property with a view to its being offered as a mtge. security. The valuers were suggested by a firm of solrs., who were to find a

### PART II. SECT. 2.

**e. Liability for negligence—Unpaid valuer.]**—*Held*: in the absence of *malæ fides* debt., being an unpaid valuator, was not liable to make good

the loss sustained by pltf. by reason of an erroneous valuation.—*FRENCH v. SKEAD* (1876), 24 Gr. 179.—*CAN.*

(1). —.]—*GOWAN v. PATON* (1879), 27 Gr. 48.—*CAN.*

**f. — Paid valuer—Fraud of employer's agent.]**—A paid valuator is not liable to make good any loss sustained by the person employing him, by reason of his over-valuing the property,

mtgee., it being understood, both by the valuers & the solrs., that the valuation was to be made on behalf of the intended mtgee. Pltf., who was a client of the solrs., became the mtgee., on the faith of the valuation being made by the valuers. The valuation was not conducted with due skill & care, & the security turned out greatly insufficient:—*Held*: the true inference to be drawn from the evidence, apart from an admission contained in the pleadings, was that the valuers were actually employed by pltf., & as they had been negligent in the performance of the work undertaken, they were liable to pltf. for the damage caused by such negligence.—*SCHOLES v. BROOK* (1891), 64 L. T. 674, C. A.

*Annotations*:—*Consd.* *Le Lievre v. Gould*, [1893] 1 Q. B. 491. *Refd.* *Earl v. Lubbock* (1904), 74 L. J. K. B. 121; *Blacker v. Lake & Elliott* (1912), 106 L. T. 533.

27. — *Plaintiff acting on valuer's report.*—*(CRABB v. BRINSLEY, CRABB v. SAME* (1888), 5 T. L. R. 14.

28. — — — — — *]*—An intending mtgor., at the request of the solrs. of an intending mtgee., applied to a firm of valuers for a valuation of the property proposed to be mortgaged. A valuation at the sum of £3,000 was sent in by the valuers direct to the mtgee.'s solrs., & the mtge. was subsequently carried out. Default having been made in payment by the mtgor., & a loss having resulted to the mtgee., he commenced an action against the valuers for damages for the loss sustained through their negligence, misrepresentation, & breach of duty. The ct. being satisfied on the evidence that defts. knew at the time the valuation was made that it was for the purpose of an advance, & that the valuation as made was in fact no valuation at all:—*Held*: under the circumstances, defts. were liable on two grounds: (a) they, independently of contract, owed a duty to pltf. which they had failed to discharge; (b) they had made reckless statements on which pltf. had acted.—*CANN v. WILLSON* (1888), 39 Ch. D. 39; 57 L. J. Ch. 1034; 59 L. T. 723; 37 W. R. 23; 4 T. L. R. 588; 32 Sol. Jo. 542.

*Annotations*:—*N.F.* *Scholes v. Brook* (1891), 63 L. T. 837. *Overd.* *Le Lievre v. Gould*, [1893] 1 Q. B. 491. *Consd.* *Blacker v. Lake & Elliott* (1912), 106 L. T. 533.

29. — *Failure of duty.*—*CANN v. WILLSON*, No. 28, *ante*.

30. — *Reckless statements.*—*CANN v. WILLSON*, No. 28, *ante*.

31. — *To third parties—Mortgagees.*—*]*—Mtgees. of the interest of a builder under a building agreement advanced money to him from time to time on the faith of certificates given by a surveyor that certain specified stages in the progress of the buildings had been reached. The surveyor was not appointed by the mtgees., & there was no contractual relation between him & them. In consequence of the negligence of the surveyor the certificates contained untrue statements as to the progress of the buildings, but there was no fraud on his part:—*Held*: the surveyor owed no duty to the mtgees. to exercise care in giving his certificates, & they could not maintain an action against him by reason of negligence.—*LE LIEVRE v. GOULD*, [1893] 1 Q. B. 491; 62 L. J. Q. B. 353;

68 L. T. 626; 57 J. P. 484; 41 W. R. 468; 37 Sol. Jo. 207; 4 R. 274; *sub nom.* *DENNES v. GOULD*, 9 T. L. R. 243, C. A.

*Annotations*:—*Consd.* *Earl v. Lubbock* (1904), 74 L. J. K. B. 121; *Australian Steam Shipping Co. v. Devitt* (1917), 33 T. L. R. 178. *Refd.* *Lane v. Cox* (1896), 66 L. J. Q. B. 193; *Pritty v. Child* (1902), 71 L. J. K. B. 512; *Empress Assee. Corp. v. Bowring* (1905), 11 Com. Cas. 107; *Love v. Mack* (1905), 92 L. T. 345; *Compania Naviera Vasconzada v. Churchill & Sim*, *Same v. Burton*, [1906] 1 K. B. 237; *Blacker v. Lake & Elliott* (1912), 106 L. T. 533; *Banbury v. Bank of Montreal*, [1917] 1 K. B. 409; *Berg v. Rotterdamse Lloyd* (1918), 34 T. L. R. 272; *Everett v. Griffiths*, [1920] 3 K. B. 163; *Baker v. James*, [1921] 2 K. B. 674. *Mentd.* *Cavaller v. Pope*, [1905] 2 K. B. 757; *Weld-Blundell v. Stephens*, [1920] A. C. 956.

32. — — — — — *]*—C., a solr., was applied to by V., who was not his client, but who owned certain properties, to find someone who would advance money on the security of same. C. knew that R., another solr., who represented pltf. under a power of attorney, had money to advance, & at an interview between C. & R., it was arranged that an advance, to be guaranteed by an insurance society, should be made to V., but no stipulation for an independent valuation of the properties was then made. C., with authority to conduct the mtge. on these lines, requested an insurance society to insure the mtge., knowing that the society usually employed deft., a local valuer of repute. C. applied to the society for a copy of deft.'s valuation, & this application was ultimately acceded to by them, they saying that on future occasions when C. was acting for the mtgee. he should have a copy. The society repudiated responsibility for deft.'s fee, which was afterwards paid by V. through C. The society instructed deft. to value the properties, & he reported to them by a valuation written on their printed form. C. relied, to the knowledge of deft., on his valuation in making the advance on mtge. to V.:—*Held*: no contractual relation of principal & agent between pltf. & deft. was established; deft. never agreed to value for the use of pltf., & pltf. had not established any duty on the part of deft. towards him to exercise reasonable care & skill in & about the valuation.—*LOVE v. MACK* (1905), 93 L. T. 352, C. A.

33. *Costs of action against valuer—Taxation of defendants costs—Allowance for expenses of expert witnesses.*—*]*—In an action against a surveyor for improperly valuing goods at an excessive price, pltf., who had subpoenaed fifteen witnesses to prove his case, was non-suited. The master, in taxing deft.'s costs, disallowed the sums paid by him to witnesses, he had subpoenaed thirteen, for their charges & expenses in surveying the goods, in order to qualify them to give evidence at the trial. The ct. refused a rule to review the taxation.—*MAY v. SELBY* (1842), 4 Man. & G. 142; 4 Scott, N. R. 727; 11 L. J. C. P. 223; 134 E. R. 59.

*Annotations*:—*Appl.* *Ormerod v. Thompson* (1847), 16 M. & W. 860. *Refd.* *Curd v. Platt* (1864), 16 C. B. N. S. 469; *Nolan v. Copeman* (1873), L. R. 8 Q. B. 84.

### SECT. 3.—REMUNERATION.

34. *Ryde's Scale as basis of remuneration.*—*]*—Upon the taxation of a bill of costs relating to the

where he has been led into making such over-estimate by the improper conduct of the agent of the employer.—*SILVERTHORN v. HUNTER* (1879), 26 Gr. 390.—*CAN.*

h. — — — *Agent of loan company.*—The paid agent of a loan society, who professed to be skilled, & had a knowledge in the valuing of lands:—*Held*: liable to the society for a loss sustained by them by reason

of a false report of such agent.—*HAMILTON PROVIDENT & LOAN SOCIETY v. BELL* (1881), 29 Gr. 203.—*CAN.*

k. — — — — — *]*—In order to render the paid valuator of a loan company answerable for a loss caused by excessive valuation of property, it is not necessary to show that such valuation is made fraudulently.—*CANADA LAND CREDIT Co. v. THOMPSON*

(1883), 8 A. R. 696.—*CAN.*

l. — — — *Evidence—Misdirection.*—*O'SULLIVAN v. LAKE* (1889), 15 O. R. 544; 15 A. R. 711; 16 S. C. R. 636.—*CAN.*

### PART II. SECT. 3.

m. *Evidence of custom.*—Pltf., who was employed by deft. to make a valuation of the furniture on the sale of an hotel, claimed as his remunera-

*Sect. 3.—Remuneration. Part III. Sects. 1, 2, 3, 4, 5 & 6.]*

reinvestment in land of moneys paid into ct. under Lands Clauses Consolidation Act, 1845 (c. 18), the taxing master allowed a lump sum for surveyor's charges, being a commission on the amount of the purchase-money according to Ryde's scale, which is a scale prepared by an eminent surveyor of that name on the principle that a commission varying from five to one-half per cent. should be paid to the surveyor according to the amount of the purchase-money. An application was made to the ct. to direct the taxing master to review his taxation in respect of this item:—*Held*: the question was in reality one not of principle but of amount, & the ct. would not interfere; but if it were a question of principle a prevailing practice of paying surveyors by commission ought not to be disturbed.—*A.-G. v. DRAPERS' Co.* (1869), L. R. 9 Eq. 69; 21 L. T. 651.

35. —[—In 1914 a correspondence took place between pltf., who was a surveyor, & the clerk of the guardians of deft. union, with a view to pltf. acting as valuer for the guardians at an arbn. between them & the B. union, arising out of the dissolution of the A. union, the transfer of its property & liabilities to the B. union, & the inclusion in the deft. union of S., a parish hitherto in the A. union. In the opinion of the ct. pltf. throughout the correspondence believed & intended that he was to be remunerated on Ryde's scale on the basis of the value of the whole of the properties of the A. union, while the guardians believed & intended that the scale was to be applied only to the interest of their union in those properties. The contract for employment of pltf. as valuer was originally drawn in the sense understood & intended by him; but the draft was altered to the sense understood & intended by the guardians, & in that form it was executed by pltf. & sealed with the seal of the guardians:—*Held*: (1) on the evidence, pltf.'s mistake had been induced innocently by the guardians, & he was entitled to rescission of the agreement; (2) he was entitled to remuneration on a *quantum meruit*; the ct., however, declining to assess the remuneration with any direct reference to Ryde's scale, & expressing its disapproval of the principle of basing remuneration on the amount of the valuation.—*FARADAY v. TAMWORTH UNION* (1910), 86 L. J. Ch. 436; 81 J. P. 81; 15 L. G. R. 258.

*Annotation*:—*As to* (1) *Consd. Higgins v. Northampton Corpn.*, [1927] 1 Ch. 128.

36. — *Evidence of custom.*—There is no custom between surveyors & their clients by which the former could base their account on Ryde's scale of fees for surveyors charges; & a surveyor, in the absence of a special agreement, is only entitled to charge a fair & reasonable sum for his services.—*DEBENHAM v. KING'S COLLEGE, CAMBRIDGE* (1884), 1 T. L. R. 170; Cab. & El. 438.

37. —[—*BUCKLAND & GARRARD v. PAWSON & Co.* (1890), 6 T. L. R. 421.

38. *Valuation by direction of company promoter—Promoter not company liable for fees.*—By an agreement made between the vendor of certain ironworks & W. & H., it was agreed that, if W. & H. succeeded within three months in getting up a co. for the purchase of the ironworks at a valuation, they should out of the purchase-money,

receive £1,500. By an agreement, dated a few weeks later, the vendor agreed with W., as trustee for the co., that the co. should buy the ironworks at a valuation. W. & H. did not get up a co. within the three months, but after some time they formed a co. with seven shareholders, who were also the directors. These shareholders were not informed of the agreement to pay W. & H. the £1,500. The co. was registered, & by the arts. of assocn. the agreement for the purchase of the property at a valuation was adopted, & it was provided that the directors should pay all expenses incurred in getting up & registering the co. Very few other shares were applied for: none were allotted, & the co. was wound up. W. & H. claimed in the winding-up remuneration for their services both before & after the co. was formed, & the valuer claimed his charges for valuing:—*Held*: any claim which the valuer might have was against W. & H. only.—*Re HEREFORD & SOUTH WALES WAGGON & ENGINEERING CO.* (1876), 2 Ch. D. 621; *sub nom. Re HEREFORD & SOUTH WALES WAGGON & ENGINEERING CO., HEAD & WALTER'S CLAIMS*, 45 L. J. Ch. 461; 35 L. T. 40; *sub nom. Re HEREFORD & SOUTH WALES WAGON & ENGINEERING CO., WALTER & HEAD'S CLAIM*, 24 W. R. 953, C. A.

*Annotations*:—*Mentid. Re Empress Engineering Co.* (1880), 16 Ch. D. 125; *Re Rotherham Alum & Chemical Co.* (1883), 25 Ch. D. 103; *Hume v. Record Reim Jubilee Syndicate* (1899), 80 L. T. 404; *Re English & Colonial Produce Co.*, [1906] 2 Ch. 435.

39. *Reduction by court of fees allowed by taxing master—Without laying down standard.*—The ct. reduced the valuers' fees allowed by the taxing master upon an appeal, but refrained from setting up any definite standard for such fees.—*COURAGE v. ST. OLAVE'S UNION* (1896), Ryde & K. Rat. App. 13.

40. *Recovery on quantum meruit—Employment of valuer by local authority—Contract not under seal.*—An urban council, exercising the powers of the R. Improvement Comrs., applied to the Local Govt. Board to sanction a loan in order that they might, under powers conferred by Local Improvement Acts, purchase & extend the pier at R. The Board directed that a valuation & estimates should be prepared by an independent expert for the purposes of an inquiry. The council passed & confirmed a resolution appointing pltf. to value, estimate, & report, upon agreed terms. His report was used for the inquiry, but the Board refused to sanction the loan & the scheme was not proceeded with. Pltf. claimed the amount of his fees under a contract of employment or, alternatively, on a *quantum meruit*. The council refused payment on the ground that, as there was no contract under seal, Public Health Act, 1875 (c. 55), s. 174, had not been complied with:—*Held*: the contract was not made under the powers or for the purposes of Public Health Act, 1875 (c. 55), but under the powers & for the purposes of the Improvement Acts; Public Health Act, 1875 (c. 55), s. 174, had no application; & under the circumstances pltf. was entitled to his fees on a *quantum meruit*.—*DOUGLASS v. RHYL URBAN COUNCIL*, [1913] 2 Ch. 407; 82 L. J. Ch. 537; 109 L. T. 30; 77 J. P. 373; 29 T. L. R. 605; 57 Sol. Jo. 627; 11 L. G. R. 1162.

*Annotation*:—*Consd. Nixon v. Erith U. C.*, [1924] 1 K. B. 819.

41. — *Contract induced by mistake.*—*FARADAY v. TAMWORTH UNION*, No. 35, *ante*.

tion 5 per cent. on his valuation as being in accordance with the custom or usage of the business. Deft. denied the existence of the custom, & paid the

sum of £90 into ct. as a sufficient remuneration for the services:—*Held*: the alleged custom or usage had not been proved, & in any event it was

unreasonable, & the amount paid into ct. was sufficient remuneration.—*YOUNG v. DWYER*, [1926] N. Z. L. R. 682.—N.Z.

42. Remuneration based on amount of valuation.]—*FARADAY v. TAMWORTH UNION*, No. 35, *ante*.

Whether recoverable by unlicensed valuer.]—*See* No. 7, *ante*.

Whether recoverable when unstamped appraisal delivered.]—*See* No. 53, *post*.

Remuneration as part of negotiation fee—Recoverable by solicitor as costs of sale.]—*See* SOLICITORS, Vol. XLII., p. 239, No. 2716.

## Part III.—Particular Kinds of Valuation.

### SECT. 1.—IN GENERAL.

**Agricultural tenancies—Valuation of hay, straw & fodder.]**—*See* AGRICULTURE, Vol. II., pp. 25, 26, Nos. 150–153.

**Tenant's outgoing valuation.]**—*See* AGRICULTURE, Vol. II., p. 29, Nos. 167–169.

**Water board—Sale of pipes, mains & fittings.]**—*See* WATER SUPPLY, pp. 1060, 1061, No. 26, *post*.

**Tramway undertaking.]**—*See* TRAMWAYS & LIGHT RAILWAYS, p. 355, No. 115, *ante*.

**Appraisement on distress.]**—*See* DISTRESS, Vol. XVIII., pp. 341, 342, Nos. 769–778.

**Enfranchisement of copyholds.]**—*See* COPYHOLDS, Vol. XIII., pp. 155, 156, Nos. 2008–2017.

**Ecclesiastical dilapidations as waste.]**—*See* ECCLESIASTICAL LAW, Vol. XIX., p. 508, No. 3669.

### SECT. 2.—SALE OF LAND.

*See, generally*, SALE OF LAND, Vol. XL., pp. 17, 18, Nos. 48–54.

43. **Specific performance of agreement to sell at valuation—Price below real value.]**—Specific performance will not be decreed of an agreement to sell certain property at a price to be settled by two persons who are named, if the ct. sees reason to believe that the price subsequently fixed by these persons is considerably below the real value of the property.—*PARKEN v. WHITBY* (1823), *Turn. & R.* 366; 37 E. R. 1142.

*Annotations:—**Reid. Bower v. Cooper* (1843), 2 Hare, 408. *Mentl. Handley & Jones v. Edwards* (1838), 1 Curt. 722.

44. **No evidence of fraud.]**—Specific performance of an agreement to purchase at a price to be fixed by third persons named in the contract, decreed, though price thus fixed was inadequate, there being no evidence that the valuation was unfair.—*WEEKES v. GALLARD* (1869), 21 L. T. 655; 18 W. R. 331.

45. **No valuation made.]**—Claim for specific performance of agreement of a railway co. to purchase land from trustees.

By the terms of the agreement the land was to be valued, & the purchase-money was not to be less than £400. *Qu.:* whether this agreement could be enforced, no valuation having been made.—*POTTS v. THAMES HAVEN DOCK & RY. CO.* (1851), 15 Jur. 1004.

46. **High valuation—No evidence of fraud,**

**mistake or miscarriage.]**—Deft. agreed to purchase a property at a valuation to be made by A. The ct., though it considered A.'s valuation very high, " & perhaps exorbitant," decreed specific performance, there appearing neither " fraud, mistake, or miscarriage."—*COLLIER v. MASON* (1858), 25 Beav. 200; 53 E. R. 613.

**Compulsory purchase.]**—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 165, 229, Nos. 428–433, 1161–1164.

**Valuation of timber.]**—*See* AGRICULTURE, Vol. II., p. 100, Nos. 804, 809; SALE OF LAND, Vol. XL., p. 75, Nos. 583–586.

### SECT. 3.—SALE OF GOODS.

*See* SALE OF GOODS, Vol. XXXIX., pp. 411–414, Nos. 454–479.

### SECT. 4.—INVESTMENT OF TRUST FUNDS ON MORTGAGE.

**The valuation.]**—*See* MORTGAGE, Vol. XXXV., pp. 287, 288, Nos. 400–415.

**Proportion of valuation allowed for investment.]**—*See* MORTGAGE, Vol. XXXV., pp. 291, 292, Nos. 434–452.

**Employment of valuer.]**—*See* MORTGAGE, Vol. XXXV., pp. 294, 295, Nos. 469–477.

### SECT. 5.—TERMINATION OF PARTNERSHIP.

**On taking accounts as between partners inter se.]**—*See* PARTNERSHIP, Vol. XXXVI., pp. 470–472, Nos. 1348–1364.

**Valuation on dissolution.]**—*See* PARTNERSHIP, Vol. XXXVI., pp. 518, 519, Nos. 1887–1892.

### SECT. 6.—RATING ASSESSMENT.

**Basis of assessment generally.]**—*See* RATES & RATING, Vol. XXXVIII., pp. 518 *et seq.*

**Rating in metropolis—Nomination of valuer.]**—*See* RATES & RATING, Vol. XXXVIII., p. 644, Nos. 1620–1622.

### PART III. SECT. 2.

45 1. **Specific performance of agreement to sell at valuation—No valuation made.]**—Specific performance cannot be decreed of an agreement to sell at a

price to be settled by arbitrators named by the parties, if no award has been made; but if the parties are agreed as to a valuation, but have not appointed any persons to make the valuation,

the ct. will itself interfere so as to ascertain the value, & direct a specific performance of the agreement.—*DALY v. DUGGAN* (1839), 1 I. Eq. 11. 312.—*IR.*

## Part IV.—Stamps.

See Inclosure, etc. Expenses Act, 1868 (c. 89), s. 2; Stamp Act, 1891 (c. 39), s. 24, sched. 1; & generally, REVENUE, Vol. XXXIX., pp. 219 *et seq.*

**47. Necessity for stamp—Award stamp.]**—An appraisement does not require an award stamp, though in fact it is in the nature of an award.—*PERKINS v. POTTS* (1814), 2 Chit. 399.

**48. — Appraisement stamp.]**—*PERKINS v. POTTS*, No. 47, *ante*.

**49. — Appraisement for information of parties only.]**—A valuation made of the parish lands by two resident parishioners, appointed for that purpose at a parish meeting by the parish officers, with a view of equalising the rate to the relief of the poor:—*Held*: not to require an appraisement stamp, it being merely for the information of the parties employing the valuers.—*ATKINSON v. FELL* (1816), 5 M. & S. 240; 105 E. R. 1039.

*Annotation*:—*Refd.* Palk v. Forc (1848), 12 Q. B. 666.

**50. — Subsequently made basis of agreement.]**—A valuation made for the information of parties, & not binding on them, is not made liable to an appraisement stamp by 55 Geo. 3, c. 184, sched. Part I, Title Appraisement, though an agreement is afterwards founded on its data.—*JACKSON v. STOPHERD* (1834), 2 Cr. & M. 361; 4 Tyr. 330; 3 L. J. Ex. 95; 149 E. R. 800.

**51. — Memorandum stating amount of first valuation—Subject to second valuation.]**—On the trial, the following memorandum, signed by pltf. on Aug. 20, was tendered in evidence for the purpose of showing that pltf. had acquiesced in a valuation made on Aug. 2, but was rejected for

want of a stamp. "This note is to be subject to the revised valuation of Messrs. T. & K., & will be more or less than £41 Os. 8d., according as they value the corn.—N.B. The note was given up to me by Mr. W. this Aug. 20, 1844." The original & subsequent agreements had been given in evidence, properly stamped:—*Held*: the memorandum was admissible without a stamp, not being an "agreement, or any minute or memorandum of an agreement," or "evidence of a contract," within Stamp Act, 1815 (c. 184), Sched. Part I, Title Agreement.—*MARSHALL v. POWELL* (1846), 9 Q. B. 779; 1 New. Pract. Cas. 590; 16 L. J. Q. B. 5; 8 L. T. O. S. 159; 11 Jur. 61; 115 E. R. 1475.

**52. — Authority to survey & negotiate mortgage on commission.]**—A. being desirous of raising £5,000 on the security of lands, employed a person to survey the estate. The instrument, after authorising the survey of the property, went on to say " & upon such survey & valuation I authorise & request you to obtain for me £5,000, by way of mtge.," & then bound A. to certain remuneration:—*Held*: this instrument was an agreement merely, & did not require a letter of attorney stamp.—*TURNER v. JUDD* (1848), 11 L. T. O. S. 536; 12 J. P. 555.

**53. Appraisement delivered unstamped—Right of valuer to recover remuneration.]**—To a declaration in debt by an appraiser, for work & materials, etc., it was pleaded, that pltf. did not, within fourteen days after the making of the appraisement, deliver it to pltf., written on vellum, parchment, or paper, duly stamped: plea:—*Held*: bad on demurrer.—*SAUNDERS v. MORGAN* (1839), 8 L. J. Q. B. 200.

## VENDITIONI EXPONAS.

*See* EXECUTION; SHERIFFS AND BAILIFFS.

## VENDOR AND PURCHASER.

*See* SALE OF GOODS; SALE OF LAND.

## VENDOR AND PURCHASER SUMMONS.

*See* PRACTICE AND PROCEDURE; SALE OF LAND.

## VENDOR'S LIEN.

*See* LIEN; SALE OF GOODS; SALE OF LAND.



## VENTILATING SHAFTS.

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## VENTILATION.

*See* FACTORIES AND SHOPS ; MINES, MINERALS, AND QUARRIES ; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

## VENUE.

*See* ACTION ; CRIMINAL LAW AND PROCEDURE ; PRACTICE AND PROCEDURE.

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## VERMIN.

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## VERMINOUS PERSONS.

*See* PUBLIC HEALTH AND LOCAL ADMINISTRATION.

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## VESTED INTERESTS.

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## VESTED REMAINDER.

*See* REAL PROPERTY AND CHATTELS REAL ; SETTLEMENTS.

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## VESTING ORDER.

*See* BANKRUPTCY AND INSOLVENCY ; CHARITIES ; INFANTS AND CHILDREN ; LUNATICS AND PERSONS OF UNSOUND MIND ; MORTGAGE ; SALE OF LAND ; TRUSTS AND TRUSTEES.

## VESTMENTS.

*See* ECCLESIASTICAL LAW.

## VESTRY.

*See* ECCLESIASTICAL LAW ; LOCAL GOVERNMENT.

## VETERINARY SURGEONS.

*See* MEDICINE AND PHARMACY.

## VEXATIOUS ACTIONS.

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## VEXATIOUS INDICTMENTS.

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## VICAR.

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## VICAR-GENERAL.

*See* ECCLESIASTICAL LAW.

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## VICINAGE.

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## VICTUALLING HOUSES.

*See* INNS AND INNKEEPERS ; INTOXICATING LIQUORS.

## VIEW.

*See* CRIMINAL LAW AND PROCEDURE ; HIGHWAYS, STREETS, AND BRIDGES ; JURIES.

## VILLAGE GREENS.

*See* COMMONS AND RIGHTS OF COMMON ; OPEN SPACES AND RECREATION GROUNDS.

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## VINEGAR MAKERS.

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## VINTNER.

*See* COMPANIES ; INTOXICATING LIQUORS.

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## VIS MAJOR.

*See* TORT.

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## VISCOUNT.

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## VISITATION OF CHARITIES AND EDUCATIONAL ESTABLISHMENTS.

*See* CHARITIES ; CORPORATIONS ; EDUCATION.

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## VISITOR IN LUNACY.

*See* LUNATICS AND PERSONS OF UNSOUND MIND.

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## VIVISECTION.

*See* ANIMALS.

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## VOIDABLE CONVEYANCES.

*See* FRAUDULENT AND VOIDABLE CONVEYANCES.

## VOLUNTARY ASSIGNMENTS, BONDS, CONVEYANCES, AND SETTLEMENTS.

*See* BANKRUPTCY AND INSOLVENCY ; BONDS ; FRAUDULENT AND VOIDABLE CONVEYANCES ;  
GIFTS ; SETTLEMENTS.

## VOLUNTARY LIQUIDATION.

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SETTLEMENTS.

## VOTERS.

*See* ELECTIONS ; LOCAL GOVERNMENT.

## VOYAGE.

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## VOYAGE POLICY.

*See* INSURANCE.

## WAGERS.

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## WAGES.

*See* MASTER AND SERVANT ; SHIPPING AND NAVIGATION ; WORK AND LABOUR.

## WAIFS.

*See* CONSTITUTIONAL LAW.

## WAIVER.

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## WAR OFFICE.

*See* **CONSTITUTIONAL LAW.**

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## WAR OFFICE LANDS.

*See* **CONSTITUTIONAL LAW; ROYAL FORCES; TRAMWAYS AND LIGHT RAILWAYS.**

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## WARD OF COURT.

*See* **INFANTS AND CHILDREN.**

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## WARDS.

*See* **ELECTIONS; LOCAL GOVERNMENT.**

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## WAREHOUSEMEN.

*See* **BAILMENT; CARRIERS.**

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## WARNING LIGHTS.

*See* **RAILWAYS AND CANALS; SHIPPING AND NAVIGATION.**

## WARRANT.

*See* **CRIMINAL LAW AND PROCEDURE; MAGISTRATES; POLICE; SHERIFFS AND BAILIFFS.**

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## WARRANT OF ATTORNEY.

*See* **AGENCY.**

## WARRANTY.

*See* ANIMALS ; AUCTION AND AUCTIONEERS ; BAILMENT ; SALE OF GOODS.

## WARREN.

*See* COMMONS AND RIGHTS OF COMMON ; GAME.

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## WASHHOUSES.

*See* PUBLIC HEALTH AND LOCAL ADMINISTRATION.

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## WASTE.

*See* EQUITY ; LANDLORD AND TENANT ; SETTLEMENTS ; TRUSTS AND TRUSTEES ; WATER SUPPLY.

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## WASTE OF THE MANOR.

*See* COMMONS AND RIGHTS OF COMMON ; COMPULSORY PURCHASE OF LAND AND COMPENSATION ;  
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## WASTING SECURITIES.

*See* EXECUTORS AND ADMINISTRATORS ; TRUSTS AND TRUSTEES ; WILLS.

## WATCHES.

*See* TRADE MARKS, TRADE NAMES, AND DESIGNS.

## WATCHING AND LIGHTING.

*See* ELECTRIC LIGHTING AND POWER ; GAS ; HIGHWAYS, STREETS, AND BRIDGES ; LOCAL  
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## WATER BAILIFFS.

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## **WATER BOARD.**

*See* METROPOLIS ; WATER SUPPLY.

## **WATER CLOSETS.**

*See* METROPOLIS ; PUBLIC HEALTH AND LOCAL ADMINISTRATION ; WATER SUPPLY.

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## **WATER RIGHTS.**

*See* EASEMENTS AND PROFITS À PRENDRE ; WATER SUPPLY ; WATERS AND WATERCOURSES.



# WATER SUPPLY.

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*Baths and Washhouses* . See PUBLIC HEALTH.  
*Drains and Sewers* . „ SEWERS AND DRAINS.  
*Easements* . . . „ EASEMENTS.  
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*Nuisances* . . . „ NUISANCE.  
*Pollution of Water* . „ NUISANCE; WATERS  
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COURSES.

*Rating of Waterworks* . See RATES AND RATING.  
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*Water Rights* . . „ EASEMENTS; WATERS  
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## Part I.—Supply by Local Authorities.

### SECT. 1.—DUTIES OF LOCAL AUTHORITIES.

#### SUB-SECT. 1.—IN GENERAL.

**Duty to provide water supply.**—*See* Public Health Act, 1875 (c. 55), ss. 299–302; Local Government Act, 1894 (c. 73), s. 16.

1. **Duty to require supply to be obtained—Meaning of house—Partly question of fact.**—Whether a lock-up shop is a “house” within Public Health Act, 1875 (c. 55), s. 62, under which the local authority may require a supply of water to be provided for a house which is without such a supply, is to some extent one of fact.

When, therefore, justices held that such a shop, in which no one was engaged, but the owner, except that his daughter, used the attend during the dinner hour, was not a “house” within the sect.:—*Held*: on a case stated by the justices, they must be taken to have decided the question as one of fact, & their decision could not therefore be reviewed by the ct.—*WOOTTON v. BISHOP* (1907), 96 L. T. 705; 71 J. P. 334; 5 L. G. R. 760, D. C.

2. ——— **Lock-up shop.**—*WOOTTON v. BISHOP*, No. 1, *ante*.

3. ——— **Notice—Sufficiency of service.**—In proceeding to recover expenses of supplying water to a house at the owner's expense under 11 & 12 Vict. c. 63, s. 70, it is not necessary to prove any special resolution of the local board as a condition precedent; & if the notice to do the work was addressed to the owner & given to her rent collector, or agent, who gave it to the owner, who admitted receiving it, this is sufficient evidence of due service of the notice.—*CABALLERO v. LEWIS* (1874), 38 J. P. 614.

4. ——— **Recovery of expenses—Special resolution not condition precedent.**—*CABALLERO v. LEWIS*, No. 3, *ante*.

5. ——— **What expenses recoverable—Works executed under Public Health (Water) Act, 1878 (c. 25), s. 3.**—(1) By Public Health Act, 1875 (c. 55), s. 62, a local authority may, under certain conditions, require the owner of a house within their district to obtain a supply of water to his house, & in default of his compliance may themselves do the necessary work & recover the expenses from him. By the Public Health (Water) Act, 1878 (c. 25), s. 3, a rural sanitary authority may, where a house within their district has not within a reasonable distance from it a supply of water, & they think that such supply can be brought within a reasonable distance at a cost not exceeding certain specified limits of amount, require the owner to provide such supply within a reasonable distance of his house, & in default of his compliance may themselves execute the necessary works, & recover the costs from him:—*Held*: sect. 3 of the later Act did not apply to limit the amount of the expenses which the local authority might recover against the owner in proceedings under s. 62 of the earlier Act.

(2) Where, under Public Health Act, 1875 (c. 55), s. 62, an owner is required by the local authority to obtain a water supply from an unreasonable

distance, the remedy of the owner is by way of appeal to the Local Government Board under sect. 268 of that Act.—*WEST LANCASHIRE RURAL COUNCIL v. OGILVY*, [1899] 1 Q. B. 377; 68 L. J. Q. B. 215; 80 L. T. 162; 63 J. P. 166; 47 W. R. 363, D. C.

6. ——— **Failure of tenant to execute works—Right to charge rates.**—*SOUTHEND WATERWORKS CO. v. HOWARD*, No. 49, *post*.

7. ——— **Effect of Public Health (Water) Act, 1878 (c. 25), s. 3.**—Public Health (Water) Act, 1878 (c. 25), s. 3, enables authorities [rural sanitary] to cause houses within their districts to be provided with a supply of water where there is not an available supply within a reasonable distance, & does not apply to cases which come within Public Health Act, 1875 (c. 75), s. 62.

*Resp.* was the owner of nine cottages within the district of the Watford Rural Sanitary Authority, which were supplied with water from a well on the premises. This well was reported by the district medical officer to the sanitary authority to be polluted, & quite unfit for use. The authority thereupon served *resp.* with a notice, under Public Health Act, 1875 (c. 55), s. 62, requiring him to provide a proper supply of water for the cottages. Nothing having been done by *resp.* to supply the water, the sanitary authority laid on a supply of water to the cottages from the mains of appts. *Resp.* never in any way acknowledged the right of the sanitary authority to lay on the water, & refused to pay the water rate. *Resp.* was also the owner of another cottage for which he refused to pay the water rate, which purported to be assessed on the gross rental, & the amount of which was 10s., that being the minimum charge which, by the terms of their special Act, appts. could make:—*Held*: it was immaterial how the premises had been assessed, as appts. had charged the minimum charge which, by their special Act, they could charge; & also, this being so, there was no dispute as to the annual value of the premises which was required by Waterworks Clauses Act, 1847 (c. 17), s. 68, to be determined by two justices.—*COLNE VALLEY WATER CO. v. TREHARNE* (1884), 50 L. T. 617; 48 J. P. 279, D. C.

8. ——— **Owner's right of appeal.**—*WEST LANCASHIRE RURAL COUNCIL v. OGILVY*, No. 5, *ante*.

—[.]—*See* Public Health Act, 1875 (c. 55), s. 62.

9. **Maintenance of fire plugs—Public Health Act, 1875 (c. 55), s. 66—Liability of local authority—Plugs must be fixed at request of local authority.**—Waterworks Clauses Act, 1847 (c. 17), & Public Health Act, 1875 (c. 55), impose no obligation on an urban local authority to bear the expense of maintaining in repair the fire plugs in their district unless such fire plugs have been fixed by them or by some water co. or person at their request.—*GRAND JUNCTION WATERWORKS CO. v. BRENTFORD LOCAL BOARD*, [1894] 2 Q. B. 735; 63 L. J. Q. B. 717; 71 L. T. 240; 59 J. P. 51; 10 T. L. R. 572; 9 R. 788, C. A.

#### PART I. SECT. 1. SUB-SECT. 1.

a. **Duty to provide water supply.**—The court had jurisdiction to order water to be supplied to a newly annexed district by a municipal corp., where the order of the Ontario Ry. & Mun. Board, providing for the annexation, did not impose any obligations

upon the corp.—*MALONE v. HAMILTON* (1913), 23 O. W. R. 956; 4 O. W. N. 755; 10 D. L. R. 305.—*CAN.*

b. **Powers of public utilities commission—Whether municipality can be compelled to provide money for scheme of waterworks.**—A public utilities commission, elected pursuant to a bye-law

of a town council passed under Public Utilities Act, R. S. O. 1914 (c. 204), s. 34, has, by sect. 35 only the powers, authorities, rights & privileges of the council as the same are given to the council by the Act itself, & are authorised to exercise those powers & privileges only if the municipal council

10. — **Erection of misleading indication plate—Misfeasance.**—By Public Health Act, 1875 (c. 55), s. 66, every urban authority is required to cause fire plugs to be provided & maintained, & to "paint or mark on the buildings & walls within the streets, words or marks near to such fire plugs to denote the situation thereof."

*Defts.*, a local authority, affixed to a wall in a street which was not repairable by the inhabitants at large a plate intended to indicate the position of a fire plug in the water main & marked "F. P. 22 ft. 3 in."; in fact, a line drawn straight from the plate across the street for the required distance crossed the water main at the spot 6 feet 10 inches away from the place where the fire plug was inserted in the main. A fire broke out on *pltf.*'s premises, which were a short distance from the plug; the fire brigade were quickly in attendance, but there was considerable delay owing to their inability to find the exact position of the fire-plug, as a result of which delay the fire assumed greater dimensions & caused more damage than it would otherwise have done:—*Held*: in putting up an indication plate which was in fact misleading, *defts.* were guilty of an act of misfeasance, & not of non-feasance only, & they were therefore liable to *pltf.*s for the extra loss caused by the fire as damages for breach of their statutory duty.—*DAWSON & Co. v. BINGLEY URBAN COUNCIL*, [1911] 2 K. B. 149; 80 L. J. K. B. 842; 104 L. T. 659; 75 J. P. 289; 27 T. L. R. 308; 55 Sol. Jo. 346; 10 L. G. R. 502, C. A.

*Annotations*.—*Reid*, *Fraser v. Fear* (1912), 107 L. T. 423; *McClelland v. Manchester Corp.*, [1912] 1 K. B. 118; *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 2 K. B. 832. *Mentd*, *Ryall v. Kidwell*, [1913] 3 K. B. 123.

#### SUB-SECT. 2.—RURAL DISTRICT COUNCILS.

See Public Health (Water) Act, 1878 (c. 25), ss. 3–7.

11. **Application of Act—Not applicable to cases within Public Health Act, 1875 (c. 55), s. 62.**—*COLNE VALLEY WATER CO. v. TREHARNE*, No. 7, *ante*.

12. — **Bringing supply within reasonable distance—Not communication of supply to house.**—*WEST LANCASHIRE RURAL COUNCIL v. OGILVY*, No. 5, *ante*.

#### SECT. 2.—POWERS OF LOCAL AUTHORITIES.

##### SUB-SECT. 1.—CONSTRUCTION AND ACQUISITION OF WORKS.

###### A. Acquisition of Land and Water Rights.

See Public Health Act, 1875 (c. 55), ss. 51, 52, 175, 176.

13. **Preservation of riparian rights—"Injuriouly affecting"—Alteration of flow.**—Under Public Health Act, 1875 (c. 55), s. 51, a local authority

have no power, for the purpose of supplying water to their district, to alter the flow of water in a stream without the consent in writing of the riparian proprietors lower down the stream, as required by sect. 332 of the Act.

By so altering the flow of water the local authority are, within the meaning of sect. 332, "injuriously affecting" the common law right of such a riparian proprietor, & they will be restrained from so doing without any proof of sensible damage caused to him.—*ROBERTS v. GWYRFAL DISTRICT COUNCIL*, [1899] 2 Ch. 608; 68 L. J. Ch. 757; 81 L. T. 465; 64 J. P. 52; 48 W. R. 51; 16 T. L. R. 2; 44 Sol. Jo. 10, C. A.

—*See, generally, WATERS & WATER-COURSES.*

###### B. Rights of Existing Water Companies.

See Public Health Act, 1875 (c. 55), s. 52.

14. **Objects of Act.**—*NEWHAVEN & SEAFORD WATER CO. v. NEWHAVEN DISTRICT LOCAL BOARD* (1882), *Times*, Jan. 21.

*Annotation*.—*Apld.* *Cleveland Water Co. v. Redcar L. B.*, [1895] 1 Ch. 168.

15. —*J.*—(1) Public Health Act, 1875 (c. 55), s. 51, authorising a local authority to supply its district with water, must be read in connection with sect. 52, with the result, that the prohibition contained in the latter sect. is not absolute but one of degree, which is not intended to apply to a case where the local authority already has substantial waterworks so as to prevent it from adding to or improving them. The provision in sect. 52, requiring notice to be given by the local authority before commencing to "construct waterworks" within the limits of supply of any water co., applies only to "new waterworks" & does not apply to additions or improvements in existing waterworks.

(2) [Sect. 52] must be read together with sect. 51, & its object is to afford protection to waterwork cos. such as *pltf.* & it may be to benefit the ratepayers (*CHITTY, J.*).—*CLEVELAND WATER CO. v. REDCAR LOCAL BOARD*, [1895] 1 Ch. 168; 64 L. J. Ch. 64; 59 J. P. 7; 43 W. R. 90; 11 T. L. R. 28; 13 R. 18.

*Annotation*.—*As to* (1) *Expld.* *Huddersfield Corp. v. Ravensthorpe U. C.*, [1897] 2 Ch. 121.

16. **Meaning of "water company"—Corporation supplying water for own profit.**—The consrs. of a township entered into an agreement with a water co. to take the water supply for the township from the co. The undertaking of the co. was afterwards transferred to the corp. of a borough by a private Act of Parliament, which confirmed & made perpetual the agreement respecting the water supply of the township; & by subsequent private Acts of Parliament, provision was made for the application of the profits or revenue obtained by the corp. from supplying the water for the benefit of the borough & of the water consumers therein:—*Held*: the agreement continued to bind

provides money for that purpose. The commission cannot force the council to furnish it with money for a scheme of waterworks.—*Re THOROLD PUBLIC UTILITIES COMMISSION & THOROLD*, [1927] 3 D. L. R. 182; 60 O. L. R. 429.—*CAN.*

#### PART I. SECT. 1, SUB-SECT. 2.

*a. Effect of Public Health (Ireland) Act, 1878 & 1896.*—*BIRR* (No. 1) *RURAL DISTRICT COUNCIL v. BIRR URBAN DISTRICT COUNCIL*, [1915] 1 I. R. 413.—*IR.*

#### PART I. SECT. 2, SUB-SECT. 1.—A.

*d. Right to divert watercourse.*—

The powers conferred upon the town council of the town of North Sydney, N. S., by the Nova Scotia Statute, 59 Vict. c. 44, for the purpose of obtaining a water supply, gave the town no rights in respect to the diversions of watercourses except subject to the provisions of sect. 4, of the Act, & after arbn. proceedings taken to settle compensation for the injurious affection to property resulting from the construction or operation of the waterworks.—*LEAHY v. NORTH SYDNEY TOWN* (1906), 37 S. C. R. 464.—*CAN.*

*a. Effect of Public Works Act, 1894, s. 11, & Municipal Corporations Act,*

1900, s. 290.]—The joint operation of the above Acts is to give to a borough council power to take land for the purposes of constructing waterworks but not to take land occupied & used by waterworks already constructed.—*BLUFF HARBOUR BOARD v. CAMPBELLTOWN CORPN.* (1903), 23 N. Z. L. R.—*N.Z.*

#### PART I. SECT. 2, SUB-SECT. 1.—B.

*1. Effect of control of waterworks by corporation committee—Whether liabilities transferred as well as rights.*—*TROTTER v. TORONTO WATERWORKS COMMISSION* (1878), 7 P. R. 316; 14 C. L. J. N. S. 169.—*CAN.*

**Sec. 2.—Powers of local authorities: Sub-sect. 1, B. & C.; sub-sect. 2.]**

the comrs. to take the water supply for the township from the corpn., & the comrs. might be restrained by injunction from obtaining the supply elsewhere, & also that the corpn. supplied water for their own profit, & were a "water co." within Public Health Act, 1875 (c. 55), s. 52.—**WOLVERHAMPTON CORPN. v. BILSTON COMRS.**, [1891] 1 Ch. 315; 39 W. R. 394; 7 T. L. R. 162; *affd.*, 7 T. L. R. 374, C. A.

**17. Meaning of "able & willing"—Necessity for requisite powers & supply of water.]**—A waterworks co. is not within the meaning of Public Health Act, 1875 (c. 55), s. 52, able & willing "to supply water within the district of a local authority," unless it has both the necessary powers & the requisite supply of water. Where co. R. had the necessary powers but no water, & co. S. had the requisite supply of water but no powers within the district, & co. R. sold its plant to co. S., & certain members of co. S. bought all the shares in co. R. with the intention of allowing co. S. to exercise the powers of co. R.:—**Held**: the powers could not be so delegated, & that neither co. was "able & willing" within the meaning of the Act, & neither was entitled to notice under Public Health Act, 1848 (c. 63), s. 75, or Public Health Act, 1875 (c. 55), s. 52.—**RICHMOND WATERWORKS CO. & SOUTHWARK & VAUXHALL WATERWORKS CO. v. RICHMOND (SURREY) VESTRY** (1876), 3 Ch. D. 82; 45 L. J. Ch. 441; 34 L. T. 480.  
*Annotation*:—**Refd.** *Re* Woking U. C. (Basingstoke Canal) Act, 1911, [1914] 1 Ch. 300.

**18. — Works not complete in every detail.]**—**NEWHAVEN & SEAFORD WATER CO. v. NEWHAVEN DISTRICT LOCAL BOARD** (1882), *Times*, Jan. 21.

*Annotation*:—**Refd.** *Cleveland Water Co. v. Redcar L. B.*, [1895] 1 Ch. 168.

**19. — Company taking steps to supply.]**—Under pltf. co.'s special Act of 1891, modifying Public Health Act, 1875 (c. 55), s. 52, it was, as the ct. construed the provision, unlawful for deft. local board to construct waterworks within pltf.'s limits of supply during four years from the passing of the special Act, so long as pltf. were able & willing to supply water proper & sufficient. Pltf. made some unsuccessful attempts to find water, & before they succeeded in doing so deft. board served them, on May 20, 1893, with notice of the board's desire to supply water within their own district, & their intention of constructing waterworks under the provisions of Public Health Act, 1875 (c. 55). The notice further stated that, if not informed within a month of pltf.'s ability & willingness the board would construct works. The matter was referred to arbn., but co. becoming aware that the board were still forwarding a scheme of water supply, moved in an action to restrain the board from commencing or threatening to construct works & from proceeding to arbn. The motion stood over on terms to await the award. The arbitrators found that the co. were "able & willing," & that the water was proper & sufficient:—**Held**: defts. must pay the costs of the action, setting off any costs incurred by defts. by reason of pltf. seeking an injunction to restrain the arbn.—**BOGNOR WATER CO. v. BOGNOR LOCAL BOARD** (1894), 70 L. T. 402.

**20. Meaning of constructing waterworks—Whether confined to new waterworks—Extension of existing works.]**—**CLEVELAND WATER CO. v. REDCAR LOCAL BOARD**, No. 15, *ante*.

**21. — — — — — Enlargement of district by order of county council.]**—A local authority with an existing system of waterworks having had an

area added to their district by order of a county council, proceeded to lay pipes for the supply of the added area:—**Held**: this was a "constructing" of waterworks within the meaning of Public Health Act, 1875 (c. 55), s. 52, so that previous notice thereof should have been given to an established water co. whose limits of supply included the added area; & such water co. was entitled to an injunction.—**HUDDERSFIELD CORPN. v. RAVENSTHORPE URBAN COUNCIL**, [1897] 2 Ch. 121; 60 L. J. Ch. 581; 76 L. T. 817; 61 J. P. 596; 45 W. R. 642; 13 T. L. R. 441; 41 Sol. Jo. 542, C. A.

*Annotation*:—**Refd.** *Brighton Intercepting & Outfall Sewers Board v. Hove Corpn.* (1904), 68 J. P. 565.

**22. Application of Act—Supply by local authority for sewage purposes.]**—It is not an infringement of the rights of a waterworks co. able & willing to supply water for a district, under Public Health Act, 1875 (c. 55), ss. 51, 52, for a sanitary authority to supply itself with water for its own purposes, *e.g.* to flush its sewers.—**WEST SURREY WATER CO. v. CHERTSEY UNION**, [1894] 3 Ch. 513; 63 L. J. Ch. 806; 71 L. T. 368; 59 J. P. 167; 43 W. R. 6; 10 T. L. R. 581; 38 Sol. Jo. 648; 8 R. 696.

*Annotation*:—**Consd.** *Southport Corpn. v. A.-G.*, [1924] A. C. 909.

**23. — Supply of township by borough—Borough corporation assignees of water company.]**—**WOLVERHAMPTON CORPN. v. BILSTON COMRS.**, No. 16, *ante*.

**24. Restraint of construction—Arbitration—Questions for arbitrator.]**—A local board served a waterworks co. with a notice, under Public Health Act, 1875 (c. 55), s. 52, requiring the company to supply each house in their district with water suitable & proper for drinking & ordinary domestic purposes at the rate of not less than 20 gallons per head per day. This not being complied with, the board served the co. with notice of the appointment of an arbitrator under sects. 179 & 180 of the same Act. On the hearing before an umpire the co. attempted to limit the scope of the inquiry to the liability of the co. to supply 20 gallons per head per day, but this was negatived by the umpire. A motion was then made to the ct. to set aside the umpire's award:—**Held**: the extent to which the board required the water was not one of the matters to be settled by arbn., nor was the reasonableness of the extent one of the matters to be submitted; but the question which was to be submitted was the ability & willingness of the co. to supply water which was proper & sufficient for all reasonable purposes.—**Re YEADON LOCAL BOARD & YEADON WATERWORKS CO.** (1888), 59 L. T. 844; 5 T. L. R. 30; *reversd.* on other grounds (1889), 41 Ch. D. 52, C. A.

*Annotation*:—**Mentd.** *Knowles v. Bolton Corpn.*, [1900] 2 Q. B. 253.

**25. — Action—Costs.]**—**BOGNOR WATER CO. v. BOGNOR LOCAL BOARD**, No. 19, *ante*.

### C. Purchase of Waterworks.

*See* Public Health Act, 1875 (c. 55), s. 51.

**26. Agreement for purchase—Price—Basis of calculation.]**—A water board was constituted by a special Act with the right of supplying water within the boundaries of two boroughs & also certain districts beyond those boundaries; provided that when so required by the sanitary authority of any such outlying district the board should sell to such sanitary authority the mains, pipes, & fittings belonging to the board within that district "at a price to be fixed, in default of agreement, by an arbitrator"; & after such sale the board should cease to supply water within such district.

In an arbn. under this provision between the board & an outlying district:—*Held*: upon the true construction of the special Act the word "price" meant price, & not compensation; & in fixing the price the basis of calculation should be merely the value of the mains, pipes & fittings regarded as plant *in situ* capable of earning a profit, & the arbitrator must not include in the price compensation to the board for the loss of the right to supply water within the outlying district.—*STOCKTON & MIDDLESBROUGH WATER BOARD v. KIRKLEATHAM LOCAL BOARD*, [1893] A. C. 444; 63 L. J. Q. B. 56; 69 L. T. 601; 57 J. P. 772; 1 R. 288, H. L.; *affg.* S. C. *sub nom.* *Re KIRKLEATHAM LOCAL BOARD & STOCKTON & MIDDLESBROUGH WATER BOARD*, [1893] 1 Q. B. 375, C. A.

*Annotations*:—*Consd.* *Re L. C. C. & London Street Tram Co.*, [1894] 2 Q. B. 189. *Reid.* *Edinburgh Street Tram Co. v. Edinburgh Corpn.*, [1894] A. C. 456; *Re Wolstanton United U. D. C. & Burslem Corpn.* (1907), 72 J. P. 28; *Hamilton Gas Co. v. Hamilton Corpn.*, [1910] A. C. 309; *Perth Gas Co. v. Perth City Corpn.*, [1911] A. C. 506. *Mentd.* *Re Montgomery Jones & Lieboenthal* (1898), 78 L. T. 406; *Re Holland S.S. Co. & Bristol Steam Navigation Co.* (1906), 95 L. T. 769; *Dudley Corpn. v. Dudley, Stourbridge & District Electric Traction Co.* (1907), 97 L. T. 556; *Re Cogstad & Newsum*, [1921] 1 K. B. 87.

27. — *Loss of right to exercise option.*—An agreement, sanctioned by Act of Parliament, was entered into between two water cos., by which it was agreed that co. A. should take over the works, provide for a mtge. debt, & pay interest upon the shares of co. B. This agreement was sanctioned by Act of Parliament, & the transaction was carried into effect by an indenture of Jan. 1857, which provided that if co. A., or their intended assignees, the corpn. or local board of health, being desirous of becoming the absolute & unrestricted owners of the works of co. B., subject only to the mtge. debt, should, "on or before any 25th of Dec., after having given to co. B. six months previous notice of their desire to avail themselves of the option thereby given, pay unto co. B." £46,246, the amount of their share capital, the party so paying should become absolutely entitled to the works. In June, 1870, the corpn., who had acquired the interest of co. A., gave notice to co. B. of their intention to pay the £46,246, on Dec. 25, following, but they were unable, from want of funds, to carry out the purchase. In June, 1871, they again gave notice that they would pay the money on Dec. 25, 1871:—*Held*: the corpn. by giving the first notice, & failing to act upon it, had not lost the right given to them by the deed of Jan. 1857, of purchasing, after six months' notice, on or before any 25th day of Dec.—*WARD v. WOLVERHAMPTON WATERWORKS CO.* (1871), L. R. 13 Eq. 243; 41 L. J. Ch. 308; 25 L. T. 487; 20 W. R. 85.

#### SUB-SECT. 2.—LAYING OF WATER MAINS AND PIPES.

See Public Health Act, 1875 (c. 55), ss. 16, 32–34, 54, 57; Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883 (c. 37).

28. *Meaning of "supplying water"—Power to supply coupled with taking steps to supply.*—(1) A local authority that has power, & is taking steps, to supply water, does "supply water" within Public Health Act, 1875 (c. 55), s. 54.

(2) Where a local authority has the consent of the local authority of an adjoining district to make sewers, or lay down water mains on land in such adjoining district, they can only do so subject to the provisions of sects. 32, 33, & 34 of Public Health Act, 1875 (c. 55), applicable to such work.—

*JONES v. CONWAY & COLWYN BAY JOINT WATER SUPPLY BOARD*, [1893] 2 Ch. 603; 62 L. J. Ch. 767; 69 L. T. 265; 41 W. R. 616; 9 T. L. R. 469; 37 Sol. Jo. 494, C. A.

29. *Laying water mains through private property—Powers as in respect of sewage.*—*JONES v. CONWAY & COLWYN BAY JOINT WATER SUPPLY BOARD*, No. 28, *ante*.

30. — *If on the report of the surveyor it appears necessary—Meaning of necessary.*—By Public Health Act, 1875 (c. 55), ss. 10, 54, urban local authorities are empowered to carry water mains through, across, or under certain roads, streets, cellars, & vaults, &, after giving "notice to the owner or occupier, if, on the report of the surveyor, it appears necessary, into, through or under any lands situate within their district." In Dec. 1887, the surveyor of defts., an urban local authority, died. On Jan. 11, 1888, defts. by resolution appointed P., a civil engineer in their employment, "surveyor to the board until a further permanent surveyor be appointed." On Mar. 21, 1888, P. reported to defts. that it was "desirable & advisable" that their water main should be carried in a particular direction from one point to another, & that it would be "necessary" to lay it through land belonging to pltf., which was within the district. This report was signed, "Your surveyor, P." Four days after its date X. was duly appointed surveyor to defts., & P., who was a candidate for the office, was retained in their service as waterworks engineer. The report of Mar. 21, was considered & adopted by the board Apr. 11, 1888, & in the following month a notice in pursuance thereof was served on pltf. that defts. intended to carry their main through a part of his lands. Upon motion made in an action by pltf. for an injunction to restrain defts. from so doing:—*Held*: (1) the word "necessary" must be construed as meaning "necessary for the efficient discharge of the duty in the way most for the benefit of the public" (2) upon the words of sect. 16 of the Act the person to determine the necessity was the surveyor; & if the ct. found that he had exercised his judgment & come to a conclusion in good faith, the ct. ought not to interfere, even although other courses were shown to be practicable by which the entry on private lands might be avoided; (3) "the surveyor" mentioned in sect. 16 must, in the case of an urban authority, be the fit & proper person duly appointed to be surveyor under sect. 189 of the Act, & no other; & P. was not "the surveyor" of defts. within the meaning of sects. 16 & 189; & as the report on which the proceedings of defts. was founded was not the report of "the surveyor," pltf. was entitled to an interlocutory injunction.—*LEWIS v. WESTON-SUPER-MARE LOCAL BOARD* (1888), 40 Ch. D. 55; 58 L. J. Ch. 39; 59 L. T. 769; 37 W. R. 121; 5 T. L. R. 1.

*Annotations*:—*As to* (1) *Reid.* *Stroud v. Wandsworth District Board of Works*, [1894] 1 Q. B. 64. *As to* (2) *Reid.* *Jones v. Conway & Colwyn Bay Joint Water Supply Board*, [1893] 2 Ch. 603; *Roberts v. Hopwood*, [1925] A. C. 578. *As to* (3) *Reid.* *Robinson v. Sunderland Corpn.*, [1899] 1 Q. B. 761; *Kendal v. Lewisham B. C.* (1903), 67 J. P. 236.

31. — *Determination of necessity by surveyor—When court will interfere with decision of surveyor.*—*LEWIS v. WESTON-SUPER-MARE LOCAL BOARD*, No. 30, *ante*.

32. — *Who is a surveyor within the Act.*—*LEWIS v. WESTON-SUPER-MARE LOCAL BOARD*, No. 30, *ante*.

33. — *Outside district—Necessity for compliance with Public Health Act, 1875 (c. 55), ss. 32–34—Notwithstanding consent of local authority of*

*Sect. 2.—Powers of local authorities: Sub-sects. 2 & 3, A. & B.; sub-sect. 4.]*

**adjoining district.**—*JONES v. CONWAY & COLWYN BAY JOINT WATER SUPPLY BOARD, No. 28, ante.*

**34. Laying pipes in private road—Necessity for consent of owner.**—Where local authority have not control of streets—Must be absence of general control.—(1) *Pltf.* was the owner of a private road in the W. district. Defts. were the urban sanitary authority of the district, & had the control of the streets generally in that district, & also the power of supplying the inhabitants with water. Defts. commenced, without *pltf.*'s consent, to break up his private road for the purpose of laying down water-mains. *Pltf.* brought an action for an injunction:—*Held*: the words "where the local authority have not the control of the streets," in Public Health Act, 1875 (c. 55), s. 57, which forbids the laying down of pipes in any private road without the consent of the owner, were descriptive of a local authority who had not the control generally of the streets in their district, & had no application to defts., & defts. had power under sects. 16 & 64 of Public Health Act, 1875 (c. 55), to lay down pipes in *pltf.*'s private road without his consent, making him proper compensation under sect. 308 of the same Act.

(2) A private road is a "street" within the meaning of sects. 16 & 54 of Public Health Act, 1875 (c. 55).—*HILL v. WALLASEY LOCAL BOARD, [1894] 1 Ch. 133; 63 L. J. Ch. 1; 69 L. T. 641; 42 W. R. 81; 10 T. L. R. 73; 38 Sol. Jo. 56; 7 R. 51, C. A.*

*Annotation:—Refd. Baird v. Tunbridge Wells Corp., [1894] 2 Q. B. 867.*

**35. ——— Meaning of street.**—*HILL v. WALLASEY LOCAL BOARD, No. 34, ante.*

**36. ———**—By Gasworks Clauses Act, 1847 (c. 15), s. 6, a local authority may in effect lay down gas pipes in streets, but by sect. 7, if in any land not dedicated to public use, only subject to the consent of the owners or occupiers thereof. This in effect is not confined to that which is a street, but extends to all lands not dedicated to the public, provided the required consent is obtained. A country road with bungalow residences abutting thereon, but over which there existed no public right of way, might fairly be said to come within the description of "street" within the definition of "street" in Gasworks Clauses Act, 1847 (c. 15).

Therefore, where a local authority with the consent of the owners laid gas pipes along such a road, formerly purely agricultural, it was held that they were within their statutory rights, & the same will apply to the laying of water pipes by virtue of Waterworks Clauses Act, 1847 (c. 17), ss. 28, 29, which are in almost identical language as Gasworks Clauses Act, 1847 (c. 15), ss. 6, 7.

Further, also, where the local authority in question had under their special Act power, upon the application of the owner or occupier of premises within their water area abutting on any street laid out but not dedicated to public use, to supply such premises with water & to lay down pipes for furnishing such supply, the physical conditions of the land must govern, & it is not necessary whenever an application is made to such local authority for a supply of water, on the footing that *appet.* has premises abutting on the street laid out but not dedicated to public use, for the local authority to go into the title of each *appet.* to see whether

in law he had adequate rights of way over the "street laid out but not dedicated to public use" as a means of access to his house.

Therefore such a road as mentioned above may be a street laid out though not dedicated to the public within the sect.; & the *corp.* having complied with the terms thereof, the sect. applies.—*DAVIES v. RIFON CORPN., [1928] Ch. 884; 97 L. J. Ch. 479; 139 L. T. 636; 92 J. P. 153; 26 L. G. R. 530.*

**Repairing pipes—Liability for breaking up highways without authority.**—*See HIGHWAYS, Vol. XXVI., pp. 440, 441, No. 1573.*

**Powers of undertakers under Waterworks Clauses Act, 1847.**—*See Part III., Sect. 1, sub-sect. 1, C., post.*

### SUB-SECT. 3.—NATURE AND PURPOSES OF SUPPLY.

#### A. Nature.

*See Public Health Act, 1875 (c. 55), s. 55.*

**Purity—Water pure & wholesome in mains.—Contaminated in consumer's pipes.**—*See No. 136, post.*

**Pollution by sewage—Liability of local authority.**—*See SEWERS & DRAINS, Vol. XLI., p. 25, No. 197.*

#### B. Purposes.

*See Public Health Act, 1875 (c. 55), ss. 57, 61, 65.*

**37. Domestic purposes—& supply of farm buildings—Effect of alteration of user.**—In 1905 *ptf.*, as the local water authority, covenanted for valuable consideration with the owner of a farm called C. farm in their district to lay a pipe to the farmhouse & to erect a standpipe at the farm buildings & to supply a reasonable quantity of water to the farmhouse & buildings free of charge. In 1911 *deft.* having become the owner, altered & enlarged the farmhouse into a residential mansion with a garage for motor cars at the farm buildings, & claimed under the covenant to have a free supply of water to the house & the farm buildings, & to use the water from the standpipe to wash his motor cars. It was conceded that the covenant ran with the land:—*Held*: (1) the covenant was to supply a farmhouse, & the C. Farm having ceased to be a farmhouse, the covenant as to the farmhouse was discharged; (2) the covenant was severable, & was not discharged as to the farm buildings which were substantially unaltered; (3) the owner was not entitled to use the water free of charge for his building operations at the farmhouse, nor for washing his motor cars at the farm buildings.—*HADHAM RURAL COUNCIL v. CRALLAN, [1914] 2 Ch. 138; 83 L. J. Ch. 717; 111 L. T. 154; 78 J. P. 361; 30 T. L. R. 514; 58 Sol. Jo. 635; 12 L. G. R. 707.*

*Annotation:—As to (1) Refd. Harper v. Hedges, [1923] 2 K. B. 314.*

**What are.**—*See Part III., Sect. 2, sub-sect. 2, C., post.*

**38. Supply to adjoining district—Effect of limited sanction.**—(1) Under Public Health Act, 1875 (c. 55), s. 61, the Local Govt. Board has power to give a limited sanction, *i.e.*, a sanction of a supply to a specified part of the district of the adjoining local authority, & after such a limited sanction has been given, a contract for a supply of water to a larger area of the district requires a fresh

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**g. Supply to railway company as part of trading community.**—*SETON v. LINLITHGOW BURGH COMBS. (1900), 2 F. (Ct. of Sess.) 907; 37 Sc. & L. R. 715; 8 S. L. T. 47.—SCOT.*



sanction of the Local Govt. Board, & will be invalid if that fresh sanction is not obtained.

(2) Public Health Act 1875 (c. 55), s. 174 (2), provides that every contract made by an urban authority whereof the value or amount exceeds £50 "shall specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed":—*Held*: this provision is directory only, not imperative, so that the omission to specify a penalty does not render such a contract invalid.—*SOOTHILL UPPER URBAN COUNCIL v. WAKEFIELD RURAL COUNCIL*, [1905] 2 Ch. 516; 74 L. J. Ch. 703; 93 L. T. 711; 69 J. P. 447; 21 T. L. R. 766; 3 L. G. R. 1208, C. A.

39. — *Whether pecuniary penalty must be specified.*—*SOOTHILL UPPER URBAN COUNCIL v. WAKEFIELD RURAL COUNCIL*, No. 38, *ante*.

40. — *Effect of enlargement of district.*—Where an agreement was entered into by the borough of Tynemouth to supply water to the Newbiggin-by-the-Sea urban district council, & the area of that council was subsequently enlarged to include two fresh parishes, an injunction was granted to the borough of Tynemouth restraining the district council from using or supplying for use, at any place not within the limits of the district of the Newbiggin-by-the-Sea urban district council, as constituted at the date of the agreement, any water taken by or supplied to deft. council from or by plfts. under the agreement, or otherwise drawn from plfts.' gravitation main.—*TYNEMOUTH CORPN. v. NEWBIGGIN-BY-THE-SEA URBAN DISTRICT COUNCIL* (1915), 80 J. P. 195; 14 L. G. R. 322.

#### SUB-SECT. 4.—EXPENSES OF WATER SUPPLY.

41. *What expenses chargeable to rates.*—*Expenses of Parliamentary bill.*—By a local Act of Parliament comrs. were appointed to construct such reservoirs & other works as might be necessary for supplying a town with water, & to do all things necessary for that purpose; & they were authorised to levy rates for the purposes of that Act. The supply of water was found insufficient, & the comrs. were desirous of bringing water from other places, so as effectually to carry out the objects of the Act:—*Held*: they were not authorised in applying any of the moneys received from such rates in payment of the expenses of making application to Parliament for another Act to extend their powers, & an injunction was granted to restrain them from so doing.—*A.-G. v. ANDREWS* (1850), 2 Mac. & G. 225; 2 H. & Tw. 431; 20 L. J. Ch. 467; 15 L. T. O. S. 322; 14 Jur. 905; 47 E. R. 1751.

*Annotations.*—*Apld.* *A.-G. v. West Hartlepool Improvement Comrs.* (1870), L. R. 10 Eq. 152; *Cleverton v. St. Germain's Union R. S. A.* (1886), 56 L. J. Q. B. 83. *Refd.* *A.-G. v. Eastlake* (1853), 11 Hare, 205; *A.-G. v. Plymouth Corpn.* (1853), 1 W. R. 445; *A.-G. v. Wigan Corpn.* (1854), Kay, 268; *Bateman v. Ashton-under-Lyne Corpn.* (1858), 3 H. & N. 323.

42. — *J.*—By 5 Geo. 4, c. 49, the corpn. of Plymouth were empowered to make certain waterworks, & were required to supply a certain daily quantity of pure, wholesome, fresh water for the use of her Majesty's naval establishments, in consideration whereof they were to be entitled to an annuity. In the course of the present session, they failed in an application for an Act to

extend their powers. They were restrained from applying any part of the borough fund in paying the expenses of the application to Parliament.—*A.-G. v. PLYMOUTH CORPN.* (1853), 1 W. R. 445.

43. — *J.*—A rural sanitary authority has no power to charge the rates with the expenses of promoting a Bill in Parliament.

A rural sanitary authority being unable to acquire by purchase land & water rights necessary for the purpose of procuring a water supply for their district, which it was the duty of the authority to do under Public Health Acts, instructed their solr. to promote a bill in Parliament for the purpose of obtaining powers to purchase the land & water rights compulsorily:—*Held*: the rural sanitary authority had no power to promote such a bill, & therefore their solr. could not recover his costs from them.—*CLEVERTON v. ST. GERMAIN'S UNION RURAL SANITARY AUTHORITY* (1886), 56 L. J. Q. B. 83; 3 T. L. R. 43.

44. — *Expenses of opposing Parliamentary bill.*—Where a bill had been presented to Parliament containing powers for the construction of waterworks, & for the doing of acts which, if done, would interfere with the stream of a river passing through a particular borough town, so as to prevent the efficient action of the stream in removing the sewage of the town, & thus indirectly affect the value of the rateable houses in the borough, the tolls of the market, & the other property forming the borough fund, & the corpn. had applied part of the surplus of the borough fund in a partially successful opposition to the passing of the bill, it was decided by one of the Vice Chancellors, that under the Municipal Corporations Act, the corpn., whether they had any surplus borough fund or not, were justified in applying their funds in opposing such a bill: & upon appeal it was held, that the payment of such expenses out of such a fund was not so clearly contrary to the spirit of sects. 90, 92 of that Act, which provides for the application of the surplus of the borough fund, as to warrant the ct. in granting an interlocutory injunction to restrain such application.—*A.-G. v. WIGAN CORPN.* (1854), 5 De G. M. & G. 52; 2 Eq. Rep. 224; 23 L. J. Ch. 429; 23 L. T. O. S. 43; 18 J. P. 245; 18 Jur. 299; 2 W. R. 308; 43 E. R. 789, L. J.J.

*Annotations.*—*Expld. & Distd.* *R. v. Sheffield Corpn.* (1871), L. R. 6 Q. B. 652. *Consd.* *A.-G. v. Brecon Corpn.* (1878), 10 Ch. D. 204. *Refd.* *Bateman v. Ashton-under-Lyne Corpn.* (1858), 3 H. & N. 323; *Ollerenshaw v. Harrop* (1874), 9 Ch. App. 489; *Cleverton v. St. Germain's Union R. S. A.* (1886), 56 L. J. Q. B. 83; *R. v. Brighton Corpn.*, *Ex p. Shoosmith* (1906), 4 L. G. R. 1104.

45. — *J.*—In the municipal borough of S. was a waterworks co., incorporated by Act of Parliament, which supplied the greater part of the borough with water. By this Act, the co., after a certain time, on the requisition of the town council, were bound to give a constant supply of water, & they were empowered to make regulations to be observed by the consumers, subject to the approval of two justices, any person aggrieved having the right to oppose the regulations before the justices. The town council having required the co. to give a constant supply, the co. proposed certain regulations, which were opposed before the justices by the corporation on the ground that they imposed too onerous conditions on the consumers; & the justices modified the regulations accordingly.

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h. *What expenses chargeable to rates.*—*Whether discharge of debts or expenditure upon improvements.*—*DUBLIN CORPN. v. A.-G.* (1835), 9 Bll. N. S. 395; 5 E. R. 1341.—*IR.*

k. *Costs of opposing Parliamentary bill.*—Costs incurred by the water comrs. in a borough in unsuccessfully opposing a bill in Parliament promoted by certain inhabitants of the burgh for the purpose of extending

the water supply & the area of distribution cannot be charged against the trust-funds. — *PERTH WATER COMRS. v. McDONALD* (1879), 6 R. (Ct. of Sess.) 1050; 16 Sc. L. R. 619.—*SCOT.*

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The co. also promoted a bill in parliament to obtain further time for the constant supply, which the corp. opposed; & it was ultimately withdrawn. The town council made two orders for the payment out of the borough fund of the expenses of the opposition before the justices & in parliament respectively, which were paid, notwithstanding objection that the orders were *ultra vires*. There was no surplus from property of the corporation, & borough rates were made. On a rule for a *certiorari*, under 7 Will. 4 & 1 Vict. c. 78, s. 44, to bring up these orders for the purpose of quashing them:—*Held*: assuming the objects for which the expenses were incurred to be for the public benefit of the inhabitants of the borough, yet they were not within 5 & 6 Will. 4, c. 78, s. 92, as “expenses necessarily incurred in carrying into effect the provisions of the Act”; & they could not come within the clause which enabled the town council to apply the funds “for the public benefit of the inhabitants of the borough,” as there was no surplus.

I cannot help thinking that the corp. acted with perfect *bona fides* in the opposition to the bill, & in the proposal to bring in a bill of their own to meet that, & also in opposing the rules & regulations proposed by the water co., in the genuine belief that they were acting for the benefit of the inhabitants; & as, I understand, the result shows that they were so acting. Therefore, if they had any funds applicable, to such a purpose, I should have thought this was a very proper application of them. But I have no doubt at all, in a case like this, where the corp. had no property & no surplus, where they had to make a borough rate in order to levy the funds necessary to carry into effect the provisions of the Municipal Corporations Act, that they could not charge these expenses to the corp. fund (LUSH, J.).—*R. v. SHEFFIELD CORPN.* (1871), L. R. 6 Q. B. 652; 40 L. J. Q. B. 247; 36 J. P. 37; *sub nom.* ROBERTS v. SHEFFIELD CORPN., 24 L. T. 659; 36 J. P. 229; 19 W. R. 1159.

**Annotations:—***Dist. A.-G. v. Brecon Corp.* (1878), 10 Ch. D. 201. *Consd.* Ward v. Sheffield Corp. (1887), 19 Q. B. D. 22; A.-G. v. Swansea Corp., [1898] 1 Ch. 602; A.-G. v. Tynemouth Corp., 1898, 1 Q. B. 604. *Reid. R. v. Liverpool Corp.* (1872), 41 L. J. Q. B. 175; *R. v. Norwich Corp.* (1882), 30 W. R. 752.

**Costs in relation to Parliamentary Bills.]—**See LOCAL GOVERNMENT, Vol. XXXIII., pp. 82, 83, Nos. 530–533.

**46. Special expenses.—What are—Cost of supply to contributory place.]—**HORN v. SLEAFORD RURAL DISTRICT COUNCIL, No. 48, *post*.

**PART I. SECT. 2, SUB-SECT. 5.**

**1. Rates payable by persons not abutting on mains.—Right to compel user of water.]—**SIMPKIN & MAY v. ENGLEHART CORPN. (1919), 45 O. L. R. 275; 48 D. L. R. 230; 16 O. W. N. 45.—**CAN.**

**m. What water rate may include.]—**A water rate imposed, under Public Health (Ireland) Act, 1878 (c. 52), s. 66, on voluntary consumers of water, being in fact the price of the water supplied, necessarily has relation to the cost of production as well as of maintenance of the water supply. A water rate struck & assessed under this sect. can include a reasonable amount for discharge of capital expenses of construction.—*HANLY v. SLIGO RURAL DISTRICT COUNCIL*, [1918] 2 I. R. 280.—**IR.**

**n. Duty to state & specify grounds for appeal against rate.]—**Public Health (Ireland) Act, 1878 (c. 52), s. 249, requiring the grounds of an appeal against a rate to be “stated & speci-

fied” in the notice of intention to appeal, is not a provision as to form only, but is of substance, & no ground is open on appeal unless it is stated in clear & unambiguous language in the notice, & in such a way that resp. can be made aware of the points upon which the rate is impeached.—*HANLY v. SLIGO RURAL DISTRICT COUNCIL*, [1918] 2 I. R. 587.—**IR.**

**o. Authority of sanitary authority.—To fix rate on poor law valuation of premises.]—**A sanitary authority under Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), purported to fix a water rate assessed on the poor law valuation of the premises of all persons using water supplied by the council for non-domestic purposes, in addition to the ordinary water rate payable for water for domestic purposes.—*Held*: the sanitary authority had no power to fix such rate; & water for non-domestic purposes can only be charged for by contract.—*BALLINA URBAN DISTRICT COUNCIL v. FARMER* (1919),

53 I. L. T. 207.—**IR.**

**p. Agreement with consumer for fixed price.]—**Where a borough council, in the absence of a bye-law fixing a rate for an extraordinary supply, agrees with a resident in the borough to supply him with water as a motive power at a fixed price, & does so for a number of years, it cannot, after a year has commenced, by resolution raise the price for that year without the consent of the consumer, & then sue him in contract for the higher price.—*NASEBY BOROUGH v. LAW* (1894), 13 N. Z. L. R. 257.—**N.Z.**

**q. Charges by bye-law instead of water rate.]—**A municipal council may, even as regards the ordinary water-supply, elect to make charges by bye-law for the water consumed, instead of striking a water rate.—*NELSON CORPN. v. NELSON COLLEGE* (1896), 14 N. Z. L. R. 507.—**N.Z.**

**r. Liability of person or company statutorily exempted from municipal**

**SUB-SECT. 5.—WATER RATES AND RENTS.**

See Public Health Act, 1875 (c. 55), ss. 56–60; Public Health (Water) Act, 1878 (c. 25), ss. 9, 10.

**47. Amount of charge—Sufficient to maintain waterworks.]—**Where land is used for a public purpose, & the occupiers thereof are prevented by statute from deriving the full pecuniary benefit which it is capable of producing, the land is to be rated to the poor with reference to the amount of profit actually made, & not with reference to the amount which might be earned by the occupiers if they were not subject to restrictions. The Local Board of Health for W. erected & occupied works for the purpose of supplying the inhabitants thereof with water. The works were situate within the parish of C. In order to benefit the inhabitants of W. the local board made the scale of charges so low, as to leave a profit far less than would have accrued to a co. carrying on the works as a commercial undertaking. In adopting the scale of charges above mentioned, the local board intended to carry out those provisions of Public Health Act, 1848 (c. 63), the object of which was to insure a supply of water at a low price for sanitary purposes. The assessment committee of the D. union, within which the parish of C. was situate, by a valuation list assessed the local board at a rateable value of £1,400, based upon the amount which might have been earned by a trading co. carrying on the waterworks for their own benefit; the local board claimed to be assessed at a rateable value of £540, based upon the profit actually earned by them.—*Held*: the assessment of £1,400 was wrong, & the local board were liable to be assessed at £540 only; for, under the provisions of Public Health Act, 1848 (c. 63), they could not make rates of an amount more than sufficient to enable them to maintain the waterworks, & they could be lawfully assessed only with reference to profit actually earned.—*WORCESTER CORPN. v. DROITWICH ASSESSMENT COMMITTEE* (1876), 2 Ex. D. 49; 46 L. J. M. C. 241; 36 L. T. 186; 41 J. P. 355; 25 W. R. 336, C. A.

**Annotations:—***Consd.* Horn v. Sleaford R. D. C., [1898] 2 Q. B. 358; *Kingston Union v. Metropolitan Water Board*, [1926] A. C. 331. *Reid.* Chorlton-upon-Medlock Overseers v. Chorlton Union & Ardwick Overseers (1882), 51 L. J. Q. B. 458; *West Bromwich School Board v. West Bromwich Overseers* (1884), 13 Q. B. D. 929. *Mentd.* Mersey

*Docks & Harbour Board v. Lucas* (1881), 1 Tax Cas. 385; *Peterborough Corp. v. Wiltshire Parish & Stamford Union Assmt. Com.* (1883), 53 L. J. M. C. 33; *Mersey Docks & Harbour Board v. Llanellian Overseers* (1884), 14 Q. B. D. 770.

**48. — Supply to contributory area—Discretion of council.**—A rural district council provided a water supply to part of a contributory place. On the petition of certain ratepayers under Public Health (Water) Act, 1878 (c. 25), s. 10, the council imposed water rates & water rents upon those liable to such rates & rents under sect. 9 of that Act. These rates & rents, however, were limited to the extent of providing for the cost of maintaining the supply, not of providing for the repayment of the capital expenditure upon the construction of the works:—*Held*: the council had a discretion to fix the water rates & water rents as they pleased. The whole cost of providing & maintaining the water supply, whether the supply extended to the whole or only part of the contributory place, was a special expense within sect. 229 of Public Health Act 1875 (c. 55), & as such charged on the whole contributory district, & the actual consumers were liable only for such part of such expense as the council thought just.—*HORN v. SLEAFORD RURAL DISTRICT COUNCIL*, [1898] 2 Q. B. 358; 67 L. J. Q. B. 724; 78 L. T. 722; 62 J. P. 502; 46 W. R. 555, D. C.

**49. Enforcement of payment—Notice requiring supply to be obtained—Whether execution of works condition precedent to recovery.**—A local authority caused a supply of water to be brought in main water pipes along the street in which a house was situate, & gave notice to the owner of the house, under Public Health Act, 1875 (c. 55), s. 62, to obtain a proper supply & do all such works as might be necessary for that purpose. That notice was not complied with, & the local authority did not exercise the power given to them by that sect. of executing the works necessary to connect the house with the main. In an action by the water co. for water rates:—*Held*: deft. was liable, & it was not a condition precedent to such liability that the works necessary to bring the water into the house should have been executed.—*SOUTHERN WATERWORKS CO. v. HOWARD* (1884), 13 Q. B. D. 215; 53 L. J. Q. B. 354; 32 W. R. 923; *sub nom.* *SOUTHERN WATERWORKS CO. v. HAVARD*, 48 J. P. 469, D. C.

**50. — — — Meaning of house—Question of fact.**—*WOOTTON v. BISHOP*, No. 1, *ante*.

**51. — Summary proceedings—Appeal by case stated.**—*NEWINGTON v. SOUTH EASTERN RY. CO.* (1878), 42 J. P. Jo. 420, D. C.

**52. — Limitation of time.**—By virtue of certain provisions of Waterworks Clauses Act, 1847 (c. 17), incorporated in the Public Health Act, 1875 (c. 55), payment of a rate or charge not

exceeding £20, made by an urban authority for water supplied to premises within their district, may be enforced by summary proceedings before justices; & by s. 11 of Summary Jurisdiction Act, 1848 (c. 43), where no time for making a complaint or laying an information is specially limited in the Act or Acts relating to each particular case, "such complaint shall be made & such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose." By s. 256 of Public Health Act, 1875 (c. 55), "if any person assessed to any rate made under this Act by any urban authority fails to pay the same when due & for the space of fourteen days after the same has been lawfully demanded in writing," he may be summoned to appear before a ct. of summary jurisdiction, who may make an order for payment against him.

Appls. having failed to pay within fourteen days after demand in writing a sum claimed by an urban authority as the amount due for a water rate, the urban authority, within six calendar months after the expiration of the fourteen days, made a complaint & took out a summons under sect. 256 to enforce payment:—*Held*: (1) the water rate was a "rate made under this Act" within Public Health Act, 1875 (c. 55), s. 256; (2) the matter of the complaint arose when appls. failed to pay the amount claimed within fourteen days from the demand, & therefore the complaint was made within the time limited by Summary Jurisdiction Act, 1848 (c. 43), s. 11.—*ELLIOTT v. RUSSELL*, [1902] 2 K. B. 748; 72 L. J. K. B. 15; 88 L. T. 204; 67 J. P. 158; 51 W. R. 269; 19 T. L. R. 5, D. C.

**Expenses chargeable to rates.**—See Nos. 41–45, *ante*.

#### SUB-SECT. 6.—WELLS, PUMPS, ETC.

See Public Health Act, 1875 (c. 55), s. 64.

**53. What amounts to public well—User by public.**—*WITNEY v. WYCOMBE UNION RURAL SANITARY AUTHORITY* (1876), 40 J. P. Jo. 149, D. C.

**54. — — — Gratuitously.**—What is the meaning of a public well except a well that is used by the public & used gratuitously by the public (LORD O'HAGAN).—*SMITH v. ARCHIBALD* (1880), 5 App. Cas. 489, H. L.

*Annotations.*—*Appld.* *A.-G. v. Tonkin* (1901), 18 T. L. R. 29. *Refd.* *Knuckey v. Redruth R. C.* (1904), 73 L. J. K. B. 265.

**55. — — — — —**—*A.-G. v. TONKIN* (1901), 18 T. L. R. 29.

**56. — — — — — For prescriptive period.**—A trough or cistern receiving the overflow from a spring at some distance had been used by the public gratuitously for watering cattle, & for the

*or local taxation to water rate.*—In an action to recover water rates imposed by plff. co. upon deft., who is exempt from municipal or local taxation under an Act of the Legislature:—*Held*: water rates were a municipal or local tax & deft. was not liable therefor.—*HARRIS GRACE WATER CO. v. REID* (1901), 8 Nfld. L. R. 428.—*NFLD.*

**t. — — —**—In an action taken by the St. John's Municipal Council to recover water rates from deft. co. as the owner of the dock in St. John's:—*Held*: water rates were included under the term "municipal or local taxation" in the Act by which defts. were incorporated, & the Act exempted defts. therefrom.—*SHEA v. REID NEWFOUNDLAND CO.* (1902), 8 Nfld. L. R. 579.—*NFLD.*

**a. Method of charging rate—Agreement to supply manufacturers with**

*surplus water for non-domestic purposes.*—A local authority entered into an agreement with the manufacturers in a district to supply them with surplus water for non-domestic purposes at a meter rate. In a question between the local authority & a firm of manufacturers, who were both owners & occupiers of their premises:—*Held*: under Public Health (Scotland) Act, 1897, s. 126, the local authority were not entitled to charge the firm with the owners' proportion of the water assessment in addition to charging them at the meter rate for the water supplied.—*AYRSHIRE COUNTY COUNCIL v. KNOX (W. & J.), LTD.*, [1918] S. C. 405.—*SCOT.*

**b. — — —**—In a question between the local authority & a person who was both the owner & the occupier of a farm, which had been supplied with

water for non-domestic purposes:—*Held*: the local authority were entitled to charge the person so supplied, in his capacity as owner, with a sum equivalent to the amount of the owner's share of the water assessment, in addition to a meter rate for the water actually supplied charged on him as occupier.—*DICKSON v. LANARKSHIRE UPPER WARD DISTRICT COMMITTEE*, [1916] S. C. 940; 53 Sc. L. R. 710.—*SCOT.*

#### PART I. SECT. 2, SUB-SECT. 6.

**c. Whether right exists in public to take water by prescription—Effect of Public Health (Ireland) Act, 1878.**—*DUNGAIR V. GUARDIAN v. MANSFIELD*, [1897] 1 I. R. 420.—*IR.*

**d. Right of public authority to repair well on private property.**—*SMITH v. ARCHIBALD* (1880), 5 App. Cas. 489.—*SCOT.*

*Sect. 2.—Powers of local authorities: Sub-sect. 6. Sects. 3 & 4. Parts II. & III. Sect. 1: Sub-sect. 1. A.]*

supply of water for domestic purposes, for a period of over fifty years. Deft. erected a gate to prevent the access of cattle to the trough, & let a pipe into the bottom of the trough leading into his own house, where it terminated in a stopcock, & by means of this pipe & stopcock he could draw off as much water as he pleased:—*Held*: the trough or cistern was a public well or work used for the gratuitous supply of water to the inhabitants of the district of the local authority in which it was situate, & it was vested in & was under the control of the local authority by force of Public Health Act, 1875 (c. 55), s. 64, & the local authority might maintain an action in their own name in the county court against deft. for damages for the interference with the trough by the insertion of the pipe in the bottom of it.—*HOLMFIRTH LOCAL BOARD v. SHORE* (1895), 59 J. P. 344.

57. *Effect of vesting in local authority—Duty to repair.*—*WITNEY v. WYCOMBE UNION RURAL SANITARY AUTHORITY* (1876), 40 J. P. Jo. 149, D. C.

58. — *Whether authority entitled to enter on private land—To maintain supply.*—*EDWARDS v. JOLLIFFE*, [1877] W. N. 120.

59. — *Right of action for interference with supply.*—*HOLMFIRTH LOCAL BOARD v. SHORE*, No. 50, *ante*.

60. — *No right to grant licence to abstract water—For purpose of sale.*—A local authority, in whom a public well is vested by Public Health Act, 1875 (c. 55), s. 64, has no power to grant a licence to abstract water from the well for the purpose of bottling & selling, so as to sensibly diminish the supply of water to riparian proprietors along a stream which is fed by the well.—*MOSTYN v. ATHERTON*, [1899] 2 Ch. 360; 68 L. J. Ch. 629; 81 L. T. 350; 48 W. R. 168.

*Annotation:—Reid. Portsmouth Borough Waterworks Co. v. L. B. & S. C. Ry.* (1909), 74 J. P. 61.

#### SECT. 3.—POWERS OF PARISH COUNCILS.

*Utilisation of wells.*—*See* Local Government Act, 1894 (c. 73), s. 8 (1).

*Acquisition of land for purpose of water supply.*—*See* Local Government Act, 1894 (c. 73), ss. 9, 15.

*Enforcement of right of inhabitants to use well or spring—Right of parish council to sue in own name.*—*See* LOCAL GOVERNMENT, Vol. XXXIII., p. 34, No. 182.

#### SECT. 4.—POWERS AND DUTIES OF METROPOLITAN LOCAL AUTHORITIES.

*See* Part V., Sect. 5, *post*.

## Part II.—Grant of Special Statutory Powers.

*Construction & maintenance under Waterworks Clauses Act, 1847 (c. 17).*—*See* Part III., *post*.  
*Supply by undertakers.*—*See* Part III., Sect. 2, *post*.  
*Metropolitan water supply.*—*See* Part V., *post*.

## Part III.—Powers, Duties and Liabilities of Undertakers.

### SECT. 1.—CONSTRUCTION AND MAINTENANCE OF WATERWORKS.

#### SUB-SECT. 1.—POWERS AND DUTIES OF UNDERTAKERS.

##### A. *In General.*

*See* Waterworks Clauses Act, 1847 (c. 17), ss. 6–34.

61. *Application of Waterworks Clauses Act, 1847 (c. 17)—Depends on incorporation in special Act.*—(1) Waterworks Clauses Act, 1847 (c. 17), s. 12, enacts that subject to the provisions & restrictions of the principal & special Acts, the undertakers may sink wells or shafts, & make, maintain, etc., such reservoirs, waterworks, etc., & other works, & erect such buildings upon the lands & streams authorised to be taken by them as they shall deem necessary for the purposes of their undertaking, & that they may take such waters as they may find in & under or on the lands to be taken for constructing the works.

A special Act authorised a co. to make the works thereinafter described in the line & situation, & on the levels & upon the lands defined by the plans & sections & book of reference, & to enter upon, take, purchase & use such of the lands, streams & waters mentioned in the plans & book of reference as they might deem necessary for all or any of

those purposes, & by a subsequent sect. they were empowered to make an aqueduct, constructed in tunnel or otherwise, as shown on the plans commencing, etc. On the plans & sections a field was exhibited as passed through by a tunnel, & in the Parliamentary notice served upon the landowner the mode in which the field would be affected was said to be by a tunnel:—*Held*: the co. were not entitled to sink wells or erect pumps on the land, or to deal with it otherwise than by driving a tunnel through it.

(2) *Semble*: Waterworks Clauses Act, 1847 (c. 17), s. 12, applies only where the undertakers are by the special Act authorised to construct waterworks, *eo nomine*.—*SIMPSON v. SOUTH STAFFORDSHIRE WATERWORKS CO.* (1865), 4 De G. J. & Sm. 679; 6 New Rep. 184, 279; 34 L. J. Ch. 380; 12 L. T. 360; 11 Jur. N. S. 453; 13 W. R. 729; 46 E. R. 1082, L. C.

*Annotations:—As to* (1) *Reid. Re Huddersfield Corp'n. & Jacomb* (1874), L. R. 17 Eq. 476. *As to* (2) *Reid. Morris v. Tottenham & Forest Gate Ry.*, [1892] 2 Ch. 47.

62. — — — — —.]—(1) The owners & occupiers of certain workhouses within the limits defined by sect. 68 of the co.'s special Act claimed the right to a supply of water to their workhouses for domestic purposes at the rents prescribed in that sect.:—*Held*: upon the construction of sect. 68

of the special Act, in conjunction with Waterworks Clauses Act, 1847 (c. 17), s. 53, the right to demand a supply of water for domestic purposes was limited to private dwelling-houses, & the claim failed.

(2) The object of Waterworks Clauses Act, 1847 (c. 17), sometimes referred to as the general Act, was, as appears from the preamble, to avoid the necessity of repeating in Acts of Parliament which authorise the construction of waterworks for supplying towns with water, sometimes referred to as special Acts, certain provisions usually inserted in such Acts & to insure greater uniformity in the provisions themselves. The general Act has no application unless & until it be incorporated in some special Act. If so incorporated, all its clauses save so far as they are expressly varied or excepted by the special Act are to be & form part of such last-mentioned Act & to be construed therewith as forming one Act. It follows that the meaning & effect to be given in each case to the clauses of the general Act, even though there be no express variation or exception, must depend, to some extent at any rate, on the provisions of the special Act, & cannot be determined without reference to such provisions (LORD PARKER OF WADDINGTON).—*BRISTOL GUARDIANS v. BRISTOL WATERWORKS CO.*, [1914] A. C. 379; 83 L. J. Ch. 393; 110 L. T. 846; 78 J. P. 217; 30 T. L. R. 296; 58 Sol. Jo. 318; 12 L. G. R. 261, II. L.

*Annotation*.—*As to* (1) *Fold. Northern Theatres Co. v. Shillito*, [1925] 2 K. B. 100.

**63. Power to erect works—Duty to comply with bye-laws.**—A water co. by their special Act, passed in 1897, & incorporating Waterworks Clauses Act, 1847 (c. 17), were empowered to erect & maintain a water tower in a specified place. Shortly after the special Act came into force the local sanitary authority of the district under the powers given by Public Health Act, 1875 (c. 55), s. 157, made bye-laws providing that any person intending to erect a building should give the local authority notice of his intention & of the date on which the building was to be commenced, & deliver to them plans & sections of it, & a description of the materials with which it was to be constructed. The special Act did not incorporate Public Health Act, 1875 (c. 55), but contained no provisions inconsistent with sect. 157 of that Act or with the bye-laws:—*Held*: with respect to the erection of the water tower authorised by the special Act, Waterworks Clauses Act, 1847 (c. 17), s. 93, had not the effect of exempting the water co. from the provisions of Public Health Act, 1875 (c. 55), & they were bound to comply with the bye-laws made by the local sanitary authority under that Act.—*UCKFIELD RURAL COUNCIL v. CROWBOROUGH DISTRICT WATER CO.*, [1899] 2 Q. B. 664; 68 L. J. Q. B. 1009; 81 L. T. 539; 48 W. R. 63; 16 T. L. R. 3; 44 Sol. Jo. 12, D. C.

*Annotations*.—*Reid*, L. C. C. v. Wandsworth & Putney Gas Co. (1900), 82 L. T. 562; Whitechapel Board of Works v. Crow (1901), 84 L. T. 595.

**64. — On additional lands acquired.**—A water co. incorporated by a special Act for the purposes of making & maintaining the waterworks thereby limited & defined, & for supplying water within the limits of the Act & for carrying on the business usually carried on by water co.s, was empowered, in addition to the lands authorised to be taken compulsorily, to acquire by agreement & hold for the general purposes of its undertaking any lands within its limits of supply not exceeding a certain acreage, provided that no buildings should be erected thereon except such as were required for the purposes of the co.'s waterworks. Under this power the co. purchased land some

distance away from its waterworks & proposed to sink a well & erect a pumping station thereon for the purpose of tapping a new water supply & pumping the water into an existing reservoir constructed under the powers of the Act:—*Held*: that the power to purchase additional land was only for purposes ancillary to the main purpose of the co., which was to supply water within its limits of supply by its statutory waterworks, & the proposed works were *ultra vires*.—*A.-G. v. FRIMLEY & FARNBOROUGH DISTRICT WATER CO.*, [1908] 1 Ch. 727; 77 L. J. Ch. 442; 98 L. T. 905; 72 J. P. 204; 24 T. L. R. 473; 6 L. G. R. 689, C. A.

*Annotations*.—*Conad*, A.-G. v. Barnet District Gas & Water Co. (1909), 101 L. T. 651. *Apld.*, A.-G. v. South Staffordshire Waterworks Co. (1909), 25 T. L. R. 408. *Reid*, Marriott v. East Grinstead Gas & Water Co., [1909] 1 Ch. 70.

**65. — — — — —**—*A.-G. v. SOUTH STAFFORDSHIRE WATERWORKS CO.* (1909), 25 T. L. R. 408.

**66. S. P. A.-G. v. SOUTH STAFFORDSHIRE WATERWORKS CO.** (1909), 73 J. P. Jo. 215.

**67. — — — — —**—*Where power given by special Act.*—A water co. had power under their special Act to buy additional land anywhere within their limits of supply & on such land "execute for the purposes of or in connection with the waterworks any of the works, & exercise any of the powers mentioned in or conferred by Waterworks Clauses Act, 1847 (c. 17), s. 12." The co., under the powers of their special Act, bought land & proceeded to sink a well at a distance of some miles from their reservoir for the purpose of supplying water to it:—*Held*: they were not exceeding their powers in so doing.—*A.-G. v. BARNET DISTRICT GAS & WATER CO.* (1910), 102 L. T. 546; 74 J. P. 193; 54 Sol. Jo. 457; 8 L. G. R. 499, H. L.

— *Duty to observe building line.*—*See HIGHWAYS*, Vol. XXVI., p. 580, No. 2548.

**68. Power to extend works—Application to Parliament—Validity of contract for supply of plans—Employment of engineer.**—A co. was incorporated by Act of Parliament for the supply of a certain district with water from certain sources within that district; & empowered to break up highways & place pipes within the district, & to do all other acts which the co. should deem necessary for supplying water to the inhabitants according to the true intent of the Act, & penalties were imposed on the co. not supplying water to the inhabitants of dwelling-houses within the district. The members of the co. were entitled to the net profits to be divided amongst them, except the surplus above 7 per cent., which was to go in the reduction of the water rents. In consequence of the increase of population the supply of water within the district became insufficient both in quantity & quality. The co. employed an engineer, who reported that a sufficient supply could not be obtained from existing sources, & recommended that a supply should be obtained from a brook beyond the district, which would be sufficient not only for the district but also for some adjoining populous villages. The co. then determined to apply to Parliament for powers to enlarge their works so as to make the brook available for the entire district which it was capable of supplying, & to increase their capital from £15,000 to £90,000:—*Held*: the co. might lawfully take steps to apply to Parliament for such extension of the undertaking, it being for the benefit of the corporate body; & that the contracts made by the co. for the supply of plans, etc., essential to the application to Parliament, were not necessarily illegal or void, or otherwise incapable of being enforced against the co. in a ct. of law.—*BATEMAN v. ASHTON-*

**Sect. 1.—Construction and maintenance of water-works: Sub-sect. 1, A. & B. (a) & (b) i. & ii.]**

**UNDER-LYNE CORPN.** (1858), 3 H. & N. 823; 27 L. J. Ex. 458; 31 L. T. O. S. 299; 22 J. P. 498; 6 W. R. 829; 157 E. R. 494.

**Annotations:—***Mentd.* Maunsell v. Mid. G. W. Ry. (of Ireland) & Great Northern & Western (of Ireland) Ry. (1863), 8 L. T. 347; Taylor v. Chichester & Midhurst Ry. (1867), L. R. 2 Exch. 356; Ploking v. Ilfracombe Ry. (1868), L. R. 3 C. P. 235; A. G. v. G. E. Ry. (1879), 11 Ch. D. 449; Dartford Union Grdms. v. Trickett (1888), 59 L. T. 754.

**69. Power to erect auxiliary works.]—SIMPSON v. SOUTH STAFFORDSHIRE WATERWORKS CO., No. 61, ante.**

**70. Right to prevent diversion of stream—Water coming into reservoir.]—**A water co. who were authorised in 1869 by their Act to make a reservoir with a dam across a stream, & to impound all the waters of that stream & of other streams then flowing into that stream above the dam, & so became owners of the reservoir through the site of which the stream originally flowed, have the right to stop any person from diverting the water, which at that time came down, or but for a stoppage would come down as part of that stream or its tributaries above the dam, & as to which the person diverting could have been restrained from continuing his diversion at the suit of a lower riparian owner, but not to stop any person using water above who had a right to do so at the time their Act was passed.—**BRYMBO WATER CO. v. LESTERS LIME CO.** (1894), 8 R. 329.

**71. Power to make outfalls for water.]—FIELDEN v. MORLEY CORPN.** (1899), as reported in 14 T. L. R. 566, C. A.

**Annotations:—***Mentd.* Southwark & Vauxhall Water Co. v. Wandsworth District Board of Works (1898), 67 L. J. Ch. 657; Roberts v. Gwyrfai R. C. (1899), 68 L. J. Ch. 233; The Ydun, [1899] P. 236; A. G. v. Margate Pier & Harbour Co. of Proprietors, [1900] 1 Ch. 749; R. v. Cockerton, [1901] 1 K. B. 726; Smith v. Northleach R. C. (1901), 71 L. J. Ch. 8; Jeremiah Ambler v. Bradford Corpn., [1902] 2 Ch. 585; Parker v. L. C. C., [1904] 2 K. B. 501; Sharpington v. Fulham Grdms., [1904] 2 Ch. 449; Lykes v. Southend-on-Sea Corpn., [1905] 2 K. B. 1; Tilling v. Dick Kerr, [1905] 1 K. B. 562; Jones v. Shervington, [1908] 2 K. B. 539; L. C. C. v. Bermondsey Bioscope Co., [1911] 1 K. B. 445; Myers v. Bradford Corpn. (1913), 110 L. T. 254; Bradford Corpn. v. Myers, [1916] 1 A. C. 242; Gilbert v. Gosport & Alverstoke U. C., [1916] 2 Ch. 587; Edwards v. Metropolitan Water Board, [1922] 1 K. B. 291; The Wilhelmina, [1923] P. 112; Bharchand Dugguda Gupthi v. Secretary of State for India in Council (1927), 43 T. L. R. 617; Graigola Morthyr Co. v. Swansea Corpn., [1928] Ch. 235.

**72. Rights under agreement with railway company—Main constructed under railway.]—**A proviso in an agreement between a water co. & a railway co. with regard to the rights of each as to a main constructed by the water co. underneath & across the railway of the railway co., that "nothing in these presents contained shall be deemed to preclude the railway co. in any way from altering adding to or widening their railway & works from time to time under their existing powers or from otherwise using or enjoying their lands for the purposes of their railway & undertaking without being liable to compensate the board, water co., for any damage or injury which may be occasioned thereby to the works of the board unless such damage or injury shall be occasioned by any wilful act or default of the railway co." is a proviso

which deals with the result of acts & defaults not *prima facie* disturbances of pliffs' rights, & on its true construction operates only to relieve defts. from liability for damages in respect of physical injury to the works resulting from such "acts or defaults" where such "acts or defaults" have not been wilful. Defts. held not entitled to substantially diminish the reasonable access of pliffs. to their main for the purposes of inspection & repair.—**METROPOLITAN WATER BOARD v. LONDON & NORTH-EASTERN Ry. Co.** (1924), 131 L. T. 123; 88 J. P. 101; 40 T. L. R. 996; 22 L. G. R. 383.

**B. Acquisition of Land and Streams.**

**(a) In General.**

See Waterworks Clauses Act, 1847 (c. 17), ss. 6, 12; & generally, COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 93 et seq.

**73. "Taking & using"—Distinguished from "injuriously affected."]—**The clauses of Waterworks Clauses Act, 1847 (c. 17), are applicable to "lands & streams," in the same manner as those of Lands Clauses Consolidation Act are applicable to "lands"; & in the mode of compensation, the same distinction is taken between "lands & streams taken & used" & "lands & streams injuriously affected."

The diversion of a stream is a "taking & using it" within Lands Clauses Consolidation Act, 1845 (c. 18), s. 85, which is incorporated in Waterworks Clauses Act, 1847 (c. 17), & before such diversion can be made, the value of the stream must be ascertained & secured to the owners of the land through which it passes.

*Qu.* whether, by diverting a stream, the river into which it used to flow is "injuriously affected," or "taken & used."—**FERRAND v. BRADFORD CORPN.** (1856), 21 Beav. 412; 27 L. T. O. S. 11; 20 J. P. 116; 2 Jur. N. S. 175; 52 E. R. 918.

**Annotations:—***Apld.* Stone v. Yeovil Corpn. (1876), 2 C. P. D. 99. *Refd.* *Re* Gough & Aspathria, Silloth & District Joint Water Board (1903), 88 L. T. 421.

**74. —What amounts to—Diversion of stream.]—****FERRAND v. BRADFORD CORPN., No. 73, ante.**

**75. Effect of subsequent Act—On powers exercised under previous Act.]—**By their special Act the Bristol Waterworks co. had power to take water from the river Chew on paying compensation for it; but sect. 30 enacted that it should not be lawful for the co. to divert, or take, or in any manner interfere with the water flowing, or passing, or which, but for the powers of this Act, might flow or pass into the river Chew, unless & until water, after the rate of 12 cubic feet per second, for twelve hours of each & every day should be passing down the river from & out of certain reservoirs for the use of mills. By a subsequent Act it was provided that nothing in that Act or in the former Act, should extend to authorise the co. to purchase, take, use or interfere with any land, soil, or water, or any rights in respect thereof, belonging to the Duke of Cornwall without his consent testified in writing under his privy seal:—*Held:* the co. did not, by the exercise of the powers conferred by the first Act, acquire any right as against the Duke of Cornwall to the water of the

**PART III. SECT. 1, SUB-SECT. 1.—B. (a).**

**e. Power limited to land authorised to be taken.]—**In June, 1835, defts. predecessors in title obtained from the owners of land the right to enter for the purpose of constructing a reservoir & keeping the same in repair. In 1884 defts. entered & rebuilt & enlarged the reservoir:—

*Held:* the construction by defts. of the larger reservoir in 1884 was not within the terms of the grant, & was a trespass for which defts. were liable. **CORBITT v. WILSON, CORBITT v. DIGBY WATER CO.** (1891), 24 N. S. R. (12 R. & G.) 25.—**CAN.**

*E. Duty to proceed under Water Act, 1909.]—A municipality, having obtained water records under Water*

Act, 1909, must proceed under the expropriation clauses of that Act in acquiring lands for the purposes of a waterworks system, & not under Municipal Clauses Act.—**LEWIS v. DELTA MUNICIPAL CORPN.** (1911), 16 B. C. R. 228.—**CAN.**

**g. Duty to proceed under Dominion Act where land or water belongs to Dominion.]—***Re* YOUNG & CITY OF



Chew, without obtaining the authority of the Duke of Cornwall in the manner provided by the last-mentioned Act.—*A. G. v. BRISTOL WATERWORKS CO.* (1855), 10 Exch. 884; 3 C. L. R. 726; 24 L. J. Ex. 205; 24 L. T. O. S. 311.

**76. Power limited to land authorised to be taken—Authority to construct tunnel under land—No right to erect works on surface.]—***SIMPSON v. SOUTH STAFFORDSHIRE WATERWORKS CO.* No. 61, ante.

**Land taken for collateral purposes.]—***See COMPULSORY PURCHASE OF LAND*, Vol. XI., pp. 116, 117, Nos. 106–108.

(b) *Compensation.*

i. *In General.*

*See Waterworks Clauses Act, 1847 (c. 17), ss. 6, 12; & generally, COMPULSORY PURCHASE OF LAND*, Vol. XI., pp. 122 et seq.

**77. Duty to make compensation—Whole value of interest.]—**Under a local Waterworks Act, which incorporated Lands Clauses Act, 1845 (c. 18), & Waterworks Clauses Act, 1847 (c. 17), defts. were empowered to take, use, divert & appropriate certain streams, & amongst others a stream necessary for the working of a mill of which pltf. was tenant for life. Defts. gave pltf. notice of their intention to take the whole of the stream, but actually diverted only a portion of it; & afterwards, by an agreement purporting to be made under the special Act, pltf. & defts. nominated two practical surveyors to determine the amount of compensation to be then paid by defts. for the damage which the owner or owners for the time being of the mill might sustain by the abstraction of the whole of the stream which defts. were authorised to take. The two surveyors did not agree on a valuation, & accordingly a third surveyor was nominated by two justices under Lands Clauses Act, 1845 (c. 18), s. 9, on the application of defts., & with the consent of pltf., to determine the amount of compensation for the damage to the mill, & he awarded the sum of £939 for compensation for the permanent damage to the owners of the mill from the abstraction of the whole of the stream. To a statement of claim alleging the above facts, defts. demurred, on the ground that they had no power to agree to make compensation for the abstraction of the whole stream, but only for such damage as was done to the owner of the mill from time to time:—*Held*: defts. had power under their Act to purchase & divert the whole stream, & having given notice to pltf. of their intention to do so, they were bound & empowered to make compensation at once for the whole value of the interest of the owners of the mill in the stream, & not merely to compensate them from time to time for injuriously affecting the property.—*STONE v. YEOVIL CORPN.* (1876), 2 C. P. D. 99; 46 L. J. Q. B. 137; 36 L. T. 279; 42 J. P. 212; 25 W. R. 240, C. A.

*Annotations:—Reid, Re Gough & Aspathria, Silloth & District Joint Water Board* (1903), 88 L. T. 421. *Mentl. R. v. Vasey & Lally* (1905), 22 T. L. R. 1.

**78. Mode of compensation—Waterworks Clauses**

*MOORE JAW (Sask.)* (1912), 21 W. L. R. 11, 860; 5 D. L. R. 83.—*CAN.*

**h. Power limited to water authorised to be taken.]—***M'CULLOCH v. DUMFRIES & MAXWELLTOWN WATERWORKS COMRS.* (1863), 1 Macph. (Ct. of Sess.) 334.—*SCOT.*

**PART III. SECT. 1, SUB-SECT. 1.—B. (b) 1.**

**k. What may be claimed—Possible future benefit to proprietary interest.]**

—*Compensation for the abstraction of streams of water by a co. under Water Supply Act, 1886, includes the value of the owners' proprietary interest, & that possible future benefit is an element not to be excluded in assessing such compensation.*—*TRENT-TOUGH-TON v. BARBADOS WATER SUPPLY CO., LTD.* [1893] A. C. 502, P. C.—*BARBADOS.*

**1. Right of corporation to possession of property—After passing of bye-**

*Act, 1847 (c. 17), ss. 6, 12.]—FERRARD v. BRADFORD CORPN., No. 73, ante.*

**79. Recovery of compensation—Action on agreement—Right to injunction to restrain—Where conflicting claims.]—**A., an owner in fee of land to which a right of running water was appurtenant, agreed with a water co. to accept £2,500 as compensation for his right in the water, & subsequently let the co. into possession of the water. The land was subject to a chief rent, & the owner of the chief rent also claimed from the co. compensation for the loss of the water. The co. refused to pay the £2,500 to A. unless he obtained the concurrence of the owner of rent in the deed of conveyance. A. then brought an action for the £2,500 & the co. filed a bill for specific performance of his agreement & for an injunction to restrain the action:—*Held*: the co. were entitled to the injunction on bringing the money into ct. to abide the decision of the conflicting claims for compensation.—*STOCKPORT DISTRICT WATERWORKS CO. v. JOWETT* (1865), 12 L. T. 720; 13 W. R. 977, L. C.

**80. Amount of compensation—Provision for arbitration—Principle of valuation—Sale by water board to sanitary authority.]—***STOCKTON & MIDDLSEBROUGH WATER BOARD v. KIRKLEATHAM LOCAL BOARD*, No. 26, ante.

—**Special adaptability of land.]—***See COMPULSORY PURCHASE OF LAND*, Vol. XI., pp. 126, 127, Nos. 165–169.

**Accommodation works.]—***See Waterworks Clauses Act, 1847 (c. 17), ss. 16, 17.*

ii. *Compensation Water.*

**81. Liability of undertaker to supply—Works not completed.]—**Defts., a corp., were empowered by a local Act of Parliament, to construct a reservoir for public purposes, & to divert to it the waters of certain rivers & streams, & were required under penalties to discharge from the reservoir a certain specified quantity of water per second, for the use of mills on the river E. The Act provided that defts. should not divert any of the waters of the river E. until the reservoir should be completed & filled, & water discharged therefrom in the quantity provided, & that, except as provided for, the rights of mill owners should not be prejudiced. Defts. diverted a part of the waters of the river E., but from engineering difficulties the reservoir was not completed so as to be capable of being filled with water:—*Held*: the mill owners on the river E. could not maintain an action for the non-supply of the statutable amount of water from the reservoir, but were confined to an action for damages occasioned by the wrongful diversion of the natural supply before the completion of the reservoir.—*WALLER v. MANCHESTER CORPN.* (1861), 6 IL. & N. 667; 30 L. J. Ex. 293; 7 Jur. N. S. 635; 158 E. R. 275.

**82. ———.]—**By a special Waterworks Act a waterworks co. were empowered to execute certain works as shown on the deposited plans, & to take, use, & appropriate certain streams for the purposes of their Act, & the co. were bound "from & after the completion of the works" to deliver

*law raising amount of award.]—CORNWALL WATERWORKS CO. v. CORNWALL CORPN.* (1898), 29 O. R. 605.—*CAN.*

**m. Where payment of compensation condition precedent—Entry without payment illegal.]—***BOTSFORD v. SEARS* (1864), 11 N. B. R. (6 ALL.) 116.—*CAN.*

**n. Right to divert streams without payment of compensation.]—***GIRDWOOD v. BELFART WATER COMRS.* (1877), 1 L. R. Ir. 28.—*IR.*

**o. Time for making claim—Within**



*Sect. 1.—Construction and maintenance of water-works: Sub-sect. 1, B. (b) ii., & C. (a) & (b) i.]*

into a certain brook as compensation water a regular supply of water not less than a specified minimum quantity during every twenty-four hours, & the Act provided that if the co. omitted or failed to deliver into the brook the minimum quantity of compensation water, they should be liable to "a penalty of £5 a day" for every day during which such failure occurred, "such penalty to be recoverable summarily," by the party or parties interested in the delivery of such water, before two justices "in manner provided by the Summary Jurisdiction Acts," & to be payable to the party or parties interested.

Upon an information against the co. for failing to deliver the minimum quantity of compensation water into the brook, the justices convicted, but reduced the penalty of £5 to 1s. a day:—*Held*: (1) the £5 a day was not compensation for the failure to send down the proper compensation water, but was a penalty for the breach of the statutory obligation imposed on the co., & the justices had power to reduce the same under sect. 4 or sect. 16 of Summary Jurisdiction Act, 1879 (c. 49); (2) the fact that the whole of the works as shown on the deposited plans had not been completed did not prevent the co. from being liable for their failure to deliver into the brook the compensation water, as the words "from & after the completion of the works" were satisfied by the completion of the works in reference to the brook in question & the taking of the water from that brook.—*COOKE v. HAWARDEN & DISTRICT WATERWORKS CO., HAWARDEN & DISTRICT WATERWORKS CO. v. COOKE* (1907), 96 L. T. 906; *sub nom. DAVIES-COOKE v. HAWARDEN & DISTRICT WATERWORKS CO., HAWARDEN & DISTRICT WATERWORKS CO. v. DAVIES-COOKE*, 71 J. P. 223; 5 L. G. R. 731, D. C.

**83. — Duty to use all reasonable care.]—**Defts. were empowered by a local Act of Parliament to construct & maintain certain waterworks & to appropriate certain streams & waters. The Act provided that as compensation for the taking of the water from a certain dike defts. should cause to flow from a reservoir into such dike a specified quantity of water per minute during every lawful working day; & further provided that in case of neglect on the part of defts. by, or in consequence of, which the specified quantity of water should not so flow, defts. should for every day on which such neglect should occur forfeit & pay to the occupiers of each of the mills & works affected thereby the sum of £5, & should, in addition make compensation for loss, damage or injury sustained by such occupiers in respect of which such penalties should be insufficient compensation. Pltfs., who were eight mill occupiers, alleged that by reason of the neglect of defts., the specified quantity of water did not flow into such dike for a period including forty-three working days, & each pltf. claimed £215, the amount of the penalties of £5 per day for forty-three days. At the trial of the action pltfs. proved that there was sufficient water in the reservoir to enable defts. to send down the statutory quantity, & that the pipes if not defective were sufficient in size to send down that quantity. It was further proved that such pipes require care & attention from time to time, but that defts.' pipes had not been inspected for a period of thirty years:—*Held*: (1) defts. were

under an obligation to use all reasonable care to send down the statutory quantity of water, & the evidence given by pltfs. established a *prima facie* case of neglect & case upon defts. the burden of proving that they had used reasonable care; (2) in case of neglect defts. were liable to pay a sum of £5 per day to each of the occupiers of the mills or works affected by such neglect, & therefore each of pltfs. was entitled to recover the amount claimed.—*BEAUMONT v. HUDDERSFIELD CORPN.* (1902), 67 J. P. 57; 19 T. L. R. 97; 47 Sol. Jo. 127; 1 L. G. R. 118, C. A.

*Annotation.—As to (2) Apld. Meltham Spinning Co. v. Huddersfield Corpn.* (1908), 89 L. T. 403.

**84. — To owners & occupiers of specified works—Effect of abandonment of works.]—**By section of a local Act, "the owners, lessees, & occupiers" of certain furnaces were permitted to take along an existing watercourse from a stream which was being acquired by the local authority, compensation water not exceeding a specified quantity in "any working day." At the time of the passing of the Act, a co. held the furnaces on lease from pltf., as tenant for life of certain settled lands, & carried on business there. The watercourse was some two miles long, & part of its course lay over lands, other than the settled lands, & the co. paid rent for wayleaves over these lands. In 1890, the co. ceased to use the furnaces, & in 1895 they gave up the wayleaves. In 1898 pltf. assented to the dismantling of the co.'s works. In the meanwhile, the watercourse had been allowed to get into disrepair, & as from 1895 or 1896 water entering it from the stream escaped by breaches in it, & was lost before reaching the site of the furnaces. In 1900, defts. diverted the stream so as to prevent any water entering the watercourse, & thereupon pltf. brought this action for a declaration as to his right to the water, & for an injunction against defts. accordingly:—*Held*: (1) the construction of the sect. that the right to water under it did not depend on the continuance of works at the furnaces, & pltf., as tenant for life of the site of the furnaces, was entitled to a supply of water to that site, as provided by the sect.; (2) an abandonment of the right conferred by the sect. was not proved by showing that no use had been made of the water during a period when it happened not to be wanted; (3) no injunction could be granted at the present time, because pltf. had so far suffered no damage from the act of defts. in diverting the stream.

(4) The words "working day," which are words used in that sect., mean the days upon which you may work, & not the days on which you do work, & mean, therefore, the six working days of the week, that is, the days of the week other than Sunday (NEVILLE, J.).—*HANBURY v. LLANFRECHFA UPPER URBAN DISTRICT COUNCIL* (1911), 75 J. P. 307; 9 L. G. R. 360.

**85. — Specified quantity in any working day—Meaning of "working day."]—***HANBURY v. LLANFRECHFA UPPER URBAN DISTRICT COUNCIL*, No. 84, *ante*.

**86. Remedy for failure to supply—Action for penalties.]—***LEWIS & SONS v. SWANSEA CORPN., LEWIS v. SWANSEA CORPN.* (1888), 4 T. L. R. 706, C. A.

*Annotations.—Distd. Beaumont v. Huddersfield Corpn.* (1902), 19 T. L. R. 97. *Refd. Meltham Spinning Co. v. Huddersfield Corpn.* (1903), 2 L. G. R. 32.

**87. — Burden of proof—On undertakers.]—***BEAUMONT v. HUDDERSFIELD CORPN.*, No. 83, *ante*.

Sc. L. R. 425; 5 S. L. T. 298.—*SCOT. q. Amount of compensation—Value of minerals owner prevented from working.]—*EDINBURGH WATER TRUS-

six months from date of injury.]—*SCHULTZ v. WELLINGTON CORPN.* (1880), O. B. & F. 1.—N.Z.

P. Time for giving notice by

mineral owner—Of work to be done in prohibited area.]—*EDINBURGH WATER TRUSTEES v. CLIPPENS OIL CO., LTD.* (1898), 25 R. (Ct. of Sess.) 504; 35

88. — Amount recoverable—Liability to each person affected.]—*BEAUMONT v. HUDDERSFIELD CORPN.*, No. 83, *ante*.

89. — Power of justices to reduce.]—*COOKE v. HAWARDEN & DISTRICT WATERWORKS CO.*, *HAWARDEN & DISTRICT WATERWORKS CO. v. COOKE*, No. 82, *ante*.

90. — Jurisdiction of High Court.]—Under a local water Act a corp. were bound to supply certain compensation water as compensation for the waters taken by them for the purposes of the Act, & in case of neglect to supply such compensation water they were for every day on which such neglect occurred to "forfeit & pay to the occupiers of each of the mills & works affected thereby, who may sue for & recover the same, the sum of five pounds" & were also to make compensation for any loss sustained by such occupiers in respect of which the penalties were not a sufficient compensation, & such compensation might be sued for in any ct. of competent jurisdiction.

Railway Clauses Consolidation Act, 1845 (c. 20), s. 145, which was incorporated in the local Act, provides that every penalty or forfeiture, the recovery of which is not otherwise provided for may be recovered by summary proceeding before two justices:—*Held*: the £5 penalties imposed by the local Act were intended in the main to be a mode of compensation to the injured occupiers of the mills, & therefore the mode of recovering penalties which was prescribed in Railways Clauses Consolidation Act, 1845 (c. 20), s. 145, did not apply & an action to recover the penalties was rightly brought in the High Ct.—*MELTHAM SPINNING CO., LTD. v. HUDDERSFIELD CORPN.* (1903), 89 L. T. 403; 67 J. P. 445, C. A.

91. — Injunction—To restrain diversion of stream.]—*HANBURY v. LLANFRECHEFA UPPER URBAN DISTRICT COUNCIL*, No. 84, *ante*.

92. Pollution of compensation water—Liability of undertakers.]—Riparian proprietors are entitled except so far as their rights are varied by statute or special circumstances, to require that nothing shall be done to affect to their prejudice either the quantity or the quality of the stream as it flows in a natural state; & when an Act of Parliament authorises interference with the natural flow, the original rights of the riparian proprietors are impaired only so far as the reasonable exercise of the statutory rights impairs them.

But where a water co. was empowered by Act of Parliament to construct a reservoir on a stream in order to supply a town with water, & the Act provided that a fixed amount of compensation water should be allowed to flow from the reservoir for the benefit of the riparian proprietors lower down the stream:—*Held*: in the absence of negligence, the water co. was not liable for damage

caused by the pollution of the compensation water from accidental causes.—*EDINBURGH WATER TRUSTEES v. SOMMERVILLE & SON* (1906), 95 L. T. 217, H. L.

### C. Laying of Pipes.

#### (a) In Private Lands.

See Waterworks Clauses Act, 1847 (c. 17), s. 29. Laying of water mains & pipes by local authorities.]—See Part I., Sect. 2, sub-sect. 2, *ante*.

#### (b) In Streets.

##### i. In General.

See Waterworks Clauses Act, 1847 (c. 17), ss. 28–34.

93. Right to break up street.]—An Act passed in 1740, enabling S., lord of the manor of F., his heirs & assigns, at their costs, to convey water in pipes from his estate there to Portsmouth, & through the streets, & for that purpose to break up the pavement, making good same again, is not repealed by the Act of 1792, passed above 50 years afterwards, vesting the property & control of the pavement in comrs., without exception of the former right; the two Acts not being inconsistent, but giving the several powers to be exercised for different purposes; & the waterworks, etc., together with the powers under the first Act, may be afterwards executed by the assigns of S., to whom same, apart from the manor, were conveyed by mesne assignments; though such powers had lain dormant since 7 years after the passing of the Act till 1809. But if S.'s assigns break up the pavement for the purpose of executing the powers reserved to them, without restoring it again, they are amenable either by indictment, or by action, for the injury done to the property of the comrs.—*GOLDSON v. BUCK* (1812), 15 East, 372; 104 E. R. 885.

94. — What works included—Stop valves & guard boxes.]—The power given by Waterworks Clauses Act, 1847 (c. 17), s. 28, includes any works which the undertakers may deem necessary for the purpose of regulating the supply of water, & is not confined to the laying down of apparatus underground, but enables the undertakers to place such works on the surface of the street, as may not be inconsistent with the substantial reinstatement of the road or pavement in its previous condition or create a nuisance; & a water co. is authorised by the sect. to place in the pavement of a street covers or guard boxes to protect stop valves placed for the purpose of regulating the supply of water in the communication pipes, by which water was supplied to premises in the street, such covers or guard boxes not creating a nuisance or being inconsistent with the substantial reinstatement of the pavement.—*EAST LONDON WATERWORKS CO. v. ST. MATTHEW, BETHNAL GREEN VESTRY* (1880), 17 Q. B. D.

*TEES v. CLIFFENS OIL CO. LTD.* (1902), 4 F. (Ct. of Sess.) (H. L.) 40; 39 Sc. L. R. 860; 8 S. L. T. 447.—*SCOT*.

r. Presumption that after eighty years' enjoyment of wayleave right of support obtained.]—*CLIFFENS OIL CO., LTD. v. EDINBURGH & DISTRICT WATER TRUSTEES* (1903), 6 F. (Ct. of Sess.) (H. L.) 7; 41 Sc. L. R. 124; 11 S. L. T. 461.—*SCOT*.

### PART III. SECT. 1, SUB-SECT. 1.—C. (a).

t. Warrant to summon jury—When granted.]—An application for a warrant to summon a jury to assess the damages to the owner of land through which the St. John Water Co. desired to lay pipes, etc., under the Authority of 2 Will. 4, c. 26, was refused, where

it was not shown that the co. deemed it absolutely necessary to lay down pipes through the land.—*Ex p. ST. JOHN WATER CO.* (1836), 2 N. B. L. (Mor.) 224.—*CAN.*

a. Discretion of corporation to issue notes in payment of compensation & expenses of water works.]—*Ex p. COSTER* (1856), 8 N. B. R. (3 All.) 349.—*CAN.*

b. Right of action for trespass—Old statute authorising use of road as public highway.]—*DICKSON v. KEARNEY* (1888), 14 S. C. R. 713.—*CAN.*

c. Pipes laid at greater vertical deviation than statute allowed.]—A landowner, though whose lands water pipes were laid at a greater vertical deviation than was authorised by the statute empowering the construction

of the works:—*Held*: not entitled, to object to a new pipe being laid alongside the other, the statute empowering the comrs. to alter, enlarge, or increase the number of pipes, & no objection having been made or being now taken to the level at which the old pipes were laid.—*BUCHANAN v. GLASGOW CORPN. WATERWORKS COMRS.* (1869), 7 Macph. (Ct. of Sess.) 853.—*SCOT*.

d. Repairs to aqueduct.]—*BRIDGES v. FRASERBURGH POLICE COMRS.* (1887), 25 Sc. L. T. 151.—*SCOT*.

e. Right to lay pipes granted subject to conditions—Effect of renunciation of servitude on fulfilment of conditions.]—*MACDONALD v. INVERNESS COUNCIL*, [1918] S. C. 141.—*SCOT*.

*Sect. 1.—Construction and maintenance of waterworks: Sub-sect. 1, C. (b) i., ii. & iii.; sub-sect. 2, A.]*

475; 55 L. J. Q. B. 571; 54 L. T. 919; 50 J. P. 820; 35 W. R. 37; 2 T. L. R. 880, C. A.

*Annotations:—*Consd. Chapman v. Fylde Waterworks Co. (1894), 71 L. T. 539. *Reid*, Osborn v. Metropolitan Water Board (1910), 102 L. T. 217; Batt v. Metropolitan Water Board, [1911] 1 K. B. 845.

**95. — Limited to authorised works.]—**(1) Waterworks Clauses Act, 1847 (c. 17), s. 28, merely enables a water co. to lay pipes under streets in connection with the undertaking authorised by their special Acts, & if they are being laid in connection with unauthorised works, the owner of the soil can sue the water co. in trespass, raise the question of *ultra vires*, & obtain an injunction without joining the A.-G.

(2) *Semble*: a public street or footpath is "land dedicated to public use" within the meaning of sect. 29, so that pipes in connection with authorised works could be laid without the consent of the owner of the soil.—*MARRIOTT v. EAST GRINSTEAD GAS & WATER CO.*, [1909] 1 Ch. 70; 78 L. J. Ch. 141; 90 L. T. 958; 72 J. P. 509; 25 T. L. R. 59; 7 L. G. R. 477.

*Annotations:—*As to (1) *Reid*, A.-G. v. Barnet District Gas & Water Co. (1909), 74 J. P. 1. As to (2) *Reid*, Schweder v. Worthing Gas Light Coke Co. (No. 2), [1913] 1 Ch. 118.

**96. — Submission of plan—What plan must show.]—**(1) The "plan" required by Waterworks Clauses Act, 1847 (c. 17), s. 31, to be furnished by a water co. to the road authority before breaking up a road for the purpose of laying down a line of pipes, is a plan, not merely of the breaking up" of the road, but also showing the mode in which the underground work is intended to be executed, so as to enable the road authority to judge whether the proposed work ought to be done without modification.

(2) When a water co. gives notice to the local authority of its intention to open & break up the street for the purpose of laying down water pipes, & submits such a plan as above-mentioned to the local authority, if the latter do not propose anything themselves so as to create a "difference" which under the same sect. can be referred to the justices, & do not attend with their officer at the time fixed for the opening & breaking up of the street to superintend it, then the water co. may perform the work without the superintendence of the local board or their officer.—*EAST MOLESEY LOCAL BOARD v. LAMBETH WATERWORKS CO.*, [1892] 3 Ch. 289; 62 L. J. Ch. 82; 67 L. T. 493; 2 R. 88, C. A.

**97. — Effect of non-approval—Duty to apply to justices.]—**Under Waterworks Clauses Act, 1847 (c. 17), s. 31, it is incumbent upon the undertakers intending to break up a road to communicate beforehand their proposed plan or method of executing the work to the road authority; & this in a sufficient manner to enable the road authority to judge whether what is proposed ought to be done without modification. If the plan is not approved of by the road authority, it rests with the undertakers to apply for the determination of two justices before proceeding to

operations.—*EDGWARE HIGHWAY BOARD v. COLNE VALLEY WATER CO.* (1877), 46 L. J. Ch. 889. *Annotation:—**Apprd.*, East Molesey L. B. v. Lambeth Water Works Co., [1892] 3 Ch. 289.

**98. —**—[*EAST MOLESEY LOCAL BOARD v. LAMBETH WATERWORKS CO.*, No. 96, *ante*.]

**99. — Public footpath over private field.]—**By sect. 32 of a private Act of Parliament, a water co. was empowered to "break up the soil & pavement of roads, highways, footways, commons, streets, lanes, alleys, passages, & public places," provided, sect. 34, that they should not enter any private lands without the consent of the owner:—*Held*: the co. had no authority, without the consent of pltf., to enter a field of his, over which there was a public footpath.—*SCALES v. PICKERING* (1828), 4 Bing. 448; 1 Moo. & P. 195; 6 L. J. O. S. C. P. 53; 130 E. R. 840.

**100. — Bridge over railway.]—**The undertakers are not authorised by Waterworks Clauses Act, 1847 (c. 17), s. 28, to cut through plates lying on the top of a girder railway bridge carrying a public road for the purpose of suspending their pipes to the girders.—*GLASGOW CORPN. v. GLASGOW & SOUTH WESTERN RY. CO.*, [1895] A. C. 376; 64 L. J. P. C. 171; 72 L. T. 809; 59 J. P. 788; 11 R. 226. *Annotations:—*Consd. Porter v. Ipswich Corp., [1922] 2 K. B. 145. *Reid*, Taft Vale Ry. v. Cardiff Gas Light & Coke Co. (1907), 71 J. P. 350. *Monk*, Sharpness New Docks & Gloucester & Birmingham Navigation Co. v. A.-G. (1915), 84 L. J. K. B. 907.

**101. — "Land dedicated to public use."]**—*MARRIOTT v. EAST GRINSTEAD GAS & WATER CO.*, No. 95, *ante*.

ii. *Interference by Other Undertakers.*

**102. Alteration in level of street—Removal of pipes—Liability for cost of removal.]—***BRISTOL WATERWORKS CO. v. BRISTOL CORPN.* (1889), 5 T. L. R. 551, C. A.

— *Duty of highway authority.]—*See *HIGHWAYS*, Vol. XXVI., p. 488, No. 1997.

**103. Construction of tramway—Notice of intention to construct—Duty of undertakers to give counter-notice.]—**A gas or water co., on being served by a tramway co., under Tramways Act, 1870 (c. 78), s. 30, with a seven days' notice of intention to make a tramway along a street under which mains are laid, is not bound to give a counter-notice to lower or alter the position of the mains within seven days, as there is no express provision to that effect, & it will not be implied although sect. 31, which refers to sewers, drains, etc., contains a limitation.—*HASTINGS TRAMWAYS CO. v. HASTINGS & ST. LEONARDS GAS CO.*, [1906] 2 Ch. 578; 76 L. J. Ch. 60; 95 L. T. 684; 79 J. P. 540; 23 T. L. R. 4; 51 Sol. Jo. 12; 5 L. G. R. 142, C. A.

iii. *Liability for Defects.*

See Sect. 3, *post*.

**SUB-SECT. 2.—RIGHTS OF PERSONS INJURIOUSLY AFFECTED.**

A. *In General.*

See Waterworks Clauses Act, 1847 (c. 17), ss. 6, 12.

**104. Right to damages—Where provision for arbitration—Obstruction of drain.]—***BLAGRAVE v. BRISTOL WATERWORKS CO.*, No. 115, *post*.

**PART III. SECT. 1, SUB-SECT. 1.—**  
C. (b) i.

**95 i. Right to break up street—What works included—Limited to authorised works.]—***CLIPPENS LTD. CO., LTD. v. EDINBURGH & DISTRICT WATER TRUSTEES* (1897), 25 R. (Ct. of Sess.) 370; 35 Sc. L. R. 304; 5 S. L. T. 242.—*SCOT*.

i. — *Meaning of tunnels.]—*

*CALEDONIAN RY. CO. v. GLASGOW CORPN.* (1901), 3 F. (Ct. of Sess.) 526; 38 Sc. L. R. 376; 8 S. L. T. 457.—*SCOT*.

**PART III. SECT. 1, SUB-SECT. 1.—**  
C. (b) ii.

**g. Construction of rival system—Whether injunction granted.]—***CHE D'AQUEDEC DE LA JEUNE-LORETTE v.*

*VERRETTE* (1909), 42 S. C. R. 156.—*CAN.*

**PART III. SECT. 1, SUB-SECT. 2.—A.**

**h. Right to compensation—Water taken without consent.]—***R. v. ST. JOHN CITY SEWERAGE COMRS.* (1850), 12 N.B. R. (1 Han.) 3.—*CAN.*

**k. Right to damages—Refusal to repair bridge—Built over overflowage by**

105. ——— **Raising level of stream.**—*BLAGRAVE v. BRISTOL WATERWORKS CO.*, No. 115, *post*.

106. ——— **In lieu of injunction—Encroachment beyond lands acquired—Measure of damages.**—*Deft. corp.*, in course of constructing a reservoir at a depth of 123 feet below the surface inadvertently carried a heading 18 feet by 6 feet for a distance of 42 feet beyond their own boundary into *pltf.*'s land. The excavation was made for the purpose of stopping a fissure in the soil, which might have caused a leak in the reservoir, & it was filled up with concrete & brickwork, the surface of *pltf.*'s land being in no way interfered with. *Pltfs.* claimed a mandatory order against *defts.* to restore the land to its former condition. The cost of doing this would have amounted to £1,000. Before action *defts.* offered to pay £100 by way of damages, & before delivery of the defence paid £10 into *ct.*—*Held*: having regard to the authority of *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287, the *ct.* had a discretion to give damages in lieu of an injunction; this was a case for damages, & the proper amount to be awarded was £100. It is not laid down as a rule in *Mayfair Property Co. v. Johnston*, [1894] 1 Ch. 508, that the measure of damages in such a case is the amount which it would cost to restore the land to its former condition.—*RILEY v. HALIFAX CORPN.* (1907), 97 L. T. 278; 71 J. P. 428; 23 T. L. R. 613; 5 L. G. R. 909.

— **Action for nuisance—Noise of sinking shaft.**—*See NUISANCE*, Vol. XXXVI., p. 162, No. 44.

107. **Right to compensation—Value of water enhanced—Validity of arbitrator's award.**—*Applt.* granted to D. certain mills on a stream forming the outlet to two lochs nearly surrounded by his property, with his "whole rights of water & water power connected with the mills"; "reserving" all his "rights in the lochs" & stream "except the rights therein connected with the mills." The storage capacity of the lochs had been increased by embankments made within *applt.*'s ground. *Resps.*, who were waterworks comrs. under a special Act, acquired by agreements the rights of D. in the water, & under their compulsory powers took from *applt.* a small piece of ground & a wayleave for a pipe, which they inserted in the stream & diverted the waters of the lochs to supply a town. Sect. 9 of the special Act provided that a certain quantity of water sent down the stream daily should be held to be a sufficient compensation to the mill owners & others. Sect. 10 reserved (*inter alia*) any rights *applt.* had in Loch Humphrey. In a claim for compensation the arbitrator found *applt.* entitled (a) to £50 for the land & wayleave; & (b) "in the event of it being determined that *applt.* had retained any right or interest in the waters of the lochs & the streams or any of them, & that he is now entitled to compensation in respect of such right or interest, I find £3,000 to be the amount to be paid" in respect of the right or interest to be acquired from *applt.* "in the foresaid waters & the embankments" at the lochs, "including in the said sum of £3,000 the sum of £1,650 as the estimated price or value of the embankments":—*Held*: the award was valid, inasmuch as the arbitrator had valued only one thing, the enhanced value of the water in the lochs, & had not valued, as a separate subject, the embankments, but had

properly included in the £3,000, as a factor of value, the incidental right obtained by *resps.* to have the embankments left standing.—*BLANTYRE (LORD) v. BARTIE* (1888), 13 App. Cas. 631, H. L.

*Annotation*:—*Distd. Re Gough & Aspatria, Silloth & District Joint Water Board* (1903), 88 L. T. 421.

— **See COMPULSORY PURCHASE OF LAND**, Vol. XI., pp. 126, 127, Nos. 165–170.

108. ——— **Injury caused after completion of works—Waterworks Clauses Act, 1847 (c. 17), ss. 6, 12.**—By their special Act, which incorporated above Act, *defts.* were empowered to "make & maintain" certain waterworks, including a shaft or well & pumping station. By the authorised pumping operations, after the completion of the works, a bed of wet running silt which lay directly under, & formed the support of, *pltf.*'s land was drawn away, & its abstraction caused a subsidence of *pltf.*'s house. *Pltf.* claimed compensation for injurious affection, & in the *arbn.* proceedings the umpire made an award in his favour. In an action on the award:—*Held*: *pltf.* was entitled to compensation by above sects., as being a person injuriously affected by the supplying & the maintenance, if not also by the construction, of the waterworks.—*FLETCHER v. BIRKENHEAD CORPN.*, [1907] 1 K. B. 205; 76 L. J. K. B. 218; 96 L. T. 287; 71 J. P. 111; 23 T. L. R. 195; 51 Sol. Jo. 171; 5 L. G. R. 293, C. A.

*Annotations*:—*Refd. Salt Union v. Brunner, Mond*, [1906] 2 K. B. 822; *Price's Patent Candle Co. v. L. C. C.*, [1908] 2 Ch. 526; *Graigola Merthyr Co. v. Swansea Corp.*, [1928] Ch. 31. *Mentd. Martins v. Fowler*, [1926] A. C. 746.

— **Abstraction of water.**—*See Sub-sects. 2, 5, post.*

— **Escape of water.**—*See Sub-sect. 3, post.*

— **See COMPULSORY PURCHASE OF LAND**, Vol. XI., pp. 136, 138, 142, Nos. 227, 247, 252, 271, 272.

109. **Right to compel undertakers to treat—For purchase of interest in stream.**—The abstraction by a waterworks co. of water from a stream does not entitle a riparian proprietor below to require the co. to treat under Waterworks Clauses Act, 1847 (c. 17), s. 6, for the purchase of his interest in the stream, but entitles him only to compensation as for land injuriously affected.—*BUSH v. TROWBRIDGE WATERWORKS CO.* (1875), 10 Ch. App. 459; 44 L. J. Ch. 645; 33 L. T. 137; 39 J. P. 660; 23 W. R. 641, L. J. J.

*Annotations*:—*Distd. Stone v. Yeovil Corp.* (1876), 2 C. P. D. 99. *Mentd. Pearce v. Watts* (1875), L. R. 20 Eq. 492; *Re Rilea Gold Washing Co.* (1879), 11 Ch. D. 36; *North Western Salt Co. v. Electrolytic Alkali Co.*, [1913] 3 K. B. 422.

110. **Right to injunction—Alteration in mode of diversion.**—Where a waterworks Act empowered a co. to divert the water of a stream, without limit as to quantity, by means of an open channel filled with loose stones, & they were diverting it by means of a culvert:—*Held*: another co. who were entitled to the water of a stream into which the diverted stream had flowed were not entitled to an injunction to restrain a violation of the terms of the Act as to the mode of diversion.—*LIVERPOOL CORPN. v. CHOILEY WATERWORKS CO.* (1852), 2 De G. M. & G. 852; 42 E. R. 1105, L. J. J.

*Annotations*:—*Consd. Cromford & High Peak Ry. v. Stockport, Disley & Whaley Bridge Ry.* (1857), 24 Beav. 74. *Appl. Marriot v. East Grinstead Gas & Water Co.*, [1909] 1 Ch. 70. *Mentd. A.-G. v. Sheffield Gas Consumers Co.* (1853), 3 De G. M. & G. 304.

111. ——— **Deviation from plans.**—Where the

*water company.*—*R. v. SEARNS* (1864), 11 N. B. R. (6 All.) 68.—*CAN.*

1. ——— *R. v. RYAN v. LOCKHART* (1872), 14 N. B. R. (1 Png.) 127.—*CAN.*

*m.* ——— *The fact that the co.*

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*deft.* was authorised by its charter to carry on the business of supplying water, & to use steam & electricity, for such purpose, does not exempt it from the legal obligation of indemnify-

ing neighbouring proprietors for the damage occasioned by the operation of its works.—*DAVIE v. MONTREAL WATER & POWER CO.* (1903), Q. R. 23 S. C. 141.—*CAN.*

*Sect. 1.—Construction and maintenance of water-works: Sub-sect. 2, A., B., C. & D.]*

promoters of a public undertaking have authority from Parliament to interfere with private property on certain terms, any person whose property is interfered with by virtue of that authority has a right to require that the promoters shall comply with the letter of the enactment so far as it makes provision on his behalf. Nor can any ct. remodel arrangements sanctioned, or relax conditions imposed, by Act of Parliament.

Deviation, in its ordinary & natural sense & as used in Acts of Parliament, means shifting the work in its integrity from one site to another which may be deemed more suitable. It does not imply a right not only to alter the situation of the work but in doing so to dispense with a half or two-thirds of it.

A local & personal Act empowered comrs. to take water from a river for the supply of a township on condition of their executing certain works & (*inter alia*) a reservoir to supply compensation water to mill owners, & a conduit, the reservoir to be constructed by an embankment across the river. The Act & the relative plans & sections described the position of the reservoir, its contour & capacity, & the height of the embankment, & provided that in constructing the authorised works the comrs. might subject to the provisions of the Act deviate from the lines of the works to any extent not exceeding the limits of lateral deviation shown on the deposited plans, & from the levels shown on the deposited sections, in the case of the reservoir to any extent of lesser height which would enable the comrs. to give a sufficient supply of water for compensation purposes; but the comrs. should not in the exercise of the power of lateral deviation thereby given construct any embankment or wall of any reservoir of a greater height above the general surface of the ground than that shown on the plans with reference to the corresponding embankment or wall & 6 feet in addition.

In constructing the reservoir the comrs. curtailed it by more than one-third of its length & nearly two-thirds of its capacity, & placed the embankment higher up the river than the point fixed by the Act, & so that the capacity could not be enlarged in the event of the supply of compensation water proving insufficient. In constructing the conduit the comrs. disregarded in material points the directions of the Act as to the course & serviceableness of the conduit & constructed a conduit which they alleged was "a substantial equivalent" to the mill owners. The mill owners having brought an action against the comrs.:—*Held*: though no actual damage was proved the mill owners were entitled to a declaration that the reservoir & conduit were not in accordance with the provisions of the Act, & to an injunction restraining the comrs. from taking or using the waters of the river or from interfering with the flow of the river otherwise than as authorised by the Act.—*HERRON v. RATHMINES & RATHGAR IMPROVEMENT COMRS.*, [1892] A. C. 498; 67 L. T. 658, H. L. *Annotations*:—*Consd. Fielden v. Morley Corp.* (1898), 14

T. L. R. 566; A.-G. v. Frimley & Farnborough District Water Co., [1908] 1 Ch. 737. *Reid. The Johannesburg.* [1907] P. 65; A.-G. v. Barnet District Gas & Water Co. (1909), 101 L. T. 651.

*B. Abstraction of Water*

**112. Right to compensation.—Abstraction of water.]—***BUSH v. TROWBRIDGE WATERWORKS Co.*, No. 109, *ante*.

**113. —.]—***PAGE v. KETTERING WATERWORKS Co.* (1892), 8 T. L. R. 228.

**114. — Abstraction of running silt.]—***FLETCHER v. BIRKENHEAD CORPN.*, No. 108, *ante*.

— *Interference with underground water.]—* See Sub-sect. 2, F., *post*.

*C. Escape of Water.*

See, generally, *NEGLIGENCE*, Vol. XXXVI., pp. 52, 53, Nos. 326–332; *NUISANCE*, Vol. XXXVI., pp. 191, 192, Nos. 323–330.

**115. Right to damages.]—**The provisional committee of a waterworks co. agreed with pltf., on his withdrawing his opposition to their bill in Parliament, to purchase lands for the works at a fixed sum per acre, including damage for severance, & in addition to pay for any damage pltf. should sustain from the water of the co. being near his house or buildings, & also to make good to pltf. or his tenants all loss or damage which the erection of the intended works might cause to any property belonging to or in the occupation of him or them which the co. might not purchase, except damage occasioned by severance, whether caused by the order or neglect of the co.; the damage in all these cases to be assessed by certain persons named as arbitrators. The local Act was obtained & it incorporated Lands Clauses Consolidation Act, 1845 (c. 18), & the purchase-money was paid, & the compensation money under the above heads was ascertained by the arbitrators & paid to pltf. Pltf. subsequently brought an action against the co. claiming damages for taking so little care of a reservoir that the water oozed out over pltf.'s land, causing offensive smells & vapours, & rendering his buildings damp & unwholesome, & permanently injuring their value, & for obstructing a drain & thereby penning back the sewerage of pltf.'s house so that it could not flow away by means of the drains as it ought; & further that by reason of the making of deft.'s reservoir & works authorised to be made by their Act, a drain whereby pltf.'s adjoining house & lands were drained, was interrupted & rendered useless, & defts. neglected to substitute another drain according to their duty, whereby pltf.'s house & lands were insufficiently drained; & also for cutting a channel across, & thereby, & also by means of deft.'s reservoir & works, depriving pltf. of the use of an agricultural road forming a communication between lands of pltf., & for not substituting another road in lieu of it; & also by the reservoir & works obstructing a public footpath & depriving pltf. of the use of it, & thereby causing him particular damage & inconvenience:—*Held*: (1) the action was maintainable, the damages claimed not being those directed by Act of Parlia-

**PART III. SECT. 1, SUB-SECT. 2.—B.**

**n. Right to damages.]—**Appl. corp. had statutory powers to make any waterworks which it required within specified limits, & to take as much water as it pleased for the supply of the city, subject to an obligation to "pay any damages occasioned by such works either to buildings or lands." The corp., acting within their powers, & without negligence,

took such an amount of water from a river as to interfere with the working of a mill of resp., who was a riparian owner lower down the river:—*Held*: such interference was damage to buildings or lands for which they were liable.—*QUEBEC CITY v. BASTIEN* (1920), 89 L. J. P. C. 247.—*CAN.*

**PART III. SECT. 1, SUB-SECT. 2.—C.**

**115 i. Right to damages.]—***Re BLAND*

*BROTHERS & INGLEWOOD BOROUGH COUNCIL*, [1918] V. L. R. 467.—*AUS.*

**115 ii. —.]—***Re BLAND BROTHERS & INGLEWOOD BOROUGH COUNCIL* (No. 2), [1920] V. L. R. 522.—*AUS.*

**115 iii. —.]—***ROTHES (COUNTESSE) v. KIRKCALDY WATERWORKS COMRS.* (1882), 7 App. Cas. 694; 9 R. (Ct. of Sess.) (H. L.) 108; 19 Sc. L. R. 907.—*SCOT.*

ment to be settled by arbn., or such as were contemplated by or within the scope of the previous agreement between the parties; (2) with respect to the right of action for the damage occasioned by the interruption of pltf.'s drain & the non-substitution of another, it was immaterial that the defts. had no notice that the interrupted drain was for the drainage of pltf.'s house, or that pltf. required any substituted drain.—**BLAGRAVE v. BRISTOL WATERWORKS CO.** (1856), 1 H. & N. 369; 26 L. J. Ex. 57; 156 E. R. 1245.

*Annotation:—Generally.* **Mentd. Goldsmid v. Hampton** (1858), 27 L. J. C. P. 286.

**116. — Negligence of undertakers.]—**A local Act of Parliament incorporated certain persons for the purpose of securing a regular & proper supply of water to millowners whose works were situated on the banks of the river B. These persons had powers given them to collect the waters of several small streams into a reservoir, & as often as necessary, to send down those waters to the B. through the channel of a stream called M. The 2nd clause of the Act directed them to "make, erect, construct, maintain, repair, & keep," by means of a reservoir, a due & adequate supply of water for the river B. at all seasons of the year, & to enter on the lands of the different streams named, to do what was necessary for the conveyance & due regulation of the supply of such waters, & "to make, erect, alter, maintain, repair, widen, deepen, scour, cleanse, & keep proper & sufficient conduits, aqueducts, channels & watercourses, drains, feeders, weirs, dams," &c. The 82nd clause gave similar directions, & ordered that the surplus water should be returned into the different streams from which it had been taken, & also made provisions for supplying with water the cattle depasturing in fields adjoining. The persons incorporated under the Act erected the reservoir, collected the waters of the different streams, & sent them through the channel of the M. to supply the B., but, after a time, neglected to cleanse the channel of the M., so that at times it overflowed its banks & did damage to the land of the adjoining proprietors:—*Held*: under the words of the Act there was an obligation on the persons so incorporated to take care that the due execution of the works & operations intended by the Act should not be injurious to the lands lying along the banks of the M., & the bed or channel of the M. must be cleansed & kept in a proper state for the flow & reflow of the water that had to pass through it.—**GEDDIS v. BARR RESERVOIR PROPRIETORS** (1878), 3 App. Cas. 430, H. L.

*Annotations:—***Reid. Evans v. M. S. & L. Ry.** (1887), 36 Ch. D. 628; **Colac v. Summerfield**, (1893) A. C. 187; **Southwark & Vauxhall Water Co. v. Wandsworth Board of Works**, (1898) 2 Ch. 603; **Boynton v. Anchole Drainage & Navigation Comrs.**, (1921) 2 K. B. 213; **Lagan Navigation Co. v. Lambeg Bleaching Dyeing & Finishing Co.**, (1927) A. C. 328. *Mentd.* **Hill v. Metropolitan Asylum District Managers** (1879), 4 Q. B. D. 433; **Fleming v. Manchester Corp.** (1881), 44 L. T. 517; **Gas Light & Coke Co. v. St. Mary Abbots, Kensington, Vestry** (1884), Cab. & El. 368; **Truman v. L. B. & S. C. Ry.** (1885), 29 Ch. D. 89; **Harrison v. Southwark & Vauxhall Water Co.**, (1891) 2 Ch. 409; **Thompson v. Brighton Corp.**, **Oliver v. Horsham L. B.**, (1894) 1 Q. B. 332; **A. G. v. Conduit Colliery Co.**, (1895) 1 Q. B. 301; **Dixon v. G. W. Ry.** (1896), 75 L. T. 245; **Goldberg v. Liverpool Corp.** (1900), 82 L. T. 362; **Lambert v. Lowestoft Corp.** (1901) 1 K. B. 590; **Canadian Pacific Ry. v. Roy**, (1902) A. C. 220; **East Fremantle Corp. v. Arnolds**, (1902) A. C. 213; **Ash v. G. N. Picc. & Brompton Ry.** (1903), 67 J. P. 417; **McClelland v. Manchester Corp.**, (1912) 1 K. B. 118; **Newberry v. Bristol Tramways & Carriage Co.** (1912), 107 L. T. 801; **G. C. Ry. v. Hewlett**, (1916) 2 A. C. 511; **Papworth v. Battersea Corp.** (No. 2), (1916) 1 K. B. 583; **Carpenter v. Flinsbury B. C.**, (1920) 2 K. B. 195; **Sheppard v. Glossop Corp.**, (1921) 3 K. B. 182.

**117. — Breach of covenant by undertakers.]—**The owners in fee of the G. castle estate by deed of 1868 confirmed by private Act of Parliament, granted to deft. corp. for the purposes of the supply authorised by their Acts a perpetual easement of taking & using surface water from a specified watershed area on pltf.'s estate. The water was conducted by streams & channels, partly natural & partly artificial, to ponds or reservoirs existing on the estate, from where there were streams & channels, also partly natural & partly artificial, for taking off the overflow from the ponds, the corp. covenanting "at all times to maintain & keep all their works now made & hereafter to be made" on the G. castle estate in good & sufficient repair & condition & not to do or occasion any avoidable damage or injury to the estate. Water having escaped & overflowed from the ponds & streams & done damage to the estate:—*Held*: the covenant covered works not made by the corp. & was not confined to artificial watercourses but extended to works existing on the estate at the date of the covenant, including every natural & artificial constituent utilised for the services of the corp.'s water system.—**EVAN-THOMAS v. NEATH CORPN.** (1912), 76 J. P. 397.

**118. — Escape from water main.—****STEWART v. METROPOLITAN WATER BOARD** (1912), 76 J. P. Jo. 183.

—*See* PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 22, 23, Nos. 123-125.

**119. Right to compensation—Construction of Private Act.]—**By a waterworks Act it was provided that the comrs. under the Act "should be bound to make good to C. & her heirs, etc., all damages which may be occasioned to her or them by reason of or in consequence of any bursting or flow, or escape of water from any reservoir or aqueduct or pipe or other work connected therewith" which may be constructed by the comrs. C. is proprietrix of lands situated below the site of one of the reservoirs, & during an extraordinary rainfall a great quantity of water was continuously discharged from the reservoir through a waste weir into the watercourse of a burn & did much damage to C.'s lands. She claimed compensation. There was no failure or insufficiency of the works & no negligence:—*Held*: on the construction of the above clause C. was entitled to compensation for damage by flood waters from the reservoir, no matter how caused.—**ROTHES (COUNTESS) v. KIRKCALDY WATERWORKS COMRS.** (1882), 7 App. Cas. 604, H. L.

*Annotations:—***Mentd.** **Davis v. Taff Vale Ry.**, [1895] A. C. 542; **Re Manchester & Milford Ry.**, [1897] 1 Ch. 276; **City of London Electric Lighting Co. v. London Corp.** (1901), 65 J. P. 563; **Croftland v. Manchester Ship Canal Co.**, [1901] 2 Ch. 123; **Witham Outfall Board v. Boston Corp.** (1926), 136 L. T. 756.

#### D. Pollution of Water.

*See* Waterworks Clauses Act, 1847 (c. 17), ss. 61-67; & generally, **WATERS & WATERCOURSES.**

**120. Right to injunction—Application of Waterworks Clauses Act, 1847 (c. 17), s. 6.]—**A waterworks co. were authorised by their private Act to take & use the water of certain springs which supplied a river upon the banks of which certain mills were situate. The Act provided that the co. should not abstract more than a certain amount of water before they had constructed a compensation reservoir for storing the water during floods for the benefit of the millowners. The Act gave the co. compulsory powers for acquiring land, streams, & springs for their undertaking, & powers

**116 I. — Negligence of undertakers.]—****JAMES v. BRIDGEWATER** (1915), 49 N. S. R. 188.—CAN.

**116 II. —**—**EMERSON v. GENERAL WATER CO.** (1874), 6 Nfld. L. R. 11.—NFLD.

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*Sect. 1.—Construction and maintenance of water-works: Sub-sect. 2, D., E. & F. Sect. 2: Sub-sect. 1.]*

to acquire by consent lands for constructing their compensation reservoir. The Act contained a reservation of the rights of the owners & occupiers of any lands, mills, or works, to the use of the waters of the stream, except so far as provided & declared by the Act. Waterworks Clauses Act, 1847 (c. 17), was incorporated with this Act. The co. constructed a compensation reservoir, & a subsequent Act of Parliament, which gave them further powers, including powers of emptying & cleansing the reservoir, recognised this reservoir as a sufficient compensation reservoir for the mill owners, & directed it to be maintained. The owner of some dye works situate on the river below the reservoir filed a bill against the co., complaining that the effect of the reservoir was to make the water of the river more muddy than it was before its construction, & to render it unfit for the process of dyeing, & praying for an injunction to restrain defts. from fouling the stream. These allegations being in the judgment of the ct. established.—*Held*: the Acts gave defts. no power to foul the water; the compensation clauses in Waterworks Act, 1847 (c. 17), did not apply, inasmuch as the injury was such as the co. were not authorised to commit; & pltf. was entitled to an injunction.—*CLOWES v. STAFFORDSHIRE POTTERIES WATERWORKS CO.* (1872), 8 Ch. App. 125; 42 L. J. Ch. 107; 27 L. T. 521; 30 J. P. 760; 21 W. R. 32, L. J. J.

*Annotations:—**Reid*, *Pennington v. Brinsop Hall Coal Co.* (1877), 5 Ch. D. 769; *Metropolitan Asylum District v. Hill* (1881), 6 App. Cas. 193; *Truman v. L. B. & S. C. Ry.* (1883), 25 Ch. D. 423; *Shelfer v. City of London Electric Lighting Co., Meux's Brewery Co. v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287; *Jordeson v. Sutton Southcoates & Drypool Gas Co.*, [1898] 2 Ch. 614.

**121. Right to damages—Depreciation of property.]**—Pltf. was owner of two dye works, which were situated upon the banks of the river, & which had carried on flourishing businesses, until the construction of a reservoir by defts. higher up the river. The consequence of the construction of the reservoir was that a deposit of mud was formed at the bottom of it, which escaping into the river so fouled it that the water became unfit for use in pltf.'s works, & the businesses consequently fell off until pltf. was obliged to sell the works very much below their former value. Pltf. brought an action when the judge directed the jury to find a verdict for pltf. & the jury awarded £400 for damages & £1,000 for the depreciation of the property. On motion for new trial:—*Held*: pltf. was not entitled to recover anything for the depreciation of his property, & the rule must be made absolute for a new trial, unless he would consent to reduce his damages to the £400 lawfully recoverable.—*TATTON v. STAFFORDSHIRE POTTERIES WATERWORKS CO.* (1879), 44 J. P. 106.

**Pollution of compensation water.]**—*See* No. 92, ante.

*E. Injury to Mines and Minerals.*

*See* Waterworks Clauses Act, 1847 (c. 17), ss. 18–27.

**122. Right to injunction—To restrain filling of reservoir—Threatened injury to mine workings.]**—The Waterworks Clauses Act, 1847 (c. 17), s. 27, provides that: "Nothing in this or the special Act shall prevent the undertakers from being

liable to any action or other legal proceeding to which they would have been liable for any damage or injury done or occasioned to any mines by means or in consequence of the waterworks in case the same had not been constructed or maintained by virtue of this Act or the special Act":—*Held*: the sect. left the undertakers liable to all legal proceedings which before the Act were open to mineowners for protection from damage or injury arising from the works, whether actual or threatened; so that the action in this case was sustainable, although it was a *quia timet* action brought by mineowners for an injunction to restrain defts. from filling a reservoir constructed & maintained by virtue of a special Act & the Act of 1847 on the ground that, if filled, the mine would be flooded.—*GRAIGOZA MERTHYR CO., LTD. v. SWANSEA CORPN.*, [1928] Ch. 31; 97 L. J. Ch. 129; 43 T. L. R. 600; 71 Sol. Jo. 681; *on appeal*, [1928] Ch. 235, C. A.; [1929] A. C. 344, H. L.

**Right to compensation.]**—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 129, 130, 151, 157, Nos. 186, 337, 377–379.

**Right to support.]**—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 153, 154, Nos. 354–356.

*F. Interference with Underground Water.*

*See, generally, WATERS & WATERCOURSES.*

**123. Right to interfere with undertakers' supply—Construction of local Act.]**—A local Act authorised a co. to enter upon lands within a certain manor, & to dig & search for any spring of water, & to convey the water from such springs into South Shields, for the use of the inhabitants of the town & the shipping in the harbour. It provided that the co. should not take the water from any spring, stream, or ponds, so as to deprive the occupiers of the lands of water for their own necessary uses, & for the cattle depasturing therein. The co. had power to lay down pipes, etc., & the inhabitants, with the consent of the co., might obtain the water by pipes, etc., to communicate with the co.'s pipes, at certain charges, according to the bore of the pipes:—*Held*: the owners or occupiers of lands within the manor were not prevented by the Act from sinking wells in such lands, though the effect might be to draw off the water from the co.'s springs.—*SOUTH SHIELDS WATERWORKS CO. v. COOKSON* (1845), 15 L. J. Ex. 315.

**124. ———.]**—The owner of land containing underground water, which percolates by undefined channels & flows to the land of a neighbour, has the right to divert or appropriate the percolating water within his own land so as to deprive his neighbour of it.—*BRADFORD CORPN. v. PICKLES*, [1895] A. C. 587; 64 L. J. Ch. 759; 73 L. T. 353; 60 J. P. 3; 44 W. R. 190; 11 T. L. R. 555; 11 R. 286, H. L.

*Annotations:—**Reid*, *Jordeson v. Sutton, Southcoates & Drypool Gas Co.* (1899) 2 Ch. 217; *Mostyn v. Atherton* (1899), 68 L. J. Ch. 629; *Salt Union v. Brunner, Mond*, [1906] 2 K. B. 822; *English v. Metropolitan Water Board*, [1907] 1 K. B. 588. *Mentid*, *Cochrane v. Smith* (1895), 12 T. L. R. 78; *Murray v. Epsom L. B.* (1896), 45 W. R. 185; *Pitts v. George* (1896), 66 L. J. Ch. 1; *Allen v. Flood*, [1898] A. C. 1; *Quinn v. Leatham*, [1901] A. C. 495; *Husey v. London Electric Supply Corp.*, [1902] 1 Ch. 411; *Fitzroy v. Cave*, [1905] 2 K. B. 364; *Pratt v. British Medical Assoc.*, [1919] 1 K. B. 244; *Ware & De Freville v. Motor Trade Assoc.*, [1921] 3 K. B. 40.

**125. Right to compensation—Abstraction of water—Waterworks Clauses Act, 1847 (c. 17), s. 12.]**

**PART III. SECT. 1, SUB-SECT. 2.—F.**

**o. Bond fide acquisition by trespasser.]**—Def't., a waterworks co., sank a well on pltf.'s property in the bond fide belief that the well was situated on property it had leased

from one S. for the purpose of augmenting the supply of water which it was under an obligation to furnish for the use of a certain town. Def't. subsequently ascertained as a result of a survey that the well had been sunk

upon pltf.'s land, but it continued to draw water therefrom. Pltf. claimed an account of all water taken from the well & payment of all profits shown to have resulted from its disposal:—*Held*: def't. was not bound to account



—Applts., in the execution of works authorised by a local Act, which incorporated Waterworks Clauses Act, 1847 (c. 17), intercepted water from percolating underground into a well belonging to resp.; & also abstracted from the well water which had already so percolated into & was in it. Waterworks Clauses Act, 1847 (c. 17), s. 12, enacts "that in the exercise of" the powers conferred by the Act "the undertakers shall do as little damage as can be," " & shall make full compensation to all parties interested for all damage sustained by them through the exercise of such powers":—*Held*: inasmuch as, apart from the Act, no action would have lain by resp. against applts. in respect of either the interception or the abstraction of such water, the Act gave resp. no right to compensation in respect of either.—*NEW RIVER CO. v. JOHNSON* (1860), 2 E. & B. 435; 29 L. J. M. C. 93; 1 L. T. 295; 24 J. P. 244; 6 Jur. N. S. 374; 8 W. R. 179; 121 E. R. 164.

*Annotations*.—*Consd. R. v. Metropolitan Board of Works* (1863), 3 B. & S. 710 *Jordeson v. Sutton Southcoates & Drypool Gas Co.* [1899] 2 Ch. 217. *Reid. Rhodes v. Alfreda Drainage Comrs.* (1876), 1 C. P. D. 380; *Lingko v. Christchurch Corpn.* (1912), 106 L. T. 376.

**126. — Withdrawal of support.**—*Defts.* were the owners of a well & pumping station situate at a distance of about 20 yards from a natural stream. This well was for 78 feet of its depth from the top lined with steel cylinders, so that no water from the adjacent soil could obtain access to the well except at a greater depth than 70 feet. *Pltf.* was a riparian owner lower down the stream. The effect of *defts.*' pumping from the well was that the general level of the water in the soil in the neighbourhood of the well was lowered to the extent of about 12 inches, with the result that the soil became dry, & a portion of the water flowing down the stream leaked out through the bed & side of the stream, so that the volume of the water in it was substantially diminished by the time it reached *pltf.*'s land. None of the water, however, which so escaped from the stream in consequence of *defts.*' pumping found its way into *defts.*' well:—*Held*: as *defts.* did not appropriate any of the water of the stream by pumping it up through their pipes, but merely caused it to sink a short distance into the ground by reason of their withdrawing the support of the lower subterranean water, the damage to the stream gave no cause of action.—*ENGLISH v. METROPOLITAN WATER BOARD*, [1907] 1 K. B. 588; 76 L. J. K. B. 361; 96 L. T. 573; 71 J. P. 313; 23 T. L. R. 313; 5 L. G. R. 384.

*Annotation*.—*Reid. Stollmeyer v. Petroleum Development Co.*, [1918] A. C. 498, n.

## SECT. 2.—SUPPLY OF WATER BY UNDERTAKERS.

### SUB-SECT. 1.—IN GENERAL.

**127. Duty to provide supply.**—For objects contemplated by special Act.]—A local Act authorised the Corpn. of Plymouth to construct a watercourse or conduit, for bringing a supply of fresh water from a distance to Plymouth for public objects, as for the supply of the ships & town & to scour the haven. Mills were erected on the watercourse,

because (1) in so far as it was a *bond fide* possessor the water taken—if it could rightly be regarded as a fruit—was a fruit of the improvement itself & not of the property generally; & (2) in so far as it might be regarded as a *mala fide* possessor after it ascertained the true position of the well the cost of making the water available was

greater than the price obtained for it from the public.—*FLETCHER & FLETCHER v. BULAWAYO WATERWORKS CO., LTD.*, [1915] App. D. 636.—S. AF.

### PART III. SECT. 2, SUB-SECT. 1.

*p. Contract to take supply.*—*Whether assumption lies.*—*Assumption* held maintainable against *defts.* for the

& the corpn. afterwards conveyed away a portion of their interest in the leat:—*Held*: the corpn. had undertaken the performance of a public trust, & could not divest themselves of the means of fully executing it; the primary duty of the corpn. was to provide for the public objects contemplated by the Act; & the surplus water only, after satisfying the public purposes, could be applied to the use of the mills.—*A.-G. v. PLYMOUTH CORPN.* (1845), 9 Beav. 67; 15 L. J. Ch. 109; 8 L. T. O. S. 34; 50 E. R. 268.

*Annotation*.—*Mentd. Christ's Hospital v. Grainger* (1846), 6 L. T. O. S. 361.

**128. Contract to take supply.**—*Necessity for stamp.*—(1) A. acted as the owner of premises, & made a contract with a water co. to supply the premises with water at a certain height. In his absence his men, to the injury of the co., fixed the pipe at a higher level. After it was done, A. knew of it. A. was not in fact the owner of the premises:—*Held*: he was liable in an action on the case brought by the co.

(2) A contract with a water co. for the supplying of premises with water does not require a stamp.—*WEST MIDDLESEX WATERWORKS CO. v. SUWERKROF* (1829), 4 C. & P. 87; *Mood. & M.* 408, N. P. *Annotations*.—As to (2) *Reid. Church v. Imperial Gas Light & Coke Co.* (1837), 6 Ad. & El. 846. *Generally, Mentd. Curr v. Scudds* (1855), 11 Exch. 190.

**129. — For specified purposes.**—*Construction.*—The B. co., possessing springs of water of their own, covenanted, upon selling to the A. co. a portion of those springs, to take from the A. co. the entire supply of water they might require for certain specified purposes, & that they would not supply any of the places, their own premises forming part of the district, which the A. co. was authorised to supply by their Act of Parliament. The B. co. afterwards leased a portion of their premises, through which portion their own stream of water ran, thus supplying their lessees with water from this stream:—*Held*: (1) the B. co. were precluded by the covenant from using their own supply of water for the purposes for which they had stipulated to take water from the A. co.; (2) it could not be decided, in the absence of the lessees of the B. co., whether the supply of water furnished to them by the B. co. could be stopped, but the ct. directed an inquiry as to what damages the A. co. had sustained, & were sustaining, by reason of the B. co. supplying their lessees with water.

(3) A delay of twelve years in making the complaint does not amount to acquiescence, or to an abandonment of *pltf.*'s rights.—*HARTLEPOOL GAS & WATER CO. v. WEST HARTLEPOOL HARBOUR & RY. CO.* (1865), 12 L. T. 366.

**130. — Breach of contract.**—*Inquiry as to damages.*—*HARTLEPOOL GAS & WATER CO. v. WEST HARTLEPOOL HARBOUR & RY. CO.*, No. 129, *ante*.

**131. — Effect of acquiescence in breach.—*HARTLEPOOL GAS & WATER CO. v. WEST HARTLEPOOL HARBOUR & RY. CO.*, No. 129, *ante*.**

*For maintenance of school.*—*Power of local education authority to make contract.*—*See EDUCATION*, Vol. XIX, p. 559, No. 30.

non-performance of a special par. agreement with *pltf.* for the supply of water to the Toronto baths.—*BLUE v. GAS & WATER CO.* (1849), 6 U. C. R. 174.—CAN.

*q. Construction of contract.*—*KINGSTON CORPN. v. CITY OF KINGSTON WATERWORKS CO.* (1860), 19 U. C. R. 490.—CAN.

*Sect. 2.—Supply of water by undertakers: Sub-sect. 2, A. & B.]*

**SUB-SECT. 2.—DOMESTIC SUPPLY.**

**A. Duty to Supply.**

*See Waterworks Clauses Act, 1847 (c. 17), ss. 35, 36.*

**132. Extent of duty—Sufficiency of supply—Effect of drought.]—**JACKSON v. FARNHAM WATER CO. (1887), 3 T. L. R. 632, D. C.

*Annotation:—Reid, Simpson v. South Oxfordshire Water & Gas Co., [1908] 1 K. B. 917.*

**133. ———.]—**The I. co. complained of the E. water co. refusing a supply of water. The E. co. were excused under Waterworks Clauses Act, 1847 (c. 17), ss. 42, 43, if prevented by frost, unusual drought, or other unavoidable cause or accident. The magistrate found that the cause was either drought or unavoidable:—*Held:* the E. co. came within the words of the exemption, & there was a good defence.—INDUSTRIAL DWELLINGS CO. v. EAST LONDON WATERWORKS CO. (1894), 58 J. P. 430, D. C.

**134. ——— Constant supply.]—**LIVERPOOL CORPN. v. BRADY (1897), 14 T. L. R. 11, D. C.

**135. ———.]—**Waterworks Clauses Act, 1847 (c. 17), s. 43, applies only to a total cessation of the supply, & not to a neglect to furnish a sufficient quantity. If the water co. continuously supply the consumer with some water for his domestic purposes, the fact that the quantity supplied is insufficient for the reasonable requirements of his house does not constitute an offence within the sect.—SIMPSON v. SOUTH OXFORDSHIRE WATER & GAS CO., [1908] 1 K. B. 917; 77 L. J. K. B. 461; 98 L. T. 585, 72 J. P. 162; 24 T. L. R. 407; 6 L. G. R. 454, D. C.

**136. ——— Purity of supply—"Pipes"—Waterworks Clauses Act, 1847 (c. 17), s. 35.]—**Resps. were undertakers empowered under a special Act, which incorporated Waterworks Clauses Act, 1847 (c. 17), s. 35, to supply water from certain sources. By bye-laws authorised by the special Act they prescribed lead or cast iron as the material to be used for service pipes. Being requested by applt. to lay down a service pipe from their main to his house, they laid down one of lead, no objection being made by him to the material used. The pipe was laid at the expense of applt. & his landlord, & became their property, but remained under respts.' control. In an action by applt. against respts. for a breach of Waterworks Clauses Act, 1847 (c. 17), s. 35, by supplying him with impure & unwholesome water, it was proved that the water complained of was pure & wholesome until it entered applt.'s service pipe, where it absorbed lead to such an extent as to make it injurious to applt.'s health:—*Held:* they had discharged their duty under the sect. & applt. could not recover.—MILNES v. HUDDERSFIELD CORPN. (1886), 11 App. Cas. 511; 56 L. J. Q. B. 1; 55 L. T. 617; 50 J. P. 676; 34 W. R. 761; 2 T. L. R. 821, H. L.

*Annotations:—Reid, Clegg, Parkinson v. Earby Gas Co., [1896] 1 Q. B. 592; Gale v. Rhymney & Aber Valley Gas & Water Co. (1903), 67 J. P. 430; Simpson v. South Oxfordshire Water & Gas Co., [1908] 1 K. B. 917; Whittington Gas Light & Coke Co. v. Chesterfield Gas & Water Board, [1914] 1 Ch. 270.*

**137. ——— Impure water from unauthorised source—Collery workings.]—**A.-G. v. NORTH

SHIELDS WATERWORKS CO. (1892), *Times*, May 12, C. A.

*Annotation:—Consd. A.-G. v. Frimley & Farnborough District Water Co., [1908] 1 Ch. 727.*

**138. ——— Impure water from unfenced reservoirs—Without filtration.]—**An area containing between 50,000 & 60,000 persons was supplied by a water co. from unfenced reservoirs, without filtration, the water being obtained from streams which received the drainage of farmyards. Samples analysed showed in one case an excess of absorbed oxygen & albuminoid ammonia, & in others bacilli indicative of sewage pollution were present:—*Held:* the water co. was not supplying pure & wholesome water as required by the Waterworks Clauses Act, 1847 (c. 17), s. 35.—A.-G. v. RHYMNEY & ABER VALLEY GAS & WATER CO. (1907), 71 J. P. 435.

**Breach of duty—Remedies against undertakers.]—***See* Sub-sect. 5, *post*.

**B. What is a " Dwelling-House."**

**139. Poor law school.]—**(1) A poor law school is a dwelling-house within enactments requiring a water co. to supply water to dwelling-houses for "domestic purposes" within the meaning of the Waterworks Clauses Acts. Though the carrying on of such a school is a business, water used in the school for purposes of a domestic character is used for "domestic purposes" within the meaning of those Acts; for it is the character of the purpose, & not the character of the premises in which the water is used, that is the important factor in determining whether it is used for "domestic purposes" or not.

(2) The words "domestic purposes" in the Waterworks Clauses Acts refer to user not merely for washing, drinking, & flushing closets & the like in a house, but extend to user for the amenities of the house, even where the house is used for business purposes; but the limit of such amenities must be ascertained with due regard to what is reasonable & to what is the ordinary user at the present day. Thus the heating of premises by hot water pipes is, while the generating of steam for the supply of power is not, a domestic purpose.

The use of boilers to supply power for driving laundry machinery & for pumping water from wells is not a domestic purpose.

(3) Where a water co. required to supply water for domestic purposes are empowered to make regulations for preventing the misuse of the water, & to refuse a supply if such regulations are not complied with, a person otherwise entitled to a supply for his domestic purposes cannot demand such supply if the appliances for the use of water in his house do not conform with the regulations.

(4) Where, there being no other prescribed limit, the bore of a service pipe to be laid by the owner or occupier of a house for obtaining water for his domestic purposes is limited by Waterworks Clauses Act, 1847 (c. 17), s. 50, to half an inch, unless the undertakers consent to the use of a larger pipe, & the co. by their regulations fix three-quarters of an inch as the maximum bore, a person entitled to a supply for domestic purposes cannot insist on being supplied by means of a pipe of larger bore, but he is not precluded from insisting on a supply by means of as many

**PART III. SECT. 2, SUB-SECT. 2.—A.**

*R. Whether payment of rate condition precedent.]—*Plt. who was the occupier of premises used as a post office within the district supplied by defts., which premises were not

entered on the valuation list & were not rated, demanded a supply of water for domestic purposes, but did not strictly comply with all the regulations made by defts., & was unable to agree with defts. as to the proper amount to be paid by them for the water-supply:—

*Held:* the premises not being rated, defts. could not insist on prepayment of water rate by plt. as a condition precedent to their supplying plt. with water.—POSTMASTER-GENERAL v. NENAGH URBAN DISTRICT COUNCIL, [1913] 1 I. R. 288.—IR.

small pipes as may be necessary.—**SOUTH-WEST SUBURBAN WATER CO. v. ST. MARYLEBONE GUARDIANS**, [1904] 2 K. B. 174; 73 L. J. K. B. 347; 68 J. P. 257; 52 W. R. 378; 20 T. L. R. 299; 48 Sol. Jo. 397; 2 L. G. R. 567.

*Annotations* :—As to (1) *Appld.* Metropolitan Water Board v. Avery, [1914] A. C. 118. *Refd.* Frederick v. Bognor Water Co. (1908), 78 L. J. Ch. 40; South Suburban Gas Co. v. Metropolitan Water Board, [1909] 2 Ch. 666; Metropolitan Water Board v. L. B. & S. C. Ry. (1910), 103 L. T. 304; Metropolitan Water Board v. Colley's Patents, [1911] 2 K. B. 38; Bristol Grdns. v. Bristol Waterworks Co., [1912] 1 Ch. 846; Northern Theatres Co. v. Shillito, [1925] 2 K. B. 100. As to (2) *Refd.* Chester Waterworks Co. v. Chester Union Grdns. (1908), 98 L. T. 701.

**140. Theatre.**—By sect. 59 of its private Act a city corp'n. was required to furnish a supply of water for domestic purposes at certain rates, based upon rental values (a) at the request of the owner or occupier of any private dwelling-house, or part of a private dwelling-house, in any street within the borough in which any water main of the corp'n. from time to time is laid; & (b) on the application of any person who under the provisions of this Act is entitled to demand a supply of water within the borough for domestic purposes. By sect. 63 the corp'n. might supply any person with water for other than domestic purposes "upon such terms & conditions as may be agreed on between the corp'n. & the persons desirous of having the supply":—*Held*: a theatre where no one resided, & where the consumption of water was very small in comparison with the high rental value, was not a "private dwelling-house" within sect. 59, but the proprietor was in the position of a person entitled to be supplied with water at an agreed rate within the meaning of sect. 63.—**NORTHERN THEATRES CO. v. SHILLITO**, [1925] 2 K. B. 100; 94 L. J. K. B. 472; 133 L. T. 156; 89 J. P. 101; 69 Sol. Jo. 459; 23 L. G. R. 288, C. A.

**141. Workhouse.**—By a special Act, incorporating Waterworks (Clauses Act, 1847 (c. 17), a waterworks co. were bound at the request of the owner or occupier of any house to supply such person with water for domestic purposes at a minimum rate, to be increased if such house should be occupied by more than one family, & the Act further provided that a supply of water for domestic purposes should not include a supply of water for baths, washhouses, or public purposes. Waterworks Clauses Act, 1847 (c. 17), deals with the supply of water for cleansing sewers & drains, cleansing & watering the streets, supplying any public pumps, baths, or washhouses, & imposes a penalty for neglect to supply water "for the public purposes aforesaid":—*Held*: a workhouse was a house of which the guardians were owners, & the co. were bound to supply them with water for domestic purposes, such supply not being a supply "for public purposes" within the meaning of the special Act or of Waterworks Clauses Act, 1847 (c. 17), & for the purposes of the special Act the inmates of the workhouse were to be treated as one family & the rate assessed accordingly.—**LISKEARD UNION v. LISKEARD WATERWORKS CO.** (1881), 7 Q. B. D. 505; 45 J. P. 780; 30 W. R. 292.

*Annotations* :—*Appld.* Barnard Castle U. C. v. Wilson, [1901] 2 Ch. 813. *Refd.* Mill End Union v. Hoare, [1903] 2 K. B. 483; South-West Suburban Water Co. v. St. Marylebone Union, [1904] 2 K. B. 174; Chester Water-

works Co. v. Chester Union Grdns. (1907), 96 L. T. 566; Bristol Grdns. v. Bristol Waterworks Co., [1912] 1 Ch. 846; Northern Theatres Co. v. Shillito, [1925] 2 K. B. 100.

**142.** —[—]—A water co. were bound by their special Acts to furnish water to dwelling-houses within their district for domestic purposes at certain rates based on the annual value of such dwelling-houses, & for other than domestic purposes at such rates & upon such terms & conditions as might be agreed upon, or, failing agreement, upon such terms as might be determined by two justices, provided that the supply for domestic purposes should not be in any way interfered with or endangered. By sect. 22 of one of their Acts it was provided that they should not "be bound to supply any dwelling-house with water, otherwise than by meter or special agreement, where any part of such dwelling-house is used for any trade or business for which water is required."

*Defts.*, as the owners & occupiers of a workhouse, had entered into an agreement with the water co. for the supply by meter of water to the workhouse at a rate varying with the quantity consumed, according to the co.'s scale of charges, & water was so supplied to the workhouse for several years, when *defts.* requested the co. to remove the meter & furnish a supply for domestic purposes at rates based on annual value. The co. refused to do so, & the water was supplied by meter to & used by *defts.* as before, but for several years no payment had been made for it, *defts.* refusing to pay except on the basis of a domestic supply. The guardians used the water for boilers used for purposes of power to engines for a ventilating fan in the kitchen; for a drying fan in the laundry; for wringer & washing machines, & for rain water pumping, for watering pigs & washing piggeries, for engines used to heat a shed where wood was chopped, for watering vegetable & flower gardens & heating greenhouses, for heating infirmary & surgery, mortuary, & chapel; for flushing water closets & for ordinary drinking, washing, & sanitary purposes:—*Held*: the guardians did not use any part of the workhouse for any trade or business purposes for which water was required, & sect. 22 did not apply, they were entitled to a supply of water for domestic purposes at the domestic rate, & a separate supply for non-domestic purposes to be paid for as provided by the Act, but they were not entitled to require the co. to supply the workhouse with water for purposes other than domestic purposes unless & until they had agreed with the co. as to the terms & conditions of such supply, or, failing such agreement, the terms & conditions had been determined by two justices, & they had made such alterations as were necessary for the segregation of the two supplies.—**CHESTER WATERWORKS CO. v. CHESTER UNION GUARDIANS** (1908), 98 L. T. 701; 72 J. P. 121; 24 T. L. R. 301; 6 L. G. R. 440, C. A.

*Annotations* :—*Consd.* Frederick v. Bognor Water Co., [1909] 1 Ch. 149. *Refd.* Bristol Grdns. v. Bristol Waterworks Co., [1912] 1 Ch. 846.

**143.** —[—]—**BRISTOL GUARDIANS v. BRISTOL WATERWORKS CO.**, No. 62, ante.

**144. Whether used for trade or business—Beer-house.**—A local Water Act provided that the water authority should at the request of the occupier of a dwelling-house furnish a sufficient supply of water for domestic purposes at certain specified rates

(undated), cited in Michael & Will's Gas & Water, 6th ed., p. 495.—*IR.*

t. *Golf club-house.*—A golf club-house in which no one slept is not a "dwelling-house" within Burgh Police (Scotland) Act, 1892, s. 4 (13), &

therefore it is not a "house" in the sense of sects. 263, 264 of that Act, & consequently is not entitled to a supply of water at the domestic water rate.—**PRESTWICK GOLF CLUB TRUSTEES v. PRESTWICK CORPN.**, [1909] S. C. 94.—**SCOT.**

### PART III. SECT. 2, SUB-SECT. 2.—B.

**141 i. Workhouse.**—A dwelling-house for the purposes of domestic water supply may include such a building as a workhouse.—**DUBLIN CORPN. v. SOUTH DUBLIN GUARDIANS**

*Sect. 2.—Supply of water by undertakers: Sub-sect. 2, B. & C.]*

*per annum*, & the Act further provided that the water authority was not bound to supply with water otherwise than by measure any building used partly as a dwelling-house & partly for a trade purpose:—*Held*: the authority was not bound to supply water otherwise than by measure to the occupier of a dwelling-house who carried on thereon the business of a beerhouse keeper, notwithstanding that the water was used solely for domestic purposes.—*BARRETT v. ILKESTON CORPN.*, [1917] 1 K. B. 827; 80 L. J. K. B. 919; 116 L. T. 593; 81 J. P. 133; 15 L. G. R. 320.

**145. — Boarding school.**—The special Act of a water co. provided, sect. 80, that they should, on the application of the owner or occupier of a dwelling-house within their area of supply furnish him with a sufficient supply of water for domestic purposes at specified rates. But by sect. 61 of the Act the co. could not be compelled to furnish & supply "otherwise than by agreement, where any part of such dwelling-house is used for any trade, manufacture, or business for which water is required":—*Held*: the keeping of a boarding-school for boys in which water was used for the domestic purposes of all the inmates was not carrying on a "business for which water is required" within the meaning of sect. 61, of the special Act, & the occupier of the house was therefore entitled to be supplied by the water co. with water to his house & premises at a rate not exceeding that specified in sect. 60.—*FREDERICK v. BOGNOR WATER CO.*, [1909] 1 Ch. 149; 78 L. J. Ch. 40; 99 L. T. 728; 72 J. P. 501; 25 T. L. R. 31; 53 Sol. Jo. 31; 7 L. G. R. 45.

*Annotations*:—*Distd.* *Oddenino v. Metropolitan Water Board*, [1914] 2 Ch. 734. *Refd.* *Metropolitan Water Board v. L. B. & S. C. Ry.*, [1910] 1 K. B. 804; *Metropolitan Water Board v. Colley's Patents* (1911), 80 L. J. K. B. 929; *Metropolitan Water Board v. Avery* (1914), 83 L. J. K. B. 178.

**146. — Workhouse.**—*CHESTER WATERWORKS Co. v. CHESTER UNION GUARDIANS*, No. 142, *ante*.

*C. What are "Domestic Purposes."*

**147. General rule.**—The governors of a school, carried on as a charity & not for purposes of profit, constructed a swimming bath for the use of the boys. The bath was in a building outside the main building of the school, but was connected with it by a corridor, & was separately rated for poor rate. A swimming master was kept to teach the boys swimming, & a fee was charged for the use of the bath. This fee was compulsory for the boarders, but was charged to such only of the day boys as used the bath:—*Held*: under the circumstances the water supplied to the bath was not supplied for "domestic purposes" within Waterworks (Laws) Act, 1863 (c. 93), s. 12, but was supplied for the business of the school, & consequently the water authority were entitled to make a special charge for the supply. *Semble*: a supply of water to a swimming bath for the use of the occupier of the dwelling-house & his family may be a supply for domestic purposes.

A supply of water for domestic purposes is not limited to a supply inside the dwelling-house of the occupier, nor must it be a supply which is essential to the occupation, or even to the healthy occupation, of the house.

Water supplied for the purpose of making the occupation of a house more convenient, or for

increasing its amenities is *prima facie* supplied for "domestic purposes."

The true test whether water is supplied for domestic purposes is not whether it is used by the occupier for the private purposes of himself & his household.

Regard must be had to the ordinary habits of domestic life & to what can reasonably be considered a "domestic purpose."

The test of reasonableness ought also to be applied to the quantity of water required, & regard should be had, not only to the consumer, but also to the obligation of the water authority to afford a supply to their district for ordinary domestic purposes.

In each case the ct. must see whether the supply required is reasonably a supply for domestic purposes.—*BARNARD CASTLE URBAN COUNCIL v. WILSON*, [1902] 2 Ch. 746; 71 L. J. Ch. 825; 87 L. T. 279; 51 W. R. 102; 18 T. L. R. 748; 40 Sol. Jo. 665, C. A.

*Annotations*:—*Consd.* *Pidgeon v. Great Yarmouth Waterworks Co.*, [1902] 1 K. B. 310; *South West Suburban Water Co. v. St. Marylebone Union*, [1904] 2 K. B. 174; *Metropolitan Water Board v. Avery* (1913), 83 L. J. K. B. 173. *Refd.* *Chester Waterworks Co. v. Chester Union* (1907), 86 L. T. 566; *Frederick v. Bognor Water Co.*, [1909] 1 Ch. 149; *Metropolitan Water Board v. Colley's Patents*, [1911] 2 K. B. 38.

**148. — SOUTH-WEST SUBURBAN WATER Co. v. ST. MARYLEBONE GUARDIANS, No. 139, *ante*.**

**149. —**The Metropolitan Water Board (Charges) Act, 1907 (c. clxxi), s. 8, provides for a supply of water for "domestic purposes" to any house or building within the limits of supply of the Board at a rate based on the annual rateable value of the house or building; sects. 9 & 13 prescribe the machinery for ascertaining such rate; sect. 16 provides for a supply of water to any premises by meter when required for "purposes other than domestic" at rates varying with the quantity supplied; & sect. 25 defines "domestic purposes" to include water closets & baths of a certain capacity, but not to include "a supply of water for . . . any trade manufacture or business."

A gas co., whose works were within the limits of supply of the Board, provided at their works in pursuance of their statutory obligations under Factory & Workshop Act, 1901 (c. 22), all necessary sanitary conveniences for their workmen. No one resided at the works, which were exempt from inhabited house duty. The co. claimed to be entitled under sect. 16 of the Act of 1907 to a supply of water by meter for the sanitary conveniences on the ground that such supply was "for purposes other than domestic," i.e. for trade purposes, & that their works were within the exception of "any trade manufacture or business" in sect. 25 of the Act:—*Held*: the question was not the character of the premises, but the character of the purposes for which the water was used; the supply in question was for domestic purposes; & therefore, the co. were not entitled to a supply under sect. 16, but were entitled to a supply under sects. 8, 9, & 13 of the Act.—*SOUTH SUBURBAN GAS CO. v. METROPOLITAN WATER BOARD*, [1909] 2 Ch. 666; 79 L. J. Ch. 27; 101 L. T. 560; 73 J. P. 503; 26 T. L. R. 12; 8 L. G. R. 43.

*Annotations*:—*Consd.* *Metropolitan Water Board v. L. B. & S. C. Ry.*, [1910] 2 K. B. 890. *Refd.* *Metropolitan Water Board v. Colley's Patents*, [1911] 2 K. B. 38; *Metropolitan Water Board v. Avery*, [1914] A. C. 118.

**150. —**Water supplied under the Metro-

**PART III. SECT. 2, SUB-SECT. 2.—C.**

**147.1. General rule.**—The definition of "domestic purposes" means nothing more nor less than legitimate household purposes.—*SURAT CITY MUNICIPALITY v. TYABJI* (1908), 1 L. R. 32 Bom. 460.—*IND.*

politan Water Board (Charges) Act, 1907 (c. clxxi), to the licensee of a public-house where luncheons were served was used for cooking the food & washing up the plates & dishes:—*Held*: the water was used for domestic purposes within the meaning of sect. 25 of the Act & must be charged for on that footing.—*METROPOLITAN WATER BOARD v. AVERY*, [1914] A. C. 118; 83 L. J. K. B. 178; 109 L. T. 762; 78 J. P. 121; 30 T. L. R. 189; 58 Sol. Jo. 171; 12 L. G. R. 95, H. L.

*Annotations*:—*Distd.* Oddenino v. Metropolitan Water Board, [1914] 2 Ch. 734; Barrett v. Ilkeston Corpn., [1917] 1 K. B. 827.

**151. Baths—Fixed baths.**—*Defts.*, a water co., had been in the practice of making a special charge of 10s. *per annum* for the supply of water to fixed baths in dwelling-houses in their district, their Act providing that they could make a special agreement as to charge in the case of water supplied "for other than domestic purposes" & that "a supply of water for domestic purposes" should "not include a supply of water for baths, horses, cattle or for washing carriages, or for any trade or business whatsoever." *Pltfs.*, who had long occupied a house in the district, containing a fixed bath supplied with water from *defts.*' main, had until recently paid the charge of 10s. *per annum*, but now refused to do so, or to sever the connection between his bath & the main, contending that he was entitled to the supply upon payment of the ordinary rate for water for domestic purposes:—*Held*: upon the proper construction of the Act, the supply of water to the fixed bath was "for other than domestic purposes."—*WALKER v. LAMBETH WATERWORKS CO.* (1894), 63 L. J. Ch. 874; 71 L. T. 75; 58 J. P. 736; 10 T. L. R. 401; 38 Sol. Jo. 399; 8 R. 622.

*Annotation*:—*Mentd.* A.-G. v. Camberwell Vestry (1894), 10 T. L. R. 653.

—**Power to make extra charge in respect of.**—*See* Part III., Sect. 2, sub-sect. 9, B., *post*.

**152. —Swimming bath—For school.**—*BARNARD CASTLE URBAN COUNCIL v. WILSON*, No. 147, *ante*.

**153. —For dwelling-house.**—*BARNARD CASTLE URBAN COUNCIL v. WILSON*, No. 147, *ante*.

**154. Farming purposes.**—*ILKESTON CORPN. v. FRETWELL* (1915), 80 J. P. Jo. 4, D. C.

**155. Supply for boarding-house.**—A waterworks co.'s special Act provided that they should, at the request of occupiers of houses, furnish them with a supply of water for "domestic purposes" at specified rates; that a supply for domestic purposes should not include a supply for any "trade, manufacture, or business," & that it should be lawful for the co. to supply any person with water for other than domestic purposes upon such terms & conditions as should be agreed upon between them.

The occupier of a dwelling-house carried on the business of a boarding-house keeper therein, receiving persons to board & lodge who used the water of the co. Water was only used in the house for cleansing, cooking, drinking, & sanitary purposes:—*Held*: having regard to the use of the water in the house, the occupier was entitled to demand a supply of water at the rates specified in the Act for a supply for "domestic purposes."—*PIDGON v. GREAT YARMOUTH WATERWORKS CO.*, [1902] 1 K. B. 310; 71 L. J. K. B. 61; 85 L. T. 632; 66 J. P. 309; 18 T. L. R. 97, D. C.

*Annotations*:—*Consd.* Frederick v. Bognor Water Co., [1909] 1 Ch. 149; Metropolitan Water Board v. L. B. & S. C. Ry., [1910] 1 K. B. 804; Metropolitan Water Board v. Colley's Patents, [1911] 2 K. B. 38. *Appvd.* Metropolitan Water Board v. Avery, [1914] A. C. 118. *Refd.* Barnard Castle U. D. C. v. Wilson (1902), 61 W. R. 102; South-West Suburban Water Co. v. St. Marylebone Grdns.,

[1904] 2 K. B. 174; Chester Waterworks Co. v. Chester Union Grdns. (1907), 96 L. T. 566; Oddenino v. Great Yarmouth Waterworks Co., [1914] 2 Ch. 734.

**156. Boilers—To supply power—For driving machinery—and for pumping water.**—*SOUTH-WEST SUBURBAN WATER CO. v. ST. MARYLEBONE GUARDIANS*, No. 139, *ante*.

**157. Washing carriage or motor car—Kept for private use.**—A local Act required a water co. to furnish to occupiers of houses, who should "demand a supply of water for domestic use," a sufficient supply thereof, at rents fixed according to the assessment of the houses to the poor rate. The Act incorporated Waterworks Clauses Act, 1847 (c. 17). An occupier was assessed upon his house & premises, including a coach house, stable & yard. He kept, for private use, a carriage in the coach house & a horse in the stable; &, on the premises, he applied, for the horse & for washing the carriage, water supplied by the co. for domestic use:—*Held*: he was entitled to do so, the water being, within the meaning of the Act, applied to domestic use.—*BUSBY v. CHESTERFIELD WATERWORKS & GAS LIGHT CO.* (1858), E. B. & E. 176; 27 L. J. M. C. 174; 31 L. T. O. S. 98; 22 J. P. 689; 4 Jur. N. S. 757; 6 W. R. 515; 120 E. R. 474.

*Annotations*:—*Consd.* Walker v. Lambeth Waterworks Co. (1894), 71 L. T. 75; Barnard Castle U. C. v. Wilson, [1902] 2 Ch. 746. *Appd.* Harrogate Corpn. v. Mackay, [1907] 2 K. B. 611. *Refd.* Bristol Waterworks Co. v. Uren (1885), 15 Q. B. D. 637; Uren v. Bristol Waterworks Co. (1885), 49 J. P. 564; Grand Junction Waterworks Co. v. Davies (1897), 13 T. L. R. 489; Chester Waterworks Co. v. Chester Union (1907), 96 L. T. 566; Frederick v. Bognor Water Co., [1909] 1 Ch. 149.

**158. —Used by medical man for professional purposes.**—Water supplied to & used by a medical man for washing a motor car & for other purposes in connection therewith, the motor car being used by him for the purposes of his profession or business of a physician & surgeon, is water supplied for domestic purposes within Waterworks Clauses Act, 1863 (c. 93), s. 12.—*HARROGATE CORPN. v. MACKAY*, [1907] 2 K. B. 611; 76 L. J. K. B. 977; 97 L. T. 689; 71 J. P. 458; 23 T. L. R. 632; 51 Sol. Jo. 607; 5 L. G. R. 876, D. C.

**159. Watering garden.**—*LOWE v. LAMBETH WATERWORKS CO.* (1875), cited in Michael & Will's Gas & Water, 7th ed., Vol. 2, at p. 214.

*Annotations*:—*Consd.* Bristol Waterworks Co. v. Uren (1885), 15 Q. B. D. 637. *Refd.* Grand Junction Waterworks Co. v. Davies, [1897] 2 Q. B. 209; Chester Waterworks Co. v. Chester Union Grdns. (1907), 96 L. T. 566. *Mentd.* Hayward v. East London Waterworks Co. (1884), 28 Ch. D. 138.

**160. Catering business—Water used for cooking & washing plates.**—*METROPOLITAN WATER BOARD v. AVERY*, No. 150, *ante*.

**161. —Restaurant.**—*Metropolitan Water Board (Charges) Act*, 1907 (c. clxxi), s. 20, gives the Board an option to refuse to supply with water, otherwise than by meter, any house or building which or part of which is used for a trade or manufacturing purpose for which water is used; & the test under the sect. is the character of the premises to which the water is being supplied, not the purpose to which the water is actually being put:—*Held*: therefore the proprietor of a restaurant was not entitled to a supply of water for domestic purposes in the restaurant otherwise than by meter.—*ODDENINO v. METROPOLITAN WATER BOARD*, [1914] 2 Ch. 734; 84 L. J. Ch. 102; 112 L. T. 115; 79 J. P. 89; 31 T. L. R. 23; 59 Sol. Jo. 129; 13 L. G. R. 33.

*Annotation*:—*Refd.* Barrett v. Ilkeston Corpn., [1917] 1 K. B. 827.

**162. Sanitary conveniences—Factory.**—A supply of water under Metropolitan Water Board

**Sect. 2.—Supply of water by undertakers: Sub-sect. 2, C. & D.; sub-sects. 3 & 4.]**

(Charges) Act, 1907 (c. clxxi), for water closets & baths of the dimensions stated in s. 25 is to be treated as a supply for domestic purposes within the meaning of that sect.

Water supplied to a factory under this Act by the Metropolitan Water Board was used for drinking & washing purposes by the workmen employed thereat & for cleansing urinals & water closets provided for their use. No one resided on the premises:—*Held*: the Board was entitled to charge for the water so supplied as for water supplied for domestic purposes upon the rateable value of the factory, subject to the rebate allowed by the Act in the case of purely business premises.—*COLLEY'S PATENTS, LTD. v. METROPOLITAN WATER BOARD*, [1912] A. C. 24; 81 L. J. K. B. 126; 105 L. T. 674; 76 J. P. 33; 28 T. L. R. 48; 56 Sol. Jo. 51; 9 L. G. R. 1159, H. L.; *affg.* S. C. *sub nom.* METROPOLITAN WATER BOARD v. COLLEY'S PATENTS, LTD., [1911] 2 K. B. 38, C. A.

*Annotations*:—*Apld.* Metropolitan Water Board v. Avery, [1914] A. C. 118. *Consd.* Northern Theatres Co. v. Shillito, [1925] 2 K. B. 100. *Refd.* Oddenho v. Metropolitan Water Board, [1914] 2 Ch. 731.

**163.** ————*—SOUTH SUBURBAN GAS CO. v. METROPOLITAN WATER BOARD*, No. 149, *ante*.

**164.** ————*—Railway station.*—The Metropolitan Water Board (Charges) Act, 1907 (c. clxxi), provides by sect. 8 for a supply of water for "domestic purposes" at the request of the owner or occupier of any house or building occupied as a separate tenement within the limits of supply of the Metropolitan Water Board at a rate based on the rateable value of the house or building. The same Act by sect. 16 provides for a supply of water by measure for "purposes other than domestic" at the request of any owner or occupier of any premises situate as therein described at rates varying with the quantity supplied. By sect. 25 "domestic purposes" are deemed to include water closets & baths of a certain capacity, but are not to include a supply of water for "railway purposes."

A railway co. owned a station situate as described in sect. 16 & within the limits of supply of the Board. The station was separately rated; it contained no stationmaster's house, but contained waiting rooms, a porter's room, & a booking office; on the up & down platforms were urinals & two water closets, one for passengers & one for the staff; there was also on each platform a tap from which water was drawn for drinking & for cleansing the platform:—*Held*: the water supplied by the Board for these purposes was supplied for "railway purposes" within sect. 25, & was therefore supplied for "purposes other than domestic" within sect. 16.—*METROPOLITAN WATER BOARD v. LONDON, BRIGHTON & SOUTH COAST RY. CO.*, [1910] 2 K. B. 890; 79 L. J. K. B. 1179; 103 L. T. 304; 74 J. P. 409; 26 T. L. R. 676; 8 L. G. R. 930, C. A.

*Annotations*:—*Refd.* Colley's Patents v. Metropolitan Water Board, [1912] A. C. 24; Metropolitan Water Board v. Avery, [1914] A. C. 118. *Mentd.* County Hotel & Wine Co. v. L. & N. W. Ry., [1918] 2 K. B. 251.

**165.** *Supply for dentist's chair.*—*MANCHESTER CORPN. v. BUTTLE* (1929), *Times*, July 3.

**PART III. SECT. 2, SUB-SECT. 2.—D.**

**a. Right to supply of salt water from sea.**—The inhabitants of a burgh & proprietors of public works were supplied with water by the trustees for lighting, etc. Afterwards the trustees entered into a contract with a water

co. whereby they bound themselves to refrain from continuing to supply water to the inhabitants or the proprietors of public works, in consideration of the water co. becoming bound to do so. The proprietors of a sugar refinery applied to the magistrates for leave to lay a pipe in the street, in order

**D. Other Cases.**

**166.** *Pressure—Whether high pressure obligation imposed by special Act.*—*PURNELL v. WOLVERHAMPTON NEW WATERWORKS CO.*, No. 173, *post*.

—*Where water supplied in bulk.*—*See* Part III., Sect. 2, sub-sect. 8, *post*.

*Charges for supply.*—*See* Part III., Sect. 2, sub-sect. 9, *post*.

**SUB-SECT. 3.—PUBLIC PURPOSES.**

*See* Waterworks Clauses Act, 1847, (c. 17), s. 37.

**167.** *Duty to supply—Sufficiency of supply—Constant supply.*—*FINCHLEY LOCAL BOARD v. BARNET DISTRICT GAS & WATER CO.* (1893), 9 T. L. R. 264, D. C.

**168.** *Power to limit purposes of supply—Supply of water to public fountain—Fountain a nuisance.*—A local board of health Act empowered the board to supply the town with water at certain rates for domestic purposes, & for other than domestic purposes for such remuneration & upon such terms and conditions as should be agreed upon between them & the persons desirous of having such supply. An inhabitant of the town having presented to the town an ornamental fountain with a trough or basin, which was set up on one of the public streets, the board supplied it with water on market-days, for the use of cattle in the market, & for horses, if yoked, when passing to & fro. Resp., who kept horses, with a view to evade payment of the rate for the supply of water to his stable, took his horses to the fountain to drink. Upon an information against him under Waterworks Clauses Act, 1847 (c. 17), s. 59—which enacts that "every person who, not having agreed to be supplied with water by the undertakers, shall take any water from any reservoir, watercourse, or conduit belonging to the undertakers, etc., or from any cistern or other like place containing water belonging to the undertakers, other than such as may have been provided for the gratuitous use of the public, shall forfeit to the undertakers for every such offence a sum not exceeding £10," the magistrates, being of opinion that the board had no right to erect a fountain on the public highway otherwise than for the gratuitous use of the public under the provisions in Public Health Act, 1848 (c. 13), s. 78, declined to convict:—*Held*: the decision of the magistrates was wrong; for, notwithstanding the fountain might be a public nuisance, it was competent to the board to limit the supply of water thereto in the manner they had done.—*HILDRETH v. ADAMSON* (1860), 8 C. B. N. S. 587; 30 L. J. M. C. 204; 2 L. T. 359; 25 J. P. 645; 8 W. R. 470; 141 E. R. 1296.

**169.** *Power to make charge for supply—Whether bound to supply water gratuitously—Building supported by rates—Rates not wholly raised within limits of local Act.*—The Oldham poor law union comprises eight townships, & the union workhouse is maintained out of the common fund of the union, consisting of the aggregate of the poor rates within those townships. The Oldham Corporation Gas & Water Act, 1853, extends only to four of those townships, & to two townships not within the union. By sect. 58 of that Act "the corpn. shall at all times afford an ample supply of gas & water

to secure a supply of salt water from the sea:—*Held*: the water co. were not entitled to interdict the magistrates from granting the privilege applied for.—*SHAW'S WATER CO. v. GREENOCK MAGISTRATES* (1856), 18 Durl. (Ct. of Sess.) (H. L.) 33; 2 Macq. 151; 27 So. Jur. 392.—*SCOT*.



without charge to all hospitals & infirmaries within the limits of the Act, & all the baths & washhouses & all buildings within those limits respectively maintained at the expense of the borough rates or the rates for the relief of the poor, or other rates raised within those limits."—*Held*: the corpn. were not bound to supply gas & water gratuitously to the union workhouse, as it was not maintained by rates wholly raised within the limits of the Act.—*OLDHAM UNION GUARDIANS v. OLDHAM CORPN.* (1854), 23 L. T. O. S. 245; 18 J. P. 601; 2 W. R. 590.

170. — *Whether bound to supply water at charges fixed by special Act—Water for watering roads during dry months.*—By the New River Company's Act 1852 (c. cix), s. 35, the co. must supply houses within their limits with sufficient water for domestic purposes at certain fixed rates. By sect. 38, domestic purposes are not to include engines or railways purposes, or baths, cattle, or fountains, or flushing sewers or drains, or any trade or business requiring an extra supply of water. By sect. 41, the co. shall, at the request of any consumer of water for purposes other than the purposes for or in respect of which the rates or charges are thereinbefore provided or limited, or at their own instance, afford a supply of water by means of a meter, & charge for the same at certain limited rates, according to the quarterly consumption. By sect. 37 of Waterworks Clauses Act 1847 (c. 17), incorporated in the Act of 1852, the undertakers shall provide a sufficient supply of water for cleansing sewers & drains, for cleansing & watering streets, & for other public purposes, at rates & upon conditions to be agreed to by the undertakers or to be settled by justices or by an inspector. Pltfs. demanded from defts. a supply of water by meter, under sect. 41, for watering the roads & gardens on the Victoria Embankment, such supply being required only during one-third of the year & the driest weather.—*Held*: defts. were not bound to afford this supply at the limited rates fixed by sect. 41; but they were entitled to claim rates for such supply, to be fixed by agreement or settlement, under sect. 37 of Waterworks Clauses Act, 1847 (c. 17).—*METROPOLITAN BOARD OF WORKS v. NEW RIVER CO.* (1877), 37 L. T. 124; 41 J. P. 790, D. C.

*Annotation*:—*Expld.* *Cooke v. New River Co.* (1888), 38 Ch. D. 56.

#### SUB-SECT. 4.—EXTINCTION OF FIRES

See Waterworks Clauses Act, 1847 (c. 17), ss. 38–42.

171. *Duty to fix fire plugs—Whether obligation to provide pipe of sufficient size for fire plug.*—Waterworks Clauses Act 1847 (c. 17), s. 38, imposes no duty on the undertakers to provide a pipe of sufficient capacity to carry a proper fire plug in a place where their existing pipe is insufficient for that purpose, although, in the opinion of the justices empowered by the sect. to settle the proper position of the fire plugs in th district, it is, as a fact, essential that a fire plug should be placed there.—*R. v. WELLS WATER CO., LTD.* (1886), 55 L. T. 188; *sub nom.* *WELLS WATER CO. v. WELLS TOWN COUNCIL*, 51 J. P. 135, D. C.

*Indication of position of fire plugs—In urban district—Duty of local authority.*—See No. 10, ante.

#### PART III. SECT. 2, SUB-SECT. 4.

b. *Liability for insufficiency or no supply of water.*—*BLAKLEE v. ST. JOHN WATER CO.* (1850), 6 N. B. 1. (1 All.) 639.—*CAN.*

a. —.—*A contractor with a*

corpn. to supply hydrants at certain points with water for public use, in the event of fires, is not liable for damages occasioned to the property of an individual ratepayer of the city by fire, owing to there not being a sufficient

172. *Maintenance of fire plugs—Cost of—Liability for—Fire plugs placed without any request.*—*GRAND JUNCTION WATERWORKS CO. v. BRENTFORD LOCAL BOARD*, No. 9, ante.

173. *Duty to supply water to fire plugs—At high pressure.*—In 1845 an Act of Parliament was passed for supplying the town of Wolverhampton with water, no mention being made in the Act as to the water being laid on at high pressure. In 1855 a new Act was passed for the same purpose, which by its first section enacted that Waterworks Clauses Act, 1847 (c. 17), should be incorporated in it, sect. 42 of which Act enacted that all the pipes to which fire plugs should be fixed should be kept at high pressure, the co. being liable to a penalty of £10 for non-performance. By sect. 50, however, of the new Act, it was provided that the water to be supplied from any pipe of the co. need not be laid on at high pressure.

In 1856 the two cos. became amalgamated, by an Act entitled the Wolverhampton Waterworks Transfer Act, in which the Waterworks Clauses Act was incorporated.

A fire having taken place, & there not being a sufficient supply of water, the complainant, on behalf of the corpn., obtained a summons against the co., & upon the hearing, the magistrate decided that the co. were not bound to keep the water on at high pressure, as the General Act was expressly varied & repealed by sect. 40 of the Wolverhampton New Waterworks Act:—*Held*: the magistrate was right.—*PURCELL v. WOLVERHAMPTON NEW WATERWORKS CO.* (1861), 10 C. B. N. S. 576; 4 L. T. 513; 142 E. R. 578.

*Annotation*:—*Apld.* *Finchley L. B. v. Barnet District Gas & Water Co.* (1893), 9 T. L. R. 264.

174. — *Liability for consequence of supply for fire—Shortage for ordinary consumers.*—C., an owner, having demanded & been refused a supply of water from the E. water co.:—*Held*: under Acts it was a sufficient defence that, owing to a fire breaking out in the neighbouring premises, the water was used for that purpose, and could not be supplied to C.—*CAMPBELL v. EAST LONDON WATERWORKS* (1872), 26 L. T. 475; 36 J. P. 711.

175. — *& to allow use of water gratuitously—Water taken from private pipe & fire plug.*—Pltfs., a water co., were possessed of a water main, from which there ran across a field of defts. a pipe, the property of defts., through which pltfs. supplied defts. with water for agricultural purposes. In this pipe pltfs. had at the request & expense of defts. fixed a fire plug. A haystack of defts. having caught fire, defts. by means of the fire plug in their pipe used pltfs.' water for the purpose of extinguishing the fire. To a claim by pltfs. for payment for the water so consumed, defts. pleaded that under Waterworks Clauses Act, 1847 (c. 17), s. 42, they were entitled to use the water gratuitously. There was no evidence that there were any fire plugs in pltfs.' main:—*Held*: the privilege conferred by sect. 42 of taking water without payment for extinguishing fire was confined to water taken from pipes of the undertakers to which fire plugs were fixed, & that in the absence of evidence of there being fire plugs in pltfs.' main defts. were liable to pay for the water taken.—*WEARDALE & CONSETT WATER CO. v. CHESTER-LE-STREET CO-OPERATIVE SOCIETY*, [1904] 2 K. B. 240; 73 L. J. K. B. 659; 91 L. T.

supply of water; there being no sufficient privity between such ratepayer, & the contractor.—*CUNNINGHAM v. FURNISS* (1855), 4 C. P. 514.—*CAN.*

d. —.—*Defct. co. entered into an agreement with defct. corpn. for a water*



*Sect. 2.—Supply of water by undertakers: Sub-sects. 4, 5 & 6.]*

293; 68 J. P. 386; 52 W. R. 684; 20 T. L. R. 464; 2 L. G. R. 805, D. C.

**176. — Breach of duty—Recovery of penalty.]**—*PIERCY v. HARDING* (1868), 32 J. P. 630.

**Whether actionable.]—See PUBLIC AUTHORITIES**, Vol. XXXVIII., pp. 56, 57, Nos. 330, 331.

**Injury from fire plugs—Tripping over fire plugs.]**—*See Nos. 279, 280, post.*

**Bursting of fire plugs.]—See No. 274, post.**

#### SUB-SECT. 5.—FAILURE TO SUPPLY.

*See Waterworks Clauses Act, 1847 (c. 17), s. 43.*

**177. What amounts to—Insufficiency of supply.]**—*SIMPSON v. SOUTH OXFORDSHIRE WATER & GAS CO.*, No. 135, *ante*.

**Excuses for insufficiency.]—See Nos. 132, 133, ante.**

**178. Remedies—Whether restricted to recovery of penalties—Under Waterworks Clauses Act, 1847, (c. 17), s. 43.]**—The builder & owner of a row of houses laid down communication pipes for the supply of water to the houses from the main of a waterworks co. which had been incorporated by special Act. The special Act incorporated Waterworks Clauses Act, 1847 (c. 7). The pipes were laid down with the approval of the co. The co. afterwards refused to make the connection between the pipes & the main. The house owner thereupon lawfully made the connection, which was then immediately cut off by the co. In an action by the house owner against the co. claiming damages & an injunction to restrain the co. from preventing him from again connecting the pipes with the main, & from severing such connection if so made again by pltf. :—*Held*: there was nothing in Waterworks Clauses Act, 1847 (c. 17), ss. 43, 53, which disabled pltf. from bringing such an action.—*GALE v. RHYMNEY & ABER VALLEYS GAS & WATER CO.* (1903), 89 L. T. 399; 67 J. P. 430; 2 L. G. R. 80, C. A.

*—See, also, PUBLIC AUTHORITIES*, Vol. XXXVIII., pp. 56, 57, Nos. 330, 331.

**179. — Injunction—To restrain discontinuance of supply.]**—A co. is established by Act of Parliament, for supplying the inhabitants of several districts with water, at such terms as they should mutually agree upon; & a subsequent Act provides, that the co. shall only demand reasonable sums :—*Held*: a ct. of equity has no jurisdiction, upon an offer to pay either a reasonable price, or that which was originally agreed upon, to compel the co. to continue a supply to any inhabitant, beyond the term of his contract, or to restrain them from discontinuing such supply, until the decision of the question by a trial at law.—*WEALE v. WEST MIDDLESEX WATERWORKS CO.* (1820), 1 Jac. & W. 358; 37 E. R. 412, L. C.

*Annotations:—Reid. Ellis v. Bedford*, [1899] 1 Ch. 494. *Mentd. Simpson v. Scottish Union Insec.* (1863), 1 Hom. & M. 618.

**180. — — — — —.]—HAYWARD v. EAST LONDON WATERWORKS CO.**, No. 251, *post*.

**181. — — — — — Undertakers cutting connection with main.]—GALE v. RHYMNEY & ABER VALLEYS GAS & WATER CO.**, No. 178, *ante*.

**182. — — — — — Who may sue—When Attorney-General necessary party.]—By Pontypridd Water-**

works Act, 1892, s. 4, the deft. co were authorised to make & maintain a reservoir & certain filter beds, service tanks, conduits or lines of pipes & other works in the county of Glamorgan therein mentioned. Sect. 10 provided that if the works authorised were not completed within the time thereby limited the powers of deft. co. should cease, "Provided that for the protection of the Pontypridd & Ystradfydwg local boards . . . the following provisions shall have effect (namely)"; & then followed provisions imposing certain obligations upon deft. co. with reference to the quantity & quality of the water to be supplied to the districts of the two local boards.

On Sept. 13, 1906, pltf. council, who were the successors in interest of the Ystradfydwg local board, commenced an action in their own name against deft. co. to enforce by mandatory injunction the provisions of s. 10. Deft. co. by their defence alleged (*inter alia*), that they would object that pltf. council's statement of claim disclosed no cause of action. On Nov. 6, 1907, after notice of trial had been given, pltf. council obtained an order giving them liberty to amend their writ & statement of claim by adding the A.-G. as a co-pltf. on their relation. The order provided that "all questions as to the terms upon which such amendments ought to be allowed be left to the judge at the trial of this action, when defts. are to be at liberty to raise such preliminary objections as they may think fit." The A.-G. was accordingly added as a co-pltf. :—*Held*: s. 10 of deft. co.'s Act did not confer upon pltf. council any statutory power to sue in their own name, & the only person who could sue was the A.-G.—*A.-G. v. PONTYPRIDD WATERWORKS CO.*, [1908] 1 Ch. 388; 77 L. J. Ch. 237; 98 L. T. 275; 72 J. P. 48; 24 T. L. R. 196; 6 L. G. R. 397.

*Annotation:—Reid. A.-G. v. North Eastern Ry.*, [1915] 1 Ch. 905.

**183. — Action for damages—Undertakers cutting connection with main.]—GALE v. RHYMNEY & ABER VALLEYS GAS & WATER CO.**, No. 178, *ante*.

**Failure to supply water to fire plugs.]—See Part III., Sect. 2, sub-sect. 4, ante.**

**184. Right to cut off supply—Refusal to adopt new arrangement of service pipes.]**—Appls. were a water co. authorised to supply water by a special Act, which Act incorporated Waterworks Clauses Acts, 1847 (c. 17), & 1863 (c. 93), & an order of 1878, which provide that they might make reasonable regulations for preventing the waste of water, & prescribe the apparatus suitable for purposes of supply, & that if the regulations are not observed they might refuse to supply water or may cut off the supply. It is also provided under the order of 1878 that if any difference arose as to the reasonableness of any of the regulations made by the water co., the same was to be referred to two justices.

Resp. was the owner of seven houses, &, by a special agreement made between himself & the water co., was liable for the water rate.

Appls. made a regulation that no service pipes for the supply of water should be so arranged as to supply more than one house. The whole of the seven houses of resp. was supplied by one service pipe. Appls. refused to accept the water rate when tendered by resp., so as to try & make him alter the mode of supply, & on the ground of non-payment cut off the water supply; but

supply with a specified pressure. The buildings of pltf., a ratepayer, were burned down owing to defective pressure :—*Held*: the co. was liable

but the town was not.—*BELANGER v. TOWN OF ST. LOUIS, TOWN OF ST. LOUIS v. MONTREAL WATER & POWER CO.* (1909), 6 E. L. R. 277.—*CAN.*

• *Right of property owners to use of water during the happening of a fire.]—WADDEN v. GENERAL WATER CO.* (1868), 5 Nfld. L. R. 223.—*NFLD.*

offered to restore it if resp. would comply with the regulation in having one service pipe for each of his houses. Resp. refused to accede to this request, & as the co. declined to restore the supply of water he laid an information against the co. under Water Companies (Regulation of Powers) Act, 1887 (c. 21):—*Held*: the special Act of applts. & the order & the regulation made thereunder did not justify them under the circumstances in refusing to restore the supply of water which resp. had formerly enjoyed in respect of his property unless he complied with the regulation of the co. in establishing a separate communication pipe for each of his houses.—*SOUTH-WEST SUBURBAN WATER CO. v. HARDY* (1913), 109 L. T. 169; 77 J. P. 283; 11 L. G. R. 1000; 23 Cox, C. C. 485, D. C.

— *For non-payment of charges.*—See Part III., Sect. 2, sub-sect. 9, C. (b), *post*.

#### SUB-SECT. 6.—COMMUNICATION OR SERVICE PIPES.

See Waterworks Clauses Act, 1847 (c. 17), ss. 44–53; Metropolitan Water Act, 1871 (c. 113), s. 82.

**185. Bore of service pipe.**—*SOUTH-WEST SUBURBAN WATER CO. v. ST. MARYLEBONE GUARDIANS*, No. 139, *ante*.

**186. Power to break up pavement—Meaning of “pavement.”**—By the East London Waterworks Act of 1853, which is deft.’s special Act, it is enacted by sect. 3, that the Waterworks Clauses Act, 1847 (c. 17), except the provisions with respect to the communication pipes to be laid by undertakers of that Act, shall be incorporated with the Act, & by sect. 70, “that no person shall make, or lay down, or permit to be made or laid down, any pipe, or other means or contrivance for using or obtaining water to communicate with any pipe or apparatus connected with any main or pipes of the co., without giving such notice, & except under such superintendence, & according to such direction as is provided by the Waterworks Clauses Act, 1847 (c. 17), with respect to the communication pipes to be laid by the inhabitants.” By Waterworks Clauses Act (c. 17), s. 48, any owner or occupier of any dwelling-house within the limits of the special Act, who shall wish to have water from the works of the undertakers brought into his premises, etc., may open the ground, & lay pipes to communicate with the pipes of the undertakers, provided that he give fourteen days’ notice of his intention to do so. By sect. 49, the pipe shall be so made to communicate under the superintendence & according to the directions of the surveyor, or other officer appointed for that purpose by the undertakers, unless such surveyor or other officer shall fail to attend at the time mentioned in the said notice; & by sect. 52, any owner or occupier may open or break up so much of the pavement of any street as shall be between the pipe of the undertakers & his house, subject to the above conditions as to notice:—*Held*: where an owner acting under these powers opened a street & so carelessly filled up the hole as to cause damage to pltf.’s horse, the owner, & not the co., was liable for not properly reinstating the street, & the word pavement in sect. 52 applied to the street as well as the foot pavement.—*GLOVER v. EAST LONDON WATERWORKS CO.* (1868), 17 L. T. 475; 32 J. P. 280; 16 W. R. 310.

**187. — For what purposes—To make indirect connection.**—A., the owner of a house & land within the borough of deft. corp., was supplied with water for his premises through a private service pipe connected with the mains of a water co. serving the district. This service pipe was laid for a considerable distance along a road vested in defts. as the highway authority, but the soil of which belonged to A. He entered into an arrangement with pltf., a neighbouring owner, to allow pltf. to obtain a supply from the same co. by tapping, with their consent, his service pipe. For the purpose of making the necessary connection, pltf. commenced to break up the pavement of the road between his property & A.’s service pipe. Defts. by their servants obstructed pltf.’s workmen, & pltf. brought an action & moved for an injunction to restrain such interference. Defts. contended that pltf.’s right to break up the road was limited by Waterworks Clauses Act, 1847 (c. 17), s. 52, to so much of it as lay “between the pipe of the undertakers & his house, building, or premises”; & that A.’s service pipe was not a “pipe of the undertakers”:—*Held*: the indirect connection by means of A.’s pipe between pltf.’s premises & the co.’s main was sufficient to bring the case within s. 52, & pltf. was entitled to break up the roadway.—*PEARSON v. TENTERDEN CORPN.* (1910), 74 J. P. 405.

**188. — To repair service pipes.**—A water co. under the provisions of their special Act, which incorporated Waterworks Clauses Acts 1847 (c. 17) & 1863 (c. 83), had power to lay down, repair, & maintain (*inter alia*) pipes & all other works necessary for supplying water within the limits of the Act. At the request & expense of the owner of a house the co. laid down a service pipe leading from their main under the street into the house, in which they placed a stop cock for the purpose of regulating the supply of water. This stop cock was protected by a cover or guard box let into the pavement, which was provided with a lid or flap. Owing to the hinge of the lid or flap being out of repair, it projected above the pavement, & pltf. while passing along the street tripped over it & sustained injury. The apparatus could not be repaired without being removed, or removed without breaking up the pavement. The jury found that there was negligence on the part of those who were liable for the repair of the hinge:—*Held*: the co., who alone had power to break up the street for the purpose of repairing the guard box, were responsible for its repair, & liable in respect of the injuries sustained by pltf.—*CHAPMAN v. FYLDE WATERWORKS CO.*, [1894] 2 Q. B. 599; 64 L. J. Q. B. 15; 71 L. T. 539; 59 J. P. 5; 43 W. R. 1; 10 T. L. R. 580; 38 Sol. Jo. 629; 9 R. 582, C. A.

*Annotations*:—*Fold*, Colne Valley Water Co. v. Hall (1907), 96 L. T. 395. *Distd.* Stacey v. Gas Light & Coke Co., Metropolitan Water Board, & West End Tailoring Co. (1910), 9 L. G. R. 174; Batt v. Metropolitan Water Board, [1911] 2 K. B. 965. *Reid*, Grand Junction Waterworks Co. v. Rodocanachi, [1904] 2 K. B. 230.

**189. Repair of service pipes—On whom duty to repair.**—*CHAPMAN v. FYLDE WATERWORKS CO.*, No. 188, *ante*.

**190. —**—*GRAND JUNCTION WATERWORKS CO. v. RODOCANACHI*, No. 325, *post*.

**191. —**—A foot passenger in a public street was injured by an explosion of gas in the basement of an adjoining shop. On investigation, it was found that under the kerb of the foot-way there was a hole full of water, that a com-

#### PART III. SECT. 2, SUB-SECT. 6.

**185.1. Bore of service pipe.**—*DUBLIN CORPN. v. SOUTH-WEST SUBURBAN GUARDIANS*

(undated), cited in Michael & Will’s Gas & Water, 6th ed., p. 495.—*IR.*

*A. Affirming nine to communication pipe*

—*Necessity for undertaker’s consent.*—*PHILIP v. DUNFERMLINE MAGISTRATES* (1902), 4 F. (Ct. of Sess.) 34.—*SCOT.*



committee they might think reasonable for decorative or iron or steel work not requiring the use of water. *Pltfs.* had not considered, in the case of the building erected by *defts.*, whether any allowance should be made:—*Held*: the word "require" in sect. 17 meant "demand" & not merely "have need of"; *defts.* had not "required" from *pltfs.* within the meaning of sect. 17 a supply of water for building purposes; & *pltfs.* were not entitled to recover the sum claimed.—*METROPOLITAN WATER BOARD v. JOHNSON & CO.*, [1913] 3 K. B. 900; 82 L. J. K. B. 1164; 109 L. T. 88; 77 J. P. 384; 29 T. L. R. 603; 57 Sol. Jo. 625; 11 L. G. R. 1106, C. A.

*Annotation*:—*Reid*. *Poulton v. Moore* (1913), 109 L. T. 976.

#### SUB-SECT. 8.—SUPPLY IN BULK.

##### 200. Whether bound to supply water at pressure.]

—The statutory requirements as to the supply of water at pressure contained in Waterworks Clauses Act, 1848 (c. 17), s. 35, do not apply to the supply of water in bulk, & the duty of the waterworks co. ends with the supply of water at a given point.—*WOMBWELL URBAN DISTRICT COUNCIL v. DEARNE VALLEY WATERWORKS CO.* (1907), 71 J. P. 415; 5 L. G. R. 1132.

*Annotation*:—*Reid*. *Morpeth Corp'n. v. Tynemouth Corp'n.* (1915), 85 L. J. K. B. 808.

201. —.]—*MORPETH CORPN. v. TYNEMOUTH CORPN.* (1915), 85 L. J. K. B. 808; 14 L. G. R. 182; *sub nom. Re MORPETH CORPN. & TYNEMOUTH CORPN.*, 80 J. P. 75.

##### 202. Power to contract with another company—For distribution of water in statutory area.]

—*Pltfs.*, a water co., incorporated by statute, agreed with *defts.* that the latter should, within the statutory area, construct mains & works, collect water rates, & distribute water, which was to be supplied in bulk at a fixed charge by *pltf. co.*:—*Held*: this agreement was not a delegation of statutory powers, it was therefore valid, & *intra vires* the co.—*TICEHURST & DISTRICT WATER & GAS CO., LTD. v. GAS & WATERWORKS SUPPLY & CONSTRUCTION CO., LTD.* (1911), 55 Sol. Jo. 459.

203. Power of party supplied to sell part of water at profit.]—A corp'n. obtained Parliamentary power to collect all the water from the gathering grounds of a district, but were bound to supply to a certain township not less than 25,000 gallons, nor more than 75,000 gallons of water per day, at the price of 6d. per 1,000 gallons, & the amount to be supplied between the maximum & minimum limits was to be at the option of the township.

The township took more than the 25,000 gallons, & sold part of it at a profit to a neighbouring township:—*Held*: there was nothing to prevent

them from doing so.—*HALIFAX CORPN. v. SOOTHILL UPPER LOCAL BOARD* (1874), 31 L. T. 6, C. A.

*Annotation*:—*Reid*. A. G. v. West Gloucestershire Water Co. (1909), 7 L. G. R. 1078.

#### SUB-SECT. 9.—CHARGES FOR SUPPLY.

##### A. Water Rates.

###### (a) Liability to be Rated.

See Waterworks Clauses Act, 1847 (c. 17), ss. 69–73.

204. Power of company to compound—Payment of water rate by owner—Sufficiency of evidence of composition.]—*ROOK v. LIVERPOOL CORPN.*, No. 212, *post*.

205. House unoccupied—When liability ceases.]—*Resps.*, relying on sect. 58 of their private Act, which extended the provisions of Waterworks Clauses Act, 1847 (c. 17), s. 72, to houses not exceeding the annual value of £20, claimed water rates from *appls.* as owners of certain houses under the annual value of £20 each for two quarters, during the whole of which time such houses were unoccupied:—*Held*: an owner's liability for rates under Waterworks Clauses Act, 1847 (c. 17), s. 72, ceases on the quarterly day of payment next after the house has become unoccupied, & as sect. 58 of the *resps.*' private Act merely extended the provisions of that sect. to houses not exceeding the annual value of £20 *resps.* were not entitled to recover.—*BRITISH EMPIRE MUTUAL LIFE ASSCE. CO. v. SOUTHWARK & VAUXHALL WATER CO.* (1888), 59 L. T. 321; 52 J. P. 758; 36 W. R. 894; 4 T. L. R. 473, D. C.

206. — Occupation commencing between quarter days—Liability for portion only.]—Where a house, to which water is supplied by a waterworks co., is unoccupied at the beginning of a quarter, & becomes occupied in the course of the quarter, the co. are only entitled to demand under Waterworks Clauses Act, 1847 (c. 17), s. 70, so much of the quarter's rate as is proportional to the period during which the house is occupied, even though whilst the house was so unoccupied the co. had no notice of the fact, & consequently continued the supply of water.—*EAST LONDON WATERWORKS CO. v. FOULKES*, [1894] 1 Q. B. 819; 58 J. P. 384; 10 L. 243.

207. House not exceeding £20 annual value—Liability of owner—Meaning of "owner."]—A water co.'s special Act provided, in terms substantially identical with Waterworks Clauses Act, 1847 (c. 17), s. 72, that, in the case of houses or tenements not exceeding a given annual value, the owner instead of the occupier should be liable for the water rate, & that "the person receiving

#### PART III. SECT. 2, SUB-SECT. 9.—A. (a).

g. Land near main—When rateable.]—Where *appls.* were authorised by their incorporating Act (XXVII. of 1892), s. 35, to make bye-laws levying a water-rate "in respect of lands & tenements distant not more than sixty yards from any main . . . although such lands or premises are not actually connected with any main":—*Held*: they had no authority to levy a rate on lands without the prescribed limit merely because such lands formed one holding with other lands within the prescribed limit.—*HUNTER DISTRICT BOARD v. NEWCASTLE WALLSEND COAL CO., LTD.* [1896] A. C. 82, P. C.—*AUS.*

h. Water not suitable for domestic use.]—*MINISTER OF WATER SUPPLY, SEWERAGE & DRAINAGE v. STONE*,

*MINISTER OF WATER SUPPLY, SEWERAGE & DRAINAGE v. GREEN* (1915), 17 W. A. L. R. 117.—*AUS.*

k. According to quantity of water consumed.]—*WATERWORKS COMR. v. COLTON, PALMER & PRESTON, LTD.*, [1926] S. A. S. R. 199.—*AUS.*

l. Dog's home.]—*Melbourne & Metropolitan Board of Works Act, 1915* (Victoria statute), s. 94, which exempts charitable institutions from water charges, was intended on a consideration of the whole of its wording, to restrict the exemption to municipally owned or municipally conducted institutions, & therefore the exemption did not extend to a dog's home not so owned or conducted.—*ADAMSON v. MELBOURNE & METROPOLITAN BOARD OF WORKS* (1928), 45 T. L. R. 3, P. C.—*AUS.*

m. Validity of discrimination—Against Government institutions.]—Under the authority given to municipal corpora. to fix the rate or rent to be paid by each owner or occupant of a building, etc., supplied by the corp'n. with water, the rates imposed must be uniform. A bye-law of the city of Toronto excepting Govt. institutions from the benefit of a discount on rates paid within a certain time is invalid as regards such exception.—*A. G. OF CANADA v. TORONTO CITY* (1893), 23 S. C. R. 514.—*CAN.*

n. — Against certain manufacturers.]—By 24 Vict. c. 56, s. 3 (Can.), the city council of H. was "empowered from time to time to establish by bye-law a tariff of rents or rates for water supplied or ready to be supplied in the said city from the

**Sect. 2.—Supply of water by undertakers : Sub-sect. 9, A. (a) & (b).]**

the rent of any such house or tenement from the occupier thereof on his own account or as agent or receiver for any person interested therein" should for that purpose be deemed the owner of such house or tenement. The water co. supplied water to a block of flats which were respectively within the statutory limit as to value. The premises were mortgaged & a receiver was appointed under a receivership deed. The mtgor. appointed another person collector of the rents, who handed over the rents intact, at first to the mtgor., & subsequently to the receiver:—**Held**: the collector & not the receiver was the person liable under the special Act to pay the water rate.—**METROPOLITAN WATER BOARD v. BROOKS**, [1911] 1 K. B. 289; 80 L. J. K. B. 495; 103 L. T. 739; 75 J. P. 41; 9 L. G. R. 442, C. A.

**208. Payment of rate by underlessee—Right to recover from assignee of lessor.**—By a lease of a portion of a freehold house the lessee covenanted to pay one-third of the water rate payable in respect of the whole house, & the lessor covenanted with the lessee "his exors., administrators, & assigns," to pay all rates, taxes, assessments, & outgoings whatsoever other than the water rate to the extent covenanted to be paid by the lessee. The lessee sub-demised to ptfs. the premises held by him for the remainder of the term for which he held, less three days, & ptfs., who had notice of the superior lease, covenanted to pay one-third of the water rate. The whole of the premises were at first included in one assessment by the local authority, but the ground floor demised & the other portions were subsequently separately assessed for the purposes of rates & taxes. Deft., who had purchased both the freehold reversion & the superior lease, refused to pay the rates & taxes in respect of the grant comprised in the lease & underlease. Ptfs., having been compelled by a threat of distress to pay these rates & taxes, brought an action to have it declared that their portion of the premises was free from such payments, except one-third of the water rate:—**Held**: that ptfs., as underlessees, were not "assigns" of their lessor, so as to be entitled to sue deft. in respect of the positive covenant by the ground landlord in the original lease.—**SOUTH OF ENGLAND DAIRIES, LTD. v. BAKER**, [1906] 2 Ch. 631; 76 L. J. Ch. 78; 96 L. T. 48.

**Innovation**:—**Reid**, Westhoughton U. C. v. Wigan Coal & Iron Co., [1919] 1 Ch. 159.

**Payment of rate by tenant—Right to recover from landlord.**—**See LANDLORD & TENANT**, Vol. XXXI., pp. 295, 297, 303, Nos. 4402–4405, 4417, 4470.

**Payment by receiver for debenture-holders—Right to recover on liquidation of company.**—**See COMPANIES**, Vol. X., p. 798, No. 5042.

said waterworks":—**Held**: the rate for water supplied to any class of consumers must be an equal rate to all members of such class & a bye-law providing for a rate on certain manufacturers higher than that to be paid by others was illegal.—**HAMILTON CITY v. HAMILTON DISTILLERY CO., HAMILTON CITY v. HAMILTON BREWING ASSOCN.** (1907), 38 S. C. R. 239.—**CAN.**

**c. Property of Dominion Government.**—Although by the British North America Act, 1867, s. 126, & Cities & Towns Act (R. S. Q. 1909), art. 672, property of the Dominion Govt. is exempt from taxation, there is an implied obligation on the Dominion Govt. to make a fair & reasonable payment for water supplied by a city council under the latter Act for use in a Dominion Govt. building.—**MINISTER**

**OF JUSTICE FOR DOMINION OF CANADA v. LEVIST CITY**, [1919] A. C. 505.—**CAN.**

**p. Liability to special rate—As condition precedent to turning on water—Mains already laid in street.**—**READ v. HALIFAX CORPN.**, [1921] 2 D. L. R. 1016; 59 N. S. R. 377.—**CAN.**

**q. Buildings within 200 yards of main pipe.**—Every building, except churches, within two hundred yards of the main pipe of the co., & into which a service pipe has been introduced, is liable to a water rate.—**PINSENT (COLLECTOR OF WATER ASSESSMENTS) v. ROYD & CO.** (1864), 5 Nfld. L. R. 64.—**NFLD.**

**r. What are "vacant lands."**—Lands leased for building purposes & upon which building operations have commenced are subject to assessment & are not "vacant lands" within the Water

**(b) Basis of Assessment.**

**See Waterworks Clauses Act, 1847 (c. 17), s. 68.**

**209. Rent—Meaning of rent—Whether equivalent to annual value.**—By their local Act, s. 79, ptfs. were bound to supply the houses within a certain district with water "at the following rate *per annum*, that is to say, where the rent of such dwelling-house" should not amount to £7 *per annum*, at a rate not exceeding 6 per cent. *per annum* on such rent, but not exceeding 7s. 2d. *per annum*; & so on in a graduated scale. Deft. was owner of numerous small houses supplied with water by ptfs., in respect of which he paid, either under statutory obligation or by voluntary agreement, the poor rate, water rate, & district rate:—**Held**: "rent" in sect. 79 was equivalent to "annual value"; & in estimating the rents on which the water rate was payable, deft. was entitled to deduct the rates so paid by him.—**SHEFFIELD WATERWORKS CO. v. BENNETT** (1872), L. R. 7 Exch. 409; 41 L. J. Ex. 233; 27 L. T. 199; 21 W. R. 74; *affd.* (1873), L. R. 8 Exch. 196; 42 L. J. Ex. 121; 28 L. T. 509; 21 W. R. 686, Ex. Ch.

**Annotations**:—**Distd. Dobbs v. Grand Junction Waterworks Co.** (1882), 9 Q. B. D. 151; **Warrington Waterworks Co. v. Longshaw** (1882), 9 Q. B. D. 145. **Appl. Smith v. Birmingham Corpn.** (1883), 11 Q. B. D. 195; **Wilkinson v. Bury Waterboard** (1905), 92 L. T. 417. **Reid. Bristol Waterworks Co. v. Uren** (1885), 15 Q. B. D. 637; **Rose v. Watson**, [1894] 2 Q. B. 90; **Mackworth v. Holland**, [1921] 2 K. B. 755.

**210.** —[It was provided by a Water Act that the charge to be made for the supply of water for domestic use should be at a rate varying according to the "annual rent" of the premises supplied. Applt. was the owner of certain houses supplied with water by resps. under the Act. The houses were let at weekly rents, applt. paying all rates charged thereon, & also for all repairs & insurances in respect thereof. He was allowed, as an owner, under Poor Rate Assessment & Collection Act, 1869 (c. 41), s. 4, a deduction of 30 per cent. from the full amount of the poor rate which an occupier if rated would have paid. Resps. charged applt. with water rates calculated on the following basis; they multiplied the weekly rents by fifty-two & deducted from the amount so arrived at the actual sums paid by applt. for rates, & then charged the water rates upon the balance:—**Held**: in order to arrive at the "annual rent" upon which the water rate was to be computed, an allowance should be made in respect of "voids," i.e. houses lying vacant from time to time; & the actual amount of the poor rates & other rates paid by applt. was rightly deducted, but applt. was not entitled to deduct the full amount of the rates which an occupier if rated would have paid; nor the amount which he paid for repairs, & insurances.—

**Company's Acts.**—**PINSENT v. PROWSE** (1881), 6 Nfld. L. R. 342.—**NFLD.**

**t. Lands outside special water supply district—Contract to call upon local authority to supply water when needed.**—**WELWOOD v. MIDLOTHIAN COUNTY COUNCIL** (1894), 22 R. (Ct. of Sess.) 58; 32 Sc. L. R. 74.—**SCOT.**

**u. Office forming separate part of distillery premises—Office sole part of premises supplied with water—Whole premises entered in valuation-roll as unum quid.**—**DISTILLERS CO. v. FIFE CITY COUNCIL**, [1925] S. C. (H. L.) 15.—**SCOT.**

**PART III. SECT. 2, SUB-SECT. 9.**—**A. (b).**

**b. "Water supplied or ready to be supplied."**—Defts. were the owners of vacant land in the city of Windsor,

**SMITH v. BIRMINGHAM CORPN.** (1883), 11 Q. B. D. 195; 52 L. J. M. C. 81; 49 L. T. 25; 47 J. P. 645; 31 W. R. 788, D. C.

**Annotation.**—*Mentl. Pigott v. Cuckfield Union Assmt.* Com. (1921), 125 L. T. 402.

**211. ——— Rack rent.**—By the terms of its special Act a water co. were to supply water at certain rates on the “annual rack rent of the house . . . if same be let at rack rent, & on the annual value if & while same is not let at rack rent.” An owner & occupier contended that his house, not being let at an annual rack rent, the water rates payable by him ought to be assessed according to the annual value; & that the annual value was the net annual value, as distinguished from the gross value or gross estimated rental:—*Held*: the words in the sect. “annual rack rent” & “annual value” must be treated as equivalent; that the legislature never intended to lay down two scales of charges, one for tenants of houses & the other for owner occupants; & an owner occupying his own house must pay water rates upon the gross estimated rental, as distinguished from the net annual value.—**STEVENS v. BARNET GAS & WATER CO.** (1888), 57 L. J. M. C. 82; 36 W. R. 924; 52 J. P. Jo. 276, D. C.

**Annotation.**—*Reid. Re Sawyer & Withall*, [1919] 2 Ch. 333.

**212. Annual value.—How ascertained.—Whether deduction for rates allowed.**—By Liverpool Corporation Waterworks Act, 1847, the rates at which water is to be supplied for domestic purposes, are to be assessed upon the “annual value” of the premises: & by Liverpool Corporation Water Works (Amendment) Act, 1850, it is enacted, that, if the owner of any dwelling-house the yearly rent or value whereof shall not amount to £13, or which, whatever may be the annual value thereof, shall be let to weekly or monthly tenants, or in separate apartments, shall be desirous of paying a reduced water rent by the year for same, whether occupied or not, the council may compound with such owner for the payment of the water rents payable by virtue of the Acts in respect of such dwelling-house at any sum not less than three-fourths of the annual water rent for same; & all such compositions shall be entered in the books of the council, & shall be recoverable in like manner as the rents & charges authorised by the Act are by law recoverable. By a composition paper, applt., as the owner of certain dwelling-houses let to weekly tenants, agreed with the corpn. to compound for the water rates, & in a schedule thereto stated the rental to be 4s. 6d. per week & 3s. 6d. per week respectively. The composition paper contained a stipulation, that, “if at any time it should be ascertained that the rental of such houses was not truly & correctly set forth in the schedule, the corpn. might be at liberty to amend same by inserting therein the true & correct amounts of such rental,” & might recover against applt. the additional water rents due in respect thereof. The rents of the houses were in point of fact 6d. per week respectively more than the sums stated in the schedule,—applt. claiming to deduct that sum in respect of poor & other rates which by agreement with the tenants were paid by him:—*Held*: (1) applt. was not entitled to make such deduction, but that the corpn. were entitled under the agreement to receive the composition upon the amount of rent paid by the

tenants; (2) the production of the composition paper, & proof that no demand of water rates had been made upon the tenants, was sufficient evidence that the composition had been made, without showing that any entry thereof had been made in the books of the council.—**ROOK v. LIVERPOOL CORPN.** (1859), 7 C. B. N. S. 240; 141 E. R. 308.

**Annotation.**—*As to* (1) **Distd. Sheffield Waterworks Co. v. Bennett** (1872), L. R. 7 Exch. 409.

**213. ———**—**SHEFFIELD WATERWORKS CO. v. BENNETT**, No. 209, ante.

**214. ———**—**SMITH v. BIRMINGHAM CORPN.**, No. 210, ante.

**215. ———**—By the Bury & District Joint Water Board Act, 1903, resp. were to supply water at specified rates, viz., “where the annual rack rent or value of such house shall not exceed £20, at a rate per cent. *per annum* not exceeding £10.”

Applt. was the owner of three cottages let to tenants, & applt. paid all the rates on such cottages:—*Held*: in order to arrive at the “annual rack rent or value,” upon which he was liable to pay the water rate, applt. was entitled to deduct the rates so paid by him.—**WILKINSON v. BURY WATER BOARD** (1905), 92 L. T. 417; 69 J. P. 214; 3 L. G. R. 715, D. C.

**216. ——— Whether rateable value.—Or gross estimated rental.**—By the special Act of a water co., which incorporated Waterworks Clauses Act, 1847 (c. 17), save so far as the clauses or provisions thereof were expressly varied or excepted, the co. were obliged to supply water to the occupiers of dwelling-houses for domestic purposes at a rate not exceeding £6 per cent. *per annum* upon the annual “rack rent or value” of the premises supplied. It was further provided in a subsequent sect. of the Act that the rate should be “payable according to the annual value at which the premises were from time to time assessed to the poor rate if same were so assessed, or, if not, according to the net annual value of the premises.” By Waterworks Clauses Act, 1847 (c. 17), s. 68, “the water rates, except as hereinafter & in the special Act mentioned, shall be payable according to the annual value of the tenement supplied with water”:—*Held*: the water rate charged by the co. must be calculated on the “rateable value” not on the “gross estimated rental” of the premises supplied with water.—**WARRINGTON WATERWORKS CO. v. LONGSHAW** (1882), 9 Q. B. D. 145; 51 L. J. Q. B. 498; 46 L. T. 815; 46 J. P. 773; 31 W. R. 11, D. C.

**Annotations.**—*Appl. Dobbs v. Grand Junction Waterworks Co.* (1882), 9 Q. B. D. 151. *Reid. Bristol Waterworks Co. v. Uren* (1885), 15 Q. B. D. 637.

**217. ———**—**A dwelling-house & garden in the occupation of the owner were assessed to the poor rate as follows:** “Gross estimated rental, £240; rateable value, £204.” It was proved that the value of the house without the garden would be 10 per cent. less, & that the owner contracted to pay & did pay £1 1s. annually for the watering by means of a pipe & tap in the garden which surrounded the dwelling-house & was occupied & assessed therewith:—*Held*: the words “gross sum assessed to the poor rate” meant the “gross estimated rental,” & not “rateable or net value”; & the water-rent was chargeable upon the gross

abutting on streets in which mains & hydrants of pfts. had been placed. Defts. had a waterworks system of their own & did not use that of pfts., though they could have done so had they wished. The corpns. imposed a water

rate “for water supplied or ready to be supplied” upon all lands in the city, based upon their assessed value, irrespective of the user or non-user of water.—*Held*: this rate was, under 37 Vict. c. 79, ss. 11, 12, validly im-

posed.—**CITY OF WINDSOR v. CANADIAN SOUTHERN RY. CO.** (1893), 20 A. R. 388.—**CAN.**

**Population.**—**DUBLIN CORPN. v. BRAY TOWNSHIP COMRS.**, [1900] 2 I. R. 88.—**IR.** ●



*Sec. 2.—Supply of water by undertakers: Sub-sect. 9, A. (b) & (c), & B.]*

estimated rental of "the premises," including the pleasure garden occupied with the house, & not merely upon the dwelling-house itself, the extra charge for the garden supply being for using a pipe & tap.—**BRISTOL WATERWORKS CO. v. UREN**, *UREN v. BRISTOL WATERWORKS CO.* (1885), 15 Q. B. D. 637; 54 L. J. M. C. 97; 52 L. T. 655; 49 J. P. 564, D. C.

*Annotations:—*Consd. Grand Junction Waterworks Co. v. Davies, [1897] 2 Q. B. 209. *Appld.* Wilkinson v. Bury Water Board (1905), 92 L. T. 417. *Refd.* Barnard Castle U. C. v. Wilson, [1902] 2 Ch. 746; South West Suburban Water Co. v. St. Marylebone Union, [1904] 2 K. B. 174; Chester Waterworks Co. v. Chester Union (1907), 96 L. T. 566.

**218.** ———— *—Held:—*—The special Act of a water co. incorporated Waterworks Clauses Act, 1847 (c. 17), "except where expressly varied by" the special Act. Waterworks Clauses Act, 1847 (c. 17), s. 68, provides that the water rates, except as thereafter & in the special Act mentioned, shall be payable according to the annual value, which has been held to mean the net annual value, of the tenement supplied with water. A sect. of the special Act provided that the co. should furnish water at rates not exceeding the yearly rates thereafter specified, namely, where the gross estimated annual rental of the premises supplied should not exceed a certain amount, at a rate per cent. *per annum* not exceeding an amount specified:—*Held:* by this sect. the rate per cent. *per annum* was to be calculated upon the gross estimated annual rental & Waterworks Clauses Act, 1847 (c. 17), s. 68, was expressly varied thereby.—**WORKING WATER & GAS CO. v. PARKER**, [1916] 1 K. B. 473; 85 L. J. K. B. 876; 114 L. T. 1207; 80 J. P. 188; 14 L. G. R. 372, D. C.

**219.** ———— *Net annual value.*—A water co. by a special Act of 1826 were compellable to supply water to certain dwelling-houses in the metropolis for domestic purposes at certain rates per cent. *per annum* payable "according to the actual amount of the rent where the same can be ascertained & where same cannot be ascertained according to the actual amount or annual value upon which the assessment to the poor's rate is computed in the parish or district where the house is situated." By a special Act of 1852 the co. were compellable to furnish the water "where the annual value of the dwelling-house or other place supplied shall not exceed £200 at a rate per cent. *per annum* on such value not exceeding £4; & where such annual value shall exceed £200 at a rate per cent. *per annum* on such value not exceeding £3." The occupier of one of the houses was lessee for a long term at a ground rent & paid no rent except the ground rent:—*Held:* whether the later Act repealed the provisions of the former or not the case must be dealt with under the later Act; & the words "annual value" in the later Act meant "net annual value" as defined in Parochial Assessments Act, 1836 (c. 96), s. 1.—**DOBBS v. GRAND JUNCTION WATERWORKS CO.** (1883), 9 App. Cas. 49; 53 L. R. J. Q. B. 50; 49 L. T. 541; 48 J. P. 5; 32 W. L. 433, H. L.

*Annotations:—*Expld. Bristol Waterworks Co. v. Uren (1885), 15 Q. B. D. 637. Consd. West Middlesex Waterworks Co. v. Coleman, Coleman v. West Middlesex Waterworks Co. (1885), 14 Q. B. D. 529. *Distd.* Smith v. Birmingham (1888), 22 Q. B. D. 211; Stevens v. Barnett Gas & Water Co. (1888), 57 L. J. M. C. 82. *Appld.* Rose v. Watson, [1894] 2 Q. B. 90. Consd. South Staffordshire Waterworks Co. v. Barrow (1897), 61 J. P. 661. *Appld.* Metropolitan Water Board v. Streeton (1910), 109 L. T. 220. *Refd.* Smith v. Birmingham Corp'n. (1883), 11 Q. B. D. 195. Hayward v. East London Waterworks Co. (1885), 49 J. P. 452; Henderson v. Folkestone Waterworks Co. (1885), 1 T. L. R. 329; Stevens v. Bishop

(1887), 19 Q. B. D. 442; Walker v. Brisley (1900), 69 L. J. Q. B. 876; Northampton Corp'n. v. Ellen (1904), 90 L. T. 71; Woking Gas & Water Co. v. Parker (1915), 80 J. P. 188.

**220.** ———— *Premises occupied for part of period—Whether deduction allowed.*—**SMITH v. BIRMINGHAM CORPN.**, No. 210, *ante*.

**221.** ———— *Minimum charge made.*—**COLNE VALLEY WATER CO. v. TREHARNE**, No. 7, *ante*.

**222.** ———— *Enhanced value—Premium paid for lease of public-house.*—The co. supplied water for domestic purposes to a house occupied as a licensed public-house. The co. contended that the annual value of the premises as a licensed public-house should be taken as the basis of the water rate payable in respect of such supply, & that therefore the fact of the premises being licensed, & a premium which had been paid for the lease of the premises as a public-house, ought to be taken into consideration in fixing the value. The occupier contended that such water-rate should be based upon the value of the premises for domestic purposes only:—*Held:* the contention of the co. was correct.—**WEST MIDDLESEX WATERWORKS CO. v. COLEMAN**, *COLEMAN v. WEST MIDDLESEX WATERWORKS CO.* (1885), 14 Q. B. D. 529; 54 L. J. M. C. 70; 52 L. T. 578; 49 J. P. 341; 33 W. R. 549; 1 T. L. R. 204, D. C.

*Annotation:—*Consd. Grand Junction Waterworks Co. v. Davies, [1897] 2 Q. B. 209.

**223.** ———— *Annual value of whole premises—Dwelling house & garden.*—On an application, under Waterworks Clauses Act, 1847 (c. 17), s. 68, to determine a dispute as to the value of a tenement supplied with water, consisting of a dwelling-house & garden with outhouses, occupied as a residence, & comprising about half an acre, the justices found as a fact that a portion of the garden might be separately let, & being of opinion that, in arriving at the annual value of the tenement supplied with water, they had to determine what quantity of garden should reasonably go with the house, they held that the annual value was the value of the premises exclusive of such portion as might be separately let:—*Held:* the justices had no jurisdiction to exclude that portion of the garden, & the assessment must be raised to the annual value of the whole of the premises as occupied.—**GRAND JUNCTION WATERWORKS CO. v. DAVIES**, [1897] 2 Q. B. 209; 66 L. J. Q. B. 633; 76 L. T. 833; 61 J. P. 484; 45 W. R. 687; 13 T. L. R. 489; 41 Sol. Jo. 624, D. C.

**224.** ———— *Ambiguity in Act authorising rate—Construction in favour of consumer.*—If a statute which authorises a water company to charge its consumers with a water rate is ambiguous with regard to the amount of rate to be charged, or the mode of assessing it, it must be construed in favour of the consumer & against the water co.—**SOUTH STAFFORDSHIRE WATERWORKS CO. v. BARROW** (1897), 61 J. P. 661; 13 T. L. R. 549, C. A.

*Annotation:—*Appld. Woking Water & Gas Co. v. Parker, [1916] 1 K. B. 473.

**225.** ———— *Provision for fixed scale for class—Water rate chargeable at maximum rate for class—Consumer not entitled to pay on annual value.*—A water co.'s statute bound the co. to supply water on request at the following rates: (*inter alia*) where the annual rack rent or value of premises is under £5, at a rate not exceeding 5s.; where premises above £5 & under £15, at a rate not exceeding 15s.; & so on with a scale up to an annual value of £100. By another sect. the water rates were to be payable according to the annual value at which the premises were assessed to the



poor rate. G.'s premises were assessed to the poor rate at £11, & he claimed to pay a water rate of only 11s., & not 15s. as demanded:—*Held*: the water co. were entitled to demand the maximum rate for the class of houses under which G.'s came, & the justices were right in so deciding.—*GWATKIN v. CHEPSTOW WATERWORKS CO.* (1861), 25 J. P. 180.

—*Dispute as to annual value—Determination of annual value condition precedent to recovery of charges.*—See Nos. 238–240, 244, *post*.

(c) *Making of Rate.*

**226. Power to make rate—Before completion of works.**—To an action of trespass for breaking & entering *pltf.*'s mill & taking his goods, *defts.* pleaded a justification under a local Act, that *defts.*, as *comrs.* under the Act, completed one of three reservoirs mentioned therein; that *pltf.*'s mill was benefitted by the supply of water therefrom; that a certain rate was made, & that the trespass was committed & the goods were taken as a distress for non-payment of the rate. *Pltf.* replied, that only one reservoir had been completed. General demurrer. Sect. 35 enacted that "no rate shall be levied or assessed under the provisions hereinbefore contained until the reservoirs shall be actually made & in use, & water supplied therefrom":—*Held*: upon the true construction of the Act, the completion of one reservoir entitled the *comrs.* to levy a rate on the class of persons mentioned in the Act actually benefitted by it; & therefore the plea was good.—*SIDEBOTTOM v. GLOSSOP RESERVOIRS COMRS.* (1847), 1 Exch. 611; 11 J. P. 569; 154 E. R. 260, Ex. Ch.

**227. Power to charge different rates—In different parts of district.**—The undertaking & powers of a water co. were by an Act of 1884 transferred to a municipal *corpn.* By s. 49 of the co.'s special Act passed in 1861, the co. were empowered to charge for a supply of water for domestic use rates "not exceeding" certain amounts graduated according to the value of the premises, & by s. 59 of the Act it was provided that "the co. may from time to time supply any persons with water for any purpose for which such supply is required, for such remuneration, & upon such terms & conditions, as shall be agreed upon between the co. & the person desirous of such supply of water, under a special agreement." By s. 36 of the before-mentioned Act of 1884, s. 49 of the Act of 1861 was repealed, & the *corpn.* were empowered to "charge for the supply of water for domestic use to any dwelling-house a sum not exceeding 7½ per cent. *per annum* on the net rateable value of such dwelling-house, as ascertained by the valuation list in force at the commencement of the quarter during which the water rate becomes payable." There was no express provision in either of the before-mentioned Acts requiring equality of rating in respect of the charge made for water to consumers.

The *corpn.* charged to consumers in respect of water supply for domestic purposes in part of their district at the rate of 7½ per cent. & in the remainder of the district at the rate of 5 per cent. upon the rateable value of their respective dwelling-houses. In an action brought to recover the sum charged to a consumer for water at the higher rate:—*Held*: no implication arose from s. 36 of the Act of 1884 that the *corpn.* were bound to charge for

water at an equal rate in the pound to all consumers, & therefore the fact that they had not done so was no defence to the action.—*NORTHAMPTON CORPN. v. ELLEN*, [1904] 1 K. B. 299; 73 L. J. K. B. 329; 90 L. T. 71; 68 J. P. 197; 52 W. R. 305; 20 T. L. R. 168; 2 L. G. R. 473, C. A.

**228. Power to charge special rate—Supply of water outside borough but within limits of Act.**—*Pltf.* was the occupier of a house which was outside the limits of the borough of Plymouth, but was within the limits of water supply under the Plymouth Corporation Water & Markets Act, 1867, which Act incorporated the Waterworks Clauses Act, 1847 (c. 17), "except where expressly excepted or varied by this Act." *Pltf.* was supplied by *defts.* with water under the special Act, but having been compelled to pay a water rate in excess of the scale prescribed by sect. 22 of that Act, he sought to recover from *defts.* the difference between the two rates, contending that by Waterworks Clauses Act, 1847 (c. 17), s. 53, & s. 22 of the special Act he was only liable to pay water rate in accordance with the scale laid down in the last-mentioned sect.—*Held*: the action failed, as sect. 15 of the special Act, relating to supply beyond the borough of Plymouth, but within the limits of supply, varied the provisions of the Act of 1847, & applied so as to entitle *pltf.* to a supply of water only on the terms to be agreed between him & the *defts.*—*PITTS v. PLYMOUTH CORPN.*, [1912] 3 K. B. 301; 81 L. J. K. B. 1240; 107 L. T. 526; 10 L. G. R. 312.

*B. Supply by Measure.*

**229. Duty to supply by measure—"Any consumer of water"**—Person actually consuming water.—The words "any consumer of water" in sect. 41 of the New River Company's Act, 1852 (c. clx), mean not any person merely desirous of being a consumer, but a person who is actually consuming water or who at least is entitled to demand a supply for his consumption & is taking the necessary steps to obtain it.—*COOKE, SONS & CO. v. NEW RIVER GOVERNOR & CO.* (1889), 14 App. Cas. 698; 59 L. J. Ch. 333; 61 L. T. 816; 54 J. P. 260; 5 T. L. R. 726, H. L.

*Annotations*:—*Consd. Northern Theatres Co. v. Shillito*, [1925] 2 K. B. 100. *Reld. South-West Suburban Water Co. v. St. Marylebone Union*, [1904] 2 K. B. 174; *Chester Waterworks Co. v. Chester Union Grdns.* (1907), 96 L. T. 566; *Metropolitan Water Board v. Paine*, [1907] 1 K. B. 285; *Wootton v. Bishop* (1907), 96 L. T. 705; *Bristol Grdns. v. Bristol Waterworks Co.*, [1912] 1 Ch. 846.

**230. Obligation to provide meter—Whether on undertakers or on consumer.**—The special Act of a water co. provided for the supply of water to the inhabitants of the district for "family use" at certain rates calculated on the rental of the house supplied. The Act contained further provisions for the supply of water for schools, manufactories, etc., etc., & for other purposes than family consumption, & for baths, etc., & for the purposes of any trade or business whatsoever at certain rates per thousand gallons. The supply of water under these latter provisions having been held obligatory upon the co. unless prevented by causes beyond their control:—*Held*: (1) there being no provision in the special Act throwing upon the consumer the obligation of providing a meter to measure the water supplied for the purposes of a bath, no such obligation could be implied from Waterworks

PART III. SECT. 2, SUB-SECT. 9.—

A. (a).

d. *Power of public utility commissioners.*—*R. v. MILLTOWN COMRS.* (N. B.) (1919), 47 D. L. R. 219.—*CAN.*

PART III. SECT. 2, SUB-SECT. 9.—B.

e. *Refusal to allow water meter to be replaced—Whether restraining order continued.*—*DENNIS v. HALIFAX CITY* (1910), 9 E. L. R. 360.—*CAN.*

f. *Meter rate—Supply to public house.*—*AIRDRIE, COATBRIDGE & DISTRICT WATER TRUSTS v. FLANAGAN* (1906), 8 F. (Ct. of Sess.) 832; 43 Sc. L. R. 422; 13 S. L. T. 880.—*SCOT.*

*Sect. 2.—Supply of water by undertakers: Sub-sect. 9, B. & C. (a) i.]*

Clauses Act, 1863 (c. 93), s. 14, incorporated with the special Act, which sect. provides that where the undertakers are authorised by the special Act to supply water by measure they may let for hire to any consumer of water so supplied any meter or instrument for measuring the quantity of water supplied. The occupier of a house within the district of the above-mentioned co. had a bath connected by means of a pipe with the house cistern, to which water was conveyed from the co.'s mains for "family use." The co. required him to put up a meter for the purpose of measuring the water used for the bath, but he refused to do so. He had paid to the co. in advance the proper amount in respect of the water supply "for family use" for the quarter ending the Sept. 29, but had not paid or tendered any sum in respect of the water supply to the bath during such period. The co. in consequence of his refusal to put up a meter or disconnect the bath, cut off the communication pipe from their main to his house upon Sept. 20. On Sept. 29, having cut off the pipe connecting the cistern with the bath, but not the waste or outlet pipe from the bath, he gave notice to the co. of what he had done, & paid to the co. in advance the proper amount for the supply of water for "family use" during the ensuing quarter, but did not restore the communication-pipe between the co.'s mains & his cistern. The co. refused to restore the supply on the ground that he had not cut off the waste-pipe from the bath, which he refused to do. The supply of water was not renewed till Nov. 4, when the co. restored the communication pipe under protest:—*Held*: (2) the co. were not entitled to insist on the consumer's providing a meter, (3) they were not liable to a penalty under the Waterworks Clauses Act, 1847 (c. 17), s. 43, for not supplying water during the period between Sept. 20 & 29, inasmuch as no payment or tender in respect of the water supply to the bath for such period had been made; (4) the co. were liable to a penalty in respect of the period subsequent to Sept. 29; (5) they had no right to refuse the supply of water after that date, & they were not justified in cutting off the supply, & were, therefore, not entitled to require the consumer to renew the communication.—*SHEFFIELD WATERWORKS CO. v. CARTER, BROOKS v. SHEFFIELD WATERWORKS CO., SHEFFIELD WATERWORKS CO. v. BROOKS* (1882), 8 Q. B. D. 632; 51 L. J. M. C. 97; 46 J. P. 548; 30 W. R. 889, D. C.

*Annotations*—*As to* (1) *Distd. Sheffield Waterworks Co. v. Bingham* (1883), 25 Ch. D. 443. *As to* (5) *Consd. South-West Suburban Water Co. v. Hardy* (1913), 109 L. T. 189. *Generally, Refd. Simpson v. South Oxfordshire Water & Gas Co.*, [1908] 1 K. B. 917.

**231.** ———.]—The Sheffield Waterworks Co. claimed a declaration that they were not bound under their Acts of Parliament to supply water for private baths except upon the terms of the consumer providing at his own expense a meter or other automatic self-registering instrument for the accurate measurement of the water used. *Deft.* alleged that it was for the co. who supplied the water to measure the quantity to be paid for:—*Held*: upon the construction of the various Acts under which the proceedings of the co. were regulated, it was not correct to treat the co. as supply-

ing the water to the consumer, but it was the consumer who was entitled to draw off from the main what water he required, & to fix pipes & apparatus at his own expense for the purpose of measuring the water so taken by him; & such measurement could only be effected by some sufficient automatic self-registering meter or other instrument, or in some other equally accurate mode.—*SHEFFIELD WATERWORKS CO. v. BINGHAM* (1883), 25 Ch. D. 443; 52 L. J. Ch. 624; 48 L. T. 604.

**232. Power to make agreement—Fixing price.]**—*SOUTHWARK & VAUXHALL WATER CO. v. DICKENSON* (1889), 5 T. L. R. 251, C. A.

—]—*See, also*, No. 170, *ante*.

**233. Power to make additional charges—Fixed baths.]**—*SHEFFIELD WATERWORKS CO. v. BINGHAM* (1881), 25 Ch. D. 446, n., C. A.

*Annotations*—*Distd. Weaver v. Cardiff Corpn.* (1883), 48 L. T. 906. *Refd. Walker v. Lambeth Waterworks Co.* (1894), 71 L. T. 75.

**234.** ———.]—*SHEFFIELD WATERWORKS CO. v. CARTER, BROOKS v. SHEFFIELD WATERWORKS CO., SHEFFIELD WATERWORKS CO. v. BROOKS*, No. 230, *ante*.

**235.** ———.]—*Defts.*, a waterworks co., were required by their special Act to supply water for domestic purposes to the inhabitants of the borough, at specified rates, it being also provided that a supply for domestic purposes should not include a supply for baths, washhouses, or public purposes, etc. *Pltf.* erected in his house a fixed bath connected with the water service. The co. demanded, in addition to the ordinary water rate, an extra charge for the supply to this bath, on the ground that a supply for such a purpose was not a supply for domestic purposes within the meaning of the Act:—*Held*: the co. were not entitled to make such extra charge.—*WEAVER v. CARDIFF CORPN.* (1883), 48 L. T. 906; 47 J. P. 599.

*Annotations*:—*Appld. Walker v. Lambeth Waterworks Co.* (1894), 63 L. J. Ch. 874. *Refd. Barnard Castle U. C. v. Wilson*, [1901] 2 Ch. 813.

**236.** ———.]—*EAST LONDON WATERWORKS CO. v. FOULKES* (1892), 37 Sol. Jo. 29.

**237.** ———.]—For water closets "beyond the first"—Water closets connected with drainage system—No water supply laid on or flushing apparatus.]—A waterworks Act, s. 33, provided: "The co. may charge in any one year . . . in respect of every water closet beyond the first . . . in or belonging to any private dwelling-house the sum of five shillings":—*Held*: a closet "beyond the first" connected with the drainage system of the premises where the closet was situate, & so with a sewer of an urban district council so constructed as to require flushing with water when used, but without any water supply laid on or flushing apparatus, was not a water closet within the sect.—*ROBERTS v. SOUTH ESSEX WATERWORKS CO.* (1903), 67 J. P. 404; 1 L. G. R. 719, D. C.

*C. Recovery of Rates and Charges.*

(a) *Legal Proceedings.*

i. *Action.*

*See Waterworks Clauses Act, 1847 (c. 17), s. 74; Waterworks Clauses Act, 1863 (c. 93), s. 21.*

**238. Dispute as to annual value—Necessity for decision of justices—Before bringing action for recovery of rate.]**—*Waterworks Clauses Act, 1847 (c. 17), s. 68*, enacts that the water rate shall be payable according to the "annual value" of the tene-

**PART III. SECT. 2, SUB-SECT. 9.—**

**C. (a) i.]**

**g. Right of water company to apply to court.—For declaration that land of deflt. is charged with amount due.]**

—Where rates have become due or payable under Water Acts, the Water Trust is entitled to apply to the ct. for an order under Act, 1861, s. 59, declaring that the land in respect of

which the rates were made should stand charged with the payment of such rates & the ct. may further order that accounts be taken to ascertain the amount due & may direct that in

ment supplied with water, & that, "if any dispute arise as to such value, the same shall be determined by two justices." This Act incorporates Railways Clauses Consolidation Act, 1845 (c. 20), ss. 140 & 142, of which give the mode of procedure before the justices. By New River Company's Act, 1852 (c. clx), s. 46, which incorporates Waterworks Clauses Act, 1847 (c. 17), it is enacted that "nothing in this Act or any Act incorporated herewith contained shall prevent the co. from recovering any sum of money not exceeding £50, which shall be due to them for water rates or rents, or for damages, costs, or expenses, by action or proceeding in such manner as is by law provided for the recovery of debts not exceeding £50":—*Held*: where a *bonâ fide* dispute arises as to the "annual value," the co. must, before they can sue for the rate under sect. 46 of the special Act, obtain a decision of justices on that dispute, under sect. 68 of the general Act.—*NEW RIVER CO. v. MATHER* (1875), L. R. 10 C. P. 442; 44 L. J. M. C. 105; 32 L. T. 658; 39 J. P. 614.

*Annotations*:—*Consid.* *Hayward v. East London Waterworks Co.* (1884), 28 Ch. D. 138. *Reid.* *Lea v. Abergavenny Improvement Comrs.* (1885), 16 Q. B. D. 18.

**239. — Minimum charge made.**—*COLNE VALLEY WATER CO. v. TREHARNE*, No. 7, ante.

**240. — — — — —**—(1) A water rate of £8 15s. 4d. for one quarter's rate in respect of certain houses, was demanded by debts, the sanitary authority, & paid by pltf., such sum being 5 per cent. on the "gross rental" of the houses. After this payment, debts. altered their basis of assessment, from "gross rental" to "rateable value" as the proper basis of assessment they being entitled to charge 5 per cent. on the "annual value." If the rate had been calculated on the "rateable value" it would have been £7 3s. 10d. Pltf. brought an action in a county ct. to recover the overcharge £1 11s. 6d., the difference between these two sums, as being money paid under compulsion.

There was no power to distrain for these rates, except when they did not exceed £1 a quarter, which did not apply to the present case, but debts. had the power to cut off the water supply on non-payment of the rate. Debts. had not cut off the water & had not threatened to do so, nor had they taken any legal proceedings for the recovery of the rate.

The county ct. judge held the payment to be a compulsory one, as debts. had the power to cut off the water, & gave judgment for pltf.:—*Held*: the payment was a voluntary payment, & could not be recovered back.

(2) Sect. 6 of Burnley Borough Improvement Act, 1883, coming under the heading, Part II. Water, provides: "The following Acts & parts of Acts, so far as they are applicable & not inconsistent with this Act, shall be incorporated with & form part of this Act, that is to say, Waterworks Clauses Acts, 1847 (c. 17) & 1863 (c. 43), except the provisions thereof with respect to the amount of profit to be received by the undertakers when the waterworks are carried on for their benefit."

the event of such amount not being paid within a time to be named in the order such land be sold for the payment of the amount so found due. Such an order may be made notwithstanding the fact that no demand for payment has been made under sect. 60 of the Act.—*BENALLA WATERWORKS TRUST v. SWAIN* (1900), 26 V. L. R. 449.—*AUS.*

**h. Right to prove for taxes & water rate—On liquidation of company.**—

The right to prove a claim for taxes against an incorporated co. in liquidation depends upon the right to maintain an action therefor, which right of action only exists when the taxes cannot be recovered in any special manner provided for by Assessment Act, as, for example, by distress, or sale of the land.—*RE OTTAWA PORCELAIN & CARBON CO., LTD.* (1900), 31 O. R. 679.—*CAN.*

**ak. Action for use of hydrants**

The Waterworks Clauses Act, 1847 (c. 17), provides: "& with respect to the payment & recovery of water rates, be it enacted as follows." Then comes sect. 68 which provides that the rates are to be paid according to the annual value, & if any dispute arise as to such value the same shall be determined by two justices:—*Held*: sect. 68 of Waterworks Clauses Act, 1847 (c. 17), was not incorporated in Burnley Borough Improvement Acts, & the settlement by two justices of a dispute as to value was therefore not a condition precedent to pltf.'s right of action.—*SLATER v. BURNLEY CORPN.* (1888), 59 L. T. 636; 53 J. P. 70; 36 W. R. 831; 4 T. L. R. 642. D. C. *Annotations*:—*Fold.* *Slater v. Burnley Corpn.* (No. 2) (1889), 53 J. P. 535. *Reid.* *Meadows v. Grand Junction Waterworks Co.* (1905), 69 J. P. 255.

**241. Whether undertakers must cut off water—Before bringing action for recovery of rate.**—It is not necessary, before water rates can be recovered under Waterworks Clauses Act, 1847 (c. 17), s. 74, that the power of cutting off the water conferred by that sect. on the undertakers should have been exercised.—*R. v. HUTTON, Ex p. METROPOLITAN WATER BOARD*, [1907] 2 K. B. 578; 76 L. J. K. B. 1001; 97 L. T. 400; 71 J. P. 424; 23 T. L. R. 642; 5 L. G. R. 914, D. C.

**242. Against whom action may be brought—Purchaser of dwelling-house—Arrears due before date of purchase.**—The effect of Water Companies (Regulation of Powers) Act, 1887 (c. 21), s. 4, is that a purchaser of the freehold of a dwelling-house is liable to a personal action at the suit of the waterworks co. to recover arrears of water rate which accrued due before the date of the purchase.—*EAST LONDON WATERWORKS CO. v. KELLERMAN*, [1892] 2 Q. B. 72; 67 L. T. 319; 56 J. P. 773; 8 T. L. R. 556, D. C.

*Annotations*:—*Reid.* *Metropolitan Water Board v. Brooks*, [1910] 2 K. B. 134; *Metropolitan Water Board v. Bibbey*, [1911] 2 K. B. 74; *Metropolitan Water Board v. Bunn*, [1913] 3 K. B. 181.

**243. Time for bringing action.**—By the joint operation of Waterworks Clauses Act, 1847 (c. 17), ss. 74 & 85, Railways Clauses Consolidation Act, 1845 (c. 20), s. 145, & Summary Jurisdiction Act, 1848 (c. 43), s. 11, if any person liable to pay water rate neglect to pay the same, the undertakers may recover the rate if less than £20 by summary proceeding before two justices within six calendar months from the time when the matter of complaint arose.

By Waterworks Clauses Act, 1863 (c. 43), s. 21, if any person neglects to pay to the undertakers any rate due to them, they may recover the same in any ct. of competent jurisdiction, & this remedy is to be in addition to their other remedies for the recovery thereof.

Water rates to an amount less than £20 became due & payable to undertakers whose special Act incorporated Waterworks Clauses Act, 1847 (c. 17), & 1863 (c. 93). More than six months after the date when the rates accrued due the undertakers brought an action in the county ct., as being a ct. of competent jurisdiction to recover them:—*Held*: the remedy in the ct. of competent jurisdiction was not subject to the six months'

*according to agreement—Validity of defence that agreement not carried out.*—*CANADIAN ELECTRIC CO. v. PERTH* (1912), 22 O. W. R. 319; 3 O. W. N. 1449; 3 D. L. R. 884.—*CAN.*

**1. Right of ratepayer to set up absence of seal—Where corporation obtains benefit of supply of water during emergency.**—*WRIGHT v. OTTAWA CITY & OTTAWA DAIRY CO.* (1914), 7 O. W. N. 151; 19 D. L. R. 722.—*CAN.*

*Sect. 2.—Supply of water by undertakers: Sub-sect. 9, C. (a) i., ii. & iii., (b) & (c); sub-sect. 10.]*

limitation to which summary proceedings before justices would have been subject.—*METROPOLITAN WATER BOARD v. BUNN*, [1913] 3 K. B. 181; 82 L. J. K. B. 1024; 109 L. T. 132; 77 J. P. 353; 29 T. L. R. 588; 57 Sol. Jo. 625; 11 L. G. R. 891, C. A.

### ii. Summary Proceedings.

*See Waterworks Clauses Act, 1847 (c. 17), ss. 74, 85.*

**244. Summons before justices to enforce payment of rate.**—Power of justices to determine annual rate.]—Upon the hearing before justices of a summons to enforce payment of a water rate made under a local Act incorporating Waterworks Clauses Act, 1847 (c. 17), the justices have power, under sect. 68 of that Act, to determine a dispute as to the annual value of the premises rated. It is not necessary to their jurisdiction before making an order for payment of the rate upon such summons that the dispute should have been previously determined in a separate proceeding before justices.—*LEA v. ABERGAVENNY IMPROVEMENT COMRS.* (1885), 16 Q. B. D. 18; 55 L. J. M. C. 25; 53 L. T. 728; 50 J. P. 165; 34 W. R. 105.

**245. — Necessity for demand.**—Before issue of summons.]—Where a summons has been taken out for arrears of water rate under Waterworks Clauses Act, 1847 (c. 17), s. 45, & Railway Clauses Act, 1845 (c. 20), s. 140, it is not a condition precedent to the jurisdiction of the justices to make an order for payment, that a demand should have been made for the amount before the issue of the summons.—*EAST LONDON WATERWORKS CO. v. KYFFIN*, [1895] 1 Q. B. 55; 64 L. J. M. C. 32; 71 L. T. 615; 50 J. P. 405; 15 R. 38, D. C.  
*Annotations:—*Consid. *Elliott v. Russell*, [1902] 2 K. B. 748. *Reld. R. v. Hutton, Ex p. Metropolitan Water Board* (1907), 76 L. J. K. B. 1001.

**246. — Necessity to cut off supply of water.**—Before taking proceedings.]—*R. v. HUTTON, Ex p. METROPOLITAN WATER BOARD*, No. 241, *ante*.

**247. Time for bringing proceedings.]**—Summary Jurisdiction Act, 1848 (c. 43), s. 43, which limits the time for making a complaint to six months from the time when the matter of such complaint arose, applies to the hearing of a summons before justices for arrears of water rate under Waterworks Clauses Act, 1847 (c. 17), s. 85.

When the sum claimed accrued due more than six months before the date of the summons, the justices have no jurisdiction in the matter.—*EAST LONDON WATERWORKS CO. v. CHARLES*, [1894] 2 Q. B. 730; 63 L. J. M. C. 209; 71 L. T. 200; 58 J. P. 764; 42 W. R. 702; 10 T. L. R. 593; 38 Sol. Jo. 666; 10 R. 435, D. C.

*Annotations:—*Consid. *Elliott v. Russell*, [1902] 2 K. B. 748. *Reld. R. v. Hutton, Ex p. Metropolitan Water Board*, [1907] 2 K. B. 578. *Mentd. Ashby De-la-Zouch Grdns. v. Summers*, [1928] 2 K. B. 397.

**248. Costs.**—Discretion of justices.]—By s. 37 of Ruabon Water Act, 1870 (c. lvii), which incorporates Waterworks Clauses Acts, 1847 (c. 117), & 1863 (c. 93), when a person neglects to pay a rate due to the water co., the latter may recover the same, with full costs of suit, in any ct. of com-

petent jurisdiction; & by s. 38, after a defaulter has been summoned, water rates & costs ordered to be paid may be recovered by distress. Upon a summons before justices for payment of a water rate:—*Held*: the justices were not bound, on making an order for payment of the rate, to order the defaulter to pay the costs, but they had a discretion in the matter.—*RUABON WATER CO. v. EVANS* (1906), 22 T. L. R. 541, D. C.

### iii. Distress.

*See DISTRESS*, Vol. XVIII., p. 417, Nos. 1560, 1562.

#### (b) Cutting off Supply.

*See Waterworks Clauses Act, 1847 (c. 17), s. 74.*

**249. When permissible.**—Arrears due from previous occupier.]—A tenant of premises supplied by a co. with water having failed to pay the water rate, the co., under the powers conferred upon them by Waterworks Clauses Act, 1847 (c. 17), s. 74, severed the communication with their main pipes. A subsequent tenant demanded a supply of water for the same premises, tendering to the co. the current quarter's rate & the estimated expense of restoring the communication, but the co. refused to supply the water until the arrears due from the former tenant were paid. A magistrate having convicted the co. under Waterworks Clauses Act (c. 17), s. 43, for such refusal:—*Held*: although the co. were not warranted in refusing to supply water to the incoming tenant until the arrears due to them as above stated were paid, they could not be made liable to the penalties imposed by sect. 43 until he himself had restored the communication with their main pipes.—*SHEFFIELD WATERWORKS CO. v. WILKINSON, SHEFFIELD WATERWORKS CO. v. CORBRIDGE* (1879), 4 C. P. D. 410; 48 L. J. M. C. 145; 41 L. T. 254; 43 J. P. 703.

*Annotations:—**Distd. Sheffield Waterworks Co. v. Carter, Same v. Brooks* (1882), 8 Q. B. D. 632; *Simpson v. South Oxfordshire Water & Gas Co.*, [1908] 1 K. B. 917. *Reld. East London Waterworks Co. v. Kellerman* (1892), 8 T. L. R. 556; *Floyd v. Lyons* (1897), 76 L. T. 251; *Grand Junction Waterworks Co. v. Rodocanachi*, [1904] 2 K. B. 230; *Cole v. Valley Water Co. v. Hall* (1890), 48 L. T. 394; *South-West Suburban Water Co. v. Hardy* (1913), 109 L. T. 169.

**250. — Failure to tender payment in advance.**—For separate supply for fixed bath.]—*SHEFFIELD WATERWORKS CO. v. CARTER, BROOKS v. SHEFFIELD WATERWORKS CO., SHEFFIELD WATERWORKS CO. v. BROOKS*, No. 230, *ante*.

**251. — Dispute as to annual value.**—Necessity for determination by justices.]—Although the statutory remedy provided by Waterworks Clauses Act, 1847 (c. 17), s. 68, for the settlement by two justices of disputes as to the annual value of a tenement supplied with water, & the special remedy by penalties given by sect. 43 against a co. for withholding water, have not ousted the general jurisdiction to restrain the co. by injunction from cutting off the supply of water pending proceedings for settling a dispute as to value, such injunction will not be granted on the application of an owner or occupier who will not undertake to commence proceedings with due speed before the justices under sect. 68.—*HAYWARD v. EAST LONDON WATERWORKS CO.* (1884), 28 Ch. D. 138; 54

### PART III. SECT. 2, SUB-SECT. 9.—C. (b).

**m. When permissible.**—Claim against former owner of buildings.]—*MCLEAN v. DUBBO MUNICIPAL COUNCIL* (1910), 10 S. R. N. S. W. 911; 28 N. S. W. N. 1.—*AUS.*

**n. — — — — —**].—Op appeal from a

judgment in pltf.'s favour in an action to restrain the city of S. from shutting off the water supply from buildings in said city, on land owned by pltf. It appeared that the building in question was purchased by pltf. at sheriff's sale & the claim of the city was against a former owner for water rates due by

him & unpaid:—*Held*: the city had no statutory lien for the unpaid rates & no authority to make the byelaw under which it proceeded, & was not warranted in refusing to supply water to pltf. unless the amount due by the previous owner was paid, & the case was one in which injunction was the

L. J. Ch. 523; 52 L. T. 175; 40 J. P. 452; 1 T. L. R. 56.

*Annotations*.—*Mentd. Young v. Thomas* (1892), 40 W. R. 488; *Stevens v. Chown, Stevens v. Clark*, [1901] 1 Ch. 884; *Panagotis v. S.S. Pontiac*, [1912] 1 K. B. 74.

252. — — — — —.]—Where a dispute has arisen as to the amount of the water rate payable by an occupier of premises to a water co., whose special Act incorporated the Waterworks Clauses Act, 1847 (c. 17), the determination of the annual value of the premises supplied by two justices, under sect. 68 of the Act of 1847, is a condition precedent to the right of the occupier to sue the co. for cutting off the water, & for the amount alleged to have been paid in excess.—*WHITING v. EAST LONDON WATERWORKS CO.* (1884), Cab. & El. 331.

253. — *Tenant refusing to quit—Supply cut off on landlord's request.*—P.'s landlord had agreed to pay water rate, & had duly paid it, when P. received notice to quit. P. refused to quit, & the landlord requested the C. waterworks co. to cut off the water, which they did without any notice to P.:—*Held*: the magistrate was wrong in holding that the co. had acted in contravention of Water Companies (Regulation of Powers) Act, 1887 (c. 21), s. 4.—*CHELSEA WATERWORKS CO. v. PAULET* (1888), 52 J. P. 724; 4 T. L. R. 239, D. C.

254. — *Where owner liable instead of occupier—House becoming empty.*—By Water Companies (Regulation of Powers) Act, 1887 (c. 21), s. 4, "Where the owner & not the occupier is liable by law . . . to the payment of the water rate in respect of any dwelling-house . . . no water co. shall cut off the water supply for non-payment of the water rate":—*Held*: the words "is liable" refer to a liability at the date when the water rate became due, & provided that there was at that date an occupier other than the owner, & the owner & not the occupier was liable for the payment of that rate, the sect. prohibited the water co. from cutting off the supply for non-payment of the rate even after the occupier had given up possession & the premises had become vacant.—*METROPOLITAN WATER BOARD v. BIBBEY*, [1911] 2 K. B. 74; 80 L. J. K. B. 977; 104 L. T. 812; 75 J. P. 322; 9 L. G. R. 531, D. C.

*Whether condition precedent to taking legal proceedings.*—*See* No. 241, *ante*.

*Liability of undertakers for wrongfully cutting off supply.*—*See* Sect. 2, sub-sect. 5, *ante*.

#### (c) Overpayments.

255. *Whether recoverable—Rate leviable by instalments—Reduction in rateable value—Right to deduct overpayment from subsequent instalments.*—Resps. were summoned for non-payment of the balance of the third instalment of general district & water rates and special rates in the nature of general district rates leviable by s. 75 of a corp'n. Act which provided that the corp'n. may levy any rate by any number of instalments, & that all the powers of the corp'n. for recovering any such rate shall apply to each instalment thereof, as if the same were a separate rate. After the payment of the first & second instalments the valuation list was, on notice of objection by resps., amended by reducing both the gross estimated rental & the rateable value, & the rates were altered accordingly. When a demand was made upon resps. for payment of the amount claimed to be payable in respect of the third instalment &

calculated upon the reduced rateable value, resps. claimed to be entitled to deduct from the third instalment the difference between the sums paid by the resps. in respect of the first & second instalments & the sums which would have been payable in respect of the first & second instalments if they had been calculated upon the reduced rateable value:—*Held*: the four instalments were not four separate rates but four instalments of one rate, & resps. were entitled to make the deduction claimed.—*HASTINGS CORPN. v. QUEEN'S HOTEL CO. HASTINGS, LTD.* (1907), 97 L. T. 310; 71 J. P. 369; 5 L. G. R. 1158; 2 Konst. Rat. App. 620, D. C.

— *Payment under mistake of law.*—*See* MISTAKE, Vol. XXXV., pp. 152, 153, 159, Nos. 490, 552-554.

— *Payment under mistake of fact.*—*See* MISTAKE, Vol. XXXV., p. 151, No. 484.

#### SUB-SECT. 10.—OFFENCES.

*See* Waterworks Clauses Act, 1847 (c. 17), ss. 54-60; Waterworks Clauses Act, 1863 (c. 93), ss. 16-20.

256. *Wrongful taking—From unoccupied house.*—Resp., a child of fourteen years of age, was charged with unlawfully taking water from an unoccupied house at H., such water being alleged to belong to the appellant company. The information was laid under Waterworks Clauses Act, 1847 (c. 17), s. 59, but the stipendiary magistrate for S., before whom the case was brought, dismissed it on the ground that the alleged offence did not come within sect. 59. The water co. appealed:—*Held*: the magistrate was right in dismissing the charge, for sect. 59, under which it was laid, provided no penalty for the taking of water from an unoccupied house.—*PIERCY v. POPE* (1881), 45 L. T. 477; 46 J. P. 102; 30 W. R. 60, D. C.

257. *Wrongful user—Using water for flushing purposes—Water already used for ordinary domestic purposes.*—*EVANS v. GORNALL* (1892), 8 T. L. R. 602, D. C.

258. — *Use of water for other than agreed purposes.*—By an agreement made between the T. district council & the W. G. Water co., the co. covenanted to supply water sufficient for purposes of domestic use & the washing of carts, as well as in the case of fire, but not for street watering or sewer flushing purposes. Resps. were ratepayers of T. & used the water for trade purposes:—*Held*: they had been guilty of an offence within Waterworks Clauses Act, 1863 (c. 93), s. 18.—*ANDREWS v. WITTS & HOLLY* (1901), 84 L. T. 124; 65 J. P. 281; 45 Sol. Jo. 278; 19 Cox, C. C. 633, D. C.

*Annotation*.—*Reid. Metropolitan Water Board v. Johnson* (1913), 77 J. P. 384.

259. — *Use of water for other than domestic purposes—Use of water for washing yard & cart.*—(1) A dairyman using water supplied by a water co. for washing a milk float or cart, used by him in his business uses the water for "other than domestic purposes" within Waterworks Clauses Act, 1863 (c. 93), s. 18.

(2) Using the water for washing a yard used for a trade & made dirty by such trade is using the water for a trade purpose.

proper remedy.—*BURCHELL v. SYDNEY CORPN.* [1927] 1 D. L. R. 486; 59 N. S. R. 84.—*CAN.*

o. — *Supply of water to Govern-*

*ment buildings by local authority—Faulty meter—Refusal to pay for water not consumed.*—*R. v. NAPIER CORPN.* (1907), 26 N. Z. L. R. 917.—*N.Z.*

PART III. SECT. 2, SUB-SECT. 10.  
p. *Wasting water by leaving tap open.*—A person who being connected with a water authority's works &

*Sect. 2.—Supply of water by undertakers: Sub-sects. 10 & 11. Sect. 3: Sub-sect. 1.]*

(3) The fixing of a temporary hose pipe to a service or communication pipe without the consent of the water co. is an offence under sect. 19 of Waterworks Clauses Act, 1863 (c. 93), & is in the same position as a permanent fixing; & it makes no difference that the water is used for a domestic purpose.—*CAMBRIDGE UNIVERSITY & TOWN WATERWORKS CO. v. HANCOCK* (1910), 103 L. T. 562; 74 J. P. 477; 8 L. G. R. 1018, D. C.

**260. Alteration of apparatus.—Affixing stop tap in service pipe.]—***WILLIAMS v. LLANDUDNO DISTRICT COUNCIL* (1897), 14 T. L. R. 18; 42 Sol. Jo. 34, D. C.

**261. — Affixing hose pipe to tap.]—***CAMBRIDGE UNIVERSITY & TOWN WATERWORKS CO. v. HANCOCK*, No. 259, *ante*.

**262. Failure to provide apparatus for regulating supply.—What is apparatus for regulating supply.—Screw-down stop valve.]—**By a local Waterworks Act, passed in 1858, it was provided that, for the purpose of preventing waste of the water, all persons supplied with water by the waterworks co. should provide "proper ball or stop cocks or other necessary apparatus for regulating such supply," & that in case any such person neglected to provide such apparatus after being required to do so, the co. might cut off the water from his premises. At the date of that Act the supply of water provided by the co. was intermittent. By another Act, passed in 1888, the co. were required to provide a constant supply of water. It then, for the first time, became necessary for the prevention of waste, that a system should be adopted of inserting in each communication pipe an apparatus, called a screw-down valve, whereby the water could be shut off from any premises in which there were indications of the water being permitted to run to waste:—*Held*: such a screw-down valve was not an apparatus for regulating the supply within the meaning of the former Act, & the co. could not justify cutting off the water from the premises of a person who neglected to comply with a notice requiring him to insert such a valve in his communication pipe.—*WARD v. FOLKESTONE WATERWORKS CO.* (1890), 24 Q. B. D. 334; 59 L. J. M. C. 65; 62 L. T. 321; 54 J. P. 628; 38 W. R. 426, D. C.

**263. Liability.—Liability of master for acts of servant.]—***WEST MIDDLESEX WATERWORKS CO. v. SUWERKOP*, No. 128, *ante*.

**264. — Wrongful taking.]—**Applt.'s servant, who was driving a steam wagon belonging to applt., drew water for the wagon in the course of his employment from a street hydrant communicating with a water main belonging to a city corpn., who were the undertakers under Water Works Clauses Act, 1847 (c. 17), which was in force in the city. Applt., who was a carrier, had not agreed to be supplied with water by the undertakers, whose practice was to grant annual permits to take water for steam wagons on payment, each permit being attached to a particular wagon & being available for any employee of the owner of the wagon. Applt. was summoned for unlawfully taking water for the wagon, contrary to sect. 59 of the Act. The justices convicted applt. on the ground that he was liable for

the act of his servant:—*Held*: as the act of applt.'s servant was done within the scope of the servant's employment, applt. was criminally liable under the sect. in respect thereof.—*BURNS v. SCHOLFIELD* (1922), 128 L. T. 382; 87 J. P. 54; 21 L. G. R. 39; 27 Cox, C. C. 378, D. C.

**265. — Owner liable to pay water rates.—House in occupation of tenant.]—**By the provisions of a water co.'s special Act, if "any person supplied with water" by the co. negligently suffered the water so supplied to him to be wasted he was liable to a penalty:—*Held*: where a house was let to a tenant at a rent not exceeding £10, so that the owner was liable under Waterworks Clauses Act, 1847 (c. 17), s. 72, to pay the water rates instead of the occupier, the owner was a "person supplied with water" within the meaning of the special Act, & was under a duty to take care that the water supplied was not wasted.—*BROCK v. HARRISON*, [1899] 1 Q. B. 958; 68 L. J. Q. B. 730; 80 L. T. 568; 63 J. P. 455; 47 W. R. 541; 43 Sol. Jo. 457; 19 Cox, C. C. 298, D. C.

Whether water subject of larceny at common law.]—*See CRIMINAL LAW*, Vol. XV., p. 911, No. 10028.

Offences within jurisdiction of Metropolitan Water Board.]—*See Part V., Sect. 4, post*.

#### SUB-SECT. 11.—RECOVERY OF DAMAGES AND PENALTIES.

*See Waterworks Clauses Act, 1847 (c. 17), s. 85. Failure to supply water.]—See Part III., Sect. 2, sub-sect. 5, ante.*

— For fire plugs.]—*See Part III., Sect. 2, sub-sect. 4, ante.*

Wrongfully cutting off supply.]—*See Part III., Sect. 2, sub-sect. 9, C. (b), ante.*

Recovery of rates & charges.]—*See Part III., Sect. 2, sub-sect. 9, C., ante.*

#### SECT. 3.—LIABILITY FOR DEFECTIVE WORK IN STREETS.

##### SUB-SECT. 1.—IN GENERAL.

*See Waterworks Clauses Act, 1847 (c. 17), ss. 28–34.*

**266. Liability to action for damages.—Personal injury.—Pipes laid negligently.]—**An action on the case may be maintained against an incorporated waterworks co., where workmen employed by persons who contract with the co. to lay down pipes for conducting water through a public street do the work in a negligent manner, whereby an individual passing along the street receives an injury.—*MATTHEWS v. WEST LONDON WATERWORKS CO.* (1813), 3 Camp. 403; 170 E. R. 1425, N. P.

*Annotations:—Consd. Overton v. Freeman* (1852), 11 C. B. 867. *Reid. Hall v. Smith* (1824), 2 Bing. 156; *Rapson v. Cubitt* (1842), 9 M. & W. 710.

**267. — Loss by contractor.]—**(1) Defts., a waterworks co., under their Act laid down one of their mains along & under a turnpike road, made under an Act which declared the soil to be in the owners of the adjoining land, subject only to the right to use & maintain the road. K. was owner

having permission to use water, wilfully permits water to run to waste may be convicted of an offence. *Water Authorities Act, 1891, s. 91.—RANSON v. STEWART*, [1902] St. R. Qd. 15.—*AUS.*

q Watering garden with hose after receiving notice to desist.]a—*TOOWOOMBA*

*CITY COUNCIL v. BARLOW*, [1926] St. R. Qd. 55; 29 Q. J. P. 36.—*AUS.*

#### PART III. SECT. 2, SUB-SECT. 11.

r Duty to prove failure of "charge" affirmatively.]—In a Waterworks Co.'s Act a penalty was imposed for not keeping the co.'s pipes

"charged" with water, except in cases of drought, etc. On a complaint against the co. to recover a penalty:—*Held*: defts. must prove affirmatively that the failure was within the exceptions of the Act.—*BENDIGO WATERWORKS CO. v. FLETCHER* (1871), 2 V. R. (Law.) 43.—*AUS.*



of land on both sides, at a spot where the road was carried across a valley on an embankment, & wanting to connect his land on either side, K. employed pltf. at an agreed sum, to make a tunnel under the road. In doing the work, it was discovered that there was a leak in the defts.' main higher up the road, & on pltf. digging out the earth, the water from the leak flowed down upon the work & delayed it, so as to cause pecuniary damage to pltf., for which he brought an action against defts. :—*Held*: assuming K. could have maintained an action against defts. for injury to his property, as to which the ct. gave no opinion, the damage sustained by pltf. by reason of his contract with K. becoming less profitable, or a losing contract, in consequence of the injury to K.'s property, gave pltf. no right of action against defts.

(2) The tunnel was formed by digging through half the width of the road, forming the tunnel, & then completing the other half in the same way. Before commencing the work K. obtained the consent of the road surveyor & the trustees :—*Held*: assuming K. could, under the circumstances, have been indicted for the nuisance to the high road, the partial obstruction to the highway did not render the whole proceeding so illegal as to prevent pltf. who was engaged in it from recovering damages for a wrong.—*CATTLE v. STOCKTON WATERWORKS CO.* (1875), L. R. 10 Q. B. 453; 44 L. J. Q. B. 139; 33 L. T. 475; 39 J. P. 791.

*Annotations* :—*As to* (1) *Appld.* Remorquage & Hélice (Soc. Anon. de) v. Bennetts, [1911] 1 K. B. 243. *Refd.* Elliott Steam Tug Co. v. Shipping Controller, [1922] 1 K. B. 127; Federated Coal & Shipping Co. v. B., [1922] 2 K. B. 42; The Zelo, [1922] 1 D. 9. *Generally*, *Refd.* McGill v. Canadian Pacific Ry., [1923] A. C. 126. *Mentd.* Allen v. Flood, [1898] A. C. 1; The Amerika, [1914] P. 167.

**268. — Improper re-instatement of street—Damage to house.**—*GLOVER v. EAST LONDON WATERWORKS CO.*, No. 186, *ante*.

**269. — Damage to gas pipes.**—*Defts.*, a municipal corp., as the waterworks undertakers for their borough & acting under powers conferred by a special Act, which incorporated the provisions of Waterworks (Clauses Act, 1847 (c. 17), relating to the breaking up of streets, laid a water main in certain roads in which there were already gas pipes belonging to pltf.s. They completed the work in Sept. 1923. By Waterworks Clauses Act, 1847 (c. 17), s. 32: "When the undertakers open or break up the road or pavement of any street . . . they shall with all convenient speed complete the work for which the same shall be broken up, & fill in the ground & reinstate & make good the road or pavement . . . so opened or broken up." *Defts.* when filling in the ground after laying their main, neglected to ram the earth sufficiently, whereby pltf.s.' gas pipes were deprived of the support to which they were entitled, & owing to a subsidence of the soil, sustained a series of fractures in the months of June & Dec. 1923, & July & Sept. 1924. In Dec. 1924, pltf.s. commenced an action for the damage suffered in consequence of the fractures. *Defts.* relied on Public Authorities Protection Act, 1893 (c. 61), contending that the action had not been commenced within the six months thereby limited :—*Held*: (1) there was a continuing duty upon defts. under s. 32 of the Act of 1847 to remedy the neglect in the improper filling in of the ground, & time did not begin to run under the Act of 1893 so long as that duty remained undischarged; (2) pltf.s. were entitled to recover compensation for all the damage sustained by them, including that resulting from the fractures which occurred

more than six months before action brought.—*HUYTON & ROBY GAS CO. v. LIVERPOOL CORPN.*, [1926] 1 K. B. 146; 95 L. J. K. B. 269; 134 L. T. 203; 90 J. P. 45; 42 T. L. R. 116; 70 Sol. Jo. 226; 24 L. G. R. 1, C. A.

— **Damage by extraordinary traffic.**—*See, generally*, HIGHWAYS, Vol. XXVI., pp. 460–475, Nos. 1762–1885.

**270. Liability to injunction—Pipes wrongfully laid.**—Where water pipes had, without the consent of the owner of the soil, been laid in the soil of a highway, an injunction to restrain the continuance of the pipes was granted; the owner of the soil not being left to his remedy at law, & not being required to establish his right at law. The facts that the soil under the highway was of no value to the owner, & that his motive for applying to the ct. was not connected with the enjoyment of his land, were held not to be reasons against the granting of the injunction.—*GOODSON v. RICHARDSON* (1874), 9 Ch. App. 221; 43 L. J. Ch. 790; 30 L. T. 142; 38 J. P. 436; 22 W. R. 337, L. C. & L. J.J.

*Annotations* :—*Consd.* Allen v. Martin (1875), L. R. 20 Eq. 462; Cooper v. Crabtree (1882), 20 Ch. D. 589; St. Mary, Buttersa, Vestry v. County of London & Bush Provincial Electric Lighting Co. (1899), 80 L. T. 31; Marriott v. East Grinstead Gas & Water Co., [1909] 1 Ch. 70. *Refd.* Wimbledon & Putney Commons Conservators v. Dixon (1875), 33 L. T. 679; Eardley v. Granville (1876), 3 Ch. D. 826; Elias v. Griffith (1878), 8 Ch. D. 521; L. & N. W. Ry. v. Westminster Corp., [1904] 1 Ch. 759; Riley v. Halifax Corp., [1907], 71 J. P. 428; Butterley Co. v. New Hucknall Colliery Co., [1909] 1 Ch. 37; Kennard v. Cory (1922), 91 L. J. Ch. 452.

**271. Recovery of cost of re-instatement of street—What expenses recoverable.**—Where a metropolitan local authority employ contractors to reinstate streets broken up by a co. in the exercise of statutory powers, they cannot, under Metropolitan Management Act, 1855 (c. 120), s. 114, recover from the co. any additional sum, beyond the amount actually paid by the authority to their contractors, in respect of supervision over the work exercised by their officers, if in fact no expense for supervision is incurred beyond what would have been incurred in supervising the work if it had been done by the co.—*METROPOLITAN WATER BOARD v. WESTMINSTER CITY COUNCIL* (1905), 75 L. J. K. B. 384; 70 J. P. 52; 22 T. L. R. 92; 4 L. G. R. 237, C. A.; *reversg.* S. C. *sub nom.* NEW RIVER CO. v. WESTMINSTER CITY COUNCIL (1904), 73 L. J. K. B. 1009, D. C.

*Annotation* :—*Appld.* Ballard v. Wandsworth Corp., (1906), 70 J. P. 331.

**272. Liability to pay compensation—Subsidence of street—Jurisdiction of justices—Claim exceeding fifty pounds.**—Undertakers for the supply of water to a borough under a special Act, which incorporated Lands Clauses Consolidation Act, 1845 (c. 18), & Waterworks Clauses Act, 1847 (c. 17), under their statutory powers, broke up the soil of a public road, which was repairable by a county council, & laid a pipe therein, & they restored the road to its former condition. Eight months after the completion of the work a portion of the road slipped & was repaired at a cost exceeding £50. Upon a claim preferred by the county council before two justices under s. 28 of Waterworks (Clauses Act, 1847 (c. 17), to recover the cost of repairing the damage the justices found (a) that the whole of the work of laying the pipe had been done in a proper, efficient & workmanlike manner; (b) that the damage was the result of laying the pipe in the road :—*Held*: the claim for compensation fell within Waterworks Clauses Act, 1847 (c. 17), s. 6, & as it exceeded £50, the justices had no jurisdiction to entertain it.—*HARPUR v. SWANSEA CORPN.*, [1913] A. C.



*Sect. 3.—Liability for defective work in streets: Sub-sects. 1 & 2.]*

597; 82 L. J. K. B. 1208; 109 L. T. 576; 77 J. P. 381; 29 T. L. R. 737; 57 Sol. Jo. 773; 11 L. G. R. 1096, H. L.; *affg.* S. C. *sub nom.* SWANSEA CORPN. v. HARPUR, [1912] 3 K. B. 493, C. A.

**SUB-SECT. 2.—DEFECTIVE STREET APPARATUS.**

**273. Fire plug—Placing open fire plug in foot-path.]—**HENDRA v. CHELSEA WATERWORKS GOVERNOR & Co. (1891), 8 T. L. R. 101.

**274. — Bursting.]—**LANCOCK v. SOUTHWARK & VAUXHALL WATERWORKS Co., [1889] W. N. 198.

**275. — Escape of water from—Severe frost.]—**A waterworks co., pursuant to the statute incorporating them, laid down main pipes at the prescribed depth below the surface of the street & placed in them proper fire plugs as required. By a frost of a severity rarely felt in England, a fire plug which had resisted the frost for twenty-five years was forced out & the water escaped from the main, but owing to the stopper above the plug being covered with ice & snow, the water could not rise to the surface, but was forced through the brickwork round the neck of the main & made its way into pltf.'s cellar, where it did damage:—*Held*: the co. were not liable since the accident arose from a frost of extraordinary severity, the effects of which the co. could not foresee or be expected to guard against, & consequently, there was no negligence on their part.—*BLYTH v. BIRMINGHAM WATERWORKS Co.* (1856), 11 Exch. 781; 25 L. J. Ex. 212; 26 L. T. O. S. 261; 20 J. P. 247; 2 Jur. N. S. 333; 4 W. R. 291; 156 E. R. 1047.

*Innotations.]—***Distd.** Steggle v. New River Co. (1863), 1 New Rep. 236. *Refd.* Madras Ry. v. Zemindar of Carvetinagarum (1874), 30 L. T. 770; Bull v. Shore-ditch Borough (1902), 1 L. G. R. 81. *Mentd.* Smith v. L. & S. W. Ry. (1870), L. R. 6 C. P. 14; Stretton v. Derby Brewery Co. r. Derby Corp'n., [1894] 1 Ch. 431; Weld-Blundell v. Stephens, [1920] A. C. 956; Baker v. James, [1921] 2 K. B. 671; *Re* Polemis & Furness, Withy, [1921] 3 K. B. 560; Montreal City v. Watt & Scott, [1922] 2 A. C. 555; Phillips v. Britannia Hygienic Laundry Co., [1923] 1 K. B. 539.

**276. — — — — —.]—**Pltf.'s premises were flooded by an escape of water laterally from one of deft.'s pipes, arising from the starting of a fire-plug, in consequence of a severe frost. By reason of an accumulation of frozen mud on the top of the plug, the water was unable to force the plug out & thus escape, in which case no damage would have resulted. Evidence was given that the plugs were known to start occasionally under such circumstances, & that the lateral escape of water might be prevented at a moderate expense:—*Held*: there was evidence to go to the jury of negligence on the part of defts.—*STEGGLES v. NEW RIVER Co.* (1863), 1 New Rep. 236; 11 W. R. 234; *affd.* (1865), 13 W. R. 413, Ex. Ch.

**277. — Failure to repair—Broken cap.]—**By a local Act a waterworks co. was bound, at the request of Town Improvement Comrs., to fix fire plugs into their mains, & to repair & keep them in proper order, at the cost of the Improvement Comrs., in whom the property in the plugs was vested by virtue of their Improvement Act. In consequence of the cap of one of the fire plugs provided under the Act being broken, a horse placed his foot in the plughole & was lamed:—*Held*: the waterworks co., & not the Comrs., were liable for the injury.—*BAXLEY v. WOLVERHAMPTON WATERWORKS Co.* (1860), 6 H. & N. 241; 30 L. J. Ex. 57; 25 J. P. 199; 158 E. R. 99.

*Annotations.]—***Consd.** Moore v. Lambeth Waterworks Co., (1886), 50 J. P. 756. *Refd.* Dawson v. Bingley U. D. C. (1910), 27 T. L. R. 46.

**278. — — — — — Hole in plug box.]—**STOCKINGS v. LAMBETH WATERWORKS Co. (1891), 7 T. L. R. 460, C. A.

*Annotation.]—***Refd.** Dawson v. Bingley U. D. C. (1910), 27 T. L. R. 46.

**279. — Projection above level of street.]—**A fire plug had been lawfully fixed in a highway by defts. Originally the top of the fire plug had been level with the pavement of the highway, but in consequence of the ordinary wearing away of the highway the fire plug projected half an inch above the level of the pavement. The fire plug itself was in perfect repair. Pltf., whilst passing along the highway, fell over the fire plug & was hurt: *Held*: as the fire plug was in good repair, & had been lawfully fixed in the highway, no action by pltf. would lie against defts.—*MOORE v. LAMBETH WATERWORKS Co.* (1886), 17 Q. B. D. 462; 55 L. J. Q. B. 304; 55 L. T. 309; 50 J. P. 756; 34 W. R. 559; 2 T. L. R. 587, C. A.

*Annotations.]—***Consd.** Thompson v. Brighton Corp'n., Oliver v. Horsham L. B., [1894] 1 Q. B. 332; G. C. Ry. r. Hewlett, [1916] 2 A. C. 511. *Refd.* Hartley v. Rochdale Corp'n., [1908] 2 K. B. 594; Dawson v. Bingley U. D. C. (1910), 75 J. P. 17. *Mentd.* R. v. Poole Corp'n. (1887), 19 Q. B. D. 602; Steel v. Dartford L. B. (1891), 60 L. J. Q. B. 256; Papworth v. Battersea B. C. (1914), 79 J. P. 105.

**280. — — — — —.]—**STYLES v. EAST LONDON WATERWORKS Co. (1887), 4 T. L. R. 190.

**281. Meter cover—Failure to repair.]—**A water meter which was the property of a water co. & used for measuring the water supplied by the co. to defts., the vestry of a parish, for watering the streets, was placed by defts. in a box of theirs sunk in the footway of one of the streets & covered with an iron flap. Defts. as such vestry were by sect. 96 of Metropolitan Management Act, 1855 (c. 120), the surveyors of highways, & by sect. 116 authorised to cause the streets in their parish to be watered. Pltf. whilst walking along the street stepped on the iron flap, & by reason of its having been worn smooth & become slippery & dangerous, he fell & was injured. In an action by him against defts. for damages for such injury:—*Held*: though defts. might not be liable as surveyors of the highway for negligence in not keeping the iron flap in a proper state, they were in their capacity as the authority for watering the street, in which capacity they had placed the iron flap there.—*BLACKMORE v. MILE END OLD TOWN VESTRY* (1882), 9 Q. B. D. 451; 51 L. J. Q. B. 496; 16 L. T. 869; 47 J. P. 52; 30 W. R. 740, C. A.

*Annotations.]—***Consd.** Moore v. Lambeth Waterworks Co. (1886), 17 Q. B. D. 462; Papworth v. Battersea B. C. (1914), 79 J. P. 105. *Mentd.* Steel v. Dartford L. B. (1891), 60 L. J. Q. B. 256; Lambeth v. Lowestoft Corp'n. (1901), 65 J. P. 326.

**282. — — — — —.]—**Pltf. was injured owing to the dangerous condition of a water meter pit cover in the highway within the district of the Metropolitan Water Board:—*Held*: the owners & occupiers of the premises, for the supply of water to which this cover was part of the apparatus, were *primâ facie* liable, & the Water Board was not liable, the former, under Water Board (Charges) Act, 1907 (c. clxix), s. 16 (1), having to maintain such apparatus.—*MIST v. METROPOLITAN WATER BOARD & CREAMILK, LTD.* (1915), 84 L. J. K. B. 2041; 113 L. T. 500; 79 J. P. 495; 13 L. G. R. 874, D. C.

**283. Stopcock—Negligent fixing in street.]—**STRUBE v. SOUTHWARK & VAUXHALL WATER CO. (1889), 5 T. L. R. 638, C. A.

**284. — Failure to repair—Projection above level of street.]—**CHAPMAN v. FYLDE WATERWORKS Co., No. 188, *ante*.

**285. — — — — —.]—**Defts. were authorised by statute to supply water in an adjoining district. By agreement with defts. the local highway

authority undertook to repair & keep in repair, at defts.' expense, the roads or pavements which had been opened or broken up by defts. during the twelve months specified in Waterworks (Clauses Act, 1847 (c. 17), s. 32. In Oct. 1904, defts. opened a pavement in order to repair a pipe, & the local highway authority immediately thereafter re-instated the paving. The pavement having sunk below the level of a water box fixed in the pavement, the local authority repaired it again in July, 1905, but did not repair it subsequently. The county ct. judge found as a fact that the pavement was out of repair in Oct. 1905, & continued unsafe until June, 1907, when pltf. slipped on the water box, & was injured in consequence of the pavement having sunk around the water box:—*Held*: (1) the fact that the highway authority had a duty to keep the road level did not take away the liability of defts. for the obstruction caused by the negligence of themselves or their agents at the expiration of the twelve months from Oct. 1904; (2) defts. were liable for damages, & not merely for the penalty under the statute as the action was brought in respect of something altogether outside the relation of water supplier & water consumer.—*HARTLEY v. ROCHDALE CORPN.*, [1908] 2 K. B. 594; 77 L. J. K. B. 884; 99 L. T. 275; 72 J. P. 343; 21 T. L. R. 625; 6 L. G. R. 858, D. C.

**286.** — [Pltf. caught her foot in a stop cock box in a highway & sustained personal injuries. The stop cock box was placed in position by the Metropolitan Water Board under statutory authority. It was the practice of the servants of the Water Board from time to time to fill up these boxes with wads of straw for the purpose of protecting the spindle from frost & stones. At the time of the accident the wad of straw in the box in question had become so worn as to leave a hole some 2 inches deep. The judge held that the Board were liable in damages. The Ct. of Appeal having ascertained from the judge that he had not applied his mind to the question whether these stop cock boxes were a source of danger unless filled in with straw, but had assumed that they were by reason of the practice of the Water Board:—*Held*: there must be a new trial.—*ROSENBAUM v. METROPOLITAN WATER BOARD* (1910), 103 L. T. 739; 75 J. P. 12; 27 T. L. R. 103; 9 L. G. R. 315, C. A.; *on appeal* from 8 L. G. R. 735.

*Annotation*.—*Relf. Batt v. Metropolitan Water Board* (1911), 9 L. G. R. 307.

**287.** — [Pltf. caught her foot in a stop cock box in a highway & sustained personal injuries. The stop cock box was placed in position by the Metropolitan Water Board under statutory authority. It was the practice of the servants of the Water Board from time to time to fill up these boxes with wads of straw for the purpose of protecting the spindle from frost & stones. At the time of the accident the wad of straw in the box in question had become so worn as to leave a hole some 2 inches deep. The judge held that the Board were liable in damages. The Ct. of Appeal having ascertained from the judge that he had not applied his mind to the question whether these stop cock boxes were a source of danger unless filled in with straw, but had assumed that they were by reason of the practice of the Water Board:—*Held*: there must be a new trial.—*ROSENBAUM v. METROPOLITAN WATER BOARD* (1910), 103 L. T. 739; 75 J. P. 12; 27 T. L. R. 103; 9 L. G. R. 315, C. A.; *on appeal* from 8 L. G. R. 735.

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**291.** — [Pltf. caught her foot in a stop cock box in a highway & sustained personal injuries. The stop cock box was placed in position by the Metropolitan Water Board under statutory authority. It was the practice of the servants of the Water Board from time to time to fill up these boxes with wads of straw for the purpose of protecting the spindle from frost & stones. At the time of the accident the wad of straw in the box in question had become so worn as to leave a hole some 2 inches deep. The judge held that the Board were liable in damages. The Ct. of Appeal having ascertained from the judge that he had not applied his mind to the question whether these stop cock boxes were a source of danger unless filled in with straw, but had assumed that they were by reason of the practice of the Water Board:—*Held*: there must be a new trial.—*ROSENBAUM v. METROPOLITAN WATER BOARD* (1910), 103 L. T. 739; 75 J. P. 12; 27 T. L. R. 103; 9 L. G. R. 315, C. A.; *on appeal* from 8 L. G. R. 735.

*Annotation*.—*Relf. Batt v. Metropolitan Water Board* (1911), 9 L. G. R. 307.

## Part IV.—Finance.

### SECT. 1.—LOCAL AUTHORITIES.

See LOCAL GOVERNMENT, Vol. XXX., pp. 18–21  
**Charges for supply of water.**—See Part III.,  
 Sect. 2, sub-sect. 9, *ante*.

### SECT. 2.—STATUTORY COMPANIES.

#### SUB-SECT. 1.—IN GENERAL.

**291. Issue of new capital—Provision for increase by special resolution—Validity of issue by Provisional Order.**—Where the articles provided that the capital of a certain gas & water co. might be increased by special resolution, & Provisional Orders were made under the Gas & Waterworks Facilities Act, 1870 (c. 70), purporting to effect such increase of capital:—*Held*: the issue of such additional capital was valid, & the holders thereof were entitled to be treated as members in the distribution of the surplus assets, although no special resolution had in fact been passed authorising such issue.—*Re NEW TREDEGAR GAS & WATER CO., LTD.* (1914), 59 Sol. Jo. 161.

**292. Nature of shares.**—Though shares in water works are a legal estate, & corporeal inheritance, yet no one proprietor can receive the profits himself; & as there is no other way to get at it, proper to come into this ct. for mesne profits.—*TOWNSEND (LORD) v. ASH* (1745), 3 Atk. 336; 26 E. R. 995, L. C.

*Annotations*:—*Distd.* *Bligh v. Brent* (1837), 6 L. J. Ex. Eq. 58. *Reid*. *Doc d. Lidgbird v. Lawson* (1828), 8 B. & C. 606; *Watson v. Spratley* (1854), 10 Exch. 222. *Mentd.* *Hicks v. Sallitt* (1854), 3 De G. M. & G. 782.

**293. —**—*Shares in the Chelsea Waterworks co. are personal property.*—*BLIGH v. BRENT* (1837), 2 Y. & C. Ex. 268; 6 L. J. Ex. Eq. 58; 160 E. R. 397.

*Annotations*:—*Distd.* *Baxter v. Brown* (1845), 7 Man. & G. 198. *Consd.* *Watson v. Spratley* (1854), 10 Exch. 222. *Reid*. *Bradley v. Holdsworth* (1838), 3 M. & W. 422; *N. W. Ty. v. M'Michael, Birkenhead, Lancashire & Cheshire Junction Ry. v. Pilcher* (1851), 5 Exch. 121; *Re Langham's Will* (1853), 1 Eq. Rep. 111; *Thomson v. Keupson* (1854), Kay, 592; *Layton v. Tucker* (1858), 4 K. & J. 243; *Bulmer v. Norris* (1860), 9 C. B. N. S. 19; *Bennett v. Blain* (1863), 15 C. B. N. S. 518; *Adair v. New River Co. & Metropolitan Water Board* (1908), 25 T. L. J. 193. *Mentd.* *Newry & Enniskillen Ry. v. Coombe* (1849), 3 Exch. 565.

— **Whether within Mortmain Acts.**—See CHARITIES, Vol. VIII., p. 272, No. 371.

**Nature of debentures—Whether within Mortmain Acts.**—See CHARITIES, Vol. VIII., p. 273, No. 390.

**Remedies of debenture holders.**—See COMPANIES, Vol. X., p. 1190, No. 8447.

**Winding-up proceedings.**—See COMPANIES, Vol. X., p. 1193, Nos. 8476, 8477.

#### SUB-SECT. 2.—PROFITS.

See Waterworks Clauses Act, 1847 (c. 17), ss. 75–82.

**294. What profits include—Rents & profits of landed property.**—(1) The New River co., by the New River co.'s Act, 1852, which incorporates Waterworks Clauses Act, 1847 (c. 17), s. 75, is prohibited from distributing amongst its shareholders dividends exceeding the rate of 10 per cent. *per annum*.

(2) The “undertaking” of the New River co., including its landed property, is all one undertaking, & the rents & profits of the landed property are part of the profits of the undertaking within Waterworks Clauses Act, 1847 (c. 17), s. 75.

(3) The undertakings of the metropolitan water cos., on their transfer to the Metropolitan Water Board under Metropolitan Water Act, 1902 (c. 41), ought to be valued as subject to & not as free from the obligations to contribute to the sinking fund created by the cos.’ special Acts.—*METROPOLITAN WATER BOARD v. NEW RIVER CO.* (1904), 20 T. L. R. 687, H. L.; *revsg.* S. C. *sub nom. Re NEW RIVER CO. & METROPOLITAN WATER BOARD*, 68 J. P. 329, C. A.; *affg.* S. C. *sub nom. EAST LONDON WATERWORKS CO. v. METROPOLITAN WATER BOARD, GRAND JUNCTION WATERWORKS CO. v. METROPOLITAN WATER BOARD, NEW RIVER CO. v. METROPOLITAN WATER BOARD*, 20 T. L. R. 245, C. A.

**295. Dividends—Limit of dividend—Waterworks Clauses Act, 1847 (c. 17), s. 75.**—*METROPOLITAN WATER BOARD v. NEW RIVER CO.*, No. 294, *ante*.

**296. — — — Provision for payment of smaller dividend.**—The Weymouth Waterworks co. was incorporated by an Act of 1797, but was subjected to the provisions of an Act passed in 1855, which incorporated Waterworks Clauses Act, 1847 (c. 17), & authorised a capital of £40,000 to be issued, but did not fix any maximum rate of dividend on the capital. In 1907 the co. was empowered to raise further capital to the amount of £60,000 by an Act which contained provisions that, except as by the Act otherwise provided, the new capital or the holders thereof were to be subject & entitled to the same liabilities, rights, & privileges as if it were part of the original capital, but limiting the dividend on the further capital to 5 per cent. *per annum*, unless a larger dividend should be necessary at any time to make up deficiencies of former dividends. These deficiencies existed in respect of both classes of capital, & there was an anticipated annual surplus which was available towards making up the deficiencies.—*Held*: in making up the deficiencies, the co. was bound to preserve, between the total amounts paid by way of back dividends to the holders of the two classes of capital, the proportions of 10 per cent. & 5 per cent. prescribed by the Waterworks Clauses Act, 1847 (c. 17), s. 75, & the special Act of 1897, as the maximum dividends on the two classes of shares respectively until the arrears were paid.—*WEYMOUTH WATERWORKS CO. v. COODE & HASELL*, [1911] 2 Ch. 520; 81 L. J. Ch. 11; 104 L. T. 587; 18 Mans. 385.

**297. — — — Meaning of “prescribed rate.”**—A waterworks co. was formed under a special Act, which incorporated Waterworks Clauses Act, 1847 (c. 17). Under subsequent special Acts, which incorporated Companies Clauses Act, 1863 (c. 118), the co. issued preference stock at 5 per cent. & 4½ per cent. respectively. None of the co.’s Acts contained a prescribed rate for the division of profits among the undertakers:—*Held*: by virtue of Companies Clauses Act, 1863 (c. 118), s. 13, the rates of interest fixed by the co. on the preference stock issued by them were “prescribed rates,” & the whole of the paid-up capital being subject to prescribed rates of interest “the co.,” by the Waterworks Clauses Act, 1847 (c. 17), s. 75, were only entitled to divide as maximum dividends 10 per cent. *per annum* on the ordinary stock.—*CHELSEA WATERWORKS CO. v. METROPOLITAN WATER BOARD*, [1904] 2 K. B. 77; 52 W. R. 449; 20 T. L. R. 433; *sub nom. Re*

CHelsea WATER CO. & METROPOLITAN WATER BOARD, 73 L. J. K. B. 532; 90 L. T. 831, C. A.

— **Deficiency in dividends.**—*See* Nos. 298-300, *post*.

**298. Surplus profits—Arrears of dividends—Rights of shareholders.**—Under an Act of 1845, the dividends on the shares in a water co. were limited to 10 per cent., after payment of which & providing for a contingent fund, the ct. of quarter sessions had power to reduce the water rates. By a second Act in 1854, the capital was extended & a variation made in the shares & rate of interest: *Held*: on the construction of the second Act, shareholders under the first Act were not deprived of their right to payment, out of any surplus, of their arrears of dividends existing at the passing of the second Act.—*COATES v. NOTTINGHAM WATERWORKS CO.* (1861), 30 Beav. 86; 4 L. T. 607; 7 Jur. N. S. 790; 9 W. R. 799; 54 E. R. 821.

**299. ——— Different maximum dividends.**—*WEYMOUTH WATERWORKS CO. v. COODE & HASELL*, No. 296, *ante*.

**300. ——— Deficiency prior to incorporation of Waterworks Clauses Act, 1847 (c. 17).**—*A*

water co., one of whose special Acts incorporates Waterworks Clauses Act, 1847 (c. 17), has no power to apply its surplus profits in making up to its ordinary stockholders any deficiency in the prescribed rate of dividend, or a full 10 per cent. dividend, if that is the prescribed rate, for any years before the time when Waterworks Clauses Act, 1847 (c. 17), was made applicable to the co.—*KENT WATERWORKS CO. v. LAMPLOUGH*, [1904] A. C. 27; 73 L. J. Ch. 96; 89 L. T. 704; 68 J. P. 361; 52 W. R. 401; 20 T. L. R. 107; 48 Sol. Jo. 130; 2 L. G. R. 403, H. L.; *affg.* S. C. *sub nom.* *LAMPLOUGH v. KENT WATERWORKS CO.*, [1903] 1 Ch. 575, C. A.

**Charges for supply of water.**—*See* Part III., Sect. 2, sub-sect. 9, *ante*.

### SECT. 3.—METROPOLITAN WATER BOARD.

*See* Metropolitan Water Act, 1902 (c. 41), ss. 15-22.

**Charges for supply of water.**—*See* Part V., Sect. 3, *post*.

## Part V.—Metropolitan Water Supply.

### SECT. 1.—METROPOLITAN WATER BOARD.

#### SUB-SECT. 1.—FORMATION AND CONSTITUTION.

##### A. In General.

*See* Metropolitan Water Act, 1902 (c. 41).

**301. Transfer of undertaking to Metropolitan Water Board—Distribution of compensation—Rights of different classes of shareholders.**—*HILL v. CHelsea WATERWORKS COMPN.* (1904), 48 Sol. Jo. 708.

**302. ——— Power to pay gratuities to employees.**—A scheme prepared by a water co. under Metropolitan Water Act, 1902 (c. 71), sched. 4, for the application & distribution of the compensation moneys payable upon the purchase of the co.'s undertaking by the Metropolitan Water Board does not empower the co. to pay a certain sum, part of the compensation moneys, as gratuities to those servants who had been for a certain number of years in the service of the co.—*WARREN v. LAMBETH WATERWORKS* (1905), 21 T. L. R. 685.

**303. Limit of supply—Effect of Metropolis Water Act, 1902 (c. 41), s. 34.**—Prior to Metropolitan Water Act, 1902 (c. 41), the Lambeth Waterworks, under a power given to them by an Act of 1848, by which they were incorporated, to supply water in the parish of Morden, had laid certain water mains in that parish, & had also, but without any authority to do so, laid water mains in parts of four other parishes. *Pltfs.* under their Act of 1871 were given power to supply water, among others, to the four parishes, & also the parish of Morden, & supplied such portion of the parish of Morden as could be served by them. The Act of 1902 gave *deft.* board power to acquire & carry on the undertakings of certain water cos., including that of the Lambeth Waterworks, & to supply water in the parishes in which such cos. were authorised to supply water. Sect. 3 provided that *deft.* board could exercise the powers previously vested in the cos., & that where any co. was supplying water in any parish in which it was not authorised to supply water the Act constituting the co. should extend & apply to that parish. Sect. 34 provided that "The provisions of this Act shall not empower

the Water Board . . . to supply water within the limits for the supply of water of the Sutton District Water co. as defined by the Sutton District Waterworks Act, 1871, except so much thereof as was on Mar. 25, 1902, supplied by the company of Proprietors of Lambeth Waterworks." In these circumstances *pltf. co.* claimed a declaration that *deft. board* were not entitled to supply water within the parish of Morden except within so much of the parish as was on Mar. 25, 1902, actually being supplied by the Lambeth Waterworks:—*Held*: the Metropolitan Water Act, 1902 (c. 41), s. 34, was not confined in its operation to the four parishes to the exclusion of the parish of Morden, & *pltf. co.* were therefore entitled to the declaration asked for.—*SUTTON DISTRICT WATER CO. v. METROPOLITAN WATER BOARD* (1926), 90 J. P. 61.

##### B. Transfer of Obligations.

*See* Metropolitan Water Act, 1902 (c. 41), s. 45.

**304. Obligations—Contribution to sinking fund.**—*METROPOLITAN WATER BOARD v. NEW RIVER CO.*, No. 294, *ante*.

**305. ——— Allowance of rebate.**—The Metropolitan Water Board is not bound to give a reduction in the rate to water consumers, although such a reduction had been granted by the waterworks co. whose undertaking had been taken over by the board, & the profits had exceeded the prescribed amount, for, as the waterworks are not now carried on for the benefit of the undertakers, the sect. of Waterworks Clauses Act, 1847 (c. 17), which regulate "the amount of profit to be received by the undertakers," would not now apply.—*CHISWICK URBAN DISTRICT COUNCIL v. METROPOLIS WATER BOARD* (1905), 69 J. P. 457; 21 T. L. R. 620; 3 L. G. R. 917.

**306. ——— Supply of water "during continuance of existence of company" — Dissolution of company.**—By an indenture, dated Sept. 25, 1841, the S. water co. covenanted to supply water to certain houses at certain rates during the continuance of the existence of the co. The S. water co. was scheduled to the Metropolis Water

*Sec. 1.—Metropolitan Water Board: Sub-sect. 1, B. & C.; sub-sect. 2. Sects. 2 & 3: Sub-sects. 1, 2 & 3. Sect. 4.]*

Board Act, 1902 (c. 41). As compensation had been duly paid, the S. water co. was dissolved under sect. 29. Pltfs. said that sect. 45 (b) bound the Water Board to perform the contract of the S. water co.:—*Held*: the contract could not be enforced, as it was only made during the continuance of the existence of the co.—*EDGE v. METROPOLITAN WATER BOARD* (1907), 97 L. T. 279; 71 J. P. 436; 23 T. L. R. 698; 5 L. G. R. 1183.

307. — *Payment of King's Clogg.*—The King's Clogg, now consisting of an annual sum of £400, is an obligation which has been transferred to, & is now an obligation of, the Metropolitan Water Board, by virtue of the Metropolis Water Act, 1902 (c. 41), & same is under sect. 4 secured upon the water fund established by that Act.—*METROPOLITAN WATER BOARD v. ADAIR & NEW RIVER CO.* (1911), 27 T. L. R. 253; 55 Sol. Jo. 270, H. L.; *affg.* S. C. *sub nom.* *ADAIR v. NEW RIVER CO., LTD. & METROPOLITAN WATER BOARD* (1908), 25 T. L. R. 193, C. A.

— *Covenant against assignment of leasehold premises without consent.*—*See LANDLORD & TENANT*, Vol. XXXI., p. 378, No. 5242.

308. *Benefits—Agreement to pay company for supply of water.*—By an agreement made on Nov. 4, 1902, M. agreed with the West Middlesex water co. to pay to the co. one guinea *per annum* for each of the twelve hydrants fixed at the King's Theatre, Hammersmith. In 1909 the Metropolitan Water Board, to whom the undertaking of the West Middlesex water co. was transferred by the Metropolis Water Act, 1902 (c. 41), sued M., under the agreement of Nov. 4, 1902, for twelve guineas in respect of the water supply to the hydrants for four quarters up to Mar. 31, 1909. Deft. contended that, having regard to the terms of Metropolis Water Act, 1902 (c. 41), & of the Metropolitan Water Board (Charges) Act, 1907 (c. clxxi), the agreement was determined by operation of law on Apr. 1, 1908, when the Act of 1907 came into operation:—*Held*: the agreement was not so determined, but was saved by sect. 45 (b) of the Act of 1902 & sect. 35 of the Act of 1907.—*METROPOLITAN WATER BOARD v. MULHOLLAND* (1909), 74 J. P. 27; 8 L. G. R. 88, D. C.

#### C. Transfer of Employees.

*See Metropolis Water Act, 1902 (c. 41), s. 47.*

309. *Remuneration—Power of Board to alter—Although no alteration in duties performed.*—Pltf. had been employed by a London water co. whose undertaking was transferred to defts. by Metropolis Act, 1902 (c. 41), the appointed day being June 24, 1904. Down to Nov. 1906, pltf. had received certain extra remuneration for overtime work under a verbal agreement made with the water co. in 1899, which had been modified in 1902, but in that month defts. gave notice to pltf. that they would thereafter pay him nothing additional to his ordinary wages, & after the expiration of that notice defts. refused & had since refused to pay the extra remuneration. Pltf. now sought a declaration that the agreement of 1899 was valid & subsisting, & that he was entitled to the payment of arrears. It was found as a fact that since Nov. 1906, he had performed the same duties as before that date although his rate of pay had been altered:—*Held*: notwithstanding that Act provided that pltf. should receive not less salary, wages or pay than he would have been entitled to if the Act had not been

passed, there was no right given him by the Act by which he was entitled to say that his rate of pay could never be altered so long as he was performing the same duties.—*ROWSELL v. METROPOLITAN WATER BOARD* (1915), 84 L. J. K. B. 1869; 79 J. P. 267; 13 L. G. R. 654.

310. *Superannuation allowance — “Existing officer” —Officer not permanently employed—Discretion of Metropolitan Water Board.*—Pltf., originally an assistant engineer of the New River co., continued to hold that office under their successors, the Metropolitan Water Board, from 1902 to 1910, when he was informed by letter that the works under the Staines Reservoir Act, 1896, & the New River co.'s Act of 1897, having been completed, his services would not, after the expiration of three months, be required. The Board had determined, & their decision had been upheld by the Treasury, that pltf. was not entitled to compensation for loss of office under Metropolis Water Act, 1902 (c. 41), s. 47; & he therefore claimed a superannuation allowance under sub-sect. 10 of that sect. It was found as a fact upon the evidence that no limitation of his employment had been communicated to him when originally engaged by the New River co., & that no limitation had been imposed upon the authority of the chief engineer of that co. who had engaged him:—*Held*: pltf. was entitled to a superannuation allowance, as having been “dismissed” on a ground other than misconduct; & even if his original employment had been of a temporary character & had *ipso facto* come to an end on the completion of specific works, there was nothing in sub-sect. 10 of sect. 47 to limit the rights of existing officers or servants to such of them as were permanently employed. But as sub-sect. 10 enacted that an existing officer upon ceasing to hold office was to be entitled to a superannuation allowance “upon the terms & conditions & according to the scale specified in the Superannuation (Metropolis) Act, 1866 (c. 31),” the amount of pltf.'s superannuation allowance was in the discretion of the Water Board.—*WEBSTER v. METROPOLITAN WATER BOARD* (1912), 76 J. P. 474; 10 L. G. R. 1025.

#### SUB-SECT. 2.—POWERS AND DUTIES.

*See Metropolis Water Act, 1902 (c. 41), s. 24.*

*Acquisition of land.*—*See COMPULSORY PURCHASE OF LAND*, Vol. XI., p. 298, Nos. 2297, 2298.

311. *Well sunk near stream—Removal of support of subterranean water—Quantity of water in stream reduced—Liability of board where no direct abstraction from stream.*—*ENGLISH v. METROPOLITAN WATER BOARD*, No. 126, *ante*.

312. *Burst pipe—Opening street to repair—Notice to reinstate—Validity of notice.*—Appls. having discovered a leak in one of their pipes caused the roadway in the district of the W. city council to be opened, & after repairing the defective pipe, temporarily reinstated the roadway. Resp., on behalf of W. city council, served the following notice on applts:

“Take notice that the W. city council require the Metropolitan Water Board forthwith well & sufficiently to repair & make good such part or parts of the pavement in Vauxhall Bridge road by 189, sunk, broken, injured or damaged by reason of the breaking, bursting or want of repair of a pipe belonging to the board. Further take notice that the city council will make good the pavement, or surface, or soil, when broken up instead of permitting such work to be done by the board, & will

charge the board with the expense of making good such pavement, or surface, or soil, so broken up or opened. Please inform me when the board have broken up or opened the permanent surface or soil in order that I may give the necessary instructions for the pavement or soil to be made good." Appls. did not carry out the work described in such notice within forty-eight hours:—*Held*: the notice was a good notice, & appls. were rightly convicted of committing a breach of the provisions of Metropolis Management Act, 1855 (c. 120), s. 112, in not within forty-eight hours next after the service of the notice carrying out the requirements thereof.—**METROPOLITAN WATER BOARD v. BRADLEY** (1910), 102 L. T. 893; 74 J. P. 331; 8 L. G. R. 815, D. C.

**313. Right of access to main—For inspection & repair—Main under property of railway company—Construction of agreement.]**—**METROPOLITAN WATER BOARD v. LONDON & NORTH-EASTERN RY. CO.**, No. 72, *ante*.

**314. Duty to supply water—Action for penalties—Under Metropolis Water Act, 1871 (c. 113), s. 16—Who may bring action.]**—When a metropolitan water co. has provided a supply of water for a district, under Metropolis Water Act, 1871 (c. 113), s. 7, a private individual cannot take proceedings against the co. for the penalties, imposed by s. 16, for refusing or neglecting "to provide & keep . . . a constant supply of pure & wholesome water sufficient for the domestic purposes of the inhabitants." Such proceedings can only be taken by the metropolitan authority within the jurisdiction of which the penalty has been incurred.—**KYFFIN v. EAST LONDON WATER CO.**, [1896] 1 Q. B. 446; 65 L. J. M. C. 60; 74 L. T. 141; 60 J. P. 230; 44 W. R. 446; 12 T. L. R. 201; 18 Cox, C. C. 235, D. C.

—*See* Part III., Sect. 2, *ante*.

## SECT. 2.—PURPOSES.

**Domestic purposes.]**—*See* Part III., Sect. 2, sub-sect. 2, A, *ante*.

**Trade & non-domestic purposes.]**—*See* Part III., Sect. 2, sub-sect. 7, *ante*.

**Public purposes.]**—*See* Part III., Sect. 2, sub-sect. 3, *ante*.

## SECT. 3.—CHARGES.

### SUB-SECT. 1.—WATER RATES.

*See* Metropolitan Water Board (Charges) Act, 1907 (c. clxxi).

**315. Liability to be rated—Owner or occupier—Annual value of premises—Mode of proof.]**—The provisions of Water Rate Definition Act, 1885 (c. 34), apply not only to sect. 68 of Waterworks Clauses Act, 1847 (c. 17), but also to sect. 72 of that Act & to sect. 58 of Southwark & Vauxhall Water Act, 1852, & consequently, in order to prove the annual value of a house in the metropolis for the purpose of determining whether the water rate is to be paid by the owner or the occupier it is sufficient to produce the rate book showing the rateable value of the house as settled by the local authority.—**METROPOLITAN WATER BOARD v. STREETON** (1910), 102 L. T. 220; 74 J. P. 180; 8 L. G. R. 277, D. C.

**316. —House or building occupied as separate tenement—Intercommunication between adjoining houses—Supply of water to one house only.]**—Defts. for the purposes of their business established communication between two blocks of buildings occupied by them which consisted of what had

formerly been separate buildings. To one of these buildings a supply of water was furnished by pltf. by means of a communication pipe which was unconnected with any other part of the premises. Persons employed in other parts of the premises were accustomed to come to the building actually supplied by pltf. for the purpose of obtaining water for drinking purposes. Pltf. sought to recover from defts. water rate based upon the rateable value of the whole of the premises on the ground "that it was a house or building occupied as a separate tenement" within the meaning of sect. 8 of Metropolitan Water Board (Charges) Act, 1907 (c. clxxi). The county ct. judge held that the building to which the water was actually supplied was a "house or building occupied as a separate tenement" & that defts. were only liable to pay water rate based upon the rateable value of that particular building:—*Held*: there was evidence upon which the judge could so hold.—**METROPOLITAN WATER BOARD v. BAKER** (G. P. & J.), LTD. (1910), 102 L. T. 536; 74 J. P. 337; 26 T. L. R. 396; 8 L. G. R. 623, D. C.

**317. —House not exceeding £20 in value—Liability of owner—Meaning of "owner."]**—**METROPOLITAN WATER BOARD v. BROOKS**, No. 207 *ante*.

**318. Basis of assessment—Annual value—Mode of proof.]**—**METROPOLITAN WATER BOARD v. STREETON**, No. 315, *ante*.

**319. —Rateable value.]**—**COLLEY'S PATENTS, LTD. v. METROPOLITAN WATER BOARD**, No. 162, *ante*.

**Valuation lists—What is "valuation list in force."]**—*See* RATES & RATING, Vol. XXXVIII., pp. 636, 637, No. 1548.

**320. Making of rate—Duty of undertakers to allow rebate—Supply of water for domestic purposes to business premises.]**—**COLLEY'S PATENTS, LTD. v. METROPOLITAN WATER BOARD**, No. 162, *ante*.

**Recovery of rates.]**—*See* Sub-sect. 3, *post*.

### SUB-SECT. 2.—SUPPLY BY MEASURE.

*See* Metropolitan Water Board (Charges) Act, 1907 (c. clxxi).

**321. Right to supply by measure—House used for trade or business purposes—Restaurant.]**—**ODDENINO v. METROPOLITAN WATER BOARD**, No. 161, *ante*.

**322. Who chargeable—Bullder "requiring" supply for building operations—Meaning of "require."]**—**METROPOLITAN WATER BOARD v. JOHNSON & CO.**, No. 199, *ante*.

*See, also*, Part III., Sect. 2, sub-sect. 9, *ante*.

### SUB-SECT. 3.—RECOVERY OF RATES AND CHARGES.

**Expense of providing supply of water to water closet—Liability of tenant.]**—*See* LANDLORD & TENANT, Vol. XXXI., pp. 303, 304, No. 4477.

**Arrears of rate—Whether trustee in bankruptcy "incoming tenant."]**—*See* BANKRUPTCY, Vol. IV., p. 206, No. 1899.

**Proceedings for recovery.]**—*See, generally*, Part III., Sect. 2, sub-sect. 9, C., *ante*.

## SECT. 4.—OFFENCES.

**323. Provision of prescribed fittings—Right of entry to inspect fittings—Whether notice to provide**



Sect. 4.—Offences. Sect. 5.]

**fittings condition precedent.]**—(1) Service of a notice under Metropolis Water Act, 1871 (c. 113), s. 27, requiring an owner or occupier to supply premises with the prescribed fittings, is not necessary to give a right of entry & inspection to the officers or agents of the water company under sect. 30 of the same statute.

(2) Before a person can be convicted under Metropolis Water Act, 1871 (c. 113), s. 30, of hindering the officer or agent of the water co. from entering a house to inspect & examine the prescribed fittings there must be proof of the regulations as to such fittings.—*METROPOLITAN WATER BOARD v. NORTHCOTT* (1907), 96 L. T. 708; 71 J. P. 338; 5 L. G. R. 770, D. C.

**324. — Conviction for non-compliance with Metropolis Water Act, 1871 (c. 113)—Right of appeal.]**—*NORMAN v. SLADE* (1887), 51 J. P. 41.

**325. Failure to repair service pipe—Right of undertakers to cut off supply.]**—A water co. in the metropolis, who were furnishing a consumer with a constant supply of water for domestic purposes, the pipe communicating with his premises being attached to the co.'s main under the roadway of a public street, opened up the roadway & found a defect in the communication pipe causing a serious waste of water. They thereupon gave him written notice to repair the pipe forthwith; & upon his failing to so do, they cut off the water supply to his premises at the main, & refused to supply him until the pipe was repaired. By Metropolis Water Act, 1871 (c. 113), s. 28, in the case of a constant supply every owner or occupier, upon whom notice in that behalf has been served under the Act, shall provide the prescribed fittings & shall from time to time keep the same in proper repair. By sect. 3 the term "fittings" includes communication pipes. By sect. 32, if any person supplied with water by the co. wrongfully fails to do anything which, under the provisions of the Act, ought to be done for preventing the waste of the co.'s water, they may cut off his supply & cease to supply him with water so long as the injury remains or is not remedied:—*Held*: on the facts stated above, the co. were entitled to cut off the supply until the pipe was repaired, & therefore that they were not liable to the penalty imposed by Waterworks Clauses Act, 1847 (c. 17), s. 43, for "neglecting or refusing" to supply water to consumers.—*GRAND JUNCTION WATERWORKS CO. v. RODOCANACHI*, [1904] 2 K. B. 230; 73 L. J. K. B. 441; 90 L. T. 819; 68 J. P. 290; 52 W. R. 508; 20 T. L. R. 410; 48 Sol. Jo. 384; 2 L. G. R. 689, D. C.

*Annotations.*—*Consd. Colne Valley Water Co. v. Hall* (1907), 96 L. T. 395; *Parnell v. Portsmouth Waterworks Co.* (1910), 75 J. P. 99.

**326. Alteration of apparatus—Cutting communication pipe & affixing thereto pipe for adjoining house.]**—By Waterworks Clauses Act, 1863 (c. 93), s. 19, it is made unlawful for the owner or occupier of any premises supplied with water to affix any pipe to a pipe belonging to the undertakers or to a communication or service pipe belonging to such owner or occupier without the consent of the undertakers, & by regulation 5 made under Metropolis

Water Act, 1871 (c. 113), s. 17, every house supplied with water is to have its own separate communication pipe "provided that as far as is consistent with the special Acts of the co. in the case of a group or block of houses, the water rates of which are paid by one owner, the owner may at his option have one sufficient communication pipe for such group or block":—*Held*: this regulation did not justify applt. in cutting a communication pipe & affixing thereto a pipe for another adjoining house which formed part of a continuous row of houses without the consent of resps., & by doing so he had committed an offence within Waterworks Clauses Act, 1863 (c. 93), s. 19.—*KYFFIN v. METROPOLITAN WATER BOARD* (1908), 99 L. T. 809; 72 J. P. 517; 7 L. G. R. 15, D. C.

#### SECT. 5.—POWERS AND DUTIES OF METROPOLITAN LOCAL AUTHORITIES.

**327. Cutting off water—Necessity for notice to sanitary authority—What amounts to cutting off supply—Question of fact.]**—Water was supplied to a dwelling-house by a water co. by means of a service pipe connected with the co.'s mains. In this service pipe at a point between the house & the main was a stop cock provided by the landlord of the house, to whom belonged the service pipe & stop cock. There being a leak in the service pipe between the stop cock & the house, the co., after notice to the tenant of the existence of the leak, turned down the stop cock to prevent waste, & thereby turned off the water supply from the house, & the water remained turned off until the leak was repaired by the landlord, when it was turned on again by the landlord's workman opening the stop cock. There was no intention on the part of the co. to withdraw the supply except for the immediate purpose of stopping the leak. A magistrate having found, on the above facts, that there was no "cutting off of the water supply" or "ceasing to supply the house with water" within the meaning of Public Health (London) Act, 1891 (c. 76), s. 49, so as to render it necessary that notice should be given to the sanitary authority:—*Held*: the question whether or not the water co. had cut off the water supply was a question of fact rather than a question of law, & the magistrate having found that there was no cutting off within the meaning of the sect., there was no ground for overruling his finding as being wrong in point of law.—*YOUNG v. SOUTHWARK & VAUXHALL WATER CO.* (1893), 69 L. T. 144; 57 J. P. 806; 41 W. R. 622; 37 Sol. Jo. 509; 5 R. 432, D. C.

*Annotation.*—*Appld. Grand Junction Waterworks Co. v. Rodocanachi*, [1904] 2 K. B. 230.

—*—*].—*See* Public Health (London) Act, 1891 (c. 76), s. 49.

**Effect of insufficient supply of water.]**—*See* Public Health (London) Act, 1891 (c. 76), s. 48.

**Supply to tenement houses.]**—*See* London County Council (General Powers) Act, 1907 (c. clxxv), s. 74.

**Effect of absence of water fittings.]**—*See* Public Health (London) Act, 1891 (c. 76), s. 2 (1) (f).



## WATERCOURSES.

*See* EASEMENTS AND PROFITS À PRENDRE ; SEWERS AND DRAINS ; WATERS AND WATERCOURSES.

## WATERMEN.

*See* WATERS AND WATERCOURSES.

END OF VOL. XLIII.



